

170 FERC ¶ 61,094
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

California Independent System
Operator Corporation

Docket No. ER04-835-010

ORDER DENYING MOTION FOR STAY

(Issued February 12, 2020)

1. On October 28, 2019, the California Independent System Operator Corporation (CAISO) submitted a compliance filing in response to the Commission's August 28, 2019 order on rehearing in this proceeding.¹ In response, Shell Energy North America (US) L.P. and the Alliance for Retail Energy Markets (collectively, the Coalition) filed a protest requesting that the Commission reject the compliance filing and a motion for stay of any interest charges that would be assessed pursuant to the Rehearing Order. In this order, we deny the motion for stay. We do not act on CAISO's compliance filing at this time.

I. Background

A. Procedural History and Rehearing Order

2. The origins of this case date back more than a decade, but as relevant here, the Commission issued several orders on a CAISO proposal addressing, among other things, the allocation of must-offer generation costs.² On December 20, 2013, CAISO submitted

¹ *Cal. Indep. Sys. Operator Corp.*, 168 FERC ¶ 61,127 (2019) (Rehearing Order).

² *Cal. Indep. Sys. Operator Corp.*, 108 FERC ¶ 61,022 (2004); *Cal. Indep. Sys. Operator Corp.*, Opinion No. 492, 117 FERC ¶ 61,348 (2006), *order on reh'g*, 121 FERC ¶ 61,193 (2007), *order on reh'g*, 136 FERC ¶ 61,197 (2011), *aff'd*, *City of Anaheim v. FERC*, 540 F. App'x 13 (D.C. Cir. 2013).

what it termed an “informational” refund report that explained that, consistent with those orders, it would be conducting resettlements for the relevant time period, i.e., July 1, 2004 through March 31, 2009. On October 20, 2016, the Commission rejected CAISO’s informational refund report and dismissed as moot a related complaint filed by the Coalition.³

3. Subsequently, the Rehearing Order granted CAISO’s and Southern California Edison Company’s requests for rehearing of the October 2016 order, which accepted CAISO’s informational refund report, and denied the Coalition’s complaint.⁴ The Commission further determined that interest should be applied to the resettlements consistent with section 35.19a of the Commission’s regulations.⁵ The Commission explained that, because interest reflects the time value of money, courts have stated that the Commission’s equitable authority to waive interest is narrow and should be exercised only in exceptional circumstances.⁶ The Commission thus found that under these circumstances requiring interest was appropriate and directed CAISO to submit a compliance filing reflecting the invoices it plans to distribute for interest amounts.⁷ Requests for rehearing of the Rehearing Order are pending.

B. CAISO’s Compliance Filing

4. On compliance, CAISO states that it is still in the process of calculating interest and plans to issue settlement statements and invoices by March 31, 2020.⁸ CAISO states that it will submit a supplemental filing in the first quarter of 2020 reflecting interest calculations through March 31, 2020. CAISO also states that it will conduct outreach and provide affected scheduling coordinators with their interest calculations.

³ *Cal. Indep. Sys. Operator Corp.*, 157 FERC ¶ 61,033 (2016).

⁴ Rehearing Order, 168 FERC ¶ 61,127 at P 12.

⁵ *Id.* PP 12, 26-29. *See* 18 C.F.R. § 35.19a (2019).

⁶ Rehearing Order, 168 FERC ¶ 61,127 at P 28 (citing *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999); *Se. Mich. Gas Co. v. FERC*, 133 F.3d 34, 43-44 (D.C. Cir. 1998); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,013, at PP 38-40 (2016)).

⁷ *Id.* P 29.

⁸ CAISO Compliance Filing at 2.

II. Notice and Responsive Pleadings

5. Notice of CAISO's compliance filing was published in the *Federal Register*, 84 Fed. Reg. 59,803 (2019), with comments due on or before November 18, 2019.

6. On November 18, 2019, the Coalition filed a protest of CAISO's compliance filing, arguing that the Commission should reject it for failing to comply with the Commission's directive, and a motion for stay. In its motion for stay, the Coalition moves to stay any interest charges that would be assessed pursuant to the Rehearing Order until after the Commission acts on pending rehearing requests.⁹ The Coalition argues that granting the stay and addressing the rehearing requests first will ensure that this proceeding moves forward in a logical and orderly manner. Moreover, the Coalition asserts that granting the stay will avoid the complex and burdensome process required to unwind CAISO's actions should the Commission grant rehearing.¹⁰

7. On December 3, 2019, CAISO filed a motion for leave to answer and answer to the Coalition's protest and an answer to the Coalition's motion for stay. CAISO argues that the Commission should not reject its compliance filing because CAISO will supplement its compliance filing on March 1, 2020.¹¹ CAISO further opposes, as relevant here, the Coalition's motion for stay, arguing that the Coalition fails to satisfy or address the Commission's standard for a stay.¹² Specifically, CAISO argues that the Coalition failed to demonstrate that they will suffer an irreparable injury without a stay because any resettlement issues solely concern economic matters.

8. Six Cities¹³ also filed an answer to the Coalition's motion for stay on December 3, 2019, arguing that the stay should be denied.¹⁴ Despite challenging the legality of the

⁹ *Id.* at 4-5.

