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Decision 96-10-069 October 25, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Application of the SOUTHERN CALIFORNIA EDISON COMPANY (U 338 E) for (1) Authority to revise its Energy Cost Adjustment Billing Factors, its Major Additions Adjustment Billing Factors, its Electric Revenue Adjustment Billing Factor, its Low Income Surcharge, and its Base Rate Levels Effective January 1, 1992; (2) Authority to Revise the Incremental Energy Rate, the Energy Reliability Index and Avoided Capacity Cost Pricing; and (3) Review of Reasonableness of Edison's operations during the period from April 1, 1990 through March 31, 1991.	Application 91-05-050 (Filed May 24, 1991; Settlement filed June 12, 1996)

OPINION

Southern California Edison Company (Edison) and the Commission's Division of Ratepayer Advocates (DRA) jointly move for adoption of the attached settlement (Appendix A), entitled "Settlement Agreement Between Southern California Edison Company and the Division of Ratepayer Advocates Regarding the Amended and Restated Power Purchase Contract Between Edison and Mojave Cogeneration Company in Application 91-05-050 QF Reasonableness Phase" (Settlement).

The Settlement resolves the disputed issues in this proceeding, with the provision that Edison will credit $14 million plus interest to its Energy Cost Adjustment Clause (ECAC) balancing account. Adoption of the Settlement would resolve all open issues in Edison's ECAC Application (A.) 91-05-050, except those which have been transferred to subsequent ECAC proceedings.

Consistent with Commission intention and Decision (D.) 96-10-035, if Edison and DRA agree to modify the Settlement such that the $14 million plus interest from January 1, 1996 is credited to an electric deferred refund account rather than to the ECAC, then the Commission will approve the Settlement.

Edison and DRA are the only two active parties in this phase of A.91-05-050, which examines the reasonableness of Edison's actions with respect to non-affiliated qualifying facility (QF) power purchase contracts. Edison and DRA believe the Settlement to be reasonable in light of the record, consistent with applicable law, and in the public interest.

Edison filed prepared testimony on non-affiliated QF reasonableness issues with the application. DRA served its testimony on those issues in October 1993. Edison served rebuttal testimony in July 1994. No other parties served testimony on those issues. A hearing on the disputed QF reasonableness issues was scheduled to begin June 19, 1995, before Administrative Law Judge (ALJ) Barnett. On June 12, 1995, Edison and DRA informed the ALJ that they had reached agreement in principle on the issues and that there was no need for a hearing. Accordingly, the hearing was cancelled. A settlement conference was held on May 3, 1996 in accordance with Rule 51.1(b) of the Rules of Practice and Procedure. Other than Edison and DRA, no parties attended the settlement conference. The Settlement was signed on May 3, 1996. With this motion, Edison and DRA propose the adoption of the Settlement.

Substance of the Settlement

Edison's June 1991 testimony on QF reasonableness issues addressed the execution and administration of six QF contracts. DRA's October 1993 testimony took issue with the reasonableness of Edison's actions with respect to one of those six QF contracts. That contract is the only disputed issue in this phase of A.91-05-050.

The dispute involves Edison's negotiation culminating in an amended power purchase contract between Edison and Mojave Cogeneration Company (Mojave). On April 12, 1985, Edison and U.S. Borax Inc. (Borax) entered into an as-available Interim Standard Offer No. 4 (ISO4) contract. That contract was amended

by an Amended and Restated Contract executed by Borax and Edison in September 1988 (Amended and Restated Contract) and Amendment No. 1 to the Amended and Restated Contract was executed on the same date. Borax assigned the Amended and Restated Contract to Mojave in September 1988. Mojave and Edison entered into Amendment No. 2 to the Amended and Restated Contract in October 1988 and entered into Amendment No. 3 in May 1989. The Amended and Restated Contract, together with Amendment Nos. 1, 2, and 3, are collectively referred to in this Settlement as the "Amended Contract." The Amended Contract is the subject of the dispute in this reasonableness review.

The principal area of dispute involves the reasonableness of Edison's agreeing to expand the capacity limit of the contract. Borax signed an as-available capacity contract on April 12, 1985 and listed its nameplate rating in the contract as 40 MW. Borax selected the as-available capacity options whereby it would receive capacity payments based on the forecast of escalating as-available capacity prices. In December 1985, Borax posted a project fee to reserve 40 MW of transmission capacity, the same as the contract nameplate capacity.

In September 1987, Borax requested that the Original Contract be revised to increase the nameplate capacity. Borax advised Edison that it interpreted the as-available capacity option contract as permitting the project to sell capacity beyond the 40 MW nameplate. Edison asserted that the nameplate rating placed an upper limit on the amount of power Edison was required to purchase at contract prices. Borax disputed Edison's position and asserted that the Original Contract placed no limits on the amount of power Edison would be required to buy from the project at the contract prices. Borax also asserted that it always intended to sell to Edison the entire output of the project, and that it would never have specified 40 MW as a nominal nameplate

rating if it believed such a limitation existed. Borax threatened to sue to enforce its position.

After analyzing the negotiations leading to the contract, Edison concluded that there were significant risks involved in litigating the dispute, which Edison believed Borax was fully prepared to do. Edison believed that in the absence of clear Commission guidance on the issue in dispute, the outcome of litigation was likely to turn largely on a court's literal reading of the contract language, which did not expressly limit the amount of power that could be sold at contract prices. Further, Commission decisions in existence at the time did not endorse any limit on the amount of power that could be sold under an as-available IS04 agreement at contract rates. Edison believed the best way to settle the dispute with Borax was to renegotiate the terms of the Original Contract to obtain a firm capacity and dispatch commitment and to place an explicit limit on the amount of capacity and energy Edison would be required to purchase at contract prices. The result was the Amended and Restated Contract.

DRA, in analyzing the same evidence as Edison, concluded that the claim for expansion was weak and unreasonable. The project size was increased merely to take advantage of IS04 pricing. Edison was imprudent in renegotiating the Original Contract. DRA recommended a disallowance of $1.575 million, plus interest, for the record period ending March 31, 1991, with similar disallowances relating to the Amended Contract's execution in each subsequent year of the contract's life, yielding an estimated total disallowance of $31.6 million in 1993 net present value.

Edison's testimony, including its rebuttal testimony, asserted that Edison's actions were reasonable and that the disallowance was appropriate.

The fundamental provision of the Settlement is that, as a compromise between DRA's recommended disallowance of approximately $31.6 million and Edison's recommended disallowance of zero, Edison will credit $14 million to its ECAC balancing account, plus applicable interest. Interest begins to accrue on January 1, 1996, and continues until the date of the credit to the balancing account.

Adoption of the Settlement will resolve all open issues in A.91-05-050, except those that have been expressly transferred to later ECAC proceedings. As stated in the ALJ's Prehearing Conference Ruling dated October 11, 1995, the QF truncation issue has been transferred to A.92-05-047, and the Arbutus QF issue has been transferred to A.93-05-044. Those issues may give rise to further disallowances.

Settlement Criteria

The Commission's 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." Edison and DRA believe this Settlement meets those criteria and should be approved by the Commission.

Edison and DRA prepared and served testimony setting forth their analyses of the issues. The Settlement amount of $14 million falls well within the range of likely outcomes, when compared with DRA's recommended disallowance of approximately $32 million and Edison's recommendation for no disallowance.[1] The

1 We accept for purposes of approving this settlement Edison's position that at the time it entered into the Amended Contract, the outcome of litigation with Borax was uncertain. We note as a general matter that Commission guidance has subsequently (if not before) made clear that QF claims for expansion of capacity beyond contract terms is unreasonable without commensurate ratepayer benefits.

Settlement value represents a reasonable compromise between the litigation positions of Edison and DRA. They recommend that their testimony be made exhibits and received into the record, to provide a formal evidentiary basis for a conclusion that the Settlement is reasonable, in light of the record. That testimony has been received.

The Settlement with one modification as discussed below is in the public interest because it provides substantial monetary relief of $14 million for Edison's customers, while avoiding the uncertainties for both Edison and DRA that would be associated with litigating this matter. In addition, adoption of the Settlement will close out this application, which was filed in 1991. Edison and DRA believe the Settlement to be fully consistent with applicable laws.

As no party other than DRA and Edison served testimony in this phase of the proceeding, the Settlement represents unanimous agreement between all active parties in this phase of the ECAC proceeding.

We will adopt the attached Settlement with one modification. As discussed in D.96-10-035 we intend to continue our policy of refunding utility cost disallowances directly to customers. Under the rate freeze contemplated in AB 1890, balancing account credit to the ECAC may not reach customers but would offset transition costs[2] in the same way that competitive transition charge revenues offset transition costs. This would be unfair to customers and would negate the incentive for each utility to manage its expenditures prudently. Edison should establish an electric deferred refund account to be used to

[2] We assume, without deciding, that AB 1890's allocation of ECAC balancing account credits to offset transition costs is a proper use for those credits.

credit the $14 million plus interest from January 1, 1996. This modified Settlement is a fair and reasonable resolution of this phase of the ECAC proceeding. Edison's ratepayers will be assured of receiving a $14 million credit to an electric deferred refund account, plus interest from January 1, 1996, while all interests benefit from a final resolution to the uncertainties inherent in litigating disputes.

Findings of Fact

1. The settling parties represent that this Settlement complies with the Commission's requirements for all-party settlements as set forth in D.92-12-019.

2. The Settlement commands the unanimous sponsorship of all active parties to the instant proceeding.

3. The settling parties are fairly reflective of the affected interests.

4. No term of the Settlement contravenes statutory provisions or prior Commission decisions.

5. The Settlement conveys to the Commission sufficient information to permit the discharge of its future regulatory obligations with respect to the parties and their interests.

6. The adoption of this Settlement as modified to credit the $14 million plus interest from January 1, 1996 to an electric deferred refund account rather than the ECAC is in the public interest.

Conclusion of Law

If Edison and DRA agree to modify the Settlement to credit the $14 million plus interest from January 1, 1996 to an electric deferred refund account rather than the ECAC, their request for approval of the Settlement should be approved.

If Edison and DRA agree to the modification of the Settlement as set forth above, they shall so notify the Commission by filing a joint motion to modify the Settlement within 10 days following the effective date of this decision. An order approving the Settlement will then issue.

This order is effective today.

Dated October 25, 1996, at Sacramento, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

Commissioner Daniel Wm. Fessler, being necessarily absent, did not participate.

SETTLEMENT AGREEMENT

BETWEEN

SOUTHERN CALIFORNIA EDISON COMPANY

AND

MOJAVE COGENERATION COMPANY

AND

THE DIVISION OF RATEPAYER ADVOCATES

REGARDING THE AMENDED AND RESTATED POWER PURCHASE CONTRACT BETWEEN EDISON AND MOJAVE COGENERATION COMPANY

IN

APPLICATION 91-05-050

OF REASONABLENESS PHASE

I. INTRODUCTION

1.1 The Parties to this Settlement Agreement ("Settlement") are Southern California Edison ("Edison") and the Division of Ratepayer Advocates of the California Public Utilities Commission ("DRA"). Edison and DRA are sometimes referred to herein individually as a "Party" and jointly as the "Parties."

1.2 The Parties intend this Settlement to resolve all open issues in Edison's Energy Cost Adjustment Clause ("ECAC") Application ("A.") 91-05-050, except those which have been expressly transferred to subsequent ECAC reasonableness review proceedings. As stated in the Administrative Law Judge's Prehearing Conference Ruling, dated October 11, 1995, the QF truncation issue has been transferred to A.92-05-017 for

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1. INTRODUCTION

1.1 The Parties to this Settlement Agreement ("Settlement") are Southern California Edison Company ("Edison") and the Division of Ratepayer Advocates of the California Public Utilities Commission ("DRA"). Edison and DRA are sometimes referred to herein individually as a "Party" and jointly as the "Parties."

1.2 The Parties intend this Settlement to resolve all open issues in Edison's Energy Cost Adjustment Clause ("ECAC") Application ("A.") 91-05-050, except those which have been expressly transferred to subsequent ECAC reasonableness review proceedings. As stated in the Administrative Law Judge's Prehearing Conference Ruling, dated October 11, 1995, the QF truncation issue has been transferred to A.92-05-047 for

disposition and the Arbutus qualifying facility ("QF") issue has been transferred to A. 93-05-044. Therefore, the only phase of A. 91-05-050 still open at the time of this Settlement is the reasonableness review of QF issues.

2. BACKGROUND

2.1 On April 12, 1985, Edison and U.S. Borax Inc. ("Borax") entered into an as-available Interim Standard Offer No. 4 power purchase contract ("ISO4"), which was subsequently amended by an Amended and Restated Contract executed by Borax and Edison in September 1988 ("Amended and Restated Contract"). Borax and Edison also entered into Amendment No. 1 to the Amended and Restated Contract on the same date.

2.2 Borax assigned the Amended and Restated Contract to Mojave Cogeneration Company ("Mojave") in September 1988.

2.3 Mojave and Edison subsequently agreed to amend the Amended and Restated Contract by entering into Amendment No. 2 to the Amended and Restated Contract on October 13, 1988 and Amendment No. 3 to the Amended and Restated Contract on May 12, 1989. The Amended and Restated Contract, together with Amendments Nos. 1, 2 and 3, are collectively referred to in this Settlement as the "Amended Contract."

2.4 In June 1991, Edison filed A.91-05-050 its 1991 ECAC proceeding. Included within that application was prepared testimony that addressed the execution and administration of

the Amended Contract, as well as five other QF contracts ("Edison's Testimony").

2.5 In October 1993, DRA served its Report on the Reasonableness of Southern California Edison Company Non-Standard Non-Affiliated Power Purchase Contracts ("Report") in A.91-05-050. In its Report, DRA did not take issue with the reasonableness of Edison's actions with respect to the five other QF contract matters. However, DRA asserted that the negotiation and execution of the Amended Contract was unreasonable. DRA recommended a disallowance of $1.675 million plus interest for the record period ending March 31, 1991, with similar disallowances relating to the contract execution in each subsequent year of the contract's life, yielding an estimated total disallowance of $31.6 million, 1993 net present value.

2.6 In July 1994, Edison served prepared rebuttal testimony to DRA's Report ("Edison's Rebuttal Testimony"), which asserted that Edison's actions were reasonable, and that no disallowance was appropriate.

2.7 The Parties thereafter engaged in settlement discussions, which have resulted in this Settlement.

2.8 The Parties believe that the agreement reflected in this Settlement is reasonable in light of the record, consistent with law, and in the public interest.

3. AGREEMENT ON $14 MILLION CREDIT TO ECAC BALANCING ACCOUNT; EFFECT OF THE SETTLEMENT

3.1 As a compromise between their litigation positions, the Parties agree that Edison shall, within 30 calendar days of a final Commission decision approving this Settlement as provided in Section 4.3, credit its ECAC Balancing Account in the amount of $14 million ($14,000,000), plus applicable interest. Interest shall accrue on the $14 million at the recorded ECAC Balancing Account 3-month commercial paper rate beginning on January 1, 1996, and continuing until the date of the credit to the Balancing Account. Within 30 days after the credit has been made, Edison shall so notify DRA by letter addressed to Mr. Gil Infante, Energy Research and Analysis Branch.

4. ADDITIONAL AGREEMENTS

3.2 Subject to the condition precedent that this Settlement shall have been approved by the Commission as provided in Section 4.3, DRA shall not, for the remaining term of the Amended Contract, make any further recommendations for disallowance, penalty or other sanction relating to, concerning or based on (i) the execution of the Amended Contract, (ii) the administration of the Amended Contract before April 1, 1991, and/or (iii) any of the facts and circumstances alleged in the Report. This settlement shall completely resolve all claims, allegations and contentions made in DRA's Report concerning the negotiation, terms and conditions, execution, and administration of the Amended Contract before April 1, 1991.

3.3 The Parties intend that DRA's Report, Edison's Testimony and Edison's Rebuttal Testimony each be made exhibits in this

proceeding and provide an evidentiary basis for the reasonableness of this Settlement.

3.4 With the exception of the $14 million credit, plus applicable interest, specified in Section 3.1, Edison shall be entitled to recover all payments made under the Amended Contract in the same manner and to the same extent permitted with respect to "standard offer" contracts with QFs, subject only to Edison's prudent administration of the Amended Contract on and after April 1, 1991.

4. ADDITIONAL AGREEMENTS

4.1 This Settlement, which was reached as a result of extended negotiations, represents a compromise of the disputed positions of the Parties. The Parties have reached this Settlement after taking into account the possibility that each Party may or may not prevail on any given issue in the litigation of this case. Both Parties agree and assert that this Settlement is fundamentally fair, reasonable in light of the whole record, consistent with the law and in the public interest. Nothing in this Settlement represents an admission by Edison of any liability, negligence or unreasonable behavior of any kind, or any agreement with positions taken or characterizations made in DRA's Report; nor any indication by DRA of any agreement with positions taken or characterizations made in Edison's Testimony or Edison's Rebuttal Testimony. In addition, the provisions of this Settlement Agreement are not intended to serve as precedent in any other proceeding or settlement.

4.2 The Parties agree to file a Joint Motion seeking Commission approval of this Settlement and shall use their best efforts to obtain Commission approval of the Settlement. Such efforts shall include the development and presentation of such testimony, exhibits, and legal arguments as may be necessary and proper to enable the Commission to find this Settlement reasonable. In the Joint Motion, the Parties shall, consistent with Section 4.3 of this Settlement, jointly request that the Commission: (1) adopt the Settlement in its entirety without change, and (2) issue an order authorizing Edison to take all actions necessary to effectuate the terms of this Settlement.

4.3 The Commission approval contemplated by this Settlement requires that the Commission issue a final decision, no longer subject to appeal, which unconditionally approves this Settlement in full and in the form presented without change.

4.4 If the Commission does not adopt this Settlement in its entirety and without change, neither Party shall be bound by the Settlement or any portion of the Settlement, and the Parties may proceed to litigation of the issues.

4.5 The Parties agree that they will not enter into any ex parte discussions with any Commission decisionmaker regarding the recommendations contained in this Settlement, irrespective of whether such discussions are reportable under the Commission's Rules, except in the presence of the other Party, or unless otherwise agreed to in advance by both Parties. For purposes of this Section 4.5, "decisionmaker" shall have the

same meaning as set forth in Rule 1.1(e) of the Commission's Rules of Practice and Procedure.

4.6 The Parties agree to actively defend this Settlement and to develop a mutually acceptable defense if its approval is opposed by non-parties to this Settlement.

4.7 Except as expressly provided for in this Settlement, none of the principles or methodologies underlying this Settlement shall be deemed by the Commission, the Parties, or any other entity as precedent in any proceeding or in any litigation, except in order to implement in this proceeding the agreements contained in this Settlement. The Parties reserve the right to advocate different principles or methodologies from those underlying this Settlement in other proceedings.

4.8 The Parties agree not to contest this Settlement before any regulatory agency or court of law where this Settlement, its meaning or effect is an issue. No Party shall take or advocate, either directly, or indirectly through another entity, any action inconsistent with the terms of this Settlement.

4.9 The Parties agree that the Commission shall have exclusive jurisdiction over any issues related to the Settlement and that no other court, regulatory agency, or other governing body shall have jurisdiction over any issue related to the interpretation of this Settlement, the enforcement of this Settlement, or the rights of the Parties to the Settlement (with the exception of the California Supreme Court or any other state or federal court that may now or in the future, by statute or otherwise, have

jurisdiction to review Commission decisions). The Parties further agree that no signatory to this Settlement, officer, director, or employee of either Party, or any member of the staff of the Commission assumes any personal liability as a result of this Settlement. The Parties agree that no legal action related to this Settlement may be brought in any state or federal court, or in any other forum with the exception of the Commission, against DRA or Edison, or any individual representing DRA or Edison, or any officer, director or employee of either Party. Nothing in this Settlement preempts or limits the provisions of Public Utilities Code Section 583.

4.10 This Settlement Agreement contains the entire agreement and understanding between the Parties as to the subject matter of this Settlement, and supersedes all prior agreements, commitments, representations and discussions between the Parties with respect to the subject matter of this Settlement.

4.11 None of the provisions of this Settlement shall be considered waived by either Party unless such waiver is given in writing. The failure of a Party to insist in any instance upon strict performance of any of the provisions of this Settlement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future.

4.12 It is the intent of the Parties that this Settlement be interpreted, governed and construed under the laws of the State of California. This Settlement is to be deemed to have been jointly prepared by DRA and Edison, and any uncertainty or

ambiguity existing herein shall not be interpreted against either Party on the basis that such Party drafted or prepared this Settlement.

4.13 Unless specifically set forth in this Settlement, neither Party intends to alter or change its obligations imposed by the orders, rules, regulations or decisions of the Commission.

5. EXECUTION

5.1 Subject to the condition of final Commission approval pursuant to Section 4.3, this Settlement shall become binding upon the date it is signed by both Parties.

5.2 Each of the undersigned Parties agrees to abide by the conditions and recommendations set forth in this Settlement.

The Parties agree that this Settlement Agreement may be executed in counterparts.

SOUTHERN CALIFORNIA EDISON COMPANY

Dated May 3, 1996 By: Allen E. Kelinsky

Allen E. Kelinsky
Attorney

DIVISION OF RATEPAYER ADVOCATES

Dated May 3, 1996 By: Carol L. Matchett

Carol L. Matchett
Attorney

(END OF APPENDIX A)