

118 FERC ¶ 61,094
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Dynegy Power Marketing, Inc. and Dynegy
Midwest Generation, Inc.

Docket No. ER07-323-000

ORDER ON REQUEST FOR WAIVER OF CERTAIN TARIFF PROVISIONS
REGARDING ANCILLARY SERVICES

(Issued February 12, 2007)

1. On December 14, 2006, Dynegy Power Marketing, Inc. (Dynegy Power Marketing) and Dynegy Midwest Generation, Inc. (Dynegy Midwest) (collectively, Applicants) filed a request for waiver of certain provisions of their respective market-based rate tariffs in order to permit Dynegy Power Marketing to make market-based rate sales of certain ancillary services to Ameren Illinois Utilities.¹ Specifically, Dynegy Power Marketing requests waiver of section 3(b) of its tariff to permit sales of ancillary services to the Ameren Illinois Utilities for resale to customers under the open access transmission tariff (OATT) of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). The Applicants also request waiver of section 2 of their respective tariffs in order to allow such sales, and the prior sale of ancillary services by Dynegy Midwest to Dynegy Power Marketing, to occur without electronic postings that might otherwise be required. In this regard, Applicants state that “[w]hile [Dynegy Power Marketing] and Ameren are still in the process of finalizing the contract resulting from

¹ “Ameren Illinois Utilities” includes Central Illinois Light Company d/b/a AmerenCILCO, Central Illinois Public Service Company d/b/a AmerenCIPS, and Illinois Power Company d/b/a AmerenIP.

the [Request for Proposals (RFP)], the Applicants are submitting this request in anticipation of the ancillary service sales commencing on January 1, 2007.”²

2. In this order, we conditionally grant Applicants’ request for waiver of the prohibition of sales of ancillary services at market-based rates by a third-party supplier to a public utility who is purchasing ancillary services to satisfy its OATT requirements to offer ancillary services to its own customers (section 3(b) of the Dynegy Power Marketing tariff), subject to refund and subject to the outcome of the hearing and settlement judge procedures in Docket Nos. ER07-169-000 and ER07-170-000 (Ameren Ancillary Services Proceeding).³ However, we will deny Applicants’ request for waiver of the electronic posting requirement (section 2) without prejudice to Applicants providing more information to support that request.

I. Background

3. Under Illinois electricity restructuring law, the Ameren Illinois Utilities were permitted to divest their generation and did so. Thus, the Ameren Illinois Utilities have virtually no generation with which to provide electric service, including the ancillary services they are required to provide under applicable tariffs. In order to meet their obligations to provide electricity and ancillary services following divestiture of their generation resources, the Ameren Illinois Utilities entered into bilateral purchase agreements. These contracts expired on December 31, 2006.⁴

4. Applicants explain in the instant filing that Ameren Services Company (Ameren Services)⁵ issued an RFP for bids to supply ancillary services.⁶ Applicants state that

² Applicants’ December 14, 2006 Filing at 4.

³ *Ameren Energy Marketing Co.*, 117 FERC ¶ 61,334 (2006) (Ancillary Services December Order).

⁴ Ancillary Services December Order, 117 FERC ¶ 61,334 at P 2.

⁵ Ameren Services is a wholly-owned subsidiary of Ameren Corporation, the ultimate corporate parent of the Ameren Illinois Operating Companies.

⁶ The RFP was issued on March 1, 2006, and a second, revised RFP was issued on August 22, 2006. The revised RFP solicited bids to supply 56 MW of spinning reserve service, 68 MW of supplemental reserve service, and 100 MW of regulation and frequency response for the period of January 1, 2007 through December 31, 2007, or until a Midwest ISO ancillary services market for each service is operational, whichever

(continued)

Dynegy Power Marketing and Dynegy Midwest won a portion of the RFP to provide certain ancillary services⁷ to Ameren Illinois Utilities at market-based rates. However, in order to provide the ancillary services, Applicants request certain waivers of their market-based rate tariffs. Specifically, Applicants state that their tariffs authorize the sale of ancillary services outside organized markets at market-based rates subject to conditions and restrictions adopted in *Avista*.⁸

5. In considering the sale of ancillary services at market-based rates, in *Avista*, the Commission prohibited such sales by a third-party supplier to a public utility who is purchasing ancillary services to satisfy its OATT requirements to offer ancillary services to its own customers,⁹ but stated that the Commission was open to considering requests for market-based rate authorization to make such sales on a case-by-case basis.¹⁰ In the

occurs first. *See* Ancillary Services December Order, 117 FERC ¶ 61,334 at P 3. Ameren's affiliates (Ameren Energy Resources Generating Company and Ameren Energy Generating Company, via their agent, Ameren Energy Marketing Company, and AmerenUE, via its agent, Ameren Energy, Inc.) won a portion of the revised RFP that required them to provide all three types of ancillary services to Ameren Illinois Utilities on a cost-basis. In the Ancillary Services December Order, the Commission accepted and suspended Ameren's affiliates' proposed rate schedules, subject to refund and further Commission order. The Commission directed Commission staff to convene a technical conference in order to address affiliate abuse issues, and set for hearing and settlement judge procedures the cost-of-service basis for the proposed rates.

⁷ We note that the Applicants do not state in their transmittal which ancillary services they propose to provide. However, Ameren Services Company states at page 3 of its motion to intervene and supporting comments that Dynegy Power Marketing "was one of the prevailing bidders through the RFP process for Schedule 3, Regulation and Frequency Control Service."

⁸ *Avista Corp.*, 87 FERC ¶ 61,223 (1999) (*Avista*), *order on reh'g*, 89 FERC ¶ 61,136 (1999).

⁹ In this regard, Applicants state that although Ameren's resale of ancillary services purchased from Dynegy Power Marketing would be under the Midwest ISO's – and not Ameren's – OATT, Dynegy Power Marketing has assumed, out of an abundance of caution, that the section 3(b) prohibition would apply.

¹⁰ *Avista Corp.*, 87 FERC at 61,883, n.12. On rehearing, the Commission explained that without such a prohibition a "transmission provider could substitute purchases under non-cost-based rates [*i.e.*, market based rates] for its mandatory service obligation." *Avista Corp.*, 89 FERC ¶ 61,136 at 61,391-92 (1999).

instant filing, Dynegy Power Marketing requests waiver of this *Avista* requirement (which is in section 3(b) of its tariff) in order to allow it to sell certain ancillary services at market-based rates to Ameren Illinois Utilities pursuant to the ancillary services RFP discussed above.

6. Another provision in *Avista* concerns the electronic posting of certain information. The Commission required an Internet-based OASIS-like site for posting information concerning ancillary services transactions (this requirement is in section 2 of the respective tariffs), including postings of offers of services available, the offering prices, and requests accepted and denied.¹¹ In this filing, Applicants request waiver of the posting requirement to allow sales of ancillary services by Dynegy Power Marketing to Ameren Illinois Utilities and the prior sale of ancillary services by Dynegy Midwest to Dynegy Power Marketing to occur without electronic postings.¹²

7. Applicants request waiver of the 60-day prior notice requirement to allow the requested waivers to become effective January 1, 2007.

II. Notice Of Filing And Pleadings

8. Notice of Dynegy Power Marketing's and Dynegy Midwest's filing was published in the *Federal Register*, 71 Fed. Reg. 78,178 (2006), with interventions and protests due on or before January 4, 2007. Ameren Services filed a timely motion to intervene and supporting comments. Southwestern Electric Cooperative, Inc. (Southwestern), Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (Constellation) and J. Aron & Company filed motions to intervene out-of-time. Soyland Power Cooperative (Soyland) filed a motion to intervene out-of-time and protest. Illinois Municipal Electrical Agency (IMEA) filed a motion to intervene out-of-time, protest, and motion to consolidate with the ongoing proceedings in Docket Nos. ER07-169-000 and ER07-170-000. On January 23, 2007, Applicants and Ameren Services filed answers.

9. Ameren Services states that Dynegy Power Marketing was one of the prevailing bidders through the RFP process for regulation and frequency response service. Ameren Services states that Ameren Illinois Utilities executed the contract with Dynegy Power

¹¹ *Id.* at 61,884.

¹² We note that Applicants' submittal fails to provide any details or description regarding sales between Dynegy Midwest and Dynegy Power Marketing.

Marketing with service commencing on January 1, 2007.¹³ Ameren Services states that approval of the waiver request is necessary to ensure that Ameren Illinois Utilities will have adequate sources for the ancillary services that they, as a Balancing Authority/Control Area operator within the Midwest ISO, must provide. Also, Ameren Services states that because Dynegy Power Marketing was selected as the supplier through a competitive process, its intended sales of ancillary services to Ameren Illinois Utilities do not give rise to the anti-competitive behavior targeted by the restrictions in the Dynegy Power Marketing and Dynegy Midwest market-based rate tariffs.

10. Soyland, on the other hand, protests Applicants' filing. Soyland argues that in light of the rates proposed in the Ameren Ancillary Services Proceeding in Docket Nos. ER07-169-000 and ER07-170-000, which are the result of the RFP, it is unjust and unreasonable to grant Applicants' request to not even make their rates – which are a result of the same RFP process – known to the transmission customers such as Soyland who will bear such costs. Soyland requests that the Commission deny Applicants' waiver requests or, in the alternative, set the matter for hearing.

11. IMEA protests the filing, stating that, although it may be that Applicants' rates are the lowest available to Ameren Illinois Utilities, because the rates were filed under protective seal, IMEA, as a customer for these ancillary services, has no way to determine what the rates are and whether they were the result of a competitive market. IMEA notes that, in *Avista*, the Commission established a generic policy allowing, in limited circumstances, third-party ancillary service providers who are authorized to sell power and energy at market-based rates to also sell ancillary services at market-based rates. First, such sales can only be made if the seller cannot perform a market study but makes public specified information about the ancillary services being sold, including services available, prices, and requests granted and denied. Second, the Commission conditioned its permission of sales of ancillary services at market-based rates on the “backstop” ability of a transmission provider to self-supply ancillary services at cost-based rates.

12. IMEA states that the consumer protections created by *Avista* are not in evidence from the Applicants' filing. Among other things, IMEA states that the transmission provider here does not have cost-based rates on file against which the third-party ancillary services seller is presumed to compete; there are only the filed-for rates of the

¹³ Ameren Services attached to its comments on a confidential basis, pursuant to 18 C.F.R. § 388.112, a copy of the executed agreement for the sale of ancillary services between Dynegy Power Marketing and Ameren Illinois Utilities.

transmission provider's affiliates. IMEA asserts that those rates, and the process by which they were negotiated, have not been found just and reasonable by the Commission.

13. In their answers, Applicants and Ameren Services argue that Soyland and IMEA have not justified their motions to intervene out-of-time. Applicants and Ameren Services oppose IMEA's motion to consolidate this proceeding with the pending proceeding in Docket Nos. ER07-169-000 and ER07-170-000. Additionally, Applicants state that concerns about rates not being made public are misplaced because the rates will be reported in Dynegy Power Marketing's Electronic Quarterly Reports, consistent with the Commission's requirements for market-based rates.¹⁴

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene of Ameren Services serves to make it a party to this proceeding.

15. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R § 385.214(d) (2006), the Commission will grant Southwestern's, Constellation's, J. Aron & Company's, IMEA's and Soyland's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' and Ameren Services' answers because they have provided information that assisted us in our decision-making process.

B. Analysis

17. As discussed below, we conditionally grant, effective January 1, 2007,¹⁵ Applicants' request for waiver of the prohibition of sales of ancillary services at market-based rates by a third-party supplier to a public utility who is purchasing ancillary

¹⁴ See *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). See 18 C.F.R. § 35.10b (2006).

¹⁵ *Central Hudson Gas and Electric Co.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

services to satisfy its OATT requirements to offer ancillary services to its own customers (section 3(b) of the Dynegy Power Marketing tariff), subject to refund and subject to the outcome of the hearing and settlement judge procedures in the Ameren Ancillary Services Proceeding in Docket Nos. ER07-169-000 and ER07-170-000. We will deny, without prejudice, Applicants' request regarding waiver of the electronic posting requirement (section 2).

18. In *Avista*, the Commission explained its belief that entry by third-party suppliers in ancillary services markets in which a transmission provider is obligated to provide such services at cost-based rates can potentially result in lower prices than would otherwise emerge. The Commission stated: "We base our policy in this case on the expectation that – as entry into ancillary service markets occurs – prices will decrease from the level established by the transmission provider's cost-based rate. Under these circumstances, customers will pay prices for ancillary services that are no higher than and will very likely be lower than the transmission provider's cost-based rate. The ancillary services customers will be protected in part by the availability of the same ancillary services at cost-based rates from the transmission provider. The backstop of cost-based ancillary services from the transmission provider will, in effect, limit the price at which customers are willing to buy ancillary services."¹⁶

19. Although the Commission stated that the policy announced in *Avista* would generally not apply to sales of ancillary services at market-based rates by a third-party supplier to a public utility who is purchasing ancillary services to satisfy its OATT requirements to offer ancillary services to its own customers, the Commission did indicate that it was open to considering requests for market-based rates in such circumstances on a case-by-case basis.¹⁷

20. Applicants argue that the RFP was sufficiently robust to discipline prices for Dynegy Power Marketing's sales of ancillary services to Ameren Illinois Utilities in a manner that alleviates the concerns underlying the prohibitions reflected in section 3(b) of the Dynegy Power Marketing tariff.

21. Also, Applicants represent that the cost-based rates for ancillary services proposed by the Ameren affiliates serve the same function as the cost-based rates for ancillary

¹⁶ *Avista Corp.*, 87 FERC at 61,883 (footnote omitted).

¹⁷ *Id.* at n.12.

services provided under a transmission provider's OATT.¹⁸ Based on Applicants' representation in this regard and in this particular circumstance, where a third party provider of ancillary services wishes to provide ancillary services to a transmission provider that has divested its generation but retains an obligation to provide ancillary services under its tariff, we will grant the requested waiver, but only to the extent that the Applicants' rates will be no higher than the Commission-approved cost-based backstop. However, as noted above, Ameren affiliates' rate schedules to implement cost of service rates for the sale of ancillary services to the Ameren Illinois Utilities have not yet been approved by the Commission, but rather were accepted for filing, subject to refund, and set for hearing and settlement judge procedures to address cost-of-service issues.¹⁹ Therefore, we grant the requested waiver conditioned upon the rates at issue here being no higher than the cost-based rate ultimately approved by the Commission in the Ameren Ancillary Services Proceeding. As such, we conditionally grant Applicants' request for waiver of section 3(b) of the Dynegy Power Marketing Tariff, subject to refund and subject to the outcome of the pending Ameren Ancillary Services Proceeding.

22. If the rate approved by the Commission in the Ameren Ancillary Services Proceeding is the same as, or higher than, Applicants' ancillary services rates in the instant proceeding, our grant of waiver will no longer be conditional and the rates at issue here will no longer be subject to refund. In this regard, we will require Applicants to submit a compliance filing, within 30 days of the date of a Commission order accepting the rate in the Ameren Ancillary Services Proceeding, demonstrating that the rate at issue here is no higher than the rate in the Ameren Ancillary Services Proceeding. We note that Applicants bear the risk that they might make sales that prove to be higher than the rate approved in the Ancillary Services Proceeding and, in such circumstances, refunds will be due. Accordingly, to the extent that the rate in the Ameren Ancillary Services Proceeding is lower than the rate at issue here, we will require Applicants to make refunds, with interest, within 30 days of the date of the Commission order accepting the rate in the Ameren Ancillary Services Proceeding. Then, 30 days thereafter, Applicants will be required to submit a refund report to the Commission.

23. In response to IMEA's arguments, we reiterate that our approval is conditioned upon Applicants' ancillary services rates being no higher than the rates that are ultimately

¹⁸ We note that Applicants suggest that their rates are lower than the cost-based ancillary services rates at issue in the Ameren Ancillary Services Proceeding. Applicants' December 14, 2006 Filing at 3, n.10.

¹⁹ Ancillary Services December Order, 117 FERC ¶ 61,334 at P 17.

approved in the Ameren Ancillary Services Proceeding. Moreover, we note that all jurisdictional rates, including the rate for ancillary services provided by Dynegy Power Marketing will be reported in Dynegy Power Marketing's Electric Quarterly Reports. Because our grant of the waiver of section 3(b) of the Dynegy Power Marketing tariff thus is conditioned on there being a cost-based "backstop," we believe that our action here will protect customers and should alleviate the concerns expressed by protesters. Additionally, we will deny Soyland's request to set this matter for hearing for this same reason.

24. We will deny IMEA's request to consolidate the proceedings. The Commission formally consolidates cases for purposes of hearing and subsequent decision when instituting a trial-type evidentiary hearing or other further procedures, such as a paper hearing or technical conference.²⁰ We established such procedures in Docket Nos. ER07-169-000 and ER07-170-000 to address the proposal by the Ameren affiliates to sell ancillary services, but we are not instituting further procedures here. Instead, we are conditioning our approval on the outcome of those proceedings.

25. Lastly, with respect to Applicants' request for waiver of the electronic posting requirement in section 2 of their tariffs, we find that Applicants have not provided a justification for their request. Applicants failed to proffer any basis on which they believe a waiver of the electronic posting requirement is justified in connection with the sales of ancillary services to Ameren Illinois Utilities, and the prior sale of ancillary services by Dynegy Midwest to Dynegy Power Marketing. As for ancillary services sales between Dynegy Midwest and Dynegy Power Marketing, Applicants have failed to provide any details or description of these sales at all. We therefore will deny Applicants' request for waiver of the electronic posting requirement in section 2 of their tariffs without prejudice to Applicants providing more information to support that request. We find that our action in this regard addresses the concerns expressed by Soyland and IMEA.

The Commission orders:

(A) Applicants' request for waiver of section 3(b) of Dynegy Power Marketing's market-based rate tariff is hereby conditionally granted, effective January 1, 2007, subject to refund and subject to the outcome of the hearing and settlement judge procedures in Docket Nos. ER07-169-000 and ER07-170-000, as discussed in the body of this order.

²⁰ See, e.g., *Entergy Services, Inc.*, 108 FERC ¶ 61, 107 at P 21 (2004).

(B) Applicants' request regarding waiver of the electronic posting requirement is hereby denied, without prejudice, as discussed in the body of this order.

(C) The motion for consolidation is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.