

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Duke Energy South Bay, LLC

Docket No. ER06-115-000

ORDER ACCEPTING AND SUSPENDING PROPOSED REVISIONS TO RATE  
SCHEDULES UNDER RELIABILITY MUST-RUN AGREEMENT AND  
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued February 6, 2006)

1. On October 31, 2005, Duke Energy South Bay, LLC (DESB) filed proposed revisions to certain rate schedules under its Reliability Must Run Agreement (RMR Agreement) with the California Independent System Operator Corporation (CAISO) under section 205 of the Federal Power Act.<sup>1</sup> DESB also submitted an informational filing detailing and supporting proposed changes to its Annual Fixed Revenue Requirement (AFRR). In this order, we accept DESB's proposed revisions to certain rate schedules under its RMR Agreement, and suspend them for a nominal period, to become effective January 1, 2006, as requested, subject to refund. We also establish hearing and settlement judge procedures.

**I. Background**

2. RMR agreements provide the rates, terms, and conditions by which DESB and other power plant owners in California provide RMR service to the CAISO, by dispatching designated units at certain power plants at the direction of the CAISO. The RMR agreements require that, whenever the CAISO extends the terms of an RMR agreement for an additional calendar year, the owner of the unit must file with the Commission updates to certain rates and terms of service.<sup>2</sup>

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<sup>1</sup> 16 U.S.C. § 824d (2000).

<sup>2</sup> The updates may be made in two separate filings. The first is an informational filing that includes AFRR values. The second is a rate filing made pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d (2000), reflecting the annual updates.

3. In order to promote administrative efficiency, DESB submits both its updates to its RMR Agreement and the informational filing of the proposed changes to DESB's AFRR because several of the revisions in the rates schedules under the RMR Agreement incorporate AFRR values in the informational filing. DESB submits revisions to several RMR rate schedules for the 2006 RMR contract year, including: (1) Schedule A of the RMR Agreement to reflect the contract service limits and owner's repair cost obligation; (2) Schedule B to revise the values in Tables B-1 through B-5, which are used to determine the Monthly Option Payment for the RMR units and Table B-6, which uses an AFRR instead of an annual fixed reliability cost to determine RMR rates; and (3) Schedule D to update the Pre-paid Start-up Costs and Pre-paid Start-up Charges.
4. DESB states that the AFRR has been calculated by application of the formulae in Schedule F, using the costs incurred during 2005, to determine the AFRR for the 2006 contract year, beginning January 1, 2006.
5. DESB requests waiver of the Commission's 60-day prior notice requirement to permit an effective date of January 1, 2006.<sup>3</sup>

## **II. Notice of Filing and Responsive Pleadings**

6. Notice of DESB's filing was published in the *Federal Register*, 70 Fed. Reg. 68,435 (2005), with interventions and protests due on or before November 21, 2005. The California Electricity Oversight Board, CAISO, and San Diego Gas and Electric Company (SDG&E) filed interventions. SDG&E and the CAISO filed protests. On December 6, 2005, DESB filed a motion for leave to answer the protests and also requested that the Commission defer action in this proceeding for 60 days to allow the parties to attempt to resolve their differences through negotiations. On December 14, 2005, DESB filed a clarification to its motion, stating that it would notify the Commission of the status of settlement negotiations on or before January 27, 2006, ten days in advance of February 6, 2006. On January 27, 2006, DESB notified the Commission that a settlement could not be reached and asked that the matter be set for hearing.

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<sup>3</sup> Insofar as DESB filed more than 60 days in advance of its proposed January 1, 2006 effective date, waiver of the Commission's 60-day prior notice requirement to permit such an effective date is not necessary.

7. SDG&E claims that DESB's filing is an unwarranted unilateral change to the currently applicable allocation methodology for distributing the total AFRR between the South Bay units, and objects to the proposed change in depreciation expense and associated accumulated depreciation. SDG&E explains, as to the former, that allocating total plant AFRR by expected unit of service hours per year, as DESB proposes to do, rather than by unit size in megawatts, is inappropriate because the change is inconsistent with cost causation principles. SDG&E alleges that the filing is also deficient in its supporting information for a rate schedule change.

8. SDG&E urges the Commission to reject DESB's submittals, or, in the alternative, urges that they be suspended and made effective subject to refund, and that the matter be set for hearing.

9. CAISO asserts that DESB may not change the amortization period for South Bay without first changing the mortality characteristics for South Bay, and requests that the Commission direct DESB to make a section 205 filing to amend its mortality characteristics to support its proposed adjustment to depreciation expense and accumulated depreciation for the 2006 contract year. CAISO further claims that DESB must make a filing under sections 205 or 206 of the FPA to amend the RMR Agreement to change its AFRR allocation method. CAISO also requests that these matters be set for hearing.

### **III. Discussion**

#### **A. Procedural Matters**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept DESB's answer to the protests and will, therefore, reject it insofar as it relates to the merits of the issues raised in the protests.

#### **B. Commission Analysis**

12. The protestors' concerns, which are identified above, raise factual questions concerning DESB's filing that we cannot summarily decide on the record before us. These concerns are best addressed in the hearing and settlement judge procedures that we order herein.

13. Based on our preliminary review of DESB's filing, we find that its filing has 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 revisions to DESB's rate schedules for filing, suspend them for a nominal period, to become effective, subject to refund, on January 1, 2006, and set them for hearing.

14. While we are setting this proceeding 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 settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, in order to assist the parties in resolving this matter.<sup>4</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Administrative Law Judge will select a judge for this purpose.<sup>5</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning 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 or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) DESB's proposed changes to its rate schedules under the RMR Agreement are hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2006, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of DESB's proposed changes to its rate

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<sup>4</sup> 18 C.F.R. § 385.603 (2005).

<sup>5</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (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, available at: <http://www.ferc.gov/about/offices/oalj/oalj-dj.asp>.

schedules under the RMR Agreement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a separate judge, they must make their request to the Chief Judge within 5 days of the date of this order.

(D) Within 30 days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission 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 the case to a presiding judge for a formal hearing, if appropriate. If the parties are given additional time to continue their efforts, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward resolving the outstanding issues.

(E) If settlement discussions fail, and a formal hearing is to be held, a presiding judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately 15 days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such 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.