



March 21, 2012

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

**Re: California Independent System Operator Corporation
Docket No. ER12-____-000**

**Notice of Termination of Large Generator Interconnection
Agreement**

Dear Secretary Bose:

The California Independent System Operator Corporation (“ISO”)¹ submits for Commission acceptance this notice of termination, effective November 7, 2011, of the Large Generator Interconnection Agreement (“LGIA”) among The Nevada Hydro Company, Inc. (“Nevada Hydro”), San Diego Gas & Electric Company (“SDG&E”), and the ISO.² Pursuant to Articles 2.3.2, 2.3.4, and 17 of the LGIA, the ISO requests that the Commission accept this notice of termination pursuant to Default by Nevada Hydro of its obligations under the LGIA.

¹ The ISO is also sometimes referred to as the CAISO. Capitalized terms not otherwise defined herein have the meanings set forth in the Master Definitions Supplement, Appendix A to the ISO tariff, the Large Generator Interconnection Procedures (“LGIP”) set forth in Appendix U to the ISO tariff, and the Large Generator Interconnection Agreement that is being terminated pursuant to the instant filing.

² The ISO filed the currently effective LGIA with the Commission on February 27, 2009 in Docket No. ER08-654-003. The Commission accepted the LGIA for filing in *Nevada Hydro Co. and California Independent System Operator Corp.*, 129 FERC ¶ 61,098 (2009). The LGIA was accepted as Substitute Original Service Agreement No. 1057 under the ISO’s then-applicable FERC Electric Tariff, Third Replacement Volume No. II, effective May 11, 2008. The LGIA is now under the ISO’s currently applicable Fifth Replacement FERC Electric Tariff.

I. Background

The LGIA sets forth the contractual rights and obligations of Nevada Hydro, SDG&E, and the ISO regarding the interconnection of the proposed Lake Elsinore Advanced Pumped Storage (“LEAPS”) project to transmission facilities owned by SDG&E and operated by the ISO. The LEAPS project consists of a proposed hydroelectric (pumped storage) generating plant and related facilities planned to be located on Lake Elsinore and San Juan Creek in Riverside County, California.

Several proceedings regarding the LEAPS project have occurred. On February 2, 2004, Nevada Hydro was party to an application submitted to the Commission for an original license to construct and operate the LEAPS project.³ The ISO received an Interconnection Request for the LEAPS project on April 26, 2005, and subsequently the Interconnection Study process was performed for the LEAPS project pursuant to the LGIP. The original version of the LGIA was filed on March 11, 2008 and, pursuant to subsequent Commission proceedings, the currently effective LGIA was accepted for filing in 2009.⁴

Nevada Hydro has not obtained the permitting necessary for the LEAPS project to be constructed. The Commission issued an order dismissing the license application for the LEAPS project on July 12, 2011, and denied rehearing of that dismissal in an order issued on November 17, 2011.⁵ On July 14, 2011 (*i.e.*, two days after issuance of the order dismissing the license application), Nevada Hydro filed an application for a preliminary permit for the LEAPS project in a new Commission proceeding.⁶ On November 29, 2011, the Commission issued a notice providing a 60-day comment period on the application for a preliminary permit and explaining that the “sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by

³ Final Application for License for Major Unconstructed Project, Project No. P-11858-002 (Feb. 2, 2004). The other party to that application was Elsinore Valley Municipal Water District.

⁴ See *California Independent System Operator Corp.*, 123 FERC ¶ 61,140 (2008) (order conditionally accepting LGIA subject to compliance filing); *California Independent System Operator Corp.*, 126 FERC ¶ 61,078 (2009) (order granting clarification in part and denying rehearing of preceding Commission order, and conditionally accepting revised LGIA subject to further compliance filing); *Nevada Hydro Co. and California Independent System Operator Corp.*, 129 FERC ¶ 61,098 (order accepting further revised LGIA), *reh’g denied*, 131 FERC ¶ 61,124 (2010). See also footnote 2, above.

⁵ *Lake Elsinore Advanced Pumped Storage Project*, 136 FERC ¶ 62,033, *reh’g denied*, 137 FERC ¶ 61,133 (2011).

⁶ Application for Preliminary Permit, Project No. P-14227-000 (July 14, 2011).

others without the owners' express permission."⁷ Nevada Hydro has requested a term for the preliminary permit of 36 months.⁸ No construction work has begun on the LEAPS project, including the interconnection facilities required to interconnect the LEAPS hydroelectric generating plant to the transmission system.

Starting in May 2011, the parties to the LGIA exchanged a series of correspondence regarding Nevada Hydro's breach and default of its obligations under the LGIA (discussed further below).⁹ On May 20, 2011, SDG&E sent Nevada Hydro a notice explaining that Nevada Hydro had breached the LGIA and requesting cure of the breach pursuant to Article 17.1 of the LGIA. On June 10, 2011, Nevada Hydro sent SDG&E a response to its May 20 notice. On November 7, 2011, the ISO sent Nevada Hydro a notice of termination stating that the June 10 response failed to demonstrate that Nevada Hydro had not breached the LGIA or that Nevada Hydro had cured or commenced curing the items of breach described in the May 20 SDG&E notice, and therefore the ISO was terminating the LGIA pursuant to Article 17.1.2 of the LGIA. On November 23, 2011, Nevada Hydro sent the ISO a response to its November 7 notice of termination. These four pieces of correspondence are provided in Attachments A through D to the instant filing.

In addition to the existing LGIA for the LEAPS project discussed above, Nevada Hydro, Southern California Edison Company ("SCE"), and the ISO are in the process of attempting to negotiate a separate Large Generator Interconnection Agreement regarding interconnection of the LEAPS project to a separate point of interconnection on transmission facilities owned by SCE and operated by the ISO. Nevada Hydro, SCE, and the ISO have been negotiating that Large Generator Interconnection Agreement for some months. The ISO and SCE are both willing to execute the Large Generator Interconnection Agreement included in that filing but Nevada Hydro is not. On March 7, 2012, Nevada Hydro requested that the Large Generator Interconnection Agreement be in unexecuted form.¹⁰ The ISO and SCE are filing the Large Generator Interconnection Agreement today in a separate docket.

⁷ *Nevada Hydro Co.*, Project No. P-14227-000 (Nov. 29, 2011). The 60-day comment period is scheduled to end on January 30, 2012.

⁸ Application for Preliminary Permit, Project No. P-14227-000, at 2 (July 14, 2011).

⁹ The parties copied each other on each piece of correspondence.

¹⁰ Section 11.3 of the LGIP requires Nevada Hydro to "either: (i) execute the appropriate number of originals of the tendered LGIA as specified in the directions provided by the CAISO and return them to the CAISO, as directed, for completion of the execution process; or (ii) request in writing that the applicable Participating TO(s) and CAISO file with FERC an LGIA in unexecuted form."

II. Reasons for Terminating the LGIA

The LGIA states that a party may terminate the LGIA in the event of a default, subject to any required acceptance of the notice of termination by the Commission.¹¹ A default is defined in the LGIA as the failure of a breaching party to cure its breach in accordance with Article 17 of the LGIA.¹²

As discussed below, Nevada Hydro has breached the terms of the LGIA and is thus a breaching party. Further, Nevada Hydro has failed to cure its breach. Therefore, Nevada Hydro is in default of its obligations under the LGIA and the ISO is authorized to terminate the LGIA, subject to the Commission's acceptance of this notice of termination.

