

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

**TGB Development Company, LLC,
Complainants
v.
California Independent System
Operator Corporation,
Respondent**

Docket No. EL11-17-000

**ANSWER OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR
CORPORATION TO MOTION FOR STAY**

The California Independent System Operator Corporation (“ISO” or “CAISO”) hereby submits its answer to the motion for stay filed in this proceeding by TGB Development Company, LLC (“Terra-Gen”).¹ Terra-Gen has filed this motion seeking to postpone the February 8, 2011 due date for Terra-Gen to make the second interconnection financial security postings for four of its projects (Q394, Q396, Q398 and Q399) in the ISO transition cluster and to avoid the consequences under the ISO tariff that the projects would be deemed withdrawn for failure to post financial security.

Terra-Gen has not met its burden to demonstrate entitlement to a stay—there is no irreparable harm. On the one hand, Terra-Gen claims that the study work is incomplete and not final, ignoring applicable language that required the ISO to make a study assumption to model an earlier queued project (Q185) as

¹ The ISO submits this answer pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure (18 C.F.R. §§ 385.206(f), 385.213) and the Notice of Complaint issued in this proceeding on February 1, 2011. Capitalized terms not otherwise defined herein have the meanings set forth in the Master Definitions Supplement, Appendix A to the ISO tariff.

“energy only.” On the other hand, Terra-Gen appears to accept a January 3, 2011 date for finality of the study, a point that undermines the contention that the study is “flawed” and needs to be restudied as well as any contention that the amount of financial security is not just and reasonable.

For the reasons explained more fully below, the Commission should deny the motion for stay based on Commission precedent, Terra-Gen’s admission that the purported harm (which the ISO disputes) is only economic, and the Commission accepted policy underlying the obligation to post interconnection financial security—to clear out projects that are not viable so that viable projects may move efficiently through the interconnection process.

I. INTRODUCTION AND SUMMARY

The ISO continues to process the transition cluster under the large generator interconnection procedures approved by the Commission and included in the ISO tariff, including Terra-Gen’s interconnection requests that are the subject of this proceeding.² As part of the interconnection process, ISO’s interconnection tariff, Appendix Y, Section 9.3.1 provides that an interconnection customer must post the second installment of financial security for network upgrades and participating transmission owner interconnection facilities within 180 days after the final Phase II study report has been published.³

² See generally, 124 FERC ¶ 61,292 (2008) and Quarterly and Comprehensive Report on Progress in Processing Interconnection Requests in Docket No. ER08-1317, January 30, 2011.

³ ISO Tariff, Appendix Y, LGIP for Requests in a Queue Cluster Window, at section 9.3.1 and, see *id.*, at Appendix 2, LGIP Relating to the Transition Cluster, section 5.3. Effective December 19, 2010, the ISO’s Generator Interconnection Process (“GIP”) Amendment became effective, which combines the small and large generation processes into one tariff procedure. In this document, the ISO will refer to Appendix Y as the “ISO

Terra-Gen essentially complains that the Phase II study report issued by the ISO contains “flaws” in the form of “critically missing information” and therefore it should not trigger the 180-day timeline for the obligation to post the second installment of interconnection financial security.⁴

ISO tariff (Appendix Y) Section 6.2 [*Scope and Purpose of Phase I Interconnection Study*] of the Cluster LGIP (now renumbered without change as Section 6.4 under GIP) requires the ISO to conduct Phase I studies in a way that determines the maximum cost responsibility of the interconnection customer.⁵ This is why the ISO studied Terra-Gen’s projects with the study assumption that the earlier-queued Q185 would be “energy only” and not “full capacity.” Terra-Gen argues that the ISO should have used a study assumption that Q185 would elect “full capacity”, thus absorbing the delivery network upgrades which Terra-Gen had hoped that Q185 would pay for and thereby lowering Terra-Gen’s financial obligations with a corresponding lower financial security posting

interconnection tariff” and point out where pertinent section numbers have changed from the Cluster LGIP to the GIP.

⁴ See Terra-Gen Complaint, EL11-17-000, at p. 19-21 (asserting it is entitled to a stay of the obligation to post the second installment of interconnection financial security due on February 7, 2011). The ISO disagrees with this characterization and reserves its rights to file an answer to the complaint on February 17, 2011 as provided in the Commission’s notice issued in this proceeding.

⁵ This section provides in pertinent part that:

The Phase I Interconnection Study shall (i) evaluate the impact of all Interconnection Requests received during the two Cluster Application Windows for a particular year on the CAISO Controlled Grid, (ii) preliminarily identify all Network Upgrades needed to address the impacts on the CAISO Controlled Grid of the Interconnection Requests, (iii) preliminarily identify for each Interconnection Request required Interconnection Facilities, (iv) assess the Point of Interconnection selected by each Interconnection Customer and potential alternatives to evaluate potential efficiencies in overall transmission upgrades costs, (v) *establish the **maximum cost responsibility** for Network Upgrades assigned to each Interconnection Request in accordance with GIP Section 6.5,* and (vi) provide a good faith estimate of the cost of Interconnection Facilities for each Interconnection Request. (emphasis added.)

obligation. The ISO's study assumption was not flawed and did not render the Phase II study incomplete or not final for purpose of triggering the 180 day timeline.

In an apparent inconsistency of position, however, Terra-Gen concedes that the study cost figures in the earlier study are now sufficiently final enough that it will accept January 3, 2011 (the date Q185 withdrew) as the date for triggering the posting date and not a later date 180 days from the date a further "corrective" report might otherwise be issued⁶ and thus, by Terra-Gen's logic, the report became final for purposes of triggering the second posting requirement on that day.⁷ It is in the nature of assumptions that some turn out to be actualized and some do not. The fact that Q185 withdrew is irrelevant; the fact that Q185 might not have withdrawn and elected "full capacity" is irrelevant. The ISO studied Q185 using the assumption that it was required to use and subsequent events should not result in any conclusion that the original study was flawed or that any restudy should occur. Nor should subsequent events trigger the 180-day posting requirement. Ironically, with the withdrawal of Q185, if the ISO were to reissue a Phase II study, Terra-Gen's financial obligations could be higher. This may very well be why Terra-Gen is now willing to accept the Phase II study results, and most certainly highlights that Terra-Gen's only concern is simply the deferral of its obligation to post financial security until a later time.

⁶ See Terra-Gen Complaint, EL11-17-000, at p. 13.

⁷ *Id.* at p. 16.

In addition to the absence of facts to support its motion for stay, the ISO does not believe Terra-Gen should be entitled to relief from the timing of its obligation to post interconnection financial security for three additional reasons.

First, Terra-Gen's procedural request for stay of the posting time rather than posting the disputed amount, subject to refund after the Commission makes its Section 206 determination on Terra-Gen's complaint, is inconsistent with the Commission's prior guidance to ISO interconnection customers to post subject to refund when a posting requirement is in dispute.

Second, Terra-Gen's pleading makes plain that the claimed irreparable harm is financial (exposure to "an excessive or premature financial posting"⁸) even as it concedes that "purely economic consequences often do not warrant a stay."⁹

Third, any grant of stay, effectively suspending the ISO's interconnection tariff as to Terra-Gen's four projects while the other transition cluster projects progress through the interconnection process, works contrary to the underlying premise upon which the cluster approach is based—to move viable projects efficiently through the interconnection process.

II. SERVICE AND COMMUNICATIONS

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

8 *Id.* at p 5.

9 *Id.* at 19.

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III. ANSWER TO MOTION FOR STAY

A. **The Commission should affirm existing precedent that requires an interconnection customer to post financial security during the pendency of a section 206 proceeding and deny the relief requested by Terra-Gen.**

The Commission should affirm existing Commission precedent that requires an interconnection customer to post financial security during the pendency of a Section 206 proceeding and deny the relief requested by Terra-Gen. Terra-Gen's procedural request for stay of its obligation to post financial security rather than post subject to refund is inconsistent with prior Commission precedent. Terra-Gen's complaint neither recognized nor distinguishes the Commission precedent in this regard.

The Commission made its earlier determination in orders issued in December 2009.¹⁰ In conditionally accepting the 2009 Cluster LGIP amendment,

¹⁰ *Order on Clarification and Waiver*, 129 FERC ¶ 61,197 (issued December 3, 2009) at p. 13 (holding that until a section 206 proceeding is resolved the interconnection financial security requirements of the ISO tariff remain in effect subject to refund).

