

Decision 87 11 063 NOV 2 5 1987

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

O'Brien Energy Systems, Inc.,

Complainant,

vs.

Pacific Gas and Electric Company,

Defendant.

(U39E)

And Related Matters.

ORIGINAL

Case 86-07-018  
(Filed July 8, 1986)

Case 86-07-019  
(Filed July 8, 1986;  
amended July 15, 1986)

Case 86-07-021  
(Filed July 8, 1986)

John J. McCauley, Attorney at Law, for O'Brien Energy Systems, Inc., complainant.  
Robert Ohlbach, Mark Huffman, and Michael S. Hindus, Attorneys at Law, for Pacific Gas and Electric Company, defendant.

OPINION

Background

On March 19, 1986, the Commission suspended Standard Offer 2 for the purchase by California electric utilities of firm capacity from qualifying facilities (QFs). This suspension was ordered in Decision (D.) 86-03-069 and was continued in effect until further order of the Commission by D.86-05-024.

In D.86-05-024, the Commission addressed administration of the suspension particularly with regard to contracts in process as of the suspension's effective date. With respect to this administration, certain parties to the proceeding had suggested, among other things, that a grace period be allowed for QFs to cure alleged defects in their submittals made to the utilities prior to March 19, 1986. The Commission, however, rejected a "grace period" and concluded that the following standard should be applied in determining a QF's entitlement to a Standard Offer 2 contract:

"The precedents set with regard to the suspension of interim Standard Offer 4 should apply to administration of the suspension of Standard Offer 2. In essence, the matter to be resolved as to a given project is the project's status on the date of the Standard Offer 2 suspension (March 19, 1986). If the project had reached a stage by that date where it could have satisfied all contract signing prerequisites (including the screening criteria of the QF Milestone Procedure), then that developer should have a reasonable opportunity to cure deficiencies in its submittals as they existed when the suspension occurred. No grace period should be authorized for developers who had not requested a Standard Offer 2 contract, or did not meet contract signing prerequisites, as of the date of the suspension."  
(D.86-05-024, mimeo. p. 28.)

For the duration of the suspension, however, the Commission endorsed the utilities' negotiation of fixed capacity price contracts with QFs. In identifying the procedures to be followed, the Commission found a suggestion made by San Diego Gas & Electric Company (SDG&E) to provide a "fruitful" basis for negotiating contracts during the suspension. Specifically, the utility would "develop a menu of performance options and indicate

its willingness to enter into a fixed capacity price contract, at the current capacity price schedules, if the QF commits to providing one (or perhaps some combination) of these options." We found this approach to be "a worthwhile concept" and encouraged "negotiation along these lines." (D.86-05-024, mimeo. p. 19.)

Since the suspension of Standard Offer 2, numerous complaints and several petitions for modification of D.86-03-069 and D.86-05-024 have been filed challenging utility decisions not to execute certain Standard Offer 2 contracts. O'Brien Energy Systems, Inc. (O'Brien) is among the complainants. To date, the complaints and petitions have resulted in nine Commission decisions, the most recent being D.87-09-074.<sup>1</sup>

#### O'Brien Complaints

On July 8, 1986, O'Brien filed C.86-07-018, C.86-07-019, and C.86-07-021 against Pacific Gas and Electric Company (PG&E), alleging that PG&E has refused to execute Standard Offer 2 power purchase contracts for three cogeneration facilities which O'Brien proposes to build in California at Santa Maria, Modesto, and Antioch. O'Brien states that it designs, finances, constructs, and operates cogeneration facilities. O'Brien contends that as of March 19, 1986 it had, with respect to each of the three facilities, established site control, requested in writing that PG&E complete a Standard Offer 2 contract and deliver it to O'Brien, and submitted a project description. O'Brien contends that it thus had satisfied, or could have satisfied, all prerequisites for signing a Standard Offer 2 contract for each facility within the guidelines of D.86-05-024.

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<sup>1</sup> We refer those interested in these prior decisions to D.87-09-074, which provides brief summaries of the prior eight decisions. We note that one of these decisions, D.86-12-062, addresses a separate complaint filed by O'Brien against Southern California Edison Company (SCE) in Case (C.) 86-07-020.

In C.86-07-019,<sup>2</sup> O'Brien alleges that O'Brien and Merchants Refrigerating Company (Merchants) executed a supply agreement on or about May 30, 1985 in which O'Brien agreed to finance, design, construct, and operate a 37 megawatt (MW) combined cycle cogeneration facility at Merchants' plant at Modesto, California. O'Brien states that, on or before May 31, 1985, it requested PG&E to complete a Standard Offer 2 contract for the Modesto facility and deliver it to O'Brien. PG&E and O'Brien negotiated the terms of such a contract to provide for wheeling by Modesto Irrigation District (MID), in whose service territory the project would be located, but no contract had been finalized at the time Standard Offer 2 was suspended.

In C.86-07-018, O'Brien alleges that O'Brien and Conoco, Inc. (Conoco) executed a memorandum agreement on December 2, 1985 in which the two parties agreed to negotiate and finalize an agreement to finance, design, construct, and operate a 40.4 MW combined cycle cogeneration facility at the Conoco refinery at Santa Maria, California. At the time the complaint was filed, the definitive agreement between Conoco and O'Brien was being finalized.

In C.86-07-021, O'Brien alleges that O'Brien and Du Pont Company (Du Pont) executed a letter of intent on or about March 5, 1986 in which the two parties agreed to negotiate and finalize an agreement to finance, design, construct, and operate a 48.9 MW combined cycle cogeneration facility at the Du Pont plant at Antioch, California. At the time the complaint was filed, the definitive agreement between Du Pont and O'Brien was being finalized.

