

123 FERC ¶ 61,251
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

MMC Energy, Inc.

v.

Docket No. EL08-46-000

California Independent System Operator Corporation

ORDER ON COMPLAINT

(Issued June 6, 2008)

1. On March 13, 2008, MMC Energy, Inc. (MMC) filed a complaint against the California Independent System Operator Corporation (CAISO) alleging that the CAISO unlawfully prohibited three generating facilities that MMC owned from fully participating in the spinning reserve¹ ancillary services market, improperly withheld payments from MMC, and improperly threatened to seek the return of previous payments made to MMC (Complaint). MMC requests that the Commission direct the CAISO to allow MMC's generating facilities, as they are currently configured, to participate in the spinning reserve market without precondition; direct the CAISO to grandfather the MMC facilities into the spinning reserve market if the CAISO changes its spinning reserve Tariff or policies; direct the CAISO to pay MMC \$522,188, plus interest, for spinning reserve service that MMC claims it provided; and direct the CAISO to cease threatening that it will revoke spinning reserve payments already received by MMC from 2006 and 2007. As discussed below, the Commission denies MMC's request that its entire facilities, as configured, be allowed to participate in the spinning reserve market. However, the Commission directs the CAISO to pay to MMC any payments owed prior to and including September 18, 2006. We establish hearing and settlement judge procedures regarding the total amount of payments owed to MMC prior to and including September 18, 2006 and the payments allegedly owed after September 18, 2006.

¹ "Spinning reserve" describes "[t]he portion of unloaded synchronized generating capacity that is immediately responsive to a system frequency and that is capable of being loaded in ten minutes, and that is capable of running for at least two hours." *See* CAISO, FERC Electric Tariff, Third Replacement Tariff Volume No. II Second Revised Sheet No. 528A.

I. Complaint

2. MMC states that it owns and operates three generating facilities located in California: a 35.5 MW Escondido facility, a 35.5 MW Chula Vista facility and a 22 MW Mid-Sun facility (MMC Facilities).² MMC states that in 2005 the Escondido and Chula Vista generating facilities were decommissioned and were not operating despite their advantageous location within the San Diego load pocket.³ MMC claims that, with the guidance of the CAISO, it purchased, recommissioned, and upgraded the facilities by adding a small second generator to aggregate each facility's output in order to participate in the spinning reserve market. Later, the Mid-Sun facility was purchased by MMC and reconfigured in a like manner. After MMC recommissioned and upgraded the MMC Facilities and participated in the CAISO's spinning reserve market, the CAISO informed MMC that the facilities could no longer participate in the spinning reserve market because they were Host/CT Aggregated Facilities.

3. In the Complaint, MMC alleges that the CAISO unlawfully failed to allow the MMC Facilities to fully participate in the spinning reserve ancillary services market, improperly issued No Pay charges to MMC, and improperly threatened to seek the return of previous payments made to MMC. MMC requests "fast track" processing in order to have the matters raised in the Complaint addressed before the peak summer season. Therefore, MMC requests that the Commission act on the Complaint before June 1, 2008.

4. MMC claims that, while MMC was deciding whether to refurbish and recommission the Chula Vista and Escondido generating facilities or to dismantle the facilities and sell the plant components and the real estate, the CAISO represented to MMC that MMC could qualify the facilities as spinning reserve by adding a small generator to each existing facility.⁴

5. MMC states that it had multiple meetings and conversations with CAISO representatives concerning the future of the Chula Vista and Escondido facilities. MMC states that Mr. Edward Fishback, Project Manager of New Resource Interconnection for

² "MMC Facilities" refers to the entire aggregated facilities including both the smaller generators of less than 1 MW (Host Units) and the larger gas-fired combustion turbines (CT Units) (collectively, Host/CT Aggregated Facilities) as presently configured. The smaller unit remains spinning and synchronized to the CAISO-controlled transmission system while the larger unit is brought on-line if the facility is dispatched by the CAISO to provide supplemental energy.

³ See Complaint at 11.

⁴ MMC claims that consequently it purchased the Mid-Sun facility and configured it in the same manner. See Complaint at 13.

the CAISO, told MMC that, by adding a small generator of less than 0.5 megawatts and synchronizing it to the CAISO-controlled transmission grid, MMC would be able to bid the entire capacity of the MMC Facilities including the off-line capacity into the spinning reserve market.

6. MMC states that it provided the CAISO with detailed one-line and three-line diagrams for the proposed facility design, as well as interconnection requests in order to install the small generator at each facility and that the CAISO approved the specifications as meeting all requirements to provide spinning reserve.

7. MMC claims that, based on the assurances from senior CAISO staff, MMC spent over \$3.5 million and thousands of man-hours to refurbish the MMC Facilities.

8. MMC states that, on September 18, 2006, the CAISO issued a market notice,⁵ which concluded that that CAISO “had reviewed its requirements for procuring [S]pinning [R]eserves from all types of generating units and found them to be consistent with the CAISO Tariff and [applicable Western Electric Coordinating Council (WECC) requirements].” (September 18, 2006 Market Notice).

9. MMC claims that the CAISO tested and certified the MMC Facilities as meeting all requirements to participate in the spinning reserve market. MMC states that the CAISO qualified the MMC Facilities as spinning reserve resources under the CAISO Open Access Transmission Tariff (Tariff) and MMC soon thereafter began participating in the spinning reserve market. The Chula Vista and Escondido facilities were certified as meeting spinning reserve requirements in June 2006. Mid-Sun received its certification as a spinning reserve resource in July 2007.

10. MMC states that the CAISO issued a June 13, 2007 White Paper that proposed decertifying many aggregated generators from qualifying as spinning reserve (White Paper). The White Paper claimed that aggregated generating units with some certified capacity that was not synchronized at all times with the CAISO-controlled transmission system did not meet the CAISO’s spin requirements even though the combined units, when dispatched by the CAISO, came up to full speed within ten minutes, remained on-line for at least two hours, and were synchronized to the transmission grid. MMC states that the CAISO claimed it was not receiving all of the frequency response capacity it was paying for from the aggregated units such as the MMC Facilities because only the host unit was synchronized with the grid. MMC claims that, in the face of strong criticism concerning the White Paper, on September 20, 2007, the CAISO issued a “Supplement to Proposal for Spinning Reserve Certification” that continued to advocate the

⁵ Complaint at 37 (citing Attachment M, CAISO Market Notice Re: Ancillary Services – Spinning Reserve Requirements (Sept. 18, 2006)).

decertification of certain aggregated spinning reserve resources, such as the MMC Facilities, but did not propose to adversely affect other aggregated generating units (White Paper Supplement).

11. Also, MMC states that in the White Paper Supplement the CAISO dropped the frequency response requirements and focused on the claimed deficiency that both components of the aggregated units were not on-line and spinning at all times.
12. MMC states that the CAISO committed to filing its proposed new ‘interpretation’ of spinning reserve with the Commission. The CAISO later decided not to file anything regarding spinning reserve with the Commission because it claimed it was not making any change to its Tariff.
13. MMC claims that the CAISO informed MMC and MMC’s scheduling coordinator at the end of September 2007 that it would seek rescission of both past and future spinning reserve payments if MMC continued to bid into the spinning reserve market. MMC also claims that the CAISO threatened MMC and its scheduling coordinator with additional sanctions if they continued to participate in the spinning reserve market.
14. According to MMC, since the threatened sanctions were so severe, MMC’s scheduling coordinator, who under the Tariff would share in any sanction, ceased placing spinning reserve bids for MMC. Thus, MMC claims that the MMC generating facilities essentially had their certification to provide spinning reserve service revoked by the CAISO, even though they met all Tariff requirements to provide this service.
15. MMC claims that the CAISO is attempting a *de facto* decertification of the MMC Facilities without following the Tariff provisions regarding enforcement of spinning reserve practices and without making a filing with the Commission to change the Tariff.
16. MMC claims that the adverse actions taken by the CAISO include: threatening to revoke all of MMC’s previously earned spinning reserve revenues if the company filed a complaint with the Commission; refusing to pay MMC for spinning reserve service provided by the MMC Facilities in July, August and September 2007 and holding up all attempts to resolve those past period disputes; halting good faith negotiations regarding past payments from summer 2006 after MMC began opposing the proposed changes to the CAISO spinning reserve requirements; linking the issues of past payments with the spinning reserve requirements so no settlement could be reached unless MMC dropped its opposition to the CAISO proposal to alter its spinning reserve requirements; and stating to MMC personnel and MMC’s scheduling coordinator that CAISO would seek sanctions and penalties against MMC and the scheduling coordinator if they continued to participate in the spinning reserve market.
17. MMC claims that the CAISO is withholding \$522,188 in past period payments as a result of MMC’s opposition to the CAISO’s interpretation of the spinning reserve

requirements.⁶ MMC and the CAISO attempted to reach a settlement of this matter, including participating in multiple settlement meetings mediated by the Commission's enforcement personnel. MMC states that those efforts were unsuccessful.

A. Tariff Interpretation

18. MMC argues that the CAISO is required to make a filing with the Commission before it imposes an altered interpretation of the Tariff.⁷ MMC claims that the Tariff requirements in place when the CAISO aided MMC in configuring its facilities to qualify for spinning reserve, and when the CAISO tested and certified the facilities as meeting those requirements, are not the same requirements that the CAISO is claiming are in effect today.

19. MMC argues that the Tariff contains multiple pages setting forth the criteria concerning spinning reserve and that the CAISO's interpretation of spinning reserve acts as an additional requirement not contained in the Tariff. Thus, MMC requests that the Commission find that the CAISO's spinning reserve requests are not properly on file with the Commission and thus are not lawfully enforceable terms and conditions of service.

20. Also, MMC claims that the CAISO's spinning reserve interpretation subjects MMC to arbitrary technical requirements that are not contained in the Tariff and that are not uniformly applied.⁸

B. Estoppel

21. MMC claims that it recommissioned and reconfigured the MMC Facilities based on the language of the existing Tariff and the explicit assurances of the CAISO staff that the entire aggregated capacity of each unit would be eligible to bid spinning reserve service. MMC claims that the CAISO's current position is inconsistent with the plain language of

⁶ Complaint at 19, 39.

⁷ *Id.* at 20 (citing section 205(c) of the Federal Power Act, 16 U.S.C. § 829d(c) (2000) (“[E]very public utility shall file with the Commission... schedules showing rates and charges for any transmission or sale subject to the jurisdiction of this Commission, and the classifications, practices, and regulations affecting such rates and charges[.]”).

⁸ *Id.* at 22 (citing CAISO's Sept. 20, 2007 Spinning Reserve Supplement at 3).

the Tariff and its previous representations. MMC adds that, without the encouragement and assistance of the CAISO, MMC would have decommissioned the facilities and then sold the generators and the Escondido real estate.⁹

22. MMC states that its facilities are not economically viable without the spinning reserve revenues. MMC claims that the Federal Power Act (FPA) and the filed rate doctrine prevent the CAISO from imposing new terms and conditions on market participants that reduce the value of their prior investments and that were made in direct reliance on specific Tariff provisions.

23. MMC claims that guidance from an Independent System Operator or Regional Transmission Organization is binding if the tariff is not clear.¹⁰ MMC also states that the Commission disfavors re-determining market outcomes after the fact. MMC claims that the Commission has held that detrimental reliance on promises and statements by one party can create an enforceable contract between the promisee and promisor.¹¹

24. Therefore, MMC requests that the Commission direct the CAISO to permit the MMC Facilities, as configured, to participate in the spinning reserve market. Also, MMC requests that the Commission direct the CAISO to grandfather the MMC Facilities into the spinning reserve market if the CAISO files Tariff amendments regarding spinning reserve that would prohibit the MMC Facilities from participating in the spinning reserve market.

C. Discrimination

25. MMC claims that the CAISO is unduly discriminating against MMC by attempting to disqualify the MMC Facilities while not affecting other participants in the spinning reserve market.¹² MMC claims that the CAISO targeted small independent providers of spinning reserve services, such as MMC, and reassured larger incumbent providers that

⁹ *Id.* at 26, 29-30 (citing the affidavits of former and current MMC officers and managers to establish MMC reliance on the CAISO personnel's representations regarding the MMC Facilities' qualification in the spinning reserve market.)

¹⁰ *Id.* at 27 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113 (2006); *PPL EnergyPlus, LLC v. New York Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,383 (2006)).

¹¹ *Id.* at 27, 28 (citing *Duquesne Light Co.*, 122 FERC ¶ 61,039 (2008); *Transcon. Gas Pipe Line Corp.*, 35 FERC ¶ 61,340, at 61,782 n.9 (1986) (*Transcon. I*); *UAH-Braendly Hydro Assoc.*, 47 FERC ¶ 61,448 (1989)).

¹² *Id.* at 32, 36 (stating that, under section 205 of the FPA, the CAISO is prohibited

the spinning reserve interpretation would not affect their facilities.¹³ MMC claims that the CAISO revised its proposed interpretation of the spinning reserve market requirement from its original White Paper position to the position in its White Paper Supplement as a result of complaints from incumbent providers of spinning reserve that they could not meet the new proposed standards.

26. MMC claims that if the frequency response requirements that the CAISO is attempting to impose on small aggregated units were applied to all market participants, it would effectively foreclose the possibility that demand response programs could enter the California spinning reserve market. MMC claims that the incumbent utility members of the CAISO have a financial interest in eliminating MMC from the spinning reserve market. MMC adds that, if the MMC Facilities are excluded from the spinning reserve market, the incumbent utilities will be able to exercise increased market share.

D. Reliability

27. MMC states that its units enhance reliability in portions of California that may need additional energy resources. MMC states there is no reason to exclude aggregated units from the spinning reserve market. MMC claims that the exclusion of the MMC Facilities will decrease spinning reserve and thus diminish reliability.

E. No Pay Charges

28. MMC seeks payment of \$522,188 that it claims the CAISO has withheld through No Pay charges.¹⁴ MMC also seeks an order from the Commission prohibiting the

from favoring incumbent generators and prohibited from maintaining “any unreasonable difference in rates, charges, service, facilities, or in any respect, either as between localities or as between classes of service”).

¹³ *Id.* at 32 (citing Attachment C, Sokoletsky Aff. at 14 (Sokoletsky Aff.)).

¹⁴ “No Pay” is a settlement mechanism that encourages generating units, dynamic system resources, participating loads and system resources that schedule ancillary service (A/S) to schedule in accordance with the Tariff and CAISO protocols. The mechanism is used to keep the awarded capacity available for ISO dispatch, to follow dispatch instructions and to avoid uninstructed deviations. The No Pay charges eliminate A/S capacity payments to the extent that the requirements for A/S were not fulfilled. *See* CAISO Apr. 14, 2008 Answer at 8 (CAISO Answer) (citing Exhibit M, CAISO Settlement Guide at 1).

CAISO from retaliating against MMC by seizing additional spinning reserve revenues for past periods.¹⁵

1. Summer 2006

29. MMC claims that the CAISO issued a series of retroactive No Pay charges totaling \$243,268 for some or all of the days during the summer 2006 period in which MMC was engaged to provide spinning reserve. MMC claims that the CAISO imposed the No Pay charges because the MMC Facilities were allegedly not operationally capable of ramping up to their full spinning reserve rated capacity within 10 minutes due to MMC's alleged failure to use proper syntax to place its bids. MMC notes that the CAISO did not claim that the facilities failed to provide spinning reserve service, only that the CAISO was not required to pay for it because of the way in which the bids were entered.

30. MMC contends that the CAISO routinely accepted the bids that it currently argues were not valid. Also, MMC argues that the CAISO relied on the spinning reserve provided by MMC to meet the spinning reserve requirements imposed by the WECC.

31. MMC claims that, after several months of negotiations regarding the No Pay charges, the CAISO informed MMC that the payments were linked to the rules governing the provision of spinning reserve service and that the parties were unable to reach an agreement.

2. Summer 2007

32. MMC claims that the CAISO is withholding \$265,018¹⁶ in payments for the months of July, August and September 2007 because the small generator portions of the MMC Facilities were not functioning during some periods for which MMC was paid for providing spinning reserve service.

33. However, MMC states that operating logs demonstrate that the generators were online throughout the period in which the facilities bid to provide spinning reserve service. MMC claims that the CAISO's failure to pay is a violation of the Tariff. Also, in his affidavit, Mr. Sokoletsky states that "If for some reason CAISO could not see our small generators on-line, CAISO should have contacted us to find out what happened.

¹⁵ Complaint at 39 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, at P 488 (2004)).

¹⁶ The affidavit of Alex Sokoletsky claims \$278,919.88 in No Pay charges. Sokoletsky Aff. at 12.

Had there been a problem, CAISO should have procured additional spin ancillary service immediately, to comply with the tariff and to ensure the reliability of the grid.”¹⁷

II. Notice of Filings and Responsive Pleadings

34. Notice of the Complaint was published in the *Federal Register*, 73 Fed. Reg. 15,512 (2008), with answers, interventions, and protests due on or before April 2, 2008. On March 18, 2008, the CAISO filed a Motion for Extension of Time to File Answer and for Expedited Action requesting that the comment date be extended to April 14, 2008. MMC filed a response. On March 21, 2008, the Commission issued a Notice of Extension of Time extending the comment date to April 14, 2008.

35. Mirant Energy Trading, LLC, Mirant California, LLC, Mirant Delta, LLC and Mirant Potrero, LLC; San Diego Gas & Electric Company; Bear Energy LP; and Pacific Gas and Electric Company (PG&E) filed timely motions to intervene. PG&E also filed comments. The CAISO filed an answer to the Complaint. On April 16, 2008, the City and County of San Francisco filed an untimely motion to intervene. On April 29, 2008, MMC filed an answer to the CAISO’s answer. On May 14, 2008, the CAISO filed a response. On May 16, 2008, MMC filed another answer.

III. CAISO Answer

A. Tariff Interpretation

36. The CAISO argues that the MMC Facilities do not satisfy the Tariff requirement that all capacity bid for spinning reserve be on-line and synchronized to the grid.

37. The CAISO explains that spinning reserve has two characteristics – synchronization and immediate frequency response – that provide valuable reliability benefits. The CAISO states that synchronized generation enhances reliability because it can respond more readily and reliably than off-line generation. The CAISO states that frequency response is the natural response of frequency-responsive loads and generators to deviations in frequency. The CAISO adds that frequency response typically occurs within twenty (20) seconds of a disturbance. The CAISO states that generators synchronized to the grid automatically respond to disturbances and that this frequency response feature significantly contributes to grid reliability.

38. The CAISO states that it paid MMC’s scheduling coordinator for spinning reserve services for over a year, with the exception of certain capacity payments that were rescinded under No Pay charges. The CAISO contends that it did not make any promise

¹⁷ *Id.*

to MMC or other stakeholders regarding how it would interpret or apply its Tariff on the issue of Host/CT Aggregated Facilities or that it would refrain from enforcing the language of the Tariff until it obtained an order from the Commission.

39. The CAISO claims that MMC proceeded to have its first two units certified in June 2006 and the third in June 2007, notwithstanding notice provided to MMC that any certification for spinning reserve would not guarantee MMC's right to provide spinning reserve as contemplated.

