

Decision 05-06-026 June 16, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of San Diego Gas & Electric
Company's Request for Approval Pursuant to
Public Utilities Code Section 8561 to Lease a
Portion of SDG&E's Property at
10975 Technology Drive, San Diego, California to
ADP Tax Services, Inc.

(U 902-M)

Application 05-05-008
(Filed May 6, 2005)

**DECISION GRANTING APPROVAL
UNDER PUBLIC UTILITIES CODE SECTION 851
FOR A LEASE OF UTILITY PROPERTY**

I. Summary

This application grants the application of San Diego Gas & Electric Company (SDG&E) for authorization pursuant to Public Utilities Code Section 851¹ to extend an existing lease of office space on property owned by SDG&E to ADP Tax Services, Inc. (ADP). The property is located at 10975 Technology Drive in San Diego, California. The term of the lease extension approved is from March 1, 2006 through February 28, 2007.

We also approve the terms of the underlying lease under Section 851.

¹ All subsequent Code references are to the Public Utilities Code, unless otherwise stated.

II. Background

According to the application, in 1997, Pacific Enterprises, then the parent company of Southern California Gas Company (SoCalGas), purchased the land and the office building located at 10975 Technology Drive, in San Diego from TransAmerica Realty Services, Inc. This property is also known as Lot 5 of the Ranch Bernardo Technology Park.

In March 1998, in Decision (D.) 98-03-073, the Commission approved the creation of Sempra Energy (Sempra), a new holding company which would hold the stock of Pacific Enterprises (and thereby, indirectly, SoCalGas) and Enova Corporation, then the parent company of SDG&E. In June 1998, after the completion of the transaction authorized in D.98-03-073, SDG&E and SoCalGas became subsidiaries of Sempra. Sempra continued to own the land and office building and used this property to provide computer services to SDG&E and SoCalGas.

On January 10, 2000, Sempra entered into an agreement to lease part of the office building to ADP. As amended on April 26, 2000, the term of the lease was for three years, from March 1, 2000 to February 28, 2003. The lease also granted ADP the right to three one-year extensions, so that ADP could extend the lease for as long as until February 26, 2006. Sempra continued to use the rest of the building not leased to ADP as a data processing center that served SDG&E and SoCalGas.

In September 2000, Sempra filed an application to reorganize its regulated California utility businesses to further integrate the management of SDG&E and SoCalGas, including the transfer of certain services previously provided by Sempra, such as computer information services, to SDG&E and SoCalGas. In D.01-09-056, the Commission approved these organizational changes.

On April 1, 2002, Sempra transferred the land and the building located at 10975 Technology Drive, San Diego, California to SDG&E. Sempra also assigned the lease with ADP to SDG&E effective April 1, 2002.

On October 30, 2002, ADP exercised its first one-year option, which extended the lease from March 1, 2003 through February 28, 2004. On November 18, 2003, ADP exercised its second one-year option, which extended the lease from February 28, 2004 through March 1, 2005. On November 1, 2004, ADP exercised its final one-year option, which extended the lease from March 1, 2005 to February 28, 2006.

SDG&E now seeks approval of a lease extension which would permit ADP to remain in part of the building from March 1, 2006 to February 28, 2007.

III. The Terms of the Lease and the First Amendment to the Lease

A. Terms of the Original Lease

Since neither Sempra nor SDG&E sought previous approval of the underlying lease with ADP, under Section 851, we must review the lease terms to determine if extension of the lease is in the public interest.²

SDG&E has agreed to lease ADP approximately 20.9% of the rentable space in the building (the leased area) solely for use as a data center.

ADP pays SDG&E rent on a monthly basis. The base monthly rent for the leased area was set at \$38,310 per month, effective February 15, 2000, in the

² As a holding company, Sempra did not seek Commission approval of the original lease pursuant to Section 851 before entering into the lease with ADP. SDG&E did not seek Commission approval of these three previous lease extensions, because ADP's right to exercise these options existed under the lease before Sempra assigned the lease to SDG&E.

original lease. However, the lease provides for an annual 3% increase in rent, effective March 1 of each successive year. ADP is also responsible for paying a proportional share of the increase in taxes or operating expenses for the property, as compared to the taxes and operating expenses in effect during the base year of the lease. Under the lease extension approved in this decision, ADP will pay SDG&E \$45,744.14 per month in rent, as well as 20.9% of the increase in taxes, insurance and maintenance, as in the previous years of tenancy.

ADP is permitted to have access to the portions of the building operated by SDG&E, the exterior of the building, and parts of the property other than the leased area only as necessary to construct, install, maintain, repair, or inspect tenant improvements or to take other actions necessary to exercise ADP's rights or fulfill ADP's obligations under the lease. However, ADP shares the parking lot with SDG&E and has the right to use 30 paved spaces and may use the loading dock during certain hours.

Except in emergencies, ADP must give SDG&E reasonable advance notice of its need to enter the portion of the building occupied by SDG&E.

SDG&E must maintain the property, except for tenant improvements, in good repair.

ADP has the right to make tenant improvements to the leased area, after obtaining SDG&E's advance approval. ADP must maintain these improvements in good repair at its own expense. Tenant improvements remain the sole property of ADP.

SDG&E must maintain insurance covering the entire building and property during the lease term. ADP must also maintain insurance on its own property and tenant improvements during the lease term.

ADP has agreed to indemnify, defend and hold SDG&E harmless from any and all claims, liability or damages arising from the death or personal injury of any person or damage to SDG&E's property, except when the death, personal injury, or property damage results from the negligence or willful misconduct of SDG&E, a violation of law by SDG&E, a structural failure of the building, or any condition in the building that ADP is not obligated to repair under the lease.

SDG&E has agreed to indemnify, defend, and hold ADP harmless from any and all claims, liability or damages resulting from the death or personal injury of any person or damage to any property, except to the extent that the death, personal injury or property damage results from the negligence or willful misconduct of ADP, a violation of law by ADP, breach of ADP's duty to make repairs under the lease, or any condition in the building that SDG&E has no duty to repair under the lease.

Both parties have agreed to comply with all laws and regulations affecting the condition, use and occupancy of the building, including legal requirements related to the use, storage or disposal of hazardous materials and hazardous wastes. The parties have indemnified each other from all claims, damages and liability that may result as a result of failure of the other party to comply with legal requirements related to hazardous materials or hazardous wastes.

So long as ADP is not in default, ADP may continue to occupy the leased area during the lease term and the term of any extensions. A default occurs under the lease if:

- Either party fails to pay an amount due for longer than 10 days after receiving written notice from the other party;
- Either party fails to perform any condition, covenant or lease provision that it is required to perform under the lease for

more than 30 days after receipt of written notice from the other party. However, if more than 30 days is needed for the party to come into compliance with the lease terms, a default will not occur so long as the party begins corrective action within 15 days of receipt of the notice and diligently works to complete the corrective action.

In the event of a default by ADP, SDG&E may terminate the lease and seek damages, continue the lease and enforce its rights, or pursue other legal remedies.

The lease also terminates as to any part of the property that is taken through eminent domain. Under certain circumstances, the parties may also terminate the lease if more than 10% of the floor space of the office building is condemned or sold, and the premises cannot be made operational, or if condemnation or sale materially interferes with the ability of a party to conduct its operations. In addition, the lease terminates if the building is totally damaged so that it is not operational, or under certain circumstances, if the building is partially damaged and the damage is not covered by SDG&E's insurance.

ADP may not assign, transfer, mortgage, sublease or encumber the leased area without SDG&E's consent. If ADP subleases or assigns the lease, ADP remains primarily responsible for payment of the rent and the performance of lease obligations.

If SDG&E assigns its interest in the lease, the assignee must agree in writing to honor ADP's rights under the lease. If SDG&E leases any other portion of the building or the property, the lease shall require the new tenant to honor ADP's rights under this lease.

B. Terms of the First Amendment to Lease Agreement

Under the First Amendment to Lease Agreement (Lease Amendment), which took effect on March 1, 2005, the parties agreed that SDG&E would apply to the Commission for authorization to extend the lease term from March 1, 2006 through February 28, 2007. SDG&E will notify ADP if the Commission approves the application. ADP may then opt to extend the lease through February 28, 2007, upon the same terms as the original lease, so long as ADP is not in default. SDG&E would continue to receive a 3% increase in the rent for each additional year under the lease.

IV. Environmental Review

The California Environmental Quality Act (CEQA, Public Resources Code Section 21000 et seq.) applies to discretionary projects to be carried out or approved by public agencies. The basic purpose of CEQA is to “inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities.” (Title 14 of the California Code of Regulations, hereafter CEQA Guidelines, Section 15002.)

Since the Commission must issue a discretionary decision (i.e., grant Section 851 authority) in order for the proposed activity to proceed, the Commission must act as either a Lead or Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines Section 15051(b)). The Commission is the Lead Agency for this project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval.

Here, the 12-month lease extension does not change the amount or the use of space of that is currently leased to ADP. The remainder of the building not

leased to ADP is used to provide information technology service to SDG&E and SoCalGas as a utility-shared service.

SDG&E requests that the Commission find that the lease extension is exempt from CEQA review as a Class 1 categorical exemption under CEQA Guidelines Section 15301. Section 15301 provides an exemption for leasing of existing facilities involving negligible or no expansion of an existing use at the time of the lead agency's determination. SDG&E states that ADP will continue to use its existing office space and no physical changes to the facilities are anticipated as part of this lease extension. Consistent with our guidance provided in

D.04-07-021, we agree that the use of existing facilities which involves no construction of change in its use is exempt from CEQA review under CEQA Guideline Section 15301.

V. Ratemaking

SDG&E states that the rent from the lease extension is already built into the miscellaneous revenues that were forecast by the Commission in adopting a Test Year 2004 revenue requirement for SDG&E. Pursuant to D.04-12-015, SDG&E's next general rate case will have a 2008 test year. Under a settlement approved in D.05-03-023, SDG&E's base margin will escalate by a minimum of 3.2%, 3.5%, and 3.8% in 2005, 2006, and 2007, over the Commission adopted level for 2004. SDG&E states that, as a result, the credit to rates for the rent paid by ADP in 2004 will escalate in 2005, 2006 and 2007 at a rate that is the same as the actual rent increase during this period. Therefore, at all times during the lease extension approved in this decision, ratepayers will be receiving full credit for the rent form the lease extension.

SDG&E should credit the rent received from ADP to its
Account 454 – Rents from Property.

VI. Discussion

Under Section 851, a utility, such as SDG&E, must obtain advance Commission approval before selling, leasing, assigning, mortgaging, or otherwise encumbering all or any part of its property that is necessary or useful in the performance of its duties to the public.³ Leasing office space to ADP therefore requires our approval under § 851.⁴

³ 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.

⁴ As the Commission previously stated: “The language of Section 851 is expansive, and

Footnote continued on next page

The basic task of the Commission in a § 851 proceeding is to determine whether the transaction is in the public interest. “The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.”

(D.02-01-058.) We have reviewed the proposed lease and the lease amendment and find it does not interfere with SDG&E’s operation or affect its ability to provide service to its customers. The use of the property as office space for ADP to provide tax services to the public is a productive purpose. Accordingly, we find the lease is in the public interest and should be approved.

VII. Final Categorization and Waiver of Comment Period

Based on our review of this application, we find no need to alter the preliminary determinations as to categorization and need for a hearing made in Resolution ALJ-3153, dated May 26, 2005.⁵ Moreover, since this is an uncontested matter in which the decision grants the relief requested, pursuant to Section 311(g)(2), the otherwise applicable 30-day period for public review and comment is waived.

VIII. Assignment of Proceeding

Geoffrey Brown is the Assigned Commissioner and Myra J. Prestidge is the assigned Administrative Law Judge in this proceeding.

we conclude that it makes sense to read “encumber” in this statute as embracing the broader sense of placing a physical burden, which affects the physical condition of the property, on the utility’s plant, system, or property.” (D.92-07-007, 45 CPUC 2d 24, 29.)

⁵ The application was filed on May 6, 2005. On May 26, 2005, in Resolution ALJ-3153, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that no hearings are necessary. Notice of the filing of this application appeared on the Commission Daily Calendar on May 27, 2005. No protests were filed.

IX. Findings of Fact

1. SDG&E currently leases a portion of its office building located at 10975 Technology Drive in San Diego to ADP.
2. The current lease extension between SDG&E and ADP will expire on February 28, 2006.
3. SDG&E and ADP have entered into an amendment to the lease that would permit the parties to extend the lease from March 1, 2006 to February 28, 2007, subject to Commission approval.
4. Permitting SDG&E to extend the lease with ADP so that ADP may continue to occupy part of the office building from March 1, 2006 until February 28, 2007 will not conflict with SDG&E's use of the property.
5. Extension of the lease will not impair SDG&E's ability to provide service to the public.
6. ADP's use of part of the office building to provide tax services is a productive use of the property.
7. The Commission is the Lead Agency for this project under CEQA.
8. CEQA Guidelines Section 15301 provides an exemption from CEQA review for the lease of existing facilities involving negligible or no expansion of existing use at the time of the agency's determination.
9. ADP will continue to use its existing office space and no physical changes to the facilities are anticipated as a result of the lease expansion.

X. Conclusions of Law

1. SDG&E's entry into the lease extension with ADP is in the public interest.
2. The lease of office space located on SDG&E property located at 10975 Technology Drive, San Diego, California to ADP qualifies for a Class 1

Categorical Exemption from CEQA pursuant to CEQA Guidelines Section 15301, and no further environmental review is required.

3. This decision should be effective today in order to allow SDG&E to expeditiously enter into the lease extension with ADP.

O R D E R

IT IS ORDERED that:

1. The First Amendment to Lease Agreement (Attachment A to this application) between San Diego Gas & Electric Company (SDG&E) and ADP Tax Services, Inc. (ADP), which permits SDG&E to extend its lease of a portion of the office building located at 10975 Technology Drive, San Diego, California, to ADP for the period from March 1, 2006 through February 28, 2007 is approved pursuant to Public Utilities Code Section 851.

2. The application of SDG&E for authority to extend its existing lease to ADP is exempt from the California Environmental Quality Act (CEQA) under CEQA Guidelines Section 15301, and no further environmental review is required.

3. Application 05-05-008 is closed.

This order is effective today.

Dated June 16, 2005, at San Francisco, California

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners