96 FERC ¶ 61, 117
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, Linda Breathitt,
Pat Wood, III and Nora Mead Brownell.

San Diego Gas & Electric Company, Complainant,		
v.	Docket No.	EL00-95-039
Sellers of Energy and Ancillary Service Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange, Respondents.		
Investigation of Practices of the California Independent System Operator and the California Power Exchange	Docket No.	EL00-98-037
California Independent System Operator Corporation	Docket No.	RT01-85-002
Investigation of Wholesale Rates of Public Utility Sellers of Energy and Ancillary Services in the Western Systems Coordinating Council	Docket Nos.	EL01-68-002

ORDER GRANTING EMERGENCY MOTION FOR CLARIFICATION

(Issued July 25, 2001)

In this order , we grant an emergency motion for clarification filed in these proceedings by Mirant Americas Energy Marketing, LP (Mirant Americas) and Mirant Potrero, LLC (Mirant Potrero) (Collectively, Mirant).[1]

[1]We will act on other pending requests for clarification and/or rehearing in these

Background

On April 26, 2001, the Commission issued an order addressing dysfunctions in the wholesale power markets operated by the California Independent System Operator Corporation (ISO) and the California Power Exchange Corporation (PX).[2] Among other things, the April 26 Order required California non-hydroelectric generators to offer all of their available capacity from their units into spot energy markets during all hours.[3] This is referred to as the "must offer requirement."

On June 19, 2001, the Commission issued an order which, among other things, denied Mirant's request for rehearing of the must offer requirement contained in the April 26 Order.[4] In the June 19 Order, the Commission explained that the April 26 Order does not require generators to run if doing so would violate their certificate or applicable law. But, the Commission explained, those units are required to run if it involves only

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proceedings in a subsequent order.

[2]San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, 95 FERC ¶ 61,115 (2001) (April 26 Order).

[3]Id. at 61,357.

[4]San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service, 95 FERC ¶ 61,418 at 61,552-53 (2001) (June 19 Order).

the payment of additional amounts to obtain emission credits to permit them to run outside of their emission limitations. The June 19 Order further clarified that generators should not be exempt from the must-offer requirement absent a showing that running the unit violates a certificate,[5] would result in criminal violations, or penalties, or would result in QF units violating their contracts or losing their QF status. The Commission explained that the incurrence of expenses for obtaining additional emission allowances is not a valid reason to withhold available energy from the ISO's market, since the Commission was providing a mechanism to recover such costs and the Governor of California had issued a series of executive orders, including the most recent order, allowing generators to exceed their emission runtimes without losing valuable future emission allowances.

On June 26, 2001, Mirant filed an Emergency Motion for Clarification (Emergency Motion) of the Commission's June 19 Order. Mirant seeks assurance that it is exempt from the must-offer requirement to the extent compliance would require operation of certain units located at the Potrero Power Plant in excess of the current 877 hour annual limitation for these units.

Specifically, Mirant states that it owns and operates three 52 MW peaking units located at the Potrero Power Plant (Potrero Units) which are restricted by the terms of their governing air quality regulation and permits to operate for no more that 877 hours per year. The governing air permit, issued in 1998 pursuant to Bay Area Air Quality Management District (BAAQMD) regulations, is enforceable by the Environmental Protection Agency (EPA).

[5] Our use of the term "certificate" extends to environmental operating limitations imposed by governmental authorities, whether in a permit, certificate, or other operating authorization.

On March 29, 2001, Mirant negotiated with the BAAQMD a Compliance and Mitigation Agreement (CMA) to relax temporarily the running hour limitations in order to permit those units to continue to produce power and help alleviate the current energy shortage.[6] According to Mirant, the Potrero Units may run for additional hours under the CMA only if the units are dispatched in response to certain emergency conditions (Local Area Support, Zonal Area Support, and System Resource)[7] and Mirant pays the BAAQMD a mitigation fee of $20,000 per ton of NOx emitted by the units resulting from the excess operations.

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[6]This negotiation was entered into pursuant to Executive Orders issued by California Governor Gray Davis. The Executive Orders direct the local air pollution control and air quality management districts to: (1) modify emissions limits that restrict the hours of operation in air quality permits as necessary to ensure that power generation facilities continue to provide power during the shortage of electric power in California; and (2) require mitigation fees for all applicable emissions in excess of the previous limits. See Executive Orders D-24-01 and D-28-01.

[7]See Emergency Motion, Exhibit B, Compliance and Mitigation Agreement between Mirant and BAAQMD, Attachment A.

On April 6, 2001, the EPA issued an Administrative Order on Consent (EPA Consent Order) regarding the CMA. The EPA Consent Order states: "By entering into this Order, the Parties agree that EPA is providing adequate notice of EPA's allegation that Mirant will be in violation of Condition 15816 of the permit and of section 302 of BAAQMD Regulation 9, Rule 9 as included in the SIP, upon exceeding the Permit limit of 877 operating hours per calendar year at the Potrero Peaking Turbines. Mirant has not admitted that it is in violation of any permit limit or other requirement of the Act."[8] However, the EPA Consent Order requires: (1) that the Potrero Units comply with any and all elements of Mirant's permit other than the restriction of each turbine to operating no more than 877 hours per year and with the CMA; and (2) that Mirant shall return to compliance with the hourly limitation and any other applicable requirements on or after January 1, 2002, but in no event later than the termination date of the Consent Order, unless Mirant meets certain specified conditions.[9]

Although Mirant does not agree that it would be in violation of a permit limit or any other requirement of the Clean Air Act, Mirant is concerned that EPA's position is that Mirant would be in violation of its air permit if it exceeds 877 hours per year. Furthermore, Mirant notes that on June 19, 2001, the San Francisco City Attorney and several environmental groups filed suit in federal court against Mirant Potrero, alleging violations of the Clean Air Act and seeking a court order prohibiting Mirant from continuing to operate its units beyond the 877 hour limitation until Mirant obtains a new air quality permit, damages, and other relief (San Francisco Complaint).[10]

Request for Clarification

Mirant claims that it intends to comply with the June 19 Order to the extent doing so would not violate its legal obligations under the governing regulation and air permit. However, since the June 19 Order states that the must offer requirement does not apply to circumstances where running the unit violates a certificate, and EPA has stated its position that Mirant would not be in compliance with the governing regulation and air permit if it operates those units in excess of 877 hours per year, Mirant requests clarification that it is exempt from the must offer requirement to the extent compliance

[8] Emergency Motion, Exhibit C, EPA Consent Order, §III.1.

[9] Emergency Motion, Exhibit C, EPA Consent Order, §IV.4 and 5.

[10] Emergency Motion, at 2, n.2.

with that requirement would require operation of the Potrero Units in excess of 877 hours per year.

Answers

Duke Energy Oakland, LLC, Duke Energy North America, LLC, and Duke Energy Trading and Marketing, LLC (Duke Energy Oakland) strongly supports the Emergency Motion. Duke Energy Oakland states that like Mirant, it has entered into an agreement with BAAQMD similar to the CMA and is now engaged in discussions with EPA. Similarly, Northern California Power Agency (NCPA) states that it would be required to enter into the same type of consent order to run its own permit-limited units. NCPA requests clarification that must-offer requirement does not apply to units that cannot operate without the risk of violating the Clean Air Act and other air quality restrictions.

Both Duke Energy Oakland and NCPA point to language in the EPA Consent Order which states that by operating in excess of its hourly limits, Mirant will be in violation of its permit. They are concerned about the implications of entering into a consent order with EPA that finds them in violation of their permits. Second, Duke Energy Oakland and NCPA argue that neither an executive order issued by the Governor of California nor an EPA Consent Order will insulate generators from citizen suits that can result in significant penalties.[11] In fact, NCPA points out that the San Francisco Complaint challenges the process through which the CMA and The EPA Consent Order were entered. Duke Energy Oakland and NCPA argue that it is not appropriate for the Commission to require a generator to violate its permit in order to produce energy for the benefit of the State of California pursuant to the request of its Governor, while the generator remains subject to lawsuits and significant liability at the hands of the state's municipalities and citizens.

Discussion

Mirant's request for clarification is based on EPA's statement in the EPA Consent Agreement that Mirant would not be in compliance with the governing regulation and air

[11]The San Francisco Complaint seeks civil penalties up to $27,500 per day for each violation of the Clean Air Act, an order that up to $100,000 be used in beneficial mitigation projects, civil penalties of $2,500 for each act of unfair competition in violation of the California Business and Professions Code, disgorgement of all profits resulting from unfair and unlawful business practices, and litigation costs. See Duke comments at 4-5.

permit if it operates the Potrero Units in excess of 877 hours per year. However, the EPA Consent Agreement also appears to conditionally allow Mirant to exceed the 877 hour operating restriction pursuant to the CMA at least until January 1, 2002 (subject to certain operating and payment conditions), and beyond that date if certain further conditions are met.

The risk that Mirant, Duke Energy Oakland, and NCPA nonetheless perceive is that despite any acquiescence by state, federal and municipal environmental authorities, individuals and municipalities may still sue them under the Clean Air Act. This Commission is not the appropriate forum for determining whether utilities are in violation of their Clean Air permits. The Commission has addressed everything within its jurisdiction to maximize the output of much needed generation in California, including the must offer requirement. Issues related to compliance with the Clean Air Act certificate are subject to either local, state or other federal agency jurisdiction. We urge the EPA and the state to work out administrative provisions that would enable these units to run. We find that Mirant's factual presentation and the related lawsuit constitute an adequate showing under our April 26 and June 19 Orders. Accordingly, we will grant Mirant's request for clarification.

Duke Energy Oakland and NCPA raise a valid concern that an executive order issued by the Governor of California and an EPA Consent Order will not insulate them from citizen suits that can result in significant penalties.[12] If a generator does not want to wait until it is sued to seek an exemption from the must offer requirement, it may instead obtain a declaratory order from an appropriate court finding that compliance with the must offer requirement will result in a violation of its permits. In summary, in order to be exempted from the must offer requirement, a generator must demonstrate that running its unit violates a permit, would result in a criminal or civil violation or penalties, or would result in QF units violating their contracts or losing their QF status. In lieu of submitting a presentation such as that filed by Mirant, a generator may obtain a declaratory order from an appropriate court finding that the generator's compliance with the must offer requirement will result in a violation of its permit.

The Commission orders:

[12] Under 42 U.S.C. § 7604, of the Clean Air Act, any person may bring a civil action, alleging violations of the Act, and seeking civil penalties, even if EPA does not seek enforcement.

Mirant's Emergency Motion is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

David P. Boergers,
Secretary.