SOUTHERN CALIFORNIA
EDISON
An EDISON INTERNATIONAL Company

Dwight E. Nunn
Vice President

May 3, 1996

U. S. Nuclear Regulatory Commission
Attention: Document Control Desk
Washington, D.C. 20555

Gentlemen:

Subject: **Docket Nos. 50-361 and 50-362**
Restructuring Issues
San Onofre Nuclear Generating Station
Units 2 and 3

During a telephone conversation on April 22, 1996, with Mel Fields, the NRC Project Manager for San Onofre Units 2 and 3, I requested an extension until June 3, 1996, to respond to the April 4, 1996, letter from William T. Russell to Harold B. Ray. This letter confirms our mutual understanding that the NRC granted our request.

One of the issues addressed in Mr. Russell's letter is the potential divestiture of Edison's assets. Enclosed for your information is a copy of "Comments of Southern California Edison Company (U338-E) on Plan for Voluntary Divestiture Submitted in Response to the Commission's December 20, 1995 Policy Decision," dated March 19, 1996. This filing submitted Edison's voluntary divestiture plan that, if implemented, would result in the divestiture of fifty percent of Edison's fossil generating assets in its service territory by January 1, 1998. The plan was submitted in response to the California Public Utilities Commission's (CPUC) order. The plan describes the staging of all related regulatory, environmental, financial, and transactional issues. Pages 17 to 30 of the enclosed filing reflect Edison's current thinking on how the CPUC should confirm certain key assurances and resolve certain key issues. The filing does not identify specific Edison facilities to be divested.

Prior to submittal of our response to Mr. Russell's letter we have scheduled a meeting with the NRC staff for May 21 to discuss the various issues addressed in the letter. In the meantime, Edison does not plan to take any actions requiring NRC consent without providing the NRC a reasonable period of time for review in accordance with applicable NRC regulations.

If you have any further questions on our schedule for the letter response, please call me.

Sincerely,

Dwight E. Nunn

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P. O. Box 128
San Clemente, CA 92672
714-368-1480

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cc: L. J. Callan, Regional Administrator, NRC Region IV
J. E. Dyer, Director, Division of Reactor Projects, Region IV
K. E. Perkins, Jr., Director, Walnut Creek Field Office, NRC Region IV
J. A. Sloan, NRC Senior Resident Inspector, San Onofre Units 2 & 3
M. B. Fields, NRC Project Manager, San Onofre Units 2 and 3

SOUTHERN CALIFORNIA EDISON
An EDISON INTERNATIONAL Company

Ann P. Cohn
Assistant General Counsel

March 19, 1996

Docket Clerk
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: R.94-04-031 and I.94-04-032

Dear Docket Clerk:

Enclosed for filing with the Commission are the original and five copies of the **COMMENTS OF SOUTHERN CALIFORNIA EDISON COMPANY (U338-E) ON PLAN FOR VOLUNTARY DIVESTITURE SUBMITTED IN RESPONSE TO THE COMMISSION'S DECEMBER 20, 1995 POLICY DECISION** in the above referenced proceeding.

We request that a copy of this document be file-stamped and returned for our records. A self-addressed, stamped envelope is enclosed for your convenience.

Your courtesy in this matter is appreciated.

Very truly yours,

Ann P. Cohn

Ann P. Cohn

Enclosures

cc: All Parties of Record
(U 338-E)

APC:amd:LW960770.007

P.O. Box 800 2244 Walnut Grove Ave. Rosemead, California 91770 (818) 302-2211 Fax (818) 302-1935

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.	R.94-04-031 (Filed April 20, 1994)
Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation	I.94-04-032 (Filed April 20, 1994)

COMMENTS OF SOUTHERN CALIFORNIA EDISON COMPANY (U338-E) ON PLAN FOR VOLUNTARY DIVESTITURE SUBMITTED IN RESPONSE TO THE COMMISSION'S DECEMBER 20, 1995 POLICY DECISION

ANN P. COHN

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (818) 302-2211
Facsimile: (818) 302-1935

Dated: March 19, 1996

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COMMENTS OF SOUTHERN CALIFORNIA EDISON COMPANY (U338-E) ON PLAN FOR VOLUNTARY DIVESTITURE SUBMITTED IN RESPONSE TO THE COMMISSION'S DECEMBER 20, 1995 POLICY DECISION

In its Decision on Restructuring,[1] the Commission directed Southern California Edison Company ("Edison") and Pacific Gas & Electric Company ("PG&E") each to submit a voluntary divestiture plan. Edison accordingly submits a voluntary divestiture plan that, if implemented as described herein, would result in the divestiture of fifty percent of its fossil generation assets in its service area by January 1, 1998.

It is important for the Commission to understand that divestiture is a momentous step for Edison, and that this voluntary plan has been submitted only after extensive corporate introspection, and in reliance on the assurances the

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1/ D.95-12-063 dated December 20, 1995, as modified by D.96-01-009 dated January 10, 1996 and issued January 12, 1996 in Dockets R.94-04-031.

Commission has given as to the terms of the transition and the full recovery of transition costs. As explained below, Edison is willing to go forward with its voluntary divestiture plan as soon as the Commission takes action to approve the plan and resolve the key issues identified herein in a manner fully protects Edison and its employees.

It is important at the outset to state the reasons why Edison would be willing to go forward with this plan, and the understandings on which Edison's proposal is predicated. As the Commission is aware, Edison's position in this proceeding has been that such a divestiture plan has not been shown necessary to mitigate concerns over market power.[2] This remains Edison's view, and is indeed confirmed by the Policy Decision.

However, the Policy Decision also found that various parties harbor a "reasonable suspicion" that there is excessive concentration in electric generation.[3] The Decision "recognize[d] the need for a rigorous empirical market concentration analysis to establish strong conclusions and to verify or disprove this suspicion."[4] Nonetheless, the Decision went on to suggest that "market power problems almost certainly will require the existing investor-owned utilities to divest themselves of a substantial portion of their generating assets, particularly their fossil generating plants located within their service territory."[5]

Edison agrees with the Commission that, absent a rigorous and appropriate analysis, any surmise as to the need for divestiture is based on "suspicion alone." Moreover, Edison continues to believe that if market power issues were evaluated

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[2] In the Memorandum of Understanding (MOU) the MOU parties proposed that FERC make a determination as to the need for any immediate structural remedies based on an appropriate antitrust analysis. The MOU permitted FERC to rely on contractual mitigation mechanisms as an interim measure and to make a judgment as to the need for and advisability of structural remedies on the basis of operating experience in the new marketplace.

[3] D.95-12-063, p. 98.

[4] Id., p. 99.

[5] Id., pp. 100-101.

on the basis of an appropriate conceptual framework and empirical evidence, any mitigation measures deemed necessary would not require the broad divestiture plan which Edison has described.[6] Thus, Edison's willingness to implement this voluntary divestiture plan on the conditions described herein does not stem from a conclusion that such divestiture is necessary at this time to assuage market power concerns.

Rather, Edison is willing to propose this voluntary divestiture plan as an indication of its support for the basic policy direction and transition plan stated in the Commission's Decision and to help ensure that the Decision -- and the assurances it contains -- are implemented in a way that protects the interests of all concerned. The Commission's Decision in effect creates a new regulatory compact governing the transition to a new regulatory regime. From Edison's standpoint, a critical element in this new compact is the Commission's declaration that "allowing utilities to recover legitimate transition costs is an essential element of the new market structure and a precondition to direct access."[7] Edison also recognizes that the Decision leaves many important questions for resolution through implementation proceedings before the Commission, and leaves other issues in need of additional clarification. These include issues that are of crucial importance to Edison, such as the establishment of a non-bypassable CTC collection mechanism, the development of assured worker protection measures, the recovery of costs associated with a divestiture, and the appropriate recovery of fixed operation and maintenance costs and necessary capital additions for fossil units that operate during the transition. As part of the new regulatory compact created by the

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[6] Appropriate conceptual framework and empirical evidence would take into account the breadth of competition in the 153,634 MW Western Systems Coordinating Council ("WSCC"), the availability of new entry, and the fact that the Independent System Operator will provide non-discriminatory transmission access to the lowest bidders.

[7] D.95-12-063, p. 141.

Decision, Edison requests that the Commission approve Edison's voluntary plan and, as part of such approval, (1) provide (if not previously issued) the clarifications requested in Edison's February 13, 1996 Petition for Clarification, and in the Alternative, Application for Rehearing; and (2) confirm that the specific divestiture-related issues identified herein will be resolved in a manner that reaffirms the principles in the Decision and that is fair to Edison, its employees and other stakeholders.

Edison believes that its voluntary divestiture plan can be consummated by January 1, 1998, if Edison, the Commission, and other stakeholders work together to address the issues in a cooperative manner. Nevertheless, we readily acknowledge that meeting this date will be a stretch target. Edison is willing to commit to do its part, once the Commission has approved this plan and provided the confirmation requested herein. Edison commits to submit its § 851 filing, related documentation, and Proponent's Environmental Assessment within seventy-five days of such Commission order.

Section I below provides details of Edison's plan. Section II describes the key actions the Commission must take, and the confirmations it needs to provide, before the plan can be implemented. Finally, in Section III, Edison makes it absolutely clear that this divestiture plan is a voluntary filing, submitted on the premise that restructuring will be implemented according to the principles set forth in the Commission's Policy Decision, especially the commitment in that Decision to full transition cost recovery by means of a non-bypassable CTC mechanism.

I.

EDISON'S VOLUNTARY DIVESTITURE PLAN

A. Overview

Edison's fossil generating assets within its service territory consist of roughly 10,000 megawatts of generating capacity. This capacity is comprised of twenty-six active, sixteen standby, and five peaking units at twelve separate locations. The active and standby units are largely undifferentiated, producing energy at roughly the same variable cost. The remaining units are gas turbine units used for peaking purposes.

Currently, Edison contemplates selling 50% of this generating capacity by auction. This plan sets forth Edison's thinking regarding how a sale by auction would be structured. Edison will continue to review the possibilities of divestiture by spin-off or swap.[8] However, at this time, Edison believes a sale by auction may be the most practical path, and accordingly, these comments focus on that approach.

Under this plan, Edison would file with the Commission, within 75 days of the Commission ruling approving its plan, a § 851 application that will identify the specific units that will be sold.[9] If the Commission acts expeditiously, implementation of Edison's plan could begin by mid-summer and divestiture could be completed by January 1, 1998.

Edison's proposed divestiture does not encompass the Mohave and Four Corners baseload coal units, which are owned jointly with others and are located in

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[8] If Edison decides to pursue a swap or spin, Edison would design such transaction so that it can be consummated within a comparable timeframe.

[9] Edison has not yet determined whether it would auction the generating units as a single package or in two or more packages.

Nevada and New Mexico. Edison has entitlements to roughly 1600 MW of generating capacity from these units. For reasons discussed further below, Edison does not interpret the Commission's Decision as referring to fossil generating units located outside of a utility's service territory. Moreover, because of the ownership and contractual arrangements associated with these units, including them in a divestiture plan would be complicated and significantly more protracted.

B. Edison Proposes A Three-Stage Divestiture Process

Edison describes below its proposal for sequencing the regulatory, environmental, and commercial aspects of the contemplated divestiture. Edison has approached the task of developing this proposal with several, potentially competing, considerations in mind. First, Edison fully understands the need for the Commission and stakeholders to have an adequate opportunity to review Edison's § 851 Application in order to assure that both the divestiture process and the actual sale transactions are in the public interest. Moreover, Edison understands that there is a possibility that Commission approval of Edison's § 851 Application may, in this instance, be deemed a "project" within the meaning of the California Environmental Quality Act ("CEQA"). To the extent CEQA is triggered, Edison fully understands that the Commission must consider the impact on the environment prior to acting on Edison's Application. Nevertheless, Edison also recognizes that the commercial markets will demand that any required final regulatory approvals of the sale follow closely upon completion of the auction.

It is the need to balance these competing considerations that has resulted in Edison proposing a three-stage process. In the first stage, Edison would file its § 851 Application and Proponent's Environmental Assessment ("PEA"). This filing would include Edison's identification of the plants, including identification of the support equipment and systems, to be sold (and any groupings of these plants for

auction purposes), a complete description of the auction process, and Edison's proposed form of sale contract and confidentiality agreement. At the conclusion of the first stage, the Commission would authorize Edison to go forward with the auction in accordance with approved protocols, procedures, and forms of sale contract and confidentiality agreement.

The second stage would involve the auction itself, culminating in the selection of the winning bidder(s) and execution of the sale contract, the effectiveness of which would be subject to final Commission approval. The final stage would involve a resumption of the regulatory proceeding to certify the auction was conducted in accordance with the approved protocols and procedures and to approve the final sale documents.

To the extent the Commission determines that an Environmental Impact Report ("EIR") is required, the CEQA process would proceed in parallel with these stages. During Stage One, the Commission would determine whether approval of the Application is a "project" within the purview of CEQA, and if so whether a Negative Declaration or EIR is warranted. If an EIR is deemed warranted, scoping activities and preparation of the Draft EIR would also be completed during this stage. Comments on the Draft EIR would be received during Stage Two, and preparation of the Final EIR would be completed during Stage Three. In the sections that follow, Edison describes in more detail the activities to be completed in each stage.

1. Stage One: Edison Will Ask The Commission To Authorize Auction Protocols And Procedures

Edison's § 851 Application would trigger the commencement of Stage One. Edison contemplates that accompanying its Application would be testimony containing recommendations for auction protocols and procedures.

Edison would also provide a proposed form of sale contract, containing terms and conditions customary for a transaction of this type and a Proponent's Environmental Assessment addressing environmental issues. In addition, Edison would address any ratemaking issues as part of this filing.[10]

The first stage of the regulatory proceeding would focus on how the auction would be conducted, what the form of the sale contract should be, and any related ratemaking issues. Edison anticipates that this proceeding may require workshops, technical conferences, and evidentiary hearings. To the extent the Commission concludes that an EIR is warranted, Edison contemplates that the initial scoping work and preparation of the Draft EIR would proceed in parallel with this phase of the § 851 proceeding.

This portion of the case should be completed in six to eight months. At its conclusion the Commission would issue an order authorizing Edison to proceed with the auction based on approved auction protocols and procedures. At this point, the § 851 proceeding would be suspended while the auction process commences.

2. Stage Two: The Auction Will Be Conducted And Winning Bidder(s) Will Be Selected

Edison contemplates that the auction itself will have five distinct phases, with some important initial work having been completed

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[10] As will be discussed below in Section II, although Edison's proposal is designed to complete the divestiture by January 1, 1998, the start of the new market structure and direct access phase-in, we must consider the possibility that there may be a mismatch in the timing of when the divestiture is completed and the new markets commence. Accordingly, Edison believes that it should propose appropriate ratemaking procedures to address both the situation in which the sale is completed and approved prior to the start of the new market and the situation in which the new market commences operation prior to Commission approval of the divestiture.

during Stage One.[11] Preparation of the selling memorandum will be commenced during Stage One. The selling memorandum will contain information on the specific plants to be sold, as well as general information on the region, industry, and regulatory environment. Bid specifications will be included in the selling memorandum.

