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Decision 90-12-098 December 19, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Gilroy Energy Company and BAF Energy, ) | ORIGINAL |
| Complainant, ) | |
| vs. ) | Case 89-04-004 (Filed April 5, 1989) |
| Pacific Gas and Electric Company, ) | |
| Defendant. ) | |

**O P I N I O N**

**Summary**

Gilroy Energy Company (Gilroy) and BAF Energy (BAF) (Complainant) are cogenerators that sell power to Pacific Gas and Electric Company (PG&E) under separate contracts which allow the utility to refuse deliveries during certain portions of the year. Complainant also buys natural gas from PG&E to power their cogeneration facilities. In this complaint, Gilroy and BAF allege that PG&E's natural gas tariffs, as implemented, unlawfully result in these dispatchable cogenerators paying substantial demand charges for natural gas service at times when PG&E's electric division is curtailing power production and Complainant are not consuming gas. In this decision, we find that this complaint is without merit, but do order PG&E to file for approval of renegotiated power purchase agreements wherein its electric ratepayers would compensate Complainant for dispatchability provisions.

## I. Procedural History

Gilroy and BAF filed this complaint on February 21, 1989. A prehearing conference (PHC) was held on June 21, 1989. In his letter requesting the PHC, attorney for Complainant requested the setting of hearing dates. At the PHC, Complainant instead proposed that the matter be submitted on the pleadings with the addition of certain stipulated facts. The assigned Administrative Law Judge (ALJ) asked all parties to report on their success in completing outstanding discovery requests and their success in reaching stipulations as to facts to be considered in the case no later than July 17, 1989. Unexpectedly, the process preceding stipulation took an additional six months. On January 5, 1990, counsel for PG&E forwarded to ALJ Steven Weissman a packet of information which included a Statement of Facts to which all parties have stipulated, a Statement of Issues which the parties agreed to address in their briefs, information related to the Gilroy bill calculations, and a copy of the Gilroy and BAF power purchase agreements (PPA) with amendments.

PG&E, Gilroy/BAF, and Division of Ratepayer Advocates (DRA) agreed to file concurrent opening briefs on January 25, 1990 and concurrent reply briefs on February 21, 1990.

As a result of a stipulation among the parties, other than the PPAs and certain billing information, the entire factual record in this proceeding is as follows:

## II. Participation by DRA

On May 30, 1989, DRA filed a Notice of Participation, stating that it has an interest in this matter because of its possible precedential impact on the restructured natural gas program. The notice further stated that DRA's position is that PG&E is serving Gilroy and BAF in accordance with the applicable tariffs and within the Commission's prescribed rules under the restructured natural gas program. Complainant responded with a Motion to Strike Notice of Participation, arguing that DRA failed to conform with Rule 53 of the Rules of Practice and Procedure, which requires that anyone interested in becoming a party to a complaint proceeding file a petition to intervene. Such a motion must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether or not the petitioner's position is in support of or opposition to the relief sought. Complainant argues that if DRA is given special status by being allowed to participate without filing a petition to intervene, then the question is raised as to whether DRA also has privileged standing in terms of its recommendation being afforded greater weight by the Commission.

The ALJ appropriately denied Complainant's motion. While evidence and argument offered by DRA are afforded no greater weight simply because they are offered by DRA, we are especially anxious to encourage DRA's participation in any matter which might affect ratepayers. Thus, we make no demands of DRA prior to granting it status as a participant in any of our proceedings. This proceeding would clearly have ratepayer impacts if Complainant prevailed, since it would be relieved of the responsibility of making payments which would have to be absorbed by the remaining ratepayers.

At the same time, DRA is no different from other participants in that it must make the nature of its participation in a given proceeding clear to all concerned. In a proceeding as simple as this one, DRA may be able to make its concerns and claims clear to other parties in a brief notice of participation. It must also cooperate with normal discovery requests and comply with deadlines which may be established for announcing the intention to present witnesses or other evidence. In a more complex complaint proceeding, it may be appropriate to require DRA to provide more detail in its pleadings as to its position on each of the assertions contained in the complaint. However, prior to allowing DRA to participate in a matter which may affect ratepayers, we will not require DRA to persuade us of the merits of its participation.

## III. Statement of Facts

Gilroy operates a cogeneration plant located at the Gilroy Foods Facility at 1350 Pacheco Pass Highway, Gilroy, CA 95021. BAF, a California limited partnership, has installed a similar cogeneration facility at its plant located at 750 Metz Road, King City, CA 93930, that had been undergoing start-up testing and has been placed in service during the pendency of this complaint.

PG&E serves natural gas and electricity in the location of the Gilroy and BAF facilities.

Gilroy and BAF receive natural gas service from PG&E pursuant to tariffs authorized by the California Public Utilities Commission (CPUC).

Gilroy and BAF are each parties to non-standard PPA (each of which incorporates several amendments) with PG&E based on a Standard Offer No. 4.

The PPA allows PG&E to "schedule" generation by Complainant during specified periods.

BAF and Gilroy each desired that a "scheduling" provision be included in its PPA because of their belief that having the provision in the PPA would increase the likelihood the California Energy Commission (CEC) would certify its cogeneration facility. Gilroy and BAF each believe that the CEC would not have certified its cogeneration facility absent a scheduling provision in its PPA.

In March 1988, PG&E notified Gilroy that PG&E would not curtail Gilroy's operation of its cogeneration facility pursuant to Appendix J of Gilroy's PPA during 1988.

During the time that Gilroy operated its cogeneration unit in 1988, Gilroy provided PG&E with approximately 780 million kWh of energy and, after it demonstrated firm capacity in accordance with the terms of its PPA, 120 MW of capacity in accordance with the terms of it PPA.

Gilroy paid PG&E for gas transport service in 1988 to its cogeneration facility pursuant to PG&E's Rate Schedule G-COG, except for December 1988. The amount of Gilroy's bill for December 1988 is the subject of a separate complaint proceeding before the CPUC in Case (C.) 89-05-029.

In December 1988, PG&E exercised its contractual right under Appendix J of Gilroy's PPA to schedule Gilroy's cogeneration operation during periods of 1989. PG&E requested Gilroy to maintain its cogeneration facility in an off-line available status from January 1, 1989 through April 30, 1989, and during the hours of 11:00 p.m. to 5:00 a.m., from May 1, 1989 through December 31, 1989.

On April 4, 1989, PG&E exercised its contractual right under Gilroy's PPA to request Gilroy to generate power. PG&E requested Gilroy to start its generation and go to full load when available, and Gilroy did so until April 14, 1989, 48 hours after PG&E requested Gilroy to return to an off-line available status as per Gilroy's contract rights.

During those months in 1989 in which Gilroy did not operate its cogeneration facility in response to PG&E's election under the PPA to curtail Gilroy's output, PG&E billed Gilroy for gas transport service under the minimum bill provision of Rate Schedule G-COG for the customer charge, D-1 demand charge and D-2 demand charge under Rate Schedule G-IND. The customer charge, as well as the D-1 and D-2 demand charges for January through April 1989 are based in part on Gilroy's use of gas transported in 1988.

Gilroy Foods, Inc. and Basic American Foods are the cogeneration hosts to Gilroy and BAF, respectively. They are competitors in the world food processing market.

## IV. Statement of Issues

The minimum bill provision in PG&E's G-COG tariff states that the minimum monthly charge for service will not be less than the pro-rata customer and demand charges under the otherwise applicable transportation schedule. That means that a QF must pay for the continuing availability of natural gas service even in those months when its immediate need for natural gas is quite low. In such instances, the minimum payment is calculated by applying the QF's otherwise applicable tariff. The tariff otherwise applicable to Complainant is G-IND. Part of the demand charge paid under G-IND is calculated based on the actual natural gas consumed during the prior year. Appendix J of the Power Purchase Agreement (PPA) between PG&E and Gilroy makes the QF dispatchable at the discretion of PG&E. In other words, PG&E can require the QF to curtail its deliveries provided that proper notice has been provided. PG&E ordered the curtailment of the Gilroy facility in early 1989 after it had been in operation for most of 1988.

