

109 FERC ¶ 61,203  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suede G. Kelly.

Cabazon Wind Partners, LLC

Docket No. EL04-137-000

v.

Southern California Edison Company

ORDER SETTING COMPLAINT FOR HEARING  
AND SETTLEMENT JUDGE PROCEDURES

(Issued November 22, 2004)

1. On September 27, 2004, Cabazon Wind Partners, LLC (Cabazon) filed a complaint against Southern California Edison Co. (SoCal Edison) alleging that SoCal Edison (1) incorrectly classified upgrades associated with interconnection of a wind power project owned by Cabazon as “distribution facilities;” (2) failed to give Cabazon transmission credits or other reimbursement for money Cabazon paid upfront for the upgrades; and (3) incorrectly required Cabazon to pay a tax gross-up associated with the project. Cabazon seeks a Commission order summarily finding that the upgrades are network upgrades for which Cabazon is entitled to receive transmission credits. If the Commission grants Cabazon’s request, Cabazon also requests the Commission to (1) set for hearing and settlement procedures the calculation of the amounts due to Cabazon and the method of payment, and (2) order immediate refund of the tax gross-up, plus interest, associated with the allegedly incorrectly classified facilities. For the reasons set forth below, the Commission will set the complaint for hearing and settlement judge procedures. This order benefits customers because it establishes a procedure for the parties to resolve their concerns.

**I. Complaint**

2. Cabazon owns a 41 MW wind power project in Riverside County, California. This wind power project is interconnected to SoCal Edison’s system at a substation on a

tap<sup>1</sup> from SoCal Edison's 115 kV Garnet-Windfarm Banning-Maraschino line (Maraschino line).<sup>2</sup>

3. SoCal Edison interconnected Cabazon's wind power project under an amended Interconnection Facilities Agreement (Agreement).<sup>3</sup> The Agreement identifies the upgrades at issue in this proceeding as "distribution system facilities" and assigns the \$4,509,000 cost of the upgrades to Cabazon. The Agreement also requires Cabazon to pay an additional \$1,370,000 for a "tax gross up" on these upgrades to indemnify SoCal Edison from any federal income tax liability that SoCal Edison might incur due to Cabazon's payment for the upgrades.

4. Cabazon points out that the Commission's policy on network upgrades requires that the generator who pays for such upgrades be reimbursed (through credits against its transmission bills). Cabazon argues that the Agreement is unjust and unreasonable and should be revised under section 206 of the Federal Power Act (FPA).<sup>4</sup> According to Cabazon, the upgrades at issue are network upgrades because the Maraschino line is part of SoCal Edison's integrated transmission system and because the upgrades benefit other SoCal Edison transmission customers. Cabazon asserts that SoCal Edison's "distribution" label in the Agreement does not determine the nature of the upgrades, and the Commission's prior designation of the Maraschino line as "distribution" under Order No. 888's seven-factor test also does not determine their nature for purposes of this case.<sup>5</sup>

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<sup>1</sup> A "tap" is a terminal where an electric connection is established. A "tap" ties a substation to an existing transmission line by running a new single circuit line from the substation to the existing line and tying into it.

<sup>2</sup> SoCal Edison's Maraschino line accepts power from several wind projects, including the Cabazon wind power project, into the SoCal Edison and California Independent System Operator Corporation (CAISO) transmission systems.

<sup>3</sup> The Commission accepted the original Interconnection Facilities Agreement. *See Southern California Edison Company* (Docket No. ER02-1764-000, July 5, 2002) (unpublished letter order). The Commission also accepted the amended Agreement. *See Southern California Edison Company* (Docket No. ER03-228-000, January 24, 2003)(unpublished letter order).

<sup>4</sup> 16 U.S.C. § 824e (2000).

