

Decision PROPOSED DECISION OF ALJ ALLEN (Mailed 6/14/2016)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U902E) to Amend Renewable Energy Power Purchase Agreement with NaturEner Rim Rock Wind Energy, LLC and for Authority to Make a Tax Equity Investment in the Project.

Application 10-07-017
(Filed July 15, 2010)

DECISION GRANTING PETITION FOR MODIFICATION

Summary

This decision grants the Petition for Modification of Decision (D.)11-07-002 filed by San Diego Gas & Electric Company (SDG&E) and NaturEner Rim Rock Wind Energy LLC (NaturEner), as modified. The Petition for Modification (Petition) reflects and implements the results of a settlement of civil court litigation between SDG&E, NaturEner, and other entities relating to a power purchase agreement between SDG&E and NaturEner that was addressed in D.11-07-002. Under the settlement, as modified and approved by this decision, SDG&E ratepayers will receive \$39 million, and SDG&E will receive an additional sum to offset part of its litigation costs. This proceeding is closed.

Background

In Decision (D.) 11-07-002, the Commission approved amendments to a power purchase agreement (PPA)¹ between San Diego Gas & Electric Company (SDG&E) and NaturEner Rim Rock Wind Energy LLC (NaturEner), and authorized SDG&E to make a tax equity investment in the Rim Rock Wind Energy Project,² among other things. (See D.11-07-002.) Subsequently, SDG&E and NaturEner initiated litigation against each other relating to “Avian Conditions” in the PPA and ECCA. (Petition at 6-8.) The proposed “Avian Conditions Settlement Agreement” resolves that litigation. (*Id.* at 3.)

SDG&E and NaturEner filed a joint Petition for Modification of D.11-07-002, requesting that the Commission modify that decision to reflect the terms of the proposed Avian Conditions Settlement Agreement (Proposed Settlement). The Proposed Settlement would result in: 1) SDG&E not making a tax equity investment in the Rim Rock project; 2) the PPA remaining in effect with modifications; and 3) SDG&E receiving a lump sum payment, with a portion of that payment going to ratepayers via the Energy Resource Recovery Account (ERRA), and the remainder of that payment going towards SDG&E’s outside litigation costs. (Petition at 8-9.) SDG&E requested that the amounts of the payments to be received by SDG&E be treated as confidential.

The Commission’s Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN) filed responses to the Petition to Modify.

¹ As used in this decision, “PPA” includes two related PPAs, the “Green Attributes PPA” and the “NOB PPA.” For more information relating to the individual PPAs, please see the Petition for Modification at 9.

² This investment would be pursuant to a separate Equity Capital Contribution Agreement (ECCA).

ORA did not oppose the Proposed Settlement, but noted that a portion of the litigation costs proposed to be recovered by SDG&E had also been forecasted in SDG&E's 2016 General Rate Case. (ORA Response at 4.) According to ORA, this would result in a potential double recovery for SDG&E; in response, ORA proposed that the allocation of the total payments received by SDG&E be modified, with more flowing to ratepayers and a corresponding amount less going to SDG&E for its litigation costs. (*Id.*)

TURN argued that all of the payments received should flow to ratepayers, with none going towards SDG&E's litigation costs. (TURN Response at 1-5.) In the alternative, TURN supported the allocation proposed by ORA. (*Id.* at 5.) TURN also opposed SDG&E's request to keep all payment amounts confidential, and argued that those amounts should be public. (*Id.* at 1-2.)

SDG&E filed a reply to ORA and TURN, which disagreed with TURN's recommendations, but agreed to ORA's proposed reallocation of payments. (SDG&E Reply at 4.) SDG&E continued to argue that all of the Proposed Settlement's payment amounts should be kept confidential. (*Id.* at 4-5.)

Morgan Stanley filed a motion for party status, which was denied without prejudice in a ruling from the assigned Administrative Law Judge (ALJ). Morgan Stanley was not a party to the proceeding leading to D.11-07-002, but became a party to certain contracts that are at issue in the Proposed Settlement. (Transcript, v. PHC-2 at 45-47.)

Procedural Issues

A pre-hearing conference (PHC) was held on May 24, 2016, which primarily addressed the confidentiality issues and Morgan Stanley's motion for party status. At the PHC, the assigned ALJ expressed concern about SDG&E's designation of all payment amounts as confidential, particularly the amount that

would be flowing to ratepayers via the ERRAs, as there is public interest in revealing that amount, and the need for confidential treatment of that amount was not clear. (Transcript at 56-59 and 72-74.) Subsequent to the PHC, in an e-mail served on all parties, SDG&E agreed to make public the amount of money that would flow to ratepayers through the ERRAs as a result of the Proposed Settlement, but requested that the amount of the overall total payment, and the payment amount that would be applied to offset a portion of SDG&E's external legal costs, remain confidential. (SDG&E e-mail dated May 26, 2016.³) Based on the specific factual and legal record of this proceeding, this decision follows that approach. Accordingly, SDG&E's request for confidential treatment is granted, with the exception of the payment amount of \$39 million that will be flowing to ratepayers as a result of the Proposed Settlement.⁴

At the PHC, counsel for Morgan Stanley was given the opportunity to further address Morgan Stanley's motion for party status. (Transcript at 45-48 and 62-63.) Morgan Stanley was not a party to the proceedings leading to D.11-07-002, its interests in this phase of the proceeding appear to be aligned with those of NaturEner, and it is represented by the same counsel. (*Id.*) There does not appear to be a need to allow Morgan Stanley to intervene in this proceeding at this late stage. Accordingly, the denial of Morgan Stanley's motion for party status is affirmed.

