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Decision 90-05-086 May 22, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company for an expedited order approving amendments to three Power Purchase Agreements with GWF Power Systems, L.P. or with GWF Power Systems Company, Inc. regarding the deferral of the purchase of long-term capacity and energy and the cancellation of up to five Standard Offer No. 4 power purchase agreements.

ORIGINAL

Application 89-11-032
(Filed November 28, 1989)

I N D E X

O P I N I O N

I. Summary

Pacific Gas and Electric Company (PG&E) requests ex parte approval of a settlement agreement with GWF Power Systems, L.P. and GWF Power Systems Company, Inc. (collectively referred to as "GWF") and recovery through the Energy Cost Adjustment Clause of all contract payments made under the agreement. We approve PG&E's request.

II. Background

GWF is a developer of qualifying facilities (QFs) in Northern California.[1] In 1984 and 1985, GWF and PG&E entered into power purchase agreements based on interim Standard Offer 4 (ISO4). Under ISO4, the contract is automatically terminated if the project is not on-line and delivering energy within five years of contract execution. On November 18, 1989, PG&E filed an application for ex parte approval of a negotiated settlement agreement (Agreement) with GWF which, among other things, would defer the five-year deadline for three of GWF's projects.

A. The Agreement

The Agreement would resolve disputes over three force majeure claims and settle the issue of the relief to which GWF is

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1 QFs are cogeneration and small power production projects that qualify for certain benefits under the federal Public Utility Regulatory Policies Act of 1978.

entitled under a fourth force majeure claim.[2] The force majeure disputes generally concern whether various delays by permitting agencies constitute force majeure events that would entitle GWF to extensions of its ISO4 on-line dates. The Agreement affects 12 of GWF's ISO4 contracts, representing a total capacity of 230 MW, comprised of petroleum coke and coal-fired plants. In brief, the Agreement would:

1. Defer the on-line dates for two projects (BARE I and Vie Del II) for 2-5/6 and 3-1/2 years, respectively, as a settlement of the force majeure disputes related to those projects.

2. Defer the on-line date for a third project (Hanford II) for seven months because of agreed-upon force majeure conditions.

3. Terminate a fourth ISO4 (the Vie Del I contract), which is the subject of a force majeure dispute, or in the alternative, modify the Vie Del I and Vie Del II contracts to obtain net ratepayer benefits equivalent to the termination of the Vie Del I contract.

4. Provide for 100 percent economic curtailment on Vie Del II for 1,350 hours per year, and on BARE I for 1,170 hours per year.

5. Reduce Vie Del II capacity payments by $13/kW-year.

6. Extend the terms of the Vie Del II, BARE I and four other GWF ISO4 contracts (BARE II-V) by five years, during which PG&E would not make payments for capacity.

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2 Force majeure is a legal term referring to certain events that excuse a party from rendering the performance required by a contract. Attachment 2 presents the force majeure provision contained in PG&E's ISO4.

7. Terminate four ISO4 contracts unrelated to the force majeure disputes.

Attachment 1 presents a summary of the terms of the Agreement, by project. If the Agreement is denied by the Commission, PG&E agrees to pay some of GWF's construction expenses related to the BARE I facility, not to exceed $750,000. In addition, the on-line dates under BARE I, Vie Del I, Vie Del II, and Hanford II purchase power agreements are extended for the number of days between October 25, 1989 and the date of Commission action approving or denying the application.

B. GWF's Claims of Force Majeure and Pending Litigation

PG&E's application recites GWF's version of the facts behind its force majeure claims, with appended declarations from the GWF Chief Executive Officer, the Mayor of the City of Pittsburg, and two Pittsburg City Council members. With the exception of events surrounding the Hanford II project, PG&E does not necessarily agree with the facts as stated by GWF, and it reserves the right to contest these facts if the Commission does not approve the settlement.

According to GWF, the force majeure events stem from an illegal moratorium ordinance in Hanford and protracted permitting processes in Pittsburg and in Fresno County. In brief, these events include:

1. Bay Area Air Quality Management District's (BAAQMD) failure to certify the BARE I Environmental Impact Report (EIR) within one year plus 60 days, as required under the California Environmental Quality Act (CEQA).

2. Pittsburg City Council's failure to approve GWF's application for a conditional use permit on the basis of unspecified, unadopted future changes that might be applicable to BARE I.

3. Fresno County's failure to: (a) certify the Vie Del I and Vie Del II EIRs within one year of the completion of GWF's application; (b) certify the EIRs prior to taking action on the applications; and (c) meet the one-year deadline of the California Permit Streamlining Act of 1977.

4. Hanford City Council's failure to lift a moratorium on building permits pursuant to a temporary restraining order issued in Superior Court.

GWF's description of the delays experienced is set forth below.

1. BARE I Project

Before GWF could begin construction of the BARE I project, it was required by law to obtain an Authority to Construct from the BAAQMD. A prerequisite to issuance of the Authority to Construct was the preparation and certification by the BAAQMD of an EIR under the CEQA. In September 1985, GWF submitted its application for Authority to Construct to the BAAQMD. On July 7, 1986, the BAAQMD deemed GWF's application to be complete. CEQA, the Administrative Guidelines thereunder, and the California Government Code require that the lead agency involved in preparing an EIR complete and certify the EIR within one year after the agency deems an application to be complete. The one-year deadline cannot be extended for more than 90 days, and then only with the applicant's consent.

GWF agreed to extend the deadline by 60 days. The BAAQMD did not complete or certify the EIR, or issue GWF the Authority to Construct, until February 8, 1988, one year plus 217 days after GWF's application was deemed complete. GWF claims that BAAQMD's failure to certify the EIR within one year plus 60 days was an unforeseeable action by a government agency amounting to a force majeure event.

GWF concurrently pursued a conditional use permit from the City of Pittsburg for construction of the BARE I project within the City limits, filing an application with the City on July 2, 1986. The Pittsburg Planning Commission approved GWF's application on April 26, 1988. On May 16, 1988, the City Council voted to overturn the Planning Commission's approval of BARE I. The City Council based its decision, in part, on a concern that, although BARE I was proposed for an appropriately zoned site, was of a use consistent with the existing General Plan, and was on a site surrounded by heavy industrial uses, the City Council might wish to redevelop and change the nature of the area in the future through amendments to the General Plan, rezoning or otherwise.

On July 5, 1988, the City Council rescinded its denial of the GWF application and voted to reconsider GWF's Conditional Use Permit at a future date. The City Council did not reconsider GWP's application until April 17, 1989, at which time it granted a Conditional Use Permit for the project, subject to certain conditions. GWF claims that the City Council's failure to approve GWF's application for a conditional use permit on the basis of unspecified, unadopted future changes that might be applicable to BARE I was an unforeseeable action by a government agency amounting to a force majeure event.

2. Vie Del I and Vie Del II Projects

In December 1985, GWF filed applications for authority to construct permits with the Fresno County Air Pollution Control district (FCAPCD). The FCAPCD processed the applications and made the preliminary decision to issue such permits upon the completion of the environmental review process by Fresno County.

In September 1986, GWF applied to Fresno County for use permits for the projects. Fresno County decided to prepare a Negative Declaration under CEQA for each project. In February 1987, the County Planning Commission deadlocked 4-4 on the adoption of the Negative Declarations and approval of use permits for the

plants. While GWF's appeal to the County Board of Supervisors (Board) was pending, the Attorney General's Office requested that full EIRs be prepared. Accordingly, in May 1987, the use permit applications were withdrawn so that Fresno County could prepare EIRs.

On June 12 and August 11, 1987, respectively, GWF resubmitted applications to Fresno County for use permits for the projects. The Vie Del II application was deemed complete as of July 12, 1987, and the Vie Del I was deemed complete as of September 10, 1987.

The County Planning Commission did not schedule a public hearing to consider certification of the proposed Final EIRs and approval or disapproval of the applications until August 25, 1988. On August 25, 1988, the County Planning Commission, without certifying the proposed Final EIRs, denied the applications. In addition, GWF contends that the County Planning Commission failed to make specific findings, as required by law, with respect to the applications. GWF contends that these actions violated CEQA and other California law.

On September 8, 1988, GWF filed timely appeals of the County Planning Commission's actions to the Board. The appeals were originally scheduled to be heard by the Board on October 10, 1988. On September 20, 1988, however, the Northern California Pipe Trades Council requested that the appeals hearing be continued so that Fresno County could conduct additional environmental review of the projects. The Board continued the hearing to January 24, 1989, and directed Fresno County to conduct additional environmental review.

According to GWF, following the Board's decision to continue the hearing, neither the Board nor County planning staff took any action to ensure that the additional environmental information requested by the Board was gathered and processed. During these delays, GWF maintains that several new developments

and changed circumstances occurred that rendered certain analyses and discussions contained in the proposed Final EIRs outdated, incomplete, and inadequate under CEQA. At its January 10, 1989 meeting, Board determined that under CEQA the proposed Final EIRs would have to be amended and recirculated, due to the amount of time that had passed since the reports had first been finalized. The Board vacated the January 24, 1989 appeals hearing and remanded the matter to the County Planning Commission for hearing after the County completed the required additional environmental review. The County is currently in the process of preparing supplemental draft EIRs.

GWF contends that the County's failure to follow the requirements of law with respect to completing legally adequate environmental review and processing the applications constitute force majeure. Specifically, GWF points to the failure of the County to certify an EIR within one year of the completion of GWF's application, the fact that the County took action on the applications before the EIRs were certified, and the fact that the County failed to meet the one-year deadline of the California Permit Streamlining Act of 1977. In GWF's view, such actions were unforeseeable at the time the agreements were executed and were beyond the reasonable control and without the fault or negligence of GWF. GWF also contends that, after failing to follow the legal requirements for certifying the proposed Final EIRs and processing the applications, the County then unforeseeably delayed completion of the additional environmental review that had become necessary.

3. Hanford II Project

On March 21, 1988, the Hanford City Council voted unanimously to (1) certify the EIR, (2) approve the Site Plan Review permit, and (3) authorize the construction and operation of the Hanford II project. Based on that approval, GWF proceeded to purchase equipment and obtain permits for initial grading activities. With the Site Plan Review approval, GWF had obtained

all discretionary permits for the project; only ministerial building permits remained to be issued.

As a result of the November 1988 elections, the Hanford City Council changed composition. In mid-November, the new City Council requested an opinion from the City Attorney regarding whether the City Council could legally reconsider its prior approval of the project. Although advised by the City Attorney that it could not legally reconsider the approval of the project, the City Council proposed a moratorium ordinance prohibiting the issuance of building permits for the project. On December 3, 1988, GWF advised the City that the adoption of the proposed moratorium ordinance would be illegal under the law. Nevertheless, on December 6, 1988, the City Council enacted as an emergency measure for 14 days, a moratorium on coal burning.

On December 8, 1988, GWF filed in Superior Court a Petition for Peremptory Writ of Mandate and Complaint for Damages, alleging the illegality of the moratorium ordinance and requesting an injunction against its enforcement. In mid-December, the Superior Court granted GWF's request for a temporary restraining order against enforcement of the moratorium. Despite the restraining order, the City refused to issue building permits for the project. On December 20, 1988, the City Council voted to extend the moratorium ordinance for an additional 31 days. On January 17, 1989, the City Council voted to extend the moratorium ordinance until December 4, 1989.

In late January 1989, after issuance of another temporary restraining order, the City agreed to issue a few building permits for the project. Work pursuant to these limited number permits proceeded until mid-February, when all work ceased due to the lack of further building permits. Pursuant to a court order in April 1989, the City released a few additional building permits. According to GWF, this allowed limited, but disjointed construction in April and May.

After a trial date was set by the Court for June 24, 1989, the City and GWF entered into settlement negotiations which culminated in a settlement agreement dated July 10, 1989. Under the terms of the settlement agreement, the City acknowledged that GWF had a vested right to construct and operate the project and agreed that the City could not apply the moratorium ordinance against GWF. The City agreed to issue building permits for the project immediately.

C. Pending Litigation

In its application, PG&E acknowledges that Hanford II experienced a force majeure event (i.e., the permit moratorium). However, PG&E and GWF do not agree on the length of on-line date extension to which GWF is entitled. Moreover, PG&E does not agree with GWF's claim of force majeure or requested relief for the BARE I, Vie Del I, and Vie Del II projects.

In response to PG&E's denial of GWF's force majeure claim for the BARE I project, GWF filed a complaint in the Superior Court of Contra Costa in June 1989. In its complaint, GWF seeks a declaration regarding the effect of the alleged force majeure on the BARE I project, and money damages of at least $20 million. The money damages were sought to compensate GWF for the increased costs of construction and tax benefits it will lose if BARE I is not put in service by December 31, 1990. GWF has informed PG&E that, if the force majeure claims regarding its Vie Del I and Vie Del II projects are not resolved to GWF's satisfaction, GWF will sue PG&E in Superior Court on those force majeure claims.

III. Position of the Parties

PG&E submits (with GWF concurrence) that the only determinations which should be made by the Commission on this application are: (1) if there was a valid dispute between PG&E and GWF over force majeure, (2) if the BARE I, Vie Del I, and Vie

Del II projects were viable, but for the claimed force majeure events, and (3) whether the Agreement is a reasonable settlement of that dispute.

In its application, PG&E provides a declaration from GWF's Chief Executive Officer attesting to project viability for the BARE I, Vie Del I, and Vie Del II projects.[3] Based on this information, PG&E concludes that each of these projects meet the viability criteria established in Decision (D.) 88-10-032, but for the claimed force majeure events.

PG&E also believes that a valid dispute exists over the legal interpretation of what constitutes a force majeure event and the appropriate remedies. After several months of protracted litigation over the BARE I project, PG&E concludes that the outcome of litigation is uncertain, with both PG&E's ratepayers and GWF facing significant risks. PG&E argues that the concessions it has obtained from GWF in the Agreement make the settlement a reasonable one from the ratepayers' perspective. PG&E estimates the net present value of ratepayer benefits to be between $78.3 and $113.3 million. (See Section IV.C below.)

Division of Ratepayer Advocates (DRA) filed its initial response to PG&E's application on December 18, 1989. In its response, DRA requested additional information regarding project viability. A series of motions and responses followed.[4] On

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3 See PG&E's Application, Exhibit B.

4 Through this process, DRA's concerns were apparently allayed. See DRA's Motion for Supplemental Filing and for Extension of Time, filed December 18, 1989; PG&E's Response in Partial Opposition to Motion for Supplemental Filing and Extension of Time, filed January 1, 1990; DRA's Reply to PG&E's Partial Opposition, filed January 17, 1990; PG&E's Response to DRA's Reply, filed January 22, 1990; and PG&E's Amendment to Application No. 89-11-032, dated February 14, 1990.

February 26, 1990, DRA filed its final comments in support of the application.

IV. Discussion

As described above, the Agreement represents a negotiated settlement of disputes related to GWF's claims of force majeure. For the BARE I, Vie Del I, and Vie Del II projects, PG&E disagrees with GWF that the permitting delays experienced by GWF constitute force majeure, and that the appropriate remedy would be on-line date extensions. For the Hanford II project, both parties acknowledge that a force majeure event took place, but disagree over the length of delay caused by that event. To settle these differences, PG&E and GWF negotiated modifications to these contracts and several others. We are asked to determine prospectively that the negotiated modifications are reasonable.

In D.88-10-032, we set forth our expectations about how utilities should evaluate requests for contract modifications and/or disputes over contract administration. The guidelines 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. The guidelines set forth various aspects of the QFs' project development that should be examined in determining viability, and direct the utility as follows:

> "In assessing a projects viability, the utility should consider these and other aspects as a whole, the reasons behind the current status of individual items, and in light of the requested modifications." (Guideline IV.3.)

The guidelines allow an exception to strict enforcement of the five-year deadline for force majeure, but limit any

extension of the five-year deadline to the duration of the force majeure:

> "Any extension of the five-year on-line requirement resulting from the occurrence of a qualifying force majeure will be limited by the duration of the force majeure and the extent to which the force majeure impacted the QF's ability to meet the contract requirement." (Guideline III.3.)

The guidelines are cautious about force majeure claims resulting 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." (D.88-06-007, Guideline III.5.)

The guidelines also give a general description of how claims of force majeure should be evaluated:

> "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." (D.88-10-032, Guideline III.4.)

In developing our guidelines, we also addressed the issue of whether a utility could negotiate on-line date extensions, with

concessions, where the QFs would otherwise seek remedies under force majeure. We stated that:

> "We never intended to preclude negotiated settlements over force majeure in cases where the utility is satisfied that the QF has a legitimate claim and has fulfilled its contractual requirements. However, as discussed above, the force majeure doctrine imposes a heavy burden of proof to excuse nonperformance with regard to the on-line requirement. We expect the utility to carefully scrutinize each claim of force majeure, consistent with these guidelines, and negotiate only in instances where it is convinced that a settlement, versus adjudication, is in the ratepayers' best interest." (D.88-10-032, mimeo. pp. 32-33.)

For assessing the reasonableness of negotiated deferrals, the guidelines provide the following guidance:

> "Contact modifications requested by QFs must be accompanied by price and/or performance concessions...commensurate in value with the degree of the change in the contract (from minor to major)." (Guideline I.1.)

> "On-line deferrals...may be considered only if the ratepayers interests will be served demonstrably better by such deferral." (Guideline III.7.)

> "The reasonableness of contract deferrals...will be determined by evaluating the need for generating capacity, the length of deferral, the costs avoided by deferring or buying out unneeded capacity and the benefits (both monetary and non-monetary) granted projects in acceding to deferral...." (Guideline III.8.)

We have already summarized GWF's description of the factual basis of its force majeure claims. We will consider the other factors mentioned in the guidelines--foreseeability of permitting delays, viability, and ratepayer benefits--in the following sections.

A. Foreseeability and Plausibility of GWF's Claims

The guidelines state that not all permitting delays constitute force majeure and that the project developer should anticipate some delays as a regular part of project development. GWF argues that it could not have foreseen the events described in Section II.B above, and that these events have prevented it from meeting the five-year contract deadlines. PG&E does not necessarily agree with GWF's claims, but believes that they are plausible enough to represent a significant risk to ratepayers in the absence of settlement.

If this were a complaint proceeding, we would need to evaluate in detail the "foreseeability" of the permitting delays and other events, considering all the facts presented by GWF, PG&E and other interested parties. If we concluded that these events constituted force majeure events, we would then determine the appropriate remedies, including possible extension of the on-line date requirements.

Instead, this case represents a negotiated settlement of GWF's and PG&E's disputes. The point of a settlement, among other things, is to obviate the need for full litigation on the merits and to establish with certainty an outcome acceptable to all parties. At the same time, we note that the Agreement is only beneficial to ratepayers under the assumption that GWF prevails with its claims. Hence, we must be convinced that GWF has at least plausible claims of force majeure. Without that conviction, we could proceed no further in the evaluation of this settlement.

Given the information presented by PG&E in its application, we conclude that GWF does indeed have plausible claims

of force majeure.[5] Several factors lead us to this conclusion. First, we note that most of the permitting delays were significant in the sense that they appear to extend beyond statutory deadlines. Second, at least for the BARE I project, GWF has obtained sworn declarations from local decisionmakers attesting to the circumstances surrounding GWF's application for a conditional use permit. We also consider GWF's decision to file a complaint in the Superior Court, conduct extensive discovery and notice depositions prior to settlement, as a reasonable indication that GWF's claims are considered plausible enough by GWF to actively pursue costly court resolution. Finally, as we concluded in D.89-11-062, it is not clear how courts would view the force majeure provision of the contracts nor what would be the outcome of litigation between the parties on this issue.[6]

Under the guidelines we also consider whether GWF (1) gave notice of the claimed force majeure and (2) took reasonable steps to mitigate the delay caused by the force majeure, as required by the ISO4 contract. In the declarations appended to PG&E's application, GWF describes how it notified PG&E of each force majeure event within the requisite two weeks. The declarations also recite facts to support GWF's claim that it has acted to mitigate the effect of the delays on its projects. Based on the information presented in those declarations, we conclude that, for the limited purpose of evaluating the settlement, GWF (1) substantially complied with the contractual provisions on

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5 In the case of the Hanford II project, based on GWF's presentation of the facts, we agree with PG&E that the permit moratorium represents a force majeure event.

6 See our discussion of PG&E's ISO4 contract language in D.89-11-062, mimeo. pp. 14-17 (American Cogen Technology, Inc. vs. PG&E, Case 89-05-018).

notice of the force majeure and (2) had made reasonable efforts to mitigate the delay connected with the force majeure.

Our conclusions today must be tempered, however, with another observation. Particularly when cases come before us without having been tested in adversary hearings, we must limit our conclusions to the scope of the information we have before us. Our finding that GWF's force majeure claims are plausible is strictly limited to the facts and materials that are presented by GWF. The implication of this limitation falls primarily on PG&E. For reasons of strategy in potential litigation, PG&E has not concurred in GWF's presentation of the facts behind its claims of force majeure. 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 (1) a legitimate dispute exists and (2) the outcome of litigation is sufficiently uncertain to justify entering into negotiations. In circumstances like the ones presented in this case, our findings on the plausibility of GWF's claims are conditioned on the accuracy of this presumption.

Our conclusion regarding the plausibility of GWF's claims speaks only to the reasonableness of PG&E entering into negotiations, and not to (1) the relative strength of GWF's and PG&E's positions in this dispute or (2) the reasonableness of the terms of the settlement. As discussed in Section C below, our overall conclusions depend not only on whether PG&E was reasonable in pursuing a negotiated settlement, but also on whether ratepayers' interests are served "demonstrably better" by the negotiated deferrals.

B. Viability

The guidelines state that examination of a QF's viability under the original contract is a prerequisite to modifications to power purchase contracts. (Guideline IV.1.) We agree with DRA's observation that, even in situations where a utility agrees with a

QF's claim of force majeure, the viability of the project must be clearly established.

PG&E's application and supplemental filing contain a recitation of how GWF's projects are viable and, except for the force majeure, would be able to comply with the requirements of the unamended contracts.[7] GWF's descriptions closely follow the items listed in the guidelines for determining the viability of a project:

1. Project Description/ Interconnection Request

   Project descriptions and interconnection request forms were submitted to PG&E in 1985 for the BARE I, Hanford II, Vie Del I, and Vie Del II projects.

2. Proof of Site Control

   For the BARE I project, proof of site control over the original site was provided to PG&E in 1984. Proof of site control over the parcel approved for construction by the city of Pittsburg was submitted to PG&E in 1989. Proof of site control for the Hanford II, Vie Del I, and Vie Del II projects was provided to PG&E in 1985.

3. The $5/kW Project Fee

   For the BARE I, Hanford II, Vie Del I, and Vie Del II projects, the $5/kW fees were paid in 1985.

4. Interconnection Study

   PG&E completed interconnection studies for the Hanford II, Vie Del I, and Vie Del II projects in 1987. GWF asked in April 1987

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7 At the request of the assigned administrative law judge, PG&E supplemented its filing with information on the viability of the Hanford II project. See: PG&E's Second Supplemental Filing in Support of Application 89-11-032, dated April 18, 1990.

that the interconnection study for the Hanford II project be modified. The revised interconnection study was completed by PG&E in approximately July 1988.

PG&E completed an interconnection study for BARE I in 1986. In July 1988, GWF asked that the interconnection study be modified. As part of the Agreement, PG&E has agreed to provide GWF with a final interconnection study on an expedited basis.

5. Proof of Permit Status

For BARE I, an Authority to Construct was issued from the BAAQMD on February 9, 1988. On April 17, 1989, the Pittsburg City Council approved GWF's application for a conditional use permit. For Hanford II, the Kings County Air Pollution Control District issued an Authority to Construct on May 5, 1987 (renewed on May 5, 1989). GWF's application for a Site Plan Review Permit was approved by the Hanford City Council in March 1988.

As described in Section II.B above, final permits for the Vie Del I and Vie Del II projects have not yet been issued.

6. Proof of Fuel Supply

For BARE I, GWF executed two fuel supply contracts, one with Exxon in December 1985 and one with TOSCO in February 1986. The Exxon contract is for five years and thereafter is cancellable upon one years' notice. The TOSCO contract is for 10 years and thereafter is cancellable upon 2 years' notice.

For Hanford II, GWF entered into a letter of intent for a 15-year coal purchase from Coastal Coal Company (Coastal) in 1987. Negotiation of the contract to replace the letter of intent was postponed during the force majeure event. GWF and Coastal are in the final stages of negotiating a final contract. GWF expects to enter into a

similar contract to supply coal to the Vie Del I and Vie Del II projects.

7. Project Construction

For BARE I and Hanford II, a construction contract was signed in November 1988 with National Energy Constructors (NEC), an affiliate of GWF. NEC constructed GWF's BARE IV facility in approximately one year. According to GWF, if the Pittsburg City Council had approved GWF's application on May 16, 1988, instead of overturning the Planning Commission's approval, NEC would have completed the BARE I facility before the current five-year deadline.

GWF further states that the design of the Vie Del plants is virtually identical to the design of the Hanford II project, which NEC is committed to build to synchronization within 14 months. GWF maintains that it would have entered into a similar contract with NEC, and met the five-year deadline, if the Fresno County Planning Commission had approved GWF's application in August, 1988.

8. Engineering and Design

The Hanford II engineering plans were completed by December 1987. For BARE I, final engineering and construction drawings were substantially completed by May 16, 1988. Preliminary engineering documents have been prepared for the Vie Del I and Vie Del II projects. GWF states that the design of these plants is virtually the same as the Hanford II facility.

9. Equipment Procurements

GWF states that all necessary components for the BARE I and Vie Del plants were ordered with contractual delivery deadlines that would have permitted synchronization before the original five-year deadline. Because of force majeure delays, some of these contracts were allowed to lapse.

10. Project Financing/Economic Viability

On November 23, 1988, GWF entered into a Construction and Term Loan Agreement with Security Pacific National Bank that would have provided 100 percent construction financing for the BARE I, Vie Del I, and Vie Del II projects. Hanford II was not included in this agreement because enactment of the moratorium on coal burning appeared imminent. However, on June 30, 1989, GWF and Security Pacific entered into a separate agreement that provided for 100 percent construction financing of the Hanford II project. When Vie Del I and Vie Del II experienced their force majeure delays, they were omitted from the current financing. Security Pacific's commitment to provide 100 percent financing for all four projects was based on its analysis that these projects were economically viable.

11. Prior Track Record

GWF has provided to PG&E evidence of its organization, sources of equity funding and prior track record in QFs development, including evidence of its development of QFs in Torrence and in Antioch, California. Since the force majeure event that affected Hanford II, GWF has successfully synchronized three projects in Contra Costa County using substantially the same design as that for Hanford II.

Based on the facts contained in sworn declarations attached to PG&E's application, it appears that GWF meets the standard of viability established in the guidelines. Again, our conclusions depend on GWF's presentation of the facts and the presumption that it has plausible claims of force majeure. With these qualifications, and based on the information submitted to us, we conclude that GWF's BARE I, Hanford II, Vie Del I, and Vie Del II projects are viable, but for the intervention of the claimed force majeure.

C. Benefits for Ratepayers

Guideline III states that "on-line date deferrals...may be considered only if the ratepayers' interests will be served demonstrably better by such deferral." Further, our Guidelines require contract modifications to be accompanied by price and/or performance concessions that are "commensurate in value" with the degree of the change in the contract. (Guideline I.)

We consider any on-line date deferral of ISO4 to represent a major contract modification. Therefore, we expect the price/performance concessions to be substantial in instances of negotiated deferrals in general, and particularly in this case where the on-line date extensions are substantial. According to PG&E's own calculations, the Agreement defers the BARE I and Vie Del II projects approximately two and one-half years beyond the extensions to which PG&E assumes GWF would be entitled under its force majeure claims.[8] We also recognize, however, that a longer deferral may have greater ratepayer benefits than a short deferral, and is not always preferable for the QFs developer.

In its application, PG&E describes the ratepayer benefits resulting from the Agreement, as compared to a situation where GWF prevailed in its claims. According to PG&E, the Agreement benefits ratepayers in several ways. First, by deferring the firm capacity availability date for the BARE I and Vie Del II projects, ratepayers incur smaller "overpayments" for capacity and energy. PG&E calculates these overpayments as the difference between (1) the ISO4 fixed energy and capacity prices and (2) projected

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8 In its calculations of net ratepayer benefits, PG&E assumes that BARE I would have come on-line (i.e., established firm capacity) four months after the unamended five-year deadline, had GWF prevailed in its force majeure claim. For Vie Del II, PG&E assumes that the project would have come on-line one year after its original five-year deadline, if GWF had prevailed. (See PG&E's Application, Exhibit C, Exhibits 1 and 6.)

avoided energy and capacity costs. In addition, the Agreement requires GWF, subject to damages, to provide firm capacity during the last five years of the Vie Del II and BARE I-V contracts at no additional cost to ratepayers. The Agreement also reduces firm capacity prices by $13/kW for the Vie Del II project. Based on two different projections of avoided costs, PG&E estimates that these benefits represent between $23.1 and $28.6 million dollars in savings, on a net present value basis.

In addition, the Agreement enables PG&E to invoke economic curtailment for up to 1,170 hours per year for BARE I and up to 1,350 hours per year for Vie Del I. Under PG&E's current ISO4, PG&E can only curtail for 1,000 hours per year and only when certain operating conditions exist on its system. PG&E estimates that the negotiated curtailment provisions would save ratepayers a total of $12.6 million, relative to the unamended contract.

Finally, PG&E estimates that terminating the Vie Del I contract would save ratepayers $42.6 to 72.1 million in capacity and energy payments. In total, PG&E estimates that the Agreement will save ratepayers between $78 and $113 million dollars (in net present value), based on a high-low range of projected avoided costs. Table 1 presents a breakdown of these estimates, by project.

Based on the information presented in PG&E's application, and DRA's comments, we are persuaded that ratepayers are substantially better off under the settlement compared to a scenario where GWF would have prevailed in its claims.[9] However,

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9 We agree with DRA that the project terminations, other than Vie Del I, should not be assigned any ratepayer benefits. PG&E declined to provide any information on the viability of these projects and also acknowledged that its calculation of benefits did not include any benefits associated with these projects.

(Footnote continues on next page)

this is not a complete analysis. In evaluating the Agreement it is also necessary to consider the terms of the settlement relative to a scenario where PG&E would have prevailed in these disputes.[10]

Had PG&E prevailed in court, GWF would not have been able to develop the BARE I, Vie Del I, and Vie Del II projects under the terms of its original contracts.[11] Neither PG&E nor DRA presented a comparison of the Agreement relative to this outcome, but the calculations are easy to perform. Based on the figures presented in Exhibit C of PG&E's application, we estimate that ratepayers would have saved between $61 and $109 million (in net present value) in capacity and energy overpayments if PG&E had succeeded in disputing GWF's force majeure claims. (See Table 1.) Therefore, the relevant range of potential ratepayer benefits resulting from the Agreement is from positive $78-113 million to negative $61-$109

(Footnote continued from previous page)

We also agree with DRA that calculations of deferral benefits should be net of any deferral that GWF would have been awarded, had it prevailed in its force majeure claims. PG&E has apparently already done this in its calculations by (1) not including any deferral benefits associated with the Hanford II settlement and (2) assuming firm capacity start dates for BARE I and Vie Del II under the "no deferral" case that are significantly later than under the unamended contract. See PG&E's Application, Exhibit C.

10 This is consistent with the approach we have taken to evaluate other negotiated settlements of contract-related disputes. See, for example, D.88-11-029 in Case 87-11-028 and D.88-12-095 in Application 88-08-002.

11 Application, p. 8.

million, depending on the outcome of litigation. These ranges can be broken-down by contract, as follows:[12]

	GWF Prevails	or	PG&E Prevails
	(NPV, in million 1989 dollars)		
BARE I:	12.1-14.8	or	(29.8-51.5)
BARE II-V:	4.0-4.4	or	0
Vie Del I	42.6-72.1	or	0
Vie Del II	19.0-22.0	or	(31.2-57.5)
Total:	78.3-113.3	or	(61.0-109.0)

By this analysis, in order for ratepayers to "break-even" (i.e., incur zero net benefits/costs) under the Agreement, GWF would have to have more than a 50-50 chance of prevailing in court on all of its claims. If the probability of GWF prevailing in court for all contested claims was much less than 50 percent, a probabilistic weighting of the worst case scenarios would not justify the settlement.[13] For the Vie Del II and BARE I projects

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12 Both PG&E and DRA agree that the four terminated projects do not have any associated ratepayer benefits. PG&E also excludes the Hanford II project from its calculation of benefits, presumably because the seven-month extension is assumed equal to the length of the force majeure event.

13 If the probability of GWF prevailing was judged to be 40 percent, the probabilistic weighting would be (0.40 x 113.3) + (0.60 x -109.0) = -20.08 million dollars. The expected value of

(Footnote continues on next page)

individually, this probability would have to be on the order of 60 and 70 percent, respectively, for us to find ratepayer indifference to the settlement. This analysis would be a more useful exercise if we had more experience with force majeure claims by QFs in California courts. We could then better estimate each party's chances in litigation and decide if, based on expected outcomes, ratepayers would be better off with the settlement or going to court. Such an analysis would, in fact, be a replication of the analysis PG&E should have used when deciding to pursue a settlement with GWF.

Yet, despite having the framework for a decision analysis such as this, it is of limited use to us because of the uncertain nature of legal proceedings, especially in force majeure claims. In order for us to complete this analysis, we would need to assess the probability of GWF prevailing in all or a portion of its legal proceedings. However, as we stated previously when discussing the plausibility of GWF's force majeure claims, we are not going to make a decision on the merits of these claims. Such a decision would require us to, in effect, eliminate one of the substantial benefits of a settlement, the alleviation of the need to litigate a dispute. If the parties had wanted us to litigate this matter they would have filed a complaint case.

Even if we did have enough experience with these types of cases to use this analysis, it is much more complicated then presented here. It is unlikely that GWF or PG&E would prevail in all cases. The facts in each case are different and may justify

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(Footnote continued from previous page)

the settlement, given the 40 percent chance GWF is assumed to have in this example, is negative and would not justify the approval of the settlement. This is only an example for demonstrating the mechanics of this type of decision analysis.

different resolutions. It is a much more difficult analysis to map out the numerous permutations of winning and losing in the different force majeure claims.

The purpose of this analysis, then, is to determine if the settlement is beneficial to ratepayers in reasonable ranges of probabilities regarding the outcomes of GWF's court cases against PG&E. Based on the analysis shown above and the plausibility of GWF's force majeure case against PG&E, it does appear that ratepayers are well-served by the settlement rather than the risks of a court proceeding.

D. Conclusion

In conclusion, we find that PG&E was reasonable in entering into negotiations with GWF to resolve disputes over force majeure and also conclude that the negotiated benefits are commensurate with the degree of the change in the contracts, when all possible outcomes of litigation are taken into consideration. The Agreement protects PG&E and its ratepayers from exposure to liability and this risk reduction justifies our acceptance of the terms of the settlement.

We should point out that settlements such as this can create problems for Commission analysis. In this case, analysis of the settlement assuming that PG&E would have prevailed in court proceedings was absent. We understand that the utility was unwilling to present a full picture of its position in order to maintain its litigation position if the case goes to court. This information, however, is useful to the Commission's ability to thoroughly analyze the reasonableness of settlements. We suggest that utilities provide this information in the future, especially when they seek ex parte approval of settlement proposals.

Findings of Fact

1. On November 18, 1989, PG&E filed an application for ex parte approval of the Agreement with GWF, a developer of QFs projects in Northern California.

2. After requesting and receiving supplemental information on project viability, DRA filed its final comments in support of the application on February 26, 1990.

3. The Agreement would resolve disputes over three force majeure claims, and settle the issue of the relief to which GWF is entitled under a fourth force majeure claim. The force majeure disputes generally concern whether various delays by permitting agencies constitute force majeure, entitling GWF to extensions of its ISO4 on-line dates.

4. In June, 1989 GWF filed a complaint in the Superior Court of Contra Costa to contest PG&E's denial of GWF's force majeure claim for the BARE I project. That complaint is stayed, pending action on PG&E's application.

5. GWF claims that the BAAQMD's failure to certify its BARE I EIR within one year plus 60 days, as required under the CEQA, is a qualifying force majeure.

6. GWF claims that Pittsburg City Council's failure to approve its BARE I application for a conditional use permit on the basis of unspecified, adopted future changes is a qualifying force majeure.

7. GWF claims that Fresno County's failure to certify the Vie Del I and Vie Del II EIRs within one year of the completion of GWF's application, along with other delays, constitute a qualifying force majeure.

8. GWF claims that the Hanford City Council's moratorium on building permits for the Hanford II project is a qualifying force majeure.

9. The Agreement defers the on-line dates for the BARE I, Vie Del II, and Hanford II projects by 2 years-10 months, 3 years-six months, and 7 months, respectively.

10. The Agreement terminates the Vie Del I contract or, in the alternative, modifies the Vie Del I and Vie Del II contracts to

obtain net ratepayer benefits equivalent to termination of the Vie Del I contract.

11. The Agreement reduces the Vie Del II capacity payments by $13/kW-year and provides for 100 percent economic curtailment on Vie Del II and BARE I for 1,350 and 1,170 hours, respectively.

12. The Agreement extends the terms of the Vie Del II, BARE I, and four other GWF ISO4 contracts by five years, during which PG&E would not make payments for capacity.

13. The Agreement would terminate four ISO4 contracts unrelated to the force majeure disputes.

14. D.88-10-032 established guidelines for how utilities should evaluate requests for contract modifications and/or settle disputes over contract administration.

15. The guidelines 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.

16. The guidelines state that on-line date deferrals may be considered only if the ratepayers' interests will be served demonstratively better by such deferral.

17. The guidelines allow an exception to strict enforcement of the five-year deadline for force majeure, but limit any extension of the five-year deadline to the duration of the force majeure.

18. 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.

19. The guidelines require contract modifications to be accompanied by price and/or performance concessions that are commensurate in value with the degree of the change in the contract.

20. GWF's declarations attached to the application support the contentions that GWF has plausible claims to force majeure for the BARE I, Vie Del I, and Vie Del II projects.

21. The declarations attached to the application and supplemental filings support the contentions that GWF gave timely notice to PG&E when it became aware of the force majeure, that GWF has attempted to mitigate the delay caused by the force majeure, and that the projects were viable but for the force majeure.

22. With the exception of the events surrounding the Hanford II force majeure, PG&E does not necessarily agree with the facts as stated by GWF, and reserves the right to contest these facts if the Commission does not approve the settlement.

23. The negotiated on-line date extension for the Hanford II project represents approximately one-half of the relief originally requested by GWF, and corresponds to the length of the moratorium imposed by the Hanford City Council.

24. If GWF were to prevail in its claims, PG&E estimates that the Agreement saves ratepayers between $78.3 and $113.3 million (in net present value).

25. According to PG&E's own calculations, the Agreement defers the BARE I and Vie Del II projects approximately two and one-half years beyond the extensions to which PG&E assumes GWF would be entitled if GWF prevailed in its claims.

26. By project, PG&E's estimate breaks down as follows, assuming GWF were to prevail: $12.1-$14.8 (BARE I); $4.0-$4.4 (BARE II-V); $42.6-$72.1 (Vie Del I); and $19.0-$22.0 (Vie Del II).

27. Neither PG&E nor DRA presented a comparison of the Agreement relative to a scenario where PG&E would have prevailed in its claims.

28. If PG&E had prevailed, the BARE I, Vie Del I, and Vie Del II projects would not have been able to meet the original five-year deadlines.

29. Based on the calculations presented by PG&E, ratepayers would have saved between $61 and $109 million (in net present value) in capacity and energy overpayments if PG&E had succeeded in disputing GWF's force majeure claims.

30. Taking both possible outcomes into account, the relevant range of net ratepayer benefits resulting from the Agreement is from positive $78-$113 million to negative $61-109 million.

31. Broken-down by project, the net benefits to ratepayers associated with the Agreement, assuming PG&E prevails, is as follows: negative $29.8-$51.5 (BARE I); zero for BARE II-V and Vie Del I; negative $31.2-57.5 (Vie Del II).

32. In order for ratepayers to incur zero net costs/benefits under the Agreement, one must assume that GWF has at least a 50-50 chance of prevailing in court on all of its claims. For the Vie Del II and BARE I projects individually, this probability is on the order of 60 and 70 percent, respectively. For ratepayers to achieve substantial net benefits under the possible outcomes of litigation, these percentages must be significantly higher.

Conclusions of Law

1. Today's decision does not reach the merits of GWF's force majeure claims for the BARE I, Vie Del I, and Vie Del II projects.

2. Under the facts alleged by GWF, GWF has plausible claims to force majeure for the BARE I, Vie Del I, and Vie Del II projects, and therefore PG&E was reasonable in entering into negotiations with GWF to resolve its disputes.

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

4. Assuming that circumstances might arise where the five-year deadline should be modified through negotiation, the record must demonstrate clearly and convincingly that the modification service the ratepayers' interest.

5. When all possible outcomes of litigation are taken into consideration, ratepayers are better off under the Agreement.

O R D E R

IT IS ORDERED that the approval sought by Pacific Gas and Electric Company of the Settlement Agreement with GWF Power Systems L.P. and GWF Power Systems Company, Inc., is granted.

This order is effective today.

Dated May 22, 1990, at San Francisco, California.

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

Commissioner Frederick R. Duda, being necessarily absent, did not participate.

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

NEAL J. SHULMAN, Executive Director

TABLE 1

CALCULATION OF NET RATEPAYER BENEFITS
(1989 NPV in $ millions)

Project	Possible Outcomes: GWF Prevails By Forecast (2)	GWF Prevails By Forecast (1)	or	PG&E Prevails By Forecast (2)	PG&E Prevails By Forecast (1)
1. BARE I [Deferral]					
a. Decrease (Increase) in Overpayments					
(i) capacity	3.56	5.12		(4.98)	(8.96)
(ii) energy	4.00	4.60		(24.80)	(42.50)
subtotal	7.56	9.72		(29.78)	(51.46)
b. Curtailment	5.10	5.10		n-a	n-a
BARE I Net Benefits:	12.7 -	14.8	or	(29.8) -	(51.5)
2. BARE II, III, IV, V [Term Extension]					
a. Decrease in Capacity Payments (last 5 yrs.)	4.0	4.4		n-a	n-a
BARE II-V Net Benefits:	4.0	4.4	or	0	0
3. Vie Del I [Termination]					
a. Decrease (Increase) in Overpayments					
(i) capacity	9.61	15.92		0	0
(ii) energy	33.00	56.20		0	0
Vie Del I Net Benefits:	42.6 -	72.1	or	0	0
4. Vie Del II [Deferral]					
a. Decrease (Increase) in Overpayments					
(i) capacity	5.75	7.72		(3.87)	(8.19)
(ii) energy	5.70	6.80		(27.30)	(49.30)
subtotal	11.45	14.52		(31.17)	(57.49)
Vie Del II Net Benefits:	19.0 -	22.0	or	(31.2) -	(57.5)
TOTAL RANGE OF NET RATEPAYER BENEFITS, BY OUTCOME:	78.3 -	113.3	or	(61) -	(109)

NOTES TO TABLE 1

n-a = "not applicable"

Figures under the "GWF Prevails" outcome are taken directly from Exhibit C of PG&E's application, dated November 28, 1989 (See Question and Answer 12).

Both PG&E and DRA assume that the four project cancellations and Hanford II deferral yield zero net ratepayer benefits, under the "GWF Prevails" outcome.

Figures under the "PG&E Prevails" outcome are calculated from the spreadsheets presented in Exhibit C as the difference between (1) excess payments under the deferral option for BARE I and Vie Del II, and (2) termination of those same contracts (i.e., zero excess payments). Since the Vie Del I project is terminated under the agreement (or equivalent), there are no net ratepayer benefits associated with that project under the "PG&E prevails" outcome.

The two forecasts of avoided energy and capacity costs are described by PG&E as follows:

(1) Forecast 1. This estimate of avoided capacity cost established the high end of the range of net ratepayer benefits. The forecast assumes no new capacity will be needed by PG&E until 1999. As annualized cost of a combustion turbine equal to $475/kW is assumed (PG&E's March 13, 1987 OIR-2 compliance filing; Table A IV F-5 per Table A IV F-2). The Energy Reliability Index (ERI) employed is equal to that filed in PG&E's March 13, 1987 OIR-2 compliance filing (Table B III E-1, without added capacity blocks). Prices were escalated at 5.5 percent after 2006.

Energy values for these analyses were derived from the DRA's supplemental testimony regarding marginal cost on PG&E's Application 86-04-012 Energy Cost Adjustment Clause. This forecast uses a "QFs in" approach.

(2) Forecast 2. The ratepayer benefits of the deferral were also evaluated against capacity forecasts used by DRA. DRA's forecast differs markedly from PG&E's capacity forecast, but the deferral was analyzed under DRA's forecast to demonstrate that the Settlement Agreement provides significant ratepayers benefits under a range of forecasts. The forecasted capacity values in testimony filed by DRA in Application 88-07-022 (testimony of Robert Kinosian, dated July 25, 1988) were used to establish the low end of the range of net benefits. In contrast to the PG&E forecast, DRA projects a need for capacity on the PG&E system as early as 1991.

(END OF TABLE 1)

ATTACHMENT 1
CONTRACT SUMMARY

#	Log ID	Name	Location	Type	Term	5-Year Deadl.*	Facility Size	Capacity (MW)	Fuel	Firm Settlement Agreement	New Term	New 5-year	Curtail	Other
1	01P049	BARE I	Pittsburg, Contra Costa Co.	ISO4	25	12-25-89	17.740	16.000	Petroleum Coke	Deferral & Amendment** (Force Majeure)	30	10-01-92	1170 hrs. economic curtailm.	no capacity for payment for last 5 years. Damages provision.
2	01P086	BARE II	Contra Costa Co.	ISO4	25	08-19-90	17.740	16.000	Petroleum Coke	Amendment	30			no capacity for payment for last 5 years. Damages provision.
3	01P091	BARE III	Antioch, Contra Costa, Co.	ISO4	25	12-01-90	17.740	16.000	Petroleum Coke	Amendment	30			no capacity for payment for last 5 years. Damages provision.
4	01P051	BARE IV	Contra Costa, Co.	ISO4	25	12-12-89	17.740	16.000	Petroleum Coke	Amendment	30			no capacity for payment for last 5 years. Damages provision.
5	01P087	BARE V	Pittsburg, Contra Costa, Co.	ISO4	25	08-19-90	17.740	16.000	Petroleum Coke	Amendment	30			no capacity payment for last 5 years. Damages provision.
6	01P088	BARE VI	Martinez, Contra Costa, Co.	ISO4	25	06-26-90	19.560	17.000	Petroleum Coke	Termination	0			
7	01P050	BARE VII	Antioch, Contra Costa, Co.	ISO4	25	12-12-89	15.000	14.500	Petroleum Coke	Termination	0			
8	04P033	BENECIA	Benecia, Solano Co.	ISO4	25	12-12-89	15.000	14.500	Petroleum Coke	Termination	0			
9	25C134	HANFORD I	Hanford, Kings Co.	ISO4	20	06-26-90	23.000	22.000	Coal	Termination	0			
10	25C136	HANFORD II	Hanford, Kings Co.	ISO4	20	06-26-90	23.000	22.000	Coal	Amendment (Force Majeure)	25	01-31-91		

* Includes effects of previous amendments to on-line date.

** Firm capacity availability date is deferred until one year prior to new 5-year deadline. No fixed capacity or energy payments are made until that date.

ATTACHMENT 1
CONTRACT SUMMARY

#	Log ID	Name	Location	Type	Term	5-Year Deadl.*	Facility Size	Capacity (MW)	Fuel	Firm Settlement Agreement	New Term	New 5-year	Curtail	Other
11	2SC135	VIE-DEL I	Selma, Fresno, Co.	ISO4	20	06-26-90	23.000	22.000	Coal	Termination Option (Force Majeure)				If GVF doesn't terminate, modif. to Vie Del I and II to provide equiv. ratepayer benefits.
12	2SC132	VIE-DEL II	Kingburg, Fresno Co.	ISO4	20	06-26-90	23.000	22.000	Coal	Deferral & Amendment ** (Force Majeure)	25	01-01-94	1350 hrs. economic curtailm.	$13/Kw-yr. reduction in firm capacity. no capacity for payment for last 5 years. Damages provision.

* Includes effects of previous amendments to on-line date.

** Firm capacity availability date is deferred until one year prior to new 5-year deadline. No fixed capacity or energy payments are made until that date.

(END OF ATTACHMENT 1)

ISO4 Force Majeure Provision

A-8 FORCE MAJEURE

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

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

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

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

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

(4) When the non-performing Party is able to resume performance of its obligations under this

Agreement, that Party shall give the other Party written notice to that effect.

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

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

(END OF ATTACHMENT 2)