UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

CXA La Paloma, LLC v. California Independent System Operator Corporation	))))	**Docket No. EL18-177-001**

REQUEST FOR REHEARING

Pursuant to Section 313(a) of the Federal Power Act (the "FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[2] the NRG Companies respectfully request rehearing of the Commission's November 19, 2018 order[3] deny a complaint filed by CXA La Paloma, LLC ("La Paloma") challenging the California Independent System Operator Corporation's ("CAISO") backstop Resource Adequacy rules.

I.

STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[4] Suppliers hereby identify each issue on which they seek rehearing of the La Paloma Order, and provide representative precedent in support of their position on each of those issues:

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1 16 U.S.C. § 825*l*(a) (2012).

2 18 C.F.R. § 385.713 (2017).

3 *CXA La Paloma, LLC v. California Independent System Operator Corp.*, 165 FERC ¶ 61,148 (2018) ("La Paloma Order").

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4 18 C.F.R. § 385.713(c)(2) (2017).

1. The La Paloma Order did not adequately consider evidence of increasing use and reasons underlying CAISO's Emergency Backstop Designations.

   Public Utils. Comm'n of Cal. v. FERC, 462 F.3d 1027 (9th Cir. 2006); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005); *Moraine Pipeline Co. v. FERC*, 906 F.2d 5 (D.C. Cir. 1990); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

2. The Order did not apply reasoned analysis of the evidence that the role that the CAISO's backstop authority plays in unduly suppressing RA prices.

   Vill. of Old Mill Creek v. Star, Nos. 17-2433 and 17-2445 (consolidated) (7th Cir. May 29, 2018); *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009); *Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315 (D.C. Cir. 2004); *Northern States Power Co. v. FERC*, 30 F.3d 177 (D.C. Cir. 1994); *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066 (D.C. Cir. 2003); *Moraine Pipeline Co. v. FERC*, 906 F.2d 5 (D.C. Cir. 1990); *Alabama Elec. Co-op., Inc. v. FERC*, 684 F.2d 20 (D.C. Cir. 1982); *Calpine Corp., et al. v. PJM Interconnection, LLC*, 163 FERC ¶ 61,236 (2018); *MRTU Order*, 116 FERC ¶ 61,274, order on reh'g, 119 FERC ¶ 61,076 (2007), *aff'd*, *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520 (2010);

3. The Order does not appropriately address the section 206 framework or address the undue discrimination arguments advanced by the parties.

   See 16 U.S.C. § 824d(b) (2016)

4. Rehearing of the La Paloma Order is required because it ignores the obligation to ensure that Rates are Just and Reasonable for all market participants.

   FPC v. Hope Nat. Gas Co., 320 U.S. 591 (1944); *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923); *Smyth v. Ames*, 169 U.S. 466, 546 (1898); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 103 (2008), *on reh'g & compliance*, 124 FERC ¶ 61,301 (2008), *on clarification*, 131 FERC ¶ 61,170 (2010), *on clarification & reh'g*, 150 FERC ¶ 61,208 (2015), *clarification & reh'g dismissed*, 158 FERC ¶ 61,127 (2017); *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 (2005); *Price Formation in Energy and Ancillary Servs. Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, 153 FERC ¶ 61,221 (2015); *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,196 (2003)

II.

BACKGROUND

The procurement of electric supply resources to serve electric demand and maintain reliability within the footprint operated by the CAISO takes place over multiple timeframes and through multiple regulatory structures. In general, most capacity is procured through the Resource Adequacy ("RA") program administered by the California Public Utilities Commission ("CPUC"). The RA program was initiated in 2004 and requires CPUC-jurisdictional load-serving entities ("LSEs") to secure system, local and then later, flexible capacity. The CPUC's RA program requires LSEs to procure all required local and flexible capacity for a given year by the end of October of the prior year. LSEs must also procure 90 percent of their required system capacity by the same time. LSEs must demonstrate that they have procured all required system capacity for a given month by 45 days prior to the beginning of that month.

The CAISO tariff includes RA provisions that largely mirror the CPUC's RA rules and apply to LSEs within the system under the CAISO's operational control, including LSEs that are not subject to the CPUC's jurisdiction. Because the CPUC's RA program operates only on a year-ahead basis, resources secured to meet RA requirements are those that already exist, or have recently come on-line pursuant to other procurement mechanisms.

