

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

EDF Trading North America LLC) Docket No. ER21-2579-000

**REQUEST FOR REHEARING OF
THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR
CORPORATION**

The California Independent System Operator Corporation (CAISO) respectfully submits this request for rehearing of the Commission's March 7, 2024 order in this proceeding.¹

I. Executive Summary

The March 7 order granted the July 29, 2021 request of EDF Trading North America, LLC (EDF), as scheduling coordinator for CXA La Paloma, LLC (La Paloma), for after-the-fact recovery of fuel costs incurred by two La Paloma generating units. The order established hearing and settlement judge procedures to determine the cost recovery to which EDF is entitled.

EDF's July 29 filing also requested waiver of procedural requirements in the CAISO tariff to the extent such waivers were necessary to permit the tariff-based request for cost recovery. The CAISO's August 19, 2021 protest explained the Commission would need to grant EDF tariff waivers to permit its request to move forward. The CAISO identified two specific tariff requirements EDF failed to meet. First, the CAISO tariff requires an entity in EDF's position to request a before-market reference level change to be eligible for an after-market uplift payment. EDF did not

¹ The CAISO submits this request pursuant to Section 313(a) of the Federal Power Act, 16 U.S.C. § 8241(a), and Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713.

make the required before-market request. Second, the CAISO tariff requires an entity in EDF's position to submit its request to the Commission within 90 business days of the CAISO rejecting an after-market request made to the CAISO. EDF's July 29 request came significantly after that 90-day period elapsed. The CAISO explained it did not object to the Commission granting waiver of these two requirements to permit substantive consideration of EDF's request. Absent a waiver, however, the CAISO argued EDF's request was barred conclusively by operation of the tariff.

The March 7 order concluded no waiver was necessary because the first procedural requirement was inapplicable to EDF's request and EDF met the second procedural requirement. The Commission should grant rehearing because these findings were erroneous.

As to the first requirement, the rationale in the March 7 order is not consistent with the record of this proceeding, runs contrary to the CAISO tariff, misapplies the canons of construction, and creates harmful market rules the CAISO never proposed to the Commission. As to the second requirement, the March 7 order conflicts with the evidence in the record of this proceeding. The record shows the CAISO rejected EDF's request for after-market cost recovery on February 17, 2021. By operation of the tariff, this rejection began the 90-business-day clock. The finding in the March 7 order that the CAISO did not reject the request until March 22, 2021 is without factual support in the record. Part of the rationale for the March 7 order finding that the CAISO's February 17, 2021 communication to EDF was not a rejection of EDF's request was that the CAISO directed EDF to review the business practice manual requirements for submitting proper requests for after-market uplift payments. Presumably, the March 7

order relies on this CAISO guidance to EDF to find the CAISO did not treat EDF's February 17 communication as a request because EDF did not follow the proper procedure for making a request. However, this concern applies equally to EDF's March 8, 2021 communication to which the CAISO replied on March 22, 2021. That second request also failed to follow the instructions stated in the business practice manual. If failure to follow the correct format and procedures for after-the-fact cost recovery means EDF did not make an actual request, then neither communication would qualify. In that case, then per the tariff the 90-business-day clock would have started on February 16, 2021 (*i.e.*, the trade date for which EDF/La Paloma seeks uplift). Either way, the only defensible conclusion is EDF's filing with the Commission was untimely.

As the CAISO explained in its August 21, 2021 protest, and as reiterated here, based on the unique factors present, the CAISO does not object to the Commission granting waiver to cure the procedural infirmities of EDF's filing. EDF's request covers the second trade date on which the CAISO's new tariff rules for fuel-cost recovery became effective. The CAISO accepts there might have been some reasonable level of confusion regarding the exact procedural requirements under the new rules. However, the absence of a waiver bars EDF's request by operation of the tariff and effectively precludes the CAISO from entering a binding settlement of this matter through the settlement judge procedures directed by the March 7 order.

The Commission also must revise the March 7 order because it incorrectly applies the tariff rules and creates bad precedent for future fuel-cost recovery requests made under section 30.12.5. Specifically, without rehearing, the March 7 order would

harm the efficiency of the CAISO's market clearing process and create incentives for generators to engage in strategic bidding to the detriment of the overall market.

II. Background

A. CAISO Tariff Provisions on Fuel Cost Recovery

As explained in the CAISO's protest, generators submit a three-part bid to the CAISO market. The first two parts include start-up costs and minimum load costs. These are referred to collectively as commitment costs. The third part of the bid is called the energy bid, and covers energy above minimum load. The CAISO calculates daily resource-specific default commitment cost bids and default energy bids based on a formula that includes the daily gas price index relevant for the specific generator. The default commitment costs are an upper limit on the resource's commitment cost bids, whereas the default energy bid applies where market power mitigation procedures apply to a resource's bid. The default commitment costs and default energy bids are referred to generally as reference levels.

To address gas market volatility, the CAISO tariff permits generators to request before-market reference level changes and after-market fuel cost uplift payments. The before-market requests are covered in CAISO tariff section 30.11 and the after-market requests are covered in tariff section 30.12. If the CAISO approves the before-market request, then the generator can bid into the market using the higher reference levels. If the CAISO does not approve the before-market request, then the generator can make an after-market request either to the CAISO or the Commission. Without differentiating between the two routes for seeking after-market recovery, the CAISO tariff states the after-market uplift payment is for "amounts in a Reference Level Change Request that

were not approved pursuant to Section 30.11.”² The process for making after-market requests to the CAISO is covered in tariff section 30.12.4 and the process for Commission requests is covered in section 30.12.5. Under tariff section 30.12.5.1, a scheduling coordinator must submit its request to the Commission 90 business days “after either the applicable Trading Day or the date the CAISO informs the Scheduling Coordinator that it is not eligible to recover its fuel costs through Section 30.12.4, whichever is applicable” These timelines provide scheduling coordinators a reasonable period to present their request to the Commission while also giving the CAISO and the market overall a defined period after which it is known there is no exposure to funding the after-market uplift payments through uplift charges allocated to load. Attachment 1 to this filing includes a table of the relevant tariff provisions and a graphic depiction of how these tariff provisions for before-market reference level change requests and after-market fuel cost recovery requests relate to each other.

Attachment O of the CAISO’s Business Practice Manual for Market Instruments (Market Instruments BPM) provides further explanation and detail on the process for requesting after-market uplift payments.³ It contains several statements explaining the connection between before-market reference level change requests and after-market uplift payment requests. It explains the “after-market cost recovery process is intended to provide the opportunity for uplift payments to cover costs that, prior to the execution of the market, the SC requested to be included in their reference levels but could not be included due to . . . limitations built into the CAISO’s reference level change request

² CAISO tariff section 30.12.1.

³ Notably, this language from the Market Instruments BPM has been in effect from the time sections 30.11 and 30.12 went into effect.

process.” It also states a scheduling coordinator “must have made an automated or manual Reference Level Change Request that was not approved” and that failing “to make a Reference Level Change Request disqualifies a SC from requesting after-market cost recovery.” Finally, it states the “after-market cost recovery process is meant to work in conjunction with the Reference Level Change Request process.” For resources eligible to request an uplift payment to the CAISO, the Market Instruments BPM directs scheduling coordinators to submit a request through the CAISO’s Customer Inquiry, Dispute, and Information (CIDI) system with the subject line “After-Market Cost Recovery.” The CIDI ticket must include several pieces of information including evidence of the claimed fuel costs, the “Requested cost components: DEB, Minimum Load, Start-up and/or Transition costs,” and an “explanation of why after-market cost recovery of the costs is justified.”

This system of before-market and after-market processes was created through the CAISO’s Commitment Costs and Default Energy Bid Enhancements (CCDEBE) initiative. The CAISO’s tariff amendment filing proposing the CCDEBE amendments and the Commission’s order approving the amendments discussed the after-market request as a single topic, without suggesting a request to the CAISO would be subject to materially different requirements than a request to the Commission. For example, citing tariff section 30.12.1, the CAISO’s CCDEBE transmittal letter to the Commission stated:

Under the proposed after-market cost recovery process, a supplier may request an additional uplift payment to cover a resource’s actual fuel or fuel-equivalent costs reflected in a resource’s start-up bid costs, minimum load bid costs, transition bid costs, and energy bid costs used in the bid cost recovery mechanism. The requested uplift payments must

be for amounts in a reference level change request the CAISO did not approve in the before-market reference level change request process.⁴

The Commission accepted this framework for after-the-fact fuel cost recovery.

The Commission order approving these tariff provisions stated:

CAISO's proposal for manual reference level adjustments provides resources with a further opportunity to recover actual or expected costs not captured by the reasonableness threshold subject to CAISO's review. CAISO's proposal to include an after-market cost recovery program will provide resources further assurance that they will be able to recover prudently incurred costs that were not able to be included in their reference levels prior to the market run.⁵

B. EDF's Communications with the CAISO

On February 17, 2021, EDF submitted a message through CIDI (CIDI case no. 00234458) requesting the CAISO approve an uplift payment under section 30.12.4 for unrecovered fuel costs on the February 16, 2021 trade date. EDF noted the La Paloma units operated at a loss on February 16, 2021 because the gas index price used in the CAISO markets was significantly below La Paloma's actual fuel costs for the day. EDF then quoted a portion of the Market Instruments BPM, which states "However, suppliers may request after-market cost recovery for any amounts of their fuel costs not recovered through the automated or manual Reference Level Change Requests made prior to the execution of the applicable market run." EDF never requested a before-market reference level change request for this trading day. The CAISO rejected EDF's request for after-market recovery that same day, explaining that EDF was making a request for after-market cost recovery but the request could not be approved because

⁴ *Cal. Indep. Sys. Operator Corp.*, Transmittal Letter, at 54, FERC Docket No. ER23-2360-000 (Jul. 9, 2020).

⁵ *Cal. Indep. Sys. Operator Corp.*, 172 FERC ¶ 61,263, P 41 (2020).

EDF was seeking recovery of costs not presented to the CAISO in a before-market reference level change request.⁶

EDF then submitted a settlement dispute to the CAISO on March 8, 2021, through CIDI case no. 00235268. This settlement dispute repeated EDF's claims regarding the discrepancy between the gas price index and La Paloma's actual gas costs and conceded that EDF had earlier made the same request in CIDI case no. 00234458 but the CAISO already denied that request. The CAISO denied this settlement dispute on March 22, 2021. The denial repeated the same information provided in response to CIDI case no. 00234458. The dispute denial also reminded EDF that the CAISO tariff required EDF to provide the CAISO notice within 30 business days of the trading day if EDF intended to seek recovery from the Commission.

