

178 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

Constellation NewEnergy, Inc.

Docket No. IN22-4-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued March 29, 2022)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Constellation NewEnergy, Inc. (CNE). This order is in the public interest because the Agreement resolves on fair and equitable terms Enforcement's investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2021), into whether CNE complied with the pertinent California Independent System Operator (CAISO) tariff provisions regarding the treatment of imports for Resource Adequacy (RA) purposes.

2. CNE agrees to: (a) pay a civil penalty of \$2,400,000 to the United States Treasury; (b) disgorge \$2,300,000 (an amount that includes any and all applicable interest) to CAISO; and, (c) only use specific generation resources or firm contracts in connection with import RA moving forward. CNE stipulates to the facts set forth in Section II of the Agreement, but neither admits nor denies the alleged violations.

I. Facts

3. Load Serving Entities (LSE) operating in CAISO are required to offer specified amounts of RA into the CAISO day-ahead energy market on a daily basis and, if such offers clear, the real-time market.

4. One option available to a LSE under the CAISO tariff is to use "import" RA, which is intertie capacity to import electricity sourced outside the CAISO footprint. The CAISO tariff sets out a system for allocating how much "import" RA a LSE may offer and requires LSEs using import RA to offer into the CAISO energy market on a daily basis.

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5. Entering 2017, CNE had in place a business practice whereby it did not source electricity for import before offering into both the CAISO day-ahead and real-time markets. CNE did not have a specific source of power linked to a specific RA import prior to submitting offers and instead intended to rely on the bilateral spot energy market if needed. As a part of this business practice, CNE regularly offered its import capacity into the CAISO day-ahead market at \$399/MWh. If those day-ahead offers cleared, CNE would reoffer the import capacity in the real-time market at either \$899/MWh or \$999/MWh.

6. In June and August 2017, CNE did not meet RA-related dispatches because it was unable to secure electricity in the bilateral spot market. Following these events, CNE chose to cease the business practice referenced above.

II. Violations

7. Enforcement determined that CNE violated 18 C.F.R. § 35.41(a) and sections 4.2.1, 37.2.1.1, and 37.3.1 of the CAISO tariff.

8. Section 35.41(a) provides, in relevant part, that “[w]here a Seller participates in a Commission-approved organized market, Seller must operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market.” Enforcement determined CNE violated Section 35.41(a) through its violation of the CAISO tariff.

9. CAISO tariff §§ 4.2.1 and 37.2.1.1 generally require market participants to follow dispatch and operating instructions issued by CAISO. Section 4.2.1 requires that market participants “shall comply fully and promptly with the Dispatch Instructions and Operating Instructions,” while Section 37.2.1.1 requires market participants to “comply with Operating Instructions issued by the CAISO as authorized under the CAISO Tariff.” Enforcement determined CNE did not comply with these tariff provisions when it could not respond to RA-related dispatches by CAISO in June and August 2017.

10. CAISO tariff § 37.3.1 requires that market participants have a “reasonable expectation” of being “available and capable of performing at the levels specified in the [b]id” at the time it is placed in the day-ahead market. Enforcement determined CNE lacked a sufficiently reasonable basis for its expectation that it would be able to wait to secure electricity in the spot market to support its RA imports during times when the market was constrained. To the contrary, Enforcement concluded it was unreasonable to expect that electricity would be readily or sufficiently available in the spot market during times when CAISO market prices rose to or above bids of \$999/MWh because such prices usually reflect an environment in which it is difficult to secure sufficient supply to meet demand.

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III. Stipulation and Consent Agreement

11. Enforcement and CNE have resolved Enforcement's investigation by means of the attached Agreement.

12. CNE stipulates to the facts set forth in Section II of the Agreement, but neither admits nor denies the alleged violations set forth in Section III of the Agreement.

13. CNE agrees to: (a) pay a civil penalty of \$2,400,000 to the United States Treasury; (b) disgorge \$2,300,000 to CAISO; and, (c) only use specific generation resources or firm contracts in connection with import RA moving forward.

14. CAISO is directed to distribute the disgorgement *pro rata* to network load.

IV. Determination of Appropriate Sanctions and Remedies

15. In recommending the appropriate remedy, Enforcement considered the factors described in the Revised Policy Statement on Penalty Guidelines.¹ The Commission concludes that CNE's civil penalty is consistent with the Revised Policy Statement on Penalty Guidelines.

16. The Commission concludes that the Agreement is a fair and equitable resolution of the matters concerned and is in the public interest, as it reflects the nature and seriousness of the conduct and recognizes the specific considerations stated above and in the Agreement. In particular, we note that CNE's conduct went against the purpose of RA, which is to ensure that firm resources are available to address supply shortfalls.

17. The Commission directs CNE to make the civil penalty and disgorgement payments as required by the Agreement within ten days of the Effective Date of the Agreement.

¹ *Enforcement of Statutes, Orders, Rules, and Regulations*, Revised Policy Statement on Penalty Guidelines, 132 FERC ¶ 61,216 (2010).

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Constellation NewEnergy, Inc.

Docket No. IN22-4-000

STIPULATION AND CONSENT AGREEMENT

I. INTRODUCTION

1. The Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) and Constellation NewEnergy, Inc. (CNE) enter into this Stipulation and Consent Agreement (Agreement) to resolve a nonpublic, preliminary investigation (the Investigation) conducted by Enforcement pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2021), into whether CNE complied with the pertinent California Independent System Operator (CAISO) tariff provisions regarding the treatment of imports for Resource Adequacy (RA) purposes.

2. CNE stipulates to the facts in Section II but neither admits nor denies the violations alleged in Section III. CNE agrees to: (a) pay a civil penalty of \$2,400,000 to the United States Treasury; (b) disgorge \$2,300,000 to CAISO; and, (c) only use specific generation resources or firm contracts in connection with import RA moving forward.

II. STIPULATIONS

Enforcement and CNE hereby stipulate and agree to the following facts.

3. CNE is a load serving entity (LSE) operating in CAISO. As a result, CNE is obligated by the CAISO tariff to offer specified amounts of RA into the CAISO day-ahead energy market and, if such offers clear, the real-time market, on a daily basis.

4. In accordance with the CAISO tariff, CNE was allocated a specified amount of "import" RA by CAISO that CNE could use to meet its RA obligation. Import RA is intertie capacity to import electricity sourced outside the CAISO footprint. The CAISO tariff requires LSEs using import RA to offer into the CAISO energy market on a daily basis.

5. Entering 2017, CNE had in place a business practice whereby it did not source electricity for import before offering into both the CAISO day-ahead and real-time markets. CNE did not have a specific source of power linked to a specific RA import prior to submitting offers and instead intended to rely on the bilateral spot energy market if needed.

6. As a part of this business practice, CNE regularly offered its import capacity into

the CAISO day-ahead market at \$399/MWh. If those day-ahead offers cleared, CNE would reoffer the import capacity in the real-time market at either \$899/MWh or \$999/MWh.

7. In June and August 2017, CNE did not meet RA-related dispatches because it was unable to secure electricity in the bilateral spot market. Following these events, CNE chose to cease the business practice referenced above.

8. CNE fully cooperated with Enforcement's investigation.

III. VIOLATIONS

9. Enforcement determined that CNE violated 18 C.F.R. § 35.41(a) and sections 4.2.1, 37.2.1.1, and 37.3.1 of the CAISO tariff.

10. Section 35.41(a) provides, in relevant part, that “[w]here a Seller participates in a Commission-approved organized market, Seller must operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market.” Enforcement determined CNE violated Section 35.41(a) through its violation of the CAISO tariff.

11. CAISO tariff §§ 4.2.1 and 37.2.1.1 generally require market participants to follow dispatch and operating instructions issued by CAISO. Section 4.2.1 requires that market participants “shall comply fully and promptly with the Dispatch Instructions and Operating Instructions,” while Section 37.2.1.1 requires market participants to “comply with Operating Instructions issued by the CAISO as authorized under the CAISO Tariff.” Enforcement determined CNE did not do so when it could not respond to RA-related dispatches by CAISO in June and August 2017.

12. CAISO tariff § 37.3.1 requires that market participants have a “reasonable expectation” of being “available and capable of performing at the levels specified in the [b]id” at the time it is placed in the day-ahead market. Enforcement determined CNE lacked a sufficiently reasonable basis for its expectation that it would be able to wait to secure electricity in the spot market to support its RA imports during times when the market was constrained. To the contrary, Enforcement concluded it was unreasonable to expect that electricity would be readily or sufficiently available in the spot market during times when CAISO market prices rose to or above bids of \$999/MWh because such prices usually reflect an environment in which it is difficult to secure sufficient supply to meet demand. Enforcement believes it is at those times that the purpose of RA comes into play because firm resources are needed to address supply shortfalls.

13. Enforcement determined that \$2,300,000 adequately represents the savings CNE realized in 2017 based on the conduct giving rise to the violations found by Enforcement.

IV. REMEDIES AND SANCTIONS

14. For purposes of settling any and all claims, civil and administrative disputes and proceedings arising from or related to CNE's conduct evaluated in Enforcement's Investigation, CNE agrees with the facts as stipulated in Section II of this Agreement, but neither admits nor denies the violations described in Section III of this Agreement. CNE further agrees to undertake obligations set forth in the following paragraphs.

A. Civil Penalty

15. CNE agrees to pay a civil penalty of \$2,400,000 to the United States Treasury, by wire transfer, within ten days after the Effective Date of this Agreement, as defined herein.

B. Disgorgement

16. CNE agrees to pay disgorgement (inclusive of interest) within ten days of the Effective Date of this Agreement to CAISO in the amount of \$2,300,000.

C. Compliance

17. CNE will continue its current practice of offering import RA into the CAISO energy market only if it has a specific generation resource or firm contract arranged in advance.

IV. TERMS

18. The "Effective Date" of this Agreement shall be the date on which the Commission issues an order approving this Agreement without material modification. When effective, this Agreement shall resolve the matters specifically addressed herein that arose on or before the Effective Date as to CNE and any affiliated entity, and their respective agents, officers, directors, or employees, both past and present.

19. Commission approval of this Agreement without material modification shall release CNE and forever bar the Commission from holding CNE, any affiliated entity, any successor in interest, and their respective agents, officers, directors, or employees, both past and present, liable for any and all administrative or civil claims arising out of the conduct covered by the Investigation, including conduct addressed and stipulated to in this Agreement, which occurred on or before the Agreement's Effective Date.

20. Failure by CNE to make the disgorgement, interest or civil penalty payments, or to comply with the compliance obligations agreed to herein, or any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued

pursuant to the Federal Power Act (FPA), 16 U.S.C. §792, *et seq.*, and may subject CNE to additional action under the enforcement provisions of the FPA.

21. If CNE does not make the required civil penalty and disgorgement payments described above within the times agreed by the parties, interest will begin to accrue at the rates specified at 18 C.F.R. § 35.19a(a)(2)(iii) from the date that payment is due, in addition to the penalty specified above and any other enforcement action and penalty that the Commission may take or impose.

22. This Agreement binds CNE and its agents, successors, and assignees. This Agreement does not create any additional or independent obligations on CNE, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in this Agreement.

23. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer or promise of any kind by any member, employee, officer, director, agent or representative of Enforcement or CNE has been made to induce the signatories or any other party to enter into the Agreement.

24. Unless the Commission issues an order approving the Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor CNE shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and CNE.

25. In connection with the civil penalty provided for herein, CNE agrees that the Commission's order approving the Agreement without material modification shall be a final and unappealable order assessing a civil penalty under section 316A(b) of the FPA, 16 U.S.C. § 825o-1(b). CNE waives findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without material modification, and judicial review by any court of any Commission order approving the Agreement without material modification.

26. This Agreement can be modified only if in writing and signed by Enforcement and CNE, and any modifications will not be effective unless approved by the Commission.

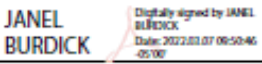
27. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity, and accepts the Agreement on the entity's behalf.

28. The undersigned representative of CNE affirms that he or she has read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of his or her knowledge, information and belief, and that he or she understands that the Agreement is entered into by Enforcement in express reliance on those

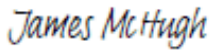
representations.

29. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

Agreed to and Accepted:


Janel Burdick
Director, Office of Enforcement
Federal Energy Regulatory Commission

Date: March 7, 2022


James McHugh
Director
Constellation NewEnergy, Inc.

Date: March 1, 2022

Document Content(s)

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