

UNITED STATES OF AMERICA 105 FERC ¶ 61,307  
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy North America, LLC ) Docket Nos. IN03-10-000  
Duke Energy Trading and Marketing, L.L.C. ) PA02-2-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued December 19, 2003)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Staff of the Division of Enforcement, Office of Market Oversight and Investigations (OMOI), Duke Energy Trading and Marketing, L.L.C. and Duke Energy North America, LLC (collectively, "Duke Energy").
2. The Agreement resolves all outstanding issues with respect to Duke Energy arising from the investigation in Docket No. PA02-2-000, including issues in the Final Report on Price Manipulation in Western Markets, filed in Docket No. PA02-2-000 ("Final Report"), the Fact-Finding Investigation of Entities that Controlled Generators Selling into the California Market ("Physical Withholding Investigation"), and Docket No. IN03-10-000 ("Anomalous Bidding Investigation").<sup>1</sup> The Agreement does not, however, affect any obligations that Duke Energy may have with respect to Docket No. EL00-95-000 (the "Refund Proceeding").

**I. Background**

3. On February 13, 2002, the Commission directed Staff to commence a fact-finding investigation in Docket No. PA02-2-000 into whether any entity manipulated short-term prices for electric energy or natural gas in the West or otherwise exercised undue influence over these prices between January 1, 2000, and June 21, 2001. In August 2002,

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<sup>1</sup> Issues regarding specific, alleged gaming practices with respect to Duke Energy arising from the Final Report are the subject of a separate agreement and stipulation in Docket No. EL03-152-000.

Staff released its Initial Report in Docket No. PA02-2-000. On March 26, 2003, the Staff's Final Report was issued in Docket No. PA02-2-000.

4. In the Final Report, Staff concluded that the Market Monitoring and Information Protocols ("MMIP") contained in the tariffs of the California Independent System Operator Corporation ("CAISO") and the California Power Exchange Corporation ("PX") put participants in the CAISO and PX markets on notice that misconduct that arose from abuses of market power and that adversely affected the efficient operations of the CAISO and PX markets were violations of the CAISO and PX tariffs. The Final Report further stated that Staff's preliminary analysis of spot-market clearing prices as compared to generation input costs during May to October 2000 reveals what appear to be instances of potential anomalous bidding behavior, as defined in the MMIP.

5. The Staff's Final Report resulted from a time- and resource-intensive investigation which involved extensive data gathering and analysis. Staff obtained in excess of 2 terabytes of electronic data and hundreds of boxes of written materials, and it shared information with other investigatory agencies, including the Department of Justice, the Commodity Futures Trading Commission and the Securities and Exchange Commission. Data requests were answered by roughly 250 respondents representing all segments of the industry, including investor-owned utilities, independent power producers, and municipalities.

6. On June 25, 2003, the Commission issued an Order in the Anomalous Bidding Investigation, in Docket No. IN03-10-000, responding to the Final Report's recommendation that the MMIP prohibits the bidding behavior discussed in the Final Report and directed OMOI to investigate anomalous bidding behavior and practices in the Western markets at the individual market participant level. The Commission adopted the recommended market-wide screen that required an examination of all bids in the CAISO and PX markets above \$250/MWh as excessive as a *prima facie* matter. The Commission therefore directed OMOI to investigate all parties who bid in the CAISO and PX markets above the level of \$250/MWh to determine whether these parties may have violated the provision in the MMIP against anomalous bidding behavior. We stated that parties with bids identified by this screen would be required to demonstrate to OMOI why their bidding behavior did not violate the MMIP. We also instructed OMOI to report to the Commission regarding its findings.

7. On July 2, 2003, OMOI issued data requests to Duke Energy in the Anomalous Bidding Investigation, in Docket No. IN03-10-000, regarding Duke Energy's bidding behavior and practices. Duke Energy responded to those data requests on July 24, 2003, providing responses and documents. OMOI conducted follow-up telephone conferences and meetings with Duke Energy and requested and received additional materials regarding Duke Energy's responses to OMOI's data requests to further investigate the matters. Duke Energy fully cooperated with OMOI in the course of its investigation.

8. Duke Energy submitted only 49 bids in the CAISO supplemental energy market above \$250 from May 1, 2000 through October 1, 2000, 46 of which were not taken by the CAISO. As a result of this and other evidence, OMOI determined that Duke Energy did not engage in a pattern or practice of economic withholding in violation of the CAISO or PX Tariffs during the period May 1, 2000 through October 1, 2000.

9. The Final Report also noted that various entities submitted evidence of alleged incidents of physical withholding of generation resources from the California markets. The Final Report did not address these allegations, but concurrent with the issuance of the Final Report, the Commission directed OMOI to conduct the Physical Withholding Investigation into the existence of any physical withholding of power by California generators during the period from May 1, 2000 to June 30, 2001.

10. Pursuant to that directive, OMOI issued data requests to California generators selling into the CAISO or PX markets, including Duke Energy, on March 26, 2003. Duke Energy responded to those data requests on June 13, 2003, providing its explanations and documents regarding the circumstances surrounding each instance of the alleged activity.

11. On August 1, 2003, OMOI issued its Initial Report on Physical Withholding by Generators Selling into the California Market and Notification to Companies. OMOI determined that the underlying reasons for any outages at facilities operated by Duke Energy during the relevant period had been adequately explained by Duke Energy and that there was no credible evidence to support further investigation. As a result of this and other evidence, OMOI determined that Duke Energy did not engage in a pattern or practice of physical withholding of power from California during the period May 1, 2000 through June 30, 2001.

12. In preparation of its Final Report, and in its conduct of the Anomalous Bidding and Physical Withholding Investigations, Staff reviewed substantial evidence, including data, expert testimony and documentation, submitted by the California Parties during each phase of the investigations.<sup>2</sup> Staff also met with California Parties' representatives and experts to review their submissions. Moreover, OMOI conducted extensive analysis of the CAISO and PX bidding data for the relevant period of time.

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<sup>2</sup> The California Parties consist of the People of the State of California, *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company, and Southern California Edison Company.

13. As a result of its Physical Withholding Investigation, its Anomalous Bidding Investigation, and consideration of all materials in its investigations under Docket No. PA02-2-000, OMOI concluded that:

- a. There was no credible evidence that, during the period May 1, 2000 through June 30, 2001, Duke Energy engaged in a pattern or practice of not bidding (“no-bid withholding”) when capacity was available and economic to supply at the prevailing market prices.
- b. There was no credible evidence that, during the period May 1, 2000 through June 30, 2001, Duke Energy engaged in a pattern or practice of physical withholding of power from the California markets to reduce supply or to drive prices significantly above market prices.
- c. There was no credible evidence that, during the period May 1, 2000 through October 1, 2000, Duke Energy engaged in a pattern or practice of economic withholding of power from the California markets to reduce supply or to drive prices significantly above market prices.
- d. There was no credible evidence that, during the period May 1, 2000 through October 1, 2000, Duke Energy was responsible for any prices that might have been materially above competitive levels as a result of artificial reductions in supply.
- e. There was no credible evidence that, during the period May 1, 2000 through October 1, 2000, Duke Energy engaged in a deliberate or systematic pattern or practice of bidding that was intended to raise the market-clearing prices in the CAISO markets.
- f. There was no credible evidence that, during the period May 1, 2000 through October 1, 2000, Duke Energy engaged in a deliberate or systematic pattern or practice that constituted a violation of the MMIPs by abusing market power and adversely affecting the operations of the CAISO and PX markets.

## II. The Agreement

14. Duke Energy has entered into the Agreement with OMOI, which would resolve all issues with respect to Duke Energy from the Final Report, the Physical Withholding Investigation and the Anomalous Bidding Investigation, except that it does not affect any obligations that Duke Energy may have with respect to the Refund Proceeding.<sup>3</sup>

15. In accordance with the Agreement, Duke Energy agrees to pay \$2.5 million into a deposit fund account established by the United States Treasury on behalf of the Commission for ultimate distribution for the benefit of California and Western electricity consumers.

## III. Discussion

16. All of the matters resolved by the Agreement involve wholesale sales of electricity that are within the exclusive jurisdiction of the Commission over wholesale electricity rates and any rule, regulation, practice or contract affecting such rates, 16 U.S.C. § 824e. In addition, we exercised exclusive federal jurisdiction under 15 U.S.C. § 3301(21) over Duke Energy's natural gas trades in the wholesale gas market, in the investigation of "wash trades" in Docket No. PA02-2-000, which is herein terminated and resolved.

17. The Commission finds that the Agreement provides an equitable resolution of this matter and is in the public interest.<sup>4</sup>

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<sup>3</sup> In addition, as earlier noted, issues regarding alleged gaming practices with respect to Duke Energy arising from the Final Report are the subject of a separate agreement and stipulation filed in Docket No. EL03-170-000.

<sup>4</sup> Because Docket No. PA02-2-000, the Physical Withholding Investigation, and the Anomalous Bidding Investigation are Part 1b investigations, 18 C.F.R. Part 1b (2003), in which the Commission has enforcement discretion and to which there are no parties, the requests for rehearing will not lie from this order. The Federal Power Act requires that an entity seeking rehearing be a party to a proceeding. See 16 U.S.C. § 8251(a) (2000). See also 18 C.F.R. § 385.713(b) (2003); *Fact-Finding Investigation into Possible Manipulation of Electric & Natural Gas Prices*, 103 FERC ¶ 61,019, at p. 61,074 (2003); *Southern Company Service, Inc.*, 92 FERC ¶ 61,167, at p. 61,566 (2000); *Consolidated Edison, Inc. & Northeast Utilities*, 92 FERC ¶ 61,014, at p. 61,031 (2000).

18. The Agreement resolves all outstanding issues with respect to Duke Energy arising from the investigation in Docket No. PA02-2-000, including issues in the Final Report, the Physical Withholding Investigation and the Anomalous Bidding Investigation, as described herein. However, the Agreement does not affect any obligations that Duke Energy may have with respect to Refund Proceeding.

19. As a result, Duke Energy shall not be subject to further scrutiny, investigation, or civil or administrative claims or causes of action by the Commission arising out of Duke Energy's conduct in the California and Western wholesale electricity markets and in the operation of its California electric generation units during the period May 1, 2000 through June 30, 2001, except as to claims for remedies for specific conduct identified and set for hearing in the Order To Show Cause and subject to a separate agreement and stipulation filed in Docket No. EL03-152-000. Further, this assurance shall not affect any obligations that Duke Energy may have in the Refund Proceeding in Docket No. EL00-95-000.

The Commission orders:

(A) The attached Stipulation and Consent Agreement is approved in its entirety without modification.

(B) The Commission's approval of the attached Stipulation and Consent Agreement does not constitute approval of, or precedent regarding, any principle or issue in these dockets.

(C) The investigations in Docket Nos. IN03-10-000 and PA02-2-000 with respect to Duke Energy are terminated, but any obligations that Duke Energy may have with respect to the Refund Proceeding are not affected.

(D) Duke Energy is hereby directed to make payment of \$2.5 million in accordance with the Stipulation and Consent Agreement.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Duke Energy North America, LLC ) Docket Nos. IN03-10-000  
Duke Energy Trading and Marketing, L.L.C. ) PA02-2-000

**STIPULATION AND CONSENT AGREEMENT**

**INTRODUCTION**

The Staff of the Division of Enforcement, Office of Market Oversight and Investigations ("OMOI") of the Federal Energy Regulatory Commission (the "Commission") and Duke Energy Trading and Marketing, L.L.C. ("DETM") and Duke Energy North America, LLC ("DENA")<sup>1</sup> (collectively, "Duke Energy") enter into this Stipulation and Consent Agreement ("Agreement") to resolve all outstanding issues of fact and law with respect to Duke Energy arising from the investigation in Docket No. PA02-2-000, including issues in the Final Report on Price Manipulation in Western Markets, filed in Docket No. PA02-2-000 ("Final Report"), the Fact-Finding Investigation of Entities that Controlled Generators Selling into the California Market ("Physical Withholding Investigation"), and Docket No. IN03-10-000 ("Anomalous Bidding Investigation").<sup>2</sup> This Agreement does not, however, affect any obligations that

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<sup>1</sup> Duke Energy North America, LLC acts on behalf of itself and its subsidiaries, Duke Energy South Bay, LLC, Duke Energy Moss Landing, LLC, Duke Energy Morro Bay, LLC and Duke Energy Oakland, LLC, which own and/or operate California generating facilities and engage in the wholesale sale of electricity. This Agreement shall apply in all respects to each of these DENA subsidiaries to the same extent as it applies to DENA and DETM.

