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Decision 91-07-054 July 24, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Malacha Hydro Limited Partnership, Complainant, vs. Pacific Gas and Electric Company, a California corporation, Defendant.	Case 90-02-001 (Filed February 2, 1990)
Application of Pacific Gas and Electric Company for an Expedited Order Approving Settlement of a Complaint Case Brought by Malacha Hydro Limited Partnership, and Amendment of the Long-Term Energy and Capacity Power Purchase Agreement Between Pacific Gas and Electric Company and Malacha Hydro Limited Partnership. (U39E)	Application 91-04-007 (Filed April 8, 1991)

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OPINION

1. Summary

This decision approves a proposed settlement between Malacha Hydro Limited Partnership (Malacha) and Pacific Gas and Electric Company (PG&E) which would amend their Standard Offer No. 4 Power Purchase Agreement for Long-Term Energy and Capacity (the PPA). The decision also finds that the pricing provisions pursuant to which PG&E will make payments to Malacha under the amended PPA are reasonable, and therefore the payments are recoverable from ratepayers (assuming the PPA is prudently administered by PG&E), without further reasonableness review by this Commission. As provided in the settlement, the complaint in Case (C.) 90-02-001 is also dismissed with prejudice.

2. Background of the Dispute

Malacha is licensed by the Federal Energy Regulatory Commission (FERC) as a Qualifying Small Power Production Facility (QF) within the definition of the Public Utility Regulatory Policies Act of 1978. See 16 U.S.C. § 796 et seq. It owns a hydroelectric facility on the Pit River near Nubieber, California. This facility became operational in December 1988, and Malacha now sells its power generation to PG&E, an investor-owned utility, pursuant to the PPA.

The PPA was executed by PG&E and Malacha's predecessor, Juniper Ridge Hydro, as of December 4, 1984, and subsequently assigned to Malacha. It provides for payment of energy and capacity prices in accordance with options elected by Malacha from the Interim Standard Offer No. 4 (SO 4) then in effect.

Under the terms of the PPA Malacha is paid for energy according to a forecasted energy price schedule during the initial 10-year "fixed price period," and at prices equal to the full short-run avoided operating costs (i.e., costs approved by this Commission that would become the basis for PG&E's published energy prices) for the remainder of the 30-year contract term.

As-delivered capacity payments are made in accordance with SO 4 As-Delivered Capacity Payment Option 2, which provides for payments computed as specified in an appendix to the agreement. Malacha elected Curtailment Option A, which specifies that PG&E will pay lower hydro savings prices in lieu of otherwise applicable contract prices during periods of hydro spill conditions.

The PPA does not describe the configuration of Malacha's generation facility. Appendix A of the PPA simply defines the term "Facility" as, "That generation apparatus described in Article 3 and all associated equipment owned, maintained, and operated by [Malacha]." Article 3 refers to Malacha's "45,000 kW Facility located at Pit River near Nubierer [sic], Lassen County, California," and states, "The primary energy source for the Facility is water," but does not indicate whether the parties contemplated that Malacha's hydro facility might, at some point, include reservoir storage capability.

As built, Malacha's facility is a run-of-the-river facility (i.e., having no reservoir storage), located upstream from several PG&E hydroelectric facilities. It consists of a generator with a nameplate capacity of 26 megawatts (MW) that is typically operated at 30 MW and has a maximum rate of delivery to PG&E's system of 32.5 MW. Water is delivered to the powerhouse via a diversion structure on the Pit River comprised of a tunnel some 4-1/8 miles in length, about two miles of concrete pipeline, and 350 feet of steel penstock that delivers water to the actual generation facilities. As a run-of-the-river facility, the current project must generate power at whatever time water is available.

Malacha now intends to construct a 7,800 acre-foot offstream storage reservoir (the "Collett Addition") by improving a dry lake bed at the upper end of the existing tunnel. Malacha will then be able to pump water into the reservoir (or fill it by gravity when the water level in the reservoir is sufficiently low) to be stored for later use. This will enable Malacha to use water

that now bypasses its generator during periods of peak generation, and to concentrate deliveries of energy and as-delivered capacity during the on-peak periods.[1] Since the PPA provides a significantly higher capacity price for on-peak deliveries than for off-peak deliveries, the addition of the storage facility would result in an increase in payments by PG&E, and in turn by ratepayers.

As a result of the new generation potential which will be available after construction of the Collett Addition, Malacha's average annual generation will increase from 93.32 gigawatt hours (gWh) to 95.41 gWh, a total of 2.09 gWh, according to PG&E's analysis. This new generation, termed "new energy," would all be delivered during the summer peak period. In addition, 6.26 gWh of existing generation would be switched to summer on-peak periods from off-peak periods. The parties refer to this as "switched energy."[2] The Collett Addition would also result in additional generation from PG&E's own facilities, averaging 1.91 gWh per year, because Collett is located upstream from five PG&E powerhouses.

Malacha's plans to build the Collett Addition gave rise to a dispute concerning PG&E's obligation to purchase the new power and pay the additional cost of on-peak switched power after generation from water impounded in the new reservoir commences.

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1 In his Prepared Testimony, PG&E expert Christopher E. Thomas claims that Malacha will store water in the new reservoir, even when river flow is not sufficient for the plant to operate at maximum capacity. There is a limit to Malacha's ability to shift its generation, however. PG&E has senior water rights on the Pit River amounting to 1,200 cubic feet per second (cfs) at Malacha's diversion structure, and Malacha accordingly may not use the reservoir for storage unless flows at the diversion structure exceed 1,200 cfs.

2 PG&E's estimates and Malacha's estimates of these figures are essentially in agreement.

Malacha contends that it is entitled to construct and use the Collett Addition and receive payment for all as-delivered capacity and energy, including that which results from its construction, under the existing PPA. PG&E disputes this contention and claims that any obligation to purchase the new and reconfigured power would be to do so at lower prices. This is the central issue which has been resolved by the proposed settlement agreement.

In support of its position Malacha cites the absence of any express contractual limitation on the output which PG&E is obligated to purchase, or any requirement that the project be run-of-the-river. Since the modification will not affect the nameplate rating of the installed generator, Malacha argues that the Collett Addition is merely an operational enhancement to the existing project which will result in greater efficiency. Malacha also contends that PG&E is estopped from disclaiming any obligation to accept generation attributable to the Collett Addition, because Malacha claims that PG&E was aware when it signed the PPA that Malacha planned to build it.

PG&E contends that, although Malacha may have considered the option of building a project with storage capability, those plans were subsequently dropped. PG&E claims that Malacha defined the project when it licensed with FERC, and thereafter built, a run-of-the-river facility. Moreover, PG&E contends that construction of the Collett Addition would constitute an impermissible attempt to phase the development of the project beyond the five-year scheduled operation date for the facility, which was December 1989.

PG&E estimates that the net present value (NPV), in 1991 dollars, of payments under the PPA for generation attributable to the Collett Addition is between $4.661 and $8.532 million above what the same energy and capacity could otherwise have been obtained for under energy and capacity prices forecasted to be paid

in accordance with a Standard Offer No. 1 (SO 1) contract.[3] PG&E claims that all of this additional cost would have to be borne by ratepayers.

3. Procedural History

Malacha, anticipating that PG&E would refuse to purchase the power attributable to the Collett Addition at prices specified in the current PPA, filed Complaint No. 90-02-001 on February 2, 1990. On March 15, 1990, PG&E filed its answer.[4]

A prehearing conference (PHC) was held on May 23, 1990. At that time the parties informed the ALJ that they had reached a settlement of the complaint proceeding, and that they planned to convene a settlement conference on June 1. Following the settlement conference, the proposed settlement was presented for Commission approval pursuant to Rule 51 of the Rules of Practice and Procedure as part of a Joint Motion to Dismiss Complaint and for Approval of Settlement (Joint Motion) filed by the parties on October 12, 1990.

The Joint Motion requests the Commission to issue an order,

> "(1) approving the Settlement Agreement as prudent and reasonable;
>
> "(2) finding that the interests of PG&E's ratepayers are adequately protected under the Settlement Agreement;

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3 PG&E's analysis is founded upon the assumption that payment for the new power and for the additional cost of the switched power would be under the terms of SO 1, if the Commission found that payments for this new and reconfigured generation were not encompassed by the existing PPA. The parties appear to agree upon this assumption.

4 PG&E requested that the Commission accept late filing of its answer, and the Administrative Law Judge (ALJ) granted that request on April 6, 1990.

"(3) finding that payments under the interim Standard Offer No. 4 Long-Term Energy and Capacity Power Purchase Agreement, signed by the Seller on October 15, 1984 and by PG&E on December 4, 1984 (the 'PPA'), as amended, are reasonable;

"(4) finding that the Commission's approval of the Settlement Agreement is final and not subject to further reasonableness review;

"(5) approving the Settlement Agreement and the PPA, as amended; and

"(6) dismissing this action with prejudice."

Because the parties sought resolution of issues beyond the scope of the complaint proceeding by requesting (1) a finding that the interests of PG&E's ratepayers would be adequately protected under the settlement, and (2) an ordering paragraph foreclosing subsequent reasonableness review, the Commission could not act upon their request. See Decision (D.) 91-02-044 (February 21, 1991), mimeo. pp. 7-8.[5] This circumstance was informally called to the parties' attention by the ALJ, and a decision on the matter was held in abeyance pending discussion by the parties of the manner in which they desired to proceed. See Application (A.) 91-04-007, pp. 2-3.

On April 8, 1991, PG&E filed A.91-04-007 and requested an expedited ex parte order approving the settlement of C.90-02-001 and amendment of the PPA to incorporate the terms of the settlement agreement. The Application encompasses precisely the same subject

5 "[W]e 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 prudency of settlement." Id.

matter as C.90-02-001, and the relief requested is the same as that requested by the parties' Joint Motion in the complaint proceeding.

Also on April 8 the ALJ held a second PHC in C.90-02-001. At the outset of the conference the ALJ stated that he was aware of the filing of the Application, and Malacha's attorney stated that Malacha acquiesced in that Application (Tr. 4-5). The parties further acknowledged that the request for an order foreclosing further reasonableness review did not extend to review of the administration of the contract (Tr. 12). The ALJ and the parties also discussed whether the evidence presented in support of the newly filed application satisfied the Commission's current procedural requirements for approval of the settlement. By stipulation of the parties it was agreed that further evidence was required to show the effect upon prices if PG&E, rather than Malacha, prevailed in the underlying litigation (Tr. 12). PG&E's counsel stated that this additional evidence would be filed, and PG&E did in fact file the supplement thereafter.

Although PG&E requested that the protest period for the Application be shortened to 15 days, the ALJ expressed a preference for holding the protest period open for a period of 30 days from the date of filing of the Application.[6] The Commission received no protests to the Application, nor any comments about the proposed settlement of C.90-02-001, notice of which had been served upon the parties in that case on May 23, 1990.

The only response filed in either of the two related cases was a document titled "Comments of the Division of Ratepayer Advocates on [PG&E's] Application for an Expedited Order Approving Settlement of a Complaint Case Brought by Malacha Hydro Limited Partnership and Amendment of Malacha's Power Purchase Agreement."

6 The Application also requests that approval of the settlement be effective as of March 15, 1990.

The gist of DRA's comments was that, although the proposed settlement and application were in all respects reasonable and acceptable to DRA, a Commission order approving the settlement should specifically state that "any recovery of payments under the PPA is subject to Commission review of the reasonableness of PG&E's performance and administration of its obligations and exercise of its rights under the PPA." As earlier noted, the parties expressly consented to this limitation.

By ruling filed May 8, 1991, the ALJ consolidated C.90-02-001 and A.91-04-007 pursuant to Rule 55 of the Commission's Rules of Practice and Procedure. Accordingly, this decision concludes both proceedings.

4. The Proposed Settlement

The parties have settled their dispute by renegotiating certain terms of the PPA.[7] The Settlement Agreement provides for amendment of the original PPA so as to require PG&E to pay for generation attributable to the Collett Addition under the PPA in return for certain price concessions and other modifications to the PPA. The essential features of the settlement are summarized here.[8]

First, the Collett Addition is acknowledged to be a part of Malacha's hydro facility as though it were specifically included in the project definition in the PPA. On the other hand, any other water storage reservoirs which may be added are specifically excluded. Thus, two additional storage reservoirs contemplated by Malacha, Muck Lake and Middle Lake, will not become a part of the facility for purposes of computing payments under the amended PPA

7 The settlement agreement is contingent upon Commission approval.

8 A complete copy of the Settlement Agreement is included as an Appendix to this decision.

if those reservoirs are built. However, Malacha intends to develop or acquire additional sources of upstream water not currently flowing into the Pit River, and the Settlement Agreement specifies that PG&E will accept and pay under the PPA for generation attributable to up to 5,000 acre-feet of such "new water" annually.

Several PG&E hydroelectric facilities downstream of the Malacha project on the Pit River will receive benefits as the result of Malacha's construction and operation of the Collett Addition. This is because water that currently exceeds the usable flow of these plants, or is otherwise unavailable at desired times, will be retained in the Collett reservoir and released by Malacha at times when PG&E's plants are able to utilize it. FERC regulations would ordinarily permit Malacha to seek payment for these "headwater benefits,"[9] but the settlement provides that all headwater benefits resulting from the Collett Addition (or from any other FERC-licensed facilities that receive SO 4 prices under the PPA) shall accrue to PG&E's downstream plants free of charge for the 50-year term of Malacha's FERC license.

In lieu of the original curtailment provision in the PPA, after completion of the Collett Addition PG&E will have the right (subject to certain limitations) to pay Malacha an adjusted energy price for off- and super off-peak deliveries from the facility for up to 400 hours per year during the first ten years of the contract term. The adjusted price is equal to that of PG&E's available alternative source. This provision applies only during wet years, which are defined as those years in which Malacha generates at least 92.8 gWh. Malacha would be able to mitigate curtailment by storing water in the Collett reservoir.[10]

9 See 18 CFR Part 11.

10 PG&E estimates that Malacha will be able to mitigate about 17.5% of PG&E's curtailment orders.

The Settlement Agreement also extends the original 30-year term of the PPA to 40 years, and provides that energy and capacity payments will be discounted in the latter years of the contract term. Under these provisions Malacha will receive 90% of the otherwise applicable price for energy deliveries during the final 15 years; a price cap of $188 per kilowatt-year is placed on the as-delivered capacity price payable after the fixed price period, instead of basing payments upon the escalating table of as-delivered capacity prices (as specified by the original PPA) during that period.

5. Discussion

5.1 General

The dispute between PG&E and Malacha that resulted in the settlement and proposed modification of the PPA is one concerning interpretation of the contract language. The complaint filed in C.90-02-001 in effect requests the Commission to issue a declaration of the rights and liabilities of the parties under the original PPA. The settlement is essentially a novation of the original PPA, substituting entirely new performance and price terms for those contained in the original agreement.

The Commission is now called upon to decide two questions: first, whether the settlement meets the requirements for approval under Article 13.5 of its Rules; and second, whether modification of the standard offer contract terms is permissible under principles enunciated by this Commission which govern the administration of such contracts. If the answer to both of these questions is affirmative, PG&E asks that the contract terms be foreclosed from further reasonableness review by this Commission.

Rule 51.1(c) permits parties to propose a stipulation or settlement for adoption by the Commission. Under Rule 51.1(e) the Commission "will not approve stipulations or settlements, whether contested or uncontested, unless...reasonable in light of the whole record, consistent with law, and in the public interest." The

effect of Commission adoption of the settlement is that it becomes binding on all parties to the proceeding. Rule 51.8. However, unless the Commission expressly provides otherwise, adoption of the settlement "does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding." Id.

Consistent with Rule 51.8, in D.91-02-044 the Commission held 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." (Mimeo. p. 7.) Thus, the two questions are entirely independent of one another, and different standards apply. Whereas Commission approval of a settlement under Article 13.5 is an official affirmation which would give the Commission power within the limits of its jurisdiction to enforce the agreement between the parties, a reasonableness determination forecloses any future objection to the recoverability of renegotiated contract payments by the utility from its ratepayers.

Insulation of the renegotiated contract terms from future Commission review is entirely consistent with the conceptual underpinnings of the Standard Offer. As the Commission explained in D.88-10-032,

> "Standard offers were developed as 'package deals' - <u>the price and performance requirements were considered, as a whole, to be reasonable to ratepayers, and automatic approval of those terms by the Commission was guaranteed</u>. This is particularly relevant for interim Standard Offer #4 which was developed via a negotiating conference procedure, and presented to the Commission as a negotiated package. QFs do not have an automatic right to modify a standard offer - nor do utilities have an obligation to agree to any and all requested changes. A utility should agree to modify only if commensurate concessions are made to benefit ratepayers." 24 CPUC 2d 426. [Emphasis added.]

Consequently, to attain the same presumption of reasonableness enjoyed by the original Standard Offer contract, modifications to the PPA must be subjected to the Commission's review to insure that ratepayers receive "commensurate concessions." The notice afforded by this procedure should be as broad as that which was afforded in developing SO 4.

By contrast, review of a settlement under Article 13.5 should be conducted according to the standard of what is reasonable between the settling parties, giving due consideration to the public interest. In the present case this means that the value of the payments and concessions must be reasonable in light of the original contract provisions and probable litigation outcome; not contrary to any rule or legal principle which would invalidate the agreement; and in furtherance of the public interest to the extent that ratepayers will not be indifferent to the negotiated outcome.

5.2 Approval of the Settlement

The probable outcome if the complaint were litigated is uncertain, as would be expected in any instance where parties agree to terminate litigation by compromise. At best we are only able to determine whether Malacha has a genuine probability of prevailing on the merits of its complaint, and that a compromise settlement of a reasonable dollar amount is therefore justifiable. Based upon the record as a whole, we find that Malacha could indeed prevail, that the dollar amount of the concessions it has made is reasonable, and that the parties are therefore acting reasonably by settling the complaint proceeding.

Since the unamended PPA does not specify the configuration of Malacha's hydro facility nor preclude Malacha from enhancing its generation capability by altering stream flow, any intent which the parties may have had to incorporate enhancements such as the Collett Addition into the project must be gleaned from the circumstances surrounding execution. In the verified complaint Malacha claims that the parties discussed the inclusion of the

Collett reservoir in the facility before the contract was signed, and PG&E does not deny that the subject was discussed. Malacha asserts that these discussions are evidence of the parties' agreement that the Collett reservoir would be a part of the "Facility," or at least grounds for estopping PG&E from claiming that they are not. PG&E, on the other hand, asserts that because Malacha's original FERC license did not include Collett within the project scope, the parties' intention was to exclude the reservoir from the "Facility" definition at the time of contracting.

Without a record concerning the content and context of these discussions we cannot predict which party would win the litigation. However, the fact that the term "Facility," as defined in the contract, contains no limitation upon the configuration of spillways and reservoirs is indicative that the contract leaves those matters to Malacha's discretion. This PPA, as apparently is true of all SO 4 contracts, makes no provision for varying the temporal distribution of power deliveries at the specified maximum voltage and rate. Indeed, the payment provisions appear to encourage the QF to maximize on-peak deliveries, which are those most demanded by the utility. In light of these facts, it appears that Malacha has a genuine probability of prevailing if the case were litigated.

If Malacha were to prevail in the litigation, the evidence demonstrates that the NPV of payments it would receive for new and reconfigured power would exceed that of payments under the original PPA by $12.7 to $13.9 million over the life of the contract.[11] This is in contrast to an estimated increase of $4.6 to $6.9 million under the settlement, without regard to

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11 These (and subsequent) figures were obtained by subtracting the range of estimated total payments under the unamended PPA from the estimated totals for the alternative outcomes. The totals cannot be predicted with greater precision because of inherent uncertainties in the forecasted prices.

commensurate benefits available to PG&E as a result of the settlement. On the other hand, PG&E estimates that the additional value of payments it would make if it prevailed in the litigation would be between $5.2 and $7.8 million, which is approximately in the same range as that of the settlement. Coupled with the possibility that Malacha could obtain a more a favorable result if the matter were litigated, settling the dispute at this level is reasonable.

The settlement is supported by consideration and consistent with public policy as announced by this Commission. Indeed, the agreement conforms to this Commission's fundamental requirement for renegotiation of SO 4 contracts: PG&E's acceptance of the new and reconfigured generation attributable to the Collett Addition is accompanied by significant price concessions and other benefits from Malacha. See D.88-10-032, 29 CPUC 2d 415, 429. Absent any objection to the settlement in the record, the Commission finds that it is not contrary to law.

Finally, the settlement is in the public interest. This is not only true by reason of the dollar value of the ratepayer benefits afforded by Malacha, but also because Malacha's ability to regulate the flow of the Pit River will increase the overall efficiency of generation by Malacha and PG&E. Instead of releasing, unused, the excess flow during periods of lower demand, water can be impounded for peak period use by Malacha's project and by PG&E's downstream generation facilities. This will increase overall capacity without additional investment by PG&E that would ultimately have to be recovered from ratepayers.

5.3 Foreclosure of Future Reasonableness Review

We now turn to the question whether this decision should cloak PG&E's future payments under the amended PPA with protection from further reasonableness review. We conclude that it should.

The application procedure provides adequate notice and other safeguards to protect ratepayers' interests. That procedure

has been followed here. There has consequently been adequate notice and opportunity for the public to be heard, which Rule 51.1 does not provide.[12]

Reasonableness, for purposes of the present determination, is assessed from the standpoint that the increased payments will eventually be borne by the ratepayers. Since modifications to the price structure of the amended PPA are the product of compromise of a claim that would otherwise be resolved by the Commission, they must be viewed in relation to the possible effect upon ratepayers if the dispute were litigated. Our fundamental concern is for the ratepayers, rather than the parties to the amended agreement, because our decision will substitute for the after-the-fact determination that would normally be afforded by an Energy Cost Adjustment Clause (ECAC) proceeding. In this respect, our task differs significantly from that of determining whether the settlement "is reasonable, consistent with law, and in the public interest" for the purpose of approval under Rule 51.1.

If Malacha were to prevail on its complaint, all of the new and shifted generation attributable to the Collett Addition would be delivered to PG&E at prices fixed by the unamended SO 4 contract; the increased payments would simply be added to those Malacha would have received under the original SO 4 contract. This is the most drastic outcome which could affect ratepayers, for the costs would presumably be passed on to them. However, if the

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12 The certificate of service indicates that copies of the Application were served on Messrs. Ross D. Ain, Gary D. Bachman, and Michael A. Swiger of the firm of Van Ness, Feldman, Sutchiffe & Curtis; Douglas K. Kerner of the firm of Robert & Kerner for the Independent Energy Producers; E. Robert Mooney of Malacha Hydro Limited Partnership; Philip A. Stohr of Downer, Brand, Seymour & Rohner; Thomas W. Thompson of CPUC's Energy Branch; Doug Long of its Advisory Branch; Faramarz Yazdani of the Division of Ratepayer Advocates; Hallie Yacknin of the Legal Division; and the ALJ.

PPA is modified to provide benefits to the ratepayers in return for increased payments, the risk of such a result is averted.

The Commission's Guidelines for Contract Administration of Standard Offers specifically permit parties to settle a dispute by negotiating modifications to their SO 4 contract. See generally D.88-10-032, 29 CPUC 2d 415. Under Guideline I(1), if the modification of the contract results in aggregate payments with a net present value equal to or greater than that which would be received under the unamended contract, it is presumptively reasonable if it is also "accompanied by price and/or performance concessions ... commensurate in value." Id. 440. This is because the original contract containing Commission-sanctioned Standard Offer terms is presumptively reasonable, as D.88-10-032 explains, supra.

As the NPV of payments for new and switched power under the amended PPA will be in the range of $4.6 million to $6.9 million, if the concessions to which Malacha has also agreed are commensurate in value, the amended payment provisions will be considered reasonable. Malacha has agreed to five important concessions which would be of direct or indirect monetary value to PG&E's ratepayers. These appear to be commensurate in value with the amount of increased payments to Malacha, and therefore reasonable.

The first concession concerns a direct benefit of indeterminate value which PG&E will receive. Construction of the Collett reservoir will result in additional generation from PG&E's downstream facilities of 1.91 gWh per year, which PG&E will receive without additional capital expenditure. This benefit will be passed through to PG&E's ratepayers.

Second, PG&E is relieved from any payment obligation to Malacha for the the headwater benefits which will result from the new reservoir; PG&E estimates the NPV of this benefit at $2.514 million through the life of the amended agreement.

Third, the curtailment provisions of the original PPA are modified in favor of PG&E; PG&E estimates the NPV of this change at $1.079 million.

Fourth, the energy price discount to 90% of the energy prices that would otherwise apply during the final 15 years of the amended contract term has an estimated NPV of $1.992 to $3.065 million. The cap on the as-delivered capacity price has an additional estimated NPV of $1.558 million. These are very significant price concessions.

Finally, the amended agreement obviates any possibility that additional increases in payments under the PPA will result from the construction of other new reservoirs as part of the project. Although PG&E's witness did not quantify this potential savings because it is unlikely that such reservoirs will actually be constructed, this concession is in the nature of a reduction of the future risk that PG&E's costs attributable to Malacha's project will increase.

Taken together, the value of these concessions appears at least commensurate with the amounts of the additional payments PG&E will have to make for generation attributable to the Collett Addition. These benefits will redound to the benefit of PG&E's ratepayers, as they will reduce the cost of power deliveries to PG&E which would otherwise be passed on in PG&E's rates. Therefore, we find that the contract provisions governing these additional payments to be made by PG&E are reasonable for ECAC purposes.

