

facilities. They argued that they should be able to rely on their final, now non-appealable certifications as QFs, which allow them to burn natural gas pursuant to the "essential fixed assets" test and that the decision in Laidlaw should not be applied retroactively to their facilities. Finally, they pointed out that SoCal Edison, in Laidlaw, had protested the use of the "essential fixed assets" test as the basis for the certification of just one, i.e., Laidlaw's, small power production facility.

5. Following the filing of these answers, the parties pursued settlement discussions concerning the issues raised in this proceeding as well as other matters.

6. On August 27, 2001, SoCal Edison filed a letter with the Commission asking that the Commission not take any action in this proceeding, explaining that SoCal Edison had entered into "Agreements Addressing Renewable Energy Pricing and Payment Issues" (Agreements) with each of the QFs in this proceeding. SoCal Edison stated that the Agreements obligated the parties to seek an order staying the proceeding "until the satisfaction of certain conditional obligations or the occurrence of certain events specified in the Agreements."

7. On August 31, 2001, Sunray and LUZ III-VII filed a response to SoCal Edison's August 27 letter. They stated that they were among the QFs referred to in SoCal Edison's submissions. LUZ III-VII stated that the Agreements do provide for a stay of the proceeding, but noted that SoCal Edison's August 27 letter failed to reflect that the Agreements also provide that, if the conditional obligations specified in the Agreements are satisfied, SoCal Edison is "obligated" to withdraw its petition for declaratory order in this proceeding and to request that its claims be "dismissed with prejudice." LUZ III-VII stated that they were supporting the request for stay only on the understanding that, if the conditional obligations in the Agreement were satisfied, the proceeding would "be dismissed with prejudice and the proceeding terminated."

8. On October 15, 2001, in light of the parties' August 27 and 31 submittals, the Commission issued an order deferring action on SoCal Edison's petition for declaratory order, stating:

This action will give time for certain conditions contained in settlement agreements to be met, ultimately resulting in the withdrawal of the petition for declaratory order.^[1]

The Commission also expressly directed SoCal Edison to report on "the satisfaction of certain conditional obligations or the occurrence of certain events specified in the

¹ Southern California Edison Company, 97 FERC & 61,052 at 61,290 (2001).

Agreements" within six months of the date of the order, unless SoCal Edison had not before that time requested the case be dismissed with prejudice.² No party sought rehearing of this order.

9. On April 15, 2002, SoCal Edison reported that it "fully satisfied the relevant conditional obligations specified in the Agreements." SoCal Edison stated that the standstill period had terminated, but instead of seeking dismissal with prejudice asked that the Commission "now proceed to consider the Petition on the merits."

September 25 and March 3 Orders

10. In response, in the September 25 Order, the Commission dismissed SoCal Edison's petition for declaratory order, finding that the Agreements between SoCal Edison and the QFs expressly provided that a petition, such as SoCal Edison's, filed before the June 2001 execution of the Agreements, should properly be dismissed with prejudice as SoCal Edison's claim did not survive the Agreements.³

11. SoCal Edison sought rehearing. In the March 3 Order, rehearing was denied.⁴

12. SoCal Edison filed a petition for review of the Commission's orders in the United States Court of Appeals for the District of Columbia Circuit, Southern California Edison Company v. FERC, Case No. 03-1123.

Offer of Settlement

13. The petition for review was assigned to the court's Appellate Mediation Program. The settlement submitted in this proceeding is the fruit of that mediation.

14. The settlement permanently resolves any and all issues concerning the past, present and future use of natural gas at facilities that were certified by the Commission under the "essential fixed assets" standard. The settlement also provides, among other things, that SoCal Edison will withdraw with prejudice its petition for declaratory order. Withdrawal of the petition with prejudice will preclude the refiling by Edison or its

²Id. at 61,291.

³ Southern California Edison Company, 100 FERC & 61,325 (2002) (September 25 Order).

⁴ Southern California Edison Company, 102 FERC ¶ 61,256 (2003) (March 3 Order).

affiliates of any future petition asserting challenges to the QF status of any facility certified under the “essential fixed assets” standard before Laidlaw.

15. The settlement asks, as an express condition, that the Commission vacate its prior orders in this proceeding, effective the date that SoCal Edison withdraws its petition.

Discussion

16. The settlement appears to be fair and reasonable and in the public interest. Accordingly, we will approve it. Moreover, while we typically do not vacate our orders,⁵ we will vacate our prior orders issued in this proceeding; we will make the vacatur effective the date that SoCal Edison’s withdrawal with prejudice of its petition for declaratory order becomes effective. Our action in vacating our prior orders is unusual, but is appropriate in the circumstances of this proceeding (1) because the motion for vacatur is supported by all parties that participated in this proceeding, and granting vacatur would harm no one, (2) because the prior orders that are being vacated address procedural matters that are unique to the parties to this proceeding, and (3) also because the orders that are to be vacated interpreted an agreement that was not on file with this Commission, *i.e.*, was not a filed rate schedule. Moreover, the effect of the settlement (and related vacatur) -- with the required withdrawal of the petition for declaratory order -- leaves the parties in the same position as if the prior orders dismissing the petition for declaratory order had continued to stand; that is, SoCal Edison’s claims are dismissed. Accordingly, we will grant vacatur.

The Commission orders:

(A) The proposed settlement filed by LUZ III-VII, Sunray, and SoCal Edison is hereby approved.

⁵ E.g., *Constellation Power Source, Inc. v. California Power Exchange*, 100 FERC ¶ 61,380 at P 20 (2002).

(B) Our prior orders issued in this proceeding are hereby vacated, effective the date SoCal Edison's withdrawal with prejudice of its petition for declaratory order filed in this proceeding becomes effective.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southern California Edison Company

Docket Nos. EL00-89-000
EL00-89-001

(Issued March 3, 2004)

KELLY, Commissioner, dissenting in part:

For the reasons I have previously set forth in Wisconsin Power & Light Co., 106 FERC 61,112 (2004), I do not believe that the Commission should depart from its precedent of not approving settlement provisions that preclude the Commission, acting *sua sponte* on behalf of a non-party, or pursuant to a complaint by a non-party, from investigating rates, terms and conditions under the “just and reasonable” standard of section 206 of the Federal Power Act at such times and under such circumstances as the Commission deems appropriate.

Therefore, I disagree with this order to the extent it approves a settlement that restricts future Commission review of changes to the settlement rates to the Mobile-Sierra “public interest” standard even with respect to non-parties. Specifically, the settlement provides, in relevant part:

None of the Parties shall petition to FERC pursuant to the provisions of Sections 205 or 206 of the Federal Power Act to amend this Agreement; absent the agreement of all Parties, the standard of review for any changes to this Agreement proposed by a non-party or FERC acting *sua sponte* shall be the “public interest” standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the “Mobile-Sierra” doctrine).

Suedeen G. Kelly