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ex rel. Bill Lockyer, Attorney General of the State of California
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14 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 FOR THE COUNTY OF SAN FRANCISCO
16

17 PEOPLE OF THE STATE OF CALIFORNIA *ex rel.*
18 BILL LOCKYER, ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,

19 Plaintiffs,

20 v.

21 DYNEGY, INC.; DYNEGY POWER MARKETING,
22 INC.; NRG ENERGY, INC.; XCEL ENERGY, INC.;
23 WEST COAST POWER, L.L.C.; CABRILLO
POWER I, L.L.C.; CABRILLO POWER II, L.L.C.;
24 EL SEGUNDO POWER, L.L.C.; LONG BEACH
GENERATION, L.L.C.; and DOES 1-100,

25 Defendants.
26

Case No.: CGC 02-4054-33

**COMPLAINT FOR
RESTITUTION, CIVIL
PENALTIES, INJUNCTION,
AND OTHER EQUITABLE AND
ANCILLARY RELIEF**

(California Business & Professions
Code § 17200)

27 The People of the State of California *ex rel.* Bill Lockyer, Attorney General of the State
28 of California, allege the following on information and belief:

1.

INTRODUCTION

1
2 1. This action seeks to remedy numerous acts of unfair competition dating back to June
3 of 1998 by the defendants, who are major participants in wholesale electricity markets
4 administered by the California Independent System Operator Corporation (the “ISO”).
5 Defendants have conspired to engage in, and have engaged in, a scheme to violate the rules of the
6 ISO market and to tortiously convert property to which the ISO has an exclusive possessory right,
7 all to the detriment of the reliability of the California electricity market and California’s residents
8 and ratepayers. In particular, defendants have repeatedly sold electricity generating capacity to
9 the ISO for use as a reserve and in the event of a system emergency, and subsequently, and
10 unlawfully, sold the *same* capacity into the lucrative “spot” market for wholesale power. As a
11 result, defendants have unlawfully collected millions of dollars. The loss and misuse of these
12 critically important reserves has posed, and continues to pose, a serious threat to the safety and
13 reliability of the transmission grid. Plaintiff seeks an injunction requiring defendants to cease
14 and desist from committing further acts of unfair competition. Plaintiff also seeks an Order
15 imposing restitution, disgorgement, and civil penalties.

PARTIES

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17 2. Plaintiff Bill Lockyer is the Attorney General of the State of California and is the
18 chief law officer of the State (Cal. Const., art. 5, § 13). He is authorized by California Business
19 and Professions Code § 17204 to prosecute any unlawful, unfair or fraudulent business act or
20 practice which is prohibited by California Business and Professions Code § 17200 in a court of
21 competent jurisdiction. For any such violation, he is also authorized to seek injunctive relief,
22 civil penalties not to exceed two thousand five hundred dollars (\$2,500) for each violation, and
23 any orders or judgments, including the appointment of receivers, as may be necessary to prevent
24 the use or employment by any person of any unlawful, unfair, or fraudulent business act or
25 practices.

26 3. Defendant Cabrillo Power I, L.L.C. (“CABRILLO I”) is a limited liability
27 company formed under the laws of the State of Delaware. On or about February 1999,
28 CABRILLO I acquired from San Diego Gas & Electric Company an electricity generation

1 facility located in Encina, California. The Encina facility consists of six separate generating units
2 with a combined capacity of approximately 976 megawatts (“MW”); CABRILLO I owns five of
3 the six units and has leased the sixth unit. Defendant West Coast Power, L.L.C. owns
4 CABRILLO I.

5 4. CABRILLO I, on behalf of all six Encina generating units, entered into a
6 Participating Generator Agreement with the ISO on or about February 3, 1999. This
7 Participating Generator Agreement, as amended, governs the rights and responsibilities of
8 CABRILLO I with respect to the conduct alleged in this Complaint.

9 5. Defendant Cabrillo Power II, L.L.C. (“CABRILLO II”) is a limited liability
10 company formed under the laws of the State of Delaware. On or about February 1999,
11 CABRILLO II acquired from San Diego Gas & Electric Company ten separate electricity
12 generating units located at seven sites throughout the San Diego area. CABRILLO II’s
13 generating units have a combined capacity of approximately 297 MW. Defendant West Coast
14 Power, L.L.C. owns CABRILLO II.

15 6. CABRILLO II entered into a Participating Generator Agreement with the ISO
16 on or about February 3, 1999. This Participating Generator Agreement, as amended, governs the
17 rights and responsibilities of CABRILLO II with respect to the conduct alleged in this Complaint.

18 7. Defendant El Segundo Power, L.L.C. (“EL SEGUNDO”) is a limited liability
19 company formed under the laws of the State of Delaware. On or about December 1997, EL
20 SEGUNDO acquired from Southern California Edison Company ten separate electricity
21 generating units located throughout the San Diego area. EL SEGUNDO’s generating units have
22 a combined capacity of approximately 1020 MW. Defendant West Coast Power, L.L.C. owns
23 EL SEGUNDO.

24 8. EL SEGUNDO entered into a Participating Generator Agreement with the ISO
25 on or about December 5, 1997. This Participating Generator Agreement, as amended, governs
26 the rights and responsibilities of EL SEGUNDO with respect to the conduct alleged in this
27 Complaint.

28 9. Defendant Long Beach Generation, L.L.C. (“LONG BEACH”) is a limited

1 liability company formed under the laws of the State of Delaware. On or about December 1997,
2 LONG BEACH acquired from Southern California Edison Company eleven separate electricity
3 generation units in Long Beach, California. LONG BEACH's generating units have a combined
4 capacity of approximately 560 MW. Defendant West Coast Power, L.L.C. owns LONG
5 BEACH.

6 10. LONG BEACH entered into a Participating Generator Agreement with the ISO
7 on or about March 31, 1998. This Participating Generator Agreement, as amended, governs the
8 rights and responsibilities of LONG BEACH with respect to the conduct alleged in this
9 Complaint.

10 11. Defendant Dynegy Power Marketing, Inc., (together with its predecessor and
11 successor entities, "DYNEGY POWER MARKETING") formerly Electric Clearinghouse, Inc.,
12 is a corporation formed under the laws of the State of Texas. DYNEGY POWER MARKETING
13 is a company which markets and distributes energy-related products in California. DYNEGY
14 POWER MARKETING entered into a Scheduling Coordinator Agreement with the ISO on or
15 about May 29, 1998. This Scheduling Coordinator Agreement, as amended, governs DYNEGY
16 POWER MARKETING's rights and responsibilities with respect to the conduct alleged in this
17 Complaint. At all relevant times alleged in this Complaint, DYNEGY POWER MARKETING
18 acted in the capacity of ISO-certified scheduling coordinator for itself and for defendants
19 CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH.

20 12. Defendant West Coast Power, L.L.C. (together with its predecessor and successor
21 entities, "WEST COAST POWER") is a limited liability company formed under the laws of the
22 State of Delaware and is a joint venture between defendants Dynegy, Inc. and NRG Energy, Inc.
23 WEST COAST POWER owns and operates electricity generation facilities in California,
24 including CABRILLO I, CABRILLO II, EL SEGUNDO and LONG BEACH.

25 13. Defendant NRG Energy, Inc. (together with its predecessor and successor entities,
26 "NRG") is a corporation formed under the laws of the State of Delaware. NRG is a global
27 energy company engaged in the acquisition and development of power generation facilities and
28 the sale of energy in California. NRG, through WEST COAST POWER, has a fifty percent

1 ownership interest in each of CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG
2 BEACH.

3 14. Defendant Dynegy, Inc. (together with its predecessor and successor entities,
4 “DYNEGY, INC.”), formerly NGC Corporation, is a corporation formed under the laws of the
5 State of Illinois. DYNEGY, INC. is engaged in the gathering, processing and transportation of
6 energy products and services in California and worldwide. DYNEGY, INC. owns DYNEGY
7 POWER MARKETING and has a fifty percent ownership interest in WEST COAST POWER.

8 15. Defendant Xcel Energy, Inc. (together with its predecessor and successor entities,
9 “XCEL ENERGY”), formerly Northern States Power Company, is a corporation formed under
10 the laws of the State of Minnesota. XCEL ENERGY is an electricity and natural gas energy
11 company which operates in twelve Western states including California. XCEL ENERGY owns
12 approximately seventy-five percent of defendant NRG; the remaining twenty-five percent share
13 is held by the public.

14 16. The true names and capacities of defendants used in this Complaint under the
15 fictitious names of Does 1 through 100, inclusive, are unknown to the plaintiff, who sues such
16 defendants by such fictitious names. Each of the fictitiously named defendants is responsible in
17 some manner for acts, occurrences, or omissions which caused the violations of law alleged.

18 17. Unless otherwise alleged, whenever reference is made in this Complaint to any act
19 of the defendants, such allegation shall mean that each defendant acted individually and jointly
20 with the other defendants named in the Complaint.

21 18. Unless otherwise alleged, whenever reference is made in this Complaint to any act
22 of any corporate or other business defendant, such allegation shall mean that such corporation or
23 other business defendant did the acts alleged in this Complaint through its officers, directors,
24 employees, agents, and/or representatives while they were acting within the actual or ostensible
25 scope of their authority.

26 19. At all relevant times alleged in this Complaint, each of the defendants has acted as
27 an agent, representative, or employee of each of the other defendants and has acted within the
28 course and scope of said agency or representation.

1 20. At all relevant times alleged in this Complaint, each of the defendants has
2 conspired, aided and abetted, or acted in concert with each other, in causing defendants
3 DYNEGY POWER MARKETING, CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG
4 BEACH to commit acts of unfair competition, including engaging in a common plan, scheme, or
5 design to violate the rules of the ISO market and the terms of applicable laws and agreements,
6 and to tortiously convert property to which the ISO had an exclusive right of possession.
7 Through their acts alleged herein, each of the defendants acted with knowledge of said
8 conspiracy, common plan, scheme, or design, and with the intent of carrying out such conspiracy,
9 common plan, scheme, or design, all to the detriment of the reliability of the California electricity
10 market, the ISO, the major investor-owned utilities, the municipal utility districts, and
11 California's residents and ratepayers.

12 **JURISDICTION**

13 21. This Court has jurisdiction to hear the claims alleged in this Complaint and is a
14 court of competent jurisdiction to grant the relief requested.

15 22. This Court has jurisdiction over the defendants named above because they do
16 sufficient business in California, or otherwise have sufficient minimum contacts with California,
17 to render the exercise of jurisdiction over them by the California courts consistent with
18 traditional notions of fair play and substantial justice.

19 **VENUE**

20 23. Venue is proper in this Court because the cause of action alleged in this
21 Complaint, and the liability arising therefrom, arose in part in the City and County of San
22 Francisco, and because many of the violations of law alleged herein occurred in the City and
23 County of San Francisco.

24 **FACTUAL ALLEGATIONS**

25 **Deregulation of California's Electricity Generation Market**

26 24. Prior to 1996, California's major investor-owned utilities owned and controlled
27 facilities used for the generation, transmission, and distribution of electricity to retail customers.
28 The utilities' operations were regulated by the California Public Utilities Commission ("CPUC"),

1 which set retail rates for each of these services pursuant to its authority under the California
2 Constitution and the California Public Utilities Code.

3 25. In September 1996, the California Legislature enacted Assembly Bill 1890 (“AB
4 1890”) in order to restructure the electric industry and bring competition to California’s
5 electricity generation market by, among other things, requiring utilities to separate their
6 electricity generation operations from their electric power transmission and distribution
7 operations. After the adoption of AB 1890, the utilities sought and received approval from the
8 CPUC to divest themselves of a number of their electricity generating plants. Defendants
9 CABRILLO I and CABRILLO II purchased the generating facilities they now own and operate
10 from San Diego Gas & Electric Company. Defendants EL SEGUNDO and LONG BEACH
11 purchased the generating facilities they now own and operate from Southern California Edison
12 Company.

13 26. In addition to facilitating the divestiture of utility-owned generating facilities,
14 AB 1890 established two new entities to administer the deregulated energy market: the
15 California Power Exchange (“PX”) and the ISO. Each is a non-profit, public benefit corporation
16 established under California state law.

17 27. The PX was established to operate a market for the purchase and sale of
18 electricity for delivery during the same or the next day.

19 **The ISO Market**

20 28. The ISO is responsible for ensuring the safe, reliable, and efficient operation of
21 the high voltage transmission grid. As stated in the ISO’s by-laws, its “principal objective is to
22 ensure the reliability of the California Grid, while fostering a competitive marketplace for
23 electrical generation and related Services in California.” The ISO attempts to achieve this
24 objective by (1) managing the flow of electricity across the grid and (2) balancing demand and
25 supply in real time.

26 29. The ISO’s operations are governed by a Tariff and Protocols (the “ISO Tariff”) on
27 file with and approved by the Federal Energy Regulatory Commission (“FERC”).

28 30. In order to maintain system reliability, the ISO procures both “imbalance energy”

1 (energy needed to balance the grid) and Ancillary Services (also known as “operating reserves”
2 or “reserve capacity”) through various market auction processes. The ISO uses the imbalance
3 energy and Ancillary Services bought and sold in these markets to keep generation (*i.e.*, supply)
4 and load (*i.e.*, demand) in balance on the system at all times. Generally, the costs of these
5 services are allocated among all load-serving entities (*i.e.*, entities that use the transmission
6 network to serve retail customers) based on their usage. California’s major investor-owned
7 utilities (Pacific Gas & Electric Company, Southern California Edison Company, and San Diego
8 Gas & Electric Company) and municipal utilities, which together provide service to millions of
9 retail customers, have historically absorbed the vast majority of these costs.

10 31. In order to provide Ancillary Services or imbalance energy to the ISO, an entity
11 that owns or controls electricity generating facilities must enter into a standard agreement with the
12 ISO known as a Participating Generator Agreement (“PGA”). The PGA is a contract which,
13 among other things, expressly requires the generator to comply with the terms of the ISO Tariff.
14 At all relevant times alleged in this Complaint, defendants CABRILLO I, CABRILLO II, EL
15 SEGUNDO, and LONG BEACH were parties to separate PGAs, as amended from time to time,
16 with the ISO.

17 32. A Scheduling Coordinator (“SC”) is an entity authorized by the ISO to submit
18 energy “schedules” to the ISO on behalf of electricity suppliers and purchasers. These schedules
19 specify the amount of energy the SC expects its customers to use over the course of the next day,
20 together with the amount of electricity generation the SC anticipates having available to meet the
21 projected demand. SCs submit revised schedules one hour before each operating hour in order to
22 account for changes in weather, plant outages, and a number of other factors. The ISO analyzes
23 the energy schedules submitted by SCs to forecast the total amount of generation and load on the
24 system at any given time, and to determine how much energy and Ancillary Services it will need
25 to procure to keep the system in balance.

26 33. In addition to being responsible for submitting balanced schedules to the ISO, SCs
27 are the only entities authorized to submit bids to sell imbalance energy and Ancillary Services into
28 markets administered by the ISO. A generator or power marketer wishing to participate in these

1 auctions must bid through its SC. A generator or power marketer may serve as its own SC or use
2 a third party to act as its SC.

3 34. All SCs are required to enter into a standard agreement with the ISO called a
4 Scheduling Coordinator Agreement (“SCA”). The SCA is a contract which, among other things,
5 expressly requires the SC to comply with the terms of the ISO Tariff. All SCs also must certify
6 that the generators they represent have entered into PGAs with the ISO.

7 35. At all relevant times alleged in this Complaint, DYNEGY POWER MARKETING
8 was a party to an SCA, as amended from time to time, with ISO. In its role as SC, defendant
9 DYNEGY POWER MARKETING has exercised, and continues to exercise, operational control
10 over the electricity generating units owned by defendants CABRILLO I, CABRILLO II, EL
11 SEGUNDO, and LONG BEACH. In addition, DYNEGY POWER MARKETING has served,
12 and continues to serve, as the ISO’s primary point of contact for resolving any operational issues
13 that arise in connection with the generating units owned by defendants CABRILLO I, CABRILLO
14 II, EL SEGUNDO, and LONG BEACH.

15 **The Imbalance Energy Market**

16 36. Although SCs are required to submit preliminary and revised “balanced schedules”
17 to the ISO, actual load often deviates from the amount of scheduled generation for a number of
18 reasons, including increased demand due to weather. In order to keep supply and demand
19 constantly in balance, the ISO procures “imbalance energy” from several different sources.

20 37. The ISO’s primary source of imbalance energy is the imbalance energy market,
21 also known as the “real-time” market. No later than forty five minutes prior to the operating hour,
22 generators and power marketers that wish to sell power into the imbalance energy market submit
23 supply bids through their SCs specifying, among other things, the amount of energy they are
24 willing to provide, and the price at which they are willing to provide it. The ISO then ranks all of
25 the supply bids in order of price from lowest to highest, forming what is commonly referred to as
26 the Balancing Energy and Ex-Post Pricing (“BEEP”) stack. The ISO then selects from the BEEP
27 stack all the bids it needs to balance the system. Generally, the last bid needed to balance the
28 system sets the price paid to all successful bidders. The price established in this manner is the

1 “market clearing price” for imbalance energy (also known as the “Ex Post Price”). After selecting
2 the generating units needed to balance the system, the ISO issues dispatch instructions to each of
3 these units directing them to produce the energy.

4 38. An “uninstructed deviation” occurs when a generating unit produces less (a
5 “negative uninstructed deviation”) or more (a “positive uninstructed deviation”) energy in real
6 time than it was scheduled to produce. The ISO has no way of knowing in advance the extent to
7 which a given unit will deviate from schedule, but must take uninstructed deviations into account
8 when balancing the system. Uninstructed deviations are determined after the fact by comparing
9 the unit’s metered output to the unit’s scheduled operating level. Prior to September 2000,
10 generators were paid the Ex Post Price for energy supplied as a result of a positive uninstructed
11 deviation.

12 39. Uninstructed deviations out of Ancillary Services capacity are prohibited by the
13 ISO Tariff.

14 **The Ancillary Services Markets**

15 40. In order to maintain system reliability, the ISO is authorized to procure Ancillary
16 Services on behalf of all load-serving entities. Ancillary Services represent generating capacity
17 that can be converted to energy and delivered to the grid in response to uncertain events, such as
18 major plant outages, in order to maintain the safe and reliable operation of the transmission
19 system.

20 41. The ISO procures four different types of Ancillary Services through market
21 auctions run one day and one hour, respectively, ahead of each operating hour: (1) “regulation,”
22 or “automatic generation control,” (2) “spinning reserves,” (3) “non-spinning reserves,” and (4)
23 “replacement reserves.” The first, regulation, is used primarily to maintain proper electrical
24 frequency on the grid. The four services are distinguished by the amount of time needed to
25 convert the reserve capacity to actual energy and deliver it to the grid when it is called on by the
26 ISO. The fastest-responding service is regulation. Spinning reserves are the next-fastest
27 responding service, followed by non-spinning reserves and then replacement reserves.

28 42. The amount of each type of Ancillary Service that the ISO must procure in order to

1 maintain an adequate reserve margin is dictated by standards set by the Western Systems
2 Coordinating Council (“WSCC”), a branch of the North American Electric Reliability Council.
3 Generally, the ISO must maintain a reserve margin equal to approximately seven percent of
4 forecasted demand. When the reserve margin falls below a specified threshold, the ISO has
5 authority under the ISO Tariff to declare a system emergency, and to issue any operating orders
6 needed to preserve system reliability, including ordering the utilities to institute rolling blackouts.

7 43. Generators wishing to provide Ancillary Services to the ISO submit bids through
8 their SCs specifying, among other things, the type and amount of capacity they are willing to
9 provide, and the price at which they are willing to provide it. The ISO then selects all the bids it
10 needs to meet its reserve requirements in a given operating hour. As in the imbalance energy
11 market, the last bid needed to meet the reserve requirement determines the price paid to all
12 successful bidders for any given Ancillary Service in any given operating hour. Under the ISO
13 Tariff, Ancillary Service bids are unit-specific: once a generator or SC has been awarded an
14 Ancillary Services bid, it may not provide the service from any unit other than the one that
15 submitted the bid. Under the ISO Tariff, the ISO must procure Ancillary Services at the lowest
16 possible cost consistent with maintaining system reliability.

17 44. A generator providing Ancillary Services capacity to ISO must, as a matter of law,
18 keep its capacity “unloaded” (*i.e.*, held in reserve) unless and until the ISO issues a dispatch
19 instruction directing it to produce energy from that reserve capacity. Moreover, a generator
20 providing Ancillary Service capacity must, as a matter of law, follow ISO dispatch instructions
21 when directed to produce energy out of that reserve capacity. When a generator submits a bid to
22 provide Ancillary Services, it expressly warrants to the ISO that it is capable of providing the
23 service and that it will comply with ISO dispatch instructions if the bid is accepted.

24 45. A generator providing Ancillary Services is entitled to payment for holding its
25 capacity in reserve, regardless of whether or not the ISO calls on the generator to produce energy
26 out of that capacity. In the event that the ISO issues a dispatch instruction to the generator to
27 supply the energy and the generator complies, the generator is entitled to payment for both the
28 reserve capacity and the resulting energy it provides.

1 46. The ISO has an exclusive possessory interest in all generating capacity it
2 procures through the Ancillary Services markets. The ISO's interest includes the right to
3 determine how much energy, if any, should be produced out of the capacity it has procured.

4 **The Settlement Process**

5 47. Settlement is the process administered by the ISO whereby suppliers (*i.e.*,
6 generators and marketers) are paid for providing imbalance energy and Ancillary Services, and
7 purchasers (*i.e.*, utilities) are billed for their usage of imbalance energy and Ancillary Services.

8 48. The ISO generates and sends to each SC preliminary and final settlement
9 statements reflecting all transactions that occurred in each market the ISO administers. Under the
10 ISO Tariff, SCs have an affirmative duty to disclose to the ISO any settlement errors in their favor
11 that they discover. All payments from energy users are wired to a bank account in California
12 controlled by the ISO. Similarly, all payments to SCs are wired from a California bank account
13 controlled by the ISO.

14 **Misconduct in the Ancillary Services Market**

15 49. On or about June 1, 1998, defendants began to engage in a scheme to violate their
16 Ancillary Services obligations. Instead of holding obligated Ancillary Services capacity in
17 reserve, defendants frequently produced energy out of obligated capacity and "dumped" it into the
18 real-time (BEEP) market in the absence of a dispatch instruction from the ISO. By engaging in
19 this misconduct, defendants unlawfully received payments for both (1) Ancillary Service capacity
20 (or reserves) that they did not keep unloaded; and (2) the energy produced out of those Ancillary
21 Services commitments. The costs associated with the Ancillary Services commitments that
22 defendants did not and could not fulfill have been passed on to the load-serving entities, *i.e.*,
23 California's investor-owned and municipal utilities.

24 50. In addition to producing energy out of Ancillary Services capacity in the absence of
25 a dispatch instruction, defendants failed to comply with the ISO dispatch instructions they did
26 receive. Instead of producing energy out of obligated Ancillary Services capacity as directed by
27 the ISO, defendants frequently delivered less energy than was required, or even none at all. By
28 engaging in this misconduct, defendants unlawfully received payments for capacity that they did

1 not provide, the costs of which were passed on, again, to the load serving entities, *i.e.*, California's
2 investor-owned and municipal utilities.

3 51. As a result of this scheme, critically important reserves that the ISO relied on to
4 preserve the safety and reliability of the transmission system were not available to serve their
5 intended purpose. The consequences to the safety and reliability of the transmission system were
6 serious and far-reaching. Due in part to defendants' failure to honor their Ancillary Services
7 obligations, the ISO fell out of compliance with WSCC reliability standards on numerous
8 occasions. These violations carried financial penalties, the costs of which have been passed on,
9 again, to the load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

10 52. As a further result of this scheme, in order to make up for operating reserves that
11 were no longer available for their intended purpose, the ISO was often forced to purchase
12 imbalance energy on an "out-of-market" basis. Such "out-of-market" supplies were generally
13 much more costly than imbalance energy dispatched through the BEEP stack. In addition, as it
14 grew to recognize that it could no longer count on defendants and other market participants to
15 honor their Ancillary Services obligations, the ISO began procuring larger quantities of Ancillary
16 Services than it would otherwise have had to procure under normal conditions. This, in turn, put
17 upward pressure on the market clearing prices for Ancillary Services and increased the amount
18 paid to all suppliers of Ancillary Services, including generators who did not hold their capacity in
19 reserve as required. Again, these increased costs were passed on to load-serving entities, *i.e.*,
20 California's investor-owned and municipal utilities.

21 53. During the summer of 1998, the ISO sent several notices addressed to all market
22 participants, including defendants, urging them to comply with their Ancillary Services
23 obligations and stating that failure to do so was a breach of their contracts with the ISO and a
24 violation of the ISO Tariff. The ISO stated in these notices, among other things, that misconduct
25 by generators and SCs was severely compromising its ability to safely operate the transmission
26 grid, and was imposing significant, unnecessary costs on the system.

27 54. Notwithstanding these and other directives from the ISO, defendants and other
28 market participants continued to violate their Ancillary Services obligations.

1 55. On or about December 1998, the ISO proposed an amendment to the ISO Tariff
2 (“Amendment 13”) designed to remove the economic incentive for generators to violate their
3 Ancillary Services obligations. Specifically, the ISO proposed that when a generator fails to
4 provide Ancillary Services as required, it should not be paid for the capacity it failed to hold in
5 reserve, or for any energy produced out of that capacity in the absence of a dispatch instruction.

6 56. On or about February 1999, FERC approved Amendment 13, and immediately
7 thereafter the ISO began to develop a software system that would automatically implement the
8 provisions of Amendment 13. The new system, which came to be called “No Pay,” was intended
9 to audit the performance of generating units in all hours in which they were obligated to provide
10 Ancillary Services. No Pay would then eliminate inappropriate payments for any Ancillary
11 Services capacity that was not held in reserve, and for any energy produced out of committed
12 Ancillary Service capacity in the absence of a dispatch instruction. No Pay was not fully
13 implemented until September 2000.

14 57. From on or about June 1998 until the implementation of No Pay in September
15 2000, defendants and other market participants continued to violate their Ancillary Services
16 obligations with impunity. They continued to collect payments for Ancillary Services they did not
17 and could not provide, and continued to parlay the operating reserves they were required to hold
18 off the market into highly lucrative energy deals, thus sacrificing the safety and reliability of the
19 transmission system serving millions of Californians, all in an effort to boost their own
20 profitability.

21 58. On or about September 10, 2000, in an attempt to ensure system reliability and
22 eliminate the financial incentive for generators to fail to honor their Ancillary Services bids, the
23 ISO fully implemented No Pay. The No Pay system has not proven to be a successful deterrent,
24 however, and the reliability of the ISO reserves system continues to be threatened by the
25 misconduct of the defendants and other generators and SCs.

26 59. From September 10, 2000 to the present, defendants and other market participants
27 have continued to violate their obligations to keep Ancillary Service capacity unloaded and
28 available when bid successfully into the ISO market.

1 **FIRST CAUSE OF ACTION ALLEGED AGAINST ALL DEFENDANTS**

2 **(Violation of Cal. Business & Professions Code § 17200)**

3 60. Plaintiff incorporates by reference paragraphs 1 through 59 inclusive, as if fully set
4 forth herein.

5 61. Section 17200 of the California Business & Professions Code prohibits unfair
6 competition, which includes any unlawful, unfair, or fraudulent business act or practice.

7 62. California law prohibits the wrongful taking or substantial interference with the
8 personal property of another.

9 63. DYNEGY POWER MARKETING, CABRILLO I, CABRILLO II, EL SEGUNDO
10 LONG BEACH, and their agents violated their respective SCA and PGAs, as amended from time
11 to time.

12 64. From on or about June 1998 through September 9, 2000, defendants, and each of
13 them, engaged in unlawful, unfair, or fraudulent business acts or practices, which include, but are
14 not limited to, the following:

15 a. Defendants converted, and conspired to engage in and did engage in a
16 scheme to convert, Ancillary Services capacity and/or monies to which the ISO had an exclusive
17 right of possession by (1) using the same energy capacity that they had sold to the ISO in the form
18 of Ancillary Services to generate electricity to sell a second time into the real-time market in the
19 absence of a dispatch instruction, and/or (2) failing to comply with ISO dispatch instructions to
20 produce energy out of committed Ancillary Services capacity;

21 b. In addition, defendants submitted, and conspired to engage in and did
22 engage in a scheme to submit, thousands of bids to provide Ancillary Services on behalf of the
23 participating generators, CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH, by
24 falsely and misleadingly warranting to the ISO that the underlying Ancillary Services capacity bid
25 into the market would remain available and unloaded as required by law and that they would
26 comply with the ISO's dispatch instructions to provide that capacity upon request;

27 c. In addition, defendants unlawfully failed to comply, and conspired to
28 engage in and did engage in a scheme to unlawfully fail to comply, with ISO dispatch instructions

1 to produce energy out of Ancillary Services capacity sold to the ISO as operating reserves;

2 d. In addition, defendants violated their agreements, and conspired to engage
3 in and did engage in a scheme to violate their agreements, to keep said Ancillary Services capacity
4 unloaded and available. On thousands of occasions defendants failed to comply with their
5 obligations by (1) causing the same capacity to be sold again as energy into the real-time market,
6 and/or (2) failing to provide the committed Ancillary Services capacity altogether;

7 e. In addition, defendants accepted payments, and conspired to engage in and
8 did engage in a scheme to accept payments, for Ancillary Services that they did not and could not
9 provide, and unlawfully failed to notify the ISO that settlements errors had been made in their
10 favor; and

11 f. In addition, defendants accepted payments, and conspired to engage in and
12 did engage in a scheme to accept payments, for energy capacity that they unlawfully sold into the
13 real-time market even though they had no ownership interest in that energy, having sold the
14 underlying capacity to the ISO as Ancillary Services.

15 65. From on or about September 10, 2000 to the present, defendants, and each of them,
16 have engaged and continue to engage in unlawful, unfair, or fraudulent business acts or practices,
17 which include, but are not limited to, the following:

18 a. Defendants have failed to honor their Ancillary Services agreements and
19 have conspired to engage in, and have engaged in, a scheme to fail to honor their Ancillary
20 Services capacity bids, despite the implementation of No Pay, by (1) using the same energy
21 capacity that they had sold to the ISO in the form of Ancillary Services to generate electricity to
22 sell a second time into the real-time market, in the absence of a dispatch instruction, and/or (2)
23 failing to comply with ISO dispatch instructions directing them to produce energy out of
24 committed Ancillary Services capacity;

25 b. In addition, defendants submitted, and conspired to engage in and did
26 engage in a scheme to submit bids to provide Ancillary Services on behalf of the participating
27 generators, CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH, by falsely and
28 misleadingly warranting to the ISO that the underlying Ancillary Services capacity committed

1 would remain available and unloaded as required by law and that they would comply with the
2 ISO's dispatch instructions;

3 c. In addition, defendants violated their agreements, and conspired to engage
4 in and did engage in a scheme to violate their agreements, to keep said Ancillary Services capacity
5 unloaded and available. Defendants failed to comply with their obligations by (1) causing the
6 same capacity to be sold again into the real-time market, and/or (2) failing to provide the
7 committed Ancillary Services capacity altogether.

8 66. As a result of the conduct alleged above, defendants, through their SC, DYNEGY
9 POWER MARKETING, unlawfully and unfairly collected millions of dollars in payments for
10 Ancillary Services they did not provide, and for energy sold into the real-time market that was
11 legally required to be held in reserve, in specific amounts to be subject to proof at trial.

12 67. As a further result of the conduct alleged above, the ISO has faced and continues to
13 face serious threats to system reliability because operating reserves it was relying on to maintain
14 the reliability of the transmission grid were not available. In many instances, after discovering
15 that defendants had failed to honor their Ancillary Services bids, the ISO was required to purchase
16 emergency supplies of electricity at prices much higher than normal to keep the system in balance.
17 Further, because it could not rely on defendants to honor their obligations, the ISO was required to
18 procure greater amounts of Ancillary Services than it normally would have needed to meet its
19 reserve requirements, which put upward pressure on the market clearing prices for Ancillary
20 Services.

21 68. As a further result of the conduct alleged above, the ISO has incurred substantial
22 costs for services never received. Those costs have been borne by the utilities, who act as
23 intermediaries to provide consumers and businesses with electricity, and by California's
24 ratepayers and taxpayers. The magnitude of the incremental costs incurred by the ISO to safely
25 and reliably operate the system in the face of said conduct will be subject to proof at trial.

26 69. As a further result of the conduct alleged above, the ISO and its market participants
27 have incurred substantial penalties from various market-monitoring entities, including the WSCC.

28 70. Defendants' continuing wrongful conduct, as alleged above, unless and until

1 restrained by an Order of this Court, will further cause great and irreparable harm to the safety and
2 reliability of the California electricity market and to California's ratepayers and taxpayers.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as
5 follows:

- 6 1. For a preliminary and permanent injunction, as authorized by Cal. Bus. & Prof.
7 Code § 17203, enjoining defendants, and each of them, their successors, agents, representatives,
8 employees and all persons acting in concert with them, from engaging in unfair competition as
9 defined in Cal. Bus. & Prof. Code § 17200, including, but not limited to the types of acts or
10 practices alleged herein;
- 11 2. For an order directing defendants to pay restitution in an amount according to
12 proof;
- 13 3. For an order directing defendants to disgorge all monies, including any profits, they
14 gained as a result of their violations of Cal. Bus. & Prof. Code § 17200 in an amount according to
15 proof;
- 16 4. For an order assessing civil penalties of two thousand five hundred dollars (\$2,500)
17 against each defendant for each violation of Cal. Bus. & Prof. Code § 17200, as authorized by
18 Cal. Bus. & Prof. Code § 17206, in an amount according to proof;
- 19 5. For costs of suit incurred herein; and
- 20 6. For such other and further relief as the nature of the case may require and the Court
21 deems just and proper.

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Dated: March 11, 2002

Respectfully submitted,

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