40. The CAISO acknowledges that it certified the MMC Facilities as eligible to provide spinning reserve and admits that members of its technical staff knew how MMC planned to operate the facilities.¹⁸ While the CAISO denies that any of its personnel recommended any configuration choice for the MMC Facilities, the CAISO does acknowledge that its technical staff did respond to questions from MMC about proposed configurations.¹⁹ The CAISO adds that one or more of its technical staff members stated that the MMC Facilities would qualify to participate in the spinning reserve market.²⁰ The CAISO notes, however, that, before MMC's first aggregated resource was certified, its Vice President warned MMC that the CAISO was assessing the accuracy of this staff advice.²¹

41. The CAISO states that it dispatched the MMC Facilities as spinning reserve from June 2006 to September 2007. The CAISO acknowledges MMC was using the Host/CT Aggregated Facilities configuration during that time.²² But the CAISO denies that the MMC Facilities were on-line during every hour for which MMC was accepted to provide spinning reserve.²³

B. Stakeholder Process

42. The CAISO states that when it assessed the MMC Facilities the certification procedures did not address the specific situation of aggregated units. The CAISO explains that the certification testing procedures test a unit's capability but does not

¹⁸ CAISO Answer at 15.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

guarantee that both units in an aggregated resource are on-line and synchronized each and every time their capacity is supposed to provide spinning reserve. The CAISO argues that the mere fact that the MMC Facilities were certified does not mean that they may legitimately bid and be paid for spinning reserve capacity that is off-line and not synchronized.

43. The CAISO states that, on August 31, 2006, its market notice announced that it was suspending certification of aggregated generation units pending a review of its spinning reserve procurement procedures to ensure that they met WECC Mandatory Operating Criteria (MORC) and Tariff requirements. The CAISO states that the subsequent September 18, 2006 Market Notice announced that the resumption of certification testing made clear that off-line, non-synchronized capacity could not be paid as spinning reserve.²⁴

44. The CAISO claims that following the second market notice MMC continued to bid Spinning Reserve capacity that was off-line and not synchronized. The CAISO states that it solicited stakeholder input on the matter and contends that the process revealed that there was no legitimate basis to doubt the meaning of the Tariff definition of spinning reserve.

45. The CAISO states that, on September 20, 2007, it issued its “Supplement to the Proposal for Spinning Reserve Certification” in which it stated it was revising its testing procedures to ensure Host/CT Aggregated Facilities complied with the Tariff requirements and did not cause reliability concerns. The CAISO states that it issued a market notice on November 30, 2007 announcing that “[t]he CAISO has determined that the Tariff clearly sets forth the requirements for providing Spinning Reserve and contains the necessary monitoring and enforcement mechanisms for the CAISO to ensure that all Market Participants, including aggregated units, comply with these requirements.”²⁵ The CAISO states that it found no need to take action other than amending its certification testing methodology for spinning reserve. The CAISO denies that it did not complete the stakeholder process on the Host/CT Aggregated Facilities issue. The CAISO explains that the November 30, 2007 market notice completed the stakeholder process. The CAISO claims that it did not promise stakeholders that it would file a new Tariff interpretation or a Tariff amendment. The CAISO states that it determined that it was unnecessary to seek a Commission order because the Tariff defined spinning reserve.

²⁴ *Id.* at 21 (citing Exhibit H, Sept. 18, 2006 Market Notice).

²⁵ *Id.* at 22.

C. Discrimination

46. The CAISO contends that MMC's contention of discriminatory treatment is based on irrelevant and unsubstantiated assertions. The CAISO states that, while MMC asserts that the CAISO treats other generators differently, MMC fails to provide a single example of the CAISO allowing a generator to do what MMC seeks to do.

47. The CAISO maintains that it has not discriminated against MMC. The CAISO argues that it has sought only to enforce its Tariff and has never singled out MMC in order to target "small independent providers of spinning reserve" or for any other purpose.

D. Estoppel

48. The CAISO contends that MMC's claims of detrimental reliance should not permit the MMC Facilities, as configured, to recover payments or participate in the spinning reserve market. The CAISO states that the filed rate doctrine prohibits a contract from being enforced if it contradicts the filed rate. The CAISO adds that, because the filed rate doctrine prevents the enforcement of a fully executed contract that contradicts a filed rate, it also prevents the enforcement of a contract based on promissory estoppel.²⁶

49. The CAISO argues that its employee, Mr. Fishback, Project Manager of New Resource Interconnection for the CAISO, did not raise the possibility that the MMC Facilities could qualify as spinning reserve.²⁷ The CAISO states that, on November 3, 2005, Mr. Fishback attended an impromptu meeting with MMC officials at which there were no CAISO officers or management officials.²⁸ The CAISO contends that, at that meeting, Mr. Fishback was the only CAISO staff member to discuss the specifics regarding the generator configurations for spinning reserve.²⁹ The CAISO states that, at the meeting, MMC officials stated their understanding that the Wellhead Electric Company used Host/CT Aggregated Facilities and bid their product into the spinning reserve market.³⁰ The CAISO states that Mr. Fishback confirmed that fact.³¹ The CAISO

²⁶ *Id.* at 25 (citing *Transcon. Gas Pipe Line Corp.*, 35 FERC ¶ 61,043, at 61,081 (1986) (*Transcon. II*); *Reiter v. Cooper*, 507 U.S. 258, 266 (1993)).

²⁷ *Id.* at 18.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

adds that, thereafter, Mr. Fishback worked with MMC officials and its consultant to answer questions about their proposed configuration.³² The CAISO contends that at no time was Mr. Fishback informed of the details of the MMC business plan.³³ The CAISO argues that Mr. Fishback could not be expected to comprehend that MMC would rely solely on his statements to make major business decisions.³⁴

50. The CAISO asserts that, in April 2006, its staff began an internal assessment of the configuration of Host/CT Aggregated Facilities. As a result of this internal review, CAISO management became aware that staff had told MMC it could use the MMC Facilities for spinning reserve. The CAISO argues that consequently, on May 16, 2006, it held an internal meeting to discuss the appropriateness of permitting the Host/CT Aggregated Facilities to be certified for spinning reserve (May 16 Meeting).

51. The CAISO contends that MMC was aware of the May 16 Meeting in advance. The CAISO states that, by letter dated May 22, 2006 from James Detmers, Vice President of CAISO Grid Operations, to Mr. Martin Quinn of MMC, Mr. Detmers confirmed that the CAISO was reconsidering the staff advice given to MMC about its operating configuration. Specifically, the CAISO claims that MMC was informed that the CAISO wanted to “ensure that ... all aggregated generation resources certified for Spinning Reserve *comply with the ISO Tariff* and WECC reliability criteria.”³⁵

52. The CAISO again asserts that, notwithstanding notice provided to MMC that any certification for spinning reserve would not guarantee MMC’s right to provide spinning reserve as contemplated, MMC proceeded to have its first two units certified in June 2006 and the third in June 2007.

53. The CAISO argues that, even if the Commission disregards the filed rate doctrine, MMC has failed to support a claim for detrimental reliance. The CAISO maintains that it lacks sufficient information to admit or deny that MMC relied on its staff advice. The CAISO contends that, if MMC believed that the CAISO would pay it for spinning reserve while providing non-spinning reserve, such a belief was not reasonable.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 19 (quoting Letter from James Detmers to Martin Quinn (May 22, 2006)).

³⁵ *Id.* (emphasis in original).

E. Spinning Reserve

54. The CAISO contends that MMC has not provided effective spinning reserve. The CAISO argues that, because the MMC Facilities, as bid, provided at best only minute amounts of synchronized, frequency-responsive capacity from the Host Units, they did not provide effective spinning reserve. The CAISO adds that MMC has not provided the amount of spinning reserve for which MMC has been paid.

F. No Pay Charges

55. The CAISO argues that it properly issued No Pay charges for the trading days MMC's units were unavailable, undispachable or unconnected.

56. The CAISO maintains that it assessed No Pay charges under the Tariff to rescind spinning and/or non-spinning reserve³⁶ payments made to MMC for trading days July 24, 2006 through August 3, 2006 and various trading days between July 1, 2007 and September 30, 2007 because MMC's units failed to meet the applicable ancillary service requirements of the Tariff and provide the service that had been procured by the CAISO.³⁷ The CAISO also claims that the dollar amount of \$522,188 that MMC requests exceeds the \$343,544 spinning reserve payments that the CAISO rescinded through No Pay charges.³⁸

³⁶ The Tariff defines "non-spinning reserve" as "[t]he portion of off-line generating capacity that is capable of being synchronized and Ramping to a specified load in ten minutes (or load that is capable of being interrupted in ten minutes) and that is capable of running (or being interrupted) for at least two hours." *See* CAISO, FERC Electric Tariff, Third Replacement Tariff Volume No. II Second Revised Sheet No. 515A.

³⁷ CAISO Answer at 27 (stating that, in each instance in which the CAISO assessed No Pay charges, an aggregated MMC unit was scheduled to provide spinning and/or non-spinning reserve service but its capacity was unavailable). The CAISO cites to Tariff section 8.10.2.2 that mandates the rescission of payments for spinning or non-spinning reserve capacity that is unavailable during the period for which the ancillary service is scheduled. *Id.*

³⁸ *Id.* (adding that the CAISO rescinded \$664 in non-spinning reserve payments for the trading days July 24, 2006 through August 3, 2006 and \$175,780 in non-spinning reserve payments for certain trading days in July, August and September 2007). The CAISO contends that, even if the rescinded non-spinning reserve payments were added to the rescinded spinning reserve payments, the total is less than MMC's requested amount of relief.

57. The CAISO adds that the No Pay charges were not retroactive as MMC claims. The CAISO contends that it applies No Pay charges in the ordinary course of its settlement process, consistent with the Tariff and in accordance with the CAISO payment calendar under which settlement charges are included in the preliminary settlement statement issued thirty-eight (38) business days after the trading day. The CAISO states that the assessment of No Pay charges to MMC followed this process.

58. The CAISO asserts that it issued the No Pay charges for trading days July 24-August 3, 2006 in the amount of \$241,198 because MMC submitted changes to the ramp rate values for each aggregated unit configured effective trading day July 24, 2006. The CAISO states that, during this period, the MMC's units were bidding and being awarded spinning and non-spinning reserve capacity in the range of 35 MW in the forward market but the amount of dispatchable spinning and non-spinning reserve capacity available from the MMC Facilities in real-time was then restricted by the minimum ramp rate, which was only 0.2 MW in 10 minutes. The CAISO claims that for this period MMC used a slower, minimum ramp-rate, which indicated that the units were unable to ramp up to the awarded capacity level within 10 minutes as required for spinning reserve and non-spinning reserve. The CAISO claims that, as a result, MMC's units were unavailable and undispachable. Therefore, the CAISO concludes that its rescission of payments to MMC for the unavailable capacity complies with the provisions of the Tariff.³⁹

59. The CAISO states that it determined from its records that, for the trading days at issue in July, August and September 2007, the MMC Facilities were unconnected and therefore unavailable under Tariff section 8.10.2.2.⁴⁰ Therefore, the CAISO argues that for various trading days from July 1, 2007 through September 30, 2007 the CAISO assessed No Pay charges in the amount of \$93,295 to rescind payments to MMC for spinning reserve capacity.⁴¹

G. Settlement Negotiations

60. The CAISO contends that any statements made concerning the matters at issue during settlement negotiations were not intended as a threat. The CAISO asserts that it was appropriate for the CAISO during such negotiations to make its legal position known and to explore possible grounds for compromise to avoid costly litigation.

³⁹ *Id.* at 30 (citing Tariff sections 8.10.2.2 and 8.10.2.2.3).

⁴⁰ *Id.* at 32-34 (citing Exhibit K, Tiffany Borchardt Declaration ¶ 16 and 17) (Borchardt Dec).

⁴¹ *Id.* at 32 (citing Tariff section 8.10.2.2).

61. The CAISO raises concerns about the disclosure of settlement negotiations by MMC in the Complaint. The CAISO requests that the section of the Complaint concerning settlement be dismissed in accordance with Rule 206(b) of the Commission's Rules of Practice and Procedure for failure to explain how the action or inaction violated applicable statutory standards or regulatory requirements.⁴²

IV. The CAISO's Motion for Partial Summary Disposition

62. The CAISO moves for summary disposition of certain issues presented in the Complaint because certain issues can be determined based on the interpretation of the Tariff.

63. The CAISO claims that based upon the Tariff definition of spinning reserve as the "portion of unloaded synchronized capacity that is immediately responsive to system frequency," the Commission must find that the portion of MMC's capacity that is off-line and not synchronized does not qualify as spinning reserve under the Tariff. Also, the CAISO states that the Commission should find that both the applicable North American Electric Reliability Corporation Regional Reliability Standard for Operating Reserves requirements for the Western Interconnection developed by the WECC and section 205 of the FPA preclude, as a matter of law, MMC's request that the Commission direct the CAISO to grandfather the MMC Facilities.

64. The CAISO states that MMC's request that the Commission order the CAISO to allow all of MMC's Facilities to be bid into the spinning reserve market without precondition despite the fact that only a small fraction of that capacity would be synchronized and immediately responsive to frequency should be disposed as a matter of law. The CAISO contends that, according to the four-corners of the Tariff, MMC's request regarding spinning reserve is invalid. Specifically, the CAISO claims that the Tariff definition of spinning reserve requires that in order for a generating unit's capacity to be considered spinning reserve it must be (1) unloaded; (2) synchronized to the grid; (3) immediately responsive to system frequency; (4) capable of being loaded in 10 minutes; and (5) capable of running for two hours. The CAISO argues that, based on this definition, MMC may not claim that the portion of the capacity from its MMC Facilities that is off-line and not synchronized is spinning reserve.

65. The CAISO asserts that the MMC Facilities provide only a small amount of spinning reserve within the plain meaning of the Tariff because the vast majority of MMC's capacity is neither synchronized nor immediately responsive to system frequency. The CAISO states that MMC may (1) bid the capacity of its Host Units into the spinning reserve market or (2) bid the entire capacity of the MMC Facilities as

⁴²18 C.F.R. § 385.206(b) (2007).

spinning reserve and receive payment when its CT Units are spinning during the spinning reserve award period. However, the CAISO argues that MMC may not claim as spinning reserve capacity that is neither synchronized nor responsive to system frequency.

66. CAISO also contends that the Commission should summarily dispose of MMC's request for an order directing the CAISO to grandfather the MMC Facilities if the CAISO changes its spinning reserve Tariff language or policies. The CAISO claims that MMC is asking the Commission to find that it has the right to continue in perpetuity its highly profitable, but unlawful, practice of bidding off-line, unsynchronized capacity into the spinning reserve market, while other CAISO market participants are forbidden from doing so. The CAISO argues that reliability concerns demand that the Commission not sanction MMC's actions. Also, the CAISO states that the filed rate doctrine prevents the Commission from making such a finding.

67. The CAISO argues that MMC's position ignores the difference between spinning reserve and non-spinning reserve in the Tariff. The CAISO claims that MMC's CT Units' capacity fits squarely within the definition of non-spinning reserve.

68. The CAISO contends that the clear language of the Tariff renders MMC's allegations of detrimental reliance immaterial because when the Tariff language is clear, as here, communications between ISO staff and market participants are immaterial.⁴³ The CAISO also states that the Commission's rule that unambiguous tariff language supersedes communication between the parties is a straightforward application of the filed rate doctrine. The CAISO adds that the filed rate doctrine prevents the enforcement of a formal contract that would contradict a filed rate and also prevents parties from incurring a contractual obligation based on detrimental reliance where doing so contradicts a filed rate.⁴⁴ The CAISO maintains that its position comports with the understanding of the term "spinning reserve" as generally used by the Commission, WECC, other ISOs, and other industry participants, including MMC's own consultant.⁴⁵ The CAISO asserts that it would not be just or reasonable to give MMC a grandfathered right to bid non-spinning reserve as spinning reserve. The CAISO concludes that (1) allowing MMC to bid off-line, non-synchronized capacity into the CAISO spinning

⁴³ *Id.* at 8-9 (citing *New York Indep. Sys. Operator, Inc. v. Astoria Energy, LLC*, 118 FERC ¶ 61,216 (2007) (*Astoria Energy*)).

⁴⁴ *Id.* at 9 (citing *Transcon. II*, 35 FERC at 61,081; *Reiter*, 507 U.S. at 266).

⁴⁵ *Id.* at 10-11 (citing Complaint, Attachment I, Comments of Ecco International, Inc. at 3).

reserve market would cause the Tariff to conflict with the Commission's mandatory reliability standards, and (2) the CAISO has found no precedent for the type of grandfathering MMC requests.

V. Comments of PG&E

69. PG&E states that it opposes the ability of off-line resources to be considered spinning reserve. PG&E contends that using off-line resources to provide spinning reserve is a violation of the Tariff and has the potential to create adverse impacts on system reliability.⁴⁶

70. PG&E does not support MMC's request to compel the CAISO to accept the MMC Facilities, capacity as spinning reserve and past payments for periods that MMC sold such capacity as spinning reserve. PG&E claims that the Tariff is unambiguous regarding the requirements for spinning reserve and that the MMC Facilities do not meet those requirements.

71. PG&E argues that the Complaint appears to indicate that the capacities of the off-line MMC Facilities were improperly submitted as on-line spinning reserve. PG&E states that the Tariff requirements have been and remain clear and past miscommunications or misunderstandings do not provide a basis for MMC to ignore the Tariff requirements.

72. PG&E asserts that the improper commitment of non-spinning reserve as spinning reserve creates reliability concerns for the CAISO and neighboring control areas. PG&E claims that the CAISO relies on spinning reserve capacity to meet its WECC MORC requirements. PG&E contends that capacity that is counted as synchronized, but in fact is not, could lead the CAISO to fail MORC. Also, PG&E argues that, with fewer on-line generating units capable of automatically reacting to frequency, system reliability could be degraded. Finally, PG&E adds that neighboring control areas could be affected if in-area reliability is compromised due to inadequate spinning reserve. As an example, PG&E notes that, if the CAISO could not provide the expected frequency response to an external event, the CAISO may inappropriately lean on a neighboring control area as a result of in-area disturbances.

⁴⁶ PG&E Apr. 14, 2008 Motion to Intervene and Comments at 3 (PG&E Comments).

VI. Discussion

A. Procedural Issues

73. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

74. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214(d) (2007), the Commission will grant the City and County of San Francisco's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

75. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2007), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept MMC's April 29 and May 16, 2008 answers or the CAISO's May 14, 2008 answer and will therefore reject them.

B. Commission Determination⁴⁷

1. Participation in the Spinning Reserve Market

76. For the reasons discussed below, the Commission finds that the MMC Facilities should not be permitted to participate in the spinning reserve market.

a. Tariff Interpretation

77. We deny MMC's complaint with respect to its request that the Commission find that the MMC Facilities can bid their entire aggregate capacity as spinning reserve. We find that MMC has not met its burden of showing that the CAISO violated the Tariff. As discussed below, the CAISO's application of the terms of the spinning reserve sections of the Tariff is just and reasonable and not inconsistent with the Tariff.

78. We find that the MMC Facilities do not provide spinning reserve as defined by the Tariff. The Commission first looks to the Tariff itself when presented with a dispute concerning the terms of the Tariff and its requirements.⁴⁸ The Tariff defines spinning

⁴⁷ The Commission will not address the CAISO's Motion for Summary Disposition directly because the Commission has decided on the merits the issues concerning the interpretation of "spinning reserve" and certain issues regarding the No Pay charges.

