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ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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APR 27 1989

COLMAC ENERGY, INC., a California Corporation, Complainant, vs. SOUTHERN CALIFORNIA EDISON COMPANY, a California Public Utility, Defendant.	Case 87-11-013 (Filed November 12, 1987)

Marron, Reid & Sheehy, by Ivor Samson, Attorney at Law, for Colmac Energy, Inc., complainant.
Richard K. Durant, Carol B. Henningson, and Frank A. McNulty, Attorneys at Law, for Southern California Edison Company, defendant.
O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, by Glenn M. Feldman, Attorney at Law, for Cabazon Band of Mission Indians, and Katherine A. Lind, Attorney at Law, for County of Riverside, Coachella Valley Association of Governments, interested parties.
Hallie Yacknin, Attorney at Law, and Thomas Thompson, for the Division of Ratepayer Advocates.

O P I N I O N

I. Background

Colmac Energy, Inc. (Colmac) filed a complaint against Southern California Edison Company (Edison) on November 12, 1987.

The general factual background to the complaint began in 1984 and grew out of Colmac's interest in developing a project to convert biomass to electric power. The source of the biomass fuel was originally cattle manure, but eventually Colmac decided to use

agricultural waste and commercial wood waste as a fuel for the facility.

On April 17, 1985, Colmac and Edison executed a contract based on interim Standard Offer No. 4 (SO4) for the sale of 45 megawatts (MW) of firm capacity and associated energy from a biomass-fired facility to be located in Coachella. The federal Public Utility Regulatory Policies Act of 1978 (PURPA) requires utilities to purchase electricity produced by certain qualifying facilities (QFs), including biomass-fired facilities, at the utility's avoided cost, or the costs the utility avoids by purchasing power rather than generating an equivalent amount of power from its own system.

After the contract was signed, financial and other considerations led Colmac to consider relocating the project to a site on the reservation of the Cabazon Band of Mission Indians, near Mecca, about six miles from the original Coachella site. Colmac began to explore with Edison the possibility of relocating the project to the Mecca site.

The heart of this dispute concerns whether Edison ever consented to the relocation of the project. It is undisputed that after months of discussions on various topics, Edison informed Colmac on November 3, 1987, that it would not approve an amendment to the contract to allow the relocation. Colmac filed its complaint nine days later.

The complaint alleges that: (1) Edison failed to negotiate in good faith with Colmac concerning the relocation request; (2) Edison breached its agreement to allow the relocation of the project; (3) Colmac reasonably relied on Edison's representations that it was preparing the necessary amendments to the contract and that Colmac suffered economic losses because of its reliance on Edison's representations; (4) Edison has violated certain regulations of the Federal Energy Regulatory Commission by refusing to allow Colmac to interconnect with Edison's system; and

(5) Colmac should receive extensions of the deadlines we established in the QF Milestone Procedure (QFMP) because the intervention of the Coachella Valley Association of Governments (CVAG) and the County of Riverside in Colmac's relations with Edison constitutes an uncontrollable force under the contract.

Colmac asks the Commission to order Edison to amend the contract to allow the site relocation; to reflect the interconnection with the Imperial Irrigation District (IID) rather than direct interconnection with Edison; to extend the termination date to account for the direct and indirect delays caused by Edison's actions; to extend the fixed energy payments beyond 1999 as necessary; and to extend the capacity payment schedule attached to the contract through 1992, to cover the year the facility is expected to reach firm operation.

Edison answered the complaint on December 18, 1987. In addition to the expected denials of complainant's allegations, Edison asserts that Colmac never met the conditions required for Edison to consent to the modification of the contract. When local opposition arose and alerted Edison to the fact that locating the project on an Indian reservation would remove the environmental review from state and local entities, Edison withdrew its conditional approval. Edison denies that it negotiated in bad faith with Colmac concerning the relocation. Edison further alleges that the complaint seeks relief--essentially an order to Edison to modify an existing contract--that the Commission has previously stated it would not grant. Several defenses based on contract law are also raised.

Prehearing conferences were held on January 29, April 19, and August 22, 1988. Evidentiary hearings were held on September 13-16 and 20-22, 1988. The Commission's Division of Ratepayer Advocates (DRA), CVAG, the County of Riverside, and the Cabazon Band of Mission Indians intervened in the proceeding and participated in the hearings.

The procedures of Public Utilities Code Section 311(d) were followed in developing this decision. The proposed decision of the administrative law judge was issued on February 8, 1989.

Colmac, Edison, DRA, and CVAG and the County of Riverside filed comments on the proposed decision.

We have reviewed and carefully considered the comments. We have incorporated appropriate changes in this decision.

II. Positions of the Parties

A. Colmac's Position

Colmac presents three grounds for its claim for relief.

1. Breach of an Agreement to Change the Project's Location

First, Colmac argues that Edison expressly agreed to the modification requested by Colmac, but Edison has refused to live up to its agreement to modify the contract. Colmac believes that this agreement was in writing, in the form of exchanges of correspondence from January through May 1986.

The correspondence began with a letter of January 6 from Colmac's Vice President and Secretary Charles Johnson to Edison's Robert Ferguson (Ex. 45). The letter stated, "At this time we are formally requesting permission from SCE to change the location of the Plant from the Coachella Industrial Park to industrial land located on the Cabazon Indian Reservation."

Edison's response was a letter of February 24 (Ex. 47). Edison's Ferguson noted in the letter that Edison would review a specific proposal from Colmac and requested a site description for the new location, documents demonstrating Colmac's right to develop the site, and proof that Colmac's fuel sources were as available at the new site as at the old location.

On March 12, Colmac sent Edison a letter providing the requested information, according to Colmac (Ex. 49). The letter enclosed a legal description of the new site and an option agreement for a lease on the property. Approval of the option to lease was pending with the Bureau of Indian Affairs (BIA). The letter also discussed the location of agricultural waste fuel sources for the relocated plant. The letter closed with Colmac's urging Edison "to accept our request for relocation at your earliest convenience."

Edison responded with a letter of April 21 (Ex. 51). This letter raised concerns about the Commission's reaction to the relocation and recommended that Colmac send a letter to the Commission outlining the reasons for the requested relocation. In addition, the letter directed Colmac to "proceed in obtaining from the Imperial Irrigation District an agreed to transmission path to the Edison point of delivery at Mirage Substation." The letter concluded, "We feel that these two pieces of evidence are absolutely necessary for Edison to make the appropriate amendments to the power purchase agreement."

A letter from Colmac on May 2 (Ex. 64) enclosed copies of a letter from IID consenting to the relocation and a letter from then-President Donald Vial of the Commission. Colmac viewed President Vial's letter as "supporting our relocation to Cabazon land." In this letter, Colmac's Sandra Walker wrote, "I assume that we have now met your conditions for approval and expect to receive shortly a letter from you acknowledging SCE's approval of the amendment."

The final piece of correspondence was a letter from Edison to Colmac on May 15 (Ex. 68). The letter acknowledges the receipt of the May 2 letter and enclosures and concludes, "With these approvals it is appropriate to proceed with contract amendments necessary for your project relocation."

Colmac argues that this exchange of correspondence demonstrates the mutual consent necessary for a binding agreement to change the project's location. Colmac stresses that California follows the objective theory of contract, which finds mutual assent in the reasonable meaning of the parties' words and actions and not from unexpressed intentions or understandings. Twice Edison required Colmac to meet certain conditions before Edison would grant its consent to the relocation; twice Colmac fulfilled those conditions, according to Colmac.

Colmac believes that the May 15 letter contains Edison's express consent to the relocation. In the letter, Edison accepts the letters from IID and Commissioner Vial as approvals of the relocation, Colmac argues. Having accepted them, Colmac says Edison went on to agree to modify the original contract to accommodate the relocation: "With these approvals it is appropriate to proceed with contract amendments...."

Colmac states that it justifiably understood at this time that Edison made a firm and unconditional promise to change the project's location. Moreover, nothing Edison did or said in the following 13 months conflicted with this understanding, Colmac asserts.

Colmac thus concludes that Edison has failed to live up to its promise to change the contract's provisions to accommodate the relocation and that Edison has therefore breached the agreement to change the site of the project.

2. Promissory Estoppel

Promissory estoppel is a legal doctrine that may be applied when a party makes a promise to another party, and the promise is such that the party making the promise should reasonably expect the other party to act or refrain from acting in reliance on the promise. The promise will be enforced, even in the absence of a valid contract, if injustice can be avoided only by such enforcement.

In this case, Colmac finds such a situation in Edison's promise to change the facility's location. Colmac sees the letter of May 15, 1986, as a firm promise to amend the contract's location provisions.

Colmac also believes that its reliance on Edison's promise was both reasonable and substantial. In reliance on Edison's promise, Colmac states that it asked IID to perform a method of service (MOS) study for the Mecca site; developed a permitting plan with federal, state, and local agencies; entered

into a lease of the site; performed engineering studies on the site; and relinquished its option to purchase the Coachella site.

Colmac asserts that Edison should have expected Colmac to rely on its promise. Edison knew that Colmac was pursuing these activities, Colmac contends, yet it did nothing to indicate to Colmac that Colmac was proceeding without Edison's concurrence.

Finally, Colmac argues that it would be unjust not to enforce Edison's promise in light of all that has happened. Since Colmac has relinquished its rights to the Coachella site, and since the contract calls for the project to be on line by April 1990, it would be impossible to revive the project at the Coachella site. And without the contract amendments Colmac would be unable to proceed at the Mecca site.

3. Bad Faith

California law imputes a covenant of good faith and fair dealing in every contract. Since the original power purchase agreement is a contract, the parties were subject to this covenant. The covenant requires each party to refrain from doing anything to injure the right of the other party to receive the benefits of the agreement. In addition, the Commission has required utilities to act in good faith in negotiations leading to contracts with QFs (Decision (D.) 82-01-103, pp. 105-106).

Colmac believes that Edison's actions and inactions in response to Colmac's request for a relocation have violated the covenant of good faith and fair dealing. Colmac lists four ways in which Edison has violated its duty to deal in good faith.

a. Failure to Deal with Colmac in a Timely and Professional Manner

Colmac alleges that Edison violated its obligation of good faith and fair dealing because it failed to deal with Colmac in a timely, professional, and businesslike manner.

