UNITED STATES OF AMERCIA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	**)** **)**	**Docket No. ER12-897-000**

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MOTION TO INTERVENE AND PROTEST OF THE NRG COMPANIES AND THE DYNEGY COMPANIES

Pursuant to Rules 211, 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[1] and the Commission's January 26, 2012 "Combined Notice of Filings #1," the NRG Companies ("NRG")[2] and the Dynegy Companies[3] ("Dynegy" and collectively with the NRG Companies, the "Protestors") protest the California Independent System Operator's ("CAISO") request for a waiver of the requirements of Section 43.3.6(3) of the CAISO Tariff governing the issuance of risk-of-retirement designations to entities under the Capacity Procurement Mechanism ("CPM"). The CAISO states that it needs a waiver to provide a risk-of-retirement CPM designation to the Sutter Energy Center ("Sutter"), a modern, flexible, efficient combined cycle unit, because Sutter cannot earn sufficient revenues from the combined CAISO and California Public Utilities Commission ("CPUC") markets to remain financially viable ("Waiver Request").

[1] 18 C.F.R. § 385.211 (2010).

[2] For purposes of this filing, the NRG Companies are NRG Power Marketing LLC, Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power, LLC, Long Beach Generation LLC, NRG Solar Blythe LLC, Avenal Solar Holdings LLC and NRG Solar Roadrunner, LLC.

[3] For purposes of this filing, the Dynegy Companies are Dynegy Marketing and Trade, LLC, Dynegy Moss Landing, LLC, Dynegy Morro Bay, LLC, Dynegy Power Marketing, LLC, and Dynegy Oakland, LLC.

I. INTRODUCTION

The Waiver Request is a wakeup call that fundamental reforms to the CAISO markets are necessary to avoid a reliability crisis by 2018. As the Waiver Request concedes, the CAISO currently has no means of retaining, or incenting the development of, the 3,500 MW of generation, ***in addition to the Sutter Facility***, that the CAISO states it needs by the end of 2017 to reliably meet California's 33% Renewable Portfolio Standard ("RPS") and aggressive phase out of existing Once-Through-Cooled ("OTC") units. The Commission thus has a short, but manageable window in which to fix the fundamental flaws plaguing California's hybrid market structure and prevent a reliability crisis.

The CAISO's Waiver Request, however, is not the right vehicle for addressing these critical market design issues. In fact, the Federal Power Act ("FPA") and this Commission's precedent prohibit the Commission from allowing the CAISO to meet its reliability needs on an *ad hoc* and discriminatory basis, by providing a preferential contract to one of many market participants that are unable to recover their costs through a combination of the CAISO and CPUC markets. The Waiver Request in fact suffers from four fatal legal deficiencies:

A. Waiver is Not an Appropriate Substitute for Section 205 Review.

The CAISO cannot use a waiver request to circumvent the requirements of section 205 of the FPA. Section 205 requires that a utility file a tariff and demonstrate that the proposed changes are just and reasonable, and not unduly discriminatory or preferential. The Commission's precedent provides that waiver is appropriate only where the request is: (i) of limited scope, (ii) has no undesirable consequences, and (iii) the resultant benefits to customers are obvious.[4] As discussed below and in the attached affidavit of economist and market design expert Mr. Robert Stoddard of Charles River Associates ("Stoddard Affidavit"), the waiver is not

[4] *See infra* Section V.B.1.

limited, has enormous consequences to the market, and will ultimately result in harm to customers. Thus, the Commission cannot approve this Waiver Request, and should instead direct the CAISO to submit an appropriate section 205 filing addressing the impending reliability crisis on a generic and non-discriminatory basis.

B. The CAISO's Waiver Request is Unduly Discriminatory and Preferential.

The unspoken premise underlying the announced retirement of the Sutter facility is that the combination of (i) the CAISO's energy and ancillary service markets and (ii) the CPUC's Resource Adequacy ("RA") market do not provide adequate recovery of costs sufficient to sustain the operation of even a clean, modern and efficient combined cycle generating resource, such as the Sutter facility. The Waiver Request, however, provides temporary relief to only one facility in California, even though there are many facilities, critical to future grid reliability, that are hemorrhaging money. The Federal Power Act requires that if the CAISO is going to provide relief to one generator, it must provide comparable relief to all similarly-situated units on a comparable and non-preferential basis. The CAISO offers the fig leaf that Sutter is the only unit that has, to date, sought a risk-of-retirement designation, and is therefore unique. This rationale is unconvincing, considering that the CAISO itself identified at least 1,200 additional megawatts with comparable operational characteristics that remain un-contracted through the RA program,[5] not to mention other units that accepted extremely low RA payments, rather than forgo any capacity revenue at all.

[5] *See* Waiver Request at 44-45.

C. The Waiver Request Represents a Collateral Attack on Prior Orders Rejecting Risk-of-Retirement Designations for Units Needed for Reliability More than One Year Out.

In its Capacity Procurement Mechanism order issued last March,[6] the Commission denied requests to allow the CAISO to provide risk-of-retirement designations to generating units needed for reliability in future years. The Waiver Request now asks the Commission to approve a risk–of-retirement designation that does exactly this. The Waiver Request thus constitutes a collateral attack on the Commission's prior findings, and should be rejected.

D. *Alternatively,* should the Commission Grant the Waiver, it should Require the CAISO to Address its Market Shortfalls on a Comprehensive Basis.

Even if the Commission were to get past these legal deficiencies and decide to grant the waiver, it should do so contingent on the CAISO implementing comprehensive reforms to its market. As testified to in the attached Stoddard Affidavit, absent such reforms, approval of this Waiver Request is almost certain to result in a stampede of additional premature retirement requests.[7] Further, in instances where the Commission has faced a comparable retirement crisis, the Commission directed fundamental reforms to the energy and ancillary services in those markets, and also directed the regional grid operator to create a mechanism for compensating capacity service. For example, in ISO New England, Inc. ("ISO NE"), Mr. Stoddard notes that the Commission approved a long series of Reliability Must Run ("RMR") contracts for generators, particularly those located in Connecticut.[8] In order to end the domino of plant retirements, the Commission in 2003 directed ISO NE to make specific improvements to its energy and ancillary services markets *and* install a locational forward capacity market.[9] ISO NE

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[6] *Cal. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,211 (2011).

[7] *See Stoddard Affidavidt* at P 10

[8] *See id.* at 11-15.

[9] *Devon Power LLC, et al.*, 103 FERC ¶ 61,082 at P 37 (2003).

was able to put forward a conceptual capacity market design within three months of the Commission's order, and its full Forward Capacity Market in approximately one year. These reforms were designed to ensure that generating units had a reasonable opportunity (thought not a guarantee) of being able to recover both their fixed and variable costs.

As the CAISO concedes, the Commission has a short window of opportunity to get the California market design to the point where it will retain existing generation needed for reliability in 2017/2018, and has time to implement market revisions that will address the projected capacity gap. Should the Commission grant the Waiver Request, it should condition such acceptance on CAISO implementing reforms to its market that would accomplish objectives comparable to those the Commission imposed in ISO NE.[10] Such comprehensive reforms are necessary to prevent additional units from retiring and worsening the already significant reliability shortfall facing California.

II. COMMUNICATIONS

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[10] A centralized capacity construct is not the only possible solution. For example, a multi-year forward RA program administered by the CPUC, using inputs from the CAISO, could provide the necessary market reforms, as could a FERC-jurisdictional bilateral or centralized capacity market.

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III. MOTION TO INTERVENE

NRG Power Marketing LLC ("NRG PML") is a power marketer that participates in the California energy markets. Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power LLC, Long Beach Generation LLC, NRG Solar Blythe LLC, Avenal Solar Holdings LLC and NRG Solar Roadrunner, LLC own and operate gas-fired and solar power generation facilities in California. As participants in the markets operated by CAISO through both their power marketing activities and their generating facilities, the NRG Companies have a direct and substantial interest in this proceeding that cannot be adequately represented by any other party and their intervention would be in the public interest. Therefore, the NRG Companies respectfully seek to intervene in the above-captioned proceeding.

Dynegy Marketing and Trade, LLC and Dynegy Power Marketing, LLC are power marketers that participate in the California energy markets. Dynegy Moss Landing, LLC, Dynegy Morro Bay, LLC, and Dynegy Oakland, LLC own and operate generation facilities in California. The Dynegy Companies produce and sell electric energy and ancillary services to the markets operated by the California ISO. The Dynegy Companies hereby move to intervene in this proceeding. The Dynegy Companies will be directly affected by the outcome of this

proceeding. The interests of Dynegy Companies are not, and cannot be, adequately represented or protected by any other participant. Moreover, participation of the Dynegy Companies in this proceeding is in the public interest. Good cause therefore exists to grant the motion to intervene of the Dynegy Companies.

IV. BACKGROUND

In California, the primary mechanism for capacity procurement is the RA program, which is designed and administered by the CPUC. Under the RA program, load-serving entities ("LSEs") are required to procure, in advance, qualifying capacity in advance through self-supply or bilateral contracts with generators or other eligible resources. Through implementation of its CPM, the CAISO sought permanent authority to designate capacity resources when procurement through the RA program was insufficient. And while the CPUC previously considered adopting a forward procurement obligation, it elected to retain its existing structure.

Currently, the RA program applicable to those LSEs under the jurisdiction of the CPUC seeks to ensure that its LSEs have procured sufficient capacity to meet the monthly peak demands of the five summer months (May through September). However, this program only requires LSEs to procure capacity at most a year, and at least a month, in advance. The RA program projects neither system or local capacity requirements more than a year in advance, nor does it project the need for "flexibility"[11] – the purported need underlying the CAISO's request to waive portions of its tariff to provide Sutter with a risk-of-retirement CPM designation.[12] Given that the CAISO's energy and ancillary markets do not provide the revenues needed to

[11] "Flexibility" refers to a resource's ability to vary its output at the direction of the CAISO. The fact that "flexibility" is not included in the designation of RA needs indicates that the "product" being procured in the RA is underspecified, and needs to be more fully described as part of the comprehensive reforms recommended here.

[12] *See* Waiver Request at 13-17.

sustain operation, there simply is no market to project the need for, sustain existing or develop new generation that is needed within the next decade.

On March 17, 2011, the Commission accepted the CAISO's revisions to its tariff to implement the CPM.[13] The CPM included a new CPM designation category to allow CAISO to procure capacity at risk-of-retirement that will be needed for reliability in the *following* year.[14] In its acceptance of the CPM, the Commission rejected suggestions from the NRG Companies that "the ISO should provide for a minimum of a three-year forward CPM designation," [15] and agreed with the CAISO's assertion "that the CPM was not designed as a multi-year forward capacity market."[16]

On November 22, 2011, Calpine Corporation ("Calpine") asked the CAISO to designate its Sutter generating facility[17] as risk-of-retirement under the CPM and stated that absent such designation the Sutter facility would be retired in 2012 and would not be available in 2013 and later years.[18] Despite the precedent that CPM was not to be a multi-year forward capacity market, two weeks following the request, the CAISO issued a report on the basis and need for CPM designation for Sutter (the "Report").[19] In its Report, the CAISO concluded that because its analysis showed that the plant would only be needed for reliability as of 2017/18, the CAISO

[13] *Cal. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,211 (2011) ("CPM Order").

[14] *Id.* at P 10. The CPM replaced the Interim Capacity Procurement Mechanism ("ICPM"). *Id.* at PP 4-5.

[15] *Protest of NRG Energy, Inc.*, Docket No. ER11-2256-000 (filed December 22, 2010).

[16] *See, e.g.*, CPM Order at P 42.

[17] Sutter is a 572 MW (525 MW for capacity purposes) combined cycle gas-fired power plant located in Yuba City, California.

[18] "California ISO Report on Basis and Need for CPM Designation for Sutter Energy Center," (Dec. 6, 2011) http://www.caiso.com/Documents/Basis_Need_CapacityProcurementMechanismDesignation_SutterEnergyCenter.pdf.

[19] *Id.*

was precluded from procuring the resource under its current tariff authority.[20] Additionally, the CAISO found that because there would be an approximately 3,500 MW capacity gap by the end of 2017, it would seek a waiver of its existing tariff provisions, specifically Section 43.2.6(3), which limits the procurement of capacity at risk-of-retirement to instances in which the capacity is needed the *following* RA compliance year.[21] Notwithstanding the overwhelming opposition to the designation reflected in the stakeholders' comments before the CAISO,[22] on January 26, 2012, the CAISO filed the instant request with the Commission seeking a tariff waiver to designate Sutter as at risk-of-retirement under the CPM.