<sup>5</sup> *Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service By Public Utilities and Recovery of Stranded Costs by Public*

5. Cabazon argues instead that we should use the five-factor test for determining whether facilities are part of the integrated transmission network set forth in *Mansfield Municipal Electric Department v. New England Power Co.* (*Mansfield* test) to determine whether the facilities are part of the integrated network.<sup>6</sup> Cabazon asserts that the upgraded facilities are integrated because: (1) they form a loop with SoCal Edison's integrated transmission system; (2) energy can flow in either direction, depending upon the status of the breakers; (3) SoCal Edison can use the Maraschino line to provide service to itself and other customers; (4) the upgrades to the Maraschino line increase the power-carrying capability of SoCal Edison's transmission line, ease constraints on other parts of the transmission line and provide reactive power support, thereby demonstrating the integrated characteristic of SoCal Edison's transmission lines and the benefits of the upgrades to SoCal Edison's transmission network; and (5) an outage on the Maraschino line would affect SoCal Edison's transmission system. Cabazon also argues that the 115 kV voltage level of the Maraschino line indicates that it is transmission, not distribution, and that the upgrades are network upgrades because they are beyond Cabazon's point of interconnection to SoCal Edison's integrated transmission grid.

6. According to Cabazon, the FPA requires the Commission to order a full refund of the network upgrade costs, plus interest. Cabazon contends that the Agreement's direct assignment of the costs without reimbursement is unlawful and that it is entitled to credits or some other form of reimbursement of the upgrade costs. If the Commission orders reimbursement, Cabazon requests the Commission to direct SoCal Edison to make the reimbursement in cash payments or by other reasonable means, since Cabazon is not a

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*Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 31,036 at p. 31,771(1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 at 30,230 (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 Study Group, et al. v. Federal Energy Regulatory Commission*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom., New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002).

<sup>6</sup> Opinion No. 454, 97 FERC ¶ 651,134 at 61,613-15 (2001), *affirming* 94 FERC ¶ 63,023 (2001) (initial decision) (*Mansfield*).

transmission delivery customer and thus cannot receive credits on a transmission bill.<sup>7</sup> Citing *Duke Energy Hinds*, Cabazon states that it is seeking prospective relief.<sup>8</sup>

7. Cabazon, therefore, seeks a Commission order summarily finding that the upgrades are network upgrades for which Cabazon is entitled to be reimbursed. It requests the Commission (1) to set for hearing and settlement procedures the calculation of the amounts due to Cabazon and the method of payment, and (2) to order immediate refund of the tax gross-up, plus interest, associated with the incorrectly classified facilities.

8. In the alternative, if the Commission does not grant this summary disposition, Cabazon requests a hearing at which it will demonstrate (1) that the Agreement is unjust and unreasonable because of the incorrectly classified upgrades and the tax gross-up, and (2) that the cost of the upgrades is excessive in any event and not prudent because SoCal Edison did not consider other feasible, lower cost alternatives.

## **II. Notice of Filing and Responsive Pleadings**

9. Notice of Cabazon's complaint was published in the *Federal Register*, 69 Fed. Reg. 59,587 (2004), with the answer and other comments, interventions or protests due on or before October 18, 2004. On October 25, 2004, the CAISO filed a motion to intervene out of time and comments. CAISO points out that the Maraschino line is not under CAISO operational control and argues that the line is therefore not integrated into the CAISO-controlled grid. CAISO knows of no reason why the current classification should be changed from distribution to transmission.<sup>9</sup> CAISO also argues that

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<sup>7</sup> Cabazon suggests that SoCal Edison could provide "credits" based on the cost of the network upgrades in monthly or quarterly installments, amortized over a five year period from the date of commercial operation. SoCal Edison could pay this credit until the entire amount was refunded (less what would have been recovered from the date of commercial operation until 60 days from the date of this complaint). It cites *Southern California Edison*, 107 FERC ¶ 61,017 at n.18 (2004) and *Pacific Gas and Electric Company*, 101 FERC ¶ 61,079 at 61,259-60 (2002).

<sup>8</sup> *Duke Energy Hinds v. Entergy Services, Inc.*, 102 FERC ¶ 61,068 at P 29 (2003), *reh'g pending (Duke Energy Hinds)*.

<sup>9</sup> The CAISO points out that it reviewed the Cabazon facilities study in 2002 and saw no reason then to reclassify the Garnet-Maraschino line as transmission and assume control over it.

reclassification of the Maraschino line as transmission would be inconsistent with the functional test requirements developed by SoCal Edison to determine transmission versus distribution.

10. Cabazon filed a response to SoCal Edison's answer on November 1, 2004, attempting to refute SoCal Edison's arguments.

### **III. SoCal Edison's Answer**

11. SoCal Edison argues that Cabazon had an opportunity to raise the issue of the proper classification of the upgrades when the Agreement was originally filed and again, when an amended Agreement was filed, but did not do so. According to SoCal Edison, Cabazon is attempting to get a third bite at the apple, but has not shown any changed circumstance that warrants altering the terms and conditions of an Agreement already reviewed and accepted by the Commission. However, SoCal Edison does not argue that the *Mobile-Sierra* doctrine<sup>10</sup> forbids this complaint.

12. Substantively, SoCal Edison asserts that the facilities are distribution facilities, not transmission facilities. It cites Opinion No. 445,<sup>11</sup> which states that a facility cannot be integrated if it is not under the control of the CAISO, which this facility is not. In order to find integration, the Commission would have to either (1) make a factual finding that the facilities are the type of facilities that are eligible to be put under the CAISO operational control (i.e., are network transmission facilities), in which case SoCal Edison would be compelled to transfer control to the CAISO and the CAISO would be compelled to accept such control; or (2) open an FPA section 206 proceeding to change the CAISO Transmission Control Agreement, which governs which facilities are under the CAISO's operational control, to include the line at issue here.

13. SoCal Edison argues that the issue of whether to build these upgrades at all can be decided summarily because (1) when SoCal Edison built the upgrades, it was abiding by a filed rate (i.e., the original Agreement and the amended Agreement) that required SoCal

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<sup>10</sup> Contracts subject to the public interest standard of the *Mobile-Sierra* doctrine may be modified only if the public interest so requires. See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power*, 350 U.S. 348 (1956). See also *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

<sup>11</sup> *Southern California Edison Co.*, 92 FERC ¶ 61,070 at 61,255 (2000), *aff'd*, 108 FERC ¶ 61,085 (2004).

Edison to build them; (2) CAISO reviewed SoCal Edison's facilities study and the alternatives presented therein and informed SoCal Edison that CAISO felt the upgrades were needed; and (3) Cabazon agreed that the upgrades should be built when it signed the agreements. According to SoCal Edison, it is too late for Cabazon to challenge the need for the facilities now.

14. SoCal Edison also requests the Commission to summarily dismiss the issue of whether the cost of the facilities is prudent and not excessive. Cabazon has not produced any evidence that SoCal Edison was imprudent in the amount spent to build the upgrades; instead, Cabazon says that perhaps it could raise some doubt during discovery, if the Commission sets the issue for hearing. SoCal Edison also challenges Cabazon's allegation that earlier queued projects should have been assigned some of the costs of the upgrades as a collateral attack on Wholesale Distribution Service Agreement Tariff Interconnection Agreements that Cabazon has not identified. According to SoCal Edison, Cabazon must identify other similarly situated customers that were treated differently in order to raise undue discrimination as an issue.

15. Finally, SoCal Edison argues that the disputed upgrades are on distribution facilities, not transmission facilities. According to SoCal Edison, before the *Mansfield* test is used to determine whether facilities are integrated, the Commission must make a threshold finding that the disputed upgrades are transmission facilities at all. Thus, there is a two-step process: (1) first, Order No. 888's seven-factor test is used to determine whether the facilities are transmission facilities; and (2) if they are, the *Mansfield* test is used to determine whether the transmission facilities are integrated, in which case credits would be due. SoCal Edison points out that the CAISO Transmission Control Agreement mandates that the facilities be subjected to Order No. 888's seven-factor test before being considered for inclusion on the CAISO controlled grid. According to SoCal Edison, CAISO's Transmission Control Agreement requires that all facilities that are proposed to be turned over to the CAISO must be found (1) not to be classified as distribution under Order No. 888's seven-factor test and (2) not to be generation ties.

16. SoCal Edison also argues that Cabazon misconstrues the *Mansfield* test by arguing that if one facet of the *Mansfield* test is met, there is some degree of integration. SoCal Edison points out that the Commission twice found that the Maraschino line is not transmission under Order No. 888's seven-factor test, and also found that the line was not an integrated network transmission facility.<sup>12</sup> SoCal Edison recognizes that the Commission indicated in those orders that the classifications could change over time and

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<sup>12</sup> SoCal Edison cites *Pacific Gas and Electric Co.*, 77 FERC ¶ 61,077 (1996) and *Pacific Gas and Electric Co.*, 81 FERC ¶ 61,122 (1997).

that the facilities then might have to be transferred to the CAISO,<sup>13</sup> and concedes that it has added and removed facilities from the CAISO-controlled grid. However, according to SoCal Edison, Cabazon has not provided evidence that the classification at issue here should be changed because of any change in the manner in which the Maraschino line is used and configured. SoCal Edison concludes that if the Commission is inclined to examine whether the upgrades are transmission as opposed to distribution, this is a factual issue that needs to be set for hearing.

#### **IV. Discussion**

##### **A. Preliminary Matters**

17. Pursuant to Rule 214 of the Commission's Rules of Practice of Procedure, 18 C.F.R. § 385.214 (2004), SoCal Edison's timely, unopposed answer serves to make it a party to this proceeding. Given the early stage of this proceeding, the absence of any undue prejudice or delay, and its interest in this proceeding, we will grant CAISO's untimely motion to intervene. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Cabazon's answer and will, therefore, reject it.

##### **B. Commission Determination**

18. The issue here is whether the facilities in dispute function as part of SoCal Edison's integrated transmission network or as merely distribution facilities as SoCal Edison claims. The initial delineation of facilities as either transmission or local distribution was made in a Commission order in 1996.<sup>14</sup> In that order, we granted a request for a declaration that facilities have multiple uses and that the initial classifications of facilities as transmission or local distribution would be subject to change as the use of the facilities changes.

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<sup>13</sup> Citing *Pacific Gas and Electric Co.*, 81 FERC at 61,559-60.

<sup>14</sup> See *Pacific Gas and Electric Company, San Diego Gas & Electric Company and Southern California Edison Company*, 77 FERC ¶ 61,077 (1996).

19. We also note that there is a case pending in Docket No. ER02-2189-003 with facts and arguments similar to the issues here (the Whitewater case).<sup>15</sup> In that proceeding, the Commission found that there were issues of material fact concerning whether the disputed upgrades were to transmission facilities that function as part of the integrated transmission network and thus may not be directly assigned, and or non-integrated “distribution” facilities.

20. In the Whitewater order, the Commission explained that ordinarily, for generator interconnections, there are only two categories of facilities: interconnection facilities and network upgrades. The Commission noted that the facts in that order were different from those in most generator interconnection cases. The Commission determined in the Whitewater case that the facilities in dispute may belong to a third category; they may be upgrades to non-integrated facilities that can be directly assigned to the generator.<sup>16</sup> The facilities at issue in this proceeding are similar to the facilities that we set for hearing in the Whitewater case.

21. Because we found facilities use could change and because the same issue has been set for hearing in the Whitewater proceeding, we will also set the same issue in this proceeding for hearing. Here, Cabazon must show that there has been a change in the use of these facilities so that they function as part of SoCal Edison’s integrated transmission network.<sup>17</sup>

### C. Hearing Procedures

22. Cabazon raises issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the trial-type evidentiary hearing ordered below. As it appears that the Agreement may be unjust, unreasonable, unduly

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<sup>15</sup> *Southern California Edison Company*, 107 FERC ¶ 61,017 (2004). This proceeding is ongoing, and testimony has been filed. The hearing is scheduled to commence on January 18, 2005.

<sup>16</sup> *Id.* at P 22.

<sup>17</sup> We note that if it is determined that the disputed facilities should be classified as network upgrades, then parties may need to re-determine the appropriate costs to be directly assigned. (Under SoCal Edison’s Wholesale Distribution Access Tariff, delivery of generation output to the CAISO-controlled grid, the rate charged is based only on the cost of those distribution system facilities which are **fully directly** assigned to the customer.)

discriminatory or preferential or otherwise unlawful, we will set the complaint for hearing and settlement judge procedures in order to determine whether the disputed upgrades are transmission network upgrades, which may not be directly assigned. If the presiding judge finds that the upgrades at issue are network upgrades, then the judge must determine how much and in what way Cabazon will receive reimbursement.

23. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>18</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>19</sup> The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Pursuant to the authority contained in, and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the treatment of the disputed upgrades and the costs associated with the upgrades, as discussed in the body of this order. However, the hearing shall be held in abeyance pending settlement procedures, as provided in Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this

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<sup>18</sup> 18 C.F.R. § 385.603 (2004).

<sup>19</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<[www.ferc.gov](http://www.ferc.gov)> -- [click](#) on Office of Administrative Law Judges).

order. Such a settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone with five (5) days of the date of this order.

(C) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the matters of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussion, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If the settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge shall within 15 days of the date of the presiding judge's designation convene a conference in the proceeding in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.