

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

La Paloma Generating Company, LLC

v.

California Independent System
Operator Corporation

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Docket No. EL16-88-000

**ANSWER OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR
CORPORATION TO COMPLAINT**

The California Independent System Operator Corporation (CAISO) hereby submits its answer to the complaint filed in this proceeding by La Paloma Generating Company, LLC (“La Paloma”) on June 17, 2016.

Under its tariff authority, the CAISO recently rejected several generator unit outage requests La Paloma submitted for its generating facility. La Paloma argues that the CAISO’s rejection of these outages reflects CAISO reliance on the La Paloma facility for grid reliability. La Paloma alleges 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 constitutes a regulatory taking in violation of the Fifth Amendment of the Constitution.¹ La Paloma requests that the Commission direct the CAISO to negotiate an annual reliability must-run contact with it to provide compensation.²

¹ La Paloma Complaint at 1.

² *Id.* at 2.

The Commission should dismiss the complaint. The CAISO's denial of La Paloma's outage requests without providing additional compensation for La Paloma does not constitute a regulatory taking. First, the CAISO is not a governmental entity, and its actions are not government undertakings. Second, even if the CAISO's actions were deemed to be those of the Commission, there would be no *per se* taking because the outage denials do not deprive La Paloma of all economic benefit of tangible property. Third, even if the CAISO's actions were deemed to be those of the Commission, there would be no regulatory taking because the outage denials do not deprive La Paloma of distinct investment-backed expectations. Having agreed to the rules for participating in a competitive market, La Paloma cannot assert any entitlement to profitability. Moreover, denial of the outages does *not* require La Paloma's facility to remain in service or to bid into the CAISO markets. La Paloma was, and continues to be, free not to bid its non-resource adequacy capacity into the CAISO markets, and it is also free to retire its facility on either a temporary or permanent basis. Fourth, the Commission has found the market rules to which La Paloma agreed to be just and reasonable. There is no impermissible taking under these circumstances.

Even if La Paloma had established the existence of a regulatory taking—which it has 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.

I. BACKGROUND

A. The La Paloma Facility and its Economic Circumstances

The La Paloma generating facility, with approximately 1,000 megawatts of maximum output, is a four-unit combined cycle facility located in McKittrick, California.³ The La Paloma facility began commercial operations in 2003. Of the facility's total capacity, 42 megawatts of capacity from unit two currently are under a resource adequacy contract. La Paloma states that it has not recovered, and does not foresee recovering, sufficient revenue from the CAISO market to remain economic absent contracts for more of its capacity. As a result, La Paloma asserts that it is on the verge of retiring the facility from service.

B. Recent Outage Requests for the La Paloma Facility

In March 2016, La Paloma submitted an outage request for unit two from June 18, 2016, through June 26, 2016. La Paloma described the outage as: "NERC GADS code- 5272 "A" GT boroscope inspection required every 8,000 EOH by OEM." The CAISO initially accepted the outage on unit two, but subsequently denied the outage because an impending heat wave led the CAISO to declare, on June 15, a restricted maintenance outage event for June 20 and June 21, and accordingly the CAISO cancelled all discretionary outages on June 17.⁴ Importantly, for unit two, the CAISO never indicated that La Paloma could not reschedule the outage for a different time. La

³ The La Paloma generating facility and its four constituent generating units are owned by La Paloma Generating Company, LLC. Throughout this answer, general use of the term "La Paloma" refers to the corporate entity at issue in this matter, whereas a reference to the facility, the plant, unit one, unit two, etc., refers to the generating facility or the individual units at issue in this matter.

⁴ See CAISO Tariff, Section 9.3.7.

Paloma has since rescheduled the outage for unit two to conduct the boroscope inspection and to address a condenser expansion joint issue. The CAISO accepted that outage, thus rendering issues related to unit two moot.

On May 13, 2016, La Paloma submitted a maintenance outage request for units one, three, and four. The proposed outage was for the dates July 1, 2016, through November 30, 2016. La Paloma described the maintenance outage as: “GADS Code 9160 – ‘other economic problems.’ No RA procured from unit, and operation expected to be uneconomic with Path 26 internal transfer reservations and online constraints.” On June 6, 2016, the CAISO denied the outage request on units one, three, and four because La Paloma requested it for economic reasons, which is not consistent with the CAISO tariff.

II. ANSWER

A. THE CAISO’S DENIAL OF OUTAGES WITHOUT THE GRANT OF A COMPENSATORY CONTACT DOES NOT CONSTITUTE AN IMPERMISSIBLE TAKING

As the Commission has explained, “A ‘regulatory takings’ analysis under Fifth Amendment precedent involves determining whether a ‘categorical’ or *per se* taking has occurred, and, if it has not, whether a case-specific weighing of the factors as described in *Penn Central Transportation Co. v. City of New York* demonstrates a taking.”⁵ In the case of La Paloma, the answer in both cases is no.

1. The CAISO’s Actions Cannot Be a Taking Because the CAISO Is Not a Governmental Entity and Is Not Authorized by a Governmental Entity to Take Property.

⁵ *N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,075 at P 64 (2015), *citing* 438 U.S. 104, 124 (1978).

As an initial matter, the Fifth Amendment regulates the government, not a private entity. As La Paloma itself states, “A regulatory taking occurs when property loses all or part of its value *as a result of a government undertaking*.”⁶ The CAISO’s actions are not governmental undertakings.

The CAISO is aware of 14 instances in which parties have presented regulatory taking arguments to the Commission. In every instance but two, the allegation was that the *Commission’s* actions constituted, or would constitute, a taking.⁷ In the two that claimed takings based on utility action, the Commission did not rule on the takings issue.⁸ There is accordingly no Commission precedent that supports a Commission-finding that the CAISO, a non-governmental entity, has engaged in a taking. Because the CAISO’s actions in question are not actions of the Commission, and thus are not governmental, there can be no taking.

⁶ 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).

⁷ *N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,075 (2015) (approving tariff); *Cal. Indep. Sys. Operator Corp.* 142 FERC ¶ 61,016 (2013) (declaratory ruling on contract rights); *Credit Reforms in Organized Wholesale Electric Markets*, 134 FERC ¶ 61,126 (2011) (rulemaking); *ISO New England Inc.*, 135 FERC ¶ 61,029 (2011) (approving tariff); *ISO New England Inc.*, 121 FERC ¶ 61,097 (2007) (approving tariff); *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076 (2007) (approving tariff); *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274 (2006) (approving tariff); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 112 FERC ¶ 61,176 (2005) (inclusion of capital costs in cost recovery filing); *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,157 (2004) (approving tariff); *PJM Interconnection, L.L.C.* 102 FERC ¶ 61,277 (2003) (approving tariff); *Cal. Indep. Sys. Operator Corp.*, 91 FERC ¶ 61,205 (2000) (approving tariff); *City of Tacoma, Wash.*, 84 FERC ¶ 61,107 (1998) (licensing). In none of these cases did the Commission find a taking.

⁸ In *Hudson Transmission Partners, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,156 (2013), the Commission did not reach the takings issue. In *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,057 (2014), parties argued that the level of compensation constituted a taking. The Commission provided relief without addressing the takings issue.

2. Even if the Actions at Issue Were Deemed Commission Actions, La Paloma Would Not Have Shown a *Per Se* Taking.

The Supreme Court has explained that there are two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. “First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. . . . A second categorical rule applies to regulations that completely deprive an owner of ‘*all* economically beneficial us[*e*]’ of her property.”⁹ La Paloma does not claim to meet either of these tests.

Indeed, it would not be possible for La Paloma to establish a *per se* taking. As the Commission has recognized, *per se* takings apply only to tangible property, *i.e.*, real property or, possibly, personal property.¹⁰ The right to earn a profit is not such a right. The CAISO has not taken a physical property right from La Paloma.

Further, La Paloma has not been denied all beneficial use of its property. In *Lucas*, the Supreme Court established a “total taking” threshold in which a regulatory taking claimant must prove that government action “has been called upon to sacrifice *all* economically beneficial uses in the name of the common good.”¹¹ The mere fact that La Paloma is not today making what it considers sufficient profits in the CAISO’s day-

⁹ *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, (1982) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original)).

¹⁰ *N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,075 at P 64 (citing *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1151-52 (Fed. Cir. 2014) and *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007)).

¹¹ 505 U.S. 1003, 1019 (1992) (emphasis in original). See also *Palazzolo v. Rhode Island*, 533 U.S. 606, 630-31 (2001) (affirming Rhode Island Supreme Court determination that no taking occurred because “all economically beneficial use was not deprived” as a result of the challenged regulation).

ahead and real-time markets does not mean that it will be unable to do so in the future; nor does that prevent La Paloma from entering into bilateral contracts.

Alternatively, the CAISO tariff provides a path for La Paloma to seek a capacity arrangement with the CAISO. Under section 43.2.6 of the CAISO tariff, the CAISO may grant, upon request of the resource owner, a long-term capacity designation to a resource at risk of retirement during the current resource adequacy compliance year if “CAISO technical assessments project that the resource will be needed for reliability purposes, either for its locational or operational characteristics, by the end of the calendar year following the current RA Compliance Year.” If La Paloma is facing economic challenges, an option under the CAISO tariff would be for La Paloma to pursue its rights under section 43.2.6. Instead of filing a complaint, La Paloma should have availed itself of this option under the CAISO tariff.

In addition, La Paloma could seek approval from the California Public Utilities Commission for a “cold lay-up” of its units. Calpine Corporation is seeking such relief for the Sutter Energy Center for at least the balance of 2016. The Sutter plant is of a similar vintage and technology type to the La Paloma facility, and its owners have claimed economic issues similar to those claimed by La Paloma. As far as the CAISO knows, there is nothing to prevent La Paloma from seeking similar treatment, rather than seeking a temporary solution through misuse of the CAISO outage management system. Seeking a planned outage for reasons not allowed in the CAISO tariff or business practice manual is not the appropriate avenue to temporarily take a unit out of service for commercial reasons.

Finally, La Paloma could retire its unit altogether and devote the property to another use. An action does not become a taking merely because it deprives an owner of the best use of his or her property.¹² Courts have allowed substantial diminution in value without finding a taking.¹³

3. Even if the Actions at Issue Were Deemed Commission Actions, La Paloma Would Not Have Shown a Taking under *Penn Central*.

As La Paloma recognizes, *Penn Central* requires consideration of: “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;” and “the character of the governmental action.”¹⁴ As to the first, La Paloma’s only argument is that it will experience unexpected losses. But that is part of a competitive market. La Paloma understood that when it decided to employ market based rates, its profitability would be determined by the market. It also voluntarily signed a participating generator agreement, under which it agreed to comply with the CAISO tariff.¹⁵ As discussed below, that tariff does not provide for outages for economic reasons. An investor that enters a competitive market cannot not reasonably expect a non-market bailout if market conditions do not materialize as hoped.

¹² See, e.g., *Goldblatt v. Town of Hempstead*, N.Y., 369 U.S. 590, 592 (1962).

¹³ See, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (no taking where regulation still allowed property owner to mine 50 percent of the value of its coal).

¹⁴ La Paloma Complaint at 17, citing *Penn Central*, 438 U.S. at 124. See also, N.Y. Indep. Sys. Operator, Inc., 151 FERC ¶ 61,075 at P 65.

¹⁵ La Paloma does not argue that the taking involves its right to put its units on an outage at will. There would, however, be no merit to that argument because La Paloma surrendered such a right in agreeing to abide by the tariff.

As for the character of the governmental action, La Paloma argues that the Commission has recognized that, if an RTO or ISO desires a generating unit to remain in operation when the generator has stated its intent to take the unit out of service, the generator must be compensated.¹⁶ The CAISO has not prevented La Paloma from taking the unit out of service. The CAISO has not required La Paloma to bid its non-resource adequacy capacity into the market.¹⁷ It has merely rejected maintenance outage requests that are not sanctioned by the CAISO tariff. Under the CAISO tariff, La Paloma is free to bid into—or not bid into—the CAISO markets. The decision is solely La Paloma's. La Paloma is able to determine the price at which it bids into the CAISO markets consistent with its market based rate authority. The decision is solely La Paloma's. The CAISO does not set the prices in its markets. The market determines the prices.

If the CAISO is to administer its markets in an efficient manner, however, it must enforce certain market rules regarding the manner in which generators make themselves available to the market. The rules are the CAISO tariff. Although the tariff provides La Paloma wide discretion in how it participates in the market, it does not allow generators such as La Paloma to remove themselves from service by seeking an outage except as permitted by the tariff.

¹⁶ La Paloma Complaint at 18, citing *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at P 42 (2004).

¹⁷ The CASIO CAISO acknowledges that during any period La Paloma chooses not to submit bids the facility still would be subject to potential exceptional dispatch instructions. Receipt of such an exceptional dispatch, however, would trigger a monthly capacity procurement mechanism designation.

4. Even if the Actions at Issue Were Deemed Commission Actions, La Paloma Would Not Have Shown a Taking Because the Actions Are Consistent with the CAISO Tariff

The Commission has held that, “in the context of setting rates, terms, and conditions for jurisdictional service, what is found to be just and reasonable is not a taking.”¹⁸ Because the CAISO’s denial of La Paloma’s maintenance outage requests was required by the CAISO’s Commission-approved tariff, such actions cannot constitute a taking.

Quite simply, the CAISO tariff does not authorize maintenance outages for economic reasons. Section nine of the CAISO tariff sets forth the CAISO’s obligations and authority regarding both generation and transmission outages. It provides only for maintenance and forced outages. With respect to generation maintenance outages (*i.e.*, the type of outages at issue here), the tariff grants the CAISO broad authority to determine whether and when generators may take maintenance outages, permits the CAISO to cancel already-approved outages, and even requires market participants to reconfirm an approved outage immediately before it is planned to start.

Section 9.3.2 establishes the basic principle that a “Scheduling Coordinator shall not take . . . Generating Units of Participating Generators out of service for the purposes of planned maintenance or for new construction or other work . . . except as approved

¹⁸ *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.”).

by the CAISO”¹⁹ The CAISO tariff defines a Maintenance Outage as “[a] period of time during which an Operator . . . (ii) limits the capability of or takes its Generating Unit or System Unit out of service for the purposes of carrying out routine planned maintenance or for the purposes of new construction work.”

Section 5.3.1 of the Business Practice Manual for Outage Management requires that Participating Generators requesting outages must state the “nature of the work to be performed.” The BPM specifies the various nature of work categories, and they all pertain to physical/operational reasons.

The CAISO rejected the maintenance outages requested on units one, three, and four because La Paloma stated that it requested them purely for commercial reasons, rather than for maintenance, new construction, or other work as the tariff requires. La Paloma’s outage request for units one, three, and four did not specify the “nature of the work to be performed” or comply with a specified “nature of work” category. The CAISO could not knowingly accept a maintenance outage request that on its face does not meet the definition of such outages under the CAISO tariff.²⁰

¹⁹ CAISO Tariff, Section 9.3.2.

²⁰ Even after the CAISO approves a maintenance outage, section 9.3.7 provides the CAISO specific tariff authority to cancel a previously approved maintenance outage “if, in the opinion of the CAISO Outage Coordination Office, the requested Maintenance Outage or change is required to secure the efficient use and reliable operation of the CAISO Controlled Grid.” The tariff grants the generator the right to request changes to the cancellation notice but section 9.3.7.2 makes clear that where the parties “cannot agree on acceptable alternative conditions . . . , the CAISO Outage Coordination Office determination shall be final.” Indeed, the CAISO cancelled unit two’s outage pursuant to its authority under tariff section 9.3.7. However, La Paloma rescheduled unit two’s maintenance outage, which renders issues related to unit two moot.

As the complainant in a section 206 complaint, La Paloma bears the burden of proof in this matter.²¹ Yet the complaint makes no showing either that (a) that CAISO's actions were inconsistent with the Commission-approved tariff; or (b) that the CAISO's outage approval authority, in effect in some form since the CAISO began operations in 1998, is no longer just and reasonable.²²

Instead, La Paloma bases its complaint solely on its claim that it suffered adverse consequences from the denied outages. Even if one were to assume that there is a causal relationship between the claimed harm and the denied outages, such harm alone could not demonstrate a regulatory taking. Contrary to La Paloma's view, no participant in a competitive market is guaranteed any specific outcome.²³ Instead, market participants are merely owed the opportunity to pursue their commercial interests within a market structure that follows the rules approved by the Commission in accordance with the Federal Power Act. Nothing about the CAISO's denial of the outage requests suggests La Paloma was denied that opportunity. The Commission has recognized that to coordinate grid operations and respond to dynamic market and system conditions,

²¹ E.g., *Ameren Services Co. v. Midwest Indep. Transmission Sys. Operator Inc.*, 124 FERC ¶ 61,173, at P 9 (2008).

²² The CAISO acknowledges that prior Commission approval of the outage provisions in the CAISO tariff would not necessarily bar La Paloma's section 206 complaint if it could demonstrate that proper application of the tariff nevertheless produced an unjust and unreasonable outcome. See, e.g., *NSTAR Elec. Co. v. ISO New England Inc.*, 125 FERC ¶ 61,187, P 25 (2008) (“[C]omplaints can arise in circumstances where the Commission may have previously approved an action as just and reasonable, which then later results in unjust and unreasonable behavior due to a variety of subsequent factors, including, but not limited to, changes in market conditions and erroneous applications of or changes in Commission policy . . .”).

²³ La Paloma Complaint, at 23 (“La Paloma will be forced involuntarily to operate . . . without any guarantee of appropriate cost recovery”) (emphasis added).

the CAISO needs to have the broad authority and discretion it currently holds over planned generator and transmission outages.²⁴ Because the CAISO acted within existing tariff authority and that tariff authority remains just and reasonable, the Commission must deny La Paloma's complaint.

B. THE REQUESTED RELIEF BEARS NO RELATIONSHIP TO THE ALLEGED HARM

Assuming, *arguendo*, the CAISO improperly denied the requested outages on the La Paloma facility and doing so constituted a regulatory taking, La Paloma's requested relief of an annual capacity contract bears no relationship to the alleged harm. There is no logic in or tariff basis for the assertion that denial of a five-month outage request entitles La Paloma to an annual capacity contract. The CAISO tariff provides for capacity contracts under certain circumstances when units are committed or dispatched out-of-market or the CAISO needs non-resource adequacy capacity to respond to a capacity procurement mechanism significant event. Even then, exceptional dispatches of non-resource adequacy capacity only result in 30-day (for system reliability needs) and 60-day (for non-system reliability needs) capacity procurement mechanism designations.²⁵ Capacity procurement mechanism significant event designations are only for 30 days, with a potential 60-day rollover, if the significant event is expected to last more than 30 days.²⁶ The CAISO did not exceptionally

²⁴ *Cal. Indep. Sys. Operator Corp.*, 148 FERC ¶ 61168, at P 30 (2014) (recognizing that improvements to the CAISO outage reporting processes "should enhance CAISO's ability to reliably operate its system"); *Cal. Indep. Sys. Operator Corp.*, 127 FERC ¶ 61,298, at P 93 (2009) (accepting the premise that outage reporting requirements are "designed to assist the CAISO in ensuring the reliability of the grid").

²⁵ CAISO Tariff, Section 43.3.6.

²⁶ CAISO Tariff, Section 43.3.5.

dispatch La Paloma, it merely denied an outage request that the tariff and business practice manual did not authorize. La Paloma fails to justify why it should receive an annual capacity contract when it would only have received a 30-day capacity payment had it been exceptionally dispatched or designated in response to a significant event. The CAISO stresses that it has not needed either (1) to exceptionally dispatch La Paloma to meet a reliability need or (2) to declare a significant event that would have required designating La Paloma as capacity resource.

La Paloma suggests that an annual reliability must-run agreement would constitute appropriate compensation, but the tariff has specific provisions for such agreements. The CAISO conducts local capacity technical studies and other technical studies, as necessary, to ensure compliance with reliability criteria. Reliability must-run designations must be based on results of such technical studies.²⁷ The CAISO's most recent local capacity technical study did not show a need for the CAISO to execute a reliability must-run agreement with La Paloma; nor has any other study. La Paloma fails to show that it is entitled to a reliability must-run contract under the tariff or that such a contract would be appropriate.

III. RULE 213 STATEMENTS

1. The CAISO admits the facts alleged in the La Paloma complaint regarding its communications with La Paloma and its treatment of outage requests.
2. The CAISO has no knowledge of the facts alleged in the La Paloma complaint regarding La Paloma's financial circumstances.

²⁷ CAISO Tariff, Section 41.3; Business Practice Manual for Reliability Requirements, section 11.2.

3. The CAISO denies that its actions described in the La Paloma complaint constitute an impermissible taking and that a failure to provide La Paloma with a reliability must-run contract would constitute an impermissible taking.

4. The CAISO denies any allegation or implication that its actions described in the La Paloma complaint are inconsistent with its tariff.

IV. COMMUNICATIONS

Communications regarding this filing should be addressed to the following. The individual identified with an asterisk is the person whose name should be placed on the official service list established by the Secretary with respect to this submittal:

Anna A. McKenna
Assistant General Counsel
David Zlotlow*
Senior Counsel

The California Independent
System Operator Corporation
250 Outcropping Way
Folsom, CA 95630
Tel: (916) 351-4400
Fax: (916) 608-7222
E-mail: amckenna@caiso.com
dzlotlow@caiso.com

V. CONCLUSION

For the foregoing reasons, the Commission should deny La Paloma's complaint in its entirety.

Respectfully submitted,

/s/ David S. Zlotlow

Roger E. Collanton

General Counsel

Anthony Ivancovich

Deputy General Counsel

Anna A. McKenna

Assistant General Counsel

David S. Zlotlow

Senior Counsel

California Independent System

Operator Corporation

250 Outcropping Way

Folsom, CA 95630

Tel: (916) 351-4400

Fax: (916) 608-7222

dzlotlow@caiso.com

Counsel for the California Independent System

Operator Corporation

Dated: July 7, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon the parties listed on the official service list in the captioned proceeding, 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 Washington, DC, this 7th day of July, 2016.

/s/ Daniel Klein

Daniel Klein