In the Commission's later order on the 206 determination, the Commission affirmed its earlier December 2009 Order. *Order On Section 206 Investigation Of Financial Security Deposit Provisions*¹³² FERC ¶ 61,005 (issued July 1, 2010) at p. 26-27 and fn. 11 (affirming the prior holding while finding that the current interconnection financial security requirements for interconnection customers exercising the option to

the Commission also instituted its own 206 investigation on an issue arising out of the protest of an ISO interconnection-customer-stakeholder. While it instituted the investigation, the Commission expressly required the interconnection customer to post interconnection financial security, subject to refund at the time the 206 matter was concluded.¹¹

The customer then sought clarification and waiver that it should not be required to post the full amount in dispute. The interconnection customer explained that it exercised the option to switch its requested service from “full capacity” to “energy only” and, as a result, the financial posting requirement exceeded the total cost of network upgrades assignable to it, an amount that the Commission may ultimately find to be unjust and unreasonable.¹² The interconnection customer requested that the Commission clarify whether or not the interconnection customer was required to post the amount of financial

switch deliverability status from full capacity to energy only to be unjust and unreasonable).

¹¹ *Order Accepting Tariff Amendments and Compliance Filing and Instituting Section 206 Proceeding*, 129 FERC ¶ 61,194 (issued November 17, 2009) at p. 40 (instituting 206 proceeding), p. 43 (establishing a refund date no later than 5 months from publication of the notice of 206 investigation). *See also*, 134 FERC ¶ 61,088 (denying a request by three transition cluster interconnection customers for waiver of the interconnection financial security deposit set forth in the ISO tariff).

¹² *Order on Clarification and Waiver*, *supra*, 129 FERC ¶ 61,197 p. 5 (reciting that Clipper Wind requests that the Commission clarify that it is not required to provide CAISO with the amount of financial security deposit required by section 9.2 of the CAISO’s GIPR LGIP unless and until the Commission determines that such a deposit is just and reasonable); *id.* at p. 6. (recapping Clipper Wind’s argument that refund is not a viable remedy); and *id.* at p. 13 (determining that until the section 206 proceeding is resolved, section 9.2 of CAISO’s GIPR LGIP remains in effect (subject to refund), and as such Clipper Windpower remains obligated to its original financial security deposit until such time, if at all, that this amount is determined to be unjust and unreasonable and a new just and reasonable amount is established).

security required by the ISO tariff until such time as the Commission determined whether the financial security requirement was just and reasonable.¹³

In denying the requested relief, the Commission clearly held that interconnection customers should be required to post interconnection financial security, subject to refund, until such time as the Commission determines whether the required amount is just and reasonable.¹⁴ Further, the Commission went on to hold that the remedy for an interconnection customer that posts financial security subject to refund has an adequate remedy to protect its financial interest, specifically that the interconnection customer would be entitled to a refund of a portion of the retained interconnection financial security that may ultimately be determined by the Commission to be unjust and unreasonable.

In its order on the request for clarification and waiver, the Commission confirmed that, until the 206 proceeding was resolved, the ISO tariff remained in effect.¹⁵ This was why the customer was obligated to post its original security deposit until such time, if at all, the amount complained of was determined to be unjust and unreasonable and a new just and reasonable amount is established.¹⁶

¹³ 129 FERC ¶ 61,197 at p.13.

¹⁴ *Id.* The Commission ultimately found the requirement to post the financial security to be unjust and unreasonable; however, this finding in no way undermines the holding of the Commission in its denial of the requested waiver. See 132 FERC ¶ 61,005.

¹⁵ See also the Commission's 2008 Order conditionally accepting the Cluster LGIP (known then as the "GIPR") 124 FERC ¶ 61,292 at p. 161 (noting that provisions of ISO interconnection tariff previously approved by the Commission as just and reasonable are presumptively just and reasonable upon later challenge).

¹⁶ 129 FERC ¶ 61,197 at p. 13 (holding that until a section 206 proceeding is resolved the interconnection financial security requirements of the ISO tariff remain in effect subject to refund); 132 FERC ¶ 61,005 at p. 27 (affirming the prior holding while finding that the current interconnection financial security requirements for interconnection customers exercising the option to switch deliverability status from full capacity to energy only to be unjust and unreasonable), and *id.* at fn 11 (noting that the Commission has instituted this section 206 investigation and established the refund effective date at the

The ISO believes this precedent applies in this circumstance. At this point there has been no finding that the amount of interconnection financial security is unjust or unreasonable, and Terra-Gen should be required to post the amount of interconnection financial security associated with its interconnection requests. Moreover, it is significant that Terra-Gen's complaint simply seeks to delay the obligation to post interconnection financial security (to 180 days from January 3, 2011) and, the ISO would argue, in so doing admits that the amount of interconnection financial security is just and reasonable for the network upgrades described in the reports.¹⁷

B. Terra-Gen's admissions in the Complaint and Motion for Stay clearly show that the purported irreparable harm is economic loss and, therefore, not irreparable, and thereby concedes that a stay is not warranted.

Terra-Gen suggests that it may be irreparably harmed and that the Commission may not be able to return it to the status quo absent a stay of the financial security posting requirement, but Terra-Gen fails to recognize Commission precedent effectively addressing the circumstances complained of by Terra-Gen in this proceeding.¹⁸ Here Terra-Gen requests a stay and claims irreparable harm would result since it may be forced to withdraw its interconnection requests, it could be burdened by having to post an excessive

earliest possible date in order to protect Clipper Windpower and any other similarly situated entities, but that the CAISO's current tariff provisions remain in effect for the duration of the section 206 proceeding).

¹⁷ See *e.g.*, Terra-Gen Complaint, EL11-17-000, at p. 5-6 (offering to withdraw the complaint if the ISO would agree to include its projects within the scope of an ISO waiver request, thus allowing it to post the second installment of interconnection financial security 180 days from the date Terra-Gen considers the final Phase II interconnection study report to be final).

¹⁸ *Id.* at p.19.

amount of financial security, and that there is no explicit mechanism in place under the ISO tariff to refund interconnection financial security.¹⁹

Terra-Gen's request to be shielded from the harm of the having to post on February 8 is clearly a request to be relieved of having to make a capital outlay, an economic harm in the form of lost opportunity costs preventing it from using the money for other purposes. This is evident from various statements in Terra-Gen's pleading, including

[F]ailure to ... [grant the stay] will cause irreparable harm to TGP by requiring it to choose *between making an excessive or premature financial security deposit* and being forced from the queue.....²⁰

TTP is being forced to choose between hastily *posting* a second financial security depositor withdrawing its project from the queue, leading to the loss of some or all of its first security deposit *and lost commercial opportunities*.²¹

TGP may be forced to withdraw these projects because...(2) *the additional burden of having to obtain and post a higher amount of financial security* than required for the project may be beyond the Interconnection Customer's ability *or risk tolerance*.²²

The belated accuracy of the CAISO's assumptions, however, does not mean that TGP was unharmed. Q185 ...could have been tendered a facilities study and [could have] elected to have Delivery Network Upgrades installed.... *If it had done so, there would have been a corresponding reduction in the costs allocated to TGP and TGP's related second posting obligation*.²³

Such claims of economic loss do not constitute irreparable harm or warrant a stay, a point that even Terra-Gen concedes.²⁴

¹⁹ Terra-Gen Complaint, EL11-17-000 at p. 21.

²⁰ *Id.* at p. 5, emphasis added.

²¹ *Id.* at p. 20, emphasis added.

²² *Id.* at p. 21, emphasis added.

²³ *Id.* at p. 12, emphasis added.

²⁴ See, e.g., *California Independent System Operator Corporation* (Docket No. ER06-615-000) 120 FERC ¶ 61,111 (July 30, 2000) at p. 11. (finding that movant's claim

C. The fact that ISO did not include Terra-Gen in the ISO's own tariff waiver request is neither grounds for redress under Section 206 nor irreparable injury to Terra-Gen.

There is no factual basis for the allegation that the ISO has discriminated against Terra-Gen within the ambit of Section 205 by not including it in the ISO's December 23, 2010 tariff waiver filed in FERC Docket No. ER11-2503-000. First, if Terra-Gen believes that there is a factual basis that would support a tariff waiver, it has the right to and should have filed a waiver request on its own behalf. Second, the ISO filed a tariff waiver request based on specific facts that applied to seven projects. The ISO is not taking any unilateral action in granting time extensions for postings of the seven customers included in the tariff waiver. *It is petitioning its regulator* for authorization to do so for seven interconnection requests where the project sponsor was provided incorrect information by the ISO. Terra-Gen was not provided incorrect information. As the ISO has indicated above, the ISO understands Terra-Gen simply to object to the timing of its obligation to post interconnection financial security. In fact, Terra-Gen arguably admits the Phase II interconnection study report should be considered final as of January 3, 2011 and, therefore, Terra-Gen should ultimately be

of economic loss does not constitute irreparable harm; *see also, Wisconsin Gas*, 758 F.2d at 674 ("bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur"). Terra-Gen also concedes that purely economic harm may not warrant stay in its complaint at p. 19.

required to post the amount of interconnection financial security supported by the report regardless of the outcome of its complaint.²⁵

