

Decision **PROPOSED DECISION OF ALJ GAMSON** (Mailed on 1/9/2015)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Nevada Hydro Company,

Complainant,

vs.

Southern California Edison Company
(U338E),

Defendant.

Case 14-09-002
(Filed on September 9, 2014)

**DECISION GRANTING MOTION TO DISMISS
BY SOUTHERN CALIFORNIA EDISON COMPANY**

Summary

The Nevada Hydro Company filed Case 14-09-002 on September 9, 2014. This decision grants the October 22, 2014 Motion to Dismiss by Southern California Edison Company.

1. Background

In Rulemaking (R.) 12-03-014, the Commission’s 2012 Long-Term Procurement Plans (LTPP) docket, Decision (D.) 13-02-015 (known as the Track 1 Decision) and D.14-03-004 (known as the Track 4 Decision) authorized Southern California Edison Company (SCE) to procure resources to meet long-term local capacity needs through 2022 in southern California in order to ensure continued reliability in that area. While many supply and demand factors were

taken into account, the main driver of the Track 1 Decision was the expected closure of thousands of megawatts (MW) of “once-through cooling” gas-fired power plants in southern California over the next several years. Similarly, the main driver of the Track 4 Decision was the unexpected early retirement of the approximately 2200 MW San Onofre Nuclear Generating Station (SONGS).

Ordering Paragraph (OP) 1 of each of the Track 1 and Track 4 Decisions authorized SCE to procure some resources from conventional power plants (i.e., gas-fired, including certain types of combined heat and power resources), and some preferred resources (i.e., energy efficiency, demand response, energy storage, and renewable resources such as wind and solar). Taken together, these Decisions authorized SCE to procure between 1900 and 2500 MW. OP 1 of the Track 1 Decision authorized SCE to procure such resources in the West Los Angeles (LA) sub-area of the LA Basin, a portion of SCE’s territory.¹ OP 5 of the Track 4 Decision required SCE to prioritize procurement in the West LA sub-area “to the extent possible”.

OP 5 of the Track 1 Decision required SCE to submit a Procurement Plan to the Commission’s Energy Division, so that Energy Division could verify compliance with the Track 1 Decision. In its Procurement Plan, which was approved as compliant by Energy Division on August 31, 2013, SCE detailed a plan to conduct a Request for Offers (RFO) to procure electrical capacity exclusively within the West LA sub-area.

The Track 4 Decision at 92 authorized SCE to procure resources authorized by both the Track 1 and Track 4 Decisions under its approved Procurement Plan.

¹ The Track 1 Decision also authorized SCE to procure between 215 and 290 MW in the Big Creek/Ventura Local Area.

The Track 4 Decision at Order 12 allowed, but did not require, SCE to amend its Procurement Plan to include procurement in the LA Basin as a whole (i.e., not only in the West LA sub-area). SCE did not seek to amend its Procurement Plan.

On September 9, 2014, The Nevada Hydro Company (Nevada Hydro) filed its Complaint. On October 22, 2014, SCE filed its Answer to the Complaint and a Motion to Dismiss the Complaint. On November 6, 2014, Nevada Hydro filed its Response to the Motion to Dismiss. On November 13, 2014, SCE filed a Motion to Strike portions of Nevada Hydro's response to the Motion to Dismiss; Nevada Hydro responded to this Motion on November 26, 2014.

A prehearing conference (PHC) was held on December 9, 2014. Nevada Hydro failed to appear at the PHC. Approximately ten minutes before the PHC, the representative of Nevada Hydro sent an e-mail to the ALJ stating: "Due to a serious scheduling mix up, I cannot get to San Francisco for today's meeting. I know this is entirely bad form, but I am not sure what to do. Again, sorry." This communication was noted in the transcript of the PHC.

2. Procedural Issues

Nevada Hydro plans a 500 MW advanced pumped storage facility in Lake Elsinore (Riverside County), California, known as LEAPS. LEAPS would be located approximately 20 miles from the retired SONGS facility, but not in the West LA sub-area.

Nevada Hydro states that on January 6, 2014, it was notified by SCE that the LEAPS proposal was "non-conforming because the interconnection is not in the LA Basin or Moorpark as required by the RFO." After the Track 4 Decision was issued, Nevada Hydro states that it contacted SCE twice (in March and April 2014) asking SCE to reassess its previous denial and consider LEAPS to fill

the need identified in the Track 1 and Track 4 Decisions, but received no response from SCE.

Nevada Hydro alleges that SCE is in violation of state law and policy and Commission directives in its implementation of the Track 1 and Track 4 Decisions by not allowing Nevada Hydro to bid the LEAPS project into SCE's RFO for procurement stemming from the Track 1 and Track 4 Decisions.

Specifically, Nevada Hydro alleges that AB 2514 (Stats, 2010, Ch. 469, codified as Pub Util. Code Section 2835 et seq.) and the Track 4 Decision require consideration of LEAPS by SCE. In general, AB 2514 directed the Commission to determine targets for each load-serving entity to procure viable and cost-effective energy storage systems and to adopt energy storage procurement targets. Nevada Hydro also alleges that SCE limited the geographic scope of its procurement area in order to bypass the Commission's mandate that it consider large storage and other preferred resources. Nevada Hydro cites to language in the Track 4 Decision at 14 stating that "the utility is to procure renewable generation to the fullest extent possible," and other language that Nevada Hydro alleges requires that SCE must consider storage facilities, including LEAPS, ahead of non-preferred resources in meeting authorized procurement targets.

Therefore, Nevada Hydro specifically requests that the Commission order SCE to "expeditiously incorporate LEAPS into its evaluation of the procurement allowances in the LTPP Proceeding and abide by the requirements of Order 8 of the Track 4 Decision which sets forth the evaluation criteria against which the effectiveness of LEAPS (and all resources) is to be measured." (Complaint at ¶ 56).

3. SCE Motion to Dismiss

SCE claims that Nevada Hydro provides no cause of action because SCE is following the Commission's procurement directives in the Track 1 and Track 4 Decisions. SCE does not dispute that SCE did not amend its Procurement Plan to go beyond the West LA sub-area and include the LA Basin as a whole, as this was a discretionary act. SCE also points out that LEAPS will be located in Riverside County and interconnecting to the SCE-owned portion of the California Independent Systems Operator (CAISO) grid in Riverside County. Riverside County is not in the West LA sub-area, and the facility is not connected to one of the substations that the CAISO identified as an effective location.² Therefore, SCE argues the proposal did not meet the requirements of the RFO and Nevada Hydro's bid was appropriately rejected as non-conforming. Therefore, SCE argues that the Complaint should be dismissed.

4. Discussion

The standard for review of a Motion to Dismiss is as follows: A Motion to Dismiss "requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and matters of law." D.14-03-032 at 4. A complaint should be dismissed if, "taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law." (D.12-03-037 at 7 (quoting D.99-11-023).) The Commission more recently elaborated on this standard, stating: "By assuming that the facts as alleged in the complaint are true for the purpose of deciding whether to grant a motion to dismiss, we assume that complainant will be able to prove everything alleged in its complaint." (D.12-03-037 at 7.) The Commission does "not accept

² OP 4 of the Track 1 Decision required SCE in its RFO to include 12 elements, including coordination with the CAISO on "use of the most up-to-date effectiveness ratings."

as true the ultimate facts, or conclusions, that Complainant alleges, for instance, that [the utility] has violated its tariffs. After accepting the facts as stated, the Commission examines them in the light of applicable law and policy.” (*Id.* at 7.) “In determining if the complaint’s allegations are ‘well pleaded,’” the Commission is “guided by the standards set forth in Public Utilities Code Section (Pub. Util. Code § 1702), which provides that the complainant must allege that a regulated utility has engaged in an act or failed to perform an act in violation of any law or commission order or rule.” (D.12-07-005 at 7.)

The facts in this proceeding regarding the levels of procurement required by the Track 1 and Track 4 Decisions, the process of SCE’s Procurement Plan and RFO, and SCE’s decision to not consider LEAPS, are not in dispute. Nor is there any dispute about the location of LEAPS and where it interconnects to the SCE system. Further, there is no dispute about the language of Assembly Bill (AB) 2514 or the Track 1 and Track 4 Decisions. Thus we can determine whether Nevada Hydro should prevail based on undisputed facts and matters of law.

First, we consider SCE’s Motion to Strike. SCE claims that Nevada Hydro misstated or misrepresented several numbers from the Track 1 and Track 4 Decisions, leading to misrepresentations of Nevada Hydro’s claims in its Complaint. In its response, Nevada Hydro acknowledges that it miscalculated certain figures. Nevada Hydro seeks to revise its Complaint to correct these miscalculations. We will accept the revisions proposed by Nevada Hydro. With these revisions, the Motion to Strike is moot and is therefore denied.

The question before the Commission is one of interpretation of law and policy. On their faces, neither the Track 1 nor Track 4 Decisions required SCE to consider any resources located outside of the West LA sub-area. It is undisputed that:

- a. LEAPS would be located outside of the West LA sub-area,
- b. The Commission specifically directed SCE to prioritize procurement in the West LA sub-area,
- c. The Commission provided a specific discretionary mechanism for SCE to expand procurement beyond the West LA sub-area, and
- d. SCE used its discretion not to expand its procurement area.

Nevada Hydro is essentially arguing that the totality of AB 2514 plus policy language in the Track 1 and Track 4 Decisions promoting renewable and/or preferred resources (including storage resources) created a requirement for SCE to consider LEAPS in its RFO. AB 2514, as codified in Section 2836(a) (1-4), states:

1. On or before March 1, 2012, the commission shall open a proceeding to determine appropriate targets, if any, for each load-serving entity to procure viable and cost-effective energy storage systems to be achieved by December 31, 2015, and December 31, 2020. As part of this proceeding, the commission may consider a variety of possible policies to encourage the cost-effective deployment of energy storage systems, including refinement of existing procurement methods to properly value energy storage systems.
2. The commission shall adopt the procurement targets, if determined to be appropriate pursuant to paragraph (1), by October 1, 2013.
3. The commission shall reevaluate the determinations made pursuant to this subdivision not less than once every three years.
4. Nothing in this section prohibits the commission's evaluation and approval of any application for funding or recovery of costs of any ongoing or new development, trialing, and testing of energy storage projects or

technologies outside of the proceeding required by this chapter.

The Commission opened R.10-12-007 to implement AB 2514. In that docket, D.13-10-040 adopted procurement targets and “The Energy Storage Procurement Framework and Design Program” for SCE and other utilities. D.13-10-040 at 33-34 specifically discussed its relationship to the LTPP proceeding:

Within the LTPP proceeding, the Commission is presently conducting an evaluation of system need, which is anticipated to be completed in early 2014, and has added a new track, to consider the local reliability impacts of a potential long-term outage at the San Onofre Nuclear Power Station (SONGS). The procurement targets and the schedule for solicitations proposed here are not presently tied to need determinations within the LTPP proceeding. Instead, in the near term, we view the Storage Framework adopted herein as moving in parallel with the ongoing LTPP evaluations of need – system and local, and with the new consideration of the outage at SONGS. In the longer term, we expect that any procurement of energy storage will be increasingly tied to need determinations within the LTPP proceeding. (footnotes omitted)

The LTPP proceeding, in the Track 1 and Track 4 Decisions, did evaluate local need and require specific procurement of energy storage resources. In OP 1(b) of the Track 1 Decision, SCE was required to procure at least 50 MW of local capacity from energy storage resources. SCE recently filed Application 14-11-012 pursuant to the Track 1 and Track 4 Decisions and its approved Procurement Plan. In this Application, SCE proposes to procure 263.64 MW of energy storage resources in the West LA sub-area.

Nevada Hydro asserts that AB 2514 requires that advance pumped storage systems be considered equally and receive the same benefits as other storage systems, based on language in Section 2835(a)(1) and 2835(a)(3) that would apply the statute to “commercially available” and “cost effective” energy storage technologies. D.13-10-040 – the Commission decision implementing AB 2514 – specifically excluded pumped storage resources over 50 MW (such as LEAPS) from eligibility to bid into the energy storage solicitations pursuant to that decision. However, the Track 1 and Track 4 Decisions required that SCE not exclude large pumped storage, thus providing a level playing field for advanced pumped storage systems with other energy storage systems.

There is no basis to conclude that AB 2514 required SCE to allow LEAPS to bid into SCE’s procurement RFO pursuant to the Track 1 and Track 4 Decisions. The mandate of AB 2514 that the Commission open a proceeding and adopt procurement targets (if appropriate) for energy storage resources has been met by D.13-10-040.

D.13-10-040 did not require that the LTPP proceeding adopt additional energy storage procurement, but at 36 did specifically address the issue of large-scale pumped storage in the LTPP proceeding:

We strongly encourage the utilities to explore opportunities to partner with developers to install large-scale pumped storage projects where they make sense within the other general procurement efforts underway in the context of the LTPP proceeding or elsewhere.

The Track 1 Decision at 61 stated that “we intend to promote the inclusion of energy storage technologies in SCE’s upcoming procurement process.” Ordering Paragraph 6 of that decision required SCE, in its Procurement Plan, to show that a specific plan to undertake integration of resources including energy

storage in order to meet or reduce local capacity requirement needs through 2021. The Track 4 Decision at 102 required that “bulk energy storage and large pumped hydro facilities should be not excluded” from SCE’s solicitation.

