

106 FERC ¶ 61, 107
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Calpine Oneta Power, L.P.

Docket No. ER04-279-000

ORDER ACCEPTING FOR FILING, AS MODIFIED,
REDISPATCH RATE SCHEDULE

(Issued February 6, 2004)

1. On December 11, 2003, Calpine Oneta Power, L.P. (Calpine) filed, under Section 205 of the Federal Power Act (FPA),¹ an initial rate schedule for Emergency Redispatch Services to Public Service Company of Oklahoma d/b/a American Electric Power (AEP) from its Oneta Energy Center (Facility), a 1,150 MW natural gas-fired facility located in Wagoner County, Oklahoma. As discussed below, we accept the rate schedule for filing effective December 12, 2003, subject to modification. This order benefits customers by ensuring Emergency Service that enables AEP to protect the security and integrity of its system.

Background

2. Calpine and AEP are parties to an Interconnection Agreement² which provides among other things, for the curtailment, interruption or reduction of energy under certain emergency conditions. In this filing, Calpine explains that the purpose of its proposed rate schedule is to establish the rates, terms, and conditions under which Calpine will

¹ 16 U.S.C. § 824d (2000).

² Calpine is party to an Interconnection Agreement with AEP, dated June 5, 2000. Calpine and AEP also executed a Supplement to the Interconnection Agreement accepted by the Commission on June 12, 2001 (collectively the “Interconnection Agreement”) in Docket No. ER01-1790-001.

make available to AEP Emergency Redispatch Services. Calpine further explains that the proposed compensation provisions are essentially identical to those previously accepted by the Commission.

Notice of Filing, Intervention, Protest, Response and Answers

3. Notice of Calpine's filing was published in the Federal Register,³ with comments, interventions, and protests due on or before January 2, 2004. AEP filed the following: a motion to intervene, a motion to reject filing, and a protest. Southwest Power Pool, Inc. (SPP) filed a timely motion to intervene and comments. Calpine filed an answer to AEP's motion to reject filing and protest. AEP filed a response to Calpine's answer.

Discussion

A. Procedural Matters

4. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Calpine's answer and AEP's response because they have provided information that assisted us in our decision-making process.

B. Analysis

5. Our preliminary analysis indicates that the proposed Redispatch tariff appears to be just and reasonable and has not been shown to be unjust and unreasonable or unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will accept Calpine's tariff filing, as modified effective December 12, 2003 as requested.⁴

1. Compensation for Curtailment, Interruption, and Reduction of Service Covered by the IA

6. AEP filed a motion to reject Calpine's proposed tariff sheets. AEP argues that Calpine has no legal basis for assessing charges against AEP under the proposed rate

³ 68 Fed. Reg. 74,572 (2003).

⁴ See Central Hudson Gas & Electric Corp., et al., 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).

schedule, as Calpine is already obligated to provide the services under another agreement with AEP and Calpine has no contractual or regulatory right to modify the existing agreement. In its answer to AEP's motion to reject, Calpine indicates that it is not seeking compensation in the proposed rate schedule for curtailment, interruption and reduction service covered by the Interconnection Agreement (IA) between the parties. In response to Calpine's answer, AEP filed to withdraw its motion to reject Calpine's tariff sheets, but requests that the Commission require Calpine to remove any reference to compensation for curtailment, interruption and reduction of service that Calpine is obligated to provide under the IA. AEP also requests that Calpine revise the proposed rate schedule to clarify that AEP will incur charges for increased reactive power only when AEP asks Calpine to operate the Facility outside the normal operating range, as provided for under AEP's Interconnection Guidelines to which Calpine is required to adhere under the IA.

7. We find that it is appropriate to require Calpine to revise its proposed rate schedule to make clear that it is consistent with the existing IA. Calpine agrees that it is not seeking compensation in the proposed rate schedule for curtailment, interruption and reduction of service covered by the IA. However, Section 2.1 of the proposed rate schedule states that the Interconnection Transmission Operator may order the generator to increase or decrease the production of real power and reactive power, including the start-up or curtailment of generation, and Section 3.1 refers to the generator being compensated for interrupted sales. Section 3.15 of the existing IA between the parties states that AEP may require Calpine "to curtail, interrupt, or reduce deliveries of Energy..." Accordingly, Calpine must modify its proposed rate schedule to remove any reference to compensation for curtailment, interruption and reduction of service and clarify that AEP will incur charges under the proposed rate schedule only when AEP asks Calpine to increase the energy output from the Facility. Calpine may charge for increases in reactive power, since Calpine is not obligated to increase reactive power under the IA. Calpine is directed to submit a revised rate reflecting these modifications within 30 days of the issuance of this order.

2. Compensation Provisions in Sections 3.1 and 3.2

8. Section 3.1 states that if an Emergency Redispatch direction conflicts with a Calpine commitment, AEP shall either pay Calpine for each megawatt-hour of such assumed energy, (i) the same amount as would have been paid by the buyer(s), and (ii) any additional amounts to keep Calpine whole; or in the alternative, assume the energy delivery obligation and/or capacity schedule(s) associated with such sales.

9. Section 3.2 provides for reimbursement to Calpine if AEP's Emergency Redispatch does not conflict with Calpine's power sale commitments, under certain scenarios, at rates of (i) \$100.00/MWh, or (ii) 110% of the sum of the actual delivered

fuel cost to run the Emergency Resource plus variable O&M charges. However, if AEP's Emergency Redispatch of the Emergency Resource does not fall within the period of another sale(s) by Calpine, AEP shall pay Calpine for each megawatt-hour the greater of: (i) \$100/MWh, or (ii) at a markup over actual costs, plus variable O&M charges and startup costs.

10. AEP states that Calpine has contracted to sell the output of the Facility to a marketing affiliate, Calpine Energy Service, L.P. (CES). AEP protests that it should not be responsible for damages or penalties arising under provisions included in non-arms length contracts between affiliates where neither party has an incentive to bargain hard over the penalties. AEP also protests that even if the rate schedule provisions were intended to apply to contracts between CES and downstream customers, AEP is not a party to those agreements and should not be held to provisions Calpine and CES may agree to where neither party has any incentive to include reasonable penalty provisions. AEP further argues that Calpine and CES have an obligation to be aware of Calpine's pre-existing redispatch obligations when they negotiate sales contracts and thus it is incumbent upon them to include provisions in those contracts that recognize these obligations.

11. Calpine does not believe that the compensation provisions of Section 3 should be revised. Calpine states that it and its affiliate each have adequate incentives to agree only to commercially reasonable liability for non-performance. Calpine further states that AEP has no basis for its allegation that Calpine has entered into any "non-arms length contracts" or any basis for assuming that contracts between affiliates are necessarily non-arms length. Calpine believes that it must be kept whole for the economic consequences it suffers on account of orders from AEP to redispatch the Facility.

12. The compensation provisions found in the redispatch rate schedule are similar to those filed by Rockingham Power, L.L.C.⁵ and those filed by Mirant Las Vegas, LLC⁶ which the Commission accepted. In Rockingham, the Commission found that there would be little chance for price manipulation when selling to an affiliate. Further, AEP has provided no evidence that contracts with Calpine's affiliates were not negotiated at arms length. Therefore, we will accept Calpine's compensation provisions in Sections 3.1 and 3.2.

⁵ See 93 FERC ¶ 61,310 (2000) (Rockingham).

⁶ See Mirant Las Vegas, LLC, 104 FERC ¶ 61,242 (2003).

3. Section 3.3 of the Rate Schedule

13. Section 3.3 of the Redispatch rate schedule states that to the extent that generation from Oneta becomes unavailable to Calpine as a result of Oneta having reached the total number of hours it is permitted to operate under any legal limitation and to the extent that the number of Additional Fired Hours Emergency Redispatch during that period contributed to Oneta having reached the total number of hours it is permitted to operate in that period, AEP shall compensate Calpine for any amounts necessary to keep Calpine whole with respect to costs, penalties or contract damages Calpine may be liable for as a result of Oneta being unavailable, reduced by any avoided costs for the delivered costs of fuel and variable O&M costs not incurred by Calpine.

