

170 FERC ¶ 61,227  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc. Docket Nos. EL15-70-002

The People of the State of Illinois By Illinois Attorney General Lisa Madigan v. Midcontinent Independent System Operator, Inc. EL15-71-002

Southwestern Electric Cooperative, Inc. v. Midcontinent Independent System Operator, Inc., Dynegy, Inc., and Sellers of Capacity into Zone 4 of the 2015-2016 MISO Planning Resource Auction EL15-72-002

ORDER DENYING REHEARING

(Issued March 19, 2020)

1. On August 19, 2019, Public Citizen, Inc. (Public Citizen) requested rehearing of the Commission's July 19, 2019 order addressing four complaints (Complaints) that had been filed in May and June 2015 in response to the results of the Midcontinent Independent System Operator, Inc.'s (MISO) 2015/16 Planning Resource Auction (Auction) for Local Resource Zone 4 (Zone 4).<sup>1</sup> In this order, we deny rehearing.

**I. Background**

2. The Complaints alleged that the capacity charges established in the 2015/16 Auction resulted in an unjust, unreasonable and unduly discriminatory rate increase in Zone 4. Complainants alleged to various extents that this rate increase may have been caused by: (1) unjust and unreasonable Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) rules governing MISO's Auction process; (2) illegal market manipulation by Dynegy Inc. (Dynegy); and/or (3) the exercise of

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<sup>1</sup> *Public Citizen, Inc. v. Midcontinent Indep. Syst. Operator, Inc.*, 168 FERC ¶ 61,042 (2019) (July 2019 Order).

market power by Dynegy, which had become a pivotal supplier following its acquisition of certain generating resources in Zone 4.<sup>2</sup>

3. On December 31, 2015, the Commission issued an order addressing those portions of the Complaints that challenged and requested prospective changes to the provisions of MISO's Tariff associated with market power mitigation and calculation of Capacity Import Limits.<sup>3</sup> The Commission granted the Complaints in part, prescribed just and reasonable provisions to be applied in future Auctions, and required MISO to make compliance filings to implement the revisions. The Commission stated that it would address other issues raised in the Complaints, including the need for an evidentiary hearing to resolve issues related to the 2015/16 Auction, in a future order. With respect to allegations of market manipulation, the Commission stated that the Office of Enforcement was conducting a formal, non-public investigation into whether market manipulation<sup>4</sup> occurred before or during the 2015/16 Auction.<sup>5</sup> The Commission stated that it would determine in a subsequent order whether additional action may be appropriate pending the outcome of the formal investigation.<sup>6</sup>

4. In the July 2019 Order, the Commission addressed the remaining issues raised in the Complaints regarding the 2015/16 Auction. As relevant here, the Commission declined requests to hold an evidentiary hearing, and found that the results of the 2015/16 Auction were just and reasonable.<sup>7</sup> The Commission also stated that the formal, non-public investigation into whether market manipulation occurred before or during the 2015/16 Auction had been closed.<sup>8</sup> Based on a review of the investigation, the Commission found that the conduct investigated did not violate the Commission's

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<sup>2</sup> The July 2019 Order provides detailed background on this proceeding. *See* July 2019 Order, 168 FERC ¶ 61,042 at PP 3-12.

<sup>3</sup> *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,385 (2015) (December 2015 Order), *order on compliance and reh'g*, 154 FERC ¶ 61,224 (2016).

<sup>4</sup> *See* 16 U.S.C. § 824v (2018); 18 C.F.R. § 1c.2 (2019) (prohibiting energy market manipulation).

<sup>5</sup> December 2015 Order, 153 FERC ¶ 61,385 at P 15 (citing *Investigation into MISO Zone 4 Planning Resource Auction Market Participant Offers*, 153 FERC ¶ 61,005 (2015)).

<sup>6</sup> *Id.* P 4.

<sup>7</sup> July 2019 Order, 168 FERC ¶ 61,042 at P 2.

<sup>8</sup> *Id.* P 30.

regulations regarding market manipulation and that no further action was appropriate to address the allegations of market manipulation raised in the Complaints.<sup>9</sup>

## II. Request for Rehearing

5. Public Citizen alleges that the Commission failed to explain the basis of its conclusion that Dynegey did not engage in market manipulation in the 2015/16 Auction. Public Citizen argues that the Commission did not address arguments raised by the parties as to whether manipulation had occurred, but instead relied solely on the results of a non-public investigation that had been unilaterally terminated by the Chairman.<sup>10</sup> Public Citizen claims that the Commission drew no rational connection between any facts and its ultimate conclusion but instead “invoked the secret record of another proceeding.”<sup>11</sup> Public Citizen faults the Commission for not including the evidence from the non-public investigation in the record of this proceeding, not allowing the parties to address it, and not saying “in even the most general terms what, in its view that evidence showed.”<sup>12</sup> In Public Citizen’s view, the Commission’s reliance on undisclosed facts outside of the record renders the July 2019 Order arbitrary and capricious.

6. Public Citizen also argues that the Commission erred by finding the Auction rates just and reasonable based solely on a finding that the Auction followed the procedures set forth in the Tariff at that time, without examining whether the resulting rates were themselves just and reasonable or whether the Tariff was just and reasonable at the time of the Auction.<sup>13</sup> Public Citizen argues that the July 2019 Order summarized arguments raised by the parties but then “entirely avoided the question whether the auction clearing prices reflected Dynegey’s exercise of market power and were therefore unjust and unreasonable.”<sup>14</sup>

7. Public Citizen challenges the July 2019 Order for not making a finding on whether the Tariff provisions, under the conditions of the 2015/16 Auction, were in fact sufficient to mitigate the exercise of market power. Public Citizen asserts that the July 2019 Order “specifically rejected the argument that the Commission had any obligation to ensure

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<sup>9</sup> *Id.* P 32.

<sup>10</sup> Rehearing Request at 12.

<sup>11</sup> *Id.* at 14.

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

<sup>13</sup> *Id.* at 2-3, 9-10.

<sup>14</sup> *Id.* at 9.

that rates resulting from an auction pursuant to the terms of a tariff are in fact just and reasonable.”<sup>15</sup> Public Citizen points to the Commission’s conclusion in the December 2015 Order that the Tariff was no longer just and reasonable as evidence that the results of the 2015/16 Auction had reflected the exercise of market power and had produced unjust and unreasonable rates.<sup>16</sup>

8. In Public Citizen’s view, rates cannot be deemed just and reasonable under the Federal Power Act (FPA) by virtue of the fact that they have been set by an Auction whose procedures the Commission previously approved.<sup>17</sup> Public Citizen further asserts that the July 2019 Order “posits that once the Commission has approved a ‘tariff’ setting forth Auction procedures, it has no power to look beyond compliance with those procedures to determine the lawfulness of the resulting rates, even on a going forward basis under Section 206.”<sup>18</sup>

9. Public Citizen refers to several opinions of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) for the proposition that the Commission’s power to review the lawfulness of “rates established by market mechanisms” is “critical to the legality of the Commission’s reliance on such mechanisms to set rates in the first instance.”<sup>19</sup> Specifically, Public Citizen argues that, in a series of cases decided between 1984 and 2002, the D.C. Circuit required the Commission to continue to review, monitor, and “check” rates that were established by the market to ensure that they were just and reasonable.<sup>20</sup> Public Citizen states that, more recently, in *TransCanada Power Marketing v. FERC*, the D.C. Circuit “held that the Commission may not rely solely on the use of ostensibly competitive bidding mechanisms to determine that rates are just and reasonable,” but instead “must determine that the rates themselves are just and reasonable, and explain why it believes that they resulted from competitive economic forces that restrained power suppliers from making bids that resulted in supracompetitive

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<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.* at 10, 15-16.

<sup>17</sup> *Id.* at 16, 17.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> *Id.* at 16, 17-21.

<sup>20</sup> *Id.* at 17-18 (citing *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, at 1509 (D.C. Cir. 1984) (*Farmers Union*); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993) (*Elizabethtown*); *Interstate Natural Gas Ass’n v. FERC*, 285 F.3d 18, 31 (D.C. Cir. 2002) (*Interstate Natural Gas*)).

profits.”<sup>21</sup> Public Citizen also states that in *Public Citizen, Inc. v. FERC*, the court questioned an assertion that the Commission lacked authority to review the results of an auction conducted in accordance with the relevant tariff.<sup>22</sup>