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<sup>2</sup> O'Brien amended C.86-07-019 on July 15, 1986 to include a page which had been omitted from the original filing.

O'Brien states that it requested in a letter to PG&E dated March 18, 1986 that PG&E complete Standard Offer 2 contracts for the Santa Maria and Antioch facilities and deliver them to O'Brien for execution. The next day, the Commission suspended Standard Offer 2.

PG&E filed an Answer and Motion to Consolidate in each of the three cases on August 14, 1986. PG&E believes that it is not obligated to execute a Standard Offer 2 power purchase agreement for any of the three projects because, it states, O'Brien had not satisfied and further could not have satisfied all the prerequisites to signing a Standard Offer 2 power purchase agreement for any of the projects as of March 19, 1986.

Regarding the Modesto project, PG&E avers that it informed O'Brien in June 1985 and August 1985 that a Standard Offer 2 power purchase agreement could not be used because the project is located in the MID service territory. PG&E contends that any standard offer power purchase agreement for this project would need to reflect whatever wheeling arrangement was reached with MID.

Regarding the Santa Maria and Antioch projects, PG&E denies that O'Brien had provided by March 19, 1986 the proof of site control or the completed project description forms needed to satisfy the QF Milestone Procedure requirements, or the information required to complete project description forms.

A consolidated prehearing conference was held in these matters on November 10, 1986. Evidentiary hearings were held on December 1 and 2, 1986. Briefs were to be filed in the matter on December 19, 1986, but the parties chose instead to work on a settlement.

Settlement Between O'Brien and PG&E

On April 10, 1987, O'Brien and PG&E jointly moved for a dismissal of O'Brien's complaints, conditioned upon (a) approval by the Commission of a settlement agreement between the two parties dated March 2, 1987, which was attached to the motion, and (b) a Commission finding that the power purchase agreements which would be entered into for the Santa Maria and Antioch projects pursuant to the settlement agreement are reasonable as a matter of law. O'Brien and PG&E assert that the settlement agreement reasonably protects the ratepayers' interest and at the same time allows O'Brien to proceed with two of its three cogeneration projects.

Under the settlement agreement, O'Brien agrees to give up its claim to a Standard Offer 2 power purchase agreement for the Modesto project.

O'Brien also agrees to give up its claim to a Standard Offer 2 power purchase agreement for its proposed 38.6 MW Santa Maria project, but retains the ability to go forward with a smaller project. Conoco holds a preexisting 25 year Standard Offer 2 power purchase agreement for a 28.9 MW project at the Santa Maria site, and PG&E in essence agrees to consent to the assignment of this power purchase agreement to O'Brien, but with the term extended to 30 years. This is consistent with the 30 year term of the power purchase agreement to which O'Brien claims it is entitled.

PG&E agrees to execute a 20 year power purchase agreement based upon Standard Offer 2 for the proposed 46.5 MW Antioch project. O'Brien gives up its claim to a 30 year Standard Offer 2 power purchase agreement for this project.

In addition, O'Brien agrees to partially curtail its electricity generation from the Santa Maria and Antioch projects for up to 2000 hours per year at times designated by PG&E. Except

in Standard Offer 2 curtailment circumstances, O'Brien would be entitled to restrict curtailment to off peak and super off peak hours and to generate electricity at 30 percent of the projects' capacities.

According to the motion, the settlement agreement provides savings due to the negotiated curtailment rights which are not available in Standard Offer 2 power purchase agreements, and further eliminates possible ratepayer exposure to capacity overpayments of the following net present value amounts:<sup>3</sup>

- o \$22.3 million for the Modesto project;
- o \$7.5 million for reduction in size of the Santa Maria project; and
- o \$4.8 million for reduction in length of the power purchase agreement for the Antioch project.

#### Evidence

O'Brien presented testimony of two employees: Joseph V. Seruto, who is O'Brien's Vice President General Manager, Western Operations, and Jeffrey D. Barnes, who is an Executive Vice President of O'Brien. PG&E also presented two witnesses: Joseph G. Meyer, who is a Supervising Engineer in PG&E's Cogeneration and Qualifying Facilities Contracts Department, and Peter T. Bray, who as a Mechanical Engineer at PG&E works as coordinator with

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<sup>3</sup> The motion states that all net present value calculations are based on a 9.5 percent interest rate and that all references to capacity overpayments are based on the difference between the Standard Offer 2 capacity price and PG&E's estimate of the value of capacity contained in Application (A.) 85-12-50, its 1987 general rate case. PG&E points out that it believes the rate case figures overstate the true value of capacity.

developers of cogeneration and alternative energy resource projects in the areas of power purchase agreements and interconnection studies.

There was general agreement regarding most pertinent O'Brien and PG&E actions prior to March 19, 1986. The controversy lies mainly in whether O'Brien's actions were sufficient to entitle it to Standard Offer 2 power purchase agreements for the Modesto, Santa Maria, and Antioch projects.

According to the testimony, O'Brien began pursuing the Modesto project in October 1984, and sent a signed Standard Offer 2 power purchase agreement to PG&E on May 31, 1985. PG&E informed O'Brien in a June 12, 1985 letter that a Standard Offer 2 power purchase agreement would need several modifications for the Modesto project because the project is not inside PG&E's service area. In an August 7, 1985 letter, PG&E outlined the conditions under which it would be willing to accept power from the facility. On October 28, 1985, PG&E sent O'Brien a marked-up Standard Offer 2 with anticipated modifications pertaining to power transfer from the Modesto project handwritten on it. O'Brien relayed the draft agreement to MID and authorized MID to proceed with an interconnection study. According to Barnes, MID had problems with some of the language regarding interconnection and wheeling, and O'Brien notified PG&E verbally of MID's concerns.

Meanwhile, O'Brien began to pursue the Santa Maria project in April 1985 and entered into a memorandum agreement with Conoco on or about December 2, 1985.



On December 10, 1985 O'Brien wrote PG&E with a proposal for a modification to an existing Standard Offer 2 power purchase agreement for an O'Brien project at Salinas,<sup>4</sup> and for proposed power purchase agreements for the Modesto and Santa Maria projects. O'Brien's proposal would provide partial curtailment during 2000 off peak hours in exchange for an energy pricing formula based on oil and/or natural gas prices and a floor for the annual incremental energy rate. At a meeting on January 23, 1986, O'Brien and PG&E discussed O'Brien's pricing proposals and also discussed other potential dispatchability modifications.

Meanwhile, O'Brien submitted a proposal for development of the Antioch cogeneration facility to Du Pont on or about January 14, 1986.

O'Brien and PG&E disagree about when PG&E learned of the Antioch project. Seruto testified that he mentioned it at the January 23, 1986 meeting, through a comment addressed to his coworker Barnes that "we should include the upcoming Antioch project in our generic discussions on curtailment." His belief was that PG&E employee Bray, while not orally responding, indicated by expression that that was the right thing to do. Seruto further testified that he was in frequent communication with Bray and Meyer in early 1986 regarding O'Brien projects in Modesto, Salinas, and Santa Maria, and that PG&E understood that O'Brien desired a Standard Offer 2 contract for the Antioch project. On the other hand, Meyer and Bray testified that they first learned of the proposed Antioch project on March 24, 1986, when PG&E received the March 18, 1986 letter from O'Brien requesting Standard Offer 2 contracts for the three projects. Bray confirmed, however, that

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<sup>4</sup> A Standard Offer 2 contract had been executed by both O'Brien and PG&E in June 1985 for O'Brien's Salinas project. The power purchase agreement for the Salinas project is not an issue in these proceedings.

Seruto had asked about transmission constraints in the general area, though he did not recall a specific mention of the Antioch project.

Seruto testified that O'Brien initiated its discussions with PG&E regarding dispatchability based on SCE's favorable reception to a similar arrangement for a project developed in SCE's territory. He testified that between January 23, 1986 and the week of March 10, 1986, he had additional discussions with PG&E regarding the proposed pricing proposals, and that over the course of those conversations it became increasingly apparent that PG&E was growing less interested in O'Brien's proposal. Bray informed Seruto during the week of March 10, 1986 that PG&E had determined that it would not accept the proposed modifications. By a followup letter dated March 17, 1986, PG&E confirmed that it was "not receptive to negotiating a [power purchase agreement] at this time with pricing provisions that include an [incremental energy rate] floor" due to the suspension of Standard Offer 4, uncertainties regarding projections of incremental energy rates, and the risk of nonrecovery of payments made under floor arrangements.

Accordingly, O'Brien sent a letter dated March 18, 1986 to PG&E requesting Standard Offer 2 power purchase agreements for the Santa Maria and Antioch projects. The letter also proposed continuing discussions on the proposed nonstandard contract terms. O'Brien included project descriptions for both facilities and also attached as proof of site control the memorandum agreement between O'Brien and Conoco for the Santa Maria project and a letter of intent which had just been signed on or about March 7, 1986 by O'Brien and Du Pont for the Antioch project.

The Commission suspended Standard Offer 2 the next day, March 19, 1986. PG&E notified O'Brien soon thereafter that it was

PG&E's position that O'Brien was not eligible for Standard Offer 2 power purchase agreements for its three projects due to this suspension. O'Brien filed these three complaints on July 8, 1986.

Parties' Arguments Regarding Entitlement to Standard Offer 2

PG&E's position is that O'Brien is not entitled to obtain a Standard Offer 2 for its Modesto, Santa Maria, and Antioch projects because of their status at the time of the suspension of Standard Offer 2.

Meyer testified that O'Brien is not entitled to a contract with Standard Offer 2 pricing terms for the Modesto project because PG&E and O'Brien simply had not reached agreement on a contract before the suspension of Standard Offer 2. PG&E does not dispute that O'Brien would have been entitled to such pricing terms for the Modesto project if an agreement on a Standard Offer 2 type contract modified to take into account the fact that the Modesto project was not located in PG&E's service territory had been reached prior to March 19, 1986.

PG&E's position is that O'Brien is not entitled to obtain a Standard Offer 2 for its Santa Maria and Antioch projects because O'Brien had not submitted a signed Standard Offer 2 power purchase agreement, established site control, or provided a satisfactory project description for either project by the suspension date. Meyer and Bray testified that the memorandum agreement with Conoco for the Santa Maria project and the letter of intent with Du Pont for the Antioch project are inadequate to establish site control. According to Bray, the Santa Maria document contains the terms for the beginning of negotiations on the parties' roles for the project which were to include discussions of a lease of the project site, and the Antioch document contains only an agreement to negotiate

toward a thermal sales contract and an acknowledgement that O'Brien had proposed that the project site be leased to O'Brien. The documents do not grant O'Brien exclusive rights to develop either project, nor are they notarized.

Meyer and Bray also testified that the descriptions of the Santa Maria and Antioch projects attached to O'Brien's March 18, 1986 letter to PG&E were not satisfactory because they were not on the project description form required by the QF Milestone Procedure and because they did not contain all the information required by that form. Specifically, there was no justification of electrical capacity, no map showing project boundaries and proposed substation location, no indication of expected station load, and no information regarding the preliminary project development schedule.

