

UNITED STATES OF AMERICA 100 FERC ¶ 61,193
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Southern California Edison Company

Docket No. ER02-2119-000

ORDER CONDITIONALLY ACCEPTING TARIFF SHEET FOR FILING, AS
MODIFIED, AND ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES

(Issued August 16, 2002)

1. On June 19, 2002, Southern California Edison Company (SCE) filed a revised rate sheet to the unexecuted Interconnection Facilities Agreement¹ (IA) between SCE and Wildflower Energy, LP (Wildflower) under SCE's Transmission Owners Tariff (TO Tariff). In this order, we conditionally accept the revised rate sheet effective August 18, 2002, subject to modifications. This action benefits customers because it assures that the terms, conditions and rates for interconnection service are just and reasonable, and provides the parties with a reasonable means to ensure the reliable operation, protection, and integrity of the transmission system.

Background

2. The IA between SCE and Wildflower provides the terms and conditions under which Wildflower's generating facility is interconnected to SCE's grid² pursuant to SCE's TO Tariff. Service has already commenced. SCE states that it provided service to Wildflower on an expedited, interim basis due to the forecast generation shortage in California during the summer of 2001. SCE also states that when Wildflower submitted its request for service, SCE informed Wildflower that SCE was in the process of

¹The Commission accepted the IA, with some changes required, in Southern California Edison Company, 97 FERC ¶ 61,148 (2001) (Original IA Order). The compliance filing to this order was accepted by the Commission by letter order dated March 19, 2002, in Docket No. ER01-2609-003.

²SCE's transmission grid is controlled by the California ISO.

converting its system line protection telecommunications circuits from metallic cable to fiber optic cable in the area of Devers Substation. SCE states that it gave Wildflower the option of either coordinating its operating date with the date that the fiber optic conversion would be ready for use or using the metallic cable temporarily until the conversion to fiber optic cable could be scheduled, and that Wildflower elected the latter. SCE states that in accordance with good utility practice, SCE required Wildflower to include a 115 kV line protection circuit as part of the facilities needed to interconnect the Wildflower generating facility.

3. The revised rate sheet updates the cost estimates for the interconnection facilities, consistent with the results of the Facility Study performed under the IA (since that study was not completed before the interconnection took place.) The revised cost estimates also reflect the cost of converting the 115kV line protection telecommunications circuit from metallic cable to fiber optic cable, including the dedicated equipment at the Wildflower generating facility site.³

4. Finally, SCE states that it discussed with Wildflower the possibility that SCE would have to pay income tax on Wildflower's contribution in aid of contribution (ITCC) and an option to request a private letter ruling from the Internal Revenue Service (IRS). Specifically, SCE states that it offered to work with Wildflower to prepare a private letter ruling, at Wildflower's expense, specific to the interconnection of the Wildflower generating facility.

Notice, Interventions and Protests

5. Notice of SCE's filing was published in the Federal Register, 67 Fed. Reg. 44,445 (2002), with interventions and protests due on or before July 10, 2002. On July 1, 2002, Coral Power, L.L.C. filed a timely motion to intervene and a motion for extension of time to file a protest until July 17, 2002. That motion was granted and on July 17, 2002, Coral Power, L.L.C. and Wildflower (Intervenors) filed a joint protest. On August 1, 2002, SCE filed an answer to the joint protest.

³SCE cites to both Section 2.7 and Exhibit A of the IA, which state that additional equipment required to fully complete the interconnection facility (e.g., equipment to convert the 115 kV line protection from metallic to fiber optic) would be identified in a yet-to-be-performed Facility Study.

Discussion

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2001), the timely, unopposed motions to intervene of Intervenor serve to make them parties to this proceeding. While answers generally are not permitted pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,⁴ we find good cause to allow SCE's answer to the extent that it aids in our understanding and resolution of the issues.

