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## **II. Motion to Intervene**

LSA is a non-profit, non-partisan, solar advocacy association whose purpose is to support market penetration of utility-scale solar technologies through appropriate policy mechanisms. LSA represents companies developing projects utilizing solar technologies, including utility-scale photovoltaic and solar thermal energy.

LSA companies are leaders in the utility-scale solar industry and share a common understanding of, and concern about, the issues facing development of the solar industry. Collectively, LSA's members have contracted to provide over seven gigawatts of clean, sustainable solar power to utilities in the western United States. They are actively developing technology and strengthening markets to facilitate significant penetration of renewable energy into the western United States power sector, as well as other states, and regional and federal venues, when appropriate. LSA members are engaged in the development, construction and/or operation of renewable generation plants throughout California and other western states.

LSA works with its member companies to represent the utility-scale solar industry in important policy-setting forums, furthering support for the large-scale solar development that will be necessary for California and other states to meet their aggressive renewable energy goals. LSA focuses efforts on transmission and interconnection reform and expansion to ensure that LSA's members can transmit renewable energy over a robust transmission grid at a reasonable cost.

The business interests of LSA members are significantly affected by regulatory

policies that affect the cost of, and access to, transmission facilities, and the requirements for interconnecting new generating facilities to the transmission system. Moreover, many of LSA's members have interconnection requests in the CAISO's generator interconnection queue. For these reasons, LSA and its individual members participated extensively in the GIP-2 stakeholder process, and LSA members will be directly affected by the outcome of this proceeding. The interests of LSA members are not adequately represented by any other party, and so granting LSA's timely motion to intervene in this proceeding is in the public interest.

### **III. Comments and Limited Protest**

LSA appreciates the CAISO's extensive stakeholder process to identify and resolve issues that incrementally improve the generation interconnection process to the CAISO-controlled transmission grid. The CAISO has listened to stakeholders' concerns and addressed a number of these concerns including, among other things, implementing partial and interim deliverability concepts, increasing timing for Generator Interconnection Agreement ("GIA") negotiation, and making certain improvements to financial security provisions. The CAISO has also committed to continuing the Generator Interconnection Process ("GIP") reform each year to address additional issues that arise or that were not previously resolved.

As the CAISO has recognized, however, these reforms only resolve specific issues that arise in the context of a generation interconnection process that fundamentally does not function well. While GIP-2 is an important first step, several of the issues raised in this protest highlight the need for the broader reform effort that the CAISO has initiated. As detailed below, the CAISO has also included several proposed provisions that are not just and reasonable and do not meet the goal of improving the interconnection process. Therefore, these provisions should be rejected or modified accordingly.

**A. Commission Policy, Contract Law and Practical Considerations All Require that Refunds of Costs for Network Upgrades Associated with a Phased or Non-Phased Generating Facility Must Begin on the Commercial Operation Date.**

**1. Introduction and Summary of Argument**

In its proposed amendments to the Tariff, the CAISO has overreached by couching significant and onerous **new** requirements for the timing of refunds of Network Upgrades<sup>3</sup> as a simple “clarification.” In granting phased projects the right to receive refunds upon Commercial Operation of each phase, the CAISO also seeks to now require all Network Upgrades associated with a Generating Facility to be complete – and the associated expenditures placed in the relevant utility’s Capital Plant accounts and recovered through the Transmission Access Charge (“TAC”)<sup>4</sup> – prior to Network Upgrades refunds commencing. Rather than accelerating repayments for phased projects as intended, this proposal could instead delay refunds for all projects until several years after the project or a project phase is complete, selling power to the grid, and fully deliverable.<sup>5</sup>

If implemented, these new requirements would place a generator’s ability to receive refunds solely within the discretion of the Participating Transmission Owner (“Participating TO”), which may not complete the Network Upgrades in a timely fashion or take the administrative actions necessary to recover the cost of the upgrades through TAC. Any such policy would threaten developers’ ability to obtain financing due to the vast uncertainty about the timing of refunds. It would also unfairly place a potentially limitless financing burden on developers, who have a

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<sup>3</sup> All capitalized terms used herein and not otherwise defined have the meaning ascribed to them in Appendix A of the CAISO Tariff.

<sup>4</sup> In its filing letter, the CAISO takes the position that refunds for Network Upgrades do not commence until all of the Network Upgrades associated with the project are included in TAC. *See* CAISO Filing Letter, at pp. 17-18. However, none of the amendments to the GIP or the GIA seems to reflect this position.

<sup>5</sup> As discussed in more detail herein, it is possible for a project to be fully deliverable on an operational basis even though all of the Network Upgrades assigned to a particular GIA are not complete.

higher cost of capital than the Participating TOs, thus ultimately increasing costs to ratepayers through higher energy prices. The CAISO's proposal on the timing of refunds for both phased and non-phased projects conflicts with well-settled Commission policy and precedent, contradicts the plain language of the GIA, and suffers from procedural defects. Therefore, this proposal is not just and reasonable and should be rejected.<sup>6</sup>

Moreover, the CAISO has not explained how it will implement this new requirement, since there are several practical complications to commencing repayment only after completion of all Network Upgrades "corresponding" to a particular project or a particular phase of a project, whereas the Commercial Operation Date of a project (or project phase) is a well-defined milestone.

Finally, it is completely unclear from the CAISO's filing whether (1) the CAISO interprets the GIA language to require the Network Upgrades be put into TAC before refunds can begin, even though it did not add Tariff language to that effect; and (2) whether the CAISO intends to apply this new policy retroactively (i.e., to GIAs that have already been executed) or only prospectively (i.e., to GIAs that have not yet been executed). While LSA believes that FERC should reject this new requirement in its totality, the Commission should at the very least clarify that the Tariff language does not impose a requirement that the Network Upgrades be approved for recovery through the TAC and that any new provision cannot apply retroactively.

