

Decision \_\_\_\_\_

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

Application of Southern California Edison Company (U 338-E) for Order Approving the Option Capacity Settlement Agreement Between Southern California Edison Company and Bonneville Power Administration.

Application 07-05-033  
(Filed May 29, 2007)

**OPINION GRANTING APPLICATION****1. Summary**

This decision grants the application of Southern California Edison Company (SCE) for approval of a settlement between SCE and the Bonneville Power Administration (BPA). This proceeding is closed.

**2. Background**

The April 12, 2007 settlement agreement at issue here (Settlement Agreement, appended hereto as an attachment) resolved matters between SCE and BPA with regard to a 20-year electricity sale and exchange agreement (Contract) the parties entered into in 1988. The dispute between BPA and SCE involved the price that SCE was required to pay to exercise its contractual right to Option Capacity in the year 2000. The parties disagreed about the formula to be used to calculate the Option Capacity price. They ultimately took their case to the Federal Court of Claims, and settled the case before trial.

The amount SCE contended BPA should pay SCE under the Contract was \$31,594,436. BPA contended its maximum liability was \$13,400,000 assuming

SCE's version of facts prevailed at trial. Under the terms of the Settlement Agreement, BPA agreed to pay SCE the sum of \$13,400,000, plus interest (the Settlement Proceeds).

### **3. Discussion**

The Commission will approve a settlement that is "reasonable in light of the whole record, consistent with law, and in the public interest."<sup>1</sup> In making this determination, the Commission considers the following issues, which we include in our analysis below:

1. Does the settlement reflect the relative risks and costs of litigation?
2. Does the settlement fairly and reasonably resolve the disputed issues and conserve public and private resources?
3. Do the settlement terms fall well within the range of possible outcomes if the parties litigated the dispute?
4. Had the litigation progressed to the stage where the parties had ample opportunity to assess the relative strengths and weaknesses of their positions so that the dispute was ripe for a reasonable compromise?
5. Were the negotiations at arm's length and without collusion?
6. Were the parties adequately represented?<sup>2</sup>

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<sup>1</sup> Commission's Rules of Practice and Procedure, Rule 12.1(d).

<sup>2</sup> D.05-07-018, *mimeo.* at 4-5, citing D.96-05-070, *mimeo.* at 5, 66 CPUC2d 314, 317 (1996), *see also* D.96-12-082, *mimeo.* at 9, 70 CPUC2d 427, 430 (1996), and *Re Pacific Gas and Electric Company*, D.88-12-083, 30 CPUC2d 189, 222.

Under this test, we find that the Settlement Agreement is reasonable and should be approved, as discussed below.

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

The Settlement Agreement is reasonable in light of the whole record.

First, the parties had very divergent views of liability (*i.e.*, the interpretation of the Contract's price term) as well as damages (the date from which damages should be calculated, and the extent to which SCE should have covered its losses). Both sides would have had to introduce parol evidence to demonstrate that their interpretation of the Contract was reasonable and appropriate. Had BPA been able to establish that its interpretation of the Contract was correct, SCE would have been unable to establish a breach of contract by BPA and thus would have recovered nothing in the litigation. Had either of BPA's damage claims prevailed, SCE would have recovered only \$13.4 million. BPA disputed the Federal Court of Claims' jurisdiction, and may have pressed this issue on appeal. Settling the case avoided significant attorneys' fees and costs, and helped preserve what will be an ongoing relationship between SCE and BPA.

Second, the parties settled after conducting ample oral and written discovery in their Court of Claims action, and thus were fully aware of the evidence to be presented at trial. They settled with full knowledge of the risks of proceeding to trial.

Finally, no party objects to the Settlement Agreement. The assigned Administrative Law Judge (ALJ) in this proceeding required SCE to serve its application far more broadly than SCE's initial service so that all parties to the Commission's large long-term energy procurement proceeding (Rulemaking

(R.) 06-02-013) received notice of the application. SCE effected this service on July 20, 2007 and no party protested this application.<sup>3</sup>

In addition, as a condition of settlement, the Settlement Agreement provided for a separate notice process under which BPA provided notice and an opportunity to comment to interested parties (customers and ratepayers) in the Pacific Northwest. That comment period closed on May 10, 2007 and did not affect the parties' willingness to proceed with settlement.<sup>4</sup>

Because liability was hotly disputed, the Settlement Proceeds figure of \$13.4 million represents a reasonable mid-point between the two views of jurisdiction and damages, was reached after ample discovery by both sides, and raised no objection either in California or the Pacific Northwest, we find the Settlement Agreement is reasonable in light of the whole record.

### **3.2. The Settlement is Consistent with Law**

The Settlement Agreement is also consistent with law. The parties' dispute was a one of simple contractual interpretation, and the settlement resolving that dispute therefore runs afoul of no applicable law. Neither SCE nor BPA is required to engage in conduct that might be unlawful; rather, the settlement simply provides for payment of a sum of money. The parties negotiated at arms' length with experienced counsel on both sides after a well fought battle that included a mediation process.

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<sup>3</sup> ALJ Ruling dated June 15, 2007.

<sup>4</sup> SCE's Amendment to Application, filed July 20, 2007, at 4. This notice was the sole condition precedent to settlement.

Further, the entire Settlement Proceeds will be credited to SCE's ratepayers: "SCE will credit the entire \$13.4 million settlement amount, plus interest, to the [Energy Resource Recovery Account] ERRA to be distributed to SCE's bundled service customers in the appropriate ERRA or other rate adjustment proceeding."<sup>5</sup> We make such a credit a condition of approval of this application.

Finally, this Commission has approved settlements of similar contract disputes between SCE and BPA. *See* Application 06-07-005, approved March 1, 2007 in Decision 07-03-005.

Because the Settlement Agreement calls for a lawful payment to ratepayers, was negotiated at arms' length by competent counsel after significant litigation, and is similar to other agreements we have approved, we find the Settlement Agreement is consistent with law.

### **3.3. The Settlement is in the Public Interest**

It is in the public interest for utilities we regulate to settle lawsuits that present risk of even greater losses if they proceed to trial. Here, SCE could have lost entirely at trial if its interpretation of the Contract did not prevail, and its damages may have been capped at the \$13.4 million Settlement Proceeds figure had the court rejected SCE's view of how to calculate damages. Thus, the Settlement Proceeds figure is in the reasonable range of outcomes. For SCE and its ratepayers to receive the same \$13.4 million (plus interest) in Settlement Proceeds, and save what could have been significant trial and appeal costs, is in the public interest.

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<sup>5</sup> Application at 19.

Further, the two sides' ongoing relationship has been preserved through a negotiated outcome, and we know of no objections to the settlement despite ample opportunity to do so.

#### **4. Conclusion**

We conclude the Settlement Agreement should be approved because it is reasonable in light of the whole record, consistent with law, and in the public interest.

#### **5. Comments on Proposed Decision**

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

#### **6. Assignment of Proceeding**

Timothy Alan Simon is the assigned Commissioner and Sarah R. Thomas is the assigned ALJ in this proceeding.

#### **Findings of Fact**

1. SCE and BPA entered into the Contract in 1988.
2. SCE and BPA engaged in substantial discovery, and a mediation session, prior to reaching settlement of the claims at issue here.
3. There were risks that SCE would not prevail in its claims against BPA both as to liability and damages.
4. Under the Settlement Agreement, BPA will pay SCE \$13.4 million, plus interest.
5. All conditions precedent to the Settlement Agreement have been satisfied.

6. SCE will credit the entire \$13.4 million Settlement Proceeds, plus interest, to the ERRA to be distributed to SCE's bundled service customers in the appropriate ERRA or other rate adjustment proceeding.

7. Conducting a further proceeding would unnecessarily consume valuable resources of SCE and BPA, and the Commission, and would delay, and possibly prevent, the realization of the benefits identified above.

### **Conclusions of Law**

1. The Settlement Agreement fully resolves and settles all disputed issues between SCE and BPA concerning SCE's Application in this proceeding.

2. The Settlement Agreement is reasonable in light of the whole record, consistent with law, and in the public interest.

3. The Settlement Agreement should be approved.

4. No hearings are necessary.

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

6. The proceeding should be closed.

## **O R D E R**

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

1. The application of Southern California Edison Company (SCE) for approval of the Settlement Agreement between SCE and Bonneville Power Administration is granted.

2. SCE shall credit the entire \$13.4 million in Settlement Proceeds, plus interest, to the Energy Resource Recovery Account (ERRA) to be distributed to SCE's bundled service customers in the appropriate ERRA or other rate adjustment proceeding.



3. SCE shall notify the assigned Commissioner and the assigned Administrative Law Judge by letter: (a) when SCE receives the Settlement Proceeds (plus interest), and (b) when SCE distributes the Settlement Proceeds to SCE's bundled customers.

4. Application 07-05-033 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.