Decision **DRAFT DECISION OF ALJ GALVIN** **(Mailed December 19, 2001)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Smurfit-Stone Container Corporation, Complainant, vs. Southern California Edison Company, Defendant.	Case 01-04-009 (Filed April 11, 2001)

O P I N I O N

I. Summary

Can a holding company offset the amount of money that it and its subsidiaries owe a utility for tariffed electric services by an equivalent amount of money that the utility owes one of its subsidiaries for the purchase of energy produced by the subsidiary's cogeneration facility? On the facts and circumstances of this case, we determine that the answer is no.

II. Procedural History

Complainant Smurfit-Stone Container Corporation (SSCC) filed this complaint on April 11, 2001. Southern California Edison Company (SCE) timely filed an answer on May 21, 2001.

A Prehearing Conference (PHC) held on July 12, 2001 was continued to August 29, 2001 at the request of SSCC and SCE because of a tentative settlement agreement between the parties. A briefing schedule was established at the

continued PHC because although the parties were not able to reach an agreement, they stated that an evidentiary hearing was not needed. The parties filed opening briefs on September 17, 2001 and reply briefs on October 1, 2001 at the conclusion of the briefing cycle. This complaint was deemed submitted on October 1, 2001.

III. Background

The facts are not in dispute. Complainant SSCC is a holding company. An organization chart depicting the ownership and relationship of SSCC to its subsidiaries operating in California is set forth in Appendix A.

Jefferson Smurfit Corporation (Jefferson Smurfit), a subsidiary of SSCC, owns and operates a Qualifying Facility (QF) cogeneration power plant in conjunction with its Vernon, California manufacturing facility. Jefferson Smurfit (formerly Container Corporation of America) sells electric energy produced by its Vernon cogeneration facility to SCE under the terms of a Commission-approved standard-offer contract (Vernon QF contract) executed on June 7, 1985.

Jefferson Smurfit has been providing deliveries of energy and capacity to SCE since November 1, 2000. However, SCE has not paid Jefferson Smurfit for the deliveries of energy and capacity delivered between November 1, 2000 and March 27, 2001, estimated by SSCC to total in excess of $7.8 million.

SSCC and its subsidiaries' Jefferson Smurfit and Stone Container Corporation (Stone CC) have not paid SCE for tariffed electric services since the filing of this complaint.[1] Concurrent with the filing of this complaint, SSCC

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[1] Although SSCC is a holding company whose principal assets consist of the outstanding stock of Jefferson Smurfit and Stone CC, there are several, but not all, SCE

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deposited $150,000[2] with the Commission for the amounts SSCC, Jefferson Smurfit and Stone CC owe SCE for tariffed electric services. SSCC continues to deposit with the Commission the monthly amounts SCE bills SSCC, Jefferson Smurfit, and Stone CC for tariffed electric services. These deposits total $2,832,000 as of November 6, 2001, as detailed in Appendix B.

IV. Issue

SSCC seeks a Commission order authorizing it to offset the amount of money that it and its subsidiaries owe SCE for tariffed electric services by an equivalent amount of money SCE owes SSCC under the Vernon QF contract.[3]

V. Discussion

SSCC takes the position that under California law, if cross-demands for money have existed between persons at any point in time when neither demand was barred by the statue of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other.[4] Based on this position, SSCC contends that equity provides it the right to offset what it and its subsidiaries owe SCE with amounts SCE owes Jefferson Smurfit.

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service accounts assigned to SSCC that relate to facilities owned and operated by either Jefferson Smurfit or Stone CC.

[2] All amounts are rounded to thousands of dollars.

[3] Although SSCC recommended alternative relief in the form of a Commission order requiring SCE to make immediate payment of the amounts due under the Vernon QF contract, SSCC withdrew this alternative request in its opening brief.

[4] Section 431.70 of the California Code of Civil Procedure.

SCE successfully disputes SSCC's equity contention in this complaint. The Vernon QF contract is an issue in a separate proceeding, Rulemaking (R.) 99-11-022. Complainant SSCC is not a party to the Vernon QF contract, does not deliver power to SCE, does not receive payment from SCE for SCE's purchase of the Vernon QF power, is not the assigned of nor the successor in interest to the Vernon QF contract, and is not a party to the recent SCE/Jefferson Smurfit settlement agreement entered into in a separate Commission proceeding which provides for SCE to pay for the deliveries of energy and capacity between November 1, 2000 and March 27, 2000.[5] SSCC has not established that SCE owes SSCC any money.

We find that SCE had a dispute with Jefferson Smurfit, and not SSCC, regarding payment for the deliveries of energy and capacity between November 1, 2000 and March 27, 2001. That dispute has been resolved with the execution of a settlement agreement between SCE and Jefferson Smurfit, approved by the Commission in D.01-07-031 in a separate Commission proceeding.

Although SSCC acknowledges that this complaint can be dismissed upon performance of the settlement agreement, it wants this complaint held in abeyance in case SCE breaches the terms of the settlement agreement. This remedy is intended to enable SSCC to pursue the substance of its complaint. Concurrently, SSCC acknowledges that its complaint can be resolved on the record that already exists.

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[5] D.01-07-031, dated July 12, 2001 of R.99-11-022.

By SSCC's own admission, we have sufficient information to resolve its complaint. The settlement agreement provides for the terms and conditions of payment owed Jefferson Smurfit by SCE. By definition, a settlement means that the parties agreed on a mutually acceptable outcome. With the approval of a settlement agreement, SCE's nonpayment for the deliveries of energy and capacity is no longer an issue in this proceeding. Further, there is no basis to use this proceeding to modify a mutually acceptable settlement agreement entered into in a different proceeding. To the extent that either party may breach that settlement agreement, the other party may seek appropriate remedies.

Any further delay in resolving this complaint would only result in a substantial increase in the amount of deposits held by the Commission, which has already increased from an initial deposit of $150,000 to approximately $3 million. Further, maintaining the deposits on hand with the Commission violates the terms and conditions of SCE's Tariffs.

SCE's Tariff Rule 9 requires all bills for energy services to be due and payable on presentation. When a customer disputes the accuracy of its electric service bill, the customer may bring the dispute to the Commission, pursuant to SCE's Tariff Rule 10. That customer has the option of paying the disputed amount to SCE or depositing it with the Commission. SCE's Tariff Rule 10 C. 3 prohibits the Commission from accepting deposits on energy bills if the underlying dispute appears to be over matters that do not directly relate to the accuracy of the bill. With no dispute regarding the accuracy of SSCC's bills for energy services, or those of any of its subsidiaries, there is no basis to retain the funds on deposit with the Commission.

As SCE correctly points out, SSCC has failed to prove by a preponderance of evidence that SCE violated any act or thing done or omitted to be done, in

violation or claimed to be in violation, of any provision of law or of any order or rule of the Commission. The amount on deposit with the Commission should be released to SCE for payment of SSCC's and SSCC's subsidiaries' unpaid energy bills. SSCC and its subsidiaries should be responsible for any remaining balance due SCE. This complaint should be dismissed.

VI. Comments on Draft Decision

The draft decision of ALJ Galvin in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure.

Findings of Fact

1. Complainant SSCC is a holding company.

2. SCE has not paid Jefferson Smurfit for the deliveries of energy and capacity between November 1, 2000 and March 27, 2001.

3. SSCC and its subsidiaries' Jefferson Smurfit and Stone Container have not paid SCE for tariffed electric services since the filing of this complaint.

4. SSCC deposits with the Commission the monthly amounts it and its subsidiaries owe SCE for tariffed electric service.

5. The Vernon QF contract is an issue in a separate Commission proceeding.

6. SSCC is not a party to the Vernon QF contract, does not deliver power to SCE, does not receive payment from SCE for SCE's purchase of the Vernon QF power, and is not the assigned of nor the successor in interest to the Vernon QF contract.

7. SSCC is not a party to the recent SCE/Jefferson Smurfit settlement agreement.

8. The dispute payment for the deliveries of energy and capacity between November 1, 2000 and March 27, 2001 has been resolved with the execution of a

settlement agreement between SCE and Jefferson Smurfit in a separate Commission proceeding.

9. SCE's Tariff Rule 10 C. 3 prohibits the Commission from accepting deposits on energy bills if the underlying dispute appears to be over matters that do not directly relate to the accuracy of the bill.

10. There is no dispute regarding the figuring of SCC or any of its subsidiaries' bills for energy services.

Conclusions of Law

1. A hearing is not necessary. This complaint can be resolved on the record that already exists.

2. The complaint fails to state a violation of any provision of law or of any order or rule of the Commission, as required by Pub. Util. Code § 1702.

3. This case should be dismissed and made effective immediately so that SCE may recover the money improperly deposited with the Commission as soon as possible.

O R D E R

IT IS ORDERED that:

1. The Commission denies Smurfit-Stone Container Corporation's (SSCC) complaint against Southern California Edison Company (SCE) in Case (C.) 01-04-009.

2. SSCC's deposits with the Commission shall be disbursed to SCE within fifteen days from today. SCE shall also receive all interest accumulated on the deposits. Such interest shall not be offset by any additional amounts SSCC or its subsidiaries may owe SCE.

3. SSCC and its subsidiaries' Jefferson Smurfit Corporation and Stone Container Corporation shall be responsible for paying SCE any remaining amounts due on their SCE energy bills.

4. Case 01-04-009 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A
(SEE CPUC FORMAL FILES FOR APPENDIX A)

APPENDIX B
(SEE CPUC FORMAL FILES FOR APPENDIX B)