123 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Dynegy Power Marketing, Inc. — Docket Nos. ER08-356-000, ER08-356-001

ORDER ON REQUEST FOR WAIVER OF TARIFF PROVISION REGARDING ANCILLARY SERVICES

(Issued May 6, 2008)

1. On December 21, 2007, as amended on March 7, 2008, Dynegy Power Marketing, Inc. (Dynegy) filed a request for a waiver of section 3(b) of its market-based rate tariff (Dynegy Tariff) to permit market-based rate sales under the Dynegy Tariff of certain ancillary services to Central Illinois Light Company, Central Illinois Public Service Company, and Illinois Power Company (collectively, Ameren Illinois Utilities). These sales are the result of a request for proposals issued by Ameren Services Company (Ameren Services) on October 31, 2007 (Ameren 2008 RFP) for service commencing January 1, 2008.[1] Dynegy states that the Ameren 2008 RFP was conducted to fill the gap following the expiration of contracts for ancillary services procured as a result of a request for proposals to supply ancillary services during calendar year 2007 (Ameren 2007 RFP) and the start-up for ancillary services markets to be administered by the Midwest Independent Transmission System Operator, Inc. (the Midwest ISO).[2]

2. In this order, we grant Dynegy's request for waiver of the prohibition in the Dynegy Tariff on sales of ancillary services at market-based rates by a third-party

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[1] *Ameren Energy Marketing Co.*, 121 FERC ¶ 61,311 (2007).

[2] On March 21, 2008, the Midwest ISO notified the Commission in Docket No. ER07-1372-006 that the start-up date for its ancillary services markets had been moved to September 9, 2008.

supplier to a public utility that is purchasing ancillary services to satisfy its open access transmission tariff (OATT) requirements to offer ancillary services to its own customers. However, our grant of the waiver is subject to the outcome of the pending request for rehearing filed in Docket No. ER07-323-002, which involves a request for waiver to make similar sales under the Ameren 2007 RFP.

I. Dynegy's Request for Waiver of Tariff Provision

3. Dynegy states that the Dynegy Tariff authorizes sales of ancillary services outside organized markets at market-based rates subject to conditions and restrictions adopted in *Avista Corp.*[3] In considering the sale of ancillary services at market-based rates, in *Avista*, the Commission prohibited such sales 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,[4] but stated that the Commission was open to considering requests for market-based rate authorization to make such sales on a case-by-case basis.[5] In the instant filing, Dynegy requests waiver of this *Avista* requirement (which is in section 3(b) of its tariff) in order to allow it to sell certain ancillary services at market-based rates to the Ameren Affiliates pursuant to the ancillary services RFP discussed above.[6]

4. Dynegy previously sought a waiver of the prohibition contained in section 3(b) of the Dynegy Tariff in order to permit market-based sales of regulation service to the Ameren Illinois Utilities as a result of the Ameren 2007 RFP. The Commission granted Dynegy's waiver request, but required the rates for Dynegy's sales of regulation service to the Ameren Illinois Utilities be no higher than the rate ultimately approved by the

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

[4] In this regard, Dynegy states that although the Ameren Illinois Utilities' resale of ancillary services purchased from Dynegy would be under the Midwest ISO's – and not the Ameren Illinois Utilities – OATT, Dynegy has assumed, out of an abundance of caution, that the section 3(b) prohibition would apply.

[5] *Avista Corp.*, 87 FERC at 61,883, n.12. On rehearing, the Commission explained that without such a prohibition a "transmission provider could substitute purchases under non-cost-based rates [i.e., market based rates] for its mandatory service obligation." *Avista Corp.*, 89 FERC ¶ 61,136, at 61,391-92 (1999).

[6] The Ameren Affiliates are Ameren Energy Resources Generating Company and Ameren Energy Generating Company, via their agent Ameren Energy Marketing Company, and Union Electric Co., via its agent Ameren Energy, Inc.