Nevada Hydro has failed to meet the milestone dates set forth in Appendix B to the LGIA. Appendix B requires the milestone dates to be achieved in sequence, which means that failure to timely achieve the earlier milestone dates in Appendix B will, in turn, delay achievement of the later milestone dates. As stated in the May 20 SDG&E notice, Nevada Hydro has not yet met the first milestone date (item (a)) listed in Appendix B – submittal of written authorization to SDG&E and the ISO to proceed with the design, procurement, and construction of non-Stand Alone Reliability Network Upgrades.

Nevada Hydro's failure to submit this written authorization to proceed will by itself delay achievement of the In-Service Date and Commercial Operation Date ("COD") for the LEAPS project by two years (24 months), because SDG&E requires 24 months for the design, procurement, and construction of non-Stand Alone Reliability Network Upgrades.¹³ The 24-month time frame for this design, procurement, and construction work by SDG&E is set forth in Table B.2B of Appendix B and thus was acknowledged and agreed to by the parties. The fact that SDG&E's activities require a 24-month time frame is just one of many reasons that Nevada Hydro's failure to submit an authorization for the Participating TO (SDG&E) renders the timeframes for the successive steps unachievable. Indeed, Nevada Hydro's June 10 response concedes the point that "the milestone dates in [the] LGIA are unrealistic at this point."¹⁴ The In-Service Date and COD are not arbitrary, they are specific requirements set forth in the LGIA, which are not subject to change at any time as stated in the June 10 response. The studies, and subsequent dates for constructing the required

¹¹ LGIA, Articles 2.3.2, 2.3.4, 17.

¹² LGIA, Article 1, definition of "Default."

¹³ See May 20 SDG&E notice at 1.

¹⁴ June 10 Nevada Hydro response at 7.

network and reliability upgrades, are based on the proposed milestone dates provided by the interconnection customer.

Moreover, the need for Nevada Hydro to restart the license application process and the required attendant environmental documents for the LEAPS project will only serve to delay the project's In-Service Date and COD even more. As explained above, the Commission has dismissed the license application for the LEAPS project, and the comment period for Nevada Hydro's subsequent application for a preliminary permit for the LEAPS project has not yet ended. Even if the Commission issues an order at some future time that grants Nevada Hydro's application for a preliminary permit, such an order will only start the clock running on Nevada Hydro's priority to file a license application during the requested 36-month permit term. Nevada Hydro would then have to file for and obtain Commission approval of the license application. It is reasonable to expect that obtaining Commission approval for a license application – assuming it is approved, which is by no means certain – will take a minimum of several years. More than seven years passed between the submittal of Nevada Hydro's original license application in 2004 and the Commission's order dismissing the license application in 2011. Further, a report issued by Commission staff on hydroelectric licensing explained that "the median time from application to issuance is 43 months, and the average time is 52 months."¹⁵ And, even assuming that the LEAPS project receives a Commission license, obtaining a license is only a prefatory step – the licensing process must be completed before construction of the LEAPS project and the interconnection facilities can even begin. As discussed above, the design, procurement, and construction of the necessary non-Stand Alone Reliability Network Upgrades *alone* is expected to take 24 months.

In sum, the proposed LEAPS project will be unable to achieve its In-Service Date and COD for an uncertain number of years, if it is able to achieve them at all. Not surprisingly, Nevada Hydro is unable to propose any expected dates for the LEAPS project to be built and start operating.

In its June 10 response, Nevada Hydro noted language in Appendix B stating that the milestone dates are only estimated dates and do not obligate Nevada Hydro to achieve the milestones by those dates, except that the In-Service Date "shall be in accordance with Section 3.5.1 of the LGIP."¹⁶ The

¹⁵ *Report on Hydroelectric License Policies, Procedures, and Regulations – Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000*, at 31 (May 2001), available on the Commission's website at http://www.ferc.gov/legal/maj-ord-reg/land-docs/ortc_final.pdf. Those time periods do not include any time required for rehearing of license orders or judicial review. *Id.* at 30 fn.70. The Commission staff report stated that "the median time to act on rehearing was 13.6 months." *Id.* at 44.

¹⁶ June 10 Nevada Hydro response at 4 & fn.6.

relevant language in Section 3.5.1 of the LGIP states that “[t]he In-Service Date may succeed the date the Interconnection Request is received by the CAISO by a period of up to ten years, or longer where the Interconnection Customer, the applicable Participating TO, and the CAISO agree, such agreement not to be unreasonably withheld.”

This language in Section 3.5.1 of the LGIP must be evaluated against the facts and circumstances of the project. The ISO received the Interconnection Request for the LEAPS project on April 26, 2005, and therefore the ten-year period for the LEAPS project will end in approximately 36 months, on April 26, 2015. Now, more than six years and nine months after the ISO received the Interconnection Request, the LEAPS project is only in the midst of the preliminary permitting process before the Commission, with an unclear but certainly significant number of years to go before it might achieve its In-Service Date. In light of these facts and circumstances, it is not unreasonable for the Participating TO and the ISO to withhold agreement to additional extensions, especially when considering that, at the present time, the ISO does not see that Nevada Hydro has a reasonable basis on which to propose any future date as a likely date by which it can assure it will reach Commercial Operation, least of all a date on or before April 26, 2015. Given that more than seven years have passed between the submittal of the original license application and the Commission’s order dismissing the license application, and given the other delays discussed above before the LEAPS project could begin operating, it is reasonable that interconnection of the LEAPS project would have to be pursued under a new and separate Interconnection Request and Interconnection Study set, rather than the existing Interconnection Request and Interconnection Study set for the LEAPS project and completed on May 15, 2007.

In its June 10 response, Nevada Hydro asserted that it should not be expected to proceed with the development of the LEAPS project or to make financial commitments with respect to the interconnection of the LEAPS project until the negotiation of the Large Generation Interconnection Agreement among Nevada Hydro, SCE, and the ISO is completed.¹⁷ Nevada Hydro has not shown a reasonable basis to make this assertion. No provision in the existing LGIA for the LEAPS project, as accepted by Commission, makes the development of the LEAPS project or Nevada Hydro’s financial commitments contingent upon the completion of the Large Generator Interconnection Agreement with SCE and the ISO. In this regard, Article 30.4 of the existing LGIA for the LEAPS project among Nevada Hydro, SDG&E, and the ISO contains an integration clause which reflects the fact that the written LGIA, including all appendices and schedules attached thereto, constitutes the entire agreement among the Parties with reference to the subject matter, which would encompass the milestones set forth in Appendix B. Moreover, it is significant that nowhere in the Commission

¹⁷ June 10 Nevada Hydro response at 5.

orders addressing the LGIA did the Commission provide that the effectiveness of the existing LGIA for the LEAPS project depends on the subsequent completion and execution of a Large Generator Interconnection Agreement with SCE and the ISO. In fact, any such interdependence of those agreements and limitation upon Nevada Hydro's performance obligations under the existing LGIA would be in conflict with the express terms of the existing LGIA and with the Commission's order unconditionally approving a May 11, 2008 effective date for that LGIA.¹⁸ Indeed, the Commission's very acceptance of the existing LGIA is in conflict with Nevada Hydro's interdependence argument: Logically, if Nevada Hydro's contention were correct, the Commission should have rejected the unexecuted LGIA as premature until the Large Generator Interconnection Agreement with SCE and the ISO was also completed and executed.

Thus, Nevada Hydro's default of its obligations under the existing LGIA is entirely unrelated to the issue of how the negotiations of the Large Generator Interconnection Agreement with SCE and the ISO are progressing, and there is no merit to Nevada Hydro's argument that SDG&E and the ISO are precluded from terminating the existing LGIA for the LEAPS project because of the negotiations of the Large Generator Interconnection Agreement with SCE and the ISO.¹⁹ Moreover, this argument has become immaterial. As discussed above, Nevada Hydro requested that the ISO file the Large Generator Interconnection Agreement, and the ISO and SCE have done so.

Nevada Hydro's June 10 response also erroneously asserted that SDG&E and the ISO could not evaluate whether a proposal by Nevada Hydro to extend the COD for the LEAPS project would constitute a Material Modification until Nevada Hydro actually requested such an extension, because the requested COD "will dictate the scope of potentially impacted customers."²⁰ On the contrary, the ISO and SDG&E can certainly evaluate the impact of various time period extensions on other interconnection customers without waiting for a specific time frame in a customer request. Consequently, it would be immaterial to the ISO's analysis whether Nevada Hydro had requested any particular extension of the COD for the LEAPS project. In any event, Nevada Hydro's

¹⁸ See *California Independent System Operator Corp.*, 123 FERC ¶ 61,140, at P 1; *Nevada Hydro Co. and California Independent System Operator Corp.*, 129 FERC ¶ 61,098, at P 2. Neither Nevada Hydro nor any other party in those Commission proceedings filed a request for rehearing of the Commission's unconditional approval of a May 11, 2008 effective date for the existing LGIA for the LEAPS project.

¹⁹ See June 10 Nevada Hydro response at 5-6 (citing Section 17.1.1 of the existing LGIA for the LEAPS project).

²⁰ June 10 Nevada Hydro response at 6-7. Nevada Hydro's Interconnection Request included a requested COD for the LEAPS project of December 31, 2008. Appendix B sets forth a COD for the LEAPS project of May 23, 2012.

argument is moot. As discussed above, Nevada Hydro is in default of the LGIA and is unable to propose any new expected date for the LEAPS project to start operating.

In addition, the June 10 response suggested that, even if extending the COD set forth in Appendix B would constitute a Material Modification, termination of the LGIA and/or withdrawal of the Interconnection Request need not follow. In support, the June 10 response asserted that the ISO expressed to the Commission in its February 27, 2009 compliance filing “its willingness to waive,” in connection with a determination that a deferred COD constitutes a Material Modification, any provisions in the LGIP or LGIA that might be deemed to require Nevada Hydro to withdraw and resubmit its Interconnection Request.²¹

This assertion in the June 10 response overstates what the ISO actually said in the February 27, 2009 compliance filing. In that filing, the ISO merely stated that, if the ISO determined that the extension of the milestone dates previously proposed by Nevada Hydro (which extension was reflected in the milestone dates contained in Appendix B to the LGIA included in the compliance filing from December 31, 2008 to May 23, 2012) would result in an adverse impact on a lower-queued interconnection customer, and the remedy for the adverse impact were to involve the construction of additional network upgrades or the need for Nevada Hydro to fund the cost of construction of the network upgrades in advance of its own construction schedule in order to provide anticipated transmission capacity for the lower-queued interconnection customer, then the ISO expected to propose an amendment to the LGIA to incorporate responsibility of Nevada Hydro for those additional network upgrades or advance funding; and, in conjunction with such an amendment, the ISO would “*consider seeking a waiver* from the Commission of any provisions of the CAISO’s LGIP or the LGIA that might be deemed to require Nevada Hydro to withdraw and resubmit its interconnection request.”²² Such limited consideration of whether to seek a waiver is a far cry from the blanket assertion in the June 10 response that the ISO is willing to seek a waiver in all circumstances, including the different circumstances that prevail today, nearly three years after the ISO made that limited statement and two months away from the current COD. Given Nevada Hydro’s complete lack of progress in meeting the milestones set forth in Appendix B, there is no reason for the ISO to seek a waiver of the provisions of the LGIP or LGIA on Nevada Hydro’s behalf.

²¹ June 10 Nevada Hydro response at 7 (citing ISO compliance filing, Docket No. ER08-654-003, at 8-9 (Feb. 27, 2009)) (quotation marks omitted).

²² ISO compliance filing, Docket No. ER08-654-003, at 9 (emphasis added).

III. Service

Copies of this filing have been served upon Nevada Hydro, SDG&E, the California Public Utilities Commission, and the California Energy Commission. In addition, the filing has been served upon all ISO scheduling coordinators and posted on the ISO website.

IV. Correspondence

Communications regarding this filing should be addressed to the following individuals, whose names should be placed on the official service list for this proceeding:

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V. Conclusion

For the reasons set forth above, the ISO requests that the Commission accept this notice of termination effective November 7, 2011, *i.e.*, the date on which the ISO sent the notice of termination set forth in Appendix C to Nevada Hydro. Please contact the undersigned with any questions.

Sincerely,

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/s/ Baldassaro "Bill" Di Capo

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Counsel for the California Independent System Operator Corporation

Attachment A



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rwinter@semprautilities.com

May 20, 2011

Mr. Rexford Wait
The Nevada Hydro Company, Inc.
2416 Cades Way
Vista, California 92083

Re: Default of Lake Elsinore Advanced Pump Storage Project LGIA

Dear Mr. Wait:

The unexecuted Large Generator Interconnection Agreement (LGIA) between The Nevada Hydro Company, Inc. (TNHC), San Diego Gas & Electric Company (SDG&E), and the California Independent System Operator Corporation (CAISO) for the Lake Elsinore Advanced Pumped Storage (LEAPS) project filed at the Federal Energy Regulatory Commission (FERC) was accepted by FERC with an effective date of May 11, 2008.

To date, the CAISO and SDG&E are not aware of any action taken on behalf of TNHC to comply with the LGIA steps necessary to provide notice to SDG&E to proceed with design, procurement and construction activities.

The In Service Date (back feed power) of August 1, 2011 included in the LGIA is unachievable. SDG&E requires 24 months for design, procurement and construction of Non-Stand Alone Network Upgrades. SDG&E would have required written notice to proceed and security by August 1, 2009 to meet the proposed In Service Date. Pursuant to LGIP Section 4.4.5., if TNHC again proposes to extend the COD of the project beyond three (3) years from the December 31, 2008 COD provided in the original IR would result in a Material Modification.

In light of the foregoing and the information provided, TNHC is in Breach of the LGIA. Pursuant to Article 17.1 SDG&E and the CAISO hereby provide written notice of such Breach to TNHC. TNHC shall have thirty (30) Calendar Days from receipt of a Default notice to cure such Breach, and that if such breach is not capable of cure within 30 days, the breaching party shall commence the cure and diligently complete the cure within ninety (90) Calendar Days after the Notice. As indicated above, it would appear

that achievement of the milestones within a 90 day period is not objectively achievable. In such cases, Article 17.2.1 permits a non defaulting party to declare a default and terminate the LGIA.

Unless THNC can provide notice within 30 Calendar days from your receipt of this Default notice letter to objectively establish how it can meet the project milestones within 90 Calendar Days of such receipt, then SDG&E and the CAISO shall terminate the LGIA.

