

Submitted to CAISO on August 12, 2022

### ***PPC Perspectives on Extended Day Ahead Market Governance***

PPC has repeatedly emphasized the importance of instituting a strong, independent governance approach for a day ahead market that equitably balances and considers the needs of all participants. Participation in any market requires an evaluation of the associated risks and benefits. We have consistently noted that the magnitude of trading activity impacted by the expansion of CAISO's day ahead market raises much greater concerns with the market's governance structure compared to the risks of participating in the EIM which has a more limited scope. PPC has identified the need for durable, independent governance as a requisite condition for an integrated day ahead market due to this much greater impact.

While the proposal set forth by the Governance Review Committee (GRC) continues to identify incremental improvements over the current EIM governance design, this proposal falls short of offering regional participants the durable, independent governance that would assure all participants that they will be treated equitably in the development and implementation of a day ahead market. The GRC appears to have explored every available avenue within its authority in the interest of creating a governance structure which would support regional participation in a day ahead market. Unfortunately, the current law restricts the options available to the GRC and perpetuates a governance structure that, in perception if not in practice, is centered around a subset of the markets' participants. Absent legislative changes aimed to "regionalize" governance and establish an independent governance structure appropriate to support a multistate market footprint, it will be very difficult for PPC to support BPA's participation in EDAM. The lack of independent governance also creates a barrier for participation for some individual PPC members.

### **The GRC Has Developed Meaningful and Necessary Improvements**

PPC appreciates the hard work of the GRC, CAISO staff, and other stakeholders over the past several years to continue to look for potential improvements in CAISO's governance structure. In the first phase of this effort, focused on improving EIM governance, the GRC developed meaningful enhancements to the existing governance of the EIM market, which have since been adopted. Chief among these were changes which expanded the scope of authority for the EIM Governing Body, including the creation of the joint authority model and an approach to dispute resolution which provided as much consideration as possible for the EIM Governing Body. Now, as the GRC turns to developing a framework for a potential Extended Day Ahead Market (EDAM) governance, the GRC continues to doggedly pursue improvements within the

confines of CAISO's existing legal framework, working to provide all market participants greater assurance that decision-making over the EDAM will be non-discriminatory and inclusive. Unfortunately, the current statutory structure hinders the GRC's ability to adopt such policies. This leaves entities outside of California, even under the best possible proposal from the GRC, relying on a decision-making body that governs pursuant to revocable and incomplete delegation of authority from a group of political appointees of the State of California. PPC has been consistent and transparent in registering these concerns, explaining on December 14, 2020 in response to the GRC's Revised Straw Proposal<sup>1</sup>:

For PPC, the central governance questions pertain to the role that the CAISO Board will play in approving policy initiatives to change the market rules, and how that role is defined and shared with the Governing Body. The role of the CAISO Board is important because of its legal connection to the State of California and the risk – or the perception of the risk – that the Board is not truly independent, may be reluctant to address concerns of all the market participants, and may be unduly influenced by the State and the State stakeholders in its initiatives and decisions that impact a broader regional market.

These questions surrounding the CAISO Board's perceived lack of independence from the State of California are not new. In fact, the Federal Energy Regulatory Commission (FERC) has previously considered the governance issues surrounding the CAISO Board, and although FERC's rulings were ultimately vacated by Federal court on the grounds that FERC exceeded its statutory authority under the Federal Power Act, its reasoning remains informative and its sentiment persists.<sup>2</sup> FERC ruled that the CAISO was "not sufficiently independent" because of its Board.<sup>3</sup> FERC explained that the "primary problem" with the CAISO Board "is the extent to which it and, in turn, the CAISO are controlled by the State," given that all the Board members are selected by the California Governor and serve at his pleasure.<sup>4</sup> This structure, FERC reasoned, "established a decision-making process that is heavily influenced, if not completely dictated, by one stakeholder (i.e., the State)."<sup>5</sup> FERC noted that the Board's lack of independence from the State, and the State's potential influence over the market, resulted in the impression that the CAISO would not provide equal treatment to all market participants and ruled that "the Board's lack of independence presents a significant impediment to a

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<sup>1</sup> <https://stakeholdercenter.aiso.com/Comments/AllComments/f6b52c90-63a6-4802-bc36-4c907ae22e5c#org-9d175506-6fd6-4aee-9ed9-c4919be970ff>

<sup>2</sup> *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 304 (D.C. Cir. 2004).

<sup>3</sup> *Mirant Delta, LLC*, 100 FERC ¶ 61,059, at P 49 (July 17, 2002), *vacated*, *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 304 (D.C. Cir. 2004).

<sup>4</sup> *Id.* at P 50.

<sup>5</sup> *Id.*

well-functioning Western energy market.”<sup>6</sup> Specifically, “[c]ontrol of the Board by one state threatens the CAISO’s ability to treat in-state and out-of-state transmission users on a non-discriminatory basis, thus undermining the prospect of broader regional cooperation throughout the West.”<sup>7</sup>

Admittedly, some things have improved considerably since the challenges of the early 2000s, but the structure of the CAISO Board has largely remained. As explained in the legal analysis in Appendix A, IRS regulations require that the “supported organization” – in this case, the State of California – must supervise or control the supporting organization – in this case, the CAISO.<sup>8</sup> This relationship is established by the fact that the CAISO Board is selected by the California Governor entirely at the Governor’s discretion.<sup>9</sup> An attempt to remove the Board from certain decisions by allowing the Governing Body to unilaterally direct changes to market rules or by irrevocably preventing the Board from changing any delegation or sharing of authority, could negate the showing of control and jeopardize the CAISO’s tax-exempt status.<sup>10</sup> PPC appreciates the restrictions arising out of the CAISO’s special status but also recognizes the practical reality that this governance structure retains the possibility and the perception of potential bias. And even if it is merely a perception of bias, it may be enough to undermine the confidence of market participants in the governance and other aspects of the market and prevent the proper market forces from working.

These concerns pertaining to the CAISO Board’s retention of ultimate authority and control over the functions delegated to the Governing Body, especially given the legal requirements that the CAISO Board be appointed by the California Governor entirely at the Governor’s discretion, continue to weigh heavily on PPC and its members across Northwest states. The salient fact remains that the Governing Body can never have complete, irrevocable, independent authority over the rules pertaining to any CAISO market. Despite the Governing Body’s best intentions, therefore, the net result might be a market governed by rules that are – or perceived to be – unduly influenced by the State of California.

To be clear, PPC is not raising concerns with the current members of the Board of Governors. On the contrary, we have observed a willingness on their part to support and explore changes that would facilitate a regional expansion of the market. Instead, we are concerned with the legal construct of the Board which may result in applications of the Board’s duties in the future

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<sup>6</sup> *Id.* at P 51.

<sup>7</sup> *Id.* at P 57.

<sup>8</sup> December 14, 2020 Revised Straw Proposal at 51.

<sup>9</sup> December 14, 2020 Revised Straw Proposal at 51 n. 98; *see also* <http://www.caiso.com/Documents/BoardSelectionPolicy.pdf>.

<sup>10</sup> December 14, 2020 Revised Straw Proposal at 51.

which are less favorable to the region as a whole. And we acknowledge that without a legislative change to pursue regionalization more formally, the GRC is limited in its ability to address PPC's long-term concerns.

We again commend the GRC for its efforts to address concerns expressed by stakeholders within the unique legal landscape discussed above. We have also appreciated the information made available by CAISO legal staff in response to questions from PPC and other stakeholders regarding the relationship of the existing statutes with the role of the GRC and with the GRC's proposal. Both the initial Appendix A published on April 12, 2021 and the updated Appendix A published with the latest straw proposal provide helpful background for PPC to understand CAISO legal staff's interpretation of the law and how it might apply in the context of a multi-state market. We understand that these appendices are intended to work together and build off of each other. We thank the CAISO legal staff for their efforts to provide this information and further clarify its position and answer questions for PPC.

### **PPC Concerns with CAISO's Founding Statutes**

As stated above, PPC has appreciated the work done to identify ways to provide additional considerations for out of state parties within CAISO's existing statutory framework. We acknowledge the challenges associated with growing and evolving what was initially designed to be a one-state market, to a market which serves and benefits entities across the West. The desire to explore EDAM is largely due to the success of the CAISO-operated energy imbalance market, which demonstrates that such an evolution is possible. The mounting challenge, as discussed above, is that the growing scope of the market submits entities to greater risks, and additional certainty is required to ensure that their interests will be considered with equal priority to those of all other participants.

Perhaps any individual element of the CAISO's statutory framework is not significant enough to cause concern on its own, but when considered together, these present a significant barrier to providing out of state participants assurance that impacts to their customers will be considered on par with the interests of California consumers.

We understand the CAISO's position that there are no conflicts between California law and Federal law or, even if such conflicts exist, they are not irreconcilable. The arguments, as we understand them, are that the California Public Utilities Code does not require CAISO to serve the interests of California ratepayers to the detriment of other market participants and that a larger regional market with broad out-of-state participation is, in fact, in the interests of both California consumers and the broader region. Further, the argument suggests that competitive pressure from other market options serves as a disincentive for CAISO to discriminate against potential market participants who could then leave to join another market, to the detriment of California ratepayers. We also appreciate the point that the current CAISO Board of Governors have, in sentiment and in practice, worked to advance a decision structure which would better serve the larger market as a whole.

While PPC does not dispute the validity of such an interpretation of CAISO's wholistic obligations, this interpretation appears to be heavily influenced by current context, and by the current interest of entities within California to attract out-of-state participants who are currently considering another option. This interpretation does not address how CAISO's statutes may be applied in situations where the interests of those within California directly conflict with the interests of one or more out-of-state participants. There are a number of market design issues where the "transfer of value" between regions is being discussed.

Under the current legal framework, the ultimate decision-making authority must remain in the hands of a governing body unilaterally appointed by the California Governor *and* CAISO's corporate structure requires it to operate to the benefit of the state of California. When taken together these create sufficient doubt whether a different Board of Governors or a legal interpretation within a context different from today's would come to the same conclusion about CAISO's responsibilities.

### **PPC Remains Committed to Developing the CAISO EDAM Option**

Notwithstanding the above concerns, PPC remains committed to continuing to develop the EDAM option with other regional stakeholders. In this spirit, we offer some additional comments (attached) on the GRC's EDAM straw proposal. Likewise, we remain committed to working with stakeholders to develop an EDAM market design which would meet the needs of our members and create benefits for the region. It is our hope that the governance issues identified above can be addressed to encourage broad participation in EDAM. At the same time, we must emphasize that these changes to governance are necessary but are not sufficient. PPC has significant outstanding concerns on several market design issues. We look forward to working with the CAISO staff and other stakeholders on these issues in the coming months.

PPC offers our sincere thanks to the GRC, CAISO staff and other stakeholders as we work through these challenging issues.

## **PPC Comments on EDAM Straw Proposal**

### *Comments on Joint Authority*

Given the current statutory framework, and the requirement that the Board of Governors retain ultimate decision-making authority on all CAISO issues, we support the use of the Joint Authority model. We see additional benefits from the decision-making bodies meeting together, sharing information, and having a shared responsibility for decisions within this context.

### *Scope of Delegation of Authority*

PPC continues to support a broad application of Joint Authority, given the interconnected nature of many of the issues in the market. We would prefer an approach where issues relevant only to the CAISO BAA is excluded from Joint Authority, with all other issues being subject to Joint Authority. This approach should provide sufficient assurance that the EDAM Governing Body is not making decisions on issues that do not impact EDAM Entities.

### *Size and Composition of the EIM Governing Body*

PPC supports a review of EIM Governing Body members at the time of renomination to ensure that they are sufficiently qualified to serve under the expanded scope of an EDAM Governing Body. PPC does not see specific benefits to altering the number of EIM Governing Body members nor the EIM Governing Body compensation at this time.

### *Stakeholder Engagement*

PPC is generally supportive of the proposed changes to stakeholder engagement.

### *CAISO Bylaw Changes*

PPC is generally supportive of making changes to the CAISO bylaws to state that CAISO's responsibility is to serve the interests of all market participants.