

110 FERC ¶ 61,005
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Duke Energy Oakland, LLC

Docket No. ER05-115-000

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

(Issued January 6, 2005)

1. In this order, the Commission accepts for filing and suspends for a nominal period proposed revisions by Duke Energy Oakland, LLC (DEO) to its Reliability Must-Run Agreement (RMR Agreement)¹ with the California Independent System Operator Corporation (CAISO), and establishes hearing and settlement judge procedures. This order benefits customers because it allows DEO to continue providing must-run generation to the CAISO, while providing an opportunity to resolve outstanding issues through settlement negotiations or hearing.

I. Background

2. RMR Agreements provide the rates, terms, and conditions by which DEO 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 an RMR

¹ DEO's RMR Agreement follows a generic, standard form that was agreed to as part of a settlement approved by the Commission in a letter order issued on May 28, 1999. See *California Independent System Operator Corporation*, 87 FERC ¶ 61,250 (1999).

Agreement for an additional calendar year, the owner of the RMR unit must file with the Commission updates to certain rates and terms of service under the RMR Agreement.²

3. The CAISO designated DEO's facilities for RMR service for calendar year 2005 (Year 2005). As a result of that designation, on October 29, 2004, DEO submitted proposed changes to the rate schedules of its RMR Agreement, which reflect updated AFRR values and VOM rates. Specifically, DEO's section 205 Filing proposes to amend: (1) Schedule A to take into account the updated contract service limits and owner's repair cost obligation; (2) Schedule B to reflect updated hourly availability charges, hourly capital item surcharges, hourly penalty rates, and target availability hours; (3) Table B-6 to incorporate the Year 2005 AFRR values; and (4) Schedule D to include updated prepaid start-up costs. DEO seeks an effective date of January 1, 2005.

4. In the same submission, pursuant to section 205 of the FPA, DEO submitted revisions to Schedule F, Exhibit B, "Depreciation Rate and Mortality Characteristics", which includes revised mortality characteristics used to determine the depreciation expense and incorporates the use of an annual fee in lieu of return on net plant (Depreciation Filing). DEO states that it is submitting its Depreciation Filing together with its section 205 Filing for administrative efficiency and because DEO's revised depreciation expenses are used in its calculation of Year 2005 AFRR values. For its Depreciation Filing, DEO requests waiver of the 60-day prior notice requirement to allow an effective date of July 1, 2003, the beginning of the 12-month cost period ending June 30, 2004, that is used to determine the AFRR values.

II. Notice of Filing and Responsive Pleadings

5. Notice of DEO's filing was published in the *Federal Register*, 69 Fed. Reg. 65,422 (2004), with interventions and protests due on or before November 19, 2004. This date was subsequently extended to December 13, 2004. The Public Utilities Commission of the State of California, the State of California Electricity Oversight Board, Pacific Gas and Electric Company, and the CAISO filed interventions. In addition, those parties (collectively, the Protestors) filed a joint protest. DEO filed an answer to the joint protest.

² The annual updates are usually made in two separate filings. The first is an informational filing that contains Annual Fixed Revenue Requirements (AFRR) values and Variable Operation and Maintenance (VOM) rates. The second is a rate filing made pursuant to section 205 of the Federal Power Act (FPA), 18 U.S.C. § 824d (2000), (section 205 Filing) reflecting the annual updates provided for in the RMR Agreement.

III. The Joint Protest

6. The Protestors argue that: (1) DEO has calculated its AFRR values in a manner inconsistent with the RMR Agreement; (2) DEO has failed to provide adequate justification for its proposed extension of the retirement date to June 30, 2008 and its inclusion of over ten million dollars in decommissioning costs to be amortized in rates until the new retirement date; (3) DEO's Depreciation Filing deviates from the pro forma RMR Agreement; and (4) DEO has failed to provide adequate justification regarding the inclusion of an annual fee. The Protestors add that they are currently engaged in discovery and hope to be able to resolve their outstanding issues with DEO once discovery is completed. Protestors also request that DEO's section 205 Filing and Depreciation Filing be suspended and made effective subject to refund, and that the matter be set for hearing.

IV. Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept DEO's answer and will, therefore, reject it.

B. The Commission's Response

9. The Protestor's concerns, which are identified above, raise factual questions concerning DEO's section 205 Filing and Depreciation 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. In addition, based on our review of DEO's section 205 Filing and Depreciation Filing, we find that the proposed revisions to DEO's RMR Agreement 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 revisions to DEO's RMR Agreement for filing, suspend them for a nominal period, to become effective, subject to refund, on the dates requested by DEO, and set them for hearing. In this regard, we find good cause to grant DEO's request for waiver of the 60-day prior notice requirement to permit an effective date of July 1, 2003 for DEO's Depreciation Filing, which is used to determine the AFRR values contained in its section 205 Filing.

10. While we are setting this proceeding for a trial-type evidentiary hearing, 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.³ 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.⁴ The settlement judge shall report to the Chief Judge and the Commission within 60 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) DEO's section 205 Filing and Depreciation Filing are hereby accepted for filing, and suspended for a nominal period, to become effective January 1, 2005 and July 1, 2003, respectively, subject to refund, as discussed in the body of this order.

(B) DEO's request for waiver of the 60-day prior notice requirement is hereby granted.

(C) 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 the proposed revisions to the RMR Agreement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering 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 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge within 15 days of the date of this order. Such

³ 18 C.F.R. § 385.603 (2004).

⁴ 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>.

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.

(E) Within 60 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 30 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward resolving the outstanding issues.

(F) 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)

Linda Mitry,
Deputy Secretary.