Please feel free to contact me at 858-654-1799, or Linda Wright with the CAISO (lwright@caiso.com; 916/351-4470) with any questions

Sincerely,

<Original Signed>

Rodney Winter
Generation Interconnection Project Manager

cc:

David Kates (dkates@sonic.net)
Rexford Wait (rwait@controltechnology.org)
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Rodney Winter (rwinter@semprautilities.com)

Attachment B

DICKSTEINSHAPIRO_{LLP}

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Rodney Winter
Generation Interconnection Project Manager
San Diego Gas & Electric Company
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San Diego, CA 92133

Linda Wright
California Independent System Operator Corporation
250 Outcropping Way
Folsom, CA 95630

RE: Response to May 20, 2011 Letter Declaring Intent to Terminate Large Generator Interconnection Agreement Among San Diego Gas & Electric Company, The California Independent System Operator Corporation, and the Nevada Hydro Company, Inc.

Dear Mr. Winter and Ms. Wright:

We are responding to your May 20, 2011 letter to Mr. Rex Wait of the Nevada Hydro Company, Inc. (“Nevada Hydro”) in which San Diego Gas & Electric Company (“SDG&E”) and the California Independent System Operator Corporation (“CAISO”) contend that Nevada Hydro is in Breach of the Large Generator Interconnection Agreement (“LGIA”) among SDG&E, CAISO and Nevada Hydro. In support of this claim, you state that:

- the CAISO and SDG&E are not aware of any action taken on behalf of Nevada Hydro “to comply with the LGIA steps necessary to provide notice to SDG&E to proceed with design, procurement and construction activities;”
- the In Service Date of August 1, 2011 included in the LGIA is unachievable, as to achieve this In Service Date, SDG&E would have required notice to proceed and security by August 1, 2009;¹
- pursuant to Section 4.4.5 of the Large Generator Interconnection Procedures (“LGIP”), if Nevada Hydro again proposes to extend the Commercial Operation Date (“COD”), this would result in a Material Modification; and

¹ Nevada Hydro notes that its project does not actually have an August 1, 2011 In-Service Date. See CAISO Compliance Filing, Docket ER08-654-003 (Feb. 26, 2009).

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- while Section 17.1 of the LGIA provides thirty Calendar Days from the date of your letter to cure a Breach, or to commence a cure that would be completed within ninety Calendar Days, no such cure can be achieved within the 90 day period.

As a result, SDG&E and the CAISO conclude that Nevada Hydro is in Breach of the LGIA (though you do not specify the actual provision(s) of the LGIA that Nevada Hydro is purported to have breached), and assert that, unless Nevada Hydro can provide notice within 30 Calendar Days from the date of the letter to objectively establish how Nevada Hydro can meet the project milestones within 90 Calendar Days, SDG&E and the CAISO will terminate the LGIA.

As discussed in Section I below, Nevada Hydro disputes your contention that its actions or inactions with respect to the notice to proceed milestone constitute a Breach of the LGIA. The LGIA provides no specific date by which the “notice to proceed” must be provided, and gives Nevada Hydro the absolute right to change the In-Service Date that SDG&E and the CAISO allege cannot be met. Given that the milestone dates are themselves flexible, there is simply no basis for asserting that Nevada Hydro’s failure to provide “notice to proceed” instructions to meet the project milestones in Appendix B constitutes a Breach of the LGIA, let alone a Default subject to termination.

Even if such actions or inactions *could* be deemed to constitute a Breach, Section 17.1.1 of the LGIA expressly states that no Default exists where the alleged failure to perform an obligation is the result of an act or omission of the other Party (or, in this case, Parties). As you know, Nevada Hydro submitted a single interconnection request to interconnect the Lake Elsinore Pumped Storage Project (the “LEAPS Project”) at two points on the CAISO-controlled transmission grid – at the Case Springs 230 kV substation on the SDG&E system, and through a loop-in on the Valley-Serrano 500 kV line at Lee Lake substation on the Southern California Edison Company (“SCE”) system. The CAISO subsequently acknowledged that the LEAPS Project would be treated as a singular project with a single scope of work to be developed jointly between SDG&E, SCE and Nevada Hydro. While the CAISO, SDG&E and SCE later decided to conduct two separate facilities studies and implement the interconnection through separate interconnection agreements, the LEAPS Project remains a single interconnection project.²

² The decision to proceed with separate studies and agreements for each point of interconnection on the CAISO grid was jointly made by the CAISO, SDG&E, and SCE, and not by Nevada Hydro. There was no reason the CAISO could not have proposed to complete the LGIA as a single, four party agreement.

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As such, the SDG&E and SCE LGIAs must be viewed and implemented as an integrated whole. The milestone dates set forth in Appendix B of the SDG&E LGIA were established based on the assumption that the companion SCE LGIA would be completed roughly contemporaneously with the SDG&E LGIA to permit the development of the LEAPS Project. However, precisely because the SCE LGIA had not yet been completed, the parties to the SDG&E LGIA agreed that the milestone dates “are only estimated dates and do not obligate Interconnection Customer to achieve such milestones by such dates...”³ The SCE LGIA still has not been completed, and it is SCE’s and the CAISO’s delay in completing that LGIA in response to Nevada Hydro’s request to interconnect to the CAISO controlled grid at two locations that has prevented Nevada Hydro from moving forward with respect to the milestones contained in Appendix B to the SDG&E LGIA. As a result, and as further discussed in Section II below, SDG&E and the CAISO have no authority to declare a Breach under the LGIA.

SDG&E and the CAISO further take the position that a change in the COD beyond December 31, 2011 will *per se* constitute a “Material Modification” under the LGIA, and appear to take the position that such a “Material Modification” is somehow inconsistent with the LGIA, therefore precluding Nevada Hydro from “curing” its alleged Breach by simply requesting an extension of its COD. As discussed in Section III below, both of these assertions are without basis, and do not constitute grounds for declaring a Default and terminating the LGIA.

Finally, as discussed in Section IV below, Nevada Hydro is amenable to modifying the milestones in the LGIA, provided that the revised dates are consistent with those ultimately established in the SCE LGIA.

I. Failure to Meet Milestone Dates Is Not a Breach of the LGIA

SDG&E and the CAISO assert that Nevada Hydro’s failure to provide notice to SDG&E to proceed with design, procurement, and construction activities for certain Network Upgrades constitutes a Breach of the LGIA sufficient to entitle SDG&E and the CAISO to terminate the LGIA. There is no basis for this assertion.

First, the LGIA’s “due date” for Nevada Hydro to provide SDG&E with notice to proceed (to ensure that the In-Service Date is met) is not even tied to any specific date, including the In-Service Date, as Appendix B requires only that such notice be provided

³ Appendix B to LGIA, p. 84.

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“[a]t least 30 Calendar Days prior to the commencement of the procurement, installation or construction of [SDG&E’s] Interconnection Facilities and Network Upgrades.”⁴ Thus, there is no “deadline” that Nevada Hydro has failed to meet; that it will take SDG&E 24 months to build the Non-Stand Alone Network Upgrades does not in and of itself create a deadline, let alone one that would entitle SDG&E and the CAISO to terminate the LGIA upon Nevada Hydro’s alleged failure to meet it.