Naturally, we make this order with the proviso that PG&E's payments to Malacha must actually be made in accordance with the terms of the PPA. This means that the Commission still may audit the history of payments after the fact to ascertain that the contract is prudently administered by PG&E and that it is consequently reasonable for PG&E to be reimbursed by its ratepayers. With this limited exception, however, the relief

granted in response to PG&E's Application is not subject to further review.

6. Conclusion

For the foregoing reasons we approve the proposed settlement and grant the relief requested in PG&E's Application herein. In so doing we commend the parties for arriving at what they characterize as "a creative and mutually agreeable settlement" (Joint Motion, p. 5). The Commission encourages such efforts. The result is a "win-win" resolution of a dispute which otherwise would have been resolved through time-consuming and counterproductive litigation. The public, as well as the parties, will obviously be well served by the outcome of this proceeding.

Findings of Fact

1. Malacha is licensed by FERC as a QF within the definition of 16 U.S.C. § 796 et seq.

2. Malacha owns a hydroelectric facility on the Pit River near Nubieber, California, which became operational in December 1988.

3. PG&E is an investor-owned utility.

4. Malacha sells power generated at its Nubieber facility to PG&E pursuant to the PPA executed by Malacha's predecessor, Juniper Ridge Hydro, and PG&E, as of December 4, 1984.

5. The PPA provides for payment of energy and capacity prices in accordance with options elected by Malacha from the SO 4 then in effect. Those terms provide, inter alia: (1) that Malacha be paid for energy according to a forecasted energy price schedule during the initial 10-year "fixed price period," and at prices equal to the full short-run avoided operating costs for the remainder of the 30-year contract term; that as-delivered capacity payments are made in accordance with SO 4 As-Delivered Capacity Payment Option 2; and that Malacha will be paid under Curtailment Option A during periods of hydro spill conditions.

6. The PPA does not describe the configuration of Malacha's generation facility, nor limit Malacha's power deliveries thereunder to those from a run-of-the-river facility.

7. The PPA specifies that the facility is a 45,000 kW facility located on the Pit River near Nubieber, Lassen County, California.

8. As built, the facility is currently a run-of-the-river facility (i.e., having no reservoir storage) with a nameplate capacity of 26 MW, is typically operated at 30 MW, and has a maximum rate of delivery to PG&E's system of 32.5 MW.

9. Malacha intends to construct a 7,800 acre-foot offstream storage reservoir (the Collett Addition) by improving a dry lake bed at the upper end of the existing tunnel. The Collett Addition will enable Malacha to store, and later utilize, water that would otherwise bypass its generator during periods of peak generation, and to concentrate deliveries of energy and as-delivered capacity during the on-peak periods.

10. The addition of the new reservoir would result in an increase in payments by PG&E, and in turn by ratepayers, under the existing PPA.

11. Malacha's plans to build the Collett Addition gave rise to a dispute concerning PG&E's obligations to purchase newly generated power and reconfigured power generation resulting from Malacha's ability to impound water in the reservoir. This dispute resulted in Malacha's filing its complaint in C.90-02-001.

12. The parties have settled their dispute by renegotiating certain terms of the PPA. Under the terms of the settlement, PG&E must pay for generation attributable to the Collett Addition in return for certain price concessions and other modifications.

13. If the parties' dispute were litigated, Malacha has a genuine probability of prevailing on its complaint.

14. If Malacha were to prevail on its complaint, the NPV of payments it would receive for new and reconfigured power would

exceed that of payments under the original PPA by $12.7 to $13.9 million over the life of the contract.

15. The estimated increase in payments to Malacha under the settlement would be $4.6 to $6.9 million above the level of payments made without the Collett Addition.

16. If PG&E prevailed in the litigation and paid Malacha for the new and reconfigured power under the terms of SO 1, the NPV of the additional payments would be $5.2 to $7.8 million.

17. The settlement is reasonable.

18. The settlement is not contrary to law.

19. The settlement is in the public interest.

20. The increased aggregate payments resulting from modifications to the PPA are accompanied by price and/or performance concessions of commensurate value, and the interests of PG&E's ratepayers are therefore adequately protected and served under the Settlement Agreement.

21. Service and other notice of the modifications is adequate to insure the assertion of ratepayers' interests regarding the impact of those modifications.

<u>Conclusions of Law</u>

1. The settlement should be approved pursuant to Rule 51.1(c).

2. The pricing provisions of the amended PPA under the settlement should not be subject to further reasonableness review by this Commission, but the Commission should be able to ascertain that the PPA is being administered prudently and that any payments are made in accordance with the amended terms thereof.

3. The complaint in C.90-02-001 should be dismissed with prejudice.

4. The Settlement Agreement and amended PPA dated August 24, 1990 should be approved.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company's (PG&E) request for a shortened comment period is denied.

2. The settlement is approved and adopted by the Commission in accordance with Rule 51.1(c).

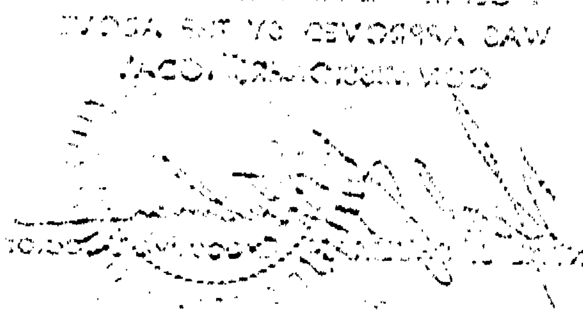
3. The amended Standard Offer No. 4 Power Purchase Agreement for Long-Term Energy and Capacity (PPA) is approved.

4. The pricing provisions of the amended PPA are reasonable, and PG&E is entitled to recover all payments made pursuant thereto through PG&E's Energy Cost Adjustment Clause or any other mechanism the Commission may establish which provides for full recovery of such payments.

5. The Commission's approval of the settlement is final and not subject to further reasonableness review, except as otherwise provided herein.

6. Any recovery of payments under the PPA is subject to Commission review of the reasonableness of PG&E's performance and administration of its obligations and exercise of its rights under the PPA.

7. The complaint in C.90-02-001 is dismissed with prejudice.



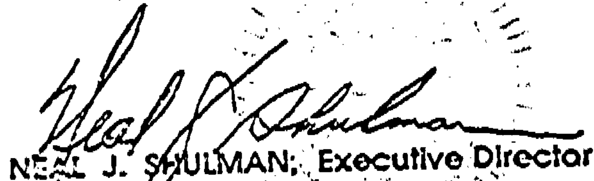
8. This is a final order disposing of all issues in C.90-02-001 and A.91-04-007, and both proceedings are accordingly closed.

This order is effective today.

Dated July 24, 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. SHULMAN, Executive Director

APPENDIX

EXHIBIT A

APPENDIX

SETTLEMENT AGREEMENT
BETWEEN
MALACHA HYDRO LIMITED PARTNERSHIP
AND
PACIFIC GAS AND ELECTRIC COMPANY

THIS SETTLEMENT AGREEMENT is by and between PACIFIC GAS AND ELECTRIC COMPANY ("PG&E"), a California corporation, and MALACHA HYDRO LIMITED PARTNERSHIP ("Seller"), a limited partnership formed under the laws of the State of Maryland. PG&E and Seller are sometimes referred to herein collectively as the "parties" and individually as "party."

I.

RECITALS

A. JUNIPER RIDGE HYDRO, INC. ("Juniper Ridge"), a California corporation, on October 15, 1984, and PG&E on December 4, 1984, executed an interim Standard Offer No. 4 Long-Term Energy and Capacity Power Purchase Agreement (the "Agreement") for a proposed hydroelectric facility to be located on the Pit River near Nubieber, Lassen County, California (the "Facility"); and

B. By letter dated September 17, 1985 addressed to PG&E's Vice President - Electric Operations, PG&E was advised that Juniper Ridge had been merged into MALACHA POWER PROJECT, INC. ("Malacha Inc."), a California corporation, and that the Agreement had been assigned to Malacha Inc. in connection with such merger; and

C. By letter dated July 25, 1986, Malacha Inc. notified PG&E that, based on the results of the interconnection study,

it was downsizing the proposed project to 32,500 kW pursuant to the California Public Utilities Commission's ("CPUC's") Qualifying Facility Milestone Procedure ("QFMP") and paragraph 9 of the Agreement to Establish an Escrow Account dated June 26, 1985; and

D. By letters dated September 12, 1986 and September 27, 1986, PG&E instructed the escrow agent to disburse $62,500.00 of the $225,000.00 QFMP escrow account to Malacha Inc. in accord with Malacha Inc.'s letter of July 25, 1986; and

E. In that certain Consent to Assignment and Agreement by and between Malacha Inc., PG&E, and Seller, signed by PG&E on November 10, 1987, PG&E consented to an assignment of the Agreement to Seller; and

F. A 26,000 kW run-of-the-river Facility was constructed and began initial energy deliveries to PG&E on December 7, 1988, which is within the five-year operation deadline contained in Article 12 of the Agreement; and

G. On February 2, 1990, Seller filed complaint No.90-02-001 (the "Complaint") with the California Public Utilities Commission ("CPUC" or "Commission"). Among other things, Seller sought acknowledgement that as contemplated by the Agreement, the Facility included additional storage capacity created by constructing a water storage reservoir (the "Collett Addition") in the Collett Valley, a dry lakebed along the Facility's existing diversion pipeline, and that it was entitled to receive payments under the Agreement for all

deliveries associated with the Collett Addition; and

H. On March 15, 1990, PG&E filed its answer to the Complaint (the "Answer"). PG&E maintained, among other things, that deliveries attributable to the Collett Addition are not eligible for payments under the Agreement; and

I. Each party desires to avoid the expense and uncertainty associated with litigation of this dispute; and

J. The parties have therefore agreed to the terms of this Settlement Agreement as a full and complete settlement of their dispute; and

K. This Settlement Agreement is subject to CPUC approval and shall be filed with the CPUC in accordance with Rule 51 of the Commission's Rules of Practice and Procedure; and

L. PG&E and Seller agree that, upon Commission approval of the Settlement Agreement, Seller's Complaint shall be dismissed with prejudice from the Commission docket; and

M. PG&E and Seller agree that the Collett Addition is recognized and specifically included as part of the Facility, as though it were originally included in the Agreement, and any other water storage reservoirs, including but not limited to those proposed storage reservoirs known as "Muck Lake" and "Middle Lake," are specifically excluded from the Facility; and

N. PG&E and Seller agree that Seller shall receive payment pursuant to this Agreement for all energy and capacity deliveries from the Facility attributable to up to five thousand (5,000) acre feet annually of new water, provided such

new water conforms to the terms and conditions specified herein; and

O. It is not Seller's intent by its use of any new water to reduce the amount of water available for use by PG&E's downstream plants and the parties acknowledge that Seller's acquisition or development of new water may enhance the availability of water to PG&E's downstream plants; and

P. The parties agree that PG&E shall retain all rights to protect PG&E's water rights by challenging in the appropriate forum any application or other proposal to transfer or otherwise grant Seller rights to any water, including new water; and

Q. For administrative convenience, the parties have agreed to define "water year" in terms of twelve (12) consecutive PG&E monthly billing cycles beginning on or about September 23 of each year; and

R. PG&E and Seller agree that the Agreement shall be amended to give PG&E curtailment of the Facility upon completion of the Collett Addition as follows: 400 hours total per water year, limited to 100 hours per month and six hours per day, off-peak and super off-peak periods only. Seller shall receive the standard Option B curtailment adders in water years during the fixed price period and half the standard Option B curtailment adders thereafter; and

S. PG&E and Seller have agreed that PG&E shall have the option to cancel both the curtailment and the adders at any

time after December 7, 1998; and

T. PG&E and Seller have agreed that the term of agreement shall be extended ten (10) years for a total of forty (40) years; and

U. PG&E and Seller have agreed that in years twenty six (26) through forty (40), energy deliveries from the Facility shall receive ninety percent (90%) of the price otherwise applicable under the Agreement for energy deliveries from the Facility; and

V. PG&E and Seller have agreed that Seller will be paid for as-delivered capacity under As-delivered Capacity Payment Option 2, as now specified in the Agreement, except that the forecast shortage cost in Table D-2 will be fixed at $188/kW-yr from 1997 through the end of the term of agreement; and

W. To help assure that PG&E will receive the value of modifications to the Agreement associated with years twenty-six (26) through forty (40) of the term of agreement, PG&E and Seller agree that the term of agreement shall, under certain circumstances and at PG&E's sole option, be extended for a period of time equal to the length of certain Facility outages; and

X. To provide PG&E with a reasonable opportunity to restore production from the Facility in the event it fails to produce any energy for any continuous period exceeding one year for any reason other than lack of water and no person or entity is making a good faith effort to restore energy production,

PG&E and Seller agree that PG&E, subject to the consent of those parties having prior leasehold or security interests, may either (i) restore the Facility to an operable condition and recover its expenses by offsetting payments due under the Agreement, or (ii) have a right of first refusal to acquire Seller's interests in the Facility; and

Y. PG&E and Seller have agreed that any and all headwater benefits to PG&E's downstream hydroelectric plants resulting from Seller's Collett Addition or from any FERC licensed facilities that receive SO4 prices under this Agreement, shall accrue to PG&E, free of charge, for the term of the Facility's (FERC) license.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises and obligations stated herein, Seller and PG&E hereby agree as follows:

1. DEFINITIONS

1.1 All underlined terms used herein shall have the meaning stated in Appendix A, Section A-1 DEFINITIONS, of the Agreement, except as expressly amended by this Settlement Agreement.

1.2 Amend the reference to PG&E at page 3, line 11, of the Agreement to read: "PACIFIC GAS AND ELECTRIC COMPANY ('PGandE' or 'PG&E')."

1.3 Amend Appendix A, Section A-1 DEFINITIONS, of the Agreement as follows.

APPENDIX

1.3.1 Insert the following term and its definition at page A-2, line 21:

Collett Addition - the 7,800 acre foot off-stream water storage reservoir to be constructed by Seller as part of the Facility in the Collett Valley along the existing diversion pipeline.

1.3.2 Amend the definition of "Facility" at page A-3, line 8, to read as follows:

Facility - That generation apparatus described in Article 3 and all associated equipment owned, maintained, and operated by Seller as described in the FERC Order Issuing License dated December 2, 1986 for project No. 8296-001, as such license was amended on June 6, 1990 pursuant to the Application for Amendment of License for the Collett Addition to Muck Valley Hydroelectric Project, dated January 1989. The Collett Addition and any associated afterbay is specifically included as part of the Facility; provided, however, that the Collett Addition is the sole water storage reservoir so included. Any other water storage facilities, including but not limited to those proposed storage reservoirs known as "Muck Lake" and "Middle Lake," are specifically excluded from the Facility.

1.3.3 Insert the following term and its definition at page A-3, line 11:

FERC - The Federal Energy Regulatory Commission.

1.3.4 Delete the definition of "fixed price period" which appears at page A-4, lines 5 through 12, and replace it with the following:

Fixed price period - The first ten (10) years of the term of agreement during which forecasted energy prices and forecasted as-delivered capacity prices are in effect.

1.3.5 Insert the following terms and their definitions at page A-5, line 22:

New water - Additional sources of water upstream of the Facility which Seller intends to develop or acquire, as defined at ARTICLE 3, PURCHASE OF POWER, section (h).

PG&E's downstream plants - Those PG&E hydroelectric facilities located downstream of the Facility and utilizing water from the Pit River.

1.3.6 Insert the following term and its definitions at page A-7, line 10:

Water year - The period of time, equal to approximately one year, covered by twelve (12) consecutive PG&E monthly billing statements for the Facility. The first such statement will cover the period of approximately one month beginning on or about September 23, 1990. Each successive water year will begin on or about September 23 of each year and will be equal in length to the number of days covered by the following twelve (12) consecutive monthly billing statements sent to Seller by PG&E.

2. FACILITY

2.1 Amend ARTICLE 3, PURCHASE OF POWER, at page 5 of the Agreement, by deleting Section (b) in its entirety and replacing it with the following:

(b) Seller shall provide capacity and energy from its 26,000 kW (generator nameplate rating at 0.9 power factor) Facility located at the Pit River near Nubieber, Lassen County, California.

2.2 Amend ARTICLE 3, PURCHASE OF POWER, at page 5 of the Agreement, by deleting Section (d) in its entirety and replacing it with the following:

(d) To avoid exceeding the physical limitations of the interconnection facilities, Seller shall limit the Facility's actual rate of delivery into the PG&E system to 32,500 kW.

APPENDIX

2.3 Amend ARTICLE 3, PURCHASE OF POWER, page 6, by adding the following new section (h) at line 13:

(h)(1) Seller has rights (i) pursuant to State Water Resources Control Board ("State Board") permit no. 20063 as of April 20, 1990 and permit no. 20445 as of May 17, 1990, and (ii) riparian rights appurtenant to lands along the Pit River between the point of diversion identified in permit no. 20063 and any afterbay or tail race associated with the Facility. Seller intends to develop or acquire additional sources of water upstream of the Facility. Subject to paragraph (h)(6) below, PG&E agrees to accept and pay, pursuant to this Agreement, for deliveries of energy and capacity from the Facility attributable to up to five thousand (5,000) acre feet per year of such additional water ("new water") which meets all of the following criteria:

(A) Such water is developed or acquired by Seller after April 20, 1990, and comes from either upstream groundwater or surface water, or both, in the same watershed as the Facility; and

(B) Seller's rights to such water are valid.

(h)(2) Seller has no right, and shall not apply for, or otherwise obtain, any right to the use of new water after it is discharged from the Facility.

(h)(3) Seller shall give PG&E written notice of any new water no later than ninety (90) days prior to putting such water to use or when an application is filed with the State Board regarding such water, whichever comes first ("Seller's Notice"). Such notice shall provide the basis upon which such water qualifies as new water based upon the criteria described in subparagraphs (A) and (B) above, the source of the new water, Seller's rights to that water, and the amount of new water. Within 30 days after the receipt by PG&E of Seller's Notice, PG&E shall notify Seller in writing of any additional specific information requested to complete Seller's Notice. Seller shall provide the additional information requested within fifteen (15) days thereafter.

(h)(4) Payments by PG&E for deliveries of energy and capacity from the Facility attributable to water in excess of five thousand (5,000) acre feet per year, which water would otherwise qualify as new water, shall be as agreed by the parties, but, in any event, shall not be less than: (i) for as-delivered capacity, at prices authorized from time to time by

the CPUC and which are derived from PG&E's full avoided costs as approved by the CPUC from time to time; and (ii) for energy, at prices equal to PG&E's full short run avoided operating costs as approved by the CPUC from time to time. Seller shall give PG&E written notice of any water for which it seeks payment under this subparagraph no later than ninety (90) days prior to putting such water to use or when an application is filed with the State Board regarding such water, whichever comes first.

(h)(5) The parties hereto acknowledge the possibility that third parties may in the future develop additional sources of water which will enter the Pit River upstream of the Facility. Subject to the provisions of paragraph (h)(6) below, any deliveries of energy and capacity from the Facility attributable to such additional water, where such water is developed or acquired in whole or in part by any person or entity other than Seller ("Third Party Water"), shall be accepted and paid for pursuant to this Agreement; provided, however, Seller shall not be paid pursuant to this Agreement for such Third Party Water if it made payments or contributed value toward the development of such Third Party Water when not required by law to do so. Payments by PG&E for deliveries of energy and capacity from the Facility attributable to Third Party Water that otherwise would not qualify for payment pursuant to this Agreement shall be as agreed by the Parties, but, in any event, shall not be less than: (i) for as-delivered capacity, at prices authorized from time to time by the CPUC and which are derived from PG&E's full avoided costs as approved by the CPUC from time to time; and (ii) for energy, at prices equal to PG&E's full short run avoided operating costs as approved by the CPUC from time to time. Seller's advocacy and defense of its interests, and exchange of information regarding water matters, shall not constitute a contribution of value of any kind for purposes of this subparagraph.

To the extent Seller acquires actual knowledge of Third Party Water, as defined in this paragraph (h)(5), Seller shall give PG&E written notice thereof no later than ninety (90) days prior to putting such water to use, or, should Seller not acquire such knowledge in sufficient time to give notice within that timeframe, within thirty (30) days after Seller acquires such knowledge. Such notice to PG&E shall not be a condition of payment with respect to deliveries of energy and capacity which qualify for payment pursuant to this Agreement.

(h)(6) PG&E retains all rights to protect PG&E's water rights by challenging in the appropriate forum an application or other proposal to transfer or otherwise grant Seller rights to any water, including new water.

3. ENERGY PRICE

3.1 Amend ARTICLE 4, ENERGY PRICE, at page 7 of the Agreement by deleting lines 14 through 17 in their entirety and substituting the following:

> For the remaining years of the term of agreement, energy payments shall be as follows. During years eleven (11) through twenty-five (25) of the term of agreement, Seller shall be paid for energy delivered to PG&E at prices equal to PG&E's full short-run avoided operating costs as approved from time to time. During years twenty-six (26) through forty (40) of the term of agreement, Seller shall be paid for energy delivered to PG&E at prices equal to ninety percent (90%) of PG&E's full short-run avoided operating costs.

4. CURTAILMENT.

4.1 Amend ARTICLE 7, CURTAILMENT, at page 12 of the Agreement by inserting the following at line 14:

> 7.1 Seller's selection of Curtailment Option A above shall remain in effect until completion of the Collett Addition. As used herein, "completion" means the Collett Addition is capable of receiving, storing and delivering water. Seller shall give written notice of completion within thirty (30) days of completing the Collett Addition. Paragraphs 7.2 through 7.5 shall apply upon receipt of such notice by PG&E and shall continue for the remaining term of agreement unless terminated by PG&E pursuant to section 7.5 below.
>
> 7.2 Adjusted Energy Price
>
> 7.2.1 Each water year, PG&E may curtail Seller during off-peak and super off-peak hours (as defined

in table B-4, Appendix B). Such curtailment shall be limited to four hundred (400) hours per water year, and further limited to one hundred (100) hours per calendar month and six (6) hours per day.

7.2.2 During any periods of curtailment in accordance with paragraph 7.2.1, PG&E will pay Seller an adjusted energy price equal to but not in excess of PG&E's available alternative energy source. Said adjusted energy prices shall not be subject to the adders provided for in Article 7.3.

7.2.3 Whenever possible, PG&E shall give Seller a minimum 24 hours prior notice of any curtailment and its probable duration, but in no event shall PG&E give prior notice later than 3:00 p.m. of any day as to any curtailment during the subsequent 24-hour period.

7.3 Adder

7.3.1 The provisions of this paragraph 7.3.1 shall apply through December 6, 1998. Throughout each water year, the forecasted energy prices listed in Appendix B, Table B-1 for the off-peak and super off-peak hours shall be adjusted upward by 7.7% for Period A and 9.6% for Period B; subject, however, to the provisions of paragraph 7.4 and Appendix G.

7.3.2 The provisions of this paragraph 7.3.2 shall apply beginning December 7, 1998, and continuing through the end of the term of agreement. Throughout each water year the applicable energy price for the off-peak and super off-peak hours pursuant to Article 4 of this Agreement shall be adjusted upward by 3.85% for Period A and 4.8% for Period B; subject, however, to the provisions of paragraphs 7.4, 7.5, and Appendix G.

7.4 End of Year Adjustments

At the end of each water year, PG&E shall determine the amount of megawatt-hours of energy delivered to PG&E from the Facility. If Seller delivered 97,800 or more megawatt-hours of energy to PG&E from the Facility during such water year, then no price adjustments shall be made. If Seller delivered less than 97,800 megawatt-hours of energy to PG&E from the Facility during such water year, then the following shall apply:

7.4.1 Payments made to Seller pursuant to paragraphs 7.2 and 7.3 above shall be adjusted

pursuant to Appendix G.

7.4.2 Any adjustments made pursuant to paragraph 7.4.1 shall be made by a credit or debit, as the case may be, to Seller's power purchase statement (the "statement") within sixty (60) calendar days after the end of a water year. If following such an adjustment an amount remains due either party, then the owing party shall pay the other party the balance due within thirty (30) days from the date of the statement. Any amount due Seller or PG&E pursuant to this paragraph shall accrue interest at the then-current three (3) month commercial paper rate of Bank of America from the end of such 30-day period.

7.5 Cancellation

PG&E may, at its sole option, cancel the provisions of this Article 7 at any time after December 7, 1998, by giving written notice to Seller. If PG&E elects to cancel these provisions, the provisions of APPENDIX C, CURTAILMENT OPTION A - HYDRO SPILL AND NEGATIVE AVOIDED COST, shall thereafter apply.

4.2 Amend the Agreement by adding "Appendix G" and "Adjustment Examples" which are attached to this Settlement Agreement as Attachments A and B, respectively, and are incorporated herein by this reference, following Appendix F.

5. NOTICES

Amend Article 9, NOTICES, at page 13 of the Agreement, by deleting lines 9 through 13 in their entirety and replacing them with the following:

All written notices shall be directed as follows:

To PG&E:

Pacific Gas and Electric Company
Attention: Vice President - Power Generation
245 Market Street, Room 316
San Francisco, CA 94106

In addition, a copy of all notices pursuant to paragraph 2.3 of this Settlement Agreement shall be sent to the following:

Pacific Gas and Electric Company
Attention: Manager - HydroGeneration
245 Market Street, Room 516
San Francisco, CA 94106

To Seller:

Malacha Power Project, Inc.
Managing Partner
Malacha Hydro Limited Partnership
P. O. Box 6640
Boise, Idaho 83707

In addition, PG&E shall exert its best efforts but shall be under no obligation under this Settlement Agreement or the Agreement to send a copy of all notices to Seller sent pursuant to this Settlement Agreement to:

Malacha Hydro Limited Partnership
Attention: Project Manager
15397 Prospect Drive
Redding, California 96001

6. TERM OF AGREEMENT

Amend ARTICLE 12, TERM OF AGREEMENT, at page 14 of the Agreement by deleting lines 6 through 10 in their entirety and inserting the following:

> This Agreement shall be binding upon execution and remain in effect thereafter for forty (40) years from December 7, 1988 subject to the provisions of this ARTICLE 12.
>
> If at any time after the end of year twenty-five (25) of the _term of agreement_ the _Facility_ fails to deliver energy to PG&E for three (3) consecutive calendar months or more for any reason other than insufficient streamflows, then the _term of agreement_ shall, at PG&E's sole option, be extended for a period equal to the length of such outage. Seller shall give written notice to PG&E of the reason for, start date, and anticipated duration of any _Facility_ outage exceeding three calendar months. Such notice shall be given to PG&E

within twenty (20) days after any outage exceeds three calendar months in length.

7. LONG TERM CESSATION OF PRODUCTION

In the event that the Facility (i) fails to produce any energy for any continuous period exceeding one year for any reason other than insufficient streamflows, and (ii) no person or entity is making a good faith effort to restore energy production at the Facility, then, subject to PG&E's receipt at the time of its exercise of either of the options described below of the written consent of (i) Juniper Ridge Ranches, Inc. and Shareholders, or their respective successors in interest, pursuant to that certain Integrated Lease Agreement, as amended and otherwise modified, memoranda of which are recorded *inter alia* January 14, 1985, in Book 441, Page 166, Official Records, and October 27, 1987, in Book 480, Page 595, Lassen County Official Records, and (ii) any lenders having a security interest in the Facility at that time, PG&E shall have the following rights, to be exercised in the alternative at its sole option:

(a) A right of first refusal to acquire Seller's interest in the Facility on such terms as are mutually acceptable to PG&E and Seller; and

(b) The right to restore the Facility to operable condition and thereafter recover its expenses through an offset against payments due under the Agreement.

8. AS-DELIVERED CAPACITY PRICE

8.1 Amend Appendix D, AS-DELIVERED CAPACITY, of the Agreement as follows.

8.1.1 Delete in their entirety lines 19 through 24 from page D-1 and lines 1 through 15 from page D-2. Substitute the following:

> During the fixed price period, the as-delivered capacity prices will be calculated in accordance with Exhibit D-1 and the forecasted shortage costs in Amended Table D-2.
>
> For the remaining years of the term of agreement, PG&E shall pay Seller for as-delivered capacity at the as-delivered capacity prices that were paid Seller in the last year of the fixed price period.

8.1.2 Amend ~~Delete in its entirety~~ Table D-2, Forecasted Shortage Cost Schedule, at page D-3, by adding at Line 17 the ~~and substitute~~ "Amended Table D-2, Forecasted Shortage Cost Schedule", which is attached as Attachment C to this Settlement Agreement and incorporated herein by this reference.

9. HEADWATER BENEFITS

9.1 PG&E and Seller agree that, pursuant to the "Agreement to Forego Headwater Benefits" (HWB Agreement) attached hereto as Attachment D and incorporated herein by this reference, Seller will forego all rights to the headwater benefits payments from PG&E as defined in the HWB Agreement to which Seller otherwise would be entitled pursuant to section 11 of the FERC regulations under the Federal Power Act.

9.2 If, notwithstanding the parties' agreement, PG&E is required by FERC or other governmental authority of competent jurisdiction to make headwater benefits payments to Seller

which Seller has agreed to forego pursuant to the HBW Agreement, then the amounts to be paid by PG&E to Seller under this Agreement shall be reduced by the amount of any such headwater benefit payments.

10. DISMISSAL WITH PREJUDICE AND RELEASE OF CLAIMS.

10.1 Seller and PG&E, in conjunction with the execution of this Settlement Agreement, shall execute and file a joint motion for dismissal with prejudice of the Complaint.

10.2 For purposes of this paragraph 10, the terms "party" and "parties" shall include all affiliates, heirs, transferees, successors, assigns, officers, directors, shareholders, agents, employees, representatives and attorneys of Seller and PG&E.

10.3 The waivers and releases set forth herein include all claims alleged in, or which could have been alleged in, the Complaint, whether or not known by either party at the time this Settlement Agreement is executed, and shall release both parties from any and all liability.

10.4 The parties intend and agree that the waivers and releases contained herein shall be effective as a full and final release of and from all matters set forth in paragraph 10.3 above, and, in furtherance of this intention, each party hereby acknowledges and agrees that it is familiar with and has been advised by legal counsel of its choice concerning the

legal effect of California Civil Code Section 1542, which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

Each party being aware of and having been advised by legal counsel as to the significance and legal effect of such code section, hereby expressly waives and relinquishes any and all rights and benefits such party may have thereunder or under any other statute or common law principal of similar effect with respect to the waivers and releases provide for in this paragraph 10.

10.5 Each party hereby further acknowledges that it is aware that it may hereafter discover facts in addition to or different from those which it knows or believes to be true with respect to the subject matter of this paragraph, but both parties agree that it is their mutual intention fully, finally and forever to settle and release all of the matters which are the subject of the waivers and releases provided for herein notwithstanding the discovery hereafter of any additional or different facts existing as of the date of this Settlement Agreement.

10.6 Each party hereby covenants and agrees that it will not, directly or indirectly, commence, institute, prosecute, or maintain in any manner whatsoever, any lawsuit, regulatory

hearing, action, or other proceeding in law, equity or otherwise, which in any way arises out of, or is related, directly or indirectly, to the waivers and releases contained herein, or which seeks to rescind, terminate invalidate or set aside this paragraph 10, in whole or in part, for any reason whatsoever; provided, however, that an action may be brought by either party to enforce this paragraph 10.

10.7 The release of claims contained in this Settlement Agreement is a part of a compromise settlement and shall never at any time, for any purpose, be considered an admission of liability or responsibility by either party.

10.8 The mutual release of claims contained in this Settlement Agreement is the result of good faith negotiations between the parties. Such release is not the product of collusion, fraud or any tortious conduct aimed to injure the interests of any person or entity.

11. REGULATORY REVIEW

11.1 This Settlement Agreement shall be submitted to the CPUC for its approval pursuant to Article 13.5, Stipulations and Settlements, of the CPUC's Rules of Practice and Procedure.

11.2 This Settlement Agreement is conditioned upon and shall not be effective until (a) the CPUC issues a decision that in terms satisfactory to PG&E approves the reasonableness of the Settlement Agreement and the Agreement as amended, and unconditionally authorizes full recovery in PG&E's rates of all payments made under the Settlement Agreement and Agreement as

so amended at the time the payments are made; and (b) such CPUC decision becomes final, unconditional and unappealable (including exhaustion of all administrative and judicial appeals or remedies and time periods thereof). PG&E shall inform Seller of the date when this condition has been satisfied.

11.3 PG&E and Seller shall use their best efforts to support the reasonableness of this Settlement Agreement, and the Agreement as amended, before any government authority of competent jurisdiction in a proceeding involving a review of the Settlement Agreement or the Agreement for purposes of allowance or disallowance in rates charged by PG&E. Each party shall bear its own costs and expenses associated with seeking such approval.

12. EFFECT ON AGREEMENT

Except as expressly modified by this Settlement Agreement, the provisions of the Agreement shall remain unchanged.

13. ENTIRE AGREEMENT

This Settlement Agreement constitutes the entire agreement of the parties with respect to the subject-matter hereof and supersedes any and all prior negotiations, correspondence, understandings and agreements between the parties respecting the subject-matter of this Settlement Agreement.

14. MODIFICATION

This Settlement Agreement may be further amended or modified only by a written instrument signed by the parties

hereto.

15. CAPTIONS

Captions are included herein for ease of reference only. The captions are not intended to affect the meaning of the contents or scope of this Settlement Agreement.

16. CHOICE OF LAWS

This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of California, excluding any choice of law rules that may direct the application of the laws of another jurisdiction.

17. NON-WAIVER

No term or provision hereof shall be deemed waived and no breach excused unless such waiver or consent is in writing and signed by the party claimed to have so waived or consented.

18. INTERPRETATION

This Settlement Agreement is the result of negotiation. Moreover, each party has reviewed this Settlement Agreement, and has had full and adequate opportunity to obtain legal advice regarding this Settlement Agreement from the legal counsel of its choice. Accordingly, the rule of construction in Civil Code § 1654 to the effect that any ambiguity shall be resolved against the drafting party shall not be employed against either party in the interpretation of this Settlement Agreement.

19. TIME

All references herein are to calendar days unless otherwise specifically stated.

20. COUNTERPARTS

This Settlement Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Settlement Agreement to be executed by their duly authorized representatives, and it is effective as of the last date set forth below:

MALACHA HYDRO LIMITED PARTNERSHIP BY ITS GENERAL PARTNER,

MALACHA POWER PROJECT INC.

BY: [signature]

NAME: E. ROBERT MEANEY

TITLE: PRESIDENT

DATE SIGNED: 24 AUGUST 1990

PACIFIC GAS AND ELECTRIC COMPANY

BY: [signature]

NAME: ROBERT J. HAYWOOD

TITLE: Vice President

DATE SIGNED: ______________

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ATTACHMENT A

APPENDIX G

This Appendix sets forth the method by which payments will be adjusted, if necessary, at the end of each water year, pursuant to Article 7, paragraph 7.4, of the Agreement. Said adjustments shall be determined using the following formula:

P = (ADD - AEP) (X)

where:

P = Payment due PG&E. If P is negative, then payment is due Seller.

ADD = Total adder payments made by PG&E to Seller during the applicable water year pursuant to Article 7.3.2 of the Agreement.

AEP = A sum of money equal to the difference between the following figures for the applicable water year: (1) the total dollar amount of energy payments Seller would have received, excluding the adders applicable under this Agreement, for the energy Seller actually delivered to PG&E during curtailment periods if PG&E had not curtailed Seller's project pursuant to Article 7.2 of the Agreement and (2) the total dollar amount of the adjusted energy price payments pursuant to Article 7.2 of the Agreement which Seller actually received for energy delivered to PG&E during curtailment periods.

X = A factor defined by the following formula, with the stipulation that X cannot have a negative value nor exceed a value of 1.0:

X = (Y - G)/10

where:

Y = 97.8 gigawatt-hours of energy

G = Total energy generation, in gigawatt-hours, by the Facility during the applicable water year.

ATTACHMENT B

END OF WATER YEAR ADJUSTMENT EXAMPLES

EXAMPLE No. 1 ("Wet year")

Assumptions:

Total energy generated during water year = 130,000 mwh
Alternate price = $.012/kwh
Applicable SO4 fixed energy price = $.082/kwh
Energy delivered during curtailment periods = 10,000 mwh
Energy subject to adder payments = 60,000 mwh
Total off-peak adder payments (ADD) during water year = $426,000

Adjustment calculation:

$$P = (ADD - AEP)(X)$$

where:

P = Payment due PG&E. If the end of year adjustment, as determined using the formula above, is negative, payment is due Seller.

ADD = Total adder payments made by PG&E to Seller during each water year, pursuant to Article 7.3.2 of the Agreement.

AEP = A sum of money equal to the difference between (1) the sum of energy payments Seller would have received if PG&E did not invoke its right to curtail Seller's project pursuant to Article 7.2 of the Agreement and (2) the sum of energy payments Seller received at adjusted energy prices pursuant to Article 7.2 of the Agreement.

X = A factor defined by the following formula, with the exception that X cannot have a negative value or exceed a value of 1.0:

$$X = (Y - G)/10$$

where:

Y = 97.8 gigawatt-hours of energy

G = Total energy generation by the Facility, in gigawatt-hours, during each water year.

Y = 97.8
G = 130.0
X = (Y - G)/10 = (97.8 - 130.0)/10 = -3.22 (Therefore = 0)
ADD = $426,000
AEP = (10,000 mwh)(.082-.012)(1,000) = $700,000
P = (ADD - AEP)(X) = (426,000-700,000)(0) = 0

Therefore, no payment is due either party.

EXAMPLE No. 2 ("Moist year")

Assumptions:

Total energy generated during water year = 90,000 mwh
Alternate price = $.012/kwh
Applicable SO4 fixed energy price = $.082/kwh
Energy delivered during curtailment periods = 5,000 mwh
Energy subject to adder payments = 50,000 mwh
Total off-peak adder payments (ADD) during water year = $355,000

Adjustment calculation:

Y = 97.8
G = 90.0
X = (Y - G)/10 = (97.8 - 90.0)/10 = 0.78
ADD = $355,000
AEP = (5,000 mwh)(.082-.012)(1,000) = $350,000
P = (ADD - AEP)(X) = (355,000-350,000)(0.78) = $3,900

Therefore, Seller owes PG&E $3,900

EXAMPLE No. 3 ("Dry year")

Assumptions:

Total energy generated during water year = 80,000 mwh
Alternate price = $.012/kwh
SO4 fixed energy price = $.082/kwh
Energy delivered during curtailment periods = 5,000 mwh
Energy subject to adder payments = 40,000 mwh
Total off-peak adder payments (ADD) during water year = $284,000

Adjustment calculation:

Y = 97.8
G = 80.0
X = (Y - G)/10 = (97.8 - 80.0)/10 = 1.78 (Therefore = 1.0)
ADD = $284,000
AEP = (5,000 mwh)(.082-.012)(1,000) = $350,000
P = (ADD - AEP)(X) = (284,000-350,000)(1.0) = $66,000

Therefore, PG&E owes Seller $66,000

PACIFIC GAS AND ELECTRIC COMPANY

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AMENDMENT TO TABLE B - 1

Forecasted Energy Price Schedule

Pursuant to Ordering Paragraph 3(d)
of Decision No. 86-12-104

Year of Energy Deliveries	Forecasted Energy Prices*, ¢/kWh						Weighted Annual Average
	Period A			Period B			
	On-Peak	Partial-Peak	Off-Peak	On-Peak	Partial Peak	Off-Peak	
1998	13.61	12.98	12.54	13.79	13.48	13.15	13.14
1999	13.61	12.98	12.54	13.79	13.48	13.15	13.14
2000	13.61	12.98	12.54	13.79	13.48	13.15	13.14

* These prices are differentiated by the time periods as defined in Table B-4.

AMENDMENT TO TABLE D - 2

Forecasted Shortage Cost Schedule

Pursuant to Ordering Paragraph 3(d)
of Decision No. 86-12-104

Year	Forecasted Shortage Cost, $/kW-yr
1998	188
1999	188
2000	188

APPENDIX

HEADWATER BENEFIT ALLOCATION AGREEMENT

BETWEEN

MALACHA HYDRO LIMITED PARTNERSHIP

AND

PACIFIC GAS AND ELECTRIC COMPANY

This agreement is by and between Pacific Gas and Electric Company ("PG&E"), a California corporation, and Malacha Hydro Limited Partnership ("Malacha"), a limited partnership formed under the laws of the State of Maryland.

Whereas, PG&E owns and operates Federal Energy Regulatory Commission (FERC) Project Nos. 233 and 2106 which are downstream of Malacha's FERC Project No. 8296 on the Pit River; and

Whereas, Malacha sells the power from FERC Project No. 8296 to PG&E under an Interim Standard Offer No. 4 Long-Term Energy and Capacity Power Purchase Agreement (PPA) signed by PG&E on December 4, 1984, and,

Whereas, in accordance with Section 11.14(a)(1) of the FERC Regulations, PG&E and Malacha have negotiated a settlement for headwater benefit payments.

Now, therefore, the parties agree as follows:

1. As an integral part of the attached amendment to the PPA, Malacha agrees to waive any and all headwater benefit payments by PG&E involving FERC Project Nos. 233, 2106, and 8296 as regulated by Part 11 of the FERC Regulations, 18 Code of Federal Regulations.

2. In the event that, by reason of any requirement of the FERC or other governmental authority having jurisdiction so to do, PG&E is required to pay headwater benefits to Malacha by reason of such facilities, the amounts to be paid by PG&E to Malacha under the Settlement Agreement between Malacha Hydro Limited Partnership and PG&E dated ______________ shall be reduced by the amount of any such headwater benefit payment made to Malacha.

3. No replacement, improvement or enlargement of PG&E FERC Project Nos. 233 and 2106 or Malacha's FERC Project No. 8296 shall result in any increase in PG&E's payments hereunder, provided, however, in the event Malacha's FERC Project No. 8296 is amended after June 7, 1990 so as to increase water storage capability, Malacha does not waive the right to claim payments for the incremental headwater benefit associated with the increase in water storage capability.

4. Malacha agrees to file this settlement with the FERC for its approval according to the provisions of Section 11.14(a)(1).

(END OF APPENDIX)