ALJ / DOT / k47

Mailed 3/16/2001

Decision 01-03-013 March 15, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Sierra Pacific Power Company (U-903-E) for an Order Pursuant to Section 853 of the Public Utilities Code Exempting the Sale of Certain Generating Plants and Related Assets Located in the State of Nevada from Section 851 of the Public Utilities Code.	Application 00-03-024 (Filed March 10, 2000)

FINAL OPINION

I. Summary

This decision denies the application of Sierra Pacific Power Company ("Sierra" or "applicant") seeking an exemption from the approval process required under Section 851 of the Public Utilities Code[1] for the sale of certain electric generating plants and related assets located in the State of Nevada. Sierra is required to divest its generation assets as a condition of its merger with Nevada Power Company (NPC) and to comply with Nevada electric restructuring legislation.

We deny Sierra's request for exemption because we find it is in the public interest for the Commission to review the transaction. In addition, we find that a subsequent settlement jointly filed by Sierra and the Office of Ratepayer

[1] All statutory references are to the Public Utilities Code unless otherwise noted.

Advocates (ORA), which requests approval of the auction under Section 851, is not consistent with the law or in the public interest. Despite the order of the Public Utilities Commission of Nevada (PUCN) for Sierra to divest its generation plants, the Commission has a continuing obligation under Section 362 to ensure the reliability of California's electric supply. In addition, a recently enacted California statute prohibits the sale of public utility generation assets before January 1, 2006 if the assets are currently serving California ratepayers.[2] The settlement does not ensure facilities needed to maintain the reliability of the electric supply remain available and operational while avoiding an overconcentration of market power as required by Section 362. Furthermore, the settlement allows the sale of generation assets in violation of the newly enacted language of Section 377. This decision denies the joint motion requesting approval of the settlement.

II. Procedural Background

In Application (A.) 00-03-024, filed March 10, 2000, Sierra requests an order exempting the sale of certain electric generating plants and related assets located in the State of Nevada from review under Section 851.

On April 24, 2000, the Commission's ORA filed a protest to Sierra's application asking the Commission to reject the current application, and setting forth a list of issues that it believes deserve closer scrutiny in a subsequent filing pursuant to Section 851.

The Commission held a prehearing conference (PHC) in San Francisco on June 14, 2000 at which Sierra and ORA discussed potential settlement of ORA's

[2] Chapter 2, Statutes of 1999-2000, First Extraordinary Session, enacted January 18, 2001.

protest. During the PHC, the assigned administrative law judge (ALJ) set a deadline for notice of a settlement conference and a deadline for Sierra to file an amended application supplying additional information not contained in the initial application.

On August 17, 2000, Sierra filed its amended application which continued to request exemption from Section 851 for the sale of its generating assets and in the alternative, requested the Commission authorize the proposed auction of generating assets under Section 851 if the Commission denied an exemption approach. At the request of the ALJ, Sierra filed a supplement to the amended application on August 31, 2000.

On September 18, 2000, Sierra and ORA filed a joint motion for adoption of a proposed settlement agreement. No party filed a protest or response to the settlement motion.

III. Sierra's Initial Application

In its initial application, Sierra explains that it is in the process of divesting all of its electric generating facilities located in the State of Nevada as a result of a series of orders from the PUCN. In a 1998 order, the PUCN conditioned its approval of the merger of Sierra Pacific Resources (Sierra's parent company) and NPC on the divestiture of the companies' generation assets, as specified in a plan of divestiture filed with the PUCN.[3] In a February 2000 order, the PUCN approved a generation divestiture plan that among other things, prevents Sierra,

[3] In Re Sierra Pacific Resources, Docket No. 98-7023, Nevada Public Utilities Commission, December 31, 1998, slip op. p. 130 (contained in Exhibit C of Supplement to Amended A.00-03-024).

its parent or NPC, and any of their affiliates from participating as potential buyers in the divestiture process.[4]

Sierra states that it is divesting its electric generation assets through an auction process, similar to the auctions performed by the three large electric utilities in California. Sierra will auction nine separate fossil fuel facilities that consist of 1076 megawatts (MW) of generating capacity. All the plants are located in the State of Nevada. The auction is designed to: (i) maximize the total value of the asset bundles offered for sale, (ii) enable and enhance competition in the generation market in Nevada, (iii) ensure the sale process is unbiased, timely and efficient, (iv) ensure fair treatment of affected employees, (v) maintain electric system reliability, and (vi) maintain provider of last resort service through various "transition power purchase contracts," as explained further in Section V below.