As a result, Gilroy experienced a dramatic reduction in its natural gas consumption in early 1989, which triggered the minimum bill provision. According to Gilroy's calculation, this resulted in its being billed $1,293,401 more than the value of the gas it actually consumed in early 1989. Complainant contests these charges by raising two issues:

1. Did PG&E's action in December 1988 to schedule Gilroy's cogeneration facility in an off-line available status from January 1, 1989 through April 30, 1989 constitute an event of <u>force majeure</u> with respect to the calculation of the demand charges under Rate Schedule G-IND, to be

paid by Gilroy under the minimum bill provision of Rate Schedule G-COG, during the months of January through April 1989?

2. Was PG&E's application of its Rate Schedules G-IND and G-COG to Gilroy during January through April 1989 contrary to Public Utilities Code Section 454.4?

## V. The Force Majeure Claim

The G-IND rate schedule contains a force majeure clause which forgives either party of its obligation to perform "to the extent that the performance of any such obligation is prevented or delayed by any cause, existing or future, which is beyond the reasonable control of the affected party." Complainant argues that PG&E's curtailment notice to Gilroy in December 1988 constituted an event of force majeure within the meaning of PG&E's Rate Schedule G-IND and that, as a result, it should be relieved of its demand charge responsibility for the period in 1989 during which its operations were curtailed.

The Complainant's cogeneration projects required the approval of the California Energy Commission (CEC). Complainant argues that it agreed to allowing its facilities to be dispatchable by PG&E because it perceived that to be the only way to gain the approval of CEC. Gilroy argues that PG&E acknowledged that dispatchability was required by the CEC since PG&E is a party to a contract that specifically states:

> WHEREAS, the CEC requires dispatchability as a condition to certification... (Reply Brief of Gilroy Energy Company and BAF Energy, p. 3; First Amendment to the BAF PPA, Ex. F)

By extension, Complainant argues that the CEC decision approving the projects' certificates, which clearly underscores the importance of dispatchability, forms government action empowering PG&E to curtail the plant's performance. Complainant also states that it was not unforeseeable that PG&E would curtail Gilroy. What Complainant regards as unforeseeable "was that the CPUC would implement a rate design based on demand charges that would apply in any event." (Reply Brief of Gilroy Energy Company and BAF Energy, p. 4) Gilroy and PG&E negotiated the dispatchability amendment in 1985 and BAF and PG&E negotiated the dispatchability amendment in 1987, well before the adoption of the new program and the minimum bill provision for cogenerators.

In response to Complainant's claim of force majeure, PG&E points out that its curtailment rights are clearly set forth in its PPA with Gilroy. It is PG&E's position that the exercise of a contractual right is not a force majeure event. PG&E argues that, by definition, a force majeure event is unforeseen and beyond the reasonable control of the affected party, not a known limitation assumed under a contract. PG&E states that a customer's contractual obligation is neither unforeseen nor beyond the control of the customer, and that a contractual obligation assumed by a customer which results in reduced gas usage is not a force majeure event.

Complainant does not directly contest the suggestion that compliance with a contract provision cannot normally form the basis for a force majeure claim. Instead, Complainant relies on the role of the CEC in regard to the imposition of the scheduling provision as a condition for certification of its project. The suggestion is that Complainant was required by government action to build a dispatchable cogeneration project and that this government action combines, in some manner, with PG&E's decision to curtail Gilroy output to form a force majeure.

Complainant states that the G-IND rate schedule does not list or define the events that constitute force majeure. However, DRA points out that the rate schedule does specifically state that: "The term 'force majeure' specifically does not include... curtailment in accordance with PG&E's gas Rule 14...." DRA argues that this means, in simple terms that a noncore customer such as Gilroy cannot claim force majeure, and therefore escape the continued payment of demand charges, simply because gas is not available. DRA asserts that the dispatching of Gilroy's operation by PG&E's electric department is analogous to a curtailment in that Gilroy and PG&E are aware that PG&E can at certain times of the year schedule zero deliveries. DRA submits that the same is true of a straight gas curtailment situation since parties are aware that curtailment may become a reality in any unidentified future month. DRA argues that since a curtailment does not constitute an event of force majeure, the dispatching provision should not be considered a force majeure event.

Complainant's theory rests on the assumption that, because of what it considered to be CEC policy, it had no choice but to agree to be dispatchable. First, as PG&E points out, the record in this case does not fully support that assumption. Perhaps because the record was limited (at Complainant's request) to a short list of stipulated facts, Complainant cannot support its claim that its project would have been rejected if it had not agreed to become dispatchable. In fact, Complainant has not pointed to any project which has been rejected by the CEC for this reason. Second, even if the record showed clearly that Complainant could not have received a CEC permit without agreeing to dispatchability, such a showing would not demonstrate the occurrence of a force majeure event.

At all times prior to signing the PPA and its amendments, Complainant had one clear option which it has not addressed in this proceeding--it could have chosen not to build a cogeneration project. Instead, it made the business decision to go forward with the project with full knowledge that PG&E could at least partially control its output, and therefore its ability to produce revenue. As DRA points out, the fact that a governmental act may make performance unprofitable or more expensive does not excuse the duty to perform a contractual obligation. (See, for instance, Rose v. Long (1954) 128 Cal.App.2d 824, 827.) In fact, Complainant procured price concessions from PG&E as compensation for its dispatchability. For example, in exchange for the scheduling provisions, PG&E pays Gilroy an additional 17% for the electricity that is delivered. In addition, Gilroy receives full capacity payments under its PPA during curtailment periods as long as its facility remains "ready-available". Finally, Complainant is not limited by law to purchasing its natural gas pursuant to the G-COG and G-IND tariffs. As we said as recently as this past January, "noncore customers that have special problems as a result of the demand charges included in our default rate structure are free to negotiate special contracts with [the utility] to address their particular problems".[1]

As PG&E so clearly argues, even if a governmental action could result in a force majeure claim regarding demand charges, that claim must be based on government action which unexpectedly interferes with a relationship, i.e. governmental action which was unforeseeable and arises after the relationship is formed. Otherwise, force majeure claims could be used to avoid an obligation whenever a pre-existing regulatory requirement results in an unfavorable consequence. Such a use of the force majeure concept would undermine the effectiveness of any number of regulatory requirements. Both law and practicality weigh heavily against applying force majeure in this way.

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1 Decision (D.) 90-01-015, mimeo. p. 97. This decision was issued in the Southern California Gas Company's Annual Cost Allocation Proceeding (ACAP).

## VI. The Public Utilities (PU) Code Section 454.4 Claim

PU Code § 454.4 states:

> "The commission shall establish rates for gas which is utilized in cogeneration technology projects not higher than the rates established for gas utilized as a fuel by an electric plant in the generation of electricity, except that this rate shall apply only to that quantity of gas which an electrical corporation serving the area where a cogeneration technology project is located, or an equivalent area, would require in the generation of an equivalent amount of electricity based on the corporation's average annual incremental heat rate and reasonable transmission losses or that quantity of gas actually consumed by the cogeneration technology project in the sequential production of electricity and steam, heat, or useful work, whichever is the lower quantity." (Added Stats. 1984, Ch. 840.)

This section requires that natural gas-fired QFs be provided with fuel at a price no higher than that paid by utility electricity generators. This price protection applies only for the quantity of natural gas which the utility would use to generate the same amount of electricity.

All parties to this proceeding appear to agree that § 454.4 requires that QFs be provided with limited price parity with utility electric generators. Complainant argues that, under PG&E's tariff interpretation, dispatchable QFs will never have parity with the electric utility or other cogenerators. Complainant says that this is because consumption of natural gas by a dispatchable QF in one year will result not only in direct costs comparable to those faced by an electric generator in that year, but in higher costs in the following year in the event of curtailment. Complainant argues that demand charges capture the potential demand a customer might put on the utility system. The previous year's usage, Complainant notes, serves as an objective measure of a customer's potential demand. However, Complainant maintains that its previous year's usage is not an objective measure of its demand because it bears no relationship to the amount of demand that Complainant might put on PG&E's system during the curtailment period. Gilroy argues that in its case the practice of using the prior year's usage levels for setting minimum payments in the current year constitutes retroactive ratemaking and is, therefore, illegal.

These two arguments are related, in that they both rest on a single faulty premise--that when a cogenerator pays a minimum demand charge in year 2 based on its level of consumption in year 1, it is simply paying more in the second year for the prior year's consumption. This premise has been offered to the Commission before and rejected. In D.88-03-041, which considered Petitions for Modifications and Applications for Rehearing of an earlier decision, the Commission disagreed with the California Manufacturers Association (CMA) when it tried to make the same point. In that decision (at p. 9, footnote 2) we said:

> "While the method used to calculate the rate relies on historical usage, the rate is set prospectively to recover a portion of the utility's revenue requirement during the period the rates are in effect, and does not in any way attempt to recover utility costs incurred during a prior period."

The revenue requirement during the period the rates are in effect includes the costs incurred by the gas utility in providing and maintaining the capacity necessary to provide service to the QF on demand. These are costs which must be borne by a noncore customer, such as a QF, even when it is not consuming gas. The prior year's usage level is considered in setting the minimum payment because it provides a reasonable basis for predicting the customer's need in the current year.

In response to Complainant's assertion that parity can never be obtained, PG&E and DRA both argue that Complainant stands to benefit in the year following curtailment because the prior year's gas usage will appear unusually low and minimum demand charges will reduce accordingly. Complainant responds that this is not so, since it pays under the G-COG (UEG equivalent) rate when the cogeneration unit is in operation and under the G-IND rate when it is not in operation. DRA responds that cogenerators do not always pay the UEG equivalent rate. As provided for in the G-COG schedule, cogenerators pay the lower of the G-COG rate or the G-IND rate. For instance, in October 31, 1988 (when the cogeneration unit was in operation) Gilroy paid the G-IND rate. In addition, both PG&E and DRA point out that electric utility gas customers are also obligated to pay demand charges, even when they are not purchasing natural gas. See D.89-03-053. This order modified D.88-08-070 which otherwise would have excused UEG customers from paying demand charges in the event of curtailment.[2]

Complainant's retroactive ratemaking argument fails not only because the payments are intended to meet prospective revenue requirements. It fails, as well, as a matter of definition. In the words of the California Supreme Court, "[a]t the risk of belaboring the obvious, we observe that before there can be retroactive ratemaking there must at least be ratemaking." Southern California Edison Co. v. California Public Utilities Commission (1978), 20 Cal.3d 813, 817. There is no dispute in this case that the rates to which Gilroy objects were in place and fully operational before the billing period under dispute. Since

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2 In D.88-08-070 (issued in June, 1988), we included the discontinuance of minimum demand charge payments by UEG customers in the event of curtailment among changes to be incorporated by each utility after its first ACAP decision. We rescinded this change in D.89-03-053 (issued in March 1989). PG&E's first ACAP decision was not issued until two months later (D.89-05-073, in May 1989). Thus, D.88-08-070 never affected PG&E's UEG tariff provision and PG&E's UEG customers have never been excused from paying demand charges, even in the event of curtailment.

Gilroy's dispute is not with ratemaking that occurred after the fact; there can be no retroactive ratemaking.

## VII. Policy Considerations

Many of Complainant's objections relate not to the legality of the tariffs or their application. Instead they relate to the policy implications of their current application. Complainant made the following assertions in its Opening Brief:

> "1. This Commission should consider the prospect that PG&E's tariff interpretation will destroy dispatchability as an element of electric utility resource planning. It is highly unlikely that other gas-fired cogeneration projects will be able to accept a scheduling provision and the associated risk of gas demand charge obligations. Thus dispatchability and the resulting enhanced flexibility of utility operations will be impaired.
>
> "2. PG&E's interpretation puts the CEC in the position of either certificating projects without dispatchability and foregoing operational flexibility, or of not certificating projects at all. In the latter case there are potential wasteful consequences, where cogeneration technology is not applied in circumstances where it would be otherwise cost-effective. This result would expose the ratepayers to the risk of expensive plant additions that otherwise would be avoided.
>
> "3. CEC Commissioner Noteware and Chairman Imbrecht urged the CPUC 'to send a positive policy signal to the innovative cogenerators who respond to changing energy needs in a cooperative way in order to promote state energy policy.' Gilroy and BAF urge the Commission to consider these policy implications in its deliberations on this issue.

> "41 On PG&E's terms Gilroy and BAF can never know the true cost of their gas at the time they use it. As shown above, depending on PG&E's subsequent curtailment decisions, the gas may prove to have been much more expensive than it first appeared. Under these circumstances it is not possible for management to make informed decision regarding fuel use."

We have determined in this complaint proceeding that PG&E's G-COG rate schedule is a lawful tariff which has been lawfully applied to the Complainant. However, we are concerned that the lawful application of the tariff provisions will discourage QFs from agreeing to provide dispatchability and penalize those who do. We do not wish to impair the benefits which dispatchability provides to electric ratepayers through enhanced flexibility of utility operations. Such improved operating efficiency should be encouraged, not discouraged.

We recognize that dispatchable cogenerators provide greater value to the electric utility than do conventional cogenerators. In adopting demand charges, the Commission never directly considered the effect on dispatchable QFs. In effect, by being encumbered with large demand charges during its period of curtailment in 1989, Gilroy has been penalized for agreeing to provide dispatchability. This result was not our intent when we established demand charges, nor when we approved of the G-COG and G-IND tariffs.

When the Complainant agreed to be dispatchable, the Complainant's control of its demand on the gas system during dispatch periods passed to the PG&E electric department. It is the PG&E electric department that makes the dispatch decision, and PG&E electric ratepayers who benefit from the Complainant's dispatchability agreements.

Complainant argues that PG&E should not be allowed to recover the amount of the demand charges resulting from dispatch of the cogeneration facilities because Complainant regards the collection of these demand charges unlawful. PG&E states that it would be unfair penalization of PG&E to require it to bear the revenue risk.

We do not find that PG&E unlawfully applied the tariff provisions resulting in the demand charges, and therefore will not put PG&E at risk of undercollection of revenues. At this time, having found PG&E to have lawfully applied its tariff, we are unable to grant Complainants relief from demand charges levied on them during periods of curtailment by PG&E under the scheduling provisions of their dispatchability amendments.

Although the Commission in its orders establishing the new gas industry framework did not consider the impact of adopting demand charges on dispatchable QFs, Complainant was aware, or should have been aware, of the potential adverse impact. Gilroy and BAF, as noncore customers, could have negotiated individual gas transportation contracts with PG&E that would have addressed their particular problem, as other dispatchable QFs have done.

Prospectively, as of August 1991, Gilroy and BAF will not be faced with demand charges. On September 25, 1990, we issued D.90-09-089 in R.90-02-008, a generic rulemaking proceeding concerning gas utility procurement practices. In that decision, we agreed in concept that demand charges should be eliminated in favor of volumetric rates. Hearings have been scheduled for January 1991 in I.86-06-005 to consider, among other things, rate proposals that will shift into volumetric rates the revenues currently collected through demand charges. Implementation of the program adopted by D.90-09-089, including resolution of the rate proposal issue, is to begin August 1991.

We strongly encourage dispatchable QFs to participate in the development of the new rate program in order to provide the Commission with an understanding of the impact of rate proposals on dispatchable QFs. We do not wish to adopt a new rate proposal that may also discourage QFs from providing dispatchability or effectively penalize existing dispatchable QFs, without remedies to address such an adverse impact.

Questions as to the wisdom of revising the G-COG tariff or its prospective application are more appropriately considered in a more generic proceeding. In such a proceeding, we can more appropriately examine the broad effects of the current rate design on dispatchable QFs, and balance the benefits of promoting dispatchability against the burden of placing more of the fixed costs of the gas system on the remaining customers. It is not appropriate to address such broad policy concerns in a complaint case.

We recognize that between now and August 1991, the Complainant still faces the possibility of paying demand charges during periods of curtailment under its dispatchability provision. While we agree that demand charges levied on dispatchable cogenerators as a result of their dispatchability provisions amount to a penalty on the QF, we are unable to grant Complainant relief. Relief on a retrospective basis is not possible without violating our retroactive ratemaking doctrine. Relief on a prospective basis is not possible in a complaint case.

We believe PG&E and Complainant are able to change this situation expeditiously through an amendment to the power purchase agreements. As stated above, it is PG&E's electric ratepayers who benefit from the dispatchability provisions. That is why we look to the parties to change this situation through amendment to the power purchase agreements.

We would look favorably upon a renegotiated contract that has PG&E's electric ratepayers compensate Gilroy and BAF for dispatch. We order PG&E to file within 60 days for approval of renegotiated or amended power purchase agreements, agreed upon by itself and representatives of Gilroy, and itself and representatives of BAF, wherein its electric ratepayers would compensate Gilroy and BAF for demand charges incurred as a result of dispatchability provisions.

We recognize that Complainant is currently receiving some compensation for providing dispatchability. The record in this case does not allow us to evaluate this level of compensation with respect to avoided cost. We expect PG&E, Gilroy, and BAF to consider, in the context of their renegotiations, the compensation Complainant currently receives for dispatchability.

**Findings of Fact**

1. Gilroy operates a cogeneration plant located at the Gilroy Foods Facility at 1350 Pacheco Pass Highway, Gilroy, CA 95021. BAF, a California limited partnership, has installed a similar cogeneration facility at its plant located at 750 Metz Road, King City, CA 93930, that had been undergoing start-up testing and has been placed in service during the pendency of this complaint.

2. PG&E serves natural gas and electricity in the location of the Gilroy and BAF facilities.

3. Gilroy and BAF receive natural gas service from PG&E pursuant to tariffs authorized by the CPUC.

4. Gilroy and BAF are each parties to non-standard power purchase agreements (each of which incorporates several amendments) with PG&E based on a Standard Offer No. 4.

5. The PPA allows PG&E to "schedule" generation by Gilroy and BAF during specified periods.

6. BAF and Gilroy each desired that a "scheduling" provision be included in its PPA because of its belief that having the provision in the PPA would increase the likelihood the California Energy Commission (CEC) would certify its cogeneration facility. Gilroy and BAF each believe that the CEC would not have certified its cogeneration facility absent a scheduling provision in its PPA.

7. In March 1988, PG&E notified Gilroy that PG&E would not curtail Gilroy's operation of its cogeneration facility pursuant to Appendix J of Gilroy's PPA during 1988.

8. During the time that Gilroy operated its cogeneration in 1988, Gilroy provided PG&E with approximately 780 million kWh of energy and, after it demonstrated firm capacity in accordance with the terms of its PPA, 120 MW of capacity in accordance with the terms of it PPA.

9. Gilroy paid PG&E for gas transport service in 1988 to its cogeneration facility pursuant to PG&E's Rate Schedule G-COG, except for December 1988. The amount of Gilroy's bill for December 1988 is the subject of a separate complaint proceeding before the CPUC in C.89-05-029.

10. In December 1988, PG&E exercised its contractual right under Appendix J of Gilroy's PPA to schedule Gilroy's cogeneration operation during periods of 1989. PG&E requested Gilroy to maintain its cogeneration facility in an off-line available status from January 1, 1989 through April 30, 1989, and during the hours of 11:00 p.m. to 5:00 a.m., from May 1, 1989 through December 31, 1989.

11. On April 4, 1989, PG&E exercised its contractual right under Gilroy's PPA to request Gilroy to generate power. PG&E requested Gilroy to start its generation and go to full load when available, and Gilroy did so until April 14, 1989, 48 hours after PG&E requested Gilroy to return to an off-line available status as per Gilroy's contract rights.

12. During those months in 1989 in which Gilroy did not operate its cogeneration facility in response to PG&E's election under the PPA to curtail Gilroy's output, PG&E billed Gilroy for gas transport service under the minimum bill provision of Rate Schedule G-COG for the customer charge, D-1 demand charge and D-2 demand charge under Rate Schedule G-IND. The customer charge, as

well as the D-1 and D-2 demand charges for January though April 1989 are based in part on Gilroy's use of gas transported in 1988.

13. The minimum bill provision in PG&E's G-COG tariff states that the minimum monthly charge for service will not be less than the pro-rata customer and demand charges under the otherwise applicable transportation schedule. A QF must pay for the continuing availability of natural gas service even in those months when its immediate need for natural gas is quite low.

14. PG&E can require the QF to curtail its deliveries provided that proper notice has been provided.

15. The G-IND rate schedule contains a force majeure clause which forgives either party of its obligation to perform "to the extent that the performance of any such obligation is prevented or delayed by any cause, existing or future, which is beyond the reasonable control of the affected party."

16. The G-IND rate schedule specifically states that: "The term 'force majeure' specifically does not include...curtailment in accordance with PG&E's gas Rule 14..."

17. Noncore customers that have special problems as a result of the demand charges included in our default rate structure are free to negotiate special contracts with (the utility) to address their particular problems.

18. Even if a governmental action could result in a force majeure claim regarding demand charges, that claim must be based on government action which unexpectedly interferes with a relationship, i.e. governmental action which was unforeseeable and arises after the relationship is formed.

19. PU Code § 454.4 requires that QFs be provided with limited price parity with utility electric generators.

20. The costs incurred by the gas utility in providing and maintaining the capacity necessary to provide service to the QF on demand are costs which must be borne by a noncore customer, such as a QF, even when it is not consuming gas.

21. While the method used to calculate the demand charges relies on historical usage, the rate is set prospectively to recover a portion of the utility's revenue requirement during the period the rates are in effect, and does not in any way attempt to recover utility costs incurred during a prior period.

22. The rates to which Gilroy objects were in place and fully operational before the billing period under dispute.

23. Since Gilroy's dispute is not with ratemaking that occurred after the fact, there can be no retroactive ratemaking.

24. Many of Complainant's objections relate not to the legality of the tariffs or their application, but to the policy implications of their current application.

25. Dispatchable cogenerators provide greater value to the electric utility than do conventional cogenerators.

26. In adopting demand charges, the Commission never directly considered the effect on dispatchable QFs.

27. It was not our intent when we established demand charges, nor when we approved of the G-COG and G-IND tariffs, to discourage or penalize QFs from agreeing to provide dispatchability.

28. As a result of the dispatchability provisions in its power purchase agreements, the Complainant's control of its demand on the gas system during dispatch periods is passed to the PG&E electric department.

29. It is the PG&E electric department that makes the economic dispatch decision and the PG&E electric ratepayers who benefit from the dispatch.

30. It is reasonable for PG&E electric ratepayers to compensate dispatchable QFs for providing dispatchability.

31. Complainant was aware, or should have been aware, of the potential adverse impact the demand charge ratemaking mechanism would have on dispatchable QFs.

32. Between now and August 1991 Complainant may continue to be adversely impacted by the demand charge ratemaking mechanism

absent resolution through an amendment to the power purchase agreement.

33. In exchange for the scheduling provisions, PG&E pays Gilroy an additional 17% for the electricity that is delivered.

34. Gilroy receives full capacity payments under its PPA during curtailment periods as long as its facility remains "ready-available".

**Conclusions of Law**

1. There is no merit to Complainant's claim of force majeure.

2. Even if the record showed clearly that Complainant could not have received a CEC permit without agreeing to dispatchability, such a showing would not demonstrate the occurrence of a force majeure event.

3. The fact that a governmental act may make performance unprofitable or more expensive does not excuse the duty to perform a contractual obligation.

4. Complainant is not limited by law to purchasing its natural gas pursuant to the G-COG and G-IND tariffs.

5. There is no merit to Complainant's claim that PG&E's application of its G-COG and G-IND tariffs to Gilroy and BAF is unlawful.

6. Questions as to the wisdom of revising the tariff are more appropriately considered in a more generic proceeding.

7. The complaint is without merit and should be dismissed.

## O R D E R

IT IS ORDERED that:

1. PG&E shall file with the Commission within 60 days of the effective date of this order for approval of an amended power purchase agreement between itself and representative(s) of Gilroy.

2. PG&E shall file with the Commission within 60 days of the effective date of this order for approval of an amended power purchase agreement between itself and representatives of BAF.

3. This complaint is dismissed.

This order is effective 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

N[illegible] J. S[illegible]ULMAN, Executive Director

PS