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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

APPLIED ENERGY, INCORPORATED, A Corporation, Complainant, vs. SAN DIEGO GAS & ELECTRIC COMPANY, A Corporation, Defendant.	Case 88-12-012 (Filed December 7, 1988)

INTERIM OPINION

Summary

This decision denies the motion of defendant San Diego Gas & Electric Company (SDG&E) for summary judgment against complainant Applied Energy, Inc. (Applied Energy) on the basis of anticipatory breach of contract.

We reserve action on the motion of Applied Energy for summary judgment against SDG&E for SDG&E's refusal to escalate the price paid for firm capacity pursuant to the Standard Offer 4 (SO4) contract between the parties. We find SDG&E's refusal to agree to change the "Operation Date" to be insufficient grounds for summary judgment because that claim raises triable issues of material fact that must be resolved after evidentiary hearing. Accordingly, the motion to dismiss the complaint filed by SDG&E is denied.

Background

On December 7, 1988, Applied Energy filed a complaint before this Commission against SDG&E alleging that SDG&E was unreasonable in its refusal to escalate its Firm Capacity Payment Schedule and to modify the Operation Date for each of Applied Energy's cogeneration projects.

Applied Energy is a subsidiary of Energy Factors, Incorporated (Energy Factors), and is its successor in interest to three SO4 contracts that Energy Factors had executed with SDG&E in March and April 1985.[1] Three qualifying facility (QF) cogeneration projects were proposed on property owned by the United States Navy in San Diego. They were the North Island Naval Air Station (NORIS) with 34.5 megawatts (MW), the Naval Training Center/Marine Corps Recruiting Depot (NTC/MCRD) with 23 MW, and the U.S. Naval Station (NAVSTA) with 49.9 MW. These three contracts were assigned to the complainant, Applied Energy, with SDG&E's consent in October 1988.

The "Operation Date" specified at Section 1.3.1.5 of the SO4 contract was originally January 1987 for NORIS and July 1987 for the other two facilities. Applied Energy's March 1988 Final Project Development Schedule listed operation dates of March 1990 for NORIS and April 1990 for the other two projects.

Applied Energy now expects to begin delivery of firm capacity to SDG&E pursuant to each of the three SO4 agreements in July 1989. If July 1989 were substituted for the operation dates specified in the Final Project Development Schedule, the complainant would be entitled to payment at firm capacity prices for the deliveries made between July 1989 and March/April 1990, rather than the lesser prices available under SDG&E's schedule for short-run as available power (the SO1 contract), which would otherwise apply.

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1 For ease of reference, "complainant" or "Applied Energy" will be used to refer to the project developer, even though its predecessor/parent company, Energy Factors, may have been the actual protagonist. The project developer is a qualifying facility, or "QF", as defined by 18 Code of Federal Regulations 292.101, subsection (b)(1).

The capacity payment table contained in SDG&E's SO4 document lists payments for QFs with initial operating dates no later than in the year 1987. The levelized firm capacity payment for a 30-year contract is $141 for QFs commencing operation in 1987. Applied Energy claims that the payment table should be extended to provide capacity payments for initial operating dates in 1988, 1989, and 1990. It also claims that the levelized capacity payment amount should be escalated, using the escalation factor implicit in the table.

The SO4 contracts were intended to offer QFs the option of being paid for energy at prices which had been forecasted for ten years from the commencement of deliveries. However, the forecasted energy cost table appended to SDG&E's SO4 includes prices only up to the year 1987. Applied Energy wishes the Forecasted Energy Cost Tables to be extended to provide ten-year forecasted energy prices for projects commencing in 1989 and 1990.

Applied Energy claims that SDG&E's refusal to escalate the firm capacity prices violates Commission decisions (D.) D.86-10-038, D.86-12-013, and D.86-12-104. Applied Energy alleges that SDG&E's refusal to consent to its requested change in the operation dates from March/April 1990 to July of 1989 is unreasonable. It seeks a Commission order requiring SDG&E to extend and escalate its firm capacity prices to $178/kW/yr, to extend the forecasted energy cost tables to provide ten years of forecasted prices, and to consent to an acceleration of the operation date.

SDG&E's "Answer to Complaint" and "Motion of San Diego Gas & Electric Company to Dismiss Complaint," both dated January 11, 1989, were accepted for filing on February 6, 1989. The utility states that it has agreed to extend the firm capacity price schedules but not to escalate the prices, that it will carry forward the last price in the energy price table to subsequent years to provide ten years of forecast energy prices, and that its

refusal to accelerate complainant's operation date is based on the QF's own representation of 1990 scheduled operation dates in its Final Project Development Schedule, submitted in compliance with the Qualifying Facilities Milestone Procedure (QFMP).

Motion of Applied Energy for Summary Judgment

On January 25, 1989, the complainant filed its "Motion of Applied Energy, Inc. for Summary Judgment and Opposition of Applied Energy, Inc. to SDG&E Motion to Dismiss." Applied Energy claims that there are no triable issues of material fact regarding its claim for relief and it is entitled to judgment as a matter of law. It urges the Commission to apply California procedural law with respect to the granting of a summary judgment motion.

Section 1701 of the Public Utilities Code states, "All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, ..." While the only pre-trial motion authorized by the Rules is a Motion to Dismiss (Rule 56), the Rules are to be liberally construed to secure "just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviations from the rules." (Rule 87.)

Given the fact that Applied Energy claim for relief turns on the Commission's interpretation of contract terms, the QF has supported its claims with very substantial documentation of facts, and there has been no objection to the admissibility of any of the matters asserted therein, it is reasonable to entertain Applied Energy's motions for summary judgment, and to employ the procedure

for summary judgment provided at Section 437(c) of the California Code of Civil Procedure and the relevant case law. [2]

1. Escalation of Firm Capacity Prices

Applied Energy claims that, as a matter of law, SDG&E must amend the SO4 contracts between the parties to "extend the firm capacity price table" to include the years 1988, 1989, and 1990, and to "escalate the firm capacity prices" paid to QFs commencing operation during those years to a maximum of $178/kW/yr in 1990. Its corollary argument is that Applied Energy should be paid the price calculated for the year during which it actually commences firm capacity deliveries, rather than the price for the year it stated in the contract that it would commence deliveries. The complainant relies on the Commission's order requiring Pacific Gas & Electric Company (PG&E) to escalate the firm capacity payment schedule attached to PG&E's SO4 for a QF who would not commence firm capacity deliveries within the last year listed on the schedule but would deliver within the five-year contract deadline (D.86-12-013).

We would be inclined to act on Applied Energy's motion if its contracts with SDG&E contained identical

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2 California Code of Civil Procedure Section 437(c) states:

"(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

provisions.[3] However, the terms regarding the establishment and amendment of operation dates and the availability of firm capacity in SDG&E's SO4 differ from those of PG&E's SO4.

Without a doubt, the intent of the standard offers was to provide firm capacity prices for QFs commencing operation during the years 1988, 1989, and 1990, since SO4 was outstanding until April 1985. While it may be successfully argued that the price should be escalated for those years, the real question is whether Applied Energy is bound by its contract to accept the price indicated in its contract summary, which is also the price to be paid during the year it indicated it would commence firm capacity deliveries. At this juncture we decline to rule on Applied Energy's demand for a firm capacity price that is escalated from the price stated in the contract summary to a price corresponding to the year of actual firm capacity deliveries. Rather, we encourage the parties negotiate an informal resolution of the issue.

2. Escalated Energy Payments

Although Applied Energy alleged that SDG&E has failed to extend forecast energy payments to cover the first ten years of Applied Energy's deliveries in its complaint, it is unclear whether, by references to decisions authorizing the escalation of capacity prices, it is seeking the escalation of energy prices as well. Such a claim can be easily disposed of as a matter of law.

SDG&E alleges that it has offered to extend, but not escalate, the schedule of forecasted energy prices in Applied Energy's contract in reliance on D.86-12-104.

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3 SDG&E has appended its SO4 contract concerning the NORIS project to its Answer as an exemplar of the contract terms which govern all three projects.

SDG&E's citation to D.86-12-104 on this issue is on point.[4] Applied Energy's motion for summary judgment on SDG&E's refusal to escalate its forecast energy prices is denied. SDG&E should complete ten years of price certainty in its forecast Marginal Energy Cost table by carrying forward the last value the required number of years.

