

112 FERC ¶61,001
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

California Independent System Operator
Corporation

Docket No. ER03-1102-009

ORDER ON REMAND

(Issued July 1, 2005)

1. This proceeding is on voluntary remand from the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in Case No. 04-1222, *California Independent System Operator Corp. v. FERC*. At issue is the Commission's prior determination in this proceeding accepting Amendment No. 55 to the California Independent System Operator Corporation's (CAISO) tariff (ISO Tariff), subject to, among other things, the CAISO making a filing in this proceeding demonstrating that it has established an independent governing board in compliance with prior Commission orders.¹ For the reasons discussed below, we find that such a filing is no longer necessary.

Background

2. On July 22, 2003, the CAISO filed its proposed Oversight and Investigations Program (O&I Program) as Amendment No. 55 to the ISO Tariff. The CAISO proposed to implement the O&I Program in three parts: (1) adding an Enforcement Protocol as a stand-alone Attachment to the ISO Tariff, (2) incorporating additional conduct rules in

¹ *California Indep. Sys. Operator Corp.*, 106 FERC ¶ 61,179 at P 1, 154 (February 20 Order) (*citing Mirant Delta, LLC v. California Indep. Sys. Operator Corp.*, 100 FERC ¶ 61,059 (Governance Order I), *reh'g granted in part and denied in part*, 100 FERC ¶ 61,271 (Governance Order II), *reh'g denied*, 101 FERC ¶ 61,078 (2002) (collectively, Governance Orders)), *reh'g denied in relevant part*, 107 FERC ¶ 61,118 at P 1 n.3, P 7 (2004) (May 6 Order).

the main body of the ISO Tariff to address specific bidding and scheduling behavior, and (3) revising the ISO Market Monitoring and Information Protocol (MMIP) under the ISO Tariff to complement the Enforcement Protocol and to correct various outdated provisions of the MMIP.

3. In an order issued on February 20, 2004, the Commission stated that, due to the composition of the then-current CAISO governing board, the CAISO was not sufficiently independent to ensure operation of its interstate transmission facilities on a non-discriminatory basis.² As a result, the Commission did not allow the CAISO's market monitoring unit (MMU)³ to administer the behavior-related tariff provisions for objectively identifiable behavior and to charge pre-defined penalties for violations of those provisions until the CAISO demonstrated in a filing to the Commission that it had established an independent governing board in compliance with the Governance Orders.⁴ The Commission stated that, once it accepted the CAISO's demonstration of independence, the MMU may begin to administer provisions of the Enforcement Protocol for objectively identifiable behavior and to charge pre-defined penalties.⁵ The Commission added that, until the Commission determined that the CAISO is independent, the Commission would enforce those Rules of Conduct accepted therein for conduct which was objectively identifiable and which required subjective evaluation.⁶ The Commission therefore directed the CAISO to modify the Enforcement Protocol to indicate that it would be enforced by the Commission in the interim.⁷

² February 20 Order, 106 FERC ¶ 61,179 at P 154 (*citing* Governance Order I, 100 FERC ¶ 61,059 at P 49).

³ The CAISO's MMU consists of the Compliance Department and Department of Market Analysis. *See* May 6 Order, 107 FERC ¶ 61,118 at P 12.

⁴ February 20 Order, 106 FERC ¶ 61,179 at P 154 (*citing* Governance Order I, 100 FERC ¶ 61,059 at P 49). *See also* May 6 Order, 107 FERC ¶ 61,118 at P 8, 11.

⁵ *See* February 20 Order, 106 FERC ¶ 61,179 at P 28, 40 & 154.

⁶ *Id.* at P 154

⁷ *Id.* On May 20, 2004, as amended on May 21, 2004, the CAISO filed to comply with the Commission's February 20 Order, substantially modifying the original Amendment No. 55 proposal. On October 28, 2004, the Commission accepted the compliance filing, subject to modification, instituted a proceeding under section 206 of the Federal Power Act (FPA), established a technical conference to address a proposed

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4. The CAISO and the California Public Utilities Commission requested rehearing of this determination. In an order on rehearing issued on May 6, 2004, the Commission found that it had addressed all of their arguments in the Governance Orders.⁸ For the reasons stated in those orders, the Commission denied those requests for rehearing.⁹

5. On June 22, 2004, the D.C. Circuit issued an opinion vacating and remanding the Governance Orders, finding that the Commission did not have authority under the FPA to require the CAISO to replace its governing board with a new board chosen through procedures dictated by the Commission.¹⁰ However, the D.C. Circuit also noted that, if the Commission “concludes that the CAISO lacks the independence . . . to constitute an [independent system operator (ISO)] for the purposes of Order No. 888, then it need not approve CAISO as an ISO.”¹¹

6. On July 6, 2004, the CAISO filed with the D.C. Circuit a petition for review of the February 20 and May 6 Orders, seeking review of the Commission’s directive in the Amendment No. 55 proceeding that the CAISO demonstrate the independence of the CAISO governing board in compliance with the Governance Orders.

“self-certification” process, and directed the CAISO to make a further compliance filing. *California Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,087 (2004) (October 28 Order). On November 29, 2004, the CAISO filed to comply with the Commission’s October 28 Order. On March 24, 2005, the Commission accepted the compliance filing, subject to modification, addressed the technical conference and the section 206 proceeding, and directed a further compliance filing. *California Indep. Sys. Operator Corp.*, 110 FERC ¶ 61,333 (2005) (March 24 Order). On April 25, 2005, the CAISO filed to comply with the Commission’s March 24 Order. On June 29, 2005, pursuant to delegated authority, the Commission’s Director of the Division of Tariffs and Market Development – West accepted the compliance filing. *California Indep. Sys. Operator Corp.*, Letter Order, Docket Nos. ER03-1102-008 and EL05-14-001 (June 29, 2005).

⁸ May 6 Order, 107 FERC ¶ 61,118 at P 7 (*citing* Governance Order I, 100 FERC ¶ 61,059; Governance Order II, 100 FERC ¶ 61,271).

⁹ *Id.*

¹⁰ *California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 401-03 (2004).

¹¹ *Id.* at 404.

7. Upon the Commission's motion for a voluntary remand, the D.C. Circuit has remanded this proceeding for further consideration by the Commission.

Discussion

8. On May 13, 2005, in Docket No. EL05-114-000, the CAISO filed a petition for declaratory order (petition), requesting that the Commission find that proposed changes to the CAISO's governing board selection process result in a governance structure that the Commission finds acceptable. In an order issued concurrently in Docket No. EL05-114-000, the Commission concludes that the CAISO's proposed governing board selection process is acceptable for purposes of the independence requirements of Order Nos. 888¹² and 2000.¹³ The Commission also concludes that the current governing board is independent. The Commission has made these findings based upon the CAISO's voluntary filing of the petition, rather than the directive contained in the Governance Orders. As a result of these findings in Docket No. EL05-114-000, it is no longer necessary for the CAISO to make a filing in this proceeding demonstrating that it has established an independent governing board in compliance with the Governance Orders.

9. In general, the Enforcement Protocol is comprised of Rules of Conduct that set forth the "expected conduct" to be followed by all market participants and "sanctions" to be assessed to violators. The Enforcement Protocol also sets forth, among other things, a process for investigation and enforcement and the administration of sanctions. Consistent with our earlier orders, the CAISO's MMU may now administer the Enforcement Protocol provisions related to behavior that is objectively identifiable and for which violations have clear Commission-approved sanctions set forth in the ISO Tariff.¹⁴ As

¹² *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹³ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd, Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

¹⁴ See February 20 Order, 106 FERC ¶ 61,179 at P 40.

such, we direct the CAISO to submit a compliance filing, within 30 days of the date of this order, modifying the Enforcement Protocol (specifically, EP 1.10 (Administration of the EP) and EP 8 (Process for Investigation and Enforcement)) to indicate that the CAISO's MMU will administer the Enforcement Protocol, except for EP 7 (No Market Manipulation). The Commission will continue to enforce EP 7 because violations of that provision require subjective evaluation.¹⁵ We also direct the CAISO to modify EP 8 to set forth the process for investigation and administration of the Enforcement Protocol that will be followed by the MMU. When drafting these revisions, the CAISO must take into account the Commission's previous determinations on this issue.¹⁶

The Commission orders:

(A) The CAISO is hereby no longer required to submit a compliance filing in this proceeding demonstrating that it has established an independent governing board, as discussed in the body of this order.

(B) The CAISO is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁵ See *id.* at P 101; May 6 Order, 107 FERC ¶ 61,118 at P 43. See also *California Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,087 at P 77-83 (2004), *order on reh'g*, 110 FERC ¶ 61,333 at P 44-45 (2005).

¹⁶ See February 20 Order, 106 FERC ¶ 61,179 at P 109; May 6 Order, 107 FERC ¶ 61,118 at P 45-49.