

126 FERC ¶ 61,233
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

California Independent System Operator Corporation Docket Nos. ER07-869-003
ER07-475-004
ER06-615-029

ORDER DENYING REQUEST FOR REHEARING

(Issued March 19, 2009)

1. In this order, the Commission denies a request for rehearing of an order it issued on July 28, 2008 that conditionally accepted, subject to modification, proposed revisions to the California Independent System Operator Corporation's (CAISO) Market Redesign and Technology Upgrade (MRTU) Tariff. The revisions concerned short-term financial transmission rights, referred to herein as short-term congestion revenue rights (CRR(s)), and the implementation of long-term firm transmission rights (referred to herein as long-term CRR(s)).¹

I. Background

A. Relevant CRR Orders

2. On February 9, 2006, in Docket No. ER06-615-000, the CAISO filed its proposed MRTU Tariff, which provided for seasonal and monthly transmission rights called short-term CRRs. The Commission conditionally accepted the short-term CRRs Tariff provisions, subject to modification.² On rehearing of the MRTU Order, the Commission directed additional modifications to the proposed short-term CRRs Tariff provisions.³

¹ *Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,095 (2008) (July 28, 2008 Order).

² *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274, at P 704-873 (2006) (MRTU Order), *order on reh'g*, 119 FERC ¶ 61,076 (2007) (MRTU Rehearing Order).

³ MRTU Rehearing Order, 119 FERC ¶ 61,076 at P 348-411.

3. On July 20, 2006, the Commission issued a final rule that, consistent with the Energy Policy Act of 2005 (EPAAct 2005),⁴ required independent transmission organizations that oversee organized electricity markets to make available long-term firm transmission rights that satisfy seven guidelines.⁵ On November 16, 2006, the Commission issued an order on rehearing of the Final Rule that required the CAISO to submit its long-term firm transmission rights proposal to the Commission by the January 29, 2007 deadline established in the Final Rule.⁶ The CAISO submitted its proposal, in Docket Nos. ER07-475-000 and ER07-475-001, to implement long-term CRRs under the MRTU Tariff and in compliance with the Final Rule on January 29, 2007, as amended on February 2, 2007. Subsequently, in another proceeding, the CAISO amended its long-term CRRs proposal as well as several short-term CRR Tariff provisions that had been conditionally accepted by the Commission.⁷

4. In a July 6, 2007 order,⁸ the Commission conditionally accepted, subject to modification, the CAISO's proposed tariff revisions implementing long-term CRRs, and made them effective on July 9, 2007. In the July 6, 2007 Order, the Commission also granted in part and denied in part the requests for rehearing on long-term firm transmission rights issues that were raised in the MRTU filing, Docket No. ER06-615-001.

⁴ Pub. L. No. 109-58, § 1233, 119 Stat. 594, 957 (2005). Section 217(b)(4) of the Federal Power Act directs the Commission to use its authority to facilitate transmission planning and expansion to meet the reasonable needs of load-serving entities with respect to meeting their service obligations and, relevant to this filing, securing long-term firm transmission rights for long-term supply arrangements made, or planned, to meet such obligations.

⁵ *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Stats. & Regs. ¶ 31,226, at P 108-428 (Final Rule), *order on reh'g*, Order No. 681-A, 117 FERC ¶ 61,201, at P 12-15 (2006) (Final Rule Rehearing Order).

⁶ Final Rule Rehearing Order, 117 FERC ¶ 61,201 at P 116.

⁷ Amendments to Facilitate the Initial Congestion Revenue Right Allocation and Auction Process under the Market Redesign and Technology Upgrade Program and Congestion Revenue Rights For Sponsors of Merchant Transmission Upgrades, Docket No. ER07-869-000 (May 7, 2007).

⁸ *Cal. Indep. Sys. Operator Corp.*, 120 FERC ¶ 61,023 (2007) (July 6, 2007 Order).

B. The CAISO's Compliance Filing

5. On July 20, 2007, the CAISO filed the Amendments in Compliance with the Commission's July 6, 2007 Order in Docket Nos. ER07-869-001, ER07-475-002, and ER06-615-008 (Compliance Filing). The Compliance Filing, among other things, modified the MRTU Tariff to implement a forward-looking determination of need for CRR nominations made by external load-serving entities, such that their on-going usage of the transmission system for wheel-through CRR nominations could be verified.⁹ Further, the Compliance Filing provided that verification of legitimate need would be based on a demonstration that the external load-serving entity has either: (1) an executed energy contract from a generating unit or system resource that covers the time period of the nominated CRRs, or (2) ownership of such generating unit or system resource. The Compliance Filing also proposed that, for CRR sources, the showing of legitimate need must be made for each CRR term for which the external load-serving entity wants to nominate CRRs in a timely manner prior to the start of the relevant annual or monthly CRR allocation process.

