

**COMPLAINT REQUESTING FAST TRACK PROCESSING**

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Public Citizen, Inc. )  
 )  
v. ) Docket No. EL-15-\_\_\_\_\_  
 )  
Midcontinent Independent System Operator, Inc )

May 28, 2015

**Emergency Section 206 Complaint of Public Citizen, Inc. And Request For Fast Track Processing**

Public Citizen, Inc. files this complaint pursuant to Section 206 of the Federal Power Act (FPA) and the Commission’s rules thereunder seeking emergency action by the Federal Energy Regulatory Commission (FERC) against the Midcontinent Independent System Operator, Inc (MISO) for contravention and violations of the FPA and the commission’s rules thereunder in the April 14, 2015 MISO Planning Resource Auction.

**MISO’s Actions and Inactions That Violate Applicable Statutory Standards**

The highly excessive, unjust, unreasonable and unduly discriminatory rate increases for MISO Local Resource Zone 4 (“Zone 4”) that are scheduled to take effect on June 2, 2015, may be the result of illegal manipulation and gaming of the auction bidding process, specifically capacity withholding, contrary to Section 222 of the FPA. MISO failed to file a rate change filing with support for the increases, which for Zone 4 equals 800%, for advance Commission and public review as required by Section 205(d) of the FPA.

Consequently, information that should be available to the public about the auction results must be pieced together from other sources, contrary to the letter and intent of the statute.

## Summary of Basis for Complaint Re: Auction Gaming

Dynegy holds a large capacity position in Zone 4 as a result of its successful acquisition of four baseload coal power plants from Ameren in 2013.

After the 2013 Ameren acquisition, Dynegy controlled a total of 8 power plants in MISO Zone 4 with a combined capacity of 6,100 MW.

According to MISO stakeholder meeting minutes, Zheng Zhou, MISO's manager of economic studies, argued that because of Dynegy's acquisition of Ameren's Zone 4 portfolio that "we [MISO staff] are concerned with Dynegy's offer strategy in the next Planning Resource Auction as they [Dynegy] are now the dominant provider of capacity in the zone."<sup>1</sup> As a result, MISO staff proposed in early 2014 to merge Zones 4 and 5 in an effort to mitigate Dynegy's Ameren acquisition.<sup>2</sup> That proposal failed under stiff resistance from Dynegy—including a presentation by Dynegy attacking the proposal on June 12, 2014 before the Supply Adequacy Working Group<sup>3</sup> that Dynegy's lobbyist served as Vice-Chair—and after Dynegy threatened to leave MISO for PJM. On June 24, just 12 days after Dynegy's presentation, MISO informed stakeholders that it was tabling the Zone 4&5 combination proposal.

Although MISO refuses to reveal company-specific auction data, including the MW that each company cleared in each Location Resource Zone, Dynegy's 2015 1<sup>st</sup> Quarterly filing with the US Securities and Exchange Commission states that:

[The company's] Coal segment cleared no volume in the MISO Planning Year 2014-2015 capacity auction, and cleared 398 MW in the MISO Planning Year 2015-2016 capacity auction at \$150 per MW-day... [Dynegy's Illinois Power Holdings] IPH cleared 1,864 MW in the MISO Planning Year 2015-2016 capacity auction, including 1,709 MW that are expected to cover retail load obligations. IPH only sold 155 MW that received the \$150 per MW-day clearing price."<sup>4</sup>

Thus, Dynegy voluntarily disclosed that it cleared a total of 553 MW in Zone 4 (not counting the 1,709 MW committed to retail load obligations). Because MISO has no plans to make company-specific bids public, we cannot know for sure how much of the several thousand of megawatts Dynegy owns in Zone 4 it bid, how

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<sup>1</sup> [www.misoenergy.org/Events/Pages/LOLEWG20140825.aspx](http://www.misoenergy.org/Events/Pages/LOLEWG20140825.aspx)

