On Complaint142 FERC ¶ 61,250
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

CSOLAR IV South, LLC,
Wistaria Ranch Solar, LLC,
CSOLAR IV West, LLC,
and CSOLAR IV North, LLC,
Complainants

v. Docket No. EL13-37-000

California Independent System
Operator Corporation
Respondent

ORDER ON COMPLAINT

(Issued March , 2013)

1. On January 3, 2013, CSOLAR Entities[1] filed a complaint (CSOLAR Entities' Complaint or Complaint) against the California Independent System Operator Corporation (CAISO) alleging that CAISO's interpretation of its Generator Interconnection Procedures (GIP) and provisions of its *pro forma* Large Generator Interconnection Agreement (LGIA) is unjust and unreasonable. CSOLAR claims CAISO could 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 to ensure other generators are not adversely affected. This order dismisses the Complaint, without prejudice, as it is not ripe for Commission review.

[1] CSOLAR Entities are CSOLAR IV South, LLC (CSOLAR South), Wistaria Ranch Solar, LLC (Wistaria), CSOLAR IV West, LLC (CSOLAR West), and CSOLAR IV North, LLC (CSOLAR North). Tenaska, Inc. is the upstream owner of the CSOLAR Entities.

I. Background

2. CSOLAR Entities state they are developing two different solar energy projects, each of which is being constructed in two phases. The first dual-phase project is the Imperial Solar Energy Center near El Centro, California being developed by CSOLAR South and Wistaria. In Phase I, CSOLAR South is developing the 130 MW "South Project," which is currently under construction and projected to achieve commercial operation this year. The output of the South Project is committed under a long-term power purchase agreement (PPA) between CSOLAR South and San Diego Gas & Electric Company (SDG&E). In Phase II, Wistaria is developing the 70 MW "East Project," which, according to CSOLAR Entities, is in an advanced stage of development and projected to be on line in 2016. CSOLAR Entities state both the South and East Projects will be interconnected to SDG&E's system, and a single non-conforming LGIA for both projects (Imperial Solar LGIA) among CAISO, SDG&E, CSOLAR South, Wistaria, and Tenaska Solar Management, LLC, dated October 21, 2011, was filed with, and accepted by, the Commission.[2]

3. The second dual-phase project at issue is being developed by CSOLAR West and CSOLAR North in Imperial County, near El Centro, California. In Phase I, CSOLAR West will develop the 150 MW "West Project." The output of the West Project is committed under a long-term PPA between CSOLAR West and SDG&E. In Phase II, CSOLAR North is to develop the 100 MW "North Project." A single interconnection request was submitted for the West and North Projects, and CSOLAR Entities anticipate that CSOLAR West and CSOLAR North will enter into a single LGIA that covers both the West and North Projects as a first phase and a subsequent phase.

4. Pursuant to CAISO's GIP, to the extent that an interconnection customer wishes to make a change that is not expressly permitted under the CAISO tariff, it may first request that CAISO evaluate whether such a modification is a "Material Modification."[3] If CAISO determines that a proposed modification is a Material Modification, the Interconnection Customer may then withdraw the proposed modification or proceed with a new Interconnection Request for such a modification, thereby losing its position in the

[2] *See San Diego Gas & Elec. Co.*, Docket No. ER12-170-000 (Nov. 29, 2011) (unpublished); *San Diego Gas & Elec. Co*., Docket No. ER12-170-000 (Dec. 13, 2011) (unpublished) (correcting a typographical error in the prior order); Cal. *Indep. Sys. Operator Corp*., Docket No. ER12-556-000 (Jan. 30, 2012) (unpublished).

[3] *See* Tariff, Appendix A (defining "Material Modification" as "[a] modification that has a material impact on the cost or timing of any Interconnection Request or any other valid interconnection request with a later queue priority date."); *see also* Tariff, Appendix Y, § 6.9.2.2.

queue. The LGIA is similar to the GIP, in that where a customer requests a modification, the LGIA provides that the Participating Transmission Owner and CAISO shall determine if such a modification is a Material Modification as defined in the tariff.

5. In addition, CSOLAR Entities' existing non-conforming Imperial Solar LGIA allows it the right to partially terminate the Phase II project without penalty by January 23, 2013, and SDG&E and CAISO were given the right to partially terminate certain provisions of this non-conforming LGIA under conditions prescribed under the agreement, with no temporal limitation.

6. On August 27, 2012, CSOLAR Entities requested CAISO to assess whether elimination of both of the Phase II projects would be considered a Material Modification of CSOLAR Entities' LGIA and/or interconnection requests. On October 22, 2012, CAISO responded by letter, notifying CSOLAR Entities that elimination of these projects was considered a Material Modification and CSOLAR Entities' request was therefore denied, stating that Phase II interconnection restudies were not part of the cluster interconnection process. Further, CAISO stated that even if it were to undertake a restudy, which is not provided for in the GIP, a reduction in project size could change the cost allocation among the cluster group.

7. Shortly thereafter, CAISO submitted a tariff amendment in Docket No. ER13-218-000 (Downsizing Proceeding) which proposed to give certain customers in the CAISO interconnection queue (including CSOLAR Entities) a one-time opportunity to downsize their projects[4] with no limitation on the MW generating capacity of the downsizing requests, provided that such request was submitted to CAISO by January 4, 2013.[5] In response to the CAISO filing, CSOLAR Entities submitted a limited protest explaining that CAISO's proposal did not give customers adequate comfort that the entirety of their LGIAs would not be terminated in the event that one or more phases of a project misses its milestones, even in cases where earlier project phases are already under construction or in operation.[6] In an order issued on December 20, 2012, the Commission

[4] *See* CAISO Tariff Amendment Filing, Docket No. ER13-218-000, at 7 (filed Oct. 29, 2012). CAISO explained that this one-time downsizing opportunity was for customers that entered the interconnection queue prior to cluster five and were facing economic challenges in the California electricity market.

[5] *See id.* at 2.

[6] *See* CSOLAR Entities, Motion to Intervene and Limited Protest, Docket No. ER13-218-000 (filed Nov. 19, 2012).

conditionally accepted CAISO's downsizing proposal[7] and found CSOLAR Entities' protest was outside the scope of the proceeding because it sought clarification on the potential termination of an executed LGIA.[8] CSOLAR Entities has now filed the instant Complaint.

II. CSOLAR Entities' Complaint

8. In their January 3, 2013 Complaint, CSOLAR Entities contend that, in interpreting its GIP and *pro forma* LGIA, CAISO has taken the position that failure to meet a project milestone, or failure to construct a phase or the full generating capacity of a project, constitutes a Material Modification of the interconnection request, or a breach of an LGIA that would give CAISO the right to terminate the interconnection request and/or LGIA in its entirety. In support, CSOLAR Entities cite to the CAISO October 22, 2012 Letter, in which CAISO explained that Tenaska's request, on behalf of the CSOLAR Entities, to reduce the size of the South and West Projects "is material and therefore denied,"[9] because "[t]he cluster interconnection process doesn't provide for a Phase II interconnection 'restudy'" and because "reducing the project megawatt sizes would likely change the cost allocation among the group. . . ."[10] CSOLAR Entities also contend that CAISO's statement in the Downsizing Proceeding that "[i]n the worst potential case, inability to complete the project or meet milestones could be a breach of the customer's generator interconnection agreement[,]"[11] reflects CAISO's intent to unjustly and unreasonably terminate CSOLAR Entities' interconnection request and/or LGIA.

9. The Complaint next contends that CAISO's interpretation of its GIP and LGIA could result in unjust and unreasonable terminations of interconnection requests and/or LGIAs for new projects that have already required substantial investments, to the detriment not only of interconnection customers, but also purchasers and consumers that are relying on such projects.[12] Even assuming that CAISO ultimately determines not to

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[7] *See Cal. Indep. Sys. Operator Corp*., 141 FERC ¶ 61,219 (2012) (December 20 Order).

[8] *See id.* P 46.

[9] *See* CSOLAR Entities January 3, 2013 Complaint (Complaint) at 12 (citing CAISO October 22, 2012 Letter at 1).

[10] *See id.* (citing CAISO Letter at 2).

[11] *See id.* (citing CAISO Tariff Amendment Filing, Docket No. ER13-218-000, at 7).

[12] *See id.* at 2, 12.

exercise its purported termination rights, CSOLAR Entities argue that the uncertainty and the threat of termination could, by themselves, be sufficient to place customers in the difficult position of having to downsize prematurely[13] or terminate potentially viable project phases in order to ensure that the entirety of their interconnection requests and/or LGIAs are not placed at risk. In either case, CSOLAR Entities assert that CAISO's position could result in a severe waste of resources.

10. Although the East and North Projects have not yet been able to obtain PPAs, the CSOLAR Entities state that they are reluctant to abandon these projects because of the time, effort, and money that have already been expended in their development, and because it is the CSOLAR Entities' belief that market conditions will shift in the foreseeable future to make the East and North Projects economically viable. According to CSOLAR Entities however, as they understand CAISO's position, any failure to meet milestones for the East or North Projects in the future could result in termination of the LGIAs – not only for those projects, but also for the South and West Projects, which could, in turn, result in breaches of the existing PPAs with SDG&E and a default under the financing of the South Project.[14]

11. The Complaint requests that the Commission make a determination that CAISO should not be permitted to terminate the entirety of an interconnection request and/or LGIA that provides for phased project development under the following circumstances: (a) one or more phases of the 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, regardless of whether such generators are connected to the CAISO grid or the distribution system of a Participating Transmission Owner.[15] CSOLAR

[13] The downsizing option accepted by the Commission in the Downsizing Proceeding provided for a one-time downsizing opportunity for customers that entered the queue prior to cluster five, and requests to downsize under this option needed to be filed with the CAISO by January 4, 2013.

[14] CSOLAR Entities state that in order to eliminate the perceived threat to their interconnection requests and LGIAs (should the East and North Projects later prove not to be economically viable), they have no choice but to exercise their partial termination rights under the Imperial Solar LGIA with respect to the East Project by January 23, 2013, and to submit a downsizing request with respect to the North Project by the January 4, 2013 deadline.

[15] *See* Complaint at 2, 14.

Entities assert that such relief is consistent with Commission precedent[16] and is appropriate in light of contractual language in the LGIA between CAISO and certain of the CSOLAR Entities that contemplates only partial – rather than complete – termination of the LGIA in the event that any project milestones are missed.[17]

12. The CSOLAR Entities assert that the requested relief will provide interconnection customers, including the CSOLAR Entities, with certainty regarding their rights under their LGIAs, while simultaneously ensuring that there will not be any monetary harm or delays to other customers in the CAISO interconnection queue. CSOLAR Entities also state that such relief would be fully consistent with the Tariff, as well as the December 20 Order in the Downsizing Proceeding.

III. Notice of Filing and Responsive Pleadings

13. Notice of CSOLAR Entities' Complaint was published in the *Federal Register*, 78 Fed. Reg. 2,390 (2013), with interventions, comments, and protests due on or before January 23, 2013.

14. Motions to intervene were filed by BrightSource Energy, Inc., the Cities of Anaheim, Azusa, Banning, Colton, Pasadena and Riverside, California (Six Cities), the City of Santa Clara, California and the M-S-R Public Power Agency, Large-Scale Solar Association (LSA), NextEra Energy Resources, LLC, Pacific Gas and Electric Company, SDG&E, Southern California Edison Company and SunPower Corporation. Timely motions to intervene and comments were filed by Imperial Valley Solar, LLC (Imperial) and Sempra U.S. Gas & Power, LLC (Sempra). On January 23, 2013, CAISO filed a motion to dismiss and answer to the Complaint. On January 25, 2013, California Wind Energy Association (CalWEA) filed a motion to intervene out-of-time[18] and comments. On February 6, 2013, CAISO filed an answer to comments on the Complaint. On

[16] *See id*. at 18-19 (citing *Judith Gap Energy LLC and NorthWestern Corp*., 125 FERC ¶ 61,169 (2008) (*Judith Gap*) (preserving full reservation of LGIA network resource interconnection service where customer missed operational milestones absent harm to lower-queued generators); *Florida Power & Light Co*., 99 FERC ¶ 61,318 (2002); *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,188 (2011)).

[17] *See id*. at 19 (citing Imperial Solar LGIA, § 2.4.4.2).

[18] CalWEA submits that good cause exists for the Commission to accept its motion and comments because: (1) CalWEA encountered difficulties coordinating with its members during the holiday season; (2) CalWEA will accept the record as it currently exists; (3) the Commission has taken no action on the Complaint; and (4) the filing was only two days out of time.

February 7, 2013, CSOLAR Entities filed an answer to CAISO's January 23, 2013 motion to dismiss.

IV. Discussion

A. Procedural Matters

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

16. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2012), the Commission will grant CalWEA's late-filed motion to intervene and comments given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

17. 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 and/or answer unless otherwise ordered by the decisional authority. We will accept the answers of CAISO and CSOLAR Entities because they have provided information that assisted us in our decision-making process.

B. Parties' Comments and CAISO's Motion to Dismiss

1. Imperial

18. Imperial requests that the Commission limit its resolution of this proceeding to the discrete facts raised in the Complaint relating to the Imperial Solar LGIA and the interconnection request of CSOLAR North and CSOLAR West. Imperial states that there is no need for the Commission to set broadly applicable precedent relating to CAISO's Material Modification review or the risk of termination of interconnection service for a service for a multiple phase interconnection customer if one of its phases does not achieve commercial operation according the milestones set in the respective LGIA. Imperial contends the partial termination provisions in CSOLAR Entities' non-conforming Imperial Solar LGIA are sufficient for the Commission to make a decision vis-à-vis CSOLAR Entities.

19. Alternatively, in the event the Commission makes a broader ruling that sets precedent applicable to Imperial and other phased generation facilities, Imperial supports CSOLAR Entities' arguments in the Complaint. Imperial states that if, as the CSOLAR Entities have agreed to do, an interconnection customer commits to fund any network upgrades that are no longer necessary as a result of non-development of future phases of generation, later-queued customers would not be harmed. Indeed, Imperial argues that the Commission has determined that extension of greater than three years does not

support termination of an LGIA where later-queued customers are not materially affected by the delay.[19] That being so, Imperial asserts the Commission should find that non-development of future phases of similarly-situated projects would not harm lower-queued customers and, therefore, reject any proposed termination of the respective project's LGIA as unjust and unreasonable.

2. Sempra

20. Sempra supports the Complaint, stating that unforeseen circumstances can lead to interconnection requests (submitted many months if not years beforehand) that do not match the PPAs that ultimately result from the developer's successful participation in utility RPS solicitation(s). Sempra explains that this is especially true of solar and wind projects, which are readily divided into phases that exactly match the sizes of power purchases desired by utilities. With respect to CSOLAR Entities' specific request for relief, Sempra agrees with CSOLAR Entities that CAISO appears to be adopting an unreasonably broad interpretation of what constitutes a Material Modification of an interconnection request (or interconnection agreement) under the CAISO Tariff.

3. CalWEA

21. CalWEA also supports the CSOLAR Entities' Complaint. CalWEA states that it and its members have experienced similar termination threats by CAISO in the past, which have been the source of considerable business risk and uncertainty for lenders and investors in their projects. CalWEA posits that none of this has been necessary given that CAISO's LGIA permits termination only if there has been a "material modification" to the contract, and given CAISO's admission in its answer that it requires Commission approval before terminating an LGIA.

22. CalWEA states the Commission's decisions on partial terminations show that CSOLAR Entities are correct when they identify harm to other interconnection customers as the key determinant of whether an interconnection customer's modification of its project is "material," thus permitting the transmission provider to terminate the customer's queue position.[20] CalWEA asserts that this policy is effectively codified, or

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[19] Imperial Comments at 11 (citing *Illinois Power Co.*, 120 FERC ¶ 61,237 (2007) (rejecting a notice of termination of an LGIA that was based on a delay to the commercial operation date).

[20] *See* CalWEA comments at 5 (citing *Judith Gap*, 125 FERC ¶ 61,169 at P 21 & n.21) (preserving full reservation of LGIA network resource interconnection service where customer missed operational milestones absent harm to lower-queued generators)).

pending codification, in the tariffs of certain of CAISO's sister regional transmission organizations (RTO).[21]

23. CalWEA next argues that the Commission should not defer action pending the indefinite timing and outcome of CAISO's promised stakeholder process to address the partial termination question further. CalWEA says that to defer action would perpetuate the cloud of uncertainty that CAISO has placed over phased generation projects.

4. CAISO's Answer and Motion to Dismiss

24. In its January 23, 2013 answer and motion to dismiss, CAISO asserts that CSOLAR Entities' Complaint is without merit and that the Commission should dismiss it for several reasons. CAISO contends that the Complaint fails to state a claim for relief sufficiently ripe for Commission adjudication. CAISO argues that CSOLAR Entities' claim centers not on what CAISO has done, but rather on what CAISO might do, at some point in the future, respecting CSOLAR Entities' LGIA. This being so, CAISO states that the Commission should, in accordance with the judicial doctrine of ripeness, decline to address the Complaint because the cause of action is predicated on the outcome of contingent future circumstances.[22]

25. CAISO emphasizes that it has never sought to terminate CSOLAR Entities' (or any other customer's LGIA), or to remove CSOLAR Entities (or any other customer) from the CAISO interconnection queue, due to a failure to complete a portion of a project that is already online or under construction.[23] CAISO states that the only support CSOLAR Entities provide to establish that such a termination would ever occur is CAISO'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

[21] *See id.* (citing Midwest Independent Transmission System Operator, Inc., Open Access Transmission, Energy and Operating Reserve Markets Tariff, Attachment X, GIP, Appendix 6 to GIP, Generator Interconnection Agreement (GIA), § 2.3.1). CalWEA states the Southwest Power Pool and PJM Interconnection, L.L.C., are currently reviewing through their respective stakeholder processes similar proposed changes to the generator interconnection procedures of their respective open access tariffs.

[22] *See id.* (citing *Seneca Power Partners, L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 138 FERC ¶ 61,207 (2012); *Chevron Products Company v. SFPP, L.P.*, 138 FERC ¶ 61,115 (2012); *La. Pub. Serv. Comm'n v. Entergy Corp. et al.*, 132 FERC ¶ 61,104 (2010); *Barnet Hydro Company*, 95 FERC ¶ 61,257 (2001); also citing *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 425 (D.C. Cir. 2007)).

[23] *See id.* at 14.

agreement."[24] CAISO then notes that the Commission itself stated that, in accepting the first non-conforming LGIA, that this was the potential circumstance that the parties sought to avoid through the partial termination provisions.[25]

26. CAISO also stresses that Commission approval would still be necessary for any future termination to take effect.[26] CAISO argues that under these circumstances, CSOLAR Entities' claim that CAISO's "interpretation" of its termination provisions rises to the level of an actionable complaint is untenable and should be rejected. CAISO suggests that given that there is no present threat of a termination action against CSOLAR Entities, the Complaint seeks an advisory opinion from the Commission and thus is not appropriate under the FPA or Commission rules.

27. CAISO states that CSOLAR Entities' Complaint is merely an attempt to have the Commission "renegotiate" CSOLAR Entities' existing contractual obligations under the Imperial Solar LGIA.[27] CAISO explains that 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. CAISO states that these provisions were included at the express request of CSOLAR Entities. CAISO asserts that CSOLAR Entities' argument that CAISO's interpretation of its tariff already prohibits terminations under the circumstances described by CSOLAR Entities would, if accepted, effectively render the partial termination provisions of the Imperial Solar LGIA superfluous.

28. CAISO notes that CSOLAR Entities indicate that they do not wish to make the decision to exercise their partial termination rights and terminate the Imperial Solar LGIA with respect to the second phase of the project by January 23, 2013 because despite the lack of purchaser for the output of the second phase of the project, they believe that "market conditions will shift in the foreseeable future to make the [second phase] economically viable."[28] According to CAISO, CSOLAR Entities hope to avoid a decision as to whether or not to terminate the second phase for as long as possible in the

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[24] *See id.* (citing CAISO Tariff Amendment Filing, Docket No. ER13-218-000, at 2).

[25] *See id.* & n.21 (citing *So. Cal. Edison Co.*, 134 FERC ¶ 61,087, at P 8 (2011)).

[26] *See* Tariff, § 2.3.4; *see also Midwest Indep. Transmission Sys. Operator, Inc.*, 141 FERC ¶ 61,097, at P 33 (2012).

[27] *See* CAISO January 23, 2013 Answer and Motion to Dismiss at 2, 5, 15-17.

[28] Complaint at 13.

hopes that it might someday become viable. As a result, CAISO contends that this rationale does not provide a basis for finding the terms of the Commission-approved LGIA unjust and unreasonable.

29. CAISO next contends that the relief CSOLAR Entities request 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 CAISO interconnection process, and potentially adverse impacts on other interconnection customers and ratepayers.[29]

30. CAISO argues that mandating a market-wide rule prohibiting terminations under the narrow circumstances that CSOLAR Entities posit in all cases, without exception, would be inappropriate, as the tariff does not include such a rule, nor is it mandated by Commission precedent. Rather, CAISO asserts that the Commission's approach in evaluating CAISO's termination of interconnection customers' interconnection agreements has been to evaluate each termination individually on a case-by-case basis.[30] Therefore, CAISO maintains that the Commission should not establish an absolute restriction on a party's ability to invoke the breach and termination provisions of its LGIA in cases where interconnection customers fail to complete the entirety of their projects.

31. Finally, CAISO argues that even if the Commission were to determine that the Complaint is ripe for review, the remedy that CSOLAR Entities seek would be better addressed in a stakeholder process, not a complaint proceeding.[31] CAISO states that it does not wish to prematurely terminate a viable generating facility from the grid. CAISO reiterates that this is precisely why it has committed to further vetting of these issues with stakeholders. CAISO further explains that based on stakeholder input provided to its Board of Governors, CAISO had already planned to initiate a stakeholder process this year, where CAISO will consider the issues raised by CSOLAR Entities and determine what, if any, additional downsizing options or modifications to existing options should be implemented. CAISO posits that this stakeholder process is the proper forum to review whether further refinements to CAISO's generation interconnection tariff provisions are warranted, and how they should be designed.

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[29] *See* CAISO January 23, 2013 Answer and Motion to Dismiss at 2, 4-5, 17-24.

[30] *See id.* at 20-21 & n.30 (citing *Judith Gap*, 125 FERC ¶ 61,169 at P 21).

[31] *See id.* at 2-3, 21-24.

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

5. CAISO's Answer to Comments

33. On February 6, 2013, CAISO filed an answer to comments submitted by Imperial and CalWEA to clarify several issues. First, CAISO states that it has not "threatened" CSOLAR Entities with termination for failure to build a phase of its generating facility when an earlier phase is already in service, as CalWEA suggests. Rather, CAISO contends that it has provided assurances that such an outcome would only be considered as a last resort.[32]

34. Next, CAISO argues that CalWEA incorrectly conflates two separate concepts in the LGIA: (1) the concept of "material modification," which relates to the conditions under which a generator can modify its facilities while retaining its queue position; and (2) the rights of the parties to the LGIA to seek to terminate the contract upon a "material" breach of the agreement. CAISO argues that while "material modification," in CAISO's generator interconnection procedures tariff provisions, refers to adverse impacts on the cost and timing of other interconnection requests, "material" breach under the LGIA is not so limited in scope.

35. Third, CAISO argues that the decisions cited by Imperial and CalWEA do not demonstrate that the breach and termination provisions of CAISO's LGIA inherently prohibit termination for failure to build the entire generating facility specified in the agreement.[33]

36. CAISO also argues that CalWEA and Imperial are also incorrect in their claim that *Judith Gap* demonstrates that the only factor to be considered by the Commission in evaluating a termination request is harm to other interconnection customers. Counters CAISO, the *Judith Gap* decision did not involve a termination request, but instead arose

[32] CAISO February 6 Answer at 4 & Attachment A at 8:8-20, Public Comments of Dr. Keith Casey, CAISO President of Market and Infrastructure Development before CAISO Board of Governors meeting (December 14, 2012).

[33] *Id.* at 7 & n.13 (citing *Illinois Power*, 120 FERC ¶ 61,237 at PP 24-25).

out of an unopposed request for a declaratory order requesting clarification from the Commission that a generator would not lose its rights to network interconnection service for its full capacity due to a delay in achieving commercial operation. While the Commission's analysis in *Judith Gap* centered on whether granting the request for declaratory order would harm other interconnection customers, CAISO urges that the Commission never stated that harm to other interconnection customers should be the sole focus under all other circumstances.

37. Moreover, CAISO notes that the Commission explicitly avoided establishing any blanket rule concerning termination requests, stating that "to the extent the Commission receives similar requests in the future, we will evaluate those requests based on the specific facts in those instances."[34] CAISO posits that these Commission decisions have made clear that the Commission reviews termination requests, and issues regarding retention of queue position, on a case-by-case, fact-specific basis.

38. Fourth, CAISO states that it has already provided mechanisms for developers to "downsize" the megawatt capacity of their generating facilities through non-conforming interconnection agreements, as well as through the recent Downsizing Proceeding.

39. Finally, CAISO reiterates that it will hold a stakeholder process in the first quarter of 2013 in an effort to develop a proposal that addresses the risk of termination under the circumstances that CSOLAR Entities present in their Complaint. Moreover, CAISO states that it does not intend to, and will commit not to, seek termination of an interconnection agreement for failure to construct the entire generating facility where an earlier phase is already in service, until the conclusion of the stakeholder process, including the filing of a tariff amendment and the resulting Commission decision.[35]

6. CSOLAR Entities' Answer to CAISO's Motion to Dismiss

40. On February 7, 2013, CSOLAR Entities filed an answer to CAISO's motion to dismiss. In their answer, CSOLAR Entities first argue that the Commission should adjudicate this Complaint even if it is not a "live" controversy yet.[36] CSOLAR Entities

[34] *Id.* at 7 & n.14 (citing *Illinois Power*, 120 FERC ¶ 61,237 at P 25).

[35] *Id.* at 2-3.

[36] CSOLAR Entities February 7, 2013 Answer at 2 & n.7 (citing *Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244, at P 29 (2012); *Central Transmission, LLC v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,243, at P 8 (2010), *order on reh'g*, 140 FERC ¶ 61,053 (2012); *Entergy Servs., Inc.*, 129 FERC ¶ 61,143, at P 67 (2009); *Mirant Energy Trading, LLC v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,007, at P 12 (2008).

claim that CAISO's interpretation of its GIP and *pro forma* LGIA raises issues that are of ongoing importance to generation developers, including CSOLAR Entities, and therefore should be resolved in this proceeding. Next, CSOLAR Entities claim that CAISO is incorrect in asserting that it has never suggested that it will, and that it has not taken any action to, terminate interconnection requests and/or LGIAs. Rather, CSOLAR Entities argue that CAISO has repeatedly stated on various occasions that it is entitled to terminate interconnection requests and/or LGIAs in the narrow circumstances CSOLAR Entities outlined in the Complaint. Moreover, CSOLAR Entities state that the threat of termination forced it to "preemptively" submit downsizing requests to CAISO in accordance with the Imperial Solar LGIA and the Downsizing Proceeding, thus making this a "live" controversy that the Commission should find unjust and unreasonable.

41. Lastly, CSOLAR Entities contend that the Commission should reject CAISO's request to defer resolution of the issues raised in the Complaint to the stakeholder process. CSOLAR Entities state that they and other generator developers should not be "held hostage" to an uncertain stakeholder process, which CSOLAR Entities argue may not even occur given CAISO's statement in its Transmittal Letter that it would only "consider" whether to provide a second downsizing opportunity. CSOLAR Entities assert that CAISO's commitment to holding a stakeholder process does not go far enough to allay the concerns CSOLAR Entities sets forth in their Complaint.[37]

C. Commission Determination

42. We find that CSOLAR Entities' Complaint is not ripe for consideration. CSOLAR Entities and some of the intervenors have asserted that the mere threat of interconnection termination by CAISO presents interconnection customers with a considerable amount of business risk and uncertainty that the Commission should resolve. These parties assert that, taken together, two CAISO statements constitute this purported threat.

43. However, we do not find the statements qualify as action under the FPA that would require Commission resolution at this time, in that CAISO has taken no affirmative steps to terminate CSOLAR Entities' interconnection request and/or LGIA. To the contrary, CAISO has made numerous commitments that the 2013 GIP Phase 3 stakeholder process would outline specific factual circumstances around which CAISO would not exercise the LGIA termination remedy, and noted that CAISO would view a termination and disconnection remedy as an absolute last resort compelled by specific factual circumstances.

[37] We note that CSOLAR Entities and CAISO's respective answers were filed so close in time that CSOLAR Entities may not have seen CAISO's commitment noted in paragraph 39 above.

44. In the meantime, CAISO has reiterated that it does not intend to, nor will it, seek termination of an interconnection agreement for failure to construct the entire generating facility where an earlier phase is already in service, until the conclusion of the stakeholder process, including the filing of a tariff amendment and the resulting Commission decision. In any event, both CSOLAR Entities and CAISO recognized in their submittals that CAISO may not unilaterally terminate an LGIA because Commission approval would be necessary for such termination to take effect.

45. Under these circumstances, the Commission finds that CSOLAR Entities' Complaint is not ripe for review, and that a Commission order granting the relief CSOLAR Entities requests would be injunctive relief or an advisory opinion[38] that is unnecessary and could interfere with CAISO's planned stakeholder process to discuss CSOLAR Entities' concerns along with other GIP initiatives. While we understand the business risk articulated by CSOLAR Entities and CalWEA regarding the uncertainty that phased generation projects may encounter is a genuine concern, we nevertheless agree with CAISO that addressing these issues in the stakeholder process is superior to attempting to resolve them in a contested proceeding at the Commission.

46. Additionally, in their comments, both Imperial and CalWEA rely, in part, on other RTOs' tariffs and pending stakeholder processes as support for their position that CAISO should not be permitted to terminate the entirety of an LGIA in the narrow circumstances CSOLAR Entities present in their Complaint.[39] The Commission, however, is not required to approve or mandate a specific interpretation of a particular tariff provision for one RTO simply because it has done so for another RTO.[40] Also, CSOLAR Entities rely on a number of prior decisions which they assert support their argument that the Commission should not dismiss the instant Complaint for lack of ripeness.[41] However, these prior decisions are inapposite, as they, unlike this matter, involve disputes over

[38] 18 C.F.R. § 385.207(a)(2) (2012).

[39] *See* Imperial comments at 15-16 & n.31; CalWEA comments at 5 & n.3.

[40] *See ISO New England Inc.*, 133 FERC ¶ 61,229, at P 38 (2010) ("[W]e agree with Transmission Parties that, to the extent Genco cites precedent involving other regions with different tariff language…such precedent is not controlling in [ISO New England]."); *see also*, *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at P 48 (2004) ("Under the 'independent entity variation' standard, an independent Transmission Provider may propose customized interconnection procedures and a customized interconnection agreement that fit the needs of its region…").

[41] CSOLAR Entities answer at n.7.

inevitable outcomes.[42] None of the decisions cited by CSOLAR Entities support the assertion that CAISO's inaction in the instant proceeding demands that the Commission grant CSOLAR Entities' Complaint. Moreover, contrary to these decisions cited by CSOLAR Entities, the Commission here cannot determine with any certainty that CAISO's tariff or LGIA will produce an unjust and unreasonable result, thus leaving CSOLAR Entities Complaint insufficiently ripe for Commission consideration.

47. We decline to impose a broad market-wide solution based on the perceived inchoate "threat" raised in the Complaint. The Commission's practice has been to review termination requests and issues regarding retention of queue position, on a case-by-case, fact-specific basis. At this point in time, we find that the claims raised in CSOLAR Entities' Complaint are speculative and would require us to adjudicate future actions that CAISO may take under the provisions of its tariff or LGIA, which we are not inclined to do. Accordingly, consistent with Commission practice, we hereby dismiss, without prejudice, CSOLAR Entities' Complaint without reaching the underlying claims therein asserted.[43]

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[42] *See Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 (2012) (Commission found that NYISO's implementation of offer floor mitigation provisions of its services tariff would necessarily result in an unjust and unreasonable outcome); *Central Transmission, LLC v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,243 (2010) (Commission dismissed complaint on grounds that a prior order precluded the unjust and unreasonable result for which Complainants sought remedy); *Entergy Servs., Inc.*, 129 FERC ¶ 61,143, at P 67 (2009) (Commission determined that although Entergy's § 205 filing was made earlier than was allowed under a prior order, dismissing it would have served no purpose other than to postpone its eventual filing); *Mirant Energy Trading, LLC v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,007, at PP 34-35 (2008) (Commission determined that the rate paid to Complainants under PJM's tariff would necessarily be unjust and unreasonable despite not providing a proper substitute rate absent a hearing).

[43] *See e.g., Louisiana Pub. Serv. Comm'n v. Entergy Corp. et al.*, 132 FERC ¶ 61,104 (2010) (dismissing complaint as premature and not ripe for Commission consideration); *Tatanka Wind Power, LLC v. Montana-Dakota Utilities Co.*, 132 FERC ¶ 61,103 (2010) (dismissing complaint as premature where Petitioner sought reimbursement for network upgrades not yet built).

The Commission orders:

For the reasons discussed in the body of this order, CSOLAR Entities' Complaint is hereby dismissed without prejudice.

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.