

Decision 10-06-009 June 3, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U338E) For Authorization to Recover Costs Necessary to Co-Fund a Feasibility Study of a California IGCC with Carbon Capture and Storage.

Application 09-04-008
(Filed April 3, 2009)

DECISION ON PETITION TO MODIFY DECISION 09-12-014

1. Summary

This decision modifies Decision (D.) 09-12-014 to clarify the scope of cooperative activities the Commission expects among the Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company and the means for active supervision in connection with the Hydrogen Energy California project approved in D.09-12-014.

2. Background

2.1. Decision 09-12-014

Decision (D.) 09-12-014 approved the application of Southern California Edison Company (SCE) to recover certain costs necessary to co-fund feasibility studies of a California integrated gasification combined cycle plant with carbon capture and storage (CCS). The plant is known as the Hydrogen Energy California (HECA) project. The decision found that the HECA project helps California meet clean energy goals and comply with legislative greenhouse gas requirements because it produces electricity with only modest increases of greenhouse gas. The decision found it reasonable for SCE to commit up to

\$17 million to the Phase I feasibility studies associated with HECA and up to \$13 million in Phase II studies that will further examine the project's permitting, engineering, and economics if the Phase I feasibility studies demonstrate that further studies are warranted.

This Application had its roots in Resolution E-4227A which was adopted on February 20, 2009 and directed, in part, SCE to fund Phase I of a feasibility study to evaluate an integrated gasification combined cycle plant and to file an application to request recovery of those costs. Resolution E-4227A also encouraged Pacific Gas and Electric Company (PG&E) and San Diego Gas & Electric Company (SDG&E) to cooperate on the HECA project:

While this advice letter was filed by SCE, we encourage the two other investor-owned utilities (IOU), Pacific Gas and Electric Company and San Diego Gas & Electric Company, as well as the publicly-owned utilities to become partners in the HECA Study project and for all utilities to work together on commercializing carbon capture and storage (CCS) technology. We suggest that SCE seek out this involvement from the other IOUs. We do acknowledge general support for emerging technologies on the part of all three IOUs, but do encourage them to work together on this particular HECA project. If the California utilities work together, the costs and risks of this and other CCS projects can be shared broadly so that the benefits can be realized by all Californians. If shown to be technically feasible and commercially reasonable, the HECA facility, and potentially other generation utilizing CCS technology, will be low-carbon, baseload generation resources that will advance California's move towards reduced greenhouse gas emissions while producing reliable power within the state and with locally derived fuel sources.¹

¹ Resolution E-4227A, Summary, quoted in D.09-12-014 at 52.

In comments to the proposed decision (PD), SCE requested that the Commission specifically authorize “the State’s investor-owned utilities (IOUs) to enter into joint discussions with HEI [Hydrogen Energy International]² to negotiate the terms and conditions (including price, quantity and scheduling arrangements) for one or more power purchase agreements (PPA) for the power output from HECA; and, if appropriate, enter an agreement . . . , subject to prior Commission review and approval.”³ HEI’s comments raised similar issues. Citing the language quoted above from Resolution E-4227A, the Commission did not include additional language because the resolution authorized the IOUs to take cooperative actions in this regard.

Since Resolution E-4227A has already asked SCE to seek cooperation on commercialization of HECA power, and because commercialization requires the sale and purchase of electricity, there is no need to address further the request for the authorization of cooperation by the utilities in this decision.⁴

Thus, while the Commission expressed its support for cooperative actions, and potentially in negotiations of a PPA, D.09-12-014 did not specifically require such cooperation or negotiations.

² Hydrogen Energy California LLC (HECA LLC) is a direct subsidiary of HEI. HEI’s comments to the Petition state that the HECA project is HECA LLC’s “primary mission.” (HEI’s comments at 1.) Hereafter, HEI refers to HEI and HECA LLC unless otherwise noted.

³ SCE Comments on the PD at 3, quoted in D.09-12-014 at 47.

⁴ D.09-12-014 at 52.

2.2. The Petition

On May 6, 2010, SCE, PG&E and SDG&E (jointly, the IOUs) filed this petition for modification of D.09-12-014 (Petition).⁵ The IOUs recognize that D.09-12-014 authorized them to partner in the HECA Study but explain that the decision did not provide further direction regarding the scope of joint-utility cooperation on HECA. The IOUs believe that further Commission direction is now needed to address a legal issue regarding joint-utility cooperation posed by the antitrust laws that could impede the IOU's ability to respond to Resolution E-4227A. The IOUs argue that unless the Commission specifically grants the IOUs state action immunity for their cooperation in the HECA project, such cooperation could be viewed as a violation of the antitrust laws, thus subjecting the ratepayers or shareholders to the significant costs of defending an antitrust lawsuit and the potential of treble damages if the lawsuit is successful.

