

Decision 07-08-008 August 23, 2007

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking into  
Implementation of Public Utilities Code  
Section 390.

Rulemaking 99-11-022  
(Filed November 18, 1999)

**OPINION ADOPTING SETTLEMENT AGREEMENT BETWEEN  
PACIFIC GAS AND ELECTRIC COMPANY AND INDICATED  
QUALIFYING FACILITY SWITCHERS**

**I. Summary**

Today's decision grants the Joint Motion of Pacific Gas and Electric Company (PG&E), The Utility Reform Network (TURN), the Division of Ratepayer Advocates (DRA) and Indicated Qualifying Facility (QF) Switchers (Indicated QF Switchers) (Settling Parties) for Commission adoption of the Settlement Agreement between PG&E and Indicated QF Switchers (Settlement Agreement)<sup>1</sup> entered into by some of the owners and/or operators of QFs that had purchase power agreements with PG&E in 2000.

In granting the Joint Motion of Settling Parties (Motion), we also apply the terms of the Settlement Agreement to all QF Switchers,<sup>2</sup> including those QF Switchers that have not entered into the Settlement Agreement. Thus,

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<sup>1</sup> See, Appendix A.

<sup>2</sup> QF Switchers are QFs which switched to the California Power Exchange Corporation (PX) zonal day-ahead market clearing price in lieu of the Commission determined short-run avoided cost (SRAC) energy price.

today's decision resolves the QF Switcher Dispute for all QF Switchers who have not previously settled with PG&E.<sup>3</sup>

Today's decision also resolves the Remand Dispute<sup>4</sup> for all QFs which were settling parties in D.06-07-032, and all other QF Switchers. However, there remain a small group of QFs who have not yet resolved the Remand Dispute with Southern California Edison Company (SCE).

## **II. Background**

### **A. QF Switcher Dispute**

In D.99-11-025, The Commission adopted a motion of several QFs which allowed QFs to switch to the PX price. In adopting the requested QF motion, the Commission also stated that it was reasonable to grant the motion subject to a later "true-up"<sup>5</sup> by the Commission. On January 18, 2001, the PX ceased to function; and on January 19, 2001, the Commission required QF Switchers<sup>6</sup> to return to the previous QF payment mechanism.

On April 29, 2004, TURN, DRA, and PG&E filed a motion requesting a briefing schedule to determine what the appropriate price paid to QF Switchers should have been during the true-up period. On May 14, 2004,

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<sup>3</sup> On July 20, 2006, Decision (D.) 06-07-032 in Rulemaking (R.) 04-04-003, R.04-04-025, and R.99-11-022 adopted a settlement agreement that resolved the QF Switcher dispute for 36 of the 58 QF Switchers. However, 22 QF Switchers were not parties to that settlement agreement.

<sup>4</sup> See, Remand Dispute, Section II. B.

<sup>5</sup> D.99-11-025, 3 CPUC3rd 315, 319.

<sup>6</sup> All 58 QF Switchers which elected to switch to the PX price are in PG&E's service territory. There were no QF Switchers in either SCE's or San Diego Gas and Electric's (SDG&E) service territory. The QF Switchers switched to the PX price between June and December 2000.

Calpine Corporation, the California Cogeneration Council, and the Independent Energy Producers (IEP) filed responses; and on May 24, 2004, TURN, DRA and PG&E replied.

On April 24, 2005, the Assigned Administrative Law Judge (ALJ) issued a ruling setting a prehearing conference (PHC) and directing parties to file PHC statements. During the PHC on October 17, 2005, the assigned ALJ requested that parties file briefs addressing “why and whether a true-up (of payments to QF Switchers) is justified and on what basis.” Opening and reply briefs were filed on August 4 and 14, 2006, respectively.

While proceedings in this rulemaking were continuing, the Commission initiated R.04-04-025 “To promote Consistency in Methodology and Input Assumptions in Commission Application of Short-run and Long-run Avoided Costs, Including Pricing for Qualifying Facilities,” and R.04-04-003 “To Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning.” These rulemakings were consolidated for hearings on policy and pricing related to QF contracts.

Following ALJ Division mediation in these consolidated rulemakings, PG&E and IEP negotiated and ultimately reached a settlement on a number of QF-related issues. Included in that settlement, among other issues, was a

resolution of the QF Switcher Dispute by 36 of the 58 QFs who elected to switch to the PX based price.<sup>7</sup>

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<sup>7</sup> The PG&E/IEP settlement also resolved the Remand Dispute for those QFs who entered into this settlement.

On October 13, 2006, the assigned ALJ convened a PHC to establish a procedural schedule to address the QF Switcher matter for those QFs that had not joined in the PG&E/IEP settlement. At the PHC, the assigned ALJ raised the possibility of convening a Commission-sponsored Alternative Dispute Resolution (ADR) process to resolve the QF Switcher dispute for the remaining QF Switchers. All parties attending the PHC expressed an interest in ADR as a means to settlement.

On October 23, 2006, the assigned ALJ issued a ruling providing an opportunity for participation in the ADR process. The ruling was mailed to the service list and to all QF Switchers that had not entered into the PG&E/IEP settlement, inviting them to participate in the mediation as parties, either individually or through counsel of their choice. The noticing of the settlement conference was made pursuant to Rule 12.1(b),<sup>8</sup> providing an opportunity to all affected QF Switchers to participate. Parties, but not all QF Switchers, met in mediation during November and December and reached a settlement. The Settlement Agreement<sup>9</sup> was filed April 26, 2007. At the request of the assigned ALJ, the Settlement Agreement was served on all QF Switcher parties, including QF Switchers that did not enter into the Settlement Agreement, because the Settlement Agreement affects all QF Switchers that have not previously entered into Settlement with PG&E.

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<sup>8</sup> All references to Rules are to the Commission's Rules of Practice and Procedure and references code section are to the California Public Utilities Code.

<sup>9</sup> The Settlement Agreement is marked for identification as Exhibit Settlement 1, and is received into evidence as part of the record in this proceeding.

PG&E requests and the Indicated QF Switchers, DRA and TURN support the Commission's expeditious issuance of an order that:

- Adopts the Settlement Agreement without change;
- Declares PG&E shall fully recover in rates all payments made pursuant to the Settlement Agreement, subject only to ongoing Commission review regarding the reasonableness of PG&E's administration of the Settlement Agreement; and
- States that the terms of the Settlement Agreement shall apply to all QF Switchers that have not previously entered into settlement with PG&E, including those that did not participate in the mediation.

#### **B. Remand Dispute**

In D.96-12-028, the Commission adopted a transition formula to determine SRAC energy payments. The transition formula included a utility-specific "factor" which was designed to relate SRAC prices to gas border prices for each utility. Transition formulas were adopted for SCE, SDG&E and PG&E. Each transition formula uses a starting energy price, and is adjusted monthly to reflect changes in assumed utility fuel costs, as reflected in percentage change to certain border gas price indices. SRAC energy payments for SCE and SDG&E were based on published gas border indices at Topock,<sup>10</sup> while PG&E relied on a 50/50 weighting of gas indices at Topock and Malin.<sup>11</sup>

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<sup>10</sup> Topock is located at the California/ Arizona border and is an entry point for gas into Southern California Gas Company's system.

<sup>11</sup> Malin is located at the California/Oregon border and is an entry point for gas into PG&E's system.

The transition formula<sup>12</sup> was intended to be used until QF energy payments could be based on the PX price.

On March 27, 2001, in response to various pleadings raising issues with the transition formula, the Commission issued D.01-03-067 which modified D.95-12-028 by, among other things, replacing the Topock gas index, with a gas price based on an average of Malin gas indices.

On April 27, 2001, SCE filed an application for rehearing in which it asserted that the Commission erred in, among other things, failing to order retroactive application of the modified SRAC formula for the period December 2000 through March 2001, also referred to as the Remand Period. The Commission denied SCE's application for rehearing on this issue, following which SCE sought a writ of review challenging, among other things, the lawfulness of the Commission's refusal to consider a retroactive adjustment. QF parties participating in SCE's writ of review proceeding supported the Commission.

The Court of Appeal for the Second District issued the writ and subsequently determined that "by failing to make a decision as to whether the SRAC prices should be applied retroactively, the Commission ran afoul of the Congressional mandate that public utilities not pay QFs more than the avoided cost."<sup>13</sup> The Court then remanded the case to the Commission stating:

It may be that the evidence will show the SRAC prices were correct for the period of December 2000 through

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<sup>12</sup> The transition formula includes a heat rate, a gas price based on the price of gas at a California border location, and an operational and maintenance expense adder.

<sup>13</sup> Southern California Edison Company v. Public Utilities Commission (2002) 101 Cal. App.4<sup>th</sup> 982. 998.

March of 2001. If the Commission makes this determination and it is based upon substantial evidence, that will end the matter. However, if the evidence shows that the formula in Decision No. 01-03-067 should have been applied retroactively to arrive at a more accurate SRAC then it is the Commission's duty to apply it retroactively.

Since the Court's remand, the Commission has taken extensive comments on the propriety of the SRAC prices paid during the December 2000 through March 2001 time period.

On February 15, 2005, President Peevey issued a Proposed Decision (PD) in response to the Court's remand that, if adopted, would have found "the evidence shows SRAC prices were correct between December 2000 and March 2001, and retroactive application of the modified SRAC formula is not warranted."<sup>14</sup>

On April 21, 2005, the PD was withdrawn, and on April 26, 2005, an Assigned Commissioner and ALJ Joint Ruling provided parties an opportunity for additional comments regarding cost information. The Remand Dispute remains pending for those QFs who have not resolved this matter with PG&E or SCE.

### **III. Settlement Agreement**

The Settlement Agreement resolves: (a) PG&E's claims for a retroactive adjustment of energy payments made to QF Switchers from June 1, 2000 through January 18, 2001; and (b) PG&E's claims for a retroactive adjustment of SRAC payments made to QF Switchers from December 1, 2000 through March 31, 2001 arising from the Court's Remand.



The Settlement Agreement contemplates that the QF Switchers who have entered into the Settlement Agreement<sup>15</sup> will return a portion of the payments they received by a deduction of \$1.50/Megawatt hour (MWh) applicable to the energy price paid to QF Switchers that have not otherwise settled with PG&E.

The deduction is effective for two and one-quarter to six years depending on the date the QF Switcher elected to switch to PX-based pricing. Two of the Indicated QF Switchers that no longer sell power from their facilities, Wheelabrator Hudson and Covanta Power Pacific, Inc. (Santa Clara), have agreed to make negotiated lump sum payments to PG&E of \$35,200 and \$16,800, respectively, in lieu of the \$1.50/MWh deduction. The Settlement Agreement also includes a mutual release and waiver of claims arising from the settled issues described above.<sup>16</sup>

#### **IV. Discussion**

Settling Parties urge the Commission to adopt the Settlement Agreement pursuant to Rule 12.1(d) and find that it is “reasonable in light of the whole record, consistent with the law, and in the public interest.”

##### **A. The Settlement Agreement is Reasonable in Light of the Whole Record**

The Settlement Agreement was reached after opposing parties were able to assess the strengths and weaknesses of their respective cases. As the

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<sup>14</sup> PD of Commissioner Peevey in R.99-11-022 mailed February 15, 2005, *mimeo.*, p. 2.

<sup>15</sup> Appendix A to the Settlement Agreement lists the Indicated QF Switchers (14) and the additional QF Switchers (8) who have not entered into the Settlement Agreement.

<sup>16</sup> Although D.06-07-032 adopted a settlement between IEP and PG&E that resolved both the Remand and QF Switcher Disputes, that decision also included other settlement terms not included in today’s decision.

Settling Parties explain, the QF Switcher and Remand Disputes have been the subject of extensive briefing in numerous pleadings by QFs, PG&E, and customer advocates during the past several years. Settling Parties point out that it is a strong measure of the reasonableness of the settlement that these parties, who vigorously disputed both issues the Settlement Agreement would resolve, have now agreed to the proposed compromise.

**B. The Settlement Agreement is  
is Consistent with the Law**

Second, the Settlement Agreement is consistent with the law. Settling Parties assert that the Settlement Agreement's resolution of the QF Switcher Dispute is within the Commission's power to resolve. We agree. Although the Federal Energy Regulatory Commission (FERC) found that energy prices paid during the true-up period were unreasonable and unjust,<sup>17</sup> the prices paid to QF Switchers have not been the subject of FERC's orders because the QF Switchers sold their power directly to utilities at the PX market prices pursuant to the state's jurisdictional pricing regime. In addition, resolution of the Remand Dispute is clearly within this Commission's power to resolve as expressed by the Court of Appeal.

**C. The Settlement Agreement  
is in the Public Interest**

Approval of the Settlement Agreement is in the public interest as it resolves the QF Switcher and Remand Disputes and provides benefits to PG&E's electric customers. As the Commission has stated, to decide whether a settlement is in the public interest:

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<sup>17</sup> See, *San Diego Gas and Electric Company, et al.* (2000) 93 FERC para. 61,21.

we consider individual elements of the settlement in order to determine whether the settlement generally balances the various interests at stake as well as to assure that each element is consistent with our policy objectives and the law.<sup>18</sup>

The Settlement Agreement is a compromise of these two difficult and complex issues contested by and among PG&E, TURN, DRA and the Indicated QF Switchers. As a result of the settlement of these long-standing disputes, ratepayers will receive, for pre-determined prospective periods, an explicit energy price reduction of \$1.50/MWh (or negotiated lump-sum payments) for PG&E's claims arising from the QF Switcher and Remand Disputes as discussed above. Furthermore, PG&E should be authorized to fully recover in rates all payments made pursuant to the Settlement Agreement, subject to our review of the reasonableness of PG&E's administration of the Settlement Agreement.

Finally, the Settlement Agreement is in the public interest because it will avoid a potentially long and expensive litigation of the QF Switcher and Remand Disputes pertaining to the Indicated QF Switchers. Conducting further proceedings, including evidentiary hearings, and filing of briefs would consume resources of the Commission and the parties.

**D. Application of the Settlement Agreement  
to Non-Participating QF Switchers**

The Settling Parties request that the Settlement Agreement apply to the non-participating QF Switchers.

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<sup>18</sup> D.96-01-011, 64 CPUC2d, 241, 267, citing D.94-04-088.

The Motion and Settlement Agreement was served on both participating and non-participating QF Switchers. No responses to the Motion were received.

We have reviewed the Settlement Agreement and find that it is reasonable. Because the Settlement Agreement is a reasonable resolution of the QF Switcher and Remand Disputes, and no non-participating QF Switchers have objected to the recommendation of Settling Parties, it is reasonable to apply the terms of the settlement to non-participating QF Switchers.

## **VI. Conclusion**

For all of the foregoing reasons, we grant the Settling Parties' Motion and adopt the Settlement Agreement without change.

No further filings with the Commission are needed to implement this settlement. PG&E shall enact the payment reductions as stated in the Settlement Agreement.

Although our adoption of the Settlement Agreement resolves the QF Switcher and Remand Disputes for both participating and non-participating QF Switchers, this approval should not be considered as prejudging or binding on any issues currently under consideration in other proceedings including R.04-04-025 or the Remand Dispute.

