

124 FERC ¶ 61,262
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. ER07-323-002

ORDER ESTABLISHING SETTLEMENT JUDGE PROCEDURES

(Issued September 18, 2008)

1. In this order, the Commission establishes settlement judge procedures to allow the parties to resolve their dispute concerning the rates charged by Dynegy Power Marketing, Inc. (Dynegy Power Marketing) for ancillary services provided to the Ameren Illinois Utilities¹ for the period January 1, 2007 through December 31, 2007.

I. Background

2. In 2003, the Ameren Illinois Utilities divested their generation pursuant to Illinois electricity restructuring law. 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, 2006.²

3. Originally, the Ameren Illinois Utilities anticipated procuring ancillary services from a Midwest Independent Transmission System Operator (Midwest ISO) ancillary services market after their bilateral ancillary services contracts expired, but no such market yet existed. Therefore, on May 1, 2006, Ameren Services Company (Ameren) issued a Request for Proposals (Original RFP) for bids to supply ancillary services. On August 22, 2006, Ameren issued a revised Request for Proposals (Revised RFP).

¹ Ameren Illinois Utilities include 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.

² *Ameren Energy Marketing Co.*, 117 FERC ¶ 61,334, at P 2 (2006) (Ameren Ancillary Services December 26 Order).

Ameren Energy Marketing Company (Ameren Energy Marketing) and Ameren Energy Inc. (Ameren Energy) (collectively, Ameren Affiliates) won a portion of the Revised RFP to provide certain ancillary services to their affiliates, Ameren Illinois Utilities, at cost-based rates. These rates were the subject of the proceeding in Docket Nos. ER07-169-000 and ER07-170-000 (Ameren Ancillary Services Proceeding). Dynegy Power Marketing and Dynegy Midwest Generation, Inc. (Dynegy Midwest) (together, Dynegy) also won a portion of the Revised RFP to provide certain ancillary services³ to the Ameren Illinois Utilities at market-based rates. In order to provide the ancillary services, on December 14, 2006, Dynegy filed a request for waiver of certain provisions in its market-based rate tariffs regarding ancillary services, stating that the tariffs authorize the sale of ancillary services outside organized markets at market-based rates, subject to conditions and restrictions adopted in *Avista*.⁴

4. Specifically, Dynegy Power Marketing requested waiver of section 3(b) of its tariff to permit market-based rate sales of ancillary services to the Ameren Illinois Utilities for resale to customers under the open access transmission tariff (OATT) of the Midwest ISO. Dynegy Power Marketing and Dynegy Midwest also requested waiver of section 2 of their respective market-based rate 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.

5. In its February 12, 2007 Order,⁵ the Commission conditionally granted Dynegy's 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 (*Avista* Restriction 3), so long as the rates were "no higher than" the cost-based rates approved in the Ameren Ancillary Services Proceeding.⁶ The Commission denied the request for waiver of the electronic posting requirement without prejudice to Dynegy providing more information to support that request.

6. In the Ameren Ancillary Services Proceeding, the Commission accepted the proposed rate schedules, subject to refund, and established hearing and settlement judge procedures to address cost-of service issues and directed staff to conduct a technical

³ Dynegy Power Marketing was one of the prevailing bidders through the Revised RFP process to provide Regulation and Frequency Response Service. *See* Ameren January 4, 2007 Comments, Docket No. ER07-323-000, at 3.

⁴ *Avista Corp.*, 87 FERC ¶ 61,223, *order on reh'g*, 89 FERC ¶ 61,136 (1999) (*Avista*).

⁵ *Dynegy Power Marketing, Inc.*, 118 FERC ¶ 61,094 (2007) (February 12 Order)

⁶ *Id.* P 21.

conference on affiliate abuse issues.⁷ In its July 2, 2007 Order in the Ameren Ancillary Services Proceeding, the Commission determined that “the Revised RFP was a reasonable and appropriate method to solicit potential suppliers” and that “the Revised RFP did not provide the Ameren Affiliates with an undue preference over non-affiliates.”⁸ Under the uncontested settlement agreement filed in the Ameren Ancillary Services Proceeding on October 1, 2007 (Ameren Settlement), the Ameren Affiliates committed to charge revised cost-based rates for ancillary services provided to the Ameren Illinois Utilities for the period commencing January 1, 2007 and ending December 31, 2007. The uncontested settlement agreement was approved by the Commission on December 31, 2007.⁹

7. On rehearing, in its order issued on September 25, 2007,¹⁰ the Commission granted Dynegy’s request to remove the condition that the ultimate rate that Dynegy Power Marketing charges the Ameren Illinois Utilities for ancillary services be no higher than the rates approved in the Ameren Ancillary Services Proceeding. The Commission reasoned that, given that it found that the Revised RFP was a reasonable and appropriate method to solicit potential suppliers, under the circumstances of the proceeding, it would be appropriate to remove the condition that Dynegy Power Marketing’s rates be no higher than the rates approved in the Ameren Ancillary Services Proceeding.¹¹ The September 25 Order therefore dismissed as moot the requests for rehearing concerning whether its decision in the February 12 Order hinders the ability to acquire ancillary services at a competitive price and whether there had been a violation of the *Mobile-Sierra* doctrine.¹²

8. The September 25 Order also rejected Ameren’s request for rehearing of the Commission’s determination that Dynegy Power Marketing’s sale of ancillary services to the Ameren Illinois Utilities was subject to the prohibition of sales of ancillary services at market-based rates by a third-party supplier to a public utility who is purchasing ancillary

⁷ See Ameren Ancillary Services December 26 Order.

⁸ *Ameren Energy Marketing Co.*, 120 FERC ¶ 61,001, at P 14 (2007) (Ameren Ancillary Services July 2 Order)

⁹ *Ameren Energy Marketing Co.*, 121 FERC ¶ 61,312 (2007).

¹⁰ *Dynegy Power Marketing, Inc.*, 120 FERC ¶ 61,278 (2007) (September 25 Order).

¹¹ *Id.* P 19.

¹² *Id.* P 21. See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

services to satisfy its OATT requirements to offer ancillary services to its own customers, finding that Ameren offered no new evidence showing that the Commission's determination was in error.¹³

9. On October 25, 2007, Constellation Energy Commodities Group, Inc. (Constellation) and the Illinois Municipal Electric Agency (IMEA) submitted separate requests for rehearing of the September 25 Order. On November 9, 2007, Dynegy filed an answer to the rehearing requests. On November 26, 2007, Constellation and IMEA filed answers to Dynegy's answer.

II. Requests for Rehearing

10. In its request for rehearing, Constellation argues that the Commission has not met its statutory obligation to ensure that Dynegy's market-based rates for ancillary services are just and reasonable, and that the Commission should set for settlement and hearing procedures the question of whether the rates Dynegy proposes to charge the Ameren Illinois Utilities for ancillary services are just, reasonable and not the result of the exercise of market power.¹⁴

11. Specifically, Constellation argues that the September 25 Order erred in removing the condition that the ultimate rate that Dynegy Power Marketing charges the Ameren Illinois Utilities for ancillary services be no higher than the rates approved in the Ameren Ancillary Services Proceeding, based on the finding in the Ameren Ancillary Services Proceeding that the Revised RFP was a reasonable and appropriate method to solicit potential suppliers and did not provide the Ameren Affiliates with an undue preference over non-affiliates.¹⁵ Constellation states that, regardless of whether the Revised RFP was a reasonable method to solicit potential suppliers, its terms did not result in sufficient competition to ensure that Dynegy was not able to exercise market power. Constellation contends that the record shows that the Revised RFP resulted in bids from Dynegy and only two other suppliers, and shows that Ameren had to accept all of those bids in order to obtain the required ancillary services. Constellation concludes that given that the Original RFP failed to produce any acceptable bids, and given the fact that competition was limited to the Ameren Illinois Utilities' balancing authority area, the Commission has no assurance that the rates offered by Dynegy in the Revised RFP "were disciplined in any meaningful way by competition."¹⁶ In addition, Constellation contends that since

¹³ *Id.* P 9.

¹⁴ Constellation October 25, 2007 Rehearing Request at 8 (citing *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (2004)).

¹⁵ *Id.* at 12 (citing September 25 Order at P 18).

¹⁶ *Id.*

the Ameren Illinois Utilities do not own any generation themselves and cannot supply the ancillary services at cost-based rates, the rates offered by Dynegy were not disciplined in any way.

12. Constellation states that the Commission may not approve third-party sales of ancillary services at market-based rates without finding that the seller lacks market power, or that customers have the alternative of obtaining ancillary services at cost-based rates from the transmission provider.¹⁷ Constellation also states that the guidance offered by the Commission in Order No. 888 and subsequent cases was designed to ensure that sellers of ancillary services do not exercise market power, and to further the goal of promoting competition in ancillary services markets.¹⁸

13. Constellation contends that Dynegy has not presented a market power study in this proceeding demonstrating that it lacks market power with respect to the sale of ancillary services in the Ameren Illinois Utilities' balancing authority area, nor has the Commission previously found that it lacks market power.¹⁹ IMEA argues that, to the extent the Commission wishes to rely on the requirements of Order No. 697 as it did when addressing Dynegy's posting requirements, the Commission should require Dynegy to submit the required market power assessments with respect to ancillary services.²⁰

14. Constellation also argues that there is no evidence in the record to conclude that Dynegy's rates for ancillary services are less than or equal to the cost-based rates in the

¹⁷ *Id.* at 9-10 (citing *Avista Corp.*, 87 FERC ¶ 61,223, *order on reh'g*, 89 FERC ¶ 61,136 (1999)).

¹⁸ *Id.* at 9 (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,220-21(1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); Order No. 888-A at 30,237-38; *Ocean Vista Power Generation, L.L.C.*, 82 FERC ¶ 61,114, at 61,406-08 (1998)).

¹⁹ Constellation also states that a recent market power analysis by the Midwest ISO Market Monitor indicates that there are market power concerns for the new Midwest ISO Ancillary Services Markets when local requirements are defined. *Id.* at 11 (citing Midwest ISO September 14, 2007 Electric Tariff Filing to Reflect Ancillary Services Markets, Docket No. ER07-1372-000, Affidavit of David B. Patton at P 53).

²⁰ IMEA October 25, 2007 Rehearing Request at 9 (citing September 25 Order at P 23).

Ameren Ancillary Services Proceeding, since Dynegy Power Marketing failed to report in a timely manner its sales of ancillary services to the Ameren Illinois Utilities in its Electric Quarterly Reports (EQRs) for the first two quarters of 2007. Constellation therefore concludes that neither the Commission nor Constellation are able to determine with certainty whether the rates Dynegy Power Marketing is charging the Ameren Illinois Utilities are less than or equal to the cost-based rates being charged by the Ameren Affiliates.²¹ Constellation also asserts that it appears that Dynegy Power Marketing bid a substantially higher price for Regulation and Frequency Response Service than did Ameren Energy Marketing.²² Constellation also states that a preliminary analysis of Dynegy Power Marketing's October 23, 2007 revised EQR appears to affirm that, for the first quarter of 2007, the rates charged by Dynegy Power Marketing to the Ameren Illinois Utilities were above the rates in the uncontested offer of settlement submitted in the Ameren Ancillary Services Proceeding.²³

15. IMEA similarly argues that the Commission's finding that the RFP process was a reasonable method to solicit potential ancillary services suppliers cannot support a conclusion that the resulting bids did not reflect the exercise of market power.²⁴ IMEA states that the fact that the seller has responded to a properly designed RFP has never been accepted as demonstrating that the seller has no market power, or that the resulting rates are just and reasonable. IMEA also contends that the Commission's examination of the RFP process at issue in this proceeding was limited to the "the matter of affiliate abuse" on the part of the issuing utility.²⁵ IMEA also asserts that because Dynegy did not intervene in the Ameren Ancillary Services Proceeding, "there is no injustice in capping Dynegy's rates at the levels to be set in the Ameren Ancillary Services Proceeding."²⁶

16. IMEA argues that, contrary to the Commission's statement in the February 12 Order that the EQRs would provide a check on Dynegy's rates, the Commission cannot

²¹ Constellation October 25, 2007 Rehearing Request at 13.

²² *Id.* at 13-14.

