

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Duke Energy Oakland, LLC) **Docket No. ER05-115-000**

**JOINT PROTEST OF THE CALIFORNIA ELECTRICITY OVERSIGHT
BOARD,
THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION,
THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND
PACIFIC GAS AND ELECTRIC COMPANY**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.211, the Commission’s November 4, 2004 Notice of Filing in this matter, and the Commission’s November 19, 2004 Notice of Extension of Time in this matter, the California Electricity Oversight Board (“CEOB”), the California Independent System Operator Corporation (“CAISO”), the California Public Utilities Commission (“CPUC”) and Pacific Gas and Electric Company (“PG&E”) (collectively, “Joint Protesters”) hereby submit this Joint Protest. In support thereof, the Joint Protesters state as follows:

I. BACKGROUND

On October 29, 2004, Duke Energy Oakland, LLC (“DEO”) submitted, pursuant to Section 205 of the Federal Power Act (“FPA”), its annual update filing proposing revised rate schedule sheets to its Reliability Must-Run Agreement (“RMR Agreement”)¹ with the ISO. DEO also submitted an informational filing describing proposed changes to its Annual Fixed Revenue Requirements (“AFRR”) under its RMR Agreement. This

¹ Because the generation unit(s) covered by this agreement must operate at certain times for the reliability of the transmission grid, they are referred to as “reliability must-run” or “RMR” unit(s) (“RMR Units”). Other capitalized terms that are not defined in this filing have the same meaning set forth in the RMR Agreement or in the Master Definitions Supplement, Appendix A to the ISO Tariff.

filing (the “DEO Filing”) was made in compliance with the terms of a settlement agreement approved by the Commission² under which each RMR unit owner is required to adjust rates annually, beginning with calendar year 2002, using the rate formula set forth in Schedule F of the RMR Agreement (“Schedule F”).

Schedule F establishes the procedures and methodology for determining the AFRR and Variable O&M Rates for facilities designated as RMR Units. The DEO Filing intends to provide the updated cost information used in determining the AFRR and the Variable O&M Rates for DEO’s designated RMR Units to be effective January 1, 2005. In addition, the DEO Filing updates a number of RMR Agreement schedules, including the Contract Service Limits and Owners Repair Cost Obligation in Schedule A, the values in Tables B-1 through B-6 in Schedule B, and the Prepaid Start-up Charges in Schedule D.

On November 4, 2004, the Commission issued a "Notice of Filing" setting November 19, 2004 as the final date for interventions and protests in this matter. On November 12, 15 & 16th, 2004, respectively, the CAISO, the CEOB and PG&E filed motions to intervene in this proceeding. The CPUC is separately filing a motion to intervene in this matter today. Both the CAISO and PG&E requested the Commission to extend the comment date to December 13, 2004 pursuant to the 45-day comment period prescribed in Part B of Article I of Schedule F of the RMR Agreement. On November 17, 2004, DEO filed a letter in support of the extension. On November 19, 2004, the Commission granted the request by the CAISO and PG&E in its Notice of Extension of Time.

² *California Independent System Operator Corp.*, 87 FERC ¶ 61,250 (1999).

The Joint Protesters are currently engaged in discovery and hope to be able to resolve the outstanding issues with DEO once this discovery is completed. However, to comply with the deadline provided by the Commission's November 19, 2004 Notice of Extension of Time and preserve their rights to litigate any issues that cannot be promptly resolved, while still affording all of the parties a reasonable opportunity to resolve this case through settlement, the Joint Protesters are hereby filing this protest. In this latter regard, the Joint Protesters request that the Commission defer taking any action in this matter, including, but not limited to, setting it for a Pre-hearing Conference, until no earlier than April 1, 2005.

II. PROTEST

In their initial analysis of DEO Filing, the Joint Protesters have identified the following problems:

- DEO has calculated its AFRR in a manner inconsistent with Schedule F of the RMR Agreement. Such modification is contrary to the RMR Agreement and results in rates that are unjust and unreasonable.
- In lieu of the "Return and Income Tax Allowance" specified in Schedule F, DEO has included an "annual fee" of \$500,000 plus an income tax allowance. DEO has failed provide adequate justification for either the inclusion of this \$500,000 item or its unilateral departure from the AFRR formula-rate calculation prescribed in Schedule F. Inclusion of inappropriate items in Schedule F would result in unjust and unreasonable rates.
- DEO has extended its retirement date to June 30, 2008, and included \$10,400,284 in negative salvage value (e.g., decommissioning costs) to be amortized in rates until the

new retirement date. DEO has failed provide adequate justification for either this date or this value to support the inclusion of this substantial cost. To the extent this cost cannot be justified, the rates are unjust and unreasonable.

In light of the above, DEO has not shown that the proposed rates are just and reasonable. The Joint Protesters do not object to DEO's proposed effective date of January 1, 2005, provided that the rates are subject to refund. Finally, the Joint Protesters request that the Commission provide the parties with a reasonable opportunity to attempt to resolve their differences, until April 1, 2005, before taking further action in this matter.

III. CONCLUSION

The parties have been engaged in useful discovery and hope to be able to resolve the outstanding issues in this matter soon. As the foregoing issues remain outstanding, the Joint Protesters accordingly protest the DEO Filing. The Joint Protesters also request that the revised schedules associated with the DEO Filing be put in effect as of January 1, 2005, but be made subject to refund, and that the matter be set for hearing.

In order to provide time to enable the parties to effectuate a settlement of the matter, the Joint Protesters additionally request that the Commission defer taking any action in this matter, including, but not limited to, setting it for a Pre-Hearing Conference, until no earlier than April 1, 2005.

Respectfully submitted,

December 13, 2004

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused the foregoing document to be served by causing the mailing of copies by first class U.S. mail properly addressed to each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at San Francisco, California this 13th day of December 2004.

/s/ Joanne M. Myers _____
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