

149 FERC ¶ 61,107  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

California Independent System  
Operator Corporation

Docket No. ER14-2824-000

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS

(Issued November 7, 2014)

1. On September 10, 2014, California Independent System Operator Corporation (CAISO) submitted a proposed *pro forma* Approved Project Sponsor Agreement (*pro forma* APSA) to be added as Appendix X to its Open Access Transmission Tariff (Tariff or CAISO Tariff). CAISO states that the *pro forma* APSA sets forth the terms and conditions that will govern an approved project sponsor's responsibilities and relationship with CAISO during the period prior to the time that the CAISO assumes operational control over the approved project sponsor's transmission facilities. In this order, the Commission conditionally accepts CAISO's proposed *pro forma* APSA, effective November 10, 2014, as requested, subject to a compliance filing, as discussed below.

**I. Background**

2. CAISO explains that it employs an annual transmission planning process, approved by the Commission, which consists of three transmission planning phases.<sup>1</sup> During phase 1, CAISO identifies study assumptions and develops a study plan. During phase 2, CAISO identifies the need for reliability-driven, policy-driven, and economic transmission solutions and develops the transmission solutions that meet those needs in the most cost-effective and efficient manner. CAISO states that these transmission solutions are designed for inclusion in a transmission plan that is approved by its Board of Governors at the end of phase 2. During phase 3, CAISO conducts a competitive solicitation for construction of all transmission solutions included in the transmission

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<sup>1</sup> CAISO Transmittal Letter at 1-2.

plan, except for local transmission facilities,<sup>2</sup> and selects an approved project sponsor based on the criteria set forth in the Tariff. CAISO notes that the approved project sponsor is not required to be an existing participating transmission owner (PTO). CAISO states that once selected, the approved project sponsor must enter into an approved project sponsor agreement with CAISO within 120 days.

3. CAISO states that in the 2012-2013 transmission planning process, it identified three transmission solutions that were subject to the phase 3 competitive solicitation process: (1) the Imperial Valley Element, (2) the Gates-Gregg Project and (3) the Sycamore-Penasquitos Project. CAISO states that it negotiated separate APSAs with each of these approved project sponsors.<sup>3</sup> According to CAISO, its Tariff contains a “high level structure” for selecting an approved project sponsor and for the selected sponsor to interact with CAISO during the construction period, but the details about each project construction and network interconnection vary according to the project and therefore must be included in a separate agreement.<sup>4</sup> CAISO states that a separate agreement is also necessary because approved project sponsors who are not PTOs are not subject to the Tariff until such time as they enter into the transmission control agreement and turn the facility over to CAISO operational control. CAISO states that it developed the *pro forma* APSA in response to stakeholder requests, and conducted a stakeholder process over the past several months.<sup>5</sup>

## II. CAISO’s Filing

4. CAISO states that the proposed *pro forma* APSA sets forth the terms and conditions that will govern an approved project sponsor’s responsibilities and relationship with CAISO prior to the time that the CAISO assumes operational control over the transmission facilities. CAISO notes that, as a *pro forma* agreement, individual APSAs

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<sup>2</sup> These facilities include those under 200 kV located entirely within a participating transmission owner’s service territory or footprint and any upgrades or additions to existing transmission facilities. *Id.* at 2.

<sup>3</sup> *Id.* The Imperial Valley Element APSA was accepted by unpublished letter order dated July 15, 2014, in Docket No. ER14-2033-000; the Gates-Gregg Project APSA was accepted by unpublished letter order dated August 12, 2014, in Docket No. ER14-2347-000; and the Sycamore-Penasquitos Project APSA was accepted by unpublished letter order dated October 8, 2014, in Docket No. ER14-2629-000.

<sup>4</sup> CAISO Transmittal Letter at 3.

<sup>5</sup> *Id.*

will not be required to be filed with the Commission unless they contain non-conforming changes. CAISO states that Article 1 defines certain terms in the *pro forma* APSA.<sup>6</sup> CAISO states that Article 2 sets forth the effective date, term and termination, and provides that, except for certain specified sections, the *pro forma* APSA terminates when the approved project sponsor turns the facilities over to CAISO's operational control. CAISO explains that, pursuant to Article 3, the approved project sponsor agrees to comply with all applicable provisions of the Tariff, to become a PTO, and to enter into the transmission control agreement.<sup>7</sup> CAISO notes that Article 3 provides that in the case of a conflict between the *pro forma* APSA and the Tariff, the Tariff governs.

5. CAISO states that Article 4 describes the approved project sponsor's obligations to seek transmission interconnection service, in accordance with the milestones included in Appendix B of the *pro forma* APSA, from the PTO or other entity to whom those facilities will connect, and to enter into a transmission interconnection service agreement.<sup>8</sup> CAISO states that Article 4 sets forth certain minimum requirements that the approved project sponsor must include in the interconnection agreement, including status reports to be provided to CAISO. Article 4 also provides that the approved project sponsor agrees that the PTO's handbook will govern certain interconnection requirements, if applicable.

6. CAISO explains that Article 5 sets forth the approved project sponsor's obligations with respect to its facilities, including accepting responsibility for procurement, construction, ownership, and installation in connection with the project, and requires CAISO approval of changes in project design.<sup>9</sup>

7. CAISO states that Article 6 requires the interconnecting entity and approved project sponsor to test the project prior to energization to ensure safe and reliable operation and to make any necessary modification to address observed deficiencies.<sup>10</sup> CAISO states that Article 7 requires metering consistent with the Tariff requirements and Article 8 requires operating communications with CAISO consistent with the Tariff and

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<sup>6</sup> CAISO explains that it made some changes to certain definitions as a result of the stakeholder process. *Id.* at 4.

<sup>7</sup> *Id.* at 5-6.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.*

the interconnecting entity.<sup>11</sup> CAISO explains that Article 9 establishes the obligation of each party to perform its operational responsibilities prior to the CAISO's assumption of operational control in accordance with applicable reliability requirements and other requirements made applicable by the CAISO's procedures or the agreement, and requires the parties to establish procedures for start-up, testing, and energization of the project.<sup>12</sup>

8. CAISO explains that Article 10 provides for the approved project sponsor to seek Commission approval of a transmission revenue requirement to recover the costs of its project before the transmission facilities become operational, and for CAISO to collect that revenue requirement through the regional access charge.<sup>13</sup> CAISO states that Articles 11 and 12 are standard provisions addressing regulatory requirements, governing laws, and notices, and that Article 13 contains standard provisions concerning force majeure.<sup>14</sup>

9. CAISO states that Article 14 provides the terms and conditions for default, including a 90-day opportunity to cure a breach.<sup>15</sup> CAISO notes that section 14.3 addresses the approved project sponsor's right to assign the *pro forma* APSA for financial security collateral purposes, which allows the *pro forma* APSA to continue in place under certain circumstances and could prevent the need to select a new project sponsor if the collateral assignee is able to cure the breach.

10. Finally, CAISO states that Articles 15 through 25 reflect standard provisions in other CAISO *pro forma* agreements, with some minor changes that cover indemnity and consequential damages, assignment, severability, comparability, confidentiality, environmental releases, information access and audit rights, subcontractors, disputes, representations and warranties, and covenants, respectively.<sup>16</sup>

11. CAISO requests that the *pro forma* APSA be made effective on November 10, 2014.

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 11.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 11-12.

<sup>15</sup> *Id.* at 12.

<sup>16</sup> *Id.* at 13.

### **III. Notice and Responsive Filings**

12. Notice of CAISO's tariff filing was published in the *Federal Register*, 79 Fed. Reg. 56,351 (2014), with interventions and protests due on or before October 1, 2014. Timely motions to intervene were filed by NRG Companies; Six Cities (the Cities of Anaheim, Azusa, Banning, Colton, Pasadena and Riverside, California); and the California Department of Water Resources State Water Project. The California Public Utilities Commission filed a notice of intervention. An untimely motion to intervene was filed by Exelon Corporation (Exelon). Timely motions to intervene and protests were filed by Southern California Edison Company (SoCal Edison); NextEra Energy Transmission, LLC (NextEra), and LS Power Transmission, LLC and LSP Transmission Holdings, LLC (LSP Transmission). An untimely motion to intervene and protest was filed by TransCanyon, LLC (TransCanyon). On October 14, 2014, CAISO submitted an answer to the protests and comments (CAISO Answer).

### **IV. Discussion**

#### **A. Procedural Matters**

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), the Commission will grant Exelon's and TransCanyon's late-filed motions to intervene given their interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept CAISO's answer because it has provided information that assisted us in our decision-making process.

#### **B. Substantive Matters**

16. We will conditionally accept the *pro forma* APSA, effective November 10, 2014, as requested, subject to CAISO submitting a compliance filing within 30 days of the date of this order. We find that the uncontested aspects of the *pro forma* APSA are otherwise just and reasonable, and we accept them without further discussion. We next turn to discussion of the contested issues.

## 1. CAISO's Role in Transmission Interconnections

### a. CAISO Proposal

17. Section 4.2 of the proposed *pro forma* APSA provides that unless the project connects solely to the facilities of the approved project sponsor, the approved project sponsor must request transmission interconnection service from the Interconnecting PTO or other entity to whom the transmission facilities it will interconnect, and enter into a separate agreement for transmission interconnection service. Appendix B to the *pro forma* APSA requires the approved project sponsor to execute an interconnection agreement with the applicable PTO prior to the commencement of construction. Section 4.2 does not require CAISO to be a party to the transmission interconnection agreement. CAISO states that the nature of the transmission interconnection arrangement is a matter to be negotiated by the approved project sponsor and the interconnecting transmission owner and therefore it does not believe it necessary that there be a contractual relationship between CAISO and the interconnecting transmission owner.<sup>17</sup> CAISO contends that the *pro forma* APSA only requires that certain matters be included in the agreement to the extent they directly affect CAISO, and that other matters are left to the individual parties involved.<sup>18</sup>

18. CAISO notes that Article 4 sets forth certain minimum requirements that the approved project sponsor must include in the interconnection agreement, such as an obligation on the interconnecting transmission owner to provide status reports to CAISO and, if applicable, an agreement that the PTO's handbook will govern certain interconnection requirements. CAISO states that one stakeholder recommended that CAISO require the interconnecting transmission owner to provide the status reports to the approved project sponsor. CAISO contends that decisions as to whether to include such a requirement in the interconnection agreement are best left to the negotiations between the approved project sponsor and the interconnecting transmission owner.<sup>19</sup> CAISO states that, for the same reasons, it did not accept stakeholder suggestions that it limit the matters that may be included in the interconnection handbook or require posting of the handbook.

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<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 6-7.

**b. Protests**

19. NextEra explains that in many cases the interconnection will be between facilities owned by a nonincumbent developer and an incumbent PTO, after the nonincumbent transmission developer has prevailed in the CAISO's competitive solicitation process over entities that may include the incumbent PTO. NextEra argues that since significant delays can cause the nonincumbent transmission developer to lose the right to proceed with its project, the incumbent PTO could benefit from material delays in the nonincumbent's development of the transmission solution, resulting in a conflict of interest.<sup>20</sup> NextEra contends that CAISO should have a role in ensuring that transmission interconnections are performed in a way that counters any possible discrimination against nonincumbent transmission developers. NextEra requests that the Commission require CAISO and the incumbent transmission owners to file their transmission interconnection procedures as part of the CAISO Tariff and require CAISO to enter into a contractual relationship with the interconnecting PTO as part of the transmission interconnection process.<sup>21</sup>

20. LSP Transmission also argues that an interconnection agreement between the approved project sponsor and the interconnecting PTO is needed to address the wires-to-wires interconnection. LSP Transmission contends that in the vast majority of circumstances the interconnection is with transmission facilities under CAISO operational control, so the underlying construction of the interconnection facilities should be addressed directly by CAISO.<sup>22</sup> LSP Transmission states that it is concerned that by shifting to transmission developers the responsibility to negotiate the underlying construction obligations for interconnections selected by CAISO in a competitive solicitation, the *pro forma* APSA unintentionally provides an advantage to incumbent developers, because the obligations of Article 4 of the *pro forma* APSA do not apply when the interconnecting PTO is also the approved project sponsor.<sup>23</sup>

21. LSP Transmission contends that the proposed provision leaves nonincumbent transmission developers in the position of having to negotiate an agreement with an incumbent transmission owner, who is likely also a submitting a response to CAISO's competitive solicitation, when the interconnection will be the same regardless of the

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<sup>20</sup> NextEra Protest at 3.

<sup>21</sup> *Id.*

<sup>22</sup> LSP Transmission Protest at 2-3.

<sup>23</sup> *Id.* at 4.

project sponsor selected and will have been determined by the CAISO in the first instance.<sup>24</sup> LSP Transmission adds that, to the extent that the incumbent transmission owner is a bidder in the competitive solicitation, the incumbent will have little incentive to negotiate the terms of the agreement *before* the bid submission thus leaving nonincumbent transmission developers having to negotiate after the fact, needlessly raising risk factors for a project that CAISO selected. LSP Transmission contends that because the CAISO regional transmission planning process selects the transmission project before it is subject to the competitive solicitation, and because CAISO determines the interconnection needed, CAISO should address construction of needed interconnection facilities directly with the interconnecting PTO.<sup>25</sup> LSP Transmission argues that by doing so, CAISO takes away the incentive to game the interconnection as part of the competitive solicitation process.

**c. CAISO Answer**

22. CAISO contends that NextEra's and LSP Transmission's recommendations are based purely on speculation and without any specific evidence that the existing Tariff framework is unjust and unreasonable. CAISO states that because the PTOs have Commission-approved transmission interconnection tariff provisions in place, to the extent they fail to comply with those provisions or act in an unduly discriminatory or preferential manner, interconnecting transmission owners can seek recourse at the Commission.<sup>26</sup>

23. Moreover, CAISO agrees that, in a future compliance filing, it will clarify in the *pro forma* APSA that approved project sponsors will not be held accountable for delays caused by the interconnecting PTO.<sup>27</sup> CAISO states that this clarification addresses NextEra's concern that a PTO may seek to delay an awarded project with the hope that CAISO might reassign the project to the PTO as the result of delay. CAISO argues that the Commission need not overhaul the existing transmission facility interconnection framework and Tariff provisions to achieve this result.<sup>28</sup> Further, according to CAISO, to

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<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> CAISO Answer at 4.

<sup>27</sup> *Id.*, referencing a clarification that CAISO agrees to make to section 5.8 of the *pro forma* APSA, discussed later in this order.

<sup>28</sup> *Id.*

the extent the Commission believes that transmission interconnection reform is needed, such issues should be considered on a nationwide basis, *via* a general rulemaking proceeding involving all transmission providers, and not in a CAISO *pro forma* APSA proceeding. CAISO further contends that the current construct of not including in competitive solicitations the project's interconnection to existing participation transmission owner facilities avoids the concern that an incumbent PTO may charge a competitor more than it would charge itself to interconnect.<sup>29</sup>

24. Finally, CAISO states that LSP Transmission's concern that if an incumbent transmission owner is a bidder in the competitive solicitation it will have little incentive to negotiate the terms of an interconnection agreement before bid submission is misplaced and based on a misunderstanding of the CAISO process. CAISO states that it would not expect PTOs to negotiate interconnection agreements before the approved project sponsor is determined. CAISO explains that because there may be many competing project sponsors, only one of which CAISO will select, such negotiations, in advance would entail a waste of both the PTO's and the project sponsors' resources.<sup>30</sup>

25. CAISO also states that the "wires-to-wires" interconnection facilities that the PTO will build are not part of the transmission solution that is the subject of the competitive solicitation. According to CAISO, PTO action (or inaction) regarding the interconnection of facilities cannot disadvantage other project sponsors in the competitive solicitation process. CAISO states that once it selects an approved project sponsor, the approved project sponsor can seek interconnection from the interconnecting PTO, who will have an obligation to provide for interconnection under its tariff. Thus, CAISO contends that its framework provides no opportunity for a PTO to undermine the proposal of a nonincumbent project sponsor based on transmission facility interconnection.<sup>31</sup> Finally, CAISO notes that it has conducted competitive solicitations that included multiple nonincumbent transmission developers in addition to the approved project sponsor and has not encountered any interference by PTOs with the development of competing applications.

**d. Commission Determination**

26. We will not require CAISO to enter into the transmission interconnection agreements between the interconnecting PTO and nonincumbent transmission developer.

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<sup>29</sup> *Id.* at 4-5.

<sup>30</sup> *Id.* at 5.

<sup>31</sup> *Id.* at 5-6.

CAISO and PTOs have a contractual relationship under the transmission control agreement and the Tariff, both of which are on file with the Commission, governing a PTOs' obligations to expand transmission facilities to accommodate interconnections, including transmission interconnections.<sup>32</sup> However, CAISO is not a transmission owner and need not be a party to the transmission interconnection agreement between the project sponsor and the Interconnecting PTO. We are not persuaded by NextEra's and LSP Transmission's arguments that, absent a direct CAISO role in the transmission interconnection agreement, nonincumbent transmission developers will be disadvantaged. First, protestors have articulated only a speculative concern in that regard, which, as CAISO points out, is not supported by past experience. Second, as discussed later in this order, we condition our acceptance of the *pro forma* APSA on CAISO submitting a compliance filing to clarify that the approved project sponsor will not be held accountable for delays caused by the interconnecting PTO. We believe this clarification addresses the concern that an interconnecting PTO may have undue influence on an approved project sponsor meeting its milestones reflected in the *pro forma* APSA.

