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Decision 00-05-046 May 18, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Orders: (1) Approving Proposed Settlement Agreement Between Southern California Edison Company and Del Ranch, L.P. and Elmore, L.P., and (2) Authorizing Edison's Recovery in Rates of Payments Pursuant to Proposed Settlement.	Application 99-11-036 (Filed November 29, 1999)

O P I N I O N

1. Summary

With this decision, we approve a settlement agreement resolving litigation between Southern California Edison Company (Edison) and two qualifying facilities, Del Ranch, L.P. and Elmore, L.P. (the QFs).[1] We find that the settlement reflects a fair compromise of contentious litigation between Edison and the QFs, and should be approved.

2. Background

The litigation in question concerns the price Edison was required to pay the QFs for electrical energy in 1998. The litigation resulted from an ambiguity in the contract price.

[1] A QF is a small power producer or cogenerator that meets federal guidelines and thereby qualifies to supply generating capacity and electric energy to electric utilities. Utilities were required to purchase this power at prices approved by state regulatory agencies.

In 1984, Edison entered into Interim Standard Offer 4 (ISO4) contracts (Contracts) with both QFs. Edison had a 20-year Contract (QFID No. 3004) with Del Ranch's predecessor-in-interest, Imperial Energy Corporation, and a 30-year Contract (QFID No. 3009) with Elmore's predecessor, Magma Electric Corporation. Each Contract provided that for the first ten years of performance (the "First Period"), Edison would pay the QFs a price based on the Forecast of Annual Marginal Cost of Energy (Forecast). When Edison and the QFs first entered into the Contracts, the parties anticipated that Contract performance would commence in 1985 (in the case of Del Ranch) and 1986 (in the case of Elmore). However, by amendment to both Contracts, executed in 1986, the parties extended the commencement of Contract performance, and of the First Period, to 1989.

At Edison's request, the Commission had approved Edison's Forecast schedules for all its QF contracts for the period 1983-1997 in Decision (D.) 83-09-054. However, because the parties to this proceeding delayed Contract commencement until 1989, D.83-09-054 did not specify the appropriate price for 1998, which was the year after the Commission-approved Forecast schedules expired.

Litigation ensued in Imperial County, with the parties taking divergent positions about the appropriate 1998 Contract price. Edison contended that a Commission decision resolving a similar dispute involving Pacific Gas and Electric Company's (PG&E) ISO4 pricing dictated the outcome in its case. In that decision, D.86-12-104, the Commission set PG&E ISO4 prices for the years 1998-2000. Rather than providing for the price to increase from the 1997 price in each of those years, the Commission established the 1997 price, without escalation, as the price for the three subsequent years, including 1998.

Edison's Forecast price for 1997 was 13.6¢ per kilowatt-hour (kWh). Therefore, Edison contended, following the reasoning of D.86-12-104, that the 13.6¢/kWh price should continue in 1998 and beyond.

While Edison included schedules containing escalated prices for 1998 (14.6¢/kWh) with some of its other QF contracts, it did not do so with the Del Ranch or Elmore Contracts. Del Ranch and Elmore thus alleged that Edison had unlawfully discriminated against them by refusing to pay them escalated forecast energy prices for 1998 while paying such prices to other QFs. Edison's primary defense was that its conduct complied with the Commission's decision in D.86-12-104 not to order price escalation for 1998 and beyond.

The difference between Edison's proposed payments to Del Ranch and Elmore based on a 13.6¢/kWh price, and the QFs' proposed prices, based on 14.6¢/kWh, was approximately $ 7 million, plus interest.[2]

After the parties had engaged in motion practice, written discovery, and settlement talks including a formal alternative dispute resolution meeting, the parties agreed to settle the lawsuit. While the amount of the settlement is confidential, Edison furnished the Commission and ORA full details of the settlement under seal. We have examined the unredacted settlement documents in reaching this decision.[3]

On November 29, 1999, Edison filed this application seeking approval of the settlement agreement and inclusion of the settlement payments in its rates. The Commission's Office of Ratepayer Advocates (ORA) initially indicated its plan to file a protest, and sought and received several extensions of the protest

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[2] Prepared testimony of Dr. Richard B. Davis, filed with Edison's application, at 1-2.

[3] We address Edison's Motion for Protective Order in Section 3(C) below.

period while negotiating with Edison. Ultimately, however, ORA resolved its disputes with Edison without filing a protest. Thus, Edison's application is unopposed.

3. Discussion

A. Test for Approving Settlement Agreements

In determining whether a settlement is fair, adequate, and reasonable, the Commission reviews a number of factors. These factors include whether the settlement reflects the relative risks and costs of litigation; whether it fairly and reasonably resolves the disputed issues and conserves public and private resources; and whether the agreed-upon terms fall clearly within the range of possible outcomes had the parties fully litigated the dispute.[4] The Commission also has considered factors such as whether the settlement negotiations were at arm's length and without collusion, whether the parties were adequately represented, and how far the proceedings had progressed when the parties settled.[5] The Commission will not approve a settlement unless it is "reasonable in light of the whole record, consistent with law, and in the public interest."[6]

Moreover, we have held in the context of evaluating utility-QF settlements that the mere existence of a dispute or a "colorable claim" regarding a contract does not ensure that any settlement of that contract is reasonable. The "colorable claim" must raise "substantive issues of law and fact."

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[4] D.96-05-070, *mimeo.*, at 5, 66 CPUC2d 314, 317 (1996); *see also* D.96-12-082, *mimeo.*, at 9, 70 CPUC 427, 430 (1996), *Re Pacific Gas and Electric Company*, D.88-12-083, 30 CPUC2d 189, 222 (1988).

[5] D.96-05-070, *mimeo.*, at 16-7.

[6] Commission Rules of Practice and Procedure, Rule 51.1(e).

> Before a utility enters into any renegotiation of a [QF] power purchase agreement, it presumably has evaluated the strength of the other party's position. If the other party does not have a unilateral right to make modifications to the contract, then the utility should determine what reasonable concessions can be obtained in exchange for the contract modification sought by the other party.[7] The simple conclusory assertion that a dispute exists is not sufficient grounds to modify a contract.[8]

B. Application of Test Approving Settlement Agreements to This Proceeding

Each of the foregoing factors militates in favor of settlement here. In our view, the settlement reflects the relative risks and costs of litigation. Edison relied on the defense that the Commission had approved the 13.6¢/kWh rate, while Del Ranch and Elmore relied on the fact that Edison had granted the higher 14.6¢/kWh rate to certain other QFs. We have examined the sealed settlement agreement and find that the settlement terms lie within the range of possible outcomes had the matter gone to trial.

There is no evidence of collusion; indeed, the evidence is that the parties hotly disputed the case up until the time of settlement. While Edison affiliates had previously owned interests in Del Ranch and Elmore, an unrelated entity, CalEnergy Company, Inc. (now MidAmerican Energy Holdings Company) acquired those interests two years before commencement of the

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[7] D.98-06-021, 1998 Cal. PUC Lexis 474, at *15, citing D.98-04-023, *mimeo.*, at 13, and D.87-07-026.

[8] *See also* D.98-04-023.

lawsuit. Every indication is that counsel for both parties adequately analyzed the risks and benefits of the parties' respective positions, and advised their clients competently. The QFs' position that they were entitled to the same price increase for 1998 that Edison gave other QFs raises a colorable claim presenting substantive issues of law and fact.

Finally , the parties were well aware of their respective positions given that they engaged in written discovery prior to settlement. The trial was set to begin in February 2000, and Edison filed this application in November 1999, so the parties were well along in the litigation.

Thus, the settlement meets the test of reasonableness and should be approved. Edison should be allowed to recover the settlement payments in its rates.

C. Edison's Motion for Protective Order

With its application, Edison sought confidential treatment of any information reflecting the terms of its settlement with the QFs. Edison justified its claim on the grounds that (1) the settlement agreement itself contains a confidentiality clause that prohibits Edison from revealing the settlement's terms; (2) the settlement terms are confidential and proprietary to Edison because disclosure could cause Edison competitive harm in negotiating settlements of future disputes involving similar issues.[9] As to this latter argument, Edison pointed out that disclosure of the settlement terms would impair Edison's ability in the future to obtain the best possible settlements on behalf of its ratepayers.

We note that in other contexts, Edison has agreed to make public the aggregate settlement payments even while asserting the need for confidentiality

[9] Motion for Protective Order, filed November 3, 1999, at 3.

of individual payments. For example, in D.98-12-072, Edison agreed to aggregate disclosure as a means of settling a dispute over its entitlement to a protective order.

