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MAR 25 1991

Decision 91-03-057 March 22, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Thomas Oil Company,

Complainant,

vs.

Southern California Edison Company,

Defendant.

ORIGINAL

Case 89-03-015

(Filed March 10, 1989)

OPINIONSummary

For several years, Thomas Oil Company (Thomas) has planned the development of a solid fuel-fired cogeneration facility at Round Mountain, near Bakersfield. The generating unit would be a qualifying facility (QF), meaning that its owners are entitled to sell its electric output to Southern California Edison Company (SCE) pursuant to a standard offer contract. This complaint results from a dispute between Thomas and SCE about the viability of the QF, and raises questions concerning SCE's good faith in refusing to negotiate revisions to the standard offer contract.

Thomas and SCE have settled their dispute. In this decision, we approve the settlement and dismiss the complaint. As a result, Thomas will have more time to complete its project and SCE will pay less for the electricity generated by the QF.

I. Procedural History

The complaint was filed on March 10, 1989 and answered by SCE on April 12, 1989. A prehearing conference was held on June 20, 1989 before Administrative Law Judge (ALJ) Steven Weissman and hearings were set to begin on August 16, 1989. Subsequently,

the parties requested a postponement of the hearings and pursued a ruling on SCE's Motion to Dismiss which was incorporated in its Answer to the Complaint. The final pleadings were filed on August 18, 1989 and the ALJ issued a ruling on October 6, 1989 denying the motion. On the same day, Thomas filed an Amendment to its Complaint. On October 30, 1989, Thomas sent to the ALJ a letter reporting that settlement discussions were underway and requesting that the schedule for the proceeding be suspended.

From the Commission's perspective, the proceeding rested peacefully until July 24, 1990, when the Division of Ratepayer Advocates (DRA) filed a Notice of Participation and Position. On August 8, 1990, the Commission received a Joint Stipulation of SCE and Thomas and Motion for Order Approving Settlement and Dismissing the Complaint, extensive exhibits supporting the Joint Stipulation, the Response of SCE to DRA's Notice of Participation and Position, and Reply Comments of Thomas to DRA's Notice of Participation and Position. In the Joint Motion for approval of the settlement, the parties also requested an order authorizing recovery of payments by SCE to Thomas through SCE's Energy Cost Adjustment Clause (ECAC).

On August 21, 1990, the ALJ issued a ruling denying the Joint Motion, without prejudice. The ruling cited the parties' failure to comply with Rule 51 of the Commission's Rules of Practice and Procedure. Rule 51 governs the approval of settlements in Commission proceedings. In addition, the ALJ warned the parties that the approval of a settlement in a complaint proceeding is limited to issues in that proceeding and cannot extend to substantive issues that may come before the Commission in other or future proceedings. ECAC issues are usually handled in separate ECAC proceedings in which broader notice is provided. On September 19, 1990, SCE and Thomas filed an Amended Joint Motion for an Order Approving Settlement and Dismissing Complaint. DRA filed a Reply to the Amended Joint Motion, dated September 25, 1990, objecting to the request to make ECAC findings in a complaint

proceeding, while agreeing not to contest the reasonableness of the settlement. A Joint Response to DRA's Reply was filed by Thomas and SCE on October 10, 1990. Finally, on January 28, 1991, SCE responded to a request of the ALJ by providing additional cost/benefit analysis to support the reasonableness of the settlement.

## II. Background

Thomas and SCE entered into the initial negotiated power purchase contract for the QF project on December 18, 1984. The parties describe the agreement as essentially a Standard Offer Number 4 (SO4) contract for a 15 megawatt (MW) small power production project.<sup>1</sup> The original agreement provided for the sale of 12 MW of Firm Capacity and 1.5 MW of As-Available Capacity for 30 years. It further provided that Thomas would construct, own, and operate a six-mile transmission line that would connect the project to a 66 kilovolt (kV) transmission line owned by SCE. In late June, 1985, Thomas asked SCE to agree to increase the size of the project under the contract to 20 MW, allowing for the sale of additional energy and capacity. On March 11, 1986, an agreement was reached to amend the contract to include the sale of the additional energy at forecasted energy rates and the additional capacity at Standard Offer Number 2 (SO2) capacity payment rates in exchange for operating the project in a dispatchable mode.