In parallel, Calpine filed a notice on the same day (November 22, 2011) with the CPUC stating that it was planning on retiring the Sutter plant in 2012 due to a lack of an RA contract.[23] In response, the CPUC issued a draft resolution that expressly acknowledged that Sutter is not required to meet any 2012 local area capacity requirements ("Draft Resolution"),[24] observed that there has been no CPUC finding of need for Sutter in 2020,[25] but yet proposed that the three California investor-owned utilities contract with Sutter until the end of 2012.[26] The Draft Resolution was also largely opposed in the January 31, 2012 comments filed in response. In its

[20] *Id.*

[21] *Id.*

[22] The stakeholders' comments are available at the following link http://www.caiso.com/informed/Pages/StakeholderProcesses/CapacityProcurementMechanismDesignation_SutterEnergyCenter.aspx.

[23] *See* Draft Resolution E-4471, available at http://docs.cpuc.ca.gov/WORD_PDF/COMMENT_RESOLUTION/157581.PDF ("Draft Resolution").

[24] Draft Resolution, Finding 6 ("The CAISO did not find deficiencies in the 2012 Resource Adequacy Plans.") In fact, Sutter is not located within any of the Local Capacity Areas under the CPUC's RA program.

[25] Draft Resolution at 5.

[26] *Id.*

Waiver Request before the Commission, the CAISO recognizes the CPUC's Draft Resolution and notes that because the result is not assured, it will continue to seek the tariff waiver.[27]

V. PROTEST

The CAISO lauds Sutter's operational characteristics, noting that the unit has a 60-80 percent capacity factor during the summer peak months and provides "significant energy and ancillary services" to the CAISO.[28] The signals that the combined CAISO and CPUC markets are sending, however, are telling Sutter that it should retire.

This raises three fundamental questions: *First*, what is wrong with the California energy, ancillary service and capacity markets that brought us to this precipice? *Second*, does the CAISO have the authority to award a single market participant an out-of-market contract, in violation of its existing tariff, as it has proposed to do in the instant filing? *Third*, if not, then what should the Commission do to fix the problems identified by the CAISO in its Waiver Request? We address each issue in turn.

A. The Problems Underlying California's Markets that Caused Sutter to Announce its Retirement:

1. California's Existing Hybrid Market Structure Does Not Provide a Reasonable Opportunity to Recover a Return On or Of Capital.

The fact that such a high-performing unit cannot recover its costs, even with the CPUC's RA program in place, brings the deficiencies of California's hybrid market structure into sharp focus. As the CAISO concedes, the combination of revenues that Sutter can expect from both the CPUC RA program and the CAISO markets is insufficient to justify its continued participation in the market. Moreover, as Mr. Stoddard notes, Calpine's decision to retire the $500 million Sutter facility suggests that Calpine has a bleak view of the CAISO's promises to

[27] Waiver Request at 10.

[28] Waiver Request at 9. Sutter is connected to the CAISO Balancing Authority Area (BAA) via a pseudo-tie connection, and, as such, is effectively located within the CAISO BAA.

create a flexible ramping product or make other reforms to its markets that would allow the Sutter plant to be economically viable within the next few years:[29]

> Assuming that Calpine is a rational economic actor (which I believe it is), its request to retire Sutter has little to do with that plant's earnings in 2012. It reveals far more about Calpine's pessimistic view about the long-run economic conditions for California generators. The CAISO's own studies support this pessimistic view, pointing to sharply reduced revenues and higher operating costs going forward, as the amount of renewable energy on the CAISO system increases.

The fact that the combination of the CAISO's energy and ancillary service markets, plus RA revenues from the CPUC's RA program, do not provide enough revenue to sustain the operation of even a modern, efficient combined cycle plant is not a new revelation. The CAISO's 2010 Market Issues and Performance Annual Report projects that the energy and ancillary service revenues from its markets in 2010 would have provided only a contribution of $30-35/kW-year towards a combined cycle unit's estimated annual fixed cost requirement of $190.70/kW-year.[30] Similarly, the same report prepared for 2009 projects that its energy and ancillary service markets would have provided a contribution of only $38-40/kW-year.[31] The revenues that a system resource, such as Sutter, can make in the CPUC's RA market are not sufficient to bridge this significant shortfall. In fact, Sutter, like every other system resource in California, no doubt attempted to seek a bilateral RA contract, and apparently was unable to find a buyer to cover the revenue shortfall that Sutter states is driving its retirement request.

While it is difficult to attribute the underlying cause of CAISO market's failure to provide meaningful revenues to any single cause, it is illuminating to point out a few:

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[29] Stoddard Affidavit at P 7.

[30] See 2010 Market Issues and Performance Annual Report at Section 2.3, pages 52-53. This report is available at http://www.caiso.com/Documents/2010AnnualReportonMarketIssuesandPerformance.pdf.

[31] See 2009 Market Issues and Performance Annual Report at Section 2.3, pages 2.21-2.23. This report is available at http://www.caiso.com/Documents/2009AnnualReportonMarketIssuesandPerformance.pdf.

- The relatively high amount of self-scheduling of units as price takers in California;
- The extensive commitment of units to minimum load, which prevents such units from setting price and is instead uplifted to load;
- The continued over-use of exceptional dispatch, which depresses prices;
- The CAISO's decision not to model all constraints that cause the commitment of resources, instead burying those costs in non-transparent uplift to the market;[32] and
- The failure to implement highly significant operational constraints (such as the operating nomogram that governs simultaneous operation of the Pacific AC and DC Interties) in the markets.

Regardless of the cause(s), the failure of the CAISO markets to provide meaningful price signals or revenues is irrefutable.

2. The CAISO Market Currently has no Means of Retaining Units Necessary for Reliability.

The threatened retirement of Sutter makes clear that neither the CAISO nor the CPUC has a market mechanism to ensure that California procures sufficient generation to meet its long-term reliability needs. The CAISO currently has no market structure to identify, let alone procure and provide compensation for, resources that will be needed for reliable operation of California's bulk electric system in the not-too-distant future. The problem is stark. As the CAISO explains in its Waiver Request, it anticipates the need for up to 3,500 MW of additional flexible gas-fired generation, above and beyond the capacity that Sutter provides, by 2017/2018 in order to meet the future demands of a system in which one-third of the energy serving load will come from variable output renewable generation resources. While the Commission clearly has the authority to ensure resource adequacy in California,[33] it has thus far deferred to the

[32] For example, NRG's Encina Generating Station (a roughly $30/MW-hour unit with prevailing gas prices) is routinely ordered to generate at a loss, even when Locational Marginal Prices at its bus settle at well below that price. Prices in fact have dropped as low as $7.00 for some hours in February, 2012. This is apparently due to CAISO's implementation of an unpriced Minimum Online Commitment Constraint.

