ALJ/RC1/tcg *

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Decision 98-07-030 July 2, 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)

ORIGINAL

OPINION

Summary

We approve the application of Southern California Edison Company (Edison) for authority, pursuant to Public Utilities (PU) Code Section 851, to sell the Ormond Beach plant to Houston Industries Power Generation, Inc. (HIPG), and the terms and conditions of the sale, including a condition that Edison sell an additional 50 acres of real property adjacent to the Cool Water generating station previously sold by Edison to HIPG.

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 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, and on March 27, 1998, we adopted D.98-03-077, which authorized Edison to consummate the sale of its Long Beach plant.

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 April 17, 1998, Edison made a Divestiture Compliance Filing to further describe the results of the auction as it affects the Ormond 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 Ormond Beach plant. On April 24, 1998, the Office of Ratepayer Advocates (ORA) filed its response, recommending that the Commission approve the proposed sale. On May 29, 1998, Thermo ECOtek Corporation (Thermo) moved for an order requiring Edison to provide certain information in connection with the proposed sale. Edison filed an opposition to Thermo's motion on June 1, 1998.

Rule 45(c) of the Rules of Practice and Procedure permits a motion to be made "at any time" during the pendency of a proceeding by any party to the proceeding. Thermo was not a party at the time it filed its motion. Rule 45(c) also permits a motion to be made by an entity which is not a party "in appropriate circumstances," including circumstances in which the movant states

an intent to become a party at the next opportunity or if the motion relates to a special appearance, as for a motion to quash. Rule 54 permits participation in an application proceeding without filing a pleading if no affirmative relief is sought, there is full disclosure of the entity in whose behalf an appearance is sought to be entered, a position is stated fairly and is reasonably pertinent to the issues already presented.

Thermo's motion was filed after the Commission had already scheduled consideration of a draft decision for our June 4, 1998 conference, more than a month after the time set by a procedural order for responses or protests to Edison's April 17, 1998 filing. Thermo states that it had good cause for failing timely to file a motion to become a party and to respond to Edison's motion: (1) Thermo had previously bid on the same 50-acre property adjacent to the Cool Water plant in 1997[1]; (2) Edison did not provide Thermo with a further opportunity to bid on the 50-acre site; (3) Edison did not serve Thermo with its April 17, 1998 filing; and (4) the caption of the April 17, 1998 filing is misleading; and (5) the April 17, 1998 filing does not disclose that the 50-acre site contains gas-fired electric generating facilities.

Thermo claims no real property interest in the 50-acre site that would entitle it to any particular notice of Edison's April 17, 1998 filing such as that which is sometimes required to be given to adjoining property owners. The mere fact that Thermo had previously bid upon the same 50-acre property does not confer upon Thermo more due process rights than any other person to notice and an opportunity to be heard. Whether Thermo was or was not afforded an opportunity to bid on the 50-acre site at any time is irrelevant to whether it was

[1] It is not clear whether Thermo is referring to an auction that was conducted in connection with this proceeding or pursuant to some other authority.

deprived of due notice. As a non-party, Thermo was not entitled to service of Edison's April 17, 1998 filing. The caption of the April 17, 1998 filing is not misleading in light of the relative monetary consideration involved in the sale of the Ormond Plant ($40 million) compared to the 50-acre site ($3 million). The filing discloses that additional details concerning the 50-acre site are contained in a declaration filed under seal with the April 17, 1998 filing. Moreover, Thermo states that it filed its motion "as soon as practicable after it became aware that Edison is also requesting authority to sell" the 50-acre site, but Thermo omits to say when it became aware that the 50-acre site was involved.

Edison criticizes Thermo's justification for coming to the Commission with its concerns so late in the process as weak. Even if we permit Thermo to become a party and consider its motion on its merits, Edison contends that Thermo has failed to justify an order requiring supplementation of the record.

We agree with Edison that its April 17, 1998 filing adequately describes the 50-acre site in relation to the equipment that is located on such property and the circumstances surrounding Edison's decision to accept a proposed condition for the sale of the Ormond Beach plant which included sale of the 50-acre site. We also agree with Edison that Thermo's focus exclusively upon the 50-acre site is misplaced. Thermo had the same opportunity as any other bidder to condition a bid for the Ormond Beach plant on the condition that Edison agree to sell to it the 50-acre site. Thermo chose not to do so.

Thermo's remaining request for relief is that Edison be required to address whether the sale of the 50-acre site will foreclose the development, by Thermo, of a competitive generating facility using equipment that Thermo owns. Absent an agreement between Thermo and the proposed transferee of the 50-acre site, the sale obviously will foreclose such development. Thermo suggests that the loss of

its commercial opportunity to develop a 140 MW generating facility using its existing equipment on the site would be detrimental to California ratepayers.

Thermo is attempting to introduce issues at the conclusion of a proceeding that has been open for more than a year and a half that broaden the issues already presented, in violation of the rules for participation without intervention contained in Rule 56. While Rule 56 applies, by its terms, to entering an appearance at a hearing without filing a pleading, we believe that it provides an appropriate standard for determining the "appropriate circumstances" under which a non-party may make a motion pursuant to Rule 45(c). In D.97-09-049 we considered a number of issues, including whether the proposed sale process were reasonable, whether the proposed operations and maintenance agreement were reasonable, and whether the accounting and ratemaking treatment should be approved. We reserved for subsequent decisions certain market power issues pursuant to PU Code Section 362[2] and questions concerning whether auctions had been properly conducted. The time for Thermo to have raised issues regarding the effect on competitive conditions of the sale of non-must run plants was toward the beginning, not the end, of this proceeding.

Accordingly, we will admit Thermo as a party with respect to the Ormond Beach plant sale and transfer, and we will deny Thermo's motion for an order requiring Edison to supplement the record.

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

[2] Neither the Ormond Beach plant nor the Cool Water plant (adjacent to the 50-acre parcel) were subject to PU Code Section 362.

gas-fired generation capacity. The real and personal property included in the proposed sale are described, in general, in D.97-09-049, and in detail in Edison's December 1, 1997, February 6, 1998, and April 17, 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 Ormond Beach plant.[3] Thereafter, Edison invited numerous parties to participate in a new round of bidding for the Ormond Beach plant. This included all parties that had expressed an interest in the station in the prior round of the auction, all parties that had agreed to purchase other plants from Edison, and selected other parties that Edison believed might have an interest in the Ormond beach plant. Some bidders conducted additional due diligence.

In February 1998, HIPG bid $43,000,000 for the purchase of the Ormond Beach plant and 50 acres of real property adjacent to the Cool Water generating station previously purchased by HIPG. Edison and HIPG allocated $40,000,000 to the Ormond Beach plant, and $3 million to the 50-acre parcel. The book value of the Ormond Beach plant at March 31, 1998, was approximately $125 million. HIPG's bid was subject to the completion of due diligence and negotiation of certain contractual provisions substantially the same as those contained in Edison's contracts with HIPG in connection with the sale of the Cool Water,

[3] No bidder bid on the Ormond Beach plant either singly or in combination with any other plant. The sale, in 1998, of the Long Beach plant is described in D.98-03-077.

Etiwanda, Mandalay, and Ellwood plants. On March 25, 1998, Edison and HIPG executed definitive agreements for the sale of the Ormond Beach plant and the 50 acres. Edison represents that it did not receive any higher bid for the Ormond Beach plant or the Cool Water real property, either singly or as part of any bundled bid.

HIPG is a wholly-owned subsidiary of Houston Industries Incorporated, which is a substantial enterprise with many other electrical generating assets in other locations that it owns directly or that are owned by affiliates.

No party except ORA commented on the outcome of the auction. ORA recommended that the transaction be approved. The transaction documents for the sale of the Ormond Beach plant substantially conform to the documents for the Long Beach plant with the exception that Edison and HIPG agreed to modify the Facilities Services Agreement (FSA) to eliminate provisions dealing with back-up fuel oil capability, which Edison and HIPG determined was not necessary for the Ormond Beach plant.

Edison and HIPG have also entered into a separate agreement for the sale of certain real property at the Cool Water site (the Land Sale Agreement). The Land Sale Agreement provides for the sale of approximately 50 acres of land adjacent to the Cool Water generating station from Edison to HIPG, which acquired the Cool Water facilities from Edison in the initial sale. This is consistent with the encouragement we gave to Edison to sell as much of its property related to the plants as possible. (*See* D.97-09-049, mimeo. at 7.)

