

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

California Independent System  
Operator Corporation

Docket Nos. ER03-1102-003  
ER03-1102-004  
ER03-1102-006  
ER03-1102-007  
EL05-14-000

ORDER ON REHEARING, COMPLIANCE FILING, TECHNICAL CONFERENCE  
AND SECTION 206 PROCEEDING

(Issued March 24, 2005)

1. On February 20, 2004, the Commission accepted the California Independent System Operator Corporation's (CAISO or ISO) proposed Amendment No. 55 to its Open Access Transmission Tariff (ISO Tariff),<sup>1</sup> which granted the CAISO limited authority to charge pre-defined penalties for certain objectively determined behaviors, directed certain modifications to conform Amendment No. 55 to the Commission's behavior rules order in Docket Nos. EL01-118-000 and EL01-118-001,<sup>2</sup> and otherwise provided direction to the CAISO on how the Commission intends market monitoring to operate in the CAISO markets.
2. 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 (May 2004 compliance filing). In an order issued on October 28, 2004,<sup>3</sup>

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<sup>1</sup> *California Indep. Sys. Operator Corp.*, 106 FERC ¶ 61,179 (2003) (February 20 Order).

<sup>2</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003) (MBR Tariff Order).

<sup>3</sup> *California Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,087 (2004) (October 28 Order).

the Commission accepted for filing the CAISO's May 2004 compliance filing, subject to modification; instituted a proceeding under section 206 of the Federal Power Act (FPA);<sup>4</sup> and established a technical conference to address the proposed "self-certification" process contained in EP 3.2 (Certification). On November 29, 2004, the CAISO filed to comply with the Commission October 28 Order. In this order, we grant the request for rehearing of the October 28 Order; accept the November 29, 2004 compliance filing, subject to modification; address the technical conference and the section 206 proceeding; and direct a further compliance filing. This order benefits customers in the CAISO markets by providing a reasonable approach to investigating and sanctioning anticompetitive behavior.

### **Background**

3. 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 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.

4. On September 22, 2003, the Commission issued an order accepting and suspending Amendment No. 55 for five months, to be effective February 21, 2004, subject to refund and further Commission order.<sup>5</sup> In the February 20 Order, the Commission directed the ISO to submit a compliance filing modifying proposed Amendment No. 55. On May 6, 2004, the Commission issued an order granting, in part, and rejecting, in part, the requests for rehearing of the February 20 Order and responded to the requests for clarification.<sup>6</sup>

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<sup>4</sup> 16 U.S.C. § 824e (2000).

<sup>5</sup> *California Indep. Sys. Operator Corp.*, 104 FERC ¶ 61,308 (2003).

<sup>6</sup> *California Indep. Sys. Operator Corp.*, 107 FERC ¶ 61,118 (2004) (May 6 Order). In a separate order issued on October 28, 2004, the Commission denied rehearing of the May 6 Order. *California Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,089 (2004).

5. On May 20, 2004, as amended on May 21, 2004, the CAISO filed the May 2004 compliance filing to comply with the February 20 Order. In the October 28 Order, the Commission accepted for filing the CAISO's compliance filing, subject to modification; instituted a proceeding under section 206 of the FPA with respect to the standard set forth in EP 5.1(a) (Expected Conduct for Accurate Information Generally); and established a technical conference to address the proposed "self-certification" process contained in EP 3.2 (Certification).

6. On November 29, 2004, the CAISO filed a request for rehearing of the October 28 Order. On that same date, the CAISO filed a compliance filing to comply with the October 28 Order. On January 12, 2005, Commission Staff held a technical conference on the CAISO's proposed "self-certification" process and alternate proposals. Initial comments and reply comments on the issues discussed at the technical conference were filed on February 4, 2005 and February 18, 2005, respectively.

### **Notices and Responsive Pleadings**

7. Notice of the Commission's initiation of a proceeding in Docket No. EL05-14-000 under section 206 of the FPA was published in the *Federal Register*, 69 Fed. Reg. 64,738 (2004). On December 21, 2004, Duke Energy North America, LLC and Duke Energy Marketing America, LLC (Duke Energy) filed a motion to intervene in Docket No. EL05-14-000.

8. Notice of the CAISO's November 29, 2004 compliance filing was published in the *Federal Register*, 69 Fed. Reg. 71,809 (2004), with protests and interventions due on or before December 20, 2004. Duke Energy and the Northern California Power Agency (NCPA) filed timely comments. The CAISO filed an answer.

9. Notice inviting comments to the January 12, 2005 technical conference held by Commission Staff was published in the *Federal Register*, 70 Fed. Reg. 3,690 (2005), with initial comments and reply comments due on February 4, 2005 and February 18, 2005, respectively. The CAISO, Powerex Corp. (Powerex) and Duke filed initial comments. The CAISO, Powerex and the California Department of Water Resources State Water Project (CDWR) filed reply comments.

### **Discussion**

#### **A. Procedural Matters**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), Duke Energy's motion to intervene serves to make it a party to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the CAISO's answer because it has provided information that assisted us in our decision-making process.

**B. Request for Rehearing**

**Conformed Tariff**

12. In the February 20 Order, the Commission stated that market participants should not be bound by tariff requirements that are currently not found in the existing ISO Tariff as posted on the ISO's website. Therefore, the ISO was directed to "post an updated, conformed tariff on its website within 30 days following the acceptance of its subsequent compliance filing in this proceeding."<sup>7</sup> The Commission stated further that penalties may not be imposed pursuant to Amendment No. 55 until this requirement was met.<sup>8</sup> In the October 28 Order, the Commission reiterated that the ISO Tariff needed to be updated thirty days from the date of that order and, thereafter, as soon as practicable but not to exceed sixty days from the date that revisions to the ISO Tariff are accepted by the Commission.<sup>9</sup> The Commission stated that, as a practical matter, this extended period of time should mitigate the administrative burden associated with the voluminous paper traffic managed by the CAISO.<sup>10</sup>

13. In the October 28 Order, the Commission also directed the CAISO to electronically file a revised tariff with the Commission reflecting the modifications discussed in the order.<sup>11</sup> The Commission based its directive upon the determination that,

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<sup>7</sup> February 20 Order, 106 FERC at P 167.

<sup>8</sup> *Id.*

<sup>9</sup> October 28 Order, 109 FERC at P 109.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at P 110.

under Order No. 614,<sup>12</sup> a public utility that revises or modifies its tariff must file with the Commission a complete revised tariff with a new designation.<sup>13</sup>

14. On rehearing, the CAISO argues that the Commission erred in requiring the CAISO to electronically file a revised tariff with the Commission. The CAISO states that the text of Order No. 614 does not require the CAISO to file such a revised tariff. The CAISO also claims that the Commission has never directed a public utility that has an Order No. 614-compliant tariff<sup>14</sup> to file a complete revised tariff as part of a filing complying with a Commission order approving modifications to discrete tariff sections. The CAISO argues that Commission orders and industry practice since the issuance of Order No. 614 does not support the conclusion that the CAISO is required by Order No. 614 to file a complete revised tariff with its compliance filing. The CAISO adds that, since the Commission does not have a mechanism in place through which the CAISO can submit a revised tariff electronically, it is impossible for the CAISO to comply with the Commission's directive. The CAISO requests therefore that the Commission stay its directive to the CAISO to file a complete revised tariff.

15. We recognize that Order No. 614 does not specifically require public utilities to refile their entire tariffs once they are compliant with that order.<sup>15</sup> We also note that the need for the filing of the entire ISO Tariff at this time is diminished by the fact that the CAISO has committed to filing, in 2005, a comprehensive ISO Tariff upon the

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<sup>12</sup> *Designation of Electric Rate Schedule Sheets*, Order No. 614, 65 Fed. Reg. 18,221 (Mar. 31, 2000), FERC Stats. & Regs., Regs. Preambles ¶ 31,096 (2000).

<sup>13</sup> October 28 Order, 109 FERC at P 110.

<sup>14</sup> The CAISO notes that, on June 13, 2001, the Commission accepted the CAISO's revised ISO Tariff filed in compliance with Order No. 614. *California Indep. Sys. Operator Corp.*, 95 FERC ¶ 61,390 (2001).

<sup>15</sup> We also agree that the CAISO does not currently need to file the ISO Tariff electronically. However, we note that a Notice of Proposed Rulemaking is outstanding that would require public utilities to make tariff filings electronically in the future. *See* Notice of Proposed Rulemaking, Prototype Testing, and Technical Conference, 108 FERC ¶ 61,021 (2004).

Commission's approval of the CAISO's Market Redesign and Technology Upgrade proposal.<sup>16</sup> Accordingly, we grant the request for rehearing.

**C. November 29, 2004 Compliance Filing**

**1. EP 2: Comply with Operating Orders**

**a. Penalty Charges Under EP 2**

**(1) Per-Day Limitation on Amount of Sanctions**

16. In the October 28 Order, the Commission found that the CAISO had failed to comply with the Commission's directive in the February 20 Order to establish a penalty range for former EP 2.2 (Comply with Operating Orders) not to exceed \$10,000 "per day."<sup>17</sup> Therefore, the Commission directed the CAISO to state that violations under EP 2 (Comply with Operating Orders) (*i.e.*, cumulative violations under the market rule itself or the subparts of EP 2) must not exceed \$10,000 per day.<sup>18</sup>

17. In the November 29 compliance filing, the CAISO proposes a new section, EP 2.6 (Per-Day Limitation on Amount of Sanctions), which states as follows: "The amount of Sanctions that any Market Participant will incur for committing two or more violations of EP 2.1 through EP 2.4 on the same day will be no greater than \$10,000 per day except as provided in EP 2.5 [(Enhancements and Exceptions)]." In addition, the CAISO adds language to EP 2.1(b) stating that sanctions for failure to comply with the CAISO's operating orders "will be subject to the limitation stated in EP 2.6." The CAISO also deletes language in EP 2.2(b) (sanctions for failing to curtail load), stating that "[a] UDC or MSS Operator may incur Sanctions for more than one violation per day."

18. We find that, once again, the CAISO has misinterpreted our directive. The February 20 Order capped the amount market participants could be sanctioned for violations of the Enforcement Protocol at \$10,000 per day. Thus, we direct the CAISO to modify proposed EP 2.6 as follows: "The amount of Sanctions that any Market

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<sup>16</sup> CAISO Transmittal Letter to Proposal for Honoring Existing Transmission Contracts under the CAISO's Amended Comprehensive Market Design Proposal (Docket No. ER02-1656-021) at 4 (Dec. 8, 2004).

<sup>17</sup> October 28 Order, 109 FERC at P 23.

<sup>18</sup> *Id.*

Participant will incur for committing two or more violations of EP 2.1 through EP 2.4 on the same day will be no greater than \$10,000 per day.” Similarly, we direct the CAISO to delete from the second sentence of EP 2.1(b) the phrase “except as provided in EP 2.5” so that the sentence reads as follows: “Sanctions under EP 2.1 will not be greater than \$10,000 per violation and will be subject to the limitation stated in EP 2.6.” If an “enhanced” penalty under EP 2.5 in excess of the \$10,000 per day limit is warranted, the CAISO should notify the Commission that a violation has occurred that would necessitate such an enhancement, and the CAISO should propose to the Commission at that time a penalty that exceeds the \$10,000 per day penalty cap. Therefore, we direct the CAISO to modify EP 2.5 to include the following: “Any penalty amount that is tripled under this provision and would exceed the \$10,000 per day penalty limit shall not be levied against a Market Participant until the CAISO proposes and the Commission approves such an enhancement.” We direct the CAISO to make a compliance filing with these revisions within 30 days of the date of this order.

(2) **Operating Order Containing Multiple Instructions**

19. In the October 28 Order, the Commission found that the CAISO had adequately described the term “violation” as it related to operating orders.<sup>19</sup> However, the Commission directed the CAISO to further clarify EP 2 to state that an operating order will apply to a single set of instructions from the CAISO to address a specific problem.<sup>20</sup> The Commission explained that, therefore, failure to obey an operating order containing multiple instructions to address a specific operating condition would result in a single violation.<sup>21</sup>

20. In the November 29 compliance filing, the CAISO proposes to revise EP 2.1(a) to state that: “[a] Market Participant’s failure to obey an operating order containing multiple instructions to address a specific operating condition will result in a single violation of EP 2.”

21. We find that the proposed revision complies with our directive. Accordingly, we accept the proposed modifications.

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<sup>19</sup> *Id.* at P 24.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

**b. Penalty Enhancements under EP 2.5 (and EP 4.4)**

22. In the October 28 Order, the Commission directed the CAISO to modify EP 2.5 (Enhancement and Exceptions) to state that: (1) a market participant may appeal a trebled sanction under this protocol with the Commission to demonstrate a mitigating circumstances not covered in EP 9.2, and (2) the sanction will be tolled until the Commission renders its decision.<sup>22</sup>

23. In the November 29 compliance filing, the CAISO modifies EP 2.5 to add language on market participants' appeal rights with respect to trebled sanctions and the tolling of those sanctions. The CAISO includes an identical modification in EP 4.4 (which addresses the enhancements and exceptions to sanctions for failing to comply with availability reporting requirements). The CAISO also makes conforming changes to EP 9.3(a), EP 9.3(b) and EP 9.3(d).

24. We find that the proposed revisions comply with our directive. Accordingly, we accept the revised language regarding market participants' appeal rights and the tolling of sanctions.