³ SDG&E also filed an ex parte notice of this communication.

⁴ SDG&E does appear to have over-designated material as confidential that could be publicly released; the Commission discourages this practice, as it is counter to the public interest. Some information marked as confidential was disclosed with SDG&E's consent at the PHC.

Discussion

The substantive changes to the underlying PPA made by the Proposed Settlement are relatively minor; in general, the PPA terms approved by D.11-07-002 would remain in place. One aspect of the previous deal would go away - SDG&E would no longer be making a tax equity investment in the underlying project. (*See* Petition for Modification at 12-13, ORA Response at 2-3.)

In addition, the Proposed Settlement would result in payments being made to SDG&E and its ratepayers. As initially proposed by SDG&E and NaturEner, a smaller portion of the total payments received would have flowed back to ratepayers, and a larger portion would have gone towards SDG&E's litigation costs. (Petition for Modification at 8.) ORA, however, pointed out that SDG&E had already forecasted some of its litigation costs for this case in its 2016 GRC, and argued that: "It is duplicative to also request recovery of such costs through this proceeding." (ORA Response at 4.) Accordingly, ORA recommended that the payment amounts be reallocated, resulting in a \$39 million credit for ratepayers. SDG&E and TURN have agreed to ORA's recommended allocation. (SDG&E Reply at 4, TURN Response at 5.)

Finally, the question of granting or denying the Petition is one of whether this Commission believes the Proposed Settlement is better or worse than continuing the civil litigation. Looking at the limited record before us it is difficult to make a clear and certain determination, but ORA provided a good description of the analysis to be performed. First, ORA looked at the potential benefits of litigation, and noted that a litigation outcome favorable to SDG&E could relieve ratepayers of the now above-market costs of the contracts involved, as well as the obligation to make the tax equity investment. (ORA Response

at 3.) At the same time, however, ORA balanced those potential benefits against the risks of continuing litigation:

On the other hand, a litigation outcome adverse to SDG&E could require SDG&E not only to continue performing under the Green Attributes PPA, but to also make the tax equity investment approved pursuant to D.11-07-02 and pay additional unknown damages, and would be more costly to ratepayers than settlement. Given the balance of litigation risks and the inherent difficulty of parties outside of the litigation and settlement negotiations processes to assess them, ORA does not oppose the settlement. (*Id.* at 3-4.)

In essence, the Proposed Settlement (as modified) would remove litigation risk and provide a \$39 million credit to ratepayers, while generally continuing the status quo as approved by D.11-07-002, but without the controversial provision allowing SDG&E to make a tax equity investment in the project. On balance, these factors support approval of the Proposed Settlement with the adjustment recommended by ORA.

Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3. Comments were filed by ORA, TURN and jointly by SDG&E and NaturEner; reply comments were filed jointly by SDG&E and NaturEner. No changes were made to the proposed decision.

Assignment of Proceeding

Michael Picker is the assigned Commissioner and Peter V. Allen is the assigned ALJ in this proceeding.

Findings of Fact

1. SDG&E has designated as confidential information contained in and supporting its Petition for Modification.

2. Not all of the information SDG&E has designated as confidential needs to be kept confidential.

3. The public interest is best served by disclosing some of the information that SDG&E has designated as confidential, particularly the amount of money that will be flowing to ratepayers as a result of the Proposed Settlement.

4. Morgan Stanley was not a party to the proceedings leading to D.11-07-002.

5. Morgan Stanley's interests in this phase of the proceeding appear to be aligned with those of NaturEner.

6. The Proposed Settlement would resolve civil court litigation involving SDG&E and NaturEner.

7. ORA proposed, and SDG&E agreed to, a modification of the payment allocation from the Proposed Settlement.

8. As modified, the Proposed Settlement would result in the payment of \$39 million to SDG&E ratepayers.

9. The Proposed Settlement would relieve SDG&E from making a tax equity investment in the Rim Rock Project.

10. The Proposed Settlement would largely leave in place the contractual terms approved by D.11-07-002.

Conclusions of Law

1. SDG&E's request for confidential treatment of information should be granted, with the exception of information disclosed at the Prehearing Conference and the amount of money flowing to ratepayers as a result of the Proposed Settlement.

2. The denial of Morgan Stanley's Motion for Party Status should be affirmed.

3. As modified, the Proposed Settlement is in the public interest.

4. As modified, the Petition for Modification should be granted.

O R D E R

IT IS ORDERED that:

1. San Diego Gas & Electric Company's request for confidential treatment of certain information is granted, with the exception of information disclosed at the Prehearing Conference and the amount of money flowing to ratepayers as a result of the Proposed Settlement.
2. The denial of Morgan Stanley's Motion for Party Status is affirmed.
3. The Petition for Modification of Decision 11-07-002 filed by San Diego Gas & Electric Company and NaturEner Rim Rock Wind Energy LLC is granted, as modified.
4. Application 10-07-017 is closed.

This order is effective today.

Dated _____, at San Francisco, California.