6. With regard to external load-serving entities, the Compliance Filing provided that a scheduling point must be nominated as the corresponding CRR source and specified that generating resources outside of the CAISO's control area, which are used by the external load-serving entity to verify a scheduling point as a CRR source, must not be located in the external load-serving entity's own control area. Also, for a CRR source that is a scheduling point, the Compliance Filing provided that an external load-serving entity must show that it has procured the appropriate transmission service from the transmission provider, outside the CAISO's control area, to the scheduling point for the term of the nominated CRR.

7. On July 28, 2008, the Commission conditionally accepted the Compliance Filing, subject to modification. On the same day, the Commission also denied requests for rehearing and clarification of the July 6, 2007 Order.¹⁰ The Sacramento Municipal Utility District (SMUD) filed a timely request for rehearing of the July 28, 2008 Order.

⁹ The CAISO explained that an external load-serving entity must make a showing of legitimate need to enable the CAISO to verify the CRR sources that the external load-serving entity wants to nominate, and also provided that all CRR nominations by external load-serving entities in all CRR years must be source verified by demonstrating legitimate need.

¹⁰ *Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,094 (2008) (Order Denying Rehearing).

II. Discussion

A. SMUD's Request for Rehearing

1. Whether the Compliance Filing Exceeded the Commission's Directive

8. SMUD contends that the Commission acted arbitrarily and capriciously when it failed to address SMUD's argument that the Compliance Filing adds new and discriminatory conditions to the allocation of congestion revenue rights. SMUD states that it did not challenge the Commission's July 6, 2007 Order permitting the CAISO to have a forward-looking verification of need requirement. However, SMUD provides that it did challenge the new source verification requirements contained in the CAISO's proposed tariff sections 36.8.3.4, 36.8.4.2 and 36.8.4.3 as going beyond the Commission's directive in the July 6, 2007 Order and as unduly discriminating against external load-serving entities. According to SMUD, the Commission's response "to apply the forward-looking showing to all CRR nominations by external [load-serving entities]" and its assertion that "it accepted [the] CAISO's proposal with regard to this language,"¹¹ are non-sequiturs. SMUD asserts that the Commission failed to address its argument that the CAISO's proposal – to add source verification requirements to all tiers of CRR nominations by qualified external load-serving entities – went beyond the Commission's directive in paragraph 189 of the July 6, 2007 Order, thus creating undue discrimination between internal and external load-serving entities.¹²

¹¹ SMUD Request for Rehearing, Docket Nos. ER07-869-003, ER07-475-004 and ER06-615-029 at 3 (Aug. 27, 2008) (quoting July 28, 2008 Order, 124 FERC ¶ 61,095 at P 42) (SMUD Rehearing Request).

¹² Short-term CRRs are allocated using a three-tier process. In each tier, a load-serving entity may nominate only CRRs that it is eligible to request. Annual eligibility is based on each load-serving entity's historical demand. In contrast, monthly allocation is based on a load-serving entity's forecasted demand.

In MRTU Year 1, a load-serving entity may nominate source verified short-term CRRs in Tiers 1 and 2. The source verification process requires a load-serving entity to demonstrate that, during the historical reference period, the load-serving entity was entitled to receive energy from the nominated sources to serve its demand. After MRTU Year 1, the CAISO proposes to replace the source verification process used in Tiers 1 and 2 with a Priority Nomination Process. Under the Priority Nomination Process, load-serving entities are limited to nominating CRRs that they were allocated in prior years. Tier 3 in the MRTU Year 1, and Tiers 2 and 3 in subsequent years, is referred to as the free-choice tier because CRR nominations are limited only by each load-serving entity's eligibility, which is based on a load-serving entity's forecasted demand.

