

141 FERC ¶ 61,092  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony T. Clark.

Public Utilities Commission of  
the State of California

v.

Docket No. EL02-60-010

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

California Electricity Oversight Board

v.

EL02-62-009  
(Consolidated)

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

ORDER APPROVING SETTLEMENT

(Issued November 5, 2012)

1. In this order, the Commission approves a settlement filed on April 27, 2012, by Dynegy Power Marketing, Inc.,<sup>1</sup> 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 a Long-Term Contract Settlement and Release of Claims Agreement (collectively, the Settlement) that 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.

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

## **Background**

2. The background of this long and complex proceeding has previously been described at length.<sup>2</sup> 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. On April 25, 2002, the Commission ordered a limited evidentiary hearing to determine “whether the dysfunctional California spot markets adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue is warranted.”<sup>3</sup> In addition, the Commission determined that it needed more information to determine the applicable standard of review for those contracts, including the Dynegy Long-Term Contract, which did not contain explicit *Mobile-Sierra*<sup>4</sup> language.<sup>5</sup> After an evidentiary hearing, the presiding Administrative Law Judge (ALJ) concluded that the applicable standard of review intended by the parties for the contracts at issue was the *Mobile-Sierra* public interest standard.<sup>6</sup>
4. The Commission affirmed the ALJ’s finding that the *Mobile-Sierra* standard of review applied to all the contracts at issue and found the complainants had not met their burden of proof under that standard to justify modification or abrogation of the contracts. Thus, 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.<sup>7</sup> The Commission denied rehearing and upheld its decision to reject the complaints.<sup>8</sup>

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<sup>2</sup> See, e.g., *Pub. Utils. Comm’n of Cal. v. Sellers of Long Term Contracts to the Cal. Dept. of Water Resources*, 103 FERC ¶ 61,354 (2003) (June 26, 2003 Order).

<sup>3</sup> *Pub. Utils. Comm’n of Cal. v. Sellers of Long Term Contracts*, 99 FERC ¶ 61,087, at 61,384 (2002) (April 25, 2002 Order).

<sup>4</sup> See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

<sup>5</sup> April 25, 2002 Order, 99 FERC ¶ 61,087 at 61,383, 61,386.

<sup>6</sup> *Pub. Utils. Comm’n of Cal. v. Sellers of Long Term Contracts*, 102 FERC ¶ 63,013, at 65,025 (2003).

<sup>7</sup> June 26, 2003 Order, 103 FERC ¶ 61,354 at P 3.

<sup>8</sup> *Pub. Utils. Comm’n of Cal. v. Sellers of Long Term Contracts*, 105 FERC ¶ 61,182 (2003).

5. On appeal, the United States Court of Appeals for the Ninth Circuit remanded the case to the Commission, stating that it found flaws in the Commission's analysis.<sup>9</sup> 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*.<sup>10</sup> In *Morgan Stanley*, the Court remanded similar long-term contract matters to the Commission to "amplify or clarify" its findings on two points. First, the Court stated that the Commission's analysis should not be limited to whether consumers' rates increased immediately upon the relevant contracts going into effect, but rather should determine whether the contracts at issue imposed an excessive burden "down the line," relative to the rates consumers could have obtained (but for the contracts) after elimination of the dysfunctional spot market.<sup>11</sup> Second, the Court found that it was unclear from the Commission's orders whether the Commission found the evidence inadequate to support the claim that individual sellers' alleged unlawful activities affected the contracts at issue.

6. On December 15, 2008, Dynegy and other sellers filed a motion for a Commission order governing procedures on remand, requesting the Commission order briefing on the two discrete issues based on the existing record, and that the Commission clarify that it will not revisit its determination that CPUC and CEOB are not third-parties to the challenged contracts.<sup>12</sup> CPUC filed an answer and cross-motion,<sup>13</sup> and additional filings followed.

7. On April 27, 2012, CPUC and Dynegy filed the Settlement.

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

<sup>10</sup> *Dynegy Power Marketing, Inc. v. Pub. Utils. Comm'n of Cal.*, 128 S. Ct. 2993 (2008) (citing *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No 1 of Snohomish County*, 554 U.S. 527 (2008) (*Morgan Stanley*)). 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 Court's *Morgan Stanley* opinion. *Pub. Utils. Comm'n of Cal. v. FERC*, 550 F.3d 767 (9<sup>th</sup> Cir. 2008).

