Decision **DRAFT DECISION OF ALJ VIETH** **(Mailed 11/29/2005)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Order Approving Contracts to Secure Additional Capacity for System Reliability in SP-15.	Application 05-06-003 (Filed June 2, 2005)

OPINION GRANTING MOTION TO WITHDRAW APPLICATION

Summary

We grant the motion of Southern California Edison Company (SCE) to withdraw this application. Accordingly, we close this proceeding.

Procedural Background

By motion filed June 3, 2005, SCE sought speedy resolution of this proceeding and submitted a proposed schedule aimed at issuance of a Commission decision by December 2005. SCE contemplated that the Commission would receive a number of oppositions to this application. We did and the assigned Administrative Law Judge (ALJ) granted SCE leave to reply to them. By ruling on July 18, 2005, the ALJ set a prehearing conference (PHC) for August 2, 2005 and requested PHC statements. We received multiple PHC statements prior to the PHC and subsequently, on August 19, 2005, we received 12 comments from 13 parties (one a joint filing) on questions the Assigned Commissioner and ALJ asked at the PHC. In addition, on August 2, 2005 the

Alliance for Retail Energy Markets and a group of parties collectively identifying themselves as the CCA Community[1] filed a motion to dismiss; on August 3, 2005 they filed an amended motion to dismiss. We received related responses and replies to the motion.

The Assigned Commissioner's September 9, 2005 scoping memo denied the motion to dismiss, identified factual issues for hearing and legal/policy issues for briefing, and set a schedule. On September 21, 2005, SCE filed a motion to withdraw this application. On October 2, 2005, West Coast Power LLC (West Coast Power)[2] and Pacific Gas and Electric Company (PG&E) filed responses in support of SCE's motion; Calpine Corporation (Calpine) filed an opposition. The ALJ granted SCE leave to reply and SCE did so on October 17, 2005. On September 22, 2005, the ALJ issued a stay of the schedule in this proceeding.

Discussion

As filed, SCE proposed to acquire up to 1,500 megawatts (MW) of capacity through new power purchase agreements with terms of up to ten years to serve the southern California region known as "South of Path-15" (SP-15) beginning in the summer of 2006.[3] At the PHC, SCE explained that it would allocate to its

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[1] CCA means "Community Choice Aggregation"; the members of the CCA Community comprise the Local Government Commission Coalition, the County of Los Angeles, the City of Chula Vista, the City of Moreno Valley, the Inland Valley Development Agency, and the Community Environmental Council.

[2] West Coast Power is a partnership owned equally by subsidiaries of Dynegy Power Corp. and NRG West Coast LLC.

[3] SCE based its proposal on forecasts by the California Energy Resources Conservation and Development Commission and California Independent System Operator and

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bundled customers approximately 1,000 MW of the 1,500 MW it sought to acquire, thereby satisfying its long-term procurement plan (LTPP) in this manner rather than with other, shorter-term resource acquisitions. SCE intended to acquire the remaining 500 MW for the benefit of the rest of SP-15.

SCE proposed that all electricity customers in SP-15 bear the costs of the contracts and stated its intention to request the Federal Energy Regulatory Commission (FERC) to authorize recovery in transmission rates. If FERC declined to levy the transmission charge, SCE proposed that we authorize recovery from all customers of the three jurisdictional utilities in SP-15 (SCE, San Diego Gas & Electric Company and Bear Valley Electric Service) – whether those customers subscribe to bundled service, Direct Access, or Community Choice Aggregation.

The Assigned Commissioner's scoping memo authorized SCE to proceed with review of two-thirds of its proposal, or 1,000 MW. The Assigned Commissioner stated:

> Implementation must be considered in the context of existing state policy and so, in delineating the application's appropriate scope, I begin by acknowledging the following premises. First, existing state policy encourages investor-owned utilities (IOUs) to acquire appropriate amounts of new generation (including renewable generation resources) over time to serve their bundled customers. Second, existing state policy does not obligate SCE (or other IOUs) to acquire new generation for other load serving entities, including

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argued that proposed long-term contracts would enable construction of new generation by securing the necessary financing. At the PHC, SCE conceded the timeline was very tight to bring new generation on line by summer 2006 and some parties contended it was impossible.

> energy service providers. Thus, the focus of this proceeding immediately narrows – and the ultimate questions become:
>
> > Should the Commission authorize SCE to enter into long-term contracts for up to 1000 MW to serve its bundled load?
> >
> > Who should pay the cost of such contracts, especially if the cost is higher than contracts for 1000 MW of existing generation?
>
> (Scoping memo, p. 5.)

SCE has declined to go forward and instead, has filed this motion to withdraw its application. SCE's reply states, moreover, that:

> SCE has terminated the RFO [Request for Offers] through which it was to obtain the power purchase agreements that would be submitted for Commission approval under the Application. This means that SCE has discontinued negotiations relating to the indicative bids that were submitted in response to the RFO, returned bidders' deposits, and otherwise ended all aspects of the RFO process. (SCE reply, p. 2.)

Thus, SCE contends that we can do nothing other than grant its motion. While we will grant the motion for the reasons discussed below, we are compelled to remind SCE that there are limits on a utility's right to withdraw any application filed at the Commission. We recognize that the Commission has not definitively drawn those limits, stating only that the right does not extend to withdrawal after issuance of a proposed decision.[4] Nonetheless, a utility that

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[4] See *In re Southern California Gas Company* 1992 Cal PUC LEXIS 340 *4, 43 CPUC2d 639, where the Commission stated.

