

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

California Independent System Operator Corporation, <i>et al.</i>)	
v.)	Docket No. EL02-15-000
Cabrillo Power I LLC, <i>et al.</i>)	
)	
California Independent System Operator Corporation, <i>et al.</i>)	
v.)	Docket No. EL03-22-000
Cabrillo Power I LLC, <i>et al.</i>)	

**COMPLAINANTS' REPLY
TO CABRILLO'S ANSWER**

The California Independent System Operator Corporation (“CAISO”), Pacific Gas and Electric Company (“PG&E”), San Diego Gas & Electric Company (SDG&E), Southern California Edison Company (“SCE”), the California Public Utilities Commission (“CPUC”), and the California Electricity Oversight Board (“CEOB”) (together, the “Complainants”) hereby reply to Cabrillo’s Answer to the Complainants’ Motion to Defer Action and Partial Motion to Dismiss (“September 7 Cabrillo Answer”). As described below, that answer rests on a fundamental error: that a prior settlement in Docket No. ER02-1264-000 resolved all refund claims against Cabrillo Power I, LLC (“Cabrillo”) in these dockets.¹

¹ While the Commission’s rules do not provide for replies to answers, such replies will be accepted when they assist the Commission in its decision-making process. *See, e.g., Trunkline Gas Co. LLC*, 116 FERC ¶ 61,106 (2006). Because this reply describes a clear and dispositive flaw in Cabrillo’s position, it will, Complainants believe, provide such assistance to the Commission.

Complainants' August 25, 2006 Motion to Defer Action requested that the Commission defer action on remand in these dockets to allow the parties to discuss settlement.² Complainants also requested that the complaint be dismissed with prejudice as to LSP South Bay, LLC ("South Bay"), on the ground that a prior settlement among South Bay, SDG&E, and the CAISO had resolved these proceedings as to South Bay.³

In its answer, Cabrillo contends, as it has previously argued in a pleading filed July 25, that:

The Complainants and Cabrillo already have expressly agreed, in a Commission-approved settlement, that if the Complainants ever prevail on the merits of their arguments in the instant case, they can only implement a rate reduction for Cabrillo on a *prospective* basis through filing *a new complaint* -- not through the case at bar. Therefore, like LSP South Bay, Cabrillo has no potential refund liability in this proceeding and should also be dismissed.⁴

The rationale underlying this assertion was stated -- with an abundance of rhetorical flourish -- in the July 25 Cabrillo Answer. Referring back to the settlement agreement filed December 31, 2002 in Docket No. ER02-1264-000 (the "ER02-1264 Settlement"), Cabrillo there quoted the following language from Article II, Section A, ¶ 5:

The Parties shall not propose, pursuant to Sections 205 or 206 of the Federal Power Act, any changes to the rates, terms or conditions expressly covered by this Settlement, with an effective date earlier than January 1, 2004; provided, however, that, in the event that the Commission grants, in whole or part, the relief sought by the complaints pending before it in Docket Nos. EL02-15-000 and EL03-22-000, any Party shall have the right to *seek prospective modification, beginning on the date of any such*

² Motion to Defer Action on Commission Proceedings on Remand and Motion to Dismiss LSP South Bay, LLC at 4 (hereafter "Complainants' August 25 Motion").

³ *Id.* at 3.

⁴ September 7 Cabrillo Answer at 1-2 (emphasis in original). Cabrillo's July 25 answer, filed in response to a July 10 motion by Complainants to establish hearing procedures on remand of the instant dockets, is referred to herein as "July 25 Cabrillo Answer."

*Commission order, pursuant to Section 205 or Section 206 of the Federal Power Act, of the AFRR agreed to in this Settlement, but only as directed by such Commission order in Docket Nos. EL02-15-000 and EL03-22-000.*⁵

That language, Cabrillo asserts, made clear that no refund relief can be granted against it in the instant dockets.

