

137 FERC ¶ 61,085
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Calpine Energy Services, L.P.	Docket Nos. ER10-2042-001
Calpine Construction Finance Co., L.P.	ER10-1942-001
Calpine Gilroy Cogen, L.P.	ER10-1941-001
Calpine PowerAmerica – CA, LLC	ER10-1938-001
Creed Energy Center, LLC	ER10-1888-001
Delta Energy Center, LLC	ER10-1885-001
Geysers Power Company, LLC	ER10-1884-001
Gilroy Energy Center, LLC	ER10-1883-001
Goose Haven Energy Center, LLC	ER10-1878-001
Los Esteros Critical Energy Facility, LLC	ER10-1876-001
Los Medanos Energy Center, LLC	ER10-1875-001
Metcalf Energy Center, LLC	ER10-1873-001
Otay Mesa Energy Center, LLC	ER10-1947-001
Pastoria Energy Center, LLC	ER10-1864-001
Power Contract Financing, L.L.C.	ER10-1862-001
South Point Energy Center, LLC	ER10-1865-001
(Collectively, Calpine Entities)	

ORDER ON UPDATED MARKET POWER ANALYSIS

(Issued October 26, 2011)

1. 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. 697.¹ As discussed below, the Commission's analysis indicates that the Calpine Entities

¹ *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 P 882, *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.

(continued...)

fail the wholesale market share screen in the Western Area Power Administration – Lower Colorado (WALC) balancing authority area. Such failure establishes a rebuttable presumption of horizontal market power. In this order, the Commission finds that the Calpine Entities have rebutted the presumption of market power in the WALC balancing authority area and satisfy the Commission’s standards for the grant of market-based rate authority.

I. Updated Market Power Analysis

2. The Calpine Entities state that they are wholly owned by Calpine Corporation, which is engaged, through various subsidiaries, in the development, financing, acquisition, ownership, and operation of independent power production facilities and the wholesale marketing of electricity in the United States and abroad.

3. The Calpine Entities represent that they and other subsidiaries of Calpine Corporation collectively own or control approximately 6,341 megawatts (MW) of generation in the Southwest region, which is all located in either the California Independent System Operator Corporation (CAISO) market or the WALC balancing authority area.

4. The Calpine Entities submit that, under the Commission’s current regulations, they are assumed to be affiliated with LS Power Development, LLC (LS Power) and its subsidiaries based on interests in Calpine Corporation held by affiliates of LS Power.

5. In their updated market power analysis, the Calpine Entities included the generation owned or controlled by LS Power and its respective affiliates and subsidiaries.² According to the Calpine Entities, subsidiaries of LS Power own or control 1,644 MW of generation in the Southwest region, including a 570 MW generation facility (the Griffith Project) within the WALC balancing authority area.

& Regs. ¶ 31,291 (2009), *order on reh’g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010). The Commission stated that “both the Commission and market participants will benefit from greater data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers’ rates remain just and reasonable.” *See also id. order clarifying final rule*, 121 FERC ¶ 61,260 at P 13.

² On July 30, 2010, LS Power and its affiliates (the LS Power Entities) filed an updated market power analysis for the Southwest region in Docket No. ER96-1947-029.

6. The Calpine Entities represent that they and their affiliates (including LS Power) have no uncommitted capacity in the WALC balancing authority area. The Calpine Entities cite the transmission reservations held by their facility located in the WALC balancing authority area (the 550 MW South Point Facility) and the Griffith Project, both of which, according to the Calpine Entities, have points of delivery outside of that balancing authority area. They also claim that those transmission reservations exceed the seasonal generating capacity of the respective facilities. In doing so, the Calpine Entities assert that these transmission reservations are evidence that the output of these facilities is exported outside of the WALC balancing authority area. Thus, for purposes of their pivotal supplier analysis and market share analysis, the Calpine Entities deducted the amount of their firm transmission reservations from installed capacity, resulting in zero uncommitted capacity. The Calpine Entities submit that this treatment of transmission export reservations is consistent with the Commission's requirements to account for long-term firm transmission reservations both when conducting the indicative screens and calculating simultaneous transmission import limitations (SILs).³

7. On August 30, 2010, the Calpine Entities amended their updated market power analysis by filing historical sales data which they state demonstrate that the transmission reservations were used to export energy from the WALC balancing authority area into other markets. They contend that the historical sales data demonstrate that less than one percent of the sales made by the South Point Facility were sold in the WALC balancing authority area during the relevant study period.⁴ The Calpine Entities assert that this historical sales data provide further support for their claim that they have no uncommitted capacity in the WALC balancing authority area.

