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Decision 91-11-017 November 6, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Application of Pacific Gas and Electric Company for an order approving an amendment to a Power Purchase Agreement with Bear Mountain Limited regarding a nonpaid deferral of the purchase of long-term capacity, curtailment of energy, and modification of project site. (U 39 E)	Application 90-05-037 (Filed May 18, 1990)

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Pillsbury, Madison & Sutro, by Robert B. Gex, Attorney at Law, for Kern Bluff Limited and Bear Mountain Limited, interested parties.
Hallie Yacknin and Judy Lamson, Attorneys at Law, and Lloyd Rowe, for Division of Ratepayer Advocates.

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O P I N I O N

1. Summary

This decision approves the "Settlement Agreement, Mutual Release, and Covenant Not to Sue" (Agreement) executed March 2, 1990 by Pacific Gas and Electric Company (PG&E), Kern Bluff Limited (Kern Bluff), and Bear Mountain Limited (Bear Mountain).

2. Background

On October 14, 1985, Kern Bluff and PG&E executed a Standard Offer No. 2 (SO2) Power Purchase Agreement (PPA) for sales and purchases of 45 megawatts (MW) of capacity and associated energy from a natural gas-fired enhanced oil recovery cogeneration project in Bakersfield, California. On May 29, 1987, Bear Mountain and PG&E executed a similar SO2 PPA for sales and purchases of 42 MW of capacity and associated energy from a natural gas-fired enhanced oil recovery cogeneration project in Bakersfield, California. Each PPA requires termination of the contract if the project's actual operation does not occur within five years (October 14, 1990 and May 29, 1992, respectively) of the PPA execution.

After PPA execution, two disputes occurred. The first stems from a claim of *force majeure*, notification of which was submitted to PG&E by Kern Bluff on November 4, 1988. The second arises from Bear Mountain's desire to relocate its project approximately 3,000 feet to a site different from that described in the SO2 PPA, notification of which was submitted to PG&E by Bear Mountain on January 9, 1989. The Agreement resolves both disputes.

2.1 Kern Bluff Force Majeure

Kern Bluff alleges that a *force majeure* event occurred when the City of Bakersfield (City) decided to require an Environmental Impact Report (EIR) after having previously issued a negative declaration for the project. Kern Bluff's initial

application for a conditional use permit was denied on appeal, necessitating the filing of a second application. On the second application, the City required an EIR even though the City's Planning Department proposed the City again issue a negative declaration. Kern Bluff asserts that the City's reversal of its earlier position was unforeseeable. In support, Kern Bluff points to the lack of significant changes in engineering, design, operational capabilities, and location of the project between the issuance of the initial negative declaration and the City's decision to require an EIR.

Kern Bluff also asserts that the requirement of an EIR stems from an unexpected change in policy by the California Energy Commission and the California Department of Justice. These state entities did not participate in Kern Bluff's first application for a conditional use permit, yet both entities filed comments asserting that an EIR was necessary after the Bakersfield Planning Department proposed to issue a negative declaration a second time. Kern Bluff states that the actions of the City, the California Energy Commission, and the California Department of Justice were beyond its control and unforeseeable.

PG&E disagrees with Kern Bluff's position. PG&E believes land use and environmental regulations were in place which alerted developers to the possibility that an EIR would be required when Kern Bluff's predecessor in interest executed its PPA in 1985. Moreover, PG&E claims that when Kern Bluff's predecessor in interest entered the PPA, an EIR for the project should have been foreseeable because no conditional use permits had been granted at or around the project site since it had been zoned residential in 1977. Finally, PG&E notes that any developer of a project which could have adverse effects on the environment should realize that an EIR may be required when the project is located only one mile away from an existing residential area.

2.2 Bear Mountain Site Relocation

Bear Mountain asserts that it has the right under the Bear Mountain PPA to relocate the project because the relocation--a distance of approximately 3,000 feet--is not a material change in the PPA. To support its position that the relocation is not material, Bear Mountain notes that it would be possible to move its project more than 3,000 feet while remaining within the existing property description in the Bear Mountain PPA. Bear Mountain's PPA states that the project will be "located at the Union Miller Lease in the E/2, Section 13, Township 29 South, Range 28 East, Kern County, California." (PG&E Application Exhibit B, p. 4.) Bear Mountain has requested a relocation to the southern one-half of Section 12 of the same Township and Range. Bear Mountain asserts that the project will be relocated from one producing oil field property to another producing oil field property of its steam host, and the relocation does not materially affect either the project's engineering, design, operation or the point of interconnection to PG&E's transmission system. Bear Mountain states that it does not benefit from the relocation whose driving force is a request by the steam host.

PG&E disagrees with Bear Mountain's position for two reasons. First, PG&E asserts that Bear Mountain is bound by the description of the project in the Bear Mountain PPA. Bear Mountain's proposed relocation would move the project outside the property description in the PPA.

Second, PG&E believes that the relocation would provide significant benefits to Bear Mountain. According to PG&E, the relocation may enable Bear Mountain to more easily procure a conditional use permit from the City. PG&E asserts Bear Mountain proposes to move the project from an area zoned R-1 residential to an area zoned agricultural near the Kern County dump, an area full of hills and valleys which inhibit residential development. As support for its contention that the move could streamline the

permitting process, PG&E points to the permitting difficulties which the Kern Bluff project encountered in an area also zoned residential. PG&E says it:

> "...believes, however, that the change in the projects's location may 'not [be] automatically significant' enough to refuse to negotiate modifications to the Bear Mountain PPA. See Final Guidelines for Contract Administration of Standard Offers (Guidelines) [Decision (D.) 88-10-032], mimeo. at 26." (PG&E Application, p. 7.)

3. Settlement Agreement and PG&E's Application

Irrespective of the parties' positions and how the Commission might rule if the disputes were presented in complaint proceedings, PG&E asserts there is no doubt that valid disputes arose which were resolved through a reasonable settlement. On May 18, 1990 PG&E filed an application for Commission approval of the Agreement. PG&E argues that the Commission may assess the reasonableness of the settlement once it determines that valid disputes exist.