Terra-Gen erroneously equates the circumstances of which it complains to the circumstances on which the ISO based a limited waiver petition for seven transition cluster interconnection requests not similarly situated to Terra-Gen.²⁶

As more fully explained in its answer to Terra-Gen's protest filed in that proceeding, the scope of the ISO's waiver request was appropriately limited and the ISO has repeatedly confirmed to Terra-Gen that it is not similarly situated to the seven customers for which the waiver was sought.²⁷ Those customers were incorrectly given information that the posting deadline had, in fact, been extended as a result of subsequent modifications to the Phase II studies. Terra-Gen's Phase II study was not modified; nor did Terra-Gen receive erroneous information as to the date of the financial security posting requirement. Consequently, there is no reason for the Commission to grant Terra-Gen a stay because Terra-Gen should have, but was not, included in the ISO's waiver request.²⁸

²⁵ See, e.g. Terra-Gen Complaint, EL11-17-000, at p. 16. (stating that Q185's January 3, 2011 withdrawal made the previously issued Phase II study final for purposes of triggering the second posting and that therefore, Terra-Gen should have 180 days from January 3 to make its financial posting.)

²⁶ *Id.* at p. 3.

²⁷ ISO Answer to Interventions and Protests, ER11-2503-000, January 28, 2011, at p. 7.

²⁸ See, e.g., Terra-Gen Complaint, EL11-17-000, at p. 20.

D. Allowing the stay would undermine the purposes behind implementation of the cluster study under the ISO interconnection tariff.

Allowing an interconnection customer to obtain a stay of its requirement to post interconnection financial security based on allegations in a complaint, for the duration of the complaint proceeding, would seriously undermine the policy behind this ISO tariff obligation. The ISO established advanced generator commitment interconnection financial security posting requirement to balance the customer's need for commercially reasonable consideration of project development options and to ensure that the interconnection process would involve viable projects mature enough to complete the interconnection process.²⁹

The Commission's prior orders in November and December 2009 that a customer must post subject to refund³⁰ recognize the fact that potential dispute should not put a halt to the interconnection cluster study process, which involves interdependencies among customers within a cluster as well as earlier-queued cluster windows to later queued cluster windows. Abiding by the financial security posting requirements allows viable projects to move forward and clears projects that are not viable or not currently viable.

Moreover, in the September 2008 Order accepting the cluster LGIP, the Commission noted the potential for problems that could occur to the cluster

²⁹ See Commission's 2008 order conditionally accepting the Cluster LGIP (known then as the "GIPR"), 124 FERC ¶ 61,292 at p. 151-157 (stating a p. 151 that "We find the enhanced financial security provisions to be reasonable" and at p. 154 that "The increased financial security requirements proposed by the CAISO represents a reasonable effort to change this regime to deter speculative projects that lack a reasonable chance of achieving commercial operation from entering the queue).

³⁰ *California Independent System Operator Corporation*, supra, 129 FERC ¶ 61,197 at p. 13; 132 FERC ¶ 61,005 at p. 27.

process if the increased financial commitments were eroded to the point where they did not accomplish their intended purpose:

In response to NRG's proposal that withdrawing generators not forfeit their security but would instead hold other generators harmless from the impacts of a withdrawal on restudies, the Commission agrees with the CAISO's assessment that this approach would be difficult to administer and would not act to discourage late-stage withdrawals. *A determination, through additional studies to isolate the effects of the withdrawal, of precisely how other generators and interconnection customers would be held harmless would be extremely complicated, would expend resources that otherwise could be devoted to processing interconnection requests and could create substantial disputes and uncertainty.*³¹

The ISO submits that these problems could also arise if interconnection customers were permitted simply to postpone their posting requirements by seeking a stay with the potential for later withdrawal at a further point in queue processing should they receive an unfavorable determination on their posting dispute.

E. The ISO reserves its rights with respect to the issues raised in the complaint.

In its notice issued on February 1, the Commission indicated that answers to Terra-Gen's request for stay would be due on February 14, but that comments to the other issues raised in the complaint would be due on February 17. The ISO accordingly reserves its rights to comment more fully on the complaint filed by Terra-Gen on February 17 as appropriate.

³¹ September 2008 Order, 124 FERC ¶ 61,292 at p. 157.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny the request for stay contained in Terra-Gen's complaint submitted in this proceeding.

Dated: February 14, 2011

Respectfully submitted,
By: /s/ John C. Anders

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing documents upon each party 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).

Dated at Folsom, CA on this 14th day of February, 2011.

/s/ Anna Pascuzzo
Anna Pascuzzo