By way of background, GIP Section 12.3.2 and GIA Article 11.4.1<sup>7</sup> address repayments to the

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<sup>6</sup> The CAISO must justify all tariff changes to ensure that they are just and reasonable. *See California Independent System Operator*, 112 FERC ¶ 61,009, at PP 112-114 (2005) (holding that the independent entity standard does not relieve the CAISO of the requirement that it provide evidentiary support for its proposed tariff changes), *reh'g denied*, 117 FERC ¶ 61,148 (2006).

<sup>7</sup> The relevant language and concepts are contained both in the GIA and the GIP; for ease of reference, this protest refers to the GIA provision. Except where specified, all arguments apply equally to the GIP's language.

Interconnection Customer for amounts that it funds for Network Upgrades. Under these sections, repayments begin once the Generating Facility has reached its Commercial Operation Date. In relevant part, the current version of the GIA Article 11.4.1<sup>8</sup> provides:

**Upon the Commercial Operation Date**, the Interconnection Customer shall be entitled to a repayment, equal to the total amount paid to the Participating TO for the costs of Network Upgrades for which it is responsible, as set forth in Appendix G. Such amount shall include any tax gross-up or other tax-related payments associated with Network Upgrades not refunded to the Interconnection Customer pursuant to Article 5.17.8 or otherwise, and shall be paid to the Interconnection Customer by the Participating TO on a dollar-for-dollar basis either through (1) **direct payments made on a levelized basis over the five-year period commencing on the Commercial Operation Date**; or (2) any alternative payment schedule that is mutually agreeable to the Interconnection Customer and Participating TO, **provided that such amount is paid within five (5) years from the Commercial Operation Date**. Notwithstanding the foregoing, if this LGIA terminates within five (5) years from the Commercial Operation Date, the Participating TO's obligation to pay refunds to the Interconnection Customer shall cease as of the date of termination. . . .

Under the GIA, Commercial Operation is defined as the “status of an Electric Generating Unit or project phase at a Generating Facility that has commenced generating electricity for sale, excluding electricity generated during Trial Operation.”<sup>9</sup> Similarly, the GIA defines “Commercial Operation Date” of an Electric Generating Unit or project phase as:<sup>10</sup>

the date on which the Electric Generating Unit or project phase at the Generating Facility commences Commercial Operation as agreed to by the applicable Participating TO, the CAISO, and the Interconnection Customer pursuant to Appendix E to this LGIA, and in accordance with the implementation plan agreed to by the Participating TO and the CAISO for multiple individual Electric Generating Units or project phases at a Generating Facility where an Interconnection Customer intends to establish separate Commercial Operation Dates for those Electric Generating Units or project phases.

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<sup>8</sup> CAISO Tariff, Appendix CC, Article 11.4.1 (emphasis added).

<sup>9</sup> *Id.*, Article 1, Definitions.

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

Because many large renewable Generating Facilities are now constructed in discrete phases, the CAISO included in GIP-2 a specific proposal that would require repayment of a portion of upfront funded Network Upgrades costs after the completion of each discrete phase of a project.<sup>11</sup>

In its Filing Letter, the CAISO asserts that in the course of developing the new refund provisions for phased projects, an “issue emerged” concerning the interpretation of the Tariff with respect to the timing of repayment for Network Upgrades generally.<sup>12</sup> The CAISO takes the position that, despite the plain language of the GIP and GIA, there has always been an implicit assumption that repayments for Network Upgrades would not begin until all Network Upgrades were complete and placed into the relevant Capital Plant account to be recovered through the TAC, not on the Interconnection Customer’s Commercial Operation Date.<sup>13</sup>

To this end, the CAISO has added a new requirement that refunds be paid only after both the Commercial Operation Date “and the in-service date of the corresponding Network Upgrades.”<sup>14</sup> The CAISO also added a similar provision for phased projects that require the completion of Network Upgrades necessary to meet that phase’s desired level of deliverability before refunds begin.<sup>15</sup>

In its explanation, the CAISO concludes, with no corresponding evidence or citation, that

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<sup>11</sup> LSA believes that the GIA already requires refunds to commence upon the Commercial Operation Date of each discrete project phase, based on the Tariff definition of Commercial Operation Date, which describes the Commercial Operation of each generating unit or project phase, rather than the entire facility. Because the CAISO agreed to include such right explicitly in GIP-2, LSA will not argue that position, but it reserves its rights to do so in the future, if necessary.

<sup>12</sup> See CAISO Filing Letter, at p. 17.

<sup>13</sup> *Id.* at pp. 17-18.

<sup>14</sup> CAISO Filing, Attachment A (Clean Tariff) and Attachment B (Marked Tariff), proposed amendments to Tariff, Appendix CC, Article 11.4.1 (proposed GIP-2 amendments).

<sup>15</sup> *Id.* at Appendix CC, Article 11.4.1.2(f), Appendix T, Section 5.3.1.2(f), and Appendix Y, Section 12.3.2.2(f) (proposed GIP-2 amendments).

“[t]he stream of payments that repays the customer comes from the [TAC].”<sup>16</sup> Based on this unsubstantiated statement, which was contradicted by some of the Participating TOs’ representatives in the initial Stakeholder meetings, the CAISO states that it “is of the opinion that the GIP Phase 2 provision does not impose any new requirement, but only makes clear what was a ‘behind the scenes’ prerequisite for recovery in TAC.”<sup>17</sup>

## **2. Commission Policy Requires That Refunds for Both Phased and Non-Phased Projects Begin upon Commercial Operation of the Generator.**

In its filing, the CAISO does not cite to Order No. 2003, or any other order, to justify its erroneous interpretation of the GIP and GIA because there is nothing in that order, or any other, that supports the CAISO’s position. Rather, the CAISO merely asserts that requiring repayments upon Commercial Operation Date “seems inconsistent with the Order No. 2003 approach that interconnection customers first pay for the construction of the network upgrades driven by their generator interconnections.”<sup>18</sup>

There is nothing inconsistent about requiring generators to initially fund the construction of network upgrades, and also requiring repayment to begin once the generator reaches commercial operation, regardless of the status of the Network Upgrades. In fact, Commission policy and precedent mandates this result, and the Commission specifically considered the CAISO’s position and rejected it in Order No. 2003.