The first phase of Stage Two, which will focus on bidder prequalification, should take between two and four weeks. The purpose of this activity is to eliminate all unqualified buyers from the auction process. In addition, Edison contemplates that during this phase, drafting of the selling memorandum, confidentiality agreements and form of sale contract will be completed, incorporating any changes required by the Commission at the conclusion of Stage One.

The second phase of the auction process would commence with distribution of the Commission's approved auction protocols and procedures, any Draft EIR, selling memorandum, confidentiality agreement and sale contract to the qualified bidders. Bidders would then have a period of time to review these materials and prepare their initial expressions of interest. Edison currently contemplates that between six and twelve weeks would be an appropriate time period for this phase.

Phase three would involve review of the initial expressions of interest and selection of second round bidders. All bids would be reviewed simultaneously, and only after the due date for submission of initial expressions of interest has passed. Edison contemplates that the criteria for evaluating the initial expressions of interest may be among the issues

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[11] During Stage One, Edison will propose criteria by which bidders will be prequalified. Edison expects that, at the conclusion of Stage One, the Commission will endorse the prequalification criteria.

addressed by the Commission in Stage One. Phase three would be completed expeditiously, probably within seven days.

Phase four would involve second round bidders undertaking their due diligence, and then completing and submitting their bids. It is conceivable that information on the specific plants, supplementary to that provided in the selling memorandum, might be required at this point. Second round bidders would have the opportunity for plant inspections, as well as access to plant operating statistics, capital expenditures, maintenance expenditures, and other financial information. A reasonable period of time for these activities would be in the range of four to eight weeks, depending on the number of second round bidders. During this phase, bidders would also submit their final bids. At the conclusion of this phase, winning bidder(s) would be notified. Edison expects that it might take up to seven days to evaluate the final bids, again using criteria approved by the Commission in Stage One.

Phase five would involve the winning bidder(s) undertaking their final due diligence. During this period, final contract negotiations would take place. At the conclusion of phase five, which might take up to four weeks, final sale contract(s) would be executed subject to Commission approval.

Edison anticipates that the entirety of Stage Two -- the actual auction from preliminary bidder qualification to selection of winning bidder(s) -- could be completed in six months. During Stage Two, interested parties would be commenting on the Draft EIR, and the Commission could commence work on the Final EIR.

3. Stage Three: Edison Will Seek The Commission's Final Approval

After completion of the auction, the § 851 proceeding would resume. Edison proposes that this final stage of the proceeding would be used to certify that the auction was conducted in accordance with the approved protocols and to review the final sale documents. Edison suggests that the Commission could issue its final decision on Edison's § 851 Application, including issuing a Final EIR, within three months of resumption of the § 851 proceeding. During this final phase, Edison anticipates that issues involving operating licenses and other permits would be resolved.

4. Edison's Proposal Is Consistent With The Commission's Roadmap Decision And In Conformance With CEQA

The Commission's recent Roadmap decision states:

> "In order to ensure that the ISO and the Power Exchange are in place and operable by the target date of no later than January 1, 1998, any §851 proceedings must be completed well before implementation."[12]

The Commission's rules and practices are flexible enough to accommodate the objectives of Edison's proposal. The law under § 851 gives the Commission the ability to administer the review process in a manner that allows it to achieve its overall policy goals.

The Commission's Rule 87 provides for "liberal construction of [its] rules 'to secure just, speedy, and inexpensive determination of the issues presented,'" and the Commission should apply its rules flexibly and

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[12] D.96-03-022, dated March 13, 1996, p. 19.

reasonably, in light of the nature of the restructuring process.[13] In re Happy Valley Telephone Company, 1983 Cal. PUC LEXIS 1077, *14, 12 Cal.P.U.C.2d 245 (quoting PUC Rules of Practice and Procedure 87).

Under Edison's proposal, the Commission will not abdicate any of its oversight responsibilities. The Commission will have ample opportunity following the conclusion of the auction to rule on the merits of the final sale(s). If Edison is able to proceed with an auction along the design proposed here, and potential bidders have the assurance that the Commission approves of the sales and auction process in general terms, the auction can be completed with sufficient time left for Commission review of the final documents before January 1, 1998.

It is not uncommon for the Commission to apply its procedural rules flexibly when rigid adherence to them might hinder achievement of a public good. In several cases involving the sale and leaseback of utility headquarters buildings, for example, the Commission approved a two-phase process in which the utilities were pre-authorized to sell their headquarters buildings on whatever terms they could obtain in the market and lease the facilities back until such time as they had completed construction of new headquarters buildings. In order to facilitate the utilities' transfer to more cost-effective space, the Commission waived the formal requirement that the buyers must be named before the Commission would consider the § 851 applications and reserved for later determination the effect the arrangements

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[13] In this context, some of the procedural rules governing pleadings pursuant to § 851, e.g. Rules of Practice and Procedure 35(d) and 36(b), are most appropriate to Stage Three of the process. During Stage Three, Edison would specify the agreed purchase price and other terms of the proposed transaction, and provide a copy of the contract for sale which could then be made an exhibit to the application. Edison's three-stage plan will provide the Commission with information with which it can determine the effect upon the public of proposed transactions, in a manner that legitimately balances the commercial needs of the divestiture transaction. See Santa Barbara Cellular, Inc., 1989 Cal. PUC LEXIS 444, 32 Cal.P.U.C.2d 478 (Sept. 27, 1989).

would have upon rates. See, e.g., In re Application of Southern California Water Co., 1989 Cal. PUC LEXIS 283 (Apr. 26, 1989); In re Application of Southern Calif. Gas Co., 1987 Cal. PUC LEXIS 243 (Sept. 23, 1987).

Edison's proposal is also fully consistent with the mandates of CEQA. CEQA is meant to interact with other statutes and regulations in a manner that is conducive to satisfying the requirements of all relevant law, and to the maximum extent feasible, CEQA procedures and other procedures should run concurrently, rather than consecutively.[14] CEQA procedures should also begin as early as possible in the planning process.[15] Under Edison's plan, environmental review can begin this year and be completed by January 1, 1998.

It is largely within the Commission's discretion to decide when in the restructuring process its CEQA review should begin. "[T]he question of timing of the preparation of an EIR [is] basically an administrative decision to be made by a public agency consistent with the overall objectives of CEQA."[16] "[I]n order to achieve the salutary objectives of CEQA the determination of the earliest feasible time to [prepare an EIR] is to be made initially by the agency itself, which decision must be respected in the absence of manifest abuse."[17]

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[14] Pub. Resources Code § 21003, subd. (a).

[15] CEQA Guidelines § 15004, subd. (b) ("EIRs . . . should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design"); CEQA Guidelines § 15006 (the CEQA process should be integrated into the early part of the planning process in order to reduce delay and paperwork); Mount Sutro Defense Committee v. Regents of the University of California, 77 Cal.App.3d 20, 34, 143 Cal.Rptr. 365 (1st Dist. 1978) (Environmental problems should be considered at a point in the planning process where genuine flexibility remains.).

[16] Mount Sutro Defense Committee, 77 Cal.App.3d 20, 36.

[17] Stand Tall on Principles v. Shasta Union High School District, 235 Cal.App.3d 772, 780, 1 Cal.Rptr.2d 107 (3d Dist. 1991), referencing No Oil, Inc. v. City of Los Angeles, 13 Cal.3d 68, 88, 118 Cal.Rptr. 34, 529 P.2d 66 (1974).

Nothing in CEQA itself or in the Guidelines implementing it requires that before environmental review of the restructuring may begin, the ultimate buyers of the generating assets to be divested by Edison must be identified. Guidelines 15120 through 15132, for example, set out in some detail the various elements that an EIR must contain, such as a precise description of the geographic location, environmental setting, objectives, and technical, economic, and environmental characteristics of the subject project. The Commission is fully capable of (1) identifying these elements as to the plants Edison puts up for auction without knowing the ultimate buyer(s), and (2) analyzing the likely effects upon the environment of generation at full capacity up to the permit limit of each plant. As the winning bidder(s) becomes identified, that information can be incorporated into the environmental analysis to the extent that it is environmentally significant.

C. Exclusion Of Edison's Coal-Fired Generating Assets From This Voluntary Divestiture Plan Is Reasonable

The Commission's Policy Decision indicates that it is particularly concerned over the concentration of generating units in Edison's, PG&E's and SDG&E's service territories.[18] The Decision's ordering paragraphs, however, request PG&E and Edison to file a plan to voluntarily divest fifty percent of their fossil generation, without specific reference to its location in their service territory.[19] Edison's divestiture proposal addresses fifty percent of all its fossil units in its service area. As noted earlier, it does not encompass the Mohave and Four Corners baseload coal units located outside of its service territory,[20] because Edison does not interpret the

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[18] See, e.g. D.95-12-063, pp. 100-101.
[19] Id., Order No. 19, p. 223.
[20] The Mohave plant is a two-unit coal station located in Laughlin, Nevada. Edison owns a portion of these units in joint tenancy with LADWP, Nevada Power, and the Salt River Project ("SRP").
Continued on the next page

Commission's Decision as desiring divestiture of such units. Moreover, it is clear that under the logic of the Decision these units should not be included in Edison's divestiture plan.

First, these units do not create the market power concerns expressed in the Decision. The Decision identifies two types of potential concern about concentration of generating assets. It postulates that a "single competitor might be able to control enough assets to alter the supply-demand equilibrium and thus be able to increase prices by withholding generation from the market (decreasing supply)." Second, it hypothesizes that a competitor could control the generating units that are likely to be the final increment in the dispatch order, i.e., that will be the marginal unit dispatched and thus "control the marginal price in generation."[21] Edison's remote coal capacity entitlements are not susceptible to either of these types of market power exercise.

These units are located in the Desert Southwest, outside of Edison's service area, in a region that contains many thousands of megawatts of competing generation. If these generating units are in the same relevant geographic market as Edison's Los Angeles basin gas-fired generation, as Edison believes is the case, it is extremely unlikely that a reasonable market power analysis would conclude that Edison has any significant market power associated with competitive sales from its generating units. There are just too many generators in California, the Southwest, and proximate areas of the WSCC for anyone to have significant market power in an open access environment. If the Commission's market power concerns are

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Continued from the previous page

Edison is entitled to 884.8 MW of capacity from Mohave. The Four Corners plant is located in San Juan county, New Mexico, and is operated by Arizona Public Service Company ("APS"). Edison is entitled to 753.6 MW of capacity from Four Corners Units 4 and 5 under a co-tenancy agreement with APS, Public Service of New Mexico, SRP, Tucson Electric Power Co., and El Paso Electric Co.

21/ D.95-12-063, p. 99.

associated with a relevant geographic market that does not include the Southwest, then divesting generators located in the Southwest would not remedy the problem. Moreover, these units are baseload units and will not set the marginal pool price. Accordingly, Edison has focused on developing a divestiture plan built around its fossil units in California, a geographic area where the Commission appears to have assumed a market power problem may lurk.

Second, the contractual arrangements governing Edison's participation in these units do not contemplate or readily lend themselves to an auction sale of these units, particularly within the timeframe contemplated by Edison's plan. Edison's rights in these units are governed by the terms of explicit joint participation agreements. These agreements require Edison to offer a right of first refusal to its co-participants, and require three years' notice prior to any sale.

In sum, Edison's divestiture proposal covers the units over which the Commission expressed concern in its Policy Decision -- all fossil units in Edison's service territory. Moreover, as the Commission notes in its Roadmap decision, FERC will conduct an assessment of generation market power issues in reviewing the utilities' April 29, 1996 ISO and Power Exchange filings.[22] Under settled FERC law, a utility seeking authority to sell power at market-based rates must establish that it does not possess significant market power.[23] Given its proposed divestiture of fifty percent of its fossil generation in its service area, Edison believes that the FERC will authorize Edison to sell into the Power Exchange at market prices. The FERC will review the ISO and Power Exchange filings to determine if any additional market power mitigation measures are necessary, and if so, of what nature. If any parties believe such measures should be instituted, their arguments

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[22] D.96-03-022, pp. 17-19.

[23] Elizabethtown Gas Co. v. FERC, 10 F.3d 866 (D.C. Cir. 1993); Kansas City Power Light Co., 67 FERC ¶ 61,183 (1994); Public Service Co. of Indiana, 51 FERC ¶ 61,367 (1990).

can be resolved on the merits by FERC based on the type of rigorous analysis the Commission has held is necessary to properly resolve such questions.

II.

EDISON'S DIVESTITURE PLAN IS PREMISED ON THE UNDERSTANDING THAT THE COMMISSION WILL APPROVE THE PLAN EXPEDITIOUSLY AND WILL CONFIRM CERTAIN KEY ASSURANCES AND FAIRLY RESOLVE CERTAIN KEY REMAINING ISSUES

In this section, Edison describes the actions that the Commission needs to take to facilitate the prompt implementation of Edison's voluntary divestiture plan. As noted earlier, Edison's plan is premised on the understanding that, as it goes forward with Restructuring, the Commission will maintain the basic policy direction and uphold the transition cost recovery principles stated in the Policy Decision. At the same time, Edison recognizes that the Policy Decision leaves certain issues that have a direct bearing on divestiture unresolved or in need of clarification or further development. How these issues are resolved could affect the practicability of Edison's plan or the understandings on which it is predicated. Further, although the three stage process Edison proposes has been specifically designed to dovetail with CEQA review and the FERC's proceedings, while allowing divestiture to occur prior to January 1, 1998, Edison recognizes that the Commission has not yet had an opportunity to review this proposal, and may not approve it. Proceeding with the plan, as proposed, would require substantial up-front commitment of resources and funds. Edison does not think it appropriate to commit these resources and funds unnecessarily.

For all these reasons, the Commission should, as expeditiously as possible:

(1) Approve Edison's divestiture plan;

(2) Provide, if it has not already done so, the confirmations relating to CTC recovery requested in Edison's February 13, 1996 Petition for Clarification and, in the Alternative, Application for Rehearing; and

(3) Provide, as part of its approval of Edison's plan, the confirmations described below in Sections A-E including that:

- All appropriate actions will be taken to assure that non-bypassable CTC collection mechanisms, including those specifically tailored to long-term recovery of QF costs, are devised and in place well before the January 1, 1998 target date;
- Worker protection measures will be in place for utility employees who could suffer hardship as a result of divestiture;
- Utilities will be permitted full recovery of the transaction costs incurred in effectuating divestiture;
- Appropriate ratemaking measures will be in place to cover the contingency that the completion of the divestiture plan or commencement of the Power Exchange is delayed;
- Prudently incurred costs associated with fuel supply, transportation, and storage contracts will not be stranded by the divestiture; and
- Divestiture will not make utilities unfairly bear the corporate general plant and fixed corporate administrative and general expenses allocated to the divested units.

Edison commits to prepare and file its § 851 application within 75 days of receiving a Commission Order approving its plan and providing these confirmations. Based on Edison's estimates of the time required to carry out the discrete tasks in its divestiture plan, Edison believes that if its § 851 application is on file and proceedings are underway by mid-summer of 1996, its plan is capable of

being completed before expected implementation of the Power Exchange. However, the Commission's approval of the plan is a key item on the critical path. The sooner the Commission takes the actions requested herein, the sooner the divestiture process can be initiated.

A. In Approving Edison's Divestiture Plan, The Commission Should Reaffirm That Its CTC Recovery Principles Will Apply

As noted above, Edison's willingness to offer and deploy its voluntary divestiture plan is premised on Edison's understanding that the assurances contained in the Decision -- including its commitment to full recovery of stranded costs -- will be honored.

The Commission's Policy Decision states that its objective is to fulfill this commitment by providing for "the collection of transition costs through the imposition of a non-bypassable" CTC charge.[24] This commitment is confirmed in the Roadmap Decision.[25] Edison recognizes and appreciates this fundamental commitment. Edison also recognizes, as does the Commission in the Roadmap Decision, that considerable efforts will be necessary to design an appropriate non-bypassable CTC mechanism. Edison would be naive to underestimate the efforts that some will make, and are already making now, to circumvent the CTC mechanism and render it non-enforceable rather than non-bypassable. It is absolutely crucial that the Commission, in approving Edison's divestiture plan, (a) provide the clarifications requested in our Petition for Clarification, or in the Alternative, Application for Rehearing, (b) confirm its commitment to transition cost recovery by means of a non-bypassable CTC, and (c) commit to commencing the

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[24] D.95-12-063, p. 3.
[25] D.96-03-022, pp. 40-41.

process to develop a non-bypassable CTC mechanism that will endure for the entirety of the CTC recovery period.

Divestiture is forever. After Edison's voluntary plan is completed, Edison will no longer own the plants that will be divested. However, Edison will retain a large stranded cost exposure for many years to come, particularly for the QF contracts many of which will continue until 2025.[26] There may be some parties who now support stranded cost recovery as part of the transition solely as an inducement for the utilities to divest their generation. Edison remains concerned that, after divestiture occurs, those parties may no longer be supportive as Edison endeavors to collect these costs over the years. Edison will be dependent on the Commission's recovery mechanisms and will have no way to retrieve its divested assets.

While the Commission's commitments are concrete, the mechanisms for CTC recovery are today largely conceptual. Edison recognizes that it is important for FERC to speak on the transmission/distribution dividing line, and that the Commission's Roadmap Decision assigns the CTC mechanism for development in the second stage of the scheduled CTC proceedings.[27] However, the Commission should reaffirm that development of this non-bypassable mechanism is a key priority, and should set up a formal mechanism for establishing workshops and

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[26] In its Industry Restructuring Decision, the Commission endorsed QF contract restructuring and provided an incentive to the utilities for renegotiating contracts. Edison is involved in discussions with independent power producers, utilities and DRA regarding a broad set of principles that would govern the restructuring of QF contracts. Edison believes that renegotiating QF contracts can provide substantial benefits through lower rates and CTC, increased contractual and operating flexibility for QF generators, and more diverse competition for power generation. Edison is also investigating financing programs that would provide immediate funding for contract restructurings without increasing customer rates. The Commission should encourage these financing programs and support, if required, legislation to enable such programs.

[27] D.96-03-022, p. 43. The Policy Decision also provides for departing customers to "sign an agreement to pay their share of transition costs." D.95-12-063, p. 141. Presumably, this agreement would be designed during this stage of the proceedings.

other preliminary negotiation sessions to help develop such a mechanism. The Commission should also state that it will consider innovative approaches to developing a non-bypassable collection mechanism for QF costs that takes into account the fact that these obligations endure for many years and that mechanisms based on today's technology or delivery systems may not be viable for the term over which the CTC recovery applies.

B. The Commission, In Approving Edison's Divestiture Plan, Should Clarify The Operation Of The Financial Incentive For Divestiture Created By The Policy Decision

The Policy Decision creates a financial incentive for divestiture by increasing the rate of return on equity on generation assets by 10 basis points for each 10% of fossil capacity divested.[28] Edison reads the Decision as applying this incentive to the equity component of all utility-owned generation in the CTC account, not merely to the CTC associated with fossil units. Edison believes this is the correct reading of the Decision because otherwise this incentive would be so insignificant as to be inconsequential. This is consistent with the clear intent of the Decision to create a meaningful financial incentive to accept the fifty percent divestiture suggestion. The understanding that this incentive applies to all generation is a motivating factor in Edison's willingness to submit this proposal.[29]

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[28] D.95-12-063, p. 101.

[29] Furthermore, Edison reads the Decision to imply that, to the extent a utility agrees to voluntarily divest more than 50% of its generation, it would be allowed to earn another 10 basis points for each additional 10% it divests, up to a maximum of 100 basis points.

C. The Commission Should Acknowledge That It Will Include Certain Key Costs In Future Regulated Authorized Revenue Or In The CTC

The Memorandum of Understanding entered into among Edison, California Manufacturers Association, California Large Energy Consumers Association, Independent Energy Producers, Inc., and Californians for Competitive Electricity ("MOU") recognized that, at the time of market valuation, there will be several categories of prudently incurred sunk costs/obligations and Commission-authorized Corporate General Plant And Corporate Fixed Administrative & General ("A&G") costs that must be addressed. It is Edison's intention to propose ratemaking treatment for these costs as part of its § 851 Application for authorization to divest generation assets. Edison contemplates that these issues will be addressed by the Commission in Stage One of the § 851 proceeding, as described in Section II.B.1, above.

It is crucial that the Commission confirm that these costs will continue to be appropriately recovered in connection with any proposed divestiture. Accordingly, Edison requests that the Commission, in its decision approving the plan proposed by Edison, expressly state its intention to provide for recovery of these categories of costs in an equitable manner.

1. Costs Associated With Prudently Incurred Fuel Supply, Transportation, And Storage Contracts

The Commission defines generation-related costs as including, "[i]n addition to investment-related costs (the costs of construction and capital improvements and a return on the undepreciated costs)", . . . unavoidable commitments directly related to generation, including nonplant physical

assets and contracts for plant parts or services and for fuel or fuel transport.[30] It is necessary to address these costs in connection with the divestiture of any of the gas-fired generation assets, and to include the costs of unavoidable commitments associated with fuel supply, transportation and storage contracts in the CTC. Edison will offer, in its Application for authorization to divest generation assets, specific proposals for including these costs in CTC which reflect the fact that many of the fixed obligations associated with the fuel supply costs were entered into by Edison to provide a reliable, assured "clean fuel" gas supply for gas-fired generation plants in its service territory.

2. Costs Associated With Corporate General Plant And Fixed Corporate A&G

In Edison's non-generation PBR application,[31] Edison proposed an allocation to the generation business unit of a portion of the costs associated with Corporate General Plant (such as the costs of Edison's general office complex) and Corporate Fixed A&G (such as the costs associated with Edison's staff functions, e.g. Controllers and Audits).[32] The MOU recognized the need to address these costs as the generation assets moved to market valuation:

> "Corporate General Plant and Corporate Fixed A&G will be appropriately allocated to generation assets. . . . SCE will take all prudent steps to mitigate or eliminate the costs associated with the generation assets' share of Fixed

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30/ D.95-12-063, p. 114.
31/ A.93-12-029.
32/ In Edison's Comments on Corporate Restructuring [generation, transmission, and distribution separation] filed with the Commission on March 19, 1996, Edison describes the basis of this allocation and its plans to propose a more appropriate reallocation in connection with the generation PBR filings ordered by the Commission for July 1996.

> Corporate A&G and Corporate General Plant. If SCEcorp [now Edison International] retains generating assets after market valuation, then (1) the retained assets' share of Fixed Corporate A&G will be the responsibility of SCEcorp, and (2) if the retained generating assets do not use the Corporate General Plant in order to maintain functional separation of the generating assets from the regulated utility, then the retained assets' share of Corporate General Plant will be recovered through the CTC or as part of the T&D utility PBR mechanism.
>
> To the extent generation assets are not retained in SCEcorp, the share of Corporate General Plant and Corporate Fixed A&G which was allocated to those assets will be recovered either through the CTC or will be included in the T&D utility PBR mechanism."[33]

Edison will present ratemaking proposals in its divestiture application that ensures that these fixed corporate costs are recovered either through CTC or through the utility non-generation PBR mechanism. The Commission should confirm that it will provide for recovery of these costs either in transmission or distribution rates or through the CTC.

3. Costs Associated With The Divestiture Transaction, Including The Costs Of Preparing The Application And PEA

In the Decision, the Commission defines transition costs[34]. However, the Commission has not explicitly acknowledged that the transaction costs associated with the overall process of valuing generation assets are legitimate costs that must be included when establishing the level of transition costs associated with any specific generation asset. Transaction costs will include all costs associated with the sale, spin-off, or independent appraisal of assets, including but not limited to closing costs, investment

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[33] MOU at 11, fn 4.
[34] D.95-12-063, pp. 113-116.

banker costs, taxes, and fees, and all costs associated with transferring the generation assets into a different corporate entity from the regulated utility distribution company. Transaction costs will also include the costs associated with preparing and processing CPUC filings, including the costs of preparation of the PEA and any costs incurred by the Commission in connection with its responsibilities under CEQA.

Edison believes that these costs should be deducted from the sales proceeds prior to calculating the CTC. This approach is consistent with the joint recommendations set forth in the MOU that the "gain or loss from market valuation, net of applicable taxes and transaction costs, will be applied to the CTC."[35] Edison intends to address in its § 851 Application the appropriate mechanisms to identify and track these costs, including the need for a memorandum account for these costs.

D. The Commission Should Resolve Worker Protection Concerns In A Manner That Safeguards Utility Employees

As the Decision recognizes, those employees who have "dedicated their working lives" to help utilities meet their obligations to serve have relied on the existing regulatory compact in much the same way as the utilities.[36] These employees and their families should not be made to bear, disproportionately among other Californians, the costs of transitioning to a new regime. Yet this is precisely what will happen unless there is explicit coverage in the CTC for provisions made to protect these employees from the effects of any reductions in the size of the workforce and other dislocations which might be caused by the Commission's restructuring and regulatory reform policies.

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[35] MOU at 16.
[36] D.95-12-063, p. 112.

The Decision thoughtfully recognizes the need to mitigate the effects of implementing divestiture on utility employees. It "conclude[s] that costs associated with retraining and early retirement have a claim for recovery as transition costs."[37] However, it does not address this subject in its ordering paragraphs, and does not specify the mitigation measures that the Commission will implement or the scope of their application. Edison believes that its employees deserve to have these protections spelled out before a divestiture program is implemented, in a way that assures them that they will be fairly treated. Edison believes that the Commission, at a minimum, should make clear its determination to provide CTC inclusion for adequate worker protection safeguards in the following respects.

First, the Decision refers to transition costs associated with protection for "employees who have dedicated their working lives to utility generation."[38] However, the same concern should extend to any employee who suffers a job loss or dislocation because of Restructuring. The effects of divestiture and Restructuring are not confined to generation sector employees only and can cut across the entire spectrum of the work force, including many employees who provide administrative and technical functions, ranging from engineers to clerks at warehouses to mobile maintenance forces.[39] These employees may include, for example, those whose functions would be provided by the ISO in the Power Exchange, or who provide services (e.g., accounting) to Edison's generation business unit that may be needed less, if the divestiture plan is implemented. The Commission should confirm that its concern about mitigating hardships extends to any employee whose a job is jeopardized due to restructuring, and not just those who operate or maintain generating units that are divested.

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[37] Id.
[38] Id.
[39] For example, the effects of a divestiture of a generating plant could cascade through other parts of the company by reason of the seniority or "bumping" provisions in union contracts.

Second, the Decision indicates that early retirement and retraining costs should be recovered as part of the CTC. To be fair, the CTC should also include other employee-related costs, such as severance payments, relocation costs, and outplacement services that are reasonably related to divestiture.[40]

Finally, because the Policy Decision leaves the details of how such worker protection measures will be reflected in CTC recovery, it creates unease and uncertainty for those who may be potentially affected. Edison could not be expected to embark on a divestiture plan until this problem is assuaged. The Commission should commit to resolve this issue well prior to final implementation of any divestiture plan.[41]

E. The Commission Should Commit To Develop Ratemaking Measures To Cover The Contingency That Implementation Of The Divestiture Plan Or The Power Exchange Is Temporarily Delayed

Edison believes that the divestiture process described in Section I above can be completed by the commencement of Power Exchange operations on January 1, 1998. Nonetheless, it would be prudent to consider and adopt contingency plans to be implemented in the event of a mismatch in time between completion of divestiture and commencement of the Power Exchange. Such a mismatch could

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[40] The interrelationships among Edison's duty to bargain with its unions, the results of such collective bargaining and the determinations made by the Commission must be carefully considered at all points in the divestiture process.

[41] To make divestiture potentially less disruptive, Edison International, through Southern California Edison Company or another affiliate, intends to offer operations and maintenance contract services to the new owners of fossil generating stations that are divested by Edison or by other utility companies. The buyer will have no obligation whatsoever to take these services, but offering the option has the potential to benefit all stakeholders. The availability of these services may expand the universe of qualified bidders by allowing domestic and foreign entities interested in owning generating units, but not currently possessing the necessary technical staff, to participate in the auction process. This can enhance the value of these units and correspondingly reduce the associated CTC. Likewise, successful provision of these services will benefit Edison's employees and the local economic communities in which they reside, and will reduce the costs that would otherwise be incurred and require inclusion in the CTC.

occur in either direction. Divestiture could occur before the Exchange commences or, alternatively, the Power Exchange could commence before divestiture is completed. Under either contingency, special ratemaking provisions will be necessary.

Consider first the situation in which divestiture is completed before the Exchange commences. Under this circumstance, Edison will still be obligated to assure adequate power supplies and system reliability pursuant to its traditional utility service obligations. However, with 50% of its gas-fired generation now divested and owned by one or more third parties, Edison will temporarily have to secure the means to satisfy its service obligations through contract. We propose that this be accomplished through an interim performance-based power purchase contract with the new owners of the divested generating plants. The exact form of this contract would be subject to Commission review and stakeholder comment during Stage One of the plan, and would be included in the materials given to qualified bidders at the start of Stage Two.

Next, consider the alternative kind of timing mismatch in which the Exchange begins before divestiture can be completed. In its Restructuring Decision, the Commission lays out, in broad terms, the major features of the ratemaking treatment it contemplates imposing on utility-owned fossil generation following the initiation of the Power Exchange in 1998. Unless it is primarily needed for reactive power or voltage control,[42] all O&M and capital expenditures yet to be incurred at a fossil generation plant are to be recovered through market revenues alone. To the extent market revenues exceed the costs of running these fossil plants (including capital costs not yet incurred), Edison will be allowed to

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[42] For those generating plants that are primarily needed for reactive power or voltage control, the Commission allows utilities to seek authorized revenues under performance-based ratemaking to the extent the cost of running these units (including capital costs not yet incurred) exceeds the Exchange clearing price.

earn up to 150 basis points above its authorized return on distribution rate base. Any further net revenues are to be used to reduce CTC.[43]

Edison is concerned, however, that, if divestiture is not completed until after the Exchange commences in 1998, Edison may be given the incentive to shut down plant, if market revenues are insufficient to cover the costs of keeping the units running efficiently,[44] even though it may be preferable, from a CTC minimization standpoint, for Edison to continue to maintain the operation of such plants until the conclusion of the divestiture process. This is particularly true if continued operation and maintenance maximizes asset values for sale, thereby minimizing the eventual CTC liability of customers.

