

135 FERC ¶ 61,068  
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.

Hydrogen Energy California LLC

Docket No. ER11-3140-000

ORDER GRANTING PETITION FOR TEMPORARY WAIVER

(Issued April 22, 2011)

1. On March 17, 2011, Hydrogen Energy California LLC (Hydrogen) filed a Petition for a Temporary Waiver of California Independent System Operator (CAISO) Tariff Provisions Regarding Interconnection Financial Security and Request for Expedited Ruling (Petition). Hydrogen requests that the Commission grant a temporary waiver of its obligation to provide a second financial security deposit under section 9.3.1 of CAISO's tariff until May 16, 2011. In this order, we grant Hydrogen's waiver request.

**I. Background**

2. Hydrogen states that it is developing an integrated gasification combined cycle carbon capture and sequestration project located in Kern County, California. According to Hydrogen, when developed and operational, its project will gasify petroleum and coal to produce fuel-grade hydrogen for use in a 250-300 MW electric power block that will be connected to the CAISO grid.

3. Hydrogen asserts that it has made substantial progress in moving the project forward. Hydrogen explains that it has filed and is actively pursuing an application for certification before the California Energy Commission (CEC); that it has commenced front end engineering design through its contractor, Fluor Enterprises, Inc; that in connection with the project, Occidental of Elk Hills, Inc. is preparing to submit to the CEC a monitoring, reporting, and verification plan; and that Hydrogen has contracted for process design packages from various licensors and technology vendors and has received completed process design packages from some licensors.

4. Hydrogen argues that the United States Department of Energy (DOE) has recognized the project's importance to the nation and California by providing substantial financial assistance. According to Hydrogen, its project was awarded \$308 million in

financial assistance on September 28, 2009, in connection with DOE's Clean Coal Power Initiative and an additional \$100 million in financial assistance was added by DOE in September 2010.<sup>1</sup>

5. According to Hydrogen, approximately \$275 million of Hydrogen's financial assistance was appropriated by the American Recovery and Reinvestment Act of 2009 (ARRA). Hydrogen states that the ARRA imposes a number of conditions on the use of these funds, including the requirement that Hydrogen must expend them before September 30, 2015.

6. The DOE Statement of Support indicated that Hydrogen's project is a significant component of DOE's effort to demonstrate carbon capture and sequestration on a commercial scale. The DOE Statement of Support confirms that DOE has agreed to reimburse Hydrogen for \$408 million of the project costs, about \$275 million of which was appropriated in the ARRA. DOE confirms that in order to receive the ARRA funds, Hydrogen must incur sufficient design and construction expenses no later than September 30, 2015, when those funds expire pursuant to the terms of the statute. Finally, DOE explains that the ARRA prevents DOE from using these funds for another project should Hydrogen's fail.

7. Hydrogen further argues that California has recognized the value of carbon capture and sequestration. Hydrogen explains that California law has provided a rate of return increase for generation employing carbon capture and sequestration, and that the California Air Resources Board has recognized the importance of carbon capture and sequestration in its Climate Change Scoping Plan. According to Hydrogen, the California Public Utilities Commission (CPUC) granted Southern California Edison Company (SoCal Edison) the ability to recover up to \$30 million in ratepayer funding for study costs associated with Hydrogen's project.

8. Hydrogen states that it has been actively pursuing interconnection with CAISO and has met previous deadlines for financial security postings. Specifically, Hydrogen notes that it made its first financial security posting in the form of two letters of credit in December 2009 and, in December 2010, made a revised financial security posting in an amount that Hydrogen states is sufficient to cover its second required financial security posting for interconnection facilities relating to PG&E's system.

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<sup>1</sup> Hydrogen attached to its Petition a statement of support for its project issued on March 16, 2011 by R.P. Detwiler, Chief Counsel of the National Energy Technology Laboratory on behalf of DOE's Office of Fossil Energy (DOE Statement of Support).

## II. Hydrogen's Waiver Request

9. Assuming that CAISO's waiver request to extend the financial security posting due date for seven interconnection customers, of which Hydrogen is one, in Docket No. ER11-2503-000 is granted, Hydrogen states that its second posting of interconnection financial security will be due as of March 28, 2011.<sup>2</sup> Under CAISO's tariff, Hydrogen's failure to make the required financial security posting would result in the project being withdrawn from CAISO's interconnection queue. Accordingly, Hydrogen requests that the Commission grant its request for temporary waiver of the obligation to post the required second interconnection financial security until May 16, 2011, and reinstate Hydrogen to the position it held in CAISO's interconnection queue prior to being withdrawn for failure to make the interconnection financial security posting on time.

10. Hydrogen states that being withdrawn from CAISO's interconnection queue would have detrimental effects on the project. First, Hydrogen asserts that because it would have to submit a new interconnection request, Hydrogen may be unable to meet its proposed in-service date for interconnection facilities and network upgrades or its proposed November 2016 commercial operation date. Second, Hydrogen also contends that the change in queue position could cause project costs to increase (e.g., restudy deposits and additional network upgrades caused by other projects). Lastly, Hydrogen argues that sufficient capacity may not be available to support the project at its only possible point of interconnection if it is delayed.

11. Hydrogen states that it is unable to make the second financial security posting required under CAISO's tariff as it relates to financial security associated with network upgrades by the assumed deadline date of March 28, 2011. Hydrogen acknowledges that it is obligated to provide additional financial security consistent with section 9.3.1.2 of CAISO's tariff. However, Hydrogen states that the form letter of credit provided to it by Pacific Gas & Electric Company (PG&E) would require posting a significantly higher amount of financial security than would be required under CAISO's tariff.<sup>3</sup>

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<sup>2</sup> We note that the Commission granted CAISO's waiver request in Docket No. ER10-2503-000 in a decision issued concurrently with this one. *Cal. Indep. Sys. Operator Corp.*, 135 FERC ¶ 61,067 (2011).

<sup>3</sup> Along with its Petition, Hydrogen submitted a request for confidential treatment of the specific dollar amounts of Hydrogen's cost responsibility for interconnection facilities and network upgrades, and the associated dollar amounts of required financial security postings.

12. Hydrogen states that the reason it is unable to make the second financial security posting by the deadline relates to its need for additional investors. Hydrogen states that it is in active, confidential negotiations with potential investors, at least one of whom has met with DOE regarding possible investment in the project. As a result, Hydrogen argues that it requires an extension of time until May 16, 2011, to make its second financial security posting in order to ensure a reasonable amount of time for potential investors to consider the project.

13. Hydrogen asserts that good cause exists for granting its request for a waiver. Hydrogen argues that inconsistencies between PG&E's form letter of credit requirements and the CAISO tariff created a delay. Hydrogen states that it learned on March 9, 2011, that PG&E's form letter of credit contains language that Hydrogen argues is in conflict with CAISO tariff section 9.3.1.2 and will increase Hydrogen's cost responsibility for network upgrades.<sup>4</sup> Hydrogen argues that it requires a waiver of CAISO's tariff to resolve this issue.

14. Hydrogen states that the requested waiver is limited in scope. Hydrogen asserts that the waiver would apply only to Hydrogen's project, based on the project's unique status as a demonstration project. Hydrogen adds that the requested waiver is for only a limited period of 48 days and would not relieve Hydrogen of the obligation to make the second financial security posting at the end of that period.

15. Hydrogen argues that the requested waiver would solve a concrete problem because not granting the requested waiver would materially increase the risk of Hydrogen's project not being viable. According to Hydrogen, the failure of its project would endanger the achievement of state and federal policy goals associated with the implementation of carbon capture and sequestration by endangering Hydrogen's ability to meet a December 2015 in-service date for interconnection facilities and network upgrades and a November 2016 commercial operation date. In addition, Hydrogen argues that in the absence of the Commission granting waiver, Hydrogen will incur additional costs and may be permanently foreclosed from project completion due to congestion at the project's only possible point of interconnection.

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<sup>4</sup> According to Hydrogen, CAISO's tariff limits the amount of the second financial security posting to 30 percent of the cost responsibility identified in the Phase I interconnection study, if that amount is lower than the cost responsibility amount identified in the Phase II study. Hydrogen states that PG&E's letter of credit form letter would require that the second interconnection financial security posting instead amount to 30 percent of the cost responsibility identified in the Phase II interconnection study, without regard to whether that amount is higher than was identified in the Phase I study.

16. Hydrogen further argues that granting its request for waiver will not result in any undesirable consequences, nor will it harm any other parties. Hydrogen asserts that if the Commission grants its waiver request, its position in CAISO's interconnection queue will be unchanged, as will that of other projects in the queue. Hydrogen also argues that, to the best of its knowledge, granting waiver will not adversely affect PG&E.

17. Finally, Hydrogen argues that by improving the prospects of success for its project, granting Hydrogen's requested waiver will advance the public policy goal of advancing carbon reduction strategies, consistent with both California and national policy.

### **III. Notice, Intervention and Responsive Pleadings**

18. Notice of the waiver request was published in the *Federal Register*, 76 Fed. Reg. 17119 (2011), with motions to intervene, comments and protests due on or before March 31, 2011. Modesto Irrigation District filed a timely motion to intervene. PG&E and CAISO each filed a timely motion to intervene and comments. On April 7, 2011, DOE filed a Request for Expedited Decision on Petition for Temporary Waiver. No protests were filed.

### **IV. Discussion**

#### **A. Procedural Matters**

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214, the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

#### **B. Substantive Matters**

##### **1. CAISO and PG&E's Comments**

20. CAISO states that it will defer to the Commission to decide if Hydrogen should receive waiver to make its second financial security posting on the grounds that there is public interest in the generation project, as DOE and the CPUC have demonstrated support for Hydrogen's project.<sup>5</sup> CAISO argues that a claim of commercial interest, however, is insufficient to meet the requisite burden for granting waiver. According to CAISO, the purpose of the generator interconnection reform process is to allow commercially viable projects to advance expeditiously and remove those projects that are not commercially viable. Therefore, CAISO contends that interconnection customers should not automatically receive waiver from the tariff's milestone deadlines simply

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<sup>5</sup> CAISO Comments at 6.

because their business conditions require them to raise additional capital from additional investors.<sup>6</sup> CAISO asserts that it has consistently denied extension requests from its own interconnection customers seeking waiver based on similar grounds, stating that such circumstances are insufficient to warrant relief from the tariff rules.<sup>7</sup>

21. If the Commission determines that Hydrogen's demonstration of public interest in its generation project is sufficient to grant waiver, CAISO recommends that the Commission limit its decision to the specific facts and circumstances presented in the instant filing and establish clear criteria for evaluating similar waiver requests in the future. Specifically, CAISO suggests that the criteria include a demonstration of project viability, special public interest that outweighs the need for adherence to standard tariff requirements, and that the waiver request will result in little or no harm.<sup>8</sup> In establishing narrow criteria for granting waiver, CAISO asserts that the Commission will limit its exposure to excessive numbers of waiver requests based on similar claims of commercial interest.

22. In conducting an internal assessment, CAISO does not believe that PG&E or any of its interconnection customers will be harmed by granting Hydrogen's requested waiver. Additionally, CAISO asserts that it is unaware of other potential projects seeking interconnection in the geographic vicinity of Hydrogen's generation project that could be considered electrically interrelated.<sup>9</sup>

23. CAISO also disputes Hydrogen's assertion that it was unable to make the second financial security on time due to a discrepancy between PG&E's form letter of credit and CAISO's tariff.<sup>10</sup> CAISO argues that there is no causal connection between PG&E's form letter of credit and Hydrogen's ability to make the second financial security posting that could serve as the basis for granting waiver. Therefore, CAISO considers Hydrogen's claim to be without merit in that regard.<sup>11</sup> In addition, CAISO contends that Hydrogen did not contact PG&E or CAISO to resolve the matter, and when PG&E became aware of the discrepancy, it immediately revised its form letter of credit. Thus, CAISO argues that PG&E's form letter of credit did not prevent Hydrogen from meeting

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<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.* at 6.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 8.

the tariff deadlines.<sup>12</sup> CAISO asserts that when evaluating similar waiver requests in the future, the Commission should evaluate whether the interconnection customer has raised the issue with the participating transmission owner (PTO), if the PTO could accommodate the request in a reasonable timeframe, and if inaction is causally connected to the customer's inability to make financial security postings.<sup>13</sup>

24. PG&E similarly disputes Hydrogen's statement that it was unable to make the second financial security posting because the language in PG&E's form letter of credit conflicted with CAISO tariff section 9.3.1.2.<sup>14</sup> PG&E argues that Hydrogen came to this conclusion after reviewing an outdated and incorrect form letter posted on CAISO's website.<sup>15</sup> PG&E clarifies that it did not request security for a higher amount than permitted under CAISO's tariff, and asserts that Hydrogen has not stated otherwise.<sup>16</sup>

## 2. Commission Determination

25. Hydrogen argues that the specific dollar amounts of Hydrogen's cost responsibility for interconnection facilities and the associated dollar amounts of required financial security postings are commercial information and are, thus, deemed privileged and confidential under 5 U.S.C. § 552(b)(4). Because the disclosure of the specific dollar amounts is not necessary or germane to our decision on Hydrogen's Petition, we will grant the request for privileged treatment.

26. The Commission historically has granted certain waiver requests involving an emergency situation or an unintentional error.<sup>17</sup> 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

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 8-9.

<sup>14</sup> PG&E Comments at 2.

<sup>15</sup> *Id.* at 2 (citing Petition at 9, n.31).

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *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).

found that a one-time waiver is appropriate.<sup>18</sup> We find that good cause exists for granting Hydrogen's request. Thus, for the reasons discussed below, we grant Hydrogen's limited request for waiver of section 9.3.1.2 of CAISO's tariff through May 16, 2011.

27. Hydrogen's waiver request is of limited scope. Hydrogen seeks a temporary waiver of a single financial security posting requirement for a period of only 48 days and that will not ultimately relieve its obligation to make further financial security postings.

28. The resultant benefits to customers are also evident. As Hydrogen argues and the DOE Statement of Support reiterates, Hydrogen's project presents a unique opportunity as a demonstration project for carbon capture and sequestration.<sup>19</sup> Further evidence of benefit is found in the financial and other support provided by DOE<sup>20</sup> and the CPUC.<sup>21</sup> While we recognize that granting Hydrogen's waiver request does not ensure that the project will be completed, denying the request could jeopardize the project's viability. We find the potential benefits of the project, as described in the DOE Statement of Support, provide compelling public policy reasons to grant Hydrogen's requested temporary waiver.

29. The Commission has previously considered public policy considerations, on a case-by-case basis, including the exigencies of ARRA-imposed deadlines in deciding whether to approve applications that would otherwise not comply with Commission requirements.<sup>22</sup> Hydrogen's project is the recipient of ARRA funding and subject to the exigencies of ARRA deadlines, including finalizing an interconnection agreement. Here, the deadline is not until 2015; however, Hydrogen must expend all the ARRA funds it receives by that time, and as Hydrogen has expressed, the timeline for project

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<sup>18</sup> 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).

<sup>19</sup> Petition at 2-3.

<sup>20</sup> See DOE Statement of Support.

<sup>21</sup> See Petition at 5-6.

<sup>22</sup> See *Southern Cal. Edison Co.*, 133 FERC ¶ 61,107, at P 43 (2010); see also *Southern Cal. Edison Co.*, 133 FERC ¶ 61,108 (2010).

development is tight.<sup>23</sup> According to DOE's Statement of Support, the ARRA funds are made available to Hydrogen only as reimbursement for expenditures made for design and construction expenses. Thus, the ARRA funds do not appear to be available for purposes of making the required interconnection financial security posting to secure Hydrogen's interconnection queue position and can only be fully utilized if sufficient design and construction occurs prior to the September 2015 deadline. It is also significant that the ARRA funds that have been committed to Hydrogen's project cannot be reallocated by DOE to a different project.<sup>24</sup> Hydrogen's project is a first-of-its-kind demonstration project that could foster future project development which is in the public interest.<sup>25</sup>

30. Furthermore, it appears that no undesirable consequences would result from the Commission's granting Hydrogen's requested waiver. Hydrogen states that its position in CAISO's interconnection queue will remain unchanged, as will that of other interconnection customers.<sup>26</sup> In addition, Hydrogen's queue position will not increase or decrease its current cost responsibility. Further, CAISO indicates that it has conducted an internal assessment and has not identified any other interconnection customers that would be harmed.<sup>27</sup> PG&E, the affected participating transmission owner has intervened in this proceeding, but does not protest or allege that it would suffer any undesirable consequences from the Commission granting Hydrogen's requested temporary waiver.

31. We agree with CAISO that the need for additional capital does not, by itself, provide a sufficient basis to support granting even a brief waiver from making timely interconnection financial security postings as required by CAISO's tariff. Accordingly, this order should not be construed as supporting such a notion, as discussed below.<sup>28</sup> We note that the Commission has consistently recognized the importance of interconnection

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<sup>23</sup> See Petition at 10-11. According to Hydrogen, if it were required to withdraw from the interconnection queue for failure to meet the financial security posting requirement, it would be moved from the 300<sup>th</sup> queue position to approximately 650<sup>th</sup>. Hydrogen points out that since it would be unable to meet the 2011 application window, its project would be delayed by at least an additional year, making it difficult to meet the projected deadlines even if the study process proceeds according to estimates.

<sup>24</sup> DOE Statement of Support at 2.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> Petition at 12-13.

<sup>27</sup> CAISO Comments at 7.

<sup>28</sup> See, e.g., *Coso Energy Developers*, 134 FERC ¶ 61,088 (2011).

financial security postings to ensure that projects advancing in the interconnection queue are viable.<sup>29</sup>

32. While Hydrogen asserts that PG&E's letter of credit requirements would impose a requirement that it post a higher amount as interconnection financial security, Hydrogen does not state that it would have been able to post the lower amount of financial security that Hydrogen believes is required under CAISO's tariff. Accordingly, we will treat Hydrogen's waiver request as applying regardless of which dollar amount is required.

33. Regardless of the issues surrounding PG&E's form letter of credit, the Commission finds that the analysis of the waiver provided above supports granting Hydrogen's waiver request, even if the facts and circumstances surrounding the form letter of credit are as PG&E argues.<sup>30</sup>

34. In granting Hydrogen's waiver, we note that we review each request for waiver of tariff requirements on its own merits and on a case-by-case basis. Thus, in granting Hydrogen's request for waiver for good cause, we emphasize that our actions are limited to the unique circumstances presented in this docket.

The Commission orders:

Hydrogen's request for temporary waiver of its obligation under section 9.3.1 of CAISO's tariff to make a second financial security posting to retain its project's position in CAISO's interconnection queue is granted. This temporary waiver shall extend through May 16, 2011, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>29</sup> See, e.g., *Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,292, at P 151 (2008).

<sup>30</sup> The Commission reminds parties that we expect them to endeavor to work issues out with the appropriate parties prior to seeking a waiver or asserting the power of the Commission.