

Decision 99-10-066 October 21, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.

Rulemaking 94-04-031
(Filed April 20, 1994)

Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.

Investigation 94-04-032
(Filed April 20, 1994)

OPINION REGARDING REQUEST OF SOUTHERN CALIFORNIA EDISON COMPANY FOR A DECLARATORY ORDER REGARDING APPLICABILITY OF PUB. UTIL. CODE § 851

Summary

On August 9, 1999, Southern California Edison Company (Edison) submitted a petition for declaratory order (Petition) to request clarification that the Commission does not require Edison to apply for authority under Pub. Util. Code § 851 to sell, lease, assign, mortgage, or otherwise dispose of or encumber transmission facilities that are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC). We deny Edison's Petition and will not issue such a declaratory order.

Background

On August 10, 1999, Edison filed a proposed amendment to its Interconnection Agreement with the City of Anaheim (Anaheim) at the FERC. The FERC docketed this proceeding as ER99-4039-000. Edison also filed an accompanying application under § 203 of the Federal Power Act (FPA) for

authorization to sell certain metering facilities to Anaheim (§ 203 proceeding). The FERC docketed the § 203 proceeding as EC99-105-000.

On August 9, 1999, Edison filed a related Petition for Declaratory Order asking for a determination that it does not need to file an application pursuant to § 851 for authority to sell certain metering facilities to the City of Anaheim.

The Utility Reform Network (TURN) filed a response to Edison's petition on August 24. TURN recommends that the Commission reject Edison's petition because it is procedurally deficient and seeks overly broad relief.

Discussion

Edison proposes to sell transmission facilities which consist primarily of metering and metering-related facilities at Lewis Substation to Anaheim. Edison explains that Edison and Anaheim are interconnected at Lewis Substation, that currently Edison owns certain meters and metering facilities at the interconnection point, and that pursuant to their Interconnection Agreement, Anaheim pays Edison's costs of owning, operating, and maintaining those facilities through a charge set forth in the Interconnection Agreement.

Edison further explains that Anaheim has entered into a Utility Distribution Company Agreement with the Independent System Operator (ISO), and agreed to replace certain meters at Lewis Substation to conform with ISO metering requirements. Edison states that Anaheim has also requested that Edison sell related equipment associated with metering the interconnection. Specifically, Edison's § 203 application to FERC requests authority to sell certain current transformers, potential transformers, disconnect switches, and pull boxes to Anaheim. Edison's application states that, of the facilities that are the subject of the sale, only certain disconnect switches are currently under the ISO's operational control.

Pub. Util. Code § 851 provides that "No public utility . . . shall sell, lease, assign, mortgage, or otherwise dispose of or encumber . . . property necessary or useful in performance of its duties to the public . . . without first having secured from the commission an order authorizing it to do so." Edison's § 203 application to FERC ignores the requirements of § 851, and asserts that "No . . . state regulatory body is required to pass upon the lawfulness of this transaction."

Edison argues in the Petition that federal preemption precludes the application of § 851 to what Edison describes as "FERC-jurisdictional facilities," and thus it need not file a § 851 application to proceed with sales of any facilities which have been transferred to the control of the ISO, including the proposed sale to Anaheim. We will not grant Edison's Petition. While we approved the transfer of operational control of Edison's transmission facilities to the ISO in D.98-01-053, we did not relinquish regulatory control of the sale of such facilities, as we discuss further below.

In Pacific Gas & Electric Company, et al., 77 FERC ¶ 61,077 (1996) ("the Transmission/Distribution (T/D) Split Decision"), FERC issued an Order approving, with minor modifications, Edison's proposed delineation of certain facilities as either "local distribution" facilities subject to state rate jurisdiction, or "transmission" facilities subject to federal rate jurisdiction. (*Id.* at 61,318.) Edison argues that facilities transferred to the operational control of the ISO are thus FERC-jurisdictional, and that this Commission "does not retain under Section 851 jurisdiction over transfers of FERC-jurisdictional facilities simply because such facilities are 'property.'" The contrary is true. As the relevant FERC decisions recognize, either implicitly or explicitly, FERC jurisdiction over transmission rates does not deprive states of existing statutory authority over disposition of utility property.

