UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Greenleaf Energy Unit 2, LLC) Docket No. ER20-2787-000

RESPONSE OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION TO COMMENTS OF PACIFIC GAS & ELECTRIC COMPANY AND PROTEST OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION TO NOTICE OF TERMINATION

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212 and 385.213, the California Independent System Operator Corporation ("CAISO") submits this response to the Comments of Pacific Gas & Electric Company ("PG&E") and the California Public Utilities Commission ("CPUC") Notice of Intervention, Protest and Request for Hearing on Greenleaf Energy Unit 2 Notice of Termination in the above-captioned matter.

I. BACKGROUND AND SUMMARY OF ARGUMENT

Greenleaf Energy Unit 2, LLC ("Greenleaf") filed a Notice of Termination pursuant to Section 2.2(b)(vi) of the Reliability Must Run Agreement filed in Docket No. ER20-1947 between Greenleaf and the CAISO ("Greenleaf RMR Agreement") on August 31, 2020, requesting that the Termination Notice take effect October 30, 2020. The CAISO had agreed to the termination provision in the course of its negotiations with Greenleaf concerning the terms under which Greenleaf would provide critical reliability services in the Drum-Rio Oso sub-area of the Sierra local reliability area, when Greenleaf had no obligation to provide reliability service. Because of this agreement, the CAISO has been able to secure much needed reliability services during the challenging heat waves of the Summer of 2020. Moreover, Greenleaf provided this service without any assurance that the rates for this service would meet Greenleaf's

commercial expectation. This termination provision simply puts Greenleaf in the position going forward that it had been in, namely, to have no obligation to participate in the CAISO markets after it has – at its risk – provided reliability services to the market at a critical time.

In their respective filings, the CPUC and PG&E seem to acknowledge that, contrary to the customary RMR designations issued to participating generators under the CAISO Tariff, which are mandatory under the terms of the Tariff, CAISO had no authority to mandate that Greenleaf provide RMR service because Greenleaf had never signed a Participating Generator Agreement, or any other agreement, that would obligate Greenleaf to comply with the CAISO Tariff, including the obligation to provide RMR service. The CPUC and PG&E further acknowledge that Greenleaf is needed for the reliability of the CAISO grid. However, they argue that the termination provision in the agreement the CAISO struck with Greenleaf is unjust and unreasonable because it departs from the *pro forma* RMR Agreement approved by the Commission – an agreement designed for situations in which the RMR designation is mandatory under Section 41.2 of the CAISO Tariff. They ignore the authority of the CAISO under Section 42.1.5 of the CAISO Tariff to negotiate contracts other than the *pro forma* RMR Agreement to assure the reliability of the CAISO grid, authority that the CAISO properly exercised in negotiating the termination clause that appears in the Greenleaf RMR Agreement.

Moreover, the CPUC and PG&E also ignore the fact that the *pro forma* RMR Agreement is just that. It has no force or effect until and unless a resource owner files it with the Commission as its own rate schedule. The benefit of the *pro forma* RMR contract is that the terms and conditions have already been determined to be just and reasonable. However, the *pro forma* holds no claim to being the exclusive terms under which providing reliability services are just and reasonable, and the existence of the *pro forma* RMR Agreement does not take away a

resource owner's right to submit differing terms and conditions that can also be just and reasonable, exercising its own rights under Section 205 of the Federal Power Act.[1]

To accept the CPUC's and PG&E's attack on the termination provision in the Greenleaf RMR Agreement would be contrary to the CAISO's authority to negotiate agreements to assure the reliability of the grid under the terms of its Tariff and would put the reliability of the grid at risk going forward because it would undermine the CAISO's authority to enter into agreements where the *pro forma* RMR Agreement is not acceptable to a non-jurisdictional party like Greenleaf whose facility is needed to protect grid reliability. Accordingly, their challenge to the Notice of Termination should be summarily rejected on the grounds that the provision is both just and reasonable and within the authority of the CAISO under Section 42.1.5 of the CAISO Tariff.

The CAISO requests waiver of Rule 213, 18 C.F.R. § 385.213(a)(2), which prohibits answers to answers. The Commission routinely allows such answers when they serve to complete the record, clarify the issues in dispute or otherwise assist the Commission in the decision-making process.[2] Because the CPUC and PG&E raise for the first time in their filings issues regarding the CAISO's negotiation of the termination provision with Greenleaf, this response is the first time the CAISO has had an opportunity to respond directly to those arguments. This filing supplements the record to reply to issues raised by the CPUC and PG&E and thus assists the Commission in its deliberative process. It also provides additional information to place the new arguments of the CPUC and PG&E in the proper context.

