UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Public Citizen, Inc.	)	
	)	
v.	)	**Docket No. EL15-70-000**
	)	
Midcontinent Independent System Operator, Inc.	)	
	)	
The People of the State of Illinois By Illinois Attorney General Lisa Madigan	)	
	)	
v.	)	**Docket No. EL15-71-000**
	)	
Midcontinent Independent System Operator, Inc.	)	
	)	
Southwestern Electric Cooperative, Inc.	)	
	)	
v.	)	
	)	**Docket No. EL15-72-000**
Midcontinent Independent System Operator, Inc., Dynegy, Inc., and Sellers of Capacity into Zone 4 of the 2015-2016 MISO Planning Resource Auction	)	
		(Not consolidated)

PROTEST OF THE ELECTRIC POWER SUPPLY ASSOCIATION

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),[1] the Electric Power Supply Association ("EPSA")[2] hereby protests the complaints filed by Public Citizen, Inc.

[1] 18 C.F.R. § 385.211 (2014).

[2] EPSA is the national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide

("Public Citizen"), the Illinois Attorney General (the "Illinois AG") and Southwestern Electric Cooperative, Inc. ("Southwestern") (collectively, "Complainants") against the Midcontinent Independent System Operator, Inc. ("MISO") in the above-captioned proceedings.[3] The Complaints challenge the results of the Planning Reserve Auction ("PRA")[4] for the 2015-2016 Planning Year (the "2015-2016 PRA") for MISO's Zone 4.

As discussed below, Complainants have provided no evidence that the 2015-2016 PRA was not conducted in accordance with the MISO Tariff rules approved by the Commission. Rather, they rely on comparisons with clearing prices in other zones and past PRAs, which prove only that flaws in MISO's resource adequacy construct have, as expected, caused PRA clearing prices to be highly volatile and that clearing prices in zones dominated by vertically-integrated utilities do not

---

reliable and competitively priced electricity from environmentally responsible facilities serving power markets. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA has separately filed motions to intervene in these proceedings. *See* (doc-less) Motion to Intervene of the Electric Power Supply Association, Docket No. EL15-70-000 (filed June 4, 2015); (doc-less) Motion to Intervene of the Electric Power Supply Association, Docket No. EL15-71-000 (filed June 4, 2015); (doc-less) Motion to Intervene of the Electric Power Supply Association, Docket No. EL15-72-000 (filed June 4, 2015).

[3] *See* Emergency Section 206 Complaint of Public Citizen, Inc. and Request for Fast Track Processing, Docket No. EL15-70-000 (filed May 28, 2015) (the "EL15-70 Complaint"); Complaint of the People of the State of Illinois, by Illinois Attorney General Lisa Madigan, Challenging the MISO 2015-16 Planning Resource Auction Rate for Zone 4 as Unjust and Unreasonable, Requesting Refunds, and Requesting Changes to the MISO Planning Resource Auction So That It Does Not Produce Unjust and Unreasonable Rates, Docket No. EL15-71-000 (filed May 29, 2015) (the "EL15-71 Complaint"); Complaint, Request for Refund Protection, and Request for Expedited Treatment, Docket No. EL15-72-000 (filed May 29, 2015) (the "EL15-72 Complaint" and collectively with the EL15-70 and EL15-71 Complaints, the "Complaints"). The EL15-72 Complaint was styled as a complaint against not only MISO but also Dynegy Inc. ("Dynegy") and other un-named suppliers.

[4] This and other capitalized terms not otherwise defined herein have the meaning given in MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (the "MISO Tariff").

accurately reflect the true costs of capacity. Moreover, even if there were merit to Complainants' criticisms of those rules, the Commission should reject their requests for a "do-over" of an auction run in accordance with the filed rate. Granting or even seriously entertaining Complainants' requests would substantially undermine confidence in the finality of auction results and thereby impair the ability of MISO's resource adequacy market, as well as capacity markets in other regions, to convey the price signals necessary for needed new entry and the retention of needed existing resources. For similar reasons, the Commission should reject the Illinois AG's request that the Commission issue a supplemental order imposing additional conditions on its prior approval under Section 203 of the Federal Power Act (the "FPA")[5] of a transaction (the "Dynegy/Ameren Transaction") by which Dynegy indirectly acquired certain generation facilities in Zone 4 owned by subsidiaries of Ameren Corporation ("Ameren"),[6] and affirm its longstanding commitment to regulatory certainty in the FPA Section 203 setting.

I. BACKGROUND

On June 11, 2012, the Commission issued an order conditionally accepting revised market rules for MISO's resource adequacy construct.[7] Among other things, these rules require load-serving entities ("LSEs") to obtain sufficient capacity resources on an annual basis, and establish local resource zones to ensure that sufficient capacity resources are deliverable to meet load requirements in each

---

5 16 U.S.C. § 824b (2012).

6 *See Ameren Energy Generating Co.*, 145 FERC ¶ 61,034 (2013) ("*Ameren*").

7 *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,199 (2012) (the "June 2012 Order").

portion of the MISO region. The rules permit an LSE to satisfy its obligations by participating in annual PRAs, self-scheduling, or submitting a fixed resource adequacy plan. The PRAs are voluntary auctions held in March of each year, two months in advance of the beginning of the relevant Planning Year on June 1. MISO has held three PRAs to date, beginning with the PRA for the 2013-2014 Planning Year.

In the PRA for the 2014-2015 Planning Year (the "2014-2015 PRA"), the clearing price for Zone 4 was $16.75 per MW-day.[8] In the 2015-2016 PRA, the clearing price for Zone 4 increased to $150.00 per MW-day.[9] Each of the Complaints alleges that this increase in the rate for Zone 4 is unjust and unreasonable under Section 206 of the FPA, and is potentially the result of market manipulation. Complainants request that the Commission invalidate the results of the 2015-2016 PRA for Zone 4, set a new rate for Zone 4, and take other action, including initiating an investigation into alleged market manipulation and imposing additional conditions on the prior approval of the Dynegy/Ameren Transaction.

II. PROTEST

A. Complainants Have Failed To Demonstrate That The 2015-2016 PRA Results Are Unjust Or Unreasonable Or The Result Of Market Manipulation

As FPA Section 206(b) makes clear, Complainants bear "the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is

[8] MISO, *2014/2015 Planning Resource Auction (PRA)* at 2 (the "2014-2015 PRA Results"), *available at* https://www.misoenergy.org/Library/Repository/Report/Resource%20Adequacy/AuctionResults/2014-2015%20PRA%20Summary.pdf.

[9] MISO, *2015/2016 Planning Resource Auction Results* at 2 (Apr. 14, 2015) (the "2015-2016 PRA Results"), *available at* https://www.misoenergy.org/Library/Repository/Report/Resource%20Adequacy/AuctionResults/2015-2016%20PRA%20Results.pdf.

unjust, unreasonable, unduly discriminatory, or preferential . . . ."[10] Consistent with this statutory requirement, the Commission has summarily denied complaints that "consist[] largely of unsubstantiated allegations."[11] The same should be done here. Complainants do not allege, much less provide evidence, that the MISO rules, including rules intended to mitigate the exercise of market power by suppliers, were violated. In fact, MISO's Independent Market Monitor (the "IMM"), Potomac Economics, reached the opposite conclusion. MISO's auction procedures require the IMM to "review[] the auction results for physical and economic withholding,"[12] and in this case, the IMM "ensured that the auction results are reliable and participants' behavior was in line with all tariff rules and procedures."[13] The IMM expressly found that "[n]o market power mitigation was warranted" because "[t]here

---

[10] *See* 16 U.S.C. § 824e(b) (2012). *See also, e.g.*, *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (stating that the complainant "bore 'the burden of proof to show that [the] rate, charge, classification, rule, regulation, practice, or contract is unjust [or] unreasonable'" (alterations in original) (citations omitted)); *Michigan Elec. Transmission Co., LLC*, 116 FERC ¶ 61,164 at P 12 (2006) (complainant "bear[s] the burden under section 206 of the FPA to show that the existing [rate] is unjust and unreasonable").

[11] *Interstate Power & Light Co. v. ITC Midwest, LLC*, 127 FERC ¶ 61,043 at P 42 (2009), *on reh'g*, 135 FERC ¶ 61,162 (2011). *See also, e.g.*, *California Wind Energy Assoc. v. California Indep. Sys. Operator Corp.*, 147 FERC ¶ 61,050 at P 37 (2014) (rejecting complaint where "Complainants provide no evidence to support the argument"); *Canales v. Edison Int'l*, 147 FERC ¶ 61,020 at P 29 (2014) (denying complaint that "failed to provide quantifiable evidence that [the respondent]'s rates are unjust and unreasonable"); *Tri-State Generation & Transmission Assoc., Inc. v. Public Serv. Co. of NM*, 143 FERC ¶ 61,226 at P 21 (2013) (finding that a complaint "amount[ed] to a mere allegation of disputed facts that, consistent with Commission precedent, is 'insufficient to mandate a hearing'" (citations omitted)); *California Indep. Sys. Operator Corp.*, 112 FERC ¶ 61,157 at P 16 (2005) (finding that "Complainants have not carried their burden of proof under section 206" where they "have not supported their allegations"). *Cf. ISO New England Inc.*, 151 FERC ¶ 61,226, at P 22 (2015) ("*ISO-NE III*") (stating that the Commission was "not persuaded by [protestors'] allegations that market manipulation affected [the auction results], as the record is devoid of any evidence to that effect").

[12] 2015-2016 PRA Results at 3.

[13] MISO, 2015-16 Planning Resource Auction Results Frequently Asked Questions, *available at* https://www.misoenergy.org/Library/Repository/Report/Resource%20Adequacy/FAQ_ILZone4_PRA2015-16_FINAL.pdf.

were no conduct failures in Zone 4" and "no conduct failures for economic withholding in Zone 4."[14]

Instead of providing any substantive support for their claims, Complainants' purported "evidence" consists primarily of pointing out that the rates for Zone 4 resulting from the 2015-2016 PRA were substantially higher than the rates in prior PRAs and in other zones. For example, while admitting that it does not "know for sure how much of the several thousand of megawatts Dynegy owns in Zone 4 it bid, how much couldn't be bid due to contract obligations, or how much it withheld from bidding altogether," Public Citizen insists that Dynegy must have engaged in withholding because the "auction price skyrocketed from $16.75 to $150.00."[15] Complainants ignore the fact, however, that the Zone 4 prices were a natural and predictable result of (1) the ability of suppliers to make sales to PJM Interconnection, L.L.C. ("PJM"), rather than MISO, and a Reference Level, determined by the IMM in accordance with Commission-approved provisions of the MISO Tariff, that reflected the associated opportunity costs of selling into the 2015-2016 PRA; and (2) the vertical demand curve and other market design elements that, as EPSA and others predicted, have made PRA clearing prices highly volatile. Moreover, even as they base their case on the level of clearing prices, Complainants fail to put those prices in perspective: the $150/MW-day clearing price that Complainants consider unreasonably high is below the Reference Level

---

[14] Potomac Economics, *Planning Resource Auction Monitoring: 2015/2016 Planning Year* at 2 (Apr. 30, 2015) (the "IMM Report"), *available at* https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/SAWG/2015/20150430/20150430%20SAWG%20Item%2002c%20IMM%20on%202015-16%20PRA%20Results.pdf.

[15] EL15-70 Complaint at 2-3.

established by the IMM and is consistent with clearing prices in capacity auctions conducted in neighboring PJM, and as discussed below, the clearing prices in prior auctions and in the other zones in the 2015-16 PRA that they would presumably consider reasonable are below levels that the Commission previously described as "token payment[s]" for capacity.[16]

1. The IMM Confirmed that the 2015-2016 PRA Was Conducted in Accordance with the MISO Tariff

As an initial matter, the rules set forth in the MISO Tariff include measures that are designed to prevent the exercise of market power by suppliers, including physical or economic withholding.[17] These measures have been reviewed and accepted as just and reasonable by the Commission. Mitigated suppliers are subject to offer caps that are set at Reference Levels calculated by the IMM, which are "intended to reflect a Generation Resource's or Stored Energy Resource's marginal costs, including legitimate risk and opportunity costs or justifiable technical characteristics for physical Offer parameters."[18] As the IMM has explained, "[t]he reference level must reflect suppliers' competitive options, including retiring/mothballing and exporting capacity to neighboring areas," and "the main competing opportunity for capacity at the time of the auction is for use as

---

[16] *ISO New England, Inc.* 93 FERC ¶ 61,290 at 61,974 (2000) ("*ISO-NE I*"), *on reh'g*, 94 FERC ¶ 61,237 at 61,846 ("*ISO-NE II*"), *on reh'g*, 95 FERC ¶ 61,174, *vacated & remanded sub nom. Central Me. Power Co. v. FERC*, 252 F.3d 34 (1st Cir. 2001).

[17] *See* MISO Tariff, § 63. *See also* June 2012 Order, 139 FERC ¶ 61,199 at P 290 (explaining that "the MISO Tariff establishes a seller's net marginal cost as the reference level that would be used in mitigating the capacity market seller with market power," which is "consistent with the offer caps used to mitigate seller market power in other capacity markets" (footnotes omitted)).

[18] MISO Tariff, § 64.1.4.

replacement capacity in PJM."[19] Accordingly, the MISO Tariff calls for the IMM to establish Initial Reference Levels for capacity offers, which are "based on the estimated opportunity cost of exporting capacity to a neighboring region."[20] In this case, the IMM found that, based on prices in the relevant Base Residual Auctions ("BRAs") and Incremental Auctions under PJM's Reliability Pricing Model ("RPM"), the reference levels should be $155.79/MW-day.[21] That is, suppliers are aware that their capacity has a historical $155.79/MW-day value in PJM, as opposed to a historical value of $16.75/MW-day value (or less) in MISO. As a result, it is hardly surprising that the IMM found that price increases in Zone 4 were the result of "roughly 1200 MW of capacity exports to PJM in MISO's local procurement framework,"[22] rather than withholding.

The Illinois AG objects to including BRA clearing prices in the calculation of the Reference Levels on the grounds that "generators that did not clear the PJM auction for 2015-2016 are limited to offering replacement capacity for generators who cannot fulfill their obligations in 2015-2016" and the "[a]verage weighted cost to purchase replacement capacity across all PJM incremental auctions conducted to-date has been just about 20% of the PJM [BRA] price."[23] It is true enough that the timing of the 2015-2016 PRA would preclude the sale of the capacity into the BRA

---

19 Potomac Economics, *Initial Reference Level for Zonal Reserve Offers: 2015/2016 Planning Year* at 3 (Feb. 5, 2015) (the "IMM Reference Level Report"), *available at* https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/SAWG/2015/20150205/20150205%20SAWG%20Item%2004%20IMM%20PRA%20Reference%20Levels.pdf.

20 MISO Tariff, § 64.1.4(e).

21 *See* IMM Reference Level Report at 2, 4.

22 IMM Report at 2.

23 EL15-71 Complaint at ¶ 47.

for PJM's 2015-2016 Delivery Year. But it does not follow that opportunity costs can or should be calculated based solely on prices in Incremental Auctions, and in fact, the Commission has already rejected that proposition when faced with a similar temporal mismatch between the PJM and New York Independent System Operator, Inc. (the "NYISO") capacity markets.[24] In that case, the Commission held that it was entirely appropriate for the NYISO to use the BRA clearing price to represent the opportunity price of selling capacity into the NYISO's month-ahead capacity auctions, rather than in PJM.[25] The Commission reasoned:

> Existing and planned resources that clear in the BRA are committed to provide capacity in the delivery year and receive the market clearing BRA price in the delivery year, not the price determined in an incremental auction. Since most capacity resources are committed in the BRA, we conclude that the BRA price reasonably reflects the opportunity cost of importing capacity from PJM into NYISO.[26]

Rejecting claims that the Incremental Auction clearing prices would be better measures of this opportunity cost, the Commission further found that "[a] higher or lower incremental price that applies to relatively small amounts of replacement capacity is a less reliable measure of such cost than a BRA price determined three years forward and paid in the delivery year."[27]

The Commission has consistently and repeatedly recognized the effectiveness of existing market power mitigation regimes like that in place in MISO,

---

[24] *Hudson Transmission Partners, LLC v. New York Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,156 at PP 102-03 (2013).

[25] *Id.* at PP 100-05.

[26] *Id.* at P 102.

[27] *Id.* at P 104.

particularly where, as in MISO, such regimes provide for review by an independent market monitor.[28] In this regard, with the 2015-2016 PRA having cleared below the Reference Level in all zones, including Zone 4, allegations that the clearing price in the 2015-2016 PRA was tainted by the exercise of market power simply do not hold water. By definition, the Reference Price represents a competitive offer level and as the Commission has found:

> As long as seller offers (including those that require seller mitigation) are consistent with competitive offers, the market price that results from such an auction would not exceed competitive levels. As we have found for other markets, it is reasonable for a seller to receive the applicable competitive price, even if the price exceeds the seller's net marginal costs.[29]

Following the 2015-2016 PRA, the IMM issued a report, confirming that "[t]he [2015-2016] PRA was conducted and cleared in accordance with the tariff."[30] The IMM expressly found that "[n]o market power mitigation was warranted" in the 2015-2016 PRA and that "[t]here were no conduct failures for economic withholding in

---

[28] *See Maryland Public Serv. Comm'n v. PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,276 at P 30 (2008) ("*Maryland PSC*") (finding that claims that suppliers exercised market power and that auction clearing prices should be reset "ignores the fact that the mitigation framework in effect during the . . . auctions included detailed and specific provisions to fully mitigate any potential to exercise market power" and that the independent market monitor "reviewed the results of each auction"), *on reh'g*, 127 FERC ¶ 61,274 (2008), *aff'd sub nom. Maryland Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011).

[29] June 2012 Order, 139 FERC ¶ 61,199 at P 290 (citations omitted).

[30] IMM Report at 2.

Zone 4 based on the Reference Level . . . ."[31] MISO has likewise stated that it too "believes the rules were followed in th[e 2015-2016 BRA]."[32]

2. Price Spikes Experienced in Zone 4 are the Result of MISO's Market Design

Ignoring existing provisions of MISO's market rules that guard against the exercise of market power, Complainants wrongly assume that the Zone 4 rates resulting from the 2015-2016 PRA are unjust and unreasonable and the result of withholding solely because they are higher than the prices in prior PRAs and in other zones. This assumption ignores the fact that price volatility is a natural consequence of flaws in MISO's market design and that the prices in other zones and past PRAs are so low as to make them inappropriate points of reference.

As EPSA and others warned in the earlier proceedings on MISO's proposed revisions to the resource adequacy construct, price volatility is a direct and foreseeable consequence of using a vertical demand curve, rather than a downward-sloping demand curve like that employed in the other capacity markets. Testifying on behalf of EPSA and various suppliers, Dr. Roy Shanker explained that "[e]ffectively the vertical demand curve means that at even one MW below the Planning Reserve Margin Requirements, capacity is valued at the market cap,

---

31 *Id.*

32 Letter from Kari A.E. Bennett to Cara Hendrickson at 3 (Apr. 24, 2015) ("MISO Letter"), *available at* http://www.rtoinsider.com/wp-content/uploads/MISO-response-to-IL-OAG-4-24-15.pdf.

CONE. Similarly, it means that MISO and the market value one MW of additional capacity at zero."[33] As a result:

> When the market is barely short, the prices will be set at the cap price of CONE; when the market is long even slightly, prices will be at or near zero. Because of this knife edge, all or nothing pricing, and its associated volatility, building new capacity is very risky, particularly when revenues are not known until well after a facility is committed to and commences operation (e.g., the two month lead).[34]

MISO's IMM expressed similar concerns, stating:

> When the low-priced supply offers clear against a vertical demand curve, only two outcomes are possible. If the market is not in a shortage, the price will clear close to zero . . . . If the market is in shortage (so the supply and demand curves do not cross), the price will clear at the deficiency price . . . .[35]

Other market design elements, including the short (two month) forward period, exacerbate the effects of the vertical demand curve. As Dr. Shanker previously testified:

> This is a two-month forward market. This means that resources and supply effectively are fixed, as is demand due to the use of a vertical demand curve/fixed capacity requirement (i.e., demand for the RTO and each local reliability zone is fixed, as contrasted from variable resource requirement downward sloping demand curves used in NYISO and PJM). Particularly in the absence of a downward sloping demand curve, the availability of sufficient lead time to allow at least for supply elasticity is highly desirable, but is absent from the MISO proposal.

---

[33] Capacity Suppliers' Motion to Intervene and Protest, Attachment A, Affidavit of Roy J. Shanker, PhD. on behalf of Capacity Suppliers at 21-22, Docket No. ER11-4081-000 (filed Sept. 15, 2011) (the "Shanker ER11-4081 Affidavit").

[34] *Id.* at 22.

[35] Motion to Intervene Out of Time and Comments of Midwest ISO's Independent Market Monitor at 6-7, Docket No. ER11-4081-000 (filed Sept. 16, 2011) (the "IMM ER11-4081 Comments").

> The combination of inelastic supply and demand will yield the type of high volatility boom and bust that were experienced in other markets, where prices toggle between long periods at or near zero and then spike to the price cap for brief periods.[36]

In approving the vertical demand curve over these objections, the Commission cited the "substantial latitude" afforded to regional transmission organizations ("RTOs") in tailoring their market rules and its having approved a vertical demand curve for ISO New England Inc. ("ISO-NE").[37] While EPSA understands that the Commission has deliberately refrained from mandating any sort of standard market design, it also shares the view, expressed in a recent Commission order, that this does not mean "that principles underlying market design in one region are not applicable to another . . . ."[38] And in this regard, it is significant that ISO-NE, the only other RTO to employ a vertical demand curve, has since abandoned that discredited approach in favor of a sloped demand curve. The Commission approved that change as "an important improvement" that "will address some of the challenges presented by the use of a vertical demand curve in previous auctions, including, among other things, the Commission's concerns regarding price volatility . . . ."[39]

Given the acknowledged price volatility that results from the use of a vertical demand curve, the fact that prices have been volatile hardly provides any support

---

[36] Shanker ER11-4081 Affidavit at 4.

[37] June 2012 Order, 139 FERC ¶ 61,199 at P 245.

[38] *Consolidated Edison Co. of N.Y., Inc. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139 at P 47 (2015) (citations omitted).

[39] *ISO New England, Inc.*, 147 FERC ¶ 61,173 at P 29 (2014), *on reh'g*, 150 FERC ¶ 61,085 (2015). *See also PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,052 at P 30 ("A downward-sloping demand curve would reduce capacity price volatility and increase the stability of the capacity revenue stream over time.").

for Complainants' allegations of unjust and unreasonable rates or withholding. Indeed, while the implementation of a sloped demand curve would represent an improvement to MISO's market design and help address Complainants' concerns regarding price spikes, the fact remains that the 2015-2016 PRA was conducted in accordance with the MISO Tariff, using the vertical demand curve approved by the Commission. And having reaped the benefits of the low prices produced under a vertical demand curve for previous years, Complainants cannot now complain that the curve has resulted in price increases consistent with its design — *i.e.*, that the curve has, as Dr. Shanker warned, resulted in scenarios "where prices toggle between long periods at or near zero and then spike to the price cap for brief periods."[40]

The only meaningful inference that can be drawn from a comparison of the Zone 4 clearing price in the 2015-2016 PRA and clearing prices in other zones and PRAs is that the market design flaws have led to exactly the sort of "boom and bust" cycle that Dr. Shanker, the IMM and others predicted.[41] Such comparisons do not establish that the Zone 4 clearing price in the 2015-2016 PRA reflected the exercise of supplier-side market power for the simple reason that Complainants do not – and cannot – demonstrate that the lower clearing prices in other zones even come close to approximating competitive or compensatory price levels. To the contrary, the clearing prices in other zones and past PRAs remain unreasonably and, indeed, distressingly low. The $3-4/MW-day clearing prices that Complainants seem to believe should be the norm are, when converted to dollars per megawatt-month,

40 Shanker ER11-4081 Affidavit at 4.

41 *Id.*

around $0.10/kW-month,[42] or barely more than half the $0.17/kW-month that the Commission dismissed as a "token payment" for capacity in the ISO-NE market.[43] If one is going to engage in price comparisons, a more suitable comparison would be to compare the PRA clearing prices with clearing prices in the neighboring PJM market. Clearing prices in PJM's BRA for the 2015/2016 Delivery Year ranged from $136 MW-day (RTO) to $357/MW-day (ATSI).[44]

Using the clearing prices in other MISO zones and PRAs as a reference point to gauge justness and reasonableness is even more inappropriate in light of the fact that the MISO Tariff has no protections against the exercise of buyer-side market power.[45] As the Commission has repeatedly recognized, net buyers have the incentive and ability to artificially suppress prices,[46] and Dr. Shanker previously

---

[42] Zones 1-3 and 5-7 cleared at $3.48/MW-day, and Zones 8-9 cleared at $3.29/MW-day in the 2015-2016 PRA. *See* 2015-2016 PRA Results at 2.

[43] *ISO-NE I*, 93 FERC ¶ 61,290 at 61,975. *See also ISO-NE II*, 94 FERC ¶ 61,237 at 61,846 (describing a "$0.17 deficiency charge [as being] so low as to be tantamount to eliminating the ICAP requirement").

[44] *See* PJM, *2015/2016 RPM Base Residual Auction Results* at 14 (May 17, 2012), *available at* http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/20120518-2015-2016-base-residual-auction-results.ashx. The clearing prices in the most recent BRA (for the 2017/2018 Delivery Year) ranged from $120/MW-day (RTO) to $215/MW-day (PS, PS North). *See* PJM, *2017/2018 RPM Base Residual Auction Results* at 1-2 (May 23, 2014), *available at* http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2017-2018-base-residual-auction-report.ashx. *Cf. ISO-NE III*, 151 FERC ¶ 61,226 at P 20 (approving as "just and reasonable" auction clearing price of $9.551/kW-month, which equates to approximately $314/MW-day).

[45] *See* June 2012 Order, 139 FERC ¶ 61,199 at PP 66-70 (rejecting the buyer-side market power mitigation provisions proposed by MISO).

[46] *See, e.g.*, *ISO New England, Inc.*, 135 FERC ¶ 61,029 at P 158 (2011) ("Entities with buyer-side market power can artificially lower the capacity price, sometimes substantially, by subsidizing new investment that is then offered into the market at prices below its full entry costs."), *on reh'g*, 138 FERC ¶ 61,027 (2012); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 103 (2006) (recognizing that "net buyers might have an incentive to depress market clearing prices by offering some self-supply at less than a competitive level"), *on reh'g*, 119 FERC ¶ 61,318, *on reh'g*, 121 FERC ¶ 61,173 (2007); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 101 ("Large net buyers may

warned that "[u]nder the MISO vertical demand curve, much smaller surpluses (and associated costs) could be used to force the market long and depress prices."[47] Even assuming *arguendo* that price comparisons of the sort Complainants propose were otherwise valid, such an exercise has no value in the absence of some assurance that the prices Complainants hold out as a baseline are not tainted by the exercise of buyer-side market power.

Moreover, even assuming that there are no buyer-side market power concerns in the other zones, prices in those zones are still not reliable gauges of the true costs of capacity because, unlike Illinois (where most of Zone 4 resides), most of the other zones are in states that have not implemented restructuring and still have retail markets dominated by vertically-integrated utilities. As the Commission has recognized, for competitive capacity markets to "function as intended — i.e., to ensure that capacity prices will elicit new entry when new capacity is needed, offers submitted into . . . capacity auctions must accurately reflect avoidable net costs."[48] Merchant resources can generally be expected to submit offers that reflect their actual costs because they must "rely on sufficient capacity market revenues to remain economic."[49] In contrast, LSEs in states that have not restructured are guaranteed to recover their costs from consumers, regardless of their revenues from capacity markets. Accordingly, even if the LSEs are not attempting to

---

have both the incentive and the ability to depress prices through uneconomic entry."), *on reh'g*, 124 FERC ¶ 61,301 (2008), on reh'g, 131 FERC ¶ 131 FERC ¶ 61,170 (2010), *on reh'g*, 150 FERC ¶ 61,008 (2015).

47 Shanker ER11-4081 Affidavit at 40.

48 *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 205 (2011) ("*PJM*"), *aff'd sub nom. New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3rd Cir. 2014).

49 *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 24 (2013).

suppress prices, they have little "incentive to bid their true avoidable net costs . . . ."[50] This means that PRA clearing prices in un-restructured states are not a reliable indicator of the actual costs of capacity in those states. Indeed, it is hard to imagine that the generation capacity component of bundled retail rates in other zones is not substantially higher than $3-4/MW-day.

The fact that PRA clearing prices provide a misleading picture of actual capacity costs in un-restructured markets belies suggestions that the 2015-2016 PRA results somehow demonstrate that restructuring forces consumers to pay more for capacity. In fact, nothing could be further from the truth. To the extent a single PRA snapshot provides any meaningful insights into the costs and benefits of restructuring, the 2015-2016 PRA results underscore the greater transparency that comes with restructuring. Moreover, the indifference of LSEs in un-restructured states to clearing prices illustrates another of the principal benefits of restructuring: without restructuring, consumers must bear the full costs of all of the LSEs' resources, regardless of whether those resources are actually economic.[51] In contrast, competitive suppliers have no similar assurances, and their investors bear the risk that their resources are uneconomic, as well as the risk that their economic resources are unable to recover their costs due to suppressed market clearing prices.

---

50 *PJM*, 137 FERC ¶ 61,145 at P 205 (citation omitted).

51 *See, e.g.*, The Electric Energy Market Competition Task Force, *Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy* at 46 (stating that prior to restructuring, "ratepayers were left to bear much of the investment risk, as they had to pay for regulator-approved projects resulting in overinvestment as well as any subsequent higher costs from underinvestment (for example, costs of running higher cost generation more often than is economically efficient)"), *available at* http://www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf.

While Complainants have not justified any re-running of the 2015-2016 PRA or other changes that would, retroactively or prospectively, bring all prices down to the near-zero levels that they apparently consider normal, Complainants and the 2015-2016 PRA results do underscore flaws in the market rules that ought to be addressed going forward: namely, market design elements that lead to "boom and bust" pricing. EPSA supports efforts to implement the reforms identified in its pleadings in Docket No. ER11-4081-000 on a prospective basis, including, but not limited to adoption of a sloped demand curve, effective buyer-side mitigation rules and a longer forward period.[52]

B. The Commission Should Deny The Requests To Reset The Zone 4 Clearing Price After the Fact

As explained above, Complainants have not alleged, much less demonstrated, that the 2015-2016 PRA was conducted other than in accordance with the existing rules. For that reason alone, the Commission should reject Complainants' requests to reset the Zone 4 clearing price that was determined in accordance with those rules.

As an initial matter, the Commission should reject out of hand Public Citizen's assertion that "MISO failed to file a rate change filing with support for the increases, which for Zone 4 equals 800%, for advance Commission and public review as required by Section 205(d) of the FPA."[53] The Commission has long made clear that an independent system operator's or RTO's rules are the filed rate

---

[52] The Commission could require MISO to implement these reforms by granting the pending request for rehearing of the June 2012 Order filed by EPSA and other parties. *See* Capacity Suppliers' Request for Rehearing, Docket No. ER11-4081-001 (July 11, 2012).

[53] EL15-70 Complaint at 1. *See also id.* at 11-13.

for purposes of Section 205,[54] and that clearing prices that are the result of such rules should not be reset.[55] In this case, Complainants do not allege any violation of MISO's market rules, and, as described previously, the IMM has confirmed that the 2015-2016 PRA was conducted in accordance with those rules[56] and prices determined in accordance with the filed rate must be allowed to stand.

The 2015-2016 PRA results are "final" under the MISO Tariff.[57] Unlike the ISO-NE Transmission, Markets and Services Tariff, the MISO Tariff does not provide for the filing of these results, even on an informational basis. As a result, there can be no colorable claim here that the "clearing prices do not 'becom[e]

---

[54] *See, e.g., New England Power Pool*, 90 FERC ¶ 61,141 at 61,425 (2000) (holding that "market rules . . . are the filed rate"); *NRG Power Mktg., Inc. v. New York Indep. Sys. Operator, Inc.*, 91 FERC ¶ 61,346 at 62,166 (2000) (holding that "the ISO Market Rules . . . are the filed rate").

[55] *See, e.g.*, *California Indep. Sys. Operator Corp.*, 137 FERC ¶ 61,180 at P 23 (2011) ("The filed rate doctrine does not allow CAISO to automatically resettle past payments when the resettlement involves a reinterpretation of how to apply its tariff and the reinterpreted methodology is different from the one outlined in CAISO's business practice manual."); *Exelon Corp. v. PPL Elec. Utils. Corp.*, 114 FERC ¶ 61,298 at P 20 (2006) (explaining that "the Commission rejected the request for retroactive correction of clearing prices because ISO-NE's clearing prices were established in accordance with ISO-NE's market rules and therefore did not violate the filed rate doctrine").

[56] *See* IMM Report at 2. *See also* MISO Letter at 3-4 (stating that the IMM "reviewed the offers and determined that the final [2015-2016 PRA] results were not impacted by physical or economic withholding and other conduct prohibited by MISO's tariff").

[57] *See* MISO Tariff, Module E-1, § 69A.7.1.c(i). Specifically, the MISO Tariff provides:

> If no network violation is indicated, then the auction results are ***final***. If a network violation is indicated, then reductions will be made to the affected export and import capabilities to avoid network violations and the auction will be cleared again with the new set of export and import capabilities. After a maximum of three (3) successive iterations to address network violations, the auction clearing iteration with the fewest megawatts of network violations will be deemed as the ***final*** auction result.

Id. (emphasis added).

'finalized' [until] after the Commission approves [a] results filing.'"[58] It would be patently unfair and unlawful to re-set auction clearing prices where, as here, participants in the auction had no notice that prices determined in accordance with Commission-approved auction rules could be subject to change.[59]

The Commission should further find, as a matter of law, that there was no violation of Section 205 of the FPA, and there is no basis for upsetting the Zone 4 rate because the 2015-2016 PRA was conducted in accordance with the MISO Tariff.[60] Indeed, given the Commission's holding that MISO's market power mitigation rules ensure that "the market price that results from [a MISO] auction would not exceed competitive levels,"[61] there is no legitimate basis for reaching any other conclusion.

Moreover, as a matter of policy, the Commission has consistently and properly recognized that it is inappropriate to disturb capacity auction results because "[c]hanging a rate and quantity already determined in accordance with existing tariff provisions on which parties have relied would defeat the purpose of the forward binding commitment, and undo the incentives for new capacity

---

58 Joint Statement of Commissioner Tony Clark and Commissioner Norman Bay on ISO-New England's Forward Capacity Market Case at 2, Docket No. ER14-1409-000 (Sept. 16, 2014) (citation omitted).

59 *See Lockyer v. British Columbia Power Exch. Corp.*, 125 FERC 61,016, at P 38 (2008), *on reh'g*, 129 FERC ¶ 61,276 (2009). And 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 since 1935. There is nothing in Section 222 of the FPA or any other subsequent amendments to the statute that makes this requirement any less relevant today than it was when the FPA was enacted.

60 *See* IMM Report at 2; MISO Letter at 3.

61 June 2012 Order, 139 FERC ¶ 61,199 at P 290.

resources."[62] In other words, disturbing the results of capacity auctions after the fact works contrary to the fundamental purpose of conducting such auctions in the first place. EPSA urges the Commission to adhere to its longstanding practice of not requiring after-the-fact re-running or re-settlement of auctions in recognition of the dangers posed to the stability and integrity of the marketplace if parties cannot rely on the results of auctions conducted in accordance with Commission-approved tariffs.

Disturbing the auction results in this case would be particularly problematic, because the ups and downs of the auction prices are a natural and anticipated

---

[62] *Maryland PSC*, 124 FERC ¶ 61,276, at P 26. *See also, e.g.*, *Public Utils. Comm'n of Ca. v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990) ("The [FPA]'s limited provision for refunds reflects a congressional determination that parties in the industry need to be able to rely on the finality of approved rates, and that this interest outweighs the value of being able to correct for decisions that in hindsight may appear unsound."); *Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 at P 141 (2012) ("Re-running past auctions would create market uncertainty for market participants and require resolving complex questions . . . . We conclude that it is preferable not to re-run these past auctions, in order to provide greater certainty for market participants, and to avoid the need to resolve these complex issues."), *on reh'g*, 151 FERC ¶ 61,044 (2015); *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157 at P 63 (2009) (rejecting intervenor's proposal that "would require re-running the capacity market to arrive at what [the party] considers an equitable price" because "[a] fundamental element of RPM is that it is intended to provide significant forward certainty on capacity procurement and capacity pricing" (footnote omitted)); *Astoria Generating Co. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 at P 132 (2012) ("we will not require NYISO to re-run the auctions occurring in the past based on such improperly-determined offer floors. Re-running past auctions would create market uncertainty for market participants and require resolving complex questions"); *DC Energy, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165 at P 101 (2012) (discussing cases in which resettlement was denied because it "was thought to potentially create substantial uncertainty and undermine faith in the markets, in light of protestors' concerns regarding the complexity of resettling and being unable to depend on the finality of prices"), *on reh'g*, 144 FERC ¶ 61,024 (2013); *Borough of Chambersburg v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,219 (2006) (declining to retroactively change the allocation of Auction Revenue Rights already determined in auction), *reh'g denied*, 119 FERC ¶ 61,166 (2007); *New York Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073 at 61,307 (2000) (denying retroactive relief where parties "cannot effectively revisit their economic decisions in these circumstances" or "retroactively alter their conduct"), *on reh'g*, 97 FERC ¶ 61,154 (2001).

consequence of MISO's market design. Upsetting the Zone 4 results at this juncture would send the signal that low prices that fail to properly compensate suppliers will be allowed to stand, while any higher prices will be reset — *i.e.*, that the Commission views the rules as a one-way ratchet under which suppliers cannot rely on higher prices during the "boom" periods but can have absolute confidence that they will be stuck with lower prices during the "bust" periods. Such a "heads I win, tails you lose" rule would obviously have a severe chilling effect on needed investment, particularly at a time when environmental and other limitations suggest that MISO will need additional resources in the future.[63] And that message would reverberate beyond the MISO's resource adequacy construct to undermine confidence in the results of auction results in all Commission-jurisdictional markets. For these reasons, under no circumstances should the Commission grant unsubstantiated requests that seek to unwind a competitive market outcome through regulatory fiat.

To the extent that the Commission is concerned about price fluctuations from one PRA to another, it should direct MISO to improve its capacity market design prospectively, rather than retroactively invalidating the results of the 2015-2016 PRA. For example, directing MISO to adopt a sloped demand curve would not only address certain of Complainants' concerns but would represent a significant improvement in MISO's capacity market design because, as the IMM previously

---

[63] *See, e.g.*, MISO, *2015 OMS MISO Survey Results* at 1 (June 2015), *available at* https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/Workshops%20and%20Special%20Meetings/2015/OMS-MISO%20Survey%20Balance%20Sheet%20Workshops/20150619/20150619%20OMS%20MISO%202015%20OMS%20MISO%20Survey%20Results%20Presentation.pdf.

explained, the vertical demand curve "raise[s] significant issues regarding the long-term performance of" MISO's capacity market, including "significant volatility and uncertainty for market participants."[64] Such volatility and uncertainty:

> can hinder long-term contracting and investment by making it extremely difficult for potential investors to forecast the capacity market prices and revenues. In fact, it may be difficult for an investor to forecast that the market will be short in the future with enough certainty that its forecasted capacity revenues will be substantially greater than zero.[65]

To be clear, as discussed above, there are any number of other improvements that can and should be made, including, but not limited to, adoption of effective market power mitigation measures, but a sloped demand curve would be a good starting point.

C. The Commission Should Reject The Illinois AG's Request For A Supplemental FPA Section 203 Order

In a single sentence buried near the end of the EL15-71 Complaint, the Illinois AG proposes that the Commission issue a supplemental order in the *Ameren* proceeding (Docket No. EC13-93-000) imposing additional conditions on its approval of the Dynegy/Ameren Transaction.[66] Tellingly, the only "precedent" to which the Illinois AG points is standard boilerplate language, found in the *Ameren* order and virtually every other FPA Section 203 order issued in the modern era, to

---

64 IMM ER11-4081 Comments at 7.

65 *Id.*

66 EL15-71 Complaint at ¶ 56(H).

the effect that "[t]he Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate."[67]

To be sure, Section 203(b) of the FPA provides that the Commission "may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate,"[68] while Section 309 of the FPA states that the Commission may "prescribe, issue, make amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."[69] The Commission has never suggested, however, that its authority under Section 203(b) would allow it to revisit transactions after-the-fact, and has instead issued supplemental orders solely as a means of following up on issues identified in the initial approval process.[70] In contrast to those rare cases in which the Commission has acted under Section 203(b), the Commission expressly determined that the Dynegy/Ameren Transaction satisfied the Commission's standards for approval under Section 203, without identifying any issues that might require ongoing mitigation measures.[71] The Illinois AG has not identified any facts that would call that determination into question so as to justify the issuance of a supplemental order under Section 203(b),

---

67 *Ameren*, 145 FERC ¶ 61,034 at Ordering Para. (F).

68 16 U.S.C. § 824b(b) (2012).

69 16 U.S.C. § 825h (2012).

70 *See The New PJM Cos.*, 105 FERC ¶ 61,251 at PP 1, 5 (2003) (supplemental order finding that the applicant was required to "fulfill its voluntary commitment to join a Regional Transmission Organization (RTO)" where the Commission had "conditioned its approval of the merger upon the adoption of certain mitigation measures," including the applicant's proposal to join an RTO), *on reh'g*, 107 FERC ¶ 61,271 (2004).

71 *See generally Ameren*, 145 FERC ¶ 61,034.

or that would justify applying some kind of one-off discriminatory standard to this transaction.

As for the Illinois AG's reliance on FPA Section 309, the Commission has stressed that "[t]he general grant of authority in Section 309 does not add authorities that we do not otherwise have under the substantive provisions of the FPA."[72] Moreover, the Commission has made clear that the "general authority" under Section 309 is not grounds for rescinding a prior order as "[i]t is a fundamental principle of good government that those affected by our decisions can rely on them."[73] Although the Illinois AG asks the Commission to "impos[e] appropriate conditions on Dynegy with regard to bidding behavior by the Ameren Generators (now controlled by Dynegy) in the annual MISO Zone 4 Planning Resource Auctions,"[74] the Illinois AG did not address the fact that, as discussed above, the MISO Tariff already includes market power mitigation measures that apply to all market participants, including Dynegy, and that there was no violation of MISO's rules in this case.

---

[72] *City of Tacoma, Washington*, 86 FERC ¶ 61,311 at n.175, *on reh'g*, 87 FERC ¶ 61,197, *on reh'g*, 89 FERC ¶ 61,273 (1999). *See also, e.g.*, *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (action under Section 309 must "conform[] with the purposes and policies of Congress and . . . not contravene any terms of the Act" (footnote omitted)); *International Power Co. v. FERC*, 737 F.2d 1159, 1161 (D.C. Cir. 1984) ("The general authority of section 309 does not empower the FERC to vacate final and nonreviewable license exemptions. To imply such authority from section 309 would make a sham of the carefully crafted license exemption regulations and render superfluous the specific revocation procedures set forth in [the Commission's regulations]."); *New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972) (Section 309 is "of an implementary rather than substantive character" and the section "merely augment[s] existing powers conferred upon the agency by Congress" rather than "confer[ring] independent authority to act" (citation omitted)), *aff'd sub nom. FPC v. New England Power Co.*, 415 U.S. 345 (1974).

[73] *FPL Energy Maine Hydro, LLC*, 124 FERC ¶ 61,037 at P 27 (2008).

[74] EL15-71 Complaint at ¶ 56(H).

Issuance of a supplemental order in Docket No. EC13-93-000 would upend longstanding Commission precedent and policy that has sought to provide "greater regulatory certainty" in the FPA Section 203 setting.[75] The Commission has repeatedly and consistently focused on articulating standards for filing and review of proposed transactions under FPA Section 203 that will provide greater "analytic and procedural certainty,"[76] including "certainty regarding the Commission's probable action on applications."[77] Imposing additional conditions more than two and a half years after the Commission approved and the parties consummated a transaction would reverse all of the Commission's good efforts in this area and create enormous uncertainty.

---

[75] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 at 30,111 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

[76] *See Analysis of Horizontal Mkt. Power under the Federal Power Act*, 138 FERC ¶ 61,109 at P 35 (2012).

[77] *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,874 (2000), *on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also, e.g.*, *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,528 at 33,361 (1998) (describing one of the purposes of proposed rules regarding FPA Section 203 filings as being to enable applicants "to better predict the outcome of the Commission's evaluation of their applications").

III. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA respectfully urges the Commission to summarily deny the Complaints.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

By: */s/*

David G. Tewksbury
Stephanie S. Lim
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006

Nancy Bagot
Senior Vice President
Arushi Sharma Frank
Director of Regulatory Affairs and Counsel
Electric Power Supply Association
1401 New York Ave, NW, Suite 1230
Washington, DC 20005

On behalf of the **Electric Power Supply Association**

Dated: July 2, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of these comments upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this 2nd day of July, 2015.

/s/
Stephanie S. Lim