The CAISO’s proposal, if adopted, would unfairly put the entire risk of non-recovery on the interconnection customer, even though the interconnection customer has no control over when the Participating TO completes the Network Upgrades; whether it prudently incurs costs during

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<sup>16</sup> *Id.* at Attachment G (CAISO Response to Stakeholder Comments on Draft GIP Phase 2 Changes), #45.

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

<sup>18</sup> CAISO Filing Letter, at p. 18.

planning, permitting, and construction; whether and when it even files a rate case to recover the costs of the transmission; or whether the Commission finds any or all of the Participating TO's expenditures to be prudent and recoverable in rates.<sup>19</sup> It would also require the developer to maintain a funding obligation for an indefinite and undefined period of time, which would severely hinder developers' ability to finance their projects.

In Order No. 2003, the Commission held that generators can be required to finance the costs of a network upgrade but must receive refunds for those costs upon the commercial operation date of the generating facility.<sup>20</sup> The primary reason for requiring an interconnection customer to initially fund Network Upgrades that would not be necessary "but for" that generator's project is to protect ratepayers from abandonment of facilities *due to the failure of that generator to reach Commercial Operation*. The rule was never intended to place the entire risk of potential non-recovery, for any reason, on the interconnection customer.

Rather, the Commission's Network Upgrade financing policy properly balances the risk of abandonment due to *generator failure* against the Commission's well-established policy that forbids transmission owners from directly assigning cost responsibility for network upgrades to a generation project.<sup>21</sup> Therefore, the Commission determined that once the generating facility commences operation, it should begin to receive refunds for any Network Upgrades it has

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<sup>19</sup> The CAISO's rationale that the income stream for refunds derives from payments received through TAC is based on faulty reasoning. The accounting life of Network Upgrades is much longer than the five year refund period, so even if utilities did not have to provide refunds until the upgrades were placed into TAC, they still must replace generator funding with their own capital or debt for a period of time.

<sup>20</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004). ("Order No. 2003"). Order No. 2003 is rife with references to the requirement that refunds for Network Upgrades should commence upon Commercial Operation of the generating facility. *See, e.g.*, Order No. 2003, at P 29.

<sup>21</sup> *See Public Svc. Co. of Colorado*, 62 FERC ¶ 61,013, at p. 61,061 (1993).

financed.<sup>22</sup> Nothing in the Commission’s orders refers to completion of *any or all* of the Network Upgrades as a pre-requisite for repayment of funds used to finance Network Upgrades. The CAISO’s proposal violates this clear Commission policy, and therefore should be rejected.

The Commission also has considered, and squarely rejected, the CAISO’s suggestion that the commencement of refunds for Network Upgrades is contingent not only on the completion of the Network Upgrades, but also on their placement into TAC. Specifically, in *Southern*, the Commission found that, “[U]ntil Southern [the transmission provider] has provided credits to generators, it should not include interconnecting generators’ system upgrade costs in its formula rates.”<sup>23</sup> The Commission further found that this conclusion is required by its uniform system of accounts, which treats the generators’ financing as a customer advance for construction, and requires that, until the amounts are credited to the generator, they be “excluded from rate base.”<sup>24</sup>

In Order No. 2003, the Commission again rejected the CAISO’s current contention that refunds can be withheld until transmission facilities were placed into rates. In comments, certain transmission owners expressed concerns “that they may not be able to recover in a timely fashion the costs that they will incur under the proposed pricing policy.”<sup>25</sup> The transmission owners argued that they would face the “expense, delay, and uncertainty of a full transmission rate case,” that there could be a retail rate freeze, and that they could face lost revenues associated with a new

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<sup>22</sup> See, e.g., Order No. 2003, at P 22 and 29.

<sup>23</sup> *Southern Co. Servs.*, 98 FERC ¶ 61,328 at P 28 (2002) (“*Southern*”) (footnote omitted).

<sup>24</sup> *Id.* at n. 27. As an additional practical matter, the CAISO does not explain how it will determine whether a particular project has been included, either in whole or in part, in TAC. Many Participating TO rate cases are resolved through a “black box” settlement, and therefore it is not clear whether a project has been fully included in rates. The decision to settle a case is wholly within the discretion of the Participating TO, and no generator should be subject to litigation risk unless it has a commensurate right to control the litigation.

<sup>25</sup> Order No. 2003, at P 708.

generating project because of the requirement to provide credits upon commercial operation.<sup>26</sup>

They requested the right to make limited Section 205 filings or be granted deferred accounting treatment. The Commission rejected these arguments, and concluded, in relevant part:

The Commission concludes that it is not necessary to provide for the Transmission Provider to make a limited Section 205 filing as proposed by Monongahela Power for the immediate roll in of the costs it will incur under the crediting policy. In the ordinary course of business, a public utility frequently incurs costs for which it has no immediate revenue offset, just as it routinely experiences revenue increases that are not accompanied by commensurate increases in costs. . . .<sup>27</sup>

These findings are dispositive and clearly demonstrate that the Commission appropriately recognized that the risk of non-recovery of transmission upgrade costs in rates should not be borne by a generator once it has reached Commercial Operation.