Sierra states that its affiliates will not be participating in the auction. The auction is already underway and once the appropriate approvals are obtained, Sierra anticipates closing any transactions and transferring plant ownership in the fourth quarter of 2000 through June 2001. Finally, Sierra proposes that the Commission review the accounting for the proceeds from the auction in a separate ratemaking proceeding once the divestiture is complete.

The application notes that Sierra owns two diesel generating stations located in California, which together produce approximately 5 MW of load. Sierra will retain these units to support the reliability of its distribution system.

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[4] In Re Sierra Pacific Resources, Docket No. 98-7023, Nevada Public Utilities Commission, February 18, 2000, slip op. p. 20. Also see p. 3 of "Stipulation Regarding Revised Generation Divestiture Plan"(contained in Exhibit A of Amendment to A.00-03-024).

In addition, Sierra's four hydroelectric plants, with a total output of approximately 10 MW, are not included in the proposed auction but will be reallocated to Sierra's Water Department.

Sierra requests that the Commission exempt the auction and divestiture transactions from the provisions of Section 851 pursuant to its authority under Section 853(b) on the basis that the public interest does not necessitate application of Section 851.[5] Sierra bases its exemption request on five arguments. First, Sierra notes that it operates primarily in Nevada, that less that 6% of the company's revenues are derived from California electric operations, and it is fully regulated by the PUCN. California operations, consisting of approximately 112 MW of load, are almost exclusively confined to the California side of Lake Tahoe.

Second, Sierra states that electric restructuring in Nevada, including divestiture of generating facilities, is proceeding under comprehensive 1997 legislation and the oversight of the PUCN and the Federal Energy Regulatory Commission (FERC). Sierra reminds the Commission of statements in a recent Commission order expressing a preference for relying on the regulatory approach adopted in a utility's dominant state for establishing market values for generation assets.[6] The application points out that Nevada electric restructuring

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[5] Section 851 requires Commission authorization before a utility may "sell…[assets] necessary or useful in the performance of its duties to the public…."

Section 853(b) provides that: "The Commission may…exempt any public utility…from this article if it finds that the applications thereof…is not necessary in the public interest."

[6] See Decision (D.) 97-12-093, pg. 21 where the Commission stated that it "would prefer that [Sierra's] plan for establishing market values for generation assets rely on the regulatory approach adopted in [Sierra's] dominant state."

legislation deems generation a "potentially competitive service" thereby precluding Sierra from providing generation except through an affiliate once customers are allowed to obtain potentially competitive services from alternative sellers.[7]

Third, Sierra points out that the Commission has on at least two occasions exempted certain of Sierra's out-of-state generating facilities from regulatory scrutiny,[8] although the Commission has allocated a portion of these plant investments to California rate base.

Fourth, Sierra states that because the company's California service area is served by a Nevada-based network and control area, what happens to customers in northern Nevada necessarily will happen to California customers. Sierra argues that since the PUCN and FERC will guard the interests of Nevada customers, the interests of Sierra's California customers will thereby be protected as well.

Fifth, Sierra argues that granting an exemption from Section 851 will not impinge on the Commission's ability to protect California ratepayers or implement AB 1890. Sierra posits that the Commission can protect California ratepayers through its authority to regulate Sierra's rates. Further, Sierra notes the requirements of AB 1890 which added Sections 362 and 363(a) to the Public

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[7] See Nevada Revised Statutes 704.976(1) and (7) (contained in Exhibit D of Supplement to Amended A.00-03-024).

[8] See D.89853, (1979) 1 CPUC2d 142 and D.91124 (1979) 3 CPUC2d 59 which grant Sierra exemptions from certificate requirements of Section 1001 for two Nevada generating plants.

Utilities Code[9] and states that these obligations will be fulfilled through PUCN oversight and FERC approval of certain generation tariffs and "transition power purchase contracts" filed at FERC by Sierra. According to Sierra, a substantial portion of its generating plants are categorized as "must run" because they maintain transmission equipment within acceptable voltage limits and they protect against emergency overloads and system instability or collapse. To assure the availability of these power plants after divestiture, Sierra has proposed at FERC that these plants be subject to "must run" contracts and tariffs. Sierra contends that if FERC approves the must run contracts and tariffs, Section 362 will be satisfied. Moreover, Sierra claims that Section 363(a) is met since the auction requires the successful bidder to assume all obligations under applicable collective bargaining agreements.

IV. ORA's Protest

ORA protested Sierra's initial application alleging that Sierra failed to provide sufficiently detailed information on ratemaking treatment of the proceeds and other elements of the auction to justify an exemption from Section 851. ORA suggested rejection of the initial application, and set forth a list of issues for closer scrutiny in a subsequent Section 851 filing. These issues

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[9] Section 362 states in relevant part: "In proceedings pursuant to Section…851, … the commission shall ensure that facilities needed to maintain the reliability of the electric supply remain available and operational, consistent with maintaining open competition and avoiding an overconcentration of market power."

Section 363(a) states in relevant part: "In order to ensure the continued safe and reliable operation of public utility electric generation facilities, the commission shall require in any proceeding under Section 851 involving the sale…of a public utility electric generating facility…that the selling utility contract with the purchaser of the facility for the selling utility, an affiliate, or a successor corporation to operate and maintain the facility for at least two years."

included whether the proposed auction process maximizes the sales price of the plants being sold, whether the divestiture will insure system reliability, and ratemaking issues surrounding the proceeds and costs associated with the auction and divestiture. ORA also questioned the level of information provided in the application on Sierra's hydroelectric plants and the environmental costs and liabilities surrounding the auction.

V. Sierra's Amended Application

In an amendment to the initial application, Sierra explains that although it continues to believe an exemption from Section 851 is appropriate for this divestiture, it now requests the Commission consider in the alternative whether to grant approval for the auction and divestiture under Section 851. The amended application requests that in either case, the Commission should extend substantial comity to the PUCN which regulates approximately 95% of Sierra's operations and which has adopted a comprehensive electric restructuring process similar to AB 1890.

To support Sierra's request for approval under Section 851, the amended application provides further information explaining two significant terms of the auction. First, Sierra contends that the divestiture complies with the reliability requirements of Section 362 because of two features -- a "recourse tariff" and "transition power purchase contracts" (TPPCs). According to the amended application, Sierra will retain obligations known as "Transitional Resource Requirements" after the divestiture. To fulfill these transitional requirements, Sierra must serve as "provider of last resort" of retail service in its service territory. In addition, Sierra will retain its wholesale requirements obligations and the obligation to provide ancillary services under its open access transmission tariff. To meet these obligations, Sierra will require the purchasers

of its generation to enter into TPPCs that will expire no later than March 1, 2003. The TPPCs will give Sierra the first call on divested generation and will entitle Sierra to purchase up to its entire "Transitional Resource Requirements" from divested generation. The contracts will cap Sierra's purchase price at the embedded cost of generation, with a floor equal to the 1998 marginal fuel cost of generation. Ancillary service prices under the TPPCs will be cost-based. Sierra is prohibited from reselling any energy or ancillary services except to satisfy its transitional obligations.

The "recourse tariff" is a tariff that Sierra has filed with FERC under which the purchasers of Sierra's divested plants will be obligated to sell power to Sierra and others at a rate determined by FERC after the TPPCs expire. FERC has accepted this tariff for filing, subject to future determination of the proposed rates. The recourse tariff is required because Sierra's service area is considered a "load pocket," that is, an area subject to shortages of supply because of transmission constraints. Sierra contends that the recourse tariff will allow customers to obtain cost based monthly recourse service and thereby protect them from any abuse of market power by new generation owners.

