

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DENNIS LIVELY, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 05-CV-0063-MJR
)	
DYNEGY INC., <i>et al.</i> ,)	
)	
Defendants.)	

FINDINGS AND ORDER CONDITIONALLY AMENDING DEFINITION OF
CERTIFIED CLASS FOR SETTLEMENT PURPOSES, PRELIMINARILY
APPROVING PROPOSED SETTLEMENT, APPROVING FORM AND
DISSEMINATION OF CLASS NOTICE, APPROVING SETTLEMENT
ADMINISTRATOR, AND SETTING DATE FOR HEARING ON FINAL APPROVAL

REAGAN, District Judge:

This litigation involves claims for alleged violations of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.* (“ERISA”), with respect to the Illinois Power Company Incentive Savings Plan for Employees Covered Under A Collective Bargaining Agreement, renamed the Dynegy Midwest Generation Incentive Savings Plan for Employees Covered Under A Collective Bargaining Agreement (the “*Plan*”).¹

Presented to the *Court* for preliminary approval is a settlement of the litigation as against all *Defendants*. The terms of the *Settlement* are set forth in a Class Action Settlement Agreement (the “*Settlement Agreement*”) dated January 17, 2008, and executed by counsel on behalf of the *Named Plaintiffs* and the *Defendants*.

The *Court* has preliminarily considered the *Settlement Agreement* to determine, among other things, whether to modify for settlement purposes the definition of the previously certified

¹ Capitalized and italicized terms not otherwise defined in this Order shall have the same meaning as ascribed to them in the *Settlement Agreement*.

class and whether the *Settlement* appears to be fair, adequate, and reasonable enough to warrant the issuance of notice to members of the *Settlement Class*. Upon reviewing the *Settlement Agreement* and all of the pleadings and documents filed with the Court in support of Plaintiffs' motion, and taking into consideration this Court's previous orders and decisions in this action, the Court ORDERS as follows:

1. **Class Findings:** The *Court* previously certified a Class in this action. *See* Memorandum and Order dated March 2, 2007 (Doc. 170) ("Class Certification Order"), by which the Court granted in part and denied in part Plaintiffs' motion for class certification. In certifying that Class with regard to Plaintiffs' First Claim for Relief, the Court found all of the requirements of FED. R. CIV. P. 23(a) were met, that the claim was appropriate for certification under FED. R. CIV. P. 23(b)(1)(b), and that *Named Plaintiffs' Counsel* met the standard set forth in FED. R. CIV. P. 23(g). The Court appointed *Named Plaintiffs' Counsel* as Class Counsel. The present motion seeks to have the Court modify the definition of that certified class for purposes of settlement. Based on the Court's prior opinion and order certifying a class herein, and on *Named Plaintiffs'* submissions in support of the instant motion, the Court preliminarily finds that the requirements of the Federal Rules of Civil Procedure, the United States Constitution, the Rules of the Court and any other applicable law have been met as to the "*Settlement Class*" defined below, in that:

A. The members of the *Settlement Class* are so numerous that their joinder before the *Court* would be impracticable. Rule 23(a)(1) is satisfied.

B. There are one or more questions of fact and/or law common to the *Settlement Class*. Rule 23(a)(2) is satisfied.

C. The claims of the *Named Plaintiffs* are typical of the claims of the *Settlement Class*. Rule 23(a)(3) is satisfied.

D. The *Named Plaintiffs* will fairly and adequately protect the interests of the *Settlement Class* in that (i) the interests of *Named Plaintiffs* and the nature of their claims are consistent with those of the members of the *Settlement Class*; (ii) there appear to be no conflicts between or among the *Named Plaintiffs* and the *Settlement Class*; and (iii) the *Named Plaintiffs* and the members of the *Settlement Class* are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated *ERISA* and other class actions. Rule 23(a)(4) is satisfied.

E. Rule 23(b)(1) is satisfied because the prosecution of separate actions by individual members of the *Settlement Class* would create a risk of (i) inconsistent or varying adjudications as to individual class members that would establish incompatible standards of conduct for the parties opposing the claims asserted in the *Action*; or (ii) adjudications as to individual class members that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede those persons' ability to protect their interests.

F. The *Defendants* have acted or refused to act on grounds generally applicable to the *Settlement Class*, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the *Settlement Class* as a whole. Rule 23(b)(2) is satisfied.

G. *Named Plaintiffs' Counsel* are capable of fairly and adequately representing the interests of the class, in that *Named Plaintiffs' Counsel* have done extensive work identifying and investigating potential claims in the action; have

successfully resisted a motion to transfer venue; have litigated the validity of the claims at the motion to dismiss stage of this case; have moved for and in part been successful in obtaining class certification; are experienced in handling ERISA and other class actions, including claims of the type asserted in the *Action*; are knowledgeable of the applicable law; and have committed the necessary resources to represent the *Settlement Class*. Rule 23(g) is satisfied.

Class Certification – Based on the findings set out above, the Court preliminarily certifies the following *Settlement Class* under FED. R. CIV. P. 23(b)(1) and/or (2) and 23(e):

All *Persons* for whose individual accounts the Illinois Power Company Incentive Savings Plan for Employees Covered Under A Collective Bargaining Agreement, renamed the Dynegy Midwest Generation Incentive Savings Plan for Employees Covered Under A Collective Bargaining Agreement (“the *Plan*”), held shares of Dynegy stock at any time from February 1, 2000, to January 17, 2008, inclusive, and as to each such *Person*, his or her beneficiaries, alternate payees, *Representatives* and *Successors in Interest*; provided, however, that notwithstanding the foregoing, the *Settlement Class* does not include any of the *Individual Defendants* in this lawsuit, any officer or director of Dynegy, Inc., Dynegy Midwest Generation, Inc., or Illinois Power Company, or any of the *Individual Defendant’s Immediate Family*, beneficiaries, alternate payees, representatives, or successors-in-interest, except for immediate family, beneficiaries, alternate payees, *Representatives* or *Successors in Interest* who themselves were participants in the *Plan*, who shall be considered members of the *Settlement Class* with respect to their own *Plan* accounts.

The *Court* appoints *Named Plaintiffs* as the class representatives for the *Settlement Class*, and *Named Plaintiffs’ Counsel* (referred to herein as such or as “*Class Counsel*”) as counsel for the *Settlement Class*. Should the Court decide not to give final approval to the proposed Settlement, or should such approval be reversed on appeal, then the class previously certified by the *Court* shall be reinstated as such without further order of the *Court*, and subject to *Defendants’* pending interlocutory appeal of that certification.

2. **Preliminary Findings Regarding Proposed Settlement** – The *Court* preliminarily finds that (i) the proposed *Settlement* resulted from extensive arm’s-length negotiations under the auspices of the Seventh Circuit’s mediation program; (ii) the *Settlement Agreement* was executed only after *Class Counsel* had conducted pre-settlement discovery; (iii) *Class Counsel*, who are highly experienced in litigating ERISA and other complex class action cases, including cases similar to this one, have concluded that the *Settlement Agreement* is fair, reasonable and adequate; and (iv) the *Settlement* evidenced by the *Settlement Agreement* is sufficiently fair, reasonable and adequate to warrant sending notice of the *Settlement* to the *Settlement Class*.

3. **Fairness Hearing** – The Court hereby sets a hearing for **Thursday, September 4, 2008, at 1:30 P. M.** in Courtroom No. 2 of this Court (the “*Fairness Hearing*”) to determine, among other things:

- Whether the *Settlement* should be approved as fair, reasonable and adequate;
- Whether the litigation should be dismissed with prejudice as to all *Defendants* pursuant to the terms of the *Settlement*;
- Whether the notice, summary notice, and notice methodology implemented pursuant to the *Settlement Agreement* (i) constituted the best practicable notice; (ii) constituted notice that was reasonably calculated, under the circumstances, to apprise members of the *Settlement Class* of the pendency of the litigation, their right to object to the *Settlement* and their right to appear at the *Fairness Hearing*; (iii) were reasonable and constituted due, adequate and sufficient notice to all persons entitled to notice; and (iv) met all applicable requirements of the Federal Rules of Civil Procedure, and any other applicable law;

- Whether *Class Counsel* adequately represented the *Settlement Class* for purposes of entering into and implementing the *Settlement Agreement*;
- Whether the *Plan of Allocation* should be approved;
- Whether the application for attorneys' fees and expenses filed by *Class Counsel* should be approved; and
- Whether the application for service incentive compensation for *Named Plaintiffs* should be approved.

4. **Class Notice** – The *Parties* have presented to the *Court* a proposed form of *Class Notice*, which is appended hereto as Exhibit A, and a summary notice, which is appended hereto as Exhibit B. With respect to such forms of *Class Notice*, the *Court* finds that such forms fairly and adequately (a) describe the terms and effect of the *Settlement Agreement* and of the *Settlement*; (b) notify the *Settlement Class* concerning the proposed *Plan of Allocation*; (c) notify the *Settlement Class* that *Class Counsel* will seek incentive compensation from the *Settlement Fund* for the *Named Plaintiffs*, in an amount not to exceed \$10,000 each; (d) notify the *Settlement Class* that *Class Counsel* will seek reimbursement of costs and expenses of litigation, and for attorneys fees not to exceed 20% of the *Settlement Amount*; (e) give notice to the *Settlement Class* of the time and place of the *Fairness Hearing*; and (f) describe how the recipients of the *Class Notice* may object to any of the relief requested. The *Parties* have proposed the following manner of communicating the notice to members of the *Settlement Class*, and the *Court* finds that such proposed manner is the best notice practicable under the circumstances.

The *Court* hereby approves Settlement Services, Inc., as the *Settlement Administrator* and directs that the *Settlement Administrator* shall:

- By no later than 60 days before the *Fairness Hearing*, cause the *Class Notice*, with such non-substantive modifications thereto as may be agreed upon by the *Parties* and presented to the *Court*, to be mailed, by first-class mail, postage prepaid, to the last known address of each *Person* within the *Settlement Class* who can be identified by reasonable effort. By no later than three (3) business days of entry of this *Preliminary Approval Order*, *Defendants* will provide to the *Settlement Administrator* from the *Plan* records the names and present or last known addresses of the *Settlement Class* members. Upon request of the *Settlement Administrator*, as needed to locate *Settlement Class* members, *Defendants* also shall provide the Social Security Numbers of *Settlement Class* members, and any differing name and address information available to *Defendants* from the records of any other pension plan(s) sponsored by any *Defendant*. In the event that no address is available from the records of the *Plan* and such other pension plan(s), then, upon request from the *Settlement Administrator*, the *Company* shall provide from available employment records the last known address, if any, of the *Settlement Class* member.
- By no later than 60 days before the *Fairness Hearing*, cause a summary notice in the form attached hereto as Exhibit B, with such non-substantive modifications thereto as may be agreed upon by the *Parties* and presented to the *Court*, to be published on at least one occasion in the following publications: St. Louis Post-Dispatch; Peoria Journal Star; the Commercial-News (Danville, IL); the News-Gazette (Champaign, IL); the Alton Telegraph; the Belleville News-Democrat; the Springfield Journal Register; the Southern Illinoisan (Carbondale, IL); and the Pantagraph (Bloomington, IL).

The Court directs that *Class Counsel* shall by no later than 60 days before the *Fairness Hearing* cause the *Class Notice* to be published on each website identified in the *Class Notice*.

At or before the *Fairness Hearing*, the *Settlement Administrator* and *Class Counsel* shall file with the *Court* proofs of timely compliance with the foregoing mailing and publication requirements.

5. Objections to Settlement – Any member of the *Settlement Class* who wishes to object to the fairness, reasonableness or adequacy of the *Settlement*, to the *Plan of Allocation*, to any term of the *Settlement Agreement*, to the proposed award of attorneys' fees and expenses, or to any request for compensation for the *Named Plaintiffs* may file an Objection. An objector must file with the *Court* a statement of his, her or its objection(s), specifying the reason(s), if any, for each such objection made, including any legal support and/or evidence that such objector wishes to bring to the *Court's* attention or introduce in support of such objection. The objector must also mail the objection and all supporting law and/or evidence to counsel for *Defendants*, and to the *Settlement Administrator*, who must ensure that *Class Counsel* receive copies of all objections. The addresses for filing objections with the *Court* and service on the *Settlement Administrator* and counsel for *Defendants* are as follows:

To the Court:

Clerk of the Court
Judge Michael J. Reagan
United States District Court for the
Southern District of Illinois
750 Missouri Avenue
East St. Louis, Illinois 62201
Re: Case No. 05-00063-MJR

To Counsel for *Defendants*:

Paul J. Ondrasik, Jr., Esq.
Morgan D. Hodgson, Esq.

Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Michael M. Wilson
Akin Gump Strauss Hauer & Feld LLP
1111 Louisiana Street, 44th Floor
Houston, TX 77002-5200

Thomas E. Wack
Jeffrey S. Russell
Bryan Cave LLP
211 North Broadway, Suite 3600
St. Louis, MO 63101

To the *Settlement Administrator*:

Settlement Administrator
P.O. Box 10687
Tallahassee, FL 32302-2687

The objector or his, her or its attorney (if any) must serve the objection on the *Settlement Administrator* and counsel for *Defendants* listed above and file it with the *Court* by no later than fourteen (14) court days before the date of the *Fairness Hearing*. Any member of the *Settlement Class* or other *Person* who does not timely file and serve a written objection complying with the terms of this paragraph shall be deemed to have waived, and shall be foreclosed from raising, any objection to the *Settlement*, and any untimely objection shall be barred.

6. **Appearance at Fairness Hearing** – Any objector who files and serves a timely, written objection in accordance with paragraph 5 above may also appear at the *Fairness Hearing* either in person or through counsel retained at the objector's expense. Objectors or their attorneys intending to appear at the *Fairness Hearing* must, no later than fourteen (14) court days before the date of the *Fairness Hearing*, serve counsel for *Defendants* and the *Settlement Administrator*, by first class mail or overnight courier service, and file with the *Court*, a notice of

intention to appear, setting forth the name, address and telephone number of the objector (and, if applicable, the name, address and telephone number of the objector's attorney). Any objector who does not timely file and serve a notice of intention to appear in accordance with this paragraph shall not be permitted to appear at the *Fairness Hearing*, except for good cause shown. If the *Settlement* is approved, objectors shall not be entitled to opt out of the *Settlement Class*.

7. **Access to Discovery Materials** – Upon agreeing to be bound by any confidentiality agreement or stipulation under which discovery materials have been produced in the *Action*, a member of the *Settlement Class* (and his or her counsel, if any) will be provided access, at his or her own expense, to the discovery materials in the *Action* for the sole purpose of assessing the *Settlement Agreement*. The discovery materials shall be made available for inspection at the offices of *Class Counsel* in St. Louis, Missouri.

8. **Notice Expenses** – The expenses of printing, mailing, and publishing all notices required hereby shall be paid from the *Settlement Fund* as provided in Section 8.2 of the *Settlement Agreement*.

9. **Service of Papers** – The *Settlement Administrator* shall ensure *Class Counsel* promptly receive any and all objections that come into its possession. *Defendants'* counsel and *Class Counsel* shall also promptly furnish each other with copies of any and all objections that come into their possession.

10. **Filing of Motions for Final Approval, Attorneys' Fees, and Service Payments** - Plaintiffs shall file and serve on counsel for the Defendants their motions for final approval of the Settlement and for awards of attorneys' fees, costs, and service incentive compensation no later than seven (7) days before the *Fairness Hearing*.

11. **Termination of Settlement** – This Order shall become null and void, and shall be without prejudice to the rights of the *Parties*, all of whom shall be restored to their respective positions existing immediately before this *Court* entered this Order, if the *Settlement* is terminated in accordance with the *Settlement Agreement*. In such event, Section 9 of the *Settlement Agreement* shall govern the rights of the *Parties*.

12. **Use of Order** – In the event this Order becomes of no force or effect, it shall not be construed or used as an admission, concession or declaration by or against *Defendants* of any fault, wrongdoing, breach or liability. Nor shall the Order be construed or used as an admission, concession, or declaration by or against *Named Plaintiffs* or the *Settlement Class* that their claims lack merit or that the relief requested in the *Action* is inappropriate, improper or unavailable, or as a waiver by any party of any defenses or claims he, she or it may have.

13. **Continuance of Hearing** – The *Court* reserves the right to continue the *Fairness Hearing* without further written notice.

IT IS SO ORDERED.

DATED this 30th day of April, 2008

s/Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge