

Decision 11-04-007 April 14, 2011

**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 Results of Fast Track of Its New Generation Request for Offers and for Cost Recovery.

Application 07-02-026  
(Filed February 28, 2007)

In the Matter of the Application of Southern California Edison Company (U338-E) for Approval of Results of Standard Track of Its New Generation Request for Offers and for Cost Recovery.

Application 08-04-011  
(Filed April 4, 2008)

**DECISION APPROVING AMENDED CONTRACT  
AND DENYING REQUESTS TO MODIFY PRIOR DECISIONS**

This decision approves Southern California Edison Company's amended and restated contract with CPV Sentinel, LLC, which is an amendment, restatement and consolidation of a contract previously approved by the Commission in Decision (D.) 08-04-011 and a contract previously approved by the Commission in D.08-09-041. This decision denies Southern California Edison Company's petitions to modify those prior decisions in order to achieve this result. These proceedings are closed.

**1. Background**

Decision (D.) 08-04-011 in Application (A.) 07-02-026 approved, among other things, Southern California Edison Company's (SCE) 10-year contract with CPV Sentinel for up to 455 megawatts (MW) of capacity and energy from five

combustion turbine generators to be located in Riverside County, California, which was slated to be on-line by August 1, 2010 (CPV Sentinel I contract).

D.08-09-041 in A.08-04-011 approved, among other things, SCE's separate 10-year contract with CPV Sentinel that added up to 273 MW of expected capacity and energy from three additional gas turbines at the same facility in Riverside County, which was slated to be on-line by May 1, 2012 (CPV Sentinel II contract).

After approval of the contracts, CPV began taking steps to construct the projects. The construction process, however, coincided with a lawsuit brought by the Natural Resources Defense Council (NRDC) and others against the South Coast Air Quality Management District (SCQAMD) challenging the validity of the SCQAMD's internal bank of offsets for PM10 emissions known as the Priority Reserve. Then-existing law required every air pollution control district or air quality management district in a federal nonattainment area for any national ambient air quality standard pollutant to establish, by regulation, a system by which all reductions of air contaminant emissions used to offset certain future emission increases are banked prior to use. The SCAQMD promulgated various rules establishing offset exemptions, providing priority reserve offsets and creating or tracking credits used for offset exemption or priority reserve projects. In *NRDC v. SCAQMD*, the Los Angeles Superior Court found certain of SCAQMD's rules to be in violation of the California Environmental Quality Act. (*NRDC v. SCAQMD*, Sup. Ct. Los Angeles Co., 2007, No. BS 110972.) Following that ruling, the SCAQMD stopped issuing any permits based on Priority Reserve PM10 emission offsets or exemptions from these offsets, which prevented CPV from obtaining the air permits it needed to construct the CPV projects.

In response to the *NRDC* decision, the state legislature took action in order to allow construction of new generation within the SCAQMD. In particular, Assembly Bill 1318, among other things, allowed the SCAQMD to transfer a limited number of emission credits from its Priority Reserve to the CPV projects upon CPV's payment of mitigation fees and the California Energy Commission's validation of the offsets. The delays in obtaining permits, however, made it impossible for CPV to complete construction of the CPV Sentinel I and CPV Sentinel II projects by their respective expected initial delivery dates of August 1, 2010, and May 1, 2012.

SCE negotiated and entered into an amended contract with CPV, which is an amendment and restatement of the CPV Sentinel I and II contracts into a single contract. The amended contract changes the Sentinel I and II contract prices, provides for an August 1, 2013, initial delivery date<sup>1</sup> (with potential extension to May 1, 2014), and makes other minor changes to the original contract terms.

On December 10, 2010, SCE filed a petition to modify D.08-04-011, which approved the CPV Sentinel I contract, and a petition to modify D.08-09-041, which approved the CPV Sentinel II contract, by adding identical findings of fact, conclusions of law, and ordering paragraphs to both decisions to the effect of approving the amended, consolidated contract. No party filed a response to either of the petitions.

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<sup>1</sup> The amended contract provides for potential extension of the initial delivery date to May 1, 2014 if the Commission has not approved the amended contract and if certain legal actions have not been resolved in CPV's favor by June 30, 2011.

By Administrative Law Judge (ALJ's) ruling dated March 15, 2011, the proceedings were consolidated.

## **2. Motions to File Under Seal**

By motions filed concurrently with the petitions to modify D.08-04-011 and D.08-09-041, SCE seeks to file under seal contract and contract valuation information contained in those petitions. Specifically, SCE claims confidential treatment pursuant to Matrix Section VII(B) of D.06-06-066 for contract information contained at 3, 6, 9, and 13, Appendices A and C, and portions of Appendices B, D and E of both petitions, and pursuant to Matrix Section VIII(B) for contract valuation information contained at 3, 12 and 13, portions of Appendices B, D and E of both petitions.

Matrix Section VII(B) provides that bilateral electric contract terms and conditions (other than contract summaries) shall be confidential for three years from the date the contract states deliveries are to begin. Matrix Section VIII(B) provides that specific quantitative analysis involved the scoring and evaluation of participating bids in a competitive solicitation for electric resources (other than evaluation guidelines) shall be confidential for three years after the winning bidders are selected. Because this information is overlapping, we will apply the later expiration date of Matrix Section VII(B) to all of this information. This information shall be sealed until August 1, 2016. The information under seal shall not be made accessible or disclosed to anyone other than the Commission and its staff, except upon further order of the Commission.

SCE also claims confidential treatment for information that SCE received under non-disclosure agreements contained at 15, 16, 17 and 18 of Appendix D of both of the petitions. SCE asserts that Ordering Paragraph 4 of D.06-06-066 has found this information to be confidential pursuant to Pub. Util. Code Section 583

and General Order (GO) 66-C. To the contrary, Ordering Paragraph merely states that GO 66-C shall continue to apply to data not addressed in the Matrix. As we stated, Pub. Util. Code Section 583 does not create a right to confidential treatment; rather, it provides a process for handling information for which a utility claims confidential treatment. (D.06-06-066, at 27-28.) SCE's assertion that it "would not normally disclose this information to anyone except Commission staff, who would receive it according to" GO 66-C is not instructive either: GO 66-C does not govern the treatment of information offered into the record of a Commission proceeding; rather, it governs the public release of information provided by utilities to Commission staff. Finally, the fact that SCE has entered into a private non-disclosure agreement does not bind the Commission or determine whether the information in the record of the proceeding should be sealed. The information contained at 15, 16, 17 and 18 of Appendix D of both petitions, under the headings "Water Interconnect" and "Imported Water (Cost Decrease)," will not be sealed.

### **3. Request to Modify D.08-04-011 and D.08-09-041**

We reject SCE's petitions to the extent that they seek to modify D.08-04-011 and D.08-09-041. While SCE identifies changed circumstances which merit Commission approval of the amended CPV contract - which, ultimately, is the extent of the relief that SCE seeks - the mere fact of new and changed circumstances (as opposed to incorrect or flawed information on the record of the proceeding) is not sufficient cause to reopen a closed proceeding. The changed circumstances that led to the need to amend the CPV contract do not put into question the appropriateness of the Commission's prior determinations in D.08-04-011 and D.08-09-041 approving the CPV Sentinel I and II contracts, and SCE does not challenge them; indeed, SCE relies on those decisions as

demonstrating why the Commission should now approve the amended CPV contract. In fact, SCE does not seek to modify any of the findings of fact, conclusions of law, or ordering paragraphs of D.08-04-011 and D.08-09-041; rather, SCE merely seeks to add to them.

D.08-04-011 and D.08-09-041 properly resolved the issues before it, namely, whether the CPV Sentinel I and II contracts should have been approved. SCE now seeks resolution of the entirely new question of whether its amended contract is reasonable; there is no cause to revisit and re-evaluate the Commission's prior determinations in order to address these new circumstances.

Granted, the Commission has entertained petitions for modification for the purpose of approving amendments to previously-approved contracts, including in this very proceeding: D.10-10-029 granted SCE's previous petition to modify D.08-09-041 in order to approve amendments to another contract (the "El Segundo" contract), stating that the petition for modification was the proper procedural vehicle because the Commission had accepted it for this use in another previous proceeding. (D.10-10-029, at 15.) However, allowing parties to petition for relief that is beyond the scope of the underlying closed proceeding upon a mere showing of inevitably changed circumstances would unduly compromise decisional certainty as well as the due process rights of parties and non-parties. These rights include the right to participate in a discussion regarding the scope of issues, category, need for hearing and opportunity to present evidence, and schedule for resolving the new matter, which arises in the context of applications but not petitions for modification (compare Rules 2.1(c) and 2.6(d) to Rule 16.4), an often longer time to file a response or opposition to the request (compare Rule 2.6(a) to Rule 16.4(f)), and the right to become a party upon filing a response or opposition, rather than upon grant of a motion for

party status (see Rule 1.4). Allowing parties to petition for relief beyond the scope of the underlying closed proceeding would also encourage misuse by persons who are not otherwise entitled to seek such relief. For example, persons who are not utilities may seek relief by complaint (Rule 4.1), but are not authorized to file applications for ratemaking relief (Rules 3.1 and 3.2). Allowing a non-utility party to petition to modify, say, a three-year-old general rate case decision to consider a new ratepayer assistance program on the basis of changed economics is procedurally indistinguishable from SCE's petitions for modification, but would circumvent this limitation. The fact that SCE, and not other, non-utility parties, is authorized to seek its requested relief by application only highlights the distinction between an application and a petition for modification. For all these reasons, we deny SCE's request that we modify D.08-04-011 and D.08-09-041.

Nevertheless, in the interest of securing just, speedy, and inexpensive determination of the issues presented and the public interest in resolving this matter by no later than June 30, 2011, in order to secure a more timely initial delivery date (*see* footnote 1, *supra*), and in the absence of prejudice to any party or non-party,<sup>2</sup> we will not dismiss the petitions outright, but will address the merits of SCEs' request for approval of the amended and restated CPV contract. (*See* Rule 1.2.) However, we advise SCE and other similarly situated utilities to

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<sup>2</sup> The petitions were served on the official service list and no party filed a response or objection to them, timely or untimely. The petitions were noticed in the Daily Calendar on December 22, 2010, and no person moved for party status or otherwise has sought to respond or object to the petitions. No person sought the opportunity to submit evidence or file legal briefs or otherwise sought to exercise their due process rights to participate in the matter.

seek approval of future amendments to contracts approved in these or any other proceedings by application.

#### **4. Request to Approve Amended and Restated CPV Sentinel Contract**

We approve the amended CPV contract.

Based on forecasts of the value of capacity, energy and ancillary services under 25 different electric power price scenarios (based on five heat rate scenarios and five natural gas price scenarios) and their associated probabilities, the net present value of the amended CPV contract is better than the original, combined CPV Sentinel I and II contracts. It is also better than the recently approved El Segundo amended contract (see D.10-10-029) and other contracts that were approved in D.08-04-011 and D.08-09-041.

SCE continues to need the new generation represented by the amended CPV contract in order to meet system reliability needs. In D.06-07-029 and D.07-12-052, the Commission authorized SCE to procure up to 3,200 MW of conventional new generation to meet system reliability needs through 2013. Some key drivers of this system reliability need at the time of these decisions were forecast load growth and the potential retirement of aging plants. To date, and including the capacity represented by the amended CPV contract, SCE has procured 2,556 MW. Of the procured new generation, only 750 MW is on-line.

In approving the CPV Sentinel I and II contracts, D.08-04-011 and D.08-09-041 re-affirmed that the projects' new capacity was needed for system reliability. Since then, California and the nation have suffered a severe recession, which reversed the trend of increasing load and actually resulted in a load decrease. However, even though the State's economy has yet to return to pre-recession growth levels and unemployment remains stubbornly high, there

are signs of economic recovery and SCE's latest load forecast indicates load growth beginning in 2011.

In addition, the uncertainty of generator retirements has increased since the Commission's approval of the CPV Sentinel I and II contracts with the adoption of the California State Water Resources Control Board's (SWRCB) policy on May 4, 2010, concerning the phase-out of once-through cooling (OTC) generation. In SCE's service territory, there are 9,070 MW of generation that uses OTC technology, of which two units representing 670 MW are required to be in compliance with the new SWRCB's policy by December 31, 2015, and another 18 units representing 6,200 MW are required to be in compliance by December 31, 2020. The San Onofre Nuclear Generating Station, representing 2,200 MW, is required to be in compliance by December 31, 2022. There is considerable uncertainty at this point as to the extent to which these plants can comply with the new OTC policy or can justify the cost of compliance and continued operation. The CPV facility, which is located in the critical Los Angeles Basin local area, does not use OTC and can serve as a replacement for some of this OTC generation that may retire. Due to the extreme difficulty of obtaining offsets for emissions (especially for fine particulate matter, such as PM10) in the SCAQMD jurisdiction, the ability to replace retiring Los Angeles Basin generation with other new generation in the basin may be severely limited.

SCE engaged an Independent Evaluator to oversee its negotiation of the amended CPV contract, as required by D.04-12-048. SCE's Independent Evaluator, Sedway Consulting, which participated in all aspects of the amended CPV contract, concludes that SCE acted in an appropriate, fair and unbiased fashion in its negotiations, and believes that the amended CPV contract warrants Commission approval.

SCE consulted with its Cost Allocation Mechanism (CAM) Group regarding amending the CPV Sentinel I and II contracts and the finalization of the amended CPV contract, as required by D.07-12-052.

SCE retained Black & Veatch to provide independent engineering services to assess the reasonableness of the amended CPV contract. Black & Veatch verified that the amendments to the CPV Sentinel I and II contracts are attributable to actual and expected cost changes that have impacted the project and do not result in material increases in profit for CPV or risk-shifting from CPV to all benefitting customers. Black & Veatch concluded that the scope of the amended CPV contract is the same as the original agreements, that amended CPV contract's price is consistent with other similar projects and contracts, and that CPV's levered, after-tax equity internal rate of return as a result of the amended CPV contract is less than that resulting from the CPV Sentinel I and II contracts.

For all these reasons, we approve the amended CPV contract.

## **5. Comments on Proposed Decision**

The proposed decision of ALJ Yacknin 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 on April 4, 2011, by the Division of Ratepayer Advocates (DRA); no other comments were filed.

DRA asserts that the proposed decision errs by determining that SCE should have sought its requested relief by application and not by petition for modification. We disagree, and have revised the proposed decision to further clarify the intended purpose and limitations of petitions for modification.

DRA asserts that, by entertaining SCE's request for approval of the amended and restated CPV contract without modifying decisions D.08-04-011 and D.08-09-041 as SCE petitioned, the proposed decision deprives parties and ratepayers of their due process rights of participating in an application, and DRA urges the Commission to approve the contract by modifying the decisions as SCE requested. In effect, DRA would have the Commission disregard parties' and non-parties' attempts, if any, to exercise their rights to participate in this matter as if it were an application; as the proposed decision explains, because SCE seeks relief that that is beyond the scope of the underlying proceedings, that would be a violation of due process. In contrast, by considering whether any party or non-party sought to exercise such rights and approving the amend contract only after determining that, after notice and opportunity, no one did, the proposed decision assures that there has been no violation of due process rights.

## **6. Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Hallie Yacknin is the assigned ALJ in this proceeding.

## **Findings of Fact**

1. SCE does not identify any new facts or law that merit reconsideration or modification of the findings of fact, conclusions of law, or ordering paragraphs set forth in D.08-04-011 and D.08-09-041.
2. All parties were duly served with the petitions for modification, and no party filed a response or opposition to them or otherwise sought to exercise their due process rights.
3. Notice of the petitions appeared in the December 12, 2010, Daily Calendar, and no person moved for party status to respond or object to the petitions or otherwise sought to exercise their due process rights.

4. Based on forecasts of the value of capacity, energy and ancillary services under 25 different electric power price scenarios (based on five heat rate scenarios and five natural gas price scenarios) and their associated probabilities, the net present value of the amended CPV contract is better than the original, combined CPV Sentinel I and II contracts.

5. SCE continues to need the new generation represented by the amended CPV contract in order to meet system reliability needs.

6. SCE's Independent Evaluator participated in all aspects of the amended CPV contract and concluded that SCE acted in an appropriate, fair and unbiased fashion in its negotiations.

7. SCE consulted with its CAM Group regarding amending the CPV Sentinel I and II contracts and the finalization of the amended CPV contract, as required by D.07-12-052.

8. The amendments to the CPV Sentinel I and II contracts are attributable to actual and expected cost changes that have impacted the project and do not result in material increases in profit for CPV or risk-shifting from CPV to all benefitting customers.

### **Conclusions of Law**

1. SCE's requests to modify D.08-04-011 and D.08-09-041 should be denied.

2. The proper vehicle for seeking approval of amendments to a contract that was approved by a prior Commission decision is, in general, by new application.

3. As parties and the public had notice of the petitions and no person responded or objected to the requested relief or otherwise sought to exercise the rights that would be due them if the Commission required SCE to file an application, there is no prejudice caused by the Commission's approval of the

amended and restated contract without requiring SCE to re-file its request as an application.

4. The amended and restated contract with CPV Sentinel, LLC, which is an amendment, restatement and consolidation of the CPV Sentinel I contract previously approved in D.08-04-011 and the CPV Sentinel II contract previously approved in D.08-09-041, should be approved.

5. These consolidated proceedings should be closed.

6. This order should be effective immediately.

## **O R D E R**

### **IT IS ORDERED** that:

1. Southern California Edison Company's amended and restated contract with CPV Sentinel, LLC, is approved.

2. Southern California Edison Company's motions to file confidential versions of its petitions for modification under seal are granted in part. The contract information and contract valuation information contained at 3, 6, 9, 12 and 13, Appendices A and C, and portions of Appendices B, D and E of both petitions is sealed until August 1, 2016, except that the information contained at 15, 16, 17 and 18 of Appendix D of both petitions, under the headings "Water Interconnect" and "Imported Water (Cost Decrease)," is not sealed. The sealed materials shall not be made accessible or disclosed to anyone other than the Commission and its staff, except upon further order of the Commission.

3. Applications (A.) 07-02-026 and A.08-04-011 are closed.

This order is effective today.

Dated April 14, 2011, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK FERRON

Commissioners