Second, Sierra contends the terms of the auction meet Section 363(a) requirements with regard to continued operation and maintenance of the divested plants. Specifically, purchasers of the divested plants must assume Sierra's collective bargaining agreements with the relevant union for two years from the close of the sale, must recognize the union as the bargaining representative of the covered plant employees, and must offer to retain all non-union employees and key management personnel involved with the plants. According to Sierra, this element of the auction allows it to comply with Nevada electric restructuring legislation that does not permit Sierra to continue to

operate its electric generation facilities after divestiture, except through an affiliate. Sierra concludes that since the terms of the auction will lead to the plants being operated nearly the same as today, Sierra has complied with the intent, policies, and goals underlying Section 363(a).

The amended application also requests the Commission leave this proceeding open to make the findings necessary under Section 32(c) of the Public Utilities Holding Company Act (PUHCA) so that the purchasers of Sierra's generation facilities may obtain status as "Exempt Wholesale Generators" (EWGs) from FERC.

Finally, the amended application contains further information on the disposition of Sierra's hydroelectric plants. Sierra explains that its four small hydroelectric plants on the Truckee River, amounting to just over 10 MW in capacity, will be transferred to the company's water division so it can "self-generate" to meet its electric pumping needs to provide retail water services to customers in the Reno metropolitan area. Sierra clarifies that it does not intend to create a separate affiliate to sell output from its hydroelectric plants into the electric market, and that the company will make a separate filing with the Commission when the transfer becomes imminent.

VI. Settlement

On September 18, 2000, Sierra and ORA filed a joint motion to adopt a proposed settlement agreement disposing of ORA's protest to the application and agreeing that the Commission should either exempt the divestiture transaction under Section 853 or in the alternative, approve the transaction under Section 851. The joint motion urges the Commission to adopt the settlement pursuant to Rule 51.1 as reasonable in light of the whole record, consistent with the law, and in the public interest.

In the settlement, Sierra and ORA agree that the ratemaking issues raised by ORA in its protest do not need to be addressed or resolved in this proceeding. Instead, Sierra and ORA agree these issues will be addressed by Sierra and reviewed by ORA in a separate proceeding such as "the Competition Transition Cost Balancing Account true-up or valuation of assets under Sections 367(b) and 377 of the Code."[10] The parties also agree that the unique facts in this proceeding support a finding by the Commission to grant an exemption under Section 853 for this auction and divestiture or, in the alternative, a finding authorizing the auction and divestiture under Section 851.

In support of this recommendation, the parties conclude that the auction procedure is substantially the same as that employed by California's large electric utilities. The parties also conclude that tariffs filed with FERC together with PUCN regulatory oversight will assure the level of reliability mandated in Section 362 of the Code. In addition, the parties state that the proposed divestiture will provide substantial compliance with and satisfies the intent of Section 363(a) of the Code because the auction requires the purchaser to assume relevant collective bargaining agreements and to fulfill other obligations to current plant employees. Finally, the settling parties agree that it is reasonable to afford comity to the electric restructuring process in Nevada, because that process, coupled with proceedings before FERC, will assure the protection of Sierra's California ratepayers.

VII. Discussion

Should the Commission Grant an Exemption under Section 853?

[10] See settlement, p. 2.

Sierra initially requested that its auction and divestiture be exempted from review pursuant to Section 853(b). The settlement between Sierra and ORA also urges the Commission to grant this exemption. Both Sierra and ORA assert that exemption is appropriate mainly because of FERC and PUCN oversight and involvement in the auction process.

Section 851 provides that no public utility may transfer its property that is necessary or useful in performing its duties to the public without first having secured the Commission's authorization. Sierra's generating plants are currently required for system reliability and for service to California customers. Therefore, the plants are presently useful in the performance of Sierra's duties as a public utility and Section 851 applies.

The purpose of Section 851 is to enable the Commission, before any transfer of useful public property is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require.[11] Further, Section 851 is designed "to prevent the impairment of the public service of a utility by the transfer of its property into the hands of agencies or persons incapable of performing an adequate service at reasonable rates or upon terms which will bring about the same undesirable result."[12] We have held that the relevant inquiry is whether the proposed transaction is "adverse to the public interest."[13]

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[11] San Jose Water Co. (1916) 10 CRC 56.

