

108 FERC ¶ 61,322  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Cedar II Power Corporation

Docket Nos. EL04-111-000 and  
QF89-126-008

ORDER APPROVING SETTLEMENT AGREEMENT

(Issued September 30, 2004)

1. On September 7, 2004, Cedar II Power Corporation (Cedar II) and all parties to the proceeding filed a settlement agreement resolving a contested petition for declaratory order to determine the amount of a true-up obligation owed by Pacific Gas & Electric Corporation's (PG&E) affiliates under a 1993 Order recertifying Cedar Bay Generating Company, Limited Partnership (Cedar Bay) as a qualifying facility (QF) under the Commission's regulations implementing the Public Utility Regulatory Policies Act of 1978. This order approves that settlement agreement. This order benefits customers because it resolves the amount of true-up payment required and ensures that the facility will retain its QF status.

**Background**

2. Cedar II's petition contends that the imminent emergence from bankruptcy of an indirect PG&E subsidiary, National Energy & Gas Transmission, Inc. (NEGT), triggers a true-up payment obligation established in the recertification order, *Cedar Bay Generating Company, Limited Partnership*, 65 FERC ¶ 62,232 (1993) (Recertification Order).

3. PG&E indirectly owns its interest in Cedar Bay through a series of intermediate companies that include NEGТ and Raptor Holdings Company (Raptor). Cedar II is not an electric utility, electric utility holding company, or any combination thereof, or any wholly- or partially-owned subsidiary thereof. Control of Cedar Bay is shared equally between Cedar Bay Cogeneration Inc, (an indirect subsidiary of NEGТ and Raptor) and Cedar II.

4. The Commission's Recertification Order noted that the allocation of the periodic stream of benefits from Cedar Bay to its owners would differ from their ownership percentages over time, although it was anticipated that the utility investor (PG&E) would not receive more than 50% of the net partnership benefits over the life of the facility. The Commission conditioned its recertification of Cedar Bay as a QF as follows:

Stream of benefit analyses involve projections of revenues and expenses for many years into the future and, therefore, PG&E's actual derivative share of the benefits may differ from that shown in the analyses. However, PG&E affiliate Raptor and Bechtel affiliate Cedar Power Corp., which exert voting control over Gray Hawk and Cedar I, respectively, have committed to enter into a true-up agreement to ensure that PG&E's share of the stream of benefits does not exceed 50% over the term of its involvement in the project. Prior to the consummation of the sale of any PG&E interests in the facility by Raptor or its upstream owners, or liquidation of the partnership, the present value of the proposed sale related benefits will be added to the present value of prior benefits. If the cumulative present value of all benefits to PG&E will exceed 50% of the total accumulation, then PG&E's share of the benefits will be adjusted as necessary to reduce it to 50% as of the sale. This true-up ensures that PG&E does not receive more than 50% of the stream of benefits in connection with its involvement with the facility.<sup>1</sup>

5. On July 8, 2003, NEGT declared bankruptcy. The Bankruptcy Court subsequently approved NEGT's plan of reorganization in an order issued on May 3, 2004. Raptor and Cedar II (together, the settling parties) stated that the plan will mark a critical step in the resolution of billions of dollars of claims held by NEGT's creditors. Among other things, the plan provides for the elimination of PG&E's equity interest in NEGT and the issuance of new debt and equity securities to NEGT's creditors, who will become the new owners of NEGT and, indirectly, NEGT's interest in Cedar Bay.<sup>2</sup> The NEGT bankruptcy plan is expected to become effective in October 2004.

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<sup>1</sup> Recertification Order, 65 FERC ¶ 62,232 at 64,567 (1993).

<sup>2</sup> PG&E's disposition of its interests was approved on April 6, 2004. *National Energy & Gas Transmission, Inc.*, 107 FERC ¶ 62,005 (2004).

### **Petition for Declaratory Order**

6. On June 18, 2004, Cedar II filed a petition for a declaratory order requesting the Commission to determine the amount of the true-up obligation due under the Recertification Order in light of NEGТ's planned deconsolidation from PG&E. Among other things, Cedar II expressed concern that implementation of NEGТ's reorganization plan without first resolving the true-up question could adversely affect Cedar Bay's QF status.

### **Interventions, Protests and Responsive Pleadings**

7. Notice of Cedar II's petition was published in the *Federal Register*, with interventions, protests and comments due on or before July 19, 2004.<sup>3</sup>

8. NEGТ and Raptor filed a timely motion to intervene and protest, disputing Cedar II's contentions that the true-up condition was triggered by NEGТ's emergence from bankruptcy and that, if triggered, a true-up payment was due. NEGТ requested the Commission decide the issues raised expeditiously so as not to unduly delay NEGТ's emergence from bankruptcy. The Unsecured Creditors of National Energy & Gas Transmission, Inc. (Unsecured Creditors) also filed a motion to intervene and protest, raising similar issues. BNP Paribas, New York Branch (BNP), in its capacity as agent for certain lenders, filed a motion to intervene and asked the Commission to ensure that any true-up obligation is implemented in a manner that does not cause Cedar Bay to lose its QF status, but otherwise took no position on the true-up issue.

9. On July 30, 2004, Cedar II filed an answer to the protests filed by the NEGТ and Raptor. On August 3, 2004, BNP filed an answer to certain issues raised by NEGТ and Raptor. Among other things, Cedar II did not oppose an expeditious decision by the Commission, provided safeguards are in place to preserve Cedar Bay's QF status. NEGТ and Raptor filed an answer to Cedar II and BNP on August 13, 2004. PG&E filed a motion to intervene out-of-time on August 11, 2004. On August 23 and 24, 2004, the settling parties, NEGТ, PG&E, the Unsecured Creditors and BNP participated in a mediation session conducted by the Commission's Dispute Resolution Service.

### **Settlement**

10. On September 7, 2004, the settling parties submitted a settlement agreement that resolves all issues raised by Cedar II's petition through a negotiated true-up payment by a non-bankrupt subsidiary of NEGТ, currently an affiliate of PG&E, to Cedar II's affiliate,

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<sup>3</sup> 69 Fed. Reg. 40,892 (2004).

Cedar Power Corporation (Cedar Power),<sup>4</sup> and through a non-bankrupt subsidiary of NEGТ granting an option for an affiliate of Cedar II to purchase an equity interest in Cedar Bay from a non-bankrupt subsidiary of NEGТ (collectively, the Consideration). The settlement agreement states that the Consideration was negotiated at arms-length between Cedar Bay's utility and non-utility owners. The settlement agreement further states that the agreement is conditioned upon the Commission finding that the true-up condition of the Recertification Order will be fully satisfied and discharged upon the transfer of the agreed-upon Consideration from a non-bankrupt subsidiary of NEGТ to Cedar Power. The settling parties state that NEGТ, PG&E, the Unsecured Creditors, and BNP all support the settlement agreement.

11. Notice of the settlement agreement was published in the *Federal Register*, with comments due on or before September 15, 2004 and reply comments due on or before September 17, 2004.<sup>5</sup> None was filed.

### **Discussion**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure<sup>6</sup>, the timely, unopposed motions to intervene serve to make the entities that filed such motions parties to this proceeding. The Commission will also grant PG&E's motion to intervene out-of-time given its interest, the early stage of the proceeding, and the absence of undue prejudice or delay.

13. The settlement agreement constitutes a full and final resolution of the proceeding. The settlement agreement is in the public interest and is hereby approved. Given the parties' agreement, we find that the Consideration fully satisfies and discharges the true-up obligation in the Recertification Order.

14. Consistent with the terms of the settlement agreement, within three business days of the effective date of this order, a non-bankrupt subsidiary of NEGТ shall provide the Consideration for the true-up payment to Cedar Power.

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<sup>4</sup> The settlement agreement provides that a non-bankrupt subsidiary of NEGТ commits to place the payment amount into an escrow account for the benefit of Cedar Power pending the Commission's decision on the settlement. On September 17, 2004, NEGТ and Raptor informed the Commission that the escrow agreement was fully funded on September 13, 2004.

<sup>5</sup> 69 Fed. Reg. 55,421 (2004).

<sup>6</sup> 18 C.F.R. § 385.214 (2004).

The Commission orders:

(A) The settlement agreement is hereby approved.

(B) Within three business days, a non-bankrupt subsidiary of NEGT is hereby directed to provide the consideration to Cedar Power, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.