

UNITED STATES OF AMERICA 105 FERC ¶ 61,249
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. EL03-26-000

v.

Dynegy Power Marketing, Inc.

ORDER ASSERTING JURISDICTION
OVER ARBITRATION AWARD
AND DIRECTING SUBMITTAL OF EXHIBITS

(Issued November 25, 2003)

1. In this order, we grant the New York Independent System Operator, Inc.'s (NYISO) request that we assert our primary jurisdiction over the review of an arbitration award (Award) that ordered NYISO to pay damages to Dynegy Power Marketing, Inc. (Dynegy) for NYISO's erroneous mitigation of a Dynegy bid into NYISO's day-ahead market. We also decide which exhibits we will consider when we determine whether the arbitrator awarded the appropriate amount of damages. Lastly, we require the filing of certain other exhibits. This order benefits customers by furthering the Commission's fulfillment of its regulatory responsibilities concerning proper mitigation of market power.

Background

2. On June 28, 2001, the Commission accepted temporary revisions to NYISO's Market Administration and Control Area Services Tariff (Services Tariff) that incorporated, for the 2001 summer capability period, an Automated Mitigation Procedure (AMP)¹ into NYISO's market power mitigation measures.² The purpose of the AMP is

¹The AMP uses a computer software program to review bids submitted by generators into the day-ahead market. Once activated, the AMP mitigates bids only if specific thresholds for both bidding conduct and market impact are crossed. See *New York Independent System Operator, Inc., et al.*, 99 FERC ¶ 61,246 at 62,036-37 (2002).

²*New York Independent System Operator*, 95 FERC ¶ 61,471, reh'g denied,
(continued...)

to eliminate the one-day delay, inherent in manual procedures, before NYISO could mitigate conduct that would otherwise set non-competitive market energy prices in the day-ahead market. The Commission agreed with certain intervenors that the AMP mechanism may mitigate bids in situations where market power is not the cause for high or volatile bids. It agreed also that NYISO's proposed revisions may not provide for sufficient consultation with generators to reasonably establish that particular bids were attempts to exercise market power. The Commission said that if NYISO subsequently determined that a particular bid was not an attempt to assert market power, the generator will be paid its full bid.³

3. Subsequently, while using this AMP, NYISO erroneously mitigated Dynegy's bid to supply electric power from two generating units into NYISO's August 10, 2001 day-ahead market. The parties did not dispute this point. However, the parties did dispute the amount of damages that made up the full bid to which Dynegy was entitled. They sought arbitration of their dispute pursuant to Section 11.3 of NYISO's Services Tariff (Section 11.3), and Section 10.05 of NYISO's Independent System Operator Agreement (NYISO Agreement), to which Dynegy is a signatory.⁴ In the Award, issued October 28, 2002, the arbitrator assessed damages of \$895,596.00 against NYISO, and denied Dynegy's claim for consequential damages of lost opportunity costs.⁵

4. Pursuant to Section 11.3, which requires filing with the Commission all arbitration decisions affecting matters subject to the jurisdiction of the Commission, NYISO filed the Award on November 8, 2002. On January 10, 2003, Dynegy filed a motion with the United States District Court for the Southern District of New York (District Court) to confirm the Award (Dynegy's Motion to Confirm). On February 20, 2003, NYISO filed with the Commission a Motion to Vacate the Award (NYISO's Motion to Vacate),⁶ in

97 FERC ¶ 61,176 (2001), petition for review denied per curiam sub nom., *Dynegy Power Marketing, Inc. v. FERC*, (D.C. Cir. Apr. 23, 2003), 2003 U.S. App. LEXIS 7886 (2001 Order).

³2001 Order, 95 FERC at 62,690 & n.9.

⁴The provisions of the Services Tariff and the NYISO Agreement are consistent. For simplicity, this order will cite only to Section 11.3. This order will also refer to the Services Tariff and the NYISO Agreement collectively as Agreements.

⁵American Arbitration Association Case No. 13 198 00247 02, *Dynegy Power Marketing, Inc. and New York Independent System Operator, Inc.* (October 28, 2002) (Grigg, Arb.).

⁶Section 11.3 states, in pertinent part:

(continued...)

which it objected to the arbitrator's adoption of Dynegey's computation of the correct damages and presented its own computation of the correct damages, together with supporting exhibits (February Exhibits). NYISO's Motion to Vacate posits that the Commission has both exclusive jurisdiction and primary jurisdiction over the Award. NYISO also filed, with the District Court, a motion for dismissal of Dynegey's Motion to Confirm and for stay of entry of the Award (NYISO's Motion for Court Stay).⁷

5. Dynegey responded to NYISO's Motion to Vacate, on March 7, 2003, by filing with the Commission a motion to dismiss NYISO's Motion to Vacate (Dynegey's Motion to Dismiss), and a motion to strike three of the February Exhibits (Dynegey's Motion to Strike Exhibits). On March 24, 2003, NYISO filed a response, requesting that the Commission reject both of Dynegey's motions (NYISO's Response). On March 31, 2003, Dynegey filed a rebuttal to NYISO's Response (Dynegey's Rebuttal). Both Dynegey's Motion to Dismiss and Dynegey's Rebuttal urged the Commission not to assert jurisdiction over the Award.

6. Contemporaneously, NYISO and Dynegey (collectively, parties) filed a joint, March 6, 2003, motion requesting a schedule for submittal of filings in this proceeding. The parties linked the issue of whether the Commission should assert jurisdiction over the Award to the issue of Commission consideration of certain of the February Exhibits. The parties also linked both these issues to the deadline for Dynegey to file a substantive answer to NYISO's Motion to Vacate. Additionally, the parties asked that NYISO be allowed to rebut Dynegey's substantive answer.⁸

The judgment of the arbitrator may be entered on the award by any court in New York having jurisdiction. Within one (1) year of the arbitration decision, a party may request that the Commission or any other federal, state, regulatory or judicial authority (in the State of New York) having jurisdiction over such matter vacate, modify or take such other action as may be appropriate with respect to any arbitration decision that . . . [among other criteria] involves a dispute in excess of \$500,000.

⁷As of the date of this order, the District Court has not ruled on Dynegey's Motion to confirm or NYISO's Motion for Stay.

⁸The parties proposed that Dynegey would file a substantive answer to NYISO's Motion to Vacate only if the Commission asserted jurisdiction over the Award. The filing deadlines for this answer and NYISO's subsequent rebuttal would depend in turn on the date of the Commission's order on Dynegey's Motion to Strike Exhibits, deciding whether the challenged February Exhibits would be excluded from consideration.

7. By an order of March 14, 2003, the Commission established the requested schedule.⁹ Therefore, the issue date of this instant order establishes the filing deadlines for Dynegy's substantive answer and NYISO's rebuttal.

Notice and Responsive Pleadings

8. Notice of NYISO's November 8, 2002, filing of the Award was published in the Federal Register, 67 Fed. Reg. 71,162 (2002), with comments, protests, and interventions due on or before October 28, 2003.¹⁰ The New York State Public Service Commission (New York Commission) filed a notice of intervention. Dynegy filed a timely motion to intervene. No substantive issues were raised.

Discussion

Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the New York Commission's notice of intervention and Dynegy's timely, unopposed motion to intervene serve to make the entities that filed them parties to this proceeding.

Commission Jurisdiction

NYISO's Position

10. NYISO contends that the Commission has both exclusive jurisdiction and primary jurisdiction over the matters that NYISO raises in its Motion to Vacate, *i.e.*, the design of the NYISO markets, NYISO's role in administering these markets, and the requirements of the Federal Power Act (FPA) and the Services Tariff. NYISO asserts that these matters cannot be raised before the District Court because of the Commission's exclusive authority to determine the reasonableness of wholesale rates. NYISO continues that this proceeding concerns questions of tariff construction and the meaning of tariff terms. NYISO asserts that the meaning of the "full bid" standard for compensation for erroneous mitigation, as used by the Commission in approving the AMP, is a critical issue, and that

⁹ New York Independent System Operator, Inc. v. Dynegy Power Marketing, Inc., 102 FERC ¶ 61,297 (2003).

¹⁰ October 28, 2003 is one year from the date of the Award. Section 11.3 gives parties one year from the date of the arbitration decision to request that vacation, modification, or other appropriate action be taken. See note 6, supra.

the Commission is the best authority to elaborate its intention in using and applying this term.

11. NYISO contends that even if the Award is subject to review by another forum, the Commission should assert primary jurisdiction. NYISO points to the necessity for uniform interpretation and application of the full bid standard, both in New York and elsewhere, and gives, as example, the market mitigation measures under consideration in the Midwest Independent Transmission System Operator tariff.¹¹ NYISO argues also that interpretation of the full bid standard is important to the Commission's regulatory responsibilities in ensuring that market power is mitigated properly and that resulting rates are just and reasonable.

Dynergy's Position

12. Dynergy urges the Commission to decline to assert jurisdiction and grant its Motion to Dismiss NYISO's Motion to Vacate. While agreeing that the Commission has the power to vacate or modify the Award, Dynergy argues that the forum where the matter was first filed, the District Court, should decide the matter.¹² Dynergy continues that to litigate first which forum hears the matter subverts both the Commission's policies encouraging alternate dispute resolution (ADR) and the intent of the United States Arbitration Act, 9 U.S.C. §§ et seq. (2000), because such litigation delays rapid and unobstructed enforcement of agreements to arbitrate.

13. Dynergy contends that the Commission's primary jurisdiction has been waived by the parties' agreement to submit disputes to arbitration. Dynergy continues that even without such waiver, the matter does not satisfy the factors that are generally the focus of a primary jurisdiction analysis.¹³ Dynergy argues that because of the arbitrator's

¹¹Midwest Independent Transmission System Operator, Inc., Docket No. ER03-323-000. On March 13, 2003, the Commission issued an order accepting market mitigation measures subject to modification and ordering a June 26, 2003 technical conference. 102 FERC ¶ 61,280 (2003), reh'g pending (Midwest ISO). After the conference, the Commission invited further comments and reply comments.

¹² Dynergy cites Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co., 529 U.S. 193 (2000) (Cortez).

¹³Dynergy cites National Communications Association, Inc. v. American Telephone and Telegraph Co., 46 F.3d 220, 223 (2d Cir. 1955). Compare Arkansas Louisiana Gas Co. v. Hall, 7 FERC ¶ 61,175 at 61,332, reh'g denied, 8 FERC ¶ 61,031

(continued...)

qualifications, issues concerning wholesale power markets were not beyond his expertise and experience. Dynegy contends that the dispute is not particularly within the Commission's discretion because, in approving the Agreement's ADR procedures, the Commission fully contemplated their use in resolving disputes arising from NYISO's administration of markets. Dynegy states that there is little likelihood of inconsistent rulings because the only questions here are: whether there was a full and fair hearing before a qualified expert; whether there were any procedural irregularities; and whether the arbitrator set forth finding of facts and rulings of law, as required by the Agreement. Lastly, Dynegy states that NYISO submitted its appeal to the Commission after Dynegy had filed its petition with the District Court.

Commission Response

14. Section 11.3 of the Services Tariff allows parties to seek modification of an arbitration decision from either the Commission or a federal or state court. Therefore, the Commission does not have exclusive jurisdiction over this case. As this matter is already pending before the District Court, the Commission could dismiss NYISO's motion and leave NYISO to raise its concerns with the District Court. In fact, the Commission believes that this would likely be the appropriate course in most arbitration cases under Section 11.3, given that the very purpose of arbitration is to streamline litigation, and that arbitration cases generally pose issues of fact rather than issues of policy. However, Commission and judicial precedent establishes that in cases of concurrent jurisdiction, the Commission has the discretion to assert primary jurisdiction "when agency action would produce needed uniformity in an area or when the agency has 'special competence' over the issue to be decided."¹⁴ We conclude that there is a novel and technical policy issue at stake in this case that warrants assertion of our primary jurisdiction.

15. We find that interpretation of the term "full bid" is critical to this case. We have not had occasion to rule on this issue. As the issue may arise in future arbitration cases concerning improper mitigation under NYISO's market power mitigation measures, we believe that NYISO market participants, as well as future arbitrators, will benefit from

(1979).

¹⁴ *Gulf States Util. Co. v. Alabama Power Co.*, 824 F.2d 1465, 1472 (5th Cir. 1987). See also *Northern States Power Co.*, 55 FERC ¶ 61,101 at 61,344 & n.8, reh'g denied, 56 FERC ¶ 61,150 (1991). Nothing in Section 11.3 indicates that the Commission waived its discretion to invoke primary jurisdiction. Further, the case upon which Dynegy relies, *Cortez*, note 12, supra, involved the issue of concurrent jurisdiction between two courts, rather than a court and an administrative agency, and, thus, is inapposite.

Commission guidance on the issue. Further, resolution of this issue implicates the design and operation of market mitigation procedures and, thus, is within the Commission's area of technical expertise. In short, Commission review of this case would provide needed uniformity in matters over which we have special competence. Therefore, we will assert primary jurisdiction over the Award.

Consideration of Exhibits

16. NYISO describes the February Exhibits included in its Motion to Vacate as summarizing and interpreting the factual record before the arbitrator, and providing legal authority, so as to facilitate the Commission's understanding of the issues. NYISO had not submitted three of these exhibits, Exhibits Nos. 5, 8, and 9, to the Arbitrator. February Exhibit No. 5 is an explanation of Exhibit No. 10 proffered at the arbitration hearing. February Exhibit No. 8, an affidavit by David B. Patton, Ph.D., an independent market advisor for NYISO, sets forth his analysis of whether the Award is consistent with the design the NYISO day-ahead market. February Exhibit No. 9 provides excerpts from two legal encyclopedias discussing compensatory damages.¹⁵

17. In its Motion to Strike Exhibits, Dynegy states that February Exhibits Nos. 5, 8, and 9 were available during the arbitration proceedings and that NYISO could have presented them to the arbitrator at that time. Dynegy objects to their inclusion in the record before the Commission on the grounds that the parties are bound by the testimony and the record before the arbitrator. Dynegy asserts that the arbitration record may be supplemented on appeal only for accident or error; circumstances that do not exist here. Dynegy states that consideration of additional material in this proceeding will defeat the purpose of ADR, and will affect the Commission's limited resources by causing *de novo* review of all arbitration awards.

18. We observe that the parties have not filed with us all the exhibits and materials that they submitted to the Arbitrator. For example, the record does not include Dynegy's exhibits at the arbitration hearing, nor does it include the relevant market rules in effect at the time of the event. While Commission staff could likely reconstruct much of the information contained in the Dynegy exhibits missing from the data provided in the Joint Stipulation of Facts (Exhibit No. 1 in the arbitration hearing), provided as February Exhibit No. 1, the exhibits proffered at the arbitration hearing may contain additional information of which we are unaware. We believe that in order to conduct a comprehensive review the Award, we must have available to us the complete record presented to the Arbitrator. We will therefore direct both parties to compare their submittals to the arbitrator against their previous filings with the Commission, and to file,

¹⁵ 22 Am. Jur. 2d Damages § 26 (2002) and 36 NY Jur. Damages § 9 (2002).

within ten days, those materials that were submitted to the arbitrator but not previously filed. However, when reviewing the Award, we will not consider the three February Exhibits that were not in the record seen by the Arbitrator. NYISO has not established any basis on which we should take the unusual step of reviewing material beyond that on which the arbitrator based his decision.

The Commission orders:

(A) NYISO's March 24, 2003 request that we assert primary jurisdiction over review of the Award is hereby granted as discussed in the body of this order.

(B) Dynegy's March 7, 2003 motion to strike NYISO's February Exhibits 5, 8, and 9 from Commission consideration is hereby granted, as discussed in the body of this order.

(C) NYISO and Dynegy are hereby directed to file, within ten days from the date of this order, all exhibits presented to the Arbitrator that were not previously filed with the Commission in this proceeding.

(D) Dynegy is hereby directed to file its substantive answer to NYISO's Motion to Vacate within 30 days of the date of this order, and NYISO is hereby directed to file its rebuttal within 15 days of the date that Dynegy files its substantive answer, as established by the Commission's order in this proceeding of March 14, 2003.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.