²³ *Id.* at 14 (citing *Ameren Energy Marketing Co.*, October 1, 2007 Settlement Agreement, Docket No. ER07-169-000, Explanatory Statement at 3-5).

²⁴ IMEA October 25, 2007 Rehearing Request at 9 (citing Midwest ISO September 14, 2007 Electric Tariff Filing to Reflect Ancillary Services Markets, Docket No. ER07-1372-000, Affidavit of David B. Patton).

²⁵ *Id.* (quoting Ameren Ancillary Services December 26 Order at P 13).

²⁶ *Id.* at 10.

rely on its quarterly reports filing requirements because Dynegy Power Marketing has failed to timely provide the information required.²⁷ IMEA also states that Dynegy Power Marketing's first quarter figures have only recently become available.

17. Both Constellation and IMEA argue that the interim nature of Dynegy's rates is not a lawful basis for approving unjust and unreasonable rates, stating that section 205 of the Federal Power Act (FPA) does not exempt Dynegy's sales of ancillary services to the Ameren Illinois Utilities from the requirement that they be just and reasonable based on the duration that the rates will remain in effect.²⁸ Constellation contends that the interim nature of the requirement increased the likelihood that Dynegy may have been able to exercise market power, and contends that the September 25 Order provides no legal basis or explanation as to how the interim nature of the rates can relieve Dynegy of its statutory burden of demonstrating that its rates are just and reasonable.²⁹

18. IMEA also faults the Commission for failing to explain why the *Avista* policy is no longer applicable.³⁰ IMEA states that the just and reasonable standard applies to all wholesale power sales, regardless of their duration, and notes that the Commission requires short-term sales to be reported in a seller's EQRs,³¹ and has required rate caps even on hourly energy prices.³²

19. IMEA also states that Order No. 697 created no exception for sales during an interim period, and states that for parties with market power, Order No. 697 establishes standards for default cost-based mitigation for sales of less than a week to long-term sales greater than a year.³³ IMEA also contends that, as a practical matter, allowing the interim nature of a contract to excuse the just and reasonable standard is an unworkable standard

²⁷ *Id.* (citing February 12 Order at P 23).

²⁸ Constellation October 25, 2007 Rehearing Request at 14.

²⁹ *Id.* at 14-15.

³⁰ IMEA October 25, 2007 Rehearing Request at 5-6.

³¹ *Id.* at 7 (citing *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, at P 254-61, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003)).

³² *Id.* (citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 95 FERC ¶ 61,418 (2001)).

³³ *Id.* (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 604 *et seq.*).

because the Commission fails to define the parameters for the term “interim.” IMEA argues that even if “interim” was defined, parties could mischaracterize the nature of their agreements, stating that there will likely always be an “interim period” between the existing rules and changes to at least one of those rules. According to IMEA, an “interim period” may present an ideal time for certain parties to exert their market power, as they might realize that purchasers are desperate for a product due to an unforeseen change of events, such as a delay in the start date for an RTO’s ancillary services market.³⁴

III. Commission Determination

Procedural Issues

20. Rule 713(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2008), prohibits an answer to a request for rehearing. Accordingly, we will reject Dynegy’s answer as well as Constellation’s and IMEA’s answers to that answer.

Discussion

21. The issues raised by Constellation and IMEA concern the rates charged by Dynegy Power Marketing for ancillary services provided to the Ameren Illinois Utilities for the locked-in period from January 1, 2007 through December 31, 2007. Before we rule on rehearing, we will offer the participants an opportunity to negotiate a settlement. Thus, we find that the issues presented here may be amenable to settlement. We also find that the involvement of a settlement judge may assist the parties in reaching a mutually agreeable resolution of this matter. Accordingly, we encourage the parties to make every effort to settle their dispute. To aid the parties in their settlement efforts, we direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission’s Rules of Practice and Procedure.³⁵ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.³⁶ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or terminate the settlement judge procedures, if appropriate. The Chief

³⁴ *Id.* at 8.

³⁵ 18 C.F.R. § 385.603 (2008).

³⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission’s website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

Judge shall report any termination of settlement judge procedures to the Commission. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

The Commission orders:

(A) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(B) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or terminate the settlement judge procedures, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.