

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corp.)

Docket No. EL13-21-000

ANSWER OF CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION
TO REQUEST OF J.P. MORGAN VENTURES ENERGY CORPORATION

To: the Commission

The California Independent System Operator Corporation (“ISO”) submits this brief answer to the request of J.P. Morgan Ventures Energy Corp. (which presumably applied to BE CA LLC, as well) (collectively, “J.P. Morgan”)¹ for thirty days to prepare a possible intervention, protest or comment to the Petition for Declaratory Order and Request for Expedited Treatment filed by the ISO in the captioned proceeding. The ISO submits that J.P. Morgan’s request for additional time is unwarranted.

J.P. Morgan’s request for additional time is premised on four incorrect contentions: (i) that the ISO selected the date of its filing to minimize the time that J.P. Morgan would have for response and to coincide with the Thanksgiving Holiday, thereby imposing an inconvenience on J.P. Morgan; (ii) that J.P. Morgan was not aware of, nor had considered, the issues in the Petition until the day before the filing; (iii) that J.P. Morgan needs time to rebut factual assertions contained in and attached to the Petition; and (iv) the Petition presents some novel legal theory. In support, the ISO states as follows:

The Timing of the Filing of the Petition and the Reason for the Shortened Response Time

1. J.P. Morgan’s withholding of consent delayed the filing of the Reliability Must-Run Agreement filed in Docket No. EL12-351-000 because the consent issue led to protracted

¹ J.P. Morgan styles its request a “protest,” but in fact it is a motion, to which answers are permitted.

negotiations not only with respect to the Reliability Must-Run Agreement, filed on November 9, 2012, but the Term Sheet Agreement, Attachment G to the transmittal letter for the Reliability Must-Run Agreement filing, and the “back stop” agreement referred to in footnote 16 of the Petition. The ISO filed the Reliability Must- Run Agreement as soon as possible after it was completed, and the Petition for filing as soon after that date as it could, within six days.²

2. In fact, the ISO was diligent in working with numerous parties to get the synchronous condenser project to its current state of development. Once the ISO Governing Board had directed ISO management to enter into a Reliability Must-Run Agreement to resolve the potential for load shedding identified in Mr. Sparks’ declaration, the ISO worked with AES Huntington Beach LLC (“AESHB”), investor owned utilities, the California Energy Commission and the California Public Utilities Commission to enable AESHB to complete contract negotiations with a vendor that could convert the generating units into synchronous condensers by June 1, 2013, to conclude necessary reimbursement agreements in the event the project was not completed, to complete a Term Sheet and then the Reliability Must-Run Agreement. All of that was occurring between late August and November 9, 2012, the date the Reliability Must-Run Agreement was filed.

3. The request for shortened time is driven by the need for some resolution in early January if there is to be a chance for the synchronous condenser project to be completed in time for summer 2013. J.P. Morgan is well aware of this timing, and the delay it seeks in responding would likely doom the synchronous condensers project because the timing to begin construction is so critical, as described in the Petition.

² The parties to the Reliability Must-Run Agreement also worked collaboratively to resolve all of the rates, terms and conditions to minimize the burden on the Commission with respect to its review.

J.P. Morgan Has Been Aware of the Consent Issue Since at Least September

4. At least as early as the beginning of September 2012, J.P. Morgan was familiar with and gave consideration to the matter of consent under the AESHB-J.P. Morgan contracts. J.P. Morgan suggests the contrary, when it claims that the “CAISO also *falsely* claims that JPMVEC ‘certainly is aware of the issues presented [in the Petition]’ and has ‘considered’ them,” is incorrect. Request at 5. (emphasis supplied).

5. J.P. Morgan’s Request conflates the time when AESHB, and later the ISO, requested J.P. Morgan’s consent, and the time when, as a courtesy, the ISO notified J.P. Morgan’s counsel that the Petition was about to be filed. J.P. Morgan seizes on that courtesy call to suggest that this was the first time it learned of the consent matter. J.P. Morgan was aware of the consent issue long before the courtesy phone call.