**c. Other Provisions Under EP 2**

**(1) Dispatch Instructions Under EP 2.5**

25. In the October 28 Order, the Commission noted that the CAISO stated that revised EP 2 only applies to non-automated dispatch instructions and therefore proposed a revision to the last sentence of revised EP 2.5 (Enhancements and Exceptions) to exclude the words “. . . that result in circumstances in which Uninstructed Deviation Penalty under section 11.2.4.1.2 of the ISO Tariff may be assessed . . .”<sup>23</sup> Thus, EP 2.5 would be revised to read “Notwithstanding the foregoing, violations of EP 2.1 through EP 2.4 are subject to penalty under this rule only to the extent that the ISO has issued a separate and distinct non-automated Dispatch Instruction to the Market Participant.”<sup>24</sup>

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<sup>22</sup> *Id.* at P 36.

<sup>23</sup> *Id.* at P 41.

<sup>24</sup> *Id.*



26. In the October 28 Order, the Commission directed the CAISO to make this revision.<sup>25</sup> In the November 29 compliance filing, the CAISO modified EP 2.5 accordingly. Therefore, we accept this modification.

(2) **Criterion Used for Starting a Generator Under EP 2.4(a)**

27. In the October 28 Order, the Commission accepted the CAISO's proposal to revise EP 2.4(a) regarding the criterion used for starting a generator.<sup>26</sup> In the November 29 compliance filing, the CAISO modified the first sentence of EP 2.4(a) to this effect to read: "A Market Participant shall start a Generating Unit and have that Generating Unit operating at minimum load within 30 minutes of the time at which a must-offer waiver revocation become effective, or report the derate, outage or other event outside the control of the Market Participant that prevents the Generating Unit from being started by such time."

28. In its comments, Duke Energy requests that the Commission clarify that this proposed revision is only applicable when the CAISO has given the must-offer generating unit sufficient advance notice of the revocation to enable it to start-up and reach minimum load within the start-up times specified in the CAISO's files (*e.g.*, Schedule 1 of the units Participating Generator Agreement). Duke Energy argues that this clarification is necessary because the proposed revision to EP 2.4(a) creates a potential conflict between ISO Tariff section 5.11.6 (which allows the CAISO to revoke a must-offer waiver at any time) and the Commission's previous orders finding that generators should not be penalized when the ISO issues infeasible operating orders or dispatch instructions.<sup>27</sup> Duke Energy states that typically generating units on must-offer waivers have long start-up times in excess of the 30 minutes provided in EP 2.4(a). Therefore, Duke Energy contends that it would be unreasonable for the CAISO to interpret EP 2.4(a) to allow it to revoke a long-start generating unit's waiver with less

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<sup>25</sup> *Id.* at P 44.

<sup>26</sup> *See id.* at P 42. The CAISO stated that a must-offer generator is obligated to start a thermal Generating Unit when the ISO revokes a must-offer waiver under section 5.11.6 of the ISO Tariff. *Id.*

<sup>27</sup> *Citing California Indep. Sys. Operator Corp.*, 106 FERC ¶ 61,179 at P 56-57 (2004), *reh'g denied in part and granted in part*, 107 FERC ¶ 61,113 (2004).

than sufficient notice to allow the unit to initiate and complete its start-up cycle and then impose a penalty under EP 2.4(b) for failing to do so.

29. In its answer, the CAISO agrees that the EP 2.4(a) should be clarified to account for generating units with start-up times that are longer than 30 minutes. The CAISO proposes to add the following sentence to EP 2.4(a): “Notwithstanding the foregoing, no violation shall occur unless the Market Participant has been provided advance notice of the waiver revocation consistent with the relevant start-up time set forth in the ISO Master File.”

30. We accept the CAISO proposal to revise EP 2.4(a) to account for generating units with start-up times in excess of 30 minutes. Accordingly, we direct the CAISO to make a compliance filing with the proposed revision to EP 2.4(a) within 30 days of the date of this order.

2. **EP 3: Submit Feasible Energy and Ancillary Service Bids and Schedules**

**Self-Certification Proposal Under EP 3.2**

31. In its May 2004 compliance filing, the CAISO proposed to add a self-certification requirement under EP 3.2(a). Pursuant to that requirement, the ISO would provide each Scheduling Coordinator that schedules ancillary services from generating units, curtailable demand, system units, and system resources a monthly listing of schedules, including the hour, location, and service type of all ancillary services that were not dispatched by the ISO. If all schedules could have been provided in accordance with its bid, then the Scheduling Coordinator would not be required to take any action and the monthly list is effectively certified. However, if the Scheduling Coordinator determined that certain schedules could not have been delivered for any reason within a 10 percent tolerance band, then the Schedule Coordinator would be required to advise the ISO of these schedules through a self-certification form, and the CAISO would rescind the payment for the undelivered portion of the ancillary service.

32. For violations of EP 3.2, the CAISO proposed to rescind payment for any portion of an ancillary service that was unavailable, based on the information that is known to the Market Participant or should have been known to the Market Participant at the time of bidding or scheduling. In EP 3.3, the CAISO proposed to make an exception for violations under this protocol that trigger the Uninstructed Deviation Penalty under section 11.2.4.1.2 of the ISO Tariff or for which payments have been eliminated under section 2.5.26 of the ISO Tariff. In addition, the CAISO stated that the submission of a schedule that causes, or that the ISO expects to cause, intra-zonal congestion shall not, by itself, constitute a violation of EP 3 unless the market participant failed to comply with an

obligation under the ISO Tariff to modify schedules as determined by the ISO to mitigate such congestion or such schedules violated another element of this protocol.

33. In the October 28 Order, the Commission directed Commission Staff to convene a technical conference on the self-certification proposal.<sup>28</sup> The Commission deferred action on EP 3.2, EP 5.3 (requiring factually accurate self-certifications), and EP 6.5 (requiring the submittal of timely self-certifications forms) until after the technical conference.<sup>29</sup>

34. In the November 29 compliance filing, the CAISO proposes to delete EP 3.2, EP 5.3, EP 6.5 and the references to EP 3.2 in EP 3.3. The CAISO states that it will propose changes to its self-certification proposal based upon the outcome of the technical conference.

35. At the technical conference, the parties discussed the CAISO's self-certification proposal and Powerex's capacity tagging proposal.

36. In its initial comments on the technical conference, the CAISO states that the self-certification process was meant to provide information that may not have been available in real-time, which would allow the CAISO to verify the availability and capability of undispached ancillary service schedules. In response to concerns raised at the technical conference, the CAISO agrees to take the self-certification process out of the Enforcement Protocol and instead amend ISO Tariff sections 2.5.24 and 2.5.26.2.3 to require a supplier to notify the CAISO if one or more undispached ancillary service schedules from a prior hour could not have been performed and to provide for the rescission of capacity payments for unavailable ancillary services capacity.<sup>30</sup> The CAISO adds that the requirement in EP 6.1 that information required under the ISO Tariff be submitted in a complete, accurate and timely manner would apply to the filing of this

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<sup>28</sup> October 28 Order, 109 FERC at P 51-52.

<sup>29</sup> *Id.* at P 52, nn.63 & 72.

<sup>30</sup> The CAISO states that it supports Powerex's capacity tagging proposal as a complement to an ISO Tariff requirement that suppliers notify the ISO when prior undispached ancillary service schedules could not have been performed. Powerex filed initial comments addressing its tagging proposal and supporting an amendment to the ISO Tariff that would require scheduling coordinators to promptly notify the CAISO when they learn that ancillary services are not available.

ancillary service information. In its reply comments, the CAISO further modified its alternative approach to addressing this undispached ancillary services issue. Reply comments were filed in response.<sup>31</sup>

37. We agree that the proposed requirement that a supplier notify the CAISO if one or more undispached ancillary service schedules from a prior hour could not have been performed and the companion proposal that capacity payments for unavailable ancillary services capacity be rescinded are better addressed elsewhere in the ISO Tariff, rather than in the Enforcement Protocol. Therefore, we accept the proposed deletion of EP 3.2, EP 5.3 and EP 6.5 and the references to EP 3.2 in EP 3.3.

38. With respect to the new proposal to revised ISO Tariff section 2.5.24 and 2.5.26.2.3, since these proposed revisions do not relate to the Enforcement Protocol, they are outside the scope of this proceeding. Because these proposed revisions may impact entities that are not parties to this proceeding, we direct the CAISO to make a separate section 205 filing that will subject this new proposal to amend ISO Tariff sections 2.5.24 and 2.5.26.2.3 to public notice and comment.

### 3. **EP 5: Provide Factually Accurate Information**

#### **Graduated Penalties Under EP 5.1(b)**

39. In its May 2004 compliance filing, the CAISO stated that the sanction for violation of EP 5.1(a) (Expected Conduct for Providing Accurate Information Generally) shall be up to \$10,000 for each submittal of false information.<sup>32</sup> In the October 28 Order, the Commission found that this proposal was inconsistent with the directive in the February 20 Order, which required the ISO “to specify the exact penalty amount to be imposed for each infraction.”<sup>33</sup> Therefore, the Commission directed the CAISO to modify EP 5.1(b)

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<sup>31</sup> Powerex supports the CAISO’s alternative proposal and requests that the Commission direct the CAISO to make a section 205 filing to implement the proposed tariff changes. Powerex also reiterates its support for a tagging procedure. CDWR argues that it should not be subject to the additional reporting burdens because of unilateral ISO actions that cause CDWR to be unable to provide the ancillary services CDWR has offered. CDWR suggests that its obligation to report be limited to instances in which CDWR discovers that it could not provide ancillary services up to (but not exceeding) the amount CDWR actually offered to make available to the CAISO.