Over the longer term, the CPUC evaluates the need and authorizes procurement for new resources through a process separate from the RA program. Resources procured through these longer-term procurement mechanisms receive long-term contracts. In contrast, resources procured to meet RA requirements receive short-term contracts of as short as a month and of as long as a few years, at best. Prior to 2017, the CPUC relied on Long-Term Procurement Planning ("LTPP") process to procure new generation resources pursuant to long-term contracts. More recently, the CPUC has initiated a new Integrated Resource Planning process to replace the

LTPP process. Additionally, the CPUC has procured new resources through other mechanisms, including the Renewable Portfolio Standard proceeding, the energy storage proceeding, and various renewables feed-in tariff programs. These programs have spurred the deployment of tens of thousands of MW of "preferred resources," a term which includes non-carbon-emitting resources, to meet state policy goals independent of the need to serve demand or maintain reliability. The influx of these state policy-driven resources completely outside of the CAISO's energy markets has had significant effects on the CAISO's energy markets (depressing energy prices) and on the CAISO's operational requirements (increasing the need for flexible resources to follow growing net load ramps driven by the disappearance of solar generation as the sun goes down).

While the RA program is intended to provide the CAISO with all the system, local and flexible capacity it requires to maintain reliability, the reality is that the RA program often does not provide the CAISO with the necessary fleet of resources. And because the CAISO is ultimately responsible for ensuring the reliability of the California electric grid, the CAISO's tariff authorizes the CAISO to procure capacity not provided by the RA program that is required to take to ensure system reliability. Specifically, the CAISO has authority to procure capacity not already under an RA contract in three main circumstances that are relevant to this rehearing (collectively, "Emergency Backstop Designations"):

1. Designate a resource without an RA contract as a temporary RA resource because of unexpected operational events (e.g., an exceptional dispatch giving rise to a CPM designation); or

2. Designate a resource without an RA contract as a temporary RA resource because the LSEs failed to provide sufficient resources to meet minimum local, system or flexible capacity reliability requirements (e.g., a CPM designation related to an RA showing deficiency).

Additionally, the CAISO tariff authorizes the issuance of "Reliability Must-Run" ("RMR") contracts that are typically used to meet local transmission reliability.[5]

In response to an alarming trend of increased Emergency Backstop Designations, La Paloma filed a complaint pursuant to section 206 of the Federal Power Act in the above-captioned proceeding against the CAISO. La Paloma alleged that the resource adequacy regime in California was unjust, unreasonable, and unduly discriminatory. As a remedy, La Paloma requested that the Commission direct CAISO to implement centralized resource adequacy procurement and a transitional payment mechanism. On November 19, 2018 the Commission issued an order denying CXA La Paloma's complaint.

III.

REQUEST FOR REHEARING

NRG respectfully requests that the Commission grant rehearing of its Order denying the La Paloma complaint. As discussed below, NRG highlights a number of significant factual issues and evidence which do not appear to have been adequately considered in the Order and that put the evolution of California resource adequacy market into proper context.

A. The La Paloma Order Did Not Adequately Consider Evidence of Increasing Use and Reasons Underlying CAISO's Emergency Backstop Designations.

Historically, the vast majority of the CAISO Emergency Backstop Designations have been to address unforeseen reliability needs, i.e., "significant events." Significant events include

[5] *See* CAISO Tariff section 41.1. In the early years of the CAISO's operation, the CAISO exclusively used RMR contracts to access cost-based energy needed for local reliability to mitigate local power. During this time, the CAISO had over 15,000 MW of generating units under RMR contract. The use of RMR contracts was largely eliminated following the implementation of the CPUC's RA program in 2004 and the development of local market power mitigation within the CAISO's energy markets in 2003; up until the end of 2017, only a single 165 MW generating resource remained under an RMR contract. The CAISO is currently conducting a stakeholder process to revise its RMR process to keep financially-challenged generators which are needed for system reliability.

the unexpected loss of a major transmission line, the failure of a generating unit, or the like, which cause the CAISO to issue emergency dispatch orders to non-RA resources to maintain system reliability. Indeed, prior to the 2018 Delivery Year, all CPM Emergency Backstop Designations were caused by a significant event. By definition, significant events are unforeseen and beyond the criteria used to set the underling RA requirements.