6. The ISO is not privy to the discussions between AESHB and J.P. Morgan. However, the ISO is aware that at least as early as September 5, AESHB had requested J.P. Morgan’s consent but was unable to get the matter resolved. At that point, AESHB informed the ISO that AESHB had not yet been successful in obtaining consent, but would keep trying to secure J.P. Morgan’s consent. It was not until late September that AESHB informed the ISO that, with the continued lack of progress with J.P. Morgan, AESHB would not be able to obtain consent. It was at that time that the ISO began engaging directly to attempt to resolve the J.P. Morgan consent issue.

7. The ISO directly communicated with J.P. Morgan representatives regarding the consent issue on October 3, 2012, and received responses indicating that J.P. Morgan would be in contact shortly thereafter by telephone. This is shown in the e-mail exchanges between ISO representatives, J.P. Morgan representatives and J.P. Morgan’s counsel included in Attachment

A.³ There can be no doubt that J.P. Morgan was aware of and familiar with the consent issue.

J.P. Morgan Does Not Need Additional Time to Rebut Facts in the Petition

8. J.P. Morgan also makes much of the length of the Petition and its attachments. In fact, the Petition is only 38 pages long (and much of that consists of quotes from the agreements to which J.P. Morgan is a party) and the length of the ISO's Petition is not dictated by its complexity. Rather, the number of pages (of which J.P. Morgan complains), is due to the size of the Tolling Agreement and related Agreements (167 pages), and the Asset Appendices filed by J.P. Morgan (67 pages). The declaration of Mr. Sparks and the 2013 Local Capacity Technical Analysis Addendum to the ISO's Final Report and Study Results were provided for background information about how the ISO Governing Board came to direct management to enter into a Reliability Must-Run Agreement (which have been matters of public record since August) and they explain the desirability of urgent Commission attention to this petition.

9. The core facts—which J.P. Morgan cannot dispute—are that

- a. SONGS is not available;
- b. the ISO concluded that it must find a way to prevent the substantial load shedding that could occur;
- c. the ISO's tariff authorizes it to designate resources as Reliability Must-Run Units; and
- d. the only obstacle to resolving this matter is the issue of J.P. Morgan's consent, which, as a legal matter, the ISO contends is not necessary.

10. The Petition requests that the Commission interpret the meaning of an agreement over which it already asserted jurisdiction as well as a contemporaneously executed agreement to determine if these agreements establish a basis for J.P. Morgan to exercise control over facilities

³ The ISO is not providing information about the substance of the later communications because the ISO and J.P. Morgan agreed that the content of those later communications would be subject to settlement privileges.

when J.P. Morgan has not disclosed that control to the Commission. J.P. Morgan is a party to both of these agreements.

11. Any claim by J.P. Morgan of unfamiliarity with the core materials cannot be reconciled with J.P. Morgan's assertions about the contracts in its Request. It contends with great certainty that the agreements confer "sole and absolute" right to consent, or withhold consent, to certain actions by the AES Subsidiaries within certain geographic boundaries specified in the agreements. J.P. Morgan also concludes that the Petition seeks to invalidate a contractual provision of purely private agreements between J.P. Morgan and the AES Subsidiaries.

The Legal Theories in the Petition Are Not Novel

12. J.P. Morgan submits that requiring answers or other response by November 29, 2012 would leave interested parties just nine business days, including Thanksgiving week, to respond to the Petition, which it incorrectly contends includes "novel assertions of the law." Actually, the assertions of law contained in the Petition are not novel, but rely on the words of the contracts, the fact that Commission required the agreement be filed in its entirety to ensure the Commission could exercise its jurisdictional responsibilities in connection with determinations about market power, and market power filings made by J.P. Morgan that show that it does not exercise control over Huntington Beach Units 3 and 4.

13. The ISO contends that the contracts cannot be construed to create a right of control for J.P. Morgan, a right that J.P. Morgan's own filings to the Commission deny and that if J.P. Morgan has such a contract right, the Commission ought to modify it.

14. The assertion that a contract for the sale for resale of electricity in interstate commerce is a purely private commercial contract is unsustainable and was already rejected by the Commission. It is far too late to resurrect that contention. *AES Huntington Beach, L.L.C., et al.*,

83 FERC ¶ 61,100, *reh'g denied* 87 FERC ¶ 61,221 (1999).

WHEREFORE, in consideration of the foregoing, the ISO submits that the Commission should not alter the time provided for interventions, answers or comments.

Respectfully submitted,

/s/ Lawrence G. Acker

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Counsel to the California Independent
System Operator Corporation

Washington, D.C.
November 19, 2012

APPENDIX

E-Mail Exchanges

Gross, Burton

From: Edson, Karen
Sent: Wednesday, October 03, 2012 1:14 PM
To: 'francis.dunleavy@jpmorgan.com'
Cc: Gross, Burton; Davies, Sidney; Pettingill, Phil; Roberts, Rita
Subject: Huntington Beach 3 and 4

Importance: High

Mr. Dunleavy,

As you are no doubt aware, the ISO is currently involved in discussions with AES regarding a reliability must-run service agreement for Huntington Beach units 3 and 4 to meet reliability needs. In the course of these discussions, AES has informed us that J.P. Morgan believes that its consent may be required under the tolling agreement between J.P. Morgan and AES with respect to other units in Southern California. We would like to have a conversation with you to make sure that we understand J.P. Morgan's position on this issue, so that the ISO will be able to better evaluate how to proceed.

In particular, we would like to better understand both the nature of J.P. Morgan's concerns, if any, and the substance of any contractual rights that you may believe are implicated. AES informed us that you would be the proper contact for such a discussion, which is why I am reaching out to you. Would it be possible to schedule a call with you, and anyone else you may want to include, tomorrow (Thursday) to discuss this issue? We will do everything possible to accommodate your availability. For reference, I would expect the group on the ISO side of the call to be me, Phil Pettingill, and ISO in-house legal counsel.

My assistant, Rita Roberts, will reach out to you this afternoon to see what can be scheduled and to handle the logistics.

Regards,

Karen Edson
Vice-President
Policy & Client Services
916-351-4435 (o)
916-600-8542 (c)

Gross, Burton

From: Edson, Karen
Sent: Friday, October 05, 2012 10:17 AM
To: Scherman, William S
Cc: Gross, Burton; Davies, Sidney; Pettingill, Phil; Roberts, Rita; 'francis.dunleavy@jpmorgan.com'
Subject: RE: Huntington Beach 3 and 4

Mr. Sherman,

Thank you for your response. We are available to talk on Tuesday, the earlier the better, or before Tuesday if your availability changes. Please communicate directly with our counsel, Burt Gross. He is cc'd on this email and can be reached at 916-608-7268 (office) or 916-934-3724 (cell).

Karen Edson

From: Scherman, William S [William.Scherman@skadden.com]
Sent: Friday, October 05, 2012 8:27 AM
To: Edson, Karen
Cc: Gross, Burton; Davies, Sidney; Pettingill, Phil; Roberts, Rita
Subject: FW: Huntington Beach 3 and 4

Ms. Edson,

Mr. Dunleavy asked me to contact you regarding your email below.

I am out of the office today and traveling Monday, but would be available to talk to you all on tues.

Please let me know what time works and we can set something up.

Thanks

Bill Scherman

From: Edson, Karen [mailto:KEdson@caiso.com]
Sent: Thursday, October 04, 2012 05:55 PM
To: Dunleavy, Francis
Cc: Gross, Burton <bgross@caiso.com>; Davies, Sidney <SDavies@caiso.com>; Pettingill, Phil <PPettingill@caiso.com>; Roberts, Rita <RJRoberts@caiso.com>
Subject: Huntington Beach 3 and 4

Dear Mr. Dunleavy,

Thank you for your message indicating that your counsel would be contacting us regarding the subject of my email yesterday, rather than having a call on the subject today. Because there are significant time sensitivities surrounding this issue, please let me know when you expect your counsel to be contacting us and by what means. I look forward to hearing from you.

Karen Edson

Karen Edson
Vice-President
Policy & Client Services
916-351-4435 (o)
916-600-8542 (c)

To ensure compliance with Treasury Department regulations, we advise you that, unless otherwise expressly indicated, any federal tax advice contained in this message was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or applicable state or local tax law provisions or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.

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Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding as provide in Rule 2010 of the Commission's Rules of Practice and Procedure and I also certify that I have this day served Catherine M. Krupka, William Scherman and Jason Fleischer, as requested by J.P. Morgan, using the e-mail addresses provided in the "Limited Emergency Protest Of J.P. Morgan Ventures Energy Corporation."

Dated at Washington, D.C. this 19th day of November, 2012.

/s/ Lawrence G. Acker

Lawrence G. Acker

Van Ness Feldman, LLP

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