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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECTRIC COMPANY for an Order approving an agreement with West Contra Costa Sanitary District for the purchase of firm capacity and energy from the West Contra Costa Sanitary District Resource Recovery Project. (U39-E)	Application 87-08-031 (Filed August 19, 1987)

Jo Shaffer, Attorney at Law, for Pacific Gas and Electric Company, applicant.
Francis Aebi and David Ninomiya, for West Contra Costa Horticultural Growers; Jay Gunkelman and Beatrice O'Keefe, for West County Citizens Alliance; Alan La Pointe, for West County Forum; and Jay Gunkelman, for himself; protestants.
Larry Burch, for Richmond Sanitary Service; Nossaman, Guthner, Knox & Elliott, by Stanley S. Taylor and Richard C. Harper, Attorneys at Law, and William P. Braga, for West Contra Costa Sanitary District; John S. Dash and David A. Haines, for Westinghouse Electric Corporation; L. Chaset, Attorney at Law, for Bay Area Air Quality Management District; Alannah Kinser, for Public Advisor's Office; and Maury Woulf, for himself; interested parties.
Kathleen Kiernan-Harrington, Attorney at Law, for Division of Ratepayer Advocates.

O P I N I O N

I. Summary

Pacific Gas and Electric Company (PG&E) requests approval of an Amended Agreement with the West Contra Costa Sanitary

District (WCCSD) and recovery through Energy Cost Adjustment Clause of all contract payments made under the Amended Agreement.

We deny PG&E's request. PG&E has not established a basis on which to make the prospective finding of reasonableness that it has requested.

II. Background

On December 30, 1983, WCCSD entered into a Standard Offer No. 4 agreement (SO4) with PG&E for the purchase of power from a proposed 27.8 megawatt (MW) waste-to-energy facility for a 30-year term. The proposed facility was to dispose of sewage sludge by incinerating it in a combustor fueled by municipal solid waste. The SO4 required energy deliveries to begin by December 30, 1988.

In February, 1984, the project developer submitted an air permit application to the Bay Area Air Quality Management District (BAAQMD). On September 7, 1984, BAAQMD issued notification of a preliminary decision to issue a conditional Authority to Construct a Waste to Energy plant in Richmond, California. BAAQMD was careful to say that this notification was not an authorization of construction and that final action on the application would be taken after a 30-day public comment period.

Public hearings were held by BAAQMD in October, 1984. In November, 1984, BAAQMD informed the project developer that a Health Risk Assessment (HRA) would have to be prepared before a final Authority to Construct could be issued. The developer then retained an expert in environmental health sciences to prepare an HRA for the proposed plant and submitted the expert's proposed workplan to BAAQMD on December 3, 1984. The first draft of the resulting HRA was submitted to BAAQMD on September 10, 1985.

In November, 1985, WCCSD approached PG&E about the possibility of extending the on-line date in the SO4 due to

unexpected delays. WCCSD claimed that the BAAQMD's imposition of an HRA requirement was a force majeure event[1] entitling it to an

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1 The SO4 provision on force majeure reads as follows:

A-8 FORCE MAJEURE

(a) The term force majeure as used herein means unforeseeable causes, other than forced outages, beyond the reasonable control of and without the fault or negligence of the Party claiming force majeure, including, but not limited to, acts of God, labor disputes, sudden actions of the elements, action by federal, state, and municipal agencies, and actions of legislative, judicial, or regulatory agencies which conflict with the terms of this Agreement.

(b) If either Party because of force majeure is rendered wholly or partly unable to perform its obligations under this Agreement, that Party shall be excused from whatever performance is affected by the force majeure to the extent so affected provided that:

(1) the non-performing Party, within two weeks after the occurrence of the force majeure, gives the other Party written notice describing the particulars of the occurrence,

(2) the suspension of performance is of no greater scope and of no longer duration than is required by the force majeure,

(3) the non-performing Party uses its best efforts to remedy its inability to perform (this subsection shall not require the settlement of any strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the Party involved in the dispute, are contrary to its interest. It is understood and agreed that the settlement of strikes, walkouts, lockouts or

(Footnote continues on next page)

extension. PG&E did not agree that a force majeure event had occurred or that the five-year on-line date could be extended by force majeure. WCCSD and PG&E, however, agreed to try to settle this dispute by renegotiating the SO4.

On December 8, 1985, the Department of Health Services (DHS) informed BAAQMD that the first draft HRA submitted by the project developer was not adequate as a risk assessment because not enough information was provided to assess whether emissions from the proposed facility might pose a hazard to the exposed population. DHS concluded that the submitted HRA was not a sufficient basis for BAAQMD to make an informed judgment.

In January, 1986, the project developer provided to BAAQMD a protocol for a supplemental HRA. This protocol was reviewed by BAAQMD and DHS, and eventually a new consultant was hired to prepare the supplemental HRA.

(Footnote continued from previous page)

other labor disputes shall be at the sole discretion of the Party having the difficulty),

(4) when the non-performing Party is able to resume performance of its obligations under this Agreement, that Party shall give the other Party written notice to that effect, and

(5) capacity payments during such periods of force majeure on Seller's part shall be governed by Section E-2(c), Appendix E.

(c) In the event a Party is unable to perform due to legislative, judicial, or regulatory agency action, this Agreement shall be renegotiated to comply with the legal change which caused the non-performance.

On July 23, 1986, PG&E met with members of the project development team to discuss extension of the on-line date in the SO4. At this meeting WCCSD presented a letter to PG&E in which WCCSD's force majeure notification was given to PG&E.

After several meetings and much discussion on the force majeure issue, PG&E and WCCSD reached a settlement of the disputed claim to avoid the perceived risks of litigation. The settlement was concluded in June, 1987 and resulted in the amended SO4. Under the amended agreement, the facility size was reduced to a two-phase, 18 MW (12 MW and 6 MW) total. In addition, PG&E obtained greater curtailment rights and lower capacity and energy payments. WCCSD's right to receive fixed prices was delayed by four years.

PG&E submitted this application requesting ex parte approval of the Amended Agreement on August 18, 1987. Protests were filed by several parties. A prehearing conference was held on October 21, 1987, and the application was later set for hearing. Three days of hearing were held from March 28-30, 1988. Apart from PG&E and WCCSD, the Division of Ratepayer Advocates (DRA), the West County Citizens Alliance (Alliance), and the West Contra Costa Horticultural Growers (Rose Growers) actively participated in the hearings. Opening and closing briefs were filed by April 20, 1988.

III. Positions of the Parties

A. PG&E

PG&E submits that the only determinations which should be made by the Commission on this application are (1) if there was a genuine dispute between PG&E and WCCSD and (2) whether the Amended Agreement is a reasonable settlement of that dispute. PG&E believes that the uncertainties surrounding the interrelationship of the force majeure clause and the five-year operational deadline in the SO4 are sufficient for the Commission to validate the nature of the "genuine dispute." PG&E then concludes that the concessions

it has obtained from WCCSD in the Amended Agreement make the settlement a reasonable one from the ratepayer's perspective.

1. The Amended Agreement Is Significantly Better Than the Original Agreement.

PG&E estimates that the Amended Agreement will result in a $52.4 million reduction in overpayments from the original agreement. This estimate was derived by comparing the original price terms for a 27.8 MW project coming on-line in 1988 to payments for a two-phase project (12 MW and 6 MW) beginning in 1993.

Since PG&E has been required to purchase power from Qualifying Facilities (QF) at avoided cost, the utility believes its estimated savings in overpayments is properly based upon the Commission's approved payments of avoided costs as specified in the standard offers.

2. A Viability Standard Should Be Rejected.

PG&E submits that DRA's viability standard, i.e. a utility should renegotiate a power purchase agreement only if the QF can show that it was viable under the original agreement, should not be followed in this application. PG&E argues that a viability standard had not been expressly adopted by the Commission at the time PG&E renegotiated the agreement with WCCSD. Thus, PG&E believes use of DRA's standard for this application would be a retroactive test.

PG&E cites prior Commission decisions for the proposition that a renegotiated power purchase agreement should result in savings when compared to expected avoided costs under the standard offers. And in this application, PG&E asserts that it has shown the Amended Agreement results in significant ratepayer benefits when compared to the original standard offer agreement.

PG&E points out that to meet DRA's viability standard, PG&E would be compelled to argue WCCSD's position that the project was viable or that a force majeure event extended the deadline.

Such arguments could be contrary to PG&E's own positions taken in negotiations with the QF.

PG&E further contends that a showing of viability forecloses the avenue for settling a legitimate dispute. If PG&E or the QF is required to show that the project is or is not viable, then the dispute would not be settled or negotiated. PG&E submits that this showing of viability is at odds with the Commission's stated preference for the settlement of disputes.

3. **A Force Majeure Event Does Not Extend the On-Line Deadline.**

PG&E does not believe that it is necessary for the Commission to resolve the force majeure issue to decide this application. However, since the protestants have succeeded in making it an issue, PG&E reluctantly has set forth its position on force majeure.

PG&E contends that a force majeure event does not extend the five-year on-line deadline in the agreement. PG&E believes that the five-year deadline was both the stated and the understood basis of the fixed prices for interim Standard Offer No. 4. If operation does not begin within the five year period, then PG&E submits that the QF cannot qualify for the fixed prices. PG&E characterizes the QF's delivery of power within the five-year period as a condition precedent to the standard offer. PG&E argues that such a condition is not extended by force majeure as an obligation of the contracting party may be extended.

B. WCCSD

WCCSD states that the Commission to date has not adopted guidelines for the renegotiation of standard offers. So far, renegotiated contracts have been found reasonable and are approved if they are based on a "colorable claim" and will yield "substantial ratepayer benefit" when compared to the original agreement. WCCSD further notes that a QF's ability or inability to perform under the original contract should not be determinative of

whether negotiations should occur, but is an indication of the level of concessions the utility should seek in any renegotiation.

WCCSD submits that PG&E's decision to renegotiate the power purchase agreement with WCCSD was reasonable. WCCSD asserts that its claim of force majeure would have resulted in litigation, that the litigation would have consumed considerable time and resources, that WCCSD had presented a "colorable claim," and that PG&E risked a claim of bad faith if it had refused to negotiate. WCCSD concludes that all of these factors amply support PG&E's decision to renegotiate the agreement.

WCCSD states that the Amended Agreement will yield significant ratepayer benefits when compared to the original agreement. The Amended Agreement provides for greater dispatchability, deferral of start-up, downsizing of the facility, and reduced capacity and energy payments. The total benefits are estimated at $40-52 million by DRA and PG&E.

WCCSD argues that DRA's standard is one of indisputability in that the applicant utility and the QF must make a showing of absolute certainty that the project was viable and the QF could have performed under the original agreement. WCCSD states that such a standard has not been endorsed by the Commission and would be impossible for the contracting parties to meet.

WCCSD also asserts that no one can determine with certainty whether its claim of force majeure would have been upheld. If WCCSD is forced to litigate this issue and ultimately does prevail, then WCCSD points out that it will be able to enforce its full contract rights. WCCSD conceivably then could build a full-size facility and could sell power at full standard offer prices under an extended performance deadline. WCCSD further points out that PG&E's ratepayers could bear the economic burden of this result.

Finally, WCCSD states that it and PG&E have expended considerable time and resources in renegotiating the agreement and

in pursuing this application. This effort has been expended in reliance upon existing Commission policy for judging renegotiated agreements. WCCSD believes that any change in this policy should not be retroactively used for this application.

C. DRA

DRA submits that PG&E has failed to meet its burden of proving that the renegotiated agreement is reasonable. DRA asserts that WCCSD's claim of force majeure was not well founded and that an investigation by PG&E at the time renegotiations were underway would have revealed this. DRA further asserts that an investigative effort by PG&E at that time would have disclosed that WCCSD was compelled to downsize its project and was not offering PG&E a real concession on project size. Based upon the evidence received during the hearings, DRA contends that the settlement reached by PG&E and WCCSD has been shown to be contrary to the best interests of the ratepayers. For this reason, DRA believes the Commission should deny the application.

1. The HRA Requirement Was Foreseeable.

DRA notes that the force majeure clause in the agreement between PG&E and WCCSD defines force majeure events as "unforeseeable causes." DRA believes that the BAAQMD's HRA requirement was a foreseeable occurrence because other waste-to-energy projects in California had been required to submit HRA's. DRA asserts that a competent project manager would have known what the emerging regulatory issues and requirements were in California. DRA points out that WCCSD's project manager acknowledged that contacts with other project managers and regulatory agencies were part of his job duties. He, however, did not know whether anyone representing WCCSD had talked with the San Diego Air Quality Management District (SDAQMD)about its imposition of an HRA requirement on the waste-to-energy project in its jurisdiction. DRA believes this omission is significant since WCCSD could

have learned about the emerging HRA requirement simply by telephoning SDAQMD.

2. WCCSD Did Not Comply With the Notice Requirement for Force Majeure.

DRA points out that the force majeure clause in the original agreement requires WCCSD to give written notice to PG&E within two weeks of the occurrence of the force majeure. Although WCCSD has suggested that there are several potential force majeure events, DRA and PG&E agree that the only force majeure event which they would recognize is the imposition of the HRA requirement.

DRA states that the only document which would meet the written notice requirement of force majeure is dated July 23, 1986, some 19 months after the November, 1984 imposition of an HRA requirement by BAAQMD. DRA submits that WCCSD's failure to timely notify PG&E of the force majeure is a fatal flaw in its claim. DRA further points out that WCCSD has made no showing as to why the two-week period for giving notice should be considered unreasonable or otherwise should be excused. Instead, DRA asserts that WCCSD has simply ignored the requirement of timely written notice.

3. Any Delays in Meeting the HRA Requirement Are Attributable to WCCSD.

Even if the HRA requirement was a force majeure event of which WCCSD properly notified PG&E, DRA submits that the difficulty and delay WCCSD has experienced in meeting this requirement are due to the project management.

DRA points out that WCCSD took 11 months to submit an HRA which was found to be inadequate by the DHS. DRA believes that WCCSD's failure to submit a protocol to BAAQMD before undertaking the HRA is a significant cause of the finding of inadequacy. Such a protocol would have been reviewed by BAAQMD before any work on the HRA was undertaken so that the applicant would know in advance of any disagreement BAAQMD might have with the assumptions to be relied upon in the HRA. However, WCCSD did not submit a protocol,

and DRA concludes that the possible rejection of the HRA was a substantial risk assumed by WCCSD's project management.

4. **The Proposed Project Was Not Viable at the Time PG&E Renegotiated the Agreement.**

DRA cites a recent concurrence by Commissioner Wilk in which the lack of a record on a proposed project's viability is lamented. DRA then submits the record in this application proves that the original project proposed by WCCSD was not viable and that PG&E, by renegotiating the original agreement has given life to a dead project.

DRA asserts that WCCSD has repeatedly changed the project size over its ten-year history. This uncertainty over project size indicates to DRA that the project has been poorly planned from the very start and that WCCSD cannot build the size plant specified in the original agreement.

DRA observes that WCCSD still does not have commitments from the cities for adequate waste streams to fuel the proposed project. Without these commitments, DRA believes that WCCSD's plans to build a project of any size are very speculative.

DRA also notes that WCCSD's efforts to downsize the project have resulted in a cancellation of the first application submitted to BAAQMD. WCCSD will have to submit a new application to BAAQMD if it does proceed with a downsized project.

D. Alliance

The Alliance states six reasons why the Commission should deny this application:

1. The renegotiated agreement is not in the public interest.

2. The delay in meeting the original agreement's requirements is due to project management and not to regulatory changes.

3. WCCSD's force majeure claim lacks merit.

concludes that this application may become a precedent which will have far greater economic consequences than the power deliveries that WCCSD may make under the renegotiated agreement.

E. Rose Growers

1. WCCSD's Alleged Force Majeure Cannot be Proven.

The Rose Growers point to a number of defects in WCCSD's claim of force majeure.

First, although WCCSD has raised this claim as the principal justification for the renegotiated agreement, WCCSD has not yet clearly identified the force majeure event. Although DRA and PG&E have agreed that the imposition of the HRA requirement is the only identified force majeure event, WCCSD has not stated its position as forthrightly.

Second, the Rose Growers believe that the very nature of the proposed project, i.e. burning garbage, should have alerted WCCSD to the possibility that an HRA could be required. However, defying common sense and ignoring trends in California, WCCSD did not avoid "obvious pitfalls" and instead has "fallen headlong" into them.

Third, the Rose Growers charge that after the HRA requirement was imposed, WCCSD selected an inexperienced consultant to perform the HRA over a short period of time with inadequate funding. Had WCCSD taken more care in selecting a consultant and in defining the scope of work, the HRA requirement might not have been found to be inadequate by BAAQMD.

Fourth, the Rose Growers also assert that WCCSD failed to give PG&E written notice of the force majeure within two weeks of its occurrence as required by the agreement.

2. WCCSD's Proposed Project Lacks Societal Benefit.

Although both PG&E and WCCSD have asked the Commission to exclude any consideration of environmental issues, the Rose Growers

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4. PG&E did not meet its responsibility to protect its ratepayers in renegotiating the agreement with WCCSD.

5. The extension of the on-line date in the renegotiated agreement is not beneficial to the ratepayers when compared to other alternatives.

6. If approved by the Commission, the renegotiated agreement will set a bad precedent for other power purchase agreements which may be renegotiated.

The Alliance asserts that WCCSD has grossly mismanaged this project. The delays which have occurred are in the Alliance's view entirely attributable to WCCSD's poor planning and failure to work with the affected cities and communities.

The Alliance also takes PG&E to task for renegotiating the agreement with WCCSD without carefully examining the force majeure claim. The Alliance disputes the validity of this claim and believes that PG&E ignored its duty to ratepayers by failing to evaluate the project's chances of complying with the original agreement's requirements.

The Alliance contends that if the original agreement is terminated, then PG&E's ratepayers will save a total of $63 million. The Alliance bases this estimate of savings on the cheaper energy resources available in the Pacific Northwest. The Alliance also states that the Amended Agreement would result in payments $10.7 million greater than equivalent purchases from the Pacific Northwest.

Finally, the Alliance notes that PG&E has some 9,297 MW of QF power under contract. Of this amount a significant percentage is expected not to reach completion. However, if the Commission approves this application and revives a failing project, the Alliance believes that many more of these otherwise unsuccessful projects will be able to extend their agreements with PG&E and eventually will sell power to the utility. The Alliance

concludes that this application may become a precedent which will have far greater economic consequences than the power deliveries that WCCSD may make under the renegotiated agreement.

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Fourth, the Rose Growers also assert that WCCSD failed to give PG&E written notice of the force majeure within two weeks of its occurrence as required by the agreement.

2. WCCSD's Proposed Project Lacks Societal Benefit.

Although both PG&E and WCCSD have asked the Commission to exclude any consideration of environmental issues, the Rose Growers

point out that the applicants have advocated societal benefits of the proposed project. If such societal benefits are to be considered, then the Rose Growers believe that the Commission also must consider the project's potential for emitting toxic substances which may endanger human life in Contra Costa County.

The Rose Growers also state that apart from the health hazards, the proposed project could have a detrimental impact on the surrounding horticultural industry.

3. PG&E Was Imprudent in Renegotiating the Agreement with WCCSD.

The Rose Growers criticize PG&E for not ascertaining prior to renegotiating the agreement with WCCSD whether or not WCCSD had a viable project. The Rose Growers note at the time PG&E renegotiated the agreement WCCSD had no commitments for waste streams, the project already had been downsized, WCCSD did not own the project site, WCCSD had not met the HRA requirement, and PG&E had a substantial oversupply of resources available in the agreement's power delivery period. In short, the Rose Growers believe PG&E did not examine WCCSD's claims with the careful scrutiny that the utility owed to its ratepayers.

The Rose Growers submit that if the Commission reviews the application and the evidence adduced at the hearings with the careful scrutiny PG&E should have used, then the Commission will deny the application and will not approve the Amended Agreement.

IV. Discussion

In D.88-10-032 we adopted final guidelines to govern our consideration of proposed settlements between electric utilities and QFs. Although this settlement was reached even before the proposed guidelines had been issued for comment, we have examined it in light of the final guidelines since they represent our preferred means of analyzing proposed utility/QF settlements.

This application stems from a dispute between PG&E and WCCSD. WCCSD has an interim SO4 contract. WCCSD would like additional time, past the five-year deadline in the contract, within which to come on-line. WCCSD claims that it is entitled to additional time, based on its interpretation of "force majeure." PG&E disagrees with that interpretation. However, in lieu of litigating this dispute on the merits, PG&E (with WCCSD's support) requests our approval, and prospective finding of reasonableness, of the Amended Agreement. This agreement would provide WCCSD with its desired extension in return for various concessions by WCCSD that would save the utility (and its ratepayers) money relative to the projected payments were WCCSD able to perform under its existing contract. We find no basis in the record on which to justify this prospective finding that the costs that PG&E would incur under the Amended Agreement are reasonable. Accordingly, we deny the application.

We do not reach the merits of the force majeure claim. The point of a settlement, among other things, is to obviate the need for full litigation on the merits. However, for the Amended Agreement to be attractive, (1) WCCSD would have to prevail on the merits of its claim, and (2) the relief accorded WCCSD would have to preserve to it all the benefits of the existing contract while allowing it to come on-line long after the present deadline. Ratepayers are not otherwise exposed to overpayments under the existing contract because the project envisioned in the existing contract almost certainly cannot be built, as provided in the contract. The size, design, and fuel supply of this project are continually changing and are still so unsettled as to suggest that the downsizing in the Amended Agreement was no concession at all. The five-year deadline for on-line status runs in December 1988. There is no evidence, beyond the bare assertion of WCCSD management, that the project could meet this on-line date.

Settlements avoid the risk of litigation. We cannot quantify that risk, but qualitatively we give it weight in support of settlements generally, and this settlement in particular. Weighing heavily against any risk that this settlement avoids are the important principles that it compromises.

The five-year deadline is probably the single most important provision of the standard offers for the protection of ratepayer interests. It gives planning certainty to the utility, limits ratepayer exposure, and allows new QFs to replace failed projects and to do so under contracts that reflect the utility's current needs. Assuming that circumstances might arise where this provision should be modified through negotiation, the record must demonstrate clearly and convincingly that the modification serves the ratepayers' interest. Given the vagaries of WCCSD's project, we conclude that this evidentiary burden is not met.[2]

This protection has special force in the case of contracts, such as those under interim Standard Offer 4, containing prices that are fixed over a long period of years. When we approved that offer, California faced major uncertainties in its electric supply picture. The most obvious of these uncertainties was the fate of the San Onofre and Diablo Canyon nuclear projects, which were years overdue and still not on-line. The picture today is different.

We certainly intend to honor interim Standard Offer 4 contracts where the QF meets its obligations under the contract. We have also approved modifications to those contracts, where the

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2 Under final Standard Offer 4, the QF in some instances has up to eight years to come on-line. However, the reason for this longer period is that such QFs defer or avoid a utility resource with an equally long lead-time. Thus, the ratepayers bear the risk of a long QF lead-time only where they would be exposed to an equally lengthy lead-time, were the utility to have to build the avoidable resource.

modifications provided clear and substantial benefits to ratepayers, relative to the existing contract.[3] But where the QF wants relief from a fundamental provision (such as the five-year deadline) of an existing contract, or requests sweeping changes to the project, then the utility should seek concessions based on its current projections of avoided cost.[4] If a QF developer were able to substitute a new project, or indefinitely prolong an old project, under an existing contract, then ratepayers' exposure to risk is increased in precisely the way that the five-year deadline was supposed to forestall.

This brings up another principle that would be compromised were we to grant this application. One of the fundamental considerations supporting the whole QF program, and a major benefit provided to ratepayers by QFs, is that QFs absorb the risks inherent in project development. Delay is certainly one of those risks. If we freely allowed extensions of the five-year deadline, development risk is shifted to ratepayers. Moreover, the risk is asymmetric: if the contract price seems high relative to current projections of avoided cost, the QF developer will seek an extension; if the contract price seems low, the QF developer will abandon the project and seek a new contract at the current, higher

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3 See, e.g. D.87-07-086, approving a dispatchability amendment sought by Basic American Foods, Inc., to its interim Standard Offer 4 contract with PG&E. The amendment was sought for purposes of Energy Commission certification. The case did not involve any question of the QF's ability to build the project as contemplated under the existing contract, nor did it involve extension of the five-year deadline.

4 This does not mean that the utility and QF are restricted to strict short-run marginal cost (i.e., Standard Offer 1) prices in such instances. For example, the QF might be able to provide load-following or other adders in return for a more favorable payment stream.

prices. We cannot countenance this kind of speculation at the expense of ratepayers.

In viewing the Amended Agreement from the standpoint of current projections of avoided cost, rather than in relation to the existing contract, we merely apply our stated policy that concessions sought by the utility should be proportionate to the extent and significance of the modifications sought by the QF. (See D.87-07-086, mimeo., p. 5.) We find, in the circumstances of this application, that WCCSD is essentially trying to replace a failed project with a new one, and that in such circumstances the standard of reasonableness requires comparison not only to the existing contract but also to current projections of avoided cost.

PG&E has not provided a record demonstrating reasonableness under the appropriate standard.[5] Thus, we have no sufficient basis to grant this application.

This disposition leaves PG&E and WCCSD with many choices. They could execute a Standard Offer 1 contract for this project to replace the existing contract. WCCSD could try to build the project by the end of this year, as provided in the latter contract. PG&E could try in a new application to demonstrate that the Amended Agreement (or a new agreement with further price concessions) satisfies the appropriate standard of reasonableness. The record suggests that none of these options would be workable. What is far preferable from every standpoint is for WCCSD to abandon the existing contract, further refine its project, and await the availability from PG&E of a final Standard Offer 4 or a Standard Offer 2 contract. Either or both of these offers may be available as a result of our resource plan review following the

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5 Some of the intervenors suggest that the Amended Agreement would still entail payments to WCCSD significantly higher than current projections of avoided cost. We make no finding on this point.

Energy Commission's adoption later this year of its Seventh Electricity Report.

Because we are not ruling on the merits of WCCSD's "force majeure" claim, WCCSD may still litigate the matter in a complaint filed before this Commission. There are many issues of law and fact in that claim. Resolving them will do absolutely nothing to help WCCSD with the many planning, siting, and permitting problems that have delayed its project, and that may continue to delay its project whether it wins or loses on the merits of its claim. The burden of such litigation would fall heavily upon the parties, this Commission and, ultimately, the ratepayers.

It is in light of that fact and in the spirit of our policy favoring reasonable settlements of disputes, that we point out an alternative which PG&E and WCCSD may consider. Within the remaining time pending WCCSD's on line date, these parties may renegotiate the current SO4 agreement whereby WCCSD would relinquish its force majeure claim in exchange for contract terms which would leave ratepayers indifferent to the renegotiation.

More specifically, the present contract could be extended until such time as this Commission approves a revised Standard Offer 2. The parties could agree to substitute the terms of the revised SO2 for the present SO4 contract. Provided that revised SO2 is made available to WCCSD on exactly the same terms as it will be available to all other similarly situated projects, ratepayers would be assured that any payments to WCCSD in the future would be as reasonable as any other future project under revised SO2.

V. Revisions Responding to Comments on Proposed Decision

Pursuant to Public Utilities Code Section 311 and the Commission's Rules of Practice and Procedure, the Proposed Decision was published on May 27, 1988, and various parties filed timely comments. Also, DRA moved to strike WCCSD's comments on the

PG&E's ratepayers are poorly served by the negotiated agreement before us.

Although our responsibilities to the ratepayers have required us to focus on what some may consider relatively narrow issues of contract enforcement, the record in this proceeding contains a great deal of information regarding the many difficulties this project has experienced in assessing the risks posed both to human health and to the environment as a whole. We know also that the problem of solid waste disposal in general raises difficult resource and planning issues. These important questions must be resolved by the appropriate local and state authorities; PG&E's ratepayers must not be forced to maintain the viability of a project experiencing difficulties in the permitting process unless net benefits to those ratepayers can be proven.

Findings of Fact

1. WCCSD entered into an interim SO4 contract with PG&E for the purchase of power from a 27.8 MW facility with energy deliveries to begin by December 30, 1988.

2. In November 1984 BAAQMD informed WCCSD that an HRA would have to be prepared before a final permit could be issued for WCCSD's proposed project.

3. In December 1985 the first HRA submitted by WCCSD was found inadequate by DHS, an advisor to BAAQMD.

4. On July 23, 1986, PG&E and WCCSD met to discuss extension of the on-line date in the interim SO4 contract; at this meeting WCCSD gave PG&E written notice of force majeure.

5. PG&E and WCCSD reached a settlement in June 1987; under this settlement, an Amended Agreement was executed. It reduced the facility size to a two-phase, 18 MW total, and it also grants PG&E greater curtailment rights, reduces the capacity and energy payments, and delays the fixed price schedule, relative to the existing SO4 contract.

CORRECTION

THIS DOCUMENT HAS

BEEN REPHOTOGRAPHED

TO ASSURE

LEGIBILITY

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grounds that they exceed the page limits and allowable scope of comments under Rule 77.3. The gist of DRA's motion is that WCCSD appended to its comments, not only alternate findings and conclusions (Rule 77.3 expressly permits this), but a completely rewritten alternate opinion. We agree with DRA that our rules do not permit or invite such rewritten opinions. At most, commenters can note that, if their proposed findings and conclusions are accepted, specific portions of the body of the decision should be revised accordingly. DRA's motion to strike is granted with respect to the alternate opinion appended to WCCSD's comments. In all other respects, the motion is denied.

After considering the comments, we affirm the result reached in the Proposed Decision. However, the discussion there was criticized on various grounds, and we have revised it extensively. Two points in the revisions deserve emphasis. First, the ground for denial of the application is that the applicant has not provided a suitable basis for the prospective finding of reasonableness that it seeks. We do not reach the merits of the force majeure issue. Second, in denying the application, we do not criticize the applicant for trying to reach a settlement to resolve the various problems raised by its existing contract with WCCSD. Our decisions consistently recognize the duty of utilities to deal in good faith with QFs. While we do not here try to define all aspects of that duty, it certainly includes meeting and conferring with a QF when the QF so requests, and making timely responses (whether affirmative or negative) to QF proposals. (Cf. D.82-01-103, 8 CPUC 2d 20, 84-85.)

We acknowledge that the QF party to the rejected power purchase agreement is a proposed waste-to-energy producer, a technology generally regarded as promising important environmental and economic benefits for the future. Our rejection of this agreement does not reflect a prejudice against this technology, but is based solely on our judgment that the long-term interests of

PG&E's ratepayers are poorly served by the negotiated agreement before us.

Although our responsibilities to the ratepayers have required us to focus on what some may consider relatively narrow issues of contract enforcement, the record in this proceeding contains a great deal of information regarding the many difficulties this project has experienced in assessing the risks posed both to human health and to the environment as a whole. We know also that the problem of solid waste disposal in general raises difficult resource and planning issues. These important questions must be resolved by the appropriate local and state authorities; PG&E's ratepayers must not be forced to maintain the viability of a project experiencing difficulties in the permitting process unless net benefits to those ratepayers can be proven.

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6. PG&E, by its application, seeks a prospective finding of reasonableness for its payments to WCCSD pursuant to the Amended Agreement.

7. PG&E estimates that the Amended Agreement will result in a $52.4 million reduction in overpayments from the existing contract.

8. The Alliance estimates that if the original agreement is terminated and the Amended Agreement is not approved, then PG&E's ratepayers will save a total of $63 million.

9. The project envisioned in the existing SO4 contract probably cannot be built, consistent with the contract.

10. For the Amended Agreement to be attractive, (1) WCCSD would have to prevail on the merits of its claim, and (2) the relief accorded WCCSD would have to preserve to it all the benefits of the existing contract while allowing it to come on-line long after the present deadline.

11. The five-year deadline is probably the single most important provision of the standard offers for the protection of ratepayer interests. It gives planning certainty to the utility, limits ratepayer exposure, and allows new QFs to replace failed projects and to do so under contracts that reflect the utility's current needs. It also places the risk of delay in project development on the QF developer. One of the justifications for the QF program is that the QF developer bears such risks.

12. If a QF developer were able to substitute a new project, or indefinitely prolong an old project, under an existing contract, then ratepayers' exposure to risk is increased in precisely the way that the five-year deadline was supposed to forestall.

13. In the circumstances of this application, WCCSD is essentially trying to replace a failed project with a new one; in such circumstances the standard of reasonableness requires comparison not only to the existing contract but also to current projections of avoided cost.

Conclusions of Law

1. Today's decision does not reach the merits of WCCSD's force majeure claim.

2. Assuming that circumstances might arise where the five-year deadline should be modified through negotiation, the record must demonstrate clearly and convincingly that the modification serves the ratepayers' interest. PG&E and WCCSD have not met this evidentiary burden.

3. Where the QF wants relief from a fundamental provision (such as the five-year deadline) of an existing contract, or requests sweeping changes to the project, then the utility should seek concessions based on its current projections of avoided cost, although a payment stream more favorable to the QF than Standard Offer 1 prices may be appropriate, e.g., if the QF commits to provide additional performance features, such as load following.

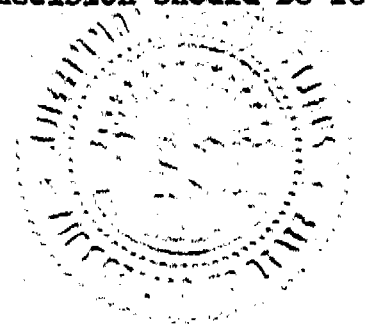
4. It is the policy of this Commission that concessions sought by the utility should be proportionate to the extent and significance of the modifications sought by the QF.

5. PG&E has not provided a record demonstrating reasonableness of the Amended Agreement under the appropriate standard. Thus, there is no sufficient basis in the record to grant this application.

6. WCCSD may litigate the merits of its force majeure claim before this Commission, should it choose to press its claim.

7. WCCSD and PG&E may continue to negotiate alternate contract modifications until the current SO4 agreement terminates.

8. The Commission's Rules of Practice and Procedure do not permit or invite commenters to submit an entire alternate opinion. At most, commenters can note that, if their proposed findings and conclusions are accepted, specific portions of the body of the decision should be revised accordingly.



O R D E R

Therefore, IT IS ORDERED that the motion of Division of Ratepayer Advocates to strike the comments of the West Contra Costa Sanitary District (WCCSD) on the Proposed Decision is granted with respect to the alternate opinion appended to WCCSD's comments. In all other respects, the motion is denied. The approval sought by Pacific Gas and Electric Company of the Amended Agreement with WCCSD is denied.

This order is effective today.

Dated December 9, 1988, at San Francisco, California.

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

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

Victor Weisser, Executive Director

and DRA concludes that the possible rejection of the HRA was a substantial risk assumed by WCCSD's project management.

4. The Proposed Project Was Not Viable at the Time PG&E Renegotiated the Agreement.

DRA cites a recent concurrence by Commissioner Wilk in which the lack of a record on a proposed project's viability is lamented. DRA then submits the record in this application proves that the original project proposed by WCCSD was not viable and that PG&E, by renegotiating the original agreement has given life to a dead project.

DRA asserts that WCCSD has repeatedly changed the project size over its ten-year history. This uncertainty over project size indicates to DRA that the project has been poorly planned from the very start and that WCCSD cannot build the size plant specified in the original agreement.

DRA observes that WCCSD still does not have commitments from the cities for adequate waste streams to fuel the proposed project. Without these commitments, DRA believes that WCCSD's plans to build a project of any size are very speculative.

DRA also notes that WCCSD's efforts to downsize the project have resulted in a cancellation of the first application submitted to BAAQMD. WCCSD will have to submit a new application to BAAQMD if it does proceed with a downsized project.

D. Alliance

The Alliance states six reasons why the Commission should deny this application:

1. The renegotiated agreement is not in the public interest.

2. The delay in meeting the original agreement's requirements is due to project managment and not to regulatory changes.

3. WCCSD's force majeure claim lacks merit.

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It is in light of that fact and in the spirit of our policy favoring reasonable settlements of disputes, that we point out an alternative which PG&E and WCCSD may consider. Within the remaining time pending WCCSD's on line date, these parties may renegotiate the current SO4 agreement whereby WCCSD would relenquish its force majeure claim in exchange for contract terms which would leave ratepayers indifferent to the renegotiation.

More specifically, the present contract could be extended until such time as this Commission approves a revised Standard Offer 2. The parties could agree to substitute the terms of the present SO4 contract for those of the revised SO2. Provided that revised SO2 is made available to WCCSD on exactly the same terms as it will be available to all other similarly situated projects, ratepayers would be assured that any payments to WCCSD in the future would be as reasonable as any other future project under revised SO2. Furthermore, WCCSD's substantial development investment would not be jeopardized and ratepayers would not be at risk for WCCSD's force majeure claim.
A contract modification along such lines would represent a fair balance of the concessions made and the benefits accruing to each.

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4. It is the policy of this Commission that concessions sought by the utility should be proportionate to the extent and significance of the modifications sought by the QF.

5. PG&E has not provided a record demonstrating reasonableness of the Amended Agreement under the appropriate standard. Thus, there is no sufficient basis in the record to grant this application.

6. WCCSD may litigate the merits of its force majeure claim before this Commission, should it choose to press its claim.

7. WCCSD and PG&E may continue to negotiate alternate contract modifications until the current SO4 agreement terminates.

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This order ~~becomes~~ effective ~~30 days from~~ today.

Dated DEC 9 1988, at San Francisco, California.

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

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Victor Weisser, Executive Director