<sup>32</sup> See October 28 Order, 109 FERC at P 60, 69.

<sup>33</sup> *Id.* at P 69 (*quoting* February 20 Order, 106 FERC at P 29).

to include graduated penalties for objectively identifiable violations of EP 5.1(a) not to exceed \$10,000.<sup>34</sup>

40. In the November 29 compliance filing, the CAISO proposes to revise EP 5.1(b) to state that: “[t]he Sanctions for a violation of EP 5.1 shall be as follows: for the first violation within a rolling twelve (12) month period, \$2,500; for the second violation within a rolling twelve (12) month period, \$5,000; subsequent violations within a rolling twelve (12) month period, \$10,000.” The CAISO states that it interprets the Commission’s directive as only requiring the ISO to specify graduated penalties, rather than to specify each potential obligation under the ISO Tariff that might give rise to a violation of EP 5.1(a).

41. As we have previously found, EP 5.1(a) sufficiently delineates the conduct expected in the submission of accurate information to the CAISO; therefore, it is not necessary for the CAISO to specify under EP 5.1(b) each potential obligation under the ISO Tariff that might give rise to a violation of EP 5.1(a). Additionally, we find that the graduated penalties proposed by the CAISO are reasonable. Accordingly, we accept the proposed modification to EP 5.1(b).

#### **4. EP 6: Provide Information Required by the ISO Tariff**

42. In its May 2004 compliance filing, the CAISO expanded the provisions of this Rule of Conduct to include late schedules and increased the level of sanctions for violations.<sup>35</sup> In the October 28 Order, the Commission agreed that these modifications fell outside the scope of the Commission’s directives in the February 20 Order.<sup>36</sup> Therefore, the Commission directed the CAISO to remove EP 6.2 (Late Schedules) in its entirety and the last sentence of EP 6.3(b) and EP 6.4(b), which states that the deficiency of information will be treated as a violation.<sup>37</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at P 76.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

43. In the instant compliance filing, the CAISO has deleted EP 6.2 and the last sentence of EP 6.3(b) and EP 6.4(b) as directed. Accordingly, we accept these modifications.

**5. EP 7: No Market Manipulation**

44. In its May 2004 compliance filing, the CAISO included language in proposed EP 7.4(a) (Expected Conduct for Artificial Congestion) stating that a Market Participant will not knowingly undertake a transaction to nullify the congestion relief the ISO expects when a dispatch instruction is issued (unless the Market Participant exercised due diligence to prevent such an occurrence) and added an example to EP 7.5(a) (Expected Conduct for Collusion) of what constitutes collusion.<sup>38</sup> In response to a protest, the CAISO agreed that to delete the phrase “or knowingly undertakes a transaction to nullify the congestion relief the ISO expects when a Dispatch instruction is issued” from EP 7.4(a) and the example in EP 7.5(a).<sup>39</sup> In the October 28 Order, the Commission directed the CAISO to remove this language.<sup>40</sup>

45. In the instant compliance filing, the CAISO has deleted the identified phrase in EP 7.4(a) and the example in EP 7.5(a) as directed. Accordingly, we accept these modifications.

**6. EP 9: Administration of Sanctions**

**a. Notice of Violations under EP 9.3(a)**

46. In the May 14 compliance filing, the CAISO inadvertently failed to provide for notification of the market participant(s) in revised EP 9.3(a).<sup>41</sup> In its answer, the CAISO agreed that both the Scheduling Coordinator and all market participants it represents that are liable for a violation should be informed of a violation.<sup>42</sup> The CAISO proposed

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<sup>38</sup> *Id.* at P 79.

<sup>39</sup> *Id.* at P 80-82.

<sup>40</sup> *Id.* at P 83.

<sup>41</sup> *Id.* at P 98.

<sup>42</sup> *Id.*

language to add to EP 9.3(a) to this effect.<sup>43</sup> In the October 28 Order, the Commission directed the CAISO to revise EP 9.3(a) to reflect the proposed language.<sup>44</sup>

47. In the instant compliance filing, the CAISO revised EP 9.3(a) as directed. Accordingly, we accept the modification.

**b. Payment by Scheduling Coordinators under EP 9.3(c)**

48. In the May 14 compliance filing, the CAISO revised EP 9.3(c) (Other Responsible Party for Settlement) to indicate that, where parties other than the Scheduling Coordinator are responsible for the conduct giving rise to a penalty reflected on a Preliminary or Final Settlement Statement, and the Scheduling Coordinator bears no responsibility for the conduct, such other parties ultimately will be liable for the penalty.<sup>45</sup> In its answer, the CAISO explained that, to the extent a market participant is responsible for the conduct that gives rise to a penalty, the market participant, not the Scheduling Coordinator, is ultimately liable.<sup>46</sup> To respond to concerns about the Scheduling Coordinator's responsibility in such a circumstance, the CAISO offered to modify EP 9.3(c) to state that: "if the ISO finds that a Market Participant separate from the Scheduling Coordinator is solely responsible for a violation, the Scheduling Coordinator that is unable to obtain payment may net its payment by the amount of the penalty in question."<sup>47</sup> In the October 28 Order, the Commission accepted the proposed revision and directed the CAISO to revise EP 9.3(c) accordingly.<sup>48</sup>

