

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

Docket No. EL00-95-128

v.

Sellers of Energy and Ancillary Services  
Into Markets Operated by the California  
Independent System Operator and the  
California Power Exchange Corporation

Investigation of Practices of the California  
Independent System Operator  
And the California Power Exchange

Docket No. EL00-98-115

ORDER APPROVING OFFER OF SETTLEMENT

(Issued July 6, 2005)

1. In this order, we approve without modification an Offer of Settlement filed by Dynegy Power Marketing, Inc. (Dynegy) on April 1, 2005, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2004), to resolve protests related to the fuel cost allowance (FCA) claim made by Dynegy in the California Refund Proceeding. This order benefits customers by promoting efficient resolution of Dynegy's outstanding FCA claim, which in turn will facilitate final resolution of the California Refund Proceeding in Docket No. EL00-95.

**I. Background**

2. On March 26, 2003, the Commission changed the methodology for calculating mitigated prices in the California Refund Proceeding, and required generators to use natural gas producing-area prices plus a tariff rate transportation allowance instead of spot index prices.<sup>1</sup> Concerned that this revised methodology could tend to reduce fuel prices, potentially below a generator's actual fuel cost, the Commission gave generators

---

<sup>1</sup> See *San Diego Gas & Electric Co.*, 102 FERC ¶ 61,317 at P 61 (2003) (March 26 Order).

the opportunity to make FCA claims to recover the difference between their actual fuel costs for mitigated sales and the proxy price used to calculate mitigated prices.<sup>2</sup> On May 12, 2003, Dynegy submitted an FCA claim, as did a number of other generators.<sup>3</sup>

3. In a subsequent order, the Commission determined that the FCA claims must be independently reviewed by an outside auditor.<sup>4</sup> While issues pertaining to the audit requirement were still pending before the Commission, Dynegy entered into a Global Settlement Agreement<sup>5</sup> with the California Parties<sup>6</sup> and the Commission's Office of Market Oversight and Investigations. The Global Settlement Agreement resolved for settling parties all issues related to Dynegy's liability in the California Refund Proceeding, including recovery of the FCA.<sup>7</sup>

4. On June 14, 2004, Dynegy and the California Parties filed a joint request for waiver from the generic procedures for FCA claims, including the audit requirement,<sup>8</sup> which the Commission denied.<sup>9</sup> While the September 2 Order rejected all such requests for a blanket waiver of the audit requirement, the Commission provided that an FCA claim would not require verification by an independent auditor if no party were to oppose the entity's FCA claim.<sup>10</sup> The September 2 Order further allowed any claimant with an

---

<sup>2</sup> *Id.*

<sup>3</sup> See Dynegy Fuel Cost Allowance Submission, Docket No. EL00-95-045 (May 12, 2003).

<sup>4</sup> See *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 107 FERC ¶ 61,166 at P 74 (2004) (May 12 Order).

<sup>5</sup> See Settlement and Release of Claims Agreement, Joint Offer of Settlement, Docket No. EL00-95-000 (June 28, 2004) (Global Settlement).

<sup>6</sup> For purposes of the Global Settlement, the California Parties include: Pacific Gas & Electric (PG&E), San Diego Gas & Electric Company (SDG&E), Southern California Edison (SCE); the California Department of Water Resources acting through its Electric Power Fund, separate and apart from its powers and responsibilities with respect to the State Water Resources Development System; the California Electricity Oversight Board; the California Public Utilities Commission; and People of the State of California *ex rel.* Bill Lockyer, Attorney General.

<sup>7</sup> See *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 109 FERC ¶ 61,071 (2004) (October 25 Order).

<sup>8</sup> Expedited Joint Request of the Dynegy Parties, Williams Power Company, Inc. and the California Parties for Waiver of Fuel Allowance Filing Requirements, Docket No. EL00-95-45 (June 14, 2004).

<sup>9</sup> See *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,219 at P 22 (2004) (September 2 Order).

<sup>10</sup> *Id.* at P 22–23.

unopposed FCA to file its claim directly with the California Independent System Operator Corporation (CAISO), along with an accompanying attestation by a responsible company official.<sup>11</sup> FCA claimants that entered into settlements approved by the Commission, such as Dynegey's Global Settlement, were only required to comply with the auditing requirement if any party that chose not to opt into the settlement were to notify the Commission of its opposition to the FCA claim within 10 days of the order approving the settlement.<sup>12</sup>

5. The Commission approved the Global Settlement Agreement on September 25, 2004. Within the ten-day time frame allotted by the September 2 Order, a number of entities notified the Commission of their opposition to Dynegey's FCA claim.<sup>13</sup> Under the letter of the September 2 Order, Protestors' opposition to Dynegey's FCA claim obligate Dynegey to submit its claim for verification by the independent auditor, Ernst & Young, before the FCA claim may be processed by the CAISO.

## II. Summary of the Filing

6. In the Explanatory Statement accompanying the Offer of Settlement, Dynegey states that the proposed settlement would resolve issues related to recovery of its FCA from those parties that protested the claim, resulting in a withdrawal of all notices of opposition to Dynegey's FCA. Under the terms of the Offer of Settlement, Dynegey will waive recovery of any portion of the FCA that would otherwise be allocated to those parties who protested Dynegey's FCA claim. In consideration of this release, each Protestor will be required to file with the Commission within five days of the effective date of the Offer of Settlement, a Notice of Withdrawal of its protest of Dynegey's FCA claim. Once these protests are withdrawn, Dynegey states that it will file its FCA directly with the CAISO along with the attestation required by the September 2 Order.

7. Dynegey argues that approval of the Offer of Settlement is in the public interest because it would enable both Dynegey and Protestors to avoid further litigation regarding the recovery of the FCA, expediting the FCA process for Dynegey.<sup>14</sup> Dynegey states that it estimates that Protestors' portion of the FCA is "far less than the anticipated costs of the audit, somewhere in the range of \$1.5 million."<sup>15</sup> Dynegey asserts that elimination of the

---

<sup>11</sup> *Id.* at P 23.

<sup>12</sup> *Id.*

<sup>13</sup> The following entities protested Dynegey's FCA claim: Cities of Anaheim, Azusa, Banning, Colton, Pasadena, Redding, Riverside, Santa Clara and Vernon; Enron Power Marketing, Inc.; Los Angeles Department of Water and Power; Northern California Power Agency; and Powerex Corp. (together, Protestors).

<sup>14</sup> *See* Explanatory Statement at 5.

<sup>15</sup> *Id.* at 6.

audit requirement for Dynegy's FCA will not adversely impact non-protesting parties because: (a) there is no audit requirement associated with non-protesting parties; and (b) the Commission has provided that any party may protest the compliance filing the CAISO will make with the Commission upon its completion of the refund calculations.<sup>16</sup> Further, Dynegy argues that the Offer of Settlement is consistent with the Global Settlement Agreement the Commission approved in its October 25 Order.

### **III. Notice and Comments**

8. Notice was issued on April 5, 2005, with comments on the Offer of Settlement due on or before April 21, 2005, and reply comments on or before May 2, 2005. On April 21, 2005, California Parties;<sup>17</sup> City of Redding, California (Redding); Sacramento Municipal Utility District (SMUD); City of Santa Clara, California (Santa Clara); and Powerex Corp. (Powerex) filed timely comments. On May 2, 2005, Dynegy, City of Vernon, California (Vernon) and APX, Inc. (APX) filed timely reply comments.

9. Notices of Withdrawal of Comments were filed by SMUD on May 2, 2005, and by Redding on May 3, 2005. On May 10, 2005, the California Parties filed an answer to Dynegy's reply comments. On May 17, 2005, Dynegy filed a reply to the California Parties' answer. Finally, on June 29, 2005, California Parties filed a Notice of Withdrawal of their comments and answer to Dynegy's reply comments.

10. Santa Clara states that it does not oppose the Offer of Settlement because the Offer of Settlement would eliminate any impact of Dynegy's FCA claim on Santa Clara. Vernon and Powerex urge the Commission to approve the Offer of Settlement. Powerex argues that it is in the public interest to approve the settlement because the settlement will avoid the burden of further litigation for Dynegy, Powerex and other Protestors, and will not affect the rights of other parties.<sup>18</sup>

11. In its reply to initial comments, APX objects to the Offer of Settlement. APX argues that, once protestors have triggered the audit requirement, the audit should proceed, or, in the alternative, unless Dynegy's FCA claim is audited, "there can be no assurance that the fuel cost issues will be resolved in an efficient and equitable manner."<sup>19</sup> APX also expresses concern that the Offer of Settlement could result in cost

---

<sup>16</sup> *Id.* at 7.

<sup>17</sup> In this proceeding, 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, PG&E, SDG&E, and SCE. PG&E, SDG&E and SCE are referred to as the "California Utilities."

<sup>18</sup> Powerex Comments at 3.

<sup>19</sup> APX Reply Comments at 2.

shifts to other parties, and asserts that the Commission should condition settlement approval on having Dynegy make a compliance filing demonstrating that no parties' allocation of Dynegy's FCA changed as a result of the Offer of Settlement. In addition, APX states that it has not yet decided whether to opt-in to the Global Settlement, or whether to submit a notice opposing Dynegy's FCA claim. APX asserts that it should be allowed to reserve the right to protest Dynegy's FCA if APX were to decide not to opt-in to the Global Settlement.

#### **IV. Discussion**

##### **A. Procedural Matters**

12. Rule 213(a) (2) of the Commission Rules of Practice and Procedure, 18 C.F.R. § 385.214(2004), prohibits answers to answers. Given that the California Parties have withdrawn their protests to the Offer of Settlement, these answers are now moot and, consequently, we will reject them.

##### **B. Offer of Settlement**

13. Requiring Dynegy to submit its FCA claim to Ernst & Young, when all parties who protested Dynegy's claim are willing to withdraw their respective protests, would elevate form over substance. Our orders require verification of FCA claims by an independent auditor only if such claims are protested.<sup>20</sup> Parties have had at least two opportunities to protest FCA claims.<sup>21</sup> Now that all the parties who protested Dynegy's FCA claim have indicated their willingness to withdraw their protests, Dynegy should be allowed to file its internally verified claim directly with the CAISO.<sup>22</sup> Dynegy states that its estimated audit fees, not to mention litigation fees, far exceed the FCA proceeds it could expect to receive from Protestors.<sup>23</sup> Given this scenario, it would be patently

---

<sup>20</sup> See September 2 Order at P 22.

<sup>21</sup> Parties had an opportunity to protest Dynegy's FCA claim when it was first filed on May 12, 2003; see Dynegy Fuel Cost Allowance Submission, Docket No. EL00-95-045 (May 12, 2003). Parties that did not opt-in to the Global Settlement subsequently had 10 days after the October 25 Order approving Dynegy's Global Settlement to decide whether or not to oppose Dynegy's FCA claim. See September 2 Order at P 22.

<sup>22</sup> We note that, consistent with our prior orders, parties will have 30 days to dispute Dynegy's claim after it is filed with the CAISO. See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,311 at P 93 (2004) (providing for 30-day dispute period after FCA claims are filed with the CAISO). Parties will then have the opportunity to raise any unresolved issues involving Dynegy's FCA claim with the Commission after the CAISO submits its refund compliance filing. See *Id.*

<sup>23</sup> See Explanatory Statement at 6–7.

unreasonable for the Commission to require Dynegy to proceed with an FCA audit, simply because Protestors previously objected to Dynegy's FCA claim, when now they no longer do so. This would violate our longstanding policy of promoting settlements as the most efficient and economic means of resolving disputes.

14. We also find unwarranted APX's concern that the settlement would increase other parties' allocation of Dynegy's FCA claim. According to the terms of the Settlement Offer, the CAISO will be authorized in its processing of Dynegy's FCA claim to simply reduce to zero the FCA amount that otherwise would have been allocated to each Protestor.<sup>24</sup> We therefore find that the settlement is structured so that it will not cause any entity to bear an increase in its allocated portion of Dynegy's FCA.

15. In addition, we reject APX's contention that it should be allowed to reserve its right to protest Dynegy's FCA, and, presumably, trigger the audit requirement, until APX decides at some unspecified date in the future whether or not it will opt-in to the Global Settlement. We cannot allow APX to keep Dynegy in limbo regarding whether it must have its FCA claim audited, and hold up indefinitely the processing of Dynegy's FCA claim and the resolution of the Refund Proceeding. As noted above, APX will have two opportunities in the future to challenge Dynegy's FCA claim: (1) during the 30-day period after Dynegy files its verified FCA claim, which includes the attestation of a responsible company official; and (2) when the CAISO makes its refund compliance filing with the Commission.

16. Accordingly, the Commission accepts the Offer of Settlement because we find it to be in the public interest. The Offer of Settlement will prevent parties from having to assume the burden of further litigating Dynegy's FCA claim, and hasten resolution of the Refund Proceeding. Once all protestors have filed their notices of withdrawal of protests with the Commission, Dynegy may proceed to file its internally verified FCA claim with the CAISO, in accordance with the timeline set forth in our prior orders.<sup>25</sup>

---

<sup>24</sup> *See Id.* at 5; Settlement and Release of Claims Agreement § 3.2.

<sup>25</sup> *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services*, 110 FERC ¶ 61,293 at P 108 (2005).

The Commission orders:

The Offer of Settlement is approved without modification, consistent with the body of this order.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Linda Mitry,  
Deputy Secretary.