142 FERC ¶ 61,016
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.

California Independent System Operator Corporation — Docket No. EL13-21-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued January 4, 2013)

1. On November 19, 2012, the California Independent System Operator Corporation (CAISO) filed a petition for declaratory order requesting that the Commission find that certain agreements between AES Huntington Beach LLC (AESHB) and BE CA LLC, a subsidiary of JP Morgan Ventures Energy Corporation (collectively, JP Morgan), do not provide JP Morgan with consent rights that cover a synchronous condenser project at Huntington Beach Units 3 and 4, and that JP Morgan's consent is not required for the Reliability Must-Run (RMR) agreement (RMR Agreement) between CAISO and AESHB to become effective.[1] As explained herein, we grant the petition and find that JP Morgan does not have contractual consent authority regarding the conversion of Huntington Beach Units 3 and 4 to synchronous condensers and, thus, JP Morgan's consent is not required under certain agreements for the RMR Agreement to become effective.

I. Background

2. On an annual basis, CAISO performs and publishes a local capacity technical study to determine the minimum amount of local capacity area resources needed to address certain contingencies and ensure that CAISO can contain potentially widespread and serious system impacts, including curtailment of load, that otherwise might result

[1] CAISO filed the RMR Agreement with the Commission on November 9, 2012, in Docket No. ER13-351-000. The Commission accepts the RMR Agreement in an order to be issued concurrently with this order on January 4, 2013. *AES Huntington Beach, L.L.C. and Cal. Indep. Sys. Operator Corp.*, 142 FERC ¶ 61,017 (2013).

from the loss of generation and transmission facilities.[2] In August 2012, CAISO updated its 2013 local capacity technical analysis to account for the continued outage, through the summer of 2013, at the San Onofre Nuclear Generating Station (SONGS) Units 2 and 3, which have been out of service since January 2012. CAISO's study indicates a need for additional voltage support of the electric grid close to SONGS during summer peak periods in order to avoid wide-spread load-shedding, which would drop up to 800 MW (approximately one-sixth of peak load in San Diego) of load in densely populated areas of San Diego during contingency events.[3]

3. CAISO's analysis of the summer 2013 system conditions determined that, in the event of an N-1-1 contingency[4] during high load conditions, [5] a deficiency in reactive power in the vicinity of the SONGS units would result in potentially serious voltage support issues.[6] CAISO states that it investigated options for enhancing voltage support that could be viable alternatives to a widespread load-shedding scheme, beginning in summer 2013, if certain contingency conditions were to arise.[7] CAISO found that the only feasible solution to address these needs would be to convert two units at the Huntington Beach Generating Station into synchronous condensers and install shunt capacitors at three separate substations.[8] CAISO contends that other potential options did not prove feasible in light of the short time for implementation and the localized nature of the voltage support need.

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[2] CAISO Tariff section 41.3.1.

[3] CAISO November 9, 2012 Petition for Declaratory Order at 3, 10 (Petition).

[4] An N-1-1 contingency loss is a sequence of events consisting of the initial loss of a single generator or transmission element, followed by system adjustments, followed by another loss of a single generator or transmission element. *See New York Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,165, at P 6, n.11 (2011).

[5] Petition, Appendix A at 5.

[6] According to CAISO, the most critical N-1-1 contingency for the Los Angeles Basin and San Diego sub-areas is the loss of the Imperial Valley-Miguel 500 kV line followed by the loss of the Imperial Valley-Suncrest 500 kV line, or vice versa. During peak load conditions in the summer, this occurrence can create serious voltage stability concerns for the transmission facilities near SONGS. *See* Petition, Appendix A, at 5:15-23.

[7] Petition at 13.

[8] *Id.* at 11-13.

4. AESHB operates the Huntington Beach Generating Station, which includes four natural gas-fired generating units that are housed separately and operate independently of one another. AESHB owns Units 1 and 2 at the Huntington Beach Generation Station, the output of which is the subject of a Tolling Agreement, entered into on May 1, 1998, between various subsidiaries of AES Corporation, including AESHB, and Williams Energy Services Company. The Tolling Agreement was filed publicly with the Commission on July 15, 1999, in response to a Commission order denying a request for waiver of the Commission's requirement that power marketers file all long-term service agreements.[9] The Tolling Agreement has subsequently been assigned to BE CA, LLC, a wholly-owned subsidiary of JP Morgan.[10] The parties entered into the Supplemental Agreement on the same day as the Tolling Agreement. The Supplemental Agreement concerns generating capacity within a specified geographic area that includes the Huntington Beach Generating Station's other two units, Units 3 and 4.[11]

5. Until October 2012, AESHB operated Units 3 and 4 pursuant to a sale and leaseback agreement with Edison Mission Huntington Beach (Edison HB). Pursuant to the terms of that agreement, AESHB can no longer operate Units 3 and 4 to produce generation because it transferred the units' emissions permits to Edison HB and, subsequently, took the units out of service. In order to address the reliability need identified in the 2013 local capacity technical analysis, CAISO proposes that AESHB convert Units 3 and 4 to synchronous condensers in order to produce reactive power. This proposal will enable AESHB to operate these units without a source of combustion and thereby not require emissions permits.[12] CAISO has designated Units 3 and 4 as RMR units and entered into a non-conforming RMR Agreement with AESHB for these units to provide voltage support for the 2013 contract year.[13]

6. However, CAISO explains that AESHB appears to be unwilling to proceed with the synchronous condenser conversion project if doing so could constitute a breach of its existing agreements with JP Morgan. Therefore, the RMR Agreement includes as a condition precedent to the effectiveness of the RMR Agreement that AESHB must

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[9] *AES Huntington Beach, LLC*, 83 FERC ¶ 61,100 (1998), *reh'g denied*, 87 FERC ¶ 61,221 (1999).

[10] Petition at 21.

[11] The Supplemental Agreement is *available at* http://www.cers.water.ca.gov//pdf_files/power_contracts/williams/111902wllmsPPA.pdf.

[12] Petition at 4, 12, and Appendix A, at 9:4-7.

[13] *Id.* at 4, 13.

receive such consent, confirmation, or acknowledgement as may be required under the existing agreements from JP Morgan for the synchronous condenser project.[14] CAISO states that, to date, JP Morgan has been unwilling to provide or waive its consent, or stipulate that its consent is not required.[15]

II. Petition

7. In order to implement the RMR Agreement and fully meet its reliability requirements, CAISO requests that the Commission issue a declaratory order finding that JP Morgan's consent is not necessary for the synchronous condenser conversion project or for the RMR Agreement to become effective.[16] CAISO contends that, based on its review of the Tolling Agreement and Supplemental Agreement, JP Morgan has no enforceable consent right regarding the conversion of Units 3 and 4 to synchronous condensers. CAISO requests that the Commission act on its Petition before January 7, 2013, to permit the RMR Agreement to become effective on its own terms. CAISO states that the synchronous condenser conversion project must be completed by June 2013 so that the units will be available to meet summer demand needs. To meet this deadline, CAISO asserts that construction must commence in early 2013, but cannot begin until the consent issue is resolved. If the consent issue is not resolved in early 2013, CAISO warns that, in the event of certain transmission outage contingencies, Southern California may be exposed to cascading voltage collapses in the absence of widespread load-shedding during the summer of 2013.

8. CAISO argues that the Commission should assert its jurisdiction to interpret the Tolling Agreement and Supplemental Agreement, which set forth the terms and conditions of the commercial relationship between AESHB and JP Morgan. CAISO states that the Commission applies a three-part test to determine whether it will exercise primary jurisdiction in any matter, in which it considers: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.[17]

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[14] *Id*. at 2, 15-16; *see also* AESHB and CAISO filing in Docket No. ER13-351-000, Attachment A, RMR Agreement 2.1(a)(iii)(x).

[15] *Id.* at 15.

[16] *Id*. at 28, 32, 38.

[17] *Id.* at 17 (citing *Arkansas Louisiana Gas Co. v. Hall,* 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*)).

9. CAISO argues that, with respect to the first *Arkla* factor, this dispute involves a contract interpretation that requires Commission expertise because the determinations involve matters relating to capacity markets and voltage support, which are clearly within the realm of Commission expertise.[18] CAISO argues that the outcome of this matter will have a direct and immediate effect on the reliability of service provided on the interstate transmission grid such that, if the Tolling Agreement and Supplemental Agreement are not interpreted to allow Units 3 and 4 to operate as synchronous condensers, reliability in Southern California may be jeopardized.[19]

10. With regard to the second *Arkla* factor, CAISO argues that this matter is appropriate for Commission interpretation because the result has effects beyond the two parties to the agreements at issue. CAISO asserts that a matter like this, with significant reliability implications, requires uniformity of interpretation, which may be jeopardized by allowing the outcome to be determined by a court.

11. Finally, CAISO argues that this matter is important in relation to the Commission's regulatory responsibilities because the outcome of the case will have a direct and immediate effect on the reliability of service on the grid.[20] CAISO argues that the Commission's finding that the Tolling Agreement was to be filed at the Commission in order to "allow the Commission to evaluate the reasonableness of the charges and to provide for ongoing monitoring of the marketer's ability to exercise market power" demonstrates the need for the Commission to interpret the contract terms that affect market operations. Finally, CAISO asserts that resolution of this matter requires an evaluation of its Commission-approved tariff.[21]

12. With respect to the consent issue, CAISO asserts that neither the Tolling Agreement nor the Supplemental Agreement confer upon JP Morgan consent rights to the conversion of Units 3 and 4 to synchronous condensers. CAISO emphasizes that Units 3 and 4 are not covered under the Tolling Agreement, as its terms pertain only to Units 1 and 2. CAISO argues that the only consent provision in the Tolling Agreement specifies that AESHB will not reduce the "dependable capacity" of Units 1 and 2 except with the consent of JP Morgan.[22] The Tolling Agreement defines dependable capacity as "the

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[18] *Puget Sound Power & Light Co.*, 74 FERC ¶ 61,192 (1996).

[19] Petition at 18.

[20] *See AES Huntington Beach, L.L.C.*, 87 FERC ¶ 61,221, at 61,877 (1999).

[21] Petition at 19.

[22] *Id*. at 23.

total net MW generating capability" of each unit.[23] CAISO argues that the conversion of Units 3 and 4 into synchronous condensers will not have any effect on the dependable capacity for any unit that is covered by the Tolling Agreement.[24] Thus, CAISO contends that this provision does not create an enforceable consent right for JP Morgan for the synchronous condenser conversion project.

13. CAISO asserts that the only other provision in the Tolling Agreement that might be interpreted as restricting AESHB's ability to perform the synchronous condenser conversion project is section 13.1(1). CAISO states that this provision represents and warrants that AESHB's assets consist solely of the facilities named in the Tolling Agreement and that AESHB will only engage in activities and transactions reasonably related to the performance of its obligations under the Tolling Agreement.[25] CAISO contends that this provision, as written, does not provide JP Morgan with consent rights. Moreover, CAISO states that this provision is not applicable to Units 3 and 4, which are not facilities included in the Tolling Agreement.

14. CAISO argues that the Tolling Agreement and Supplemental Agreement should be viewed as a single instrument because the Supplemental Agreement was executed contemporaneously with the Tolling Agreement and the parties agreed that the two agreements constitute the "entirety of the agreement between the parties."[26] CAISO contends that the two agreements should be treated as a single instrument, explaining that the courts have considered that "[g]enerally, separate writings are construed as one agreement if they relate to the same subject matter and are executed simultaneously." [27]

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[23] *Id*. Appendix D, Tolling Agreement, section 1.29.

[24] *Id*. at 24.

[25] *Id*.

[26] *Id*. at 31, Appendix D, Supplemental Agreement, section 6.1.

[27] *Commander Oil Corp. v Pass & Seymour, Inc.*, 991 F.2d. 49, 53 (2d Cir. 1993) (*Commander Oil Corp*.) (citing *Carvel Corp. v. Diversified Mgnt. Grp., Inc.*, 930 F.2d 228, 233 (2d Cir. 1991) citing *Nau v. Vulcan Rail & Constr. Co.*, 36 N.E.2d 106, 110 (N.Y. 1941)*; Rudman v. Cowles Communications, Inc.*, 30 N.Y. 2d 1, 13 (N.Y. 1970). The Tolling Agreement provides that New York law shall govern the terms of the agreement, and the Supplemental Agreement incorporates that provision by reference.

15. CAISO asserts that, although section 2.1 of the Supplemental Agreement[28] restricts AESHB's right to own or operate any additional generating capacity in the specified geographic area without obtaining JP Morgan's consent or first offering to sell that capacity to JP Morgan, the definition of "capacity" in the Tolling Agreement does not include the type of ancillary services that the synchronous condensers will supply, i.e. reactive power to provide voltage support. CAISO emphasizes that this definition in the Tolling Agreement, which is incorporated by reference into the Supplemental Agreement, specifies that capacity is "the MW output level that a generating unit is capable of continuously producing."[29] Therefore, CAISO argues that section 2.1 does not apply to the synchronous condenser conversion project because the converted units will not provide any generating capacity in the form of MWs or MWhs.[30] Rather, the synchronous condensers will produce only reactive power in the form of MVARs.[31]

16. Finally, CAISO notes that JP Morgan has not listed Units 3 and 4 as assets that it or any of its subsidiaries control in any of its filings with the Commission. CAISO argues that, if the Supplemental Agreement created any form of control over Units 3 and 4, JP Morgan would be obligated to report these assets to the Commission.[32] Further, CAISO states that, if the Supplemental Agreement created a form of control over facilities of which the Commission was previously unaware, any control provisions

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[28] Section 2.1 of the Supplemental Agreement states, in pertinent part:

> subject to the provisions of Section 2.3, neither the AES Subsidiaries nor any of their respective Affiliates (including AES Corporation (AES)) will add Capacity to the Facilities or acquire, construct, own, lease, or operate, directly or indirectly, any assets with generating Capacity (a) within the service area on the load side of Edison's Del Amo, Serrano and Santiago substations except (A) with the consent of [J.P. Morgan], which may be withheld in [J.P. Morgan]'s sole and absolute discretion as such additional Capacity would have an adverse effect on the economic benefit (including cash flow and profit) to be derived by J.P. Morgan from the Facilities or on CAISO's designation of Facilities as must-run. . . .

[29] Petition at 30 (citing Appendix D, Tolling Agreement section 1.17).

[30] *Id.* at 30.

[31] MVAR is the unit of measure for reactive power, mega-volt-amperes reactive.

[32] Petition at 31-32 (citing Appendix E (JP Morgan Chase & Co. Energy Affiliates (as defined in 18 C.F.R. § 35.36(a)(9)) Market-Based Rate Authority and Generation Assets)).

would not be enforceable until approved by the Commission.[33] CAISO also argues that, in the event that the Tolling Agreement and/or Supplemental Agreement confer on JP Morgan any enforceable consent rights, the Commission should exercise its authority under *Mobile-Sierra*[34] to modify the relevant contract provisions as against the public interest. CAISO contends that such action would be justified in order to allow the RMR Agreement and synchronous condenser conversion project to move forward without further delay.[35] Otherwise, CAISO asserts that Southern California may be forced to rely on a wide-scale load-shedding scheme of unacceptable magnitude.[36]

17. Due to the urgent need for resolution of the consent issue, CAISO also requests that the Commission direct implementation of certain settlement procedures in order to determine whether a negotiated settlement can be reached without the delays associated with an order on the merits and a possible rehearing application.[37]

III. Notice, Interventions, and Responsive Pleadings

18. Notice of CAISO's filing was published in the *Federal Register*, 77 Fed. Reg. 70,160 (2012), with interventions and protests due on or before November 29, 2012.

19. On November 16, 2012, JP Morgan filed a limited emergency protest stating, among other things, that additional time is required to review and fully respond to the Petition. On November 19, 2012, CAISO filed an answer to the limited protest. On November 19, 2012, the Commission issued a notice setting November 20, 2012, as the deadline for responses to the limited protest. On November 20, 2012, JP Morgan filed a further limited protest. On November 21, 2012, the Commission extended the comment period from November 29, 2012, to December 10, 2012.[38]

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[33] *Id*. at 32.

[34] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

[35] Petition at 32.

[36] *Id*., Appendix A, at 5:9-11.

[37] Petition at 37.

[38] On December 6, 2012, CAISO filed a motion for protective order in anticipation of the possibility that JP Morgan would include privileged material in any protest it might file. CAISO withdrew its motion for protective order on December 11, 2012.

20. Timely motions for intervention were filed by Pacific Gas & Electric Company, Southern California Edison Company, California Department of Water Resources State Water Project, and San Diego Gas & Electric Company. The Public Utilities Commission of the State of California filed a notice of intervention. A timely motion for intervention and comments was filed by the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities). On December 10, 2012, JP Morgan filed a timely motion for intervention and protest. On December 17, 2012, CAISO filed an answer to JP Morgan's protest. On December 31, 2012, JP Morgan filed an answer.

A. JP Morgan Protest

21. JP Morgan argues that the Commission does not have the authority to grant the relief CAISO requests in the Petition. JP Morgan does not dispute that the Tolling Agreement is subject to the Commission's jurisdiction; however, JP Morgan explains that its position does not rely on the Tolling Agreement. Rather, JP Morgan states that its consent right is grounded in section 2.1 of the Supplemental Agreement and argues that the Commission has no jurisdiction over the Supplemental Agreement. JP Morgan argues that, for a contract to fall within the Commission's authority it must either: (1) directly provide for the provision of a Commission jurisdictional service, such as wholesale power sales or interstate transmission; or (2) have an indirect effect on the rates, terms, or conditions of a jurisdictional service. JP Morgan argues that the Supplemental Agreement does not meet either condition and adds that the Supplemental Agreement does not obligate the parties to provide Commission-jurisdictional services, make payments in connection with such services, or affect rates in any way that could make it subject to Commission jurisdiction.[39]

22. JP Morgan characterizes the Supplemental Agreement as analogous to a joint ownership agreement that addresses the construction of new generation facilities. JP Morgan argues that the Commission has previously acknowledged that contracts that concern only construction or infrastructure development are beyond the scope of the Commission's authority.[40]

23. JP Morgan protests CAISO's argument that the Commission cannot interpret the Supplemental Agreement in a way that interferes with the CAISO tariff.[41] JP Morgan

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[39] JP Morgan November 28, 2012 Protest at 14-15 (JP Morgan Protest).

[40] *Id*. at 10-16 (citing *Prior Notice and Filing Requirements Under Part II of the Fed. Power Act*, 64 FERC ¶ 61,139, at 61,993, 61,988-99, *order on clarification and reh'g*, 65 FERC ¶ 61,081 (1993)).

[41] *Id*. at 17.

contends that such an interpretation would impact many other agreements (construction agreements, supply agreements, operation and maintenance agreements, labor agreements, insurance agreements, etc.) that could be said to interfere with some tariff provisions, thereby expanding the scope of the Commission's jurisdiction. Moreover, JP Morgan asserts that CAISO fails to identify any specific tariff provisions that would be frustrated by its consent rights.[42]

24. JP Morgan also denies that it had an obligation to disclose the Supplemental Agreement in BE CA LLC's market-based rate application. JP Morgan asserts that the Supplemental Agreement does not create a form of control over facilities that would require it to be filed and approved by the Commission.[43] Rather, JP Morgan explains that the Supplemental Agreement merely defines the reciprocal rights of JP Morgan and AESHB to add new infrastructure at their sites. Moreover, JP Morgan argues that any failure to disclose its ownership interests in generation sites or consent rights has no relevance to the relief CAISO seeks in the Petition.

25. JP Morgan contends that, even if the Commission finds that it does have jurisdiction over the Supplemental Agreement, CAISO has not justified the relief it seeks. JP Morgan argues that CAISO has failed to support its reliability claims, asserting that an 800 MW load-shedding scheme, as an alternative to the synchronous condenser conversion project, would not be unprecedented. JP Morgan notes that CAISO currently relies on several load-shedding schemes, and notes that utilities around the country routinely rely on load-shedding schemes in their reliability planning. In addition, JP Morgan projects that the type of contingency cited by CAISO is extremely unlikely. Therefore, JP Morgan opines that reliance on a load-shedding scheme is appropriate under the circumstances described in the RMR Agreement and the Petition. JP Morgan also argues that transferring air emissions credits to Units 3 and 4, so that the units can operate as generators, is a feasible alternative to the synchronous condenser conversion project. JP Morgan asserts that this option would avoid the construction costs of the synchronous condensers and the potential for construction delays and cost overruns.[44]

26. Further, JP Morgan argues that any jurisdiction the Commission may have over the Supplemental Agreement would be concurrent with jurisdiction by the courts. JP Morgan contends that CAISO has failed to establish that the Commission should exercise primary jurisdiction over this matter because none of the *Arkla* factors apply to the Petition. In particular, JP Morgan asserts that the consent provision in section 2.1 of the

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[42] *Id*. at 17-19.

[43] *Id*. at 19

[44] *Id.* at 3, 12-13.

Supplemental Agreement is a garden-variety commercial provision that is more familiar to the courts and does not require Commission expertise. JP Morgan also argues that there is no need for uniformity in interpretation due to the fact-specific nature of the contract provision at issue. Finally, JP Morgan rejects CAISO's assertion that Commission interpretation is necessary because resolution of this matter will impact reliability. JP Morgan contends that this argument could be made in any contract dispute involving companies that generate or transmit power, even if the substance of those contracts has nothing to do with the Commission's regulatory responsibilities.[45]

27. JP Morgan claims that, in any event, CAISO's interpretation of section 2.1 of the Supplemental Agreement is incorrect. JP Morgan maintains that section 2.1 of the Supplemental Agreement provides it with consent rights with respect to: (1) any addition of capacity; (2) within a specified geographic area; (3) if the addition of that capacity would have an adverse effect on economic benefit it derives from the facilities it controls under the Tolling Agreement. JP Morgan argues that all three of those factors are present with regard to the RMR Agreement.[46]

28. With respect to the first factor, JP Morgan argues that interpreting the term "capacity" to include reactive power in the form of MVARs is consistent with the usage of the term throughout the Tolling Agreement and the Supplemental Agreement. JP Morgan argues that the term "capacity" as referenced in section 2.1 of the Supplemental Agreement includes all of the generation products that JP Morgan purchases from AESHB under the Tolling Agreement, including both MW and MVARs. For example, JP Morgan states that sections 5.3, 5.1, and 2.1 of the Tolling Agreement provide for the purchase of ancillary services, including VARs. Further, JP Morgan argues that CAISO's interpretation of the term "capacity" is inconsistent with its own tariff. JP Morgan asserts that CAISO's tariff provisions regarding RMR contracts pertain expressly to a "generating unit," which JP Morgan states the CAISO tariff defines as a unit capable of producing "net energy." Thus, JP Morgan argues that, under CAISO's proffered definition of "capacity," its own tariff would not permit it to enter into a RMR contract for the production of VARs from synchronous condensers.[47]

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[45] *Id*. at 26-28.

[46] *Id*. at 27.

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

29. With respect to the second factor, JP Morgan argues that all of the units at the Huntington Beach Generating Station, including Units 3 and 4, are located within the geographic region covered by the Tolling Agreement and Supplemental Agreement.[48]

30. Further, JP Morgan argues that the synchronous condenser conversion project would cause significant and long-lasting economic harm to the value of JP Morgan's interests in the Tolling Agreement, satisfying the third factor. JP Morgan emphasizes the substantial financial commitments and investment it has made under the Tolling Agreement, and highlights the importance of the consent rights in the Supplemental Agreement for protecting those investments.[49]

31. JP Morgan also argues that its consent rights in the Supplemental Agreement cannot be abrogated under the *Mobile-Sierra* doctrine. JP Morgan asserts that, on its face, the *Mobile-Sierra* doctrine does not authorize the abrogation of non-jurisdictional contracts. Moreover, JP Morgan contends that CAISO has not met its burden to show that the consent provision seriously harms the public interest because system reliability can be maintained without the synchronous condenser conversion project. Instead, JP Morgan argues that abrogating the consent provision under *Mobile-Sierra* would harm public interest by creating contractual uncertainty, which could have a chilling effect on infrastructure investment. JP Morgan adds that, even if the Commission were to abrogate the consent rights, the outcome would constitute an unconstitutional regulatory taking because it would interfere with "distinct investment-backed expectations."[50]

32. Finally, JP Morgan argues that, if the Commission does not reject CAISO's Petition, it should set the proceeding for a formal evidentiary hearing. JP Morgan contends that the Commission cannot grant the requested declaratory order without first resolving several issues of material fact, such as the question of whether a reliability need of the magnitude CAISO claims truly exists and whether there are other feasible alternatives for meeting any such need.

B. <u>CAISO Answer</u>

33. In its answer, CAISO emphasizes that the only issue before the Commission in this proceeding is whether JP Morgan has a consent right to the conversion of Units 3 and 4 to synchronous condensers and challenges JP Morgan's contention that the Commission lacks jurisdiction to resolve this issue. CAISO reiterates that the Supplemental

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[48] *Id*. at 31.

[49] *Id*.

[50] *Id*. at 34 (citing *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978)).

Agreement is not a separate, stand-alone agreement, but is properly understood as a key component of the Tolling Agreement, and is "part of the overall benefit of the bargain."[51] In particular, CAISO notes the entire agreement provision of the Supplemental Agreement, which states that the two agreements together constitute "the entirety of the agreement between the parties."[52]

34. CAISO argues that JP Morgan has misapplied the Commission's construction agreement precedent in its protest because the contract provisions at issue here affect or relate to rates, terms, and conditions in connection with the sale of wholesale power.[53] CAISO adds that JP Morgan's suggestion that the Supplemental Agreement represents a distinct "private commercial agreement" is contrary to New York contract law, which applies to the construction and interpretation of both agreements.[54]

35. CAISO also contends that JP Morgan's arguments regarding the meaning of the term "capacity" in the agreements belie its assertion that this matter is not appropriate for the Commission's consideration. Due to the technical nature of the dispute, CAISO counters that the Commission is better suited than a court to evaluate the meaning of the terms at issue. Further, CAISO contends that JP Morgan's arguments regarding jurisdiction stem from the mistaken premise that it is asking the Commission to modify or abrogate the terms of the Agreements. CAISO clarifies that modifying the contract terms would only be necessary if the Tolling Agreement and/or Supplemental Agreement were found to have a consent provision regarding the synchronous condenser conversion project, which CAISO argues does not exist.[55]

36. In addition, CAISO argues that by its terms, the Tolling Agreement resolves the question of what the parties mean by "capacity." CAISO reasons that the consent provision in the Supplemental Agreement, which applies only to additions of capacity, not voltage support, is inapplicable to the synchronous condensers that are the subject of the RMR Agreement, and that will produce MVARs, not MW of capacity. Further, CAISO notes that the Tolling Agreement includes separate definitions of "capacity" and

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[51] CAISO December 17, 2012 Answer at 8 (CAISO Answer).

[52] *Id.* at 3.

[53] *Id*. at 9-11.

[54] *Id*. at 8 (citing *Commander Oil Corp. v. Pass & Seymour, Inc.*, 991 F.2d 49, 53 (2nd Cir. 1993)); *Rudman v. Cowles Communications*, 30 N.Y.2d 1, 13 (1972); *Nau v. Vulcan Rail & Construction Co.*, 36 N.E.2d 106, 110 (1941)).

[55] *Id*. at 11-13.

"ancillary services." CAISO contends that, if the parties meant for the terms to be synonymous, there would be no need for two distinct definitions. Moreover, CAISO argues that the definition of "capacity" in its tariff is not relevant to the Petition because the only relevant definition for interpreting the Supplemental Agreement is the definition the Supplemental Agreement incorporates from the Tolling Agreement.[56]

37. CAISO claims that JP Morgan's attempt to undercut CAISO's need for the synchronous condensers is not material for purposes of making the legal determination CAISO has requested. Even so, CAISO asserts that JP Morgan's arguments are unsupported and founded on faulty premises.[57] Moreover, CAISO points out that JP Morgan fails to recognize that CAISO has the authority and the obligation to make the determination regarding solutions for its reliability needs based upon its technical studies. CAISO also reiterates that it considered other options, including load shedding, and determined that the synchronous condenser project is the only feasible option for obtaining voltage support within the necessary timeframe.[58] CAISO dismisses JP Morgan's proffered alternatives as speculative and/or erroneous.

C. JP Morgan Answer

38. On December 31, 2012, JP Morgan filed an answer asserting that CAISO's request exceeds the Commission's jurisdiction and that, because this dispute concerns a private contract, the Commission should not render a decision. More specifically, JP Morgan argues that business decisions regarding construction of infrastructure are not within the Commission's jurisdiction and contracts regarding those business decisions are similarly beyond the Commission's jurisdiction.[59] JP Morgan also asserts that the Commission lacks jurisdiction over the Supplemental Agreement, even if it is a single agreement with the Tolling Agreement, because the Commission lacks jurisdiction over arrangements that do not involve the sale of power or transmission even though the provisions

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[56] *Id*. at 14-15.

[57] *Id*. at 16-24.

[58] *Id*. at 18, 21-22 (citing Attachment A, Sparks Testimony at 5-12. *See also Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 550 (2007), 72 Fed. Reg. 16,416 (Apr. 4, 2007), 72 Fed. Reg. 31,452 (June 7, 2007); *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007)).

[59] JP Morgan December 31, 2013 Answer at 3 (JP Morgan Answer).

establishing those arrangements are contained in agreements that are otherwise Commission-jurisdictional.[60]

39. Further, JP Morgan argues that CAISO's reliability claims are inconsistent with North American Electric Reliability Corporation and Western Electric Coordinating Council rules, which JP Morgan asserts provide for load-shedding schemes in circumstances such as those at issue here. JP Morgan also argues that, even if transfer of air permits for Units 3 and 4 are not available, waiver of air permits should be available based upon reliability risks.[61]

40. Finally, JP Morgan asserts that the consent provisions of the Supplemental Agreement encompass development projects for a range of electrical products, including VARs, as part of a sale of "capacity."[62]

IV. Discussion

A. Procedural Matters

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

42. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that has assisted us in our decision-making process.

B. Commission Determination

43. In the Petition, CAISO requests that the Commission determine whether JP Morgan's consent is required for AESHB to proceed with the conversion of Units 3 and 4 to synchronous condensers in order to supply reactive power for voltage support. As explained in detail below, the Supplemental Agreement and Tolling Agreement together form a single, Commission-jurisdictional agreement, thereby bringing the Supplemental Agreement, and the consent provisions contained therein, within the scope of our jurisdiction. We also find that neither the Tolling Agreement nor the Supplemental

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[60] *Id*. at 3, 5-7 (citing *Duquesne Light Co*., 84 FERC ¶ 61,309 (1998); *Northeast Utilities Serv. Co*., 127 FERC ¶ 61,179 (2009)).

[61] *Id*. at 4, 10-11.

[62] *Id*. at 4, 11-13

Agreement provide JP Morgan consent authority regarding the conversion of Units 3 and 4 to synchronous condensers and, thus, JP Morgan's consent is not required under the Tolling Agreement and Supplemental Agreements for the RMR Agreement to become effective.

44. The Commission is charged with regulating the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, pursuant to section 201(a) of the Federal Power Act (FPA).[63] Further, section 201(b) of the FPA confers jurisdiction on the Commission over the transmission of electric energy in interstate commerce, sales of electric energy at wholesale in interstate commerce, and the facilities for such transmission or sale of electric energy.[64] The term "facilities" may include contracts, accounts, memoranda, papers, and other records, insofar as they are utilized in connection with wholesale sales.[65] The Tolling Agreement concerns the sale of capacity and energy at wholesale and, therefore, satisfies the statutory definition of a Commission-jurisdictional facility.[66]

45. We find that the Supplemental Agreement, which was executed by the same parties contemporaneously with the Tolling Agreement, is properly considered as part of the Tolling Agreement. As JP Morgan notes, the Supplemental Agreement serves no independent purpose other than to ensure that both parties get the benefit of their bargain with respect to the substantial investment they made in the Tolling Agreement.[67] Further, the Supplemental Agreement states that the Supplemental Agreement, "together with the Tolling Agreement, constitutes the entire agreement between the [p]arties hereto with

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[63] 16 U.S.C. § 824(a) (2006).

[64] *Id*. § 824(b).

[65] *See Hartford Elec. Light Co*., 131 F.2d 953, 961 (2d Cir. 1942); *Golden Spread Elec. Coop*., 39 FERC ¶ 61,322, at 62,022 (1987), *reh'g denied*, 40 FERC ¶ 61,348 (1987).

[66] We note that the Commission previously required the filing of all such long-term service agreements and continues to require entities with the authority to trade energy at market-based rates to report data for transactions under such contracts. *See Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003).

[67] JP Morgan Protest at 7-8.

respect to the matters contained herein and therein."[68] This provision indicates the intent of the parties to consider the two agreements as an integrated whole. This intent is further exemplified by the fact that the Supplemental Agreement incorporates by reference numerous provisions of the Tolling Agreement, including its definitions and remedy provisions,[69] such that the Supplemental Agreement cannot be interpreted or enforced without reference to the Tolling Agreement.

46. The Commission has previously determined that it can read two contracts as a single Commission-jurisdictional agreement when both contracts pertain to the same transaction. Parties cannot avoid Commission jurisdiction by splitting a unified agreement into more than one agreement.[70] Moreover, the courts have established that multiple agreements, executed either contemporaneously or at different times, pertaining to the same transaction, will be read together, even if they do not expressly refer to each other.[71] Consistent with these principles, we find that here, the Supplemental Agreement between JP Morgan and AESHB, along with the Tolling Agreement, is jurisdictional, and any attempt to split the related contracts does not remove them from the Commission's jurisdiction. Therefore, we find that JP Morgan's argument that the Supplemental Agreement is outside the Commission's jurisdiction because it is separate from the Tolling Agreement and concerns construction or infrastructure development is incorrect.[72] Having determined above that these agreements are within the Commission's

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[68] Petition, Appendix D, Supplemental Agreement, section 6.1.

[69] *Id.*, Preamble and section 6.2.

[70] *See Natural Gas Pipeline Co. of America*, 85 FERC ¶ 61,322, at 62,262 (1998) (stating that a party "cannot avoid the Commission's filing requirements by splitting a unified agreement also involving non-jurisdictional services into two or more separate contract documents"); *WSPP, Inc*., 139 FERC ¶ 61,061, at P 24 (2012) (*WSPP*) (explaining that parties cannot avoid Commission jurisdiction by separating a bundled energy and renewable energy certificate transaction "in connection with" or that "affected" jurisdictional rates or charges, so that the sale of energy and the sale of the renewable energy certificate are executed under separate agreements).

[71] *See Kurz v. United States*, 156 F. Supp. 99, 104 (S.D.N.Y. 1957); *Peterson v. Miller Rubber Co. of New York*, 24 F.2d 59, 62 (8th Cir. 1928); *Hampton Roads Shipping Assoc. v. Int'l Longshoreman's Assoc.*, 597 F. Supp. 709, 716 (E.D. Va. 1984).

[72] We also find that *Duquesne Light Co*., on which JP Morgan relies, involved different circumstances, as the contested sale of generating units at issue was not subject to the Commission's jurisdiction. Moreover, there was an ongoing court proceeding over

(continued…)

jurisdiction, we also find that it is appropriate to exercise our discretion and interpret the contract provisions at issue.[73]

47. The Supplemental Agreement includes a provision that grants each party the right of consent over the other party before either may add new generation infrastructure within a specified geographic area that includes the location of Units 3 and 4.[74] The central question presented in this case is whether that provision can be construed to require JP Morgan's consent to the conversion of Units 3 and 4 to synchronous condensers. This question requires an analysis of the term "capacity" as it is contained in section 2.1 of the Supplemental Agreement. This provision states that, without the consent of JP Morgan, "neither AES Subsidiaries nor any of their respective affiliates will add Capacity to the Facilities or acquire, construct, own, lease, or operate, directly or indirectly, any assets with generating Capacity . . . ." As discussed above, the Supplemental Agreement expressly incorporates by reference the definitions in the Tolling Agreement.[75] "Capacity," as defined in the Tolling Agreement, is tied directly to the MW output of a *generating* unit, and does not mention any services that are measured in MVARs, the measure of output produced by synchronous condensers.[76] Moreover, the

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that contested sale of generating units, and the Commission found that the petitioner failed to meet any of the *Arkla* factors. Therefore, it is not controlling here.

[73] The parties ask us to analyze this case in terms of the familiar *Arkla* test, which the Commission uses as a guideline to determine whether to exercise its discretion to assert primary jurisdiction. *See Arkla*, 7 FERC ¶ 61,175 at 61,322 (identifying three factors for Commission consideration: whether the Commission possesses some special expertise making a Commission decision appropriate; whether there is a need for uniformity of interpretation; and whether the case is important in relation to Commission regulatory responsibilities). As a preliminary matter, we note that we are aware of no pending litigation in another forum where this consent issue is at issue, let alone more appropriately resolved. Nevertheless, we believe that this is a case where the Commission should exercise primary jurisdiction because the resolution of the consent issue raises significant reliability implications, involves matters and terminology squarely within the Commission's expertise, and the circumstances require an urgent decision.

[74] *See* Supplemental Agreement, sections 2.1, 2.2, 2.3, and 2.4.

[75] The Preamble of the Supplemental Agreement states that, "all capitalized terms used in this Agreement that are not defined herein have the meanings given in the Tolling Agreement." Petition, Appendix D.

[76] The Tolling Agreement states that, "c*apacity* means the MW output level that a generating unit is capable of continuously producing." *Id.* Tolling Agreement, section 1.17.

Tolling Agreement separately defines ancillary services to include services such as those that the synchronous condensers will provide.[77] Therefore, we reject JP Morgan's contention that the defined term "capacity" of a generating unit is intended to include ancillary services such as voltage support. If the parties intended for the terms "capacity" and "ancillary services" to be used interchangeably, there would have been no reason for the Tolling Agreement to define the two terms separately. Alternatively, if the parties intended for the consent rights to include ancillary services, the Supplemental Agreement could have specified such inclusion.

48. As JP Morgan notes, sections 5.1 and 5.2 of the Tolling Agreement provide the terms for fixed payments and variable payments, which include payments for ancillary services; however, we find these provisions provide no basis for JP Morgan's purported consent rights. Regardless, these provisions do not supersede the fact that the term "ancillary services" is defined in the Tolling Agreement as a product separate from "capacity"; the fact that a single payment may provide remuneration for multiple services does not render the terms "capacity" and "ancillary services" synonymous.

49. In addition, we find that JP Morgan's reference to the definition of "capacity" in CAISO's tariff is misplaced, as the manner in which CAISO interprets and applies its tariff is not determinative of what the parties to the Tolling Agreement and Supplemental Agreement intended "capacity" to mean in those agreements. Here, we agree with CAISO that the synchronous condensers do not constitute "capacity" of a generating unit, as defined by the Tolling Agreement, because these facilities will provide voltage support measured in MVARs. Accordingly, we find that section 2.1 of the Supplemental Agreement provides JP Morgan with consent rights limited to the addition of capacity of a generating unit, not voltage support. Thus, we find that JP Morgan contractual consent authority does not cover the synchronous condenser conversion project. Consequently, JP Morgan's consent is not required under the Tolling Agreement or the Supplemental Agreement for the RMR Agreement to become effective.

50. Because we are able to resolve the consent issue on the basis of interpreting the Supplemental Agreement, we do not need to address whether the Commission should consider modification of the Agreements. Hence, we need not address CAISO's *Mobile-Sierra* arguments. For similar reasons, we need not address CAISO's request for expedited settlement procedures.

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[77] The Tolling Agreement states that, "*Ancillary Services* shall include automatic generating control, spinning reserve, non-spinning reserve, replacement service, black start, voltage support and black starts and any and all similar or related services capable of being provided by Facilities, to the extent commonly sold or saleable (or used or usable) in the electric power generation or transmission industry from time to time." *Id.* section 1.5.

51. Finally, we find that JP Morgan's assertions regarding CAISO's reliability studies and its plan to resolve the identified reliability issues are beyond the scope of this proceeding. CAISO's tariff gives it the right, at any time, based on technical analyses and studies, to designate any generating unit as an RMR unit.[78] Moreover, CAISO is obligated to study its system and identify corrective plans in such a manner that ensures compliance with North American Electric Reliability Corporation reliability standards, and we find that CAISO has demonstrated that the synchronous condenser conversion project is a feasible technical solution to address the identified reliability issues and avoid load shedding in San Diego.[79]

The Commission orders:

CAISO's petition for declaratory order, requesting a finding that the Tolling Agreement and the Supplemental Agreement do not give JP Morgan consent authority over the conversion of Huntington Beach Units 3 and 4 to synchronous condensers and, thus, that JP Morgan's consent is not required under the Tolling Agreement or the Supplemental Agreement for the RMR Agreement to become effective, is hereby granted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[78] *See* CAISO Tariff section 41.2

[79] *See* CAISO Answer Attachment A, Sparks Testimony at 5-10.