

**UNITED STATES OF AMERICA 104 FERC ¶ 63,039
FEDERAL ENERGY REGULATORY COMMISSION**

Delta Energy Center, L.L.C.

Docket No. ER03-510-000

CERTIFICATION OF UNCONTESTED SETTLEMENT

(Issued August 14, 2003)

TO THE COMMISSION:

I. INTRODUCTION

1. The Settlement Agreement (“Settlement”) between Delta Energy Center, LLC (“Delta”), the California Independent System Operator Corporation (“CAISO”) and Pacific Gas & Electric Company (“PG&E”) is certified as an uncontested settlement. Acceptance of the settlement is in the public interest.

II. PROCEDURAL HISTORY

2. On March 31, 2003, the Commission accepted for filing and suspended for a nominal period to become effective February 10, 2003, subject to refund, Delta’s proposed Reliability Must-Run agreement (“RMR agreement”) with the CAISO.¹

3. On April 4, 2003, Chief Administrative Law Judge Wagner appointed a Settlement Judge and directed the parties to file a status report by May 2, 2003.² The parties, on April 30, 2003, reached an agreement in principle and requested an extension of time until May 30, 2003.

4. On May 5, 2003, Chief Judge Wagner denied a motion to intervene by the Californians for Renewable Energy, Inc. holding that the parties had worked hard to obtain a negotiated settlement of the issues in this proceeding and had reported that a settlement in principle had been reached. On June 11, 2003, the Chief Judge continued

¹ *Delta Energy Center, LLC*, 102 FERC ¶ 61,352 (2003).

² Order of Chief Judge Appointing Settlement Judge and Deferring First Settlement Conference, April 4, 2003.

the settlement procedures since the parties had filed an Offer of Settlement on May 30, 2003.³

III. THE OFFER OF SETTLEMENT

A. Section I. Status of Proceeding.

5. This Section of the Offer of Settlement describes Delta as an 880 MW natural gas-fired combined-cycle electric generating facility, an exempt wholesale generator. It specifies that on February 7, 2003, Delta filed an unexecuted RMR agreement based on a *pro forma* agreement previously approved by the Commission,⁴ with some modifications and operating parameters specific to Delta concerning rates and terms. This section also sets forth the procedural history of this proceeding.

B. Section II.A. Effective Dates.

6. Paragraph 1 of this section establishes that the settlement shall be effective on the date the Commission issues an order accepting the settlement, or, if modified, when all parties accept the Commission's modifications. In paragraph 2 the refund obligation date is designated as February 10, 2003. Additionally, paragraph 3 indicates that the Reinstitution Date will be the earlier of: (a) the date the Commission issues an order on rehearing (or 30 days after an opinion, if rehearing is not sought) in *Pacific Gas and Elec. Co.*, Docket Nos. ER98-495-000 et al. ("*Mirant RMR case*"); (b) or October 1, 2005. Under paragraph 4, the settlement terminates when the Commission issues an order recommencing settlement judge procedures, or an order establishes a procedural schedule for an evidentiary hearing to address Delta's rates for RMR services. The settlement

³ Order of the Chief Judge Continuing Settlement Procedures, June 11, 2003.

⁴ According to Commission Trial Staff ("Staff"), the usual CAISO RMR agreements follow a standard format agreed upon as a result of a settlement. *California Independent System Operator Corporation, et al.*, 87 FERC ¶ 61,250 (1999). The *pro forma* CAISO agreement provides rates, terms and conditions for RMR service. "Initial Comments of the Commission Staff on Offer of Settlement," filed on June 18, 2003, at p. 2, n. 2. Under the *pro forma* agreement, the CAISO may dispatch a generating unit for energy to meet local reliability needs, or manage intra-zonal congestion and for ancillary services when the available bids in ancillary service capacity markets do not provide sufficient capacity to meet the CAISO's requirements. The owner is paid a percentage of its fixed costs (adjusted pursuant to a formula based on the availability of the facility for service) and certain variable costs (if it has chosen to forego energy sales revenue). The owner agrees to maintain and repair the facility and keep the CAISO notified of the level of its availability.

specifies that termination shall not affect any obligations of a Party accrued prior to termination, which shall continue until satisfied.

