

Decision \_\_\_\_\_

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

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

Application 06-07-005  
(Filed July 5, 2006)

**OPINION APPROVING SETTLEMENT****Summary**

This decision approves a settlement resolving litigation between Southern California Edison Company (SCE) and Bonneville Power Administration (BPA). The settlement resolves two disputes that have arisen between SCE and BPA under a twenty-year sale and exchange agreement (the Contract) the parties entered into in 1988. The settlement reflects a fair compromise of contentious litigation between SCE and BPA. This proceeding is closed.

**Background**

SCE filed this application<sup>1</sup> July 5, 2006, requesting approval of a settlement that would resolve two disputes in which SCE alleged that BPA violated certain terms of the Contract. The Contract is a “take or pay” agreement for which BPA either sold power to SCE or exchanged power with SCE. In the sale mode, which

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<sup>1</sup> Accompanying the application are Public and Confidential versions of the Prepared Testimony of Kevin Cini Supporting Application for Approval of Settlement Agreement with BPA, and Accompanying Documents (provided by disc) supporting the Settlement Agreement.

was the default mode, SCE bought power from BPA at a price determined by a formula set forth in the Contract. In the exchange mode, SCE paid for the capacity and energy provided by BPA by returning power to BPA.

In the first dispute, called the Conversion Dispute, SCE states it filed a complaint in December 2002 in the Court of Federal Claims (the Court) alleging that from 1991 until 1999, BPA breached material terms of the Contract when BPA became aware of facts that should have required it to convert the Contract from the sale mode to the exchange mode. SCE also alleged that BPA actively concealed such facts from SCE, and misinformed SCE of its actions. SCE believed that the Contract would be in the sale mode, and could not properly plan for the unexpected conversion of the Contract to the exchange mode in August 2000. During the 2000-2001 Energy Crisis, SCE had to purchase large amounts of power at a very high cost to replace power SCE expected to receive from BPA and to make power returns to BPA required in the exchange mode.

In the second dispute, called the Termination Dispute, SCE states it filed a complaint on November 30, 2004 in the Court alleging that BPA wrongfully terminated the Contract in July 2001 following a disagreement with SCE over SCE's return of energy to BPA while the contract was in the exchange mode earlier in 2001. Following BPA's conversion of the Contract to the exchange mode in August 2000, SCE was required to return energy that BPA supplied to SCE. Beginning in September 2000 and continuing through July 2001, a series of transmission outages and other emergencies reduced SCE's ability to return power to BPA and caused SCE to invoke the clause of the Contract allowing deliveries of return energy to be reduced or delayed. However BPA refused to accept SCE's invocation of this clause and demanded a return of all energy by a date certain. Due to the emergency circumstances, SCE could not commit to

returning the energy by a specific date. Although SCE completed all energy returns by June 2001, BPA demanded that SCE sign a revised contract and pay BPA \$9.3 million in damages. BPA suspended energy deliveries under the Contract on June 1, 2001.

SCE explains that in February 2005, SCE suggested to their BPA counterparts that the disputes be mediated. After the parties agreed on a mediator, SCE and BPA met in mediation on June 13 and 14, 2005. Although matters were not resolved during the mediation, after further negotiations, and tentative agreement on a settlement, SCE and BPA reached the Settlement Agreement on June 5, 2006.

### **Terms of the Settlement Agreement**

Under the Settlement Agreement, BPA has agreed to pay SCE \$28.5 million, plus interest. BPA will pay the settlement amount when the “California Refund Process” before the Federal Energy Regulatory Commission (FERC) reaches a final determination regarding whether BPA is owed money or it owes money to others due to its role as a seller of power in the California wholesale electricity market during the 2000-2001 energy crisis.<sup>2</sup> Although the Settlement Agreement resolves the Conversion Action and the Termination Action, BPA and SCE continue to be adversaries in other actions regarding the California Refund Process.

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<sup>2</sup> See, FERC Docket nos. EL00-95-000 and EL-00-98-000.

The Settlement Agreement is subject to formal approval by both the Commission and BPA.<sup>3</sup> Upon Commission approval of the Settlement Agreement and receipt of the settlement amount from BPA, SCE will credit the entire \$28.5 million settlement amount, plus interest, to the Energy Resource Recovery Account (ERRA) to be distributed to SCE's ratepayers in an appropriate ERRA or other ratemaking proceeding.

### **Settlement Criteria**

Parties to the proceeding have reached a settlement of all disputed issues relating to the Conversion and Termination Disputes. SCE contends that the Settlement Agreement should be approved under Rule 12.1(d)<sup>4</sup> of the Commission's Rules of Practice and Procedure, which states that the Commission will approve a settlement that is "reasonable in light of the whole record, consistent with law and in the public interest." Although Rule 12.1(d) is usually applied to a settlement that resolves disputes between active parties in a Commission proceeding, in this instance the rule provides a basis for approving the settlement between BPA and SCE. Accordingly we will consider the Settlement Agreement under each of the criterion of Rule 12.1(d).

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<sup>3</sup> The Settlement Agreement requires BPA to notify interested parties in the Pacific Northwest, and notify SCE that it will proceed with the settlement. SCE provided a letter from Stephen J. Wright, Administrator and Chief Executive Officer for the Department of Energy, BPA, dated August 1, 2006 which states that BPA supports the Settlement Agreement. By ALJ Ruling November 20, 2006, this letter is identified and received as Exhibit 2.

<sup>4</sup> Rule 12.1(d) was previously Rule 51.1(e) prior to September 2006.

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

The record includes the Application, the Prepared Testimony (Public and Confidential Versions), the Accompanying Documents (electronically provided by disc), and the August 1, 2006 Letter from the BPA to SCE supporting the Settlement Agreement.<sup>5</sup> These documents contain the information necessary to find the Settlement Agreement reasonable in light of the record. A review of the Prepared Testimony (Exhibit 1) indicates that the Settling Parties engaged in extensive litigation prior to the Settlement Agreement, and aggressively pursued their respective interests in the Conversion and Termination Disputes. Furthermore, parties had ample opportunity to assess the relative strengths and weaknesses of their positions so that the disputes were ripe for reasonable compromise. Given the vigor of the two disputes, and the strength of their respective representation, the negotiations were conducted at arms length and without collusion. It was only after engaging in this difficult litigation that Settling Parties met in a mediation session with a bona fide mediator in June 2005. After meeting in mediation, the Settling Parties only resolved the two disputes after further negotiations leading to a tentative agreement and eventually the Settlement Agreement.

The Settlement Agreement represents a reasonable compromise of the Settling Parties' positions. The Prepared Testimony (Public and Confidential

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<sup>5</sup> An ALJ Ruling on November 20, 2006, granted SCE's motion to move the Prepared Testimony (Public Version) and Prepared Testimony (Confidential Version), and the Accompanying Documents into Evidence.

A separate ALJ Ruling on November 20, 2006, granted a SCE motion to seal a portion of the evidentiary record.

versions), and the Accompanying Documents contain sufficient information for the Commission to determine the reasonableness of the Settlement Agreement.

**The Settlement Agreement  
is Consistent with Law**

A review of the Settlement Agreement indicates that the terms of the Settlement Agreement comply with all applicable statutes and prior Commission decisions, and reasonable interpretations thereof. SCE and BPA have authority to enter into contracts for the wholesale purchase and sale of electricity, administer the contracts, and to “use their best efforts to amicably and promptly resolve the dispute.”<sup>6</sup> The Settlement Agreement is not precluded by any Commission decision, and is similar to other previously approved settlements between utilities and power providers.<sup>7</sup>

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

The Settlement Agreement is a reasonable compromise of the Settling Parties’ respective positions. SCE explains that if the two disputes were to go to trial, SCE and BPA would present conflicting evidence reflecting two different perspectives of their respective behavior and its impact on the other party. The Settlement Agreement allows both sides to avoid the risks of the possible outcomes of continued litigation, and reduces the use of valuable resources of SCE and BPA, as well as Commission resources.

The Settlement Agreement amount falls within the range of potential outcomes estimated by SCE. This view is supported by the neutral mediator selected by the Settling Parties. The mediator concludes:

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<sup>6</sup> Exhibit 2, Accompanying Documents, Tab B, pp.61-62, paragraph. 20, “Disputes.”

<sup>7</sup> See, D.04-08-032.

“The settlement reached by SCE and BPA of those two disputes is roughly in the middle of the numerical range I recommended to the parties at the conclusion of the mediation” (Accompanying Documents, Tab HH).

In addition, we have reviewed the Prepared Testimony (Confidential Version), including the Accompanying Documents. In weighing the information and analyses provided in these documents, we conclude that the Settlement Agreement provides positive benefits to ratepayers under a range of scenarios and is reasonable.

### **Conclusion**

The Settlement Agreement resolves complex matters relating to SCE’s litigation with BPA and the resolution of the two disputed matters. In sum, we find SCE’s application to be reasonable and we will approve it.

In Resolution ALJ-3176 dated July 20, 2006, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Given this status public hearing is not necessary and we confirm the preliminary determinations made in Resolution ALJ 176-3176.

### **Assignment of Proceeding**

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

### **Findings of Fact**

1. SCE and BPA entered into a 20-year take or pay agreement to either sell or exchange power in 1988.
2. The Conversion Dispute arose during the energy crisis of 2000-2001.
3. The Termination Dispute arose in 2004.

4. SCE and BPA pursued their claims against each other, and litigated both the Conversion and Termination Disputes before meeting in mediation in June 2005.

5. After further negotiations, SCE and BPA reached a Settlement Agreement on June 5, 2006, resolving both the Conversion and Termination Disputes.

6. The Settlement Agreement is the product of extensive negotiations between SCE and BPA.

7. Under the Settlement Agreement, BPA has agreed to pay SCE \$28.5 million, plus interest, pending resolution by FERC of the California Refund Process.

8. Upon Commission approval of the Settlement Agreement, the entire \$28.5 million plus interest will be credited to the ERRA to be distributed to SCE's ratepayers in an ERRA or other appropriate proceeding.

9. 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 pertaining to the \$28.5 million, plus interest, payment.

### **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 we approve 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 for approval of the Settlement Agreement between SCE and Bonneville Power Administration is granted.
2. Application 06-07-005 is closed.

This order is effective today.

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