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Decision 98-05-055 May 21, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Southern California Edison Company, for order approving agreement for termination of power purchase agreement between Southern California Edison Company and Mammoth-Pacific, L.P.	Application 97-01-052 (Filed January 31, 1997)

ORIGINAL

O P I N I O N

Summary

Southern California Edison Company (Edison) seeks approval of a proposed buyout and termination agreement of an Interim Standard Offer (ISO) 4 contract with Mammoth-Pacific, L.P. (Mammoth).

After reviewing the comments on the draft decision, the Commission finds that Edison acted reasonably in accepting Mammoth's claim of force majeure to excuse its performance under its existing contract, and accordingly the request for approval of the Termination Agreement, as modified by the Waiver Agreement, is granted.

Procedure

On January 31, 1997, Edison filed this application together with Edison's and Mammoth's Motions for Protective Order. On March 11, 1997, the motions of both Edison and Mammoth were granted by Administrative Law Judge's (ALJ) Ruling and were extended on March 6, 1998. On May 15, 1997, following approved extensions of time, the Office of Ratepayer Advocates (ORA) filed its response supporting the application. On July 1, 1997, ORA answered two questions from the ALJ assigned to this proceeding. The matter was submitted for decision on July 1, 1997.

On December 24, 1997, a draft decision denying Edison's request for approval of the buyout agreement was mailed as part of the agenda materials for the Commission's January 7, 1998 business meeting. In a January 6, 1998 Assigned Commissioner's Ruling, parties were provided with an opportunity to comment on the draft order. On March 4, 1998, comments were submitted by ORA, Mammoth, and Edison. The comments focused on two areas, Edison's acceptance of the force majuere claim by Mammoth, and the disclosure of protected materials in the draft decision. On April 23, 1998, joint reply comments were submitted by ORA, Mammoth, and Edison. The parties therein submitted an agreement modifying the termination agreement in such a way as to deal with their respective concerns over the earlier disclosure of the protected materials. As anticipated in the joint reply comments, Edison submitted Supplemental Testimony on April 30, 1998 updating its analysis of ratepayer benefits.

Background

On April 15, 1985, Edison and Mammoth executed an ISO 4 contract providing for the sale and purchase of 12 megawatts of as-available capacity and associated energy for 30 years. The contract involves the purchase by Edison and sale by Mammoth of electricity from an undeveloped geothermal power plant in Mono County (referred to as MP III.) Pursuant to the ISO 4 contract, firm operation was to commence not later than April 15, 1990, five years from the contract's date of execution. Construction of the generating facility was to commence by April 1987.

Mammoth has been unable to obtain the necessary conditional use permit (CUP) from Mono County, and construction of the proposed power plant has yet to begin. Edison and Mammoth now estimate that a CUP can be obtained by the year 2002. The parties contend that the delinquency to date in performance

under the contract is excusable by reason of unforeseeable circumstances beyond Mammoth's control (uncontrollable force or force majeure.)

Provisions in the standard offer contract respecting force majeure are as follows:

"2.43 Uncontrollable Forces Any occurrence beyond the control of a Party which causes that Party to be unable to perform its obligations hereunder and which a Party has been unable to overcome by the exercise of due diligence, including but not limited to flood, drought, earthquake, storm, fire, pestilence, lightning, and other natural catastrophes, epidemic, war, riot, civil disturbance or disobedience, strike, labor dispute, action or inaction of legislative, judicial, or regulatory agencies, or other proper authority, which may conflict with the terms of this Contract, or failure, threat of failure or sabotage of facilities which have been maintained in accordance with good engineering and operating practices in California."

"15. Uncontrollable Forces

"15.1 Neither Party shall be considered to be in default in the performance of any of the agreements contained in this Contract, except for obligations to pay money, when and to the extent failure of performance shall be caused by an Uncontrollable Force.