[33] *See, e.g., Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) ("*Connecticut DPUC*"), *cert. denied*, 130 S. Ct. 1051 (2010).

CPUC to address RA issues. However, the instant filing makes clear that the market structure favored by the CPUC for system RA resources is teetering on the brink of failure and endangering system reliability. Further, the Protesters note that the CAISO footprint will shortly encompass areas outside of California.[34] It is not clear that this Commission's reliance on the CPUC's resource adequacy structure remains sufficient to maintain reliability across the entire multi-state footprint. This change in circumstances also requires that the Commission re-evaluate its deference to the CPUC.

When PJM brought a comparable reliability shortfall to the Commission's attention in 2006, the Commission noted that "PJM has shown that the existing construct will, in the future, fail to achieve the intended goal of ensuring reliable service."[35] The Commission identified that the then-existent PJM structure:[36]

> Does not enable market participants to see the reliability problems in particular locations, does not provide price signals that would elicit solutions to reliability problems in enough time before the problems occur, and does not allow transmission and demand response to compete on a level playing field with generation to solve reliability problems. These factors, in conjunction with other factors (such as load growth in particular locations, and the lack of price signals sent by the energy markets) render PJM's current construct unreasonable on a long-term basis. While one or more of the elements of PJM's current capacity construct may exist and be just and reasonable in other regional transmission organizations, the Commission finds the combination of these elements, results in an unjust and unreasonable capacity construct within PJM.

These elements – the lack of effective locational energy price signals and an inability to retain generation resources needed for reliability – are present in California today. In ultimately

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[34] Mr. Stoddard notes that "the CAISO will soon become a multi-state RTO and, presumably, the Nevada utility will act as its own [Local Regulatory Authority] and set its own reserve margins." *See* Stoddard Affidavit at P 30, n.23. *See also Order Accepting Transition Agreement, California Independent System Operator Corporation*, 137 FERC ¶ 61,194 (2011) (noting that Valley Electric Association, Inc. is "a member-owned electric cooperative based in Pahrump, Nevada, with a service territory that borders California and extends into a small portion of that state.")

[35] *PJM Interconnection, LLC,* 115 FERC ¶ 61,079 at P 26 (2006).

[36] *Id.*

approving PJM's Reliability Pricing Model, the Commission recognized that "[a]s the energy needs of participants in competitive markets subject to our jurisdiction continue to grow, the Commission must ensure just and reasonable rates by requiring that the energy supply continues to meet these growing needs. Specifically, the Commission must approve market designs and rate policies that elicit sufficient investment in energy, transmission, and demand response."[37] No party should seriously dispute that the Commission has the same obligations in California. Thus, *if* the Commission grants the Waiver Request, it should condition its acceptance on CAISO implementing the necessary market reforms discussed herein in order to meet its statutory obligations; and if it denies the waiver, then it should consider finding *sua sponte* that the CAISO's existing market is unjust and order appropriate changes.

While the Protestors do not wish to become embroiled in a jurisdictional tug of war, it is clear that system resources are in a catch-22: they cannot depend on the CAISO markets to survive and are not earning enough from the CPUC RA markets to make up the shortfall. Thus, California has no mechanism in place to identify and meet future needs, especially the need for sufficient flexible gas-fired generation capacity.

3. The CAISO's Projections of Need Correctly Identify Reliability Problems Starting in 2017/2018.

The Protestors strongly support the CAISO's efforts to project a realistic need for flexibility associated with California's move towards a 33 percent RPS. The CAISO's "operations planning scenario" projects a higher load than the CPUC-approved scenarios, which incorporate aggressive, but uncommitted and unproven energy efficiency and demand response

[37] *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 at P 1 (2006).

into their 2020 demand forecasts.[38] If these aggressive energy efficiency and demand response forecasts fail to materialize, the CPUC will be faced with a choice between a reliability crisis or the need to issue high-cost emergency procurement of new capacity, such as the CPUC did in directing Southern California Edison to build five new peaking units in 2006.[39] And should California turn to non-competitive procurement to try to meet the projected 3,500 MW shortfall of flexible capacity projected by the CAISO, such extra-market procurement of generation that does not rely on CAISO market revenues for its survival will only serve to make the CAISO's energy and ancillary markets more irrelevant. This, in turn, will only serve to drive other units to seek Sutter-like treatment, or will drive other units from the market and create an even larger deficit in flexible capacity that can only be met by non-competitively procured generation insulated from the chill of the CAISO markets.[40]

The CAISO's assumptions underlying its waiver request – the increasing need for flexibility and the long development timelines for new generation – are reasonable. It is the CAISO's proposal to address these underlying realities in an *ad hoc* way, rather than in a comprehensive manner, to which the Protestors object.

B. The Legal Flaws in CAISO's Proposed Waiver:

1. The CAISO's Request Fails to Satisfy the Commission's Requirements for Waiver Requests.

In granting waivers of tariff provisions, the Commission has generally found good cause for the waiver where the requested waiver is necessary to "alleviate the effects of errors by ISOs

[38] As the D.C. Circuit clarified in *Connecticut DPUC*, it is *this* Commission's ultimate obligation to ensure that California has the necessary resource mix to ensure reliability. *See also* Section 215 of the FPA (charging the Commission with maintaining reliability).

[39] *See* President Peevey Assigned Commissioner Ruling Addressing Electric Reliability Needs in Southern California For Summer 2007, issued in R. 06-02-013 (August 15, 2006).

[40] *See* Stoddard Affidavit at P 8.

or other entities"[41] or where the market participant's error was "unintentional"[42] or "an inadvertent mishap."[43] The Commission specifically requires that the waiver: (i) be of limited scope, (ii) has no undesirable consequences, and (iii) contain obvious benefits to customers.[44] As explained below, none of these circumstances are present here.

a. Waiver is not intended to allow a utility to bypass section 205 review.

Typically, waivers are granted in cases where a party has erred in complying with a tariff provision or where enforcement of a particular tariff would result in injustice on an individual party. Conversely, waivers are not designed to allow a utility to escape review under section 205 of the Federal Power Act. Whether a utility has a right to financial contract with a unit that may be needed for reliability service, but will not be needed until beyond the horizon where new entry could come into the market is clearly an issue of first impression at the Commission, and not appropriately reviewed and resolved through a tariff waiver. Thus, as a threshold matter, the Commission should reject the waiver as an impermissible end-run around the FPA. As the Commission recently noted in rejecting a request for waiver by Midwest ISO:[45]

> We find that MISO's proposal would alter the existing cost allocation methodology . . . As a result, we find that MISO's [waiver request] would significantly affect the rates and charges for jurisdictional service. Pursuant to section 205(c) of the FPA, '. . . every public utility shall file with the Commission . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges . . . .' ***Such changes should not be effectuated by a waiver of the Tariff, but should be submitted via a properly-supported section 205 filing***[.]

[41] *See id.*

[42] *See Cal. Indep. Sys. Operator Corp.,* 118 FERC ¶ 61,226, P 24 (2007).

[43] *See Wisvest-Connecticut LLC v. ISO-New England, Inc.,* 101 FERC ¶61,372., P 24 (2002).

[44] *See Arizona Public Service Commission*, 137 FERC ¶ 61,023 at n.5 (2011).

[45] *Midwest Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,212 (2011) at P 28 (citations omitted) (emphasis added).

There is little question that the CAISO's proposal to provide long-term out-of-market financial support to generating units that, while critical to system reliability in six years, are losing money today would "significantly affect" the rates charged by the CAISO for jurisdictional services. In addition to the direct impact on Sutter and on ratepayers required to pay for the Sutter contract, the retention of an uneconomic plant has direct impacts on energy and capacity prices throughout California, as it is effectively being subsidized by the CAISO. Further, the ability of generators to seek risk-of-retirement CPM designations is likely to ripple through both the CAISO and CPUC markets, as economically rational generators seek treatment comparable to Sutter.

For this reason alone, the Commission should reject the CAISO's Waiver Request. The Protestors recommend that any such rejection be without prejudice, and would welcome a section 205 proposal from the CAISO to implement enhancements to its CPM mechanism that would be generically available to all generators in California. As even the CAISO concedes, the 525 MW Sutter facility would not satisfy any of the 3,500 MW capacity gap that the CAISO predicts will occur in 2017/2018.[46] Thus, the changes CAISO seeks to the CPM process are better implemented on a generic basis.

b. <u>The Waiver Request is not limited in scope.</u>

CAISO posits that its Waiver Request is limited in scope merely because "the Sutter plant is the only resource for which any market participant has requested or is anticipated to request a CPM designation due to a risk-of-retirement."[47] This is, in fact, incorrect. In addition to Sutter, the CAISO filing identified more than 1,200 additional megawatts of flexible ramping capacity that is currently not subject to an RA contract.[48] Sutter was simply the first through the door to

[46] *See* Waiver Request at 3 ("If the Sutter plant is retired, the capacity gap identified by the ISO will grow by an additional 525 MW . . .").

[47] *Id.* at 47-48.

[48] *Id.* at 44-45.

seek a retirement. Perhaps because Sutter is the first plant to request such designation, CAISO has failed to give adequate consideration to the potential consequences of setting such precedent.

And while the Waiver Request asserts that Sutter is "uniquely" situated, the Sutter Facility is, in fact, one of many units that are unlikely to survive without fundamental reforms to California's hybrid market structure. In this way, as noted in the Stoddard Affidavit, Sutter is more appropriately characterized as an "unexceptional unit" that provides only generic system capacity.[49] Mr. Stoddard estimates that there are tens of thousands of additional megawatts of system capacity that entered into RA contracts at low, likely non-compensatory, rates simply because some capacity revenue is better than no capacity revenue.[50] These units are also losing money.

Further, experience has shown that relying on non-competitive *ad hoc* procurements has the potential to encourage more such *ad hoc* procurements, to the detriment of ratepayers and the competitive market. Just as the early stages of ISO-NE's market development led to the proliferation of RMR agreements, precedent of this Waiver Request could lead to additional requests to designate capacity at risk-of-retirement in 2012 under the CPM. CAISO's blanket statements that the Sutter designation will not lead to additional requests do not refute the history of the ISO-NE market and offer no assurance that other units will not likely request the same designation.

The likeliness of others following in Sutter's path increases with the amount of time it takes the CAISO to implement new risk-of-retirement provisions, which it aggressively anticipates will be early 2013:[51]

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[49] Stoddard Affidavit at P 16.

[50] *Id.* at 17.

[51] Waiver Request at 8.

> The ISO expects to file new risk-of-retirement tariff provisions with the Commission in the fall of 2012, which once approved by the Commission would potentially apply to the Sutter plant and any other similarly situated resources in years after 2012. In other words, the requested waiver only applies to the designation of the Sutter plant for 2012; it does not carry over into future years.

The CAISO's logic is that additional requests to designate capacity at risk-of-retirement in 2012 under the CPM are unlikely because the comparable resources risking retirement will be assessed under the longer-term capacity procurement mechanism to be implemented is equally unavailing.[52] Past experiences with the implementation of California market mechanisms shed doubt on whether new risk-of-retirement provisions, let alone a forward capacity type market can be developed and implemented in just a six-month process – short of the Commission mandating such action.[53] Moreover, the CAISO is currently under no obligation to make a section 205 filing. In short, the Protestors do not share the CAISO's optimism that the CAISO will *voluntarily* develop and file a comprehensive new capacity market structure in just six-months.

Even if the CAISO succeeded in the Herculean[54] task of getting new risk-of-retirement provisions in place by 2013, new risk-of-retirement provisions do not constitute a durable, forward-looking market structure. Such provisions would simply become the next band-aid laid over the still unhealed market deficiencies, and would do nothing to prevent future risk-of-retirement designations. In that case, the waiver giving Sutter a risk-of-retirement CPM

[52] Waiver Request at 47-48.

[53] The CAISO's optimism that it can craft new risk-of-retirement provisions – especially for a new product, flexibility – in six months may be admirable, but it does not reflect historical reality. All previous CAISO attempts to assert or expand its "backstop" capacity procurement authority, beginning with the CAISO's Reliability Must-Run contracts, and continuing with the Reliability Capacity Services Tariff ("RCST"), the ICPM and the CPM were long, complex, and extremely contentious proceedings. Additionally, the fact that there have been multiple proceedings dealing with the topic of the CAISO's backstop capacity procurement authority – even following settlements – suggests that none of these mechanisms proved especially durable. Consequently, there is little reason to believe that the new risk-of-retirement provisions that the CAISO asserts will be in place at the beginning of 2013 and will prove to be the permanent fix that will make the proposed Sutter CPM designation a one-and-done event.

[54] Given the history of the CAISO's capacity backstop authority, "Sissiphean" might be the better mythological allusion.

designation would be "limited" only in the sense that it would be the last risk-of-retirement designation made under the existing tariff provisions.

c. The Waiver Request Will Create Undesirable Consequences and Will Not Obviously Benefit Customers.

Finally, the proposed Waiver Request will create undesirable consequences and will not benefit customers. The Commission has granted waiver requests where the waiver will "avoid potentially unnecessary adverse market impacts that may result"[55] and the "resultant benefits to customers are obvious."[56] While the CAISO baldly asserts that its Waiver Request meets these requirements, at the same time it concedes that the "waiver will result in the allocation of significant costs to ratepayers."[57] Along these same lines, the CAISO argues that customers will benefit if the Waiver Request is granted because the retirement of the Sutter plant would harm customers.[58] There are several serious flaws in this reasoning.

First, the CAISO ignores the fact that approval of the waiver may incent additional generators to shed their RA obligations and seek retirement. As the Commission observed in the context of the *Devon Power* proceeding in ISO NE, this is not a genie that can easily be put back into the bottle, and once one generator is granted access to non-market price supports, other entities are forced to seek comparable concessions in order to remain competitive. As Mr. Stoddard testifies "this Petition will be the first of a long line of resources that are too essential for reliability, both now and in the future to let go, but whose owners simply do not expect to earn enough money to justify their continued operation."[59]

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[55] *Cal. Indep. Sys. Op.Corp.*, 136 FERC ¶ 61,214 at PP 16-19 (2011) .

[56] *See Arizona Public Service Commission*, 137 FERC ¶ 61,023 at n.5 (2011) (internal citations omitted).

[57] Waiver Request at 48.

[58] *Id.* at 50-51.

[59] Stoddard Affidavit at P 8.

Second, the Commission has long recognized that out-of-market non-competitively priced contracts are harmful to the market. In ISO NE, the Commission concluded that out-of-market contracts were generally harmful, stating:[60]

> RMR contracts suppress market-clearing prices, increase uplift payments, and make it difficult for new generators to profitably enter the market. … As a result, expensive generators under RMR contracts receive greater revenues than new entrants, who would receive lower revenues from the suppressed spot market price. In short, extensive use of RMR contracts undermines effective market performance. In addition, suppressed market clearing prices further erode the ability of other generators to earn competitive revenues in the market and increase the likelihood that additional units will also require RMR agreements to remain profitable. Therefore, we believe that ISO-NE, rather than focusing on and using stand-alone RMR agreements, should incorporate the effect of those agreements into a market-type mechanism.

Thus, the Commission itself has already concluded that there are undesirable consequences associated with granting the waiver.

Third, the Commission has been explicit in several recent proceedings that in order for markets to function properly, non-economic capacity must be allowed to freely exit the market when price signals warrant. In *ISO NE*, 138 FERC ¶ 61,027 at P 57 (2012), the Commission strongly condemns artificial price support that would "prevent otherwise economic resources from prematurely retiring. To the contrary, extending [artificial price support], and thus keeping prices above market clearing levels, would delay efficient retirement."[61]

Mr. Stoddard likewise disagrees with the CAISO's assertions that the requested waiver would have no adverse impacts and would obviously benefit ratepayers. Mr. Stoddard testifies to these adverse impacts and notes that retention of uneconomic units will further depress energy

[60] *Id.* at 29.

[61] While NRG disagrees with the Commission's conclusion that premature retirements caused by flaws in market design are good for the market, it is currently the law of the land and should be applied here.

prices in California, creating a vicious cycle that will cause additional downward pressure on generator revenues.[62]

The CAISO also ignores the harm in applying an *ad hoc* approach rather than focusing on reforming its capacity market in an effort to alleviate the potential 2017 3,500 MW capacity gap. This is akin to offering that extra-market (e.g., exceptional) dispatch has no ill effect on proper price formation – if you exceptionally dispatch only one unit. As noted in the testimony of Mr. Stoddard, any extra-market procurement or dispatch affects proper price formation.[63]

2. The Waiver Request Violates the FPA's Prohibition Against Undue Discrimination.

Section 205(d) of the FPA prohibits undue discrimination or preferential treatment of any party. In practice, the Commission interprets this mandate as requiring similarly-situated entities to be treated in a comparable manner. The CAISO attempts to get around these statutory requirements through repeated assertions that Sutter is "uniquely situated."[64] However, while Sutter provides beneficial operating characteristics, including efficiency and flexibility, Sutter does not provide these characteristics in a unique way. Sutter is not located within a local capacity region; in fact, it is not physically within the CAISO BAA, but connects to the CAISO BAA via a pseudo-tie. In fact, the CAISO itself recognizes that there are "1,256 MW of flexible resources that have not been included in resource adequacy showings" for the 2012 RA compliance period alone.[65] It makes the blanket assertion that the "vast majority of [flexible]

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[62] *See* Stoddard Affidavit at P 21.

[63] *Id.* at P 6 and P 21.

[64] *See* Waiver Request at 7 ("The Sutter plant is uniquely situated as the only plant that has provided the ISO with notice of its intent to retire in 2012 absent a CPM designation . . . ISO does not expect another resource can support a comparable waiver request . . . There is no other resource as large and flexible as Sutter that has not been procured through the annual CPUC resource adequacy process.").

[65] *Id.* at 44-45.

resources have resource adequacy contracts for 2012," while conveniently ignoring the fact that its own pleading identifies similarly-situated flexible generation that remains uncontracted.

According to the CAISO, Sutter is "unique" simply because it is the only resource that has, to date, sought a risk-of-retirement CPM designation. Even if the Commission were to adopt the CAISO's definition of unique, Sutter's "uniqueness" would be destroyed if any other resource sought a risk-of-retirement CPM designation – something that is virtually certain to happen unless the Commission rejects or otherwise conditions this Waiver Request. Moreover, the CAISO ignores the fact that a myriad of other generating facilities would effectively be punished because they agreed to accept unreasonably low RA contracts, in lieu of getting nothing. The capacity products these other units provide are by definition identical to the capacity product provided by Sutter.[66]

Sutter is the canary in the coal mine that points out the flaws in the current market structures. Saving this particular canary, however, does not mean that the mine air will suddenly become breathable for all. The transformation of California's grid that will take place over the next decade as California moves towards its bold Renewable Portfolio Standard, which mandates

[66] *See PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 141 (2006) ("In a competitive market, prices do not differ for new and old plants or for efficient and inefficient plants; commodity markets clear at prices based on location and timing of delivery, not the vintage of the production plants used to produce the commodity. Such competitive market mechanisms provide important economic advantages to electricity customers in comparison with cost-of-service regulation. . . . This market result benefits customers, because over time it results in an industry with more efficient sellers and lower prices."); *Commonwealth Edison Co.*, 113 FERC ¶ 61,278 at P 43 (2005) (nondiscriminatory single-clearing price capacity auctions "ha[ve] the benefit of encouraging all sellers to place bids that reflect their actual marginal opportunity costs" and have been "found to produce just and reasonable rates for all the energy and ancillary service markets currently operated by the independent system operators and regional transmission organizations under our jurisdiction."); *Devon Power LLC*, 110 FERC ¶ 61,315 at P 45 (2005) (paying all "generators the same market-clearing price creates incentives to minimize costs, because a generator's cost reductions are retained by the generator and thus increase its profits" while paying "different amounts to different generators based on the level of compensation needed to keep the generator in operation would create a unit-specific cost-based system and undermine the advantages of a market for capacity"); *New York Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,244 at P 65 & n.76 (2005) ("Efficient pricing requires that suppliers receive the highest market value for their resources, independent of their bids [as] [t]his gives all sellers the proper incentive to offer their resources at the marginal cost of their highest valued use."); *New York Indep. Sys. Operator, Inc.* 103 FERC ¶ 61,201 at P 81 (2003) ("all capacity suppliers, regardless of the age of their resources, are entitled to the same treatment in the ICAP market. . . . The Commission does not see how [more expensive] generators could receive ICAP revenues that were fundamentally different from those paid to other generators. Moreover, those are the types of market signals the Commission would expect to encourage new generation additions.").

that one-third of the electricity consumed in 2020 be generated by renewable resources, will require an equally bold transformation of California's existing electricity market structures. The instant Waiver Request, however, does not amount to a bold transformation. Nor does it even begin the hard work needed to bring about this transformation.

3. The Commission Has Already Rejected a Multi-Year Forward CPM Designations and the CAISO Proposal Represents an Impermissible Collateral Attack.

The CAISO proposal to modify its risk-of-retirement provisions on an *ad hoc* basis for a single market participant represents a material deviation from the "narrowly tailored" provisions previously approved by the FERC. In its explanation of why it needed a risk-of-retirement designation, the CAISO explained to FERC that:[67]

> …. the risk of retirement designation was carefully designed to address a narrow situation, where a resource at risk of retirement that is needed for reliability in the following resource adequacy compliance year (year 2) is not procured for the current or imminent compliance year (year 1), that none of the existing measures can address. In such a situation, CAISO explains, the resource does not meet the reliability must-run eligibility requirements, as the reliability must-run structure is designed for current year procurement only, and the resource has not been procured in the bilateral resource adequacy market.
>
> Moreover, CAISO states, because the resource is not needed in the current year, it would not qualify under the existing ICPM authority. Finally, CAISO notes that a resource that qualifies for the risk of retirement designation will not be replaced with new generation through the most recent long-term planning process in time to meet the following year's need, and is not deemed to be needed for reliability purposes by the CPUC under its General Order 167 operating standards.

It is clear that the Sutter facility is not needed for the following resource adequacy compliance year (2012) or even the compliance year after that.[68] In fact, the CAISO explicitly states that "[t]he sole purpose of this waiver request is to permit the ISO's analysis of reliability

[67] *Cal. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,211 at P 113 (2010) ("CPM Order").

[68] Waiver Request at 14 ("The ISO's analysis does not support such a need for the Sutter plant by 2013.").

needs to look forward a period of five years rather than the two-year period currently contemplated by Section 43.2.6 of the ISO Tariff."[69]

The CPM Order, however, expressly rejected suggestions from the NRG Companies that "the ISO should provide for a minimum of a three-year forward CPM designation," [70] and agreed with the CAISO's assertion "that the CPM was not designed as a multi-year forward capacity market."[71] The instant proposal thus represents a direct collateral attack on this precedent. While the Protestors are sympathetic to Sutter's plight, the Commission should not preserve a single facility without having provided similar designations to all other similarly-situated facilities in California.

The downside of relying on a bilateral RA capacity "market" is that such a construct is opaque, dominated by a small number of large buyers, and conducted on short-term time horizons that neither match the realities of permitting, construction or capital addition timelines nor account for operational requirements beyond the next compliance year. However, the Commission presumably took this into consideration when it approved the CAISO's CPM proposal, and expressly declined to allow multi-year commitments.

4. The Remaining Requirements for Risk-of-Retirement CPM Designation are Not Met.

Even if the Commission grants the Waiver Request, the CAISO lacks authority to designate CPM capacity to keep Sutter in operation because such designation fails not only the requirements of CAISO Tariff Section 43.2.6(3), but also the requirement of CAISO Tariff Section 43.2.6(4), which both must be met for risk-of-retirement CPM designation. Section 43.2.6(4) requires that for a risk-of-retirement CPM designation "no new generation is projected

[69] *Id.* at 49.

[70] *Protest of NRG Energy, Inc.*, Docket No. ER11-2256-000 (filed December 22, 2010).

[71] *See, e.g.*, CPM Order at P 42.

by the ISO to be in operation by the start of the subsequent RA Compliance Year that will meet the identified reliability need." Not only does the CAISO admit that its "analysis does not support such a need for the Sutter plant by 2013,"[72] it is forced to concede that it is possible to bring new generation online prior to the 2017/2018 time period when Sutter would be needed. Said another way, it is possible that new generation could come on line to displace the need for Sutter prior to the time for which the need has been determined (2018). Thus, not only is Sutter not needed within the next five years, it also is not a unique solution to the CAISO's reliability concerns. Thus, in order to have the requisite authority to enter into a multi-year forward capacity contract with Sutter, the CAISO would also require a waiver of Section 43.2.6(4), which it has not sought.

C. Recommendations on How the Commission Should Respond to the Reliability Crisis Predicted by the CAISO

1. The Commission should Adopt a Long-Term Capacity Mechanism to Address the Impending Reliability Crisis.

Should the Commission elect to grant the waiver, it should, at a minimum, direct the CAISO to fix the problems that led to Sutter's proposed retirement. This will require substantial improvements to the CAISO's energy and ancillary services markets, as well as significant amendments to its CPM, as well as establishing a centralized capacity market or comparable means of retaining the necessary resources into the CAISO marketplace. Similar to the plight of Sutter, under the ISO-NE market structure in place in the early 2000's, certain generating units could not recover their investments to economically run without the designation.[73] Ultimately, FERC found that the "proliferation of [RMR] agreements is not in the best interest of the competitive market as they affect other suppliers participating in this market, especially those

[72] *Id.* at 14.

