

Decision **PROPOSED DECISION OF ALJ KOLAKOWSKI (Mailed 2/24/2009)****BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of San Diego Gas and Electric Company (U902E) for Approval of Power Purchase Agreement with J-Power, USA Development Company, LTD and Wellhead Power Margarita, LLC for Recovery of Costs and for a limited Exemption from the Requirements of Public Utilities Code Section 851.

Application 07-05-023  
(Filed May 11, 2007)

**PROPOSED DECISION MODIFYING DECISION 07-09-010****1. Summary**

On September 5, 2008, San Diego Gas and Electric Company (SDG&E) filed a petition for modification (Petition) of Decision (D.) 07-09-010 (the Decision) in proceeding Application 07-05-023, with a corresponding motion to file under seal. On October 6, 2008, Ladera Hope moved for party status and filed a response to the Petition. This decision grants Ladera Hope party status, partially grants the Petition's requested relief, orders SDG&E to amend the Petition regarding the remaining relief within 90 days (subject to extension for good cause), and modifies D.07-09-010 as set forth in Attachment 1. The proceeding remains open.

**2. Background**

In D.07-09-010, the Commission approved two power purchase agreements (PPAs), along with associated option agreements and proposed leases (collectively, Agreements), between SDG&E and developers J-Power, USA

Development Company (J-Power) and Wellhead Power Margarita, LLC (Wellhead) (collectively, the Developers), and found that the Agreements did not require approval under Pub. Util. Code § 851. Under the Agreements, SDG&E would lease to each of the Developers a single parcel of land on which the Developers would construct and operate peaking generation facilities (peakers). The Developers would operate the peakers and sell the output to SDG&E under agreed terms. At the end of the 25-year terms of the Agreements, the leases would expire and SDG&E would take ownership of the peakers.

SDG&E filed the Petition on September 5, 2008. SDG&E filed a minor amendment to the Petition on September 11, 2008.

Ladera Hope, a community organization comprised of residents of properties located near the proposed site of the Wellhead peaker, filed its motion for party status and a response to the Petition on October 6, 2008. Ladera Hope objects to D.07-09-010's granting approval to the Wellhead peaker, and opposes the Petition. SDG&E replied to Ladera Hope's comments on October 16, 2008.

### **3. Procedural Requirements Under Rule 16.4**

Rule 16.4 governs the process for the filing and consideration of Petitions for Modification (PFMs). Rule 16.4(b) requires that a PFM concisely state the justification for the proposed relief and to propose specific wording for all requested modifications. SDG&E's Petition contained a concise but thorough statement of justification for the proposed modifications related to the J-Power Agreements, almost all of which SDG&E sought to seal as confidential. SDG&E's statement of justification and proposed modifications regarding the Wellhead Agreements are incomplete, as discussed in more detail below. Hence, this requirement has been fulfilled regarding the J-Power peaker but not the Wellhead peaker.

Rule 16.4(d) states if more than one year has elapsed since the effective date of the decision, then the petitions must explain why they could not have been presented within one year of the effective date of the decision. SDG&E initially filed its Petition within one year, and the subsequent amendment was sufficiently minor that the initial filing is sufficient to avoid that requirement.

Hence, we conclude that SDG&E's Petition complies with the requirements of Rule 16.4 regarding the requested modifications related to the J-Power Agreements, but not regarding the requested modifications related to the Wellhead Agreements. The manner in which SDG&E can cure this defect is discussed herein.

#### **4. Discussion of the Requested Relief**

For purposes of this decision, we shall consider the modifications regarding the J-Power peaker and Wellhead peaker separately, so that we may consider granting the modifications related to the J-Power PPA without delay.

##### **4.1. J-Power Orange Grove Peaker**

The J-Power Agreements have been impacted by unforeseen delays in construction of the J-Power peaker. These delays are the result of changes made to the project in response to the California Energy Commission (CEC), local businesses and CalTrans.<sup>1</sup> The modifications to the J-Power Agreements occur in the online date as well as the confidential terms, and do not fundamentally change the nature of the original J-Power Agreements.

The requested modifications have been reviewed by Commission Energy Division staff (Staff) and by an independent evaluator (R.W. Beck), and have

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<sup>1</sup> Petition, pages 7-8.

been found to be reasonable and prudent. Therefore we shall modify D.07-09-010 as shown in Attachment 1 to this decision to authorize the requested modifications in the J-Power PPA, Option Agreement and Ground Lease, as well as authorize a change of the online date to October 1, 2009.

#### **4.2. Wellhead Margarita Project**

The Wellhead Agreements have also been impacted by unforeseen delays. However, unlike with the J-Power peaker unit, the Wellhead peaker faces substantial uncertainty. SDG&E notes that it may either be completed at the existing site or at another location.<sup>2</sup>

If the Wellhead peaker is relocated to a different location which is no longer on SDG&E property, the approved fundamental nature of the original Wellhead Agreements project will change. The project as approved would have SDG&E lease land to Wellhead for 25 years, for Wellhead to construct and operate the peaker unit and sell the output to SDG&E under defined terms, and then for SDG&E to assume ownership of the peaker unit upon expiration of the lease. If the project is moved to a new location not on SDG&E property, then the ownership of the peaker will not transfer to SDG&E at the expiration of the lease.<sup>3</sup>

SDG&E contends that the lost value from not taking ownership of the peakers in 25 years is less than the value received by relocating the project. However, this does not change the fact that the peaker project as constructed will be fundamentally different than the project as described in D.07-09-010. A

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<sup>2</sup> Petition, pages 11-12.

<sup>3</sup> Petition, page 12.

number of modifications to the Decision will be needed so that the nature of the Wellhead Margarita peaker project is described correctly. At present, the information in the Petition is inadequate to clearly and comprehensively make the necessary modifications.

Fundamentally, the problem is that the request regarding the Wellhead Margarita peaker is premature, as SDG&E has not finalized the location of the project. This is understandable, as SDG&E is interested in obtaining the modifications for the J-Power Orange Grove peaker Agreements as quickly as possible, and SDG&E sought to avoid duplication by having separate requests for the two projects. Unfortunately, the Wellhead Margarita peaker's details are still too speculative to allow us to make the necessary changes to the Decision.

Therefore we order SDG&E to amend the Petition within 90 days to clarify the relief requested, or we will dismiss the request regarding the Wellhead Margarita project without prejudice. We will allow the assigned Commissioner or Administrative Law Judge (ALJ) to extend this period upon showing of good cause. Furthermore, if the Petition is either dismissed or withdrawn by SDG&E and later refiled, we will accept the amended Petition as meeting the timeliness requirements of Rule 16.4(d) and will not require a showing of cause for filing beyond one year from issuance of the Decision.

#### **5. Ladera Hope's Motion and Comments**

Ladera Hope has requested party status in this proceeding. Granting Ladera Hope party status is appropriate in this proceeding. As SDG&E notes in the Petition, the delays regarding the Wellhead peaker which necessitated the

Petition are partly because of opposition from Ladera Hope.<sup>4</sup> Therefore we will grant Ladera Hope the requested party status.

SDG&E objected in its October 16 reply that Ladera Hope's comments are all directed to the Decision and not the Petition, and constitute an untimely challenge to the Decision. SDG&E is correct to the extent that Ladera Hope challenges the Decision.

Ladera Hope's objections are largely related to the environmental impacts of the project. We do not consider those issues when approving a PPA. As noted in the Decision, the Developers had to obtain any permits and undergo any environmental review that is required by the CEC and local authorities.<sup>5</sup>

The peaker project has undergone substantial local environmental review, which has delayed the project to the point where the present modifications were requested, and SDG&E and Wellhead are considering relocation of the project. Ladera Hope has fully and successfully participated in that local environmental review process. Thus, we were correct in noting in the Decision that the local community was adequately protected by the CEC and local authorities.

## **6. SDG&E's Motion to File Under Seal**

Concurrent with its Petition, SDG&E filed a motion on September 5, 2008 to file the Petition under seal (SDG&E Motion). SDG&E provided a declaration from Mike McClenahan and accompanying exhibits regarding the confidentiality of certain portions of the Petition. The declaration identified information subject to requested confidential treatment, the appropriate reference to the Matrix

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<sup>4</sup> Petition, page 11.

<sup>5</sup> D.07-09-010, pages 12-13.

Category in Appendix A of D.06-06-066 regarding confidential treatment of investor-owned utility data.

No party has objected to SDG&E's Motion, and we grant it with some reservations. SDG&E has sought broad protection, to the extent that the redactions made it difficult for us to draft a meaningful decision that actually grants the requested relief. Because no party objected and in the interest in achieving a timely resolution to the Petition to allow the J-Power peaker construction to finish quickly, we have not engaged in a thorough review of the individual redactions in this case. However, in the future, and in the amended Petition, if filed, SDG&E is encouraged to be more sparing in its application of redactions in order to allow public access to as much of the information relied upon by the Commission as possible, consistent with D.06-06-066.

## **7. Conclusion**

The Petition has been found to be procedurally proper as it relates to the J-Power Agreements but to require amendment as it relates to the Wellhead Agreements within 90 days (or later upon showing of good cause). We shall modify D.07-09-010 as shown in Attachment 1 to this decision to authorize the requested modifications in the J-Power PPA, Option Agreement and Ground Lease, as well as to authorize a change of the online date to October 1, 2009.

## **8. Comments on Proposed Decision**

The proposed decision (PD) 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 of the Commission's Rules of Practice and Procedure. Comments were filed by SDG&E on March 16, 2009, and no reply comments were filed. SDG&E's comments proposed minor typographical and clarifying changes to the PD, which were incorporated.

**9. Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Victoria S. Kolakowski is the assigned ALJ in this proceeding.

**Findings of Fact**

1. The Commission approved in D.07-05-023 power purchase agreements and associated option agreements and proposed leases between SDG&E and the Developers. The Agreements authorized the construction of peakers by each of the Developers.

2. SDG&E filed a Petition for Modification for the Decision on September 5, 2008, along with a corresponding Motion to File Under Seal, which are within one year of the issuance of the Decision.

3. SDG&E filed a minor amendment to the Petition on September 11, 2008.

4. Ladera Hope, a community organization comprised of residents of properties located near the originally proposed site for the Wellhead peaker, moved for party status on October 6, 2008 and filed a response to the Petition. SDG&E replied to the response on October 16, 2008.

5. Ladera Hope has not objected to the SDG&E Motion.

6. The J-Power Agreements have been impacted by unforeseen delays in construction of the J-Power peaker. These delays are the result of changes made to the project in response to the CEC, local businesses and CalTrans.

7. The modifications to the J-Power Agreements occur in the online date as well as the confidential terms, and do not fundamentally change the nature of the original J-Power Agreements.

8. The Wellhead Agreements have been impacted by unforeseen delays. However, the Wellhead peaker faces substantial uncertainty. SDG&E notes that

it may either be completed at the existing site or at another location; hence, the location of the Wellhead peaker is not specified.

9. Relocation of the Wellhead site could result in a fundamental change in the nature of the original Wellhead Agreements, as construction of the Wellhead peaker off of SDG&E property would not allow transfer of ownership of the peaker at the expiration of the Wellhead Agreements.

10. If the Wellhead peaker is relocated to a different location which is no longer on SDG&E property, the approved fundamental nature of the original Wellhead Agreements project will change.

11. The requested modifications to the J-Power Agreements have been reviewed by Commission Staff and by an independent evaluator (R.W. Beck), and have been found to be reasonable and prudent.

12. The modifications necessary for D.07-09-010 are in Attachment 1.

13. A.07-05-023 should remain open for the sole purpose of considering this Petition with respect to the Wellhead Agreements.

### **Conclusions of Law**

1. SDG&E's Petition, satisfies the requirements of Rule 16.4 regarding the proposed modifications related to the J-Power Agreements, but not regarding the proposed modifications related to the Wellhead Agreements.

2. The October 11, 2008 amendment to the Petition was so minor as to not place the filing of the Petition outside the one year window set forth in Rule 16.4(b).

3. Based upon review by Staff and R.W. Beck, the requested modifications regarding the J-Power Agreements should be granted.

4. Relocation of the Wellhead peaker to a property not owned by SDG&E will change the fundamental nature of the original approved Wellhead Agreements.

5. The Petition should be amended regarding the modifications related to the Wellhead Agreements within 90 days to clarify whether the Wellhead peaker will be constructed on SDG&E property; and if it is not, to identify the new location of the peaker. Furthermore, SDG&E must provide comprehensive suggested revisions to the Decision pursuant to Rule 16.4 to account for any change in the nature of the approved Wellhead Agreements. SDG&E should be allowed to extend this period upon showing of good cause.

6. Ladera Hope should be granted party status.

7. SDG&E's Motion to File Under Seal is consistent with the provisions of D.06-06-066 and should be granted as set forth below.

8. A.07-05-023 should remain open.

9. This order should be effective immediately.

**O R D E R**

**IT IS ORDERED** that:

1. Decision (D.) 07-09-010 is modified as shown in Attachment 1. All other language in D.07-09-010 shall be read and understood to conform to those modifications.

2. Ladera Hope is granted party status.

3. San Diego Gas & Electric Company's (SDG&E) motion to file under seal is granted. The unredacted version of the Petition for Modification shall be placed under seal and shall remain sealed for a period of three years from the effective date of this decision.

4. SDG&E shall amend the Petition for Modification (Petition) within 90 days as described herein. This period may be extended by the assigned Commissioner or Administrative Law Judge upon showing of good cause. If the

Petition is either dismissed or withdrawn by SDG&E and later refiled, the Commission will accept the amended Petition as meeting the timelines requirements of Rule 16.4(d) and will not require a showing of cause for filing beyond one year from issuance of the original decision, D.07-09-010.

5. Application 07-05-023 remains open.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

## ATTACHMENT 1

## REDLINES TO D.07-09-010

P.2 (add new paragraph before first full paragraph): Due to unforeseen delays associated with necessary permitting, the J-Power project was delayed. Nevertheless, because the J-Power project continues to prudently meet demonstrated need at a reasonable cost, approval remains in the public interest.

P. 2: This decision further orders full recovery of costs associated with the PPAs, including the revised PPAs and associated costs from an independent evaluation, from bundled customers through SDG&E's Energy Resources Recovery Account (ERRA).

P. 3: The commercial online date ~~will~~ for the J-Power project was originally expected to be May 31, 2008, and the delivery term of the PPA is was expected to be from May 31, 2008 through May 31, 2033. However, unforeseen permitting delays associated with applications before the California Energy Commission (CEC) require a need to reschedule the online date. These unanticipated delays have also caused an increase in the total cost of the project.

P. 6: As discussed below, we determine that the amended PPAs and lease agreements with J-Power and Wellhead should be approved.

P. 9: We have reviewed the J-Power and Wellhead PPAs, as amended by the amended PPA and lease option agreements, and find that they prudently meet the demonstrated need at reasonable costs.

P. 11: Therefore it is appropriate for SDG&E to recover its purchased power costs through the ERRAs, including the costs associated with the Independent Evaluator (R.W. Beck) used by SDG&E to analyze the reasonableness of the amended J-Power contracts.

Finding of Fact No. 1: SDG&E ~~has~~ entered into a PPA and lease option agreement with J-Power to develop approximately 86.5 MW of gas-fired peaking generation on 16.5 acres of SDG&E's 202 acre Pala substation in northern San Diego County, to which the generators will be connected. The commercial online date ~~will~~ was expected to be May 31, 2008, and the delivery term of the PPA is was expected to be from May 31, 2008 through May 31, 2033.

New Finding of Fact No. 19: Unanticipated delays associated with permitting have caused the need to amend the contracts with J-Power. The new online date is expected to be October 1, 2009, and the delivery term is expected to be from October 1, 2009 through October 1, 2034. Nevertheless, the J-Power project continues to be a least cost and best fit proposal that fully meets the current location, delivery and creditworthiness requirements of SDG&E. Thus, the J-Power project continues to prudently meet demonstrated need at reasonable costs.

Conclusion of Law No. 1: SDG&E's amended PPA and lease option agreement with J-Power ~~and its associated lease option agreement~~ should be approved, as they prudently meet demonstrated need at reasonable costs.

Conclusion of Law No. 6: SDG&E's amended agreements to lease substation land provide useful purposes for the land without interfering with SDG&E's provision of utility services, and therefore meet the requirements under § 853(b) of a waiver of the § 851 requirements for the limited purposes of constructing peaker units pursuant to these agreements, provided that they are the same as those attached to the lease option agreements.

Ordering Paragraph No. 1: San Diego Gas and Electric Company's (SDG&E) amended power procurement agreement (PPA) and lease option agreement of ~~May 9, 2007~~ June 20, 2008 with J-Power, USA Development Company, Ltd. is approved.

Ordering Paragraph No. 3: SDG&E is authorized to recover payments made pursuant to the amended PPA<sub>s</sub> by means of entries into its Energy Resources Recover Account (ERRA), subject to annual review of those payments.

**(END OF ATTACHMENT 1)**