27. We also decline to require that PTOs include their transmission interconnection procedures in the CAISO Tariff. Because we are not requiring CAISO to be a party to the transmission interconnection agreement between an approved project sponsor and the Interconnecting PTO, we find no reason to require the PTOs' transmission interconnection procedures to be included in CAISO's Tariff. We note that any wires-to-wires interconnection agreement entered into with a Commission-jurisdictional transmission provider would be required to be filed with the Commission. As the Commission has previously stated, a public utility must file any contracts that in any manner affects or relates to Commission-jurisdictional service.<sup>33</sup> We also note that in *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187 (2014) (PJM Order), the Commission declined a protester's request for a *pro forma* interconnection agreement.<sup>34</sup>

28. We disagree with LSP Transmission that section 4.2 of *pro forma* APSA leaves the approved project sponsor in the position of having to negotiate an agreement with an incumbent transmission owner that may be competing for the project. At the stage of the process where CAISO has selected an approved project sponsor, and a wires-to-wires interconnection is requested, there is no longer competition between the approved project

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<sup>32</sup> See Amended and Restated Transmission Control Agreement, section 11. See also CAISO Tariff section 24.

<sup>33</sup> See, e.g., *South Carolina Elec. & Gas Co.*, 147 FERC ¶ 61,126, at n.443 (2014).

<sup>34</sup> See PJM Order, 148 FERC ¶ 61,187 at P 86.

sponsor and the incumbent transmission owner for sponsorship of the particular transmission project. With regard to LSP Transmission's request that CAISO address construction of needed interconnection facilities directly with the Interconnecting PTO, CAISO notes that such facilities will have been identified in CAISO's transmission plan and Interconnecting PTOs would therefore have an obligation to proceed with permitting and construction of these facilities pursuant to terms and conditions of their respective tariffs.<sup>35</sup>

29. We believe, however, that because executing a transmission interconnection service agreement with the Interconnecting PTO is one of the milestones in the *pro forma* APSA between CAISO and the approved project sponsor, and because in some cases the implementation of CAISO's transmission plan will require transmission upgrades to be completed by an approved project sponsor and the Interconnecting PTO(s), CAISO can play an important role coordinating among the parties to ensure timely completion of transmission upgrades. Therefore, we direct CAISO to submit a compliance filing to modify the *pro forma* APSA to provide that CAISO may facilitate coordination between the approved project sponsor and the Interconnecting PTO(s).<sup>36</sup> The compliance filing must be submitted within 30 days of the date of this order.

## 2. Definition of Force Majeure

### a. CAISO Proposal

30. For purposes of the *pro forma* APSA, CAISO proposes to reflect the following revision from the existing definition of "force majeure" in its Tariff<sup>37</sup> as follows (changes underlined):

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<sup>35</sup> Further, an approved project sponsor may file a complaint under section 206 of the Federal Power Act if it believes that circumstances demonstrate that the lack of CAISO involvement in wires-to-wires interconnection agreements has led to unreasonable delays or other problems.

<sup>36</sup> We note that this is a similar approach to the proposal accepted in *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187, at PP 73, 77, and 81 (2014) (PJM Order) (accepting PJM Interconnection, L.L.C.'s (PJM) proposal for PJM to act as facilitator to coordinate interconnection between designated entity (similar to approved project sponsor) and the transmission owner).

<sup>37</sup> See CAISO Tariff, Appendix A, Definitions.

...any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, earthquake, or explosion, any order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, or any other cause beyond the reasonable control of the Parties that could not have been avoided through the exercise of Good Utility Practice. A Force Majeure event does not include (1) acts of negligence or intentional wrongdoing by the Party claiming Force Majeure; (2) economic conditions that render a Party's performance of this Agreement unprofitable or otherwise uneconomic; (3) economic hardship of either Party; or (4) failure or delay in granting of necessary permits for reasons not caused by Force Majeure.<sup>38</sup>

CAISO states that it proposes these changes because it concluded that the listed categories of events that qualify as force majeure might not cover all events, and that it therefore added the phrase containing "Good Utility Practice" to make the definition of force majeure consistent with the Tariff definition of "uncontrollable force."<sup>39</sup> CAISO states that the exclusions (as underlined above) should not excuse nonperformance of contractual terms.<sup>40</sup>

**b. Protests**

31. In its protest, SoCal Edison seeks to confirm that CAISO's intent in expressly excluding from the definition of force majeure "economic conditions that render a Party's performance of this Agreement unprofitable or otherwise uneconomic" is to exclude only those economic conditions that are not otherwise a force majeure. SoCal Edison contends that an economic condition that results from an act of God or governmental

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<sup>38</sup> *Pro Forma* APSA, Article 1, Definitions.

<sup>39</sup> CAISO Transmittal Letter at 4. The definition of "uncontrollable force" in the CAISO Tariff is: "Any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm, flood, earthquake, explosion, any curtailment, order, regulation or restriction imposed by governmental, military or lawfully established civilian authorities or any other cause beyond the reasonable control of the CAISO or Market Participant which could not be avoided through the exercise of Good Utility Practice." CAISO Tariff, Appendix A, Definitions.

<sup>40</sup> CAISO Transmittal Letter at 5.

regulation or restriction should still qualify as force majeure. SoCal Edison argues that if CAISO's intent is to exclude all economic consequences, regardless of how they arise, the definition is not just and reasonable and that the phrases "... (2) economic conditions that render a Party's performance of this Agreement unprofitable or otherwise uneconomic; (3) economic hardship of either Party..." should be removed.<sup>41</sup>

32. Similarly, TransCanyon argues that the general exclusion of all economic conditions that may render a party's performance unprofitable or uneconomic is overly broad and ignores the fact that there may be legitimate extraordinary factors beyond the control of a developer that would render a project uneconomic or unprofitable.<sup>42</sup> TransCanyon contends that CAISO should revise the definition of force majeure to include, or at least not explicitly exclude, extraordinary events beyond the control of the developer that would render the project uneconomic or unprofitable.<sup>43</sup>

**c. CAISO Answer**

33. In its answer, CAISO restates that the definition of force majeure in the *pro forma* APSA derives from the term "uncontrollable force" in the Tariff and is reasonable. CAISO states that although the Tariff defines the term "force majeure," that term is not used within the Tariff. Rather, according to CAISO, section 14 of the Tariff, which is entitled "Force Majeure, Indemnity, Liabilities, and Penalties" uses the defined term "uncontrollable force" when referring to events beyond a party's control. CAISO states, however, that agreements use the term "force majeure" with the definition provided in the Tariff.<sup>44</sup>

34. CAISO explains that after it sought a tariff waiver in connection with the September 2011 outage in the southwest, it committed to undertake a stakeholder process, which is underway, to better define the interaction between force majeure events and obligations under the Tariff. In the interim, because the *pro forma* APSA implements provisions of section 24 of the Tariff, CAISO concluded it was appropriate as

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<sup>41</sup> SoCal Edison Protest at 3. SoCal Edison notes that the *pro forma* Large Generator Interconnection Agreement (LGIA) uses the CAISO Tariff definition of force majeure, but separately excludes economic hardship in section 16.1.1. *Id.* n.3.

<sup>42</sup> TransCanyon Protest at 1-2.

<sup>43</sup> *Id.* at 2.

<sup>44</sup> CAISO Answer at 12.

a general matter to use the Tariff definition regarding events beyond a party's control, i.e., to define "force majeure" in the same manner as "uncontrollable force."<sup>45</sup>

35. CAISO reiterates that in response to stakeholder questions, it concluded that clarifying the aforementioned exclusions was appropriate to specify certain circumstances that were not beyond the reasonable control of a party or could be avoided through exercise of good utility practice. To that end, CAISO emphasizes that it considers these additions to be clarifications, rather than new modifications.<sup>46</sup>

36. CAISO restates that it does not intend for economic conditions that render a party's performance of the *pro forma* APSA unprofitable or otherwise uneconomic to constitute force majeure. According to CAISO, an approved project sponsor is different than a merchant transmission project. In the case of an approved project sponsor, an entity agrees to build a project that CAISO has determined is necessary on a cost-based basis. The entity accepts the risk that economic conditions might change. Ordinarily, this is not a significant risk because the sponsor is guaranteed recovery of its prudent and just and reasonable expenditures. The only circumstance in which there is likely to be a greater risk is when the project sponsor agrees to a fixed cost cap or other cost-containment measure. However, explains CAISO, a project sponsor that CAISO selected as the approved project sponsor based on its use of a cost cap should not later be able to avoid its commitment by pointing to changed economic circumstances.<sup>47</sup>

**d. Commission Determination**

37. We will accept the *pro forma* APSA definition of force majeure as proposed. Excluding economic hardship from force majeure events is consistent with both a natural reading of force majeure as it is already defined in CAISO's Tariff, as well as the common understanding of the term.<sup>48</sup> Excluding economic hardship from the definition is also consistent with Commission precedent addressing similar issues.<sup>49</sup> In Order

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 12-13.

<sup>47</sup> *Id.* at 13-14.

<sup>48</sup> Black's Law Dictionary (9<sup>th</sup> ed. 2009) defines force majeure as an "event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars)."

<sup>49</sup> See PJM Order, 148 FERC ¶ 61,187; *New England Power Generators Ass'n v. ISO New England Inc.*, 144 FERC ¶ 61,157, at P 58 (2013) (unwillingness to procure fuel

(continued ...)

No. 2003,<sup>50</sup> the Commission pointedly found that economic hardship should be excluded from the definition of force majeure, stating that economic hardship is not considered an event outside the control of the party.<sup>51</sup> Accordingly, article 16.1.1 of the Commission's *pro forma* LGIA states that economic hardship is not a force majeure event. For these reasons, we find CAISO's proposed definition of force majeure to be just and reasonable requiring no further modifications.

### 3. Posting of Financial Security

#### a. Protests

38. SoCal Edison notes that CAISO's proposed *pro forma* APSA requires no posting of financial security to cover the incremental costs of construction resulting from a reassignment of the project due to default or abandonment. SoCal Edison argues that without some reasonable financial security requirement, utility ratepayers may bear costs associated with transferring the project to an alternative project sponsor or a backstop PTO, costs for which ratepayers receive no benefit.<sup>52</sup>

39. SoCal Edison notes that PJM's Designated Entity Agreement requires the designated entity to post financial security of three percent of project costs "to cover the incremental costs of construction resulting from having to reassign the project if the designated entity defaults or abandons the project." SoCal Edison notes that no party protested this requirement and the Commission approved PJM's Designated Entity Agreement without requiring modification to this provision.<sup>53</sup> SoCal Edison requests that

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at prevailing price not within natural interpretation of force majeure). *See also* PJM, Intra-PJM Tariffs, OATT Attachment KK - Form of Designated Entity Agreement, 0.0.0, section 10.0 – Force Majeure.

<sup>50</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

<sup>51</sup> Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 624.

<sup>52</sup> SoCal Edison Protest at 4.

<sup>53</sup> *Id.* at 3-4 and n.4 (citing the PJM Order, 148 FERC ¶ 61,187).

the Commission direct CAISO to initiate a separate stakeholder process within a reasonable timeframe to address this issue, and to revise the *pro forma* APSA as necessary.

40. TransCanyon states that it does not support imposing a financial security requirement for projects that are economically justified, or for projects that do not otherwise require a backstop by an existing PTO.<sup>54</sup> TransCanyon states that it would support the initiation of a stakeholder process to determine whether, and to what extent, approved project sponsors should be required to post financial security for reliability projects, but that such a change should be applied only on a prospective basis.

**b. CAISO Answer**

41. CAISO states that its evaluation of project sponsors under section 24.5.3.1 of the Tariff includes a complete examination of the project sponsor's financial resources, including its ability "to assume liability for major losses resulting from failure of any part of the facilities associated with the transmission solution." CAISO further states that the selection criteria under section 24.5.4 of its Tariff include "the current and expected capabilities of the Project Sponsor and its team to finance, license, and construct the facility and operate and maintain it for the life of the solution." CAISO argues that there is no reason to require a project sponsor that has undergone this extensive evaluation and has met these criteria to undertake an additional burden of posting financial security.<sup>55</sup> CAISO contends that it has not imposed such a burden on the current PTOs when it has assigned them to construct transmission projects and CAISO believes that approved project sponsors should receive similar treatment. CAISO notes that although it does not believe that the lack of a financial security requirement is a problem that warrants a stakeholder process, CAISO is exploring with stakeholders whether the issue should be part of the current competitive solicitation enhancements stakeholder process.

**c. Commission Determination**

42. We find that sections 24.5.3.1 and 24.5.4 of the CAISO Tariff contain reasonable safeguards regarding a project sponsor's financial resources and ability to meet its obligations. Those safeguards include examination by CAISO of the project sponsor's financial resources, including its ability to assume liability for major losses resulting from failure of any part of the facilities associated with the transmission solution, and examination of the current and expected capabilities of the project sponsor and its team to

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<sup>54</sup> TransCanyon Protest at 2.

<sup>55</sup> CAISO Answer at 14.

finance, license, and construct the facility and operate and maintain it for the life of the solution. We agree with CAISO that these Tariff provisions provide for a complete examination of the project sponsor's financial resources, as well as the current and expected capabilities of the project sponsor to get the project financed, constructed, and operated. Accordingly, at this time, we do not find it necessary for an approved project sponsor who has met the financial requirements to undertake the additional burden of having to post financial security to cover the incremental construction costs of a reassigned project.

**4. Assignment for Collateral Security**

**a. CAISO Proposal**

43. Section 16.1 of the *pro forma* APSA provides that the agreement may be assigned by the approved project sponsor only with written consent of CAISO, whose consent shall not be unreasonably withheld. However, section 16.1 allows the project sponsor to assign the agreement without CAISO's consent for collateral security purposes to aid in providing financing for the project, provided that the approved project sponsor shall promptly notify CAISO of any such assignment, including identification of the assignee and contact information.

**b. Protest**

44. SoCal Edison states that not requiring a project sponsor to obtain CAISO's consent before transferring its rights in the project to a third party, such as a lender, would allow a project sponsor to transfer the project to a non-qualified third-party and thereby circumvent the criteria essential to ensuring that a competent party will build the project. SoCal Edison also states the proposal contradicts other CAISO agreements, the Tariff, and standard financial practices.<sup>56</sup> SoCal Edison states that the transmission control agreement, which governs the assets once they are put under CAISO operational control, restricts a PTO's ability to transfer the transmission assets, and that the Tariff also restricts such transfer without CAISO's consent. SoCal Edison argues that CAISO must ensure that the project sponsor has not inappropriately assigned its rights in a manner that could jeopardize ratepayers or be inconsistent with the Tariff or other provisions of the APSA, and that the *pro forma* APSA should be modified to require CAISO consent for all assignments, including collateral assignment, which consent will not be unreasonably withheld.

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<sup>56</sup> SoCal Edison Protest at 4-5.

**c. CAISO Answer**

45. CAISO emphasizes that the only time the approved project sponsor can assign its APSA without CAISO's consent is for financing purposes, and that it cannot be done for construction responsibility as SoCal Edison contends.<sup>57</sup> CAISO argues that project sponsors must obtain financing to construct transmission solutions and may not have other assets to pledge as collateral, and elimination of the exemption of assignment for collateral security purposes would impose a major obstacle to the participation of nonincumbents in transmission construction, contrary to the Commission's intent in Order No. 1000.<sup>58</sup> CAISO contends that it is unrealistic to expect a financing entity to assume construction responsibility in the case of a financial collapse of the approved project sponsor. CAISO states that the financing entity will have every incentive to reassign the APSA and, because the reassignment will require CAISO approval, to identify a qualified alternative project sponsor. CAISO argues that the exemption therefore presents minimal risk, and the need for a broad pool of potential project sponsors outweighs this risk.

**d. Commission Determination**

46. We will not require revisions to the assignment provision of the *pro forma* APSA to require CAISO's consent for assignment for collateral security purposes. We find it is appropriate to permit an approved project sponsor to assign the APSA or rights thereunder as security, as doing so can assist with the financing of the construction or operation of the project sponsor's transmission facilities.<sup>59</sup> At the same time, we further agree with CAISO that the provision presents minimal risk because a typical reassignment will require CAISO approval based on criteria set forth in *pro forma* APSA section 16.1. This provision is also consistent with section 19.1 of the Commission's *pro forma* LGIA.<sup>60</sup>

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<sup>57</sup> CAISO Answer at 15.

<sup>58</sup> *Id.* at 16.

<sup>59</sup> See *South Carolina Electric & Gas Co.*, 147 FERC ¶ 61,126, at P 223 (2014) (concluding that a public utility transmission provider should revise its proposed *pro forma* Coordination Agreement, which is similar in purpose to the *pro forma* APSA, to allow for assignments without consent for such purposes).

<sup>60</sup> See Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at PP 465-476.

47. However, we also find that section 19 of the *pro forma* APSA is not consistent with the *pro forma* LGIA in that it appears to contemplate a one-sided arrangement, under which CAISO must consent to an approved project sponsor's assignment, with the exception of the collateral security assignment discussed above. However, the *pro forma* LGIA, which is a similar agreement between a transmission provider and an interconnection customer, includes a bilateral assignment provision.<sup>61</sup> Given that the *pro forma* APSA is also a bilateral agreement between CAISO and the approved project sponsor, we find that the assignment provision should be revised in a manner consistent with the *pro forma* LGIA assignment provision. Accordingly, we direct CAISO on compliance to revise its assignment provision consistent with this discussion.

## 5. Transfer of Project Assets Upon Abandonment

### a. CAISO Proposal

48. Section 5.8 of the proposed *pro forma* APSA provides that if the project is unreasonably delayed, CAISO will consult with the approved project sponsor and take appropriate actions, including termination of the APSA if the approved project sponsor is unable to proceed. If either party determines that an alternative project sponsor should be selected consistent with section 24.6.4 of the CAISO Tariff,<sup>62</sup> the approved project sponsor agrees to work with CAISO, the alternative project sponsor, and, if applicable, the Interconnecting PTO to transfer responsibility for the project to the alternative project sponsor. CAISO asserts that a provision requiring transfer of ownership rights is unnecessary under the *pro forma* APSA because a project sponsor would have no motivation to hold rights in connection with a project when it is no longer in position to recover costs of the project, and that the project sponsor facing abandonment would have every reason to transfer those rights to the extent it can.<sup>63</sup>

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<sup>61</sup> See *pro forma* LGIA at section 19.

<sup>62</sup> Section 24.6.4 of the CAISO Tariff states, in pertinent part: "If the CAISO determines that the Approved Project Sponsor cannot secure necessary approvals or property rights or is otherwise unable to construct a transmission addition or upgrade, or if the CAISO finds that an alternative Project Sponsor is necessary pursuant to Section 24.6.2, or if the Approved Project Sponsor determines that it is unable to proceed with construction and so notifies the CAISO, the CAISO shall take such action as it reasonably considers appropriate, in coordination with the Participating TO and other affected Market Participants, to facilitate the development and evaluation of alternative proposals."

<sup>63</sup> CAISO Transmittal Letter at 9.

**b. Protest**

49. SoCal Edison argues that the proposed language is not sufficient because it only contemplates that the project sponsor will transfer responsibility to the alternate project sponsor and says nothing about rights. SoCal Edison contends that the *pro forma* APSA should require a project sponsor that abandons a needed project to transfer: (a) all rights, title, and interest in real and personal property, (b) all rights under agreements associated with the project, including any interconnection agreements, and (c) any rights, title or interest that may have been pledged or assigned to any third parties (including without limitation, lenders, contractors or subcontractors) to the alternative project sponsor, or a backstop PTO, if the alternative project sponsor or a backstop PTO is willing to assume such ownership interest, obligations, rights or agreements.<sup>64</sup> SoCal Edison states that the potential retention of rights by a failed project sponsor would give the failed project sponsor leverage that could compromise timely and cost-effective transfer of the project to the backstop or alternative project sponsor.

**c. CAISO Answer**

50. CAISO states that it understands SoCal Edison's concern, but also believes that SoCal Edison's proposal raises a number of issues, including the compensation to the project sponsor for the rights, title, or interest that it has acquired. CAISO proposes to add this issue to the "Competitive Solicitation Process Enhancements" stakeholder process that the CAISO states that it is commencing, noting that the first stakeholder call is scheduled for October 14, 2014.<sup>65</sup>

**d. Commission Determination**

51. We decline to direct CAISO to modify this section of the *pro forma* APSA. This section addresses unreasonable delays in the project that results in the project sponsor being unable to proceed with construction, and provides for the transfer of the project to an alternative project sponsor. If a project sponsor must abandon the project, and the project is transferred to another project sponsor, it follows that any rights would also transfer. Section 25.1 – Binding Effect, of the *pro forma* APSA, which is consistent with other agreements such as the *pro forma* LGIA, states that "[t]his Agreement and the rights and obligations hereof shall be binding upon and shall inure to the benefit of the successors and assigns of the Parties hereto." In addition, we note that CAISO states that it plans to add the issue of compensation to the project sponsor for the rights, title, or

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<sup>64</sup> SoCal Edison Protest at 6-7.

<sup>65</sup> CAISO Answer at 17.

interest that it has acquired to a stakeholder process designed to enhance the competitive solicitation process. Accordingly, we accept this provision as proposed.

**6. Third Party Rights**

**a. CAISO Proposal**

52. Section 25.5 of the *pro forma* APSA states: “This Agreement is not intended to and does not create rights, remedies, or benefits of any character whatsoever in favor of any persons, corporations, associations, or entities other than the Parties, and the obligations herein assumed are solely for the use and benefit of the Parties, their successors in interest, and, where permitted, their assigns.”

**b. Protest**

53. SoCal Edison argues that this section does not create rights for third parties to seek remedies for a party’s breach of the APSA. SoCal Edison argues that third party rights should be provided under the *pro forma* APSA to allow a PTO backstop or an alternative project sponsor selected by CAISO to fulfill its responsibilities under the Tariff and to protect ratepayers.<sup>66</sup>

**c. CAISO Answer**

54. CAISO states that SoCal Edison does not explain why CAISO would not be in a position to enforce the APSA as necessary to ensure construction of the project, or would otherwise decline to do so.<sup>67</sup> CAISO states that the only *pro forma* CAISO agreement that creates third-party beneficiary rights is the Reliability Must-Run agreement, which governs relationships among three entities including: CAISO, the responsible utility, and the reliability must-run generator owner. CAISO explains that the reason behind that construct in that agreement was that the CAISO Tariff establishes the roles and responsibilities between CAISO and the PTO who paid the costs incurred by the reliability must-run entity, and the *pro forma* Reliability Must-Run agreement establishes the roles and responsibilities between CAISO and the reliability must-run entity. CAISO contends that the *pro forma* APSA presents no such circumstances and thus no reason to depart from standard CAISO practice regarding such rights.<sup>68</sup>

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<sup>66</sup> SoCal Edison Protest at 7.

<sup>67</sup> CAISO Answer at 17.

<sup>68</sup> *Id.* at 18.

**d. Commission Determination**

55. We disagree with SoCal Edison that section 25.5 needs to be revised to create third-party rights in the event of a breach of the APSA. Sections 5.7 and 5.8 of the *pro forma* APSA provide for CAISO to take action in the case of delay of the project, including the possibility of finding an alternative project sponsor.<sup>69</sup> Thus, we are not persuaded by SoCal Edison's argument that this standard contract language must be revised to allow a PTO backstop or an alternative project sponsor selected by CAISO to fulfill its responsibilities under the Tariff and agree with CAISO that the circumstances requiring third party rights in CAISO's Reliability Must-Run agreement are not applicable here. We further note that this provision is consistent with other *pro forma* agreements.<sup>70</sup> Accordingly, we find that section 25.5 of the *pro forma* APSA is just and reasonable, and accept it as filed.

**7. Procurement of Insurance**

**a. Protest**

56. SoCal Edison contends that the *pro forma* APSA should require the project sponsor to procure insurance in accordance with Good Utility Practice.<sup>71</sup> SoCal Edison states that the *pro forma* APSA, as proposed, does not require the project sponsor to procure insurance beyond what is required by state law, noting that CAISO argues that insurance would create an additional financial requirement above what is required by the Tariff.<sup>72</sup> SoCal Edison states that PJM's Designated Entity Agreement requires that the

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<sup>69</sup> CAISO includes a similar process as part of its regional transmission planning process, Tariff § 24.6.4, if an approved project sponsor is unable to complete the transmission solution.

<sup>70</sup> *Pro forma* LGIA § 30.5; *ISO New England Inc.*, 143 FERC ¶ 61,150 (2013) (*ISO-NE*). *ISO New England Nonincumbent Transmission Developer Operating Agreement*, section 11.05 states: "Except as provided in Article IX, it is not the intention of this Agreement or of the Parties to confer a third party beneficiary status or rights of action upon any Person or entity whatsoever other than the Parties and nothing contained herein, either express or implied, shall be construed to confer upon any Person or entity other than the Parties any rights of action or remedies either under this Agreement or in any manner whatsoever."

<sup>71</sup> SoCal Edison Protest at 8-9.

<sup>72</sup> *Id.* at 8 (citing CAISO Transmittal Letter at 13).

designated entity procure insurance in accordance with Good Utility Practice despite it being an additional financial requirement, and that the Commission did not require PJM to modify this provision. SoCal Edison also argues that any project sponsor could face a catastrophic loss that could overwhelm its current credit and cash position, particularly if the entity is a limited liability corporation formed for the single purpose of developing a single transmission asset. SoCal Edison contends that if the project sponsor is underinsured and cannot cover its liabilities, CAISO and ultimately utility ratepayers may have to make up the shortfall.

**b. CAISO Answer**

57. CAISO states that it is unnecessary to require approved project sponsors to carry insurance coverage beyond that which is required by law. CAISO responds that it is not a guarantor of approved project sponsors, and that the *pro forma* APSA does not impose any financial obligations on CAISO or its ratepayers. CAISO argues that there is nothing in its Tariff or the *pro forma* APSA that would require CAISO to take on an approved project sponsor's liabilities if the project sponsor cannot meet them, and thus there is no reason for CAISO to interfere with the approved project sponsor's business decisions.<sup>73</sup> Furthermore, CAISO contends that existing PTOs are not required to procure insurance under the transmission control agreement, and approved project sponsors should not be held to a higher financial standard.<sup>74</sup>

**c. Commission Determination**

58. Section 15.1.2 of the *pro forma* APSA provides that if a party is obligated to indemnify and hold harmless the other party, the amount shall be net of any insurance. However, the *pro forma* APSA does not specifically require the approved project sponsor to carry insurance. Given that the *pro forma* APSA will govern the construction of facilities and obligations of the CAISO and the approved project sponsor until the facilities are turned over to CAISO control, we find that the procurement of insurance should be required to mitigate against unforeseen losses. Further, as stated in Order No. 2003, requiring certain minimum insurance requirements in the Final Rule would benefit both the Transmission Provider and the Interconnection Customer and will help the Transmission Provider to avoid undue financial risk.<sup>75</sup> The situation addressed in Order No. 2003 is analogous to an approved project sponsor's development of a

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<sup>73</sup> CAISO Answer at 18-19.

<sup>74</sup> *Id.* at 19.

<sup>75</sup> Order No. 2003, ERC Stats. & Regs. ¶ 31,146 at P 850.

transmission project. Requiring that an approved project sponsor carry insurance is also consistent with Commission acceptance of the insurance procurements requirements included in similar agreements developed by PJM and ISO New England.<sup>76</sup> Accordingly, we direct CAISO, in its compliance filing, to include a provision in the *pro forma* APSA that would require project sponsors to carry insurance in accordance with good utility practice.

## **8. CAISO Approval of Modifications**

### **a. CAISO Proposal**

59. Section 5.9 of the *pro forma* APSA provides that the approved project sponsor may undertake modifications to its facilities only with the approval of CAISO. In addition, the provision requires the approved project sponsor to provide the relevant drawings, plans, and specifications for modifications to CAISO at least 90 calendar days in advance of the commencement of the work, and gives CAISO up to 30 days to provide its approval of modifications.

### **b. Protests**

60. SoCal Edison and NextEra argue that this provision should be modified to require CAISO's pre-approval of only material or major modifications, such as those that could reasonably be considered to have an impact on the project.<sup>77</sup> NextEra adds that section 5.9 provides CAISO with up to 90 days for reviewing a proposed modification. NextEra argues that CAISO should be required to complete its review of modifications within 45 days.<sup>78</sup>

### **c. CAISO Answer**

61. CAISO contends that NextEra has misread this section. CAISO explains that it must act within 30 calendar days from the date of submission of the modification request to approve the request.<sup>79</sup>

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<sup>76</sup> See PJM Designated Entity Agreement at section 6.0; ISO New England Nonincumbent Transmission Developer Operating Agreement at section 9.05.

<sup>77</sup> SoCal Edison Protest at 9; NextEra Protest at 7.

<sup>78</sup> NextEra Protest at 7.

<sup>79</sup> CAISO Answer at 10.

62. Further, CAISO disagrees that the provision should apply only to major modifications. CAISO states that “modifications to the project” refer to alterations in the project details, specifications, and other information provided to CAISO. CAISO states it will select the approved project sponsor and monitor construction of the project based on this information, which will be included in Appendix A of the approved project sponsor’s APSA. CAISO argues that it should not be up to the approved project sponsor to determine which modifications it considers major; under such circumstances, CAISO contends that it may be left unaware of a modification that it considers major until it is too late to take any action. CAISO states that it deems any information regarding the project as material. CAISO notes that the approved project sponsor is free to make any modifications to work outside those parts of the project as the project sponsor has defined in Appendix A to the APSA.<sup>80</sup>

**d. Commission Determination**

63. We disagree with protestors that this provision should be revised to only apply to major modifications to eliminate discretion on the part of the approved project sponsor to determine what constitutes a major modification. As in the PJM Order, the Commission here finds that CAISO must be able to approve all proposed modifications to projects in order to ensure efficient and effective transmission planning as well as to protect the reliable operation of the transmission system.<sup>81</sup> Also, section 4.4 of the Commission’s *pro forma* LGIA requires the interconnection customer to submit in writing any modifications to the information provided in its interconnection request, and section 4.4.3 provides that the transmission provider will decide if any such change is a material modification. Thus, we find that section 5.9 of the *pro forma* APSA is generally consistent with the Commission’s determinations in Order No. 2003. We also note that section 5.9 provides CAISO with 30 days to review a proposed modification, not 90 days as NextEra states.

**9. Obligation to Provide Project Specifications**

**a. CAISO Proposal**

64. Section 5.4.1 of the proposed *pro forma* APSA requires the approved project sponsor to submit specifications for major project equipment or materials to the CAISO and Interconnecting PTO for review and comment at least 30 days before the start of procurement. Section 5.4.2 requires the approved project sponsor to submit changes in

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<sup>80</sup> *Id.* at 10-11.

<sup>81</sup> *See* PJM Order, 148 FERC ¶ 61,187 at P 58.

major project equipment and/or materials for review at least 180 days before testing is to commence, and final specifications at least 90 days before testing is to commence. In addition, if material or equipment is different from original specifications, section 5.4.2 allows a 30-day period for CAISO and Interconnecting PTO to provide comments after each submission.

**b. Protest**

65. NextEra argues that this provision may be both vague and unduly restrictive.<sup>82</sup> First, NextEra contends that the provision is vague because it fails to specify what Project equipment and/or materials are *major*. NextEra states that it would consider major equipment or materials to be transformers, circuit breakers, series compensation (capacitors), static var compensation systems, and synchronous condensers, adding that these items typically have to be ordered with significant lead times and are a large part of the capital expense. NextEra contends that CAISO should provide a proposed definition of major Project equipment and/or materials to avoid later disputes.

66. NextEra also argues that it is unclear how CAISO would apply the 30-day notice requirement, contending that an approved project sponsor should be allowed to submit specifications for equipment and materials on a staggered basis, rather than having to wait until it has settled the details of all equipment and materials and submitting everything at once. NextEra contends that allowing submission of proposed specifications on a rolling basis will foster more expedited project development, and requests that CAISO clarify that the 30-day notice requirement can be given to CAISO as and when needed. NextEra argues that the 90 day timeline for review of final project specifications for major equipment and material is too long, given that CAISO and the Interconnecting PTO have already reviewed the proposed specifications and been involved or kept informed of development of the project. NextEra adds that the long review time could in some cases threaten energization of the project by the agreed upon date. NextEra thus proposes 60 days for review instead of the 90 days proposed by CAISO. In addition, NextEra questions why 180 days would be required for review when a final specification differs from what was previously submitted, arguing that there appears to be no reason why this review of the changed specification could not be done in 30 days consistent with the original specification review.<sup>83</sup>

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<sup>82</sup> NextEra Protest at 4-5.

<sup>83</sup> *Id.*

c. CAISO Answer

67. CAISO states that because every project is unique, it would be nearly impossible to establish one definition of the term “major” that would fit all projects and not be arbitrary. Nevertheless, CAISO states that its intent is, and its practice has been, to determine which project equipment and material is major in the context of the particular project in consultation with the approved project sponsor. CAISO notes that if the approved project sponsor considers it necessary, the parties could identify the major equipment or materials in Appendix A of its APSA. By limiting the specifications that the approved project sponsor must submit to CAISO and the Interconnecting PTO, CAISO argues that the *pro forma* APSA reduces the burden on the approved project sponsor.<sup>84</sup>

68. CAISO states that its intent is that the approved project sponsor submits the specifications 30 days prior to the procurement of the equipment or material to which the specifications apply. Thus, the specification submittal would be on a rolling basis, 30 days prior to the date the approved project sponsor intends to release the equipment or material for specification. CAISO acknowledges, however, that the requirement of section 5.4.1 that the approved project sponsor submit specifications 30 days prior to the date that procurement “is scheduled to commence” might be interpreted as inconsistent with that intent. CAISO therefore requests that the Commission direct it to clarify section 5.4.1 on compliance.<sup>85</sup>

69. CAISO contends that the proposed time for final specification review is reasonable. CAISO argues that NextEra fails to recognize the difference between the initial and final review. CAISO states that section 5.4.1 allows CAISO and the Interconnecting PTO to review the specifications for specific equipment and material that the approved project sponsor plans to procure. CAISO states that this level of review addresses specifications for the particular equipment and material, e.g., the cable, towers, and transformers. CAISO states that section 5.4.2 allows it and the Interconnecting PTO to review the overall project specifications including, among other things, one-line diagrams, protection interconnections, line sag, and metering plans if applicable. According to CAISO, reviewing this overall project detail is more time-consuming than reviewing the bid packages for procurement of specific equipment and materials.<sup>86</sup>

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<sup>84</sup> CAISO Answer at 6-7.

<sup>85</sup> *Id.* at 7.

<sup>86</sup> *Id.* at 7-8.

70. Finally, CAISO states that the time periods reflected in the *pro forma* APSA parallel those used in its generator interconnection agreements. CAISO states that its experience shows that these time frames appropriately balance the workloads of CAISO personnel with the ability to move forward with transmission and generation interconnections.<sup>87</sup>

**d. Commission Determination**

71. We conditionally accept the provisions regarding an approved project sponsor's obligation to provide project specifications for major project equipment and materials subject to CAISO clarifying that the project sponsor submit the project specifications 30 days prior to the procurement of the equipment or material to which the specifications apply. This will ensure that project specifications can be submitted on a rolling basis and, as NextEra suggests, foster more expedited project development.

72. We otherwise disagree with NextEra that these provisions are vague and unduly restrictive. First, CAISO acknowledges the difficulty of defining the term "major" that would fit all projects. We find it reasonable that CAISO will determine which project equipment and material is major on a project-by-project basis, in consultation with the approved project sponsor. Second, we find the timeline to review project specifications is reasonable. In its answer, CAISO sufficiently explains why the review periods for initial review and final review are necessary and also notes that it parallels the project specification submission requirements in CAISO's generator interconnection agreements.<sup>88</sup> Accordingly, we conditionally accept these provisions and direct CAISO to revise section 5.4.1 to clarify that the project sponsor submit the project specifications 30 days prior to the procurement of the equipment or material to which the specifications apply.

**10. Changes in Project Vendor**

**a. CAISO Proposal**

73. Section 5.5.5 of the *pro forma* APSA provides that if the approved project sponsor decides to use a vendor or other project team member that is different from the vendor or other project team member the project sponsor specified in its project proposal, the approved project sponsor must notify CAISO, and CAISO may "take whatever action is necessary to ensure that the selected vendor or Project team member will at a minimum

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<sup>87</sup> *Id.* at 8.

<sup>88</sup> *See, e.g.*, CAISO LGIA, Tariff, Appendix V § 5.10.1.

provide the same level of service that would have been provided” by the original vendor or project team member.

**b. Protest**

74. NextEra objects to this provision, arguing that it appears to give CAISO unfettered discretion and is unclear about what actions CAISO could take.<sup>89</sup> NextEra explains that project vendors and team members may change for various unforeseen reasons and states that CAISO should be kept advised of these changes, but argues that CAISO should not have unbridled authority to interfere with the approved projects sponsor’s performance. NextEra contends that, at a minimum, CAISO should modify this provision so that CAISO would first have to justify why it has reasonable grounds for believing that the level of service would be compromised due to the change in the approved project sponsor’s team member or vendor, and set forth in the Tariff the type of actions it proposes to take.

**c. CAISO Answer**

75. CAISO contends that NextEra fails to appreciate that the qualifications and capabilities of the project team, which includes vendors and contractors, are a fundamental part of CAISO’s determinations of the project sponsor’s qualifications under section 24.5.3.1 of its Tariff and a critical component of the selection process. CAISO states that it was at the insistence of potential project sponsors that CAISO included consideration of the entire “project team” in this evaluation and referenced the “project team,” not just the project sponsor, in the Tariff. CAISO states that use of a different vendor or other team member, therefore, could invalidate its determination regarding the qualifications of the project sponsor.<sup>90</sup>

76. To illustrate, CAISO provides a hypothetical example where the use of a particular vendor may have been a factor in CAISO’s selection of that project sponsor. If the project sponsor subsequently changes the vendor to a much less qualified or problematic vendor, one of the bases for CAISO’s selection will have been rendered moot. CAISO therefore states that it is critical that it have the flexibility to ensure that this does not occur and that CAISO and its ratepayers do not “get something different than they bargained for.”<sup>91</sup>

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<sup>89</sup> NextEra Protest at 5-6.

<sup>90</sup> CAISO Answer at 8-9.

<sup>91</sup> *Id.*

77. Finally, CAISO notes that its discretion is not unlimited. CAISO states that it can only take such actions as are “necessary to ensure that the selected vendor or Project team member will at a minimum provide the same level of service.” To the degree an approved project sponsor believes CAISO has abused that discretion, it can seek redress through dispute resolution procedures.<sup>92</sup>

**d. Commission Determination**

78. We find that section 5.5.5, which requires notification to CAISO of a change in project vendor or project member and action by CAISO, if necessary, is reasonable to ensure that the attributes of the project team that was selected as part of the competitive solicitation process are maintained through project development. We disagree with NextEra that this provision gives CAISO unfettered discretion; rather, it simply gives CAISO the ability to ensure on a project-by-project basis that the selected vendor or project team member will provide, at a minimum, the same level of service. Therefore, we accept this provision without modification.

**11. Delays Caused by Interconnecting PTO**

**a. CAISO Proposal**

79. Section 5.8 of the proposed *pro forma* APSA states that if the approved project sponsor cannot obtain the necessary approvals or property rights or otherwise cannot construct the project in a timely manner, CAISO may take such action as it determines to be necessary in accordance with section 24.6.4 of the Tariff, which includes selection of an alternative project sponsor.

**b. Protests**

80. NextEra states that it understands the need for CAISO to be able to reassign a project when the approved project sponsor is unable to complete it; however, NextEra argues that any delays in the interconnection process due to actions or inactions by the Interconnecting PTO should not be held against the approved project sponsor.<sup>93</sup> NextEra contends that this provision should be modified to protect the approved project sponsor from delays caused by the Interconnecting PTO or parties acting on its behalf.

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<sup>92</sup> *Id.* at 9.

<sup>93</sup> NextEra Protest at 6-7.

81. SoCal Edison argues that CAISO's ability to terminate under section 5.8 should not be conditioned on unreasonable delay of project construction milestone dates, contending that if completion of the project proves infeasible, CAISO should not also need to show unreasonable delay in order to terminate the project.<sup>94</sup>

**c. CAISO Answer**

82. CAISO states that it agrees with NextEra that approved project sponsors should not be held accountable for delays caused by the Interconnecting PTO. CAISO states that under section 24.6.4 of the Tariff, as part of the evaluation of alternatives to be considered in the event of such a delay, CAISO will take into account "the reasons that the approved project sponsor was unable to construct the transmission solution." Under these circumstances, CAISO concedes that it would not be reasonable for CAISO to terminate the APSA when the alternative is to address the Interconnecting PTO's delay.<sup>95</sup>

**d. Commission Determination**

83. We will direct CAISO to revise section 5.8 of the *pro forma* APSA, consistent with CAISO's statements in its answer. CAISO notes that this provision, in conjunction with section 24.6.4 of the Tariff, allows it to address any delays while also accounting for the cause of such a delay. CAISO states, and we agree, that the cause of the delays should be evaluated and that a delay caused by the Interconnecting PTO should not be sufficient to justify reassignment of a project. Further, while section 5.8 of the *pro forma* APSA is narrowly based on the specific timeline of the project, section 24.6.4 of the Tariff gives CAISO broader discretion to evaluate project delays.<sup>96</sup> Thus, this provision allows CAISO to address delays in transmission projects and ensure that system reliability is maintained. Therefore, consistent with CAISO's Tariff and its own statements, we direct CAISO to include in the compliance filing directed herein modifications to section 5.8 of its *pro forma* APSA to clarify that the approved project sponsor will not be held accountable for delays caused by the Interconnecting PTO.

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<sup>94</sup> SoCal Edison Protest at 3.

<sup>95</sup> CAISO Answer at 9-10.

<sup>96</sup> CAISO Tariff § 24.6.4 ("If the CAISO determines that the Approved Project Sponsor cannot secure necessary approvals or property rights or is otherwise unable to construct a transmission solution...the CAISO shall take such action as it reasonably considers appropriate").

## 12. Representation of Technical Specifications

### a. CAISO Proposal

84. Section 24.1.5 of the proposed *pro forma* APSA provides that the technical specifications provided by the approved project sponsor to CAISO are “accurate and complete.”

### b. Protest

85. NextEra states that it understands that this representation applies to the specifications provided as part of the approved project sponsor’s bid in the competitive process, and by executing the APSA, the approved project sponsor confirms that these specifications were accurate and complete in the context of a bid submission. NextEra points out that the APSA contemplates that specifications may change during project implementation, and argues that the approved project sponsor should not be deemed in violation of the APSA simply because the specifications have since been modified.<sup>97</sup>

### c. CAISO Answer

86. CAISO states that the *pro forma* APSA provides for changes to specifications as the project evolves; thus CAISO agrees that it would be unreasonable to interpret such a representation as a statement that the originally submitted specifications will not change. CAISO does, however, believe that the representation is a continuing obligation, and applies to the accuracy and completeness of any modified specifications during the life of the APSA.<sup>98</sup>

### d. Commission Determination

87. We agree that it may be unreasonable to interpret a representation made under this section as a representation that the originally submitted specifications will not change. However, we also agree with CAISO that representations made under this section are continuing in nature and also apply to the accuracy and completeness of any modified specifications during the life of the APSA. With this understanding, we will accept section 24.1.5 of the *pro forma* APSA as proposed.

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<sup>97</sup> NextEra Protest at 7-8.

<sup>98</sup> CAISO Answer at 11.

### 13. Specifications Provided by Interconnecting PTO

#### a. CAISO Proposal

88. Section 5.5.3 of the proposed *pro forma* APSA states: “At any time during construction, should any phase of the Project engineering, equipment procurement, or construction not meet the standards and specifications provided by the Interconnecting PTO or other entity, the Approved Project Sponsor shall be obligated to remedy deficiencies in that portion of the Project.”

#### b. Protest

89. TransCanyon requests that the CAISO clarify that this provision would not require approved project sponsors to bear the costs of any additional specification beyond the initial functional requirements the CAISO issued at the time of competitive solicitation. TransCanyon argues that because the Interconnecting PTO may be a competing party at the time of competitive solicitation, this provision may give an incentive to Interconnecting PTOs to withhold information or data integral to the bidding process, or to otherwise reduce the reliability of the bids and bidding process.<sup>99</sup> TransCanyon contends that CAISO should obtain and provide the information necessary to inform the bidding process at the time of solicitation, or in the alternative, the *pro forma* APSA should explicitly allow for the full recovery of just and reasonable costs, expended by the project sponsor, as a result of additional requirements raised by the Interconnecting PTO after the bid award.

#### c. CAISO Answer

90. CAISO states that it would expect that the approved project sponsor would be able to recover any cost that the Commission determines to be just and reasonable project costs, regardless of the source of the costs. However, to resolve any doubts, CAISO states that it would not object to a Commission directive to specify that an approved project sponsor may include additional just and reasonable costs, such as interconnection costs, under section 5.5.3 in its transmission revenue requirement.<sup>100</sup> CAISO adds that it expects that part of TransCanyon’s concern may be the impact of such additional costs on a cost cap or other cost containment measures under the APSA. CAISO states that application of cost containment measures to such costs would be inequitable because the approved project sponsor would not have been aware of these additional costs when it

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<sup>99</sup> TransCanyon Protest at 3.

<sup>100</sup> CAISO Answer at 19.

submitted its project proposal. Therefore, CAISO requests that the Commission further direct it, on compliance, to provide that any cost cap or cost containment measure included in an APSA will exclude bearing the costs of any additional specifications beyond the initial functional requirements for the transmission solution that CAISO issued at the time of the competitive solicitation.<sup>101</sup>

**d. Commission Determination**

91. We agree with TransCanyon that approved project sponsors should not be required to bear the costs of additional specifications beyond the initial functional requirements CAISO issued at the time of competitive solicitation. Indeed, in its answer, CAISO acknowledges that project sponsors should be able to recover such costs to the extent they are just and reasonable, and CAISO states that it is amenable to submitting a compliance filing.<sup>102</sup> Therefore, we direct CAISO to modify the *pro forma* APSA to specify that an approved project sponsor may include additional just and reasonable costs, such as interconnection costs, under section 5.5.3 in its transmission revenue requirement. We also agree with TransCanyon and CAISO that application of cost containment measures to these additional costs would be inequitable because the approved project sponsor would not have been aware of these costs when it submitted its project proposal. We therefore direct CAISO, in the compliance filing directed here, to provide in section 5.5.3 that any cost cap or cost containment measure included in an APSA will exclude the costs of any additional specifications beyond the initial functional requirements for the transmission solution that CAISO issued at the time of the competitive solicitation.

**14. Indemnification Language**

**a. CAISO Proposal**

92. Section 5.5.4 of the proposed *pro forma* APSA states: “The Approved Project Sponsor shall indemnify the CAISO for claims arising under this Agreement resulting from Project construction under the terms and procedures specified in section 15.1 Indemnity.” Section 15.1 in turn states: “Each Party (the “Indemnifying Party”) shall at all times indemnify, defend, and hold the other Party (the “Indemnified Party”) harmless from any and all Losses arising out of or resulting from the Indemnifying Party’s action or inactions of its obligations under this Agreement, except in cases of gross negligence or intentional wrongdoing by the Indemnified Party.”

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<sup>101</sup> *Id.* at 20.

<sup>102</sup> *Id.* at 19.

**b. Protest**

93. TransCanyon states that that indemnification language proposed by CAISO in the stakeholder process required indemnification of CAISO from the “Approved Project Sponsor’s construction of the Project” but has been revised to require the approved project sponsor to indemnify CAISO for claims generally arising from “project construction.” TransCanyon argues that this language appears to broaden the indemnification requirements to any claims against the project, including for those not directly within the control of the approved project sponsor.<sup>103</sup> TransCanyon contends that CAISO should clarify the reason for the change in this language, particularly as it relates to the scope of the additional indemnification requirements.

**c. CAISO Answer**

94. CAISO contends that TransCanyon’s concern is unfounded because section 15.1 requires each party to indemnify the other from all losses “arising out of or resulting from the Indemnifying Party’s action or inactions of its obligations under this Agreement.” CAISO states that this means that the approved project sponsor does not assume liability for losses arising from actions that are not within its control.<sup>104</sup> CAISO argues that it would be a mistake to limit liability to claims arising from “the approved project sponsor’s construction of the project,” because it could lead to disputes regarding claims arising from actions of vendors and subcontractors when the action is subject to the approved project sponsor’s control, but not specifically an action of the approved project sponsor.<sup>105</sup> CAISO contends that the proposed language of section 5.5.4 avoids such disputes while preserving the limitations in section 15.1.

**d. Commission Determination**

95. We agree with TransCanyon that the indemnification language proposed in section 5.5.4 is overly broad and could be read to require project sponsors to indemnify CAISO for claims arising generally from project construction, and not only from claims arising out of or resulting from that party’s obligations under the *pro forma* APSA. CAISO’s response does not alleviate these concerns, as section 15.1 applies to indemnification by either party, while section 5.5.4 only applies to the project sponsor’s indemnification of CAISO. While CAISO states that it does not intend for the approved

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<sup>103</sup> TransCanyon Protest at 4.

<sup>104</sup> CAISO Answer at 20.

<sup>105</sup> *Id.* at 20-21.

project sponsor to assume liability for losses arising from actions that are not within its control, the *pro forma* APSA does not convey this intent. Accordingly, we direct CAISO to revise section 5.5.4 of the *pro forma* APSA to clarify that the approved project sponsor does not assume liability for losses arising from actions that are not within its control.

96. Proposed section 15.1 states that each party shall indemnify the other from all losses arising out of or resulting from the indemnifying party's action or inaction of its obligations under the agreement except in cases of gross negligence or intentional wrongdoing by the indemnified party. However, as the Commission has previously discussed, a hold harmless provision must strike a balance between protecting the indemnified party and ensuring that the indemnified party has an incentive to avoid negligent acts.<sup>106</sup> In *Northeast Utilities Service Company*, the Commission explained that “[a] broader customer indemnification obligation that would include ordinary negligence would not give any incentive to the transmission provider to avoid negligent actions.”<sup>107</sup> The Commission also noted, however, that a broader indemnification obligation was appropriate in the case of interconnection service because interconnection is not only more risky than other transmission but also because the indemnity provision is expressly bilateral.<sup>108</sup> The *pro forma* APSA is similar in many respects interconnection arrangements, including the bilateral nature of the arrangement between CAISO and the approved project sponsor. Accordingly, we direct CAISO to revise the *pro forma* APSA to exempt from the indemnification provision a party's own ordinary negligence in the compliance filing ordered herein.

The Commission orders:

(A) CAISO's proposed *pro forma* APSA is hereby conditionally accepted for filing, effective November 10, 2014, as requested, as discussed in the body of this order.

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<sup>106</sup> *ISO-NE*, 143 FERC ¶ 61,150 at P 279.

<sup>107</sup> *Northeast Utilities Service Company*, 111 FERC ¶ 61,333, at P 27 (2005).

<sup>108</sup> *Id.* P 28.

(B) CAISO is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.