Moreover, as Edison pointed out in its Comments on the Commission's Proposed Roadmap, the incentive to shut down plant would be exacerbated if the Commission excludes capital expenditures after the effective date of the Policy Decision from CTC. If such expenditures were excluded from the CTC, Edison would have the incentive not to undertake any new capital expenditures because the unamortized value of these new capital expenditures would not be permitted to be reflected in the calculation of CTC at the time of market valuation. This would mean that even when these new capital expenditures are necessary and reasonable and therefore increase or preserve the market value of the asset, they would not be allowed to increase the book value of an asset for purposes of CTC calculation.

Edison intends to address the issue of needed capital additions for its generating portfolio generally through a Petition for Modification which we plan to file before the end of March 1996. In addition, we may address this issue further in

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[43] D.95-12-063, p. 135.

[44] In its Policy Decision the Commission acknowledges that, at least initially, the market price for power after restructuring will likely not be high enough to compensate participants for much more than their variable operating costs. (D.95-12-063, p. 54) This will create an economic incentive for Edison to shut down the generation plant -- even those plants undergoing divestiture -- to avoid incurring nonrecoverable fixed operating costs.

our July PBR filing. Additionally, Edison expects that its § 851 application will address specific ratemaking/CTC treatment for these necessary and reasonable capital expenditures for the plants which would be divested in the § 851 Application.

The Commission should commit that, in order to avoid unfair or anomalous results in the event unforeseen circumstances cause temporary mismatches in timing between completion of divestiture and implementation of the Power Exchange, it will implement the type of contingency ratemaking measures described above prior to final implementation of Edison's divestiture plan.

III.

EDISON'S DIVESTITURE PLAN IS VOLUNTARY AS A MATTER OF LAW

Finally, Edison wants to make it clear beyond any possible doubt that this filing constitutes a voluntary divestiture plan, offered with the understanding (1) that the assurances provided in the Commission's Decision will be honored through Commission and Legislative actions; and (2) that the fundamental clarifications and facilitating commitments described above will be implemented before consummation of divestiture. To confirm the voluntary nature of this filing, Edison shows in this section that as a matter of law the Commission has no authority to order Edison to divest itself of any generating assets.

Edison does not include this section to be adversarial. To the contrary, Edison's voluntary proposal reflects its belief that cooperation among all the parties to the restructuring is in each party's long-term interest. Edison fully expects that the Commission will carry out the assurances in the Policy Decision and ensure appropriate resolution of the remaining issues discussed in Section II above. However, it is important for the Commission to recognize that Edison's willingness to proceed with its voluntary divestiture plan is premised on these understandings.

The Commission should know that if these understandings turn out to be incorrect, and the course outlined in the Policy Decision is altered or if the facilitating Commission commitments do not materialize, Edison reserves the right not to go forward with this voluntary divestiture plan.

Edison is aware, moreover, that despite the Commission's best efforts, there may remain some parties that oppose the course charted by the Decision. Further, some of the facilitating commitments described above may take time to fully implement. If due to unforeseen circumstances the Commission's policy principles or facilitating commitments are withdrawn or altered at any point after the divestiture process is underway, Edison reserves the right to withdraw its § 851 application at that juncture.

A. The Commission Lacks The Authority To Order A Utility To Divest Its Assets

The Commission has expressly recognized that it lacks any authority, whether express or implied, to order a utility to divest its assets. In Carmel Mountain Ranch, Inc. v. San Diego Gas & Electric Co., the Commission explained:

> We have found no case or statute that confers on the Commission the power to compel a public utility to sell and convey an interest in real property to another person or entity or to determine the price or terms of the sale. . . . We do not know of any judicial decision or any of our own decisions or orders that would support the exercise of such powers.[45]

As the Commission noted, the only California judicial decision with language on point "states explicitly that the Commission cannot compel an owner to sell property."[46] In Hanlon v. Eshleman, the court stated that the Commission's only

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[45] Carmel Mountain Ranch, Inc. v. San Diego Gas & Electric Co., D.88-03-024, 1988 Cal. PUC LEXIS 67 at *14-15 (Mar. 1988).

[46] Id. at *15, citing Hanlon v. Eshleman, 169 Cal. 200 (1915).

power in this context is to prevent a sale, not to force one or even to enforce a sale to which a utility has contracted:

> [The Commission] is merely authorized to prevent an owner of a public utility from disposing of it where such disposition would not safeguard the interests of the public. If the owner does not desire to sell, the Commission cannot compel him to do so. If, having contracted to sell, he refuses to comply with his contract, the Commission is not empowered to determine that he should carry out his bargain.[47]

As the Commission concluded from Hanlon, "If the Commission lacks that power [to compel sale where a valid contract existed], it follows inexorably that it lacks the power to compel a sale of real property where . . . no contract exists."[48]

B. Requiring The Sale Of Utilities' Assets Would Amount To An Attempt By The Commission To Exercise The Power Of Eminent Domain -- A Power The Commission Lacks

An order by the Commission requiring a utility to sell its assets would amount to an attempt to exercise the power of eminent domain, a power the Commission lacks. "Eminent domain is the power of the government to take private property for public use," and a governmental entity may exercise that power only by instituting a condemnation proceeding.[49] Courts have held that an

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[47] Hanlon, 169 Cal. at 203 (emphasis added).

[48] Carmel Mountain Ranch, 1998 Cal. PUC LEXIS at *16. In addition to California, it is settled in at least two other states that public utility commissions do not have the power to order the sale of utility assets. See Public Util. Comm'n v. Home Light & Power Co., 428 P.2d 928, 935 (Colo. 1967) ("whether a sale [of utility property] will take place and the actual sale price are subjects for negotiation between the parties .... [A]n outright order to sell [by the Commission] cannot be sustained"); Chicago, B. & Q.R.R. v. Public Util. Comm'n, 193 P. 726, 728 (Colo. 1920) (forcing a railroad to sell its property would amount to a condemnation of the property; the Railroad Commission has no right to condemn); see also Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 85 S.E.2d 14, 19 (Ga. 1954) (the Commission has no power to order one utility company to sell property and another utility company to buy property).

[49] Needles v. Griswold, 6 Cal. App. 4th 1881, 1891, 1894-96, 8 Cal. Rptr. 2d 753, 758, 760-61 (Cal. Ct. App. 1992).

attempt to effect a taking by any other method is invalid,[50] and a legislative or regulatory action that requires the transfer of a property interest from a private party for public use is an invalid attempt to exercise eminent domain power.[51]

In addition, it is settled law that "[t]he power of eminent domain may be exercised . . . only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use."[52] The Commission has no express statutory authority to condemn property.[53] Nor does such authority arise from the clear implication of any statute.

The only sections of the Public Utilities Code that expressly concern condemnation are Sections 1401 to 1421, which authorize the Commission "to determine the just compensation payable by a public entity for public utility owned property which it seeks to acquire through eminent domain if it is invited to do so by the condemnor." People ex rel. Pub. Util. Comm'n v. Fresno, 254 Cal. App. 2d 76, 85, 62 Cal. Rptr. 79, 85 (1967). These sections do not imply that the Commission itself possesses the power of eminent domain. To the contrary, the sections "demonstrate that the legislature intended to involve the [C]ommission in a condemnation proceeding only with the consent of [a public entity with the express power of eminent domain], and then only on the limited question of "just

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[50] Id. In Needles, for example, the court invalidated a preliminary injunction that had the effect of a taking, holding that even the payment of just compensation would not convert the injunction into a proper condemnation. Id. at 1895, 8 Cal. Rptr. 2d at 761 ("[T]he only legal procedure provided by the constitution and statutes of this state for the taking of private property for a public use is that of a condemnation suit which the constitution expressly provides must first be brought before private property may be taken or damaged for public use." (citations omitted)).

