CULTURE OF SECRECTY AND COMPLEXITY DISASTER AT CPUC

The CPUC conducts the important part of its proceedings in secret. CPUC commissioners and staff leak inside information about future CPUC policies in meetings at Wall Street, the CPUC office in San Francisco, in exclusive restaurants and members-only clubs in Los Angeles. The amount of money utility customers have to pay under contracts the CPUC authorizes to buy electricity are blacked out so utility customers see the costs. The CPUC keeps hidden the key documents in proceedings before the CPUC supposedly held to determine if utilities have acted illegally. This memorandum outlines the culture of secrecy and provides representative examples.

In 2002 the legislature enacted Pub. Util Code § 454.5 which took away the used and useful standard historically used to protect utility customers from unreasonable costs. Under the used and useful standard utilities had to prove costs were reasonable before they could be imposed on utility cusotmers. The new law (Sect. 454.5) changed the paradigm from after-the-fact review to upfront approval.

The CPUC claims the utilities "must show that their proposed procurement will provide safe, reliable capacity which complies with State policies and is at the least cost to ratepayers." The CPUC under the Long Term Procurement Plan (LTPP) supposedly takes a 10-year-ahead look at system, local, and flexible electricity needs.

The assumptions used in this evaluation are included in the documents used to support this memorandum.

One the assumptions are set and the needs identified the CPUC authorizes procurement in the form of a Commission Decision. The most recent example of this was D.14-03-004 which authorized procurement in SCE and SDG&E territories to replace electricity lost when San Onfore's new generators failed 11 after they were installed.

The CPUC adopts rules that supposedly govern the electricity procurement process. However, the key parts of the procurement is done in secret. Instead of public scrutiny, the CPUC uses "Independent Evaluators" to monitor the cost-effectiveness and overall appropriateness of transactions again in secret. The CPUC claims it does quarterly audits.

The procurement plans detail what is going to be procured and how it will be done. Utilities are supposed to submit proposed long term procurement via applications.

These seek approval of contracts or authority to build utility-owned resources. While oppositions can be filed, the CPUC makes the decisions in secret after consulting with utility executives and Wall Street insiders. For example, the decision on replacement power for San Onofre was made in a series of secret meetings at the California Club in Los Angeles and Mary Nichols (head of the Air Resources Board) personal residence.

SCE replaced San Onofre with electricity from gas fired plants. The CPUC allowed SCE to buy control of those plants using the informal advisory letter route to approve SCE's purchase.

The seller was JP Morgan. The sale occurred when FERC was in the middle of an investigation that showed JP Morgan had fraudulently manipulated the prices it charged for electricity from these plants, resulting in a half-billion dollar fine. The relevant pages are attached. As can be seen in its related attachment, the CPUC allowed terms of SCE's purchase of the generators JP Morgan used to commit illegal electricity price manipulation to remain secret.

The culture of secrecy and complexity at the CPUC hides the policy decisions that leaves utility customers paying amongst the highest rates in the country while using amongst the lowest amounts of electricity. The secrecy and complexity also conceals the fact that California is not achieving meaningful reductions in carbon emissions. The over dependence on gas fired generators to replace the generation lost at San Onofre has stressed the gas system to the breaking point. It is no exaggeration to say the radiation leak at San Onofre in 2012 led to the gas leak at Aliso Canyon in 2014. See Picker presentation to Senate Utilities Committee slides 4 and 5 attached explaining that Aliso is needed to supply the San Onofre replacement power plants with natural gas.

Message

From: Peevey, Michael R. [michael.peevey@cpuc.ca.gov]
Sent: 10/13/2012 12:15:03 AM
To: Ron.Litzinger@sce.com
Subject: RE: Huntington Beach Synchronous Condensers

I re-confirm.

From: Ron.Litzinger@sce.com [Ron.Litzinger@sce.com]
Sent: Friday, October 12, 2012 5:13 PM
To: Michael Peevey
Subject: Huntington Beach Synchronous Condensers

Mike,

Thanks for the call yesterday regarding the Huntington Beach Sychronous Condensers. The call was timely as Steve Berberich from CAISO had called me earlier about signing an agreement to backstop AES expenditures for the equipment while a Reliability Must Run (RMR) agreement is negotiated. We certainly share your concern about grid reliability and are willing to consider reasonable measures for Summer 2013 preparedness. I appreciated your sharing with me the your support and the support of the CPUC, CAISO and the Governor's Office.

We are concerned about AES inability thus far to get JP Morgan consent to the equipment under their tolling agreement. We appreciate CAISO's plan to overcome this obstacle, but remain concerned after review of the plan by our legal team and outside counsel.

We appreciate both your assurance on the call yesterday as well as your letter on September 4 for cost recovery should an RMR not be executed. Based on everyone's mutual desire for grid reliability, I am willing to instruct the team to sign the backstop agreement. I would appreciate re-confirmation of assurance of reasonable cost recovery.

Thanks Mike.

PUBLIC UTILITIES COMMISSION
SAN FRANCISCO, CA 94102-3298

July 2, 2013

Advice Letter 2853-E

Akbar Jazayeri
Vice President, Regulatory Operations
Southern California Edison Company
P O Box 800
Rosemead, CA 91770

SUBJECT: Bilateral Capacity Sale and Tolling Agreement Between SCE and BE CA LLC

Dear Mr. Jazayeri:

Advice Letter 2853-E is effective, per Ordering Paragraph in Resolution E-4584, as of May 9, 2013.

Sincerely,

Edward Randolph

Edward F. Randolph, Director
Energy Division

SOUTHERN CALIFORNIA EDISON
An EDISON INTERNATIONAL Company

Akbar Jazayeri
Vice President of Regulatory Operations

February 15, 2013

ADVICE 2853-E
(U 338-E)

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
ENERGY DIVISION

SUBJECT: Bilateral Capacity Sale and Tolling Agreement Between Southern California Edison Company and BE CA LLC

I. PURPOSE

The purpose of this Advice Letter is to seek California Public Utilities Commission ("Commission" or "CPUC") approval of the bilaterally-negotiated Capacity Sale and Tolling Agreement (the "BECA Contract") between Southern California Edison Company ("SCE") and BE CA LLC ("BECA"), a subsidiary of JPMorgan Chase & Co. ("JPMorgan") and J.P. Morgan Energy Ventures Corporation ("JPMVEC"). The BECA Contract will provide SCE with energy, capacity, ancillary services, and Resource Adequacy ("RA") benefits for a term beginning on October 1, 2013, and ending on May 31, 2018, via a tolling arrangement for 12 existing generating units located in the Los Angeles Basin local area ("LA Basin").

A summary of the BECA Contract is included below.

Seller	Resource Type	Location	RA Capacity	Contract Capacity	Product	Term of Agreement
BECA	Natural gas-fired	LA Basin (Long Beach for the Alamitos Generating Station, Huntington Beach, and Redondo Beach)	3,818 MW	3,690 MW	Energy, capacity, ancillary services, and RA benefits (including all RA attributes such as local RA and the as yet to be determined flexible RA product, to the extent the units can provide them)	56 months

As discussed below and in the Appendices to this Advice Letter, the Commission should approve the BECA Contract because it provides significant, unique benefits at a reasonable price. In particular, approval of the BECA Contract will eliminate the

contractual barriers to the operation of synchronous condensers at Huntington Beach Generating Station Units 3 and 4, which the California Independent System Operator ("CAISO") has determined are needed to provide voltage support this summer. Approval of the BECA Contract will also avoid Capacity Procurement Mechanism designations for the generating units included in the agreement and may also result in a decrease in Exceptional Dispatches and the costs for such Exceptional Dispatches when they do occur, which would result in cost savings for SCE's customers. Additionally, the BECA Contract will provide SCE and its customers with critical LA Basin resources to meet local RA requirements. Finally, the BECA Contract acts as a hedge against future capacity price increases and will alleviate near-term market power concerns in solicitations for LA Basin RA capacity.

SCE respectfully requests that the Commission approve this Advice Letter on an expedited basis. As explained in more detail in Sections IV.A and XII below, the CAISO has concluded that synchronous condensers at Huntington Beach Units 3 and 4 are needed to provide voltage support in summer 2013 with a planned in-service date of June 1, 2013. Final and non-appealable Commission approval of the BECA Contract will allow the synchronous condensers to be placed in operation. Accordingly, SCE requests that the Commission issue a resolution containing the findings requested in this Advice Letter by no later than May 9, 2013, which would allow sufficient time for the synchronous condensers to be placed in operation for the peak summer season.

In accordance with General Order ("GO") 96-B, the confidentiality of information included in this Advice Letter is described below. This Advice Letter contains both confidential and public appendices as listed below.

Confidential/Public Appendix A:	Contract and Valuation Information
Confidential/Public Appendix B:	RA, Capacity, and Energy Positions
Confidential Appendix C:	BECA Contract
Public Appendix D:	Confidentiality Declaration
Public Appendix E:	Proposed Protective Order

II. BACKGROUND

A. General Project Description

The BECA Contract provides SCE with the tolling rights to 12 generating units at the Alamitos, Huntington Beach, and Redondo Beach Generating Stations (collectively, the "AES 4000"), which are owned and operated by three subsidiaries of The AES Corporation ("AES"), AES Alamitos, L.L.C., AES Huntington Beach, L.L.C, and AES Redondo Beach, L.L.C. (collectively, the "AES Subsidiaries").

The AES 4000 fleet consists of existing natural gas-fired steam boiler electric generating facilities located at various strategic locations throughout the LA Basin. The Alamitos Generating Station is located in Long Beach, California, the Huntington Beach Generating Station is located in Huntington Beach, California, and the Redondo Beach Generating Station is located in Redondo Beach, California. Each generating facility is subject to the State Water Resources Control Board's ("SWRCB's") once-through cooling ("OTC") policy and has a SWRCB OTC compliance deadline of December 31, 2020.

The specific AES 4000 generating units included in the BECA Contract and their corresponding capacity are listed in the table below.

Generating Facility	Unit	RA Capacity (MW)	Contract Capacity (MW)
Alamitos Generating Station	AL1	174.56	175
	AL2	175.00	175
	AL3	332.18	320
	AL4	335.67	320
	AL5	497.97	480
	AL6	495.00	480
Huntington Beach Generating Station	HB1	225.75	215
	HB2	225.80	215
Redondo Beach Generating Station	RB5	178.87	175
	RB6	175.00	175
	RB7	505.96	480
	RB8	495.90	480
	Total	**3817.66**	**3,690**

B. Negotiation of the BECA Contract

On May 1, 1998, Williams Power Company, Inc. (formerly known as Williams Energy Services Company) ("Williams Power") and the AES Subsidiaries entered into a Capacity Sale and Tolling Agreement (as amended and supplemented, the "Base Agreement")[1] for the tolling rights to 14 generating units at the AES 4000.[2] The term of the Base Agreement ends on May 31, 2018.

In 2007, BECA, then a subsidiary of Bear Stearns Companies, Inc. ("Bear Stearns"), acquired Williams Power's rights under the Base Agreement. During the financial crisis in 2008, JPMorgan acquired Bear Stearns. With this series of events, JPMorgan, through its newly-acquired subsidiary BECA, acquired the Base Agreement.

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1 The Base Agreement is included as Exhibit A to the BECA Contract, which is included as Appendix C to this Advice Letter. The Base Agreement is also publicly available at http://www.cers.water.ca.gov/pdf_files/power_contracts/williams/111902wllmsPPA.pdf.

2 The Base Agreement currently covers 12 AES 4000 generating units.

Since obtaining the rights to the AES 4000 as set forth in the Base Agreement, JPMorgan, on behalf of its subsidiary BECA, has participated in SCE's annual All-Source Requests for Offers ("RFOs") and, through those solicitations, has resold some of its tolling and RA rights from the AES 4000 to SCE. In particular, as explained in more detail in Appendix A, SCE and BECA are currently parties to two unit contingent tolling agreements with RA covering two AES 4000 units and 18 RA agreements covering several AES 4000 units.

The existing volumes and terms of SCE's unit contingent tolling agreements with RA for AES 4000 units are included in the table below.

Generating Facility	Unit	Contract Capacity (MW)	Term
Alamitos Generating Station	AL5	497.97	Jan 2011-Sept 2013
Huntington Beach Generating Station	HB2	225.80	Jan 2012-Sept 2013

The existing volumes and terms of SCE's RA agreements for AES 4000 units are included in the table below.

Generating Facility	Unit	Contract and RA Capacity (MW)	Term
Alamitos Generating Station	AL1	174.56	Jan-Dec 2013, 2014
	AL2	175.00	Jan-Dec 2013, 2014
	AL3	332.18	Jan-Dec 2013
	AL4	335.67	Jan-Dec 2013
	AL5	497.97	Jan-Dec 2015
	AL6	495.00	Jan-Dec 2013, 2014, 2015
Huntington Beach Generating Station	HB1	225.75	Jan-Dec 2013
Redondo Beach Generating Station	RB5	178.87	Jan-Dec 2013, 2014
	RB6	175.00	Jan-Dec 2013, 2014
	RB7	505.96	Jan-Dec 2013, 2015
	RB8	495.90	Jan-Dec 2013, 2014, 2015

Beginning in July 2012, SCE and JPMorgan, on behalf of BECA, began negotiation of a bilateral transaction whereby BECA would resell all of its rights under the Base Agreement to SCE pursuant to a modified "back-to-back" tolling agreement with BECA. A discussion of the substance of the negotiations is provided in Appendix A. The BECA Contract is included as Appendix C.

III. SUMMARY OF BECA CONTRACT

SCE and BECA ultimately agreed to a modified "back-to-back" transaction based on the terms of the Base Agreement. The BECA Contract is intended to provide SCE with the rights and obligations that BECA has under the Base Agreement. SCE will receive energy, capacity, ancillary services, and RA benefits (including all RA attributes such as local RA and the as yet to be determined flexible RA product, to the extent the units can provide them) for a term beginning on October 1, 2013, and ending on May 31, 2018, via a tolling arrangement for the AES 4000 generating units listed in Section II.A above. As part of the transaction, all existing RA agreements between BECA and SCE will be terminated or amended to end prior to October 1, 2013, and replaced with the new BECA Contract.[3]

Additionally, BECA and the AES Subsidiaries are also parties to a May 1, 1998 agreement (the "Capacity Addition Agreement") under which, among other things, BECA has consent rights with respect to new generating capacity in certain portions of the LA Basin constructed by the AES Subsidiaries.[4] Under the BECA Contract, BECA is granting SCE its consent rights under the Capacity Addition Agreement, effective upon final and non-appealable Commission approval of the BECA Contract.

More details about the BECA Contract are included in Appendix A.

IV. BENEFITS OF THE BECA CONTRACT

As discussed below and in Appendix A, the BECA Contract secures dispatch control of critical LA Basin generating facilities for SCE and provides SCE's customers with energy, capacity, ancillary services, and all current and future RA benefits from such facilities at a reasonable price. In addition, there are other unique and substantial benefits of the BECA Contract that warrant its approval by the Commission.

A. Removing Contractual Barriers to Synchronous Condensers at Huntington Beach Units 3 and 4

The ongoing outage at the San Onofre Nuclear Generating Station ("SONGS") has illuminated the critical need for voltage support and electric generation in the Ellis Sub-area of the LA Basin and northern San Diego County. The Huntington Beach Generating Station and, to a lesser extent, the Alamitos Generating Station, provide a significant contribution to meet that local need.

The CAISO has entered into a Reliability Must-Run ("RMR") agreement with AES Huntington Beach, L.L.C. ("AESHB") to convert Huntington Beach Units 3 and 4 into

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[3] The terms of SCE's existing unit contingent tolling agreements with RA for the AES 4000 units will end prior to the start of the BECA Contract.

[4] The Capacity Agreement is attached as part of the version of the Base Agreement that is publicly available at http://www.cers.water.ca.gov/pdf_files/power_contracts/williams/111902wllmsPPA.pdf.

Public Appendix A

Contract and Valuation Information

CONTRACT AND VALUATION INFORMATION

I. Negotiation of the BECA Contract

As explained in the main portion of this Advice Letter, since obtaining the rights to the AES 4000 as set forth in the Base Agreement, JPMorgan, on behalf of its subsidiary BECA, has participated in SCE's annual All-Source RFOs and, through those solicitations, has resold some of its tolling and RA rights from the AES 4000 to SCE.[1]

The existing volumes, prices, and terms of SCE's unit contingent tolling agreements with RA for AES 4000 units are included in the table below.

Generating Facility	Unit	Contract Capacity (MW)	Price ($/kW-month)	Term
Alamitos Generating Station	AL5	497.97		Jan 2011-Sept 2013
Huntington Beach Generating Station	HB2	225.80		Jan 2012-Sept 2013

The existing volumes, prices, and terms of SCE's RA agreements for AES 4000 units are included in the table below.[2]

Generating Facility	Unit	Contract and RA Capacity (MW)	Jan-Dec 2013	Jan-Dec 2014	Jan-Dec 2015
Alamitos Generating Station	AL1	174.56			
	AL2	175.00			
	AL3	332.18			
	AL4	335.67			
	AL5	497.97			
	AL6	495.00			
Huntington Beach Generating Station	HB1	225.75			
Redondo Beach Generating Station	RB5	178.87			
	RB6	175.00			
	RB7	505.96			
	RB8	495.90			

[1] The confidential information in the confidential version of this Appendix is generally highlighted in gray. However, certain confidential information in tables and charts could not be highlighted in gray, but is redacted in the public version of this Appendix.

[2] Prices are in $/kW-month.

[redacted]

[redacted] SCE and BECA ultimately agreed to a modified "back-to-back" transaction based on the terms of the Base Agreement [redacted] The BECA Contract is intended to provide SCE with the rights and obligations that BECA has under the Base Agreement. SCE will receive energy, capacity, ancillary services, and RA benefits (including all RA attributes such as local RA and the as yet to be determined flexible RA product, to the extent the units can provide them) for a term beginning on October 1, 2013, and ending on May 31, 2018,[3] via a tolling arrangement for the covered AES 4000 units. As part of the transaction, all existing RA agreements between BECA and SCE will be terminated or amended to end prior to October 1, 2013, and replaced with the new BECA Contract.[4]

Additionally, under the BECA Contract, BECA is granting SCE its consent rights under the Capacity Addition Agreement, effective upon final and non-appealable Commission approval of the BECA Contract. [redacted]

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[3] The original term of the Base Agreement was 15 years with either party having the option to extend the term an additional five years. [redacted]

[4] The terms of SCE's existing unit contingent tolling agreements with RA for the AES 4000 units will end prior to the start of the BECA Contract.

[redacted]

Effective upon final and non-appealable Commission approval of the BECA Contract, SCE will obtain BECA's consent rights and will consent to the interconnection and operation of the synchronous condensers. Accordingly, final and non-appealable Commission approval of the BECA Contract will remove the contractual barrier AESHB currently faces and allow it to proceed with the operation of the synchronous condensers. As indicated in the main portion of this Advice Letter, SCE is requesting that the Commission approve this Advice Letter on an expedited basis, by no later than May 9, 2013, in order to allow sufficient time for the synchronous condensers to be operational for the peak summer season, which the CAISO has determined is necessary for local area reliability.

II. Summary of BECA Contract

The BECA Contract is attached as Appendix C. The BECA Contract is not the typical tolling arrangement that SCE enters into. As stated earlier, the BECA Contract is a modified "back-to-back" transaction. In other words, most of the terms regarding operations and expected performance are the same across the agreements. Under the BECA Contract, BECA provides everything it gets from the AES Subsidiaries to SCE.

[redacted]

[redacted]

It is important to note that the description above is high level and that the provisions governing this arrangement are very complicated. Thus, ultimately, the contract language is the best source for determining the rights of the parties, and this summary is not a complete description of every possible scenario that could arise under the BECA Contract.

A summary of the major terms and conditions of the BECA Contract is included below.

<table>
<tr><td>Seller</td><td>BECA</td></tr>
<tr><td>Buyer</td><td>SCE</td></tr>
<tr><td>Transaction Overview</td><td>Seller is providing Buyer with its rights under the Base Agreement. Buyer will receive energy, capacity, ancillary services, and all current and future RA benefits from the Units listed below, if provided by the Units.

Buyer and Seller will terminate or amend to end prior to the start of the BECA Contract all existing sales of RA capacity between the Parties effective at the start of the Deal Term.</td></tr>
<tr><td>[redacted]</td><td>[redacted]</td></tr>
<tr><td>Deal Term</td><td>October 1, 2013 through May 31, 2018</td></tr>
<tr><td>Units</td><td>
<table>
<tr><th>Generating Facility</th><th>Unit</th><th>RA Capacity (MW)</th><th>Dependable Capacity (MW)</th></tr>
<tr><td rowspan="6">Alamitos Generating Station</td><td>AL1</td><td>174.56</td><td>175</td></tr>
<tr><td>AL2</td><td>175.00</td><td>175</td></tr>
<tr><td>AL3</td><td>332.18</td><td>320</td></tr>
<tr><td>AL4</td><td>335.67</td><td>320</td></tr>
<tr><td>AL5</td><td>497.97</td><td>480</td></tr>
<tr><td>AL6</td><td>495.00</td><td>480</td></tr>
<tr><td rowspan="2">Huntington Beach Generating Station</td><td>HB1</td><td>225.75</td><td>215</td></tr>
<tr><td>HB2</td><td>225.80</td><td>215</td></tr>
<tr><td rowspan="4">Redondo Beach Generating Station</td><td>RB5</td><td>178.87</td><td>175</td></tr>
<tr><td>RB6</td><td>175.00</td><td>175</td></tr>
<tr><td>RB7</td><td>505.96</td><td>480</td></tr>
<tr><td>RB8</td><td>495.90</td><td>480</td></tr>
<tr><td></td><td>Total</td><td>3817.66</td><td>3,690</td></tr>
</table>
</td></tr>
<tr><td>Dependable Capacity</td><td>Initially 3,690 MW

For each year of the Deal Term, the AES Subsidiaries may adjust each Unit’s Dependable Capacity plus or minus 5% from the initial amount. In other words, adjustments to the Dependable Capacity of each Unit can be made once a year, every year, so long as the Dependable Capacity</td></tr>
</table>

	remains in the plus or minus 5% band of the initial amount.[5]
Toll Product	Tolls will be physical gas (i.e., SCE provides the gas to the Units), with energy delivery at the individual project busbar.
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

[5] [redacted]

[6]

[7]

[redacted]

[redacted]	[redacted]
Consent Rights	Upon final and non-appealable Commission approval, Seller grants Buyer its consent rights under Section 2.1(a) of the Capacity Addition Agreement.

III. EVALUATION METHODOLOGY AND RESULTS

A. Evaluation Methodology

SCE's evaluation methodology is summarized in the main portion of this Advice Letter. In general, the quantitative valuation entails forecasting (1) the value of contract benefits, (2) the value of contract costs, and (3) the net value of both (1) and (2). Once all of the valuation elements are calculated, they are discounted to a present value using a 10% discount rate. SCE then subtracts the present value of expected costs from the present value of expected benefits to determine the expected net present value ("NPV") of the offer. NPVs are normalized by dividing them by the number of kW-months of capacity offered to SCE. In addition to quantitative benefits, many contracts also have qualitative benefits that are evaluated separately. The qualitative benefits of the BECA Contract are discussed in the main portion of this Advice Letter.

SCE discusses confidential information related to the quantitative valuation of the BECA Contract below, but does not repeat the discussion of all elements of its evaluation methodology.

1. Contract Benefits

- Energy and Ancillary Service Benefits

As noted in the main portion of this Advice Letter, in valuing energy and ancillary service benefits, SCE uses the economic dispatch principle, wherein a unit is dispatched if its forecasted benefits exceed its costs, i.e., if it is "in the money." ProSym compares the forecast cost of running a unit against energy and ancillary services price forecasts to determine whether a unit is in the money. SCE creates an expansive lookup library of ProSym dispatch results to avoid the need to perform multiple runs for each analysis. [redacted]

SCE then deploys a stochastic Monte Carlo simulation process to generate a large number of gas price and implied market heat rate pairs, using SCE's blended power and gas price curves as the expected case (see below for more details), by

ATTACHMENT 1

Planning Assumptions Update and Scenarios for use in the CPUC Rulemaking R.13-12-010 (The 2014 Long-Term Procurement Plan Proceeding), and the CAISO 2015-16 Transmission Planning Process

REDLINE VERSION

Ruling.[5] Following a similar process of workshops and comments in 2012 and 2013, the CPUC established LTPP planning assumptions for the 2012 and 2014 LTPP that build upon previous planning efforts to further improve the LTPP process. [6] This document refines earlier efforts and furthermore seeks to achieve transparent and consistent assumptions and coordination for resource planning activities across the energy agencies.

2 Guiding Principles

The Guiding Principles[7] for developing assumptions to be used and scenarios to be investigated in the 2014 LTPP Rulemaking:

A. **Assumptions** should take a realistic view of expected achievements from established policies while exploring potential impacts from possible policy changes.

B. **Assumptions** should reflect real-world possibilities, including the stated positions or intentions of market participants.

C. **Scenarios** should be informed by an open and transparent process. An exception is confidential market price data, which may be reasonably submitted with publicly available engineering or market-based price data checked against confidential market price data for accuracy.

D. **Scenarios** should inform the transmission planning process and the analysis of flexible resource requirements to reliably integrate and deliver new resources to loads.[8]

E. **Scenarios** should be designed to form useful policy information, for example tracking greenhouse gas reduction goals, and reliability implications of existing and expected resource procurement policies.

F. **Resource portfolios** should be substantially unique from each other.

G. **Scenarios** should inform bundled procurement plan limits and positions.

H. **Scenarios** should be limited in number based on the policy objectives that need to be understood in the current Long Term Procurement Plan cycle.

[5] *See* Assigned Commissioner and Administrative Law Judge's Joint Scoping Memo and Ruling, issued December 3, 2012, http://docs.cpuc.ca.gov/EFILE/RULC/127542.htm

[6] Decision Adopting Long-Term Procurement Plans Track 2 Assumptions and Scenarios, D.12-12-010, issued December 20, 2012.

[7] *See* Assigned Commissioner's Ruling on Standardized Planning Assumptions, R.12-03-014, issued June 27, 2012.

[8] Scenarios used by the CAISO Transmission Planning Process must meet the requirements in Section 24.4.6.6 of the CAISO's tariff. Scenarios developed in the LTPP process may inform the development of the CAISO's TPP scenarios to the extent feasible under the CAISO tariff and adopted by that organization.

I. Resource planners including the CPUC, CEC, and CAISO should strive to reach agreement on planning assumptions, and commit **to transparent, consistent, and coordinated planning processes.**

3 Planning Scope: Area & Time Frame

The following assumptions and scenarios are created specifically with regard to the loads served by and the supply resources interconnected to the CAISO-controlled transmission grid and the associated distribution systems. The LTPP planning period is established as twenty years in order to consider the major impacts of infrastructure decisions now under consideration. While detailed planning assumptions are used to create an annual loads and resources assessment in the first period (2014-2024), more generic long-term assumptions are used in the second period (2025-2034), reflecting heightened uncertainties around future conditions[9]. The second period is designed to inform resource choices made today as well as shape policy discussions, and not to make authorizations of need in those years. The CPUC primarily expects technical studies of system and local reliability in 2024 to inform procurement decisions. However, the CPUC does not limit itself to studying 2024 and may also consider technical studies of interim years before 2024. The CAISO's TPP studies target several years within the first ten-year period, including the tenth year for long-term local reliability studies. In the 2014-15 TPP, long-term reliability studies focused on 2024, while the 2015-16 studies will focus on 2025.[10] As such, the staff of the CPUC, CEC, and CAISO focused on developing the most reasonable set of assumptions up to year 2024 for the LTPP and up to 2025 for the TPP. This document supersedes the previous versions of assumptions and scenarios in this proceeding.

[9] The updates incorporated in this document will also inform the 2015-16 TPP studies for the 2015-2025 timeframe.

[10] As stated in an earlier footnote, in the 2015-16 TPP, the CAISO will conduct local capacity requirement analyses for the LA Basin and San Diego local areas, and the Moorpark subarea of the Big Creek/Ventura local area. Full analyses of all local areas occur every two years, on cycles starting on even years.

4 Planning Assumptions

A description of assumptions is provided in this section. All values are reported in the 2014 Scenario Tool, a spreadsheet developed by CPUC staff to quantitatively present the load and resource assumptions for each of the scenarios described in this document.[11]

4.1 Demand-side Assumptions

4.1.1 Base, Incremental, and Managed Forecasts

Demand-side assumptions are either base forecasts or incremental to the demand forecast. Base values, such as the California Energy Demand Forecasts (CED),[12] are independent forecasts without ties to any other forecast. Incremental resource projections, such as Additional Achievable Energy Efficiency[13] (AAEE, formerly known as Incremental Uncommitted Energy Efficiency, or IUEE), are not embedded in the base forecast, but can be used to modify the base forecast to create a net or "managed" forecast. As an example, in the CED, which is treated as a base load forecast, the CEC embeds an amount of energy efficiency representing current codes and standards and established energy efficiency programs. AAEE represents future expected energy and capacity savings from programs not yet established or funded, so AAEE is considered an incremental resource projection. Reducing the base load forecast by the AAEE incremental impacts creates a managed load forecast. Assumptions originating from other state agencies, for example the CED, will not be re-litigated in this proceeding.

4.1.2 Locational Certainty

As California chooses to meet its electricity needs with increasing proportions of demand-side management resources, such as energy efficiency and customer-sited solar photovoltaic (PV) self-generation, it becomes increasingly important to accurately forecast the locations of these demand-side impacts in order to capture the benefits of these resources. Reliability studies in

[11] The 2014 Scenario Tool, version 4 will be posted to the following location: http://www.cpuc.ca.gov/PUC/energy/Procurement/LTPP/ltpp_history.htm

[12] The CED: California Energy Demand 2014-2024 Forecast, http://www.energy.ca.gov/2013_energypolicy/documents/demand-forecast_CMF/LSE_and_Balancing_Authority_Forecasts/

[13] The AAEE projections: Estimates of Additional Achievable Energy Savings, Supplement to California Energy Demand 2014-2024 Forecast, http://www.energy.ca.gov/2013_energypolicy/documents/demand-forecast_CMF/Additional_Achievable_Energy_Efficiency/

transmission-constrained local areas depend on these demand-side resources providing capacity value at least within the electrical areas forecasted, and preferably at specific transmission-level busbar or substation locations if they are to offset local capacity requirements. Historically, demand-side resource projections lacked the locational certainty needed to contribute to local reliability. However, the current California Energy Demand set of forecasts, with its embedded demand-side resources and incremental AAEE projections, is moving in the direction of greater locational certainty by providing impacts at the climate zone level. The CEC defines 15 climate zones in California.[14] Efforts are underway to further refine the locational certainty of all demand-side resources so that their benefit as substitutes for conventional generation can be realized in future planning cycles.