Edison asks that we determine that the additional property at the Cool Water site is not necessary or useful for utility purposes, and, therefore, the transfer of that property does not require our approval under PU Code Section 851. Edison acquired the 50-acre parcel as part of the original acquisition of the 2,353-acre Cool Water site in 1956. This portion of the site was originally

intended to support a possible expansion of the plant and to provide water rights for plant operation.

Even though it does not appear to have been Edison's intention to so structure the transaction as to make the initial sale of the Cool Water plant subject to PU Code Section 851 and the subsequent sale of the adjacent 50-acres not subject to that statute, we adopt an approach to discourage "piecemeal" applications. It is clear that had the 50-acre parcel been part of the initial sale, it would have been included within PU Code Section 851 and been part of the "project" for purposes of the California Environmental Quality Act (CEQA). Accordingly, in determining whether the sale and transfer of utility property to a person or corporation is subject to PU Code Section 851, we will integrate all related transactions for a period of one year preceding the agreement for the subsequent transfer of additional property.

Edison represents that the 50-acre parcel is not presently necessary or useful to it since it no longer owns the Cool Water generating station. Under the integration rule, however, Edison would have to show that the 50-acre parcel was not necessary or useful to it at any time during the 12-month period ended March 25, 1998, when it agreed to sell the 50-acres to HIPG. This rule is necessary to assure that we have properly considered the totality of the activities under CEQA for which our approval is sought.

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 Ormond Beach plant and the 50-acre site is in the public interest, subject to the adoption of those measures, which are equally applicable to the

50-acre site as to the adjoining Cool Water plant site previously transferred,[4] and our analysis of the factors in PU Code Section 362. It is the intent of the Commission that this Decision shall constitute an addendum to the mitigated negative declaration that we approved in D.97-10-059.

Request for Exempt Wholesale Generator Finding

Under the federal Energy Policy Act of 1992 (the Act), it is possible for the buyer to qualify as an "exempt wholesale generator" (EWG) under the Act, which avoids federal regulation as a public utility holding company under the Public Utility Holding Company Act of 1935 ("PUHCA"). The buyer 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 Ormond Beach Plant 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.

[4] The measures are independent of the identity of specific buyers for specific plants.

Findings of Fact

1. 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 sale and transfer of the Ormond Beach plant and the 50-acre parcel adjacent to the Cool Water generating station.

3. Upon sale, the market value of the Ormond Beach plant will be $40,000,000.

Conclusions of Law

1. The sale of the Ormond Beach plant and the 50-acre parcel adjacent to the Cool Water generating station to HIPG 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 sale and transfer of the Ormond Beach plant and the 50-acre parcel adjacent to the Cool Water generating station.

2. Allowing the Ormond 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 sale of the Ormond Beach plant and the 50-acre parcel adjacent to the Cool Water generating station to HIPG, in accordance with the forms of the transaction documents in Edison's April 17, 1998 filing, together with customary ancillary documentation necessary to effectuate the transactions.

4. Thermo should be admitted as a party with respect to the sale and transfer of the Ormond Beach plant.

5. Thermo's motion to require Edison to supplement the record should be denied.

ORDER

THEREFORE, IT IS ORDERED that:

1. Subject to the measures described in the mitigated negative declaration approved in Decision (D.) 97-10-059 to avoid or mitigate the reasonably foreseeable adverse environmental effects of the project, Southern California Edison Company (Edison) is authorized to transfer and sell the Ormond Beach electric generation plant and the 50-acre parcel adjacent to the Cool Water Generating Station as described in Edison's April 17, 1998 filing to Houston Industries Power Generation, Inc., or it permitted affiliates, in accordance with the forms of the transaction documents in Edison's April 17, 1998 filing, together with customary ancillary documentation necessary to effectuate the transactions.

2. Edison shall apply the ratemaking treatment approved in D.97-09-049 to this transaction.

3. Thermo ECOtek Corporation (Thermo) is admitted as a party to this proceeding with respect to the transfer and sale of the Ormond Beach electric generation plant and the 50-acre parcel adjacent to the Cool Water Generating Station.

4. Thermo's motion to require Edison to supplement the record is denied.

5. Application 96-11-046 is closed.

This order is effective today.

Dated July 2, 1998, at San Francisco, California.

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