127 FERC ¶ 61,177
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

California Independent System Operator Corporation Docket No. ER08-1317-001

ORDER DENYING REHEARING

(Issued May 21, 2009)

1. On October 27, 2008, Optisolar, Inc. (Optisolar) filed a request for expedited rehearing and request for limited stay and the California Wind Energy Association, the Large-Scale Solar Association and the American Wind Energy Association (collectively the Wind and Solar Parties) filed a request for rehearing of a September 26, 2008 Commission order conditionally approving the California Independent System Operator Corporation's (CAISO) proposed tariff amendments implementing its Generation Interconnection Process Reform (GIPR).[1] This order denies the requests for rehearing and stay.

I. Background

2. On May 15, 2008, the CAISO filed a petition for waiver of certain provisions of its tariff related to its large generator interconnection process and interconnection study agreements[2] to prepare the CAISO market for adoption of some of the reforms suggested in the Commission's March 20, 2008 order on interconnection queuing practices.[3] The CAISO proposed a two-step process to reform its current large generator interconnection process in order to more efficiently manage its interconnection queue. The Waiver

[1] *Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,292 (2008) (GIPR Order).

[2] *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) (Waiver Petition).

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

Petition, which the Commission approved on July 14, 2008,[4] constituted the first step in the large generator interconnection process reform process. The second step involved a tariff amendment filing to incorporate the CAISO's anticipated GIPR tariff revisions. The CAISO explained that the waiver would facilitate the processing of current interconnection requests that are well along in the study process by allowing the CAISO to focus its resources on clearing the current queue of later stage interconnection requests. According to the CAISO, the waiver also would accommodate the transition to the new GIPR procedures by temporarily suspending the time schedule in the large generator interconnection process 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.

3. The 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 then-current large generator interconnection process; (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.

4. The 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.[5]

5. In the July 14 Order, the Commission approved the CAISO's Waiver Petition.[6] Specifically, the Commission found that the CAISO identified criteria that appropriately

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[4] *Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,031 (2008) (July 14 Order), *reh'g denied*, 124 FERC ¶ 61,293 (2008).

[5] July 14 Order, 124 FERC ¶ 61,031 at P 12.

[6] *Id.* P 19-20 (citing *Cal. Indep. Sys. 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

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identify later stage interconnection requests, and that this category could be processed efficiently under the existing large generator interconnection process, which would subject the remaining interconnection requests to prompt treatment under the CAISO's GIPR queue management process.[7]

6. On July 28, 2008, the CAISO filed its GIPR tariff amendment. The GIPR tariff amendment comprised four major elements: (1) the GIPR adopted a clustering approach to processing interconnection requests within a queue cluster window, as opposed to the earlier large generator interconnection process of serial studies on each interconnection request as it was received; (2) the GIPR consolidated the interconnection studies associated with each interconnection request from the three studies required previously into two studies; (3) under the GIPR, interconnection entails only entering into one study agreement, as opposed to the three study agreements required previously; and, (4) the GIPR increased and accelerated the financial commitments to participate in the interconnection process.[8]

7. The CAISO argued that its GIPR tariff amendment was intended to achieve the following objectives: (1) clear the existing backlog of generator interconnection requests; (2) balance generation developer flexibility with increased generation developer commitments; (3) provide interconnection customers with significant certainty regarding network upgrade costs; (4) provide interconnection customers with greater certainty in the timing of interconnection study outcomes; (5) reduce or eliminate the need for restudies following completion of interconnection studies; (6) better integrate the generation interconnection process with the CAISO's transmission planning process; and (7) allow the integration of state efforts to identify transmission needs for energy resource areas.[9]

8. In the GIPR Order, the Commission conditionally approved the CAISO's GIPR tariff amendment. Specifically, the Commission found that the CAISO's GIPR tariff amendment represented an attempt to comprehensively reform its large generator interconnection process to eliminate the queue backlog and provide an efficient mechanism with which to manage interconnection on an ongoing basis. The Commission

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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.

[7] *Id.* P 20.

[8] GIPR Order, 124 FERC ¶ 61,292 at P 7.

[9] *Id.* P 9.

found the GIPR tariff amendment to be consistent with the directives of the March 20 Order and the July 14 Order.[10]

9. Of particular relevance on rehearing is the Commission's finding with regard to the benefits to the CAISO's interconnection process that would be brought about by the adoption of increased financial commitments. Specifically, the Commission found that increasing the financial commitments associated with interconnection might make it more difficult for under-funded projects to enter the interconnection process. The Commission noted the likelihood that under-funded projects might be more likely to drop out of the interconnection process and disrupt interconnection processing for others. The inability of planned and financed generating facilities to interconnect to the CAISO because of a clogged interconnection queue was the structural barrier to entry that the GIPR process was designed to remedy. The Commission found that increased financial commitments represented a reasonable effort to deter speculative projects that lack a reasonable chance of achieving commercial operation from entering the queue.[11]

10. Additionally, the CAISO's GIPR tariff amendment required interconnection customers to demonstrate site exclusivity,[12] or post a refundable deposit in the amount of $250,000. For rehearing purposes, the relevant element of the site exclusivity requirement is the distinction between the site exclusivity requirements on public lands, as opposed to the site exclusivity requirements on private lands.

11. In the GIPR Order, the Commission approved the CAISO's definition of site exclusivity as stated in its GIPR tariff amendment. Relying on the CAISO's representations regarding its interactions with the Bureau of Land Management (BLM), the Commission acknowledged the differences between projects proposed on federal land and those proposed on private land. Since site control is a necessary component of attaining commercial operation and the objective of the GIPR tariff reform is to ensure that the queue comprises projects that are likely to attain commercial operation, the

[10] *Id.* P 33.

[11] *Id.* PP 151-154.

[12] Under the CAISO's earlier large generator interconnection process, interconnection customers were required to demonstrate site control. The CAISO explained in its transmittal letter that the term "site exclusivity" was employed in the GIPR tariff amendment to avoid confusion because some interconnection customers would continue to be processed under the earlier large generator interconnection procedures. Accordingly, "site exclusivity" should be considered as the specific means by which site control is determined under the CAISO's GIPR tariff amendment. In all other respects, the terms are used interchangeably.

Commission found the increased requirements on public land where site control is more difficult to be reasonable. The Commission noted that the $250,000 site exclusivity deposit is fully refundable if the interconnection customer demonstrates site exclusivity or withdraws its interconnection request.[13]

II. Requests for Rehearing and Request for Limited Stay

12. Optisolar filed a request for rehearing and request for limited stay. The Wind and Solar Parties filed a request for rehearing. Subsequently, on December 19, 2008, the Wind and Solar Parties filed a motion for expedited consideration of request for rehearing. On January 5, 2009, the CAISO filed an answer to the Wind and Solar Parties' request for expedited consideration and on January 9, 2009, the Wind and Solar Parties filed a reply to the CAISO's answer.[14]

13. On November 10, 2008, the CAISO filed a motion for leave to answer and answer to Optisolar's request for rehearing. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2008) provides that the Commission will not permit answers to requests for rehearing. Accordingly, we will reject the CAISO's answer.

A. Optisolar's Request for Rehearing

14. Optisolar requests rehearing based on certain generating projects "leapfrogging" ahead of other higher-queued projects proposed for the same interconnection location. Optisolar alleges that this results in unjust, unreasonable and unduly discriminatory treatment of its generating project and constitutes unreasonable decision-making and is arbitrary and capricious. Additionally, Optisolar states that to the extent that the CAISO or a transmission owner conducted an interconnection system impact study for a lower-queued project without including higher queued projects in the base case, the GIPR Order failed to enforce the tariff.[15]

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[13] GIPR Order, 124 FERC ¶ 61,292 at P 54, 63.

[14] Optisolar's motion and the CAISO's answer are permitted under Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213 (2008). However, pursuant to Rule 213(a)(2), an answer to an answer is not permitted unless ordered by the decisional authority. Accordingly, we reject the Wind and Solar Parties' reply.

[15] Optisolar request for rehearing at 6.

B. Commission Determination

15. Optisolar's request for rehearing in this docket is substantially the same as its request for rehearing of the Commission's July 14 Order in the waiver proceeding, which we denied.[16] Optisolar's concerns continue to relate to the establishment of the serial study group, transition cluster and initial GIPR study group in the waiver proceeding.[17] The Commission has already denied Optisolar's request for rehearing of the establishment of these study groups in the Waiver Rehearing Order. Therefore, we reject Optisolar's attempt here to re-cast its objections as relating to the GIPR tariff changes.