14. AEP protests that Section 3.3 of the proposed rate schedule should be rejected, since it would subject AEP to open-ended undefined charges, if Calpine reaches the total number of hours that it is legally permitted to operate. AEP contends that the provision incorrectly assumes that any redispatch hours would be the incremental hours that cause Calpine to exceed any permit limitations, and Calpine's redispatch obligations under the IA must take precedence over any obligations under subsequent sales contracts. AEP argues that Calpine would already have received a minimum \$100/MWh for any redispatch obligations, which should be more than sufficient to compensate Calpine for any subsequent hours that it may not sell energy due to a redispatch order.

15. Calpine disagrees that Section 3.3 should be rejected. In its answer, Calpine states that the Additional Fired Hours Emergency Redispatch ordered in accordance with the proposed rate schedule are incremental hours that accrue towards Calpine's permit limitations. Calpine argues that only redispatch orders to startup Calpine's facility or to increase output could cause Calpine to exceed its legal operating limits and therefore a keep-whole provision is necessary in the proposed rate schedule. Finally, Calpine asserts that there is no basis for assuming that compensation at a minimum of \$100/MWh will compensate Calpine for lost sales due to a redispatch order.

16. We agree with Calpine that Additional Fired Hours ordered by AEP in accordance with the Redispatch rate schedule are incremental hours that accrue towards Calpine's permit limitations. Section 3.3 limits the basis for keeping Calpine "whole." AEP is obligated to keep Calpine whole only to the extent that the number of Additional Fired Hours Emergency Redispatch ordered by AEP contributed to Oneta having reached the total number of hours it is permitted to operate in the relevant period. It is not an open-ended undefined charge as AEP argues. AEP offers no basis for assuming that \$100/MWh would adequately compensate Calpine for subsequent hours that it is not permitted to sell output due to an order for redispatch. AEP offers no evidence that the \$100/MWh compensation would keep Calpine whole if permit limitations are reached.

17. Further, AEP's argument that AEP should not have to keep Calpine whole if legal operating limits are breached because the IA takes precedence over subsequent sales contracts is without merit. The redispatch provisions of the IA are limited to AEP's reducing, interrupting or curtailing Calpine's output, activities which would not cause Oneta to exceed its legal operating limits. However, the Redispatch rate schedule provides that AEP has authority to direct start up of the Facility or to increase Facility output. Since such directives could cause Oneta to exceed its legal operating limits, it is appropriate for Calpine to maintain a keep-whole provision in its Redispatch rate schedule. Consistent with RockGen,⁷ we share this concern and maintain that the keep whole provision which Calpine seeks is just and reasonable and similar to established precedent. Accordingly, we will accept Section 3.3 of the Redispatch rate schedule.

4. Standards of Review for Changes to the Rate Schedule

18. AEP states that the rate schedule is silent as to the parties' rights to seek amendments. It asserts that the rate schedule should be modified to make clear that each party has the right to seek unilateral changes under the just and reasonable standard of Section 206 of the FPA. Calpine agrees to revise the rate schedule to memorialize each party's rights to seek changes in accordance with the Commission's just and reasonable standard under Sections 205 and 206 of the FPA. We will require Calpine to incorporate into its rate schedule language setting forth each party's rights to seek changes under Sections 205 and 206 of the FPA. Calpine should submit this language in a compliance filing to be submitted within 30 days of the issuance of this order.

5. Conflicts between the Rate Schedule and the IA

19. AEP asserts that although the rate schedule defines the IA and provides that disputes should be resolved in accordance with the dispute resolution provisions of the IA, it does not state that the rate schedule should be interpreted in a manner consistent with the IA. It maintains that the rate schedule should be modified to make that point explicitly and further to provide that any conflicts between the provisions of the rate schedule and the provisions of the IA should be resolved in favor of the IA. Calpine agrees that the redispatch rate schedule should be interpreted in a manner consistent with the IA, but states that it is unaware of any potential conflicts between the redispatch rate schedule and the IA given that they contemplate separate services. Thus, Calpine declines to require that conflicts be resolved in favor of the IA. We agree that there are

⁷ See RockGen Energy, LLC, 100 FERC ¶ 61,261 at 61,998 (2002) (RockGen).

presently no potential conflicts between the Redispatch rate schedule and the IA. If any conflicts arise between the provisions of the rate schedule and the provisions of the IA, either party may make appropriate filings with the Commission.

6. Term Provision

20. AEP asserts the rate schedule includes no term provision. AEP argues that the rate schedule should terminate automatically if the SPP (or any other RTO that may functionally operate the AEP transmission facilities) adopts market rules setting forth the rates and terms for the type of redispatch service provided under the rate schedule. They argue the rate schedule should, therefore, be revised to state explicitly that it will not be effective beyond the term of the IA. Calpine states that in Rockingham Power, L.L.C., 93 FERC ¶ 61,310 (2000) (Rockingham) the Commission declined to address the term of the subject redispatch tariff vis-à-vis an RTO tariff. It adds that the Commission held that while the term of the tariff may be superseded by an RTO open access transmission tariff at some point in the future, such issue should be addressed in the relevant proceeding. Consistent with our finding in Rockingham, we will not require that the term of the redispatch service be established at this time. While we note that the term of this redispatch rate schedule may be superseded by an RTO OATT at some point in the future, we believe that this issue should be addressed in the RTO proceeding.

7. Definition of “Interconnecting Transmission Operator”

21. Section 2.8 of the rate schedule defines “Interconnecting Transmission Operator” to include AEP and an RTO with responsibility for operating the AEP transmission system. AEP protests that the definition of Interconnecting Transmission Operator should be revised to eliminate references to an RTO. Calpine declines to revise the definition of Interconnecting Transmission Operator to eliminate references to an RTO.

22. We will not require that this provision be modified. Once an RTO encompassing AEP’s facilities begins operations, an appropriate filing can be made at that time addressing the impact on this agreement.

8. Effective Date

23. Calpine requests an effective date on the date following the date of filing, or December 12, 2003. It claims that good cause exists because Emergency Redispatch Service is a critical service. AEP protests that Calpine has no basis for seeking a waiver of the 60-day notice requirement of Section 205 of the FPA. AEP argues that the rate schedule is an unexecuted agreement that neither was negotiated, agreed-upon nor executed by the parties.

24. Consistent with Central Hudson Gas & Electric Corporation, 60 FERC ¶ 61,106 at 61,339 (1992), we will grant waiver of the Commission's 60-day notice requirement, and permit an effective date of December 12, 2003.

9. Miscellaneous

25. AEP requests a number of other revisions to the redispatch rate schedule in its protest. In its answer, Calpine agrees to revise the redispatch rate schedule as AEP requests to: (1) clarify that the charges under the redispatch rate schedule do not apply to redispatch required under the relevant OATT; (2) state that Calpine is obligated to provide the emergency redispatch service covered by the redispatch rate schedule; (3) clarify how O&M charges will be calculated and define such charges; (4) set the alternative cap on charges in Section 3.2 (b) at no higher than 110 percent; and (5) clarify that Calpine will not require AEP to assume additional sales liabilities once an emergency has been declared consistent with the redispatch rate schedule. Accordingly, the Commission directs Calpine to incorporate the agreed to revisions in a compliance filing to be submitted within 30 days of the issuance of this order.

The Commission orders:

(A) The Redispatch rate schedule is hereby accepted effective December 12, 2003, subject to modification as discussed in the body of this order.

(B) Calpine is hereby directed to submit a revised Redispatch rate schedule within 30 days of the issuance of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.