For instance, in the T/D Split Decision, FERC stated that its determination as to which facilities were "local distribution" and which were "transmission" was made for the "sole purpose of delineating federal and state ratemaking jurisdiction, which, among other things, will facilitate the implementation of the state's unbundled retail access." (*Id.* at 61,325¹) Similarly, in its landmark Order No. 888,² FERC stated that its efforts to distinguish transmission facilities from distribution facilities was aimed at asserting and defining its jurisdiction over unbundled retail transmission in interstate commerce. (Order 888, at p. 31,781.) FERC asserted its exclusive jurisdiction only over the rates, terms, and conditions of such transmission transactions, in order to ensure open and non-discriminatory interstate transmission service. (*Id.* at 31,781-31,782.) Order 888 clarified that it should not be "construed as preempting or affecting any jurisdiction a state commission . . . may have under applicable state and federal law." (*Id.* at 31,782.) FERC has not held that classifying a facility as "transmission," or transferring operational control of a facility to an ISO, deprives a state commission of historic state authority to approve disposition of utility property.

¹ FERC conditionally authorized transfer of operational control of Edison's transmission facilities to the ISO in Pacific Gas & Electric Company, et al, 77 FERC ¶ 61,204 at 61,822-23 (November 26, 1996). FERC granted interim § 203 authorization for the transfer of operational control of Edison's transmission facilities identified in Appendix A to the Transmission Control Agreement in Pacific Gas & Electric Company, et al, 81 FERC ¶ 61,122, slip op. 262-264 (October 30, 1997). Neither decision supports Edison's position.

² Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996) (Order 888").

In authorizing the transfer of operational control of Edison's facilities to the ISO, we expressly recognized in D.98-01-053 this Commission's continuing jurisdiction over transmission facilities for the purposes of § 851. The CPUC stated that "any future transfer of operational control of the transmission facilities *from* the ISO will, itself, be subject to review under PU Code § 851, whether it is to [Edison or one of the other IOUs] or to some other party." (D.98-01-053, slip op. at 10.) If § 851 review is required for a subsequent transfer of operational control, it follows that § 851 review is required for a proposed transfer of ownership. Edison asks us to clarify that a statement in D.98-01-053 does not require Edison to submit applications under both Pub. Util. Code § 851 and FPA § 203. In fact, we conclusively foreclosed the position Edison asserts in the Petition when we determined that "our jurisdiction under PU Code Section 851 is over utility property, and the subject matter of the Transmission Control Agreement³ remains utility property even under the control of the ISO." (*Id.* at 11, n. 2.)

Therefore, in the proceeding resulting in the issuance of D.98-01-053, we undertook a § 851 analysis for the purpose of transferring operational control, not ownership. Section 851 provides for CPUC review of a variety of proposed transactions, including mortgages, leases, sales, and related transactions. There can be no dispute that if Edison obtained approval pursuant to § 851 to mortgage a facility, and years later desired to sell the facility, a subsequent § 851 proceeding would be required to obtain authority to complete this new transaction. The same is true here. Edison has received § 851 approval to

³ I.e. , facilities transferred to the operational control of the ISO.

transfer operational control of its transmission facilities to the ISO. It has neither requested nor received authority to sell such facilities to any entity.

Disposition of utility property may require both FERC approval under the FPA § 203 and our approval under Pub. Util. Code § 851. The Enova-Pacific Enterprises merger decisions illustrate this fact. Both FERC and this Commission separately approved the merger. FERC treated the case as an application for approval of the disposition of SDG&E's and Enova's jurisdictional facilities occurring in conjunction with the merger. In San Diego Gas & Electric Company, 79 FERC ¶ 61,372 (1997) FERC conditionally approved the proposed disposition of facilities occurring in conjunction with the merger. Importantly, FERC expressly conditioned its approval on approval by this Commission of certain market power mitigation measures. Thus, the FERC decision supports our continued § 851 authority over electric transmission facilities. We note that FERC recently authorized the disposition of the Anaheim facilities in Southern California Edison Company, 89 FERC ¶ 61,009 (1999). In that order, FERC expressly stated that the authorization of this transfer "in no way affect[s] the issue pending before the California Commission. Our actions do not affect other proceedings or constitute a consummation of the transaction to the extent other regulatory approval is pending."

