

Decision 09-12-026 December 17, 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 Agreements 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)

**DECISION MODIFYING DECISION 07-09-010  
(as previously modified by D.09-03-033)**

**1. Summary**

On September 22, 2009, San Diego Gas & Electric Company (SDG&E) filed an amended petition for modification of Decision (D.) 07-09-010 (as previously modified by D.09-03-033) in proceeding Application 07-05-023, with a corresponding motion to file under seal. This decision modifies D.07-09-010 (as previously modified by D.09-03-033) as set forth in Attachment A and authorizes SDG&E's proposed changes to its Amendment to Wellhead Option Agreement and the modified power purchase agreement. This proceeding is closed.

**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 a petition for modification of D.07-09-010 on September 5, 2008, followed by a minor amendment on September 11, 2008. On April 1, 2009, the Commission issued D.09-03-033, modifying D.07-09-010. In part, the Commission authorized: 1) modifications to selected sections of the decision that addressed the power purchase agreements (PPA) with J-Power and Wellhead; and 2) SDG&E to amend its Petition for Modification within 90 days to clarify whether the Wellhead peaker would be constructed on SDG&E property, and if not, to identify the new location of the peaker; and to provide details of all the changes regarding the Amendment. SDG&E subsequently requested an extension of the 90 day period, which was authorized in a ruling on July 1, 2009.

On September 22, 2009, SDG&E timely filed a petition for modification of D.07-09-010, as modified by D.09-03-033. SDG&E requests approval of its proposed modifications to the Amendment to the Wellhead Option Agreement (Amended Agreement (Amended Agreement)) and the modified power purchase agreement (Modified PPA).

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

Rule 16.4 governs the process for the filing and consideration of petitions for modification. Rule 16.4(b) requires that a petition for modification 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 Amendment, some of which SDG&E sought to seal as confidential. Hence, this requirement has been fulfilled regarding the Wellhead peaker.

Rule 16.4(d) states if more than one year has elapsed since the effective date of the decision, then the petition must explain why it could not have been presented within one year of the effective date of the decision. SDG&E 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 Amendment.

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

The Amended Agreement between SDG&E and Wellhead, has been impacted by unforeseen delays in permitting of the Wellhead peaker at the original SDG&E-owned site, resulting in the relocation of the peaker project.

On November 7, 2007, the Orange County Planning Commission (OCPC) approved a site development permit and variance and issued a Negative Declaration for the Wellhead facility at the Margarita site, located on SDG&E-owned property. However, on January 2, 2008, the Ladera Hope group and six individual filed a petition for writ of mandate seeking to overturn OCPC's decision. On February 19, 2008, SDG&E, Wellhead, and Ladera Hope entered into a Memorandum of Understanding (MOU), in an effort to resolve Ladera Hope's issues. Subsequent to the expiration of the MOU, on May 8, 2008, Ladera Hope submitted a Revocation Request to OCPC in regards to the permit,

variance, and declaration previously issued to Wellhead. On May 13, 2008, OCPC issued a Status Conference Statement, stating that it believed its original Negative Declaration was based on flawed information, and that a new environmental review would be necessary. Given this progression of events, Wellhead requested that OCPC rescind its previous approvals for the Margarita project, and started evaluating other suitable sites in the San Diego County area. Given the delays and permitting problems that had already occurred, and knowing that there would be opposition by Ladera Hope and others if another environmental review were performed for the same site, Wellhead and SDG&E's decision to find another location is appropriate.

The project as originally 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. Since the project has moved to a new location not on SDG&E property, the ownership of the peaker will not transfer to SDG&E at the expiration of the lease. SDG&E contends that the lost value from not taking ownership of the peakers in 25 years is less than the value that would be received by ratepayers by relocating the project to a non-SDG&E owned site.

Although most proposed changes to D.07-09-010 (as previously modified by D.09-03-033) are straightforward, one is not supported by any documentation in the petition. Specifically, SDG&E proposes to add the following language to Finding of Fact 8:

Also, the Wellhead project may make an important contribution to elimination of once through cooling units in the San Diego service territory as early as next year. Moreover, the Wellhead project is important for reliability in SDG&E's service territory

and it should therefore qualify for expedited interconnection treatment under the California Independent System Operator (CAISO)'s generator interconnection procedures.

SDG&E has provided no documentation in support of these factual statements. Therefore, the Commission will not make this modification to Finding of Fact 8.

The amendment of the requested modifications to the Amended Agreement and Modified PPA,<sup>1</sup> resulting from the delays and site change, have been reviewed by an independent evaluator (PA Consulting Group), who found the modifications to be reasonable and prudent.

The Commission accepts SDG&E's proposed modifications to D.07-09-010 (as modified by D.09-03-033), as shown in Attachment A to this decision, authorizes the requested modifications to the Amended Agreement and Modified PPA as shown in Exhibit 2 to the petition for modification, and authorizes a change of the online date of the Wellhead project to July 1, 2010.

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

Concurrent with its Petition, SDG&E filed a motion on September 22, 2009 to file selected information in 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 and referenced the provisions of D.06-06-066 regarding confidential treatment of investor-owned utility data. No party has objected to SDG&E's Motion. Given the commercially

---

<sup>1</sup> Petition, Exhibit 2, Filed under Seal, Dated September 4, 2008.

sensitive nature of the information, it is appropriate that these materials be field under seal.

## **6. Reduction of Comment Period**

We reduce the 30-day public comment period because of this Proposed Decision (PD) due to the imminent start of construction at the new Wellhead project site, which outweighs the need for a full comment period on this decision. Pursuant to Pub. Util. Code § 311(g)(2) and Rule 14.6(c)(9), opening comments on this PD are due 14 days after the PD is mailed and reply comments are due 5 days after opening comments. No comments were received.

## **7. Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Seaneen M. Wilson is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. The Agreements approved in D.07-09-010, authorized the construction of peakers by each of the Developers.
2. The Agreements were subsequently modified by D.09-03-033.
3. SDG&E's amended Petition for Modification of D.07-09-010 (as previously modified by D.09-03-033) was filed within one year of the issuance of the D.09-03-033.
4. The Amended Agreement has been impacted by unforeseen delays in permitting of the Wellhead peaker at the original SDG&E-owned site, resulting in the relocation of the peaker project.
5. SDG&E's proposed modification to Finding of Fact 8 in D.07-09-010 as previously modified by D.09-03-033) is not supported by the record.

6. The balance of SDG&E's proposed modifications to D.07-09-010 (as previously modified by D.09-03-033) are supported by the record, as set forth in Attachment A.

7. The modifications to the Amended Agreement and Modified PPA occur in the selected terms and conditions, as well as the online date and do not fundamentally change the nature of the original Amended Agreement.

8. The requested modifications to the Amended Agreement and Modified PPA have been reviewed by an independent evaluator (PA Consulting Group), and have been found to be reasonable and prudent.

9. SDG&E's Motion to File selected portions of its Petition Under Seal is consistent with the provisions of D.06-06-066.

### **Conclusions of Law**

1. SDG&E's Petition satisfies the requirements of Rule 16.4 regarding the proposed modifications related to the Amended Agreement.

2. SDG&E's proposed modification to Finding of Fact 8 in D.07-09-010 as previously modified by D.09-03-033) should not be adopted.

3. The balance of SDG&E's proposed modifications to D.07-09-010 (as previously modified by D.09-03-033) as set forth in Attachment A, should be adopted.

4. The requested modifications to the Amended Agreement and Modified PPA (Exhibit 2 to Petition, Filed under Seal, Dated September 4, 2008) should be granted.

This order should be effective immediately.

**O R D E R**

**IT IS ORDERED** that:

1. Decision (D.) 07-09-010 (as previously modified by D.09-03-033) is further modified as shown in Attachment A. All other language in D.07-09-010 (as previously modified by D.09-03-033) shall be read and understood to conform to those modifications.

2. San Diego Gas & Electric Company's requested modifications to the Amended Wellhead Option Agreement and Power Purchase agreement between San Diego Gas & Electric Company and Wellhead Power Margarita, LLC, attached as Exhibit 2 to its Petition for Modification, dated September 4, 2008, are granted.

3. San Diego Gas & Electric Company's motion to file under seal is granted. The information shall be filed under seal and shall remain under seal for a period of two years after the date of this order. During this two-year period, this information shall remain under seal and shall not be viewed by any person other than the assigned Commissioner, the assigned Administrative Law Judge, the Assistant Chief Administrative Law Judge, or the Chief Administrative Law

Judge, except as agreed to in writing by San Diego Gas & Electric Company or as ordered by a court of competent jurisdiction.

4. Application 07-05-023 is closed.

This order is effective today.

Dated December 17, 2009, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners

ATTACHMENT A

**REDLINES TO D.07-09-010 (as previously modified by D.09-03-033)**

Page 1-2: ~~For each of these sets of agreements~~ the J-Power agreements, SDG&E shall grant an options to lease its land to a developer (J-Power ~~and Wellhead, respectively~~), who shall construct a gas-powered peaker generators (peakers) on the leased land. For the Amendments, SDG&E shall grant an option to locate the peaker on either SDG&E-owned property or other private property. The J-Power PPAs commits the output of ~~those~~ its peakers to SDG&E for a period of 25 years, after which the leases shall expire and title to the peakers shall transfer to SDG&E at no additional cost. The Wellhead PPA will terminate on December 31 of the year in which the 25<sup>th</sup> anniversary of initial delivery occurs, and so will be in effect for longer than 25 years, but less than 26 years. Since it has been confirmed that the Wellhead peaker is going to be located on private property, as opposed to SDG&E-owned property, the lease provisions regarding transfer to SDG&E are inapplicable.

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

Page 2 Because the public interest is served by these lease arrangements, this decision also finds that these leases of utility land to J-Power falls within the exceptions to the requirements of Pub. Util. Code § 851 found in Pub. Util. Code § 853(b). Since the option to lease SDG&E-owned land in the Amendment is no

longer applicable, the provisions of Pub. Util. Code § 851 do not apply to the Amendment.

Page 4: Under the Amendments, ~~J-Power Wellhead~~ would construct one simple cycle gas-fired peaker turbine with a capacity of about 44 MW, ~~to be constructed on 1.68 acres of SDG&E's 19-acre Margarita substation site in Orange County, to which the generators would be connected.~~ The commercial online date ~~will~~ for the Wellhead project was originally expected to be July 1, 2008, and the delivery term of the PPA is was expected to be from July 1, 2008 through December 31, 2033. However, unforeseen permitting delays associated with permits required by Orange County require a need to reschedule the on-line date. These unanticipated delays have also caused the need to re-locate the project to private property near SDG&E's El Cajon 69/12 kV substation on the corner of W. Main Street and N. Johnson Ave. in El Cajon, CA, to which the generators will be connected.

Page 4: At the end of ~~each~~ the J-Power lease, ownership of the peaker generators constructed on that site will transfer to SDG&E without cost. With respect to Wellhead, since the peaker will be located on privately owned land, ownership of the peaker will remain with Wellhead.

Page 7: ~~While it would otherwise be appropriate to wait until determining the total LTPP needs of SDG&E in R.06-02-013 before reaching a decision on this application, the need to begin the process of construction of the peaker units in time to meet the projected need for the summer of 2008 requires that we make a determination without delay. Given SDG&E's current and unique situation, we are persuaded to approve these commitments prior to a final need determination in the LTPP proceeding, R.06-02-013. However, we note that the conclusions reached here today are based on a unique set of circumstances and should not be~~

~~assumed to be applicable in a general sense.~~ Moreover, in D.07-12-052, based on SDG&E' 2006 LTPP, the Commission authorized SDG&E to procure a total of 530 MW by 2015, including the approximately 130 MW represented by J-Power and Wellhead.

Page 8: The J-Power project will be built on SDG&E property, and therefore meets the requirement that IOUs give priority to generation projects on existing (brownfield) sites before using new (Greenfield) sites.

Page 9: (add sentence to end of third full paragraph): With respect to Wellhead, since a privately owned site has been selected, the option to lease SDG&E-owned property is inapplicable. Nevertheless, the agreement remains a least cost, best fit option for SDG&E's ratepayers.

Page 11: SDG&E will receive lease payment revenues from J-Power ~~and Wellhead.~~

Finding of Fact No. 2: Originally, SDG&E has entered into an PPA and lease option agreement to enter into a PPA and lease with Wellhead to develop approximately 44 MW of gas-fired peaking generation on 1.68 of SDG&E's 19 acre Margarita substation in Orange County, to which the generators will be connected. The commercial online date ~~will~~ was expected to be July 1, 2008, and the delivery term of the PPA ~~is~~ was expected to be from July 1, 2008 through December 31, 2033. SDG&E has now entered into an amended option agreement to enter into an alternate PPA, pursuant to which Wellhead may locate the peaker on privately owned property. The amended option agreement and associated alternate PPA include an expected commercial operation date of July 1, 2010. The amended option, however, does not expire until November 1, 2010, which will allow for commercial operation as late as the second quarter of 2011. Moreover, Wellhead has now confirmed that it intends to locate the peaker on private property near

SDG&E's El Cajon 69/12 kV substation on the corner of W. Main Street and N. Johnson Ave. in El Cajon, CA, to which the peaker will be connected.

Finding of Fact No. 4: At the end of ~~each~~ the J-Power lease, ownership of the peaker generators constructed on that site will transfer to SDG&E without cost. With respect to Wellhead, since the peaker will be located on privately owned land, ownership of the peaker will remain with Wellhead.

Finding of Fact No. 8: Delay in approval of peaking generation could result in shortfalls as early as ~~2008~~ 2010.

Conclusion of Law No. 2: SDG&E's PPA amended option agreement with Wellhead and its associated ~~lease option agreement~~ alternate PPA should be approved, as they prudently meet demonstrated need at reasonable costs.

Ordering Paragraph No. 2: SDG&E's PPA ~~and lease option agreement of May 2, 2007~~ amended option agreement and associated alternate PPA of September 4, 2008 with Wellhead Power Margarita, LLC is approved for the site on private property near SDG&E's El Cajon 69/12 kV substation on the corner of W. Main Street and N. Johnson Ave. in El Cajon, CA. SDG&E shall provide notice of the actual on-line date to the Commission as part of a future compliance advice letter filing, requiring no additional action by the Commission.

**(END OF ATTACHMENT A)**