9. SMUD states that the Commission, in rejecting its argument, only provided that “the appropriate forum for protestors to raise these issues is in the rehearing proceeding, which protestors have done.”¹³ SMUD asserts that the statement is incorrect, but that it did not raise this issue in its request for rehearing of the July 6, 2007 Order because it did not challenge the Commission’s determination that a forward-looking verification of need requirement was acceptable. However, SMUD states that, as it explained in its protest, the Compliance Filing is the first time the CAISO proposed tariff language containing source verification requirements for external load-serving entities making Tier 3 seasonal nominations or long-term CRR nominations.¹⁴ Specifically, SMUD reiterates its objections that this requirement is too onerous, is more restrictive than necessary to verify need or on-going reliance, and unduly discriminates between internal and external load-serving entities. Further, SMUD states that it would have been impossible for it to have raised this issue in its request for rehearing of the July 6, 2007 Order.¹⁵ Accordingly, SMUD contends that the Commission’s failure to address its argument that the Compliance Filing exceeded the Commission’s directive renders the Commission’s decision arbitrary and capricious.¹⁶

2. Source Verification in All Three Tiers

10. SMUD asserts that the July 28, 2008 Order is based on the premise that the July 6, 2007 Order preapproved the use of source verification for any nominated CRRs. However, SMUD asserts that the Commission fails to explain how paragraphs 188 and 189 of the July 6, 2007 Order authorized the CAISO to add source verification requirements to all tiers of the CRR nomination process for qualified external load-serving entities.¹⁷ SMUD explains that the CAISO has modified section 36.9.1 to do

Long-term CRRs are allocated in a separate tier (Tier LT), which follows the source verified tiers (i.e., Tiers 1 and 2) in MRTU Year 1 and the Priority Nomination Process in subsequent years.

¹³ SMUD Rehearing Request at 3 (quoting July 28, 2008 Order, 124 FERC ¶ 61,095 at P 44).

¹⁴ *Id.* at 4 (citing SMUD Protest in Docket No. ER07-869 at 3-6 (Aug. 10, 2007) (SMUD Protest)).

¹⁵ *Id.* (citing *Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20, 23-25 (D.C. Cir. 1982)).

¹⁶ *Id.* (citing *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)).

¹⁷ *Id.* at 5.

more than add language that would allow it “to verify an external [load-serving entity’s] on-going reliance on the CAISO transmission system.”¹⁸ Specifically, SMUD contends that verification of on-going reliance on the CAISO’s transmission is more narrow than verification of particular supply sources.

11. SMUD provides that, as it noted in its protest, the prior absence of a source verification requirement for Tier 3 seasonal nominations was critical to all load-serving entities because a load-serving entity simply “may not have the ability to source-verify all of its expected needs a year in advance,” but “can point to its historic use of the grid to serve customers and validate its need.”¹⁹

12. SMUD contends that the CAISO’s added tariff language improperly conflates source verification with verification of on-going usage of the CAISO grid. In particular, SMUD notes that the Commission found that the CAISO may require an external load-serving entity to make a “forward-looking legitimate showing of need” when it nominates a CRR in any tier.²⁰ However, SMUD asserts that the CAISO has not shown that it is necessary to require source verification in all tiers in order to assure an external load-serving entity’s legitimate need for the CRRs it has nominated. Further, SMUD provides that if an external load-serving entity can demonstrate its on-going dependence on the CAISO grid in connection with a Tier 3 nomination, the particular power source it will utilize is irrelevant. Thus, SMUD states that the CAISO has anticipated that load-serving entities participating in Tier 3 may not know the sources at the time they make their nominations. SMUD asks how it can be “anything but arbitrary to demand of external [load-serving entities] what the CAISO knows internal [load-serving entities] may not be able to provide?”²¹

13. SMUD states that the July 28, 2008 Order fails to explain how paragraph 189 of the July 6, 2007 Order could have authorized the CAISO to require source verification of any nominated CRR, given the Commission’s directive in that same paragraph that external load-serving entities that can demonstrate reliance on the CAISO transmission system “should be permitted to participate in the CRR allocation process in a manner

¹⁸ *Id.* (quoting July 6, 2007 Order, 120 FERC ¶ 61,023 at P 189).

¹⁹ *Id.* (citing SMUD Protest at 5).

²⁰ *Id.* at 6 (quoting July 6, 2007 Order, 120 FERC ¶ 61,023 at P 189).

²¹ *Id.*

similar to internal [load-serving entities].”²² Accordingly, SMUD contends that such a failure renders the Commission’s decision arbitrary and capricious.²³

14. SMUD argues that the Commission’s silence on this question in its July 28, 2008 Order is not salvaged by the assertion in the Order Denying Rehearing that the prepayment obligation applicable solely to external load-serving entities “does not demonstrate that the external [load-serving entities] are actually subject to congestion charges related to their use of the CAISO’s transmission system.”²⁴ Even if this statement was part of the rationale of the July 28, 2008 Order, SMUD states that it could not have assumed that the Commission’s approval of a forward-looking demonstration of need for all CRR nominations by external load-serving entities would result in a requirement of source verification for all CRR tiers. SMUD reiterates that, as noted in its protest, the CAISO has said that the prepayment obligation applicable to external load-serving entities already serves the function of establishing a forward-looking demonstration of need.²⁵

15. According to SMUD, if external load-serving entities must prepay access charges and forfeit their payments if they do not schedule exports to serve their loads, they have assumed exposure to congestion charges. SMUD elaborates that the prepayment obligation exposes them to financial liability that internal load-serving entities do not face. However, even if the CAISO could argue that the prepayment obligation is insufficient to demonstrate an external load-serving entity’s “on-going reliance on the CAISO transmission system,”²⁶ SMUD argues that it would not justify imposition of a source verification requirement. Thus, SMUD asserts that such a requirement serves not to ensure that external load-serving entities seek only the CRRs they need, but denies them the CRRs they may need by imposing a condition that is impractical.

16. SMUD states that its September 5, 2007 answer provides that rejecting the source verification requirement would not preclude the CAISO from proposing less restrictive requirements. SMUD asserts that submitting source verification declarations, coupled with prepayment obligations, would satisfy any legitimate need the CAISO has for assurance that CRR allocations to external load-serving entities will be used to meet the

²² *Id.*

²³ *Id.* (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983)).

²⁴ *Id.* at 6-7 (quoting Order Denying Rehearing, 124 FERC ¶ 61,094 at P 76).

²⁵ *Id.* at 7.

²⁶ *Id.* at 8 (quoting July 6, 2007 Order, 120 FERC ¶ 61,023 at P 189)).

load obligations of external load-serving entities.²⁷ Finally, SMUD contends that the Commission does not explain why, or even if the source verification requirement is necessary for all tiers, or whether a less restrictive condition would avoid undue discrimination between external and internal load-serving entities.

3. Consideration of SMUD's Response to the CAISO's Answer

17. SMUD asserts that the Commission abused its discretion in failing to consider SMUD's response to the CAISO's answer to SMUD's protest. Specifically, SMUD provides that the Commission states that Rule 213 prohibits "an answer to a protest or to an answer unless otherwise ordered by the decisional authority."²⁸ However, SMUD contends that the Commission frequently waives this rule in order to consider pleadings that clarify parties' positions or somehow assist the Commission in its decision-making process.²⁹ Accordingly, SMUD argues that the Commission's unexplained refusal to consider its answer is an abuse of its discretion.

B. Commission Determination

18. For the following reasons, we deny SMUD's request for rehearing of the July 28, 2008 Order. We disagree with SMUD that the Commission failed to address its argument that the CAISO's Compliance Filing went beyond the scope of the Commission's directives set forth in the July 6, 2007 Order. In the July 28, 2008 Order, the Commission rejected SMUD's contention that the "CAISO's proposal exceeded the directives set forth in the July 6, 2007 Order" and found that the CAISO's proposed tariff modifications appropriately implemented the forward-looking demonstration discussed in the July 6, 2007 Order.³⁰

19. In the July 6, 2007 Order, the Commission accepted the CAISO's request to modify the CRR allocation rules to ensure that CRR nominations submitted by external load-serving entities are associated with the actual congestion charges they incur while serving their load.³¹ The Commission stated that "the inability to verify on-going usage of the transmission system could result in the allocation of wheel-through CRRs to external entities that are no longer using the CAISO transmission system to serve their

²⁷ *Id.*

²⁸ *Id.* at 9 (quoting July 28, 2008 Order, 124 FERC ¶ 61,095 at P 9).

²⁹ *Id.* (referencing *Kansas City Power & Light Co.*, 53 FERC ¶ 61,097 (1990); *Southern Minnesota Municipal Power Agency*, 57 FERC ¶ 61,136 (1991)).

³⁰ July 28, 2008 Order, 124 FERC ¶ 61,095 at P 42.

³¹ July 6, 2007 Order, 120 FERC ¶ 61,023 Order at P 189.

load, which is inconsistent with allocating CRRs to [load serving entities] to hedge the actual congestion cost they incur.”³²

20. In prior orders, the Commission has explained that external load-serving entities are “situated differently than internal [load-serving entities] because external [load-serving entities] may have the option of not using the CAISO transmission system.”³³ Therefore, the Commission found that it is reasonable to require an external load-serving entity to demonstrate that their CRR nominations will serve as a hedge against the congestion charges the external load-serving entity will actually incur while serving its load. Moreover, the Commission has found that this requirement is not unduly discriminatory, because external load-serving entities are not similarly situated.³⁴ Accordingly, in the July 6, 2007 Order, the Commission directed the CAISO “to incorporate a mechanism through which it can verify an external [load-serving entity’s] on-going reliance on the CAISO transmission system.”³⁵

21. In the July 28, 2008 Order, we found that the Compliance Filing accomplishes the objectives the Commission specified in the July 6, 2007 Order. We also note that the demonstration required under MRTU Tariff section 36.9.1, which establishes an external load-serving entity’s eligibility to participate in the CRR allocation process, is unchanged. Specifically, section 36.9.1 states that “legitimate need will be based on demonstration by the [external load-serving entity] of an executed [e]nergy contract from a [resource] or [s]ystem [r]esource that covers the time period of the CRRs nominated, or ownership of such [resource] or [s]ystem [r]esource.”³⁶ The Commission has previously explained that “energy contracts or proof of generation ownership appropriately enable the CAISO to verify external [load-serving entity’s] need for CAISO transmission service.”³⁷ Therefore, we reject SMUD’s assertion that the tariff language proposed in the Compliance Filing, which was accepted by the Commission in the July 28, 2008 Order, somehow establishes a new requirement that is too “onerous.”

22. Additionally, we disagree with SMUD’s claim that if an external load-serving entity can demonstrate an on-going reliance on the CAISO’s transmission system, then the location of the particular supply resource is irrelevant. The location of a particular

³² *Id.*

³³ *Id.* (citing MRTU Rehearing Order, 119 FERC ¶ 61,076 at P 679).

³⁴ MRTU Rehearing Order, 119 FERC ¶ 61,076 at P 369.

³⁵ July 6, 2007 Order, 120 FERC ¶ 61,023 Order at P 189.

³⁶ MRTU Tariff section 36.9.1.

³⁷ MRTU Rehearing Order, 119 FERC ¶ 61,076 at P 371.

CRR source is directly related to the value of the CRR; if sources could be arbitrarily selected for CRR allocation purposes, which do not correspond to the underlying transaction, then the congestion caused by the transaction and the related CRR value cannot be meaningfully determined. Thus, the CRR value may be inconsistent with the external load-serving entity's congestion costs. The CRR allocation rules help ensure that the CRRs released to external load-serving entities will be appropriately valued by linking them to their supply resources.

23. Concerning SMUD's assertion that the Commission abused its discretion in failing to consider SMUD's response to the CAISO's Answer, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure states that "an answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made."³⁸ The Commission was within its authority to reject SMUD's response to the CAISO's answer to SMUD's Protest.³⁹ Further, we find that SMUD has the burden of proof to establish the facts needed to support the claims in its protest, rather than through subsequent unauthorized pleadings. To the extent that SMUD attempted, in the rejected pleading, to raise further issues and to supplement its protest, it has no procedural right to do so, and the admission of such a pleading is subject to our discretion, which we properly exercised.⁴⁰ Therefore, we deny SMUD's request for rehearing on this issue.

³⁸ 18 C.F.R. § 385.213(a)(2) (2008).

³⁹ The Commission has broad discretion to structure its proceedings so as to resolve a controversy in the way it best sees fit. *See Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003), *citing Telecomm. Resellers Assoc. v. FCC*, 141 F.3d 1193, 1196 (D.C. Cir. 1998) (administrative agencies enjoy broad discretion to manage their own dockets); *see also Ameren Energy Generating Company*, 108 FERC ¶ 61,081, at P 23, footnotes omitted (2004) ("The courts have repeatedly recognized that the Commission has broad discretion in managing its proceedings").

⁴⁰ *See 330 Fund I, L.P. v. New York Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,151 (2009).

The Commission orders:

The request for rehearing of the July 28, 2008 Order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.