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

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| **California Independent System Operator Corporation** | **)** **)** | **Docket No. ER09-1722-000** |

# ANSWER OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION TO EMERGENCY MOTION FOR CLARIFICATION AND TEMPORARY WAIVER OF TARIFF PROVISION

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213, the California Independent System Operator Corporation ("ISO") hereby answers the "Emergency Motion for Clarification and Temporary Waiver of Tariff Provision" filed by Clipper Windpower Development Company, Inc. ("Clipper") in this proceeding on November 20, 2009. For the reasons set forth below, the Commission should deny Clipper's motion in its entirety.

## I. BACKGROUND

On September 18, 2009, the ISO filed its tariff amendment to modify the LGIP which was added as Appendix Y to the ISO tariff as a result of the Generator Interconnection Process Reform ("GIPR") filing, a prior amendment to the ISO's tariff which instituted comprehensive reforms of the ISO's interconnection process, and which the Commission accepted in September 2008 ("2008 GIPR Amendment").[1] The ISO preceded the September 18 filing with two stakeholder conference calls, first on August

[1] Capitalized terms not otherwise defined herein have the meanings set forth in Appendix A to the ISO tariff. The ISO is also sometimes referred to as the CAISO.

27, 2009 to discuss the draft proposal and then on September 2, 2009, to discuss the final proposal.

Under the label of a "protest" to this amendment, Clipper filed comments taking issue with a feature of the 2008 GIPR Amendment, as approved by the Commission, which was not modified by the September 18 filing, namely, that an interconnection customer's initial security deposit for network upgrades is based on its share of both reliability network upgrades and deliverability network upgrades, even when that interconnection customer switches from Full Capacity deliverability status[2] to Energy-Only deliverability status.[3] The ISO provided an answer to Clipper's pleading and Clipper filed an answer to the ISO's answer.

In an order issued on November 17, 2009,[4] the Commission accepted the CAISO's September 18 amendment to the GIPR tariff provisions. With respect to the issue raised by Clipper regarding the appropriate financial security requirements for interconnection customers that change their status from Full Capacity to Energy-Only prior to the commencement of the Phase II study, the Commission noted that it agreed with the ISO as to the importance of tariff provisions balancing the need for required financial security amounts large enough to discourage speculative projects but not so

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[2] Full Capacity deliverability status is defined in the ISO Tariff, Appendix A as "the condition whereby a Large Generating Facility interconnected with the CAISO Controlled Grid, under coincident CAISO Balancing Authority Area peak Demand and a variety of severely stressed system conditions, can deliver the Large Generating Facility's full output to the aggregate of Load on the CAISO Controlled Grid, consistent with the CAISO's Reliability Criteria and procedures and the CAISO On-Peak Deliverability Assessment.

[3] Energy-Only deliverability status is defined in the ISO Tariff, Appendix A as "A condition elected by an Interconnection Customer for a Large Generating Facility interconnected with the CAISO Controlled Grid the result of which is that the Interconnection Customer is responsible only for the costs of Reliability Network Upgrades and is not responsible for the costs of Delivery Network Upgrades, but the Large Generating Facility will be deemed to have a Net Qualifying Capacity of zero, and, therefore, cannot be considered to be a Resource Adequacy Resource.

[4] 129 FERC ¶ 61,124 (2009) ("November 17 Order").

large as to discourage the continuation of viable projects.[5] However, the Commission expressed concern that it might not be just and reasonable "to require a financial security obligation for an amount greater than an interconnection customer's full exposure of reliability upgrades" following a customer's switch from Full Capacity to Energy-Only status.[6] Therefore, the Commission instituted a Section 206 investigation into the justness and reasonableness of the ISO's current tariff provisions relating to the financial security deposit following an interconnection customer's change in status from Fully Capacity to Energy-Only, and required the ISO to submit a filing within 30 days of the date of the order demonstrating that such provisions, particularly Section 9.2., are just and reasonable.[7]

On November 20, 2009, Clipper filed the motion at issue, requesting that the Commission rule that Clipper is not required to post financial security by the December 4, 2009 deadline for the ISO's transition cluster in accordance with the current tariff provisions that require that such posting cover its share of both reliability network upgrades and deliverability network upgrades, based on the fact that it elected Full Capacity service at the commencement of the Phase I study process[8]. Rather, Clipper asks the Commission to grant it a "temporary waiver" of Section 9.2 and, pending resolution of the 206 investigation initiated by FERC in the November 17 Order, permit

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5 *Id*. at P 41.

6 *Id*.

7 *Id*. at P 42.

8 Under the provisions of the September 2009 GIPR amendment, the initial posting for the transition cluster is due on or before the later of 10 business days after the effective date of that amendment or 120 calendar days after the publication of the Phase I study results, but in no event earlier than November 30, 2009 or later than December 15, 2009. Because the Commission order was issued on November 17, 2009, the initial posting is due December 4, 2009.

Clipper to make its initial financial security posting based on only the cost of the reliability network upgrades associated with its project.[9]

## II. ANSWER

Clipper styles its motion as a request for clarification of the Commission's November 17 Order, asserting that the Commission "could not have intended" that Clipper would be required to post financial security based on its share of the network upgrade costs associated with its study group, including both reliability and delivery upgrades. There is no evidence, however, to support this assertion. In its protest of the September 18 filing, Clipper stated that it would need to make its first posting of financial security by the December 4, 2009 deadline. Therefore, the Commission was well aware of this milestone. Considering this, along with all of the other facts and arguments raised, the Commission concluded that the appropriate outcome was to initiate a 206 investigation into the justness and reasonableness of the ISO's tariff provisions and set a refund effective date at the earliest date possible, *i.e*. the date on which notice of the 206 investigation was published in the Federal Register – November 27, 2009, which is prior to the December 4 deadline for the initial posting of financial security.

This decision is clear and unambiguous, and the fact that the Commission set a refund effective date as of the earliest date possible indicates that it understood that compliance with the current ISO tariff provisions would mean that Clipper and other interconnection customers would continue to be obligated to make payments under those provisions before the Commission's determination as to whether those tariff provisions are just and reasonable. This is in accord with the Commission's standard

[9] Clipper Motion at 2.

practice when it opens a Section 206 investigation. If the Commission had intended to depart from this practice and excuse Clipper and other developers from compliance with the applicable provisions of the ISO tariff regarding financial security, which constitute the applicable "filed rate," then it would have said as much. There is simply no basis for deriving such a mandate from the November 17 Order. In short, there is nothing to "clarify."

Next, Clipper attempts to cast its request for relief as a request for temporary waiver of Section 9.2 of the ISO tariff. This label is inaccurate, however, because Clipper is not really seeking a "temporary waiver" of Section 9.2. Temporary waiver would imply that the provision is generally sound but that good cause exists not to apply it under a certain limited set of circumstances as applied to this petitioner. Instead, Clipper seeks a Commission determination that Section 9.2 is unjust and unreasonable, as it currently exists. In reality, Clipper's motion is more akin to a request for stay or injunction, which requires that Clipper show irreparable harm in order to prevail.[10] The Commission has also made clear that economic loss alone does not justify such relief.[11]

Clipper has entirely failed to meet this standard. First, if Clipper continues through the interconnection process, its security obligation will presumably be reduced after the conclusion of the Phase II study because the second and third security postings are based on the lesser of Phase I or Phase II study costs. Moreover, as noted above, the Commission set a refund effective date prior to the date on which Clipper is obligated to post interconnection financial security in order to remain in the transition cluster. Therefore, even if Clipper were to withdraw and the Commission

[10] See California Independent System Operator, Inc., 126 FERC ¶ 61,013 at P 12 (2009).
[11] *Rockies Express Pipeline LLC*, 128 FERC ¶ 61,075 at P 18 (2009).

were to subsequently determine that Clipper had been required to post security only for its share of the applicable reliability upgrades identified in the Phase I study, Clipper would be entitled to receive a refund of a portion of the retained security, based on the difference between the amount posted and the amount determined by the Commission to be just and reasonable.

As such, the only "harm" that Clipper will arguably suffer if the Commission ultimately concludes that it posted more initial financial security than was just and reasonable is the temporary cost of maintaining a larger letter of credit during the intermediate period between the December 4 posting deadline and the Commission's decision. Because such impact would be economic in nature and merely temporary in duration (*i.e*. not irreparable), there is no justification for granting Clipper what amounts to a stay of the Commission's prior orders in this proceeding. As the D.C. Circuit stated in *Virginia Petroleum Jobbers Ass'n v. FPC*,[12] "the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Nevertheless, Clipper alleges that the fact that its deposit is subject to refund is not a viable remedy because it is "not a large utility company" and would suffer "severe financial hardship" if required to post security based on the existing provisions of the ISO tariff. However, Clipper makes no attempt to quantify this financial hardship.[13] Absent such a demonstration, Clipper's request for this extraordinary relief should be rejected.

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[12] 259 F.2d 921, 925 (D.C. Cir.1958).

[13] Clipper suggests that having to post security in accordance with Section 9.2 "may well discourage the continuation of Clipper's project." Of course, even if it elected to withdraw from the transition cluster, there would be nothing precluding Clipper from making another interconnection application for a future cluster. Moreover, the gravamen of Clipper's complaint is that, for customers who have determined that the cost of full capacity deliverability is too expensive and who want to continue on as energy only, the amount of the security deposit at risk should be small enough so that the customer could preserve its

Moreover, regardless of whether it is styled as a request for waiver or stay, Clipper must show that its request is in the best interest of other customers and has no undesirable consequences. Clipper asserts that it meets this standard because a lower level of deposit will adequately protect against the actual cost exposure to Clipper based on the service that it has elected to receive. However, the actual cost exposure to Clipper will not be definitely known until the conclusion of the Phase II study. Even more importantly, allowing Clipper and other interconnection customers the freedom to switch from Full Capacity to Energy-Only deliverability status, free of any financial consequences, will fundamentally undermine the incentive for interconnection customers to accurately determine and identify the level of service they wish to receive prior to the commencement of the interconnection study process. The result will be to undermine any confidence in the accuracy of the Phase I studies as well as to create numerous gaming opportunities, because there will be no check on developers submitting projects as Full Capacity even if a developer ultimately expects to switch to Energy-Only service.

The primary purpose of GIPR was to put in place an interconnection process that created stronger incentives for generators , by way of requiring a greater level of financial commitment, to require interconnection customers to make serious and sound judgments as to the scope and viability of their proposed projects as early in the process as possible, and to time their participation in the process so that premature entry is not followed by withdrawal and the consequent detrimental impact on the process and other interconnection customers. It was the lack of such incentives that led

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ability to withdraw, without significant financial consequence, for its own business reasons in Phase II. This sort of cascading detrimental impact on the process and other customers was precisely what the 2008 GIPR Amendment sought to redress

to the stagnation of interconnection queues in the ISO and in organized electricity markets across the country. As such, the ISO believes that it is of the utmost importance to preserve the balance between encouraging viable projects and discouraging speculation, and that granting Clipper's request to set aside the application of the ISO's current financial security requirements would risk upsetting this balance. The ISO will expand on this and other arguments in the filing mandated by the November 17 Order. However, in the interim, Clipper has provided no compelling reason for departing from the Commission's standard procedure for conducting 206 investigations, as applied in the November 17 Order.

## III. CONCLUSION

For the reasons explained above, the Commission should reject Clipper's motion in its entirety.

Respectfully submitted,

*/s/ Michael Kunselman*

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Dated: November 30, 2009

## CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon the parties listed on the official service list in the captioned 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 Washington, D.C. this 30th day of November, 2009.

*/s/ Rafael Lopez*
Rafael Lopez