

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Public Citizen, Inc.**

**v.**

**Midcontinent Independent System  
Operator, Inc.**

**Docket No. EL15-70-003**

**The People of the State of Illinois by the  
Illinois Attorney General**

**v.**

**Midcontinent Independent System  
Operator, Inc.**

**Docket No. EL15-71-003**

**Southwestern Electric Cooperative, Inc.**

**v.**

**Midcontinent Independent System  
Operator, Inc., Dynegy, Inc., and Sellers of  
Capacity into Zone 4 of the 2015-2016 MISO  
Planning Resource Auction**

**Docket No. EL15-72-003**

**Remand Report**

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## I. Introduction

Office of Enforcement (OE) staff submits this Remand Report, as directed by the Commission's June 16, 2022 Order in this proceeding, to provide "staff's assessment regarding Dynegy's conduct related to the [Midcontinent Independent System Operator, Inc. (MISO) 2015/16 Planning Resource Auction (2015/16 Auction)], whether Dynegy's conduct constituted an exercise of market power and/or market manipulation, and, if so, what effect Dynegy's conduct had on the 2015/16 Auction results for Zone 4."<sup>1</sup> This Remand Report also provides, including through appended materials, "a record for the Commission to respond to the court's directive in *Public Citizen* in addressing the complaints filed in this proceeding."<sup>2</sup>

As set forth below, OE staff found during its investigation that Dynegy knowingly engaged in manipulative behavior to set the Zone 4 price in the 2015/16 Auction. The evidence detailed in this Remand Report reflects that, as part of Dynegy's strategy, Dynegy meticulously monitored and estimated what it referred to as the "gap"—the estimated quantity of non-zero priced Dynegy capacity that MISO likely would need to clear Zone 4 (*i.e.*, the quantity of non-zero priced Dynegy capacity needed to set the price). Between November 1, 2013 and early December 2013, Dynegy became aware that due to its acquisition of 4,393 MW of generating assets in Zone 4,<sup>3</sup> and certain other events described below,<sup>4</sup> MISO could not clear Zone 4 without at least some of Dynegy's Zone 4 capacity. Based on such monitoring and estimating, Dynegy took four steps that were not based on market fundamentals, but, rather, were based on Dynegy knowingly increasing the likelihood that MISO would need Dynegy non-zero priced capacity to clear Zone 4. Dynegy knew that each of the four steps it took would increase the likelihood that Dynegy would set the price in a manner that would increase profitability of Dynegy's 553 MW cleared in the 2015/16 Auction and post-2015/16 capacity sales. As discussed below, Dynegy's four steps succeeded in setting the Zone 4 clearing price for the 2015/16 Auction.

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<sup>1</sup> *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 179 FERC ¶ 61,185, at P 18 (2022) (June 2022 Order).

<sup>2</sup> *Id.* P 16.

<sup>3</sup> Joint Application For Authorization Under Section 203 Of The Federal Power Act And Request For Expedited Consideration, Docket No. EC13-93-000, filed April 16, 2013, at note 53.

<sup>4</sup> *See, e.g.*, 2015-07-22 Volpe Tr. 58:20-59:13, Volpe Exh. 10 (MISO 2014 LOLE Study Report dated November 1, 2013 as referenced in the cited testimony).

The findings in this Remand Report are based on 17 days of investigative testimony from 11 Dynegy witnesses, Dynegy's narrative responses to data requests, and over 500,000 pages of documents produced by Dynegy and others, including Auction data.<sup>5</sup>

## **II. Summary of OE Staff's Findings**

### **A. MISO's Planning Resource Auctions (Auctions)**

As discussed in Section III, *infra*, MISO uses its Auctions to, among other things, acquire sufficient capacity to meet the Local Clearing Requirement (LCR) for each MISO Zone.<sup>6</sup> The LCR for a Zone consists of the minimum amount of capacity that must be physically located within such Zone, as opposed to imported into those Zones. In advance of each Auction, MISO determines the amount of capacity that must be acquired to meet the LCR for each Zone. It then uses the Auction to select the least-cost set of resources needed to meet each Zone's calculated LCR.

A resource can offer its capacity into the Auction at zero (*i.e.*, as a price taker) or at a higher, non-zero price. The marginal resource in each Zone that clears the Auction generally sets the clearing price for all other cleared capacity in the Zone for the upcoming Planning Year (PY).<sup>7</sup> A resource that offers its capacity at zero usually ensures that its capacity will clear in the Auction but subjects itself to taking whatever price clears the Zone. A resource that offers its capacity at a non-zero price has no guarantee that its capacity will clear in the Auction but ensures that it will receive at least the price it offered if its capacity does clear (*i.e.*, either the resource will become the marginal resource and its offer will set the price for the Zone or another resource that submits a higher offer will become the marginal resource and set the price for the Zone).

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<sup>5</sup> As required by Paragraph 18 of the June 2022 Order, OE staff's findings below are "based on the documents and materials collected by [OE staff]...during the non-public investigation that was closed." June 2022 Order, 179 FERC ¶ 61,185, at P 18. In preparing this Remand Report, OE staff did "not undertake any new discovery[.]" *Id.* This Remand Report is filed with an Appendix including the "cited materials on which [OE staff] relies from the material collected by staff during the now-closed investigation." *Id.* OE staff's findings set forth in this Remand Report rely upon OE staff's review and consideration of (1) all 17 days of Dynegy employee testimony and exhibits thereto (Appendix Items 1-578); (2) Dynegy's written responses to OE staff's data requests dated April 28, 2015, July 31, 2015, and April 29, 2016 and supplements thereto (Appendix Items 579-689); and (3) Appendix Items 690-704, including as cited below. Exhibit 1 hereto is an Index listing all Appendix Items.

<sup>6</sup> See *infra* notes 28-31.

<sup>7</sup> See *infra* note 32.

In the 2013/14, 2014/15, and 2015/16 Auctions, MISO's Zone 4 LCR requirements and clearing prices were as follows:

- **2013/14 Auction:** LCR - 5,231 MW; Clearing Price - \$1.05/MW-day.
- **2014/15 Auction:** LCR - 8,879 MW; Clearing Price - \$16.75/MW-day.
- **2015/16 Auction:** LCR - 8,852 MW; Clearing Price - \$150/MW-day.<sup>8</sup>

**B. Dynegy Significantly Increased Its Zone 4 Capacity in 2013 in Advance of the 2014/15 Auction**

As discussed in Section VI.A, *infra*, leading up to the 2013/14 Auction, Dynegy held 2,746 MW of the 14,000 MW of capacity in Zone 4 (or about 20% of total Zone 4 capacity that year).<sup>9</sup> Dynegy pursued a strategy of selling over 80% of this capacity in advance of the 2013/14 Auction.<sup>10</sup> Capacity that is sold in advance of the Auction is

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<sup>8</sup> See Complaint, Request for Refund Protection, and Request for Expedited Treatment by Southwestern Electric Cooperative, Inc., Docket No. EL15-72-000, filed May 29, 2015, Exhibit No. SWN-2 (Chiles), Attachment 1 (2013/2014 MISO Planning Resource Auction Results), Attachment 2 (2014/2015 MISO Planning Resource Auction (PRA)), Attachment 3 (MISO 2015/2016 Planning Resource Auction Results dated April 14, 2015).

<sup>9</sup> Joint Application For Authorization Under Section 203 Of The Federal Power Act And Request For Expedited Consideration, Docket No. EC13-93-000, filed April 16, 2013, at Exhibit JRS-1 - Affidavit of Julie R. Solomon at Confidential Workpaper "PRIV\_Capacity Market analysis.xlsx" (located at accession number 20130417-4004) and 2013 State of the Market Report for the MISO Electricity Markets, June 2014, at p. 7, Figure 8 (located at <https://www.potomaceconomics.com/wp-content/uploads/2017/02/2013-State-of-the-Market-Report.pdf>).

<sup>10</sup> 2016-02-03 Jones Tr. 18:17-25, Jones Exhs. 8 (black & white) and 9 (color) (DYN\_0009875 at DYN\_0009883) (MISO Capacity Update, CoalCo Asset Management Presentation to Bob Flexon dated February 5, 2013 introduced at cited testimony). Dynegy considered wholesale, bilateral, export, and retail as pre-Auction sales channels for its capacity. See, e.g., Answer of Dynegy Inc., Dynegy Marketing and Trade, LLC, and Illinois Power Marketing Company, filed in Docket Nos. EL15-70-000, EL15-71-000, and EL15-72-000, July 2, 2015, Exhibit A – Affidavit of Henry D. Jones at (public portions of) Section IV, Dynegy's Potential Channels for the Sale of Its Zone 4 Capacity. Based on OE staff's review of relevant market data, typically: (1) a wholesale sale is between a seller and buyer directly where the buyer is a utility or other generator; (2) a bilateral sale is the same but the sale is handled "over the counter" through a broker; (3) a retail sale involves a buyer who will not resell at wholesale—like an industrial company or municipality; and (4) an export is a sale outside of MISO into a nearby balancing area, such as PJM. *Id.*

generally offered by the purchaser into the Auction at a zero price to reduce the purchaser's exposure to the Auction clearing price.<sup>11</sup>

Dynegy's strategy of selling the majority of its Zone 4 capacity prior to Auctions changed in 2013 when it took steps to significantly increase its Zone 4 capacity in preparation for the 2014/15 Auction. On March 14, 2013, Dynegy agreed to acquire from Ameren Corporation generation facilities located in Zone 4 with a total capacity of 3,152 MW, as well as generation facilities located outside of, but adjacent to, Zone 4 with a total capacity of 1,241 MW (collectively, the Ameren Resources).<sup>12</sup> This acquisition, which Dynegy anticipated would close in December 2013, when combined with Dynegy's existing 2,746 MW in Zone 4, resulted in Dynegy holding—by Dynegy's consultant's February 13, 2014 calculations—approximately 50% of the total Zone 4 capacity for PY 2014/15.<sup>13</sup>

### **C. Dynegy Attempted Unsuccessfully to Set the Zone 4 2014/15 Auction Clearing Price**

As discussed in Section VI.A, *infra*, after acquiring the Ameren Resources, Dynegy changed its Zone 4 capacity market offering and sales strategy prior to the 2014/15 Auction. Dynegy did not set non-retail capacity sales targets for pre-Auction PY 2014/15 sales and decreased its non-retail sales of capacity, causing it to retain 67% of its total capacity on its books in advance of the 2014/15 Auction (compared with 39% in advance of the 2013/14 Auction).<sup>14</sup> As noted above, capacity that is sold in advance of the Auction is generally offered into the Auction at a zero price, so by cutting its capacity sales Dynegy

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<sup>11</sup> See, e.g., Answer of Dynegy Inc., Dynegy Marketing and Trade, LLC, and Illinois Power Marketing Company, filed in Docket Nos. EL15-70-000, EL15-71-000, and EL15-72-000, July 2, 2015, Exhibit B, Affidavit of Susan Pope at ¶ 10.

<sup>12</sup> See Joint Application For Authorization Under Section 203 Of The Federal Power Act And Request For Expedited Consideration, Docket No. EC13-93-000, filed April 16, 2013 at note 53.

<sup>13</sup> 2016-02-03 Jones Tr. 160:25-161:19, Jones Exh. 29 (DYN\_0186441 at DYN\_0186454) (Market Assessment MISO Capacity Construct Module E-1 dated February 13, 2014 prepared for Dynegy by CES as discussed at the cited testimony) (“With the addition of the Ameren merchant coal fleet, Dynegy owns roughly 50% of the resources in LRZ 4.”).

<sup>14</sup> See Dynegy's Supp. Response To Data Request No. 16 (DYN\_0542937) (Data Request No. 16: “For each Dynegy generating unit located in MISO Zone 4, produce each bilateral capacity contract relative to such unit and any documents regarding the same sufficient to identify quantities, prices, term or length of contract, buyers, the rationale for price terms, and the effective dates of the contract.”) (Appendix Item 657).

increased the amount of capacity that it could offer into the 2014/15 Auction at non-zero prices. Dynegy also hired a consulting firm to model in advance of the 2014/15 Auction the resources from which MISO would need to purchase capacity to meet the Zone 4 LCR and the estimated price at which the Zone 4 2014/15 Auction would clear. The firm's models estimated that MISO would need the capacity that Dynegy offered into the Auction at non-zero prices to meet the Zone 4 LCR and that a Dynegy resource offered into the Auction at \$117/MW-day would become the marginal resource.

Dynegy's change in strategy and the information gleaned from its consultant's model, positioned Dynegy to estimate that it would likely submit the marginal resource offer for the 2014/15 Auction, which would allow Dynegy to set the Zone 4 clearing price at a significantly higher level than the price at which Zone 4 cleared in the 2013/14 Auction. Indeed, Dynegy's Senior Director for Regulatory Affairs admitted this was Dynegy's intent, testifying that the goal of Dynegy's strategy with respect to the 2014/15 Auction was to have one of its non-zero priced resources set the clearing price.<sup>15</sup>

Despite Dynegy's estimates that MISO likely would have to acquire capacity Dynegy offered at non-zero prices to meet the Zone 4 LCR during the 2014/15 Auction, Dynegy's non-zero priced resources were not marginal. MISO ultimately was able to meet the LCR without using any of the capacity Dynegy offered at non-zero prices. The divergence between Dynegy's estimates and the actual outcome for the 2014/15 Auction was due to Dynegy's failure to account for how MISO would treat zero-priced capacity offered into the Auction by the Joppa Power Station (Joppa), a 974 MW coal plant located outside of, but adjacent to, Zone 4 that Dynegy had acquired with the Ameren Resources. Although Dynegy's consultant estimated that Joppa would be treated as an external resource, MISO treated Joppa as internal to Zone 4 for purposes of meeting the Zone 4 LCR. Because Joppa's capacity had been priced at zero, it displaced Dynegy's non-zero, higher-priced capacity that otherwise would have been needed as the marginal resource.

#### **D. Dynegy Successfully Manipulated the Zone 4 2015/16 Auction Clearing Price**

As discussed in Sections VI.B., *infra*, after failing to set the price in MISO's 2014/15 Auction due to MISO's treatment of Joppa's capacity as internal to Zone 4, Dynegy's senior management refined Dynegy's capacity offering strategy, referred to

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<sup>15</sup> 2015-07-22 Volpe Tr. 69:2-12 ("Q: To your knowledge has Dynegy ever pursued a strategy that was designed to set the clearing price in an auction, the MISO PRA for 2014-'15 or the MISO PRA for 2015-'16? A: To set the auction clearing price? Q: Yes. A: Yes. Q: So your understanding is that that has been a goal of Dynegy's in its bidding strategy for both 2014-'15 and '15-'16. Is that right? A: Yes.").

internally as the “Reference Level Strategy,”<sup>16</sup> in a manner that knowingly increased the likelihood that MISO would need non-zero priced capacity from Dynegy to clear Zone 4 at or near the Zone 4 reference level of \$155.79/MW-day.<sup>17</sup> As detailed below, Dynegy pursued this strategy by engaging in what OE staff found to be four manipulative steps that Dynegy intended to, or at minimum, knew would increase the likelihood that Dynegy capacity offered into the Auction at a non-zero price near the reference level<sup>18</sup> would become the marginal resource, setting the clearing price. Dynegy increased the amount of its Zone 4 non-zero priced capacity that it offered into the Auction from 2,914 MW in 2014/15 to 3,695 MW in 2015/16.<sup>19</sup>

As part of its strategy, Dynegy monitored and estimated several metrics associated with Zone 4 capacity, including: (1) how much capacity MISO would need to acquire to meet its Zone 4 LCR; (2) how much capacity was held by other entities and thus could be offered into the Auction at zero; (3) how much capacity was held by Dynegy but committed to bilateral, wholesale, or retail sales and thus would likely be offered into the Auction at zero; and (4) how much of Dynegy’s remaining capacity likely would be needed by MISO to meet the Zone 4 LCR and thus had to be kept under Dynegy’s control (thereby preventing other entities from offering it into the Auction at zero or Dynegy from having

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<sup>16</sup> See Brown Exh. 43 (DYN\_0010154) (Dynegy February 6, 2015 analysis referencing its “Z4 Reference Level Strategy”).

<sup>17</sup> See Complaint, Request for Refund Protection, and Request for Expedited Treatment by Southwestern Electric Cooperative, Inc., Docket No. EL15-72-000, filed May 29, 2015, Exhibit No. SWN-2 (Chiles), Attachment 3 (MISO 2015/2016 Planning Resource Auction Results dated April 14, 2015) at p. 7 (Zone 4 2015-2016 Reference Level = \$155.79/MW-Day).

<sup>18</sup> In MISO, reference levels are calculations performed by the Independent Market Monitor (IMM) intended to reflect units’ marginal costs. See, e.g., MISO Tariff, Definitions, Reference Level (effective Nov. 19, 2013). At the time of the 2015/16 Auction, MISO’s Tariff provided: “Reference Levels for Zonal Resource Credit Offers will be based on the estimated opportunity cost of exporting capacity to a neighboring region.” MISO Tariff, Module D, Market Monitoring and Mitigation Measures, 64.1.4 (effective Nov. 19, 2013).

<sup>19</sup> Answer of Dynegy Inc., Dynegy Marketing and Trade, LLC, and Illinois Power Marketing Company, filed in Docket Nos. EL15-70-000, EL15-71-000, and EL15-72-000, July 2, 2015, Exhibit A – Affidavit of Henry D. Jones at ¶ 27 (2410.6 MW (DMG) + 503.1 MW (IPH) = 2,913.7 non-zero offered Dynegy MW for 2014/15 Auction) and ¶ 32 (2,560.1 MW (DMG) + 1,135.1 MW (IPH) = 3,695.2 non-zero offered Dynegy MW for 2015/16 Auction). “DMG” refers to Dynegy’s historic MISO generation assets, while “IPH” refers to its acquired Ameren assets.

to offer it at zero because it had been sold prior to the Auction). Dynegy monitored and estimated these metrics using a spreadsheet it developed to analyze the 2015/16 Auction. It used the spreadsheet during internal presentations and discussions about its capacity market strategy.

Graphic 1, below, shows a slide (with OE staff's annotations in red) from a February 27, 2015 Dynegy presentation titled "MISO Auction Strategy PY 15-16"<sup>20</sup> that included calculations from the aforementioned spreadsheet:

*Graphic 1*

## Zone 4 Stack Analysis

|                                                   | Total Cap MW | Cumulative MW               |               |
|---------------------------------------------------|--------------|-----------------------------|---------------|
| FRAP                                              | 2936         | 2936                        |               |
| Rockland                                          | 632          | 3568                        |               |
| NRG                                               | 324          | 3892                        |               |
| Ameren Peakers                                    | 1599         | 5491                        |               |
| Clinton                                           | 971          | 6462                        |               |
| EEI                                               | 975          | 7436.5                      | Open EEI 346  |
| IPH                                               | 2573         | 10009.5                     | Open IPH 1036 |
| DMG                                               | 2678         | 12687.5                     | Open DMG 2510 |
| <b>Subtotal Dyn Z4</b>                            | <b>6226</b>  |                             |               |
| LCR Z4                                            | 9069         |                             |               |
| Non-DYN Generation MW                             | 6462         |                             |               |
| <b>Required Z4 Capacity</b>                       | <b>2607</b>  |                             |               |
| Bilateral                                         | 323          |                             |               |
| Exports                                           | 301          |                             |               |
| Wholesale                                         | 482          |                             |               |
| Retail                                            | 1228         |                             |               |
| <b>Total Committed DYN Sales (2/10 Plan)</b>      | <b>2334</b>  |                             |               |
| <b>Required Auction Z4 Capacity (ex: exports)</b> | <b>574</b>   |                             |               |
|                                                   |              | <b>Subtotal Dyn Open Z4</b> | <b>3892</b>   |

(1) MISO would need to acquire 9,069 MW of capacity to meet its LCR

(2) Other entities held 6,462 MW of capacity that could be offered at zero

(3) Dynegy had sold 2,033 MW of capacity (excluding exports) that would thus likely be offered at zero

(4) Of Dynegy's remaining, unsold 3,892 MW of capacity, MISO would need 574 MW to meet the Zone 4 LCR

- LOLE Study has already established the Local Clearing Requirement for Z4
- Dynegy has already committed sales of 2334 MW via bilateral channels
- System appears to need a minimum of 574MW of capacity from Dynegy to meet the Local Clearing Requirement out of the total 3892MW available

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In Graphic 1, Dynegy estimated that MISO needed to acquire 9,069 MW of capacity to meet the Zone 4 LCR. Dynegy then subtracted from that figure all LCR zero-priced capacity that Dynegy estimated could be offered into the Auction, including capacity held

<sup>20</sup> 2015-07-23 Brown Tr. 198:20-199:19, Brown Exh. 44 (DYN\_0009415 at DYN\_0009420) (Dynegy PowerPoint titled "MISO Auction Strategy PY 15-16" dated February 27, 2015 as discussed in the cited testimony). This testimony exhibit was shown at Exhibit 2, Preliminary Findings Slide 52.

by other entities (6,462 MW) and capacity that Dynegy had already sold (2,033 MW). After accounting for these subtractions, Dynegy estimated that as of the date of the presentation, MISO would need to acquire 574 MW of Dynegy's unsold capacity in the Auction to meet the Zone 4 LCR.

Internally, Dynegy referred to this 574 MW figure as the “gap”—the estimated quantity of non-zero priced Dynegy capacity that MISO likely would need to clear Zone 4.<sup>21</sup> Dynegy's analysis showed that, to set the Zone 4 clearing price, it had to maintain a sufficient gap in the months leading up to the 2015/16 Auction through a combination of: (1) purchasing capacity to decrease the amount of Zone 4 capacity held by other entities, allowing Dynegy to offer that capacity into the Auction at non-zero prices; and/or (2) taking steps to retain control over its existing, unsold capacity so that it could offer that capacity into the Auction at non-zero prices. The evidence indicates that Dynegy ultimately pursued both strategies. Beginning in January 2015, Dynegy took at least four steps prior to the 2015/16 Auction to obtain and maintain what Dynegy estimated to be a sufficient gap to ensure it set the clearing price. Importantly, each of these steps alone was uneconomic *but for* Dynegy's knowledge that these actions would, individually and in combination, increase the likelihood that MISO would need a Dynegy non-zero priced capacity offer to meet the Zone 4 LCR and clear the Auction:

**Step 1.** On January 27, 2015, Dynegy purchased **50 MW** of capacity bilaterally for \$61/MW-day, or about four times the clearing price of the 2014/15 Auction, despite Dynegy being the largest supplier in Zone 4 with close to 3,900 MW of unsold capacity on its books.<sup>22</sup>

**Step 2.** On February 27, 2015, Dynegy increased by 2½ times the price of the capacity offered by its retail group, driving down retail sales and resulting in at least **125.4 MW** of lost capacity sales that Dynegy attributed to that price increase.<sup>23</sup>

**Step 3.** In early March 2015, Dynegy refused to offer **300 MW** of capacity at any price, in response to a wholesale customer's request.<sup>24</sup>

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<sup>21</sup> Dynegy monitored and estimated the size of the “gap” over time. *See, e.g.*, 2016-10-26 Jones Tr. 572:7-18.

<sup>22</sup> *See infra* Section VI.B.3.

<sup>23</sup> *See infra* Section VI.B.4.

<sup>24</sup> *See infra* Section VI.B.5.

**Step 4.** On or about March 17, 2015, Dynegy refused to offer **85 MW** of capacity on anything but a “pass through” basis,<sup>25</sup> in response to a customer request. Any capacity purchased on a “pass through” basis would allow Dynegy to offer the capacity into the Auction at non-zero prices.<sup>26</sup>

Collectively, these four steps enabled Dynegy to knowingly obtain, or retain, control over at least **560.4 MW** of capacity that might otherwise have been offered into the Auction at a zero price if it had been held by, or sold to, other entities. These four steps together enabled Dynegy to set the 2015/16 Auction clearing price for Zone 4 at \$150/MW-Day. In the Auction, Dynegy cleared **553 MW** of non-zero priced capacity and was paid \$150/MW-Day on each of the **553 MW** cleared. But for these four steps, taken by Dynegy with the knowledge that each step would increase or preserve Dynegy’s ability to offer non-zero priced capacity, an additional **560.4 MW** of zero priced capacity may have been offered into the Auction, displacing Dynegy’s non-zero priced capacity and resulting in a significantly lower Zone 4 clearing price. OE staff estimated that price would have been about \$50/MW-Day.<sup>27</sup>

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<sup>25</sup> A pass through contract is a sale that Dynegy makes to a customer in which the customer agrees to pay the prevailing cost of capacity that Dynegy would pass through. The advantage to Dynegy is a pass through contract does not require Dynegy to reserve capacity that Dynegy would offer at a zero price into the Auction. *See* 2016-02-03 Jones Tr. 240:2-17 (“Q: Okay. So for purposes of bidding into the auction to cover its retail load, Dynegy ignores the megawatts for retail obligations that have the pass-through provision in their contract; is that right? A: Let me think about that for just a minute. I believe we exclude the pass-through capacity sales in the context of self-scheduling generation against it because the retail business doesn’t have exposure to the auction because it’s being passed through to the customer. Q: At least the pass-through contracts don’t have exposure? A: That’s what I meant to say. So that would be excluded from the calculation -- I believe it would be excluded from the calculation when we contemplate scenarios where we self-schedule or offer in at a price of zero commensurate with our customer load.”).

<sup>26</sup> *See infra* Section VI.B.6.

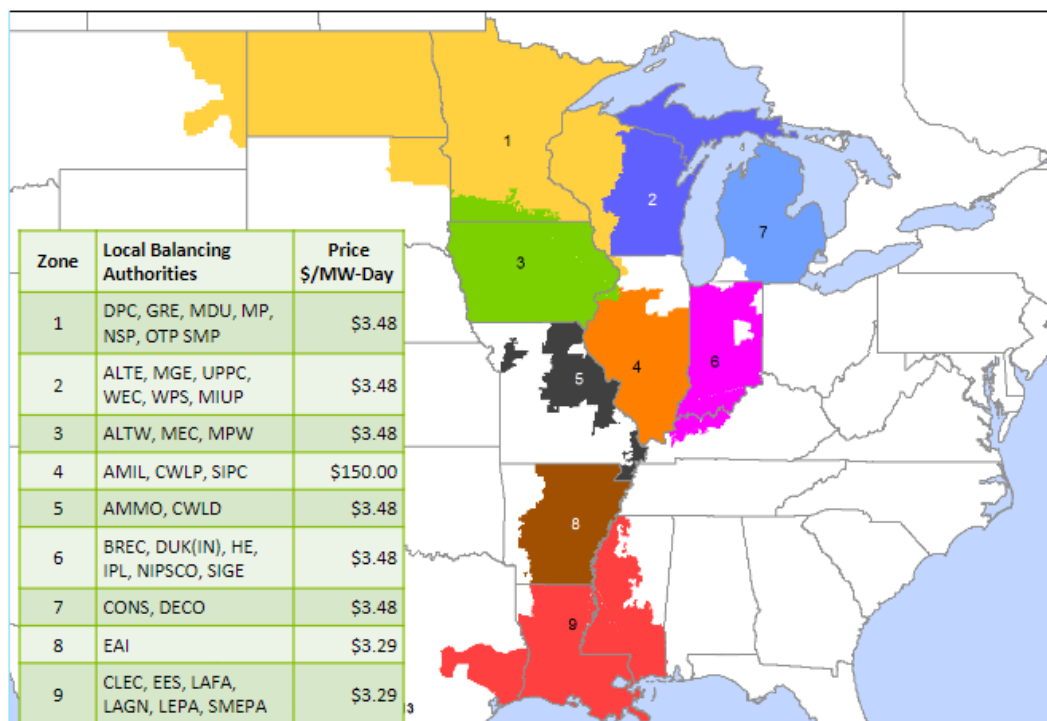
<sup>27</sup> *See infra* Section VIII.

### III. Background

As noted in the June 2022 Order, the MISO Tariff requires Load Serving Entities (LSE) in a Zone to each procure sufficient Planning Resources to meet their respective annual Planning Reserve Margin Requirements (PRMR) so that, in aggregate, the Zone meets the zonal PRMR.<sup>28</sup>

During the 2015/16 Auction, MISO was broken into 9 Zones as shown in Graphic 2.<sup>29</sup>

**Graphic 2**



An LSE can satisfy its MISO PRMR in any of four ways: (1) submit a Fixed Resource Adequacy Plan (FRAP) which demonstrates that it has designated capacity to meet all or a portion of its PRMR; (2) self-schedule capacity and offer it into the Auction at a zero price; (3) purchase required capacity in MISO's voluntary Auction; and/or (4) pay

<sup>28</sup> June 2022 Order, 179 FERC ¶ 61,185, at P 3 (*citing* MISO, FERC Electric Tariff, Module E-1, §§ 68A.7 (32.0.0), 69A.7.1 (44.0.0)).

<sup>29</sup> See Answer of Midcontinent Independent System Operator, Inc., filed in Docket Nos. EL15-71-000 and EL15-72-000, July 2, 2015, at Exhibit 1.

MISO the Capacity Deficiency Charge (CDC).<sup>30</sup> Prior to the Auction, MISO determines the amount of capacity that must be acquired to meet forecasted load for each Zone, establishes Capacity Import Limits (CIL) and Capacity Export Limits (CEL) for each Zone, and establishes an LCR for each Zone, which is the minimum amount of procured capacity that must be physically located within the Zone (rather than imported).<sup>31</sup>

The MISO Auction selects the least-cost set of Planning Resources needed to meet each Zone's PRMR, while respecting local and sub-regional transmission constraints, and establishes the Auction Clearing Price for each Zone for the upcoming PY.<sup>32</sup> If none of the transmission constraints binds, the marginal resource that clears the Auction will set the Auction Clearing Price for all other capacity in the region.<sup>33</sup> If a constraint binds, the marginal resource in that constrained Zone or sub-region will set the Auction Clearing Price for all other capacity in the Zone or sub-region and the marginal resource in the unconstrained Zones or sub-regions will set the Auction Clearing Price for the remainder of the region.<sup>34</sup> If there is an insufficient amount of capacity to meet the requirements of a Zone, sub-region, or the entire region, the Auction Clearing Price will equal the Cost of New Entry (CONE) for that Zone, sub-region, or the entire region.<sup>35</sup>

MISO's 2013/14 Auction cleared at \$1.05/MW-day for each Zone and the 2014/15 Auction cleared no higher than \$16.75/MW-day for each Zone. In the 2015/16 Auction held in April 2015, substantial price separation occurred between Zone 4 and the rest of MISO: Zones 1 through 3 and 5 through 7 cleared at \$3.48/MW-day; Zones 8 and 9 cleared at \$3.29/MW-day; whereas Zone 4 cleared at \$150/MW-day—almost 9 times higher than the 2014/15 Auction.<sup>36</sup> In Zone 4, the PRMR was 10,420 MW and the calculated LCR was 8,852 MW.<sup>37</sup> In meeting the LCR, FRAP totaled 838 MW, and 8,014 MW cleared.

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<sup>30</sup> June 2022 Order, 179 FERC ¶ 61,185, at P 3 (*citing* MISO, FERC Electric Tariff, Module E-1, § 69A (35.0.)).

<sup>31</sup> *Id.* (*citing* MISO, FERC Electric Tariff, Module E-1, § 1.L (45.0.0)).

<sup>32</sup> *Id.* P 4 (*citing* MISO, FERC Electric Tariff, Module E-1, § 69A.7.1 (44.0.0)).

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

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

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

<sup>36</sup> *Id.* P 5.

<sup>37</sup> *Id.*

The remaining 1,568 MW needed to satisfy Zone 4's PRMR was met with capacity imported from other Zones.<sup>38</sup>

#### **IV. OE Staff's Investigation**

In April 2015, OE staff began a non-public, preliminary investigation of Dynegy's conduct leading up to and through MISO's 2015/16 Auction, which focused on whether Dynegy engaged in market manipulation. The Commission converted OE staff's preliminary investigation into a formal investigation with subpoena power in an October 1, 2015 Order.<sup>39</sup>

OE staff's investigation included receipt and review of documents and other written materials from Dynegy, MISO, Potomac Economics Ltd., Illinois Power Agency (IPA), Southwestern Electric Cooperative, Inc. (SWECI), ICAP Energy LLC (ICAP), Customized Energy Solutions Ltd. (CES), American Electric Power Company, Inc. (AEP), Tenaska Inc. (Tenaska), and Kestler Energy Consulting, LLC (KEC).

During the investigation, OE staff also took sworn investigative testimony from the following Dynegy employees:

- 1) Dennis Beutler – Managing Director, Wholesale Origination;<sup>40</sup>
- 2) Shannon Brown – Vice President, Coal Asset Management;<sup>41</sup>
- 3) Christopher Cotrone – Senior Director, Asset Management;<sup>42</sup>
- 4) Mark Fanning – Managing Director, Retail Business Operations;<sup>43</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Investigation into MISO Zone 4 Planning Resource Auction Market Participant Offers*, 153 FERC ¶ 61,005 (2015) (Order Authorizing Formal Investigation).

<sup>40</sup> 2015-07-21 Beutler Tr. 50:20-24.

<sup>41</sup> 2015-07-23 Brown Tr. 17:11-21 and Brown Exh. 2 (2015-06-04 LinkedIn Bio).

<sup>42</sup> 2016-01-27 Cotrone Tr. 12:17-19, 26:19-24 and Cotrone Exh. 5 (2015-06-04 LinkedIn Bio).

<sup>43</sup> 2016-09-29 Fanning Tr. 6:5-7, 12:13-21 and Fanning Exh. 1 (2016-09-27 LinkedIn Bio).

- 5) Henry “Hank” Jones – Executive Vice President & Chief Commercial Officer;<sup>44</sup>
- 6) Michael Kirshner – Vice President, Commercial Analysis;<sup>45</sup>
- 7) Mathew Parker – Chief Risk Officer;<sup>46</sup>
- 8) Sheree Petrone – Executive Vice President, Retail;<sup>47</sup>
- 9) Christopher Sill – Managing Director, Retail Sales;<sup>48</sup>
- 10) Rudy Tolentino – Manager, Strategic Market Analytics;<sup>49</sup> and
- 11) Mark Volpe – Senior Director, Regulatory Affairs.<sup>50</sup>

On July 12, 2017, consistent with OE’s investigative process, OE staff provided preliminary findings to Dynegy orally and in writing, communicating its view that Dynegy had engaged in market manipulation.<sup>51</sup> As of that date, OE staff had reviewed over 500,000 pages of documents produced by Dynegy and taken 17 days of testimony from 11 witnesses.<sup>52</sup> OE staff informed Dynegy that it had acquired all relevant facts to fairly

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<sup>44</sup> 2016-02-03 Jones Tr. 15:24-16:3 and Jones Exh. 5 (2015-06-04 LinkedIn Bio).

<sup>45</sup> 2016-10-04 Kirshner Tr. 6:17-19, 24:20-25:6 and Kirshner Exh. 1 (2016-09-29 LinkedIn Bio).

<sup>46</sup> 2016-10-05 Parker Tr. 11:7-21, 20:21-23 and Parker Exh. 1 (2016-09-29 LinkedIn Bio).

<sup>47</sup> 2016-02-23 Petrone Tr. 21:13-20 and Petrone Exh. 6 (2015-06-04 Dynegy Website Bio).

<sup>48</sup> 2016-09-28 Sill Tr. 6:19-21, 14:20-15:4 and Sill Exh. 1 (2016-09-27 LinkedIn Bio).

<sup>49</sup> 2016-02-25 Tolentino Tr. 26:21-27:19 and Tolentino Exh. 4 (2016-02-17 LinkedIn Bio).

<sup>50</sup> 2015-07-22 Volpe Tr. 13:9-18 and Volpe Exh. 2 (2015-06-04 LinkedIn Bio).

<sup>51</sup> PowerPoint titled “Dynegy Investigation, Presented to Dynegy on July 12, 2017.” (Appendix Item 690, Exhibit 2 hereto).

<sup>52</sup> Dynegy had the opportunity to cross-examine witnesses during the 17 days of testimony, and used such opportunity in two instances and expressly declined such opportunity on six occasions.

support a decision on whether to pursue a market manipulation claim against Dynegy.<sup>53</sup> Among other things, OE staff's preliminary findings included a timeline which identified all key events in summary form.<sup>54</sup> Subsequently, OE staff and Dynegy, and later, Vistra, communicated about OE staff's preliminary findings. Together, Dynegy and Vistra provided two formal responses: (1) a 129-slide presentation from Dynegy's counsel on October 10, 2017;<sup>55</sup> and (2) a 32-slide presentation from Vistra's counsel on November 16, 2018.<sup>56</sup> Neither response persuaded OE staff to alter its preliminary conclusion that Dynegy's four steps, as described in the preliminary findings and below, constituted market manipulation.

## **V. OE Staff's Compliance With Commission's Order Relative to Confidentiality**

As directed by Paragraph 20 of the June 2022 Order, on June 20, 2022, OE staff provided notice to eleven entities<sup>57</sup> that information, including privileged or confidential information, produced by such entities to OE during OE's now-closed investigation into whether market manipulation occurred during the MISO 2015/16 Auction may be publicly

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<sup>53</sup> As required by the Commission's Policy Statement on Disclosure of Exculpatory Materials, OE staff scrutinized materials it received from sources other than Dynegy for material that would be required to be disclosed under *Brady v. Maryland*, 373 U.S. 83, 88 (1963). *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,248, at P 9 (2009). OE staff identified no such materials or information.

<sup>54</sup> Exhibit 2, Preliminary Findings Slide 13.

<sup>55</sup> PowerPoint titled "Dynegy Inc., Docket No. IN15-10-000 Response to the Preliminary Findings of FERC's Office of Enforcement Staff," October 11, 2017. (Appendix Item 691, Exhibit 3 hereto.)

<sup>56</sup> PowerPoint titled "Summary of Legal and Policy Findings from Internal Review Regarding Dynegy's Offer Behavior in the MISO Planning Year 2016-2016 Planning Resource Auction, Prepared for FERC Office of Enforcement," November 16, 2018. (Appendix Item 692, Exhibit 4 hereto). Notably, this PowerPoint, at Slides 5 and 6, states that it reflects "Vistra's Response" and, at footnote 1, states "[t]his response supplements, but does not replace Dynegy's October 11, 2017 presentation." On April 9, 2018, Vistra Energy Corp. (Vistra) merged with Dynegy Inc. (Dynegy) with Vistra being the surviving entity. (See <https://hub.vistracorp.com/wp-content/uploads/2018/04/Vistra-Dynegy-Merger-Close-News-Release-4-9-18-FINAL.pdf> and Exhibit 4, Vistra Response at Slide 32.)

<sup>57</sup> The entities notified were: (1) AEP, (2) CES, (3) ICAP, (4) Tenaska, (5) KEC, (6) IPA, (7) SWEI, (8) MISO, (9) Potomac Economics Ltd., (10) Dynegy, and (11) Vistra.

disclosed under the procedures adopted in the June 2022 Order. Each such notice included, as an enclosure, a copy of the Commission’s June 2022 Order.

On June 29, 2022—less than 14 days after the Commission issued the June 2022 Order—OE staff called counsel for Dynegy and Vistra to alert counsel that OE staff anticipated, at a minimum, it would append to the Remand Report all testimony transcripts, and all exhibits thereto,<sup>58</sup> and three PowerPoint presentations exchanged among OE staff, Dynegy, and Vistra prior to December 2018.

As further directed by Paragraph 20 of the June 2022 Order, on July 27 or July 28, 2022—less than 45 days after the Commission issued the June 2022 Order—OE staff provided a second notice to six entities<sup>59</sup> that the information identified in the second notice previously produced by such entity to OE during OE’s now-closed investigation would be relied on and appended to the Remand Report. On August 9, 2022, OE staff provided such second notice to one additional entity.<sup>60</sup>

Subsequently, Dynegy, Vistra, and CES notified OE staff that they maintained their original confidentiality and privilege designations.<sup>61</sup> KEC notified OE staff that it no longer sought to continue confidential or privileged treatment. IPA notified OE staff that it does not claim—and has never claimed—privilege or confidentiality over the information listed in OE staff’s second notice to IPA. MISO notified OE staff that it did not appear that MISO originally submitted the information listed in OE staff’s second notice under a claim of privilege or confidentiality, and MISO did not intend to request that OE staff now treat this information as privileged or confidential. Lastly, ICAP emailed OE staff that it is not seeking continued confidential/privileged treatment over the information ICAP produced as listed in OE staff’s notification.

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<sup>58</sup> Dynegy has had possession of all such testimony and exhibits since OE staff’s investigation, as all investigative testimony is from Dynegy employees.

<sup>59</sup> The entities to which OE staff provided a second notice on July 27 or July 28, 2022 were: (1) ICAP, (2) KEC, (3) IPA, (4) MISO, (5) Dynegy, and (6) Vistra.

<sup>60</sup> The entity to which OE staff provided a second notice on August 9, 2022 was CES.

<sup>61</sup> Appendix Item 702 – (August 4, 2022 Dynegy letter to OE staff indicating that Dynegy “maintain[s] its original confidentiality and privilege designations.”); Appendix Item 703 – (August 17, 2022 CES letter to staff including that CES’s identified information “continue to be treated as privileged or confidential.”); Appendix Item 704 – (September 1, 2022 email from Dynegy and Vistra counsel confirming that Dynegy’s August 4, 2022 letter applied to Vistra’s November 16, 2018 PowerPoint to staff).

As directed by Paragraph 21 of the June 2022 Order, in preparing the redacted version of this Remand Report, including Appendix Items accompanying the Remand Report, OE staff adopted Dynegy's, Vistra's, and CES's privilege and confidentiality claims with regard to their information.<sup>62</sup> On September 8, 2022, in response to an OE staff request, Dynegy agreed that the identity of the witnesses from whom OE staff took sworn testimony (all of whom were Dynegy employees) need not be redacted. Staff filed the unredacted (non-public) and redacted (public) versions of the Remand Report, including Appendix Items, in a manner consistent with section 388.112(b)(1).

## **VI. Evidence From OE Staff's Investigation Presented in Chronological Order**

### **A. Dynegy's Behavior Leading Up to the 2014/15 Auction**

Section VI.B of this Remand Report describes some of the evidence supporting OE staff's finding that Dynegy knowingly engaged in a manipulative scheme to set the clearing price for Zone 4 in the 2015/16 Auction. This Section VI.A describes Dynegy's early behavior that further supports OE staff's findings about Dynegy's scienter and motives relative to its scheme to manipulate the 2015/16 Auction. Dynegy's early behavior included its: (1) acquisition of the Ameren Resources in 2013, which increased its market share in Zone 4; (2) strategy of reducing non-retail capacity sales during the periods before the 2014/15 and 2015/16 Auctions; (3) growing awareness that reducing its non-retail capacity sales prior to the Auction would increase the likelihood that MISO would need its non-zero priced capacity to clear Zone 4; (4) strategy to set the clearing price for the 2014/15 Auction; (5) modeling of the 2014/15 Auction clearing price; (6) ultimate inability to set the clearing price due to its failure to account for Joppa's capacity in relation to the Zone 4 LCR; and (7) efforts to prevent a proposed combination of Zones 4 and 5 ahead of the 2015/16 Auction.

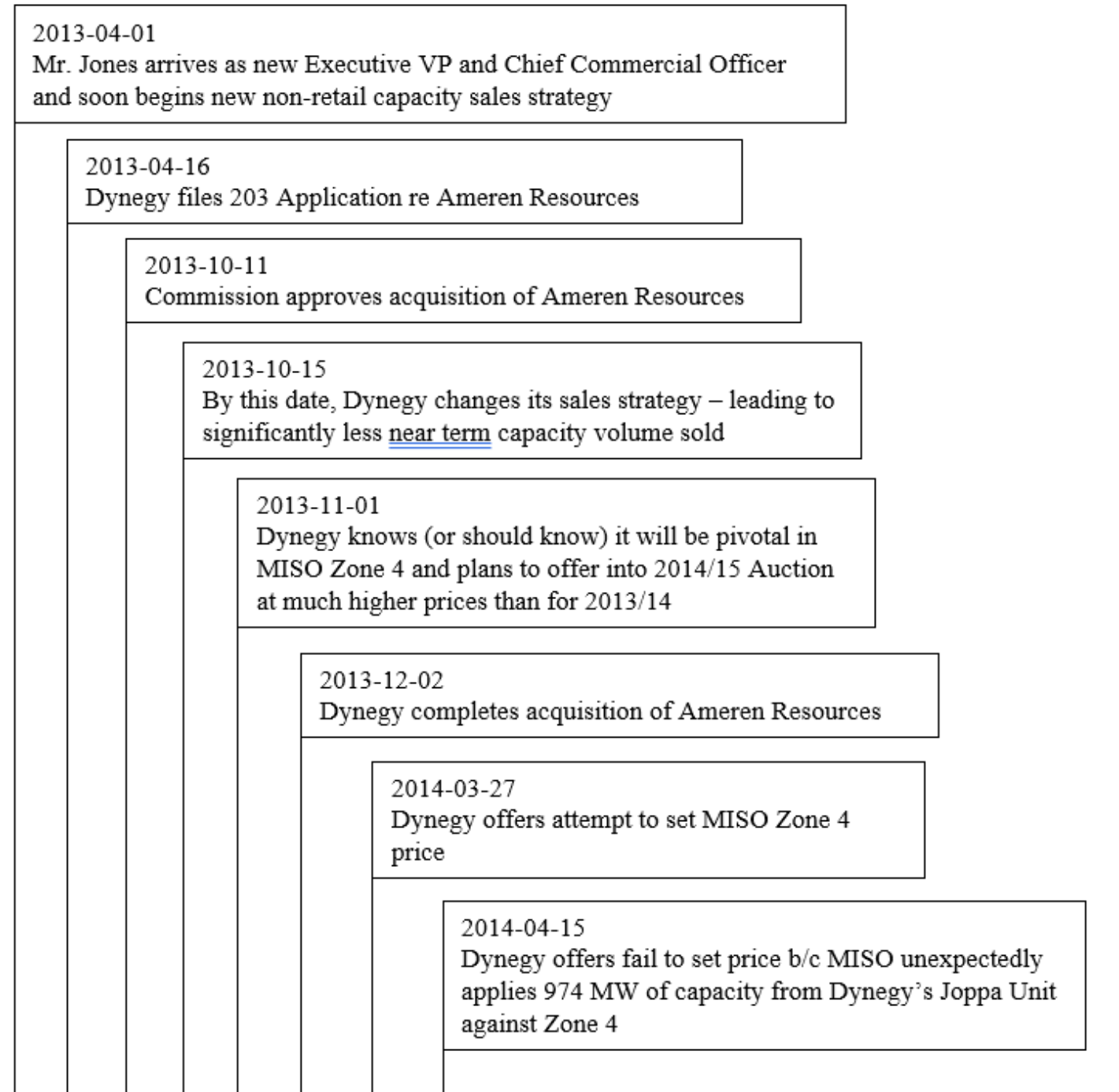
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<sup>62</sup> OE staff adopted such claims as to these entities' information such that redactions are based solely and directly on such claims by Dynegy, Vistra, and CES. OE staff believes that claims of confidentiality or privilege asserted by Dynegy, Vistra, and CES should be based on the information itself, and is not dependent upon how such information is used in the Remand Report or any Appendix Item thereto.

## 1. Timeline of Conduct Leading Up to the 2014/15 Auction

### *Timeline 1*



## **2. The 2013 Ameren Resources Acquisition Increased Dynegy's Market Share Within MISO and Zone 4**

On March 14, 2013, Dynegy entered an agreement to acquire the Ameren Resources.<sup>63</sup> As of March 2013, Dynegy owned or controlled 2,746 MW in MISO Zone 4.<sup>64</sup> Through the acquisition of the Ameren Resources, Dynegy acquired an additional 3,152 MW in MISO Zone 4 plus 1,241 MW of capacity relative to the Joppa facility located adjacent to MISO Zone 4.<sup>65</sup>

In December 2012, months before Dynegy agreed to acquire the Ameren Resources, Mr. Tolentino, a Dynegy Manager of Strategic Market Analytics, raised the point at Dynegy that the acquisition could create market power concerns in MISO, particularly in Zone 4.<sup>66</sup> He wrote in an email to others at Dynegy, "Market Power – How would we address market power concerns?"<sup>67</sup> Mr. Tolentino's email, along with his testimony about the email, demonstrate that he and others at Dynegy were aware of potential Zone 4 market power concerns prior to the Ameren Resources acquisition.

## **3. Dynegy Began Changing Its Approach to the Marketing of Its Capacity in Anticipation of Its Ameren Resources Acquisition and Shortly After Hiring a New Chief Commercial Officer**

Before the acquisition of the Ameren Resources and leading up to the 2013/14 Auction, Dynegy's capacity marketing behavior did not appear to focus on how Dynegy's

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<sup>63</sup> Joint Application For Authorization Under Section 203 Of The Federal Power Act And Request For Expedited Consideration, Docket No. EC13-93-000, filed April 16, 2013, at p. 15.

<sup>64</sup> *Id.* at Exhibit JRS-1 – Affidavit of Julie R. Solomon at Confidential Workpaper "PRIV\_Capacity Market analysis.xlsx" (located at accession number 20130417-4004).

<sup>65</sup> *See id.* at note 53.

<sup>66</sup> *See* Exhibit 2, Preliminary Findings Slide 15.

<sup>67</sup> Tolentino Exh. 15 (DYN\_0062683); *see also* 2016-03-22 Tolentino Tr. 345:1-15 ("Q: And when you were thinking about market power, what was the area in which you were concerned about market power? A: Well, both overall, you know, MISO-wide and, you know, also, you know, in Illinois as well. Q: Okay. And in -- when you say "Illinois," is it fair to say that that concern was relative to the Zone 4 area? A: Yes. Q: Okay. So your market power concern is kind of at two levels. One is, is there a market power issue across the whole MISO footprint, and is there a market power issue relative to Zone 4. Was that your concern at that time? A: Yes.").

relative market share would affect Auction clearing prices for MISO Zone 4. As reflected in a February 5, 2013 internal Dynegy presentation to its Chief Executive Officer,<sup>68</sup> prior to the 2013/14 Auction, Dynegy had pursued a strategy of selling over 80% of its MISO Zone 4 capacity in advance of the 2013/14 Auction.<sup>69</sup> Moreover, as shown in a February 14, 2013 internal Dynegy strategy document,<sup>70</sup> Dynegy's MISO capacity sales strategy prior to the 2013/14 Auction had been to "have half of the available capacity sold six months prior to a planning year" and to have the remaining capacity reserved for "MISO and IPA auctions as well as bilateral sales *leading up* to auctions."<sup>71</sup>

On April 1, 2013, Henry Jones became Dynegy's new Executive Vice President and Chief Commercial Officer. Under Mr. Jones' management, Dynegy changed its strategy for marketing its capacity in MISO. One feature of the new capacity marketing strategy was that Dynegy no longer set any particular sales targets prior to the 2014/15 Auction. Mr. Jones testified as follows:

Q: So it's fair to say that after you joined Dynegy, Dynegy did not -- rolling toward the '14-'15 PRA, it did not seek to have half the available capacity sold for planning year '14-'15 prior to the '14-'15 auction; is that right?

A: That's right.

Q: Did Dynegy have any particular target as to how much capacity it would attempt to sell prior to the '14-'15 auction?

A: I don't recall a volumetric target for capacity sales.<sup>72</sup>

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<sup>68</sup> Exhibit 2, Preliminary Findings Slide 16.

<sup>69</sup> 2016-02-03 Jones Tr. 18:17-25, Jones Exhs. 8 (black & white) and 9 (color) (DYN\_0009875 at DYN\_0009883) (MISO Capacity Update, CoalCo Asset Management Presentation to Bob Flexon dated February 5, 2013 introduced at cited testimony).

<sup>70</sup> Exhibit 2, Preliminary Findings Slide 17 (at left).

<sup>71</sup> 2016-02-03 Jones Tr. 21:6-23:3 (emphasis added), Jones Exh. 10 (DYN\_0006240) (February 14, 2013 email attaching Dynegy Strategy document discussed at cited testimony).

<sup>72</sup> 2016-02-03 Jones Tr. 23:7-17, Jones Exh. 10 (DYN\_0006240) (February 14, 2013 email attaching Dynegy Strategy document discussed at cited testimony). Staff found no evidence of any volumetric capacity sales target for pre-2014/15 Auction sales.

Although he did not set any particular goal for PY 2014/15 capacity sales prior to the 2014/15 Auction, in October 2013, Mr. Jones established a Strategic Plan that set a capacity sales goal for 2016 through 2020 of selling 500 MW—less than half the amount of capacity that Dynegy had sold prior to the 2013/14 Auction. Mr. Jones testified as follows regarding an October 15, 2013 slide from Dynegy’s 2014-2018 Strategic Plan:

Q: ...For the '13-'14 year, we had seen that the sales had been in excess of 1500 megawatts; right?

A: I don’t recall if it was in excess. But it was in that neighborhood of 14- to 1600. I don’t remember the number exactly.

Q: Right. It was well over a thousand; right?

A: Yes.

Q: And that was just for planning year '13-'14; right?

A: Yes.

Q: So now you were setting a goal for the '16 to 2020 time frame that was less than half of what the company had done for the planning year '13-'14; correct?

A: It’s less than half the volume, but it’s over a multiyear term. I’m trying to set goals here that are challenging but achievable.<sup>73</sup>

Dynegy’s non-retail capacity sales declined under Mr. Jones’ new strategy during the pre-2014/15 Auction and pre-2015/16 Auction periods.<sup>74</sup> The substantial sales decline from 2013/14 through 2015/16 is shown in Graphic 3 prepared by OE staff using Dynegy

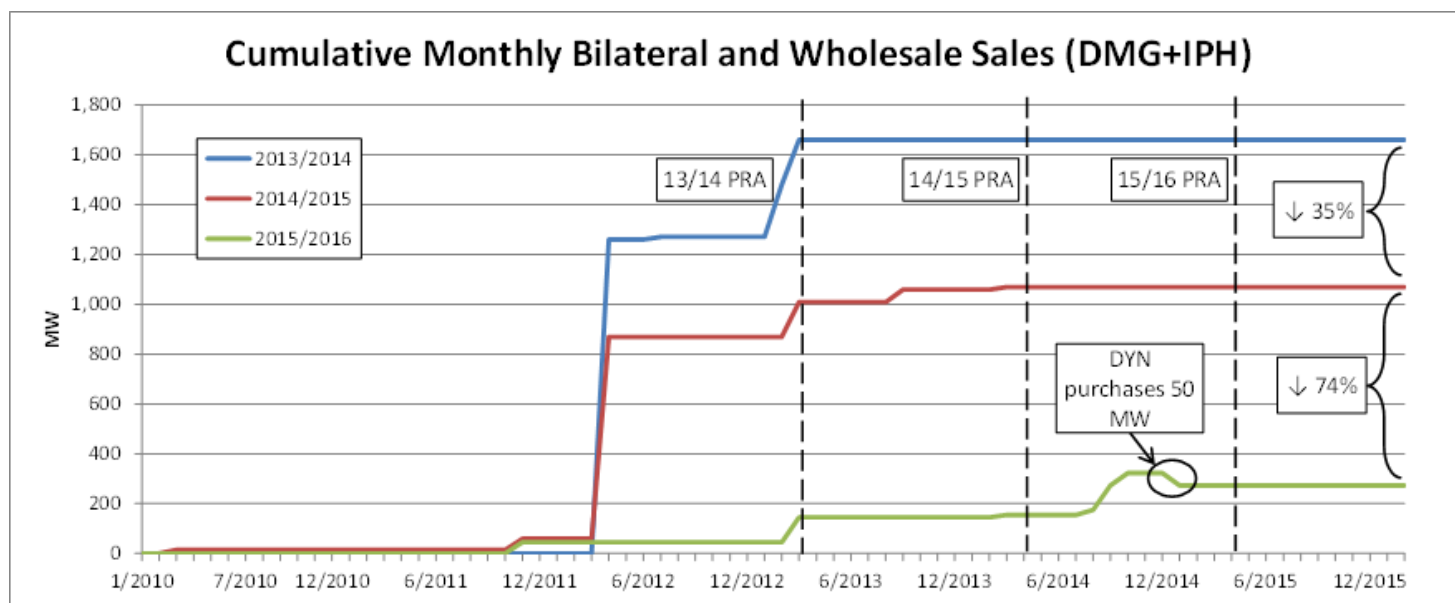
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<sup>73</sup> 2016-02-03 Jones Tr. 76:5-21, Jones Exh. 16 (DYN\_0005439 at DYN\_0005467) (PowerPoint titled Dynegy, 2014-2018 Strategic Plan, October 15 – 16, 2013 discussed at the cited testimony).

<sup>74</sup> A chart prepared by OE staff using Dynegy’s data for DMG (its historic MISO generating assets) and IPH (the acquired Ameren Resources), as shown in Exhibit 2, Preliminary Findings Slide 18, demonstrates that Mr. Jones’ sales strategy led to declines from previous levels. In this chart, OE staff uses the term “% OPEN” to indicate capacity available to offer into the relevant upcoming Auction. Dynegy referred to its historic MISO generating assets as “DMG” and its MISO generating assets acquired from Ameren as “IPH.” *See, e.g.*, 2015-07-21 Beutler Tr. 70:6-71:7.

data.<sup>75</sup> This chart shows that Dynegy sold 35% less capacity through non-retail sales prior to the Auction in 2014/15 than it had in 2013/14, and 74% less capacity through non-retail sales prior to the Auction in 2015/16 than it had in 2014/15.

**Graphic 3**



#### **4. Dynegy Was Aware That Its Capacity Market Share in Zone 4 Was Increasing and That Fewer 2014/15 Advance Capacity Sales Would Increase the Likelihood of MISO Accepting a Non-Zero Priced Capacity Offer**

On April 16, 2013, Dynegy submitted to the Commission an application pursuant to sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)<sup>76</sup> (203 Application) seeking a Commission order permitting Dynegy to acquire the Ameren Resources, which had 3,152 MW of capacity in MISO and 1,241 MW of capacity in the nearby Electric Energy, Inc. (EEI or EEInc.) balancing authority area.<sup>77</sup> As part of its application, Dynegy submitted a forward-looking, competitive analysis screen using the delivered price test

<sup>75</sup> In particular, OE staff used the Dynegy data set forth in Jones Exh. 67 (DYN\_0542937) (Dynegy's Supp. Response To Data Request No. 16) (Appendix Item 657). Graphic 3 is included at Exhibit 1, Preliminary Findings Slide 19.

<sup>76</sup> 16 U.S.C. § 824b.

<sup>77</sup> See Joint Application For Authorization Under Section 203 Of The Federal Power Act And Request For Expedited Consideration, Docket No. EC13-93-000, filed April 16, 2013, at note 53.

framework for the MISO market, along with other analyses.<sup>78</sup> As directed by the Commission on July 26, 2013, Dynegy subsequently, on August 5, 2013, filed a revised simultaneous transmission import limit (SIL) study for the MISO market. Dynegy's analyses showed no violations of the Commission's market power screens in the MISO geographic market for any load/season under various assumptions.<sup>79</sup> Dynegy contended that the generation assets it was acquiring would be unlikely to allow Dynegy to exercise a profitable withholding strategy.<sup>80</sup>

Separate from its 203 Application and as part of an internal analysis, Dynegy's consultant, CES, ultimately found that the acquisition of this additional Ameren capacity resulted in Dynegy holding approximately 50% of the total Zone 4 capacity for PY 2014/15.<sup>81</sup>

After Dynegy submitted its 203 Application, an August 9, 2013 Dynegy internal analysis<sup>82</sup> showed that fewer PY 2014/15 capacity sales—referred to as “ZRC transactions” or “ZRCs”<sup>83</sup>—in advance of the MISO Auction for 2014/15 would increase the likelihood that MISO would need to accept non-zero priced capacity offers to clear Zone 4.<sup>84</sup>

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<sup>78</sup> *Ameren Energy Generating Co.*, 145 FERC ¶ 61,034, at P 38 (2013) (Order Authorizing Disposition of Jurisdictional Facilities and Acquisition of Securities).

<sup>79</sup> *See id.* P 22; *see also* Applicants' Response to the July 26 Information Request, Docket No. EC13-93-000, at Ex. 3 (filed Aug. 5, 2013).

<sup>80</sup> Joint Application for Authorization Under Section 203 of the Federal Power Act and Request for Expedited Consideration, Docket No. EC13-93-000, at p. 29-30 (filed Apr. 16, 2013).

<sup>81</sup> 2016-02-03 Jones Tr. 160:25-161:19, Jones Exh. 29 (DYN\_0186441 at DYN\_0186454) (Market Assessment MISO Capacity Construct Module E-1 dated February 13, 2014 prepared for Dynegy by CES as discussed at the cited testimony) (“With the addition of the Ameren merchant coal fleet, Dynegy owns roughly 50% of the resources in LRZ 4.”).

<sup>82</sup> Exhibit 2, Preliminary Findings Slide 20.

<sup>83</sup> *See, e.g.*, 2016-02-03 Jones Tr. 19:16-25, 44:18-46:11; 2016-02-25 Tolentino Tr. 121:18-125:2.

<sup>84</sup> 2016-02-25 Tolentino Tr. 121:18-122:19, 124:4-125:2, 133:6-134:8, Tolentino Exh. 8 (DYN\_0007076 at DYN\_0007077) (Dynegy's 2013 MISO PRA Review Draft for Discussion dated August 9, 2013 as discussed at cited testimony). A slide from this August 9, 2013 Dynegy analysis is shown at Exhibit 2, Preliminary Findings Slide 20. *See also*

By September 2013, additional Dynegy analyses<sup>85</sup> demonstrated that fewer PY capacity sales in advance of the MISO Auction for a PY would increase the likelihood that MISO would need to accept Dynegy's non-zero priced capacity offers to clear Zone 4.

On October 11, 2013, the Commission approved Dynegy's acquisition of the Ameren Resources.<sup>86</sup> In approving the acquisition, the Commission found "that for energy and capacity products, the appropriate geographic market to analyze is the MISO balancing authority area" and that "Applicants appropriately presented data that shows no additional submarkets need to be considered[.]"<sup>87</sup> The Commission also found "that the Proposed Transaction will not create horizontal market power concerns."<sup>88</sup>

**5. Dynegy Designed and Pursued a Strategy to Set the MISO Auction Clearing Price After Acquiring the Ameren Resources, Expecting That MISO Would Need Some of Dynegy's Non-Zero Priced Capacity to Clear Zone 4 in the 2014/15 Auction**

As of November 1, 2013, before closing on the Ameren Resources acquisition, Dynegy was aware that MISO would need at least some Dynegy capacity to meet the recently increased LCR in MISO Zone 4.<sup>89</sup> With this knowledge, Dynegy pursued a

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2016-02-03 Jones Tr. 48:12-24 ("Q: Okay. So in order to increase the likelihood in the next PRA at this time, the '14-'15 PRA, the company knew that it could increase the likelihood, if everything else stays constant, all those other variables we talked about, if those stay constant, the one way Dynegy knew that it could increase the likelihood that its nonzero bids, based on cost or otherwise, would be accepted and ultimately set price would be to make fewer bilateral, wholesale or retail sales prior to the auction; correct? A: It's correct that more the cost-based offers would increase the probability that those cost-based offers were required to satisfy the local clearing requirement.").

<sup>85</sup> 2016-02-25 Tolentino Tr. 149:8-12, Tolentino Exh. 9 (DYN\_0036845 at DYN\_0036846) (September 12, 2013 email attaching Final Capacity Slides as discussed at cited testimony). This Dynegy slide is included at Exhibit 2, Preliminary Findings Slide 21.

<sup>86</sup> *Ameren Energy Generating Company*, 145 FERC ¶ 61,034 (2013).

<sup>87</sup> *Id.* P 55.

<sup>88</sup> *Id.* P 54.

<sup>89</sup> 2015-07-22 Volpe Tr. 58:20-59:13 ("Q: So let's put away with the 'pivotal supplier' terminology. ...[w]hether you sat down to particularly do that math or not, was it your

strategy designed to set the MISO Auction clearing price, as Mr. Volpe, Dynegy Senior Director Regulatory Affairs, acknowledged in his testimony:

Q: To your knowledge has Dynegy ever pursued a strategy that was designed to set the clearing price in an auction, the MISO PRA for 2014-'15 or the MISO PRA for 2015-'16?

A: To set the auction clearing price?

Q: Yes.

A: Yes.

Q: So your understanding is that that has been a goal of Dynegy's in its bidding strategy for both 2014-'15 and '15-'16. Is that right?

A: Yes.

Q: Would you agree that Dynegy's acquisition of the Ameren assets increased the likelihood that that bidding strategy could succeed?

A: Potentially, yes.<sup>90</sup>

On December 2, 2013, Dynegy completed its acquisition of the Ameren Resources.<sup>91</sup>

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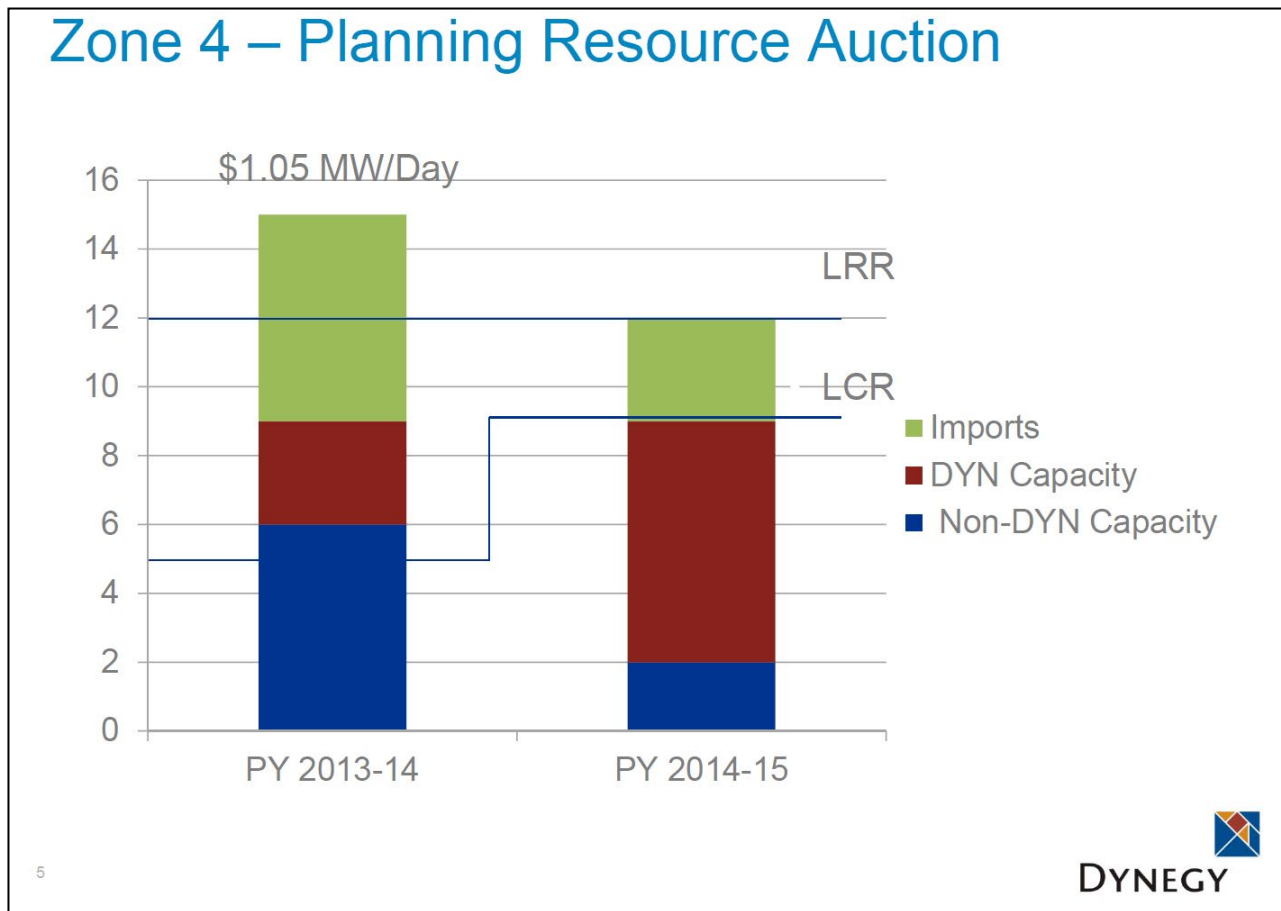
understanding that as of November 2013 that Dynegy's capacity would be needed to meet the LCR in zone 4? A: Yes. .... Q: How had you come to that conclusion? A: Well, assuming that the [Ameren] transaction closed as it did in December, it's apparent just by doing the math that the LCR can't be met without at least a portion of Dynegy's capacity. Q: So although you didn't do the math we just did here, you knew because of the magnitude of the numbers, you knew the result was at least some of Dynegy's capacity was necessary to meet the LCR in the upcoming PRA, based on at least the November 1 LOLE [ - Loss of Load Expectation - ] study. Right? A: Yes.”), Volpe Exh. 10 (MISO 2014 LOLE Study Report dated November 1, 2013 as referenced in the cited testimony).

<sup>90</sup> 2015-07-22 Volpe Tr. 69:2-16; *see also* 2016-03-23 Tolentino Tr. 648:16-22 (“Q: So the reason that you kept going through that math and monitoring the positions for bilateral, wholesale, retail, exports, and all that was so that as you got closer and closer to the auction, Dynegy would know, as best as it could estimate, whether its megawatts would be able to set price in the auction; correct? A: Yes.”); 2016-10-26 Jones Tr. 593:17-594:5.

<sup>91</sup> *See* <https://ameren.mediaroom.com/news-releases?item=1235>.

At Dynegey's December 2013 Board of Directors meeting, Mr. Jones used the following slide, Graphic 4, to illustrate MISO's prior and future need for Dynegey's Zone 4 capacity.<sup>92</sup>

*Graphic 4*



In Graphic 4, blue represents non-Dynegey capacity in Zone 4, red represents Dynegey capacity in Zone 4, and green represents capacity that potentially could be

<sup>92</sup> 2016-10-25 Jones Tr. 309:13-16 (“Q: Do you doubt that you used this slide presentation included in this exhibit in front of the board of directors for Dynegey? A: No.”), Jones Exh. 19 (DYN\_0251916 and DYN\_0251921) (DYN\_0251916 and DYN\_0251921) (December 13, 2013 email attaching presentation for December 16-17, 2013 Dynegey Board of Directors Meeting as discussed at cited testimony). This Dynegey slide is shown at Exhibit 2, Preliminary Findings Slide 24.

imported into Zone 4.<sup>93</sup> For the 2013/14 Auction, the line labelled LCR shows that none of Dynegy's capacity was needed by MISO to meet the Zone 4 2013/14 LCR.<sup>94</sup> For the 2014/15 Auction, the line labelled LCR shows Dynegy estimated and expected that MISO would need to use all of Dynegy's capacity (now augmented by the Ameren Resources) before turning to imports to meet the Zone 4 2014/15 LCR. The slide reproduced in Graphic 4 also demonstrates Dynegy's estimate and expectation that even if MISO used all available capacity imports and non-Dynegy capacity before turning to Dynegy's capacity, MISO could not meet the Zone 4 2014/15 LCR without at least some of Dynegy's capacity.<sup>95</sup> Accordingly, as long as Dynegy did not sell too much of this capacity before the Auction, Dynegy would be able to offer such capacity into the Zone 4 2014/15 Auction at non-zero prices and would anticipate that MISO would have to purchase some of this capacity to meet the Zone 4 2014/15 LCR.<sup>96</sup>

As of late January 2014, Dynegy's internal analysis included a diagram that estimated that Dynegy was more likely than not to set the MISO Zone 4 capacity price for

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<sup>93</sup> 2016-02-03 Jones Tr. 85:16-90:17 ("A: . . . I think it [-- chart on page 5 (DYN\_0251921) --] was just to show two primary issues. One is that a fundamental market construct had changed, which is a big shift in the local clearing requirement as put forward by MISO where and also that we, clearly as of two weeks prior to this, had more than – I'll just say doubled our capacity. Q: Right. And the LCR, having increased, actually made it more likely that Dynegy's megawatts would be needed to clear the LCR; correct? A: Yes."), Jones Exh. 19 (DYN\_0251916 and DYN\_0251921) (December 13, 2013 email attaching presentation for December 16-17, 2013 Dynegy Board of Directors Meeting as discussed at cited testimony).

<sup>94</sup> See *supra* note 28 regarding the LCR.

<sup>95</sup> Graphic 4, which shows a slide used by Mr. Jones during a December 2013 Dynegy Board of Directors meeting, further bolsters Mr. Volpe's testimony that he "knew ... at least some of Dynegy's capacity was necessary to meet the LCR in the upcoming PRA, based on at least the November 1 LOLE [ - Loss of Load Expectation - ] study." See 2015-07-22 Volpe Tr. 58:20-59:13, Volpe Exh. 10 (MISO 2014 LOLE Study Report dated November 1, 2013 as referenced in the cited testimony). OE staff found that subsequent to MISO's November 1, 2013 LOLE Study and no later than Dynegy's December 2013 Board of Directors meeting, Mr. Volpe, Mr. Jones, and Dynegy knew MISO needed Dynegy's capacity to clear Zone 4.

<sup>96</sup> Dynegy's forecasts were disrupted later when MISO unexpectedly used 974 MW of zero priced capacity from Dynegy's Joppa generating facility located adjacent to Zone 4 to clear Zone 4. See *supra* Section VI.A.7.

the 2014/15 Auction.<sup>97</sup> Based on its assumptions, including that MISO would not treat Dynegy's Joppa facility as if it were in MISO Zone 4, Dynegy estimated that MISO would need at least some of Dynegy's non-zero priced capacity to clear Zone 4 in the 2014/15 Auction.<sup>98</sup> As noted in the diagram, Dynegy "believe[d] there [was] a good possibility that Zone 4 could price separately from the rest of MISO in the 2014/15" Auction.<sup>99</sup>

**6. Dynegy's Modeling Estimated That Dynegy Would Set the Zone 4 Price in the 2014/15 Auction With an Offer Priced at \$117/MW-Day, and This Modeling Informed Dynegy's 2014/15 Auction Strategy**

Dynegy's pre-2014/15 Auction modeling, as developed for Dynegy by its consultant CES, estimated that Dynegy would set the Zone 4 price using a Dynegy offer priced at \$117/MW-Day and that Dynegy's offers would cause prices to increase in other Zones.<sup>100</sup> Dynegy's 2014/15 Auction strategy was directly informed by the CES modeling and, in fact, Dynegy submitted offers at \$117.39/MW-Day—consistent with offers included in CES modeling scenarios.<sup>101</sup>

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<sup>97</sup> 2016-10-04 Kirschner Tr. 80:3-14 ("Q: The diagram shows that if things are the way they are shown here – A: Uh-huh. Q: -- with all the numbers tabulating and things counting the way they are, including Joppa not being in MISO and those things, if all of that is true, then Dynegy at this point believes with 100 percent likelihood that it's going to, with a nonzero offer, be able to set the price in zone 4? A: Uh-huh."), Kirschner Exh. 14 (DYN\_0499270) (January 27, 2014 email attaching the Dynegy slide or diagram discussed in the cited testimony); 2016-10-25 Jones Tr. 312:22-317:10, Jones Exh. 25 (DYN\_0499270) (January 27, 2014 email attaching the Dynegy slide or diagram discussed in the cited testimony). The Dynegy slide or diagram included in these testimony exhibits is included at Exhibit 2, Preliminary Findings Slide 25.

<sup>98</sup> See *supra* note 97.

<sup>99</sup> The Dynegy slide or diagram included in these testimony exhibits is included at Exhibit 2, Preliminary Findings Slide 25.

<sup>100</sup> 2016-10-25 Jones Tr. 318:24-319:6 ("Q: ...CES's modeling demonstrated to Dynegy that Dynegy's offer strategy into the '14-'15 PRA could affect zones beyond just zone 4; correct? A: Yes."), Jones Exh. 37 (DYN\_0056221) (March 7-20, 2014 email thread amongst Dynegy and CES personnel discussed at the cited testimony). This testimony exhibit is documentary evidence shown at Exhibit 2, Preliminary Findings Slide 26.

<sup>101</sup> 2016-02-03 Jones Tr. 230:22-25 ("Q: But would it be fair to say that your bid strategy that was ultimately used was at least informed by actual scenarios that had been run by CES? A: Yes."), Jones Exh. 46 (Affidavit of Henry D. Jones, signed June 30, 2015). CES's

## **7. MISO's Treatment of the Joppa Unit as a Zone 4 Internal Resource Prevented Dynegy From Setting the Price in the 2014/15 Auction**

The 2014/15 Auction Zone 4 price settled at \$16.75/MW-Day, which was not in line with Dynegy's estimates. Dynegy later examined how its 2014/15 Auction strategy failed to set price in Zone 4. Dynegy's post-auction analysis, including as reflected in an April 24, 2014 Dynegy slide shown below in Graphic 5, showed that, but for MISO using 974 MW of capacity from Dynegy's Joppa unit to clear Zone 4, Dynegy's offers in the 2014/15 Auction would have set price and Dynegy would have cleared 444 MW at \$90/MW-Day.<sup>102</sup> The Joppa unit, which Dynegy acquired co-ownership of through the Ameren Resources acquisition,<sup>103</sup> has its own unique dedicated balancing authority referred to as EEInc. or EEI.<sup>104</sup>

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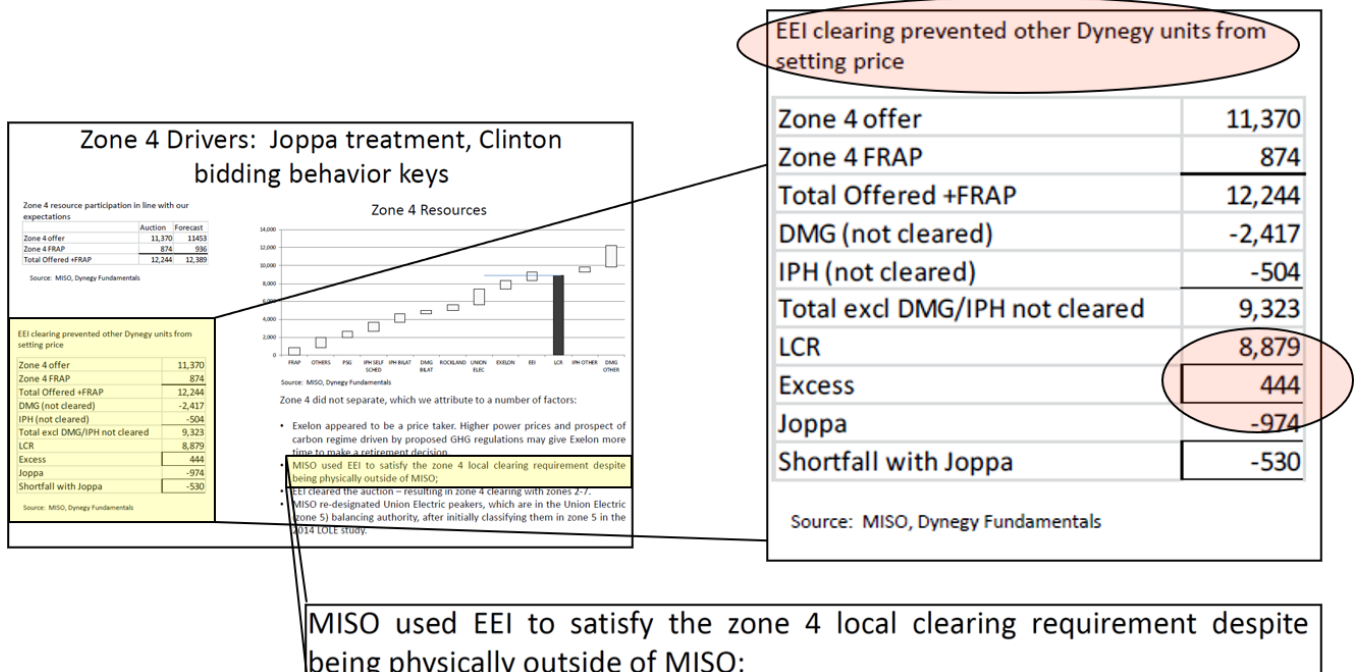
modeling scenarios 4, 5, and 6 considered Dynegy's potential capacity offering strategy for the 2014/15 Auction, each using slightly different assumptions. 2016-03-22 Tolentino Tr. 568:3-22, Tolentino Exh. 39 (DYN\_0056228) (MISO PRA Scenario 4 Summary dated March 20, 2014 prepared by CES for Dynegy as discussed at cited testimony).

<sup>102</sup> 2016-10-04 Kirschner Tr. 154:8-13, Kirschner Exh. 25 (DYN\_0009386) (Dynegy PowerPoint titled "An initial look at the MISO 2014/15 PRA" dated April 24, 2014 discussed at the cited testimony); 2016-10-25 Jones Tr. 324:24-326:1, Jones Exh. 48 (DYN\_0009386). The key Dynegy slide from this PowerPoint is included at Exhibit 2, Preliminary Findings Slide 28.

<sup>103</sup> See Joint Application For Authorization Under Section 203 Of The Federal Power Act And Request For Expedited Consideration, Docket No. EC13-93-000, filed April 16, 2013.

<sup>104</sup> See *Electric Energy, Inc.*, 144 FERC ¶ 61,028 (2013). Within Dynegy, the terms "Joppa" and "EEI" and "EEInc." were used synonymously to refer to the Joppa unit and capacity provided by the Joppa unit. 2015-07-23 Brown Tr. 81:16-17; 2016-10-26 Jones Tr. 625:21-23; see also Joint Application For Authorization Under Section 203 Of The Federal Power Act And Request For Expedited Consideration, Docket No. EC13-93-000, filed April 16, 2013 at note 53 ("The Joppa plant is located in the EEInc BAA.").

Graphic 5

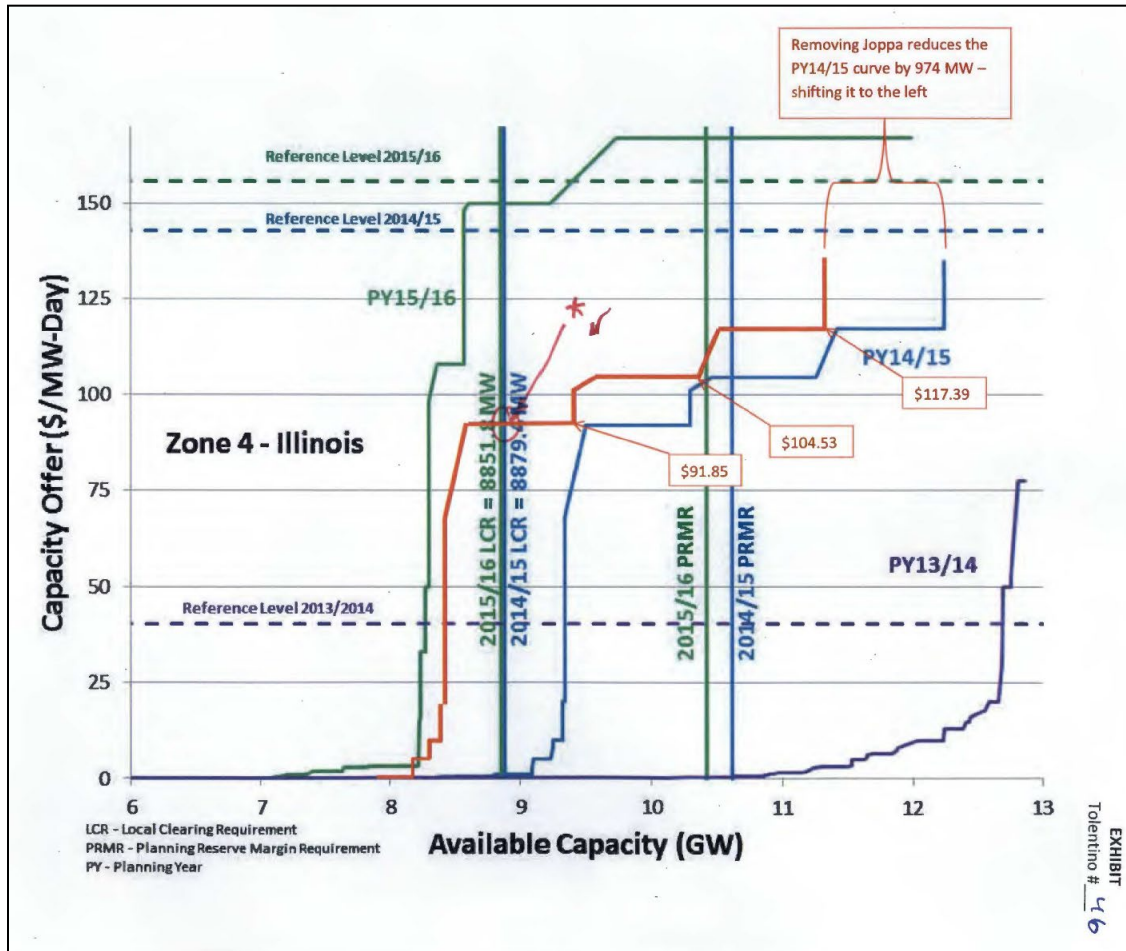


As shown in Graphic 6, a chart prepared by OE staff during the investigation based on a MISO chart (with OE staff's annotations shown in red text and Mr. Tolentino's handwritten annotations during his testimony shown in red pen), OE staff calculated that a Dynegy offer would have set price at \$91.85/MW-Day in the 2014/15 Auction if MISO had not applied Dynegy's zero priced offers for Joppa's capacity to Zone 4.<sup>105</sup> During his testimony, OE staff asked Mr. Tolentino to circle (and highlight with a line and asterisk) the place where the price would have been set had Joppa not been included by MISO in clearing Zone 4.<sup>106</sup>

<sup>105</sup> See Complaint, Request for Refund Protection, and Request for Expedited Treatment by Southwestern Electric Cooperative, Inc., Docket No. EL15-72-000, filed May 29, 2015, Exhibit No. SWN-2 (Chiles), Attachment 3 (MISO 2015/2016 Planning Resource Auction Results dated April 14, 2015) at p. 7.

<sup>106</sup> 2016-03-23 Tolentino Tr. 669:20-670:24 ("Q: Just so it is clear on the record, I will ask you to take – you've got a red pen here. If you could circle the place where the price would have been set had Joppa not been counted by MISO. A: And then everything else in the rest of MISO was unchanged? Q: Right. A: So no one else. Okay. Q: If you could maybe draw like an arrow and put a little star so people can see that. Yeah, that would be good. Terrific. Thank you. Put your initial next to that so there's never a question as to that. Yeah, great. Now that I've walked you through the way that I prepared this, would you agree with me that this is a fair representation of the circumstance where Joppa would be not counted

**Graphic 6**



**8. After the 2014/15 Auction, Dynegy Successfully Delayed a Potential Zone 4 and Zone 5 Combination**

Immediately after the 2014/15 Auction, Ameren sent a letter to MISO requesting that MISO combine Zones 4 and 5.<sup>107</sup> According to Dynegy, at a May 7, 2014 MISO Loss

toward Zone 4 in the '14-'15 auction? A: If Joppa were removed, that would be fair.”), Tolentino Exh 46 (MISO Graph w-OE staff annotations in red); *see also* 2016-10-26 Jones Tr. 714:14-20, Jones Exh. 117 (MISO Graph w-OE staff annotations in red as discussed at the cited testimony). This testimony exhibit is included at Exhibit 2, Preliminary Findings Slide 29. Mr. Tolentino’s initials appear in Graphic 6 to the lower right of the asterisk.

<sup>107</sup> Answer of Dynegy Inc., Dynegy Marketing and Trade, LLC, and Illinois Power Marketing Company, filed in Docket Nos. EL15-70-000, EL15-71-000, and EL15-72-000, July 2, 2015, Exh. A.8 - Mark Birk, SVP Corporate Planning & Business Risk Management, Ameren’s April 2, 2014 letter to Clair Moeller, EVP of Transmission and

of Load Expectation Working Group (LOLEWG) meeting, MISO staff linked the requested Zone 4 and 5 combination then under discussion to MISO staff's concerns about Dynegy's offer strategy for the 2015/16 Auction. An email from Mr. Volpe to Dynegy's consultant, CES, includes Mr. Volpe's account of what was stated at the MISO meeting: that MISO staff stated "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>108</sup> As Mr. Jones admitted, Dynegy understood that MISO staff (1) had observed Dynegy's 2014/15 Auction offering strategy and (2) was concerned that Dynegy might be attempting to manipulate the market.<sup>109</sup>

In a May 9, 2014 letter to MISO, Mr. Jones, on behalf of Dynegy, began efforts to delay any potential combination of Zones 4 and 5.<sup>110</sup> In his letter, Mr. Jones raised a number of issues with MISO staff's analysis presented at the May 7, 2014 LOLEWG

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Technology, MISO ("Ameren is writing to request MISO to combine Local Resource Zones 4 (Illinois) and 5 (Missouri) for MISO Resource Adequacy purposes starting from Planning Year (PY) 15/16 onwards."). This letter is included at Exhibit 2, Preliminary Findings Slide 30.

<sup>108</sup> 2015-07-22 Volpe Tr. 36-50, Volpe Exhs. 8 (Loss of Load Expectation Working Group Minutes for May 7, 2014 Meeting) and 9 (DYN\_0052440) (August 13, 2014 email between Dynegy and CES discussed at the cited testimony). This Volpe Exhibit 9 is included at Exhibit 2, Preliminary Findings Slide 31.

<sup>109</sup> 2016-10-25 Jones Tr. 517:9-23 ("Q: Let's go back to a similar circumstance relative to MISO. MISO saw what Dynegy had done in bidding in the '14-'15 auction; right? A: Yes. Q: And because of what they saw, they intimated at a meeting, maybe Mr. Zhou [(with MISO)] misspoke, but he intimated at a meeting that one of the reasons [MISO] wanted to combine zone 4 and 5 was to push back on the possibility that Dynegy would want to somehow set price in the market through its bid strategy; right? A: Yes. Q: And Dynegy saw that as MISO, in Dynegy's view, inappropriately suggesting that what Dynegy was up to was an attempt to manipulate the market; right? A: Yes."); *see also* 2016-10-25 Jones Tr. 348:6-349:8, Jones Exh. 53 (Loss of Load Expectation Working Group Minutes for May 7, 2014 Meeting); *see also* 2015-07-22 Volpe Tr. 70:8-14, Volpe Exh. 14 (DYN\_0012836) (May 9, 2014 letter from Mr. Jones to MISO, which included the statement that "a MISO staff member at the [May 7, 2014] LOLEWG meeting stated 'there was a change in the ownership of Ameren's coals assets in Zone 4 to Dynegy, and we [MISO staff] are concerned with Dynegy's offer strategy in the planning resource auction as they [Dynegy] are now the dominant provider of capacity in the zone'").

<sup>110</sup> 2015-07-22 Volpe Tr. 69-70, Volpe Exh. 14 (DYN\_0012836) (May 9, 2014 letter from Mr. Jones to MISO discussed at the cited testimony). This testimony exhibit is shown at Exhibit 2, Preliminary Findings Slide 33.

meeting as justification for evaluating a combination of the two zones, including MISO staff's position that "a significant amount of resource in ZR 4 changed ownership or retired during the past two years."<sup>111</sup> Mr. Jones claimed that "[n]o significant changes [had] occurred" because Dynegy's acquisition of the Ameren Resources "does not constitute a change in membership as outlined in the tariff."<sup>112</sup> Mr. Jones also asserted that "retirements as cited by MISO staff as justification for combining the zones [had] occurred in preceding years and had not previously initiated any action by MISO staff to study the combination of zones 4 and 5 . . . ."<sup>113</sup> Lastly, Mr. Jones noted that "Dynegy is greatly concerned with MISO staff making public statements or assertions that imply 1) Dynegy has in the past employed or may in the future employ a strategy aimed at manipulating the auction clearing outcome . . . ."<sup>114</sup>

MISO ultimately did not propose combining the two zones,<sup>115</sup> and Dynegy viewed itself as having "successfully prevented the merger" of the two zones before the 2015/16 Auction.<sup>116</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

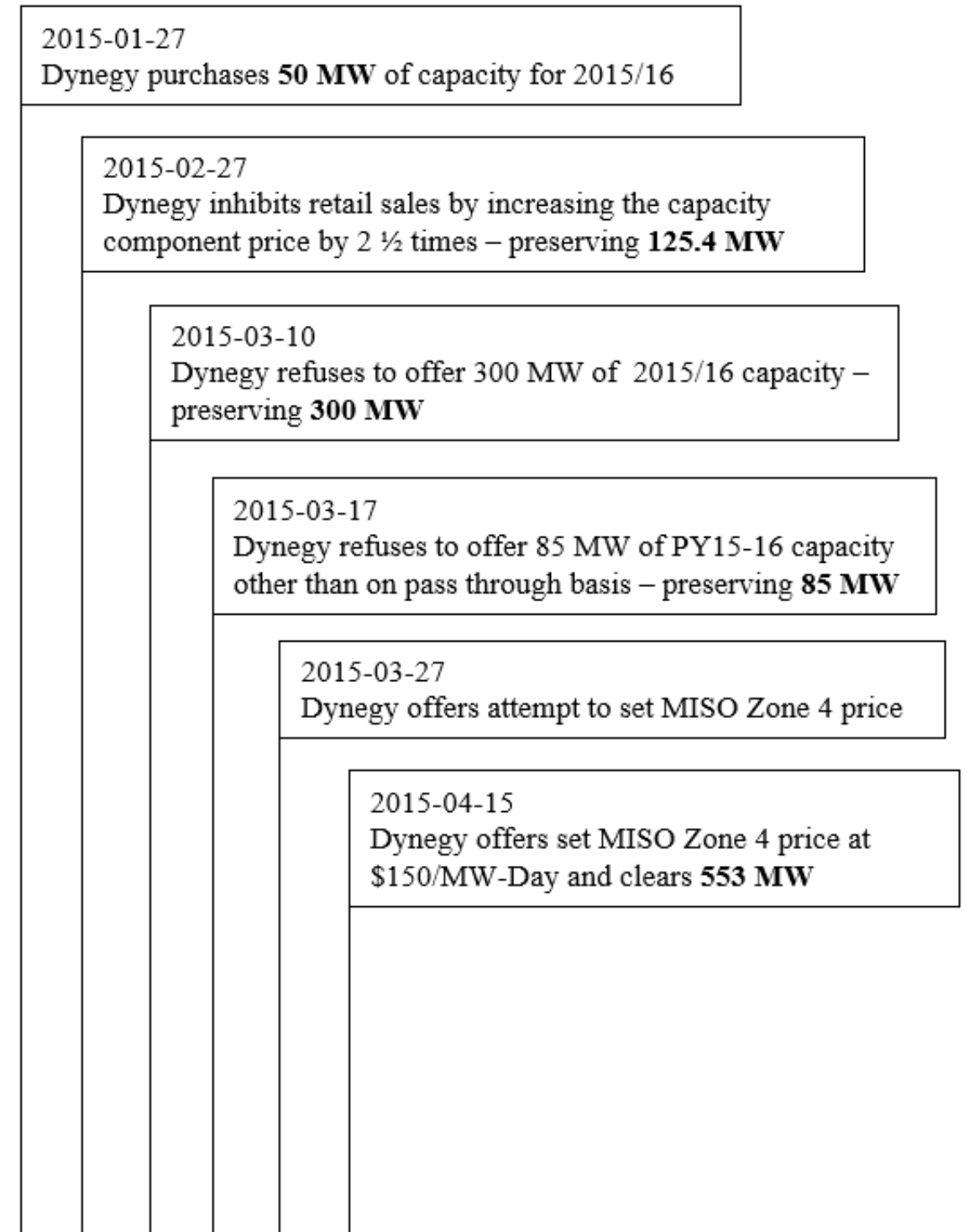
<sup>115</sup> See 2015-07-22 Volpe Tr. 89:14-22, Volpe Exh. 16 (June 24, 2014 email from Matt King of MISO to stakeholders) ("Extensive feedback was received from stakeholders as MISO evaluated the combination of the Illinois and Missouri Local Resource Zones. MISO believes it is prudent to address these concerns by delaying the filing and to work with its stakeholders to establish a more structured and prescriptive process around evaluation of zonal boundaries."). This testimony exhibit is shown at Exhibit 2, Preliminary Findings Slide 35 (upper portion).

<sup>116</sup> DYN\_0109902 (August 14, 2014 Dynegy email with subject line "MISO Capacity & Energy Market Strategy" and stating that "[Ameren] requests MISO combine Zones 4 & 5 for next PRA" and "Complete – DYN successfully prevented the merger – will now possibly come back to stakeholder process for 2016-2017 PRA"). (Appendix Item 695) DYN\_0109902 is shown at Exhibit 2, Preliminary Findings Slide 35 (lower portion).

**B. The 2015/16 Auction and Dynegy's Four Manipulative Steps**

**1. Timeline of Conduct Leading Up to the 2015/16 Auction**

*Timeline 2*



## **2. After Failing to Set Price in the 2014/15 Auction, Dynegy Saw an Opportunity to Set the Price in the 2015/16 Auction**

After the 2014/15 Auction, analyses conducted by Dynegy indicated that a potential opportunity existed to set the price in the 2015/16 Auction for several reasons.

*First*, an August 2014 Dynegy analysis of the 2014/15 Auction showed that fewer 2014/15 PY Dynegy capacity sales before the Auction would have increased the likelihood that MISO would need to accept non-zero offers to clear Zone 4 in the 2014/15 Auction.<sup>117</sup>

*Second*, Dynegy's August 2014 analysis estimated that the Zone 4 clearing price for the 2015/16 Auction would depend on offering strategy and not retirements or additions to generating capacity.<sup>118</sup>

*Third*, in another August 2014 analysis shown below in Graphic 7, Dynegy estimated that Zone 4 would separate during the 2015/16 Auction—that is, the clearing price would be higher or different than other Zones—if capacity sales ahead of the Auction were weak and Joppa was not treated as a Zone 4 resource, and still might separate even if Joppa were to be treated as a Zone 4 resource.<sup>119</sup>

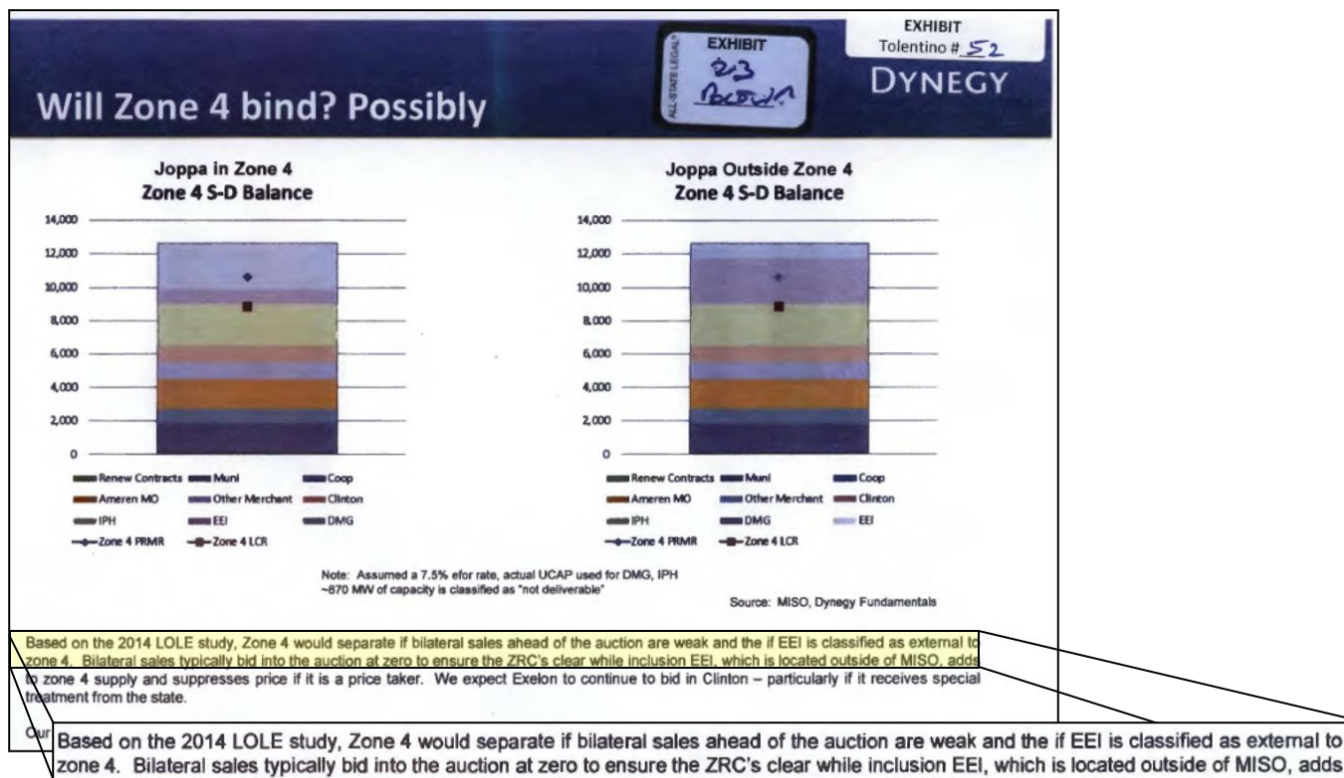
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<sup>117</sup> Tolentino Exh. 50 (DYN\_0052405 at DYN\_0052410) (August 13, 2014 email attaching Dynegy draft PowerPoint titled “MISO 2014-15 PRA Results Analysis” dated August 11, 2014 discussed at the cited testimony). This testimony exhibit is shown at Exhibit 2, Preliminary Findings Slide 37. OE staff notes that fewer capacity sales before the Auction by any market participant, not just Dynegy, would increase the likelihood that MISO would need to accept non-zero offers to clear Zone 4 in the 2014/15 Auction. Dynegy understood that making more or less Dynegy capacity sales was within its control. 2016-03-23 Tolentino Tr. at 711:5-8 (“Q: But on the bilateral sales ahead of the auction, Dynegy can either make more or less sales? That’s within their control; right? A: Yes.”).

<sup>118</sup> 2016-03-23 Tolentino Tr. 696:18-706:25, Tolentino Exh. 50 (DYN\_0052405 at DYN\_0052408 and 418) (August 13, 2014 email attaching Dynegy draft PowerPoint titled “MISO 2014-15 PRA Results Analysis” dated August 11, 2014 discussed at the cited testimony). The testimony exhibit cited here includes slides featured at Exhibit 2, Preliminary Findings Slide 38.

<sup>119</sup> 2016-03-23 Tolentino Tr. 709:17-710:4 (“Q: Okay. So would it be fair to say that Zone 4 could potentially separate if bilateral sales ahead of the auction are weak without regard to how Joppa is treated? A: Potentially. Q: Right. And that even if bilateral sales weren’t weak before the auction but Joppa was not counted, that alone might actually be a circumstance where there would be separation; right? A: That could be the case. Q: Okay. The two together would make the likelihood higher than either one of them standing on

*Graphic 7*



Lastly, a mid-November 2014 analysis indicated that Dynegy believed its 2015/16 Auction offering strategy would impact price in Zone 2 through Zone 7 regardless of whether MISO applied Joppa as an internal resource, as MISO had for the 2014/15 Auction.<sup>120</sup>

### 3. First Step in Dynegy's Manipulative Scheme for the 2015/16 Auction: 50 MW Purchase

#### i. Dynegy Purchased the 50 MW Knowing it Would Increase the "Gap"

their own generally? A: Yes.”), Tolentino Exh. 52 (DYN\_0007119) (Slide from an August 25, 2014 Dynegy analysis discussed at the cited testimony). This testimony exhibit is shown in Exhibit 2, Preliminary Findings Slide 39.

<sup>120</sup> 2016-03-23 Tolentino Tr. 743:15-24, Tolentino Exh. 55 (DYN\_0043059 and DYN\_0043064) (November 19, 2014 email attaching Dynegy Powerpoint titled “MISO Fundamentals Update” dated November 20, 2014 as discussed in cited testimony); 2016-10-25 Jones Tr.446:8-17, Jones Exh. 72 (DYN\_0043059 and DYN\_0043064). This testimony exhibit, at DYN\_0043064, is shown at Exhibit 2, Preliminary Findings Slide 42.

On January 27, 2015, Dynegy took its first step in what OE staff found to be Dynegy's four manipulative steps for the 2015/16 Auction. On that day, as shown in Dynegy's data request response below at Graphic 8, Dynegy purchased 50 MW of MISO Zone 4 2015/16 capacity from American Electric Power (AEP) in a bilateral transaction.<sup>121</sup>

**Graphic 8**

Response of Dynegy Inc. to the  
Division of Investigations of the Office of Enforcement's Data Request No. 1  
Non-Public Investigation

| Planning Year 15/16 |          |         |              |            |            |        |                   |
|---------------------|----------|---------|--------------|------------|------------|--------|-------------------|
| Trade Date          | Buy/Sell | Deal #  | Counterparty | Start Date | End Date   | Volume | Price (\$/Kw-mo.) |
| 2014-08-21          | Sell     | 4219975 | BP Energy    | 2015-06-01 | 2016-05-31 | -20    | \$1.65            |
| 2014-09-08          | Sell     | 4225563 | BP Energy    | 2015-06-01 | 2016-05-31 | -53    | \$2.00            |
| 2014-09-08          | Sell     | 4225564 | Integraysene | 2015-06-01 | 2016-05-31 | -25    | \$2.00            |
| 2014-09-09          | Sell     | 4226022 | BP Energy    | 2015-06-01 | 2016-05-31 | -20    | \$2.10            |
| 2014-10-14          | Sell     | 4238329 | EDF Trading  | 2015-06-01 | 2016-05-31 | -50    | \$2.20            |
| 2015-01-27          | Buy      | 4274493 | AEP          | 2015-06-01 | 2016-05-31 | 50     | \$1.85            |

| Planning Year 16/17 |          |         |              |            |            |        |                   |
|---------------------|----------|---------|--------------|------------|------------|--------|-------------------|
| Trade Date          | Buy/Sell | Deal #  | Counterparty | Start Date | End Date   | Volume | Price (\$/Kw-mo.) |
| 2014-09-09          | Sell     | 4226023 | BP Energy    | 2016-06-01 | 2017-05-31 | -20    | \$1.65            |

| Planning Year 15/16 |          |         |              |            |            |        |                   |
|---------------------|----------|---------|--------------|------------|------------|--------|-------------------|
| Trade Date          | Buy/Sell | Deal #  | Counterparty | Start Date | End Date   | Volume | Price (\$/Kw-mo.) |
| 2014-08-21          | Sell     | 4219975 | BP Energy    | 2015-06-01 | 2016-05-31 | -20    | \$1.65            |
| 2014-09-08          | Sell     | 4225563 | BP Energy    | 2015-06-01 | 2016-05-31 | -53    | \$2.00            |
| 2014-09-08          | Sell     | 4225564 | Integraysene | 2015-06-01 | 2016-05-31 | -25    | \$2.00            |
| 2014-09-09          | Sell     | 4226022 | BP Energy    | 2015-06-01 | 2016-05-31 | -20    | \$2.10            |
| 2014-10-14          | Sell     | 4238329 | EDF Trading  | 2015-06-01 | 2016-05-31 | -50    | \$2.20            |
| 2015-01-27          | Buy      | 4274493 | AEP          | 2015-06-01 | 2016-05-31 | 50     | \$1.85            |

| Planning Year 16/17 |          |         |              |            |            |        |                   |
|---------------------|----------|---------|--------------|------------|------------|--------|-------------------|
| Trade Date          | Buy/Sell | Deal #  | Counterparty | Start Date | End Date   | Volume | Price (\$/Kw-mo.) |
| 2014-08-21          | Sell     | 4219975 | BP Energy    | 2015-06-01 | 2016-05-31 | -20    | \$1.65            |
| 2014-09-08          | Sell     | 4225563 | BP Energy    | 2015-06-01 | 2016-05-31 | -53    | \$2.00            |
| 2014-09-08          | Sell     | 4225564 | Integraysene | 2015-06-01 | 2016-05-31 | -25    | \$2.00            |
| 2014-09-09          | Sell     | 4226022 | BP Energy    | 2015-06-01 | 2016-05-31 | -20    | \$2.10            |
| 2014-10-14          | Sell     | 4238329 | EDF Trading  | 2015-06-01 | 2016-05-31 | -50    | \$2.20            |
| 2015-01-27          | Buy      | 4274493 | AEP          | 2015-06-01 | 2016-05-31 | 50     | \$1.85            |

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At the time Dynegy made this purchase, it had already made five sales of capacity from DMG (Dynegy's historic MISO generating assets) for the 2015/16 PY totaling 168 MW. Purchasing the 50 MW of MISO Zone 4 2015/16 capacity from AEP reduced Dynegy's net non-retail sales for DMG from 168 MW to 118 MW (*i.e.*, increased by 50 MW the amount of unsold DMG MW on Dynegy's books)—thereby increasing the likelihood that MISO would need Dynegy's non-zero priced capacity offers to clear Zone 4.<sup>122</sup>

<sup>121</sup> Dynegy's Supp. Response To Data Request No. 16 (DYN\_0542937) (Data Request No. 16: "For each Dynegy generating unit located in MISO Zone 4, produce each bilateral capacity contract relative to such unit and any documents regarding the same sufficient to identify quantities, prices, term or length of contract, buyers, the rationale for price terms, and the effective dates of the contract.") (Appendix Item 657). This Data Request response is shown at Exhibit 2, Preliminary Findings Slide 46.

<sup>122</sup> See, e.g., 2015-07-21 Beutler Tr. 70:6-71:7; 2016-01-27 Cotrone Tr. 262:14-263:3 ("Q: Now, the impact of that 50-megawatt purchase was to significantly trim back your sales that you had made for planning year '15/'16; right? A: The impact was? Q: Yeah. A: Yeah, I believe I said the net position off our sales of DMG was 118. Q: Yeah, you had sold 168, and then basically, because you made this purchase, you're now down to 118; right? A:

During the investigation, OE staff found that Dynegy offered no plausible economic rationale for this capacity purchase other than increasing the likelihood that Dynegy would set the Zone 4 price with a non-zero offer. Mr. Brown, Dynegy's VP of Coal Asset Management, and Mr. Cotrone, Dynegy's Senior Director of Asset Management, claimed that Dynegy's 50 MW purchase—for over \$1 million—was to obtain market intelligence, *i.e.*, the name of the seller. In particular, Mr. Brown testified as follows:

Q: So you bought 50 megawatts to find out the name of who you were going to buy from, is [sic] [that] what you are telling me?

A: Yes. Market intel.<sup>123</sup>

Mr. Cotrone further testified as follows.

Q: Okay. And the purpose was to find out the name of the counterparty who was willing to sell; right?

A: Yeah, basically to try to get some information on who was selling, and maybe if we got -- you know, if we were on the other side of the trade, if we were the purchaser, then having the ability to know who was actually trading it, and maybe to find out is there a reason why it's transacting below what it's been transacting previously.<sup>124</sup>

This testimony is inconsistent with contemporaneous Dynegy emails, which show that Dynegy could have learned multiple sellers' names without its 50 MW purchase.<sup>125</sup> Specifically, contemporaneous emails amongst Mr. Cotrone, Mr. Jones, and Mr. Brown,

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That's correct. Q: So after making 168 megawatts of sales, you give back almost a third of that by this purchase; right? A: Correct. We offset a portion of the sales with the purchase.”).

<sup>123</sup> 2015-07-23 Brown Tr. 213:19-22.

<sup>124</sup> 2016-01-27 Cotrone Tr. 245:25-246:8, Cotrone Exh. 36 (DYN\_0490459) (January 26, 2015 email discussed in the cited testimony).

<sup>125</sup> 2016-01-29 Brown Tr. 482-484, Brown Exhs. 88 (DYN\_0490459) (January 26, 2015 email discussed in the cited testimony) and 89 (DYN\_0490456) (January 27, 2015 email discussed in the cited testimony); 2016-01-27 Cotrone Tr. 245-63, Cotrone Exhs. 36 (DYN\_0490459) (January 26, 2015 email discussed in the cited testimony) and 37 (DYN\_0490456) (January 27, 2015 email discussed in the cited testimony). These contemporaneous emails are shown at Exhibit 2, Preliminary Findings Slide 48.

show that Dynegy obtained three capacity sellers' names—Lively Grove Energy Partners, Tenaska, and AEP—without spending over \$1 million for 50 MW that Dynegy did not need. Indeed, Dynegy already had 3,892 MW of unsold capacity at this time<sup>126</sup> and learned these sellers' names before Dynegy was legally obligated to make any purchase.<sup>127</sup>

Mr. Jones agreed in testimony that Dynegy's motives for purchasing 50 MW included: (1) profit (because Dynegy believed the 2015/16 Auction would clear at a higher price); (2) sending price signals; and (3) as Messrs. Brown and Cotrone claimed, obtaining market intelligence. In particular, Mr. Jones testified as follows:

Q: Okay. But for the purchase of the 50 megawatts, it sounds like there's three reasons for it, if I've gotten your testimony right.

One reason was speculative, because maybe Dynegy could make money off of it.

Another reason was to send a price signal to the market because 1.85 was -- although low, Dynegy would rather see that than maybe a lower price. So it sends that price signal to the market.

And also, Dynegy picked up some additional market intel because it figured out that Tenaska was willing to sell.

Those three reasons for this transaction. Fair enough?

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<sup>126</sup> 2015-07-23 Brown Tr. 198:20-199:19, Brown Exh. 44 (DYN\_0009415 at DYN\_0009420) (Dynegy PowerPoint titled "MISO Auction Strategy PY 15-16 dated February 27, 2015 as discussed in the cited testimony); *see also* 2015-07-23 Brown Tr. 224:6-12 ("Q: But Dynegy certainly did not need the additional 50 megawatts represented by that transaction, right? A: That is correct."), 223:1-4 ("Q: Based on [the name of the seller of the 50 MW], what did Dynegy do with that information? A: Nothing. We just learned who was out there selling."), 224:22-225:6 ("Q: Do you think you will ever do this again [buy MW to find out who sold it]? A: Oh, I am not sure. Q: Would you recommend that Dynegy do this again? A: No, not really, but we did it back then, so. Q: Do you think anybody at Dynegy would recommend that you do this again, to spend one million dollars to find out the name who sold you some megawattage of capacity? A: Probably not.").

<sup>127</sup> Mr. Cotrone actually flagged for Mr. Jones the possibility that Dynegy might not want to consummate the 50 MW purchase. 2016-01-27 Cotrone Tr. 261:2-263:3, Cotrone Exh. 37 (DYN\_0490456) (January 27, 2015 email discussed in the cited testimony) ("I want to make sure you [Mr. Jones] are still on board with this incremental trade.").

A: Yes.<sup>128</sup>

Based on the evidence previously discussed and his testimony, Mr. Jones knew such purchase improved Dynegy's position by increasing the likelihood that MISO would need Dynegy's non-zero priced capacity to clear Zone 4. On this point, Mr. Jones testified as follows:

Q: Because at this time and rolling ahead for the next several weeks, one of the things that Dynegy was, in fact, considering was shoring up its position relative to the auction by actually going out and purchasing additional megawatts; right?

A: It was brought up, and we didn't execute on it, but it was brought up.

Q: Right. But you would agree with me, the 50 megawatts that was already purchased, certainly served the same purpose; right?

A: Not with intent, but yes.

Q: Ultimately, Dynegy cleared 553 megawatts in the auction; right?

A: Yes.

Q: Had Dynegy not bought the 50, Dynegy would only have cleared 503 megawatts; right?

A: Yes.<sup>129</sup>

Messrs. Beutler and Tolentino, who testified they first learned of Dynegy's 50 MW purchase during meetings to prepare to testify during staff's investigation, agreed that the following Dynegy slide, shown below as Graphic 9, from the March 6, 2015 portion of a multi-dated Dynegy presentation, provides a rationale for such purchase.<sup>130</sup> Graphic 9

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<sup>128</sup> 2016-10-25 Jones Tr. 481:14-482:2. *See also* 2016-03-23 Tolentino Tr. 652:14-653:22, 658:3-16; 2016-01-29 Brown Tr. 502:11-503:15.

<sup>129</sup> 2016-10-25 Jones Tr. 497:20-498:11.

<sup>130</sup> 2016-03-23 Tolentino Tr. 789:10-790:4 ("Q: Yeah. Could you read that, please? A: 'Given our position, it suggests a need to purchase capacity in the bilateral market or run the risk that MISO influences the outcome detrimental to our position.' Q: Do you understand what that means? A: It appears -- well, just reading it, it suggests a need to purchase capacity in the bilateral market or run the risk that MISO influences the outcome detrimental to our position. Q: And that's consistent with -- remember we discussed that

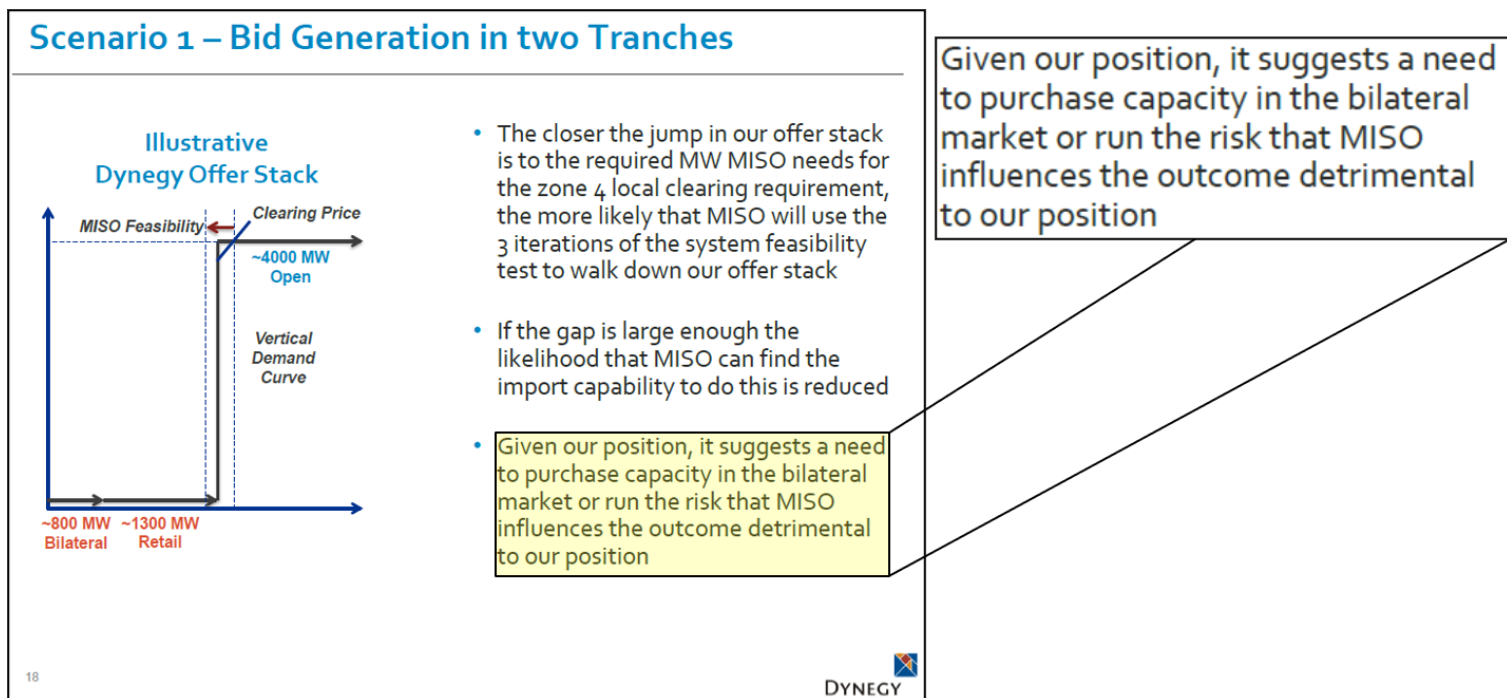
illustrates that Dynegy was actively monitoring what Dynegy called, the “gap”<sup>131</sup>—the amount of non-zero priced Dynegy capacity that Dynegy was estimating MISO might need to clear Zone 4. The larger the “gap,” the more likely MISO would need to purchase at least some of Dynegy’s non-zero priced capacity to clear Zone 4. By purchasing 50 MW that Dynegy could offer in the 2015/16 Auction at a non-zero price, Dynegy increased such “gap” by 50 MW.

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50-megawatt purchase before? A: Yes. Q: This would be a rationale for the 50-megawatt purchase, wouldn’t it? Remember you said you couldn’t figure out why they would do a 50-megawatt purchase? A: Yes. Q: Reading that bullet, that actually supplies a rationale for the purchase; right? A: You can put the two together, yes.”), Tolentino Exh. 61 (DYN\_0010087 at DYN\_0010104) (Dynegy PowerPoint titled “MISO Auction Strategy PY 15-16” dated February 27, 2015 with “MISO Auction Update” dated March 6, 2015 and with “MISO Auction Update” dated March 27, 2015 discussed in cited testimony); 2016-02-22 Beutler Tr. 410:7-19), Beutler Exh. 43 (DYN\_0490523 at DYN\_0490541) (email attaching Dynegy PowerPoint titled “MISO Auction Strategy PY 15-16” dated February 27, 2015 with “MISO Auction Update” dated March 6, 2015 discussed in cited testimony). The Dynegy slide referencing the “gap” discussed in this cited testimony is shown at Exhibit 2, Preliminary Findings Slide 51.

<sup>131</sup> 2016-10-26 Jones Tr. 572:7-14 (“Q: Okay. Earlier, we saw in the presentations there was a reference to a **gap**, that it was better to have a large **gap**. And I think your testimony the other day was the **gap** was referring to it’s better to have a large number of megawatts that MISO might need going into the auction at nonzero prices to increase the likelihood that MISO would actually take a non-zero-priced Dynegy offer, right? A: Yes.”) (emphasis added).

**Graphic 9**



In order to offer the 50 MWs Dynegy purchased leading up to the 2015/16 Auction, Dynegy was required to take a “management exception” to Dynegy’s Risk Policy. This action is shown below in Graphic 10 as documented in Dynegy’s June 2, 2015 report of the Financial and Commercial Oversight Committee.<sup>132</sup>

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<sup>132</sup> 2016-10-05 Parker 135:21-149:7, Parker Exh. 22 (DYN\_0560119) (Dynegy presentation titled “Finance & Commercial Oversight Committee Meeting” dated June 2, 2015 as discussed in the cited testimony). This testimony exhibit is shown at Exhibit 2, Preliminary Findings Slide 62.

**Graphic 10**

- Max incremental Value-at-Risk over the period of \$424k vs. \$500k limit

Management Exception allowed a 50 MW PY '15 / '16 MISO capacity position to be taken to the auction. Although settlement risk not explicitly captured in Value-at-Risk calculation, the 99<sup>th</sup> percentile outcome was certainly a loss in excess of \$500k

DYN Finance & Commercial Oversight Committee - Commodity Risk Control Report

## Compliance Summary

Effective period: 2/11/15 – 5/13/15

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- All asset hedging, incremental trading, and retail positions are compliant with Risk Control policies

- Max incremental Value-at-Risk over the period of \$424k vs. \$500k limit
- › Management Exception allowed a 50 MW PY '15 / '16 MISO capacity position to be taken to the auction. Although settlement risk not explicitly captured in Value-at-Risk calculation, the 99<sup>th</sup> percentile outcome was certainly a loss in excess of \$500k

- Average Incremental Value-at Risk over the period of \$153k

- Violation Summary
  - 2/25/15: Level 2 – Violation due to March 2015 baseload physical gas transaction being entered in Endur after trade date. Transaction was discovered and entered into the risk system after the Confirmations department realized trade was missing. Commercial verified they had forgotten to enter trade in a timely manner
  - 5/12/15: Level 1 – Violation due to one day (5/6/15) physical gas transaction being entered in Endur after trade date. Transaction was discovered and entered into the risk system after Commercial realized trade was missing. Commercial verified they had forgotten to enter trade in a timely manner. Violation would normally be considered a 'Level 2', but following the large number of violations related to the physical gas deal entry earlier this year, it was communicated that all violations would temporarily be upgraded in severity
  - 5/12/15: Level 1 – Violation due to a weekly (5/5/15-5/11/15) physical gas transaction being entered in Endur after trade date. Transaction was discovered and entered into the risk system after Commercial realized trade was missing. Commercial verified they had forgotten to enter trade in a timely manner. Violation would normally be considered a 'Level 2', but following the large number of violations related to the physical gas deal entry earlier this year, it was communicated that all violations would temporarily be upgraded in severity

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DYNEGY

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As explained by Mr. Parker, Dynegy's Chief Risk Officer, Mr. Parker required Mr. Jones to request the "management exception," which Mr. Parker approved because Mr. Parker "wanted to make clear and communicate that we were --that we were intentionally as a company taking on this risk."<sup>133</sup> The risk Mr. Parker was concerned about was the historic risk of selling in the MISO Auction that historically provided a low price.<sup>134</sup> That Dynegy management allowed the purchased 50 MW of PY 2015/16 Zone 4 capacity to be taken into the 2015/16 Auction only makes sense, as OE staff's investigation found, when recognizing that Dynegy knew that it was pursuing a strategy to lower the historic risk of selling in the Auction by increasing the likelihood that MISO would need a non-zero priced Dynegy capacity to clear Zone 4—turning a historic risk into a likely lucrative sale of 50 MW of capacity.

**ii. Dynegy Did Not Make Additional Capacity Purchases Because It Feared Drawing Too Much Regulatory Scrutiny**

By February 27, 2015, Dynegy's analysis, shown in the Dynegy slide below at Graphic 11, estimated that MISO would need 574 MW of Dynegy's non-zero capacity offers to clear Zone 4.<sup>135</sup>

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<sup>133</sup> 2016-10-05 Parker Tr. 132:16-20.

<sup>134</sup> 2016-10-05 Parker Tr. 132:5-134:6.

<sup>135</sup> 2015-07-23 Brown Tr. 198:20-199:19, Brown Exh. 44 (DYN\_0009415 at DYN\_0009420) (Dynegy PowerPoint titled "MISO Auction Strategy PY 15-16 dated February 27, 2015 as discussed in the cited testimony); 2016-10-04 Kirschner Tr. 232:4-14 ("Q: So based on this, your expectation was, unless you were wrong about an assumption, your expectation was with 100 percent certainty that the company would – A: Sell something. Q: -- have MISO use some of it's nonzero – A: Yeah, we would sell some of our open position into the auction. Q: At a price? A: Right. Q: Not just at a price taker of zero? A: Right."), Kirschner Exh. 35 (DYN\_0010087 at DYN\_0010092) (Dynegy PowerPoint titled "MISO Auction Strategy PY 15-16" dated February 27, 2015 with "MISO Auction Update" dated March 6, 2015 with "MISO Auction Update" dated March 27, 2015 as discussed in cited testimony). This Dynegy slide is shown at Exhibit 2, Preliminary Findings Slide 52.

**Graphic 11**

System appears to need a minimum of 574MW of capacity from Dynegy to meet the Local Clearing Requirement out of the total 3892MW available

### Zone 4 Stack Analysis

|                                                   | Total Cap MW | Cumulative MW |                             |             |
|---------------------------------------------------|--------------|---------------|-----------------------------|-------------|
| FRAP                                              | 2936         | 2936          |                             |             |
| Rockland                                          | 632          | 3568          |                             |             |
| NRG                                               | 324          | 3892          |                             |             |
| Ameren Peakers                                    | 1599         | 5491          |                             |             |
| Clinton                                           | 971          | 6462          |                             |             |
| EEI                                               | 975          | 7436.5        | Open EEI                    | 346         |
| IPH                                               | 2573         | 10009.5       | Open IPH                    | 1036        |
| DMG                                               | 2678         | 12687.5       | Open DMG                    | 2510        |
| <b>Subtotal Dyn Z4</b>                            | <b>6226</b>  |               |                             |             |
| LCR Z4                                            | 9069         |               |                             |             |
| Non-DYN Generation MW                             | 6462         |               |                             |             |
| <b>Required Z4 Capacity</b>                       | <b>2607</b>  |               |                             |             |
| Bilateral                                         | 323          |               |                             |             |
| Exports                                           | 301          |               |                             |             |
| Wholesale                                         | 482          |               |                             |             |
| Retail                                            | 1228         |               |                             |             |
| <b>Total Committed DYN Sales (2/10 Plan)</b>      | <b>2334</b>  |               |                             |             |
| <b>Required Auction Z4 Capacity (ex: exports)</b> | <b>574</b>   |               | <b>Subtotal Dyn Open Z4</b> | <b>3892</b> |

- LOLE Study has already established the Local Clearing Requirement for Z4
- Dynegy has already committed sales of 2334 MW via bilateral channels
- System appears to need a minimum of 574MW of capacity from Dynegy to meet the Local Clearing Requirement out of the total 3892MW available

DYNEGY

Dynegy’s strategy—internally referred to as the “Z4 Reference Level Strategy,” as shown in the February 27, 2015 Dynegy slide below at Graphic 12—was estimated to achieve \$35 million in capacity revenue.<sup>136</sup> Graphic 12 also shows that Dynegy considered purchasing additional MWs to boost revenue.<sup>137</sup>

<sup>136</sup> OE staff understands Dynegy calculated the \$35 million as follows: 574 MW X \$5.12/kW-month X 1000 kW/MW X 12 month/year = \$35.3 million. See 2015-07-23 Brown Tr. at 188:17-198:20, Brown Exh. 43 (DYN\_0010154) (Dynegy February 6, 2015 analysis estimating that \$35,279,392 would result from the “Z4 Reference Level Strategy”).

<sup>137</sup> 2016-01-29 Brown Tr. 502:11-503:8, Brown Exh. 92 (DYN\_0043866 at DYN\_0043874) (February 26, 2015 email attaching Dynegy PowerPoint title “MISO Auction Strategy PY 15-16 February 27, 2015 as discussed in the cited testimony). This testimony exhibit is shown at Exhibit 2, Preliminary Findings Slide 53.

Graphic 12

|                                              |                |
|----------------------------------------------|----------------|
| Required Z4 Capacity @ Auction               | 574            |
| Reference Level for Zonal Reserve PY15/16 \$ | 5.12           |
| Z4 Reference Level Strategy \$               | 35,279,392 (B) |

## Zone 4 Stack Analysis cont.

### Committed Sales Financials

|                                            |                |
|--------------------------------------------|----------------|
| Total Committed DYN Sales                  | 2334           |
| Wt. Avg. Plan Pricing \$                   | 2.16           |
| Committed plan capacity revenue PY15-16 \$ | 60,497,280 (A) |

### Bidding Financial Assumptions

|                                              |                |
|----------------------------------------------|----------------|
| Required Z4 Capacity @ Auction               | 574            |
| Reference Level for Zonal Reserve PY15/16 \$ | 5.12           |
| Z4 Reference Level Strategy \$               | 35,279,392 (B) |

### Plan Financial Assumptions

|                                  |                |
|----------------------------------|----------------|
| Open JFH + EEI Capacity MW       | 1382           |
| Plan Pricing \$                  | 2.10           |
| Plan capacity revenue PY15-16 \$ | 34,826,400 (C) |

|                          |                |
|--------------------------|----------------|
| 40% DMG Capacity MW      | 1004           |
| Plan pricing \$          | 2.10           |
| Plan capacity revenue \$ | 25,300,800 (D) |

Estimated Reference Level Strategy (A+B) \$ 95,776,672

Estimated plan revenue PY15/16 (A+C+D) \$ 120,624,480

### Indifference MISO Wide Clearing Price

|                                        |         |
|----------------------------------------|---------|
| 100% Open Position Clears MISO Auction | \$ 0.76 |
| 75% Open Position Clears MISO Auction  | \$ 1.01 |
| 50% Open Position Clears MISO Auction  | \$ 1.51 |
| 25% Open Position Clears MISO Auction  | \$ 3.02 |

### Indifference MISO Wide Clearing Price

|                                        |         |
|----------------------------------------|---------|
| 100% Open Position Clears MISO Auction | \$ 1.29 |
| 75% Open Position Clears MISO Auction  | \$ 1.72 |
| 50% Open Position Clears MISO Auction  | \$ 2.57 |
| 25% Open Position Clears MISO Auction  | \$ 5.15 |

Estimated MISO Clearing Strategy (A+B) \$ 95,776,672

Estimated MISO Clearing Strategy (A+C+D) \$ 120,624,480

### Value of 100MW of Z4 Bought Back

|                       |              |
|-----------------------|--------------|
| Average of \$1.75/kwh | \$ 4,046,236 |
| Average of \$2.00/kwh | \$ 3,746,236 |
| Average of \$2.50/kwh | \$ 3,146,236 |

Purchasing incremental MW in the bilateral market could mitigate the revenue shortfall

- Zone 4 is sufficiently long that only a small amount of MW are required to meet LCR
- Even offering capacity at the Reference Level will leave Dynegy short of plan
- Indifference levels are calculated for Zone 2-7 clearing under a variety of clearing volumes for both the Reference Level clear in Zone 4 and a MISO wide clear
- Purchasing incremental MW in the bilateral market could mitigate the revenue shortfall

DYNEGY

Based on the evidence discovered in its investigation, OE staff found that Dynegy knew, however, that purchasing additional MW beyond the 50 MW of capacity to boost revenue via the 2015/16 Auction might draw scrutiny and be seen as manipulative. On this point, Mr. Kirschner testified as follows about the Dynegy analysis included in the February 27, 2015 Dynegy slide shown immediately above in Graphic 12:

- Q: So this is showing that if Dynegy wanted to make more money from having set the -- or having MISO use its nonzero-priced megawatts to clear, Dynegy could have increased its profits by going out into the market and just buying some megawatts and then selling them in the auction? That's what this is about; right?
- A: Yeah, the sensitivity associated with doing that. Whether it's the right thing is a different question.
- Q: Right. There was some concern that that would raise scrutiny with the regulators if Dynegy had gone about doing that; right?
- A: I think. I think there's generally a concern. Anybody who has been in the sector for any length of time, there's a lot of questions about

manipulation, influence, things like that, and I think we're trying to behave.<sup>138</sup>

**iii. In February 2015, Dynegy Was Aware that Its Auction Strategy Could Result in Regulatory Scrutiny**

Dynegy's February 27, 2015 strategy presentation anticipated that Dynegy's "strong price signal" may cause "push back" from MISO and FERC that might lead to favorable market redesign (at least from Dynegy's perspective).<sup>139</sup> Dynegy's strategy presentation noted, for example, that "Downstream impact of a strong price signal could be significant across regulatory, legal, retail, and PR/IR fronts" and asked, "Can the organization defend against push back from external parties?"<sup>140</sup>

On this point, Mr. Brown testified as follows.

Q: ... The term "strong price signal," can that be interpreted as the price signal that would be given if the market cleared at \$150 that Dynegy had offered?

A: Yes.<sup>141</sup>

Based on the evidence, OE staff found that Dynegy had reason to anticipate MISO "push back" regarding its 2015/16 Auction capacity offering strategy. Dynegy understood

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<sup>138</sup> 2016-10-04 Kirschner Tr. 216:13-217:14, Kirschner Exh. 32 (DYN\_0010154) (Dynegy February 6, 2015 analysis estimating that \$35,279,392 would result from the "Z4 Reference Level Strategy" based on MISO needing 574 MW from Dynegy priced at \$5.12/kW-Month).

<sup>139</sup> 2015-07-23 Brown Tr. 203:13-208:6, Brown Exh. 44 (DYN\_0009415 at DYN\_0009427) (Dynegy PowerPoint titled "MISO Auction Strategy PY 15-16 dated February 27, 2015 as discussed in the cited testimony). This testimony exhibit is shown at Exhibit 2, Preliminary Findings Slide 55.

<sup>140</sup> *Id.*

<sup>141</sup> 2015-07-23 Brown Tr. 204:21-25, Brown Exh. 44 (DYN\_0009415 at DYN\_0009427) (Dynegy PowerPoint titled "MISO Auction Strategy PY 15-16 dated February 27, 2015 as discussed in the cited testimony); *see also* 2016-10-04 Kirschner Tr. 236:5-7 ("Q: 'Strong price signal' is your term to describe whatever price is used to clear zone 4, if set by Dynegy? A: Right."); 2016-10-25 Jones Tr. 511:1-5 ("Q: Okay. And in that bullet, the term 'strong price signal' is a reference to the signal that would be sent if MISO, as estimated here by Dynegy, would use the \$150 offer from Dynegy to clear the zone 4 market; right? A: Yes.").

that MISO staff had observed its 2014/15 Auction capacity offering strategy and that Dynegy's actions might be perceived as attempting to manipulate the market.<sup>142</sup> Dynegy planned to follow the same basic capacity Auction offering strategy in the 2015/16 Auction, albeit using different non-zero priced offers based on different cost information.<sup>143</sup>

#### **4. Second Step in Dynegy's Manipulative Scheme for the 2015/16 Auction: Increasing the Price of Retail Capacity by 2½ Times Resulting in Preserving 125.4 MW of Capacity**

On February 27, 2015, Dynegy took its second step in what OE staff found to be a manipulative scheme to knowingly purchase and/or retain sufficient non-zero priced capacity to increase the likelihood that MISO would need non-zero priced Dynegy capacity to clear Zone 4. On that day, Dynegy's Chief Executive Officer, Bob Flexon, ordered that the capacity component of Dynegy's retail pricing be increased 2½ times from \$2/kW-month to \$5/kW-month (\$164.34/MW-day).<sup>144</sup> Graphic 13 below shows a Friday, February 27 to Sunday evening, March 1, 2015 email exchange that refers to the meeting wherein Mr. Flexon ordered this change.<sup>145</sup>

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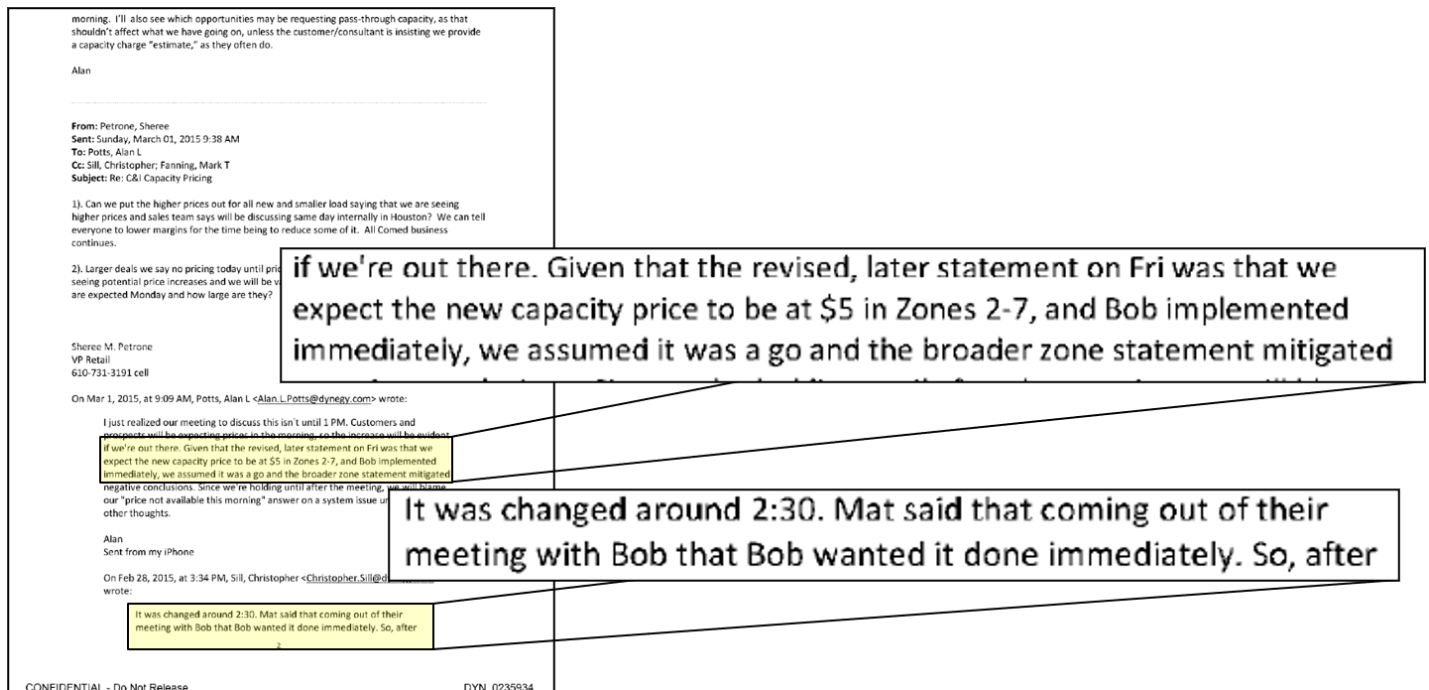
<sup>142</sup> 2016-10-25 Jones Tr. 517:9-23; *see also* 2016-10-25 Jones Tr. 348:6-349:8, Jones Exh. 53 (Loss of Load Expectation Working Group Minutes for May 7, 2014 Meeting); *see also* 2015-07-22 Volpe Tr. 70:8-14, Volpe Exh. 14 (DYN\_0012836) (May 9, 2014 letter from Mr. Jones to MISO).

<sup>143</sup> *See, e.g.*, 2016-10-26 Jones Tr. 669:21-670:2 ("Q: And Dynegy did make offers into the auction at non-zero prices in '14-15 – A: Yes. Q: -- following a bid strategy that was, except for the way the cost build-ups were put together, tantamount to the same strategy as it did in '15-16; right? A: Yes."); 2015-07-23 Brown Tr. 154:11-16 ("Q: Is it fair to say that Dynegy has taken the position that bidding strategy was essentially the same in 2014 and 2015, as it was in 2015-2016? A: To offer in our cost, yes. Q: Right. A Right.").

<sup>144</sup> As shown in a Dynegy Retail Strategy and Tutorial, at slide 8, Dynegy's retail pricing included several components, including energy and capacity components. 2016-02-25 Petrone Tr. 25:7-26:14, Petrone Exh. 9 (DYN0071553 at DYN\_0071541) (October 2, 2013 email attaching Dynegy Retail Strategy and Tutorial dated October 2, 2013 introduced at the cited testimony). As Mr. Jones explained, the price of the capacity component of Dynegy's retail pricing was dictated by Mr. Jones' commercial group. 2016-10-25 Jones Tr. 358:22-359:1 ("Q: Well, when the retail folks, under Sheree's [Ms. Petrone's] responsibility, go out and sell Dynegy's retail product, the capacity component of their pricing is dictated by your commercial group; right? A: Yes.").

<sup>145</sup> 2016-02-23 Petrone Tr. 109:17-110:3, Petrone Exh. 10 (DYN\_0235933 at DYN\_0235934) (email thread starting Friday, February 27, 2015 at 3:52 pm and running

### Graphic 13



During OE staff's investigation, Dynegy claimed to have raised the price 2½ times because Dynegy "thought it likely that Zone 4 would clear at or around \$4.50 - \$5.00."<sup>146</sup>

As Mr. Jones testified, Dynegy also knew such a price hike would slow the pace of Dynegy's retail capacity sales.

Q: Do you recall being involved in a discussion where the four of you determined that it was more likely than not that Dynegy's nonzero bids in the '15-'16 auction would be utilized by MISO to clear the

through Sunday, March 1, 2015 at 9:18 pm among Ms. Petrone and others in Dynegy's retail group as discussed in the cited testimony). This email exchange is shown at Exhibit 2, Preliminary Findings Slide 64. See also Dynegy Response to Data Request No. 48 (DYN\_0056467-69) (Data Request No. 48: "Provide a comprehensive narrative description of Dynegy's development and maintenance of the capacity pricing curves over time, including dates that such documents were changed and the rationale for each change, and produce documents sufficient to support the same") (Appendix Item 634).

<sup>146</sup> Appendix Item 695 - 2016-09-22 email from Dynegy outside counsel to staff. This email is shown, in part, at Exhibit 2, Preliminary Findings Slide 65.

auction, and that because of that belief, that Dynegy might as well now raise prices more in line with the level of the offers that it planned to put in in the '15-'16 auction? Do you recall that?

A: Yes.

Q: Now, in that discussion, raising the price that much, Dynegy knew that that would slow the pace of retail sales; right?

A: That was the assumption. I mean, that's what I would assume.

Q: And you would -- you knew that the others knew that, too; right? I mean, it's not difficult to see raising the price by 2-1/2 times is going to slow the sales.

A: Right.

Q: You don't think you were uniquely situated to have seen that; right?

A: Correct.<sup>147</sup>

Dynegy knew that by slowing the pace of Dynegy's retail sales, Dynegy would retain more capacity and thus could increase the likelihood that MISO would use some of Dynegy's non-zero priced capacity offers to clear Zone 4. On this point, Mr. Jones testified as follows.

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<sup>147</sup> 2016-10-25 Jones Tr. 506:8-507:4; *see also* 2016-10-25 Jones Tr. 525:21-526:3 ("Q: But the company did, and you were involved in the decision to, raise price well above the \$2 price that it had been previous; right? A: Yes. Q: And you knew at that time that it would decrease the pace of sales; right? A: I felt it would decrease the pace of sales. That's my intuition, that sales would slow down."); 2016-10-26 Jones Tr. 570:3-7; 2016-10-26 Jones Tr. 580:18-581:4 ("Q: Yeah. Okay. Fair enough. So what's the first sentence in her response to Mr. Fanning? A: 'Bob, meeting on Friday. It looks '15-'16 volumes are the problem...' Q: Okay. And that's a reference to -- at that meeting there was concern that the pace of Dynegy's retail sales was such that if the pace continued, it's possible that the *gap* that we've discussed of the amount of megawatts needed by MISO would get so small as to Dynegy might lose the opportunity to have MISO need one of its non-zero-priced offers to clear Zone 4, correct? A: I think that's part of it.") (emphasis added), Jones Exh. 87 (DYN\_0236019) (March 5, 2015 email thread among Ms. Petrone and others from Dynegy's retail group as discussed in the cited testimony); 2016-10-04 Kirschner Tr. 241:19-242:17, 263:15-24; 285:23-286:19; 2016-10-05 Parker Tr. 174:8-17; 2016-01-29 Brown Tr. 513:21-514:6.

Q: ... And by raising the price to \$5, although I've heard your testimony that it was not the primary reason, the company knew in raising the price to \$5 it would lower the volumetric pace of retail sales. Fair enough?

A: Fair assumption.

Q: Which would consequently make it more likely that Dynegy's non-zero-priced units would still be needed by the time the auction rolled around?

A: Yes.<sup>148</sup>

As expected, this increased retail capacity price reduced Dynegy's rate of retail sales in the weeks leading up to the 2015/16 Auction. Ms. Petrone, Dynegy's Executive Vice President, Retail, testified as follows:

Q: Subsequent to the price increase that was ordered immediately on 2/27, do you recall any increase in the number of deals that the Retail team lost?

A: I think that we did lose some -- we lost some bids. I do think we did. We lost.

Q: Right. But on any one day, you're winning some, you're losing some. My question is, did you find that you were losing more than you anticipated?

A: I -- I think we lost more than we had previously.

Q: And in the Sales team's view, that was due -- primarily due to the price increase, correct?

A: I think that, yes.<sup>149</sup>

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<sup>148</sup> 2016-10-26 Jones Tr. 581:25-582:9; *see also* 2016-10-05 Parker Tr. 77:22-78:4 ("Q: Now, you would agree with me that if the pace of retail sales slowed down as a result of that price increase, if, in fact, Dynegy sold less retail between the time of that meeting and the time of the auction, every megawatt less that Dynegy sold was actually increasing the likelihood that Dynegy's nonzero offers would be needed by MISO to clear the zone; correct? A: Correct.").

<sup>149</sup> 2016-02-23 Petrone Tr. 186:22-187:12.

Based on the evidence, OE staff found that by slowing Dynegy's rate of retail capacity sales, Dynegy knowingly preserved more capacity to offer into the 2015/16 Auction at non-zero prices.<sup>150</sup>

In attempting to maintain retail customers in light of the 2½ times price increase from \$2/kW-month to \$5/kW-month, Dynegy's retail group considered three alternatives: (1) offering capacity on a "pass through" basis<sup>151</sup>; (2) lowering Dynegy's retail margins; and (3) asking Mr. Jones to make a pricing exception<sup>152</sup>.

The email exchange shown at Graphic 13 above mentions the "pass through" and lower margins methods of dealing with customers' concerns about the price increase.<sup>153</sup> As shown in another Dynegy email thread from March 5, 2015, employees in Dynegy's retail group even discussed "going negative" on margin and "tak[ing] a loss in the retail book for the good of Dyn[egy]."<sup>154</sup> Based on the evidence, OE staff found that the retail

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<sup>150</sup> See, e.g., 2016-02-23 Petrone Tr. 335:16-336:5 ("Q: Right? So, but the impact on '15/'16 volumes that you would be selling was that, by the price going up -- A: The volumes would go down. Q: -- your volumes would go down, correct? A: Mm-hmm. Q: And who was recognizing that as a problem? A: Us, the Retail team. Q: So -- so the problem here is the problem caused by -- A: -- an increased price. Q: An increased price. A: That -- right, that it could affect our offers and we lose business.").

<sup>151</sup> See *supra* note 25.

<sup>152</sup> 2016-02-23 Petrone Tr. 155:2-156:2, Petrone Exh. 10 (DYN\_0235933 at DYN\_0235934) (email thread starting Friday, February 27, 2015 at 3:52 pm and running through Sunday, March 1, 2015 at 9:18pm among Ms. Petrone and others in Dynegy's retail group as discussed in the cited testimony); 2016-09-29 Fanning Tr. 182:16-25.

<sup>153</sup> 2016-02-23 Petrone Tr. 155:2-156:2, Petrone Exh. 10 (DYN\_0235933 at DYN\_0235934) (email thread starting Friday, February 27, 2015 at 3:52 pm and running through Sunday, March 1, 2015 at 9:18 pm among Ms. Petrone and others in Dynegy's retail group as discussed in the cited testimony). This portion of the email exchange is shown at Exhibit 2, Preliminary Findings Slide 70.

<sup>154</sup> Fanning Exh. 13 (DYN\_0236019) (March 5, 2015 email thread among Ms. Petrone and others from Dynegy's retail group as discussed in the cited testimony). This email thread is feature at Exhibit 2, Preliminary Findings Slide 71. See also 2016-09-29 Fanning Tr. 105:2-12 ("A: To the point of we had talked about -- because there was a -- we were in a period of transition where our pricing was out of whack with our competitors. Q: Right. A: And we suspected that it was because of the capacity price component of our deal. We had discussed a concept for, on certain deals or for a short period of time, until there was more

capacity price increase was not economic for Dynegy absent Dynegy's knowledge that fewer retail sales ahead of the Auction would preserve capacity that Dynegy could offer at non-zero prices and Dynegy's expectation that MISO likely would need to clear Zone 4.

In deciding whether to allow an exception to the \$5/kW-month pricing, Mr. Jones considered the volume of the potential sale and its impact on the "gap"—the amount of non-zero priced Dynegy capacity that Dynegy was estimating MISO might need to clear Zone 4. Mr. Jones testified as follows.

Q: Do you recall around the March 9th, 2015, time frame that you were frequently getting contacts from folks on the retail side that were either asking permission to go off the \$5 pricing or lower margins or take other action to try to maintain sales?

A: Yes.

\* \* \* \*

Q: Mm-hmm. But one factor you were considering each time in whether to make it easier or not for the retail folks to make a sale is how much volume they were trying to sell, correct?

A: I'm sure that was part of the consideration.

\* \* \* \*

Q: Fair enough. But as you were getting closer and closer to the auction, you were concerned about maintaining a sufficient *gap* that MISO would still need Dynegy's non-zero-priced bids to clear Zone 4, correct?

A: I was cognizant of the *gap*, but also trying to balance if -- if we were able to sell to customers at the -- at or near the offer price level of the auction, that that would be a good outcome.

Q: Right. And I know you're -- you're focused on what price you might offer relative to how the auction might clear, but, in addition, you also

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clarity to the auction pricing, actually taking our energy margins to zero or even negative if they were an important enough sort of customer relationship that we wanted to keep.”),

had in mind what impact a retail sale would have on diminishing the size of the **gap** we've been discussing, correct?

A: Yes.<sup>155</sup>

Mr. Jones testified that he was not surprised that Dynegy lost retail sales due to the decision to increase the price of the capacity component of Dynegy's retail offering by 2½ times.<sup>156</sup> As shown in an April 30, 2015 Dynegy email, Dynegy kept a tally of Commercial and Industrial—*i.e.*, C&I—retail sales Dynegy lost because of the higher capacity pricing.<sup>157</sup> This Dynegy email also shows Dynegy's decision to implement \$5/kW-month pricing resulted in 46.4 MW of lost commercial and industrial retail capacity sales.<sup>158</sup> As shown in an April 30, 2015 Dynegy internal report, Dynegy's decision to implement \$5/kW-month pricing also resulted in 79 MW of lost "muni-agg" retail capacity sales.<sup>159</sup>

Dynegy viewed the negative impact on its retail business as a trade-off for benefitting its commercial business. On this point, Mr. Jones testified as follows.

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<sup>155</sup> 2016-10-26 Jones Tr. 585:9-587:1 (emphasis added), Jones Exh. 88 (DYN\_0236071) (March 9, 2015 email, including Mr. Fanning asking to go negative on margin and Ms. Petrone responding "Approved - spoke with Kirshner who spoke to Hank. **Volume is okay**") (emphasis added).

<sup>156</sup> 2016-10-26 Jones Tr. 675:25-676:19 ("Q: So for the commercial and industrial retail deals, it's titled here 'C&I Deals Lost Since 2/27 Due to Capacity;' do you see that? A: Yes. Q: And that's; you take that as a reference to the price increase, right, that you guys put in on 2-27? A: Yes. Q: Okay. So he gives a listing of deals that in his assessment were lost because of that? A: Yes. Q: Fair enough? Okay. And we'll come back to this, but I'll just state for the record that the PLC megawatts there total up to 46.4 megawatts. A: Okay. Q: So it doesn't surprise you to see this information that in the wake of the price increase from the 2 to the \$5 that megawatts of retail sales were in fact lost; fair enough? A: That doesn't surprise me."), Jones Exh. 105 (DYN\_0502025-27) (April 30, 2015 email thread including Ms. Petrone and others in Dynegy's retail group as discussed at the cited testimony).

<sup>157</sup> Jones Exh. 105 (DYN\_0502025-27) (April 30, 2015 email thread including Ms. Petrone and others in Dynegy's retail group as discussed at the cited testimony). This Dynegy email is shown at Exhibit 2, Preliminary Findings Slides 73 and 74.

<sup>158</sup> See *supra* note 157.

<sup>159</sup> Appendix Item 694 – DYN\_0233920 (Dynegy Retail Metrics, April 30, 2015) at DYN\_0233926. This information is included at Exhibit 2, Preliminary Findings Slide 75.

Q: ...[E]very retail sale, every additional megawatt of retail sold was an additional megawatt that could not be priced at a non-zero level for MISO's taking in the auction; fair enough?

A: Under the strategy we employed, that is correct.

Q: Okay. So it was a *trade-off* that the company considered as to raising the price and slowing retail versus the likelihood that the gap was getting smaller, those were considerations that Dynegy weighed in considering the bid strategy that it took; fair enough?

A: Yes.<sup>160</sup>

In sum, OE staff found that Dynegy took its second manipulative step to influence the outcome of the 2015/16 Auction by increasing the price of the capacity component of Dynegy's retail price by 2½ times on Friday, February 27, 2015, causing retail sales to decline by 125.4 MW of capacity (46.4 MW (Commercial & Industrial) + 79 MW (Muni-Agg))—thus preserving such capacity for Dynegy to offer at non-zero prices in the 2015/16 Auction.

#### **5. Third Step in Dynegy's Manipulative Scheme for the 2015/16 Auction: Refusing to Offer 300 MW of Capacity at Wholesale**

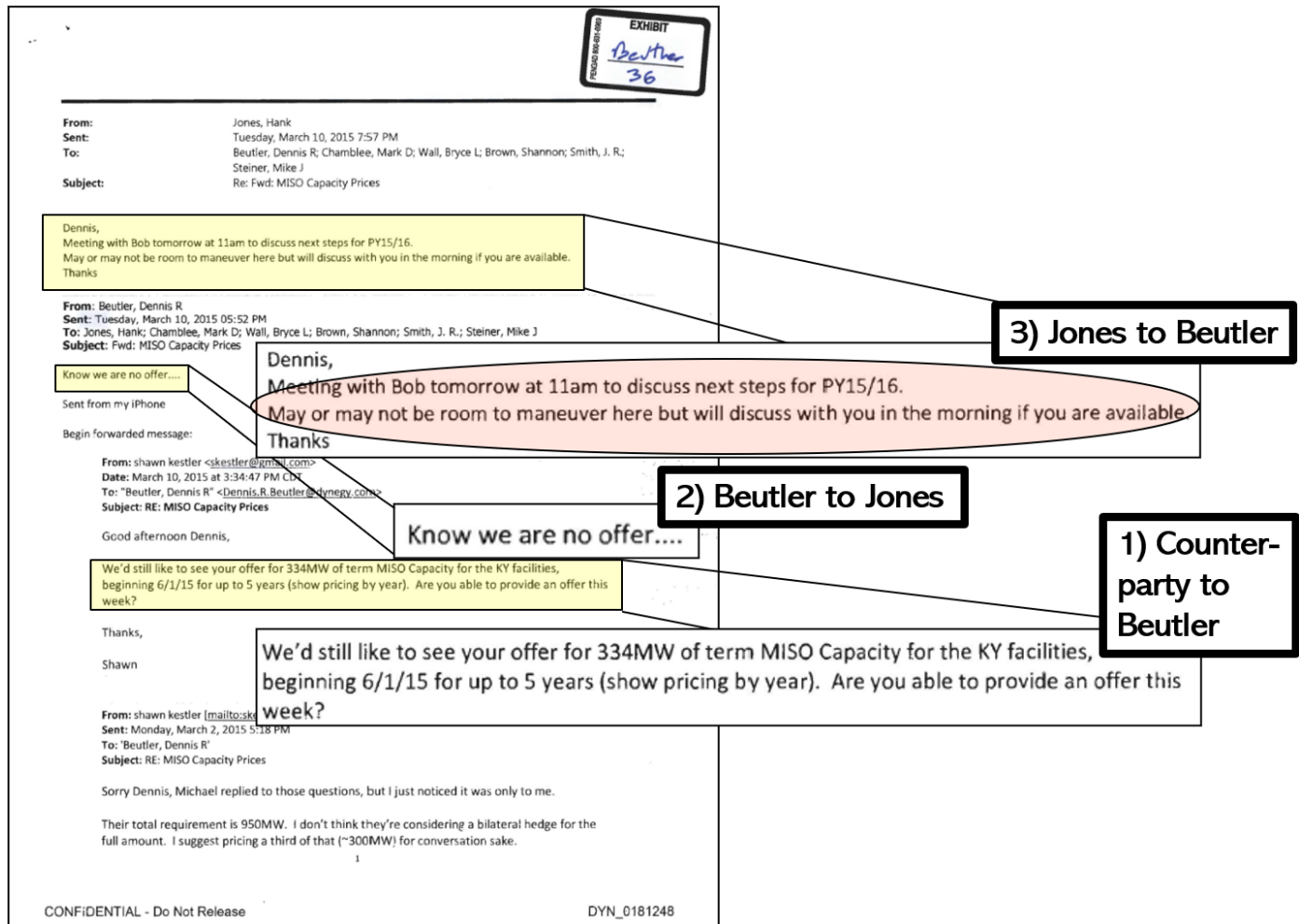
In early March 2015, Dynegy took its third step in what OE staff found to be a manipulative scheme to knowingly purchase and/or retain sufficient non-zero priced capacity to increase the likelihood that MISO would need non-zero priced Dynegy capacity to clear Zone 4. Dynegy refused to offer 300 MW of 2015/16 Zone 4 capacity to a counterparty seeking a multiyear offer beginning with the 2015/16 PY. On March 10, 2015, Messrs. Beutler, Managing Director of Wholesale Origination, and Jones, EVP and

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<sup>160</sup> 2016-10-26 Jones Tr. 662:11-21 (emphasis added); *see also* 2016-10-26 Jones Tr. 633:1-19, Jones Exh. 97 (DYN\_0236222) (March 19, 2015 email to Ms. Petrone showing two Dynegy retail customers – Spring Valley and LaSalle – have received negative margin pricing as discussed in cited testimony), 643:2-16, Jones Exh. 100 (DYN\_0236341) (March 24-26, 2015 email thread including Mr. Fanning and others as discussed at the cited testimony); 2016-09-29 Fanning Tr. 179:20-180:18, 181:2-182:4, 184:10-22; 2016-10-05 Parker Tr. 72:20-73:3.

Chief Commercial officer, exchanged the following emails, shown at Graphic 14, about the counterparty's request for an offer.<sup>161</sup>

**Graphic 14**



In this email thread, the counterparty reiterated its request for an offer for over 300 MW of Zone 4 capacity for up to 5 years, Mr. Beutler relayed this request to Mr. Jones and added that Mr. Beutler knew that Dynegy's response was "no offer." Mr. Jones replied that he was meeting with Bob (CEO Bob Flexon) the next day about next steps for the 2015/16 capacity and whether there "may or may not be room to maneuver here."

<sup>161</sup> 2016-02-22 Beutler Tr. 361:11-16, Beutler Exh. 36 (DYN\_0181248) (March 10, 2015 email exchange among Mr. Jones, Mr. Beutler, and others at Dynegy as discussed in the cited testimony). This email is shown at Exhibit 2, Preliminary Findings Slide 78.

Mr. Jones testified that he refused to offer the 300 MW of 2015/16 capacity, in part, because of the impact such sale might have on the “gap”—the amount of non-zero priced Dynegy capacity that Dynegy was estimating MISO might need to clear Zone 4:

Q: And do you see that – what’s your response to Mr. B[e]utler[sic]?

A: ‘Dennis, meeting with Bob tomorrow at 11 a.m. to discuss next steps for planning year '15-'16. May or may not be room to maneuver here, but will discuss with you in the morning if you are available. Thanks.’

Q: Does that refresh your recollection that you discussed with Mr. Flexon the next morning, which would have been March 11th, whether or not Dynegy should provide an offer to an interested customer on 300 megawatts for planning year '15-'16?

A: I don’t recall the conversation with Mr. Flexon.

Q: Do you -- does this refresh your recollection that your consideration of room to maneuver, in fact, was a reference to whether or not the possible sale of 300 megawatts would close the **gap** that we have been discussing too much so that it would present a high risk that MISO would not need Dynegy’s non-zero-priced offers in the next auction to clear Zone 4?

A: I recall that the -- this particular Century Aluminum deal deserved scrutiny because of the **gap** and the pricing. I do remember that.<sup>162</sup>

\* \* \* \*

Q: But you would agree with me that your phraseology of room to maneuver is entirely consistent with your monitoring of the **gap** or amount of megawatts that MISO may need to take from Dynegy’s non-zero-priced offers in order to clear the LCR for Zone 4, correct?

A: I would assume that that’s part of -- the other part of it is -- is a function of price.

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<sup>162</sup> 2016-10-26 Jones Tr. 596:8-597:4 (emphasis added), Jones Exh. 89 (DYN\_0181248) (March 10, 2015 email exchange among Mr. Jones, Mr. Beutler, and others at Dynegy as discussed in the cited testimony).

Q: Fair enough. But it's most definitely also a function of volume -- monitoring the volume, right?

A: Yes.<sup>163</sup>

Dynegy's refusal to offer the 300 MWs was consistent with a March 6, 2015 Dynegy analysis that noted additional retail capacity sales had decreased Dynegy's open position (*i.e.*, volume of unsold capacity) and recommended weekly meetings to monitor retail capacity sales.<sup>164</sup> By March 11, 2015, Dynegy's analysis, shown below at Graphic 15, estimated that MISO would need 428 MW of Dynegy's non-zero offers to clear Zone 4.<sup>165</sup>

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<sup>163</sup> 2016-10-26 Jones Tr. 620:23-621:7 (emphasis added), Jones Exh. 92 (DYN\_0010150) (Dynegy's March 11, 2015 analysis estimating that MISO would need 428 MW of Dynegy's non-zero priced offers as discussed around cited testimony).

<sup>164</sup> See 2015-07-23 Brown Tr. 233:17-34:2 ("Q: But if you had sold 600 more megawatts, whether through bilateral or wholesale, or retail, the strategy wouldn't have worked? A: That would have been the same strategy though. As I mentioned before, regardless of whether we sell it bilateral, wholesale, retail, or through the auction, they are all part of the same strategies. Q: Right, but the auction strategy wouldn't have worked, right? A: The auction, yes, because our megawatts clearly would not have been needed."), Brown Exh. 45 (DYN\_0010087 at DYN\_0010101) (Dynegy PowerPoint titled "MISO Auction Strategy PY 15-16" dated February 27, 2015 with "MISO Auction Update" dated March 6, 2015 with "MISO Auction Update" dated March 27, 2015 as discussed in cited testimony); 2016-01-29 Brown Tr. 509:15-510:12, Brown Exh. 96 (DYN\_0490523 at DYN\_0490544) (March 18, 2015 email attaching Dynegy PowerPoint titled "MISO Auction Strategy PY 15-16" dated February 27, 2015 with "MISO Auction Update" dated March 6, 2015 with "MISO Auction Update" as discussed at cited testimony). These testimony exhibits are shown at Exhibit 2, Preliminary Findings Slide 80.

<sup>165</sup> 2016-10-04 Kirschner Tr. 292:3-14 ("Q: And is it fair to say here you've done a recalculation, and now the *gap*, as it were, is now down to 428? A: Okay. Q: Is that right? A: That appears to be the number that resulted from the adjustments that we made. Q: Right. At 428, you're estimating at this point that MISO will [need] Dynegy's nonzero offers to clear zone 4 in the amount of 428 megawatts? A: Uh-huh.") (emphasis added), Kirschner Exh. 38 (DYN\_0010150) (Dynegy's March 11, 2015 analysis estimating that MISO would need 428 MW of Dynegy's non-zero priced offers as discussed around cited testimony). This testimony exhibit is shown at Exhibit 2, Preliminary Findings Slide 81.

Graphic 15

EXHIBIT  
Kirschner # 38

|                             | Total Cap MW | Cumulative MW |
|-----------------------------|--------------|---------------|
| FRAP                        | 2936         | 2936          |
| Rackand                     | 632          | 3568          |
| MFG                         | 324          | 3892          |
| American Position           | 1599         | 5491          |
| Clinton                     | 971          | 6462          |
| EDI                         | 975          | 7436.5        |
| WH                          | 2573         | 10009.5       |
| DAG                         | 2678         | 12687.5       |
| <b>Subtotal Dyn 21</b>      | <b>6325</b>  |               |
| LCR 24                      | 9859         | 9859          |
| Non-DYN Generation MW       | 6462         | 7197          |
| <b>Required Z4 Capacity</b> | <b>3397</b>  |               |

|                                                  |             |             |
|--------------------------------------------------|-------------|-------------|
| Bilateral                                        | 773         | 323         |
| Exports                                          | 346         | 301         |
| Wholesale                                        | 482         | 482         |
| Retail                                           | 1214        | 1228 248    |
| <b>Total Committed DYN Sales (2/10 Plan)</b>     | <b>2315</b> | <b>2334</b> |
| <b>Required Auction Z4 Capacity (ex: export)</b> | <b>428</b>  |             |

|                                         |                   |
|-----------------------------------------|-------------------|
| <b>Committed Sales Revenue</b>          |                   |
| Total Committed DYN Sales               | 2315              |
| WH Avg Plan Pricing                     | \$ 2.38           |
| Committed plan capacity revenue PY15-16 | \$ 60,004,800 (A) |

Bidding Financial Assumptions

|                                           |                          |
|-------------------------------------------|--------------------------|
| <b>Required Z4 Capacity @ Auction</b>     | <b>428</b>               |
| Reference Level for Zonal Reserve PY15/16 | \$ 5.12                  |
| <b>Z4 Reference Level Strategy</b>        | <b>\$ 26,305,888 (B)</b> |

|                                                 |                      |
|-------------------------------------------------|----------------------|
| <b>Estimated Reference Level Strategy (A+B)</b> | <b>\$ 86,310,688</b> |
| Indifference MISO Wide Clearing Pric            |                      |
| 100% Open Position Clears MISO Auction          | \$ 0.56              |
| 75% Open Position Clears MISO Auction           | \$ 0.75              |
| 50% Open Position Clears MISO Auction           | \$ 1.11              |
| 25% Open Position Clears MISO Auction           | \$ 2.25              |

|                                               |                      |
|-----------------------------------------------|----------------------|
| <b>Estimated MISO Clearing Strategy (A+C)</b> | <b>\$ 86,310,688</b> |
| Value of 100MW of Z4 Bought Back              |                      |
| Average of \$1.75/barm                        | \$ 4,046,236         |
| Average of \$2.00/barm                        | \$ 3,746,236         |
| Average of \$2.50/barm                        | \$ 5,146,236         |

Plan Financial Assumptions

|                                 |                   |
|---------------------------------|-------------------|
| <b>Open WH + ED Capacity MW</b> | <b>1394</b>       |
| Plan Pricing                    | \$ 2.10           |
| Plan capacity revenue PY15-16   | \$ 34,826,400 (C) |

|                              |                          |
|------------------------------|--------------------------|
| <b>40% DAG Capacity MW</b>   | <b>1004</b>              |
| Plan pricing                 | \$ 2.38                  |
| <b>Plan capacity revenue</b> | <b>\$ 23,908,000 (D)</b> |

|                                                 |                       |
|-------------------------------------------------|-----------------------|
| <b>Estimated plan revenue PY15/16 (A+C+D)</b>   | <b>\$ 138,132,000</b> |
| Indifference MISO Wide Clearing Pric            |                       |
| 100% Open Position Clears MISO Auction          | \$ 1.29               |
| 75% Open Position Clears MISO Auction           | \$ 1.72               |
| 50% Open Position Clears MISO Auction           | \$ 2.37               |
| 25% Open Position Clears MISO Auction           | \$ 5.23               |
| <b>Estimated MISO Clearing Strategy (A+C+D)</b> | <b>\$ 138,132,000</b> |

|                                                  |             |
|--------------------------------------------------|-------------|
| Bilateral                                        | 273         |
| Exports                                          | 346         |
| Wholesale                                        | 482         |
| Retail                                           | 1214        |
| <b>Total Committed DYN Sales (2/10 Plan)</b>     | <b>2315</b> |
| <b>Required Auction Z4 Capacity (ex: export)</b> | <b>428</b>  |

|                                           |                          |
|-------------------------------------------|--------------------------|
| <b>Required Z4 Capacity @ Auction</b>     | <b>428</b>               |
| Reference Level for Zonal Reserve PY15/16 | \$ 5.12                  |
| <b>Z4 Reference Level Strategy</b>        | <b>\$ 26,305,888 (B)</b> |

## 6. Fourth Step in Dynegy's Manipulative Scheme for the 2015/16 Auction: Refusing to Offer 85 MW of Capacity on Anything Other Than a "Pass Through" Basis

By March 17, 2015, Dynegy took its fourth step in what OE staff found to be a manipulative scheme to knowingly purchase and/or retain sufficient non-zero priced capacity to increase the likelihood that MISO would need non-zero priced Dynegy capacity to clear Zone 4. By that date, as shown in the email exchange between Messrs. Beutler and Jones, Mr. Jones authorized an 85 MW Zone 4 2015/16 wholesale capacity offer made only on a "pass through"<sup>166</sup> basis because he wanted to avoid reducing the "gap"<sup>167</sup>.

<sup>166</sup> See *supra* note 25.

<sup>167</sup> 2016-10-26 Jones Tr. 629:13-630:9, Jones Exh. 96 (DYN\_0181378) (March 17, 2015 email between Mr. Jones and Mr. Beutler discussed at the cited testimony). This email is shown at Exhibit 2, Preliminary Findings Slide 83.

Regarding this email exchange, Mr. Jones testified as follows:

Q: And you told Mr. B[e]utler[sic] that you're comfortable with offering planning year '15-'16 capacity to this particular customer only if it's on a pass through basis?

A: Yes.

Q: And why was that?

A: I'm hesitating because I'm not sure if this is -- if this is after the auction or not.

Q: The bids didn't get put in until the end of March.

A: The auction bids were not put in, okay. I -- I don't recall the specific Caterpillar conversations. But in anticipation of your next question, I think it does have -- it has to do with the *gap*.

Q: Okay. So you can see here that the megawatts at issue were 85 megawatts, right?

A: Right.

Q: And that had the 85 megawatts been offered as not a pass through and Caterpillar had decided to buy them prior to the auction, that would reduce the *gap* by 85 megawatts, correct?

A: Yes.<sup>168</sup>

As the 2015/16 Auction date approached, Dynegy continued to monitor and estimate the gap to estimate whether MISO likely would need a non-zero priced Dynegy capacity to clear Zone 4. By March 27, 2015, a contemporaneous Dynegy analysis estimated that MISO would need 0 MW of Dynegy's non-zero capacity offers to clear Zone 4—*i.e.*, what Dynegy called the “gap” was now negative such that MISO was estimated to have 64 MW more than needed to clear Zone 4 without using any of Dynegy's non-zero priced capacity because retail sales had outpaced Dynegy's estimates.<sup>169</sup> But even as these

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<sup>168</sup> 2016-10-26 Jones Tr. 629:13-630:9, Jones Exh. 96 (DYN\_0181378) (March 17, 2015 email between Mr. Jones and Mr. Beutler discussed at the cited testimony) (emphasis added).

<sup>169</sup> 2016-10-04 Kirschner Tr. 298:2-16 (“Q: Okay. So it was ultimately retail sales, nonetheless, outpaced where Dynegy thought its position was? A: Right. Q: Fair enough?

gap estimates changed, there is no evidence that Dynegy ceased its strategy to increase the likelihood that MISO would need non-zero priced Dynegy capacity to clear Zone 4.

In fact, on the same day, Dynegy's updated MISO 2015/16 Auction Strategy presentation noted that although Dynegy was no longer estimated to be long relative to the Zone 4 LCR, a Dynegy offer might nonetheless still set price for Zones 2 through 7.<sup>170</sup> This analysis, shown below at Graphic 16, also included a potential outcome where Dynegy estimated that Dynegy would clear 552 MW—only 1 MW off from the 553 MW Dynegy ultimately cleared.<sup>171</sup>

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A: Uh-huh. Q: So now what had been a **gap** had shrunk to zero, in fact gone negative. A: Right.”) (emphasis added), 305:14-306:4, Kirschner Exh. 40 (DYN\_0010153) (Dynegy's March 27, 2015 analysis estimating that MISO would need -64 MW of Dynegy's non-zero priced offers as discussed around cited testimony); 2016-10-26 Jones Tr. 660:19-661:6, Jones Exh. 102 (DYN\_0010153). This March 27, 2015 Dynegy analysis is shown, in part, at Exhibit 2, Preliminary Findings Slides 84 and 85.

<sup>170</sup> 2016-10-04 Kirschner 316:24-317:23 (“Q: Okay. And in the last bullet, if you could read that. A: ‘Opportunities still exist for MISO to need Dynegy megawatts to clear auction, but it will not likely be due to zone 4 separating. Possibly needed to clear zones 2 through 7.’ Q: Okay. A: So we spent a lot of time looking at zone 4 as an island, but there were enough concerns about the overall length of the system. I think we showed a graphic in one of the earlier presentations. I believe actually, it’s on this one, page 5, the original presentation, the February 27, for Exhibit 35. It just shows that the overall system is relatively flat. Q: Uh-huh. A: And so there was still a probability, even without the local clearing requirement constraint in zone 4, there would be a chance that the system could need us for another ISO -- or another zone, rather, in the ISO. Q: Fair enough. But if that occurred, the clearing price would still be at a Dynegy-set -- or rather, a Dynegy offer would be taken to clear the system? A: Right. It would just be for the whole of the system and not for zone 4 by itself.”), Kirschner Exh. 35 (DYN\_0010087 at DYN\_0010109) (Dynegy PowerPoint titled “MISO Auction Strategy PY 15-16” dated February 27, 2015 with “MISO Auction Update” dated March 6, 2015 and with “MISO Auction Update” dated March 27, 2015 as discussed in cited testimony); 2016-10-26 Jones Tr. 553:5-17, Jones Exh. 84 (DYN\_0010087 at DYN\_0010109). This Dynegy March 27, 2015 MISO 2015/2016 Auction Strategy is shown, in part, at Exhibit 2, Preliminary Findings Slide 86.

<sup>171</sup> 2016-10-04 Kirschner 320:20-321:8 (“Q: Let’s go to page 25, ‘economic outcomes-DYN cost-based offers.’ A: Uh-huh. Q: So what this was indicating is if Dynegy got pricing at the levels shown in the left-most column and cleared the quantity shown in the second column in, this shows what the incremental revenue would be; right? A: That’s right. Q: Okay. So I think you would agree with me that if we go to the second to last row in this table, the quantity clearing in the auction, the 552, that was actually just one megawatt off

Graphic 16

| Economic Outcomes – DYN Cost Based Offers |                                |                            |                  |  |
|-------------------------------------------|--------------------------------|----------------------------|------------------|--|
| PY 15-16 Auction Price (\$/kw-mo)         | Quantity Clearing Auction (MW) | Incremental Revenues (\$M) | Comments         |  |
| PY 15-16 Auction Price (\$/kw-mo)         | Auction (MW)                   | Revenues (\$M)             | Comments         |  |
| \$0.50                                    | \$4.75                         | 552                        | \$31.43          |  |
| \$2.10                                    | 0                              | \$0.00                     |                  |  |
| \$3.50                                    | 150                            | \$6.30                     |                  |  |
| \$4.00                                    | 150                            | \$7.20                     |                  |  |
| \$4.75                                    | 552                            | \$31.43                    |                  |  |
| \$5.00                                    | 1052                           | \$63.09                    | 500MW at \$5 Cap |  |

- MISO would only need a small amount of Dynegy MW to clear the market with a price signal (\$3-4/kw-mo) that represents our real costs
- Should MISO need additional Dynegy MW, opportunity to close in on MISO reference price level (~\$5/kw-mo) as higher cost units clear market
- Near reference price level, Dynegy can exceed budget targets

25

DYNEGY

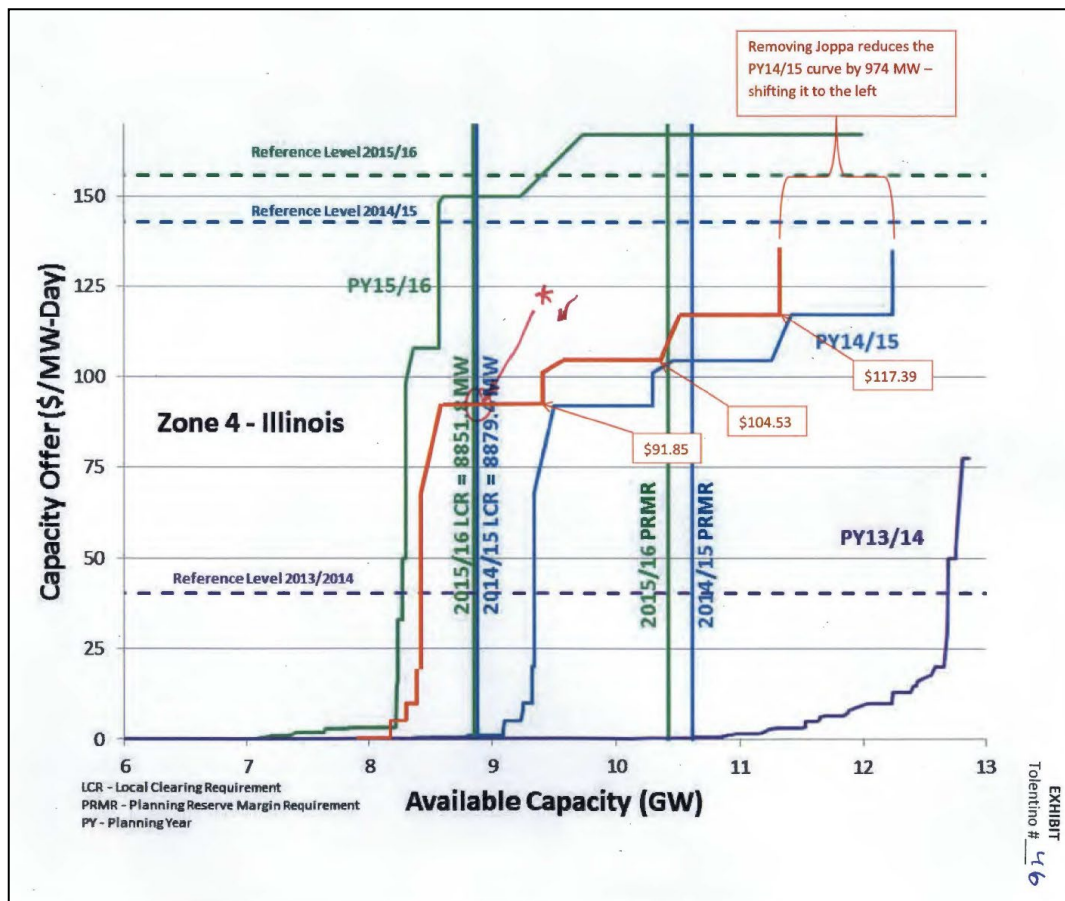
## 7. Dynegy's Scheme to Set the 2015/16 Auction Price Worked

As shown in Graphic 6 (repeated below), a Dynegy offer set the 2015/16 Auction price at \$150/MW-day and Dynegy cleared 553 MW. In Graphic 6, green is used to show the 2015/16 LCR and capacity offer prices vs. available capacity and that the 2015/16 Zone 4 price was set at \$150/MW-Day—*i.e.*, at the intersection of the green capacity offers line

of what ultimately happened . . . .? A: Yeah, . . . .”), Kirschner Exh. 35 (DYN\_0010087 at DYN\_0010111) (Dynegy PowerPoint titled “MISO Auction Strategy PY 15-16” dated February 27, 2015 with “MISO Auction Update” dated March 6, 2015 and with “MISO Auction Update” dated March 27, 2015 as discussed in cited testimony). This portion of Dynegy’s updated MISO 2015/16 Auction Strategy is included at Exhibit 2, Preliminary Findings Slide 87.

and the green vertical line showing the LCR at 8,851 MW. MISO used a Dynegy \$150/MW-Day offer to clear Zone 4.<sup>172</sup>

**Graphic 6**



## 8. Further Evidence of Dynegy's Knowing Actions to Set Price

The testimony of three Dynegy executives regarding the outcome of the 2015/16 Auction provides additional insight into the scienter behind Dynegy's offering strategy and actions leading up to the 2015/16 Auction.

<sup>172</sup> Mr. Jones confirmed his understanding in testimony that one of Dynegy's units set the price in the 2015/16 Auction. 2016-10-25 Jones Tr. 280:20-25 ("Q: Relative to the '15-'16 PRA, ultimately, Dynegy did succeed in having at least some of its offers accepted by MISO and actually be used to set price for capacity, correct, at \$150 a megawatt-day? A: One of our units was the marginal unit that set that price.").

*First*, Mr. Tolentino, Dynegy's lead analyst who monitored Dynegy's position relative to the 2015/16 Auction, testified that Dynegy had the ability to influence price and used such influence to set price under the mitigation threshold.

Q: Relative to the '15-'16 auction --

A: Uh-huh.

Q: -- Dynegy had market power, it exercised market power, beneath the cap where it would be mitigated. Those three statements, are any of those statements wrong, in your view?

A: What I would say is we did have the ability to influence price. We ended up setting price.

Q: And you did it below the cap; right?

A: Well, and the price was below -- from what I understand, the price was below the cap.

Q: Okay. So do you agree with my statement, Dynegy had market power, it exercised market power, but it did so below the cap?

A: I do not have a definition of market power<sup>[173]</sup> to state that we -- that -  
- by any defined standard that there was market power.

Q: All right. Let me -- as best I can, let me restate what you did and see if you will agree.

A: Uh-huh.

Q: Because I'm going to use your words.

A: Okay.

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<sup>173</sup> OE staff does not find credible Mr. Tolentino's claimed ignorance about the definition of market power in light of the evidence that he identified Dynegy's market power concerns as early as December 2012—the period leading to Dynegy's acquisition of Zone 4 generating assets from Ameren. *See supra* notes 66-67. At that time, Mr. Tolentino flagged concerns with Dynegy market power "MISO-wide and . . . In Illinois [ – Zone 4 – ] as well." *Id.*

Q: As best I recall them. Dynegy had the ability to influence price. Dynegy ultimately used that influence and set the price. And it did so below the cap. Do you agree with that?

A: Yes.<sup>174</sup>

Similarly, Mr. Jones admitted that, but for Dynegy's (1) purchase of 50 MW, (2) refusal to offer 300 MW, and (3) increasing price on the capacity component of Dynegy's retail offers by 2½ times in the weeks leading to the 2015/16 Auction, Dynegy would have cleared far fewer than 553 MW and possibly none at all. On this point, Mr. Jones testified as follows:

Q: So it's quite possible that had Dynegy not taken those three steps, bought the 50 megawatts, not offered on the 300, and not jacked the price by 2-1/2 times on the retail capacity components of its retail, it's quite possible that Dynegy would have cleared far fewer than 553 and maybe even not cleared anything in the '15-16 auction had it not taken those three steps; fair enough?

A: I think that's the way the math stacks up, but the --

Q: It's a yes-or-no question. If you could answer that, then you can provide any --

A: Yes.

Q: Do you agree?

A: Yes.<sup>175</sup>

*Second*, Mr. Jones admitted that Dynegy knew that each of these three steps enhanced the likelihood that MISO would need Dynegy's non-zero priced capacity to clear the 2015/16 Auction.

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<sup>174</sup> 2016-03-23 Tolentino Tr. 815:9-816:10.

<sup>175</sup> 2016-10-26 Jones Tr. 737:18-739:8; *see also* 2016-10-04 Kirschner Tr. 358:16-359:21. The foregoing testimony does not discuss Dynegy's fourth manipulative step—refusing to offer 85 MW other than on a pass through basis. Mr. Jones testified that “it has to do with the gap” that Dynegy would only offer the 85 MW on a pass through basis and if not offered only on a pass through basis a sale would have reduced the gap by 85 MW. 2016-10-26 Jones Tr. 629:13-630:9, Jones Exh. 96 (DYN\_0181378) (March 17, 2015 email between Mr. Jones and Mr. Beutler as discussed at the cited testimony).

Q: ... So I think it's a fair statement that for each of these three steps that I have outlined, the 50 purchase, the 300 no offer, and the price hike from 2 to 5, when each of those decisions were made I think what you are saying is they; none of them were made with the primary goal of influencing the market outcome in the '15-16 PRA; fair enough?

A: Yes.

Q: But you would agree with me that, relative to each of those, Dynegy knew that although it had other reasons to do these transactions or make these decisions it knew that by buying the 50 it would make it more likely that MISO would need its megawatts in the '15-16 auction by not offering the 300 and not giving anybody a chance to buy it, it knew that it was preserving or enhancing the likelihood that MISO would need its megawatts in the auction at non-zero prices, and it knew by increasing the price on the capacity component of its retail that it would slow retail sales, again enhancing the likelihood that MISO would need Dynegy's non-zero priced units in the auction; fair enough?

A: Yes, sir.<sup>176</sup>

*Lastly*, Mr. Parker, Dynegy's Chief Risk Officer, testified that Dynegy's Code of Conduct—which states: “It should never be Dynegy's intention to engage in activities that can be construed as manipulative, unethical, or deceptive. Any strategy for bidding that involves efforts to affect the clearing price—moving it either up or down—potentially could be viewed as market manipulation by FERC and deemed illegal”—suggests its 2014/15 and 2015/16 Auction strategies could be deemed illegal.

Q: So do you agree with me that based on this code of conduct, what Dynegy did in bidding the way it did for the '15-'16 and '14-'15 PRA is something that the code of conduct on its face suggests that it could be seen by FERC as manipulation and maybe deemed illegal? Do you agree with that?

A: It could, correct.<sup>177</sup>

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<sup>176</sup> 2016-10-26 Jones Tr. 740:7-741:3. *See also supra* note 175 regarding Mr. Jones' testimony about only offering 85 MW on a pass through basis.

<sup>177</sup> 2016-10-05 Parker Tr. 228:7-13, Parker Exh. 31 (DYN\_0001834) (Dynegy Code of Conduct revised July 2014 as discussed in cited testimony). Dynegy's Code of Conduct is

## VII. Financial Impact of Dynegy's Manipulative Scheme

OE staff's analysis from its investigation estimates that Dynegy earned in the range of \$17 million more directly from the 2015/16 Auction than Dynegy would have but for Dynegy's four manipulative steps. As shown in the chart shown at Preliminary Findings Slide 100, OE staff calculated these additional profits by taking the difference between Dynegy's approximately \$30 million of 2015/16 Auction capacity revenue and the revenue Dynegy theoretically would have earned by selling the cleared 560 MW (attributed to Dynegy's four manipulative steps) for \$2/kW-month prior to the Auction. This additional profit supported OE staff's having found that Dynegy intended to achieve this result (or close to it), including by taking four manipulative steps—each of which Dynegy understood would increase the likelihood MISO would use a Dynegy non-zero priced capacity offer to set price.

OE staff's investigation also estimated that Dynegy earned additional profits from post-2015/16 Auction capacity sales whose values were enhanced by Dynegy's four manipulative steps. Notably, after setting the \$150/MW-day (\$4.56/kW-month) Zone 4 price in MISO's 2015/16 Auction, Dynegy increased its internal valuation of its capacity—the value of such capacity as a Dynegy asset on Dynegy's books—and began pursuing higher priced capacity sales.<sup>178</sup> OE staff calculated these additional post-2015/16 Auction profits to have been likely over \$100 million. Subsequent to the MISO 2015/16 Auction, Dynegy sold Good Energy 958 MW of Zone 4 capacity for the next three planning years (2016/17, 2017/18, and 2018/19).<sup>179</sup> Using this and other information shown in the chart shown at Preliminary Findings Slide 101, OE staff estimated that Dynegy's additional profit on the Good Energy transaction alone was approximately \$101 million.

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shown at Exhibit 2, Preliminary Findings Slide 57; *see also* 2016-10-25 Jones Tr. 517:24-518:4.

<sup>178</sup> 2016-01-29 Brown Tr. 445:24-447:19, Brown Exh. 83 (DYN\_0189006) (September 23, 2014 email attaching the then current Dynegy capacity position report as discussed at the cited testimony) and 517:6-10, Brown Exh. 98 (DYN\_0009944 at DYN\_0009959) (undated post-2015/16 Dynegy report showing Dynegy's updated capacity position as discussed at the cited testimony). A portion of Brown Exh. 83 is shown on the left and a portion of Brown Exh. 98 is shown on the right at Exhibit 2, Preliminary Findings Slide 89.

<sup>179</sup> 2016-10-26 Jones Tr. 706:7-20, Jones Exh. 114 (Dynegy News Release, dated 2016-05-03).

Regarding, the Good Energy transaction, Mr. Jones testified as follows.

Q: And you would agree with me that if Dynegy had not succeeded in having MISO accept its \$150-a-day megawatt units to clear the price in Zone 4, Dynegy most definitely would not be in the position to be proposing pricing like this to Good Energy with any hope of having them pay anywhere close to that price; fair enough?

A: I would agree that the capacity price for the '15-'16 auction had an impact on price perceptions . . . .<sup>180</sup>

\* \* \* \*

Q: A second benefit [of Dynegy's 2015/16 Auction strategy] that was pursued by the company with the bidding strategy was if the company's bid strategy was to succeed, the higher price, the higher than historical price that would result would incent customers to be more interested in higher price capacity for later years, for instance like the Good Energy transaction, that's a number two benefit that came from the strategies; right?

A: Yes.<sup>181</sup>

#### **VIII. Effect of Dynegy's Conduct on 2015/16 Auction Results for Zone 4**

As shown in the following chart, at Graphic 17, prepared by OE staff and included at Preliminary Finding Slide 97, had Dynegy not taken the four manipulative steps identified above, the evidence suggests Dynegy would not have set the \$150/MW-day price for the MISO Zone 4 2015/16 Auction. This chart shows (1) Step 1 – Dynegy's 50 MW purchase, (2) Step 2 – the 125.4 (79 + 46.4) MW not sold because of Dynegy's 2½ times retail capacity price increase, (3) Step 3 – Dynegy's refusal to offer 300 MW at any price, and (4) Step 4 – Dynegy's refusal to offer 85 MW other than on a pass through basis. Steps 1 through 4 allowed Dynegy to offer 560.4 MW at non-zero prices, and MISO ultimately needed to purchase 553 MW of such Dynegy capacity to meet the LCR and clear Zone 4.

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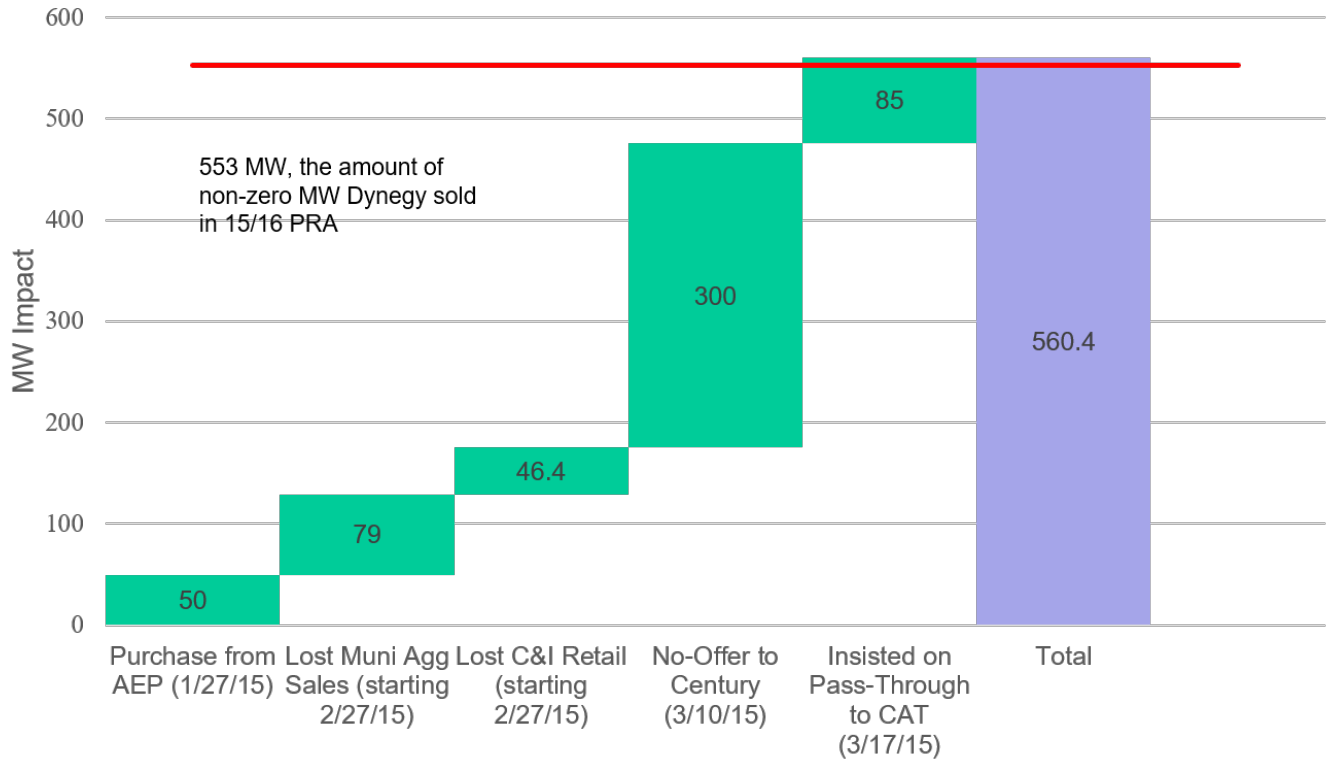
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<sup>180</sup> 2016-10-26 Jones Tr. 704:18-25.

<sup>181</sup> 2016-10-26 Jones Tr. 720:8-16.

**Graphic 17**

The MW Impact Of DYN's Uneconomic Actions Totals To Over 560 MWs

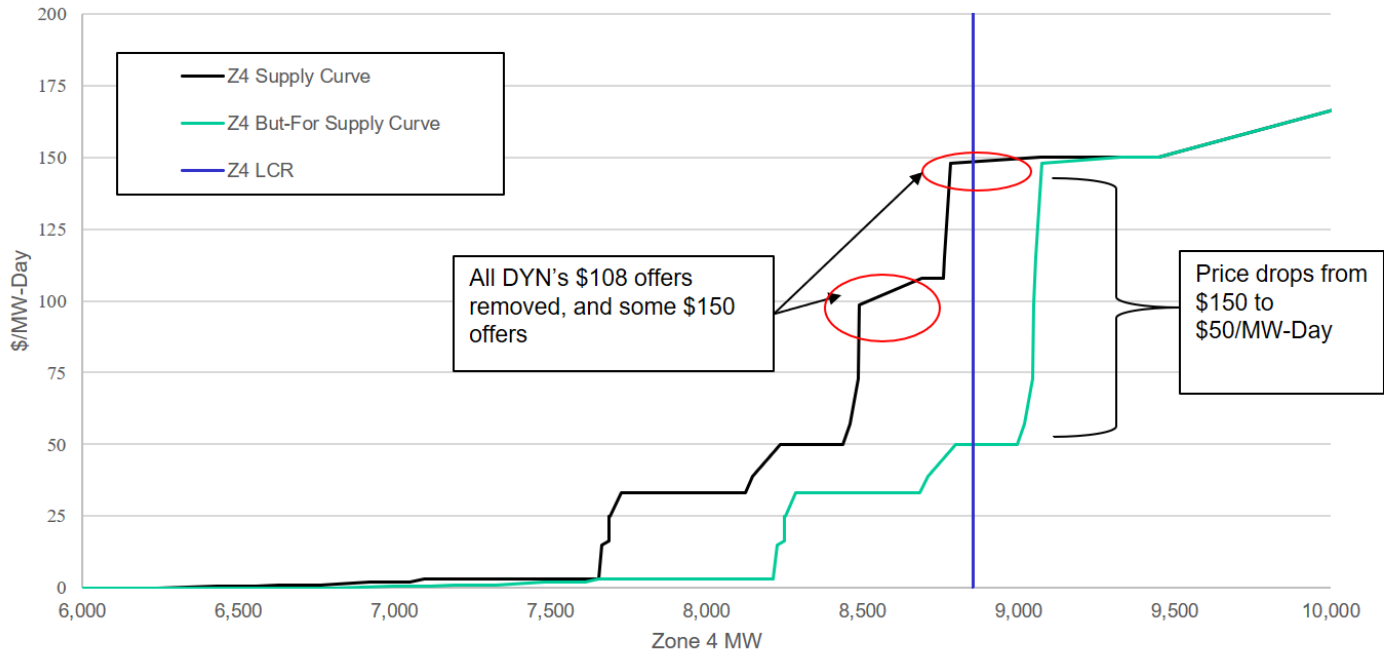


But for Dynegy's four manipulative steps, the evidence shows MISO Zone 4 might have cleared at \$50/MW-day for PY 2015/16 capacity. OE staff's conclusion on this point was developed by graphing data collected from MISO and removing the least expensive Dynegy non-zero capacity offers up to 560 MW which had the effect of removing all of Dynegy's \$108/MW-Day offers and some of Dynegy's \$150/MW-Day offers as shown below in Graphic 18 and at Preliminary Findings Slide 99. This adjustment to Dynegy's offers had the effect of shifting the zonal supply curve, which caused it to intersect the demand at a lower price—about \$50/MW-day.