10. Public Citizen notes that three opinions from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) similarly require that the Commission engage in a review of the actual rates established by market mechanisms.<sup>23</sup> Public Citizen states that in *Lockyer*, the court held that a market-based rate tariff complied with the FPA “so long as it was coupled with enforceable post-approval reporting that would enable [the Commission] to determine whether the rates were ‘just and reasonable’ and whether market forces were truly determining price.”<sup>24</sup> Public Citizen argues that in *Montana Consumer Counsel*, the court stated that the Commission “may not determine in advance that the prevailing market rate is just and reasonable” but must analyze the rates actually charged.<sup>25</sup> Finally, Public Citizen notes that, in *Harris*, the court required the Commission to engage in “active ongoing review” of actual rates charged pursuant to a seller’s market-based rate authority to ensure that those rates are just and reasonable.<sup>26</sup> According to Public Citizen, *Harris* “resoundingly rejects the Commission’s contention that because it characterizes the tariff establishing [A]uction procedures as the ‘filed rate,’ it is not required by [s]ection 205<sup>27</sup> to review whether the actual rates resulting from the [A]uction are just and reasonable.”<sup>28</sup>

11. Public Citizen also argues that the Commission failed to consider whether the Tariff provisions governing the Auction remained just and reasonable at the time the Auction was held and “[t]hat omission is particularly striking given the Commission’s

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<sup>21</sup> *Id.* at 18-19 (citing 811 F.3d 1, at 11-13 (D.C. Cir. 2015) (*TransCanada*)).

<sup>22</sup> *Id.* at 19 (citing 839 F.3d 1165, at 1174 (D.C. Cir. 2016) (*Public Citizen*)).

<sup>23</sup> *Id.* (citing *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004) (*Lockyer*); *Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011) (*Montana Consumer Counsel*); *California ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015) (*Harris*)).

<sup>24</sup> *Id.* (quoting *Lockyer*, 383 F.3d at 1014).

<sup>25</sup> *Id.* at 18-19 (quoting *Montana Consumer Counsel*, 659 F.3d at 918).

<sup>26</sup> *Id.* at 20 (citing *Harris*, 784 F.3d at 1273-75).

<sup>27</sup> 16 U.S.C. § 824d.

<sup>28</sup> Rehearing Request at 20.

determination in December 2015 that the tariff’s provisions were no longer just and reasonable.”<sup>29</sup>

### III. Discussion

#### A. Allegations of Unlawful Market Manipulation Pursuant to FPA Section 222

12. Public Citizen’s 2015 complaint requested that the Commission:

[e]xercise its authority under FPA [s]ection 206 to institute an emergency investigation into whether the April 14, 2015 Planning Resource Auction was manipulated by illegal practices under FPA [s]ection 222 so that the rates resulting therefrom, especially as to MISO Zone 4, were unjust and unreasonable, or unduly discriminatory, and to set a refund effective date as of the effective date of the [c]omplaint.<sup>30</sup>

13. Public Citizen’s arguments with respect to market manipulation, both in its complaint and on rehearing, are unpersuasive for two reasons. First, the Commission has discretion on whether and how to explore the possibility that market manipulation has occurred.<sup>31</sup> FPA section 316A<sup>32</sup> authorizes the Commission to assess civil penalties for violations of section 222 – which is entitled, “Prohibition of Energy Market

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<sup>29</sup> *Id.* at 21.

<sup>30</sup> Public Citizen Complaint, Docket No. EL15-70-000, at 14 (filed May 28, 2015).

<sup>31</sup> *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision committed to an agency’s absolute discretion.”) (citing *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869)); *American Gas Ass’n v. FERC*, 912 F.2d 1496, 1505 (D.C. Cir. 1990) (“nonenforcement decisions are ordinarily unreviewable by virtue of . . . the Administrative Procedure Act”). As discussed in *Heckler*, the scope of the agency’s discretionary investigatory decision includes “not only assess[ing] whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.” *Heckler*, 470 U.S. at 831.

<sup>32</sup> 16 U.S.C. § 525o-1 (2018).

Manipulation” – through the procedures that are set forth in FPA section 31(d).<sup>33</sup> The Commission has established detailed procedures for conducting market manipulation investigations, as set forth in Part 1b of its regulations.<sup>34</sup> Here, as explained in the December 2015 Order, the Commission reasonably exercised its discretion by authorizing the Office of Enforcement to conduct a non-public formal investigation under Part 1b of the Commission’s regulations into whether market manipulation occurred before or during that auction.<sup>35</sup> Although Public Citizen may raise an allegation of market manipulation in the context of a complaint,<sup>36</sup> its choice to do so neither supersedes nor curtails the Commission’s discretion on how to explore that issue.

14. Second, Public Citizen both in its complaint and on rehearing fails to accurately articulate and address the definition of “market manipulation” in the FPA. Under the above-noted title of “Prohibition of Energy Market Manipulation,” FPA section 222(a) prohibits an entity from using “any manipulative or deceptive device or contrivance” in connection with the purchase or sale of electric energy or transmission service subject to the Commission’s jurisdiction.<sup>37</sup> Public Citizen has not met its burden as a complainant

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<sup>33</sup> 16 U.S.C. § 823b(d) (2018).

<sup>34</sup> 18 C.F.R. pt. 1b (2019).

<sup>35</sup> December 2015 Order, 153 FERC ¶ 61,385 at PP 4, 14 (citing 18 C.F.R. pt. 1b); *see Investigation into MISO Zone 4 Planning Resource Auction Market Participant Offers*, 153 FERC ¶ 61,005. Prior to these orders, the Office of Enforcement had initiated a non-public, preliminary investigation on this subject.

<sup>36</sup> The Commission has previously explained that “[a]lthough section 222(b) of the FPA does not provide a private right of action, a person alleging energy market manipulation is not foreclosed from bringing such an allegation before the Commission pursuant to section 306 of the FPA.” *Blumenthal v. ISO-New England, Inc.*, 128 FERC ¶ 61,182, at P 56, *on reh’g*, 129 FERC ¶ 61,057, at P 18 (2009). Public Citizen did not file its complaint under FPA section 306. However, even if Public Citizen had properly pled its market manipulation claim under section 306, that section provides that “it shall be the duty of the Commission to investigate the matters complained of in any such manner and any such means as it shall find proper.” 16 U.S.C. § 825e (2018). In addition, a complaint is not the only, or primary, means by which a stakeholder may raise for the Commission concerns about market manipulation. For example, section 1b.8 of the Commission’s regulations allows individuals and other listed entities to request that the Commission initiate such an investigation. 18 C.F.R. § 1b.8

<sup>37</sup> 16 U.S.C. § 824v. The July 2019 Order quoted section 1c.2 of the Commission’s regulations that implements FPA section 222, which, in sum, defines unlawful market manipulation as using or employing any device, scheme, or artifice to defraud; making any untrue statement of a material fact or to omit to state a material fact

to demonstrate that activity meeting that definition occurred and resulted in rates that are unjust and reasonable. Instead, on rehearing, Public Citizen seeks to shift its burden to the Commission, contending that the Commission has “dismissed” its market manipulation allegations and must provide further explanation of its decision to take no further action on the allegations of market manipulation.<sup>38</sup> We find that effort unavailing. Based on the reasonable application of the Commission’s discretion, as described above, and after the Office of Enforcement conducted a thorough investigation, the Commission determined in the July 2019 Order that “no further action is appropriate to address the allegations of market manipulation in the complaints.”<sup>39</sup>

15. We therefore reject Public Citizen’s arguments with respect to market manipulation. That conclusion, however, does not resolve the distinct question of whether an exercise of market power in the auction resulted in rates that are unjust and unreasonable. The Commission considered that distinct question in the July 2019 Order, and we also address it in further detail immediately below.

**B. Allegations that the Auction Results were Unjust and Unreasonable**

16. We affirm the Commission’s decision that the results of the 2015/16 Auction for Zone 4 were just and reasonable. The crux of Public Citizen’s specification of error on this point rests on a fundamental misunderstanding of the Commission’s market-based rate program. Public Citizen mistakenly believes that the Commission must engage in a review under section 205 of individual transactions, including auction offers, entered into pursuant to a seller’s market-based rate tariff.<sup>40</sup> The Ninth Circuit rejected this idea when

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necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity. July 2019 Order, 168 FERC ¶ 61,042 at P 22 (quoting 18 C.F.R. § 1c.2 (2019)).

<sup>38</sup> Rehearing Request at 1-3, 12-15.

<sup>39</sup> July 2019 Order, 168 FERC ¶ 61,042 at P 32. Moreover, to the extent that Public Citizen’s request for rehearing implies that an FPA section 206 investigation and remedial action are necessary to resolve its market manipulation claims, the Commission has stated previously that its analysis of market manipulation allegations is distinct from its analysis under FPA section 206. *See Blumenthal v. ISO-New England, Inc.*, 135 FERC ¶ 61,117, at PP 37-38 (2011) (just and reasonableness inquiry under FPA section 206 is not applicable to market manipulation).

<sup>40</sup> *See* Rehearing Request at 20-21. However, as discussed below, the Commission reviews market-based rate sellers’ electric quarterly reports to ensure that they have not gained market power.



it held, agreeing with the Commission, that a rate “change” occurs only once, when an authorized seller files a market-based rate tariff.<sup>41</sup> Specifically, the court recognized that “the ‘rate’ filed by authorized power wholesalers is the ‘market rate,’ and that rate does not ‘change’ even though the prices charged by the wholesalers may rise and fall with the market.”<sup>42</sup>

17. As the Commission explained in the July 2019 Order, market-based rate tariffs are lawful under the FPA so long as they are authorized under a regulatory framework that incorporates both an ex ante finding of the absence of market power and enforceable post-approval transaction reporting.<sup>43</sup> From an ex ante standpoint, the Commission will allow a seller to make wholesale power sales pursuant to a market-based rate tariff provided that the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.<sup>44</sup> For sellers, such as Dynegy, that operate in a regional transmission organization or independent system operator (RTO/ISO) with Commission-approved market monitoring and mitigation, the Commission has adopted a rebuttable presumption that the market monitoring and mitigation is sufficient to address market power concerns.<sup>45</sup> The presumption that MISO’s market monitoring and mitigation rules were sufficient to address market power concerns in MISO’s Auctions was not challenged until the filing of the instant Complaints, which occurred after the 2015/16 Auction had taken place. Accordingly, Dynegy’s bids into the 2015/16 Auction were permissible under its market-based rate tariff and did not constitute new or changed rates subject to Commission review under section 205 of the FPA.

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<sup>41</sup> *Montana Consumer Counsel*, 659 F.3d 910 at 921.

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

<sup>43</sup> July 2019 Order, 168 FERC ¶ 61,042 at P 89 (citing *Lockyer*, 383 F.3d at 1013).

<sup>44</sup> *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, at PP 62, 399, 408, 440, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh’g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh’g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh’g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff’d sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

<sup>45</sup> Order No. 697-A, 123 FERC ¶ 61,055 at P 111.

18. The case law cited in Public Citizen's request for rehearing<sup>46</sup> provides that the legality of a seller's market-based rate sales also depends on the Commission's ability to monitor rates through post-approval reporting requirements. In Dynegy's case, this monitoring includes the requirement to submit quarterly reports, triennial market power updates, and change in status updates, which the Commission reviews to ensure that Dynegy has not gained or exercised market power since its initial authorization. Unlike the sellers in *Lockyer*, who had submitted deficient electric quarterly reports,<sup>47</sup> Dynegy has followed the Commission's post-approval reporting requirements, and Public Citizen does not allege otherwise. Accordingly, the sales made pursuant to Dynegy's market-based rate tariff at the time of the 2015/16 Auction were appropriately made.

19. Public Citizen's argument that the July 2019 Order is inconsistent with *TransCanada Power Marketing* and *Public Citizen* is unpersuasive, as those cases are factually distinguishable.<sup>48</sup> *TransCanada* concerned ISO New England Inc.'s (ISO New England) Winter Reliability Program, and the bids associated are not analogous to the bids that Dynegy submitted in the 2015/16 Auction pursuant to its market-based rate tariff, which are subject to the regulatory framework described above.<sup>49</sup> The Commission's review of the forward-capacity auction results in ISO New England, at issue in *Public Citizen*, is an exception to the general policy that individual transactions under a seller's market-based rate authority are not subject to review under section 205. That exception stems from a settlement agreement that is only applicable to the facts of that case and similarly does not control our determination here.<sup>50</sup> In any event,

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<sup>46</sup> See *Farmers Union*, 734 F.3d at 1509; *Elizabethtown*, 10 F.3d at 870; *Interstate Natural Gas*, 285 F.3d at 31; *Lockyer* 383 F.3d 1006; *Harris*, 784 F.3d 1267.

<sup>47</sup> See *Lockyer*, 383 F.3d at 1014 (“[T]he reporting requirements were not followed in the period at issue.”).

<sup>48</sup> Rehearing Request at 18-19.

<sup>49</sup> See *TransCanada*, 811 F.3d at 5 (describing the Winter Reliability Program as a “time-limited, discrete, out-of-market solution, which, in future years, would yield to a market-based solution”); see also *supra* P 17 (describing the applicable regulatory framework).

<sup>50</sup> See *Devon Power LLC*, 117 FERC ¶ 61,133 (2006).

the court in *Public Citizen* made no finding as to whether a seller must obtain approval for individual transactions made pursuant to its market-based rate authority.<sup>51</sup>

20. We disagree with Public Citizen's assertion that the July 2019 Order "posits that once the Commission has approved a 'tariff' setting forth auction procedures, it has no power to look beyond compliance with those procedures to determine the lawfulness of the resulting rates, even on a going-forward basis under section 206."<sup>52</sup> The Commission has authority to review, pursuant to section 206, both individual sellers' market-based rate authority<sup>53</sup> and the market monitoring and mitigation rules governing transactions in RTO/ISO markets.

21. In the December 2015 Order, the Commission took action on the Complaints to direct prospective changes to the market monitoring and mitigation rules in MISO's Tariff. The changes to the MISO Tariff mitigate the ability that all capacity sellers, including Dynegy, might have to exercise market power in MISO's capacity auction. Accordingly, the Commission engaged in precisely the type of "active ongoing review" of a seller's market-based rate authority that the court required in *Lockyer* and *Harris*,<sup>54</sup> including through its oversight of the generally-applicable market monitoring and mitigation rules in MISO's Tariff.

22. But, contrary to Public Citizen's assertions, those prospective changes directed by the Commission in the December 2015 Order do not support a claim that the 2015/16 Auction results reflected the exercise of market power and produced unjust and unreasonable results.<sup>55</sup> In the December 2015 Order, the Commission found that certain Tariff provisions governing market mitigation measures for MISO's Auction were no longer just and reasonable due to changes to the PJM capacity market, including future

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<sup>51</sup> *Public Citizen*, 839 F.3d 1165 at 172 (finding that the Commission's deadlock does not constitute agency action, and the notices describing the effects of the deadlock are not reviewable orders under the FPA).

<sup>52</sup> Rehearing Request at 17.

<sup>53</sup> The Commission can exercise its authority under section 206 of the FPA to determine whether a seller's market-based rate authority remains just and reasonable. See Order No. 697, 119 FERC ¶ 61,295 at PP 953, 964 (discussing the requirement of ex post oversight and reconsideration of a seller's market-based rate authority under section 206 of the FPA).

<sup>54</sup> *Harris*, 784 F.3d at 1273-74 (quoting *Lockyer*, 383 F.3d at 1017).

<sup>55</sup> Rehearing Request at 10, 21.

changes to the capacity market construct.<sup>56</sup> The Commission explained that those changes in PJM would affect the opportunity costs for MISO resources participating in MISO capacity auctions “going forward.” Accordingly, the Commission directed changes to MISO’s Tariff to be effective prospectively. Further, the market mitigation measures in place for the 2015/16 Auction had been approved by the Commission as a just and reasonable approach to mitigating anticompetitive behavior in the MISO capacity market.<sup>57</sup> As the Commission found in the July 2019 Order, Dynegy’s offers were subject to Tariff provisions “designed to mitigate market power” and were permissible under the Tariff.<sup>58</sup>

23. In summary, we affirm that the results of the 2015/16 Auction were just and reasonable because Dynegy’s bids were authorized under a valid market-based rate tariff and because, as noted in the July 2019 Order, the bids complied with the terms of the MISO Tariff, which had been approved by the Commission and were in effect at the time of the 2015/16 Auction.<sup>59</sup>

The Commission orders:

Public Citizen’s request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>56</sup> December 2015 Order, 153 FERC ¶ 61,385 at PP 85-89.

<sup>57</sup> July 2019 Order, 168 FERC ¶ 61,042 at P 84 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,213) (2013).

<sup>58</sup> *Id.*

<sup>59</sup> *See Id.*

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(Issued March 19, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because the Commission continues to sidestep the key question posed in these proceedings: Whether the results of the Midcontinent Independent System Operator, Inc.'s (MISO) 2015/2016 capacity auction (2015 auction) were just and reasonable in light of the allegations of market manipulation by Public Citizen and others.<sup>1</sup> Rather than directly confronting that issue, the Commission states that the relevant tariff language was followed and that a non-public investigation was conducted and did not, in my colleagues' view, uncover manipulative conduct. That enforcement proceeding, however, was terminated by the Chairman without a vote by the Commission and the details of that investigation remain confidential. Accordingly, the Commission has at no point provided Public Citizen with an adequate response to the concerns raised in its complaint or explained why, in light of those concerns, the auction results were just and reasonable

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<sup>1</sup> The Illinois Attorney General and Southwestern Electric Cooperative, Inc. also filed complaints, although only Public Citizen sought rehearing of the Commission's July 19, 2019 Order. *See Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.*, 170 FERC ¶ 61,227, at P 1 (2020) (Rehearing Order); *Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.*, 168 FERC ¶ 61,042, at P 8 (2019) (July 2019 Order).