[12] So. Cal. Mountain Water Co. (1912) 1 CRC 520, 524.

[13] Universal Marine Corporation (1984) 14 CPUC2d 644, 646. See also Southern California Edison Company (Edison), D. 99-03-016, p. 14.

We reject Sierra's request for an exemption under Section 853(b) because we believe review of this auction and divestiture is necessary in the public interest. We find that the public interest in protecting the interests of Sierra's California ratepayers mandates that we retain review over the transaction. Over the past year, this Commission has witnessed tremendous price volatility in wholesale power markets and increasing reliability problems due to electricity supply shortages. These wholesale market occurrences impact California's retail ratepayers. Our experience with price volatility and reliability has prompted us to investigate the wholesale power market and the associated impacts on retail rates, [14] and to investigate whether utilities should be required to construct or contract for new power plants.[15] The events of the past year underscore the Commission's responsibility to scrutinize the proposed transfer of Sierra's generating plants.

We acknowledge that we have given exemptions from Section 851 to Sierra in the past, most recently in D.00-03-049 for stock and securities transactions. Nevertheless, we believe that a divestiture of generating assets deserves greater scrutiny because it is a more significant transaction and has greater long-term ramifications than a financing transaction. And although we previously stated our preference to allow a utility's dominant state to establish an asset valuation plan for generation assets, we do not believe a complete exemption from Section 851 makes sense at this time. Furthermore, that statement was made in 1997, long before the current reliability and pricing issues in California electricity markets that cause us now to give greater scrutiny to transactions that may

[14] Investigation 00-08-002, issued August 3, 2000.

impact regional wholesale electricity prices and supply. In support of our decision to deny an exemption from Section 851, we note that we have performed several reviews under Section 851 for other recent divestiture proposals,[16] including proposals by Pacificorp and Edison to dispose of generating plants located in other states and have not granted these requests.[17]

Therefore, we conclude that the public interest does not warrant granting Sierra's request for an exemption from Section 851.

Should We Approve the Settlement?

Having denied Sierra's exemption request, we now consider the reasonableness of the settlement presented in the joint motion, which recommends Commission authorization of Sierra's auction and divestiture plan under Section 851.

We must consider whether the settlement conforms to the requirements of Article 13.5 of our Rules of Practice and Procedure, including Rule 51.1(e), which requires that the settlement is "reasonable in light of the whole record, consistent with law, and in the public interest."

We find that the proposed settlement is not consistent with the law or in the public interest. The settlement provisions do not provide adequate assurance that facilities needed to maintain the reliability of the electric supply will remain

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[15] Investigation 00-11-001, issued November 2, 2000.

[16] See D.97-12-107 (Pacific Gas and Electric Company's (PG&E) first fossil plant auction); D.97-12-106 (Edison); D.99-02-073 (San Diego Gas & Electric Company (SDG&E) Encina plant); D.99-03-015 (SDG&E South Bay Plant); and D.99-04-026 (PG&E's second auction).

[17] D.00-04-031 (sale of Pacificorp's Centralia plant in Washington); D. 00-04-009 (sale of Edison's Mohave plant in Nevada).

available and operational. The parties do not convince us that the settlement provisions avoid an overconcentration of market power, as required by Section 362. The settlement attempts to explain how the auction and divestiture will satisfy Section 362 by describing how Sierra will retain an obligation to serve as "Provider of Last Resort" for retail service within its service territory. Additionally, the settlement details how the purchasers of Sierra's generation facilities must enter into contracts that will allow Sierra to meet these service obligations. The settlement also explains how the "recourse tariff" is designed to protect customers from any abuse of market power by the new generation owners.

Despite these explanations, we are not convinced that the terms of the TPPCs and the "recourse tariff" filed at FERC adequately protect California ratepayers. For one thing, the settlement provides no assurance that the terms of the TPPCs and the recourse tariff might not change before the auction is finalized. The settlement provides no guarantee that the terms it describes will remain intact and unchanged.

Second, the settlement asks us to rely on FERC and the PUCN to protect the interests of California ratepayers. However, the price spikes and power shortages in California during the last nine months, coupled with FERC's response to these events, suggest we cannot rely solely on FERC to protect the interests of California's electric consumers, particularly when the settlement describes how FERC must set the rate for the recourse tariff after the TPPCs expire. Sierra's application admits that the plants in question operate in a load

pocket condition and "likely…will have the ability to exercise market power."[18] The application also describes how Sierra's California customers are served by a Nevada-based network and control area and "what happens to customers in northern Nevada necessarily will happen to California customers."[19] Given these statements, we are not assured that the settlement adequately protects Sierra's California ratepayers.

Third, the increasingly regional nature of the electricity marketplace suggests the divestiture of these Nevada generating plants could affect the rates and services of California customers. The settlement does not provide assurance to the contrary. We have no guarantee that the divestiture will not have a detrimental effect on the entire California electricity supply and the price that is charged for it. Given the Commission's ongoing obligation under Section 362 to ensure reliability and avoid excess market power, we find the settlement is not in the public interest.

Furthermore, the settlement is not consistent with legislation recently passed to deal with California's current power crisis. In a special session called by California's Governor, the California Legislature passed Assembly Bill (AB) 6X, which the Governor signed on January 18, 2001.[20] The legislation took effect immediately as an urgency statute. AB 6X modifies Section 377 to state that:

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[18] A.00-03-024, Exhibit B, Proponent's Environmental Assessment (PEA), "CPUC PEA Report" (appended to PEA), p. 4.

[19] A.00-03-024, p. 6-7.

[20] Chapter 2, Statutes of 1999-2000, First Extraordinary Session.

> Notwithstanding any other provision of law, no facility for the generation of electricity owned by a public utility may be disposed of prior to January 1, 2006. The commission shall ensure that public utility generation assets remain dedicated to service for the benefit of California ratepayers.

Given this provision and the fact that Sierra is a public utility serving California and subject to this statute, the Commission cannot at this time allow Sierra to proceed with its auction of electric generation assets, even if these assets are located in Nevada. Therefore, the Commission must reject the settlement as unlawful.

We do not address whether the proposed settlement complies with Section 363(a) because we are rejecting the settlement on other grounds.

VIII. Exempt Wholesale Generator Issues

As part of the Energy Policy Act of 1992, Congress enacted a new portion of PUHCA, Section 32, that created a new class of electric generators known as EWGs, which are exempt from the restrictions that would otherwise apply to corporations seeking to provide wholesale electric generation. Before a generator can receive such an exemption from FERC, an entity acquiring a formally rate-based power plant must first receive a finding from state regulators that allowing such an exemption (1) would benefit consumers, (2) would be in the public interest, and (3) would not violate state law.

Sierra requests that the Commission leave this proceeding open to make the findings necessary under PUHCA. Because this order denies the proposed settlement and closes the proceeding, we will deny this request as well.

IX. Environmental Matters

The application asks the Commission to find that the request for exemption from Section 851 for the proposed sale of generating assets is not a

"project" requiring review under the California Environmental Quality Act (CEQA), or is categorically exempt from CEQA.[21] In the alternative, the application requests that the Commission issue a Negative Declaration under CEQA because the change in ownership of the plants will not produce environmental impacts requiring mitigation. Applicant submitted a PEA along with the application in accordance with Rule 17.1 which states that "Given the lack of changes in the assets or their operation, this proposed ownership transfer is not a "project" within the meaning of CEQA and no additional CEQA inquiry is required." (PEA, pg. 2.) The PEA goes on to state:

> "Notwithstanding that this proposed divestiture is not a project requiring CEQA analysis…(t)his PEA concludes that the proposal presents no potentially significant environmental impacts, nor any other reasonably foreseeable environmental impacts of any magnitude."[22]

Contrary to the PEA's assertion, transfers of utility assets are generally projects subject to CEQA review by the Commission. Nevertheless, because this decision rejects the proposed settlement to move forward with the auction, we do not need to address the question of whether there are environmental effects from the proposed asset sale at this time.

