136 FERC ¶ 61,133
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Southern California Edison Company   Docket No. EL11-48-000

ORDER ON WAIVER REQUEST

(Issued August 26, 2011)

1. On June 30, 2011, Southern California Edison Company (SoCal Edison) submitted a request for a limited waiver of certain specific requirements imposed by the Commission's Order No. 2003 and its progeny[1] to annually reassess the estimated current tax liability (CTL) with respect to generator interconnection agreements SoCal Edison executed before calendar year 2011. SoCal Edison's filing requests waiver from the annual reassessment requirement for the period 2008 through 2010 and requests approval of a proposed treatment of CTL for the year 2011, as well as a proposed treatment going forward. In this order, we grant SoCal Edison's requests, subject to a subsequent compliance filing.

I. Background

2. SoCal Edison states that Order No. 2003 addressed transmission providers' concerns that receipt of payments from generators could create potential tax liability for transmission providers under certain circumstances by requiring generators to fully indemnify transmission providers in the event of such tax liability. SoCal Edison explains that Order No. 2003 allows transmission providers to collect security from the generators, in the form of cash, letter of credit, corporate guarantee or other form reasonably acceptable to the transmission providers to cover the possible tax liability.

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[1] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

SoCal Edison also explains that the purpose of the tax security authorized in Order No. 2003 was to protect transmission providers against the risk that generators may be unable to fully indemnify the transmission providers for the tax liability that could be imposed on the transmission providers as a result of the generators' actions.

3. SoCal Edison further explains that the Commission clarified its policy on the tax security amounts in Order Nos. 2003-A and 2003-B. Specifically, in Order No. 2003-A, SoCal Edison states the Commission clarified that the security amount will only cover the transmission provider's exposure to any current tax liability as of January 1 of each year.

4. SoCal Edison notes that in Order No. 2003-B, the Commission further clarified that while the potential tax payment may be based on the fair value of the property, this does not justify allowing a security requirement to be imposed in excess of the potential current tax liability as of January 1 of each year. SoCal Edison explains that the clarifications expressed in Order Nos. 2003-A and 2003-B imposed an administrative obligation on transmission providers to assess the CTL on an annual basis and, if needed, readjust the tax security posted by generators.

5. SoCal Edison states that its personnel inadvertently failed to implement an annual reassessment process as established by the Commission's directive set forth in Order Nos. 2003-A and 2003-B. As a result, SoCal Edison did not perform CTL reassessment for the applicable tax security postings in the years 2008 through 2010 for its generator interconnection agreements.

II. <u>SoCal Edison's Waiver Request</u>

6. SoCal Edison concluded that it held excess security for potential tax liability with respect to five of the eleven tax security postings in 2010.[2] According to SoCal Edison the total amount of over-security was $1,448,964.00 in 2010,[3] which was secured by the generators through letters of credit or cash. For the remainder of the security postings,

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[2] SoCal Edison states that while there are five postings for which SoCal Edison is over-secured, these postings relate to four generators, as one generator has a security posting which covers a large generator interconnection agreement and a generation-tie line agreement.

[3] SoCal Edison states that the aggregate amount of over-security in 2008 was $1,117,727 and that the aggregate amount of over-security in 2009 was $1,069,057.

SoCal Edison states it was under-secured, and could have required the affected generators to post more security, in the aggregate amount of approximately $400,161.00 in 2010.[4]

7. SoCal Edison requests waiver of the Commission's requirement to annually reassess the CTL for the agreements that SoCal Edison had less security than it was entitled to, thus benefitting interconnection customers. SoCal Edison states there is no harm to the interconnection customers if the Commission grants this request for waiver. SoCal Edison states that the appropriate remedy is to adjust the amount of tax security based on the reassessment as of January 2011, to bring the respective tax security postings for these interconnection customers in line with SoCal Edison's current CTL without making any retroactive adjustments for past years when SoCal Edison was under-secured.

8. For the agreements that SoCal Edison held greater security than it was entitled to, SoCal Edison proposes to work with those interconnection customers to ensure that they are made financially whole. Therefore, in consultation with the affected interconnection customers, SoCal Edison will determine the appropriate values of the additional security and reimburse these interconnection customers for any lost opportunity cost or savings as a result of its failure to recalculate the CTL.

9. Within 15 days of Commission action on this waiver request, SoCal Edison states that it will notify those interconnection customers of any modifications needed to their tax security.[5] SoCal Edison asserts that the timing of the 2011 reassessment and notification is reasonable due to the time required for its review and its formulation of an appropriate methodology for determining estimated CTL annually. SoCal Edison states that in future years, it will provide notification earlier in the calendar year.

10. Going forward, SoCal Edison states it will implement specific and documented procedures to ensure the annual reassessment of the CTL. SoCal Edison states that in January of each year it will begin the process to reassess the CTL and will send notifications to those interconnection customers whose tax security amounts have changed as a result of the CTL recalculation. SoCal Edison explains that within 30 days the interconnection customer shall either provide the additional tax security necessary to offset the under-secured CTL amount or have the option to reduce its tax security to reflect the over-secured CTL amount.

[4] SoCal Edison states that the amount of under-security in 2008 was $245,112 and in 2009 the aggregate amount of under-security was $465,362.

[5] SoCal Edison states that it has already contacted the affected interconnection customers to address any possible concerns.

11. Accordingly, SoCal Edison requests that the Commission accept substitute definitions and revised provisions to the appendices of the affected interconnection agreements to reflect that SoCal Edison will be performing a CTL reassessment on a yearly basis.[6] SoCal Edison states that, upon approval of its request for waiver, it will amend the subject interconnection agreements to add the following language:

> Upon notification of the Annual Tax Security Reassessment, Interconnection Customer shall modify its Tax Security accordingly. If the Annual Tax Security Reassessment results in a deficiency in the Tax Security amount, Interconnection Customer will be required to increase its Tax Security Amount within 30 days after receipt of the deficiency notification. If the Annual Tax Security Reassessment results in a reduction of the Tax Security amount, Interconnection Customer may choose to reduce its Tax Security amount or maintain the Tax Security in the current amount for the following year.
>
> The Annual Tax Security Reassessment will be calculated utilizing the following methodology
>
> 1) Tax Assessment Event:
> ((Current Tax Rate x (Gross income – NPV Tax Depreciation)) + Interest)/(1- Current Tax Rate)
>
> 2) Subsequent Taxable Event:
> (Current Tax Rate x (Replacement Facility Cost –NPV Tax Depreciation))/(1- Current Tax Rate)

III. <u>SoCal Edison's Proposed Annual CTL Calculations</u>

12. SoCal Edison states that three types of events would cause SoCal Edison to recognize a tax liability as a result of interconnection agreements that are subject to Order No. 2003. SoCal Edison proposes to evaluate each event in connection with each annual

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[6] To the extent that SoCal Edison wants to include the modified definitions and language in future interconnection agreements, it should add such changed language to the appendices or attachments of each large generator interconnection agreement or small generator interconnection agreement.

CTL reassessment. According to SoCal Edison the three events are: a tax audit assessment event;[7] a disqualification event;[8] and, a termination event.[9]

13. SoCal Edison proposes to compute an annual CTL based on a tax audit assessment by starting with the original taxable value of the property, reduced by the net present value of related tax depreciation. The result of that computation is multiplied by the applicable income tax rate, plus accumulated interest that a taxing authority would assess. The resultant figure is then divided by "one minus the tax rate" to determine the necessary revenue to secure SoCal Edison.

14. SoCal Edison states that the computation of an annual CTL based on a disqualification event starts with the taxable value of the property and reduces it by the net present value of tax depreciation. The amount that results from the calculation is multiplied by the applicable income tax rate and the product is divided by "one minus the tax rate" to determine the necessary revenue to secure SoCal Edison.

15. With respect to termination events, SoCal Edison proposes to use the same methodology for calculating a disqualification event.

16. SoCal Edison proposes that, after calculating the CTL amount for each of the three possible taxable events, SoCal Edison will annually require an interconnection customer to post tax security in an amount that will provide SoCal Edison with the greatest protection from the tax risk.

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[7] SoCal Edison describes a tax audit assessment event as an event in which an interconnection transaction was found not to originally qualify as nontaxable as the result of a tax audit. SoCal Edison further states that it will exclude the tax audit assessment event from annual CTL reassessment calculations occurring when the applicable interconnection project has a placed-in-service date in a year that is closed for tax audit purposes.

[8] SoCal Edison states that a disqualification event could occur under certain factual circumstances, such as, if, for each of any three taxable years within any period of five consecutive years, more than five percent of the total power flows over the intertie from the utility to the generator.

[9] According to SoCal Edison, a termination event would occur at such time as the interconnection contract between the transmission provider and the interconnection customer is terminated. At that time, an interconnection customer would be deemed to have made a transfer to the utility in the nature of a taxable contribution in aid of construction.

IV. Notice and Intervention

17. Notice of SoCal Edison's waiver request was published in the *Federal Register*, 76 Fed. Reg. 40721, with motions to intervene, comments and protests due on or before July 22, 2011. Pacific Gas and Electric Company (PG&E) filed a motion to intervene. No protests were filed.

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[10] PG&E's timely, unopposed motion to intervene serves to make it a party to this proceeding.

V. Commission Determination

19. The Commission grants SoCal Edison's request for a limited waiver of certain specific requirements imposed by Order Nos. 2003, 2003-A and 2003-B to reassess its CTL with respect to generator interconnection agreements executed before 2011. The Commission historically has granted certain waiver requests involving an emergency situation or an unintentional error.[11] Waiver, however, is not limited to those circumstances. When good cause for a waiver of limited scope exists, there are no undesirable consequences, and the resultant benefits to customers are evident, we have found that a one-time waiver is appropriate.[12] As elaborated below, we find good cause exists to grant the waiver requested by SoCal Edison because of the limited scope of SoCal Edison's requested waiver, the lack of undesirable consequences and the evident benefits to customers.

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[10] 18 C.F.R. § 385.214 (2011).

[11] *See, e.g., ISO New England Inc.*, 117 FERC ¶ 61,171, at P 21 (2006) (granting limited and temporary change to tariff to correct an error); *Great Lakes Gas Transmission LP.*, 102 FERC ¶ 61,331, at P 16 (2003) (granting emergency waiver involving *force majeure* event for good cause shown); *TransColorado Gas Transmission Co.,* 102 FERC ¶ 61,330, at P 5 (2003) (granting waiver for good cause shown to address calculation in variance adjustment).

[12] *See, e.g., Cal. Indep. Sys. Operator Corp.,* 118 FERC ¶ 61,226, at P 24 (2007); *Cal. Indep. Sys. Operator Corp.,* 124 FERC ¶ 61,031 (2008) (granting waivers of the CAISO's LGIP to allow CAISO to create three study groups in order to streamline interconnection requests). *Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,132 (2010) (granting limited waiver of the Large Generator Interconnection Procedures for projects in the transition cluster when a participating transmission owner has committed to up-front fund all or a portion of the customer's share of network upgrades); *but see Coso Energy Developers*, 134 FERC ¶ 61,088 (2011).

20. SoCal Edison's waiver request is limited to the period from 2008 to 2010. SoCal Edison proposes to conduct an annual CTL reassessment for 2011 and each year going forward. The scope of SoCal Edison's waiver request is also limited to the eleven interconnection customers in which SoCal Edison failed to implement the annual CTL reassessment process.

21. We further find that the benefits to customers are evident. Interconnection customers that have provided less tax security than should have been required will benefit from not being required to increase their security postings for the affected years of 2008 to 2010. In addition, Interconnection customers that posted higher tax security than they should have during this period will benefit from SoCal Edison's reimbursement of any savings they may have foregone as a result of SoCal Edison's failure to perform a CTL reassessment. All reimbursed amounts that are properly expensed should be recorded in Account 426.5, Other Deductions.

22. While SoCal Edison has indicated that it intends to reimburse any savings that may have been foregone by interconnection customers that were over-secured, SoCal Edison has not provided the Commission with specific information describing the method for calculating such refunds or the amount of refund that each customer may anticipate.[13] We find that SoCal Edison's general approach of ensuring that each generator that posted excess security is reimbursed for the excess costs incurred by the generator is reasonable. However, because the proposal lacks sufficient information for us to assess the reasonableness of the actual refunds, we will direct that, within 30 days from the issuance of this order, SoCal Edison submit a filing providing the amounts of refunds and the manner in which they were calculated.

23. Finally, we find that no undesirable consequences are evident from granting SoCal Edison's limited waiver request. Going forward, SoCal Edison will be calculating an appropriate annual CTL reassessment and interconnection customers will be required to post tax security consistent with Order No. 2003 and its progeny. Given the abbreviated historical period, the relatively limited number of affected interconnection customers and SoCal Edison's commitment to compensate and protect affected interconnection customers from potential harm, we find it reasonable to grant SoCal Edison's requested waiver.

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[13] We note that Docket No. ER11-3944-000 involved PG&E's treatment of refunds that were related to its failure to conduct annual reassessments of potential income tax liability as required by Order No. 2003 *et seq.* PG&E is providing refunds of any possible over-collections that include interest through the date of payment based on the year when the largest over-collection occurred. The Commission found PG&E's treatment to be acceptable. *See Pacific Gas and Electric Co.*, 136 FERC ¶ 61,131 at P 14 (2011).

<u>The Commission orders:</u>

(A) SoCal Edison's request for limited waiver of Order Nos. 2003, 2003-A and 2003-B requirements to annually reassess CTL and to amend the affected interconnection agreements by adding definitions and language is granted, as discussed in the body of this order.

(B) SoCal Edison is hereby directed to make a compliance filing within 30 days from the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.