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Decision 91-12-043 December 18, 1991

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 Orders:
 (1) Consolidating this Application with Order Instituting Investigation No. 85-11-008, (2) Approving a Proposed Settlement Between Edison and Geo-Energy Partners-1983, Ltd. (Successor-In-Interest to Steam Reserve Corporation), (3) Dismissing with Prejudice the Petition Filed by Steam Reserve Corporation on August 2, 1985, and (4) Authorizing Edison's Recovery in Rates of Payments Made Pursuant to the Power Purchase Agreement Included in the Proposed Settlement.

ORIGINAL

Application 91-06-020
 (Filed June 11, 1991)

Investigation on the Commission's own motion into the desirability of power purchases from cogenerators and small power producers located outside of the purchaser's service area or outside of California and the terms and conditions which should be applied to such purchases.

I.85-11-008
 (Filed November 6, 1985)

OPINIONSummary

This decision approves the settlement agreement between Southern California Edison Company (Edison), Geo-Energy Partners (Geo), Geothermal Drilling, Ltd., and Steam Reserve Corporation (SRC). The settlement agreement obligates Edison to purchase electricity generated by Geo's 15 megawatt (MW) power project in Fish Lake, Nevada, pursuant to a power purchase agreement (PPA) modeled after Edison's Interim Standard Offer 4 (ISO 4). The terms of the contract are found to be reasonable. Edison is authorized,

to recover payments made pursuant to the settlement agreement under its Energy Cost Adjustment Clause (ECAC), subject to Commission review of Edison's exercise of its rights and obligations under the contract.

Background

SRC's Negotiations with Edison

In 1982, SRC contacted Edison regarding the utility's potential purchase of power produced by SRC at a recently discovered geothermal site in Fish Lake, Nevada. The site is outside of Edison's service territory. Edison indicated it would be willing to negotiate a PPA if SRC obtained from Valley Electric Association (VEA), the electric utility serving the Fish Lake area, a commitment to wheel SRC's power to Edison's point of interconnection.

After determining the project to be commercially feasible, SRC pursued wheeling arrangements with VEA and renewed discussions about a PPA with Edison. In November of 1984, SRC sent Edison a written proposal to enter into an ISO 4 contract. Edison did not prepare a PPA in response but reiterated that SRC must first obtain a commitment from VEA to wheel SRC's power. SRC was unable to obtain a commitment satisfactory to Edison prior to April 17, 1985, the effective date of the Commission's suspension of Edison's ISO 4. On April 16, 1985, SRC mailed to Edison a project summary consisting of the first 4 pages of Edison's ISO 4 and a check for \$72,500 as a deposit for interconnection study costs. Edison did not consider this sufficient to establish a contract or SRC's right to an ISO 4; Edison returned the check to SRC.

Procedural History

On August 2, 1985, SRC filed a petition in Application (A.) 82-04-044, et al., seeking an order compelling Edison to enter into an ISO 4 contract for power generated at SRC's Fish Lake geothermal site. In the petition, SRC alleged that it had

sufficiently manifested to Edison its intention to execute an ISO 4 contract and that its ability to execute an ISO 4 contract was impeded by circumstances beyond SRC's control. Edison answered that it was not required to execute the contract because in Edison's opinion, SRC had not formed an ISO 4 contract prior to the suspension date and SRC had not demonstrated the ability to deliver power generated by the project to the Edison system. The petition was assigned to Investigation (I.) 85-11-008, the Commission's ongoing investigation into the terms and conditions under which utilities would be required to purchase power from out-of-service territory qualifying facilities (QFs).¹

Beginning in 1985, SRC and Edison undertook substantial discovery, including the deposition of all major potential witnesses. In 1990, both parties served prepared testimony in anticipation of hearing in I.85-11-008. Ongoing discussions between the parties evolved into settlement negotiations. A settlement agreement was executed by Edison and Geo² on June 6, 1991. It recites that Edison will execute the negotiated PPA upon a final order of the Commission approving the settlement agreement, that Geo will arrange firm transportation to Edison's point of interconnection, that Geo will bear the cost of transportation and

1. Decision (D.) 88-04-070 restructured I.85-11-008 to allow for review on a case-by-case basis of out-of-service area QF interconnection to interties or bulk transmission lines when such interconnection may result in the displacement of economy energy. There have been only two such reviews, the above-referenced petition of SRC and the petition of Yankee Caithness Joint Venture for Modification of D.88-04-070. The latter petition was resolved by D.90-08-046.

2. In 1990, SRC transferred its interest in the Fish Lake Project to Geo. Geo is the successor to SRC's sole and exclusive right to manage the project and to enter into agreements for the purchase of power from the project. Geo is also the successor in interest to SRC with respect to the petition pending in I.85-11-008.

any necessary upgrades to the Edison system, that Geo will meet specified transmission development milestones, and that Geo will meet Edison's applicable QF milestone procedure. By this agreement, the parties would also settle their dispute and terminate the proceeding pending in I.85-11-008.

Prior to filing the instant application, Edison and Geo conferred with the Commission's Division of Ratepayer Advocates (DRA). DRA indicated that if Edison wished to confirm the reasonableness of its payments under the proposed PPA for ECAC rate recovery now, rather than waiting until the payments are subject to ECAC reasonableness review, Edison would have to request a finding of reasonableness in an application filed concurrently with the proposed settlement agreement. DRA relied on Rule 51.1 of the Commission's Rules of Practice and Procedure (Rules), and D.91-02-044, Smith River Power Plant Associates v. Pacific Gas and Electric Company as the basis of its position. Edison does not agree with DRA; Edison makes the instant application only to expedite final disposition of the matter and in light of DRA's cooperation.

Compliance with Rule 51 - Ex Parte Treatment

Before signing the proposed settlement, Edison and Geo (the settling parties) convened a settlement conference pursuant to Rule 51.1. Notice of the settlement conference was provided to all appearances of record in I.85-11-008 and all other persons known to have an interest in this proceeding. None of the notified parties indicated any opposition to the proposed settlement. Edison and Geo met with representatives of DRA on March 26, 1991 to discuss the case and the proposed settlement. After the meeting, DRA advised the settling parties that it would not contest the proposed settlement.

The application for Commission approval of the proposed settlement was filed on June 11, 1991. The application includes a copy of the settlement agreement, the signed PPA, and the prepared

testimony of an Edison engineer which offers a comparative cost analysis of the settlement and the possible outcomes of litigation. No protests have been received. DRA has filed comments on the proposed settlement but does not protest it.

Edison requests ex parte approval of the settlement. It has followed the notice and comment procedure required by Rule 51.1, and no protest was filed. Under these circumstances, no purpose would be served by subjecting the application to evidentiary hearing. The application will be considered on an ex parte basis.

Consolidation with I.85-11-008

Edison requests the Commission to consolidate its application for approval of the settlement agreement (A.91-06-020) with I.85-11-008, the proceeding in which SRC's August 2, 1985 petition is pending. Under the terms of the settlement agreement, Edison will purchase power from SRC's successor in interest under a modified ISO 4 contract. In I.85-11-008, SRC asks the Commission to order Edison to execute an ISO 4 contract for the Fish Lake project. DRA objects to consolidation as being unnecessarily complex.

Both the petition and the application for approval of the settlement agreement concern the right of SRC to an ISO 4 contract with Edison. DRA did not explain what it meant by "unnecessarily complex" or indicate what burden would result from consolidation. The issue presented by SRC is the only controversy subsisting within I.85-11-008. This proceeding will be consolidated with I.85-11-008.

On August 20, 1991, Edison filed its "Motion for Dismissal with Prejudice of the Petition filed by Steam Reserve Corporation on August 2, 1985". The Motion realleges the parties' argument in support of the proposed settlement agreement.

Terms of the Settlement Agreement

The settlement agreement provides for Geo's sale to Edison of up to 14 MW of contract capacity, plus associated energy, over a 30-year term. Edison's firm purchase obligation is limited to 10 MW until 1994. Thereafter, until the expiration of 5 years from the effective date of the PPA, Geo will have the opportunity to increase the total contract capacity under the PPA to a maximum of 14 MW. Firm capacity payments will be \$187 per kilowatt year over the contract term.

Assuming the plant begins deliveries in 1992, its firm energy payments for the first 10 years of operation will be 82% of payments it would have received had it executed its ISO 4 in 1985. During the next five years of operation, energy payments will be at published avoided cost plus additional payments providing Geo with partial compensation for the prior years' discount. During years 16 through 30, energy payments will be based on Edison's published avoided cost.

Edison provided the present value of payments under three scenarios. Assuming Geo prevailed in its petition, it would be entitled to payments under ISO 4 with a present value of \$129 million. If Edison prevailed, it would make payments to Geo under Standard Offer 1 (SO 1) with a present value of \$74 million. Under the settlement agreement, payments would total a present value of \$114.4 million.

The reduction in capacity from the 15 MW proposed by SRC in 1985 to 14 MW contained in the settlement results in a \$3.7 million savings; the deferral of 4 MW of capacity over the 1992 - 1993 period results in a \$3.4 million savings, and the reduction in scheduled energy prices yields a \$7.5 million savings. Altogether, these modifications to Edison's ISO 4 result in \$14.6 million less than the payments Geo would have received had it litigated its right to an ISO 4 contract and won.

In addition to these economic terms, the settlement agreement specifies how the project will interconnect with the Edison grid. It provides some milestones for meeting transmission requirements and adopts Edison's currently effective project development milestones.

Comments of DRA

DRA does not object to the reasonableness of the terms of the amended PPA or the settlement agreement. However, it claims that Edison is requesting approval of payments that have not yet been made. DRA fears that such approval would preclude the Commission from reviewing the reasonableness of the utility's exercise of its rights and obligations under the PPA. According to DRA, the Commission can approve the contract terms, but cannot approve payments until it reviews the circumstances under which the utility made the payment. DRA recommends specific language for approval of the settlement agreement and amended PPA.

Geo believes that DRA's concerns are legitimate.

Discussion

Rule 51.1(e) provides that the Commission will not approve a settlement unless the settlement is "reasonable in light of the whole record, consistent with law, and in the public interest." We will balance the various factors considered by the civil courts in class actions when determining whether a settlement is fair, adequate, and reasonable. (See Application of PG&E re: Diablo Canyon, 30 CPUC 2d 189, 222.)

Here, each party could claim that public policy existed in support of its position. SRC could validly argue that its acceptance of Edison's ISO 4 was sufficient to create a contract because the time for performance, i.e., the firm-capacity delivery date, was five years after contract formation. The QF arguably could have arranged for wheeling and interconnection to the Edison grid within the five-year period. Edison, on the other hand, could legitimately argue that it should not be compelled to enter into a

contract if, at the time of contract, performance is impossible because the existence of such contracts would only exacerbate the uncertainty in utility resource planning and impose higher capacity costs on ratepayers.

The difference between ISO 4 payments and SO 1 payments to Geo is \$55 million. Edison's ratepayers would be at risk for that amount if the matter were litigated. The amount offered in settlement is a reasonable compromise of that risk. Discovery has been ongoing since 1985; Edison and Geo had served their proposed testimony in I.85-11-008; and both parties are represented by counsel who are well versed in QF matters. It appears that the settlement has been reached through arm's-length negotiations.

The circumstances of the proposed settlement agreement assure the Commission that the settlement is fair to the parties, within a reasonable range of possible outcomes, and protective of ratepayer interests. For these reasons, the settlement agreement and the attendant PPA should be approved.

DRA has distinguished approval of the terms of a settlement agreement or amended PPA from preapproval of payments made thereunder. The distinction is a valid one. Here, the PPA negotiated by Geo and Edison stands in the place of a standard offer. Like a standard offer, the amended PPA requires the utility to make payments to the QF which the Commission deems to be reasonable. The utility may book payments made under an approved PPA to its ECAC balancing account.

Standard offers, amended PPAs, and approved nonstandard contracts set forth a reasonable value for the QF's energy and capacity, under specified circumstances. However, the fact of payment may not have been reasonable, as the payments may not have been required by the contract. Thus, the utility's ultimate recovery of payments under such a contract is still conditioned on a finding of reasonableness of the utility's administration of the contract in an ECAC proceeding.

We find that the terms and conditions of the settlement agreement and the amended PPA are reasonable. Payments made pursuant to the amended PPA will be subject to reasonableness review where the Commission will determine whether the payments were consistent with the utility's prudent exercise of its rights and obligations under the PPA.

Findings of Fact

1. In 1982, SRC contacted Edison regarding the potential purchase by Edison of power produced by SRC's QF outside of Edison's service territory.
2. Edison required SRC to obtain a commitment from the QF's serving electric utility to wheel the QF's power to Edison's point of interconnection.
3. SRC was not able to obtain a wheeling commitment satisfactory to Edison by April 16, 1985.
4. On April 16, 1985, SRC mailed to Edison a project summary consisting of the first 4 pages of Edison's ISO 4 and a deposit for interconnection study costs.
5. Edison did not consider SRC's April 16, 1985 transmittal to be sufficient to establish SRC's right to an ISO 4 contract.
6. On August 2, 1985, SRC filed a petition in A.82-04-044 seeking an order compelling Edison to enter into an ISO 4 contract. The petition was assigned to I.85-11-008.
7. SRC and Edison undertook substantial discovery and prepared testimony in anticipation of evidentiary hearing.
8. Negotiations between SRC and Edison have resulted in a PPA between Edison and SRC's successor in interest, Geo.
9. On June 11, 1991, Edison filed an application for Commission approval of its settlement agreement with Geo, dated June 6, 1991, and the related PPA.
10. On August 20, 1991, Edison filed a motion for dismissal with prejudice of the petition filed by SRC on August 2, 1985.

11. Edison and Geo have provided notice and opportunity for comment on the proposed settlement pursuant to Rule 51.1 of the Commission's Rules. No protest to the settlement agreement has been filed with the Commission.

12. The Commission's DRA has filed comments on the proposed settlement agreement but does not protest it.

13. The petition of Geo claiming a right to an Edison ISO 4 presents the only pending controversy in I.85-11-008.

14. Both the petition filed in I.85-11-008 and the instant application concern SRC's right to an ISO 4 contract with Edison.

15. Edison's payments to Geo under the proposed settlement agreement are \$14.6 million less, in present value terms, than payments Edison would make to Geo if Geo prevailed in its petition.

16. The amount offered in settlement is a reasonable compromise of each party's risk that the other party would prevail in litigation.

17. The proposed settlement provides Edison with greater certainty about the availability of capacity from Geo than otherwise would be available because the settlement agreement establishes transmission milestones.

18. The circumstances of the proposed settlement agreement show that the settlement is fair to the parties, within a reasonable range of possible outcomes, and protective of ratepayer interests.

19. The settlement agreement and the related PPA should be approved.

20. Approval of the terms and conditions of a PPA allows the utility to book payments made under the PPA to its ECAC balancing account.

21. Approval of the terms and conditions of a PPA does not constitute approval of the reasonableness of the utility's administration of the PPA.

22. The prudence of the utility's exercise of its rights and performance of its obligations under a PPA is subject to review in an ECAC or other proceeding wherein the reasonableness of utility acts is reviewed.

23. This decision should be effective as soon as possible to remove any financial uncertainty that may interfere with the development of Geo's alternative energy project.

Conclusions of Law

1. It is reasonable to consider this application on an ex parte basis.

2. It is reasonable to consolidate A.91-06-020 with I.85-11-008.

3. The terms and conditions of the proposed settlement agreement and PPA between Geo and Edison are reasonable.

4. A finding that the terms and conditions of a PPA is reasonable authorizes the utility to book payments under that contract to its ECAC balancing account.

5. A finding that the contract is reasonable does not constitute a finding that payments made thereunder are reasonable.

6. Edison must obtain a finding that payments made pursuant to the subject PPA were reasonably made before it may permanently recover those payments in rates.

ORDER

IT IS ORDERED that:

1. Investigation (I.) 85-11-008 is consolidated with this proceeding.

2. The settlement agreement dated June 6, 1991 between Southern California Edison Company (Edison) and Geo-Energy Partners, Geothermal Drilling, Ltd., and Steam Reserve Corporation is approved.

3. Edison is authorized to book expenses incurred pursuant to the power purchase agreement (PPA) agreed to in the Settlement Agreement to its Energy Cost Adjustment Clause balancing account. Payments made pursuant to the amended PPA will be subject to a reasonableness review where the Commission will determine whether those payments were consistent with the utility's prudent exercise of its rights and obligations under the PPA. Edison's permanent recovery of those costs is conditioned upon a finding that those expenses were reasonably incurred.

4. The "Motion for Dismissal with Prejudice of the Petition filed by Steam Reserve Corporation on August 2, 1985" filed by Edison on August 20, 1991 is granted.

5. I.85-11-008 is closed.

6. This proceeding is closed.
This order is effective today.

Dated December 18, 1991, at San Francisco, California.

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

PATRICIA M. ECKERT

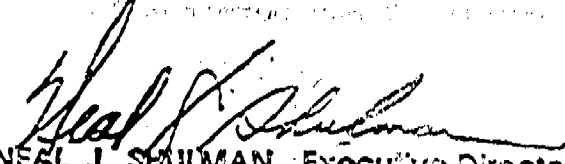
President

JOHN B. OHANIAN

DANIEL Wm. FESSLER

NORMAN D. SHUMWAY

Commissioners


NEAL J. SHULMAN, Executive Director