16. In that the waiver proceeding, we found that, while Optisolar may potentially suffer from some processing delay, it stands to benefit from the CAISO's queue-clearing and reform efforts because the improved efficiencies in the interconnection process will benefit interconnection customers as a whole. In addition, we found that the waiver granted to the CAISO was limited in scope.[18] For example, in approving the CAISO's waiver request we found that the CAISO had identified appropriate criteria for identifying later stage interconnection requests. We approved the CAISO's continued treatment of those later stage interconnection requests under its then-existing large generator interconnection process and limited the effect of the waiver in such a manner that interconnection requests not eligible for treatment under the then-existing large generator interconnection process will be subject to prompt treatment under the CAISO's GIPR large generator interconnection process, either as transition cluster interconnection requests or as part of the initial GIPR cluster.[19] And, notwithstanding Optisolar's contention that it has complied with what was required of it, we found that the public interest requires that the CAISO clear its queue of backlogged interconnection requests and that the CAISO has proposed a just and reasonable resolution involving fair and acceptable criteria for eliminating the queue backlog. Finally, we concluded that basic fairness and the public interest would be undermined by disregarding the three criteria and cherry-picking various entities for inclusion in or exclusion from the serial study group.[20] Thus, we decline to consider Optisolar's request again in this proceeding. Accordingly, Optisolar's request for rehearing is denied.

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[16] *See Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,293 (2008) (Waiver Rehearing Order).

[17] *See* July 14 Order, 124 FERC ¶ 61,031 at P 20.

[18] *See* Waiver Rehearing Order, 124 FERC ¶ 61,293 at P 19, 20.

[19] *See* July 14 Order, 124 FERC ¶ 61,031 at P 20.

[20] *Id.* P 21.

C. The Wind and Solar Parties' Request for Rehearing

17. To show site exclusivity under the GIPR large generator interconnection procedure, an interconnection customer must provide documentation reasonably demonstrating:

> (1) Private Land:
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> (a) Ownership of, a leasehold interest in, or a right to develop property upon which the Generating Facility will be located consisting of a minimum of 50% of the acreage reasonably necessary to accommodate the Generating Facility; or
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> (b) An option to purchase or acquire a leasehold interest in property upon which the Generating Facility will be located consisting of a minimum of 50% of the acreage reasonably necessary to accommodate the Generating Facility.
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> (2) Public Land:
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> For public land, including that controlled or managed by any federal, state or local agency, a final, non-appealable permit, license, or other right to use the property for the purpose of generating electric power and in acreage reasonably necessary to accommodate the Generating Facility, which exclusive right to use public land under the management of the federal Bureau of Land Management (BLM) shall be in a form specified by the BLM.[21]

18. The Wind and Solar Parties' rehearing request asserts that the Commission erred in approving the CAISO's GIPR site exclusivity requirements. Specifically, the Wind and Solar Parties assert that the site exclusivity requirements as applied to projects on public lands is not supported by substantial evidence in the record, that the Commission failed to offer a reasoned explanation for approving the site exclusivity requirements, and that the Commission's order failed to address certain facts presented by intervenors in connection with the site exclusivity requirements.[22]

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[21] GIPR Order, 124 FERC ¶ 61,292 at n.40, citing GIPR large generator interconnection process, Appendix A Master Definitions Supplement.

[22] Wind and Solar Parties request for rehearing at 1.

19. The Wind and Solar Parties essentially state a single claim: in the Wind and Solar Parties' view, the distinctions between establishing site exclusivity on public lands as opposed to private lands do not merit the differing treatment proposed by the CAISO in connection with its GIPR proposal. In their request for rehearing, the Wind and Solar Parties assert this claim as four separate legal arguments: (1) the Commission's decision to approve the CAISO's new site exclusivity provisions were not supported by substantial evidence in the record; (2) the Commission failed to provide a reasoned basis for accepting the CAISO's new site exclusivity provisions as they relate to projects located on public land; (3) the Commission's decision is unlawful for having failed to respond to the arguments presented; and, (4) the Commission's decision is unlawful for having failed to provide a rational connection between the facts found and the choice made. The arguments overlap significantly and are inextricably interwoven. We find that they are best addressed in two segments. First, we will discuss the evidentiary support for the CAISO's site exclusivity provisions and then we will discuss the relationship between that evidence and the Commission's determination to approve the CAISO's proposal.

1. Substantial Evidence

a. The Wind and Solar Parties' Claim

20. The Wind and Solar Parties assert that the Commission's approval rests on a finding that private ownership lends itself to quicker and easier resolution of site control issues than is the case with federal lands, a statement found in paragraph 63 of the GIPR Order. The Wind and Solar Parties state that this statement is unsupported in the record because no party to the proceeding made such a claim or offered any evidence in support of such a claim.

21. The Wind and Solar Parties assert that, as a general proposition, achieving site control is no more difficult on public lands than on private lands. In support of this claim in their request for rehearing, the Wind and Solar Parties offer the assertion that the existing BLM process provides a right of priority upon acceptance of a right-of-way application.[23] In addition, the Wind and Solar Parties note that a developer on private land may have additional obligations before completing development, because the CAISO's site exclusivity definition only requires proof of exclusivity over 50 percent of the acreage reasonably necessary to accommodate the generating facility if a project is on private land; whereas for public land exclusivity is required over all of the necessary acreage.

[23] Wind and Solar Parties request for rehearing at 5, citing Motion to Intervene, Comments and Limited Protest of the California Wind Energy Association, the Large-Scale Solar Association and the American Wind Energy Association at 34-35, Docket No. ER08-1317-000 (August 18, 2008).

b. Commission Determination

22. We find that the record contains substantial evidence to support the Commission's determination approving the CAISO's site exclusivity definition. The CAISO chose different requirements to prove site exclusivity on public land versus private land due to their different characteristics. In support of this different treatment the CAISO noted that BLM does not currently have provisions for exclusive rights to a particular site on BLM land short of a final use permit.[24] In addition, the Wind and Solar Parties acknowledged the differences between acquiring site control on public versus private lands in their own Reply Comments, stating that "acquiring site control is a complicated and lengthy process [that is] perhaps even more complicated for projects on public lands."[25]

23. Finally, the CAISO site exclusivity provisions recognize that there are a variety of ways that legally binding site control can be established on private land, whereas the available means to accomplish the same end on public land are much more limited. The CAISO's site exclusivity definitions identify the following as potential means to acquire legally binding site control on private land: (1) ownership; (2) a leasehold interest; (3) a right to develop; (4) an option to purchase; or (5) an option to acquire a leasehold interest. On public land, only two alternatives are identified: (1) a final, non-appealable permit; or, (2) a license or other right to use the necessary property in a form specified by the BLM.[26] Beyond their contention that a BLM Type II right-of-way confers rights that are similar to those of an option-holder on private land, the Wind and Solar Parties do not identify additional alternative means for demonstrating legally binding site control on public land. We find that the range of available means of obtaining legally binding site control on public land, in conjunction with our finding that a BLM Type II right-of-way holder on public land is not substantially similar to an option holder on private land, provides evidence supporting the CAISO's proposed site exclusivity definition.

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[24] Motion for Leave to Answer and Answer of the California Independent System Operator Corporation to Comments On and Protests To its Generator Interconnection Process Reform Filing (CAISO Answer) at 30, Docket No. ER08-1317-000 (September 2, 2008).

[25] Limited Reply comments of the California Wind Energy Association, the Large-Scale Solar Association and the American Wind Energy Association at 11, Docket No. ER08-1317-000 (September 2, 2008).

[26] *See* GIPR large generator interconnection process, Appendix A Master Definitions Supplement.

24. The Wind and Solar Parties point out that the distinction between site exclusivity on public and private lands is partly driven by concerns raised by BLM.[27] Specifically, BLM "currently does not have provisions for exclusive rights to a particular site on [BLM] land short of a final use permit."[28] Despite the Wind and Solar Parties' protestations to the contrary, the CAISO's evidence and Wind and Solar Parties' own admissions provide adequate support for the Commission's approval of the CAISO's site exclusivity provisions.

25. BLM must balance the public's need for energy with other uses of the land – for grazing and wildlife, recreation and timber harvesting – under federal laws such as the Endangered Species Act, the Clean Water Act and the Clean Air Act. The nature of BLM's balancing is evident from its policy statement issued on August 2, 2008, which indicated as follows: "This statement sets forth the [BLM] policy for the management of energy and mineral resources on public lands, *a component of the agency's multiple use mandate.* The BLM seeks to implement its multiple use mission to balance various uses to achieve healthy and productive landscapes, including the development of energy and minerals in an environmentally sound manner."[29] Similar concerns do not exist on private land, where parties are free to contract for their use without balancing the public interest as BLM must.

26. Furthermore, the Wind and Solar Parties all but ignore significant attributes of the CAISO's public land site exclusivity provisions. Their concerns are focused on the primary provision that requires a "final, non-appealable permit [or] license." But the additional alternative provided under the CAISO's public land site exclusivity provisions includes "…or other right to use the property for the purpose of generating electric power and in acreage reasonably necessary to accommodate the Generating Facility, which exclusive right to use public land under the management of the [BLM] shall be in a form specified by the BLM."[30] CAISO witness Stephen Rutty explains that the alternatives to prove site control on public lands include either obtaining a final use permit, or showing

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[27] *See* Wind and Solar Parties request for rehearing at 5.

[28] CAISO Answer at 30.

[29] *See* Bureau of Land Management-Energy and Mineral Policy, issued August 26, 2008 (emphasis added), available at: http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/ib_attachments/2008.Par.15798.File.dat/IB2008-107_attl.pdf.

[30] *See* CAISO GIPR large generator interconnection process Appendix A Master Definitions Supplement, cited *supra.* n.17.

an alternative measure of exclusivity that is approved by BLM.[31] Since the ultimate viability of any project depends on obtaining a legal right to construct and operate the generation facility at its selected site, site control is an essential element in determining the viability of any particular interconnection request. The CAISO's proposal recognizes that at present BLM has no mechanism to provide those exclusive rights short of a final use permit. But the CAISO has crafted a proposal that will allow potential interconnection customers to work with BLM to establish such a mechanism, if that can be accomplished.[32] In addition to the BLM alternative, developers would have another alternative to demonstrate site exclusivity in the form of paying a $250,000 site exclusivity deposit.[33]

27. In conclusion, the Commission finds that approval of the CAISO's site exclusivity provisions is supported by substantial evidence on this record. It is clear from the record that acquiring site exclusivity on public lands is different, and more difficult, than acquiring site exclusivity on private lands. The evidence also supports a finding that the different requirements for interconnection customers on public lands are necessary to manage multiple uses of public land and the particular requirements of the BLM permitting process. The evidence demonstrates that it is more difficult to acquire site exclusivity on public land than on private land, and that the BLM must manage multiple uses of the public land it oversees. Accordingly, the different requirements embodied in the CAISO's site exclusivity definition, including the requirement that site exclusivity be demonstrated over all of the necessary acreage rather than 50 percent of the necessary acreage requirement on private land is supported by substantial evidence.

2. Reasoned Decisionmaking

a. The Wind and Solar Parties' Claim

28. The Wind and Solar Parties assert that the Commission failed to articulate a rational connection between the facts found and the choice made. Specifically, the Wind and Solar Parties state that the Commission failed to consider the evidence proffered that, they assert, establishes that a final, non-appealable use permit is not necessary to establish on public lands project viability that is comparable to that required to be established on private lands. Additionally, the Wind and Solar Parties state that the Commission failed to explain the connection between its findings that site control is

[31] Testimony of Stephen Rutty, Exhibit ISO-1 at 17-18, Docket No. ER08-1317-000.

[32] CAISO Answer at 30-31.

[33] *See* GIPR Large Generator Interconnection Process Tariff § 3.5.1.

easier and quicker to establish on private lands and the adoption of the CAISO's definition of site exclusivity.

29. In support of this argument, the Wind and Solar Parties explain that a final, non-appealable use permit is not necessary to establish a level of project viability consistent with that of a project with an option on private land. The Wind and Solar parties suggest that the Commission ignored their evidence comparing a "Type II right-of way" on public lands with that of a developer holding an option on private land. The Wind and Solar parties then assert that the Commission failed to draw a rational connection explaining why an increased difficulty of obtaining site control on public lands requires a final, non-appealable permit to attain comparability for development on public lands. According to the Wind and Solar Parties, the resultant conclusion on the part of the Commission approving the CAISO's definition of site exclusivity is arbitrary and capricious and unduly discriminatory.

b. Commission Determination

30. We deny the request for rehearing. The Wind and Solar Parties argument fails to account for the actual proposal made by the CAISO. As discussed above, the CAISO's site exclusivity definition requires either "a final, non-appealable permit, license, or other right to use the property for the purpose of generating electric power and in acreage reasonably necessary to accommodate the Generating Facility, which exclusive right to use public land under the management of the [BLM] shall be in a form specified by the BLM."[34] By ignoring the alternative of establishing a right to use the property by means other than a final use permit, the Wind and Solar Parties argument does not directly address the provision approved by the Commission.

31. The Wind and Solar Parties are mistaken that a Type II right-of-way from the BLM provides site exclusivity. In support of the claim, Wind and Solar Parties cite to the Bureau of Land Management's policy applicable to wind generation.[35] Wind and Solar Parties quote from the BLM policy statement, but fail to acknowledge the following statement indicating that a Type II right-of-way does not provide such exclusivity: "The holder of the site testing and monitoring right-of-way grant [Type II right-of-way] for a

[34] GIPR Order, 124 FERC ¶ 61,292 at n.40, citing GIPR large generator interconnection process, Appendix A Master Definitions Supplement.

[35] U.S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2006-216, Wind Energy Development Policy, (Aug. 24, 2006), *available at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2006/2006-216__.html.

project area establishes *no right to development* and is required to submit a separate right-of-way application for wind energy development to the BLM for analysis, review, and decision."[36]

32. In order to ensure that the interconnection queue does not become clogged with questionable projects and the CAISO does not unnecessarily expend resources studying such projects, it is reasonable to require that a developer show some legally binding control over the property on which it seeks to develop an electric generating facility. We find that a Type II right-of-way does not provide adequate evidence of legally binding control because it establishes no right to development, as compared to an option which does provide legally binding rights. The fact that a developer who holds an option over private land may be required to complete permitting and environmental review processes does not alter the legally binding nature of the control obtained over the land in question.

33. In addition, as we discussed above, interconnection customers have yet another alternative available to satisfy the exclusivity requirements. Under the CAISO's GIPR interconnection process, an interconnection customer continues to have the alternative of either demonstrating site exclusivity, or of posting a deposit in lieu thereof. While the deposit amount has been increased to $250,000, the increased deposit is only an acceleration of the $250,000 site control deposit that already existed under section 11.3 of the CAISO's previous large generator interconnection procedures. In addition, under the GIPR, the site exclusivity deposit is refundable, whereas the site control deposit under the previous large generator interconnection process was non-refundable.[37] Moreover, the site control provisions under the CAISO's previous large generator interconnection process were substantially the same as those provided by the *pro forma* large generator interconnection procedures as directed by Order No. 2003.[38] Thus, the GIPR site

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[36] *Id* at 2 (emphasis added).

[37] *See* CAISO transmittal letter at 17-18, Docket No. ER08-1317-000, (July 28, 2008).

[38] Although the *pro forma* large generator interconnection agreement does not expressly address development rights on public lands, a Type II right-of-way permit would not satisfy the three conditions for satisfying "site control": "Site Control shall mean documentation reasonably demonstrating: (1) ownership of, a leasehold interest in, or a right to develop a site for the purpose of constructing the Generating Facility; (2) an option to purchase or acquire a leasehold site for such purpose; or (3) an exclusivity or other business relationship between Interconnection Customer and the entity having the right to sell, lease or grant Interconnection Customer the right to possess or occupy a site for such purpose." *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,

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exclusivity provisions provide a just and reasonable means of achieving the site control objectives directed by Order No. 2003 by appropriately recognizing the differences in obtaining site control on public versus private lands and providing several alternative means to satisfy the site control requirements.

34. We find that the facts in the record support the Commission's conclusion that the CAISO's requirements for interconnection on public land, where site control is more difficult to attain, are just and reasonable. BLM rights-of-way, such as the Type II right-of-way, are inadequate to demonstrate the necessary legally binding control over property. The CAISO's proposed site exclusivity provisions incorporated other alternatives, such as submitting a site exclusivity deposit, or arriving at an alternative means of demonstrating site exclusivity that is approved by BLM. We further find that the differing treatment of site exclusivity on public land is justified and does not unduly discriminate against developers with projects on public land. Wind and Solar Parties' request for rehearing does not justify reversing that conclusion and is hereby denied.

D. Optisolar's Request for Limited Stay

1. Optisolar's Request

35. As part of its October 27, 2008 request for rehearing of the September 26 Order, Optisolar requests a limited stay of the GIPR Order. Specifically, Optisolar requests a stay of that portion of the GIPR Order that suspends the large generator interconnection process requirements for processing the interconnection requests that currently are assigned to the transition cluster but have higher queue positions than projects in the grandfathered 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."[39] 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."[40]

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).

[39] 5 U.S.C. § 705 (2006).

[40] Optisolar request for rehearing at 14, citing *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.*

(continued)

36. Optisolar asserts that its request for limited stay satisfies these requirements. First, Optisolar asserts that it will suffer irreparable harm as a result of being placed in the transition cluster due to (1) the allocation of existing transmission capacity and possible additional capacity being assigned first to projects included in the serial study group, (2) allocation of 200 MW of available transmission capacity to a lower-queued project included in the serial study group at its same location, and (3) a pro rata allocation of any remaining transmission capacity at its same location among Optisolar's project and other projects in the transition cluster, all of which had lower queue positions than Optisolar's project. Optisolar further asserts that, if it remains in the transition group, it is likely that insufficient transmission capacity will be available at the time its project is ready for interconnection.[41]

37. Secondly, Optisolar asserts that its requested stay will not harm other parties because adopting Optisolar's position would expand the serial study group by no more than three additional projects. Optisolar asserts that such a limited expansion of the serial study group would not result in a material delay. Finally, Optisolar states that the limited stay would be in the public interest because it comports with notions of basic fairness.

2. Commission Determination

38. We conclude that Optisolar has failed to meet the standard for granting a request for stay.

39. Under section 705 of the Administrative Procedure Act, the Commission may stay its action "when justice so requires."[42] In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing a stay will substantially harm other parties; and, (3) whether a stay is in the public interest.[43] The Commission's general policy is to refrain from granting a stay of its orders, to assure definiteness and finality in Commission proceedings.[44] The key

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Michigan Municipal Cooperative Group v. FERC, 990 F.2d 1377 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 990 (1993).

[41] *Id.* at 15.

[42] 5 U.S.C. § 705 (2006).

[43] *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).

[44] *Id.*

element in the inquiry is irreparable injury to the moving party.[45] If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.[46] However, the Commission may examine the other factors where appropriate.[47]

40. Optisolar's request for a stay in this docket relies on substantially the same factors that it relied on in seeking a stay from the July 14 Order. Optisolar identifies as potential harm the loss of an allocation of existing transmission capacity and unavailability of additional capacity at the Ivanpah Substation, as a result of transmission capacity being allocated to projects in the serial study group, while Optisolar remains in the transition cluster. The harms Optisolar is concerned with are those that occur as a result of its project being assigned to the transition cluster, rather than the serial study group.[48] We rejected in detail the claim that being placed in the transition cluster instead of the serial study group results in irreparable harm in our order denying a stay of the July 14 Order and we make the same findings here for the reasons given in that order.[49] Nothing in Optisolar's request for a stay in this docket changes the determinations made in denying a stay of the July 14 Order.

41. More importantly, the request for a stay in the instant docket is no more than a collateral attack on the July 14 Order and the denial of a stay thereof. As discussed above, the establishment of the transition cluster occurred in the issuance of the July 14 Order, not the GIPR Order.

42. Additionally, granting 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 contained in the serial study group. But we have already noted that, according to the CAISO a delay such as the one sought by Optisolar would severely disrupt the CAISO's ongoing efforts to quickly process the

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[45] *Id.*

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

[47] *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)).

[48] Optisolar request for rehearing at 15-17.

[49] *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,013, at P 11-16 (2009).

more advanced interconnection requests in the serial study group and that the disruption would ripple throughout and further delay all projects in the queue.[50]

43. Finally, the public interest must be addressed in considering a request for a stay. We have already found that it is appropriate and necessary to change the CAISO's interconnection request processing rules and that the CAISO has established criteria for including certain projects in the serial study group, which criteria the Commission concluded were fair and acceptable for eliminating the queue backlog.[51] Basic fairness and the public interest would be undermined by disregarding the established criteria and our earlier orders approving the CAISO's process to now engage in selecting certain entities for inclusion or exclusion from the serial study group established in the July 14 Order. Therefore, granting a stay now of the GIPR Order, effectively setting aside the findings of the July 14 Order, would not be in the public interest.

The Commission orders:

The Commission denies the requests for rehearing by Wind and Solar Parties and Optisolar, and Optisolar's request for limited stay, as discussed in the body of this order.

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

[50] *Id.* P 15.

[51] *Id.* P 16.