

MAR 27 1998

Decision 98-03-077 March 26, 1998

**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 sell gas-fired electrical generation facilities.

Application 96-11-046  
(Filed November 27, 1996)

**INTERIM OPINION**

**ORIGINAL**

**Summary**

We approve the application of Southern California Edison Company (Edison) for authority, pursuant to Public Utilities (PU) Code Section 851, to sell the Long Beach plant to NRG Energy, Inc. and Destec Energy, Inc. (NRG/Destec), and the terms and conditions of the sale.

**Procedural Background**

Edison filed its application on November 27, 1996. Notice appeared in the Daily Calendar on December 4, 1996. We issued our first interim opinion in Decision (D.) 97-09-049 on September 3, 1997, in which we permitted Edison to commence an auction of the 12 plants described in its application, subject to certain conditions, approved the form of the proposed operations and maintenance agreement for subsequent operation of the plants by Edison for the purchasers, and approved the accounting and ratemaking treatment described in the application, subject to certain conditions. On October 22, 1997, we adopted D.97-10-059, which approved a mitigated negative declaration for the project represented by the application, and approved a related mitigation, monitoring, and reporting program. On November 5, 1997, we adopted D.97-11-075, which required Edison to require as a condition of sale that the successful bidder enter

(S)  
Donald B. Clemen  
CPUC  
Utility Performance and Analysis Branch  
RM. 4209

into an operations and maintenance agreement with Edison as described in the application, and, for the Alamitos, El Segundo, Etiwanda, Huntington Beach, Mandalay, and Redondo plants, an agreement with the Independent System Operator (ISO). On December 12, 1997, we adopted D.97-12-106, which authorized Edison to consummate the sale of ten of the plants.

On October 3, 1997, Edison moved for the adoption of a procedural schedule following its filing of transaction documents reflecting the results of the auction. No party filed any response. The assigned Administrative Law Judge (ALJ) issued a ruling on October 27, 1997, permitting any party to make a responsive pleading to Edison's filing not later than the fifth business day following. On February 6, 1998, Edison made a Divestiture Compliance Filing to further describe the results of the auction as it affects the Long Beach plant, provide the definitive sales agreement, and to ask the Commission to make specific findings and to grant final approval of the sale of the Long Beach plant. On February 17, 1998, ORA filed its response, requesting that the Commission require Edison to provide additional information regarding the sale of the Long Beach plant. No other party<sup>1</sup> commented on the record. On February 20, 1998, Edison filed a motion to be permitted to file its reply to ORA's response under seal. The law and motion calendar ALJ issued a ruling on March 4, 1998, that permitted the reply to be so filed.

---

<sup>1</sup> Destec Energy, Inc., filed a response on behalf of NES/Destec urging the Commission to approve the sale of the El Segundo station, but has not moved to be recognized as a party pursuant to Rule 54 of the Rules of Practice and Procedure.

## **Description of the Application**

### **Auction of the Plant**

Edison conducted an auction of the 12 electric generation plants or stations described in its application. The plants represent substantially all of Edison's gas-fired generation capacity. The real and personal property included in the proposed sale are described, in general, in D.97-09-047, and in detail in Edison's December 1, 1997 and February 6, 1998 filings.

The planned auction process consisted of five phases: pre-auction publicity, initial indication rounds of bidding, detailed due diligence, final rounds of bidding, and negotiation and execution of final documents. Separate bidding rounds were held for plants classified as must-run and for plants that are not required to be offered to the ISO. To provide additional time for due diligence, final bids for the four South Coast must-run plants (Alamitos, Huntington Beach, Redondo Beach, and El Segundo) were scheduled a week after final bids were accepted on the other plants.

In the pre-auction, publicity phase, Edison prepared an informational brochure describing electric utility industry restructuring in California, the 12 plants to be sold, and the auction process. Edison's financial advisors developed a list of potential bidders from North America, Europe, and Asia in the electric/gas utility, oil and gas, and independent power industries. Each potential bidder was contacted individually by mail, informed of the auction process and expected schedule, and invited to participate in the auction. Edison or its financial advisor distributed informational brochures to parties who responded to these contacts or who made inquiry. Edison also issued press releases concerning the projected sales and placed print advertisements in *The Wall Street Journal*, the *Los Angeles Times*, and the *Houston Chronicle*. In addition, Edison conducted large, open-invitation public conferences for all interested

parties in Los Angeles, Houston, and New York City and met with potential bidders from the United States, Europe and Asia.

Parties who expressed interest in the auction were required to sign a Confidentiality and Auction Protocols Agreement, following which they were provided with copies of a three-volume Selling Memorandum and package of information in electronic form containing a significant amount of information regarding the plants offered. Among the information received were drafts of the Asset Sale Agreement and related transaction documents. Participants included North American and European companies in the electric/gas utility, pipeline, power equipment manufacturing, independent power, and equipment salvage and relocation industries.

Following these initial investigations, bidders were invited to submit non-binding initial indications of interest for specified plants, setting forth proposed prices and other information required by the auction protocols. All plants were offered on an unbundled basis, and bidders were free to bid on plants individually or in combination and to provide price indications on each such plant individually or in combination. On the basis of such initial indications, Edison qualified bidders to participate in the second, final round of the auction for those plants in which they had indicated an interest.

Second-round bidders received a significant amount of additional information, subject to the Confidentiality and Auction Protocols Agreement, including independent engineer reports and Phase I and Phase II environmental reports on each plant. For all but a few documents, bidders received electronic or printed copies. Some documents were reviewed in Edison data rooms, separated and monitored to maintain confidentiality of bidder identity. In addition, bidders were invited to plant tours and due-diligence interviews with company

personnel. Tours and interviews were also conducted with a view toward preserving the confidentiality of bidder identity.

Prior to accepting final bids, Edison asked participants to submit detailed written comments on proposals to modify any of the transaction documents. Based on bidder input, Edison revised the transaction documents based on whether Edison believed the comments to be acceptable and consistent with the intent of the overall transaction. Edison then provided the revised documents to all bidders.

Edison certifies that it conducted the auction in compliance with the auction protocols approved by the Commission in D.97-09-049. No party has raised any claim that the auction was conducted contrary to the approved procedures.

#### **Outcome of the Auction**

In 1997, Edison executed agreements with four bidders for ten plants, but did not accept bids for the Long Beach or Ormond plants.<sup>2</sup> In early December 1997, Edison advised parties that had executed confidentiality agreements that Edison would re-conduct the auction of the Long Beach plant. Edison permitted all such parties to submit final bids, and no bidder was disqualified. On December 18, 1997, Edison rejected all bids received on the grounds that they contained material contingencies and could not be considered "final." Edison invited parties that had submitted bids to remove the contingencies to and submit final bids on January 28, 1998. Bids submitted on that date continued to include potentially material open terms. Following discussions with each bidder who submitted January 28 bids, Edison provided a revised set of proposed

---

<sup>2</sup> No bidder bid on the Long Beach plant in combination with any other plant.

contract documents to each such bidder on January 31, 1998, and requested a final, noncontingent bid on February 2, 1998. Only NRG/Destec submitted a final bid.

NRG/Destec has the right to assign its rights and obligations to a subsidiary that may take title to the assets. NRG/Destec is a substantial enterprise with many other electrical generating assets in other locations that it owns directly or that are owned by affiliates. Edison received no higher bid for the plant. The total winning bid was \$28,800,900, which is less than the book value of the plant, as of September 30, 1997, of approximately \$98 million.

No party except ORA commented on the outcome of the auction. ORA was concerned that the auction may not have been conducted in a manner to attract a reasonable number of bidders and Edison may have made trade-offs among contingencies in various bids that were adverse to ratepayer interests.

In its February 6, 1998 filing, Edison stated that it "did not receive a satisfactory bid for the Long Beach plant, and it rejected what it did receive." In its reply, filed under seal, Edison expanded upon that statement, and the grounds that it gave for rejecting the first-round results as they affected the Long Beach plant are reasonable, by any measure. The contingencies that Edison described in its reply were not contingencies over which ratepayers and shareholders would have a divergence of interest. The transaction documents for the sale of the Long Beach plant substantially conform to the documents for the initial batch of ten plants with the single material change that the operations and maintenance agreement was amended to provide for the possibility that the Long Beach plant would be operated on a seasonal basis.

We have considered the mitigated negative declaration that we approved in D.97-10-059 and the adequacy of the measures described there to avoid the possibility of indirect physical changes to the environment or to reduce the effect

of such changes to non-significant levels. We will conclude that the sale and transfer of the plants is in the public interest, subject to the adoption of those measures<sup>3</sup> and our analysis of the factors in PU Code Section 362.

### **Market Power**

In proceedings pursuant to Section 851, we must ensure that "facilities needed to maintain the reliability of the electric supply remain available and operational, consistent with maintaining open competition and avoiding an overconcentration of market power." (PU Code § 362.) In D.97-11-030, we determined that making several of the plants that were required for the reliable operation of the system subject to an agreement with the ISO was consistent with maintaining open competition, but we reserved determining whether it would be consistent with "avoiding an overconcentration of market power." Now that we know the results of the auction, we are in a position to determine whether the outcome raises any overconcentration issue or other market power issue.

No party has raised any claim that any of the buyers will possess sufficient capacity to have market power. The information concerning the buyers that Edison has provided does not raise serious issues with respect to market power.

### **Request for Exempt Wholesale Generator Finding**

Under the federal Energy Policy Act of 1992 (the Act), it is possible for the buyers to qualify as "exempt wholesale generators" (EWGs) under the Act, which avoids federal regulation as a public utility holding company under the Public Utility Holding Company Act of 1935 ("PUHCA"). Buyers must apply to the Federal Energy Regulatory Commission for EWG status and, in the case of facilities that were formerly in a utility's ratebase, such as the Long Beach Plant

---

<sup>3</sup>The measures are independent of the identity of specific buyers for specific plants.

that Edison has agreed to sell, a finding is necessary that allowing such a facility to be an EWG "(1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law." (15 U.S.C. § 79z-5a(c).) Since that determination must be made by this Commission, as the applicable state utility commission, Edison requests that we include that determination in this decision.

As Edison correctly observes, the transition of electrical generation from a regulated monopoly to a competitive marketplace is the policy of the State of California. (*See, e.g.,* PU Code § 330(d).) That policy is expressly intended to benefit consumers. (*Id.*) Subjecting the buyers to regulation under PUHCA would not advance that policy and is not required to prevent any violation of California law regulating utilities.

#### **Findings of Fact**

1. No party disputes that Edison has conducted the auction process without significant irregularity.
2. The measures described in the mitigated negative declaration approved in D.97-10-059 are sufficient to avoid or mitigate the reasonably foreseeable adverse environmental effects of the project.
3. Upon sale, the market value of the Long Beach plant will be \$28,800,900.
4. No party asserts that sale of the plant to the buyer will result in an overconcentration of market power.

#### **Conclusions of Law**

1. The sale of the Long Beach plant to NRG/Destec as a result of the auction is in the public interest and should be approved, subject to the measures described in the mitigated negative declaration approved in D.97-10-059 to avoid or mitigate the reasonably foreseeable adverse environmental effects of the project.

2. Allowing the Long Beach plant to be an exempt wholesale generator within the meaning of the Act would benefit consumers, be in the public interest, and would not violate California law.

3. Edison should be authorized to consummate the sales of the Long Beach plant to NRG/Destec, in accordance with the forms of the transaction documents in Edison's February 6, 1998 filing, together with customary ancillary documentation necessary to effectuate the transactions.

4. After the matter was submitted, and after the issuance of the agenda for this meeting, the Commission was formally notified that the ISO and Power Exchange would commence operations on March 31, 1998. There is a need for immediate action prior to that date, so that the buyer and the ISO can finalize all agreements required for sale of power into the grid on that date or, in the alternate, that Edison and the ISO can make whatever adjustments are required in the event that the Long Beach Plant remains under Edison's ownership. That need was not definite until the Commission was formally notified that the transfer of operational control of the grid would occur on March 31, 1998. Accordingly, the Commission added this item to the agenda under Government Code Section 11125.3(a)(2) so that it could consider the draft decision in this matter.

#### INTERIM ORDER

THEREFORE, IT IS ORDERED that, subject to the measures described in the mitigated negative declaration approved in Decision 97-10-059 to avoid or mitigate the reasonably foreseeable adverse environmental effects of the project, Southern California Edison Company (Edison) may transfer and sell the Long Beach electric generation plant to NRG Energy, Inc. and Destec Energy, Inc., or their permitted affiliates, in accordance with the forms of the transaction

A.96-11-046 ALJ/RC1/mrj

documents in Edison's February 6, 1998 filing, together with customary ancillary documentation necessary to effectuate the transactions.

This order is effective today.

Dated March 26, 1998, at San Francisco, California.

RICHARD A. BILAS  
President  
P. GREGORY CONLON  
JESSIE J. KNIGHT, JR.  
HENRY M. DUQUE  
JOSIAH L. NEPPER  
Commissioners