

107 FERC ¶ 61,109  
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. ER01-3034-004

ORDER DENYING REHEARING

(Issued May 5, 2004)

1. In this order, we deny a joint request for rehearing<sup>1</sup> of the March 5, 2004 Commission Order<sup>2</sup> in this proceeding rejecting a refund report filed by Duke Energy Oakland, LLC (Duke Energy). Duke Energy filed the refund report pursuant to the Commission's February 1, 2002 Order concerning Duke Energy's proposed revisions to a reliability-must-run (RMR) agreement with the CAISO.<sup>3</sup> The issues raised on rehearing are: (1) whether the Commission's March 5 Order is inconsistent with the Commission's California Refund Order<sup>4</sup> finding that RMR services through contract path pricing are not subject to price mitigation but RMR services provided through market path pricing are

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<sup>1</sup> The request for rehearing was filed jointly by the California Independent System Operator Corporation (CAISO), Pacific Gas and Electric Company (PG&E), the California Electricity Oversight Board (CEOB), and the California Public Utilities Commission (CPUC) (collectively, Petitioners).

<sup>2</sup> Duke Energy Oakland, LLC, 106 FERC ¶ 61,221 (2004) (March 5 Order).

<sup>3</sup> Duke Energy Oakland, LLC, 98 FERC ¶ 61,114 (2002) (February 1 Order)

<sup>4</sup> See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*; and *Investigation of Practices of the California Independent System Operator and the California Power Exchange*, 102 FERC ¶ 61,317 at P 5.Q. (2003) (California Refund Order).

subject to mitigation; and (2) whether the Commission should direct Duke Energy to make partial refunds at this time. As discussed below, we will deny Petitioners' request for rehearing. This order is in the public interest because it removes uncertainty surrounding the Commission's decision relating to Duke Energy's refund report.

### **Background**

2. Under Duke Energy's RMR Agreement with the CAISO, a RMR unit may operate under either Condition 1 or Condition 2. When a unit operates under Condition 2, it receives essentially a cost-of-service rate for the RMR service provided and cannot retain revenues from participation in market transactions.<sup>5</sup> This is in contrast to a unit operating under Condition 1, which retains revenues from participation in the market. All units owned by Duke Energy operate under Condition 2 of the RMR Agreement. When the CAISO issues a dispatch notice to a Condition 2 RMR unit, Duke Energy, as the unit's owner, must bid the required energy into the next available market. Duke Energy then invoices the CAISO at the formula rate contained in the RMR Agreement, and the CAISO, in turn, invoices the responsible utility, in this case, PG&E. After PG&E pays the invoiced amount to the CAISO, the CAISO passes through payment to Duke Energy.

3. Pursuant to the RMR Agreement, Duke Energy must subtract from the invoices any amounts received by or due from its Scheduling Coordinator (in this instance, PG&E) in connection with market transactions and non-market transactions. Under the RMR Agreement, any amounts received by or due to Duke Energy in connection with market transactions are referred to as Scheduling Coordinator Revenues and must be applied as a credit on Duke Energy's RMR invoices to the CAISO (SC Credits). This procedure is intended to ensure that Duke Energy, as a Condition 2 owner, is not paid more than once for the energy by retaining the market payment a Condition 2 owner receives from its Scheduling Coordinator (PG&E) for the same energy. It also ensures that PG&E does not pay twice, once at the market price and again at the formula rate contained in the RMR Agreement.

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<sup>5</sup> In general, RMR agreements specify the rates, terms, and conditions by which 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.

4. On September 10, 2001, as amended on September 20, 2001, Duke Energy submitted proposed, revised rate schedule sheets to the RMR Agreement.<sup>6</sup> The proposed revisions included changes to certain plant-specific schedules, altering the rates charged under the RMR Agreement (revised rates).

5. By delegated letter order issued October 17, 2001,<sup>7</sup> the revised rates were accepted for filing, with certain sheets effective October 1, 2000 and others effective January 1, 2001. On November 15, 2001, PG&E filed a request for rehearing of the October 17 Order. On rehearing, PG&E argued that the revised rates would result in a refund in excess of \$20 million.<sup>8</sup>

6. In response to PG&E's request for rehearing, the Commission issued the February 1 Order on rehearing, directing Duke Energy to calculate any amounts collected in excess of the revised rates from the effective dates thereof, plus interest; make refunds within 30 days of issuance of the order; and file a report within 30 days of making such refunds.

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<sup>6</sup> These revisions were made pursuant to the Terms of Agreement (TOA), dated July 25, 2001, among Duke Energy, the CAISO and PG&E. The TOA was necessitated by Duke Energy's rehabilitation, at the request of the CAISO, of one of its RMR units at Duke Energy's Oakland power plant. Because this unit operates under Condition 2, DEO is prevented from recovering, through market sales, any cost associated with that unit's rehabilitation. Duke Energy recovers these rehabilitation costs through revisions to its RMR Agreement with the CAISO. The TOA details the justification for the revisions to the RMR Agreement and sets forth the parties' express agreements as to the propriety and effective dates for the revisions.

<sup>7</sup> Delegated letter order, Docket Nos. ER01-3034-000 and ER01-3034-001 (October 17 Order).

<sup>8</sup> In response to PG&E's rehearing request, Duke Energy stated that it did not disagree in principle with PG&E. Duke Energy maintained that, to the extent it has collected amounts in excess of the revised rates since the effective dates indicated in the October 17 Order, it would calculate and make refunds, with interest, in accordance with Commission regulations and file a subsequent refund report.

### **Duke Energy's Compliance Refund Report**

7. On April 3, 2002, Duke Energy submitted its refund report pursuant to the February 1 Order. In its refund report, Duke Energy maintained that, for the entire refund period, *i.e.*, October 1, 2000 through December 31, 2001, it received from CAISO no amounts in excess of the revised rates, and that therefore, no refunds were due. Duke Energy contended that the ongoing California Refund Proceeding,<sup>9</sup> makes the amount of the SC Credit incalculable, because the market clearing prices upon which the SC Credit is computed are being litigated in that proceeding.<sup>10</sup> Furthermore, Duke Energy stated that PG&E had not paid any RMR invoices submitted by Duke Energy since the production month of January 2001. Duke Energy argued that it should not be required to refund monies that it has never collected. Accordingly, Duke Energy maintained that PG&E is due no refund for the entire refund period.

### **Petitioners' Protest to Duke Energy's Compliance Refund Report**

8. Petitioner's argued that, contrary to Duke Energy's assertion, PG&E is due a refund of \$24,393,577. For the October 2000 through January 2001 portion of the refund period, Petitioners claim that Duke Energy collected from PG&E \$28,619,083 in RMR payments. According to Petitioners, when Duke Energy originally submitted to the CAISO the RMR invoices for the First Portion of the refund period, the invoices properly included \$24,909,930 in SC Credits, based on applicable market prices. Petitioners maintain that these RMR invoices were approved by the CAISO and fully paid by PG&E to the CAISO and by the CAISO to Duke Energy. Petitioners state that Duke Energy's refund report does not reflect the SC Credits for the First Portion of the refund period (October 2000 through January 2001).

9. Petitioners claimed that Duke Energy cannot now remove the SC Credits from its refund report calculations merely because the market clearing prices for the refund period might be subject to change in the California Refund Proceeding. Petitioners argued that

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<sup>9</sup> San Diego Gas & Electric Company, Complainant, v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents; Investigation of Practices of the California Independent System Operator and the California Power Exchange, Docket Nos. EL00-95-000 and EL00-98-000, *et al.* (California Refund Proceedings).

<sup>10</sup> The market clearing prices in question in the California Refund Proceeding cover the period from October 2, 2000 through June 20, 2001 (California refund period), which overlaps with the refund period at issue in this proceeding.

the market prices Duke Energy used to calculate SC Credits in the original invoices were then, and presently remain, the only lawfully filed rates. They stated that, unless and until those rates are modified, they are in effect, and the RMR Agreement obligates Duke Energy to use them to calculate SC Credits.

10. For the February 2001 through December 2001 portion of the refund period, Petitioners conceded that Duke Energy's RMR invoices for that period have not been paid by PG&E, and that, accordingly, Duke Energy collected no amounts for that period in excess of the revised rates. However, Petitioners claimed that this was because the CAISO properly rejected Duke Energy's invoices for various reasons, including Duke Energy's failure to apply the required market-based SC Credits as provided for in the RMR Agreement.

### **March 5 Order**

11. In the March 5 Order, the Commission rejected Duke Energy's refund report. The Commission found that the outcome of the California Refund Proceeding will affect the refunds due in this proceeding.<sup>11</sup> The Commission stated that the market clearing prices are reflected in the refund report as the SC Credits, and that, therefore, they are an integral factor in the calculation of refunds due.<sup>12</sup> Accordingly, we directed Duke Energy to recalculate, with interest, amounts collected in excess of the revised rates since their effective date, issue refunds accordingly, and file another refund report, after a final order has been issued in the California Refund Proceedings.<sup>13</sup> We stated that Duke Energy's recalculation of SC Credits, and attendant refunds, must be based upon the market clearing prices set in the California Refund Proceedings.<sup>14</sup>

### **Rehearing Request**

12. On rehearing, Petitioners argue that Commission properly rejected Duke Energy's refund report, but for the wrong reason. Petitioners contend that the March 5 Order is inconsistent with the Commission's California Refund Order. Petitioners maintain that

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<sup>11</sup> 106 FERC ¶ 61,221 at P 17.

<sup>12</sup> Id.

<sup>13</sup> Id. at Ordering Paragraph (B).

<sup>14</sup> Id.

the California Refund Order makes clear that RMR services provided through contract path (cost-of-service) pricing are not subject to mitigation. Accordingly, Petitioners state that the market payments to Duke Energy that form the basis for the SC Credits should not be mitigated. Petitioners contend that the Commission should reject Duke Energy's refund report for the reason stated in Petitioners' prior protest and order Duke Energy to refund the appropriate amount of \$24,395,577, plus interest, and file a new refund report.

### **Discussion**

13. We will deny Petitioners' request for rehearing. As described above, Duke Energy's RMR units, when operating under Condition 2, receive a cost-of-service rate. When the CAISO dispatches a Condition 2 unit, the owner, here, Duke Energy, submits a bid into the next available market. The RMR unit's owner, Duke Energy, then credits what it receives in the market against the Condition 2 rate. This credit is called the SC Credit. Under our March 5 Order, the Condition 2 cost-of-service rate is not to be mitigated; the SC Credit, however, is to be mitigated in the California Refund Proceeding. Nothing raised by Petitioners on rehearing convinces us that our directive in the March 5 order was in error, or was inconsistent with the California Refund Order. This is because the rate for the Condition 2 RMR units, a cost-of-service rate, is not to be mitigated, while the SC Credits that reflect market transactions are to be mitigated.

### **The Commission orders:**

Petitioners' request for rehearing is hereby denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.