<sup>2</sup> [www.misoenergy.org/Events/Pages/LOLEWG20140507.aspx](http://www.misoenergy.org/Events/Pages/LOLEWG20140507.aspx)

<sup>3</sup> [www.misoenergy.org/Events/Pages/LOLEWGSAWG2014612.aspx](http://www.misoenergy.org/Events/Pages/LOLEWGSAWG2014612.aspx)

<sup>4</sup> Page 45-6, [www.sec.gov/Archives/edgar/data/1379895/000137989515000010/dyn-2015331x10q.htm](http://www.sec.gov/Archives/edgar/data/1379895/000137989515000010/dyn-2015331x10q.htm)

much couldn't be bid due to contract obligations, or how much it withheld from bidding altogether. What we do know is that a result of Dynegy's 2013 acquisition of Ameren's power plants, the company held significant control over generation capacity in Zone 4. And we know that certain MISO staff produced studies showing that Dynegy's post-Ameren acquisitions in Zone 4 left MISO "concerned with Dynegy's offer strategy in the next Planning Resource Auction as they [Dynegy] are now the dominant provider of capacity in the zone." And we know that the Zone 4 auction price skyrocketed from \$16.75 to \$150.00. Dynegy, more than any other company in Zone 4, was in the best position to execute a capacity withholding scheme for the purpose of driving Zone 4 auction prices up. And we knew that MISO recognized Dynegy's Zone 4 market power to the point that MISO proposed mitigating Dynegy's market power by merging Zones 4 and 5—a proposal that failed after Dynegy opposed it.

Dynegy, with thousands of newly-acquired baseload generation units, had financial incentive to intentionally withhold capacity—either by refusing to offer them for bid, or offering them at prices so high they knew they had a low likelihood of clearing—to drive the auction price up, thereby providing increased revenue to its cleared generation units. As has been seen with increasing regularity in ISO and RTO clearing auctions, power companies like Dynegy make more money by creating shortages by selling or committing less power.

An equities analysis by UBS estimated that a Dynegy withholding strategy would generate roughly \$5 million in earnings before interest, taxes and amortization (EBITA) for every 100 MW cleared in MISO's Zone 4.<sup>5</sup> With Dynegy clearing 553 MW, the company could earn a windfall profit (at \$150) of roughly \$30 million by withholding capacity—a figure confirmed by Dynegy spokesman Micah Hirschfield: "The total we make [sic] from the auction was roughly \$30 million."<sup>6</sup>

Roughly 3,800 MW of Dynegy's Zone 4 generation did not clear the auction. Public Citizen believes that the available evidence suggests Dynegy may have engaged in intentional capacity withholding to drive auction prices from \$16.75 to \$150.00. Indeed, the stock market recognized Dynegy's enhanced value in the

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<sup>5</sup> "Collecting on the Midwest Bet (MISO Auction)," April 15, 2015.

<sup>6</sup> Jacob Barker, "Power plant owners say they won't see windfall from electricity price auction, disputing Illinois AG," April 24, 2015, *St. Louis Post-Dispatch*, <http://bit.ly/1LLyD3t>

weeks after the April 14 MISO capacity auction, as the company's shares jumped 12%, from \$30.53 on April 14 to \$34.16 on May 4.<sup>7</sup>

Importantly, MISO did not appear to make any changes to its Local Clearing Requirement for Zone 4 in light of Dynegy's significant Zone 4 power plant acquisition that cleared FERC approval in December 2013. The Local Clearing Requirement mandated that 85% of Zone 4's capacity auction must come from within the zone. Failing to adjust that Local Clearing Requirement after Dynegy significantly altered the generation ownership in the Zone may have facilitated Dynegy's ability to execute a capacity withholding scheme.

Moreover, the Vice-Chair of the key MISO stakeholder group helping to coordinate and design aspects of MISO's Planning Resource Auction ("Supply Adequacy Working Group", or "SAWG") during the critical years when MISO was developing the capacity auction rules was (and is still as far as we know) Mark J. Volpe, Dynegy's Director of Regulatory Affairs. His role and the role of other powerful utility and financial stakeholders in the auction's design and coordination do not lend credibility to the auction process and cry out for FERC review of the auction results under Section 206 at least.