3.1 Terms of the Agreement

The Agreement provides that:

a. Kern Bluff Termination:

1) The Kern Bluff PPA is terminated;

2) PG&E shall release Kern Bluff's letter of credit in the amount of $235,000; and

3) Kern Bluff agrees to suspend project development while PG&E seeks Commission approval of the Agreement;

b. Bear Mountain Deferral:

1) PG&E shall not be obligated to purchase firm capacity from the Bear Mountain project prior to January 15, 1993 (a seven and one-half month deferral from the original final on-line date), even

if actual operation occurs before January 15, 1993;

2) PG&E shall not be obligated to make any as-available capacity payments to Bear Mountain for any electricity delivered prior to January 15, 1993;

3) The Bear Mountain PPA shall be amended to suspend the project's final on-line date to the later of August 15, 1993, or the last day of the 36th month following the month in which the Commission issues an order approving the Agreement; and

4) PG&E shall pay Bear Mountain for capacity delivered to PG&E at the rate of $208 per kilowatt-year (kW-yr)--an increase from the rate of $202/kW-yr in SO2--assuming the project delivers such firm capacity for the full term of the PPA; if the project delivers firm capacity for a period less than the full term of the PPA, only $202 of the $208/kW-yr shall be subject to the terms and conditions of Appendix D (Adjustment of Capacity Payments in the Event of Termination or Reduction) of the PPA;

c. Bear Mountain Curtailment: The Bear Mountain PPA will be amended to provide for economic or physical curtailment on an annual basis under 1 of 3 alternatives, at Bear Mountain's election:

1) Physical or economic curtailment down to 38 MW for 1,500 super off-peak or off-peak hours, or

2) Physical or economic curtailment down to 35 MW for 1,000 super off-peak or off-peak hours, or

3) Curtailment down to zero MW during two weekends during either January, February, March, April, November or December; curtailment down to 38 MW for 1,000 super off-peak or off-peak hours,

and curtailment down to zero MW for no less than 336 hours for scheduled and unscheduled maintenance;

d. Bear Mountain Site Relocated: The Bear Mountain PPA will be amended to change the description of the project location to the southern one-half of Section 12, Township 29 South, Range 28 East, Kern County, California;

e. All claims Released: Each party shall release the other from all claims arising out of the force majeure and project site disputes; and

f. Project Deadline Extensions if Application Denied: If PG&E's application to the Commission for approval of the Agreement is denied, PG&E agrees to suspend the five-year on-line dates set forth in both Kern Bluff's and Bear Mountain's PPAs by a period of time equal to the period between November 21, 1989 and the date on which the application is denied.

3.2 PG&E Showing on Reasonableness of Settlement Agreement

PG&E asserts that valid, genuine disputes exist which are subject to negotiations and settlement under the Commission's Guidelines for the Administration of Power Purchase Contracts Between Electric Utilities and Qualifying Facilities (QFs) (Guidelines; D.88-10-032). PG&E estimates the ratepayer benefits from the settlement are:

Item	Net Benefit ($Millions; 1990 Net Present Value)
Kern Bluff PPA Termination	$32.27 to $48.00
Bear Mountain Deferral	3.95 to 6.24
Bear Mountain Curtailment	2.11
Total	$38.33 to $56.35

PG&E summarizes the benefits as:

> "The Kern Bluff project will not deliver 45 MW of unneeded and overpriced firm capacity. Under the deferral, firm capacity that is delivered by the Bear Mountain project will be paid for at prices more likely to be in step with the market. Curtailment of energy deliveries will lower the average overall cost of energy purchased by PG&E from Bear Mountain, add to the flexibility of PG&E's operations, and permit PG&E to purchase energy at its least cost-replacement price. The Agreement also allows the settling parties to avoid expensive and protracted litigation, the outcome of which is uncertain." (PG&E Application, p. 3.)

PG&E argues the Agreement constitutes a good faith settlement of valid disputes. Both Kern Bluff and Bear Mountain assert they are viable under the terms of the original PPAs, according to PG&E. The Agreement serves ratepayer interests "demonstrably better" than the original SO2s, because it provides both tangible benefits ($38 million to $56 million) and intangible benefits (e.g., avoidance of litigation risk and a release of all claims), and fully compensates PG&E ratepayers for benefits received by Bear Mountain.

Therefore, PG&E requests the Commission issue an order determining that:

a. The Agreement is reasonable and PG&E's entering into the Agreement is prudent;

b. PG&E's ratepayers are adequately protected under the Agreement;

c. All payments made pursuant to the Agreement and Bear Mountain PPA as modified thereby are reasonable in the year in which they are made, and PG&E is authorized to recover all such payments through PG&E's Energy Cost Adjustment Clause (ECAC) or any other mechanism established by the Commission which provides for full recovery of such payments (subject to reasonableness review

for PG&E's administration of the Agreement[1]);

d. The Commission's approval of the Agreement is final and not subject to further reasonableness review (except for administration of the Agreement); and

e. The Agreement is approved as executed.

4. Division of Ratepayer Advocates Protest

The Division of Ratepayer Advocates (DRA) filed a protest on June 18, 1990. DRA objects to the Agreement on two grounds, and recommends the Commission deny the application. First, DRA objects to the deferral of Bear Mountain's five-year on-line date. DRA asserts the deferral violates Commission policy and places an unreasonable risk on ratepayers of breathing "...life into an otherwise moribund contract which is based on an outdated value of capacity." (DRA Protest, p. 2.)

Second, DRA notes that the Agreement escalates the firm capacity price from the $202/kW-yr specified in SO2 to $208/kW-yr. DRA objects to this escalation. Nonetheless, DRA offers that except for the Bear Mountain deferral and the capacity price escalation, the Agreement is otherwise reasonable.

In recommending denial of the application, DRA argues that Kern Bluff does not have a plausible claim of force majeure. Permit denials and EIRs are foreseeable events. According to DRA:

> "Both of those events 'are a regular part of project development and should be anticipated by project developers.' (D.88-10-032, Appendix A, p. 3.)" (DRA Protest, p. 4.)

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1 PG&E clarified at the second prehearing conference that its request recognizes continuing reasonableness review of Agreement administration (Tr. p. 27).

Regarding Bear Mountain, DRA contends that despite its assertion to the contrary, Bear Mountain cannot unilaterally change its site location. DRA admits Bear Mountain has a plausible viability claim at its original location, however, and given the dispute PG&E may therefore enter negotiations to modify the contract.

Nonetheless, DRA recommends the Commission withhold a finding of reasonableness regarding the capacity price escalation. DRA notes that Bear Mountain believes the delay in its operational date justifies an increase in its capacity price from $202/kW-yr to $214/kW-yr, and that PG&E and Bear Mountain settled at $208/kW-yr. DRA contends that the mere fact that Bear Mountain makes an assertion is not sufficient to justify negotiations unless that assertion is at least plausible. (D.90-05-086, mimeo. p. 15.) DRA argues that PG&E failed to make any showing that Bear Mountain's assertion of eligibility for $214/kW-yr is plausible.

Regarding PG&E's estimate of net ratepayer benefits, DRA

> "...severely discounts the benefits attributable to the termination of the Kern Bluff contract to account for the low probability that Kern Bluff would prevail on its claim...DRA does not believe that Kern Bluff has a plausible claim of force majeure. Kern Bluff estimates that it requires approximately 16 months for equipment procurement, construction, and commencement of commercial operations. (Exhibit D, p. 4.) Clearly, Kern Bluff cannot meet its October 1990 operational deadline. Therefore, even without this agreement, the ratepayers would see the benefits associated with termination of the Kern Bluff contract." (DRA Protest, p. 7.)

DRA believes Bear Mountain may not be able to comply with the terms of its contract (since Kern Bluff's experience shows there may be permitting delays). DRA claims PG&E's estimated $3.95 million to $6.26 million ratepayer net benefits for the Bear Mountain deferral must be weighed against costs of between $21.36 million and $30.40 million of ratepayer payments above updated

estimates of avoided costs if the deferral is approved. DRA does not challenge the estimated $2.11 million of benefits from the Bear Mountain curtailment.

DRA concludes by recommending that the Commission disregard the alleged benefits and find the deferral unreasonable, given the risk that it may preserve a high-priced SO2 QF which would otherwise terminate, and given the Commission policy that deferrals should only be negotiated when QFs have all necessary permits and certificates. DRA believes the Agreement could be found reasonable, except for the firm capacity price increase and the deferral. DRA recommends the Commission withhold a finding of reasonableness of the negotiated firm capacity price until PG&E demonstrates it was reasonable to negotiate that price.

5. PG&E Response

On August 3, 1990, PG&E filed a response to DRA's Protest. PG&E asserts that the $208/kW-yr is a reasonable compromise that avoids scuttling the other benefits of the Agreement. Since the Bear Mountain PPA was signed in 1987, Bear Mountain has until 1992 to come on-line. D.87-09-025 extended the capacity price table to 1991. PG&E points out that:

> "The Commission stated in D.87-09-025, mimeo. p. 5, that 'a QF that is entitled to a capacity price schedule determined as of the date of contract execution must have such a schedule established for all years in which that QF could come on-line.'" (PG&E Response, pp. 4-5.)

Thus, Bear Mountain argued it was due a 1992 capacity price of $214/kW-yr (based on escalation factors built into the SO2 capacity

price table), according to PG&E.[2] The countervailing argument, PG&E points out, is that by D.86-03-069 and D.86-05-024 the Commission intended that no SO2 PPAs be available after March 19, 1986. PG&E argues that $208/kW-yr is a reasonable compromise.

Regarding DRA's assertion that PG&E should not have negotiated with Bear Mountain since it did not have its permits and certificates, PG&E points out that air quality and conditional use permits must be site specific. Because it can be very costly to procure these permits, PG&E argues it is not unreasonable for Bear Mountain to defer such applications until this Commission decides whether to approve the site relocation. PG&E claims sufficient time remains for Bear Mountain to apply for and receive the necessary permits.

6. First Prehearing Conference

A prehearing conference was held on September 6, 1990, at which the assigned administrative law judge (ALJ) directed PG&E to file a supplement to its application that would address project viability. The Guidelines state: "Examination of a QF's viability under the original contract is prerequisite to modifications to power purchase contracts." (D.88-10-032, Guideline IV.1, 29 CPUC

2 In support of this claim, Bear Mountain points to the petition of PSE, Inc. (PSE) to modify D.87-09-025 in Application (A.) 82-12-48. That petition seeks a 1992 firm capacity price of $213/kW-yr ($202 escalated by 5.65%) for 4 PSE projects. Bear Mountain is a subsidiary of PSE, but was not included in PSE's petition to modify. PSE's petition notes that if the Agreement in this application (A.90-05-037) is not approved, PSE would seek to amend its petition for modification to include both Bear Mountain and Kern Bluff.

Bear Mountain's testimony in this proceeding notes that if this application is denied "...then the firm capacity price for Bear Mountain as determined by the petition will be higher than the compromise reached in the Settlement Agreement." (PG&E's Response to DRA's Protest, Exhibit A "Additional Prepared Testimony of Albert J. Smith III," p. 2.)

2d 415, 441.) Since PG&E's application merely recites the assertions of viability made by the developers without PG&E's independent assessment, PG&E was directed to produce its own analysis of the viability of the two projects.

7. PG&E's Amendment on Viability

On October 26, 1990, PG&E filed an amendment to its application. In its amendment PG&E argues D.90-06-022 states that utilities may renegotiate PPAs when there is significant possibility that a court would rule in favor of the QF should a dispute be taken to court. PG&E asserts that it cannot unequivocally state that its positions on the key claims (e.g., force majeure and site relocation) will prevail if Kern Bluff and Bear Mountain pursue their claims in court. Therefore, these negotiations are reasonable, according to PG&E.

PG&E notes that:

> "Under the Guidelines Decision [D.88-10-032], modification of an existing PPA is not appropriate if the QF is nonviable. The Commission, however, has expressly remarked that when 'there is a genuine question of the QF's viability, then negotiated modifications to the contract may constitute a reasonable settlement of the dispute.' D.88-10-032, Appendix A, mimeo. p. 5." (PG&E Amendment, p. 3.)

For both projects, PG&E reviews the 12 items identified by the Commission in assessing project viability (D.88-10-032, Guidelines, Item IV.3; 29 CPUC 2d 415, 441). PG&E concludes:

> "In summary, but for the claimed force majeure, the Kern Bluff project could probably have come on-line within its five-year deadline if the deadline had been extended for the duration of the force majeure and its permits. Similarly, if the Bear Mountain project is able to obtain its necessary permits, this project, too, could probably have become operational within its five-year deadline, whether at the existing site or at the relocated site. Although PG&E cannot state with certainty that either Kern Bluff or Bear Mountain would prevail on their

> claims, PG&E cannot unequivocally conclude that these projects are not viable." (PG&E Amendment, pp. 5-6.)

8. DRA Comments on PG&E's Amendment

On October 24, 1991, DRA filed comments on PG&E's amendment. DRA argues that PG&E's amendment begs the viability issue. DRA accepts that PG&E cannot predict the future when PG&E says it "cannot state with certainty" what the outcomes will be. But DRA claims that:

> "From this [PG&E's] filing, it is impossible to determine if PG&E believes that it is more likely than not that either project could obtain its permitting, if PG&E believes that it is less than likely, or if PG&E simply sets the permitting odds at 50-50. If PG&E has no opinion on the projects' viability, it shouldn't agree to contract modifications under the Guidelines. (See, e.g., D.88-10-032.)" (DRA Comments on Amendment, p. 2.)

DRA alleges that PG&E's amendment shows both projects face objections and obstacles that are very likely to be fatal. Further, based on the supplemental material, DRA reverses its earlier position that Bear Mountain has the requisite viability to allow it to seek contract modifications and that the settlement of the Bear Mountain dispute is reasonable except for the deferral and capacity price escalation. DRA now argues that PG&E should not have agreed to contract negotiations and that the entire Bear Mountain settlement is unreasonable.

DRA continues to believe that neither claim alleged by the projects is plausible (e.g. force majeure, ability to relocate site). Therefore, DRA renews its recommendation that the Commission deny PG&E's application.

9. Second Prehearing Conference

A second prehearing conference was held June 5, 1991. DRA renewed a motion to defer this proceeding until the Commission has reached a decision in PSE's petition for modification of D.87-09-025, which the ALJ took under submission. We deny the

motion. No party expressed a desire for hearings or briefs. The parties answered questions posed by the ALJ, presented their respective positions, and offered brief argument. The matter was submitted for a decision upon receipt of the transcript.

10. Discussion

The issue before us is whether to grant or deny PG&E's application for approval of the Agreement, including PG&E's requested ratemaking treatment. In making this decision we must determine if the contract modifications are reasonable and acceptable within our guidelines. Specifically, in relevant part the Guidelines state:

Viability:

> "Where the project would not be viable under the original terms of the contract, the modifications should not be accepted." (Guideline II.2.)

> "Examination of a QF's viability under the original contract is prerequisite to modifications to power purchase contracts. In considering the QF's viability, the utility must be mindful of its duty to deal in good faith with the QF." (Guideline IV.1.)

> "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 the dispute, or the QF may choose to bring a complaint before the Commission." (Guideline IV.2.)

New Project:

> "Where requested contract modifications would result in an essentially new project, the modifications should not be accepted. In considering whether or not the requested modifications represent an essentially new

> project, the utility must be mindful of its duty to deal in good faith with QFs." (Guideline II.3.)

> "Modifications such as significant changes in site, thermal load, fuel, plant size, cogeneration thermal host, or prime-mover technology suggest that the project is new." (Guideline II.3(a).)

> "Multiple modifications to a contract suggest that the project is new." (Guideline II.3(b).)

Deferrals:

> "In general, deferrals (paid or nonpaid) and buyouts should be considered only with QFs who have obtained all of the permits and certification necessary to go forward with their projects." (Guideline III.6.)

Price and/or Performance
Concessions and Ratepayers' Interests:

> "Contract modifications requested by QFs must be accompanied by price and/or performance concessions...commensurate in value with the degree of the change in the contract (from minor to major). The modifications and concessions obtained through negotiation should be valued with reference to the unamended contract and, where appropriate (e.g., deferrals and performance concessions), the current and expected value of the QF's power." (Guideline I.1.)

> "On-line date deferrals...may be considered only if the ratepayers' interests will be served demonstrably better by such deferral." (Guideline III.7.)

Kern Bluff may terminate its project whether or not it has a dispute over force majeure. Since Kern Bluff's agreement to terminate is linked to Bear Mountain, we will discuss the Kern Bluff project in our assessment of Bear Mountain.

Bear Mountain sought to move its project, and believed that the move was within its rights under the original contract. We view this site relocation as a modification to the contract, not something within Bear Mountain's rights under the original contract. In this context we will assess in turn our guidelines on project viability, new projects, deferrals, price and performance concessions, and the ratepayers' interests.

10.1 Project Viability

Bear Mountain believed it could change sites without a modification to its contract. PG&E disagreed. PG&E was not able to unequivocally state that it believed the project was viable. We accept that PG&E had a genuine question of the project's viability. PG&E is obligated to deal with the QF in good faith. Consistent with guideline IV.2, PG&E agreed to negotiate a settlement of the dispute.

Whether we approve the application and accept the Agreement, however, depends on whether we think Bear Mountain was viable when the dispute arose and whether the settlement is reasonable. Summarizing our guidelines on viability, we said in the Texaco decision (D.90-03-031):

> "A project is viable when, [but for the issue in dispute and]...a deferral, it would have been able to meet its contractual deadline for providing power to the utility. In order to be viable, the facility must receive, on a timely basis, the permits necessary for construction and operation. To be considered viable, a project must have a source of fuel, evidence that timely construction and operation is feasible and evidence that site control exists. To demonstrate viability, the project proponents must show that the project makes sufficient economic sense to merit financing, construction, and operation within the time limits set by the contract." (35 CPUC 2d 616, 620.)

Bear Mountain notified PG&E on January 9, 1989 that it desired to move sites. At that point under its SO2 PPA, Bear

Mountain had nearly 41 months (until May 29, 1992) to come on-line. According to the project timeline, Bear Mountain needed about 27 months to come on-line, including 9.9 months for the environmental review. There was adequate time, even if the EIR process took longer than planned.

PG&E's amendment addresses the 12 specific items we suggest be considered as a whole in assessing project viability. (Guideline IV.3.) These items, including project timing, all suggest that the project was viable, except perhaps for the absence of necessary permits and a cash flow analysis.

10.1.1 Permits

Bear Mountain had not applied for air quality and land use permits when the dispute arose, and has not thereafter applied (since the location of the project is in dispute and is one of the matters in this application). It would have been a costly and wasteful use of scarce private and public resources for Bear Mountain to pursue permits for a site it no longer desired to use only to demonstrate it could obtain its permits and was viable, making it eligible to negotiate with PG&E for an alternate site. It was reasonable for Bear Mountain to delay pursuit of its permits after the dispute arose.

PG&E and DRA question whether Bear Mountain would succeed, however, in obtaining necessary land use and air quality permits. Neither PG&E, DRA nor this Commission can precisely predict the outcome before the appropriate permitting agencies. We are satisfied that there was a reasonable chance that the necessary permits would have been obtained.

PG&E states that the original Bear Mountain site is zoned residential. This may suggest that permits will be hard to secure. PG&E and DRA speculate that it will be easier to secure permits at the new section, which includes a dump. A letter from the City Planning Department submitted with PG&E's amendment says that the new site "...is designated Low-density Residential in the general plan and zoned A (Agriculture)." (PG&E's Amendment, Exhibit H,

Attachment E.) Just as the original site is zoned residential, the new site is designated low-density residential. And, even though designated low-density residential, the new site is in a section that contains a dump. The residential specification is not conclusive.

In PG&E's dispute with Kern Bluff (that an EIR should have been foreseeable at the time Kern Bluff's predecessor in interest entered into the PPA in 1985), PG&E argues that no conditional use permits had been granted at or around the Kern Bluff project site since it was zoned residential in 1977. The original Bear Mountain site is near the Kern Bluff site. This may suggest that it will be very difficult for Bear Mountain to obtain a conditional use permit. To the contrary, we have no information of what--if any--projects were proposed for the area between 1977 and 1985, whether or not EIRs were prepared for any projects (if any were proposed), and what issues--if any--there were about use of the area.

PG&E telephoned the Bakersfield Planning Department for information on the City's requirements and process just before PG&E filed its amendment. PG&E included memoranda of two calls with its amendment. First, an Associate Planner told PG&E that the:

> "...Bear Mountain project is located even closer to town and the proposed elementary school site than the Kern Bluff project." Also "...some of the [Kern Bluff EIR] analysis is applicable [to the Bear Mountain EIR], but probably stricter mitigation measures will be required considering the location." (PG&E Amendment, Exhibit H, Attachment E.)

Second, the Planning Director told PG&E that:

> "...it would be very difficult for him to recommend approval of this project at that location [Bear Mountain at the original site in the PPA]. It is located in the same section as an operational school. It is also next to a future city park. The land for this park is now in escrow, however, the city may decide not to purchase the land because of an existing oil well. This park has been planned for five

> years. Most of the section where Bear Mountain is proposed has been approved for development. [The Planning Director] said this plant will not receive a good reception. He said it would be easier to recommend approval if it moves closer to the dump, as proposed." (PG&E Amendment, Exhibit H, Attachment E.)

DRA refers to the negative comments made by the City's Planning Department as support that at the time the dispute arose the project faced considerable opposition. The environmental impact review process had not been undertaken when the comments were made, however. Moreover, the comments were made in telephone calls without the Planning Department having time to fully consider the matter, including having the benefit of the complete EIR and any mitigation measures that Bear Mountain might have put forward. The comments were made nearly a year after the EIR process would have begun for Bear Mountain on its original timeline, and may have included some hindsight.

The Planning Director indicates it would be easier to recommend approval at the new site (Section 12, closer to the dump), but this does not say a recommendation for approval at the original site would not be made, especially after considering all factors that might arise in the EIR process. A recommendation of approval might be possible given that the Planning Department previously studied the Kern Bluff area, twice recommended negative declarations for the Kern Bluff site (which is close to the Bear Mountain site), and indicated that some of the environmental work done on the Kern Bluff site can be used in the Bear Mountain review. Nonetheless, even if the Planning Department had recommended rejection of the Bear Mountain project at the original site during the original project timeline, it is the Board of Zoning Adjustment, or the City Council on appeal, that makes the final decision.

We observe that the Planning Director reported that most of the section which includes Bear Mountain's proposed site has

been approved for development, but it is not clear which proposed site is being referenced, and we do not know what type of development has been approved (e.g., industrial, including existing and new oil wells; commercial; residential; mixed-use). A letter by the project proponent included with the amendment contains a photocopy of a photograph of the original site. The photocopy shows the area is an active producing oil field, with only oil production facilities and electric lines in plain view. If the original site is the location where development has been approved and it is approved for only residential development, that development will be on or near an existing, producing oil field.

The original site is apparently in the same section as either an existing or proposed school, but the school could be 3,000 feet (over one-half mile) or more away, given that Bear Mountain could have moved its project 3,000 feet and still have been within the site description for Section 13. Town is one mile away from the Kern Bluff site, and the Bear Mountain site is closer to town than Kern Bluff. Assuming the existing or proposed school is in town, the school might be about one mile away. The topology may impact whether the distance to the school is material (i.e., if there are hills and valleys, as there are in Section 12). The photocopy of the photograph does not reveal a school, but shows the land is not completely flat. Without further information we cannot conclude that a site permit would not be awarded because the site may be close to an existing or proposed school.

We also note that the original site is reported to be close to a future park, but that the City may decide not to purchase the land because of an existing oil well. Again, with this information we cannot conclude that a permit would not be awarded because of a possible park that may not be developed, particularly without the benefit of knowing the mitigation measures that Bear Mountain might propose.

DRA points to other opposition. Even a disputed project may be able to satisfy community concerns and obtain necessary

approvals. We need not prejudge the outcome. As we said in the Texaco decision:

> "Of course, we could never be certain that a project meets these viability criteria unless it is built and ready to offer power to PG&E on a timely basis. We do not need that level of assurance...." (35 CPUC 2d 616, 620.)

We only need a reasonable level of confidence that the project could obtain its permits, and we have that degree of confidence here. We base that confidence on the factors discussed above.

<u>10.1.2 Cash Flow and Economic Viability</u>

The Bear Mountain project has not obtained financing, and its proposal alleges it is too early in project development for this step. PSE is the corporate parent of Bear Mountain. PSE has 5 projects similar to Bear Mountain operating in PG&E's territory, 4 in Kern County. PSE has already received financing for another project which will receive a firm capacity price of $202/kW-yr. PSE's track record on similar projects supports an expectation that PSE would not have trouble financing Bear Mountain. Moreover, since the original negotiations, PSE has merged with Destec Energy, Inc., which is a wholly owned subsidiary of Dow Chemical. Dow Chemical is the largest QF developer in the United States, according to PSE. The merger potentially increases the financing options for the project.

Bear Mountain's financial advisor submitted a letter confirming its opinion that Bear Mountain could secure financing at $202/kW-yr. We are somewhat skeptical of this letter and give it reduced weight, however, since it is self-serving. Moreover, we note that Bear Mountain refused to submit a cash flow analysis. In

other circumstances that fact alone may be sufficient to deny the application.[3]

Nonetheless, this does not seem to be a case where the project is not economic except for the negotiated increased capacity price. Neither the proponent, PG&E nor DRA indicates any reason to believe that the project is not economically viable at $202/kW-yr. This is not a case where the QF will receive advance payments for a deferral, and might have an incentive to indicate economic feasibility even for a project that was not economic or that the proponent had decided to cancel.[4] And it was PG&E that sought the deferral, not Bear Mountain. Given these circumstances, we conclude that Bear Mountain was economically viable when the dispute arose.

10.1.3 Conclusion on Viability

PG&E and Bear Mountain had a dispute, PG&E had a genuine question of the project's viability, and, consistent with our guidelines, PG&E negotiated a settlement of the dispute which modified the SO2 contract. We are satisfied there was sufficient chance the necessary permits could have been obtained at the original site and that the project was economically healthy. We conclude that Bear Mountain was a viable project when the dispute arose, and that it was reasonable for PG&E to deal in good faith with Bear Mountain.

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3 See D.90-03-031, where lack of a cash flow analysis in significant part lead to our denying a PG&E application to amend four SO4 contracts.

4 Moreover, we note that Public Utilities Code § 2826(a) may also apply. This section requires the Commission to prohibit payments by an electric utility to a QF for deferring construction unless the QF agrees to repay all deferral payments if the project is not operating by the end of the deferral period.

10.2 Essentially New Project

The Guidelines also specify that where contract modifications would result in an essentially new project, the modifications should not be accepted. Bear Mountain proposes basically the same project. It is still a natural gas-fired enhanced oil recovery cogeneration project. The thermal load, fuel, plant size, cogeneration thermal host, and prime-mover technology all remain the same. It is a relocation from one producing oil field property to another producing oil field property of the same steam host, and the move does not materially affect the engineering, design or operation of the project. It interconnects to the PG&E system in the same location.

Both PG&E and DRA raise issues regarding the change in site. We say that "modifications such as significant changes in site...suggest that the project is new." (Guideline II.3(a).) We find that the site relocation in this case is not significant. The relocation is within the same township and range, to an adjoining section, for a move of approximately 3,000 feet. While that may be very significant in a densely used or controversial area (e.g., where a particularly unique environment is to be preserved), this move is to an adjoining property owned by the same steam host all within producing oil recovery fields.

Another measure of whether a project is essentially new is whether the QF seeks multiple modifications to the contract. Bear Mountain did not seek multiple modifications.

We specifically direct utilities, in considering whether a modification represents an essentially new project, to be mindful that they must deal in good faith. We believe PG&E did that. This is not the case of a QF attempting to broker a contract or fundamentally and dramatically change its project for its own gain. This is a QF seeking to move sites within an existing oil field in conjunction with its steam host. The contract modification sought by Bear Mountain does not make this an essentially new project.

Even though PG&E disputed whether Bear Mountain could relocate its site, PG&E was correct to deal in good faith.

10.3 Deferrals

DRA points to our guideline that deferrals should in general be considered only with QFs who have obtained all permits and certificates. As we said above, it would have been a waste of both private and government resources for Bear Mountain to seek permits for a site it no longer wished to use. Additionally, if the project had been forced to proceed, we have a sufficient level of confidence that the project had adequate time and likelihood of getting its permits at the original site.

DRA admits that having all permits and certificates is not an absolute prerequisite, but argues it shows a heightened concern by the Commission that a project demonstrate viability in the case of a deferral. That is correct. We have a heightened concern with project viability if a QF seeks to defer a project and retain a particularly advantageous standard offer. This is especially true if granting the deferral would "breathe life into an otherwise moribund QF."

In this case, however, PG&E, not Bear Mountain, sought the project deferral. PG&E indicates the deferral was sought so that "...capacity that is delivered by the Bear Mountain project will be paid for at prices more likely to be in step with the market." (PG&E Application, p. 3.) This is neither a case of a QF seeking to defer a project to retain a particularly advantageous standard offer, nor to breathe life into an otherwise moribund project.

Whether intended or not, however, paying above the prices in the standard offer and having the project deferred may appear to be a paid deferral. We have an especially heightened concern for paid deferrals, particularly those where an advance payment is made before the project comes on-line. (E.g., see D.90-03-031.)

This is not a paid deferral, however. Bear Mountain appears to argue that it deserved a higher capacity price for 1992,

consistent with the petition filed by its corporate parent (PSE, Inc.) for modification of D.87-09-025. PG&E sought a seven and one-half month deferral, to 1993. If Bear Mountain sought payment for the deferral it would have sought an increase of the 1992 price to a 1993 price. It did not. Even though the agreement provides for an increase in the capacity payment and a deferral, the two are not closely linked.

Therefore, this deferral satisfies our Guidelines wherein deferrals, whether paid or nonpaid, should in general be considered only with QFs who have obtained all permits and certification, and should be subject to our viability guidelines. (Guideline III.6.) For the reasons stated above, it was reasonable for Bear Mountain to not have its permits, and the project meets our viability guidelines. The increased capacity price is not a paid deferral.

10.4 Price and/or Performance Concessions and Ratepayers' Interests

We specify that contract modifications requested by QFs must be accompanied by price and/or performance concessions commensurate in value with the degree of the change in the contract--from minor to major. We also state that the modification should be valued with reference to the unamended contract and the current and expected value of the QF's power. (Guideline I.1.) The contract modification requested by Bear Mountain is minor. The price and performance concessions may consequently be small, and they are. We also specify that on-line date deferrals may be considered only if the ratepayers' interests will be served demonstrably better by such deferral. (Guideline III.7.) Even though the benefits are small, they are enough to justify the Agreement, even with the deferral. We will assess in turn the various ratepayer benefits, and the price and performance concessions made by Kern Bluff and Bear Mountain, as advanced by PG&E.

10.4.1 Kern Bluff Termination

First, PG&E estimates a net ratepayer benefit of between $32 million and $48 million (1990 net present value) for the termination of the Kern Bluff PPA. This net benefit is estimated by measuring the excess payments above current estimates of avoided cost that will be saved by contract termination. Current estimates of avoided cost range from a "low" estimate (based on PG&E's forecast of no new need for capacity until 1999) to a "high" estimate (based on DRA's forecast of capacity need in 1991).

Kern Bluff asserts that, but for the occurrence of the *force majeure* event, it would have been on-line within the original five years. PG&E agrees, but states that given the *force majeure* PG&E cannot conclude that Kern Bluff remains viable. The Agreement provides that Kern Bluff suspend project development while PG&E seeks Commission approval of this application. This includes a suspension of the environmental review process. If we approve the application, the Kern Bluff project is terminated. If we deny the application, the Agreement provides that Kern Bluff has 10 months and 3 weeks to come on-line.[5] Kern Bluff states it needs about 16 months for equipment procurement, construction, and commencement of commercial operations once it resumes project development. (PG&E's Application, Exhibit D, Testimony of Albert J. Smith III, p. 4.) There will be additional time needed to complete the environmental review process, to the extent it cannot be done simultaneously with equipment procurement and construction. Kern Bluff agreed at the second prehearing conference that it is

5 The Agreement provides that the period from November 21, 1989 to the date of the Commission decision is added to the original five-year deadline of October 14, 1990. This makes the final on-line date 10 months, 3 weeks after the date of the Commission decision. For example, if the Commission decision is issued November 21, 1991, this adds two years to October 14, 1990. That would make the new deadline October 14, 1992, or 10 months, 3 weeks from November 21, 1991.

unlikely to be able to come on-line without winning a lawsuit against PG&E to extend the deadline to account for the period of project suspension due to the force majeure. (Tr. p. 20.)

Therefore, even if we deny the application, there is considerable doubt that Kern Bluff will come on-line under terms of the original PPA. PG&E's estimate does not account for this possibility and the related possibility that ratepayers may have already gotten the benefit of Kern Bluff's termination. Further, PG&E's estimate does not account for the possibility that Kern Bluff may not sue PG&E to get extra time under the force majeure. Nor does it account for the possibility that Kern Bluff may lose if it does sue. Nor does PG&E's estimate seem to take account of an anomaly: It appears inconsistent for Kern Bluff to agree to project termination in the Agreement, but, if the Agreement fails, to fight, and incur costs, to bring a project on-line it had otherwise agreed to terminate. Moreover, PG&E's estimate does not recognize that, but for the Agreement, the project fee (letter of credit) of $235,000 would not be refunded. Thus, PG&E's estimate of net ratepayer benefits of $32 million to $48 million is excessive.

There may still be benefits for project termination, however. Project termination will clearly avoid the costs and uncertainties of a lawsuit. Also, project termination mitigates damage to the business relationship between PG&E and PSE, which has a number of operating facilities under contract to PG&E. Therefore, project termination benefits to ratepayers may be positive, but are very small and severely discounted, with project termination clearly costing ratepayers $0.24 million for the project fee refund.

10.4.2 Bear Mountain Deferral

PG&E estimates the Bear Mountain deferral provides a net ratepayer benefit of $3.95 million to $6.24 million. We find Bear Mountain was viable at the time the dispute arose, and the deferral is not "breathing life into an otherwise moribund QF," so that

there is a benefit to the deferral. But we find that PG&E overestimates this benefit. PG&E's base case is premised on paying Bear Mountain $208/kW-yr rather than $202/kW-yr. (PG&E Application, Attachment F, Exhibit 4.) This error overstates the deferral benefit by $1.58 million (1990 net present value). Correcting PG&E's estimate, however, still yields a positive result, in the range of $2.37 million to $4.66 million.

Additionally, PG&E fails to estimate the benefit to Bear Mountain, and the cost to ratepayers, of agreeing to only $202/kW-yr of the $208/kW-yr being subject to the terms and conditions of Appendix D (Adjustment of Capacity Payments in the Event of Termination or Reduction) of the PPA. That is, just as the deferral renders benefits by reducing the overpayments above avoided cost, a premature termination or reduction in capacity deliveries could reduce overpayments and yield a benefit. But the benefit is reduced by the reduced payment PG&E, and ratepayers, would get from Bear Mountain by the Agreement. This payment, should it happen, varies depending on the years into the contract when premature termination or reduction occurs, and whether required notice is given. This could reduce deferral benefits in a single year by as much as $0.80 million (1990 net present value), and over the 20 years would reduce deferral benefits by up to $0.52 million (1990 net present value). Adjusting the above corrected estimates, the benefits are still positive, in the range of $1.85 million to $4.14 million.

Our Guidelines provide that on-line deferrals will be considered only if ratepayers' interests will be served demonstrably better by such deferrals. (Guideline III.7.) DRA argues that the $3.95 million to $6.24 million (corrected to $1.85 million to $4.14 million) in benefits of the deferral must be weighed against $21.36 million to $30.36 million in ratepayer savings if Bear Mountain fails. According to DRA, but for the deferral, Bear Mountain may not be able to come on-line due to permitting delays or denials, as demonstrated by Kern Bluff's

experience. If Bear Mountain thus fails, ratepayers avoid $21.36 million to $30.36 million of payments pursuant to Bear Mountain's SO2 compared to updated estimates of avoided costs.

However, we find Bear Mountain was viable at the time the dispute arose and is still viable. Therefore, the project is reasonably likely to come on-line, and we are not persuaded that but for the deferral ratepayers would save $21.36 million to $30.36 million.

Finally, our guidelines indicate the modifications should be valued in reference to the unamended contract. The deferral saves ratepayers $3.86 million (1990 net present value) compared to the unamended contract.

We note that in D.91-09-029 we rejected PSE's petition for modification of D.87-09-025, wherein PSE sought to escalate the SO2 capacity price. We thus have rejected the theory on which Bear Mountain relied when it argued the capacity price should be escalated as well as extended. Nonetheless, the parties had a dispute and negotiated a result. The negotiated result of $208/kW-yr reduces benefits to ratepayers, but still yields positive net benefits, and is reasonable.

<u>10.4.3 Bear Mountain Curtailment</u>

PG&E estimates the Bear Mountain curtailment provides net ratepayer benefits of $2.11 million. We agree.

<u>10.4.4 Conclusion on Net Benefits</u>

Therefore, the tangible benefits are in the range of $3.72 million to $6.01 million (1990 net present value), based on between $1.85 million and $4.14 million for the deferral (this range includes the $3.86 million when compared to the unamended contract), $2.11 million for the curtailment and negative $0.24 million for the project fee refund. There are also intangible benefits from avoiding the costs and uncertainty of litigation, the release of all claims, and the mitigation of any possible negative effect on the business relationship between PG&E and PSE. The combined tangible and intangible benefits are small net

benefits to ratepayers compared to PG&E's estimate (of $38.33 million to $56.35 million), and compared to the ratepayer payments to Bear Mountain under the unamended contract (e.g. $54.9 million 1990 net present value for capacity alone). But they are sufficient to make ratepayers demonstrably better off.

10.5 Reasonableness Reviews

PG&E requests that all payments made pursuant to the Agreement be found reasonable in the year in which they are made, and that PG&E be authorized to recover all such payments through its ECAC (or any other mechanism we establish for full recovery of such payments), subject to reasonableness review of PG&E's administration of the contract. Further, PG&E asks that the approval be final and not subject of further reasonableness review, except for Agreement administration. We grant this request.

Insulation of the Agreement from future Commission review is entirely consistent with the conceptual underpinnings of our standard offers. As we explained in D.88-10-032:

> "Standard offers were developed as 'package deals' - 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." (29 CPUC 2d 426.)

Further, as we said in D.91-07-054:

> "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.' [29 CPUC 2d 440.] This is because the original contract containing Commission-sanctioned Standard Offer terms is presumptively reasonable, as D.88-10-032 explains, _supra_." (mimeo. p. 17.)

The Agreement provides for concessions commensurate in value with the contract modifications. Just as we find standard

offers reasonable, with automatic approval of the terms guaranteed, we find the Agreement reasonable and payments made thereunder recoverable from ratepayers without further review (except review as to the reasonableness of Agreement administration).

11. Conclusion

We approve PG&E's application. PG&E and Bear Mountain had a dispute, PG&E had a genuine question of the project's viability, and the parties agreed to negotiate a settlement of the dispute. The Bear Mountain project was viable at the time the dispute arose. Bear Mountain's request did not make this an essentially new project. It was reasonable for Bear Mountain and PG&E to discuss site relocation before Bear Mountain obtained all its permits. The deferral was not sought by Bear Mountain, and did not breathe life into an otherwise lifeless project. The Agreement is not a paid deferral. The contract modifications requested by Bear Mountain are minor and the price and performance concessions are commensurate in value. The deferral makes ratepayers demonstrably better off, even if only by a relatively small amount. Therefore, we approve PG&E's application.

Findings of Fact

1. On October 14, 1985 PG&E and Kern Bluff executed an SO2 for sales and purchases of 45 MW of capacity and associated energy.

2. On May 29, 1987 PG&E and Bear Mountain executed an SO2 for sales and purchases of 42 MW of capacity and associated energy.

3. These SO2s provide that each contract expires if the project is not on-line within five years of contract execution.

4. On November 4, 1988 Kern Bluff notified PG&E that it experienced a force majeure.

5. On January 29, 1989 Bear Mountain notified PG&E that it desired to relocate the project about 3,000 feet to a site different from that described in the SO2.

6. PG&E disputes that Kern Bluff experienced a force majeure and that Bear Mountain may relocate under terms of the original SO2.

7. Bear Mountain had not applied for its air quality and land use permits by the time the dispute arose, and has not since applied.

8. On March 2, 1990, PG&E, Kern Bluff and Bear Mountain executed an agreement that terminates the Kern Bluff SO2 and modifies the Bear Mountain SO2.

9. Kern Bluff may agree to terminate its SO2 whether or not it has a dispute with PG&E over a claim of force majeure.

10. PG&E and Bear Mountain had a dispute, PG&E had a genuine question of the project's viability, and PG&E agreed to negotiate a settlement of the dispute as provided in our guidelines.

11. It would have been a costly and wasteful use of scarce private and public resources for Bear Mountain to pursue permits for a site it no longer desired to use only to demonstrate it could obtain its permits and was viable, making it eligible to negotiate with PG&E for an alternate site.

12. There is a reasonable likelihood that at the original site on an existing, producing oil field, Bear Mountain could have obtained the necessary permits and that the project was economically viable.

13. Bear Mountain was viable when the dispute arose.

14. Bear Mountain's requested contract modification does not make the project an essentially new project.

15. The deferral was not sought by Bear Mountain and did not breathe life into an otherwise moribund project.

16. The deferral of the Bear Mountain project is not a paid deferral.

17. The deferral of the Bear Mountain project satisfies our Guidelines on deferrals, since it was reasonable for Bear Mountain

to not have its permits at the time the dispute arose or after, and the project is viable.

18. The contract modification requested by Bear Mountain is minor and the price and performance concessions may consequently be small.

19. If we deny the application, there is considerable doubt that Kern Bluff will come on-line under the terms of the original PPA because Kern Bluff needs 16 months for equipment procurement, construction, and commencement of commercial operations (plus time for the environmental review process to the extent it cannot be done simultaneously with equipment procurement and construction) but will have only 10 months and 3 weeks under the terms of the Agreement.

20. PG&E's estimate of net ratepayer benefits from Kern Bluff's termination is excessive because it does not account for the possibility that Kern Bluff cannot come on-line under the terms of the original PPA, that Kern Bluff may not sue PG&E for more time, that Kern Bluff may lose even if it does sue, and that it is anomalous for Kern Bluff to agree to project termination in the Agreement but, if the Agreement fails, to fight and incur costs to develop a project it had otherwise agreed to terminate.

21. PG&E's estimate of net ratepayers benefits from Kern Bluff's termination does not account for the $0.24 million project fee refund.

22. There are intangible benefits from Kern Bluff's termination, including avoiding the costs of a lawsuit and uncertainties, however remote, along with mitigating any possible damage to the business relationship between PG&E and Bear Mountain's corporate parent, PSE.

23. The Bear Mountain deferral provides net ratepayer benefits of between $1.85 million and $4.14 million (1990 net present value) compared to updated estimates of avoided costs, and

saves ratepayers $3.86 million (1990 net present value) compared to the unamended contract.

24. The Bear Mountain curtailment provides net ratepayer benefits of $2.11 million (1990 net present value).

25. The combined ratepayer net benefits are small, consistent with the minor change in the contract requested by Bear Mountain, but are sufficient to make ratepayers demonstrably better off.

<u>Conclusions of Law</u>

1. Bear Mountain's site relocation is a modification to the SO2 contract, not something within Bear Mountain's rights under the original contract.

2. The Agreement is reasonable and should be approved.

3. All payments made pursuant to the Agreement and the Bear Mountain PPA as modified by the Agreement are reasonable in the year in which they are made, and PG&E should be authorized to recover all such payments through PG&E's ECAC (or any other mechanism established by the Commission for the full recovery of such payments), subject to reasonableness review over the life of the Agreement of PG&E's administration of the Agreement.

4. The Commission's approval of the Agreement should be final and not subject to further review, except for PG&E's administration of the Agreement. This approval is final and not subject to further reasonableness review, except for review of Agreement administration.

5. The application should be granted.

6. This order should be effective today so that PG&E, Kern Bluff, and Bear Mountain may proceed without delay in fulfilling the Agreement and without any further delay to the final on-line date for Bear Mountain.

O R D E R

IT IS ORDERED that:

1. The approval sought by Pacific Gas and Electric Company (PG&E), of the "Settlement Agreement, Mutual Release, and Covenant Not To Sue" (Agreement) between PG&E, Kern Bluff Limited and Bear Mountain Limited, is granted. PG&E is authorized to recover all payments made for energy and capacity pursuant to the Agreement through PG&E's Energy Cost Adjustment Clause (or any other mechanism established by the Commission which provides for PG&E's recovery of such costs), subject to reasonableness review of PG&E's administration of the Agreement. This approval is final and not subject to further reasonableness review, except for review of Agreement administration.

2. The proceeding is closed.

This order is effective today.

Dated November 6, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
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