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February 27, 2012

**VIA INTERNET**

The Honorable Robert V. Abbey  
Director  
Bureau of Land Management  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

**Re: Comments on Advance Notice of Proposed Rulemaking Regarding a Competitive Process  
for Leasing Public Lands for Solar and Wind Energy Development**

Dear Mr. Abbey:

The Bureau of Land Management (BLM) has published an Advance Notice of Proposed Rulemaking Regarding a Competitive Process for Leasing Public Lands for Solar and Wind Energy Development. 76 FR 81906 (December 29, 2011) (ANPR). BLM published the ANPR to solicit public comments that will be helpful to it in developing a proposed rule providing for a competitive bidding process. We appreciate the tremendous amount of work BLM and the Department of the Interior have devoted to permitting utility-scale solar power projects over the last three years. As we look to continue the record of successful solar power plant development on public lands, SEIA must oppose this proposal to establish a competitive bidding process for solar right-of-way (ROW) applications for the reasons outlined below.

The Solar Energy Industries Association (SEIA) is the national trade association of the U.S. solar energy industry. Through advocacy and education, SEIA is building a strong solar industry to power America. As the voice of the industry, SEIA works with its 1,100 member companies to make solar a mainstream and significant energy source by expanding markets, removing market barriers, strengthening the industry and educating the public on the benefits of solar energy. Accordingly, SEIA has a strong interest in the issue of competitive leasing for solar energy projects.

In short, competitive bidding will most likely increase the costs of developing utility-scale solar projects on public lands, and thereby decrease opportunities for innovation that will help make the most of the public lands that are used for renewable energy. Combined with high rental rates, bonds, and other costs, some developers that might have pursued projects on public lands will pursue projects on private lands or not at all. Instead of promoting the efficient use of public lands to achieve national and state renewable energy objectives, competitive bidding would stymie those efforts, in direct conflict with Presidential and

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Secretarial orders and statutory goals, as discussed below. SEIA firmly opposes BLM's proposal to establish a competitive bidding process for solar right-of-way (ROW) applications.

SEIA strongly recommends that, instead of competitive bidding, BLM continue to use the financial and technical capability criteria it adopted in 2011 (see BLM Instruction Memorandum (IM) No. 2011-060)<sup>1</sup> to select among competing applications. Where applicants are considered to be equal in their capabilities under these criteria, BLM should process the earliest application filed. Finally, SEIA supports the issuance of a lease to solar developers, rather than a right-of-way grant, if BLM is proposing such a change.

## **I. Background**

More than 100,000 Americans are employed by the solar industry at over 5,000 businesses (many of them small businesses) in all 50 states.<sup>2</sup> In fact, the solar industry is one of the fastest growing industries in the country.<sup>3</sup> Solar energy capacity installed in the U.S. now exceeds 4,400 megawatts, enough to power more than 650,000 American homes.

This phenomenal growth is the result of private investment, technological innovation, a maturing industry and smart federal and state policies. The federal government has received a strong return on its investment of public dollars, with benefits to our economy that far exceed their costs.

The last few years have also been noteworthy for the Bureau of Land Management's (BLM) solar efforts: it issued the first sixteen permits for construction of utility - scale solar power projects or associated transmission lines on public lands in the entire history of the agency. Today, work is underway at these and other utility - scale solar power plants under construction in the Southwest, employing hundreds of workers from the region. In addition, the supply chains behind each of those facilities are turning out highly reflective mirrors, precision - crafted receiver tubes, steel posts and thousands of other components across the United States.

This proposal to institute competitive leasing for solar energy projects on public lands jeopardizes the continued growth of the solar industry and its supply chain and would thwart the nation's move to an economy powered by clean energy.

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<sup>1</sup> Instruction Memorandum 2011-060, "Solar and Wind Energy Applications- Due Diligence," February 7, 2011 ("IM 2011-060") available at [http://solareis.anl.gov/documents/docs/IM2011-060\\_Solar\\_and\\_Wind\\_Due\\_Diligence.pdf](http://solareis.anl.gov/documents/docs/IM2011-060_Solar_and_Wind_Due_Diligence.pdf)

<sup>2</sup> 2011 Jobs Census Topline at <http://www.thesolarfoundation.org/sites/thesolarfoundation.org/files/2011%20Jobs%20Census%20Topline%20Release%20FINAL.pdf>.

<sup>3</sup> *U.S. Solar Market Insight: 2<sup>nd</sup> Quarter 2011*, available at <http://www.seia.org/galleries/pdf/SMI-Q2-2011-ES.pdf>.

## **II. Competitive Bidding Is Inappropriate for Solar Energy Resources**

Competitive leasing is often useful in determining fair market value of certain commodities and services, but none of the circumstances in which competitive leasing is useful are present for the leasing of public land for solar energy projects.

### **A. Competitive Bidding Is Useful Where Market Value Cannot Otherwise Be Priced**

Competitive bids are useful to establish a market value for a product or service that cannot otherwise be priced. In the natural resources arena, the federal government has successfully used competitive bidding for certain commodities, such as for oil and gas leasing, where the pre-lease market value of the resource is essentially unknown. The value of an oil and gas lease prior to any drilling is determined by geological and geophysical studies that are subject to interpretation by both the bidders and the lessor, and these interpretations can vary widely. Competitive bidding allows the lessor to capture the value of the bidders' most favorable interpretation of the geological and geophysical studies.

Using competitive bidding to determine the value of solar energy resources does not fit this traditional model. The value of solar energy sites is determined by the amount of solar radiation reaching a site, i.e., insolation, the slope of the land, access to transmission and other known factors. Essentially, there is nothing unknown about the value of the energy-generating resource for a given solar site. (To be sure, the cost of managing conflicts with other resources may be unknown for solar energy sites, but the same is true of oil and gas leases.) The result is that there is little or no interpretation value that the government can leverage through a competitive leasing system. Given the known resource values at solar energy sites, rental payments are the customary vehicle for obtaining fair market value.

An economist would say, theoretically, if all bidders had the identical information they would all bid identically. In reality, even with the identical information different solar companies might bid differently depending upon the technology they intend to implement or the price at which the electricity is being sold. Some technologies are cheaper than others or produce electricity more efficiently. But different technologies have different environmental impacts, and assessment and mitigation of environmental impacts are critical to solar energy project siting. Either BLM would identify a particular technology for a site, in which case all bidders again have the same information or BLM would allow solar energy companies to bid based upon their own technologies, in which case environmental impacts could not be fully assessed until a winning bidder is selected. The first scenario suggests that competitive bidding is inappropriate; the second scenario puts bidders in a risky position of not knowing the ultimate expense of mitigation until well after they have committed to a bid.

This risk factor is especially evident in the solar energy industry. Unlike a mature industry, such as the oil and gas industry, where a company can absorb a certain degree of risk in establishing a leasing portfolio, the solar energy industry works on much tighter margins. This is particularly true for innovative technologies that may better meet federal goals for renewable energy, but which have even tighter margins and do not have the ability to absorb additional risk beyond that associated with commercializing a new technology. Moreover, the real costs involved in siting a solar energy project on public lands are just beginning to become evident. The irony presented by competitive bidding is that

entities most likely to assume greater risk in structuring a bid are placing themselves at a greater risk of being unable to complete the solar project successfully.

#### **B. Competitive Bidding Is Useful for Procurement**

Competitive bidding is used in the procurement of electricity. A utility will put out a request for proposal (RFP) looking for the lowest-cost electricity provider that meets a certain generation profile. Competitive bidding is inappropriate for siting solar energy projects because the government is not purchasing electricity. It is leasing land. Moreover, BLM would be seeking the highest bidder for the solar energy site, not the lowest bidder as would a utility.

Competitive bidding is appropriate for federal procurement because it enables the government to obtain goods and services at the lowest prices by stimulating competition. But this factor is inapplicable for siting solar energy projects. The government is not procuring goods and services. It is renting real property with a known resource value. Again, BLM would be seeking the highest bidder, not the lowest.