X. Conclusion

Sierra's request for exemption from Section 851 for the auction and divestiture of its generation plants is denied because we find it is in the public

[21] CEQA defines a "project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Pub. Res. Code Section 21065

[22] A.00-03-024, PEA p. 3.

interest for the Commission to review the transaction. Further, we find that the settlement jointly filed by Sierra and ORA is not consistent with the law or in the public interest because it does not satisfy the criteria of Section 362 to ensure reliability and avoid excess market power. The settlement also directly contradicts the provisions of AB 6X signed by the Governor on January 18, 2001. We deny the joint motion requesting approval of a settlement between Sierra and ORA.

XI. Categorization and Comments on the Proposed Decision

Pursuant to Rule 6.1, the Commission preliminarily determined in Resolution ALJ 176-3036, dated April 6, 2000, that this is a ratesetting proceeding that would not require a hearing. Based on the record in this matter, it is not necessary to alter these preliminary determinations.

The Commission mailed the draft decision of the ALJ in this matter to the parties in accordance with Section 311 (g) (1) and Rule 77.7 of the Rules of Practice and Procedure. Sierra filed comments on March 5, 2001. In its comments, Sierra states that the Commission has reached the wrong resolution by denying the settlement agreement. Specifically, Sierra states that a state-mandated prohibition on the sale of out-of-state property principally dedicated to serving customers outside the state places an unreasonable burden on interstate commerce in violation of Article I, § 8, Clause 3 (Commerce Clause) of the United States Constitution and Public Utilities Code Section 202. At the same time, Sierra acknowledges that its comments assume the Legislature will remove the current prohibition on sale of utility generation assets in the newly amended Public Utilities Code Section 377. Sierra also urges the Commission to provide advice to the parties on what evidence would be needed to sustain an order authorizing the divestiture. Finally, Sierra asks the Commission to address

whether the application to divest its plants complies with CEQA and Section 363(a) regarding operation and maintenance of divested plants.

Public Utilities Code Section 202 indicates that the California Public Utilities Act, and accordingly this commission's authority, does not apply to interstate commerce "except insofar as such application is permitted under the Constitution and laws of the united States." Sierra requests that the Commission act in a manner consistent with Sierra's position that the draft order is an unconstitutional burden on interstate commerce. Yet for the commission to do so would require the Commission to, at a minimum, refuse to enforce Section 377. Article III, Section 3.5 of the California Constitute provides that the Commission has no power to "declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional" or to "declare a statute unconstitutional." (Cal. Const., Article III, § 3.5, subd. (a) & (b).) We are expressly barred from finding the prohibition on divestiture in Section 377 to be an unreasonable burden on interstate commerce. Despite Sierra's assumption, we are not aware of any modifications to Section 377 as of the date of this order. Therefore, we decline to make any changes to the draft order based on Sierra's comments.

Findings of Fact

1. On September 18, 2000, Sierra and ORA filed a joint motion to adopt a proposed settlement that asks the Commission to either exempt Sierra's proposed auction and divestiture from review under Section 853 or in the alternative, approve it under Section 851.

2. Hearings are not required on the settlement.

3. The public interest in protecting the interests of Sierra's California ratepayers requires the Commission to retain review over the auction and divestiture under Section 851.

4. The Commission has an ongoing obligation under Section 362 to ensure that generation facilities remain available and operational, while avoiding an overconcentration of market power.

5. The proposed settlement is not consistent with the law because it does not assure reliability of supply and avoid an overconcentration of market power as required by Section 362 and it does not comport with the language of AB 6X prohibiting the sale of public utility generation assets.

Conclusions of Law

1. The Commission should deny Sierra's request for exemption from Section 851 for the sale of certain generating assets.

2. The Commission should deny the motion requesting approval of the proposed settlement because it is not consistent with the law or in the public interest.

3. This application is a project under CEQA but does not require further CEQA review by the Commission because the motion regarding the proposed settlement is denied.

ORDER

IT IS ORDERED that:

1. The joint motion of Sierra Pacific Power Company (Sierra) and the Office of Ratepayer Advocates to Adopt Proposed Settlement Agreement, filed on September 18, 2000 is denied.

2. Sierra's request for an exemption from Public Utilities Code Section 851 is denied.

3. In all other respects, Sierra's application is denied without prejudice.
4. This proceeding is closed.

This order is effective today.

Dated March 15, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners