

150 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Dynegy Inc.
Dighton Power, LLC
Elwood Energy LLC
EquiPower Resources Management, LLC
Kincaid Generation, L.L.C.
Lake Road Generating Company, L.P.
Liberty Electric Power, LLC
MASSPOWER
Milford Power Company, LLC
Richland-Stryker Energy LLC
Brayton Point Energy, LLC

Docket No. EC14-140-000

ORDER AUTHORIZING ACQUISITION AND
DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued March 27, 2015)

1. On September 11, 2014, as amended February 6, 2015, Dighton Power, LLC (Dighton Power), Elwood Energy LLC (Elwood Energy), EquiPower Resources Management, LLC (EquiPower Management), Kincaid Generation, L.L.C. (Kincaid Generation), Lake Road Generating Company, L.P. (Lake Road Generating), Liberty Electric Power, LLC (Liberty Electric), MASSPOWER, Milford Power Company, LLC (Milford Power), Richland-Stryker Generation LLC (Richland-Stryker Generation), Brayton Point Energy, LLC (Brayton Point Energy) (collectively, the ECP Utilities), and Dynegy Inc. (Dynegy) (together with the ECP Utilities, Applicants) filed a joint application requesting Commission authorization under sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)¹ for a multi-step transaction in which Dynegy will indirectly acquire (1) 100 percent of the equity interests in the ECP Utilities other than

¹ 16 U.S.C. § 824b(a)(1), (2) (2012).

Elwood Energy, and (2) 49.5 percent of the equity interests in Elwood Energy, together with an option to acquire an additional 0.5 interest (Proposed Transaction).² As a result of the Proposed Transaction, Dynegy will acquire ownership of the ECP Utilities, which own certain generation facilities in ISO New England Inc. (ISO-NE) and PJM Interconnection, L.L.C. (PJM) that are described in further detail below. The Commission has reviewed the Application under the Commission's Merger Policy Statement.³ As discussed below, we authorize the Proposed Transaction as consistent with the public interest, subject to Dynegy's compliance with the terms and conditions of the settlement agreement between Dynegy and the PJM Market Monitor.

² Joint Application for Authorization Under Section 203 of the Federal Power Act and Request for Expedited Consideration, Docket No. EC14-140-000 (Sept. 11, 2014) (Application). As discussed in further detail below, on February 6, 2015, Applicants submitted a response to a request for additional information from the Director of Electric Power Regulation – West and a settlement agreement resolving issues raised by the market monitor for the PJM Interconnection, L.L.C. (PJM Market Monitor) in this proceeding and Docket No. EC14-141-000. Docket No. EC14-141-000 addresses an application concurrently filed by Dynegy Resource I, LLC (Dynegy Resource I), Duke Energy Commercial Asset Management, LLC (DECAM) and its public utility subsidiaries, and Duke Energy Retail Sales, LLC (Duke Retail) requesting Commission authorization under FPA section 203 for Dynegy Resource I to acquire all of the membership interests of DECAM and Duke Retail. That proposed transaction is referred to as the Proposed Duke Transaction. The Commission is issuing concurrently with this order an order approving the Proposed Duke Transaction. *Dynegy Resource I, LLC, et al.*, 150 FERC ¶ 61,232 (2015).

³ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

I. Background**A. Applicants****1. The ECP Utilities****a. Description of the ECP Utilities**

2. Applicants state that each of the ECP Utilities is a public utility under the FPA, an Exempt Wholesale Generator, and is authorized by the Commission to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates in ISO-NE, PJM, and other regions. Applicants describe the ECP Utilities as follows:

i. ISO-NE

- Brayton Point Energy, a Virginia limited liability company, owns and operates an approximately 1,544 MW (summer) generating facility consisting of three coal-fired units; one gas/oil-fired steam unit; four small diesel-fired units; and related interconnection facilities (Brayton Point Station). The Brayton Point Station is located in Somerset, Massachusetts, within ISO-NE.
- Dighton Power, a Delaware limited liability company, owns and operates an approximately 180 MW (summer) natural gas-fired electric generating facility and related interconnection facilities located in Dighton, Massachusetts, within ISO-NE.
- Lake Road Generating, a Delaware limited partnership, owns and operates an approximately 750 MW (summer) natural gas-fired, combined-cycle electric generating facility and related interconnection facilities located near Killingly, Connecticut, within ISO-NE.
- MASSPOWER, a Massachusetts general partnership, owns and operates an approximately 255.6 MW (summer) gas- and oil-fired, combined-cycle electric generating facility and related interconnection facilities located in Indian Orchard, Massachusetts, within ISO-NE.
- Milford Power, a Delaware limited liability company, owns and operates an approximately 507 MW (summer) gas- and oil-fired, combined-cycle generating facility and related interconnection facilities located in Milford, Connecticut, in ISO-NE.

ii. PJM

- Elwood Energy, a Delaware limited liability company, owns and operates an approximately 1,424 MW (summer) electric generating facility consisting of nine natural gas-fired turbine units and related interconnection facilities in Elwood, Illinois, within PJM (Elwood Energy Facility).
- Kincaid Generation, a Virginia limited liability company, owns and operates an approximately 1,158 MW (summer) generating facility, consisting of two coal-fired units and related interconnection facilities located in Kincaid, Illinois, within PJM. Kincaid Generation has a rate schedule specifying the revenue requirement for reactive supply and voltage control from generation sources service (Reactive Power) under Schedule 2 of the PJM Open Access Transmission Tariff (PJM Tariff) (Kincaid Generation Reactive Power Rate Schedule).
- Liberty Electric, a Delaware limited liability company, owns and operates an approximately 549 MW (summer) combined cycle, natural gas-fired generating facility and related interconnection facilities located in the Borough of Eddystone, Delaware County, Pennsylvania, within PJM (Liberty Electric Facility).
- Richland-Stryker Generation, a Delaware limited liability company, owns and operates two generating facilities: (1) an approximately 447 MW (winter) natural gas- and oil-fired generating facility in Defiance, Defiance County, Ohio (Richland-Stryker Defiance Facility); and (2) an approximately 19 MW (winter) oil-fired generating facility near Stryker, Ohio in Williams County, Ohio (Richland-Stryker Stryker Facility). Both of these facilities are located within PJM and include limited interconnection facilities necessary to interconnect the generating facilities with the transmission system controlled by PJM.⁴

⁴ We note that the capacity ratings provided by Applicants for the Elwood Energy, Liberty Electric, Richland-Stryker Defiance, and Richland-Stryker Stryker Facilities differ from the capacity ratings provided for the same units in the application for authorization of the Proposed Duke Transaction filed in Docket No. EC14-141-000. The ratings provided by Applicants in the instant proceeding are also inconsistent with the capacity ratings used in their Delivered Price Test and reported by the Energy Information Administration in Form EIA-860. The correct summer capacity ratings for the facilities are as follows: Elwood Energy Facility, 1,350 MW; Liberty Electric Facility, 541 MW; Richland-Stryker Defiance Facility, 369 MW; Richland-Stryker Stryker Facility, 17 MW.

iii. **Other**

- EquiPower Management, a Delaware limited liability company, is engaged as a power marketer in energy management and marketing activities throughout the United States. EquiPower Management has been granted authorization to make wholesale sales of electric capacity, energy, and ancillary services at market-based rates but does not own, operate, or control any generation or transmission facilities.

b. **Ownership of the ECP Utilities**

3. Applicants explain the ownership of the ECP Utilities as follows. Currently, Dighton Power, Elwood Energy, EquiPower Management, Kincaid Generating, Lake Road Generating, Liberty Electric, MASSPOWER, Milford Power, and Richland-Stryker Generating (i.e., all of the ECP Utilities other than Brayton Point Energy), are direct or indirect subsidiaries of EquiPower Resources Corp. (EquiPower), a Delaware corporation. Applicants state that EquiPower directly or indirectly owns 100 percent of the equity interest in these utilities, referred to as the EquiPower Companies, except for Elwood Energy, in which EquiPower owns a 49.5 percent interest and an option to acquire an additional 0.5 percent interest.⁵ Applicants explain that the remaining 50 percent interest in Elwood Energy is owned by J-Power Elwood, LLC, a third party that is otherwise unaffiliated with any of the Applicants.

4. According to Applicants, the stock of EquiPower is owned by six affiliated investment funds, collectively referred to as the EquiPower Funds. Applicants state that various passive investors hold direct and indirect economic interests in the EquiPower Funds, and the EquiPower Funds are controlled indirectly by Energy Capital Partners II, LLC (ECP II), a Delaware limited liability company owned and controlled by five individuals who are referred to collectively as the ECP II Managers.⁶

⁵ Applicants note that this option is described in more detail in the FPA section 203 application filed with the Commission on March 21, 2013 in Docket No. EC13-82-000. The Commission approved that application on August 20, 2013 in *Dominion Energy Brayton Point, LLC, et al.*, 144 FERC ¶ 61,139 (2013). Application at n.26.

⁶ The five individuals are Douglas W. Kimmelman and his estate planning vehicle; Thomas K. Lane and his estate planning vehicle; Andrew D. Singer; Peter Labbat; and Tyler Reeder. *Id.* at 9. Applicants note that on September 1, 2012, Murray D. Karp was admitted to ECP II for “very limited purposes,” and that Mr. Karp is not a managing member of, and has no voting rights and no economic interests with respect to, ECP II. *Id.* at n.28.

5. With respect to Brayton Point Energy, Applicants explain that it is wholly-owned by Brayton Point Holdings, LLC (Brayton Point Holdings), a Delaware limited liability company. Applicants further explain that the ownership interests in Brayton Point Holdings are directly held by four affiliated investment funds, two of which are also EquiPower funds, and Brayton Point Management, LLC, a Delaware limited liability company. The four affiliated investment funds and Brayton Point Management are collectively referred to as the Current Brayton Point Holdings Owners. Various passive investments hold direct and indirect economic interests in the Current Brayton Point Holdings Owners, and the Current Brayton Point Holdings Owners are controlled indirectly by ECP II, which, in turn, is owned by the ECP II Managers.

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

6. Applicants state that Dynegy is a Delaware corporation and utility holding company that is publicly traded on the New York Stock Exchange. Through its public utilities, Dynegy controls approximately 13,000 MW of electric generation and produces and sells electric energy, capacity, and ancillary services in U.S. markets in ISO-NE, PJM, the Midcontinent Independent System Operator, Inc. (MISO), California Independent System Operator Corp. (CAISO), New York Independent System Operator, Inc. (NYISO) and other regions. Applicants describe the Dynegy public utilities as follows.

a. ISO-NE

- Casco Bay Energy Company, LLC (Casco Bay Energy), a Delaware limited liability company, is an indirect, wholly-owned subsidiary of Dynegy. Casco Bay Energy is an Exempt Wholesale Generator that owns and operates the Maine Independence Station (Independence Station), a natural gas-fired, combined cycle generating facility with a net capacity of 490 MW (summer), located in Veazie, Maine, within ISO-NE. Casco Bay Energy is authorized by the Commission to sell energy, capacity, and certain ancillary services at market-based rates.

b. PJM

- Dynegy Kendall Energy, LLC (Dynegy Kendall), a Delaware limited liability company, is an indirect, wholly-owned subsidiary of Dynegy. Dynegy Kendall is an Exempt Wholesale Generator that owns and operates the Kendall County Generation Facility, a natural gas-fired electric generating facility with a net capacity of 1,140 MW (summer) located in Kendall, Illinois, within PJM. Dynegy Kendall is authorized by the Commission to sell energy, capacity, and certain ancillary services at market-based rates, and has a rate schedule for cost-based reactive power compensation (Dynegy Kendall Reactive Power Rate Schedule).

- Dynegy Marketing and Trade, LLC (Dynegy Marketing), a Delaware limited liability company, is an indirect, wholly-owned subsidiary of Dynegy. Dynegy Marketing is a power marketer and currently controls 200 MW of a generating unit in PJM owned by Dynegy Kendall, its affiliate, pursuant to a long-term capacity and energy purchase agreement that was assigned to Dynegy Marketing by Constellation Energy Commodities Group, Inc. The Commission has authorized Dynegy Marketing to sell energy, capacity, and certain ancillary services at market-based rates.
- Ontelaunee Power Operating Company, LLC (Ontelaunee Power) is a Delaware limited liability company and an indirect, wholly-owned subsidiary of Dynegy. Ontelaunee Power is an Exempt Wholesale Generator that owns and operates the Ontelaunee Energy Center, a natural gas-fired electric generating facility with a net capacity of 466 MW (summer) located in Ontelaunee, Pennsylvania, within PJM. The Commission has authorized Ontelaunee Power to sell energy, capacity, and certain ancillary services at market-based rates, but it also has a rate schedule on file with the Commission for cost-based power compensation (Ontelaunee Power Reactive Power Rate Schedule).

c. MISO

- Dynegy Energy Services, LLC (Dynegy Energy Services), a Delaware limited liability company, is a direct, wholly-owned subsidiary of Dynegy. Dynegy Energy Services is a power marketer that has been authorized by the Commission to sell electric energy, capacity, and certain ancillary services at market-based rates in the PJM and MISO markets. Dynegy Energy Services does not own any generation assets. Dynegy Energy Services is engaged in retail marketing in the state of Illinois and is regulated by the Illinois Commerce Commission (Illinois Commission) as an Alternative Retail Electric Supplier.
- Dynegy Midwest Generation, LLC (Dynegy Midwest), a Delaware limited liability company, is an indirect, wholly-owned subsidiary of Dynegy. Dynegy Midwest is an Exempt Wholesale Generator that owns and operates four fossil-fueled generating facilities having a total capacity of approximately 2,944 MW at various locations in Illinois, within MISO. Dynegy Midwest is authorized by the Commission to sell energy, capacity, and certain ancillary services at market-based rates, but it also has a rate schedule for cost-based reactive power compensation (Dynegy Midwest Reactive Power Rate Schedule).
- Electric Energy, Inc. (Electric Energy), an Illinois corporation and Exempt Wholesale Generator, owns and operates a coal generating facility with a capacity of approximately 1,002 MW (summer) located in Joppa, Illinois (Joppa Facility). Electric Energy also controls approximately 74 MW of gas-fired capacity located

at the same site but which is owned by Midwest Electric Power, Inc. (Midwest Electric, described below). Dynegy indirectly owns an 80 percent equity stake in Electric Energy through Illinois Power Generating Company (Illinois Power Generating, described below); the remaining 20 percent interest in Electric Energy is owned by Kentucky Utilities. Electric Energy has been granted market-based rate authority by the Commission. The Joppa Facility is interconnected with the Tennessee Valley Authority, Louisville Gas & Electric/Kentucky Utilities, and MISO. In addition to owning and operating the Joppa Facility, Electric Energy owns six parallel generation tie lines which are approximately eight miles long. As those transmission lines could conceivably be used by an unaffiliated third party for transmission service, the Commission has required Electric Energy to file an open access transmission tariff with the Commission, but has granted waiver of certain other transmission owner requirements.

- Midwest Electric is an Illinois corporation and wholly-owned subsidiary of Electric Energy that owns and operates natural gas-fired units with an aggregate generating capacity of approximately 74 MW (summer) at the site of the Joppa Facility. All of the output of Midwest Electric's generating facilities is sold to Electric Energy pursuant to a cost-based, long-term sales agreement that was accepted by the Commission. Midwest Electric does not have any other rate schedules in effect.
- Illinois Power Generating, formerly known as Ameren Energy Generating Company, is an Illinois corporation and an indirect subsidiary of Dynegy, and has been granted market-based rate authority by the Commission. Excluding the generation capacity owned by Electric Energy and Midwest Electric, Illinois Power Generating currently owns approximately 2,257 MW of generation capacity (summer) located in Illinois. With the exception of 165 MW of gas-fired generation located in Joppa, Illinois within the Electric Energy Balancing Authority Area, all of the generation is located within MISO. Illinois Power Generating sells all of the output of its generating facilities to Illinois Power Marketing Company (Illinois Power Marketing, described below), and has a rate schedule for cost-based reactive power compensation (Illinois Power Generating Reactive Power Rate Schedule).
- Illinois Power Marketing, an Illinois corporation, is a wholly-owned subsidiary of Dynegy and a power marketer with market-based rate authority. Illinois Power Marketing was formerly known as Ameren Energy Marketing Company, and succeeded to the market-based rate tariff of that company. Illinois Power Marketing does not own any generation capacity, but, pursuant to long-term power sales agreements with Illinois Power Generating, Illinois Power Resources Generating, LLC (Illinois Power Resources, described below), and Electric Energy, Illinois Power Marketing currently controls approximately 4,319 MW of

capacity. In addition to making wholesale sales, Illinois Power Marketing is engaged in retail marketing in the state of Illinois and is regulated by the Illinois Commission as an Alternative Retail Electric Supplier.

- Illinois Power Resources, formerly known as Ameren Energy Resources Generating Company, is an Illinois corporation and indirect subsidiary of Dynegy. Illinois Power Resources is authorized by the Commission to sell energy, capacity, and certain ancillary services at market-based rates. Illinois Power Resources owns approximately 1,060 MW of capacity within MISO and sells 100 percent of the output from its generating facilities to Illinois Power Marketing. Illinois Power Resources has a rate schedule for cost-based reactive power compensation (Illinois Power Resources Reactive Power Rate Schedule).

d. CAISO

- Dynegy Moss Landing, LLC (Dynegy Moss Landing), a Delaware limited liability company, is an indirect, wholly-owned subsidiary of Dynegy. Dynegy Moss Landing is an Exempt Wholesale Generator that owns and operates the Moss Landing Power Plant, which consists of natural gas-fired combined cycle/conventional steam generating units with a combined capacity of 2,529 MW (summer) and is located in Monterey County, California, within CAISO. Dynegy Moss Landing is authorized by the Commission to sell energy, capacity, and certain ancillary services at market-based rates.
- Dynegy Oakland, LLC (Dynegy Oakland), a Delaware limited liability company, is an indirect, wholly-owned subsidiary of Dynegy. Dynegy Oakland is an Exempt Wholesale Generator that owns and operates the Oakland Power Plant, which consists of oil-fired generating units with a combined capacity of 165 MW (summer) and is located in Oakland, California, within CAISO. Dynegy Oakland has been authorized by the Commission to sell energy, capacity, and certain ancillary services at market-based rates, and is subject to a cost-based Reliability Must-Run agreement with CAISO.

e. NYISO

- Sithe/Independence Power Partners, LP (Sithe/Independence) is a Delaware limited liability company and an indirect, wholly-owned subsidiary of Dynegy. Sithe/Independence is an Exempt Wholesale Generator that owns and operates the Sithe Independence Station, a natural gas-fired electric generating facility with a net capacity of 933 MW (summer) located in Oswego, New York, within NYISO. The Commission has authorized Sithe/Independence to sell energy, capacity, and certain ancillary services at market-based rates.

f. Other

- Dynegy Power Marketing, LLC (Dynegy Power Marketing), a Texas limited liability company, is an indirect, wholly-owned subsidiary of Dynegy and a power marketer. Dynegy Power Marketing has been authorized by the Commission to sell energy, capacity, and certain ancillary services at market-based rates.

B. The Proposed Transaction

7. Applicants explain that the Proposed Transaction will be accomplished pursuant to two separate agreements. The first agreement, the Stock Purchase Agreement (referred to as the EquiPower Agreement) is by and among the EquiPower Funds;⁷ EquiPower; Dynegy; and Dynegy Resource II, LLC (Dynegy Resource II), a Delaware limited liability company and special purpose vehicle formed by Dynegy for purposes of the Proposed Transaction.

8. Applicants state that, pursuant to the EquiPower Agreement, Dynegy Resource II will purchase 100 percent of the common stock of EquiPower from the EquiPower Funds. As a consequence, Dynegy will indirectly acquire (1) 100 percent of the ownership interests in the EquiPower Companies, other than Elwood Energy, and (2) either a 49.5 percent ownership interest in Elwood Energy and the option to acquire an additional 0.5 percent interest, or a 50 percent ownership interest in Elwood Energy (if the option has been exercised prior to the consummation of the Proposed Transaction).⁸

9. The second agreement, the Stock Purchase Agreement and Agreement and Plan of Merger (referred to as the Brayton Point Agreement), is by and among Energy Capital Partners GP II, LP; Energy Capital Partners II, LP; Energy Capital Partners II-A, LP; Energy Capital Partners II-B, LP; Energy Capital Partners II-D, LP; and Energy Capital Partners II-C (Cayman), L.P., collectively, the Brayton Point Holdings Sellers;⁹ Brayton

⁷ Applicants note that an affiliated investment fund, Energy Capital Partners II-C, LP (ECP II-C), is a party to the EquiPower Agreement for “certain limited guarantee purposes.” *Id.* n.63.

⁸ Applicants note that under the EquiPower Agreement, Dynegy will also acquire non-jurisdictional subsidiaries of EquiPower engaged in development activities and providing operations and maintenance services to certain of the EquiPower Companies. *Id.* n.65.

⁹ Applicants state that certain of the Brayton Point Holdings Sellers are also Current Brayton Point Holdings Owners, and are all controlled by ECP II. An affiliated

(continued...)

Point Holdings; Dynegy; and two special purpose vehicles formed by Dynegy for purposes of the Proposed Transaction, Dynegy Resource III, LLC (Dynegy Resource III) and its wholly-owned subsidiary, Dynegy Resource III-A, LLC (Dynegy Merger Sub), both of which are Delaware limited liability companies.

10. According to Applicants, the Brayton Point Agreement provides for multiple steps of the Proposed Transaction. First, through a series of internal equity transfers, certain of the Current Brayton Power Holdings Owners will be dissolved and their membership interests in Brayton Power Holdings will be distributed in part to intermediate entities, referred to as Blockers, owned by certain of the Brayton Point Holdings Sellers. Second, those Brayton Point Holdings Sellers will sell 100 percent of their equity interests in the Blockers to Dynegy Resource III, so that Dynegy Resource III will indirectly acquire the membership interests in Brayton Point Holdings held by the Blockers. Third, Dynegy Merger Sub will be merged into Brayton Point Holdings with Brayton Point Holdings as the surviving company; pursuant to such merger the remaining outstanding membership interests in Brayton Point Holdings held by the other Brayton Point Holdings Sellers will be acquired by Dynegy Resource III. Once the transactions contemplated by the Brayton Point Agreement are consummated, Brayton Point and its parent company Brayton Point Holdings will become wholly-owned, indirect subsidiaries of Dynegy.

II. Notice of Filing and Responsive Pleadings

11. Notice of the Application was published in the *Federal Register*, 79 Fed. Reg. 56,349 (2014), with interventions and protests due on or before October 2, 2014. The PJM Market Monitor filed a timely motion to intervene in this proceeding, and subsequently filed, on September 16, 2014, a motion to consolidate this proceeding with Docket No. EC14-141-000, regarding the Proposed Duke Transaction, and to extend the comment date in both proceedings to November 10, 2014. Applicants filed an answer opposing the motion to consolidate. On September 16, 2014, the Commission issued an errata notice extending the comment date in this proceeding to November 10, 2014.

12. Timely motions to intervene were filed by PJM, the Massachusetts Attorney General, and Public Citizen, Inc. On November 10, 2014, the PJM Market Monitor filed comments,¹⁰ and the Utility Workers of America Local 464 and Robert Clark (together,

investment, ECP II-C, is also a party to the Brayton Point Agreement for “certain limited guarantee purposes.” *Id.* n.64.

¹⁰ Comments of the Independent Market Monitor for PJM, Docket Nos. EC14-140-000 and EC14-141-000 (not consolidated) (Nov. 10, 2014) (PJM Market Monitor Comments). These comments were cross-filed in the proceeding on the Proposed Duke Transaction, in Docket No. EC14-141-000.

UWA Local 464) filed a motion to intervene and protest.¹¹ Applicants filed an answer to the PJM Market Monitor's comments and UWA Local 464's protest.¹² UWA Local 464 and the PJM Market Monitor each filed answers to Applicants' answer.¹³ Applicants filed a response to the answers.¹⁴

13. On January 16, 2015, the Director of Electric Power Regulation – West requested that Applicants provide additional information with respect to the Application (Request for Additional Information). On February 6, 2015, Applicants filed a response to the Request for Additional Information (Applicants Feb 6 Response).¹⁵

14. Simultaneously with their response to the Request for Additional Information, Applicants also submitted a settlement agreement among Dynegy and Dynegy Resource I and the PJM Market Monitor that satisfies the concerns raised by the PJM Market Monitor regarding the Proposed Transaction and the Proposed Duke Transaction (Supplemental Filing).¹⁶ Notices of Applicants Feb 6 Response and the Supplemental

¹¹ Motion to Intervene and Protest of Utility Workers Union of America Local 464, and Robert Clark, Docket No. EC14-140-000 (Nov. 10, 2014) (UWA Local 464 Protest).

¹² Motion for Leave to Answer and Answer of Dynegy Inc. and Certain Public Utility Subsidiaries of Energy Capital Partners II, LLC, Docket No. EC14-140-000 (Nov. 24, 2014) (Applicants Answer).

¹³ Motion for Leave to Answer and Answer of Utility Workers Union of America Local 464, and Robert Clark to Answer of Dynegy, Inc., and Certain Subsidiaries of Energy Capital Partners II, Filed November 24, 2014, Docket No. EC14-140-000 (Dec. 8, 2014) (UWA Local 464 Answer); Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Docket Nos. EC14-140-000 and EC14-141-000 (not consolidated) (Dec. 9, 2014) (PJM Market Monitor Answer).

¹⁴ Limited Answer, Docket No. EC14-140-000 (Dec. 12, 2014). In the limited answer, Applicants conclude that the issues raised by UWA Local 464 and the PJM Market Monitor answers have been fully addressed by the Application and Applicants' answer. As a result, Applicants advised the Commission that they would not submit a substantive response to those pleadings.

¹⁵ Response to Request for Additional Information and Request for Shortened Comment Period, Docket Nos. EC14-140-000 and EC14-141-000 (Feb. 6, 2015).

¹⁶ Supplemental Filing Regarding Settlement with the Independent Market Monitor for PJM Interconnection, L.L.C. at 1-2, Docket Nos. EC14-140-000,

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Filing were published in the *Federal Register*, 80 Fed. Reg. 8303 (2015), with interventions and protests due on or before February 23, 2015.

15. On February 20, 2015, UWA Local 464 filed an additional protest of the Application, as amended.¹⁷ On February 24, 2015, Applicants filed a response to UWA Local 464's additional protest.¹⁸

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁹ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure²⁰ prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept the answers because they have provided information that assisted us in our decision-making process.

18. We decline to grant the PJM Market Monitor's motion to consolidate this proceeding with Docket No. EC14-141-000, regarding the Proposed Duke Transaction.

EC14-141-000 (Feb. 6, 2015). The Commission considers a settlement agreement filed prior to a dispositive order as an amendment to the application. *See BHE Holdings Inc., et al.*, 133 FERC ¶ 61,231, at P 12, n.7 (2010).

¹⁷ Renewed Motion to Intervene and Protest of Utility Workers Union of American Local 464, and Robert Clark, Docket No. EC14-140-000 (Feb. 20, 2015) (UWA Local 464 Renewed Protest).

¹⁸ Motion for Leave to Answer and Limited Answer, Docket No. EC14-140-000 (Feb. 24, 2015). In this second limited answer, Applicants conclude that the issues raised by UWA Local 464 in its renewed protest are "substantially the same" as those it has raised previously, and that Applicants have addressed those issues in the Application and in their other pleadings. *Id.* at 2. As a result, Applicants notify the Commission that they will not be submitting a substantive response.

¹⁹ 18 C.F.R. § 385.214 (2014).

²⁰ 18 C.F.R. § 385.213(a)(2) (2014).

In general, the Commission consolidates proceedings only if a trial-type evidentiary hearing is required and there are common issues of law and fact.²¹ We conclude that consolidating this proceeding with Docket No. EC14-141-000 is not appropriate because there are no issues relating to the Proposed Transaction that are being set for a trial-type evidentiary hearing.

B. The Proposed Transaction

1. Standard of Review Under FPA Section 203

19. FPA section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.²² The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.²³ FPA section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."²⁴ The Commission's regulations establish verification and informational

²¹ See, e.g., *Duke Energy Corp., et al.*, 136 FERC ¶ 61,245, at P 33 (2011); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,253, at P 25 (2008); *Terra-Gen Dixie Valley, LL, et al.*, 132 FERC ¶ 61,215, at P 44, n.74 (2010).

²² 16 U.S.C. § 824b(a)(4) (2012). With respect to other regulatory approvals, Applicants state that the Proposed Transaction requires expiration of waiting periods pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and approval of radio license transfers by the Federal Communications Commission. In addition, notice of sale or transfer of ownership or operational interest in Kincaid Generation and Brayton Point Holdings will be provided in connection with an EPA Consent Decree, entered in the Central District of Illinois on April 2, 2013. Application, Exhibit L: Other Regulatory Approvals. Our findings under FPA section 203 do not affect those agencies' evaluations of the Proposed Transaction pursuant to their respective statutory authorities.

²³ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

²⁴ 16 U.S.C. § 824b(a)(4) (2012).

requirements for entities that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.²⁵

2. Analysis of the Proposed Transaction Under EPA Section 203

a. Effect on Competition

i. Applicants' Analysis

(a). Horizontal Competition

20. Applicants assert that the Proposed Transaction will not have an adverse effect on competition. According to Applicants, a Delivered Price Test, or Competitive Analysis Screen, is required for those geographic markets where a proposed transaction will result in a material overlap in generation.²⁶ Applicants explain that the assets to be acquired by Dynegy in the Proposed Transaction from the ECP Utilities (the ECP Assets) consist of five generating facilities located in the ISO-NE market, and five generating facilities located in the PJM market. As Dynegy also owns assets in the ISO-NE and PJM markets, Applicants conclude that these markets are the only relevant markets for purposes of analyzing the Proposed Transaction using the Competitive Analysis Screen.²⁷

²⁵ 18 C.F.R. § 33.2(j) (2014).

²⁶ The Delivered Price Test, or Competitive Analysis Screen, is used to determine the pre- and post-transaction market shares from which the change in market concentration, or the Herfindahl-Hirschman Index (HHI), can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails the relevant screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

²⁷ Application at 22-23.

Further, Applicants note that, under the Commission's regulations, a full Competitive Analysis Screen is not required if an applicant demonstrates that the merging entities do not currently conduct business in the same geographic markets, or demonstrate that the extent of business transactions in the same geographic market is *de minimis*.²⁸ Based on the *de minimis* exception, Applicants only prepared a Competitive Analysis Screen for the ISO-NE market, and not for the PJM market, since the combination of Applicants' assets would represent less than 3 percent of the installed capacity in PJM.²⁹

21. Applicants explain that, in addition to defining the geographic markets relevant to a proposed transaction, the Commission's regulations require applicants to examine the competitive effects of proposed transactions on those products traded in the relevant geographic markets for which sufficient data is available to evaluate changes in market shares and concentration levels. For purposes of reviewing the effect of the Proposed Transaction within the ISO-NE market, Applicants identify energy, both non-firm energy and short-term capacity (firm energy), long-term capacity, and certain ancillary services, specifically regulation and reserves, as the relevant products for purposes of their Competitive Analysis Screen of the ISO-NE market.

22. According to Applicants, when considering energy products, the Commission's regulations require applicants to examine both Economic Capacity and Available Economic Capacity.³⁰ Applicants state that while applicants must generally consider the impacts of a proposed transaction on the markets for both of these energy products, the Commission assigns greater significance to the Economic Capacity measure in "substantially restructured markets" such as ISO-NE and PJM where, for the most part, utility suppliers no longer maintain load-serving responsibility.³¹ Applicants focus their analysis of the Proposed Transaction on the market for Economic Capacity in ISO-NE, but

²⁸ *Id.* at 23 (citing 18 C.F.R. § 33.3(a)(2)(i) (2014)).

²⁹ *Id.* at 23. Applicants assert that the Commission has generally not required preparation of a Competitive Analysis Screen or Delivered Price Test where applicants' combined market share was less than three percent of the installed capacity in a market. *Id.* n.77.

³⁰ Each supplier's "Economic Capacity" is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability. "Available Economic Capacity" is based on the same factors but subtracts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

³¹ Application at 24.

also include screen results for Available Economic Capacity given that ISO-NE has some states in which there is no retail competition.³²

23. Applicants also explain that in determining market shares and concentration levels under the Competitive Analysis Screen, applicants must consider the generation located inside of the Balancing Authority Area being analyzed and generation that can be imported into the market at the applicable price level. Applicants state that for purposes of their Delivered Price Test, they used Simultaneous Import Transmission Limit data that was recently approved by the Commission in connection with market-based rate triennial filings in the Northeast Region.³³

(1). **Results of Competitive Analysis Screen for ISO-NE Markets**

ISO-NE Energy Market

24. Based on the results of their Competitive Analysis Screen for the ISO-NE energy markets, Applicants conclude that the effects of the Proposed Transaction on those markets are small and do not raise competitive concerns. Applicants explain that these results are likely due to the fact that Dynegy's single generating facility in the ISO-NE market, the Independence Station, which is owned and operated by Casco Bay Energy, represents only 1.6 percent of the approximately 31,000 MW of installed capacity in ISO-NE, and that the ECP Assets represent roughly 10.2 percent of the installed capacity in ISO-NE.

25. Based on a simplified "2ab analysis" (2ab Analysis) of changes in market concentration, Applicants state that the Proposed Transaction would result in, at most, a 32 point change in HHI in the market for installed capacity in the ISO-NE market.³⁴

³² *Id.* at 24-25.

³³ *Id.* at 26 (citing *New Brunswick Energy Mktg. Corp., et al.*, Order on Simultaneous Transmission Import Limit Values for the Northeast Region, 147 FERC ¶ 61,190, at Appendix A (2014)).

³⁴ The 2ab Analysis is a simplified market power analysis that approximates the HHI change in a market. Specifically, if *a* equals the market share of buyers and their affiliates, and *b* equals the market share of the entities being acquired by buyers, one can approximate the HHI change resulting from a hypothetical transaction because $(a + b)^2 - (a^2 + b^2) = a^2 + b^2 + 2ab - (a^2 + b^2) = 2a \cdot b$. *2ab* represents the change in HHI of the individual firm without considering the market HHI. *Horizontal Merger Guidelines*,

(continued...)

Applicants note that the ISO-NE market is currently unconcentrated. Applicants assert that the results of the 2ab Analysis are conservative as the 2ab methodology does not account for generation retained by affiliates of ECP II that is not part of the Proposed Transaction.³⁵ Further, Applicants assert that taking into account a recently announced transaction wherein an ECP II affiliate proposes to acquire additional generation in several markets, including ISO-NE, would lead to an even smaller HHI change.³⁶

26. Applicants state that their analysis of Economic Capacity in the ISO-NE energy market affirms the results of their 2ab Analysis. Applicants explain that the results of the Delivered Price Test for Economic Capacity show that the ISO-NE market remains unconcentrated after consummation of the Proposed Transaction, and that the screens are passed by wide margins in all season/load periods and load conditions. Applicants note that the results of their analysis of Available Economic Capacity, including price sensitivity analyses where they increased and decreased prices by 10 percent, are not materially different.

ISO-NE Capacity Market

27. Applicants consider the competitive effects of the Proposed Transaction on the Forward Capacity Market administered by ISO-NE. According to Applicants, the RTO-wide market share results reported by ISO-NE for Forward Capacity Auction 7 and Forward Capacity Auction 8 are “generally comparable” to both the results of

57 Fed. Reg. 41,552 at 41,558, n.18 (1992). *See also NRG Yield, Inc., et al.*, 148 FERC ¶ 61,109, at n.12 (2014).

³⁵ Applicants explain that the 2ab calculation actually overstates the post-transaction HHI change because ECP II affiliates will retain ownership of capacity in the relevant market. Specifically, they will continue to hold certain indirect ownership interests in the approximately 326 MW Millennium Power Project in ISO-NE. The generation retained by the ECP II affiliates has the effect of reducing the post-transaction change in HHI because it reduces Applicants’ post-transaction market share. Application at 29, n.93.

³⁶ Applicants refer to the proposed acquisition by an ECP II affiliate of 17 waste-to-energy plants with an installed capacity of approximately 850 MW from Wheelabrator Technologies Inc. *Wheelabrator Technologies, Inc.*, 149 FERC ¶ 62,127 (2014) (*Wheelabrator*) (authorizing transaction). Combined with the Proposed Transaction, the acquisition of the waste-to-energy plants authorized in *Wheelabrator* would result in a negative 2 point change in HHI. Application at 29, n.94.

Applicants' Delivered Price Test at the highest summer peak season/load period, and their 2ab analysis of installed capacity.³⁷ Based on the results of the Forward Capacity Auction 7, Applicants conclude that the Proposed Transaction would result in a "very small" increase in concentration levels in the overall ISO-NE capacity market, with an increase in HHI of 7 points.³⁸

ISO-NE Reserve and Regulation Service Markets

28. Applicants note that ISO-NE operates both Reserve and Regulation Service markets, but that none of the generation owned by Dynegy or the ECP Utilities in ISO-NE participates in the 10-minute Non-Spinning Reserves or 30-minute Operating Reserves markets. As a result, Applicants conclude that the Proposed Transaction will not have an impact on either of those markets.

29. With respect to the ISO-NE Regulation Service market, Applicants explain that although Dynegy and ECP Utilities both participate in that market, data is not available to perform a detailed quantitative analysis of it. Applicants note, however, that recent reports by the ISO-NE internal and external market monitors indicate that the Regulation Service market is competitive.³⁹ Applicants conclude that because average available supply of Regulation Service in 2013 was more than 10 times average demand, there are no competitive concerns with respect to Regulation Service in ISO-NE.

(2). Results of Applicants' Analysis of the PJM Markets

30. As noted above, based on the larger scale of the PJM market and Applicants' smaller share of installed capacity in PJM, Applicants conclude that the extent of the overlap in generation between Dynegy and the ECP Utilities qualifies the Proposed Transaction for the *de minimis* exception to preparing a Delivered Price Test. Applicants instead evaluate the Proposed Transaction using the 2ab methodology and shares of installed capacity as a proxy for energy market shares.

31. Applicants state that Dynegy's 1,606 MW of generation represents less than 0.9 percent of the approximately 184,000 MW of installed capacity in PJM and that the ECP Utilities' 3,435 MW of generation represents only 1.9 percent of installed capacity

³⁷ *Id.* at 29.

³⁸ *Id.* at 29-30.

³⁹ *Id.* at 30-31.

in PJM. According to Applicants, the 2ab methodology shows a post-transaction increase in HHI of 3 points. Applicants assert that this change in HHI, coupled with the less than 2.8 percent combined market share for Applicants after the Proposed Transaction is consummated, support their claim that no further competitive analysis of the Proposed Transaction for the PJM markets is required, in accordance with the *de minimis* exception.⁴⁰

32. Applicants conclude that the only submarket relevant to the Proposed Transaction is PJM East, where Dynegy and the ECP Utilities each own a single generating plant. According to Applicants, their analysis shows that the combination of Dynegy's 466 MW of capacity and the ECP Utilities' 541 MW of capacity in PJM East together represents less than 3 percent of the approximately 39,000 MW of installed capacity in PJM East. The 2ab calculation shows an increase in HHI of 3 points.

33. Applicants also consider post-transaction market shares of installed capacity and changes in market concentration after taking into account Dynegy's future commitment of some of its generation located in MISO in the PJM Reliability Pricing Model Capacity Market (PJM Capacity Market) and its long-term firm transmission reservations from MISO to PJM. Applicants state that the results of this sensitivity analysis are similar to the base case. Specifically, Dynegy's post-transaction market share would be 3.2 percent, and the HHI would increase by 5 points (as opposed to 3 points, as noted above). Applicants assert that the HHI change in this sensitivity case is conservative as it assigns 937 MW of imports to Dynegy, but does not include any competing imports into PJM.⁴¹

34. Finally, Applicants include a sensitivity case that evaluates post-transaction market shares and changes in market concentration after taking into account the Proposed Duke Transaction, where Dynegy Resources I proposes to acquire approximately 6,000 MW of generation from Duke Energy Corporation (Duke Energy). Applicants state that after completion of both the Proposed Transaction and the Proposed Duke

⁴⁰ Applicants assert that this estimate of combined market share is conservative since it assumes that Dynegy will acquire control over 100 percent of the output of the 600 MW Elwood Energy facility in PJM even though EquiPower only owns approximately 50 percent of Elwood Energy and the capacity of the facility is committed under a long-term tolling agreement with an affiliate of Exelon Generating Company, LLC. *Id.* at n.106. Applicants explain that their analysis of installed capacity in PJM assigns 100 percent of the Elwood Energy facility to the ECP Utilities pre-Proposed Transaction, and to Dynegy post-Proposed Transaction.

⁴¹ *Id.* at 33.

Transaction, Dynegy's market share would be 6.5 percent (including 937 MW of Dynegy generation assumed to be imported from MISO), and the total HHI change would be either a 17 point increase (assuming the Proposed Duke Transaction is completed before the Proposed Transaction), or a 21 point increase (assuming both transactions are completed simultaneously). Applicants note that even though Dynegy's market share of installed capacity in PJM would be approximately 6.5 percent after the consummation of both transactions, the change in market concentration would be small in a market that is unconcentrated, or at most, moderately concentrated. On this basis, Applicants conclude that no Delivered Price Test of energy markets or separate competitive analyses of capacity or ancillary service markets are required for PJM.

(b). **Vertical Competition**

35. Applicants claim that the Proposed Transaction does not present any vertical market power concerns. First, Applicants note that neither Dynegy nor the ECP Utilities owns or controls electric transmission assets in ISO-NE or in PJM, other than those necessary to connect generation to the grid, and that the Proposed Transaction does not include acquisition of additional transmission assets. While Applicants acknowledge that Dynegy's affiliate Electric Energy owns limited transmission facilities outside of the ISO-NE and PJM markets, Applicants state that these facilities are subject to a Commission-approved open access transmission tariff which mitigates any transmission market power concerns.⁴²

36. Second, Applicants state that Dynegy does not own any natural gas pipeline or distribution assets used to serve unaffiliated competing generation facilities, and that it is not acquiring any such facilities as part of the Proposed Transaction.

37. Third, Applicants state that while Dynegy and its affiliates own limited inputs to generation, including undeveloped coal supplies, owned/leased rail cars and rail facilities dedicated to private use, no such inputs are being acquired as part of the Proposed Transaction.

38. Applicants also provide estimates of the amount of generation in the interconnection queues in ISO-NE and PJM. They state that this information supports the Commission's presumption that entry into long-term electricity markets is competitive.⁴³

⁴² *Id.* at 37.

⁴³ *Id.* at 38-39 (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. By Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at

ii. Comments and Responsive Pleadings**(a). UWA Local 464 Protest and Responsive Pleadings**

39. UWA Local 464 argues that Applicants have not provided sufficient evidence to demonstrate that the Proposed Transaction will not have an adverse impact on competition and/or system reliability. According to UWA Local 464, the Proposed Transaction cannot be approved because combining EquiPower's 1,659 MW of non-Brayton Point Station generation with Dynegy's 488 MW of generation from the Independence Station would give the resulting entity generation market power that would enable it to profitably withhold capacity to reduce supply and increase market prices in the ISO-NE markets.⁴⁴

40. UWA Local 464 states that EquiPower and Dynegy currently have limited or no market power with respect to their generation assets in ISO-NE, which limits their ability to withhold economic capacity to increase prices. Based on analyses using hypothetical clearing prices for the ISO-NE Forward Capacity Auctions, UWA Local 464 claims that if EquiPower's and Dynegy's ISO-NE assets are combined through the Proposed Transaction, Dynegy's ability and economic incentive to withhold generation from the ISO-NE market would significantly increase, leading to annual market-wide increases in rates for customers.⁴⁵ UWA Local 464 also alleges that the Proposed Transaction may render a previously unprofitable withholding strategy profitable.

41. UWA Local 464 also expresses specific concerns related to the Brayton Point Station. Specifically, UWA Local 464 asserts that the Proposed Transaction cannot be approved because combining the ECP Assets with the Independence Station will increase the incentive of the owner of the Brayton Point Station to withhold capacity from that station in future auctions, which would reduce supply and increase prices for consumers.⁴⁶ UWA Local 464 claims that Dynegy has "stated that it intends to engage in

31,649 & nn.85-86 (1996) (citing *Kan. City Power & Light Co.*, 67 FERC ¶ 61,183, at 61,557 (1994) and *Entergy Servs., Inc.*, 58 FERC ¶ 61,234, at 61,756 & nn.63, 65 (1992)).

⁴⁴ UWA Local 464 Protest at 4.

⁴⁵ *Id.* at 4-6.

⁴⁶ UWA Local 464 references arguments made by intervenors in the proceeding in Docket No. ER14-1409-000 alleging that capacity from the Brayton Point Station was intentionally withheld from Forward Capacity Auction 8. *See id.* at 7-8.

the same withholding conduct in which [Energy Capital Partners] is alleged to have engaged with respect to [the Brayton Point Station] if it obtains ownership” of that station.⁴⁷ UWA Local 464 claims that if the conduct by Energy Capital Partners with respect to the Brayton Point Station is illegal, the acquisition of the station by Dynegy cannot be in the public interest because Dynegy (1) will be better positioned and have a greater incentive to engage in illegal withholding from the Brayton Point Station; and (2) has expressly stated that it intends to engage in the allegedly illegal conduct in the future. UWA Local 464 asserts that Applicants should be willing to divest the Brayton Point Station, unless they are attempting to ensure that the station will be shut down in order to reduce supply and enhance prices for their other assets.

42. Applicants dispute UWA Local 464’s claims that Dynegy will be able, and will have an incentive, to withhold supply from the ISO-NE capacity market after consummation of the Proposed Transaction. According to Applicants, the withholding strategy posited by UWA Local 464 could result in “significant losses” for Dynegy, with the risk of incurring such losses being high.⁴⁸ Applicants also question the hypothetical clearing prices relied upon by UWA Local 464, which Applicants claim are without basis or support, and contrary to recent publicly available projections. According to Applicants, intentional uneconomic or physical withholding of energy or capacity would be an “easily detectable violation” of the ISO-NE tariff and the Commission’s rules against market manipulation.⁴⁹

43. Applicants also address UWA Local 464’s arguments relating to the Brayton Point Station. Applicants explain that, contrary to UWA Local 464’s statements, Brayton Point Energy, the current owner of the Brayton Point Station, made the final decision to permanently retire the facility, consistent with ISO-NE’s market rules, effective June 1, 2017, coincident with the start of the 2017/2018 Capacity Commitment Period in ISO-NE. According to Applicants, Brayton Point Energy notified ISO-NE of its decision and did not participate in Forward Capacity Auction 8. As the decision to retire the Brayton Point Station was made prior to the Proposed Transaction, Applicants assert that the decision is unrelated to the Proposed Transaction. Further, Applicants conclude that since the Brayton Point Station will no longer be a part of the ISO-NE market as of June 1, 2017, there is no basis to consider any other factual scenario with respect to the Brayton Point Station. Applicants assert that UWA Local 464’s claims about prior

⁴⁷ *Id.* at 9.

⁴⁸ Applicants Answer at 15-16.

⁴⁹ *Id.* at 16.

decisions relating to the Brayton Point Station and the future disposition of it are outside the scope of the Commission's FPA section 203 analysis.⁵⁰

44. In response to Applicants' claims regarding the Brayton Point Station, UWA Local 464 asserts that "the withholding of the Brayton Point Station was uneconomic, and that therefore the [station] was not properly 'retired' in accordance with the ISO-NE tariff nor as permitted by the anti-manipulation provisions of the Federal Power Act."⁵¹ According to UWA Local 464, Applicants' assertion that the Brayton Point Station should not be considered in this proceeding depends on the contested issue of fact of whether the Brayton Point Station was properly retired, which in turn depends on whether it was uneconomic for the Brayton Point Station to withdraw from the market, as UWA Local 464 and others have alleged. UWA Local 464 argues that this issue must be adjudicated in order to evaluate the Application and Applicants' assertions regarding the Application.⁵²

45. UWA Local 464 argues that even if Applicants could show that the Brayton Point Station was properly retired, the station could still potentially supply power to the ISO-NE market in the future, and is therefore relevant to this proceeding. In addition, UWA Local 464 notes that Applicants do not dispute that the Proposed Transaction will result in substantially increased incentives to economically withhold capacity from the Brayton Point Station if it is a potential resource in the ISO-NE market, and that, even setting aside the Brayton Point Station, the Proposed Transaction will increase Applicants' ability and incentive to uneconomically withhold power from the ISO-NE market over a variety of future pricing scenarios.⁵³

46. In their renewed protest, UWA Local 464 reiterates many of the arguments raised in its initial protest and answer, and incorporates by reference, in further support of its protest of the Proposed Transaction, their amended protest filed in Docket No. ER14-1409-000, regarding the results of the ISO-NE's Forward Capacity Auction 8.

⁵⁰ *Id.* at 16-17.

⁵¹ UWA Local 464 Answer at 2.

⁵² *Id.* at 4.

⁵³ *Id.* at 7.

(b). **PJM Market Monitor Comments and Responsive Pleadings**

47. The PJM Market Monitor submits an alternative analysis and comments that consider both the Proposed Transaction and the Proposed Duke Transaction together as one transaction. The PJM Market Monitor's analysis takes the form of a report based on market structure metrics that it examines in order to quantify the expected impact of the proposed transactions on constraint-defined markets within PJM. The PJM Market Monitor explains that it makes use of actual dispatch, offer and availability data to define the relevant markets, and to examine the effects of the proposed transactions on those markets using concentration ratios and pivotal supplier indices.⁵⁴ The PJM Market Monitor states that it evaluates the effect of the proposed transactions using three metrics: market share; HHI; and the Three Pivotal Supplier Test, a "residual supplier index used in the PJM markets to define locational market power."⁵⁵

48. Based on its analysis, the PJM Market Monitor concludes that the proposed transactions would significantly increase concentration in specific, highly-concentrated locational energy markets; have a significant effect on the market for regulation service; and increase concentration in portions of the PJM Capacity Market.⁵⁶ The PJM Market Monitor argues that the Commission should require behavioral mitigation measures to address the issues identified by its alternative analysis.

49. Specifically, the PJM Market Monitor recommends that if the Commission approves the Proposed Transaction and the Proposed Duke Transaction, it should require the entity resulting from the proposed transactions to make cost-based offers in the energy, capacity, and regulation service markets. In addition, the PJM Market Monitor recommends that the entity be required to continue to offer the same units and quantities historically offered into the PJM regulation service market because participation in that market is voluntary, and one way to exercise market power is simply not to offer. Third, the PJM Market Monitor further recommends that Dynegy be required, absent "catastrophic failure or significant regulatory changes which make continued operation of

⁵⁴ PJM Market Monitor Comments at 2.

⁵⁵ PJM Market Monitor Comments, Attachment: Review and Analysis of Dynegy's Proposed Purchase of Duke and ECP Assets at 10 (PJM Market Monitor Report). The Three Pivotal Supplier Test can be used to evaluate a market participants' residual supply index, which is the measure of the extent to which one or more generation owners are pivotal suppliers in a market. *Id.* at 9.

⁵⁶ PJM Market Monitor Comments at 2.

a resource uneconomic,”⁵⁷ to offer its resources into the PJM Capacity Market. The PJM Market Monitor also recommends that Dynegy be required to provide at least 18 months notice to it and PJM of any planned resource retirements due to a failure to clear the PJM Capacity Market. Finally, the PJM Market Monitor recommends that, in order to limit further the effect on market structure of a recently approved transaction involving the creation of Talen Energy Corporation (Talen Energy), Dynegy be added to the list of participants ineligible to purchase the Talen Energy resources identified as Option 1 or Option 2 assets in the application requesting approval of the Talen Energy transaction.⁵⁸ According to the PJM Market Monitor, after consummating the Proposed Transaction and the Proposed Duke Transaction, Dynegy would, based on the criteria for exclusion proposed by the PJM Market Monitor in the Talen Energy proceeding, be ineligible to acquire the Talen Energy assets.⁵⁹

50. Applicants respond that the PJM Market Monitor’s arguments and analysis of the proposed transactions on the PJM energy, capacity and Regulation Service markets are flawed. With respect to the PJM energy markets, Applicants allege that the PJM Market Monitor’s approach to defining relevant geographic markets is inconsistent with Commission guidelines and has been previously rejected by the Commission. Applicants also claim that the PJM Market Monitor fails to provide any metrics by which to evaluate whether the alleged screen failures yielded by its analysis are competitively significant and require mitigation. Applicants assert that the PJM Market Monitor’s proposed mitigation measures are flawed because there is no logical nexus between the failures the market monitor identifies and the proposed mitigation measures, and question the PJM Market Monitor’s failure to explain why PJM’s extensive market power mitigation protocols and offer caps will not address market power issues when localized markets become constrained.⁶⁰

⁵⁷ PJM Market Monitor Report at 2.

⁵⁸ *PPL Corp. and JS Power Holdings LLC.*, 149 FERC ¶ 61,260 (2014) (*PPL Corp.*). In the Talen Energy proceeding, applicants committed to a mitigation plan that consists of alternative divestiture options, Option 1 and Option 2. Each option comprises two sets of generating plants and is designed to mitigate concerns raised by the Talen Energy transaction in the PJM 5004/5005 submarket. *Id.* P 43.

⁵⁹ PJM Market Monitor Report at 2.

⁶⁰ *Id.* at 10-11.

51. Applicants also dispute the PJM Market Monitor's concerns regarding the PJM Capacity Market, which they state focus on the ComEd Locational Deliverability Area in the 2017/2018 period for the Base Residual Auctions. Applicants note that while ComEd was considered as a potential Locational Deliverability Area prior to the most recent Base Residual Auction, it has never cleared as a separate zone/Locational Deliverability Area in a Base Residual Auction and therefore has not qualified as a separate market. Moreover, Applicants state that because the PJM Market Monitor failed to include supporting workpapers with the data and assumptions underlying its results and recommendations, Applicants were unable to validate the accuracy of the PJM Market Monitor's estimates of the effects of the Proposed Transaction on the ComEd Locational Deliverability Area based on existing capacity resources reported prior to the 2017/2018 Base Residual Auction.⁶¹ Applicants further state that the PJM Market Monitor's analysis of the PJM Regulation Service market is flawed since that analysis ignores excess supply and is apparently based solely on the cleared MW.

52. The PJM Market Monitor disputes Applicants' response and rejects their assertion that its alternative analysis should not be considered by the Commission. The PJM Market Monitor asserts that the Commission accepts and considers analyses based on more granular and precise market definitions, and that, within organized markets, data is available to define markets based on how units are evaluated and actually dispatched, and that data should be used.⁶² The PJM Market Monitor claims that the confidentiality of the data was not a legitimate rationale for rejecting its analysis, and suggests that Applicants could request access to the data and supporting workpapers pursuant to a protective agreement, and that the Commission could independently request and review the data.⁶³

53. With respect to the results of its analysis, the PJM Market Monitor confirms them, reiterating its conclusion that they demonstrate that the proposed transactions will have significant anti-competitive effects on the identified markets. The PJM Market Monitor also disagrees with Applicants' argument that the PJM Market Monitor's proposed market power mitigation measures are overly broad and that PJM's market power mitigation eliminates the need for behavioral mitigation in the energy market. The PJM Market Monitor explains that while it plays a significant role in implementing PJM's market power mitigation program and in assisting market participants in developing cost

⁶¹ *Id.* at 12.

⁶² PJM Market Monitor Answer at 2-4.

⁶³ *Id.* at 5.

inputs, neither it nor PJM has the ability to prevent an offer because they believe it is excessive and involves a potential exercise of market power. Further, the PJM Market Monitor states that the mitigation rules for the PJM market apply only to local constraints and market power, and that the mitigation rules do not address aggregate market power that affects the entire PJM market. The PJM Market Monitor also reiterates its claim that the proposed transactions would have a significant anti-competitive effect on the PJM regulation service market.⁶⁴

iii. **Applicants' Response to the Request for Additional Information and Settlement Agreement with the PJM Market Monitor**

54. In the Request for Additional Information, Applicants were directed to perform a Delivered Price Test for the PJM market and the AP South, 5004/5005, and PJM East submarkets because Applicants' 2ab Analysis did not adequately address whether the Proposed Transaction and the Proposed Duke Transaction raise horizontal market power issues in PJM.⁶⁵

55. Applicants performed a Delivered Price Test for the PJM market, as directed, and argue that the results of the Delivered Price Test confirm that the proposed transactions will not have an adverse impact on competition in the PJM market or submarkets. Specifically, Applicants state that under the Economic Capacity measure, the proposed transactions will result in HHI increases of 16 points or less in an unconcentrated market and a post-transaction market share of less than seven percent.⁶⁶ Applicants state that, under the Available Economic Capacity measure, the proposed transactions would result in an HHI increase of 59 points or less in an unconcentrated market and a post-transaction market share of less than 11 percent.⁶⁷

56. Applicants also provide the results of the Delivered Price Test for the PJM submarkets they were directed to study, PJM East, 5004/5004, and AP South, and conclude that those results confirm their claim that the proposed transactions will not have any adverse effect on competition in any relevant PJM submarket. For the PJM

⁶⁴ *Id.* at 26.

⁶⁵ Request for Additional Information at 4.

⁶⁶ Applicants Feb 6 Response at 3.

⁶⁷ *Id.*

East submarket, which Applicants assert is the only relevant submarket,⁶⁸ the proposed transactions result in an HHI increase of 17 points or less under the Economic Capacity measure in a moderately concentrated market and a post-transaction market share of less than six percent. Under the Available Economic Capacity measure, the proposed transactions result in an HHI increase of 47 points or less in an unconcentrated market and a post-transaction market share of less than nine percent.⁶⁹ According to Applicants, the results of the Delivered Price Test for the 5004/5005 and AP South submarkets under the Economic Capacity and Available Economic Capacity measures also show that the proposed transactions will not have an adverse effect on competition in those submarkets.⁷⁰

57. In addition to submitting the Delivered Price Test, Dynegy and Dynegy Resource I submit a settlement agreement which they have entered into with the PJM Market Monitor (Settlement Agreement). According to Dynegy and Dynegy Resource I, the PJM Market Monitor has authorized them to represent (1) that the Settlement Agreement “satisfies all of the concerns raised by [the PJM Market Monitor]” in this proceeding and Docket No. EC14-140-000, regarding the Proposed Duke Transaction; and (2) that the PJM Market Monitor “has no further comments regarding, and does not oppose approval of” the applications for approval of the proposed transactions, subject to Dynegy’s compliance with the terms of the Settlement Agreement.⁷¹

58. As noted above, the PJM Market Monitor alleges that the Proposed Transaction and the Proposed Duke Transaction raise competitive concerns, but that appropriate market power mitigation measures would resolve those concerns.⁷² According to

⁶⁸ Applicants state that the PJM East submarket is the only submarket in which any of Applicants or their relevant affiliates own or control generation facilities. Applicants Feb 6 Response at 3.

⁶⁹ *Id.*

⁷⁰ Under the Economic Capacity measure, the HHI changes in the 5004/5005 and AP South submarkets range from five points to one point in moderately concentrated markets; under the Available Economic Capacity measure, the HHI changes in the 5004/5005 and AP South submarkets range from 16 to three points in moderately concentrated and unconcentrated markets, respectively. Applicants Feb 6 Response, Attachment A: Second Supplemental Solomon Affidavit at Tables 4-5, 8-9.

⁷¹ Supplemental Filing at 1-2.

⁷² *See* P 49, *supra*.

Dynergy and Dynergy Resource I, the Settlement Agreement sets forth several structural and behavioral commitments that resolve the PJM Market Monitor's concerns. The Settlement Agreement states that if the orders issued by the Commission approving the proposed transactions are conditioned upon Dynergy's compliance with the terms and conditions of the Settlement Agreement, then the PJM Market Monitor will not object to the proposed transactions.⁷³

59. The Settlement Agreement imposes upon Dynergy obligations that are very similar, if not identical, to the market power mitigation measures suggested by the PJM Market Monitor in its comments. The structural commitment established in the Settlement Agreement, for example, adopts the market power mitigation measure related to the Talen Energy transaction recommended by the PJM Market Monitor.⁷⁴ The Settlement Agreement requires, for example, that Dynergy not acquire from Talen Energy any of the resources identified as Option 1 or Option 2 assets, or any asset sold to comply with the divestiture obligations set out in *PPL Corp.*, the Commission's order approving the Talen Energy transaction.

60. The behavioral commitments established in the Settlement Agreement are also similar to the PJM Market Monitor's recommended market mitigation measures. The commitments cover Dynergy's participation in the PJM Capacity Market, retirement of generating units, and offers by Dynergy in the PJM energy and ancillary services markets. Except as otherwise stated in the Settlement Agreement, the behavioral commitments apply to generating units owned and controlled by Dynergy that are located within PJM or pseudo-tied to PJM,⁷⁵ and the behavioral commitments will apply for seven years from the date of the closing of the transactions.⁷⁶

⁷³ Supplemental Filing, Attachment A: The Settlement at 1 (Settlement Agreement).

⁷⁴ See P 49, *supra*.

⁷⁵ Supplemental Filing, Settlement Agreement at § 2.

⁷⁶ *Id.* Section 2(d) states that if Dynergy believes that there is an "extraordinary change in circumstances" that calls into question whether certain of the commitments made by Dynergy in the Settlement Agreement should still be required, then Dynergy will work in good faith with the PJM Market Monitor to develop an appropriate and mutually agreeable amendment to the Settlement Agreement. *Id.* § 2(d).

61. With respect to offers by Dynegy in the PJM Capacity Markets, the Settlement Agreement requires that Dynegy “continue to offer all of its generating units in the [PJM Capacity Markets] in accordance with the then-current tariff governing such offers.”⁷⁷

62. The Settlement Agreement also addresses uprates of generating units by Dynegy. The Settlement Agreement states, that, should Dynegy wish to uprate a unit and such uprate would not materially change the operational characteristics of the unit, such uprate will be subject to the PJM Market Seller Offer Caps, as defined in Attachment DD of the PJM Tariff for existing units. The Settlement Agreement notes that Dynegy will not be limited in pursuing any Minimum Offer Price Rule exemptions if the offer is less than the offer cap. The Settlement Agreement also states that should Dynegy wish to uprate a unit and the uprate would materially change the operational characteristics of the unit (for example, uprating a simple cycle combustion turbine to a combined cycle unit), such offer will be subject to the PJM Market Seller Offer Caps, as defined in Attachment DD of the PJM Tariff. Under the terms of the Settlement Agreement, in these circumstances Dynegy will also not be limited in pursuing any Minimum Offer Price Rule exemptions allowed if the offer is less than the offer cap. The Settlement Agreement states further that if the PJM Market Monitor does not agree with the offer based on the Settlement Agreement, the Settlement Agreement does not create an obligation for Dynegy to offer the proposed uprate into a PJM capacity auction, provided, however, that Dynegy will have the right to seek approval from the Commission, and if the Commission grants its approval, Dynegy may submit the proposed offer in the PJM capacity auctions notwithstanding the lack of agreement by the PJM Market Monitor.⁷⁸

63. The provisions in the Settlement Agreement relating to retirement state that Dynegy will not retire a unit unless certain conditions are met. Specifically, Dynegy will not retire a unit unless (i) Dynegy has offered such unit into the most recent base residual Reliability Pricing Model auction and the unit did not clear in that auction, in which case Dynegy will comply with the then-current PJM rules and procedures regarding retirement of units (PJM Retirement Rules), or (ii) Dynegy has supported retirement of a unit by documenting that the unit is not covering its going forward costs and the PJM Market Monitor agrees with Dynegy’s conclusions.⁷⁹ Dynegy is also required to provide to PJM and the PJM Market Monitor 90 days written notice, or whatever other notice period is required by the PJM Retirement Rules, before retiring any generating unit it owns. If

⁷⁷ Supplemental Filing, Settlement Agreement at § 2(a)(i).

⁷⁸ *Id.* § 2(a)(iv).

⁷⁹ *Id.* § 2(a)(ii)(A).

after such notice PJM determines that there are no reliability issues associated with the retirement of the unit, Dynegy may retire it on the date provided in the notice. If, however, PJM determines, in accordance with the PJM Retirement Rules, that there are reliability issues associated with the retirement of the unit and PJM requests that Dynegy enter into a Reliability Must Run agreement, Dynegy shall agree to provide reliability must run services from the date of retirement to a date requested by PJM that is no more than 18 months from the date of the retirement notification.⁸⁰ The Settlement Agreement also requires Dynegy to provide to the PJM Market Monitor, as expeditiously as possible after announcing the decision to retire any generating unit owned by Dynegy, an economic analysis supporting the retirement decision.⁸¹

64. With respect to offers by Dynegy in the PJM energy market, the Settlement Agreement provides that, for any unit or portion of a unit with a PJM capacity commitment, Dynegy's post-transaction market-based offers in PJM must be consistent with the actual minimums, maximums, and ramp rates of the units.⁸² In addition, Dynegy is required to continue to set start up times such that the start-up time is a function only of the physical capability of each unit,⁸³ and no unit or part of a unit must be offered as "Max Emergency" continuously for more than one week except as necessary to comply with environmental restrictions or if otherwise approved by the PJM Market Monitor.⁸⁴

65. Finally, the Settlement Agreement states that, for regulation and synchronized reserve ancillary services from units owned by Dynegy on the day of the transactions, Dynegy will, for as long as such units are in operation, continue to offer "at least the same units and quantities historically offered into these markets."⁸⁵ In addition, following the closing of the proposed transactions, Dynegy will commence a feasibility study to determine the ability of the Kincaid Facility to offer regulation and synchronized reserve ancillary services.

⁸⁰ The Settlement Agreement states that these requirements do not apply to any unit that is pseudo-tied to PJM, or certain jointly owned facilities. *Id.* § 2(a)(ii).

⁸¹ This provision also does not apply to pseudo-tied units. *Id.* § 2(a)(iii).

⁸² *Id.* § 2(b)(i).

⁸³ *Id.* § 2(b)(ii).

⁸⁴ *Id.* § 2(b)(iii).

⁸⁵ *Id.* § 2(c).

iv. **Commission Determination**

66. As discussed below, we find that the Proposed Transaction will not have an adverse effect on competition in the ISO-NE and PJM markets.

(a). **The Proposed Transaction Will Not Have an Adverse Effect on Competition in the ISO-NE Markets.**

67. We find that the Proposed Transaction will not have an adverse effect on horizontal or vertical competition in the ISO-NE markets. In addition, we find that the issues raised by UWA Local 464 are beyond the scope of this proceeding, and that its arguments are speculative and unsupported.

68. As an initial matter, we note that Applicants' Delivered Price Test for the ISO-NE markets suffers from certain flaws. First, Applicants calculated the Day Ahead Hourly and Real Time Hourly prices for the ISO-NE markets as the arithmetic average of the Locational Marginal Price at eight zones in ISO-NE. Applicants' approach is inconsistent with the Commission's guidance for performing a Delivered Price Test. Rather than taking the arithmetic average, Applicants should have used the ISO-NE hub price. Second, Applicants explain that "all units with operating status listed as 'operating' or 'standby' during the study period were included" in their analysis.⁸⁶ However, in Applicants' Delivered Price Test model, in the "wkp – generation dataset" spreadsheet, Applicants included generating units with several other operating statuses such as "proposed," "permitted," and "under construction." While Delivered Price Tests should be forward-looking, some of the generating units in this dataset have been canceled and would not compete to serve customers in the ISO-NE market. Accordingly, these generating units should have been excluded from Applicants' model.

69. After correcting for these errors in Applicants' Delivered Price Test, we obtained results that are not materially different from the results Applicants reached. Applicants' Delivered Price Test and price sensitivity analyses demonstrate that the Proposed Transaction passes the market power screens in all time periods and load conditions under both the Economic Capacity and Available Economic Capacity measures in the ISO-NE energy market. For the Economic Capacity measure, in the base case, the HHI changes resulting from the Proposed Transaction range from five to six points, with

⁸⁶ Application, Attachment 1: Affidavit of Julie R. Solomon and Exhibits to Affidavit, Exhibit J-5: Modeling and Data Inputs at 1.

market shares ranging from 9.9 percent to 12.9 percent, in unconcentrated markets.⁸⁷ For the Available Economic Capacity measure, in the base case, the HHI changes resulting from the Proposed Transaction range from six to 12 points, with market shares ranging from 14.4 percent to 17.7 percent, in unconcentrated markets.⁸⁸ Based on these results, we conclude that the Proposed Transaction will not adversely affect horizontal competition in the ISO-NE energy market.

70. We also find that the Proposed Transaction will not adversely affect horizontal competition in the ISO-NE capacity market. Applicants' analysis of the effect of the Proposed Transaction on Forward Capacity Auction 7 indicates that the Proposed Transaction would lead to an HHI increase of seven points, with a market share of 9.42 percent. This change does not indicate an increase in market concentration sufficient to raise competition concerns.

71. We also conclude that the Proposed Transaction will not adversely affect horizontal competition in the ISO-NE Reserve and Regulation Services markets. First, as Applicants note, none of the generation owned by Dynegy or the ECP Utilities in ISO-NE participates in the 10-minute Non-Spinning Reserves or 30-Minute Operating Reserves markets, so the Proposed Transaction will not have an adverse competitive effect on the markets for these services. With respect to the market for regulation service, although data is not available to perform a detailed quantitative analysis of that market, Applicants represent that both the internal and external ISO-NE market monitors have issued reports concluding that the regulation market in ISO-NE is competitive,⁸⁹ and

⁸⁷ Application, Exhibit J-1: Affidavit of Julie R. Solomon at Table 10. The price increase sensitivity analyses yield similar results. The price increase scenario shows HHI changes ranging from four to six points, with market shares ranging from 9.9 percent to 12.3 percent, in unconcentrated markets; the price decrease scenario shows HHI changes ranging from six to negative six points, with market shares ranging from 9.9 percent to 12.5 percent, in unconcentrated markets. *Id.*, Exhibit J-6: Delivered Price Test Results, Economic Capacity.

⁸⁸ Application, Exhibit J-7: Delivered Price Test Results, Available Economic Capacity. The price increase sensitivity analyses yield similar results. The price increase scenario shows HHI changes ranging from five to 12 points, with market shares ranging from 14.4 percent to 16.8 percent, in unconcentrated markets; the price decrease scenario shows HHI changes ranging from five to negative 24 points, with market shares ranging from 14.4 percent to 17.4 percent, in unconcentrated markets.

⁸⁹ Application at 30 (citing ISO New England Inc., Internal Market Monitor, 2013 Annual Markets Report at 71-72 (May 6, 2014), available at <http://www.iso-ne.com/>

(continued...)

that average available supply of regulation in 2013 was more than 10 times demand.⁹⁰ Based on these representations, we agree that the Proposed Transaction does not raise competitive concerns with respect to the ISO-NE regulation service market.

72. We find UWA Local 464's arguments that the Proposed Transaction will enable Dynegy to execute a profitable withholding strategy to be speculative and unsupported. In particular, UWA Local 464 does not explain how it derived the prices upon which its analyses depend, or the methodology it used to derive those prices that would result from a hypothetical reduction in offered capacity. We find also that UWA Local 464's arguments concerning the Brayton Point Station are beyond the scope of this proceeding. As the Commission has explained, its authority to condition FPA section 203 authorizations is limited to addressing specific, transaction-related harm.⁹¹ The issues raised by UWA Local 464 are related to the retirement of the Brayton Point Station, which the Commission has already reviewed,⁹² rather than the Proposed Transaction.

73. Finally, we find that the Proposed Transaction will not have an adverse effect on vertical competition in ISO-NE. As Applicants note, neither Dynegy nor the ECP Utilities own or control electric transmission assets in ISO-NE other than those necessary to connect generation to the transmission grid, and no other transmission assets are being acquired as part of the Proposed Transaction. Further, Dynegy does not own any natural gas pipeline or distribution assets used to serve unaffiliated competing generation, nor is

markets/mkt_anlys_rpts/annl_mkt_rpts/2013/2013_amr_final_050614.pdf; Potomac Economics, Ltd., ISO New England External Market Monitor, *2013 Assessment of the Electricity Markets in New England* at 20 (June 2014) (External Market Monitor Report), available at http://www.isone.com/markets/mktmonmit/rpts/ind_mkt_advsvr/isone_2013_emm_report_final_6_25_2014).

⁹⁰ *Id.* & n.104 (citing External Market Monitor Report at 20 (“[a]n average of approximately 670 MW of available supply [was] competing to serve an average of 60 MW of regulation demand”).

⁹¹ See, e.g., *Entergy Gulf States, Inc., and Calcasieu*, 121 FERC ¶ 61,182, at P 71 (2007); *Boston Edison Co., et al.*, 117 FERC ¶ 61,083, at P 34 (2006).

⁹² As previously disclosed, the Commission's Office of Enforcement, as part of its non-public investigation into the bidding behavior of FCA 8, found credible justifications for the owners' retirement decision for Brayton Point and elected not to widen its investigation to include Brayton Point. *ISO New England Inc.*, 148 FERC ¶ 61,201, at P 11 (2014).

it acquiring such facilities as part of the Proposed Transaction. In addition, while Dynegy and its affiliates own other limited inputs to generation, such as undeveloped coal supplies, owned/leased rail cars and rail facilities dedicated to private use, no such inputs to generation are being acquired as part of the Proposed Transaction.

(b). **The Proposed Transaction Will Not Have an Adverse Effect on Competition in the PJM Markets.**

74. We find that the Proposed Transaction will not have an adverse effect on horizontal or vertical competition in the PJM market or its submarkets.

75. While we encourage parties to resolve their differences by settlement, and we are thus encouraged by Dynegy and the PJM Market Monitor's resolution of their differences, our findings here are based on our own independent analysis of horizontal and vertical competition resulting from the Proposed Transaction, as amended⁹³ by the Settlement Agreement.⁹⁴

76. After we corrected for incomplete and inaccurate data and coding errors,⁹⁵ our analysis indicates that the Delivered Price Test and price sensitivity analyses demonstrate

⁹³ See, fn.16, *supra*.

⁹⁴ As noted above, fn.77, *supra*, the Settlement Agreement provides for the possibility that it may be amended. Specifically, if Dynegy believes that there is an "extraordinary change in circumstances," the Settlement Agreement imposes an obligation on Dynegy and the PJM Market Monitor to work in good faith to develop an appropriate and mutually agreeable amendment to the Settlement Agreement. We remind Dynegy that an amendment to the Settlement Agreement would constitute an amendment to its application for the approval of the Proposed Transaction under FPA section 203, and would therefore need to be submitted for approval by the Commission in this proceeding as an amendment to the Proposed Transaction.