Because the IOUs wish to pursue meaningful joint discussions with HEI on the HECA project at the earliest opportunity, they requested expedited treatment of the Petition. A May 7, 2010 Administrative Law Judge's (ALJ) ruling shortened the comment period so that opening comments were due on May 17, 2010, and stated that there would be no replies.

On May 17, 2010, HEI filed an answer to the Petition and the Division of Ratepayer Advocates (DRA) and The Utility Reform Network (TURN) filed responses thereto.

HEI's answer supports the Petition and urges the Commission to vote on it expeditiously as the IOUs request. According to HEI, on July 1, 2009, HECA LLC

⁵ *Petition to Modify Decision 09-12-014 by Southern California Edison Company (U 338-E), Pacific Gas and Electric Company (U 39 E), and San Diego Gas & Electric Company (U 902 E).*

was selected by the National Energy Technology Laboratory of the United States Department of Energy (DOE) for negotiations leading to a \$308 million award. The DOE required, as a condition to entering into a Cooperative Agreement and thus access to funding, that HECA LLC demonstrate a plan for the HECA project to achieve commercial power sales through a PPA. The DOE also wished to expedite its typical negotiation period and executed the HECA LLC Cooperative Agreement on September 30, 2009.⁶ HEI goes on to state that:

. . . [o]n September 18, 2009, HECA LLC and SCE (jointly, 'the Parties') entered into a Letter Agreement that provides, in part, that the Parties will use good faith efforts to negotiate and execute a term sheet by December 10, 2009, as well as negotiate and agree upon, by the later of July 1, 2010 or three months following the commencement of Phase II front end engineering and design ('FEED'), one or more PPA(s) between the Parties in a form sufficient for submittal to the CPUC for approval. This Letter Agreement was used to provide the demonstration of commitment to commercial power sales required by the DOE. The HECA LLC Cooperative Agreement was then executed on September 30, 2009. A similar agreement was executed with Pacific Gas & Electric Company.⁷

HEI explains that the Phase I feasibility study is completed. According to HEI, Phase II will address the next step of feasibility and refine costs and analyses.⁸ HEI further states that the IOUs have been reluctant to commence negotiations for any PPA collectively or separately as expressed in detail in the Petition, and that the delay associated with the legal antitrust concern has been a

⁶ HEC Answer to Petition at 3-4.

⁷ *Id.*

⁸ *Id.* at 3.

major impediment to HECA project implementation and the schedule and expectations of the DOE funding Cooperative Agreement negotiations. HEI therefore urges the Commission approve the Petition.

DRA opposes the Petition on multiple grounds. DRA believes the Petition exceeds the scope of D.09-12-014 because the decision only addressed SCE's need for investing in a study and that issues pertaining to joint IOU cooperative activities on the HECA project are not within the scope of this application. Particularly, DRA states that negotiations regarding a PPA constitute project development which is outside the proceeding's scope. DRA points out that SCE only raised the issue of antitrust immunity for joint PPA negotiations in comments to the PD and that the Commission failed to adopt SCE's requested change to the PD.

DRA also argues that the Federal Power Act restricts the Commission from regulating wholesale rates, and the clearly articulated state policy must be a specific legislative directive for the utilities to be immune from antitrust laws under the State Action Doctrine. Finally, DRA states that the requested relief is unnecessary. DRA believes the IOUs could all form a procurement vehicle that would purchase power for the three of them while keeping each party's confidential information protected from the other parties, and then submit the PPA to the Commission for approval in accordance with D.07-12-052. In any event, DRA argues that whatever approach is used, it should be transparent, competitive with the IOUs' solicitation as are other bilateral contracts, and subject to reasonableness review and approval. If this Petition is approved, DRA fears that the Commission will have directed the IOUs to enter into a PPA that cannot be reviewed for reasonableness.

TURN opposes the Petition because it is inadequately supported and seeks overbroad relief at this juncture. TURN states that the requested modification is not slight, as stated in the Petition, and that this same issue was raised in the comments to the PD and rejected. TURN argues that nothing in the Petition indicates a change in circumstance as to why the Commission should adopt a different outcome here. According to TURN, the facts presented in HEI's answer are unverified and vague such that they do not give the other parties a meaningful opportunity to address them. TURN therefore urges the Commission to ignore the new factual assertions in HEI's answer. TURN also argues that if the Commission considers these assertions, the facts that the Cooperative Agreement was signed in September 30, 2009 and that negotiations stalled shortly thereafter cast doubt on the need for expeditious action here because the IOUs have not acted expeditiously to bring this issue to the Commission. TURN also argues that the conduct authorized by the Commission should be specifically tailored to the situation and that the Petition fails to give the Commission a sufficient basis for determining the appropriate limits and is overbroad.

TURN recommends the Commission deny the Petition without prejudice and direct the IOUs to work in consultation with other interested parties to develop a more detailed proposal for the process they intend to pursue with each other and HEI toward developing a PPA for the output from the HECA facility. In the alternative, TURN recommends the Commission authorize further coordination and discussion only insofar as necessary to develop a joint proposal for the process the IOUs expect to pursue with each other and with HEI. Once the utilities present such a joint proposal, the Commission can then consider extending its authorization as appropriate.

3. Discussion

While we are disappointed that the IOUs did not file this Petition in a more timely and thorough fashion, D.09-12-014 recognized the important benefits of the HECA project to California's ability to meet its clean energy goals. In this unique instance, we consider the relief requested in the Petition on its merits.

HEI indicates that the Phase I feasibility study is complete, but under the Cooperative Agreement, the parties undertook to negotiate and agree upon, by the later of July 1, 2010 or three months following the commencement of Phase II, one or more PPAs between the parties in a form to submit to the Commission for approval.

D.09-12-014 approved the terms for SCE to conduct feasibility studies for the HECA project. Yet, it appears that the parties' cooperative agreements concerning the HECA project require the terms of PPAs to be negotiated prior to the Phase II studies being complete, and that the endeavor is stalled because of the antitrust issue.

Courts have articulated the State Action Doctrine to determine whether a state's legislative and regulatory actions remove certain private commercial conduct from scrutiny under the federal antitrust laws.

"Private party conduct is immune from antitrust liability only if the party claiming immunity shows that its conduct satisfies two requirements. First, it must be 'clearly articulated and affirmatively expressed as state policy.' [*California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)(*Midcal*)] (internal quotation marks omitted.) This may be satisfied if the conduct is a 'foreseeable result' of the state's policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39, 42, 105 S.Ct. 1713, 1716-17, 1718, 85 L.Ed.2d 24 (1985). Second, the conduct must be 'actively supervised by the State

itself.’ *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943 (internal quotation marks omitted). This is satisfied only if ‘state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.’ (remaining citations omitted.)” *Nugget Hydroelectric, Inc. v. Pacific Gas & Electric Co.*, 981 F.2d 429, 434 (9th Cir. 1992).

We reiterate here the importance of the HECA project to California’s ability to meet its clean energy goals. In order for the IOUs to commence meaningful negotiations with HEI, and in light of the requirements necessary to demonstrate immunity under the State Action Doctrine, we believe it is prudent to modify D.09-12-014 to clarify that the cooperative activities the Commission expects among the IOUs related to the HECA project shall be deemed to be undertaken at the express direction and under the supervision of the Commission in furtherance of an expressly articulated state policy. We therefore modify D.09-12-014 as set forth below in the Ordering Paragraphs.

DRA argues that PPA negotiations constitute project development which is outside the scope of this proceeding. We disagree for the limited purposes of addressing the State Action Doctrine with respect to this activity.

In D.08-04-038, concerning SCE’s application to incur and recover costs necessary to determine the feasibility of a clean hydrogen power generation plant, we addressed a similar issue. There, intervenors argued that SCE should not recover activities related to the design or construction of the facility as project development. SCE argued that analyzing a specific site location was interrelated with, and thus necessary to, the feasibility study. We therefore found in the unique instance of this emerging technology that the activities associated with

the feasibility study are to support new generation and not associated with a proposed project.⁹

Here, although negotiating the PPAs would generally be considered project development, because the completion of the PPAs is so intertwined with the timing of the feasibility studies and DOE funding, particularly concerning Phase II, we address the State Action Doctrine with respect to such activities as delineated in the Ordering Paragraphs below. However, if the IOUs were later to submit a PPA, nothing in this decision determines at this time whether the Commission would approve it.

DRA's arguments concerning the state action immunity are unpersuasive. First, DRA states that the Commission cannot regulate the actions of the utilities, because they involve the purchases of their electricity in the wholesale market, which is the exclusive province of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA), 16 U.S.C. §§ 824, *et seq.* However, as the Commission found in both D.07-01-039 at 203 and D.09-12-042 at 8-9 and n. 11, under section 201(b) of the FPA, 16 U.S.C. § 824(b), FERC regulates the seller in the wholesale market, but leaves the reasonableness of the procurement decisions of the retail electric utilities to state commissions. The Commission further found in both D.08-03-018 at 81-82 and D.09-12-042 at 12, that "in enacting the FPA, Congress did not intend, either explicitly or implicitly, to occupy the field of the environmental regulation of the power sector."

DRA also argues that for the state action immunity to apply, for the first prong of the test for state action immunity, the "clearly articulated state policy"

⁹ D.08-04-038 at 17-18.

has to be statutory authority for the specific state directive. We disagree with DRA. For the first prong of the test for state action immunity, it is sufficient for general state statutory or state constitutional authority to authorize a state agency, such as the Commission, to then specifically address the anticompetitive conduct.¹⁰ Article XII, section 6 of the California Constitution and numerous sections of the California Public Utilities Code (e.g., §§ 451, *et seq.*) clearly reflect such general authorization for state regulation of the rates of electric utilities. In addition, in Assembly Bill 32 (Stats. 2006, ch. 488),¹¹ and Senate Bill 1368 (Stats. 2006, ch. 598),¹² the Legislature has also made clear by statutory provisions the importance of the Commission's efforts to reduce greenhouse gas emissions.

Our modifications concerning active state supervision, the second prong of the test for State Action immunity, require, among other things, that the IOUs make regular progress reports on the progress and status of the IOU activities in support of the HECA. Additionally, we make clear that DRA and TURN, the only other parties who actively participated in all phases of the underlying matter which lead to D.09-12-014, shall also have access to these reports and other appropriate documents pursuant to the confidentiality restrictions of Public Utilities Code Section 583 (for DRA) or the non-disclosure agreements provided in the Procurement Review Group process (for TURN). Thus, DRA and TURN will have access to information regarding this process and can also

¹⁰ See, *Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas & Electric Co.* (10th Cir. 2001) 244 F.3d 1220, 1226-1227 (State does not have to point to a specific, detailed legislative authorization for the challenged conduct. The State's Constitution or statute may merely manifest the State's intent to displace competition with regulation of electric utilities.)

¹¹ See, Cal. Health and Safety Code §§ 38501(g) and 38592.

¹² See, Cal. Pub. Util. Code §§ 8340 and 8341.

monitor it. If the IOUs jointly submit a proposed PPA to the Commission for approval, we can at that time determine which other parties, if any, can have access to necessary confidential information under an appropriate non-disclosure agreement. Moreover, if the utilities were to later submit a proposed PPA, nothing in this decision determines at this time whether the Commission would approve it.

4. Comments on the PD

The PD of Commissioner Michael R. Peevey was mailed to the parties on May 19, 2010, in accordance with Section 311 of the Public Utilities Code. The time for public review and comment was reduced to 15 days pursuant to Rule 14.6 (c)(9) of the Commission's Rules of Practice and Procedure, and the time for filing comments was set for no later than May 28, 2010. The public interest in the Commission issuing a decision at its regularly scheduled June 3, 2010, business meeting clearly outweighs the public interest in having the full 30-day period for review and comment because of the need for the IOUs to pursue meaningful joint discussions with HEI on the HECA project as soon as possible.

TURN, HEI, SCE and DRA filed comments. We make one change, clarifying that agreements between parties for confidential treatment of information (with DRA) or for non-disclosure of information (with TURN or other parties) go into effect immediately and without Commission action.

5. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Timothy J. Sullivan is the assigned ALJ in this proceeding.

Findings of Fact

1. The HECA project is important to California's ability to meet its clean energy goals.
2. We wish the IOUs to commence meaningful negotiations with HEI concerning the HECA project pursuant to D.09-12-014 as soon as possible.

Conclusions of Law

1. Private party conduct is immune from antitrust liability under the State Action Doctrine only if the party claiming immunity shows that its conduct satisfies two requirements. First, it must be clearly articulated and affirmatively expressed as state policy. Second, the conduct must be actively supervised by the State itself.
2. D.09-12-014 should be modified to include specific language addressing the State Action Doctrine as set forth in the Ordering Paragraphs below.
3. If the IOUs later submit a proposed PPA on the HECA project, nothing in this decision should determine at this time whether the Commission should approve it.
4. This decision should be effective immediately so that the IOUs may pursue meaningful joint discussions with HEI on the HECA project as soon as possible.

O R D E R

IT IS ORDERED that:

1. The May 6, 2010 Petition to Modify Decision 09-12-014 by Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company is granted to the extent set forth in Ordering Paragraphs 2 and 3 below.
2. Decision 09-12-014 is modified to add Conclusion of Law 15 at page 61:

15. In further recognition of the importance of the HECA project to California's ability to meet its clean energy goals, the Commission hereby determines that the State's IOUs - SCE, PG&E, and SDG&E - should jointly pursue commercialization of carbon capture and sequestration technology via the HECA project, and that their exchange of confidential and/or competitively-sensitive information related to the HECA project shall be deemed to have been undertaken at the express direction and under the supervision of the Commission in furtherance of an expressly-articulated state policy.

3. Decision 09-12-014 is modified to add Ordering Paragraphs 6, 7, and 8 at page 62:

6. In recognition of the need for affirmative steps to induce public and private investment in alternative energy technologies capable of meeting goals for clean energy to meet future demand from California's consumers, the Commission has determined it is necessary and appropriate to exercise its authority pursuant to California Public Utilities Code Sections 451, 729 and 8341. In the exercise of this authority, the Commission authorizes the participation of the State's three investor-owned utilities (IOUs), Southern California Edison Company (SCE), Pacific Gas and Electric Company, and San Diego Gas & Electric Company, in a joint effort to pursue commercialization of carbon capture and sequestration technology via the Hydrogen Energy California (HECA) project. Such IOU participation shall include the following measures (IOU Activities):

- (a) joint and cooperative consultations between and among the IOUs and Hydrogen Energy International and/or Hydrogen Energy California LLC (HEI) to assist with determination of the construction and operating characteristics of the HECA project for the purpose of facilitating the development of a commercial-scale project;
- (b) joint and cooperative discussions and negotiations both among the IOUs themselves and then between the IOUs

collectively and HEI to establish, subject to approval of the Commission, the terms and conditions for one or more power purchase agreements (PPAs) for the power output from HECA, including all necessary elements of a commercial arrangement such as development and construction benchmarks, performance guarantees, and the price, quantity, and scheduling specifications for the output of the plant;

- (c) joint submission to the Commission for its approval by application, pursuant to Sections 451, 729 and 8341 as determined by the Commission, of a proposed PPA or PPAs for the power output from HECA;
- (d) joint submission to the Commission of regular progress reports at intervals of not less than six months on the progress and status of the IOU Activities in support of HECA described in subsections (a) - (c) above, including reports regarding the development of information sharing guidelines and procedures to facilitate the Commission's supervision of the development of the HECA project and associated contractual arrangements, the first of which reports shall be submitted by December 31, 2010; and
- (e) at the discretion of the Commission's Energy Division, appointment of an Independent Evaluator (IE) to assist in the Commission's supervision of the IOU's joint negotiation of a PPA for the output of the HECA project and associated contractual arrangements. SCE shall pay the costs of the IE out of the feasibility study funds previously authorized in Decision 09-12-014.

7. The Division of Ratepayer Advocates (DRA) and The Utility Reform Network (TURN) shall have access to the reports to the Commission, referenced above, and, in addition, DRA and TURN, may seek any additional documents exchanged between each of the IOUs relating to the Hydrogen Energy California (HECA) project or between any investor-owned utility and Hydrogen

Energy International and/or Hydrogen Energy California LLC relating to the HECA project, provided that documents marked confidential shall remain confidential pursuant to California Public Utilities Code Section 583 or the non-disclosure agreements provide in the Procurement Review Group Process.

8. Any agreements reached between the parties with respect to the Hydrogen Energy California Project, with the exception of agreements pertaining to the confidential treatment or non-disclosure of information, must be filed with the Commission for approval and shall be of no force and effect until filed with the Commission and approved in a written order after Commission review.

4. This proceeding is closed.

This order is effective today.

Dated June 3, 2010, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

TIMOTHY ALAN SIMON

NANCY E. RYAN

Commissioners