Eight days after Thomas and SCE agreed to amend the contract in this manner, the Commission issued Decision (D.) 86-03-069, which suspended the availability of SO2. An

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1 The SO4 contract is a long-term sales agreement that was latter been suspended and then substantially revised.

argument ensued between the parties as to whether or not the now-suspended SO<sub>2</sub> provisions could be applied to the agreed-upon contract modification. On October 2, 1986, Thomas filed with the Commission a complaint in Case 86-10-014, asking for a determination that the suspension of SO<sub>2</sub> did not prohibit SCE from executing an amendment based on the March 11, 1986 agreement. Thomas asked for the Commission to order SCE to enter into an amended contract. On May 29, 1987 (14 months after the order suspending SO<sub>2</sub>), the Commission issued a decision ordering SCE to honor the March 11, 1986 agreement.

SCE submitted a revised contract to Thomas on October 22, 1987. When the parties met to discuss the proposed revisions on March 22, 1988, Thomas asked for a 14-month extension of the Firm Operation Date specified in the contract. In a telephone conversation later that day, SCE responded by saying that Thomas was not entitled to an extension and would need to demonstrate that the project could meet the latest Firm Operation date in the existing contract (December 18, 1989) before SCE could agree to negotiate an extension.

The next day, Thomas wrote a letter to SCE requesting the 14-month extension (to February 26, 1991), claiming that actions of the Commission had delayed the development of the project and created an uncontrollable force as defined in the power purchase contract. The existence of an uncontrollable force would allow Thomas to avoid breaching the contract even if it failed to meet its obligation to deliver power by a specific date. On April 1, 1988, SCE responded to the letter with one of its own, denying Thomas' claim that the Commission's action in suspending SO<sub>2</sub> constituted an uncontrollable force as defined in the contract. In addition, SCE stated that Thomas had failed to meet its contractual obligation by not notifying SCE of the alleged uncontrollable event within two weeks of its occurrence. In its letter, SCE also requested that Thomas provide proof that the project was viable;

i.e., that it could be placed in operation by the date set forth in the agreement.

On August 9, 1988, Thomas renewed its request for a 14-month extension of the on-line date and indicated that it was "not necessarily talking about a Force Majeure." The efforts of SCE and Thomas to resolve their disagreement failed. On February 3, 1989, the parties executed an Amended and Restated Power Purchase Contract as authorized by the Commission's 1987 decision. The Firm Operation Date of December 19, 1989, remained unchanged from the prior version of the contract. To pursue its desire to postpone the Firm Operation Date, Thomas filed this complaint, in which it requested the following relief:

1. Order SCE to amend the Power Purchase Contract provisions of Article 12 to specify a firm capacity delivery date at least 437 days after December 18, 1989 to reflect the time period from the suspension of SO2 on March 19, 1986 until the Commission order of May 29, 1987.
2. In the alternative, order SCE to amend the Power Purchase Contract provisions of Article 12 to specify a firm capacity delivery date at least 239 days after December 18, 1989, to reflect the time period from the filing of the complaint by Thomas on October 2, 1986 until the Commission order of May 29, 1987.
3. Order SCE to provide an additional period of compliance with the Article 12 firm capacity on-line provisions reflecting the time period from September 16, 1988 when a formal complaint was filed by Thomas pursuant to Section 22.3 of its Power Purchase Contract until the date of order of this Commission resolving the instant complaint filing.

In its amendment to the complaint, Thomas added the following elements to its prayer for relief:

4. Declare that the requirement of Milestones #10 and #11 of the QF Milestone Procedure

(QFMP) for the Thomas project were tolled during the pendency of this complaint.

5. Declare that SCE has incorrectly determined that Thomas is not in compliance with the QFMP, particularly with regard to the Milestones #10 (requiring that by February 25, 1989, Thomas request of SCE and provide security or payment for certain engineering and procurement activities) and #11 (requiring that construction begin by February 5, 1989), and declare that Thomas is in compliance with the QFMP.
6. Declare that Thomas has not lost its interconnection priority and order SCE to reinstate the interconnection priority for the Thomas project.
7. Declare that SCE's administration of the QFMP with regard to the Thomas project has been in bad faith, and direct SCE to refrain from further bad faith administration of the QFMP for the Thomas project.
8. In the alternative to Paragraph 3, order SCE to provide an additional period for compliance with the Article 12 firm capacity on-line provisions reflecting the time period from March 6, 1989 when the original complaint was filed by Thomas until the date of the order of this Commission resolving the complaint.

