ATTACHMENT A

Provisions of Duke Energy's Must-Run Agreement That Are Substantially Different from PG&E's Must-Run Agreement[1]

Duke Energy's contract includes a different definition of a "force majeure event" that expands the definition to encompass disruptions of services that could not be overcome by Good Industry Practice. PG&E's "force majeure" definition does not include disruptions of services that could not be overcome by Good Industry Practice. Specifically, the contract states that "mechanical or electrical breakdowns or failure of machinery . . . due to the manner in which such machinery or plant has been operated . . . shall not of itself constitute a force majeure event." The ISO does not intend for mechanical or electrical breakdowns to be force majeure events unless those breakdowns or failures are triggered by an event that in and of itself would be considered a force majeure event. This is why the ISO allowed forced outages to be included in the calculation of unit availability limits.

Duke Energy's termination provision (Section 2.2(a)(v)), which allows the owner to terminate the contract when it sells its facilities, does not include the requirement that the new contract provide services to the ISO under substantially the same terms as the prior contract. PG&E's contract does include such a provision. Duke Energy's termination provision (section 2.2(a)(vi)) for a transfer to an affiliate or subsidiary only requires that the new contract include substantially similar terms and conditions, rather than identical terms and conditions as PG&E's contract requires. There is no reason that

[1] Pacific Gas and Electric Company, Docket No. ER98-1614-000 filed January 29, 1998 and amended on March 5, 1998.

an owner should be allowed to alter the terms and conditions of the RMR Agreement by simply transferring the contract to an affiliate or subsidiary. Other than changing the party's name, address and signatory, which would not be a change in the terms and conditions but rather owner-specific information to the requirement for a name, address and signatory, there should be no reason that identical terms and conditions should not continue. The purpose of this provision as stated in PG&E's contract is to avoid an owner assigning a contract to its subsidiary that may have a very different capital structure, which would increase the cost of the must-run agreement without providing any additional benefit to the ISO.

Under Duke Energy's contract, the commencement of service (Section 3.2) allows Duke Energy to transfer to a "B" agreement after 90 days of ISO operations, even if Duke Energy gives less than 90 days notice. Duke Energy's language also allows it to automatically transfer to a "B" Agreement if it takes ownership after 90 days of ISO operations. This provision is substantially different from PG&E's Master Agreement Sections 2.3 and 3.2. The ISO requires RMR Agreements to commence under Agreement "A" as a result of the stakeholder process during which several parties did not want there to be an Agreement "B", and as a compromise it was decided that all RMR Agreements would commence under Agreement "A" terms. This requirement only applies to new contracts and not to assignments, under which a new owner may assume the same condition (A, B or C) of the contract as the owner from whom it was assigned.

Section 3.2(b) of Duke Energy's agreement is substantially different from PG&E's Section 2.1(b). PG&E's contract provides for rollover of the RMR Agreement for an additional twelve months at the end of the contract year, whereas Duke Energy's

provision allows it to also transfer the affected units from an Agreement "B" to an Agreement "A". Duke Energy's rollover provision grants the owner the right to choose another form of the contract, rather than following the a traditional concept of a rollover which is to continue the contract under exactly the same terms and conditions and rates as during the previous term.

Duke Energy's Section 3.3(b)(ii)[A] and [B] are new provisions concerning the ISO's right to transfer units from one form of the contract to another. Duke Energy has included the right to argue about the ISO's decisions and pursue alternative dispute resolution. There is no such provision in PG&E's contract even if a modification to Agreement "B" was proposed. Duke Energy has also included the right for it to transfer the units to another form of the contract before the dispute procedure (which does not currently exist) is resolved and allow it to recover costs retroactively based on the outcome of the dispute. There are no such provisions in PG&E's contract.

Section 3.6(a) is a new provision that allows Duke Energy to transfer a unit from an Agreement "B" to an Agreement "A" 30 days after the Commission approves its initial rates. This provision along with Section 3.2 allows Duke Energy to transfer between Agreements "A" and "B" much more frequently than other must-run owners, thereby taking advantage of the various provisions and rates as seasons change. Also, the notice provision is 30 days, while other RMR owner's notice provisions are 90 days.

Section 3.6(b) is a new provision that allows Duke Energy to transfer from one form of the contract to another if it does not like a Commission decision affecting its rates, terms and conditions. This is basically a regulatory-out-clause applicable if the Commission requires a modification to any rate, terms or condition if the Commission

finds that such rate, term or condition previously in place was unjust, unreasonable or discriminatory. No other must-run owner has a regulatory-out-clause, which allows it to avoid a Commission decision that may be unfavorable to it. This provision allows for more frequent transfers among contracts than other must-run owners are allowed, thereby taking advantage of the various provisions and rates as seasons change. Also, the notice provision is 30 days, while other RMR owner's notice provisions are 90 days.

Section 4.1(e) requires the ISO to issue dispatch notices under certain circumstances while PG&E's contract (Agreement A, B and C, Section 3.1(f)) states that the ISO shall not be required to issue dispatch notices, but shall be entitled to do so under certain circumstances. This provision is substantially different in that it changes a right of the ISO to an obligation.

Section 4.3 is substantially different from PG&E's Agreements A, B & C Sections 5.3(b) and 5.4(b), which address what will happen if the ISO needs to issue a dispatch notice for a start-up, generation hours or services hours above the monthly service limits for Agreement "A" and annual service limits for Agreements "B or C". Duke also included the maximum hourly generation commitment as one of the service limits to which Schedule G would also be applicable. Section 4.4 is a new provision allowing the parties to negotiate a price up to a cap for services provided above the hourly, monthly and annual service limits. This is not a negative proposal, but may be unrealistic in practice. If the ISO needs services above the contract levels there most likely will not be time to negotiate a price, and therefore, the cap price would be paid.

Section 4.5(a)(iii) is a new provision that allows Duke Energy to have a two percent margin for error for successfully completing an availability test. PG&E does not

have a margin of error. It must successfully complete the availability test to the specifications that the ISO has ordered.

Section 4.5(c) is a new provision that allows an owner to order an annual heat rate test. It is unclear whether the ISO would be required to pay for such a test. The Agreement under Section 4.5(a)(iv) specifically requires the owner to pay for any availability test that the owner has requested, but there is no such language under Section 4.5(c). Even without the additional payment requirement, this is a substantial change in that no other owner has the ability to request a heat rate test. Other owners must use the heat rate information listed in their current schedules.

The payment terms and conditions provision, Section 8.3, is substantially different from PG&E's contract Section 4.5 in Agreement "A" and Section 4.6 in Agreements "B & C" in that it allows Duke Energy to suspend service if payment is more than 30 days late and a good faith dispute has not been initiated. There is no right to suspend service to the ISO in PG&E's contract. There is only a right to terminate for default in payment. The payment terms are vital to the ISO. The ISO does not have the funds to pay must-run invoices unless it receives full payment from the utilities responsible for payment of all must-run costs as defined in Section 5.2.7 of the ISO Tariff. This concern is why the ISO has worked diligently to negotiate a resolution with all the must-run owners and responsible utilities. Duke Energy and PG&E are the only parties that have not resolved the payment terms with the ISO.

Sections 8.4 through 8.7 of Duke Energy's contract are new provisions. There is not a requirement for the ISO to issue a letter of credit as referenced in Duke Energy's Section 8.5, nor to grant a security interest as referenced in Section 8.6, in any other

must-run owner's contract. No other must-run owner or utility responsible for payment has such rights and remedies.

Section 9.4 concerning repairs, replacements and capital improvements is substantially different. PG&E's corresponding Section 5.1 in Agreement "B" states specific reasons why the ISO may object to a capital improvement, while Duke Energy's contract provision would require the parties to negotiate and proceed with alternative dispute resolution if necessary. Without, the seven criteria listed in PG&E's Section 5.1(d), the ISO does not have the evidence it needs to justify its determination regarding a denial of a proposed capital improvement, and the ISO may not be able to meet its burden of proof before an arbitrator.

Additionally, in Section 9.4(e) Duke Energy has granted itself the right to seek recovery of such costs through rates under the contract, which basically eliminates the ISO's existing right to determine what repairs, replacements and capital improvements will and will not be paid for by the ISO. Section 9.4(e), would allow Duke Energy to do as it wishes and let the Commission decide later how much the ISO would be required to pay. Conversely, if the ISO maintains that a capital improvement should be made and Duke Energy does not agree, an arbitrator will make the final decision. Determining whether a capital improvement should be made at a particular must-run unit should be the sole decision of the ISO if the ISO is expected to pay for that capital improvement. The ISO is the entity solely responsible for the reliability of the ISO Controlled Grid. There may be other options the ISO is willing to take into consideration when the must-run owner proposes major repairs and replacements or capital improvements. Such options may be i) transmission expansion projects, repairs, replacements or capital improvements

at other units whether must-run or not, iii) changes to the ISO's operations to improve scheduling, dispatching or communications, or iv) changes to the bidding rules in the Ancillary Services market to improve the market's ability to support reliability needs. The ISO should not be paralyzed in its responsibility to manage the ISO Controlled Grid to the best of its ability and allowed to utilize as many options as possible.

Section 9.5, allowing the owner to build an upgrade, includes a new provision that states the ISO will have no rights to any extra capacity or services increased or enhanced by the upgrade if the ISO and Duke Energy have not agreed on the amount the ISO should pay for the upgrade. This provision is substantively different from PG&E's corresponding provision in Agreements "B & C", Section 5.1(k), which allows PG&E to build an upgrade but states that no such upgrade shall release the owner from or modify or affect the owner's performance obligations under the contract.

Duke Energy has also revised the "best efforts" standard in PG&E's agreement. In Section 10.3 "Remedial Efforts," the best efforts obligation was replaced with "reasonable efforts". PG&E is obligated to use best efforts to remedy a force majeure event should the circumstances require such action, while Duke Energy can just use reasonable efforts and have fulfilled its obligations under the contract. There is a significant difference under California case law between "best efforts" and "reasonable efforts." When pursuing the latter, a party may take economics into account when making a business decision, while under the former standard a party may not.

Duke Energy's Section 11.3, which allows the ISO to seek injunctive relief, does not grant the owner's consent to the ISO obtaining such relief, PG&E's Agreements "B & C," Section 7.2 state that the ISO shall be entitled to seek and obtain such relief.

In Section 11.4, the termination for default provision is substantially different in that it is reciprocal. Duke Energy has removed the process by which the ISO determines how much, if any, of an exit fee the owner will receive for capital improvements not fully recovered at the time of termination,[2] and the provision establishing the procedure under which the ISO determines if the owner will have to repay a portion of the exit fee it received if it reopens the unit within three years after the ISO has paid the exit fee. PG&E's corresponding provision is Section 2.2. of Agreements "B & C." It sets forth specific restrictions on the owner's ability to receive and keep an exit fee based on its market decisions. Furthermore, Schedule B Item (e) in Agreements "B & C" states the formula for the lump sum exit fee.[3] Duke Energy's contract offers no such formula.

The insurance provision in Section 12.2(b) is substantially different from PG&E's Schedule F. There is a new requirement for the ISO to add the owner on its commercial liability and errors and omission insurance policy, and there is no reciprocal treatment (which Duke Energy seems to favor elsewhere in the contract) for the ISO to be included as an additional insured on Duke Energy's insurance policy. Even though Duke Energy changed several other provisions of the Must-Run Agreement to make them reciprocal in Duke Energy's favor, such as Sections 11.4, 12.3, 12.4 and 13.7. This obligation is only directed at the ISO. It is the must-run owner's staff or subcontracted staff at the must-run

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[2] ISO's payment of outstanding capital improvement costs is contingent upon whether or not the owner plans to remain in the market or close the unit permanently. If the unit remains in the market, then future customers who will benefit from the repair, replacements or capital improvement should, and will under the ISO's current contract with PG&E, pay for those amortized improvements to a unit.

[3]Under Agreement " A" there is no approval process for capital improvements, and therefore, no procedure for recovery of any costs. A unit under Agreement "A" is presumed to be actively participating in the markets and recovering a major percentage of its costs from the market.

facilities that is directly operating and controlling the units, and who have ultimate responsibility for maintaining the safety of the plant. If something were to happen at a unit that would lead to an insurance claim, the owner's insurance should name the ISO as an additional party in order to protect the ISO if the owner is found ultimately responsible.

Duke Energy changed the performance security provision in Section 12.3, and the books and records provision in Section 12.4. These two provisions change two of the ISO's exclusive rights as stated in PG&E's contract in Agreements "B & C," Sections 8.3 and 8.4, into reciprocal provisions. Additionally, Duke Energy placed a two year limitation on how long the ISO has to request to review the owner's books and records.

Section 12.8, the indemnification provision, incorporates third party claims caused by negligence or willful misconduct and limits the indemnification to the deductible of the indemnifying Party's commercial general insurance. Under PG&E's indemnification provision, Agreement "A" Section 8.4 and Agreements "B & C" Section 8.6, neither party indemnifies the other's willful misconduct and does not reference a financial limit on the amount for indemnification.