7. For the reasons discussed below, we will accept in part, and reject in part, the revised rate sheet for filing, to become effective on August 18, 2002, as requested. Based on our initial review of SCE's filing, we find that the revised rate sheet appears to be just and reasonable, and has not been shown to be unjust, unreasonable, or unduly discriminatory, or otherwise unlawful. We note that the Commission has pending a rulemaking that will adopt standard interconnection procedures and agreements.⁵ We stated in our Original IA Order that this IA will be subject to the outcome of that rulemaking.⁶

I. Transmission Credits

A. Network Upgrades vs. Directly Assignable Facilities

8. We will deny the Joint Protest of the Intervenor concerning network upgrades. Intervenor argue that SCE erroneously failed to provide transmission credits for Interconnection Facilities Costs (\$1,925,000) and associated one-time costs (\$194,000). They allege that all of the facilities listed on Exhibit A to SCE's June 19, 2002 filing are located "at or beyond" the point where Wildflower connects to the grid, and should be classified as network facilities.

⁴ 18 C.F.R. § 385.214(d) (2001).

⁵ See Standardizing Generator Interconnection Agreements and Procedures, Notice of Proposed Rulemaking, 99 FERC ¶ 61,61,086 (2002), RM02-1-000, 67 Fed. Reg. 22,250 (April 24, 2002), FERC Statutes and Regulations, ¶ 32,560 (2002) (Interconnection Rulemaking).

⁶ Original IA at p. 61,645.

9. In a similar case presenting the same issue,⁷ the Commission held that it would not "reopen" an executed interconnection agreement that it had already accepted to consider the issue of whether transmission credits were appropriate. Therefore, consistent with our precedent in Duke Hinds, we will accept the Revised IA, without modification.

B. Mechanism for Crediting

10. In the Original IA Order, the Commission also directed SCE to modify the IA to provide for Wildflower to receive credits, with interest, pursuant to the crediting mechanism that SCE and the California ISO will develop.⁸ On February 6, 2002, SCE filed a compliance filing to the Original IA order in which it notes, "As directed by the FERC on November 7, 2001, ...System Facilities installed under this IA, SCE shall propose a mechanism to the Commission to refund Wildflower the installed costs of such facilities."⁹

11. However, SCE has not submitted to the Commission a proposed mechanism to provide transmission credits with interest. In its transmittal letter in Docket No. ER01-2609-003, SCE stated that it provided Wildflower with the results of the facilities study and informed Wildflower that further review was necessary because a number of generation projects had withdrawn applications from SCE's generation interconnection queue. SCE also stated that once the facilities study was complete and the estimated system facilities cost to accommodate Wildflower's interconnection had been determined, SCE would make the required filing with the Commission specifying charges to Wildflower for its estimated System Facilities Cost, and credits applicable to the project. We direct SCE to file a mechanism to provide Wildflower credits, with interest.

II. Income Tax on Contributions in Aid of Construction (ITCC)

12. Intervenors argue that SCE's proposal that Wildflower pay ITCC costs or incur the burden of obtaining a private letter ruling from the IRS unlawfully transfers SCE's

⁷ See Entergy Services, Inc., 98 FERC ¶ 61,290 (2002) (Duke Hinds), reh'g pending.

⁸ See Southern California Edison Company, 97 FERC ¶ 61,148 at 61,645.

⁹ Service Agreement No. 10, Substitute Original Sheet No. 13 under SCE's FERC Electric Tariff, First Revised Original Volume No. 6.

burden under FPA Section 205 onto Wildflower. Intervenors further argue that SCE also stated that until Wildflower obtained a private letter ruling from the IRS finding that there is no tax event associated with Wildflower's interconnection payments, SCE would retain the \$529,000 in ITCC costs that Wildflower has paid.

13. Intervenors note that SCE submitted its filing under FPA Section 205, which provides that the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility. Intervenors argue that SCE never even alleges that it made payments to the IRS related to Wildflower's interconnection payments, or that SCE will incur a tax liability as a result of those payments. Intervenors allege the SCE suggests only that it cannot rule out the possibility that it may incur that liability some day, and seeks to recover those costs in advance from Wildflower just in case. Intervenors argue that SCE seeks to recover speculative costs that this is impermissible under Section 205.

14. Intervenors recognize that the Commission has stated that it "is reasonable to place the cost responsibility on the party that receives the benefit" of the letter ruling, Florida Power & Light Co.¹⁰, which the Commission presumed to be the interconnection customer. They dispute the notion that Wildflower would be the beneficiary of an IRS letter ruling here and point out that the IRS has already ruled that interconnection payments of the nature at issue here will not be treated as "contributions in aid of construction" and thus do not create a taxable event. Intervenors further state that the Commission has already reached the same conclusion in its Interconnection NOPR, ("[c]onsistent with these IRS notices, the draft tax provisions in the NOPR treat the funding as a non-taxable event").¹¹

15. As in FP&L, we are unable to determine, on the record before us, if the IRS has issued a definitive ruling in such a way as to relieve SCE from a duty to pay taxes on Wildflower's CIAC payments. This is an issue that can only be resolved by the IRS. If the IRS finds that the CIAC payments are not a taxable event, we find that SCE should refund the CIAC payments with interest. We agree with the intervenors that SCE has not

¹⁰Florida Power & Light Co. (FP&L), 98 FERC ¶ 61,276 at 62,149 & n. 26.

¹¹See Standardizing Generator Interconnection Agreements and Procedures, Advanced Notice of Proposed Rulemaking, RM02-1-000, 65 Fed. Reg. 55,140 (November 1, 2001), FERC Statutes and Regulations, ¶35,540 (2001) (Interconnection Rulemaking).

provided adequate cost support for the proposed ITCC charges. Therefore, we will set this issue for hearing and settlement judge procedures. We note that the Original IA contains a provision directing the parties to Alternative Dispute Resolution when disputes arise.¹² However, we are requiring SCE to add additional language to the IA that requires SCE to cooperate with Wildflower in obtaining an IRS letter ruling. .

16. Our preliminary analysis indicates that SCE's proposed CIAC provisions have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. We believe that this issue is best resolved by good faith negotiations or, failing that, by hearing. Accordingly, we will accept the tariff sheet for filing, as modified, and suspend it as ordered below.

17. While we are setting certain issues for a trial-type evidentiary hearing, we encourage the parties to make an effort to settle their dispute before hearing procedures are commenced. We believe this case is a good case for settlement. To aid the parties in their settlement efforts, the hearing will be held in abeyance and a settlement judge shall be appointed, pursuant to Rule 603 of the Commission Rules of Practice and Procedure.¹³ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise the Chief Judge will select a judge for this purpose.

The Commission orders:

(A) We accept the revised tariff sheet as proposed, subject to the outcome of the Final Rule on Interconnection.

(B) We direct SCE to add language to the IA requiring that SCE cooperate with Wildflower in obtaining an IRS letter ruling.

(C) We direct SCE to revise the IA to include a mechanism for Wildflower to receive credits with interest for relevant costs, and file the revised IA within 30 days of the date of this order.

(D) Wildflower is directed to file with the Commission the IRS ruling regarding ITCC charges.

¹² Original IA Sheet No. 17.

¹³ 18 C.F.R. § 385.603 (2002).

Docket No. ER02-2119-000

- 7 -

(E) SCE must file a modified tariff sheet to reflect that IRS ruling within 15 days of the receipt of the IRS ruling.

(F) 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 by the Federal Power Act, particularly Sections 205 and 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 in Docket No. ER02-2119-000 concerning the justness and reasonableness of SCE's proposed IA, as discussed in the body of this order. However, the hearing will be held in abeyance while the parties attempt to settle, as discussed in Paragraphs (G) and (H) below.

(G) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603, the Chief Administrative Law Judge is hereby directed to appoint to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. To the extent consistent with the order, the designated settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene an initial settlement conference as soon as practicable.

(H) Within 60 days of the date of this order, the settlement judge shall issue a report to the Commission and the Chief Judge on the status of the settlement discussions. The settlement judge shall issue a report at least every sixty (60) days thereafter, apprising the Commission and the Chief Judge of the parties' progress toward settlement.

(I) If the settlement discussions fail, a presiding administrative law judge, to be selected by the Chief Judge, shall convene a prehearing conference in these proceedings, to be held within approximately fifteen (15) days of the date of the settlement judge's report to the Commission and the Chief Judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.