

153 FERC ¶ 61,128
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Public Utilities Commission of
the State of California

Docket Nos. EL02-60-012

v.

Sellers of Long Term Contracts to
the California Department of Water Resources

California Electricity Oversight Board

EL02-62-011
(Consolidated)

v.

Sellers of Energy and Capacity Under Long Term
Contracts to the California Department of Water
Resources

ORDER APPROVING UNCONTESTED SETTLEMENT AMENDMENT

(Issued February 24, 2016)

1. In this order, the Commission approves an amended settlement filed on November 2, 2015, by Dynegy Power Marketing, Inc.,¹ Cabrillo Power I LLC, El Segundo Power, LLC, and Long Beach Generation, LLC (collectively, Dynegy) and the California Public Utilities Commission (CPUC) (collectively, the Parties). The Parties submitted a Joint Offer of Settlement, a Joint Explanatory Statement, and an amendment to the Long-Term Contract Settlement and Release of Claims Agreement originally approved on November 5, 2012 (collectively, First Settlement Amendment), which resolves all claims in the above-captioned proceedings arising from the March 2, 2001 System Contingent Capacity Purchase and Sales Agreement (Dynegy Long-Term Contract) between the California Department of Water Resources and DPMI, acting as agent for Dynegy.

¹ The Parties state that Dynegy Power Marketing, Inc. is now known as Dynegy Power Marketing, LLC (DPMI).

Background

2. The background of this proceeding has previously been described at length.² Thus, only the relevant details are described briefly here.

3. On February 25, 2002, the California Electricity Oversight Board (CEOB) and CPUC filed separate, but virtually identical, complaints alleging that the rates, terms and conditions of certain long-term contracts, including the Dynegy Long-Term Contract, were unjust and unreasonable, and seeking abrogation or modification of those contracts. After an evidentiary hearing, the Commission denied the complaints, noting that the evidentiary record in this proceeding, as well as the findings of the Commission in two related proceedings, did not support modification of the contracts at issue.³ On appeal, the United States Court of Appeals for the Ninth Circuit remanded the case to the Commission, finding flaws in the Commission's analysis.⁴ On review of the Ninth Circuit's decision, the United States Supreme Court remanded the case for further consideration in light of the Court's decision in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County*.⁵ There, the Court remanded similar long-term contract matters to the Commission to "amplify or clarify" its findings on certain points. On December 4, 2008, the Ninth Circuit issued an order vacating its prior decision in the case and remanding the matter to the Commission for further proceedings consistent with the Supreme Court's *Morgan Stanley* opinion.⁶ The Commission issued an order on remand of the Ninth Circuit decision on November 17, 2014.⁷

² See, e.g., *Pub. Utils. Comm'n of Cal. v. Sellers of Long Term Contracts to the Cal. Dep't of Water Resources*, 103 FERC ¶ 61,354 (2003) (June 26, 2003 Order).

³ June 26, 2003 Order, 103 FERC ¶ 61,354 at P 3.

⁴ *Pub. Utils. Comm'n of Cal. v. FERC*, 474 F.3d 587, 594-97 (9th Cir. 2006).

⁵ *Dynegy Power Marketing, Inc. v. Pub. Utils. Comm'n of Cal.*, 128 S. Ct. 2993 (2008) (citing *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008) (*Morgan Stanley*)).

⁶ *Pub. Utils. Comm'n of Cal. v. FERC*, 550 F.3d 767 (9th Cir. 2008).

⁷ *Pub. Utils. Comm'n of the State of Cal. v. Sellers of Long Term Contracts to the Cal. Dep't of Water Res.*, 149 FERC ¶ 61,127 (2014), *clarified*, 150 FERC ¶ 61,079 (2015). The remaining active parties in this proceeding are currently in an evidentiary hearing before an Administrative Law Judge.

4. On April 27, 2012, CPUC and Dynegy filed an uncontested settlement in this proceeding, and the Commission approved the settlement as fair and reasonable and in the public interest on November 5, 2012.⁸ Under the terms of the Settlement, the Dynegy Parties agreed to cause NRG Energy, Inc. (NRG) to undertake certain investments in electric vehicle charging infrastructure (the EV Charging Station Project) over a four-to-six year period.⁹ The Settlement also required that NRG's aggregate investment in the EV Charging Station Project be \$102,500,000 (the Aggregate Investment Amount). Finally, NRG would guaranty the Dynegy Parties' timely performance of their obligations under the Settlement (NRG Guaranty).

5. Pursuant to the First Settlement Amendment filed on November 2, 2015, the Parties seek to make certain technical and supplemental changes to the Settlement that pertain to the EV Charging Station Project, as described below.¹⁰

Procedural Matters

6. The Parties filed the First Settlement Amendment pursuant to Rule 602(b) of the Commission's Rules of Practice and Procedure.¹¹ Pursuant to Rule 602(f), initial comments were due on or before November 22, 2015, and reply comments were due on or before December 2, 2015. No comments or protests were filed in response to the First Settlement Amendment.

The Terms of the First Settlement Amendment

7. In the First Settlement Amendment, the Parties are proposing to make certain technical amendments and supplemental refinements to the EV Charging Station Project, including expanding the geographical areas in which NRG has discretion to install certain additional EV charging stations over the minimum amount (if actual costs are less than

⁸ *Pub. Utils. Comm'n of the State of Cal. v. Sellers of Long Term Contracts to the Cal. Dep't of Water Res.*, 141 FERC ¶ 61,092 (2012).

⁹ The Parties explain that, at the time the Dynegy Long-Term Contract was entered into and during the period of performance thereunder, Dynegy Inc. and NRG each owned a 50 percent share in West Coast Power, which in turn owned 100 percent of the membership interests of Cabrillo Power, El Segundo Power, and Long Beach Generation. The Parties also state that NRG was neither the party that entered into the Dynegy Long-Term Contract nor "the market participant in any of the alleged improper market activities underlying the claims upon which the EL02-60/62 Proceeding are premised." Joint Offer of Settlement at n.7.

¹⁰ See Joint Offer of Settlement at 4-5.

¹¹ 18 C.F.R. § 385.602(b) (2015).

that allocated for such installation under the Settlement), revisions to the request for proposal process outlined in the Settlement, definitional changes, and other revisions.¹² The First Settlement Amendment would also permit the Parties to make further changes to the Settlement without the need for further approval from the Commission, provided that such changes do not materially reduce NRG's aggregate investment in the Electric Charging Station Project below the Aggregate Investment Amount.¹³

8. The Parties explain that the First Settlement Amendment makes no changes to the financial consideration, waivers, or releases supporting the Settlement and does not otherwise enlarge any obligation or duty, create any new obligation or duty for, or affect in any way any release received by or waiver or benefit in favor of, any of the Parties to the Settlement.¹⁴ Moreover, the Parties state that the First Settlement Amendment makes no changes to, and has no effect on, NRG's obligation to invest the Aggregate Investment Amount or its obligation to provide the NRG Guaranty.

Commission Determination

9. The First Settlement Amendment appears to be fair and reasonable and in the public interest, and is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

10. With respect to the provision of the First Settlement Amendment permitting the Parties to make changes to the Settlement without the need for further approval from the Commission, provided that such changes do not materially reduce NRG's aggregate investment in the EV Charging Station Project below the Aggregate Investment Amount,¹⁵ the Commission's approval of this provision is subject to our understanding that it relates to immaterial or technical changes that do not implicate the Commission's statutory responsibilities. However, to the extent any further amendment to the Settlement does implicate the Commission's statutory responsibilities, such amendment will remain subject to approval by, and must therefore be filed with, the Commission. Moreover, as noted in the prior paragraph, our action in approving the First Settlement Amendment here does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

¹² Joint Offer of Settlement at 4-5; Joint Explanatory Statement at 3-4.

¹³ Joint Offer of Settlement at 4-5; Joint Explanatory Statement at 4, 7; First Settlement Amendment, § (D)(2).

¹⁴ Joint Offer of Settlement at 5; Joint Explanatory Statement at 4.

¹⁵ Joint Offer of Settlement at 5; Joint Explanatory Statement at 7; First Settlement Amendment, § (D)(2).

The Commission orders:

The First Settlement Amendment is hereby approved, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.