UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Southern Energy Delta, L.L.C.	)	Docket Nos. ER00-936-000
Southern Energy Potrero, L.L.C.	)	and ER00-937-000
	)	
	)	(not consolidated)

REQUEST FOR REHEARING
OF THE
CALIFORNIA INDEPENDENT SYSTEM
OPERATOR CORPORATION

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713, the California Independent System Operator Corporation ("ISO") submits this Request for Rehearing of certain aspects of the "Order on Rehearing" issued by the Commission in the above-captioned docket on May 22, 2000 ("May 22 Order").[1]

I. BACKGROUND

On April 2, 1999, Pacific Gas and Electric Company ("PG&E"), the ISO, Southern Energy Delta, L.L.C. ("Southern Delta") and Southern Energy Potrero, L.L.C. ("Southern Potrero") (collectively "Southern Parties"), and other parties, entered into a Stipulation and Agreement in Docket Nos. ER98-441-000, *et al*. ("April Settlement"). The April Settlement resolved certain issues concerning Must-Run Service Agreements ("RMR Contracts") between the ISO and

[1] *Southern Energy Delta, L.L.C.*, 91 FERC ¶ 61,177 (2000).

California electric generation owners.[2] The Commission accepted the April Settlement on May 28, 1999.[3] The April Settlement established a *pro forma* RMR Contract. The April Settlement and the *pro forma* RMR Contract, read together, set forth specific elements of that contract that RMR Owners are permitted to revise annually under Section 205 of the Federal Power Act (16 U.S.C. 825d) ("FPA"). These revisions are discussed more fully below. For revisions not specifically permitted under the April Settlement and the *pro forma* RMR Contract, the RMR Owner must seek approval by the affected parties during the rate freeze period established under the April Settlement.

Southern Delta owns and operates two generation facilities designated as Reliability Must-Run Units ("RMR Units"), the Pittsburg and Contra Costa plants. Southern Potrero owns and operates one generation facility designated as a RMR Unit, the Potrero plant. In December 1999, Southern Delta and Southern Potrero filed revisions to the RMR Contracts specific to these facilities.[4] These contract revisions reflected the transfer of ownership of the facilities from PG&E to the Southern Parties[5] and revised Schedules A, B, and C of the RMR Contracts to specify new Contract Service Limits[6] and other operational characteristics for the RMR Units for the year beginning January 1, 2000. The

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[2] Because the generating units covered by these agreements must run at certain times for the reliability of the transmission grid, they are referred to as "reliability must-run" or "RMR" units and the agreements covering them are referred to as "RMR Contracts," although they are titled "Must-Run Service Agreements."

[3] *California Independent System Operator Corp.*, 87 FERC ¶ 61,250 (1999).

[4] *Southern Energy Delta*, ER00-936-000 (December 29, 1999) and *Southern Energy Potrero*, ER00-937-000 (December 29, 1999).

[5] Ownership of these RMR Units was transferred to the Southern Parties on April 16, 1999.

[6] Capitalized terms not otherwise defined herein are used in the sense given in Article I of the *pro forma* RMR Contract.

ISO, PG&E and the California Public Utilities Commission filed protests asking the Commission to reject several of the proposed revisions that were impermissible under the April Settlement. The California Electricity Oversight Board, while not formally protesting, filed a motion to intervene stating that certain of the proposed revisions were beyond the scope of the April Settlement.

In an order issued February 23, 2000 ("February 23 Order"),[7] the Commission found that the proposed revisions, other than the revisions to the Contract Service Limits, were not permitted by the April Settlement, and therefore they could not be filed without the prior consent of the affected parties (in this case, the ISO and PG&E). Since the Southern Parties provided no evidence that they sought and obtained the approval of the ISO and PG&E for the revisions in question, the Commission ordered the Southern Parties to re-file the RMR Contracts to include only the permitted Contract Service Limits revisions.

Following the Commission's order, the Southern Parties submitted a request for rehearing and clarification[8] asking the Commission to interpret the extent to which the Southern Parties could update the operational data for their RMR Units. The Southern Parties argued that the proposed revisions to the operational characteristics of the RMR Units were permitted under the terms of the April Settlement and did not require the prior consent of the ISO or PG&E. In support of their proposition, the Southern Parties directed the Commission's

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[7] 90 FERC ¶ 61,162 (2000).

[8] *Southern Energy Delta, L.L.C. and Southern Energy Potrero, L.L.C.,* Docket Nos. ER00-936-001 and ER00-937-001 ("Request for Rehearing, Clarification, and Motion for Extension of Time of Southern Energy Delta, L.L.C. and Southern Energy Potrero, L.L.C.") (March 9, 2000).

attention to Article II, Section B.3(d) of the April Settlement, which provides, in part:

> In addition to the other express exceptions specified herein, each RMR Owner's Rate Freeze Settlement Rates and its Revised RMR Rate Schedules, as applicable, shall be adjusted as permitted by the RMR Contract to account for, among other things:
>
> (1) changes in operational characteristics due to: (i) Capital Items, Repairs or Upgrades approved by the ISO or through ADR, (ii) disapproval of Capital Items or Repairs and rerating of a RMR Unit by the ISO or through ADR or (iii) heat rate tests. . .

The Southern Parties argued that the inclusion of the phrase "among other things" indicates that the list of permitted changes set out in Article II, Section B.3(d) is merely illustrative, rather than inclusive, of the kinds of data that may need to be updated to better reflect actual unit capabilities and therefore the proposed revisions to the operational characteristics of their RMR Units are permitted under the April Settlement and did not require the prior consent of the ISO and PG&E.

On May 22, 2000, the Commission issued an order granting rehearing in part of the February 23 Order. The Commission agreed with the Southern Parties that the phrase "among other things" in Article II, Section B.3(d) permitted RMR Owners to file proposed changes to the RMR Contracts beyond those expressly identified in that Section but believed it could not determine the types of additional changes the parties intended to permit. The Commission ordered an alternative dispute resolution ("ADR") proceeding to attempt to resolve what type of changes the parties envisioned as being permissible under the April Settlement.

II. SPECIFICATION OF ERROR

In compliance with Rule 713(c)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.7(c)(1), the ISO respectfully submits that the Commission erred in the following respect in the May 22 Order:

1. The Commission erred in failing to interpret the phrase "among other things" in Article II, Section B.3(d) of the April Settlement, to be qualified by the preceding phrase "shall be adjusted as permitted by the RMR Contract" in the same section, and thus failing to rule that the only permissible revisions to the RMR Contracts, beyond those specifically listed, are revisions permitted by the *pro forma* RMR Contract.

III. ARGUMENT

Article I, Section C.1 of the April Settlement sets forth a rate freeze period that is in effect through December 31, 2001 ("Rate Freeze Period"). All RMR Owners, including the Southern Parties, agreed to waive their Section 205 rights to file rate changes to individual RMR Contracts during the Rate Freeze Period, with certain limited exceptions.[9] These exceptions are expressly authorized by the RMR Contract and identified in Article I, Section C.4; Article II, Sections B.3(b), (c) and (d); Article III, Section B, and Article VI, Section C.3 of the April

[9] Article I, Section C.2 provides: "The rights of each RMR Owner to file to change it Revised RMR Rate Schedules(s), either under contract or pursuant to Section 205 of the FPA, shall be suspended, commencing with the effectiveness of the Settlement and continuing such that changes shall not become effective until after the end of the Rate Freeze Period, except as expressly provided [in the April Settlement]."

Settlement.[10] These exceptions permit the following revisions: (i) Article I, Section C.4 permits the RMR Owner to file revisions in order to conform its contract to a non-conforming RMR Contract that the ISO enters into or operates under; (ii) Article II, Section B.3(b) permits adjustments to the Fixed Option Payment percentage as a result of settlement or litigation of issues reserved under the April Settlement; (iii) Article II, Section B.3(c) permits a RMR Owner to file to increase the level of Fixed Option Payment in response to the ISO's Tariff Amendment No. 26, which changed the timing of dispatch under the *pro forma* RMR Contract; (iv) Article II, Section B.3(d) identifies adjustments permitted during the Rate Freeze Period; (v) Article III, Section B permits RMR Owners to file under Section 205 if the ISO or the California Electricity Oversight Board files under Section 206 to reform the *pro forma* RMR Contract to eliminate documented market distortions; and (vi) Article VI, Section C.3 expressly recognizes that RMR Owners may file under Section 205 to increase their Fixed Option Payment in response to the ISO tariff filing referenced in (iii) above.

Thus, all parties to the April Settlement are barred from filing revisions to their RMR Contracts that would take effect prior to the end of the Rate Freeze Period *unless* the revisions fall under the identified exceptions discussed above. Any other proposed change must have prior approval of all parties affected by the change. The specific exception to the Section 205 bar that is at issue in this proceeding is the one found in Article II, Section B.3(d), which is item (iv) above.

[10] The referenced sections are appended as Attachment 1 for the Commission's convenience.

The revisions filed by the Southern Parties proposed a number of changes to both the RMR Contracts and their attached schedules. These filings seek to revise Contract Service Limits, certain operational characteristics, and the heat input coefficients for the RMR Units. The modifications to the Contract Service Limits are expressly permitted under Article II, Section B.3(d)(5) of the April Settlement and are thus not barred by the waiver provisions, as correctly noted by the Commission in its February 23 Order. However, the Southern Parties' proposed revisions to the operational characteristics and the unit hourly cap heat inputs do not fall into the specified exceptions listed above and are thus prohibited under the waiver provisions of the April Settlement.

The proposed revisions in dispute are:

(i) Changes to the Maximum Net Dependable Capacity ("MNDC") for certain units at the Pittsburg and Potrero plants (RMR Schedule A.1);

(ii) Changes in the cooling water outfall temperature for certain units at the Pittsburg and Contra Costa plants (RMR Schedule A.3);

(iii) Changes in the lead time for synchronization of certain units at the Pittsburg plant (Schedule A.6); and

(iv) Changes in the heat input coefficients for certain units at all three RMR plants (RMR Schedule C1-7b).

The Southern Parties argue that these proposed revisions are permitted under the terms of the April Settlement and do not require the prior consent of the ISO or PG&E, even though these changes are not expressly identified in the April Settlement or otherwise permitted under the *pro forma* RMR Contract.

In support of their proposition, the Southern Parties point to Article II, Section B.3(d) of the April Settlement that identifies changes not barred during the Rate Freeze Period. Article II, Section B.3(d) provides, in part:

> In addition to the other express exceptions specified herein, each RMR Owner's Rate Freeze Settlement Rates and its Revised RMR Rate Schedules, as applicable, shall be adjusted as permitted by the RMR Contract to account for, among other things:
>
> (1) changes in operational characteristics due to: (i) Capital Items, Repairs or Upgrades approved by the ISO or through ADR, (ii) disapproval of Capital Items or Repairs and rerating of a RMR Unit by the ISO or through ADR or (iii) heat rate tests. . .

The Southern Parties contend that the phrase "among other things" in Article II, Section B.3(d) should be interpreted to mean that the identified exceptions in that section can not be characterized as an exclusive list; rather the identified exceptions are merely illustrative of revisions that are permitted during the Rate Freeze Period. The ISO does not disagree with the Southern Parties on the fundamental point that the identified exceptions are not exclusive but instead are illustrative. However, the Southern Parties would read the phrase "among other things" as introducing an open-ended element to the question of which additional filings are permitted, and on that point the Southern Parties are incorrect – as was the Commission, to the extent its May 22 Order indicated that the phrase could conceivably be read as the Southern Parties contended. The phrase "among other things," read out of context, might lead the reader to the Southern Parties' interpretation. However, the intent of the parties to the April Settlement was to identify specific changes that were permissible during the Rate Freeze Period. This intent is clear from the structure of the April Settlement, in that it

established a bar to Section 205 filings and then listed specific exceptions as noted earlier. These limited exceptions were negotiated and agreed to by all parties to the April Settlement, including the Southern Parties. In fact, each of the exceptions identified in Article II, Section B.3(d) is tied to provisions in the *pro forma* RMR Contract. For example: changes in operational characteristics due to Capital Items, Repairs or Upgrades approved by the ISO or through ADR, which is item (1)(i) under Article II, Section B.3(d), is permitted under Article 7, Section 7(a) and 7(b) of the *pro forma* RMR Contract; disapproval of Capital Items or Repairs and rerating of Unit by the ISO or through ADR, which is item (1)(ii) under Article II, Section B.3(d), is permitted under Article 7, Section 7(c); the provisions for changing heat inputs following a heat rate test, which is item (1)(iii) under Article II, Section B.3(d), are found under Article 4, Section 9(d); and the provisions for annual updates of Contract Service Limits, which is item (5) under Article II, Section B.3(d), are found under Article 4, Section 11. The Southern Parties' proposed changes to the Contract Service Limits, which is item (5) are permitted under Article 4, Section 11(a) and thus permitted as an exception to the Section 205 waiver. However, the Southern Parties' other proposed changes are not provided for under the *pro forma* RMR Contract and are thus barred under the waiver provisions in Article I, Section C.2. Since they are also not permitted by any of the other waivers to the bar on Section 205 filings found in the April Settlement, those proposed changes fall squarely under that general bar.

The key phrase in Article II, Section B.3(d), therefore, is not "among other things" as suggested by the Southern Parties. The key phrase is "shall be adjusted as permitted by the RMR Contract." When the two phrases are read in context, the proper interpretation is clear: in addition to the other express exceptions identified in the April Settlement, Article II, Section B.3(d) specifically identifies items that *shall* be adjusted to account for those items specifically identified in that Section *as well as* those additional items (if any) not specifically identified but permitted under the *pro forma* RMR Contract itself. Thus, the phrase "among other things," read in context, refers to the other exceptions that *shall* be adjusted as permitted under the *pro forma* RMR Contract beyond those specifically identified in Article II, Section B.3(d). Therefore, any revision not expressly identified in the April Settlement or specifically permitted under the *pro forma* RMR Contract is barred during the Rate Freeze Period unless the RMR Owner obtains the prior consent of all affected parties to the proposed change. Any other interpretation would render meaningless the Section 205 waiver that is in effect during the Rate Freeze Period.[11]

The ISO acknowledges that it could make the argument in this pleading in the ADR proceeding ordered by the Commission, and subsequently bring the argument to the Commission if necessary. The ISO believes the parties' intent in the April Settlement is so clear, however, that there is no need to go through

[11] Item (4) in Article II, Section B.3(d) is not specifically found in the *pro forma* RMR Contract. The ISO submits that the parties' inclusion in this section of the April Settlement of that specific exception to the bar on Section 205 filings, rather than writing a separate section to exclude it, should be seen simply as a matter of drafting convenience.

such a proceeding. It is for that reason that the ISO is requesting that the Commission reconsider its previous Order on Rehearing.

IV. CONCLUSION

For the reasons set forth above, the ISO respectfully requests that the Commission grant rehearing of the May 22 Order and find that the changes proposed by the Southern Parties to their RMR Contracts that are not specifically identified in the April Settlement or permitted under the *pro forma* RMR Contract as an exception to the FPA Section 205 waiver must be approved by all parties affected by the change.

Respectfully submitted,

Charles F. Robinson,
Vice President and General Counsel
Roger E. Smith,
Senior Regulatory Counsel
California Independent System
Operator Corporation
151 Blue Ravine Road
Folsom, CA 95630
Tel: (916) 608-7135
Fax: (916) 608-7222

J. Phillip Jordan
Rebecca A. Blackmer
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
Tel: (202) 424-7500
Fax: (202) 424-7643

Counsel for the California Independent
System Operator Corporation

Dated: June 21, 2000

June 21, 2000

VIA MESSENGER

David P. Boergers, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: **Southern Energy Delta, L.L.C., Docket No. ER00-936-000 and Southern Energy Potrero, L.L.C., Docket No. ER00-937-000**

Dear Secretary Boergers:

Enclosed for filing are one original and fourteen copies of the Request for Rehearing of the California Independent System Operator Corporation in the above-cited proceedings. Two additional copies of the filing are also enclosed. I would appreciate your stamping the additional copies with the date filed and returning it to the messenger.

Respectfully submitted,

J. Phillip Jordan
Rebecca A. Blackmer
Counsel for the California Independent System Operator Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, on this 21st day of June, 2000.

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Rebecca A. Blackmer