

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

California Electricity Oversight Board,

Docket No. EL06-30-001

People of the State of California, ex rel.  
Bill Lockyer, Attorney General of the  
State of California, and

California Department of Water Resources

v.

Calpine Energy Services, L.P.,  
Calpine Corporation, Power Contract Financing,  
and Gilroy Energy Center, L.L.C.

ORDER GRANTING MOTION TO WITHDRAW PLEADINGS AND DISMISSING  
REQUESTS FOR REHEARING

(Issued February 10, 2006)

1. By this order, the Commission grants the Notice of Withdrawal of Petition filed by the California Electricity Oversight Board, the California Attorney General, and the California Department of Water Resources (California State Parties) on February 2, 2006 in the captioned docket. Because we grant the Notice of Withdrawal, we also dismiss pending petitions for rehearing as moot.

**Procedural Background**

2. On December 19, 2005, the California Parties filed a Petition for Emergency Declaratory Order Requiring Continuing Performance of Jurisdictional Power Purchase Agreement and Complaint Requesting Fast Track Processing (Petition). The Petition sought a Commission order requiring Calpine Energy Services, LP, and Calpine Corporation (Calpine) to continue to supply power, and otherwise perform, under a Master Power Purchase and Sale Agreement (Calpine 2 Contract). The following day, Calpine Corporation and a number of its subsidiaries filed for bankruptcy reorganization under Chapter 11 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for

the Southern District of New York (the Bankruptcy Court).<sup>1</sup> On December 21, 2005, Calpine initiated an adversary proceeding against the Commission before the Bankruptcy Court seeking a preliminary injunction, and it received an *ex parte* temporary restraining order (TRO) enjoining the Commission from requiring Calpine to comply with and perform the Calpine 2 Contract. In addition, that same day, Calpine filed a motion before the Bankruptcy Court seeking rejection of certain energy contracts (including the Calpine 2 Contract) pursuant to 11 U.S.C. §365(a), asserting that these contract obligations were the “most financially burdensome” of all of Calpine’s energy contracts (the Rejection Motion).<sup>2</sup>

3. On January 3, 2006, the Commission issued an Order Providing Interim Guidance in these proceedings.<sup>3</sup> In the Guidance Order, the Commission explained that, because of an Ex Parte Temporary Restraining Order (TRO) against the Commission, it could not grant the relief requested in the Petition. However, the Commission sought comment on whether rejection of the Calpine 2 Contract would have an impact on the public interest or would cause “any disruption in the supply of electricity to other public utilities or to consumers.”<sup>4</sup> The Guidance Order pointed out that the purpose of this inquiry was to develop a record that would enable the Commission to make a determination, if necessary, and then inform the Bankruptcy Court, of the Commission’s views regarding potential rejection of the Calpine 2 Contract. The Guidance Order also provided interim guidance so that the parties could address the issue of how the public interest bears on the Bankruptcy Court’s determination of whether to permit Calpine to breach its obligations under the Calpine 2 Contract and, if so, to pay damages for such breach as determined by the Bankruptcy Court. The California Parties were directed to amend their filing to address the standard of review to be applied in this case, and were required to make certain additional filings.

4. On January 12, the Bankruptcy Court issued a Stipulation and Scheduling Order (Scheduling Order) requiring that the parties file briefs on whether the Bankruptcy Court had jurisdiction to resolve the issues raised in the Rejection Motion, and if so, what standard should be applied. At the request of the California State Parties, in a motion

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<sup>1</sup> *In re Calpine Corporation, Inc.*, Docket No. 05 Civ. 10842 (RCC).

<sup>2</sup> *Id.* at 4, *citing* Affidavit of Paul Posoli in Support of Motion of the Debtors for Entry of an Order Authorizing the Debtors to Reject Certain Energy Contracts, Bankruptcy Docket No. 57, at ¶ 13.

<sup>3</sup> *California Elec. Oversight Bd. v. Calpine Energy Services, L.P.*, 114 FERC 61,003 (2006) (Guidance Order).

<sup>4</sup> *Id.*, P 12, *citing* Calpine’s Memorandum of Law in Support of Debtors’ Motion for Declaratory Judgment, *Ex Parte* Temporary Restraining Order, and Preliminary Injunction Against the Federal Energy Regulatory Commission, at 5.

opposed by none of the parties, the Commission issued that same day a notice temporarily suspending the period for interventions and comments on the Guidance Order, in anticipation of the January 26, 2006 hearing set by the Bankruptcy Court's Scheduling Order and pending a ruling by the Bankruptcy Court following that hearing. On January 23, 2006, the Bankruptcy Court allowed the Official Committee of Unsecured Creditors to intervene and brief these issues.

5. On the day following the hearing (January 27, 2006), the District Court issued an order dismissing the Rejection Motion based on the court's determination that exclusive jurisdiction to make the determination as to the continued validity of the Calpine 2 Contract resided with the Commission and not with the District Court (the District Court Order). The Bankruptcy Court reasoned that it did not have the authority to grant Calpine's Rejection Motion, because doing so would allow Calpine to cease performing under a Commission-regulated contract solely based on Calpine's dissatisfaction with the rates applicable to the Calpine 2 Contract.

6. In response to the Guidance Order, on February 2, 2006, the Commission received motions to intervene from Pacific Gas and Electric (PG&E), Southern California Edison Company (SCE), and Strategic Energy, LLC. In addition, on the same day, these companies also filed requests for rehearing of the Guidance Order.

### **The California State Parties' Notice of Withdrawal**

7. On February 2, 2006, the California State Parties filed a Notice of Withdrawal of Petition as Moot, and Request to Vacate Interim Guidance Order or, in the Alternative Request for Rehearing, Clarification and Order to Show Cause (Notice of Withdrawal). The California State Parties now ask that the Commission approve the withdrawal of their Petition and vacate the Guidance Order, "thereby ending this proceeding."<sup>5</sup> In support of their Notice of Withdrawal, the California State Parties assert that the District Court Order, by dismissing Calpine's Rejection Motion based on the finding that the Calpine 2 Contract is subject to the exclusive jurisdiction of the Commission, renders the instant proceeding moot.<sup>6</sup>

### **Commission Determination**

8. The Commission approves the Notice of Withdrawal filed by the California State Parties. The District Court has declined to grant rejection of the Calpine 2 Contract, and the California State Parties no longer wish to pursue their complaint. Because we grant

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<sup>5</sup> Notice of Withdrawal, at 25.

<sup>6</sup> *Id.* at 2-3.

withdrawal of the complaint, we also dismiss as moot the requests for rehearing of the Guidance Order filed by PG&E, SCE and Strategic Energy.

The Commission orders:

(A) The Notice of Withdrawal filed by the California State Parties is hereby granted, as discussed in the body of this order.

(B) Requests for rehearing of the Guidance Order are dismissed as moot, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary