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 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 Oakland LLC

Docket Nos. ER02-240-000
 and ER02-240-001

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

(Issued December 19, 2001)

In this order we accept, subject to refund and conditions, and nominally suspend revised tariff sheets that Duke Energy Oakland LLC (Duke) filed on November 1, 2001, and as corrected on

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December 11, 2001, to update its Reliability Must-Run Agreement (RMR Agreement). Our decision benefits customers because it allows Duke to continue providing must-run generation to the California Independent System Operator Corporation (Cal-ISO) and ensures that the justness and reasonableness of the cost data in Duke's filing will be established.

Background

Duke provides service to the Cal-ISO pursuant to its RMR Agreement, a specialized service agreement. The RMR Agreement requires Duke to adjust annually its rates using the formula detailed in the RMR Agreement. It also requires Duke to submit a Schedule F filing detailing and supporting its Annual Fixed Revenue Requirements (AFRR) and its variable operation and maintenance (VOM) rates for RMR facilities. Duke made such a filing on October 1, 2001, in Docket No. ER02-10-000.

On November 1, 2001, as corrected on December 11, 2001, Duke filed in the instant dockets revised tariff sheets pertaining to its RMR Agreement. The tariff sheets propose to: (1) amend Schedule A, section 12 to reflect contract service limits for the year beginning January 1, 2002; (2) amend Schedule B to reflect the hourly availability rate, hourly penalty rate, target availability hours and AFRR; and (3) amend Schedule D to reflect the prepaid start-ups for the year beginning January 1, 2002. Duke notes on the transmittal letter attached to its filing that

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In an errata dated December 11, 2001, Duke submitted revised tariff sheets reflecting revisions to certain tariff sheets contained in the November 1, 2001, filing.

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the revised AFRR figures it proposes in this filing are identical to those currently pending Commission acceptance in Docket No. ER02-10-000. Duke requests an effective date of January 1, 2002, for the revised tariff sheets.

Notice, Interventions and Protests

Notice of Duke's filing was published in the Federal Register, 66 Fed. Reg. 57,065 (2001), with interventions and protests due no later than November 23, 2001. The Commission received timely motions to intervene and and protest from the State of California Public Utilities Commission (California PUC), the State of California Electricity Oversight Board (California EOB) and Pacific Gas & Electric Company (PG&E) and Cal-ISO, jointly. On December 11, 2001, Duke filed an answer to the protests and an errata that revised the proposed tariff sheets. The errata added data that Duke states it had inadvertently omitted from the November 1, 2001 filing. Cal-ISO filed a Motion to Establish a January 1, 2001 Refund Date on December 13, 2001.

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

In separately-filed protests, the California PUC and the California EOB state that they have "significant substantive concerns" about data that, in the Schedule F filing that Duke made in Docket No. ER02-10-000, purport to justify Duke's updated AFRR. (Both agencies have filed protests to the Schedule F filing.) 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 PUC adds that the Commission could summarily approve Duke's proposed AFRR revisions in the instant docket without the California PUC's participation.

Both agencies request that the Commission sever consideration of the AFRR revisions for the Oakland RMR unit to which this filing pertains, 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, however, the agencies protest the justness and reasonableness of the increased AFRR. The California PUC goes on to argue that the proposed increase of 40% for the Oakland RMR unit is dramatically higher than the general rate of inflation

for the past year, and that it can only view the increase as unjust and unreasonable until it has had sufficient time to complete discovery pursuant to Schedule F.

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2. PG&E and Cal-ISO's Protest

In a jointly filed protest, PG&E and Cal-ISO echo the concerns of the California PUC and the California EOB. In addition, they protest the absence of changes to Table B-2 on Fifth Revised Sheet No. 140. They state that the Hourly Capital Item Charge (HCIC) is a function of Target Available Hours (TAH), so when TAH values change, the HCIC also should change. Finally, PG&E and Cal-ISO protest the lack of information in Schedule A, part 13. They state that Duke should have changed the Owner's Repair Cost Obligation (ORCO) for the contract year in accordance with section 7.5(k)(ii) of the RMR Agreement. As this amount is related to the AFRR calculation, PG&E and the Cal-ISO propose that these two values be determined at the same time.

3. Duke's Answer and Errata

Duke's Answer states that pursuant to an April 2, 1999 Stipulation and Agreement, which partially settled issues related to terms, conditions and rates under which Duke provides RMR service to Cal-ISO, it was required to submit the instant filing. It adds that the Stipulation freezes the rates in the RMR Agreement through January 1, 2002; after that, it is required to adjust its rates pursuant to a Schedule F formula. 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 non-conformity to the rate formula, and disputes of this nature are to be resolved through alternative dispute procedure as stated in the Stipulation.

Duke acknowledges clerical errors that the protestors identified in its November 1, 2001, filing and states that it has addressed those errors through a Notice of Errata filed concurrently with its Answer.

Duke further states that it may not ignore the filing mandates of the RMR Agreement and the Stipulation and delay its filing here until Docket No. ER02-10-000 has been resolved. It notes that if protests in that docket are not resolved through summary Commission action, then they must be resolved through the ADR procedures specified in the RMR Agreement. It argues that nothing in Schedule F suggests that review of the filing in Docket No. ER02-10-000 could or should result in rejection or suspension of the proposed rates that incorporate the AFRR during the pendency of Docket No. ER02-10-000. Duke states that if arithmetic errors are found that require it to modify its AFRR in Docket No. ER02-10-000, it will amend the AFRR and issue refunds.

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Until then, it argues, the rates utilizing the AFRR in the

November 1 filing should be accepted and made subject to refund if at all only to the limited extent provided for under the RMR Agreement and the Stipulation.

The Errata specified a 2002 dollar amount for the Owner's Cost Repair Obligation and revised the Hourly Capital Item Charge.

4. Cal-ISO Motion

On December 13, 2001, Cal-ISO filed a Motion to Establish a January 1, 2002 Refund Date. Cal-ISO argues that certain rates proposed in Duke's November 1 filing are subject to the outcome of Docket No. ER02-10-000.

Discussion

1. Procedural Matters

The timely motions to intervene and protest of the California PUC, the California EOB, PG&E and Cal-ISO 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. We find that good cause exists in this proceeding to allow Duke's answer because it aids us in our understanding and resolution of the issues raised in this proceeding.

2. Commission Decision

The Commission agrees with the protestors that the Commission should not accept Duke's revised AFRR in this docket because the same issue is pending in Docket No. ER02-10-000, and that it is inefficient and unnecessary to consider the justness and reasonableness of the AFRR more than once. We will, therefore, accept Duke's proposed revisions to the AFRR, subject to refund and subject to the outcome of the proceeding in Docket
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No. ER02-10-000.

We will grant PG&E's and Cal-ISO's request to determine the ORCO. Section 7.5(k)(ii) of the RMR Agreement indicates that the ORCO shall be computed, for all years subsequent to the Contract Year ending December 31, 2001, as "3% of the fixed operation and
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In Docket No. ER02-10-000, the comment period expires December 14, 2001. The case is currently under review.

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maintenance cost for all Units at the Facility, underlying the
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rates in effect at the beginning of the Contract Year." PG&E

and Cal-ISO protested the lack of information as to this number, and Duke has rectified this by submitting revised data. As PG&E and Cal-ISO have not had an opportunity to respond to the Errata, and ORCO is a component of AFRR, we will accept the proposed ORCO subject to refund and subject to the outcome of Docket No. ER02-10-000.

For the same reasons we will also accept, subject to refund and subject to the outcome of Docket No. ER02-10-000, the revised HCIC that Duke submitted in the Errata. PG&E and Cal-ISO protested the absence of change to this number, because HCIC is a function of Target Available Hours (TAH) and TAH had been changed. Duke has rectified this error by submitting a revised figure; however, PG&E and Cal-ISO have not had an opportunity to respond. We expect that PG&E and Cal-ISO will notify the Commission if Duke's Errata resolves their protest with respect to ORCO and HCIC.

We find 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, we will accept the proposed tariff sheets in part for filing, subject to refund and to the outcome of the proceedings in Docket No. ER02-10-000, to become effective January 1, 2002, and suspend them for a nominal period of time.

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RMR Agreement at 7.5(k)(ii).

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The Commission orders:

(A) The revised tariff sheets are hereby accepted for filing, subject to refund and subject to the outcome of Docket No. ER02-10-000, and suspended for a nominal period of time, as

discussed in the body of this order.

(B) Duke's rate schedule designations are accepted as filed.

By the Commission.

(S E A L)

Linwood A.
Watson,
Jr.,

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tary.