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Decision 91-11-045 November 20, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas &)
 Electric Company (U 902-E) for)
 Resolution of an Interpretations)
 Dispute and Claims for Modification,)
 In Accordance with D.88-10-032,)
 Involving Contract with)
 Energy Factors, Inc.)

Application 91-04-034
 (Filed April 26, 1991)

ORIGINAL

O P I N I O N

Summary

This decision denies the application of San Diego Gas & Electric Company (SDG&E) for an interpretation of its power purchase agreement (PPA) with Energy Factors, Incorporated (EFI), a qualifying facility (QF). SDG&E requested a finding that the PPA is subject to a five-year deadline such that the contract should terminate if EFI has not begun firm operation before the deadline, that the EFI project is not viable, and that EFI is not entitled to any modification of the contract. We find that SDG&E is seeking declaratory relief. The Commission generally does not grant declaratory relief, and there are no circumstances to justify departure from our general rule. The application is, therefore, dismissed. This decision makes no finding on the merits of either party's position.

Procedural History

Application of SDG&E

SDG&E signed a PPA with EFI concerning a 49.9 megawatt cogeneration project to be located on property leased by EFI near the National Steel and Shipbuilding Company (NASSCO) facilities at the Unified Port of San Diego. The contract was approved by the Commission and became effective on September 17, 1986. The PPA terminates by its own terms if reliable delivery of energy and firm

capacity does not occur within five years of the contract's effective date, or September 17, 1991.

On April 26, 1991, SDG&E filed the instant application. SDG&E asserts that EFI has missed nearly every Qualifying Facility Milestone Procedure (QFMP) deadline, has not cured any of its failures, and has not begun construction of the project. SDG&E claims there is no possibility that the project could begin operation before the contract expires, even if construction began in April, 1991. According to SDG&E, EFI asked for a three-year extension to begin deliveries and to move the project to a new location. SDG&E has declined the request.

Protest and Motion to Dismiss of EFI

On June 3, 1991, EFI protested the application and moved for an order dismissing the application on the basis of a lack of jurisdiction. EFI asserts that it diligently pursued its project and complied with the QFMP and that SDG&E has failed to perform the final interconnection study requested by EFI and required by the QFMP.

EFI also complains that SDG&E negotiated a pre-emptive agreement for the sale of utility power to NASSCO, despite SDG&E's knowledge that the economic basis of EFI's PPA was EFI's proposed sale of power to both SDG&E and NASSCO. EFI alleges that SDG&E entered this contract for the purpose of frustrating construction of the NASSCO plant and avoiding the PPA. The QF states that it has filed a complaint for breach of contract, among other things, against SDG&E before Superior Court in the County of San Diego.

Reply of SDG&E

On June 17, 1991, SDG&E filed its reply to EFI's motion to dismiss. According to SDG&E, EFI's jurisdictional argument is premised on the erroneous assumption that SDG&E has asked the Commission to modify the PPA to change the contract termination date. SDG&E states that it is simply requesting confirmation that

the five-year deadline in the contract continues to apply and that SDG&E has applied the contract administration guidelines correctly.

SDG&E notes that the EFI contract for nearly 50 megawatts represents a significant addition to SDG&E's system. It claims that EFI's request to postpone its deliveries until 1994 would create uncertainty over whether SDG&E will acquire 50 MW from EFI or must obtain capacity from other sources. SDG&E seeks a finding that EFI's contract is terminated and that the capacity represented by this project should be subject to QF bidding in the Biennial Resource Plan Update proceeding. The Commission, not a court, is the proper forum to address this issue, according to SDG&E.

Amendment to Protest and Motion to Dismiss

On July 24, 1991, EFI filed an amendment to its previous filing to advise that the Commission has recently stayed all proceedings in Application (A.) 90-12-064 (Application of SDG&E for a determination and ruling of when the seller under a non-standard power purchase agreement must begin operation) pending a decision by the Superior Court respecting the same matters at issue in A.90-12-064. By this filing, EFI again moved to dismiss SDG&E's application. EFI states that if the Commission does not dismiss SDG&E's application, it should stay further proceedings pending a decision in the civil proceeding filed by EFI against SDG&E concerning the issues in this application.

Reply of SDG&E to Amendment to Protest

On August 5, 1991, SDG&E responded that EFI's amendment to its protest and motion to dismiss is not permitted by the Commission's Rules, should be ignored as procedurally improper, and lacks merit.

SDG&E attempts to distinguish the Commission's stay in A.90-12-064 from the one sought by EFI in this proceeding. SDG&E argues that there, the Commission found that questions of contract interpretation and performance were involved to a greater degree than Commission policy issues. SDG&E claims that here, only the

specific application of the Commission's QF contract administration guidelines to the PPA is involved. SDG&E relies on Decision (D.) 88-10-032, wherein we adopted guidelines for utility administration of QF contracts. SDG&E believes that decision encourages parties to raise with the Commission differences of opinion on whether a QF is entitled to contract modification.

Discussion

EFI has questioned the Commission's jurisdiction to declare that the five-year deadline in the PPA should be enforced and that the contract should terminate if EFI has not begun firm operation before the deadline. Such action would amount to declaratory relief, and the Commission has held that it does not grant declaratory relief.

Declaratory relief is defined in California Civil Code Section 1060 as a declaration of a person's rights and duties under a contract, including a determination of any question of construction or validity arising under a contract. As a preliminary matter, we find that SDG&E has requested declaratory relief.

The Commission has promulgated the QF contract administration guidelines to advise utilities and QFs of their contractual rights and obligations. These guidelines make it unnecessary for the Commission to issue advisory opinions on individual QF cases. The resolution of contract disputes by the application of our QF contract guidelines is consistent with the general rule that the Commission does not grant declaratory relief.

In one such case, Pacific Bell filed a motion asking the Commission if its proposed contract was consistent with an ordering paragraph of D.85-03-017. That situation is similar to the one presented here; SDG&E wishes the Commission to find that holding the QF to its contract terms would be consistent with the QF contract administration guidelines communicated in D.88-10-032. The Commission held:

"Pacific's motion does not seek a modification of D.85-03-017. Rather it seeks a declaratory opinion on whether the Committee's proposed procedure is 'consistent' with Ordering Paragraph 2 of the decision. Since the Commission does not accord declaratory relief by the issuance of an advisory opinion, the motion should be dismissed without prejudice." (General Telephone Co. of Calif., D.89-06-035, p. 2)

SDG&E characterizes its application as an effort to ensure that it has applied the Commission's QF contract administration guidelines consistently with the Commission's decisions. However, SDG&E has neither cited any decisions that may be implicated nor alleged that any PPA term is ambiguous. Even assuming that the enforcement of a PPA's five-year deadline is a policy issue, the application fails to show why the Commission need address the matter here, when the five-year deadline was fully discussed in the context of other considerations in D.88-10-032.

The relief sought by SDG&E is premised on a plain reading of the contract terms and their application to specific facts. The application simply requests confirmation that SDG&E should enforce the terms of its PPA with EFI. D.88-10-032 does not invite utilities to petition the Commission whenever a contract term must be enforced.

However, the Commission has not always refrained from issuing advisory opinions. "In determining whether or not to entertain an application which is not prescribed by law, the Commission can exercise wide discretion in weighing the importance of the subject matter, the availability of its resources, time constraints, etc." (SoCal Edison Co. (1981) 6 CPUC 2d 117, 136).

In this case, the nearly 50 megawatts represented by the NAASSCO project would represent a major resource addition potentially affecting the utility's resource plan. However, the purpose of resource planning is to recognize contingent needs.

The normal resource planning process is adequate to accommodate the inclusion or exclusion of this increment of QF power.

Conclusion

The Commission will not shift the responsibility for the reasonable administration of QF contracts away from utility management by granting declaratory relief. Since no Commission policy is at stake, and a decision granting the relief sought by SDG&E would simply constitute an advisory opinion, the application must be dismissed. Dismissal is without prejudice; either party may bring the underlying dispute before the Commission in an appropriate filing.

Findings of Fact

1. On April 26, 1991, SDG&E filed its application which requested a finding that its power purchase agreement (PPA) with Energy Factors, Inc. (EFI) is subject to a five-year deadline, that the contract should terminate if EFI has not begun firm operation before the deadline, that the EFI project is not viable, and that EFI is not entitled to any modification of the contract.

2. The application of SDG&E for an interpretation of its PPA with EFI is a request for an advisory opinion.

3. The five-year deadline for commencement of energy and capacity deliveries is not an ambiguous contract term.

4. No prior Commission decision is implicated in SDG&E's requested interpretation of the five-year deadline.

5. This decision should be effective as soon as possible to enable SDG&E to make the appropriate adjustments to its resource plan.

Conclusion of Law

The subject matter of this application is not so significant nor is Commission policy at stake to require the Commission to depart from its general rule that it does not issue advisory opinions.

ORDER

IT IS ORDERED that:

1. The "Application of San Diego Gas & Electric Company for Resolution of an Interpretation Dispute and Claims for Modification in Accordance with D.88-10-032, Involving Contract with Energy Factors, Inc." is dismissed, without prejudice to the filing of a subsequent action that addresses the underlying dispute between the parties.

2. The Motion to Dismiss of Energy Factors, Inc. is denied except to the extent granted herein.

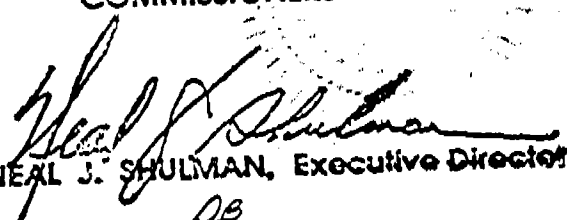
This order is effective today.

Dated November 20, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

Commissioner John B. Ohanian,
being necessarily absent, did
not participate.

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


NEAL J. SHULMAN, Executive Director
PB