

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

May 26, 2005

In Reply Refer To:

CalPeak Power - Midway LLC

Docket No. ER01-2537-001

CalPeak Power - Panoche LLC

Docket No. ER01-2543-001

CalPeak Power - Vaca Dixon LLC

Docket No. ER01-2544-001

CalPeak Power - El Cajon LLC

Docket No. ER01-2545-001

CalPeak Power - Enterprise LLC

Docket No. ER01-2546-001

CalPeak Power - Border LLC

Docket No. ER01-2547-001

Latham & Watkins LLP

Attn: Natasha Gianvecchio, Esq.

Attorney for CalPeak Power

555 11th Street, NW, Suite 1000

Washington, DC 20004

Dear Ms. Gianvecchio:

1. On January 13, 2005, CalPeak Power - Midway LLC (Midway), CalPeak Power - Panoche LLC (Panoche), CalPeak Power - Vaca Dixon LLC (Vaca Dixon), CalPeak Power - El Cajon LLC (El Cajon), CalPeak Power - Enterprise LLC (Enterprise), and CalPeak Power - Border LLC (Border) (collectively, CalPeak Entities) filed an updated market power analysis pursuant to the requirements of the Commission's order granting the CalPeak Entities market-based rate authority.¹ They also filed tariff modifications

¹ *CalPeak Power – Midway LLC*, Docket No. ER01-2537-000, *et al.* (Sept. 4, 2001) (unpublished letter order).

incorporating the Commission's market behavior rules.² Pursuant to Market Behavior Rule 4, CalPeak Entities further assert that they do not report transactions to publishers of electricity or natural gas price indices.³ CalPeak Entities request that the Commission accept the instant submittal out of time and grant any needed waivers to obtain this acceptance.⁴

2. As discussed below, the Commission concludes that CalPeak Entities satisfy the Commission's standards for market-based rate authority. We also accept the tariff modifications incorporating the market behavior rules.

3. Each of the CalPeak Entities is a limited liability Delaware company. CalPeak Power LLC, a wholly-owned subsidiary of UT California Power LLC, solely owns each of the CalPeak Entities. Further, UT California Power LLC is a wholly-owned subsidiary of United Technologies Corporation (United Technologies).

4. Each of the CalPeak Entities owns a natural gas fired generation facility that has a nameplate capacity of 60 MW. Five of the six CalPeak Entities began operation on various dates between late 2001 and mid-2002 and are currently operating five California natural-gas fired generation facilities. CalPeak Entities own the facilities, which are located in or near the California cities of Firebaugh, Vacaville, El Cajon, Escondido, and San Diego. The sixth, Midway, is a California facility currently in development and not operational.

Procedural Matters

5. Notice of CalPeak Entities' filing was published in the *Federal Register*, 70 Fed. Reg. 4835 (2005), with motions to intervene and protests due on or before February 3, 2005. California Electricity Oversight Board filed a motion to intervene. Pursuant to

² Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003) (Market Behavior Rules Order), order on reh'g, 107 FERC ¶ 61,175 (2004).

³ Market Behavior Rules Order at Appendix A.

⁴ CalPeak Entities should have filed their updated market power analysis by September 4, 2004, which is three years from the date the Commission accepted their previous analysis. CalPeak Entities did not file their analysis until January 13, 2005. Their next updated market power analysis is due within three years of the date of this order and we expect that filing to be made in a timely fashion.

Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motion to intervene of the California Electricity Oversight Board serves to make it a party to this proceeding.

Discussion

Market-Based Rate Authorization

6. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁵ As discussed below, the Commission concludes that CalPeak Entities satisfy the Commission's standards for market-based rate authority.

7. In the Commission's order issued in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004), we adopted two indicative screens for assessing generation market power. However, we note that, under section 35.27 of the Commission's regulations, applicants need not demonstrate any lack of market power in generation with respect to sales from capacity constructed after July 9, 1996.⁶ Further, if an applicant sites generation in an area where it or its affiliates own or control other generation assets, the applicant must study whether its new capacity, when added to existing capacity, raises generation market power concerns.⁷ The Commission clarified that in circumstances where construction on all of an applicant's generation commenced after July 9, 1996, no interim generation market power analysis need be performed.⁸ Construction on all the CalPeak Entities' plants began after July, 1996⁹ and therefore section 35.27 does not require CalPeak Entities to submit a generation market power

⁵ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

⁶ 18 C.F.R. § 35.27(a) (2004). We note that the Commission intends to address as part of the generic rulemaking proceeding in Docket No. RM04-7-000 whether to retain or modify section 35.27(a) of our regulations.

⁷ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 69 (2004).

⁸ *AEP Power Marketing, Inc.*, 108 FERC ¶ 61,026 at P 110 (2004).

⁹ See *CalPeak – Midway LLC*, July 6, 2001 Filing at 5-6.

study.¹⁰ Accordingly, the Commission finds that CalPeak Entities satisfy the Commission's generation market power standard for the grant of market-based rate authority.

8. CalPeak Entities state that they do not own or control any transmission facilities other than certain limited facilities specifically used to interconnect their facilities to the regional transmission grid, which is subject to the functional control of the California Independent System Operator (CAISO). Based on this representation, the Commission finds that CalPeak Entities satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

9. CalPeak Entities explain that neither they nor any of their affiliates own, operate, or control resources that could be used to restrict the market entry of competing suppliers, marketers, or brokers. Further, CalPeak Entities state that neither they nor their affiliates own natural gas transportation or distribution facilities, nor do they provide natural gas transportation service to electric generating units. Based on this representation, the Commission is satisfied that CalPeak Entities cannot erect barriers to entry.

10. The CalPeak Entities state that they do not have any affiliates that are franchised utilities and therefore affiliate abuse is not an issue. Based on CalPeak Entities' representations, the Commission finds that CalPeak Entities satisfy the Commission's concerns with regard to affiliate abuse.

11. CalPeak Entities request waiver of the requirement to file its updated market analysis within three years of the date they received market-based rate authorization. CalPeak Entities should have filed their analysis by September 4, 2004, but state their failure to do so resulted from an oversight caused by a change in personnel that are responsible for monitoring CalPeak Entities regulatory compliance. Further, CalPeak Entities state that their filing of status under Market Behavior Rule 4 is untimely. The Commission will grant CalPeak Entities' request for waiver and accept the instant submittal out of time.

Reporting Requirements

12. 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

¹⁰ *Cal Peak Power Midway – LLC*, Docket No. ER01-2537-000, *et.al.* (July 6, 2001).

information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.¹¹ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹²

13. CalPeak 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.¹³ Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, CalPeak Entities are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the following provision:

[insert market-based rate seller name] 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. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

¹¹ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted 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>.

¹² The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). 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.

¹³ *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175 (2005) (Order No. 652).

14. CalPeak Entities is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

By direction of the Commission.

Linda Mitry,
Deputy Secretary.