49. In the November 29 compliance filing, the CAISO makes a slightly different revision to EP 9.3(c). The CAISO deletes the following sentence: "The Scheduling Coordinator shall be obligated to pay the full amount of the invoice, inclusive of the penalty, unless [the Commission] specifically authorizes the Scheduling Coordinator to

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at P 103.

<sup>45</sup> *Id.* at P 88.

<sup>46</sup> *Id.* at P 97.

<sup>47</sup> *Id.* at P 93, 97.

<sup>48</sup> *Id.* at 101.

net its payment by the amount of the penalty in question.” The CAISO proposes to replace that sentence with the following: “If the ISO finds that a Market Participant separate from the Scheduling Coordinator that is unable to obtain payment from the responsible party(ies) is solely responsible for a violation, the Scheduling Coordinator that is unable to obtain payment may net its payment of its invoice amount by the amount of the penalty in question.”

50. We find that the proposed revision to EP 9.3(c) addresses the concern raised by protestors. Accordingly, we accept the modification.

### **7. Scheduling on Zero-Rated Paths**

51. In the February 20 Order, the Commission accepted the ISO’s prohibition against intentionally scheduling over zero-rated paths, as proposed in ISO Tariff section 2.2.9, effective on the date of implementation of the changes the ISO commits to make to its scheduling system.<sup>49</sup> The language related to this effective date that the CAISO proposed in the May 2004 compliance filing created confusion. Therefore, in the October 28 Order, the Commission directed the CAISO to specifically state that the effective date for section 2.2.9 is on the date of implementation of the changes the ISO commits to make to its scheduling system.<sup>50</sup>

52. In the November 29 compliance filing, the CAISO filed Fourth Revised Sheet No. 20 and Second Revised Sheet No. 20A which state that these sheets will be effective “[u]pon the date the ISO implements changes to its scheduling system to permit [s]ection 2.2.9 of the ISO Tariff to go into effect.” We find that the effective date indicated on these tariff sheets comports with our directive. Accordingly, we accept these tariff sheets for filing.

### **8. Enforcement of the Enforcement Protocol**

53. In the October 28 Order, the Commission stated that, in the February 20 Order, the Commission conditionally granted the CAISO limited authority to charge pre-defined penalties for certain objectively determined behaviors.<sup>51</sup> In the October 28 Order,<sup>52</sup> the

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<sup>49</sup> February 20 Order, 106 FERC at P 121.

<sup>50</sup> October 28 Order, 109 FERC at P 114.

<sup>51</sup> *Id.* at P 1 & n.2.

<sup>52</sup> *Id.* at n.2.



Commission also noted that the Commission conditioned the CAISO's limited authority on the Commission's acceptance of a CAISO filing that demonstrates that the CAISO has established an independent Governing Board in compliance with the Commission's orders in *Mirant Delta, LLC v. California Indep. Sys. Operator Corp.*<sup>53</sup> The Commission stated that, until such time, enforcement of all market rules under the ISO Tariff will be performed by the Commission.<sup>54</sup>

54. In its comments on the November 29 compliance filing, NCPA argues that the CAISO's proposed modifications do not make clear that all the market rules under the ISO Tariff will be enforced by the Commission until the CAISO has an independent Governing Board. NCPA also asserts that the Commission cannot delegate authority to a market monitor.<sup>55</sup> NCPA requests that the Commission clarify the status of the relationship between the Commission, the CAISO and the market monitor.

55. In its answer, the CAISO contends that the Commission should not provide any clarification concerning a delegation of authority by the Commission to a market monitor. The CAISO states that the only action the ISO's market monitoring staff can currently take under the Enforcement Protocol is to refer to the Commission matters as to which a determination has been made that a violation for the Enforcement Protocol may have occurred, and the only actions that the CAISO can currently take under the Enforcement Protocol are to assess penalties that the Commission has approved and to collect and distribute penalty amounts.<sup>56</sup> The CAISO adds that the Commission has authorized the market monitoring staff and the CAISO to take these actions under the Enforcement Protocol but that the Commission has not thereby delegated its own authority to them. The CAISO contends that the market monitoring staff, not the Commission, has the ability to monitor the ISO's markets to determine if violations of the Enforcement Protocol may have occurred and to refer possible violations to the Commission. The CAISO also states that the CAISO, not the Commission, issues the

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<sup>53</sup> *Mirant Delta, LLC v. California Indep. Sys. Operator Corp.*, 100 FERC ¶ 61,059 (2002), *reh'g granted in part and denied in part*, 100 FERC ¶ 61,271, *reh'g denied*, 101 FERC ¶ 61,078 (2002); *see California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004).

