

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

California Independent System) Docket No. EL13-37-000
Operator Corporation)

**MOTION TO DISMISS AND ANSWER OF THE
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION
TO COMPLAINT OF THE CSOLAR ENTITIES**

The California Independent System Operator Corporation (“ISO”) submits this motion to dismiss and answer¹ to the CSOLAR entities’ complaint.² CSOLAR argues that the ISO has interpreted the termination provisions of its generator interconnection procedures (“GIP”) and *pro forma* large generator interconnection agreement (“LGIA”) in a manner that is unjust and unreasonable. Specifically, CSOLAR alleges that the ISO interprets its GIP and LGIA as allowing the ISO to terminate the entirety of an interconnection request or an LGIA where a portion of a project is not constructed, even if another portion of the project is under construction or in operation and the customer has “made commitments that will ensure that other generators are not adversely affected.”³ CSOLAR asks the Commission to find that the ISO is not permitted to seek to terminate an interconnection request or LGIA under these circumstances.

¹ The ISO submits this filing pursuant to Rules 206(f), 212 and 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.206(f), 385.212, and 385.213 (2012).

² The “CSOLAR entities” or “CSOLAR” refers to IV South, LLC, Wistaria Ranch Solar, LLC, CSOLAR West, LLC, and CSOLAR IV North, LLC. The CSOAR entities are referred to herein collectively as “CSOLAR.”

³ Complaint at 1-2.

CSOLAR's complaint is without merit, and the Commission should dismiss it on the following grounds:

- The complaint fails to state a claim for relief sufficiently ripe for Commission adjudication, because the ISO has never sought to terminate CSOLAR or any other interconnection customer under the "interpretation" articulated by CSOLAR, or even suggested that it would do so.
- The relief CSOLAR requests would effectively provide generators with a new option to "downsize" the scope of their projects at virtually any time in the interconnection process, resulting in serious implications for the efficiency and fairness of the ISO's interconnection process, and potentially adverse impacts on other interconnection customers and ratepayers.
- The complaint is an attempt to have the Commission "renegotiate" CSOLAR's existing contractual obligations.

To be clear, the ISO has been highly responsive to the needs of renewable developers, and is acutely aware of the need for effective rules to facilitate the integration of renewable resources. The ISO's unwavering commitment to renewable development has been demonstrated time and again by its history of filings at the Commission. Indeed, the State of California has been leading the charge nationally in this important effort. The ISO by no means desires a framework that will prematurely terminate a viable generating facility from the grid. This is precisely why the ISO has committed to further vetting of these issues to stakeholders.

Consequently, based on stakeholder input provided to its Board of Governors, the ISO had already planned to initiate a stakeholder process this year, where the ISO will consider the issues raised by CSOLAR and determine what, if any, additional downsizing options or modifications to existing options should be implemented. This stakeholder process, where all entities affected by any rule change will be involved, including renewable developers, is the proper forum to review whether further refinements to the ISO's generation interconnection tariff provisions are warranted, and how they should be designed.

I. SUMMARY OF ARGUMENT

CSOLAR frames its complaint as a request for the Commission to opine on what CSOLAR contends is the ISO's interpretation of certain provisions of its generator interconnection procedures and large generator interconnection agreement. Specifically, CSOLAR complains that the ISO interprets these provisions to allow it to terminate the "entirety of an interconnection request and/or LGIA where a phase of a project is not constructed, even if an earlier phase of the project is already under construction or in operation, and even if the customer has made commitments that will ensure other generators are not adversely affected."⁴ CSOLAR argues that this is unjust and unreasonable and requests that the Commission "make clear" that the ISO would not be permitted to terminate "the entirety of an interconnection request and/or LGIA that provides for phased project development if (a) one or more phases of the

⁴ Complaint at 2. The ISO has agreed to explore avenues for providing greater certainty to customers in its stakeholder process, but as explained below, the remedy that CSOLAR requests raises serious concerns regarding the ongoing fairness and efficiency of the ISO's interconnection process.

project are already under construction or in operation; (b) one or more later phases of the project fails to meet its milestones, or is not constructed; and (c) the interconnection customer commits to bear the costs for all affected generators . . .”⁵

This complaint should be dismissed because it fails to state any plausible claim that the ISO has acted, or failed to act, in a manner that violates any statute, rule or order of the Commission.⁶ The ISO has never sought to terminate an LGIA with CSOLAR, or any other interconnection customer, under the circumstances CSOLAR posits. Because the complaint asks for a Commission determination as to what the ISO *might do* in the future, it is really a request that the Commission render an advisory opinion. CSOLAR thus fails to state a claim that is ripe for Commission adjudication under sections 206 and 306 of the Federal Power Act and Rule 206 of the Commission’s Rules of Practice and Procedure, and its complaint should be dismissed.

CSOLAR’s complaint should also be rejected because it fails to present any convincing rationale for adopting a broad mandate that the ISO may *never, under any circumstances*, seek to terminate an LGIA that meets the characteristics described by CSOLAR. Such a mandate is inconsistent with the “partial termination” provisions that CSOLAR agreed to in the LGIA for the Imperial Solar project, and is clearly not supported by the ISO’s large generator interconnection procedures and large generator interconnection agreement. The breach and termination provisions in the LGIA and GIP are, in all relevant respects, identical to those contained in the Commission’s *pro forma* large generator interconnection procedures and agreement,

⁵ *Id. at 2, 14.*

⁶ 16 U.S.C. § 824e (2006); 16 U.S.C. § 825e (2006); 18 CFR §385.206 (2012).

which the Commission has never interpreted to include the restrictions argued by CSOLAR. In fact, the precedent cited by CSOLAR demonstrates the opposite: the Commission will review the justness and reasonableness of breach and termination issues on a case-by-case, fact-specific basis, rather than mandating general rules of applicability.

Moreover, although CSOLAR frames its complaint in terms of the ISO's termination rights, the crux of CSOLAR's concern is its reluctance to exercise its existing options under the ISO tariff and the partial termination provision of a contract it negotiated – its non-conforming LGIA – to downsize those phases of its generating facilities which it admits are not presently viable for lack of a power purchaser. In this light, CSOLAR's complaint is actually an attempt to both reform a contract it negotiated and signed and to incorporate a new requirement into the ISO's tariff that would effectively provide interconnection customers with a unilateral option to downsize their projects at any time. While the ISO intends to consider the rule advocated by CSOLAR in its stakeholder process, the ISO is concerned that it is so broad as to potentially undermine the fundamental principles underlying the ISO's reform of its interconnection process, such as:

- Avoiding a series of successive studies and re-studies, which creates uncertainty for all customers.
- Preserving incentives for early decisions as to project viability.
- Avoiding harm to ratepayers through appropriately-scoped transmission upgrades.

Nonetheless, the ISO believes the concerns noted above should be vetted with all stakeholders so that all sides of the issues can be explored and debated and a full range of options to address the fundamental concerns being raised in this complaint can be considered. This approach is superior to attempting to resolve these complicated issues through the ill-suited mechanism of CSOLAR's complaint. Over the past several years, the ISO has worked closely with developers, including CSOLAR, to address their desire for increased flexibility to reduce the scope of their projects. This has resulted in additional opportunities for developers to "downsize" their projects during the interconnection process beyond those provided for under the Commission's *pro forma* procedures. For example, in December 2012 the Commission conditionally accepted the ISO's October 2012 tariff amendment to provide a one-time downsizing opportunity for certain customers in the ISO interconnection queue to downsize their projects, in order to facilitate competition and achieve commercial operation of projects that would be viable but for an inability to construct the full megawatt generating capacity originally requested.

The ISO is also about to begin the GIP Phase 3 stakeholder process this year to examine additional interconnection process reforms. Addressing CSOLAR's concerns through this stakeholder process will allow the ISO to consult freely and openly with all of its stakeholders in order to craft solutions that consider the needs and interests of all of its various market segments.

II. BACKGROUND

The ISO provides this background information to offer the appropriate context to as to how the issues raised by CSOLAR fit within the ISO's interconnection process reforms.

A. General Principles of ISO Interconnection Reform

As the Commission is well aware, the past several years have seen a significant change in the size and composition of generator interconnection queues across the country. This phenomenon has perhaps been most pronounced in California, where the adoption of an ambitious Renewables Portfolio Standard mandate has resulted in a massive increase in the number of interconnection requests in the ISO's queue, with the total capacity of requests that far exceed the historic peak demand for the ISO's balancing authority area and surpass any needed capacity from renewable resources to satisfy California's environmental goals. The result is a large amount of capacity in the queue effectively pursuing a much smaller amount of capacity being sought through power purchase contracts. It is thus anticipated that many of the projects in the ISO's queue will never be constructed.

To address the queue management challenges associated with California's renewable energy goals, the ISO has, in conjunction with stakeholders and regulators, developed and implemented a number of important process reforms, beginning with its Generator Interconnection Process Reform initiative in 2008.⁷ Prior to the 2008 reforms, the huge influx of interconnection requests into the ISO queue had functionally deadlocked the study process, to the detriment of all participants.

⁷ Generator Interconnection Process Reform Initiative Tariff Amendment, Docket No. ER08-1317-000 (July 28, 2008).

The most significant reasons for this deadlock were two-fold: (1) the low barriers for entering into the queue process and retaining a queue position meant that developers with speculative or otherwise non-viable projects had no clear incentive to avoid entering the queue, or leaving once it was clear that their project was unlikely to achieve commercial operation; and (2) a cascading series of withdrawals, re-studies, and further withdrawals which made it increasingly difficult to complete studies for any individual customer as well as to provide customers with any sense of cost certainty.⁸ In the 2008 reforms, the ISO implemented, with the Commission's approval, a more efficient study process that avoided successive re-studies and withdrawals and increased financial requirements from generation developers. These reforms have proven critically important in getting the ISO's interconnection process back on track. Nevertheless, the ISO has continued to work with its stakeholders to find ways to further improve its interconnection process, and has made several tariff amendments subsequent to the 2008 reforms to implement these improvements. Throughout this process, the ISO has been sensitive to ensuring that any modifications or new provisions do not compromise the fundamental process reforms realized by the 2008 reforms.

B. Generator Downsizing Opportunities

An issue that the ISO has explored with stakeholders subsequent to the enactment of its 2008 generator interconnection reforms, and the issue that is at the heart of CSOLAR's complaint, is the flexibility of developers to "downsize" the generating facilities in their interconnection requests. Most customers in the ISO

⁸ See *id.* at 7-8.

queue plan to develop renewable projects using modular wind or solar technology. This means that, from a technical and engineering perspective, it is fairly easy for these projects to add or reduce MW generating capacity, relative to projects that rely on more traditional fuel sources. Due to challenges associated with securing purchasers or obtaining permits for the entire planned capacity of their projects, some of these developers have expressed to the ISO a desire that the ISO's interconnection process provide them with the maximum flexibility to reduce the capacity of their projects below the level indicated in their interconnection request and/or interconnection agreement.

1. The partial termination provisions

In 2009, due to a long-lead time delivery network upgrade identified in several customers' interconnection configurations, the ISO negotiated with one of these customers, Solar Millennium, to add a non-conforming provision to its LGIA to include a contract provision allowing the customer to "partially terminate" the LGIA with respect to one or more later "phases" of its entire generating facility, while the LGIA remained in effect for those phases that were not terminated. The customer's commercial need for partial termination arose out of a delay in the timeline for the construction of the network upgrades.

Solar Millennium explained that this delay would create a significant challenge in obtaining financing and securing power purchase contracts for the later phases that required the transmission upgrade. This uncertainty, combined with a concern that the *pro forma* provisions of the LGIA could result in a breach and termination affecting the entire project for failure to construct one or more of the later phases

created a risk that, according to Solar Millennium, would jeopardize its ability to bring even the first phase online.⁹

Based on these concerns the ISO, the transmission owner, and the interconnection customer worked together to create a non-conforming LGIA that balanced developer needs, ratepayer protection, the integrity of the interconnection study process and the needs of other customers in the queue to avoid the risk of future contract termination or the forced development of a portion of the project that is no longer economically viable. In return for posting an additional security deposit based on the capacity of the project phases the customer wishes to be subject to the partial termination option, the customer has the ability to terminate the LGIA with respect to those project phases without risking termination of the entire LGIA.

Another important aspect of the partial termination provisions is that, if the participating transmission owner cannot build the remote network upgrades on the projected timeframe, the interconnection customer has the right to partially terminate the designated phases without payment of the partial termination charge. Moreover, the ISO has stated that an interconnection customer with partial termination provisions who ultimately built the later phases would never pay both the partial termination charge and the full network upgrades cost.¹⁰ Accordingly, if there is no partial termination, any partial termination charge security posted by the customer

⁹ See *Order Conditionally Accepting Non-Conforming Large Generator Interconnection Agreement*, 134 FERC ¶ 61,087 at PP 8-13 (2011), (describing the non-conforming partial termination provisions and the reasons for their inclusion in the LGIA).

¹⁰ See Addendum to June 30, 2011 Revised Draft Final Proposal, Generator Interconnection Procedures Phase 2, table item No 2. “The ISO adds the clarification that the partial termination charge will not result in the customer being responsible for more than 100% of their network upgrades cost responsibility when added to the partial termination charge.” The addendum is accessible on the ISO website at <http://www.caiso.com/Documents/Addendum-RevisedDraftFinalProposal-GenerationInterconnectionProceduresPhase2.pdf>

would ultimately be returned. The customer, therefore, obtains an option for which it is charged only if it follows through and terminates.

