

101 FERC ¶ 61,369
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Dynegy Power Marketing, Inc.,
El Segundo Power, LLC,
Long Beach Generation LLC,
Cabrillo Power I LLC
Cabrillo Power II LLC

v.

Docket No. EL01-23-000

California Independent System Operator
Corporation

ORDER DISMISSING COMPLAINT

(Issued December 26, 2002)

{SEQ ParaNumbers1_0 * Arabic \r 1}. This order dismisses a complaint filed by Dynegy Power Marketing, Inc., El Segundo Power, LLC, Long Beach Generation LLC, Cabrillo Power I LLC & Cabrillo Power II LLC (collectively, Dynegy) regarding the California Independent System Operator Corporation's (California ISO) use of out-of-market (OOM) pricing provisions in the California ISO Tariff.

Background

2. On December 22, 2000, Dynegy filed the instant complaint. Dynegy claimed that, when the California ISO believed it might have insufficient imbalance energy or ancillary services for the next day, the California ISO ignored other market options¹ and chose the cheapest course of action, the OOM provisions, under which rates do not cover the generators' short-run marginal costs.

¹Specifically, Dynegy argued that the California ISO could have purchased energy through the California Power Exchange (California PX) and Automated Power Exchange super peak markets or it could have negotiated appropriate terms for service with in-state and out-of-state generators and marketers.

3. Dynegey also asserted that, as of December 31, 2000, all participating generators were required under Section 11.2.4.2 of the California ISO Tariff to select one of two "confiscatory" rates to be paid by the California ISO for OOM calls. Dynegey argued that one rate was based on the market clearing price, which as of January 1, 2001 would be no higher than \$150/MWh, and that the alternative OOM pricing method, a formula rate, arbitrarily assigned a price for the hour dispatched based on markets which were effectively constrained to clear below the price cap, and thus provided no assurance that short-run marginal costs would be recovered. Dynegey claimed that the market clearing price was unquestionably below short-run marginal costs, even during non-peak hours.

4. Dynegey also claimed that Section 2.3.5.1.5 of the California ISO Tariff provided that the California ISO must exercise good utility practice by negotiating with generators, but the California ISO refused to do so with generators that had been required, as a condition to obtaining transmission service, to execute a Participating Generator Agreement (PGA). Dynegey claimed that the California ISO instead employed the OOM provisions before exhausting competitive offers and repeatedly paid PGA generators rates that were below short-run marginal costs. Dynegey argued that, by violating the terms of its own tariff and engaging in discriminatory service (by negotiating rates for OOM purchases from generators and marketers located outside of California, while holding similarly situated generators that are located on its grid to the alternative rates in the California ISO Tariff OOM provisions), the California ISO has violated section 205 of the Federal Power Act (FPA). Dynegey claimed that, because of these discriminatory actions, in the almost two-month period, from November 1, 2000 to December 22, 2000, when its complaint was filed, Dynegey incurred out-of-pocket losses of more than \$2,000,000. Moreover, Dynegey alleged that, besides being confiscatory, the California ISO's actions produced market distortions.

5. Dynegey asked that the Commission order the California ISO to file, no later than March 1, 2001, a proposal to create a third payment option for OOM-required energy deliveries, which would permit a generator subject to OOM calls to elect to be paid its day-ahead pre-submitted bid or call price. In addition, Dynegey asked that the Commission order the California ISO to: (1) limit OOM calls to instances of actual or reasonably expected emergency; (2) enter negotiations under Section 2.3.5.1.5 of the California ISO Tariff when the California ISO has no available market option; (3) pay a compensatory rate for OOM calls that will provide Dynegey short-run marginal costs plus a 15 percent adder to cover fixed costs until a different pricing methodology is established; (4) enter into good faith negotiations for an additional capacity payment if OOM dispatch instructions have been issued for five consecutive days; and (5) cease and desist from using OOM calls in non-emergency situations.

Notice of Filing, Interventions, and Answers

6. Notice of Dynegey's complaint was published in the Federal Register, 66 Fed. Reg. 1121 (2000), with motions to intervene, protests, and answers due on or before January 11, 2001.

7. Timely motions to intervene raising no substantive issues were filed by Williams Energy Marketing and Trading Company (Williams), California Electricity Oversight Board (California Board), Calpine Corporation (Calpine), the Cities of Redding and Santa Clara, California, and the M-S-R Public Power Agency (collectively, Cities/M-S-R), Duke Energy North America, LLC, Duke Energy Trading and Marketing, LLC, and Duke Energy Merchants, LLC (collectively, Duke Energy), PPL Montana, LLC and PPL EnergyPlus, LLC (collectively, PPL Parties), Southern Energy California, L.L.C., Southern Energy Potrero, L.L.C., and Southern Energy Delta, L.L.C. (collectively, Southern Energy Parties), and Sacramento Municipal Utility District (SMUD).

8. On January 10, 2001, the California PX filed a motion to intervene and comments. The California PX requested that the Commission require the California ISO to demonstrate that market-based solutions to their need for imbalance energy and ancillary services, such as the super peak service, were either unavailable or inappropriate before turning to OOM calls that would compensate generators at fixed tariff rates that might not recover incremental operating costs.

9. On January 11, 2001, Reliant Energy Power Generation, Inc. (Reliant) filed a motion to intervene and comments in support of Dynegy. Reliant asked the Commission to order: (1) the California ISO to abide by the terms of its Tariff, by accepting all bids in the market before exercising its emergency OOM authority; (2) the California ISO to revise or replace the OOM payment options of the California ISO Tariff with a fully compensatory payment mechanism; and (3) the interim relief requested by Dynegy for any OOM calls issued in actual emergencies.

10. On January 11, 2001, Modesto Irrigation District (Modesto) filed a motion to intervene and comments. Modesto took no position on the pricing issues, but reiterated its strong opposition to any interpretation of the California ISO Tariff or other applicable rules or regulations which would permit the California ISO to manipulate economic emergencies into physical emergencies.

11. On January 11, 2001, Southern California Edison Company (SoCal Edison) filed a motion to intervene, protest, request for dismissal, or, in the alternative, for hearing. SoCal Edison argued that the California ISO Tariff gave the California ISO authority to make OOM calls on Dynegy's units, and the PGA between Dynegy and the California ISO required Dynegy to comply with such calls. SoCal Edison also disputed the allegation that it is discriminatory for the California ISO to use a different procedure for buying emergency power from sellers who are not bound by a PGA, because those sellers, who did not receive the same level of benefits from the California ISO's operation of the grid as did sellers such as Dynegy, were not similarly situated.

12. On January 11, 2001, the Public Utilities Commission of the State of California (California Commission) filed a notice of intervention and request for summary rejection, or in the alternative, protest, and request for hearing. The California Commission argued that the complaint represents the second collateral attack on the California ISO's Commission-approved OOM authority and OOM pricing mechanisms citing to California Independent System Operator Corporation, 90 FERC ¶ 61,006 (2000), and El Segundo Power, 91 FERC ¶ 61,110 (2000).

13. On January 13, 2001, the Northern California Power Agency (NCPA) filed a motion to intervene out-of-time and comments in support of Dynegy. NCPA stated that the multiple filings before this Commission, the California Commission, and the Department of Energy related to the energy crisis in California caused NCPA to miss the filing deadline for this proceeding.

14. On January 11, 2001, the California ISO filed an answer asking the Commission to deny Dynegy's complaint. The California ISO argued that it consistently exercised its OOM authority in accordance with the requirements of the California ISO Tariff. First, regarding Dynegy's allegations that it refused to negotiate prices with generators for OOM calls, the California ISO responded that neither the Commission nor the California ISO Tariff required the California ISO to engage in negotiations when making OOM calls.

15. Second, in response to Dynegy's allegation that the California ISO did not comply with the terms of its Tariff, the California ISO responded that the Commission recognized that, in approving the alternative payment option for OOM calls in the California ISO Tariff, there would be times when the payment option would result in payments higher than necessary, as well as other times when the payment option would fail to consider all of the generator's costs.² Third, the California ISO argued that Dynegy's claim that the California ISO was unjustifiably discriminating against in-state generators was incorrect, as the California ISO was not acting outside its Tariff. Moreover, the California ISO asserted that, even if an out-of-state generator was able to negotiate price above its costs to resolve a system emergency, there was no undue discrimination because the California ISO was ensuring reliable service for system users, including its in-state generators and, through the PGA, these generators had agreed to certain conditions, including being subject to redispatch.

16. On January 26, 2001, Dynegy filed an answer to the motions to dismiss of SoCal Edison and the California Commission and requesting leave to answer and answer the protests or comments of the California ISO and California PX. Dynegy asserted that it was not seeking to

²The California ISO also stated that the Commission's acceptance of a soft cap approach in Amendment No. 33 would, in fact, allow a generator to recover its costs through the price it bids. California ISO Answer at 5.

recover the specific costs addressed in the affidavit, but rather asked that it be allowed to base future rates as such costs are incurred. Dynegy also claimed that SoCal Edison's and the California Commission's claims that the complaint was a collateral attack on the OOM pricing provisions were incorrect; rather, it was seeking relief from a "confiscatory" rate, based on the California ISO's promise to develop a third payment option.

Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), the timely, unopposed motions to intervene of Williams, California Board, Calpine, Cities/M-S-R, Duke Energy, PPL Parties, Southern Energy Parties, SMUD, the California PX, Reliant, Modesto, and SoCal Edison, and the California Commission's notice of intervention serve to make these entities parties to this proceeding. Given the early stage of this proceeding, NCPA's interest in the proceeding, and the absence of undue delay or prejudice, we find good cause to grant NCPA's late intervention. We will reject Dynegy's answer to the extent that it represents an impermissible answer to an answer or to protests. See 18 C.F.R. § 385.213(a)(2) (2002).

B. Response to Dynegy's Complaint

1. Pricing Provisions

18. Dynegy's first concern was that the OOM pricing provisions in the California ISO Tariff resulted in economic loss, because the OOM payments were below the short-run marginal costs that generators incurred in the period November-December 2000. We will reject this argument as a collateral attack on the Commission's decision in Docket No. ER00-555-000,³ where the Commission (over the objection of Dynegy, among others⁴) accepted this alternative payment option for OOM calls, even though the Commission recognized that this alternative payment option might, on occasion, result in payments that overcompensate generators or, on other occasions, fail to consider all opportunity costs.⁵

³See California Independent Operator Corporation, 90 FERC ¶ 61,006 at 61,010, 61,015 (January Order), reh'g denied, 91 FERC ¶ 61,026 (2000), appeal dismissed per motion to dismiss voluntarily, Case No. 00-1427 (D.C. Cir. July 18, 2001).

⁴E.g., 90 FERC at 61,014 & nn. 18-19.

⁵See 90 FERC at 61,015. The alternative payment option includes components for fuel-related startup costs and verifiable gas imbalance charges, a capacity component tied to the average of certain day-ahead prices for spinning and non-spinning reserves, and an

19. Moreover, we also note that this is Dynegey's second collateral attack on the January Order. Its first was filed in Docket No. ER00-1830-000, where Dynegey, through its affiliate, El Segundo Power, LLC (one of the complainants here), proposed a non-market dispatch service tariff (NDST).⁶ In the April 27 Order, the Commission rejected El Segundo's NDST, stating that, to the extent that El Segundo filed the NDST in response to its dissatisfaction with the alternative payment option the Commission accepted in Docket No. ER00-555-000, then the proposed NDST was a collateral attack on that order.⁷

20. Because we find that Dynegey's argument is yet another attempt to relitigate the issues raised in these prior proceedings,⁸ we will dismiss its claims.

2. Other OOM-Related Provisions

energy component tied to an average of certain California PX day- and hour-ahead and California ISO real-time energy prices. See 90 FERC at 61,014.

⁶See El Segundo Power, LLC, 91 FERC ¶ 61,110 (2000) (April 27 Order), reh'g denied, 95 FERC ¶ 61,159 (2001).

⁷See 91 FERC at 61,390-91.

⁸Indeed, we note that, in its complaint, Dynegey conceded that "[m]atters related to the issue raised in this complaint [were then] pending" in Docket Nos. ER00-555-000 and ER00-1830-000. See Dynegey's complaint at 14.

21. Since Dynegy filed this complaint in late December 2000, a number of developments have occurred in the California markets and the California ISO's administration of those markets. Significantly, on April 26, 2001, the Commission issued an order adopting a prospective monitoring and mitigation plan for wholesale sales through the real-time markets operated by the California ISO.⁹ The Commission's mitigation plan required all public and non-public utilities (sellers) who owned or controlled generation (excluding hydroelectric resources) in California to offer, under a must-offer requirement, to the California ISO all of their uncommitted capacity in real-time during all hours. The must-offer obligation was designed to prevent withholding and, thereby, ensure that the California ISO would be able to call upon available resources in the real-time market to the extent that energy is needed.¹⁰

22. In subsequent orders in the Monitoring and Mitigation Proceedings,¹¹ the Commission established a hearing and clarified that OOM calls were no different than

⁹San Diego Gas & Electric Company *et al.*, 95 FERC ¶ 61,115, order on reh'g, 95 FERC ¶ 61,418 (2001), order establishing hearing, 96 FERC ¶ 61,120, order on clarification and reh'g, 97 FERC ¶ 61,275, order accepting in part and rejecting in part compliance filing, 97 FERC ¶ 61,293 (2001) (Monitoring and Mitigation Proceedings).

¹⁰See 95 FERC at 61,351, 61,354, 61,355-57; 95 FERC at 62,551-54.

¹¹In addition, OOM issues have been addressed in other orders. See, e.g., *Reliant Energy Power Generation Inc. v. California Independent System Operator Corporation*, 97 FERC ¶ 61,215 (2001).

purchases through the California ISO's markets, in that both types of purchases were made by the California ISO to reliably operate the grid. As such, the Commission found that OOM calls made from October 2, 2000 through June 20, 2001 were subject to refund and subject to the hourly mitigated price in the ordered hearing.¹² The Commission also clarified in these orders that generators must be compensated for actual costs during each hour that the generator is available under the must-offer requirement.¹³

¹²See 96 FERC at 61,499, 61,504, 61,515-16, 61,519-20; 97 FERC at 62,195.

¹³See 97 FERC at 62,241.

23. The mitigation plan included a calculation of a mitigated market clearing price that used the marginal cost of the last unit dispatched during periods of reserve deficiency, which was designed to emulate prices that would result in a competitive market and provide generators with a reasonable opportunity to recover their costs. The mitigation plan used available data to develop a reasonable marginal cost for each generator and to permit reasonable recovery of legitimate costs. The Commission also explained that, under the FPA and the Commission's authorization for market-based rates, sellers are not guaranteed to recover all costs but are provided the opportunity to do so. Moreover, the Commission held that, if a generator was unable to work within the mitigation framework, it could apply for cost-of-service rates for its generating units in the WSCC for the duration of the mitigation plan.¹⁴

24. Given these subsequent Commission orders, the Commission concludes that Dynegey's concerns regarding OOM calls have either been addressed or mooted by subsequent events.

25. Accordingly, we will dismiss Dynegey's complaint.

The Commission orders:

Dynegey's complaint is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.

¹⁴See 95 FERC at 62,558.