<sup>54</sup> October 28 Order, 109 FERC at n.2.

<sup>55</sup> *Citing Electric Power Supply Ass'n. v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004).

<sup>56</sup> *Citing* EP 1.10, EP 8, EP 9.3 and EP 9.4.

Settlement Statements upon which assessed penalties appear and collects and distributes penalty amounts.

56. We agree that clarification is not needed. The Commission has not delegated its own authority to the CAISO's market monitoring staff. Under the Enforcement Protocol, the market monitoring staff has the ability to monitor the ISO market to determine if a violation of the Enforcement Protocol has occurred and to refer possible violations to the Commission. Further, just as it assesses other fees under the ISO Tariff, the CAISO has the ability to issue statements which may now include Commission-approved penalties and to collect and distribute these penalty amounts. These activities on the part of the market monitor, and the CAISO, do not constitute a delegation of the Commission's authority. We also find that the CAISO has sufficiently specified the roles of the Commission, the CAISO and the market monitor under the Enforcement Protocol. Accordingly, we deny the request for clarification.

**D. Section 206 Proceeding**

**EP 5: Provide Factually Accurate Information**

57. In the October 28 Order, the Commission found that the second half of the last sentence of revised EP 5.1(a), which states that such information must be "to the best of the knowledge of the person submitting the information," provided a standard which was inconsistent with the more objective standard announced in the MBR Tariff Order and Market Behavior Rule 3.<sup>57</sup> Market Behavior Rule 3 provides that:

Seller will provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, or Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercised *due diligence* to prevent such occurrences.<sup>58</sup>

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<sup>57</sup> October 28 Order, 109 FERC at P 65 (*citing* MBR Tariff Order at P 106 and Appendix A).

<sup>58</sup> MBR Tariff Order at P 106 and Appendix A (emphasis added). In the MBR Tariff Order, the Commission stated that "we intend the 'due diligence' exception to apply to the entity, not the individual, submitting data." MBR Tariff Order at P 110.

58. The MBR Tariff Order also held that the behavior rules adopted by the Commission for market-based rate sellers “apply to all markets.”<sup>59</sup> Therefore, in the October 28 Order, the Commission instituted a proceeding under section 206 of the FPA, in Docket No. EL05-14-000, to establish a just and reasonable rule, consistent with the Market Behavior Rule 3, under revised EP 5.1(a).<sup>60</sup>

59. We conclude that, in order for EP 5.1(a) to be a just and reasonable rule, the standard set forth therein must be consistent with the standard set forth in Market Behavior Rule 3. Therefore, we direct the CAISO to revise EP 5.1(a) to provide the standard set forth in Market Behavior Rule 3. We direct the CAISO to make a compliance filing with this revision within 30 days of the date of this order.

60. When we initiated this section 206 proceeding, we established a refund effective date pursuant to section 206(b) of the FPA.<sup>61</sup> Here, refunds will only be due to the extent the incorrect standard in EP 5.1(a) was applied to a market participant and that market participant was penalized for a violation of that standard. Although it is unlikely that the incorrect standard and a penalty were applied given the procedural posture of the Commission’s acceptance of EP 5, we direct the CAISO to file a refund report within 30 days of the date of this order explaining whether the incorrect standard in EP 5.1(a) was applied to any market participant and any market participant was penalized as a result, and calculating refunds due<sup>62</sup> if such events occurred.

The Commission orders:

(A) The request for rehearing is granted, as discussed in the body of this order.

(B) The CAISO’s November 29, 2004 compliance filing is accepted, subject to modification, as discussed in the body of this order.

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<sup>59</sup> *Id.* at P 185.

<sup>60</sup> October 28 Order, 109 FERC at 65.

<sup>61</sup> *See California Indep. Sys. Operator Corp.*, 69 Fed. Reg. 64,738 (2004).

<sup>62</sup> The Commission will require the CAISO to refund to any market participant penalized as a result of the incorrect standard in EP 5.1(a) the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission’s regulations.

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

(D) The CAISO is hereby directed to file a refund report, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Commission Kelly not participating.

( S E A L )

Linda Mitry,  
Deputy Secretary.