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[1] Instances in which FERC has accepted RMR filings that did not conform to a *pro forma* include *AES Huntington Beach, L.L.C.,* 142 FERC 61,017 (2012), and *Milford Power Co., LLC*, 110 FERC 61,299, at P 81 (2005).

[2] *See, e.g., Citizens Energy Corp.,* 157 FERC ¶ 61,150, at P 10 (2016) (accepting answers to comments and answer "because they have provided information that assisted us in our decision making process"); *HORUS Central Valley Solar 1, LLC v. California Independent System Operator Corp.*, 157 FERC ¶61,085, at P 29 (2016).

II. CAISO Had Authority to Contract with Greenleaf to Protect Grid Reliability

CAISO's standard "Reliability Must-Run" authority is described in detail in Section 41 of the CAISO Tariff. Among other things, Section 41.2 makes clear that a participating generating unit, that is, a party participating in the CAISO market, designated by CAISO as an RMR unit "shall be obligated to provide CAISO with its proposed rates for Reliability Must-Run service for negotiation with the CAISO." However, Greenleaf is not such a party. As a former QF that had never signed a Participating Generator Agreement with the CAISO, Greenleaf was under no obligation to respond to CAISO's designation of Greenleaf as a Reliability Must-Run facility.[3] Nevertheless, after the CAISO's identification of the reliability need for the Greenleaf facility to meet local reliability needs in the Drum-Rio Oso sub-area of the Sierra local reliability area, Greenleaf agreed to explore with the CAISO whether there were terms that could be mutually agreed that would cause Greenleaf to accept the RMR designation and become a participating generator in the CAISO market.

In the course of extended negotiations, as it came to understand the RMR cost-based regime and the uncertainty surrounding its ability to earn what it deemed a reasonable return for its service, Greenleaf concluded it was not willing to take the risk of becoming an RMR service provider unless it had the right to terminate the agreement. Because the CAISO had already determined that Greenleaf was critical to meet a local reliability grid need, the CAISO exercised its authority under Section 42.1.5 of its Tariff to agree to RMR terms different from the *pro*

[3] It is only by virtue of signing a Participating Generator Agreement that a Generator becomes subject to the CAISO Tariff. CAISO Tariff Appendix A, definition of Participating Generator (a Generator "which has undertaken to be bound by the terms of the CAISO Tariff"). Greenleaf's acceptance of the Participating Generator Agreement was conditional on its ultimate acceptance of the RMR terms, i.e., its willingness to forego its termination rights under Section 2.2(vi) of the RMR Agreement as filed with FERC.

forma terms in Appendix G of the CAISO Tariff, including the termination provision that the CPUC and PG&E now attack. [4]

The CPUC asserts that the CAISO "does not have negotiated rate authority." CPUC at 3. In fact, Section 42.1.5 of its FERC-approved Tariff gives CAISO broad latitude to "negotiate contracts" where necessary to meet reliability needs that the RMR authority cannot meet:

> [I]f the CAISO concludes that it may be unable to comply with the Applicable Reliability Criteria, the CAISO shall, acting in accordance with Good Utility Practice, take such steps as it considers to be necessary to ensure compliance, including the negotiation of contracts through processes other than competitive solicitations. These steps can include the negotiation of contracts for Generation or Ancillary Services on a Real-Time basis.

What Greenleaf and the CAISO agreed to in most respects follows the CAISO RMR *pro forma*. Greenleaf further agreed to file the RMR Agreement pursuant to Section 205 of the Federal Power Act for FERC review of rates. However, the agreement reached between the parties was conditioned on the CAISO's acceptance of the termination provision now under attack:

> This Agreement may be terminated . . .
>
> (vi) during Calendar Year 2020 only, by Owner, after FERC issues an order accepting or approving rates under this Agreement subject to refund and upon sixty days prior written notice to CAISO, that it would be uneconomical, impractical, or illegal for Owner to continue operation. At the end of that notice period and for the remainder of 2020 and 2021, CAISO will not expect or pay for performance by Owner under this Agreement or under any other reliability services or other agreement signed contemporaneously with this Agreement.

Greenleaf RMR Agreement, Section 2.2(b)(vi).

