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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy South Bay, LLC) Docket No. ER03-117-000

JOINT RESPONSE OF THE CALIFORNIA INDPENDENT SYSTEM OPERATOR, CALIFORNIA ELECTRICITY OVERSIGHT BOARD AND SAN DIEGO GAS & ELECTRIC TO MOTION FOR LEAVE TO ANSWER

Pursuant to 18 C.F.R. § 385.213, the California Independent System Operator Corporation (the "ISO"), the California Electricity Oversight Board (the "EOB"), and San Diego Gas & Electric Company ("SDG&E") (collectively, "Joint Parties") hereby submit their Joint Response to the Motion for Leave to Answer and Answer in Opposition to the Joint Protest of the California Independent System Operator Corporation, the California Electricity Oversight Board, and San Diego Gas & Electric Company, filed by Duke Energy South Bay, LLC ("DESB") in this proceeding on December 20, 2002 (the "Answer").

As DESB recognizes, the Commission rules do not allow answers to protests. See 18 C.F.R. § 385.213(a)(2). DESB asserts, however, that its answer should be accepted because that Answer "offers essential information and analysis to clarify the issues and technical data involved in this proceeding and which will assist the Commission in its decision making

process."[1] As described below, however, DESB's Answer itself is mistaken in several respects. DESB's motion should therefore be denied.

In its Answer, DESB asserts that the relief requested by Joint Parties in the Joint Protest is inappropriate under the procedures specified by the contract (the "RMR Agreement") to which this proceeding relates. In particular, DESB maintains the formula rate provided in Schedule F allows parties to challenge rates only by complaint under Section 206 of the Federal Power Act, unless the objection is to arithmetic calculations in applying the formula.[2]

In their Joint Protest, the Joint Parties objected to certain methods and figures used by DESB in applying the formula rate set forth in Schedule F of the RMR Agreement. In particular, they protested the allocation of certain costs properly allocable to Unit 4 at the South Bay plant, which is not an RMR unit in 2003, to other units that are RMR units; DESB's treatment of certain costs as maintenance rather than capital items; and the allocation of certain outside legal expenses, incurred by the regional office of DESB's parent, to DESB. Joint Parties also noted that other figures in DESB's filing had not been explained. For that reason, they requested that the filing either be rejected or suspended and made subject to refund.

As DESB points out, the formula rate provided in Schedule F is to govern rates under the contract absent a change pursuant to Section 205 or a Commission order under Section 206.

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1 DESB Motion at 1-2.

2 As DESB puts it:

> Therefore, under the RMR Agreement and April 1999 Stipulation, the only means by which a party can challenge the RMR rates (as opposed to the arithmetic calculations using these rates) is through a Section 206 proceeding.

DESB Motion at 6.

Here, however, Joint Parties have not sought a change in the formula. Rather, they have asserted that, in deriving the Annual Fixed Revenue Requirement for 2003 for each unit, DESB has not followed the requirements of the formula set forth in Schedule F. Moreover, such challenges are specifically contemplated by Schedule F, i.e., "[p]rotests to the Information Package challenging arithmetic calculations or conformity to the Rate Formula."[3] Thus, contrary to DESB's claim, nonconformity to the formula, rather than just arithmetic error, is a ground for protest.

Nor is DESB correct in suggesting that such challenges may be resolved only by Alternative Dispute Resolution. Article I, Part B of Schedule B provides for ADR only for issues "not resolved by summary disposition of the FERC."[4] And, to the extent that summary disposition is granted, refunds of any excessive amounts collected may, indeed, be appropriate. Finally, the request by Joint Parties that the filing be rejected or suspended is appropriate because, as DESB recognizes, the filing contained not just the Informational Package required by the Schedule F, but also updated Schedules A, B, and D, which include the AFRR derived in the Informational Package.[5] The latter schedules are submitted under Section 205, rather than pursuant to the Schedule F Formula Rate.

CONCLUSION

The relief sought by Joint Parties in their Joint Protest is entirely consistent with the April 1999 Stipulation and with the procedures provided by Schedule F of the RMR Agreement. While Joint Parties are continuing to work with DESB in an effort to resolve the issues set forth in the protest, the Commission and parties are not obligated simply to accept an improper AFRR

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3 Schedule F Article I, Part B (emphasis added).

4 Id.

5 DESB Motion at 2-3.

submitted by DESB if that effort fails. The DESB Motion should be denied, and DESB's answer rejected.

Respectfully submitted,

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January 6, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of January 2003, served by first class mail, postage prepaid, a copy of the foregoing upon all parties listed on the service list compiled in this proceeding.

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Cathy L. Johnston

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