2. As an initial matter, the fact that MISO and the individual market participants appear to have followed the relevant tariff language does not insulate them against the argument that market manipulation rendered the resulting rates unjust and unreasonable. I am not aware of any authority to support the proposition that a market participant can commit market manipulation with impunity so long as it does not violate the relevant tariff language. To the contrary, in cases involving section 10(b) of the Securities Act of 1934<sup>2</sup>—the template for the prohibition on market manipulation in section 222 of the Federal Power Act (FPA)<sup>3</sup>— courts have repeatedly recognized that a facially legal action can constitute manipulation when it is taken for an improper purpose.<sup>4</sup> The courts have similarly admonished the Commission to “not take a cramped view of the types of deception that can give rise to fraud”<sup>5</sup> and that “the same conduct may or may not be deceptive depending on an actor’s purpose.”<sup>6</sup> And the Commission itself has recognized that conduct consistent with the relevant tariff can nevertheless be manipulative if motivated by an illicit or improper aim.<sup>7</sup>

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<sup>2</sup> 15 U.S.C. § 78j (2018).

<sup>3</sup> 16 U.S.C. § 824v; *see id.* § 824v(a) (prohibiting the use of a “manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of title 15)”).

<sup>4</sup> *See Koch v. SEC*, 793 F.3d 147, 152 (D.C. Cir. 2015) (finding that trades made for the purpose of “marking the close” constituted manipulation based in part on the individual’s “intent to deceive or manipulate the market”); *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 100 (2d Cir. 2007) (explaining that, under section 10(b) of the Securities Act, “deception arises from the fact that investors are misled to believe ‘that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators.’” (quoting *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999)); *Markowski v. SEC*, 274 F.3d 525, 529 (D.C. Cir. 2001); *see also FERC v. Coaltrain Energy, L.P.*, No. 2:16-CV-732, 2018 WL 7892222, at \*11 (S.D. Ohio Mar. 30, 2018) (“The Supreme Court has directed courts to ‘interpret Section 10(b) and Rule 10b-5 flexibly and broadly, rather than technically or restrictively.’” (quoting *VanCook v. SEC*, 653 F.3d 130, 138 (2011))).

<sup>5</sup> *FERC v. City Power Mktg., LLC*, 199 F. Supp. 3d 218, 234 (D.D.C. 2016) (citing *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971)).

<sup>6</sup> *Id.* at 235 (citing *Markowski*, 274 F.3d at 529).

<sup>7</sup> *See In Re Make-Whole Payments & Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 83 (2013) (“Market manipulation under the Commission’s Rule 1c is not limited to tariff violations.”); *id.* n.8 (collecting proceedings in which the Commission has taken that position). Multiple courts have agreed with that basic premise. *See, e.g.*,

3. I do not interpret the underlying order—or today’s order on rehearing—to indicate that the Commission has had a change of heart and now believes that simply following the relevant tariff creates a safe harbor for market manipulation. Such an about face would be an unreasoned departure from settled policy<sup>8</sup> and would seem to directly contravene the case law cited in the previous paragraph. That means, however, that the absence of a tariff violation cannot be a complete answer to an allegation that market manipulation rendered the 2015 auction results unjust and unreasonable.

4. Instead, the Commission must also conclude that the 2015 auction results were not the product of market manipulation. I see no basis for such a conclusion in today’s order. As in the underlying order, the Commission notes that a non-public investigation into alleged manipulation was commenced by the Commission and has since been closed.<sup>9</sup> Although the Commission directed that investigation,<sup>10</sup> the decision to terminate the enforcement process was made by the Chairman without consulting the other commissioners.<sup>11</sup> Had I been consulted, I would have argued against terminating the

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*Coaltrain Energy*, 2018 WL 7892222, at \*12 (holding that the Commission adequately pleaded a claim of manipulation were it alleged that traders “engaged in otherwise benign virtual trading for a deceptive purpose”); *City Power*, 199 F. Supp. 3d at 235-36 (similar); *FERC v. Silkman*, 177 F. Supp. 3d 683, 703-04 (D. Mass. 2016) (applying this principle).

<sup>8</sup> See, e.g., *ABM Onsite Servs.-W., Inc. v. Nat’l Labor Relations Bd.*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) (“[A]n agency’s unexplained departure from precedent is arbitrary and capricious.”); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) (“[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.”).

<sup>9</sup> Rehearing Order, 170 FERC ¶ 61,227 at P 4; July 2019 Order, 168 FERC ¶ 61,042 at P 12.

<sup>10</sup> *Investigation into MISO Zone 4 Planning Resource Auction Market Participant Offers*, 153 FERC ¶ 61,005 (2015) (Investigation Order). As that order recognized, the Commission had already begun investigating the results of the 2015 auction. See *id.* P 1.

<sup>11</sup> The exclusion of the other commissioners from the decision to terminate this type of investigation runs counter to the spirit of section 222 of the FPA, which gives the Commission as a whole the authority to prevent and penalize market manipulation. See 16 U.S.C. § 824v(a). It is profoundly unwise for the Chairman to unilaterally close an investigation directed by the Commission. See Investigation Order, 153 FERC ¶ 61,005 at P 1 (stating that the “Commission will determine what further action, if any, may be

enforcement process.<sup>12</sup> Because the details of the investigation remain non-public, I cannot explain why I believe that the Chairman erred in terminating the enforcement process. Suffice it to say that I am confident that the evidence uncovered in that investigation was more-than-sufficient to press ahead.

5. But even putting aside my disappointment with the fate that befell that investigation, today's order provides a wholly unsatisfactory response to the allegations of market manipulation raised in the complaints. Although the Commission can choose to publicly disclose aspects of a non-public investigation,<sup>13</sup> the Commission has refused to do so here, meaning that the evidence uncovered and staff's findings remain confidential.<sup>14</sup> As such, today's order does not provide even the scantest reasoning to support its finding that the nearly 1,000 percent year-over-year increase in the MISO Zone 4 capacity price had nothing to do with market manipulation.<sup>15</sup> Instead, all we have is the Commission's unsubstantiated assurance that there is nothing to see here.

6. The premature end to the enforcement process coupled with the conclusory assertion that there was no market manipulation leave important questions unanswered. Given those unanswered questions, I do not believe we can say with any confidence that the 2015 auction was not subject to market manipulation. Accordingly, because I cannot

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appropriate . . . after it considers the results of the staff investigation"). Doing so effectively ignores the views of the remaining commissioners who were also confirmed by the Senate to enforce the Commission's statutory requirements.

<sup>12</sup> In the underlying order, the majority responded to my concerns by reciting statistics about the investigation, including the number of document pages reviewed and the number of witnesses interviewed. July 2019 Order, 168 FERC ¶ 61,042 at P 31. Now, as then, I do not doubt that the Office of Enforcement was thorough in its work and rigorously reviewed the relevant conduct. Rather, my point is that the evidence uncovered as part of that review raised serious concerns about manipulation and provided a more-than-sufficient basis to continue the enforcement process.

<sup>13</sup> 18 C.F.R. § 1b.9 (2018).

<sup>14</sup> Under those circumstances, it is a little rich for the Commission to chide Public Citizen for failing to adduce adequate evidence to carry its burden under section 206 of the FPA, Rehearing Order, 170 FERC ¶ 61,227 at P 14, when the Commission has a complete enforcement dossier that it refuses to make public.

<sup>15</sup> July 2019 Order, 168 FERC ¶ 61,042 at P 5 (explaining that Zone 4 cleared at \$16.75/MW-day in the 2014 capacity auction and \$150/MW-day in the 2015 auction). That increase in price is particularly striking given the clearing price in every other MISO zone cleared below \$4/MW-day in the 2015 auction. *Id.*



make that judgment, I cannot join the Commission's conclusion that those auction results are just and reasonable.

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7. Guarding against market manipulation remains one of the Commission's most important obligations. Competitive wholesale electricity markets have yielded tremendous benefits for customers. But continuing to realize those benefits requires that market outcomes be the product of genuine competition, not market manipulation. I hope that identifying, eliminating, and punishing manipulative acts will remain one of our chief priorities, which is what Congress intended when it vested the Commission with that responsibility in the 2005 amendments to the FPA.<sup>16</sup> Today's order, however, does little to inspire confidence in that regard.

For these reasons, I respectfully dissent.

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Richard Glick  
Commissioner

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<sup>16</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, § 1283, 119 Stat. 979.