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Decision 92-05-012 May 8, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company for an expedited order approving amendments to a Power Purchase Agreement with JRW Associates, L.P.	Application 92-01-030 (Filed January 15, 1992)

O P I N I O N

I. Summary

This decision approves two agreements, consisting of four documents, entered into between Pacific Gas and Electric Company (PG&E) and JRW Associates, L.P. (JRW). These agreements modify the Standard Offer No. 2 Firm Capacity and Energy Power Purchase Agreement Between Interpro International Inc.[1] and PG&E (PPA) that was entered into on December 9, 1985 for a project located in Atwater, California.[2] The two agreements modify the capacity and energy prices that PG&E is obligated to pay JRW. In addition to other contract modifications, the first agreement also modifies the on-line date for the project.

II. Background

PG&E filed its application on January 15, 1992 seeking approval of two agreements between PG&E and JRW. Notice of PG&E's

1 JRW succeeded to the interests of Interpro International Inc.

2 The project itself is referred to as the J. R. Wood, Inc. cogeneration project. JRW is the owner, operator, and developer of the project.

application appeared in the Commission's Daily Calendar on January 24, 1992.

In Article 7 of the PPA, the term of agreement provides that if the actual operation date of the project does not occur within five years of the execution date, the PPA shall terminate. Prior to the amendment of the PPA, PG&E was obligated to pay JRW for firm capacity at the contract capacity price under Option 2 as set forth in Appendix C of the PPA. The contract capacity price is derived from PG&E's full avoided costs as approved by the Commission. With respect to the energy payment provision, PG&E was obligated to pay JRW at prices equal to PG&E's full short-run avoided operating costs as approved by the Commission.

The first agreement between PG&E and JRW was signed by JRW on December 13, 1990 and by PG&E on December 21, 1990 (the December 21, 1990 Agreement). The execution of the December 21, 1990 Agreement also resulted in the execution of the First Amendment to the PPA (First Amendment). Both of these documents were included as part of PG&E's application, as was a copy of the PPA.

The second agreement, which PG&E and JRW entitled Settlement Agreement, is dated January 14, 1992 and was signed by JRW on January 10, 1992 and by PG&E on January 14, 1992. Execution of the proposed Second Amendment is made contingent upon certain actions by the Commission.[3] The Settlement Agreement and the

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3 The proposed Second Amendment will be executed "when a CPUC order becomes final 1) approving this Settlement Agreement, the December 21 Agreement and the First Amendment; 2) finding that the terms of the Settlement Agreement, the December 21 Agreement, and the First Amendment are reasonable and adequately protect PG&E's ratepayers' interests; and 3) authorizing the recovery of all payments to be made to Seller [JRW] pursuant to this Settlement Agreement and the First Amendment through PG&E's Energy Cost

(Footnote continues on next page)

proposed Second Amendment were also included as part of the application. In addition, the application included the Prepared Testimony of Harold E. Dittmer of JRW[4] and the Prepared Testimony of Marc L. Renson of PG&E.[5]

The December 21, 1990 Agreement and the First Amendment were the result of negotiations that began in July 1990. According to the prepared written testimony of Mr. Dittmer, in the Second Quarter of 1990, JRW became aware of some unanticipated delays in the scheduling of both the natural gas and the electrical interconnections for the project. The delays in scheduling allowed little margin for error if the project was to meet its December 9, 1990 on-line date. To avoid jeopardizing the project, and in an effort to avoid a lengthy dispute with PG&E over the responsibility for delays in the interconnection schedules, the JRW witness approached PG&E around July 1990 to explore a possible modification of the terms of the project's PPA. These negotiations led to the December 21, 1990 Agreement and the First Amendment.

PG&E did not seek advance approval from the Commission of the December 21, 1990 Agreement and the First Amendment because JRW

(Footnote continued from previous page)

Adjustment Clause ('ECAC') or such successor mechanism as the CPUC may adopt for recovery of purchased power costs subject only to CPUC review at [sic] PG&E's administration of this Settlement Agreement, and the PPA as modified by this Settlement Agreement, the December 21 Agreement, and the First Amendment." (Settlement Agreement, pp. 2-3.)

4 During the time of the negotiations and execution of the agreements and amendments, Mr. Dittmer was the President of JRW Cogen, Inc. JRW Cogen, Inc. is the managing General Partner of JRW.

5 Mr. Renson is the project coordinator for the JRW project, and negotiated the agreements and amendments on PG&E's behalf.

was at the time negotiating permanent financing for the project. The project financing included the expectation that the project would be eligible for tax benefits under the 1986 Tax Reform Act of approximately $1 million because the project was expected to be paralleled with PG&E's system prior to the end of 1990. The tax benefits were to expire on December 31, 1990, and JRW expected the project financing to close prior to that time. JRW informed PG&E that advance Commission approval of the amended PPA was undesirable because the financing would not close prior to the end of 1990 if the financing of the project was subject to Commission approval. JRW estimated that a final Commission decision approving the amended PPA would not come earlier than March 1, 1991. Due to the significant tax benefits involved, JRW sought PG&E's agreement on this point.

According to Mr. Dittmer's testimony, although PG&E preferred to seek advance Commission approval of the amended PPA, PG&E understood the financial implications that a post-1990 Commission approval would have on the project financing. PG&E was willing to forego advance Commission approval of the amended PPA provided that the project met strict deadlines for two project milestones. The first deadline called for the completion of the pre-parallel inspection for the project. The second deadline called for the commencement of the project's Firm Capacity Demonstration Test (FCDT).

The two deadlines were agreed to toward the end of November 1990, and were incorporated into Paragraph 2 of the December 21, 1990 Agreement. Under the terms of Paragraph 2, PG&E agreed to forego seeking advance Commission approval of the December 21, 1990 Agreement and the First Amendment in exchange for the following: (a) that within 12 working days after receipt of written notification from PG&E that PG&E's interconnection facilities are capable of safe and reliable operation, JRW schedule and conduct a pre-parallel test; (b) that the FCDT begin within 15

working days after receiving written notification that the project was cleared for operation by PG&E; and (c) that if PG&E has to curtail natural gas supplies to the project during the FCDT, and the FCDT is interrupted, a second FCDT will be scheduled within the next 15 days, unless PG&E believes that additional time is required. In no event was the FCDT to be completed any later than April 30, 1991.

These deadlines were designed to show that the project was capable of meeting its original operational deadline had the interconnection facilities been installed in late October or early November 1990 as originally contemplated. By completing these two deadlines, the project would also demonstrate the viability and the reasonableness of the underlying PPA.

PG&E witness Renson's testimony addressed the project's viability to come on line by the PPA's five-year deadline. According to PG&E, the developer of the project had an established record for bringing projects on line. JRW submitted a project description and interconnection study cost form on June 8, 1990. Once PG&E received the money from JRW to start the work, a detailed interconnection study for the project began in early June 1990. JRW chose not to establish a $5 per kilowatt (kW) project fee to reserve its interconnection priority because the time span between JRW's request for an interconnection study and PG&E's submission of a Special Facilities Agreement was expected to be less than three months.

On September 26, 1990, JRW provided PG&E with a copy of its conditional use permit and a copy of the authority to construct permit issued by Merced County. A copy of the project building permit was received by PG&E on October 3, 1990. JRW also supplied a construction schedule for the project to PG&E. Based on JRW's past experience and PG&E's experience with JRW, it was reasonable to expect that the project could be ready for operation by December 9, 1990 assuming that PG&E had completed its

interconnection facilities. By late September of 1990, all the elements of the project's design were finalized.

On September 26, 1990, JRW provided a pro forma financial statement to PG&E regarding the economic viability of the project. Based on the past experience of JRW, the numbers appeared reasonable to PG&E. Also on September 26, 1990, PG&E received a copy of the thermal energy supply agreement between JRW and J. R. Wood, Inc., the project's steam host. JRW also supplied proof of access to a backup fuel that could be used by the project in the event that PG&E could not complete its gas interconnection by December 9, 1990.

As part of the December 21, 1990 Agreement and the First Amendment, the price that PG&E pays to JRW for firm capacity was reduced from $209 per kW year to $201 per kW year for the entire 30-year term of the PPA in exchange for an extension of the operational deadline for the delivery of energy to April 30, 1991. According to the First Amendment, the $201 per kW year price represents a discount from PG&E's full avoided costs as approved by the Commission. In addition, and as further consideration for the extension of the deadline for energy deliveries, the project is subject to up to 3,000 hours of curtailment annually during off-peak and super off-peak hours in each year throughout the term of the PPA. The curtailment can be either physical or economic curtailment, or both, as determined by PG&E's in its sole judgment and discretion.

