

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Calpine Corporation  
and Otay Mesa Generating Company, LLC

Docket No. CP03-335-000

ORDER GRANTING NGA SECTION 3 AUTHORIZATION  
AND ISSUING PRESIDENTIAL PERMIT

(Issued January 29, 2004)

1. On July 15, 2003, Calpine Corporation (Calpine) and Otay Mesa Generating Company, LLC (Otay Mesa), together referred to as Applicants, filed a request to amend the Natural Gas Act (NGA) Section 3 authorization and Presidential Permit held by Otay Mesa.<sup>1</sup> The purpose of the proposal is to insert Calpine's name in lieu of Otay Mesa's name to reflect the merger of Otay Mesa, a wholly-owned subsidiary of Calpine, with and into Calpine.

2. We find that Calpine's succession to Otay Mesa's NGA Section 3 authorization and Presidential Permit is in the public interest to permit operation of facilities for the importation of natural gas supplies from Mexico, as contemplated by our July 31, 2001 order authorizing the facilities.<sup>2</sup> Accordingly, we will grant the Applicants' requests, as discussed below.

**Background**

3. Otay Mesa was authorized in Docket No. CP01-145-000 to construct and operate natural gas facilities in San Diego County, California at the International Boundary between the United States and Mexico. The authorized border crossing facilities, which

---

<sup>1</sup> Otay Mesa Generating Company (Otay Mesa), LLC, 96 FERC ¶ 61,178 (2001).

<sup>2</sup> Id.

have not yet been constructed,<sup>3</sup> will consist of approximately 340 feet of 16-inch pipeline. The border crossing facilities will interconnect with the facilities of Transportada de Gas Natural de Baja California at the border. The border crossing facilities will also interconnect with the Applicants' 1.5-mile non-jurisdictional pipeline currently under construction to serve their 510 MW electric power generating plant in San Diego County, California. The border crossing facilities will be used to import up to 110 MMcfd of gas to fuel the power plant.

### **Proposal**

4. Applicants propose to amend Otay Mesa's existing NGA Section 3 authorization and Presidential Permit for the sole purpose of inserting Calpine's name in lieu of Otay Mesa's name, as necessitated by the merger of Otay Mesa with and into Calpine. No additional facilities are proposed, nor are any changes in the terms and conditions of the NGA Section 3 authorization and Presidential Permit proposed.
5. On July 16, 2003, Otay Mesa and six other Calpine subsidiaries merged with and into Calpine.<sup>4</sup> The merger moved power development assets owned by the seven Calpine subsidiaries up to the parent corporation in order to facilitate the sale of approximately \$2.5 billion in bonds by Calpine. The merger is a condition of the bond sale because the assets of the subsidiaries provide necessary collateral for the bonds.
6. Applicants state that they recognize that Otay Mesa's existing NGA Section 3 authorization and Presidential Permit are not transferable without prior authorization from the Commission. See 18 C.F.R. § 153.9 (2003). However, Applicants assert that they did not conclusively determine that the merger would occur until July 9, 2003, and that the application was filed as soon as possible thereafter.
7. Applicants request that the Commission waive or otherwise not apply the prior authorization requirements in this instance because the merger, and the collateral it provides for the subsequent sale of bonds, is important to maintaining the liquidity and financial strength of Calpine so that it can continue to engage in the construction, development, ownership, and operation of power generation facilities including the Otay Mesa power plant. Applicants state that no party is harmed in this instance by the lack of prior authorization for the transfer of Otay Mesa's NGA Section 3 authorization and

---

<sup>3</sup> Otay Mesa's December 19, 2003 data response.

<sup>4</sup> Id.

Presidential Permit since the border facilities have not yet been constructed and will be used solely to receive imported gas supplies into the Applicants' non-jurisdictional pipeline for delivery to their electric generation plant for use as fuel.

8. Based on the Commission staff's review and recommendation, the Commission finds, in its discretion, that there is no need in this instance for further investigation or enforcement action. See infra. However, the Commission emphasizes that it takes seriously any company's failure to comply with the Commission's regulatory conditions making the transfer of facilities or interests therein subject to the Commission's prior approval. The Commission will take appropriate enforcement action in any situation where it determines such action is warranted. See BP West Coast Products, LLC, 103 FERC ¶ 61,323 (2003).

### **Consultation with Secretaries of State and Defense**

8. On September 17, 2003, the Commission sent copies of the application and a draft Presidential Permit to the Secretary of State and the Secretary of Defense for their recommendations. Replies on behalf of the Secretary of State dated October 15, 2003, and on behalf of the Secretary of Defense dated October 31, 2003, indicate no objection to the issuance of the Presidential Permit as described.<sup>5</sup>

### **Notice and Interventions**

9. Public notice of the application was published in the Federal Register on July 31, 2003, (68 Fed. Reg. 44,931). Comments were due no later than August 14, 2003. No motions to intervene or protests to the application were filed.

### **Discussion**

10. Pursuant to Section 3 of the NGA and authority delegated by the Secretary of Energy, the proposal to site, construct, operate and maintain certain natural gas facilities to import gas at the International Boundary between the United States and Mexico in San Diego County, California is subject to the jurisdiction of the Commission.<sup>6</sup>

---

<sup>5</sup> The Presidential Permit is attached as the appendix to this order.

<sup>6</sup> Pursuant to Department of Energy delegation order No. 00-004.00, the Commission has the delegated authority to issue Presidential Permits and to grant NGA Section 3 authorizations.

11. The Commission has reviewed the application and finds that the proposal is not inconsistent with the public interest. The merger of Otay Mesa with and into Calpine necessitates the succession of Calpine to Otay Mesa's interest in the authorized border crossing facilities. While NGA Section 3 authorizations and Presidential Permits are non-transferable,<sup>7</sup> the Applicants explain that it would not have been in the public interest to delay the merger, possibly delaying important power generation projects, in order for Calpine to receive prior authorization from the Commission to succeed to Otay Mesa's authorizations under Section 3 of the NGA of its Presidential Permit.

12. Since, as stated supra, NGA Section 3 authorizations and Presidential Permits are non-transferable, we will consider Applicants' request to amend Otay Mesa's NGA Section 3 authorization and Presidential Permit as a request by Calpine for new NGA Section 3 authorization and a new Presidential Permit. As noted above, the Secretaries of State and Defense have stated no objection to the Commission's approval of a Presidential Permit for Calpine's proposal. Accordingly, we will issue Calpine NGA Section 3 authorization and a Presidential Permit to site, construct, operate, and maintain the subject border crossing facilities, as authorized in our July 31, 2001 order in Docket No. CP01-145-000.<sup>8</sup> These authorizations will be conditioned on Calpine presenting its border crossing plans to the International Boundary and Water Commission for review and approval prior to commencing construction, as required by the July 31, 2001 order issuing Otay Mesa's existing NGA Section 3 authorization and Presidential Permit.<sup>9</sup>

13. Consistent with current Commission policy,<sup>10</sup> the new Presidential Permit for Calpine provides, in Article 9 thereof, that any determinations regarding whether authorized facilities shall be abandoned in place or by removal shall be deferred until such time that the facilities are no longer in use.

---

<sup>7</sup> Section 153.9(a) of the Commission's regulations, and standard Article 8 of Otay Mesa's Presidential Permit.

<sup>8</sup> Otay Mesa, 96 FERC ¶ 61,178 (2001).

<sup>9</sup> Id. at Ordering Paragraph (C).

<sup>10</sup> See, e.g., Reef International 99 FERC ¶ 61,221 at P 21 (2002).

**Environmental Matters**

14. In the July 31, 2001 order issuing Otay Mesa's existing NGA Section 3 authorization and Presidential Permit, we found that based on the California Energy Commission's environmental review and approval of the border crossing facilities and on the construction and operation procedures described in Otay Mesa's application in that proceeding, the approval of the proposal would not constitute a major Federal action significantly affecting the quality of the human environment.<sup>11</sup> In this proceeding, no additional construction or modification of facilities, or deviation from Otay Mesa's described procedures for construction and operation of facilities is proposed. Thus, there are no environmental issues.

15. At a hearing held on January 22, 2004, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application and exhibits thereto submitted in support of the authorization sought herein, and upon consideration of the record,

**The Commission orders:**

(A) Pursuant to its authority under Section 3 of the NGA, as delegated by the Secretary of Energy, the Commission issues Calpine NGA Section 3 authorization and a Presidential Permit to site, construct, operate, and maintain pipeline facilities at the border of the United States and Mexico in San Diego County, California, as described in the application and in the body of this order.

(B) Calpine shall sign and return the Testimony of Acceptance of all the provisions, conditions, and requirements of the Presidential Permit to the Secretary of the Commission within thirty days of the issuance of this order.

(C) The Presidential Permit and the NGA Section 3 authorization granted in Ordering paragraph (A) is conditioned on Calpine's presenting its plans to the International Boundary and Water Commission for review and approval prior to commencing construction.

---

<sup>11</sup>Otay Mesa, 96 FERC ¶ 61,178 at p. 61,787 (2001).

(D) The NGA Section 3 authorization and Presidential Permit granted to Otay Mesa by the Commission's July 31, 2001 order in Docket No. CP01-145-000 are rescinded.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.

**Appendix A****PERMIT AUTHORIZING CALPINE CORPORATION TO SITE, CONSTRUCT,  
OPERATE AND MAINTAIN NATURAL GAS FACILITIES AT THE  
INTERNATIONAL BOUNDARY BETWEEN UNITED STATES AND MEXICO****FEDERAL ENERGY REGULATORY COMMISSION  
DOCKET NO. CP03-335-000**

(Issued January 29, 2004)

Calpine Corporation and Otay Mesa Generating Company, LLC, corporations organized and existing under the laws of the State of Delaware, filed in Docket No. CP03-335-000 on July 15, 2003, an application pursuant to Executive Order Nos. 10485 and 12038 and the Secretary of Energy's Delegation Order No. 00-004.00, for Calpine Corporation to succeed to the authorization under the Presidential Permit issued to its wholly owned subsidiary Otay Mesa Generating Company, LLC, on July 31, 2001, in Docket No. CP01-145-000. 96 FERC ¶ 61,178 (2001). In support of this request, Calpine Corporation (Permittee) states that the subject facilities will not be altered, activities will not vary from those permitted by the original Presidential Permit and the activities of Calpine will be consistent with the Commission's previous authorization for the subject facilities.

By letter dated October 15, 2003, the Secretary of State, and by letter dated October 31, 2003, the Secretary of Defense favorably recommend that the Permit be granted. The Federal Energy Regulatory Commission finds that the issuance of a Permit is appropriate and consistent with the public interest.

Pursuant to the provisions of Executive Order Nos. 10485 and 12038, dated September 3, 1953 and February 3, 1978, respectively, the Secretary of Energy's Delegation Order No. 00-004.00, effective December 12, 2001, and the Commission's General Rules and Regulations, permission is granted to the Permittee to construct, operate, maintain and connect the natural gas transmission facilities described in Article 2 below, upon the terms and conditions of the Permit.

Article 1. It is expressly agreed by the Permittee that the facilities herein described shall be subject to all provisions and requirements of this Permit. This Permit may be modified or revoked by the President of the United States or the Federal Energy Regulatory Commission and may be amended by the Federal Energy Regulatory Commission upon proper application.

Article 2. The following facilities are subject to this Permit:

340 feet of 16-inch diameter pipeline at the international boundary between the United States and Mexico near San Diego Gas & Electric Company's metering station. All facilities will be located in San Diego County, California. The capacity of these facilities is limited to 110 MMcf of natural gas per day.

Article 3. The natural gas facilities authorized herein, or which may subsequently be included herein by modification or amendment, may be utilized for the importation or exportation of natural gas and in the manner authorized under Section 3 of the Natural Gas Act.

Article 4. The construction, operation, maintenance, and connection of the aforesaid facilities shall be subject to the inspection and approval of representatives of the United States for such purposes. The Permittee shall allow officers and employees of the United States, showing proper credentials, free and unrestricted access to the land occupied by the facilities in the performance of their official duties.

Article 5. If in the future it should appear to the Secretary of the Army that any facilities or operations permitted hereunder cause unreasonable obstruction to the free navigation of any of the navigable waters of the United States, the Permittee may be required, upon notice from the Secretary of the Army, to remove or alter the same so as to render navigation through such waters free and unobstructed.

Article 6. The Permittee shall be liable for all damages occasioned to the property of others by the operation or maintenance of the aforesaid facilities and connections, and in no event shall the United States be liable therefor. The Permittee shall do everything reasonable within their power to prevent or suppress fires on or near land occupied under this Permit.

Article 7. The Permittee agrees to file with the Commission, under oath and in such detail as the Commission may require, such statements or reports with respect to the natural gas imported or the facilities described herein, as the Commission may, from time to time, request. Such information may be made available to any federal, state, or local agency requesting such information.

Article 8. Neither this Permit nor the facilities and connections, nor any part thereof, covered by this Permit shall be voluntarily transferred in any manner, but the Permit shall continue in effect temporarily for a reasonable time in the event of the involuntary transfer of the facilities and connections used hereunder by operation of law

(including transfer to receivers, trustees, or purchasers under foreclosure or judicial sale) pending the making of an application for a permanent Permit and decision thereon, provided notice is promptly given in writing to the Commission, accompanied by a statement that the facilities and connections authorized by this Permit remain substantially the same as before the involuntary transfer. The Permittee shall maintain the facilities and connection, and every part thereof, in a condition of repair for the efficient operation of said facilities and connections in the transportation of natural gas and shall make all necessary renewals and replacement.

Article 9. At such time that this Permit is surrendered, revoked, or otherwise terminated, the Commission shall determine which of the authorized facilities shall be removed and which shall remain in place. The Commission will specify the time within which any authorized facilities shall be removed, and the Permittee shall remove those facilities within such time and at the Permittee's expense. Upon failure of the Permittee to comply with the Commission's direction to remove any authorized facilities, the Commission may direct that possession of the same be taken and the facilities be removed at the Permittee's expense, and the Permittee shall have no claim for damages by reason of such possession or removal.

Article 10. The Permittee agrees that when in the opinion of the President of the United States, evidenced by a written order addressed to it as holder of this Permit, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any of the facilities, or parts thereof, maintained or operated under this Permit, and all contracts covering the transportation or sale of natural gas by means of said facilities, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the Permittee; and in the event that the United States shall exercise such right it shall pay the Permittee just and fair compensation for the use of said facilities upon the basis of a reasonable profit in time of peace, and the cost of restoring said facilities to as good condition as existed at the time of taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the Permittee.

Article 11. This Permit is subject to any action which the Government of the United States may in the future deem expedient or necessary to take in case any part of the aforesaid facilities comes into the control of any foreign government.

Article 12. The Government of the United States shall be entitled to the same or similar privileges as may by law, regulation, agreement, or otherwise, be granted by the Permittee to any foreign government.

By direction of the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.

IN TESTIMONY OF ACCEPTANCE of all the provisions, conditions and requirements of this Permit, the Permittee this day of \_\_\_\_\_, 2004 has caused its name to be signed by \_\_\_\_\_, [pursuant to a resolution of its Board of Directors duly adopted] on the \_\_\_\_ day of \_\_\_\_\_, 2004, a certified copy of the record of which is attached hereto.

Calpine Corporation

By \_\_\_\_\_