What Cabrillo obviously overlooks are the three words “of the AFRR” that immediately follow the language it italicizes. “AFRR” is a defined term in the ER02-1264 Settlement, referring to “Annual Fixed Revenue Requirements.”⁶ As its name suggests, that is the figure that, under the RMR contract, represents the owner’s actual 12-month fixed costs, updated by yearly filings.⁷ Fixed cost recovery, under the contract, comes in the form of a Monthly Option Payment which, on an annual basis, is derived, with certain adjustments, by multiplying the AFRR times a Fixed Option Payment Factor.⁸ Cabrillo’s annual filing of March 5, 2002 in Docket No. ER02-1264 contained a revised AFRR. It did not, however, purport to change the Fixed Option Payment Factor. In contrast, the complaints in these dockets -- Docket Nos. EL02-15 and EL03-22 -- sought a reduction, effective January 1, 2002, in the Fixed Option Payment -- the sum of the Monthly Option Payments over a calendar year⁹ -- because, the complaints asserted, that charge was too high to be just and reasonable. In any case in which, like Cabrillo’s, the AFRR has been settled for the relevant period, a reduction in the Fixed

⁵ See July 25 Cabrillo Answer at 3 (emphasis in original).

⁶ ER02-1264 Settlement at 4. The settlement is attached in pertinent part to the July 25 Cabrillo Answer.

⁷ See Schedule B of the standard RMR contract filed April 2, 1999 in Docket Nos. ER98-441-000, *et al.*

⁸ *Id.*

⁹ As noted at footnote 3 of the complaint in Docket No. EL02-15, the term “Fixed Option Payment” does not appear in the RMR contract itself, but rather in the settlement in Docket Nos. ER98-441-000, *et al.*, in which the contract was initially adopted and approved.

Option Payment due to the complaint would result from a reduction in the Fixed Option Payment Factor, leaving the AFRR unchanged. This is entirely consistent with the settlement in Docket No. ER02-1264. The December 31, 2002 settlement in Docket No. ER02-1264 resolved Cabrillo's AFRR -- the annual fixed costs to which the FOPF is applied -- subject to the limited, prospective adjustment provided in the language that Cabrillo quotes. (Indeed, the provision Cabrillo relies on, Article II, Section A, ¶ 4, is in a section headed "Adjustments to AFRR"). It did not, however, purport to curtail, or affect in any way, what is at issue in the instant dockets, the Fixed Option Payment. Quite the contrary, the settlement repeatedly emphasizes that those proceedings are not affected. Thus, in the Background section, the settlement describes the instant proceedings and states:

Neither of these proceedings is affected by this Settlement agreement.¹⁰

And again, in Article II E (titled "Reservations"), the Settlement describes the instant proceedings and states:

The instant Settlement is not intended to affect in any way the outcome of those proceedings, and the Parties specifically reserve their rights and positions therein.¹¹

Cabrillo asserts that these reservations must yield to the "prospective-only" requirements in Article II, Section A, ¶ 4.¹² But, as described above, the latter provision explicitly relates only to adjustments of the AFRR and in no way constrains the generality of the reservation of rights in these dockets. There is no inconsistency between the provisions; they deal with different subjects.

¹⁰ ER02-1264 Settlement at n. 10.

¹¹ *Id.* at 15.

¹² July 25 Cabrillo Answer at 4-5.

CONCLUSION

Cabrillo's assertion that deferral of these proceedings is justified only if the Complainants acknowledge that they have no claim for refunds against it is based on a flat-footed legal error, one made all the more startling by the shrill rhetoric that accompanies it. The Commission should make clear that refunds are not precluded by the ER02-1264 Settlement so that the parties can get down to the business of negotiating a settlement in these dockets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of September, 2006, caused to be served a copy of the forgoing Complainants' Reply to Cabrillo's Answer upon all parties listed on the official service lists compiled by the Secretary of the Federal Energy Regulatory Commission in these proceedings.

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