On the other hand, we have approved protective orders in other QF-utility cases where all of the terms of the settlement are kept confidential.[10] Moreover, no party has opposed the application or the motion for protective order.[11] We find that disclosure of the settlement terms would put Edison in breach of the settlement agreement's requirement of confidentiality, and might jeopardize ratepayers by revealing the settlement terms to other potential QF litigants.

Edison had demonstrated good cause to maintain the terms of the settlement agreement in confidence. Therefore, we grant Edison's motion for protective order.

4. Public Utilities Code Section 311(g)(2)

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311 (g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

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[10] D.99-08-008, 1999 Cal. PUC Lexis 499, at *4; D.98-06-021, 1998 Cal. PUC Lexis 474, at *20; D.98-02-112, 1998 Cal PUC Lexis 235, at *3.

[11] As noted above, ORA reviewed the application and jointly with Edison sought several extensions of the protest period in order to negotiate a settlement with Edison whereby it would not file a protest. Ultimately, ORA filed no protest.

Findings of Fact

1. In 1984, Edison entered into ISO4 Contracts with Del Ranch, L.P. and Elmore, L.P. Edison had a 20-year Contract (QFID No. 3004) with Del Ranch's predecessor-in-interest, Imperial Energy Corporation, and a 30-year Contract (QFID No. 3009) with Elmore's predecessor, Magma Electric Corporation.

2. Each Contract provided that for the first ten years (the "First Period"), Edison would pay the QFs a price based on the Forecast of Annual Marginal Cost of Energy (Forecast).

3. When Edison and the QFs first entered into the Contracts, the parties anticipated that Contract performance would commence in 1985 (in the case of Del Ranch) and 1986 (in the case of Elmore). However, by amendment to both Contracts, executed in 1986, the parties extended the commencement of Contract performance, and of the First Period, to 1989.

4. At Edison's request, the Commission had approved Edison's Forecast schedules for all its QF contracts for the period 1983-1997 in D.83-09-054. However, because the parties to this proceeding delayed Contract commencement until 1989, D.83-09-054 did not specify the appropriate price for 1998, which was the year after the Commission-approved Forecast schedules expired.

5. A lawsuit to resolve the 1998 contract price ensued, with Edison contending that the 1997 price should be filled in for the missing 1998 Contract price, and the QFs contending that they should be entitled to a higher price in 1998 because Edison had granted a higher price to certain other QFs. The amount in dispute was approximately $7 million, plus interest.

6. After the parties had engaged in motion practice, written discovery, and settlement talks including a formal alternative dispute resolution meeting, the

parties agreed to settle their disputes. While the amount of the settlement is confidential, Edison furnished the Commission and ORA full details of the settlement under seal.

7. No party protested the application, although ORA sought several extensions of the protest period in order to facilitate negotiations with Edison in which ORA agreed not to file a protest.

8. Edison has sought a protective order for certain portions of its Application and of Exhibits SCE-1 and SCE-2, and for SCE-3 (the settlement agreement) in its entirety on the ground that dissemination of the contents of these documents would harm Edison and ratepayers.

9. No hearing is necessary.

Conclusions of Law

1. The settlement agreement between Edison and the QFs is reasonable in light of the whole record, consistent with law, and in the public interest.

2. The application should be granted as provided in the following order.

3. Edison should be allowed to recover the settlement payments in its rates.

4. Edison's motion for protective order should be granted.

5. In order that benefits of the settlement agreement may be realized promptly, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The application of Southern California Edison Company (Edison) for approval of the settlement of litigation between Edison, Del Ranch, L.P. and Elmore, L.P. (the QFs), as set forth in Exhibit SCE-3 to the application, is granted.

2. The settlement agreement between Edison and the QFs is reasonable in light of the whole record, consistent with law, and in the public interest.

3. Edison shall be allowed to recover the settlement payments in its rates.

4. Edison's motion for a protective order is granted to the extent set forth below.

A. Designated portions of Edison's application and Exhibit Nos. SCE-1 and SCE-2, and Exhibit No. SCE-3 in its entirety, which Edison filed under seal as an attachment to its motion for protective order, shall remain under seal for a period of two years from the date of this decision. During that period, the foregoing documents or portions of documents shall not be made accessible or be disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

B. If Edison believes that further protection of this information is needed after two years, it may file a motion stating the justification for further withholding the material from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than 30 days before the expiration of this protective order.

5. This proceeding is closed.

This order is effective today.

Dated May 18, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners