UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Moss Landing, LLC	)))	Docket Nos. ER98-2668-000, *et al.*

JOINT ANSWER OF
THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION,
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
THE CALIFORNIA ELECTRICITY OVERSIGHT BOARD, AND
PACIFIC GAS AND ELECTRIC COMPANY
IN OPPOSITION TO
APPLICANT'S MOTION TO FILE SUPPLEMENTAL TESTIMONY

TO: The Chief Administrative Law Judge
Curtis L. Wagner, Jr.

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, the California Independent System Operator Corporation ("California ISO"), the Public Utilities Commission of the State of California ("CPUC"), the California Electricity Oversight Board ("Oversight Board"), and Pacific Gas and Electric Company ("PG&E") (collectively, the "California Consumer Parties") hereby jointly submit this answer in opposition to the Motion of Duke Energy Moss Landing LLC ("Duke") to file supplemental testimony, dated January 13, 1999 ("Motion"). For the reasons set forth below, the California Consumer Parties respectfully urge the Chief Judge to deny the Duke Motion. Essentially, Duke is using the Motion as a device for revisiting the Commission's June 1998 Suspension Order in this case, which denied Duke's request to recover an "acquisition adjustment" in its cost-of-service rates. Simply stated, Duke is attempting to do indirectly what the Commission has prohibited Duke from doing directly. The Chief Judge should rebuff Duke's effort by denying the Motion.

In support of their position, the California Consumer Parties state as follows:

I.

BACKGROUND

At issue in these proceedings are the rates Duke charges to the California ISO for "reliability must-run" ("RMR") services provided by Duke's Moss Landing Power Plant, one of three plants Duke purchased from PG&E during 1998. The California ISO, in turn, passes these RMR costs along to PG&E. For its part, the CPUC, among other things, regulates retail electric rates in California, which include that share of the costs of California ISO operations passed through by PG&E. The Oversight Board is a California state agency charged with, among other things, ongoing monitoring of the restructured electric industry in California, including transmission system reliability and cost. Therefore, the California ISO, the CPUC, the Oversight Board, and PG&E all have a common interest in the cost-of-service issues presented in this case.

In its original rate filing in this docket, Duke sought Commission authorization to recover in its Moss Landing RMR rates a substantial acquisition premium, indeed more than the acquisition premium it paid for all three PG&E power plants. In its Suspension Order, issued on June 25, 1998, the Commission summarily denied this proposed "acquisition adjustment," finding that "Duke Energy will have the opportunity to recover its acquisition premium through the market-based rates that it will receive when the units are *not* operating as must-run." [1/] Accordingly, Ordering Paragraph (F) of the Commission's suspension order stated that: "Duke Energy Moss Landing's proposed acquisition adjustment is hereby denied." [2/]

[1/] *Duke Energy Moss Landing LLC*, 83 FERC ¶ 61,318, at 62,304 (June 25, 1998) (emphasis in original).

[2/] *Id.* at 62,307.

On June 30, 1998, Duke made a compliance filing in accordance with the Suspension Order, but the compliance filing did not seek any change in Duke's filed cost-of-equity. Instead, nearly seven months later, on January 13, 1999, Duke filed a Motion requesting leave to submit "supplemental testimony" which proposes an increase in Duke's return on equity, allegedly to reflect the impact of the Commission's action in the Suspension Order. In its Motion, Duke alleges that "changes in the rate of return are the necessary consequence of complying with the Commission's [Suspension] Order." (Motion, p. 3, *citing United Distribution Companies v. FERC*, 88 F.3d 1105, 1164 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1224 (1997), and *ANR Pipeline Co. v. FERC*, 863 F.2d 959 (D.C. Cir. 1988).) Duke contends that the Suspension Order, because it rejected the proposed acquisition adjustment, imposed on Duke "enhanced risk of recovering costs." Accordingly, Duke states that it is seeking, by its proposed new, supplemental testimony, to support an "increased return on equity to be included in the rate of return on capital and ultimately the cost of service requested by [Duke]." (*Id.* at 3.)

II.

DISCUSSION

In its June 1998 Suspension Order, the Commission specifically ruled that Duke's must-run captive customers should not be required to reimburse Duke for the acquisition premium Duke paid to buy the Moss Landing Power Plant. By its Motion here, Duke boldly seeks to accomplish indirectly what the Commission's Suspension Order prohibited Duke from doing directly, namely, recover an acquisition premium in the rates Duke charges for RMR services. The Motion flies in the face of the well-established rule against presentation of a "moving target" in rate proceedings, *i.e.,* selective changes in particular cost-of-service items during the pendency of the proceedings. The cases cited by Duke, in particular the D.C. Circuit's decision in *ANR*

Pipeline Co. v. FERC, supra, are readily distinguishable, and do not entitle Duke to an exemption from the normal rule. Accordingly, the Motion should be denied.

A. Duke's Request To Supplement Its Case-In-Chief With A New, Higher Proposed Cost Of Equity Violates The Well-Established Rule Against Presentation Of A "Moving Target" In Rate Proceedings.

It is a familiar and longstanding rule in rate proceedings before this Commission that a public utility may not present a "moving target" by selectively changing particular cost-of-service elements, whether in response to interlocutory orders issued by the Commission in the course of the case, or for any other reason. [3/] The Commission has described its rule as follows:

> Our precedent is clear that a utility cannot include in a compliance filing a rate change not directed or otherwise authorized by the Commission. Nor can a utility present the Commission with a 'moving target' on compliance by offering an alternative justification for previously-filed rates. [4/]

Duke's Motion plainly defies the foregoing rule. In effect, Duke seeks to "sneak in through the back door" essentially the same acquisition premium (or at least a portion thereof) which the Commission rejected in the June 1998 Suspension Order. Consistent with its well-established "no moving target" rule, Duke's Motion should be denied.

Indeed, in at least one prior case, the Commission rejected a gambit strikingly similar to what Duke seeks in its Motion here. In *Jersey Central Power & Light Co.*, [5/] a utility sought, in a compliance filing, to increase its return on equity following the issuance of a suspension order which summarily rejected a portion of the utility's rate filing. The Commission held that the

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3/ *E.g., Southwestern Pub. Serv. Co.*, 83 FERC ¶ 61,138, at 61,625 and n.36 (1998) (citing cases); *Louisiana Power & Light Co.*, Opinion No. 366, 57 FERC ¶ 61,101, at 61,382 and n.33 (1991); *Virginia Elec. & Power Co.*, 23 FERC ¶ 61,289, at 61,604-605 (1983).

4/ *Indiana & Michigan Muni. Distribs. Ass'n v. Indiana Michigan Power Co.*, 61 FERC ¶ 61,351, at 62,373 (1992) (citations omitted).

utility's attempt to increase its return on equity in a compliance filing, based on its dissatisfaction with a different aspect of the suspension order, violated the "moving target" rule. [6/] Duke's motion suffers from precisely the same infirmity, and likewise should be denied.

There is yet another case, *Northern Natural Gas Co.*, [7/] which not only is distinguishable from the instant case, but also is instructive in showing the limited circumstances under which an applicant in a rate proceeding may be given the opportunity to change its requested return-on-equity to reflect summary Commission rulings. In that case, the Commission in a suspension order directed a pipeline to refile its rates using the capital structure of its parent company (Enron Corporation). The pipeline, however, in order to reflect the parent company's somewhat greater market risk, raised its proposed rate of return on common equity, from the originally proposed 17 percent to 18.5 percent. The Commission declined to reject the amended testimony, while upholding the basic teachings of *Jersey Central*:

> The situation here is distinguishable from that in *Jersey Central*. In *Jersey Central*, the company attempted to justify a change in its cost of service that was unrelated to the Commission's directive that certain plant facilities had to be excluded from the company's rate base. Here, however, there is a direct correlation between Northern's capitalization and return on common equity

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5/ *Jersey Central Power & Light Co.*, 20 FERC ¶ 61,083 (1982), *remanded on other grounds sub nom. Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987) (*en banc*).

6/ *Jersey Central Power & Light Co., supra*, 20 FERC, at 61,182. The Commission has continued to follow the "no moving target" rule even though the *Jersey Central* case itself was remanded by the U.S. Court of Appeals on other grounds. The Court determined that, given Jersey Central's dire financial circumstances, the Commission was obligated to consider whether Jersey Central's overall rates and charges were just and reasonable under standard articulated in *Hope Natural Gas*. *See Jersey Central, supra*, 810 F.2d at 1178. As the Commission has explained:

> The Commission has long held that a utility may not present a "moving target" by offering alternative justifications for previously filed rates. [Citing Jersey Central.] As Judge Mikva noted for the dissent, the D.C. Circuit in Jersey Central did not question the Commission's authority to implement the 'moving target' rule. Rather, it was concerned about the specific application of that rule to Jersey Central, especially since Jersey Central was not afforded a hearing [of any kind] in that case.

Louisiana Power & Light Co., supra, 57 FERC, at 61,382, n.33 (citation omitted).

7/ *Northern Natural Gas Co.*, 46 FERC ¶ 61,403 (1989).

> that justifies the adjustment made by Northern in its compliance filing.[8/]

Thus, the *Northern Natural* case establishes a limited exception to the "no moving target rule" for changes in cost-of-service elements that have a *direct correlation* to those aspects of the company's rate filing which have been changed by Commission mandate. In *Northern Natural*, the requirement that the pipeline switch and use its parent company's capital structure necessarily had a bearing on the cost-of-equity component of its cost-of-service. Obviously, this is not the situation faced by Duke in the present case. Here, there is no "direct correlation" at all between the Commission's rejection of an acquisition premium in RMR rates and Duke's proposed adjustment of its cost of equity. Duke is merely trying to make up dollars lost on one cost-of-service element by increasing dollars under another cost-of-service element. As such, Duke's Motion falls squarely under the normal "no moving target" rule and should be denied.

B. The Court Cases Cited By Duke In Support Of Its Motion Are Readily Distinguishable, And They Do Not Support The Extraordinary Relief Duke Seeks By Its Motion.

Duke relies on two court cases in its Motion to file supplemental testimony, *United Distribution Companies v. FERC*, and *ANR Pipeline Co. v. FERC*. Neither case, however, supports Duke's request for an exemption from the "moving target" rule discussed above.

The first of these cases, *United Distribution Companies v. FERC*, merely held that the Commission had statutory authority under the Natural Gas Act to order a change in pipeline rate design which resulted in higher demand charges for some customers relative to the demand charges they previously had paid. 88 F.3d at 1163-66. In the course of its opinion, the Court noted that the Commission had interpreted the Court's earlier decision in the *ANR Pipeline* case

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8/ *Northern Natural, supra*, 46 FERC at 62,276.

to stand for the proposition that "when the Commission orders a pipeline to implement a different rate design method that requires reductions in one component of the pipeline's rates, it must permit the pipeline to implement offsetting increases in some other component simultaneously in order for the pipeline to recover its cost of service." 88 F.3d at 1164, *quoting* Commission Order No. 636-A. Here, of course, the Commission has not ordered any change in Duke's rate design. Moreover, Duke is fully recovering its cost of providing RMR service. Indeed, the point in rejecting Duke's proposed acquisition adjustment was to prevent Duke from overrecovering its costs. As such, the Court's holding in *United Distribution* is simply irrelevant.

It appears, however, that Duke is relying more heavily on the earlier *ANR Pipeline* case, in particular the Commission's *interpretation* of that case, which was quoted in the Court opinion in the *United Distribution* case. But Duke's reliance on *ANR Pipeline* is equally misplaced. In that case, the Court of Appeals remanded for lack of reasoned decision-making a Commission order which rejected, in part, a pipeline compliance filing that purported to implement an earlier Commission order. The Commission there had ordered the pipeline to eliminate its fixed-cost "minimum bill", which had allowed the pipeline to bill its partial requirements customers for gas volumes not actually purchased. In its compliance filing, the pipeline not only eliminated the minimum bill provisions of its tariff, but also adjusted its sales volume projections to eliminate so-called "phantom volumes" that it had expected a large partial requirements customer to pay for under the now-stricken minimum bill. As noted by the Court, instead of a rate *decrease* from 63.2 cents per dekatherm ("Dth") to 50.01 cents/Dth, elimination of the phantom volumes in the compliance filing actually yielded a rate *increase*, to some 79.12 cents/Dth. 863 F.2d at 961, n.6. The Court held that the Commission had erred in not allowing the pipeline to recalculate its

volume projections to reflect elimination of the phantom volumes attributable to the Commission-mandated elimination of the minimum bill.

Here, Duke seeks to stretch the holding of the *ANR Pipeline* case well beyond its facts, to the point that it would obliterate the "no moving target" rule itself. In *ANR Pipeline*, the Commission required a change in rate design that would have reduced the pipeline's overall revenues, unless the pipeline was permitted to make the off-setting rate design adjustments. Notably, the Commission's order did not find that ANR's overall revenue levels were inappropriate. By contrast, Duke has been expressly ordered to eliminate the acquisition adjustment from its cost-of-service, and should not be permitted to undo that ruling under *ANR Pipeline* -- or any other Commission precedent -- by seeking an increase in return on equity. Under Duke's reading of the *ANR Pipeline* case, the pipeline, in addition to eliminating the phantom volumes, also could have chosen to file an upward adjustment to its rate-of-return to reflect its new, heightened "risk profile" as a consequence of the elimination of its minimum bill. But no such extravagant claim was made by the pipeline in that case. Indeed, nothing in the Court's decision in *ANR Pipeline* even remotely suggests that Duke is entitled to a mid-stream adjustment of its filed cost-of-service to reflect an allegedly greater risk profile, merely because the Commission rejected an acquisition adjustment in RMR rates in the June 1998 Suspension Order.

In summary, Duke is not entitled to any exemption from the "no moving target" rule, and neither the *United Distribution* nor the *ANR Pipeline* court decisions reasonably can be read to support such an exemption in the circumstances of this case.

III.

CONCLUSION

For the reasons stated above, the undersigned California Consumer Parties urge the Chief Judge to deny the Duke Motion to file supplemental testimony.

Respectfully submitted,

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