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Decision 90-12-074 December 19, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Sayles Hydro Associates, Complainant, vs. Pacific Gas and Electric Company, Defendant.	ORIGINAL Case 87-03-032 (Filed March 17, 1987)

Messrs. Pettit & Martin, by Edward Lozowicki, and Thomas Queri, Attorneys at Law; and Messrs. McDonough, Holland & Allen, by Dennis W. De Cuir, Attorney at Law, for Sayles Hydro Associates; complainant.
Jo Shaffer, Michelle Wilson, Roger J. Peters, and Mark D. Patrizio, Attorneys at Law, for Pacific Gas and Electric Company; defendant.
J. V. Henry, for Save our Streams; and Joseph G. Meyer, for Joseph Meyer Associates; interested parties.

I N D E X

O P I N I O N

Summary

This complaint was initially filed in 1987 by Sayles Hydro Associates (Sayles) in an effort to resolve a dispute with Pacific Gas and Electric Company (PG&E) over who should bear the costs of improvements to PG&E's transmission system needed to receive power to be generated at Sayles' proposed small hydroelectric facility. Sayles chose not to pursue its action against PG&E until this year, by which time the Power Purchase Agreement (PPA) under which Sayles was going to sell power to PG&E had expired. Sayles asserts that its failure to meet the on-line deadline is the result of a force majeure event and that its nonperformance should be excused. The alleged force majeure event is the delay by the Federal Energy Regulatory Commission (FERC) in issuing a license for the facility.

In this decision, we reject the force majeure claim, both because (1) the FERC activities did not constitute force majeure, (2) the alleged force majeure event was not without the fault or negligence of Sayles, and (3) the alleged force majeure event was not the proximate cause of Sayles failure to complete the project prior to expiration of the contract; other factors would have prohibited timely performance even if the FERC had acted more quickly.

Questions involving allocation of transmission costs are moot, since a new power sales and transmission arrangement must now be negotiated in light of expiration of the original contract.

The complaint is dismissed.

Procedural History

Sayles Hydro Associates first filed a complaint under this docket on March 17, 1987, seeking the Commission's assistance in resolving a dispute with PG&E concerning the allocation of costs

related to the transmission of power from the proposed Sayles Hydro project. PG&E filed its answer on April 20, 1987.

A prehearing conference was held before Administrative Law Judge (ALJ) Randolph L. Wu on May 1, 1987, to consider Sayles Hydro's Motion for Emergency Relief. In that motion, Sayles asked the Commission to direct PG&E to provide a temporary interconnection of its plant to the PG&E transmission system to help Sayles meet a condition of its agreement for permanent financing for the project. A second Prehearing Conferences was held on May 1, 1987. On May 18, 1987, the ALJ denied the motion in order to avoid increasing the operating risk on the PG&E system and in recognition of the fact that the interconnection dispute at issue had existed since 1982. As ALJ Wu stated at the time, "emergency relief of the type sought by Sayles is innappropriate since Sayles could have sought resolution of the interconnection problem before it built its project. Sayles also could have sought relief from the Commission at an earlier date." The ALJ scheduled hearings to begin July 13, 1987 and suspended the milestone requirements of the Qualifying Facility Milestone Procedure pending resolution of the complaint.

ALJ Wu was unable to continue to hear this matter and its reassignment to ALJ Brian T. Cragg led to a postponement of the hearings until September 21, 1987. In a letter dated August 3, 1987, counsel for Sayles indicated that his client and PG&E were in the midst of settlement negotiations and asked for a short additional postment. In subsequent letters, several further postponements were requested. In a letter dated March 5, 1988, counsel for Sayles asked to have the matter removed from the calendar indefinitely to facilitate further negotiations. ALJ Cragg wrote to counsel for Sayles on June 21, 1989, indicating his intention of dismissing the complaint without prejudice because the file had remained dormant for so long. Mr. Dennis W. DeCuir, who

had then become counsel to Sayles, wrote a series of letter to ALJ Cragg asking that the dismissal be postponed.

In a letter dated October 20, 1989, DeCuir asked ALJ Cragg to schedule a conference among the parties to discuss the status of the case. The PPA governing this project called for Sayles to deliver power no later than November 5, 1989. On November 30, 1989, PG&E filed a Motion to Dismiss, based on Sayles' failure to meet its delivery date. Sayles responded to the motion on December 15, 1989 and PG&E filed a further response on December 21, 1989. In late December, Sayles filed an amended complaint, asserting that its failure to deliver power was excused by two force majeure events. One related to delays experienced before the FERC and the other involved delays evolving from United States Forest Service activities. The third prehearing conference was held on January 4, 1990, at which the parties were allowed to elaborate on their positions related to the motion. Without ruling on the merits of the claims of force majeure, ALJ Cragg denied the Motion to Dismiss in a ruling dated January 26, 1990, stating that Sayles should have an opportunity to present evidence in support of these claims.

On January 26, 1990, PG&E filed its answer to the amended complaint. The matter was subsequently transferred to ALJ Steven Weissman. Hearings were held April 23, 1990 through April 27, 1990 and June 11, 1990 through June 15, 1990. At the beginning of hearings, Save Our Streams Council (SOS) was granted status as an intervenor. The matter was submitted with the filing of reply briefs on August 30, 1990. In order to facilitate a decision in 1990, all parties agreed to a waiver of the 30 day waiting period otherwise required under Public Utilities Code Section 311 between the release of a Proposed Order and the issuance of a final order by the Commission.

Opening comments were received from Sayles, PG&E, and SOS on December 12, 1990. In its comments, Sayles moved for an additional 23 days for filing opening comments, proposing that opening comments be due no later than January 4, 1991. The Commission's Rules of Practice and Procedure Rule 77.2 states that

an applicant may move for such an extension, but does not provide a similar privilege for a complainant. Such an extension will be entertained only when the benefits of delay clearly outweigh the burdens. Sayles has not demonstrated any reason that it could not have filed complete comments within the time frame to which it stipulated. The motion is denied.

I. Background

The Sayles Flat Hydro project is a proposed hydroelectric facility located near Camp Sacramento, on the South Fork of the American River. The project is a "run of the river" hydroelectric plant with expected average generation of one megawatt (MW) for nine months of the year and two to three MW for three months during the spring run-off. The project is a qualifying facility (QF) as defined by this Commission's decisions and the regulations of the Federal Energy Regulatory Commission (FERC).

Camp Sacramento is a summer camp owned and operated by the City of Sacramento. A large meadow adjacent to the power plant site is the camp's main recreational area. During the winter, the meadow is used for sledding and other winter activities. The plant site is located within the Eldorado National Forest. The basin of the South Fork of the American River is described by the FERC as an important central California recreational corridor, readily available to visitors from Sacramento and the San Francisco Bay Area. According to the FERC, "millions of people visit the basin each year because of its recreational opportunities. Many visitors simply enjoy the scenic beauty of the basin, while others participate in more active pursuits such as swimming, fishing, hiking, camping and whitewater boating."[1] The partially completed hydro project is visible from Highway 50, a scenic highway. It is visible from the Pyramid Creek area, which is used

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1 Final Environmental Assessment for Hydropower License, Sayles Flat Project, FERC Project No. 3159-003, October 10, 1989, p.13.

extensively by hikers on their way to and from the Desolation Wilderness area. The Sayles Flat project is also visible from Lover's Leap, an enormous granite formation that attracts many geologists and is one of the most popular rock climbing sites in California.

Keating and PG&E entered into a PPA under Interim Standard Offer 4 (SO4) on November 5, 1984, for forecasted energy and as-delivered capacity. Sayles acquired the right to develop and sell the power generated from this facility from Joseph M. Keating. Sayles and PG&E disagree as to whether or not Keating's rights under the PPA were ever appropriately assigned to Sayles. The project was allocated 2.95 MW of transmission capacity under the Interim Solution established in Decision (D.) 84-08-037 to deal with the transmission constraint conditions in the northern portion of PG&E's service territory.

The complaint, which was originally filed in March of 1987, was prompted by a disagreement between Sayles and PG&E as to who should pay for improvements to the El Dorado Feeder, a radial line that would carry the project's power into the PG&E system, and as to whether or not Sayles should be responsible for moving its point of interconnection with the El Dorado Feeder if required by future system changes. As a result of these disagreements, the parties have found themselves unable to execute a Special Facilities Agreement (SFA), which is a necessary prerequisite to completing the interconnection. The complainant chose not to bring this matter to hearing prior to this year. In the meantime, the five-year contractual deadline by which the project proponents were obligated to begin deliveries to PG&E has passed and the project is not yet completed. Sayles asks the Commission to resolve its interconnection dispute and to extend the contractual on-line date by finding that the permitting problems Sayles has experienced with the FERC constitute a force majeure event.

The force majeure issue is pivotal to the resolution of this proceeding. Because Sayles has failed to meet the on-line date specified in the PPA, PG&E has no contractual obligation to buy power from the Sayles Flat Project or arrange for an

interconnection of the QF to its transmission system. Unless Sayles can demonstrate that a force majeure event intervened to prevent it from meeting its obligations (and that it has provided appropriate and timely notice of the force majeure event to PG&E), PG&E is not required to interconnect the facility and the interconnection dispute between the parties becomes moot. Thus, we will begin by exploring the facts affecting the claim of force majeure.

Many of the events affecting this claim occurred well before the signing of the PPA in 1984. On April 21, 1980, Keating filed an application with the United States Forest Service (Forest Service) for a special use permit allowing him to construct and operate a hydroelectric plant on Forest Service land. No action was taken by the Forest Service because Keating had yet to apply for a license from the FERC. Keating filed a Notice of Application for Preliminary Permit with the FERC on September 8, 1980. The Forest Service notified the FERC that the "proposed project may have a major impact upon lands and resources within the Eldorado National Forest," and added that "much additional data must be gathered before we can quantify these impacts and their effect upon National Forest management objectives".[2] On December 11, 1980 the FERC issued a preliminary permit conditioned, among other things, on full cooperation by Keating with the Forest Service in its effort to develop a plan to alleviate damage and achieve maximum utilization of National Forest resources that would be affected by the project. Keating signed a letter of understanding with the Forest Service on March 9, 1981 in which he acknowledged that an application for a Special Use Permit would have to be filed with the Forest Service at the same time that a license application

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2 Letter to Kenneth Plumb, Secretary of the FERC from Richard D. Hull, Director of Lands, dated October 17, 1980, included in the record of this proceeding as Attachment 2 to Exhibit 33.

was filed with the FERC. By letter dated March 29, 1982, the Forest Service again reminded Keating that a Special Use Permit would be required for the project.

Keating applied with the FERC on April 29, 1982 for a license to construct, operate, and maintain the Sayles Flat project. Meanwhile, the Forest Service continued its independent negotiations with Keating. In July, the Forest Service wrote to the FERC and said that it expected to have all of its environmental concerns addressed in a Memorandum of Agreement which it was negotiating with Keating and that it, therefore, would not suggest further conditions to be imposed on Keating in a FERC license.

Harriet G. LaFlamme, the owner of a cabin in the Pyramid Creek area, was notified by the Army Corps of Engineers that Keating intended to build the Sayles Flat project. She immediately sought the assistance of a private engineer and visited the proposed site with him to gain a better understanding of the project's likely impact. She also explored issues related to the proposed project's potential impact on water supply. LaFlamme then began to actively oppose the project.

In a letter to the Army Corps of Engineers dated July 12, 1982, LaFlamme raised several concerns about the project that included,

Impacts to the following:

a. Disrupting the pristine nature of the streams.

b. Reducing water quality (by increasing the water temperature during impound periods - leading to growth of bacteria and algae).

c. Leach line contamination downstream where flows are reduced.

d. Water turbidity during articial high flow periods.

e. Destruction of many trees during construction.

f. Reduction in stream fishing in the downstream areas.

g. Need for more governmental monitoring at taxpayer expense.

h. Only segment of the public which will benefit from the project is Keating and PG&E stockholders.[3]

The Army Corps of Engineers requested responses from Keating concerning these issues, which he provided in a letter dated August 19, 1982.

On July 17, 1982, LaFlamme attended a meeting with Keating and Forest Service representatives at which she expressed her concerns about the project. According to LaFlamme, her concerns were not adequately addressed at the meeting.

> "Instead, my concerns were sidestepped and their validity was questioned. Instead of an exchange of information and an opportunity to influence the direction the project would take, I was 'told' about what had already been decided. Neither at that meeting, nor at any time after that meeting, did Mr. Keating satisfactorily address my concerns. Quite to the contrary, it was clear to me early on that Mr. Keating would do nothing to respond to such concerns unless compelled to do so."

LaFlamme filed a formal protest with the State Water Resources Control Board, Division of Water Rights, on September 12, 1982. Three days later, she attended a meeting at the Governor's Office of Planning and Research to discuss the permitting of the Sayles Flat project and other projects being pursued by Keating. According to LaFlamme, Keating attended that meeting as well. LaFlamme and others attended a meeting with Keating at the Forest Service Office in Placerville on January 11, 1983. A letter subsequently written by District Ranger Robert A. Smart listed

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3 See Exhibit 23, Attachment 2.

twenty-eight clusters of issues and concerns raised by those in attendance. The majority of the issues involved potential impacts of the project on the environment.[4] On January 17, 1983, LaFlamme filed a Petition for Leave to Intervene in the FERC licensing proceeding for the Sayles Flat project. Leave was granted by the FERC on March 9, 1983.

The FERC license was issued on September 26, 1983. LaFlamme filed a Petition for Rehearing on October 24, 1983. On November 25, 1983, the FERC granted rehearing of the September 26, 1983 order "solely for the purpose of further consideration". The rehearing was still pending when Keating signed his PPA with PG&E on November 5, 1984. The Petition was finally denied on August 23, 1985.

After the denial of rehearing, LaFlamme filed an action with the United States Court of Appeals for the Ninth Circuit. A focus of LaFlamme's ongoing concern was the decision of the FERC not to prepare either an Environmental Assessment or a more comprehensive Environmental Impact Statement.

On December 19, 1983, Keating sent to the Forest Service a proposed Memorandum of Agreement bearing his signature. The Forest Service responded by letter, dated June 16, 1984, advising Keating of issues that needed to be addressed before issuance of a Special Use Permit (see Exhibit 33, Attachment 16). Those issues fit into five major categories:

a. Recreation and aesthetics,

b. Fisheries, riparian, and wildlife,

c. Water quality, water use, and stream protection,

d. Cultural resources, and

e. Construction impacts.

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4 See Exhibit 23, Attachment 4.

A revised Memorandum of Agreement was signed by Keating on September 28, 1984 and executed by the Forest Service on October 12, 1984.

For the better part of the next two years, Keating, his successors, and Forest Service personnel disagreed about the studies needed to support a Special Use Permit, the adequacy of studies offered by the project proponents and the appropriate resolution of water rights issues. A Special Use Permit was issued on July 6, 1986 and signed by Keating. Soon thereafter, representatives of Shupe Energy Development (Shupe), which was planning to construct the facility, began to object to many of provisions of the Special Use Permit, claiming that they must be changed because they were inconsistent with the FERC license.

The project proponents and the Forest Service disagreed as to when construction could begin under the Special Use Permit. In issuing the permit, the Forest Service reminded the proponents that numerous conditions had to be met before they could begin to build. Nonetheless, in the summer of 1986 Shupe brought earthmoving equipment to the site and began to dig. On July 28, 1986, the Forest Service informed the proponents that all use under the permit should be considered suspended unless specifically approved. Shupe eventually began construction with Forest Service authorization, but the Forest Service issued temporary suspensions on at least five different occasions between October 1986 and February 1987.

On February 21, 1987, the Forest Service suspended the permit, finding that the proponents were proceeding in violation of six different permit conditions. For a time, Shupe continued to construct the facility, despite this suspension. At one point, one of the Shupe representatives was arrested for failure to comply with Forest Service prohibitions. The Forest Service did not pursue criminal charges. The project proponents defended their actions by claiming that because a license had been issued by the

FERC, the Forest Service had no authority to stop construction. On April 13, 1987, the FERC reminded Keating, by letter, that the Forest Service had legitimate concerns that needed to be addressed and that the FERC was required, by law, to assure that its licenses do not interfere with and were not inconsistent with the purposes of the National Forest.

On March 18, 1988 the Ninth Circuit suspended the license and remanded the proceeding to the FERC for more detailed environmental analysis. FERC undertook an Environmental Assessment of the project and reinstated the license on October 27, 1989. Based on its long history of disputes with Keating and his successors, the Forest Service decided it would be prudent to ask the FERC to require compliance with Forest Service conditions as a special condition of any reissued license. It initially submitted suggested conditions to the FERC. However, as a result of a negotiated agreement with Sayles, the Forest Service agreed that the Special Use Permit and a stipulation of the Forest Service, Army Corps of Engineers and Sayles should become part of the reinstated FERC license. The Forest Service informed the FERC of this agreement in a letter dated October 25, 1989. The Special Use Permit which was suspended on February 21, 1989, remained suspended until the Forest Service executed a revised Special Use Permit on December 14, 1989, more than a month after the date by which the project had to be on line under the terms of the PPA.

LaFlamme filed a new Request for Rehearing, which was denied by the FERC on September 12, 1990.

While complainants were attempting to secure approval of the project from FERC and the Forest Service, they were also at odds with PG&E. At stake in the PG&E controversy was the appropriate allocation of costs resulting from the interconnection of the Sayles Flat project with the PG&E system. Keating and his successors were willing to build and pay for a radial line running from the project site to PG&E's nearest transmission line. The

project proponents balked, however, when asked to pay for improvements to the existing PG&E line needed to efficiently handle the new load and when asked to agree to move its point of interconnection in response to changes in PG&E's transmission system.

PG&E's nearest transmission line is referred to as the Eldorado Feeder 2101. It is a line running from the Eldorado Power House at its western end to Echo Summit on the east. At Echo Summit, the line interconnects with the Sierra Pacific transmission system. Portions of the Eldorado Feeder are strung to accommodate 12 kV and other portions are strung to carry 21 kV. For some time, PG&E has been unable to serve the load at Echo Summit. To serve those customers, PG&E has purchased power from Sierra Pacific under contract. In order to keep the Sierra Pacific power from moving further to the west into the remainder of PG&E's service territory, an open switch is maintained on the Eldorado Feeder.

Due to its remote location, the dramatically changing terrain, severe weather, and thick vegetation, the Eldorado Feeder is comparatively unreliable. In using the line, PG&E experiences frequent voltage regulation problems and, according to the utility, the line is overextended. Since 1981, PG&E and Keating/Sayles have disagreed as to whether or not an upgrade of the Eldorado Feeder is needed to carry the power from Sayles Flat and, if so, who should pay for it. In addition, PG&E and the QF owners have been at odds as to who should bear the cost for moving the point of interconnection if PG&E ever finds it necessary to relocate the open air switch to a point west of the Sayles Flat project. What is at issue is PG&E's good faith in interpreting the parties' rights and responsibilities under PG&E's Rule 21, which governs the interconnection of QFs to the utility system. As set forth in earlier Commission decisions, it is the version of Rule 21 in effect at the time the PPA was signed which applies to the interconnection arrangement for each project.

II. Discussion

The dispute over the allocation of transmission costs formed the basis for the complaint as originally filed in 1987. However, the complainant chose not to litigate the dispute between 1987 and 1989. Instead, complainants filed an amendment to the complaint requesting an extension of the 5 year deadline. If Sayles prevails on the force majeure issue, we must explore the interconnection issues in much greater depth. If PG&E prevails and we rule against a finding a force majeure, then an examination of the issues in light of Rule 21 as it existed in 1984 becomes moot. Therefore, we will first consider the claim of force majeure.

The Force Majeure Claims

"Force majeure" is a legal doctrine. It refers to uncontrollable or unforeseeable circumstances or actions which would relieve one party in a contract from certain obligations. The Commission described force majeure in D.83-10-093 as follows:

> "When the occurrence of a force majeure renders a party wholly or partly unable to perform under the contract, the party is excused from that performance to the extent that it has notified the other party of the occurrence, suspended its performance only for the period required by the force majeure, and used its best efforts to remedy its inability to perform."[5]

The PPA defines force majeure as follows:

> "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 action of the elements, actions of federal, state and municipal agencies, and actions of legislative,

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5 D.83-10-093, page 80 (mimeo), and see Conclusion of Law 22.

judicial, or regulatory agencies which conflict with the terms of this Agreement."

As we explained in D.88-11-063,

"any extension granted as a result of force majeure should be limited to the duration of the force majeure, and the extent to which the QF can demonstrate that the force majeure affected its ability to meet contract requirements. Furthermore, consistent with the terms of the standard offer contract, a QF must be prepared to show that it properly notified the utility, and took steps to overcome the effect of the force majeure, using due diligence. Finally, the occurrence of force majeure does not alter contract terms that are not directly affected by the force majeure event."

In D.88-11-063 we explained the purpose of the force majeure clause:

"The purpose of a force majeure clause is to allocate the risk of nonperformance appropriately between the parties to a contract. In a standard offer contract, the risk of nonperformance is properly allocated to the QF, not the utility or its ratepayers. An inherent part of the standard offer "deal" is that the utility and ratepayers can count on the QF resource coming on-line as planned, and they are not at risk for delays or cost overruns in the QF's development. In exchange for a contract at full avoided cost, the QF assumes the risk that the five-year development stage may not be sufficient to develop its project.

"In D.83-10-093, we tempered the QF's risk of nonperformance by excusing a QF from the full burden of "unanticipated" or "unforeseeable" actions of legislative, judicial, and regulatory agencies. Our policy statement in that decision was consistent with PG&E's proposed force majeure clause:

"We believe that a scheme similar to that proposed by PG&E, if expanded to include actions by the courts and legislature, provides reasonable certainty in the face of potential legal changes. It also prevents

> utilities from being placed in the untenable position of being bound to a contract which violates the law. Unanticipated changes in law are the fault of neither party, and neither party should be held in breach of contract as a result of those changes. (Emphasis added.)[6]

"Our intent was to excuse the QF from 'unanticipated' changes in the law, and to prevent the utilities from being placed in the untenable position of being bound to a contract that violates the law.

In D.88-11-063 we expressly held that

"not all government orders and regulatory actions are 'unanticipated' or 'unforeseeable,' thereby qualifying as a force majeure event under the standard offers. In particular, we agree with SCE and DRA that most permitting delays are common events and should be anticipated by project developers when they commit to deliver power to a utility."

In summary, as we held in D.88-11-063, the QF claiming force majeure must establish (1) the particular delay, and duration of delay, was unanticipated at the time the contract was entered into, (2) that it was without any fault or negligence in contributing to the delay, (3) that it has been diligent in attempting to end any delay, and (4) that the QF has given the required notice of the delay in a timely manner.

Assuming that the QF proves that it meets these criteria, the effect of the force majeure must be determined. Before considering a deferral of the on-line date, the extent to which the force majeure event (and not other factors) impacted the QF's ability to meet that requirement must be assessed.

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6 D.83-10-093, page 81, mimeo.

Complainant's Assertions of Force Majeure

When Sayles filed its amended complaint, it asserted that two force majeure events worked independently to preclude its bringing the project on-line by the date required in its PPA. One "event" occurred on February 21, 1989, when the U.S. Forest Service suspended the project's Special Use permit. We will refer to this "event" as the Forest Service force majeure. The second event occurred on March 18, 1988, when the Ninth Circuit Court suspended the FERC license and remanded the matter for further environmental review. We will refer to this "event" as FERC force majeure.

Forest Service Force Majeure

Complainant's amended complaint alleges that a condition of force majeure has existed from February 21, 1987, when the U.S. Forest Service suspended the project's Special Use Permit. However, part-way through the hearings in this matter, Sayles announced its intention to drop its Forest Service force majeure claim. PG&E objected, and insisted that it had the right to raise the claim on its own, presumably in the hope that the Commission would find the claim to be without merit and dispose of the claim for all future purposes.

We agree with Sayles that a complainant should be free to decline to pursue rulings or relief. However, if an element of a complaint is withdrawn after the commencement of hearings, it has been our practice to allow amendment of the complaint to effect the withdrawal with prejudice. We will allow complainant to withdraw the assertion of Forest Service force majeure, with prejudice.

FERC Force Majeure

Our first task is to determine whether the particular delay and the duration of the delay was unexpected. Our task is complicated by the complainant's contradictory assertions regarding the particular event or events which are claimed to cause a force majeure condition.

Complainant's opening brief states that "the protracted judicial and regulatory delay constitutes force majeure...delay of the magnitude found in this case was entirely unanticipated. The extraordinary delays have resulted in lack of a final License seven (7) years after the application was filed, six (6) years after the original license was granted, and five (5) years after the execution of the Agreement with PG&E..."

Although this portion of complainant's brief seems to argue that the entire period of delay constitutes force majeure, the amended complaint states that a condition of force majeure has existed "from the date of the initial opinion of the court of appeals." (#9)

Another portion of complainant's opening brief suggests that a force majeure condition did not exist when the Ninth Circuit issues its opinion, but at some unspecified point in time thereafter: "The Ninth Circuit decisions of March 18, 1988 and July 5, 1989 did not, by themselves, make it impossible to complete the Project prior to November 5, 1989. From March 1988 until November 1989 the date for power delivery, FERC had ample time to comply with the Ninth Circuit's order to correct the deficiencies in the environmental document, about 19 months in total. Had FERC acted regularly, not even expeditiously, following the Ninth Circuit's first opinion, it could have prepared the necessary environmental documents and reinstated the project in time for Sayles to meet the five year deadline." (32)

As we have held in past decisions, permitting delays are common events and should be anticipated by project developers. In this instance, Sayles has shown that nearly seven years elapsed between the Notice of application for a FERC license on April 29, 1982 and reissuance of the license on October 27, 1989. However, Sayles has failed to prove that the nature or duration of the particular delays, either individually or cumulatively, were either unexpected or extraordinary.

Based on the record before us, we cannot conclude that FERC's alleged failure to "act regularly" following the March 1988 Ninth Circuit opinion was unexpected. Sayles presents no evidence to demonstrate that FERC was unforeseeably dilatory in issuing its final decision. Sayles has not shown us what a reasonable period of review might be. In particular, Sayles has not offered evidence regarding the average time required by the FERC to prepare environmental documentation or to issue licenses for projects of this type.

Sayles points out that, under California state law, environmental impact reports must be completed and licenses must be issued within one year. The apparent suggestion is that if one year is reasonable for California actions, it should be the normal duration of review by a federal agency. However, the FERC is not bound to a one year time period. The deadline for state action does not help us understand the normal time for review at the FERC.

According to the record, the project received its initial license in 17 months. However, the license issued in 17 months lacked sufficient environmental analysis. Is it unlikely that review with more substantial underlying environmental work would take two months longer? Sayles suggests that it might have taken less time to issue the new decision, since so much work had been done the first time around. Sayles does not tell us what work was done in the initial proceeding and what duplication could be avoided. What work did the FERC do in the second proceeding? Sayles does not say.

Sayles (and Keating as its predecessor) freely chose to invest in a project in an environmentally sensitive and remote place located on federal land. Before spending a penny on this project, they should have known that environmental opposition was likely and that successful project completion would require artful navigation through the jurisdictional conflicts of various governmental agencies. As it turns out, steering that course

became a formidable challenge. Keating and Sayles may have overestimated their chances of success at various points along the way. Yet, the fact there would be challenges could hardly be considered unforeseeable.

To support its claim that the effects of the LaFlamme intervention were unforeseeable at the time, Sayles reports that it consulted four law firms, all or which reviewed LaFlamme's intervention and dismissed it as being unlikely to succeed or to delay the project. This means that the project proponents addressed the issue of whether or not LaFlamme posed a risk, guessed that the risk was low, and decided to take on that risk. Clearly, the fact that her involvement posed some risk to the project was not unforeseeable. The proponents foresaw it. They simply gambled, unsuccessfully, that she would not succeed. The implication of the Sayles position is that a developer can fail to respond to environmental concerns and contest an intervention all the way up the line knowing that the risk of any resulting delay will be absorbed by utility ratepayers. The force majeure in its PPA does not provide a project proponent this type of protection.

Even if we assume, arguendo, that Sayles had encountered unexpected delay in receiving a FERC license, we cannot find that Sayles was without fault or negligence in contributing to the delay. The project was delayed because the Ninth Circuit suspended the issuance of the FERC license. The license was suspended because the court found that FERC's assessment of the project's impact on recreational resources and visual quality to be extremely inadequate:

> "At the outset, we note that FERC neglected to prepare either an environmental assessment (EA) or a FONSI, as required by 40 C.F.R. § 1501.4 (1987), thereby violating the required NEPA procedure. The only environmental analysis performed was the two FERC staff reports of December 29, 1982 and May 31, 1984, filed after the license was issued, after the petition for rehearing was filed, and just one week before

> the petition for rehearing was denied,...FERC's failure to follow proper NEPA procedure violates the law and provides sufficient basis for reversing their decision.
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> "In addition to this technical violation of NEPA, FERC's substantive evaluation of the project's impact on recreational use and visual quality also violates NEPA." 852 F.2d 399

Sayles argues that it is without fault because it (and, presumably, Keating) constantly urged the FERC to do a complete job and move quickly. Contrary to this argument, the record demonstrates that Keating failed to support LaFlamme's requests that FERC undertake a complete environmental review. The proponents opposed LaFlamme's petition for rehearing at the FERC. They intervened in the federal litigation, in support of the FERC's position that no further environmental review is required. They should have known that by failing to encourage a complete enviromental review, they took on the risk that LaFlamme would prevail and environmental review would be required at a later date. We conclude that complainant's opposition to LaFlamme's request for further environmental review (whether that opposition was active or passive) contributed to the delays which necessarily resulted from the court's finding that FERC's actions violated the law.

Sayles asserts that LaFlamme could not be satisfied unless she did everything she could to stop this project. This, Sayles argues, demonstrates that the forces delaying project completion were uncontrollable. However, LaFlamme, although perhaps a formidable project opponent, is not a force majeure. The question is not whether Sayles or Keating could have done anything to control LaFlamme, but whether they could have done anything to limit licensing delays. The surest way to limit licensing delays, as the Ninth Circuit held, is to ensure that "consideration of the environmental impacts of proposed projects take place before any licensing decision takes place." (Id. at 400.)

From at least 1982, Keating and his successors were aware that LaFlamme was seeking full environmental review. If the project proponents had joined her in insisting that the FERC undertake such review from the outset, several years might have been trimmed from the licensing process. Other strategies may have been available to help control licensing delays, as well. We are simply not convinced that the delays were beyond the control of a project proponent, nor are we persuaded that the proponents were diligent in attempting to end any delay.

We also find that Sayles failed to provide timely notice of the alleged force majeure event. Section A-8(b)(1) of the PPA requires that a party which believes it has been rendered wholly or partly unable to perform its obligations under the PPA as a result of a force majeure shall be excused from rendering performance which is effected by the force majeure provided that:

"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."

Although the amended complaint alleges that a condition of force majeure has existed from the date of the initial opinion of the Court of Appeals on March 18, 1988, complainant did not provide written notice to PG&E within two weeks of March 18, 1988. Instead, complainant provided notice on May 19, 1989.

Complainant seeks to excuse it's failure to provide timely written notice by arguing, contrary to the amended complaint, that the force majeure condition did not exist in March 1988, but arose instead in May 1989, when it realized that it would not receive its license in time to complete performance in November. However, the argument that the force majeure claim arose in May 1989 is contradicted by evidence that the project's developers had a force majeure claim on April 25, 1989, but did not present it to PG&E until May 15, 1989. Because Sayles' argument that the force majeure condition first arose in May 1989 is

contrary to the record, the amended complaint and the terms of the notice itself, we find the argument to be entirely without merit.

Finally, even if complainant had proven that the delay in issuance of the FERC license had constituted force majeure, we would conclude that this delay did not warrant an extension of the date of performance. In this case, complainant has failed to prove that the delay in issuance of the FERC license adversely impacted its ability to perform. The record clearly demonstrates that the delays resulting from Forest Service activities independently precluded the project proponents from meeting their contractual on-line obligation. The suspension of the Forest Service permit was not lifted until December 14, 1989, when the Forest Service issued a revised permit. Since the on-line deadline was November 5, 1989, Sayles could not go on site and spin the turbine, let alone complete the additional project changes required by the FERC, until it was too late. Since Sayles now declines to press its earlier assertion that the Forest Service activities were unforeseeable and uncontrollable, we take the Forest Service actions at face value. Even if the FERC permit had been finalized at a much earlier date, the suspension of the Special Use Permit would have kept Sayles from delivering power on time.

Interconnection Costs and the Open Air Switch

In terms of responsibility for interconnection and transmission improvement costs, the PPA was governed by the version of PG&E's Rule 21 in effect at the time the PPA was signed, D.83-10-093 and related decisions, and D.85-09-058 (where applicable). With the expiration of the PPA, questions as to PG&E's good faith interpretation of those provisions is moot. Even if PG&E was responsible for delays in completing an interconnection agreement, other factors would have precluded Sayles from meeting its contractual on-line date. The expiration of the agreement also makes moot questions as to whether or not the agreement was properly assigned by Keating to Sayles. Although the lucrative

interim SO4 is no longer available, Sayles is free to pursue a new standard offer agreement with PG&E.

If Sayles chooses to pursue a new agreement to sell power to PG&E, it will face circumstances and standards in effect at the time, which may differ from those in effect when the last PPA went into effect. For instance, the status of the much debated Sierra Ski Ranch expansion (raised recently by Sayles to demonstrate a potential need for more transmission capacity in the area) may be more certain. In addition, there is currently an OII in progress, in the course of which the Commission will reconsider issues about the appropriate allocation of costs related to transmission improvements needed to serve QFs. Even in the absence of other changes, any subsequent agreement will be subject to a more recent version of Rule 21 than that which governed the recently expired PPA. It is not evident that an exploration of the conduct of the parties under the expired contract would help any of us to understand how to proceed under the changed circumstances.

Despite the apparent acrimony between the parties, we will expect PG&E and Sayles to work quickly and cooperative to reach their own agreement concerning interconnection and transmission costs. However, the history of delays and miscommunications suggests that some oversight may be necessary. If Sayles chooses to pursue a new standard offer agreement, PG&E will be expected to move rapidly to complete a detailed transmission study. Sayles should inform the Commission and the parties in writing if it perceives delay in PG&E's response to interconnection and transmission cost issues. The record concerning the interconnection and transmission cost issues related to the expired PPA remains available for use, if relevant, in a future examination of PG&E's good faith effort to resolve disputes with Sayles.

Relevant guidance can be provided, however, on the open switch issue. The QF is responsible to provide the line that interconnects its facility with the utility system. The QF continues to bear that cost even if reasonable changes in the utility's transmission system require a relocation of the point of

interconnection. It is the QF which decides where to locate its facility. The utility and its ratepayers should not bear the risks associated with that siting decision. While the cost of relocation must be borne by the QF, the utility must be fair. Any required location must be necessary for the utility to continue to meet its service requirements in a cost-effective manner. The utility must provide reasonable notice of the need for relocation and assist the QF by providing any needed information in a timely manner. PG&E is not at fault in insisting that Sayles "follow" the open switch in the event that it is necessary and reasonable to move that switch.

Suspension of the Qualifying Facility Milestone Procedure

In its opening comments, PG&E points out that ALJ Wu's suspension of the QFMP pending resolution of the complaint should be lifted, if the complaint is to be discussed. We agree. Milestone 12 requires that the project start operation within five years of the execution of the PPA. Since Sayles has failed to meet that deadline, the lifting of the suspension results in Sayles' violation of the QFMP. As a result, it surrenders its priority position on the list of these QFs seeking access to transmission capacity in PG&E's transmission-constrained area.

Findings of Fact

1. The Sayles Flat Hydro project is a proposed low head hydroelectric facility located near Camp Sacramento, on the South Fork of the American River.

2. A large meadow adjacent to the power plant site is the Camp Sacramento's main recreational area. The plant site is located within the Eldorado National Forest.

3. The hydro project is visible from Highway 50, a scenic highway. It is visible from the Pyramid Creek area, which is used extensively by hikers on their way to and from the Desolation Wilderness area. The Sayles Flat project is also visible from Lover's Leap.

4. Sayles acquired the right to develop and sell the power generated from this facility from Joseph M. Keating.

5. Keating and PG&E entered into a PPA under Interim Standard Offer 4 (SO4) on November 5, 1984, for forecasted energy and as-delivered capacity.

6. The five-year contractual deadline by which the project proponents were obligated to begin deliveries to PG&E has passed and the project is not yet completed.

7. On April 21, 1980, Keating filed an application with the United States Forest Service (Forest Service) for a special use permit allowing him to construct and operate a hydroelectric plant on Forest Service land.

8. Keating applied with the FERC on April 29, 1982 for a license to construct, operate, and maintain the Sayles Flat project.

9. For more than eight years, Harriet G. LaFlamme has been actively opposing the project.

10. The FERC license was originally issued on September 26, 1983.

11. The United States Court of Appeals for the Ninth Circuit suspended the license and remanded the proceeding to the FERC for more detailed environmental analysis.

12. FERC undertook an Environmental Assessment of the project and reinstated the license on October 27, 1989.

13. LaFlamme states that she will continue to pursue the avenues of appeal available to her at the FERC and in the courts.

14. A Special Use Permit was issued by the Forest Service on July 6, 1986 and signed by Keating.

15. The project proponents and the Forest Service disagreed as to when construction could begin under the Special Use Permit.

16. The Forest Service issued temporary suspensions of the Special Use Permit on at least five different occasions between October 1986 and February 1987.

17. On February 21, 1987, the Forest Service suspended the permit, finding that the proponents were proceeding in violation of six different permit conditions.

18. The suspension of the Special Use Permit issued on February 21, 1989, remained in effect until the Forest Service executed a revised Special Use Permit on December 14, 1989, more than a month after the date by which the project had to be on line under the terms of the PPA.

19. While the project proponents were arguing with Harriet LaFlamme about the environmental significance of the project and fighting battles with the Forest Service as to how to comply with the Special Use Permit, they were also arguing with PG&E as to the appropriate allocation of costs resulting from the interconnection of the Sayles Flat project with the PG&E system.

20. If Sayles prevails on the force majeure issue, we must explore the interconnection issues in much greater depth.

21. If PG&E prevails and we rule against a finding a force majeure, then an examination of the issues in light of Rule 21 as it existed in 1984 becomes moot.

22. Half-way through the hearings in this matter, Sayles announced its intention to drop its Forest Service force majeure claim.

23. The delays resulting from Forest Service activities independently precluded the project proponents from meeting their contractual on-line obligation.

24. Whether or not the exact length of delay in the FERC licensing could have been predicted, the forces leading to delay were foreseeable.

25. Sayles (and Keating as its predecessor) freely chose to invest in a project in an environmentally sensitive and remote place located on federal land. The project proponents should have known that environmental opposition was likely and that successful

project completion would require artful navigation through the jurisdictional conflicts of various governmental agencies.

26. The fact that LaFlamme's involvement posed some risk to the project was not unforeseeable. The proponents foresaw it.

27. No later than September 15, 1982, two things should have been clear to Keating. LaFlamme was seeking to exhaust administrative remedies in pursuit of her concerns and she was asserting that approval of the project would require full environmental review.

28. Despite all of the drama and discord over the years between Keating, LaFlamme, the FERC, the Forest Service, the Ninth Circuit Court of Appeals, and PG&E, Sayles asserts that it had ample time to complete its project when the license proceeding was remanded to FERC. The only remaining event that could constitute force majeure is the failure of the FERC to issue a new decision until 19 months after the remand.

29. Only after Sayles became concerned that it would not get its permit in time to meet the on-line date did it provide PG&E with the notice of a force majeure event.

30. Sayles presents no evidence to demonstrate that FERC was unforeseeably dilatory in issuing its final decision.

31. In terms of responsibility for interconnection and transmission improvement costs, the PPA was governed by the version of PG&E's Rule 21 in effect at the time the PPA was signed, D.83-10-093 and related decisions, and D.85-09-058 (where applicable).

32. Even if PG&E was responsible for delays in completing an interconnection agreement, other factors would have precluded Sayles from meeting its contractual on-line date.

33. The QF is responsible to provide the line that interconnects its facility with the utility system. The QF continues to bear that cost even if reasonable changes in the

utility's transmission system require a relocation of the point of interconnection.

34. It is the QF which decides where to locate its facility.

35. The lifting of the ALJ's suspension of the Qualifying Facility Milestone Procedure causes Sayles to violate Milestone 12, which requires operation within five years of the execution of the PPA.

Conclusions of Law

1. We will not require Sayles to pursue the force majeure claim relating to the Forest Service, a defense that it wishes to drop.

2. We should dismiss the assertion of Forest Service force majeure with prejudice.

3. Even if the FERC permit had been finalized at a much earlier date, the suspension of the Special Use Permit would have kept Sayles from delivering power on time.

4. If Sayles still wishes to sell power to PG&E, it must do so pursuant to a new PPA.

5. Issues concerning the appropriate interpretation of the interconnection rules in effect when the expired PPA was signed are moot.

6. The FERC force majeure claim would not prevail, even if an earlier completion of the FERC licensing process could have brought the project on-line by the required date.

7. With the expiration of the PPA, question as to PG&E's good faith interpretation of those provisions is moot.

8. While the cost of relocation must be borne by the QF, the utility must be fair. Any required location must be necessary for the utility to continue to meet its service requirements in a cost-effective manner.

9. PG&E is not at fault in insisting that Sayles "follow" the open switch in the event that it is necessary and reasonable to move that switch.

10. The suspension of the QFMP for the Sayles Project should be lifted.

11. Sayles is in violation of QFMP Milestone 12.

O R D E R

IT IS ORDERED that:

1. For all of the reasons stated above, the relief sought in this complaint proceeding is denied and the proceeding is closed.

2. The claim of force majeure stemming from the actions and inactions of the United States Forest Service is denied with prejudice.

3. The suspension of the QFMP for the Sayles project is lifted and the project is in violation of Milestone 12 of the QFMP. PG&E is instructed to allocate the transmission heretofore granted the project to the next proposed project on the waiting list.

This order becomes effective 30 days from today.

Dated December 19, 1990, 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

NEAL J. SHOAMAN, Executive Director