

102 FERC ¶ 61, 087
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell

Duke Energy South Bay, LLC

Docket No. ER03-117-000

ORDER ACCEPTING AND SUSPENDING PROPOSED REVISIONS TO
RELIABILITY MUST-RUN AGREEMENT AND ESTABLISHING HEARING AND
SETTLEMENT PROCEDURES

(Issued January 30, 2003)

1. In this order, the Commission accepts for filing and suspends for a nominal period proposed revisions by Duke Energy South Bay, LLC (DESB) to its Reliability Must-Run Agreement (RMR Agreement) with the California Independent System Operator Corporation (CAISO).¹ The order also sets the matter for hearing, but holds the hearing in abeyance, to allow the parties time to press forward with their current settlement discussions. This order benefits customers because it allows DESB to continue providing must-run generation to the CAISO while encouraging the parties to resolve their disagreements through direct settlement negotiations, if possible.

Background

¹DESB's RMR Agreement follows a generic, standard form that was agreed to as part of a settlement approved by the Commission in a letter order issued on May 28, 1999. California System Operator Corporation, *et al.*, 87 FERC ¶ 61,250 (1999). The RMR Agreements provide the rates, terms, and conditions for RMR service.

The RMR Agreement requires that, whenever the CAISO extends the terms of an RMR Agreement for an additional calendar year, the owner of a designated RMR unit must file with the Commission (in an informational filing and a rate filing) updates to certain rates and terms of service under the RMR Agreement.

2. DESB and other power plant owners in California provide reliability must-run (RMR) service to the CAISO by dispatching designated units at certain power plants at the direction of the CAISO.
3. As required in the RMR Agreement, the CAISO designated DESB's facilities for RMR service for the 2003 calendar year (Year 2003). Accordingly, on October 31, 2002, pursuant to Schedule F of the RMR Agreement, DESB submitted an Informational Package providing updated Annual Fixed Revenue Requirement (AFRR) values and Variable Operation and Maintenance (VOM) rates for Year 2003 (Schedule F Informational Package).
4. In the same submission, pursuant to section 205 of the Federal Power Act (FPA),² DESB filed revised rate schedule sheets to the RMR Agreement reflecting the updated AFRR values and VOM rates contained in the Schedule F Informational Package and certain other annual updates provided for in the RMR Agreement (205 Filing). DESB's 205 Filing proposes to amend: (1) Schedule A to reflect updated contract service limits, repair cost obligations, and air emission limitations; (2) Schedule B to reflect the updated AFRR values, fixed option payment factor, hourly availability and penalty rates, target available hours, and capital item surcharges; and (3) Schedule D to reflect prepaid start-up costs. DESB seeks an effective date of January 1, 2003 for the Rate Filing.

Notice, Interventions, and Protests

5. Notice of DESB's October 31, 2002 filing was published in the Federal Register,³ with interventions and protests due on or before November 21, 2002. The California Public Utilities Commission (California Commission) filed a notice of intervention and timely unopposed motions to intervene were filed by the CAISO, the California Electricity Oversight Board (CEOB), San Diego Gas and Electric Company (SDG&E), and Pacific Gas and Electric Company (PG&E).
6. The CAISO, the CEOB and SDG&E (Protestors) jointly filed a protest of DESB's filing. Protestors state that, although DESB has responded to their requests for additional information, DESB and Protestors have been unable to resolve all of the issues relating to DESB's filing. The protest identifies four unresolved issues. First, is it appropriate for DESB to include the costs relating to the shutdown of one non-RMR unit at the South

²16 U.S.C. § 824d (2000).

³67 Fed. Reg. 68,856 (2002). This date subsequently was extended to December 17, 2002.

Bay facility in its AFFR calculations? Second, should certain expenses be treated as maintenance expenses or capital expenses? Third, what is proper level for DESB's outside legal expenses? Fourth, has DESB adequately explained and justified all of its expense items? Further, Protestors add that the costs proposed by DESB for Year 2003 are 46 percent higher than those for Year 2002. Protestors urge the Commission to reject DESB's filing or, at a minimum, suspend it and make it effective subject to refund. Additionally, Protestors ask that the parties be given an additional sixty days to resolve their differences and, absent such resolution, they request that the issues be set for hearing.

DESB's Answer

7. On December 20, 2002, DESB filed a motion for leave to answer and an answer to the joint protest. DESB asserts that the relief requested by Protestors is inappropriate under the procedures specified in the RMR Agreement. DESB maintains that the parties may challenge rates only by complaint under section 206 of the FPA,⁴ unless the objection concerns the accuracy of the arithmetic computations or conformity to the rate formula.

8. DESB argues that the rates contained in the Schedule F Informational Package are subject to refund only for challenges to arithmetic calculations and for nonconformity to the rate formula and that disputes of this nature are to be resolved through the specific alternative dispute resolution procedures (ADR) outlined in the RMR Agreement. Therefore, DESB argues that there is no basis to reject, suspend, or make effective subject to refund the rates in DESB's filing, unless the rates are adjudged unjust, unreasonable, or unduly discriminatory pursuant to a proceeding under section 206 of the FPA or where a party mounts a successful challenge through the ADR procedures outlined in the RMR Agreement to the arithmetic calculations or conformity to the rate formula.

9. Further, DESB states that the parties worked together last year to resolve issues raised in response to DESB's Year 2002 filing. It adds that these cooperative efforts resulted in the execution of a settlement that resolved all of the issues raised by Protestors. DESB states that it anticipates that the issues raised in the instant filing will be resolved in a similar fashion.

Protestors' Answer

⁴16 U.S.C. § 824e (2000).

10. On January 6, 2003, the Protestors jointly filed an answer to DESB's motion for leave to answer and answer. In their answer, Protestors urge the Commission to deny DESB's motion to file an answer. They state that, as DESB points out, the formula rate provided in Schedule F governs charges under the contract absent a change pursuant to FPA section 205 or a Commission order under FPA section 206. Here, Protestors claim that they have not sought a change in the rate formula, but rather that DESB has not followed the requirements of the rate formula set forth in Schedule F. Finally, Protestors argue that it would be appropriate to reject or suspend DESB's filing because, as DESB recognizes, the filing contained not just the Informational Package required by Schedule F, but also a section 205 rate filing updating Schedules A, B, and D of the RMR Agreement.

Discussion

A. Procedural Matters

11. Under Rule 214 of the Commission's Rules of Practice and Procedure,⁵ the California Commission's notice of intervention and the timely unopposed motions to intervene of the CAISO, the CEOB, SDG&E, and PG&E serve to make them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,⁶ prohibits the filing of answers to protests unless otherwise permitted by the decisional authority. Likewise, this same provision prohibits the filing of answers to answers unless otherwise permitted by the decisional authority. We find good cause in this proceeding to allow DESB's answer and Protestor's answer thereto because they provide information that aids us in our understanding and resolution of the issues.

B. Motion to Reject Filing

12. Notwithstanding Protestors' challenge to the sufficiency of the filing, we find DESB's October 31, 2002 filing substantially complies with the Commission's filing requirements and that no other basis for rejection has been shown. Therefore, we shall deny the motion to reject.

C. Availability of Refunds

⁵18 C.F.R. § 385.214 (2002).

⁶18 C.F.R. § 385.213(a)(2) (2002).

13. DESB argues that the formula rate in the Schedule F Informational Filing only allows parties to challenge rates by means of a section 206 complaint, unless the objection concerns the accuracy of the arithmetic computations or conformity to the rate formula. Thus, DESB argues, there is no basis to reject, suspend, or make effective subject to refund the rates in DESB's filing, unless the rates are adjudged unjust, unreasonable, or unduly discriminatory pursuant to a proceeding under section 206 of the FPA or where a party mounts a successful challenge through the ADR procedures outlined in the RMR Agreement to the arithmetic calculations or conformity to the rate formula.

14. Protestors respond that they have not sought a change in the rate formula but rather that DESB has not followed the requirements set forth in Schedule F. More importantly, Protestors reiterate that not only did DESB make the required Schedule F Informational Filing, but also, pursuant to section 205 of the FPA, DESB filed revised rate schedule sheets reflecting, among other things, the updated AFRR value and VOM rates contained in the Schedule F Informational Package.

15. The RMR Agreement provides a mechanism for challenging the accuracy of DESB's Schedule F Informational Package (i.e., DESB's arithmetic computations and conformity to the rate formula) and that mechanism is ADR. DESB's 205 Filing, which has been submitted pursuant to section 205 of the FPA, includes revised rate schedule sheets reflecting, among other things, the Year 2003 updated AFRR values and VOM rates contained in the Schedule F Informational Package as well as other changes to the terms of the RMR Agreement. As such, the 205 Filing is subject to review by the Commission and subject to our statutory authority to suspend the filing.

D. Acceptance for Filing and Suspension Period

16. Protestor's concerns, identified above, raise factual questions concerning the 205 Filing that we cannot summarily decide on the record before us. In addition, we note that the fixed option payment factor (FOPF) contained in Schedule B of the RMR Agreement is the subject of a complaint pending in Docket No. EL02-15-000⁷ and that the

⁷On November 2, 2001, the California Commission, the CEOB, PG&E, SDG&E, and Southern California Edison Company filed an FPA section 206 complaint, which is presently pending before the Commission. The complaint asks the Commission to institute a proceeding to investigate the fixed option payment (FOP) payable by the CAISO under their respective RMR Agreements and establish a refund effective date of

calculation of the hourly availability charges found in Schedule B reflects not only the AFRR value, but also the FOPF. Therefore, any determinations made in this filing are subject to the outcome of Docket No. EL02-15-000.

17. Based on our review of DESB's 205 Filing, we find that DESB's proposed revisions to its RMR Agreement have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or otherwise unlawful. Accordingly, we accept the proposed revisions to the RMR Agreement for filing, suspend them for a nominal period, to be effective January 1, 2003, subject to refund and set the proposed revisions for hearing.

18. The parties have stated that they are engaged in ongoing negotiations to expeditiously resolve the outstanding issues. Thus, we will hold the hearing in abeyance to permit the parties to continue their settlement negotiations.

E. Compliance with Order No. 614

19. We note that DESB's filing does not comply with the guidelines set forth in Order No. 614.⁸ A review of our records indicates that DESB has never filed its RMR Agreement with the CAISO (DESB's Rate Schedule No 2) in compliance with Order No. 614.⁹ Thus, we will condition our acceptance of DESB's filing in the instant proceeding on DESB's refiling the entire Rate Schedule in compliance with Order No. 614 within 60 days of the date of this order.

The Commission orders:

(A) DESB's 205 Filing is hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2003, subject to refund and subject to the outcome of Docket No. EL02-15-000, as discussed in the body of this order.

⁷(...continued)

January 1, 2002. The FOPF is a percentage of a generating unit's AFRR. The FOP is the product of the FOPF and the AFRR.

⁸See Designation of Electric Rate Schedule Sheets, Order No. 614, FERC Stats. & Regs, Regulations Preambles July 1996 - December 2000 ¶ 31,096 (2000).

⁹See, e.g., Pacificorp, 97 FERC ¶ 61,336 (2001), for further guidance in complying with the requirements of Order No. 614.

Docket No. ER03-117-000

-7-

(B) Within 60 days of the date of issuance of this order, DESB shall file a revised rate schedule that complies with the requirements of Order No. 614.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the proposed revisions to the RMR Agreement. As discussed in the body of this order, the hearing shall be held in abeyance to provide time for the parties to resolve the outstanding issues.

(D) Within 60 days of the date of this order, the parties shall file a report with the Commission and the Chief Judge on the status of the negotiations and identify the issues that they have resolved through negotiations, and any issues that remain unresolved. Based on this report, the Chief Judge shall provide the parties with additional time to continue their efforts, or if appropriate, provide for a formal hearing by assigning the case to a presiding judge. If the parties are given additional time to continue their efforts, they shall file a report at least every 30 days thereafter, informing the Commission and the Chief Judge of their progress toward resolving the outstanding issues.

(E) If the discussions between the parties fail, and a formal hearing is to be held, a presiding judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately 15 days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.