

**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 No. A.05-12-030

**OPPOSITION OF THE CALIFORNIA COGENERATION COUNCIL
TO MOTION FOR PROTECTIVE ORDER**

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Introduction and Summary

Pursuant to Rule 45 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), the California Cogeneration Council (“CCC”) submits this opposition to the motion (“Motion”) for a protective order filed by the Southern California Edison Company (“Edison”) in connection with its application (“Application”) for approval of a power purchase contract with Kern River Cogeneration Company (“KRCC Contract”). The CCC takes no position at this time on the merits of the Application; this pleading is limited to opposing the Motion.

Requests for protective orders, including in connection with power purchase contracts, are not new and have been granted in the past by the Commission. What makes the current request unique is that it involves a request to keep secret the terms of a contract between Edison and its own affiliate. Because of this, as explained fully below, the Commission must treat the instant request differently from prior requests for protective orders. In particular, the Commission must allow non-affiliated QFs the right to review the KRCC Contract in order to protect their right to fair treatment vis-a-vis Edison affiliates.

In addition, Edison has made numerous comparisons in the Application between the KRCC Contract and various proposals made by the CCC and other parties in the Commission’s

ongoing Qualifying Facility (“QF”) pricing and policy proceedings (R.04-04-003 and R.04-04-025). All of these comparisons paint the CCC proposals in a negative light relative to the KRCC Contract. Given the obvious relationship between the proceedings, it would violate basic principles of due process to permit Edison to make these comparisons without providing the CCC and other QFs the opportunity to understand them (and perhaps to challenge them). Again, the Commission must allow the CCC to review the KRCC Contract.

The Motion seeks adoption of a protective order that would prevent the CCC and other parties that participate in the market from reviewing (i) the KRCC Contract, (ii) details concerning the negotiation of the contract terms and (iii) details concerning Edison’s financial evaluation of the contract. Related information was redacted from the copy of the Application and supporting testimony served on the CCC. Although all of this information rightfully should be provided to the CCC, the CCC limits its request to disclosure of the KRCC Contract itself. This limited request properly balances any legitimate claim by Edison for secrecy in connection with the Application and the CCC’s rights to disclosure.

Discussion

- 1. Edison should be required to disclose the KRCC Contract to allow non-affiliated QFs to enforce their right to equivalent treatment.*

The Commission has long held that contracts between Edison and its QF affiliates will not be approved unless the Commission is convinced that such approval will be fair to, among others, non-affiliated QFs. Decision 90-09-088, at 569. Edison acknowledges this obligation to treat non-affiliated QFs fairly vis-à-vis its affiliates in the Application. Application at 5. In fact, in order to comply with this obligation, Edison states that it will offer similarly situated, non-affiliated QFs comparable contract terms as those included in the KRCC Contract. Application at 14. In light of the applicable requirement and Edison’s proposal to comply therewith, Edison must disclose the terms of the KRCC Contract to non-affiliated QFs.

Even if we assume that Edison's proposal to offer similarly situated, non-affiliated QFs comparable terms and conditions as those included in the KRCC Contract is deemed sufficient to satisfy Edison's requirement to treat non-affiliated QFs fairly (which, as discussed below, may not be the case), Edison must disclose the KRCC Contract to non-affiliated QFs. If similarly situated, non-affiliated QFs do not know the terms of the KRCC Contract, they will not know whether Edison is offering them comparable terms. If Edison is suggesting that because the Commission and certain non-market participants that sign the protective order will know the terms of the KRCC Contract, similarly situated, non-affiliates are protected, Edison is mistaken. Unless Edison expects every similarly situated, non-affiliated QF to complain to the Commission and ask whether the contract terms being offered by Edison are equivalent to those in the KRCC Contract, its proposal would not work. And even if every such QF did complain, the Commission could not conduct a reasonable proceeding adjudicating the merits of the complaint without disclosing the KRCC Contract terms to the complaining QFs.

It is also arguable that Edison's proposal to offer similarly situated, non-affiliated QFs comparable contract terms is legally inadequate. As the Commission stated, affiliated QF contracts must be fair to all QFs, not just similarly situated QFs. Decision 90-09-088, at 569. Moreover, it is entirely unclear how Edison will implement the "similarly situated" provision of its proposal. Does it mean that a QF needs to be a 300 MW QF with multiple generating units, willing to make half of them dispatchable, before Edison will negotiate comparable terms? There are few, if any, QFs that would fit this bill. As Edison itself argues in the Motion, "each contract, including the counterparty, project, market conditions and other factors are unique." Motion at 6. Edison's proposal may, depending upon its implementation, be a sham.

A more realistic standard might be that Edison must offer all non-affiliated QFs whose contracts have expired terms and conditions that are the economic equivalent of the terms and conditions in the KRCC Contract. This is akin to the way the Commission has implemented the requirement that non-standard affiliated QF contracts be fair to ratepayers, by holding ratepayers economically indifferent vis-à-vis standard offer contracts. D.90-09-088, at 570. As a package, the terms and conditions offered to non-affiliated QFs should yield a similar economic result as does the KRCC Contract.