> We need not speculate on the possible circumstances which would cause us to regard dismissal or withdrawal as no longer a matter of right. It is

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presumes a right to withdraw a filed matter bears the risk of a contrary determination by the Commission.

In this case, two factors weigh in favor of granting the motion to withdraw. Procedurally, this proceeding is still at an early stage, since SCE filed the motion before any prepared testimony had been distributed. Substantively, we recognize that our review of SCE's long-term procurement plan (LTPP) does not expressly direct SCE to acquire additional long-term resources, though it notes it might be "prudent" for SCE to do so.[5] While the scoping memo would allow SCE to acquire additional long-term resources, SCE has declined to do so except on the terms proposed in its application.

> sufficient that we indicate that submission of a matter upon an evidentiary record and obtaining a proposed decision within the meaning of Section 311(d) involve steps which clearly make termination a matter of the Commission's discretion.

See also *In re Southern California Edison Company* 1996 Cal PUC LEXIS 127 *4, 65 CPUC2d 130 [Edison does not have the unilateral right to withdraw its application under all circumstances].

[5] The Commission decision approving SCE plans states:

> We find that SCE's LTPP is reasonable, subject to the compliance requirements ... SCE has demonstrated that its primary residual resource need through 2011 is for peaking, dispatchable and shaping resources. SCE has considerable need for peaking and shaping resources, which should be obtained through short, medium- and long-term acquisitions. SCE's strategy of relying primarily on short and mid-term contracts during this planning period is reasonable, *but it may be prudent to add some long-term resources*. SCE is authorized to present such a case to the Commission as an implementation of its LTPP by way of application following a RFP. (D.04-12-048, Ordering Paragraph 5, emphasis added.)

We recognize that several other entities besides SCE have voiced concern that non-utility customers benefit from utility resource acquisitions but do not share the costs. Responses to SCE's motion from PG&E and West Coast Power ask us to commence a proceeding to look at the larger issues raised by SCE's application, and Calpine's response, without specifying the issues going forward, also urges "a defined process and clear procedures." (Calpine response, p. 2.) More specifically, PG&E urges establishment of a program to assure investment in long-term resources and argues:

> The foundation of such a program is the adoption of multi-year resource adequacy requirements that require every LSE [load-serving entity] – including community choice aggregators, energy service providers and local publicly-owned electric utilities – to demonstrate that it has arranged for adequate supply over a minimum five year period. (PG&E response, p. 1.)

West Coast Power essentially concurs with PG&E:

> [A]ny successor proceeding must allow SCE, other LSEs, and affected parties to provide testimony on whether resource commitments made by one LSE in the form of long-term PPAs [purchase power agreements] have reliability benefits that accrue to all customers in SP26 [part of SP-15] and, if so, whether such costs should be allocated to such customers. (West Coast Power response, p. 2.)

We intend to bear these issues in mind as we consider the scope of inter-related procurement proceedings in 2006. A utility-specific application is not a preferred forum for developing statewide policies on these important issues.

Finally, because we allow SCE to withdraw this application, there is no need to rule on its September 9, 2005 request for a protective order. Neither need we rule on the need to file under seal the document tendered with the application as SCE-1 [Confidential], entitled "Testimony supporting Application

for Approval of Contracts to Secure New Generation Capacity for SP-15."[6] SCE should contact the Commission's Central Files to arrange, as it prefers, to collect the document or to request that our staff destroy the document.

Comments on Draft Decision

The draft decision in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. No comments were filed.

Assignment of Proceeding

Dian M. Grueneich is the Assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

Findings of Fact

1. SCE filed its motion to withdraw this application before any prepared testimony had been distributed.

2. Decision 04-12-048 does not expressly direct SCE to acquire additional long-term resources, but merely notes it might be "prudent" for SCE to do so.

Conclusions of Law

1. SCE's motion to withdraw this application should be granted.

2. There is no need to rule on SCE's September 9, 2005 request for a protective order or on its request to file under seal the document tendered with

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[6] Rule 2.7(b) of the Commission's Rules of Practice and Procedure Provides establishes the general provision that "*testimony and exhibits shall not be filed* with the Docket Office." (Emphasis added.) Accordingly, where a utility provides prepared testimony in support of an application at the time the application is tendered for filing, the preferred practice is to serve both the application and the prepared testimony on the service list but tender the application, only, for filing.

the application as SCE-1 [Confidential], entitled "Testimony supporting Application for Approval of Contracts to Secure New Generation Capacity for SP-15."

3. To provide certainty to SCE and all parties, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. We grant the September 21, 2005 motion of Southern California Edison Company (SCE) to withdraw Application 05-06-003.
2. SCE's September 21, 2005 motion for a protective order is moot.
3. SCE shall contact the Central Files Office of the California Public Utilities Commission and arrange, as it prefers, to collect or to have staff destroy the document marked by SCE as SCE-1 [Confidential] and entitled "Testimony Supporting Application for Approval of Contracts to Secure New Generation Capacity for SP-15."
4. The September 22, 2005 Administrative Law Judge ruling staying the schedule in this proceeding is confirmed; no hearings shall be held.
5. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.