145 FERC ¶ 61,191
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Calpine Energy Services, L.P.	Docket Nos.	ER10-2042-005
Calpine Construction Finance Co., L.P.		ER10-1942-004
Calpine Gilroy Cogen, L.P.		ER10-1941-002
Calpine Power America – CA, LLC		ER10-1938-002
Creed Energy Center, LLC		ER10-1888-002
Delta Energy Center, LLC		ER10-1885-002
Geysers Power Company, LLC		ER10-1884-002
Gilroy Energy Center, LLC		ER10-1883-002
Goose Haven Energy Center, LLC		ER10-1878-002
Los Esteros Critical Energy Facility, LLC		ER10-1876-002
Los Medanos Energy Center, LLC		ER10-1875-002
Metcalf Energy Center, LLC		ER10-1873-002
Otay Mesa Energy Center, LLC		ER10-1947-002
Pastoria Energy Center, LLC		ER10-1864-002
Power Contract Financing, L.L.C.		ER10-1862-002
South Point Energy Center, LLC		ER10-1865-002
(Collectively, Calpine Entities)		

ORDER GRANTING CLARIFICATION

(Issued December 3, 2013)

1. In an order issued on October 26, 2011,[1] the Commission found that the Calpine Entities have rebutted the presumption of market power in the Western Area Lower Colorado (WALC) balancing authority area and satisfy the Commission's standards for the grant of market-based rate authority. However, the Commission stated that should the Calpine Entities or any of their affiliates make sales in the WALC balancing authority area, we would consider this a change in the circumstances on which the Commission relied in finding that the Calpine Entities have rebutted the presumption of horizontal

[1] *Calpine Energy Services, L.P.*, 137 FERC ¶ 61,085 (2011) (October 26 Order).

market power and the Calpine Entities must notify the Commission within 30 days of the date of any such sale.[2] On November 25, 2011, the Calpine Entities filed a request for clarification of the October 26 Order. As discussed below, we grant the Calpine Entities' request for clarification.

I. Background

2. On July 30, 2010, the Calpine Entities filed an updated market power analysis for the Southwest region in accordance with the regional schedule adopted in Order No. 697.[3] On August 30, 2010, the Calpine Entities amended their updated market power analysis by filing historical sales data (First Supplement). On July 22, 2011, the Calpine Entities filed a delivered price test for the WALC balancing authority area.

3. In the October 26 Order, the Commission found that the Calpine Entities pass the pivotal supplier and wholesale market share screens for the California Independent System Operator Corporation market. However, with respect to the WALC balancing authority area, the Commission found that the Calpine Entities pass the pivotal supplier screen, but do not pass the wholesale market share screen.[4] The Commission found that, after weighing all of the relevant factors, on balance, and based on the record evidence, the Calpine Entities rebutted the presumption of horizontal market power and satisfy the Commission's horizontal market power standard for the grant of market-based rate authority.[5] However, the Commission stated that should the Calpine Entities or any of their affiliates make sales in the WALC balancing authority area, the Commission would

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[2] *Id.* P 24 (citing 18 C.F.R. § 35.42(a) (2013)).

[3] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at PP 817, 822, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

[4] October 26 Order, 137 FERC ¶ 61,085 at PP 14-15.

[5] *Id.* P 22.

consider this a change in the circumstances on which the Commission relied in finding that the Calpine Entities have rebutted the presumption of horizontal market power and the Calpine Entities must notify the Commission within 30 days of the date of any such sale.[6]

II. Request for Clarification

4. The Calpine Entities request clarification of the reporting obligation imposed in the October 26 Order. The Calpine Entities contend that the Commission's finding that they lack horizontal market power in the WALC balancing authority area was based on the results of the delivered price test and historical sales data, which demonstrated that, during the relevant study period, less than one percent of the energy generated by the South Point Energy Center, LLC (South Point) facility (South Point Facility), the Calpine Entities' only generating facility in the WALC balancing authority area, sunk in the WALC balancing authority area.[7] The Calpine Entities state that the language in the October 26 Order directing the Calpine Entities to "notify the Commission within 30 days of the date of any such sale" could be read to mean that any future sale that sinks in the WALC balancing authority area, no matter how small (e.g., a single kWh), by any of the Calpine Entities or their affiliates would trigger the October 26 Order's reporting requirement. The Calpine Entities state that the Commission should clarify that this is not the case, especially given the Commission's understanding that nominal amounts of power were already sinking in the WALC balancing authority area.[8]

5. Specifically, the Calpine Entities request clarification that volumes delivered to the Western Area Power Administration (WAPA) in the WALC balancing authority area for the in-kind repayment of transmission losses or operational deviations and penalties are not sales of electric energy for the purposes of this reporting requirement. The Calpine Entities state that without this clarification, each time power is scheduled and

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[6] *Id.* P 24 (citing 18 C.F.R. § 35.42(a) (2013)).

[7] Calpine Entities Request for Clarification at 2 (citing October 26 Order, 137 FERC ¶ 61,085 at PP 22-24).

[8] *Id.* at 3.

transmitted over the WAPA transmission system, there will inevitably be some amount of transmission losses and/or deviations and penalties that will have to be repaid to WAPA.[9]

6. The Calpine Entities explain that, in particular, the volumes delivered to compensate WAPA in WALC for deviations and associated penalties constitute payment in-kind for WAPA's provision of energy and/or generator imbalance service, as contractually agreed to by WAPA and Calpine Energy Services, L.P. (Calpine Energy). The Calpine Entities state that WAPA has interpreted the WALC Control Area Agreement between WAPA and Calpine Energy as requiring Calpine Energy, acting on behalf of South Point, to provide such payment in-kind for any over-deliveries and under-deliveries of power scheduled to flow over WAPA's transmission system and to pay additional penalties for deviations outside the bandwidth specified.[10]

7. The Calpine Entities argue that a requirement to report even *de minimis* sales within the WALC balancing authority area as a change in circumstances on which the Commission relied would, however, be inconsistent with the fact that, as the Commission recognized in the October 26 Order, the Calpine Entities have historically made *de minimis* sales, representing "less than one percent of the energy generated by the South Point Facility," in the WALC balancing authority area.[11] The Calpine Entities state that in the First Supplement, they informed the Commission that during the relevant study period, less than one percent of the output of the South Point Facility, or 9,625 MWhs, sunk in the WALC balancing authority area, of which 9,069 MWhs were for the in-kind pay back to WAPA for transmission losses and operational deviations and penalties and that the Commission relied on this historical data in concluding that the Calpine Entities lacked horizontal market power in the WALC balancing authority area.[12] Thus, they argue that given the Commission's explicit reliance on this historical sales data, future sales by the Calpine Entities or their affiliates that sink in the WALC balancing authority area, but that do not exceed the amount reported in the First Supplement, should not be considered a change in the circumstances on which the

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[9] *Id.*

[10] *Id.* at 7.

[11] *Id.* at 9 (citing October 26 Order, 137 FERC ¶ 61,085 at P 24).

[12] *Id.* at 10 (citing First Supplement at 3 and Table 1).

Commission relied in finding that the Calpine Entities lack market power, and therefore should not trigger the reporting requirement.[13]

8. If the Commission does not adopt the above clarification, the Calpine Entities request that the Commission clarify that sales below a specified, *de minimis* threshold – for example, sales of less than one percent of the South Point Facility's annual output, or alternatively, 15,000 MWh per year – do not trigger this reporting requirement.[14]

III. Discussion

9. We grant the Calpine Entities' request for clarification.

10. In Order No. 697, the Commission explained that it will continue to use the delivered price test for companies that fail the market power indicative screens.[15] The Commission stated that, as with the initial screens, applicants and intervenors may present evidence such as historical wholesale sales data, which can be used to calculate market shares and market concentration and to refute or support the results of the delivered price test. Further, the Commission encouraged applicants to present the most complete analysis of competitive conditions in the market as the data allows.[16]

11. Consistent with this precedent, after weighing all of the evidence, the Commission found in the October 26 Order that the Calpine Entities do not have horizontal market power in the WALC balancing authority area.[17] The Commission noted that its decision was based on its review and analysis of the evidence in the record, including the historical sales data. Further, the Commission explicitly noted that less than one percent of the energy generated by South Point was sold in the WALC balancing authority area and cited to the First Supplement, which indicated that "virtually all [of the sales in the WALC balancing authority area] was for payback to WAPA for losses/penalties."[18]

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[13] *Id.*

[14] *Id.* at 3-4.

[15] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 104.

[16] *Id.* P 111.

[17] October 26 Order, 137 FERC ¶ 61,085 at P 24.

[18] *Id.* (citing First Supplement at 3).

Thus, in finding that the Calpine Entities have rebutted the presumption of horizontal market power in the WALC balancing authority area and directing the Calpine Entities to notify the Commission within 30 days of the date of any sales that the Calpine Entities or any of their affiliates make in the WALC balancing authority, the Commission was aware that a small portion of South Point's energy (less than one percent of the energy generated by South Point) was sold in the WALC balancing authority area to WAPA for repayment of transmission losses or deviation penalties. Accordingly, we clarify that volumes delivered by the Calpine Entities to WAPA in the WALC balancing authority area for the in-kind repayment of transmission losses or operational deviations and penalties, as described by the Calpine Entities, are not subject to the reporting requirement imposed in the October 26 Order.[19]

The Commission orders:

The Calpine Entities' request for clarification is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[19] Because we grant the Calpine Entities' request for clarification, we need not address the various other arguments raised by the Calpine Entities in support of their request for clarification.