Colmac argues that Edison was extremely slow in responding to Colmac's request of January 6, 1986, for Edison's

consent to the relocation. Edison's denial of Colmac's request was not conveyed until November 3, 1987, 22 months after Colmac's request. The contract allows 5 years, or 60 months, for the project to come on line. Colmac forecasts that construction of its project will take 26 months, leaving 34 months for all other activities, including permitting, engineering, and financing. Colmac believes that for Edison to consume 22 months out of these 34 months to answer a single request is "monumental" bad faith.

Colmac also argues that Edison led it to believe that Edison had accepted the relocation of the project. Edison's actions from May 1986 to November 1987 were consistent with acceptance of the relocation on May 15, 1986, according to Colmac. Edison's action and its silence in the face of Colmac's repeated inquiries whether Edison needed anything further led Colmac to believe that it had met all requirements. Colmac relied on Edison's actions and inactions and pursued development of the Mecca site, and Edison did nothing to discourage Colmac's reliance.

Edison behaved this way even though Colmac kept it informed of the project's progress. Colmac regularly sent Edison copies of important documents: a request to IID for an MOS study on June 19, 1986 (Ex. 75); a project status report of August 15, 1986, including civil engineering, soil, and hydrology studies that were specific to the Mecca site (Ex. 87); proposed amendments to the contract on September 25, 1986 (Ex. 25); the BIA's acceptance of Colmac's application for a conditional use permit for a biomass-fueled power plant on the Cabazon Indian Reservation (Ex. 109); and the draft (Ex. 114) and final (Ex. 124) copies of the plant connection agreement (PCA) with IID in November and December 1986. This correspondence routinely invited Edison to contact Colmac with any questions or comments, but according to Colmac, Edison never responded to this invitation.

Repeated calls to Edison's Ferguson in January and February 1987 led to promises to work on the amendments, but

eventually responsibility for the Colmac project was reassigned to William McCroskey in February, with no progress having been made on the amendments.

McCroskey received the Colmac file from Ferguson at the same time as over two dozen others, and it took him three months just to organize and become familiar with the file's contents. In about May 1987, McCroskey became aware of the draft amendments that Colmac had submitted in September 1986. John Maybin, Colmac's president, telephoned McCroskey every ten days or so in April and May of 1987 to inquire about the progress on the amendments, and McCroskey represented that he was working on the amendments.

In fact, Colmac continues, McCroskey never produced a document related to the amendments. He testified that he spent time gathering his thoughts and assembling information in preparation to writing the amendments, but he had not actually begun drafting when Edison rejected the relocation request in November 1987. During this time, McCroskey also never requested any information from Colmac.

Colmac believes that Edison's pattern of behavior in its handling of the Colmac request was "more than just bureaucratic inefficiency; SCE has dealt with Colmac in bad faith."

b. Failure to Communicate Edison's Requirements

In anticipation of Edison's claim that Colmac never met the conditions that Edison set for its approval of the relocation, Colmac argues that Edison failed to communicate its requirements. Colmac believes that Edison's suggestion that Colmac should have been aware of these requirements, by inference or assumption, is faulty.

Edison alleged that Colmac failed to supply it with certain details of the transmission service provided by IID. Edison pointed to the letter of May 15, 1986 (Ex. 68), which stated, "Specific details of your interconnection and service agreements with IID will be needed." Colmac asserts that it never

received any communication from Edison that identified what specific details it needed. Edison alleged that its letter of July 29, 1985 (Ex. 29), solicited the details, but Colmac responds that that letter contains no discussion of details.

Colmac points out that the specific details that Edison finally listed in response to an interrogatory from Colmac were in fact met in various documents that Colmac had supplied to Edison on or before December 31, 1986.

Similarly, Edison alleged that Colmac failed to comply to its request for an "agreed to transmission path." However, Colmac argues that the term came up as part of Edison's request conveyed by Edward Meyers' letter of April 21, 1986 (Ex. 55), and Nola's letter of May 15, 1986, indicated that the request had been met. Colmac asserts that Edison never informed it that it had failed to provide details of the agreed-to transmission path.

Edison also alleged that Colmac was informed that it needed to supply Edison with a copy of its transmission service agreement (TSA) with IID. Colmac disputes this contention. Colmac's witnesses testified that no one at Colmac had ever received such a request, and Colmac's repeated inquiries whether Edison needed any further transmission information after it had received a copy of the IID-Colmac PCA were met with silence. Colmac concludes that this argument is an after-the-fact excuse to attempt to justify Edison's bad faith.

Colmac also finds bad faith in Edison's leading Colmac into believing that progress on the amendments was proceeding without problems. Edison made no comments on the draft or final PCA with IID, and Colmac reasonably concluded that Edison accepted the PCA. As has been discussed, McCroskey told Colmac he was working on the amendments starting in the spring of 1987. In addition, Edison never responded to Colmac's repeated inquiries whether Edison needed any further information from Colmac.

c. Shifting and Inconsistent Reasons for Claiming No Agreement to Allow the Relocation

Colmac contends that Edison has supplied shifting and inconsistent reasons for repudiating its consent to the relocation of the project. These reasons have been expressed in various ways--in Edison's responses to the concerns of local governments and agencies, in its answer to the complaint, and in its testimony in this proceeding.

Colmac lists several reasons that it believes Edison has relied on, and Colmac presents its facts and arguments to support its contention that the reasons were not legitimate. These reasons include lack of a formal order from the Commission approving the relocation. Colmac points out that this condition was not conveyed to Colmac until June 29, 1987, well after Colmac had obtained a supporting letter from Commissioner Vial on April 28, 1986, in response to an earlier request by Edison.

The opposition of local governments was a spurious reason, according to Colmac, because it had no bearing on this case and because the head of one of these governments, Riverside County, clarified that Edison's actions in the Colmac matter would have no effect on later relations between the County and Edison (Ex. 269).

Colmac continues by noting that Edison's claimed concern about the interests of ratepayers was not reflected in Edison's dealings with Colmac: Edison never asked for any concessions in exchange for its consent to the relocation.

Edison's asserted concern about the permitting for the project is also invalid, Colmac argues. Even if Edison is assumed not to have any general knowledge about federal jurisdiction over Indian lands, Colmac provided specific information about permitting for its project on October 15, 1986. On that date Colmac sent Edison copies of its application to the BIA for a use permit for the Mecca site and the BIA's notice of acceptance of the application (Ex. 109). Included in the packet sent to Edison was a

summary of permitting requirements. That summary is explicit about the federal role in the permitting for the project and states, "Because of the location of the plant on Indian land, held in trust by the U.S. Congress, no land use permit from Riverside County will be involved." Colmac argues further that the contract with Edison mentions permitting for the limited purpose of requiring Colmac to obtain all necessary permits and that Edison has admitted that it was not really concerned with the permitting of QFs.

As has been discussed previously, Colmac also believes that Edison's claimed concerns about transmission arrangements with IID are a specious reason raised only to camouflage Edison's repudiation of its agreement to allow the relocation of the project. Colmac supplied all documents and information requested by Edison, and Colmac repeatedly inquired about whether Edison needed anything further. Edison never responded to these inquiries, according to Colmac. Colmac concludes, "SCE has continually created one alleged 'requirement' after another; each time one was met by Colmac, SCE created another. The evidence has shown each to be illusory. The scope of SCE's misrepresentations and inconsistencies with respect to transmission issues in this case is so pervasive and egregious as to constitute manifest bad faith."

d. Concealing the Decision to Repudiate the Consent to Relocation of the Project

Finally, Colmac finds bad faith in Edison's behavior after it decided to repudiate its consent for relocation of the project.

Edison decided in May 1987 not to go through with the relocation of the project, Colmac states. But Colmac was not informed of this decision until November 3, six months later. During this period, Colmac sent several letters to Edison that clearly revealed that Colmac was proceeding with its work on the Mecca site, and Colmac had three face-to-face meetings with key

Edison personnel, including those who made the decision not to consent to the relocation. Colmac followed the last of these meetings with a letter that said, "As you know, we have continued to rely on our agreement with SCE concerning approval of our Project's site relocation and contract performance." Despite this clear expression of Colmac's understanding, Edison never disagreed with this statement, and waited over two months before it finally informed Colmac of the decision made six months earlier.

For all of these reasons, Colmac concludes that Edison has violated the covenant of good faith and fair dealing that is a part of every California contract. Colmac believes that these violations justify its requested relief.

4. Colmac's Requested Relief

Colmac's request has many elements, but the basic request is for an order directing Edison to amend the contract to accommodate the Mecca site. Colmac notes that amendments will be necessary to reflect the new location, to compensate for the intervening delay caused by Edison's actions, and to incorporate the role of IID in interconnecting with Colmac and delivering Colmac's power to Edison. Colmac argues that the Commission has the jurisdiction to make such an order.

In addition, Colmac requests that the payments under the contract should be adjusted for the delay. Under interim SO4, the energy payments may be fixed for the first ten years of the project's life. Because the firm operation date will necessarily be delayed due to the dispute with Edison, the first ten years of operation will extend beyond the years explicitly covered in the contract, which extend only to 1999. Colmac suggests that the energy payments within the first ten years of the project's operation but beyond 1999 be paid at the rate established for 1999, 15.6 cents/kilowatt-hour (kWh).

The capacity payments also depend on the date of the project's firm operation. The tables attached to the contract do

not cover projects beginning after 1989. Colmac argues that the payments set forth in the contract should be extended as necessary at the average escalation rate used to develop the payments for projects starting firm operation from 1985 to 1990, 7.6% per year. For the expected firm operation of the project in 1992, the resulting capacity payment would be $246 per kilowatt-year.

B. Edison's Position

Edison agrees with Colmac that a central issue in this case is whether Edison consented to the relocation of the project. As might be expected, Edison comes to the opposite conclusion from Colmac on this issue.

Edison asserts that its acquiescence in Colmac's request was expressly contingent on Colmac's securing both interconnection and transmission arrangements with IID. Up to November 3, 1987, when Edison denied Colmac's request, Colmac had never met this important and necessary condition. In the absence of such an agreement, Edison believes that it was entitled under the contract to deny Colmac's request for modification of the existing contract.