<sup>11</sup> *Morgan Stanley*, 554 U.S. at 552-53.

<sup>12</sup> Indicated Sellers' December 15, 2008 Motion for Order Governing Procedures on Remand in Dockets Nos. EL02-60-003 and EL02-62-003.

<sup>13</sup> CPUC January 14, 2009 Answer and Cross-Motion in Docket Nos. EL02-60-003 and EL02-62-003.

### **Procedural Matters**

8. The parties filed the Settlement pursuant to Rule 602(b) of the Commission's Rules of Practice and Procedure.<sup>14</sup> Pursuant to Rule 602(f), initial comments were due on or before May 17, 2012, and reply comments were due on or before May 29, 2012.

9. On May 17, 2012, ECotality, Inc. (ECotality) filed a motion to intervene and protest, Car Charging Group, Inc. (Car Charging Group) filed a motion to intervene and protest, and San Diego Gas and Electric Co. (SDG&E) filed a motion to intervene and comments supporting the Settlement. On May 29, 2012, ECotality filed a motion for administrative notice that it filed an appeal in state court, Dynegy and CPUC filed answers opposing the motions to intervene and protests. On May 30, 2012, ECotality filed a second motion for administrative notice with an update of the state court action. On June 5, 2012, Dynegy filed an answer opposing ECotality's motions. On June 6, 2012, Dynegy and CPUC filed joint comments clarifying their answers. On June 13, 2012, CPUC filed an answer to ECotality's motions, and CPUC and Dynegy filed motions for administrative notice of their respective filings in the state court action. On June 22, 2012, ECotality filed a third motion for administrative notice of its filing in the state court proceeding. On June 28, 2012, Dynegy filed an answer opposing ECotality's motion. On July 9, 2012, CPUC filed an answer opposing ECotality's motion. On October 16, 2012, CPUC filed a motion to lodge a state court order that denied Ecotality's appeal.

### **The Terms of the Settlement**

10. The Parties explain that the Settlement extends to Dynegy affiliates, including NRG Energy, Inc. (NRG). Because of certain contractual commitments, NRG and its affiliates will perform Dynegy's obligations under the Settlement.

11. Pursuant to the Settlement, NRG will make a \$20 million cash payment to CPUC and a \$102.5 million investment in electric vehicle charging infrastructure, and CPUC and Dynegy will mutually release claims arising from or related to the Dynegy Long-Term Contract.<sup>15</sup> The Settlement also provides that NRG will undertake the "EV Charging Station Project."<sup>16</sup> The Parties state that the EV Charging Station Project

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<sup>14</sup> 18 C.F.R. § 385.602(b) (2012). Because a presiding officer has not been appointed in the above-captioned proceedings since remand of the proceedings to the Commission from the Ninth Circuit, Rule 602(b)(2)(ii) applies and the Settlement was transmitted directly to the Commission.

<sup>15</sup> Joint Offer of Settlement at 4-5. Dynegy notes that CPUC's release of claims includes the release of Dynegy affiliates, including NRG.

<sup>16</sup> *Id.* at 4.

provides for: (1) installation of two-hundred fast charging stations that will be available to the general public; (2) installation of infrastructure to support ten-thousand privately owned chargers at a total of one-thousand multi-family, workplace and public interest sites (e.g., public university); and (3) development, funding and implementation of electric vehicle-related technology pilot programs and electric vehicle car-sharing pilot programs. The Settlement provides for the fast charging stations to be available to the public for a five-year term, with access to subscribers and non-subscribers, credit card swiping capability, and reasonable rates.

