

148 FERC ¶ 61,120
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, John R. Norris,
Tony Clark, and Norman C. Bay.

Southern California Edison Company

Docket No. ER14-897-001

ORDER DENYING REHEARING

(Issued August 14, 2014)

1. In this order, the Commission denies requests for rehearing by Southern California Edison Company (SoCal Edison) and Arizona Public Service Company (APS) of an order issued on February 27, 2014 that rejected: (1) an Assignment and Assumption Agreement (Assignment Agreement) between SoCal Edison and APS; and (2) SoCal Edison's Tariff for the Assignment of Transmission Rights Purchased under the Edison-Arizona Transmission Agreement (Resale Tariff).¹

I. Background

2. This matter began in 2010 when SoCal Edison decided to terminate its ownership interests in the Four Corners Power Plant Units 4 and 5, which are served by a 500 kV transmission line that APS built, owned, operated, and maintained under a 1966 agreement between APS and SoCal Edison (Edison-Arizona Transmission Agreement). Under the Edison-Arizona Transmission Agreement, SoCal Edison agreed to pay APS a monthly transmission charge in return for the rights to all of the transmission capacity on that line for use in transmitting SoCal Edison's portion of the output from the Four Corners Power Plant to California.

3. APS filed in Docket No. ER13-1402-000 for Commission approval of the termination of the Edison-Arizona Transmission Agreement and the recovery through APS's transmission rates of a \$40 million payment to SoCal Edison. In an order issued on September 13, 2013, the Commission accepted APS's notice of cancellation, but

¹ *Southern California Edison Co.*, 146 FERC ¶ 61,136 (2014) (February 2014 Order).

denied APS's request to recover the \$40 million payment in its transmission rates, explaining that the request had not been adequately supported.²

4. On December 18, 2013, APS filed a request to change the effective date of the cancellation of the Edison-Arizona Transmission Agreement from December 24, 2014 (the date originally requested by APS and accepted by the Commission in the September 2013 Order) to "the date on which the Edison-Arizona Transmission Agreement terminates pursuant to its own terms."³ This request was granted in an unpublished letter order issued in Docket No. ER13-1402-003 on January 3, 2014.

5. Following denial of APS's filing in Docket No. ER13-1402-000 to recover the \$40 million payment in its transmission rates, SoCal Edison filed an alternative proposal in the instant proceeding. Specifically, SoCal Edison proposed to assign 300 MW of SoCal Edison's transmission rights under the Edison-Arizona Transmission Agreement to APS's marketing function (APS Marketing) through the Assignment Agreement. SoCal Edison stated that, under the Assignment Agreement, it would charge APS Marketing the undiscounted APS Open Access Transmission Tariff (APS Tariff) rate for monthly delivery of long-term firm point-to-point service for the 300 MW. As to the remaining capacity, SoCal Edison planned to periodically assign all or a portion of its rights to third parties through the Resale Tariff, using APS's transmission business function (APS Transmission) as its agent for marketing such transmission capacity.

6. SoCal Edison proposed that the Assignment Agreement, the Resale Tariff, and the Edison-Arizona Transmission Agreement would remain in effect until the sum of the cumulative payments received by SoCal Edison under the Assignment Agreement and from assignments under the Resale Tariff equaled the sum of the prospective payments made by SoCal Edison to APS under the Edison-Arizona Transmission Agreement plus \$40 million.⁴

7. In the February 2014 Order, the Commission stated that SoCal Edison was seeking to add a rider to the Edison-Arizona Transmission Agreement, a pre-Order No. 888 transmission agreement,⁵ and found it "would have the effect of modifying the Edison-

² *Arizona Pub. Serv. Co.*, 144 FERC ¶ 61,200 (2013) (September 2013 Order), *reh'g denied*, 147 FERC ¶ 61,017 (2014).

³ APS letter to Commission in Docket No. ER13-1402-003 dated Dec. 18, 2013.

⁴ SoCal Edison December 30, 2013 Filing at 3.

⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities*

Arizona Transmission Agreement to assign 300 MW of SoCal Edison's transmission rights under the Edison-Arizona Transmission Agreement to APS Marketing.”⁶ In addition, the Commission found that, if such a revision were made, the related transmission service for the assigned rights would need to be provided pursuant to the rates, terms, and conditions of the APS Tariff.⁷

8. Because the Commission found that the assignment arrangement contemplated by the parties in the Assignment Agreement would require the transmission service currently provided pursuant to the Edison-Arizona Transmission Agreement to be provided under APS's Tariff,⁸ the Commission also rejected the Assignment Agreement without prejudice to SoCal Edison or APS effectuating the assignment pursuant to the terms and conditions of APS's Tariff, including the conversion of transmission service under the Edison-Arizona Transmission Agreement to a reservation for transmission service under APS's Tariff.⁹ Finally, the Commission also rejected the Resale Tariff as the Commission has only allowed resale tariffs in the context of jurisdictional transmission providers reselling transmission rights on a non-jurisdictional transmission provider's facilities in circumstances where there is not a Commission-approved Tariff under which the resale can be facilitated.¹⁰

and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2002), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). The Commission noted that if a pre-Order No. 888 transmission agreement is modified, or otherwise expires by its own terms, Commission policy requires that the modified service be taken pursuant to the rates, terms and conditions of an open access transmission tariff. February 2014 Order, 146 FERC ¶ 61,136 at P 24.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* P 25.

⁹ *Id.*

¹⁰ *Id.* P 26 (citing *U.S. Dep't of Energy - Bonneville Power Admin.*, 128 FERC ¶ 61,057, at P 24 (2009), *reh'g denied*, 135 FERC ¶ 61,023 (2011) (*Bonneville*)).

II. Requests for Rehearing

9. On March 28, 2013 and March 31, 2013, respectively, APS and SoCal Edison filed requests for rehearing. SoCal Edison and APS each makes three main arguments challenging the Commission's findings in the February 2014 Order. These arguments largely overlap. First, SoCal Edison and APS both argue that the Commission erred in ruling that the Assignment Agreement constitutes a modification of the Edison-Arizona Transmission Agreement.¹¹ SoCal Edison contends that an assignment cannot modify a contract.¹² By contrast, APS disputes the Commission's characterization of the Assignment Agreement as a rider and argues that it is a stand-alone agreement.¹³

10. Second, SoCal Edison and APS argue that the Commission's ruling that modification of the Edison-Arizona Transmission Agreement would require related transmission service to be provided pursuant to APS's Tariff was arbitrary, contrary to precedent, and discriminatory.¹⁴ In this regard, SoCal Edison argues that, assuming an assignment is, in fact, a modification, the Commission routinely permits modifications of pre-Order No. 888 contracts; in contrast, abrogation of transmission contracts is only permitted if the modification renders them unjust and unreasonable.¹⁵ SoCal Edison states that some entities have been allowed to assign their pre-Order No. 888 agreements with no conversion obligation. Thus, SoCal Edison argues, the Commission's refusal to allow it to do the same is plainly arbitrary.¹⁶ APS argues that, if the Commission had admitted the answers by SoCal Edison and APS, it would have seen evidence about why the Assignment Agreement does not constitute an amendment to the Edison-Arizona Transmission Agreement.¹⁷ APS adds that the Commission erred in deciding that the

¹¹ SoCal Edison Rehearing Request at 1, 6-7; APS Rehearing Request at 4, 5-8.

¹² SoCal Edison Rehearing Request at 2, 6-7.

¹³ APS Rehearing Request at 6.

¹⁴ SoCal Edison Rehearing Request at 2, 7-9; APS Rehearing Request at 7-10.

¹⁵ SoCal Edison Rehearing Request at 3, 7-9.

¹⁶ *Id.* at 8.

¹⁷ APS Rehearing Request at 6-7.

Assignment Agreement revised or constituted a rider to the Edison-Arizona Transmission Agreement without first conducting a factual investigation.¹⁸

11. Finally, SoCal Edison and APS argue that the Commission's rejection of the Resale Tariff was arbitrary and unsupported because it made that decision without evaluating extrinsic evidence on the meaning of the Edison-Arizona Transmission Agreement.¹⁹ SoCal Edison and APS add that the Resale Tariff should have been accepted because it achieved the Commission's policy goals and addressed its concerns with regard to transmission capacity reassignment, as it ensured that capacity is used by the parties who value it most.²⁰ SoCal Edison further argues that, in *Bonneville*,²¹ the Commission did not indicate that a resale tariff would be inappropriate for reassigning grandfathered transmission rights, only that a resale tariff would be permissible when the Tariff does not provide for reassignment of certain transmission rights, similar to SoCal Edison's situation.²² Thus, SoCal Edison argues that the Commission's reliance on *Bonneville* as a reason to reject the Resale Tariff is misplaced.²³ APS argues that the Commission's findings in the February 2014 Order are inconsistent with its past practice of occasionally accepting amendments to grandfathered agreements without requiring them to be converted to Tariff service.²⁴ Thus, APS argues that the Commission erred in summarily rejecting the Resale Tariff.²⁵

¹⁸ *Id.* at 7-10.

¹⁹ SoCal Edison Rehearing Request at 2, 9-10; APS Rehearing Request at 8.

²⁰ SoCal Edison Rehearing Request at 4, 9-10; APS Rehearing Request at 4, 10-16.

²¹ 128 FERC ¶ 61,057 at P 24.

²² SoCal Edison Rehearing Request at 10-11.

²³ *Id.* at 11.

²⁴ APS Rehearing Request at 13.

²⁵ *Id.* at 4, 14.

III. Discussion

12. SoCal Edison argues that the Commission in the February 2014 Order failed to explain how it reached the conclusion that the Assignment Agreement would have the effect of modifying the Edison-Arizona Transmission Agreement.²⁶ Our reasoning in reaching this conclusion was that, while the Edison-Arizona Transmission Agreement contains specific language providing that SoCal Edison would pay APS a monthly transmission charge in return for all of the transmission capacity of the Arizona Transmission Line for the life of the agreement and contains provisions giving SoCal Edison the right to terminate the agreement with five years' prior notice and payment of a lump sum, these terms and conditions were effectively renegotiated and significantly revised as a result of the Assignment Agreement. In particular, the Assignment Agreement would permanently reduce the capacity made available to SoCal Edison under the Edison-Arizona Transmission Agreement in return for the payment negotiated by the parties and memorialized in the Assignment Agreement.²⁷

13. Moreover, the Assignment Agreement and Resale Tariff represent an attempt to elevate form over substance. Although SoCal Edison and APS contend that the arrangement is an "assignment," what is actually occurring is much more than a one-time assignment of capacity. SoCal Edison is "reassigning" transmission service that it contractually bargained for from APS back to APS so that SoCal Edison would be compensated by APS for terminating the Edison-Arizona Transmission Agreement.²⁸ This reverses the original arrangement under which SoCal Edison would compensate APS if it wanted to terminate the contract and is tantamount to a major modification of the Edison-Arizona Transmission Agreement, as it significantly modifies the termination procedures long embodied in the Edison-Arizona Transmission Agreement. Thus, SoCal

²⁶ SoCal Edison Rehearing Request at 6.

²⁷ *See, e.g.*, Section 1.1.1 of the Assignment Agreement, providing that APS and SoCal Edison "are entering into this Agreement in lieu of amending the Edison-Arizona Transmission Agreement as contemplated by Section 7.3 thereof."

²⁸ *See, e.g.*, Section 1.2 of the Assignment Agreement, providing the "Assignment Payment Period shall continue until (1) the sum of the cumulative payments received by Edison under this Section 1 and under the third party assignments made under Section 2 below equal the sum of the payments made by Edison to APS under the Edison-Arizona Transmission Agreement following the Effective Date and forty million dollars (\$40,000,000.00), or (2) the effective date of the early termination of the Edison-Arizona Transmission Agreement, pursuant to Section 3.2 of this Agreement, whichever is earlier."

Edison is attempting to accomplish by other means the termination of Edison-Arizona Transmission Agreement, in return for a \$40 million payment, that the Commission denied APS recovery of in Docket No. ER13-1402-000.²⁹

14. APS and SoCal Edison also argue the Commission erred in stating that the contract modifications contemplated by the parties in the Assignment Agreement would require the transmission service currently provided pursuant to the Edison-Arizona Transmission Agreement to be provided under the APS Tariff.³⁰ SoCal Edison argues that the Commission “routinely” permits modifications of pre-Order No. 888 contracts, and abrogation of transmission contracts is only permitted if the modification renders them unjust and unreasonable.³¹ APS argues that the Commission should not have made a summary disposition of this issue, as it has on occasion allowed service to continue under a grandfathered agreement despite the agreement being revised.³²

15. APS and SoCal Edison cite a number of cases in which the Commission allowed modification of a pre-Order No. 888 agreement. However, these modifications were only allowed in narrow circumstances, and none of them affected the character or nature of the service under the original agreement to the extent that the Assignment Agreement and Resale Tariff would do. For example, in *Louisville Gas & Elec. Co.*, 101 FERC ¶ 61,182 (2002), the Commission permitted revisions to two grandfathered transmission contracts to reflect additional expenses incurred as a result of the company’s participation in the Midwest Independent System Operator. In *Southern California Edison Co.*, 120 FERC ¶ 61,101 (2007), the Commission permitted revisions to the rates of a grandfathered agreement to incorporate unforeseen costs that resulted from SoCal Edison becoming a scheduling coordinator in the California Independent System Operator Corporation. In *Village of Belmont v. Wisconsin Power & Light Co.*, Opinion No. 451, 95 FERC ¶ 61,334, at 62,193 (2001), the Commission found that a grandfathered agreement does not *need* to be modified as a result of Order No. 888 if it remains just and reasonable. In

²⁹ As the Commission discussed in the September 2013 Order, the Edison-Arizona Transmission Agreement gives SoCal Edison a means to terminate the agreement if it so desires. Section 25.3 provides that, if SoCal Edison wishes to dispose of its interest in the Four Corners Project, it has the right to terminate the agreement under section 25.2, with five years’ advance notice to APS. This is to be accompanied by the payment of a lump sum payment from SoCal Edison to APS, as prescribed in section 25.3.

³⁰ February 2014 Order, 146 FERC ¶ 61,136 at P 25.

³¹ SoCal Edison Rehearing Request at 7.

³² APS Rehearing Request at 11.

Portland General Elec. Co., 137 FERC ¶ 61,261, at 5, 23 (2011), the Commission permitted revisions to a grandfathered agreement to simplify and clarify the processes for addressing third party requests for service. In *ITC Holdings Corp.*, 143 FERC ¶ 61,257 at P 177 (2013), the Commission allowed grandfathered agreements to continue after one of the signatories merged with another company, and committed to honor the existing agreements. Thus, the cases cited by APS and SoCal Edison are distinguishable from the instant case, where SoCal Edison seeks to: (1) introduce a termination provision into the Edison-Arizona Transmission Agreement by means of a separate agreement; (2) reverse the identities of the buyer and seller of transmission services and the flow of payments for this service between the parties; (3) reverse which party owes compensation to the other in the event of early termination of the Edison-Arizona Transmission Agreement; and (4) introduce a new and very large payment of \$40 million from APS to SoCal Edison which has not been shown to be a just and reasonable cost to ratepayers. The fact that the agreement is labeled as an 'assignment agreement' does not diminish the effects of these modifications on the Edison-Arizona Transmission Agreement.

16. Finally, APS argues that the Commission erred, in the February 2014 Order, by failing to consider extrinsic evidence that it and SoCal Edison had separately proffered in answers to protests and answers. We disagree. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. This rule encourages litigants to present all of their arguments and evidence as early in the process as possible. It discourages litigants from strategically holding back arguments that they could have presented sooner, so that other parties have less of an opportunity to respond to them or to give the Commission a one-sided view of the issue. The Commission's discretion on this issue has been affirmed on appeal.³³ Neither APS nor SoCal Edison presented any reason in their respective answers why the information they wished to bring to the Commission's attention was not available earlier. They offered no evidence of any impediment to filing this information sooner if they had wished to do so. This being the case, there is no merit to APS's argument that the Commission erred in making a decision that did not consider the information it provided in its rejected answer.

17. Moreover, the Commission in the February 2014 Order did not interpret a vague or unclear contractual provision in the Edison-Arizona Transmission Agreement that could have been interpreted in different ways and where extrinsic evidence might have clarified what the language in question meant. Rather, the Commission found that the

³³ See, e.g., *Kourouma v. FERC*, 723 F.3d 274, 280 (D.C. Cir. 2013) (finding it was not an abuse of discretion for the Commission to follow Rule 213 and deny an answer).

Assignment Agreement effectively modified the terms of the Edison-Arizona Transmission Agreement and, based on our policy in Order No. 888, we determined that such a modification dictated that service be provided under the APS Tariff. The proffered extrinsic evidence, as described in the requests for rehearing, would not impact this result.

The Commission orders:

The requests for rehearing filed by APS and SoCal Edison are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.