Decision _____

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Application of Southern California Edison Company (U 338-E) for Order Approving Settlement Agreement Between Southern California Edison Company and Inland Paperboard and Packaging, Inc. | Application 04-03-036 (Filed March 22, 2004) |

# OPINION APPROVING SETTLEMENT

## I. Summary

This decision approves a settlement resolving litigation between Southern California Edison Company (Edison) and Inland Paperboard and Packaging, Inc. (Inland). The settlement reflects a fair compromise of contentious litigation between Edison and Inland.

## II. Background

Edison filed this application March 22, 2004, requesting approval of a settlement that would resolve complex and contentious litigation arising out of Edison's power purchase agreement (PPA)[1] with Inland, the owner of a qualifying facility (QF) in Ontario, California. Edison filed public and non-public

[1] The PPA was signed August 30, 1984.

versions of its application and attached Exhibits (SCE-1, SCE-2, and SCE-3)[2], and a motion for a protective order under California Public Utilities Code Section 583[3], and Commission General Order 66-C. The public version of Edison's application and exhibits describe the events leading to the litigation including the claims and counterclaims of Inland and Edison, and a general description of the process involved for resolving the litigation. The non-public version of the application and exhibits describe the litigation, the entirety of the litigation resolution process, and the settlement terms. Edison requests expedited *ex parte* approval of the settlement, and contends that no hearing is necessary as there are no factual issues to be resolved by a hearing. No party protested the application or otherwise participated in this proceeding.

The litigation in this matter began during California's energy crisis and market failures in 2000 and 2001. The energy crisis, which created financial burdens for California utilities, motivated Edison to suspend some or all payments to QFs beginning November 2000. In March 2001 the Commission issued D.01-03-067, modifying the formula that governs SRAC payments to QFs, and ordering utilities to resume paying QFs for prospective energy deliveries. Notwithstanding Edison's request to Inland for an estimate of April 2001 energy deliveries, Inland mailed Edison a "Termination Notice" purporting to terminate the Inland PPA. Inland filed suit against Edison April 9, 2001, seeking damages, as well as injunctive and declaratory relief finding the Inland PPA cancelled and

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[2] SCE-1 is prepared testimony in support of the application; SCE-2 is the Inland-Edison Settlement Agreement; SCE-3 is the Inland PPA and Amendment (Edison Standard Contract for Long Term Power Purchase, 1984)

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

requiring Edison to permit Inland to use Edison's facilities to transmit Inland's power to third party marketers for sale.

Inland also sought damages for non-payment between November 2000 and March 27, 2001,[4] consequential damages purportedly from payment suspension, declaratory relief entitling Inland to cancel the PPA, and over $50 million in damages because Edison interfered with Inland's ability to sell energy to Sempra Energy Trading Company. Edison denied the material allegations of Inland's claims and asserted several counterclaims related to capacity payments made under the PPA. Edison alleged the amount of capacity refunds related to its counterclaims would exceed $12 million. In June 2001 Edison attempted to settle the litigation, and offer Inland a new form of agreement[5] that included payment of unpaid energy amounts. Inland declined the new agreement, and moved for partial summary judgment allowing sales to third parties. On March 15, 2002, Edison paid Inland approximately $5.3 million representing past energy amounts due including interest calculated at 7% per annum. During 2001 and 2002, Edison engaged in further discovery that indicated Inland may have unreasonably shut down its plant in November and December, resulting in additional counterclaims by Edison. Edison estimates that the value of the additional energy not produced by Inland in November and December 2000 is

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[4] Edison states that it has timely made all payments to Inland for electricity deliveries on and after March 27, 2001.

[5] *See* D.01-06-015 which pre-approved voluntary contract amendments providing a five-year fixed energy price option, supplemental payments for up to one year for QFs demonstrating that current SRAC payments were insufficient to cover fuel costs, and incentive payments for excess contract generation.

$600,000. In addition, during discovery, Edison alleges it found questionable data indicating that Inland did not meet certain Federal Energy Regulatory Commission operating and efficiency requirements. (QFCOES.) Although Inland contends it met QFCOES, Edison disagrees. The application does not provide an estimate of the potential amount at issue in this particular dispute.

Despite numerous negotiation meetings in 2001, 2002, and 2003, and a mediation conference in 2002, Inland and Edison were unable to resolve their differences. Ultimately during the end of 2003, and early 2004, Edison and Inland reached a settlement, which is the subject of this application. Based upon the joint request of the parties, the court vacated a February 24, 2004 trial date and removed the matter from its active calendar, subject to prompt resetting in the event Commission approval of the settlement is not obtained within the agreed-upon timeframe.[6]

## III. Discussion

### A. Confidentiality of Settlement Terms and Litigation Risk

Edison seeks confidential treatment of any information reflecting Edison's litigation risk analysis and terms of its settlement with Inland[7]. Edison justified its claim on the grounds that (1) the Settlement Agreement itself contains a confidentiality clause that prohibits Edison from revealing the settlement's terms; (2) disclosure of the settlement terms would impair Edison's ability in the future

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[6] A final Commission decision that is no longer subject to appeal by January 5, 2005.

[7] An assigned Administrative Law Judge (ALJ) Ruling on May 11, 2004, granted Edison's Motion for a Protective Order.

to obtain the best possible settlements on behalf of its ratepayers; (3) disclosure of the settlement terms could cause Edison competitive harm in negotiating settlements of future disputes involving similar issues with other QFs; (4) disclosure may also disadvantage Edison in litigation with other parties by allowing such parties to exploit concessions that Edison may have given under unique circumstances even though such concessions would not be appropriate in a different context or under different circumstances. In further support of its motion, Edison cites previous Commission decisions that have granted requests for confidential treatment of similar proprietary and contractual matters.[8]

In D.03-07-027, addressing a similar settlement and request for confidentiality, we stated "[t]hat the amount of liability assumed by SCE's (Edison) ratepayers as a result of the settlement should be publicly disclosed for the purpose of facilitating accountability. This order also discloses the circumstances underlying the parties' disputes and a simple description of associated settlement terms. We do not find that disclosure of this information would jeopardize ratepayers by revealing the settlement terms to other potential litigants. The facts of the case and settlement terms are sufficiently complex that other parties would not be advantaged by knowledge of major settlement terms in isolation from more detailed information about the settlement. We have carefully tailored this order to ensure that it does not provide enough information about the settlement or its circumstances to compromise SCE's (Edison) future negotiations."[9]

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[8] *See* D.02-04-014, *mimeo,* at p. 5, and D.00-04-042, *mimeo,* at p. 10.

[9] *See* pp. 7-8.

Similarly in this proceeding, we will grant Edison's motion for protective order insofar as we retain its application and associated exhibits under seal and do not publish the settlement in its entirety; however, we will disclose certain significant aspects of the settlement in the interests of promoting a full and public process and open decisionmaking.

### B. Test for Approving Settlement Agreements

In determining whether a settlement is fair, adequate and reasonable, the Commission reviews a number of factors. These factors include whether the settlement reflects the relative risks and costs of litigation; whether it fairly and reasonably resolves the disputed issues and conserves public and private resources; and whether the agreed-upon terms fall clearly within the range of possible outcomes had the parties fully litigated the dispute.[10] The commission also has considered factors such as whether the settlement negotiations were at arm's length and without collusion, whether the parties were adequately represented, and how far the proceedings had progressed when the parties settled. The Commission will not approve a settlement unless it is "reasonable in light of the whole record, consistent with law, and in the public interest."[11]

Before a utility enters into any settlement agreement it presumably has evaluated the strength of the other party's position. The non-public version of the application and exhibits explain Edison's analysis of continuing litigation and possible litigation outcomes, and why the Settlement Agreement is reasonable.

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[10] Decision (D.) 04-04-067, *mimeo*, p. 2; *see also* D. 96-12-082, 70CPUC 2nd 427, 430 (1996), and D.88-12-083, 30 CPUC 2nd, 189, 222 (1988).

[11] Commission Rules of Practice and Procedure, Rule 51.1(e).

This analysis and explanation is necessary to support the application, as the simple conclusional assertion that a dispute exists is not sufficient grounds to justify a settlement agreement.

### C. Application of Test Approving Settlement Agreements to This Proceeding

The settlement presented in this application would resolve the majority of claims and counterclaims between Inland and Edison. Edison's application states that the settlement:

1. Continues the PPA between Edison and Inland;
2. Provides a payment of $50,000 from Edison to Inland;
3. Dismisses claims by Inland against Edison;
4. Dismisses counterclaims by Edison against Inland;
5. Releases most claims by Edison against Inland related to operating efficiency;
6. Preserves Edison's claims against Inland related to potential retroactive adjustment regarding the Transition Formula;[12]
7. Establishes that the Settlement Agreement is contingent upon Commission approval by January 5, 2005;[13]
8. Would be confidential.

In support of the settlement, Edison states that the settlement reflects the relative risks and costs of litigation, fairly and reasonably resolves the disputed issues, conserves resources and falls well within the range of possible outcomes.

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[12] The Transition Formula adopted in D.96-12-028 calculates utility specific short run avoided costs (SRAC) to determine energy prices paid to QFs.

[13] Commission approval means approval that is no longer subject to appeal.

Edison's application provides substantial discussion of Inland's claims, and Edison's counterclaims, and the litigation risks Edison would face if the settlement is not approved and the litigation continues. Edison notes that the settlement was reached only after three years of litigation, and mediation, and that negotiations were at arm's length and without collusion and the parties were adequately represented. Edison also explains that initially Inland demanded a settlement amount that was over 30 times the amount agreed upon in the final settlement.

