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December 18, 2001

VIA MESSENGER

Linwood A. Watson, Jr.
Acting Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: **California Independent System Operator Corporation, *et al.***
Docket No. EL02-15-000

Dear Secretary Watson:

Enclosed for filing in the above-captioned proceeding are an original and fourteen copies of the joint *Complainants' Limited Reply to Answers to Joint Complaint* of the California Public Utilities Commission, the California Electricity Oversight Board, Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison and the California Independent System Operator Corporation. Two additional copies of the filing are also enclosed to be date-stamped and returned to the messenger.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation, California Electricity Oversight Board, Public Utilities Commission of the State of California, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company,	)	
Complainants,	)	
v.	)	**Docket No. EL02-15-000**
Cabrillo Power I LLC, Cabrillo Power II LLC, Duke Energy South Bay, LLC, Geysers Power Company, LLC, and Williams Energy Marketing and Trading Company,	)	
Respondents.	)	

COMPLAINANTS' LIMITED REPLY TO ANSWERS TO JOINT COMPLAINT

Complainants[1] in the above-captioned proceeding hereby submit this limited reply to address one assertion raised by Duke Energy South Bay, LLC ("Duke") and Geysers Power Company, LLC ("Geysers") in their respective answers to the Joint Complaint. Specifically, Duke and Geysers claim that the relief sought in the Joint Complaint is inconsistent with certain

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[1] Complainants are the California Independent System Operator Corporation (the "ISO"), the California Public Utilities Commission (the "CPUC"), the California Electricity Oversight Board (the "EOB"), Pacific Gas and Electric Company ("PG&E"), San Diego Gas & Electric Company ("SDG&E"), and Southern California Edison Company ("Edison").

settlements previously entered into by Complainants. That assertion, as described below, is wrong.

I. Request for Leave to File Reply

The Commission's rules do not provide for replies to answers to complaints. The Commission will, however, accept such replies if they help clarify the issues in dispute.[2] For the reasons described below, Complainants believe that the instant reply will clarify the effect of prior settlement agreements on the Commission's authority to grant the relief requested in the Joint Complaint. Complainants therefore request that the reply be accepted for filing.

II. Reply to Answers

The Joint Complaint asks the Commission to do two things: (1) institute an investigation into the justness and reasonableness of the Fixed Option Payment Factor currently in effect under the respective Reliability Must-Run ("RMR") contracts between, on the one hand, the ISO, and, on the other hand, the individual Respondents,[3] and (2) set a refund effective date of January 1, 2002. The Joint Complaint suggests that, in the interests of administrative economy, the Commission, having established the refund effective date, defer further action on the complaint pending its decision on exceptions in Docket No. ER98-495-000.

In their respective answers, Duke and Geysers raise a number of objections, mostly going to the merits of the "net incremental cost" method adopted by the Presiding Judge

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2 *See, e.g., Chesapeake Panhandle Limited Partnership v. Natural Gas Pipeline Co. of America,* 92 FERC ¶ 61,082 (2000); *ExxonMobil Chemical Co. v. Entergy Gulf States, Inc.,* 91 FERC ¶ 61,106 (2000).

3 The Respondents other than Duke and Geysers are Cabrillo Power I LLC, Cabrillo Power II LLC (jointly, "Cabrillo"), and Williams Energy Marketing and Trading Company ("Williams").

in Docket No. ER98-495-000.[4] Those assertions -- and similar arguments by Cabrillo and Williams -- require no rejoinder.[5]

Additionally, however, Duke and Geysers allege that the owner-specific settlements underlying the currently effective Fixed Option Payment Factors are inconsistent with the relief sought in the Joint Complaint. Thus, Duke, citing various statements by parties in support of the settlement filed in Docket No. ER98-496-006 on March 31, 2000, maintains that those parties, including some of the Complainants, are barred from now challenging the rates adopted in the settlement.[6] Geysers argues that the settlement filed on July 1, 1999 in Docket Nos. ER98-441-000 *et al.*, similarly bars the Complainants from seeking to adjust the Fixed Option Payments applicable to its units.[7]

Review of the settlements themselves belies these claims.[8] The generic terms and certain rate formulations of the currently effective RMR contracts were agreed to by the affected parties and embodied in the Stipulation and Agreement filed April 2, 1999 in Docket Nos. ER98-

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4 *Pacific Gas and Electric Co.*, 91 FERC ¶ 63,008 (June 7, 2000).

5 The Respondents cannot covert this complaint into a rehearing of the Fixed Option Payment Factor issues or into a premature analysis of how the Fixed Option Payment Factor would apply to their individual facilities. *See, e.g.*, Answer of Williams Marketing and Trading Company ("Williams Answer") at 12-15.

6 Answer of Duke South Bay, LLC to Complaint of California Independent System Operator, *et al.* ("Duke Answer") at 7.

7 Geysers Power Company, LLC Answer to Complaint ("Geysers Answer") at 15-23.

8 It is worth noting that neither Cabrillo nor Williams advances similar claims. Indeed, far from claiming that the relief sought in the Joint Complaint is barred by prior settlements, Williams asserts that the relief is available in another proceeding, Docket No. ER02-303-000. Williams Answer at 12-15. Although that assertion is itself mistaken (Article IV. A. of the April 1999 Settlement, under which Docket ER02-303-000 was initiated, limits such filings to certain adjustments for purposes of Schedule F of the RMR contract), it is noteworthy because the language of the owner-specific settlement applicable to Williams is virtually identical to the language relied upon by Geysers. Compare Article I.A.1 of the Stipulation and Agreement filed August 31, 1999 in Docket Nos. ER98-441-000, *et al.* (the "Williams Stipulation") with Article I.A.1 of the Final Stipulation and Agreement filed July 1, 1999 in the same docket (the "Geysers RMR Settlement").

441-000, *et al.*, (the "April 1999 Settlement"), which was approved by the Commission on May 28, 1999.[9] That settlement carved out for subsequent resolution certain specified issues, including the level of the Fixed Option Payment for each RMR unit.[10]

The April 1999 Settlement provided for a "Rate Freeze Period," ending December 31, 2001, during which, with certain exceptions, the rights of owners to file for changes under Section 205, and the rights of other parties to file for changes under Section 206, were "suspended:"

> Except as provided in Article III, the rights of each Sponsoring Party and Subject Party to file to change the Revised RMR Rate Schedules pursuant to Section 206 of the FPA shall be suspended, commencing with the effectiveness of the settlement and continuing such that changes shall not become effective until after the end of the Rate Freeze Period.[11]

Article IV of the Stipulation and Agreement further provided for certain formula rates that would take effect after January 1, 2002, the "Post Rate Freeze Formula Rates." That article specifically contemplated, however, Section 205 or 206 proceedings to change those rates.[12] Thus, as Duke

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9 *California Independent System Operator Corp.*, 87 FERC ¶ 61,250 (1999).

10 Article 10.C of the April 1999 Settlement listed several "items not resolved with respect to the Revised RMR Rate Schedules", the first of which was: "What is the appropriate level of the Fixed Option Payment under each Revised Rate Schedule?"

11 *See* Article I.C.3 of the April 1999 Settlement. Each Complainant was either a "Sponsoring Party" or a "Subject Party."

12 Article IV.B. provides:

> The use by an RMR Owner of the Post Rate Freeze Formula Rates may be terminated by the RMR Owner if the Commission, acting on a complaint of another person or on its own motion, establishes a proceeding under Section 206 of the FPA to investigate such RMR Owner's rates or the terms and conditions under the Revised RMR Rate Schedules.

recognizes, "In the [April 1999 Settlement] the Complainants retained their right to file a Section 206 complaint once the rate freeze period ended on January 1, 2002."[13]

The RMR contracts adopted in the April 1999 Settlement took effect on June 1, 1999, with the contentious Fixed Option Payment issue unresolved.[14] Over the succeeding months the parties reached further, owner-specific settlements resolving that issue for all RMR units (other than the Mirant units at issue in Docket No. ER98-495-000) for the remainder of the Rate Freeze Period, *i.e.*, through December 31, 2001, and, in the absence of further changes, for the Post Rate Freeze Period as well. None of those settlements, however, purported to limit the filing of Section 206 complaints beyond the period of the "suspension" of Section 206 rights agreed to in the April 1999 Settlement. Thus, Section I.A.3 of the "Duke South Bay Offer of Settlement" filed March 31, 2000 in Docket No. ER98-496-006, provided:

> For the calendar year 2001, and during any portion of each calendar year thereafter for which the Post Rate Freeze formula Rates are in effect in accordance with Article IV of the First Stipulation, the FOPF for the Duke Units shall be 0.30. All parties retain whatever rights they have under the First Stipulation to make filings under Section 205 or Section 206 of the Federal Power Act to change such FOPF to become effective after the end of the Rate Freeze Period.[15] (Emphasis added.)

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13 Duke Answer at 7.

14 Pending such resolution, each owner charged a Fixed Option Payment equal to a specified percent of stipulated Annual Fixed Revenue Requirements, which amount was subject to refund or surcharge, depending on the outcome of the issue. *See* Article II.B.3 of the April 1999 Settlement.

15 The "First Stipulation" is the April 1999 Settlement. The term "FOPF" refers to the Fixed Option Payment Factor, which, when multiplied by the Annual Fixed Revenue Requirements, yields the Fixed Option Payment. The Duke South Bay Offer of Settlement was approved on August 1, 2000. *Duke Energy South Bay, LLC*, 92 FERC ¶ 61,155 (2000).

Virtually identical language appears in Article I.A.3 of the May 8, 2000 "Cabrillo Offer of Settlement" in Docket No. ER98-496-006, approved by the Commission on July 31, 2000.[16] In approving both offers of settlement, the Commission specifically noted that it retained the right to review the rates adopted therein under the just and reasonable standard.[17]

In its answer in the instant proceeding, Duke ignores the above-quoted language in the very settlement it relies on. Duke instead cites statements of certain of the Complainants submitted in support of the Duke South Bay Offer of Settlement affirming that the offer was fair and reasonable and in the public interest.[18] What the cited comments supported, however, was the entire Offer of Settlement, which explicitly included the rights of Complainants to seek adjustment of the settlement rates upon termination of the Rate Freeze Period. The Duke South Bay Offer of Settlement was, in Complainants' view, justified and in the public interest insofar as it obviated the need for costly and time-consuming litigation concerning the level of the Fixed Option Payment for a limited period, *i.e.*, through December 31, 2001. It would hardly encourage future rate settlements to hold that, having entered into such a settlement, a party permanently waives its rights to seek adjustment of the resulting rates, particularly where the settlement specifically preserves that right.[19]

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16 *Cabrillo Power I LLC and Cabrillo Power II LLC*, 92 FERC ¶ 61,116 (2000).

17 92 FERC at 61,436 and 61,546.

18 Duke Answer at 5-6.

19 Williams also argues that a Tolling Agreement it entered into with AES – an agreement to which none of the Complainants are a party – prevents Williams from being subject to the Commission's orders regarding the Fixed Option Payment Factor or to the ISO Tariff provisions regarding designation of RMR units. Essentially, Williams intimates that because there were 12 RMR units in Edison's service territory at the start of the ISO market, it believed that the ISO would not, despite express provisions in the ISO Tariff, exercise its rights not to redesignate RMR units operated by Williams. Williams Answer at 8-9. As Williams tacitly concedes, however, Edison did not and could not represent to Williams that the ISO would not follow its own Tariff and redesignate RMR units on an (continued...)

Geysers maintains that, "in the Geysers RMR Settlement, Complainants gave up the right to advocate for a different Fixed Option Payment Factor during the term of the Geysers RMR Settlement."[20] In support of that claim, Geysers relies upon Article I.A.1. of the Geysers RMR Settlement, which reads as follows:

> Beginning June 1, 1999, and for the duration of the Rate Freeze Period, and during each year thereafter for which the Post Rate Freeze Formula Rates in accordance with Article IV of the Interim Stipulation are in effect (the "Effective Period"), the Fixed Option Payment Factor ("FOPF") shall be 0.50 for each Unit owned by Geysers Power which is presently subject to an RMR contract as an RMR Unit, and for Unit 13 or Unit 16 if either or both becomes subject to an RMR contract. (Emphasis added.)

As seen above, the Post Rate Freeze Rates provided in Article IV of the April 1999 Settlement were, by the terms of Article I.C.3 of that settlement, subject to adjustment under Section 206 once the Rate Freeze Period ended. Article I.C.3. "suspends" for the Rate Freeze Period, but not beyond, the rights of the parties to seek rate adjustments under Section 206. Thus, the provision of the Geysers RMR Settlement on which Geysers now relies provides that the Fixed Option Payment Factor shall remain at 0.50 until changed by the Commission under Section 206. Indeed, as seen above, Article IV.B. of the April 1999 Settlement specifically contemplates that the Commission may institute a Section 206 investigation of the Post Rate Freeze Formula Rates, and, in approving the Geysers RMR Settlement, the Commission noted that it retains the right to review the rates adopted therein under the just and reasonable standard.[21]

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annual basis. The ISO Tariff, as approved by the Commission, clearly provides for the ISO to annually update the designation of its RMR units.

[20] Geysers Answer at 15-16.

[21] *Geysers Power Co., LLC*, 90 FERC ¶ 61,096 (2000). Geysers also claims that its Fixed Option Payment should not be subject to Commission review because, "The Commission has already determined Geysers Power's (continued...)

Likewise flawed is Geysers' claim that any complaint under Section 206 that its rates are too high must be adjudicated under the *Mobile-Sierra* public interest standard rather than the conventional just and reasonable standard.[22] That claim is based on the assertion that such complaints are barred by the Geysers RMR Settlement, an assertion that, as seen above, is erroneous. Geysers' claim also conflicts with the above-cited statement by the Commission that the rates adopted in the Geysers RMR Settlement are reviewable under the latter standard.

CONCLUSION

Neither the April 1999 Settlement or the subsequent owner-specific settlements cited by Duke and Geysers waived the rights of the Complainants to seek the relief requested in the Joint Complaint.

Respectfully submitted,

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initial rates to be just and reasonable." Geysers Answer at 27. However, Geysers does not provide any citation for that assertion; in fact, in approving the Geysers RMR Settlement the Commission made no such determination.

22 Geysers Answer at 18-19.

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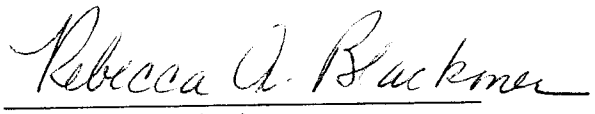
December 18, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, on this 18th day of December, 2001.



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