**3. As a Matter of Contract Interpretation and the Filed Rate Doctrine, Repayment of Network Upgrades Begins on the Generator’s Commercial Operation Date.**

The CAISO’s position about the timing of refunds is also a clear violation of well-settled contract law and the filed rate doctrine. The plain language of GIA Article 11.4.1 provides that refunds commence upon the generator’s Commercial Operation Date, with no reference to the status of the Network Upgrades or the placement of those upgrades in the Participating TO’s rates.<sup>28</sup> The CAISO’s filing improperly ignores the plain-meaning interpretation of the contract in favor of an unsubstantiated and self-serving statement purportedly made by the Participating

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at P 709.

<sup>28</sup> *See Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154, at P 19, *reh’g denied*, 108 FERC ¶ 61,304 (2004) (holding that “when the language of a contract is explicit and clear and does not lead to an absurd result, then the court may ascertain the intent from the written terms and not go further”).

TOs.<sup>29</sup> Even if these statements were made, they merely signify that the Participating TOs are breaching the GIA, not that their faulty interpretation is correct.

The CAISO is also forbidden from unilaterally modifying the GIA based on the well-settled “filed rate doctrine.”<sup>30</sup> The Commission must honor the Tariff language setting forth the rights and obligations of the parties, approved by the Commission, and relied upon by developers to plan, price and finance their projects. A change in those provisions now would inject massive uncertainty into the Network Upgrade repayment process and would severely threaten developers’ ability to obtain financing for their projects.

The GIA is not ambiguous; rather, it clearly states, without condition, that repayment for Network Upgrades begins on the Commercial Operation Date, or the date that the generation project “has commenced generating electricity for sale.”<sup>31</sup> Therefore, the Commission should reject the CAISO’s new proposal on the timing for repayment for Network Upgrades.

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<sup>29</sup> LSA members were not part of the conversations with the Participating TOs that the CAISO referred to in its Filing Letter (at pp. 17-18), but notes that in earlier phases of the GIP-2 Stakeholder process, at least two representatives from the largest Participating TOs agreed that repayments began once the generator reached Commercial Operation. Moreover, it is LSA’s understanding that at least one of the Participating TOs does refund costs for Network Upgrades within sixty days of the Commercial Operation Date of the generation project.

<sup>30</sup> See *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Comm’n*, 341 U.S. 246, 251 (1951) (finding that under the filed rate doctrine, a utility “can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms”).

<sup>31</sup> See CAISO Tariff, Appendix CC, Article 1, Definition of “Commercial Operation.” LSA’s interpretation is also supported by another clause in the same provision. The GIA provides that if the parties choose to negotiate an alternative payment arrangement, all refunds must be paid within five years of the Commercial Operation Date of the generation project. This further supports the conclusion that completion of all Network Upgrades and inclusion in TAC – both of which could occur more than five years after a generator’s Commercial Operation Date – were never intended to be requirements for commencement of repayment for Network Upgrade costs.

#### **4. Practical Concerns Dictate that Refunds For Both Phased and Non-Phased Projects Begin Upon Commercial Operation.**

In addition to the policy and legal justifications for rejecting the CAISO's proposed language, there are numerous practical concerns that make it unwise to key commencement of refunds off of the completion of the Network Upgrades and/or placement of those upgrades in rates. The CAISO's proposed language that the "corresponding"<sup>32</sup> Network Upgrades must be in service for refunds to begin is completely ambiguous. There are several reasons why Network Upgrades allocated to an individual project may not be unambiguously "corresponding" to such project once the project reaches commercial operation.

For example, certain Network Upgrades assigned to a project may not be necessary to make that project deliverable due to project drop-outs or delays, re-studies, and modifications of planned Network Upgrades as a result of those re-studies. Thus, there will likely be instances where a project can be partially or even fully deliverable even where the Network Upgrades set forth in the GIA are not complete.<sup>33</sup> LSA does not believe the CAISO is intentionally taking the position that a generator could be fully deliverable, but still not be entitled to refunds; unfortunately, the CAISO's proposed language would lead to exactly that result.

Additionally, the Participating TO may wish to alter the plan of service set forth in a GIA due to permitting restrictions, subsequent queue drop-outs or other reasons. While LSA supports this flexibility, a change in the plan of service after the GIA is executed may make it impossible to attribute which Network Upgrades are associated with a particular project. In fact, it is possible that certain Network Upgrades originally associated with a project may never be built, thus forever preventing the Interconnection Customer from receiving refunds. Under the CAISO's proposed

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<sup>32</sup> See CAISO Filing, Attachment A (Clean Tariff) and Attachment B (Marked Tariff), proposed amendments to Tariff, Appendix CC, Article 11.4.1.

<sup>33</sup> Indeed, in this filing, the CAISO proposes an annual operational and partial deliverability assessment to reflect such changes as each project's Commercial Operation Date approaches.

approach, endless disputes could occur about when refunds are triggered. Conversely, the Commercial Operation Date of a project or a discrete project phase is a defined and objective trigger that would be easy to administer.

There is another practical concern with the CAISO's proposal specific to phased projects. There is currently no delineation in the interconnection studies or the GIAs between Network Upgrades for one phase of a project versus another phase. The CAISO has not explained how it would determine which upgrades were actually necessary to achieve a particular level of deliverability for a particular project phase, especially where the plan of service has changed or prior-queued projects have dropped out.

The need to assign multiple upgrades to multiple phases of the many generation projects included in the CAISO's study clusters would render the interconnection study process impossibly complex. For a variety of reasons, developers have the right and may phase their generation projects after the study process is complete, but before the GIA is executed; however, at that point, there would be no way to ascribe the need for different cluster-related upgrades to different phases of a specific project. The CAISO has neither thoroughly considered the practical implications of its proposal nor explained how it will address the myriad logistical issues engendered by this proposed policy. Therefore, the Commission should reject the proposal for these reasons as well.

