UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Trading and Marketing Company Docket No. EL03-152-000

ORDER APPROVING CONTESTED SETTLEMENT

(Issued September 21, 2004)

1. On December 19, 2003 Commission Trial Staff and Duke Energy Trading and Marketing Company (Duke) filed a Settlement Agreement. The Settlement Agreement resolves all issues related to Duke that were set for hearing in Docket No. EL03-152-000 in the Commission's Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior (Gaming Order).[1]

2. On January 20, 2004, the California Parties[2] filed initial comments opposing the Settlement Agreement. On January 20, 2004, the Port of Seattle, Washington (Seattle) filed comments incorporating the comments of the California Parties. Also on January 20, 2004 the Pacific Northwest Parties[3] filed comments partially opposing the settlement. The California Independent System Operator Corporation (CAISO) filed comments on January 20, 2004 opposing the resolution of the so-called Replacement Reserve issue (discussed below). On February 9, 2004, both Trial Staff and Duke filed reply comments in support of the settlement. In addition, Trial Staff incorporates by

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[1] American Electric Power Service Corporation, *et al.*, 103 FERC ¶ 61,345 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004).

[2] The California Parties are the People of the State of California *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Pacific Gas and Electric Company, and Southern California Edison Company.

[3] The Pacific Northwest Parties consist of the Public Utility District No. 1 of Snohomish County, Washington and the Port of Seattle, Washington.

reference its general reply comments submitted on October 20, 2003.[4] On April 19, 2004 the presiding judge certified the Settlement Agreement to the Commission as contested, but recommending its approval.[5]

3. The Settlement Agreement expressly acknowledges that there may be different views on whether the CAISO Tariff requires the amount of capacity sold as Replacement Reserves remain unloaded at all times except when dispatched by the CAISO, or that the unit providing the Replacement Reserves merely be capable of being at a specified load point within 60 minutes. The Settlement Agreement states that in the event the Commission determines that capacity sold as Replacement Reserves was required to have remained unloaded at all times except when dispatched by the CAISO, Staff and Duke agreed that the settlement amount ($549,973) would be increased by a further payment of $1,539,351, the amount of the total alleged revenues from the sale of Replacement Reserved alleged to be double selling.

4. Duke argues that the CAISO Tariff did not require that the capacity sold as Replacement Reserves remain unloaded at all times except when dispatched by the CAISO. Conversely, the Tariff requires only that the unit providing Replacement Reserves be capable of being at a specified load point within 60 minutes. Duke contends that the Replacement Reserves issue is a legal one and not a factual one. Thus the settlement can be certified to the Commission. Duke also asserts that the Tariff imposes different obligations upon a supplier of Replacement Reserves than it does on the sellers of operating reserves (spinning and non-spinning reserves). According to Duke, the Tariff specifies that spinning reserves must be unloaded and immediately responsive to dispatch but does not state so for Replacement Reserves. The Tariff treats the types of reserves differently.

5. Duke also submits that several protocols support its view that there is no requirement for Replacement Reserves to remain idle until the CAISO issues a dispatch order.[6] Duke contends that it is not a violation of the MMIP to sell Replacement Reserves because the Tariff does not require the seller to represent that the capacity would remain unloaded. According to Duke, the MMIP confirms that a unit that has sold

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[4] The terms of the Settlement Agreement and these various pleadings are described in more detail in the presiding judge's certification. Duke Energy Trading and Marketing Company, 107 FERC ¶ 63,016 (2004) (Certification).

[5] *Id.* at P 86.

[6] *See* Duke Comments at 23 n.80, *citing* Ancillary Services Requirements Protocol §§ 6.2.3, 6.4, 10.4; Schedules and Bids Protocol §§ 5.1.4.1(f) and (h); Dispatch Protocol § 9.4.1.

Replacement Reserves can generate uninstructed energy in the hour before it must be at a load point. As long as a unit providing Replacement Reserves can reach the load point within 60 minutes, independently of whether the unit has sold energy in the interim, the seller has provided the service, complied with CAISO requirements and not misstated the service provided.

6. Duke contends that neither the California Parties nor the CAISO, whose arguments are discussed below, cite any Tariff or MMIP provision mandating that Replacement Reserves must remain unloaded until called upon by the CAISO. Duke disputes the California Parties' cited precedent[7] and contends that it does not modify the participants' existing obligations under the CAISO Tariff.

7. The CAISO first requests that the Commission not consider the Replacement Reserve issue in this proceeding, claiming that the Settlement would "short circuit" a trial-type proceeding.

8. In the alternative, the CAISO asks that the Commission find that the sale of energy from capacity committed as Replacement Reserves meets the definition of "double selling." The CAISO argues that the Commission did not carve out a separate exception for energy from Replacement Reserves in its definition of "double selling." Additionally, the CAISO argues that its Tariff imposes the obligation to hold capacity committed as Replacement Reserves unloaded, prior to the CAISO's dispatch. The CAISO states that the Tariff provides that ancillary service schedules represent binding commitments between the CAISO and the scheduling coordinator and the CAISO will pay only for capacity that is made available. The CAISO also maintains that the Commission has affirmed the obligation of scheduling coordinators to hold capacity sold as ancillary services in reserve. Additionally, the CAISO argues that the Commission has recognized that the failure of suppliers to hold capacity committed to ancillary services in reserve exposes the CAISO to reliability risks.[8] The CAISO contends that the same reasoning that the Commission has applied to operating reserves applies to capacity committed as Replacement Reserves.

9. The California Parties also maintain that the settlement improperly excluded all revenues associated with Replacement Reserves. They claim that Duke's contention that it can sell from Replacement Reserves defeats the purpose of the CAISO's acquisition of that energy.

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[7] Cal. Indep. Sys. Operator Corp., 86 FERC ¶ 61,122 at 61,416 (1999).

[8] Cal. Indep. Sys. Operator Corp., 86 FERC ¶ 61,122, at 61,418 (1999).

10. The presiding judge found that the Replacement Reserve issue is a legal issue and a policy matter for the Commission. Noting the Commission's determination that this is the proper forum to resolve legal and factual issues related to alleged double selling,[9] the presiding judge also remarked, among other things, that the plain language of the Tariff does not expressly require Replacement Reserves to be unloaded, but only that they can reach a load point within 60 minutes.[10]

Commission Determination

11. We deny the CAISO's request that this issue not be resolved in this proceeding. As stated in the Certification, the Commission has previously held that the Gaming Order Show Cause proceedings are the appropriate forum for determinations with respect to alleged double selling.

12. We agree that the CAISO Tariff does not require Replacement Reserves remain unloaded at all times except when dispatched by the CAISO. The CAISO Tariff defines "Replacement Reserves" as:

> Generating capacity that is dedicated to the ISO capable of starting up if not already operating, being synchronized to the ISO Controlled Grid, and ramping to a specified Load point *within a sixty (60) minute period*, the output of which can be continuously maintained for a two hour period.[11]

13. In contrast, the CAISO Tariff defines "Spinning Reserve," a type of operating reserve, as:

> The portion of *unloaded* synchronized generating capacity that is *immediately responsive* to system frequency and that is capable of being loaded in ten minutes, and that is capable of running for at least two hours.[12]

14. Replacement Reserves thus differ from Spinning Reserves. While the CAISO Tariff requires that Spinning Reserves be unloaded and capable of being immediately responsive to CAISO dispatch, the definition of Replacement Reserves does not state that this capacity must be unloaded. Under the plain language of the CAISO Tariff, the only

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[9] Cal. Indep. Sys. Operator Corp., 106 FERC ¶ 61,099, at P 18 (2004).

[10] Certification, 107 FERC ¶ 63,016 at P 78-83.

[11] CAISO Tariff Appendix A at 344 (emphasis added).

[12] *Id.* at 349 (emphasis added).

requirements of Replacement Reserves is that the capacity dedicated to the CAISO: (1) is capable of starting up if not already operating, (2) is synchronized to the CAISO Controlled Grid, (3) is capable of ramping to a specified load point within 60 minutes, and (4) can continuously maintain output for a two hour period.

15. Thus, while the CAISO argues that the capacity should remain unloaded at all times, we disagree. The Tariff language simply does not require that the capacity be unloaded. Therefore, when Duke sold this capacity, it did not engage in double selling with respect to this Replacement Reserve capacity.[13]

16. The Settlement Agreement constitutes a reasonable resolution of this proceeding and will be approved. The Settlement Agreement reasonably addresses and resolves the charges against Duke that were set for hearing in the Gaming and Partnership Orders. In this regard, Duke will be returning $549,973, the total revenues (and not merely the profits – and thus more than would be achieved in litigation[14]) from Duke's participation in alleged gaming practices. Furthermore, given our determination in our order on rehearing not to expand the scope of this proceeding, the release provisions in Articles IV and V, sections 4.5 and 5.2, of the Settlement Agreement, releasing Duke from further scrutiny of its trading activities in California during the period January 1, 2000 through June 20, 2001 (with the exception of the ongoing proceedings in Docket Nos. IN03-10-000 and EL00-95-000, *et al.*) is reasonable.[15]

17. Moreover, issues raised in the comments filed by the CAISO, the California Parties, the Pacific Northwest Parties, and Seattle go to the scope of these proceedings, are thus essentially requests for rehearing of the Gaming Order and, in fact, were addressed and denied in the Gaming Order on rehearing.[16] Such matters thus need not be further addressed here.

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[13] As a consequence of this finding, the dollar amounts being returned do not need to be increased by $1,539,351.

[14] Gaming Order, 103 FERC ¶ 61,345 at P 1, 2, 71.

[15] *Compare* Certification, 107 FERC ¶ 63,039 at P 33, 55, 84 *with supra* note 1.

[16] Gaming Order on Rehearing, 106 FERC ¶ 61,020 at P 85.

18. This order terminates Docket Nos. EL03-152-000.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.