⁴⁸ *Astoria Energy*, 118 FERC ¶ 61,216, at P 34 (2007) (quoting *Nicole Gas Prod. Ltd.*, 105 FERC ¶ 61,371 (2003) (*Nicole Gas*)).

reserve as “[t]he portion of unloaded synchronized generating capacity that is immediately responsive to system frequency and that is capable of being loaded in ten minutes, and that is capable of running for at least two hours.”⁴⁹ The Tariff also defines non-spinning reserve as “[t]he portion of off-line generating capacity that is capable of being synchronized and Ramping to a specified load in ten minutes (or load that is capable of being interrupted in ten minutes) and that is capable of running (or being interrupted) for at least two hours.”⁵⁰

79. An important difference in the definition of spinning reserve and non-spinning reserve is that the definition of spinning reserve requires that capacity is unloaded, synchronized to the grid and is immediately responsive to system frequency. The MMC Facilities do not meet this Tariff definition. The MMC Facilities are each composed of two units. The Host Units may meet the definition of spinning reserve. However, because the CT Units that comprise the majority of the MMC Facilities’ capacity, are off-line and unsynchronized, the MMC Facilities do not meet the definition of spinning reserve and thus cannot be bid into the spinning reserve market.

80. We reject MMC’s arguments that the MMC Facilities should be allowed to participate in the spinning reserve market based upon the manner in which the spinning reserve bids had previously been handled by the CAISO. We find that the Tariff definition of spinning reserve is unambiguous. Past practices are not considered when interpreting an unambiguous provision of the Tariff.⁵¹ When presented with a dispute concerning the interpretation of a tariff, the Commission looks first to the tariff itself and, only if it cannot discern the meaning of the tariff from its language, will the Commission look to extrinsic evidence such as the parties’ course of performance.⁵² Such evidence is only considered to ascertain the intent of the parties when the intent has been imperfectly expressed in ambiguous language and is not admissible to contradict or alter express terms.⁵³ Also, prior misinterpretation of a term does not necessarily make that term ambiguous.⁵⁴ The Commission finds that the definition of spinning reserve

⁴⁹ See CAISO, FERC Electric Tariff, Third Replacement Tariff Volume No. 2 Second Revised Sheet No. 528A.

⁵⁰ *Id.* at Second Revised Sheet No. 515A.

⁵¹ *Nicole Gas*, 105 FERC ¶ 61,371 at P 10.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Epright v. Env'tl. Res. Mgmt., Inc.*, 81 F.3d 335, 340 (3d Cir. 1996).

unambiguously requires, as the CAISO argues, that for a generating unit's capacity to be considered spinning reserve it must be (1) unloaded; (2) synchronized to the grid; (3) immediately responsive to system frequency; (4) capable of being loaded in 10 minutes; and (5) capable of running for two hours. To the extent that the MMC Facilities do not satisfy each of these requirements, they should not be considered spinning reserve and should not be entitled to any spinning reserve payments.

81. In addition, because “a tariff must be interpreted to give meaning to all provisions of the tariff,”⁵⁵ we find that the term spinning reserve must be considered in light of the term non-spinning reserve. MMC's interpretation of spinning reserve would make the definition of non-spinning reserve meaningless. MMC's interpretation of spinning reserve does not require that the entire spinning reserve capacity be synchronized. Because the definition of non-spinning reserve only requires that the capacity be *capable* of being synchronized, MMC's interpretation of spinning reserve makes it essentially the same as non-spinning reserve. Therefore, we cannot accept MMC's interpretation. The MMC Facilities, as configured, do not meet the definition of spinning reserve and, therefore, cannot be bid into the spinning reserve market.

82. We conclude that the CAISO is not attempting to alter its Tariff-defined spinning reserve requirements as MMC claims. To the contrary, the CAISO is properly applying the definition of spinning reserve as it is stated in the Tariff. The CAISO is not required to grandfather facilities that never conformed to the Tariff's spinning reserve requirements. For these reasons, we deny the Complaint with respect to this issue.

b. Estoppel

83. We find that any reliance MMC may have placed on representations it argues were made by representatives or employees of the CAISO is not sufficient to find that the MMC Facilities should be permitted to continue to participate in the spinning reserve market.

84. Only if we cannot discern the meaning of the Tariff from its four corners will we consider extrinsic evidence such as representations made to MMC by the CAISO.⁵⁶ Therefore, in order for the Commission to consider any representations that MMC may have relied upon concerning the Tariff, we must find that the Tariff language is

⁵⁵ *Nicole Gas*, 105 FERC ¶ 61,371 at P 9.

⁵⁶ *Id.* at P 10; *see also Astoria Energy*, 118 FERC ¶ 61,216 (stating “...under our precedent, informal communications between the parties, such as phone calls and e-mails, do not take precedence over the language of the filed tariffs....”) (citing *Arco Oil and Gas Co.*, 22 FERC ¶ 61,293, at 61,515 (1983)).

ambiguous.⁵⁷ As explained above, the Tariff definition of spinning and non-spinning reserve is unambiguous. According to those definitions, the MMC Facilities do not constitute spinning reserve, and therefore they cannot participate in the spinning reserve market.⁵⁸

c. **Discrimination, Demand Response and Stakeholder Process**

85. We deny MMC's claims against the CAISO alleging undue discrimination and intimidation. These claims are vague and therefore cannot be properly adjudicated.⁵⁹ We note that, contrary to MMC's assertion, simply because a small number of facilities are affected by the application of the definition of spinning reserve does not, on its own, justify a claim of undue discrimination.

86. MMC also claims that, if the CAISO's standards were uniformly applied, demand response would be damaged. Specifically, MMC claims that "[t]he frequency response requirements that the CAISO is trying to impose on small aggregated units, if applied on a non-discriminatory basis to all Market Participants, however, would effectively foreclose the possibility that Demand Response programs could enter into the California spinning reserve market."⁶⁰ MMC's contention is immaterial to its participation in the spinning reserve market because MMC is not a demand response provider. Moreover, in

⁵⁷ *Transcon. II*, 35 FERC at 61,081; *Reiter*, 507 U.S. at 266 (express tariff terms must take precedent over any promissory estoppel claim that contradicts the terms of the tariff).

⁵⁸ However, if the configuration of the MMC Facilities was altered, and they were made to conform to the Tariff spinning reserve requirements, then they could be able to participate in the spinning reserve market. For instance, the Host Units may be able to qualify as spinning reserve if they satisfy the Tariff requirements.

⁵⁹ Rule 206 of the Commission's Rules of Practice and Procedure requires that a complaint "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements." 18 C.F.R. § 385.206 (2007).