"15.2 If either Party because of an Uncontrollable Force is rendered wholly or partly unable to perform its obligations under this Contract, the Party shall be excused from whatever performance is affected by the Uncontrollable Force to the extent so affected provided that:

"(1) the nonperforming Party, within two weeks after the occurrence of the Uncontrollable Force, gives the other Party written notice describing the particulars of the occurrence,

"(2) the suspension of performance is of no greater scope and of no longer duration than is required by the Uncontrollable Force,

"(3) the nonperforming Party uses its best efforts to remedy its inability to perform (this subsection shall not require the settlement of any strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the Party involved in the dispute, are contrary to its interest. It is understood and agreed that the settlement of strikes, walkouts, lockouts or other labor disputes shall be at the sole discretion of the Party having the difficulty),

"(4) when the nonperforming Party is able to resume performance of its obligations under this Contract, that Party shall give the other Party written notice to that effect, and

"(5) capacity payments during such periods of Uncontrollable Force on Seller's part shall be governed by Section 9.1.2.3.

"15.3 In the event that either Party's ability to perform cannot be corrected when the Uncontrollable Force is caused by the actions or inactions of legislative, judicial or regulatory agencies or other proper authority, this Contract may be amended to comply with the legal or regulatory change which caused the nonperformance."

In the course of the permit process for MP III and MP II (a companion project in the same area), the Mono County Planning Commission granted, in part, CUPs for the projects. This decision was appealed to the Mono County Board of Supervisors (Board) by Sierra Club California, and, following a public hearing on the appeal, the Board passed Resolution 88-14 reversing the Planning Commission and denying CUPs for the projects. This resolution, adopted March 1, 1988, is supported by 26 findings leading to the Board's conclusion that there are not benefits of the projects sufficient to outweigh their unavoidable adverse environmental and economic impacts. Board policy was enunciated in Resolution 88-14, Findings of the Mono County Board of Supervisors.

On March 11, 1988, Mammoth notified Edison that the Board action denying a permit for MP II and MP III constituted an unforeseeable event or force majeure. In its prepared testimony filed with the application, Mammoth testifies as follows:

> "During the hearing on February 22, 1988, a California Department of Fish and Game field staff member testified falsely to the Board of Supervisors that a new Fish and Game study done subsequent to approval of the EIR had identified a previously unknown deer mitigation route traversing the Project site that had not been assessed during the EIR process. For that reason, the Mono County Board of Supervisors upheld the appeal and denied the CUP for both MP II and the Project. Mammoth considered these circumstances to be an uncontrollable force because such misconduct was out of Mammoth's control and certainly could not have been anticipated, especially in light of the detailed public record of evidence contrary to the false testimony. Mammoth notified Edison that an uncontrollable force had occurred and briefed Edison in their offices on May 17, 1988. Edison accepted Mammoth's claim by letter of June 23, 1988."

On December 6, 1988, the Board, acting on the request for reconsideration by Mammoth, passed Resolution 88-82 which approved a CUP for MP II and denied with prejudice a CUP for MP III. This resolution also addressed the issue of allegedly false testimony, finding that "the representatives of the California Department of Fish and Game who testified before this Board in February of this year were making statements which were uncorroborated, unsupported by any substantial evidence and lacking credibility. From the evidence now before this Board, it appears that the California Department of Fish and Game, in their testimony before this Board, intentionally tried to mislead this Board as to the potential severity of the impacts of the project." (See Findings in Support of Approval of Resolution No. 88-82.)

The Board's denial with prejudice of a permit for MP III by Resolution 88-82 was reported to and accepted by Edison as an event continuing

Mammoth's being excused from performance by reason of the allegedly false testimony of the California Department of Fish and Game. Prepared testimony submitted with the application describes the final Board denial as follows:

> "In December 1988, Mammoth-Pacific notified Edison that the uncontrollable force period continued to exist with respect to the development of the Project, and supplied information to Edison that the Mono County Board of Supervisors had enacted new and unprecedented development conditions unique in the history of geothermal power plant development to be met by Mammoth-Pacific prior to issuance of a CUP for the Project. This resolution (Resolution 88-22) required that a geothermal resource monitoring program be implemented subsequent to commencement of operation of MP II and the other operating power plants at the project site to assess the impact, if any, of the extraction of geothermal fluid for power production on the surface hydrology of the area surrounding the geothermal reservoir, including a geothermal surface feature (steam vents, hot springs, etc.) observation area approximately three miles south of the Project site at Hot Creek Gorge."