[73] *Id.* at 7.

suppliers operating within the same [Designated Congestion Area]"[74] and "rejected the majority of RMR agreements, out of concern about the effect widespread use of such contracts would have on the competitive market."[75] Otherwise, as the Commission saw in 2006 in ISO NE, California is likely to see other market participants to follow Calpine's lead and seek a risk-of-retirement designation. As Mr. Stoddard testifies:[76]

> Reading the Petition and reviewing the underlying materials, I could not escape the feeling that I had seen this movie before, or perhaps its prequel. The fact pattern and general circumstances are, to my eye, remarkably similar to the market design issues in New England litigated nine years ago.
>
> On February 26, 2003, Devon Power LLC et al., subsidiaries of NRG, filed four cost-of-service agreements with the Commission. NRG had negotiated these agreements with ISO New England, Inc. ("ISO-NE"), in accordance with market rules, for 1,728 MW of capacity in the deliverability-constrained areas ("DCAs") of Connecticut and Southwest Connecticut. From a systems operations perspective, these units were not exceptional, except for their location on the grid.

Mr. Stoddard relates that, as is currently the case in California, overly-prescriptive mitigation rules limited the energy revenues that generating units in certain areas of the grid could earn.[77] NRG demonstrated that its units were unable to recover their costs, and thus sought "temporary RMR contracts for its units that would pay them their full cost-of-service until ISO-NE is able to implement locational ICAP or some other form of locational capacity requirement."[78] This situation is entirely analogous to the situation facing the Commission today with regards to

[74] *Id.* at 31.

[75] *Devon Power LLC, et al.*, 115 FERC ¶ 61,340 at P 7 (2006).

[76] Stoddard Affidavit at PP 11-12.

[77] *Id.* at P 12.

[78] *Id.*

Sutter. Mr. Stoddard then explains that the Commission, in response to the ISO NE crisis directed ISO NE to make four reforms to its markets:[79]

> Rather than rubber-stamp the RMR contracts, the Commission took four actions that collectively changed the evolution of the ISO-NE markets away from one-off contracting and towards greater reliance on market mechanisms to assure reliability:
>
> > a. First, it temporarily changed energy market rules to allow a greater markup over cost, "to provide a market mechanism for high cost, seldom run units to recover their fixed costs";
> >
> > b. Second, it required that energy from peaking units be allowed to set the market clearing price so that "all sellers will be able to receive a high market price and recover fixed costs."
> >
> > c. Third, it eliminated the CT Proxy price rule, now mooted by the previous two actions; and
> >
> > d. Fourth, it directed ISO-NE to make a filing within approximately ten months for implementation no later than three months following the filing date of "a mechanism that implements location or deliverability requirements in the ICAP or resource adequacy market."

Comparable reforms in California would include allowing units dispatched at minimum load to set price; eliminating certain unpriced constraints in the CAISO system that artificially lower prices; and establishing a capacity market design that would allow units, including Sutter, to have a reasonable opportunity to recover their costs.

2. The Commission Should Direct Market Reform, Not Extra-Market Procurement

The CAISO projects a 3,500 MW capacity gap as early as the end of 2017 and anticipates an increase in the capacity gap to 4,600 MW by 2020.[80] Having a need for thousands of megawatts of flexible generation with no idea about how this generation will be built constitutes

[79] *Id.* at P 14 (*internal citations omitted*).

a problem. The CAISO is coming to the Commission asking for a band-aid. The Commission should instead direct the CAISO to institute the bold market reforms that this situation demands.

The flaws in the CPUC's RA program and the CAISO's inability to designate sufficient capacity resources when procurement through the RA program is insufficient must be remedied. While the CAISO and CPUC are both undertaking their own measures to prevent the retirement of Sutter, the two have not even agreed on the future need for the project – the CAISO projected a 3,500 MW capacity gap in 2017/2018, while the CPUC neglected to make any official determination of need in its Draft Resolution.[81] The Commission is the appropriate party to require the CAISO to undertake measures to implement a long-term capacity procurement mechanism that ensures that sufficient capacity is available to meet California's needs, both now, in the near future, and beyond the next RA year. Indeed, the CAISO itself has implicitly recognized that it currently lacks any jurisdictional tools to deal with the potential medium- and long-term threats to system reliability.[82]

The Commission should require the CAISO to address the California market flaws in a systematic and transparent manner that applies to all generators on a non-discriminatory basis. Specifically, the Commission should direct CAISO to file by a date certain for implementation of a long-term capacity procurement mechanism that ensures sufficient capacity is available to meet the CAISO's reliability needs. The Commission's approach should be similar to its efforts in ISO-NE, in which the Commission required ISO-NE to file by a date certain for implementation,

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[80] *See, e.g., id.* at 3 ("If the Sutter plant is retired, the capacity gap identified by the ISO will grow by an additional 525 MW . . .").

[81] Draft Resolution at 5.

[82] Resource adequacy and the ensuring the reliability of the transmission system are, at the end of the day, both jurisdictional to *this* Commission. *See, e.g.*, Section 215 of the Federal Power Act and *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (holding that FERC has jurisdiction to "determine just and reasonable capacity charges" and that "it may set those charges so as to incentivize the procurement or creation of additional capacity to ensure system reliability.")

no later than three months after the initial filing, a mechanism to appropriately compensate installed capacity for reliability.[83] Such approach will foster reliability and avoid the potential harm to ratepayers and the competitive market likely to result from relying on non-competitive *ad hoc* procurements that have the potential to encourage more such *ad hoc* procurements.

VI. CONCLUSION

In summary, the Protestors respectfully request that the Commission reject the CAISO's Waiver Request, find *sua sponte* that the CAISO's existing market is unjust and direct CAISO to file by a date certain for implementation of a long-term capacity procurement mechanism that ensures sufficient capacity is available to meet the CASIO's reliability needs. Alternatively, should the Commission grant the Waiver Request, Protestors respectfully request that the Commission condition such acceptance on CAISO implementing the necessary market reforms as outlined above.

Respectfully submitted,

/S/	/S/
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[83] *Devon Power LLC, et al.*, 103 FERC ¶ 61,082 at P 37 (2003).

Certificate Of Service

I hereby certify that I have served a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Princeton, New Jersey this 16th day of February, 2012.

_/s/ *Gretchen Hunt*
Gretchen Hunt