The Commission need not decide in connection with the Motion the appropriate mechanism for implementing its requirement that all QFs be treated fairly. The relevant point here is that all non-affiliated QFs have a legitimate interest in knowing the terms of the KRCC Contract because all QFs are entitled to fair treatment from Edison in relation to this contract. Without knowing the terms of the contract, the QFs cannot enforce their right to such fair treatment.

2. *Edison should be required to disclose the KRCC Contract to QFs because of comparisons that Edison has drawn between the KRCC Contract terms and the proposals made by the CCC and others in the QF pricing and policy proceedings.*

Among Edison's primary justifications for the KRCC Contract is that the contract contains prices that are lower than the prices that would result if the proposals of various QF parties, including the CCC, in the currently ongoing avoided cost rulemaking (R.04-04-025) were adopted. Application at 10. Edison also argues that the KRCC Contract contains numerous terms and conditions that are more favorable to ratepayers than standard offer provisions. *Id.* As Edison admits, the CCC and other QF parties have proposed in the currently pending QF policy proceeding (R.04-04-003) that the Commission extend various standard offer contract terms and

conditions to new QFs and to QFs whose contracts expire in the currently ongoing QF policy proceeding (R.04-04-003). Application at 10.

Edison should not be permitted, in one proceeding, to characterize negatively positions being taken by the CCC adverse to Edison in other pending proceedings before the Commission. This is especially important if, as in the case at present, Edison is seeking to prevent the CCC from seeing the information on which its negative characterizations are based. This kind of conduct would severely compromise the fairness of the QF pricing and policy proceedings. The only way to ameliorate the damage is to permit the CCC to review the data supporting the characterizations so that the CCC may understand them and, potentially, refute them.

While the KRCC Contract has not, at this time, been introduced in either of the other pending QF proceedings, it is undeniable that the contract prices, terms and conditions of the contract and Edison's comparisons of these prices, terms and conditions to the CCC's and other parties' positions in these other proceedings may be considered relevant to these proceedings by some – including, potentially, Commission staff and decisionmakers who will review both . It is also undeniable that the KRCC Contract and Edison's comparisons need not be introduced formally in the other QF proceedings to have an influence in those proceedings. The Commission should not, in this proceeding, issue a protective order that prevents QF parties from access to the KRCC Contract in light of the obvious overlap between the various QF proceedings.

3. *Requiring Edison to disclose only the KRCC Contract fairly balances the parties' interests.*

The CCC is not asking the Commission to require Edison to disclose its financial evaluation of the KRCC Contract or the details of its negotiating strategy. The CCC is only

asking that the KRCC Contract itself be disclosed. This limited request fairly balances the parties' interests.

Edison claims that the KRCC Contract constitutes a trade secret. Motion at 4. Even if true, that does not mean that Edison is free from any potential disclosure obligation. When faced with trade secrets, courts generally apply a balancing test to determine whether the need for secrecy outweighs the need for disclosure. See, e.g., *Bridgestone/Firestone, Inc. v. Superior Court*, 7 Cal.App.4th 1384, 9 Cal.Rptr.2d 709 (Cal.App. 1 Dist. 1992). In the case at present, the need for disclosure clearly outweighs the need for secrecy.

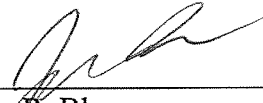
Edison's entire reason for keeping secret the terms of the KRCC Contract is that disclosing the terms will provide a bargaining advantage to other QFs seeking contracts from Edison. But as Edison itself has said, every contract negotiation is unique. Motion at 6. If Edison can make this argument to the Commission, it can make the same argument to potential QF negotiators. Edison also has said that it will make comparable terms and conditions available to similarly situated, non-affiliated QFs. With that, Edison cannot also say that knowledge of the terms and conditions of the KRCC Contract disadvantages Edison in the negotiations.

The need for disclosure of the KRCC Contract to non-affiliated QFs is discussed above. Such need clearly outweighs Edison's transparent assertions of the need for secrecy.

Conclusion

For the foregoing reasons, the CCC respectfully requests that the Commission reject the Motion and modify the proposed protective order to require disclosure of the KRCC Contract to non-affiliated QFs and their representatives.

Respectfully submitted,



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Certificate of Service

I hereby certify that I have this day served a copy of the

Opposition of the California Cogeneration Council to Motion for Protective Order

on all known parties to A.05-12-030, R.04-04-003 and R.04-04-025 by sending a copy via electronic mail and by mailing a properly addressed copy by first-class mail with postage prepaid to each party named in the official service list without an electronic mail address.

Executed on January 9, 2006, at San Francisco, California.



Burton Clarke