

126 FERC ¶ 61,013
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

California Independent System Operator
Corporation

Docket No. ER08-960-001

ORDER DENYING REQUEST FOR STAY

(Issued January 9, 2009)

1. On July 31, 2008, OptiSolar, Inc. (OptiSolar) filed a request for clarification or, in the alternative, rehearing of a July 14, 2008 Commission order granting the California Independent System Operator Corporation's (CAISO) request for waiver of certain provisions in its tariff related to its Large Generator Interconnection Procedures (LGIP) and Interconnection Study Agreements.¹ OptiSolar also moved for a limited stay of the Commission's July 14 Order.² On September 26, 2008, the Commission issued an order denying clarification and rehearing.³ For the reasons discussed below, the Commission denies OptiSolar's request for stay of the July 14 Order.

I. Background

2. On March 20, 2008, the Commission issued an order on interconnection queuing practices.⁴ In that order, the Commission expressed concern about delays in processing interconnection queues and noted that all Transmission Providers should evaluate

¹ *California Independent System Operator Corp.*, 124 FERC ¶ 61,031 (2008) (July 14 Order).

² OptiSolar Request at 14.

³ *California Independent System Operator Corp.*, 124 FERC ¶ 61,293 (2008) (September 26 Order).

⁴ *Interconnection Queuing Practices*, 122 FERC ¶ 61,252 (2008) (March 20 Order).

whether changes are needed to their queue management practices to ensure the expediency called for by Order No. 2003.⁵ We specifically noted that the queuing backlog has been creating additional challenges in meeting the state's renewable portfolio standard⁶ and recognized the potential benefits of other queue management reforms. We also recognized that reforms affecting late-stage interconnection requests require careful consideration due to the potential disruptive effects on customers who may have taken action in reliance on the existing process.⁷

3. On May 15, 2008, the CAISO filed a petition for waiver of certain provisions of its tariff related to its LGIP and Interconnection Study Agreements to prepare the CAISO market for adoption of some of the reforms suggested in the March 20 Order.⁸ CAISO proposed a two-step process to reform its current LGIP in order to more efficiently manage its interconnection queue. The May 15 Petition, which the Commission approved in the July 14 Order, constituted the first step in the LGIP reform process. The second step involved a tariff amendment filing to incorporate CAISO's anticipated generator interconnection process reforms (GIPR).⁹ CAISO explained that the waiver would facilitate the processing of current interconnection requests that are well along in the study process by allowing CAISO to focus its resources on clearing the current queue of later stage interconnection requests. According to CAISO, the waiver also would accommodate the transition to the new GIPR procedures by temporarily suspending the time schedule in the LGIP for completing interconnection studies and other actions applicable to the processing of early stage interconnection requests. The July 14 Order granted the petition for waiver.

⁵ *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, *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).

⁶ March 20 Order, 122 FERC ¶ 61,252 at P 5.

⁷ *Id.* P 19.

⁸ *Petition for Waiver of Tariff Provisions to Accommodate Transition to Reformed Large Generator Interconnection procedures, and Motion to Shorten Comment Period*, FERC Docket No. ER08-960-000 (filed May 15, 2008) (May 15 Petition).

⁹ *California Independent System Operator Corp.*, 124 FERC ¶ 61,292 (2008).

4. CAISO's waiver petition included provisions separating pending interconnection requests into three study groups for processing: (1) a grandfathered serial study group that would receive expedited treatment under the current LGIP; (2) a transition cluster, comprising non-grandfathered interconnection requests submitted by June 2, 2008, which would be processed under the slightly modified GIPR revisions; and (3) an initial GIPR cluster of interconnection requests submitted after June 2, 2008.

5. CAISO proposed that interconnection requests meet one of three specific criteria to be eligible for the grandfathered serial study group: they must (1) be the subject of an executed interconnection system impact study agreement specifying an original study results due date prior to May 1, 2008; (2) have a power purchase agreement with a load-serving entity approved or pending approval by the California Public Utilities Commission or a local regulatory authority as of May 1, 2008; or (3) be the next interconnection request in queue order to interconnect to a new transmission project that has received land use approvals from any local, state, or federal entity, as applicable, up to the capacity studied by the CAISO.¹⁰

6. In the July 14 Order, the Commission approved CAISO's May 15 Petition.¹¹ Specifically, the Commission found that CAISO identified criteria that appropriately identify later stage interconnection requests, and that this category could be processed efficiently under the existing LGIP process, which would subject the remaining interconnection requests to prompt treatment under CAISO's reformed queue management process.¹²

II. Request for Stay

7. On July 31, 2008, as part of its request for clarification or, in the alternative, rehearing of the July 14 Order, OptiSolar requested a limited stay of the July 14 Order.¹³

¹⁰ July 14 Order, 124 FERC ¶ 61,031 at P 12.

¹¹ *Id.* P 19-20 (citing *California Independent System Operator Corp.*, 118 FERC ¶ 61,226, at P 24, *order on clarification*, 120 FERC ¶ 61,180 (2007) (Tehachapi)). In Tehachapi, the Commission granted waivers of CAISO's LGIP procedures to allow a greater-than-180-day Queue Cluster Window and to allow the retroactive clustering of interconnection requests submitted prior to the establishment of the Queue Cluster Window, specifically finding a one-time waiver appropriate where good cause for a waiver of limited scope exists, there are no undesirable consequences, and the resultant benefits to customers are evident. Tehachapi, 118 FERC ¶ 61,226 at P 24.

¹² *Id.* P 20.

¹³ OptiSolar Request at 14-17.

Specifically, OptiSolar requested a stay of that portion of the Commission's July 14 Order that waives the LGIP requirements for processing the interconnection requests of those projects that currently are assigned to the Transition Group but have higher queue positions than projects in the serial study group and that have requested interconnection at the same location. OptiSolar argues that the Commission may stay its action when "justice so requires." 5 U.S.C. § 705 (2006). In deciding whether justice requires a stay, the Commission weighs the following factors: "(1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest."¹⁴

8. First, OptiSolar argues the limited stay is necessary to avoid irreparable injury to OptiSolar as a result of an anticipated project delay of more than two years.¹⁵ OptiSolar claims that if the waiver granted by the July 14 Order is allowed to remain in effect without modification, OptiSolar's project will not be studied until the CAISO has completed processing the interconnection requests in the serial study group.¹⁶ As a result, OptiSolar states that it will lose irreplaceable ground in moving toward construction and operation of its solar power plant and will be placed at a competitive disadvantage in responding to utility solicitations seeking renewable power needed to meet the 2010 renewable portfolio standard goal.¹⁷ OptiSolar asserts that it will lose not only the economic benefits of having its project move to completion, but it will have lost the opportunity to supply clean, renewable energy to the grid.¹⁸

9. Second, OptiSolar argues the requested stay will not substantially harm other parties.¹⁹ OptiSolar states that the limited stay would result in the expansion of the serial study group by at most three projects.²⁰ OptiSolar asserts that such an increase in the serial study group will not result in material delay in the CAISO's study and processing of the projects that are included in the serial study group.

¹⁴ *Id.* at 14-15 (citing *Pinnacle West Capital Corp.*, 115 FERC ¶ 61,064, at P 8 (2006)).

¹⁵ OptiSolar Request at 15.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 15-16.

²⁰ *Id.*

10. Lastly, OptiSolar argues that the limited stay would be in the public interest because it comports with basic notions of fairness.²¹ OptiSolar states that it dutifully followed all of the CAISO's procedural and substantive requirements for processing its interconnection request and that it is manifestly unjust to send OptiSolar to the back of the line. OptiSolar states that doing so would offend fundamental notions of fairness because a competitor of OptiSolar would be able to leapfrog ahead of OptiSolar in the queue. OptiSolar further argues that the public interest would be harmed if a stay is not granted because allowing the CAISO to proceed with its processing of the interconnection requests in the serial study group without OptiSolar's project would impede the development of a major renewable (solar) energy project in contravention of to the Commission's stated goals of bringing renewable energy projects on line as quickly as possible.

III. Commission Determination

11. We conclude that OptiSolar has failed to meet the standard for granting a request for stay.

12. Under section 705 of the Administrative Procedure Act, the Commission may stay its action "when justice so requires."²² In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.²³ The Commission's general policy is to refrain from granting a stay of its orders, to assure definiteness and finality in Commission proceedings.²⁴ The key element in the inquiry is irreparable injury to the moving party.²⁵ If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the

²¹ *Id.* at 16.

²² 5 U.S.C. § 705 (2006).

²³ *Pinnacle West Capital Corp.*, 115 FERC ¶ 61,064, at P 8 (2006) (citing *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,361 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 990 (1993)).

²⁴ *Id.*

²⁵ *Id.*

other factors.²⁶ However, the Commission may examine the other factors where appropriate.²⁷

A. Whether the moving party will suffer irreparable injury without a stay

13. In its request for a limited stay, OptiSolar does not substantiate its claim for irreparable harm. OptiSolar identifies as potential harm that it will lose irreplaceable ground in moving toward construction and operation of its solar power plant and will be placed at a competitive disadvantage in responding to utility solicitations seeking renewable power needed to meet the 2010 renewable portfolio standard goal. Such consequences, in regards to a delay in processing its interconnection request, are of a purely economic nature. And OptiSolar admits that economic injury, such as a loss in revenue, by itself is not a sufficient basis for establishing irreparable harm.²⁸ It is well-settled that the potential for such economic loss does not and cannot constitute irreparable harm for purposes of justifying a stay.²⁹ OptiSolar provides no specifics as to the monetary extent of that harm; nor does it provide sufficient evidence showing that such economic harm is the result of the waiver granted by the July 14 Order. Such a claim is too broad and speculative to justify the granting of injunctive relief.³⁰

²⁶ *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,361 (1991).

²⁷ *Pinnacle West Capital Corp.*, 115 FERC ¶ 61,064, at P 8 (2006) (citing *The Montana Power Company, Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 85 FERC ¶ 61,400 at 62,535 (1998) (granting stay even without a finding of irreparable injury)).

²⁸ OptiSolar Request at 15 n.25.

²⁹ *Massachusetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, 31 FERC ¶ 61,215, at 61,429 (1985) (citing *Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*)). The court in *Wisconsin Gas v. FERC* did note, however, that monetary loss could constitute irreparable harm if it threatened the very existence of a movant's business. 758 F.2d at 674. No such evidence suggests that this narrow exception has any application in this case. OptiSolar makes a blanket statement that this economic harm would be "substantial" and provides no other facts detailing the extent of its economic injury. OptiSolar Request at 15 n.25.

³⁰ In *Wisconsin Gas*, 758 F.2d at 674, the court stated that, to meet the irreparable injury test for granting a stay:

First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against

(continued...)

14. OptiSolar also alleges that in addition to loss of economic benefits, it will have lost the opportunity to supply clean, renewable energy to the grid. OptiSolar provides no details to support this assertion. On the contrary, in its answer to OptiSolar's Request, the CAISO states that OptiSolar's project may be able to take advantage of the new LGIP procedures, filed by the CAISO on July 28, 2008 in Docket No. ER08-1317.³¹ CAISO states that the GIPR tariff amendment provides for an accelerated process that can be used under specified conditions to expedite an interconnection request in the Transition Cluster.³² OptiSolar has not provided any factual support as to why its placement in the Transition Cluster causes it to lose its opportunity to supply clean, renewable energy to the grid and provides no argument as to why such placement causes irreparable harm to OptiSolar.

B. Whether issuing the stay will substantially harm other parties

15. We find that issuance of the stay as proposed by OptiSolar would substantially harm other parties. OptiSolar states that granting the stay would result in the expansion of the serial study group by at most three projects and would not result in a material delay in the CAISO's studying and processing of the projects included in the serial study group. OptiSolar also states that because CAISO has indicated that it does not oppose the request, the requested stay would have no negative impact on the ability of the CAISO to fulfill its obligations with respect to projects in the serial study group. But CAISO opposes OptiSolar's request for a stay.³³ Such a stay, according to CAISO, would require CAISO to revert to the serial study processes for some or all interconnection requests in the queue, would severely disrupt CAISO's ongoing efforts to quickly process those more advanced interconnection requests in the serial study group, and this disruption

something merely feared as liable to occur at some indefinite time," *Connecticut v. Massachusetts*, 282 U.S. 660, 674, 75 L. Ed. 602, 51 S. Ct. 286 (1931); the party seeking injunctive relief must show that "the injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 179 U.S. App. D.C. 22, 548 F.2d 977 (D.C. Cir. 1976) (citations and internal quotations omitted).

³¹ CAISO's Answer at 5.

³² *Id.* (citing Docket No. ER08-1317-000, Transmittal Letter at pp. 29-30; proposed LGIP Section 7.6).

³³ *Id.* at 5-6.

would ripple throughout and further delay all projects in the queue.³⁴ In conclusion, we find that issuance of the stay as proposed by OptiSolar would substantially harm other parties.

C. Whether a stay is in the public interest

16. Finally, the public interest must be considered in addressing a request for a stay: whether granting the stay will have consequences beyond the immediate parties. OptiSolar argues that basic notions of fairness require the stay. OptiSolar also states that it would not be in the public interest to impede the development of a major renewable energy project. We have already found that it is appropriate and necessary to change CAISO's interconnection request processing rules in part because the significant queue backlogs were undermining important goals like California's renewable portfolio standards. The public interest requires that CAISO clear its queue of backlogged interconnection requests and develop and implement reforms to its LGIP.³⁵ We further found that CAISO has established criteria for including certain projects in the serial study group, and the Commission concluded that those criteria were fair and acceptable for eliminating the queue backlog. Basic fairness and the public interest would be undermined by disregarding the three criteria and cherry-picking various entities for inclusion or exclusion from the serial study group.³⁶ Therefore, granting a stay now of the waiver granted by the July 14 Order would not be in the public interest.

³⁴ *Id.*

³⁵ September 26 Order at P 21 (citing March 20 Order, 122 FERC ¶ 61,252 at P 4-5). In the March 20 Order, the Commission stated it is "concerned about delays in processing interconnection queues," and "the magnitude of the backlogs in...ISO-managed queues is particularly significant." They "not only deprive generation developers of needed business certainty," but "undermine other important public goals...[such as] meeting state renewable portfolio standards." March 20 Order, 122 FERC ¶ 61,252 at P 4-5.

³⁶ September 26 Order at P 21.

The Commission orders:

The Commission hereby denies the stay requested by OptiSolar, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.