

Decision 89 07 055 JUL 19 1989

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APPLIED ENERGY, INCORPORATED, a )  
 corporation, )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 SAN DIEGO GAS & ELECTRIC COMPANY, )  
 a corporation, )  
 )  
 Defendant. )

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Case 88-12-012  
(Filed December 7, 1988)

O P I N I O N

This complaint arises out of three Standard Offer 4 (SO 4) contracts between complainant Applied Energy, Incorporated (Applied Energy) and defendant San Diego Gas & Electric Company (SDG&E). The contracts provide for the complainant's delivery to the defendant of firm capacity from three generating stations totaling 107.4 MW of capacity located on property owned by the U.S. Navy in San Diego. The background and procedural summary of this case is contained in the interim opinion (Decision (D.) 89-04-076) rendered April 26, 1989.

By that order, the Commission denied the motions for summary judgment filed by each party and directed them to meet and attempt to resolve the subject of the complaint themselves. On May 26, 1989, SDG&E applied for rehearing of the interim opinion. That matter is still pending before the Commission. On June 5, 1989, the "Joint Motion of San Diego Gas & Electric Company and Applied Energy, Incorporated for Approval of Settlement Agreement" (Settlement Agreement) was filed. That document is attached to

this decision as Appendix A and incorporated by this reference.<sup>1</sup> The Settlement Agreement embodies compromises on the three primary issues raised in the complaint. Those issues were: the price which SDG&E must pay Applied Energy for delivery of firm capacity, the date on which the contract price must be paid for firm capacity delivered, and whether Applied Energy had committed anticipatory repudiation of the contract. The Settlement Agreement is conditioned on the Commission's approval and finding that SDG&E's expenses under the SO 4 contracts, as modified by the Settlement Agreement, are reasonable and may be recovered in rates.

The Commission's Division of Ratepayer Advocates (DRA) filed comments in support of the parties' Settlement Agreement on June 19, 1989. Intervenor U.S. Navy did not comment on the proposed settlement. The settlement is uncontested. In addition, the parties have waived the Commission's rules regarding settlements (Rule 51 et seq.).

#### Discussion

The Commission's interim opinion in this proceeding denied the parties' motions for summary judgment. It directed the parties to meet and confer on the issues raised in the complaint to arrive at a resolution consistent with the interim opinion. The proposed Settlement Agreement represents a good faith effort to resolve the material issues in the complaint. The Settlement Agreement has the virtue of enabling the parties to put the uncertainty and ill-will which accompanies litigation behind them and to proceed with the integration of a very substantial source of non-utility owned generation into SDG&E's resource plan.

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1 One of the conditions Applied Energy and SDG&E have specified in their settlement is dismissal of all outstanding motions, petitions, appeals, and applications for rehearing associated with the complaint.

Moreover, the terms of the agreement respect the potential validity of the parties' positions and facilitate our finding that "neither the Settlement Agreement nor its approval implies that (either Party's) claims are either correct or incorrect." The terms of the SO 4 have been modified to adopt the middle ground between the parties' positions on the issue of capacity price and operation date. We note that the increase in firm capacity price from \$141/kilowatt-year (kW-yr) to \$152.50/kW-yr is conditioned upon the complainant's ability to pass the SDG&E-required 15 day firm capacity test in 1989. This provision constitutes a quid pro quo that tends to ensure that ratepayers are receiving the benefit of actual performance in exchange for the price concession.

The Settlement Agreement and SDG&E's entering into the Settlement Agreement are reasonable. There is no public interest to be served by further proceeding under the complaint.

#### Findings of Fact

1. Applied Energy filed a complaint December 7, 1988 against SDG&E challenging SDG&E's interpretation of the terms of three SO 4 contracts between the parties.

2. By interim opinion dated April 26, 1989 (D.89-04-076), the Commission denied the Motions for Summary Judgment filed by each of the parties and directed them to "meet and confer on the outstanding issues raised in the complaint to arrive at a resolution consistent with this interim opinion."

3. On June 5, 1989, the "Joint Motion of San Diego Gas & Electric Company and Applied Energy, Incorporated for Approval of Settlement Agreement" was filed.

4. The Settlement Agreement disposes of the three material issues raised in the complaint.

5. While SDG&E maintained that the capacity price should be \$141/kW-yr and Applied Energy argued that the capacity price for

operation beginning in 1989 should be \$164/KW-yr, the Settlement Agreement provides for a capacity price of \$152.50/KW-yr.

6. SDG&E had contended that the Operation Date should remain March and April, 1990 depending on the project; Applied Energy sought to revise the Operation Date to July, 1989 for each project. The Settlement Agreement provides that the Operation Date for each project is the later of December 1, 1989 or when the project passes a firm capacity test. Applied Energy is still required to commence firm operation within five years from the date of each SO 4 contract, and until the Operation Date, Applied Energy would be paid the SO 1 price for delivery of energy.

7. The increase in firm capacity price from \$141/kilowatt-year (kW-yr) to \$152.50/kW-yr is conditioned upon the complainant's ability to pass the SDG&E-required 15 day firm capacity test in 1989.

8. Under the Settlement Agreement, SDG&E waives its right to seek a remedy for Applied Energy's alleged anticipatory repudiation of the contracts, but reserves the right to claim subsequent breach of any of the contracts.

9. The expenses incurred by SDG&E pursuant to the Settlement Agreement and the SO 4 contracts which are the subject of the Settlement Agreement would constitute reasonable expenses recoverable in rates.

10. One of the conditions specified in the Settlement Agreement between Applied Energy and SDG&E is dismissal of all outstanding motions, petitions, appeals, and applications for rehearing associated with the complaint.

11. All parties to this proceeding have waived the Commission's rules regarding settlements (Rule 51 et seq.).

#### Conclusions of Law

1. The Settlement Agreement is a reasonable disposition of the parties' claims in this complaint proceeding.

2. SDG&E's resolution of the complaint proceeding is reasonable.

3. The complaint and all outstanding motions, petitions, appeals, and applications for rehearing associated with the complaint should be dismissed with prejudice.

4. Neither the Settlement Agreement nor the Commission's approval thereof implies that any claim with respect to any issue settled by the Settlement Agreement is either correct or incorrect.

5. The Settlement Agreement should be approved.

ORDER

IT IS ORDERED that:

1. The Settlement Agreement between Applied Energy, Incorporated (Applied Energy) and San Diego Gas & Electric Company (SDG&E) dated June 2, 1989 and attached as Appendix A is approved.

2. SDG&E may recover the costs of energy and capacity arising out of the Standard Offer 4 contracts which were the subject of this complaint proceeding, as modified by the Settlement Agreement, in rates.

3. Pursuant to the agreement of Applied Energy and SDG&E, the complaint and all outstanding motions, petitions, appeals, and applications for rehearing associated with the complaint are hereby dismissed, with prejudice.


This order is effective today.

Dated JUL 19 1989, at San Francisco, California.

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

Commissioner Patrick M. Eckert,  
being necessarily absent, did  
not participate.

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



Victor Weisner, Executive Director  
P.D.

SETTLEMENT AGREEMENT

Applied Energy, Incorporated (AEI) and San Diego Gas & Electric (SDG&E), (collectively the "Parties"), agree as follows:

1. Recitals:

a. AEI and SDG&E are parties to the following contracts, among others:

(i) Long Run Standard Offer for Power Purchase and Interconnection from Qualifying Facilities with Energy Factors, Incorporated - North Island Cogeneration Project, dated March 29, 1985;

(ii) Long Run Standard Offer for Power Purchase and Interconnection from Qualifying Facilities with Energy Factors, Incorporated - U.S. Naval Station Cogeneration Project, dated April 16, 1985; and

(iii) Long Run Standard Offer for Power Purchase and Interconnection from Qualifying Facilities with Energy Factors, Incorporated - NTC/MCRD Cogeneration Project, dated April 16, 1985.

(The contracts described in (i), (ii) and (iii) were assigned to AEI with SDG&E's consent and are referred to herein as the "Contracts".)

b. AEI initiated a formal complaint before the California Public Utilities Commission relating to the Contracts,

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entitled Applied Energy Incorporated v. San Diego Gas & Electric Company, CPUC Case No. 88-12-012, dated December 7, 1988 (the "Complaint").

c. SDG&E denied the claims made by AEI in the Complaint and asserted that AEI had anticipatorily repudiated the Contracts.

d. The Parties desire to settle the dispute and claims raised by the Complaint.

2. Modification and Clarification of Contracts: The Parties agree to the following modifications and clarifications to the Contracts:

a. The price per KW of Firm Capacity in each Contract, as set forth in Section 1.3.6.3.3 of each Contract, shall be \$152.50/KW-yr.

b. The Operation Date under each Contract shall be the later of December 1, 1989 or such later date as AEI passes either the 15 consecutive calendar day or 15 consecutive business day firm capacity test required by SDG&E. AEI must elect which of these tests shall apply and notify SDG&E of its decision prior to the commencement of the test. The Parties agree that a test of 15 days duration is acceptable under the Contracts. If AEI does not pass the firm capacity test in 1989, the price for Firm Capacity specified above shall not be increased. AEI must pass the firm capacity test within five (5) years from the date of execution of each Contract.



- c. From initial operation until the Operation Date, AEI's operation of the plants associated with the Contracts shall be governed by the Standard Offer 1 (SO1) Contracts executed by the Parties on October 6, 1988. Upon the Operation Date of each plant, the SO1 Contract for that plant shall terminate.
- d. For purposes of Section 4.4.8 of each Contract, if a number is required from Exhibit B, Table 3 to compute termination payments, that number shall be derived from assumptions that would yield a rate of \$152.50/KW-yr for a 30-year contract.
- e. The Contracts are confirmed and ratified in all other respects.

3. Releases:

- a. AEI, on behalf of its parents, subsidiaries, related companies, affiliated entities, partnerships, predecessors, successors, insurers, financiers, directors, officers, employees, agents and assigns, releases SDG&E, its parents, subsidiaries, related companies, affiliated entities, partnerships, predecessors, successors, insurers, financiers, directors, officers, employees, agents and assigns from all liability relating to or arising out of in any way the claims that AEI brought or could have brought, in whatever forum, in connection with the claims for relief set forth in the Complaint or SDG&E's Motion for Summary Judgment dated February 9, 1989, whether sounding in

contract, tort, statute or other legal or equitable theory of recovery, and from all demands, obligations, losses, causes of action, damages, penalties, costs, expenses, attorneys' fees, liabilities and indemnities of any nature based upon such claims. AEI explicitly acknowledges its obligation to ensure that all parties on whose behalf AEI is executing this Agreement, including any financiers, assent to the terms hereof.

- b. SDG&E, on behalf of its parents, subsidiaries, related companies, affiliated entities, partnerships, predecessors, successors, insurers, financiers, directors, officers, employees, agents and assigns releases AEI, its parents, subsidiaries, related companies, affiliated entities, partnerships, predecessors, successors, insurers, financiers, directors, officers, employees, agents and assigns from all liability for claims it brought or could have brought relating to the Firm Capacity Price and the Operation Date as settled in Paragraphs 2a and 2b, and from all demands, obligations, losses, causes of action, damages, penalties, costs, expenses, attorneys' fees, liabilities and indemnities of any nature based on such claims.
- c. SDG&E on behalf of its parents, subsidiaries, related companies, affiliated entities, partnerships, predecessors, successors, insurers, financiers, directors, officers, employees, agents and assigns waives its right to claim any remedy from AEI, its parents,

subsidiaries, related companies, affiliated entities, partnerships, predecessors, successors, insurers, financiers, directors, officers, employees, agents and assigns in whatever forum, whether the claim sounds in contract, tort, statute or other legal or equitable theory of recovery, for anticipatory repudiation in connection with the factual issues raised in SDG&E's Motion for Summary Judgment dated February 9, 1989. SDG&E releases AEI from all demands, obligations, losses, causes of action, damages, penalties, costs, expenses, attorneys' fees, liabilities and indemnity of any nature based on such claim of remedy. However, SDG&E does not waive any claims or right to claim any subsequent breach of any of the Contracts, whether arising out of the sale of power by AEI to the Navy from the plants associated with the delivery of power under the Contracts, or otherwise, or to claim anticipatory repudiation of any of the Contracts arising out of facts other than those on which SDG&E's Motion for Summary Judgment was based.

