THE UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Fact-Finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices	**)** **)** **)**	**Docket No. PA02-2-005**

ANSWER OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION IN OPPOSITION TO MOTION OF DUKE ENERGY NORTH AMERICA, LLC, AND DUKE ENERGY TRADING AND MARKETING, LLC FOR EXPEDITED APPROVAL OF LIMITED DISCOVERY

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.213 (2002), the California Independent System Operator Corporation ("ISO") hereby answers the Motion of Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC's (collectively "Duke") for Expedited Approval of Limited Discovery, filed with the Commission on April 4, 2003.

Duke's request for "limited discovery" is, in fact, a thinly veiled attempt to derail the Commission's efforts to provide full and timely relief for wrongs during the California crisis. Duke has been on notice since the beginning of the 100-day discovery period in EL00-95 that whether violations of the ISO and PX tariffs had occurred was a crucial issue, and Duke had a full opportunity to seek the type of discovery it contends it now needs. Moreover, it is clear form Duke's own filing that the discovery it seeks is not at all "limited," as it would have the Commission believe.

When the Ninth Circuit remanded the matters before it to the Commission, and the Commission ordered the 100-day discovery period, both did so against the

background of Commission orders clearly stating that additional relief could be ordered *if* violations of the ISO or PX tariffs could be established. *See* San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al., 96 FERC ¶ 61,120 (2001) at 61,507-08. Moreover, during the 100-day discovery proceeding, Duke and other sellers spent two days taking the deposition of Dr. Anjali Sheffrin, the Director of the ISO's Department of Market Analysis, and either Duke or any other seller could have asked her then any questions it wanted about interpretation of the Market Monitoring and Information Protocol ("MMIP"). At that time, all of the sellers' attention was apparently elsewhere, and now Duke on their behalf wants the Commission to give them a second bite at the apple. Equally amazingly, Duke passed up the opportunity to depose Eric Hildebrandt, the Director of Market Monitoring within DMA, but now it suddenly wants to depose him. Duke and the other sellers simply cannot sit on their rights for 100 days and now ask the Commission to disrupt the orderly process it has established to bring closure to the issue of Tariff violation, so that they can embark on a fishing expedition for several more weeks (at a minimum).[1]

And make no mistake, a fishing expedition is what Duke seeks. Duke titled its motion as one for "limited discovery," and cleverly attached four data requests and three deposition notices. It does not even require reading of the fine print, however, to see that these data requests and these depositions would be only the proverbial camel's

[1] Duke's couple of data requests aimed at interpretation of the MMIP were buried among some 435 separately numbered (and sometimes multi-part) data requests that Duke posed to the ISO during the 100-day discovery process. As the ISO noted in its recent filing opposing another motion by Duke (along with other generators), when time grew short in the discovery period and the ISO sought informal guidance from Duke as to which requests were most important, Duke identified other data requests and *not* the ones seeking materials related to tariff interpretation. It bears noting that neither Duke nor any other seller brought any motion to compel discovery from the ISO during the 100-day discovery period, even though they together posed nearly 1000 separately numbered data requests to the ISO.

nose. Duke first maintains that the discovery it seeks is "of the type" allegedly relevant to whether parties were on notice of proscribed conduct. But in the very next sentence, Duke states that "other evidence may be relevant as well" – without any hint of just how far afield of the "type" of evidence mentioned in the previous sentence Duke might venture if allowed to undertake more discovery. Later, Duke makes clear that the attached data requests are only illustrative, and that the depositions are only the beginning, as well.[2] *See* Duke Motion at 5. The Commission should be under no illusion that it can grant Duke's motion without seriously disrupting any reasonable schedule it might have for resolving the issues stemming form the California crisis of 2000-2001; Duke's purpose is to delay, delay, delay, the advent of any potential enforcement actions.[3]

The Commission should ignore Duke's suggestions that the Commission cannot legally act without granting Duke's request, s*ee, e.g.*, Duke Motion at 5, or that any sanctions the Commission might impose would be "retroactive." *See id.* at 2. Perhaps Duke was simply trying to influence the Commission's decision on the merits of whether there have been tariff violations. In any event, as shown above, even if Duke's version of the law were correct, Duke and the other sellers have had more than enough opportunity to adduce any evidence they wanted; the Commission can simply take note of that opportunity provided in EL00-95 when it rules in this docket. There is certainly nothing "retroactive" about any show-cause orders the Commission might issue; the

[2] "Duke Energy intends to serve a limited number of data requests, *including* those attached hereto as Appendix A, and notices of deposition, *including* those attached hereto as Appendix B." (Emphasis added.)

[3] Even the data requests Duke attached to its motion reveal its real purpose: witness the unnecessary breadth of the fourth data request.

tariff provisions were *in effect* when the prohibited activities occurred, so the tariffs would be applied *prospectively*.

Moreover, the entire legal premise for Duke's request for discovery lacks foundation. None of its cited cases, properly understood, suggest that any factual discovery is necessary to interpret the provisions of the MMIP. [4]

Finally, granting Duke's motion would impose a serious burden on the ISO. Even if discovery was limited to the data requests attached to Duke's motion (which, as noted above, is not even what Duke is requesting), those requests are broad in the extreme, asking essentially for any document that has any relevance to the creation and enforcement of the ISO's MMIP. This burden is especially onerous at present because, in addition to its day-to-day operations and market monitoring activities, the ISO is preparing to recalculate the mitigated market clearing prices and perform the settlement and billings reruns to implement the Commission's order on refunds.

Duke's invitation to compromise, *i.e.*, to allow its fishing expedition during any "show-cause" period the Commission might order, *see* Duke Motion at 7, must also be rejected. Duke has had its opportunity for this kind of discovery. Its motion is a

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[4] The cases cited by Duke Energy can easily be distinguished from the current situation. Each of those cases involved circumstances in which the regulation or standard upon which an enforcement action was based either was silent on the issue of the alleged violating activity, was internally contradictory, or could reasonably be interpreted to allow the activity. For instance, *U.S. v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998), concerned whether an automobile manufacturer could be penalized for using a particular procedure for demonstrating compliance with an automobile safety standard where the standard and the published laboratory test procedures for the standard did not address the specific aspect of the testing that was at issue. *Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154 (D.C. Cir. 1986) and *Kropp Forge Co. v. OSHRC*, 657 F.2d 199 (7th Cir. 1981) also involved enforcement actions where the relevant regulations were silent on the specific issues at hand. In *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995), the EPA regulations were contradictory, with one section appearing to expressly allow the specific conduct that was the basis for the enforcement action. *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987) involved a similar situation. Finally, *Upton v. Securities and Exchange Comm.*, 75 F.3d 92 (2d Cir. 1996), involved activity that undisputedly complied with the literal terms of the Commission's rule but was alleged to violate the "spirit" of the rule.

delaying tactic. The legal basis for the motion is non-existent. The Commission should stick to the procedure it has set out: determine *now* whether the plain words of the tariffs support Commission sanctions, and if the answer to that is yes, proceed with a determination as to whether the conduct engaged in merits sanctions.

CONCLUSION

For the foregoing reasons, the ISO urges the Commission to deny the Duke Motion.

Respectfully submitted,

/s/ J. Phillip Jordan

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Dated: April 7, 2003

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April 7, 2003

The Honorable Magalie Ramon Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Fact-Finding Investigation Into Possible Manipulation of Electric and Natural Gas, Docket No. PA02-2-005

Dear Secretary Salas:

Enclosed is an original and fourteen copies of the Answer of California Independent System Operator Corporation In Opposition To Motion Of Duke Energy North America, LLC, And Duke Energy Trading And Marketing, LLC For Expedited Approval Of Limited Discovery.

Also enclosed is an extra copy of the filing to be time/date stamped and returned to us by the messenger. Thank you for your assistance.

Respectfully submitted,

/s/ Michael Kunselman

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 7th day of April, 2003.

/s/ Michael Kunselman
Michael Kunselman