C. Section II.B. Withdrawal of Rehearing Request and Deferral of Further Proceedings.

7. Under paragraph 1 of this Section, PG&E will withdraw its Rehearing Request within 10 business days of the effective date. Paragraph 2 provides that, upon the effective date, the instant dockets will be terminated. Moreover, it explains that further Commission procedures in this proceeding will be deferred until a party requests that the Commission open a new subdocket. In addition, paragraph 3 establishes that the deferral is on a non-prejudicial basis, and the parties are reserving their rights to assert that any Commission order in the *Mirant RMR* case, including any rate methodology, is or is not applicable to Delta.

D. Section II.C. Interim Rates, Terms, and Conditions.

8. Paragraph 1 of this section specifies that Delta will provide services to the CAISO pursuant to the rates, terms, and conditions set forth in its RMR filing, subject to refund as of the refund obligation date. In paragraph 2 there is a description of the limited section 205 filing Delta will make in a new subdocket in this proceeding, updating rates (Hourly Availability Charge, Hourly Penalty Rate and Prepaid Start-up Charge), for the subsequent Contract Year to reflect updates to Contract Service Limits, Target Available Hours and Hourly Fuel Price, in accordance with the provisions of the RMR agreement, if the reinstatement date has not occurred by October 1 of a given contract year and the CAISO has designated Delta as a RMR unit for the subsequent contract year. Additionally, this paragraph specifies that Hourly Availability Charges and Hourly Penalty rates shall be updated using an Annual Fixed Reliability Cost ("AFRC") of \$14,740,960 and Target Available Hours calculated annually pursuant to Section 6 of Schedule B of the RMR agreement. Further, this paragraph provides that the Variable Cost Payment shall be equal to the Variable Cost Payment rates set forth in the RMR Filing. However, this section specifies that adjustments based on Schedule F of the RMR Agreement will not be made in a limited Section 205 filing during the Settlement term. This paragraph does not limit the rights of any party under Section 205 of the Federal Power Act ("FPA"), to protest or oppose the limited section 205 filings.

9. At paragraph 3 it is established that Delta will request that the rates for the contract year be placed into effect subject to refund, as of the refund obligation date in each such limited section 205 filing. Paragraph 4 sets forth the parties' agreement that during the term of this Settlement, PG&E's concerns (that the RMR agreement restricts the CAISO's ability to review and challenge the financial terms of the agreement and to dispatch the Unit) have been addressed.

10. Pursuant to paragraph 5 capital additions and resulting capital addition charges will be governed by the Delta RMR agreement. Under paragraph 6 it is specified that Delta will neither change, nor give notice to the CAISO to change, any Unit from operation under Condition 1 of the RMR agreement to Condition 2, during the term of the Settlement.

E. Section II.D. Reinstitution Date.

11. Pursuant to paragraph 1 of this section, the written notice Delta will give to all parties upon the occurrence of the reinstatement date shall include a statement to the effect that if the parties do not give written notice of reinstating settlement negotiations concerning the Delta RMR Agreement, then the interim rates in effect for Delta will be final and cease to be subject to refund. Paragraph 2 explains that within 30 days of Delta's notice, any party may provide written notice that it is reinstating settlement negotiations concerning the Delta RMR agreement.

12. In addition, paragraph 3 establishes that if settlement negotiations prove unsuccessful after 90 days, any party may request the Commission to establish further proceedings. Paragraph 4 provides that the interim rates in effect from February 10, 2003, as modified by any limited section 205 filing, will be final and no longer subject to refund if parties do not respond to Delta's written notice within 90 days of being advised of the occurrence of the Reinstitution date. According to paragraph 5, the parties may agree in writing before the end of the 90 day period to extend the notice period or the period for commencing or conducting settlement negotiations.

F. Section III.A. Reliability Must-Run Designations.

13. Under this section, paragraph 1 explains that during the term of the settlement, the CAISO retains its right to designate the Delta Energy Center as a RMR Unit for the subsequent contract year or extend the RMR agreement by giving notice no later than October 1 of the expiring contract year. Additionally, the CAISO retained rights to terminate the RMR agreement in accordance with its terms.