However, starting with the 2018 Delivery Year, the situation markedly changed. In 2018, the overwhelming majority of the Emergency Backstop Designations were caused by the failure of the CPUC's RA program to secure the capacity required for the CAISO to reliably operate the California grid. This represents the first significant failure of the RA program to provide the CAISO the suite of resources necessary to meet basic reliability criteria under *normal* operating conditions. Critically, the problem includes the inability of the CPUC's RA process to procure sufficient RA in Local Areas needed to meet reliability criteria. The Order was largely silent on these issues, despite its requirement to provide a "reasoned response" and "respond meaningfully" to this tectonic shift in how California consumers receive basic reliability services.[6]

NRG and others clearly illustrated these arguments, citing to the various Emergency Backstop Designations that the CAISO was forced to issue because of holes in the CPUC's RA procurements:

[6] *See e.g.*, *Public Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006) ("CPUC Case") (the Commission is obligated to provide a "reasoned response" to arguments raised before it); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("*PPL Wallingford*") (requiring the Commission to "respond meaningfully" to concerns raised by parties); *Moraine Pipeline Co. v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990) ("*Moraine*") (Commission failed to engage in reasoned decision-making where it "fail[ed] to respond to [petitioner's] arguments").

- the first-ever failure of the RA program to procure sufficient generation in Local Area load pockets, leading to CPM issued to the Encina and Moss Landing facilities;

- a second failure of the RA program to procure sufficient generation, this time across the system, leading to 624 MW of CPM issued to multiple units in August 2018;[7]

- a third failure of the RA program to procure sufficient generation, leading to 2,579 MW of deficiency-related CPM designations issued to multiple units in September 2018; and

- RMR contracts issued to the Metcalf, Yuba City and Gilroy facilities.

Thus, while the Order suggests "that each recent issuance of a CPM or RMR designation has been unique and transitional in nature,"[8] the record evidence in the proceeding suggests that the use of CAISO's backstop authority is not only growing in scale and importance, but also shifting from responding to unexpected physical events to addressing failures of the RA program in advance of the need. Referring to these as "unique and transitional" completely mischaracterizes the factual record.[9]

Further, as NRG noted in its protest (evidence which also went unaddressed in the Order), "[i]n total, the CAISO has provided out-of-market support to approximately 10% of the local generating capacity in California over the past two years."[10] Emergency Backstop Designations of this magnitude are a clear indication that the CAISO's backstop authority is not

[7] While the CAISO refers to the August and September CPM designations, which were necessitated by low demand forecasts that did not incorporate recent conditions, as "significant event" designations, these designations, unlike most "significant event" designations, were issued in advance and not following an unexpected physical event.

[8] Order at P 75.

[9] *Moraine*, 906 F.2d at 9 (Commission failed to engage in reasoned decision-making where it failed to "articulate its decision based on evidence in the record").

[10] NRG Comments at p.3.

functioning properly and, as discussed below, is now often driving bilateral pricing in the RA market.[11]

And while Suppliers pointed to numerous examples of the CAISO being forced to exercise its Emergency Backstop Designation authority relating to the 2018 Delivery Year, the Order addresses only one of those examples in a cursory fashion, stating that: "[w]e agree with CAISO that each recent issuance of a CPM or RMR designation has been unique and transitional in nature, and consistent with the purposes of CAISO's backstop procurement authority, and has not been for the purpose of curing a deficiency in flexible capacity."[12] As support for this conclusion, the Order cites one RMR designation that was issued to a Calpine-owned facility that will not be extended once transmission upgrades are completed in 2019.[13] The Order, however, ignores the remainder of the designations that were to facilities that are (i) not expected to retire, (ii) needed to meet shortfalls, including shortfalls in local reliability areas, or (iii) were issued to facilities that the utilities in California declined to offer contracts.

The expanded use of the CAISO's emergency backstop provisions into the primary means (at least with respect to a subset of generators) is neither "transitional in nature" nor "consistent with the purposes of CAISO's backstop procurement authority,"[14] which "[a]s originally proposed and approved . . . was intended to be a rare occurrence that would be reserved for genuine emergencies where the CAISO needs to take actions outside of the market

[11] *See, e.g., Allentown*, 522 U.S. at 374 (the process by which an agency arrives at a particular "result must be logical and rational"); *State Farm*, 463 U.S. at 48 (the Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner" (citations omitted)).

[12] Order at P 75.

[13] Order at fn. 137 ("[f]or example, CAISO has indicated that transmission upgrades that are currently underway should eliminate the need for an RMR contract for 2019 for Calpine's Metcalf unit.")

[14] Order at P 75.

software for maintaining system reliability."[15] We respectfully submit that the Order does not accurately reflect the factual record developed during this proceeding, and thus, the Order does not demonstrate reasoned decision-making.[16]

Finally, the Order's claim that none of the "circumstances"[17] have changed since the Commission implemented the long-term CPM framework in 2011 is baffling.[18] The Order entirely ignores the fact that the California is grid is going through one of the most massive transitions towards a low-carbon grid anywhere in the world. It is hardly surprising that the CAISO's backstop rules, in place for almost a decade, have failed to keep up. As WPTF noted, "the resource adequacy regime has not been meaningfully reformed in response to changing wholesale market conditions" and that "…there is evidence that [the existing RA] framework is ill-suited to meet the long-term needs of the grid given the changing resource mix."[19] These comments were not addressed in the Order. Mr. Stoddard, on behalf of NRG, provided testimony making a similar point that was also not addressed in the Order:[20]

> This dysfunction occurs at a critical time in the evolution of CAISO's resource base, with California policy driving towards a greater reliance on renewable resources, particularly solar, which places heightened demands on and for dispatchable, highly flexible resources. RA can no longer be measured solely by counting installed megawatts, but CAISO lacks any framework to attract and retain capital investment in the flexible resources that will be required to reliably operate the low-carbon grid envisioned by California policymakers.

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[15] *California Independent System Operator, Corp.*, 126 FERC ¶ 61,150 at P 18 (2009) (Discussing the use of Exceptional Dispatch that leads to CPM designations).

[16] *See supra* note 6 (citing cases requiring the Commission's orders to be supported by substantial record evidence).

[17] "CXA La Paloma has not demonstrated that circumstances have changed such that this division of responsibilities has become unjust and unreasonable."

[18] *See, e.g., California Independent System Operator Corp.*, 134 FERC ¶ 62,211 (2008) ("2008 CPM Order").

[19] Order at P 48 (citing WPTF).

[20] Affidavit of Robert Stoddard at p. 2.

Since the Commission first approved the CAISO emergency backstop mechanisms, California has quadrupled the amount of renewable and other non-conventional generation, which caused even the grid operator to establish a whole new terminology (e.g., the "duck curve") to describe the new challenges the system faces. The Commission cannot put on blinders and ignore the fact that the policy transitions desired by California policymakers is upending the CAISO's role in ensuring reliability in California; yet this is exactly what the Order does.

B. The Order Ignored Evidence that the Role that the CAISO's Backstop Authority Plays in Unduly Suppressing RA Prices.

The Order suggests that "even if bilateral resource adequacy prices are low, by CXA La Paloma's own admission this situation is not the result of any CAISO tariff provision, but instead results from a current surplus of capacity."[21] This finding, however, ignores specific allegations, supported by credible evidence, raised by NRG among others that the resource adequacy prices are not suppressed solely by excess capacity, but also because the CAISO backstop provisions are being used to bypass needed reliability procurement that should happen through the CPUC-jurisdictional RA program, thereby suppressing bilateral capacity prices to levels that may be below the going-forward costs of the facilities.[22] These concerns were plainly presented to the Commission but went entirely unaddressed in the La Paloma order.[23]

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[21] Order at P 72.

[22] *See, e.g.*, *AmerenEnergy Res. Generating Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,062 at P 35 (2015) (recognizing that "a generator would effectively be denied the opportunity to recover its fixed costs if it were only permitted to recover going-forward costs" (citation omitted)).

[23] *See, e.g.*, *ICC*, 576 F.3d at 477 (explaining that a reviewing court cannot "uphold a regulatory decision that is not supported by substantial evidence on the record as a whole"); *PG&E*, 373 F.3d at 1319 (the Commission's orders must be "based upon substantial evidence in the record" (quoting *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)); *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1072-75 (D.C. Cir. 2003) (vacating and remanding Commission orders because it found, among other things, that the Commission had failed to articulate the actual reasons for its decision, and the

Indeed, NRG provided evidence that the CPUC has begun strategically taking advantage of the CAISO's emergency backstop rules by excusing utilities from contracting with needed reliability resources in two key situations: first, when the bilateral RA contract price exceeds the CPM backstop price ($6.31/kW-month); and second, in local sub-areas where the CPUC excused utilities from their obligation to meet local reliability needs because of concerns over price or the exercise of market power in subareas where there is only a limited pool of suppliers. As NRG noted in its Comments, "[t]he California market has tightened considerably over the past several years and the market price for capacity has approached – and in some cases, even exceeded – the cost of exercising the backstop mechanism."[24] Thus, the lure for utility buyers (whether at the direction of the CPUC or independently) to bypass the bilateral negotiation process to buy RA is very real.

In each case, the CPUC knew that the CAISO would be required to use its backstop authority to require the supplier to "contract" to sell Resource Adequacy at the CPM rate. The Order acknowledged that these arguments had been advanced in the Comment Summary,[25] but these compelling facts are ignored in the Discussion section of the Order. Relying on the fact that the CAISO can compel the provision of RA service that should have taken place through the RA program's bilateral RA market clearly undercuts the integrity of RA process.

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reasons it did cite were "speculative," unsupported by record evidence, and did not support its decision); *Moraine*, 906 F.2d at 9 (Commission failed to engage in reasoned decision-making where it failed to "articulate its decision based on evidence in the record").

[24] NRG Comments at p. 4.

[25] *See* Order at P 45 ("Calpine and WPTF contend that the lack of more granular sub-local procurement requirements, combined with CPUC's policy of allowing the aggregation of distinct and unrelated local areas and proliferation of CCAs, deny existing thermal generation located in local sub-areas a reasonable opportunity to obtain forward contracts sufficient to cover costs and ensure appropriate business planning.") NRG's comparable arguments were apparently ignored entirely.

The Commission's major response to these legitimate concerns is to discount La Paloma's "undue discrimination argument and its claim that the LTPP/IRP gives undue preference to renewable resources is not legally cognizable under FPA section 206."[26] Even assuming that the Order is correct that a discriminatory state-level procurement is outside the Commission's ability to remedy (which NRG does not concede and for which the Commission provides not a single citation), the Order inappropriately ignored the impacts that these state procurements have on the wholesale rate. This is certainly not the first (or second or third) time that the Commission has been forced to address how state programs can render an existing tariff unjust and unreasonable. In its recent joint *amicus* brief with the U.S. Department of Justice, the Commission told the 7th Circuit Court of Appeals that, "[i]f the [state] program, in fact, impairs the functioning of the wholesale markets subject to FERC jurisdiction" … "the Commission … has the means and the authority to confront those effects."[27] This is likewise consistent with the Commission's longstanding position that "[i]n *Connecticut v. FERC*, the Court found that the Commission can take into account 'concerns about system adequacy' in considering fairness of wholesale rates and is limited in this context only by the FPA's prohibition against direct regulation of generating facilities."[28]

[26] Order at P 77.

[27] Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae in Support of Defendants-Respondents and Affirmance at 8, *Vill. of Old Mill Creek v. Star*, Nos. 17-2433 and 17-2445 (consolidated) (7th Cir. May 29, 2018).

[28] 2008 CPM Order, at P 126 (citing *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009). *See also MRTU Order*, 116 FERC ¶ 61,274 at P 1113 (finding that, "in situations where one party's resource adequacy decisions can cause adverse reliability and costs impacts on other participants in a regionally operated system, it is appropriate for us to consider resource adequacy in determining whether rates remain just and reasonable and not unduly discriminatory."), *order on reh'g*, 119 FERC P 61,076 (2007), *aff'd, Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520 (2010).

Indeed, the Commission has recently launched a major inquiry into the tariff of PJM Interconnection based on the *impact* that state programs are having on wholesale market prices subject to the exclusive jurisdiction of the Commission.[29] The fact that one market (PJM, in the case of the *Calpine* case) involves a centralized capacity market, while California relies on a bilateral market would seem to present no legal difference in the Commission's legal obligations to address whether the wholesale rules remain compliant with the dictates of the FPA.

In addition, many parties provided evidence that state public policies are responsible for a sizable amount of any capacity surplus. Not only does the CPUC directly authorize California utilities to contract with fossil resources, but it has also brought substantial renewable and other public policy resources (i.e., battery storage, among others) into the market. Even accepting the claim in the La Paloma Order that direct discrimination claims are non-cognizable (which we do not, as discussed above), the Commission is required to account for the state's actions in determining whether the *wholesale* market is just and reasonable. It is one thing to say that the CPUC is not required to pay all conventional generation resources comparable rates. It is another to excuse the CAISO from doing so. Or enacting rules that create a FERC-approved loophole that buyers can use to suppress bilateral contract prices. Yet this is exactly what the La Paloma Order countenances when it refuses to address the effect on the competitive markets caused by the State of California's activities on the market.

Further, the Order barely skims the surface in evaluating whether the existing RA scheme in California is complaint with the FPA. In California, the RA program has created two classes of generators – those that "have" and those that "have not." The haves (those with long-term contracts or active state support) receive significantly higher rates for providing the same serve

[29] *See Calpine Corp., et al. v. PJM Interconnection, LLC,* 163 FERC ¶ 61,236 (2018) ("Calpine").

as the have-nots (those that subsist on suppressed energy and RA contracts). In NRG's view, this must result in a violation of Section 205(b) of the FPA, which prohibits rates that "make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage."[30] As the D.C. Circuit has recognized, "[w]hile the typical complaint of unlawful rate discrimination is leveled at a rate design which assigns different rates to customer classes which are similarly situated, a single rate design may also be unlawfully discriminatory."[31] In particular, the court explained that a rate can be unduly discriminatory to the extent that it results in "an undue disparity between the rates of return on sales to different groups of customers."[32] That is clearly the case here, where suppliers receive different treatment as between the CPUC and the CAISO, and within the universe of CAISO backstop procurements as well. Indeed, the Commission may not even need to reach this issue, given the obvious infirmities in the CAISO's tariff.

Yet these concerns went entirely unaddressed in the La Paloma order and give lie to the Commission's conclusion that "low prices, in and of themselves, do not demonstrate that a market is not just and reasonable." As the Commission itself recognized in the MISO context, "low capacity prices . . . are not necessarily indicative of an unjust and unreasonable construct." The La Paloma order, however, extrapolates that very reasonable holding into an apparent rule that prices are not relevant to just and reasonable rates – an obvious overreach.

30 16 U.S.C. § 824d(b) (2012).

31 *AECI*, 684 F.2d at 27.

32 *Id.*

C. The La Paloma Order Elevates Reliability *Outcomes* while Ignoring Whether the Emergency Backstop Tariff Provisions are Just and Reasonable.

The La Paloma Order rejects the complaint based, in part, on repeated assertions that La Paloma cannot meet its burden of proof in this case unless it can show that emergency reliability actions authorized by the CAISO tariff "have failed to achieve their objective of ensuring sufficient capacity to operate the grid reliably." The Commission's reasoning implies that so long as the CAISO achieves a positive outcome (i.e., system reliability) it does not matter if the ISO uses an unduly discriminatory or unjust and unreasonable means to achieve that outcome. This reasoning ignores the gravamen of La Paloma's complaint, as well as the supporting comments of other Suppliers, that the CAISO's tariff is not lawful – not because it fails to preserve reliability – but because it does so in a manner that conflicts with the directives of the Federal Power Act to police against unduly discriminatory or unjust and unreasonable tariff rules. The very nature of resource adequacy *backstop* measures, such as RMR agreements or issuance of backstop CPM orders, is to prevent the system from crashing even when the market fails to achieve reliability objectives.

Requiring that La Paloma prove that a reliability crisis has occurred or is imminent is entirely inconsistent with the body of Commission precedent evaluating tariffs according to just and reasonable and not unduly discriminatory and preferential standard established by the Federal Power Act. The Commission clearly has the discretion to act prior to a reliability crisis. Indeed, it just exercised its section 206 authority to declare the PJM tariff unjust and unreasonable, well ahead of any manifestation of reliability problems. As another example, between 2003 and 2006 when the Forward Capacity Market was finalized, the ISO New England market went through many of the same growing pains that the California market is going through now. ISO New England issued a spate of RMR contracts and the Commission seized upon that

as evidence of a fundamental dysfunction in the New England markets and required an appropriate remedy. Comparing the reasoning of the La Paloma Order to historical events demonstrates how firmly at odds this Order is with prior fundamental Commission precedent.

D. The Order Entirely Fails to Address Other Substantive Record Evidence.

1. Failure to Address Affidavits.

Multiple parties to this proceeding provided substantive affidavits presenting record evidence. NRG itself sponsored testimony from noted market design expert Mr. Robert Stoddard. Mr. Stoddard's testimony does not appear to be addressed anywhere in the Order, nor were many of the main arguments he raised, including the Commission's endorsement of price discrimination between similarly situated units caught up in the CAISO's Emergency Backstop Designations, the manner in which the CAISO's Emergency Backstop Designations encourage the exercise of buyer-side market power in the RA market, and the fact that "the vast majority of designations, for either only 30 or 60 days from the date when committed and, worse yet, often only pay for the portion of the resource from which energy was actually dispatched (often the minimum load, or PMIN, of the plant), while the entire unit remains available to the CAISO to be dispatched if needed."

The summary portion of the Order briefly touches on these arguments in Paragraph 45, nothing that "NRG also argues that the use of monthly or annual procurement targets threatens the ability of generators to recover operating costs" and "that the potential exercise of buyer-side market power [by the CPUC] puts artificial downward pressure on resource adequacy contract prices and also forces CAISO to assume the primary role in resource adequacy procurement through its backstop mechanisms." Yet there is no sign that this evidence was addressed in the Discussion part of the Order.

The testimony of other market design experts and economists, including that of Mr. Jeffrey Tranen and Mr. Joseph Cavicchi, sponsored by La Paloma, are likewise virtually untouched by the Order.

2. Other Evidence Ignored by the Order.

These experts were not alone in having their arguments neglected. In paragraph 47, the Order notes that, "EPSA argues that CAISO's 2019 Local Capacity Technical Analysis shows that several local areas are deficient or nearly deficient in capacity. Thus, EPSA posits that lower compensation and misaligned incentives for unsubsidized conventional resources pose a risk to the reliable operation of the grid." Yet again, this record evidence was ignored in the substantive portions of the La Paloma Order.

Likewise, in Paragraph 49, the Order acknowledges that "Powerex opines that a review of data regarding the pricing of resource adequacy contracts indicates that price differentials demonstrate clear and intentional price discrimination and are not an unintended consequence of the state pursuing a legitimate policy objective." And: "Powerex asserts that the discriminatory outcomes observed in the bilateral capacity market suppress wholesale rates in the short-term energy markets." Yet a reader of the Order would search in vain to find any analysis of this evidence – other than a blanket statement "that the issues raised by Powerex are already being explored in ongoing or planned initiatives by CPUC or CAISO."

3. The Order Entirely Ignores the CAISO's Recent Procurement of Gigawatts of Additional Capacity.

The increased use of Emergency Backstop Designations is not the only convincing evidence that the CAISO's rules are undermining the opportunity for suppliers to earn a just and reasonable return on, and of, capital in the California market. The CAISO recently directed the emergency procurement for September to meet a 1,250 MW load forecast deficiency, with

another load forecast deficiency of over 4,000 MW for October. However, the Order completely ignores evidence provided by NRG, Powerex and others that the CAISO's recent use of CPM to procure significant amounts of additional capacity to address shortfalls between the 2018 resource adequacy requirements and the RA requirements resulting from updated peak load forecasts. The Order's failure to address this multi-gigawatt emergency procurement is again clear error warranting rehearing.

E. The Factual Standard for Granting the Complaint is as Slippery as an Eel and Inconsistent Across the Order.

While the La Paloma Order briefly dwells on the standard established by the Commission for evaluating whether a resource adequacy construct is lawful – that it must provide suppliers in competitive wholesale electricity markets "the opportunity to recover their costs" – the Order immediately pivots to evaluating the La Paloma complaint against a variety of different criteria.

None of these various alternative formulations of the applicable standard appear connected to the standard set out in sections 205 and 206 of the Federal Power Act, or the Commission's prior statements about what constitutes a lawful market construct. Arbitrary moving of goal posts is clearly not what Congress intended when it established the section 206 mechanism. The Commission describes La Paloma's failure to meet its burden of proof in a variety of ways. We address the legal and factual deficiencies in several of these alternative formulations:

- the CAISO tariff provisions must have "failed to achieve their objective of ensuring sufficient capacity to operate the grid reliably" and La Paloma "… fails to identify any reliability violation resulting from the purported inadequacies of the resource adequacy paradigm, nor does it provide credible evidence that any such reliability violations are likely in the foreseeable future."

As discussed in Section III.C above, La Paloma did not demonstrate any reliability problems that have arisen under the current RA paradigm. This is hardly surprising, given that the CAISO's

backstop authority is explicitly designed to kick in *before* a reliability crisis arises. Under the reasoning of the Order, until the car's brakes actually fail, causing an accident, it is not necessary to inspect or repair the car, no matter how loudly those same brakes may squeal.

- "… perceived insufficiency of revenues under the current resource adequacy paradigm will lead to the premature retirement of needed gas-fired resources."

Parties clearly alleged that the Commission-jurisdictional CAISO tariff Emergency Backstop Provision is actively preventing existing generators from having "the opportunity to recover their costs." The Order ignores the clear nexus between the ability of merchant generators to recover their costs and the functioning of the CAISO's backstop measures. Given the Commission's clear statements that state actions can affect the justness and reasonableness of tariffs subject to federal jurisdiction, there is no legal basis for ducking the issue.

- "as described by CAISO, its recent studies confirm that the existing volume of flexible capacity exceeds the maximum monthly flexible needs through 2021"

There is no basis for the Order to arbitrarily limit its inquiry into Emergency Backstop Designations of resources "for the purpose of curing a deficiency in *flexible* capacity."[33] Nor is there any reasoned basis for limiting the Commission's inquiry to 2021. Each backstop designation reflects a failure of the RA program to meet its core mission; namely, to provide the CAISO with the capacity it requires to operate the system reliably.

F. The Order's Reliance on Future Stakeholder Proceedings is not Reasonable.

The La Paloma Order's reliance on the outcome of *future* stakeholder initiatives that may be carried through the CAISO or CPUC to excuse deficiencies in *today's* tariff is not reasoned-decisionmaking. The La Paloma Order asserts that the "CAISO acknowledged the importance of flexible capacity and is taking appropriate steps through its stakeholder processes to reconsider

[33] Order at P 75 (emphasis added).

its flexible capacity rules and enhance opportunities for flexible resources to earn additional revenue" and in another place asserts that "… the issues raised by Powerex are already being explored in ongoing or planned initiatives by CPUC or CAISO." Even assuming CAISO and the CPUC continue to work on improving the process, it is a truth universally acknowledged that every ISO is in want of improved tariff structures. We strongly suggest that nothing in the FPA allows the Commission to ignore infirmities in a tariff based on the theoretical possibility that the tariff may be improved in the future. To the extent that this analysis has relevance, it suggests that the CAISO itself recognizes that changes are needed to bring its tariff into compliance with the section 205 standards, and thus suggests that the existing tariff is not compliant with the FPA's requirements.

G. Rehearing of the La Paloma Order is Required Because it ignores the Obligation to Ensure that Rates are Just and Reasonable for All Market Participants.

The Supreme Court has made clear that the Constitution obligates the Commission to ensure that all public utilities have a fair opportunity for recovery of and on their investments.[34] The Commission has therefore acknowledged that "establishing just and reasonable rates involves a balancing of consumer and investor interests,"[35] and that "in a competitive market, the Commission is responsible . . . for assuring that [generators are] provided the opportunity to recover [their] costs."[36] Nonetheless, in denying the La Paloma, the Commission failed to

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[34] *See, e.g.*, *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 607 (1944) ("*Hope*"); *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923); *Smyth v. Ames*, 169 U.S. 466, 546 (1898).

[35] *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 103 (2008) (citing *Hope*, 320 U.S. 591), *on reh'g & compliance*, 124 FERC ¶ 61,301 (2008), *on clarification*, 131 FERC ¶ 61,170 (2010), *on clarification & reh'g*, 150 FERC ¶ 61,208 (2015), *clarification & reh'g dismissed*, 158 FERC ¶ 61,127 (2017).

[36] *Bridgeport*, 113 FERC ¶ 61,311 at P 29; *Price Formation in Energy and Ancillary Servs. Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, 153 FERC ¶ 61,221 at P 2 (2015) (the

adequately consider the interests of suppliers, or to ensure that they have a reasonable opportunity for recovery of, and on, their invested capital.

IV.

CONCLUSION

NRG respectfully requests that the Commission grant rehearing of the La Paloma Order.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served a copy of the foregoing document upon the Commission compiled service list in this proceeding.

Dated at Princeton, New Jersey this 19th day of December, 2018.

/s/ *Abraham Silverman*

"goals of proper price formation" include "ensur[ing] that all suppliers have an opportunity to recover their costs"); *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,196 at P 49 (2003) ("[W]e believe that competitive prices over the long run should recover both the fixed and variable costs of efficient generating units[,] and we fear investors may decline to invest in needed generation . . . if they do not see a reasonable expectation of recovering their costs.").