

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



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Investigation on the Commission's Own)
Motion Into the Operations and Practices of)
Calpine PowerAmerica-CA, LLC; Notice)
of Opportunity for Hearing; and Order to)
Show Cause Why the Commission Should)
Not Impose Fines and Sanctions For)
Calpine's 2007 Violation of System and)
Local Resource Adequacy Requirements.)

I.09-01-017
(Filed January 29, 2009)

**JOINT MOTION OF CONSUMER PROTECTION AND
SAFETY DIVISION AND CALPINE POWERAMERICA-CA, LLC
FOR APPROVAL OF SETTLEMENT AGREEMENT**

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January 22, 2010

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Pursuant to Article 12 of the California Public Utilities Commission (“Commission”) Rules of Practice and Procedure, Calpine PowerAmerica-CA, LLC (“CPA”) and the Commission’s Consumer Protection and Safety Division (“CPSD”) (collectively, the “Settling Parties”) hereby move the Commission to adopt the Settlement Agreement attached hereto as Appendix A as a complete and final resolution of all issues between CPSD and CPA in this proceeding.

The Settlement Agreement constitutes an “all party” settlement and satisfies the criteria for Commission approval of settlements. Specifically, the Settlement Agreement is reasonable in light of the entire record, consistent with the law, and in the public interest. Accordingly, the Settling Parties urge the Commission to approve the Settlement Agreement without modification.

I. BACKGROUND

On February 16, 2006, CPA submitted a Resource Adequacy (“RA”) compliance filing which referenced a liquidated damages (“LD”) contract that CPA represented qualified for RA compliance purposes under Commission Decision 05-10-042.

On October 31, 2007, CPA submitted a year-ahead compliance filing for 2008 System RA compliance and 2008 Local RA compliance.

On December 5, 2008, CPSD submitted an Investigation Report, which alleged that CPA failed to comply with RA procurement obligations, as required by Commission Decision 05-10-042 and Decision 06-06-064. Specifically, the CPSD Investigation Report alleged that CPA’s 2008 Year-Ahead System RA compliance filing included procurement from an expired LD contract for the months of July, August and September 2008 causing a system deficiency. The CPSD Investigation Report also alleged that CPA used incorrect monthly demand response (“DR”) allocation values for Local RA compliance purposes resulting in a Local RA deficiency for 2008.

On February 2, 2009, the Commission issued an order instituting investigation to determine whether CPA violated Commission RA program rules, regulations, or orders in CPA’s 2008 Year-Ahead System and Local RA compliance filings (“I.09-01-017”).

On May 11, 2009, CPA submitted Direct Testimony responding to and disputing the allegations in CPSD’s Investigation Report and I.09-01-017. With respect to the alleged System RA deficiency, CPA’s Direct Testimony stated that the LD contract at issue did not expire on June 30, 2008 as alleged in the CPSD Investigation Report and that CPA had no system RA deficiencies for the time period at issue in I.09-01-017.

With respect to the alleged Local RA deficiency, CPA's Direct Testimony stated that, based on the Commission's guidelines and other information related to the 2008 Year-Ahead Local RA compliance filing, CPA believed it was using the correct DR allocations at the time it made the compliance filing.

On June 12, 2009, CPSD submitted Rebuttal Testimony responding to CPA's Direct Testimony. CPSD's Rebuttal Testimony disputed CPA's position that CPA had correctly completed its February 16, 2006 RA compliance filing.

II. SUMMARY OF KEY TERMS OF SETTLEMENT AGREEMENT

The attached Settlement Agreement includes the terms and conditions of the settlement. It represents a compromise in the Settling Parties litigation positions and is not an endorsement of either party's position on any issue, nor does it constitute an admission by either party of any disputed issue of fact or law or of any violation or liability by any party. The key terms of the Settlement Agreement include:

- The Settling Parties agree that the way in which CPA completed its February 16, 2006 RA compliance filing led the Commission's Energy Division and CPSD to believe that CPA had not timely procured the capacity needed to meet its 2008 Year-Ahead System RA obligation.
- For settlement purposes only, CPSD accepts that CPA had timely acquired the capacity needed to meet its 2008 Year-Ahead System RA obligation consistent with Commission Decision 05-10-042 and Decision 06-06-064.
- CPA shall make a settlement payment to the State of California General Fund in the amount of \$225,000 within 60 days of the issuance of a final and non-appealable decision by the Commission approving the Settlement Agreement without material change.

III. THE SETTLEMENT AGREEMENT SHOULD BE APPROVED BY THE COMMISSION

The Commission has a long, well-established policy of supporting the resolution of disputed matters through settlement.¹ In doing so, the Commission has acknowledged that settlements advance several important goals, such as reducing the time and expense of litigation, conserving scarce Commission resources, and allowing the parties to reduce the risks associated with litigation.² Commission Rule 12.1(d) provides that the Commission will not approve a settlement unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

In assessing settlements, the Commission considers all of the settlement provisions. In light of strong public policy favoring settlements, the Commission will not base its conclusion on whether any single provision is the optimal result but rather, “whether the settlement as a whole produces a just and reasonable outcome.”³ Furthermore, Commission policy “weighs against the Commission’s alteration of agreements reached through negotiation.”⁴ As demonstrated below, the Settlement Agreement represents a reasonable resolution of this proceeding in light of the whole record that is consistent with the law and in the public interest.

A. The Settlement Agreement Is Reasonable In Light of The Record

The Settling Parties have engaged in extensive discovery, including written data requests and oral depositions, and both CPSD and CPA prepared and served testimony

¹ See e.g., Decision 05-03-022, mimeo at 7-8; Decision 08-01-043, mimeo at 10.

² Decision 05-03-022, mimeo at 8, 9 (citing Decision 92-12-019).

³ Decision 05-11-005, mimeo at 16.

⁴ Decision 06-06-014, mimeo at 12.

and supporting exhibits in support of their litigation positions.⁵ An examination of the complete record demonstrates conclusively that each of the Settling Parties made significant concessions to resolves the issues in this proceeding in a manner that reflects a reasonable compromise among their respective litigation positions. By doing so, the Settlement Agreement addresses the issues in the proceeding in a reasonable manner in light of the record as a whole.

B. The Settlement Agreement Is Consistent With The Law

Nothing in the Settlement Agreement contravenes any statute or Commission decision or rule. Therefore the Settlement Agreement is consistent with applicable law.⁶

C. The Settlement Agreement Is In The Public Interest

The Settlement Agreement is consistent with the Commission's well-established policy of supporting the resolution of disputed matters through settlement, reflects a reasonable compromise between the Settling Parties' positions, and will avoid the time, expense and uncertainty of evidentiary hearings and further litigation. Accordingly, the Settlement Agreement is in the public interest and should be adopted by the Commission without material change.

IV. CONCLUSION

For the reasons set forth above, CPSD and CPA respectfully request that the Commission:

⁵ The Settling Parties have identified this testimony in an appendix to the Settlement Agreement and request that this testimony be received in evidence, without cross-examination, for the sole and limited purpose of facilitating a determination by the Commission of whether the Settlement Agreement is reasonable in light of the whole record, consistent with the law, and in the public interest.

1. Find that the Settlement Agreement, attached as Appendix A, is reasonable in light of the whole record, consistent with law, and in the public interest;
2. Adopt the Settlement Agreement without modification; and
3. Admit into evidence the testimony listed in the appendix to the Settlement Agreement for the limited purpose of completing the record upon which to evaluate the Settlement Agreement.

Respectfully Submitted:

/s/ TRAVIS T. FOSS

/s/ JEFFREY P. GRAY

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Dated: January 22, 2010

⁶ By oral ruling dated September 14, 2009, Administrative Law Judge Fukutome waived the requirement that the Settling Parties convene a settlement conference pursuant to Commission Rule 12.1(b) prior to signing the Settlement Agreement. Tr. at 1-2.

APPENDIX A

SETTLEMENT AGREEMENT

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **“JOINT MOTION OF CONSUMER PROTECTION AND SAFETY DIVISION AND CALPINE POWERAMERICA-CA, LLC FOR APPROVAL OF SETTLEMENT AGREEMENT** to each party of record on the official service list in **I.09-01-017** via electronic mail.

Parties who did not provide an electronic mail address, were served by U.S. mail with postage prepaid listed on the official service list.

Executed on **January 22, 2010** at San Francisco, California.

/s/ HALINA MARCINKOWSKI

Halina Marcinkowski

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