G. Section III.B. Section 205 and 206 Rights.

14. Paragraph 1 of this section specifies that (1) Delta will not make a unilateral application to the Commission for a change in any rate covered by the settlement under section 205 of the FPA and (2) the parties will not seek relief under section 206. Except that the parties may seek relief under section 205 or 206 as to a change in rate, term or condition not proposed to be effective during the term of the settlement or a change in a rate, term or condition pursuant to a party's initiative to modify such rate, term or condition generally for RMR facilities substantially similar to the Delta Energy Center. It also provides that any proposed change to the Delta RMR agreement with respect to

Condition 2, will not be proposed to be effective during the term of the settlement. Additionally, this paragraph establishes that the Commission is not precluded from its right to investigate, on its own motion, the rates, terms and conditions under the just and reasonable and not unduly discriminatory or preferential standard of Section 206 of the FPA.

15. In paragraph 2 it is established that the settlement does not limit the parties' rights and remedies regarding any dispute arising under the RMR agreement whose resolution does not require any modification of its rates, terms or conditions, including any claim that the amounts invoiced under the Delta RMR agreement are incorrect and any disputed involving the interpretation or application of the agreement.

H. Section III.C. "Black Box" Settlement.

16. Under this section Paragraph 1 states that the settlement is a negotiated agreement for the sole purpose of settling certain issues in the captioned dockets and that acquiescence in the settlement is not deemed to constitute an admission by any Party that any allegations or contentions made in the proceeding are true or valid. This paragraph also provides that approval of the settlement shall not constitute approval of, or precedent regarding, any principle or issue in this proceeding. In paragraph 2 the parties agree that resolution of any matter in the settlement shall not be deemed a "settled practice" as that term was interpreted and applied in *Public Service Commission of the State of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980). Furthermore, paragraph 3 explains the fact that the discussions which produced the settlement were conducted under Section 602(e) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(e) (2002).

I. Section IV. Waiver of Rehearing.

17. The paragraphs in this section define terms ("Sponsoring Party" and "Subject Party") and waive rehearing or judicial review of any Commission order approving the settlement, if the Commission accepts the settlement without modification or conditions. Paragraph 3 explains that if the Commission modifies the Settlement, an adversely affected party may accept the modified settlement or reject it within 15 days of the modification. In paragraph 4 it is specified that if the Commission rejects the settlement, or if a party rejects a modified or conditioned settlement, the parties agree to request further proceedings (settlement judge procedures or evidentiary hearing reinstated). Additionally, paragraph 5 provides that a party may seek rehearing or judicial review of the Commission's order accepting the settlement solely to challenge any modification or condition imposed by the Commission.

J. Section V. Miscellaneous Provisions.

18. This section specifies that headings are for reference only and that the rights and obligations of the settlement shall inure to the benefit of the parties' successors in interest or assignees.

IV. INITIAL COMMENTS

19. Staff filed comments supporting the settlement on June 18, 2003.⁵ In their comments, Staff urged acceptance of the settlement as a fair, reasonable, and in the public interest resolution of the issues in this proceeding. According to Staff, the settlement provides interim rates, terms and conditions for the provision of RMR services to the CAISO, while establishing procedures for the final resolution of the outstanding issues in deferred settlement negotiations or hearing procedures after the outcome of the *Mirant RMR* case. Moreover, the agreement addresses Commission concerns with the Delta filing. No other comments were received.⁶

V. DISCUSSION AND CONCLUSION

20. The settlement provides a reasonable resolution of all the issues set for hearing by the Commission. The rates, terms and conditions pursuant to which Delta will provide services under a RMR Agreement to the CAISO from the Delta Energy Center are established by this settlement. Additionally, the settlement establishes time frames and procedures for the parties to commence negotiations over the appropriate rates for Delta to provide RMR services (deferred settlement negotiations or hearing procedures). Approval of the settlement terminates docket Nos. ER03-510-000 and ER03-510-001, avoids costly litigation, promotes administrative efficiency and benefits consumers.

