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Decision 89 11 062 NOV 2 2 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AMERICAN COGEN TECHNOLOGY, INC. a California corporation, Complainant, vs. PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, Defendant.	ORIGINAL Case 89-05-018 (Filed May 8, 1989)

OPINION

I. Introduction

The parties to this case request an order approving a settlement and finding the terms of the settlement to be reasonable. The parties further ask for a finding that Pacific Gas and Electric Company (PG&E) is prudent in entering into the settlement. If we approve the settlement as requested, the parties ask for dismissal of this case with prejudice.

The case originated when American Cogen Technology, Inc. (ACT) filed its complaint against PG&E on May 8, 1989. The complaint alleged that PG&E had acted in bad faith in refusing to acknowledge a force majeure and to extend certain contractual deadlines, as required under ACT's two power purchase agreements (PPA) with PG&E. (Force majeure is a legal term referring to uncontrollable and unforeseeable events. Claims of force majeure often arise, as in this case, in contractual disputes. In this context, the force majeure prevents a party from rendering the performance required by a contract.)

The complaint detailed the harm that ACT would suffer because of PG&E's acts, and requested an order declaring that a

force majeure had occurred, that ACT had fulfilled its contractual obligations in response to the force majeure, and that ACT was entitled to an extension of certain contractual deadlines corresponding to the duration of the force majeure.

Before PG&E's answer was due, the parties jointly requested a stay of the proceeding to allow them to work out the final details of a settlement they had negotiated. The stay was granted by an order of the Administrative Law Judge on May 19, and the parties' "Joint Motion to Dismiss Complaint and for Approval of Settlement" was filed on August 1.

The Commission's Division of Ratepayer Advocates (DRA) filed comments on the joint motion on August 31 and submitted additional comments on September 28. ACT replied to DRA's additional comments on October 6.

II. Background to the Dispute

The motion recites ACT's version of the facts behind this dispute. PG&E does not necessarily agree with the facts as stated, and it reserves the right to contest these facts if we do not approve the settlement. The probable areas of dispute will become clear from the description of the complaint and proposed settlement.

ACT is the developer of two cogeneration projects in Monterey County. The first is a 49.9 megawatt (MW) project at the site of the Spreckels Sugar Company. The second is an identically sized project at an abandoned industrial site formerly owned by Firestone Tire and Rubber Company. ACT and PG&E entered into contracts based on interim Standard Offer No. 4 (SO 4) for both projects in October 1984. The PPAs contain a standard deadline terminating the contract if ACT does not begin delivering energy within five years of the date of the execution of the contract. Both projects began as 59 MW plants, but the planned size was

reduced to 49.9 MW in March 1986. The parties amended the PPAs to reflect the reduction in size in March 1989.

ACT proceeded to take steps to construct the projects, including securing property rights, obtaining engineering and contracting services, purchasing equipment, contracting for permitting studies, obtaining a financing commitment, and getting certification as a qualifying facility (QF) from the Federal Energy Regulatory Commission. (QFs are cogeneration and small power production projects that qualify for certain benefits under the federal Public Utility Regulatory Policies Act of 1978.)

ACT states that the incidents leading to the force majeure claim began in May 1988 when ACT applied for use permits from Monterey County. ACT expected to be able to obtain the permits without the need for an Environmental Impact Report (EIR) under the California Environmental Quality Act or CEQA (California Public Resources Code Section 21000 et seq.).

According to ACT, the County's previous actions had led ACT to believe that no EIR would be required. At the time of its application, ACT continues, the policy of the Monterey County Board of Supervisors was to treat cogeneration facilities of less than 50 MW as categorically exempt from the EIR requirement. In this respect, the Board followed Section 15329 of the CEQA Guidelines (14 Cal. Code of Regs. 15000 et seq.), which provided that cogeneration projects of less than 50 MW at existing industrial sites are categorically exempt from the EIR requirement if they meet certain air quality standards. With its application for the use permits, ACT had provided the air quality studies that it believed would entitle its projects to the categorical exemption under the Board's existing policies.

In addition, local officials had not required EIRs from two comparable cogeneration facilities, the O'Brien Energy Facility and the Texaco/Yokum project. Negative declarations had been prepared for these two projects.

In July 1988, ACT received two nearly identical letters from the Monterey County Planning Department. The letters stated that the County Department of Health and the County Flood Control and Water Conservation District had recommended that EIRs be prepared for the projects. ACT believes the recommendations apparently resulted from a study completed in May that raised concerns about seawater intrusion into groundwater basins in the Salinas Valley.

ACT contends that the change in the County's policy on EIRs for cogeneration projects constitutes a force majeure under the PPAs. Each of its PPAs states that a force majeure is an action by a federal, state, or municipal agency that was "unforeseeable" at the time the PPA was executed and was "beyond the reasonable control and without the fault or negligence of the party claiming force majeure."

ACT believes the County's actions meet these criteria for several reasons. As already mentioned, ACT contends that the County's express existing policy would have exempted ACT's projects from the EIR requirement. In earlier conversations with County Health Department officials, ACT states that it had been assured that neither water availability nor contamination would impede its projects. The projects are located 13 and 16 miles from the coast, and ACT argues that it had no reason to suspect that seawater intrusion would be an issue in the permitting process. Furthermore, the Spreckels project will use less than one-tenth and the Firestone project less than one-third of the water used by the previous occupants of the sites. Finally, County officials have confirmed in writing that the ACT projects were the first projects in the Salinas Valley basin that were subject to the EIR requirement and that the requirement of an EIR was "new" and an "unforeseeable change in policy."

The PPAs require a party claiming force majeure to notify the other party within two weeks of the occurrence of the force

majeure. ACT states that it met this requirement by notifying PG&E on July 28 and August 10 of the County's position on EIRs for the projects. ACT asked PG&E for an extension of the five-year deadline only for the exact number of days from the time ACT learned that County officials were recommending EIRs for the projects until the date the final EIRs are certified as legally adequate under CEQA. PG&E's refusal of this request led to the complaint and eventually to the settlement.

ACT also recites facts to show that it made its best efforts to remedy the inability to perform created by the force majeure. Its actions included retaining experts to perform the necessary hydrologic studies and meeting repeatedly with County officials, first to attempt to obtain a negative declaration or categorical exemption for the projects and later to narrow the scope of the EIR to the seawater intrusion issue.

The projects have been and continue to be viable, according to ACT. ACT has taken various steps to maintain the projects' viability and to comply with the requirements of the Qualifying Facility Milestone Procedure (QFMP) established by the Commission. ACT believes the projects also meet the standards on evaluation of proposed modifications of utilities' contracts with QFs the Commission set up in Decision (D.) 88-10-032. But for the force majeure, ACT contends, the projects would have been completed within the five-year deadlines established in the PPAs.

III. The Settlement

ACT and PG&E join in supporting their settlement as a reasonable resolution of this dispute.

The settlement has three main points.

First, commencement of firm capacity payments under both PPAs is delayed until May 1, 1991. This date assumes a revised on-line date of May 1, 1990.

Second, the five-year deadline for beginning energy deliveries is extended to no later than May 1, 1991.

Third, PG&E has the right to curtail each facility for up to 2000 hours during off-peak and super off-peak periods each year. During these periods, PG&E may require ACT to reduce its capacity from 47 MW to 37 MW.

The parties negotiated the settlement with the Commission's guidelines on contract modifications (D.88-10-032) in mind, and they believe that the settlement serves ratepayers' interests "demonstrably better" than the original agreements.

Several factors motivated the settlement. First, both parties felt the outcome of litigation on this issue was uncertain. Second, settlements avoid the substantial costs of litigation. Third, the parties were able to arrive at a settlement that benefited ratepayers sufficiently to approach the Commission for approval.

The net present value of the settlement to ratepayers is estimated to be between $14 million and $53.5 million. The value to PG&E of being able physically to curtail the facilities' generation is difficult to quantify but substantial. The parties believe these benefits should be weighed against the result if ACT had prevailed in litigation--no deferral of the capacity payments and no control by PG&E over the facilities' generation.

IV. DRA's Comments

DRA's initial comments reviewed the joint motion and the standards that DRA applied in evaluating the parties' request. DRA concluded that "the dispute between PG&E and ACT presents to the ratepayers a bona fide risk if it were to be resolved through litigation." DRA weighed that risk against the savings for ratepayers that result from the settlement and recommended that the Commission approve the settlement.

In its additional comments, DRA notes that its initial comments were based on a limited evaluation, constrained by time, of the primary issue raised in the joint motion: "whether or not Monterey County's 'new policy' of requiring EIRs for these projects constituted a force majeure event." New information led DRA to reconsider its evaluation.

The new information consists of correspondence received by the California Energy Commission (CEC) when it reviewed the original version of the Spreckels project. DRA believes this new information "suggests that, contrary to ACT's and Monterey County's suggestions in the record, Monterey County's interest in a thorough EIR on the issue of saltwater intrusion for projects in its jurisdiction was or should have been foreseeable from the time of ACT's initial attempts to get its permits, and well before the spring of 1988." DRA attaches several letters to its comments. The letters indicate that Monterey County agencies had expressed their belief that the project required preparation of an EIR and had raised concerns about seawater intrusion. DRA concludes that "ACT at no time had assurances from either the lead agency or any responsible agency that its projects qualified for categorical exemptions."

In light of this new information, DRA withdraws its previous endorsement of the joint motion and is "guardedly neutral" on the reasonableness of the settlement. DRA does not request hearings on this matter, but it suggests that the Commission should "admonish the parties and future applicants for settlement approvals of their duty to fully disclose all information."

ACT's response to the additional comments begins by noting that the correspondence attached to DRA's motion pertained to a previous version of the Spreckels project, which included a large food processing center and a larger generator. When the letters are read in this light, ACT believes it is clear that they do not relate to the concerns that led to the force majeure that

delayed the smaller projects that are the subject of the joint motion.

ACT also argues that DRA's additional comments misstate the facts reflected in the letters.

Even if DRA's concerns are accepted as stated, however, ACT believes that they are irrelevant to the claim of force majeure. "The ultimate fact upon which ACT's force majeure claim is based is not the recognition of the potentially harmful effects of seawater intrusion, or where or when it had been discussed," ACT contends, "but the change in policy that required EIR review to assess the risks of seawater intrusion for projects like ACT's, projects that had previously been Categorically Exempt."

ACT believes the benefits of the settlement overwhelm the concerns raised by DRA, and the settlement should therefore be approved.

V. Discussion

The proposed settlement includes several modifications to existing contracts. We recently set forth our expectations about how utilities should evaluate requests for contract modifications in our "Guidelines for Contract Administration of Standard Offers" (D.88-10-032). The settlement was apparently negotiated with these guidelines in mind, and the motion contains statements that seem to be intended to show that the settlement complies with the guidelines.

The guidelines include several provisions concerning claims of force majeure. The guidelines allow an exception to strict enforcement of the five-year deadline for force majeure and limit any extension of the five-year deadline to the duration of the force majeure.

The guidelines are cautious about force majeure claims arising from permitting delays:

> "Events giving rise to valid claims of force majeure may include delay in obtaining required governmental permits, depending on the circumstances of the individual QF. However, not all project delays resulting from delays in obtaining required governmental permits are valid claims of force majeure. Permitting delays and denials are a regular part of project development and should be anticipated by project developers."

Thus, we must examine whether the permitting delays arising from the EIR requirement should be viewed as a regular part of the development of the projects and whether ACT should have anticipated the delays associated with the EIR requirement.

The guidelines also give a general description of how we will evaluate claims of force majeure:

> "Decisions about the applicability of the force majeure clause will be made on a case-by-case basis. Factors to be considered will include an examination of the factual basis of the force majeure claim, the specific language of the contractual force majeure clause, and whether the QF has complied with applicable contractual requirements to give notice of the force majeure and to mitigate the delay caused by the force majeure. The effect of the force majeure on the utility's obligations under the contract will also be considered as cases arise."

The guidelines also require utilities to examine the viability of a project before any contract modifications are considered and to obtain concessions favorable to ratepayers before granting deferrals of the five-year deadline, like the deferral in the amendments connected to the settlement. We have already summarized ACT's description of the factual basis of its claim of force majeure. We will consider the other factors mentioned in the guidelines--foreseeability of permitting delays, viability, ratepayer benefits, the language of the contracts, notice and mitigation--in the following sections.

A. Foreseeability

The guidelines state that not all permitting delays result in force majeure and that the project developer should anticipate some delays as a regular part of project development. A threshhold issue, then, is whether the EIR requirement was a delay that ACT should have anticipated.

ACT argues that it could not have foreseen that the County would change its policy to require an EIR for cogeneration projects of less than 50 MW at existing industrial sites.

DRA's additional comments, however, cast some doubt on ACT's assertions. ACT has represented that a new emphasis on the problem of seawater intrusion into the Salinas basin led the County to cease granting categorical exemptions for such projects. But the attachments to DRA's additional comments show that several county agencies had expressed their concerns about seawater intrusion in connection with the Spreckels project several years before the county changed its policy. Even though the environmental review undertaken by the CEC became moot when the projects were reconfigured, these letters raise the question whether it was really unforeseeable that these agencies would raise this issue again.

ACT has not addressed the legal basis for the change in the County's policy that led to the force majeure. Section 15329 of the CEQA Guidelines has not been amended, and ACT's projects still appear to fall under the exemption created by that section. The only exceptions that are allowed from this categorical exemption arise "when the cumulative impact of successive projects of the same type in the same place, over time is significant" or when "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances" (14 Cal. Code of Regs. Section 15300.2(b), (c)).

Presumably the County relied on one of these exceptions in revising its policy on categorical exemptions for cogeneration

projects. Exhibits attached to the joint exhibit, although not contemporary with the change in policy, indicate that concern over groundwater overdrafts and resulting seawater intrusion led to stricter environmental reviews for facilities, like cogeneration projects, with large water requirements. Groundwater overdrafts and seawater intrusion could be viewed as facts justifying either exception to the categorical exemption: The cumulative effects of overdrafts result in the significant impact of seawater intrusion, and the unusual circumstance of seawater intrusion justifies the exception.

Regardless of the legal bases for the County's action, the question here is this: Was it foreseeable that the County's concerns about groundwater overdrafts and seawater intrusion, expressed at least as early as 1985, would lead it to revise its review of cogeneration projects in 1988?

If we relied only on the materials submitted with the motion, we would find that the change was not foreseeable, because the motion leaves the impression that the issue of seawater intrusion never reached a level of concern that stimulated County officials to require EIRs because of this issue until May 1988. The materials attached to DRA's additional comments, however, cast some doubt on that impression. Solely on the basis of the information before us, we cannot conclude that it was foreseeable that the County would require an EIR for ACT's projects.

This conclusion must be tempered with another observation. Particularly when cases come before us without having been tested in adversary hearings, we must limit our approvals to the scope of the information we have before us. Any finding of reasonableness in cases like this is strictly limited to the facts and materials that are presented by the parties. The implication of this limitation falls primarily on PG&E. For reasons of strategy in potential litigation, PG&E has not concurred in ACT's presentation of the facts behind the settlement. In presenting

such a settlement to us, PG&E is presumed to have investigated the underlying facts fully and to have found an adequate basis for concluding that the settlement is a fair resolution of a legitimate dispute. In circumstances like the ones presented in this case, our finding of reasonableness is conditioned on the accuracy of this presumption.

B. Viability

The joint motion contains a recitation of how ACT's projects are viable and, except for the force majeure, would be able to comply with the requirements of the original PPAs. ACT's descriptions closely follow the items listed in the guidelines for determining the viability of a project.

ACT states that it has expended substantial sums of money to secure site control. It has submitted complete Project Description and Interconnection Study Request forms and paid PG&E the necessary fees for commencement of an interconnection study. ACT further states that it has the ability to pay the remaining $5 per kilowatt project fee upon receipt of the Special Facilities Agreement from PG&E. ACT has pursued and obtained all other permits needed for the projects, and PG&E has agreed to supply fuel for the projects under a standard agreement. ACT has engaged construction contractors, has ordered the projects' turbines and generators, and has secured construction financing. ACT has prepared financial data showing that the plants will operate profitably for 30 years. A similar cogeneration project of ACT's is proceeding to a timely completion.

Although PG&E reserves its right to dispute these facts and has accordingly not joined ACT in this presentation of facts, it appears from the facts contained in sworn declarations attached to the joint motion that ACT meets the standard of viability established in the guidelines. We conclude that ACT's projects are viable but for the intervention of the claimed force majeure.

C. Benefits for Ratepayers

The guidelines support strict enforcement of the five-year on-line requirement, subject to extension because of force majeure, and set the standards for deferral of the five-year on-line date: "On-line date deferrals...may be considered only if the ratepayers' interests will be served demonstrably better by such deferral." The joint motion describes the parties' efforts to meet this guideline.

In exchange for consenting to the extension of the five-year deadline, the parties have agreed to several contract modifications that will benefit ratepayers. First, firm capacity payments under the PPAs are delayed until May 1, 1991, even if the projects begin operation at an earlier date. ACT expects to be on-line by May 1, 1990, and even with the extension due to force majeure, the amended contract requires ACT to begin delivering energy by May 1, 1991.

Second, PG&E acquires the right to curtail the generation from each project for up to 2000 hours annually. The curtailment must occur during off-peak or super off-peak periods, when curtailments are most beneficial to PG&E's system. PG&E may reduce each project's output to no lower than the generation associated with 37 MW, or about 12.5 MW less than each facility's full capacity.

The joint motion contains a declaration setting forth an analysis of these amendments. Although no information is given concerning the expertise or even the employer of the declarant, it appears from the context of the analysis that it was prepared for PG&E to aid in the decision to accept the settlement. The analysis concludes that these amendments benefit PG&E and its ratepayers in terms of both economics and the efficient operation of PG&E's system.

A one-year deferral in the commencement of capacity payments to ACT saves ratepayers between $11.9 million and

$16.6 million, depending on the forecast of the value of capacity. Using a medium forecast of capacity value, the savings are estimated to be $14.2 million. The one-year deferral used in the analysis apparently refers to the delay between the expected operation of ACT's projects and the start of capacity payments. We note that the beginning of capacity payments on May 1, 1991, is about two years later than the deadline for energy deliveries under the original PPAs.

Savings from the curtailment provisions, on a net present value basis, would total between $2.1 million and $36.8 million, depending on the forecast of the cost and amount of replacement energy. (This analysis assumes a right to reduce output by 11.5 MW for each unit, rather than the 12.5 MW stated in the motion. It appears that use of 12.5 MW would increase the economic benefits. On the other hand, the amendments to the PPA proposed by the stipulation reduce the projects' firm capacity to 47 MW, and this reduction would appear to decrease the economic benefits. The discrepancies in the capacities stated in the motion, the analysis, and the amendments are not explained.)

Thus, on a net present value basis, the analysis concludes that the amendments would save PG&E's ratepayers between $14.0 million and $53.5 million.

In addition, the analysis points out that the amendments provide benefits that are substantial but difficult to quantify. These benefits are connected to PG&E's right to curtail energy deliveries for 2000 hours annually.

Without endorsing the specific figures presented in the analysis, we are persuaded that the amendments will produce substantial benefits for PG&E and its ratepayers compared with the original PPAs.

D. The Language of the Contracts

The guidelines suggest that the validity of a claim of force majeure may be affected by "the specific language of the

contractual force majeure clause." Even though we have found the contractual modification to be beneficial to ratepayers, examination of the contract's specific provisions is necessary because greater ratepayer benefits might have accrued if PG&E had successfully resisted the force majeure claim and allowed the contracts to terminate. Thus, we must examine the contractual provisions to evaluate the reasonableness of PG&E's decision to settle this dispute on these terms, rather than to continue to resist ACT's assertions.

The dispute underlying the proposed settlement concerns whether or not the action of Monterey County officials in requiring preparation of an EIR for ACT's project is a force majeure under the terms of the PPAs. The contracts define force majeure as

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

The effect of force majeure on the performance required by the contracts is also addressed in the PPAs:

> "If either Party because of force majeure is rendered wholly or partly unable to perform its obligations under this Agreement, that Party shall be excused from whatever performance is affected by the force majeure to the extent so affected provided that:
>
> "(1) the non-performing Party, within two weeks after the occurrence of the force majeure, gives the other Party written notice describing the particulars of the occurrence,

> "(2) the suspension of performance is of no greater scope and of no longer duration that is required by the force majeure, [and]
>
> "(3) the non-performing Party uses its best efforts to remedy its inability to perform..."

The force majeure provisions of the PPAs, as applied to the facts in this dispute, are somewhat ambiguous. If the acts of state agencies (including the agencies of counties, which are subdivisions of the state (Gov. Code Section 23002)) must conflict with the terms of the agreement to qualify as force majeure, then force majeure as defined under the PPAs has not occurred. There was no allegation that the EIR requirement conflicted with any provision of the PPAs. If, on the other hand, such acts become force majeure merely by rendering a party unable to perform, in whole or in part, its obligations under the contract, then requiring the EIR could be seen as rendering ACT unable to meet the five-year deadline.

The ambiguity exists because it does not make sense to apply the limiting phrase--"which conflict with the terms of this Agreement"--to all of the examples listed in the definition of force majeure. Acts of God, labor disputes, and sudden actions of the elements, for example, are unlikely to conflict directly with the terms of the contracts. The limiting phrase obviously applies to the example it immediately follows--actions of legislative, judicial, or regulatory agencies--but it is not clear that a county's actions must be similarly limited to qualify as force majeure.

In addition, judicial interpretation of the notion of the impossibility of performing the obligations required by a contract, which underlies force majeure provisions, is somewhat in transition. The older interpretations, which required a strict impossibility of performance, have been expanded by modern courts

to include extreme economic difficulty in rendering the required performance. Thus, it is not clear how courts would view the force majeure provision of the PPAs nor what would be the outcome of litigation between the parties on this issue.

E. Notice and Mitigation

The guidelines recommend a consideration of whether ACT gave notice of the claimed force majeure as required under the PPAs and whether ACT took reasonable steps to mitigate the delay cause by the force majeure.

The motion contains copies of ACT's letters to PG&E, which notified PG&E that an EIR might be required for each project. The letters were sent 14 and 15 days after ACT received notice of the EIR requirements. The letter for the Spreckels plant appears to have been sent later than the two weeks allowed under the PPA, but PG&E has not raised an issue of timely notice, so far as the joint motion reveals. It is doubtful that a one-day delay in the notice for the second plant would have detrimentally affected PG&E, and we conclude that, for the limited purpose of evaluating the settlement, ACT substantially complied with the contractual provisions on notice of the force majeure.

The motion also recites facts to support ACT's claim that it has acted to mitigate the effect of the delay on its projects. It quickly retained the hydrologic and other experts needed to perform the studies for the EIR, and it met repeatedly and successfully with County officials to limit the scope of the EIR to the question of seawater intrusion, shortening the delay. It also explored, unsuccessfully, various options to forego the EIR requirement.

We conclude that ACT has made reasonable efforts to mitigate the delay connected with the preparation of EIRs for its projects.

F. The Reasonableness of the Settlement

Uncertainty about how a court would resolve the issues raised by this dispute undoubtedly led the parties to consider a settlement. There may have been additional questions about the facts of the case and how legal doctrines concerning the impossibility of performing a contract's required duties would be applied in these circumstances. The parties have acknowledged that the expense and uncertainty about the outcome of litigation helped incline them to settle their dispute.

For similar reasons, we have consistently encouraged QFs and utilities to attempt to settle disputes that arise in the interpretation or modification of standard offers, and we have agreed to review settlements when there appears to be a legitimate underlying dispute. (See D.87-09-080.)

In this case, we believe that the ambiguous definition of force majeure in the PPAs, when applied to the facts as recited by ACT, presents a legitimate dispute that reasonable parties would attempt to resolve through negotiations.

The settlement provides substantial benefits to ratepayers when compared with the original PPAs, and PG&E's ability to curtail part of the output of ACT's projects makes it likely that ratepayers will benefit from the energy supplied by the projects. The right to curtail makes it easier for PG&E to integrate the projects into its system and to maximize the value of the projects' production for the benefit of its system and its ratepayers.

The parties have estimated that the net present value of the amendments resulting from the settlement as compared with ACT's existing PPAs is from $14.0 million to $53.5 million. We accept this range as an illustration, rather than a precise calculation, of the benefits that ratepayers may receive under the settlement.

Finally, the settlement is a final resolution of this dispute, which eliminates substantial litigation costs for both

parties and protects PG&E and its ratepayers from any exposure to liability raised by these issues.

However, we have two additional reservations about the settlement as presented in the joint motion.

One minor reservation is that the pages of the settlement attached to the joint motion skip from page 6 to page 12. This appears to be a clerical error, but we obviously cannot approve any portions of the settlement that have not been presented to us.

Our second and more serious reservation concerns a provision of the settlement that states, "The Commission shall have exclusive jurisdiction and venue over the Parties with respect to any dispute or controversy arising from or in connection with this Agreement...." We have many strong objections to this provision.

First, this provision incorporates a bad policy. From the very inception of the development of the standard offers and related contracts between QFs and utilities, we have viewed the resulting agreements as legally enforceable contracts between two equal parties. We have been very hesitant to engage in reviews of these agreements, because the resolution of contractual disputes is an area that our laws and traditions have delegated to the courts and similar entities for centuries. We have reluctantly become involved in some contractual disputes when the issues were closely related to our proper authority as the agency charged with the regulation of investor-owned electric utilities. (See D.82-01-103, 8 CPUC 2d 20, 81-84; D.87-09-080, mimeo. pp. 7-8.) We have recently discussed our discomfort at being asked to resolve legal matters having nothing to do with our jurisdiction and expertise that came before us as part of a QF's claim of bad faith negotiation by a utility (D.89-03-012, mimeo. pp. 23-25; D.89-04-081, mimeo. pp. 28-29).

The settlement attempts to put us in a position that is one step further removed from our proper role in the relations

between QFs and utilities. The settlement agreement, the subject of this provision, is a purely legal document that was negotiated and arrived at to settle a dispute concerning other contracts, the PPAs. The disputes and controversies that may arise under this settlement agreement, over which the parties attempt to give this Commission "exclusive jurisdiction and venue," will almost certainly be narrow questions of traditional contract law. Such issues should be resolved by the courts and other agencies for dispute resolution that have the expertise, resources, and authority to address them.

Second, the legal validity of this provision appears to us to be highly questionable. We doubt that the mere agreement of two parties can force jurisdiction on a constitutional agency like the Commission, particularly when the State Constitution and the Legislature have granted other entities jurisdiction to resolve these issues. The provision also raises many other legal issues, which we will not purport to resolve, such as the nature of the Commission's jurisdiction over ACT, a private, unregulated corporation; the approaches the Commission, with its quasi-legislative and quasi-judicial powers, would use to resolve disputes and interpret the agreement; and the Commission's role in granting attorneys' fees to the prevailing party, as called for under the agreement.

Finally, we feel very strongly that the question of what types of cases come before us is a decision for the Commission, the Legislature, and the people of this state, speaking through the Legislature and the State Constitution, and not for private parties who may be seeking a convenient forum for resolving their disputes. We are not a private dispute resolution agency, and our budget and staffing limitations do not permit us to act beyond our properly prescribed functions.

We believe that the jurisdiction provision of the settlement agreement is unwise. We do not approve of that

provision of the settlement, and we will not be forced by our desire to encourage settlements to accept disputes on collateral agreements that parties attempt to bring before us.

G. Conclusion

We are persuaded that, in light of all the circumstances, the settlement, subject to the reservations we have expressed in this decision and based solely on the information submitted to us, and the resulting amended PPAs are reasonable and that PG&E should be allowed to recover in rates all payments properly made under the amended PPAs.

Although we cannot approve the settlement's jurisdiction provision or any missing pages, we approve all other provisions, and we will issue the order requested in the joint motion and dismiss the complaint.

Findings of Fact

1. ACT filed a complaint against PG&E on May 8, 1989. The complaint alleged that PG&E had acted in bad faith in refusing to acknowledge a force majeure and to extend the five-year deadlines in the PPAs of ACT's Firestone and Spreckels projects.

2. On August 1, ACT and PG&E filed a joint motion, setting forth the terms of the settlement of their dispute. The parties request the Commission to find that the settlement is reasonable, to find that PG&E was prudent in entering into the settlement agreement, and to dismiss the complaint upon approval of the settlement.

3. DRA filed comments on the joint motion on August 31 and additional comments on September 28, and ACT responded to DRA's additional comments on October 6. DRA is neutral on the question of the reasonableness of the settlement, and DRA did not request hearings.

4. ACT claims that the actions of Monterey County officials in requiring an EIR for its projects is a force majeure as defined in the projects' PPAs.

5. The settlement amends the PPAs for ACT's Firestone and Speckels projects. The amendments extend the five-year deadline to no later than May 1, 1991, release PG&E from any obligation to pay for capacity from the projects before May 1, 1991, and grant PG&E the right to curtail generation at each project as low as 37 MW for up to 2000 off-peak and super off-peak hours each year.

6. The parties estimate that the ratepayer benefits resulting from the amendments as compared with ACT's original PPAs for the two projects have a total net present value ranging from $14.0 million to $53.5 million.

7. The declarations and exhibits attached to the joint motion support the contentions that ACT gave timely notice to PG&E when it became aware of the force majeure, that ACT has attempted to mitigate the delay caused by the force majeure, and that the projects are viable but for the force majeure.

8. The settlement is the final resolution of the parties' dispute.

Conclusions of Law

1. Under the facts alleged by ACT, ACT has a colorable claim to force majeure under the wording of its contracts with PG&E.

2. The portion of the definition of force majeure contained in the PPAs that relates to this case is ambiguous.

3. In light of the wording of the PPAs, the trend of the law on impossibility of performance, and the facts alleged by ACT, the outcome of litigation of the dispute between PG&E and ACT is uncertain.

4. The settlement between ACT and PG&E is a fair and reasonable compromise of the parties' dispute.

5. Substantial ratepayer savings are likely to result from the amendments to the PPAs required by the settlement.

6. Except for the reservations noted in this decision, the settlement and amended PPAs entered into between ACT and PG&E are

reasonable, and PG&E was prudent in entering into the settlement with ACT.

7. This complaint should be dismissed as requested by the parties.

ORDER

IT IS ORDERED that:

1. Except for subparagraph 9(j) and any material contained on pages 7 through 11, and based on the information presented in the joint motion, the settlement entered into by Pacific Gas and Electric Company and American Cogen Technology, Inc. (ACT) in connection with ACT's Firestone and Spreckels cogeneration projects in Monterey County is a reasonable resolution of the dispute concerning the interpretation and application of the force majeure provision of the power purchase agreements for those projects.

2. Except as limited in Ordering Paragraph 1, the joint motion for an order approving the settlement and dismissing the complaint is granted.

3. ACT's complaint is dismissed with prejudice.
This order is effective today.
Dated NOV 2 2 1989, at San Francisco, California.

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

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

Wesley Franklin

WESLEY FRANKLIN, Acting Executive Director