

98 FERC & 61, 110
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy South Bay LLC

Docket Nos. ER02-239-000,
ER02-239-001, and
ER02-239-002

ORDER ACCEPTING AND SUSPENDING REVISED
TARIFF SHEETS, SUBJECT TO REFUND AND CONDITIONS

(Issued February 1, 2002)

In this order, the Commission accepts, subject to refund and conditions, and nominally suspends revised tariff sheets filed by Duke Energy South Bay LLC (Duke) on November 1, 2001, November 29, 2001, and December 11, 2001, to update Duke's Reliability Must-Run Agreement (RMR Agreement). The Commission's decision benefits customers because it allows Duke to continue providing must-run generation to the California Independent System Operator Corporation (California ISO).

Background

Duke and other power plant owners in California provide RMR service to the California ISO by dispatching designated units at certain power plants at the direction of the California ISO. This dispatch is provided under individual RMR Agreements that follow a generic, standard-form RMR Agreement that was agreed to as part of a settlement approved in California Independent System Operator Corp.¹ (Settlement). The RMR Agreements provide the rates, terms, and conditions for RMR service. Under the terms of the Settlement, each RMR owner files annual updates to its RMR Agreements.

¹87 FERC & 61,250 (1999).

On November 1, 2001, and as amended on November 29 and December 11, 2001, Duke filed revised tariff sheets reflecting the Year 2002 annual updates to its RMR Agreement. Among other things, the tariff sheets propose to: (1) amend Schedule A to reflect updated contract service limits and air emission limitations, (2) amend Schedule B to reflect updated annual fixed revenue requirements (AFRR), hourly availability and penalty rates, target available hours, capital item surcharges, and (3) amend Schedule D to reflect prepaid start-up costs. Duke notes in the transmittal letter attached to its filing that the revised AFRR figures it proposes in this filing are identical to those currently pending before the Commission in Docket No. ER02-10-000.²

In the amendment filed on November 29, 2001, in Docket No. ER02-239-001, Duke filed two additional rate schedule sheets. The proposed rate schedule sheets reflect an hourly capital item charge, which Duke states was necessitated by costs related to the recent installation of new equipment at its South Bay facility. Duke states that the California ISO has confirmed its acceptance of the project. Duke filed one rate schedule sheet reflecting these costs for the remainder of Year 2001 and a superseding rate schedule sheet for the Year 2002. Duke requests waiver of the 60-day prior notice requirement to permit an effective date of November 29, 2001 and January 1, 2002, respectively.

In the amendment filed on December 11, 2001, in Docket No. ER02-239-002 Duke filed additional Year 2002 updates to Schedule A reflecting proposed revisions to its maximum annual service hours, maximum annual startup figures, and the owner's repair cost obligations. Duke seeks waiver of the 60-day prior notice requirement to permit an effective date of January 1, 2002, for the revised tariff sheets.

Notice, Interventions, and Protests

Notice of Duke's November 1, 2001, November 29, 2001, and December 11, 2001, filings were published in the Federal Register, 66 Fed. Reg. 57,065 (2001), Fed. Reg. 64,241 (2001), and 66 Fed. Reg. 65,694 (2001), with interventions and protests due no later than November 23, 2001, December 20, 2001, and January 2, 2002,

²Id. This is the first year that annual updates include any changes to the AFRR values. Pursuant to the RMR Agreement, the AFRR values have been subject to a rate freeze that expired December 31, 2001.

respectively. The Commission received timely unopposed motions to intervene and protests from the State of California Public Utilities Commission (California Commission), the State of California Electricity Oversight Board (California EOB), the California ISO, and San Diego Gas and Electric Company (SDG&E).

1. California Commission's Protest and California EOB's Protest

In separately-filed protests, the California Commission and the California EOB state that they have "significant substantive concerns" about data that Duke filed in Docket No. ER02-10-000, which purports to justify Duke's updated AFRR value. (Both agencies filed protests to the AFRR filing in Docket No. ER02-10-000.) The agencies argue in the instant docket that Duke's attempt to update the AFRR for its RMR units in this docket presents a logistical problem because the issue of the appropriateness of the AFRR might have to be litigated in both dockets. The California Commission adds that it is concerned that it be able to participate in the proceeding in which AFRR rates are revised.

Both agencies request that the Commission sever consideration of the AFRR revisions for the South Bay RMR units and consolidate the issue with Docket No. ER02-10-000. They protest any consideration in the instant docket of the justness and reasonableness of the AFRR. If the Commission considers the AFRR in this docket, the agencies protest the justness and reasonableness of the increased AFRR.

2. California ISO's Protest

The California ISO echoes the concerns of the California Commission and the California EOB concerning the inclusion of the AFRR value in the instant docket. In addition, it protests the revisions to certain operating data and rates included in Schedules A and D of the RMR Agreement. For Schedule A, the California ISO states: (1) that the monthly reserve MWHS figures for the San Diego Air Pollution Control District appear to be incorrect, (2) that the maximum annual startup figures and the maximum annual service hour figures were not adequately updated, and (3) that the owner's repair cost obligation was not updated, and that this figure is based on the AFRR value, which is pending in Docket No. ER02-10-000. Additionally, the California ISO states that in Schedule D the prepaid startup costs and charges also appear to be unduly elevated.

3. SDG&E's Protest

Like the California ISO, the California Commission, and California EOB, SDG&E protests the inclusion of the AFRR value in the instant filing. It also cites many of the concerns of the California ISO pertaining to the revisions to certain operating data and rates included in Duke's filing. SDG&E complains that Duke's filing contains no data supporting

the changes reflected in the revised rate schedule sheets and that SDG&E does not have the data necessary to verify the changes independently.

In addition, SDG&E argues that the fixed option payment factor (FOPF) contained in Schedule B is the subject of a complaint pending in Docket No. EL02-15-000,³ and that the calculation of the hourly availability charges found in Schedule B reflects not only the AFRR value, but also the FOPF. SDG&E requests that the revised rate schedule sheets be suspended and put in effect, if at all, subject to refund.

4. Duke's Answer

On December 11, 2001, Duke filed an answer in opposition to the protests filed in this proceeding. Duke adds that the Settlement freezes the rates in the RMR Agreement through January 1, 2002. If it files to adjust its rates, then the effectiveness of the RMR rates continues unless the RMR owner terminates them or the Commission establishes an investigation of the rates pursuant to section 206 of the Federal Power Act. Moreover, Duke claims that the rates 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 alternative dispute resolution (ADR) as stated in the Settlement. Therefore, Duke argues that, unless adjudged pursuant to a section 206 proceeding or where a party mounts a successful challenge through ADR to the arithmetic calculations and conformity to the rate formula, there is no basis to reject, suspend, or make effective subject to refund the rates in Duke's filing.

³ On November 2, 2001, the California Commission, California EOB, Pacific Gas and Electric Company, SDG&E, and Southern California Edison Company filed an FPA section 206 complaint. The complaint asks the Commission to institute a proceeding to investigate the fixed option payment (FOP) payable by the California ISO under their respective RMR Agreements and establish a refund effective date of 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. The complaint is pending before the Commission.

Duke acknowledges some errors that the protestors identified in its November 1, 2001 filing and states that it has addressed those errors through a December 11, 2001 amendment filed in Docket No. ER02-239-002 concurrently with its Answer.

5. California ISO's Motion

On December 13, 2001, the California ISO filed a motion to establish a January 1, 2002 refund date. The California ISO again argues that certain rates proposed in Duke's filing are subject to the outcome of Docket No. ER02-10-000 and urges the Commission to establish a January 1, 2002 refund date for all rates under consideration in this proceeding.

6. Duke's Answer to California ISO's Motion

On December 28, 2001, Duke filed an answer to the December 13, 2001 motion of the California ISO. In its answer, Duke asks that refunds be made available in this proceeding, if at all, subject to the outcome of the section 206 proceedings in Docket No. EL02-15-000, and subject to any successful arithmetic challenges to Duke's filing currently under review in Docket No. ER02-10-000. Additionally, it states that this result is consistent with the Commission's recent order in Duke Energy Oakland LLC.⁴

Discussion

1. Procedural Matters

The timely unopposed motions to intervene and protests of the California EOB, SDG&E and the California ISO and the notice of intervention of the California Commission make them parties to this proceeding pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. ' 385.214 (2001). Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.213(a)(2) (2000), prohibits the filing of answers to a protest unless otherwise permitted by the decisional authority. The Commission finds that good cause exists in this proceeding to allow Duke's answer because it aids the Commission in resolving the issues raised in this proceeding.

2. Commission Decision

⁴97 FERC & 61,283 (2001).

The protestors urge the Commission not to accept Duke's revised AFRR value contained in Schedule B because the issue relating to the appropriateness of the AFRR is pending in Docket No. ER02-10-000. The Commission agrees with the protestors that it is inefficient and unnecessary to examine the justness and reasonableness of the AFRR more than once. The Commission will, therefore, accept and nominally suspend Duke's proposed revisions to the AFRR, subject to refund and subject to the outcome of the proceeding in Docket No. ER02-10-000, to be effective January 1, 2002.

SDG&E urges the Commission not to accept the FOPF because it is at issue in a complaint currently under review in Docket No. EL02-15-000. The FOPF is part of the calculation used to determine the hourly availability charge; therefore, the Commission agrees that the FOPF also will be subject to refund and subject to the outcome of the proceeding in Docket No. EL02-15-000, effective January 1, 2002.

The Commission finds that the proposed tariff revisions have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, the Commission will accept and nominally suspend Duke's proposed revisions to the RMR Agreement, subject to refund and subject to the outcome of the proceedings in Docket Nos. ER02-10-000 and EL02-15-000, as discussed in the previous two paragraphs.⁵ The Commission will grant waiver of the 60-day prior notice requirement to permit an effective date of January 1, 2002, for those sheets reflecting Year 2002 updates and November 29, 2001, for the one sheet reflecting a Year 2001 update as requested by Duke.⁶

The Commission orders:

(A) The Commission hereby conditionally accepts and nominally suspends the revised tariff sheets, subject to refund and subject to the outcome of the proceedings in Docket Nos. ER02-10-000 and EL02-15-000, to be effective January 1, 2002, and November 29, 2001, as discussed in the body of this order.

(B) Duke's request for waiver of the Commission's 60-day prior notice requirement is granted.

⁵Both Docket Nos. ER02-10-000 and EL02-15-000 are currently under review. The protest date for Docket No. ER02-10-000 expired December 14, 2001.

⁶See Central Hudson Gas & Electric Corp., 60 FERC & 61,106, reh'g denied, 61 FERC & 61,089 (1992).

(C) Duke is hereby advised of the following rate schedule designations: First Revised Second Revised Sheet No. 12 under FERC Electric Rate Schedule No. 2, effective November 29, 2001. First Revised Sheet Nos. 4, 14 and 30; Third Revised

Sheet Nos. 10 and 13; Substitute Third Revised Sheet No. 8; and Fourth Revised Sheet No. 12 under FERC Electric Rate Schedule No. 2, effective January 1, 2002.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.