C. EDF's Filings with the Commission

On July 29, 2021 (*i.e.*, the 114th business day following the CAISO's February 17, 2021 rejection of EDF's requested uplift payment), EDF filed a request to the Commission to recover fuel-related costs under CAISO tariff section 30.12. EDF's filing also requested waiver of CAISO tariff requirements to the extent necessary to permit its fuel cost petition to be granted. EDF's request, as supplemented on September 27, 2021, argued waivers of section 30.12 were unnecessary.

⁶ CIDI Case 00234458. The CAISO's response to EDF stated: "It seems that [EDF] is requesting After-Market Cost Recovery as introduced under CCDEBE for trading date 2/16. If that is the case, then unfortunately this resource is not eligible for cost recovery for the trade date and market requested." The CAISO further explained: "In order to be eligible for after-market cost recovery, you must meet the conditions explained in Section O.3 of the BPM for Market Instruments. It does not appear that you submitted an automated or manual reference level change request prior to the execution of the DAM for 2/16. For this trade date and market, automated requests would have to be submitted prior to 10AM Pacific Time on 2/15 and manual requests prior to 8AM Pacific Time on 2/15."

First, EDF argued that making a before-market request is not a requirement to make an after-market request to the Commission. EDF's argument notes that tariff section 30.12.4 states an after-market request to the CAISO is based on "evaluat[ing] the costs specified in Section 30.12.1" This section contains the statement that after-market payments are only for "amounts in a Reference Level Change Request that were not approved pursuant to Section 30.11." In contrast, tariff section 30.12.5.2 states that a successful after-market request to the Commission must result in "an order finding the resource actually incurred costs claimed by the Scheduling Coordinator that were not recovered through the Bid Cost Recovery process" From this, EDF argued the only limitation on recovery from an after-market request to the Commission is that the costs were incurred and there has been no double recovery through bid cost recovery of those actually-incurred costs.⁷

Second, EDF argued the 90-business-day clock began running with the CAISO's response to CIDI case no. 00235268 on March 22, 2021, and its July 19, 2021, filing with the Commission was thus timely filed. Without acknowledging the explicit response it received on February 17, 2021 from CIDI case no. 00234458, EDF referred to this CIDI inquiry as its "*direct* request to CAISO for after-market recovery."⁸

⁷ *EDF Trading North America LLC*, Request to Recover Fuel-Related Costs Filing, at 16-17, FERC Docket No. ER21-2579-000 (Jul. 29, 2021).

⁸ *EDF Trading North America LLC*, Answer and Supplement, at 4 (emphasis added), FERC Docket No. ER21-2579-000 (Sept. 27, 2021).

D. Commission Order

The March 7 order concluded no tariff waivers were necessary for the Commission to consider the substance of EDF's after-market request for fuel cost recovery.

As to the need for a before-market reference level change request, the Commission's March 7 order found the CAISO tariff "provides for an alternate approach to after-market fuel cost recovery that does not require Scheduling Coordinators to satisfy the eligibility requirements of section 30.12.1."⁹ Thus, in the Commission's view, the general statement in section 30.12.1 that after-market uplift payment requests can only be for "amounts in a Reference Level Change Request that were not approved pursuant to Section 30.11" applied only to after-market requests made under section 30.12.4 (requests submitted to the CAISO) but not to after-market requests made under section 30.12.5 (requests submitted to the Commission). The basis of this conclusion is that tariff section 30.12.4 contains a general cross-reference to section 30.12.1, whereas section 30.12.5 does not. The March 7 order views this as a material variation. Based on the "meaningful-variation canon," the March 7 order concluded the differences in language "lead to different results and alternate pathways for after-market fuel cost recovery."¹⁰

On the question of EDF's filing being timely, the March 7 order concluded the CAISO's February 17 response did not constitute CAISO denial of EDF's request for an after-market uplift payment because the CAISO did not view the request as a

⁹ March 7 order at P 59.

¹⁰ *Id.* at P 61 (citing *Entergy Servs., Inc. v. FERC*, 568 F.3d 978, 984 (D.C. Cir. 2009)).

procedurally proper after-market request. In the Commission's view, the CAISO only treated the March 8, 2021 request as a valid request. In which case, per the Commission, the request was not rejected until March 22, 2021, which would make the July 21, 2021 filing timely.¹¹ Attachment 2 to this request for rehearing includes a graphic depiction of key events leading to the Commission's order addressing EDF's filing.

III. Statement of Issues and Specifications of Error

The CAISO specifies these issues and errors in accordance with Commission Rule 713(c)(2):

1. Whether the March 7 order erred in concluding that a request to the Commission for after-market recovery under CAISO tariff section 30.12.5 is not subject to the procedural requirements established in the rest of section 30.12. The Commission should find on rehearing that the March 7 order erred because it was based on an unsupportable reading of CAISO tariff section 30.12 and fails to acknowledge the inter-related nature of the sub-sections within section 30.12. The March 7 order thus violates the filed rate doctrine because it compels a result contrary to the CAISO's rate on file and in effect for the trading day at issue in EDF's request.¹² The March 7 order also violates the Commission's obligation, under the Administrative Procedure Act, to engage in reasoned decision-making and not take arbitrary and capricious action because in reaching its decision it did not justify the relevance of the

¹¹ *Id.* at P 62.

¹² See *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) ("Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively.").

claimed material variations between section 30.12.4 and 30.12.5 and did not address the material consistency between the tariff sections.¹³ Further, the March 7 order also interprets section 30.12.5 to permit bidding that harms market efficiency and would impact the CAISO market detrimentally. Imposing such an outcome would violate the Commission's obligations under section 205 of the Federal Power Act to ensure rates under its jurisdiction are just and reasonable.¹⁴

2. Whether the March 7 order erred in concluding the CAISO failed to reject EDF's request for after-market recovery on February 17. The Commission should find on rehearing that the March 7 order erred because it is factually unsupportable. The CAISO's February 17 response to EDF explicitly communicated to EDF the CAISO would not approve after-market recovery under CAISO tariff section 30.12.4. Because the CAISO made this communication on February 17, EDF's July 29 filing was made over 90 business days after the CAISO rejected EDF's after-market request. The March 7 order thus violates the filed rate doctrine because it compels a result contrary to the CAISO's rate on file and in effect for the day at issue in EDF's request.¹⁵ In failing to acknowledge record evidence directly contrary to its conclusion, the March 7 order also violates the Commission's obligation, under the Administrative Procedure Act, to engage in reasoned decision-making and not take arbitrary and capricious action.¹⁶

¹³ 5 U.S.C. § 706; *See Emera Maine v. FERC*, 854 F.3d 9, 21 & 27 (D.C. Cir. 2017).

¹⁴ 16 U.S.C. § 824e.

¹⁵ *Arkansas Louisiana Gas Co.*, 453 U.S. at 578.

¹⁶ 5 U.S.C. § 706; *Emera Maine*, 854 F.3d at 21 & 27.

IV. Request for Rehearing

A. The Commission Erred by Failing to Read Section 30.12 as a Single Coherent Tariff Section

The Commission's conclusion that section 30.12.1 does not apply to requests made under section 30.12.5 is flawed for several reasons.

1. The Commission has not identified a *relevant* material variation between sections 30.12.4 and 30.12.5.
2. To the extent there are relevant material variations between sections 30.12.4 and 30.12.5, those variations do not justify the Commission's conclusion that after-market requests for fuel cost recovery before the Commission do not require scheduling coordinators to submit a before-market reference level change request because other aspects of section 30.12 dictate the opposite conclusion.
3. The Commission's order represents a flawed application of the canons of construction because it selectively chose one canon without explaining how it applies and without considering how other canons support a contrary result.
4. If left in place, the Commission's interpretation of section 30.12.5 would create inefficient market outcomes and incentives for generators to engage in strategic bidding to the detriment of the overall market.

The March 7 order appears to view this as a case of the dog that did not bark.¹⁷

The March 7 order finds meaning in the absence of a cross-reference to section 30.12.1 in section 30.12.5, when that cross-reference appears in section 30.12.4. But the absence of the cross-reference in section 30.12.5 can only have meaning to the extent the inclusion of that citation in section 30.12.4 also has meaning. That citation in section 30.12.4, however, has no substantive meaning. It is merely a cross-reference inserted to make the tariff easier to navigate. That navigational aid also could have been, but was not, included in section 30.12.5. Sometimes there is great meaning to be

¹⁷ ARTHUR CONAN DOYLE, THE SILVER BLAZE, in THE COMPLETE SHERLOCK HOLMES (1938).

gleaned when the dog does not bark. But sometimes the dog does not bark because there is no dog.

1. The March 7 Order Fails to Establish Material Variations Relevant to the Issue in Dispute

There is no debate there are variations between section 30.12.4 and 30.12.5. After all, one sub-section section addresses requests to the CAISO and one addresses requests to the Commission. The question is whether there are material variations between the two sub-sections that speak to whether the provisions relating to submitting before-market reference level change requests in section 30.12.1 apply to section 30.12.5. The Commission erred in finding there were *relevant* material variations between section 30.12.4 and 30.12.5. The March 7 order is flawed because it does not meaningfully explain how the absence of a cross-reference to section 30.12.1 in section 30.12.5 is a material variation, let alone one that is relevant to the issue in dispute (*i.e.*, whether section 30.12.1 applies to section 30.12.5). It also fails to consider the relevant material consistency between the two sub-sections.

The single biggest error in the March 7 order is that it assumes the reference to section 30.12.1 contained in section 30.12.4.1 is relevant to understanding the substance of section 30.12.4.1. The meaning of section 30.12.4.1 is the same regardless of the cross-reference at issue. The sole purpose of this section is to define a 60-business-day deadline for the CAISO to respond to requests for additional uplift payments. It does not purport to define what costs are recoverable or what procedural requirements the scheduling coordinator must meet to eventually receive a requested payment. It does not logically hold that there can be a relevant material variation between section 30.12.4 and section 30.12.5 if the key material the Commission finds

constitutes the material variation (*i.e.*, a cross-reference to section 30.12.1 contained in section 30.12.4.1 but not contained in section 30.12.5) is not even material to the meaning of section 30.12.4 in the first place.

Another gap in the March 7 order is that it does not consider a critical way section 30.12.5 indirectly refers back to section 30.12.1. Section 30.12.5.1 states one type of after-market request to the Commission covers cases where the “the CAISO informs the Scheduling Coordinator that it is not eligible to recover its fuel costs through Section 30.12.4” This cross-reference to section 30.12.4 is significant because the March 7 order finds that requests under section 30.12.4 are unquestionably subject to section 30.12.1. At least for cases where a scheduling coordinator is first denied an uplift request from the CAISO, the Commission should construe the reference to section 30.12.4 as a reference to the requirements of section 30.12.1 because, in the logical sequence of steps outlined in the tariff, a request to the Commission under section 30.12.5 is the next step for seeking recourse after being denied by the CAISO under section 30.12.4.¹⁸ The March 7 order relies almost entirely on drawing meaning from the presence of a cross-reference in section 30.12.4 to section 30.12.1 that is absent from section 30.12.5. But the March 7 order fails to discuss, or even acknowledge, the ways in which a different cross-reference in section 30.12.5 to section 30.12.4 serves the same function.

The March 7 order also ignores the material consistency between sections 30.12.4 and 30.12.5. The March 7 order draws relevance from the fact that section

¹⁸ As explained in section III.B, there is reason to question if EDF's July 29 filing constitutes a direct request to the Commission or a request following CAISO denial of a request.

30.12.5.2 refers to a petitioner being awarded the uplift payment if the Commission finds “the resource actually incurred costs claimed by the Scheduling Coordinator that were not recovered through the Bid Cost Recovery Process,” without noting a link to making a before-market reference level change.¹⁹ The March 7 order finds this is part of what constitutes the material variation. However, section 30.12.4.3 states, without referencing section 30.12.1, that the CAISO will award the uplift payment request if “the resource’s actually incurred costs claimed by the Scheduling Coordinator were not recovered through the Bid Cost Recovery process” As seen in Figure 1, these two passages are virtually identical.

¹⁹ March 7 order at P 61. The quotation of this passage provided in the order is incorrect because it omits the phrase “claimed by the Scheduling Coordinator.” This phrase is included in both section 30.12.4.3 and section 30.1.5.2. Its omission from the March 7 order obscures the material consistency between these two provisions.

Figure 1 –Comparison of Section 30.12.4.3 and Section 30.12.5.2

30.12.4.3 Settlement of Recoverable Amounts

To the extent the CAISO's evaluation results in verification that the resource's actually incurred costs claimed by the Scheduling Coordinator were not recovered through the Bid Cost Recovery process, the CAISO will resettle Bid Cost Recovery and Exceptional Dispatch using revised Bid Costs and revised Default Energy Bids, as applicable, for the resource and will issue Recalculation Settlement Statement(s) within the normal Recalculation Settlement Statements timelines specified in Section 11.29.

30.12.5.2 Settlement of FERC-Approved Amounts

To the extent FERC issues an order finding the resource actually incurred costs claimed by the Scheduling Coordinator that were not recovered through the Bid Cost Recovery process, the CAISO will resettle Bid Cost Recovery using revised Bid Costs for the resource so that these costs can be recovered through the Recalculation Settlement Statement(s) within the normal timelines specified in Section 11.29.

In the case of an after-market request to the Commission, the March 7 order cites this language in section 30.12.5.2 to support the conclusion that section 30.12.1 does not apply. Yet the March 7 order does not acknowledge or attempt to explain how that can be the case when virtually identical language is used in discussing an after-market request to the CAISO, which the March 7 order agrees is subject to section 30.12.1.

2. The March 7 Order Fails to Consider the Plain Reading of Section 30.12.1 as an Independent Provision with its Own Meaning and Relies on an Unsustainable Reading of Section 30.12.5

To the extent there are relevant material variations between sections 30.12.4 and 30.12.5, those variations do not justify the Commission's conclusion that a scheduling coordinator may make an after-market request for fuel cost recovery without first

submitting a before-market reference level adjustment because that conclusion ignores the plain reading of section 30.12.1. Section 30.12.1 introduces the concept of the request for after-market recovery and provides rules of general applicability (*i.e.*, it is for amounts denied from a before-market request or for reference level change requests that exceed hard bid caps). It is a blanket statement of what costs are recoverable in an after-market uplift payment and does not distinguish between the two routes for seeking after-market recovery. Section 30.12.1 does not acknowledge a scheduling coordinator may submit an after-market request either to the CAISO or the Commission. It is not until section 30.12.2 that the tariff states the request can be presented to either the CAISO or the Commission. The plain reading of section 30.12.1 applies to all requests for after-market uplift payments because it does not even contemplate there are two routes for requesting such payments.

The March 7 order focuses on the supposed plain reading of section 30.12.5. But the plain reading of section 30.12.1 directly states its requirements apply to after-market requests with no exceptions. If the supposed plain reading of one section operates to negate the plain reading of another, then the Commission cannot justify its order. Instead, the Commission must grapple with how to reconcile the conflict. The March 7 order requires rehearing because it makes no effort to do so.

The Commission also fails to acknowledge that section 30.12.5 says nothing directly about how section 30.12.1 applies. Instead, the Commission's plain reading of section 30.12.5 is only possible when read in conjunction with section 30.12.4. This is problematic on two fronts. First, the need to divine the plain meaning of section 30.12.5 with reference to section 30.12.4 belies the Commission's claim that its reading is plain.

If the meaning of section 30.12.5 were so plain, the Commission would not need to fetch that meaning from an adjacent sub-section. Second, to the extent the plain reading of section 30.12.5 can be ascertained only by reference to other parts of section 30.12, then the Commission did not justify why it only looked to section 30.12.4 and not other aspects of the tariff, such as the blanket statement in section 30.12.1 that after-market uplift requests were limited to amounts denied from a before-market request or for reference level change requests exceeding hard bid caps.

Further, if the Commission's supposed plain reading of section 30.12.5 were to hold, then that raises the question of what other aspects of section 30.12 similarly would be nullified for requests made under section 30.12.5. For example, the 30-business-day deadline to notify the CAISO of a request for after-market uplift is in section 30.12.2 but section 30.12.5 does not cross-reference that requirement. The same applies for section 30.12.3, which describes what documentation must support an after-market request. Would the Commission find these rules are inapplicable to after-market requests submitted to the Commission even though neither section suggests it applies only to requests made to the CAISO under section 30.12.4? Or does the fact that section 30.12.4 does not contain a cross-reference to these mean that they apply equally to requests made to the CAISO under section 30.12.4 and to the Commission under section 30.12.5?

The March 7 order's supposed plain reading of section 30.12.5 is also belied by the filing history of the CCDEBE initiative. Nowhere in the CAISO transmittal letter or in the Commission's order did the CAISO or the Commission contemplate the two types of after-market recovery would permit different types of recovery or would have

fundamentally different prerequisites. In the underlying stakeholder initiative, the CAISO explained the purpose of providing an option to file with the Commission for an after-market uplift payment was because “the California ISO believes it prudent to retain the option for stakeholders to seek after-the-fact cost recovery at [the Commission] in the event that the California ISO cannot verify the request for uplift re-settlement based on actually incurred costs.” Nothing about this purpose suggests the CAISO ever intended to make a request under section 30.12.5 serve as an independent pathway for recovery subject to lower standards.

3. Misapplication of the Canons of Construction

Without stating so directly, the March 7 order suggests the putative material variations between sections 30.12.4 and 30.12.5 are significant based on the meaningful-variation canon of construction.²⁰ The March 7 order cites to *Entergy Services, Inc. v. FERC* for general support for this canon.²¹ Although neither the court’s decision in that case nor the Commission’s brief in that case ever mention such a canon by name,²² the Supreme Court has addressed the meaningful-variation canon multiple times as a potentially useful interpretive guide. The canon stands for the concept that if a document uses one term in one place and a materially different term elsewhere, then the different terms indicate different ideas.²³

²⁰ *Id.* at P 61 n.120.

²¹ 568 F.3d 978 (D.C. Cir. 2009).

²² The court’s decision makes a passing reference to the “interpretive maxim of meaningful variation” merely to note the Commission’s argument in the case happens to be consistent with that maxim. *Id.* at 984.

²³ *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457–58 (2022) (citing A. SCALIA & B. GARNER, *READING LAW* 170 (2012)).

This canon does not support the result reached by the March 7 order. Section 30.12.5.1 does not use any materially different terms from section 30.12.4.1. The difference is merely the inclusion of a cross-reference to section 30.12.1 in section 30.12.4.1 in one instance, which does not appear in section 30.12.5.1. That is not an instance of using different terms within a document but claiming they nevertheless should be given the same meaning. For this reason, the meaningful-variation canon is unavailing.

Assuming, *arguendo*, the meaningful-variation canon applied, that alone would not be determinative because “[c]anons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction.”²⁴ In particular, the meaningful-variation doctrine can only go so far in compelling a particular result and is easily defeasible.²⁵ For example, the “whole-text canon” requires a document to be understood based on the entire text, structure, and logical relationship among its parts.²⁶ Indeed, “[p]erhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.”²⁷ One way this error materializes is a narrow focus on a single provision without considering the context or how other statements elsewhere in the document narrow or

²⁴ *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001).

²⁵ *Pulsifer v. United States*, No. 22-340, 601 U.S. ___, 2024 WL 1120879, at *13 (Mar. 15, 2024).

²⁶ *Mont v. United States*, 139 S. Ct. 1826, 1833–34 (2019) (citing READING LAW at 167).

²⁷ READING LAW at 167. See also *Fluor Corp. v. Zurich Am. Ins. Co.*, 65 F.4th 387, 398 (8th Cir. 2023) (Colloton, J., dissenting); *United States v. Pate*, 84 F.4th 1196, 1215 (11th Cir. 2023); *United States v. Fischer*, 64 F.4th 329, 365 (D.C. Cir.), cert. granted, 144 S. Ct. 537 (2023).

broaden that single provision.²⁸ That is what the March 7 order did. It looked at the absence of a cross-reference it expected to see in section 30.12.5 without considering the relevance of a different cross-reference and without considering the plain reading of section 30.12.1.

Alternatively, the Commission could have considered the “harmonious-reading canon,” which dictates a document should be interpreted to render various provisions compatible and not contradictory.²⁹ The March 7 order’s claimed plain reading of section 30.12.5 involves nullifying part of section 30.12.1, which violates this canon. On the other hand, treating the reference in section 30.12.4.1 to section 30.12.1 as a mere cross-reference with no deeper meaning maintains harmony among the provisions of section 30.12. Similarly, the Commission could have heeded the maxim to construe exceptions narrowly to preserve the primary provision.³⁰ In reading the absence of a tariff cross-reference in section 30.12.5 to create an implied exception from a blanket statement in section 30.12.1, the March 7 order turns this maxim on its head.

Here, the canon of construction cited in the March 7 order does not support the conclusion of the March 7 order. At the same time, other canons suggest the opposite result. Reliance on the meaningful-variation canon thus represents a significant flaw of the March 7 order that justifies rehearing.

²⁸ *In re Wild*, 994 F.3d 1244, 1272 (11th Cir. 2021).

²⁹ *Alexander v. Carrington Mortg. Servs., LLC*, 23 F.4th 370, 378–79 (4th Cir. 2022) (citing *READING LAW* at 180-82).

³⁰ *Comm’r v. Clark*, 489 U.S. 726, 739 (1989) (“[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision . . . [and] we should not eviscerate . . . legislative judgment through an expansive reading of a somewhat ambiguous exception.”).

4. Harmful impacts of the decision

The March 7 order, if not corrected on rehearing, also would harm the CAISO markets by reducing market efficiency and creating incentives for strategic bidding behavior.

The requirement to request a before-market reference level change advances market efficiency by creating a direct incentive for scheduling coordinators to make every effort to ensure their true gas costs are considered in the market clearing process. Without this incentive, scheduling coordinators could request after-market recovery of costs on a generator the market never would have dispatched had the resource made a before-market reference level change request and bid up to its allowable caps. In this scenario, CAISO load would be forced to bear costs that never would have been incurred had the market had the opportunity to see these costs to make an efficient optimization decision by not committing the expensive resource. By concluding that making a before-market request is unnecessary to make a direct request to the Commission under section 30.12.5, the March 7 order undermines least-cost dispatch principles and allows scheduling coordinators to shift inefficiently-incurred costs to load serving entities.

The requirement to request a before-market reference level change also prevents one form of strategic bidding. This requirement helps prevent a generator from intentionally bidding low commitment costs in order to secure a market commitment with the hope of profiting from prices above the generator's true costs. If the higher prices occur, then the generator can profit through the high prices. If the higher prices do not occur, then the resource can still seek an uplift payment to make it

whole through the bid cost recovery process. This creates an incentive for the generator to bid at high prices, while facing limited downside risks for doing so. This would be a highly problematic market design the CAISO never proposed, and the Commission did not approve, through the CCDEBE initiative. The March 7 order would impose this market design based on a stray cross-reference that appears in one location of the CAISO tariff and not another.

Importantly, nothing about denying a resource's request under tariff section 30.12.5 for failure to comply with section 30.12.1 would prevent scheduling coordinators from pursuing other avenues of relief, such as filing a complaint under section 206 of the Federal Power Act,³¹ requesting remedial relief under section 309 of the Federal Power Act,³² or seeking a tariff waiver under Rule 207 of the Commission's Rules of Practice and Procedure.³³ Section 30.12.5 provides a streamlined cost recovery process with lower burdens than those other potential routes for cost recovery. That streamlined process is reserved for parties that meet the procedural requirements, such as making a before-market reference level change request. Scheduling coordinators that fail to meet this requirement appropriately must clear a higher (but not insurmountable) bar to receive after-the-fact fuel cost recovery.

B. The March 7 Order Erred by Finding EDF's July 29, 2021 Request was Filed Timely

Under section 30.12.5.1, the 90-business-day clock to file an after-market request for recovery of fuel costs with the Commission after submitting such a request

³¹ 16 U.S.C. § 824e.

³² 16 U.S.C. § 825h.

³³ 18 C.F.R. § 385.207.

to the CAISO starts with “the date the CAISO informs the Scheduling Coordinator that it is not eligible to recover its fuel costs through Section 30.12.4” The key factor in determining if EDF’s request to the Commission was timely is establishing when the CAISO informed EDF it was ineligible to recover its costs under Section 30.12.4.

The CAISO’s August 19 protest explained the request was denied on February 17, 2021, which made the July 29 request untimely.³⁴ The CAISO’s February 17 response stated: “It seems that this ticket is requesting After-Market Cost Recovery as introduced under CCDEBE for trading date 2/16. If that is the case, then unfortunately this resource is not eligible for cost recovery for the trade date and market requested.” This denial was direct, explicit, and unequivocal. There is nothing in the response to indicate to EDF that resubmitting the request or asking the same question again would yield a different answer.

Despite the unambiguous language of the CAISO’s February 17 response, the March 7 order concluded the request was not denied until the CAISO responded to EDF’s March 8 CIDI ticket on March 22. The order states that the Commission’s review “concludes that CAISO treated only one of these CIDI tickets—the one submitted by EDF on March 8, 2021—as consistent with its procedural requirements for after-market fuel cost recovery requests.”³⁵ The rationale offered is that the February 17 response “reflected the deficiencies in the submittal and referred EDF to CAISO’s Business Practice Manual for Market Instruments” whereas the March 22 response “provided a

³⁴ *EDF Trading North America LLC*, Protest of the CAISO, at 6, FERC Docket No. ER21-2579-000 (Aug. 19, 2021).

³⁵ March 7 order at P. 62.

substantive response.”³⁶ The Commission’s rationale for disregarding the February 17 response and treating the March 22 response as the actual denial of EDF’s request is unsupportable and the Commission’s conclusion merits rehearing.

First, the order states the CAISO’s February 17 response identified deficiencies in EDF’s initial request. The CAISO agrees. The CAISO’s response informed EDF its failure to make a before-market reference level change request created an incurable deficiency. The March 7 order does not attempt to explain how this factor possibly supports the notion the CAISO’s response was provisional or inconclusive.