Nevada Hydro alleges that SCE effectively excluded large pumped storage facilities, including LEAPS, from consideration by limiting its RFO to the West LA sub-area. There is no dispute that SCE did not consider LEAPS in its RFO, however there is no evidence that SCE excluded any other large pumped storage facilities which would be located in the West LA sub-area and which may otherwise met the criteria of the RFO.

Further, Nevada Hydro argues that D.14-03-004 required SCE to consider advanced pumped storage facilities like LEAPS, even if not in the West LA sub-area, based on language continuing the Commission’s ongoing policy of promoting preferred resources (explicitly at footnote 3 including energy storage resources). There is no dispute that the Commission has consistently for several years promoted preferred resources in many dockets and venues. The Track 1 and Track 4 Decisions continued this preference. There is also no dispute that the Track 1 and Track 4 Decisions, consistent with D.13-10-040, called for SCE to consider (and procure at least 50 MW of) energy storage resources, and to not exclude advanced pumped storage in its RFO solicitation consistent with other provisions of those decisions.

However, the preferences and requirements regarding consideration of energy storage procurement stemming from the Track 1 and Track 4 Decisions cannot be considered in a vacuum. These decisions also recognized that SCE must address other factors in its RFO. Specifically, OP 4 of D.13-02-015 lists

12 criteria for SCE's RFO. Order 4(a),(c) and (l) contained requirements for SCE's RFO³: "The resource must meet the identified reliability constraint identified by the California Independent System Operator;" "The consideration of costs and benefits must be adjusted by their relative effectiveness factor at meeting the CAISO identified constraint;" and "use of the most up-to-date effectiveness ratings."

In considering AB 2514 and the Track 1 and Track 4 Decisions, it is clear that SCE was required to consider and give preference to preferred resources (including energy storage) and to adhere to specific reliability criteria. However, the Track 1 and Track 4 Decisions were fundamentally decisions concerning local reliability. The May 12, 2012 Track 1 Scoping Memo stated: "Overall, the purpose of this rulemaking is to ensure a reliable and cost-effective electricity supply in California through integration and refinement of a comprehensive set of procurement policies, practices and procedures underlying long-term procurement plans." The March 21, 2013 Track 4 Scoping Memo stated: "Track 4 will consider the local reliability impacts of a potential long-term outage at the SONGS generators, which are currently not operational."

In order to ensure that resources procured for the purposes of the Track 1 Decision would meet the primary reliability purposes of the LTPP proceeding, the Commission specifically provided that SCE should procure resources in the West LA sub-area. The Track 4 Decision required SCE to prioritize procurement in the West LA sub-area. In order to allow flexibility for SCE to consider resources beyond the West LA sub-area in the event such resources were

³ These requirements also held for procurement authorized by D.14-03-004, as SCE was authorized to procure pursuant to that decision via the RFO authorized in D.13-02-015.

necessary for reliability purposes, the Commission provided a discretionary mechanism for SCE to modify its Procurement Plan if, in its judgment and in consultation with the CAISO, SCE wished to procure resources pursuant to the Track 1 and Track 4 Decisions beyond the West LA sub-area. SCE exercised its discretion not to expand the procurement area.

The Track 1 and Track 4 Decisions provided policy guidance and certain mandates for types of procurement, consistent with the primary objective of local reliability. Thus, SCE was required to procure certain amounts of preferred resources, and give certain preferences to preferred resources, within the geographic area necessary to ensure reliability.

Nevada Hydro attempts to turn the purposes of these decisions on their heads by creating a mandate to procure (or at least require SCE to consider bids for) resources which were not necessary for local reliability. Put another way, if LEAPS was located in the West LA sub-area, SCE would have been required to consider this project in its RFO and to apply to it certain preference criteria. Because LEAPS was not located in the West LA sub-area, and because SCE did not extend the RFO beyond the West LA sub-area, SCE had no obligation to consider this project. Nevada Hydro's argument that SCE must consider LEAPS in its RFO simply because it is the closest large pumped storage facility to the West LA sub-area is not supported by law or Commission policy.

Nevada Hydro is not entitled to prevail as a matter of law or in light of applicable law and policy. SCE has not failed to perform an act, in violation of any law or Commission order or rule. On this basis, the Motion to Dismiss is granted.

5. Proceeding Category and Need for Hearing

The Instruction to Answer filed on September 22, 2014, categorized this complaint as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings. SCE's Motion to Dismiss is granted. Therefore, this complaint is dismissed, and the evidentiary hearings determination is changed to state that no evidentiary hearings are necessary.

6. Comments on Proposed Decision

The proposed decision of ALJ Gamson in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed by Nevada Hydro Company on January 29, 2015, and reply comments were filed by Southern California Edison Company on February 3, 2015.

In its comments, Nevada Hydro provides proposed edits to the Proposed Decision. Included in these edits is a change to Conclusion of Law #1 to state "There are material disputed facts in this proceeding." If there are material disputed facts, the Motion to Dismiss should be denied, as Nevada Hydro would have. However, Nevada Hydro also provides proposed edits to Conclusion of Law #6 to add language that LEAPS "does not connect directly to an SCE substation within" the West LA sub-area. Nevada Hydro also provides a variety of other proposed edits.

The issue is not whether there are facts in dispute; there are. The issue is whether there are material facts in dispute. As discussed herein, the material facts are those which would determine whether SCE violated the underlying decisions. Nevada Hydro has provided no new information to challenge the Findings of Fact or Conclusions of Law which support this determination in the

Proposed Decision. If anything, Nevada Hydro's proposed edit concerning Conclusion of Law #6 concerns a further undisputed material fact in support of the Proposed Decision. Other proposed edits do not address material facts; they are either not material or involve legal arguments which have been considered in the Proposed Decision.

7. Assignment of Proceeding

Michel Peter Florio is the assigned Commissioner and David M. Gamson is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Nevada Hydro's proposed LEAPS project would be located outside of the West LA sub-area of the LA Basin local area in SCE's territory.
2. In the Track 1 and Track 4 Decisions, the Commission specifically directed SCE to prioritize procurement in the West LA sub-area.
3. In the Track 4 Decision, the Commission provided a specific discretionary mechanism for SCE to expand procurement beyond the West LA sub-area.
4. SCE used its discretion to not expand its procurement area beyond the West LA sub-area.
5. AB 2514 required the Commission to open a proceeding to determine appropriate targets, if any, for each load-serving entity to procure viable and cost-effective energy storage systems.
6. The Commission opened R.10-12-007 to implement AB 2514. In that docket, D.13-10-040 adopted procurement targets and "The Energy Storage Procurement Framework and Design Program" for SCE and other utilities.
7. D.13-10-040 anticipated further energy storage procurement would take place in the LTPP and other proceedings.

8. The LTPP proceeding, in the Track 1 and Track 4 Decisions, evaluated local need and required SCE to procure at least 50 MW of energy storage resources.

9. The Track 1 and Track 4 Decisions required that SCE not exclude large pumped storage in its procurement RFO (consistent with other elements delineated in the Decisions), thus providing a level playing field for advanced pumped storage systems with other energy storage systems.

10. The Track 1 and Track 4 Decisions required SCE to consider and give preference to preferred resources (including energy storage) and to adhere to specific reliability criteria.

11. The Scoping Memos of the Track 1 and Track 4 Decisions delineated the reliability purposes of the proceeding.

Conclusions of Law

1. There are no material disputed facts in this proceeding.

2. With the revisions in Nevada Hydro's response to SCE's Motion to Strike, SCE's Motion to Strike is moot and should be denied.

3. There is no basis to conclude that AB 2514 required SCE to allow LEAPS to bid into SCE's procurement RFO pursuant to the Track 1 and Track 4 Decisions.

4. To the extent that AB 2514 requires that advanced pumped storage systems be considered equally and receive the same benefits as other storage systems, the Track 1 and Track 4 Decisions achieve this outcome for the purposes of the LTPP proceeding.

5. It is clear from the Scoping Memos for Track 1 and Track 4 that the Track 1 and Track 4 Decisions were fundamentally decisions concerning local reliability.

6. Nevada Hydro's argument that SCE must consider LEAPS in its RFO simply because it is the closest large pumped storage facility to the West LA sub-area is not supported by law or Commission policy.

7. SCE did not violate the Track 1 and/or Track 4 Decisions by limiting its procurement RFO to the West LA sub-area.

8. Nevada Hydro is not entitled to prevail as a matter of law or in light of applicable law and policy.

9. SCE has not failed to perform an act, in violation of any law or Commission order or rule.

10. Hearings are not necessary.

11. The SCE Motion to Dismiss should be granted.

O R D E R

IT IS ORDERED that:

1. The October 22, 2014 Southern California Edison Company Motion to Dismiss Case 14-09-002 is granted.

2. The hearing determination is changed to no hearings are necessary.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.