

130 FERC ¶ 61,076  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Dynegy South Bay, LLC

Docket No. ER10-166-000

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

(Issued January 29, 2010)

1. On October 30, 2009, pursuant to section 205 of the Federal Power Act,<sup>1</sup> Dynegy South Bay, LLC (Dynegy) filed proposed revisions to its Reliability Must-Run Agreement (RMR Agreement) with the California Independent System Operator Corporation (CAISO) and to certain rate schedules under the RMR Agreement (collectively, Annual Section 205 Filing). Dynegy also submitted an informational filing detailing proposed changes to its Annual Fixed Revenue Requirement (AFRR), pursuant to Schedule F of the RMR Agreement (Schedule F Filing). On December 1, 2009, Dynegy requested that the Commission defer action in this proceeding until January 31, 2010, without prejudice to the requested January 1, 2010 effective date, in order to permit the parties to focus on their ongoing settlement negotiations. In this order, we accept for filing Dynegy's proposed revisions to the RMR Agreement and its rate schedules and suspend them for a nominal period, to become effective January 1, 2010, as requested, subject to refund. We also establish hearing and settlement judge procedures.

**I. Background**

2. The RMR Agreement provides the rates, terms, and conditions by which Dynegy provides RMR service to the CAISO, by dispatching designated units at certain power plants at the direction of the CAISO.

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<sup>1</sup> 16 U.S.C. § 824d (2006).

3. Dynege submits proposed revisions to the RMR Agreement to reflect the retirement of its South Bay generating facility (South Bay Facility). Dynege explains that, for the 1998 to 2009 (except for 2003) contract years, the CAISO has designated all generating units at the South Bay Facility as RMR units. However, for the 2010 contract year, the CAISO has released Units 3 and 4 from RMR service and has designated Units 1 and 2 plus a combustion turbine as RMR (2010 RMR Units). Notwithstanding this selection of the 2010 RMR Units, Dynege states that the CAISO has indicated that it may terminate the RMR Agreement prior to the conclusion of the 2010 contract year due to other generation scheduled to become commercial during the term of the 2010 contract year. As a result, Dynege expects that the South Bay Facility will be retired no later than December 31, 2010, with Units 3 and 4 being retired no later than December 31, 2009. Dynege states that the revenues collected under the RMR Agreement are insufficient to pay for the costs of the closure, including demolition and remediation costs; labor retention and severance payments; and lease costs after the 2009 cost year. Therefore, Dynege submits proposed revisions to the RMR Agreement to reflect end of service life costs that it expects to incur with the retirement of the South Bay Facility.<sup>2</sup>

4. Dynege also submits updated RMR Agreement rate schedules for the 2010 contract year, consistent with the Stipulation and Agreement governing the instant RMR Agreement,<sup>3</sup> which requires Dynege to file updates of certain rates and terms of service in the RMR Agreement in its Annual Section 205 Filing. Specifically, Dynege proposes updates to: (1) Schedule A: Contract Service Limits and Owner's Repair Cost Obligation; (2) Schedule B to revise Tables B-1 through B-6; (3) Schedule C: Table CI-7a Coefficients for Equation CI-7a; (4) Schedule D: Table D-0 Pre-paid Start-ups; (5) Schedule H: Indicating the non-applicability of the Fuel Oil Service; and (6) Schedule J: Notices.

5. Additionally, pursuant to Schedule F of the RMR Agreement, Dynege is required to submit an informational filing that includes AFRR values for the upcoming contract year by November 1 of the current year. Dynege states that it submits both filings together for administrative efficiency because several of the revisions in the Annual 205

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<sup>2</sup> More specifically, Dynege submits revisions to the RMR Agreement to: (1) add new section 2.2(f) to address the terms of the early termination; (2) amend existing section 2.5(a) so that the termination fee under section 2.5 would apply in the event of early termination; and (3) add new section 8.7 and new Schedule Q to address the potential under-recovery of the end-of-service life costs under the AFRR rates and allow Dynege to recover the actual cost of closing the South Bay Facility.

<sup>3</sup> The Stipulation and Agreement was approved by the Commission in *Duke Energy Moss Landing LLC et al.*, 87 FERC ¶ 61,250 (1999).

Filing incorporate the AFRR derived in the Schedule F Filing. Dynegy explains that the AFRR has been calculated by applying the formulae in Schedule F, using the costs incurred by Dynegy during 2009, to determine the AFRR for the 2010 contract year. Dynegy states that operating expenses are estimated to decrease by \$6 million as a result of the CAISO selecting only the RMR Units and not Units 3 and 4 under the RMR Agreement for the 2010 contract year.

6. Dynegy requests that all of the proposed rate revisions submitted in its filing become effective as of January 1, 2010.

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

7. Notice of Dynegy's filing was published in the *Federal Register*, 74 Fed. Reg. 58,269 (2009), with interventions and protests due on or before November 20, 2009. The California Public Utilities Commission (CPUC) and Steve Castaneda, Councilmember of the City of Chula Vista, California, filed notices of intervention. San Diego Gas & Electric Company (SDG&E) filed a timely motion to intervene and protest. The CAISO filed a timely motion to intervene and a joint protest on behalf of itself, the CPUC, and SDG&E. The City of Chula Vista, California (Chula Vista) filed a motion to intervene out-of-time and comments, which the CAISO answered.

8. The CAISO, the CPUC, and SDG&E argue that Dynegy failed to provide adequate support to establish that: (i) the proposed rate schedules are just and reasonable, and (ii) the expense categories and amounts that Dynegy seeks to recover are warranted under the terms of the RMR Agreement. Additionally, the CAISO, the CPUC, and SDG&E contend that Dynegy has not adequately justified its proposal to recover the entire end-of-service life costs in 2010, rather than as they are incurred, which is projected to be over a period of four years. Finally, the CAISO, the CPUC, and SDG&E assert that Dynegy has failed to provide the information necessary to determine how it determined the Schedule F costs and allocated them to the three remaining RMR units at the South Bay Facility (i.e., the 2010 RMR Units).

9. Chula Vista contends that, according to Dynegy's filing, generation at the South Bay Facility is slated to end in 2010. Chula Vista supports ending operations at the South Bay Facility and the proper and efficient remediation of the site; however, it is concerned that several of the concerns raised by the CAISO, CPUC, and SDG&E may adversely affect the timing of the South Bay Facility's retirement, its proper and effective demolition, and the remediation of the site. In its answer, the CAISO clarifies that it has

not yet authorized Dynegy to retire all units and close the South Bay Facility in 2010.<sup>4</sup> The CAISO states that it has determined that there is a continuing need for the South Bay Facility due to local reliability concerns during the 2010 contract year and that it will reevaluate the need for the South Bay Facility beyond 2010 through its local capacity requirement study process.

10. The CAISO, the CPUC, and SDG&E state that discussions between the CAISO, the CPUC, SDG&E, and Dynegy are underway, which could lead to a mutually agreeable resolution of their concerns. As a result, the CAISO, the CPUC, and SDG&E request that the Commission suspend the proposed revisions subject to hearing, establish a refund date at the proposed effective date of January 1, 2010, and hold all hearing or settlement judge procedures in abeyance until January 31, 2010 to give the parties an opportunity to resolve the outstanding issues in this proceeding.

### **III. Discussion**

#### **Procedural Matters**

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the CPUC's and Steve Castaneda's notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

12. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.214(d) (2009), the Commission will grant the Chula Vista's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the CAISO's answer because it has provided information that assisted us in our decision-making process.

#### **Hearing and Settlement Judge Procedures**

14. Dynegy's proposed revisions to its RMR Agreement and its rate schedules raise issues of material fact that cannot be resolved based on the record before us, and that are

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<sup>4</sup> See CAISO, January 14, 2010 Answer at 1-2 (citing Chula Vista, Motion to Intervene Out-of-Time and Comments at 2-3).

more appropriately addressed in the hearing and settlement judge procedures ordered below.

15. Our preliminary analysis indicates that Dynegy's proposed revisions to its RMR Agreement and its rate schedules have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Dynegy's proposed revisions for filing, suspend them for a nominal period, make them effective January 1, 2010, as requested, subject to refund, and set them for hearing and settlement judge procedures.

16. 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 of the Commission's Rules of Practice and Procedure.<sup>5</sup> 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.<sup>6</sup> 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) Dynegy's proposed revisions to the RMR Agreement and its rate schedules are hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2010, as requested, 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 by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and

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<sup>5</sup> 18 C.F.R. § 385.603 (2009).

<sup>6</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 ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Dynegy's proposed revisions to the RMR Agreement and its rate schedules. 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 (2009), 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 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 specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, 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 toward settlement.

(E) 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 these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 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 )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.