According to PG&E witness Renson, the reduction in capacity price will benefit PG&E's ratepayers by $590,000 over the

term of the PPA.[6] The 3,000 hours of curtailment will benefit PG&E by providing operational flexibility. However, because the energy deliveries under the PPA receive PG&E's published short-run avoided cost prices and due to the feedback loop problem, the curtailment provision cannot be quantified.

The First Amendment also amended the scheduled operation date of the project to December 1, 1990. In addition, Article 7 of the PPA was amended to read as follows: "This Agreement shall be binding upon execution and remain in effect thereafter for 30 years from the actual operation date; provided, however, that it shall terminate if Seller fails to meet the deadline set forth in Paragraph 2 of the Agreement dated December 21, 1990, or if the actual operation date does not occur before April 30, 1991."

According to the JRW witness, the financing negotiations for the project broke down in mid-December 1990. However, the witness still believed that the project would commence deliveries of energy before the end of the year, and that tax benefits could be preserved.

Site personnel were working on the project in anticipation of receiving the transformer on December 21 or 22 of 1990. The transformer was the last piece of critical path equipment that was needed before startup. However, when the transformer was not delivered to the project site prior to Christmas for the reasons described below, it was clear to JRW that all hope of making initial energy deliveries by December 31, 1990 had to be abandoned, and that the tax benefits would be lost. JRW

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6 The expected benefits were derived using PG&E's annualized cost of a combustion turbine from PG&E's March 13, 1987 OIR-2 filing, and the Commission Division of Ratepayer Advocates' (DRA) Robert Kinosian's forecast of capacity values as used in his PTI Crockett deferral analysis.

continued with the task of completing the project and meeting the deadlines specified in the December 21, 1990 Agreement.

In a letter dated January 3, 1991, PG&E notified JRW that the 12-working day period for completing the pre-parallel test would commence upon receipt of the notice. JRW received PG&E's notice on January 7, 1991.

On January 3 or 4 of 1991, Mr. Dittmer learned that the transformer that was being transported by truck from Pennsylvania to the project had been damaged in transit. Initial reports led Mr. Dittmer to believe that the transformer could be repaired quickly and be back on its way to California within a matter of days. The damage to the transformer had occurred on December 21, 1990.

After receiving PG&E's notice on January 7, 1991, Mr. Dittmer began an investigation to determine whether the transformer could be repaired, tested, shipped, and installed at the project site in time to complete the pre-parallel inspection by January 22, 1991. By January 11, 1991, it became evident to JRW that the damage was more extensive than previously thought, and there was no possibility that the transformer would be on the project site by the end of January 1991. Mr. Dittmer then requested a meeting with PG&E representatives, which meeting took place on January 14, 1991.

At the January 14, 1991 meeting, Mr. Dittmer outlined the facts about the transformer damage to PG&E, and the impossibility of meeting the 12-working day deadline for completion of the pre-parallel inspection. On January 15, 1991, JRW gave PG&E formal written notice of a force majeure event which prevented JRW from meeting its obligations under the terms of the PPA, as amended. Mr. Dittmer then began assembling the documentation in support of its force majeure claim, and forwarded the documentation to PG&E on February 8, 1991. PG&E reviewed the materials that JRW submitted,

and notified Mr. Dittmer that PG&E did not agree with the force majeure claim.

Although PG&E and JRW were unable to resolve whether the damage to the transformer constituted a force majeure event, the two were able to eventually resolve the force majeure dispute. Under the Settlement Agreement dated January 14, 1992, and the proposed Second Amendment, PG&E and JRW, subject to Commission approval, have agreed to compromise the dispute, and JRW will agree to a 5% reduction in energy payments for the entire 30-year term of the PPA. If the Commission approves the Settlement Agreement, Article 3(b) of the PPA would be deleted, and the following substituted in its place: "PG&E shall pay Seller (JRW) for energy, except for energy delivered during periods of economic curtailment, at prices equal to 95 percent of PG&E's full short-run avoided operating costs as approved by the CPUC." In exchange, JRW agrees to the relinquishment and abandonment of its force majeure claim.

