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Decision 91-02-044 February 21, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Smith River Power Plant
Associates, a California
Limited Partnership,

Complainant,

vs.

Pacific Gas and Electric
Company, a corporation,

Defendant.

ORIGINAL

Case 89-10-035
(Filed October 27, 1989)

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OPINION

I. Summary

This complaint proceeding arose out of a good faith dispute between the parties over whether, and under what circumstances, the means of interconnecting the complainant, a qualifying facility, with the defendant, a utility, could be changed.

This decision finds the terms of the "Settlement Agreement and Mutual Release" (Settlement) between Smith River Power Plant Associates (Smith River) and Pacific Gas and Electric Company (PG&E) of January 16, 1991 to be a fair and reasonable compromise of the dispute between Smith River and PG&E, and that PG&E was prudent to enter into the settlement. The complaint of Smith River is dismissed, with prejudice.

II. Background

Complainant is a limited partnership created to develop the Smith River Power Plant, a "qualifying facility" (QF) within the definition of the federal Public Utility Regulatory Policies Act of 1978 (16 U.S.C.A. 796, et seq.). The facility was constructed in 1979 and consists of a wood waste fired electric generating plant located within the service territory of Pacific Power and Light (PP&L).

Smith River and PG&E entered into a Standard Offer No. 4 (SO 4) contract for PG&E's purchase of 10 MW of firm capacity for 30 years on April 28, 1985. The contract contemplated that beginning five years after the date of contract, April 28, 1990, Smith River would receive firm capacity payments at \$196 per kilowatt/year (kW/yr) and levelized energy payments equal to the

SO 4 forecast of energy costs for 10-years and energy payments at actual avoided cost thereafter.

The parties to the contract assumed that Smith River's electrical output would be carried over a transmission line to PG&E. Smith River determined in early 1989 that it might economically wheel its output on PP&L's existing transmission line from Smith River to Klamath Glen. PG&E maintained that use of this alternative would require an interconnection study. The 180 days needed for the study would impose such a delay that Smith River could not meet its 5-year deadline to begin deliveries to PG&E.

Smith River sought a one-year extension of the on-line date and offered PG&E a price concession, which PG&E rejected based on its asserted doubt that Smith River was a viable project. PG&E demanded evidence of PP&L's willingness to wheel the energy, which Smith River provided. Smith River also proposed that its output be wheeled by the Hoopa Valley Indian Public Utility District (PUD). Smith River claimed that this wheeling arrangement would enable the PUD to provide electricity to the Yurok Indians residing on the Yurok reservation. PG&E continued to maintain that the project was not viable and, on that basis, refused to enter into negotiations on the deferral of the April 28, 1990 deadline.

A. Procedural History

1. Complaint by Smith River

Smith River filed the instant complaint on October 27, 1989 seeking among other things, a declaration that the project is viable so that as a consequence, PG&E would be required to negotiate a contract extension with Smith River, an order requiring PG&E to act in good faith and complete an interconnection study with PP&L within 120 days, and a suspension of the running of the five-year period for Smith River to deliver electricity to PG&E on a day-to-day basis until Commission decision on the complaint.

2. Motion for Ex Parte Relief

Smith River also filed a "Motion for Immediate and Ex Parte Relief" (Motion) on October 27, 1989 seeking a tolling of the five-year period to avoid unnecessary expense pending Commission action. PG&E responded on November 2, 1989 that the granting of Smith River's Motion would unilaterally alter a fundamental term in a standard offer contract without hearing and potentially revive what PG&E has determined to be a dead project. The Commission's Division of Ratepayer Advocates (DRA) filed its opposition to the Motion on November 6, 1989 on the grounds that granting the Motion would create viability by giving the QF additional time in which to complete its project. In its "Reply of Complainant in Support of Motion for Immediate and Ex Parte Relief" filed November 13, 1989, Smith River argued that the tolling of the five year deadline would only preserve the status quo which existed as of the date on which the complaint was filed. The assigned administrative law judge (ALJ) considered but did not grant the Motion at the prehearing conference of January 4, 1990. We hereby deny the Motion.

3. Answer of PG&E

On November 30, 1989, PG&E filed the "Answer of P&GE", seeking dismissal of the complaint, with prejudice. The defendant asserted that the complainant is solely responsible for the situation about which it complains, since instead of developing the project, "complainant constantly proposed alternative interconnection schemes and facility locations", and while "PG&E made extraordinary efforts in considering and preliminarily evaluating the numerous and constantly changing proposals advanced by complainant, ...complainant was not developing any one of the proposals."

4. Petition to Intervene

On December 20, 1989, the "Petition of the Yurok Transition Team for Leave to Intervene" (Petition) was filed. The Petition was opposed by PG&E in its Reply filed on January 12,

1990. According to the Petition, approximately 80 Indian households are located in PG&E's service territory; these residents of the Yurok Reservation have unsuccessfully sought electric utility service from PG&E; and Smith River has proposed a means of providing the Yurok Tribe with resources needed to bring electricity to the Reservation, as well as income to the Yurok and Hoopa Tribes. The Petition asserts that the Yurok Transition Team (YTT) has entered into an agreement with Smith River whereby the Yurok Tribe will receive income and a fund would be established to provide energy resources for the development of the reservation. Implementation of the agreement is contingent upon the CPUC granting of relief sought in the complaint. The Petition was opposed by PG&E, which claimed that the YTT's averments are not "reasonably pertinent to the issues already presented" by the Complaint as required by Rule 53 of the Commission's Rules of Practice and Procedure (Rules). PG&E fears that intervention by the YTT would shift the focus of the proceeding to PG&E's past interaction with the Yurok Indians.

YTT has clearly alleged its interest in the outcome of the proceeding and its support of the complaint. The assertions concerning the Yurok Tribe's relationship with PG&E provide a historical context for the YTT's interest in the complaint and are not contested issues of fact in this proceeding. Thus, participation by the YTT will not unduly broaden the issues presented in the complaint. The Petition to Intervene is granted.

B. Joint Motion to Dismiss Complaint

On August 15, 1990, Smith River and PG&E filed their "Joint Motion to Dismiss Complaint and for Approval of Settlement" (Joint Motion). The Joint Motion was denied, without prejudice, by ALJ ruling dated August 21, 1990 because the Joint Motion did not indicate that the procedures for settlements set forth in Rule 51 had been followed.

An "Amended Joint Motion to dismiss complaint and for Approval of Settlement" (Amended Motion) was filed on August 15, 1990. Smith River and PG&E asserted that the other parties to the proceeding had attended a meeting to discuss the terms of the settlement and that all parties had agreed to waive the issuance of notice and the holding of a subsequent settlement conference as required by Rule 51. In all other respects, the Amended Motion was identical to the Joint Motion of August 15, 1990.

DRA replied to the Amended Motion on September 25, 1990. According to DRA, the opportunity afforded DRA and others to comment on the settlement does not cure the settlement's inconsistency with Rule 51.1 (a), which states in part: "Resolution shall be limited to the issues in that proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings."

By ALJ Ruling dated November 1, 1990, the ALJ agreed with DRA that the settlement exceeds the scope of the issues raised in the underlying complaint because it requests that the Commission declare the settlement to be final and not subject to further reasonableness review. The ALJ determined that although Rule 51.1 would normally prohibit the parties from settling issues beyond the viability dispute raised by the pleadings, the QF Guidelines (see, D.88-10-032) allow the parties to take the further step of settling their differences by negotiating modifications to the SO 4 contract. By written motion, the parties may then seek the Commission's approval of the settlement. The ALJ cautioned that the parties would not be entitled to a finding that the agreement is not subject to further reasonableness review; such relief should be requested by separate application. The ALJ further required the parties to file an exhibit comparing the impact of the settlement to ratepayer costs assuming that PG&E prevailed in the underlying controversy.

Smith River, PG&E, and the YTT sought review of the ALJ's ruling. On December 10, 1990, an ALJ Ruling affirmed the November 1, 1990 ruling, with modification. The parties were expressly permitted "to request an order declaring the settlement between Smith River and PG&E to be a fair and reasonable compromise of their dispute and finding that PG&E was prudent in entering into the settlement with Smith River." The ALJ found that the Commission had never intended to insulate the utility from the possibility of appropriate further review when determining the reasonableness of the utility reaching a settlement agreement with a QF.

We affirm that while the Commission has facilitated the modification of QF contracts by adopting the QF Guidelines, it has never held that adherence to the Guidelines would exempt a utility from review of the reasonableness of payments made pursuant to its negotiated settlement. The Commission stated, "... (P)roviding explicit 'how to' instructions in guidelines wrongly implies that we will relieve the utility of their burden of proof in reasonableness reviews. Utilities are held to a standard of reasonableness based on the facts that are known or should be known at the time the utility makes a decision. While this reasonableness standard can be clarified through the adoption of guidelines, guidelines do not relieve the utility of its burden of proof." (D.88-10-032, 29 CPUC 2d 415, 428.)

We support the ALJ's ruling that the parties should be entitled to a finding on the reasonableness of the settlement due to their reliance on American Cogen Technology, Inc. v. PG&E (D.89-11-062). However, based on our reading of the QF Guidelines, we instruct all utilities and QFs that the settlement of a complaint does not entitle the utility to a reasonableness determination of the expenses borne under the terms of the settlement or a revised power purchase agreement. Consequently,

the recovery of those expenses from ratepayers will not be ordered in a decision on the prudence of settlement.

Review of the settlement will be limited to a determination of whether or not the utility was prudent in entering into the settlement agreement. The question of viability must be answered, as viability establishes the utility's duty to negotiate with the QF. To warrant a change in contract terms, a bona fide dispute must be found. In this case, the parties disputed whether the means of interconnection could be changed. In other cases, issues such as the validity of a force majeure claim or whether modifications would result in essentially a "new project" may be resolved through settlement. When a complaint is properly framed, the resolution of these questions is within the scope of the complaint. The reasonableness of the cost of a settlement is not only beyond the scope of a complaint, it will come before the Commission in a later reasonableness review. Thus, the Commission will not rule on the reasonableness of settlement expenses in this or subsequent complaint proceedings. The parties may either bring the issue before the Commission in a separately filed application for approval of the amended contract or the utility may wait until the expenses have been incurred and undergo reasonableness review in the appropriate energy cost proceeding.

C. Amendment to Joint Motion to Dismiss

On January 16, 1991, Smith River and PG&E filed their "Amendment to Joint Motion to Dismiss Complaint and for Approval of Settlement". The parties request the following:

- (1) a finding that the terms of the settlement agreement entered into by Smith River and PG&E on January 16, 1991 (Settlement Agreement) are a fair and reasonable compromise of the dispute between PG&E and Smith River and a finding that PG&E was prudent to enter into the settlement;
- (2) a finding that the Settlement Agreement and Power Purchase Agreement (PPA), as

- amended pursuant to the terms of the Settlement Agreement, are reasonable, and
- (3) upon approval of the Settlement Agreement, dismissal of Smith River's Complaint, with prejudice.

On February 15, 1991, DRA filed its "Reply of Division of Ratepayer Advocates to Amendment to Joint Motion to Dismiss Complaint and for Approval of Settlement." DRA objects to the parties' use of a motion, instead of an application, to request the Commission's approval of the settlement and a finding of reasonableness. DRA points out that notice of a motion is received only by parties to a proceeding, while notice of an application and the relief sought is given to the public at large. While DRA concedes that a settlement may be approved by motion, DRA argues that due to the limited public notice of motions, a settlement proposed by motion should strictly observe the limitation of issues set forth in Rule 51.1 (a). DRA claims that the Joint Amended Motion should not be the vehicle by which the reasonableness of payments under the proposed Settlement Agreement is determined. DRA's concerns have been thoroughly considered and have been reflected in the following discussion.

III. Settlement Agreement

The parties to the Settlement Agreement include Ray Tate and Smith River Power Company, who executed the SO 4 agreement with PG&E and have assigned their interest in the SO4 agreement to the complainant, Smith River, and PG&E. The intervenor, YTT, is not a party to the agreement.

The Settlement Agreement suspends the five-year operation date until June 1, 1993 and provides a daily extension for each day after January 1, 1991 until the date the Commission order approving the Amendment to Joint Motion becomes final.

Fixed energy prices for a maximum of 10 MW will be paid for a period of 120 months, as in the original PPA, but from the later of June 1, 1992 or the date of initial energy deliveries. Energy delivered before June 1, 1992 shall be purchased at as-delivered energy prices, but will not receive any payment for capacity.

Additional pricing provisions are contingent upon which of the two transmission line alternatives specified in the Settlement Agreement is used.

If Smith River elects the "53-Mile Transmission Line Alternative" (53-Mile Line) and provides the level of firm capacity designated in the PPA, the ratepayers would pay \$193 per kw/yr for firm capacity, assuming the project delivers for the full term of the PPA. Smith River agrees that \$3 per kw/yr of that amount will be paid by PG&E to the Yurok Tribe. Thus, the QF would receive \$190 per kw/yr.

If Smith River elects the "PP&L Wheeling Alternative" and provides the level of firm capacity designated in the PPA for the full term of the PPA, the ratepayers would pay \$192 per kw/yr for firm capacity. Smith River agrees that \$4 per kw/yr of that amount would be paid by PG&E to the Yurok Tribe and that it would receive \$188 per kw/yr.

The Joint Motion recites that in the event the price of firm capacity is reduced due to the QF's failure to provide the designated level of firm capacity, those reduced payments would continue to be subject to the \$3 per kw/yr or \$4 per kw/yr payments to the Yurok Tribe.

The fixed energy price received by Smith River will also depend on which of the two interconnection plans the project uses.

Under the 53-Mile Line option, Smith River would receive a weighted price consisting of 97% fixed energy price and 3% variable energy price. If the PP&L Wheeling option is selected,

Smith River would receive a weighted price consisting of 96% fixed energy price and 4% variable energy price.

The QF agrees that depending on whether the 53-Mile Line or PP&L Wheeling option is chosen, the product of either 3% or 4%, respectively, of the QF's energy deliveries times the difference between the fixed and variable energy price shall be paid by PG&E to the Yurok Tribe for the purpose of facilitating the supply of energy to the inhabitants of the Yurok Reservation.

A. Viability

The question faced here is whether the special facts presented by Smith River warranted negotiations over an extension of the five-year deadline. "We do not force the utility to negotiate contract modifications if the utility is convinced of nonviability. Instead, we provide a forum for settlement only if the utility is satisfied that there is a genuine question of a QF's viability." (QF Guidelines, 29 CPUC 2d 415, 427.)

In its complaint, Smith River asserted that it requested a one year extension of the project's on-line date on April 21, 1989 and that PG&E replied that the QF's construction schedule was "very optimistic, although not impossible." According to Smith River, PG&E required Smith River to first obtain a letter from PP&L expressing willingness to wheel; a letter from PP&L was provided on July 7, 1989; PG&E then claimed that the status of the Caltrans permit and fuel supply were in such doubt that PG&E concluded that the project was not viable.

Smith River states that it subsequently provided PG&E with evidence that Caltrans would have issued its permit in time to allow for completion of transmission line construction by the five-year deadline and that there would be economic contracts for the QF's purchase of fuel once the project's on-line date approached.

We find that there was a fair chance that the project may have commenced deliveries by the five-year deadline so that the QF was "viable." By undertaking the more expensive 53-Mile line,

Smith River could have met its performance deadline. PG&E was prudent in negotiating with Smith River because a reasonable person may have concluded that the QF could have met its performance obligations under the original contract.

B. Good Faith Dispute

Since the QF is located in the service territory of PP&L, some means of transmitting the power to PG&E's service territory was necessary to accomplish the purpose of the power purchase agreement. After a series of proposals for interconnecting the project, PG&E understood that the QF's developers had elected to construct a 53-mile transmission line from the project to PG&E's Orick substation. In early 1989, Smith River learned that transmission capacity had become available on the 33 mile stretch of PP&L's existing transmission line from Smith River to Klamath Glen at the edge of the Hoopa reservation. According to the QF, PG&E stated that to implement the Smith River-Klamath Glen wheeling option PG&E and PP&L would have to complete a new interconnection study. Smith River states that PG&E required 180 days at a minimum to complete the interconnection study, making it impossible for Smith River to implement the PP&L Wheeling option within the 5-year, on-line deadline.

The QF states that use of PP&L's transmission line would lower project costs, increase its economic benefits, and make the project more environmentally benign. In addition, the ratepayers of both PP&L and PG&E could benefit from the increase in revenues from PP&L's wheeling services and the avoidance of costs to extend PG&E service into the Yurok reservation and the PP&L Wheeling option provides the potential for providing electric service to Yurok residences, according to the QF.

We observe that a good faith dispute could easily exist over whether PG&E was required to extend the five year deadline to accommodate an interconnection study. The Commission has encouraged the utilities to carefully manage their standard offer

contracts so as to limit ratepayer liability for payments above avoided cost; to the extent that Smith River's SO 4 contract payments are based on erroneously high forecasts of energy and capacity costs, PG&E should manage the SO 4 contract to avoid making unnecessary payments. Utility management techniques have included strict enforcement of the five-year deadline.

We find that there is a distinct possibility that in the case of litigation, a court might weigh the harm to ratepayers from the payments above avoided cost represented by SO 4 payments against the benefits to ratepayers and society as a whole from the PP&L Wheeling alternative. The court may find that refusal to extend the date for performance of the contract was in error and thus require PG&E to make payments under the SO 4 contract. This forms the basis of a good faith dispute between PG&E and Smith River as to whether the five-year deadline should be extended or not. The revised on line date of June 1, 1993 is a good choice, as it provides sufficient time for the necessary interconnection study but not excessive time to allow a troubled QF to enhance its viability at the expense of ratepayers. We find that PG&E was prudent in negotiating a compromise extending the on-line date for the project to June 1, 1993.

C. Ratepayer Benefits

We must assess the cost that would be borne by ratepayers as the result of different litigation outcomes of the underlying dispute. PG&E forecasted the cost to replace capacity and energy that would have been purchased from Smith River based on two sets

of assumptions.¹ While the two "current" forecasts are useful in providing a range of potential ratepayer benefits, the analysis would have been more helpful if one of the scenarios had been based on the most recently adopted forecast of avoided capacity and energy costs in the utility's most recent ECAC or the Commission's biennial resource plan update proceeding (I.89-07-004). The use of other assumptions would be appropriate to establish a range of potential costs.

If PG&E were to prevail, then no payments under the existing SO 4 contract would be made. Ratepayers would then purchase capacity and energy at currently forecasted avoided cost to replace the 10 MW represented by the complainant. The present value of those purchases, stated in 1990 dollars, would vary between \$47.43 million and \$76.86 million.

If Smith River were to prevail, the project's on-line date would be extended to approximately June 1, 1992 to enable PP&L and PG&E to perform the necessary interconnection work. The ratepayers would pay replacement costs for energy until Smith River began deliveries in 1992, then purchase power at SO 4 prices for thirty years thereafter. The net present value of those payments range between \$79.95 million and \$95.93. These payments exceed replacement costs by a present value of \$19.25 to \$32.61 million.

1 The two forecasts employed the following assumptions:

- (1) No new capacity needed until 1999; the annualized cost of a combustion turbine is assumed to be \$475/kw and the energy reliability index stated in PG&E's OIR-2 compliance filing of 3/13/87 is used. Energy values were derived from DRA's testimony in A.86-04-012, a PG&E ECAC proceeding.
- (2) New capacity needed in 1991; capacity values forecasted by DRA on 7/25/88 in A.88-07-022.

In this case, the parties have settled and proposed amendments to Smith River's power purchase agreement. The ratepayer benefit expected to result from Commission approval of the Settlement Agreement was calculated by PG&E under the two transmission scenarios.² Depending on which transmission alternative is employed, ratepayers would pay between \$18.37 and \$31.71 million more than replacement cost. PG&E has calculated the reduction in payments above avoided cost resulting from the Settlement Agreement or in other words, savings from the settlement. Under the 53-Mile Line alternative, ratepayers would be better off by \$3.99 to \$5.48 million. Under the PP&L Wheeling alternative, ratepayers would benefit by \$4.25 to \$5.74 million.

PG&E's analysis, which we adopt here, uses deviation from replacement cost as a measure of ratepayer burden imposed by each of the scenarios. Ratepayers would be best off if PG&E prevailed, and instead of purchasing power under contract with Smith River, PG&E purchased replacement power at currently forecasted avoided cost. Ratepayers would be worst off if Smith River prevailed, and could collect more than the cost of replacement power. The net ratepayer benefit, roughly \$4.0 to \$5.7 million, is fair consideration for the settlement if one estimates PG&E's chances of prevailing, and thus, saving ratepayers approximately \$19 to \$33 million, at roughly 20% or less. Given the fact that Smith River was seeking to postpone its performance date in order to explore

² PG&E employed the following methodology to quantify the net ratepayer benefit: (1) calculate the total firm capacity and fixed energy price payments under the SO 4 contract and under the amended PPA; (2) subtract from each total the payments for firm capacity and energy based on forecasted avoided cost to obtain the payments above replacement cost imposed by the SO 4 and amended PPA contracts, respectively; (3) convert those two sets of payments above avoided cost into present values and calculate the difference between present values.

the feasibility of an operationally efficient, less costly, and environmentally attractive transmission line, Smith River's assertions that it had substantially complied with the QF milestone procedure, and Smith River's colorable showing of "viability", we find that PG&E acted reasonably in settling the complaint.

D. Benefits to the Yurok Tribe

PG&E and Smith River agree that the Settlement Agreement should provide economic benefit to the Yurok Tribe. One of the alternatives for delivering Smith River's generation to the PG&E grid, the PP&L Wheeling Alternative, presents an opportunity for the provision of electricity to inhabitants of the reservation who do not currently have electrical service. Power could be wheeled over PP&L facilities to the Hoopa Reservation and a line could be constructed over the reservation to connect with PG&E's grid at the Hoopa Substation.

The Settlement Agreement provides that certain amounts earned from the delivery of Smith River energy to PG&E will be paid directly to the Yurok Indian Tribe. The Joint Motion states that the parties intend to provide partial funding for the Yurok Tribe's efforts to supply energy to the reservation and contemplates that an escrow account will be established with a disinterested third party fiduciary to make the funds available to the Yurok Tribe.

We find that payments to the Tribe will serve the public interest and approve the intent of the parties. Since the Settlement Agreement does not provide for an escrow account and the Yurok Tribe was not represented in the Settlement Agreement, we will order the establishment of a trust account. A trust account is preferable to an escrow account because it provides the parties with more flexibility. The trust account will be established to receive funds designated for receipt by the Yurok Tribe in the Settlement Agreement. It will be administered by a third party jointly chosen by PG&E, Smith River, and the YTT. The trust document will require the trustee to manage the fund for the

benefit of the Yurok Tribe and to disburse the funds for the purpose of providing electrification to the Yurok Reservation as requested by the Yurok Transition Team or its successor. By use of the third party trust mechanism, the parties and the Commission will be removed from any responsibility for disbursements and the need for any ongoing reasonableness review will be obviated.

The power purchase agreement is to be amended to incorporate the terms of the Settlement Agreement. The amended PPA shall provide for signature by the YTT to enable the Yurok Tribe to enforce the payment and receipt of its share of capacity and energy payments.

VI. Conclusion

Smith River alleged sufficient facts in its complaint as a prima facie showing that it was viable. We find that a bona fide dispute existed as to whether PG&E should have extended the five-year deadline to enable Smith River to study the feasibility of the PP&L Wheeling alternative. Consequently, PG&E was prudent in entering into negotiations with Smith River to amend the pre-existing SO 4 contract.

The resultant settlement agreement reduces the ratepayer burden of payments above replacement cost for capacity and energy by \$4.0 to \$5.7 million, depending on the assumptions used. Given the potential for PG&E to prevail in litigation over the issues presented in the complaint, the net ratepayer benefits are sufficient consideration for settlement of the complaint. We conclude that the settlement agreement and the amended PPA are a fair and reasonable compromise of the dispute between PG&E and Smith River.

As explained above, we do not determine that all payments by PG&E under the amended PPA should be recovered from ratepayers. PG&E must still seek a determination of the reasonableness of its

payments in the appropriate energy cost adjustment clause (ECAC) or other reasonableness proceeding.

The Settlement Agreement should be approved, and the complaint of Smith River should be dismissed, with prejudice.

Findings of Fact

1. The complainant, Smith River Power Plant Associates (Smith River) is a QF as defined by the Public Utilities Regulatory Policies Act of 1978.

2. Smith River and Pacific Gas & Electric Company (PG&E) entered into a SO-4 contract for PG&E's purchase of 10 MW of firm capacity for 30 years on April 28, 1985. The contract contemplated that Smith River would receive levelized energy payments equal to the SO-4 forecast of energy costs and firm capacity payments in exchange for firm capacity deliveries beginning five years after the date of contract, April 28, 1990.

3. The use of transmission line and interconnection facilities is necessary to deliver Smith River's electrical output to PG&E.

4. There is no doubt on the record that Smith River could have met its deadline for commencement of deliveries by constructing a 53-mile transmission line as had been discussed with PG&E.

5. Smith River determined in early 1989 that it might economically wheel its output on PP&L's existing transmission line from Smith River to Klamath Glen. PG&E maintained that use of this alternative would require an interconnection study. The 180 days needed for the study would delay the project so that Smith River could not meet its 5-year on-line deadline.

6. PG&E expressed doubt that Smith River was a viable project and initially refused the request of Smith River for a one-year extension of the date for commencement of deliveries under the SO-4 contract.

7. A reasonable person may conclude that Smith River could have met its performance obligations under the original contract, so the QF was viable.

8. Smith River claims that its PP&L Wheeling Alternative would reduce the amount of new construction of transmission line, use currently underutilized transmission lines, avoid environmental disturbance, provide revenues to PP&L customers, and create the options for electric service to the Yurok Reservation.

9. A court might weigh the harm to ratepayers from the payments above avoided cost represented by SO 4 payments against the benefits to ratepayers and society as a whole from the PP&L Wheeling Alternative.

10. There is a bona fide dispute whether the deadline for commencement of deliveries under contract should be extended to enable the QF to study the implementation of the PP&L Wheeling Alternative.

11. Smith River and PG&E entered into a Settlement Agreement on January 16, 1991.

12. The Settlement Agreement enables Smith River to utilize either the 53-Mile Transmission Line Alternative (53-Mile Line) or the PP&L Wheeling Alternative (PP&L Wheeling). It extends the operation date for the project to June 1, 1993, plus additional days corresponding to the number of days after January 1, 1991 until the Commission order approving the Settlement Agreement becomes final.

13. The ratepayer benefit of the Settlement Agreement is equal to the difference between the payments above replacement cost of energy and capacity represented by the SO 4 contract and the payments above replacement costs of energy and capacity represented by the renegotiated power purchase agreement (PPA).

14. PG&E correctly used a range of forecasts of avoided energy and capacity costs to illustrate the potential replacement cost of energy and capacity. The analysis should include one

scenario based on the avoided cost figures most recently adopted in the utility's most recent energy cost adjustment clause (ECAC) proceeding or the biennial resource plan update proceeding (I.89-07-004).

15. The Settlement Agreement amends the PPA to provide a net ratepayer benefit of from \$3.99 to \$5.74 million.

16. The Yurok Transition Team's petition for leave to intervene in the case should be granted because the Yurok Tribe stands to benefit from the set aside of PPA payments if the relief sought by the complaint is granted.

17. The Settlement Agreement provides that depending on whether the 53-Mile Line or the PP&L Wheeling alternative is chosen, \$3 per kw/yr or \$4 per kw/yr for firm capacity delivered by Smith River shall be paid to the Yurok Tribe. The Agreement also provides that depending on the transmission alternative chosen, either 3% or 4% of the energy deliveries times the difference between current variable energy price and the fixed energy price shall be paid to the Yurok Tribe.

18. PG&E and Smith River agree that the Settlement Agreement should provide economic benefit to the Yurok Tribe, and that funds will be made available to the Yurok Tribe through an escrow account to be established with a disinterested third party fiduciary. The Yurok Tribe is not a signatory to the Settlement Agreement. The Agreement states that the PPA will be amended to incorporate the terms of the Settlement Agreement.

19. Payments to the Yurok Tribe pursuant to the Settlement Agreement will serve the public interest.

20. The Yurok Transition Team should be made a signatory to the amended PPA to enable it to effectively enforce its rights under the Settlement Agreement.

21. Since the disposition of payments for the benefit of the Yurok Tribe described in the Settlement Agreement more closely resembles the creation of a trust relationship than an escrow

arrangement, a trust account should be established to effect the intent of the parties.

Conclusions of Law

1. Intervention is proper when the assertions by the petitioner provide a historical context for the petitioner's interest in the complaint and are not contested issues of fact in this proceeding. Since they are not contested, such claims will not unduly broaden the issues presented in the complaint.

2. The utility's adherence to the QF Guidelines does not exempt a utility from a subsequent review of the reasonableness of a settlement negotiated in a complaint proceeding.

3. Review of the settlement of a QF complaint proceeding is limited to a determination of whether or not the utility was prudent in entering into the settlement agreement.

4. The Commission will not rule on the reasonableness of expenses incurred under the terms of the settlement or a revised power purchase agreement in QF complaint proceedings. The reasonableness of expenses and ratepayer liability therefore may be submitted for review in a separately filed application for approval of the amended contract. Alternatively, the utility may seek recovery of expenses incurred in its ECAC proceedings.

5. PG&E acted reasonably in negotiating with Smith River because Smith River had made a prima facie showing that it was viable.

6. PG&E was prudent in negotiating a compromise extending the on-line date for the project.

7. The Settlement Agreement and the amended PPA are a fair and reasonable compromise of the dispute asserted in the complaint between PG&E and Smith River.

8. PG&E must still seek a determination of the reasonableness of its payments pursuant to the Settlement Agreement and amended PPA in the appropriate energy cost adjustment clause (ECAC) or other reasonableness proceeding.

9. The Settlement Agreement should be approved, and the complaint of Smith River should be dismissed, with prejudice.

ORDER

IT IS ORDERED that:

1. A trust account will be established no later than the date on which Pacific Gas and Electric Company (PG&E) Smith River Power Plant Associates (Smith River) are to execute a Special Facilities Agreement according to the "Settlement Agreement and Mutual Release" (Settlement Agreement), Section IV, Paragraph H. The purpose of the trust account shall be to receive funds designated for receipt by the Yurok Tribe in the Settlement Agreement. A trust document shall be drafted to require the trustee to manage the fund for the benefit of the Yurok Tribe and to disburse the funds for the purpose of providing electrification to the Yurok Tribe as requested by the Yurok Transition Team or its successor. The third party trustee will be jointly chosen by PG&E, Smith River, and the Yurok Transition Team.
2. The amended power purchase agreement shall provide for signature by the Yurok Transition Team.
3. The Settlement Agreement and Mutual Release between Smith River Power Plant Associates, Smith River Power Company, Ray Tate, and Pacific Gas and Electric Company dated January 16, 1991 is approved.

4. The Complaint of Smith River filed October 27, 1989 is dismissed, with prejudice and the proceeding is closed.

This order becomes effective 30 days from today.

Dated February 21, 1991, at San Francisco, California.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the State of California, this 21st day of February, 1991.

PATRICIA M. ECKERT

President

G. MITCHELL WILK

JOHN B. OHANIAN

Commissioners

I abstain.

DANIEL W. FESSLER

Commissioner

I abstain.

NORMAN D. SHUMWAY

Commissioner

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

NEAL J. SHULMAN, Executive Director