In further support of the application, Edison has calculated the difference between payments under the cogeneration settlement Inland rejected in June 2001 and payments Edison has and will make to Inland assuming the Settlement Agreement is approved by the Commission on or before December 31, 2004. Edison's financial calculations show that ratepayers will pay approximately $1.6 million less under the Settlement Agreement in this application, than under the June 2001 cogeneration settlement.

The settlement presented in this application reflects the relative risks and costs of litigation. Parties were well aware of their respective positions given that they engaged in written discovery and litigation prior to settlement. The settlement terms lie within the range of possible outcomes had the litigation continued.

There is no evidence of collusion; indeed, the evidence suggests the parties aggressively pursued their respective interests in the case until the time of settlement and that the parties negotiated the settlement in good faith and with the knowledge of the court and a bona fide mediator.

We note that in similar litigation between Edison and QFs we have approved cogeneration settlement agreements that resolved the litigation between parties, and provided the energy payment terms adopted in D.01-06-015.[14] If Inland had accepted Edison's similar settlement offer at that time, and we approved it, ratepayers would have paid approximately $1.6 million more than as proposed under this settlement. Thus, the settlement is reasonable and should be approved. Edison should be allowed to recover the settlement payment in its rates.

## IV. Conclusion

The settlement resolves complex matters relating to Edison's litigation with the Inland PPA, and the dismissal of claims and counterclaims by Edison and Inland. Under the settlement, the PPA is continued, thus providing ratepayers with a reliable energy source under a standard QF contract. The settlement also preserves any offset or other claims against Inland that may arise from a retroactive adjustment by the Commission to the SRAC transition formula for periods prior to April 1, 2001, thus providing a potential ratepayer benefit.

Because disclosure of the precise settlement terms may compromise negotiations by Edison in future similar circumstances, we do not elaborate here on the terms of the settlement. We do however disclose the most essential elements of the settlement and the financial liabilities that Edison's ratepayers assume as a result of the settlement.

We herein find the Settlement Agreement is reasonable and in the public interest.

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[14] *See* D.01-07-031.

## V. Public Comment and Publication of Draft Decision

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

## VI. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Bruce DeBerry is the assigned Administrative Law Judge in this proceeding.

## Findings of Fact

1. The subject settlement resolves outstanding litigation and associated risk and cost. There is no evidence of collusion or other improper conduct by either party. The settlement follows three years of negotiations and a mediation.

2. The terms and conditions of the settlement are considered confidential by the parties, although Edison furnished the Commission with full details of the settlement under seal.

3. No party protested the application.

4. Edison has sought a protective order for certain portions of its application and exhibits on the ground that dissemination of the contents of these documents would harm Edison and its ratepayers. No harm would result if the Commission were to disclose the aggregate sum of the settlement and basic settlement terms in order to facilitate accountability on behalf of Edison ratepayers.

5. No hearing is necessary.

6. A financial comparison of payments by ratepayers under the cogeneration agreement offered to Inland in June 2001 with payments under the proposed Settlement Agreement in this application, shows ratepayers would pay approximately $1.6 million less under the settlement agreement in this application through December 2004.

7. The settlement agreement preserves any offset or other claims against Inland that may arise from a retroactive adjustment by the Commission to the SRAC formula for periods prior to April 1, 2001.

8. The Inland PPA will remain in effect.

9. Edison will make a $50,000 payment to Inland as part of the Settlement Agreement.

## Conclusions of Law

1. The Settlement Agreement between Edison and Inland is reasonable in light of the whole record, consistent with law, and in the public interest.

2. The application should be granted as provided in the following order.

3. Edison should be allowed to recover the settlement payment in its rates.

4. Edison's motion for protective order should be granted except to the extent that this order discloses certain elements of the settlement in the interests of a public process and open decisionmaking.

5. In order that benefits of the settlement may be realized promptly, this order should be effective immediately.

## O R D E R

**IT IS ORDERED** that:

1. The application of Southern California Edison Company (Edison) for approval of the Settlement Agreement between Edison and Inland Paperboard and Packaging, Inc., as set forth in Exhibit SCE-2 to the application, is granted.

2. Edison shall be allowed to recover the settlement payment in its rates.

3. Edison's motion for a protective order is granted to the extent set forth below:

   a. Designated portions of Edison's application and Exhibits, which Edison filed under seal as an attachment to its motion for protective order, shall remain under seal for a period of one year from the date of this decision. During that period, the foregoing documents or portions of documents shall not be made accessible or be disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned ALJ, or the ALJ then designated as Law and Motion Judge.

   b. If Edison believes that further protection of this information is needed after one year, it may file a motion stating the justification for further withholding the material from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than 30 days before the expiration of this protective order.

4. The Commission originally determined that hearings would be required in this proceeding. Because no party protested this application and there exists no outstanding factual matters, the Commission herein determines that no hearings are needed in this proceeding.

5. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.