Second, the CAISO’s reference in the February 17 response to the BPM procedures for submitting a request cannot reasonably be read as a request for EDF to resubmit its request. It merely noted an additional reason, above and beyond failing to submit a before-market reference level change, for why the request was rejected.

Third, the Commission does not offer meaningful justification for its position that the March 22 response was more substantive than the February 17 response. In support, it notes the CAISO response referred to research to confirm EDF was ineligible and referenced the 30-business-day deadline under tariff section 30.12.2. The research referenced in the March 22 response simply repeats what was already conveyed in the February 17 response – EDF was ineligible because it failed to submit a before-market reference level change request. The CAISO’s reference to the 30-business-day deadline was a customer service courtesy reminding EDF of other tariff requirements.

Fourth, the March 7 order fails to acknowledge that EDF submitted its March 8, 2021 CIDI ticket as a settlement dispute. By its nature, a scheduling coordinator

³⁶ *Id.*

submits a settlement dispute to contest something the CAISO already did. Otherwise, there is nothing to dispute. If the CAISO had not already denied the first request on February 17, then there would not have been something to dispute. That the March 8 CIDI ticket was submitted as a dispute reflects that EDF itself understood its February 17 request was denied.

Finally, the March 7 order places emphasis on the February 17 response's reference to the BPM procedures for requesting an after-market uplift request to the CAISO as relevant to the finding that the February 17 response did not reject EDF's request. The implication is that this was a request to EDF to re-submit the request under the proper procedures. Presumably under the Commission's logic, EDF's failure to present a procedurally proper request through the February 17 request means that the CAISO's response could not have constituted a denial. This reasoning does not account for the March 8, 2021 request also not following the procedures outlined in the BPM. The BPM states clearly that the request should be through a CIDI ticket with a defined subject line "After-Market Cost Recovery."³⁷ It does not identify submission of a settlement dispute as an appropriate way to make the request. To the extent the Commission views EDF's February 17 request as invalid, then it must similarly find the March 8 request was invalid because neither request followed the BPM procedures. That being the case, EDF never made a legitimate request to the CAISO for after-market recovery. Which means EDF's July 29 filing to the Commission must be construed as a direct request for after-market uplift to the Commission. However, under section 30.12.5.1, the 90-business-day deadline for direct requests starts on the

³⁷ BPM for Market Instruments, section O.3.2.

applicable trading day, which would be February 16, 2021. Either way, EDF's request to the Commission was untimely.

V. Conclusion

The CAISO respectfully requests the Commission grant rehearing of its March 7 order to correct two erroneous findings in the order. The Commission's finding that a pre-market reference level change request is not a prerequisite for making an after-market uplift request to the Commission is inconsistent with the record of this proceeding, runs contrary to the plain language of the CAISO tariff, represents a misapplication of the canons of construction, and creates harmful market rules the CAISO never proposed to the Commission. The Commission's finding that the CAISO did not reject EDF's after-market uplift request submitted to the CAISO until March 22, 2021 is unsupported by evidence in the record.

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Dated: April 8, 2024

CERTIFICATE OF SERVICE

I certify that I have served the foregoing document upon the parties listed on the official service list in the captioned proceedings, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Folsom, California this 8th day of April, 2024.

/s/ Ariana Rebancos

Ariana Rebancos

An employee of the California ISO

Attachment 1

**EDF Trading North America LLC
Docket No. ER21-2579-000**

**REQUEST FOR REHEARING OF THE CALIFORNIA INDEPENDENT SYSTEM
OPERATOR CORPORATION**

Filed April 8, 2024

30.11, et seq. Procedures on requesting before-market reference level changes

CAISO and FERC

- 30.12.1* After-market uplift available for “amounts in a Reference Level Change Request that were not approved pursuant to Section 30.11” or reference level change requests limited by hard bid caps
- 30.12.2 30-business-day deadline after trading day to notify CAISO if scheduling coordinator will submit after-market request to CAISO or Commission
- 30.12.3 Description of documentation required of an after-market uplift request

CAISO

- 30.12.4 After-market requests to the CAISO
 - 30.12.4.1* Timeline for CAISO to respond to uplift requests
 - 30.12.4.2 Statement of costs the CAISO verifies in its review
 - 30.12.4.3* Description of how CAISO processes granted requests through the bid cost recovery mechanism
 - 30.12.4.4 Extension of time for CAISO to decide on request is possible if needed
 - 30.12.4.5 If CAISO deems request ineligible, then entity may submit request to the Commission under section 30.12.5

FERC

- 30.12.5 After-market requests to the Commission
 - 30.12.5.1* Scheduling Coordinator has 90 business days “after either the applicable Trading Day or the date the CAISO informs the Scheduling Coordinator that it is not eligible to recover its fuel costs through Section 30.12.4, whichever is applicable” to file with the Commission
 - 30.12.5.2* If Commission finds resource actually incurred the claimed costs, the CAISO resettles the costs through the bid cost recovery mechanism

Attachment 2

**EDF Trading North America LLC
Docket No. ER21-2579-000**

**REQUEST FOR REHEARING OF THE CALIFORNIA INDEPENDENT SYSTEM
OPERATOR CORPORATION**

Filed April 8, 2024