#### **III. Competitive Bidding Will Be More Costly and is Inappropriate for a Newcomer to the Electricity Market such as Solar Energy**

Even if competitive leasing were a valid approach for leasing solar energy sites, competitive leasing *at this time* is inappropriate for a newcomer to the electricity market such as solar. BLM must not lose sight of the big picture: solar competes in the wholesale electricity marketplace for power purchase agreements with utilities. Increased land costs will directly result in increased prices for solar-generated electricity, which means a solar plant will be less likely to win a contract with a utility to provide wholesale electricity.<sup>4</sup> At a time when conventional electric generation appears to be trading at a reduced price, the additional financial stress of competitive bidding would frustrate efforts to make solar a significant part of the nation's electric generation portfolio.

#### **IV. Competitive Bidding Undermines Administration Goals and Works at Cross Purposes with Other Federal Programs**

Congress and the Administration have recognized the value that solar energy brings as part of a diverse energy marketplace and has enacted policies to reduce the price of solar and increase its domestic deployment.<sup>5</sup> Establishing a competitive leasing system would work at cross purposes with other federal programs by imposing an additional cost for solar energy sites on public land.

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<sup>4</sup> While it is possible that a site may be less expensive for the winning bidder than today's rental rates, presumably BLM anticipates that competitive bidding will fetch a higher price for the land, thus increasing production costs for solar-generated electricity.

<sup>5</sup> Such policies include the solar Investment Tax Credit (ITC), the federal loan guarantee program and the Department of Energy's SunShot Initiative.

Implementing a competitive leasing system now would also interfere with implementation of the mandates of:

1. Executive order 13212, "Actions to Expedite Energy-Related Projects," 66 Fed. Reg. 28357 (May 22, 2001), mandating that agencies act expediently and in a manner consistent with applicable laws to increase the "production and transmission of energy in a safe and environmentally sound manner."
2. The Energy Policy Act of 2005 (EPA 05), which sets forth the "sense of Congress" that the Secretary of the Interior should seek to have approved non-hydropower renewable energy projects on the public lands with a generation capacity of at least 10,000 MW by 2015.
3. Secretarial Order 3285A1, dated March 11, 2009 and amended on Feb 22, 2010, which "establishes the development of renewable energy as a priority for the Department of the Interior."

Moreover, it would be contrary to the principles espoused by the President in his January 24, 2012, State of the Union address. Rather than pursue competitive bidding, BLM should focus on policies that enable the solar industry to contribute even more toward achieving these Presidential, Secretarial and statutory objectives.

#### **V. Competitive Bidding has the Strong Potential to Lengthen and Complicate Siting a Solar Project**

Siting a solar energy project on public land is already an extremely cumbersome process. Competitive leasing has the strong potential to lengthen and complicate siting a project, thereby increasing costs and the resulting price of electricity generated by solar power plants. This will make solar energy less competitive compared to other fuel sources and reduce the number of megawatts of solar developed on public lands, which is counter to the goal the President laid out in his State of the Union address.<sup>6</sup>

In fact, how solar energy projects will be permitted on public lands is still in flux. BLM has not yet finalized its solar Programmatic Environmental Impact Statement ("Solar PEIS"), which will establish the rules for permitting of solar energy projects in the future. Until the final Solar PEIS is issued, it will be difficult to assess and understand the complexities a competitive leasing system may impose upon the siting process. Creating a new system for the solar industry and the public to adjust to will only slow solar deployment, and may even result in little or no solar development on public lands, due to costs and complications.

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<sup>6</sup> State of the Union Address (January 24, 2012), wherein President Barack Obama "direct[ed his] administration to allow the development of clean energy on enough public land to power 3 million homes."

## **VI. Competitive Bidding is Not an Effective Tool to Weed out Speculators**

BLM has expressed concerns about speculative applications being filed for renewable energy projects (See, e.g., Supplement to the Draft Solar PEIS, p. 2-4). However, competitive leasing will not effectively address the problem of speculators tying up land. BLM has ample existing authority to weed out speculative applicants. IM 2011-060 has proven highly effective against speculation. More broadly, Section 505 of FLPMA provides:

The Secretary concerned shall grant, issue, or renew a right-of-way under this title only when he is satisfied that the applicant has the technical and financial capability to construct the project for which the right-of-way is requested, and in accord with the requirements of this title.

43 U.S.C. 1764(j). BLM has been meeting this standard for the last 35 years. There is nothing to indicate that competitive bidding is needed to resolve any existing problem BLM has in complying with this requirement.

Indeed, the California BLM has done just that, eliminating dozens of pending applications from its queue in 2011 by applying IM 2011-060. We reiterate our call for other BLM offices in the West to do the same.

Moreover, BLM has already established financial and technical criteria for accepting applications for solar energy sites. While these financial and technical criteria could be improved, BLM should continue to use these types of criteria to select among applicants for sites upon which there is more than one application.

Ironically, prioritizing a bidder's ability to pay over other factors necessary to bring a project to fruition may result in more speculation, not less, and fewer solar megawatts being developed on public lands. A developer with deep pockets but little interest or ability to complete a solar project would be able to secure the land and block access to others with economically sound and technically viable solar power plants.

## **VII. FLPMA does not Mandate Competitive Bidding**

The ANPR cites section 102(a)(9) of FLPMA as mandating that "the United States receive fair market value of the use of public lands and their resources . . ." 43 U.S.C. 1701(a)(9). Nothing in this language requires BLM to institute competitive bidding for solar energy resources. Section 102 of FLPMA is in fact only a declaration of policy and not a strict legal requirement. *See* 43 U.S.C. 1701(b) ("The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation. . . .") Moreover, BLM has been successfully accomplishing this policy with respect to nearly every grant of right-of-way for the last 35 years without reliance on competitive bidding, and there is no particular reason to think that existing policies would fail for solar energy rights-of-way. Indeed, if BLM takes the position that competitive bidding is the only way to attain fair market value, BLM's practices would be called into question for a wide variety of uses.

In addition, this proposal conflicts with provisions of BLM's existing rules and policy. Competitive bidding is in conflict with BLM policy that calls for fees set according to "comparable payment practices for existing wind energy right-of-way authorizations on Federal and non-Federal lands." BLM Instruction Memorandum (IM) No. 2009-043 (Dec. 19, 2008).<sup>7</sup> Existing practices for Federal and non-Federal land do not involve competitive bidding. Further, BLM's competitive leasing proposal does not explain or justify variation from the language in 43 C.F.R. § 2806.10, which does not provide for competitive bidding process unless that process is based on sound business and comparable commercial practices.

#### **VIII. At a Minimum, Competitive Bidding Should be Deferred**

As explained above (See Section III), the solar energy industry is a relative newcomer to the wholesale electricity market. If BLM chooses to implement a competitive leasing system, it should not implement such a program until the solar industry has reached maturity and wholesale solar electricity is cost-competitive with fossil generation. This criterion notwithstanding, all current solar applications for a right-of-way permit should be grandfathered and not subject to competitive leasing.

#### **IX. BLM Should Use a Lease Rather Than a Right-of-Way to Authorize Utility-Scale Solar Energy Projects**

BLM currently issues rights-of-way to authorize utility-scale solar energy facilities. At multiple points within the ANPR, BLM speaks in terms of *leasing* public lands for solar and wind energy development. If BLM intends to begin issuing leases for utility-scale solar energy projects, SEIA strongly supports this change.

Leases would provide solar energy facilities with greater land tenure than rights-of ways. Typically, a right-of-way is a license to pass across the real property of another, while a lease operates to authorize possession of the real property of another. See Garner, "A Dictionary of Modern Legal Usage," 2d Edition (Oxford University Press, 1995). While rights-of-way may be suitable for transmission lines, pipelines and roads, they do not meet the needs of solar energy developers, which need to possess non-linear acreage on a long-term basis.

BLM has the authority to issue leases, rather than rights-of-way for solar energy facilities. Section 302(b) of FLPMA provides in part:

In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate,

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<sup>7</sup> Although IM 2009-043 expired on September 30, 2010, the BLM continues to act in accordance with this policy since its expiration. The BLM has issued offers of ROW using the rate policy set by IM 2009-043 as recently as February of 2012.

through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands. . .

43 U.S.C. 1732(b). This authority expressly allows BLM to issue leases.

BLM should clarify if its use of the word “leasing” indicates an intention to begin using leases rather than rights-of-way. If not, BLM should at least clarify its language and instead use the term “right-of-way.”

#### **X. SEIA's Specific Response to Questions Presented in the ANPR**

In the ANPR BLM presents eight specific questions for which it seeks public comment. SEIA's responses to these questions follow.

##### **1. How should a competitive process be structured for leasing lands within designated solar or wind energy development leasing areas?**

The use of competitive bidding within Solar Energy Zones (SEZs) is a flawed concept which will undermine the goal of zone-based development. BLM has developed SEZs in order to focus solar energy development on lands with fewer conflicts and will establish incentives for solar energy companies to site projects in these areas. For SEZs to be successful, BLM must populate them with viable projects. Competitive bidding will drive up the cost of developing projects within SEZs, increase the cost of solar power generated in SEZs, thereby making solar energy less viable in the marketplace and ultimately increase the risk of a project within an SEZ being successfully completed. Rather than promoting the most effective use of land within SEZs, competitive bidding would favor those entities capable of offering the highest up-front bid, regardless of the overall benefit they may offer in return for the use of the land.

An important incentive BLM has proposed for developing solar energy projects within SEZs is the financial incentive of phased rental payments. Under this proposed incentive, rental rates would be kept low until the project begins generating electricity. This incentive would reduce the upfront costs of bringing a project online. Competitive leasing within SEZs would essentially undo any benefit from phased rentals by increasing upfront costs. Again, this lessens the viability of successful solar energy projects within SEZs.

##### **2. Should a competitive leasing process be implemented for public lands outside of designated solar or wind energy development leasing areas? If so, how should such a competitive leasing process be structured?**

No. Competitive leasing is even more inappropriate outside of SEZs. Developing a project outside of an SEZ would require an applicant to obtain a variance under the Modified Solar Energy Development Program Alternative in the supplement to the draft Solar PEIS. Obtaining a variance could put an applicant through a considerable amount of time, work and expense. An applicant who has successfully obtained a variance should not see that investment placed at risk of loss to a higher bidder.



### **3. What competitive bidding procedures should the BLM adopt?**

If BLM chooses to develop a competitive leasing system for solar energy facilities, the bidding variable should be the price paid per acre of leased land. A bonus bidding system is inappropriate as discussed in Sections II through VI above. Bidding on the price paid per acre resolves how an appropriate per acre price might otherwise be established, and would lock in a price for the duration of the lease or right-of-way. Establishing a fixed price for land over the length of the authorization is an important goal of the solar energy industry and mirrors the way contracts are structured for private land. SEIA still endorses the phasing of rental payments. Bidding using rentals as the variable could still be structured to allow for a lower initial rate and an increase once a project is generating electricity.

In addition, SEIA recommends that the following general principles be followed, if BLM chooses to implement competitive bidding:

- BLM should not implement competitive bidding by regulation until it has tested the process first. We recommend that if BLM chooses to adopt competitive bidding, it begin by conducting a pilot project through which BLM and the solar energy industry can judge the effectiveness of the system chosen. By conducting a pilot project, BLM will have the ability to modify the competitive bidding system based on its own analysis and feedback from the solar energy industry. Most importantly, BLM should allow itself the flexibility to continue its current solar permitting regime while it develops a competitive bidding policy. BLM has the authority to conduct such a pilot project under 43 C.F.R. 2804.23. If the pilot project is considered unsuccessful, BLM should preserve its ability to reject the use of competitive bidding and to rely on technical and financial criteria to decide among competing applications.
- To the extent that BLM implements a competitive bidding system or competitive bidding pilot project, neither should apply to existing solar applications. Rather, all pending solar applications should be grandfathered and processed under the current ROW application system.
- No royalty should be established or adopted, regardless of how competitive bidding is structured. Solar energy generation does not result in the depletion of the resource which is the economic rationale for imposing a royalty.
- Due diligence requirements should be established separately from the bidding process. However, only those who qualify as an acceptable bidder in accordance with BLM policies should be allowed to submit a bid. See Question 9 below for further details.
- BLM should not establish a value below which it will refuse a competitively offered lease price. If a minimum bid is considered necessary to reduce possible speculation, at most a minimum bid of \$1 per acre should be established.

- Any increase in the acreage necessary for a project that has already undergone competitive bidding should not involve competitive bidding for the additional land.
- No two-stage or multifactor bidding systems should be used for solar energy projects.

#### **4. What is the appropriate term for a competitive solar energy ROW lease?**

In response to a request for public comments on the supplement to the draft Solar PEIS, SEIA commented as follows:

BLM has determined, by policy (WO IB No. 2006-006), that the initial term of a ROW grant issued under the Federal Land Policy and Management Act of 1976 ("FLPMA") generally should not exceed 30 years. However, the 30 year cap is only a policy. The regulations require only that a ROW grant be limited to a "reasonable term" as established by BLM after considering "(i) The public purpose served; (ii) Cost and useful life of the facility; (iii) Time limitations imposed by licenses or permits required by other Federal agencies and state, tribal, or local governments; and (iv) The time necessary to accomplish the purpose of the grant", 43 C.F.R. § 2805.11(b)(1). BLM has stated in guidance documents that it will consider terms greater than 30 years based on the factors set forth in 43 C.F.R. § 2805.11(b)(1) and whether "the applicant/holder can demonstrate the 30 year term and provision for renewal is not sufficient." BLM Policy and Procedures for Issuance of "Long Term" Right-of-Way Grants and Easements Over Public Lands To Be Transferred Out of Federal Ownership 8 (June 2007).

The [Solar] PEIS alludes to plans to limit the term of a solar ROW grant to 30 years. (SDPEIS at p. 2-2.) BLM's advanced notice of proposed rulemaking to establish a competitive bidding process and other policies confirm that BLM intends to establish such a rule. 76 Fed. Reg. 81,906 (Dec. 29, 2011). Although BLM is correct in observing, in support of the proposed rule, that Power Purchase Agreements tend to be 25- 30 years, this timeframe does not take into account the construction or the decommissioning period for a project. An addition[al] buffer of five to seven years should be built into the ROW grant period to account for these activities.

SEIA resubmits these comments for this ANPR. Some developers have suggested lease terms as long as 50 years.

#### **5. What is the appropriate term for a competitive wind energy ROW lease?**

SEIA declines to comment on this.

#### **6. Should nomination fees be established for the competitive process? If so, how should the fees be determined?**

No. For reasons stated above, levying additional charges on solar energy companies is at cross purposes with Congressional policies intended to promote the deployment of more solar energy nationwide.

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Moreover, fees are typically paid for services provided to a particular beneficiary. It is unclear at present what services BLM would be providing for payment of nomination fees.

**7. How should the bidding process for competitive solar and wind energy ROW leases be structured to ensure receipt of fair market value?**

See our answer to Questions 1 and 3. In addition, BLM has been receiving fair market value for rights-of-way without competitive leasing for over 35 years.

**8. Should a standard performance bond be required for competitive solar and wind energy ROW leases and how should the bond amount be determined?**

SEIA submitted extensive comments on bonding in its May 2, 2011 comment letter on the draft Solar PEIS (see pp. 33-37). We reiterate our request that BLM address the concerns raised and implement the suggested changes contained therein.

**9. What diligent development requirements should be included in competitive solar and wind energy ROW leases?**

SEIA supports the diligent development requirements set forth in BLM's IM 2011-060.

**XI. Conclusion**

SEIA appreciates the opportunity to provide these comments on the ANPR and your consideration of them. We look forward to continuing to work with BLM to advance environmentally-responsible solar energy development on public lands.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul B. Smyth", with a long horizontal line extending to the right.

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On behalf of the Solar Energy Industries Association