This termination provision, which the CAISO concluded was necessary to obtain the reliability services of the Greenleaf plant, was narrowly crafted to give Greenleaf a one-time right to withdraw from its conditional agreement to provide reliability services to the California

[4] The CAISO would vigorously protest inclusion of such a termination provision if the resource owner was, in contrast to Greenleaf, contractually bound to the CAISO Tariff and the obligation to provide RMR service.

grid. Under the particular circumstances presented here, that provision is just and reasonable because it allows Greenleaf a limited, one-time "out" if it concludes the terms and conditions of providing RMR services, which it has no obligation to provide, and the risks of subjecting itself to the CAISO Tariff going forward are too onerous.

Given CAISO's decades of history of reaching settlements on rates for reliability services with the support of the CPUC and the utility in whose service territory such units were located – without litigation, agreeing to the termination provision was not only just and reasonable, but it also appeared to be a reasonable and manageable risk. More fundamentally, however, the termination provision was material to the agreement between the CAISO and Greenleaf, and there is nothing in Section 42.1.5 of the CAISO Tariff to suggest that the CAISO was without authority to agree to it. If the Commission were to conclude that the termination provision is invalid, then there is no agreement at all between the CAISO and Greenleaf, and Greenleaf has no obligation at all to provide RMR service to the California grid.

III. Neither the CPUC and PG&E nor the Commission Can Selectively Accept Some Terms, But Not Others, of the Agreement Under Which Greenleaf Accepted CAISO and Commission Jurisdiction Over Its Operations.

While arguing that the termination provision is unjust and unreasonable, and therefore invalid, the CPUC and PG&E nevertheless seek to preserve those elements of the agreement reached between CAISO and Greenleaf that require Greenleaf to continue to provide reliability services this year and hereafter. *See, e.g.,* PG&E Comments at 7. There is no support for such an approach.

In the termination provision negotiated as part of the Greenleaf RMR Agreement between CAISO and Greenleaf pursuant to Section 42.1.5 of the Tariff, the CAISO agreed not only to a termination right but to a further understanding that, if Greenleaf were to choose to exercise its

termination right, the CAISO would forbear any attempt to enforce the Tariff, provided that Greenleaf also terminate its participating generator agreement and any other agreement with the CAISO. Both elements of Section 2.2(b)(vi) were material terms; they are conditions without which there would have been no agreement between the parties. The CPUC and PG&E seem to think that Greenleaf's termination right can be written out of the Greenleaf RMR Agreement, but that the Participating Generator Agreement that Greenleaf also had to sign in order to provide reliability services, can nevertheless be enforced. The fatal flaw in that argument is that, as is clear from the words of the termination provision, Greenleaf signed the Participating Generator Agreement conditioned on CAISO's agreement not to enforce the Participating Generator Agreement if Greenleaf exercised its termination right. The status of the Greenleaf Participating Generator Agreement rises and falls with the provision of the Greenleaf RMR Agreement that gives Greenleaf a termination right.

Contracts cannot be selectively rewritten at the behest of and to achieve the ends of entities that are not parties to them.[5] Likewise, the Commission cannot assert jurisdiction over an entity like Greenleaf, over whom it would otherwise have no jurisdiction, if it refuses to accept the key condition under which that entity agreed to accept Commission jurisdiction. Yet that is the very result for which PG&E and the CPUC are advocating. They are making the fundamentally perverse argument that the Commission can force a non-jurisdictional generator

[5] It is well-settled law that even "a third-party beneficiary to a contract may not selectively enforce provisions of the contract, but is subject to the whole contract as formed by the parties thereto." *See, e.g., R & L Grain Co. v. Chicago Eastern Corp.*, 531 F. Supp. 201 (1981). See also *Bentley v. Control Group Media Co., Inc.*, No. 19-CV-2437-DMS-RBB, 2020 WL 3639660, at *3 (S.D. Cal. Jul. 6, 2020) (finding that equity precludes selective enforcement of a contract, whereby plaintiffs sought to benefit from certain contractual provisions without being bound by the contract); *City of Riverside v. Mitsubishi Heavy Industries, LTD*, No. 13–CV–1724–BEN (KSC), 2014 WL 1028835, at *4 (S.D. Cal. Mar. 14, 2014) (noting that equity does not allow one party to "benefit selectively from the contract…without being bound by the [c]ontract's restrictions").

to make jurisdictional sales that it has not agreed to make. The Commission does not have that authority under Section 205.[6]

CAISO believes that the termination provision to which it agreed is entirely just and reasonable. All that it requires is for the intervenors to promptly negotiate in good faith on a rate for reliability service that reflects that the Greenleaf unit has never been a utility asset and that its owners are assuming the considerable risk of agreeing to become a regulated asset that, as described below, it now appears will be needed for at least five years under terms that would deprive it of the benefits of retaining market revenues.[7]

The termination provision is also just and reasonable because it reflects the terms on which the CAISO could reach agreement with Greenleaf on obtaining the critical reliability service Greenleaf has been providing from a facility for which there is no alternative – using the only authority available to the CAISO, Section 42.1.5 of its Tariff. The parties with the direct ability to resolve the reliability need, the CPUC and PG&E, have declined to do so. Specifically, the CPUC could have used its authority to require PG&E to meet this local reliability need under the CPUC's Resource Adequacy program, but it chose not to do so. Similarly, PG&E could have either negotiated a Resource Adequacy Agreement with Greenleaf to meet the reliability need, or it could have undertaken the transmission upgrade that would have obviated the need for the Greenleaf facility. PG&E declined Greenleaf's Resource Adequacy proposal for 2020, and PG&E has also failed to implement the upgrades that would obviate the need for Greenleaf to provide reliability services. Those upgrades were first approved by the CAISO in 2007, with a proposed in-service date of 2009. Since then, PG&E has repeatedly delayed the upgrades, most

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6 *See NRG Power Mkt'g, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) (even with the consent of the regional transmission operator whose rate filing was at issue, FERC was not permitted under Section 205 to order material changes in the filing).

7 Notwithstanding the fact that it filed its 60-day notice of termination, Greenleaf agreed to continuing negotiating in good faith toward a settlement, and to date it has done so.

recently advising the CAISO that they will not be in place until at least 2024 – another two and one-half year delay, following a dozen years of prior delays. Specifically, when the CAISO Board approved the RMR designation for Greenleaf, the in-service date for the upgrades was mid-2022, and that was reaffirmed on July 1, 2020. But on August 21, PG&E advised the CAISO staff that the project is being delayed until the end of 2024. Thus, Greenleaf faces the prospect of providing RMR services not just for a year or two, as PG&E suggests,[8] but potentially for five years or more because of decisions the CPUC and, more directly, PG&E are making.

Both the CPUC and PG&E fully understand that, if resources the CAISO needs for reliability are not available, the CAISO must rely on its backstop authority to secure these resources. While each undoubtedly had its reasons for not taking the steps available to them to address this undisputed reliability need, the CPUC and PG&E knowingly put the CAISO in the position where it was forced to use its Section 42.1.5 authority to address the reliability gap they left. Their attacks on the termination provision should be evaluated in that light.

More fundamentally, if the Commission were to accept the CPUC's and PG&E's argument that the termination provision – a material term of the Greenleaf RMR Agreement – is unjust and unreasonable, then the Greenleaf RMR Agreement falls in its entirety, and the Commission has no basis upon which to force Greenleaf to provide service to the CAISO grid since Greenleaf has never taken any action to subject itself to Commission jurisdiction, except as conditioned by the termination provision at issue here.

[8] *See* Comments of PG&E on the Notice of Termination at 15.

IV. The Commission Should Summarily Reject the Protests of Greenleaf's Termination Notice

The central legal questions before the Commission in this proceeding is whether the CAISO had the authority under Section 42.1.5 to negotiate an agreement with Greenleaf for reliability services under terms other than the *pro forma* RMR Agreement contained in Appendix G of the CAISO Tariff. The plain language of Section 42.1.5 makes it clear that the CAISO had the requisite authority. There is no need for a hearing to resolve that issue. If the Commission goes on to evaluate whether the termination provision of that Agreement is just and reasonable, it has only two choices: i) it can conclude that the provision is just and reasonable – as the CAISO believes – and can therefore be implemented, which means the Greenleaf RMR Agreement will end absent a promptly negotiated settlement on rates; or ii) it can conclude that the provision, which has been understood by the parties from the outset to be material, is unjust and unreasonable, thereby invalidating the Greenleaf RMR Agreement of which it is a material part, absent a settlement by the parties on rates and an accompanying agreement to remove the termination provision.[9] The outcome is the same in either event, and it requires no hearing by the Commission to establish that.[10]

In these circumstances, it is appropriate for FERC to rule on the papers filed in this docket. There is no need for a hearing to resolve whether the termination provision is just and reasonable.

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[9] The termination provision becomes immaterial once the parties and intervenors reach an agreement on rates.

[10] *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013) (the Commission "need not conduct an oral hearing if it can adequately resolve factual disputes on the basis of written submissions"), *cert. denied,* 134 S. Ct. 1277 (2014).

Respectfully submitted,

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Dated: September 30, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of September, 2020 caused to be served a copy of the forgoing Response upon all parties listed on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

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