

Decision 01-06-006 June 7, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) for Authority to Lease Space on Two Properties to CalPeak Power LLC.

Application 01-04-015
(Filed April 16, 2001)

O P I N I O N

Summary

We grant the request of San Diego Gas & Electric Company (SDG&E) for a limited exemption from the requirements of Pub. Util. Code § 851¹ for the lease of space at two substations for the installation of electric generation units.

Background

On April 16, 2001, SDG&E filed an Application for Authority to Lease Space on Two Properties to CalPeak Power LLC (Application). SDG&E seeks Commission approval to lease space at its Mission and El Cajon substations to CalPeak Power LLC (CalPeak) for installation and operation of electric generation units. At each location, CalPeak would be installing a 49 megawatt combustion turbine generator and related equipment, including that needed for emissions control.

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

Leases of utility property such as those requested by the Application require approval of the Commission under § 851.² Any such transfer without the approval of the Commission is void. *Transport Clearings-Bay Area v. Simmonds* (1964) 226 Cal. App. 2d 405, 419. However, § 853(b) provides an exemption from the requirements of § 851:

(b) The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The commission may establish rules or impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision. These rules or requirements may include, but are not limited to, notification of a proposed sale or transfer of assets or stock and provision for refunds or credits to customers or subscribers.

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 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.

SDG&E's Application requests an exemption from § 851 pursuant to § 853(b), or in the alternative, Commission approval under § 851, but with a Commission finding of exemption from the requirements of the California Environmental Quality Act (CEQA).

SDG&E provides a relatively concise description of the background leading to the Application:

California is experiencing an electricity supply shortage emergency, as evidenced by rolling blackouts in northern California this past January and statewide outages on March 19 and 20, 2001. Last summer, on August 24, 2000, the California Independent System Operator Corporation ("ISO") issued to generators a Request for Bids ("RFB") to Provide Summer Reliability Generation to California Independent System Operator Corporation. The RFB sought bids from generation facilities to provide new generation in the form of peaking capability to the ISO for reliability purposes during summer periods. Some of the generators responding to the RFB asked SDG&E about the best sites to locate new generation and whether SDG&E would consider making land available at any of SDG&E's substations. SDG&E replied that it would provide a list of all substation addresses to potential generators who asked about locating generation within SDG&E substation property provided they sign a nondisclosure agreement and agree to apply for interconnection under SDG&E's Transmission Owner Tariff. SDG&E confirmed this willingness to make certain substation locations available for respondents to the RFB in a September 22, 2000 letter to Brian Theaker of the ISO, attached to this Application as Exhibit A.

DG Power Corporation (“DG Power”) was one of the respondents to the RFB that received a contract(s) for peaking generation from the ISO. DG Power intends to assign its ISO contract rights and obligations to CalPeak. CalPeak desires to lease space for its peaking generation units at SDG&E’s properties known as El Cajon and Mission, on which two of SDG&E’s substations are located, and has been working with SDG&E for approximately two months defining how to incorporate CalPeak’s peaking plants into the two SDG&E sites. In addition, as a result of recently-enacted Assembly Bill (AB) X1 (Ch.4 First Extraordinary Session 2001), CalPeak is currently negotiating separate contracts with the California Department of Water Resources (“DWR”).

SDG&E and CalPeak are now very close to executing two leases, one for space at SDG&E’s Mission property and one for space at its El Cajon property. In light of the urgent nature of obtaining additional generation for peaking capability for the State, however, neither party wished to delay the filing of this Application until after the leases were executed as the Commission’s Rules of Practice and Procedure would require. Instead, SDG&E has attached the most recent version of each lease to this Application, with this request that the Commission waive its requirement of including copies of the signed leases on the condition that SDG&E will submit the signed leases to the Commission as an update to this Application. (Application, pp. 2-3)

SDG&E gives several reasons why granting an exemption from § 851 would be appropriate here. First, SDG&E cites to the Governor’s Executive Order D-26-01, dated February 8, 2001, which acknowledged the State of Emergency declared on January 17, 2001, due to the energy shortage in the State of California. (Application, p. 4 and Ex. B.) The Executive Order states that: “[T]his energy supply emergency poses a threat to public health, safety, and welfare and requires the siting of new powerplants that can be on-line to avoid electricity supply shortages this summer and next.” The Executive Order also orders local, regional and state agencies to accelerate the availability of electric generation sources to the State.

SDG&E states that the threat of rolling blackouts is a reality, and that bringing additional generation on-line by this summer is a key part to the overall solution to the current electricity crisis. SDG&E has space available that is suitable for the generation

units that CalPeak desires to install, and both parties are ready to proceed, but absent an exemption from § 851, "...CalPeak's generating units simply will not be on-line by this summer." (Application, pp. 4-5.)

Second, SDG&E asserts that leasing space to CalPeak is in the public interest, "[B]ecause it will in no way impair or affect SDG&E's ability to provide utility service and will provide a stream of revenue for otherwise unused square footage on SDG&E property." (Application, p.4.) Finally, SDG&E argues that the Commission need not undertake an environmental assessment of the siting of the generation units, as that will be done by various local agencies.

SDG&E's Application also provides information typically required in a § 851 proceeding. SDG&E has requested in the alternative that the Commission approve its Application on an expedited basis under § 851 if the Commission does not approve an exemption under § 853(b). As part of that expedited § 851 process, SDG&E requests that the Commission find one or more CEQA exemptions to be applicable here. Specifically, SDG&E argues that the proposed project would fall under the exemption for "Early Activities Related to Thermal Power Plants" (CEQA Guideline 15271), and/or the project is one to "prevent or mitigate an emergency," and therefore qualifies for the exemption for "Emergency Projects" (CEQA Guideline 15269). SDG&E also argues that local governmental agencies would more appropriately be the lead agency for CEQA.

Procedural History

SDG&E filed its Application on April 16, 2001. By the *ALJ Ruling Shortening Protest Period*, issued April 20, 2001, SDG&E was ordered to provide additional notice of its Application on April 24, 2001, and to file a Supplemental Certificate of Service showing that the ordered service had been made. SDG&E filed the supplemental Certificate of Service on April 24, 2001. The protest period ended on May 1, 2001, and the only protest received was from the Commission's Office of Ratepayer Advocates (ORA). On May 4, 2001, SDG&E was granted the requested authority to relocate

specific utility facilities. (*Assigned Commissioner's and Administrative Law Judge's Ruling Granting Request to Relocate Utility Facilities*, May 4, 2001.)

ORA Protest

ORA filed a protest to the Application on May 1, 2001. The scope of ORA's protest is quite limited. ORA acknowledges that the current electricity crisis requires the need to bring additional generation on-line. While ORA states that it would prefer a review under § 851, it does not oppose SDG&E's request for an exemption under § 853, and is not requesting an evidentiary hearing. ORA does request that any exemption granted SDG&E under § 853 be narrowly tailored, and only applicable to the two leases specified in the Application. ORA's request is actually consistent with the authority requested by SDG&E's Application. ORA is not contesting the Application, but rather seeking to ensure that the Commission limit the relief granted to the relief requested.

Discussion

There are a number of reasons to grant SDG&E's request for an exemption from the requirements of § 851 under § 853(b). First and foremost, SDG&E is correct that California needs to have additional generation units on-line by this summer. SDG&E's Application specifically seeks authority to lease property for installation of additional generation units. Accordingly, the Application responds to a pressing need, for which time is critical. For a number of reasons, including the fact that the leases in question had not been executed on the date the Application was filed, the Commission can grant an exemption under § 853(b) faster than it could grant approval under § 851.

Second, the relief sought is very limited. SDG&E is only requesting exemption from the requirements of § 851 for leasing of two small parcels contained within existing utility facilities. Section 853(b) allows the Commission to make any exemption to § 851 subject to specific terms and conditions, and the Commission may also "establish rules or impose requirements" as necessary to protect utility ratepayers, and we will do so here. Consistent with ORA's request, we will limit the authority granted to SDG&E to the two leases described in the Application.

Third, SDG&E has given assurances that leasing space to CalPeak “will in no way impair or affect SDG&E’s ability to provide utility service,” and will also provide an additional stream of revenue. (Application, p. 4.)

Finally, there were no substantive protests to the Application. ORA generally supports the underlying purpose of the Application, which is to bring more generation on-line quickly. From the record before us, it appears that there are specific and significant benefits to be gained from expediting approval of the Application. No specific drawbacks or problems with granting an exemption from § 851 were identified here. At the same time, however, the Commission takes seriously its duty under § 851 to ensure that sales, leases, and other encumbrances of utility property are in the public interest. Exemptions from § 851, even with the safeguards of § 853(b), will not be granted lightly, nor should they be any broader than necessary. Accordingly, while we are granting the requested exemption from § 851, we will impose limits on the scope of that exemption.

The exemption to § 851 that we grant today, as authorized by § 853(b), is limited to the two leases identified in the Application, for the sites and leasehold interests described on pages 12 and 13 of the Application, and for the purpose of installing and operating electric generation units. The Commission maintains its jurisdiction over SDG&E and its facilities, and does not exempt from the requirements of § 851 any other leases, even if they are similar or related to the ones approved here.³ In addition, the Commission retains its authority over the ratemaking treatment to be accorded to any revenue stream from the leases, and this decision does not authorize SDG&E to incur any ratepayer liability or spend any ratepayer funds. With these limitations, and given the current desirability of expediting the siting of new generation, we find that an exemption from § 851, as authorized by § 853(b), is in the public interest.

³ Without prejudging any particular application, the Commission is not presently aware of any reason why similar applications would not receive similar treatment, and would recommend that any other utilities seeking approval of similar projects generally follow the approach used by SDG&E.

Given that we are granting an exemption from § 851, we cannot and do not review the actual leases or their terms. As a result, CEQA is not applicable to the present proceeding. The CEQA Guidelines describe the general concepts of CEQA applicability, including the following language: “CEQA applies to governmental action. This action may involve...(3) Private activities which require approval from a governmental agency.” CEQA Guideline 15002(b)(3), emphasis added. (*See also*, Public Resources Codes § 21001.1.) By our granting of an exemption from § 851, we are holding that SDG&E does not require Commission approval for the identified proposals. Since Commission approval is not required, neither is CEQA review.⁴

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code, the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. California is currently experiencing an electricity crisis, and the Governor has declared a State of Emergency.
2. The Governor has issued Executive Order D-26-01, dated February 8, 2001, which determined that the energy supply emergency poses a threat to public health, safety, and welfare, and requires the siting of new powerplants that can be on-line to avoid electricity supply shortages this summer and next, and ordered State agencies to act expeditiously to accelerate the availability of new generation sources to the State.
3. Granting SDG&E’s Application would make additional electric generation sources available to the State.
4. SDG&E has requested an exemption from the requirements of Pub. Util. Code § 851 pursuant to Pub. Util. Code § 853(b).

⁴ SDG&E makes credible arguments that one or more CEQA exemptions would apply even if we were to approve the Application under § 851, but we need not reach that issue here.

5. The scope of the exemption from Pub. Util. Code § 851 requested by SDG&E is narrow, consisting of leases of designated land at two SDG&E facilities to CalPeak.

6. CalPeak seeks to install a 49 megawatt combustion turbine peaking generation unit at each site.

7. Review and approval of the Application under § 853(b) can be accomplished more quickly than review and approval of the Application under § 851.

8. ORA filed a protest which did not contest the substance of the Application, and which did not request a hearing.

9. No issues of disputed material fact have been presented and an evidentiary hearing is not required.

Conclusions of Law

1. Pub. Util. Code § 853(b) provides for the Commission to exempt a public utility from the requirements of Pub. Util. Code § 851, and to place terms, conditions, rules and/or requirements upon any such exemption.

2. Exempting the Application from the requirements of Pub. Util. Code § 851 is in the public interest.

3. CEQA is not applicable to the Application.

4. This order should be effective today to allow for expeditious installation of new generation.

O R D E R

IT IS ORDERED that:

1. San Diego Gas & Electric Company's (SDG&E) request for an exemption from the requirements of Pub. Util. Code § 851 is granted.

2. The scope of the exemption from Pub. Util. Code § 851 is limited to the utility sites, leasehold interests, and purposes described in the Application, as discussed above.

3. The Commission retains its authority over SDG&E, SDG&E property, and ratemaking treatment of the leases, as discussed above.

4. This proceeding is closed.

A.01-04-015 ALJ/PVA/eap

This order is effective today.

Dated June 7, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners