

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of San Diego Gas & Electric
Company's Request for Commission PUC Section
851 Approval to Lease a Portion of SDG&E's Real
Property to Ramco for the Construction of a
46MW Combustion Turbine.

(U 902-M)

Application 04-10-009
(Filed October 5, 2004)

O P I N I O N**I. Summary**

Subject to conditions we grant the *ex parte* application of San Diego Gas and Electric Company (SDG&E) for approval to enter into a lease agreement with Ramco Generating One, Inc. (Ramco) for the construction by Ramco of a 46MW combustion turbine on a portion of real property owned by SDG&E in the Miramar area of San Diego, California, under Public Utilities Code Section 851.¹ The lease agreement is needed for Ramco to build a turnkey facility which it will sell to SDG&E for use by SDG&E to meet its intermediate load requirements beginning in June 2005. Commission approval is contingent upon certain conditions to ensure timely completion of the project for Summer 2005 reliability needs.

¹ All statutory references are to the Public Utilities Code unless noted otherwise.

II. Background

A. The Application

On October 5, 2004, SDG&E filed its application, seeking authorization from the Commission to enter into a lease agreement with Ramco Generating One, Inc. (Ramco) for the construction by Ramco of a 46MW combustion turbine on a portion of real property owned by SDG&E in the Miramar area of San Diego, California. SDG&E's application is made under Section 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the public.² SDG&E's application

² Section 851 reads:

No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of Chapter 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture. Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which

Footnote continued on next page

requested an expedited, *ex parte*, order from the Commission authorizing SDG&E to enter into a Lease Agreement with Ramco.

Also on October 5, 2004, SDG&E filed a Motion³ requesting that the assigned Administrative Law Judge (ALJ) in this proceeding issue an order shortening time for filing protests to the Section 851 application, in order to enable the Commission to act on the Application at its meeting on October 28, 2004. The Application was filed consistent with Rules 35 and 36 of the Commission's Rules of Practice and Procedure. On October 8, the Chief ALJ issued a Ruling accepting SDG&E's application and granting SDG&E's motion shortening time for the filing of protests, but modified the date protests were due. The ruling stated that protests to the application were due on October 15, 2004, rather than on October 8, 2004, as SDG&E requested. SDG&E was also directed to provide to the assigned ALJ information regarding which ratemaking accounts the land to be leased has been booked by SDG&E by October 12, 2004. SDG&E provided that information by letter to the assigned ALJ on October 12, which we attach to this decision.

is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value; provided, however, that nothing in this section shall apply to the interchange of equipment in the regular course of transportation between connecting common carriers.

³ *Motion Of San Diego Gas & Electric Company (U 902 M) For An Order Shortening Time For Filing Protests.*

SDG&E believes that the issues raised in this Application should be categorized as ratesetting, although approval of the lease agreement itself will have no impact on SDG&E's rates. SDG&E states that the sole issue raised by this application is whether it is in the public interest for SDG&E to enter into the lease agreement with Ramco as described herein. No party protested SDG&E's Advice Letter 1621-E, which addressed the issue of this lease agreement as well other matters involving the Ramco CT. Since SDG&E believes this application does not raise any contested issues of fact, no hearing is required, and the Commission should rule on the application on an *ex parte* basis. Therefore, SDG&E and Ramco request that the Commission grant SDG&E's request for approval under Section 851 at the Commission's meeting on October 28, 2004.

B. Overview of the Ramco CT Project

On October 29, 2001, the Commission initiated Rulemaking (R.) 01-10-024 to establish ratemaking mechanisms for California investor-owned electric utilities to resume the procurement of electric energy, capacity, ancillary services, and related hedging instruments to meet the needs of their electric customers. This rulemaking has addressed the utilities' short- and long-term procurement plans, and is addressing a long-term regulatory framework for the utilities to plan for and procure their energy resources and demand-side investments for the future. The California State Legislature passed Assembly Bill (AB) 57,⁴ which added § 454.5 to the Public Utilities Code. Section 454.5 provides that an electric utility's procurement plan may include a competitive procurement process

⁴ AB 57, (Stats. 2002, Ch.850, Sec. 3. Effective September 24, 2004).

under which the utility may request bids and requires an expedited Commission approval process for the proposed procurement contracts.

Pursuant to § 454.5, SDG&E conducted a competitive procurement process by issuing a Request for Proposals (RFP) on May 16, 2003. Ramco was one of the bidders to SDG&E's RFP. On June 15, 2004, the Commission in D.04-06-011 approved the Term Sheet between SDG&E and Ramco whereby Ramco agreed to sell to SDG&E on a turnkey basis a 45MW (now 46MW) LM 6,000 combustion turbine (the "Ramco CT") for use by SDG&E to meet its intermediate load requirements beginning in June 2005. SDG&E projects a substantial grid reliability capacity shortage beginning in 2005. The Ramco CT is expected to satisfy a large portion of that 2005 reliability need. The Term Sheet required Ramco to design, permit, and construct the Ramco CT in the city of Chula Vista, and transfer title to SDG&E when the turbine was fully constructed and in operating condition.

The application states that several months ago Ramco determined that obtaining a permit from Chula Vista to build the Ramco CT on a timely basis to meet the in-service date of June 2005 was problematic. Therefore Ramco decided to look for an alternative site having the necessary prospects for obtaining permits and the physical infrastructure that provided an opportunity to construct and begin operation of the Ramco CT by the summer of 2005. Ramco and SDG&E determined that a portion of real property that SDG&E owns in the Miramar area of San Diego (the "Miramar property") had the appropriate attributes for location and operation of the Ramco CT.

At the Miramar property, the primary permit necessary was an Authority to Construct from the County of San Diego Air Pollution Control District ("SDAPCD"). Said permit required California Environmental Quality Act

(“CEQA”) compliance. On September 17, 2004, the SDAPCD certified a Mitigated Negative Declaration under CEQA and issued its Authority to Construct permit.

At present, no permit has been issued for the Chula Vista site. The Miramar property is the only site where Ramco would be able to build the Ramco CT and have it on-line by June 2005. In order for Ramco to construct the Ramco CT on the Miramar property, Ramco must obtain site control over the property to satisfy the financing requirements of Ramco’s lender. Site control means that Ramco must enter into a Lease Agreement with SDG&E.

In order for SDG&E to enter into the lease agreement, Commission approval pursuant to Section 851 is required. SDG&E requests expedited Commission approval of this Section 851 application because the turbine manufacturer, General Electric (“GE”), requires payment by October 30, 2004, and Ramco cannot make the payment until its loan is funded. Construction of the Ramco CT was originally planned to begin October 1, 2004. Due to the delay in securing viable site locations and obtaining the necessary permits, construction was delayed to October 18, 2004. Commission approval of the Lease Agreement is a condition precedent to Ramco obtaining its financing, financing that allows Ramco to pay for the turbine and initiate construction.

On September 8, 2004, SDG&E filed Advice Letter 1621-E requesting, among other things, that the Commission waive the Section 851 requirement for the Lease Agreement (as allowed by Section 853(b)) or, in the alternative, grant Section 851 approval. Commission staff informed SDG&E that the appropriate procedural process was to file an application. Thus, SDG&E withdraw its advice letter and filed its application on October 5, 2004.

C. Description of the Property Involved in the Transaction

The lease agreement between Ramco and SDG&E that is the subject of this Application pertains to a portion of real property owned by SDG&E. The SDG&E real property is located at 6879 Consolidated Way, in San Diego, California. SDG&E's real property is currently developed with industrial uses and is bounded by commercial and industrial facilities and the Marine Corps Air Station Miramar. SDG&E's property at this location consists of one legal parcel (APN 343-050-630) containing 9.5 acres. The Miramar property that is subject to the Lease Agreement is an area of approximately 2.5 acres. Approximately one-half of those 2.5 acres will be used for a construction lay-down area and the other one-half will be used for locating the Ramco CT and related equipment. The Miramar property subject to the Lease Agreement is located in the southeastern portion of SDG&E's 9.5 acres and its entire topography is flat, covered by gravel or asphalt. SDG&E's property is booked to FERC Account No. 340, which includes the cost of land and land rights used in connection with other power generation. Ramco is fully responsible for obtaining all permits for the construction and operation of the Ramco CT. Attachment A to the Application is a listing of the permits necessary for the Ramco CT and the status of those permits (as of September 27, 2004).

