

Summary of proposed settlement with CPN Cascade Inc. (Calpine) to resolve litigation concerning “Telephone Flats” geothermal development

I. Factual Background

In September 1994, CPN Cascade (then d/b/a CE Newberry, Inc., or, CalEnergy) and Bonneville entered into a Power Purchase Agreement for output from a geothermal project that CalEnergy planned to build near the Newberry Volcano in central Oregon (Newberry PPA).

On December 18, 1996, BPA and CalEnergy executed a Settlement Agreement to resolve disputes between BPA and CalEnergy arising under the Newberry PPA. Under the 1996 Settlement Agreement, BPA agreed to: (1) make a payment to CalEnergy immediately upon executing the 1996 Settlement Agreement; and (2) potentially make a second payment to CalEnergy if certain conditions were met in the future.

BPA made the first payment in 1996. The present litigation (summarized below) concerns the conditional second payment.

The conditional second payment dealt with the possibility that CalEnergy might gain approval for and develop a geothermal project at Telephone Flats (located in what is sometimes known as the “Glass Mountain Geothermal Resource Area” of Northern California). If so, the 1996 Settlement Agreement required BPA to make a decision whether to “approve” that project and enter into a Power Purchase Agreement with CalEnergy to purchase output from it.¹

However, before BPA would be faced with such a decision, CalEnergy would have to obtain the requisite environmental approvals (NEPA approval) for the Telephone Flats project from the U.S. Forest Service and Bureau of Land Management.

II. The Present Litigation

In October 2001, Calpine acquired CalEnergy. Thus, Calpine (d/b/a CPN Cascade, Inc.) became the interested party in the 1996 Settlement Agreement.

On December 19, 2005, CPN Cascade (i.e. Calpine) filed a lawsuit alleging that BPA breached the 1996 Settlement Agreement. Specifically, CPN Cascade alleged it had obtained the requisite NEPA approval for the Telephone Flat project from the Forest Service and BLM on November 26, 2002. CPN Cascade also alleged that BPA, by taking no action after November 26, 2002, effectively disapproved the Telephone Flat project. Therefore, according to CPN Cascade, the 1996 Settlement Agreement obligated BPA to make the conditional second payment in the amount of \$9,000,000.

¹ Specifically, if CalEnergy obtained NEPA approval, then the 1996 Settlement Agreement required BPA to choose whether to: (1) approve the Telephone Flat project and execute a Power Purchase Agreement with CalEnergy, in which case BPA would be required to pay CalEnergy \$10,000,000; or (2) not approve the Telephone Flat project and/or not execute a Power Purchase Agreement with CalEnergy, in which case BPA would be required to pay CalEnergy \$9,000,000.

BPA disagrees with CPN Cascade's reading of the 1996 Settlement Agreement, in particular, CPN Cascade's interpretation of the requirements for the conditional second payment. Accordingly, BPA maintains it has no obligation to make the second payment and has refused to do so.

III. The Settlement Proposal

CPN Cascade's lawsuit seeks \$9,000,000 in damages, plus applicable interest (initial calculations indicate interest would bring the total damages amount to over \$10,418,000).

BPA disagrees with CPN Cascade's legal and factual conclusions. BPA is not in breach of the 1996 Settlement Agreement and BPA does not owe CPN Cascade the damages it is seeking. Nevertheless, as with any lawsuit, a litigated outcome presents risks.

Accordingly, BPA's counsel at the US Department of Justice and CPN Cascade's counsel have pursued settlement. The authorized representative of the Attorney General is considering a settlement whereby BPA would pay \$1,500,000 in exchange for CPN Cascade's voluntary dismissal of its lawsuit. CPN Cascade would also be barred from bringing any similar suit in the future. Additionally, BPA would be definitively relieved of any and all obligations under the 1996 Settlement Agreement and any and all obligations with regard to the proposed Telephone Flats geothermal project. The settlement would not have any bearing on any of BPA or CPN Cascade's legal or factual arguments, and it would not be an admission of fault by either party.

BPA believes the settlement is advisable to dispense with whatever modicum of litigation risk this lawsuit represents. The \$1,500,000 settlement payment is approximately 17% of CPN Cascade's total damages claim of \$9,000,000. Additionally, the settlement payment does not include interest which would be a significant additional component of damages if CPN Cascade were successful on its claim (initial calculations indicate at least \$1,418,000 worth of interest could be added to CPN Cascade's \$9,000,000 damages claim).

This lawsuit is very complex from both a factual and legal perspective. To further litigate, BPA would likely incur tremendous lost attorney/staff time and would divert resources from other uses, to a point where the overall impact on BPA could quickly outweigh the \$1,500,000 financial burden of settling. And, even if BPA did further litigate, BPA would have no guarantee of success in the outcome.

Accordingly, BPA believes this settlement comports with sound business principles and BPA has authority to enter into the settlement under section 2(f) of the Bonneville Project Act and section 9(a) of the Northwest Power Act.

IV. Purpose of Notice & Comment

By statute, the final decision of whether to accept or reject this settlement rests with the authorized representative of the Attorney General. However, BPA will be afforded an opportunity to make a recommendation to the authorized representative of the Attorney General. Therefore, BPA now seeks comment on whether to make a recommendation to "accept" or "reject" the settlement proposal set forth above.