⁹⁵ Before addressing the results of the Delivered Price Test, we note certain flaws in Applicants' Delivered Price Test. First, as submitted, Applicants' Delivered Price Test model could not be executed because Applicants did not include code in the "wkp – generation dataset" to effect the transfer of ownership of the generation units subject to the Proposed Transaction from "Duke Energy Corp" and "Energy Capital Partners" to "Dynegy Inc." As a result of omitting this code, Applicants' Delivered Price Test model did not produce the final changes in HHI that result from the change in ownership. Second, Applicants did not include complete and accurate load data in the working papers.

that the Proposed Transaction passes the market power screens in all time periods and load conditions under both the Economic Capacity and Available Economic Capacity measures in the PJM energy market and its submarkets. Therefore, we conclude that the Proposed Transaction will not adversely affect horizontal competition in the PJM energy market or any PJM energy submarket. Further, the Settlement Agreement imposes additional requirements on offers by Dynegy in the PJM energy markets.

77. With regard to the PJM capacity and ancillary services markets, Applicants made structural and behavioral commitments in the Settlement Agreement which address the market power concerns of the PJM Market Monitor. We find that, based on our independent analysis of the commitments in the Settlement Agreement, the Proposed Transaction will not adversely affect the capacity or ancillary services markets in PJM.⁹⁶ For this reason, our authorization of the Proposed Transaction is subject to Dynegy's compliance with the terms and conditions of the Settlement Agreement.

78. Finally, we find that the Proposed Transaction will not have an adverse effect on vertical competition in PJM. As Applicants note, neither Dynegy nor the ECP Utilities own or control electric transmission assets in PJM other than those necessary to connect generation to the grid, and no other transmission assets are being acquired as part of the Proposed Transaction. Further, Dynegy does not own or control any natural gas pipeline or distribution assets used to serve unaffiliated competing generation, nor is it acquiring such facilities as part of the Proposed Transaction. In addition, while Dynegy and its affiliates own other limited inputs to generation, such as undeveloped coal supplies, owned/leased rail cars and rail facilities dedicated to private use, no such inputs to generation are being acquired as part of the Proposed Transaction.

b. Effect on Rates

i. Applicants' Analysis

79. Applicants state that the Proposed Transaction will not have an adverse impact on rates. First, Applicants note that they do not currently provide third-party transmission service or have any captive wholesale requirements customers. Other than sales under the Kincaid Generating Reactive Power Rate Schedule, all wholesale sales of electric energy, capacity, and ancillary services by the ECP Utilities are and will continue to be made under market-based rate authority.⁹⁷ Applicants explain that the Kincaid

⁹⁶ We note also that Applicants provide limited information regarding the effect of the Proposed Transaction on the PJM capacity and ancillary services markets.

⁹⁷ Application at 39.

Generating Reactive Power Rate Schedule is a cost-based, fixed-rate contract that does not contain any mechanisms that would allow for the pass-through of any costs resulting from the Proposed Transaction without a separate filing under FPA section 205.⁹⁸

80. With respect to Dynegy, Applicants state that Dynegy's existing public utility subsidiaries are not involved in the Proposed Transaction and that their rates will be unaffected by the transaction.⁹⁹ Applicants state that while all of the existing public utility subsidiaries of Dynegy have market-based rate authority and make most of their sales under negotiated rates, certain subsidiaries make sales under cost-based rate schedules on file with the Commission. Applicants state that these cost-based rate schedules are either fixed-rate contracts that would not allow the pass-through of any costs of the Proposed Transaction without a separate filing under FPA section 205, or provide for sales of power to a non-traditional utility affiliate.¹⁰⁰

81. In their response to the request for additional information, Applicants state that, to the extent that the Commission has any remaining concerns regarding the effect of the proposed transactions on rates, Dynegy is "willing to commit, on behalf of itself and its public utility subsidiaries, to hold its cost-based rate customers harmless from Transactions-related [*sic*] costs, absent a filing under Section 205 of the FPA demonstrating that Transaction-related costs are exceed by Transaction-related savings."¹⁰¹

ii. Commission Determination

82. We agree with Applicants that the Proposed Transaction will not have an adverse effect on rates. First, the Proposed Transaction will not have an adverse effect on wholesale power rates because, except for a limited number of agreements identified by Applicants, Applicants do not make wholesale power sales at cost-based rates, and they will continue to make sales of electric energy pursuant to their market-based rate authorizations.¹⁰² Further, those cost-based rate schedules identified by Applicants

⁹⁸ 16 U.S.C. § 824d (2012).

⁹⁹ Application at 39.

¹⁰⁰ *Id.* n.129.

¹⁰¹ Applicants Feb 6 Response at 6.

¹⁰² See *Union Electric Co.*, 114 FERC ¶ 61,255, at P 45 (2006) (finding wholesale customers will not be adversely affected where Applicant provides wholesale service at market-based rates); *NorAm Energy Servs., Inc.*, 80 FERC ¶ 61,120, at 61,382-83 (1997)

(continued...)

provide no mechanism through which the costs of the Proposed Transaction could be passed through to customers and affect those rates, or provide for sales of power to a non-traditional utility affiliate.¹⁰³ In addition, the Proposed Transaction does not involve entities that provide unbundled transmission service and therefore will have no adverse effect on transmission rates. We also note that no customer has argued that consummation of the Proposed Transaction would have an adverse effect on rates.

83. We accept Dynegy's commitment, on behalf of itself and its public utilities subsidiaries, to hold its cost-based rate customers harmless from costs related to the proposed transactions. We interpret Dynegy's commitment to apply to all transaction-related costs, including costs related to consummating the proposed transactions and transition costs (both capital and operating) incurred to achieve transaction synergies, incurred prior to the consummation of the proposed transactions or after the proposed transactions' consummation.¹⁰⁴

84. The Commission has established that, where applicants make hold harmless commitments in the context of FPA section 203 transactions, in order to recover transaction-related costs, applicants must demonstrate offsetting benefits at the time they apply to recover those costs. The Commission has clarified its procedures for recovery of such costs under FPA sections 203 and 205.¹⁰⁵ Consistent with those clarifications, and given the commitment by Dynegy to hold wholesale requirements and transmission customers harmless from transaction-related costs, if Dynegy seeks to recover transaction-related costs incurred prior to the consummation of the proposed transactions or after the consummation of the proposed transactions, then Dynegy must make that filing in a new FPA section 205 docket¹⁰⁶ and submit that same filing as a concurrent informational filing in this FPA section 203 docket, and in Docket No. EC14-141-000,

(stating that the Commission's ratepayer protection concerns do not apply to customers charged market-based rates).

¹⁰³ See, e.g., *FirstEnergy Generation Corp.*, 94 FERC ¶ 61,177, at 61,613 (2001); *USGen Power Services, L.P.*, 73 FERC ¶ 61,302, at 61,846 (1995).

¹⁰⁴ See, e.g., *Exelon Corp.*, 138 FERC ¶ 61,167, at P 118 (2012).

¹⁰⁵ *Exelon Corp.*, 149 FERC ¶ 61,148, at PP 106-109 (2014).

¹⁰⁶ The Commission will not authorize the recovery of transaction-related costs in an annual informational filing under existing formula rates.

regarding the Proposed Duke Transaction.¹⁰⁷ The Commission will notice the new section 205 filing for public comment.

85. In the FPA section 205 proceeding, the Commission will determine first, whether Dynegy's public utility subsidiaries have demonstrated offsetting savings, supported by sufficient evidence, to customers served under Commission jurisdictional rate schedules such that recovery of transaction-related costs is consistent with the hold harmless commitment and, second, whether the resulting new rate is just and reasonable in light of all the other factors underlying the proposed new rate. In the FPA section 205 filing, Dynegy's public utility subsidiaries must: (1) specifically identify the transaction-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the proposed transactions. Dynegy's public utility subsidiaries must show that the proposed rate is just and reasonable in addition to providing appropriate evidentiary support, such as reasonable documentation and estimates of the costs avoided, demonstrating that transaction-related costs have been offset by transaction-related savings in order to recover those transaction-related costs and comply with its hold harmless commitment. Those savings must be realized prior to, or concurrent with, any authorized recovery of transaction-related costs, and cannot be based on estimates or projections of future savings, but must be based on a demonstration of actual transaction-related savings realized by jurisdictional customers.¹⁰⁸ The Commission will consider rates not to be "just and reasonable" if they include recovery of costs subject to a hold harmless commitment made in connection with an FPA section 203 application and if applicants fail to show offsetting savings due to the transaction.¹⁰⁹

86. The Commission will be able to monitor Dynegy's hold harmless commitment under its authority under FPA section 301(c)¹¹⁰ and the books and records provision of the Public Utility Holding Company Act of 2005.¹¹¹ Moreover, the commitment is fully enforceable based on the Commission's authority under FPA section 203.

¹⁰⁷ Upon receipt, the Commission will not act on or notice the concurrent informational filing.

¹⁰⁸ See *Audit Report of National Grid, USA*, Docket No. FA09-10-000 (Feb. 11, 2011) at 55; see also *Ameren Corp.*, 140 FERC ¶ 61,034, at PP 36-37 (2012).

¹⁰⁹ *Exelon Corp.*, 149 FERC ¶ 61,148 at P 107.

¹¹⁰ 16 U.S.C. § 825(c) (2012).

¹¹¹ 42 U.S.C. § 16452 (2012).

c. Effect on Regulation

i. Applicants' Analysis

87. Applicants state that the Proposed Transaction will not have an adverse effect on the effectiveness of federal or state regulation. According to Applicants, the Proposed Transaction will not affect the ability of the Commission to regulate rates for wholesale power sales or transmission service provided by Applicants or their affiliates, or affect state regulation.

ii. Commission Determination

88. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.¹¹² We find that the Proposed Transaction will not create a regulatory gap at the federal level. As to regulation at the state level, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.¹¹³ No state has requested that the Commission address the effect of the Proposed Transaction on state regulation.

d. Cross-Subsidization

i. Applicants' Analysis

89. Applicants state that, based on facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the transaction or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of assets of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional facilities for the benefit of an associate company. Specifically, Applicants verify that the Proposed Transaction will not now, or in the future, result in: (1) transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company;

¹¹² Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

¹¹³ *Id.* at 30,125.

(2) new issuances of securities by traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) new affiliate contracts between non-utility associate companies and traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review pursuant sections 205 and 206¹¹⁴ of the FPA.

ii. Commission Determination

90. Based on the representations in the Application, we find that the Proposed Transaction will not result in inappropriate cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

e. Other Considerations

91. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.¹¹⁵ To the extent that the foregoing authorization results in a change in status, Applicants are advised that they must comply with the requirements of Order No. 652.

92. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215.¹¹⁶ Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information database, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to

¹¹⁴ 16 U.S.C. § 824e (2012).

¹¹⁵ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2014).

¹¹⁶ 16 U.S.C. § 824o (2012).

the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The Proposed Transaction is hereby authorized, subject to Dynegy's compliance with the terms and conditions of the Settlement Agreement, as discussed in the body of this order.

(B) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in authorizing the Proposed Transaction.

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

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

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

(F) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.