21. Acceptance of the settlement ensures the provision of interim critical RMR service to the CAISO. The agreement addresses Commission concerns, it preserves the CAISO's ability to flexibly dispatch the unit and its ability to review and challenge the financial terms of any final agreement. As Staff correctly points out, the settlement represents the parties' pragmatic solution to the problem posed by the fact that many RMR issues

⁵ "Initial Comments of the Commission Staff on Offer of Settlement," filed June 18, 2003.

⁶ The settling parties stated that they were authorized to represent that The California Electricity Oversight Board (intervened on February 28, 2003) supports this settlement. "Explanatory Statement in Support of Offer of Settlement," filed on May 30, 2003, at pp. 1 and 6. Additionally, the settling parties stated that they were authorized to represent that the California Public Utilities Commission does not oppose the settlement.

(including usage of net incremental costs) are pending before the Commission in the *Mirant RMR* proceeding. Moreover, the settlement preserves the rights of all the Parties to assert that any Commission order in the *Mirant RMR* case, including whether any rate methodology found to be applicable in that proceeding, is or is not applicable, in whole or in part, to Delta's filing in this case. As a result, the settlement specifies the time frame and related procedures under which the Parties will reinstitute negotiations regarding the appropriate rates pursuant to which Delta will provide RMR services, once the Commission has rendered a decision in the *Mirant RMR* case. In addition, the settlement establishes a refund obligation date for Delta. However, the agreement also addresses the Commission's concerns that the parties achieve some finality in this proceeding regarding rates for RMR services. Finally, the settlement potentially simplifies the parties' issues (and may eliminate the need for hearing) by maintaining the *status quo* until the Commission issues an opinion in the *Mirant RMR* case. Accordingly, the public interest will be served by approval of the settlement.

22. There are no policy implications in this settlement. The settlement does not affect any other cases pending before the Commission. The settlement does not involve any issues of first impression. For these reasons, it is recommended that the settlement be approved by the Commission.

VI. CERTIFICATION

23. Pursuant to 18 C.F.R. § 385.602(g)(1), the following are certified for the Commission's consideration:

- (a) The Offer of Settlement filed by Delta Energy Center, LLC, the California Independent System Operator Corporation and Pacific Gas and Electric on May 30, 2003;
- (b) The Explanatory Statement, a draft Notice of Filing and a draft letter order filed by Delta Energy Center, LLC, the California Independent System Operator Corporation and Pacific Gas and Electric on May 30, 2003;
- (c) Initial Comments of the Commission Staff on Offer of Settlement, filed on June 18, 2003;

Docket No. ER03-510-000

-8-

- (d) All pleadings, orders, and other documents of record in this proceeding;
and
- (e) A draft Letter Order.

Carmen A. Cintron
Settlement Judge

DRAFT

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

In Reply Refer To:
Docket Nos. ER03-510-000
and ER03-510-001

Davis Wright Tremaine, LLP
Attn: Lindsey How-Downing
Attorney for Delta Energy Center, LLC
One Embarcadero Center, Suite 600
San Francisco, CA 94111-3611

Dear Ms. How-Downing:

1. On June 3, 2003, you filed an uncontested settlement between Delta Energy Center, LLC ("Delta"), the California Independent System Operator Corporation ("ISO"), and Pacific Gas and Electric Company ("PG&E"). On June 18, 2003, Commission Trial Staff submitted comments in support of the settlement. No other comments were filed. On August 14, 2003, the settlement judge certified the settlement as an uncontested settlement.
2. The settlement is in the public interest and is hereby approved. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. The Commission retains the right to investigate the rates, terms, and conditions under the just and reasonable and not unduly discriminatory or preferential standard of § 206 of the Federal Power Act, 16 U.S.C. § 824e (2000).

Docket No. ER03-510-000

-2-

3. This letter order terminates Docket Nos. ER03-510-000 and ER03-510-001. New subdockets will be assigned upon initiation of further proceedings in this docket.

By direction of the Commission.

Secretary

cc: All Parties

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102-3214