³ Calpine Entities' January 21, 2011 Filing at 4 (noting that the Commission requires a seller to "assume that any seller's uncommitted first-tier generation capacity fully utilizes the seller's firm transmission rights" and "to the extent the seller has remaining uncommitted first-tier generation capacity, the remaining simultaneous import limit capability is allocated on a pro rata basis to import the remaining uncommitted first-tier generation capacity of both the seller and competing suppliers" (*citing* Order No. 697-B at P 23 and Order No. 697 at P 368-369)). However, as the Calpine Entities acknowledge, the requirement they refer to in these citations pertains to imports, not exports.

⁴ The LS Power Entities also submitted historical sales data, which they state demonstrate that all of the output from the Griffith Project also was sold outside of the WALC balancing authority area during the relevant study period. *See* LS Power Entities, Amendment to Updated Market Power Analysis, Docket No. ER96-1947-029 (filed Aug. 30, 2010).

8. On January 21, 2011, the Calpine Entities filed an additional amendment to their updated market power analysis in which they propose to adopt, on a prospective basis, and if needed to remedy a market power problem that is identified by the Commission, the Commission's default, cost-based mitigation for any sales made by South Point Energy Center, LLC or Calpine Energy Services, L.P. (the Calpine Entities' marketing affiliate) within the WALC balancing authority area.

9. On July 22, 2011, the Calpine Entities filed a delivered price test (DPT) for the WALC balancing authority area and contend that, based on the results of their DPT analysis, they no longer need to adopt the proposed mitigation measures. They also explain that LS Power's sole plant located in the WALC balancing authority area (the Griffith Project) was sold to Star West Generation LLC, an entity that is not affiliated with the Calpine Entities.⁵

II. Notice of Filings and Responsive Pleadings

10. Notices of the Calpine Entities' July 30, 2010, August 30, 2010, January 21, 2011, and July 22, 2011 Filings were published in the *Federal Register*, 75 Fed. Reg. 48,663 (2010), 75 Fed. Reg. 54,602 (2010), 76 Fed. Reg. 5574 (2011), and 76 Fed. Reg. 45,787 (2011), respectively, with interventions or protests due on or before August 20, 2010, September 20, 2010, February 11, 2011, and August 12, 2011, respectively. None were filed.

III. Discussion

A. Market-Based Rate Authorization

11. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.⁶ As discussed below, the Commission finds that the Calpine Entities have rebutted the presumption of market power in the WALC balancing authority area and concludes that the Calpine Entities satisfy the Commission's standards for the grant of market-based rate authority.

⁵ See *LS Power Equity Partners, L.P.*, 135 FERC ¶ 62,109 (2011) (May 5 Order) and Notice of Consummation of Transaction, Docket No. EC11-59-000 (filed May 24, 2011) (informing the Commission that the transaction authorized by the May 5 Order had been consummated).

⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, and 440.

1. Horizontal Market Power

12. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.⁷ The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power.⁸

13. The Calpine Entities prepared the pivotal supplier and wholesale market share screens for the CAISO market and the WALC balancing authority area, consistent with the requirements of Order No. 697.⁹

14. The Commission has reviewed the Calpine Entities' pivotal supplier and wholesale market share screens for the CAISO and WALC markets. We find that the Calpine Entities pass the pivotal supplier and wholesale market share screens for the CAISO market, with market shares ranging from 16 to 18 percent. Accordingly, we find that the Calpine Entities satisfy the Commission's requirements regarding horizontal market power in the CAISO market.

15. With respect to the WALC balancing authority area, we find that the Calpine Entities pass the pivotal supplier screen, but do not pass the wholesale market share screen. The Calpine Entities and their affiliate, LS Power, own a combined 1,120 MW¹⁰ of uncommitted generation capacity in the WALC balancing authority area. According to the Calpine Entities' updated market power analysis, the total uncommitted seasonal capacity of all sellers in the WALC balancing authority area ranges from approximately 2,200 MW to 2,700 MW. Thus, according to our analysis, the Calpine Entities fail the wholesale market share screen in the WALC balancing authority area with market shares ranging from 30 to 52 percent.¹¹

⁷ *Id.* P 62.

⁸ *Id.* P 33, 62-63.

⁹ *Id.* P 231-232.

¹⁰ This is the combined uncommitted capacity of Calpine's South Point unit and LS Power's Griffith unit.

¹¹ The Calpine Entities fail the wholesale market share screen in the WALC balancing authority area even with the sale of LS Power's Griffith unit, with market shares ranging from 27 to 34 percent.

16. As discussed above, the Calpine Entities assert that most of their generation capacity in the WALC balancing authority area is exported outside of that balancing authority area in all four seasons, resulting in zero uncommitted capacity within that balancing authority area. Taking these exports into consideration, under their analysis, the Calpine Entities assert that they do not fail the wholesale market share screen in the WALC balancing authority area. The Calpine Entities cite the transmission reservations held by the Griffith Project and the South Point Facility, which, according to the Calpine Entities, have points of delivery outside of the WALC balancing authority area and exceed the seasonal generating capacity ratings of the respective facilities. The Calpine Entities claim that these transmission reservations are evidence that the output of these facilities is exported outside of the WALC balancing authority area.¹²

17. We find that the Calpine Entities' assertion that their treatment of transmission export reservations is consistent with the Commission's requirements to account for long-term firm transmission reservations when calculating SIL values is misplaced. The Commission requires sellers to submit SIL studies to calculate the aggregated simultaneous transfer capability into the market or balancing authority area being studied.¹³ These studies take into account a study area's imports and exports and associated long-term firm transmission reservations.¹⁴ Determining a study area's simultaneous import capability is a different analysis than determining, for the purposes of our indicative screens, whether an individual seller's generation capacity is committed to a particular market. While the transmission reservations held by the Calpine Entities may affect the calculation of the WALC balancing authority area SIL, they do not affect or constrain the Calpine Entities' ability to sell power in the WALC balancing authority area.

18. The Commission has stated that an applicant that fails one or more of the indicative screens is provided with several procedural options, including the right to challenge the presumption of market power by submitting a DPT analysis, or, alternatively, sellers can accept the presumption of market power and adopt some form of

¹² The Calpine Entities have not identified any transmission constraints that prevent them from selling in WALC.

¹³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 354.

¹⁴ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at Appendix E, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

cost-based mitigation.¹⁵ Accordingly, we turn to the Calpine Entities' DPT analysis for the WALC balancing authority area.

a. Delivered Price Test

19. As the Commission has previously explained, the DPT identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity¹⁶ for each season/load period.¹⁷ Under the DPT, applicants must also calculate market concentration using the Hirschman-Herfindahl Index (HHI).¹⁸ An HHI of less than 2,500 in the relevant market for all season/load periods, in combination with a demonstration that the applicants are not pivotal and do not possess more than a 20 percent market share in any of the season/load periods would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors. A detailed description of the mechanics of the DPT is provided in Order No. 697.¹⁹

20. As with our 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 DPT. In Order No. 697, the Commission encouraged applicants to present the most complete analysis of competitive conditions in the market as the data allows.²⁰

¹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 63.

¹⁶ "Economic capacity" is the total generation capacity of a potential supplier that can compete in the destination market, given its costs and transmission availability. "Available economic capacity" is derived by subtracting each potential supplier's native load obligation from its total capacity and adjusting transmission availability accordingly. *See id.* P 96 n.78.

¹⁷ Super-peak, peak, and off-peak, for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

¹⁸ The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20 percent market share. For that market, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$.

¹⁹ *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 P 104-117.

²⁰ *Id.* P 111.

21. The Calpine Entities' DPT analysis for the WALC balancing authority area indicates that the Calpine Entities are not pivotal in any season/load period using either the economic capacity measure or the available economic capacity measure. The Calpine Entities pass the market share screen and the HHI screen in all season/load periods when the economic capacity measure is used. When the available economic capacity measure is used, however, the Calpine Entities fail the market share screen in all ten season/load periods with market shares ranging from 20.4 percent to 28.9 percent but pass the HHI test in all season/load periods with HHIs ranging from 1,632 to 2,460.

b. Commission Determination

22. After weighing all of the relevant factors, the Commission finds that, on balance, based on the record evidence, the Calpine Entities have rebutted the presumption of horizontal market power and satisfy the Commission's horizontal market power standard for the grant of market-based rate authority. As noted above, the Calpine Entities' DPT analysis for the WALC balancing authority area varies depending on whether the economic capacity or available economic capacity measure is used. As the Commission has stated, the DPT does not function like the initial screens – i.e., failure of either the economic capacity or available economic capacity analyses does not result in an automatic failure of the test as a whole. Neither measure is definitive; the Commission weighs the results of both the economic capacity and the available economic capacity analyses and considers the arguments of the parties.²¹

23. We note that the Calpine Entities' DPT analysis for the WALC balancing authority area indicates that the Calpine Entities are not pivotal in any season/load period using either the economic capacity measure or the available economic capacity measure. The Calpine Entities' market shares under the economic capacity measure are below 20 percent in all season/load periods. Moreover, although the Calpine Entities' market share exceeds 20 percent in all ten season/load periods under the available economic capacity measure, HHIs are below 2,500 in every season/load period. Thus, we find that the Calpine Entities pass two out of the three screens (pivotal supplier and HHI) in every season/load condition under the available economic capacity measure.

24. In addition, we note that, based on the historical sales data provided by the Calpine Entities, during the relevant study period, less than one percent of the energy generated by the South Point Facility was sold in the WALC balancing authority area.²² Thus, after weighing all of the evidence, we find that the Calpine Entities do not have horizontal

²¹ *Id.* P 112.

²² August 30, 2011 Filing, Supplemental Affidavit of Julie Solomon at 3.

market power in the WALC balancing authority area. Our decision is based on our review and analysis of the evidence in the record, including the historical sales data. However, 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 market power and the Calpine Entities must notify the Commission within 30 days of the date of any such sale.²³

2. Vertical Market Power

25. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved open access transmission tariff (OATT) on file before granting that utility or affiliate market-based rate authorization.²⁴

26. The Calpine Entities state that neither they nor their affiliates own or control transmission facilities other than the limited equipment necessary to interconnect their generation to the grid.

27. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.²⁵ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage, or distribution facilities; sites for generation capacity development; and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).²⁶ The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.²⁷

28. The Calpine Entities state that neither they nor their affiliates own or control any intrastate natural gas transportation or intrastate natural gas storage or distribution

²³ 18 C.F.R. § 35.42(a) (2011).

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

²⁵ *Id.* P 440.

²⁶ *Id.* P 447; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

²⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

facilities, any sites for generation capacity development that can be used to erect barriers to entry, any sources of physical coal supplies, or any facilities for the transportation of coal supplies, such as barges or rail cars. The Calpine Entities note that one of their affiliates, Calpine Fuels Corporation, owns and operates limited intrastate natural gas gathering and pipeline facilities in Northern California, but state that those facilities are used exclusively to supply natural gas-fired generation facilities of the Calpine Entities and their affiliates.

29. The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.²⁸ The Calpine Entities affirmatively state that neither they nor their affiliates have erected barriers to entry in the relevant markets and will not erect barriers to entry in the relevant markets in the future.

30. Based on the Calpine Entities' representations, as discussed herein, we find that the Calpine Entities satisfy the Commission's requirements for market-based rate authority regarding vertical market power.

B. Reporting Requirements

31. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based power sales during the most recent calendar quarter.²⁹ Public

²⁸ *Id.* P 447.

²⁹ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Reports to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.³⁰

32. The Calpine Entities must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.³¹ This includes the timely submission of land acquisition reports.³²

33. Additionally, the Calpine Entities must file updated market power analyses for the Northeast, Southeast, Central, Southwest, Southwest Power Pool, and Northwest regions, where they are designated as Category 2 sellers, in compliance with the regional reporting schedule adopted in Order No. 697.³³ The Commission also reserves the right to require such an analysis at any intervening time.

34. Last, we note that the current tariffs for Calpine Energy Services, L.P.; Calpine Construction Finance Company, L.P.; Calpine Gilroy Cogen, L.P.; Calpine PowerAmerica – CA, LLC; Creed Energy Center, LLC; Delta Energy Center, LLC; Gilroy Energy Center, LLC; Goose Haven Energy Center, LLC; Los Esteros Critical Energy Facility, LLC; Los Medanos Energy Center, LLC; Power Contract Financing, L.L.C.; and South Point Energy Center, LLC (collectively, the Calpine Sellers) do not reflect the fact that the Commission previously granted waiver of 18 C.F.R. Part 141 with the exception of sections 141.14 and 141.15. Therefore, we direct the Calpine Sellers to

³⁰ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2011). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

³¹ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42(a) (2011).

³² *See* Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 18 (requiring market-based rate sellers to report the acquisition of control of sites for new generation capacity development on a quarterly basis instead of within 30 days of the acquisition); Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 at P 21-24; 18 C.F.R. § 35.42(d) (2011); *Notice of New Docket Prefix "LA" for Land Acquisition Reports and Guidelines for Filing Under Order No. 697-C*, Docket No. RM04-7-006, 75 Fed. Reg. 22,125 (2010).

³³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882.

include revised tariffs to reflect these exceptions in the limitations and exemptions sections the next time that the Calpine Sellers make a market-based rate filing with the Commission.

The Commission orders:

(A) The Calpine Entities' updated market power analysis for the Southwest region is accepted for filing, as discussed in the body of this order.

(B) The Calpine Sellers are directed to revise their market-based rate tariffs as discussed in the body of this order, effective the date of issuance of this order.

(C) The Calpine Entities are directed to timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority, including any sales made by the Calpine Entities or any of their affiliates in the WALC balancing authority area, as discussed in the body of this order.

(D) The Calpine Entities are hereby directed to file updated market power analyses according to the regional reporting schedule adopted in Order No. 697, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.