As part of the Settlement Agreement, PG&E and JRW also agreed to submit the December 21, 1990 Agreement and the First Amendment to the Commission for approval as part of this application.

According to Mr. Renson, the expected net ratepayer benefits resulting from the Second Amendment will be from $1,100,000 to $1,800,000 over the term of the PPA. These expected benefits were derived using two forecasts. The first calculation was based on the Commission's staff report in PG&E's Application (A.) 86-04-014 and A.85-12-050. The other forecast is based on the California Energy Commission's short-run energy cost forecast dated November 9, 1987.

The project began energy deliveries on April 21, 1991, and the FCDT was completed on April 30, 1991. Through October 31, 1991, the project has operated at an 84% availability factor, and achieved a capacity factor of 97.4% during the peak months of June, July, and August of 1991.

PG&E's application requests that the Commission issue an order determining that:

> "(1) the Agreements and the Amendments to the PPA described herein are reasonable and prudent as executed; (2) the interests of PG&E's ratepayers are adequately served by the Agreements and the Amendments; (3) all payments made pursuant to the Agreements and the PPA, as modified by the Amendments, are reasonable and PG&E is authorized to recover all such payments in ECAC or any successor mechanism; (4) the Commission's approval is final and not subject to further reasonableness review, except for review of the reasonableness of PG&E's administration of the PPA, as amended."

DRA submitted for filing its "Comments Of The Division Of Ratepayer Advocates On The Application For Approval By Pacific Gas and Electric" on February 25, 1992, one day after the protest period had expired. DRA's pleading, which was not accompanied by a motion to accept late-filed comments, was rejected for filing by the Commission's Docket Office as untimely.

On March 3, 1992, DRA filed its "Motion To Accept Late-Filed Comments Of The Division Of Ratepayer Advocates." Accompanying the motion was DRA's "Comments Of The Division Of Ratepayer Advocates On The Application For Approval Of The Pacific Gas and Electric Company (Corrected)."[7] DRA's motion requests that the corrected comments be accepted for filing because no party will be harmed by the late filing of the corrected comments, and represents that PG&E supports the changes that are contained in DRA's corrected comments.

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7 DRA's corrected comments includes a passage from Decision (D.) 92-01-014, which modified D.91-06-050 (the Dexcel decision). In the late-filed comments that were rejected by the Docket Office, DRA cited only to D.91-06-050, and not to D.92-01-014.

DRA's corrected comments object to PG&E's application insofar as PG&E requests that the Commission determine that all payments made under the amended PPA are presumed to be reasonable and that the payments are recoverable in Energy Cost Adjustment Clause (ECAC) proceedings without further reasonableness review.

DRA believes that the Commission in D.91-06-050, as modified by D.92-01-014, and D.91-07-054 adopted language which qualified the recovery of payments made under an amended agreement. DRA states that "PG&E has indicated in the attached letter that it will support DRA's proposed modifications." Attached to DRA's comments is a letter from PG&E dated February 25, 1992 and signed by PG&E witness Renson. In PG&E's letter, PG&E states that it would be willing to modify its request in its application, found at pages 1 and 8, by modifying Request No. 4 and adding Request No. 5 as follows (additions are indicated by underlining and deletions by strikeout):

> "(4) the Commission's approval is final and not subject to further reasonableness review, except ~~for review of the reasonableness of PG&E's administration of the PPA, as amended,~~ as otherwise provided herein;
>
> "(5) 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."

DRA recommends that PG&E's application be granted subject to the inclusion of the above language.

No other protests were received in connection with PG&E's application.

III. Discussion

No response in opposition to DRA's motion to accept its late-filed corrected comments was filed. Accordingly, we will

grant DRA's motion to accept the late-filed corrected comments, and accept the corrected comments for filing and inclusion in the Commission's formal file. No other protests were filed in connection with this application. Since there was no request for a hearing, and because PG&E agrees with DRA's comments, we find that no hearing is necessary in this proceeding.

The relief requested by PG&E requires us to determine whether it was reasonable for PG&E to enter into the agreements to modify the PPA. One of the areas of concern that we have with the modification of the PPA in this case, and which we generically expressed in Rulemaking (R.88-06-007) and D.88-10-032, is the five-year on-line requirement that is contained in standard offer contracts. The prepared testimony shows that the project did not come on line until some time in the first quarter of 1991, five years and several months after the initial execution of the PPA on December 9, 1985. The project was not able to meet the original five-year on-line requirement because of some delays in the scheduling of the natural gas and electrical interconnections for the project. This problem resulted in the deferral of the scheduled operation date to December 1, 1990 and a revision of the termination provision without Commission approval.

In Sections III-6 to III-10 of the Final Guidelines For Contract Administration Of Standard Offers (Final Guidelines),[8] we listed several criteria that contract modifications should meet if the contract on-line date is deferred. In addition to the viability guidelines contained in Section IV of the Final Guidelines, the following criteria should be followed where the on-line date is deferred:

> "6. In general, deferrals (paid or non-paid) and buyouts should be considered only with

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8 The final guidelines are contained in Appendix A to D.88-10-032.

QFs [qualifying facilities] who have obtained all of the permits and certification necessary to go forward with their projects. As with all other types of contract modifications, deferrals and buyouts are subject to the viability guidelines outlined under Section IV.

"7. On-line date deferrals and/or contract buyouts may be considered only if the ratepayers' interests will be served demonstrably better by such deferral.

"8. The reasonableness of contract deferrals and buyouts will be determined by evaluating the need for generating capacity, the length of deferral, the costs avoided by deferring or buying out unneeded capacity, and the benefits (both monetary and non-monetary) granted projects acceding to deferral or buyout.

"9. Unless an on-line date deferral is specifically negotiated between the utility and the QF, contract modifications will not extend the five-year on-line date.

"10. Prospective reviews by this Commission for paid deferrals and buyouts will be required. Applications for preapproval of paid deferrals or buyouts must include documentation demonstrating that the utility has examined information on project viability, consistent with these guidelines, and that the utility is satisfied that the QF is able to meet the original terms of the contract."

The viability criteria in Section IV of the Final Guidelines state in part that the examination of a qualifying facility's (QF) viability under the original contract is a prerequisite to the modification of a power purchase contract. In determining viability, the utility should examine, and the QF should provide information on, various aspects of the QF's project development including, but not limited to, the following: (a) a completed Project Description and Interconnection Study Cost

Request form; (b) proof of site control; (c) commencement of a detailed interconnection study for the project; (d) proof that the $5/kw project fee has been established or an explanation as to why the QF has chosen not to establish the project fee and interconnection priority; (e) proof of permit status; (f) proof of fuel supply; (g) evidence of feasibility of project construction and operation within the five-year deadline; (h) status report of equipment procurements; (i) status report of engineering and design; (j) status report on project financing; (k) status of economic viability of the project by submission of a cash flow analysis; and (l) evidence of the QF's prior track record on project development.

It appears from a review of the prepared testimony that JRW submitted most of the information listed in the preceding paragraph so that PG&E could review the viability of the JRW project. PG&E witness Renson states in his prepared testimony that he assessed the project's overall viability following the criteria in D.88-10-032. We believe that the information that PG&E reviewed, as described in the Background section of this decision, was sufficient for PG&E to determine that the JRW project was still viable at the time the contract negotiations took place in the second half of 1990.

Having addressed the viability issue, we now turn to the deferral of the on-line date for the project. The deferral of the scheduled operation date was an appropriate topic of discussion between PG&E and JRW because JRW had obtained a conditional use permit, a permit for authority to construct, and the project's building permit by approximately the end of September 1990. The deferral of the five-year on-line date was also an item that PG&E and JRW specifically negotiated. This is evidenced by Paragraph E in the Recitals portion of the December 21, 1990 Agreement, and the

amended scheduled operation date contained in the First Amendment.[9] (See Final Guidelines, Sections III-6 and III-9.)

Of the three remaining criteria for deferral of the on-line date, the criteria pertaining to preapproval of paid deferrals or buyouts by the Commission appear at first glance to be applicable to the situation in this proceeding. However, the paid deferrals or buyouts apply in the situation where ratepayers "pay" the QF for the deferral or buyout. (See D.88-10-032, pp. 33-36.) This typically arises when it is in the ratepayers' interest to defer or buy out a QF from coming on line. In this case, JRW requested the deferral, and PG&E in turn was able to negotiate a reduction, rather than an increase, in the capacity price, as well as a curtailment provision. This is not a preapproval deferral situation which requires preapproval review by the Commission as envisioned by Section III-10 of the Final Guidelines.

Although preapproval was not necessary in this situation, PG&E has requested, pursuant to Public Utilities Code § 2821, that the Commission find that the modified payments be considered reasonable and prudent.

PG&E did not submit its application to approve the revised capacity payments until January 15, 1992, nearly two years after the PPA was first amended by the December 21, 1990 Agreement

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9 Paragraph E of the Recitals in the December 21, 1990 Agreement states in part that "In May, 1990, Seller contacted PG&E to discuss the possibility of contract modifications, including the extension of the PPA's five-year operational deadline." The First Amendment revised the scheduled operation date, and changed the operational deadline to the dates set forth in the December 21, 1990 Agreement or if the actual operation date does not occur before April 30, 1991.

and the First Amendment.[10] Although PG&E and JRW agreed not to seek advance approval of the December 21, 1990 Agreement and the First Amendment because of the possible effect it could have on its financing negotiations that were expected to close by the end of 1990, we must determine whether PG&E's reasoning for not bringing the amended PPA to our attention was reasonable under the circumstances.

We believe that PG&E's consent to forego Commission approval of the December 1990 modifications to the PPA was reasonable under the circumstances. It was reasonable for two reasons. First, the deadlines imposed by PG&E would ensure that the project was capable of coming on line because the pre-parallel test and the FCDT would have to be carried out in a very short time frame. The December 21, 1990 agreement specifically provided that the FCDT would have have to be completed no later than April 30, 1991. In addition, the amended termination provision ensured that the PPA would terminate if the two deadlines could not be met or if the actual operation date did not occur before April 30, 1991. Thus, at the latest, the project would have to commence operation by April 30, 1991 or the contract would be terminated. In addition, the deferral represents only a four-month extension of the original PPA termination date. (See Final Guidelines, Section III-8.)

The second reason why we believe PG&E's consent to forego Commission approval was reasonable is that PG&E was able to reduce the capacity price that it pays to JRW from $209 per kW year to $201 per kW year for the entire 30-year term of the PPA. According to the calculations of PG&E, this amounts to a savings to

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10 Ironically, PG&E seeks an "expedited order" from the Commission approving an amendment to the PPA that was negotiated two years ago.

ratepayers of $590,000 over the life of the contract. In addition, the amended contract provision of 3,000 hours of curtailment allows PG&E some operational flexibility, the value of which cannot be quantified. Both the reduction in capacity payments and the curtailment provision are in the ratepayers' interests. Furthermore, we believe that the reduction in the capacity payments and the curtailment provision are commensurate in value to a four-month deferral of the on-line date. (See Final Guidelines, Sections I-1, III-7, and III-8.)

Accordingly, we find that the December 21, 1990 Agreement and the First Amendment to the PPA are reasonable and prudent as executed, and in the ratepayers' interest.

The next issue we address is the reasonableness of the Settlement Agreement[11] and the proposed Second Amendment.

JRW's claim of a force majeure event is not recognized as a valid force majeure claim by PG&E. Despite their differing positions, the two have agreed to submit a compromise to the Commission for approval.

There is no need to address whether the claim of force majeure deferred the on-line date of the PPA because the legal effect of the December 21, 1990 Agreement and the First Amendment extended the on-line date requirement of the PPA to April 30, 1991. As of April 30, 1991, the JRW project was delivering energy to PG&E and the project had completed the FCDT, thereby meeting the amended on-line date.

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11 Although PG&E and JRW call the resolution of JRW's claim of force majeure a "Settlement Agreement," Article 13.5 of the Commission's Rules of Practice and Procedure, dealing with stipulations and settlements, does not apply because this agreement was entered into prior to this application being filed. (See Rule 51.2.)

Before deciding whether we should approve the Settlement Agreement, we are concerned about the length of time it took to resolve the force majeure claim. The claim of force majeure was made by JRW in January 1991. A resolution of that claim was not agreed to by PG&E and JRW until January 1992. No explanation was provided as to why it took one year to resolve the force majeure issue. Although we stated in D.88-10-032 that the Commission is unwilling to dictate specific time schedules for contract negotiations, except for a 30-day response period to a proposal for modification of a standard offer, was the one-year wait to resolve the force majeure issue reasonable?

Under the circumstances, we do not believe the one-year time period was unreasonable. Although the claim of force majeure affected JRW's ability to meet the deadlines set in the December 21, 1990 Agreement and the First Amendment, the project was still able to come on line before the amended April 30, 1991 termination date. Once the project came on line, it appears that any concerns PG&E may have had about the viability of the project were no longer an issue. Thus, PG&E did not act unreasonably when it took its time to negotiate the claim of force majeure.

In deciding whether we should approve the compromise, we will follow Section I-1 of the Final Guidelines. That section states that contract modifications requested by QFs must be accompanied by price and/or performance concessions that are commensurate in value with the degree of changes in the contract.

PG&E was able to negotiate a 5% reduction in energy payments over the life of the PPA in exchange for JRW's relinquishment and abandonment of its claim of force majeure. This is expected to have net ratepayer benefits of $1,100,000 to $1,800,000 over the term of the PPA. We believe that these savings are commensurate in value to reaching a compromise of JRW's force majeure claim, a claim which affected the project schedule for a four-month period. Accordingly, we find that the Settlement

Agreement and the proposed Second Amendment are reasonable and prudent, and in the ratepayers' interest.

DRA's concern with PG&E's application is that PG&E's requested relief implies "that payments under the amended agreement are to be presumed reasonable and recoverable in ECAC without further review." DRA comments that the Commission adopted specific language in D.91-06-050, as amended by D.92-01-014, and in D.91-07-054, which qualifies the recovery of such payments so that the payments are subject to Commission review of the reasonableness of PG&E's performance and administration of its obligations and exercise of its rights under the amended PPA. PG&E's letter that was attached to DRA's comments expressed its support and willingness to modify the language in its application in accordance with what DRA has suggested.

A review of D.91-06-050, as modified by D.92-01-014, and D.91-07-054 confirms that the Commission has qualified the recovery of past and future payments made by a utility under an amended standard offer contract. Although the amended pricing provisions in the two agreements would no longer be subject to further reasonableness review by the Commission, the Commission retains the authority to ascertain that the amended PPA is being administered reasonably and prudently, and that any past or future payments made by PG&E to JRW are in accordance with the amended PPA. Subject to the limitation that we have just described, we will authorize PG&E recovery of all payments made to JRW pursuant to the amended PPA through PG&E's ECAC proceeding or any successor mechanism the Commission may establish.

Findings of Fact

1. On December 9, 1985, a Standard Offer No. 2 power purchase agreement was entered into between PG&E and JRW's predecessor in interest.

2. Article 7 of the PPA provides that if the actual operation date of the project does not occur within five years of the execution date, the PPA shall terminate.

3. The PPA's capacity price provision is derived from PG&E's full avoided costs as approved by the Commission.

4. The PPA's energy price provision is equal to PG&E's full short-run avoided operating costs as approved by the Commission.

5. The December 21, 1990 Agreement and the First Amendment were the result of negotiations that began in July 1990 over a concern about delays in the scheduling of natural gas and electrical interconnections for the project, and the project's ability to meet its December 9, 1990 on-line date.

6. At JRW's request, PG&E did not seek advance approval from the Commission for the December 21, 1990 Agreement and the First Amendment.

7. In consideration of foregoing Commission approval of the December 11, 1990 Agreement and the First Amendment, PG&E negotiated two deadlines for meeting two project milestones.

8. The deadlines were designed to show that had the interconnection facilities been installed in October or November 1990, the project would have been capable of meeting its original operational deadline, and that the project was viable.

9. In consideration for an extension of the operational deadline for the delivery of energy to April 30, 1991, the December 21, 1990 Agreement and the First Amendment reduced the firm capacity price that PG&E pays from $209 per kW year to $201 per kW year for the entire 30-year term of the PPA.

10. As further consideration for an extension of the operational deadline for energy deliveries, a provision subjecting the project to up to 3,000 hours of curtailment was also negotiated.

11. The reduction in the capacity price payments is expected to benefit PG&E's ratepayers by $590,000 over the term of the PPA.

12. The curtailment provision will provide PG&E with operational flexibility, the benefits of which cannot be quantified.

13. Based on the information that PG&E had in the second half of 1990, PG&E's belief that the JRW project was still viable was reasonable.

14. Due to the perceived viability of the JRW project, the deferral of the five-year on-line date was an appropriate subject of negotiation between PG&E and JRW.

15. PG&E's delay in seeking Commission approval of the December 21, 1990 Agreement and the First Amendment due to JRW's financing efforts was reasonable under the circumstances.

16. Both the reduction in capacity payments and the curtailment provision are in the ratepayers' interests.

17. The December 21, 1990 Agreement and the First Amendment to the PPA are reasonable and prudent as executed.

18. On January 7, 1991, JRW received PG&E's January 3, 1991 notice that the 12-working day period for completing the pre-parallel test would commence upon receipt of the notice.

19. The transformer for the project was damaged on December 21, 1990.

20. JRW did not learn of the damage to the transformer until the first week of January 1991.

21. JRW determined that the damage to the transformer was more extensive than originally thought, and that it would be impossible to meet the pre-parallel inspection by January 22, 1991.

22. JRW met with PG&E's representatives on January 14, 1991 to inform them of the transformer damage and the impossibility of meeting the pre-parallel inspection date.

23. On January 15, 1991, JRW gave PG&E formal written notice that the damage to the transformer was a force majeure event.

24. Upon receipt of JRW's documentation of its claim of force majeure, PG&E notified JRW that it did not agree with JRW's claim of force majeure.

25. PG&E and JRW have agreed to reach a compromise of the force majeure claim by executing the Settlement Agreement and making the execution of the proposed Second Amendment contingent upon certain Commission approvals.

26. In consideration of JRW's relinquishment and abandonment of its claim of force majeure, JRW agrees to a 5% reduction in energy payments for the entire 30-year term of the PPA.

27. The reduction in the energy price payments is expected to benefit PG&E's ratepayers by $1,100,000 to $1,800,000 over the term of the PPA.

28. Despite the claim of force majeure, the project was able to come on line before the expiration of the April 30, 1991 amended contract termination date.

29. The passage of one year between the time of the claim of a force majeure event and the compromise of that issue was not unreasonable under the circumstances.

30. The 5% reduction in energy payments is commensurate in value to the relinquishment and abandonment of JRW's force majeure claim, and in the ratepayers' interests.

31. The Settlement Agreement and the proposed Second Amendment to the PPA are reasonable and prudent as executed.

Conclusions of Law

1. DRA's motion to accept as late filed the corrected comments to PG&E's application is granted.

2. No hearings are necessary for this application.

3. Preapproval by the Commission of the deferral of the project's on-line date was not required under the circumstances.

4. The December 21, 1990 Agreement and the First Amendment extended the project's on-line date to April 30, 1991.

5. The project would have to commence operation by April 30, 1991 or the amended PPA would terminate.

6. D.91-06-050, as modified by D.92-01-014, and D.91-07-054 provide that the amended pricing provisions are not subject to further reasonableness review except that the recovery of payments 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 amended PPA.

7. The application of PG&E should be granted as set forth in the following order.

O R D E R

IT IS ORDERED that:

1. The Division of Ratepayers Advocates' (DRA) motion to accept late-filed comments is granted, and the Docket Office is directed to file the corrected comments of the DRA as of March 3, 1992.

2. The December 21, 1990 Agreement and the First Amendment, which modify certain terms of the power purchase agreement dated December 9, 1985 between Pacific Gas and Electric Company (PG&E) and JRW Associates, L.P., are reasonable and prudent and in the ratepayers' interests.

3. The Settlement Agreement and the proposed Second Amendment, which would modify certain terms of the power purchase agreement, are reasonable and prudent and in the ratepayers' interests.

4. The capacity and energy payment provisions, as amended, are reasonable and prudent, and PG&E is authorized to recover all such payments made in PG&E's Energy Cost Adjustment Clause proceeding or any other mechanism the Commission may establish.

5. The recovery of payments (whether past or future payments) made by PG&E under the amended power purchase agreement 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 amended power purchase agreement.

6. The Commission's approval of the agreements and amendments modifying the power purchase agreement is final and not subject to further reasonableness review, except as otherwise provided herein.

This order is effective today.

Dated May 8, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

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

NEAL J. SHULMAN, Executive Director