Commission for cost-based sales of ancillary services by the Ameren Affiliates.[7] In response to a request for rehearing, the Commission removed the requirement that the rates charged by Dynegy be no higher than those approved for the Ameren Affiliates.[8] As noted above, there is a request for rehearing of the September 25 Order removing the rate cap currently pending before the Commission in Docket No. ER07-323-002.

5. Dynegy states that Ameren Services solicited in the Ameren 2008 RFP bids to provide ancillary services for the period commencing January 1, 2008 and ending on the earlier of the date when a Midwest ISO-administered market for the relevant service becomes operational or December 31, 2008. The Ameren 2008 RFP was thus intended to fill the gap between the expiration of the contracts that resulted from the Ameren 2007 RFP and the start-up of organized, bid-based ancillary services markets to be administered by the Midwest ISO.

6. Dynegy states that filings made by the Ameren Affiliates to extend the terms of their contracts show that the Ameren 2008 RFP was generally conducted in the same manner as the Ameren 2007 RFP.[9] In addition, in the Ameren 2008 RFP, Ameren Services modified two aspects of the process in order to make "the universe of potential RFP respondents more robust" and to make the RFP process "less onerous for bidders."[10] Dynegy states that the list attached to the Ameren Affiliates' November 2, 2007 applications demonstrates that the Ameren 2008 RFP appears to have been distributed to a large number of potential bidders. Dynegy also states that it was selected to provide 25 MWs of regulation service in response to the Ameren 2008 RFP and that it is in the process of finalizing a contract with the Ameren Illinois Utilities with non-price terms (other than quantity and time period) that will be substantively identical to those in its contract with the Ameren Illinois Utilities that resulted from the Ameren 2007 RFP.

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[7] *Dynegy Power Marketing, Inc.*, 118 FERC ¶ 61,094 (February 12 Order), *order on reh'g*, 120 FERC ¶ 61,278 (2007) (September 25 Order).

[8] September 25 Order, 120 FERC ¶ 61,278 at P 19.

[9] These contracts were originally filed in Commission Docket Nos. ER07-169-000 and ER07-170-000. The filings to extend the terms of these contracts were made in Commission Docket Nos. ER08-185-000 and ER08-186-000.

[10] Application at 4 (citing Application of Ameren Energy Marketing Company under section 205 of the Federal Power Act at 6, Docket No. ER08-185-000 (Nov. 2, 2007); Application of Union Electric Company under section 205 of the Federal Power Act at 5, Docket No. ER08-186-000 (Nov. 2, 2007)).

7. Dynegy argues that granting its waiver request would be consistent with the grant of its prior waiver request and the grant of similar waivers to other market-based rate sellers.[11] Dynegy asserts that the waiver is justified for precisely the same reasons that the previous waiver was justified. Dynegy asserts that the Ameren 2008 RFP was conducted in a manner nearly identical to the Ameren 2007 RFP, which the Commission found to be "reasonable and appropriate,"[12] and the only changes appear to the have been calculated to ensure that the Ameren 2008 RFP was even more robust than the Ameren 2007 RFP. Dynegy also states that, like the Ameren 2007 RFP, the Ameren 2008 RFP was intended to procure ancillary services for an interim period until the Midwest ISO's ancillary services markets are operational. Dynegy states that its contract with the Ameren Illinois Utilities will terminate on the day prior to the commencement of operations of the Midwest lSO's regulation market and in no case will be in effect for more than 12 months.[13]

8. Dynegy requests waiver of the 60-day prior notice requirement to allow the requested waiver to become effective January 1, 2008.

II. <u>Notice of Filing and Pleadings</u>

9. Notice of Dynegy's filing was published in the *Federal Register*, 73 Fed. Reg. 1,220 (2008), with interventions and protests due on or before January 11, 2008. Ameren Services, Constellation Energy Commodities Group, Inc. (Constellation), and Illinois Municipal Electrical Agency (IMEA) filed timely motions to intervene and comments. Southwestern Electric Cooperative, Inc. (Southwestern) filed a Motion for Leave to Intervene Out-of-Time and Comments. Dynegy filed an answer to Constellation and IMEA. IMEA filed supplemental comments in support of Constellation's answer. Constellation filed an answer to Dynegy's answer. Ameren Services filed an answer to Constellation's answer.

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[11] *See Avista Corp. & NorthWestern Corp.*, 121 FERC ¶ 61,277 (2007) (*Avista & NorthWestern)* and *NorthWestern Corp. & Powerex Corp.*, 121 FERC ¶ 61,204 (2007) *(NorthWestern & Powerex).*

[12] Application at 6.

[13] Dynegy claims that its rates under the contract entered into as a result of the Ameren 2008 RFP are lower then the Ameren Affiliates' cost-based rates for the same service. Dynegy thus argues that a waiver would be appropriate even under the reasoning of the February 12 Order limiting the rates Dynegy may charge to be no higher than those approved for the Ameren Affiliates.

10. Ameren Services states that the waiver request is consistent with Commission precedent, and the Commission should approve the waiver to help ensure that the Ameren Affiliates will have adequate sources for the ancillary services that they, as a Balancing Authority within the Midwest ISO, must provide. Ameren Services states that Dynegy was selected in a competitive process, and the proposed sales therefore do not give rise to the anti-competitive behavior targeted by the restrictions in the Dynegy Tariff. Ameren Services notes that Dynegy is not affiliated with the Ameren Affiliates, and states that any agreement for the sale of ancillary services should be viewed as an arms-length transaction that is free of affiliate abuse or preference. According to Ameren Services, the sales will serve the public interest because they are necessary to allow the Ameren Affiliates to serve their retail customers in Illinois and fulfill their obligations as a transmission owner under the Midwest ISO's OATT. Finally, Ameren Services states that the transaction with Dynegy is for a limited term, and a waiver in this instance is only an interim measure pending the implementation of ancillary services markets by the Midwest ISO.

11. Constellation states that Dynegy has not supplied a market power study demonstrating that it lacks market power in connection with the sale of ancillary services in the Ameren Illinois Utilities balancing authority area, and it also states that the Commission has not found that Dynegy lacks such market power. Constellation maintains 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. The Ameren Illinois Utilities have no generation and cannot supply ancillary services at cost-based rates, which Constellation contends means that the 2008 Dynegy rate was not disciplined by the possibility that customers could obtain ancillary services directly from the Ameren Illinois Utilities.

12. In addition, Constellation argues that Dynegy does not support its claim that the Ameren 2008 RFP was robust with evidence that shows that the ancillary service rates are just, reasonable and not the result of market power. Constellation states that while the scope of the Ameren 2008 RFP was expanded for spinning and supplemental services, it is not clear that it was expanded for regulation, nor is it clear how many entities were actually solicited to provide regulation, how many of those solicited were technically capable of providing the service, and how many actually submitted RFP bids. Constellation states that only two suppliers (Dynegy and Ameren Energy Marketing Company) submitted bids in the 2007 Revised RFP, and the Ameren Illinois Utilities were forced to purchase 50 MWs of regulation from Dynegy as a result of the 2007 RFP. Constellation notes that Dynegy's request does not indicate whether it offered more than the 25 MWs of service that was taken in the 2008 RFP and, if it did not, why it reduced the quantity from the 2007 Revised RFP level. Constellation states that regardless of

whether the 2008 Ameren RFP was a reasonable method to solicit potential suppliers, there is no evidence to show that there was sufficient competition to ensure its results as reflected in the 2008 Dynegy rate were just, reasonable and not a result of market power.

13. Constellation disagrees that the cases Dynegy cites support Dynegy's waiver request. Constellation states that the Commission held in *Avista & NorthWestern* that the cost-based portion of Avista's proposed rate was below the level that the Commission has previously found to be just and reasonable. The Commission also found that Avista did not control any capacity in the NorthWestern market and made express findings that Avista did not have market power in the provision of ancillary services in the NorthWestern market. Constellation states that in *NorthWestern & Powerex* the Commission made express findings that Powerex did not control any available capacity in the NorthWestern market and did not have market power for the provision of ancillary services there. Constellation states that Dynegy controls substantial quantities of generation in the Ameren Affiliates balancing authority area. It also states that Dynegy does not set forth the rate it will charge, as was done in the cases it cites and provides no evidence to support its conclusion that its rate will be lower than the 2008 Ameren rate for regulation.

14. Constellation requests that the Commission require Dynegy to make a compliance filing setting forth the details of the actual rate it will be charging the Ameren Illinois Utilities for regulation. It further requests that if that rate exceeds Ameren's rate, the Commission should either: (1) condition approval of Dynegy's waiver request on its rates being capped at the 2008 Ameren rate for regulation approved in Docket Nos. ER08-185-000 and ER08-186-000; or (2) limit Dynegy to recovery of the higher of its embedded or opportunity costs and set the matter for hearing.

15. Southwestern states that it adopts the comments made by Constellation. IMEA states that it supports Constellation's comments generally. IMEA argues that if Dynegy's rates for 2008 are, as Dynegy claims, lower than the rates developed through settlement in Docket Nos. ER07-169-000 and ER07-170-000, the protections required by Avista arguably would be in place. However, IMEA states that it is not able to confirm that Dynegy's claim is correct, and it agrees with Constellation that Dynegy should be required to file the details of the rate it will charge the Ameren Illinois Utilities. The Commission therefore should, prior to any approval, require Dynegy to make a compliance filing setting out the details of its proposed 2008 rates and, if the rates are in excess of those approved under the terms of the Ameren settlement, condition the approval of Dynegy's waiver request on Dynegy's rates being capped at the Ameren settlement rate.

III. Request for Additional Information and Dynegy Response

16. On February 15, 2008, the Director, Division of Tariffs and Market Development -- West, issued a letter to Dynegy (request for information) requesting additional information supporting Dynegy's statement that:

> the ER07-169 Settlement specified rates that would be in effect if the Ameren Affiliates were winning bidders in the Ameren 2008 RFP, and those rates are reflected in the Ameren Affiliates' pending application. Dynegy Power's rates under the contract entered into as a result of the Ameren 2008 RFP are lower than the Ameren Affiliates' cost-based rates for the same service.[14]

17. The request for information stated that Dynegy did not provide the rate calculation under the contract nor did it provide support for its contention that Dynegy's rate is lower than the Ameren Affiliates' cost-based rates for the same service. The request for information sought the following information from Dynegy regarding the proposed rate, including: (1) the Fixed Rate, Variable Charge, and Total Annual Cost for its proposed rate and support for Dynegy's assumptions or estimations relied upon in calculating the Total Annual Cost; and (2) information comparing Dynegy's proposed rate to the Ameren Affiliates' cost-based rates for the same service.[15]

18. On March 7, 2008, Dynegy responded to the request for information. Dynegy provided estimates of its rates broken down into Fixed and Variable Cost components. Dynegy's states that fixed cost component equals $5,350 per MW per month or approximately $7.43 per MWh.[16] Dynegy's explained that the fixed cost component of its rate is known and will not change over the course of the contract. Dynegy described the assumptions it used to estimate its variable charge of approximately $28.08 per MWh. Dynegy's states that its variable cost component is an estimate and may change over the course of the contract. Dynegy provided two estimates using different assumptions regarding the variable cost component of the same service from the Ameren Affiliates. Dynegy states that the Ameren Affiliates' fixed cost component equals $5,750 per MW per month or approximately $7.98 per MWh. Dynegy provided an estimate of the

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[14] *Dynegy Power Marketing, Inc.*, Docket No. ER08-356-000, at 1 (citing Application at 6) (Feb. 15, 2008) (unpublished letter order) (requesting additional information needed to process Dynegy's filing).

[15] *Id.* at 2.

[16] Based on a 30 day month times 24 hours per day, or 720 hours a month.

Ameren Affiliates' variable charge of approximately $31.12 per MWh.[17] As in Dynegy's case, the Ameren Affiliates' variable cost component is an estimate and may change over the course of the contract. Dynegy argues that both of the estimates of the Ameren Affiliates' total costs exceeded Dynegy's total costs for the same service. Dynegy further stated that it provided an estimate of its variable charge using the forward curve and making several reasoned adjustments based on historical data. Dynegy claimed that the final calculation of variable costs will not be available until after the contracts have terminated.

19. Notice of Dynegy's response to the request for information was published in the *Federal Register*, 73 Fed. Reg. 14,464 (2008), with interventions and protests due on or before March 28, 2008. None was received.

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene of Ameren Services, Constellation and IMEA serve to make them parties to this proceeding.

21. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.214(d) (2007), the Commission will grant Southwestern's, late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Dynegy's answer to Constellation and IMEA, IMEA's supplemental comments, Constellation's answer to Dynegy's answer, or the answer of Ameren Services to Constellation's answer and will, therefore, reject them.

[17] Dynegy estimated variable cost at $25.93 per MWh, multiplied by 30 and divided by 25 to equal the $31.12 per MWh figure.

B. <u>Analysis</u>

23. As discussed below, we grant, effective January 1, 2008,[18] Dynegy's request for waiver of the prohibition on sales of ancillary services at market-based rates by a third-party supplier to a public utility that is purchasing ancillary services to satisfy its OATT requirements to offer ancillary services to its own customers (section 3(b) of the Dynegy Tariff). As discussed below, our grant of the waiver in this case is subject to the Commission's decision on the request for rehearing pending in Docket No. ER07-323-002.

24. The Commission explained in *Avista* its belief that entry by third-party suppliers in ancillary services markets in which a transmission provider is obligated to provide such services at cost-based rates can potentially result in lower prices than would otherwise emerge. The Commission stated there:

> We base our policy in this case on the expectation that – as entry into ancillary service markets occurs – prices will decrease from the level established by the transmission provider's cost-based rate. Under these circumstances, customers will pay prices for ancillary services that are no higher than and will very likely be lower than the transmission provider's cost-based rate. The ancillary services customers will be protected in part by the availability of the same ancillary services at cost-based rates from the transmission provider. The backstop of cost-based ancillary services from the transmission provider will, in effect, limit the price at which customers are willing to buy ancillary services.[19]

25. Although the Commission stated that the policy announced in *Avista* would generally not apply to 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, as Dynegy notes, the

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[18] We grant Dynegy's request for waiver of the 60-day prior notice requirement. *See Central Hudson Gas and Electric Co.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

[19] *Avista Corp.*, 87 FERC at 61,883 (footnote omitted).

Commission indicated that it was open to considering requests for market-based rates in such circumstances on a case-by-case basis.[20]

26. In the September 25 Order, the Commission noted that it had previously found that the Ameren 2007 RFP "was a reasonable and appropriate method to solicit potential suppliers under the circumstances of the proceeding, where the Ameren Illinois Utilities needed to procure ancillary services for an interim period until the Midwest ISO ancillary services market becomes operational . . . ." The Commission removed the requirement that Dynegy's rates be no higher than the rates approved for the Ameren Affiliates, noting that "our decision in this regard is based on the fact that these rates are intended to be for an interim period only." That decision is the subject of the pending request for rehearing in Docket No. ER07-323-002. The circumstances surrounding the instant request for waiver are similar to the circumstances presented in the pending rehearing request regarding the Ameren 2007 RFP. Therefore, we grant the request for waiver in this docket subject to the outcome of the pending request for rehearing in Docket No. ER07-323-002, including refunds as may be warranted. Finally, we do not believe that the compliance filing requested by Constellation and IMEA is warranted here in light of Dynegy's response to the request for information. In addition, while Constellation has raised market power concerns, it has raised the same concerns in its request for rehearing in Docket No. ER07-323, and the matter will be addressed there.

The Commission orders:

Dynegy's request for waiver of section 3(b) of the Dynegy Tariff is hereby granted, effective January 1, 2008, as discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[20] *Id*. at n.12.