We approved the Enova-Pacific Enterprises merger in March 1998 in D.98-03-073. Although the merger included the disposition of facilities as to which the transfer of operational control to the ISO had been approved in D.98-01-053, the Commission analyzed and approved the merger pursuant to § 851. Therefore, we have made it clear in at least two decisions, D.98-01-053 and D.98-03-073, that we retain the authority to review proposed utility transfers of property under § 851, notwithstanding the fact that the property proposed to be

transferred has been classified as "transmission" or has been transferred to the operational control of the ISO.⁴

We agree with TURN that Edison's request is overly broad. Although Edison's request may appear to be innocuous in the context of the sale of metering facilities to Anaheim, approval of its position would set a dangerous precedent. Edison's Petition asks for a broad determination that disposition of its "transmission" facilities are no longer subject to § 851 review. Edison's Petition makes no distinction between the metering facilities in Anaheim which it describes as transmission facilities, and its thousands of miles of high-voltage transmission lines. Should we determine that § 851 review no longer applies to transmission facilities, this Commission would no longer have the ability to review (e.g., for environmental and other consequences), future proposed sales of transmission lines.

Finally, Edison admits that of the current transformers, potential transformers, disconnect switches, and pull boxes it proposes to sell to Anaheim, "only certain disconnect switches are currently under the ISO's operational control." (Application in EC99-105-000, emphasis added.) Edison's argument as to the Anaheim sale is thus undercut by the facts of this case. Edison presents no rationale for claiming that we have relinquished jurisdiction over the potential transformers, current transformers and pull boxes that are included in the proposed sale.

⁴ See also D.99-04-066 and related decisions in Docket Nos. A.98-02-042, A.98-05-034, and A.98-07-018, in which Edison filed § 851 applications seeking authority to lease available land in transmission rights of way for secondary uses.

Thus, we determine that Edison's petition should be denied. The Petition is essentially a request for an advisory opinion. We seldom issue advisory opinions and decline to do so in this instance. (See, e.g., D.99-08-018, slip. op. at pp. 3-4 and D.98-03-038, 1998 Cal PUC LEXIS 74, p. 5.) While Edison believes the issue is ripe, the request is overly broad and the issue is certainly not sufficiently developed to assist the Commission in reaching a reasoned decision. Edison has not presented any extraordinary circumstances that would lead us to conclude that an advisory opinion should be issued regarding the disposition of transmission facilities.

We recognize that Edison may complain that a § 851 proceeding may unnecessarily delay the completion of the facility transfer. Such a complaint would be unfounded. Edison filed a request with the ISO to approve the facility transfer on February 17, 1999. Approval of the ISO for transactions related to facilities which are part of the ISO-controlled Grid is necessary under the terms of the Transmission Control Agreement. The ISO responded affirmatively on June 7, 1999. However, Edison failed to file any pleading with this Commission until August 9, 1999, when it filed the instant Petition. Any delay in finalizing the facility transfer would be due solely to Edison's delay in bringing this matter to our attention.

Comments on Draft Decision

The draft decision of the administrative law judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure. Edison filed timely comments. We have reviewed these comments and incorporated such changes as we deem appropriate.

Findings of Fact

1. While we approved the transfer of operational control of Edison's transmission facilities to the ISO in D.98-01-053, we did not relinquish regulatory control of the sale of such facilities.
2. In authorizing the transfer of operational control of Edison's facilities to the ISO, we expressly recognized our continuing jurisdiction over transmission facilities for the purposes of § 851.
3. Edison's request for a declaratory order is overly broad in asking for a broad determination that disposition of transmission facilities is no longer subject to § 851 review.
4. Should we determine that § 851 review does not apply to transmission facilities, this Commission would no longer have the ability to review future proposed sales of transmission lines.
5. We seldom issue advisory opinions and decline to do so here.

Conclusions of Law

1. FERC jurisdiction over transmission rates does not deprive states of existing statutory authority.
2. Pub. Util. Code § 851 provides for this Commission's review of a variety of proposed transactions, including mortgages, leases, sales, and related transactions.
3. Disposition of utility property may require both FERC approval under the FPA § 203 and this Commission's approval under Pub. Util. Code § 851.
4. Edison has received § 851 approval to transfer operational control of its transmission facilities to the ISO; however, Edison has neither requested nor received authority to sell such facilities to any entity.

5. Edison has not presented any extraordinary circumstances that would lead us to conclude that an advisory opinion should be issued regarding the disposition of transmission facilities.

6. Edison's Petition for a Declaratory Order should be denied.

O R D E R

IT IS ORDERED that Southern California Edison Company's Petition for a Declaratory Order, filed on August 9, 1999, is denied.

This order is effective today.

Dated October 21, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners