

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

CalPeak Power, LLC

Docket Nos. ER05-302-000,
ER05-302-001, ER05-303-000,
ER05-303-001, ER05-304-000,
and ER05-304-001

ORDER ON RELIABILITY MUST-RUN AGREEMENTS
AND ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES

(Issued February 14, 2005)

1. On December 6, 2004, as amended on December 22, 2004, CalPeak Power, LLC (CalPeak) filed three Reliability Must-Run Service Agreements¹ (RMR Agreements) between CalPeak Power-Border, LLC (Border), CalPeak Power-Enterprise, LLC (Enterprise) and CalPeak Power-Vaca Dixon, LLC (Vaca Dixon) (collectively, CalPeak Entities) and the California Independent System Operator Corporation (CAISO). As discussed below, the Commission accepts the RMR Agreements between Border, EnterPrise, and the CAISO. The Commission also accepts the RMR Agreement between Vaca Dixon and the CAISO, suspends it for a nominal period, to be effective January 1, 2005, subject to refund, as requested, and establishes hearing and settlement judge procedures for the Vaca Dixon RMR Agreement. The Commission grants waiver of its prior notice provisions pursuant to 18 C.F.R. § 35.11 (2004). This order benefits

¹ The RMR Agreements conform to a standard form that was agreed to as part of an uncontested settlement. *See California System Operator Corporation*, 87 FERC ¶ 61,250 (1999) (order approving settlement). An RMR unit is generally a generator that a transmission provider can call upon when necessary to provide energy and ancillary services essential to the reliability of the transmission network. That is, some generating units "must run" at certain times to protect the transmission system from voltage collapse, instability, and thermal overloading. The owner is paid pursuant to a formula based on the availability of the facility for service.

customers because it allows the CalPeak Entities to continue providing must-run generation to the CAISO while encouraging parties to resolve their outstanding issues through direct settlement negotiations.

I. The Filing

2. Border, Enterprise and Vaca Dixon own and operate the generating facilities (collectively, CalPeak Facilities). CalPeak states that each of the CalPeak Facilities is a simple cycle natural gas-fueled combustion turbine with a nominal electric capacity of 49 MW.

3. CalPeak states that CalPeak Entities are exempt wholesale generators,² and that the Commission granted them authority to make wholesale sales of energy and ancillary services at market-based rates.³

4. CalPeak points out that the Commission accepted a *pro forma* version of an agreement for the provision of RMR services to the CAISO.⁴ CalPeak states that the RMR Agreements in this filing are based on this *pro forma* agreement, and incorporate rates, terms and operating parameters specific to the CalPeak Facilities. CalPeak requests waiver of the Commission's 60-day prior notice requirements pursuant to 18 C.F.R. § 35.11 to permit a January 1, 2005, effective date.

II. Notices and Further Filings

5. Notice of CalPeak's filing was published in the *Federal Register*, 70 Fed. Reg. 1,430 (2005), with interventions and protests due on or before January 12, 2005.⁵ CAISO filed a timely motion to intervene and the California Electric Oversight Board (EOB) filed a motion to intervene out of time in all three dockets. Pacific Gas & Electric

² See *CalPeak Power-Border LLC*, 96 FERC ¶ 62,166 (2001); *CalPeak Power-Enterprise LLC*, 96 FERC ¶ 62,189 (2001); *CalPeak Power-Vaca Dixon LLC*, 96 FERC ¶ 62,168 (2001).

³ See *CalPeak Power-Midway LLC*, Unpublished Letter Order Issued in Docket No. ER01-2537-000 (Sept. 4, 2001).

⁴ See *California Independent System Operator Corporation*, 87 FERC ¶ 61,250 (1999).

⁵ While CalPeak's initial filing dated December 6, 2004 was noticed, notice was not published in the *Federal Register*. Notice of CalPeak's amended filing dated December 22, 2004 was published in the *Federal Register*.

Company (PG&E) filed a motion to intervene and protest the Vaca Dixon RMR Agreement filed in Docket No. ER05-304-000. CalPeak filed an answer to PG&E's protest on January 14, 2005 and a supplemental response on January 31, 2005.

6. In its protest, PG&E notes that under section 5.2.8 of the CAISO tariff, the costs paid by the CAISO under an RMR agreement are passed through to the transmission owner in the territory in which the plant subject to the RMR Agreement is located. PG&E points out that the Vaca Dixon Facility is located in PG&E's service territory, and therefore, the rates charged under the Vaca Dixon RMR Agreement will impact PG&E and its customers.

7. PG&E asserts that there is a discrepancy between the heat rate for the Vaca Dixon Facility proposed in this proceeding (11,500 BTU/kWh) and the heat rate proposed for the same facility (10,300 BTU/kWh) in a separate Power Purchase Agreement with the California Department of Water Resources. PG&E argues that this difference will result in an increase in revenue generated under this RMR Agreement, and a resulting increase in cost to the California ratepayers served by PG&E. PG&E contends that Vaca Dixon has not explained this discrepancy, and has not shown that the proposed rates are just and reasonable. PG&E, therefore, requests the Commission to set Vaca Dixon's RMR Agreement for hearing and settlement judge proceedings. PG&E also requests the Commission to hold the hearing in abeyance for ninety (90) days to give the parties an opportunity to reach a settlement.

8. In its answer, CalPeak disagrees with PG&E's assertion that there is a discrepancy in the heat rate cited in this RMR Agreement and a separate Power Purchase Agreement between Vaca Dixon and the California Department of Water Resources. CalPeak points out, however, that it is in discussions with PG&E to resolve the concerns regarding the Vaca Dixon RMR Agreement. CalPeak anticipates that the parties will make a filing resolving the issue soon. However, it reserves the right to supplement its answer if it is unable to reach a resolution with PG&E. CalPeak, therefore, requests the Commission not to act on PG&E's request to set Vaca Dixon's RMR Agreement for hearing and settlement judge proceedings until a further report by the parties.

III. Discussion

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. The Commission will grant EOB's motion to intervene out of time given EOB's interest in these proceedings, the early stage of the proceedings and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004),

prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept CalPeak's answer and supplemental response because they have provided information that assisted us in our decision-making process.

10. RMR Agreements provide the rates, terms, and conditions by which CalPeak and other power plant owners in California provide RMR service to the CAISO by dispatching designated units at certain power plants at the direction of CAISO. CalPeak's RMR Agreements will provide RMR services to the CAISO for one (1) contract year beginning January 1, 2005.

11. As an initial matter, we find good cause to grant CalPeak's request for waiver of the Commission's prior notice requirement to permit an effective date of January 1, 2005 for its filing,⁶ which is the effective date set forth in the RMR Agreements.

12. We find that the Border and Enterprise RMR Agreements generally conform with CAISO's *pro forma* RMR Agreement and have been filed in accordance with the procedures approved by the Commission.⁷ Our preliminary analysis of the Border and Enterprise RMR Agreements, which were not protested, indicates that they appear to be just and reasonable, and have not shown to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, the Border and Enterprise RMR Agreements in Docket Nos. ER05-302-000 and ER05-303-000, respectively, are accepted for filing, to be effective January 1, 2005, as requested.

13. However, our preliminary analysis indicates that Vaca Dixon RMR Agreement in Docket No. ER05-304-000 has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. It is not certain whether PG&E and CalPeak will reach a successful and timely settlement regarding the Vaca Dixon RMR Agreement. Therefore, we will accept the Vaca Dixon RMR Agreement, suspend it for a nominal period, to be effective January 1, 2005, subject to refund, and set it for hearing and settlement judge procedures.

⁶ See *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992); see also *Florida Power Corp.*, 76 FERC ¶ 61,070 at 61,436 (1996) (stating that "the Commission generally will grant waiver for filings that increase rates if the rate change and effective date are prescribed by contract, such as annual rate revisions required by contract to become effective on a date specified in the contract"); accord, *Florida Power and Light Co.*, 74 FERC ¶ 61,038 at 61,092-93 (1996); *Consolidated Edison Company*, 68 FERC ¶ 61,230 at 62,090 (1994).

⁷ *Supra* note 4.

14. While we are setting the Vaca Dixon RMR Agreement for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts we will hold the hearing in abeyance and direct that a settlement judge be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁸ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁹ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) The RMR Agreements in Docket Nos. ER05-302-000 and ER05-303-000 are hereby accepted for filing to be effective January 1, 2005, as discussed in the body of this order.

(B) The RMR Agreement in Docket No. ER05-304-000 is hereby accepted for filing, suspended for a nominal period, to be effective January 1, 2005, as requested, subject to refund, as discussed in the body of this order, and set for hearing and settlement judge procedures as discussed in Paragraphs (D) through (G) below.

(C) CalPeak's request for waiver of the Commission's prior notice requirement is hereby granted.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the Vaca Dixon RMR

⁸ 18 C.F.R. § 385.603 (2004)

⁹ If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone at 202-502-8500 within five days of the date of this order. The Commission's website contains a listing of the Commission judges and a summary of their background and experience (www.FERC.gov – click on the Office of Administrative Law Judges.)

Agreement in Docket No. ER05-304-000. However, the hearing will be held in abeyance to provide time for settlement judge procedures as discussed in Paragraphs (D) and (E) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in Docket No. ER05-304-000 within fifteen (15) days of the date of this order. Such settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone within five (5) days of the date of this order.

(F) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter informing the Chief Judge and the Commission of the parties' progress toward settlement.

(G) If the settlement discussions fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.