[51] See Agins v. Tiburon, 24 Cal. 3d 266, 272, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), aff'd, 447 U.S. 255 (1980).

[52] Cal. Civ. Proc. Code § 1240.020; see also Kenneth Mebane Ranches v. Superior Court, 10 Cal. App. 4th 276, 282, 12 Cal. Rptr. 2d 562, 565 (Cal. Ct. App. 1992), review denied, No. S029491, 1992 Cal. LEXIS 6517 (Cal. Dec. 31, 1992).

[53] As explained below, there is a very limited exception to this. Cal. Pub. Util. Code § 767 grants the Commission the power to order a utility to allow joint use of certain types of property under limited circumstances. This is, in effect, a limited grant of eminent domain.

compensation.'" Id. Moreover, because the power of eminent domain is an extreme remedy, courts have made clear that "any reasonable doubt concerning the existence of the [eminent domain] power must be resolved against the entity" seeking to invoke it. Kenneth Mebane Ranches, 10 Cal. App. 4th at 282-83, 12 Cal. Rptr. 2d at 566.

C. The Power To Order The Sale Of Utility Assets Cannot Be Inferred From The Commission's General Authority To Take Action "Necessary" To The Exercise Of Its Jurisdiction

Public Utilities Code § 701 provides the Commission with a broad grant of authority to take action "necessary" to the exercise of its jurisdiction. However, specific provisions of the Code supersede and limit this expansive grant of power. As a result of these limitations, the authority to order the sale of utility assets cannot be inferred from the general grant of power contained in § 701.

In Southern Cal. Gas Co. v. Public Util. Comm'n,[54] the Court held that where the Legislature has expressly provided the Commission with specific authority over particular subject matters, the general grant of power in § 701 cannot be read as conferring more extensive authority over the same subject matters, even if the specific grant of power does not by its terms expressly limit the scope of the Commission's power.[55]

54/ Southern Cal. Gas Co. v. Public Util. Comm'n, 24 Cal. 3d 653, 658-59, 596 P.2d 1149, 1152-53, 156 Cal. Rptr. 733, 735-36 (1979).

55/ Id., at 659, 156 Cal. Rptr. at 736, 596 P.2d at 1152. In Southern Cal. Gas Co., the Court concluded that a statute that authorized the Commission to permit utilities to institute a home insulation financing program impliedly precluded the Commission from requiring utilities to institute the same type of program. Id. The Court recognized that Section 701 was, on its face, broad enough to allow the Commission to require such programs. Id. at 657, 596 P.2d at 1151, 156 Cal. Rptr. at 735. In addition, the Court recognized that nothing in the specific provision expressly precluded the Commission from ordering the utilities to institute such programs. Id. Nevertheless, the Court concluded that the Commission's power was restrained by the specific statute granting only limited power. Id. at 659, 596 P.2d at 1151, 156 Cal. Rptr. at 736; see also Decision No. 86192, 80 C.P.U.C. 290, 291, 294 (1976) ("[S]pecific provisions relating to a

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Public Utilities Code §§ 767 and 851 each grant the Commission limited authority over the disposition of utility assets. These sections therefore serve as express limits on the Commission's power to order the sale of utility property.

Section 767 provides that the Commission may order a public utility to allow another utility to use certain types of the utility's property only after making three specific findings enumerated in the statute. Section 767 further provides that the Commission may prescribe reasonable compensation and may impose the terms and conditions of use. In essence, this section grants the Commission under certain limited circumstances the power to order one utility to transfer to another an interest in property akin to an easement or a license. By expressly granting the Commission the authority to order a limited transfer of certain types of property rights, the Legislature has precluded the Commission from ordering a total transfer of property rights or from transferring other types of utility property rights. Further, by requiring the Commission to make certain findings before ordering a transfer of property interests, the Legislature has precluded the Commission from ordering a transfer of property interests in the absence of such findings.[56] Section 767 thus delineates the outer boundaries of the Commission's power to take property.

The Commission's authority to order the sale of utility assets is further proscribed by Public Utilities Code § 851. Section 851 provides that a seller of utility property must seek approval of the Commission before transferring utility property that is necessary or useful in the performance of utility duties. The California Supreme Court has concluded that because this provision authorizes the

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particular subject ... will govern with respect to that subject, as against any general provision for that subject such as might logically be inferred from a liberal reading of Public Utilities Code Section[] ... 701 ... -- although the latter, standing alone, would have been broad enough to include the subject to which the more particular provisions relate.").

56/ See Southern Cal. Gas Co., 24 Cal. 3d at 658-59, 596 P.2d at 1151, 156 Cal. Rptr. at 735.

Commission to intervene only after a sale has been negotiated between two parties and only when the seller seeks approval from the Commission, it impliedly precludes the Commission from ordering a sale. According to the Court, "[t]he provision that an owner may not sell without the consent of the [C]ommission implies that there must be an owner ready to sell and seeking authority [to do so] before the Commission is called upon to act."[57] Thus, "[i]f the owner does not desire to sell, the [C]ommission cannot compel him to do so."[58]

In sum, the limited grant of authority contained in §§ 767 and 851 precludes the Commission from ordering the sale of utility assets under its general grant of authority in § 701. Indeed, the fact that specific legislation had to be enacted to authorize the Commission to require public utilities to relinquish property rights in the limited circumstances outlined in § 767 demonstrates that the Commission lacks the general authority to order a utility to relinquish property rights.

D. The Record Before The Commission Would Not Support A Divestiture Order On The Basis Of Market Power Problems Even If The Commission Had Been Granted Authority To Issue Such A Ruling

Even if the Commission had the authority to order a utility to divest its assets, the record before the Commission in this matter could not support a divestiture order. Indeed, this is acknowledged in the Commission's Decision.

As noted earlier, the Commission's December 20, 1995 Policy Decision finds that there is a "suspicion" of excessive market concentration. Yet, the Commission itself recognizes that a finding of excessive market concentration would require a "rigorous empirical market concentration analysis," and that without such an

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57/ Hanlon, 169 Cal. at 203, 146 P. at 657.
58/ Id., p. 203, 146 P. at 657.

analysis -- which does not exist in the record -- this suspicion cannot be verified.[59] Thus there is no supportable basis for the Commission's statement that it will "require . . . SCE to . . . voluntarily divest" itself of 50% of its fossil generating assets.[60] The simple fact is that the record concededly does not permit the resolution of this issue.

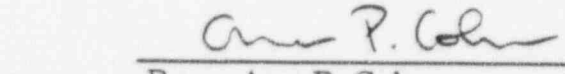
IV.

CONCLUSION

It is in everyone's interest that the restructuring take place as smoothly as possible. By submitting this voluntary divestiture plan and by acting proactively rather than merely waiting to respond in an adversarial way to other proposals, Edison intends to support the path outlined in the Commission's Policy Decision, and help fully implement the new market structure by January 1, 1998.

Respectfully submitted,

ANN P. COHN



By: Ann P. Cohn

Attorney for
SOUTHERN CALIFORNIA EDISON COMPANY

Dated: March 19, 1996

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[59] D.95-12-063, p. 99.
[60] Id., p. 101 (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing **COMMENTS OF SOUTHERN CALIFORNIA EDISON COMPANY (U338-E) ON PLAN FOR VOLUNTARY DIVESTITURE SUBMITTED IN RESPONSE TO THE COMMISSION'S DECEMBER 20, 1995 POLICY DECISION** to be served upon all appearances herein pursuant to the Commission's Rules of Practice and Procedure.

Dated at Rosemead, California, this 19th day of March, 1996.

Ann P. Cohn

Ann P. Cohn, Attorney for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (818) 302-2211