

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

La Paloma Generating Company, LLC	)	
	)	
v.	)	
	)	Docket No. EL16-88-000
California Independent System	)	
Operator Corporation	)	

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

The California Independent System Operator Corporation (CAISO) hereby moves for leave to answer, and submits its answer, to the July, 18, 2016 answer (La Paloma Answer) of La Paloma Generating Company, LLC (La Paloma) to the CAISO’s answer to La Paloma’s Complaint in this proceeding (CAISO Answer).<sup>1</sup> The CAISO files this answer to identify errors in the factual and legal contentions of the La Paloma Answer. The Commission should reject or disregard the La Paloma Answer.

**I. BACKGROUND**

As the CAISO explained in the CAISO Answer, the CAISO recently rejected several generator unit outage requests that La Paloma submitted for its generating

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<sup>1</sup> The CAISO files this answer pursuant to Rules 212 and 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213. The CAISO requests waiver of Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2), to permit it to make an answer to the protests. Good cause for this waiver exists here because the answer will aid the Commission in understanding the issues in this proceeding, provide additional information to assist the Commission in the decision-making process, and help to ensure a complete and accurate record in this case. *See, e.g., Equitrans, L.P.*, 134 FERC ¶ 61,250, at P 6 (2011); *California Independent System Operator Corp.*, 132 FERC ¶ 61,023, at P 16 (2010); *Xcel Energy Services, Inc.*, 124 FERC ¶ 61,011, at P 20 (2008).

facilities. La Paloma's Complaint argued that the CAISO's rejection of these outages reflects CAISO reliance on the La Paloma facility for grid reliability. La Paloma alleged that these outage rejections, combined with the CAISO's failure to provide La Paloma with a means for appropriate cost recovery for maintaining its units' operation, would constitute a regulatory taking in violation of the Fifth Amendment of the Constitution.<sup>2</sup> La Paloma requested that the Commission direct the CAISO to negotiate an annual reliability must-run or similar contract with La Paloma to provide compensation for such denials.<sup>3</sup>

In the CAISO Answer, submitted on July 7, 2016, the CAISO explained that the Commission should dismiss the Complaint because the CAISO's denial of La Paloma's outage requests did not constitute a regulatory taking. The CAISO further explained that even if La Paloma had established the existence of a regulatory taking—which it had not—there would be no basis to grant its requested relief. Granting an annual capacity contract bears no relationship to the alleged harm from denying a requested five-month outage.

On July 18, 2016, La Paloma sought leave to file and filed an answer. The CAISO responds to the La Paloma Answer below.

## **II. ANSWER**

### **A. The CAISO Has Not Found a Need for the La Paloma Units that Would Justify a Reliability Must-Run Contract**

Sections 41.1 and 41.2 of the CAISO tariff authorize the CAISO to enter a reliability must-run contract with a unit only after technical studies show that the unit is

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<sup>2</sup> La Paloma Complaint at 1.

<sup>3</sup> *Id.* at 2.

required to ensure the reliability of the CAISO grid. No studies conducted by the CAISO have shown a need for continued operation of La Paloma. This fact is undisputed.

La Paloma nonetheless contends that the CAISO has conceded the need for the unit. La Paloma argues that despite the requirements of the Commission's rules that the CAISO admit or deny each material allegation of the Complaint, "CAISO does not state that it has no present need and no foreseeable future need for the generating units at the La Paloma facility."<sup>4</sup> The CAISO made no such explicit statement because none was necessary. In its Complaint, La Paloma made no blanket assertion of a reliability need for its units that required a denial from the CAISO. Rather, La Paloma merely argued that "the CAISO's recent denial of outage tickets for every one of the units at the Facility *indicates to La Paloma* that CAISO requires and desires the units' continued operations."<sup>5</sup>

The CAISO did, however, explain in the CAISO Answer that the outage denials were *not* indicative of a continued need for La Paloma's units. With regard to three of the outages at issue, the CAISO explained that it denied the outages because they were economic outages unauthorized by the tariff—a reason unrelated to need for the units.<sup>6</sup>

With regard to the fourth outage—a maintenance outage—La Paloma asserts that the CAISO acknowledged the need for the unit when it explained it cancelled the

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<sup>4</sup> La Paloma Answer at 2-3, 6.

<sup>5</sup> Complaint at 10.

<sup>6</sup> La Paloma also contends that, if the CAISO did not have a need for these units, it could have cooperated with La Paloma to seek a solution rather than simply denying the outages because the tariff does not discuss economic outages. This, of course, proves nothing about the need for the units.

outage because an impending heat wave made the change in approval status “required to secure the efficient use and reliable operation of the CAISO Controlled Grid.”<sup>7</sup> La Paloma neglects to note that the CAISO explained that it cancelled that outage as part of a broader cancellation of discretionary outages due to the heat wave.<sup>8</sup> That cancellation was fully within the CAISO’s tariff authority.<sup>9</sup> La Paloma’s assertion that the rejection demonstrated a need for its unit that would justify an annual reliability must-run contract would thus mean that *every other unit* whose outage the CAISO cancelled would also be needed and would qualify for an annual reliability must-run contract. There is no basis for such a result.

The CAISO’s mere conclusion that proceeding with all scheduled outages during that period would interfere with “the efficient use and reliable operation” of the grid is insufficient to satisfy the basic requirements for a reliability must-run contract under tariff sections 41.1 and 41.2. To cancel the outages, the CAISO was not required to—and did not—conduct a technical study to determine whether La Paloma and the other units were required to ensure the reliability of the CAISO grid. The CAISO’s cancellation of these outages does not support a conclusion that La Paloma (or any other affected unit) merits a reliability must-run contract.

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<sup>7</sup> La Paloma Answer at 3, citing CAISO Answer at 11 n.20. See also *id.* at 4, 6, 9. La Paloma also appears to believe that, under the Commission’s rules, the CAISO’s statements regarding the impact of the inoperability of the Aliso Canyon natural gas storage facility on gas service to Southern California necessitated a denial of the need for La Paloma’s units. *Id.* at 4. The CAISO is unaware of a regulatory need for an answering party to respond to a complainant’s unstated inference from the answering party’s public statements outside the docket.

<sup>8</sup> CAISO Answer at 3.

<sup>9</sup> *Id.* at 11 n.20 (citing CAISO tariff section 9.3.7).

**B. La Paloma Has Made No Showing that It Meets the Criteria for a Reliability Must-Run Contract**

Recognizing that prior technical studies conducted by the CAISO did not conclude that La Paloma's units merited reliability must-run status, La Paloma asserts that the CAISO cannot rely upon such studies because it did not assume in the studies that La Paloma was at risk of retirement.<sup>10</sup> There was no reason to make such an assumption, however. The fact that a unit may face such risk is irrelevant to whether it is eligible for a reliability must-run designation. The Local Capacity Technical Study shows whether or not a unit is needed for local reliability. In La Paloma's case, the study showed that it was not needed for local reliability. That La Paloma may or may not be a risk-of-retirement unit does not, and cannot, change the findings of that study.

La Paloma contradicts itself in arguing that it could not have sought a Capacity Procurement Mechanism designation because it did not know that a lack of resource adequacy contracts would put it at risk for retirement<sup>11</sup> but then asserting it would have expected the CAISO to have assumed it to be at risk for retirement in the CAISO studies. Contrary to La Paloma's contention, the tariff does not "afford[ ] the RMR agreement option" as a solution for La Paloma's failure to obtain resource adequacy commitments. The Risk-of-Retirement Capacity Procurement Mechanism potentially serves that purpose. Under section 43.2.6, a resource need not wait until all resource adequacy possibilities are exhausted prior to seeking a Risk-of-Retirement Capacity Procurement Mechanism designation. It merely must not have obtained resource adequacy contracts and must attest to the fact that in the absence of such contracts it

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<sup>10</sup> *Id.* at 14.

<sup>11</sup> *Id.*

will retire absent a capacity procurement mechanism designation. If resource adequacy contracts subsequently materialize, the CAISO simply will not issue the designation, or if the resource adequacy commitment occurs subsequent to the designation, rescind it.

### **C. La Paloma Has Not Rehabilitated Its Takings Argument**

Having failed to establish a regulatory taking in its Complaint, La Paloma now makes a convoluted effort to reframe its argument. La Paloma's revised argument has even less of a legal basis than its initial argument. La Paloma now asserts that the takings argument is predicated on the consequences of a Commission failure to act.<sup>12</sup>

This was not the argument in the Complaint. There, La Paloma stated that "CAISO has offered no means for La Paloma to take the requested outages. This forms the basis for its takings claim."<sup>13</sup> Although the La Paloma Answer quotes statements in the Complaint that refer to the consequences of a Commission failure to act, it is only to suggest that the Commission can avoid the taking by requiring the CAISO to provide compensation.

Nonetheless, the CAISO responded to, and refuted, La Paloma's arguments assuming that the Commission could be deemed to be engaged in the taking.<sup>14</sup>

La Paloma's reframed argument tries to rely on a novel "passive takings" theory. La Paloma now claims that the Commission will engage in a taking not by its actions, but rather if it "does not act" to prevent the CAISO from "caus[ing] economic injury to La Paloma, and [interfering] with La Paloma's investment-back expectations."<sup>15</sup> The

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<sup>12</sup> La Paloma Answer at 16.

<sup>13</sup> Complaint at 9 (emphasis added).

<sup>14</sup> See CAISO Answer at 6-13 demonstrating the lack of a taking even if the actions were deemed to be Commission actions.

<sup>15</sup> La Paloma Answer at 18.

CAISO is not aware of any case in which a taking was found to arise because of a governmental failure to act, and La Paloma has identified no case law in support of the notion implicit in its “passive takings” claim that the Fifth Amendment of the Constitution imposes an affirmative burden on the government to ensure that businesses achieve their investment-backed expectations. As La Paloma itself noted, “A regulatory taking occurs when property loses all or part of its value *as a result of a government undertaking*.”<sup>16</sup> Nowhere in the Complaint or the La Paloma Answer has La Paloma pointed to any action by the Commission that purportedly interfered with the value of its property.

The CAISO has acted pursuant to its tariff. That the Commission has found the CAISO tariff to be just and reasonable means that action consistent with the tariff is not an unjustified taking: “In the context of setting rates, terms, and conditions for jurisdictional service, what is found to be just and reasonable is not a taking.”<sup>17</sup> La Paloma claims it does not matter that the CAISO’s actions are pursuant to a just and reasonable tariff because “the Commission has not given CAISO unfettered discretion to decide that La Paloma must incur additional costs it otherwise would have avoided,

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<sup>16</sup> La Paloma Complaint at 17 (emphasis added). See *Penn Central*, 438 U.S. at 123 (“[T]his Court has recognized that the ‘Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,’ . . .,” quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>17</sup> *Midwest Indep. Trans. Sys. Operator, Inc.*, 109 FERC ¶ 61,157, at P 143 (2004), citing *FPC v. Texaco Inc., et al.*, 417 U.S. 380, 391-92 (1974) (“All that is protected against, in a constitutional sense, is that the rates being fixed by the Commission be higher than a confiscatory level.”); *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968) (“[A]ny rate selected by the Commission from the broad zone of reasonableness permitted by the [Natural Gas] Act cannot properly be attacked as confiscatory.”); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600-01 (1944) (“The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid.”).

without providing adequate compensation.”<sup>18</sup> La Paloma is correct that the tariff does not give the CAISO “unfettered discretion to decide that La Paloma must incur additional costs it otherwise would have avoided.” It does, however give the CAISO authority to approve or disapprove outages, and the Commission has no statutory or constitutional duty to police the economic consequences of that authority absent an allegation that the authority is unjust or unreasonable—an allegation that La Paloma has not made.

**D. The Need to Address Risk-of-Retirement Generation Does Not Support La Paloma’s Complaint**

La Paloma claims that the CAISO has recognized that additional tariff authority would assist in retaining needed but uneconomic generation and has pursued such authority.<sup>19</sup> The CAISO committed in its Answer to Protests in this docket, filed July 20, 2016, to a stakeholder process to address this issue. The CAISO also stated in its July 20 Answer to Protests that it did not object to requests for a Commission-directed technical conference on related issues, so long as the conference is conducted in a new docket. None of this, however, supports La Paloma’s arguments that it has been, or will be, subject to a regulatory taking or that it is entitled to a reliability must-run contract.

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<sup>18</sup> *Id.* La Paloma asserts that the CAISO’s assertion that the tariff is just and reasonable is belied by an acknowledgement that reform is needed. *Id.* at n. 67. A recognition that reform is needed now, however, is not an admission that the existing tariff is not just and reasonable.

<sup>19</sup> La Paloma Answer at 9-10.



### III. CONCLUSION

For the reasons stated in the CAISO's Answer and above, the Commission should deny La Paloma's Complaint in its entirety.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that I have served the foregoing document upon the parties listed on the official service list in the captioned proceedings, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Folsom, California this 28<sup>th</sup> day of July, 2016.

/s/ Grace Clark  
Grace Clark