

119 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellingshoff.

In re Calpine Energy Services, L.P.

Docket No. IN07-24-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued May 9, 2007)

1. The Commission approves the attached Stipulation and Consent Agreement (“Agreement”) between the Office of Enforcement (“Enforcement”) and Calpine Energy Services, L.P., (“CES”), an affiliate of Calpine Corporation (“Calpine”). This Order is in the public interest because it resolves certain self-reported violations by CES of the Commission’s “shipper-must-have-title” requirement resulting from CES’ failure to hold title to the gas it transported. As a civil penalty, CES shall provide the Commission with an allowed pre-petition, unsecured claim in its bankruptcy proceeding of \$4,500,000.00. CES will also institute a compliance program to ensure compliance with transportation requirements, including the “shipper-must-have-title” requirement.

Background

2. Calpine was established in 1984 and, together with its direct and indirect subsidiaries (the “Calpine Companies”), is an integrated power company owning, operating and developing power generation facilities and selling electricity, capacity and related electricity products and services, primarily in the United States and Canada. The Calpine Companies operate the largest fleet of natural gas-fired power plants in North America, and have utilized both firm and interruptible natural gas transportation and storage services on approximately 45 pipelines in the United States and Canada under approximately 110 separate contracts.

3. CES was formed in 2000 for the purpose of consolidating the Calpine Companies’ natural gas and power marketing activities into a single subsidiary. CES acts as the fuel manager for its affiliates, many of which hold title to interstate pipeline capacity. CES, not the individual generating plants, manages transportation capacity, including capacity

procurement. Where a plant holds gas transportation capacity in its own name, CES acts on behalf of the plant by nominating and scheduling service.

4. On or about December 20, 2005, Calpine and certain of the Calpine Companies (“Calpine Debtors”) filed voluntary petitions for relief under title 11 of the United States Code (“Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of New York (“Bankruptcy Court”). The Calpine Debtors are currently operating as debtors-in-possession under the Bankruptcy Code. On August 1, 2006, the Federal Energy Regulatory Commission filed a proof of claim (“Proof of Claim”) in the Calpine bankruptcy proceeding, as a regulator, on behalf of energy customers and other energy market participants. Among other matters, the Proof of Claim includes the present investigation.

5. CES’ violations came to light as a result of an internal review of contracts performed in connection with its bankruptcy. In March 2006, Calpine discovered that CES was utilizing the firm natural gas transportation contracts held by Rumford Power Associates, LP on the Portland Natural Gas Transmission System to transport gas owned by CES to another Calpine entity. CES ceased using the Rumford pipeline capacity in this manner after it discovered the misuse of the capacity. At that time, CES also engaged outside counsel to assist in an investigation to explore whether there were other violations of the “shipper-must-have-title” requirement. After completing an internal investigation, CES met with staff to self-report its violations on June 29, 2006, and delivered a written self-report on July 27, 2006. CES’ self-report covered the period January 1, 2003 through June 30, 2006, in which CES described “shipper-must-have-title” violations on eight interstate pipelines.

6. Enforcement opened a preliminary, non-public investigation into the reported violations. The period investigated by Enforcement is January 2003 through September 2006. During the course of the investigation, CES representatives demonstrated exemplary cooperation with staff, promptly responding to data requests, keeping staff apprised of new developments, and providing expeditious and complete answers to all questions.

Summary of Violations

7. In order to promote pipeline open-access and to prevent undue discrimination in the primary and secondary markets for capacity, the Commission adopted a number of specific capacity release policies. Among them was the “shipper-must-have-title” policy,

which requires that “all shippers shall have title to the gas at the time the gas is delivered to the transporter and while it is being transported by the transporter.”¹

8. As part of the implementation of Order No. 636, pipelines revised their tariffs to include “shipper-must-have-title” provisions in the General Terms and Conditions. These provisions, all of which require shippers to warrant that they hold good title to the gas shipped utilizing their capacity, are included in the tariffs of the eight pipelines on which CES shipped natural gas utilizing capacity held by a Calpine affiliate.

9. CES violated the “shipper-must-have-title” requirement by transporting gas to which it held title using capacity rights of other Calpine affiliates. CES’ violations involve a large number of transactions representing approximately 156.5 Bcf of natural gas, and occurring over a period of years dating back to at least January 2003. Those violations fall into three categories of transactions: (1) transactions involving CES selling gas to an affiliated generating plant that holds pipeline capacity rights, with the delivery point in the gas sales agreement being the inlet to the affiliated shipper’s plant rather than the inlet to the applicable interstate pipeline on which the generating plant holds capacity; (2) transactions involving CES holding title to the gas transported, and using capacity rights of certain Calpine affiliates to deliver gas to other Calpine affiliates; and (3) transactions involving CES using capacity rights of Calpine affiliates to transport gas for deliveries to unaffiliated third parties on three interstate pipelines.

10. CES’ first category of violations did not demonstrably harm third parties because the gas was delivered to the generating affiliate holding the pipeline capacity, and was used to generate electricity. CES’ second category of violations generally deprived market participants of information on the alternate use made of the plants’ pipeline capacity, but these intra-company transactions did not result in identifiable financial harm to third parties because the transactions could have been pre-arranged as maximum rate releases and, thus, need not have been subject to competitive bidding. CES’ third category of transactions did not harm third parties because, although CES violated the requirement, CES could have accomplished the transactions through pre-arranged capacity releases at maximum rates and, in addition, the pipelines on which the gas was transported all had capacity available at the time CES engaged in the transactions. Thus, the commodity sales could have been accomplished without CES using its affiliates’ capacity to transport the gas on three interstate pipelines.

¹ See, e.g., *Rendezvous Gas Services LLC*, 113 FERC ¶ 61,169, at P 40 (2005); *Enron Energy Services, Inc.*, 84 FERC ¶ 61,222, at 60,063 (1998); *Consolidated Gas Transmission Corp.*, 38 FERC ¶ 61,150, at 61,408 (1987) (citing *Texas Eastern Transmission Corp.*, 37 FERC ¶ 61,260, at 61,683-85 (1986)).

11. Notwithstanding the foregoing, by failing to engage in proper releases followed by Internet website postings, CES shielded from other market participants relevant information concerning the use being made of capacity held by Calpine affiliates. In this way, CES undermined the market transparency necessary for the Commission's open access policies to function properly.

12. Upon learning of its violations of the Commission's "shipper-must-have-title" requirement, CES moved quickly to investigate further, self-report its violations, and take corrective action. As of September 2006, CES achieved complete compliance with the Commission's "shipper-must-have-title" requirement.

Stipulation and Agreement

13. Enforcement and CES have entered into the attached Agreement to resolve Enforcement's investigation of CES' self-report. As a civil penalty, CES shall provide the Commission with an allowed pre-petition, unsecured claim in its bankruptcy proceeding of \$4,500,000.00.

14. CES shall submit semi-annual reports with Enforcement for a period of one year with the option of a second year at staff's discretion. The first report, to be submitted no later than August 31, 2007, shall describe in detail the steps CES has taken to assure compliance with transportation requirements, and shall include an affidavit that CES is in compliance with the Commission's capacity release program and pipeline tariffs, including the "shipper-must-have-title" requirement.

Determination of the Appropriate Remedy

15. The Commission may impose civil penalties of up to \$1 million per day per violation pursuant to section 22(a) of the Natural Gas Act, as amended by the Energy Policy Act of 2005.² In approving the Agreement and the \$4.5 million civil penalty, we considered the factors set forth in our Policy Statement on Enforcement.³ Among all the factors considered, seven are of particular significance: (1) the fact that the Commission's "shipper-must-have-title" requirement is a long-standing, well-known, and important element of the Commission's open-access program; (2) the large number and long

² 15 U.S.C § 717t-1 *added by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 314 (b)(1)(B), 119 Stat. 594, 691 (2005). Under the NGA (15 U.S.C. §§ 717 *et seq.* (2000)) section 22(a), the Commission can assess a penalty "of not more than \$1,000,000 per day per violation for as long as the violation continues." *See generally Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006).

³ *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005).

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duration of violations involving the transportation of 156.5 Bcf of natural gas; (3) the failure of CES senior management to ensure relevant personnel complied with the “shipper-must-have-title” requirement; (4) CES’ prompt submission of a self-report; (5) exemplary cooperation during the course of the investigation; (6) prompt corrective actions taken to help ensure future compliance; and (7) the absence of identifiable financial harm to third parties.

16. In light of the facts and circumstances, we conclude that the penalty specified in the Agreement provides a fair and equitable resolution of this matter and is in the public interest. We also conclude that the compliance program specified in the Agreement is in the public interest.

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.