

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

California Independent System )  
Operator Corporation )

Docket No. ER08-1317-000

**REQUEST FOR REHEARING OF  
THE CALIFORNIA WIND ENERGY ASSOCIATION,  
THE LARGE-SCALE SOLAR ASSOCIATION AND THE  
AMERICAN WIND ENERGY ASSOCIATION**

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.713 (2008), the California Wind Energy Association (“CalWEA”), the Large-scale Solar Association (“LSA”) and the American Wind Energy Association (“AWEA” and, together with CalWEA and LSA, the “Wind and Solar Parties”) respectfully request rehearing of the Commission’s *Order Conditionally Approving Tariff Amendment*, issued September 26, 2008, in the captioned proceeding. *California Independent System Operator Corporation*, 124 FERC ¶ 61,292 (2008) (“September 26 Order”).

As discussed below, the September 26 Order errs in adopting the California Independent Transmission System Operator’s (“CAISO”) proposed new “site exclusivity” definition — which was never discussed with stakeholders — because the higher standard it entails for projects on public lands is not supported by substantial evidence in the record, the Commission failed to offer a reasoned explanation for its decision, and failed to address key un rebutted facts presented by intervenors that undercut the CAISO’s proposal.

In further support, the Wind and Solar Parties show as follows:

## I. BACKGROUND

On July 28, 2008, the CAISO filed its Generator Interconnection Process Reform (“GIPR”) as proposed amendments to its Open Access Transmission Tariff (“OATT”) in order to implement a number of reforms to the Large Generator Interconnection Procedures (“LGIP”) portion of the OATT. Most of these proposed reforms arose through the CAISO’s numerous and detailed discussions with stakeholders addressing how to alleviate crippling backlogs that had emerged in the CAISO’s generation interconnection queue.

The CAISO’s proposed LGIP reforms included four main elements to speed the interconnection study process and integrate it with the transmission planning process (“TPP”). First, the GIPR adopts a cluster study approach to processing interconnection requests. Second, the GIPR streamlines the previous three-study approach into two studies — the Phase I Study and the Phase II Study. Third, interconnecting generators need sign only one agreement, the Large Generator Interconnection Study Process Agreement, instead of three. Finally, the GIPR significantly increases and accelerates the financial commitments that generators must make to participate in the interconnection process.<sup>1</sup>

These reforms are intended to achieve a number of objectives, including the expedited clearing of interconnection request backlogs, providing interconnection customers with greater certainty concerning their financing responsibility for grid upgrades, better integration of the generation interconnection and transmission planning processes, and integration of California’s efforts to identify transmission needs for energy resource areas.<sup>2</sup>

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<sup>1</sup> See September 26 Order at P 7 (summarizing GIPR elements).

<sup>2</sup> *Id.* at P 8.

The Wind and Solar Parties filed initial and reply comments in response to the CAISO's LGIP reform plan. Among other things, the Wind and Solar Parties urged the Commission to reject the CAISO's new "site exclusivity" requirement, which was a major change to the OATT that was never discussed with stakeholders, established vague and unattainable requirements for projects on public land, and ultimately would force such projects to pay a \$250,000 deposit that would not likely be required for comparable projects on private land. The Commission, however, found that the GIPR's proposed new definition is appropriate and not unduly discriminatory, despite the different burdens imposed on developers on public and private lands.

The Commission should grant rehearing of this issue for the reasons given below.

## **II. Statement of Issues**

1. The September 26 Order is arbitrary, capricious and otherwise contrary to law because it fails to provide a reasoned basis for accepting the CAISO's new site exclusivity condition as it applies to projects located on public land. *Idaho Power Company v. FERC*, 312 F.3d 454 (D.C. Cir. 2002); *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996); *Am. Gas Ass'n v. FERC*, 428 F.3d 255, 263 (D.C. Cir. 2005); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002); *Gulf States Util. Co. v. FERC*, 1 F.3d 288, 291 (5th Cir. 1993).
2. The September 26 Order is arbitrary, capricious and otherwise contrary to law because it is not supported by substantial evidence in the record. 5 U.S.C. § 706; *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 446 (D.C. Cir. 2005); *Florida Municipal Power Agency v. FERC*, 411 F.3d 287, 291 (D.C. Cir. 2005); *Northern States Power Co. (Minn.) v. FERC*, 30 F.3d 177 (D.C. Cir. 1994).
3. The September 26 Order is arbitrary, capricious and otherwise contrary to law because it failed to respond to the arguments presented. *New England Power Co. v. FERC*, 533 F.3d 55, 57 (D.C. Cir. 2008) (vacating relevant portions of FERC's order that failed to consider the arguments raised); *NorAm Gas Transmission*, 148 F.3d at 1165 ("[I]t most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it . . .") (quoting *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992)).

4. The September 26 Order is arbitrary and capricious and otherwise contrary to law because it fails to provide a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48-49 (1983); *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1282 (D.C. Cir. 2004); *Idaho Power Company v. FERC*, 312 F.3d 454 (D.C. Cir. 2002); *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996); *Exxon Corp. v. FERC*, 206 F.3d 47, 54 (D.C. 2000); *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996).

### III. Request for Rehearing

#### A. **The Commission's Finding That Private Ownership Provides Quicker and Easier Resolution of Site Control Issues Is Not Supported By Substantial Evidence Because No Party Ever Made Such a Claim.**

The Commission's decisions must be supported by substantial evidence in the record.<sup>3</sup> This includes a determination of “whether each of the order's essential elements is supported by substantial evidence,” and whether FERC “abused or exceeded its authority.”<sup>4</sup> The September 26 Order's decision to accept the CAISO's new site exclusivity requirement does not satisfy this legal standard.

In the September 26 Order, the Commission states that “[p]rivate ownership lends itself to quicker and easier resolution of site control issues than is the case with federal lands.”<sup>5</sup> This finding of fact is not supported by substantial evidence because there is no claim anywhere in the record that private ownership provides quicker and easier resolution of site control issues. The Commission should grant rehearing because this finding is not based on substantial evidence, or even any evidence in the record.

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<sup>3</sup> 5 U.S.C. § 706; *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 482 (1951); *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 446 (D.C. Cir. 2005); *Florida Municipal Power Agency v. FERC*, 411 F.3d 287, 291 (D.C. Cir. 2005); *Northern States Power Co. (Minn.) v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994).

<sup>4</sup> *Gulf States Util. Co. v. FERC*, 1 F.3d 288, 291 (5th Cir. 1993).

<sup>5</sup> September 26 Order at P 63.

In the CAISO’s initial filing, Mr. Stephen Rutty explained that the CAISO chose to add a new definition of “site exclusivity” to the GIPR in large part to accommodate the concerns of the federal Bureau of Land Management (“BLM”).<sup>6</sup> The CAISO’s answer further explained that “BLM has represented to the CAISO that it currently does not have provisions for exclusive rights to a particular site on BLM land short of a final use permit.”<sup>7</sup> Nowhere did the CAISO offer evidence to support the finding on which the Commission’s decision turns; *i.e.*, that projects on private land obtain “quicker and easier resolution of site control issues.”

Contrary to the Commission’s assumption, as a general proposition, achieving site control is no more difficult on public lands than on private lands. Under the CAISO’s proposed definition of “site exclusivity,” a developer for a project on private land must show, at a minimum, an option on — not an actual lease or purchase of — only 50% of the land required for the project. This leaves the rights to the remaining 50% of the property required for the project to be subsequently negotiated with the owners of contiguous parcels of land. The success of these negotiations is far from certain, given the potential for hold-outs and related transaction costs.

By contrast, the existing BLM process provides the right of priority above other developers from all the land required for the project upon acceptance of a right-of-way application.<sup>8</sup> While BLM approval of the right of way is required for the right to exclude to be extended, just as an actual lease or purchase is required to establish the right to exclude beyond a

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<sup>6</sup> Exhibit No. ISO-1 (Rutty) at p. 17.

<sup>7</sup> Answer of the California Independent System Operator Corp., Docket No. ER08-1317, at 30 (“CAISO Answer”).

<sup>8</sup> See Motion to Intervene, Comments, and Limited Protest of the California Wind Energy Association, the Large-scale Solar Association, and the American Wind Energy Association, Docket No. ER08-1317-000, at 34-35 (“Wind and Solar Parties Protest”). Note that although

mere option, this uncertainty presents no more of an impediment to achieving site control on public lands than the acquisition of options on the remaining land needed to achieve site control on private lands and the conversion of those options to actual leases or purchases. Thus, there is no basis for a categorical declaration that site control is easier to acquire on private lands.

In short, the Commission’s finding that “private ownership lends itself to quicker and easier resolution of site control issues than is the case with federal lands” is legally deficient because there is no evidence in the record to support it. Accordingly, the Commission should grant rehearing and direct the CAISO to modify the definition of “site exclusivity” as the Wind and Solar Parties requested in their reply comments.

**B. The Commission’s Conclusion That the Site Exclusivity Definition Is Just and Reasonable Is Arbitrary and Capricious Because the Commission Did Not Articulate a Rational Connection Between the Facts Found and the Choice Made, Nor Did It Respond to the Wind and Solar Parties’ Arguments.**

The Commission’s decisions are required to be the product of reasoned decision-making, which means there must be a rational connection between the facts found and the choice made.<sup>9</sup> The Commission’s decision on the site exclusivity issue fails to satisfy this legal standard.

The September 26 Order failed to articulate a rational connection between the facts found and the choice made because the Commission failed to: (1) consider the large volume of evidence that a final, non-appealable use permit is not necessary to establish a level of project viability on federal land consistent with that achieved through an option on privately-

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BLM may, in some circumstances, allow overlapping or stacking of applications on given areas of property, the first in the line retains priority.

<sup>9</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48-49 (1983); *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1282 (D.C. Cir. 2004); *Idaho Power Company v. FERC*, 312 F.3d 454 (D.C. Cir. 2002); *United Distribution Companies v. FERC*, 88 F.3d 1105, 1188 (D.C. Cir. 1996); *Exxon Corp. v. FERC*, 206 F.3d 47, 54 (D.C. 2000); *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996).

owned land, or (2) explain the connection between its flawed finding that achieving site control is “quicker and easier” on private land and its conclusion that the definition of “site exclusivity” is just and reasonable. Thus, the Commission should grant rehearing and modify the definition of “site exclusivity.”

1. **The Commission failed to consider evidence submitted by the parties demonstrating that a final, non-appealable use permit is not necessary to establish a level of project viability on federal land consistent with that achieved through an option on privately-owned land.**

The Wind and Solar Parties provided a detailed explanation of the process for developing a project on BLM land.<sup>10</sup> Those comments showed that existing BLM policy provides a mechanism for developers to obtain the right to exclude other developers from a particular parcel of BLM land without obtaining a final, non-appealable permit.<sup>11</sup>

With respect to wind projects, “a Type II right-of-way grants the applicant an exclusive right to use the land to develop wind energy projects for three years.”<sup>12</sup> This exclusivity begins upon acceptance of the right-of-way application and either continues upon a grant of the requested right-of-way, or expires upon a denial. While a Type II right-of-way still requires a subsequent application to BLM for review, analysis, and approval of a plan to progress to the next stage of development activities, this process is no different than development on private lands, where the developer must still undergo all permitting and environmental review processes even though it owns, or has an option on, the private land.<sup>13</sup>

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<sup>10</sup> See Wind and Solar Parties Protest at 33-35.

<sup>11</sup> *Id.* at 33-34.

<sup>12</sup> *Id.* at 34 (internal citation omitted).

<sup>13</sup> *Id.* at 32-33.

Likewise, Horizon Wind Energy also submitted comments demonstrating that a final, non-appealable permit is not necessary to establish viability of a project on federal lands equivalent to that of a project with an option on private land.<sup>14</sup> These comments made the point that a BLM Type II right-of-way provides substantially the same level of assurance of project viability as an option on private land.<sup>15</sup> Further, Horizon Wind Energy noted that requiring a final, non-appealable use permit from BLM as a condition of establishing “site exclusivity” for interconnection purposes is illogical because the BLM permitting process itself requires an analysis of the transmission needs, which are identified in the interconnection process.<sup>16</sup>

The September 26 Order, however, was arbitrary and capricious because it ignored these comments and thereby failed to address any of the relevant evidence.<sup>17</sup> Rather, the September 26 Order lumps discussion of the equivalency of BLM rights-of-way and options on private land into a request for identical treatment,<sup>18</sup> and dismisses the arguments by asserting that site control is more difficult to obtain on private lands.<sup>19</sup>

This resolution of the issue fails to address the evidence that a final, non-appealable permit for projects on federal land is not necessary to establish a level of viability equivalent to that of a project with an option on private land. While the Commission is afforded

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<sup>14</sup> See Motion to Intervene and Protest of Horizon Wind Energy LLC, Docket No. ER08-1317-000.

<sup>15</sup> See *id.* at 5.

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

<sup>17</sup> *New England Power Co. v. FERC*, 533 F.3d 55, 57 (D.C. Cir. 2008) (vacating relevant portions of FERC’s order that failed to consider the arguments raised); *NorAm Gas Transmission*, 148 F.3d at 1165 (“It most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it . . . .”) (quoting *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992)).

<sup>18</sup> September 26 Order at P 47.

<sup>19</sup> *Id.* at P 63.

a great deal of discretion, it must at least consider the alternatives.<sup>20</sup> Here, it has not. Thus, the conclusion that the definition of “site exclusivity” is just and reasonable is arbitrary and capricious because the Commission did not respond to the arguments presented or the relevant evidence.

**2. The Commission Failed to Articulate a Rational Connection Between Its Finding and Its Conclusion.**

The Commission’s conclusion that the definition of “site exclusivity” is just and reasonable is arbitrary and capricious because the Commission failed to articulate “a rational connection between the facts found and the choice made.”<sup>21</sup> This articulation must “cogently explain why it has exercised its discretion in [the] given manner.”<sup>22</sup> Here, the Commission has not explained why the putative increased difficulty of obtaining site control on public lands requires a final, non-appealable permit to level the playing field, and does not establish a causal relationship between two independent concepts.

The Commission offers a three-step explanation. First, the Commission finds that “[p]rivate ownership lends itself to quicker and easier resolution of site control issues than is the case with federal lands”<sup>23</sup> Second, the Commission states that one “objective of GIPR reform is to ensure that the queue is composed of projects that are likely to attain commercial operation,” and that “site control is a necessary component of attaining commercial operation.”<sup>24</sup> Third, the

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<sup>20</sup> See, e.g., *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983).

<sup>21</sup> *BP West Coast Products, LLC* at 1282.

<sup>22</sup> *State Farm*, at 48.

<sup>23</sup> September 26 Order at P 63.

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

Commission concludes that a substantially higher standard for demonstrating “site exclusivity” on public lands is just and reasonable because site control is more difficult to obtain.<sup>25</sup>

The Commission’s analysis is missing one key step. The Commission failed to articulate why the specific standard set forth in the definition of “site exclusivity” — a final, non-appealable permit — is just and reasonable. If one accepts the Commission’s logic, there is a need for a higher standard for projects on public land that will equalize the expected viability of projects on public lands and projects on private lands. The Wind and Solar Parties provided language in their comments that would achieve such a result.<sup>26</sup>

The Commission chose not to address this proposal, and instead accepted the CAISO’s proposed definition of “site exclusivity.”<sup>27</sup> In doing so, however, the Commission failed cogently to articulate why the CAISO’s approach was appropriate. The Commission did not address why the requirement for a final, non-appealable permit is necessary to make projects on federal land sufficiently viable to avoid the \$250,000 site control deposit. The Commission’s casual observation that the \$250,000 deposit is refundable simply misses the point – it is a large, current, out-of-pocket expense that places projects on public lands at an unnecessary competitive disadvantage compared to projects on private land, and imposes an obstacle that has no rational relationship to its purported purpose. Accordingly, the Commission’s conclusion that the definition of “site exclusivity” is just and reasonable is arbitrary and capricious.

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

<sup>26</sup> *See* Limited Reply Comments of the California Wind Energy Association, the Large-scale Solar Association and the American Wind Energy Association, Docket No. ER08-1317-000, at 12 (“Wind and Solar Parties Reply Comments”).

<sup>27</sup> September 26 Order at P 63.

3. **The Definition of Site Exclusivity Remains Unduly Discriminatory Because Differences Between Federal and Private Lands Do Not Justify the Different Requirements Imposed.**

The FPA prohibits the exercise of undue discrimination.<sup>28</sup> In this case there is clearly discrimination – the definition of “site exclusivity” includes different requirements for projects proposed on federal lands than for projects proposed on private lands. Thus, the propriety of the definition turns on whether such discrimination is justified.

The discrimination exercised through the “site exclusivity” definition is undue discrimination because the disparate requirements for demonstrating “site exclusivity” are not based on differences in project development on federal lands versus private lands. Where discrimination exists, “the utility must demonstrate . . . that the discriminatory effects are not unreasonable.”<sup>29</sup> This may be demonstrated “by offering a valid reason for the disparity.”<sup>30</sup>

In this case, the CAISO never offered a reason for proposing the disparate treatment under the “site exclusivity” definition, other than to reference its desire to accommodate vaguely-described BLM concerns.<sup>31</sup> By contrast, the Wind and Solar Parties showed that the procedural differences in developing a project on private versus public lands do not require the draconian remedy proposed by the CAISO.<sup>32</sup> Indeed, the Wind and Solar Parties demonstrated that existing processes include milestones that provide indicia of project viability that are comparable to that used for projects on private lands.<sup>33</sup>

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<sup>28</sup> 16 U.S.C. § 824d(b) (“No public utility shall with respect to any transmission or sale subject to the jurisdiction of this Commission (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage”).

<sup>29</sup> *Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20, 29 (D.C. Cir. 1982).

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

<sup>31</sup> Exhibit No. ISO-1 (Rutty) at p. 17.

<sup>32</sup> *See* Wind and Solar Parties Protest at 33-35; Wind and Solar Parties Reply Comments at 11-12.

<sup>33</sup> *See id.*

Accordingly, the CAISO's proposed definition of "site exclusivity," with its burdensome requirement for a final, non-appealable permit on public lands, is unduly discriminatory because the onerous requirements are neither justified by, nor necessary, to address differences in developing projects on the two types of land. Because the definition is unduly discriminatory, it cannot be found to be just and reasonable.

#### **IV. Conclusion**

Wherefore, for the foregoing reasons, the Wind and Solar Parties respectfully request the Commission to grant rehearing of the September 26 Order by requiring the CAISO to modify the definition of "site exclusivity" as the Wind and Solar Parties proposed in their Reply Comments.

Respectfully submitted,

*/s/ Raymond B. Wuslich*

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2008).

Dated at Washington, D.C., this 27th day of October, 2008.

*/s/ Margaret H. Claybour*

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