

L/jmc

Decision 91-06-048 June 19, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
SAN DIEGO GAS & ELECTRIC COMPANY for)
Clarification of Decision 84-05-057)
and a Determination of when the)
Seller under the Contract Approved in)
D. 84-05-057 Must Commence Operation.)

ORIGINAL

A.90-12-064
(Filed December 19, 1990)

Utility Consumers' Action Network,)

Complainant,)

vs.)

San Diego Gas & Electric Company,)

Defendant.)

Case 90-11-041
(Filed November 21, 1990)

City of Carlsbad, a Municipal)
Corporation; City of Encinitas,)
a Municipal Corporation; and)
City of Escondido, a Municipal)
Corporation,)

Complainants,)

vs.)

San Diego Gas & Electric Company,)

Defendant.)

Case 91-01-013
(Filed January 14, 1991)

O P I N I O N

A. BACKGROUND

In 1984, in Decision 84-05-057, the Commission found reasonable and approved a non-standard Power Purchase Agreement (PPA) between San Diego Gas & Electric Company (San Diego) and North County Resource Recovery Associates (NCRRA) dated November 14, 1983.

Under the terms of the PPA, SDG&E is to purchase electricity generated by a waste-to-energy facility to be built by NCRRA on San Diego County landfill in the City of San Marcos. NCRRA has not commenced construction of the facility. In December 1990, SDG&E filed Application No. 90-12-064, asking the Commission to determine, among other things, a date by which NCRRA should have begun operation of the facility, or, if the Commission were to find that such date had passed, to declare the PPA terminated. Other parties¹ intervened and/or joined in the Application or filed Complaints with the Commission seeking similar relief with respect to the PPA.

In March 1991, NCRRA filed a Complaint for Declaratory Relief in the San Diego County Superior Court, naming SDG&E as defendant.² In its complaint in Action 634642, NCRRA asks the superior court to issue a declaration that the PPA is still valid and existing and that the rights and obligations of the parties under it are continuing. NCRRA contends in that action that the issues in dispute between NCRRA and SDG&E relating to the PPA are legal issues that should only be determined by a court of law. At the same time, NCRRA filed its protest to SDG&E's Application and filed a Motion to Dismiss the Application on the basis that Action 634642 in the superior court was and is the appropriate

1. Parties that have appeared in the proceeding in support of the Application are Utility Consumers' Action Network, the Cities of Carlsbad, Encinitas, Escondido, Oceanside and San Diego, Christward Ministry, North County Concerned Citizens and Citizens for Healthy Air in San Marcos. The Division of Ratepayer Advocates filed its comments on the Application, supporting the relief requested. The County of San Diego has appeared in the proceeding and filed a Protest to the Application. Others who have appeared are Southern California Edison Company and the Commission's Advisory and Compliance Division.

2. North County Resource Recovery Associates v. San Diego Gas & Electric Company, Action No. 634642, hereinafter for convenience "Action 634642."

proceeding and forum for the resolution of the legal disputes between NCRRA and SDG&E.

The Administrative Law Judge (ALJ) assigned to the Application denied NCRRA's motion at a prehearing conference on March 22, 1991, but expressly allowed NCRRA to appeal his ruling to the full Commission. The ALJ further permitted the intervention of certain parties and consolidated all of the Complaints relating to the PPA with the Application, and set discovery and hearing schedules.

B. THE APPEAL

NCRRA filed its Motion for Expedited Commission Review and Reversal of the ALJ's Ruling of April 5, 1991. Thereafter, on April 15, 1991, SDG&E filed its Reply to the Motion. A joint reply to the Motion was also filed on April 15 by the Cities of Encinitas, Carlsbad, Oceanside and Escondido. On April 22, the Division of Ratepayer Advocates filed its response opposing NCRRA's motion.

C. POSITIONS OF THE PARTIES

1. NCRRA's Position

NCRRA's position is that the dispute between NCRRA and SDG&E raises legal issues related to the interpretation of the PPA. NCRRA asserts that the absence of a specific time for performance in the PPA was negotiated by SDG&E and NCRRA and, in consideration of other terms, specifically agreed to in recognition of difficulties anticipated in getting the facility on line.

NCRRA also contends that (1) whether any specific period for performance can be implied into the PPA is a legal issue and that under Commission authority and decision, legal issues and the interpretation of a PPA's terms should be left to

a court of law; (2) even if a time for performance were to be implied into the PPA, that time should be four years from the commencement of construction of the facility; and (3) NCRRA's performance under the PPA has been tolled by uncontrollable forces, including most particularly legal challenges to construction of the facility, which have at times precluded any construction at the site of the facility, which in turn has led to the expiration of permits and the need to apply for new permits under more stringent requirements.

Thus, NCRRA moved to dismiss, and now seeks a stay of, all consolidated proceedings relating to SDG&E's Application, including abatement of the discovery and hearing schedules and requirements, pending a judgement by the San Diego County Superior Court in Action 634642. Alternatively, NCRRA seeks public hearings on the Application should the Commission determine not to grant NCRRA's request for the stay. The County of San Diego joins in NCRRA's protest to the Application, on the basis that the PPA is still viable and existing.

2. SDG&E's Position

SDG&E opposes NCRRA, stating that the matters involved in dispute raise policy issues that should be determined by the Commission. It contends that because the PPA was made subject to Commission approval in Decision 84-05-057, the Commission thereby assumed and has continuing jurisdiction over the PPA. Thus, SDG&E characterizes its Application as seeking to obtain a clarification of Decision 84-05-057.

SDG&E seeks to have this clarification made by asking the Commission to imply a term into the PPA which is not there. Although the PPA is silent as to the time of performance, SDG&E seeks a ruling from the Commission that a reasonable time for NCRRA to perform must be implied into the PPA and that such a reasonable time is 5 years from the execution of the PPA. SDG&E argues that a term of 5 years for performance is included in

certain standard offer contracts approved by the Commission, and that therefore such a term should be reasonably applied to the PPA.

SDG&E further asserts that, because the Commission approved the PPA, the Commission's intent and policies govern future interpretation of the PPA, and that therefore the Application is properly before the Commission. SDG&E also claims that NCRRA's time to perform has not been prevented by uncontrollable forces, but rather by NCRRA's attempts to renegotiate its contract with the County of San Diego and by changes that NCRRA has made in its plans for the project.

Thus, SDG&E seeks a determination by the Commission (1) of the date when NCRRA should have or must begin operation of the facility; (2) if that date has not passed, whether, and under what circumstances, the project may still be considered viable; (3) if the period has not passed, whether any uncontrollable forces have prevented performance; and (4) if the date for performance has passed, that the PPA is terminated without further obligation to either party.

3. DRA's Position

DRA's position is that the dispute properly belongs before the Commission because it involves important Commission policies. The issues that DRA refers to are the five-year deadline for operation and the force majeure claims.

D. DISCUSSION

While SDG&E has tried to infuse policy considerations into this proceeding, the dispute between SDG&E and NCRRA centers around questions of interpretation of the PPA, whether NCRRA has performed under the PPA, whether a term for performance should be implied in the PPA, the nature of the parties' negotiations in 1983 and if a term for performance is to be implied, whether it

must be deemed tolled by uncontrollable forces or other events. These are all legal issues which the Commission believes are more appropriately determined by a court of law.

Although the Commission has jurisdiction to resolve this type of dispute, we believe that on balance, this dispute involves more contractual issues than Commission policy questions. To the extent that Commission policy is implicated, we would expect the parties to bring relevant Commission decisions to the attention of the court.

Accordingly, we grant NCRRA's request, vacate the ALJ's order denying NCRRA's motion to dismiss, and hereby stay all consolidated proceedings in this Application pending a decision in Action No. 634642.

E. FINDINGS OF FACT

1. NCRRA moved to dismiss this case in favor of a Complaint for Declaratory Relief filed in San Diego County Superior Court as Case No. 634642.

2. The ALJ denied NCRRA's motion at a prehearing conference on March 22, 1991, but expressly allowed an appeal to the full Commission from his ruling.

3. NCRRA filed its appeal for dismissal or, in the alternative, a stay of Commission proceedings on April 5, 1991.

4. All parties have had an opportunity to respond to NCRRA's motion.

5. The dispute between NCRRA and SDG&E involves matters of contract interpretation which are within the purview of the court as well as the Commission to resolve.

6. The court has authority to award damages arising out of the contract dispute and the Commission does not.

7. The consolidated proceedings may be stayed pending a decision by the court.

8. Any aggrieved party may seek intervention in the court proceeding.

F. CONCLUSIONS OF LAW

1. The Commission and the courts have concurrent jurisdiction to resolve contract disputes between utilities and QFs.

2. The Commission may elect not to exercise its jurisdiction.

3. The superior court is qualified to interpret the terms of the PPA as well as published Commission decisions in order to resolve this contract dispute.

4. The court has the additional power to award damages arising out of the contract dispute.

5. The Commission should stay the consolidated proceedings in this matter pending a decision by the court.

ORDER**IT IS ORDERED that:**


1. The application and related complaints consolidated in this proceeding are stayed pending a decision in San Diego Superior Court Case No. 634642.

2. SDG&E shall serve upon the Commission in this docket copies of pleadings submitted by any and all parties to the court and any and all decisions or orders issued by the court.

This order becomes effective 30 days from today

Dated June 19, 1991 at San Francisco, California.

**WE CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY**


NEAL J. SHULMAN, Executive Director

**PATRICIA M. ECKERT
President
G. MITCHELL WILK,
JOHN B. OHANIAN
DANIEL WM. FESSLER
NORMAN D. SHUMWAY
Commissioners**