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Decision 88 12 097 DEC 19 1988**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
 SOUTHERN CALIFORNIA EDISON COMPANY )  
 (U 338-E) for Authority to Enter )  
 into an Electric Service Agreement )  
 with the Dow Chemical Company Under )  
 the Accelerated Approval Guidelines )  
 of the Expedited Application Docket. )

(EAD)  
 Application 88-10-043  
 (Filed October 21, 1988)

OPINIONBackground

On October 21, 1988, the Southern California Edison Company (Edison) filed this application for accelerated approval by the Commission of an electric service agreement between it and Dow Chemical Company (Dow). The agreement was executed on October 14, 1988, for electric service delivered to Dow's facility in Torrance, California.

Edison filed this application pursuant to the Expedited Application Docket (EAD). The EAD was first made effective on an experimental basis by Resolution ALJ-159 issued on June 15, 1987. Although the EAD procedure terminated under its own terms on June 30, 1988, the procedure has continued to be followed by the Commission when requested by the parties, pending review and refinement of the procedure. The original purpose of the EAD procedure was to provide a rapid response to requests for approval of special service contracts offered expressly to prevent a customer from bypassing the utility's electric system or from substantially reducing its requirements by fuel switching.

In support of its filing this application under the EAD procedure, Edison cites Decision (D.) 88-03-008 in the Commission's Rulemaking (R.) 86-10-001, also known as the "3-Rs" (risk, return, and ratemaking) rulemaking. The "3-Rs" proceeding was intended to

revise electric utility ratemaking mechanisms in response to changing conditions in the electric industry, including bypass.

In D.88-03-008, the Commission adopted a set of guidelines for the Commission's review of proposed contracts for sales to individual customers at other than tariff rates. The guidelines are intended to serve as "a set of safeguards that should assure that contracts conforming to the guidelines meet certain key standards and do not disadvantage other ratepayers." (D.88-03-008, at p. 3.) It was also the Commission's intention in D.88-03-008 that all special contracts be filed under the EAD procedure. The accelerated review provided by the EAD would include contracts designed to avoid uneconomic bypass as well as contracts for incremental sales. (Id.)

In the present application, Edison alleges that its agreement with Dow was negotiated to defer the self-generation project that Dow would have pursued but for the agreement. In general, the agreement provides Dow with a rate lower than the currently applicable standard tariff rate for a significant portion of Dow's electrical requirements at the Torrance facility.

In addition to seeking Commission approval of the agreement, Edison also asks that the terms and conditions of its agreement with Dow be found reasonable. Edison states that the agreement will benefit Edison's other customers because Edison will continue to provide service for all of Dow's electrical requirements and Dow will contribute more to Edison's fixed costs than Dow would have contributed as a standby customer.

In support of its request, Edison's application provides a history of its negotiations with Dow, including Edison's efforts to present alternatives to Dow for reduction of Dow's electrical costs. Edison states that on several occasions it requested extensive data from Dow regarding its proposed self-generation facility. Edison then performed an independent technical and financial feasibility review of the project. The information used

in this review included the self-generation project schedule, project capital cost estimate, fuel costs, operation and maintenance costs, capacity factor, alternative supply systems, and Dow's minimum acceptable return on the proposed project. Edison's independent review led Edison to conclude that Dow could have constructed the project and bypassed the Edison system.

The key features of Edison's agreement with Dow are as follows:

1. Under the agreement, Dow receives a "Self-Generation Deferral" (SGD) rate level for a significant portion of its electrical requirements at its Torrance facility. This rate is lower than the currently applicable standard tariff rate. The SGD rate reflects Dow's opportunity costs or indifference point for the proposed project and is based on (i) a facilities charge and (ii) a variable charge. The SGD rate level is subject to a ceiling price based on Edison's Rate Schedule TOU-8 and a minimum floor price based on Edison's marginal costs. One of the key components used to calculate the SGD rate level is Dow's current and projected electric and thermal load data which Edison agreed to make available to the Commission's Division of Ratepayer Advocates (DRA) for inspection.
2. Dow agrees not to self-generate or take power from any third party while the agreement is in effect.
3. The agreement has an overall term of five years, but has early termination provisions for Edison and Dow. The agreement requires Commission approval.
4. Implementation of the agreement begins December 31, 1988 (the planned start date of Dow's self generation project) or upon Commission approval, whichever is later.

On November 3, 1988, Edison revised its expedited application. This action was taken, however, only to include declarations on its appended testimony that the testimony was true

and correct to the best of each witness's knowledge and belief. This change was made to ensure compliance with the EAD procedure.

DRA Protest

On November 10, 1988, DRA filed a protest to this application. In its protest, DRA objects to Edison's use of an expedited application for approval of a contract which DRA asserts does not meet the special contract guidelines or EAD procedure set forth in D.88-03-008.

Specifically, DRA cites Dow's own admission that, on May 13, 1988, it withdrew its application for an air quality permit application by the South Coast Air Quality Management District. On that basis, DRA argues that Dow's project does not meet the special contract guideline of posing a "very credible threat" of Dow "imminently leaving the system." DRA also argues that Edison's requested "reasonableness" review of this agreement is precluded by D.88-03-008 and the EAD procedure.

Edison Response to DRA Protest

On November 28, 1988, Edison filed a response to DRA's protest. In that response, Edison states that Dow's lack of an air quality permit is irrelevant to the imminence of Dow's threat of bypass. In particular, Edison notes that Dow was pursuing this permit during negotiations with Edison, but withdrew its application only after Dow reached an agreement in principle with Edison. Edison states that its review of Dow's project reveals that Dow would have received its permit to construct in time for the project to be operational on December 31, 1988.

Edison also notes that Dow could re-initiate this permitting process at any time. Further, Edison states that it was Dow's intent in withdrawing its permit request to maintain a good working relationship with the South Coast Air Quality Management District by not overwhelming them with work which might never be required.

With respect to a reasonableness review of Dow's contract in this proceeding, Edison concurs with DRA that the approval of a special contract rate does not result in a finding that the level of prices in a special contract is reasonable and prudent. Edison argues, however, that nothing in D.88-03-008 prohibits the Commission, on request of a party, from determining that a special contract rate is reasonable based on facts presented in an expedited application. Edison believes that such a reasonableness determination is appropriate in this instance because of the timeliness of Edison's request and the extensive information provided in the application.

EAD Procedure and D.88-03-008

Under the EAD procedure, a workshop is to be automatically set and noticed not less than 27 days after the filing of the application. At the workshop, the utility is required to produce a knowledgeable person to explain the application and answer questions. Only in the absence of a protest can the workshop be canceled and an ex parte decision on the application issued.

The assigned Administrative Law Judge (ALJ) serves as the workshop moderator. The moderator may accept written or oral statements by workshop participants and may request additional documentation necessary for the Commission to reach an informed decision. ✓

Workshops are to be limited to a single day and are to be reported. Facts disclosed in the workshop are privileged. At the close of the workshop, the moderator is to confer with the assigned Commissioner to determine if the matter is sufficiently controversial to warrant the regular hearing process. In the absence of a sufficient controversy, a decision can be placed on the next public agenda following the workshop.

In D.88-03-008, the Commission concluded that the EAD workshop was also "an appropriate forum for the determination of

whether a contract conforms with the guidelines" adopted in that order. (D.88-03-008, at p. 4.) The decision further states that the utility's application should include a complete statement of how the contract meets the guidelines. (Id.)

D.88-03-008 makes clear that the EAD procedure is intended to provide a rapid review of these agreements with the guidelines providing "an additional way to speed up the review of some of the special contracts." (D.88-03-008, at p. 3.) The Commission advised in D.88-03-008, however, that "routine approval" of contracts conforming to the guidelines might not result in every EAD application. Further, despite the Commission's desire to "speed-up" the process, the purpose of the review of the agreements remained one "to ensure that other ratepayers are not unduly disadvantaged by these contracts." (D.88-03-008, at p. 4.)

The guidelines adopted in D.88-03-008 largely focus on contract terms such as price, project size, and contract length. The Commission's goal in developing the guidelines, however, was not to "specify the exact terms of the special contracts, but to develop a set of safeguards that should assure that contracts conforming to the guidelines meet certain key standards and do not disadvantage other ratepayers." (Id., at p. 3.)

We also made clear in D.88-03-008 that the "nature of the review that occurs in the Expedited Application Docket...is not one that results in a finding that the level of prices in the special contract is reasonable and prudent." (D.88-03-008, at p. 40.) Instead, we observed that EAD approval "merely indicates that the contract's prices are high enough so that other classes of ratepayers are not unreasonably harmed." (Id.)

This policy is consistent with decisions previously issued under the EAD procedure. Specifically, those decisions have approved special contracts conditioned on the contracts being subject to the ratemaking treatment and reasonableness review later

deemed appropriate by the Commission. (See, e.g., D.87-07-089, D.87-09-082, D.88-02-016, D.88-08-056, D.88-08-058.)

In accordance with the EAD procedure, a workshop in this application was duly noticed and held on November 29, 1988, in San Francisco, California.

Workshop and Subsequent Correspondence

During the workshop, Edison presented various experts who provided statements and answered questions regarding Dow's project and its agreement with Edison. Those making statements included a member of Edison's staff, two representatives of Dow, and a former member of the South Coast Air Quality Management District.

During this presentation, Edison and Dow demonstrated that the project which Dow would have built absent its agreement with Edison was both economically and technically feasible. The statements provided by these companies indicated that by building the plant, Dow would have been able to reduce its costs of electric service.

Edison also stated that it had provided Dow with conservation alternatives which were rejected by Dow. Dow's representatives stated that it was the company's intention to have actively pursued this project in the absence of the agreement. Dow noted its expertise in building the type of facility which it was planning for its Torrance site.

The information provided by Edison also indicated that the Dow agreement met the special contract guidelines set forth in D.88-03-008. Edison also maintained its request for a finding of reasonableness related to the Dow agreement.

The aspect of the agreement which DRA had questioned was the withdrawal of Dow's application for an air quality permit. During the workshop, Dow demonstrated that the permit was only withdrawn because of the company's desire to preserve a good working relationship with the South Coast Air Quality Management District. With the existence of an agreement in principle with

Edison, Dow did not think it was appropriate to pursue a permit for which it would have no use. Dow, through statements of its own representatives as well as a former member of the South Coast Air Quality Management District, demonstrated that Dow's permit was like those that had been previously granted by the district. Dow also made clear that it had fully intended to pursue its project absent its agreement with Edison.

Following this presentation, DRA stated that it was withdrawing its objection to the agreement based on the status of Dow's air quality permit. DRA stressed, however, that its withdrawal of this objection was limited to the specific facts of this case. DRA stated that in all other cases it would continue to closely review the status of each project's permits as a measure of that project's posing an imminent and credible threat of the customer leaving the utility system.

DRA continued its objection, however, to Edison's requested finding of reasonableness related to the Dow agreement. Citing D.88-03-008, DRA stated that the EAD was not an appropriate forum for undertaking such a reasonableness review.

At the close of the statements by Edison, Dow, and DRA, the assigned ALJ stated that she concurred with DRA's position both as to its decision to withdraw its objection to the agreement based on the status of Dow's air quality permit and its objection to a finding of reasonableness being made in an EAD application. The ALJ referenced both D.88-03-008 and prior Commission decisions in EAD applications in support of the impropriety of a reasonableness review occurring in an EAD proceeding. The ALJ advised Edison that if the utility wished to pursue this request, it would be necessary to remove the application from the EAD docket. The docket, designed to provide speedy approval of special contracts, did not, in the ALJ's view, provide an adequate opportunity for the type of review and record required to support a finding of reasonableness.



Edison was given the opportunity to submit a letter stating how it wished to proceed.

On December 1, 1988, Edison wrote to the ALJ indicating the following:

"At this time, because of Edison's desire to retain Dow as a customer, Edison withdraws its request for a finding of reasonableness for the Agreement between Edison and Dow in this Expedited Application Docket ('EAD')."

Edison also stated, however, that a reasonableness review of the agreement was still of great concern to the company. Edison therefore requested that the Commission state in its decision in this application that a reasonableness review of the Dow agreement be conducted in Edison's next annual ECAC reasonableness review filing. Recognizing that such a forum might not be appropriate for review of all EAD contracts, however, Edison further indicated that it would pursue a generic resolution of this issue in other proceedings.

On December 8, 1988, DRA responded to Edison's letter. DRA supports Edison's withdrawal of its requested finding of reasonableness for the Dow agreement. DRA observes that "the very quick EAD procedure is incompatible with a reasonableness review of the Dow contract or any other negotiated electricity purchase contract."

DRA, however, objects to Edison's request for the Commission to direct that the reasonableness of the Dow agreement be undertaken in the next Edison ECAC reasonableness review. DRA states that "[t]he question of which forum reasonableness reviews of negotiated contracts should take place is a generic issue." This issue, in DRA's opinion, should therefore be addressed in the "3-Rs" proceeding which generically reviews issues concerning negotiated contracts for utility electricity sales to qualified customers.

Discussion

In D.87-05-071 in the "3-Rs" proceeding, the Commission adopted and recognized several measures designed to respond to the threat of "uneconomic bypass" created by large electric customers choosing to self-generate rather than receive service from the utility. We found, among other things, that special contracts could serve as an effective "short-term measure" to keep customers on the system "who present a credible threat of imminently developing self-generation capability." (D.88-05-071, at p. 10.)

Thus, the special contract guidelines and the EAD procedure were subsequently adopted by the Commission "to speed" the Commission's review of these special contracts. This review, of course, is only appropriate for contracts required to offset an "imminent" and "credible" threat of uneconomic bypass by the utility's customer. The threshold question in this application or any other EAD application based on a bypass threat is therefore whether such a threat in fact exists.

In this case, Edison and Dow adequately demonstrated that the facility planned by Dow met the threshold test of posing a "credible" and "imminent" threat of Dow leaving Edison's system. We agree with DRA that the status of all permits necessary to making the plant operational is a critical part of the determination of whether a special contract is appropriate. In this case, however, we find that Dow adequately demonstrated that its withdrawal of its air quality permit request was appropriate under the particular circumstances of this case. Those circumstances included the existence of an agreement in principle between Edison and Dow, the great likelihood of the permit being granted, and the desire to maintain a good working relationship with the South Coast Air Quality Management District, with whom Dow had and was likely to continue to have regular contact.

In particular, having shown that the permit would likely have been granted, it was appropriate for Dow to withdraw its

application to avoid the district's having to engage in unnecessary work. Dow's statement also revealed that its high level of activity in alternate generation made the continuance of a good working relationship with the South Coast Air Quality Management District important.

On the issue of the propriety of any reasonableness review taking place in this proceeding, we find that DRA's position accurately reflects the Commission's current policy. It is obvious from all of our decisions which have touched on this issue, both in previous EAD applications and the "3-Rs" proceeding, that the EAD procedure is designed for the "speedy" review of special contracts. This review is intended to ensure only that contracts designed to meet a bypass threat are quickly reviewed to determine whether the "contract's prices are high enough so that other classes of ratepayers are not unreasonably harmed." (D.88-03-008, at p. 40.) The determination of the appropriate ratemaking treatment for these types of contracts is another issue entirely which can require lengthy study and investigation of the contract on its own terms and as compared to others. Such an investigation cannot effectively take place within the procedural confines and time limits of the EAD.

We understand Edison's desire to resolve the issue of the appropriate forum for such reasonableness review. We do not find, however, that this issue can or should be resolved in a single EAD application. As DRA has stated, and even Edison has acknowledged, this issue is one which affects all utilities entering such special contracts and must be decided on a generic basis using consistent policy grounds. We have been presented with no evidence or allegations in this proceeding to justify any special treatment of the Dow agreement. The issue of the forum for determining the reasonableness of this type of agreement is therefore appropriately left to the "3-Rs" proceeding.

Under these circumstances, we will approve Edison's agreement with Dow which is the subject of this application. Approval of the agreement, however, is conditioned on Edison being at risk for any ratemaking treatment of the agreement which the Commission later determines to be just and reasonable.

Findings of Fact

1. Edison has filed an application under the Expedited Application Docket seeking approval of a negotiated electric service agreement with Dow.

2. In addition to approval of the agreement, Edison also requests that the Commission find reasonable the terms of Edison's agreement with Dow.

3. Special contracts serve as an effective short-term measure to keep customers on the system "who present a credible threat of imminently developing self-generation capability." (D.88-05-071, at p. 10.)

4. Special contract guidelines and EAD procedures adopted by the Commission in D.88-03-008 are designed to speed the Commission's review of these special contracts.

5. The threshold question in this application or any other EAD application based on a bypass threat is whether the project planned by the customer in lieu of a special contract poses an "imminent" and "credible" threat of the customer leaving the utility's system.

6. Based on the statements and information provided by Edison and Dow both in the application and during the workshop in this proceeding, it is clear that the facility planned by Dow at its Torrance site met the threshold test of posing a credible and imminent threat of Dow leaving Edison's system.

7. The status of all permits necessary to make an alternative generation facility operational is a critical part of the determination of whether a special contract is appropriate.

8. Dow adequately demonstrated that its withdrawal of an air quality permit request was appropriate under the particular circumstances of this case.

9. The circumstances justifying Dow's withdrawal of its air quality permit request included the existence of an agreement in principle between Edison and Dow, the great likelihood of the permit being granted, and the desire to maintain a good working relationship with the South Coast Air Quality Management District, with whom Dow had and was likely to continue to have regular contact.

10. It is not current Commission policy to undertake reasonableness reviews of special contracts under the EAD procedure.

11. The EAD procedure is intended to ensure only that contracts designed to meet a bypass threat are quickly reviewed to determine whether the contract's prices are high enough so that other classes of ratepayers are not unreasonably harmed.

12. The determination of the appropriate ratemaking treatment for special contracts is one which can require lengthy study and investigation of the contract on its own terms and as compared to others and cannot take place effectively within the procedural confines and time limits of the EAD.

13. The forum for determining the reasonableness or ratemaking treatment for special contracts is a generic issue which should be decided in the Commission's "3-Rs" rulemaking.

#### Conclusions of Law

1. The agreement between Edison and Dow should be approved with the condition that Edison will be at risk for any ratemaking treatment related to the agreement which the Commission later determines to be just and reasonable.

2. The EAD procedure should not be used for the reasonableness review of special contracts.

3. In order to allow Edison to provide service to Dow effective December 31, 1988, this order should be made effective today.

ORDER

IT IS ORDERED that:

1. The electric service agreement (agreement) between Southern California Edison Company (Edison) and Dow Chemical Company (Dow) is approved subject to the condition that Edison shall be at risk for any ratemaking treatment related to the agreement which the Commission later determines to be just and reasonable.

2. Approval of the agreement in this proceeding does not include a determination of the reasonableness of its terms.

3. Five days before Dow first receives service under the agreement, Edison shall file the agreement as an advice letter pursuant to General Order 96-A. The agreement shall be marked to reflect the effective date of this decision and upon filing shall be available for public inspection upon request.

This order is effective today.

Dated DEC 19 1988, at San Francisco, California.

STANLEY W. HULETT  
President  
DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OHANIAN  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

*Victor Weissert*  
Victor Weissert, Executive Director

With respect to a reasonableness review of Dow's contract in this proceeding, Edison concurs with DRA that the approval of a special contract rate does not result in a finding that the level of prices in a special contract is reasonable and prudent. Edison argues, however, that nothing in D.88-03-008 prohibits the Commission, on request of a party, from determining that a special contract rate is reasonable based on facts presented in an expedited application. Edison believes that such a reasonableness determination is appropriate in this instance because of the timeliness of Edison's request and the extensive information provided in the application.

EAD Procedure and D.88-03-008

Under the EAD procedure, a workshop is to be automatically set and noticed not less than 27 days after the filing of the application. At the workshop, the utility is required to produce a knowledgeable person to explain the application and answer questions. Only in the absence of a protest can the workshop be canceled and an ex parte decision on the application issued.

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In D.88-03-008, the Commission concluded that the EAD workshop was also "an appropriate forum for the determination of