D. Reasons for Entering into the Lease Agreement

The lease agreement is necessary because Ramco must obtain site control over the real property on which it will construct the Ramco CT. Site control is required by Ramco's lender as a condition precedent to funding the Ramco loan. Without this loan, Ramco will be unable to purchase the turbine from GE or otherwise fulfill any of its obligations to construct the Ramco CT. SDG&E is

relying upon the Ramco CT as an energy resource to satisfy a substantial portion of its grid reliability capacity needs in the summer of 2005.

Practically, even though the lease agreement is for a term of 30 years, it will only encumber SDG&E's Miramar property for less than a year, assuming construction is completed on time. Assuming the Ramco CT is constructed and capable of operation as required under the Turnkey Acquisition Agreement, SDG&E is obligated to pay for the Ramco CT and assume full operation and control of the Ramco CT. Under that scenario, the lease agreement will terminate once the purchase is complete. Should the Ramco CT not be built per the specifications, or Ramco otherwise default on the Turnkey Acquisition Agreement, SDG&E has contractual "step-in" rights to take over the project and complete it. Under that scenario, the lease agreement will terminate by operation of law.

SDG&E believes the lease agreement is in the public interest because it is the linchpin to facilitating the construction and on-line operation of the Ramco CT by the summer of 2005. Without it, the Ramco CT cannot be built on SDG&E's Miramar property. SDG&E's Miramar property is now the only site permitted for the Ramco CT.

E. Price and Terms of the Lease Agreement

SDG&E included a copy of the Lease Agreement in Attachment B of the Application. The lease term is a period of 30 years and the lease requires an annual rental payment from Ramco of \$71,000. Realistically, for the reasons described above, the lease will terminate within a year.

1. Discussion

Public Utilities Code Section 377

In considering this application, we need to address § 377, which reads:

The commission shall continue to regulate the facilities for the generation of electricity owned by any public utility prior to January 1, 1997, that are subject to commission regulation until the owner of those facilities has applied to the commission to dispose of those facilities and has been authorized by the commission under Section 851 to undertake that disposal. Notwithstanding any other provision of law, no *facility for the generation of electricity* owned by a public utility may be disposed of prior to January 1, 2006. The commission shall ensure that public utility *generation assets* remain dedicated to service for the benefit of California ratepayers. (Section 377, as amended by AB 6X, emphasis added.)

Therefore, before we may consider the merits of this application, we must address the threshold question— whether § 377 bars the proposed transaction. As stated at p.6 in D.03-06-028, “we believe we must exercise discretion and make a factual determination of whether the denial of the disposition, in our view, is necessary to ensure dedication of generation assets to service for California ratepayers. This requires consideration of the nature, history, past or future intended use of the asset, including the nexus between it and future generation. In making these determinations, we will evaluate each § 851 application according to its unique facts, on a case by case basis, to determine whether the requested disposition is barred by § 377.” In the case at hand, SDG&E seeks authority to lease land that is booked to FERC Account No. 340, which includes the cost of land and land rights used in connection with other power generation. Moreover, a generation facility will be built and housed on this land for the foreseeable future. Thus, in considering the nature, history, past or future intended use of the asset, it is clear that the land in question is a generation asset. However, for the following reasons we find § 377 inapplicable.

SDG&E is only seeking authority to enter into this lease in order for Ramco to obtain the necessary financing to construct the CT. On obtaining the necessary

financing, Ramco plans on having the CT operational by the summer of 2005. Once the facility is operational, SDG&E will purchase and take over ownership of the CT. The goal of this commercial transaction is to have additional generating capacity built ultimately for SDG&E's purchase. This lease does not involve the "disposal" of generating assets. In fact, SDG&E's arrangement with Ramco will ultimately add needed utility-owned generation to SDG&E's generation portfolio, and will ensure that the creation of this generation asset will be dedicated to service for California ratepayers.

Section 12.5 of the Turnkey Acquisition Agreement, provides that in the event of termination for any reason due to Ramco's Default, SDG&E shall have the right at its sole option, but not the obligation, to step-in and assume all reasonable obligations of Ramco to complete the project itself or with the assistance of third parties. In order to ensure that ratepayers are protected, we will require SDG&E to exercise its step-in rights. We will direct SDG&E to enforce its contractual step-in rights upon an event of default of Ramco impacting the completion schedule in the Turnkey Acquisition Agreement. In addition, SDGE shall obtain prior to disbursement of construction funding typical lender protective provisions, enforceable by SDG&E, on the monitoring of project construction and the disbursement of project funds during the term of the Turnkey Acquisition Agreement.

Public Utilities Code Section 851

Public Utilities Code Section 851 provides that no public utility "shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its...property necessary or useful in the performance of its duties to the public...without first having secured from the commission an order authorizing

it so to do.” The Commission’s role in examining transactions subject to Section 851 is the protection of the public interest.⁵

As stated above, SDG&E conducted a competitive procurement process by issuing a Request for Proposals (RFP) on May 16, 2003. Ramco was one of the bidders to SDG&E’s RFP. On June 15, 2004, the Commission in D.04-06-011 approved the Term Sheet between SDG&E and Ramco whereby Ramco agreed to sell to SDG&E on a turnkey basis a 45MW (now 46MW) LM 6,000 combustion turbine (the “Ramco CT”) for use by SDG&E to meet its intermediate load requirements beginning in June 2005. SDG&E projects a substantial grid reliability capacity shortage beginning in 2005. The Ramco CT is expected to satisfy a large portion of that 2005 reliability need. Consequently, this project not only protects the public interest, it furthers it by ensuring safe and reliable power for the residents of San Diego.

The only party filing comments was The Utility Reform Network (TURN). TURN did not protest Advice Letter 1621-E and stated that it continues to believe that the Ramco CT will benefit ratepayers. Based on the representations contained in the application and materials provided to SDG&E’s Procurement Review Group, and stating that it understands that complications with permitting the original site in Chula Vista will require the selection of the alternative Miramar location, and that there is urgency due to various financing, purchasing, and construction-related deadlines, TURN states that it concurs with SDG&E that the lease with Ramco is a reasonable approach to bringing the

⁵ Section 853(a): “This article [Article 6, Transfer or Encumbrance of Utility Property, Sections 851 through 856]...shall apply to any public utility...if the commission finds...that the application of this article is required by the public interest.”

project on-line by June 2005. Therefore, TURN supports Commission approval of SDG&E's application for Section 851 approval of the SDG&E/Ramco lease on an expedited, *ex parte*, basis as proposed by SDG&E.

For all the aforementioned reasons, we find that our approval of this project is in the public interest and furthers the Commission's goals for resource adequacy. Further, in order to ensure that ratepayers are adequately protected, as set forth previously, we will require SDG&E to exercise its step-in rights under its Turnkey Acquisition Agreement with Ramco.

F. Environmental Compliance

The California Environmental Quality Act (CEQA, Public Resources Code Sections 21000, et seq.) applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities.

Since the project is subject to CEQA and the Commission must issue a discretionary decision without which the project cannot proceed (*i.e.*, the Commission must approve the proposed lease of property pursuant to Section 851), the Commission must act as either a Lead Agency or a Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole.⁶

SDG&E states that environmental review for the Ramco CT project has already been conducted by the SDAPCD as the Lead Agency under CEQA. In support of that position SDG&E submitted with its Application a copy of the

⁶ CEQA Guidelines (Title 14 California Code of Regulations), Section 15051(b).

Initial Study/ Mitigated Negative Declaration (MND) dated August 12, 2004 and Notice of Determination dated September 17, 2004 for the Project.

As a Responsible Agency under CEQA the Commission must consider the Lead Agency's environmental documents and findings before acting upon or approving the project.⁷ We have reviewed the SDAPCD's environmental documents and we find these documents adequate for our decision making purposes.

The MND encompasses the construction and operation of a gas-fired CT with a nominal capacity of 46 megawatts. The document notes that the CT is designed to meet local and regional electrical needs and will operate between 2,600 and 5,000 hours per year. The project will be constructed on a piece of property that is currently developed with industrial uses and is bounded by commercial and industrial facilities and Marine Corps Air Station Miramar. The project site is a square area, approximately 300 feet per side. The project site has been used for equipment storage by SDG&E since approximately 1971. The environmental document did find any significant impacts. However, in response to comments on the proposed negative declaration, the SDAPCD provided and incorporated additional detail about specified permit conditions as mitigation measures. The mitigation measures dealt with conditions during the construction period, with the objective being to mitigate for emissions, especially particulate matter emissions.

Based on the entire record before it, the SDAPCD found no substantial evidence that the project would have a significant adverse impact on the

⁷ CEQA Guidelines Sections 15050(b) and 15096.

environment. We find that the SDAPCD reasonably concluded that the project described above would have no significant adverse impacts on the environment and we adopt that finding for purposes of our approval.

III. Comments on Draft Decision

Section 311(g)(2) provides in relevant part that the 30-day comment period may be reduced or waived in an unforeseen emergency situation, upon the stipulation of all parties in the proceeding, for an uncontested matter in which the decision grants the relief requested. Although there is no formal service list to this proceeding, this application was served on all parties to the service list of R.04-04-003, and no protests were received. Comments in support of SDG&E's application were filed by TURN.⁸ Consistent with the requirements of Section 311(g) (2), we waive the 30-day comment period, since this is an uncontested matter in which the decision grants the relief requested.

IV. Categorization and Need for Hearing

We confirm that this is a ratesetting proceeding. There are no contested factual issues or protests to this application. TURN submitted comments in support of this application. Therefore, there is no need for a hearing.

V. Assignment of Proceeding

This proceeding is assigned to Commissioner Michael R. Peevey and Administrative Law Judge Carol Brown.

⁸ As previously discussed, SDG&E had originally served Advice Letter 1621-E on all parties to the service list of R.04.04-003. No protests were received. Therefore the service list of R.04-04-003 has been on notice since September 8, 2004 of SDG&E's request for Section 851 approval of the Ramco project at Miramar.

Findings of Fact

1. In A.04-10-009, SDG&E seeks on an expedited, *ex parte*, basis authority to enter into a lease agreement with Ramco.
2. Ramco will build a combustion turbine on SDG&E property.
3. Once the project is completed, Ramco will turn over the facility to SDG&E, via purchase.
4. SDG&E has the right to step-in to take over the facility in case of a default by Ramco.
5. The property in question is a generation asset.
6. SDG&E is not disposing of the property.
7. The SDAPCD is Lead Agency for the Ramco Project under CEQA.
8. On September 17, 2004 the SDAPCD issued a Mitigated Negative Declaration to the State Clearing House determining that the construction and operation of a combustion turbine, known as the Ramco Project will have no significant impact on the environment.
9. The Commission is a Responsible Agency for the project under CEQA.
10. The project will provide 46 megawatts of power for the ratepayers of SDG&E.
11. This power will be of a substantial benefit to SDG&E's ratepayers.
12. The Ramco lease allows SDG&E's property to be used for productive purposes, which will benefit SDG&E's ratepayers.
13. There are no contested factual issues.
14. There were no protests to A.04-10-009.

Conclusions of Law

1. This is a ratesetting proceeding.
2. There is no need for a hearing.

3. Consistent with the requirements of Section 311(g) (2), we waive the 30-day comment period, since this is an uncontested matter in which the decision grants the relief requested.

4. Since SDG&E will not be disposing of a generation facility, § 377 does not apply.

5. We have reviewed SDAPCD's environmental documents and find them to be adequate for our decision making purposes.

6. We find that SDCAPCD reasonably concluded that the Ramco Project will have no significant adverse impacts on the environment and we adopt SDAPCD's findings for purposes of our approval.

7. The public interest is served when utility property is used for productive services without interfering with the utility's operations or the provision of utility service to the public.

8. In order to ensure that ratepayers are adequately protected, we will direct SDG&E to enforce its contractual step-in rights upon an event of default of Ramco impacting the completion schedule in the Turnkey Acquisition Agreement. In addition, SDGE shall obtain prior to disbursement of construction funding typical lender protective provisions, enforceable by SDG&E, on the monitoring of project construction and the disbursement of project funds during the term of the Turnkey Acquisition Agreement.

O R D E R

IT IS ORDERED that:

1. SDG&E is authorized to enter into this lease with Ramco, with the following conditions: SDG&E shall enforce its contractual step-in rights upon an

event of default of Ramco impacting the completion schedule in the Turnkey Acquisition Agreement. In addition, SDGE shall obtain prior to disbursement of construction funding typical lender protective provisions, enforceable by SDG&E, on the monitoring of project construction and the disbursement of project funds during the term of the Turnkey Acquisition Agreement.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.