Edison's argument has several elements.

1. Interconnection and Transmission Agreements with IID Are Necessary

The Colmac contract resulted from Colmac's acceptance of SO4. However, SO4, as a form contract, was designed for a typical project that could directly interconnect with Edison's system. Colmac's project, whether located at Coachella or Mecca, is in IID's service territory and is too far from Edison's Mirage substation for a practical direct interconnection to Edison's system, according to Edison. At either location Colmac needed to arrange to get its power to IID's system (interconnection) and from the point of interconnection to Edison's system (transmission service). Thus, at either location Colmac needed to obtain interconnection and transmission agreements with IID and to supply

that information to Edison so that the contract could be appropriately modified.

The need for modification was known to the parties at the time of contracting. Edison states that even in late March 1985, Colmac was still actively considering five sites. Since SO4 was site specific, Edison would not enter into such a contract without proof of site control, a requirement that was later endorsed by the Commission as part of the QFMP.

On April 12, 1985, Colmac obtained an option on the Coachella site. A copy of the option, which served as proof of site control, was provided to Edison on April 17, the same day that the contract was signed. At that point, Edison had understood, based on Colmac's representations, that the project was located near enough to the Mirage substation to permit direct interconnection to Edison's system.

During this time, just before the Commission's suspension of interim SO4 on April 17, many developers were seeking to obtain SO4-based contracts, and Edison often accepted the developer's representations about a project, subject to later analysis. In Colmac's case, Edison agreed to sign the contract even though an MOS study, which determines in detail the scope and cost of a project's interconnection with Edison, had not yet been performed; the MOS study was done after the contract was signed.

When the MOS study was completed in June 1985, it revealed that the project was not near Mirage but was some 20 miles away, according to Edison. At this distance, direct interconnection with Edison was infeasible, and arrangements with IID would be needed. This discovery also made it impossible to complete Appendix A to the contract, the interconnection facilities agreement (IFA).

On July 29, 1985, Edison's Ferguson wrote Colmac's Johnson to inform him that direct interconnection with Edison would require construction of a transmission line, would also require

IID's consent, and would be expensive. He suggested that Colmac work with IID to interconnect with IID's system so that IID could transmit the power to Edison. The letter (Ex. 29) continued:

> "Since it is unclear what the exact nature of the interconnection agreement that you obtain with IID will be, I suggest for the time being that the existing contract be left in place. Necessary amendments can be made after it is clear what is needed as determined by your arrangements with IID."

Colmac pursued Ferguson's suggestion to negotiate transmission and interconnection arrangements with IID, and Colmac understood that Appendix A could not be completed until the arrangements were made final. In October 1985, Johnson wrote Ferguson (Ex. 41):

> "Once again I would like to confirm and acknowledge our prior and continuing understanding that the necessary amendments to our Power Sales Contract will be made at the time the interconnect and wheeling arrangements are completed with the Imperial Irrigation District."

Thus, Edison argues that from mid-1985 Colmac knew that the contract required amendments to reflect its final arrangements with IID and that the amendments could not be completed until Colmac had reached its final arrangements with IID.

2. Colmac Knew that Arrangements with IID Were Needed Before the Contract Could Be Amended to Reflect the New Site

Edison argues that it made clear from the outset of its dealings with Colmac that both interconnection and transmission arrangements with IID were needed before Edison could agree to the relocation of the project.

Even before the contract was signed, Edison told Colmac on January 31, 1985, that, since the project was outside of Edison's territory, Colmac would need to interconnect to IID's system and reach agreement with IID for transmission service to

Edison's system (Ex. 5). Colmac appeared to understand that requirement, and in August 1985, after the MOS study confirmed Edison's initial impression about arrangements with IID, Colmac requested IID to study the cost of interconnecting to IID and transmitting power to Edison (Ex. 33).

Edison reminded Colmac of these requirements after it received the formal request for relocation. Meyers' letter of April 21, 1986, stated that the Commission's support and "an agreed to transmission path to the Edison point of delivery at Mirage Substation" were "absolutely necessary" before Edison could amend the contract (Ex. 55). Edison notes that the term "agreed to transmission path" refers to the means to deliver power from the project to Edison's system and is a common term in the electric industry. It is a contractual term that would normally be defined in a transmission service agreement.

The letter of May 15 (Ex. 68) repeats this requirement:

> "[T]he existing agreement contemplates a direct interconnection with Edison and, therefore, contract changes will be necessary to reflect that your project will now be interconnecting with the IID system. Specific details of your interconnection and service agreements with IID will be needed."

Even after interconnection was arranged when the plant connection agreement was executed between Colmac and IID, Edison asserts, Colmac was aware that a TSA needed to be arranged. Two sections of the PCA (Ex. 124) refer to a TSA "to be entered into." In addition, Ferguson testified that he made it clear in meeting with Colmac personnel that a TSA was required.

Colmac characterized the actions of Edison's personnel in late 1986 and early 1987 as inefficient bureaucracy or bad faith, but Edison argues that its employees' actions were entirely consistent both with Edison's position that Colmac needed to secure transmission arrangements with IID before the contract could be

modified to reflect the relocation and with Edison's understanding that Colmac knew what was required.

Viewed from this perspective, Edison's handling of the amendments takes on an entirely different character. Although Colmac's Maybin complained that Ferguson did not return his calls, he could not recall that he ever left messages; without a message, Ferguson would not know that a return call was expected. Also, Maybin's dissatisfaction with the progress on the amendments never reached the level that led him to try to call Ferguson's supervisor. Similarly, in the initial meeting with McCroskey, the need for amendments was not raised. McCroskey recalled that subsequent conversations with Maybin were checks on the status of the project. According to Edison, no one told McCroskey of any deadline for the amendments or expressed any urgency for the completion of the amendments. He had no reason to believe, or to think that Colmac believed, that the PCA signed in December 1986 could also serve as a TSA. McCroskey understood that the amendments could not be completed until the TSA was supplied.

Thus, Edison argues that, rather than bad faith or bureaucratic inefficiency, all of Edison's acts toward Colmac were consistent with Edison's view of the circumstances during this time. Edison was not prepared to amend the contract until both the PCA and TSA had been secured, and it was Edison's understanding that Colmac knew that both these agreements were required.

3. **Interconnection and Transmission Service Agreements Were Prerequisites to Edison's Consent to the Relocation**

Edison contends that the interconnection and transmission service agreements were not mere details, as Colmac portrayed them. Rather, Edison would not agree to any contract modifications without assurance that Colmac could deliver the power contracted for.

The main reason for Edison's position was its uncertainty about IID's transmission capacity. At this time, the existing transmission allocation on IID's system was almost entirely spoken for by other QFs. Capacity for a project the size of Colmac's did not exist, and Edison was concerned that Colmac would not be able to proceed with its project. Colmac apparently viewed a letter of March 21, 1986, to Colmac from IID as a transmission agreement, but Edison made clear in the letter of May 15 that it did not view the letter in the same way. In addition, Henry Legaspi of IID testified that the letter was not a transmission agreement, Edison argues.

This interpretation was confirmed and communicated to Colmac in a letter from IID of August 19, 1987 (Ex. 178), in response to Colmac's request for IID to reconfirm its agreement to transmit power for Colmac:

> "This is to confirm our conversation that the Imperial Irrigation District (IID) is prepared to enter into a transmission service agreement with Colmac Energy, Inc. . . . IID will interconnect your facility into our electrical system as per Plant Connection Agreement of December 23, 1986 and would enter into a Transmission Service Agreement with Colmac, if transmission capability exists between the Mirage and Devers Substations."

As of November 3, 1987, when Edison denied Colmac's request for relocation of the project, Colmac could not ensure that its power would be transmitted to Edison's system, and it had not executed a TSA with IID, according to Edison. Not until January 1988 did Colmac finally enter into a TSA with IID (Ex. 249). Under these circumstances, Edison believes that its refusal to consent to the relocation was reasonable.

4. Local Governments Opposed the Relocation

In its relocation request of January 6, 1986, Colmac represented that the relocation would "simplify and streamline the permitting processes with the local, state, and federal government

agencies." Edison did not understand this statement to mean that state and local agencies would be entirely removed from the permitting process for the project. When the local governments began informing Edison of their objections to the project in May and June of 1987, Edison reevaluated the Colmac situation. Edison acknowledges that local opposition is not a sufficient reason to deny the relocation, but Edison's awareness of the actual permitting process and the local opposition led it to reevaluate its posture towards the project.

5. Denial of the Relocation Request

As stated earlier, Edison maintains that its consent to the relocation of Colmac's project was expressly contingent on Colmac's securing both interconnection and transmission service arrangements with IID. Colmac obtained the PCA in December 1986, but it delayed in obtaining a TSA with IID. Meanwhile, the Commission's and Edison's stances toward QFs evolved while the relocation request was pending. Edison points to the suspension of SO2 and SO4, the fall and stabilization of oil and gas prices at levels far below those assumed in the forecasts underlying the prices under Colmac's contract, and the rapid development of overcapacity on Edison's system as some of the events that affected Edison's approach to QFs.

When local governments made Edison aware of their opposition to the Colmac project in May and June 1987, Edison reviewed the economic analysis of the contract from the ratepayers' perspective. The review concluded that the contract was likely to result in overpayments of up to $88 million and that oil prices would have to rise to $47.39 per barrel in 1990 and to $69.48 per barrel in 1995 to match the assumptions that were used in developing the prices in the Colmac contract.

In keeping with its "tough but fair" policy on modifications to contracts with QFs, Edison determined that the great likelihood of substantial losses to ratepayers dictated that

it should not consent to the relocation of the project. Edison remains willing to live up to the original contract if Colmac can construct its plant at the Coachella site, but it will not consent to the relocation requested by Colmac.

6. Edison Has Not Caused Any Delays in the Project

Edison rejects Colmac's contention that Edison has caused a delay in the progress of the project. First, Edison argues that Colmac took all steps in the development of the Mecca site at its own risk, since Edison had not consented to the relocation. Second, Colmac could not commence construction at the Mecca site until it had received all permits, and at least two necessary permits were not granted until mid-1988. Edison views the permits as the primary reason for any construction delay.

7. Colmac's Allegations Are Not Supported by the Facts

Finally, Edison addresses the specific causes of action contained in Colmac's complaint. Edison contends that the evidence presented in this proceeding does not support any of Colmac's claims.

Edison believes it treated Colmac and its representatives in good faith at all times. Even though it informed Colmac that its general policy was not to permit relocations (Ex. 47), it agreed to review Colmac's proposal. It then stated the two conditions--evidence of the Commission's support and firm arrangements with IID for interconnection and transmission service--that were necessary for its consent. Edison negotiated in good faith to a set of conditions that, once they were satisfied, would permit Edison to amend the contract. Edison prepared itself to go ahead once those conditions were satisfied.

Colmac's claim of breach of contract is grounded on the existence of an agreement, documented in the exchange of correspondence that took place in early 1986, to amend the original contract to accommodate the relocation. Edison contends that no

such agreement existed. In terms of contract law, Edison believes that it rejected Colmac's original offer and made a counteroffer that contained two contingencies. One of these contingencies, the TSA, was not fulfilled before Edison rejected the request for relocation, or, in legal terms, withdrew its counteroffer. Thus, there was no completed agreement on the relocation request and no contract to be breached, in Edison's opinion.

In addition, the law requires some sort of exchange of value, or consideration, for a valid modification of an existing contract. Consideration must be bargained for, and the evidence is clear that there was no bargaining on this topic and no exchange, according to Edison. Furthermore, the remedy Colmac requests, specific performance of the alleged contract, requires a higher standard of "adequate consideration," and requires the party seeking enforcement to allege and prove that the contract is just and reasonable. Edison believes that the alleged modification fails to rise to the level of an enforceable agreement on all of these counts.

Edison also notes that Colmac's claim that sufficient consideration existed directly conflicts with its invocation of the doctrine of promissory estoppel, which functions as a substitute for consideration and does not apply if consideration is present.

Moreover, both parties contemplated that written amendments to the contract would need to be agreed on and executed to effect the relocation. Since a formal and written amendment was contemplated, the law is clear that no new contract would be consummated until the formal amendment was executed, according to Edison.

Edison disputes Colmac's allegation that it had decided not to consent to the relocation six months before the refusal was communicated to Colmac on November 3, 1987. Colmac's position is based on a decision made by Glenn Bjorklund, one of Edison's vice presidents, but that was only his personal decision, and not a

corporate decision of Edison. Further investigation was made and additional meetings with Colmac took place, but eventually Bjorklund confirmed his earlier decision and recommended to Edison's Management Committee that the request be denied. The Management Committee agreed in a meeting of November 3, 1987, and the decision of Edison was communicated to Colmac on the same day.

Edison responds to Colmac's allegations that the doctrine of promissory estoppel applies in this case by pointing out that one element of this doctrine is a clear and unambiguous promise to do or refrain from doing something. In Edison's view, no such promise was made. In addition, Colmac proceeded at its own risk with the development of the project, and its reliance was not reasonable and foreseeable, as the doctrine requires. Thus, the doctrine has no application to the facts of this case.

Edison finds Colmac's contentions somewhat confusing, so it also addressed the doctrine of estoppel, which is quite distinct from promissory estoppel. An essential element of this doctrine is a concealment or misrepresentation of material facts. Edison believes the evidence shows that no such concealment or misrepresentation occurred, and the doctrine does not apply.

For all of these reasons, Edison concludes that Colmac's complaint should be denied.

C. DRA's Position

DRA takes no position on whether Colmac and Edison agreed to amend the contract to reflect the relocation. If the Commission grants Colmac's requested relief, however, DRA strongly recommends that the order should make it clear that the determination of this complaint does not mean that Edison is automatically entitled to recover in rates all of its payments under the contract. The reasonableness of the amended contract should be reviewed with other power purchases in the Edison's Energy Cost Adjustment Clause (ECAC) proceeding.

DRA also asks the Commission to affirm that the primary measure of the reasonableness of modifications to existing contracts is that the modifications should be balanced by concessions benefiting ratepayers of commensurate value to the requested modifications. Even though this standard was not explicitly stated at the time that Edison was considering Colmac's request for relocation, DRA believes that this notion is so grounded in common sense that it is included in the standard that the Commission has always set for utilities: utilities are expected to act in a prudent and reasonable manner.

DRA notes that the Commission has recently adopted principles governing the utilities' administration of contracts with QFs (D.88-10-032). In that decision, the question arose about the effect of the guidelines on previously negotiated amendments. The Commission declined "to excuse utilities from considering viability and other principles articulated in these guidelines just because the deal was made before the effective date of this order." DRA believes that this statement is consistent with its recommendation in this case.

Edison commented on DRA's positions in its reply brief. Edison points out that on its recommendation Colmac obtained a letter supporting the relocation from Commissioner Vial. DRA's approach is retrospective and would have Edison apply a different standard to the relocation request than was being applied by a Commissioner during the same period. Moreover, Edison believes the Commission endorsed its position in D.88-10-032, when it stated, "negotiated modifications to a standard offer should be judged by the standards and circumstances in existence at the time the deals were made." Edison states that it always acted reasonably and that its actions should not be subject to additional review in an ECAC proceeding.

DRA also opposes Colmac's request in its opening brief for an order allowing the capacity prices in the contract to

escalate to compensate for delay in the operation of the project. Nowhere in the complaint, the exhibits, or the hearings did Colmac raise this contention, DRA claims. On this ground alone, DRA believes that the requested escalation should be denied. In addition, DRA argues that the Commission does not have the jurisdiction to order increased capacity payments. Increased capacity prices are essentially payment of damages, and the Commission has no authority to award damages, DRA states. Furthermore, the Commission has already faced a similar issue and has rejected the position presented by Colmac (D.88-08-054).

D. Riverside and CVAG's Position

The County of Riverside and the Coachella Valley Association of Governments (jointly referred to as Riverside) filed a brief opposing the relief Colmac seeks.

First, Riverside asserts that Colmac has not demonstrated that it has control over the Mecca site. Colmac failed to produce its lease during the hearings and relied on an option to lease, which by its own terms expired well before the complaint was filed. The alleged lease is not recorded in Riverside County, as it is required to be under federal regulations, according to Riverside.

Because Colmac has failed to prove that it controls the relocation site, and because its requested relief is entirely dependent on its right to construct the project on that site, Riverside concludes that the Commission should deny Colmac's complaint.

Second, Riverside believes that public policy argues against granting Colmac its requested relief. Many affected local communities oppose the construction of the project at the Mecca site (see Ex. 191, 193, 194, 201, 202, and 207). In addition, the suspension of SO4 and the excess capacity that led to that suspension demonstrate the harm to ratepayers of such projects. Accordingly, the Commission should deny all requests for material amendments to SO4-based contracts. Granting Colmac's relief would

revive an otherwise dormant project and ensure a detrimental effect on ratepayers, Riverside argues. At a minimum, the Commission should extract some concessions from Colmac before approving any amendments to carry out the relocation.

Finally, Riverside contests Colmac's allegation that the acts of local governments and agencies constituted an uncontrollable force under the contract. Riverside argues that there is no evidence that any acts of these entities prevented Colmac from performing its obligations under its contract with Edison or affected Edison's reactions to the relocation request. Under the terms of the contract, therefore, there was no uncontrollable force that would excuse Colmac from performing its obligations under its contract. Riverside concludes that the parts of the complaint relating to the allegations of uncontrollable force should be denied.

For these reasons, Riverside urges the Commission to deny the complaint.

E. Colmac's Response

Colmac finds several legal and factual errors in Edison's brief.

Colmac reasserts its position that Edison consented to allow relocation of the project. Colmac argues that Edison's interpretation of the May 15 letter violates a reasonable reading of the letter and the objective theory of contract that applies in California. Colmac thinks that a plain reading of this letter leads to the conclusion that Edison unconditionally accepted Colmac's request after Colmac had met conditions earlier set by Edison for its consent. Edison's interpretation is strained to create a condition where none exists, according to Colmac. The condition Edison posits, concerning details of the interconnection and transmission service agreements with IID, applied regardless of whether the site was built at Coachella or Mecca and thus had no effect on Edison's consent to the relocation.

Colmac also disputes Edison's contention that there was no consideration for the relocation agreement. Colmac believes the law is clear that change in mutual obligations resulting from the amendment of the original contract supplies sufficient consideration to enforce the agreement.

Edison's denial of the application of the doctrine of promissory estoppel depends on its assertion that it made no promise that Colmac could have reasonably relied on. Colmac continues to believe that it has demonstrated the existence of such a promise and that the doctrine provides a basis for enforcing the promise.

Colmac also finds that Edison has based its argument that it negotiated in good faith on assertions that are contradicted by the evidence in this case. These assertions concern the transmission arrangements with IID, statements of Edison's employees, and when the decision was made to deny Colmac's relocation request.

Colmac also believes that the evidence is clear that progress on the permitting and construction of the project was directly and immediately affected by Edison's denial of Colmac's relocation request on November 3, 1987.

Colmac denies Riverside's allegation that it does not have site control over the Mecca site. Although BIA has a policy against public disclosures of its lease, the evidence is clear that BIA believed that Colmac has a valid lease and that Edison was supplied with sufficient information to verify the Colmac had site control. Colmac also believes that Riverside has misinterpreted the federal regulation it cites, and that this regulation does not require that a lease be recorded in the circumstances relevant to this case.

III. Discussion

A. Background

When we chose to develop the standard offers to fulfill in part our obligations under PURPA, one of our hopes was that the existence of the standard offers would allow us to avoid the necessity of detailed review of individual contracts between utilities and what promised to be a multitude of QFs. The economic and natural resources of California seemed particularly well suited to the development of the independent generators that PURPA was intended to stimulate, and we concluded that a case-by-case review of individual contracts would soon prove to be unwieldy. Thus, we engaged in the sometimes tedious and laborious task of developing form contracts that the utilities were required to offer to QFs. Once we approved these standard offers, the utility's purchases under the contracts were presumed to be reasonable, and we hoped that this prior approval and presumption of reasonableness would also speed up the review of the reasonableness of the utility's overall purchases.

The standard offers were also designed to neutralize the tremendous bargaining power of the utility as the only purchaser of the QF's power. We adopted several requirements to ease negotiations between utilities and QFs, but the QF's ultimate bargaining power was its right to accept the standard offer if it could not come to different terms with the utility.

Once the QF and the utility signed a contract--either one of the standard offers or a negotiated contract--we had hoped that our subsequent role would be limited to the usual review of the reasonableness of the utility's purchases and administration of its contracts with QFs. If later disputes developed between the utility and the QF about the performance of the contract, we presumed that the parties would turn to the common resources for resolving such disputes--negotiations, arbitration, and, if necessary, the courts.

Colmac has stated its complaint in this case in a way that was intended to fall within the limited role we have said we would assume in these disputes, and we have addressed several ancillary issues in narrowing the scope of this case. Nevertheless, it is now clear, after we have narrowed the case to its essential elements, that the primary points of the complaint boil down to disputes that frequently arise around contracts of all types and that have been addressed in several hundred years of contract law. This case turns on choosing a plausible set of facts from the different versions presented to us and apply principles of established law to those facts. Very few of the essential issues of this complaint require our special expertise to resolve; most of the issues could have been handled by the normal means of dispute resolution.

At this point, having accepted the complaint, conducted the hearings, and evaluated the arguments of the briefs, we will not direct the complainant to another forum. But complainant and other parties should recognize that we have no special expertise to address the legal and equitable claims that are essential to this complaint, and our processes are neither intended nor structured to decide the detailed legal issues that are at the heart of the complaint and defense. Although we try our utmost to decide these cases correctly, our decisions typically rely more on policy concerns, fairness, and common sense than on a detailed study of pertinent legal precedents. In short, we strongly recommend that contractual disputes that require resolution of narrow legal issues should be initiated in forums that are better suited to decide those issues justly and correctly.

B. <u>The Agreements to Modify the Contract</u>

Although none of the parties have analyzed the facts in precisely this way, we conclude from our review of the evidence presented at the hearing that the parties arrived at two related agreements to modify the original contract.

1. Interconnection and Transmission Service from IID

The first agreement arose from the fact that Colmac's project was outside Edison's service territory. The original contract contemplated a direct interconnection to the Mirage substation. As early as January 31, 1985, Edison had alerted Colmac to the possibility that it would have to interconnect with IID and obtain an agreement to transmit its generation over IID's system to Edison's system (Ex. 5). At the time of the signing of the contract on April 17, 1985, however, Colmac believed that its project would interconnect directly with Edison's system.

Edison's practice during this period was to sign an agreement even before it had the details of a project's interconnection with Edison's system. These details would be incorporated later in an IFA, Appendix A to the contract. It notified Colmac on April 22 that Colmac must sign the IFA within 45 days of the completion of the MOS study, which Edison had begun (Ex. 19).

When Edison determined that the Coachella location was too far from Edison's territory for an economical direct interconnection, it notified Colmac on July 29, 1985, that interconnection with and transmission through IID would be more practical (Ex. 29). The letter also stated:

> "Since it is unclear what the exact nature of the interconnection agreement that you will obtain with IID will be, I suggest for the time being that the existing contract be left in place. Necessary amendments can be made after it is clear what is needed as determined by your arrangements with IID."

On August 20, 1985, Colmac asked IID to perform an interconnection study for the Coachella site (Ex. 33), and on September 5 Colmac sent Edison a letter (Ex. 34) informing Edison of that request and responding to Edison's suggestion about the contract:

> "[W]e are proceeding on the assumption that we should wait for the results of that study, before initiating any specific discussion with you about amendments that may be required to some sections of our present contract."

At this point, it appears that both parties agreed to amend the contract to reflect the eventual arrangements with IID, and both parties further agreed that negotiations on those amendments would not begin until the arrangements with IID were complete.

This agreement is made explicit in a later exchange of correspondence. On October 18, 1985, Colmac sent Edison a letter (Ex. 41) stating:

> "Once again I would like to confirm and acknowledge our prior and continuing understanding that the necessary amendments to our power sales contract will be made at the time the interconnect and wheeling arrangements are completed with the Imperial Irrigation District and that the current provisions in the contract relating to various interconnect agreements and time constraints with SCE are not applicable."

Edison's response in its letter of November 4 (Ex. 42) was direct:

> "We agree that the statements in your October 16, 1985, letter correctly describe the understanding between Edison and Colmac...."

Thus, Edison and Colmac agreed to amend the contract when the final arrangements with IID had been determined. More precisely, Edison agreed that it would amend the contract to reflect the details of the arrangements with IID when those details were available; Colmac agreed to make the necessary arrangements with IID, inform Edison of the details of those arrangements, and amend the contract to reflect those details.

This agreement arose before the request for relocation and is distinct from any agreement concerning the relocation. (Colmac's reference to time constraints refers to the time limit

for executing the IFA that would have applied if Colmac had directly interconnected with Edison.) Of course, the specific terms of the interconnection would be affected by the relocation, but the essential agreement was to amend the contract to accommodate the final arrangements with IID. This agreement and the agreement about the relocation tend to get confused later in this chronology, but we find it helpful to keep them separate for purposes of the analysis.

2. Relocation of the Project

The second agreement concerned the relocation. The specific request of Colmac, in the letter of January 6, 1986 (Ex. 45), was somewhat unclear:

> "At this time we are formally requesting permission from SCE to change the location of the Plant from the Coachella Industrial Park to industrial land located on the Cabazon Indian Reservation. . . . [W]e request your consideration and, hopefully, approval of our request for relocation of the project to the Cabazon Indian Reservation land. However, if this is not possible, we are and will continue to proceed with development of the Coachella plant as originally planned."

Strictly speaking, Colmac did not need Edison's consent to move the project, but it did need Edison's consent to amend the contract to cover the relocated project. Edison's response of February 24 (Ex. 47) used terms similar to those in Colmac's request, and requested additional information. Edison's letter of April 21 to Colmac's attorney (Ex. 55) was somewhat more specific. In this letter Edison suggested that Colmac obtain both the support of the Commission for the relocation and "an agreed to transmission path to the Edison point of delivery at Mirage Substation" from IID. The letter continued, "We feel that these two pieces of evidence are absolutely necessary for Edison to make the appropriate amendments to the power purchase agreement."

After obtaining a letter from Commissioner Vial and a letter from IID consenting to the relocation, Colmac again wrote to Edison on May 2 (Ex. 64). This letter concluded, "I assume that we have now met your conditions for approval and expect to receive shortly a letter from you acknowledging SCE's approval of the amendment."

The final letter of this sequence was Edison's letter of May 15 (Ex. 68). A paragraph of this letter has become central to this case:

> "With these approvals it is appropriate to proceed with contract amendments necessary for your project relocation. However, the existing agreement contemplates a direct interconnection with Edison and, therefore, contract changes will be necessary to reflect that your project will now be interconnecting with the IID system. Specific details of your interconnection and service agreements with IID will be needed."

Colmac alleges that this exchange of correspondence sealed Edison's agreement to the relocation of the project. The parties have not directly addressed the initial question: What exactly, if anything, was Edison agreeing to?

a. <u>What Were the Terms of the Agreement?</u>

Colmac's original request, as we have discussed, was a general request for Edison's consent to the relocation. The May 2 letter referred to consent to the amendment, which is more closely related to the precise consent that was needed--Edison's agreement to amend the contract. However, no specific amendment had then been discussed between the parties, so further negotiation on the exact terms of the amendment would be required. The May 15 letter, to the extent that it agrees to anything, agrees to proceed with contract amendments for the relocation.

From our review of these exchanges and from the subsequent behavior of the parties, we conclude that any agreement between the parties must be defined in terms similar to the May 15

letter. What Colmac ultimately needed was an amended contract to reflect the relocation of its project. At the time of this exchange, however, no specific amendments had been proposed by either party. The ultimate agreement, the amended contract, could therefore not arise from these exchanges. At this point, the parties could agree to the general idea of the relocation and to negotiate appropriate amendments at a later date. Thus, the most that Edison could have agreed to in the May 15 letter was to give its general consent to the relocation and to develop appropriate amendments when the necessary information was available.

b. Did the Parties Agree?

California follows the objective theory of contract, which relies on the objective actions and words of parties, rather than their undisclosed intentions or beliefs, to determine the terms and existence of a contract. We have followed this theory in defining the scope of any agreement between Edison and Colmac. We will also rely on the facts that can be objectively determined to decide whether there was the meeting of the minds necessary to form an enforceable agreement concerning the relocation of the project.

From our review of all the evidence presented at the hearing, we conclude that in the May 15 letter Edison consented in a general sense to the relocation of Colmac's contract and agreed to negotiate appropriate amendments with Colmac when Colmac supplied all information needed to develop the amendments.

Edison has argued that its letter was intended to be conditional--that it would agree to the relocation once Colmac had provided the specific details of its interconnection and transmission service agreements with IID. However, as we have discussed, the parties had already agreed to amend the contract when these details were made certain, so Edison's "conditions" merely repeated the parties' previous agreement. It is clear that Edison was recognizing that it would be practical and convenient to work out all amendments to the contract at the same time. Edison

also appears to recognize that amending the contract merely to change the location of the project would be an idle act unless the remaining terms of the contract could also be completed. We therefore read the "conditions" as statements of the information that was required before the final amendments to the contract could be negotiated.

The essence of Edison's argument is that its agreement to amend the contract did not become effective unless and until Colmac supplied the details of its agreements with IID. From the words of the parties and the circumstances of this case, we find that the agreement was completed on May 15, but Edison's promised performance--amendment of the contract--did not become due until Colmac's performance--securing the agreements with IID and communicating the details to Edison--had been completed. This is a subtle but important difference. Under Edison's interpretation, it was under no obligation until Colmac supplied the necessary information. In our view, the obligation arose for both parties with the agreement on May 15, although Edison was not required to carry out its promised performance until Colmac had performed parts of its promise.

Thus, we interpret the May 15 letter as consenting in a general way to the relocation and as promising to amend the contract when Colmac supplied sufficient information on its interconnection and transmission service arrangements.

In terms of the parties' obligations, Edison agreed to amend the contract to reflect the Mecca site and Colmac's arrangements with IID when Colmac provided the details of its plant connection and transmission service agreements with IID for the Mecca site; Colmac agreed to make the necessary arrangements with IID for the Mecca site, to convey the details of these arrangements to Edison, and to amend the contract to reflect the site change and the arrangements with IID.

c. Was There Bad Faith?

Our conclusion that Edison consented to the concept of the relocation makes it unnecessary for us to determine in detail whether Edison acted in bad faith in its dealings with Colmac. Without deciding this issue, we observe that it appears that a misunderstanding developed between the parties over what constituted a TSA and who was responsible for obtaining it. The evidence strongly suggests that this misunderstanding lies behind Colmac's allegations of bad faith.

The apparent misunderstanding took several months to develop, since both parties understood that the interconnection arrangements described in the PCA would normally precede the TSA. Colmac asked IID to perform an MOS study for the Mecca site on June 9 (Ex. 71). Colmac prepared some suggested amendments and sent the draft amendments to Edison on September 25. The draft PCA with IID was sent to Edison on November 4, and the final PCA was conveyed to Edison on December 31.

This sequence conformed to Edison's expectations. Edison knew from its experience that the PCA could not be completed until the MOS study had been performed, and it expected that the TSA would follow the PCA by a few months.

Around the beginning of 1986, however, the parties' understandings of the sequence of events seemed to diverge. Edison claims to have been prepared to work out the amendments once it received the TSA. Colmac appears to have believed that the PCA was all that was required to allow completion of the amendments. The letter conveying the executed PCA (Ex. 124) confirms this impression:

> "Now that the interconnection agreement is completed, I suggest that we proceed to amend the power purchase agreement. . . . John Maybin will be in touch shortly to arrange for a time to meet concerning contract amendments...."

The terms of the PCA may have encouraged Colmac's apparent belief that this agreement was sufficient to allow completion of the amendments. For example, Section 2.2 (which may have misidentified some of the parties) states:

> "SCE and COLMAC agree that the terms and conditions regarding transmission of Plant's Energy to an IID/SCE point of interconnection shall be pursuant to an agreement to be entered into between IID and SCE."

Several other QFs in IID's territory had been accommodated in just this fashion. IID and Edison had negotiated a master agreement for transmission service, and individual QFs were incorporated into that agreement through appendices worked out between IID and Edison.

Section 9 repeats this conception of how the TSA would be arranged:

> "IID shall accept [the project's] output for the account of SCE and deliver such output to SCE pursuant to transmission service agreement to be entered into between Southern California Edison Company and Imperial Irrigation District, copy of which shall be provided to COLMAC."

In addition, Section 11 defined IID's general obligations under the PCA:

> "IID shall...[a]ccept the Plant's net electrical output for the account of SCE at the Point of Delivery and concurrently deliver an equal amount of electric energy to the SCE system at IID/SCE point(s) of interconnection."

If Colmac did not clearly understand the need for a separate TSA, it is easy to see how it could have interpreted the PCA's provisions to support its belief that it had completed the necessary arrangements with IID, and that any further details would be worked out between IID and Edison. The evidence is strong that Colmac in fact proceeded for several months under that impression.

At the same time, developments at Edison made it less likely that anyone would notice and correct Colmac's impression. In February, responsibility for Colmac's project was transferred from Ferguson to McCroskey. McCroskey believed that the amendments would be drafted after Colmac got the final TSA from IID, and some time passed before he was sufficiently acquainted with the file to understand all of its history. The parties' different understandings about the timing of the preparation of the amendments continued, and the opportunities for conforming the differing understandings diminished because of the reassignment of Colmac's file.

The letter from CVAG to Edison acted to make Colmac aware that all was not right with its relations with Edison. It appears that Colmac then became aware that it needed to obtain a TSA, and it took steps to work out the TSA with IID in the summer of 1987. Around this time, however, Edison raised concerns with IID about limitations on Edison's system between the Mirage and Devers substations. On August 19, IID expressed its willingness to enter into a TSA with Colmac if these limitations could be overcome (Ex. 178). The TSA was finally executed by Colmac and IID on January 26, 1988 (Ex. 249).

The letter from CVAG also affected Edison's attitude toward the project. As early as May 1987, Bjorklund had decided to oppose the relocation of the project. New economic studies were performed, and they showed large potential losses for ratepayers under the terms of the original agreement. It is fair to surmise that around this time Edison's attitude may have become less cooperative and that its representatives were perhaps less willing to take pains to help Colmac complete the submission needed to develop the amendments.

Colmac's apparent misunderstanding about the need for a separate TSA has no effect on the resolution of this case. We find no evidence that Edison recognized Colmac's misperception and

avoided enlightening Colmac about this requirement. Colmac had the responsibility to obtain and supply the TSA, and any delay resulting from its apparent misunderstanding would primarily affect Colmac's ability to meet the deadlines established in the contract. In other words, Colmac's confusion harmed only Colmac and had no effect on Edison's performance under the contract.

It is evident that Edison's reorganization impaired, at least temporarily, its ability to deal efficiently with the large number of QFs it had under contract. We believe that Edison should have organized its personnel so that it could have responded promptly, in some fashion, to Colmac's draft amendments, and that McCroskey should not have created the impression that he was drafting amendments when he was in a preliminary stage of gathering information needed for the amendments. But we doubt that these occurrences reach the level of bad faith, and, as we have discussed, it is unnecessary for us to resolve this issue definitively.

d. The Attempted Rescission

Against the background of expressed local opposition and Edison's new economic analysis, Edison's executive committee decided to oppose the relocation, and this decision was conveyed to Colmac in a letter of November 3, 1987 (Ex. 212):

> "Edison has carefully reviewed Colmac's request for a project site move from Coachella to the Cabazon Indian Reservation and regrets to inform you we cannot approve a contract amendment allowing a site move."

The letter gave three reasons for this action. First, Edison was not informed when Colmac made its request that the relocation would remove the project from local, regional, and state jurisdiction. Second, Edison felt it had to respect local opposition. Third, Edison's analyses showed large adverse effects on ratepayers. The letter concluded, "For these reasons, we cannot approve the contract amendment you have sought."

We have earlier determined that Edison's letter of May 15, 1986, concluded an agreement between the parties to allow the project to be relocated to the Mecca site and to amend the contract to reflect the relocation when Colmac supplied the information needed to effect a previous agreement to amend the contract to accommodate the interconnection and transmission service arrangements with IID. Edison's letter of November 3, 1987, amounts to an attempt to rescind its earlier agreement. We conclude that Edison may not unilaterally rescind its earlier consent.

Edison argued that Colmac's supplying the information about the arrangements with IID was a condition of its agreement. In Edison's view, it had made its acceptance of Colmac's request expressly contingent on Colmac's securing interconnection and transmission service arrangements with IID. Until Colmac made those arrangements and communicated the details to Edison, Edison was under no obligation and was therefore free to reject Colmac's relocation request, in Edison's view.

We have rejected this argument and interpreted the exchanges between the parties to be an agreement to amend the contract when the needed information was supplied. In our view, obligations arose for both parties at the time of agreement on May 15, and Edison could not unilaterally rescind the agreement.

The agreement between the parties did not include a time limitation on the performance of either party, and therefore Colmac had no deadline under the agreement for obtaining and conveying the details of its arrangements with IID. In some circumstances, the lack of a specified time for the parties' performance would be fatal. However, the law will uphold agreements and imply a reasonable time for performance in light of the circumstances of the agreement. In this case, the underlying contract had specific deadlines for the accomplishment of various acts, the most stringent being the requirement that the project had to be on line

within five years of the execution of the contract. This deadline imposed a reasonable limit on Colmac's securing its arrangements with IID. Thus, we believe that the lack of a defined term for the agreement to amend the contract did not make the contract invalid.

Since the attempt to rescind the agreement to amend the contract was not effective, Edison remained bound to develop amendments to the contract when Colmac secured the final TSA with IID on January 26, 1988.

e. Other Issues

Before considering the consequences of Edison's actions, we will address some of the arguments that Edison has raised in opposition to this conclusion.

Edison argues that it was misled by Colmac's statements that the relocation would streamline local and state permitting. In fact, removal of the project to Indian property resulted in a removal of state and local jurisdiction over the important permits for the project.[1]

We find that Edison should have been alerted to the dominance of federal jurisdiction. Locating the property on Indian lands was in itself an action that should have alerted Edison that federal jurisdiction would be involved. In addition, Colmac supplied information on permitting in the attachments to a letter of October 15, 1986 (Ex. 109), and specifically noted, "Because of

1 We understand that discussions may be taking place among Colmac and the relevant air quality management officials in which substantial agreement may be reached on environmental concerns. We hope that any agreement will be far-reaching and will mitigate the air quality concerns that have been expressed. We note that Colmac witness W. Philip Reese testified that Colmac intends to "abide by permitting requirements that would apply were the project off the reservation" (Tr. 277). At minimum we expect Colmac to follow through on this commitment.

the location of the plant on Indian land, ...no land use permit from Riverside County will be involved."

Moreover, in terms of its commercial relationship with Colmac, Edison should not have been concerned about the source of the permits, although Edison may have been interested in the identity of the permitting agencies for other reasons. Edison's narrow interest is reflected in the original contract (Ex. 18), which states, "Seller [Colmac], at no cost to Edison, shall... [a]cquire all permits and other approvals necessary for the construction, operation, and maintenance of the Generating Facility." The contract properly gave Colmac primary responsibility for obtaining all necessary permits.

Thus, we conclude that the change in permitting jurisdiction should not have affected Edison's decision on Colmac's requests.

Similarly, as Edison has acknowledged, the opposition of local governments to the relocation should not have affected Edison's attitudes toward its contractual obligations and Colmac's requests, although, again, Edison may have been interested in the concerns of local governments for other reasons.

On the question whether the agreement between Colmac and Edison was supported by sufficient consideration, we agree with Colmac that the mutual change in positions is sufficient to support an agreement to modify an existing contract when performance has not yet been rendered. In addition, Colmac has invoked the doctrine of promissory estoppel, which, as Edison has correctly pointed out, can serve as a substitute for consideration and allow enforcement of an agreement on equitable grounds. We believe that the facts here are sufficient to show a reasonable and detrimental reliance by Colmac on Edison's promise to amend the contract when interconnection and transmission information was supplied. This reliance is sufficient to support enforcement of that agreement, even if more conventional consideration were lacking.

DRA has urged us to withhold judgment on the reasonableness of Edison's purchases from Colmac if we find in favor of Colmac in this complaint. Although we have not entirely endorsed Colmac's position, we expect that our order will permit construction of Colmac's project and sales of electricity to Edison. The reasonableness of Edison's purchases from Colmac, like Edison's other power purchases, should be evaluated in connection with the ECAC case covering the period of the purchases.

To this extent we adopt DRA's recommendation. We should, however, make some observations that may prove relevant to the ECAC review. At the time that Colmac made its request for relocation, the evidence in this case shows Colmac had the ability to complete its project at the Coachella site. At the time of the request, we therefore conclude, ratepayers were not affected by the choice of locations. The same contract would have been in effect if the plant was built at Coachella or Mecca.

Riverside argues that we should deny Colmac's complaint because it has not demonstrated that it controls the Mecca site where it proposes to construct the project. We believe that Colmac has demonstrated sufficient site control for our purposes. We note that Edison has concluded that Colmac met the site control requirement of the QFMP. More important, if Riverside's contentions are true, Colmac will be unable to construct its project whether or not we grant the requested relief.

Riverside also contends that public policy considerations argue against granting the requested relief. Although it appears that ratepayers would receive short-term benefits if we could cancel this contract, we believe that a greater public benefit is served by preserving the rights of parties to contract and by enforcing the parties' legally binding promises. If we were to invalidate contracts because of variations in forecasts of oil and gas prices, we would undermine the foundation of our QF program and appear to question the basis for our entire economic system.

Although we played a role in developing the standard offers, we contemplated that acceptance of these offers would result in valid and binding contracts that should be enforced like any other contract. Preserving the sanctity of contracts serves a higher public policy goal, in our opinion, and outweighs the considerations listed by Riverside.

C. The Remedy

1. Extension of the Contract's Deadlines

In addition to specific enforcement of Edison's agreement, Colmac seeks an order extending the time for meeting certain deadlines established under the contract.

We note at the outset that on December 31, 1986, Colmac had asked Edison to extend some of these deadlines (Ex. 124). No evidence was presented, however, that indicated that Edison had ever agreed to the requested extensions. Thus, any adjustments of the deadlines established in the contract must flow from equitable considerations, rather than from an agreement between the parties.

The current contract will terminate if firm operation does not occur within five years of the date the contract was executed, or by April 17, 1990. Colmac contends that the firm operation date should be extended by the time from November 3, 1987, when Edison notified Colmac that it would not agree to a relocation, to the date of the Commission's order in this case. In addition, Colmac states that it would take 30 days to get operations commenced after issuance of the Commission's order. Colmac presented testimony that another 184 days would be needed to gear up construction to the point it had reached on November 3.

Colmac's fear is that the interruption of construction may have set it back so far that it could not achieve firm operation in time to avoid termination. To this extent we agree that Colmac should have some time to complete its project. The firm operation date should be extended by the number of days between November 3, 1987, and the effective date of this decision.

In addition, the parties should negotiate a reasonable extension to allow Colmac an opportunity to gear up its construction operations. Colmac's testimony has provided an estimate of the time needed to recover from the interruption, and the parties may use this estimate of 184 days if they can reach no other resolution. Because of changes in circumstances, we have no objection to a somewhat longer extension. Under current projections, a later firm operation date is in Edison's and ratepayers' interests, and we believe that the parties should have no difficulty resolving this issue. Other deadlines and target dates in the contract and in the application of the QFMP to Colmac's project should also be adjusted to account for the total extension of the termination date.

2. Increase in Prices

The prices currently set in the contract were based on projections available at the time of execution. Both of the fixed prices--for firm capacity, based on SO2, and energy, based on a forecast of the annual marginal cost of energy--are for a certain number of years starting on the firm operation date. We have authorized an adjustment to the firm operation date, so the periods for the set prices must also be extended. But this change presents a problem, since the tables attached to the contract do not extend far enough to cover the necessary period after the new firm operation date.

Colmac's solution is to continue the last year of the energy payment tables and to escalate the existing capacity payment tables to cover the additional years. However, the contract specifies that payments are to be based on schedules "approved by the Commission and in effect on the date of the execution of this Contract." The only tables that meet this description are tables attached to the contract. In addition, we have previously rejected a proposal to escalate the capacity tables. In D.88-08-054, we concluded that even if a QF successfully showed that its project had been delayed because of uncontrollable forces recognized by the

contract, we would not escalate capacity prices to account for firm operation beginning in years beyond those contemplated at the time the contract was executed.

Colmac's proposed treatment of the fixed energy prices--extending without escalation the prices set for the last year in the tables attached to the contract--is reasonable under the circumstances, and we have endorsed this approach previously (D.86-12-104). We will use this approach to extend both the energy and capacity price tables.

Thus, we will authorize use of the last year of the existing tables to cover the years needed for the revised firm operation date. According to Appendix E to the contract, a 30-year contract beginning firm operation in 1989 would receive a firm capacity payment of $198 per KW per year. According to Appendix C, the annual marginal cost of energy in 1999 was forecasted to be 15.6 cents per kWh. These prices should be applied to the additional years necessary under the revised firm operation date.

Findings of Fact

1. Edison and Colmac entered into a contract based on interim SO4 on April 17, 1985. The contract concerned the sale of 45 MW of firm capacity and associated energy from a biomass-fueled generator to be located in Coachella.

2. On January 6, 1986, Colmac requested Edison's permission to change the location of the facility from Coachella to the land of the Cabazon Band of Mission Indians, near Mecca.

3. In response to Edison's requests, Colmac supplied a legal description of the new site, an option agreement for a lease of the property, information on potential fuel sources, a letter from IID consenting to the relocation, and a letter from Commissioner Vial stating that he had no objection to Edison's consent to the amendments reflecting the relocation.

4. On May 15, 1986, Edison sent Colmac a letter agreeing to proceed to amend the contract to reflect the relocation and

requesting information about Colmac's interconnection and transmission service arrangements.

5. On November 3, 1987, Edison sent Colmac a letter denying Colmac's request for relocation.

6. At either the Coachella or Mecca location, Colmac could not practically interconnect directly to Edison's system, and Colmac needed IID's consent to allow interconnection with IID's system and to transmit power generated by Colmac to Edison's system. Colmac and Edison made arrangements to accommodate this fact in letters dated October 18 and November 4, 1985.

7. In a letter of October 15, 1986, Colmac informed Edison of its permitting arrangements and stated that no land use permit from Riverside County would be required for the project.

8. The current contract will terminate if firm operation is not achieved by April 17, 1990. The contract's fixed payment schedules for firm capacity and energy assume firm operation no later than 1989.

9. Colmac wound down and eventually suspended its construction activities after receiving Edison's letter of November 3, 1987. Some time would be needed to revive construction activities to the level they had reached on November 3, 1987.

10. Colmac and IID entered into a PCA on December 23, 1986.

11. Colmac and IID entered into a TSA on January 26, 1988.

Conclusions of Law

1. In letters dated October 18 and November 4, 1985, Colmac and Edison agreed to amend the contract to correct the contract's assumption that Colmac could interconnect directly with Edison's system, once Colmac had made arrangements for interconnection and transmission service with IID.

2. On May 15, 1986, Edison and Colmac agreed to amend the contract to reflect the relocation of Colmac's project and agreed to proceed with necessary contract amendments when Colmac supplied

the details of its interconnection and transmission service arrangements with IID.

3. Edison's agreement was not contingent on Colmac's securing a PCA and TSA with IID.

4. The agreement of May 15 was supported by consideration.

5. Edison could not unilaterally rescind its general consent to the relocation and its agreement to proceed with necessary contract amendments, as it attempted in its letter of November 3, 1987.

6. By at least October 15, 1986, Edison should have been alerted that permits from state and local governments and agencies would not be required for the Mecca site.

7. The provision for termination, Section 12 of the contract, should be amended to extend the date when failure to achieve firm operation will result in termination. The deadline for firm operation in the contract should be extended by the number of days between November 3, 1987, and the effective date of this decision. In addition, the parties should negotiate a reasonable extension to permit Colmac an opportunity to gear up its construction operations. If the parties cannot agree, Colmac's estimate of 184 additional days should be used. Other deadlines and target dates in the contract and in the application of the QFMP to Colmac's project should also be adjusted to reflect the total extension of the termination date.

8. The tables setting out the payments for firm capacity and for energy for the first ten years of operation should be extended, but not escalated, to accommodate a new firm operating date to be agreed on by the parties.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company (Edison) shall negotiate amendments to its contract with Colmac Energy, Inc. (Colmac) to reflect the relocation of Colmac's facility to the reservation of the Cabazon Band of Mission Indians near Mecca and the plant connection agreement and transmission service agreement entered into between Colmac and the Imperial Irrigation District. Edison shall further negotiate amendments extending the date when failure to achieve firm operation will result in termination (Section 12) and other incidental dates by at least the number of days from November 3, 1987, until the effective date of this decision. Edison shall also negotiate a further extension of the termination date to allow Colmac a reasonable opportunity to gear up its construction operations. If the parties cannot agree on the latter extension, an extension of 184 days shall be used. Other deadlines and target dates in the contract and in the application of the Qualifying Facilities Milestone Procedure to Colmac's project should also be adjusted to reflect the total extension of the termination date. The payment schedules attached to the contract shall be extended to accommodate the new firm operation date.

2. Except to the extent granted herein, Colmac's complaint is denied.

This order becomes effective 30 days from today.

Dated April 26, 1989, at San Francisco, California.

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

Commissioner Patricia M. Eckert present but not participating.

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

AB Victor Weisser, Executive Director

(5) Colmac should receive extensions of the deadlines we established in the QF Milestone Procedure (QFMP) because the intervention of the Coachella Valley Association of Governments (CVAG) and the County of Riverside in Colmac's relations with Edison constitutes an uncontrollable force under the contract.

Colmac asks the Commission to order Edison to amend the contract to allow the site relocation; to reflect the interconnection with the Imperial Irrigation District (IID) rather than direct interconnection with Edison; to extend the termination date to account for the direct and indirect delays caused by Edison's actions; to extend the fixed energy payments beyond 1999 as necessary; and to extend the capacity payment schedule attached to the contract through 1992, to cover the year the facility is expected to reach firm operation.

Edison answered the complaint on December 18, 1987. In addition to the expected denials of complainant's allegations, Edison asserts that Colmac never met the conditions required for Edison to consent to the modification of the contract. When local opposition arose and alerted Edison to the fact that locating the project on an Indian reservation would remove the environmental review from state and local entities, Edison withdrew its conditional approval. Edison denies that it negotiated in bad faith with Colmac concerning the relocation. Edison further alleges that the complaint seeks relief--essentially an order to Edison to modify an existing contract--that the Commission has previously stated it would not grant. Several defenses based on contract law are also raised.

Prehearing conferences were held on January 29, April 19, and August 22, 1988. Evidentiary hearings were held on September 13-16 and 20-22, 1988. The Commission's Division of Ratepayer Advocates (DRA), CVAG, the County of Riverside, and the Cabazon Band of Mission Indians intervened in the proceeding and participated in the hearings.

II. Positions of the Parties

A. Colmac's Position

Colmac presents three grounds for its claim for relief.

1. Breach of an Agreement to Change the Project's Location

First, Colmac argues that Edison expressly agreed to the modification requested by Colmac, but Edison has refused to live up to its agreement to modify the contract. Colmac believes that this agreement was in writing, in the form of exchanges of correspondence from January through May 1986.

The correspondence began with a letter of January 6 from Colmac's Vice President and Secretary Charles Johnson to Edison's Robert Ferguson (Ex. 45). The letter stated, "At this time we are formally requesting permission from SCE to change the location of the Plant from the Coachella Industrial Park to industrial land located on the Cabazon Indian Reservation."

Edison's response was a letter of February 24 (Ex. 47). Edison's Ferguson noted in the letter that Edison would review a specific proposal from Colmac and requested a site description for the new location, documents demonstrating Colmac's right to develop the site, and proof that Colmac's fuel sources were as available at the new site as at the old location.

On March 12, Colmac sent Edison a letter providing the requested information, according to Colmac (Ex. 49). The letter enclosed a legal description of the new site and an option agreement for a lease on the property. Approval of the option to lease was pending with the Bureau of Indian Affairs (BIA). The letter also discussed the location of agricultural waste fuel sources for the relocated plant. The letter closed with Colmac's urging Edison "to accept our request for relocation at your earliest convenience."

III. Discussion

A. Background

When we chose to develop the standard offers to fulfill in part our obligations under PURPA, one of our hopes was that the existence of the standard offers would allow us to avoid the necessity of detailed review of individual contracts between utilities and what promised to be a multitude of QFs. The economic and natural resources of California seemed particularly well suited to the development of the independent generators that PURPA was intended to stimulate, and we concluded that a case-by-case review of individual contracts would soon prove to be unwieldy. Thus, we engaged in the sometimes tedious and laborious task of developing form contracts that the utilities were required to offer to QFs. Once we approved these standard offers, the utility's purchases under the contracts were presumed to be reasonable, and we hoped that this prior approval and presumption of reasonableness would also speed up the review of the reasonableness of the utility's overall purchases.

The standard offers were also designed to neutralize the tremendous bargaining power of the utility as the only purchaser of the QF's power. We adopted several requirements to ease negotiations between utilities and QFs, but the QF's ultimate bargaining power was its right to accept the standard offer if it could not come to different terms with the utility.

Once the QF and the utility signed a contract--either one of the standard offers or a negotiated contract--we had hoped that our subsequent role would be limited to the usual review of the reasonableness of the utility's purchases and administration of its contracts with QFs. If later disputes developed between the utility and the QF about the interpretation or implementation of the contract, we presumed that the parties would turn to the common

resources for resolving such disputes--negotiations, arbitration, and, if necessary, the courts.

Colmac has stated its complaint in this case in a way that is apparently intended to fall within the limited role we have said we would assume in these disputes. Nevertheless, it is now clear that the primary points of the complaint boil down to disputes that frequently arise around contracts of all types and that have been addressed in several hundred years of contract law. Very little in this complaint requires our special expertise to resolve; most of the issues could have been handled by the normal means of dispute resolution.

At this point, having accepted the complaint, conducted the hearings, and evaluated the arguments of the briefs, we will not direct the complainant to another forum. But complainant and other parties should recognize that we have no special expertise to address the legal and equitable claims raised in the complaint, and our processes are neither intended nor structured to decide the detailed legal issues that are at the heart of the complaint and defense. Although we try our utmost to decide these cases correctly, our decisions typically rely more on policy concerns, fairness, and common sense than on a detailed study of pertinent legal precedents. In short, we strongly recommend that contractual disputes that require resolution of legal issues should be initiated in forums that are better suited to decide those issues justly and correctly.

B. <u>The Agreements to Modify the Contract</u>

Although none of the parties have analyzed the facts in precisely this way, we conclude from our review of the evidence presented at the hearing that the parties arrived at two related agreements to modify the original contract.

within five years of the execution of the contract. This deadline imposed a reasonable limit on Colmac's securing its arrangements with IID. Thus, we believe that the lack of a defined term for the agreement to amend the contract did not make the contract invalid.

Since the attempt to rescind the agreement to amend the contract was not effective, Edison remained bound to develop amendments to the contract when Colmac secured the final TSA with IID on January 26, 1988.

e. Other Issues

Before considering the consequences of Edison's actions, we will address some of the arguments that Edison has raised in opposition to this conclusion.

Edison argues that it was misled by Colmac's statements that the relocation would streamline local and state permitting. In fact, removal of the project to Indian property resulted in a removal of state and local jurisdiction over the important permits for the project.

We find that Edison should have been alerted to the dominance of federal jurisdiction. Locating the property on Indian lands was in itself an action that should have alerted Edison that federal jurisdiction would be involved. In addition, Colmac supplied information on permitting in the attachments to a letter of October 15, 1986 (Ex. 109), and specifically noted, "Because of the location of the plant on Indian land, ...no land use permit from Riverside County will be involved."

Moreover, in terms of its commercial relationship with Colmac, Edison should not have been concerned about the source of the permits, although Edison may have been interested in the identity of the permitting agencies for other reasons. Edison's narrow interest is reflected in the original contract (Ex. 18), which states, "Seller [Colmac], at no cost to Edison, shall... [a]cquire all permits and other approvals necessary for the construction, operation, and maintenance of the Generating

Facility." The contract properly gave Colmac primary responsibility for obtaining all necessary permits.

Thus, we conclude that the change in permitting jurisdiction should not have affected Edison's decision on Colmac's requests.

Similarly, as Edison has acknowledged, the opposition of local governments to the relocation should not have affected Edison's attitudes toward its contractual obligations and Colmac's requests, although, again, Edison may have been interested in the concerns of local governments for other reasons.

On the question whether the agreement between Colmac and Edison was supported by sufficient consideration, we agree with Colmac that the mutual change in positions is sufficient to support an agreement to modify an existing contract when performance has not yet been rendered. In addition, Colmac has invoked the doctrine of promissory estoppel, which, as Edison has correctly pointed out, can serve as a substitute for consideration and allow enforcement of an agreement on equitable grounds. We believe that the facts here are sufficient to show a reasonable and detrimental reliance by Colmac on Edison's promise to amend the contract when interconnection and transmission information was supplied. This reliance is sufficient to support enforcement of that agreement, even if more conventional consideration were lacking.

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review. At the time that Colmac made its request for relocation, the evidence in this case shows Colmac had the ability to complete its project at the Coachella site. At the time of the request, we therefore conclude, ratepayers were not affected by the choice of locations. The same contract would have been in effect if the plant was built at Coachella or Mecca.

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Riverside also contends that public policy considerations argue against granting the requested relief. Although it appears that ratepayers would receive short-term benefits if we could cancel this contract, we believe that a greater public benefit is served by preserving the rights of parties to contract and by enforcing the parties' legally binding promises. If we were to invalidate contracts because of variations in forecasts of oil and gas prices, we would undermine the foundation of our QF program and appear to question the basis for our entire economic system. Although we played a role in developing the standard offers, we contemplated that acceptance of these offers would result in valid and binding contracts that should be enforced like any other contract. Preserving the sanctity of contracts serves a higher public policy goal, in our opinion, and outweighs the considerations listed by Riverside.

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The prices currently set in the contract were based on projections available at the time of execution. Both of the fixed prices--for firm capacity, based on SO2, and energy, based on a forecast of the annual marginal cost of energy--are for a certain number of years starting on the firm operation date. We have authorized an adjustment to the firm operation date, so the periods for the set prices must also be extended. But this change presents a problem, since the tables attached to the contract do not extend far enough to cover the necessary period after the new firm operation date.

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circumstances, and we have endorsed this approach previously (D.86-12-104). We will use this approach to extend both the energy and capacity price tables.

Thus, we will authorize use of the last year of the existing tables to cover the years needed for the revised firm operation date. According to Appendix E to the contract, a 30-year contract beginning firm operation in 1989 would receive a firm capacity payment of $198 per kW per year. According to Appendix C, the annual marginal cost of energy in 1999 was forecasted to be 15.6 cents per kWh. These prices should be applied to the additional years necessary under the revised firm operation date.

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(Section 12) and other incidental dates by at least the number of days from November 3, 1987, until the effective date of this decision. Edison shall also negotiate a further extension of the termination date to allow Colmac a reasonable opportunity to gear up its construction operations. If the parties cannot agree on the latter extension, an extension of 184 days shall be used. Other deadlines and target dates in the contract and in the application of the Qualifying Facilities Milestone Procedure to Colmac's project should also be adjusted to reflect the total extension of the termination date. The payment schedules attached to the contract shall be extended to accommodate the new firm operation date.

2. Except to the extent granted herein, Colmac's complaint is denied.

This order becomes effective 30 days from today.

Dated APR 26 1989, at San Francisco, California.

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