### III. Settlement Agreement

#### A. Terms of the Agreement

Under the Settlement Agreement, the Purchase Power Contract is changed in the following respects:

1. The contractual capacity of the project is increased from 18,700 kw to 20,700 kw, to enable the project to use existing power generation equipment.

2. The As-Available Capacity is reduced from 2,000 kW to 0 kW. Thomas is given an option to increase As-Available Capacity up to 2,800 kW, but this capacity would be subject to curtailment by SCE during periods of wind turbine curtailment in the Tehachapi area. This is because in periods of high wind, it is expected that the existing 66 kW transmission system could not support all of the available wind generated power, and that there would be no excess transmission capacity available for carrying power from Thomas.
3. The expected Firm Operation date is extended to 800 calendar days after the Commission's approval of the settlement and the latest Firm Operation date is extended to 889 calendar days after approval of the settlement. The 889 days is the total number of days required to settle the original complaint plus the time from the first notice of the current complaint until the termination date of the original Power Purchase Contract.
4. The Capacity Price is changed from a fixed \$189.76/kW-year for 18,700 kW of capacity to a blended price for 20,700 kW. The blended price is determined by combining the existing contractual capacity of 18,700 kW (at the existing rate of \$189.76/kW-year) with 2,000 kW of additional capacity at a rate equal to 85% of the posted As-Available Capacity price or \$15.30/kW-year, whichever is greater. This results in an expected floor Capacity Price of \$172.90/kW-year.
5. In order to track the progress of the project completion and performance, parties would rely on the Project Development Milestone Procedure (PDMP) instead of the QFMP. The PDMP is the project development tracking procedure most recently adopted by the Commission and it applies to all contracts executed after May 2, 1989.

6. Thomas is required to post security to reflect the increased project size as required by the PDMP.
7. New restrictions are included on Thomas' ability to claim the occurrence of an Uncontrollable Force. These changes are intended to preclude Thomas from making Uncontrollable Force claims for problems that may exist with existing permits.
8. The Prescribed Dispatch time period is changed from 5.5 hours per day to a maximum of 2,008 hours per year, with the actual hours to be set according to a SCE Prescribed Dispatch Schedule. This change allows SCE to prescribe the number of hours of dispatch in a given day, instead of being limited to 5.5 hours per day.
9. The Prescribed Dispatch Capacity level is increased from 7,500 kW to 9,500 kW to reflect the 2,000 kW increase in contractual capacity. This maintains the existing amount of dispatch, which is equal to 11,200 kW.
10. The energy payment rates during the first ten years of the contract term are changed from a blended SO4/SO2 forecasted rate to a blended rate based on 15,000 kW at SO4 rates and 5,700 kW at posted SO1 rates. The energy payment rate for all power delivered in excess of 20,700 kW is the posted SO1 as-available energy payment rate.
11. The energy payment rate during dispatch is changed from the Forecasted Economy Energy rates to 75% of SCE's system incremental rates in effect during those hours. This eliminates the uncertainty inherent in the use of forecasted numbers and provides Thomas with the opportunity to deliver energy during dispatch periods at a price competitive with SCE's economy energy purchases.
12. The Interconnection Facilities Agreement (IFA) is changed to reflect the terms of the Uniform Standard Offer IFA. This will



allow Thomas to construct and own a six-mile transmission line and to construct and deed to SCE a switching station located adjacent to SCE's 66 kV transmission line.

13. Thomas is required to make a settlement payment of \$6 million, either in a lump sum prior to Firm Operation, or amortized monthly at an interest rate of 12% per annum over the 30-year term of the contract.
14. The settlement agreement is conditioned on our approving it in a decision does all of the following:
  - a. finds SCE's actions in entering into the settlement agreement to be reasonable and prudent;
  - b. declares that SCE may recover through its ECAC all payments made to Thomas under the settlement agreement;
  - c. dismisses the complaint; and
  - d. expresses no opinion as to the merits of either party's claims.
15. Additionally, Thomas waives all claims against SCE relating to the subject of the complaint.

**B. Scope of Review in this Proceeding**

Under Rule 51.1 (a) of the Commission's Rules of Practice and Procedure, the resolution of issues of fact or law in an acceptable settlement "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." Thomas' Complaint and First Amendment to the Complaint raise issues as to how soon Thomas should be required to deliver power, and whether or not SCE exhibited bad faith by refusing to negotiate a revision of the contractual firm capacity delivery date.

The settlement agreement before us answers the "how soon" question and asks us to dismiss the claim of bad faith. These provisions are consistent with the issues in the underlying proceeding. However, SCE and Thomas also ask the Commission to declare that SCE may recover through ECAC all of its payments to Thomas. In its comments filed in reply to the settlement agreement, DRA argued that this request exceeds the scope of the issues raised in the complaint without adequate notice to potentially affected ratepayers. In addition, as DRA points out, cost recovery issues are reserved for applications, where the threshold for ratepayer participation is lower than it is in a complaint proceeding, where a participant must file a formal intervention pursuant to the Commission's Rule 53.

Thomas and SCE do not refute DRA's arguments. Instead, they claim that the Commission has allowed for ECAC reasonableness findings in past complaint proceedings and that there is no need to worry about notifying ratepayers, since DRA has not demonstrated that any ratepayers are interested. In none of the prior cases cited by SCE and Thomas was the Commission directly faced with the procedural issues now raised by DRA. The Commission first addressed this issue in D.91-02-044, signed in February of this year, in a complaint proceeding involving Smith River Power Plant Associates and Pacific Gas and Electric Company. The Commission concluded there, as we do here, that 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. The argument of SCE and Thomas about DRA's failure to demonstrate the existence of unrepresented ratepayer interest underscores the appropriateness of this conclusion. We cannot know the extent of ratepayer interest in the pass-through of these costs without providing adequate notice and giving interested parties an opportunity to come forward.

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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 an amended contract or the utility may wait until the expenses have been incurred and then undergo reasonableness review in the appropriate energy cost proceeding.

Review of the settlement will be limited to a pragmatic determination of whether or not the utility was prudent in entering into the agreement modifying the contract. In order to be found prudent, a contract modification must be consistent with the Final Guidelines for Contract Administration of QF Standard Offers (Guidelines) approved by the Commission in D.88-10-032.

The Guidelines require that contract modifications requested by a QF be accompanied by price and/or performance concessions commensurate in value with the degree of the change in the contract. In addition, the modifications and concessions obtained through negotiation should be valued with reference to the unamended contract and the current and expected value of the QF's power. Finally, no modifications to a power purchase contract should be made if, after a reasonable examination of the QF's viability, the QF is determined to be nonviable. In the event that there is a genuine question of the QF's viability, then negotiated modifications to the contract may constitute a reasonable settlement of a good faith dispute. Thus, our consideration of the settlement agreement must include an examination of project viability and ratepayer benefits.

### C. Viability

A viable project is one that could meet all of its contractual commitments (including performance deadlines) in the absence of contract modifications. 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 the QF's viability." (Guidelines, 29 CPUC 2d 415, 427.)

Thomas asserts that it wants an extension of time for bringing its project on-line to make up for the regulatory delays resulting from its earlier dispute with SCE over the availability of SO<sub>2</sub>. Nonetheless, in its complaint (at p. 16), Thomas argues that "there can be no question that, even ignoring the time lost to this project due to regulatory actions, there is substantial evidence that the project could have been constructed and could have achieved operation before the deadline in the original agreement." Thomas argued that it had taken appropriate steps to demonstrate this fact to SCE by reporting the execution of a contract with Hawker Siddeley Power Engineering to construct the project. In addition, Thomas says that it provided preliminary information to SCE as late as November 1, 1988 showing that a subsidiary of Bechtel had offered to construct the project within the time required.

In its answer, SCE states that in late 1988, it had received inadequate information to determine that the QF met several of the viability criteria set forth in the Guidelines. SCE said that Thomas' Engineering and Design Status information was too limited and summary in nature, the Financing Status Reports showed that construction funds and debt funding were not released to meet the developer's time schedule, the data provided to demonstrate economic viability was incomplete, the IFA was no longer valid, and there was no physical evidence that Engineering and Construction were underway.

In its Notice of Participation and Position, DRA argues that viability should never have been an issue, because the Commission found the project to be viable in 1987 when it determined that Thomas had a right to receive a SO<sub>2</sub> contract. DRA then added that even if SCE was reasonable to require viability as a prerequisite to an on-line extension under

these circumstances, the pleadings in this case suggest that SCE may have been less than even-handed in evaluating the QF's viability. In response to SCE requests, Thomas provided a letter and proposal from Becon Construction Inc., a subsidiary of Bechtel, dated November 1, 1988 indicating that construction could begin in January of 1989 and be complete in September of 1989. (Complaint Exhibit I) SCE dismissed this proposal as inadequate proof of viability. Yet a December 9, 1988 letter from Mission Power Engineering Company, an SCEcorp subsidiary, to Thomas indicated that they were capable and willing to provide engineering assistance and start up services to enable Thomas to meet its December 18, 1989 deadline. (Complaint, Exhibit J) Thus, at the same time that SCE was rejecting Thomas's offer of proof that it could meet its on-line date, SCE's affiliate was assuring Thomas that, with its services, the on-line date could be met.

SCE responds that the Mission Power letter could not have influenced SCE's assessment of Thomas' viability since Thomas never provided SCE with any documentation from Mission Power Engineering offering to complete the project within the scheduled deadlines.

The arguments of the parties demonstrate that there are differing perceptions of Thomas' viability at the time it sought the extension of its on-line date. While citing several ways in which the QF failed to satisfy the Guideline's test of viability, SCE acknowledges that a QF need not comply with each element in check-list fashion. Instead, a QF's progress in meeting its contractual commitments must be viewed as a whole. Thomas offered evidence to show that it had received all of its critical path permits, had secured sufficient control of the project site, arranged for the purchase of coal needed to fuel the plant, and had received an offer to provide financing from a company experienced in energy project financing. Thomas and DRA appear prepared to provide evidence that SCE should have known that Thomas could have constructed the project and begun power deliveries on time.

These pleadings demonstrate the existence of a genuine dispute concerning the viability of the QF. If the proceeding had not been settled, either party would have had a chance to prevail on the question of viability.

**D. Good Faith Dispute**

The contractual life of this QF has been checkered with starts and stops. Thomas introduced some unpredictability into its contractual relationship with SCE when it sought to modify its original contract. However, SCE's refusal to modify the initial contract, as it had previously agreed to do, led to the filing of Thomas' first complaint and the need for the Commission to direct SCE to modify the contract in D.87-05-065. It is reasonable for Thomas to argue that the dispute embodied in that complaint delayed its project completion. It is also reasonable for SCE to require Thomas to demonstrate the ways in which that dispute actually caused delay. In the context of the long history of disagreements between Thomas and SCE, it is both understandable that Thomas would question the utility's good faith in facilitating the QF's compliance with the contract, and that SCE would adhere to its strict interpretation of the Guidelines in its effort to protect ratepayer interests. Although we would have preferred that the parties resolve their difference outside of a formal complaint proceeding, the disagreement has elements of a bona fide dispute, properly the subject of a settlement.

**E. Ratepayer Benefits**

SCE and Thomas have compared the stream of payments to Thomas for delivered power under various sets of assumptions. They have concluded that SCE and its ratepayers would pay less under the terms of the settlement than they would if Thomas were granted an extension of time and then provided payments under the terms of the existing contract. Most of the savings results from the \$6 million payment Thomas has agreed to make in exchange for the contract modification.

The parties to the agreement have suggested that the settlement would relieve ratepayers of the obligation to make payments to Thomas with a net present value (NPV) in 1989 dollars of \$21.8 to \$26.6 million. These figures represent additional sums that would be paid to Thomas if the QF prevailed in its complaint and was awarded an extension of time for performing under its existing contract. However, most of these assumed savings are not closely related to the proposed settlement. Although the numbers do not add up in a manner that matches the above savings estimate, SCE and Thomas state that the savings can be broken down as follows:

- \$11.8 to \$18.1 million (1989 NPV) in ratepayer benefits negotiated as part of the 1986 agreement
- \$1.5 to \$4.0 million (1989 NPV) in ratepayer benefits due to the project delay of 24 to 30 months
- \$5.9 to \$7.4 million (1989 NPV) in ratepayer benefits due to the settlement agreement. This benefit is primarily obtained through Thomas' \$6 million settlement payment.

The range of benefits in each category is primarily dependent on the performance of the plant.

Only the \$5.9 to \$7.4 million savings estimate appears relevant to our considerations. The benefits resulting from the 1986 agreement were secured before the filing of the complaint underlying this settlement. A substantial delay in project completion is going to occur regardless of resolution of this complaint proceeding. Under the existing contract, Thomas was to begin deliveries in December, 1989. It was eight months after that date that the settlement agreement was submitted. Even if the parties had proceeded under the settlement without seeking our approval, it is likely that at least another 12 months would have passed before the project could deliver power. The settlement

agreement can only be supported by the benefits predicted to occur because of the settlement itself.

The numbers discussed above compare the benefits and costs attached to the settlement agreement with those expected to result if Thomas were to prevail in the complaint proceeding. The ALJ directed SCE to enlarge its analysis to include the expected benefits if SCE were to prevail in the complaint proceeding. On January 28, 1991, SCE submitted this additional analysis. SCE has assumed that if it prevailed in the complaint proceeding, the project would still be constructed, it would begin operating in June of 1992 and power would be purchased pursuant to a SOI contract. The following table reflects SCE's comparison of the benefits of the settlement to each of the polar outcomes discussed above:

TABLE 1

Summary of Savings Resulting from Settlement  
as Compared to Two Possible Outcomes of Complaint Proceeding  
(\$ thousands)

<u>Capacity Factor</u>	<u>QF Prevails</u>	<u>SCE Prevails</u>
65%	6,704	(30,759)
70%	6,856	(33,998)
75%	6,171	(37,998)
80%	5,704	(40,469)
85%	7,221	(42,242)
90%	7,378	(43,807)
95%	6,712	(48,505)
100%	5,986	(51,635)

While the terms of the settlement are better for ratepayers than a decision favorable to the QF in the underlying complaint, they are far inferior to a decision in the complaint proceeding favoring SCE. Let us assume, for instance that the plant delivers power at an average lifetime capacity of 65% (the capacity assumption most favorable to the settlement). If the settlement were rejected and the QF prevailed in the complaint, the ratepayers would be likely to lose \$6.7 million. However, if the



settlement were rejected and SCE prevailed in the complaint, the ratepayers would save \$30.76 million. Thus, this settlement is only a reasonable resolution of the dispute if there is an extremely small likelihood that SCE would prevail in the complaint proceeding. Once again using the example of a 65% capacity factor, settlement is in the best interest of ratepayers if SCE had less than an 18% chance of prevailing in the complaint proceeding ( $.18 \times 30.76 = 5.5$ , while  $.82 \times 6.7 = 5.5$ ).

There are several factors suggesting that SCE faced tough odds in litigating this complaint. First, SCE was found by the Commission in D.87-05-065 to have inappropriately denied Thomas the SO2 contract it had earlier promised to execute. As DRA points out, that decision found that, when the initial agreement to enter into a SO2 contract was negotiated, the QF was a viable project. It is quite possible that the resulting contract dispute hampered Thomas' ability to proceed with the project. Second, Thomas was prepared to present substantial evidence that it was viable when SCE claimed it was not. Third, DRA was prepared to present evidence suggesting that SCE exhibited bad faith by asserting that the QF was not viable at the same time one of SCE's affiliates was telling Thomas that it could construct the project in a timely manner. SCE's claim of non-viability may have been undermined by the analysis of its own affiliate, lending credibility to the QF's claim of viability. Finally, DRA was prepared to explore the possibility that SCE was applying a stricter standard of viability in its assessment of this QF than it applied to QFs owned by SCE affiliates.

DRA remains free to explore these issues in other proceedings where appropriate. However, in light of the arguments presented in this proceeding, it was reasonable for SCE to settle the dispute as it did.

#### IV. Conclusion

Thomas alleged sufficient facts in this complaint to make a prima facie showing of viability. We find that a bona fide dispute existed as to whether SCE should have extended the five-year deadline as requested by Thomas. Consequently, SCE was prudent in entering into negotiations with Thomas to amend the power purchase contract.

Depending on the performance of the plant, the settlement agreement reduces the ratepayer burden of payments by \$5.9 to \$7.4 million over the payments required under an unamended contract. Given the potential for SCE to prevail over 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 power purchase contract are a fair and reasonable compromise of the dispute between Thomas and SCE.

As discussed earlier, we do not determine that all payments by SCE under the amended contract should be recovered from ratepayers. SCE must still seek a determination of the reasonableness of its payments in the appropriate ECAC or other reasonableness proceeding.