4.1.3 Load

The CEC's 2013 Integrated Energy Policy Report (IEPR) California Energy Demand (CED) forecasts serve as the source for the "managed demand forecast," consisting of a base load forecast coupled with several alternative Additional Achievable Energy Efficiency (AAEE) projections (see subsection on Energy Efficiency below). The CED base forecasts include three load cases, "Low", "Mid", and "High", each factoring in variations on economic and demographic growth, retail electricity rates, fuel prices, and other elements. Each load case also has peak demand weather variants, for example, 1-in-2 weather year and 1-in-10 weather year. The 2014 LTPP Scenarios incorporate the "Mid" and "High" load cases.

The 2013 IEPR CED forecasts account for transportation electrification given existing state policies. Development of policies that drive higher electrification growth is underway, and may include increased penetration of electric vehicles (EVs) across all vehicle types, and accelerated rail electrification. As the impacts of such policies become more certain, future planning assumptions will consider accounting for such policies by adjusting the base load forecast (e.g., changes in load shapes and higher annual energy consumption).

The CEC adopted the CED base forecasts on December 11, 2013, and published final versions in spreadsheet format.[15] The 2013 IEPR final report, published on January 23, 2013,[16] based on the IEPR record and in consultation with the CPUC and the CAISO, recommends that the Mid load case (and associated peak demand weather variants) of the CED base forecasts shall be used for long-term infrastructure planning activities at the CPUC, CEC, and CAISO.

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[14] See p. 51 of http://www.energy.ca.gov/2013publications/CEC-200-2013-004/CEC-200-2013-004-V1-CMF.pdf

[15] See spreadsheets at http://www.energy.ca.gov/2013_energypolicy/documents/demand-forecast_CMF/LSE_and_Balancing_Authority_Forecasts/

[16] See pp. 127-130 of http://www.energy.ca.gov/2013publications/CEC-100-2013-001/CEC-100-2013-001-CMF.pdf

The CEC staff made its 2014 IEPR Update CED forecasts available in December 2014, and the CEC adopted a slightly revised version in January 2015. Therefore, the 2015-16 CAISO TPP is expected to use the 2014 IEPR Update CED forecasts (Mid load case) as its source for the "base demand forecast".[17] Adjustments to this base forecast, such as subtracting AAEE, produce a "managed demand forecast" that incorporates demand-side policy goals not included within the CEC's base demand forecast.

4.1.4 Energy Efficiency

Energy efficiency forecasts shall be developed from the CEC's 2013 IEPR CED base forecasts and its supplemental Additional Achievable Energy Efficiency (AAEE) projections. Each load case of the CED base forecasts contains an embedded EE component that will be paired with an AAEE projection scenario representing additional savings. CEC staff, with input from the Demand Analysis Working Group and in consultation with CPUC staff and CAISO staff, developed the AAEE projections from the CPUC's 2013 California Energy Efficiency Potential and Goals Study.[18] The AAEE projections include five savings scenarios, "Low", "Low-Mid", "Mid", "High-Mid", and "High". In general, the lowest savings scenario includes only the EE savings most certain to materialize while the highest savings scenario includes all EE potential including aspirational goals (e.g. emerging technologies). Depending on the type of planning study, finer granularity of EE savings projections may be required. Some planning study types may utilize EE savings projections allocated at the transmission-level busbar, and/or daily and seasonal load-shape EE savings projections. Such studies may need to account for uncertainties regarding busbar location or load-shape impacts. In all studies, transmission and distribution loss-avoidance effects shall be accounted for.

Like the CED base forecasts, the CEC adopted the AAEE projection scenarios on December 11, 2013, and published final versions in spreadsheet format.[19] During 2013, the CEC, CPUC and CAISO engaged in collaborative discussion on how to consistently account for reduced energy demand from energy efficiency in these planning and procurement processes. To that end, the 2013 IEPR final report, published on January 23, 2013,[20] based on the IEPR record and in

[17] The CPUC expects to continue to use the 2013 IEPR CED forecasts for consistency throughout the two year 2014 LTPP cycle

[18] Attached to the R.13-11-005 Assigned Commissioner's Ruling Amending Scoping Memorandum, and providing guidance on energy savings goals for program year 2015 http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=88661908

[19] http://www.energy.ca.gov/2013_energypolicy/documents/demand-forecast_CMF/Additional_Achievable_Energy_Efficiency/

[20] See pp. 127-130 of http://www.energy.ca.gov/2013publications/CEC-100-2013-001/CEC-100-2013-001-CMF.pdf

consultation with the CPUC and the CAISO, recommends using the Mid AAEE scenario for system-wide and flexibility studies for the CPUC 2014 LTPP and CAISO 2014-15 TPP cycles. Because of the local nature of reliability needs and the difficulty of forecasting load and AAEE at specific locations and estimating their daily load-shape impacts, using the Low-Mid AAEE scenario for local studies is more prudent at this time.

For the purposes of calculating a statewide renewable net short to develop Renewable Portfolio Standard (RPS) portfolios, that calculation must also account for energy load reductions from incremental EE for all California Publicly Owned Utilities (POUs). That amount of incremental EE is the sum of the projections of each POU's incremental (uncommitted) EE reported by the POU on the CEC's S-2 supply forms.[21] The CEC projects 3,420 GWh of POU incremental EE savings in 2022 and recommends the same assumption in 2024. This number is used to calculate the statewide renewable net short in 2024.

The 2014 IEPR Update CED forecasts were made available in December 2014 and adopted by the CEC in January 2015. The 2014 IEPR Update aggregate projections of AAEE were not substantively changed from the 2013 IEPR. However, they have been scaled down slightly to account for the passage of time and the inclusion of more years of historical data in the base demand forecast. In addition, CEC staff intends to provide an updated allocation of EE savings projections down to the transmission level busbar to the CAISO for use in the 2015-16 TPP. As described earlier in this section, the 2015-16 TPP will continue to use the Low-Mid AAEE projection in local reliability studies.

4.1.5 Solar Photovoltaics

The CED forecasts embed the impacts of initiatives such as the California Solar Initiative, as well as the effects of retail rates and programs such as Net Energy Metering. As such, the default projection for behind-the-meter solar PV assumes no change from what the CED forecasts embed. Besides the default projection, planning scenarios may model a low or high projection of behind-the-meter solar PV ***incremental*** to the default projection. The low incremental projection is created by subtracting the self-generation PV projection embedded in the CED "Mid" load case (mid PV projection) from the self-generation PV projection embedded in the CED "Low" load case (high PV projection). The high incremental projection is created by subtracting the self-generation PV projection embedded in the CED "Mid" load case from the projection in the CPUC's study on the ratepayer impacts of Net Energy Metering (NEM)

[21] http://energyalmanac.ca.gov/electricity/s-2_supply_forms_2013/ See each POU's Uncommitted Energy Efficiency plans in the spreadsheet section "Generation/Production" on line item 3.

prepared by Energy and Environmental Economics (E3).[22] The NEM study result projects total cumulative behind-the-meter PV to reach 5,573 MW of installed capacity in 2020,[23] and CPUC staff linearly extrapolates this to 7,783 MW of installed capacity in 2024.

Although behind-the-meter PV is generally regarded as a demand-side resource, both the CED embedded PV and any incremental amounts will be modeled as supply resources, and modelers will adjust upward the load forecast as needed when accounting for CED embedded self-generation on the supply-side. This maintains consistency with modeling practice that treats these resources as non-dispatchable generators with both capacity value and an annual production profile. Transmission and distribution loss-avoidance effects shall be accounted for. Absent more specific locational and technology type information for a resource projection, the default shall be to allocate aggregate resource projections to substations on the basis of peak load ratios, and to model capacity value at peak (peak impact factor) and annual energy production (capacity factor) using values implied by the CED "Mid" load case embedded self-generation PV projection for each of the three major IOUs. The table below summarizes by IOU the implied peak impact factor and capacity factor.

Table 1: Small Solar PV Operational Attributes

Variable	PG&E	SCE	SDG&E	Average of all 3 IOUs
Peak impact factor	0.47	0.47	0.47	0.47
Capacity factor	0.18	0.19	0.20	0.19

4.1.6 Combined Heat and Power

The CED forecasts embed the impacts of initiatives such as the Self-Generation Incentive Program. As such, the default projection for behind-the-meter combined heat and power (CHP) assumes no change from what the CED forecasts embed. Besides the default projection, planning scenarios may model a low or high projection of behind-the-meter CHP ***incremental*** to the default projection. ICF International conducted a policy analysis of CHP resources through 2030 and produced a report published in July 2012.[24] The low incremental projection is based on a CEC analysis of the "Base" projection of on-site generation from the ICF report. The high incremental projection is based on a CEC analysis of the "High" projection of on-site generation

[22] http://www.cpuc.ca.gov/PUC/energy/Solar/nem_cost_effectiveness_evaluation.htm

[23] See the "Forecast" Tab in the E3 NEM Summary Public Model located at: http://www.cpuc.ca.gov/NR/rdonlyres/AD52FE7A-E283-4AB8-BCB2-87DF56D7443B/0/E3NEMSummaryTool.xlsm

[24] *See* Combined Heat and Power: Policy Analysis and 2011-2030 Market Assessment – Consultant Report at http://www.energy.ca.gov/2012publications/CEC-200-2012-002/CEC-200-2012-002-REV.pdf

from the ICF report.[25] Note that since the projections in the ICF report are statewide, these numbers are disaggregated to planning areas for the three major IOUs using ratios derived from the CEC analysis of the "Base" and "High" projections of on-site generation from the ICF report. This results in CAISO area 2024 incremental installed capacity projections of 955 MW in the low case, and 2,405 MW in the high case.

Similar to behind-the-meter PV, behind-the-meter CHP is generally regarded as a demand-side resource. As such, CHP embedded in the CED forecast, in addition to any incremental CHP amount, will be modeled as supply resources. Modelers will adjust the load forecast upward, as needed, when accounting for CED forecast embedded self-generation on the supply-side. This maintains consistency with modeling practice that treats these resources as non-dispatchable generators with both capacity value and an annual production profile. Transmission and distribution loss-avoidance effects shall be accounted for. Absent more specific locational and technology type information for a resource projection, the default shall be to allocate aggregate resource projections to substations on the basis of peak load ratios, and to model capacity value at peak (peak impact factor) as 0.70 of installed capacity and annual energy production using a 0.80 capacity factor.

4.1.7 Demand Response

The CED forecasts embed the impacts of load-modifying[26] demand response (DR) programs, in other words, those impacts are treated on the demand-side. These programs are generally non-event-based and/or tariff-based and include TOU rates, Permanent Load Shifting, and Real Time Pricing. Supply-side DR programs, which are generally event-based, price-responsive and reliability programs, are treated as supply resources.

There may be other effects that supply additional DR impacts, for example, a higher EV penetration could lead to charging models that can provide load shifting and frequency regulation by managing the charging times of an aggregate group of EVs. These speculative impacts are not accounted for at this time. Another expected future DR impact may come from defaulting residential customers to TOU rates. These impacts may be explored in the next major CEC IEPR planning cycle.

[25] Straight-line interpolation for intervening years between the "Base" case and "High" case target years identified in the ICF report

[26] See D.14-03-026 in the Demand Response Rulemaking, R.13-09-011, for further background on "load-modifying" and "supply-side" DR programs.

4.1.8 Energy Storage

Energy storage units shall be modeled as supply-side resources; therefore this document describes the planning assumptions for distribution-connected and customer-side storage, as well as transmission-connected storage, within the Supply-side Assumptions section.

4.1.9 Avoided Transmission and Distribution Losses

Demand-side resource projections need to account for avoided transmission and distribution losses when calculating the balance of projected supply and demand. The table below specifies factors supplied by the CEC for accounting of avoided transmission and distribution losses. The factors are multiplied by demand-side resource projections to determine the avoided generation replaced by the presence of the demand-side resource.

Table 2: Factors to Account for Avoided Transmission and Distribution Losses

	PG&E	SCE	SDG&E
Peak, distribution losses only	1.067	1.051	1.071
Peak, transmission and distribution losses	1.097	1.076	1.096
Energy, transmission and distribution losses	1.096	1.068	1.0709

4.2 Supply-side Assumptions

All supply-side resource assumptions are solely for planning purposes. Inclusion or exclusion of a specific project or resource in the planning cycle has no implications for existing or future contracts. To the extent a specific projected resource is not available; the analysis assumes an electrically equivalent resource will be available.

All supply-side resources should be categorized either as within a specific local area, as a generic system resource, or as out-of-state. Resources should be accounted for in terms of their most current net qualifying capacity (NQC). For purposes of constructing simple annual load and resource tables, August NQC values will be used. In the absence of a NQC, a resource's expected NQC should be based on its expected installed capacity adjusted for the peak impact value of that technology type. To the extent that NQC accounting methodologies change in the future, those changes should be reflected in LTPPs subsequent to the current LTPP. For variable resources, methods that can forecast production based on a variety of conditions are preferred to utilizing single point or year assumptions. For example, 8760 hour generation profiles for variable resources are used in production simulation model analyses. These profiles may also be used in CAISO TPP studies to determine output levels of these resources corresponding to the load levels (peak, off-peak, partial peak, and light load base

cases) of the applicable studies. The Effective Load Carrying Capability (ELCC) method of assigning capacity value to wind and solar resources is expected to become available for the next cycle of developing planning assumptions. At this time, no degradation of resource production over time is accounted for in these planning assumptions.

4.2.1 Existing Resources

The capacities of existing resources shall be the monthly NQC values found in the 2014 Resource Adequacy compliance year NQC list.[27] The CAISO and CPUC both publish these lists annually on their respective websites.

4.2.2 Conventional Additions

The default values for conventional resource additions 50 MW or larger derive from the list of power plant siting cases maintained on the CEC website.[28] The default values for conventional resource additions smaller than 50 MW derive from other databases maintained by the CEC. The CEC updates these lists several times per year. A power plant project shall be counted if it (1) has a contract, (2) has been permitted, and (3) has begun construction. A power plant project that does not meet these criteria may be counted if the staff of the agency with permitting jurisdiction expects the project to come online within the planning horizon.[29]

4.2.3 Combined Heat and Power

Resources identified here export electricity to the grid. The Demand-side Assumptions section discusses resources that provide on-site energy. The default projection for exporting CHP assumes no net growth. Planning scenarios that model a higher penetration of exporting CHP shall add either a low or a high incremental projection of growth. ICF International conducted a policy analysis of CHP resources through 2030 and produced a report in July 2012.[30] The low

[27] *See* Resource Adequacy Compliance Materials at http://www.cpuc.ca.gov/PUC/energy/Procurement/RA/ra_compliance_materials.htm

[28] http://www.energy.ca.gov/sitingcases/all_projects.html

[29] The Oakley power plant project was approved by the CPUC but recently annulled by the California Court of Appeal: http://www.courts.ca.gov/opinions/documents/A138701.PDF Therefore, Oakley will not be assumed as a conventional resource addition. During the second year of the LTPP cycle, CPUC staff expects to facilitate additional studies with varying additional resource options to determine the best way to fill any need found from studies conducted during the first year of the LTPP cycle. At that time, there may be an opportunity to explore the efficacy of the Oakley power plant in meeting identified needs.

[30] See Combined Heat and Power: Policy Analysis and 2011-2030 Market Assessment – Consultant Report at http://www.energy.ca.gov/2012publications/CEC-200-2012-002/CEC-200-2012-002-REV.pdf

incremental projection is based on a CEC analysis of the "Base" projection of exporting CHP from the ICF report. The high incremental projection is based on a CEC analysis of the "High" projection of exporting CHP from the ICF report.[31] Note that since the projections in the ICF report are statewide projections, these numbers are adjusted downward by a factor of 0.8, approximately the CAISO area to statewide load ratio. This results in CAISO area 2024 installed capacity projections of 164 MW in the low case, and 1,855 MW in the high case.

Absent more specific locational and technology type information for a resource projection, the default shall be to allocate aggregate resource projections to substations on the basis of peak load ratios and to model capacity value at peak (peak impact factor) as 0.70 of installed capacity. These resources are assumed to be non-dispatchable by the CAISO.

4.2.4 Energy Storage

CPUC Decision (D.)13-10-040 established a 2020 procurement target[32] of 1,325 MW installed capacity of new energy storage units within the CAISO planning area. Of that amount, 700 MW shall be transmission-connected, 425 MW shall be distribution-connected, and 200 MW shall be customer-side. D.13-10-040 also allocates procurement responsibilities for these amounts to each of the three major IOUs. Storage operational after January 1, 2010 and no later than December 31, 2024 shall count towards the procurement target. The default planning assumption for new storage capacity shall account for a conservative expected contribution to grid services and reliability from the storage procurement target in D.13-10-040. No further growth in new storage capacity is assumed post 2024.

Assumptions about storage attributes and capabilities

While all storage can provide energy services, that is, storage can charge during periods of low energy prices and discharge during periods of high energy prices, their ability to provide capacity and flexibility (load-following, ancillary services, etc.) depends on their visibility and controllability by the CAISO. Transmission-connected storage will likely interconnect to the system near transmission substations and be visible and controllable by the CAISO. Therefore, all of the 700 MW of new transmission-connected storage described above is assumed to provide capacity and flexibility as a default.

The ability of distribution-connected storage to provide capacity and flexibility carries significant uncertainty, in part because this technology is new to the market, and in part

[31] Straight-line interpolation for intervening years between the "Base" case and "High" case target years identified in the ICF report

[32] The Decision specifies that resources must be online by 2024 so in the planning assumptions, target amounts are reached in 2024.

because current policy and the CAISO market does not fully support the participation of distribution-connected resources. Therefore, only 50% of the 425 MW of new distribution-connected storage described above is assumed to provide capacity and flexibility as a default. This acknowledges that greater than zero percent but less than 100% of these resources are expected to provide such services.

The ability of customer-side storage to provide capacity and flexibility carries even higher uncertainty. Not only is the market new, but customer-side storage will likely be non-dispatchable by either the CAISO or the IOUs (absent significant policy and market changes) and it is unclear how much of customer-side storage will charge from the grid or on-site generation, and according to what schedule. Therefore, none of the 200 MW of new customer-side storage described above is assumed to provide capacity and flexibility as a default.

A limiting factor to the ability of storage to provide capacity during peak demand hours is the duration of sustained output. The CPUC factors in a resource's ability to sustain output for at least four hours when calculating NQC for Resource Adequacy purposes.[33] Therefore, storage resources that only have a depth of two hours should have their capacity value derated by half (50%) for purposes of power flow reliability studies. This accounts for the inability of such resources to sustain full output during the duration of system peak hours. Capacity values in Table 3 below reflect this adjustment.

Note that although there are limits on the amount of storage procurement assumed to provide capacity and flexibility as described above, all 1,325 MWs can provide energy services and will be modeled as such in studies involving production cost simulations. The capacity limitations described above applies to power-flow type studies conducted in the CAISO's TPP. The table below describes the assumptions that shall be used for the technical characteristics and accounting of the three classes of storage described by D.13-10-040.

[33] See page 32 of http://www.cpuc.ca.gov/NR/rdonlyres/C61CB838-E9BB-4CE2-AEB3-63DB955E2EF8/0/RAWorkshopReport2004.doc

Table 3: Storage Operational Attributes

Values are MW in 2024	Transmission-connected	Distribution-connected	Customer- side
Total Installed Capacity	700	425	200
Amount providing capacity in power flow studies	560 *	170 *	0
Amount providing flexibility	700	212.5	0
Amount with 2 hours of storage	280	170	100
Amount with 4 hours of storage	256 ^	170	100
Amount with 6 hours of storage	124 ^	85	0
Charging rate: If a unit is discharged and charged at the same power level, assume it takes 1.2 times as long to charge as it does to discharge. Example: 50 MW unit with 2 hours of storage. If the unit is charged at 50 MW, it will take 2.4 hours to charge. If the same unit is charged at 25 MW, it will take 4.8 hours to charge.			

***** This reflects a 50 % derating of capacity value of 2 hour storage due to not being able to sustain maximum output for 4 hours per Resource Adequacy accounting rules.
^ This amount was adjusted down to reflect the assumption that the 40 MW Lake Hodges storage project satisfies the storage target for a portion of SDG&E's share of the target.

In the CAISO's TPP Base local area reliability studies, locations for this new storage capacity must be assumed. It is reasonable to assume that cost-effectiveness requirements for new storage capacity will lead to siting at the most effective locations to contribute to local area reliability. As the CAISO's technical studies in the 2014-15 TPP identify transmission constraints in the local areas, the CAISO will identify the effective busses for mitigating those constraints. The storage amounts providing capacity and flexibility identified in the table above will be distributed amongst effective busses within the local areas and modeled. These bus locations are potential development sites for storage and shall inform the actual procurement to meet the storage procurement target.

All energy storage described here is exclusive and incremental to any similar technologies that are accounted for as non-dispatchable DR (e.g. Permanent Load Shifting) embedded within the CEC's CED forecasts.

Adjustments due to actual and expected storage projects

The 50 MW of storage that D.13-02-015 ordered SCE to procure and the 25 MW of storage that D.14-03-004 ordered SDG&E to procure are assumed to count towards the D.13-10-040 storage procurement target and shall not be double counted. To the extent pending applications to fill procurement authorizations D.13-02-015 and D.14-03-004 include storage beyond the minimum requirements ordered in the decisions, such storage projects are also assumed to count towards the storage procurement target and shall not be double counted. Table 3 above does not include any adjustment to reflect storage procurement resulting from D.13-02-015 and D.14-03-004. See the discussion on pending applications in section 4.2.13 for further details.

The Lake Hodges storage project in the San Diego area counts as an existing resource within the Scenario Tool. This project is assumed to satisfy a portion of SDG&E's share of the D.13-10-040 storage procurement target and Table 3 above reflects this. Specifically, Lake Hodges is a 40 MW project and is assumed to satisfy all of SDG&E's share of 6-hour transmission-connected storage target (16 MW target minus 16 MW from Lake Hodges) and most of SDG&E's share of 4-hour transmission-connected storage target (32 MW target minus the remaining 24 MW from Lake Hodges).

Alternative storage assumptions

The default planning assumptions accounting for the storage procurement target are admittedly conservative. For example, the assumption that half of distribution-connected storage and all of customer-side storage does not provide capacity or flexibility probably undercounts their value. The intention is to model the grid conservatively to start with in order to reveal potential reliability needs. Any revealed reliability needs will be used to inform how the storage procurement target actually gets implemented. To enable this, during the second year of the LTPP cycle, CPUC staff expects to facilitate additional flexibility studies with varying additional resource options to determine the best way to fill any flexibility need found from studies conducted during the first year of the LTPP cycle. If there is a need, CPUC staff may explore two additional resource options for storage in LTPP flexibility studies:

1. In addition to the default planning assumptions for new storage, add one or two new large-pumped hydro storage units, the exact MW amount depends on what the revealed need is. Note that according to D.13-10-040, the maximum size of pumped storage projects that count towards storage procurement target is 50 MW. Therefore if studies demonstrate that this additional resource option is the best way to fill any need, the LTPP proceeding will consider pumped storage projects larger than 50 MW in general solicitations for new capacity conducted by utilities.
2. In addition to the default planning assumptions for new storage, assume policy and market changes that enable a more complete contribution to grid services and reliability

from new distribution-connected and customer-side storage. Additional storage beyond the storage procurement target may be assumed depending on what the revealed need is.

4.2.5 Demand Response

Demand response, or DR, (generally event-based price-responsive and reliability programs) that can be bid into CAISO market shall be accounted for as a supply-side resource[35]. Transmission and distribution loss-avoidance effects shall be accounted for. The most recent Load Impact reports[36] filed with the CPUC serve as the basis for DR planning assumptions. The Load Impact reports are published annually on April 1. In all types of system and local area resource planning studies, DR capacity shall be counted using the 1-in-2 weather year ex-ante forecast of monthly load impact, portfolio-adjusted. This is consistent with the capacity value of DR for Resource Adequacy. For the purpose of building load and resource tables, DR capacity shall be counted using the 1-in-2 weather year condition ex-ante forecast of August load impact, portfolio-adjusted. For the purpose of building detailed profiles of DR load impact in system and local area planning models, DR is assumed available at times of system stress, subject to program operating constraints but not limited to operating hours specified in Resource Adequacy accounting rules. Program operating constraints are obtained from the utilities' Load Impact reports and tariffs for each program.[37] The ex-ante load impacts for the operating hours specified in Resource Adequacy accounting rules, by program, are found in the Load Impact reports. For modeling purposes, programs with operating hours beyond hour ending 18 shall be triggered at $600/MWh and all other programs shall be triggered at $1000/MWh.

In the CAISO's TPP Base local area reliability studies, only capacity from DR programs that can be relied upon to mitigate "first contingencies", as described in the 2012 LTPP Track 4 planning

[35] See D.14-03-026 in the Demand Response Rulemaking, R.13-09-011, for further background on "load-modifying" and "supply-side" DR programs.

[36] To access IOU Load Impact reports, please see:
PG&E: https://www.pge.com/regulation/DemandResponseOIR/Other-Docs/PGE/2013/DemandResponseOIR_Other-Doc_PGE_20130402_269621.pdf
SCE: http://www3.sce.com/sscc/law/dis/dbattach5e.nsf/0/62A8F5E44C447F0688257B410052EC7B/$FILE/R.07-01-041_DR+OIR-SCE+DR+Portfolio+Summary+2012+-+Final.pdf
SDG&E: http://www.sdge.com/regulatory-filing/742/rulemaking-regarding-policies-and-protocols-demand-response-load-impact

[37] To access IOU demand response tariffs, please see:
PG&E: http://www.pge.com/en/mybusiness/save/energymanagement/index.page
SCE: https://www.sce.com/wps/portal/home/business/savings-incentives/demand-response/
SDG&E: http://www.sdge.com/save-money/demand-response/overview

assumptions[38], are counted. DR that can be relied upon to mitigate first contingencies in local reliability studies participates in, and is dispatched from, the CAISO market in sufficiently less time than 30 minutes[39] from when it is called upon.

There is uncertainty as to what amount of DR can be projected to meet this criteria within the TPP planning horizon given that few current programs meet this criteria and the current DR Rulemaking R.13-09-011 expects to restructure DR programs to better meet CAISO operational needs and has already produced two major policy decisions towards that goal.[40] The rulemaking is expected to issue additional decisions that enable demand response to be more useful for grid needs, but CAISO has several tasks it must complete in order to make integration of DR possible.

The 2012 LTPP Track 4 planning assumptions estimated that approximately 200 MW of DR would be available to mitigate first contingencies within the combined LA Basin and San Diego local reliability areas by 2022. The 2014 LTPP planning assumptions, however, estimates that approximately 1,100 MW would be available to mitigate first contingencies within the combined LA Basin and San Diego local reliability areas by 2024. Staff developed this latter estimate by screening DR projections in the Load Impact reports for programs that deliver load reductions in 30 minutes or less from customer notification. The table below identifies for each IOU the programs and capacities that meet this criteria.

[38] See Attachment A of Revised Scoping Ruling and Memo of the Assigned Commissioner and Administrative Law Judge in R.12-03-014, May 21, 2013, http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M065/K202/65202525.PDF

[39] The 30 minute requirement is based on meeting NERC Standard TOP-004-02. Meeting this requirement implies that programs may need to respond in 20 minutes, from customer notification to load reduction, in order to allow for other transmission operator activities in dealing with a contingency event.

[40] Commission Decision 14-03-026 approved the bifurcation of DR programs into two categories: Supply DR (DR that is integrated into CAISO markets and dispatched when and where needed) and Load-Modifying DR (DR that is not integrated into CAISO markets and used to modify the demand forecast). Decision 14-12-024 clarified that complete bifurcation will occur by the beginning of 2018.

Table 4: DR Capacity in Local Area Reliability Studies

"First Contingency" DR Program MW in 2024 using 1-in-2 weather year ex ante impacts	PG&E	SCE	SDG&E
Base Interruptible	287	627	1
Agricultural Pumping Interruptible	n/a	69	n/a
AC Cycling Residential	82	298	12
AC Cycling Non-Residential	1	76	3

Given the uncertainty as to what amount of DR can be relied upon for mitigating first contingencies, the CAISO's 2014-15 TPP Base local area reliability studies examined two scenarios, one consistent with the 2012 LTPP Track 4 DR assumptions and one consistent with the 2014 LTPP DR assumptions, shown above. Staff expects the same two scenarios to be examined in the 2015-16 TPP, except that the latter scenario should be updated to be consistent with the latest Load Impact reports filed with the CPUC on April 1, 2014 under R.13-09-011.

To the extent technical studies require estimates of DR capacity at individual transmission-level busbars, DR capacity will be allocated to busbar using the method defined in D.12-12-010, or specific busbar allocations provided by the IOUs. For the 2014-15 TPP, the DR amounts in Table 4 were the basis for busbar allocations provided from the IOUs to the CAISO. In November 2014, the IOUs updated the busbar allocations to be consistent with the latest available Load Impact reports (April 1, 2014). CPUC staff expects the IOUs to provide these updated busbar allocations to the CAISO for use in the 2015-16 TPP. CPUC staff submitted comments identifying the updated busbar allocations in response to the CAISO's request for input on demand response assumptions for the CAISO's 2015-16 Unified Planning Assumptions.[41]

The default planning assumptions accounting for DR capacity are admittedly conservative given CPUC expectations to restructure programs and expand capacity in the DR Rulemaking R.13-09-011. However, rather than speculate what the outcome of the DR Rulemaking might be, the default planning assumptions presume the continuation of the utilities' existing DR programs. The intention is to model the grid conservatively to start with in order to reveal potential reliability needs. Any revealed reliability needs will be used to inform new DR program

[41] Comments were submitted via this CAISO Market Notice: http://www.caiso.com/Documents/StakeholderInputfor2015-2016UnifiedPlanningAssumptions.htm

development/procurement. To enable this, during the second year of the LTPP cycle, CPUC staff expects to facilitate additional flexibility studies with varying additional resource options to determine the best way to fill any flexibility need found from studies conducted during the first year of the LTPP cycle. If there is a need, CPUC staff may explore an additional resource option in LTPP flexibility studies that expands DR capacity such that the total DR capacity is equal to 5% of the forecasted managed 1-in-2 weather year system peak demand by 2021, and reaches 10% of the forecasted managed 1-in-2 weather year system peak demand by 2030. The expanded DR capacity shall be assumed available to hour ending 21, triggered at $600/MWh, and use limited to 20 hours per month. These parameters may be adjusted depending on the revealed need.

4.2.6 RPS Portfolios

Overview

The forecast of renewable resources is developed using the Renewable Portfolio Standard (RPS) Calculator. The RPS Calculator uses public data to develop portfolios of renewable resources to use for planning studies. Since a large portion of the cost associated with renewables is tied to the cost of transmission capacity needed to deliver the power to market, the RPS Calculator optimizes existing transmission and, when necessary, optimizes the use of minor upgrades to existing transmission lines as well as the use of new transmission lines. As such, when two similar resources are incorporated into the RPS Calculator, it selects the resource with access to current transmission capacity over the resource that requires new transmission capacity, thereby minimizing additional transmission cost. The RPS Calculator also incorporates four policy priority metrics: permitting (i.e. quickest on-line time), lowest cost, least environmentally harmful and commercial interest. The weight applied to each metric, in addition to the overall renewable net short (RNS) need, impacts the make-up of a given portfolio. The portfolios created for the 2014-2015 TPP and LTPP reflect the application of a 70% weight to the Commercial Interest score and a 10% weight to the Environmental, Permitting, and Cost scores.

CPUC & CEC Collaboration

CPUC and CEC staff collaboratively developed the RPS portfolios, with CEC staff providing to CPUC staff its most recent IEPR CED retail sales forecast, demand side management assumptions, environmental scores, and online renewable generation, which CPUC staff uses to, among other things, calculate each portfolio's RNS. Once the RPS portfolios are created and vetted via a public stakeholder process, the CPUC and CEC jointly submit the portfolios to the CAISO for incorporation into the CAISO's Transmission Planning Process (TPP) studies. The CAISO's transmission modeling, which is more detailed than the modeling performed by RPS

JP Morgan Ventures Energy Corporation (J

141 FERC ¶ 61,131
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

J.P. Morgan Ventures Energy Corporation Docket No. EL12-103-000

ORDER SUSPENDING MARKET-BASED RATE AUTHORITY

(Issued November 14, 2012)

1. On September 20, 2012, the Commission issued an order directing J.P. Morgan Ventures Energy Corporation (JP Morgan) to show cause why its authorization to sell electric energy, capacity, and ancillary services at market-based rates should not be suspended.[1] As discussed below, we find that the statements identified in the Show Cause Order constitute violations of section 35.41(b) of the Commission's regulations.[2] Consequently, pursuant to section 206 of the Federal Power Act (FPA), we will suspend JP Morgan's market-based rate authority for a period of six months, to become effective on April 1, 2013.[3]

I. Background

2. In 2005, the Commission authorized JP Morgan to sell electric energy, capacity, and ancillary services at market-based rates in several regions, including the market administered by the California Independent System Operator Corporation (CAISO).[4]

[1] *J.P. Morgan Ventures Energy Corp.*, 140 FERC ¶ 61,227 (2012) (Show Cause Order).

[2] 18 C.F.R. § 35.41(b) (2012) "*Communications*. A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences."

[3] 16 U.S.C. § 824e (2006).

[4] *J.P. Morgan Ventures Energy Corp.*, 112 FERC ¶ 61,322 (2005).

JP Morgan continues to be an active participant in the CAISO market, and is therefore subject to the terms and conditions of CAISO's Open Access Transmission Tariff (Tariff or OATT).

3. Section 11.1 of Appendix P of CAISO's Tariff requires CAISO's Department of Market Monitoring (DMM) to refer to the Commission all instances in which the DMM has reason to believe that a Market Violation[5] has occurred and to immediately terminate all independent actions related to the alleged violation following a referral.[6] Section 11.5 of Appendix P of the Tariff similarly prohibits the DMM from undertaking "any investigative steps regarding the referral except at the express direction of FERC or FERC Staff."[7]

4. On March 25, 2011, CAISO sent a data request to JP Morgan regarding its bidding activities in the CAISO market.[8] In March of 2011, CAISO also orally informed JP Morgan that CAISO intended to refer the matter to the Commission's Office of Enforcement.[9] JP Morgan submitted responses to CAISO's March 25 request on April 11, 19, and 27, 2011.[10] In light of those responses, CAISO sent an amended data

[5] The Tariff defines a "Market Violation" as "A CAISO Tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies." CAISO, eTariff, FERC Electric Tariff, App. A (0.0.0).

[6] CAISO, eTariff, FERC Electric Tariff, App. P, § 11.1 (3.0.0) (section 11.1) (". . . Once DMM has obtained sufficient credible information to warrant referral to FERC, DMM shall immediately refer the matter to FERC and desist from independent action related to the alleged Market Violation. DMM may, however, continue to monitor for any repeated instances of the activity by the same or other entities, which would constitute new Market Violations. DMM shall respond to requests from FERC for any additional information in connection with the alleged Market Violation it has referred.").

[7] CAISO, eTariff, FERC Electric Tariff, App. P, § 11.5 (section 11.5) ("Following a referral to FERC, DMM is committed to notify and inform FERC of any information that DMM learns of that may be related to the referral but DMM shall not undertake any investigative steps regarding the referral except at the express direction of FERC or FERC Staff.").

[8] *See* JP Morgan Response to Show Cause Order at Att. 2 (letter from the DMM to JP Morgan's outside counsel).

[9] *See* JP Morgan Complaint, Docket No. EL12-70-000, at 5 (filed May 21, 2012) (May 21, 2012 Complaint).

[10] *See* JP Morgan Response to Show Cause Order at Att. 2 (letter from the DMM to JP Morgan's outside counsel).

request on May 4, 2011 that requested information responsive to five different areas of inquiry.[11] CAISO identified these separate requests for information as Request No. 1, Request No. 2, Request No. 3, Request No. 4, and Request No. 5. The May 4 data request required JP Morgan to respond by May 18, 2011.[12]

5. In a May 18, 2011 letter to the DMM, JP Morgan's outside counsel cited the "post-referral bar" in section 11.1 of Appendix P of CAISO's Tariff and argued that "the DMM should refer the matter to FERC and stop its independent action."[13]

6. On May 20, 2011, CAISO officially referred JP Morgan's bidding activities to the Office of Enforcement for further investigation.[14]

7. In a June 13, 2011 letter to the DMM, JP Morgan's outside counsel provided certain spreadsheets and stated JP Morgan's belief that "the DMM does not have the authority to seek the [spreadsheets] and should refer the matter to FERC and stop its independent action."[15]

8. In a June 21, 2011 email, the DMM forwarded to JP Morgan's outside counsel the official referral of JP Morgan's bidding activities sent to the Director of the Office of Enforcement on May 20, 2011.[16]

9. In a June 24, 2011, 9:45 AM email to JP Morgan's outside counsel, with the Subject line: "Data requests to JP Morgan from California MMU," staff from the Office of Enforcement wrote:

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[11] *Id*.

[12] *Id.*

[13] *See* JP Morgan Response to Show Cause Order at Att. 3 (letter from JP Morgan's outside counsel to the DMM).

[14] *See* JP Morgan Response to Show Cause Order at Att. 7. CAISO also referred more of JP Morgan's bidding activities in 2010 to the Office of Enforcement in June 2011.

[15] JP Morgan Response to Show Cause Order at Att. 5 (letter from JP Morgan's outside counsel to the DMM).

[16] JP Morgan Response to Show Cause Order at Att. 7 (letter from the DMM to JP Morgan's outside counsel).

> This will confirm that Commission staff has expressly directed the California ISO Market Monitor to continue to seek full and complete responses from JP Morgan to the data requests or other inquiries that the Market Monitor directed to JP Morgan through June 20, 2011.[17]

JP Morgan's outside counsel responded to this email at 11:25 AM: "Thank you."[18]

10. In a July 28, 2011, 12:31 PM email to JP Morgan's outside counsel, with the Subject line: "FW: Data requests to JP Morgan from California MMU," staff from the Office of Enforcement wrote, "I hereby confirm that FERC OE has expressly directed the CAISO MMU to analyze those materials to assist us in our work."[19] JP Morgan's outside counsel responded to this email at 12:49 PM: "Thank you."[20]

11. In a September 27, 2011 letter to JP Morgan, CAISO informed JP Morgan of the results of the CAISO's review of potential violations of the Investigation Information requirements as described in CAISO Tariff Section 37.6.2.[21] CAISO's review determined that JP Morgan had failed to timely provide full responses to Request No. 4 and Request No. 5 of the May 4, 2011 data requests.[22] CAISO's notice indicated that JP Morgan had 30 days to respond to the letter before CAISO determined whether sanctions were required by the CAISO Tariff.[23]

12. Meanwhile, on October 15, 2011, staff from the Office of Enforcement sent an email to JP Morgan's deputy general counsel (and copying JP Morgan's outside counsel) asking if the deputy general counsel could provide the DMM with certain materials that outside counsel still had not provided in response to the DMM's May 4 data request and

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[17] JP Morgan Response to Show Cause Order at Att. 9 (letter from Office of Enforcement staff to JP Morgan's outside counsel).

[18] *See Submission By Office of Enforcement Concerning JP Morgan Complaint Against CAISO*, at 5, Docket No. EL12-70-000 (filed June 19, 2012) (hereinafter referred to as "Enforcement's June 2012 Submission").

[19] *See id.* at 7. Hereinafter, the Office of Enforcement's June 24, 2011 email and its July 28, 2011 email will together be referred to as "the 2011 emails."

[20] *See id.*

[21] *See* JP Morgan Response to Show Cause Order at Att. 23 (letter from CAISO to JP Morgan).

[22] *Id.*

[23] *Id.*

the 2011 emails from the Office of Enforcement.[24] Attached to the email was a letter in which the Office of Enforcement included copies of the 2011 emails to JP Morgan's outside counsel confirming the DMM's authorization to continue to seek information responsive to Request No. 4 and Request No. 5 of the CAISO DMM's May 4 data request.[25]

A. October 18, 2011 Data Response to the CAISO DMM

13. In an October 18, 2011 letter to the DMM, JP Morgan's outside counsel provided additional materials but continued to cite the CAISO Tariff section 11.1 and to characterize its submission of materials as voluntary.[26]

14. In an October 27, 2011 letter, JP Morgan's outside counsel responded to the CAISO's September 27, 2011 notice of penalty for failure to timely submit discovery responses as required under the CAISO Tariff.[27] JP Morgan counsel asserted that "J.P. Morgan had a good faith belief it was responding to the DMM on a voluntary, as opposed to a mandatory, basis" and again cited the CAISO Tariff section 11.1.[28]

15. In a December 5, 2011 letter to JP Morgan, CAISO stated that it had revised its earlier determination to find that JP Morgan's responses to Request No. 4 and Request No. 5 of the DMM's May 4 data request were 162 days late, rather than the 30 days indicated in the September 27, 2011 letter.[29] CAISO determined that information responsive to Request No. 4 and Request No. 5 was due by May 18, 2011 and JP Morgan failed to provide a full response until October 27, 2011. In this revised notice, CAISO stated its position on JP Morgan's repeated assertions of "voluntary" disclosures:

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[24] *See Submission by Office of Enforcement Concerning JP Morgan Motion to Withdraw Complaint Without Prejudice*, at 16-22 (filed July 3, 2012) (hereinafter referred to as "Enforcement's July 2012 Submission").

[25] *Id.*

[26] *See* JP Morgan Response to Show Cause Order at Att. 21 (letter from JP Morgan's outside counsel to the DMM) (October 18, 2011 Data Response to the CAISO DMM).

[27] *See* JP Morgan Response to Show Cause Order at Att. 24 (letter from JP Morgan's outside counsel to CAISO).

[28] *Id.*

[29] *See* JP Morgan Response to Show Cause Order at Att. 25 (letter from CAISO to JP Morgan).

> In providing its response, the ISO reminds [JP Morgan] that, contrary to any suggestions made in the October 27 letter or elsewhere, the ISO has never viewed [JP Morgan]'s compliance with the May 4 data requests as voluntary and communicated that point to [JP Morgan] in advance of the initial May 18, 2011 due date.

16. In a February 13, 2012 letter, CAISO notified JP Morgan that it had decided to impose a financial penalty of $486,000 against JP Morgan for failing to submit all responsive materials to CAISO by the deadline established in the May 4 data request.[30] The letter stated:

> The ISO's determination is based, in part, on its view that the [DMM's] May 4, 2011 Information Request did not violate Appendix P, Section 11.1 of the ISO Tariff and, as such, was validly issued. Compliance with the Information request was thus mandatory, not voluntary, under the ISO Tariff.[31]

B. March 21, 2012 Appeal

17. On March 21, 2012, JP Morgan filed with the Commission a non-public appeal of CAISO's decision to impose the monetary penalty for violation of the CAISO Tariff.[32] Among other things, JP Morgan continued to argue that its responses to the May 4 data request were "completely voluntary" and that, pursuant to sections 11.1 and 11.5 of the Tariff, the DMM was divested of its authority to continue its investigation and impose a monetary penalty.[33] Further, JP Morgan stated that it "reasonably concluded as of March 9, 2011—and continues to conclude—that any responses to the DMM after that date were completely voluntary and that the assessed penalty has no basis under the CAISO Tariff."[34]

18. On April 20, 2012, in a non-public order, the Commission rejected JP Morgan's appeal as procedurally deficient.

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[30] *See* Enforcement's July 2012 Submission, at 27.

[31] *Id.*

[32] JP Morgan, Non-Public Appeal, Docket No. IN11-08-000 (filed Mar. 21, 2012) (March 21, 2012 Appeal).

[33] *Id.* at 8-10.

[34] *Id.* at 10.

C. May 21, 2012 Complaint

19. On May 21, 2012, pursuant to section 206 of the FPA, JP Morgan filed a complaint alleging that the monetary penalty imposed by CAISO for JP Morgan's alleged failure to timely respond to the May 4 data request is unjust, unreasonable and unduly discriminatory.[35] Among other things, JP Morgan argued that CAISO's imposition of the monetary penalty and continued efforts to obtain information in response to the May 4 data request after CAISO had referred the matter to the Office of Enforcement violated sections 11.1 and 11.5 of the Tariff.[36] According to JP Morgan, once CAISO referred the matter to the Office of Enforcement, sections 11.1 and 11.5 of the Tariff prohibited CAISO from taking any further action against JP Morgan in the absence of an "'express direction of FERC or FERC Staff.'"[37] Notably, JP Morgan also stated in the May 21, 2012 Complaint:

> Neither the DMM nor [the Office of Enforcement] informed [JP Morgan] that the DMM had been authorized or instructed to continue to seek responses to the DMM's May 4 Requests—or any other request—either at the direction of [the Office of Enforcement] or the Commission under Section 11.5 or the monitoring clause of Section 11.1.
>
> When [the Office of Enforcement] later requested that [JP Morgan] provide specific documents to the DMM, there was no suggestion that [the Office of Enforcement] was triggering the "express direction" exception in Section 11.5 or that [JP Morgan] had an on-going duty to respond to the May 4 Requests.
>
> Therefore, it was entirely reasonable for [JP Morgan] to believe that the DMM had no legal basis for mandating information from the company relating to the relevant 2010 and 2011 bidding activity.[38]

20. In response to JP Morgan's May 21, 2012 Complaint, the Office of Enforcement submitted a response quoting the 2011 emails to show that the Office of Enforcement had informed JP Morgan and its counsel more than once that it had expressly directed the

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[35] May 21, 2012 Complaint at 2.

[36] *Id.* at 1-5.

[37] *Id.* at 12-13 (quoting section 11.5).

[38] *Id.* at 13 (Spaces have been inserted between sentences for clarity).

DMM to continue to seek data responses from JP Morgan because the DMM was authorized to continue analyzing materials to assist Commission staff.[39]

D. June 22, 2012 Answer

21. Following the Office of Enforcement's June 2012 Submission, JP Morgan filed a motion to withdraw its complaint,[40] and an answer to Enforcement's submission in which JP Morgan acknowledged that the March 21, 2012 Appeal and May 21, 2012 Complaint contained a "factual error."[41]

22. Specifically, in its June 22, 2012 Answer, JP Morgan acknowledged that in filing its March 21, 2012 Appeal and May 21, 2012 Complaint, it "failed to bring to the Commission's attention [the 2011] emails."[42] JP Morgan asserted that at the time it prepared and submitted these filings with the Commission, its outside counsel who had received and viewed the 2011 emails "did not recall" their existence "and did not otherwise connect them with the issues addressed in the Complaint, or in the previously filed Appeal."[43] JP Morgan stated that its omission of relevant communications with the Office of Enforcement in its filings with the Commission was in part due to outside counsel's receipt of these emails nearly a year earlier and the fact that the 2011 emails "did not expressly refer to section 11.5 of Appendix P to the CAISO Tariff."[44]

23. On July 3, 2012, the Office of Enforcement filed a submission to address the statements and assertions JP Morgan made to the Commission in its June 22, 2012 Answer.[45] The Office of Enforcement stated that despite the claim that JP Morgan's outside counsel (at Sutherland, Asbill and Brennan LLP) did not forward the 2011 emails to its co-counsel (at Skadden, Arps, Slate, Meagher & Flom, LLP), their client—JP Morgan—had itself received copies of those communications prior to its filing of the March 21, 2012 Appeal and May 21, 2012 Complaint.[46]

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[39] *See* Enforcement's June 2012 Submission.

[40] *Motion to Withdraw 206 Complaint*, Docket No. EL12-70-000 (filed June 20, 2012).

[41] *Answer to Enforcement Staff's Submission Concerning Complaint*, Docket No. EL12-70-000, at 1 (filed June 22, 2012) (June 22, 2012 Answer).

[42] *Id.*

[43] *Id. at 2.*

[44] *Id.* at 1-2.

[45] Enforcement's July 2012 Submission.

[46] *Id.* The October 15, 2011 email from the Office of Enforcement is discussed *supra* in P 12.

24. In the September 20, 2012 Show Cause Order, the Commission preliminarily found that the: (1) October 18, 2011 Data Response to the CAISO DMM; (2) the March 21, 2012 Appeal of the CAISO Penalty; (3) the May 21, 2012 Complaint; and (4) the June 22, 2012 Answer may constitute violations of section 35.41(b) of the Commission's regulations.[47] Consequently, the Commission directed JP Morgan to show cause why it should not be found to have violated section 35.41(b). In addition, the Commission directed JP Morgan to show cause why its authority to sell electric energy, capacity, and ancillary services at market-based rates should not be suspended.

II. Notice and Responsive Pleadings

25. Notice of this proceeding was published in the *Federal Register*, 77 Fed. Reg. 59,184 (2012), with JP Morgan's answer, as well as interventions, comments and protests due on or before October 17, 2012. JP Morgan filed its show cause response on October 17, 2012. Timely motions to intervene were filed by Invenergy Thermal Development LLC; Duquesne Power, LLC; Trans Bay Cable LLC; Pacific Gas and Electric Company; and Southern California Edison Company. A motion to intervene and comment was filed by CAISO.

III. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

1. Violation of Section 35.41(b)

a. Show Cause Response

27. JP Morgan argues that the statements identified in the Show Cause Order do not constitute violations of section 35.41(b) for four reasons.[48] First, JP Morgan contends

[47] Show Cause Order, 140 FERC ¶ 61,227 at P 14. In the Show Cause Order, these statements were referred to as, "the October 18 Statement," "the March 21 Statements," "the May 21, 2012 Statements," and "the June 22, 2012 Statements."

[48] JP Morgan Response to Show Cause Order at 22-31.

that no violation has occurred because it observed adequate due diligence procedures.[49] In support of this assertion, JP Morgan explains that it hired "experienced, well-respected lawyers who specialized in the specific tasks at hand: handling discovery issues involving CAISO and [the Office of Enforcement]."[50] In addition to its in-house counsel, JP Morgan explains that two experienced law firms reviewed the October 18, 2011 Data Response to the CAISO DMM[51] and three law firms reviewed the March 21, 2012 Appeal before it was filed with the Commission.[52]

28. Regarding both the March 21, 2012 Appeal and the May 21, 2012 Complaint, JP Morgan confirms that it "failed to mention or address contextually the June 24 and July 28 Emails, either on a stand-alone basis or as attachments to the October 15 letter."[53] Despite these failures, JP Morgan states that it "took sufficient, if imperfect, due diligence steps to comply with section 35.41(b)."[54] Further, JP Morgan states that it repeatedly expressed its position that its production of information to CAISO was voluntary. JP Morgan suggests that the repeated "ventilating" of its position evidences its good-faith effort to prevent misstatements.[55]

29. Second, JP Morgan contends that no violation has occurred because the "communications and actions—or lack thereof—of the Commission and CAISO help explain how [JP Morgan's] misunderstanding continued unabated for over a year."[56] JP Morgan states that it was never provided with information "in which [the Office of Enforcement] expressly directed CAISO to continue its post-referral investigation."[57] JP Morgan further asserts that CAISO never informed JP Morgan that the Office of Enforcement had expressly directed CAISO to take investigative measures following the

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[49] *Id.* at 22-24 JP Morgan also states that section 35.41(b) only prohibits knowing violations. *Id.* (citing *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at PP 96, 110 (2003), *reh'g denied*, 107 FERC ¶ 61,175 (2004)).

[50] *Id.* at 23.

[51] *Id.* at 28.

[52] *Id.* at 24.

[53] *Id.* at 29-30.

[54] *Id.* at 30.

[55] *Id.* at 24.

[56] *Id.* at 25.

[57] *Id.*

DMM's referral.[58] Moreover, JP Morgan claims that prior to filing Enforcement's June 2012 Submission in response to the May 21, 2012 Complaint, the Office of Enforcement never informed JP Morgan that CAISO had been expressly directed to continue its investigation pursuant to section 11.5.[59]

30. In addition, JP Morgan describes an email sent on May 17, 2012 from the Office of Enforcement to JP Morgan's outside counsel and asserts that the Office of Enforcement staff "refused to answer" JP Morgan's inquiry as to whether the Office of Enforcement's use of the phrase "expressly directed" was intended to invoke section 11.5.[60] JP Morgan contends that on May 17, 2012, the Office of Enforcement sent JP Morgan's representatives an email that "used similar 'expressly directed' language" as is contained in the 2011 emails.[61] JP Morgan states:

> Having raised in the [March 21, 2012 Appeal], and planning to raise in the [May 21, 2012 Complaint], similar issues, and in order to understand clearly what the May 17, 2012 email meant, [JP Morgan] asked [the Office of Enforcement] directly whether the "expressly directed" language was meant to invoke [s]ection 11.5. [The Office of Enforcement] refused to answer this question, and merely responded that it was important that [JP Morgan] "cooperate." This was consistent with [the Office of Enforcement's] actions from June 2011 to June 2012.[62]

31. Third, JP Morgan argues that the October 18, 2011 Data Response to the CAISO DMM, the March 21, 2012 Appeal, the May 21, 2012 Complaint, and the June 22, 2012 Answer do not contain knowingly false or misleading information.[63] JP Morgan asserts that the October 18, 2011 Data Response to the CAISO DMM accurately reflects its view at the time that the Office of Enforcement's October 15, 2011 letter sought voluntary cooperation, rather than mandatory compliance.[64] JP Morgan further contends that the March 21, 2012 Appeal and the May 21, 2012 Complaint were the product of an

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[58] *Id.*

[59] *Id.* at 26.

[60] *Id.* at 27, n.83.

[61] *Id.* Hereinafter, this email will be referred to as "the May 17, 2012 email."

[62] *Id.*

[63] *Id.* at 27-31.

[64] *Id.* 27-28.

inadvertent oversight during a period in which the "frequency and intensity of communications and discovery in this investigation reached very high levels. . . ."[65]

32. JP Morgan rejects the Commission's preliminary finding that the June 22, 2012 Answer may be false or misleading or contain material omissions.[66] According to JP Morgan, its filing "simply expresses [JP Morgan's] regret for the errors that occurred and provides information explaining the reasons for that mistake."[67] JP Morgan further asserts that statements in its June 22, 2012 Answer "confirmed that [JP Morgan] acted with good faith and with no intent to mislead anyone."[68]

33. In support of its contention that the statements identified in the Show Cause Order did not knowingly contain false or misleading information, JP Morgan provides several affidavits by individuals closely involved in the preparation of the statements identified in the Show Cause Order. The affidavits generally state that each individual either did not recall the existence of the 2011 emails or believed that the 2011 emails set forth a request by the Office of Enforcement that JP Morgan voluntarily provide additional information to the CAISO DMM.[69]

34. Fourth, JP Morgan suggests that it could not have misled the Commission or CAISO by filing the March 21, 2012 Appeal and the May 21, 2012 Complaint , which "both omitted citation to the FERC Communications" because the information contained in the 2011 emails "was already in [the Commission's] possession."[70] JP Morgan

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[65] *Id.* at 29.

[66] *Id*. at 30.

[67] *Id*.

[68] *Id.*

[69] *See e.g.,* Krupka Aff. ¶ 3 ("I read the June 24 Email as a request from the Federal Energy Regulatory Commission's Office of Enforcement Staff asking, rather than compelling, JPMVEC to provide information to the DMM."); Phillips Aff. ¶ 2 ("I did receive the October 15, 2011 sent by email from Enforcement staff to Diane Genova . . . . However, I do not recall reviewing the attachments to that email at that time."); Raisler Aff. ¶ 4 ("Although I appear to have seen in July 2011 one or both of the June 24, 2011 and July 28, 2011 emails from OE staff to Catherine Krupka . . . at the time of the filing of the [October 18, 2011 2011 Data Response to the CAISO DMM, the March 21, 2012 Appeal of the CAISO Penalty, the May 21, 2012 Complaint, and the June 22, 2012 Answer] I did not remember, or recall the existence of, the June 24 Email and the July 28 Email. . . ."); *see generally,* Genova Declaration ¶¶ 3-5; Konieczny Aff. ¶¶ 6-8; and Nakkab Aff. ¶¶ 3-4.

[70] JP Morgan Response to Show Cause Order at 31.

contends that had it "recalled the FERC Communications and realized their import, it would have referenced them."[71]

b. Commission Determination

35. We find that the statements identified in the Show Cause Order each constitute individual violations of section 35.41(b). Section 35.41(b) of the Commission's regulations requires sellers to provide accurate and factual information and prohibits sellers from submitting false or misleading information or omitting material information in any communication with the Commission, market monitors, independent system operators, regional transmission organizations, and jurisdictional transmission providers, unless the seller can demonstrate that it has exercised due diligence to prevent such occurrences.[72]

36. The record demonstrates that the Office of Enforcement informed JP Morgan and its outside counsel on at least three separate occasions through the 2011 emails and a letter that it had expressly directed the DMM to continue its investigation of JP Morgan's bidding activities and to seek responses to CAISO's May 4 data request.[73] JP Morgan both failed to disclose its receipt of these communications and submitted statements in filings with the Commission that falsely stated that it had no knowledge that the Office of Enforcement had expressly directed the DMM to continue seeking information from JP Morgan.[74]

37. The Commission has explained that section 35.41(b) only applies if a seller submits: (i) "false or misleading information"; or (ii) if the seller "omits material information" in "any communication" to the Commission or one of the entities specified in section 35.41(b). The statements contained in each of the communications identified in the Show Cause Order failed to satisfy the standard established in the Commission's regulations. With respect to the October 18, 2011 Data Response to the CAISO DMM and the March 21, 2012 Appeal, JP Morgan falsely asserted to the DMM and the

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[71] *Id.*

[72] 18 C.F.R. § 35.41(b); *see also Cobb Customer Requesters v. Cobb Elec. Membership Corp.*, 136 FERC ¶ 61,084, at P 42 (2011). For the purpose of section 35.41(b), the Commission's regulations define the term "seller" to mean "any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the [FPA]." 18 C.F.R. § 35.36 (2012).

[73] *See* JP Morgan Response to Show Cause Order at Att. 9; Enforcement's June 2012 Submission at 7; Enforcement's July 2012 Submission at 16-22.

[74] *See* Enforcement's July 2012 Submission at 9, 13, App. A.

Commission respectively, that JP Morgan's responses to the DMM were voluntary pursuant to section 11.1 of the Tariff. Regarding the May 21, 2012 Complaint, JP Morgan falsely stated that the Office of Enforcement had not informed JP Morgan that the DMM had been authorized to continue to seek responses to the May 4 data request. As the record illustrates, JP Morgan's statements in its communications with the CAISO DMM and filings with the Commission were not only inaccurate, but omitted material information.

38. In its June 22, 2012 Answer, JP Morgan acknowledges it "failed to bring to the Commission's attention [the 2011] emails," in its submission of the March 21, 2012 Appeal and May 21, 2012 Complaint. However, despite this admission, the June 22, 2012 Answer also fails to comport with the requirements of section 35.41(b). While the June 22, 2012 Answer attempts to draw support from several affidavits of individuals at JP Morgan and JP Morgan's counsel,[75] it is not credible that JP Morgan's representatives failed to recall or appreciate the significance of the 2011 emails and the Office of Enforcement's October 15, 2011 letter, especially in its preparation of the October 18 Data Response to the CAISO DMM.

39. JP Morgan's position also lacks credibility because of the May 17, 2012 email exchange with the Office of Enforcement.[76] In the May 17, 2012 email addressed to JP Morgan with the Subject line: "Confirming [the Office of Enforcement's] express directive to CAISO Market Monitor, and request to JP Morgan to cooperate with the MMU," the Office of Enforcement wrote, in part:

> This is to advise you that the Office of Enforcement has expressly authorized and directed the CAISO Market Monitor to continue to seek from JP Morgan answers . . . to any other questions (or provision of any other relevant data) that the Market Monitor believes may be helpful in understanding the bidding behaviors mentioned. . . .
>
> We have also advised the CAISO Market Monitor that, if they believe live interviews of the responsible traders would be more informative than getting written answers to written questions, they should seek to conduct the interviews. We hereby request that, if asked, JP Morgan promptly

[75] *See* Krupka Aff. ¶¶ 3-9; Konieczny Aff. ¶¶ 6-8; Phillips Aff. ¶¶ 3-5; Raisler Aff. ¶¶ 4, 7; Genova Declaration at ¶ 4; Nakkab Aff. ¶ 3.

[76] *See supra* P 30.

> (within three business days) make the traders available for any interviews requested by the Market Monitor relating to these topics.[77]

On May 18, 2012—only three days before filing the May 21, 2012 Complaint—JP Morgan's outside counsel replied:

> Thank you for your message. We assume you sent this pursuant to Section 11.5 of Appendix P of the CAISO tariff. However, we have not seen a notice of referral from the CAISO, as has been customary in the past (see attached example) and consistent with Article 37.8 and Appendix P Article 11 of the CAISO tariff. Can you let us know where things stand?[78]

On May 18, 2012, Office of Enforcement staff replied:

> I understand that the MMU is getting in touch with you about this. Meanwhile, I want to reiterate how important it is for JP Morgan to provide full and timely cooperation to the MMU's office, including making the responsible traders available for prompt interviews.[79]

Thus, only three days before filing the May 21, 2012 Complaint, JP Morgan and its outside counsel demonstrated that they understood that the Office of Enforcement's use of phrases virtually identical to the language of section 11.5 of the CAISO Tariff confirmed that Commission staff had authorized the CAISO DMM to continue its investigation of JP Morgan's bidding activities pursuant to that provision.[80] JP Morgan's contention that the Office of Enforcement staff "refused" to clarify whether the "expressly directed" language was intended to invoke section 11.5 is meritless. JP Morgan's response to the May 17, 2012 email confirms that in the days immediately

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[77] *Id*. May 17, 2012, 7:34pm email from Office of Enforcement Staff to JP Morgan and JP Morgan's outside counsel.

[78] *Id.* May 18, 2012, 3:37pm email from JP Morgan's outside counsel to Office of Enforcement staff.

[79] *Id*. May 18, 2012, 5:40pm email from Office of Enforcement Staff to JP Morgan and JP Morgan's outside counsel.

[80] Section 11. *Protocol on Referrals of Investigations to the Office of Enforcement* provides in section 11.5 that the DMM may continue to "undertake any investigative steps regarding the referral" if expressly directed by Commission staff. Notably, section 11.1 provides that even after a referral has been made to the Commission, the "DMM may, however, continue to monitor for any repeated instances of the activity by the same or other entities, which would constitute new Market Violations. DMM shall respond to requests from FERC for any additional information in connection with the alleged Market Violation it has referred."

preceding JP Morgan's submission of the May 21, 2012 Complaint, JP Morgan's representatives in fact fully understood and appreciated the significance of the "expressly directed" language included in the 2011 emails, even in the absence of a specific reference to section 11.5 or 11.1 of the CAISO Tariff. And yet, JP Morgan filed the May 21, 2012 Complaint without mentioning the existence or knowledge of these 2011 emails from the Office of Enforcement. Therefore JP Morgan lacks any good faith basis for interpreting its cooperation as voluntary.

40. We find that the various communications provided to JP Morgan by the Office of Enforcement staff, which contained the precise tariff language at issue, informed JP Morgan that the post-referral bar provided in section 11.1 of the Tariff was no longer in effect and adequately apprised JP Morgan of CAISO's authority to continue its investigation pursuant to section 11.5 of the CAISO Tariff. As discussed above, the Office of Enforcement repeatedly confirmed for JP Morgan that the Office of Enforcement had expressly directed the CAISO DMM to continue to seek responses to the May 4 data request. The fact that the 2011 emails did not specifically cite section 11.5 or 11.1 is inconsequential.[81]

41. JP Morgan's response to the Show Cause Order that it always believed that its production of information to the DMM was voluntary lacks credibility and cannot be reconciled with a rational reading of the emails from the Office of Enforcement. The 2011 (and 2012) email communications with the Office of Enforcement *directly* relate to the argument JP Morgan puts forth in its March 21, 2012 Appeal and May 21, 2012 Complaint. In sum, viewed in light of the entire record, the explanation provided in the June 22, 2012 Answer that JP Morgan "did not recall that the 2011 [e]mails existed and did not otherwise connect them with the issues addressed in the Complaint"[82] lacks credibility. Furthermore, section 35.41(b) requires the exercise of due diligence, which may extend beyond reliance on memory.

42. Contrary to JP Morgan's assertions, its retainer of qualified attorneys does not constitute sufficient due diligence to exonerate JP Morgan's violations. At the time the Commission implemented Market Behavior Rule 3, the predecessor of section 35.41(b), the Commission was well aware of the fact that the vast majority of entities that interact with the Commission do so through or with the assistance of competent counsel. Had the Commission intended the assistance of counsel to satisfy the due diligence exception, it need not have established the exception at all because sellers would be excused from virtually all misrepresentations or material omissions.

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[81] We note, moreover, that section 11.5 contemplates communication between the Commission and the DMM but does not require the Commission to give notice to the subject.

[82] June 22, 2012 Answer at 1.

43. Further, we fail to see how JP Morgan's representatives exercised the "best-practice due diligence . . . that companies should take to address government investigations."[83] Absent in JP Morgan's response to the Show Cause Order is any explanation or description of how its counsel performed due diligence to ensure that all statements it made to the Commission in those filings were accurate. Instead, JP Morgan's response suggests that reliance on counsels' memories was "sufficient, if imperfect, due diligence."[84] We disagree with this suggestion, particularly in light of the fact that one of the misrepresentations occurred a mere three days after JP Morgan received notice from the Office of Enforcement staff of its express direction to CAISO to continue to seek data, and demonstrated in a reply to Office of Enforcement staff that it understood the import of that notice. Moreover, as we explain elsewhere in this order, JP Morgan's suggestion that it failed to recall its correspondence with the Office of Enforcement staff on this matter is not credible.

44. Further, JP Morgan's repeated "ventilating" of its position that its production of information to CAISO was voluntary does not demonstrate the exercise of due diligence because it in no way suggests that JP Morgan took steps to avoid the misrepresentations at issue. Rather, such reiteration better demonstrates JP Morgan's failure to exercise due diligence despite the various communications it received from the Office of Enforcement staff stating that staff had expressly directed CAISO to continue to seek responses to all data requests issued before June 20, 2011. Moreover, JP Morgan's characterization of its discovery responses to the DMM does not change the obligation under the Tariff for it to timely and comprehensively respond to the DMM.

45. JP Morgan's contention that none of the statements at issue contain knowingly false or misleading information, as explained by the various affidavits filed by JP Morgan in support of its position, offers no defense in this case. As discussed above, it is a violation of section 35.41(b) when a seller submits false or misleading information or omits material information in an applicable communication unless the seller demonstrates it has exercised due diligence to prevent such an occurrence. No showing of the respondent's intent or mindset is necessary in order to demonstrate that a violation of section 35.41(b) has occurred.[85] The Commission has explained that the due diligence exception was added to the Commission's rules for the purpose of ensuring that

[83] *See* JP Morgan Response to Show Cause Order at 23-24.

[84] *See id*. at 30.

[85] *See Moussa I. Kourouma*, 135 FERC ¶ 61,245, at PP 20-22 (2011) (*Kourouma*).

inadvertent submissions are not sanctioned.[86] Thus, the Commission's task is first, to determine whether a qualifying misrepresentation or material omission has been made, and second, to the extent necessary, to evaluate whether the seller has exercised due diligence. JP Morgan's intent or state of mind is irrelevant to this inquiry because neither demonstrates the veracity or accuracy of JP Morgan's assertions or that JP Morgan exercised due diligence to ensure the accuracy of its communications with the CAISO and the Commission in this case.

46. Similarly, JP Morgan's suggestion that it could not mislead the Commission or CAISO about information that was already in the Commission's possession in no way demonstrates that the statements identified in the Show Cause Order do not violate section 35.41(b). The objective accuracy of a seller's statements is the regulation's central requirement. JP Morgan's purported inability to mislead CAISO, the DMM, or the Commission neither shows that the statements at issue were accurate nor that JP Morgan exercised due diligence. Further, a straightforward reading of the text of that provision dispels JP Morgan's interpretation that the Commission's rules would allow an entity to submit inaccurate information or omit material information, either intentionally or through its failure to exercise due diligence, so long as the entity ultimately failed to mislead the recipient. The regulation does not require that the recipient actually be misled or even be capable of being misled in order for communications containing misleading statements or material omissions to be deemed violations of section 35.41(b).

47. The failure of JP Morgan and its attorneys to acknowledge the existence of the 2011 emails from the Office of Enforcement staff in its March 21, 2012 Appeal and May 21, 2012 Complaint, together with the existence of the May 17-18, 2012 email exchange demonstrating counsel's awareness that Commission staff had authorized the ongoing DMM investigation, raises particular concerns under the circumstances. We remind counsel that as representatives of those sellers that have authorization to or seek authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the FPA, they are required under Commission regulations to ensure the veracity and accuracy of the pleadings they file with the Commission, and that Commission regulations provide various ways of addressing circumstances in which those requirements have not been met.[87]

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[86] *Kourouma*, 135 FERC ¶ 61,245 at P 21 (discussing *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 110); *see also Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 110 (revising the initially proposed rule to include the due diligence exception to "assure that inadvertent submission of inaccurate or incomplete information will not be sanctioned.").

[87] *See, e.g.*, 18 C.F.R. § 385.2102(a) (2012).

2. Suspension of Market-Based Rate Authority

a. Show Cause Response

48. Assuming for the sake of argument that any of the statements identified in the Show Cause Order constitute a violation of section 35.41(b), JP Morgan argues that such a violation does not warrant suspension of its market-based rate authority.[88] JP Morgan states that suspension of a seller's market-based rate authority is a severe penalty.[89] Further, JP Morgan explains that the Commission has committed to consider the circumstances surrounding a given violation in assessing non-monetary penalties to ensure that such penalties are appropriate and in proportion to the severity of the applicable violation.[90] Additionally, JP Morgan argues that the statements at issue caused no economic harm and were not made knowingly or with the intent to deceive the DMM or the Commission.

49. JP Morgan also argues that the Commission may only punish a seller's OATT violation where the Commission identifies a nexus between the violation and the entity's market-based rate authority.[91] In this case, JP Morgan contends that no such nexus exists. Specifically, JP Morgan states that the statements identified in the Show Cause Order pertain to a discovery-related directive, rather than JP Morgan's market-based rate authority or its selling or trading activities.[92] Moreover, JP Morgan argues that the

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[88] JP Morgan Response to Show Cause Order at 31 (citing *Investigations of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 110).

[89] *Id.* at 32.

[90] *Id.* at 32 (citing *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068, at P 1 (2005)).

[91] *Id.* (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 417, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 21012 U.S. LEXIS 4820 (U.S. June 25, 2012)).

[92] *Id.* at 33.

statements were not made in the course of a Commission proceeding addressing market-based rates.[93]

50. Finally, JP Morgan contends that its representatives argued based on a good-faith belief that section 11.1 applied because the exception provided in section 11.5 had not been triggered. According to JP Morgan, the Commission has previously "explained that 'a subject's good faith exercise of its rights under the relevant statutes and our regulations, including but not limited to good faith disputes regarding discovery or settlement issues, will not be considered in determining whether the subject of an investigation has cooperated with staff and will not cause the subject of an investigation to forego possible credit for exemplary cooperation.'"[94]

b. Comment

51. CAISO states that serious sanctions are appropriate if a seller submits material misrepresentations.[95] CAISO explains that it is essential that market participants act with candor and honesty in responding to requests for information in the course of an investigation. CAISO notes that such candor is especially significant in the course of a market monitor's investigation of potential market misconduct. As a result, CAISO supports "decisive action" where a market participant has failed to comport to the Market Behavior Rules, and believes that suspension of market-based rate authority or some similar sanction could be appropriate for such a violation.[96]

52. CAISO also urges the Commission to consider operational factors that may affect the markets administered by CAISO in determining whether to suspend JP Morgan's market-based rate authority.[97] CAISO explains that the generating units controlled by JP Morgan and its subsidiaries play a significant role in enabling CAISO to reliably meet demand. CAISO asserts that any remedy imposed should not result in CAISO losing access to the energy and capacity provided by those facilities. However, CAISO observes that the significance of those units offers no basis for reducing the severity of any sanction imposed by the Commission and that, in fact, the opposite may be true.

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[93] *Id.* JP Morgan encourages the Commission to refrain from "blurring the boundary between its ratemaking and enforcement authority." *Id.* at 34.

[94] *Id.* at 31, n.95 (citing *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 22 (2008)).

[95] CAISO Comment at 4.

[96] *Id.* at 5.

[97] *Id.* at 7-8.

c. Commission Determination

53. As discussed above, we find that the statements identified in the Show Cause Order each represent violations of section 35.41(b). On numerous occasions, the Commission has explained that companies failing to adhere to the proper standards are subject to immediate revocation of their market-based rate authority.[98] Accordingly, we will suspend JP Morgan's authority to sell energy, capacity, and ancillary services at market-based rates for a period of six months, to become effective on April 1, 2013. JP Morgan will only be allowed to participate in wholesale electricity markets by either scheduling quantities of energy products without an associated price or by specifying a zero-price in their offer, as the relevant tariffs require. Furthermore, the rate received by JP Morgan will be capped at the higher of the applicable locational marginal price or its default energy bid. The Commission has previously accepted the default energy bid as a reasonable opportunity to recover costs.[99] Such a cap will also ensure that load-serving entities have access to adequate generating capacity to serve demand. However, given CAISO's stated concern that the generating units controlled by JP Morgan and its subsidiaries play a significant role in enabling CAISO to reliably meet system needs, we will delay the suspension until April 1, 2013. Such a delay will allow CAISO sufficient time to take steps necessary to maintain system reliability during the suspension period. Such a delay will also afford JP Morgan time to make alternative arrangements to fulfill any existing contractual obligations that may be affected. For instance, JP Morgan would have the option to file for cost-based rates pursuant to which it could be authorized to sell energy, capacity, and ancillary services during the suspension period.

54. JP Morgan's misrepresentations and the resulting penalty are most appropriately addressed at this time because the facts underlying the Office of Enforcement's ongoing investigation and the aforementioned violations are distinct. Consequently, we will not exercise the Commission's right to defer consideration of the matter until the Office of Enforcement has concluded its investigation.[100] The principal issue in the Office of

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[98] *See, e.g.*, *Enforcement of Statutes and Regulations and Orders*, 123 FERC ¶ 61,156 at P 49; *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, at P 32 (2006); *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at P 6, 146, 151; *Enron Power Mktg., Inc.*, 102 FERC ¶ 61,316, at P 8 (2003) (citing *Fact Finding Investigation of Potential Manipulation of Elec. and Natural Gas Prices*, 99 FERC ¶ 61,272, at 62,153-54 (2002); *accord Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 97 FERC ¶ 61,220, at 61,975-77 (2001); *GWF Energy, LLC*, 98 FERC ¶ 61,330, at 62,390 (2002)).

[99] *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274, at P 1033-1057 (2006).

[100] *See* Show Cause Order, 140 FERC ¶ 61,227 at P 15.

Enforcement's investigation is whether JP Morgan's trading behavior constitutes market manipulation in violation of section 222 of the FPA[101] and Part 1c of the Commission's regulations.[102] The communications containing misrepresentations and material omissions that are at issue in this case, however, occurred several months after the trading behavior referred by the DMM took place. Additionally, while the October 18, 2011 Data Response to the CAISO DMM and the March 21, 2012 Appeal were made in the course of the Office of Enforcement's investigation, the May 21, 2012 Complaint and the June 22, 2012 Answer were made in a separate proceeding pursuant to section 206 of the FPA.

55. Separate consideration of JP Morgan's false statements is also appropriate because the principal causes of action in the respective proceedings are distinct. The Commission has previously explained that a violation of section 222 has occurred where an entity:

> (1) uses a fraudulent device, scheme or artifice, or makes a material representation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit on any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.[103]

In comparison, a violation of section 35.41(b) requires neither a showing of a seller's intent nor a showing that the statements were made in connection with a jurisdictional transaction.[104] In addition, no party has alleged that the statements identified in the Show Cause Order constitute violations of Part 1c of the Commission's regulations.

56. Contrary to JP Morgan's assertion, our decision to address the communications at issue in the current proceeding would not "blur the boundary between [the Commission's] ratemaking and enforcement authority."[105] JP Morgan's argument in favor of deferring our determination until after the Office of Enforcement has concluded its investigation is based on the faulty premise that "[t]he dispute here relates to discovery

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[101] 16 U.S.C. § 824w (2006).

[102] 18 C.F.R. Part 1c (2012) (Part 1c).

[103] *Prohibition of Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 (2006).

[104] *Compare* 18 C.F.R. § 35.41(b), *with* 18 C.F.R. § 1c.2 (2012), *and* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

[105] JP Morgan Response to Show Cause Order at 34.

in an ongoing non-public investigation by [the Office of Enforcement]."[106] This premise ignores the legal authority pursuant to which JP Morgan filed communications with the Commission that contained significant misrepresentations and material omissions. The May 21, 2012 Complaint and the June 22, 2012 Answer were filed pursuant to section 206 of the FPA and relate to its allegation that the monetary penalty imposed by CAISO violated the Tariff and was unjust and unreasonable as a result.[107] Moreover, JP Morgan's premise ignores the fundamental role of honesty and candor in the Commission's market-based rate regime, as discussed further below. Thus, our suspension of JP Morgan's market-based rate authority in the current proceeding, separate from the Office of Enforcement's ongoing investigation, would adhere to the boundaries between the Commission's ratemaking and enforcement authorities, rather than blur them.

57. The nature of JP Morgan's violations is of critical importance in this case. The ability to charge market-based rates is a privilege, not a right, and in granting that privilege the Commission relies on the truth and veracity of the demonstrations made by companies when they apply for market-based rate authority. Furthermore, the Commission's grant of market-based rate authority is founded upon the presumption that a company's behavior will not involve fraud, deception or misrepresentation.[108] Consequently, the Commission relies on the submission of complete and accurate information from those that seek authorization to charge market-based rates. Indeed, the provision of false, misleading or inaccurate information undermines the very integrity of the Commission's decision-making process, the Commission's market-based rate regime, as well as the Commission's ability to carry out its statutory obligation to ensure just and reasonable rates. For these reasons, the Commission has continuously warned market participants of the consequences associated with failing to abide by the Commission's rules and regulations.[109]

58. In this light, the egregious nature of JP Morgan's repeated submission of false and misleading statements to CAISO, the DMM, and the Commission requires the severe penalty of suspending JP Morgan's market-based rate authority. Over a period of several months, JP Morgan continuously reasserted its fallacious position that section 11.1 barred the DMM's investigative efforts because the DMM had not been expressly directed to continue its investigation pursuant to section 11.5. The record in this case demonstrates that JP Morgan and its representatives were notified and reminded time and again that this assertion was in fact incorrect. However, JP Morgan and its representatives either

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[106] *Id*.

[107] *See* May 21, 2012 Complaint at 10.

[108] *Enron Power Mktg., Inc.*, 102 FERC ¶ 61,316 at P 8.

[109] *Cf. supra* note 98.

intentionally, recklessly, or negligently ignored the Office of Enforcement's communications and continued to mislead those tasked with ensuring that the CAISO markets functioned properly and resulted in just and reasonable rates.

59. Again, we find JP Morgan's conduct before this Commission particularly troublesome under the circumstances. In the past several months, JP Morgan has submitted three separate filings containing statements that were premised on what are undeniably falsehoods. In the March 21, 2012 Appeal and the May 21, 2012 Complaint, JP Morgan implored the Commission to overturn CAISO's monetary penalty on the basis that the Office of Enforcement had never expressly directed the CAISO DMM to continue its investigation of JP Morgan's bidding activities. These misrepresentations served as the central argument advanced by JP Morgan as it persisted in referring to the post-referral bar of section 11.1. Notably, it was not until the Office of Enforcement called the Commission's attention to the inaccuracy of JP Morgan's assertions that JP Morgan acknowledged "mistakes in the Submissions."[110]

60. JP Morgan's argument that suspension of its market-based rate authority is unwarranted because its various misrepresentations caused no economic harm fails to fully take into account the seriousness of its violations. "The decision of whether to impose [non-monetary sanctions, such as suspending market-based rate authority] is based on an evaluation of the particular circumstances of the individual case, including the scope and seriousness of the violations."[111] The harm caused by a violation, whether it is economic or physical, is merely one factor in determining the appropriate penalty to be imposed. Moreover, as we note above, the Commission's market-based rate program relies on a presumption that those authorized to charge market-based rates will not engage in fraud, deception, or misrepresentation. Thus, misrepresentations by market-based rate sellers are serious violations causing harm to the integrity of the Commission's market-based rate authorizations.

61. Other factors similarly require a severe penalty in this case. For instance, JP Morgan's withdrawal of its complaint cannot be characterized as JP Morgan's having reported its own violation because the Office of Enforcement brought JP Morgan's misrepresentations to light. Only afterward did JP Morgan withdraw its complaint,

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[110] *See* JP Morgan Response to Show Cause Order at 25.

[111] *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 49 (2008); *see also Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216, at P 97 (2010) ("We clarify that the Penalty Guidelines do allow for non-monetary sanctions. The Commission has always had the discretion to assess non-monetary sanctions, instead of or in addition to monetary penalties . . . . The Penalty Guidelines do not change this practice.").

while simultaneously filing the June 22, 2012 Answer, which contained more misrepresentations in violation of section 35.41(b).[112]

62. Similarly, JP Morgan offered no form of cooperation until after its misrepresentations had been exposed. Rather, JP Morgan repeatedly made deceptive and misleading statements to CAISO, the DMM, and the Commission over a period of several months.[113] Although a subject's good faith exercise of its rights is not to be considered as a failure to cooperate with the Commission, JP Morgan failed to act in good faith in this case.[114] At least as early as its receipt of the 2011 emails, JP Morgan could no longer in good faith argue that the DMM had not been expressly authorized by the Office of Enforcement to continue its investigation. Nevertheless, after being informed of the DMM's authority on three separate occasions, JP Morgan continually and disingenuously impeded the DMM's efforts.[115]

63. JP Morgan inappropriately relies on Order No. 697 in arguing that the Commission must establish a nexus between JP Morgan's inaccurate and incomplete statements and its market-based rate authority. In Order No. 697, the Commission stated:

> We will adopt the NOPR proposal to revoke an entity's market-based rate authority *in response to an OATT violation* only upon a finding of a nexus between the specific facts relating to the OATT violation and the entity's market-based rate authority, and reiterate our statement in the NOPR that an OATT violation may subject the seller to other remedies the Commission may deem appropriate, such as disgorgement of profits or civil penalties. As stated in the NOPR, the finding that an OATT adequately mitigates transmission market power rests on the assumption that individual

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[112] *See supra* P 21-23, 38.

[113] As discussed above, JP Morgan's assertion that it and its representatives failed to recall the 2011 emails in preparation of the statements identified in Show Cause Order lacks credibility.

[114] *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 at P 22.

[115] JP Morgan cites a September 30, 2012 article from the *L.A. Times* in support of its statement that the Commission must not act on its violations of 35.41(b) until an enforcement decision in the ongoing investigation is made to "avoid[] the possibility of prejudgment." *See* JP Morgan Response to Show Cause Order at 34, n.101. However, we note that the suggestion in the article that corporate law firms are there to represent their clients' interests by obfuscation, obstruction, delay or misdirecting the Commission from the truth in violation of Commission regulations renders our decision in this matter all the more relevant and important.

> entities comply with the OATT and there may be OATT violations in circumstances that, after applying the factors in the Enforcement Policy Statement, merit revocation or limitation of market-based rate authority. We find, however, that it is inappropriate to revoke a seller's market-based rate authority *for an OATT violation* unless there is a nexus between the specific facts relating to the OATT violation and the seller's market-based rate authority.[116]

A straightforward reading of Order No. 697 makes clear that the nexus requirement set forth in that order for revocation of market-based rate authority is limited to cases involving OATT violations. In this case, JP Morgan has been found to have violated section 35.41(b) of the Commission's regulations—not any provision of the OATT. Thus, the passage of Order No. 697 cited by JP Morgan is inapplicable under the circumstances. Nevertheless, there is a nexus between JP Morgan's misleading statements and its market-based rate authority in that, as noted above, the Commission relies on accurate and complete information from those that it authorizes to charge market-based rates.

3. JP Morgan Subsidiaries

a. Comment

64. CAISO suggests that the Commission consider expanding the scope of this proceeding to include JP Morgan's subsidiary BE CA LLC (BE CA), which CAISO states may have been involved in the conduct at issue in the Show Cause Order.[117] According to CAISO, in a separate proceeding, JP Morgan has explained that it operates in the CAISO markets through tolling agreements held by JP Morgan and BE CA.[118] Further, CAISO states that BE CA has the right to dispatch the output of certain generating facilities in the CAISO region through tolling agreements. Thus, CAISO suggests that the Commission add BE CA as a respondent to the current proceeding, "if for no other reason than to avoid the risk of having an affiliate of [JP Morgan] circumvent and frustrate any remedy the Commission may determine is appropriate."[119]

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[116] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 417 (footnotes omitted) (emphasis added).

[117] CAISO Comment at 5.

[118] *Id.* at 6 (citing J.P. Morgan Ventures Energy Corporation, Complaint, Docket No. EL12-105-000, at 1 (filed Sept. 14, 2012)).

[119] *Id.*

b. Commission Determination

65. In the Show Cause Order, the Commission directed JP Morgan to demonstrate why it should not be found to have violated section 35.41(b) of the Commission's regulations. The Show Cause Order addresses evidence suggesting that specific statements by JP Morgan may have been inaccurate. Consequently, CAISO's recommendation that the Commission add BE CA as a respondent to the Show Cause Order is beyond the scope of the current proceeding, which is confined to the October 18, 2011 Data Response to the CAISO DMM, the March 21, 2012 Appeal, the May 21, 2012 Complaint, and the June 22, 2012 Answer. Further, there is no evidence in the current record that BE CA has submitted misrepresentations that would violate section 35.41(b). Should evidence of a violation eventually come to light, the Commission will address the matter in a future proceeding.

The Commission orders:

JP Morgan's market-based rate authority is hereby suspended for a period of six months, effective as of April 1, 2013, as discussed in the body of this order.

By the Commission. Commissioner LaFleur is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

J.P. Morgan Ventures Energy Cooperation Docket No. EL12-103-000

(Issued November 14, 2012)

LaFLEUR, Commissioner, *dissenting*:

The record in this proceeding demonstrates that JP Morgan's alleged misrepresentations do not relate to its conduct in the market, but are instead litigation positions that pertain to whether it had the obligation to provide documents to CAISO after CAISO referred JP Morgan's bidding activities to the Commission.[1] Therefore, I believe the statements should be addressed as part of the ongoing investigation into JP Morgan's bidding activities, either as separate counts of obstruction, or as aggravating circumstances that factor into the determination of any civil penalty.[2]

[1] Specifically, JP Morgan asserted that the Commission's Office of Enforcement did not expressly direct the Market Monitor to continue its investigation into JP Morgan's market activities, as required by the tariff, and that its production of documents to the Market Monitor was voluntary. *See* Order at PP 3-24.

[2] The Commission has available multiple alternatives for addressing JP Morgan's statements in the context of the ongoing investigation. For example, the Penalty Guidelines provide for adding points to JP Morgan's culpability score, and thus increasing its civil penalty, for obstruction of justice. *Penalty Guidelines §* 1C2.3(e) ("If the organization willfully obstructed or impeded . . . or encouraged obstruction of justice during the investigation or resolution of the instant violation, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance . . . add **3** points."). The Commission can also refuse to give JP Morgan any credit for cooperation, which would also result in a larger civil penalty. *Id. §* 1C2.3(g). If the Commission still feels that these adjustments do not fully address JP Morgan's statements, it may depart from the Penalty Guidelines and impose a higher penalty. *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216, at P 32 (2010). Finally, the Commission may bring a separate charge against JP Morgan for making intentional or reckless misrepresentations that result in "substantial interference with the administration of justice." *Penalty Guidelines §* 2C1.1 (defining "substantial interference" in part as causing "the unnecessary expenditure of substantial governmental or Commission resources.").

The Commission's decision to proceed with the suspension represents a novel use of its authority over market-based rates, and is unsupported by its own regulations.[3] In Order No. 697, the Commission recognized that it would be "inappropriate" to revoke an entity's market-based rate authority for a tariff violation unless there is a nexus between the specific facts of the violation and the entity's market-based rate authority.[4] By proceeding with today's order, the Commission departs from this sensible principle and establishes a new and potentially dangerous precedent: an entity can lose its market-based rate authority for litigation positions it takes before the Commission or Commission Staff, even if those positions do not relate to its activity or honesty in the market.

That this new precedent can yield arbitrary results is already clear from today's order. After today, the Commission's policy appears to be that there is a nexus requirement for revoking market-based rates in response to tariff violations, but not for misrepresentations or omissions.[5] The lack of such a requirement only underscores the absence of a clear and

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[3] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 417, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 204, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc.* v. FERC, 21012 U.S. LEXIS 4820 (U.S. June 25, 2012).

[4] Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 417.

[5] Order at P 63 ("A straightforward reading of Order No. 697 makes clear that the nexus requirement set forth in that order for revocation of market-based rate authority is limited to cases involving OATT violations.") In any event, the Commission goes on to claim that there is a nexus between JP Morgan's alleged misrepresentations and its market-based rate authority. Citing *Enron Power Mktg., Inc.*, 102 FERC ¶ 61,316, at P 8 (2003) (*Enron*), the Commission explains that its "grant of market-based rate authority is founded upon the presumption that a company's behavior will not involve fraud, deception or misrepresentation" and therefore the Commission relies on sellers with market-based rates to provide accurate and complete information to the Commission. Order at P 57, 63. This explanation, however, only further demonstrates the novelty of the Commission's position in this case. In *Enron*, the Commission revoked Enron's market-based rate authority after finding that Enron had engaged in gaming and misrepresentation related to the market. *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343, at P 53 (finding that Enron engaged in gaming in the form of inappropriate trading strategies), P 55 (finding that Enron failed to inform the Commission in a timely manner of changes in its market shares that resulted from its gaining influence/control over others' facilities), P 56 (concluding that Enron "engaged in behavior that undermines the functioning of the wholesale power market" and that "this same conduct violates the express requirements in [the Commission's] orders allowing the Enron Power Marketers to make sales at market-based

principled set of rules for when and how the Commission will exercise its authority to revoke market-based rates.

The principle that the punishment must bear at least some reasonable relationship to the behavior being punished is more important than the Commission's indignation in any particular case. JP Morgan may well face the loss of its market-based rate authority as a consequence of the pending investigation. But if so, it should be because of its conduct in the market, not because of a dispute over document production.

Accordingly, I would not reach in this proceeding the question of whether the statements violate section 35.41(b) of the Commission's regulations and would instead refer them to the ongoing investigation. Therefore, I respectfully dissent.

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Cheryl A. LaFleur
Commissioner

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rates that they report changes in their status.") (2003). Thus, in *Enron*, there was a clear nexus between Enron's conduct and its market-based rate authority, and the broad statements cited by the Commission today must be understood in that context.