

UNITED STATES OF AMERICA 118 FERC ¶61,062
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Cabrillo Power II LLC

Docket No. ER07-291-000

ORDER ACCEPTING AND SUSPENDING TARIFF SHEETS, SUBJECT TO
REFUND, AND ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES

(Issued January 30, 2007)

1. On December 1, 2006, Cabrillo Power II LLC (Cabrillo II) submitted, pursuant to section 205 of the Federal Power Act,¹ proposed revisions to its Reliability Must Run (RMR) Agreement with the California Independent System Operator Corporation (CAISO) for the calendar year 2007. As discussed below, we accept for filing Cabrillo II's proposed revisions to its RMR Agreement, suspend them for a nominal period, to become effective on January 1, 2007, as requested, subject to refund, establish a hearing and settlement judge procedures, and grant waiver of the notice requirements in section 35.11 of the Commission's regulations (18 C.F.R. § 35.11 (2006)).

Background

2. Cabrillo II consists of six combustion turbines in various locations in San Diego County, California.² Cabrillo II has provided RMR services to the CAISO since 1999 pursuant to the *pro forma* RMR Agreement³ and two Commission approved settlement agreements between Cabrillo Power I LLC (Cabrillo I), Cabrillo II, the CAISO and San

¹ 16 U.S.C. § 824d (2000).

² Cabrillo II is a wholly owned subsidiary of West Coast Power LLC, which, in turn, is a wholly owned subsidiary of NRG Energy, Inc.

³ The Commission approved the *pro forma* RMR Agreement in *California Independent System Operator Corp.*, 87 FERC ¶ 61,250 (1999).

Diego Gas & Electric Company (SDG&E), the responsible local utility (collectively, the parties). One settlement agreement covers calendar years 2002 and 2003 and the other covers calendar years 2004 through 2006.⁴ The most recent settlement established the annual fixed revenue requirement (AFRR) and fixed option payment factor (FOPF) for Cabrillo II for the three years covered by the agreement – 2004 through 2006.

3. On September 29, 2006, the CAISO notified Cabrillo II that it wanted to extend the term of the RMR Agreement through December 31, 2007. Subsequently, the parties reached an agreement in principle to continue the currently effective RMR rates through calendar year 2007, thereby making no change in overall rates for RMR service from 2006 to 2007.⁵

4. In accordance with the parties' agreement, Cabrillo II's filing of December 1, 2006, extends the existing RMR Agreement for one year at the existing AFRR and FOPF and thus, does not result in a change in the rates from 2006 to 2007. The filing also includes the annual updates to Schedules A, B, C, D, and J. Cabrillo II did not submit an updated Schedule F⁶ with its filing, arguing that the parties' agreement on the AFRR negates the need to do so.

5. Cabrillo II requests that the Commission accept its filing and make the revisions to the RMR Agreement effective January 1, 2007.⁷ Cabrillo II argues that good cause exists to grant waiver of the Commission's 60 day notice requirement because the parties agreed to support a waiver to allow further discussions concerning 2007 RMR service. Cabrillo II further contends that its filing simply continues the previously-accepted AFRR and FOPF, both of which were agreed to in prior settlements, thereby maintaining a rate that the Commission has already determined to be just and reasonable.

⁴ *Cabrillo Power I, LLC, et al.*, 103 FERC ¶61,054 (2003) and *Cabrillo Power I LLC, et al.*, 110 FERC ¶ 61,143 (2005).

⁵ Cabrillo II states that the agreement in principle is part of a comprehensive agreement between the parties on RMR matters, including that in Docket Nos. EL02-15-000 and EL03-22-000.

⁶ Schedule F is the annual informational filing used to establish the revenue requirement for RMR units.

⁷ This requires waiver of the Commission's 60-day prior notice requirement in 18 C.F.R. § 35.11 (2006).

Notice of Filings and Responsive Pleadings

6. Notice of Cabrillo II's filing was published in the *Federal Register*, 71 Fed. Reg. 75,531 (2006), with interventions and protests due on or before December 22, 2006. On December 22, 2006, the California Electricity Oversight Board filed a motion to intervene and the California Public Utilities Commission (CPUC) filed a motion to intervene and comments. On December 21, 2006, SDG&E filed a motion to intervene in support of Cabrillo II and the CAISO filed a motion to intervene and protest. On January 5, 2007, Cabrillo II filed an answer to CAISO's protest and CPUC's comments.

7. SDG&E argues that the Commission should approve Cabrillo II's filing because the PPA will serve to reduce RMR costs billed by the CAISO.

8. CPUC maintains that, since Cabrillo II is not subject to the resource adequacy PPA between SDG&E and Cabrillo I, Cabrillo II's failure to file a Schedule F to support its 2007 AFRR does not constitute harmless error. CPUC requests that the Commission defer taking action on the filing of Cabrillo II for at least thirty days to give Cabrillo II a reasonable opportunity to file an updated Schedule F with the Commission.

9. The CAISO also objects to Cabrillo II's failure to file a Schedule F with its revised tariff sheets because Cabrillo II is not subject to a PPA. The CAISO argues that it cannot support a continuation of a stale AFRR rate for Cabrillo II during any period in which Cabrillo II's output is not subject to a PPA since one hundred percent of the RMR rates will be charged to users of the transmission system. The CAISO argues that, absent a Schedule F providing underlying revenue requirement data, it does not have confidence that Cabrillo II's RMR rates are just and reasonable.

10. Accordingly, the CAISO requests that the Commission suspend the Cabrillo II rate schedules subject to hearing and establish a refund effective date equal to the proposed effective date, January 1, 2007. In addition, the CAISO requests that the Commission direct Cabrillo II to file a new Schedule F containing accurate information from the most recent test year available as well as appropriate revisions to the RMR rates to reflect the AFRR reflected in the Schedule F filing. The CAISO requests that, prior to taking such action, the Commission afford Cabrillo II, the CAISO, and other interested parties, the opportunity to reach a settlement regarding the appropriate 2007 AFRR for Cabrillo II.

11. Cabrillo II argues in its answer that the agreement in principle did not require that the PPA with Cabrillo I would cover every facility for which the continuation of the AFRR was sought, but rather contemplated a PPA only for Cabrillo I. Cabrillo II also contends that, when entering the comprehensive agreement between SDG&E and Cabrillo I and Cabrillo II, it anticipated that the existing AFRR rate would be left in place in exchange for the additional dispatch rights it provided to CAISO. Cabrillo II requests that the Commission accept the RMR filing, with only nominal suspension, effective January 1, 2007, subject to refund and establish settlement procedures.

Discussion**Procedural Matters**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits answers to protests and answers unless otherwise ordered by the decisional authority. We will accept Cabrillo II's answer because it has provided information that assisted us in our decision making process.

Waiver

14. The Commission grants waiver of the notice requirements in section 35.11 of the Commission's regulations (18 C.F.R. § 35.11 (2006)). Good cause has been shown for granting waiver and the agreement was filed prior to the commencement of service.⁸

Hearing and Settlement Judge Procedures

15. Cabrillo II's proposed tariff sheets reflecting revisions to its RMR Agreement raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

16. Our preliminary analysis indicates Cabrillo II's proposed revisions to its RMR Agreement have not been shown to be just and reasonable and may be unjust, unreasonable, and unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Cabrillo II's tariff sheets reflecting revisions to its RMR Agreement for filing, suspend them for a nominal period, make them effective January 1, 2007, as requested, subject to refund, and set them for hearing and settlement judge procedures.

17. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance, and direct that a settlement judge be appointed, pursuant to Rule 603

⁸ *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (stating that the Commission will grant waiver of notice if good cause is shown and the agreement is filed prior to the commencement of service).

of the Commission's Rules of Practice and Procedure.⁹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁰ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Cabrillo II's proposed tariff sheets reflecting revisions to its RMR Agreement are hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2007, as requested, subject to refund, as discussed in the body of this order.

(B) The request for waiver of section 35.11 of the Commission's regulations is hereby granted, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedures and the regulations under the FPA (18 C.F.R., Chapter I), a public hearing shall be held concerning the proposed revisions. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge

⁹ 18 C.F.R. § 385.603 (2006). If the parties wish to engage in settlement discussions of their own, they can request that the settlement judge defer the initiation of settlement judge procedures to allow the parties time to resolve the issue regarding applicable taxes and fees.

¹⁰ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(E) Within thirty (30) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the Settlement Judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress towards settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, D.C. 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.