<sup>2</sup> Issues regarding specific, alleged gaming practices with respect to Duke Energy arising from the Final Report are the subject of a separate agreement and stipulation in Docket EL03-152-000.

Duke Energy may have in Docket No. EL00-95-000 (the "Refund Proceeding").<sup>3</sup>

### STIPULATION

The facts stipulated herein are stipulated solely for the purpose of resolving between Duke Energy and OMOI the matters discussed herein and do not constitute stipulations or admissions for any other purpose. OMOI and Duke Energy hereby stipulate and agree to the following:

1. On February 13, 2002, the Commission directed Staff to commence a fact-finding investigation in Docket No. PA02-2-000 into whether any entity manipulated short-term prices for electric energy or natural gas in the West or otherwise exercised undue influence over these prices between January 1, 2000, and June 21, 2001. In August 2002, Staff released its Initial Report in Docket No. PA02-2-000. On March 26, 2003, the Staff's Final Report was issued in Docket No. PA02-2-000.

2. In the Final Report, Staff concluded that the Market Monitoring and Information Protocols ("MMIP") contained in the tariffs of the California Independent System Operator Corporation ("CAISO") and the California Power Exchange Corporation ("PX") put participants in the CAISO and PX markets on notice that misconduct that arose from abuses of market power and that adversely affected the efficient operations of the CAISO and PX markets were violations of the CAISO and PX tariffs. The Final Report further stated that Staff's preliminary analysis of spot-market clearing prices as compared to

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<sup>3</sup> Proceedings being conducted under EL00-95-000, as of now, require Duke Energy to make refunds pursuant to Section 206 of the Federal Power Act.



generation input costs during May to October 2000 reveals what appear to be instances of potential anomalous bidding behavior, as defined in the MMIP.

3. The Staff's Initial Report and Final Report resulted from a time- and resource-intensive investigation which involved extensive data gathering and analysis. Staff obtained in excess of 2 terabytes of electronic data and hundreds of boxes of written materials, and it shared information with other investigatory agencies, including the Department of Justice, the Commodity Futures Trading Commission and the Securities and Exchange Commission. Data requests were answered by roughly 250 respondents representing all segments of the industry, including investor-owned utilities, independent power producers, and municipalities.

4. On June 25, 2003, the Commission issued an Order in the Anomalous Bidding Investigation, in Docket No. IN03-10-000, responding to the Final Report's recommendation that the MMIP prohibits the bidding behavior discussed in the Final Report and directed OMOI to investigate anomalous bidding behavior and practices in the Western markets at the individual market participant level. The Commission adopted the recommended market-wide screen that required an examination of all bids in the CAISO and PX markets above \$250/MWh as excessive as a *prima facie* matter. The Commission therefore directed OMOI to investigate all parties who bid in the CAISO and PX markets above the level of \$250/MWh to determine whether these parties may have violated the provision in the MMIP against anomalous bidding behavior. The Commission stated that parties with bids identified by this screen would be required to

demonstrate to OMOI why their bidding behavior did not violate the MMIP. The Commission also instructed OMOI to report to the Commission regarding its findings.

5. On July 2, 2003, OMOI issued data requests to Duke Energy in the Anomalous Bidding Investigation, in Docket No. IN03-10-000, regarding Duke Energy's bidding behavior and practices. Duke Energy responded to these data requests on July 24, 2003, providing responses and documents. OMOI has conducted follow-up telephone conferences and meetings with Duke Energy and requested and received additional materials regarding Duke Energy's responses to OMOI's data requests to further investigate these matters. Duke Energy has fully cooperated with OMOI in the course of its investigation.

6. Duke Energy submitted only 49 bids in the CAISO supplemental energy market above \$250 from May 1, 2000 through October 1, 2000, 47 of which were not taken by the CAISO. As a result of this and other evidence, OMOI determined that Duke Energy did not engage in a pattern or practice of economic withholding in violation of the CAISO or PX Tariffs during the period May 1, 2000 through October 1, 2000.

7. The Final Report also noted that various entities have submitted evidence of alleged incidents of physical withholding of generation resources from the California markets. The Final Report did not address these allegations. Concurrent with the issuance of the Final Report, the Commission directed OMOI to conduct the Physical Withholding Investigation into the existence of any physical withholding of power by

California generators during the period from May 1, 2000, to June 30, 2001.

8. Pursuant to that directive, OMOI issued data requests to California generators selling into the CAISO or PX markets, including Duke Energy, on March 26, 2003. Duke Energy responded to those data requests on June 13, 2003, providing its explanations and documents regarding the circumstances surrounding each instance of the alleged activity.

9. On August 1, 2003, OMOI issued its Initial Report on Physical Withholding by Generators Selling into the California Market and Notification to Companies. OMOI determined that the underlying reasons for any outages at facilities operated by Duke Energy during the relevant period had been adequately explained by Duke Energy and that there was no credible evidence to support further investigation. As a result of this and other evidence, OMOI determined that Duke Energy did not engage in a pattern or practice of physical withholding of power from California during the period May 1, 2000 through June 30, 2001.

10. In preparation of its Initial and Final Reports, and in its conduct of the Anomalous Bidding and Physical Withholding Investigations, Staff reviewed substantial evidence, including data, expert testimony and documentation, submitted by the California Parties during each phase of the investigations.<sup>4</sup> Staff also met with California Parties'

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<sup>4</sup> The California Parties consist of the People of the State of California, *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the Public

representatives and experts to review their submissions. Among the evidence that Staff considered from the California Parties were:

- a. The California Parties submitted an extensive analysis of bidding practices by in-state generators and certain power marketers who imported power into California, relying in large part on actual ISO bid data. The results of the California Parties' analysis and data were analyzed in the Final Report.<sup>5</sup>
- b. OMOI reviewed evidence submitted by the parties in the 100 Days Evidence Proceeding,<sup>6</sup> including supplemental evidence, expert testimony and exhibits submitted by the California Parties on March 3, 2003 and March 20, 2003.<sup>7</sup> OMOI held meetings with and reviewed all additional materials of alleged withholding and market manipulation submitted by representatives of the California Parties after the submissions in the 100 Days Evidence

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Utilities Commission of the State of California, Pacific Gas and Electric Company, and Southern California Edison Company.

<sup>5</sup> Final Report at VI-48.

<sup>6</sup> On November 20, 2002, the Commission issued an order that allowed parties in Docket Nos. EL00-95-000, EL00-95-048, EL00-98-000 and EL00-98-042 to conduct additional discovery for a period of approximately 100 days into market manipulation by various sellers during the western power crisis of 2000 and 2001. *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 101 FERC ¶ 61,186 (2002) and *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 102 FERC ¶ 61,164 at PP 3-5 (2003) ("100 Days Evidence Proceeding").

<sup>7</sup> OMOI also reviewed the rebuttal evidence submitted by Duke Energy on March 20, 2003 in the 100 Days Evidence Proceeding and supplemental and rebuttal evidence submitted by other parties on March 3, 2003, and March 20, 2003, respectively.

Proceeding. Moreover, OMOI conducted extensive analysis of the CAISO and PX bidding data for the relevant period of time.

c. OMOI reviewed submissions by the California Parties on May 27, 2003 of alleged hour-by-hour trading behavior and manipulation that occurred from May 2000 through October 2000.<sup>8</sup>

11. Based on its Physical Withholding Investigation, its Anomalous Bidding Investigation, and consideration of all materials in its investigations under Docket No. PA02-2-000, in addition to the OMOI determinations made in paragraphs 6 and 9, the following conclusions were reached:

- a. OMOI does not find any credible evidence that, during the period May 1, 2000 through June 30, 2001, Duke Energy engaged in a pattern or practice of not bidding (“no-bid withholding”) when capacity was available and economic to supply at the prevailing market prices;
- b. OMOI does not find any credible evidence that, during the period May, 1, 2000 through June 30, 2001, Duke Energy engaged in a pattern or practice of physical withholding of power from the California markets to reduce supply or to drive prices significantly above market prices;

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<sup>8</sup> See Attachments A and B to California Parties’ Reply to Answers to Motion for Institution of Consolidated Proceeding to Address Remedy and Damage Issues and for Common Protective Order, filed in Dockets PA02-2-000 and EL00-95-000 *et al.*, March 27, 2003.

c. OMOI does not find any credible evidence that, during the period May 1, 2000 through October 1, 2000, Duke Energy engaged in a pattern or practice of economic withholding of power from the California markets to reduce supply or to drive prices significantly above market prices.

d. OMOI does not find any credible evidence that, during the period May 1, 2000 through October 1, 2000, Duke Energy was responsible for any prices that might have been materially above competitive levels as a result of artificial reductions in supply;

e. OMOI does not find any credible evidence that, during the period May 1, 2000 through October 1, 2000, Duke Energy engaged in a deliberate or systematic pattern or practice of bidding that was intended to raise the market-clearing prices in the CAISO markets.

f. OMOI does not find any credible evidence that, during the period May 1, 2000 through October 1, 2000, Duke Energy engaged in a deliberate or systematic pattern or practice that constituted a violation of the MMIPs by abusing market power and adversely affecting the operations of the CAISO and PX markets;

12. In an Order To Show Cause Concerning Gaming and/or Anomalous Market

Behavior issued on June 25, 2003 (“Order To Show Cause”),<sup>9</sup> the Commission set for hearing the issues of whether Duke Energy’s specific activities and transactions identified therein constituted gaming an/or anomalous market behavior as identified in the CAISO and PX Tariffs and whether any such conduct should be subject to disgorgement of unjust profits and any other additional, appropriate non-monetary remedies.

13. All of the foregoing matters involve wholesale electricity sales that are within the exclusive jurisdiction of the Commission. 16 U.S.C. § 824e.

14. The Commission exercised exclusive federal jurisdiction under 15 U.S.C. § 3301(21) over Duke Energy’s natural gas trades in the wholesale gas market in the investigation of “wash trades” in Docket No. PA02-2-000, which is herein terminated and resolved.

## **REPRESENTATIONS**

1. OMOI states:

In light of the stipulated findings and remedy herein, this Agreement is an equitable resolution of the outstanding matters at issue with respect to Duke Energy in the Physical Withholding Investigation, the Anomalous Bidding Investigation in Docket No. IN03-10-000, and the investigations in Docket No. PA02-2-000 and is in the public interest.

1. Duke Energy states:

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<sup>9</sup> American Electric Power Service Corp., et al., 103 FERC ¶ 61,345 (2003).

Duke Energy does not admit that any of the Duke Energy activities described in the Final Report or alleged in the 100 Days Evidence Proceeding or in any submissions made to the OMOI in its investigations constituted a violation of any state or federal statute, or of any Commission rule, regulation, tariff, or order issued thereunder, or of the MMIPs.

**REMEDIES, TERMINATIONS OF INVESTIGATIONS  
AND FINAL RESOLUTIONS OF ISSUES AND CLAIMS**

1. To avoid the burdens, costs and uncertainty associated with the litigation process, and to achieve regulatory certainty and closure with respect to any and all civil and administrative claims and causes of action, and in lieu of any other remedy or penalty that the Commission might assess or determine, arising out of or concerning any of the matters arising from or related to Docket No. PA02-02-000, the Final Report, the Physical Withholding Investigation and/or the Anomalous Bidding Investigation, OMOI and Duke Energy agree that Duke Energy shall pay a Settlement Amount of \$2.5 million. Duke Energy shall pay the \$2.5 million Settlement Amount, within thirty-five (35) days of the Commission's issuance of a final, non-reviewable order approving this Agreement without modification (the "Effective Date") into the deposit fund account established by the United States Treasury on behalf of the Commission for ultimate distribution for the benefit of California and Western electricity consumers ("Deposit Fund"). Upon the Effective Date and subject to payment of the Settlement Amount as specified in this paragraph, this Agreement terminates and resolves and provides complete and total satisfaction of any and all administrative or civil claims or causes of action the



Commission has or may have had, whether known or unknown and whether raised previously or in the future by FERC Staff or the Commission, against Duke Energy arising from or relating to the Physical Withholding Investigation, the Anomalous Bidding Investigation in Docket No. IN03-10-000, and Docket No. PA02-2-000, other than specific conduct identified and set for hearing in the Order To Show Cause and subject to a separate agreement and stipulation filed in Docket No. EL03-152-000. This Agreement does not, however, affect any obligations that Duke Energy may have in the Refund Proceeding in Docket No. EL00-95-000.

2. Upon the Effective Date and subject to payment of the Settlement Amount as specified in paragraph 1, this Agreement constitutes the sole remedy and final and complete resolution of issues and matters subject to the Commission's investigations into Duke Energy's conduct in the California and Western wholesale electricity markets and in the operation of its California electric generation units during the period May 1, 2000 through June 30, 2001, except those issues and matters specifically identified and set for hearing in the Order To Show Cause and subject to a separate agreement and stipulation filed in Docket No. EL03-152-000. This Agreement does not, however, affect any obligations that Duke Energy may have in the Refund Proceeding in Docket No. EL00-95-000.

3. Payment of the Settlement Amount provides full compensation for any injury that may have been caused by or attributed to Duke Energy's alleged conduct that has been the subject of investigations in the above-referenced proceedings.

## V. TERMS AND ASSURANCES

1. OMOI and Duke Energy state that they enter into this Agreement voluntarily and that, other than the agreements provided herein, no tender, offer, or promise of any kind whatsoever has been made by any party to this Agreement or by any member, officer, agent or representative thereof, to induce the other party to enter into this Agreement.
2. OMOI and Duke Energy acknowledge and agree that this Agreement is a settlement of claims investigated by the Commission under its plenary authority over rates for wholesale electricity sales in interstate commerce and is a compromise and settlement of disputed claims. This Agreement and any Commission order approving this Agreement shall not be deemed or construed as an admission or as evidence of any violation by Duke Energy of any law or regulation, or any Commission rule, regulation or order issued thereunder, or any Commission-approved tariff or filed rate.
3. As a condition to the Agreement, it is understood that the Commission will find in its Order approving the Agreement that:

The Commission provides assurance that at no time shall Duke Energy be subject to further scrutiny or investigation or civil or administrative claims or causes of action by the Commission arising out of Duke Energy's conduct in the California and Western wholesale electricity markets and in the operation of its California electric generation units during the period May 1, 2000 through June 30, 2001, except as to claims for remedies for specific conduct

identified and set for hearing in the Order To Show Cause and subject to a separate agreement and stipulation filed in Docket No. EL03-152-000. Such assurance shall not affect any obligations that Duke Energy may have in the Refund Proceeding in Docket No. EL00-95-000.

Unless the Commission issues an Order approving this Agreement in its entirety, including the above assurance, without modification, this Agreement shall be null and void and of no effect whatsoever, and shall not be used in any proceeding, and neither OMOI nor Duke Energy shall be bound by any of its provisions or terms, unless they agree otherwise in writing.

4. On the Effective Date, this Agreement shall resolve any and all administrative or civil claims or causes of action the Commission has or may have against Duke Energy, its parents and affiliates, their successors and assigns, and the officers, directors or employees of each, arising from or related to the captioned proceedings, except for those matters specifically identified and set for hearing in the Order To Show Cause and subject to a separate agreement and stipulation filed in Docket No. EL03-152-000. This Agreement does not, however, affect any obligations that Duke Energy may have in the Refund Proceeding in Docket No. EL00-95-000.

5. With respect to the representations by Duke Energy set forth herein, the undersigned representative of Duke Energy represents and warrants that he has read them and knows the contents thereof, that all the statements and matters set forth are true and correct to the best of his knowledge, information and belief, and that he understands that

OMOI enters into this Agreement in express reliance on those representations.

6. The provisions of this Agreement are binding on Duke Energy, its parents and affiliates and their successors and assigns, and the officers, directors or employees of each.

7. The Commission's approval of the Agreement shall not constitute precedent regarding any principle, issue, or methodology underlying its provisions.

8. Each of the undersigned warrants that he or she is an authorized representative of the party designated, is authorized to bind such party, and accepts this Agreement on behalf of that party.

Agreed to and accepted:

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William F. Hederman  
Director, Office of Market Oversight  
And Investigations

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Date

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Keith L. Head  
Senior Vice President and General Counsel  
Duke Energy North America, LLC  
On behalf of  
Duke Energy Trading and Marketing,  
L.L.C.

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Date

Duke Energy North America, LLC  
Duke Energy South Bay, LLC  
Duke Energy Moss Landing, LLC  
Duke Energy Morro Bay, LLC  
Duke Energy Oakland, LLC