On November 12, 1993, Mono County notified Mammoth that it could apply again for a CUP for MP III, and on January 24, 1994 Mammoth recommenced the application process. Buyout negotiations between Mammoth and Edison began on May 20, 1994, nine years after the contract was signed and before any construction of plant had occurred.

Applicable Principles

The principles we find applicable to this proceeding were set forth in Re Power Purchase Contracts Between Electric Utilities and Qualifying Facilities, Decision (D.) 88-10-032 (29 CPUC2d 415), which adopted our "Final Guidelines For Contract Administration of Standard Offers." Of particular relevance to the facts in this case are the guidelines governing the on-line requirement.

Five-Year On-Line Date Requirement

"1. The five-year on line requirement in standard offer contracts should be enforced, and should begin when both the qualifying facility (QF) and the utility have signed the contract.

"2. Exceptions may be appropriate where the QF has experienced a 'force majeure' or 'uncontrollable force' within the meaning of the QF's standard offer contract and has complied with all contractual requirements in claiming the protection of the force majeure clause.

"3. Any extension of the five-year on-line requirement resulting from the occurrence of a qualifying force majeure will be limited by the duration of the force majeure and the extent to which the force majeure impacted the QF's ability to meet the contract requirements.

"4. Decisions about the applicability of the force majeure clause will be made on a case-by-case basis. Factors to be considered will include an examination of the factual basis of the force majeure claim, the specific language of the contractual force majeure clause, and whether the QF has complied with applicable contractual requirements to give notice of the force majeure and to mitigate the delay caused by the force majeure. The effect of the force majeure on the utility's obligations under the contract will also be considered as cases arise.

"5. Events giving rise to valid claims of force majeure may include delay in obtaining required governmental permits, depending on the circumstances of the individual QF. However, not all project delays resulting from delays in obtaining required governmental permits are valid claims of force majeure. Permitting delays and denials are a regular part of project development and should be anticipated by project developers.

"6. In general, deferrals (paid or non-paid) and buyouts should be considered only with QFs who have obtained all of the permits and certification necessary to

go forward with their projects. As with all other types of contract modifications, deferrals and buyouts are subject to the viability guidelines.

"7. On-line date deferrals and/or contract buyouts may be considered only if the ratepayers' interests will be served demonstrably better by such deferral.

"8. The reasonableness of contract deferrals and buyouts will be determined by evaluating the need for generating capacity, the length of deferral, the costs avoided by deferring or buying out unneeded capacity, and the benefits (both monetary and non-monetary) granted projects acceding to deferral or buyout.

"9. Prospective reviews by this Commission for paid deferrals and buyouts will be required. Applications for preapproval of paid deferrals or buyout must include documentation demonstrating that the utility has examined information on project viability, consistent with these guidelines, and that the utility is satisfied that the QF is able to meet the original terms of the contract."
(29 CPUC2d at 440-441.)

Discussion

In this application Edison seeks approval of a agreement whereby it would pay Mammoth to terminate its power purchase agreement (PPA). A prerequisite to our authorizing the termination agreement is our approval of Edison's conduct in exercising its rights and duties under the PPA. We must concur that Edison's acceptance of Mammoth's force majeure claims extending the performance due date under the PPA was reasonable.

We have acknowledged that claims of force majeure may include delay in obtaining governmental permits. But not all project delays in obtaining permits are excusable as uncontrollable forces. We have held that permitting delays and denials are a regular part of project development and should be anticipated by project developers. (29 CPUC2d at 440.)

In accordance with these principles, Mammoth and Edison do not contend that the Board twice denying CUP for MP III, standing alone, constitutes force majeure. Their claim is that the circumstances surrounding the permit denials were exceptional, unforeseeable, and beyond Mammoth's control. We examine the claim, and measure Edison's reasonableness in accepting it.

In the course of the permit process for MP III and MP II (a companion project in the same area), the Mono County Planning Commission granted, in part, CUPs for the projects. This decision was appealed to the Board by Sierra Club California, and, following a public hearing on the appeal, the Board passed Resolution 88-14 reversing the Planning Commission and denying CUPs for the projects. This resolution, adopted March 1, 1988, is supported by 26 findings leading to the Board's conclusion that there are not benefits of the projects sufficient to outweigh their unavoidable adverse environmental and economic impacts.

The Board's stated conclusion that the benefits of permitting the geothermal project were insufficient to outweigh their unavoidable adverse environmental and economic impacts was disputed by Mammoth in its claim of force majeure. Mammoth claims, and Edison accepts, that the real reason that the permits were denied is that the California Department of Fish and Game gave false testimony to the Board, and this allegedly false testimony was the cause of the Board's action denying permits.

Mammoth claims, and Edison accepts, that a California Department of Fish and Game field staff member testified falsely that a department study had identified a previously unknown deer migration route traversing the project site that had not been assessed during the environmental impact report process. Mammoth's knowledge that the false deer migration route testimony was key to the Board's action denying permits was obtained through Mammoth's ex parte

contacts with Board members. ORA's May 15, 1997 response supports Edison's acceptance of the uncontrollable force claim (see page 3).

The written comments of the parties and our review of the record have persuaded us that it was reasonable for Edison to accept this claim of force majeure and we have modified the draft decision to reflect this finding. Our reasoning is described below.

First, the testimony of the Department of Fish and Game field staff member appears to be false. The record of Resolution No. 88-82, granting a CUP for MP II, contains the Board's statement that "substantial evidence" had come to light since the hearing on Resolution No. 88-14 regarding the falsity of the testimony. In the record, the Board states that the testimony was, "uncorroborated, unsupported by substantial evidence and lacking credibility."[1] Furthermore, the Board concluded that the Department of Fish and Game may have "intentionally tried to mislead" the Board.

Second, the false testimony was material to the Board's decision. Through ex parte communication with the Chairman of the Board, it was discovered that the allegedly false testimony was taken into consideration in the Board's denial of the CUP on appeal. Even though the supposedly false testimony was listed as but one of several reasons for the Board's denial of the CUP, it was material and therefore had some bearing on the Board's decision. Accordingly, it was unforeseeable at the time the parties entered into the contract, not that the permit would be denied, but rather that the Board's denial would be based, in part, on the false testimony of the representative of a state agency.

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[1] This Resolution was referenced in the applicant's testimony but the Findings in Support of Approval of Resolution No. 88-82 were not attached to the original application. In response to the January 6, 1998 Assigned Commissioner's Ruling, Mammoth submitted a copy of the Findings (see Appendix 5 of the March 4, 1998 comments of Mammoth).

We also must evaluate for reasonableness the additional uncontrollable force claim when, in December 1988, the Board denied a CUP for MP III with prejudice, holding that it should be considered only after other Mammoth projects had been built and had operated for a reasonable period of time, and such operation had demonstrated that there was no increased risk of adverse hydrologic impacts to sensitive hydrothermal features. A geothermal resource monitoring program was ordered to be implemented.

Edison and Mammoth contend that the accurate measurements of pressure changes ordered by the Board prior to construction of additional power producing plants constitute new and unprecedented conditions unique in the history of geothermal plant development. This permitting delay, lasting until November 1993, was not reasonably foreseeable, according to Edison and Mammoth. ORA agrees that the environmental monitoring requirement was "atypical and unforeseeable" (see March 4, 1998 ORA comments).

This claim of force majeure is also reasonable. While the record shows that MP III is the fourth intrusion into the hydrothermal reservoir by Mammoth in the Long Valley area of Mono County, it was the first time the Board had conditioned the permit on completion of a geothermal resource monitoring program. While Mammoth was not unaware of some permitting risks associated with the instant project in light of the known environmental concerns expressed by the California Department of Fish and Game and Sierra Club California, it was not until three years after Mammoth entered into the contract that the Board instituted this particular condition precedent to a CUP.

Accordingly, we find that Edison's conduct in accepting Mammoth's force majeure claims was reasonable.

Termination Agreement

The termination agreement between Edison and Mammoth, as submitted in the application, is contingent on Commission approval and the project receiving a Mono County conditional use permit.[2] Upon satisfaction of the conditions, the contract will terminate and Edison will make a specified number of payments to terminate the contract. Edison will also reimburse Mammoth for up to a specified amount of project development expenditures.

The projected ratepayer benefits of the termination under all scenarios range from $0.8 million to $40.7 million. According to base case projections, Edison estimates $32.6 million in customer benefits through the elimination of Edison's obligation to purchase above-market priced energy and capacity under the contract if the termination agreement is approved.

In joint reply comments, ORA, Mammoth, and Edison agree on certain financial concessions from Edison and Mammoth in return for ORA's waiver of the CUP requirement. Edison and Mammoth have entered into a "Waiver Agreement," dated April 2, 1998, to modify the termination agreement, as confirmation of the agreement between ORA, Mammoth, and Edison. This document was attached to the joint reply comments submitted on April 23, 1998. The Waiver Agreement specifies the reduction in payments to Mammoth. In addition, Edison has agreed to forgo $1.97 million of the shareholder incentive

[2] Mammoth represents in its March 4, 1998 comments that a draft Termination Agreement between Mammoth and Edison was modified at ORA's request to include the requirement that Mammoth obtain the Conditional Use Permit. Section 6.2.5 of the Termination Agreement gives Edison the right to waive the conditional use permit requirement.

associated with this QF restructuring.[3] These waivers increase the ratepayer benefits associated with this buyout.

Findings of Fact

1. Edison and Mammoth are parties to a power purchase agreement (PPA) providing for the sale and purchase of 12 megawatts of as-available capacity and energy from a geothermal power plant.

2. Mammoth has been unable to obtain the necessary permits from Mono County and construction of the plant has yet to begin.

3. Mammoth claimed force majeure in that allegedly false testimony by the California Department of Fish and Game caused the Mono County Board of Supervisors to deny a permit to MP III.

4. Edison's acceptance of this force majeure claim was reasonable because the testimony has been found to be false and shown to be material to the Board's decision to reject the CUP.

5. Mammoth additionally claimed force majeure in that the Board ordered that a geothermal resource monitoring program be implemented for a reasonable period of time to show that there was no increased risk of hydrologic impacts to sensitive hydrothermal features, causing unforeseeable permitting delays.

6. Edison's acceptance of this force majeure claim was reasonable because, while permitting delays are a regular part of project development, the adoption of a new monitoring program three years after the applications which acts as a condition precedent to the CUP was unforeseeable.

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[3] In D.95-12-063 (as modified by D.96-01-009), the Commission adopted the policy that "(w)hen a QF contract is renegotiated, shareholders should retain 10% of the resulting ratepayer benefits." (See Conclusion of Law 74.) The $1.97 million figure is calculated on a 1/1/95 net present value basis.

7. On April 2, 1998 Edison and Mammoth entered into a Waiver Agreement which modifies the Termination Agreement.

8. The Waiver Agreement specifies a reduction in payments to Mammoth in return for Edison's agreement to waive the requirement that Mammoth obtain a conditional use permit.

9. The Termination Agreement is expected to result in ratepayer benefits of $32.6 million; these benefits are expected to increase under the Waiver Agreement.

10. Edison has agreed to reduce by $1.97 million the shareholder incentive payment it would otherwise be entitled to as a result of this contract restructuring.

Conclusions of Law

1. The Termination Agreement, as modified by the April 2, 1998 Waiver Agreement, should be approved.

2. The shareholder incentive payment that Edison would otherwise be entitled to as a result of this contract restructuring should be reduced by $1.97 million.

3. Edison's recovery of costs associated with the Termination Agreement, as modified by the Waiver Agreement, should be conditioned on Edison's reasonable administration of the two agreements.

O R D E R

IT IS ORDERED that:

1. The Termination Agreement between Southern California Edison Company (Edison) and Mammoth-Pacific L.P, as modified by the April 2, 1998 Waiver Agreement, is approved.

2. The shareholder incentive payment that Edison may claim as a result of this buyout shall be reduced by $1.97 million on a 1/1/95 net present value basis.

3. Edison is authorized to recover in rates all payments under the Termination Agreement, as modified by the Waiver Agreement, through its Transition Cost Balancing Account, or any other mechanism authorized by the Commission, subject to Edison's prudent administration of the modified agreement.

4. Application 97-01-052 is closed.

This order is effective today.

Dated May 21, 1998, at San Francisco, California.

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