

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

ILLINOIS POWER HOLDINGS, LLC and )	
AMERENENERGY MEDINA VALLEY )	
COGEN, LLC; )	
)	
Petitioners, )	
)	
AMEREN ENERGY )	
RESOURCES, LLC )	
)	
Co-Petitioner, )	
)	
v. )	PCB No. 14-10
)	(Variance – Air)
)	
ILLINOIS ENVIRONMENTAL )	
PROTECTION AGENCY, )	
)	
Respondent. )	

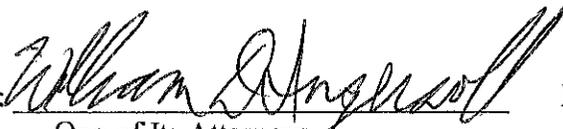
**NOTICE OF FILING**

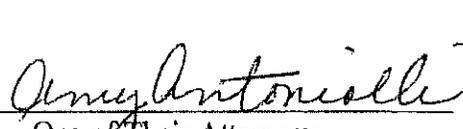
To: ALL PARTIES ON THE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that we have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board a MOTION TO FILE INSTANTER and PETITIONERS' AND CO-PETITIONER'S POST-HEARING COMMENT, copies of which are herewith served upon you.

**ILLINOIS POWER HOLDINGS, LLC**

**AMEREN ENERGY RESOURCES, LLC  
and AMERENENERGY MEDINA  
VALLEY COGEN, LLC**

By:   
One of Its Attorneys

By:   
One of Their Attorneys

Dated: October 17, 2013

**BROWN, HAY & STEPHENS, LLP**

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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ILLINOIS ENVIRONMENTAL	)	
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	)	
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**MOTION TO FILE INSTANTER**

NOW COME Petitioners, ILLINOIS POWER HOLDINGS, LLC (“IPH”) and AMERENENERGY MEDINA VALLEY COGEN, LLC (“MEDINA VALLEY”) and Co-Petitioner, AMEREN ENERGY RESOURCES, LLC (“AER”) by and through their attorneys, BROWN, HAY and STEPHENS, LLP and SCHIFF HARDIN, LLP, and pursuant to 35 Ill. Adm. Code 101.522, and respectfully state as follows:

1. Section 101.522 of the Illinois Pollution Control Board’s (“Board”) procedural rules provides:

The Board or hearing officer, for good cause shown on a motion after notice to the opposite party, may extend the time for filing any document or doing any act which is required by these rules to be done within a limited period, either before or after the expiration of time. 35 Ill. Adm. Code 101.522.

2. During this proceeding, the Petitioners and Co-Petitioner explained that approval of the transaction by the Federal Energy Regulatory Commission ("FERC") was "a mandatory regulatory and contractual condition" but that they expected FERC approval sometime during the Fourth Quarter of 2013, in sufficient time to execute a Certification of Acceptance in this variance proceeding. See Petitioners' and Co-Petitioner's Responses to Illinois Pollution Control Board's Question Set Forth in Hearing Officer Order of September 12, 2013 (filed on September 16, 2013).

3. Nonetheless, some public commenters in this proceeding raised issues related to whether such approval would actually occur. See Public Comment # 2336, at p. 4-5; Public Comment # 2337, at p. 20.

4. A public hearing was held in this matter on September 17, 2013. Post-hearing comments from public commenters were due on September 24, 2013. Post-hearing comments of the parties were due on October 7, 2013. All filings have been timely made and the record, therefore, is presumed to be closed.

5. On October 11, 2013, FERC issued an order authorizing the proposed transfer of energy centers from AER to IPH and Medina Valley.

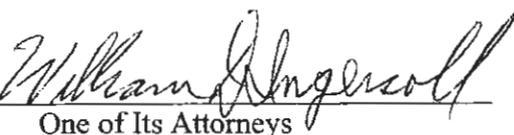
6. The Petitioners and Co-Petitioner state that because FERC's issuance of the above-referenced Order relates directly to an issue raised in this proceeding, and will provide the Board with a more complete record, good cause is shown for an extension of time to allow Petitioners and Co-Petitioner the opportunity to provide the Board with the FERC approval decision, which it files concurrently with this motion.

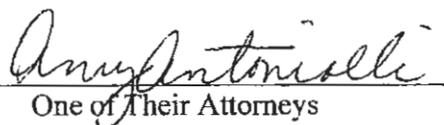
**WHEREFORE**, the Petitioners and Co-Petitioner respectfully request that the Pollution Control Board grant this Motion to File Instanter and accept their Post-Hearing Comment as timely filed.

Respectfully submitted,

**ILLINOIS POWER HOLDINGS, LLC**

**AMEREN ENERGY RESOURCES, LLC  
and AMERENENERGY MEDINA  
VALLEY COGEN, LLC**

By:   
One of Its Attorneys

By:   
One of Their Attorneys

**BROWN, HAY & STEPHENS, LLP**

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

ILLINOIS POWER HOLDINGS, LLC and	)	
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Co-Petitioner,	)	
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v.	)	
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ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

**POST-HEARING COMMENT OF ILLINOIS POWER HOLDINGS, LLC,  
AMERENENERGY MEDINA VALLEY COGEN, LLC, AND AMEREN ENERGY  
RESOURCES, LLC.**

NOW COME Petitioners, ILLINOIS POWER HOLDINGS, LLC (“IPH”) and AMERENENERGY MEDINA VALLEY COGEN, LLC (“Medina Valley”), and Co-Petitioner, AMEREN ENERGY RESOURCES (“AER”), by and through their attorneys and pursuant to Section 104.224(d) of the Illinois Pollution Control Board’s (“Board”) procedural rules (35 Ill. Adm. Code 104.224(d)). On October 11, 2013, the United States Federal Energy Regulatory Commission (“FERC”) issued an order authorizing the Proposed Transaction as consistent with public interest.<sup>1</sup> The Proposed Transaction that is the subject of the Order is the same transaction that is the subject of this PCB 14-10 proceeding, and was put into evidence as Exhibit B of the Motion to Substitute Parties in PCB 12-126. Among its findings, FERC found that the Proposed Transaction would not create horizontal or vertical market concerns,<sup>2</sup> and will not have an

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<sup>1</sup> A copy of the order, *Order Authorizing Disposition of Jurisdictional Facilities and Acquisition of Securities*, EC13-93-000, (Oct. 11, 2013) (“Order”), is attached to this comment.

<sup>2</sup> Order, p. 19, 23.

adverse effect on rates.<sup>3</sup> The Order is in effect and remains in effect throughout any rehearing process.<sup>4</sup>

Ms. Faith Bugel, on behalf of the Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club (collectively, the "ELPC"), asserted in post-hearing comments that the Proposed Transaction is hypothetical, in part, because FERC had not yet authorized the transaction.<sup>5</sup> Likewise, Mr. James Gignac, of the Illinois Office of the Attorney General, relied on the pending FERC approval in arguing the Proposed Transaction does not provide assurance of when the Petitioners will assume ownership of the energy centers.<sup>6</sup> FERC's authorization of the transaction is further evidence that the nature of the Proposed Transaction is very real, and is now one step closer to consummation. As stated previously, Petitioners and Co-Petitioner expect the transaction to close before the end of the year, assuming a favorable decision from the Board.

WHEREFORE, Petitioners, Illinois Power Holdings, LLC and AmerenEnergy Medina Valley Cogen, LLC, and Co-Petitioner, Ameren Energy Resources, LLC, respectfully request that the Illinois Pollution Control Board accept this comment as a supplement to its post-hearing brief.

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<sup>3</sup> Order, p. 29.

<sup>4</sup> 18 C.F.R. 385.713(e).

<sup>5</sup> PC#2337, p. 20, fn. 13.

<sup>6</sup> PC#2336, p. 4-5.

Respectfully submitted,

**ILLINOIS POWER HOLDINGS, LLC**

**AMEREN ENERGY RESOURCES, LLC  
and AMERENENERGY MEDINA  
VALLEY COGEN, LLC**

By:   
One of Its Attorneys

By:   
One of their Attorneys

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CERTIFICATE OF SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing, Motion to File Instant and Petitioners' and Co-Petitioners's Post Hearing Comment, by means described below, upon the following persons:

To: Pollution Control Board, Attn: Clerk  
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Dated: September 17, 2013

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By: /s/William D. Ingersoll  
William D. Ingersoll

145 FERC ¶ 61,034  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony Clark.

Ameren Energy Generating Company  
AmerenEnergy Resources Generating Company  
Ameren Energy Marketing Company  
Electric Energy, Inc.  
Midwest Electric Power, Inc.  
AmerenEnergy Medina Valley Cogen, L.L.C.  
Dynergy Inc.

Docket No. EC13-93-000

ORDER AUTHORIZING DISPOSITION OF  
JURISDICTIONAL FACILITIES AND  
ACQUISITION OF SECURITIES

(Issued October 11, 2013)

1. On April 16, 2013, Ameren Energy Generating Company (Ameren Energy Generating), AmerenEnergy Resources Generating Company (Ameren Resources Generating), Ameren Energy Marketing Company (Ameren Marketing), Electric Energy, Inc. (Electric Energy), Midwest Electric Power, Inc. (Midwest Power and, together with Ameren Energy Generating, Ameren Resources Generating, Ameren Marketing and Electric Energy, the Ameren Merchant Utilities), AmerenEnergy Medina Valley Cogen, L.L.C. (Medina Valley), and Dynergy Inc. (Dynergy and, together with the Ameren Merchant Utilities and Medina Valley, Applicants), filed an application under sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)<sup>1</sup> requesting authorization for a multi-step transaction in which a special purpose subsidiary of Dynergy, Illinois Power Holdings, LLC (Illinois Power Holdings), will acquire all of the equity interests indirectly owned by Ameren Corporation (Ameren) in the Ameren

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<sup>1</sup> 16 U.S.C. § 824b (2006).

Merchant Utilities (Proposed Transaction).<sup>2</sup> Applicants supplemented the Application on May 9, 2013 and on August 5, 2013. The Commission has reviewed the Proposed Transaction under the Commission's Merger Policy Statement.<sup>3</sup> As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

**I. Background**

**A. Description of the Parties**

**1. Ameren, the Ameren Merchant Utilities, and Affiliates**

2. Applicants state that Ameren is a public utility holding company that, among other things, owns two traditional load-serving electric utilities, Ameren Illinois Company (Ameren Illinois) and Union Electric Company, as well as interests in the Ameren Merchant Utilities and two other public utilities, Medina Valley and Ameren Transmission Company of Illinois (Ameren Transmission Illinois).

3. Applicants state that Ameren Illinois is a direct, wholly-owned public utility subsidiary of Ameren engaged in: (i) the transmission and sale of electric energy subject to the Commission's jurisdiction; and (ii) the provision of retail electric and natural gas service in Illinois under the jurisdiction of the Illinois Commerce Commission (Illinois Commission). Applicants state that transmission service on the Ameren Illinois

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<sup>2</sup> Joint Application for Authorization under Section 203 of the Federal Power Act and Request for Expedited Consideration, Docket No. EC13-93-000 (Application).

<sup>3</sup> *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

transmission system is provided pursuant to the Midwest Independent Transmission System Operator Inc. (MISO) Tariff.<sup>4</sup>

4. Applicants state that Union Electric Company is a direct, wholly-owned public utility subsidiary of Ameren engaged in: (i) the generation, transmission, and sale of electric energy subject to the Commission's jurisdiction; and (ii) the provision of retail electric and gas service in central and eastern Missouri under the jurisdiction of the Missouri Public Service Commission. Applicants state that transmission service on the Ameren Missouri transmission system is provided pursuant to the MISO Tariff.

5. Applicants state that Ameren Transmission Illinois is a transmission-only subsidiary of Ameren that provides transmission service under the MISO Tariff in the Ameren Illinois pricing zone of MISO.

6. Applicants state that Medina Valley is a wholly-owned subsidiary of Ameren. It currently does not own any generation capacity, but it is authorized to make sales at market-based rates. Applicants state that Medina Valley is not one of the Ameren Merchant Utilities, and Dynegy will not acquire it in the Proposed Transaction. Applicants state, however, that Medina Valley will acquire from Ameren Energy Generating three active gas-fired generating facilities (the Grand Tower Energy Center, the Gibson City Energy Center, and Elgin Energy Center) and two mothballed generating facilities (the Hutsonville Plant and the Meredosia Plant) after Commission approval of, but prior to, closing of the Proposed Transaction. Applicants state that, as a result, these facilities will not be among those acquired by Dynegy in the Proposed Transaction.

7. Applicants state that Ameren Energy Resources Company, LLC (Ameren Resources) is a wholly-owned intermediate holding company through which Ameren owns indirect interests in the Ameren Merchant Utilities, which are described below.

**a. Ameren Energy Generating**

8. Applicants state that Ameren Energy Generating, a wholly-owned subsidiary of Ameren Resources, has received market-based rate authority from the Commission. Ameren Energy Generating currently owns (excluding Electric Energy and Midwest Power) approximately 3,293 MW of generation capacity (summer rating) located in Illinois. Applicants state that all of this generation is located within the MISO balancing authority area, with the exception of the 452 MW (summer rating) Elgin Energy Center which is located near Elgin, Illinois within the PJM Interconnection, LLC (PJM)

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<sup>4</sup> Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

balancing authority area. Applicants state that Ameren Energy Generating sells 100 percent of the output of its generating facilities to Ameren Marketing.

**b. Ameren Resources Generating**

9. Applicants state that Ameren Resources Generating, a wholly-owned subsidiary of Ameren Resources, has received market-based rate authority from the Commission. Applicants state that Ameren Resources Generating owns approximately 1,060 MW of capacity within the MISO balancing authority area, and that it sells 100 percent of the output from its generating facilities to Ameren Marketing.

**c. Ameren Marketing**

10. Applicants state that Ameren Marketing, a wholly-owned subsidiary of Ameren Resources, has received market-based rate authority from the Commission. Applicants state that Ameren Marketing is a power marketer and does not own any generation capacity. However, through long-term power sales agreements with Ameren Energy Generating, Ameren Resources Generating, and Electric Energy, Ameren Marketing currently controls approximately 5,600 MW of capacity. The Commission has granted Ameren Marketing waivers to sell electric capacity and energy to its affiliates under certain circumstances.<sup>5</sup> Applicants state that in addition to making wholesale sales, Ameren Marketing is engaged in retail marketing in the State of Illinois and is regulated by the Illinois Commission as an Alternative Retail Electric Supplier.

**d. Electric Energy**

11. Applicants state that Electric Energy owns and operates coal and gas-fired generating units having a combined capacity of approximately 1,167 MW (summer rating), located in Joppa, Illinois (Joppa Facility). Applicants state that Ameren Energy Generating owns an 80 percent equity interest in Electric Energy, and an unaffiliated utility, Kentucky Utilities, owns the remaining 20 percent interest. Electric Energy is an exempt wholesale generator and has received market-based rate authority from the Commission. Applicants state that Electric Energy owns six parallel transmission lines approximately eight miles long that interconnect the Joppa Facility with the MISO, Tennessee Valley Authority (TVA), and Louisville Gas & Electric (LG&E)/Kentucky Utilities balancing authority areas through a Department of Energy transmission bus in Paducah, Kentucky. Applicants state that, because the lines that Electric Energy owns could conceivably be used by an unaffiliated third party for transmission service, the

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<sup>5</sup> See *Ameren Energy Marketing Co.*, Docket No. ER08-651-000 (May 9, 2008) (delegated letter order); *Ameren Energy Marketing Co.*, Docket No. ER07-361-000 (May 31, 2007) (delegated letter order).

Commission has required Electric Energy to file an Open Access Transmission Tariff (OATT), but the Commission has granted waiver of certain other transmission owner requirements.

**e. Midwest Power**

12. Applicants state that Midwest Power is a wholly-owned subsidiary of Electric Energy. Applicants state that it owns and operates two gas turbines with a total capacity of approximately 74 MW (summer rating) located in Joppa, Illinois. Applicants state that all of the output of Midwest Power's generating facilities is sold to Electric Energy under a cost-based, long-term sales agreement. Applicants state that Midwest Energy does not have any other rate schedules in effect.

**2. Dynegy, the Dynegy Public Utilities, and Other Dynegy Generation**

13. Applicants state that Dynegy is a public utility holding company. Applicants state that Dynegy controls approximately 11,400 MW of electric generation and produces and sells electric energy, capacity, and ancillary services in U.S. markets through public utilities and other generation-owning subsidiaries, as described below.<sup>6</sup>

**a. Casco Bay Energy Company, LLC**

14. Applicants state that Casco Bay Energy Company, LLC (Casco Bay) is an indirect, wholly-owned subsidiary of Dynegy. It is an exempt wholesale generator that owns and operates the Maine Independence Station, a natural gas-fired, combined cycle generating facility with a net capacity of 490 MW (summer rating), located in Veazie, Maine. Applicants state that Maine Independence Station is interconnected with the transmission grid controlled by ISO New England Inc. Applicants state that Casco Bay has received authority from the Commission to sell energy, capacity, and certain ancillary services at market-based rates.

**b. Dynegy Danskammer, L.L.C.**

15. Applicants state that Dynegy Danskammer, L.L.C. (Dynegy Danskammer) is an indirect, wholly-owned subsidiary of Dynegy. It is an exempt wholesale generator that leases, owns, and operates, and has the right to the output from, the Danskammer Generating Station, a coal-, gas-, and oil-fired electric generating facility with a net capacity of 497 MW (summer rating), located in Orange, New York. Applicants state

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<sup>6</sup> Dynegy is approximately 35 percent controlled by investment management subsidiaries of Franklin Resources, Inc., an investment management company. Application at n.11.

that Danskammer Generating Station is interconnected with the transmission grid controlled by the New York Independent System Operator, Inc. (NYISO). The Commission has authorized Dynegy Danskammer to sell energy, capacity, and certain ancillary services at market-based rates. Applicants state that the Danskammer Generating Station is not in operation, and the Commission has recently authorized Dynegy Danskammer to acquire title to units of the Danskammer Generating Station that it currently leases and to sell the entire Danskammer Generating Station to an unaffiliated third party for purposes of demolition.<sup>7</sup>

**c. Dynegy Kendall Energy, LLC**

16. Applicants state that Dynegy Kendall Energy, LLC (Dynegy Kendall) is an indirect, wholly-owned subsidiary of Dynegy. Applicants state that it is an exempt wholesale generator that owns and operates the Kendall County Generation Facility, a natural gas-fired electric generating facility with a net capacity of 1,140 MW (summer rating), located in Kendall, Illinois. Applicants state that the Kendall County Generation Facility is interconnected with the transmission grid controlled by PJM. The Commission has authorized Dynegy Kendall to sell energy, capacity, and certain ancillary services at market-based rates. Applicants state that Dynegy Kendall also has a rate schedule for cost-based reactive power compensation.

**d. Dynegy Marketing and Trade, LLC**

17. Applicants state that Dynegy Marketing and Trade, LLC (Dynegy Marketing and Trade) is an indirect, wholly-owned subsidiary of Dynegy. Applicants state that it is a power marketer and currently controls 200 MW of a unit in PJM owned by its affiliate, Dynegy Kendall, under a long-term capacity and energy purchase agreement that Constellation Energy Commodities Group, Inc. assigned to Dynegy Marketing and Trade. The Commission has authorized Dynegy Marketing and Trade to sell energy, capacity, and certain ancillary services at market-based rates.

**e. Dynegy Midwest Generation, LLC**

18. Applicants state that Dynegy Midwest Generation, LLC (Dynegy Midwest Generation) is an indirect, wholly-owned subsidiary of Dynegy. Applicants state that it is

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<sup>7</sup> On March 11, 2013, the Commission authorized the disposition of the Danskammer Generating Station. *Dynegy Danskammer, LLC*, 142 FERC ¶ 62,197 (2013). The Commission was informed on September 5, 2013 that the disposition authorized would not be occurring. On September 9, 2013, Dynegy Danskammer filed a new application to request authorization for disposition of the Danskammer Generating Station in Docket No. EC13-144-000. That application is pending.

an exempt wholesale generator that owns and operates six fossil-fueled generating facilities at various locations in Illinois with a total capacity of approximately 2,980 MW. Applicants state that Dynegy Midwest Generation's facilities are interconnected with the transmission grid controlled by MISO. Applicants state that Dynegy Midwest Generation is authorized to sell energy, capacity, and certain ancillary services at market-based rates. Applicants state that Dynegy Midwest Generation also has a rate schedule for cost-based reactive power compensation.

**f. Dynegy Morro Bay, LLC**

19. Applicants state that Dynegy Morro Bay, LLC (Dynegy Morro Bay) is an indirect, wholly-owned subsidiary of Dynegy. Applicants state that it is an exempt wholesale generator that owns and operates the Morro Bay Power Plant, which consists of natural gas-fired generating units with a combined net capacity of 650 MW (summer rating), located in Morro Bay, California. Applicants state that the Morro Bay Power Plant is interconnected with the transmission grid controlled by the California Independent System Operator Corporation (CAISO). The Commission has authorized Dynegy Morro Bay to sell energy, capacity, and certain ancillary services at market-based rates.

**g. Dynegy Moss Landing, LLC**

20. Applicants state that Dynegy Moss Landing, LLC (Dynegy Moss Landing) is an indirect, wholly-owned subsidiary of Dynegy. It is an exempt wholesale generator that owns and operates the Moss Landing Power Plant, which consists of natural gas-fired combined cycle/conventional steam generating units with a combined capacity of 2,529 MW (summer rating), located in Monterey County, California. Applicants state that the Moss Landing Power Plant is interconnected with the transmission grid controlled by CAISO. The Commission has authorized Dynegy Moss Landing to sell energy, capacity, and certain ancillary services at market-based rates.

**h. Dynegy Oakland, LLC**

21. Applicants state that Dynegy Oakland, LLC (Dynegy Oakland) is an exempt wholesale generator that owns and operates the Oakland Power Plant, which consists of oil-fired generating units with a combined capacity of 165 MW (summer rating), located in Oakland, California. Applicants state that the Oakland Power Plant is interconnected with the transmission grid controlled by CAISO. The Commission has authorized Dynegy Oakland to sell energy, capacity, and certain ancillary services at market-based rates. In addition, Applicants state that Dynegy Oakland is subject to a cost-based Reliability Must-Run agreement with CAISO.

**i. Dynegy Power Marketing, LLC**

22. Applicants state that Dynegy Power Marketing, LLC is an indirect, wholly-owned subsidiary of Dynegy and a power marketer. Applicants state that it has received

authority from the Commission to sell energy, capacity, and certain ancillary services at market-based rates.

**j. Dynegy Roseton, L.L.C.**

23. Applicants state that Dynegy Roseton, L.L.C. (Dynegy Roseton) is an indirect, wholly-owned subsidiary of Dynegy. Applicants state that it is an exempt wholesale generator that leases, operates, and has the right to the output from the Roseton Generating Station, a natural gas- and oil-fired electric generating facility with a net capacity of 1,213 MW (summer rating), located in Orange, New York. Applicants state that the Roseton Generating Station is interconnected with the transmission grid controlled by NYISO. The Commission has authorized Dynegy Roseton to sell energy, capacity, and certain ancillary services at market-based rates. The Commission has recently authorized Dynegy Roseton to acquire title to the Roseton Generating Station from its passive lessor and to sell the entire facility to an unaffiliated third party.<sup>8</sup>

**k. Ontelaunee Power Operating Company, LLC**

24. Applicants state that Ontelaunee Power Operating Company, LLC (Ontelaunee Power) is an indirect, wholly-owned subsidiary of Dynegy. Applicants state that it is an exempt wholesale generator that owns and operates the Ontelaunee Energy Center, a natural gas-fired electric generating facility with a net capacity of 516 MW (summer rating), located in Ontelaunee, Pennsylvania. Applicants state that the Ontelaunee Energy Center is interconnected with the transmission grid controlled by PJM. The Commission has authorized Ontelaunee to sell energy, capacity, and certain ancillary services at market-based rates. Applicants state that Ontelaunee also has a rate schedule on file with the Commission for cost-based reactive power compensation.

**l. Sithe/Independence Power Partners, L.P.**

25. Applicants state that Sithe/Independence Power Partners, L.P. (Sithe/Independence) is an indirect, wholly-owned subsidiary of Dynegy. Applicants state that it is an exempt wholesale generator that owns and operates the Sithe Independence Station, a natural gas-fired electric generating facility with a net capacity of 982 MW (summer rating), located in Oswego, New York. Applicants state that the Sithe Independence Station is interconnected to the transmission system controlled by NYISO. The Commission has authorized Sithe/Independence to sell energy, capacity, and certain ancillary services at market-based rates.

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<sup>8</sup> Application at 13 (citing *Dynegy Roseton, L.L.C.*, 142 FERC ¶ 62,148 (2013)).

**m. Nevada Cogeneration Associates #2**

26. Applicants state that Nevada Cogeneration Associates #2 (Nevada Cogen) is indirectly owned 50 percent by Dynegy and 50 percent by Chevron Corporation. Applicants state that it owns and operates the Black Mountain Facility, a natural gas-fired qualifying cogeneration facility with a capacity of 85 MW (summer rating), located near Las Vegas, Nevada, that is interconnected with the transmission system of the Nevada Power Company. Applicants state that by virtue of the qualifying facility status of the Black Mountain Facility, Nevada Cogen does not make FPA-jurisdictional sales and therefore does not have a rate schedule on file with the Commission.

**B. Description of the Proposed Transaction**

27. The Proposed Transaction will occur pursuant to the Transaction Agreement Between Ameren Corporation and Illinois Power Holdings, LLC dated March 14, 2013 (Transaction Agreement). Illinois Power Holdings is an indirectly owned, special purpose vehicle that Dynegy has formed for purposes of accomplishing the Proposed Transaction. The generating assets subject to the Proposed Transaction include the Duck Creek (410 MW), Coffeen (895 MW), E.D. Edwards (650 MW), and Newton (1,197 MW) coal-fired stations, all located in the MISO footprint, and Ameren's indirect 80 percent interest in the Joppa generating station (1,167 MW) and the Midwest Power gas turbines (74 MW), located in the Electric Energy balancing authority area. The jurisdictional facilities involved in the Proposed Transaction also include: (1) market-based rate tariffs or schedules; (2) contracts entered into under such tariffs or schedules; (3) reactive power rate schedules, an OATT and a cost-based rate schedule; (4) associated books and records; and (5) transmission interconnection facilities.

28. Applicants state that the Proposed Transaction will be accomplished in a series of steps. In the first step, which will occur following Commission approval of the Proposed Transaction but before closing, Ameren Energy Generating will transfer the Grand Tower Energy Center, the Gibson City Energy Center, and Elgin Energy Center to Medina Valley. Applicants explain that this step will be taken because these three plants are not being sold to Dynegy. Instead, consistent with its decision announced in December 2012 to exit the merchant generation business, Ameren states that it intends to sell these gas-fired units to a non-affiliated third party.<sup>9</sup> Ameren Energy Generating will also transfer to Medina Valley two mothballed generating facilities, the Hutsonville Plant and the Meredosia Plant, together with certain associated liabilities. Ameren Resources will cause, through contributions or mergers, all of its remaining assets and liabilities,

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<sup>9</sup> Applicants state that Ameren has commenced a sale process for these three units and that any transfer of the three units would be the subject of a separate application under section 203. Application at n.43.

including its interests in the Ameren Merchant Utilities, to be held directly or indirectly by a newly-formed subsidiary (New Ameren Resources), except for: (i) any debt owed to the seller group (that is, debt owed to Ameren and its subsidiaries other than Ameren Resources (or New Ameren Resources) and its subsidiaries); and (ii) certain contracts relating to the development of advanced coal generation technology. In the second step of the Proposed Transaction, Ameren will cause Ameren Resources to transfer 100 percent of its equity interests in New Ameren Resources to Illinois Power Holdings, with the result that Dynegy will indirectly acquire all of Ameren's interests in the Ameren Merchant Utilities, including the operating generating facilities that they hold at closing. Also at closing, Ameren and Illinois Power Holdings will enter into a transitional services agreement, under which Ameren and its subsidiaries will provide to New Ameren Resources and the Ameren Merchant Utilities certain administrative services they received prior to closing for a term of six months (subject to one six-month extension).

29. Applicants explain that Ameren will receive no cash proceeds as a result of the divestiture of New Ameren Resources. However, Applicants state that Ameren will receive benefits from the Proposed Transaction, including the removal of Ameren Energy Generating's debt from Ameren's consolidated balance sheet, as well as certain tax benefits that will accrue to Ameren. In addition, at the closing of the Proposed Transaction, Ameren Energy Generating and Ameren Resources Generating will enter into amendments to the agreements by which they acquired their generating facilities from predecessors of Ameren Illinois.<sup>10</sup> Applicants explain that, through these amendments, Ameren Energy Generating and Ameren Resources Generating will assume certain environmental liabilities currently held by Ameren Illinois relating to ownership and operation of the generating facilities prior to ownership by Ameren Energy Generating and Ameren Resources Generating. Thus, as Dynegy will indirectly acquire Ameren Energy Generating and Ameren Resources Generating upon consummation of the Proposed Transaction, the assumed environmental liabilities will be transferred out of the Ameren corporate family. Applicants demonstrate that following the closing of the Proposed Transaction, Dynegy will obtain a total of approximately 4,393 MW of additional capacity, to bring their company-wide total capacity to 13,868 MW, while Ameren will retain approximately 11,578 MW of generation capacity, which is reduced from 15,971 MW.<sup>11</sup>

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<sup>10</sup> Ameren Illinois was formed by the merger of Central Illinois Light Company and Illinois Power Company into Central Illinois Public Service Company, which then changed its name to Ameren Illinois. *See Ameren Corp.*, 131 FERC ¶ 61,240 (2010).

<sup>11</sup> Application at 21.

## **II. Notice of Filing and Responsive Pleadings**

30. Notice of the Application was published in the *Federal Register*, 78 Fed. Reg. 25,072 (2013), with interventions and comments due on or before June 17, 2013. Notice of the May 9, 2013 supplement to the Application was published in the *Federal Register*, 78 Fed. Reg. 29,128 (2013), with interventions and comments due on or before June 17, 2013.

31. The Illinois Commission filed a notice of intervention. Local Union Nos. 51 and 702, International Brotherhood of Electrical Workers, AFL-CIO filed a timely motion to intervene. The Illinois Municipal Electric Agency (Illinois Municipal), Southwestern Electric Cooperative, Inc. (Southwestern Electric), and the Missouri Joint Municipal Electric Utility Commission (Missouri Joint Municipal) filed timely motions to intervene and protest.

32. On July 2, 2013, Applicants filed an answer to the protests.<sup>12</sup> On July 3, 2013, Illinois Municipal filed an answer to Applicants Answer to Protests.<sup>13</sup> On July 12, 2013, Missouri Joint Municipal filed an answer to Applicants Answer to Protests.<sup>14</sup>

33. On July 26, 2013, the Director of the Division of Electric Power Regulation - West issued a request for additional information from Applicants.<sup>15</sup> Applicants filed a response to the request on August 5, 2013.<sup>16</sup> Notice of Applicants Response to Information Request was published in the *Federal Register*, 78 Fed. Reg. 49,493 (2013), with interventions and comments due on or before August 19, 2013. Sierra Club filed a timely motion to intervene and protest to Applicants Answer (Sierra Club Protest). Illinois Municipal and Missouri Joint Municipal (together, Municipal Protesters) filed

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<sup>12</sup> Request for Leave to Answer and Answer of Ameren Generating Company, *et al.*, Docket No. EC13-93-000 (Applicants Answer).

<sup>13</sup> Answer of Illinois Municipal to Applicants motion for leave to file answer and conditional motion for leave to file answer to an answer, Docket No. EC13-93-000 (Illinois Municipal Answer).

<sup>14</sup> Answer of Missouri Joint Municipal to Applicants motion for leave to file answer and conditional motion for leave to file answer to an answer, Docket No. EC13-93-000 (Missouri Joint Municipal Answer).

<sup>15</sup> Letter order directing Applicants to provide additional information, Docket No. EC13-93-000.

<sup>16</sup> Response to July 26, 2013 letter, Docket No. EC13-93-000 (Applicants Response to Information Request).

comments in response to Applicants' Response to Information Request.<sup>17</sup> On September 3, 2013, the Ameren Merchant Utilities filed a supplemental answer.<sup>18</sup> On September 12, 2013, Illinois Municipal filed an answer to the Ameren Merchant Utilities' supplemental answer.<sup>19</sup>

### **III. Discussion**

#### **A. Procedural Issues**

34. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention, and timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

35. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers that have been filed because they have provided information that assisted us in our decision-making process.

#### **B. Standard of Review Under Section 203**

36. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>20</sup> Section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization,

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<sup>17</sup> Respectively, Comment of Illinois Municipal to Applicants response to the Commission's request for more information (Illinois Municipal Response to Applicants Response) and Response of Missouri Joint Municipal to Applicants August 5, 2013 compliance filing (Missouri Joint Municipal Response to Applicants Response).

<sup>18</sup> The Ameren Merchant Utilities Supplemental Answer notified the Commission of a lawsuit filed in the United States District Court in the Central District of Illinois regarding a contract between Illinois Municipal and Ameren Marketing.

<sup>19</sup> In its Answer to Supplemental Answer, Illinois Municipal informed the Commission that the relief requested in the lawsuit was different than the relief requested in its protest filed in this proceeding.

<sup>20</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

pledge, or encumbrance will be consistent with the public interest."<sup>21</sup> The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>22</sup>

**C. Analysis Under Section 203**

**1. Effect on Horizontal Competition**

**a. Applicants' Analysis**

37. Applicants state that the Proposed Transaction will not have an adverse effect on competition. Applicants identify the MISO, Electric Energy/TVA and PJM markets as the relevant geographic markets in which Applicants already own or control generation capacity. However, Applicants determine that the only significant change in generation ownership resulting from the Proposed Transaction will be in the MISO geographic market.<sup>23</sup> Applicants identify the following products as relevant to the Proposed Transaction and analyze them within the MISO geographic market: electric energy, electric capacity, and ancillary services.<sup>24</sup>

38. Applicants submit a forward-looking, competitive analysis screen using the delivered price test framework for the MISO market assuming that the current MISO footprint exists as well as a scenario that assumes the inclusion of the transmission systems of certain public utilities operating in the southern region into MISO<sup>25</sup> expected to occur in December of 2013 (MISO Southern Region).<sup>26</sup> Additionally, Applicants

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<sup>21</sup> 16 U.S.C. § 824b(a)(4) (2006).

<sup>22</sup> 18 C.F.R. § 33.2(j) (2013).

<sup>23</sup> Application at 21.

<sup>24</sup> *Id.* at 23.

<sup>25</sup> See *MISO Southern Region Integration*,

<https://www.midwestiso.org/WhatWeDo/StrategicInitiatives/SouthernRegionIntegration/Pages/SouthernRegionIntegration.aspx> (MISO approved the integration of the transmission systems of Entergy Corporation's public utility subsidiaries, South Mississippi Electric Power Association, Cleco Power, LLC, and Lafayette City-Parish Consolidated Government).

<sup>26</sup> Application at 22.

analyze a combined Electric Energy/TVA market.<sup>27</sup> Applicants submit an Appendix A analysis as required under section 33.3(a)(2) of the Commission's regulations.<sup>28</sup> Applicants performed both an economic capacity (EC) and available economic capacity (AEC) analysis.<sup>29</sup>

39. In connection with their competitive analysis, Applicants were directed by Commission staff to submit a revised simultaneous transmission import limit (SIL) study for the MISO market for 2014 to monitor all the 100 kV and above transmission elements in the first-tier areas, and were directed to rerun the results of their Appendix A analysis with the revised SIL.<sup>30</sup>

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<sup>27</sup> While Applicants' base case models the output of the Joppa Facility in MISO, Application at 21-22, in accepting Electric Energy's market-based rate tariff, the Commission made no finding with respect to Electric Energy's claim that MISO is the proper relevant geographic market for the Joppa Facility. See *Electric Energy Inc.*, 113 FERC ¶ 61,245, at P 15 (2005).

<sup>28</sup> Applicants performed an Appendix A analysis, also referred to as a Delivered Price Test or Competitive Analysis Screen, to determine the pre- and post-transaction market shares from which the market concentration or Herfindahl-Hirschman Index (HHI) change can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; see also *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

<sup>29</sup> Each supplier's EC is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability. AEC is based on the same factors but subtracts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

<sup>30</sup> Information Request at 2.

40. Applicants' revised competitive analysis shows no violations of the Commission's market power screens in the MISO geographic market for any load/season under various assumptions. The table below shows no screen failures for EC, defining the geographic market as the current MISO footprint under Applicants' base case assumptions.

EC Results in Current MISO Footprint (revised SIL) Table 1						
Period	Dynegy		Ameren			
	MW	Market Share	MW	Market Share	HHI	HHI Change
Summer Super Peak 1	6,855	5.3%	9,973	7.8%	393	(36)
Summer Super Peak 2	6,855	5.4%	9,973	7.6%	379	(36)
Summer Peak	6,647	6.0%	7,563	6.8%	376	(30)
Summer Off-Peak	6,183	6.5%	6,105	6.4%	351	(33)
Winter Super Peak	6,240	5.5%	8,509	7.5%	378	(33)
Winter Peak	6,245	6.1%	6,891	6.7%	361	(29)
Winter Off-Peak	4,053	5.0%	5,745	7.1%	342	(26)
Shoulder Super Peak	5,715	5.1%	8,642	7.8%	376	(35)
Shoulder Peak	5,602	6.0%	5,876	6.4%	341	(27)
Shoulder Off-Peak	1,663	2.3%	4,977	6.8%	342	(11)

Source: Applicants' Response to Information Request at Exh. JRS-6.

41. Applicants note that the result of the Proposed Transaction is a reduction in EC market concentration as measured by HHI because affiliates of the Ameren Merchant Utilities are affiliated with more generation in MISO than the Dynegy affiliates, which is why the HHI changes shown in Table 1 are negative.<sup>31</sup> For the EC measure, Applicants performed the following sensitivity analyses: including the MISO Southern Region as part of the relevant geographic market; adjusting for price (both higher and lower by 10 percent); and assuming the retirement of certain coal generation in the market (4,127 MW), none of which results in screen failures or results that differ from the base results presented above.<sup>32</sup>

<sup>31</sup> Application at 26-27.

<sup>32</sup> *Id.* at 27.

42. Applicants' revised competitive analysis, presented in the table below, shows no screen failures for AEC, defining the geographic market as the current MISO footprint under their base case assumptions.

Period	Dynergy		Ameren		HHI	HHI Change
	MW	Market Share	MW	Market Share		
Summer Super Peak 1	6,927	25.4%	2,407	8.8%	906	48
Summer Super Peak 2	6,901	16.0%	3,417	7.9%	637	(26)
Summer Peak	6,702	15.2%	1,685	3.8%	634	45
Summer Off-Peak	6,253	15.5%	467	1.2%	517	91
Winter Super Peak	6,317	12.3%	2,613	5.1%	519	2
Winter Peak	6,330	13.8%	1,275	2.8%	530	49
Winter Off-Peak	4,053	13.3%	444	1.5%	482	68
Shoulder Super Peak	5,771	11.8%	3,358	6.9%	464	(28)
Shoulder Peak	5,638	14.5%	1,109	2.9%	540	56
Shoulder Off-Peak	1,732	6.3%	297	1.1%	426	14

Source: Applicants' Response to Information Request at Exh. JRS-7.

43. Applicants explain that to derive AEC, they first assigned the lowest cost generation in MISO to serve the load located in MISO, with the residual generation available for sale in the market. Applicants further state that they derived an alternate measure of AEC by assigning load serving utilities' lowest cost capacity resources to serve their respective load obligations and the residual capacity is available for sale in the market. As with the EC analysis, Applicants performed the following sensitivity analyses: including the MISO Southern Region as part of the relevant geographic market; adjusting for price (both higher and lower by 10 percent); and assuming the retirement of certain coal generation in the market (4,127 MW), none of which results in screen failures or results that differ from the base results presented above.<sup>33</sup>

44. Applicants further explain that the characteristics of the generation involved in the Proposed Transaction indicate the absence of competitive concerns. Applicants state that the only generation Dynergy currently owns in MISO and the majority of the generation being transferred to Dynergy in the Proposed Transaction is baseload, coal-fired generation. Applicants contend that the generation assets that Dynergy is acquiring would be unlikely to allow Dynergy to exercise a profitable withholding strategy.

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<sup>33</sup> *Id.* at 29.

45. Applicants state that, in the MISO long-term, forward capacity market, based on the results of the auction for the June 2013 to the May 2014 planning year, the Proposed Transaction will result in Dynegy's share of the capacity market rising from approximately one percent to slightly less than four percent.<sup>34</sup>

46. Applicants also studied the ancillary services markets in MISO for regulation and contingency reserves.<sup>35</sup> Applicants conclude that the Proposed Transaction will have a deconcentrating effect on the regulation and the contingency reserves markets because the generation associated with Ameren has more capability to provide those products than does that of Dynegy.<sup>36</sup>

**b. Protests and Comments**

47. Illinois Municipal challenges Applicants' claim that there are no relevant submarkets to consider in MISO. Illinois Municipal asserts that there is evidence, noted by Applicants' study, that there is transmission congestion in Southern Illinois and that Applicants should be required to demonstrate that there will be no ability post transaction to drive up locational marginal prices through selective withholding at Illinois flowgates.<sup>37</sup>

48. Missouri Joint Municipal claims that Applicants have significantly understated the scope of the environmental compliance issue and asks the Commission to consider the effect of an estimated 12,000 MW of coal-fired plant retirements and 50,000 MW of coal retrofits.<sup>38</sup> Missouri Joint Municipal states that the Proposed Transaction will eliminate a supply choice for purchasers in the MISO market and poses a danger of real competitive harm. Missouri Joint Municipal requests that the Commission direct Applicants to submit a revised sensitivity analysis to address a greater number of projected coal retirements and retrofits that are projected in a March 2013 MISO owner survey of plant retrofits and retirements.<sup>39</sup>

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<sup>34</sup> *Id.* at 30.

<sup>35</sup> Contingency reserves are the sum of spinning reserves and supplemental reserves.

<sup>36</sup> Application at 31.

<sup>37</sup> Illinois Municipal Protest at 25.

<sup>38</sup> Missouri Joint Municipal Protest at 13-14.

<sup>39</sup> *Id.* at n.13.

49. Southwestern Electric states that Applicants did not perform a proper analysis of the ancillary services market because they did not account for the localized nature of regulating reserves, spinning reserves, and supplemental reserves products.<sup>40</sup> Specifically, Southwestern Electric states that voltage regulation and spinning reserves have to be purchased from local generation within a specified reserve zone.<sup>41</sup> Southwestern Electric disagrees with Applicants' assertion that the decrease in HHI attributable to Ameren more than offsets the increase in HHI from the Proposed Transaction attributable to Dynegy. Southwestern Electric requests that the Commission require Applicants to provide this information.<sup>42</sup>

50. Sierra Club asks that the Commission require Applicants to submit a market power analysis focusing on the effect of the Proposed Transaction on local markets served by the generators at issue and accounting for a more realistic estimate of coal plant retirements in the region, inquire of Dynegy whether there are any plans to acquire additional generation capacity beyond that involved in the Proposed Transaction, and condition authorization on a commitment by Dynegy not to acquire additional generation capacity in Illinois.<sup>43</sup> Sierra Club posits that local congestion in central and southern Illinois indicates the need for Applicants to study local markets and points to several flowgates within MISO that have experienced congestion.<sup>44</sup> Sierra Club also states that Applicants' sensitivity analysis for coal retirements is much smaller than what is likely to occur, reiterating Missouri Joint Municipal's claim and source.<sup>45</sup> The Sierra Club also asserts that Applicants failed to properly consider the market for ancillary services.<sup>46</sup>

**c. Applicants Answer**

51. Applicants respond to the Illinois Municipal's concern regarding a possible submarket in MISO by noting that no evidence was presented to counter Applicants'

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<sup>40</sup> Southwestern Electric Protest at 10-11.

<sup>41</sup> *Id.* at 12.

<sup>42</sup> *Id.* at 10.

<sup>43</sup> Sierra Club Protest at 7.

<sup>44</sup> *Id.* at 3-4.

<sup>45</sup> *Id.* at 4.

<sup>46</sup> *Id.* at 5.

analysis of price and congestion data in MISO, which concluded that there are no relevant submarkets.<sup>47</sup>

52. Applicants respond to Missouri Joint Municipal's concern regarding an underestimation of coal-fired power plant retirements by stating that there is a substantial degree of uncertainty and variability in published forecasts of near-term coal plant retirements in MISO. Applicants state that the amount of planned retirements ranged from 4,000 to 6,000 MW as reported in the March 2013 MISO owner survey cited by Missouri Joint Municipal. Applicants state that the assumption of 4,000-5,000 MW of retirements assumed in Applicants' analysis is within a reasonable range for a sensitivity analysis.<sup>48</sup>

53. Applicants respond to Southwestern Electric's claim that Applicants have failed to consider local markets for procuring ancillary services.<sup>49</sup> Applicants state that MISO established reserve zones within the MISO balancing authority area to ensure that regulation and contingency reserves are provided in a manner that precludes adverse operating conditions affecting the reliability of the transmission system. Applicants explain there are currently six reserve zones in MISO.<sup>50</sup> Applicants state that all of Dynegy's current generating capacity in MISO is located in reserve zone one and that the Ameren Merchant Utilities own generating capacity in both reserve zone one and reserve zone two.<sup>51</sup> Applicants state that the Proposed Transaction reduces the share of total generation (as well as spinning reserves and regulation) that Ameren will retain in both reserve zone one and reserve zone two and does not increase market concentration because Ameren currently has a higher market share than Dynegy.<sup>52</sup>

**d. Commission Determination**

54. We find that the Proposed Transaction will not create horizontal market power concerns. We find that the changes in HHI that will result from the Proposed Transaction in the MISO footprint show that the thresholds established in the Commission's competitive analysis screen under the EC and AEC measures are not exceeded for any

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<sup>47</sup> Applicants Answer at 4-5.

<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.* at 12.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 13.

<sup>52</sup> *Id.* at 15.

season/load period, even when tested using various sensitivities. We note that the MISO market remains unconcentrated under each scenario and sensitivity submitted by Applicants. We also find the Proposed Transaction does not result in an adverse effect on competition in the MISO regulation and contingency reserve markets for ancillary services.

55. We find that for energy and capacity products, the appropriate geographic market to analyze is the MISO balancing authority area. Applicants appropriately presented data that shows no additional submarkets need to be considered, and intervenors have not provided evidence to show that there are binding transmission constraints during historical peaks and other competitively significant times that would prevent competing supply from customers within the proposed alternative geographic market of southern or central Illinois.<sup>53</sup> While Sierra Club notes the existence of flowgates that have experienced historical congestion, there is no mention of the direction of the congestion that would indicate limits of available supply in southern or central Illinois.

56. Applicants' Delivered Price Test, as revised, was performed in accordance with Commission policy.<sup>54</sup> In the MISO energy market as a whole, we find that Applicants pass the Commission's screens for market concentration under all season/load levels under both EC and AEC measures.<sup>55</sup> Additionally Applicants pass the Commission's screens when sensitivity analyses assuming a 10 percent increase in price and a 10 percent decrease in price are studied. Applicants also pass the screens under various possible future market conditions, including: an expanded Southern MISO market; using an alternative dispatch methodology to AEC; and assuming the retirement of 4,217 MW of coal-fired generation. Therefore, we find that in the MISO energy market the Proposed Transaction does not create an adverse effect on competition.

57. We disagree with the Southwestern Electric's and Sierra Club's assertions that Applicants have not studied coal retirement scenarios sufficiently. The Commission has stated that merger analysis should be as forward-looking as practicable.<sup>56</sup> Applicants' consideration of 4,127 MW of coal-fired retirements in their sensitivity analysis is a

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<sup>53</sup> See *NRG Energy, Inc.*, 141 FERC ¶ 61,207, at P 75 (2012).

<sup>54</sup> See, e.g., Merger Policy Statement at Appendix A. See also Order No. 642, FERC Stats. & Regs. ¶ 31,111; *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at App. E (2004).

<sup>55</sup> Both EC and AEC measures are relevant and useful because MISO market participants are in both restructured markets and markets where traditional public utilities retain their load serving obligations.

<sup>56</sup> Order No. 642, FERC Stats. & Regs. ¶ 31,111 at P 38.

reasonable figure given the uncertainty surrounding retirement decisions. Applicants note that the March 2013 MISO owner survey results have ranged from 4,000 to 6,000 MW of planned retirements over the prior 12 month period and that an internal MISO analysis in that document forecasts as much as 8,000 MW of net retirements over the 2013-2016 time frame.<sup>57</sup> Applicants also explain that the 38,000 MW of retrofit outages would be scheduled by MISO in the spring and fall season and average approximately 4,000 MW.<sup>58</sup> Given the wide range of estimates of retirements put forth in the record, the uncertain time frame over which those retirements will occur, and that those retirements are not directly impacted by the transaction, we find Applicants' estimate of retirements for sensitivity analysis purposes to be reasonable. While the overall future concentration levels of the market are relevant to the Commission's analysis, we note that future retirements of coal-fired generation are independent of the Proposed Transaction. Since all of the capacity that Applicants are disposing of is coal-fired, had Applicants considered alternate scenarios with more coal retirements, the Proposed Transaction would continue to be deconcentrating, as measured by HHI, under most season/load conditions because Ameren's current larger market presence of approximately 14,270 MW of capacity would be reduced to approximately 11,118 MW, but not eliminated, such that each of Dynegy and Ameren will hold less market share than Ameren currently holds prior to the close of the Proposed Transaction.

58. While the Proposed Transaction does not trigger screen failures, the Commission has previously made clear that it will consider other evidence of anticompetitive effects beyond HHI.<sup>59</sup> Here we find no evidence of anticompetitive effects that may be masked in the market concentration measures, and intervenors have not provided alternative evidence for the Commission to consider. As Applicants note, the Proposed Transaction consists almost entirely of baseload capacity. The Commission has previously stated that it is difficult from an operational perspective to withhold baseload generation because of the expense involved in doing so and because of the length of time it typically takes to ramp up and ramp down such generation.<sup>60</sup> This provides additional assurance that the Proposed Transaction will not have an adverse effect on competition.

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<sup>57</sup> Applicants Answer at 7-8.

<sup>58</sup> Applicants Answer at 9.

<sup>59</sup> *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 at P 36.

<sup>60</sup> *Arizona Public Service Co.*, 141 FERC ¶ 61,154, at P 33 (2012); *First Energy Corp.* 133 FERC ¶ 61,222, at P 50 (2010).

59. In the market for ancillary services, both spinning reserves and regulation, Applicants have demonstrated that there is no overlap of sales capabilities in MISO's reserve zone two. Applicants also have demonstrated that where there is overlap in MISO's reserve zone one, the market concentration, as measured by HHI, will decrease because Ameren's current larger market share will be reduced by the Proposed Transaction. After the Proposed Transaction closes, Dynegy will continue to have less capability than Ameren to provide ancillary services. Therefore, because the Proposed Transaction will not increase concentration in the market for ancillary services in the MISO market, we conclude that it will not have an adverse effect on competition.

## **2. Effect on Vertical Competition**

### **a. Applicants' Analysis**

60. Applicants state that the Proposed Transaction does not present any vertical market power concerns. Specifically, Applicants state that Dynegy does not own or control any electric transmission facilities, other than generator interconnection facilities within the relevant geographic market. Other than localized interconnection facilities, Electric Energy's limited transmission facilities are the only transmission facilities being acquired through the Proposed Transaction. All transmission service over the Electric Energy facilities is provided under a Commission-approved OATT. Applicants state that under Commission precedent, service under a Commission-approved OATT mitigates any vertical market power concerns related to Dynegy's acquisition of those facilities.

61. Applicants further state that Dynegy does not own any natural gas pipeline or distribution assets used to serve unaffiliated competing generation facilities within the relevant geographic market, and it is not acquiring such facilities through the Proposed Transaction. As a result, Applicants state that Dynegy will not obtain any ability from the Proposed Transaction to leverage control over such assets to benefit its electric generation facilities.

62. Applicants also state that Dynegy does not currently possess any market power with respect to any other inputs to the generation of electricity. Through its acquisition of interests in the Ameren Merchant Utilities, Dynegy will acquire certain sites for generation capacity development, undeveloped coal and mineral rights at the Newton and Coffeen generating facilities, and owned and leased rail cars used to deliver coal to the Newton, Coffeen, and other generating facilities. Dynegy will also acquire: (i) the Joppa and Eastern Railroad Company, a subsidiary of Electric Energy that owns a 3.9-mile rail line and operates and controls associated rail cars that transport coal to the Joppa Facility; and (ii) the Coffeen and Western Railroad Company, a subsidiary of Ameren Energy Generating, which owns a 0.48 mile rail line and operates and controls associated rail cars that transport coal to the Coffeen facility. Applicants maintain that Dynegy could not use such assets and facilities to create barriers to entry to rival electricity producers.

**b. Commission Determination**

63. We find that the Proposed Transaction does not raise any vertical market power concerns since Dynegy does not own and will not in the Proposed Transaction acquire any transmission facilities, other than localized interconnection facilities, does not own and will not be acquiring any upstream natural gas assets used to serve unaffiliated generators, and does not currently possess any market power with respect to any other inputs to generation. Additionally, transmission service over the Electric Energy facilities is provided under a Commission-approved OATT. We note that no party has argued that the Proposed Transaction raises vertical market power concerns.

**3. Effect on Rates**

**a. Applicants' Analysis**

64. Applicants state that the Proposed Transaction will have no adverse impact on jurisdictional rates. They state that none of the Applicants currently provides third-party transmission service or has any captive wholesale requirements customers. Applicants state that Ameren Energy Generating and Ameren Resources Generating have plant specific, cost-based reactive power rate schedules on file. In addition, Midwest Power sells the output of its assets under a long-term, cost-based contract to Electric Energy. Ameren Energy Generating and Ameren Resources Generating's reactive power rate schedules are fixed-rate contracts that, according to Applicants, do not contain mechanisms that would allow for the pass-through of any costs of the Proposed Transaction without a separate filing under FPA section 205. Applicants state that following closing of the Proposed Transaction, Ameren Energy Generating will cancel its reactive power rates with respect to the plants transferred to Medina Valley, and Medina Valley will make a corresponding section 205 filing to adopt those same rates. Applicants maintain that the Midwest Power cost-based contract should not be of concern because Electric Energy, Midwest Power's parent company, is the buyer under the contract, and Electric Energy sells power under market-based rate authority.<sup>61</sup> With these exceptions, all of the Ameren Merchant Utilities' wholesale sales of electric energy, capacity, and ancillary services are, and will continue to be, at market-based rates. Applicants state that Dynegy's existing public utility subsidiaries are not involved in the Proposed Transaction, and their rates will be unaffected by it.<sup>62</sup>

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<sup>61</sup> Application at 35 n.95.

<sup>62</sup> *Id.* at 35.

65. While Applicants maintain that the Proposed Transaction will not have an adverse effect on jurisdictional rates, they nevertheless offer a rate freeze commitment with respect to the Electric Energy OATT and the reactive power rates for the Ameren Energy Generating and Ameren Resources Generating generation units, including those to be transferred to Medina Valley. Applicants explain that the rates subject to this rate freeze are all cost-based, stated rates that can only be changed via filings made under sections 205 and 206 of the FPA. Applicants commit for a period of five years following the closing of the Proposed Transaction not to seek any rate increase with respect to these cost-based rates.<sup>63</sup>

66. Applicants note that Ameren Marketing has long-term, wholesale sales contracts for the supply of capacity and energy to Missouri Joint Municipal and Illinois Municipal (the Municipal Contracts). Applicants state that, while sales under these contracts are made at negotiated rates, the rates are based on formulas that incorporate the costs of the Ameren Energy Generating and Ameren Resources Generating facilities used to supply power under the contracts. Applicants state that Ameren Marketing is currently engaged in disputes with Illinois Municipal under one of the Municipal Contracts relating to various matters, including the effect of transferring generating assets on the calculation of rates under the contract formula. Applicants state that while Ameren Marketing (and Dynegy to the extent the disputes continue past the closing of the Proposed Transaction) hope to resolve these disputes amicably in accordance with the provisions of the contract, the disputes are not relevant to the consideration of the Proposed Transaction's effect on jurisdictional rates because both of the Municipal Contracts were entered into under Ameren Marketing's market-based rate authority.<sup>64</sup>

**b. Protests and Comments**

67. Illinois Municipal maintains that the Proposed Transaction will adversely affect its wholesale rates. It explains that it is responsible for meeting the full load-serving requirements of its municipal electric system members, which it does through a long-term, wholesale power purchase contract with Ameren Marketing. Illinois Municipal states that this is a cost-based contract based on the costs of the Ameren Energy Generating and Ameren Resources Generating generation facilities that supply the power delivered under the contract. Illinois Municipal maintains that the asset values of these generating facilities are significantly overstated on the 2012 FERC Form No. 1 of Ameren Energy Generating and on the books maintained by Ameren Resources Generating. It states that in December 2012, Ameren recorded an impairment of approximately \$2 billion of generating assets owned by Ameren Energy Generating and

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<sup>63</sup> *Id.* at 36.

<sup>64</sup> *Id.* at 36-37.

Ameren Resources Generating to value those assets at significantly lower values (the 2012 impairment).<sup>65</sup> Illinois Municipal maintains that the sale price for the Proposed Transaction provides strong evidence that the real value of the generating assets is no more than \$439 million. Illinois Municipal argues that the Commission should require the assets be valued at that amount following completion of the Proposed Transaction.<sup>66</sup>

68. Illinois Municipal states that the accounting entries that Applicants have provided do not reflect a proper reduction in generation facility asset values, as the Securities and Exchange Commission (SEC) requires in accordance with SEC Staff Accounting Bulletin 112. In this regard, Illinois Municipal maintains that “the stage is being set” for Dynegy to acquire those facilities for about \$439 million, but to carry them on its books at the “improperly inflated valuation” now recorded on Ameren Energy Generating’s and Ameren Resources Generating’s books. Illinois Municipal argues that Dynegy should be required to “push down” the purchase accounting adjustments to the books of Ameren Energy Generating and Ameren Resources Generating. It also argues that if the generation facilities are not valued at the lower amount, the improperly inflated asset values will result in Illinois Municipal being overcharged under its contract.<sup>67</sup>

69. Illinois Municipal argues that the Commission’s main objective when considering a merger’s effect on rates is to protect captive customers that are served under cost-based rates. Illinois Municipal maintains that its status as an Ameren family (soon to be Dynegy family) wholesale customer is the same as that of a captive customer that is required to obtain power from the merging utilities and pay cost-based rates for it. Illinois Municipal asserts that Applicants’ claim that the contract between Ameren Marketing and Illinois Municipal is beyond the Commission’s concern since it was entered into under Ameren Marketing’s market-based rate authority “badly misstates” the Commission’s policy and holdings in orders upon which Applicants rely. Quoting from these orders, Illinois Municipal maintains that the fact that contracts at issue were entered under a utility’s market-based rate authority was not a determinative factor, as Applicants claim. Rather, Illinois Municipal maintains that the determinative factor in these cases was that the rates charged under the contracts at issue would not be affected by the

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<sup>65</sup> Illinois Municipal Protest at 8-9. The 2012 impairment is discussed in more detail below.

<sup>66</sup> *Id.* at 10, 16.

<sup>67</sup> *Id.* at 14-16.

merger because market-based rates, unlike cost-based rates, are set by the market and not the merging companies' costs.<sup>68</sup>

70. Illinois Municipal argues that, unlike market-based rate contracts, where the entity surviving the merger can assume the contract without change to the contract's rates, terms, and conditions because the contract rates are unaffected by the transaction, in this case the Proposed Transaction will have "an immediate, substantial and detrimental impact" on the cost-based rates that Illinois Municipal pays because of "the resulting cost-structure of the new parent company."<sup>69</sup> Illinois Municipal maintains that, absent Commission-imposed conditions, Applicants are positioned to inflate Illinois Municipal's cost-of-service with new or overstated costs generated solely by the Proposed Transaction as a result of Applicants' accounting and asset valuations.<sup>70</sup> Illinois Municipal argues that the Commission should set the Proposed Transaction for full evidentiary hearing in order to develop conditions to ensure that Illinois Municipal is held harmless as a result of the Proposed Transaction.<sup>71</sup>

71. Missouri Joint Municipal states that it estimates that the Proposed Transaction will increase its cost-based payment under its contract with Ameren Marketing in an amount that poses the risk of significant rate impacts, and it maintains that it should be protected from those impacts.<sup>72</sup> Missouri Joint Municipal states that the fleet of Ameren Energy Generating resources currently providing service under the contract is a mix of coal- and gas-fired facilities, but if the Proposed Transaction is approved as proposed, the fleet of resources owned by the seller under the contract, i.e., Dynegy, would be quite different, since it would consist only of Dynegy's current coal-fired units and Ameren Energy Generating's current coal-fired units, but would not include any gas-fired generation (i.e., the three gas-fired units that will be transferred to Medina Valley prior to closing). Missouri Joint Municipal maintains that the absence of gas-fired generation will increase its total annual charges under the contract.<sup>73</sup>

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<sup>68</sup> *Id.* at 16-19 (citing *Exelon Corp.*, 112 FERC ¶ 61,011, at P 210 (2005); *Duquesne Light Holdings, Inc.*, 117 FERC ¶ 61,326, at P 25 (2006)).

<sup>69</sup> *Id.* at 19-20.

<sup>70</sup> *Id.* at 20-21.

<sup>71</sup> *Id.* at 22.

<sup>72</sup> Missouri Joint Municipal Protest at 5-6.

<sup>73</sup> *Id.* at 4.

72. Missouri Joint Municipal maintains that the Commission's view that ratepayer protections are not needed for contracts formed under market-based rate authority is expressly premised on the assumption that the rates under such contracts are not cost-based and therefore would not be directly affected by merger transactions. It maintains that the Commission has recognized that rate protections may still be required in those situations where the rates established under a market-based contract depend on the seller's actual cost of service.<sup>74</sup>

73. Missouri Joint Municipal notes that Applicants argue that Order No. 669 limits the Commission's wholesale customer protection focus to captive customers. Missouri Joint Municipal answers that, while Order No. 669 sets forth the Commission's main objective in implementing its new cross-subsidization responsibilities under the Energy Policy Act of 2005, it does not confine the Commission's effect on rates analysis to captive customers and thus alter the scope of the Commission's obligations under its statutory responsibility to approve merger applications only if it finds that the transaction is consistent with the public interest.<sup>75</sup>

74. Missouri Joint Municipal argues that, consistent with the Merger Policy Statement's emphasis on ratepayer protections, the Commission should require, as a condition of its approval of the Proposed Transaction, that Applicants permit Missouri Joint Municipal to terminate its power contract with Ameren Marketing within 90 days after the closing of the Proposed Transaction or require that Missouri Joint Municipal be held harmless from all adverse rate impacts of the Proposed Transaction that would otherwise flow through the contract.<sup>76</sup>

**c. Applicants' Answer**

75. In their answer, Applicants state that they offered a rate freeze commitment with respect to the Electric Energy OATT and reactive power rates for Ameren Energy Generating's and Ameren Energy Resources' generating units, including those to be

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<sup>74</sup> *Id.* at 7-8 (citing *Cinergy Corp.*, 140 FERC ¶ 61,180, at P 41 (2012) (finding that the proposed transaction would not adversely affect wholesale rates because, when there are market-based rates, the effect on rates is not of concern); *Union Elec. Co.*, 114 FERC ¶ 61,255, at P 45 (2006) (finding that rate protections were not needed because wholesale service was provided at market-based rates that were not affected by the cost of service)).

<sup>75</sup> *Id.* at 8 n.7.

<sup>76</sup> *Id.* at 12.

transferred to Medina Valley. They maintain that, under Commission precedent, nothing more should be required concerning the effect of the Proposed Transaction on rates.<sup>77</sup>

76. Responding to Municipal Protesters' claim that they pay Ameren Marketing "cost-based rates" for wholesale capacity and energy, Applicants argue that the question is not whether the Municipal Contracts are cost-based; rather, the operative question is how these contracts are regulated. In this regard, Applicants assert that contract rates negotiated in the marketplace under a seller's market-based rate authorization are, as recognized by the Commission in Order No. 669, "constrained by competition, regardless of the seller's costs."<sup>78</sup> Applicants assert that Municipal Protesters' rates were negotiated pursuant to Ameren Marketing's market-based rate authority, and that, while both customers had access to other suppliers, they elected to execute contracts with Ameren Marketing. Applicants note that neither of the Municipal Customers has suggested that the contracts should have been filed with the Commission as cost-of-service regulated contracts. They argue that the fact that "the formula rates fluctuate with changes in costs is simply the operation of a pricing mechanism (i.e., a formula rate) that these parties chose in arm's-length negotiations." Applicants state these are not "cost-of-service regulated contracts" but rather "market-regulated formula rates."<sup>79</sup>

77. In addition, Applicants state that Municipal Protesters confuse market-based rates with stated rates, noting that Illinois Municipal's argument that market-based rates do not require protection because they "can be assumed by the surviving entity without change to the rates, terms and conditions of the contract . . ." in fact describes stated rates.<sup>80</sup> In this regard, Applicants reiterate that Municipal Protesters could have negotiated a fixed-price contract, but instead opted for the risks and benefits of a fluctuating formula rate.<sup>81</sup>

78. Applicants state that Municipal Protesters chose to contract for service under rates that fluctuate based on many factors, and they knowingly accepted the risks of any number of factual changes that would impact their rates, including a sale of assets. Applicants state that Municipal Protesters also contracted for the possibility that such fluctuations could lead to rate decreases.<sup>82</sup> Applicants state that even if the Commission

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<sup>77</sup> Applicants Answer at 17.

<sup>78</sup> *Id.* at 20 (citing Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 166 n.118).

<sup>79</sup> *Id.* at 21.

<sup>80</sup> *Id.* at 21-22 (quoting Illinois Municipal Protest at 20).

<sup>81</sup> *Id.* at 22.

<sup>82</sup> *Id.* at 17-18.

views potential rate changes as directly attributable to the Proposed Transaction, such changes are not the types of adverse rate impacts with which the Commission has been concerned in reviewing section 203 applications. Applicants state that Municipal Protectors were not captive wholesale customers when they negotiated their contracts, as they did not meet the Commission's definition of captive customers as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."<sup>83</sup>

79. Applicants dispute Illinois Municipal's claim that it is required to obtain power from the merging utilities and pay cost-based rates for that power. Applicants argue that Illinois Municipal is not required to obtain power from Ameren Marketing or any other Ameren entity, or to pay cost-based rates. According to Applicants, Illinois Municipal's obligations arise from a voluntary contractual arrangement.<sup>84</sup>

80. Finally, Applicants reject Illinois Municipal's argument that the Commission should require a post-closing compliance filing "to ensure that any post-transaction accounting adjustments only accrue to its [Illinois Municipal's] benefit."<sup>85</sup> They note that, while Illinois Municipal argues that Ameren Energy Generating's accounting entries are insufficient because they do not reflect a proper reduction in power plant asset values, as required by the SEC in accordance with SEC Staff Accounting Bulletin 112, Illinois Municipal fails to note that SEC Staff Accounting Bulletin 112 does not require that push down accounting be used with respect to the acquired generating assets.<sup>86</sup>

#### **d. Commission Determination**

81. We find that the Proposed Transaction will not have an adverse effect on rates under our section 203 analysis.

82. Regarding Illinois Municipal's argument that the Commission should require that the asset valuations of the transferred facilities in Dynegy's hands be decreased to reflect the 2012 impairment of the Ameren Merchant Utilities' generation facilities, we note that the 2012 impairment predated, and was not the result of, Applicants' agreement to undertake the Proposed Transaction. We express no view regarding the requirements of SEC Staff Accounting Bulletin 112 as it would apply to rates charged to Illinois Municipal under its contract with Ameren Marketing after the Proposed Transaction

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<sup>83</sup> *Id.* at 23 (quoting 18 C.F.R. § 33.1(b)(5) (2013)).

<sup>84</sup> *Id.* at 24.

<sup>85</sup> *Id.* at 29.

<sup>86</sup> *Id.*

closes. Further, because the contract at issue was entered into under Ameren's market-based rate authorization, which includes a waiver of the Uniform System of Accounts (USofA), we will not prescribe any specific accounting requirements to Ameren Marketing for the Proposed Transaction. Any dispute between Illinois Municipal and Ameren Marketing regarding Dynegy's accounting for the Proposed Transaction should be resolved in accordance with any dispute resolution provision of the contract or by judicial proceedings.

83. Municipal Protesters' argument that there will be an adverse effect on rates concerns the treatment of market-based rates that incorporate a cost-of-service formula. In the case of market-based rates, the Commission has found that:

[w]here customers are served under market-based regulation as opposed to cost-based regulation, it is presumed that the seller has no market power over a customer and that the customer has a choice of suppliers; thus, there is less opportunity for a customer to involuntarily be in a situation in which its rates subsidize or support another entity.<sup>87</sup>

84. The Commission's policy on ratepayer protection in section 203 proceedings takes this finding into account. Our main objective is the protection of ratepayers served under a regime of cost-of-service regulation for wholesale sales or transmission service. This policy is encapsulated in the goal of protecting "captive customers." The Commission defines the term "captive customers" for purposes of its section 203 regulations as "any wholesale or retail electric energy customers served by a franchised public utility *under cost-based regulation*."<sup>88</sup> Neither Illinois Municipal nor Missouri Joint Municipal is a captive customer under this definition.

85. Illinois Municipal argues that it is a captive customer on the grounds that "captive customers are required to obtain power from the merging utilities and to pay cost-based rates for that power." It maintains that this is "exactly [Illinois Municipal]'s status as an Ameren family (soon to be Dynegy family) wholesale power customer."<sup>89</sup> However, Illinois Municipal is neither served by a franchised public utility nor served under cost-of-service regulation. It is served under a contract it freely negotiated in an arm's length transaction, and the contract is authorized under market-based regulation.

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<sup>87</sup> *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, at P 42, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

<sup>88</sup> 18 C.F.R. § 33.1(b)(5) (2013) (emphasis added).

<sup>89</sup> Illinois Municipal Protest at 17.

Moreover, while Illinois Municipal states that it is “required to obtain” power from the merged company, this requirement is the result of contractual obligations that it freely assumed, not because of the absence of competitive alternatives.

86. Missouri Joint Municipal argues that when the Commission chose to single out captive customers in its section 203 analysis, it was speaking in the context of implementing its new cross-subsidization responsibilities under the Energy Policy Act of 2005. Missouri Joint Municipal maintains that confining the analysis of a merger’s effect on rates to captive customers is inconsistent with Commission precedent, as this precedent encompasses impacts on cost-based rates approved under market-based rate authority. This is incorrect.

87. While the Commission propounded the formal definition of captive customers in its regulations in the course of implementing its new cross-subsidization responsibilities, it made clear that this action represented a continuation of longstanding policy. The Commission stated that

[i]n our Merger Policy Statement, the Commission explained that, in determining whether a merger is consistent with the public interest, one of the factors we consider is the effect the proposed merger will have on rates. The Commission’s main objective in applying this factor is to protect captive customers who are served under cost-based rates that could be adversely affected by a section 203 transaction. The new provision in amended section 203(a)(4) concerning cross-subsidization is rooted in similar concerns.<sup>90</sup>

88. Missouri Joint Municipal cites a number of Commission cases that it maintains show that the Commission’s policy that ratepayer protections are not needed in section 203 proceedings for contracts formed under market-based rate authority is “expressly premised” on the assumption that the rates in question are not cost-based. However, Missouri Joint Municipal does not identify any cases where the Commission has addressed in a section 203 proceeding the issue of cost-based rates under contracts entered into under a seller’s market-based rate authority. For instance, Missouri Joint Municipal notes that, in one case, the Commission stated that the transaction would “not adversely affect wholesale rates” because “when there are market-based rates, the effect on rates is not of concern.”<sup>91</sup> Missouri Joint Municipal then points out that the Commission went on to say that “[t]he effect on rates is not of concern in these

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<sup>90</sup> Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 166.

<sup>91</sup> Missouri Joint Municipal Protest at 7 (quoting *Cinergy Corp.*, 140 FERC ¶ 61,180, at P 41 (2012)).

circumstances because market-based rates will not be affected by the seller's cost-of-service and, thus, will not be adversely affected by the Proposed Transaction.”<sup>92</sup> However, Missouri Joint Municipal fails to note that these two statements are preceded by an essential express premise -- the statement that no captive customers were involved.<sup>93</sup> In short, the Commission was speaking to the issue of effects on cost-of-service as it pertains to customers served under cost-of-service regulation, not to all instances where a cost-of-service formula is used. A market-based rate can be set based on a number of factors (including cost) that the parties negotiate. The fact that parties to a transaction entered into under market-based rate authority negotiate a price that is equal to cost does not mean that the customer is thereby being served under cost-based regulation.

89. We accept Applicants' rate freeze proposal with respect to Electric Energy's OATT and the reactive power contracts, as it provides additional assurance that the Proposed Transaction does not result in an adverse effect on rates. In the Merger Policy Statement, the Commission noted that a rate freeze is one method for ensuring no adverse effect on rates. We also note that a rate freeze does not insulate a party from a rate reduction if the Commission, pursuant to section 206, determines that the utility's rates are no longer just and reasonable.<sup>94</sup>

#### 4. Effect on Regulation

##### a. Applicants' Analysis

90. Applicants state that the Proposed Transaction will have no adverse effect on the effectiveness of federal or state regulation. They state that the Proposed Transaction will not impair or have any effect on: (i) the ability of the Commission to regulate rates for wholesale power sales or transmission service provided by Applicants or their affiliates; or (ii) the ability of the Illinois Commission to regulate Ameren Marketing as an Alternative Retail Electric Supplier.

##### b. Commission Determination

91. We find that neither state nor federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.<sup>95</sup> We find

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<sup>92</sup> *Id.*

<sup>93</sup> *Cinergy Corp.*, 140 FERC ¶ 61,180 at P 41.

<sup>94</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at n.52.

<sup>95</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

that the Proposed Transaction will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over the jurisdictional assets after the transaction. We note that no party alleges that regulation would be impaired by the Proposed Transaction, and no state commission has contested Applicants' assertion that there are "no affected state commissions" or requested that the Commission address the issue of the effect on state regulation.

## 5. Cross-Subsidization

### a. Applicants' Analysis

92. Applicants state, based on facts and circumstances known to them or that are reasonably foreseeable, that the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future: (1) any transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional facilities, for the benefit of an associate company; or (4) any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

93. Regarding the fourth prong of Applicants' verification described above, Applicants state that the Transaction Agreement provides for the acceptance by Ameren Energy Generating and Ameren Resources Generating of certain environmental liabilities (or the potential therefore) through the Liability Assumption Agreements. Applicants state that the Liability Assumption Agreements, which amend certain historical contracts to implement such acceptance, are for the benefit of Ameren's utility subsidiary, Ameren Illinois, and, according to Applicants, they therefore are not the type of affiliate agreement that gives rise to inappropriate cross-subsidization.

94. Applicants also state that while Ameren Illinois is not an Applicant, Applicants disclose that Ameren Illinois' public utility assets are currently encumbered under the Ameren Illinois mortgage indenture (secured by substantially all Ameren Illinois property formerly owned by Illinois Power Company and Central Illinois Public Service Company) and the CILCO mortgage indenture (secured by substantially all Ameren Illinois property formerly owned by Central Illinois Light Company).

**b. Commission Determination**

95. Based on the representations as presented in the Application, we find that the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

**6. Other Issues**

**a. Change in Status**

96. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>96</sup> To the extent that the foregoing authorization results in a change in status, Applicants are advised that it must comply with the requirements of Order No. 652. In addition, Applicants shall make any appropriate filings under section 205 of the FPA to implement the proposed transaction.

**b. Accounting Analysis**

97. In the Proposed Transaction, Dynegy will acquire the majority of Ameren's existing merchant generating assets, and the remaining generating assets will be transferred to Medina Valley. To the extent the Proposed Transaction affects the books of a jurisdictional entity subject to the Commission's Uniform System of Accounts,<sup>97</sup> the jurisdictional entity must submit its final accounting entries within six months of the date the Proposed Transaction is consummated.<sup>98</sup> The accounting submission must provide all accounting entries and amounts related to the Proposed Transaction, including any costs

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<sup>96</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). See 18 C.F.R. § 35.42 (2013).

<sup>97</sup> 18 C.F.R. pt. 101 (2013).

<sup>98</sup> Applicants state that Ameren Illinois' books will be affected by the Proposed Transaction because the generating plants to be transferred were previously owned by predecessors of Ameren Illinois, causing certain ancillary tax implications. Application at n.98.

incurred to effectuate the transaction,<sup>99</sup> along with narrative explanations describing the basis for the entries.

**c. Reliability and Cyber Security Standards**

98. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, and the like, must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

(B) Applicants and any affiliates of the Applicants subject to the Commission's Uniform System of Accounts shall account for the Proposed Transaction in accordance with Electric Plant Instruction No. 5 and Account 102 of the USofA. Such companies shall submit their final accounting entries within six months of the date that the Proposed Transaction is consummated, and the accounting submission shall provide all the accounting entries and amounts related to the Proposed Transaction along with narrative explanations describing the basis for the entries.

(C) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in granting the Application.

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<sup>99</sup> These costs may include, but are not limited to, internal labor costs, legal, consulting, and professional services incurred to effectuate the transaction.

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(D) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(E) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(F) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(G) Applicants, to the extent that they have not already done so, shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(H) Applicants shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

Document Content(s)

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