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## Graphic 18

### MISO Z4 - 2015/2016 Planning Resource Auction



Source: Created using MISO 2015/2016 PRA Detailed Report, from <https://www.misoenergy.org/layouts/MISO/ECM/Redirect.aspx?ID=199977>

## IX. Market Manipulation

The Commission’s June 2022 Order in this proceeding directed OE staff to provide “staff’s assessment regarding Dynegy’s conduct related to the [Midcontinent Independent System Operator, Inc. (MISO) 2015/16 Planning Resource Auction (2015/16 Auction)], whether Dynegy’s conduct constituted an exercise of market power and/or market manipulation, and, if so, what effect Dynegy’s conduct had on the 2015/16 Auction results for Zone 4.”<sup>182</sup>

OE staff’s investigation found, based on the evidence detailed above, that Dynegy engaged in market manipulation by taking the four steps leading up to and in MISO’s 2015/16 Auction relative to Zone 4 knowing that each step would increase the likelihood that Dynegy would set price.

<sup>182</sup> See *supra* note 1.

**A. Dynegy Violated the Commission’s Anti-Manipulation Rule, 18 C.F.R. § 1c.2**

The Commission’s Anti-Manipulation Rule prohibits an entity from: “(1) us[ing] a fraudulent device, scheme or artifice, or mak[ing] a material misrepresentation or material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engag[ing] in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.”<sup>183</sup>

**1. Dynegy Engaged in a Fraudulent Scheme to Set the Auction Clearing Price**

OE staff determined that Dynegy employed a fraudulent scheme on MISO and market participants, with the requisite scienter, and in connection with the sale of electricity subject to the Commission’s jurisdiction. Specifically, OE staff determined that Dynegy engaged in a scheme—consisting of the four steps discussed above—to amass and hoard megawatts that might otherwise have been offered into the Auction at a zero price, thereby increasing the likelihood that a Dynegy resource offered into the Auction at a non-zero price would become the marginal resource, setting the clearing price. In essence, Dynegy engaged in a scheme to corner the relevant portion of the market, consisting of those megawatts that MISO would likely need to clear the auction and that could be offered into the Auction at a zero price if not held on Dynegy’s unsold books.<sup>184</sup>

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<sup>183</sup> *Prohibition of Energy Mrkt. Manipulation*, Order No. 670, 114 FERC ¶ 61,047, at P 49 (2006) (Order No. 670); 18 C.F.R. § 1c.2 (2021).

<sup>184</sup> See, e.g., Energy Primer: A Handbook For Energy Market Basics, FERC (April 2020), p. 134 (“Withholding is the removal of supply from the market and is one of the oldest forms of commodities manipulation. The classic manipulative scheme referred to as a ‘market corner’ involves taking a long contract position in a deliverable commodity and stockpiling physical supply to force those who have taken a short position to buy back those positions at an inflated price.”); see also *U.S. v. Patten*, 226 U.S. 525, 539-40 (1913) (stating that “running a corner consists, broadly speaking, in acquiring control of all or the dominant portion of a commodity, with the purpose of artificially enhancing the price; one of the important features of which . . . is the purchase for future delivery, coupled with a withholding from sale for a limited time . . .”).

The Commission has defined fraud “to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.”<sup>185</sup> In finding manipulation,

the Commission has relied on a number of indicia of fraud, such as: a consistent pattern of trading in a direction that would tend to move the price to the benefit of a related financial position; changes in trading behavior during periods when manipulation is alleged as compared to trading during other time periods when manipulation is not alleged; trading that is uneconomic in nature; communications among traders substantiating the scheme; and the failure of a company to adequately explain the relevant positions and trading behavior.<sup>186</sup>

Based on the evidence set forth in Section VI, *supra*, OE staff found that many of these indicia are present here and support OE staff’s finding of manipulation against Dynegy.

**(1) Changes in trading behavior.** Dynegy changed its behavior from the period prior to and during the 2013/14 Auction to the period leading to and during the 2014/15 and 2015/16 Auctions. As described above, prior to and during the 2013/14 Auction, Dynegy tried to sell most of its capacity prior to auctions. However, starting with the period leading to the 2014/15 Auction, Dynegy employed several strategies designed to increase and preserve capacity to offer into Auctions at non-zero prices.

**(2) Trading that is uneconomic in nature.** Each of the steps Dynegy took to obtain, or retain, control over the megawatts needed to carry out its scheme were uneconomic, but for Dynegy’s knowledge that it would likely set price. In the 2014/15 Auction, Zone 4 cleared at a price of \$16.75/MW-Day,<sup>187</sup> and OE staff estimates that in the absence of Dynegy’s scheme, Zone 4 would have cleared in the 2015/16 Auction at a price of \$50/MW-Day.<sup>188</sup> Given these prices, Dynegy stood to lose (or miss out on) millions of dollars by taking the steps it did.

**Step 1:** Purchasing 50 MW at \$61/MW-day exposed Dynegy to a potential loss of between \$804,313 (based on 2014/15 Auction clearing price of \$16.75/MW-Day)

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<sup>185</sup> Order No. 670, 114 FERC ¶ 61,047, at P 50.

<sup>186</sup> *Vitol Inc.*, 169 FERC ¶ 61,070, at P 93 (2019) (citations omitted).

<sup>187</sup> June 2022 Order, 179 FERC ¶ 61,185, at P 5.

<sup>188</sup> *See supra* Section VIII.

to \$197,500 (based on OE staff's projected 2015/16 Auction clearing price of \$50/MW-Day, absent manipulation).

**Steps 2, 3, & 4:** Dynegey's approximate median sales price in the bilateral market was \$66/MW-day.<sup>189</sup> Using this figure, Dynegey's knowing efforts to forgo sales of 125.4 MW, 300 MW, and 85 MW caused it to lose out on added revenue of \$9,129,142 (based on 2014/15 Auction clearing price of \$16.75/MW-Day) to \$2,934,800 (based on OE staff's estimated 2015/16 Auction clearing price of \$50/MW-Day, absent manipulation).

Each of these steps was only profitable because Dynegey's scheme succeeded in setting the Zone 4 Auction price at \$150/MW-day, transforming its loss on the 50 MW purchase into a profit of about \$1.63 million<sup>190</sup> and ballooning the \$3 to \$9 million in revenue it missed out on by forgoing sales into a \$15.69 million gain.<sup>191</sup>

**(3) Contemporaneous communications and documents substantiating the scheme and failure of a company to adequately explain the relevant positions and trading behavior.** Dynegey's own documents and witness testimony, including the testimony of its Chief Commercial Officer and Chief Risk Officer, substantiate the purpose of Dynegey's conduct—*i.e.*, that Dynegey took steps knowing that each would increase the likelihood that Dynegey would set price. And, as discussed at Section VI.B.3, *supra*, Dynegey's alternative explanations for its conduct, including that it purchased the 50 MW for purposes of market intelligence, fail to adequately explain its trading behavior.

Taken together, these facts provide strong indicia of fraud.

## **2. Dynegey Acted with the Requisite Scienter**

The Commission defines scienter as reckless, knowing, or intentional actions taken in conjunction with a fraudulent scheme, material misrepresentation, or material omission.<sup>192</sup> It is well-established that “[t]he presence of fraudulent intent is rarely susceptible of direct proof, and must instead be established by legitimate inferences from circumstantial evidence. These inferences are based on the common knowledge of the

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<sup>189</sup> See Dynegey's Supp. Response to Data Request No. 16 (DYN\_0542937-47) (Appendix Item 657).

<sup>190</sup>  $(\$150/\text{MW-Day} - \$60.82/\text{MW-Day}) \times 50 \text{ MW} \times 365 \text{ Days} = \$1.63 \text{ million}.$

<sup>191</sup>  $(\$150/\text{MW-Day} - \$66/\text{MW-Day}) \times 510.4 \text{ MW} \times 365 \text{ Days} = \$15.69 \text{ million}.$

<sup>192</sup> See Order No. 670, 114 FERC ¶ 61,047, at PP 52–53.

motives and intentions of [people] in like circumstances.”<sup>193</sup> Factors indicating scienter include contemporaneous communications, testimony, and the pattern and evolution of specific conduct.<sup>194</sup> Improper intent alone may transform what appears to be a legitimate market transaction into prohibited manipulation.<sup>195</sup> Ample contemporaneous communications, testimony, and the uneconomic nature of the steps Dynegy took to carry out its manipulative scheme demonstrate Dynegy intentionally or, at least, knowingly implemented a strategy to amass and hoard megawatts in contravention of prevailing supply and demand fundamentals. Such evidence includes at least that:

- Dynegy was aware following its acquisition of the Ameren Resources that its capacity market share in Zone 4 had increased to around 50%<sup>196</sup> and that fewer 2014/15 advance capacity sales would increase the likelihood of MISO accepting a non-zero priced capacity offer;

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<sup>193</sup> *GreenHat Energy, LLC*, 177 FERC ¶ 61,073, at P 205 (2021) (quoting *U.S. v. Sullivan*, 406 F.2d 180, 186 (2d Cir. 1969) (alteration in original)).

<sup>194</sup> See *Houlian Chen*, 151 FERC ¶ 61,179, at P 128 (2015) (“We find sufficient evidence demonstrating Respondents’ manipulative intent, including contemporaneous e-mail communications, testimony and other evidence, the pattern and evolution of Dr. Chen’s trading, the absence of market fundamentals underlying the UTC trades at issue, and Respondents’ deliberate actions to expand and increase their profits from the scheme.”); see also *id.* P 131 (“Dr. Chen’s manipulative intent is also reflected in the pattern and evolution of his UTC trades.”).

<sup>195</sup> See, e.g., *Houlian Chen*, 151 FERC, at P 136 (“transactions entered into with manipulative intent can serve as the basis for a manipulation claim, even in the absence of some other deceptive conduct”) (citing *Barclays Bank PLC*, 144 FERC ¶ 61,041, at P 54 (2013)); *Barclays Bank PLC*, 144 FERC ¶ 61,041, at P 52 (“The difference between legitimate open-market transactions and illegal open-market transactions may be nothing more than a trader’s manipulative purpose for executing such transactions.”) (quoting *Brian Hunter*, 135 FERC ¶ 61,054, at P 50 (2011), order denying reh’g, 137 FERC ¶ 61,146 (2011), rev’d on other grounds, *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013)).

<sup>196</sup> See 2016-02-03 Jones Tr. 160:25-161:19, Jones Exh. 29 (DYN\_0186441 at DYN\_0186454) (Market Assessment MISO Capacity Construct Module E-1 dated February 13, 2014 prepared for Dynegy by CES as discussed at the cited testimony) (“With the addition of the Ameren merchant coal fleet, Dynegy owns roughly 50% of the resources in LRZ 4.”).

- Dynegy began changing its approach to capacity sales contemporaneous with the acquisition of the Ameren Resources and the ascendancy of a new Chief Commercial Officer;
- Dynegy pursued a strategy designed to set the MISO Auction clearing price after acquiring the Ameren Resources, expecting and estimating that MISO would need to purchase some of its capacity to clear Zone 4 in the 2014/15 Auction;
- Dynegy developed its 2014/15 Auction offering strategy based on its own modeling that estimated that Dynegy would set the Zone 4 price in the 2014/15 Auction using a Dynegy offer priced at \$117/MW-Day;
- Dynegy's Senior Director for Regulatory Affairs admitted that the goal of Dynegy's offering strategy with respect to the 2014/15 and 2015/16 Auctions was to have one of its non-zero priced resources set the clearing price;<sup>197</sup>
- After failing to set price in the 2014/15 Auction, Dynegy took four uneconomic steps knowing that each step increased the likelihood that MISO would need Dynegy non-zero priced capacity to clear Zone 4 and thus set the price in the 2015/16 Auction;
- Dynegy's Manager for Strategic Market Analytics admitted that Dynegy had the ability to influence price in the 2015/16 Auction and ultimately used that influence to set the price;<sup>198</sup> and
- Dynegy's Chief Commercial Officer agreed that each of the four steps was taken knowing that each step increased the likelihood that MISO would need Dynegy non-zero priced capacity to clear Zone 4 and thus set the price in the 2015/16 Auction.<sup>199</sup>

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<sup>197</sup> 2015-07-22 Volpe Tr. 69:2-12 (Q: To your knowledge has Dynegy ever pursued a strategy that was designed to set the clearing price in an auction, the MISO PRA for 2014-'15 or the MISO PRA for 2015-'16? A: To set the auction clearing price? Q: Yes. A: Yes. Q: So your understanding is that that has been a goal of Dynegy's in its bidding strategy for both 2014-'15 and '15-'16. Is that right? A: Yes.”).

<sup>198</sup> 2016-03-23 Tolentino Tr. 815:9-816:10.

<sup>199</sup> See 2016-10-26 Jones Tr. 740:7-741:3 (discussing 50 MW purchase, retail capacity price hike, and 300 MW refusal to offer); 2016-10-26 Jones Tr. 629:13-630:9 (discussing 85 MW pass through only offer).

### 3. The Violations Occurred in Connection With Jurisdictional Transactions

OE staff found that Dynegy's scheme to manipulate the 2015/16 Auction was misconduct in connection with jurisdictional transactions. Pursuant to the FPA, the Commission has jurisdiction over "the sale of electric energy at wholesale in interstate commerce."<sup>200</sup> The FPA defines a "sale of electricity at wholesale" as "a sale of electric energy to any person for resale."<sup>201</sup> Selling capacity to MISO in the Auction is plainly jurisdictional.

#### B. Dynegy's Defenses in Response to OE Staff's Findings

In its two formal responses to OE staff's preliminary findings, Dynegy proffered several defenses to OE staff's market manipulation finding. OE staff considered all these defenses, certain of which are described below, and found them unavailing.

**(1) Report on investigation of KeySpan-Ravenswood, LLC (*KeySpan*).** Dynegy claimed that OE's February 28, 2008 Staff Report regarding its investigation of KeySpan-Ravenswood, LLC (*KeySpan*) "illustrates that no economic withholding occurred here."<sup>202</sup> But in *KeySpan*, "Enforcement staff did not find any evidence that KeySpan engaged in any activity that lacked a legitimate business purpose given the unique circumstances and history of the ICAP market, was not economically rational, or that it possessed the requisite scienter."<sup>203</sup> Here, by contrast, OE staff determined that Dynegy engaged in four steps that lacked a legitimate business purpose and did so with scienter—with intent or, at minimum, with knowledge that each step increased the likelihood that MISO would need one MW or more of non-zero priced Dynegy capacity to clear Zone 4 in the 2015/16 Auction. Whereas there was insufficient evidence that KeySpan's actions lacked a legitimate business purpose and were not economically rational, each of the four steps that Dynegy took were economically *irrational* absent knowledge that they would increase the likelihood that MISO would need non-zero priced Dynegy capacity to set the market clearing price. Dynegy crossed the line between permissible and illicit conduct by engaging in these uneconomic steps in a knowing effort to manipulate the market and set the market clearing price.

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<sup>200</sup> 16 U.S.C. § 824(b)(1).

<sup>201</sup> 16 U.S.C. § 824(d).

<sup>202</sup> Exhibit 3, Vistra Response, at Slides at 19-22.

<sup>203</sup> Enforcement Staff Report: Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New York City Capacity Market, Docket Nos. IN08-2-000 & EL07-39-000, at 17 (Feb. 28, 2008).

**(2) Purpose of the 50 MW purchase.** Dynegy claimed that it purchased the 50 MW for purposes of market intelligence.<sup>204</sup> But Dynegy’s own documents show that Dynegy routinely obtained such market intelligence—*i.e.*, the name of the seller—without having to purchase capacity.<sup>205</sup> Furthermore, Dynegy witnesses testified that Dynegy did not make any business decisions based on the alleged market intelligence, Dynegy had never purchased capacity to obtain market intelligence before, and Dynegy had no plans to do it again.<sup>206</sup> Based upon evidence OE staff obtained during its investigation, Dynegy turned down the opportunity to learn the name of a seller – *i.e.*, the alleged market intelligence – by purchasing 10 MW instead of 50 MW.<sup>207</sup> At the time of the purchase, Dynegy had thousands of MWs of uncommitted Zone 4 capacity and had no legitimate need to purchase even 1 MW, let alone 50 MW.

**(3) Purpose of raising retail capacity prices.** Dynegy claimed that it increased its retail capacity pricing from \$2/kW-Month to \$5/kW-Month to reflect costs and market expectations.<sup>208</sup> But Dynegy admitted that it raised its retail capacity price because Dynegy anticipated Dynegy’s non-zero priced capacity offers would be used by MISO to set the Zone 4 price at or around \$4.50/kW-Month to \$5/kW-month.<sup>209</sup> There is no evidence that, in making the decision to raise its retail capacity price, Dynegy considered that its costs of

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<sup>204</sup> Exhibit 3, Dynegy Response, at Slides 13, 49, and 70; Exhibit 3, Vistra Response, at Slides 24 and 32.

<sup>205</sup> See, e.g., 2016-01-29 Brown Tr. 482:21-486:19; 2016-01-27 Cotrone Tr. 154:20-165:1, 170:9-171:6, 175:12-17, 246:17-249:13, 253:4-21; 2016-10-25 Jones Tr. 361:23-362:10, 473:12-474:4,

<sup>206</sup> See, e.g., 2015-07-23 Brown Tr. 214:11-16; 2016-01-27 Cotrone Tr. 239:3-240:6, 251:4-252:20, 253:14-255:11.

<sup>207</sup> During its investigation, OE staff obtained the following materials from ICAP Energy LLC (ICAP), a third party energy broker who dealt with Dynegy over Dynegy’s 50 MW purchase. These materials show that Dynegy refused the opportunity to purchase only 10 MW rather than 50 MW. Appendix Item 698 - (Outlook Item with filename “Conversation #26739382”); Item 699 (Outlook Item with filename “Pivot 360 80 Messages 2 Users 8 Hours 57 Minutes 1 Second”); Item 700 - (Transcript of Wave Sound with filename “KYNTRCORE\_24706846” and the associated metadata pulled from an accompanying .xls file named “MetaData”); and Item 701 - (Transcript of ICAP produced Wave Sound file with filename “KYNTRCORE\_24706634” and the associated metadata pulled from an accompanying .xls file named “MetaData”).

<sup>208</sup> Exhibit 3, Dynegy Response, at Slides 13, 49, 76, and 110.

<sup>209</sup> 2016-09-22 email from Dynegy outside counsel to OE staff (Appendix Item 693).

Zone 4 capacity for 2015/16 had increased. Moreover, that its 2015/16 alleged cost-based offers were about 18% to 43% more than they were in 2014/15 does not justify the 2½ times price increase.<sup>210</sup>

**(4) Purpose of refusing to sell 300 MW.** Dynegey claimed that it refused to offer 300 MW of 2015/16 capacity to a counterparty because it doubted the credibility of such counterparty’s request for pricing for 300 MWs of capacity for PYs 2015/16, 2016/17, and 2017/18.<sup>211</sup> But months earlier, Dynegey offered to sell the same counterparty capacity for 2015/16 as well as 2016/17 and 2017/18 and only determined to provide no offer for 2015/16 just prior to the 2015/16 Auction after Dynegey’s Chief Commercial Officer, Mr. Jones, considered whether there was “room to maneuver” (*i.e.* whether the “gap”—the Dynegey estimated quantity of non-zero priced Dynegey MW that MISO likely would need to clear Zone 4—was sufficiently large for Dynegey to move 300 MW off its books).<sup>212</sup>

**(5) Lack of perfect foreknowledge.** Dynegey claimed that the Zone 4 Auction clearing price was uncertain due to factors outside of its control, and that it thus lacked certainty that a Dynegey non-zero priced capacity offer would be used by MISO to clear Zone 4.<sup>213</sup> However, lack of perfect foreknowledge is not a defense to market

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<sup>210</sup> Answer of Dynegey Inc., Dynegey Marketing and Trade, LLC, and Illinois Power Marketing Company, filed in Docket Nos. EL15-70-000, EL15-71-000, and EL15-72-000, July 2, 2015, Exhibit A – Affidavit of Henry D. Jones at ¶ 29 (For the 2014/15 Auction, “all of the capacity of Dynegey’s units that was not self-scheduled at a \$0/MW-day price was offered at prices of \$91.85/MW-day, \$104.53/MW-day, and at \$117.39/MW-day.”) and ¶ 34 (For the 2015/16 Auction, all of the capacity of Dynegey’s units that was not self-scheduled at a \$0/MW-day price was offered at prices of \$108/MW-day, \$150/MW-day, and at \$167/MW-day). \$108/M-Day is 18% more than \$91.85/MW-Day, \$150/MW-Day is 43% more than \$104.53/MW-Day, and \$167/M-Day is 42% more than \$117.39/MW-Day.

<sup>211</sup> Exhibit 3, Dynegey Response, at Slides 13, 49, 81, and 82; Exhibit 4, Vistra Response at Slide 32.

<sup>212</sup> 2016-10-26 Jones Tr. 620:23-621:7, Jones Exh. 92 (DYN\_0010150) (Dynegey’s March 11, 2015 analysis estimating that MISO would need 428 MW of Dynegey’s non-zero priced offers as discussed around cited testimony).

<sup>213</sup> Exhibit 3, Dynegey Response, at Slides 2, 10, 53, 96, and 114; Exhibit 4, Vistra Response, at Slide 22.

manipulation. The Commission’s Anti-Manipulation Rule “covers even unsuccessful schemes that harm no one.”<sup>214</sup>

**(6) MISO Zone 4’s market structure and rules.** Dynegy asserted several defenses to allegations that OE staff did not make. Specifically, OE staff did not assert that Dynegy manipulated MISO’s 2015/16 Auction by: (1) acquiring additional Zone 4 capacity through acquisition of the Ameren Resources;<sup>215</sup> or (2) lobbying MISO not to merge Zones 4 and 5.<sup>216</sup> OE staff also did not assert that the \$150/MW-Day Zone 4 price achieved by Dynegy’s manipulative behavior was unsupported by Dynegy’s costs or MISO’s market construct,<sup>217</sup> incomparable to some prices in neighboring markets,<sup>218</sup> or based solely on factors within Dynegy’s control.<sup>219</sup> Lastly, OE staff did not assert that Dynegy was required to make more PY 2015/16 capacity sales leading up to MISO’s 2015/16 Auction.<sup>220</sup> Certain of these factors, such as additional Zone 4 capacity provided by the Ameren Resources and MISO’s decision not to merge Zones 4 and 5, may have enabled Dynegy’s scheme to succeed and support OE staff’s findings on Dynegy’s scienter

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<sup>214</sup> *FERC v. City Power Mktg., LLC*, No. 15-1428, 2016 WL 4250233, at \*13 (D.D.C. Aug. 10, 2016); *see also* 18 C.F.R. §§ 1c.1(a)(3), 1c.2(a)(3) (2016) (making it unlawful “[t]o engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.”); *Maxim Power Corp.*, 151 FERC ¶ 61,094, at n.5 (2015) (holding that “manipulation, fraud, and misrepresentations to market monitors are unacceptable in Commission-regulated markets even where such behavior is caught before it causes harm to consumers”); *see id.* (noting that Maxim Power’s conduct was caught before it could cause harm and holding that “[c]ourts have long recognized that attempted manipulation and fraud are worthy of punishment in the same manner as successful schemes”).

<sup>215</sup> Exhibit 3, Dynegy Response, at Slide 12; Exhibit 4, Vistra Response, at Slide 5, 7, and 30.

<sup>216</sup> Exhibit 3, Dynegy Response, at Slides 16 and 64; Exhibit 4, Vistra Response, at Slide 30.

<sup>217</sup> Exhibit 3, Dynegy Response, at Slides 103, 104, and 105; Exhibit 4, Vistra Response, at Slides 5, 6, 9, 10, 12, 22, 27, and 31.

<sup>218</sup> Exhibit 3, Dynegy Response, at Slides 3 and 54; Exhibit 4, Vistra Response, at Slides 5, 14, and 18.

<sup>219</sup> Exhibit 3, Dynegy Response, at Slides 3 and 54; Exhibit 4, Vistra Response, at Slides 24 and 32.

<sup>220</sup> Exhibit 3, Dynegy Response, at Slide 12; Exhibit 4, Vistra Response, at Slide 15.

and motives behind its scheme to manipulate the 2015/16 Auction, but OE staff's determination that Dynegy engaged in a manipulative scheme was based on the four manipulative steps described above as viewed in context with Dynegy's pre-2015/16 Auction behavior.

## **X. Market Power**

In Paragraph 18 of the June 2022 Order, the Commission asked OE staff to assess “whether Dynegy’s conduct constituted an exercise of market power and/or market manipulation[.]”<sup>221</sup>

OE staff’s investigation and preliminary findings did not assess whether Dynegy had market power or exercised market power. Rather, OE staff focused on whether Dynegy violated the Commission’s Anti-Manipulation Rule by engaging in a scheme to increase the likelihood that a Dynegy resource offered into the 2015/16 Auction at a non-zero price would become the marginal resource, setting the Zone 4 clearing price. As discussed above, OE staff found that Dynegy knew that MISO would need its capacity to meet the Zone 4 LCR and engaged in a series of four uneconomic steps knowing that each step would increase the likelihood that MISO would need a Dynegy non-zero priced MW to clear Zone 4 and thus set the price in the 2015/16 Auction.

OE staff notes, though, that there is evidence that Dynegy was a pivotal supplier in Zone 4 because MISO could not have met the Zone 4 LCR for the 2015/16 Auction without Dynegy’s capacity. The LCR was 8,851 MW and the total non-Dynegy MW offered into the 2015/16 Auction relative to Zone 4 was 5,575 MW.<sup>222</sup> Consequently, MISO needed to obtain at least 3,276 MW from Dynegy (*i.e.*, 8,951 MW less 5,575 MW).<sup>223</sup>

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<sup>221</sup> June 2022 Order, 179 FERC ¶ 61,185, at P 18.

<sup>222</sup> Complaint, Request for Refund Protection, and Request for Expedited Treatment by Southwestern Electric Cooperative, Inc., Docket No. EL15-72-000, filed May 29, 2015, Exhibit No. SWN-2 (Chiles), Attachment 3 (MISO 2015/2016 Planning Resource Auction Results dated April 14, 2015) at p. 6.

<sup>223</sup> Answer of Dynegy Inc., Dynegy Marketing and Trade, LLC, and Illinois Power Marketing Company, filed in Docket Nos. EL15-70-000, EL15-71-000, and EL15-72-000, July 2, 2015, at p. 30. (Dynegy offered 1,709 MW at \$0/MW-Day and 3,695 MW at \$108/MW-Day, \$150/MW-Day or \$167/MW-Day).

OE staff also notes that MISO's market monitor has concluded that Dynegy was a pivotal supplier in Zone 4 relative to the 2015/16 Auction.<sup>224</sup> In the pending proceedings, MISO's market monitor stated:

A pivotal supplier is a supplier who controls enough capacity that the market cannot clear without some of its capacity and, in the pending matters, [t]he Complainants correctly point out that Dynegy is a pivotal supplier in Zone 4.<sup>225</sup>

Further, Dynegy's expert, Susan Pope, did not dispute OE staff's assessment that Dynegy was a pivotal supplier in Zone 4 relative to the 2015/16 Auction.<sup>226</sup>

## **XI. Conclusion**

For the reasons set forth above, OE staff found that Dynegy knowingly engaged in a manipulative scheme to set the Zone 4 clearing price in the 2015/16 Auction and caused Zone 4 to clear at a higher price than it would have absent Dynegy's manipulative scheme.

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<sup>224</sup> Motion to Intervene and Comments of MISO's Independent Market Monitor, Docket Nos. EL15-70-000, EL15-71-000, and EL15-72-000, filed 2015-07-02 at 3.

<sup>225</sup> *Id.*

<sup>226</sup> Answer of Dynegy Inc., Dynegy Marketing and Trade, LLC, and Illinois Power Marketing Company, filed in Docket Nos. EL15-70-000, EL15-71-000, and EL15-72-000, July 2, 2015, Exhibit B, Affidavit of Susan L. Pope, Docket Nos. EL15-70-000, EL15-71-000, and EL15-72-000, filed 2015-07-02 at ¶ 18 ("Observing after the fact that Dynegy was the pivotal supplier for Zone 4 does not establish that Dynegy knew this outcome in advance of the auction or used this knowledge in submitting its offers.").

Respectfully submitted

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