

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) for Approval of a Power Purchase Agreement Between the Utility and an Affiliate and for Authority to Recover the Costs of Such Power Purchase Agreement in Rates.

Application 05-12-030
(Filed December 23, 2005)

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING IN PART AND DENYING IN PART SOUTHERN CALIFORNIA EDISON'S MOTION FOR A PROTECTIVE ORDER

Summary

This ruling grants, in part, and denies in part, Southern California Edison's (Edison) Motion for a Protective Order (Motion) filed on December 23, 2005, in connection with Application 05-12-030 (Application), an application for approval of a power purchase agreement between Edison and an Edison affiliate, Kern River Cogeneration Company (KRCC). This ruling grants Edison's request to protect information related to its economic analysis and negotiation strategy associated with the KRCC power purchase agreement (KRCC Contract), but denies Edison's request to protect information in the KRCC Contract.

Background

Edison filed two versions of its Application for approval of a non-standard power purchase agreement between Edison and KRCC¹, a public version and a

¹ Edison states that KRCC is a qualifying facility (QF) 50% owned by an Edison affiliate.

confidential version filed under seal.² Information that Edison considers confidential has been redacted in the public version. Redacted information includes specific terms of the KRCC Contract, and associated negotiation strategy and economic analysis.³ Edison contends that the power purchase agreement will benefit customers and is not harmful to non-affiliated QFs, and that although the negotiations were with an Edison affiliate, the negotiations were at “arms-length”. Edison explains that during the negotiations Edison rejected certain KRCC price offers and that Edison is prepared to offer comparable terms to other similarly situated non-affiliated QFs. Edison requests that this application be approved no later than April 30, 2006, in order that ratepayers may immediately benefit from the terms of the KRCC Agreement.

Edison’s Motion requests an order protecting: 1) portions of the filed testimony in support of the Application including economic analyses and negotiation strategy, and 2) the KRCC Contract (Confidential Information). Edison contends the Confidential Information includes “market sensitive information” that if revealed would place Edison at an unfair business advantage, and furthermore would harm ratepayers. Edison argues that release of the terms and conditions of the KRCC Contract is likely to place Edison at a disadvantage when negotiating a future contract and provide a counterparty leverage in negotiations. Edison explains that the information related to the negotiation of, and the economic analysis of, the KRCC Contract includes the tools Edison employs in evaluation of offers it receives. Edison also notes that

² Edison filed the confidential version under Public Utilities Code Sections 454.5(g) and 583, and Commission General Order 66-C.

³ All of the redacted information is included in Edison’s prepared testimony and is intended to demonstrate that the KRCC Contract is the result of arms-length negotiations, compares favorably to standard offer contracts, is in the customers’ interest, and will not harm non-affiliated QFs.

QF contracts are an issue in the avoided cost Rulemaking (R.) 04-04-025, and that a determination regarding treatment of confidential and market sensitive information is an issue in R.05-06-040.⁴ Edison offers to make any necessary changes to its redacted materials in accordance with any decision emanating from R.05-06-040.

On January 9, 2006, The Utility Reform Network (TURN) and the California Cogeneration Council (CCC) filed responses in opposition to Edison's Motion. TURN, noting that it generally favors confidential treatment of market sensitive information, argues that in this case the terms of the KRCC contract should be public as the QF is an Edison affiliate, and the contract may reflect favoritism. TURN also contends that Edison's willingness to offer similar contract terms to other QFs similarly situated removes the benefit of affording the contract confidential treatment as the terms will be known to other QFs. TURN supports Edison's request to maintain the confidentiality of the strategy and economic analyses used in the negotiations with KRCC.

CCC also argues that the KRCC Contract should be public. CCC explains that disclosure of the KRCC Contract to non-affiliated QFs is one means of ensuring that non-affiliated QFs receive equal treatment. Furthermore, CCC questions the meaning of Edison's term "similarly situated", and whether the application of this term might preclude non-affiliated QFs from receiving similar contract terms. As the R.04-04-003 proceedings may be impacted by the outcome of this application, CCC contends QF parties should have the ability to review the KRCC Contract terms and not be denied disclosure as this might impact arguments in the R.04-04-003 proceeding. Similar to TURN's position, CCC

⁴ The Commission is reviewing confidentiality in R.05-06-040, a rulemaking to implement Senate Bill 1488 (2004 Cal. Stats., Ch. 690).

supports Edison's request to maintain the confidentiality of the strategy and economic analyses used in the KRCC negotiations.

On January 19, 2006, Edison replied to the TURN and CCC oppositions to Edison's Motion (Edison Reply). Edison's Reply, quoting Code Section 454.5(g), argues that the KRCC Contract should remain confidential regardless of whether the contract is between Edison and an affiliate. Edison contends public knowledge of the contract will create a "floor" for future non-affiliated contract negotiations. Edison further contends the purpose of the Commission review of KRCC Contract terms is not to offer similar terms to non-affiliated QFs, but to determine whether the contract is fair to non-affiliated QFs. As an alternative, Edison proposes that if the KRCC Contract is publicly produced, it should be subject to limitations including prohibitions against reviewing parties participating in non-affiliated QF negotiations.

Discussion

In many prior QF contracts Edison and other utilities have been granted orders protecting QF contract information from public view except to specific Commission staff. In those QF contracts, negotiated with non-affiliated QFs, prices and terms were granted confidential treatment, and generally other parties did not protest protection of the information. However, in this instance, both CCC and TURN have raised questions of fairness and access to the KRCC Contract. Furthermore, Edison has stated it will grant similar contract prices and terms to non-affiliated QFs, and thus the information Edison seeks to protect may become known to other parties. While Edison is correct that the purpose of this proceeding is not whether similar QFs should receive similar contracts, nevertheless, in the interest of fairness and equal treatment non-affiliated QFs should have an opportunity to review the actual KRCC Contract.

As both CCC and TURN point out, granting confidential status in this proceeding does impact the use of this information in other proceedings including R.04-04-003. After conferring with the assigned administrative law judges in related proceedings, they agree it would be improper to grant a protective order in this Application that might impact the use of the KRCC contract information in their proceedings. On that basis also, the terms included in the KRCC contract should not be protected.

Finally, all parties recognize that unlike many other applications for approval of non-standard QF contracts, this Application is between Edison and an affiliate. KRCC is not only an affiliate, but an affiliate that was the subject of a substantial disallowance on the basis of a QF agreement.⁵ Although this by itself is not sufficient to warrant disclosure of the proposed KRCC contract, it does imply that close review and scrutiny by parties may be necessary to determine the absence of favoritism.

While Edison has proposed an alternate solution that would restrict and limit parties' review and use of KRCC Contract terms and conditions, that solution would limit the use of this information in a way that essentially protects the information but in a different manner. Thus, this proposal is unworkable.

In all considerations of whether sensitive information should be protected it is necessary to balance the needs for protection against the rights of other parties to review the information. In this case, and for the reasons explained above, Edison's Motion to protect the KRCC Contract should be denied.

Although this ruling denies Edison's Motion regarding the KRCC Contract, no party has objected to Edison's request to protect its strategy and economic analyses used in negotiating the KRCC Contract. In fact, both CCC

⁵ See, D.90-09-088, 37 Cal.PUC 2d, 488.

and TURN have recognized Edison's right to protect this information. Edison has demonstrated that disclosure of its strategy and economic analyses used in negotiating the KRCC Contract is worthy of protection. Public disclosure of this information used in Edison's negotiations with KRCC could affect the outcome of other QF contract negotiations. Therefore, Edison's Motion to protect its negotiation strategy and economic analysis associated with the KRCC Contract should be granted.

In order to implement this ruling and continue this proceeding, Edison should amend its Application consistent with the above discussion.

Protective Order Rulemaking

This ruling is issued under current considerations for protecting information as defined by Public Utilities Commission Code Sections 454.5(g) and 583, and General Order 66-C and related Commission rules. As a Commission decision in R.05-06-040 will be relevant, if not definitive, to confidentiality issues in this proceeding, future confidentiality rulings in this proceeding will take any Commission decision in R.05-06-040, when issued, into account.

Therefore, **IT IS RULED** that:

1. The December 23, 2005, Motion of Southern California Edison Company for a protective order is denied in part and granted in part as described above.

2. In order to continue this proceeding, Edison should amend its Application consistent with this ruling.

Dated January 26, 2006, at San Francisco, California.

/s/ BRUCE DeBERRY

Bruce DeBerry
Administrative Law Judge