## **VII. Comments on Proposed Decision**

The proposed decision of Commissioner Peevey in this matter was mailed to the parties in accordance with Section 311 of the Pub. Util. Code and Rule 14.3 of the Commission's Rules of Practice and Procedure. In addition, the PD was mailed to all QF Switchers. Comments were filed on August 9, 2007, by Wheelabrator Hudson Company, Inc. supporting the proposed decision.

### **VIII. Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Bruce DeBerry is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. PG&E, Indicated QF Switchers, DRA and TURN presented the Commission with a Settlement Agreement entered into by participating QF Switchers and PG&E.
2. The Settlement Agreement resolves the Switcher Dispute pertaining to PG&E's claims for a retroactive adjustment of energy payments made to QF Switchers from June 1, 2000 through January 18, 2001.

3. The Settlement Agreement resolves the Remand Dispute pertaining to PG&E's claims for a retroactive adjustment of SRAC payments made to QFs from December 1, 2000 to March 31, 2001 arising from the Court of Appeal's Remand.

4. PG&E will receive \$1.50/MWh from Indicated QF Switchers effective for two and one-quarter to six years depending on the date the QF Switcher elected to switch to PX-based energy pricing, and these payments thereby benefit ratepayers.

5. No party opposes approving the Settlement Agreement.

6. The Settlement Agreement is the product of extensive negotiations between the Settling Parties. Settling Parties entered into these negotiations after numerous pleadings.

7. Conducting a further proceeding would unnecessarily consume valuable resources of the Commission, PG&E, QF Switchers, DRA and TURN, and would delay, and possibly prevent, the realization of the benefits identified above pertaining to QF Switcher payments.

8. The Settlement Agreement is a reasonable resolution of the Switcher and Remand Disputes and should apply to all QF Switchers including those who did not participate in the mediation leading to the Settlement Agreement.

9. No further filings with the Commission are needed to implement this settlement. PG&E shall enact the payment reductions as stated in the Settlement Agreement.

### **Conclusions of Law**

1. The Settlement Agreement meets the requirements of Rule 12.1 of the Commission's Rules and should be adopted by the Commission.

2. The Settlement Agreement's resolution of the QF Switcher and Remand Disputes is within the Commission's authority to resolve.

3. The Settlement Agreement fully resolves and settles all disputed issues among the parties concerning the QF Switcher and Remand Disputes.

4. The Settlement Agreement is a reasonable resolution of the Switcher and Remand Disputes and should apply to all QF Switchers, including those who did not participate in the mediation leading to the Settlement Agreement.

5. The Settlement Agreement should be approved.

6. This decision should be effective today so that the Settlement Agreement may be implemented expeditiously.

## **O R D E R**

### **IT IS ORDERED** that:

1. The Settlement Agreement between Pacific Gas and Electric Company (PG&E) and indicated Qualifying Facility (QF) Switchers, attached as Appendix A, shall be approved without change.

2. The terms of the Settlement Agreement shall apply to all QF Switchers which have not previously entered into settlement with PG&E.

3. PG&E is authorized to fully recover in rates all payments made pursuant to the Settlement Agreement adopted herein, subject only to ongoing Commission review regarding the reasonableness of PG&E's administration of the Settlement Agreement.

This order is effective today.

Dated August 23, 2007, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners



**APPENDIX A**  
**BEFORE THE PUBLIC UTILITIES COMMISSION**  
**OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking Into  
Implementation of Pub. Util. Code § 390.

Rulemaking 99-11-022  
(Filed November 11, 1999)

**SETTLEMENT AGREEMENT BETWEEN**  
**PACIFIC GAS AND ELECTRIC COMPANY AND**  
**INDICATED QUALIFYING FACILITY SWITCHERS**

In accordance with Rule 12.1 of the California Public Utilities Commission's Rules of Practice and Procedure, Pacific Gas and Electric Company ("PG&E") and the indicated Qualifying Facility ("QF") switchers (the "Indicated QF Switchers") (collectively referred to as the "Parties" or individually as a "Party"), hereby enter into this Settlement Agreement Between Pacific Gas and Electric Company and Indicated Qualifying Facility Switchers ("Settlement Agreement") to resolve certain issues, as more fully described below, raised in Rulemaking 99-11-022, that are currently pending before the Public Utilities Commission of the State of California ("Commission"). The Indicated QF Switchers include the entities listed in Part I of Appendix A, each of whom is an individual Party for purposes of this settlement. The Commission's Division of Ratepayer Advocates ("DRA") and The Utility Reform Network ("TURN") were active in the mediation leading to this Settlement Agreement and also support its approval by the Commission.

The Parties believe that this Settlement Agreement is in the public interest and represents a fair and equitable resolution of the issues in the proceeding and

request that the Commission approve it without modification. The Administrative Law Judge ("ALJ") invited all QFs potentially affected by the mediation to participate therein and gave written notice to all such QFs that those who declined to participate may be subject to and bound by any settlement reached in the mediation and approved by the Commission. *See, "ALJ's Ruling Providing Opportunity for Participation in an Alternative Dispute Resolution Process,"* issued October 23, 2006, in R.99-11-022 ("ALJ Ruling") at 4. The remaining Qualifying Facility switchers that did not participate in the meditation (the "Remaining QF Switchers") are listed in Part II of Appendix A. PG&E requests that the Commission apply the terms of the Settlement Agreement to the Remaining QF Switchers as contemplated in the ALJ Ruling. The Indicated QF Switchers have no objection to this request. Together, the Indicated QF Switchers and the Remaining QF Switchers are referred to herein as the "QF Switchers."

## **RECITALS**

A. On November 4, 1999, in Decision 99-11-025, the Commission permitted eligible QFs to switch to the California Power Exchange Corporation's ("PX") zonal day-ahead market clearing price for the energy portion of their QF payments, instead of using the otherwise applicable Short-Run Avoided Cost ("SRAC") energy pricing methodology, subject to the potential for a later true-up by the Commission. QFs were permitted to switch on or after June 1, 2000 until January 18, 2001, when the PX day-ahead market terminated (the "QF Switcher Period"). Starting January 19, 2001, the Commission returned the QF Switchers to the otherwise applicable SRAC energy pricing methodology. The true-up for QFs who switched to PX pricing during the QF Switcher Period is a contested issue in R.99-11-022 (the "QF Switcher Issue").

B. As a result of the California Court of Appeal decision in *Southern California Edison v. Public Utilities Commission*, 101 Cal. App. 4<sup>th</sup> 982 (2002), regarding SRAC pricing between December 1, 2000 and March 31, 2001 (the "Remand Period"), there are disputed issues regarding the SRAC prices paid for energy to QF Switchers during the portion of the Remand Period (January 19, 2001 through March 31, 2001) for which such QF Switchers received the SRAC price then in effect. SRAC pricing during the Remand Period is a contested issue in R.99-11-022 (the "Remand Issue").

C. On April 18, 2006, PG&E and the Independent Energy Producers Association ("IEP") filed a joint motion seeking Commission approval of a settlement that, *inter alia*, resolved the QF Switcher Issue and Remand Issue for those QFs that elected to execute a contract amendment PG&E and IEP developed to implement the settlement. The Commission adopted the settlement without change or modification in Decision 06-07-032.

D. In the ALJ Ruling, Judge DeBerry issued a notice and opportunity for QF Switchers that had not already settled the QF Switcher Issue to participate in Alternative Dispute Resolution ("ADR"). The ALJ Ruling specifically noted that "QFs which do not participate in ADR may be subject to any negotiated settlement agreement reached as a result of ADR" and that ruling was mailed to all QFs PG&E identified as being potentially affected by the outcome of the mediation on the QF Switcher Issue. ALJ Ruling at 1.

E. Mediation of the QF Switcher Issue was conducted with the assistance of Administrative Law Judge Yacknin on November 29-30 and December 5-7, 2006. As a result of this mediation, the Parties reached this Settlement Agreement to resolve, as to PG&E and the QF Switchers, the QF Switcher Issue and the Remand Issue.

## SETTLEMENT AGREEMENT

As a compromise among their respective litigation positions, and subject to the recitals, reservations, and releases set forth in this Settlement Agreement, the Parties hereby agree to resolve the QF Switcher Issue and Remand Issue by: (1) a reduction in the net energy payment that PG&E would otherwise pay to the QF Switcher, subject to this Settlement Agreement, pursuant to its respective power purchase agreement; and (2) by a one-time payment in the case certain QFs that have ceased operations, as described in paragraph 2, below.

**1. Effective Date.** This Settlement Agreement shall become effective on the first business day after the date on which a Commission decision approving this Settlement Agreement becomes final and no longer subject to judicial review (the "Effective Date"). The Commission's decision must: (1) adopt this Settlement Agreement unconditionally and without modification; (2) find that PG&E acted reasonably in entering into it; and (3) order that PG&E may recover in rates all payments made pursuant to this Settlement Agreement. The Parties agree that if the Commission decision fails to: (1) approve this Settlement Agreement as reasonable; (2) adopt it unconditionally and without modification (except as it may relate to any Remaining QF Switcher); and (3) include the findings relevant to PG&E set forth in the preceding sentence, any Party may, in its sole discretion, elect to terminate this Settlement Agreement upon notice to the other Parties given no later than 15 calendar days after the Effective Date of the Commission's decision. Unless the Parties otherwise agree, this Settlement Agreement shall terminate if the Commission has not issued a final decision that is no longer

subject to judicial review approving this Settlement Agreement by September 7, 2007.

**2. Settlement Payment and Period.** For the QF Switchers to which this Settlement Agreement applies, there shall be a reduction in the net energy price payment equal to \$1.50/MWh, calculated monthly. Such payment reduction shall apply for a period of time ranging from two and one-fourth years to six years, depending upon the month that each of the QF Switchers switched to PX-based SRAC pricing. The energy price reductions shall commence on the first day of the month following the Effective Date of this Settlement Agreement and shall continue for the period specified in the following table:

<b>Switch Month</b>	<b>Energy Price Reduction Period</b>
June 2000	n/a <sup>1</sup>
July 2000	6 years (72 months)
August 2000	5 ¼ years (63 months)
September 2000	4 ½ years (54 months)
October 2000	3 ¾ years (45 months)
November 2000	3 years (36 months)
December 2000	2 ¼ years (27 months)

Attachment B details the month that each QF Switcher that is a Party to this Settlement Agreement, or to which this Settlement Agreement may apply, switched to market-based pricing during the QF Switcher Period. This Settlement Agreement shall apply to any contract that expires and is renewed or renegotiated. If the contract under which payments otherwise due under this Settlement Agreement has expired, or expires prior to the end of the repayment

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<sup>1</sup> There are no QF Switchers that switched effective in June 2000 to which this Settlement Agreement applies.

period, and such contract is not otherwise renewed or renegotiated, such QF and PG&E shall in good faith negotiate a payment amount and schedule to resolve any amounts that remain unpaid as the result of such contract expiration.

Wheelabrator Hudson and Covanta Power Pacific, Inc. (Santa Clara) have ceased operations, therefore the Parties agree that the QF Switcher Issue and the Remand Issue shall be resolved as to these entities by a one-time payment to PG&E of \$35,200 in the case of Wheelabrator Hudson and \$16,800 in the case of Covanta Power Pacific, Inc. (Santa Clara). Such payments shall be made by a cashier's check for the full amount delivered to PG&E no later than noon, Pacific Time, on the thirtieth day after the Effective Date, unless such date is a weekend or legal holiday in which case delivery shall be made by noon Pacific Time on the next business day. PG&E shall provide notice to Wheelabrator Hudson and Covanta Power Pacific, Inc. (Santa Clara) of the Commission's order adopting this Agreement within five business days of such Commission order, specifying the date on which payment is due to PG&E.

### **3. Releases and Waiver.**

Mutual Releases. The Indicated QFs separately and each for itself and for each of its current and former successors, assigns, agents, owners, officers, directors, partners, shareholders, employees, predecessors, affiliated entities, transferees, attorneys, and representatives (collectively, the "QF Releasers") hereby release and forever discharge PG&E and its current and former successors, assigns, agents, owners, officers, directors, partners, shareholders, employees, predecessors, affiliated entities, transferees, attorneys and representatives, from any and all claims, demands, causes of action, controversies, liens, agreements, contracts, covenants, fees, debts, costs, expenses, amounts payable, invoices, damages, judgments, orders and liabilities

of whatever kind or nature, both in law and equity, including but not limited to claims for attorneys' fees or costs, whether now known or unknown, vested or contingent, matured or unmatured, liquidated or unliquidated, suspected or unsuspected, and whether or not concealed or hidden, that have existed, may have existed, or that do exist as of the Effective Date, or that could or do later accrue as a direct result (in whole or in part) of transactions, occurrences, acts or omissions that have occurred as of the Effective Date, which they now have or ever may have arising out of the QF Switcher Issue and/or the Remand Issue, whether pursuant to contract, general law, tort law, or statute, including any claims related to or arising out of, directly or indirectly, the QF Switcher Issue and/or the Remand Issue (the "Released Claims"). This release also extinguishes all remedies that might be available to the QF Releasors or any of them on any Released Claims, including without limitation damages (general, specific, consequential and punitive), restitution, penalties, interest and attorneys' fees.

PG&E for itself and for each of its current and former successors, assigns, agents, owners, officers, directors, partners, shareholders, employees, predecessors, affiliated entities, transferees, attorneys, and representatives (collectively, the "PG&E Releasors") hereby release and forever discharge the Indicated QF Switchers, and any Remaining QF Switchers to which the Commission determines this Settlement Agreement applies, and each of them and each of their respective, current and former successors, assigns, agents, owners, officers, directors, partners, shareholders, employees, predecessors, affiliated entities, transferees, attorneys and representatives, from any and all Released Claims. This release also extinguishes all remedies that might be available to the PG&E Releasors or any of them on any Released Claims,

including without limitation damages (general, specific, consequential and punitive), restitution, penalties, interest and attorneys' fees.

Waiver. The Released Claims fall within a limited and defined scope. It is the intention of the Parties in executing this Settlement Agreement that the releases set forth above shall be effective as a bar to each and every Released Claim specified above, whether known or unknown to the releasing party. In furtherance of this intention, the Parties hereby expressly waive all rights and benefits, if any, conferred upon them by the provisions of Section 1542 of the California Civil Code ("Section 1542") (to the extent this provision may be applicable to the releases granted in this Settlement Agreement) and expressly consent that this Settlement Agreement shall be given full force and effect according to each and all of its express terms and provisions, including those relating to unknown and unsuspected claims. Section 1542 provides:

**A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.**

Without conceding the applicability of Section 1542 to this Agreement or to any of the releases given hereunder, each Party expressly consents that, notwithstanding Section 1542 or any other statute or rule of law of similar import, whether enacted or in force in California or elsewhere, the releases hereinabove shall be given full force and effect according to each and all of their respective, express terms and provisions, including those terms and provisions relating to unknown or unsuspected claims that exist as of the Effective Date as well as those terms and provisions relating to any other claims related to the QF



Switcher Issue and the Remand Issue, each as specified above (including but not limited to any claims related thereto that may or will accrue in the future based on transactions, occurrences, acts or omissions that have occurred as of the Effective Date). Each Party acknowledges and agrees that this waiver is an essential and material term of this Settlement Agreement and the releases and settlement contained herein, and without such waiver this Settlement Agreement would not have been entered into. Each Party has been advised by its respective legal counsel with respect to this waiver, and understands and acknowledges the significance and consequences of the foregoing releases and of this express waiver of Section 1542 and other similar statutes or rules of law wherever enacted or in force.

Exceptions. The foregoing releases do not extend to, and nothing in this Settlement Agreement will be construed to extinguish or limit, the rights or claims of any Party hereto to enforce this Settlement Agreement according to its terms.

The foregoing releases do not extend to, and nothing in this Settlement Agreement will be construed to extinguish or limit, the rights or claims of any Party hereto concerning any matter not arising out of the Released Claims.

#### **4. Representations and Warranties**

Authority to Settle. PG&E and the Indicated QF Switchers each represents and warrants to the other that it has the right, power and authority to execute this Settlement Agreement. PG&E and the Indicated QF Switchers each further represents and warrants to the other that: (1) it has the exclusive right to prosecute and compromise the claims released by this Settlement Agreement; (2) it has neither made nor suffered to be made any sale, assignment, transfer, conveyance, pledge, hypothecation, or encumbrance of any kind whatsoever of

any right, claim, demand, obligation, cost, expense, sanction, grievance, action, cause of action, controversy, debt, damage, arbitration, liability, duty, penalty, attorneys' fee, charge, suit, punitive damage, injury, loss, agreement, contract, promise, or lien released, canceled, rescinded or discharged hereby and accordingly that no other party or entity possesses any rights which would otherwise prevent any release and discharge granted in this Settlement Agreement from being less than a full, final and complete release and discharge; (3) it is the sole and absolute legal and equitable owner of the Released Claims, free and clear of any interest of any other person or entity; and (4) upon the execution date of this Settlement Agreement, there is no other court or regulatory approval required for the effectiveness and implementation of this Settlement Agreement that has not been fully and finally obtained. PG&E and each of the QF Switchers subject to this Settlement Agreement, on its own behalf in relation to PG&E, represents and warrants to the other that, except as may be expressly set forth in this Settlement Agreement, no representations of any kind or character, written or oral, have been made to or by it or any of its agents, employees, or representatives, relating in any way to this Settlement Agreement.

Notice and Consent. PG&E and each of the QF Switchers subject to this Settlement Agreement, on its own behalf and in relation to PG&E, represents and warrants to the other that it has given any and all notices, and obtained any and all consents, powers and authorities, necessary to permit them and the persons executing this Settlement Agreement for them to enter into this Settlement Agreement, settle, compromise, and release the claims settled, compromised, and released herein, to do, undertake, or forebear from any act called for herein, and to make this Settlement Agreement, and all the provisions hereof, fully binding on and enforceable against them in accordance with its terms, including, without

limitation thereto, any necessary notice to or consent or approval from their shareholders, creditors, Board of Directors, partners, limited partners, members, managers, officers, or any other person, entity, group or body, and that it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization.

## **5. Miscellaneous Provisions**

**Amendments.** The Settlement Agreement may be amended or changed only by a written agreement signed by the Parties.

**Integration.** The Parties have bargained earnestly and in good faith to achieve this Settlement Agreement. The Parties intend the Settlement Agreement to be interpreted and treated as a unified, interrelated agreement. This Settlement Agreement embodies the entire understanding and agreement of the Parties with respect to the matters described herein, and, except as described herein, supersedes and cancels any and all prior oral or written agreements, principles, negotiations, statements, representations or understandings among the Parties.

**Neutral Construction.** Each of the Parties hereto and its respective counsel and advocates have contributed to the preparation of this Settlement Agreement. Accordingly, the Parties agree that no provision of this Settlement Agreement or ambiguity shall be construed against any Party because that Party or its counsel drafted the provision.

**Governing Law.** This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of California, excluding any choice of law rules that may specify the laws of another jurisdiction.

Compromise Not Binding Precedent. This Settlement Agreement represents a compromise of respective litigation positions and is not intended to establish binding precedent for any future proceeding. The Parties have assented to the terms of this Settlement Agreement only for the purpose of arriving at the compromise embodied herein. The Parties further agree that this Settlement Agreement reflects a compromise, not an agreement or endorsement of disputed facts and law presented by the Parties.

Execution. This document may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute the same instrument.

In witness whereof, intending to be legally bound, the signatories hereto have duly executed this Settlement Agreement on behalf of the Party(ies) each signatory represents.

PACIFIC GAS AND ELECTRIC COMPANY

By: \_\_\_\_\_

Name/Title: Thomas E. Bottorff, Senior Vice-President, Regulatory Relations

Date: \_\_\_\_\_

INDICATED QUALIFYING FACILITIES

COVANTA (SALINAS)  
COVANTA (SANTA CLARA)  
COVANTA (STOCKTON)

By: \_\_\_\_\_

Name/Title: Seth Myones, Vice-President

Date: \_\_\_\_\_

WHEELABRATOR HUDSON ENERGY COMPANY, INC.

By: \_\_\_\_\_

Name/Title: David M. Beavens, Vice President Finance

Date: \_\_\_\_\_

ALTAMONT COGENERATION CORP.

By: \_\_\_\_\_

Name/Title: Daniel V. Gulino, Vice-President and General Counsel

Date: \_\_\_\_\_

DG FAIRHAVEN POWER LLC

By: \_\_\_\_\_

Name/Title: Steven Jay Mueller, President

Date: \_\_\_\_\_

HL POWER COMPANY

By: \_\_\_\_\_

Name/Title: \_\_\_\_\_

Date: \_\_\_\_\_

MARTINEZ COGEN PARTNERSHIP

By: \_\_\_\_\_

Name/Title: John Crider, Vice-President

Date: \_\_\_\_\_

CARDINAL COGEN, INC.

By: \_\_\_\_\_

Name/Title: Ronald S. Dahlin, Plant Manager

Date: \_\_\_\_\_

OGDEN - BURNEY

OGDEN - MT. LASSEN

By: \_\_\_\_\_

Name/Title: \_\_\_\_\_

Date: \_\_\_\_\_

SAN JOAQUIN POWER CO.

By: \_\_\_\_\_

Name/Title: Daniel V. Gulino, Vice-President and General Counsel

Date: \_\_\_\_\_

UNITED COGEN, INC.

By: \_\_\_\_\_

Name/Title: \_\_\_\_\_, Vice President, Operations

Date: \_\_\_\_\_

SRI INTERNATIONAL COGENERATION PROJECT

By: \_\_\_\_\_

Name/Title: \_\_\_\_\_

Date: \_\_\_\_\_

We agree that the terms of the Settlement Agreement are a reasonable compromise of the Settled Issues and should be approved without modification:

THE DIVISION OF RATEPAYER ADVOCATES

By: \_\_\_\_\_

Name/Title: Dana S. Appling, Director

Date: \_\_\_\_\_

THE UTILITY REFORM NETWORK

By: \_\_\_\_\_

Name/Title: Michael Florio

Date: \_\_\_\_\_

APPENDIX A

PART I -- Indicated QF Switchers

ALTAMONT COGENERATION CORP.  
CARDINAL COGEN  
COVANTA POWER PACIFIC, INC. (SALINAS)  
COVANTA POWER PACIFIC, INC. (SANTA CLARA)  
COVANTA POWER PACIFIC, INC. (STOCKTON)  
FAIRHAVEN POWER CO.  
HL POWER CO.  
MARTINEZ COGEN PARTNERSHIP  
BURNEY MOUNTAIN POWER  
MT. LASSEN POWER  
SAN JOAQUIN POWER CO.  
SRI INTERNATIONAL COGENERATION PROJECT  
UNITED COGEN INC.  
WHEELABRATOR HUDSON ENERGY COMPANY, INC.

PART II -- Remaining QF Switchers (not Parties to the Mediation)

AMERICAN ENERGY-WOLFSEN  
FAR WEST POWER CORPORATION  
GEORGIA PACIFIC CORP.  
MONTEREY POWER COMPANY  
PALO ALTO LANDFILL  
SAN JOSE COGEN  
SONOMA COUNTY WATER AGENCY  
AMERICAN ENERGY-SAN LUIS



## ATTACHMENT B

<u>Name</u>	<u>Switch Month<sup>1</sup></u>
FAIRHAVEN POWER CO.	Jul-00
WHEELABRATOR HUDSON	Jul-00
HL POWER CO.	Aug-00
MT. LASSEN POWER	Aug-00
BURNEY MOUNTAIN POWER	Aug-00
UNITED AIRLINES (COGEN)	Aug-00
ALTAMONT COGENERATION CORP.	Sep-00
MONTEREY POWER COMPANY*	Sep-00
SAN JOAQUIN POWER CO.	Sep-00
MARTINEZ COGEN	Oct-00
PALO ALTO LANDFILL*	Nov-00
SAN JOSE COGEN*	Nov-00
CARDINAL COGEN	Dec-00
COVANTA POWER PACIFIC, INC. (SALINAS)	Dec-00
COVANTA POWER PACIFIC, INC. (SANTA CLARA)	Dec-00
COVANTA POWER PACIFIC, INC. (STOCKTON)	Dec-00
GEORGIA PACIFIC CORP.*	Dec-00
SRI INTERNATIONAL COGENERATION PROJECT**	Dec-00
AMERICAN ENERGY-SAN LUIS*	Jan-01
AMERICAN ENERGY-WOLFSEN *	Jan-01
FAR WEST POWER CORPORATION*	Jan-01
SONOMA COUNTY WATER AGENCY*	Jan-01

\* Companies identified with an asterisk are "Remaining QF Switchers."

\*\* SRI International switched in Nov-00. However, it made no power sales in Dec-00 or Jan-01, and, therefore, for purposes of this settlement is treated as if it switched in Dec-00.

**(END OF APPENDIX A)**

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<sup>1</sup> Under the terms of the Settlement Agreement, the QFs that switched to PX market pricing in January 2001 would have no repayment liability.

