



## Legislation Details (With Text)

**File #:** 19-2012      **Version:** 1      **Name:** Resolution: Settlement of Pre-Suit Litigation - Constellation NewEnergy, Inc.  
**Type:** Resolution      **Status:** Adopted  
**File created:** 12/20/2019      **In control:** Law  
**On agenda:** 1/22/2020      **Final action:** 1/22/2020  
**Title:** Dept/ Agency: Law  
Action: ( ) Ratifying (X) Authorizing ( ) Amending  
Purpose: Settlement of Pre-Suit Litigation  
Docket No.: N/A  
Claimant: Constellation NewEnergy, Inc.  
Claimant's Attorney: Mark Packel, Assistant General Counsel  
Attorney's Address: 2301 Market Street, 23rd Floor, Philadelphia, Pennsylvania 19103  
Settlement Amount: \$3,000,000.00  
Funding Source: 2019 Budget/Department of Engineering/011-210-2101- A-95220-B2019 (\$921,079.00); and 011-110-1107-A-71520-B2019 (\$78,921.00)  
Additional Comments:  
\$3,000,000.00, to be paid in five (5) installments, commencing upon authorization by the Municipal Council and terminating in October 2021.  
Invitation: Corporation Counsel  
**Sponsors:** Council of the Whole

**Indexes:**

**Code sections:**

Date	Ver.	Action By	Action	Result
1/22/2020	1	Municipal Council	Adopt	Pass

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**WHEREAS**, in an effort to reduce the fiscal impacts of rising energy prices and demonstrate a commitment to renewable energy generation the City of Newark (the "City"), 920 Broad Street, Newark, New Jersey 07102 sought to purchase electric generation services for its Public Buildings and Street Lighting ("Electricity Services") from a third-party energy supplier; and

**WHEREAS**, the Essex-Hudson Regional Cooperative Pricing System (EHCPCS) is a regional cooperative pricing system duly approved by the Department of Community Affairs (Regional Cooperative Pricing System ID# 198ECAEPC), which has been formed between the Essex County Aggregate Energy Procurement Cooperative Pricing System or "ECAEPC" (Cooperative Pricing System ID# 198ECAEPC) and the Hudson County Cooperative Pricing System or "HCCPS" (Cooperative Pricing System ID# 83-HCPS). Participation in the EHCPCS enables participating members to obtain electric generation services from a third-party energy supplier in the retail electricity market at a more competitive rate than is offered through the Public Service Electric and Gas Company (PSE&G) Basic Generation Service and Body Politic Lighting Service; and

**WHEREAS**, the City, along with other participating Member Local Governmental Units ("LGUs") adopted Resolution 7R4-a(S) on April 21, 2015, authorizing LGU's to purchase power supply through the EHCPCS; and

**WHEREAS**, in 2015, the County of Hudson served as the Lead Agency of the EHCPCS and was authorized to issue Request for Bids for electric generation services on behalf of participating members and award energy supply contracts, based upon the recommendation of the Lead Agency's Consultant's application of the evaluation criteria to the bid; and

**WHEREAS**, in response to a Request for Bids on or about May 5, 2015, Constellation, was awarded a twenty-four (24) month contract to supply electric generation service to member accounts in Bid Group 1, which included the City; and

**WHEREAS**, the City obtained Electricity Services from Constellation for the period of approximately June 2015 through May 2017 to ensure the City met its electricity service obligations to provide energy to public buildings and street lights for the benefit of its citizens; and

**WHEREAS**, Constellation erroneously sent the City invoices to an incorrect billing address from the period between June 2015 and October 2016; and

**WHEREAS**, Constellation acknowledged that participating City accounts were not enrolled in consolidated billing, as required in the EHCPCS Request for Bids for the period of approximately June 2015 through October 2016, and had instead erroneously used the dual billing process for billing electricity provided to the City; and

**WHEREAS**, in an effort to resolve these issues, the City provided Constellation with the correct billing addresses (for the Department of Engineering, Division of Traffic and Signals and Department of Public Works, Division of Public Buildings) and Constellation re-issued corrected invoices from the period between January 1, 2016 through October 1, 2016; and

**WHEREAS**, Constellation re-issued and corrected all subsequent invoices to reflect correct service periods; and

**WHEREAS**, the City (Department of Engineering, Division of Traffic and Signals) on or about May 2017 made a payment in the amount of Five Hundred Thirty-Eight Thousand, Ninety-Two Dollars and Ten Cents (\$538,092.10) to Constellation toward the overall balance; and

**WHEREAS**, Constellation submitted invoices totaling Three Million Three-Hundred Five Thousand Five Hundred Dollars and Nineteen Cents (\$3,305,500.19) (the "Claim") for the costs

associated with providing Electricity Services to the City during the period of June 2015 through May 2017, which the invoices remain unpaid; and

**WHEREAS**, the Parties dispute the remaining outstanding balance owed by the City to Constellation and the allegations above; and

**WHEREAS**, to avoid the costly expense of litigation, Constellation and the City desire to amicably resolve this matter prior to any commencement of litigation; and

**WHEREAS**, the Parties have agreed to settle the dispute for payment by the City of Three Million Dollars and Zero Cents (\$3,000,000.00) (the "Settlement Sum"), as further set forth below, in exchange for Constellation's execution of this Settlement Agreement as a full and complete release of the Claim, including any claims for attorney's fees; and

**WHEREAS**, this Settlement Agreement neither admits nor should it be construed as an admission of liability or violation of any law, statute or regulation or a breach of any duty by the City or Constellation, or their respective agents, officers and/or employees whatsoever and is entered into to resolve this matter and prevent the incurring of additional costs and fees; and

**WHEREAS**, the Municipal Council based upon the recommendation of the Business Administrator, Director of Engineering, Director of Public Works and the Corporation Counsel deem it is in the best interest of the taxpayers of the City to settle and avoid the cost, expense, delay and uncertainty of litigation; and

**WHEREAS**, the Director of the Department of Finance has certified that there are adequate, appropriated monies available to pay the Settlement Sum.

**NOW, THEREFORE, BE IT RESOLVED BY THE MUNICIPAL COUNCIL OF THE CITY OF NEWARK, NEW JERSEY, THAT:**

1. The Corporation Counsel is authorized on behalf of the City of Newark to negotiate and execute a Settlement Agreement and any other documents, sufficient in form and content to the Corporation Counsel and to take whatever actions are necessary to effectuate the terms of the within resolution and settlement of this matter pursuant to the terms contained in this resolution.
2. In exchange for the execution of the Settlement Agreement, acceptable in form to the Corporation Counsel and after passage of this resolution and upon receipt by the Corporation Counsel and the Director of Finance of any and all other documents deemed necessary, the Director of Finance on behalf of the City is authorized to make payments totaling Three Million Dollars and Zero Cents (\$3,000,000.000) for the benefit of Constellation pursuant to the following payment schedule:
  - a) One Million Dollars and Zero Cents (\$1,000,000.00) within (45) forty-five days of the Municipal Council's Resolution approving the Settlement Agreement; and

b) Five Hundred Thousand Dollars and Zero Cents (\$500,000.00) on May 1, 2020 and Five Hundred Thousand Dollars and Zero Cents (\$500,000.00) on October 1, 2020; and

c) Five Hundred Thousand Dollars and Zero Cents (\$500,000.00) on May 1, 2021 and Five Hundred Thousand Dollars and Zero Cents (\$500,000.00) on October 1, 2021.

(The Parties have agreed the City shall have a thirty (30) day grace period from the due date to make any of the payments exclusive of the first payment to Constellation, which shall be made within forty-five (45) days from the date of Municipal Council approval.)

3. The Certification of Funds from the City Comptroller totaling One Million Dollars (\$1,000,000.00) are attached. Budget source and codes are as follows: 011-210-2101- A-95220-B2019 (\$921,079.00) and 011-110-1107-A-71520-B2019 (\$78,921.00). Funds for Years 2020 and 2021 shall be appropriated and budgeted in the year in which the payments take effect.
4. A copy of the Certification(s) of Funds shall be filed in the Office of the City Clerk, along with a copy of this resolution for each payment.
5. The Director of Finance is authorized to issue check(s) made payable to: "Constellation NewEnergy, Inc." attention: Mark Packer, Assistant General Counsel, 2301 Market Street, 23<sup>rd</sup> Floor, Philadelphia, Pennsylvania 19103; or if by wire: Constellation NewEnergy, Inc. ABA-ACH/Wire #121000248, ACCT #4879656445, Bank: Wells Fargo.
6. A fully executed copy of the Settlement Agreement and Release shall be filed in the Office of the City Clerk by the Corporation Counsel.

### **STATEMENT**

This resolution authorizes the Settlement of a dispute between the City of Newark and Constellation NewEnergy, Inc. of unpaid invoices for the provision of electricity services to the City during the period of June 2015 through May 2017, for a total settlement amount of Three Million Dollars and Zero Cents (\$3,000,000.00), to be paid in five (5) installments, commencing upon authorization by the Municipal Council and terminating in October 2021.