

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

California Independent System Operator Corporation)	
)	Docket No. ER12-897
)	
)	

MOTION TO INTERVENE AND PROTEST OF THE ALLIANCE FOR RETAIL ENERGY MARKETS, DIRECT ACCESS CUSTOMER COALITION, ENERGY USERS FORUM, MARIN ENERGY AUTHORITY, RETAIL ENERGY SUPPLY ASSOCIATION, AND SHELL ENERGY NORTH AMERICA (US) L.P.

Pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure,¹ and in accordance with the January 26, 2012, “Combined Notice of Filings #1,” the Alliance for Retail Energy Markets (“AReM”),² Direct Access Customer Coalition (“DACC”),³ Energy Users Forum (“EUF”), Marin Energy Authority (“MEA”), Retail Energy Supply Association (“RESA”),⁴ and Shell Energy North America (US), L.P. (“Shell Energy”) (collectively, “Protesting Parties”) submit this motion to intervene and protest in response to the California Independent System Operator Corporation’s (“CAISO”) *Petition for Waiver of*

¹ 18 C.F.R. §§ 385.211 and 214 (2007).

² AReM is a California non-profit mutual benefit corporation formed by electric service providers that are active in the California’s direct access market. This filing represents the position of AReM, but not necessarily that of a particular member or any affiliates of its members with respect to the issues addressed herein.

³ DACC is a regulatory alliance of education, commercial and industrial customers that utilize direct access for all or a portion of their electricity requirements.

⁴ RESA’s members include: Champion Energy Services, LLC; ConEdison Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

Tariff Revisions and Request for Confidential Treatment (“Waiver Request”), which was filed with the Commission on January 25, 2012 in the above-captioned docket.

I. BACKGROUND

Under its current tariff (Section 43.2.6), the CAISO has authority to designate a generation unit under the Capacity Procurement Mechanism (“CPM”) and purchase capacity from the CPM designated unit in order “to keep a resource in operation that is at risk of retirement during the current resource adequacy (“RA”) compliance year and that will be needed for reliability by the end of the calendar year following the current RA compliance year.”⁵ The CAISO may issue a “risk of retirement” CPM designation if all of the following conditions are satisfied:

- (1) the resource was not contracted as RA capacity nor listed as RA capacity in any LSE’s annual RA plan during the current RA compliance year;
- (2) The CAISO did not identify any deficiency, individual or collective, in an LSE’s annual RA plan for the current RA compliance year that resulted in a CPM designation for the resource in the current RA compliance year;
- (3) CAISO technical assessments project that the resource will be needed for reliability purposes, either for its locational or operational characteristics, by the end of the calendar year following the current RA compliance year;

⁵ CAISO Tariff Section 43.2.6.

- (4) no new generation is projected by the ISO to be in operation by the start of the subsequent RA compliance year that will meet the identified reliability need; and
- (5) the resource owner submits a request for a CPM designation under this Section 43.2.6 and an affidavit that attests that it will be uneconomic for the resource to remain in service in the current RA compliance year and that the decision to retire is definite unless CPM procurement occurs.⁶

On December 6, 2011, in accordance with Tariff Section 43.2.6, the CAISO issued a ***Report on Basis and Need for a CPM Designation for Sutter Energy Center*** (“CAISO Report”). The CAISO Report stated that four of the five required conditions have been met to offer a CPM designation to the Sutter Energy Center to forestall retirement. The one condition that has not been met, according to the CAISO Report, is a “reliability” need for the unit in the coming RA compliance year. To the contrary, the CAISO Report noted that the Sutter Energy Center will not be needed for reliability until late 2017 or early 2018.

The CAISO Report indicated, however, that there is a potential 3,570 MW resource gap in 2017. On this basis, the CAISO stated that it intends, if the Commission grants the Waiver Request herein, to offer a CPM designation to the Sutter Energy Center in 2012 so that the generating unit will not be retired.

The CAISO Report also noted that the CAISO’s request for a CPM designation for the Sutter Energy Center highlights the benefit of developing a capacity procurement mechanism that addresses longer term system capacity needs. The CAISO Report stated that the CAISO would

⁶ Id.

initiate a stakeholder process in early 2012 to develop a longer term capacity procurement mechanism.

Subsequent to issuing the CAISO Report, the CAISO conducted a stakeholder teleconference call on December 12, 2011 that provided the opportunity for market participants to ask questions about the CAISO Report and the planned waiver request. Written comments were submitted by market participants on December 16, 2011. Numerous parties, including members of the Protesting Parties, submitted comments opposing the CAISO's proposal to seek the tariff waiver described in the CAISO Report. Notwithstanding the overwhelming opposition expressed in response to the CAISO Report, the CAISO submitted the Waiver Request.

II. SUMMARY

The CAISO's Waiver Request does not provide a reasonable basis or a viable record on which to grant a waiver of the conditions for granting a CPM designation. The Waiver Request should be denied.

The CAISO's Waiver Request seeks to use the CPM designation in Tariff Section 43.2.6 in a manner that was not intended. The CPM designation is intended to address a short-term capacity deficiency and a demonstrated reliability need "in the year following the current RA compliance year." As the CAISO readily acknowledges, no reliability need exists for the Sutter Energy Center until 2017, at the earliest.

Moreover, a CPM designation is only appropriate for generating capacity that is needed for its "locational or operational characteristics." No showing has been made that the Sutter Energy Center is uniquely required for its "locational or operational characteristics," even in 2017. The CAISO's Waiver Request in these circumstances reflects a misuse of the CPM designation. Approval of the Waiver Request would cause California consumers to pay a CPM price that is based

on constrained capacity supply in a market in which there is excess capacity. The Commission should not approve a waiver that would permit a CPM designation for the Sutter Energy Center.

III. COMMUNICATIONS AND CORRESPONDENCE

The Protesting Parties request that all pleadings, correspondence and other communications concerning this proceeding be directed to the representative identified below. The Protesting Parties request that the name and address of their representative be placed on the official service list for Docket No. ER12-897:

John W. Leslie
Luce, Forward, Hamilton & Scripps LLP
600 West Broadway, Suite 2600
San Diego, California 92101
Tel: (619) 699-2536
Fax: (619) 232-8311
E-Mail: jleslie@luce.com

IV. MOTION TO INTERVENE

The Protesting Parties represent a broad spectrum of participants in the California wholesale and retail market, including the market for RA capacity.

AReM is a regulatory alliance of electric service providers (“ESP”) that are active in the California competitive retail market as load-serving entities (“LSEs”). AReM’s members serve, predominately, commercial and industrial customers in the Pacific Gas & Electric, Southern California Edison and San Diego Gas & Electric service territories and are also active participants in the CAISO’s energy markets, including buying, selling and scheduling of power and capacity on a wholesale basis.

DACC is a regulatory alliance of educational, commercial, industrial and governmental end-use customers that utilize direct access (“DA”) for all or a portion of their electricity load requirements.

EUF is an ad hoc group that represents the interests of medium and large bundled service and DA customers in California, primarily taking service on rate schedules for accounts with demand above 100 kW, with accounts in investor-owned utility and/or municipal utility service areas.

MEA is the not-for-profit public agency (formed by the County of Marin and the eleven towns and cities in Marin County) that administers the Marin Clean Energy community choice aggregation program.

RESA is a non-profit trade association of independent corporations that are involved in the competitive supply of electricity and natural gas. RESA and its members are actively involved in the development of retail and wholesale competition in electricity and natural gas markets throughout the United States. Some RESA members are ESPs serving retail customers in California and others are considering entering the California market.

Shell Energy is an energy marketer that sells electricity on a wholesale and retail basis to customers located throughout the United States, including California. Shell Energy is a registered ESP and is an active participant in the energy and RA markets.

The Protesting Parties' intervention in this proceeding is in the public interest. The members of the Protesting Parties have a direct interest in the outcome of this proceeding that cannot be adequately represented by any other party.

The members of the Protesting Parties have a vital interest in ensuring that the CAISO's Waiver Request is disposed of by the Commission in a manner that is just, reasonable and non-discriminatory. Under these circumstances, good cause exists to grant the Protesting Parties' motion to intervene.

The filing of this motion and protest is without prejudice to the Protesting Parties adopting and advocating a position with respect to any issue that has been, or may be, raised by other parties

in this matter, as well as such other issues that become known to the Protesting Parties upon their further review of this matter.

V. **PROTEST**

The Protesting Parties urge the Commission to reject the Waiver Request for the following reasons:

1. **The Projected Need for the Sutter Energy Center is More than Five Years from Now, Which is an Insufficient Reason to Make a Six-Month CPM Designation.**

The CAISO tariff specifies that backstop procurement by the CAISO must be predicated on a demonstration of a reliability need in the coming year. In fact, the RA program that is under the jurisdiction of the California Public Utilities Commission (“CPUC”) requires LSEs to meet established capacity reliability (RA) requirements on a year-ahead basis. The year-ahead RA showings for 2012 have been made by LSEs, and there is no evidence that there is an RA procurement deficiency. On this basis, the CAISO’s proposal to apply the CPM to the Sutter Energy Center -- based on RA requirements that are more than five years out -- cannot possibly be categorized as “backstop” procurement. There is no RA obligation imposed on LSEs that far into the future.

There is simply no basis upon which the CAISO can justify procurement from the Sutter Energy Center as backstop procurement. Indeed, allowing the CAISO to undertake this type of forward-looking “backstop” procurement, when such forward looking obligations have not been included or even defined within the CPUC’s established RA procurement requirements, would be a dangerous precedent for the Commission to set.

Moreover, the CPM compensation structure was developed on the premise that any such payments would be made to meet a reliability need in the current year, and *not as payment in the current year for a resource need that is more than five years in the future*. The Protesting Parties

urge the Commission to reject the Waiver Request in its entirety. However, if the Commission were to entertain the Waiver Request, the Commission would need to reevaluate the CPM payment structure for resources whose value to the system is more than five years out.

The California grid currently has significant excess capacity, especially for capacity that does not meet any locational need, as is the case with the Sutter Energy Center. This excess capacity has developed because procurement policies in California have resulted in the execution of contracts for facilities that were in excess of new resource needs identified by the CPUC through either the RA program or the Long-Term Procurement Plan (“LTPP”) proceedings conducted every two years.

Policies implemented by the CPUC have led to the development of a capacity supply base that now far exceeds demand. The Sutter Energy Center’s inability to sell its capacity to an entity that has an RA obligation is an example of the market consequences that result when supply exceeds demand. Market participants should not be shielded from the market impacts of supply and demand through special purpose, out-of-market payments. Approval of the CAISO’s Waiver Request would distort the operation of the California energy market.

2. The CAISO’s Reliability Analysis is Incomplete and Inconsistent with the CPUC’s LTPP Process.

Every two years, the CPUC conducts an LTPP process, through which the CPUC analyzes the procurement requirements for its jurisdictional Investor-Owned Utilities (“IOU”). The LTPP process often results in the CPUC authorizing the IOUs to engage in specific procurement for long-term capacity needs. While there are flaws with the LTPP process, including the manner by which the CPUC authorizes new procurement of generation facilities when existing generation offers RA capacity, the Commission should note that the current LTPP process⁷ is ongoing, and is awaiting

⁷ CPUC Docket No. R.10-05-006.

specific analyses from the CAISO that will serve to assist the CPUC in deciding on the level of future necessary IOU procurement.

In the meantime, all active parties in the current LTPP process, including the CAISO, have agreed that there is no scenario that requires new generation authorization for renewable integration purposes for the planning period 2012-2020.⁸ Granting the CAISO's Waiver Request -- and allowing the CAISO to make a CPM payment to a specific unit to stay open to participate in future procurement solicitations that are as yet undefined -- all on the basis of unfinished and incomplete analyses, will be costly to ratepayers and will prejudice the outcome of those solicitations. In any event, granting the Waiver Request in the middle of the LTPP process would devalue the LTPP process, discriminate in favor of a single generator, and create market uncertainty and confusion.