The settlement should be approved, and Thomas' complaint should be dismissed, with prejudice.

#### Findings of Fact

1. There are differing perceptions of Thomas' viability at the time it sought the extension of its on-line date.
2. The QF failed to satisfy several elements of the Guideline's test of viability.
3. The QF received all of its critical path permits, and secured sufficient control of the project site, arranged for the purchase of coal needed to fuel the plant, and had received an

offer to provide financing from a company experienced in energy project financing. Thomas introduced some unpredictability into its contractual relationship with SCE when it sought to modify its original contract.

5. SCE's refusal to modify the initial contract, as it had previously agreed to, led to the filing of Thomas' first complaint and the need for the Commission to direct SCE to modify the contract in D.87-05-065.

6. In the context of the long history of disagreements between Thomas and SCE, it is both understandable that Thomas would question the utility's good faith in facilitating the QF's compliance with the contract, and that SCE would adhere to its strict interpretation of the Guidelines in its effort to protect ratepayer interests.

7. SCE and its ratepayers would pay less under the terms of the settlement than they would if Thomas were granted an extension of time and then provided payments under the terms of the existing contract.

8. If the settlement were rejected and the QF prevailed in the complaint, the ratepayers would be likely to lose \$68.7 million.

9. If the settlement were rejected and SCE prevailed in the complaint, the ratepayers would save \$30.76 million.

10. This settlement is only a reasonable resolution of the dispute if there is an extremely small likelihood that SCE would prevail in the complaint proceeding.

11. SCE was found by the Commission in D.87-05-065 to have inappropriately denied Thomas the SO<sub>2</sub> contract it has earlier promised to execute.

12. When the initial agreement to enter into a SO<sub>2</sub> contract was negotiated, the QF was a viable project.

13. Thomas was prepared to present substantial evidence that it was viable when SCE claimed it was not.

14. DRA was prepared to present evidence suggesting that SCE exhibited bad faith by asserting that the QF was not viable at the same time one of SCE's affiliates was telling Thomas that it could construct the project in a timely manner.

15. DRA was prepared to explore the possibility that SCE was applying a stricter standard of viability in its assessment of this QF than it applied to QFs owned by SCE affiliates.

16. Depending on the performance of the plant, the settlement agreement reduces the ratepayer burden of payments by \$5.9 to \$7.4 million over the payments required under an unamended contract.

17. Given the potential for SCE to prevail over issues presented in the complaint, the net ratepayers benefits are not sufficient consideration for settlement of the complaint.

#### Conclusions of Law

1. The approval of a settlement in a complaint proceeding is limited to issues in that proceeding and cannot extend to substantive issues that may come before the Commission in other or future proceedings.

2. The pleadings demonstrate the existence of a genuine dispute concerning the viability of the QF.

3. SCE was prudent in entering into negotiations with Thomas to amend the power purchase contract.

4. The settlement agreement and the amended power purchase contract are a fair and reasonable compromise of the dispute between Thomas and SCE and should be approved.

5. SCE must still seek a determination of the reasonableness of its payments in the appropriate ECAC or other reasonableness proceeding.

6. Thomas' complaint should be dismissed, with prejudice.

7. In order to enable the QF to proceed with project completion as soon as possible, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement and Amendment to the Amended and Restated Power Purchase Contract between Southern California Edison Company and Thomas Oil Company (Thomas) effective December 18, 1989 and dated August 2, 1990 is approved.

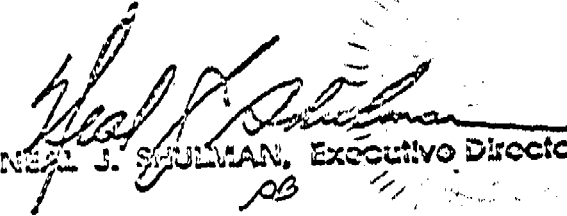
2. The Compliant of Thomas is dismissed with prejudice and the proceeding is closed.

This order is effective today.

Dated March 22, 1991, at San Francisco, California.

PATRICIA M. ECKERT  
President  
G. MITCHELL WILK  
JOHN B. OHANIAN  
DANIEL WM. FESSLER  
NORMAN D. SHUMWAY  
Commissioners

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

  
NEAL J. SULLIVAN, Executive Director  
JB