In response, Seruto testified that a modified Standard Offer 2 type contract could have been executed for the Modesto project prior to the suspension. According to Seruto, Meyer stated at the January 23, 1986 meeting that PG&E was prepared at that time to execute the modified Standard Offer 2 he had sent O'Brien on October 28, 1985 for the Modesto project. Barnes had stated in response that he would be willing to accept the terms in the draft agreement subject to a final examination for accuracy of information in the agreement and based on the faith that PG&E would execute appropriate modifications later if the MID interconnection study proved them to be necessary. Barnes testified that Meyer had assured him that MID's concerns could be handled subsequent to the execution of the document. Meyer confirmed that Barnes had stated during the meeting that O'Brien wanted to execute a power purchase agreement based on Standard Offer 2 for the Modesto project, in case the incremental energy rate arrangement being discussed did not materialize.

Based on expectations that the MID interconnection study would be completed "any day," O'Brien decided to wait for the study and incorporate its conclusions into a final typed draft power purchase agreement to be submitted to PG&E. Barnes testified that O'Brien saw no pressing need to take further action at that time. However, MID did not provide its study until March 7, 1986. The suspension took place before O'Brien had completed analysis of the MID study.

Regarding the Santa Maria and Antioch projects, Seruto testified that O'Brien's provision of the letter of intent and the memorandum agreement to PG&E to demonstrate site control was consistent with earlier representations by Meyer that a signed letter of intent would prove site control for O'Brien's Modesto project. Meyer did not confirm this assertion, stating instead that site control for the Modesto project had been established by a fully executed steam sales contract between O'Brien and Merchants.

Seruto further testified that once O'Brien entered into the memorandum agreement with Conoco and the letter of intent with Du Pont, O'Brien was the exclusive developer of the two projects and that Conoco and Du Pont did not negotiate with any other developers further and in fact informed the other competitors that they had selected O'Brien.

According to Seruto, O'Brien has made significant expenditures after the memorandum agreement for the Santa Maria project was signed that it would not have undertaken in the absence of such an agreement. Following the signing of the agreement, Conoco released its engineering staff to generate data regarding Conoco's requirements, and O'Brien hired an outside consultant to assist in that effort and an environmental firm to perform air quality work. O'Brien has invested sums approaching \$100,000 to

satisfy the air quality district and the environmental district. It has initiated land use permits and has engaged outside legal assistance. Seruto testified that he interprets the fact that the memorandum agreement with Conoco is not legally binding to mean that it was not the intent of either party to allow the memorandum agreement to supersede the final supply agreement.

Work on the Antioch project is not as advanced as efforts on the Santa Maria project. However, after the letter of intent was signed, O'Brien went out for bids and selected a firm to do the environmental engineering. It was going forward with preliminary design when the suspension occurred.

Regarding the alleged deficiency in the project descriptions, Seruto testified that he could have provided, if he had been asked, preliminary project development schedules, the station loads, and the locations for the Santa Maria and Antioch projects, and could have justified the request for transmission capacity for the projects.

#### Discussion

Since hearings were held and completed in this matter, we have before us a full record by which to evaluate the reasonableness of the submitted settlement. The absence of briefs does not prevent us from basing our decision upon the record. We note that PG&E and O'Brien voluntarily waived their opportunity to file briefs, choosing instead to pursue a settlement. As a result, their rights are in no way curtailed by our consideration of the record in this matter.

PG&E has raised several issues regarding whether O'Brien's Modesto, Santa Maria, and Antioch projects qualify to receive Standard Offer 2 terms under the criteria set forth in D.86-05-024, including the following:

- o Whether PG&E is required to provide Standard Offer 2 capacity payments for projects outside the utility's service area if specific arrangements for power transfer have not been completed;
- o Whether the memorandum agreement with Conoco and the letter of intent with Du Pont were adequate to establish site control;
- o Whether O'Brien was capable of meeting the other QF Milestone Procedure requirements for the Santa Maria and Antioch projects as of March 19, 1986, in particular the justification of electrical capacity, the map of project boundaries and substation location, the expected station load, and a preliminary project development schedule; and
- o Whether O'Brien was required to submit a signed Standard Offer 2 power purchase agreement for the Santa Maria and Antioch projects before March 19, 1986, or whether the request in the March 18, 1986 letter was adequate to meet the requirements of D.86-05-024.

PG&E's only basis for its assertion that the Modesto project is not eligible for Standard Offer 2 pricing terms is that PG&E and O'Brien simply had not reached agreement on the power transfer arrangements prior to March 19, 1986. However, O'Brien testified that PG&E had indicated on January 23, 1986 its willingness to sign a power purchase agreement for the Modesto project with Standard Offer 2 pricing terms prior to completion of power transfer arrangements with MID. PG&E's witnesses did not deny that PG&E had made this representation to O'Brien, nor did they assert that finalized power transfer arrangements are necessary prior to the signing of standard offer contracts. We conclude that O'Brien, having met all other prerequisites, could have entered into a power purchase agreement with Standard Offer 2

pricing terms for the Modesto project prior to March 19, 1986. Thus, the Modesto project meets the criteria in D.86-05-024 for eligibility for Standard Offer 2 pricing.

PG&E states that O'Brien's memorandum agreement with Conoco and its letter of intent with Du Pont do not adequately provide proof of site control, which is one of the prerequisites to eligibility for a standard offer power purchase agreement. The QF Milestone Procedure provides two examples of adequate proof of site control for projects involving a third party developer such as O'Brien: a notarized statement signed by the site owner granting the developer exclusive land or development rights, or proof of exclusive rights to negotiate a power sales agreement and develop the project. (D.85-08-045, Appendix A.) We agree with PG&E that O'Brien's memorandum agreement with Conoco and its letter of intent with Du Pont do not meet these criteria because they do not grant O'Brien exclusive rights to develop either project, nor are they notarized.

We addressed the issue of adequacy of a QF's proof of site control further in D.86-04-053. PG&E was concerned at that time because some QFs were submitting documents of 30-90 day options as supposed proof of site control. We concluded that:

"Rather than impose additional requirements on the execution of the [power purchase agreement] and [Special Facilities Agreement] or [Interconnection Facilities Agreement], we will simply state that the utilities have some discretion in determining the adequacy of the QF's proof of site control. A utility may reject a QF's proof of site control if the utility determines that the QF has not made an adequate showing as required in Section IV/A.a of the QF [Milestone Procedure]."  
(D.86-04-053, mimeo. p. 3.)

We must evaluate the adequacy of O'Brien's assertions of site control in light of the guidance given in D.86-04-053.



It is obvious that the Du Pont project was in a very early planning stage at the time of suspension of Standard Offer 2. O'Brien's letter of intent with Du Pont, which was signed on or about March 7, 1986, is a scant one and one half pages in length and was to be in effect for somewhat less than eight weeks. It sets forth an agreement to pursue negotiation of a contract for a steam supply at Du Pont's Antioch plant, with negotiations beginning from a proposal which O'Brien had made earlier. Du Pont reserved the right to terminate the letter of intent at any time during its eight weeks effectiveness for any reason and with no penalty. Further, the letter of intent states clearly that it does not constitute an acceptance by Du Pont of O'Brien's proposal, or any part thereof.

O'Brien's letter of intent with Du Pont appears to be the type of option about which PG&E had concerns as discussed in D.86-04-053. After examining it, we conclude that it does not establish that O'Brien actually controlled the site, since Du Pont could withdraw from negotiations at any time for any reason and with no adverse consequences. Further, as PG&E has noted, nothing in the letter of intent grants O'Brien exclusive rights of negotiation.

O'Brien's memorandum agreement with Conoco, signed on or about December 2, 1985, is eleven pages long and provides, in addition to detailed descriptions of the proposed plant and the terms and conditions regarding negotiations between the two parties, each party's responsibilities regarding other requirements such as negotiations with PG&E, obtaining governmental approvals, negotiating construction, maintenance, operating, and fuel purchase contracts, provision of financing, environmental affairs, and waste disposal. Conoco agrees to reimburse O'Brien's expenses up to \$50,000 if Conoco elects to abandon development of the project during the one year effective period of the memorandum agreement.

The prerequisites to eligibility for standard offer power purchase agreements and other components of the QF Milestone Procedure were established, among other reasons, to aid in transmission and resource planning. (See D.85-01-038, mimeo. p. 9.) The utilities need reasonable assurance that a developer has control over and can develop its proposed project on the site under consideration. In D.86-04-053, we confirmed that the utilities should assess the adequacy of each developer's submission of proof of site control on a case-by-case basis.

While we may review the utilities' determinations regarding adequacy of proof of site control in particular situations, we hesitate to substitute our own judgment for that of the utilities in this matter unless there is clear abuse of the discretion we have given them. To do so would effectively shift the responsibility to evaluate each project from the utilities to us.

We find that PG&E acted entirely within the guidelines established in the QF Milestone Procedure and the discretion granted in D.86-04-053 in concluding that O'Brien had not secured site control for the Santa Maria and Antioch projects at the time of the suspension of Standard Offer 2 on March 19, 1986. Because of this, we agree with PG&E that these projects are not eligible for Standard Offer 2 power purchase agreements within the guidelines of D.86-05-024. Having made this finding, we do not need to address the other issues which PG&E has raised regarding these projects.

We turn now to the question of reasonableness of the settlement which has been submitted in this case. The only justifications which have been given for its reasonableness relate to the costs which ratepayers would have incurred had power from the three projects been purchased at Standard Offer 2 prices. We have concluded that only one of the three projects was eligible for a power purchase agreement with Standard Offer 2 prices. Therefore we must compare the settlement, not to the three original projects, as does PG&E, but to the two approved projects: the 37 MW project at Modesto, and the existing 28.9 MW SO2 contract at Santa Maria.

The first area of comparison is capacity. The Modesto Project plus the existing Santa Maria Project total 65.9 MW while the settlement provides for 75.4 MW of capacity. At this time capacity is available in excess, so the extra 9.5 MW must be offset by other conditions.

PG&E has no curtailment rights (other than emergency and negative avoided costs) for the 65.9 MW. PG&E can curtail the 75.4 MW in the settlement up to 2000 hrs/year. When curtailed, the projects would have to reduce to 30 percent of capacity. Thus the equivalent effective capacity of the 75.4 MW can be estimated by calculating the equivalent capacity, including the maximum allowed curtailment:

$$\frac{75.4 [(2000 \times .3) + (8760 - 2000)]}{8760} = 63.3 \text{ MW}$$

Although this is a simple estimate, it is a conservative one since this capacity will tend to be used at the system peak, when it is more valuable than the average capacity. Conversely, curtailment will occur off-peak, when capacity is least valuable. Thus in addition to a lower net capacity (63.3 MW instead of 65.9 MW) the effective capacity in the settlement, because it is dispatchable, has a higher average value than base load capacity.

Findings of Fact

1. Notwithstanding the suspension of Standard Offer 2 on March 19, 1986, O'Brien seeks to enter into a power purchase agreement with Standard Offer 2 pricing terms for its Modesto project and also desires Standard Offer 2 power purchase agreements for its Santa Maria and Antioch projects.

2. The Santa Maria and Antioch projects are in MID's service territory.

3. PG&E sent O'Brien a marked-up Standard Offer 2 with anticipated modifications pertaining to power transfer from the Modesto project handwritten on it, and indicated a willingness to execute the modified Standard Offer 2 prior to completion of power transfer arrangements.

4. O'Brien indicated on January 23, 1986 that it wanted to execute a power purchase agreement based on Standard Offer 2 for the Modesto project, but chose to delay completion of the power purchase agreement based on expectations that an MID interconnection study would be forthcoming.

5. O'Brien could have completed a power purchase agreement based on Standard Offer 2 for the Modesto project prior to March 19, 1986.

6. O'Brien's Modesto project is eligible for a power purchase agreement with Standard Offer 2 pricing terms based upon the criteria established in D.86-05-024.

7. O'Brien entered into a memorandum agreement with Conoco for the Santa Maria project on or about December 2, 1986.

8. O'Brien executed a letter of intent with Du Pont for the Antioch project on or about March 7, 1986.

**CORRECTION**

**THIS DOCUMENT HAS**

**BEEN REPHOTOGRAPHED**

**TO ASSURE**

**LEGIBILITY**

We turn now to the question of reasonableness of the settlement which has been submitted in this case. The only justifications which have been given for its reasonableness relate to the costs which ratepayers would have incurred had power from the three projects been purchased at Standard Offer 2 prices. We have concluded that only one of the three projects was eligible for a power purchase agreement with Standard Offer 2 prices. Therefore we must compare the settlement, not to the three original projects, as does PG&E, but to the two approved projects: the 37 MW project at Modesto, and the existing 28.9 MW S02 contract at Santa Maria.

The first area of comparison is capacity. The Modesto Project plus the existing Santa Maria Project total 65.9 MW while the settlement provides for 75.4 MW of capacity. At this time capacity is available in excess, so the extra 9.5 MW must be offset by other conditions.

PG&E has no curtailment rights (other than emergency and negative avoided costs) for the 65.9 MW. PG&E can curtail the 75.4 MW in the settlement up to 2000 hrs/year. When curtailed, the projects would have to reduce to 30 percent of capacity. Thus the equivalent effective capacity of the 75.4 MW can be estimated by calculating the equivalent capacity, including the maximum allowed curtailment:

$$\frac{75.4 [(2000 \cdot .3) + (8760 - 2000)]}{8760} = 63.3 \text{ MW}$$

Although this is a simple estimate, it is a conservative one since this capacity will tend to be used at the system peak, when it is more valuable than the average capacity. Conversely, curtailment will occur off-peak, when capacity is least valuable. Thus in addition to a lower net capacity (63.3 MW instead of 65.9 MW) the effective capacity in the settlement, because it is dispatchable, has a higher average value than base load capacity.

The other conditions of the settlement include an increase in the term of the Santa Maria contract from 25 years to 30 years, but this is more than offset by the fact that the term of the Antioch contract pursuant to the settlement is only 20 years, while the Modesto contract is for 30 years.

Overall, we conclude that the settlement is significantly better, from the ratepayer perspective, than the Modesto project and the existing Santa Maria project. Dispatchability provides ratepayer benefits in the short-term, allowing tighter control, network reliability improvements and least-cost dispatching by the utility. The shorter term of the Antioch contract allows the utility more control of its resource cost in the long-term, reducing risk of overpayments and allowing more flexibility to the utility to modify its resource plan.

We reiterate that we are not obligated to automatically accept the settlement; to the contrary we must evaluate each settlement brought before us for reasonableness since it is our duty to protect the interests of ratepayers, who were not a party to the settlement. However we continue to encourage the utilities to negotiate contracts with QFs containing curtailment provisions such as those in the settlement agreement with O'Brien. This, plus the indication of substantial ratepayer benefit, lead us to approve the settlement.

The ALJ proposed decision was filed in this matter on October 9, 1987. PG&E and O'Brien filed comments on the proposed decision, which we have carefully considered. We note that our conclusions in this decision are consistent in many respects with PG&E's filed comments.

Findings of Fact

1. Notwithstanding the suspension of Standard Offer 2 on March 19, 1986, O'Brien seeks to enter into a power purchase agreement with Standard Offer 2 pricing terms for its Modesto project and also desires Standard Offer 2 power purchase agreements for its Santa Maria and Antioch projects.

2. The Santa Maria and Antioch projects are in MID's service territory.

3. PG&E sent O'Brien a marked-up Standard Offer 2 with anticipated modifications pertaining to power transfer from the Modesto project handwritten on it, and indicated a willingness to execute the modified Standard Offer 2 prior to completion of power transfer arrangements.

4. O'Brien indicated on January 23, 1986 that it wanted to execute a power purchase agreement based on Standard Offer 2 for the Modesto project, but chose to delay completion of the power purchase agreement based on expectations that an MID interconnection study would be forthcoming.

5. O'Brien could have completed a power purchase agreement based on Standard Offer 2 for the Modesto project prior to March 19, 1986.

6. O'Brien's Modesto project is eligible for a power purchase agreement with Standard Offer 2 pricing terms based upon the criteria established in D.86-05-024.

7. O'Brien entered into a memorandum agreement with Conoco for the Santa Maria project on or about December 2, 1986.

8. O'Brien executed a letter of intent with Du Pont for the Antioch project on or about March 7, 1986.



9. O'Brien sent a letter dated March 18, 1986 to PG&E requesting Standard Offer 2 power purchase agreements for the Santa Maria and Antioch projects.

