

168 FERC ¶ 61,042
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc. Docket Nos. EL15-70-000

The People of the State of Illinois By Illinois Attorney General Lisa Madigan v. Midcontinent Independent System Operator, Inc. EL15-71-000

Southwestern Electric Cooperative, Inc. v. Midcontinent Independent System Operator, Inc., Dynegy, Inc., and Sellers of Capacity into Zone 4 of the 2015-2016 MISO Planning Resource Auction EL15-72-000

ORDER DENYING COMPLAINTS IN PART

(Issued July 19, 2019)

1. Four complaints (Complaints) were filed with the Commission in May and June 2015 in response to the results of the Midcontinent Independent System Operator, Inc.'s (MISO) 2015/16 Planning Resource Auction (Auction) for Local Resource Zone 4 (Zone 4). On December 31, 2015, the Commission issued an order addressing those portions of the Complaints that challenged the justness and reasonableness of provisions of MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) governing the Auction.¹ The Commission granted the Complaints in part and found, among other things, that certain provisions in the Tariff associated with market power mitigation and with calculating Capacity Import Limits were no longer just and reasonable for prospective application. The Commission prescribed just and reasonable

¹ *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,385 (2015) (December 2015 Order), *order on compliance and reh'g*, 154 FERC ¶ 61,224 (2016) (March 2016 Order).

provisions to be applied in future Auctions and required MISO to make a compliance filing to implement the revisions.

2. In this order, we address the remaining arguments raised in the Complaints regarding the 2015/16 Auction. Specifically, we: (1) grant motions to dismiss and other pleadings by entities asserting that the complaint filed by Southwestern Electric Cooperative, Inc. (Southwestern) against “sellers of capacity into Zone 4 during the 2015/16 Auction” does not make them respondents; (2) decline requests to hold an evidentiary hearing to resolve issues related to the 2015/16 Auction; and (3) find that the results of the 2015/16 Auction for Zone 4 were just and reasonable.

I. Background

A. MISO’s Auction

3. Module E-1 of MISO’s Tariff, which sets forth MISO’s currently effective annual resource adequacy construct, requires Load Serving Entities in a Local Resource Zone (Zone) to procure sufficient Capacity Resources to meet their respective annual Planning Reserve Margin Requirements, so that in aggregate, the Zone meets the zonal Planning Reserve Margin Requirement.² A Load Serving Entity can satisfy its Planning Reserve Margin Requirement in any of four ways: (1) submit a Fixed Resource Adequacy Plan which demonstrates that it has designated capacity to meet all or a portion of its Planning Reserve Margin Requirement; (2) self-schedule capacity and bid it into the Auction at a price of zero; (3) purchase required capacity in MISO’s voluntary Auction; and/or (4) pay the Capacity Deficiency Charge.³ In advance of the Auction, MISO determines the amount of capacity that must be acquired to meet forecasted load for each Zone, establishes Capacity Import limits and Capacity Export Limits for each Zone,⁴ and establishes a Local Clearing Requirement for each Zone, which is the minimum amount of procured capacity that must be physically located within the Zone (rather than imported).⁵

² MISO, FERC Electric Tariff, Module E-1, § 68A.7 (32.0.0). Capitalized terms not otherwise defined herein have the meanings ascribed to them in the MISO Tariff.

³ *Id.* § 69A (34.0.0).

⁴ The Tariff defines these limits as the amount of Planning Resources in a Zone that can be reliably imported into or exported out of that Zone. *Id.*, Module A § 1.C (60.0.0).

⁵ *Id.* § 1.L (41.0.0).

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4. MISO conducts the Auction annually in the first 10 business days of April and posts the results approximately six weeks prior to the Planning Year, which begins on June 1 and ends on May 31 of the following year.⁶ The Auction selects the least-cost set of Planning Resources needed to meet each Zone's Planning Reserve Margin Requirement, while respecting local and sub-regional constraints, and establishes the Auction Clearing Price for each Zone for the upcoming Planning Year.⁷ If none of the constraints bind, the marginal resource that clears the Auction will set the Auction Clearing Price for all other capacity in the region. If a constraint binds, the marginal resource in that constrained Zone or sub-region will set the Auction Clearing Price for all other capacity in the Zone or sub-region and the marginal resource in the unconstrained Zones or sub-regions will set the Auction Clearing Price for the remainder of the region. If there is an insufficient amount of capacity to meet the requirements of a Zone, sub-region, or the entire region, the Auction Clearing Price will equal the Cost of New Entry for that Zone, sub-region, or the entire region.

5. MISO's 2013/14 Auction cleared at \$1.05/MW-day for each Zone, and the 2014/15 Auction cleared at \$3.29/MW-day for Zone 1, \$16.75/MW-day for Zones 2 through 7, and \$16.44/MW-day for Zones 8 and 9.⁸ In the 2015/16 Auction held in April 2015, the Auction experienced substantial price separation between Zone 4 and the rest of the Zones: Zones 1 through 3 and 5 through 7 cleared at \$3.48/ MW-day, Zones 8 and 9 cleared at \$3.29/MW-day, and Zone 4 cleared at \$150/MW-day. With respect to Zone 4, the Planning Reserve Margin Requirement was 10,420 MW and the Local Clearing Requirement was 8,852 MW. In meeting the Local Clearing Requirement, Fixed Resource Adequacy Plans totaled 838 MW, and 8,014 MW cleared in the 2015/16

⁶ *Id.* § 1.P (59.0.0).

⁷ *Id.*, Module E-1, § 69A.7.1 (42.0.0).

⁸ While there are currently 10 Zones, there were nine Zones during the 2015/16 Auction. *See Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,061 (2015) (accepting revisions to MISO's zonal boundaries creating a new Zone for Mississippi).

Auction. The remaining 1,568 MW needed to satisfy Zone 4's Planning Reserve Margin Requirement was met using imported capacity from other Zones.⁹

B. Dynegy's Acquisition of Generation Resources in Zone 4

6. On April 14, 2013, Ameren Companies¹⁰ and Dynegy Inc. (Dynegy) filed a joint application under FPA section 203¹¹ seeking Commission approval of Dynegy's acquisition from Ameren Companies of five coal-fired generation resources with a total installed capacity of 4,393 MW: Duck Creek (410 MW), Coffeen (895 MW), E.D. Edwards (650 MW), Newton (1,197 MW), and Joppa (1,241 MW).¹² With the exception of Joppa, these resources were located in Zone 4. In the Section 203 Application, Ameren Companies and Dynegy represented that the transaction would increase Dynegy's capacity ownership in MISO by 3,152 MW (from 2,954 MW to 6,106 MW).¹³ Ameren Companies and Dynegy stated in the Section 203 Application that they analyzed Dynegy's market share in MISO's capacity market on a system-wide basis because the 2013/14 Auction cleared at a single (i.e., system-wide) Auction Clearing Price. Ameren Companies and Dynegy explained that Dynegy's approximate one percent share of the MISO capacity market would increase to less than a four percent

⁹ MISO, *2015/2016 Planning Resource Auction Results (Extended)* (May 2015) (2015/16 Auction Summary), <https://cdn.misoenergy.org/2015-2016%20PRA%20Summary%20Extended87080.pdf>.

¹⁰ Ameren Companies are: Ameren Energy Generating Company; AmerenEnergy Resources Generating Company; Ameren Energy Marketing Company; Electric Energy, Inc. (Electric Energy); Midwest Electric Power, Inc.; and AmerenEnergy Medina Valley Cogen, L.L.C.

¹¹ 16 U.S.C. § 824b (2012).

¹² Ameren Companies, Joint Application, Docket No. EC13-93-000, at 1, 20 n.53 (filed Apr. 16, 2013) (Section 203 Application).

¹³ *Id.* at 21. Ameren Companies and Dynegy did not include Joppa in this calculation because it is located in Electric Energy's balancing authority area. However, according to Ameren Companies and Dynegy, there are long-term transmission reservations into MISO and therefore Joppa is treated as part of the MISO market. *Id.* at 20-22 nn.53, 55.

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share as a result of the acquisition, while the market concentration in the MISO capacity market as a whole would decrease.¹⁴

7. On October 11, 2013, the Commission authorized Dynegy's acquisition of the five generation resources, concluding that Ameren Companies and Dynegy correctly analyzed the transaction's effect on the MISO balancing authority area as a whole, as opposed to analyzing the effect on submarkets (i.e., Zones), as some intervenors argued was necessary.¹⁵ The Commission also found that Ameren Companies and Dynegy had demonstrated that the transaction would not have an adverse effect on competition.

C. Complaints

8. On May 28, 2015, Public Citizen, Inc. (Public Citizen)¹⁶ filed a complaint against MISO pursuant to section 206 of the Federal Power Act (FPA)¹⁷ and Rule 206 of the Commission's Rules of Practice and Procedure.¹⁸ On May 28, 2015, the People of the State of Illinois By Illinois Attorney General Lisa Madigan (Illinois Attorney General)¹⁹ filed a complaint against MISO pursuant to FPA sections 205,²⁰ 206, and 222²¹ and Rule 206 of the Commission's Rules of Practice and Procedure. On May 29, 2015, Southwestern²² filed a complaint against MISO, Dynegy, and all sellers of capacity into

¹⁴ *Id.* at 30.

¹⁵ *Ameren Energy Generating Co.*, 145 FERC ¶ 61,034, at PP 1, 54-58 (2013) (*Ameren Energy*).

¹⁶ Public Citizen is a nonprofit, nonpartisan consumer research and advocacy organization with members in Zone 4 and other Zones.

¹⁷ 16 U.S.C. § 824e.

¹⁸ 18 C.F.R § 385.206 (2018).

¹⁹ Illinois Attorney General represents the People of the State of Illinois on public utility issues in proceedings before state and federal regulatory agencies and in state and federal courts.

²⁰ 16 U.S.C. § 824d.

²¹ 16 U.S.C. § 824v.

²² Southwestern is an electric distribution cooperative that serves rural consumers in Illinois and is a MISO transmission customer located within Zone 4.

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Zone 4 of MISO's 2015/16 Auction pursuant to FPA sections 206, 222, and 306²³ and Rule 206 of the Commission's Rules of Practice and Procedure. Together, Public Citizen, Illinois Attorney General, and Southwestern will be referred to as Complainants.²⁴ Complainants allege that the 2015/16 Auction resulted in an unjust, unreasonable, and unduly discriminatory rate increase in Zone 4. Complainants allege to various extents that this rate increase may be the result of: (1) unjust and unreasonable Tariff rules governing MISO's Auction process; (2) illegal market manipulation by Dynege; and/or (3) the exercise of market power by Dynege, the pivotal supplier in Zone 4 during the 2015/16 Auction. The specific allegations made in the Complaints are described in Section III.B, *infra*.

II. Actions Taken by the Commission

A. December 2015 Order and Subsequent Precedent

9. In the December 2015 Order, the Commission addressed only the portions of the Complaints that challenged, prospectively, Tariff provisions governing the Auction. Specifically, the Commission granted the Complaints in part and found that current Tariff provisions associated with market power mitigation and Capacity Import Limits were no longer just and reasonable for prospective application.²⁵ The Commission directed MISO to file Tariff revisions to be applied in future Auctions, including the upcoming 2016/17 Auction. The Commission required MISO to file Tariff revisions implementing these provisions within 30 days and within 90 days of the date of the

²³ 16 U.S.C. § 825e (2012).

²⁴ On June 30, 2015, Illinois Industrial Energy Consumers (Industrial Consumers) filed a complaint against MISO pursuant to sections 206, 222, and 306 of the FPA and Rule 206 of the Commission's Rules of Practice and Procedure. In their complaint, Industrial Consumers requested relief in the form of prospective Tariff changes to address problems with the calculation of Reference Levels and Local Clearing Requirements. Industrial Consumers explicitly stated that they "[do] not seek a refund nor a finding on whether one or more market participants exercised their market power in the MISO 2015-2016 Auction." See Industrial Consumers Complaint at 1-2, Docket No. EL15-82-000 (filed June 30, 2015). The issues raised by Industrial Consumers' complaint were fully addressed in the December 2015 Order.

²⁵ December 2015 Order, 153 FERC ¶ 61,385 at PP 3, 92-93.

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December 2015 Order.²⁶ The Commission denied the Complaints in part regarding changes to zonal boundaries and MISO's stakeholder process.²⁷

10. The Commission stated it would continue to consider other issues raised in the Complaints regarding the 2015/16 Auction, such as the need for an evidentiary hearing and the motions to dismiss.²⁸ With respect to allegations of market manipulation, the Commission stated that the Office of Enforcement was conducting a formal, non-public investigation into whether market manipulation occurred before or during the 2015/16 Auction. The Commission stated that it would determine in a subsequent order whether additional action may be appropriate pending the outcome of the formal investigation.

11. On March 18, 2016, the Commission issued an order granting requests for clarification with regard to the calculation of facility-specific reference levels, Capacity Import Limit, and Local Clearing Requirement, but denying all other requests for clarification and rehearing.²⁹ The Commission also accepted MISO's Tariff revisions filed in response to the December 2015 Order in a series of orders on compliance.³⁰

B. Non-Public Formal Investigation

12. Shortly after the conclusion of the 2015/16 Auction, the Commission's Office of Enforcement began a non-public, informal investigation under Part 1b of the Commission's regulations³¹ into whether market manipulation or other potential violations of Commission orders, rules and regulations occurred before or during the

²⁶ *Id.* PP 85, 93, 98, 99, 100, 148, 149. The Commission stated that the Tariff revisions filed within 90 days of the date of the December 2015 Order must be implemented in time for the 2017/18 Auction. *Id.* P 97.

²⁷ *Id.* P 3.

²⁸ *Id.* P 4.

²⁹ March 2016 Order, 154 FERC ¶ 61,224 at PP 86-95, 105-112.

³⁰ *See id.* PP 23-28, 66-72; *Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,075 (2016); *Midcontinent Indep. Sys. Operator, Inc.*, 157 FERC ¶ 61,242 (2016); *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER16-833-000 (Mar. 8, 2017) (delegated letter order).

³¹ 18 C.F.R. pt. 1b (2018).

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2015/16 Auction. On October 1, 2015, pursuant to the FPA sections 201, 307, and 309,³² and Part 1b of the Commission's regulations, the Commission authorized the Office of Enforcement to conduct a non-public, formal investigation, with subpoena authority, regarding violations of the Commission's regulations, including section 1c (Prohibition of electric energy market manipulation)³³ that may have occurred in connection with, or related to, the 2015/16 Auction.³⁴ That investigation has been closed.

III. Discussion

A. Procedural Matters

1. Matters Previously Discussed

13. A list of all intervenors and commenters and their pleadings in these proceedings was included in the appendix to the December 2015 Order, and is also appended to this order for convenience. Comments were also filed by or on behalf of numerous individual residents of the state of Illinois expressing concern about the effect of the 2015/16 Auction on the price of electricity. The December 2015 Order also provided information about public notice of the Complaints and ruled on procedural matters other than the motions to dismiss discussed below.³⁵

2. Motions to Dismiss

a. Southwestern Complaint

14. In its complaint, Southwestern identifies as respondents, in addition to MISO, all capacity sellers in Zone 4 because Southwestern asserts that these sellers will be unjustly enriched by the results of the 2015/16 Auction Clearing Price in Zone 4 at the expense of Southwestern and other customers.³⁶ Southwestern asserts that these respondents will be the source of requested refunds, despite not having set the Auction Clearing Price.³⁷

³² 16 U.S.C. §§ 824, 825f, 825h.

³³ 18 C.F.R. § 1c.2 (2018).

³⁴ *Investigation into MISO Zone 4 Planning Resource Auction Market Participant Offers*, 153 FERC ¶ 61,005 (2015) (Order Authorizing Formal Investigation).

³⁵ December 2015 Order, 153 FERC ¶ 61,385 at PP 16-23.

³⁶ Southwestern Complaint at 3.

³⁷ *Id.* at 7.

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Southwestern states that it is unable to identify entities, other than Dynegey, as sellers in Zone 4 during the 2015/16 Auction because the post-auction data that MISO posted to its website conceals the identity of bidders. Southwestern states that it contacted MISO and requested that it forward Southwestern's complaint to sellers of capacity into the Auction in Zone 4, but that MISO declined to do so. Southwestern requests waiver of the service requirements pursuant to Rule 206(c), to the extent necessary, as to other potential respondents based on its best efforts at compliance with the service requirements of Rule 206(c).³⁸

b. Responsive Pleadings

15. Several parties assert that, to the extent Southwestern alleges they are respondents, the Commission should dismiss Southwestern's complaint against them.³⁹ Exelon and Wabash Valley each request that the Commission dismiss any attempt to seek refunds from them because there is no suggestion or proof that either of them manipulated the 2015/16 Auction or violated any Tariff provision, rule, or regulation.⁴⁰ Further, Exelon states that it offered its unsold Zone 4 resource into the 2015/16 Auction as a price taker.⁴¹ Prairie Power states that all of its resources were submitted into the 2015/16 Auction as part of a Fixed Resource Adequacy Plan, and therefore it should not be considered a capacity seller or a respondent to the Southwestern complaint.⁴² Northern Illinois Municipal argues that it did not participate in the 2015/16 Auction, but rather sold all of its capacity into the PJM Interconnection, L.L.C. (PJM) capacity markets.⁴³

16. AMP and Kentucky Municipals propose that the Commission clarify that its jurisdiction in the proceeding is confined to consideration and potential relief in relation to Zone 4 capacity sellers that are subject to the Commission's regulatory jurisdiction under section 206 of the FPA.⁴⁴ AMP and Kentucky Municipals argue that because

³⁸ *Id.* at 3 & n.4.

³⁹ These parties include Northern Illinois Municipal; Exelon; Prairie Power; Wabash Valley; Hoosier and Southern Illinois; and AMP and Kentucky Municipals.

⁴⁰ Exelon Answer at 3; Wabash Valley Answer at 4-5.

⁴¹ Exelon Answer at 3.

⁴² Prairie Power Comments at 4-5.

⁴³ Northern Illinois Municipal Answer at 2.

⁴⁴ AMP and Kentucky Municipals Petition for Declaration at 5-6.

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section 201(f) of the FPA exempts municipal utilities from Commission jurisdiction, the Commission lacks statutory authority to either order refunds from them⁴⁵ or achieve that result by resetting market rates applicable to both public and non-public utilities.⁴⁶ In the alternative, AMP and Kentucky Municipals request that the Commission dismiss AMP and Kentucky Municipals as respondents due to a lack of jurisdiction over non-public utilities.⁴⁷

17. Hoosier and Southern Illinois argue that the Southwestern complaint against them should be dismissed because: (1) Hoosier and Southern Illinois are not public utilities and therefore are not subject to complaints under section 206 of the FPA; (2) Southwestern cannot support a complaint against Hoosier and Southern Illinois under section 222 of the FPA because Southwestern does not allege manipulation on their part; and (3) Southwestern does not allege that Hoosier and Southern Illinois have done, or omitted to do, anything in contravention to the FPA.⁴⁸ Finally, Hoosier and Southern Illinois state that Southwestern presents neither allegation nor evidence of wrongdoing.⁴⁹

18. In its answer, Southwestern does not disagree with movants' arguments that they are not appropriate respondents in these proceedings; however, Southwestern argues that movants still have a vested interest in these proceedings because they can still be required

⁴⁵ *Id.* at 6 (citing *Bonneville Power Administration v. FERC*, 422 F.3d 908, 921-22 (9th Cir. 2005)).

⁴⁶ *Id.* (citing *City of Redding, Cal. v. FERC*, 693 F.3d 828 (9th Cir. 2012)).

⁴⁷ *Id.* at 8-9 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs. Into Markets Operated by the Cal. Indep. Sys. Operator and the Cal. Power Exchange*, Opinion No. 536, 149 FERC ¶ 61,116, at P 22 (2014)).

⁴⁸ Hoosier and Southern Illinois Answer at 1, 3.

⁴⁹ *Id.* at 4.

to pay refunds, an obligation that stems from their contractual obligation to MISO's Market Participant Agreements rather than from the FPA.⁵⁰

19. In its answer, Illinois Attorney General states that, if the Commission agrees with Complainants that the exercise of market power inflated the Auction Clearing Price to a level that is not just and reasonable, all sellers in Zone 4 should be prepared to refund the excess charges to consumers.⁵¹ Illinois Attorney General further states that the failure to apply a refund remedy to all sellers places sellers' interests over those of consumers of electricity and allows the imposition of charges that are unjust and unreasonable, in violation of the FPA.⁵² AMP and Kentucky Municipals respond to Illinois Attorney General, arguing that only MISO was named in Illinois Attorney General's complaint and, as a matter of due process, remedies cannot be imposed on entities not named respondents.⁵³ Further, AMP and Kentucky Municipals state that Illinois Attorney General has not addressed the Commission's lack of statutory authority to direct the payment of refunds by governmental entities, and there is no reason to put the non-jurisdictional Zone 4 sellers through the burden and expense of discovery, investigation, and further litigation if the Commission lacks authority to direct a remedy to those sellers.⁵⁴ AMP and Kentucky Municipals also respond that the fact that they voluntarily participated in the 2015/16 Auction and accepted payment based on the Auction Clearing Price does not bring municipal or cooperative capacity sellers within the Commission's statutory refund authority.⁵⁵

20. AMP and Kentucky Municipals state that Southwestern concedes that "these [municipal] entities may not be appropriate respondents in these proceedings."⁵⁶ While Southwestern suggests that a remedy against non-jurisdictional entities may be pursued elsewhere such as through private contract action, AMP and Kentucky Municipals

⁵⁰ Southwestern July 17 Answer at 24-27 (citing *Alliant Energy*, 347 F.3d 1046, 1049-50 (8th Cir. 2003); *TANC v. FERC*, 495 F.3d 663, 675-676 (D.C. Cir. 2007)).

⁵¹ Illinois Attorney General July 20 Answer at 8.

⁵² *Id.* at 9 (citing *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346, at P 14 (2003)).

⁵³ AMP and Kentucky Municipals Answer at 3.

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 5.

⁵⁶ *Id.* at 6.

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state that this is not a basis for forcing the non-jurisdictional entities to continue as respondents. AMP and Kentucky Municipals also state that, by suggesting the non-jurisdictional capacity sellers in Zone 4 may have contractual refund obligations, Southwestern alludes to an issue outside the scope of the complaints.

c. Commission Determination

21. The Commission's regulations require a complaint to clearly specify and explain the alleged violation of statutory or regulatory standards.⁵⁷ We find that, because Southwestern has neither identified nor explained any such violation with respect to all capacity sellers in Zone 4, it has not met its burden with respect to those capacity sellers. Accordingly, we grant the motions to dismiss filed by Northern Illinois Municipal, Exelon, Prairie Power, Wabash Valley, Hoosier and Southern Illinois, and AMP and Kentucky Municipals of Southwestern's complaint against them.

B. Substantive Matters

1. Alleged Market Manipulation

a. Background

22. The Commission's regulations prohibit electric energy market manipulation, providing that:

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

⁵⁷ 18 C.F.R. § 385.206(b)(1), (2) (2018).

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(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.⁵⁸

b. Complaints

23. Complainants argue that the Commission should institute an investigation into whether market manipulation occurred before or during the 2015/16 Auction and assess civil penalties as appropriate.⁵⁹ Public Citizen alleges that Dynegy had the financial incentive to illegally engage in intentional capacity withholding to drive up the prices in the 2015/16 Auction, thereby providing increased revenue to its cleared generation units.⁶⁰ Public Citizen states that Dynegy has been suspected of and penalized for manipulating energy markets several times in the past.⁶¹ Public Citizen asserts that the fact that Dynegy's Director of Regulatory Affairs was the Vice-chair of the MISO stakeholder committee when MISO developed its Auction rules calls for Commission review of the Zone 4 2015/16 Auction results.⁶²

24. Complainants also express concern as to whether Dynegy's representations in the *Ameren Energy* proceeding⁶³ led to market manipulation in the 2015/16 Auction. Public Citizen argues that MISO, the Market Monitor, and the Commission failed to consider the effect this transaction would have on MISO Auctions.⁶⁴ Public Citizen states that, after Dynegy's acquisition of Ameren's Zone 4 power plants, no adjustments were made to the Zone 4 Local Clearing Requirements mandating that 85 percent of the Zone's capacity market needs must be met from in-zone resources, a fact that likely enhanced

⁵⁸ 18 C.F.R. § 1c.2; *see also* 16 U.S.C. § 824v.

⁵⁹ Public Citizen Complaint at 14; Illinois Attorney General Complaint at 6, 20; Southwestern Complaint at 46-50.

⁶⁰ Public Citizen Complaint at 3, 9-10.

⁶¹ *Id.* at 4, 10.

⁶² *Id.* at 4.

⁶³ *See supra* PP 8-9.

⁶⁴ Public Citizen Complaint at 8-9.

(continued ...)

Dynegy's ability to engage in capacity withholding to drive up Zone 4 Auction prices.⁶⁵ Southwestern asks the Commission to investigate whether Dynegy's failure to disclose in the *Ameren Energy* proceeding that it would have a significant market concentration within the Zone 4 submarket constituted a material misrepresentation or material omission that caused the 2015/16 Auction Clearing Price in Zone 4 to be a product of market manipulation.⁶⁶

c. Answers to the Complaints

25. MISO denies allegations that the Zone 4 Auction Clearing Price was the product of market manipulation.⁶⁷ MISO states that the fact that the 2015/16 Auction Clearing Price was higher than the previous year's price does not establish that the higher price was the product of market manipulation, and asks the Commission to reject Complainants' speculative allegations.⁶⁸

26. Dynegy asserts that, to the extent that the Complaints attempt to use alleged market manipulation violations under section 222 of the FPA, their attempts fail because section 222(b) expressly states that it does not create a private right of action.⁶⁹

d. Comments and Answers

27. Sierra Club agrees with Complainants that Dynegy's procurement of significant additional generation capacity in Zone 4 prior to the 2015/16 Auction created the risk that it could exercise inappropriate market power manipulation of the Auction.⁷⁰ Sierra Club requests that the Commission investigate whether Dynegy's actions leading up to the 2015/16 Auction resulted in market manipulation and impose civil penalties if so.⁷¹

⁶⁵ *Id.* at 9.

⁶⁶ Southwestern Complaint at 47.

⁶⁷ MISO Answer to Complaint, Att. A at 5.

⁶⁸ *Id.* at 2-4.

⁶⁹ Dynegy Answer to the Complaints at 59-60 (citing 16 U.S.C. § 824v(b)).

⁷⁰ Sierra Club Comments at 11.

⁷¹ *Id.* at 29.

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Other commenters generally support Complainants' requests to the Commission to institute a proceeding to investigate the allegations in the Complaints.⁷²

28. EPISA argues to the contrary that Complainants have not shown evidence that the 2015/16 Auction Clearing Price was the result of market manipulation, but rather rely on the high prices to insist that Dynegy must have engaged in withholding.⁷³ EPISA states that, even if the Commission were to find that there were some sort of manipulation, that would not justify re-running the auction as doing so would effectively eviscerate the fundamental notice requirement embodied in sections 205 and 206 of the FPA.⁷⁴ Protesters assert that, because the prices were below the Initial Reference Level and the Market Monitor found no evidence of economic or physical withholding, Complainants have not shown that market manipulation occurred.⁷⁵ NRG asserts that price volatility is inherent in MISO's capacity market design, and is not indicative of market manipulation.⁷⁶

29. Southwestern counters protests to the complaint, arguing that the Commission has previously re-run markets to correct for market manipulation, even if no Tariff violations were alleged.⁷⁷ Southwestern asserts that its complaint invoked sections 222 and 306 of the FPA, and argues that a Commission finding that Dynegy engaged in market manipulation would amount to a violation of the FPA and the Commission's regulations, a sufficient basis for the Commission to order refunds.⁷⁸

⁷² Joint Consumer Advocates Comments at 7; Ameren Illinois Comments at 5; Joint MISO Industrial Customers Comments at 2.

⁷³ EPISA Protest at 4-7.

⁷⁴ *Id.* at 20 n.59.

⁷⁵ *Id.* at 4-7; Gibson City and Grand Tower Answer at 19; NRG Comments at 6-7; Market Monitor Answer at 4.

⁷⁶ NRG Protest at 9-10.

⁷⁷ Southwestern August 14 Answer at 11-14 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv. Into Markets Operated by the Cal. Indep. Sys. Operator Corp., and the Cal. Power Exchange*, 96 FERC ¶ 61,120, at 61,513, 61,516-20 (2001) (CAISO Complaint Order); *Midcontinent Indep. Sys. Operator*, 148 FERC ¶ 61,071 (2014)).

⁷⁸ *Id.* at 6.

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e. **Commission Determination**

30. As the Commission indicated in its December 2015 Order, the Commission's Office of Enforcement had already initiated a formal, non-public investigation into whether market manipulation occurred before or during the 2015/16 Auction.⁷⁹ That investigation has been closed.

31. The dissent suggests that the Office of Enforcement did not have an opportunity to conduct a full and thorough investigation of the conduct at issue in this case.⁸⁰ We disagree. Because the Commission converted that investigation from an informal to formal investigation, the Office of Enforcement was fully authorized to "administer oaths and affirmations, subpoena witnesses, compel their attendance and testimony, take evidence, compel the filing of special reports and responses to interrogatories, gather information, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records."⁸¹ That investigation was open for more than three years, during which time the Office of Enforcement reviewed over 500,000 pages of documents and took 17 days of testimony, from 11 witnesses. We reject any implication that the investigation was not sufficiently complete to consider the conduct at issue.

32. Based on a review of the investigation, we find that the conduct investigated did not violate the Commission's regulations regarding market manipulation.⁸² We conclude, therefore, that no further action is appropriate to address the allegations of market manipulation raised in the complaints.

2. **Whether Dynegy's Alleged Exercise of Market Power in the 2015/16 Auction Led to an Unjust and Unreasonable Zone 4 Auction Clearing Price**

a. **MISO Market Power Mitigation Tariff Provisions**

33. MISO's market power mitigation Tariff provisions in place during the 2015/16 Auction provided that capacity offers into the Auction could not exceed the Cost of New

⁷⁹ Order Authorizing Formal Investigation, 153 FERC ¶ 61,005 at P 2.

⁸⁰ *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc., et al.*, 168 FERC ¶ 61,042, at P 6 (2019) (Glick, Comm'r, dissenting).

⁸¹ Order Authorizing Formal Investigation, 153 FERC ¶ 61,005 at P 3.

⁸² 18 C.F.R. § 1c.2 (2018).

(continued ...)

Entry for the Zone where the capacity is represented.⁸³ For the 2015/16 Auction, the Cost of New Entry for Zone 4 equaled \$247.40/MW-day.⁸⁴ MISO's Tariff included market power mitigation provisions that allowed MISO to "mitigate the market effects of any conduct that would substantially distort competitive outcomes" by mitigating conduct only when such "conduct exceeds well-defined conduct thresholds and when the effect on market outcomes of the conduct exceeds well-defined market impact thresholds."⁸⁵ The Tariff provided that when an offer into the Auction exceeded the conduct threshold and resulted in an increase to the Auction Clearing Price that exceeded the market impact threshold, MISO would mitigate that offer down to the applicable Reference Level.⁸⁶

i. Reference Level

34. Under MISO's Tariff, a region-wide Initial Reference Level effectively serves as the default applicable Reference Level. At the time of the 2015/16 Auction, the Initial Reference Level was "based on the estimated opportunity cost of exporting capacity to a neighboring region."⁸⁷ The Market Monitor implemented this Tariff provision by estimating the opportunity cost of exporting capacity to PJM. The Market Monitor determined that the Initial Reference Level equaled \$155.79/MW-day.

ii. Conduct Threshold

35. At the time of the 2015/16 Auction, the conduct threshold equaled the sum of the applicable Reference Level and 10 percent of the Cost of New Entry.⁸⁸ The default conduct threshold for Zone 4, calculated by taking the sum of the Initial Reference Level (\$155.79/MW-day) plus 10 percent of Cost of New Entry (\$24.74/MW-day), equaled \$180.53/MW-day. The conduct threshold for a resource in Zone 4 with a facility-specific

⁸³ MISO, FERC Electric Tariff, Module E-1, § 69A.7.1 (34.0.0).

⁸⁴ See MISO, *2015/2016 Planning Resource Auction Results (Extended)*, at 9 (May 2015), <https://cdn.misoenergy.org/2015-2016%20PRA%20Summary%20Extended87080.pdf>.

⁸⁵ MISO, FERC Electric Tariff, Module D, § 62 (30.0.0).

⁸⁶ See *id.* § 65.2.2 (30.0.0).

⁸⁷ *Id.* § 64.1.4 (30.0.0). As an alternative to using the Initial Reference Level, the Tariff provided market participants the option to request facility-specific reference levels.

⁸⁸ *Id.* § 64.1.2 (30.0.0).

(continued ...)

reference level would equal the sum of the facility-specific reference level, as determined by the Market Monitor, and 10 percent of Cost of New Entry.

iii. Market Impact Threshold

36. The market impact threshold at the time of the 2015/16 Auction for identifying offers that had a “substantial effect” on clearing prices in the Auction equaled an increase in the clearing price equal to 10 percent of Cost of New Entry.⁸⁹

b. Complaints

37. Complainants argue that the 2015/16 Auction produced an unjust and unreasonable rate in Zone 4 because Dynegy became a pivotal supplier after its acquisition of the generating plants from the Ameren Companies and subsequently exercised market power in the 2015/16 Auction.⁹⁰ Illinois Attorney General explains that the Market Monitor has recognized that an “indicator of potential market power is whether a supplier is pivotal, which occurs when its resources are necessary to satisfy load or to manage a constraint.”⁹¹ Southwestern explains that, in a well-functioning market, entities compete by submitting bids at the lowest possible price in order to ensure that their bids clear the market; however, when an entity knows that its bid is required to clear in the Auction in order to meet the Local Clearing Requirement, it has no incentive to submit the lowest possible bid and may instead knowingly submit the bid that sets the Auction Clearing Price.⁹²

38. Complainants describe the amount of capacity that Dynegy owned after the acquisition approved in *Ameren Energy*. They estimate that Dynegy increased its total unforced capacity in Zone 4 to a total of 6,100-7,300 MW out of approximately 12,000-13,000 of total unforced capacity in Zone 4.⁹³ Illinois Attorney General asserts that,

⁸⁹ *Id.* § 64.2.1 (31.0.0).

⁹⁰ Public Citizen Complaint at 3, 8-9; Illinois Attorney General Complaint at 14-15; Southwestern Complaint at 15-22.

⁹¹ Illinois Attorney General Complaint at 14 (citing Potomac Economics, Independent Market Monitor for MISO, 2013 State of the Market Report for the MISO Electricity Markets (June 2014), at 65, *available at* [https://www.misoenergy.org/Library/Repository/Report/IMM/2013%20State%20of%20the%20Market %20Report.pdf](https://www.misoenergy.org/Library/Repository/Report/IMM/2013%20State%20of%20the%20Market%20Report.pdf)).

⁹² Southwestern Complaint at 18-19.

⁹³ *Id.* at 20-21; Public Citizen Complaint at 2, 3, 8-9; Illinois Attorney General
(continued ...)

while the supply serving Zone 4 was more than sufficient at the time of the 2015/16 Auction, the ownership of supply in Zone 4 was highly concentrated.⁹⁴ Illinois Attorney General explains that the bidding data shows a Herfindahl-Hirschman Index of 2,562, and that Herfindahl-Hirschman Index indices over 1,800 are presumed to be concentrated. Southwestern argues that Dynegy's concentration of ownership is so high in Zone 4 that it would fail both the market share and pivotal supplier analyses.⁹⁵ Southwestern asserts that the Auction cannot produce just and reasonable results in Zone 4 due to market concentration.⁹⁶

39. Complainants argue that Dynegy's large capacity market share gave Dynegy the opportunity to exercise market power in the 2015/16 Auction. Illinois Attorney General argues that that fact that Dynegy owned approximately half of the capacity of Zone 4 is material to the 2015/16 Auction because Zone 4 is a distinct submarket with transmission limited to 3,130 MW of imported capacity and an additional Local Clearing Requirement stipulating that 8,852 MW be procured from resources within Zone 4.⁹⁷ Illinois Attorney General notes that, without Dynegy's capacity, there were only approximately 7,100 MW to meet the 8,852 MW requirement. Thus, according to Illinois Attorney General, Dynegy was the pivotal supplier for Zone 4 because Dynegy's capacity was necessary to

Complaint at 13-14. Each Complainant puts forth slightly different estimates of Dynegy's total unforced capacity and the total unforced capacity in Zone 4.

⁹⁴ Illinois Attorney General Complaint at 12-13 (citing McCullough Aff. at 16; *Analysis of Horizontal Market Power Under the Federal Power Act*, 138 FERC ¶ 61,109, at P 5 (2012)).

⁹⁵ Southwestern Complaint at 16-17, 19-21 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at P 43 (2007) (stating that the market share analysis determines "whether a seller has a dominant position in the market based on the number of megawatts of uncommitted capacity owned or controlled by the seller as compared to the uncommitted capacity of the entire relevant market"), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011) (*Montana Consumer Counsel*), *cert. denied*, 133 S. Ct. 26 (2012)).

⁹⁶ *Id.* at 34-36 (citing Ameren Companies, Joint Application, Docket No. EC13-93-000, at 30 (filed Apr. 16, 2013) and Ex. No. JRS-1 at 6 (Solomon Test.)).

⁹⁷ Illinois Attorney General Complaint at 13-14.

(continued ...)

meet the Local Clearing Requirement in Zone 4, and therefore it was able to set the price for the marginal unit of capacity, regardless of Dynegy's internal cost of providing that capacity.⁹⁸ Illinois Attorney General claims that, if there were no pivotal supplier, the Zone 4 2015/16 Auction Clearing Price would have matched the Auction Clearing Prices in Zones 1 through 7 (i.e., the Zones that are not part of MISO-South).⁹⁹ Southwestern states that the Local Clearing Requirement of 8,852 MW was known prior to the start of the 2015/16 Auction, as was the roughly 12,000 MW of total capacity in Zone 4; thus, a participant in the 2015/16 Auction would know prior to the Auction that any entity controlling more than approximately 3,000 MW of generation would possess sufficient market power to control the Auction Clearing Price and might tailor its bidding behavior accordingly.¹⁰⁰ Southwestern further asserts that Dynegy was the only entity that controlled over 3,000 MW of capacity in Zone 4 that was eligible to participate in the 2015/16 Auction, and thus, knew that its generation was necessary for the Auction to clear.¹⁰¹ Public Citizen asserts that Dynegy had a financial incentive to withhold capacity because it could drive up the Auction Clearing Price and receive increased revenue for its cleared units.¹⁰²

⁹⁸ *Id.* at 14.

⁹⁹ *Id.* (citing McCullough Aff. ¶ 33).

¹⁰⁰ Southwestern Complaint at 20-21.

¹⁰¹ *Id.* at 18-22 (citing Chiles Test. ¶ 8).

¹⁰² Public Citizen Complaint at 3.

40. Complainants assert that the bid data that MISO released from the 2015/16 Auction demonstrates that Dynegy exercised its market power in the Auction.¹⁰³ Southwestern argues that Dynegy was not deterred from submitting a bid far in excess of the other capacity sellers because it knew that, while only a portion of its capacity would clear the market, it would gain millions of dollars in revenues from higher prices for its capacity that was guaranteed to clear in order to meet the Zone 4 Local Clearing Requirement.¹⁰⁴ Complainants state that Dynegy's two divisions submitted a portion of their bids at an identical \$150/MW-day, which set the Zone 4 2015/16 Auction Clearing Price.¹⁰⁵ Southwestern contends that Dynegy chose this amount because it was under the Reference Level of \$155.79/MW-day established by the Market Monitor prior to the Auction.¹⁰⁶ Illinois Attorney General states that Dynegy was able to set the Auction Clearing Price for Zone 4 well above its internal cost of providing capacity.¹⁰⁷

41. Complainants note that the Zone 4 2015/16 Auction Clearing Price of \$150/MW-day represented a significant increase from the Zone 4 2014/15 Auction Clearing Price, which was \$16.75/MW-day.¹⁰⁸ Southwestern and Illinois Attorney General note that the next highest Zone cleared at \$3.48/MW-day.¹⁰⁹ Southwestern contends that, other than one outlier, no other entity submitted a bid in excess of \$50/MW-day, which

¹⁰³ Southwestern states that the bid data is masked to conceal the bidders' identities, but explains that Dynegy revealed its bidder identity by disclosing the capacity that each of its two divisions cleared in the auction. Southwestern Complaint at 28 (citing Chiles Test. ¶ 7 and Attachment 2 (Dynegy Press Release)).

¹⁰⁴ *Id.* at 26.

¹⁰⁵ *Id.* at 28-29; Public Citizen Complaint at 3; Illinois Attorney General Complaint at 13. Southwestern states that in an April 14, 2015 press release, Dynegy disclosed that its Illinois Power Holdings, LLC and its separate coal division cleared 1,864 MW and 398 MW, respectively, in the 2015/16 Auction. Southwestern states that it matched these amounts to the post-auction bid data released by MISO. Southwestern Complaint at 28.

¹⁰⁶ *Id.* at 25.

¹⁰⁷ Illinois Attorney General Complaint at 14, 19.

¹⁰⁸ *Id.* at 1, 6; Public Citizen Complaint at 1, 5, 6, 9, 13; Southwestern Complaint at 10, 50. Public Citizen, Illinois Attorney General, and Southwestern approximate the rate increase as 800 percent, 900 percent, and ten-fold, respectively.

¹⁰⁹ Southwestern Complaint at 2; Illinois Attorney General Complaint at 5.

(continued ...)

demonstrates that Dynegy did not anticipate competition from other capacity suppliers.¹¹⁰ Southwestern contrasts the increase in the Zone 4 Auction Clearing Price to the decreases in the other MISO Zones, which cleared at prices about 80 percent below the prior year's price.¹¹¹

42. Complainants argue that the rate in Zone 4 resulting from the 2015/16 Auction is not just and reasonable.¹¹² Illinois Attorney General argues that it is not just and reasonable to burden the residents and businesses of central and southern Illinois with rates that are close to nine times larger than the rate for the same capacity purchased in 2014/15 and more than 40 times larger than the capacity rates in the neighboring MISO Zones.¹¹³ Illinois Attorney General estimates that the financial burden for electricity customers in Zone 4 created by the increased capacity price is at least \$100 million, and that the resulting electricity costs for commercial and industrial consumers may increase by 20 percent over last year.¹¹⁴ Southwestern argues that the cost of capacity in Zone 4 is excessive and Southwestern will spend over \$3.5 million for the 65.1 MW of its capacity obligations that it is unable to self-supply.¹¹⁵ In contrast, Southwestern states that it spent only \$437,133 for the 71.5 MW of capacity it procured through the 2014/15 Auction. Further, Southwestern argues that its total expenditure for capacity would have been at most \$83,000 if it were located in an adjacent Zone for the 2015/16 Planning Year.¹¹⁶

¹¹⁰ Southwestern Complaint at 29.

¹¹¹ *Id.* at 10-11.

¹¹² *Id.* at 2; Illinois Attorney General Complaint at 12 (quoting *Pub. Util. Dist. No. 1 of Snohomish County Washington v. FERC*, 471 F.3d 1053, 1089 (9th Cir. 2006) (“Market-based rate regulation presumes – appropriately – that a functioning marketplace will drive prices toward marginal cost, and therefore toward . . . [a] ‘zone of reasonableness.’”) (citing *Interstate Natural Gas Ass’n of America v. FERC*, 285 F.3d 18, 31-32 (D.C. Cir. 2002)); Public Citizen Complaint at 1.

¹¹³ Illinois Attorney General Complaint at 6.

¹¹⁴ *Id.* at 19. Illinois Attorney General states that the average residential customer of Ameren will pay an additional \$131 due to the increase in MISO's capacity charge during the 12-month period beginning June 1, 2015. *Id.* at 2.

¹¹⁵ Southwestern Complaint at 11-12.

¹¹⁶ *Id.* at 12 (citing Sloan Aff. ¶ 11).

(continued ...)

43. Southwestern argues that, if the Commission does not take action, Dynegy's market power will likely extend to the bilateral market for capacity.¹¹⁷ Southwestern explains that Dynegy's capacity must be available in the bilateral market in order for any Zone 4 load-serving entities to meet their capacity obligations outside of the Auction. Southwestern states that, knowing that it controls the Zone 4 capacity market, Dynegy lacks motivation to sell capacity on a bilateral basis for less than it would bid that capacity into the Auction. Southwestern anticipates arguments from some entities that project developers will react to the price signals and begin evaluating the construction of additional capacity in Illinois.¹¹⁸ Southwestern contends that such a theory fails to: (1) take into account that Zone 4 currently has excess capacity and no further capacity is necessary for the Load Serving Entities in Zone 4 to meet their capacity obligations; and (2) consider that Dynegy could protect its market power by submitting lower bids in subsequent Auctions to dissuade any generation projects.

44. Complainants assert that the increase in the Zone 4 2015/16 Auction Clearing Price cannot be explained by factors other than Dynegy's exercise of market power. Southwestern states that neither the overall capacity requirements nor the underlying data points were significantly different from the 2014/15 Auction.¹¹⁹ Illinois Attorney General similarly contends that differences in the Auction parameters for Zone 4 between the 2014/15 and 2015/16 Auctions, such as changes in the Capacity Import Limit and Capacity Export Limit, do not explain the increase in the Auction Clearing Price.¹²⁰ Southwestern argues that, in fact, had the 2015/16 Auction adhered to typical auction norms, prices would have been relatively low because Zone 4 had an excess of capacity and the Local Clearing Requirement for the 2015/16 Auction was lower in Zone 4 than it had been in the 2014/15 Auction.¹²¹ Illinois Attorney General argues that the lack of material change in supply and demand and the greatly increased Auction Clearing Price in Zone 4 demonstrate that the Tariff did not reflect the true cost and availability of capacity in Zone 4 and did not produce a just and reasonable price for Zone 4.¹²²

¹¹⁷ *Id.* at 43-44.

¹¹⁸ *Id.* at 44.

¹¹⁹ *Id.* at 11.

¹²⁰ Illinois Attorney General Complaint at 15-16.

¹²¹ Southwestern Complaint at 30.

¹²² Illinois Attorney General Complaint at 16.

(continued ...)

45. Complainants claim that Dynegy acted to protect its market power. They state that MISO proposed to merge Zones 4 and 5 after Dynegy's acquisition of Ameren Company's generating facilities due to concerns about Dynegy's share of the capacity market in Zone 4, but that the proposal failed after Dynegy opposed it.¹²³ Public Citizen states that Dynegy's lobbyists took part in nearly all MISO stakeholder meetings to develop capacity auction rules, including the creation of Local Resource Zones and Local Clearing Requirements, beginning on July 19, 2010 through 2015.¹²⁴ Public Citizen further alleges that Dynegy used the threat of leaving MISO for PJM as a lever to influence the development of market rules that protect its profitability (or to prevent changes in the rules that would limit its ability to exercise market power).¹²⁵

46. Complainants contend that Dynegy, MISO, the Market Monitor, and the Commission failed to consider the effect that Dynegy's acquisition of Ameren's generating facilities in the *Ameren Energy* proceeding would have on MISO Auctions. Southwestern and Illinois Attorney General state that Dynegy (and the Commission) should have examined the proposed transaction's effect on the sub-markets within MISO (i.e., the individual Zones), rather than a MISO-wide capacity market, because (1) MISO's capacity construct is based upon a zonal structure and (2) Dynegy should have known that it had significant market concentration such that the Zone 4 capacity market was no longer competitive.¹²⁶ Public Citizen notes that neither MISO nor the Market Monitor intervened or raised concerns about the proposed acquisition's implications for future Auctions.¹²⁷ Further, Public Citizen states that, while the Commission in *Ameren Energy* found that the transaction raised no competition issues due in part to the difficulty of withholding baseload generation from energy markets, it failed to consider the ease with which baseload generation could be withheld from capacity markets. Public Citizen asserts that, after Dynegy's acquisition of the generating plants from the Ameren Companies, neither MISO nor the Market Monitor made any adjustments to the Local Clearing Requirement for Zone 4, which mandated that 85 percent of the Zone's capacity needs must be met by resources located in the Zone, and that failure to adjust the Local Clearing Requirement may have facilitated Dynegy's

¹²³ *Id.* at 9-10; Public Citizen Complaint at 2; Southwestern Complaint at 32-33.

¹²⁴ Public Citizen Complaint at 7.

¹²⁵ *Id.* at 5-6.

¹²⁶ Southwestern Complaint at 35-36, 47; Illinois Attorney General Complaint at 11-12.

¹²⁷ Public Citizen Complaint at 8-9 (citing Section 203 Application, Docket No. EC13-93-000; *Ameren Energy*, 145 FERC ¶ 61,034 at P 58).

(continued ...)

ability to execute a capacity withholding scheme to drive up prices in Zone 4.¹²⁸ Illinois Attorney General requests that the Commission enter a supplemental order in the *Ameren Energy* proceeding to impose appropriate conditions on Dynegy with regard to Auction bidding behavior of the generation resources that Dynegy acquired from Ameren Companies.¹²⁹

47. Southwestern contends that MISO failed in its obligation to ensure that the markets it administers are free from market power even though it was aware of the dominant influence that Dynegy would have on the auction results.¹³⁰ Southwestern states that the Market Monitor has the power to investigate market participants' activity even if it falls within the threshold benchmarks established in the Tariff, and that if such behavior may distort competitive market outcomes, the Market Monitor has an obligation to identify such behavior and seek redress with the Commission.¹³¹ Southwestern argues that the fact that a capacity bid is below the Reference Level does not mean the price is free from the exercise of market power, nor does it immunize that bid from corrective action.¹³² Southwestern contends that MISO and the Market Monitor should have investigated the \$150/MW-day bid from the dominant market participant.

48. Public Citizen asserts that electric market clearinghouse rates, such as the Auction results, must be reviewed after-the-fact as well as in advance to determine whether they actually produce just and reasonable rates.¹³³ If the Tariff does not require MISO to file the Auction results for Commission review, specifically charges that are changes in rates, Public Citizen argues that the Tariff cannot lawfully be implemented.¹³⁴ Public Citizen

¹²⁸ *Id.* at 4, 9.

¹²⁹ Illinois Attorney General Complaint at 20-21.

¹³⁰ Southwestern Complaint at 38.

¹³¹ *Id.* at 39 (citing MISO Tariff, Module D § 62(c)).

¹³² *Id.* at 40.

¹³³ Public Citizen Complaint at 11-12 (citing *California ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015) (*Harris*); 16 U.S.C § 824d).

¹³⁴ *Id.* at 11-12 (citing *Harris*, 784 F.3d at 1275; *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015-1016 (9th Cir. 2004) (*Lockyer*) (“FERC erred by structuring the remand proceedings to focus exclusively on market-share evidence of market power. By doing so, FERC unlawfully administered the market-based tariff. If the ability to monitor the market, or gauge the just and reasonable nature of the rates is eliminated, then effective federal regulation is removed altogether. Without the required filings, (continued ...)”)

asks that the Commission require that the MISO file as soon as possible the results of the 2015/16 Auction as a section 205 filing of increased rates for Zone 4, and any other MISO Zone in which changed charges are proposed, and to set such rates for hearing with the burden of proof on MISO to justify the increases, and to suspend such rates for at least one day and make them subject to refund.¹³⁵

49. Illinois Attorney General requests that the Commission: (1) find that the rate resulting from the 2015/16 Auction is not just and reasonable; (2) suspend the Auction Clearing Price for Zone 4 effective June 1, 2015; (3) investigate the allegations in the complaint and, if the rate is not suspended, establish a refund effective date of June 1, 2015; (4) establish a new rate that is just and reasonable; (5) if the Commission declines to find the rate unjust and unreasonable, set the issues for settlement judge proceedings and if that is not successful, set the matter for discovery and evidentiary hearing; and (6) enter a supplemental order imposing conditions on Dynegy regarding bidding behavior.¹³⁶

50. Southwestern requests that the Commission: (1) find the results of the 2015/16 Auction for Zone 4 to be unjust, unreasonable, and unduly discriminatory; (2) in the alternative, if such relief is not granted, grant a waiver of the application of the 2015/16 Auction Clearing Prices to Load Serving Entities within Zone 4, effective June 1, 2015; (3) set a just, reasonable, and non-discriminatory price for capacity in Zone 4; (4) if a new rate is not established, set the matter for trial-type hearing, subject to an opportunity to first pursue settlement negotiations; and (5) establish the earliest possible refund effective date, i.e. June 1, 2015.¹³⁷

neither FERC nor any affected party may challenge the rate. Pragmatically, under such circumstances, there is no filed tariff in place at all.”)); *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)).

¹³⁵ *Id.* at 14.

¹³⁶ Illinois Attorney General Complaint at 20-21.

¹³⁷ Southwestern Complaint at 48-50.

(continued ...)

c. Answers to the Complaints

i. Dynegy

51. Dynegy rebuts Complainants' allegations that Dynegy had market power and the incentive to exercise that market power.¹³⁸ Dynegy argues that it could not have known whether it would be a pivotal supplier at the time it submitted its offers into the 2015/16 Auction due to several uncertainties, such as the amount of unforced capacity eligible to participate in the Auction in Zone 4, the amount of load and capacity participating in Fixed Resource Adequacy Plans, or the amount of capacity in Zone 4 that other sellers of capacity sold under bilateral contracts.¹³⁹ Dynegy asserts that, because of uncertainty about the quantity of offers into the 2015/16 Auction from non-Dynegy parties, at the time it formed its offers for the 2015/16 Auction, Dynegy would not have known whether and to what extent its non-zero priced offers would be needed to meet the Zone 4 Local Clearing Requirement.¹⁴⁰

52. Dynegy asserts that the existence and possession of market power does not equate to the exercise of market power.¹⁴¹ Dynegy asserts that the Commission has never found that market results were not competitive or not just and reasonable simply because an entity with market power participated in the market, but rather has reviewed that entity's conduct to determine whether it engaged in withholding or otherwise attempted to exercise market power.¹⁴² Dynegy argues that MISO's Tariff does just that by setting forth a process for mitigating market power, including establishing Reference Levels and a conduct threshold (the Reference Level plus 10 percent of the Cost of New Entry).¹⁴³ Dynegy asserts that, as Complainants concede, the 2015/16 Auction was conducted in

¹³⁸ Dynegy Answer to the Complaints at 3-6.

¹³⁹ *Id.* at 23 (citing Jones Aff. ¶ 4).

¹⁴⁰ *Id.* at 24.

¹⁴¹ *Id.* at 12 (citing *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at PP 262-263, 335-340, 345 (2015) (Capacity Performance Order); *ISO New England Inc.*, 149 FERC ¶ 61,227, at P 24 (2014); *Sw. Power Pool, Inc.*, 147 FERC ¶ 61,212, at P 27, *order on clarification*, 149 FERC ¶ 61,253 (2014); *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at PP 144, 159 (2008), *order on clarification and reh'g*, 131 FERC ¶ 61,170 (2010), *order on clarification and reh'g*, 150 FERC ¶ 61,208 (2015)).

¹⁴² *Id.* at 13.

¹⁴³ *Id.* at 14-15.

(continued ...)

full compliance with the Tariff.¹⁴⁴ Dynegy asserts that the Complaints fail as a matter of law and policy because no Complainant has alleged that MISO violated its Tariff and because the Market Monitor has confirmed that the results of the Auction were competitive.¹⁴⁵ Dynegy points to another case where, even where all capacity suppliers with existing resources were deemed pivotal, the Commission nonetheless found that the Market Monitor had properly reviewed all offers and bids from the auction and that the results of the auction were competitive, just, and reasonable.¹⁴⁶ Dynegy also cites several Commission cases to demonstrate that, where the Commission found that the Tariff was followed, there was no basis to overturn auction results.¹⁴⁷

53. Dynegy argues that its offers into the 2015/16 Auction were competitive.¹⁴⁸ Dynegy states that it submitted similar offers in the 2014/15 and 2015/16 Auctions, and that its offers in both Auctions were competitive, just and reasonable.¹⁴⁹ With regard to the 2014/15 Auction, Dynegy states that only 954 MW of non-zero offers were required to satisfy the 8,879 MW Local Clearing Requirement for Zone 4, and there was 1,556 MW of non-Dynegy capacity offered into Zone 4, most offered below Dynegy's lowest non-self-supply offer. Dynegy explains that, according to information provided by MISO about offers after the conclusion of the 2014/15 Auction, it was not a pivotal supplier in that Auction and the marginal offer necessary to satisfy the Local Clearing Requirement

¹⁴⁴ *Id.* at 15-17.

¹⁴⁵ *Id.* at 17.

¹⁴⁶ *Id.* at 19-20 (citing *ISO New England Inc.*, 151 FERC ¶ 61,226, at P 21 (2015); Capacity Performance Order, 151 FERC ¶ 61,208 at PP 12, 335-340, 345).

¹⁴⁷ *Id.* at 17-19 (citing *Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,276, at P 30 (2008) (*Maryland PSC*) (finding that because “the tariff’s mechanisms for protecting customers from the exercise of market power . . . were followed . . . [the Commission] find[s] no basis to overturn the auctions for the transition period”), *order denying reh’g*, 127 FERC ¶ 61,274 (2009), *denying petition for review*, 632 F.3d 1283 (D.C. Cir. 2011); *Bangor Hyrdo-Elec. Co. v. ISO New England Inc.*, 97 FERC ¶ 61,339, at 62,589-90 (2001), *reh’g denied*, 98 FERC ¶ 61,298 (2002); *Borough of Chambersburg, Pa. v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,219, at P 1 (2006), *reh’g denied*, 119 FERC ¶ 61,166, at PP 45-46 (2007)).

¹⁴⁸ *Id.* at 21-38.

¹⁴⁹ *Id.* at 26-28.

(continued ...)

came from offers slightly above \$0/MW-day submitted by another capacity supplier.¹⁵⁰ With regard to the 2015/16 Auction, Dynegy states that it self-scheduled 1,709 MW of capacity at \$0/MW-day and offered 270 MW of capacity at \$108/MW-day, 651 MW of capacity at \$150/MW-day, and 2,775 MW of capacity at \$167/MW-day.¹⁵¹ Dynegy states that 553 MW of capacity offered at a price above \$0/MW-day cleared the 2015/16 Auction. Dynegy notes that the Zone 4 2015/16 Auction Clearing Price is lower than the Cost of New Entry for Zone 4, which is \$247.40/MW-day.¹⁵²

54. Dynegy contends that its offer strategy contradicts Complainants' allegations of withholding by Dynegy in the 2015/16 Auction.¹⁵³ Dynegy states that it did not violate the Auction's physical withholding provisions because all of its capacity was offered into the Auction, sold bilaterally, or exported to PJM. According to Dynegy, it submitted self-scheduled offers into the 2015/16 Auction to hedge the cost of purchasing capacity to satisfy its retail load obligations, and therefore it could not use any of that capacity in a withholding strategy.¹⁵⁴ Dynegy asserts that those purchases and sales net out, leaving it "financially indifferent" to the results of the Auction for its self-scheduled capacity.¹⁵⁵ Dynegy also states that it employed a strategy of pursuing bilateral capacity sales and wholesale sales that included the sale of capacity. Dynegy states that such sales reduce the capacity available to execute a withholding strategy.

55. Dynegy argues that Illinois Attorney General and Southwestern affiants, Mr. McCullough and Mr. Chiles, respectively, mistakenly assume that Dynegy received the \$150/MW-day clearing price for all capacity offered by Dynegy into the 2015/16 Auction, including capacity that Dynegy self-scheduled at \$0/MW-day.

¹⁵⁰ *Id.* at 28-29.

¹⁵¹ *Id.* at 30 (citing Jones Aff. ¶ 34). Dynegy explains that it erroneously submitted 2,775 MW of capacity at \$167 per MW-day, but contends that regardless the offers did not clear and they were below the \$180.53 per MW-day conduct threshold. *Id.* at 31.

¹⁵² *Id.* at 43 (citing Pope Aff. ¶¶ 30-36). Dynegy states that it calculated the net Cost of New Entry by subtracting from the Cost of New Entry an estimate of the energy revenues that a new unit would be expected to earn in the MISO energy market.

¹⁵³ *Id.* at 31.

¹⁵⁴ *Id.* at 30, 21 (citing Jones Aff. ¶ 15).

¹⁵⁵ *Id.* at 22 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,199, at P 18 (2012); Jones Aff. ¶¶ 18-20).

(continued ...)

Instead, Dynegy explains that the net revenues received from the 2015/16 Auction were \$30 million after accounting for Dynegy's self-scheduled capacity.¹⁵⁶ According to Dynegy, such mistaken assumptions undermine Mr. McCullough's and Mr. Chiles' conclusions about Dynegy's incentives and actions.

56. Dynegy also contends that its capacity offers in the 2015/16 Auction were not too high.¹⁵⁷ Dynegy states that its offers were cost-based and that it did not simply offer its capacity at a price at or near the Initial Reference Level or conduct threshold. Regardless, Dynegy asserts that even if its offers were not cost-based, but were instead marginal opportunity costs, the Auction Clearing Price would have been almost exactly equal to or higher than the \$150/MW-day price challenged by Complainants.¹⁵⁸

57. Dynegy asserts that there is further evidence showing that the \$150/MW-day clearing price for the 2015/16 Auction was competitive, just, and reasonable.¹⁵⁹ Dynegy states that the Zone 4 capacity price is reasonable compared to: (1) PJM's 2015/16 capacity price for the unconstrained PJM zone located in Illinois, which was \$136/MW-day;¹⁶⁰ (2) the capacity costs recovered by integrated utilities in retail rates in the other MISO Zones (ranging from \$180/MW-day to \$435/MW-day);¹⁶¹ (3) the Cost of New Entry (\$247.40/MW-day);¹⁶² and (4) capacity costs in other RTOs/ISOs. To the last point, Dynegy avers that Zone 4 has competitive retail suppliers instead of integrated utilities, and argues that the prices in regions with competitive capacity markets, like PJM, ISO New England Inc. (ISO New England), and New York Independent System Operator, Inc. (New York ISO), are a more relevant benchmark for comparison to the Zone 4 price than the capacity prices in the other MISO Zones. Dynegy states that the PJM capacity price for its Third Incremental Auction cleared at \$163.20/MW-day; the

¹⁵⁶ *Id.* at 25-26, 44 (citing McCullough Aff. ¶ 34; Chiles Aff. ¶ 9).

¹⁵⁷ *Id.* at 33-35.

¹⁵⁸ *Id.* at 35 (citing Gerhardt Aff. ¶ 4(a)).

¹⁵⁹ *Id.* at 40-44.

¹⁶⁰ *Id.* at 40 (citing Pope Aff. ¶ 42).

¹⁶¹ *Id.* at 41-42 (citing Jones Aff. ¶ 43-48).

¹⁶² *Id.* at 43.

(continued ...)

ISO New England capacity price for the 2015/16 delivery year is \$113/MW-day; and the most recent New York ISO prices range from \$95/MW-day to \$510/MW-day.¹⁶³

58. Dynegy argues that capacity prices from other MISO Zones and from past years do not represent an appropriate proxy for evaluating the reasonableness of the Zone 4 2015/16 Auction Clearing Price.¹⁶⁴ Dynegy states that the Auction price does not represent the cost of capacity paid by most Load Serving Entities, either in Zone 4 or in general, because the Auction does not apply to significant amounts of capacity in MISO. Dynegy explains that the Auction allows entities arranging for a Fixed Resource Adequacy Plan to opt out of the auction and that Load Serving Entities that purchase capacity bilaterally can opt out of the auction as a practical matter by submitting \$0/MW-day self-schedules that cancel out their capacity purchase obligations, leaving the capacity price paid under the bilateral contract as the only price that they pay for their capacity. Dynegy contends that as much as 91 percent of capacity in MISO as a whole and 74 percent of capacity in Zone 4 was procured through a Fixed Resource Adequacy Plan or a bilateral contract, and that the Auction price does not set the price for any of this capacity that is procured outside of the Auction.¹⁶⁵ Dynegy argues that the prices cited by Complainants cannot reflect the cost of capacity located in Zone 4 or in MISO as a whole because “these amounts are so low that they cannot come close to compensating owners of capacity for even the marginal costs of operating that capacity, especially the costs of older coal-fired plants like the ones owned by Dynegy, much less provide for a reasonable return on investment.”¹⁶⁶

59. Dynegy contends that a change in the Zone 4 price does not indicate an exercise of market power or a non-competitive price, and can be explained by other factors, such as: (1) MISO reported that substantially more Load Serving Entities purchased capacity in the 2015/16 Auction as opposed to relying on self-supply; and (2) MISO uses a vertical demand curve to evaluate offers, which means that even a small change in supply, demand, or self-schedules could have significant effects on market price.¹⁶⁷ Dynegy argues that there were over 1,000 MW fewer self-supply offers in Zone 4 in the 2015/16 Auction compared to the 2014/15 Auction. Dynegy contends that this decline in self-supply shifted the supply curve to the left to the point at which the 2015/16 supply curve

¹⁶³ *Id.* at 43-44 (citing Pope Aff. ¶¶ 42-44, 49).

¹⁶⁴ *Id.* at 45.

¹⁶⁵ *Id.* at 46-47.

¹⁶⁶ *Id.* at 47-48.

¹⁶⁷ *Id.* at 35-36.

(continued ...)

for Zone 4 in the 2015/16 Auction began to rise. Dynegy argues that “[t]his fact alone could cause the [Auction] clearing price for Zone 4 to increase.”¹⁶⁸

60. Dynegy rebuts Complainants’ assertions that Dynegy acted to protect its market power. Dynegy states that it legitimately opposed the consolidation of MISO Zones 4 and 5 because the conditions for consolidation were not met, notes that MISO rejected the proposal on its merits, and asserts that the proposal had nothing to do with whether Dynegy’s offers into the 2015/16 Auction were just and reasonable.¹⁶⁹ Dynegy also rebuts Public Citizen’s claim that Dynegy affected the 2015/16 Auction price by threatening to leave MISO for PJM, noting that only transmission owners can switch from one RTO/ISO to another, and Dynegy does not own any transmission facilities in MISO.¹⁷⁰ Dynegy also disputes claims that it tainted MISO’s market design by its participation in the stakeholder process, arguing that Dynegy is within its rights to express its point of view and that there is no reason to believe that Dynegy could force an outcome over the objections of other numerous and diverse stakeholders.¹⁷¹

61. Dynegy rebuts Complainants’ allegations regarding the market power analysis performed in the *Ameren Energy* proceeding.¹⁷² Dynegy argues that such allegations have nothing to do with whether the 2015/16 Auction results were competitive, and regardless, are contrary to the Commission’s section 203 precedent. Dynegy asserts that the Commission did not impose any obligation on section 203 applicants to analyze any geographic markets other than the RTO/ISO and any previously identified submarkets, and in *Ameren Energy*, the Commission had not identified any submarkets in MISO requiring separate analysis prior to the date the Dynegy application was filed. Further, Dynegy acknowledges that, while intervenors in section 203 proceedings may argue that other submarkets should be analyzed and certain intervenors did so in the *Ameren Energy* proceeding, the Commission found in *Ameren Energy* that the intervenors had not satisfied their burden of presenting evidence suggesting that any submarket should be analyzed separately. Moreover, Dynegy asserts that it properly analyzed the MISO market as a whole, as opposed to any identified submarket, and that the Commission

¹⁶⁸ *Id.* at 36 (citing Pope Aff. ¶ 51).

¹⁶⁹ *Id.* at 52-55.

¹⁷⁰ *Id.* at 55-56.

¹⁷¹ *Id.* at 56.

¹⁷² *Id.* at 49-51.

(continued ...)

approved that approach. Dynegy argues therefore that the Commission should dismiss Complainants' arguments as collateral attacks on *Ameren Energy*.¹⁷³

62. Dynegy rejects Public Citizen's claim that the Commission must review the Auction results before they can go into effect.¹⁷⁴ Dynegy states that the cases on which Public Citizen relies do not require the Commission to issue an affirmative finding that every rate produced by an auction is just and reasonable before allowing the rate to go into effect, but only require "enforceable post-approval transaction reporting" in order to allow the Commission to determine whether sellers' rates were the result of market power.¹⁷⁵ Dynegy states that the Commission's reporting regime is codified in its Electric Quarterly Reporting regulations, and asserts that the holdings in *Lockyer* and *Harris* relate to their findings that the Commission did not enforce its Electric Quarterly Reporting regulations, not that the Commission should have reviewed the justness and reasonableness of market-based rates before they went into effect.

ii. MISO

63. MISO argues that Complainants have not shown that MISO violated a Commission order, applicable statute or regulation, or that it failed to properly administer its Tariff.¹⁷⁶ MISO explains that its Tariff establishes specific parameters for establishing an Initial Reference Level and general criteria for identifying economic withholding, and that it followed these parameters.¹⁷⁷ MISO rejects Complainants' assertion that the 2015/16 Auction price was unjust and unreasonable because it departed substantially from prices in other Zones and prior Auctions.¹⁷⁸ MISO contends that different results by location and year can occur for multiple reasons, including commercial decisions of market participants (both on the supply and the demand side), and available capacity offered into an Auction. MISO attributes the higher prices in Zone 4 for the 2015/16 Auction to: (1) the fact that higher priced local resources were needed to meet the Local

¹⁷³ *Id.* at 50-52.

¹⁷⁴ *Id.* at 58.

¹⁷⁵ *Id.* at 58-59 (citing *Lockyer*, 383 F.3d at 1013; *Harris*, 784 F.3d at 1269, 1273).

¹⁷⁶ MISO Answer to the Complaints at 2. MISO states that it does not address allegations that are specific to the conduct of Dynegy. *Id.* at 2, 35.

¹⁷⁷ *Id.* at 15-16 (citing MISO, FERC Electric Tariff, Module D, §§ 64.1.2 (30.0.0), 64.1.4 (30.0.0)).

¹⁷⁸ *Id.* at 14.

(continued ...)

Reliability Requirement in Zone 4 because fewer resources were offered in at zero prices and because more price sensitive offers were submitted compared to the prior Auction; (2) the fact that more capacity was procured through the Auction than through bilateral contracts as compared to capacity acquisitions in the prior year; and (3) the effect of different rules applied by different state agencies to utilities' procurement of supply for end-users.

64. MISO rejects Illinois Attorney General's assertion that the Zone 4 2015/16 Auction Clearing Price did not reflect marginal costs or actual costs to supply capacity, arguing that this assertion is in conflict with Commission policy and the Commission orders that approved the design of MISO's Auctions.¹⁷⁹ Further, MISO states that the Supreme Court has noted that the justness and reasonableness of market-based prices should not be evaluated based on a comparison to marginal costs because such an evaluation would constitute an improper attempt to reinstitute cost-based regulation, and asserts that the marginal costs of an individual generator are irrelevant to a determination of whether a generator may be engaging in economic withholding.¹⁸⁰ MISO also states that the Commission, in authorizing MISO's resource adequacy requirements, ruled that "[a]s we have found for other markets, it is reasonable for a seller to receive the

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 15 (citing *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 550 (2008)).

applicable competitive price, even if the price exceeds the seller's net marginal costs.”¹⁸¹ MISO states that the sale price of \$150/MW-day was just and reasonable because it was below the threshold for economic withholding under the specific parameters of MISO's Commission-accepted Tariff in effect at the time of the 2015/16 Auction.

65. MISO rejects claims that it failed to act to prevent Dynegy from exercising market power in the 2015/16 Auction. MISO states that it was not forced by Dynegy into foregoing the combination of Zones 4 and 5 into one Zone; rather, MISO conducted a robust stakeholder process as required under its Tariff and decided, after several stakeholders expressed concerns, not to reevaluate zonal boundaries.¹⁸² MISO argues that the issues raised by Complainants regarding the appropriateness of a regional versus sub-regional analysis of market power issues either were or should have been raised in the *Ameren Energy* proceeding.¹⁸³ MISO states that Public Citizen and Illinois Attorney General did not participate in that proceeding and Southwestern did not seek rehearing of *Ameren Energy*. MISO therefore argues that Complainants' attempts to raise those same issues with respect to the results of the 2015/16 Auction amount to an improper collateral attack on *Ameren Energy*. With regard to Public Citizen's comments that MISO did not intervene in the *Ameren Energy* proceeding, MISO notes that it was under no obligation to participate in the proceeding and its decision not to do so in no way affected the results of the 2015/16 Auction. MISO maintains that it properly followed its Tariff and states that, in order for MISO to have taken action to prevent Dynegy from exercising market power in the 2015/16 Auction, MISO would have had to have: (1) known Dynegy's bidding strategy, which it could not do; (2) disregarded *Ameren Energy*, which it has no authority to do; and (3) determined that Dynegy exercised market power in the 2015/16 Auction, even though the Market Monitor determined that the final results were not impacted by conduct prohibited by the Tariff.¹⁸⁴

66. MISO rejects Public Citizen's argument that the Commission must be given an opportunity to review the Auction rates in order to determine if they are just and reasonable before they go into effect.¹⁸⁵ MISO asserts that Public Citizen's reliance on the *Lockyer* and *Harris* cases is misplaced. MISO argues that, in those cases, the court

¹⁸¹ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 91,199, at P 290 (2012)).

¹⁸² *Id.* at 22-26.

¹⁸³ *Id.* at 26-28.

¹⁸⁴ *Id.* at 28-29.

¹⁸⁵ *Id.* at 29.

(continued ...)

found that the Commission's market-based rate program requires the Commission to engage in an *ex post* review of rates, which is satisfied by the filing of quarterly reports.¹⁸⁶ MISO asserts that, aside from these reports, once a seller has been granted market-based rate authority, Commission regulations do not require it to file specific sales prices with the Commission. MISO also states that the court has recognized a distinction between the filed rate and fluctuating prices. According to MISO, Public Citizen is incorrect in identifying the result of each Auction as the "filed rate" because the rate on file with the Commission in this case is the Tariff provisions describing the Auction procedures, not the prices which may change over time.¹⁸⁷

d. Comments in Support of Complaints

67. Joint Consumer Advocates express concern that Dynegy was able to exercise market power as a pivotal supplier of capacity in Zone 4 during the 2015/16 Auction, and that as a result the Auction may no longer produce a competitive market-based price for capacity in Zone 4.¹⁸⁸ Sierra Club states that Dynegy could have engaged in economic withholding by submitting offers that clear at prices significantly above competitive levels or that do not clear the auction.¹⁸⁹ Sierra Club argues that Dynegy orchestrated its bids as a pivotal supplier to set the market price at \$150/MW-day, which Sierra Club asserts is likely well above Dynegy's costs.¹⁹⁰ Several parties argue that the Commission should investigate the allegations raised in the Complaints to determine whether MISO's Auction rules were violated during the 2015/16 Auction.¹⁹¹

68. Several parties argue that the Commission should investigate the allegations raised in the Complaints to determine whether the Zone 4 2015/16 Auction Clearing Price is just and reasonable.¹⁹² Sierra Club also requests that the Commission find the 2015/16

¹⁸⁶ *Id.* at 30.

¹⁸⁷ *Id.* at 29-32 (citing *Montana Consumer Counsel*, 659 F.3d at 921-22).

¹⁸⁸ Joint Consumer Advocates Comments at 7.

¹⁸⁹ Sierra Club Comments at 21-22 (citing MISO Tariff, Module D, § 63.3 (30.0.0)).

¹⁹⁰ *Id.* at 23.

¹⁹¹ *Id.* at 14-15; Joint MISO Industrial Customers Comments at 2-4; Illinois Commerce Commission Comments at 2, 6, 10; Ameren Illinois Comments at 5-6; Joint Consumer Advocates Comments at 7.

¹⁹² Joint MISO Industrial Customers Comments at 2-4; Sierra Club Comments at (continued ...)

Auction results to be unjust and unreasonable; suspend the rate for Zone 4 or set a refund date pending an expedited investigation of the allegations; and commence a settlement and discovery process and schedule an evidentiary hearing.¹⁹³ Some parties request that, to the extent that the Commission finds that the Auction rules were violated or that the Auction Clearing Price is unjust and unreasonable, the Commission take appropriate action, such as ordering refunds and Tariff modifications.¹⁹⁴

69. Sierra Club argues that the Commission's finding in *Ameren Energy* failed to prevent the improper exercise of market power and failed to reveal the existence of a market power problem.¹⁹⁵ Sierra Club argues that the transaction was not in the public interest and that the consolidation of ownership gave Dynegy the ability to exercise market power in an area of Illinois that already experiences transmission congestion. Sierra Club argues that the Commission's analysis in *Ameren Energy* did not properly account for the retirement of at-risk generators, that the Herfindahl-Hirschman Index used to evaluate market power does not account for network constraints or other physical characteristics of electricity, and that the Commission's market power analysis should have been conducted for the Zone 4 submarket instead of the MISO region as a whole.¹⁹⁶ Sierra Club requests that the Commission impose appropriate conditions on Dynegy with regard to bidding behavior by the generators acquired in the *Ameren Energy* proceeding.¹⁹⁷

e. **Opposition to Complaints**

70. The Market Monitor acknowledges that Dynegy is a pivotal supplier in Zone 4.¹⁹⁸ The Market Monitor explains, however, that the existence of pivotal suppliers in

14-15; Ameren Illinois Comments at 5-6; Joint Consumer Advocates Comments at 7.

¹⁹³ Sierra Club Comments at 29.

¹⁹⁴ *Id.* at 29-30; Illinois Commerce Commission Comments at 2, 6, 10; Ameren Illinois Comments at 5-6; Citizens Utility Board Comments at 8; Joint MISO Industrial Customers Comments at 3.

¹⁹⁵ Sierra Club Comments at 25.

¹⁹⁶ *Id.* at 26-27.

¹⁹⁷ *Id.* at 29.

¹⁹⁸ Market Monitor Comments at 3.

(continued ...)

wholesale electricity markets is extremely common, which the Market Monitor asserts is why RTOs/ISOs have market power mitigation measures.¹⁹⁹

71. Several parties assert that the 2015/16 Auction was conducted in compliance with the Tariff and that Complainants fail to demonstrate otherwise.²⁰⁰ NRG argues that Complainants' arguments are a collateral attack on the Commission's order approving the Auction rules.²⁰¹ EPSA argues that, because there are no alleged Tariff violations, the Commission must uphold the Auction results.²⁰² EPSA avers that the results of the 2015/16 Auction are final and that the MISO Tariff does not provide for the filing of the Auction results for Commission approval.²⁰³ EPSA argues that the Commission has consistently recognized that it is inappropriate to revise capacity auction results because of potential harm to the stability and integrity of the market if parties cannot rely on Auction results conducted in accordance with the Tariff.²⁰⁴ EPSA adds that revising the Auction results in this case is exceptionally problematic because doing so would indicate to market participants that low prices that fail to compensate suppliers will be

¹⁹⁹ *Id.* at 3-4.

²⁰⁰ *Id.* at 4; EPSA Protest at 20; NRG Comments at 8.

²⁰¹ NRG Comments at 8 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,213 (2011)).

²⁰² EPSA Protest at 19-23.

²⁰³ *Id.* at 19-20 (citing Joint Statement of Comm'r Tony Clark and Comm'r Norman Bay on ISO New England's Forward Capacity Market Case at 2, Docket No. ER14-1409-000 (Sept. 16, 2014) (citation omitted)).

²⁰⁴ *Id.* at 20-21 (citing *Maryland PSC*, 124 FERC ¶ 61,276 at P 26; *Public Utils. Comm'n of Ca. v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990); *Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189, at P 141 (2012), *on reh'g*, 151 FERC ¶ 61,044 (2015); *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157, at P 63 (2009); *DC Energy, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165, at P 101 (2012), *on reh'g*, 144 FERC ¶ 61,024 (2013); *Borough of Chambersburg v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,219, *reh'g denied*, 119 FERC ¶ 61,166;

New York Indep. Sys. Operator, Inc., 92 FERC ¶ 61,073, at 61,307 (2000), *on reh'g*, 97 FERC ¶ 61,154 (2001)).

(continued ...)

preserved but higher prices will be reset.²⁰⁵ The Market Monitor and EPSA oppose any retroactively applied remedies, arguing that such remedies are destructive to the integrity of the market and create risk prospectively for market participants,²⁰⁶ and Gibson City and Grand Tower state that any Tariff changes must be prospective and that the Reference Level must remain the mitigation level for the 2015/16 Auction.²⁰⁷

72. Gibson City and Grand Tower request that the Commission reject Southwestern's request for waiver of the application of the 2015/16 Auction results to Load Serving Entities within Zone 4, effective June 1, 2015, stating that no error was made in conducting the 2015/16 Auction.²⁰⁸ They argue that the waiver request is of substantial scope, and while granting the waiver would remedy Southwestern's claimed harm, it would harm others that participated in the 2015/16 Auction.

73. Several parties argue that Complainants have not set forth adequate facts to satisfy their burden in demonstrating that the 2015/16 Auction resulted in prices in Zone 4 that are unjust and unreasonable.²⁰⁹ The Market Monitor notes that the Zone 4 2015/16 Auction Clearing Price is lower than the Cost of New Entry for Zone 4, which is \$247.40/MW-day.²¹⁰ Gibson City and Grand Tower state that Southwestern has not met its burden of proof under section 206 of the FPA to show that any rate is unjust, unreasonable, unduly discriminatory or preferential.²¹¹ Gibson City and Grand Tower argue that Southwestern's claim that, absent Dynegy's generation, the Auction Clearing Price in Zone 4 would not exceed \$50/MW-day is unfounded, as one cannot change one element of the auction and assume all else would be equal.²¹² Further, Gibson City and

²⁰⁵ *Id.* at 21-22.

²⁰⁶ *Id.* at 22-23; Market Monitor Comments at 9-10.

²⁰⁷ Gibson City and Grand Tower Answer at 16.

²⁰⁸ *Id.* at 24.

²⁰⁹ *Id.* at 7; Market Monitor Comments at 10; EPSA Protest at 2-3; NRG Comments at 2-3.

²¹⁰ Market Monitor Comments at 7-8.

²¹¹ Gibson City and Grand Tower Answer at 7, 14.

²¹² *Id.* at 13.

(continued ...)

Grand Tower state that Southwestern's claimed alternative price for capacity that it would pay were it located in an adjacent region is unsupported.²¹³

74. The Market Monitor, NRG, EPSA, and Gibson City and Grand Tower aver that MISO's vertical demand curve for capacity can result in unstable capacity prices across Planning Years.²¹⁴ The Market Monitor explains that, given the vertical demand curve, although capacity prices are generally close to zero, the market can suddenly clear at much higher prices as surpluses decline to zero.²¹⁵ Gibson City and Grand Tower also argue that the mere two-month period between the Auction and the Planning Year contributes to year-to-year volatility because any new investment that may be made in reaction to the price signal would have insufficient time to materialize until future Planning Years.²¹⁶ NRG further asserts that the entirety of Zone 4 is located within Illinois, which is a retail choice state, while all other MISO Zones are comprised of non-retail choice states; therefore, it is a falsity to suggest that unbundled capacity rates in the only Zone comprised solely of a retail choice state should clear the same as the other Zones comprised of non-retail choice states, where capacity costs are bundled into retail rates.²¹⁷

75. The Market Monitor contends that the previous Auction Clearing Prices in Zone 4 that were near-zero undervalued the reliability provided by that capacity, and therefore, the price increase in Zone 4 merely reflects that prices were unreasonably low in previous Planning Years.²¹⁸ Further, the Market Monitor notes that over 1,000 MW of capacity from Zone 4 was committed to PJM for the 2015/16 Planning Year and argues that the Zone 4 Auction Clearing Price thus reflects the convergence between MISO and PJM markets. Gibson City and Grand Tower state that the PJM capacity clearing price in the area adjacent to Zone 4 is similar to the Zone 4 Auction Clearing Price and that any

²¹³ *Id.* at 11.

²¹⁴ *Id.* at 21-22; Market Monitor Comments at 7-8; NRG Comments at 2, 10; EPSA Protest at 6.

²¹⁵ Market Monitor Comments at 8.

²¹⁶ Gibson City and Grand Tower Answer at 22.

²¹⁷ NRG Protest at 10-12.

²¹⁸ Market Monitor Comments at 7-8.

(continued ...)

increase in one auction to the next within a Zone or different prices between Zones proves nothing.²¹⁹

76. Gibson City and Grand Tower state that Southwestern's comparison of clearing prices in Zone 4 and other Zones does not support Southwestern's claim of a disparity in effective capacity prices among Zones because Zone 4 is the only Zone representing a fully deregulated state.²²⁰ Gibson City and Grand Tower maintain that the embedded cost of capacity in the adjacent Zone 5 is in the range of \$200/MW-day to \$300/MW-day. Gibson City and Grand Tower also argue that it is inappropriate to compare the prices in Zone 4 and Zone 5 because Zone 5 has a single utility with a market concentration of 94 percent that bid \$0/MW-day for capacity and had no incentive to offer at its true costs because it is recovering its costs through a non-auction mechanism.²²¹

77. EPSA opposes Illinois Attorney General's request that the Commission issue a supplemental order in the *Ameren Energy* proceeding because doing so would undermine the confidence in the Auction results.²²²

f. Answers to Answers and other Pleadings

78. Illinois Attorney General states that the Market Monitor and Dynegy itself admit that Dynegy was a pivotal supplier in Zone 4, and that rather than constraining market power, MISO's measures to mitigate market power led to one party, (i.e., the one with market power), submitting bids that were wildly divergent from the bids of the other market participants.²²³ Illinois Attorney General disputes Dynegy's assertion that it could not exercise market power because of "uncertainties."²²⁴ Illinois Attorney General states that the uncertainties Dynegy describes are no greater than those faced by generators that are not pivotal suppliers and that offered capacity at prices that were more consistent with both prior years and with bids in other MISO Zones.²²⁵ Illinois Attorney

²¹⁹ Gibson City and Grand Tower Answer at 11, 17.

²²⁰ *Id.* at 19-20.

²²¹ *Id.* at 21.

²²² EPSA Protest at 2-3.

²²³ Illinois Attorney General July 20 Answer at 4, 6.

²²⁴ *Id.* at 13.

²²⁵ *Id.* at 14.

(continued ...)

General argues that Dynegy did not describe the information that it did have, nor how that information enabled it to estimate the probability of different outcomes.²²⁶ Illinois Attorney General states that the following information is available before the Auction: (1) the Planning Reserve Margin Requirement; (2) the amount of unforced capacity available in each Zone; (3) the Local Clearing Requirement in each Zone; (4) Capacity Import and Export Limits; and (5) the availability of transmission within and between Zones. As such, Illinois Attorney General asserts that Dynegy did not lose its substantial market advantage and market power due to a lack of information. Southwestern agrees that Dynegy's denial of pre-knowledge of its market power provides support for Southwestern's request for the Commission to launch an investigation into Dynegy's market behavior.²²⁷ Southwestern adds that Dynegy's denials of its market power and the details of its bidding strategy confirm that there are issues of material fact that must be explored in the context of a hearing because, according to Southwestern, sophisticated market participants in a small geographic region like Dynegy are aware that they have market power.

79. Illinois Attorney General argues that, while Dynegy attempts in its answer to the Complaints to show that its incremental costs are consistent with the Reference Level, without discovery and further analysis, it is impossible to determine whether the estimated costs are valid.²²⁸ Illinois Attorney General and Public Citizen argue that Dynegy's arguments support the need for a hearing in these proceedings due to the complexity of ratemaking issues and the number of factual and legal issues involved.²²⁹

80. Southwestern rejects Dynegy's reliance on *Maryland PSC* for the proposition that the Commission is hesitant to re-settle markets.²³⁰ Southwestern argues that the complaint that initiated that proceeding did not allege any violations of the FPA and only generally alleged market manipulation, while the complainants in this case have presented factual data demonstrating that Dynegy exercised market power.²³¹

²²⁶ *Id.* at 15.

²²⁷ Southwestern July 17 Answer at 21-22.

²²⁸ Illinois Attorney General July 20 Answer at 11.

²²⁹ *Id.* at 14-16; Illinois Attorney General August 14 Answer at 3-4; Public Citizen August 3 Answer at 2-3.

²³⁰ Southwestern August 14 Answer at 7.

²³¹ *Id.* at 8-9.

(continued ...)

Southwestern argues that another distinguishing factor here is that the Commission in *Maryland PSC* was capable of determining that a factor other than market power could be the cause of the capacity auction price spikes, while the same record has not been produced in this case; therefore, the Commission in this case is well within its discretion to direct a re-run of the Zone 4 2015/16 Auction.²³²

81. Illinois Attorney General states that its arguments are not a collateral attack on *Ameren Energy*.²³³ Illinois Attorney General states that both section 203(b) of the FPA and *Ameren Energy* authorize the Commission to review the effect of the transaction on market power in the MISO Auction notwithstanding its decision to allow the transaction to proceed. Illinois Attorney General states that the Auction was only eight months old at the time of Dynegy's acquisition of the Ameren Companies' generating plants and that new information regarding the operation of the Auction and the existence of Zone 4 as a cognizable submarket should cause the Commission to take another careful look at the Zone 4 submarket and to impose appropriate conditions on the generation resources that Dynegy acquired from the Ameren Companies in order to ensure just and reasonable rates in Illinois. Southwestern supports Illinois Attorney General's request that the Commission exercise its section 203 authority to revisit the determination made in *Ameren Energy*.²³⁴ Southwestern argues that its complaint neither attacked nor questioned the basis of *Ameren Energy*. Instead, Southwestern asserts that it raised the *Ameren Energy* proceeding as a relevant historical note in describing how Dynegy acquired considerable concentration of market power in Zone 4 and in explaining how the issue has not been addressed by the Commission.²³⁵

82. Dynegy asserts that Illinois Attorney General's and Southwestern's answers should be dismissed as a matter of law and policy because they still fail to allege that MISO violated its Tariff and because the Market Monitor confirmed that the 2015/16 Auction results were competitive.²³⁶ According to Dynegy, the Commission has previously held that it will not invalidate the results of completed capacity auctions that

²³² *Id.* at 9-10. Southwestern notes that the Commission has re-run markets to correct for market manipulation. *See id.* at 10 (citing CAISO Complaint Order, 96 FERC ¶ 61,120 at 61,516–20).

²³³ Illinois Attorney General July 20 Answer at 23-24.

²³⁴ Southwestern July 17 Answer at 23-24.

²³⁵ *Id.* at 22-23.

²³⁶ Dynegy July 30 Answer at 1-2.

(continued ...)

were conducted in accordance with the market mitigation measures and determined to be competitive by an independent market monitor.

83. Dynegy rejects allegations that it was able to set the Zone 4 2015/16 Auction Clearing Price at a point likely above its internal cost of providing capacity, and that without discovery and further analysis, it is impossible to determine whether the estimated costs are valid.²³⁷ Dynegy asserts that, in the non-public version of Dynegy's answer to the Complaints, Dynegy's affiant Mr. Gerhardt provided going-forward costs for each Dynegy unit offered into the auction, prepared consistently with the provisions of the MISO Tariff that require such estimates in other circumstances that were not present here.²³⁸ Dynegy contends that, as Mr. Gerhardt explained, going-forward cost capacity offers would have produced a Zone 4 Auction Clearing Price very similar to, or higher than, the \$150/MW-day price that actually occurred.²³⁹ Dynegy argues that Illinois Attorney General and Southwestern do not mention Mr. Gerhardt's analysis and therefore cannot be found to have substantiated any disputed issue of material fact regarding that analysis.²⁴⁰

g. Commission Determination

84. We deny Complainants' allegations that Dynegy exercised market power in the 2015/16 Auction, causing an unjust, unreasonable, and unduly discriminatory Auction Clearing Price in Zone 4. MISO conducted the 2015/16 Auction in compliance with the MISO Tariff, including the Tariff provisions pertaining to Dynegy's offers in the Auction, that were designed to mitigate the exercise of market power and result

²³⁷ *Id.* at 2-4.

²³⁸ *Id.* at 3.

²³⁹ *Id.* (citing Dynegy Answer to the Complaints at 33-35).

²⁴⁰ *Id.* at 3-4.

in a just and reasonable rate. These Tariff provisions, approved by the Commission,²⁴¹ expressly allow offers into the Auction at levels up to and including the Cost of New Entry for the Zone where the capacity being offered is represented. For the 2015/16 Auction, the Cost of New Entry for Zone 4 equaled \$247.40/MW-day. As Dynegy explains in its answer, it offered 1,709 MW of capacity at \$0/MW-day, 270 MW of capacity at \$108/MW-day, 651 MW of capacity at \$150/MW-day, and 2,775 MW of capacity at \$167/MW-day.²⁴² Because all of Dynegy's offers were made below the Cost of New Entry for Zone 4, the offers themselves were permissible under the Tariff. We agree with MISO and Dynegy that an Auction Clearing Price is not unjust and unreasonable because it is higher than expected.²⁴³ We find no evidence in the record to support a finding that Dynegy's offers violated MISO's Tariff and we conclude, as discussed below, that the resulting Auction Clearing Price was just and reasonable.

85. Complainants and supportive commenters suggest that the prices resulting from the 2015/16 Auction were unjust and unreasonable because Dynegy exercised market power by engaging in economic withholding.²⁴⁴ As it relates to offers into the Auction, the Tariff includes provisions to mitigate economic withholding.²⁴⁵ At the time of the 2015/16 Auction, section 64.1.2 of the Tariff established that the Market Monitor would identify potential economic withholding that would be mitigated if the offer exceeded the sum of 10 percent of Cost of New Entry and the applicable Reference Level (i.e., this sum would be the conduct threshold).²⁴⁶ Viewing sections 63.3 and 64.1.2 of the Tariff together, the conduct threshold represents the price over which offers made into the Auction substantially exceed competitive levels and would constitute potential economic

²⁴¹ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,213 (MISO) (conditionally accepting MISO's compliance filing that, among other things, established the conduct and market impact thresholds, and the methodology for basing the Initial Reference Level on the estimated opportunity cost of exporting capacity to a neighboring region).

²⁴² Dynegy Answer to the Complaints at 30.

²⁴³ See MISO Answer to Complaints at 2-4; Dynegy Answer to the Complaints at 33-35.

²⁴⁴ See, e.g., Public Citizen Complaint at 3, 9-10; Illinois Attorney General Complaint at 12-14, 20; Southwestern Complaint at 12-13, 48; Sierra Club Comments at 21-24.

²⁴⁵ MISO, FERC Electric Tariff, Module D, § 63.3 (30.0.0).

²⁴⁶ *Id.* § 64.1.2 (30.0.0).

(continued ...)

withholding.²⁴⁷ Because Dynegy's offers all fell below the \$180.53/MW-day conduct threshold for Zone 4, those offers were considered to be competitive under the Tariff and therefore did not warrant mitigation.²⁴⁸

86. We find that the 2015/16 Auction Clearing Price in Zone 4 was just and reasonable because it resulted from the application of MISO's Tariff, which had previously been accepted as a just and reasonable approach to mitigating the effects of anticompetitive behavior in the capacity market.²⁴⁹ We therefore deny Complainants' requests to: (1) establish a new rate that is just and reasonable; (2) suspend the Auction Clearing Price for Zone 4 effective June 1, 2015 or, if the rate is not suspended, establish a refund effective date of June 1, 2015; or (3) set the issues for settlement judge proceedings or set the matter for discovery and evidentiary hearing.

87. We also deny Southwestern's request for waiver of the application of the Zone 4 Auction Clearing Price. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.²⁵⁰ Given our finding that the 2015/16 Auction results were just and reasonable, there is no concrete problem for the waiver to address.

²⁴⁷ See Market Monitor Comments at 5 ("The fundamental purpose of a reference level is to serve as a competitive benchmark that reflects the offer of a supplier that faces robust competition.").

²⁴⁸ The Market Monitor indicated that the "[market power mitigation] measures were in effect for the 2015-2016 [A]uction and were applied appropriately" and concluded that, "[b]ecause no participant failed the conduct test for the [Auction], it was not necessary to conduct an impact test. This indicates that all offers were within a workably competitive range based on the reference level we established." See *id.* at 4.

²⁴⁹ See *MISO*, 137 FERC ¶ 61,213 at PP 54-61, 85-98.

²⁵⁰ See *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 14 (2016).

88. We deny Illinois Attorney General's request that the Commission enter a supplemental order in the *Ameren Energy* proceeding to impose appropriate conditions on Dynegy with regard to Auction bidding behavior of the generation resources that Dynegy acquired from the Ameren Companies, and we deny any suggestion that the Commission revisit the determination made in *Ameren Energy*.²⁵¹ We find that re-evaluating the Commission's analysis of the acquisition is beyond the scope of this proceeding, and that such requests are a collateral attack on the Commission's findings in *Ameren Energy*.

89. We reject Public Citizen's argument that the Commission must review electric market clearinghouse rates (such as the 2015/16 Auction Clearing Price) before the rate goes into effect to determine if the rate is just and reasonable.²⁵² Public Citizen misreads the precedent that it cites. In *Lockyer*, the Ninth Circuit held that the Commission may authorize market-based energy tariffs under the FPA, so long as that regulatory framework incorporates both an ex ante finding of the absence of market power and enforceable post-approval transaction reporting that would enable the Commission to determine whether the rates were just and reasonable.²⁵³ We agree with Dynegy that the Court did not intend for the Commission to make an affirmative finding that a rate is just and reasonable before allowing the rate to go into effect. Rather, the Court required the Commission to enforce the reporting requirements of its Electric Quarterly Report that enable the Commission to evaluate whether rates are just and reasonable. We also find that Public Citizen is incorrect in identifying the result of each Auction as the "filed rate" because, in the market-based rate context, the rate on file with the Commission is the Tariff describing the Auction procedures, not the prices that may change over time.²⁵⁴

²⁵¹ Illinois Attorney General Complaint at 20-21; Southwestern July 17 Answer at 23-24.

²⁵² Public Citizen Complaint at 11-13 (citing *Harris*, 784 F.3d at 1275; *Lockyer*, 383 F.3d at 1015-1016).

²⁵³ *Lockyer*, 383 F.3d at 1013.

²⁵⁴ See *Montana Consumer Counsel*, 659 F.3d at 921 ("the 'rate' filed by authorized power wholesalers is the 'market rate,' and that rate does not 'change' even though the prices charged by the wholesalers may rise and fall with the market.").

The Commission orders:

The Complaints are hereby denied in part, as discussed in the body of this order.

By the Commission. Commissioner Glick is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Motions to Intervene

Alliant Energy Corporate Services (Docket No. EL15-82-000)

Ameren Services Company, a wholly-owned subsidiary of Ameren Corporation, is filing on behalf of its affiliated public utility operating company Union Electric Company (Docket No. EL15-82-000)

American Electric Power Service Corporation, on behalf of its affiliates Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

American Public Power Association (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

American Municipal Power, Inc. (AMP) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

American Transmission Company LLC (Docket No. EL15-82-000)

Coalition of MISO Transmission Customers (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Consumers Energy Company (Docket No. EL15-82-000)

DTE Electric Company (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Duke Energy Corporation, on behalf of its franchised utility affiliates Duke Energy Indiana, Inc., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Duke Energy Carolinas, LLC, and Duke Energy Progress, Inc. (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Electric Power Supply Association (EPSA) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Exelon Corporation (Exelon) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Gibson City Energy Center, LLC and Grand Tower Energy Center, LLC (Gibson City

and Grand Tower) (Docket Nos. EL15-70-000, EL15-71-000, EL15-82-000)

Great River Energy (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Hoosier Energy Rural Electric Cooperative, Inc. and Southern Illinois Power Cooperative (Hoosier and Southern Illinois) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Illinois Citizens Utility Board (Citizens Utility Board) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Illinois Industrial Energy Consumers (Industrial Consumers) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Illinois Municipal Electric Agency (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Illinois Power Agency (Docket No. EL15-71-000)

Illinois Power Marketing Company and Dynegy Marketing and Trade, LLC (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Indianapolis Power & Light Company (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Louisiana Public Service Commission (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Madison Gas & Electric Company (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Midcontinent MCN, LLC (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Minnesota Large Industrial Group (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Northern Illinois Municipal Power Agency (Docket No. EL15-72-000)

NRG Companies (NRG Power Marketing LLC and GenOn Energy Management) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

People of the State of Illinois (Illinois Attorney General) (Docket Nos. EL15-70-000,

EL15-72-000, EL15-82-000)

Prairie Power, Inc. (Prairie Power) (Docket Nos. EL15-70-000, EL15-71-000)

Public Citizen, Inc. (Public Citizen) (Docket Nos. EL15-71-000, EL15-72-000, EL15-82-000)

Public Service Electric and Gas Company, PSEG Power LL, and PSEG Energy Resources & Trade LLC (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Southern Minnesota Municipal Power Agency (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Southwestern Electric Cooperative, Inc. (Southwestern) (Docket Nos. EL15-70-000, EL15-71-000)

The Sustainable FERC Project and Natural Resources Defense Council (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Union Electric Company (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Wabash Valley Power Association, Inc. (Wabash Valley) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Wisconsin Public Service Corporation (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Xcel Energy Services Inc., on behalf of its utility operating company affiliates Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation (Xcel) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Notices of Intervention

Arkansas Public Service Commission (Arkansas Commission) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Council of the City of New Orleans, Louisiana (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Illinois Commerce Commission (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Michigan Public Service Commission (Docket Nos. EL15-70-000, EL15-71-000, EL15-

72-000)

Mississippi Public Service Commission (Docket Nos. EL15-70-000, EL15-71-000, EL15-82-000)

Missouri Public Service Commission (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Organization of MISO States (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Motions to Intervene and Comments and/or Protests

Ameren Illinois Company (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Illinois Power Marketing Company and Dynegy Marketing and Trade, LLC (Docket No. EL15-82-000)

Indiana Office of Utility Consumer Counselor, the Iowa Office of Consumer Advocate, the Michigan Citizens Against Rate Excess, the Minnesota Department of Commerce, the Minnesota Attorney General's Office – Residential Utilities and Antitrust Division, and the Citizens Utility Board of Wisconsin (Joint Consumer Advocates) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Potomac Economics, Ltd. (MISO Market Monitor) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Prairie Power (Docket No. EL15-72-000)

Sierra Club (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

WPPI Energy (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Comments and/or Protests

Citizens Utility Board (Docket Nos. EL15-70-000, EL15-71-000)

Coalition of MISO Transmission Customers and the Illinois Industrial Energy Consumers (Joint MISO Industrial Customers) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Illinois Attorney General (comments and separate attachment) (Docket No. EL15-82-000)

Illinois Commerce Commission (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Individuals (Comment of Mike Grimes and Comment of Nancy Eileen Harris (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000); Comments of Cliff Hamal (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000); the following comments were filed in Docket No. EL15-71-000: Comments of Barbara Beam and 62 Individuals; Comments of Lawrence Beaudin and 197 Individuals; Comment of Kathleen SE Booth; Comment of Pat Cline; Comments of Jon Cole and 208 Individuals; Comment of D.L. Depper; Comment of Helen Fern Dexter; Comments of Martin Dolan and 91 Individuals; Comment of Tom Emswiler; Comments of Vincent Formanek and 261 Individuals; Comment of Paul S. Gabriel; Comment of Manuel Garcia; Comments of M. Hallock and 92 Individuals; Comment of Robert Henderson; Comment of Susan J. Hoff; Comments of Edwin Janssen and 56 Individuals; Comment of Elaine Kassak; Comment of Joe W. Knickmeyer; Comments of Robert and Diane Maes; Comments of Harold McKee and 92 Individuals; Comments of Barbara Mullins and 81 Individuals; Comments of William Myers and 164 Individuals; Comments of Shari Parker and 297 Individuals; Comments of Caroline Pienta and 172 Individuals; Comment of Charlotte Projansky; Comments of Donna Rabus and 235 Individuals; Comments of Robert Revels and 211 Individuals; Comments of Scott Rhoton and 187 Individuals; Comment of Thomas Sargent; Comment of Kathy Uher; Comments of Samantha Vercellino and 105 Individuals; Comment of Louise Wilt)

