

102 FERC ¶ 61,352
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Delta Energy Center, LLC
000

Docket No. ER03-510-

ORDER ACCEPTING AND SUSPENDING FILING AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 31, 2003)

Summary

1. In this order, the Commission accepts for filing and suspends for a nominal period the Delta Energy Center, LLC's (Delta) proposed Reliability Must-Run Agreement (Agreement) with the California Independent System Operator Corporation (California ISO).¹ The order also sets the matter for hearing, but holds the hearing in abeyance, so that the parties may pursue settlement discussions. This order benefits customers because it allows Delta to provide must-run generation to the California ISO while encouraging the parties to resolve their disagreements through direct settlement negotiations, if possible.

¹ The usual California ISO 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 May 28, 1999. *California System Operator Corporation, et al.*, 87 FERC ¶ 61,250 (1999). The California ISO RMR Agreements provide rates, terms, and conditions for RMR service.

An RMR Unit is a generator that a transmission provider can call upon when necessary to provide energy and ancillary services essential to the reliability of the transmission network. That is, some generating units "must run" at certain times to protect the transmission system from voltage collapse, instability, and thermal overloading. See *AES Southland, Inc., et al.*, 94 FERC ¶ 61,248 at 61,871 & nn 2, 6 (2001); *Duke Energy Oakland, LLC*, 85 FERC ¶ 61,047 at 61,141-42 n.1 (1998).

Background

2. According to Delta, in the summer of 2002, the California ISO conducted its Local Area Reliability Service assessment to determine the resources, including generation, that it needed to ensure the reliability of its transmission network. It then solicited bids to meet these reliability requirements. Delta submitted a bid to provide RMR service in response to the solicitation. The California ISO designated Delta as an RMR Unit, contingent upon execution of an RMR Agreement with rates, terms and conditions acceptable to the California ISO. The California ISO and Delta negotiated, but were unable to agree on rates. Because the California ISO needs Delta's RMR service to maintain reliability in the Greater Bay Area, it encouraged Delta to file an unexecuted RMR Agreement with the Commission.²

3. On February 7, 2003, Delta filed with the Commission the Agreement setting forth the rates, terms and conditions under which Delta proposes to provide RMR service to the California ISO. Delta requests waiver of the 60-day prior notice requirement and an effective date of February 10, 2003.³ Delta filed the Agreement as an "initial rate."⁴

Notice, Intervention and Protest

4. Notice of Delta's filing was published in the Federal Register, 68 Fed. Reg. 7996 (2003), with comments, protests and interventions due on or before February 28, 2003. The California Electricity Oversight Board filed a timely motion to intervene. Pacific Gas & Electric Company (PG&E) and the California ISO filed timely motions to intervene and protest. Delta filed an answer to PG&E's and the California ISO's protests.

5. The California ISO objects to the rates that Delta proposes to charge for RMR service. It argues that the Commission should find those rates unjust and unreasonable and should base the rates for RMR services on the net incremental cost methodology that

²Delta Cover Letter at 3.

³Id. at 6.

⁴Id. at 5.

an administrative law judge adopted in Docket No. ER98-495-000.⁵ The California ISO argues that Delta is seeking to exact a monopoly price for a service that is essential to transmission reliability.⁶

6. PG&E⁷ argues that Delta's filing: (a) is not an "initial rate"; (b) does not comply with the Commission's filing requirements; (c) lacks cost support; (d) fails to demonstrate that the rates are just and reasonable; and (e) includes terms and conditions that are unjust and unreasonable. PG&E also states that Delta should base its rates on the net incremental cost methodology that California ISO advocates.⁸

7. PG&E asks that the Commission either: (a) reject the filing; or (b) suspend the filing for a nominal period, make it subject to refund, and set it for hearing. PG&E also notes that rates for RMR service are at issue in Docket No. ER98-495-000. It asks that, if the Commission does not reject Delta's filing, we hold it in abeyance until we have issued our decision in that docket.⁹

Discussion

A. Procedural Matter

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(c) (2002), the California Electricity Oversight Board's, California ISO's and PG&E's timely, unopposed motions to intervene serve to make them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2002), prohibits an answer to a protest unless otherwise permitted by the decisional authority. As we are not persuaded to allow Delta's answer to PG&E's and the California ISO's protests, we will reject it.

⁵See Pacific Gas and Electric Company, 91 FERC ¶ 63,008 at 65,110-65,115 (2000). See also California ISO Protest at 5.

⁶California ISO Protest at 7-8.

⁷Because Delta's generator is located in PG&E's service territory, PG&E will pay Delta's RMR rates. PG&E Intervention at 2.

⁸ PG&E protest at 1, 3-4, 7-8, 12.

⁹Id. at 1-7, 11-13.

B. Analysis of Filing

9. Delta filed the RMR Agreement as an initial rate. For a filing to be an initial rate, the rate must be for both a new service and a new customer.¹⁰ As Delta already sells wholesale electric energy and other transmission services to the California ISO under rate schedules on file with the Commission,¹¹ Delta's RMR service is a change in rates rather than an initial rate and is thus subject to the Commission's suspension and refund authority under the Federal Power Act.¹²

10. Although Delta's filing does not completely comply with the Commission's filing requirements,¹³ it is not so patently deficient as to warrant rejection.

11. The California ISO and PG&E urge us to find that the RMR rates are unjust and unreasonable to the extent that they exceed rates based on the net incremental cost methodology that is awaiting Commission review in Docket No. ER98-495-000, et al. PG&E also asks us to defer decision in this docket until we have issued our decision in that docket. We decline to apply in this docket a cost methodology that we have not yet reviewed. Nor will we defer decision in this docket pending our review of that cost methodology. As RMR services are crucial to transmission network stability, the parties should know what the just and reasonable rates for those services are as soon as possible.

¹⁰E.g., Florida Power & Light Company, 65 FERC ¶ 61,411, at 63,128 n.28 (1993).

¹¹See Delta Energy Center, LLC FERC Electric Tariff, No. 1. RMR service, though necessary to support the transmission function, is a wholesale sale of electric energy.

¹²See New York State Gas & Electric Corporation, 44 FERC ¶ 61,250 at 61,923-24 (1988); Southwestern Electric Power Company, 39 FERC ¶ 61,099 at 61,292-293 (1987).

¹³18 C.F.R. § 35.13 (2002).

12. As noted above,¹⁴ the standard California RMR Agreement provides the rates, terms and conditions for RMR services that generating units provide to the California ISO. That standard agreement contains a carefully negotiated balance of rights and obligations between the parties. As PG&E notes, Delta's proposed Agreement departs from the standard terms and conditions for RMR services and significantly restricts the California ISO's ability to review and challenge the financial terms of the Agreement and to dispatch the unit.

13. Our review of the unexecuted RMR Agreement reveals that the rates, terms and conditions for RMR services have not been shown to be just and reasonable and may be unjust, unreasonable and unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will accept the Agreement for filing, suspend it for a nominal period, effective February 10, 2003, subject to refund with interest, and set it for hearing as ordered below. We will also grant the requested waiver of our prior notice requirement for good cause shown, and allow the proposed RMR Agreement to become effective February 10, 2003, as requested.¹⁵

14. While we are setting this proceeding for a trial-type evidentiary hearing, we encourage the parties, before hearing procedures are commenced, to first make every effort to settle their dispute. To aid the parties in their settlement efforts, the hearing we have ordered shall be held in abeyance and a settlement judge shall be appointed to assist the parties in reaching a settlement.¹⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise the Chief Judge will select a judge.¹⁷

The Commission orders:

¹⁴ See n.1, supra.

¹⁵ See Central Hudson Gas and Electric Corporation, et al., 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).

¹⁶ 18 C.F.R. § 385.603 (2002).

¹⁷ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. FERC's website contains a listing of Commission judges and a summary of their background and experience (www.ferc.fed.us- click on the Office of Administrative Law Judges).

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(A) Delta's request for waiver of the Commission's 60-day prior notice requirement is hereby granted.

(B) The RMR Agreement is hereby accepted for filing and suspended for a nominal period, to become effective February 10, 2003, as requested, subject to refund as discussed in the body of this order.

(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 the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held in Docket No. ER03-510-000 into the justness and reasonableness of the RMR Agreement, as discussed in the body of this order. However, this hearing shall be held in abeyance while the parties attempt to settle, as discussed in Ordering Paragraphs (D) and (E), below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2002), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in Docket No. ER03-510-000, within fifteen (15) days of the date of this order. To the extent consistent with this order, the designated Settlement Judge shall have all the powers and duties enumerated in Rule 603 and shall convene an initial settlement conference as soon as practicable.

(E) Within sixty days of the date of this order, the Settlement Judge shall file a report with the Chief Judge and with the Commission on the status of the settlement discussions in this docket. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 30 days thereafter informing the Chief Judge and the Commission of the parties' progress toward settlement.

(F) If settlement discussions fail, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding to be held within approximately fifteen days of the Settlement Judge's report to the Commission, in a hearing room of the Federal Energy Regulatory Commission, 888 First St., N.E., Washington D. C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding administrative law judge is authorized to establish procedural dates, and to rule on all

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motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(G) Delta's answer to PG&E's and the California ISO's protests is hereby rejected.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.