

before BLM,”⁴ and the tariff requirement that the customer must produce “evidence of a final, non-appealable permit.”⁵ The CAISO claims that it has merely clarified that an interconnection customer has to show that it (1) has “secured” a temporary use permit, (2) has undertaken significant additional activity to prosecute a permanent permit, and (3) is the first-in-time applicant to meet the first two conditions.⁶ There are several fundamental problems with the CAISO’s explanation that reinforce why the Commission must act now to clear up the confusion.

First, the CAISO’s explanation is inconsistent with its Technical Bulletin, and the Technical Bulletin is inconsistent with BLM’s rules. The Technical Bulletin actually says that a customer must provide evidence that it is “prosecuting the permit application before the BLM,” not that it has “secured” a temporary permit or is actively pursuing a “permanent” permit. There is a significant difference in these conditions that cannot be overlooked; the act of “prosecuting the permit application” presupposes that an actual permanent application has been filed,” which would require significantly more prior work than simply securing a temporary permit and undertaking significant activity to prosecute a permit.

Second, the Technical Bulletin incorrectly characterizes the BLM application process. The Technical Bulletin states that the CAISO understands that a permit applicant “can acquire no right to use property for power generation, and to exclude others from the site, prior to the issuance of a final BLM permit” (not a “temporary” permit),⁷ but that statement is simply

⁴ See CAISO Tariff Bulletin, Generator Interconnection Process Reform (GIPR), Public Lands BLM Site Exclusivity; Proposed Interpretation of Tariff Language and Criteria for Establishing “Site Exclusivity” on BLM/Public Land (“Tariff Bulletin”), available at <http://www.aiso.com/2092/2092dfce24850.pdf>. (A copy of the December 3, 2008 Tariff Bulletin is attached hereto as Attachment A.)

⁵ CAISO, Third Replacement FERC Electric Tariff Vol. No. 2, Sixth Rev. Sheet No. 528 (2008).

⁶ CAISO Answer at p. 4.

⁷ Technical Bulletin at ¶ 1, page 2 of 3.

wrong. As the Wind Parties showed in their protest, BLM's policy gives developers with accepted right-of-way applications an *exclusive* interest in the project area that precludes incompatible applications for three years.⁸

Third, the CAISO's attempt to give meaning to the words "other right to use the property" in the tariff definition of "site exclusivity" is procedurally defective. Either the explanation adds nothing to the tariff because it "does not signal any re-evaluation of the CAISO's position", as CAISO says in its answer,⁹ or it is a substantive revision that affects the rates, terms or conditions of jurisdictional service that can only be implemented through a tariff change.¹⁰ It is apparent that the significant market reaction to the implementation of CAISO's new tariff definition of "site exclusivity", CAISO is using the Technical Bulletin to change the erroneous "site exclusivity" definition in its Tariff.

Fourth, the CAISO's attempt to clarify the "site exclusivity" definition through a Technical Bulletin is unnecessary because the Wind Parties' request to modify the definition to reflect BLM's actual practice is pending before the Commission, and that modification will properly solve the problem. As the Commission will recall, the Wind Parties asked the Commission to direct the CAISO to adopt the following:

For public land, including that controlled or managed by any federal, state or local agency, the Interconnection Customer must have an accepted application for a right-of-way for the proposed Generating Facility site, or

⁸ 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 p. 34, Docket No. ER08-1317-000 (filed Aug. 18, 2008). The applicable BLM policy is available at: http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2006/2006-216.html.

⁹ CAISO Answer at p. 4.

¹⁰ *California Independent System Operation Corporation*, 107 FERC ¶ 61,329, at P 21 (2004).

for site testing and monitoring (e.g., an application for a BLM Type II right-of-way or its equivalent).¹¹

This definition solves the problem because BLM's acceptance of a right-of-way application gives the applicant an interest in the project area that precludes incompatible applications for three years.

Fifth, there is no evidence in this case to support the premise on which the Commission's order at issue turned. Obtaining the exclusive right to pursue development of a project on BLM land is no more difficult than obtaining equivalent property rights on private land, as the Wind Parties showed in their request for rehearing.¹² The CAISO's answer does not make a claim to the contrary. While the CAISO's Technical Bulletin underscores the considerable deference it has afforded to BLM's interpretation of its right-of-way policy, BLM's views are irrelevant to the analysis of what is just, reasonable and not unduly discriminatory under the CAISO's jurisdictional tariff. Given the similarities between what the CAISO tariff accepts for projects on private lands and the rights conveyed by BLM-accepted right-of-way permit applications (see the Wind Parties' rehearing request at pp. 5-6), there is no legitimate basis for CAISO's persistent discrimination between development on public and private lands.

Finally, the CAISO's cavalier suggestion that developers could have posted the \$250,000 deposit misses the point and reflects a surprising lack of awareness of credit market conditions.¹³ It is unjust, unreasonable and unduly discriminatory to require project developers with BLM-accepted right-of-way permit applications, providing an exclusive interest to pursue

¹¹ Limited Reply Comments of the California Wind Energy Association, the Large-scale Solar Association and the American Wind Energy Association, at p. 12, Docket No. ER08-1317-000 (filed Sept. 2, 2008).

¹² Request for Rehearing of the California Wind Energy Association, the Large-scale Solar Association and the American Wind Energy Association, at pp. 5-6, Docket No. ER08-1317-000 (filed Oct. 27, 2008).

development in the land area, to secure an additional \$250,000 of financing in the toughest credit market since the Great Depression when competing projects with equivalent options on private lands do not face the same burden. This burden was a major factor in several projects withdrawing from the CAISO's queue. If the Wind Parties' revised site exclusivity definition had been in effect, this inequitable result would likely never have occurred.

WHEREFORE, for the foregoing reasons, the Wind Parties renew their request that the Commission expeditiously grant their rehearing request by requiring the CAISO to modify the definition of "site exclusivity" as set forth in their Reply Comments, and permit any party who dropped out of the interconnection queue to re-enter the queue at their previous position if they can meet the test set forth therein.

Respectfully submitted,

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¹³ CAISO Answer at p. 5.

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 9th day of January, 2009.

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