Answers/Replies/Responses

AMP and Kentucky Municipal Power Agency (Kentucky Municipal) (Motion for Leave to File Limited Response and Response by AMP and Kentucky Municipal) (July 24, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Dynegy Inc., Dynegy Marketing and Trade, LLC, and Illinois Power Marketing Company (Dynegy) (Answer of Dynegy) (July 6, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Dynegy (Response of Dynegy to Illinois Attorney General and Southwestern) (July 30, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Exelon (Limited Answer) (July 2, 2015) (Docket No. EL15-72-000)

Gibson City and Grand Tower (Answer of Gibson City and Grand Tower to Complaint of Southwestern) (July 2, 2015) (Docket No. EL15-72-000)

Hoosier and Southern Illinois (Motion to Dismiss and, in the Alternative, Answer of Hoosier and Southern Illinois) (July 2, 2015) (Docket No. EL15-72-000)

Illinois Attorney General (Response to Motions to Dismiss and Motion for Leave to File

Answer and Answer of Illinois Attorney General) (July 20, 2015) (answer and public and non-public affidavit of Robert McCullough) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Illinois Attorney General (Motion for Leave to File an Answer and Answer of Illinois Attorney General to the Response of Dynegy Filed July 30, 2015) (August 14, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Illinois Commerce Commission (Motion for Leave to Respond and Reply Comments of Illinois Commerce Commission) (July 28, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Industrial Consumers (Motion for Leave to Answer and Answer of Industrial Consumers) (August 7, 2015) (Docket No. EL15-82-000)

Industrial Consumers (Answer to MISO Response to Answer of Industrial Consumers) (September 9, 2015) (Docket No. EL15-82-000)

Midcontinent Independent System Operator, Inc. (MISO) (Answer of MISO) (July 2, 2015)

MISO (Answer of MISO) (July 17, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

MISO (Answer of MISO) (July 20, 2015) (Docket No. EL15-82-000)

MISO (Answer of MISO) (August 11, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

MISO (Motion for Leave to Respond to Answer of Industrial Consumers) (August 24, 2015) (EL15-82-000)

Northern Illinois Municipal Power Agency (Northern Illinois Municipal) (Answer and Limited Motion to Dismiss of Northern Illinois Municipal) (July 2, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Public Citizen (Response of Public Citizen to Dynegy Response of July 30, 2015) (August 3, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Sierra Club (Motion for Leave to Answer and Answer of Sierra Club) (July 24, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Southwestern (Motion for Leave to Answer and Answer of Southwestern) (July 17, 2015)

(Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Southwestern (Motion for Leave to Answer and Answer of Southwestern) (August 14, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

WPPI (Motion for Leave to Reply and Reply of WPPI) (July 21, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Other Motions and Pleadings

AMP and Kentucky Municipal (Petition for a Commission Declaration Regarding Entities Subject to the Proceeding, Alternative Motion to Dismiss Indicated Non-jurisdictional Entities as Respondents, and Reservation of Rights) (July 2, 6, 2015) (Docket No. EL15-72-000)

AMP and Kentucky Municipal (Motion for Leave to File the Non-Public Version of a Pleading One Business Day Out-of-Time) (July 7, 2015) (Docket No. EL15-72-000)

Arkansas Commission (Motion to file Comments One Day Out of Time) (November 5, 2015) (Docket Nos. EL15-71-000, EL15-82-000)

Dynegy (Motion to File Answer One Business Day Out of Time) (July 6, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

EPSA (Comments in Support of Motion for Extension of Time to File Comments) (June 5, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Illinois Attorney General (Response to MISO's Motion to Consolidate Proceedings, to Extend Answer and Comment Period to July 2, 2015, to Shorten the Comment Period on This Motion, and for Expedited Consideration of This Motion) (June 5, 2015) (Docket No. EL15-71-000)

Illinois Commerce Commission (Out-of-Time Motion to Intervene) (December 3, 2015) (Docket Nos. EL15-70-000, EL15-72-000, EL15-82-000)

Independent Market Monitor for PJM (PJM Market Monitor) (Out-of-Time Motion to Intervene) (November 3, 2015) (Docket Nos. EL15-70-000) (November 4, 2015) (Docket Nos. EL15-71-000, EL15-72-000, EL15-82-000)

Indiana Municipal Power Agency (Out-of-Time Motion to Intervene) (July 6, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Industrial Consumers (Errata to June 30, 2015 Formal Complaint and Request for Fast-

Track Processing) (July 6, 2015) (Docket No. EL15-82-000)

Industrial Consumers (Motion for Leave to Reply and Post-Technical Conference Reply Comments) (November 17, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Kentucky Municipal (Out-of-Time Motion to Intervene) (July 6, 2015) (Docket No. EL15-72-000)

MISO (Motion to Consolidate Proceedings, to Extend Answer and Comment Period to July 2, 2015, to Shorten the Comment Period on This Motion, and for Expedited Consideration of This Motion) (June 3, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

MISO (Revised and Unopposed Motion to Consolidate Proceedings, to Extend Answer and Comment Period to July 2, 2015, to Shorten the Comment Period on This Motion, and for Expedited Consideration of This Motion) (June 5, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Missouri Joint Municipal Electric Utility Commission (Out-of-Time Motion to Intervene) (July 6, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Public Citizen (Comments One Day Out of Time) (November 5, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, EL15-82-000)

Sierra Club (Motion for Leave to File Response and Response/Correction) (November 18, 2015) (Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000)

Southwestern (Out-of-Time Motion to Intervene) (July 21, 2015) (Docket No. EL15-82-000)

Wabash Valley (Motion for Leave to File One Day Out-of-Time Limited Motion to Dismiss and Answer and Limited Motion to Dismiss and Answer of Wabash Valley) (July 6, 2015) (Docket No. EL15-72-000)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc. Docket Nos. EL15-70-000

The People of the State of Illinois By Illinois Attorney General Lisa Madigan v. Midcontinent Independent System Operator, Inc. EL15-71-000

Southwestern Electric Cooperative, Inc. v. Midcontinent Independent System Operator, Inc., Dynegy, Inc., and Sellers of Capacity into Zone 4 of the 2015-2016 MISO Planning Resource Auction EL15-72-000

(Issued July 19, 2019)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because it fails to adequately address the key question posed by the complaints: Whether the results of the Midcontinent Independent System Operator, Inc.'s (MISO) 2015/2016 capacity auction (2015 auction) were just and reasonable. Instead, it makes a series of statements, none of which adequately support the Commission's finding that those results were just and reasonable. First, the order states that the relevant tariff language was followed. Second, it explains that Commission staff conducted a non-public investigation. However, the enforcement proceeding was subsequently terminated by the Chairman without a vote by the full Commission. Finally, the order makes an unsupported statement that the conduct examined in that truncated enforcement process did not violate the Commission's regulations regarding market manipulation. Because serious allegations of market manipulation deserve more than a conclusory assurance that there is nothing to see here, I have no choice but to dissent.

2. As an initial matter, the fact that MISO and the individual market participants appear to have followed the relevant tariff language does not respond to allegations that the resulting rates are unjust and unreasonable as a result of market manipulation. I am not aware of any authority to support the proposition that a market participant can commit market manipulation with impunity so long as it does not violate any tariff provision. To the contrary, in cases involving section 10(b) of the Securities Act of

1934¹—the template for the prohibition on market manipulation in section 222 of the Federal Power Act (FPA)²— courts have repeatedly recognized that a facially legal action can constitute manipulation when it is taken for an improper purpose.³ The courts have similarly instructed the Commission to “not take a cramped view of the types of deception that can give rise to fraud”⁴ and that “the same conduct may or may not be deceptive depending on an actor’s purpose.”⁵ And the Commission itself has recognized that conduct consistent with the relevant tariff can nevertheless be manipulative if motivated by an illicit or improper aim.⁶

¹ 15 U.S.C. § 78j (2012).

² 16 U.S.C. § 824v; *see id.* § 824v(a) (prohibiting the use of a “manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of title 15)”).

³ *See Koch v. SEC*, 793 F.3d 147, 152 (D.C. Cir. 2015) (finding that trades made for the purpose of “marking the close” constituted manipulation based in part on the individual’s “intent to deceive or manipulate the market”); *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 100 (2d Cir. 2007) (explaining that, under section 10(b) of the Securities Act, “deception arises from the fact that investors are misled to believe ‘that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators.’” (quoting *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999)); *Markowski v. SEC*, 274 F.3d 525, 529 (D.C. Cir. 2001); *see also FERC v. Coaltrain Energy, L.P.*, No. 2:16-CV-732, 2018 WL 7892222, at *11 (S.D. Ohio Mar. 30, 2018) (“The Supreme Court has directed courts to ‘interpret Section 10(b) and Rule 10b-5 flexibly and broadly, rather than technically or restrictively.’” (quoting *VanCook v. SEC*, 653 F.3d 130, 138 (2011))).

⁴ *FERC v. City Power Mktg., LLC*, 199 F. Supp. 3d 218, 234 (D.D.C. 2016) (citing *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971)).

⁵ *Id.* at 235 (citing *Markowski*, 274 F.3d at 529).

⁶ *See In Re Make-Whole Payments & Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 83 (2013) (“Market manipulation under the Commission’s Rule 1c is not limited to tariff violations.”); *id.* n.8 (collecting proceedings in which the Commission has taken that position). Multiple courts have agreed with that basic premise. *See, e.g., Coaltrain Energy*, 2018 WL 7892222, at *12 (holding that the Commission adequately pleaded a claim of manipulation were it alleged that traders “engaged in otherwise benign virtual trading for a deceptive purpose”); *City Power*, 199 F. Supp. 3d at 235-36 (similar); *FERC v. Silkman*, 177 F. Supp. 3d 683, 703-04 (D. Mass. 2016).

(continued ...)

3. I do not interpret today's order to indicate that the Commission has had a change of heart and now believes that simply following the relevant tariff creates a safe harbor for market manipulation. Such an about face would be an unreasoned departure from settled policy⁷ and would seem to directly contravene the case law cited in the previous paragraph. This means, however, that the absence of a tariff violation cannot be a complete answer to an allegation that market manipulation rendered the 2015 auction results unjust and unreasonable.

4. Instead, we must also believe that the 2015 auction results were not the product of market manipulation. I see no basis for that belief in today's order, which notes that a non-public investigation into alleged manipulation was commenced by the Commission and has since been closed.⁸ Although the Commission directed that investigation,⁹ the decision to close it was made by the Chairman without consulting the other commissioners.¹⁰ Had I been consulted, I would have argued against terminating the enforcement process.¹¹ Because the details of the investigation were, and remain non-

⁷ See, e.g., *ABM Onsite Servs.-W., Inc. v. Nat'l Labor Relations Bd.*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) (“[A]n agency’s unexplained departure from precedent is arbitrary and capricious.”); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) (“[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.”).

⁸ *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042, at P 12 (2019) (Order).

⁹ *Investigation into MISO Zone 4 Planning Resource Auction Market Participant Offers*, 153 FERC ¶ 61,005 (2015) (Investigation Order). As this order recognized, the Commission had already begun investigating the results of the 2015 auction. See *id.* at P 1.

¹⁰ The exclusion of the other commissioners from the decision to terminate this type of investigation runs counter to the spirit of section 222 of the FPA, which gives the Commission as a whole the authority to prevent and penalize market manipulation. See 16 U.S.C. § 824v(a). It is profoundly unwise for the Chairman to unilaterally close an investigation directed by the Commission. See generally Investigation Order, 153 FERC ¶ 61,005 at P 1 (stating that the “Commission will determine what further action, if any, may be appropriate . . . after it considers the results of the staff investigation”). Doing so effectively ignores the views of the remaining commissioners who were also confirmed by the Senate to enforce the Commission’s statutory requirements.

¹¹ The majority responds to my statement by reciting statistics about the investigation, including the number of document pages reviewed and the number of
(continued ...)

public at the choice of the Commission, I cannot explain why I disagree with the Chairman's decision to close the investigation.¹² Suffice it to say that I believe that the evidence uncovered to date was more-than-sufficient to justify continuing the enforcement process.

5. But even putting aside my disagreement with the fate of that investigation, today's order provides a wholly unsatisfactory response to the allegations of market manipulation raised in the complaints. Although the Commission can choose to publicly disclose aspects of a non-public investigation,¹³ the Commission has not done so here. Today's order does not provide even the scantest reasoning to support its finding that the nearly 1,000 percent year-over-year increase in the MISO Zone 4 capacity price had nothing to do with market manipulation.¹⁴ Instead, all we have is the Commission's unsubstantiated assurance that no one violated the Commission's regulations regarding market manipulation.¹⁵

6. The premature end to the enforcement process coupled with the conclusory assertion that there was no market manipulation leave important questions unanswered. Given those unanswered questions, I do not believe we can say with any confidence that the 2015 auction was not subject to market manipulation. Accordingly, because I cannot make that judgment, I cannot join the Commission's conclusion that the 2015 auction results were just and reasonable.

* * *

7. Guarding against market manipulation remains one of the Commission's most important obligations. Competitive wholesale electricity markets have yielded

witnesses interviewed. Order, 168 FERC ¶ 61,042 at P 31. I do not doubt that the Office of Enforcement was thorough in its work. Rather, my point is that the evidence staff uncovered raised serious concerns about manipulation and provided a more-than-sufficient basis to continue the enforcement process.

¹² 18 C.F.R. § 1b.9 (2018).

¹³ *Id.*

¹⁴ Order, 168 FERC ¶ 61,042 at P 5 (explaining that Zone 4 cleared at \$16.75/MW-day in the 2014/2015 capacity auction and \$150/MW-day in the 2015 auction). That increase in price is particularly striking given the clearing price in every other MISO zone cleared below \$4/MW-day in the 2015 auction. *Id.*

¹⁵ *Id.* P 32.

(continued ...)

tremendous economic and other benefits for customers. But continuing to realize those benefits requires that market outcomes be the product of genuine competition, not market manipulation. I hope that identifying, eliminating, and punishing manipulative acts will remain one of our chief priorities, which is what Congress intended when it vested the Commission with that responsibility in the 2005 amendments to the FPA.¹⁶ Today's decision, however, does little to inspire confidence in that regard.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

¹⁶ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1283, 119 Stat. 979.