

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

Cabrillo Power I LLC

)

Docket No. ER06-426-000

**MOTION FOR LEAVE TO ANSWER AND ANSWER
OF THE
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”) 18 C.F.R. §§ 385.212 and 385.213 (2005), the California Independent System Operator Corporation (“CAISO”) hereby requests leave to submit a limited answer to correct factual errors in MMC Energy North America, LLC’s (“MMC”) “Reply in Support of Motion to Intervene and Protest” filed on February 8, 2006 (hereinafter “MMC Reply”).

In December 2005, the CAISO entered into a Reliability Must-Run Agreement with Carbillo Power I LLC (“Cabrillo I”) for one of its generating units, Encina Unit 4, for Contract Year 2006. As required by section 205 of the Federal Power Act (“FPA”), on December 29, 2005, Cabrillo I initiated this proceeding by filing revisions to certain of its RMR rate schedules to reflect the designation of Encina Unit 4 for Contract Year 2006 (“December 29 RMR Filing”). MMC has sought to intervene in this otherwise uncontested rate proceeding to request that the Commission condition acceptance of the Cabrillo I December 29 RMR Filing on

the outcome of an arbitration that MMC “anticipates” filing on the entirely different question whether the CAISO’s should have entered into an RMR contract with MMC for 2006.¹

On January 30, 2006, the CAISO filed an Answer in Opposition to Motion to Intervene of MMC and Motion for Summary Rejection of MMC Protest (“CAISO Opposition and Motion”), arguing that the Commission should either deny MMC’s intervention or summarily reject MMC’s Protest because MMC has not raised any issue germane to Cabrillo I’s section 205 proceeding and that its allegations of discrimination and imprudence by the CAISO are properly raised in a section 206 complaint against the CAISO, if at all.

On February 9, 2006, MMC filed an Answer arguing that it should be granted the relief it seeks here because a section 206 complaint is not likely to provide it with an effective remedy for the current year. The prospective nature of section 206 relief has not caused the Commission to conclude it is an inadequate remedy.² More fundamentally, however, as is shown below, the assertions on which MMC’s Protest and Answer rest are unfounded.

In making this filing to correct the record, the CAISO does not seek to draw into this proceeding issues that are fundamentally irrelevant to the matters properly before the Commission. Nor does the CAISO believe that the judgments it made are subject to second-guessing by MMC or even the Commission. Rather, the CAISO seeks to make clear that it

¹ Cabrillo Power I LLC, Motion to Intervene and Protest of MMC Energy North America, LLC, Docket No. ER06-426-000 (filed January 17, 2006) (hereinafter “MMC Protest”).

² See City of Anaheim, California, Opinion No. 483, 113 FERC ¶ 61,091, at P 132 (2005) (concluding that even if the CAISO had been unduly discriminatory in its practices, FPA section 206(a) "requires that, when the Commission finds a rate or practice is unduly discriminatory, it determine[] the just and reasonable rate or practice to be observed thereafter, that is, in the future").

carefully evaluated a complex array of facts in making the judgment to terminate negotiations with MMC, and the MMC Reply presents a serious risk that the Commission could be misled about the nature of the CAISO's decision-making or the considerations that the CAISO ultimately concluded were controlling. We seek to set the record straight on those matters and to make it clear that the CAISO sought to select the resources that would best ensure the reliability of the grid, and thus the availability of electricity to California ratepayers, on the most favorable terms available. The selection of the MMC resources that ultimately proved to present significant questions about cost, availability and efficiency would not have served those purposes.

I. STATEMENT OF ISSUES

The Commission should accept and consider the CAISO's limited answer because good cause exists to permit a response. Specifically, the MMC Reply contains factual errors and unfounded assertions that the CAISO is compelled to correct in order to clarify the record. The Commission routinely permits answers, like the CAISO's, that serve to correct and clarify the record in a proceeding. 18 C.F.R. § 385.213(a)(2); 18 C.F.R. § 385.101(e); see *ISO New England, Inc. v. New England Power Pool*, 106 FERC ¶ 61,280 (2004); *Entergy Services, Inc.*, 105 FERC ¶ 61,318 (2003); *FirstEnergy Solutions Corp. v. PJM Interconnection, L.L.C. et al.*, 103 FERC ¶ 61,119 (2003); *Northern Natural Gas Co.*, 105 FERC ¶ 61,172 (2003); *Old Dominion Electric Cooperative v. PJM Interconnection L.L.C.*, 92 FERC ¶ 61,278 (2000); *American Electric Power Company*, 85 FERC ¶ 61,201 (1998).