Second, as noted above, the LGIA clearly states that the milestone dates in Appendix B “are only estimated dates and do not obligate Interconnection Customer to achieve such milestones by such dates....” Furthermore, the Commission has expressly recognized this flexibility in a prior order on the LGIA, noting that, while delays in the processing of Nevada Hydro’s project raise “the possibility that Nevada Hydro may prove incapable of meeting its own milestones, the LGIA allows for this possibility and provides the interconnection customer with flexibility to adjust its in-service, initial synchronization and commercial operation dates accordingly.”⁵ Therefore, if Nevada Hydro’s project cannot achieve the In-Service Date initially specified in Appendix B, then the LGIA expressly provides Nevada Hydro the right to change the In-Service Date. The LGIA does not, however, authorize SDG&E and the CAISO to convert this milestone flexibility into an obligation, and to terminate the LGIA on those grounds.⁶

SDG&E and the CAISO thus have no basis for asserting that they may terminate the LGIA because Nevada Hydro has allegedly not satisfied an obligation that (1) is not tied to a specific date, and (2) is necessary to satisfy a milestone that is not binding and can be changed at any time by Nevada Hydro to reflect delays in the commercial development process, including the CAISO’s own delay in processing the SCE LGIA, the completion of which is essential to the development of the LEAPS Project.

⁴ *Id.* § B.1(a).

⁵ *California Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,078 at n. 30 (2009) (citing LGIA Appendix B, which allows Nevada Hydro to change its milestone dates).

⁶ The LGIA does require that the In-Service Date “be in accordance with Section 3.5.1 of the LGIP.” The CAISO and SDG&E’s letter does not assert that Nevada Hydro’s In-Service Date is in violation of this provision, an assertion that would be plainly contrary to the LGIP. Furthermore, Section 3.5.1 provides for extensions of the In-Service Date beyond the 10-year anniversary of the date the interconnection request was received by the CAISO, and mandates that consent to such an extension by the CAISO and SDG&E may not be unreasonably withheld. If SDG&E and the CAISO are indicating their refusal to consent to such an extension *prior to the request even being made by Nevada Hydro*, Nevada Hydro believes that the CAISO and SDG&E are in violation of Section 3.5.1 of the LGIP.

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II. SDG&E and the CAISO Have No Authority to Declare a Customer Default Under the LGIA Because the Processing Delay Is the Responsibility of the CAISO, and Arises from a Decision by the CAISO, SDG&E, and SCE to Separately Study Each Point of Interconnection on the CAISO-Controlled Grid

Section 17.1 of the LGIA prevents one Party from claiming a Default and pursuing termination of the LGIA based on that Party's conduct. Any alleged failure by Nevada Hydro to satisfy its milestones, or to provide notices by some required date, is attributable to the ongoing delays in the CAISO's processing of the LEAPS Project, and not to Nevada Hydro's own actions or inactions. As a result, you have no authority to deem the alleged Breach a "Default" and to terminate the LGIA on those grounds.

As discussed above, Nevada Hydro filed a request to interconnect the LEAPS Project at two points on the CAISO-controlled transmission grid. While the CAISO, SDG&E, and SCE have responded to the interconnection request by requiring separate interconnection agreements, the CAISO did not bifurcate Nevada Hydro's interconnection request into separate queue positions; the LEAPS Project remains a single interconnection request.

On March 11, 2008, when the LGIA was filed with the Federal Energy Regulatory Commission ("FERC") and the milestone dates were first established, Nevada Hydro believed that finalization of the SCE LGIA was similarly imminent and that the milestone dates were feasible. However, the CAISO and SCE deferred negotiations on the second component of the interconnection request (the SCE LGIA) for an extended period and, while negotiations resumed last year, they are still underway. This delay – for which the CAISO, a Party to the LGIA, is jointly responsible (along with SCE) – is the reason that Nevada Hydro is unable to proceed in accordance with the milestones in the SDG&E LGIA. However, notwithstanding the use of separate LGIAs for a single interconnection request, Nevada Hydro should be treated no differently than if it were subject to a single LGIA. Thus, consistent with the interconnection procedures established in FERC Order No. 2003, Nevada Hydro should not be expected to proceed with the development of the LEAPS Project or make financial commitments with respect to one component of the requested interconnection, until such time as the CAISO completes processing the second component of Nevada Hydro's interconnection request. Only then will Nevada Hydro be informed as to the full cost of the proposed interconnection and the terms and conditions under which the interconnection will be implemented and administered.

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In short, Nevada Hydro has adhered to an interconnection process selected for it by the CAISO, SDG&E, and SCE, a process that has resulted in extended delays in the processing of the LEAPS Project's proposed interconnection request. And now SDG&E and the CAISO wrongly seek to use the delays inherent in the process that the CAISO imposed on Nevada Hydro as purported justification to terminate the LGIA, despite the fact that Nevada Hydro's alleged failure to satisfy "mandatory" deadlines is attributable to the CAISO's (and SCE's) own delays. As a result, the alleged "Breaches" cited by SDG&E and the CAISO cannot constitute a Default under Section 17.1.1, and do not permit you to terminate the LGIA.

III. Extending the COD Does Not *Per Se* Constitute a Material Modification, and SDG&E and the CAISO Provide No Support for Your Position That the Alleged "Breaches" Cannot Be Cured by an Extension of the COD, Even if It Constitutes a Material Modification

SDG&E and the CAISO take the position that a change in the COD beyond December 31, 2011 will *per se* constitute a "Material Modification" under the LGIP, and appear to take the position that such a "Material Modification" is somehow inconsistent with the LGIA, therefore precluding Nevada Hydro from "curing" its alleged Breach by simply requesting an extension of its COD. Both of these assertions are meritless, and neither constitutes grounds for declaring a Default and terminating the LGIA.

First, you cite Section 4.4.5 of the LGIP for the proposition that extending the LEAPS Project's COD beyond three years after December 31, 2008, *i.e.*, the COD provided in the original interconnection request, "would result in a Material Modification" under the LGIA. But, Section 4.4.5 does not stand for this proposition. Rather, it provides only that extensions of less than three years in the COD are not material; it does *not* conclude that any extension *beyond* three years is *per se* material. To determine whether the modification is material, SDG&E and the CAISO would first need to determine whether the changed COD would negatively impact later-queued interconnection customers.⁷ In fact, FERC has made clear that such an extension is not material unless it harms an interconnection customer later in the queue,⁸ an evaluation

⁷ A "Material Modification" is defined 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.**" LGIA Article 1, Definitions (emphasis added).

⁸ *E.g.*, *Standardization of Generator Interconnection Agreements and Procedures*, Order No 2003, 68 *Fed. Reg.* 49,845 at P 168 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,146 (2003) ("The impact of a modification depends in large part on the size, location, type of project and the configuration of the Transmission Provider's Transmission System. The various Interconnection Studies

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that SDG&E and the CAISO cannot perform until Nevada Hydro actually requests such an extension (since the requested COD will dictate the scope of potentially-impacted customers). SDG&E and the CAISO simply have no basis to unilaterally conclude that a changed COD is a Material Modification, nor does your letter indicate that you have performed the studies required under the LGIP to determine that to be the case.⁹

Furthermore, even if a COD extension *would* constitute a Material Modification, SDG&E and the CAISO provide no support for your apparent position that such a modification cannot “cure” the alleged Default (which relates solely to the milestone dates provided in Appendix B). You cite to no provision of the LGIA directing that result. In addition, in the past, the CAISO has expressed to FERC its willingness to waive, in connection with a determination that a deferred COD constitutes a Material Modification, “any provisions of the CAISO’s LGIP or the LGIA that might be deemed to require Nevada Hydro to withdraw and resubmit its interconnection request.”¹⁰ Thus, the CAISO has made clear that, *even where a Material Modification is found*, the LGIA can be revised as needed, and any appropriate waivers sought, to ensure that the LGIA is implemented upon a revised timeline. There is no basis for the CAISO and SDG&E to simply jump to the conclusion that a request for a Material Modification fails to cure the alleged Breach and entitles you to terminate the LGIA.

IV. Nevada Hydro Proposes that the Parties Discuss Revisions to the Milestone Dates that Will Correspond to the Proposed Milestone Dates in the LGIA Among SCE, the CAISO, and Nevada Hydro

Nevada Hydro recognizes that the milestone dates in its LGIA are unrealistic at this point, and is amenable to modifying the milestones in the LGIA to reflect attainable dates. However, those dates cannot be determined at this point because its LGIA with SCE is still being negotiated. Therefore, Nevada Hydro believes (given these delays) that it would be prudent to postpone such modification until the CAISO and SCE complete

will identify the modification’s impact on other Interconnection Customers. **This impact determines if the change is indeed a Material Modification.**”) (emphasis added and subsequent history omitted); *Judith Gap Energy LLC*, 125 FERC ¶ 61,169 at P 17 (2008) (affirming that LGIP Section 4.4.5’s conclusion that an extension of less than three years is not a Material Modification “does not lead to the corollary that *all* extensions of the commercial operation date beyond three years are considered material modifications.... [T]he key factor in determining whether a commercial operation date extension of three years of more is “material” is whether the extension will harm later-queued generators.” (emphasis added)).

⁹ See LGIP § 4.4.3 (requiring that the CAISO and Participating TO evaluate whether a proposed modification is material after a modification is requested by an Interconnection Customer).

¹⁰ CAISO Compliance Filing, Docket ER08-654-003 at 8-9 (Feb. 26, 2009).

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processing Nevada Hydro's interconnection request, so that consistent dates can be included in both the SDG&E and SCE LGIAs. By waiting until the SCE LGIA is final, the parties can ensure that the LGIAs are consistent while minimizing the possibility of future conflicts between the two agreements.

Accordingly, Nevada Hydro urges you to reconsider both your position that Nevada Hydro is in Breach of the LGIA and your intent to seek to terminate the LGIA. If, however, you elect to provide notice of termination, Nevada Hydro reserves its right to protest the request for termination in proceedings before the FERC, and to pursue other damages and remedies to which it is entitled at law, as it may deem appropriate.

Please let us know if you have any questions or would like to discuss the matter further.

Sincerely,



Michael J. Rustum
Counsel to Nevada Hydro Company, Inc.

cc:

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Attachment C



November 7, 2011

Michael J. Rustum
Dickstein Shapiro LLP
1825 I Street, NW
Washington, DC 20006-5403

RE: Lake Elsinore Advanced Pumped Storage Project (Queue # 72)

Dear Mr. Rustum:

On May 20, 2011, Rodney Winter at San Diego Gas & Electric Company (SDG&E) sent your client a written Default notice explaining that The Nevada Hydro Company, Inc. (Nevada Hydro) has breached the currently effective Large Generator Interconnection Agreement (SDG&E LGIA) among Nevada Hydro, SDG&E, and the California Independent System Operator Corporation (CAISO) for the Lake Elsinore Advanced Pumped Storage (LEAPS) project.¹

On June 10, 2011, you sent a response to the May 20 Default notice to Mr. Winter and also to Linda Wright at the CAISO. As the CAISO outlines below, your June 10 response fails to demonstrate that Nevada Hydro has not breached the LGIA or that Nevada Hydro has cured or has commenced curing the items of Breach described in the SDG&E May 20 Default notice, as required by Article 17.1.1 of the LGIA. Therefore, the CAISO by this letter provides notice of termination of the LEAPS project LGIA pursuant to Article 17.1.2 of the SDG&E LGIA.²

I. Nevada Hydro's Failure to Meet the Milestone Dates Set Forth in the SDG&E LGIA Constitutes a Breach of the LGIA

Nevada Hydro has failed to meet the project milestone dates set forth in Appendix B to the LGIA. Appendix B requires the milestone dates to be

¹ FERC accepted the currently effective SDG&E LGIA as of May 11, 2008. *Nevada Hydro Company, Inc. and California Independent System Operator Corp.*, 129 FERC ¶ 61,098, at P 2. This letter also sometimes refers to that LGIA as the existing LGIA for the LEAPS project, in order to distinguish it from the LGIA currently being negotiated among Nevada Hydro, the CAISO, and Southern California Edison Company (SCE) regarding a different Point of Interconnection for the LEAPS project, which this letter refers to as the SCE LGIA. Unless otherwise specifically noted in this letter, references to the LGIA are solely references to the existing LGIA for the LEAPS project.

² See May 20 Default notice at 1-2.

achieved in sequence, which means that failure to timely achieve the earlier milestone dates in Appendix B will, in turn, delay achievement of the later milestone dates. As stated in the May 20 Default notice, Nevada Hydro has not yet met the first milestone date (item (a)) listed in Appendix B – submittal of written authorization to SDG&E and the CAISO to proceed with the design, procurement, and construction of non-Stand Alone Reliability Network Upgrades.

Nevada Hydro's failure to submit this written authorization to proceed will by itself delay achievement of the In-Service Date for the LEAPS project by 24 months (two years), because SDG&E requires 24 months for the design, procurement, and construction of non-Stand Alone Reliability Network Upgrades.³ The 24-month time frame for this design, procurement, and construction work by SDG&E is set forth in Table B.2 of Appendix B and thus was acknowledged and agreed to by the parties. The fact that SDG&E's activities require a 24-month time frame is just one of many reasons that Nevada Hydro's failure to submit an authorization for the Participating TO (SDG&E) renders the timeframes for the successive steps unachievable. Indeed, Nevada Hydro's June 10 response concedes the point that "the milestone dates in [Nevada Hydro's] LGIA are unrealistic at this point."⁴ The In-Service Date and the Commercial Operation Date (COD) are not arbitrary, they are specific requirements set forth in the LGIA, which are not subject to change at any time as stated in the June 10 letter. The studies, and subsequent Network/Reliability Upgrades, are based on the proposed milestone dates provided by the interconnecting customer.

Moreover, it is clear that the need for Nevada Hydro to restart its hydro generation facility license application (now that FERC has dismissed the original application) and the required attendant environmental documents for the LEAPS project will only serve to further delay the project's In-Service Date even more. As you know, FERC issued an order dismissing the license application for the LEAPS project on July 12, 2011 (after SDG&E's May 20 Default notice).⁵ While Nevada Hydro has filed a request for rehearing of the FERC order dismissing the license application, FERC has not yet addressed it. As of now, it is uncertain when FERC will issue an order on rehearing, and even when it is issued, the order on rehearing may or may not find that the license application should be reinstated. In any event, an uncertain time frame (which might extend from months to years) now exists for Nevada Hydro to again have a license application – either a new license application or a reinstatement of its dismissed license application – pending FERC review.

Given that more than seven years passed between the submittal of the original license application in 2004 and FERC's order dismissing the license

³ See May 20 Default notice at 1.

⁴ June 10 response at 7.

⁵ *Lake Elsinore Advanced Pumped Storage Project*, 136 FERC ¶ 62,033 (2011).

application in 2011,⁶ it is reasonable that interconnection of a future LEAPS generation project be pursued under a new and separate interconnection request and interconnection study set.

In the June 10 response, you note the language in Appendix B stating that the milestone dates are only estimated dates and do not obligate Nevada Hydro to achieve the milestones by those dates, except that the In-Service Date “shall be in accordance with Section 3.5.1 of the LGIP [Large Generator Interconnection Procedures].”⁷ The relevant language in Section 3.5.1 of the LGIP states that “[t]he In-Service Date may succeed the date the Interconnection Request is received by the CAISO by a period of up to ten years, or longer where the Interconnection Customer, the applicable Participating TO, and the CAISO agree, such agreement not to be unreasonably withheld.”⁸

This language must be evaluated against the facts and circumstances of the project. The CAISO received the Interconnection Request for the LEAPS project on April 26, 2005,⁹ and therefore the ten-year period for the LEAPS project will end in a mere three and a half years, on April 26, 2015. Now, six and a half years after the CAISO received the Interconnection Request, the generation project licensing appears to need to restart its development at the beginning of the process. Given these facts and circumstances, it is not unreasonable for the Participating TO and the CAISO to withhold agreement to additional extensions, especially when considering that, at the present time, the ISO does not see that Nevada Hydro has reasonable basis on which to propose any future date as a likely date by which it can assure it will reach Commercial Operation.

II. Nevada Hydro Has No Basis to Assert that the Milestone Requirements Set Forth In the Existing LGIA For the LEAPS Project Are Tied To the Completion of the Southern California Edison (SCE) LGIA

In the June 10 response, you assert that Nevada Hydro should not be expected to proceed with the development of the LEAPS project or to make financial commitments with respect to the interconnection of the LEAPS project until the negotiation of the SCE LGIA is completed.¹⁰ Nevada Hydro has not shown reasonable basis to make this assertion. No provision in the existing LGIA for the LEAPS project, as accepted by FERC, makes the development of the LEAPS project or Nevada Hydro’s financial commitments contingent upon the completion of the SCE LGIA. In this regard, Article 30.4 of the existing LGIA for the LEAPS project sets forth an integration clause which reflects the fact that the

⁶ *Id.* at P 1.

⁷ June 10 response at 4 & fn. 6.

⁸ LGIP, Appendix U to the CAISO Tariff, Section 3.5.1.

⁹ See <http://www.caiso.com/Documents/ISOGeneratorInterconnectionQueue.pdf> (entry for Queue # 72).

¹⁰ June 10 response at 5.

written LGIA, including all appendices and schedules attached thereto, constitute the entire agreement among the Parties with reference to the subject matter, which would encompass the milestones set out in Appendix B. Moreover, it is significant that nowhere in the FERC orders conditionally accepting the unexecuted LGIA or the compliance filing of the existing LGIA did FERC provide that the effectiveness of the existing LGIA for the LEAPS project depends on the subsequent completion of the SCE LGIA. In fact, any such interdependence of the LGIAs and limitation upon Nevada Hydro's performance obligations under the existing LGIA would be in conflict with the express terms of the existing LGIA and with FERC's order unconditionally approving a May 11, 2008 effective date for that LGIA.¹¹ Indeed, FERC's very acceptance of the existing LGIA is in conflict with Nevada Hydro's interdependence argument: logically, if Nevada Hydro's contention were correct, FERC should have rejected the unexecuted LGIA as premature until the SCE LGIA was also completed and executed.

Thus, Nevada Hydro's Breach of the existing LGIA is entirely unrelated to the issue of how the negotiations of the SCE LGIA are progressing, and there is no merit to Nevada Hydro's argument that SDG&E and the CAISO are precluded from terminating the LGIA for the LEAPS project because of the negotiations of the SCE LGIA.¹²

III. Nevada Hydro Has No Basis for Its Assertions Regarding Material Modification

The June 10 response also erroneously asserts that SDG&E and the CAISO cannot evaluate whether Nevada Hydro's proposed extension constitutes a Material Modification until Nevada Hydro actually requests such an extension, because the requested Commercial Operation Date "will dictate the scope of potentially impacted customers."¹³ On the contrary, the CAISO and SDG&E can certainly evaluate the impact of various time period extensions on other interconnection customers without waiting for a specific time frame in a customer request. Consequently, it would be immaterial to the CAISO's analysis whether Nevada Hydro had requested any particular extension of the Commercial Operation Date.

The June 10 response letter also suggests that, even if extending the Commercial Operation Date would constitute a Material Modification, termination of the LGIA and/or withdrawal of the interconnection request need not follow. In support, the letter asserts that the CAISO expressed to FERC in its February 26, 2009 compliance filing "its willingness to waive," in connection with a

¹¹ See *California Independent System Operator Corp.*, 123 FERC ¶ 61,140, at P 1 (2008); 129 FERC ¶ 61,098, at P 2. Neither Nevada Hydro nor any other party in those FERC proceedings filed a request for rehearing of the Commission's unconditional approval of a May 11, 2008 effective date for the existing LGIA for the LEAPS project.

¹² See June 10 response at 5-6 (citing Section 17.1.1 of the existing LGIA for the LEAPS project).

¹³ June 10 response at 6-7.

determination that a deferred Commercial Operation Date constitutes a Material Modification, any provisions in the LGIP or LGIA that might be deemed to require Nevada Hydro to withdraw and resubmit its interconnection request.¹⁴

This assertion in the June 10 response overstates what the CAISO actually said in the February 26, 2009 compliance filing. In that filing, the CAISO merely stated that, if the CAISO determined that the extension of the milestone dates previously proposed by Nevada Hydro (which extension was reflected in the milestone dates contained in Appendix B to the SDG&E LGIA included in the compliance filing) would result in an adverse impact on a lower-queued interconnection customer, and the remedy for the adverse impact were to involve the construction of additional network upgrades or the need for Nevada Hydro to fund the cost of construction of the network upgrades in advance of its own construction schedule in order to provide anticipated transmission capacity for the lower-queued interconnection customer, then the CAISO expected to propose an amendment to the LGIA to incorporate responsibility of Nevada Hydro for those additional network upgrades or advance funding; and, in conjunction with such an amendment, the CAISO would “*consider seeking a waiver of the CAISO’s LGIP or the LGIA that might be deemed to require Nevada Hydro to withdraw and resubmit its interconnection request.*”¹⁵ Such limited consideration of whether to seek a waiver is a far cry from the blanket assertion in the June 10 response that the CAISO is willing to seek a waiver in all circumstances, including the different circumstances that prevail today, well over two years after the CAISO made that limited statement. Given Nevada Hydro’s complete lack of progress in meeting the milestones set forth in Appendix B to the LGIA, there is no reason for the CAISO to seek a waiver of the provisions of the LGIP or LGIA on Nevada Hydro’s behalf.

IV. Notice of Termination of the Existing LGIA

For the reasons set out above, the CAISO and SDG&E have determined that Nevada Hydro has breached the terms of the LGIA for failure to meet milestone dates set forth in Appendix B to the LGIA. The facts and circumstances surrounding the LEAPS project are such that that the items of Breach cannot be timely cured, and the June 10 response letter indicates that Nevada Hydro has no present willingness to respond to the May 20 Default notice with a plan for cure of Breach. It is objectively clear that Nevada Hydro is unable at this time to provide further dates for milestones in the LGIA pertaining to the permitting and Commercial Operation Date of the LEAPS project, because it has no current basis in fact to provide reasonable time projections for the milestone events. For these reasons, the CAISO and SDG&E will not agree to extension of the milestone dates set out in Appendix B. Accordingly, by this

¹⁴ June 10 response at 7 (citing CAISO compliance filing, Docket No. ER08-654-003, at 8-9 (Feb. 26, 2009)) (quotation marks omitted).

¹⁵ CAISO compliance filing, Docket No. ER08-654-003, at 9 (emphasis added).

letter, the CAISO provides notice of termination of the existing LGIA for the LEAPS project pursuant to Article 17.1.2.

Sincerely,



Stephen Ruty
Director, Grid Assets
California Independent System Operator Corporation

Cc:

Pat Alexander (Dickstein Shapiro)
Rex Wait (Nevada Hydro)
David Kates (Nevada Hydro)
Will Speer (SDG&E)
Mariam Mirzadeh (SDG&E)
Rodney Winter (SDG&E)
James Walsh (SDG&E)
Jon Newlander (SDG&E)
Brad Miliauskas (Alston)
John Anders (ISO)
Bill Di Capo (ISO)
Keith Johnson (ISO)
Bob Emmert (ISO)
Linda Wright (ISO)
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Attachment D

DICKSTEINSHAPIRO_{LLP}

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November 23, 2011

Stephen Rutty
Director, Grid Assets
California Independent System Operator Corporation
250 Outcropping Way
Folsom, CA 95630

RE: Response to November 7, 2011 Letter Providing Notice of Termination of the Large Generator Interconnection Agreement Among San Diego Gas & Electric Company, The California Independent System Operator Corporation, and the Nevada Hydro Company, Inc.

Dear Mr. Rutty:

We are responding to your November 7, 2011 letter (“Termination Notice”) in which the California Independent System Operator Corporation (“CAISO”) provides notice of termination of the Large Generator Interconnection Agreement (“LGIA”) among The Nevada Hydro Company, Inc. (“Nevada Hydro”), San Diego Gas & Electric Company (“SDG&E”) and the CAISO, on the grounds that Nevada Hydro’s alleged failure to meet the milestone dates in Appendix B to its LGIA authorizes the CAISO or SDG&E to terminate the LGIA.

As stated in its June 10, 2011 response (the “June 10 Letter”) to SDG&E’s May 20, 2011 letter (the “May 20 Letter”), Nevada Hydro disputes any argument that the CAISO or SDG&E have authority under the LGIA to declare a breach and seek to terminate the LGIA, and Nevada Hydro incorporates by reference its June 10 Letter and the positions stated therein. Simply put, the assumptions underlying your claimed termination are wrong or -- at best -- premature, and should the CAISO or SDG&E seek to terminate the LGIA at the Federal Energy Regulatory Commission (“FERC”), as is required by Section 2.3.4 of the LGIA to effectuate termination, Nevada Hydro believes that the record will amply demonstrate that the grounds upon which your claimed termination rests are baseless.

First, you claim that Nevada Hydro’s failure to meet the milestone dates established in Appendix B to the LGIA constitutes a breach of the LGIA. However, the milestones in Appendix B are tied to dates -- the In Service Date, Initial Synchronization Date, and Commercial Operation Date -- that, as FERC has recognized¹ and Nevada

¹ *California Indep. Transmission Sys. Operator Corp.*, 126 FERC ¶ 61,078 at P 15 and n.30 (2009).



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Hydro explained in its June 10 Letter, are not binding, and that Nevada Hydro has express authority to change. For the CAISO to contend that such dates “are not subject to change at any time” and convert those milestones into binding commitments, and preemptively seek to terminate the LGIA based upon Nevada Hydro’s failure to meet them, is directly contrary to the plain language of the LGIA.²

Furthermore, the CAISO’s assertion that Section 3.5.1 of the Large Generator Interconnection Procedures (“LGIP”) allows it to preemptively terminate the LGIA because, in the CAISO’s purely speculative judgment, Nevada Hydro might be unable to meet a COD of April 26, 2015, is without support in the LGIA or LGIP. As a threshold matter, Section 3.5.1 grants Nevada Hydro the right to extend its COD to any date prior to April 26, 2015, extensions that are not subject to the CAISO’s discretion (whether reasonably exercised or not). In any event, Nevada Hydro is working diligently to obtain the regulatory approvals and financing needed to develop the Lake Elsinore Advanced Pumped Storage (“LEAPS”) facility.

In this regard, the CAISO’s preemptive termination of the LGIA wrongly denies Nevada Hydro even the *opportunity* to achieve under its current LGIA a COD prior to April 26, 2015. In so doing, the CAISO cites the FERC’s order dismissing the license application for the LEAPS facility. In its order on rehearing, however, FERC stated that the license application was dismissed only on procedural grounds, that the dismissal in no way represents a conclusion as to the merits of the LEAPS facility, and that it may be possible to use in a subsequent licensing proceeding those portions of the record that already have been developed.³ Nevada Hydro, in fact, submitted a new application for the identical project on July 18, 2011, in Docket No. P-14227-000. Thus, the CAISO’s speculation that a replacement application would necessarily take as long as the initial application to process is without merit. Rather than allowing FERC to rule on the merits of Nevada Hydro’s application, and at that time making a determination of whether Nevada Hydro’s interconnection will be delayed further, the CAISO simply speculates as to potential consequences of FERC’s hypothetical action. Nothing in the LGIA or LGIP confers this authority upon the CAISO, let alone permits the CAISO to terminate the LGIA through its exercise of that claimed authority.

² “The Interconnection Customer is permitted to select later dates for each of the In-Service Date, Initial Synchronization Date and/or the Commercial Operation Date set forth in Appendix B These dates are only estimated dates and do not obligate Interconnection Customer to achieve such milestones by such dates, except that the In-Service Date shall be in accordance with Section 3.5.1 of the LGIP.” SDG&E LGIA, Appendix B at p. 84.

³ *The Nevada Hydro Company, Inc.*, 137 FERC ¶ 61,133 (2011) at PP 32, 36 and n.19.

Stephen Ritty
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Nevada Hydro is also disappointed by the CAISO's willful and knowing indifference to the complexity of the LEAPS project. As the CAISO well knows, Nevada Hydro has diligently pursued state permitting for the transmission line between SDG&E's and SCE's transmission systems and the LEAPS facility as a necessary prerequisite to financing development of the LEAPS facility. Moreover, the CAISO is fully aware that the LEAPS project was submitted as a single interconnection request with two points of interconnection, and that the decision to process that request through separate studies and agreements was made by, and for the benefit of, the CAISO, SDG&E, and Southern California Edison ("SCE"). Nevada Hydro did not contest that decision, and in good faith relied on the CAISO's assurances that such approach would not prejudice Nevada Hydro's rights or unduly delay interconnection. At the time the SDG&E LGIA was filed with and accepted by FERC, Nevada Hydro had no reason to believe, and thus no basis to inform FERC, that the companion SCE LGIA would be subject to years of additional delay caused in part by the CAISO or that the overall development process would become mired in regulatory bureaucracy. For these reasons, we believe the CAISO has misplaced reliance on the integration clause of Article 30.4, and should not now hold against Nevada Hydro the fact that there is no express reference in the SDG&E LGIA to the SCE process.

Accordingly, Nevada Hydro again urges the CAISO and SDG&E to reconsider both your position that Nevada Hydro is in Breach of the LGIA and your notice of termination. Should you proceed to file a notice of proposed termination pursuant to Section 205 of the Federal Power Act and Section 35.15 of the FERC regulations, Nevada Hydro reserves its right to protest such request.

Please let us know if you have any questions or would like to discuss the matter further.

Sincerely,



Michael J. Rustum
Counsel to The Nevada Hydro Company,
Inc.

cc:
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