⁶⁰ Complaint at 34.

a separate proceeding on the CAISO's compliance with Order No. 890, we are addressing concerns regarding the ability of demand response and other non-generation resources to participate in the CAISO's ancillary service market.⁶¹

87. We also find that MMC's claims related to the CAISO's stakeholder process are invalid. MMC claims that the CAISO is unduly discriminating against MMC by attempting to disqualify the MMC Facilities while not affecting other participants in the spinning reserve market and that the CAISO must file a Tariff amendment. There is no requirement that the CAISO file to amend the Tariff once it discovers that no amendments are necessary. Consequently, we find no merit in this argument.

d. Reliability

88. We find that MMC's claims concerning reliability are unsupported. Power suppliers need a ready supply of power quickly to accommodate the loss of generation or transmission. Those participating in the spinning reserve market can provide that required power quickly because the facility is operating, synchronized to the grid system, and ready to provide power to load within a given time period.⁶² Thus, the reliability of the grid is enhanced. It may also be more expensive for the provider of spinning reserve to keep the facility operating when it is not providing power. For this reason, the spinning reserve market is more expensive than other ancillary service markets.

89. While they are not spinning reserve under the Tariff, as discussed above, the service that the MMC's Facilities provide may fit into the Tariff's definition of non-spinning reserve.⁶³ Although the MMC Facilities may be more economically viable if they are permitted to participate in the spinning reserve market, reliability certainly is not enhanced. In fact, reliability may be damaged if non-spinning reserve units are permitted to participate in the spinning reserve market. In addition, we will not ignore the clear terms of the Tariff based upon MMC's claim of enhanced reliability.

⁶¹ See *Cal. Ind. Sys. Operator Corp.*, 123 FERC 61,180 at P 29 (2008) (“[W]e direct the CAISO to address those modifications to the MRTU tariff section 8 [Ancillary Services] that are necessary to permit participation by non-generators in the CAISO's ancillary services market, and to file tariff sheets reflecting these changes within 30 days from the date of issuance of this order.”).

⁶² WECC defines spinning reserve as the unloaded generation, which is synchronized and ready to serve additional demand. See CAISO Answer, Exhibit A, WECC Reliability Standard BAL-STD-002, Operating Reserves.

⁶³ WECC defines non-spinning reserve as that operating reserve not connected to the system but capable of serving demand within a specified time, or interruptible load that can be removed from the system in a specified time. *Id.*

2. No Pay Charges

90. We find that MMC and the CAISO both misapplied the terms of the Tariff during 2006 when bidding and accepting the MMC Facilities for the provision of spinning reserve service. While the CAISO contends that MMC's ramp rate during 2006 was not in-line with its ability to provide spinning reserve service, MMC was able to provide service to the CAISO when the MMC Facilities were dispatched during 2006. Thus, MMC was able to meet dispatch instructions and grid operations were maintained.

91. Although both the CAISO and MMC recognized the MMC Facilities as spinning reserve resources during the summer of 2006, this categorization was called into question in the September 18, 2006 Market Notice reminding participating generators of its spinning reserve requirements. The notice contained the Tariff definition of spinning reserve and also reminded generators that, among other things, the entire awarded spinning reserve capacity must be synchronized to the grid.⁶⁴ We find that following the September 18, 2006 Market Notice, the CAISO correctly clarified and applied the requirements for providing spinning reserve service. As explained above, the MMC Facilities did not meet these requirements.

92. Based upon these facts, we find that the CAISO should not enforce No Pay charges on the MMC Facilities prior to and including September 18, 2006. Thus, MMC should receive any funds not paid as a result of the No Pay charges, with interest, up to and including September 18, 2006. Accordingly, we direct the CAISO to pay or release from liability the No Pay charges, with interest, prior to and including September 18, 2006. Because MMC claims that the 2006 No Pay charges at issue total \$243,272 and the CAISO claims that the 2006 No Pay charges at issue total \$241,198, we find that the parties raise issues of material fact regarding the total amount of 2006 No Pay charges at issue.⁶⁵ Therefore, we set for hearing the issue of the total amount of No Pay charges that MMC is entitled to be paid or to be released from liability up to and including September 18, 2006 but hold the hearing in abeyance pending the outcome of settlement judge procedures.

93. Further, after September 18, 2006, the CAISO's market notice was sufficient notice to alert MMC to the fact that the MMC Facilities did not meet the requirements for spinning reserve and should no longer have been bid into the market as such. The pleadings and affidavits provided by MMC and the CAISO herein greatly conflict on whether MMC was providing any ancillary services to the CAISO during the summer of

⁶⁴ Complaint Attachment M, CAISO Market Notice Re: Ancillary Services – Spinning Reserve Requirements (Sept. 18, 2006).

⁶⁵ Complaint at 40 (citing Sokoletsky Aff. at 8-14); CAISO Answer at 28 (citing Borchardt Dec. at ¶ 4).

2007, and, if so, what service, and further, what payments should or should not have been made and in what amounts. We find that the record regarding the No Pay charges for the summer of 2007 is insufficient and that the parties raise issues of material fact concerning that period. We therefore set for hearing the No Pay charges accruing after September 18, 2006 but hold the hearing in abeyance pending the outcome of settlement judge procedures.⁶⁶

94. Where, as here, the Commission institutes an FPA section 206 investigation on a complaint, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date of the filing of the complaint nor later than five months after the filing of the complaint. We will establish the statutorily-directed refund effective date at the earliest date allowed, the date of the filing of the Complaint, March 13, 2008.

95. Section 206(b) also requires that if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record and in consideration of the nature of the issues set for hearing, and assuming that the parties are unable to reach a settlement, we expect that a presiding judge should be able to render a decision within approximately twelve months, or, if the parties were to proceed to trial-type evidentiary hearing procedures immediately, on or before January 30, 2009. If a presiding judge were to render an initial decision by that date, and assuming that the case does not settle, we estimate that we will be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions or by September 30, 2009.

96. While we are setting these matters for a trial-type evidentiary hearing we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007). If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Administrative Law Judge (Chief Judge) will select a judge for this purpose. The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of

⁶⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. FERC's website contains a listing of the Commission's judges and a summary of their background and experience (www.ferc.gov - click on Office of Administrative Law Judges).

settlement discussions. Based on this report, the Chief Judge shall provide parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) MMC's Complaint is hereby denied in part, as discussed in the body of this order.

(B) The CAISO is hereby directed to pay to MMC any amounts withheld for charges accrued prior to and including September 18, 2006, plus interest, pursuant to 18 C.F.R. § 35.19a (2007), as discussed in the body of this order.

(C) The refund effective date established pursuant to section 206(b) of the FPA is March 13, 2008, the date of the filing of the complaint.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL08-46-000 concerning the total amount of No Pay charges MMC is entitled to be paid or to be released from liability up to and including September 18, 2006 as discussed in the body of this order and concerning whether MMC is entitled to any relief regarding the CAISO's No Pay charges accruing after September 18, 2006 and the proper amount of any such relief as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007), the Chief Judge is hereby directed to appoint a settlement judge within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(F) Within thirty (30) days of being appointed by the Chief Judge, the settlement judge shall file an initial report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if

appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(G) If the settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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