II. MOTION FOR LEAVE TO FILE LIMITED ANSWER

The Commission should permit the CAISO to file this limited answer to correct erroneous factual statements and unfounded suppositions in order to clarify the record in this proceeding. While the Commission's procedural rules do not provide for answers to protests, answers or similar filings as a matter of course, the Commission may, for good cause, permit such an answer.³ Good cause exists to permit the CAISO to respond to the MMC Reply because this answer will correct the misapprehensions and mischaracterizations reflected in the MMC Reply.⁴ This limited answer, therefore, will materially aid in the efficient disposition of these proceedings and should be permitted.⁵

III. ANSWER

The CAISO addresses in this answer only MMC's most fundamental errors of fact and relies for its legal position on the arguments presented in its January 30 Opposition and Motion.

³ 18 C.F.R. §§ 385.213(a)(2) and 385.101(e).

⁴ See Northern Natural Gas Co., 105 FERC ¶ 61,172, at P 6 (2003) (accepting rebuttal comments correcting factual errors since the information will assist the Commission in resolving issues in the proceeding); FirstEnergy Solutions Corp. v. PJM Interconnection, L.L.C. et al., 103 FERC ¶ 61,119, at P 33 (2003) (accepting answer to an answer "because it provides additional factual information that will assist us in ruling"); Old Dominion Electric Cooperative v. PJM Interconnection L.L.C., 92 FERC ¶ 61,278, at p. 61,937 (2000) (granting a request for waiver of Rule 213(a)(2) to answer an answer "because the pleading clarifies the arguments and enhances our understanding of the facts").

⁵ ISO New England, Inc. v. New England Power Pool, 106 FERC ¶ 61,280 at P 19 (2004) ("We will accept the answers to protests and answers to answers noted above, given the complex nature of this proceeding and because these answers aided in clarifying certain issues . . ."); Entergy Services, Inc., 105 FERC ¶ 61,318 at P15 (2003) (finding good cause to accept answers, including an answer to an answer, because the answers provided the Commission "information that assisted [in the] decision-making process").

A. Cabrillo I's FOPF Does Not Increase Rates

MMC's claim that Cabrillo I's increase in the Condition 1 Fixed Option Payment Factor (FOPF) will increase rates⁶ is fundamentally incorrect. First, the FOPF is not a cost as MMC suggests. Rather, the FOPF represents the percentage of an RMR unit's fixed costs that will be recovered through the RMR formula rate. Encina Units 4 and 5 have been operating as Condition 2 units. That means that they have had, by definition, an FOPF of 100 percent.⁷ Unit 5 was scheduled to continue operating under Condition 2 in 2006.⁸ As a central element of the Cabrillo I "two-for-one" proposal that the CAISO accepted, Units 4 and 5 are committed to operating under Condition 1 in 2006, at an FOPF of 0.542 or 54%. In effect, the applicable FOPF *decreased* from 100% to 54%. The decrease in the applicable FOPF causes a dramatic decrease in the fixed costs, including capital costs, for Encina Units 4 and 5 charged to ratepayers through the RMR Agreement and, similarly decreases the charges and rates set for in Tables B-1 through B-4 of the Cabrillo Rate Schedule.⁹

⁶ MMC Reply at pp. 10-11.

⁷ All RMR units have a 1.0 FOPF for Condition 2 and a FOPF equal to something less than 1.0 for Condition 1.

⁸ While the Cabrillo I's 2004 Settlement included a Condition 1 FOPF of .30, it was effectively irrelevant because the units operated under Condition 2, with an FOPF of 1. See Cabrillo I LLC, Offer of Settlement, Docket No. ER04-308 (filed December 14, 2004), which expressly addressed a number of issues that had been in contention, but made no express mention of the FOPF; Cabrillo Power I, LLC and Cabrillo II, LLC, Letter Order issued in Docket No. ER06-197-000 (issued December 14, 2005) (accepting RMR rate schedules for Cabrillo I Units 1-3 and 5 for Contract Year 2006).

⁹ The CAISO has already amply addressed MMC's claim that Encina Unit 4 has higher fixed costs than the MMC units. Briefly, the CAISO was already committed to the AFRR of \$17.9 million of Encina 5, operating on Condition 2. The "two-for-one" deal gave the CAISO an additional 299 MW unit for *no* additional AFRR. See CAISO Opposition and Motion at 13-15.

B. Variable Costs Do Not Favor the MMC Units

Without apparent basis, MMC claims that ancillary services and variable charges, will result in higher costs to ratepayers will be higher for Encina Unit 4 than for MMC. The CAISO considered these costs in its evaluation. In recent years, the CAISO has rarely had occasion to use RMR dispatch for ancillary services. Thus, ancillary services proved to be immaterial to the CAISO's analysis. Other variable charges, particularly related to heat rate, are significant and favor Encina Unit 4.

MMC attempts to portray the difference in heat rate between its units and Encina Unit 4 as "moderate" and of no significance when considered in light of Encina Unit 4's slower ramp rate. The facts speak for themselves. The heat rate for the MMC units is approximately 40 percent higher than the heat rate for Encina Unit 4. That translates into substantially higher fuel costs for the MMC units.

MMC notes that its units have black-start and automatic-start capabilities that Encina Units 4 and 5 do not have. In theory, that could result in higher start-up charges for the Cabrillo units than for the MMC units.¹⁰ However, because Cabrillo's proposal included operating both units on Condition 1, the CAISO made the judgment that, in all likelihood, it would not have to pay for many start-ups for either unit because the units would likely already be in the market at times when they were needed for local reliability, and thus the CAISO would not pay for the start-ups at all. In other words, by virtue of the Condition 1 and "two-for-one" terms

¹⁰ The quick-start capability is generally irrelevant because the CAISO has ample quick-start capacity in the area served by these units and because RMR dispatch notices are issued at 5 a.m. of the day before the operating day.

of the deal Cabrillo I offered, the CAISO had the prospect of little or no start-up cost for Unit 4 *and* an unexpected savings in start-up costs on Unit 5, which was already committed to RMR service for 2006 on the assumption it would be a Condition 2 unit. Additionally, the CAISO would not have to pay pre-paid start-up costs for either unit, saving approximately \$1 million.

To be sure, this analysis called for the CAISO to exercise its expert judgment about the California market and the specific units in question, but that is precisely the kind of judgment the CAISO is charged with making. Plainly, as the Commission has acknowledged, neither MMC nor the Commission is better positioned than the CAISO to make such a judgment.¹¹

In a further effort to support its hypothesis that variable costs for Encina Unit 4 would be higher than for the MMC units, MMC speculates that, as a 50+ year old unit, Encina Unit 4 presents cost risks associated with forced outages and the need to acquire replacement power. In fact, the CAISO had a solid track record of performance to consider in deciding whether Encina Unit 4 was able to provide the needed reliability service. As the outage hours data included in the revised tariff sheets no. 118 and 124 show, over the last five years, Encina Unit 4 had an excellent availability factor of 93 percent.¹² By contrast, the CAISO learned only after the MMC units had been tentatively designated RMR that there had not yet even been an

¹¹ It is precisely because such judgments are required in selecting RMR units that the Commission has held it will not second guess the judgments of an ISO. Milford Power Co. LLC, 110 FERC ¶ 61,299, reh'g denied, 112 FERC ¶ 61,154 (2005).

¹² This does not include long-term planned outage hours.

engineering study to evaluate what would be necessary for recommissioning. Again, MMC's unfounded and self-serving speculation cannot justify subjecting the CAISO's informed judgment to second-guessing.

Perhaps the most inexplicable of MMC's contentions is that one of the "costs to the ISO from the conversion of the Encina Unit 5 to Condition 1 will be an inability to call on energy from the unit, or on generation-related ancillary services, which translates to a substantial loss of sales revenue from such energy sales." MMC Reply at 10. The "two-for-one" deal Cabrillo proposed in fact assures that both Encina Units 4 and 5, totaling more than 628 MWs, are fully dispatchable, that is, *always* available to provide the energy and ancillary services the market needs. When the units are doing that in market transactions, they meet the local reliability needs just as surely as when they are dispatched as RMR units. Grid stability depends on the sources and amounts of energy and ancillary services available to the grid, not on whether they bear a "market" or "RMR" label. Moreover, the CAISO's RMR dispatch rights for Condition 1 and Condition 2 units are identical.¹⁴ By virtue of the fact that the Encina Units are operating under Condition 1, however, the costs to the CAISO for RMR go down, without any loss – indeed they achieve a gain – in grid reliability.¹⁵

¹⁴ See RMR Agreement, Article 4.

¹⁵ MMC's claim that the "two-for-one" deal makes no economic sense from Cabrillo I's perspective and suggests some undisclosed deal (MMC Reply at 12-13) inexplicably overlooks that Cabrillo I will now have two units, totaling 628 MW, that can earn revenues from market transactions, along with the RMR Condition I revenues.

C. The CAISO Properly Considered MMC's Capacity and Availability Date

MMC argues that it began discussing RMR status for the MMC units in the Spring of 2005, implying that: i) the CAISO fully understood all along the issues about their availability; ii) the Board was concerned only with availability as of May 1, 2006; and iii) the capacity of the units was never in doubt. The facts are quite different.

Although the Request for Proposals for 2006 RMR service clearly stated that the CAISO sought to conclude agreements with new RMR owners by November 1, 2005,¹⁶ nothing in MMC's bid alerted the CAISO that the units would not be available until some months later.

MMC further contends that the CAISO Board gave the CAISO authority to seek RMR alternatives "only if the May 2006 Required Date could not be met."¹⁷ The Board's resolution plainly refutes that: It authorized the CAISO management to "[s]eek and, in its` discretion, contract with alternative resources under rate, terms and conditions acceptable to Management that will meet local reliability needs *if an acceptable RMR Contract cannot be obtained with the designated RMR resources* in Attachment 1 to the Memorandum."¹⁸ Thus, the CAISO acted well within its authority in terminating contract negotiations with MMC based on the multitude of reasons described in CAISO's Opposition and Motion, including availability of the unit.¹⁹

¹⁶ LARS RFP at 4 available at <http://www.caiso.com/docs/2001/10/15/2001101510100413037.html>.

¹⁷ MMC Reply at p. 7.

¹⁸ See Board Documents, Motion: Approval of the RMR Designations for 2006 (emphasis added), at <http://www.caiso.com/docs/2005/09/02/200509021450326849.html>.

¹⁹ CAISO Motion for Summary Rejection at p. 14-16.

The record is also clear the CAISO put all bidders on notice that it was seeking resources *for the 2006 calendar year* and that Availability Date was a directly relevant criterion in the CAISO's evaluation of resources.²⁰ The assured availability of an RMR unit is one of several clearly articulated criteria the CAISO takes into consideration in selecting an RMR unit. Not only are MMC's units not currently operational, but they have never operated as RMR units, and MMC has never operated the units. In comparison, Encina Unit 4 had a January 1, 2006 Availability Date and a long record of reliable service as an RMR unit. Thus, on the issue of availability, Unit 4 was a demonstrably preferable choice.

D. MMC Placed the Capacity of Its Units in Doubt

MMC disputes that the CAISO ever had reason to doubt that MMC could make 84 MW of capacity available to meet the reliability need in San Diego for which it had been conditionally designated. In fact, after bidding 84 MWs in the LARS process, MMC sought to contract for less than that and, as noted above, disclosed that the engineering studies for recommissioning had not yet been undertaken. Taken together with the CAISO's knowledge of the past operating history of the units, those facts gave the CAISO considerable pause about whether the MMC units would provide the capacity the CAISO needed to meet its responsibility to maintain the reliability of the grid. As the Commission has recognized, that was the CAISO's judgment to make, and it should not be second-guessed,²¹ particularly in the context of this section 205 proceeding concerning the rates for an alternate RMR resource.

²⁰ LARS RFP at cover page and pp. 1-3. Indeed, two of the RMR unit selection criteria expressly mention Availability Date. *Id.* at 9.

²¹ See Milford Power, *supra* at PP 42-43.

IV. CONCLUSION

WHEREFORE, the CAISO respectfully requests that the Commission grant this motion for leave to answer, accept this answer, and deny MMC's Motion to Intervene or, alternatively, deny MMC's Protest and accept the revised RMR Agreement between Cabrillo I and the CAISO effective January 1, 2006.

Dated: February 10, 2006

Respectfully submitted,

/s/ Mary Anne Sullivan
Mary Anne Sullivan
Karin L. Larson
Hogan & Hartson L.L.P.
555 13th Street, NW
Washington, DC 20004

Counsel for the California Independent
System Operator Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of February, 2006 caused to be served a copy of the forgoing Motion for Leave to Answer and Answer upon all parties listed on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

/s/ Karin L. Larson
Karin L. Larson
Hogan & Hartson L.L.P.
555 13th Street, NW
Washington, DC 20004