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DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM19-2-001; Order No. 861-A]

Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional
Transmission Organization and Independent System Operator Markets

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Order on rehearing and clarification.

SUMMARY: In this order on rehearing, the Federal Energy Regulatory Commission grants clarification in part and denies rehearing of certain revisions to its regulations regarding the horizontal market power analysis required for market-based rate sellers that study certain Regional Transmission Organization or Independent System Operator markets and submarkets therein.

DATES: This order on rehearing and clarification is effective **[INSERT DATE 60 days after date of publication in the FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

I. Introduction

1. On July 18, 2019, the Commission issued Order No. 861,¹ which modified its regulations regarding the horizontal market power analysis required for market-based rate Sellers² that study certain Regional Transmission Organization (RTO) or Independent System Operator (ISO) markets and submarkets therein. Specifically, in Order No. 861, the Commission relieved Sellers located in certain RTO or ISO markets and submarkets therein of the obligation to submit indicative screens to the Commission in order to obtain or retain authority to sell energy, ancillary services, and capacity at market-based rates. The Commission's regulations continue to require Sellers that study an RTO, ISO, or submarket therein, to submit indicative screens for authorization to make capacity sales at market-based rates in any RTO/ISO market that lacks an RTO/ISO administered capacity market subject to Commission-approved RTO/ISO monitoring and mitigation.³ For those RTOs and ISOs that do not have an RTO/ISO-administered capacity market, the Commission found that Commission-approved RTO/ISO monitoring and mitigation is no longer presumed sufficient to address any horizontal market power concerns for capacity sales where there are indicative screen failures. However, Sellers studying such markets

¹ *Refinements to Horizontal Market Power Analysis for Sellers in Certain Reg'l Transmission Org. & Indep. Sys. Operator Mkts.*, Order No. 861, 84 FR 36374 (July 26, 2019), 168 FERC ¶ 61,040 (2019).

² The term "Seller" is defined as any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates. 18 CFR 35.36(a)(1).

³ Order No. 861, 168 FERC ¶ 61,040 at P 38.

would be relieved of the requirement to submit indicative screens if they sought market-based rate authority limited to sales of energy and/or ancillary services in those markets.⁴

2. On August 15, 2019, California Independent System Operator Corporation (CAISO) filed a motion for clarification of Order No. 861. On August 19, 2019, Pacific Gas and Electric Company (PG&E) filed a request for rehearing, or in the alternative clarification, of Order No. 861. As discussed further below, we grant CAISO's requested clarification and deny PG&E's request for rehearing and alternative request for clarification.

II. Discussion

A. Capacity Procurement Mechanism Soft Offer Cap

1. Final Rule

3. In describing CAISO's Capacity Procurement Mechanism, the Commission stated that the soft offer cap for the Capacity Procurement Mechanism is an estimate of the cost of new entry. In response to the Commission's notice of proposed rulemaking (NOPR),⁵ some commenters argued that California's Resource Adequacy program coupled with CAISO's backstop procurement process, including the Capacity Procurement Mechanism, offer adequate safeguards against the exercise of horizontal market power in

⁴ *Id.* P 51.

⁵ *Refinements to Horizontal Market Power Analysis for Sellers in Certain Reg'l Transmission Org. & Indep. Sys. Operator Mkts.*, 84 FR 993 (Feb. 1, 2019), 165 FERC ¶ 61,268 (2018) (NOPR).

the sale of capacity.⁶ In response, the Commission noted that “the soft offer cap is an estimate of the cost of new entry and does not necessarily reflect a mitigated, ‘going forward’ cost of any existing generator and does not address concerns regarding local market power.”⁷

2. Requests for Clarification and Rehearing

4. CAISO seeks clarification and PG&E requests rehearing regarding the Commission’s description of CAISO’s Capacity Procurement Mechanism soft offer cap. CAISO and PG&E state that the Commission’s characterization of the soft offer cap as the cost of new entry for resources is not technically correct. CAISO states that the “soft offer cap is based on the levelized going-forward fixed costs of a reference resource, plus a 20 percent adder.”⁸ Thus, CAISO recommends “that the Commission clarify Order No. 861 to state that the [Capacity Procurement Mechanism] soft offer cap represents an estimate of going-forward costs plus a 20 percent adder, as opposed to an estimate of the cost of entry.”⁹ PG&E states that the Commission should grant rehearing and remove the requirement for capacity sellers in CAISO to submit indicative screens because the Commission based its conclusion that the Capacity Procurement Mechanism is inadequate to mitigate local capacity market power in CAISO on the incorrect finding

⁶ See Order No. 861, 168 FERC ¶ 61,040 at P 33.

⁷ *Id.* P 40.

⁸ CAISO Motion for Clarification at 2.

⁹ *Id.* at 2, 3.

that the soft offer cap is based on the cost of new entry.¹⁰

5. PG&E notes that the Commission erred in Order No. 861 when it stated that the soft offer cap is an estimate of the cost of new entry, and PG&E contends that the soft offer cap mitigates local capacity market power by limiting Capacity Procurement Mechanism compensation to the marginal unit's going-forward fixed costs, plus a 20 percent adder.¹¹

3. **Commission Determination**

6. We grant CAISO's request and clarify that the CAISO Capacity Procurement Mechanism soft offer cap represents an estimate of going-forward costs plus a 20 percent adder, as opposed to an estimate of the cost of entry. We note that the Commission approved this definition of the soft offer cap,¹² which is included in CAISO's tariff.¹³ As discussed further below, the change in characterization of the soft offer cap does not affect the determinations made in Order No. 861.

7. We deny PG&E's request for rehearing. While the Commission incorrectly characterized the Capacity Procurement Mechanism soft offer cap in Order No. 861, the Commission also stated that the soft offer cap does not provide mitigation comparable to

¹⁰ PG&E Request for Rehearing at 6-7.

¹¹ *Id.* at 11-12.

¹² *Cal. Indep. Sys. Operator Corp.*, 153 FERC ¶ 61,001, at PP 13, 29 (2015).

¹³ CAISO Tariff section 43A.4.1.1.2.

the mitigation applied to the RTO/ISO administered capacity markets.¹⁴ As discussed further below, the Commission declined to extend Order No. 861's relief to capacity Sellers located in CAISO for several reasons, including the lack of a transparent market price for capacity in CAISO and the fact that capacity sales are not reviewed, approved, or monitored by CAISO.¹⁵ We find that these reasons continue to apply and, therefore, deny PG&E's request for rehearing and continue to require that capacity Sellers in CAISO submit indicative screens for capacity sales. For the same reasons, we also will not permit capacity Sellers in CAISO to rely on a rebuttable presumption that the Capacity Procurement Mechanism adequately mitigates Sellers' horizontal market power.

B. Retention of Screens for Capacity Sellers in CAISO

1. Final Rule

8. In Order No. 861, the Commission required capacity Sellers in CAISO to continue to submit indicative screens and eliminated the rebuttable presumption that Commission-approved RTO/ISO market monitoring and mitigation is sufficient to address any horizontal market power concerns regarding sales of capacity in CAISO.¹⁶ The Commission stated that, although the majority of capacity sales within CAISO are made through the Resource Adequacy program, these sales are not reviewed, approved, or monitored by CAISO. The Commission explained that the California Public Utilities

¹⁴ See Order No. 861, 168 FERC ¶ 61,040 at P 40.

¹⁵ *Id.* P 39.

¹⁶ *Id.* P 38.

Commission (CPUC) reviews and approves capacity purchases by load serving entities through the Resource Adequacy program pursuant to resource requirements established by the CPUC, but that these purchases are not necessarily the result of competitive solicitations. The Commission also explained that there is no transparent market price determined under Commission-approved rules for capacity in CAISO comparable to the market price for capacity established by RTOs/ISOs with centralized capacity markets.¹⁷

2. Request for Rehearing

9. PG&E requests rehearing of the Commission's decision to retain indicative screens for capacity Sellers in CAISO and asks that the Commission conclude that existing Commission-approved capacity backstop mechanisms in CAISO adequately mitigate the potential for capacity market power and, therefore, that capacity Sellers in CAISO do not need to submit indicative screens.¹⁸ PG&E explains that CAISO and the CPUC have created a two-step process to ensure that adequate supply resources are available to meet the demand for electricity in California. PG&E states that first, load serving entities are required to demonstrate to both the CPUC and CAISO that they have procured an adequate amount of Resource Adequacy capacity to meet their forecasted peak demand as well as a planning reserve margin. PG&E states that load serving entities rely primarily on the bilateral market to procure these resources, and this bilateral market, the procurement requirements, and associated rules are generally called the

¹⁷ *Id.* P 39.

¹⁸ PG&E Request for Rehearing at 4.

Resource Adequacy program.

10. Second, PG&E states that if load serving entities fail to meet their Resource Adequacy requirements, CAISO may procure additional capacity through the Capacity Procurement Mechanism, and that “[t]he [Capacity Procurement Mechanism] is thus a backstop procurement that fills any remaining need for supply-side resources.”¹⁹ PG&E states that when CAISO procures backstop capacity through the Capacity Procurement Mechanism, CAISO runs a competitive solicitation process, a pay-as-bid auction with a soft offer cap, which serves to mitigate market power in these competitive solicitation processes and, if designed properly, can also mitigate prices in the bilateral Resource Adequacy market in a manner similar to other RTO/ISO capacity markets.

11. PG&E argues that, given the current role that the Capacity Procurement Mechanism plays in mitigating market power in CAISO, and in light of the ongoing CAISO stakeholder process to improve the Capacity Procurement Mechanism so that it more effectively limits the abuse of market power through market power tests and enhanced mitigation, the Commission erred in Order No. 861 in concluding that CAISO should be treated differently than other RTOs/ISOs. PG&E asserts that the Commission should therefore grant rehearing and determine that the Capacity Procurement Mechanism works in tandem with California’s Resource Adequacy program to mitigate capacity market power, and that this creates a rebuttable presumption that Sellers of capacity cannot exercise horizontal market power and therefore are not required to submit

¹⁹ *Id.* at 7.

indicative screens studying the capacity market in CAISO.²⁰

12. PG&E next argues that if the Commission nonetheless continues to find CAISO's existing Capacity Procurement Mechanism to be inadequate to mitigate the potential for market power, the Commission should modify Order No. 861 to require improvements to the Capacity Procurement Mechanism so that it provides adequate mitigation of capacity market power comparable to other RTOs/ISOs.²¹

13. PG&E also requests that, in the event that the Commission continues to require Sellers of capacity in CAISO to submit indicative screens, it should host a technical conference or otherwise clarify how the assumptions and modeling process should be adjusted to reflect that the energy market-focused indicative screens are now only being used as an indicator for market power in certain capacity markets.²²

3. Commission Determination

14. We deny PG&E's request for rehearing and motion for clarification. We disagree with PG&E's assertion that the Capacity Procurement Mechanism adequately mitigates the potential for capacity market power such that the Commission should lift the requirement that Sellers of capacity in CAISO submit indicative screens. In CAISO, capacity is primarily procured in the bilateral market, and the Capacity Procurement Mechanism serves as a backstop procurement mechanism, not a mitigation construct for

²⁰ *Id.* at 13.

²¹ *Id.* at 14.

²² *Id.* at 16-21.

the bilateral market.

15. CAISO does not have a centralized capacity market, and thus, as explained in Order No. 861, there are no transparent capacity prices determined under Commission-approved rules, similar to the market prices for capacity that are established in RTOs/ISOs with centralized capacity markets.²³ The vast majority of capacity sales within California are bilateral sales, and those sales are not reviewed, monitored, or approved by CAISO. The CPUC regulates capacity purchases by load serving entities to ensure compliance with the CPUC's Resource Adequacy program. However, the bilateral Resource Adequacy procurement processes are not subject to Commission review to ensure competitive process. Load serving entities' Resource Adequacy capacity purchases and their associated prices are only transparent to the relevant regulatory authority, be it the state utility commission, a municipal utility board, a city council, or some other authority.

16. We also deny PG&E's request to require that the Capacity Procurement Mechanism be modified so that it provides adequate mitigation of capacity market power comparable to other RTOs/ISOs. Such a requirement would be outside of the scope of this rulemaking. As noted in Order No. 861, relief from the requirement to submit indicative screens may be extended to capacity Sellers in CAISO in the future, if CAISO develops an ISO-administered capacity market that is subject to Commission-approved

²³ Order No. 861, 168 FERC ¶ 61,040 at P 39.

market monitoring and mitigation.²⁴

17. Finally, we deny PG&E's request to hold a technical conference or otherwise clarify how to adapt the market power screens for different capacity products. In Order No. 861, the Commission did not require adjustments to the current market power screens, and we thus find this request to be outside the scope of this rulemaking. The market power screens were designed to show the lack of presumption of market power for energy, capacity, and ancillary services and will continue to serve this purpose in markets that lack an RTO/ISO administered capacity market subject to Commission-approved RTO/ISO monitoring and mitigation.

III. Document Availability

18. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

19. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in

²⁴ *Id.* P 42.

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20. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

IV. Effective Date

21. This order on rehearing and clarification is effective **[INSERT DATE 60 days after date of publication in the FEDERAL REGISTER]**.

By the Commission.

Issued: February 20, 2020.

Nathaniel J. Davis, Sr.,
Deputy Secretary.