¹⁰ As discussed herein, we will address CAISO's compliance filing in a future order.

¹¹ CAISO Answer at 3-5.

¹² *Id.* at 6-7 (citing *Am. Wind Energy Ass'n v. Sw. Power Pool, Inc.*, 168 FERC ¶ 61,006, at PP 20-22 (2019) (*AWEA v. SPP*)).

¹³ Six Cities are the Cities of Anaheim Azusa, Banning, Colton, Pasadena, and Riverside, California.

¹⁴ Six Cities Answer at 2.

Commission's application of interest on rehearing,¹⁵ Six Cities oppose the motion for stay because they assert that it could result in considerable harm to the parties required to pay interest on refunds, including Six Cities.¹⁶

9. On December 16, 2019, the Coalition filed a motion for leave to answer and answer to CAISO's and Six Cities' answers. With regard to the motion for stay, the Coalition argues that, in light of the atypical facts and the unique nature of this proceeding, a stay is warranted regardless of the standard.¹⁷ The Coalition agrees with CAISO that money damages are not an irreparable injury, but argues that the problematic nature of the current posture of this proceeding is a valid basis for only moving forward after the Commission considers critical issues with the Rehearing Order that could not have been raised prior to rehearing.¹⁸

III. Discussion

A. Procedural Matters

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept CAISO's answer to the Coalition's protest and the Coalition's answer to CAISO's answer because they have provided information that assisted us in our decision-making process.¹⁹

¹⁵ See Six Cities Request for Rehearing, Docket No. ER04-835-011 (filed Sept. 26, 2019).

¹⁶ Six Cities Answer at 3.

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 6.

¹⁹ CAISO's answer and Six Cities' answer to the Coalition's motion for stay were filed within 15 days of that motion and are thus permissible under the Commission's regulations. 18 C.F.R. § 385.213(d) (2019).

B. Substantive Matters

11. At the outset, we note that we will not address CAISO's compliance filing here.²⁰ In its answer to the Coalition, CAISO has committed to supplement this compliance filing by March 1, 2020,²¹ and we will review the compliance filing, as well as any responsive pleadings, after that supplemental filing is made. Nevertheless, we think it is appropriate for us to now address – and as discussed below, deny – the Coalition's motion for stay of any interest charges.

12. The Commission will grant a motion for stay when “justice so requires.”²² In determining whether this standard has been met, the Commission considers several factors, including: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest.²³ If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other two factors.²⁴

13. In order to support a stay, the movant must substantiate that irreparable injury is “likely” to occur.²⁵ The injury must be both certain and great, and it must be actual, not theoretical. Bare allegations of what is likely to occur do not suffice.²⁶ The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof

²⁰ We note that, in the future, when CAISO cannot meet a compliance deadline, it should seek an extension of the compliance deadline rather than submitting a filing with a commitment to amend that filing later.

²¹ See CAISO Answer at 3-5.

²² *AWEA v. SPP*, 168 FERC ¶ 61,006 at P 20; *Tenn. Gas Pipeline Co., L.L.C.*, 157 FERC ¶ 61,154, at P 4 (2016); *Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,111, at P 9 (2016); *Enable Gas Transmission, LLC*, 153 FERC ¶ 61,055, at P 118 (2015); *Transcon. Gas Pipe Line Co., LLC*, 150 FERC ¶ 61,183, at P 9 (2015).

²³ Ensuring definiteness and finality in our proceedings is also important to the Commission. See *Enable Gas Transmission, LLC*, 153 FERC ¶ 61,055 at P 118; *Millennium Pipeline Co.*, 141 FERC ¶ 61,022, at P 13 (2012).

²⁴ See, e.g., *Algonquin Gas Transmission*, 156 FERC ¶ 61,111 at P 9.

²⁵ See *Transcon. Gas Pipe Line Co., LLC*, 150 FERC ¶ 61,183 at P 10 (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*)).

²⁶ *Id.*

indicating that the harm is certain to occur in the near future.²⁷ Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.²⁸

14. Further, “[i]t is also well-settled that economic loss does not, in and of itself, constitute irreparable harm.”²⁹ As the United States Court of Appeals for the District of Columbia Circuit has explained:

Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.³⁰

15. We find that the Coalition has failed to establish that the inclusion of interest in the refund calculation meets the standard of irreparable harm required to justify a stay. As the Commission recently stated, “[e]ven if [they are] substantial, economic losses alone do not constitute irreparable harm.”³¹ The Coalition concedes that “money damages are not an irreparable injury”³² and does not otherwise attempt to satisfy the Commission’s established standard for a stay. Instead, the Coalition asks that the Commission grant its stay request given the unique nature of this case. We decline to depart from the Commission’s precedent and apply a new standard for reviewing motions for stay in this proceeding. Because the Coalition has failed to demonstrate that it will suffer irreparable harm under the Commission’s existing standard, we deny its motion for stay.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Wisconsin Gas*, 758 F.2d at 674.

³⁰ *Id.* (quoting *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

³¹ *AWEA v. SPP*, 168 FERC ¶ 61,006 at P 23.

³² Coalition Answer at 6.

The Commission orders:

The Coalition's motion for stay is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.