10. O'Brien asserts, and PG&E disagrees, that the memorandum agreement with Conoco and the letter of intent with Du Pont establish site control for the Santa Maria and Antioch projects, respectively.

11. O'Brien's memorandum agreement with Conoco and its letter of intent with Du Pont do not meet the criteria of the examples in the QF Milestone Procedure for proof of site control.

12. In D.86-04-053 we confirmed that the utilities have discretion to assess the adequacy of each developer's submission of proof of site control on a case-by-case basis.

13. PG&E acted within the guidelines established in the QF Milestone Procedure and the discretion granted in D.86-04-053 in concluding that O'Brien had not established site control for the Santa Maria and Antioch projects as of March 19, 1986. Because of this, these projects are not eligible for Standard Offer 2 power purchase agreements within the guidelines of D.86-05-024.

14. O'Brien and PG&E entered into a settlement agreement, dated March 2, 1987, and requested Commission approval of this settlement of the instant complaints.

15. The settlement agreement, when performed, would dispose of the entire dispute between O'Brien and PG&E.

16. The effectiveness of the settlement agreement is conditioned on approval of the agreement by the Commission and a Commission finding that the power purchase agreements which would be entered into for the Santa Maria and Antioch projects pursuant to the settlement agreement are reasonable as a matter of law.

17. The only justifications which have been presented for the reasonableness of the settlement agreement relate to the costs which ratepayers would have incurred had power from O'Brien's three projects been purchased at Standard Offer 2 prices. But even when compared to the one new contract found reasonable in this decision and the existing SO 2 contract, the costs likely to be incurred under the settlement are reasonable.

18. We find that the power purchase agreements which PG&E would be obligated to enter into with O'Brien under the settlement are reasonable based on the record before us.

Conclusions of Law

1. The motion to dismiss complaints and for approval of settlement should be granted.

2. This order should be made effective today to permit the parties to complete their contractual undertakings regarding the Santa Maria and Antioch projects.

ORDER

IT IS ORDERED that:

1. The joint motion to dismiss and for approval of settlement is hereby granted.

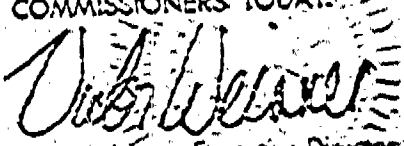
2. Except as provided in Ordering Paragraph 1, O'Brien's complaints are otherwise denied.

This order is effective today.

Dated November 25, 1987, at San Francisco, California.

STANLEY W. HULETT  
President  
DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OGANIAN  
Commissioners

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

  
Victor Woisser, Executive Director

We turn now to the question of reasonableness of the settlement which has been submitted in this case. The only justifications which have been given for its reasonableness relate to the costs which ratepayers would have incurred had power from the three projects been purchased at Standard Offer 2 prices. We have concluded that only one of the three projects was eligible for a power purchase agreement with Standard Offer 2 prices. Therefore we must compare the settlement, not to the three original projects, as does PG&E, but to the two approved projects: the 37 MW project at Modesto, and the existing 28.9 MW SO2 contract at Santa Maria.

The first area of comparison is capacity. The Modesto Project plus the existing Santa Maria Project total 65.9 MW while the settlement provides for 75.4 MW of capacity. At this time capacity is available in excess, so the extra 9.5 MW must be offset by other conditions.

PG&E has no curtailment rights (other than emergency and negative avoided costs) for the 65.9 MW. PG&E can curtail the 75.4 MW in the settlement up to 2000 hrs/year. When curtailed, the projects would have to reduce to 30 percent of capacity. Thus the equivalent effective capacity of the 75.4 MW can be estimated by calculating the equivalent capacity, including the maximum allowed curtailment:

$$\frac{75.4 [(2000 \times .3) + (8760 - 2000)]}{8760} = 63.3 \text{ MW}$$

Although this is a simple estimate, it is a reasonably conservative one since this capacity will tend to be used at the system peak, when it is more valuable than the average capacity. Conversely, curtailment will occur off-peak, when capacity is least valuable. Thus in addition to a lower net capacity (63.3 MW instead of 65.9 MW) the effective capacity in the settlement, because it is dispatchable, has a higher average value than base load capacity.

The other conditions of the settlement include an increase in the term of the Santa Maria contract from 25 years to 30 years, but this is more than offset by the fact that the term of the Antioch contract pursuant to the settlement is only 20 years, while the Modesto contract is for 30 years.

Overall, we conclude that the settlement is significantly better, from the ratepayer perspective, than the Modesto project and the existing Santa Maria project. Dispatchability provides ratepayer benefits in the short-term, allowing tighter control, network reliability improvements and least-cost dispatching by the utility. The shorter term of the Antioch contract allows the utility more control of its resource cost in the long-term, reducing risk of overpayments and allowing more flexibility to the utility to modify its resource plan.

We reiterate that we are not obligated to automatically accept the settlement; to the contrary we must evaluate each settlement brought before us for reasonableness since it is our duty to protect the interests of ratepayers, who were not a party to the settlement. However we continue to encourage the utilities to negotiate contracts with QFs containing curtailment provisions such as those in the settlement agreement with O'Brien. This, plus the indication of substantial ratepayer benefit, lead us to approve the settlement.

The ALJ proposed decision was filed in this matter on October 9, 1987. PG&E and O'Brien filed comments on the proposed decision, which we have carefully considered. We note that our conclusions in this decision are consistent in many respects with PG&E's filed comments.

The other conditions of the settlement include an increase in the term of the Santa Maria contract from 25 years to 30 years, but this is more than offset by the fact that the term of the Antioch contract pursuant to the settlement is only 20 years, while the Modesto contract is for 30 years. Overall, we conclude that the settlement is roughly equivalent, from the ratepayer perspective, to the Modesto project and the existing Santa Maria project and, if anything, may provide some amount of ratepayer benefit relative to development of those two projects.

We reiterate that we are not obligated to automatically accept the settlement; to the contrary we must evaluate each settlement brought before us for reasonableness since it is our duty to protect the interests of ratepayers, who were not a party to the settlement. However we continue to encourage the utilities to negotiate contracts with QFs containing curtailment provisions such as those in the settlement agreement with O'Brien. This, plus the indication of some ratepayer benefit, lead us to approve the settlement.

Findings of Fact

1. Notwithstanding the suspension of Standard Offer 2 on March 19, 1986, O'Brien seeks to enter into a power purchase agreement with Standard Offer 2 pricing terms for its Modesto project and also desires Standard Offer 2 power purchase agreements for its Santa Maria and Antioch projects.

2. The Modesto project is in MID's service territory.

3. PG&E sent O'Brien a marked-up Standard Offer 2 with anticipated modifications pertaining to power transfer from the Modesto project handwritten on it, and indicated a willingness to execute the modified Standard Offer 2 prior to completion of power transfer arrangements.

4. O'Brien indicated on January 23, 1986 that it wanted to execute a power purchase agreement based on Standard Offer 2 for the Modesto project, but chose to delay completion of the power purchase agreement based on expectations that an MID interconnection study would be forthcoming.

5. O'Brien could have completed a power purchase agreement based on Standard Offer 2 for the Modesto project prior to March 19, 1986.

6. O'Brien's Modesto project is eligible for a power purchase agreement with Standard Offer 2 pricing terms based upon the criteria established in D.86-05-024.

7. O'Brien entered into a memorandum agreement with Conoco for the Santa Maria project on or about December 2, 1986.

8. O'Brien executed a letter of intent with Du Pont for the Antioch project on or about March 7, 1986.

9. O'Brien sent a letter dated March 18, 1986 to PG&E requesting Standard Offer 2 power purchase agreements for the Santa Maria and Antioch projects.

10. O'Brien asserts, and PG&E disagrees, that the memorandum agreement with Conoco and the letter of intent with Du Pont establish site control for the Santa Maria and Antioch projects, respectively.

11. O'Brien's memorandum agreement with Conoco and its letter of intent with Du Pont do not meet the criteria of the examples in the QF Milestone Procedure for proof of site control.

12. In D.86-04-053 we confirmed that the utilities have discretion to assess the adequacy of each developer's submission of proof of site control on a case-by-case basis.

13. PG&E acted within the guidelines established in the QF Milestone Procedure and the discretion granted in D.86-04-053 in concluding that O'Brien had not established site control for the Santa Maria and Antioch projects as of March 19, 1986. Because of this, these projects are not eligible for Standard Offer 2 power purchase agreements within the guidelines of D.86-05-024.



14. O'Brien and PG&E entered into a settlement agreement, dated March 2, 1987, and requested Commission approval of this settlement of the instant complaints.

15. The settlement agreement, when performed, would dispose of the entire dispute between O'Brien and PG&E.

16. The effectiveness of the settlement agreement is conditioned on approval of the agreement by the Commission and a Commission finding that the power purchase agreements which would be entered into for the Santa Maria and Antioch projects pursuant to the settlement agreement are reasonable as a matter of law.

17. The only justifications which have been presented for the reasonableness of the settlement agreement relate to the costs which ratepayers would have incurred had power from O'Brien's three projects been purchased at Standard Offer 2 prices. But even when compared to the one new contract found reasonable in this decision and the existing SO 2 contract, the costs likely to be incurred under the settlement are reasonable.

18. We find that the power purchase agreements which PG&E would be obligated to enter into with O'Brien under the settlement are reasonable based on the record before us.

#### Conclusions of Law

1. The motion to dismiss complaints and for approval of settlement should be granted.

2. This order should be made effective today to permit the parties to complete their contractual undertakings regarding the Modesto project.

14. O'Brien and PG&E entered into a settlement agreement, dated March 2, 1987, and requested Commission approval of this settlement of the instant complaints.

15. The settlement agreement, when performed, would dispose of the entire dispute between O'Brien and PG&E.

16. The effectiveness of the settlement agreement is conditioned on approval of the agreement by the Commission and a Commission finding that the power purchase agreements which would be entered into for the Santa Maria and Antioch projects pursuant to the settlement agreement are reasonable as a matter of law.

17. The only justifications which have been presented for the reasonableness of the settlement agreement relate to the costs which ratepayers would have incurred had power from O'Brien's three projects been purchased at Standard Offer 2 prices. But even when compared to the one new contract found reasonable in this decision and the existing SO 2 contract, the costs likely to be incurred under the settlement are reasonable.

18. We find that the power purchase agreements which PG&E would be obligated to enter into with O'Brien under the settlement are reasonable based on the record before us.

Conclusions of Law

1. The motion to dismiss complaints and for approval of settlement should be granted.

2. This order should be made effective today to permit the parties to complete their contractual undertakings regarding the Santa Maria and Antioch projects.

ORDER

IT IS ORDERED that:

1. The joint motion to dismiss and for approval of settlement is hereby granted.

2. Except as provided in Ordering Paragraph 1, O'Brien's complaints are otherwise denied.

This order is effective today.

Dated NOV 25 1987, at San Francisco, California.

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