**5. The CAISO Did Not Utilize Proper Procedure to Make these Changes, and the Tariff Changes and Filing Letter are Ambiguous.**

LSA believes that the GIA clearly requires repayment at the time of the generator's Commercial Operation Date, and that well-established policy dictates that result for both phased and non-phased projects. Even if that were not the case, the CAISO's proposal must fail for two process reasons as well: (1) the CAISO did not raise the issue of timing of repayment for Network Upgrades for non-phased projects as a GIP-2 issue in the stakeholder process, and its argument

that the change is simply a clarification is demonstrably false; and (2) the proposed new language in the GIA is not consistent with the GIP or the explanation in the Filing Letter, creating impermissible ambiguity about what rules the CAISO will actually apply in processing interconnections.

As described above, the CAISO added a requirement to the GIA Article 11.4.1 that refunds will not be paid until the “in service date of the corresponding Network Upgrades.”<sup>34</sup> Notably, the CAISO did not include that significant GIA change in any of the prior drafts issued to the stakeholders. In addition, the CAISO has created a conflict between the GIA and GIP, as it did not add this same requirement to Section 12.3.2 of the GIP, even though Section 12.3.2 of the GIP otherwise mirrors the GIA provision. The CAISO’s argument that the change was simply a clarification is specious, since the CAISO acknowledges that the parties fundamentally disagree about the underlying meaning of the provision.<sup>35</sup> These very serious due process errors should automatically trigger a rejection of the provision.

The CAISO insinuates in its Filing Letter that prior to refunds commencing, not only do corresponding Network Upgrades need to be complete, but that the facilities must also be included in TAC. In fact, the CAISO avers that currently the Participating TOs do not pay refunds until a facility is included in TAC. Despite this contention, the CAISO has not made *any* corresponding changes to the Tariff to reflect its erroneous interpretation. This incongruity leaves interconnection customers with significant uncertainty. Thus, whether or not CAISO *could* add such a provision to the GIP or GIA (and LSA believes it cannot), LSA requests that the Commission clarify that the CAISO *has not* added any such provision to the Tariff by virtue of

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<sup>34</sup> CAISO Filing, Attachment A (Clean Tariff) and Attachment B (Marked Tariff), proposed amendments to Tariff, Appendix CC, Article 11.4.1.

<sup>35</sup> CAISO Filing Letter, at pp. 17-18.

unsubstantiated statements in its Filing Letter and *cannot* impose such a requirement in the absence of a Commission-approved modification to that effect. Developers require this certainty in order to obtain financing for their projects.

**B. The CAISO Should Include a Provision that Offset for Damages and Losses Is Appropriate Only Where Actual Damages Are Incurred.**

In Section 12.3.2.2 of the GIP,<sup>36</sup> the CAISO inserted language that allows the Participating TO and the CAISO to offset potential losses or damages arising from an interconnection customer completing some, but not all, phases of its project:

If the Interconnection Customer completes one or more phases and then defaults on the GIA, the Participating TO and the CAISO shall be entitled to offset any losses or damages resulting from the default against any repayments made for Network Upgrades related to the completed phases provided that the party seeking to exercise the offset has complied with any requirements which may be required to apply the stream of payments utilized to make the repayment to the Interconnection Customer as an offset.

While LSA agrees generally that the Participating TO should have the right to offset refunds in the case where it incurs actual damages, LSA proposed in the stakeholder process that the CAISO should limit the offset right to cases where the parties agree that there is a default and damages or, if there is not agreement, where the Participating TO and CAISO can demonstrate a default and actual damages. Otherwise, this provision allows the Participating TO and the CAISO to unilaterally withhold funds that are otherwise due to the generator.

Specifically, LSA requests that the following language be added to both Section 12.3.2.2 of the GIP (Tariff, Appendix Y) and Article 11.4.1.2 of the GIA (Tariff, Appendix CC):

If there is a dispute between the parties about whether the Interconnection Customer has defaulted on the GIA and/or whether such default has resulted in actual damages, that dispute shall be resolved under the appropriate dispute resolution provision of the GIA, and the Participating TO and/or CAISO shall not be entitled to exercise the offset until the dispute is resolved.

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<sup>36</sup> The CAISO also made similar changes to the LGIA and the SGIA. *See infra.*, Section IV.

This addition is particularly appropriate here for three separate reasons. First, the CAISO has already included a provision that protects the Participating TO and ratepayers by requiring the Interconnection Customer to post 100% of its financial security for *all* phases of the project before receiving refunds for a single project phase.<sup>37</sup> This security requirement should hold the Participating TO and ratepayers harmless for any potential losses that accrue due to a failure of the generator to construct all phases of its project. That is, the Participating TO will either hold financial security or cash for all of the Network Upgrades assigned to a particular project. Thus, allowing the Participating TO both to offset refunds already due and to continue to hold any remaining security for Network Upgrades for future project phases could result in the Participating TO, in effect, “double” recovering any potential damages. The offset should only be allowed where a Participating TO can prove damages beyond the security being held, which should not occur in the normal course.

Second, in this situation, actual damages may be difficult to quantify and may require a neutral arbiter to determine the appropriate damages. The Participating TO should not be permitted to offset refunds where the relevant Network Upgrades are used by, or will be used by, other interconnection customers. It is not just and reasonable to give the Participating TO the unilateral right under the contract to determine the existence and amount of purported damages.<sup>38</sup>

Third, LSA questions the need for the CAISO to have a right of offset under this provision; however, it does not object to such inclusion as long as the CAISO is required to prove actual

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<sup>37</sup> CAISO Filing, Attachment A (Clean Tariff) and Attachment B (Marked Tariff), proposed amendments to Tariff, Appendix CC, Article 11.4.1.2(g), Appendix T, Section 5.3.1.2(g), and Appendix Y, Section 12.3.2.2(g).

<sup>38</sup> See *Midwest Independent Trans. Sys. Op., Inc.*, 135 FERC ¶ 61,065, at P 27 (2011) (“MISO”) (holding that while independent system operations have greater flexibility under the “independent entity variation” standard, the Commission “nonetheless review[s] the proposed variations to ensure that they do not provide an unwarranted opportunity for undue discrimination or produce an interconnection process that is unjust and unreasonable.”) (quoting *PJM Interconnection, LLC*, 108 FERC ¶ 61,025, at P 7 (2004).

damages before it applies any such offset. The CAISO does not fund Network Upgrades or provide refunds, so it generally will not incur damages for a default under the GIA. Therefore, if the CAISO wishes to retain an offset right for Network Upgrades, it should be required to demonstrate any alleged losses prior to applying any offset.

The CAISO's rationale for refusing to incorporate this provision is both confusing and misplaced. The CAISO relies on GIA Article 27.1, which states that if the parties *do not agree* to submit their claims to dispute resolution, they may exercise all other rights in law or equity.<sup>39</sup> The CAISO goes on to claim that because "offset is such a right in law," it cannot add LSA's suggested edit.<sup>40</sup> Simply because offset is a possible remedy at law does not mean that the contract itself cannot limit offset rights, where appropriate, to require a party to prove the right of offset. As described above, in this case, LSA's proposal provides an appropriate and necessary safeguard to the provision added by the CAISO.<sup>41</sup>

**C. The Criteria for the Issuance of a Revised Study Report Should be Equal for Overestimates and Underestimates of the Interconnection Customer's Cost Responsibility.**

In the GIP-2 filing, the CAISO proposed a new Section 6.10 to the GIP, which provides, in part, that a revised report will be issued where there is a substantial error or omission in the original final study report. The CAISO defines a "substantial error or omission," in relevant part, as an understatement of the Interconnection Customer's cost responsibility for facilities by more

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<sup>39</sup> CAISO Filing, Attachment A (Clean Tariff) and Attachment B (Marked Tariff), at Attachment G (CAISO Response to Stakeholder Comments on Draft GIP Phase 2 Changes), #45.

<sup>40</sup> *Id.*

<sup>41</sup> LSA also seeks clarification of the following phrase proposed at the end of Section 12.3.2.2 of the GIP: "provided that the party seeking to exercise the offset has complied with any requirements which may be required to apply the stream of payments utilized to make the repayment to the Interconnection Customer as an offset." LSA does not understand the meaning of this phrase, and was not able to get sufficient verbal clarification from the CAISO. Thus, LSA requests that the CAISO clarify the meaning of this phrase, and LSA reserves the right to comment on the provision once it receives clarification of its meaning.

than **five percent or one million dollars**; an overstatement of cost responsibility of more than **twenty percent**, or a timing delay of over one year.<sup>42</sup>

While LSA appreciates the addition of this provision generally, LSA does not believe that the CAISO has justified the massive discrepancy between the criteria for the issuance of a revised report for overstatements versus the criteria respecting understatements – a discrepancy that favors the Participating TO by requiring an upward adjustment in costs if there is more than a one million dollar discrepancy, but not requiring a downward adjustment unless there is much larger overstatement.

Notably, some clustered projects have been assigned Network Upgrades upwards of \$500 million. In such cases, a revised report would not be issued unless there was an error resulting in an *overstatement* of \$100 million or more (i.e., twenty percent of \$500 million), while an error resulting in an *understatement* of only \$1 million would require a revised report. LSA recommends that a revised report should be issued where there is either an over- or understatement of the greater of at least five percent (5%) or one million dollars.

In the stakeholder process, the CAISO suggested that it believed the consequences of a cost understatement would be greater than the consequences for a cost overstatement for purposes of developer financing. This is not true. An overstatement error can be just as problematic as an understatement error, because a developer may not be able to get financing in the first instance if the costs are too high, and may decide to forego construction of a project due to erroneously high cost estimates. In sum, the CAISO gives no persuasive justification for the tremendous discrepancy, and it has not met its burden in the face of such imbalanced treatment to demonstrate that the provision is just and reasonable as proposed.<sup>43</sup> Therefore, LSA requests that the

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<sup>42</sup> CAISO Filing Letter, at pp. 9-11.

<sup>43</sup> See *MISO*, 135 FERC ¶ 61,065, at P 27.

Commission order the CAISO to modify the provision as suggested on compliance.

**D. The GIA Negotiation Time Should be Extended Day-for-Day to Reflect Participating TO Delays in Issuing a Draft GIA.**

In its Filing, the CAISO has proposed an increase for negotiation of the GIA from 90 days to 120 days from the issuance of the Phase II Study Report, and LSA supports this proposed extension.<sup>44</sup> Section 11.1.1 of the GIP also requires that the Participating TO tender a draft GIA to the Interconnection Customer within thirty days of the issuance of the Phase II Study Report. Because the Phase II Study Report is issued for the entire queue cluster, the Participating TO often is not able to provide all of the project-specific draft GIAs within the allotted time frame. While the delay may be understandable, it is not just and reasonable to deduct a Participating TO-driven delay from the negotiation time among the parties. Thus, the Commission should require the CAISO to allow a day-for-day delay, if needed, to reflect any delays in the tender of the GIA.

The CAISO argued that the requested addition is not necessary because the parties may agree to extend the negotiation time of the GIA. LSA concurs that if the parties agree, the interconnection customer would not have to invoke this provision. However, in a case where the parties do not agree to extend the negotiation period – and the generator is at risk of being withdrawn from the queue – the interconnection customer should not be penalized if the Participating TO tenders the GIA beyond the thirty day time limit.

**E. Permitted Reductions in Output Capacity Should be Greater than Five Percent.**

In GIA Article 5.19.4, the CAISO has proposed a revision allowing an interconnection customer a “safe harbor” capacity reduction of up to five percent (5%) during the time period between the effective date of the GIA and Commercial Operation Date. The allowable reduction would be calculated from before the Phase II study, so that if the parties already agreed to a reduction prior to execution of the GIA, a further reduction would not be allowed.

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<sup>44</sup> CAISO Filing Letter, at p. 11.

In the stakeholder process, LSA proposed that the allowable reduction should be twenty percent (20%), but the CAISO rejected that proposal as creating an improper balance between limiting ratepayer risk and allowing flexibility to developers. However, using this test, the CAISO's own proposal must fail, as (1) it does not accomplish its stated goal of providing *meaningful* flexibility to the development community (a "safe harbor" of five percent (5%) is virtually meaningless from a commercial perspective); (2) the ratepayer protections already inherent in the GIP and GIA are sufficient and are not at all reduced by allowing a 20% "safe harbor" reduction; and (3) a limited safe harbor ultimately could actually increase, rather than decrease, ratepayer risk as discussed herein.

From a commercial perspective, allowing a 20% reduction would strike the right balance between encouraging developers to right-size their projects and allowing flexibility when a developer simply does not yet know what size project it can permit and/or the number of megawatts it can sell through a power purchase agreement ("PPA"). Transmission facilities have very long lead times, and so interconnection requests often must be filed years before a project is permitted or a PPA is secured.

Several companies have faced permit-related capacity reductions due to mitigation and environmental issues, and these are risks that cannot be identified in advance. While the CAISO has allowed for discretionary reductions for permitting or other issues, an absolute right to reduce up to twenty percent is much more meaningful from a financing perspective.

The CAISO argues that allowing a twenty percent reduction could result in an "overbuild" of the transmission system and subject ratepayers to additional risk. Those concerns are misplaced for several reasons. First, a reduction in size after GIA execution would not absolve a generator from funding its share of the plan of service (or revised plan of service, if revision is appropriate) nor its financial security obligation. Second, the interconnection queue is so large, and

transmission planning has moved so slowly, that it is highly unlikely that the capacity on any new line would not be utilized by another generator, or for another purpose (e.g., service to load). Third, major transmission lines must be permitted by the relevant state agency, and they will not be permitted if they cannot meet the “need” test required by those agencies to grant a construction permit.

Even in the unlikely event that a project triggers massive upgrades that are not part of the “backbone” needed for California to accomplish its renewable energy goals, the generator would be required to fund the full amount of its upgrades (assuming the Participating TO does not agree to upfront fund), and it is highly unlikely that a single developer could (or would) raise funds to finance massive upgrades for a single project that could not also be used by other generation projects.

Even companies with very large balance sheets find it difficult to finance transmission facilities; thus, this potential “problem” should not be used as a reason for the CAISO to avoid implementing rules that make sense for the development community, the ratepayers, and California as a whole. There is also far more financial risk to ratepayers if generation projects with PPAs fail due to financing hurdles based on the risk of not being able to downsize in any meaningful way.

Since the CAISO’s primary “ratepayer protection” rationale does not hold up under scrutiny, and LSA has demonstrated a need for a “safe harbor” reduction of up to twenty percent, the Commission should require the CAISO to modify the Tariff accordingly on compliance.

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**F. The Commission Should Order the CAISO to Revise the Filing on Compliance to Remedy the Following Typographical and Editorial Errors.**

**a. On Compliance the CAISO Should Revise GIP Section 9.3.1.3 to Accurately Reflect the Intent of the Provision.**

LSA supports the CAISO's revision of the provision of the GIP concerning financial security for the Participating TO's Interconnection Facilities.<sup>45</sup> These revisions modify the financial security posting amounts for Participating TO Interconnection Facilities so that they mirror the approach that the GIP sets out for financial security for Network Upgrades.

However, LSA believes that the Tariff language contains an editorial error, and requests that the Commission order the CAISO to correct this error on compliance. Specifically, LSA believes that the highlighted language below should read "assigned to the Interconnection Customer for **Participating TO Interconnection Facilities**", rather than "assigned to the Interconnection Customer for **Network Upgrades**."

Each Interconnection Customer for a Large Generating Facility assigned to a Queue Cluster and each Interconnection Customer for a Large Generating Facility in the Independent Study Process shall post an Interconnection Financial Security instrument such that the total Interconnection Financial Security posted by the Interconnection Customer for Participating TO Interconnection Facilities equals the lesser of (i) \$15 million or (ii) thirty (30) percent of the total cost responsibility assigned to the Interconnection Customer for ~~Network Upgrades~~ **Participating TO Interconnection Facilities** in either the final Phase I Interconnection Study, final Phase II Interconnection Study, System Impact Study, or Facilities Study, whichever is lower. In no event shall the total amount posted be less than \$500,000.

**b. On Compliance, the CAISO Should Revise Section 6.9.4 of the GIP to Reflect CAISO's Verbal Commitment to Modify That Section.**

In a new proposed GIP Section 6.9.4, the CAISO provides, among other things, that the CAISO and the applicable Participating TO may determine that one or more Delivery Network

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<sup>45</sup> This issue is Item #12 of the CAISO's Filing. *See id.*, at pp. 29-30.

Upgrades identified in the Phase I study are no longer needed based on interconnection customers' reduction in project size and/or change in deliverability status after the Phase I study report is issued. If such upgrades are found not to be needed anymore, the interconnection customer's initial financial posting is reduced accordingly, but its maximum cost responsibility is not affected.

LSA believes that the CAISO and Participating TO should evaluate whether one or more Delivery *or Reliability* Network Upgrades can be eliminated from the cost estimate for purposes of calculating the financial security posting amount. Significant reductions in project size in a queue cluster could significantly reduce required Reliability Network Upgrades, as well as Delivery Network Upgrades. One of LSA's representatives raised this issue with the CAISO, and the CAISO concurred with that position; however, the change has not been reflected in the proposed Tariff language. Thus, LSA requests that the Commission order the CAISO to make this change upon compliance.

#### **IV. Conclusion and Specific Relief Requested**

WHEREFORE, for the foregoing reasons, LSA respectfully moves for leave to intervene in the above-captioned proceeding and requests that the Commission accept the CAISO's Tariff Filing subject to compliance, with the modifications and clarifications requested below:

- 1) Delete the following language (subsection (f)) from proposed **Appendix Y, GIP 12.3.2.2**:  
“The Network Upgrades necessary for the completed phase to meet the desired level of deliverability are in service; and”
- 2) Delete the following language (subsection (f)) from proposed **Appendix T, SGIA, Article 5.3.1.2**: “The Network Upgrades necessary for the completed phase to meet the desired level of deliverability are in service; and”
- 3) Delete the following language (subsection (f)) from proposed **Appendix CC, LGIA**,

**Article 11.4.1.2:** “The Network Upgrades necessary for the completed phase to meet the desired level of deliverability are in service; and”

- 4) Delete the bolded phrase from proposed **Appendix CC, LGIA 11.4.1:** Upon the Commercial Operation Date of a Generating Facility that is not a Phased Generating Facility, **and the in-service date of the corresponding Network Upgrades**, the Interconnection Customer shall be entitled to a repayment, equal to the total amount paid to the Participating TO for the costs of Network Upgrades for which it is responsible, as set forth in Appendix G.
- 5) Clarify that refunds for Network Upgrades begin upon Commercial Operation, regardless of whether Network Upgrades are complete and/or included in the TAC.
- 6) Insert the following phrase to the relevant provision, as describe in this protest, of proposed **Appendix T, SGIA 5.3.1.2, Appendix Y, GIP Section 12.3.2.2** and **Appendix CC, LGIA Section 11.4.1.2:** “If there is a dispute between the parties about whether the Interconnection Customer has defaulted on the GIA and/or whether such default has resulted in actual damages, that dispute shall be resolved under the appropriate dispute resolution provision of the GIA, and the Participating TO and/or CAISO shall not be entitled to exercise the offset until the dispute is resolved.”
- 7) Revise proposed **Appendix CC, LGIA, Article 5.19.4** as follows: “An Interconnection Customer may reduce the MW capacity of the Generating Facility by up to **twenty five percent (205%)** for any reason, during the time period between the Effective Date of this LGIA and the Commercial Operation Date.
- 8) Revise proposed **Appendix Y, GIP, Section 6.10.1** as follows:

A substantial error or omission shall mean an error or omission that results in one or more of the following:

- (i) understatement of the Interconnection Customer’s cost responsibility for either Network Upgrades or Participating TO Interconnection Facilities by more than five (5) percent or one million dollars (\$1,000,000), whichever is greater; or
- (ii) overstatement of the Interconnection Customer’s cost responsibility for either Network Upgrades or Participating TO Interconnection Facilities **by ~~of~~ more than twenty five (5 20) percent or one million dollars (\$1,000,000), whichever is greater;** or
- (iii) results in a delay to the schedule by which the Interconnection Customer can achieve Commercial Operation, based on the results of the final Interconnection Study, by more than one year.

9) Insert the bold and highlighted language to proposed **Appendix Y, GIP Section 11.2** as follows: The applicable Participating TO(s) and CAISO and the Interconnection Customer shall negotiate concerning any disputed provisions of the appendices to the draft GIA for not more than one hundred-twenty (120) calendar days after the CAISO provides the Interconnection Customer with the final Phase II Interconnection Study report, or the Facilities Study report (or System Impact Study report if the Facilities Study is waived), **except that such time shall be extended one day for each day of delay by the Participating TO in tendering the initial draft of the GIA in accordance with GIP Section 11.1.**

10) Revise **Appendix Y, GIP Section 9.3.1.1** as follows: Each Interconnection Customer for a Large Generating Facility assigned to a Queue Cluster and each Interconnection Customer for a Large Generating Facility in the Independent Study Process shall post an Interconnection Financial Security instrument such that the total Interconnection Financial Security posted by the Interconnection Customer for Participating TO Interconnection Facilities equals the lesser of (i) \$15 million or (ii) thirty (30) percent of the total cost responsibility **assigned to the Interconnection Customer for Network Upgrades Participating TO Interconnection Facilities** in either the final Phase I Interconnection Study, final Phase II Interconnection Study, System Impact Study, or Facilities Study,

whichever is lower. In no event shall the total amount posted be less than \$500,000.

11) Insert the bolded and highlighted phrase to proposed **Appendix Y, GIP Section 6.9.4**: the CAISO, in coordination with the applicable Participating TO(s), will determine, based on best engineering judgment, whether such modifications will eliminate the need for any Delivery Network Upgrades **and/or Reliability Network Upgrades** identified in the Phase I Interconnection Study report.

12) Order the CAISO to clarify the meaning of the following phrase proposed in **Appendix Y, GIP Section 12.3.2.2** - “provided that the party seeking to exercise the offset has complied with any requirements which may be required to apply the stream of payments utilized to make the repayment to the Interconnection Customer as an offset.”

LSA thanks the Commission again for its consideration of LSA’s recommendations in this filing, and respectfully requests the Commission grant LSA’s requested relief as detailed herein.

Respectfully submitted,

*/s/ Ellen A. Berman*

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ATTORNEY FOR THE LARGE-  
SCALE SOLAR ASSOCIATION

December 21, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at San Francisco, CA this 21st day of December 2011.

*/s/ Ellen A. Berman*

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