

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Ameren Corporation  
Dynergy Inc.  
Illinova Corporation  
Illinova Generating Company

Docket No. EC04-81-001

Dynergy Midwest Generation, Inc.  
Dynergy Power Marketing, Inc.

Docket No. ER04-673-001

Dynergy Power Marketing, Inc.

Docket No. ER04-711-001

ORDER DENYING REHEARING

(Issued April 18, 2005)

1. This order denies requests for rehearing of the Commission's July 29, 2004 Order in *Ameren Corporation, et al.*,<sup>1</sup> filed by the Missouri Office of the Public Counsel (MOPC) and the Missouri Industrial Energy Consumers (MIEC).<sup>2</sup> The Commission also declines to provide a clarification requested by MOPC in its rehearing request, because the clarification is not necessary. This order benefits customers by reaffirming the Commission's commitment to ensuring competitive regional transmission markets and ensuring that the transaction at issue here is consistent with the public interest.

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<sup>1</sup> 108 FERC ¶ 61,094 (2004) (July 29 Order).

<sup>2</sup> The MIEC is a consortium of industrial energy consumers comprising Anheuser-Busch, Boeing, DaimlerChrysler, General Motors, Ford, Hussman, J.W. Aluminum, Nestlé Purina, Precoat Metals, Proctor & Gamble, and Solutia.

## **I. Background**

2. The July 29 Order authorized a merger involving Ameren Corporation (Ameren), Dynegy, Inc. (Dynegy), Illinova Corporation (Illinova), and Illinois Generating Company (Illinois Generating) (collectively, the Applicants). The order also accepted for filing a number of power purchase agreements by Dynegy Midwest Generation (Dynegy Midwest) and Dynegy Power Marketing, Inc. (Dynegy Power).

3. Part of the transaction approved by the Commission involved a transfer of ownership participation in Electric Energy, Inc. (EEInc). EEInc owns and operates a six-unit coal-fired generating facility with a capacity of approximately 1,014 MW in Joppa, Missouri (Joppa Facility). Through a wholly-owned subsidiary, EEInc owns and operates two turbines of approximately 72 MW also located at the Joppa Facility. Prior to the consummation of the transaction, EEInc was jointly owned by four entities: Ameren Energy Resources (AER) (20 percent), Illinova Generating (20 percent), AmerenUE (40 percent), and LG&E Corporation's Kentucky Utilities (KU) (20 percent). The EEInc bylaws provide for the allocation of capacity and energy from EEInc's facilities in proportion to the owners' ownership shares.<sup>3</sup> In the transaction approved by the Commission, AER obtained Illinova Generating's 20 percent interest in EEInc. As a result, AER's ownership interest in EEInc increased from 60 percent (AER's 20 percent interest plus its affiliate AmerenUE's 40 percent interest) to 80 percent.

4. MOPC protested this aspect of the merger, asserting that Ameren would now be able to control the allocation of capacity and energy from the Joppa Facility. The bylaws may be changed by a 75 percent vote of the outstanding shares, and the acquisition gives Ameren control of 80 percent of the shares. MOPC argued that this would enable Ameren to "freeze out" AmerenUE from receiving its 40 percent share of low-cost coal-fired capacity from the Joppa Facility, to the detriment of Missouri ratepayers.<sup>4</sup> While the Applicants committed not to "freeze out" the remaining non-affiliated owner of EEInc from receiving its share of the capacity and energy from the Joppa Facility, they offered no corresponding commitment to AmerenUE. Thus, according to MOPC, there is nothing to prevent Ameren from discriminating against its own affiliate, AmerenUE, by not allowing it to have the capacity and energy that its ownership share warrants. MOPC alleges that, if AmerenUE does not receive the proper share of this low-cost coal-fired generation based on its ownership interest in EEInc, it will impose higher retail rates for

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<sup>3</sup> Joint 203 Application at 28.

<sup>4</sup> MOPC Protest at 5.

AmerenUE's retail customers. Thus, MOPC's protest urged the Commission to condition its approval of the transaction on a commitment by Ameren that it will preserve AmerenUE's 40 percent allocation of capacity and energy. MIEC's motion to intervene supported MOPC's protest, arguing "that Missouri ratepayers should be protected from any adverse impact on rates that may result from the proposed transaction."<sup>5</sup>

5. The July 29 Order approved the merger but did not adopt the condition advocated by MOPC and MIEC. Rather, the Commission instead found that the protesters' concerns were about matters "under the state's jurisdiction."<sup>6</sup>

## **II. The Requests for Rehearing**

6. Both the MOPC and the MIEC seek rehearing of the July 29 Order, alleging that the Commission did not address their argument that the merger will have a discriminatory impact and failed to protect retail ratepayers.<sup>7</sup> They again assert that, because Ameren will now control how 80 percent of the ownership shares of EEInc are voted, it will be able to divert for itself the benefits of capacity historically paid for by AmerenUE ratepayers. This will result in undue discrimination as between KU and AmerenUE. MOPC concludes that a disposition that results in such harm is not "consistent with the public interest" and therefore violates section 203<sup>8</sup> of the Federal Power Act (FPA).<sup>9</sup>

7. MOPC also seeks rehearing of the Commission's determination that the issue is a retail rate matter subject to state jurisdiction.<sup>10</sup> MOPC further asserts that the Commission erred in deferring to the Missouri Public Service Commission (Missouri Commission) to prevent increases in retail rates that might result if AmerenUE does not obtain the capacity and energy to which it is entitled from the Joppa Facility. MOPC charges that the Commission's deference to the Missouri Commission is a "shifting of

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<sup>5</sup> MIEC Motion to Intervene at 2.

<sup>6</sup> July 29 Order at P 68.

<sup>7</sup> MOPC at 3, 4; MIEC at 1, 2.

<sup>8</sup> MOPC at 2.

<sup>9</sup> 16 U.S.C. § 824b (2000).

<sup>10</sup> MOPC at 4–6.

federal statutory responsibility to a state commission, without assurance that the state would carry out that responsibility in a manner comparable to the Commission's obligations,"<sup>11</sup> and that this deference is not permitted by law. MOPC seeks clarification concerning the "non-preemptive nature of [the Commission's] approval" of the merger.<sup>12</sup>

### **III. Commission Determination**

8. The arguments on rehearing continue to be founded on the concern that Ameren, having acquired an additional 20 percent ownership interest in EEInc, will now divert capacity and energy away from its affiliate, AmerenUE, in favor of more lucrative wholesale transactions, while "protecting" KU from such diversion by virtue of Ameren's commitment to ensuring that KU continues to get its allocated 20 percent share of capacity and energy from the Joppa Facility. MOPC and MIEC allege that such diversion would be discriminatory, and that the Commission's July 29 Order did not address the discrimination that would be facilitated by Ameren's increase in ownership of EEInc.

9. MOPC and MIEC misunderstand the July 29 Order. As stated in that order, the Commission's analysis under the Merger Policy Statement<sup>13</sup> of whether a disposition of jurisdictional facilities is consistent with the public interest under section 203 of the FPA considers three factors: 1) the effect on competition; 2) the effect on rates; and, 3) the effect on regulation.<sup>14</sup> In the July 29 Order, the Commission applied these factors and determined that the merger was consistent with the public interest. The Commission would not have made this determination if it had accepted the allegations of

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<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997)(Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,984 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

<sup>14</sup> July 29 Order at P 18.

discriminatory impact hypothesized by MOPC and MIEC in their protests and reargued on rehearing. Moreover, the Commission's July 29 Order relied on Applicants' hold harmless commitment concerning wholesale rates and addressed their concerns about retail rate impacts by pointing out that the Missouri Commission was the forum to address these concerns. We note that, while the Missouri Commission intervened in the proceeding, it did not request that we address the effect of the transaction on retail rates.<sup>15</sup> MOPC and MIEC have failed to articulate how Missouri retail customers would be harmed if AmerenUE did not receive its allocated 40 percent share of the Joppa Facility's capacity and energy. Their arguments about the discriminatory impact of the change in ownership participation in EEInc are speculative and based on the unsupported premise that Ameren would discriminate against its own affiliate, AmerenUE, to the detriment of Missouri retail customers. Accordingly, the Commission denies the requests for rehearing.

10. With respect to MOPC's request for clarification concerning the preemptive effect of the July 29 Order on state ratemaking prerogatives, the Commission finds that such clarification is not necessary. MOPC theorizes that the Commission "appears to have assumed" that the Missouri Commission "could hold AmerenUE directly responsible for the cost-increasing effects of AmerenUE's" capacity and energy acquisition decisions at the Joppa Facility.<sup>16</sup> MOPC then suggests that the Commission should make this "premise" an explicit condition so that approval of the merger would be "deemed withdrawn upon a judicial finding that the Missouri Commission retail ratemaking authority is diminished by virtue of this transaction."<sup>17</sup> MOPC's request for clarification appears to be an attempt to undermine the Commission's clear articulation of the appropriate forum for MOPC's concerns: the Commission has no jurisdiction over AmerenUE's retail rates or the manner in which it procures capacity or energy to serve its native load, except to the extent wholesale competition could be harmed, which is not at issue here. Clearly, the July 29 Order did not preempt state authority over retail rates. No further clarification is required.

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<sup>15</sup> In the Merger Policy Statement at pages 30,127-28, we stated that, in cases where a state commission asks us to address the merger's effect on retail markets because it lacks adequate authority under state law, we would do so.

<sup>16</sup> MOPC at 7.

<sup>17</sup> *Id.*

The Commission orders:

(A) The requests for rehearing of MOPC and MIEC are denied as discussed in the body of this order.

(B) MOPC's request for clarification is denied as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.