This is not the first time that Dynegy has been suspected of manipulating energy markets. The company settled allegations it engaged in illegal gaming of the California power market;<sup>8</sup> An additional \$122 million was paid to settle allegations that Dynegy's long-term power contract signed with California utilities was fraudulent;<sup>9</sup> Dynegy refunded another \$280 million for overcharging consumers;<sup>10</sup> Dynegy forfeited \$5 million to the US Commodity Futures Trading Commission to settle allegations the company intentionally reported false Natural Gas prices to a key index for the purpose of manipulating the price;<sup>11</sup> And the company paid a \$3 million civil penalty for committing securities fraud for the company's illegal energy trades.<sup>12</sup>

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<sup>7</sup> <http://finance.yahoo.com/q?s=DYN>

<sup>8</sup> [www.ferc.gov/whats-new/comm-meet/072804/E-57.pdf](http://www.ferc.gov/whats-new/comm-meet/072804/E-57.pdf)

<sup>9</sup> <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13111481>

<sup>10</sup> <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10178358>

<sup>11</sup> [www.cftc.gov/opa/enf02/opa4728-02.htm](http://www.cftc.gov/opa/enf02/opa4728-02.htm)

<sup>12</sup> [www.sec.gov/news/press/2002-140.htm](http://www.sec.gov/news/press/2002-140.htm)

## Threat of MISO Defection Puts Dynegy in the Driver's Seat

Utilities like Dynegy use the threat of "ISO Shopping" as a lever to influence the development of market rules that protect its profitability (or to prevent changes in the rules that would limit its ability to exercise market power). MISO, acting out of a sense of self-preservation, has incentive to acquiesce to such threats in order to retain membership. Lost in this bullying "raise rates or else I leave" tactic are consumers: MISO's internal procedures appear to prioritize the demands of its large owners of generation at the expense of 800% price increases for Zone 4.

A Dynegy executive told a reporter in an interview in September 2014 that the rates that the company's newly-acquired power plants in MISO's Zone 4 were earning were "insufficient,"<sup>13</sup> and that "there are several ways for Illinois to address this concern and benefit all market participants. Improving the MISO capacity construct is one, **moving to PJM is another**" [emphasis added].<sup>14</sup> It is important to remember that Dynegy had received FERC's permission to acquire Ameren's generation less than one year before telling reporters that the revenue it could earn from them in MISO was "insufficient." Ensuring reliability cannot mean that owners of newly-acquired, aging power plants should be allowed to influence market rules to deliver windfall profits to these newly purchased assets.

Dynegy's claims of "insufficient" earnings are particularly striking considering the company secured a five-year waiver of having to install expensive pollution-control equipment from the Illinois Pollution Control Board in November 2013 for the sole purpose of allowing the company to avoid "an arbitrary and unreasonable hardship" of costs imposed on its soon-to-be-acquired aging coal fleet.<sup>15</sup>

Observers noted at the time of Dynegy's complaints about inadequate prices in MISO that "the clearing price for the zone [4], including Dynegy's Illinois generation, was \$16.75/MW-day for the 2014/2015 delivery year. The PJM clearing

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<sup>13</sup> Steve Daniels, "Illinois' second-biggest power generator pushes to boost downstate electric bills," September 3, 2014, *Crain's Chicago Business*, [www.chicagobusiness.com/article/20140903/NEWS11/140909983/illinois-second-biggest-power-generator-pushes-to-boost-downstate-electric-bills](http://www.chicagobusiness.com/article/20140903/NEWS11/140909983/illinois-second-biggest-power-generator-pushes-to-boost-downstate-electric-bills)