12. The Parties have executed the Settlement and it became binding pursuant to its terms as of the execution date. However, some of the operative provisions become effective only after a final Commission order approving the Settlement. The Parties state the Settlement effective date shall be stayed if the Settlement is challenged in a forum other than at the Commission. The Settlement will terminate upon a Commission order that rejects the Settlement or approves it with conditions or modifications unacceptable to any party, or upon a federal appellate court vacating the relevant Commission order.<sup>17</sup>

13. The Settlement provides that, in order to fully effectuate the releases contemplated, the Commission's approval of the Settlement shall constitute a dismissal of the consolidated EL02-60-000 and EL02-62-000 proceedings as they relate to Dynegy and the Dynegy Long-Term Contract. The Parties assert that such dismissal is appropriate because: (1) CEOB, the complainant in the EL02-62-000 proceeding, has long been inactive in this proceeding and is no longer in existence;<sup>18</sup> (2) nearly identical complaints initiated each docket and the Commission consolidated the proceedings; and (3) CPUC is a party to the Settlement. The Parties to the Settlement waive all rights to rehearing or appeal with respect to the released claims, and agree to withdraw pending rehearing requests or associated appeals.<sup>19</sup>

14. The Parties state that the Settlement benefits California ratepayers by resolving claims related to the Dynegy Long-Term Contract. The Parties also state that approval of the Settlement will avoid further litigation, eliminate regulatory uncertainty, provide monetary consideration, and enhance financial certainty.

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<sup>17</sup> Joint Explanatory Statement at 6-7.

<sup>18</sup> The Parties also note that, as CEOB is no longer in existence, it is not a party to the Settlement. Joint Offer of Settlement at 5.

<sup>19</sup> *Id.*

**Responsive Filings****Motions to Intervene Out of Time**

15. In requesting intervention, ECOTality explains that it is an electric vehicle service equipment provider that competes in the California market with NRG.<sup>20</sup> ECOTality states that it has a direct interest in the Settlement because it is currently working on installing electric vehicle charging infrastructure in California in three of the four regions identified in the Settlement. ECOTality asserts that it seeks to intervene out of time for good cause, because before the Settlement was filed ECOTality had no direct interest in the determination of overcharges and refunds at issue in this proceeding.<sup>21</sup>

16. ECOTality states that it sought public review of the Settlement before the CPUC, but that CPUC denied its motion and filed the Settlement with the Commission without public review.<sup>22</sup> Thus, ECOTality asserts that this proceeding is an appropriate forum to protest the Settlement.

17. In its motion to intervene out of time, Car Charging Group explains that it is in the business of owning, providing, and servicing electric car charging stations to building owners, parking garages, shopping centers, and municipalities, among others. Car Charging Group states that approval of the Settlement could seriously injure Car Charging Group and NRG's other competitors, and would impede Car Charging Group's ability to grow its business in California. Car Charging Group explains it had no idea this proceeding could affect its interest prior to mid-April 2012, when the first publicly available information on the Settlement was published in a newspaper, and Car Charging Group immediately took action thereafter to make known its concerns.<sup>23</sup>

18. SDG&E moves to intervene, explaining that it serves one of the largest regional concentrations of electric vehicle customers in the United States and that it will be directly impacted by the outcome of this proceeding.<sup>24</sup> SDG&E states that it supports the Settlement.

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<sup>20</sup> Ecotality May 17, 2012 Motion at 7.

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> Car Charging Group May 17, 2012 Motion at 5-6.

<sup>24</sup> SDG&E May 17, 2012 Motion at 3.

### **Protests and Answers**

19. ECotality contends that CPUC lacks the requisite authority to enter into the Settlement. ECotality and Car Charging Group assert that the Settlement's implementation would result in anticompetitive conditions in the California electric vehicle charging market.<sup>25</sup> ECotality also maintains that the Settlement violates state laws governing the development of electric vehicle infrastructure and treatment of rate refunds, and that CPUC has compromised the state's claims without demonstrating adequate ratepayer benefits.<sup>26</sup> Thus, ECotality requests that the Commission either reject the Settlement or suspend any determination until ECotality's issues have been publicly reviewed.

20. ECotality asserts that the functioning of the electric vehicle recharging market will be critical to meeting grid reliability. Thus, ECotality argues that the Commission cannot determine that the Settlement is in the public interest without ensuring that it is consistent with state law and will not create anti-competitive conditions in the electric vehicle recharging market.<sup>27</sup>

21. In a similar vein, Car Charging Group asserts that the Settlement will result in anticompetitive effects, as it will allow NRG to capture a majority of the industry's potential customers. Car Charging Group adds that the \$102 million that NRG is going to spend on the EV Charging Station Project is money that Dynegy collected during the California Energy Crisis of 2000-2001, which should be returned to California ratepayers.<sup>28</sup> Thus, Car Charging Group asks the Commission to appoint a presiding officer to explore with Dynegy, CPUC, and adversely affected parties, how the Settlement could be amended to eliminate discriminatory, unjust, and unreasonable impacts.<sup>29</sup>

22. Dynegy responds that the late motions to intervene should be rejected, because good cause has not been shown, and allowing late intervention a decade after the deadline would disrupt the proceeding.<sup>30</sup> Dynegy asserts that ECotality and Car Charging Group seek to advance their own business interests, not the interests of California ratepayers,

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<sup>25</sup> ECotality May 17, 2012 Motion at 2, 10, 12-17; Car Charging Group May 17, 2012 Motion at 8.

<sup>26</sup> ECotality May 17, 2012 Motion at 18-22.

<sup>27</sup> *Id.* at 10-11.

<sup>28</sup> Car Charging Group May 17, 2012 Motion at 9.

<sup>29</sup> *Id.* at 13.

<sup>30</sup> Dynegy May 29, 2012 Answer at 3.

and these business interests are outside the scope of this proceeding and outside the Commission's statutory obligation to promote the public interest.<sup>31</sup> Dynegy notes that the Commission has the discretion to consider the comments of a non-party, but because the Settlement has not been challenged by a party, the Commission should treat it as uncontested and, pursuant to Rule 602, approve it if it "appears to be fair and reasonable and in the public interest."<sup>32</sup> Dynegy explains that settlements involve compromises by opposing parties and the Commission has been reluctant to second-guess parties' determinations about the specific structure of a settlement.<sup>33</sup> Finally, Dynegy argues that the protests have no merit, as the Settlement places no restrictions on competition.

23. CPUC also opposes the late motions to intervene, but states that the Commission should consider the comments filed. CPUC asserts that intervention should be denied because the claims of ECOTality and Car Charging Group fall outside the zone of interest Congress intended the Commission to regulate under the Federal Power Act (FPA), because the claims of injury are too vague and speculative, and because admitting late intervenors would burden the existing parties.<sup>34</sup>

#### **Motions for Administrative Notice**

24. ECOTality's first motion for administrative notice asks the Commission to take notice of, and consider the merits of, ECOTality's Verified Petition for Writ of Mandate and Other Appropriate Relief (Petition) filed in the Court of Appeals for the State of California, First Appellate Division (State Court), requesting an immediate stay of any CPUC action that would further the Settlement.<sup>35</sup> ECOTality states that its Petition also requests a ruling directing CPUC to annul the Settlement on grounds that the agency abused its discretion and acted contrary to law. ECOTality's second motion provided an update of the State Court action, explaining that the State Court denied ECOTality's request for a stay, but set an accelerated schedule whereby briefing would be completed by June 26, 2012. ECOTality urges the Commission to suspend its consideration of the Settlement, arguing that the State Court will likely rule on the merits of the Petition promptly after briefing is complete.<sup>36</sup>

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<sup>31</sup> *Id.* at 10-12 (citing *NAACP v. FPC*, 425 U.S. 662, 669 (1976); *Algonquin Gas Transmission, LLC*, 126 FERC ¶ 61,130, at P 32 (2009)).

<sup>32</sup> *Id.* at 3-4 (citing 18 C.F.R. § 385.602(g)(3); *Okla. Gas & Elec. Co.*, 127 FERC ¶ 61,296, at P 2 n.3 (2009)).

<sup>33</sup> *Id.* at 13 (citing *Cal. Power Exch.*, 105 FERC ¶ 61,101, at P 17 (2003)).

<sup>34</sup> CPUC May 29, 2012 Answer at 6.

<sup>35</sup> ECOTality May 29, 2012 Motion at 1-2.

<sup>36</sup> *Id.* at 2-3.

25. Dynegy and CPUC respond that they have no objection to the Commission taking notice of the general fact of the existence of the State Court action, or the court's order. However, Dynegy and CPUC object to ECOTality's request that the Commission accept its Petition and consider its merits, and Dynegy opposes ECOTality's request that the Commission suspend consideration of the Settlement. Dynegy and CPUC argue that the Commission cannot take notice of the arguments in the Petition because they do not meet the criteria for matters that can be noticed.<sup>37</sup> Dynegy further asserts that as a non-party ECOTality has no right to submit evidence in this proceeding; that ECOTality's arguments raise issues that are beyond the Commission's jurisdiction; and that there is no reason for the Commission to delay consideration of the Settlement because the Commission's approval will not interfere with the State Court action.

26. Dynegy and CPUC ask the Commission to take official notice of their filings in the State Court opposing ECOTality's Petition.<sup>38</sup> ECOTality filed a motion asking the Commission to take official notice of its reply filings and exhibits in State Court.<sup>39</sup> Dynegy and CPUC again oppose any relief beyond the Commission taking notice of the fact that ECOTality filed a reply in State Court.<sup>40</sup>

27. CPUC asks that the Commission lodge in the record the State Court's order summarily denying ECOTality's Petition.<sup>41</sup>

### **Commission Determination**

#### **Procedural Matters**

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits answers to protests and to answers unless otherwise ordered by the decisional authority. We will accept the answers filed by Dynegy and CPUC because they provided information that assisted us in our decision-making process.

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<sup>37</sup> Dynegy June 5, 2012 Answer at 3 (citing 18 C.F.R. § 385.508(d) providing that the Commission can "take official notice of any matter that may be judicially noticed by the courts of the United States..." and asserting that the Petition could not be noticed by a court because it does not meet the Federal Rules of Evidence.); CPUC June 13, 2012 Answer at 2.

<sup>38</sup> CPUC June 13, 2012 Motion at 2; Dynegy June 13, 2012 Motion at 2.

<sup>39</sup> ECOTality June 22, 2012 Motion at 1-2.

<sup>40</sup> CPUC July 9, 2012 Motion at 2; Dynegy June 28, 2012 Motion at 2.

<sup>41</sup> CPUC October 16, 2012 Motion to Lodge at 1.

29. We deny the motions to intervene out of time filed by ECOTality, Car Charging Group, and SDG&E because of the disruption, prejudice, and burden that would result, and because the injury alleged by ECOTality and Car Charging Group is speculative.

30. When deciding whether to allow an untimely motion to intervene, Rule 214 of the Commission's Rules of Practice and Procedure provides that the Commission may consider one or more of the following five factors:

[W]hether: (i) The movant had good cause for failing to file the motion within the time prescribed; (ii) Any disruption of the proceeding might result from permitting intervention; (iii) The movant's interest is not adequately represented by other parties in the proceeding; (iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and (v) The motion conforms to the [procedural requirements in] paragraph (b) . . . .<sup>[42]</sup>

31. In considering whether ECOTality, Car Charging Group and SDG&E have good cause for their late interventions, the Commission recognizes that some elements of the Settlement may have introduced issues that affect their business interests. However, the Commission's review of the Settlement is statutorily limited to considering interests within the scope of "public interest" considerations relative to FPA section 205 and 206.<sup>43</sup> We find that the Settlement has not "fundamentally change[d] the issues involved"<sup>44</sup> in terms of the Commission's review of the Settlement, consistent with its statutory obligations.

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<sup>42</sup> 18 C.F.R § 385.214(d)(1) (2012).

<sup>43</sup> 16 U.S.C. §§ 824d, 824e (2006); *see, e.g., National Association for the Advancement of Colored People v. FPC*, 425 U.S. 662, 669-70 (1976) ("[The Supreme Court's] cases have consistently held that the use of the words "public interest" in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation . . . . The use of the words "public interest" in [the FPA] is not a directive to the Commission to seek to eradicate [racial] discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates." (citations omitted)).

<sup>44</sup> *California Trout v. FERC*, 572 F.3d 1003, 1019 (9<sup>th</sup> Cir. 2009) (upholding the Commission's decision to deny a motion for late intervention finding that the movants lacked good cause because the new reports cited "did not fundamentally change the issues . . . involved.")

32. The second and fourth factors that the Commission may weigh, the potential disruption to the proceeding and potential burden on the existing parties, weigh heavily against ECOTality, Car Charging Group, and SDG&E. The ten-year record of this proceeding makes clear its protracted history. Dynegy and CPUC state that the litigation has been costly as they both zealously advocated for their opposing positions. Even in their joint filings on the Settlement, Dynegy and CPUC state that they continue to disagree strongly on the merits of the case.<sup>45</sup> To allow new intervenors at this late stage to obstruct approval of the parties' Settlement, on the basis of the issues here, would impose a substantial delay in the captioned proceedings, and place significant additional burdens on the Commission and the parties. The Commission's policy is to foster settlements; indeed it has encouraged the parties to these proceedings to resolve their competing claims through settlement,<sup>46</sup> and they have. Moreover, the Settlement provides that it will not become effective until the State Court action and any appeals therefrom, are resolved,<sup>47</sup> so the asserted issues may be addressed in that venue.

33. Thus, whether the late movants' interests are not adequately represented by another party is not germane, because the issues raised by ECOTality, Car Charging Group, and SDG&E mainly involve issues that are not relevant to determining whether the Settlement is "just and reasonable," or whether the Settlement "appears fair and reasonable and in the public interest."<sup>48</sup>

34. In sum, in considering all of the factors set forth in Rule 214(d), the Commission concludes that granting late intervention here would substantially disrupt this proceeding and significantly burden existing parties. Moreover, ECOTality, Car Charging Group, and SDG&E have not demonstrated good cause to support their untimely interventions in this

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<sup>45</sup> Dynegy and CPUC June 6, 2012 Answer at 1-2.

<sup>46</sup> April 25, 2002 Order, 99 FERC ¶ 61,087, at 61,384 ("[W]e want to strongly encourage all parties involved in disputes arising from the California crisis to seriously negotiate settlements. The uncertainty and expense of continued litigation over these disputes serves the interests of neither the parties to those disputes nor the public.").

<sup>47</sup> Settlement § 6(c) ("[T]his Agreement shall be fully effective as of the date that a FERC order constituting the Required Approval becomes a Final Order . . . *provided* that the occurrence of the Settlement Effective Date shall be stayed in the event that . . . there exists pending litigation before a Governmental Authority other than FERC, including appeals therefrom, challenging the settlement or a Party's authority to enter into this Agreement . . .").

<sup>48</sup> *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,339-40 (1998) (explaining that the "just and reasonable" standard may be used for contested settlements while the "fair and reasonable and in the public interest" standard is used for uncontested settlements), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999).

proceeding, nor shown that their relevant interests and potential injury should be considered by the Commission in evaluating the Settlement. For these reasons, we deny the untimely motions to intervene.

35. Regarding the Motions for Official Notice, the Commission acknowledges the fact of the State Court action, but need not weigh the merits of any filing in that state proceeding. We have explained above that those concerns are more appropriately addressed in that state proceeding.

### **Substantive Matters**

36. Given that the Commission denies the untimely interventions as discussed above, the Commission will treat the Settlement as uncontested under its Rules of Practice and Procedure.<sup>49</sup> The Settlement resolves protracted and complex proceedings before this agency, and allows the issues to be addressed consensually by parties at odds for many years. Thus, the Settlement may be considered under the Commission's standard for approving such uncontested settlements, and, as the Settlement appears to be fair and reasonable and in the public interest, it 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.

37. Even if we were to address the merits of the arguments raised against the Settlement, we would approve the Settlement. Dynegy's commitment to invest in car charging infrastructure is not a bar to similar investments by others. As to the claim that the Settlement funds should instead be refunded to retail ratepayers, it is clear that the interests represented here by the Settlement's opponents are their own commercial interests instead of the monetary interests of retail ratepayers. While those commercial interests are certainly understandable, they do not warrant rejection of this Settlement by the litigants of a decade-long dispute. Finally, CPUC, which states that it is charged with representing the interests of California's ratepayers in proceedings before this Commission,<sup>50</sup> is a party to the Settlement.

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<sup>49</sup> 18 C.F.R. § 385.602(g)(3) (2012).

<sup>50</sup> CPUC May 29, 2012 Answer at 5.

The Commission orders:

The Settlement in the above-captioned dockets is hereby approved, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.