The Commission has approved the partial termination provisions in four non-conforming LGIAs, including, at the express request of CSOLAR, the LGIA covering the two-phase Imperial Solar project being developed by CSOLAR IV South and Wistaria Ranch Solar.¹¹ The Commission agreed that under the facts and circumstances of these projects, the partial termination provisions would provide all parties with some protection against the “significant adverse results” if some portion of the projects were unable to achieve commercial operation.¹² In its initial order on the Solar Millennium/Blythe Solar Power Project LGIA, the Commission agreed “with SoCal Edison and CAISO that the protracted time period that would elapse before completion of all the transmission upgrades necessary to achieve full capacity deliverability status, *combined with the termination provisions of CAISO’s pro forma LGIA*, creates a risk that could jeopardize the ability of even the first phases of the Blythe Solar Power Project to achieve commercial operation.¹³

2. Further downsizing abilities under two tariff amendments

The ISO has provided two additional downsizing opportunities in amendments to its *pro forma* procedures and interconnection agreements, as follows:

¹¹ See Letter Order Accepting Non-Conforming Large Generator Interconnection Agreement, Docket No. ER12-556-000 (January 30, 2012). Although CSOLAR discusses the four CSOLAR entities as each developing a “project” it is important to understand that these four “projects” were submitted to the ISO as two interconnection requests – one request relating to a project being developed in two phases by CSOLAR South and Wistaria, which is the subject of an LGIA that contains partial termination provisions, and one request relating to a project being developed in two phases by CSOLAR North and CSOLAR East, which has not yet entered into an LGIA.

¹² 134 FERC ¶ 61,087, *supra*, at P 50.

¹³ *Id.*

GIP Phase 2 amendment: This tariff amendment, effective January 31, 2012, added to the ISO's LGIA a "safe harbor" provision, under which an interconnection customer may reduce the MW capacity of its generating facility by up to five percent (5%).¹⁴ This safe harbor can be utilized for any reason, up until the facility's commercial operation date. The customer may also request authorization from the ISO to further reduce the MW capacity of its generating facility by more than five percent under certain limited conditions.

Generator downsizing amendment: As mentioned above, the ISO (in January 2013) is implementing a new generator downsizing opportunity that the Commission approved in December 2012.¹⁵ With this amendment, any customer that entered the queue prior to the ISO's fifth queue cluster group could elect to downsize its project by any amount by submitting a downsizing request by January 4, 2013, along with a study deposit to cover the costs of studying the impacts of the downsizing requests and the costs of amending any affected interconnection agreements. Although this option was implemented as a one-time opportunity, the ISO has committed to evaluating the appropriateness of permitting another similar opportunity at the end of 2013.¹⁶

¹⁴ See GIP Phase 2 Tariff Amendment to Revise Generator Interconnection Procedures, Docket No. ER12-502-000 (November 30, 2011), Transmittal Letter at 14-16; Order Conditionally Accepting Tariff Revisions, 138 FERC ¶ 61,060 at PP 40-42 (2012).

¹⁵ See Generator Project Downsizing Amendment, Docket No. ER13-218-000 (October 29, 2012) ("Generator Downsizing Amendment"); Order on Tariff Amendment, 141 FERC ¶ 61,219 (2012).

¹⁶ See discussion in Section III(C).

III. ARGUMENT

A. CSOLAR fails to present a claim that is ripe for Commission adjudication

CSOLAR fails to state a cause of action that is ripe for adjudication under any of the provisions under which it files its complaint – sections 206 and 306 of the Federal Power Act, as well as Rule 206 of the Commission’s Rules of Practice and Procedures. CSOLAR fails to state a cognizable claim under any of these provisions because it does not allege that the ISO has actually acted, or failed to act, in a manner that contravenes any law or regulation administered by the Commission.¹⁷

The genesis of CSOLAR’s claim is a concern that the ISO *might, at some point in the future*, seek to terminate an LGIA or otherwise remove an interconnection customer from its queue based on the failure of that customer to construct the full committed-to capacity of its project. The Commission, however, in accordance with the well-established judicial doctrine of ripeness, has consistently declined to address complaints where the cause of action is predicated on the outcome of contingent future circumstances.¹⁸

¹⁷ Section 206 states that the Commission may, upon its own motion or upon complaint, “revise any rate, charge, or classification, demanded, observed, charged, or collected by any public utility” for transmission or sales subject to Commission jurisdiction if the Commission finds such rate, charge or classification unjust or unreasonable. 16 U.S.C. § 824e (2006). Section 306 provides that a complaint may be filed regarding “anything done or omitted to be done by any . . . public utility in contravention of the provisions of the [Federal Power Act].” 16 U.S.C. § 825e (2006). The implementing provisions of the Commission’s regulations, in turn, provide that “[a]ny person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.” 18 C.F.R. §35.206 (2012).

¹⁸ See, e.g., *See Seneca Power Partners, L.P. v. New Independent System Operator, Inc.*, 138 FERC ¶ 61,207 (Mar. 22, 2012) (dismissing complaint alleging the NYISO improperly determined a minimum run time for a 58 MW gas-fired generation facility as premature when evidence showed that NYISO had discussed a reduction in the minimum run time, but had not yet changed the minimum run time); *Chevron Products Company v. SFPP, L.P.*, 138 FERC ¶ 61,115 (Feb. 16, 2012) (dismissing complaint requesting that the Commission investigate the *possibility* that SFPP could increase its rates as premature, holding that the justness and reasonableness of a possible, future index-based rate

CSOLAR's complaint is a clear-cut example of a claim based on the outcome of "contingent future events."¹⁹ The ISO has never sought to terminate CSOLAR's or any other customer's LGIA, or remove CSOLAR or any other customer from the ISO's interconnection queue, due to a failure to complete a portion of a project that is already online or under construction. CSOLAR argues at length why any such attempt by the ISO would be unjust and unreasonable. Yet, the only support CSOLAR provides to establish that such a termination would ever occur is the ISO's statement that "[i]n the worst potential case, inability to complete [a] project or meet its milestones could be a breach of the customer's generator interconnection agreement."²⁰ As the Commission noted in accepting the first non-conforming LGIA, this was the potential circumstance that the parties sought to avoid through the partial termination provisions.²¹

Even so, Commission approval would still be necessary for such termination to take effect. Given these realities, CSOLAR's claim that the ISO's "interpretation" of

increase is not ripe for Commission review until SFPP submits a tariff filing proposing to charge such rates)(emphasis added); *Louisiana Public Service Commission v. Entergy Corp. et al.*, 132 FERC ¶ 61,104 (Aug. 4, 2010) (dismissing complaint seeking to challenge the inclusion of costs associated with the cancellation of a repowering project in rates as premature when a final decision on the cancellation of the project had yet to be approved); *Barnet Hydro Company*, 95 FERC 61,257 (May 18, 2001)(dismissing a complaint requesting the Commission prohibit the assessment of transmission charges as premature when no such charges had been assessed).

¹⁹ *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 425 (D.C. Cir. 2007).

²⁰ Generator Downsizing Amendment, Transmittal Letter at 2.

²¹ 134 FERC ¶ 61,087, *supra*, at P 8 ("Another non-conforming provision included in the LGIA by SoCal Edison is the ability of Palo Verde to partially terminate the LGIA. Under CAISO's existing *pro forma* LGIA, a failure to complete any portion of the project results in the customer's default of the LGIA, along with the forfeiture of some or all of the interconnection financial security posted by the customer and potential termination of the entire LGIA with loss of interconnection service for the entire project. In this LGIA, however, SoCal Edison incorporates a partial termination provision in Article 2.4.4 that permits Palo Verde to terminate the LGIA solely related to the generating unit(s) that cannot achieve commercial operation. The partial termination provision will be available to Palo Verde upon the satisfaction of certain conditions and payment of a partial termination charge.)

its termination provisions rises to the level of an actionable complaint is untenable and should be rejected.²²

Given that there is no present threat of a termination action against CSOLAR, or any other interconnection customer, the ISO respectfully suggests that the complaint seeks an advisory opinion from the Commission and thus is not appropriate under the Federal Power Act or Commission rules.

B. CSOLAR effectively asks the Commission to Renegotiate its LGIA Partial Termination Provisions

As explained above, the LGIA covering the two-phase Imperial Solar project contains “partial termination” provisions that allow CSOLAR to terminate the LGIA with respect to the second phase of the project without risking termination of the LGIA with respect to the first phase. These provisions were included at the express request of CSOLAR, consistent with the Solar Millennium precedent and CSOLAR’s development plans. CSOLAR’s argument that the ISO’s “interpretation” of its tariff already prohibits terminations under the circumstances described by CSOLAR would, if accepted, effectively render the partial termination provisions of the Imperial Solar LGIA superfluous. CSOLAR specifically requested that the ISO include the partial termination provisions in the Imperial Solar LGIA to protect against the exact risk alleged in CSOLAR’s complaint. CSOLAR’s argument that those protections are inherent in the existing provisions of the ISO tariff is inconsistent with its bargained-for LGIA provisions. Rather, it is an attempt to allow it to effectively exercise a much

²² CSOLAR argues that based on the ISO’s statement, to avoid the potential for future termination actions it may “have no choice” but to exercise the downsizing options provided by the ISO. This concern goes primarily not to the reasonableness of the ISO’s interpretation of the termination provisions in its tariff, but rather, the nature and scope of a generator’s downsizing options. Moreover, even accepting CSOLAR’s argument at face value, it still does not establish a sufficiently ripe case or controversy under the statutory and regulatory standards for complaints.

broader partial termination right without having to comply with the obligations that it agreed to in the non-conforming LGIA that it executed. The Commission should deny CSOLAR's attempt to circumvent its contractual obligations.

CSOLAR, in comments to the Commission, strongly advocated for including the partial termination provisions in its LGIA. Nowhere in those comments did CSOLAR even suggest that these provisions were superfluous or otherwise unnecessary due to existing provisions in the ISO tariff. It is also significant that, in accepting the non-conforming LGIAs that include partial termination provisions, the Commission explicitly endorsed the reasoning underpinning the termination risk, stating that it "agree[d] with . . . the CAISO that the protracted time period that would elapse before completion of all the transmission upgrades necessary to achieve full capacity deliverability status, combined with the termination provisions of CAISO's *pro forma* LGIA, creates a risk that could jeopardize the ability of even the first phases of the [project] to achieve commercial operation."²³

In short, CSOLAR already has included in the Imperial Solar LGIA the termination protection that forms the basis of its complaint. Yet CSOLAR makes no attempt to explain why these partial termination provisions are no longer necessary or applicable, or are otherwise unjust or unreasonable. The only argument that CSOLAR raises along these lines involves the term in the Imperial Solar LGIA under which CSOLAR must choose whether to exercise its partial termination rights and terminate the LGIA with respect to the second phase of its project by January 23, 2013. CSOLAR indicates that it does not wish to make this decision by January 23,

²³ 134 FERC ¶ 61,087 *supra*, at P 50.

2013 because despite that lack of purchaser for the output of the second phase of the project, it believes that “market conditions will shift in the foreseeable future to make the [second phase] economically viable.”²⁴ Yet CSOLAR provides no factual support for this assertion.

In other words, CSOLAR hopes to avoid a decision as to whether or not to terminate the second phase for as long as possible in the hopes that it might someday become viable. This rationale does not provide a basis for finding the terms of the Commission-approved LGIA unjust and unreasonable. There also no basis to find that the ISO’s generator interconnection procedures and conforming LGIA includes a unilateral downsizing option that can be exercised at any time, a far broader downsizing option than CSOLAR bargained for in the Imperial Solar LGIA. The Commission should reject CSOLAR’s attempt to undo the Imperial Solar LGIA through this complaint.

C. CSOLAR’s complaint should also be dismissed because CSOLAR attempts to add a new rule to the ISO tariff which should be considered during the ISO’s upcoming stakeholder initiative.

Even were the Commission to determine that CSOLAR’s complaint is ripe for adjudication, the Commission should nevertheless dismiss the complaint on dispositive alternate grounds. The complaint fails to establish that the ISO has misinterpreted, or is violating, its tariff. Moreover, although CSOLAR’s claim is framed as an issue of how to interpret the ISO tariff, the remedy that CSOLAR seeks is a *market-wide rule* that would effectively add new provisions to the ISO tariff

²⁴ Complaint at 13.

regarding the circumstances under which a generator could downsize its generating facility.

As previously discussed, the new downsizing rule that CSOLAR would add to the ISO tariff would have adverse effects that could undermine some of the fundamental reforms that the ISO has made to its interconnection process over the past several years, and also raises concerns regarding fairness to other customers and ratepayers. CSOLAR provides no explanation as to how its proposed new rule would balance these concerns, and as such, these issues should be reserved for the ISO's stakeholder process, which will consider them as part of a broader interconnection process improvement effort taking place this year.

- 1. CSOLAR fails to establish that the ISO tariff or Commission precedent mandate an absolute bar on terminations under the posited circumstances.**

CSOLAR requests that the Commission rule that the ISO may never terminate an interconnection request and/or LGIA “if (a) one or more phases of the project are already in construction or operation; (b) one or more phases of the project are already under construction or in operation; and (c) the interconnection customer commits to bear the costs for all affected generators.” CSOLAR argues that this result is “consistent with the ISO Tariff and Commission precedent.”²⁵ However, given that CSOLAR seeks an absolute rule prohibiting terminations under these circumstances *in all cases, without exception*, the appropriate query is not whether this result is “consistent” with the tariff and Commission precedent, but whether the

²⁵ Complaint at 2.

tariff actually includes such a rule, or whether this rule is otherwise mandated by Commission precedent.

The answer in this case is “no.” The ISO’s LGIA, using the exact language of the Commission’s *pro forma* LGIA, defines a “Breach” as “the failure of Party to perform or observe any material term or condition” of the LGIA.²⁶ The LGIA does not state, or even suggest, that a generator’s failure to construct the project indicated in the LGIA should be treated as non-material, nor did the Commission do so in its Order No. 2003 series of cases in which it established the *pro forma* interconnection procedures and agreement on which the ISO’s GIP and LGIA are directly based. The termination provisions of the ISO’s LGIA, which are also identical to the Commission *pro forma* LGIA, provide that unless the breaching party cures the breach per the requirements as set forth in the LGIA the “affected non-Breaching Party . . . shall have the right to declare a Default and terminate this LGIA.” The Commission has, to the best of the ISO’s knowledge, never stated that certain types of breaches are *per se* excluded from this termination right, and CSOLAR does not point to any evidence to the contrary. Consequently, the logical conclusion is that the Commission’s *pro forma* LGIA, and by extension the ISO’s LGIA, does not *inherently* include the limitation on the termination provision that CSOLAR asserts.

As CSOLAR correctly points out, any notice of termination of an LGIA must be filed with and approved by the Commission in order to be effective. In assessing such requests the Commission will “evaluate . . . whether the application demonstrates that the proposed termination is not unjust, unreasonable, unduly

²⁶ Imperial Valley LGIA, Article 1 as included as Attachment B to CSOLAR’s complaint. This term is unchanged from the ISO’s *pro forma* LGIA. See ISO Fifth Replacement FERC Electric Tariff, Appendix CC, Article 1.

discriminatory or preferential, or if it is consistent with the public interest.”²⁷ This indicates that the Commission’s approach is to treat requests to terminate interconnection agreements on an individual basis and evaluate such requests based on the applicable facts and circumstances. CSOLAR nevertheless argues that, to the best of its knowledge, the Commission has “never approved the termination of an interconnection agreement based solely on the interconnection customer’s failure to develop the entirety of its planned project.”²⁸ Yet, none of the cases cited by CSOLAR involve a request to terminate an interconnection agreement based on the failure of a customer to construct the entirety of its project.

The only case even remotely analogous is the *Midwest ISO* case. However, even that case did not directly address the issue raised by CSOLAR here. Rather, it involved an addition to the Midwest ISO’s tariff indicating that a transmission provider has a *specific and positive right* to terminate an interconnection agreement if a customer failed to reach commercial operation for three consecutive years following its commercial operation date.²⁹ This case did not address at all the applicability of the general breach and termination language in the LGIA to instances where an interconnection customer fails to construct the entirety of its project. With respect to the other cases cited by CSOLAR, these simply reinforce the notion expressed above that the Commission will evaluate termination requests on a case-by-case basis.³⁰

²⁷ *Midwest Indep. Trans. Sys. Operator, Inc.*, 141 FERC P 61,087 at P 33 (2012) (“Midwest ISO”).

²⁸ Complaint at 18.

²⁹ *Midwest ISO* at P 20.

³⁰ For example, in the *Judith Gap* decision, the Commission determined that under the circumstances, the petitioners had established that the interconnection customer should continue to be entitled to the full capacity of the upgrades originally planned, even though it would not be able to

In summary, there is no merit to CSOLAR’s claim that the ISO’s GIP and LGIA already include an absolute restriction on a party’s ability to invoke the breach and termination provisions in cases where interconnection customers fail to complete the entirety of their projects. As made clear above, the Commission will evaluate termination requests based on the merits of each individual case.

2. Whether or not the ISO Tariff should include additional downsizing opportunities for customers such as CSOLAR should be addressed in the ISO’s stakeholder process rather than a complaint proceeding.

The heart of the Complaint—the issue of whether the ISO’s generation interconnection process should be modified to include a new interconnection customer option to downsize the MW capacity of its generating facility – should be evaluated in an ISO stakeholder process. The ISO has informed all of its market participants, including CSOLAR’s parent company, that it will address this issue in 2013 as part of the ISO’s Generator Interconnection Procedures Phase 3 stakeholder initiative.

As CSOLAR notes, and as discussed above, the ISO has recently implemented a new generator downsizing option, available to CSOLAR, effective January 1, 2013. Interconnection customers have asked the ISO to commit now to provide a second generator downsizing opportunity under the generator downsizing amendment, addressing their request to the ISO Board of Governors.³¹ As the ISO

complete construction of the entire project within three years of its intended commercial operation date. However, the Commission noted that this decision could be revisited if another generator in the queue were to demonstrate that reserving this capacity for the Judith Gap project would cause it harm. *Judith Gap Energy LLC*, 125 FERC PP 61,169 at P 21 (2008).

³¹ Two requests were made: LSA’s September 8, 2012 letter to the Board (see <http://www.caiso.com/Documents/PublicCommentLetter-LSA-GenDownsizing.pdf>) and LSA’s

explained in its transmittal letter in support of the generator downsizing amendment, the ISO had previously committed to consider a potential second downsizing window in mid-2014. In December, the ISO committed to *accelerate* the time when it would consider whether to provide a second downsizing opportunity—from 2014 to the end of the year in 2013. The ISO committed that the 2013 ISO GIP Phase 3 stakeholder process would outline specific factual circumstances around which the ISO would not exercise the LGIA termination remedy, and noted that the ISO would view a termination and disconnection remedy as an absolute last resort compelled by specific factual circumstances.

One of the primary benefits of addressing these issues in the stakeholder process is to ensure that any additional downsizing opportunities and/or modifications to the termination provisions of the LGIA are appropriately balanced against the need to preserve the fairness and efficiency of the ISO's interconnection process as well as avoiding harm to other customers and ratepayers and preserving the benefits gained in the several years of reforms to the generator interconnection process. As formulated, however, the rule advocated by CSOLAR is so broad as to potentially undermine several of the fundamental principles of the ISO's interconnection reform efforts.

- Avoiding a series of successive studies and re-studies. The ISO addressed this problem by implementing a cluster study process that identifies upgrades and allocates cost responsibility using group studies performed in successive queue clusters. The rule advocated by CSOLAR

December 11, 2012 letter to Board members (See <http://www.caiso.com/Documents/PublicComment-General-Large-ScaleSolarAssociation-Dec2012.pdf>.)

is problematic because, if customers have the option to reduce their capacity by any amount at any point during the interconnection process, the ISO will potentially need to perform multiple re-studies of multiple queue clusters in order to assess the impacts of downsizing generators. This would substantially interfere with the ISO's ability to perform studies and provide meaningful results to customers.

- Preserving incentives for early decisions as to project viability. In order to keep the number of projects in the queue to a manageable level, the ISO increased customers' financial commitments so as to discourage speculative projects from entering the queue, and encourage those projects that turned out not to be viable to exit the queue earlier.³² CSOLAR's proposed rule would significantly undermine this effort by providing generators with the ability to speculate indefinitely while remaining in the queue, to the detriment of other interconnection customers.
- Avoiding harm to ratepayers through appropriately scoped transmission upgrades. The ISO has made numerous modifications to its interconnection process to avoid "over-building" transmission upgrades to protect ratepayers from having to pay the costs of under- or un-utilized transmission assets. CSOLAR's proposed rule would increase the risk of overbuilding, for which transmission ratepayers would bear the costs.

³²

See 124 FERC ¶ 61,292 at PP 151-157.

Given the serious implications raised by generator downsizing, and in particular CSOLAR's proposed downsizing opportunity, the ISO's stakeholder process represents a far better forum than a litigated complaint proceeding for addressing the issues raised by CSOLAR. This is particularly true given that the ISO has already committed to, and is about to commence, a new interconnection stakeholder process in which downsizing along with LGIA termination issues will be considered.

Addressing these issues in a stakeholder process is also superior to attempting to resolve them in a litigated complaint proceeding because the stakeholder process will provide the ISO with the ability to consult freely and openly with all interested participants, as well as Commission staff. It will also allow the ISO and participants the opportunity to discuss and fully explore various proposals in a more collegial and constructive environment. Finally, even if the Commission were inclined to set this matter for hearing and/or settlement procedures, the ISO believes that it is almost certain that its stakeholder process will result in a tariff amendment filed with the Commission on these issues well before an administrative litigation proceeding could be concluded. CSOLAR and other participants would, of course, have the ability to submit comments on or protest any such filing.

IV. COMMUNICATIONS

All service of pleadings and documents and all communications regarding this proceeding should be addressed to the following:

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V. CONCLUSION

For the reasons explained above, the ISO respectfully requests that the Commission dismiss the CSOLAR complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all of the parties listed on the official service list for the above-referenced proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010 (2012)).

Dated at Washington, D.C. this 23rd day of January, 2013.

/s/ Michael Kunselman
Michael Kunselman