

136 FERC ¶ 61,131
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.

Pacific Gas and Electric Company

Docket No. ER11-3944-000

ORDER ON REQUEST FOR TARIFF WAIVER

(Issued August 26, 2011)

1. On June 29, 2011, Pacific Gas and Electric Company (PG&E) submitted a request for waiver of the provision in the appendices or attachments of certain generator interconnection agreements that requires interconnection customers to provide security for the estimated amount of the potential income tax liability on generator interconnection facilities. The income tax at issue is commonly referred to as the income tax component of contribution (ITCC). PG&E's requested waiver would, on a prospective basis waive the provisions requiring customers to post ITCC under each generator interconnection agreement¹ and authorize PG&E to refund all ITCC security amounts (with interest) to certain customers. In this order, we grant PG&E's waiver request.

¹ Many generator interconnection agreements are three-party agreements among PG&E, the California Independent System Operator Corporation (CAISO) and an interconnection customer. In those cases, in addition to the interconnection agreement, CAISO has issued a tariff service agreement. All ITCC security was collected by PG&E, rather than by CAISO. PG&E asserts that it is authorized to state that CAISO supports PG&E's request for waiver.

I. Background

2. PG&E states that Order No. 2003² provided that interconnection customers were required to indemnify transmission providers, such as PG&E from income taxes imposed against the transmission provider as a result of payments or property transfers made by the interconnection customer for interconnection facilities in the event the Internal Revenue Service's "safe harbor" provisions did not protect the transmission provider from having to pay income taxes on those transactions. PG&E also explains that Order No. 2003 included provisions under which a transmission provider can require each interconnection customer to provide ITCC security in an amount equal to the estimated tax liability.³

3. PG&E goes on to explain that the Commission clarified its policy on ITCC security amounts in Order Nos. 2003-A and 2003-B. Specifically, in Order No. 2003-A, the Commission directed that the ITCC security requirement is limited to an amount reflecting a transmission provider's potential income tax liability as of January 1 of each year, with the intent that the security requirement will track the cost consequences of any current tax liability over time.⁴

4. PG&E notes that in Order No. 2003-B, the Commission found it necessary to base the security requirement on the cost consequences of the potential current tax liability as of January 1 of each year. The Commission specifically found that it is excessive to require that an interconnection customer maintain security equal to the maximum theoretical tax liability calculated at the outset of the agreement.⁵

5. According to PG&E, it filed this waiver request because it may have not complied with the requirement under Order No. 2003-A to annually re-assess the level of ITCC

² *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).

³ PG&E Request for Waiver at 2 (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 432).

⁴ *Id.* at 2-3 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 343).

⁵ *Id.* at 3 (citing Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 at P 95).

security associated with each interconnection agreement. PG&E states that instead of conducting an annual assessment, PG&E fixed the level of the ITCC security required under each agreement for the entire term of the agreement.⁶

II. PG&E's Waiver Request

6. PG&E states that it has determined that certain generator interconnection agreements that it has entered contain provisions requiring the interconnection customers to provide ITCC security as provided under Order No. 2003.⁷ PG&E further states that it understands that the ITCC security it collects pursuant to the affected generator interconnection agreements must be modified in accordance with Order No. 2003-A to reflect only PG&E's exposure to the cost consequence of any current tax liability as of January 1 of each year.⁸

7. Instead of modifying the affected generator interconnection agreements to conform with the requirements of Order No. 2003-A, PG&E proposes to forego its right to require ITCC security from interconnection customers covered by Order Nos. 2003, 2003-A and 2003-B at this time. PG&E indicates that should it decide to resume requiring ITCC security pursuant to Order No. 2003 *et seq.*, PG&E will make a filing with the Commission reflecting that decision.

8. Accordingly, PG&E requests that the Commission accept substitute language regarding ITCC security for insertion into the appendices or attachments of the affected generator interconnection agreements. The specific language requested by PG&E is as follows:

PG&E currently does not require the Interconnection Customer to provide Income Tax Component of Contribution ("ITCC") security to cover the potential tax liability on the Interconnection Facilities; however, PG&E reserves the right to require, on a non-discriminatory basis, the Interconnection

⁶ *Id.* at 1.

⁷ PG&E lists the 44 affected interconnection agreements in Attachment 1 to its Request for Waiver.

⁸ PG&E Request for Waiver at 3. PG&E notes that in Order No. 2003, the Commission ruled that it would not require retroactive changes to individual interconnection agreements prior to the effective date of Order No. 2003 (October 20, 2003).

Customer to provide such security, in a form reasonably acceptable to PG&E as indicated in Section 5.17 of the LGIA (or Section 11 of the SGIA), in an amount up to the cost consequences of any current tax liability. Upon request, and within sixty (60) Calendar Days' notice, the Interconnection Customer shall provide PG&E such ITCC security in the form requested by PG&E.

9. In addition, PG&E requests permission to provide refunds to certain customers that paid ITCC security after the effective date of Order No. 2003, as opposed to customers that have not, as yet, paid ITCC security because those customers have not commenced commercial operations.⁹ PG&E proposes to provide refunds of both principal (with interest through the date of payment) and any possible over-collections (with interest through the date of payment based on the year where the largest over-collection occurred). PG&E argues that its proposed refunds are fair and reasonable because they will provide immediate economic benefit to the affected interconnection customers in that those customers will no longer be required to post an ITCC security deposit and will receive refunds upon Commission approval of PG&E's request. For customers that have not as yet been required to pay ITCC security, PG&E argues that its proposal is fair and reasonable because it will remove the ITCC security requirement from their interconnection agreements and thereby free interconnection customers from the obligation of posting an ITCC security deposit.

III. Notice and Intervention

10. Notice of PG&E's waiver request was published in the *Federal Register*, 76 Fed. Reg. 40352, with motions to intervene, comments and protests due on or before July 20, 2011. CAISO filed a motion to intervene. No protests were filed.

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁰ CAISO's timely, unopposed motion to intervene serves to make it a party to this proceeding.

⁹ PG&E indicates that 23 interconnection customers paid ITCC security, which makes them eligible to receive refunds from PG&E. See Attachment 2 to PG&E's Request for Waiver.

¹⁰ 18 C.F.R. § 385.214 (2011).

IV. Commission Determination

12. The Commission grants PG&E's request for waiver of the provision in certain generator interconnection agreements requiring customers to provide ITCC security. 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 PG&E because of the limited scope of PG&E's requested waiver, the lack of undesirable consequences and the evident benefits to customers.

13. PG&E's waiver request is of limited scope based on the 44 interconnection customers listed in Attachment 1 to its waiver request. Of the 44 affected interconnection customers, the waiver will affect 23 interconnection customers, as they were the only customers that actually posted ITCC security prior to PG&E waiver request.

14. We further find that the benefits to customers are evident. In addition to refunds of potentially over collected ITCC security amounts, including interest, all interconnection customers that have previously posted ITCC security will benefit from refunds of the posted security. In addition, interconnection customers that have not as yet been required to post ITCC security, but whose interconnection agreements currently contain provisions requiring ITCC security posting, will benefit by being relieved of the

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 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).

potential obligation. All refunded amounts that are properly expensed should be recorded in Account 426.5, Other Deductions.

15. Finally, we find that no undesirable consequences are evident from granting PG&E's waiver request. The purpose of ITCC security is to ensure that transmission providers are indemnified from potential income tax liability associated with transfers of property by an interconnection customer to the transmission provider. By requesting that its interconnection customers be relieved of the obligation to provide security to support the required indemnification, PG&E has implicitly agreed to assume the risk that any of its interconnection customers may be unable to meet the obligation to indemnify PG&E. We see no reason not to allow PG&E to accept the risk.

16. We also note that, while PG&E has implicitly agreed to accept risks associated with a possible inability of an interconnection customer to meet the obligation of indemnifying PG&E against possible income tax liability associated with the transfer of interconnection facilities to PG&E, PG&E has provided in its substitute tariff language an opportunity to reinstate the ITCC security requirement should PG&E determine that it is necessary. PG&E states in its request for waiver that it will make a filing with the Commission reflecting any decision PG&E might make to reinstate an ITCC security posting obligation on its current and future interconnection customers.¹³ We will grant PG&E's request to substitute language in the appendices or attachments of current and future interconnection agreements and expect that PG&E will make a filing with the Commission in advance of the effective date of any decision to reinstate an ITCC security requirement.

The Commission orders:

PG&E's request for tariff waiver, to insert substitute language in the appendices or attachments of current and future interconnection agreements and to provide refunds with interest is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹³ PG&E Request for Waiver at 5.