In its stakeholder process leading up to the Waiver Request, the CAISO was criticized for its use of the highest load scenario posited in the LTPP proceeding as the basis for justifying the Waiver Request. In the Waiver Request, the CAISO attempts to address this criticism, suggesting that reliance on any other scenario would be inconsistent with good utility practice. The CAISO concludes that any other scenario will force units like the Sutter Energy Center to retire. The CAISO further suggests that considering any other scenario will put the CAISO in an untenable situation because of its role in maintaining grid reliability. These conclusions by the CAISO seem to foreclose any further discussion about resource planning and the appropriate planning scenarios, a clear overstepping of the CAISO's role in the CPUC's LTPP process.

⁸ See CPUC Docket No. R.10-05-006, "Motion for Expedited Suspension of Track I Schedule, and for Approval of Settlement Agreement," Settlement at p. 4 (filed August 3, 2011).

3. The CAISO's Claim of a Future Potential Capacity Shortfall Does Not Justify CPM Designation for the Sutter Energy Center.

The CAISO Report indicates that there will be a 3,570 MW capacity shortfall in late 2017/early 2018, much of which will be needed both to support the integration of renewable resources and address retirements due to once through cooling ("OTC") restrictions. In its Waiver Request, the CAISO states that paying the Sutter Energy Center pursuant to a CPM designation in 2012 would ensure that the shortfall does not widen.

There are several problems with the CAISO's reasoning. First, the CAISO fails to acknowledge that if the scenario it uses to justify the CPM payment is accurate, there will be extensive opportunities for procurement to meet the 3,570 MW of new resource need. These procurement opportunities will present LSEs with the ability to evaluate potentially new and better technologies than the Sutter Energy Center's combined cycle plant. For instance, new gas turbine technology, such as GE's LMS100 gas turbines, provide 50 MW of ramping on a 100 MW unit, with fast start capability, which may be better suited for the cycling needs anticipated with large scale renewables. Pumped storage in permitting phases is another potential solution. In spite of these procurement alternatives, the Waiver Request sets the stage for providing a significant subsidy to one potential supplier of capacity.

Second, the potential shutdown of plants due to insufficient revenues has been discussed at renewable integration stakeholder workshops. While such shutdowns may be unfortunate in some instances, the fact that such shutdowns will occur has been anticipated. A decision by the CAISO to make a six-month CPM designation for a unit that will not be needed for five years is unwarranted and unfair to other units that may face similar shutdowns. Indeed, many parties that submitted comments to the CAISO after the stakeholder call that was held on December 12, 2011, expressed

concern that the CAISO was unable and/or unwilling to provide information on whether there is a significant level of additional uncommitted resources that might also seek a CPM designation.

Interestingly, in the Waiver Request, the CAISO devotes considerable attention to a review of the status of uncommitted capacity. The CAISO concludes that only 50 MW of additional capacity is similarly situated to the Sutter Energy Center – but for 2012 only. The CAISO’s analysis provides no similar assessment for years past 2012 (which it cannot do because there is no multi-year RA obligation). As a result, the Waiver Request provides no guarantee that the Sutter Energy Center’s request for a CPM designation will be unique. Indeed, the CAISO even acknowledges that it is possible - and perhaps even likely - that the Sutter Energy Center will make additional requests for a CPM designation in future years.

Third, the CAISO recognizes that a CPM payment for 2012 will not guarantee that the Sutter plant will be online at the end of 2017, when the CAISO expects to need the Sutter plant for reliability. The current CPM “risk-of-retirement” procurement provisions of the CAISO Tariff provide that a resource cannot be procured for more than one year. On this basis, it will be necessary to evaluate whether the Sutter plant will be needed again in later years -- if and when Calpine submits another statement of risk of retirement (or a submittal pursuant to similar procedures under the CAISO’s new proposal for a longer-term capacity procurement mechanism which is to be developed in a CAISO stakeholder process later this year).⁹

In this connection, the CAISO seeks to justify its need to procure Sutter Energy Center capacity based on “the retirement of 12,079 MW of OTC resources.”¹⁰ These OTC resources have an obligation to discontinue use of OTC technology, but the generating units are not required to

⁹ See Waiver Request, page 49-50.

¹⁰ See Waiver Request, page 6.

retire. Options are available and are actively being evaluated to keep these resources operational, which include retrofitting with air-cooled condensers or repowering existing facilities. It is unreasonable to justify a CPM designation for the Sutter Energy Center based on the assumption of a full shutdown of all OTC plants.

In summary, little certainty exists that the proposed CPM payment would serve the CAISO's intended purpose of ensuring that the Sutter Energy Center will remain available through 2017. Moreover, there is no reliable evidence as to how many more CPM designations will be requested by the Sutter Energy Center -- or other facilities. This uncertainty should lead the Commission to conclude that embarking on this slippery slope of out-of-market procurement by the CAISO is ill-advised and should be avoided.

4. The CAISO's Projected Timetable for a Stakeholder Process to Initiate Reforms to California's Resource Adequacy Program is Unrealistic.

The CAISO Report and the CAISO's Waiver Request promise that the CAISO will initiate a stakeholder process to put in place more forward looking RA capacity requirements. The CAISO suggests that a more forward looking RA obligation will make it more likely that the Sutter Energy Center will have increased near-term market value, obviating the need for additional CPM designations.

The Protesting Parties do not oppose the stakeholder process that the CAISO has promised. Indeed, the CAISO initiated its stakeholder process on January 27, 2012, with the release of its "issue paper" on *Flexible Capacity Procurement* (stakeholder comments on which are due February 17, 2012). Notwithstanding the CAISO's prompt initiation of the stakeholder process, the CAISO's presumption that such a process will be completed in six months is not realistic, for all of the following reasons:

First, the CPUC has previously rejected proposals to implement a multi-year forward RA procurement obligation. The CPUC did so in a decision that was issued over 18 months ago in a proceeding that lasted several years.¹¹ Given the CPUC’s position on a multi-year forward procurement requirement, it is unrealistic to presume that a proceeding to re-evaluate the benefits of such an approach can be completed in six months.

Second, the CAISO’s track record for concluding RA proceedings does not support its claim to be able to conclude this controversial topic in six months. For instance, its stakeholder process on the Planning Reserve Margin (“PRM”) was *never* resolved, and issues relative to the Standardized Capacity Product (“SCP”) have been ongoing since 2005. Both of these issues are simpler to resolve than the design of capacity requirements and markets to meet them.

Third, the form of the RA modifications that the CAISO will seek through its stakeholder process remains unclear, inasmuch as its stakeholder process has just begun. Without any specific direction at the outset of the process, it is unlikely that the process can be resolved as promptly as the CAISO projects.

Fourth, the CPUC, not the CAISO, has the obligation to provide for the capacity procurement process. The CPUC is still in the process of implementing proposed RA procurement policies such as a “bulletin board” posting system exhibiting available RA capacity and pricing in forward markets. These measures are intended to provide the exact price information needed to ensure that plants such as the Sutter Energy Center are kept in service if they are needed and economical.

In short, there is little likelihood that the CAISO’s stakeholder process will produce meaningful changes to California’s capacity construct in six months’ time. This, in turn, raises a serious concern that the Waiver Request will not be one-time occurrence for the Sutter Energy

¹¹ See CPUC Decision 10-06-018 (June 3, 2010).

Center (and perhaps for other generation resources). If the CAISO is permitted to pursue the individual plant subsidy that the Waiver Request represents, this type of one-off, out-of-market procurement will be difficult to control, to the detriment of ratepayers and contrary to sound market design.

5. **Other Alternatives for Keeping the Sutter Energy Center Open Have Not Been Fully Explored.**

The Protesting Parties object to the out-of-market procurement that the CPM designation for the Sutter Energy Center represents. The socialized uplift associated with such procurement is detrimental to competitive market formation and meaningful market price signals. If, notwithstanding this risk, the Commission considers the Waiver Request, it should undertake a thorough consideration of the full range of alternatives.

One such alternative is “mothballing” the Sutter Energy Center until a need for the unit materializes, as a way for its owners to reduce the cost they would incur to maintain the facility for future use. The CAISO Report dismissed that alternative on the grounds that the owner of the Sutter Energy Center had indicated that bringing the units back from mothballing could trigger the need for unit modifications in keeping with new source review requirements, which would be uneconomic and would have an uncertain outcome. In the Waiver Request, the CAISO repeats this excuse for dismissing the mothballing approach in the Waiver Request.

There is no solid evidence, however, to support the contention that mothballing would trigger a new source review requirement; *i.e.* there is nothing that suggests that the Sutter Energy Center has asked for a ruling on whether mothballing would subject the unit to new source review requirements at a later date, and there is no evidence that indicates whether a waiver from such requirements has been sought by the owner of the Sutter Energy Center. Before any ratepayer money is expended on a CPM designation, a more complete vetting of this alternative should be required.

The CAISO also dismisses mothballing because the CAISO has no tariff authority to pay for it. This is a curious argument for two reasons. First, the CAISO has no specific authority to make the immediate Waiver Request, but that has not stopped it from bringing this Waiver Request before the Commission. Second, the purpose of determining whether mothballing is a viable alternative is not so that the CAISO can pay the mothballing expenses, but so that the owner of the Sutter Energy Center has an alternative to retirement that it can manage on its own without a CPM designation.

Likewise, the CAISO has dismissed the potential use of the Reliability Must Run (“RMR”) contract on the basis that it too would require a tariff amendment to the conditions imposed on RMR contracts. This is also a curious argument because the CPM designation requires a tariff waiver, which is not substantially different than a tariff amendment. Further, the “long-term”¹² nature of the RMR agreement provides for *only a 1-year contract*, effectively only a short term solution. While any form of payment should be rejected, if one is considered, the comparative economics of an RMR contract versus a CPM designation should be fully explored.

VI. CONCLUSION

The CAISO’s Waiver Request should be denied. The evidence shows that any need for the Sutter Energy Center capacity for “reliability” does not arise until 2017, at the earliest. The CAISO fails to establish why the Sutter Energy Center must be under contract in 2012 to meet a system reliability need in 2017. The CAISO also fails to demonstrate that the Sutter Energy Center is the only alternative or the best alternative to meet a reliability need in 2017.

The CAISO’s Waiver Request ignores the CPUC’s ongoing LTPP process and interdicts the very stakeholder process that the CAISO has initiated to address forward RA capacity requirements. The CAISO’s Waiver Request, if granted, would impose significant costs on California ratepayers

¹² Waiver Request, page 9.

without any justification based on need. Moreover, approval of the Waiver Request would interfere with the operation of the RA capacity market and create uncertainty among market participants.

Respectfully submitted,



John W. Leslie
Luce, Forward, Hamilton & Scripps LLP
600 West Broadway, Suite 2600
San Diego, California 92101
Tel: (619) 699-2536
Fax: (619) 232-8311
E-Mail: jleslie@luce.com

Attorneys for Shell Energy North America (US), L.P

And on behalf of:
Alliance for Retired Energy Markets
Direct Access Customer Coalition
Energy Users Forum
Marin Energy Authority
Retail Energy Supply Association

February 16, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the *Motion to Intervene and Protest of the Protesting Parties* on all parties of record in proceeding ER12-897 by serving an electronic copy on their email addresses of record and by mailing a properly addressed copy by first-class mail with postage prepaid to each party for whom an email address is not available.

Executed on February 16, 2012, at San Diego, California.



Sue Pote

101808163.2