3. Change in Operating Date

The complainant alleges that SDG&E's refusal to consent to a change in its Operation Date for the three projects is unreasonable as a matter of law. The following chronology was compiled from the declarations filed in support of the parties' various motions.

> The Operation Date specified at Section 1.3.1.5 of the SO4 contract was January 1987 for NORIS and July 1987 for the other two facilities.
>
> On October 29, 1987, Applied Energy delivered Preliminary Project Descriptions for each of the three projects which identified February 1990 as the anticipated date of project energization.
>
> On March 2, 1988, Applied Energy submitted a Final Project Development Schedule specifying estimated Operation Dates of March 1990 for NORIS and April 1990 for the other two projects.

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4 D.86-12-104 modified D.86-12-038 to extend PG&E's energy price table to provide energy price certainty for up to ten years for each QF signing under that contract. Price escalation of those tables was not carried forward into the three extended years, as with the firm capacity prices because the forecast energy prices were based on negotiations between the parties. Thus, there was no basis for escalation. This differs from the firm capacity values, which were an expression of the values of the agreed-upon price proxy, the cost of a combustion turbine, carried over all applicable years. The escalation of firm capacity prices was merely ministerial and was therefore reasonable.

> About one month later, Applied Energy determined that initial operation could occur as early as March and April of 1989. SDG&E agreed in writing on March 30, 1988 to modify its interconnection facility construction schedule to accommodate earlier power deliveries.
>
> The utility notified the QF in June 1988 that it would not consent to modification of the Operation Dates.

SDG&E claims that Applied Energy is not entitled to such a change, and further, that Applied Energy refused to perform in good faith. That is, it refused to explain substantial delays in schedule, ignored its obligations under QFMP, and unilaterally established schedule changes without seeking SDG&E's consent.

Applied Energy argues that it should not be held to the 1990 Operation Dates because on March 2, when they were transmitted to SDG&E,

> ". . . Applied Energy was in the process of finalizing its project construction schedule and did not know with certainty the date upon which it would actually begin operations. (The dates were specified) to avoid further controversy with SDG&E over the QFMP and the possible loss of transmission priority,... At that time, (Applied Energy) was not certain of its actual start-up date, though it hoped to begin operations in mid-1989. Through the use of the 1990 dates, Applied Energy sought to avoid a situation in which it would need to procure SDG&E's consent to extend the Operation Dates if the construction contractor was unable to meet Applied Energy's desired timetable." (Motion of Applied Energy for Summary Judgment, pp. 5 and 6.)

Apparently, Applied Energy was conservative in designating its operation date to avoid the risk of possible breach. If the QF is not held to those dates now, the QF would enjoy the best of two worlds - the absence of risk plus the benefit

of higher payments. In general, the parties to a contract are entitled to the benefit of their bargain. Ratepayers were not liable for SO4 payments until the operation date specified in the Final Project Development Schedule. The benefit of accelerated payments to the QF should be counterbalanced by a corresponding benefit to ratepayers.

On June 24, 1988, SDG&E advised Applied Energy by letter that it would not consent to modification of the Operation Dates to accommodate Applied Energy's revised construction schedule. The reason given was that in reliance on the QF's representation of March and April 1990 Operation Dates, SDG&E had made other capacity arrangements with Arizona Public Service (APS) for 1989. The utility claimed that if it were to assent to a 1989 in-service date under the power purchase contracts, SDG&E customers would face several million dollars in excess capacity and energy payments. Thus, whatever the in-service date of Applied Energy's units, SDG&E would not pay for electricity under the SO4 contracts until the dates specified in the March 2 Final Project Development Schedule. SDG&E offered to take energy from the projects prior to those dates at a negotiated price which would leave SDG&E and its customers indifferent compared with other available energy alternatives. (June 24, 1988 letter from James Holcombe, VP Resource Development, SDG&E, to Ralph Grutsch, President, Energy Factors.)

Applied Energy claims that the APS contract was signed two months after Applied Energy had first advised SDG&E of its intent to change its Operation Dates and SDG&E had, by its promulgation of transmission engineering milestones, acknowledged such dates. It is unclear whether consent to accelerate a transmission engineering schedule equals consent to amend a price term in the contract for sale of electricity. One cannot assume that simply because the seller wishes his transmission facilities to be in place by a certain date that deliveries will be made on

that date. Thus, SDG&E could have entered into its agreement with APS in "good faith" and its refusal now to compensate the QF at the firm capacity rate could still be found to be reasonable.

Applied Energy claims the cost of having to curtail capacity takes from APS would not exceed $500,000. This is allegedly "significantly outweighed" by the savings from accelerating the operation date to 1989 and obtaining a lower firm capacity price for the life of the SO4 contracts. Through the declaration of Ralph Grutsch, Applied Energy claims that it "offered at one time, to pay to SDG&E all of the costs incurred in not taking power from APS. Despite such offer, SDG&E refused to accept such payment or to consent to a change in the Operation Dates in exchange for such payment." (Declaration of Ralph Grutsch in support of Applied Energy's Motion for Summary Judgment, etc., Par. 8.) There is no documentation of this offer besides the declaration, however.

For its part, SDG&E claims that the acceptance of Applied Energy's power at SO4 prices beginning in 1989 would harm the interests of its ratepayers. The utility claims that if Applied Energy is entitled to firm capacity payments of $141/kW/yr (the 1987 price), allowing the QF to accelerate its SO4 operation date would cost SDG&E's customers roughly $15.4 million more than payments under SO1 during the period from July 1989 to March 1990. (Declaration of David Hermanson, Exhibit C of SDG&E Reply to Applied Energy's Motion for Summary Judgment.)

According to SDG&E, yet another economic impact of Applied Energy's requested relief would be overpayment of QFs under SDG&E's SO1 contract. Payments for short-run capacity would exceed their forecasted value because the 1989 ERI of 1.0 was premised on the unavailability of Applied Energy's projects until the beginning in 1990.

Because we have not determined the price Applied Energy should be paid when it commences firm capacity deliveries,

the cost to ratepayers due to a change in operation date and the amount of offsetting benefit are questions of fact that cannot be resolved at this time.

SDG&E interprets Applied Energy's motion to require the utility to accelerate the Operation Date if it can physically accommodate those deliveries. It points out that Applied Energy does not offer facts to show that SDG&E could physically accommodate change. Indeed, such evidence was not provided by Applied Energy.

SDG&E argues that Applied Energy has failed to perform as required by the contract and thus is not entitled to a change in the Operation Date. The contract requires a QF to provide the maximum amount of notice of any desired change in the Operation Date. The Declaration of David Hermanson, cited above, provides a chronology in support of SDG&E's claim that this was not done.

The dispute over SDG&E's refusal to change the Operation Date in its SO4 contract presents a tangle of factual issues. The ultimate issue is whether SDG&E's refusal is reasonable or not. Analysis of the more pertinent facts and arguments shows that any inference of unreasonable behavior is contradicted by other inferences of reasonable behavior. Applied Energy has not shown that "there is no triable issue as to any material fact and that Applied Energy is entitled to a judgment as a matter of law." Therefore, Applied Energy's motion for summary judgment must be denied.

SDG&E's Motion for Summary Judgment

By its "Motion of San Diego Gas & Electric Company for Summary Judgment" filed February 9, 1989, SDG&E claims that Applied Energy has voluntarily and deliberately repudiated the SO4s and, as a matter of law, the contracts are subject to termination. SDG&E urges the Commission to find that the contracts have been

repudiated, in which case SDG&E would exercise its legal right to terminate, thus rendering the complaint moot.

In February 1988, Applied Energy entered into three contracts with the Navy, whereby the QF is to furnish "steam and electric service requested", and "(t)he Government will have the right to demand all, or any portion thereof, of the electric energy generated by the new gas turbine for use by the Government and its facilities." SDG&E claims this constitutes anticipatory repudiation.

Applied Energy's Opposition to the SDG&E motion reviews the relationship among the Navy, SDG&E, and itself to rebut SDG&E. Applied Energy argues that SDG&E was aware from the time of signing the standard offers in 1985, that Applied Energy's ability to perform under the power purchase agreement was subject to its relationship with the cogeneration host, the U.S. Navy. A "Letter Agreement" executed by Applied Energy and SDG&E simultaneously with the standard offers accommodates the possibility that the QF should sell a portion of its SO4 power to the Navy to ensure that the commercial purposes of the standard offer agreements are met. The parties apparently recognized the risk of non-performance due to uncontrollable acts of the cogeneration host. They feared that the Navy might evict the turbines, or request some other operator to provide steam and electricity, or require the turbine operator to sell a portion of its electric output of EFI's new gas turbine to the Navy.

Subsequently, it appears that both parties vied to meet the Navy's steam and electrical requirements. Applied Energy asserted its right to sell power to the Navy in a letter by its president, Ralph Grutsch, dated May 13, 1987. SDG&E replied that both Applied Energy and SDG&E could submit bids to the Navy, in spite of the 1985 letter agreement. (James Holcombe, VP Fuels and Power Contracts, May 29, 1987.)

The supporting declarations suggest that SDG&E had contemporaneous knowledge of Applied Energy's grant to the Navy in September 1987 of an option to purchase electricity. (Declaration of Jeffrey Keyak in support of Memorandum of Applied Energy in opposition to SDG&E's Motion for Summary Judgment, etc.) Although SDG&E suggested that the option given to the Navy might constitute repudiation, it did not claim a repudiation but made a demand for assurances in March 1988. In that same letter by J. Holcombe to James Thomson, dated March 21, 1988, SDG&E stated that "If, in spite of the contracts with SDG&E, Energy Factors sells any output of the cogeneration units to the Navy, SDG&E will pay only the lowest price dictated by applicable PURPA requirements in California for any excess energy sold to SDG&E." Applied Energy's response of April 27, 1988 stated it intended to honor its commitments. Apparently, the issue of anticipatory repudiation lay dormant until July 22, 1988, when James Holcombe of SDG&E wrote to Applied Energy to advise it that SDG&E would not consent to a change in the Operation Date, and that if the issue were brought before the Commission, SDG&E would would assert an anticipatory repudiation claim at that time.

Anticipatory breach occurs when one of the parties to a bilateral contract repudiates the contract. The repudiation may be express or implied. An express repudiation is a clear, positive, unequivocal refusal to perform (citations omitted); an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible. (Taylor v. Johnson (1975) 15 Cal. 3d 130, 137.)

SDG&E claims that Applied Energy's actions unequivocally constituted a repudiation of the SO4s. The fact that Applied Energy has granted the Navy the "right to demand all, or any portion thereof, of the electric energy" from the generating units conflicts with the rights to firm capacity and associated energy

which Applied Energy gave to SDG&E under the SO4 agreements. This frustrates the intent of the utilities' SO4 and is a repudiation of Applied Energy's commitment under its SO4 contracts, according to SDG&E.

It appears that SDG&E is alleging an implied repudiation on the part of Applied Energy. To obtain summary judgment under that theory, SDG&E must demonstrate that the QF has put it out of its power to perform so as to make substantial performance of its promise impossible. SDG&E supports its claim with a copy of Applied Energy's contract with the Navy as well as the Holcombe letter of March 21, 1988, the Thomson reply of April 27, 1988, and excerpts of Admiral Montoya's testimony before a subcommittee of the Committee on Appropriations of the House of Representatives.

We are not persuaded that Applied Energy has put it out of its power to perform under its standard offer contracts with SDG&E. It appears from the documents submitted by both parties that the option to purchase electricity generated by the QF's steam turbines was granted to enable the Navy to negotiate favorable electric rates with SDG&E. The quoted testimony of Admiral Montoya before a Congressional subcommittee bears out the Navy's strategic use of its purchase option. The Commission also takes notice of SDG&E's application for approval of the contract it ultimately signed with the Navy, Application 88-11-047. The fact that the Navy has obligated itself to fill its electric requirements from SDG&E tends to negate the possibility that the Navy will exercise its option to purchase electricity from Applied Energy. Thus, under these facts, the mere granting of the option did not constitute repudiation.

By its "Supplemental Memorandum in Support of SDG&E's Motion for Summary Judgment" filed March 20, 1989, SDG&E amplifies its argument that Applied Energy's actions constituted a wrongful repudiation and that Applied Energy's legal and factual arguments are meritless. The utility states that the SO4s do not allow

Applied Energy to sell to another power previously committed to SDG&E. While this statement has merit, SDG&E's argument is premature because Applied Energy has not sold any power to the Navy. SDG&E repeats its claim that the QF's granting of an option to the Navy constitutes a repudiation of the SO4s. Again, SDG&E overlooks the difference between the right to demand performance bestowed by the granting of an option and actual performance which frustrates Applied Energy's performance under the SO4 contract. The Johnson case, (Johnson v. Meyer (1962) 209 Cal. App. 2d 736) which SDG&E cites in support of its argument that the granting of the option constitutes repudiation, is distinguishable because when the Johnsons granted an option to lease real property to a third party, the optionee did take possession of the property. Applied Energy has "put it out of its power to perform" as promised under the SO4s only if the electricity it produces is in fact subject to a contract of purchase by the Navy. SDG&E admits that Applied Energy's commitment to deliver power is subject to the Navy's exercise of the option. SDG&E has not demonstrated nor even claimed that the Navy will exercise its option. Until that condition has been met, we cannot find that Applied Energy has repudiated the contract.

The rule is that "among other requirements for application of the doctrine of breach by anticipatory repudiation are that the repudiatee treat the repudiation as a breach, and that there have been no retraction of the repudiation by the repudiator prior to the time for performance or prior to a detrimental change in position on the part of the repudiatee in reliance thereon." (Guerrieri v. Severini 1958 51 Cal. 2d 12, 19).

The statements by Applied Energy's president J. Thomson in his April 27, 1988 response to SDG&E's demand that Applied Energy perform, which lists planning, construction, and investment Applied Energy had undertaken to effect interconnection of the entire generation load with SDG&E create an inference that the QF

intended to perform substantially as provided in the standard offer contracts. Assuming that there was a repudiation, this correspondence operates as a retraction of the repudiation.

According to Applied Energy, SDG&E cannot treat its repudiation, if there is one, as an anticipatory breach unless it immediately seeks damages for breach of contract. SDG&E cites persuasive authority otherwise. Nonetheless, the fact that SDG&E did not press its claim of breach when it suspected that Applied Energy had repudiated but held its claim in abeyance so long as these matters were not addressed to the Commission raises the question of good faith.

Petition of the U.S. Navy to Intervene

On February 28, 1989, the Department of the Navy sought "leave to intervene and an opportunity to take positions on the various motions currently pending before this Commission in this Docket." The Navy is opposed to the granting of SDG&E's summary judgment motion. It urges the Commission to refrain from any summary action without the opportunity for all parties to present information bearing on the contractual relations among the complainant, defendant, and the Department of the Navy.

The Navy has alleged an interest which is pertinent to the issues already presented and will not unduly broaden the proceeding. Leave will be granted to intervene.

On March 17, 1989, the Navy filed a "Memorandum in Opposition to the Motion of San Diego Gas and Electric Company for Summary Judgment." The Navy takes no position on the relief sought by Applied Energy in the underlying complaint but concurs in Applied Energy's arguments against SDG&E's motion. It states that the primary reason the Navy reserved the option to purchase electrical service from Applied Energy no longer exists because it has committed to purchasing nearly 95% of its total historic load requirements in the San Diego Bay region from SDG&E. This supports

the conclusion that Applied Energy has not committed anticipatory repudiation of the standard offers.

Thus, it cannot be said as a matter of law, that by granting an option to the Navy to purchase its electric output, Applied Energy has repudiated its power purchase agreements with SDG&E. If the Navy does in fact exercise its option, SDG&E may exercise all available contractual remedies at that time. Accordingly, SDG&E's motion for summary judgment is denied.

We are impressed by the substantial investment of resources that has gone into this QF project. The parties should bear in mind their continuing obligation to deal in good faith in furtherance of the objectives of the standard offer contract. We believe that a more satisfactory, and more enduring, solution to the current pricing problem can be achieved by a mutual discussion of the parties' needs and interests than through an adversarial proceeding before this Commission. In view of the fact that the standard offer contracts establish a more than 30-year long relationship between the parties, it would behoove the parties to pursue informal resolution of their differences, rather than embark on a pattern of reliance on the Commission for dispute resolution.

Thus, we will defer further decision on Applied Energy's motion for summary judgment pending anticipated negotiations between the parties. A meaningful resolution should be forthcoming within 45 days of the effective date of this order. On that date, the parties should serve on the administrative law judge and other parties a status report on their attempts at settlement. This matter will be set for hearing if no resolution has been reached within the 45-day period.

Findings of Fact

1. Applied Energy is a subsidiary of Energy Factors, Incorporated, and is its successor in interest to three SO4 contracts that Energy Factors had executed with SDG&E in March and April 1985.

2. The three SO4 contracts involve three QF cogeneration projects located on property owned by the United States Navy in San Diego. They are the North Island Naval Air Station (NORIS) with 34.5 megawatts (MW), the Naval Training Center/Marine Corps Recruiting Depot (NTC/MCRD) with 23 MW, and the U.S. Naval Station (NAVSTA) with 49.9 MW.

3. These three contracts were assigned to the complainant, Applied Energy, with SDG&E's consent in October 1988.

4. The contracts specify an "Operation Date" of January 1987 for NORIS and July 1987 for the other two facilities.

5. The Final Project Development Schedule which Applied Energy submitted in compliance with the Qualifying Facilities Milestone Procedure (QFMP) lists March and April 1990 as the operation date of the three facilities.

6. Applied Energy now expects to begin delivery of firm capacity to SDG&E pursuant to each of the contracts in July 1989.

7. SDG&E has advised Applied Energy that it would not consent to modification of the Operation Dates.

8. The capacity payment table contained in the subject contracts lists payments for QFs with initial operating dates no later than in the year 1987. Applied Energy claims that the payment table should be extended to provide capacity payments for initial operating dates in 1988, 1989, and 1990. It also claims that the levelized capacity payment amount should be escalated, using the escalation factor implicit in the table.

9. SDG&E has agreed to extend the firm capacity price schedules. It refuses to escalate the capacity prices in the table for deliveries of capacity by Applied Energy after 1987. SDG&E states that it will carry forward the last price in the energy price table to subsequent years to provide ten years of forecast energy prices.

10. On December 7, 1988, Applied Energy filed a complaint before this Commission against SDG&E alleging that SDG&E was

unreasonable in its refusal to accelerate its Firm Capacity Payment Schedule and to modify the Operation Date for each of Applied Energy's cogeneration projects.

11. SDG&E's "Answer to Complaint" and "Motion of San Diego Gas & Electric Company to Dismiss Complaint," both dated January 11, 1989, were accepted for filing on February 6, 1989.

12. On January 25, 1989, the complainant filed its "Motion of Applied Energy, Inc. for Summary Judgment and Opposition of Applied Energy, Inc. to SDG&E Motion to Dismiss." Applied Energy claims that there are no triable issues of material fact regarding its claim for relief and it is entitled to judgment as a matter of law.

13. On February 9, 1989, SDG&E filed a "Motion of San Diego Gas & Electric Company for Summary Judgment" claiming that Applied Energy had repudiated its SO4 contracts with SDG&E by granting the U.S. Navy an option to purchase the output of the QF cogeneration projects subject to the SO4 contracts. By that motion, SDG&E claimed it could legally terminate the contracts and render the complaint moot.

14. On February 28, 1989, the U.S. Navy filed its "Memorandum in Opposition to the Motion of San Diego Gas and Electric Company for Summary Judgment" wherein it sought leave to intervene. It argues that Applied Energy did not commit anticipatory breach because the Navy load that could have been served under the option will be served by SDG&E pursuant to special contracts.

15. The Navy has alleged an interest which is pertinent to the issues already presented and will not unduly broaden the proceeding.

16. Applied Energy claims that, as a matter of law, SDG&E must amend the SO4 contracts between the parties to "extend the firm capacity price table" to include the years 1988, 1989, and 1990, and to "escalate the firm capacity prices" paid to QFs commencing operation during those years to a maximum of $178/kW/yr in 1990. Its corollary argument is that Applied Energy should be

paid the price so escalated for the year during which it actually commences firm capacity deliveries, rather than the price for the year it indicated it would commence deliveries in the contract.

17. Given the fact that the claims of Applied Energy and SDG&E turn on the Commission's interpretation of the parties' contract, they have supported their claims for relief with very substantial documentation of facts, and there has been no objection to the admissibility of the matter asserted therein, it is reasonable to entertain the parties' motions for summary judgment, and to employ the procedure for summary judgment provided at Section 437(c) of the California Code of Civil Procedure and the relevant case law.

18. The terms regarding the establishment and amendment of operation dates and the availability of firm capacity in SDG&E's SO4 differ materially from those of PG&E's SO4.

19. The parties would be better served by negotiations to resolve Applied Energy's demand for a firm capacity price escalated from the price stated in its contract than by a Commission ruling on the issue.

20. A ruling on the merits of the motion of Applied Energy for summary judgment against defendant SDG&E for SDG&E's refusal to escalate the price paid for firm capacity pursuant to the SO4 contract between the parties would be premature at this time.

21. The assertions regarding the reasonableness of SDG&E's refusal to amend the operating date of Applied Energy's SO4 contracts raise questions of material fact which must be resolved at evidentiary hearing.

22. The granting of an option to purchase the output of the subject generating facilities to the Navy was not a repudiation of the contracts by Applied Energy.

23. Even assuming that the granting of the option was a repudiation, the repudiation was subsequently retracted by Applied

Energy's written response to SDG&E's request for assurance that it intended to perform under the contracts.

Conclusions of Law

1. The petition of the U.S. Navy to intervene should be granted.

2. Applied Energy did not commit anticipatory repudiation of its standard offer contracts with SDG&E.

3. The motion of SDG&E for summary judgment against Applied Energy on the basis of anticipatory breach of contract should be denied.

4. Applied Energy's motion for summary judgment for SDG&E's refusal to pay it an escalated firm capacity price cannot be granted at this time.

5. Applied Energy's motion for summary judgment on SDG&E's refusal to agree to change the "Operation Date" cannot be granted because that claim raises triable issues of material fact that must be resolved after evidentiary hearing.

6. Because Applied Energy's complaint states a cause of action and triable issues of fact exist, the motion to dismiss the complaint filed by SDG&E should be denied.

INTERIM ORDER

IT IS ORDERED that:

1. The Motion of San Diego Gas and Electric Company (SDG&E) for Summary Judgment against Applied Energy, Inc. is denied.

2. The Motion to Dismiss filed by SDG&E is denied.

3. The petition of the U.S. Navy to intervene is granted.

4. The parties to this proceeding shall meet and confer on the outstanding issues raised in the complaint to arrive at a resolution consistent with this interim opinion. The complainant and the defendant, and any other parties who may choose to join, will serve a status report on the administrative law judge and other parties on the progress of their negotiations no later than 45 days after the effective date of this order.

This order is effective today.

Dated APR 26 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director

Energy's written response to SDG&E's request for assurance that it intended to perform under the contracts.

Conclusions of Law

1. The petition of the U.S. Navy to intervene should be granted.

2. Applied Energy did not commit anticipatory repudiation of its standard offer contracts with SDG&E.

3. The motion of SDG&E for summary judgment against Applied Energy on the basis of anticipatory breach of contract should be denied.

4. Applied Energy's motion for summary judgment for SDG&E's refusal to pay it an escalated firm capacity price cannot be granted at this time.

5. Applied Energy's motion for summary judgment on SDG&E's refusal to agree to change the "Operation Date" cannot be granted because that claim raises triable issues of material fact that must be resolved after evidentiary hearing.

6. Because Applied Energy's complaint states a cause of action and triable issues of fact exist, the motion to dismiss the complaint filed by SDG&E should be denied.

INTERIM OPINION

IT IS ORDERED that:

1. The Motion of San Diego Gas and Electric Company (SDG&E) for Summary Judgment against Applied Energy, Inc. is denied.

2. The Motion to Dismiss filed by SDG&E is denied.

3. The petition of the U.S. Navy to intervene is granted.