- d. The Parties understand and acknowledge that SDG&E intends to apply for rehearing of CPUC Decision 89-04-076 in order to preserve its rights pending fulfillment of the Conditions to this Agreement. If the Conditions to this Agreement are fulfilled, then SDG&E agrees not to pursue further that application for rehearing.

- e. AEI acknowledges and agrees that it will not assert this Agreement as a defense to any claim for repudiation or breach made by SDG&E in the event that AEI sells electric power to the Navy from the plants associated with the Contracts.

4. Conditions to Settlement:

- a. This Agreement is conditioned on the unconditional approval of this Agreement by the CPUC as follows:
- (i) The CPUC must find this Agreement and SDG&E's entering into this Agreement to be reasonable and prudent and must find that expenses incurred under this Agreement and the Contracts are reasonable and shall be recovered in rates.
  - (ii) The CPUC must dismiss the Complaint with prejudice, including all outstanding motions, petitions, appeals and applications for rehearing associated with the Complaint.
  - (iii) The CPUC must take no position on the validity or lack of validity of either Party's claims with respect to any issue settled by this Agreement and must find that neither this Settlement Agreement nor its approval implies that any such claims are either correct or incorrect.
- b. If the CPUC issues a decision consistent with Paragraph 4a but which is appealed, this Agreement shall not be

effective unless the appeal is resolved consistently with Paragraph 4a.

5. Entire Agreement: This Agreement contains the entire agreement of the Parties; it cannot be modified orally and can only be changed by a writing duly signed by the Parties.
6. No Admission: The Parties acknowledge and agree that their execution and performance of this Agreement is the result of a compromise entered into in good faith and shall never for any purpose be considered an admission by any of them of liability or responsibility concerning any of the claims which were the subject of the Complaint. No past or present wrongdoing of any party may be implied by this Agreement.
7. Costs and Fees: Each Party shall pay its own costs and attorney's fees in connection with the prosecution and defense of the Complaint and in connection with this Agreement.
8. Governing Law: This Agreement is entered into in the State of California and shall be construed and interpreted in accordance with its laws.
9. Breach: This Agreement may be pleaded as a full and complete defense to, and may be used as a basis for any injunction against, any action, suit or other proceeding which may be instituted, prosecuted or attempted in breach of this Agreement.
10. Binding Nature of Agreement: This Agreement shall be binding upon and inure to the benefit of the heirs, devisees, legatees, executors, administrators, successors,

assigns, subsidiaries, financiers, parents and affiliates of each party hereto and upon and to the officers, directors, trustees, agents, partners and employees of any of the foregoing.

11. Parties Represented by Counsel: The parties hereto represent and warrant to each other that they have been represented by counsel with respect to this Agreement, and all matters covered by and relating to it, that they have been fully advised by such counsel with respect to their rights and with respect to the execution of this Agreement.
12. Authority to Enter into Agreement: The parties to this Agreement represent and warrant to each other that each individual executing this Agreement on behalf of any party hereto is authorized to enter into this Agreement on behalf of that party and that this Agreement binds that party.
13. No Disposition of Claims: The parties to this Agreement represent and warrant to each other that they have made no assignment, transfer, conveyance or other disposition to any third party of the claims, demands, causes of action, obligations, damages and liabilities released in this Agreement, and each of them warrants that it is fully entitled to give its full and complete release of all such

claims, demands causes of action, obligations, damages and liabilities.

In witness whereof, the Parties have executed this Agreement as of the date set forth below:

SAN DIEGO GAS & ELECTRIC COMPANY  
By: [Signature]

D.E. FELSINGER  
Print Name

V.P. Marketing & Resource Development  
Title

6/2/89  
Date

APPLIED ENERGY, INC.  
By: [Signature]

Ralph J. Grutsch  
Print Name

President  
Title

June 2, 1989  
Date