<sup>14</sup> Ted Caddell, "Dynegy: Change MISO Capacity Rules or We'll Join PJM," September 9, 2014, *RTO Insider*, [www.rtoinsider.com/dynegy-miso-capacity-pjm/](http://www.rtoinsider.com/dynegy-miso-capacity-pjm/)

<sup>15</sup> Jeffrey Tomich, "Regulators OK delay of pollution controls for Ameren coal plants," November 21, 2013, *St. Louis Post-Dispatch*, <http://bit.ly/1J4uYPN>

price for the same period was \$125.99/MW-day."<sup>16</sup> Journalists have reported that Dynegy issued a threat that unless MISO changed its capacity market rules to more closely align with PJM's far more lucrative arrangement, that Dynegy would leave MISO for PJM.

Importantly, there is no documentation that the higher PJM capacity payment prices, or the 800% increase in MISO's Zone 4 capacity payments, result in quantifiable increases in reliability.

This fundamental flaw exposes MISO's political science problem: FERC has placed a private organization in charge of developing power markets, and that organization's insecurity about member flight results in decisions about rate structures driven (or preservation of existing, flawed rate structures) primarily by the need to retain membership, thereby prioritizing power generator profits at the direct expense of consumers. The stakeholder process tasked with developing capacity auction rules is Vice-Chaired by the very company threatening to leave MISO unless auction prices increase, and consumers have very little presence or capacity to counter the influence of generators like Dynegy. Indeed, just days after this disputed auction, on April 22, MISO's Advisory Committee announced the rejection of a request by consumer advocates for financial assistance, with Kent Feliks, an American Electric Power lobbyist and Chair of the MISO Power Marketers/Brokers Sector, writing that Power Marketers opposed "funding the Public Consumer Advocates Sector in this docket, [because it] will set a dangerous precedent."<sup>17</sup> It appears as though having *inadequate* consumer representation is the true "dangerous precedent" for consumers' utility bills.

### **Some Procedural History on MISO's Rate-Making Process**

MISO is a non-profit corporation based in Carmel, Indiana. According to its 2013 990 form filed with the Internal Revenue Service,<sup>18</sup> MISO's mission is to "Monitor and control electric transmission system[s] to provide non-discriminatory open-access to all customers and ensure safe, reliable, and efficient operation for

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<sup>16</sup> Ted Caddell, "Dynegy: Change MISO Capacity Rules or We'll Join PJM," September 9, 2014, *RTO Insider*, [www.rtoinsider.com/dynegy-miso-capacity-pjm/](http://www.rtoinsider.com/dynegy-miso-capacity-pjm/)

<sup>17</sup> [www.misoenergy.org/Events/Pages/AC20150422.aspx](http://www.misoenergy.org/Events/Pages/AC20150422.aspx)

<sup>18</sup> [www.guidestar.org/FinDocuments/2013/431/827/2013-431827033-0ae27090-90.pdf](http://www.guidestar.org/FinDocuments/2013/431/827/2013-431827033-0ae27090-90.pdf)

the benefit of all," with no mention of any requirement to help FERC ensure that all rates are "just and reasonable."

In an effort to secure adequate capacity supplies, FERC authorized MISO to design and implement a Planning Resource Auction and directed "MISO *and its stakeholders* [to] develop a plan that details the steps that will be taken to incorporate market mechanisms into the Resource Adequacy Plan and submit its plan and a discussion of stakeholder perspectives" [emphasis added].<sup>19</sup>

The primary stakeholder forum for MISO's development of its Planning Resource Auction rules has been the Supply Adequacy Working Group (SAWG). Archives of some of its meeting materials are available online.<sup>20</sup>

MISO's stakeholder meetings to develop capacity auction rules, including the creation of Local Resource Zones and Local Clearing Requirements, began on July 19, 2010<sup>21</sup> and continued through 2015. According to meeting minutes, Dynegy lobbyists were involved in nearly all of the key working group meetings where proposed capacity market rules were proposed and debated. MISO has no transcripts of the meetings; the private organization simply makes bare-bones minutes available which list the partial names and affiliations of working group members present for the meetings.

Beginning on December 1, 2011, Dynegy's Director of Regulatory Affairs—Mark J. Volpe—was named Vice-Chair of the Supply Adequacy Working Group. As of the time of this filing, Mr. Volpe continues to serve as Vice-Chair of SAWG.

On July 11, 2012, MISO submitted a filing to FERC that, among other things, implemented FERC's request to fracture the market into seven Local Resource Zones:

"MISO proposed to develop the geographic boundaries of each of the Local Resource Zones after consultation and discussion with the relevant stakeholder committee."<sup>22</sup>

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<sup>19</sup> Docket No. ER11-4081, July 20, 2011, pg. 2, <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12760172>

<sup>20</sup> [www.misoenergy.org/Library/MeetingMaterials/Pages/SAWG.aspx](http://www.misoenergy.org/Library/MeetingMaterials/Pages/SAWG.aspx)

<sup>21</sup> See footnote 12, Docket No. ER11-4081, July 20, 2011, <http://1.usa.gov/1HwGKwD>

<sup>22</sup> Docket No. ER11-4081, Page 8 <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13026797>

The stakeholder committee involved in creating the seven LRZs—including the subject of this complaint, Zone 4—was the working group vice-chaired by Dynegy.

Dynegy Inc. announced in March 2013 that it was purchasing five merchant power plants from Ameren Corp for \$900 million, with 92% of the acquisition cost in the form of Dynegy assuming Ameren's debt (rather than paying cash for the power plants). Four of these power plants were located in Zone 4.

One month after announcing the purchase, Dynegy applied to FERC for permission to acquire the power plants from Ameren.<sup>23</sup> Neither MISO nor its independent market monitor, the for-profit consulting firm Potomac Economics, intervened in this docket, and therefore raised no questions or concerns about the transaction's implications on future capacity market auctions.

Six months after Dynegy filed its application, FERC approved the transaction, finding that it raised zero competition issues:

"we [FERC] 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...[the] 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. This provides additional assurance that the Proposed Transaction will not have an adverse effect on competition."<sup>24</sup>

Public Citizen notes that while FERC's observation about the difficulty of withholding baseload generation from energy markets may be valid, FERC failed to consider the ease with which baseload generation could be withheld from capacity auctions.

FERC relies on rather simplistic screens to test market power, and the acquisitions' impact on future capacity auctions was not analyzed as part of FERC's approval of the transaction.

The FERC-approved transaction allowed Dynegy to acquire four of Ameren's coal-fired power plants with a combined 3,150MW in MISOs Zone 4: Duck Creek in Canton, Ill; Coffeen in Montgomery County, Ill; E.D. Edwards in Bartonville, Ill; and

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<sup>23</sup> Docket No. EC13-93, filed April 16, 2013, <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13236109>

<sup>24</sup> At Page 21, <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13369441>

Newton in Jasper, Ill. Prior to the 2013 transaction, Dynegy had four existing power plants in MISOs Zone 4: Baldwin (1,785 MW); Havana (428 MW); Hennepin (285 MW); and Wood River (456 MW).

After the 2013 acquisition of Ameren's four power plants, Dynegy controlled 8 power plants with a combined 6,100MW in MISO Zone 4.

Importantly, after Dynegy's 2013 acquisition of Ameren's Zone 4 power plants, neither MISO nor its for-profit market monitor made any adjustments to the Zone 4 Local Clearing Requirements mandating that 85% of the Zone's capacity market needs must be met from in-Zone resources. The failure to adjust the Local Clearing Requirement in the face of significant upheaval in the ownership of Zone 4 power plants likely enhanced Dynegy's ability to engage in capacity withholding to drive Zone 4 auction prices up.

On the day that MISO publically released the auction results, it offered no explanation whatsoever for the 800% price increase for electricity customers in Zone 4. Instead, MISO congratulated itself: "Today's auction results ensure that the MISO region will continue to maintain reliability at the lowest possible cost."<sup>25</sup> In most segments of the economy, an entity responsible for overseeing an 800% price increase would feel some sort of need to explain to the public why their utility bills are going to skyrocket. MISO's most detailed public explanation of the massive price discrepancy can be found in the April 24, 2015 letter from MISO's Kari A.E. Bennett to Cara Hendrickson of the Illinois Office of the Attorney General: "Different results by location and by year can occur for multiple reasons, including *the impact of commercial decisions market participants make leading up to the auction and available capacity offered into the auction*. In Zone 4, higher priced local resources were needed to meet the Local Clearing Requirement" [emphasis added].<sup>26</sup>

### **Legal Basis for Finding Market Manipulation Through Withholding**

It is illegal for an energy market participant to intentionally withhold economically viable supply from a generating facility for the purpose of inflating prices so it can earn greater profits on sales from other remaining generating

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<sup>25</sup> <http://bit.ly/1GEp3zh>

<sup>26</sup> Page 3, [www.rtoinsider.com/wp-content/uploads/MISO-response-to-IL-OAG-4-24-15.pdf](http://www.rtoinsider.com/wp-content/uploads/MISO-response-to-IL-OAG-4-24-15.pdf)

assets at the higher price caused by the withholding. See, e.g., Federal Power Act, 16 USC § 824v(a), and 18 CFR § 1c.2(a).<sup>27</sup> As discussed in more detail below, the Commission has imposed fines and penalties of \$245 million on Constellation Energy for similar types of conduct, where the defendant engaged in uneconomically withholding or diverting supply from the market to increase market prices in order to make greater profits from the increased prices on other assets whose value increased as a result of the artificially increased market prices. (See *Constellation Energy Commodities*, 138 FERC ¶ 61,168, at P 12 (2012) ("*Constellation*").) In addition, the Commission is currently seeking to impose fines and penalties of \$435 million on Barclays Bank PLC for engaging in economically similar conduct, where Barclays engaged in uneconomic conduct to intentionally inflate market prices in order to benefit other asset positions it held which would benefit from the inflated prices. (See *FERC v. Barclays Bank PLC, et al.*, U.S. District Court Eastern District of California, Docket No 13-2093 ("*Barclays*").)

The Commission's recently-filed brief in the *Barclays* manipulation penalty case makes clear that engaging in uneconomic conduct "**for the purposes of controlling prices rather than in response to legitimate supply and demand, and an 'external purpose' to benefit other positions owned by the alleged manipulator**" constitutes illegal market manipulation in violation of 18 CFR § 1c.2(a). See FERC Brief in Opposition to Motion to Dismiss filed in *FERC v. Barclays Bank PLC, et al.*, U.S. District Court Eastern District of California, Docket No 13-2093 (FERC Opposition Brief).

Public Citizen believes that, any enforcement proceedings that the Commission chooses to undertake aside, the Commission should set the MISO Auction rates for emergency hearing under Section 206 and make them subject to refund in the event that it finds that the rates are unjust and unreasonable or unduly discriminatory as the result of illegal market manipulation of the auction through

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<sup>27</sup> We note that The U. S. Department of Justice has described this type of prohibited conduct as follows: "[In certain electricity auction markets] a firm owning or controlling generating units may find it profitable to physically or economically withhold one or more of its units, reducing supply of electricity to the market and thereby increasing the market-clearing price. Although the firm may reduce revenue on the units it withholds, it may more than make up for that loss through the gains in revenue on its units still supplying electricity to the market." Comments of the Department of Justice dated November 15, 2004, FERC Docket No. RM04-14.

withholding or any other illegal market actions, and to set the just and reasonable and not unduly discriminatory rates to be charged prospectively.

**A recent Federal Court of Appeals Opinion holds that Market-Based Rate Tariffs Must Include Both Ex Ante and Ex Post Opportunities for Review of Rates to Determine Their Lawfulness and FPA Section 205(d) Requires that Rate Changes be Filed in Advance of Collection and Be Subject to Suspension and Refund**

The April 29, 2015 Opinion in *Lockyer II* makes it clear that electric market clearinghouse rates, such as the Planning Resource Auction results, must be reviewed after-the-fact as well as in advance to determine whether they actually produce just and reasonable rates. Yet as recently as September 16, 2014, the then-Commission Chair found it to be an unacceptable “alternative approach” to the statute to find that the Commission must determine whether actual auction rates charged are just and reasonable.<sup>28</sup> She found the filing of actual auction rates in another ISO case to be mere “informational filings” just as the Commission argued the actual charges in California were merely informational “reporting requirements.” The *Lockyer II* court found to the contrary:

FERC erred by structuring the remand proceedings to focus exclusively on market-share evidence of market power. By doing so, FERC unlawfully administered the market-based tariff. “If the ability to monitor the market, or gauge the ‘just and reasonable’ nature of the rates is eliminated, then effective federal regulation is removed altogether. Without the required filings, neither FERC nor any affected party may challenge the rate. Pragmatically, under such circumstances, there is no filed tariff in place at all.” (quoting *Lockyer I* at 1015-1016)

The Federal Power Act requires, in addition, that specific charges that are changes in rates must be noticed by filing in advance of collection to allow the Commission and the public to review them with the opportunity for the Commission to suspend them and set them for hearing. To the extent the MISO’s tariff fails to conform to the statute’s filing requirements, the tariff cannot be lawfully implemented even if it was previously approved. In the *Lockyer II* case, the opinion says at p.10:

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<sup>28</sup> *ISO New England Inc.*, Docket No. EL14-99, “Order to Show Cause,” concurring opinion of Chair LaFleur at 3-4.

FERC rejected the state's suggestion that the hub-and-spoke test was an inappropriate screen for market power, claiming that it must use only those standards in effect at the time of the reviewed transactions.

The Lockyer II court rejected this view, quoting its original decision in Lockyer I:

The structure of the tariff complied with the FPA, so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were 'just and reasonable' and whether market forces were truly determining the price." 383 F.3d at 1014.

When implementation of the tariff structure failed to comply with the FPA by failing to include such enforceable post-approval reporting to enable determination of just and reasonable rates, FERC's view that it "must use only those standards in effect at the time of the reviewed transactions" was rejected because the tariff as so implemented would have been unlawful.

Although the California system at the time of the original *California ex rel. Lockyer v. FERC*<sup>29</sup> opinion in 2004 differed somewhat from the MISO and other ISO and RTO auction rate systems, the basic principles are the same: the Commission reviews auction rules (like the market-share analysis in California) *ex ante* to determine whether they appear to provide for a competitive and non-manipulated market-based auction. However, the recent *California* opinion (*Lockyer II*) holds (at p. 7, paper opinion) that if the Commission relies on such analyses *alone* it:

ignores the agency's statutory charge under § 205 of the FPA: to determine whether sellers charged a "just and reasonable" rates. 16 USC § 824d(a).

Moreover, if the Commission (and the public) do not have an opportunity to review *ex post* the actual increased charges arising from the auction to determine whether those rates are in fact just and reasonable, the auction scheme fails to comply with the statutory filing and review requirements of FPA section 205(d) and the market-based rates have no statutory foundation. Instead, as the Supreme Court held in *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) such a regulatory scheme results in unlawful agency deregulation under *Maislin* and other cases as California argued in the original *Lockyer* case.

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<sup>29</sup> 383 F.3d 1006 (9<sup>th</sup> Cir. 2004) ("*Lockyer*" or "*Lockyer I.*")

The courts have held that the Commission is a creature of statute and has no powers not granted to it by statute. It cannot delegate the statutory responsibilities it has to others, certainly not to a corporation, even a non-profit corporation such as MISO, whose 990 form filed with the IRS makes no mention in its mission statement of any requirement to help FERC ensure that all wholesale electric and transmission rates are “just and reasonable.”

And it should go without saying that the Commission cannot delegate authority that it does *not* have, such as the authority to allow increased rates to go into effect without the statutorily required opportunity for review by the Commission and the public, with the corresponding ability to order refunds when charges are found to be excessive.

**Business, commercial, and economic issues presented by MISO’s actions and inactions as they relate to or affect the Complainant.**

Public Citizen, Inc. is a nonprofit, nonpartisan consumer research and advocacy organization with over 400,000 members and supporters across the country, as well as those in MISO Zone 4 and other MISO zones. Our members are household utility customers directly impacted by the actions and decisions ISOs and RTOs make, or fail to make, with regard to the charging of just and reasonable rates under the FPA, including the 800% rate increase in Zone 4 and the failure to file this rate change for Commission and public review.

**Make a good faith effort to quantify the financial impact or burden created for Complainant as a result of the action or inaction.**

Media reports claim that the Zone 4 results “will raise the annual electricity bill of the average Ameren Illinois residential customer by more than \$140.”<sup>30</sup> Our members cannot make either future domestic or commercial decisions when faced with an 800% rate increase without prior warning or opportunity to contest such a huge increase. At the domestic level, such a sudden and extreme rate increase could cause consumers to have to choose between keeping the lights on or paying

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<sup>30</sup> Steve Daniels, “Exelon’s Downstate Windfall not as Large as Thought,” *Crain’s Chicago Business*, April 22, 2015, [www.chicagobusiness.com/article/20150422/NEWS11/150429935/exelons-downstate-windfall-not-as-large-as-thought](http://www.chicagobusiness.com/article/20150422/NEWS11/150429935/exelons-downstate-windfall-not-as-large-as-thought)

the mortgage, buying groceries, medicine, etc. For those with businesses, it may make the difference between profit and loss.

**Whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the Complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum.**

Public Citizen has protested the increasing appearance of market manipulation in other ISO/RTO proceedings, but those protests apply to the facts of those cases. [Public Citizen is currently awaiting rehearing orders in *ISO NE*, Docket Nos. EL14-00 and ER15-117.]

**State the specific relief or remedy requested and the basis for that relief.**

Public Citizen, Inc. hereby requests that the Commission:

- (i) Exercise its authority under FPA Section 206 to institute an emergency investigation into whether the April 14, 2015 Planning Resource Auction was manipulated by illegal practices under FPA Section 222 so that the rates resulting therefrom, especially as to MISO Zone 4, are unjust and unreasonable, or unduly discriminatory, and to set a refund effective date as of the effective date of this Complaint; and to:
- (ii) Exercise its authority under FPA Sections 205(d) and 309 to require that the MISO file as soon as possible the results of the April 14, 2015 Planning Resource Auction as a section 205 filing of increased rates for MISO Zone 4, and any other MISO Zone in which changed charges are proposed, and to set such rates for hearing under FPA Section 205(e) with the burden of proof on MISO to justify the increases, and to suspend such rates for at least one day and make them subject to refund.

**State whether Enforcement Hotline, ADR, etc. or other informal dispute procedures were used or why not; whether ADR could successfully resolve the complaint.**

Public Citizen is asking for actions to be taken by the Commission, including statutory interpretations. Informal dispute procedures are not applicable.

**Explain why Fast Track processing pursuant to 385.206(h) is needed.**

The 800% rate increase is scheduled to go into effect for Zone 4 on June 1,

2015, so standard processes will not be adequate for expeditiously resolving the Complaint. MISO failed to give the necessary notice of its proposed rate increases as required by Section 205(d) of the Federal Power Act by timely filing such increases and their support for review by the Commission and the public sixty days in advance of charging them.

### **CONCLUSION**

Public Citizen respectfully requests that the Commission grant the relief requested in this Complaint as well as any other relief that the Commission finds necessary to ensure consumers a complete, effective and permanent bond of protection from excessive rates.

Respectfully submitted,

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