

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

Midwest Independent Transmission System Operator, Inc.)))	Docket No. ER08-394-022
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COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION

The Electric Power Supply Association¹ (EPSA) hereby files comments² in the above captioned proceeding. On June 17, 2009, the Midwest Independent Transmission System Operator (MISO) submitted a compliance filing in response to the Federal Energy Regulatory Commission's ("Commission" or "FERC") April 16, 2009 Order concerning MISO's Module E.³

In the April 16 Order, the Commission gave MISO substantial discretion concerning how to comply with its directives regarding mitigation measures relating to Module E. The policy proposals in the June 17 compliance filing and the Commission's response to those proposals will greatly affect the general course of development of MISO's capacity procurement mechanism. Accordingly, the Commission should carefully consider the broad policy concerns discussed herein and by other commenters and direct MISO to reconfigure its proposals to consider their long term effects.

¹ EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving global power markets. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the view of any particular member with respect to any specific issue.

² On June 19, 2009, the Commission issued a Notice of MISO's June 17 Compliance filing. EPSA first intervened in Docket No. ER08-394 on January 28, 2008, and was provided intervener status in the Commission's March 26, 2008 Order (122 FERC ¶ 61,283).

³ *Midwest Independent Transmission System Operator, Inc.*, 127 FERC ¶ 61,054 (April 16, 2009).

EPSA has four specific concerns with MISO's compliance filing. First, EPSA is concerned with MISO's treatment of pricing for Module E. In its section on price volatility, MISO asserts, with little to no supporting evidence, that its bilateral market is sufficient to support long-term investment. Second, based on a reliance on a said strong bilateral market, MISO proposes a pricing policy based solely on supply-side mitigation measures and caps rather than structuring properly balanced price incentives to ensure long-term reliability and investment. Third, EPSA is concerned that the filing does not offer comparable treatment for participation by supply and load in the Voluntary Capacity Action (VCA). The filing implements stringent requirements for supply-side VCA participants while placing no requirements on load. Further, the filing seems to favor load-modifying resources by prematurely allowing them to participate in the VCA before they have qualified as universally deliverable resources. Finally, EPSA has concerns about the requested effective date laid out in the compliance filing. MISO has requested an effective date of May 1, 2009, which precedes MISO's compliance filing by more than a month. This is problematic because it presents retroactive ratemaking concerns.

I. COMMENTS

A. MISO FAILED TO ADDRESS THE COMMISSION'S DIRECTIVE REGARDING PRICING STABILITY AND RELIABILITY

MISO's Module E pricing policy needs further refinements to meet long-term resource adequacy goals. Further, the compliance filing's treatment of pricing fails to comply with the directives of the Commission's April 16 Order.

MISO has neither sufficiently explained price volatility nor balanced its proposed mitigation measures with proper price incentives in order to ensure long-term reliability. The Commission should direct MISO to more fully address long-term reliability questions and to lay out a formal timeline in which those questions will be resolved.

The compliance filing's section on price volatility does not satisfy the Commission April 16 Order. MISO was required to address two primary questions in its compliance filing: (1) will the market monitoring plan result in volatile prices for capacity; and (2) does MISO expect capacity prices to provide sufficient revenues for resources needed to maintain reliability to stay in the market, or will stabilization factors be necessary?⁴ EPSA agrees with MISO that "with regard to the first issue of price volatility, price stability is not a goal in a competitive market."⁵ However, in addressing how the market monitoring plan specifically could result in volatile prices for capacity, MISO does not address the market monitor's role at all but instead focuses on longer-term bilateral prices.

MISO explains:

As the system moves toward a capacity shortage, the frequency with which very high capacity prices occur will increase along with longer-term prices in the bilateral market. These longer-term bilaterals should support investment in new resources and achieve long-term equilibrium.⁶

This explanation in no way addresses the Commission's April 16 concerns and ignores the adverse long-term incentives in place with the existing Module E

⁴ Compliance Filing, Transmittal Letter, p.4.

⁵ Ibid.

⁶ Id., p. 5.

program. It is necessary to balance mitigation with proper price incentives, especially as MISO's capacity pricing mechanism is so new. As explained in detail below, the proposed mitigation has the potential to further suppress capacity prices. The Commission has already recognized that PJM, New York ISO and ISO New England have all modified their capacity mechanisms to incorporate "stabilization factors" that will ensure proper price signals to incent new investment.⁷ MISO can not deflect its responsibility for ensuring appropriate price signals for capacity by pointing to bilateral prices to ensure long-term investment and reliability. Indeed, ensuring long-term investment and reliability are the two main reasons the Commission directed MISO to formulate its Module E reliability construct in the beginning.⁸ Further, the long-term bilateral contracting value of capacity in the Midwest ISO is inherently determined by the price signals and obligations of the Module E requirements.

The Commission should find that MISO has not answered the questions laid out in the April 16 Order, especially those concerning how the VCA will ultimately lead to long-term investment and reliability. The Commission should order MISO to evaluate and address potential modifications to improve Module E's ability to attract and retain investment. To ensure that there is no undue delay in needed development, EPSA suggests that such an evaluation be required by November 30 to the Commission. This will allow ample time for MISO to digest and consider the current Module E and VCA construct and provide an

⁷ April 16 Order, P. 124.

⁸ *Order Conditionally Accepting Midwest Independent Transmission System Operator Tariff Sheets to Start Energy Markets and Establishing Settlement Judge Procedures*, 108 FERC ¶ 61,163 (August 6, 2004), P. 397.

opportunity for consideration of incremental improvements that may be possible going into the Summer of 2010 and lay the foundation for other more substantive improvements going forward.

B. THE MISO MITIGATION PROPOSAL IS UNBALANCED AND DOES NOT ADDRESS LOAD-SIDE BEHAVIOR

MISO's proposed mitigation policy governing participation in the VCA is solely based on the mitigation of supply-side resources, not a balanced consideration of the long-term price structure or signal. The unbalanced mitigation of suppliers will lead to depressed pricing and an eventual decrease in competitive supply and investment. MISO states "because the IMM will enforce physical and economic withholding of Capacity provisions, it is likely that more Capacity will participate in the VCA."⁹ This assertion is confusing and MISO does not include any basis underlying its conclusion. In fact, the mitigation provided for in the June 16 compliance filing will dampen competition and stifle true market prices. For example, with the current mitigation scheme, suppliers face mitigation that compels participation in the VCA, whereas load has the opportunity to bid as little or as much into the voluntary auction as it pleases. Further, the VCA provides for an extra week of bilateral procurement outside of the auction. This favors load by allowing the load side to suppress the VCA price by not participating fully, getting a lower VCA clearing price, then procuring their remaining needs bilateral. Thus, rather than having the higher price occur in the VCA, load can put price sensitive bids into the supply-mitigated VCA market.

⁹ Compliance Filing, Transmittal Letter, p.5.

What is the incentive for bidding the full value of load's capacity needs in a voluntary mechanism that provides for another week of bilateral procurement outside of the auction? What incentive is there to make investments required to maintain facilities if market rules require participation when prices are too low to allow recovery of the investment? In truth, load serving entities (LSEs), acting as a rational price discriminating monopsonist, have a strong incentive to lean on the VCA for inexpensive capacity and then have the flexibility for additional procurement outside of the auction. MISO's reasoning to support this one-sided participation obligation is unclear and disregards the Commission's directives to provide meaningful answers on the long-term feasibility of MISO's resource adequacy construct. In fact, a mitigation policy for the VCA that depresses prices below their long-run values will discourage long-term contracting and investment as LSE's lean on artificially mitigated capacity available in the VCA. No mitigation on load side behavior has been included to prevent such perverse outcomes. Should the proposed supply-side mitigation be accepted, EPSA recommends that the Commission direct the Midwest ISO to develop mitigation procedures to prevent monopsony abuse of the VCA, implement remedies to any load forecasting gaps that occur under the current Module E process, and establish penalties for under-forecasting of load by LSEs.

C. SUPPLY AND LOAD SHOULD BE TREATED COMPARABLY IN THE VOLUNTARY CAPACITY AUCTION (VCA)

MISO's VCA mechanism should be balanced and fair for all participants. MISO has revised section 63.3 of its tariff to offer mitigation measures to address physical and economic withholding, which may ultimately lead to mandatory

participation of supply but not load in the VCA. Additionally, MISO has modified its tariff to allow for demand response resources (DRRs) to participate in the VCA even though they do not yet qualify as a universally deliverable resource, ultimately creating an unduly discriminatory situation. The Commission should reject MISO's proposals to structure the VCA in a manner that unduly favors load, and direct MISO to revise its proposed VCA mitigation scheme to include load requirements. Further, the Commission should require MISO to produce a plan to either allow all non-universally deliverable generation to participate in the VCA or allow no such resources to participate.

Supply and load requirements are woefully unbalanced for the VCA. In the April 16 Order, the Commission directed MISO to revise the tariff to contain "sufficient detail for market participants to understand how the Market Monitor will monitor for withholding, when a market participant will be subject to mitigation, and what mitigation will be applied."¹⁰ In response to that directive, MISO has modified tariff section 63.3 to address mitigation measures for suppliers who engage in physical or economic withholding. Further, Tariff section 64.1.1 specifically establishes withholding thresholds that serve as brightline alerts to the market monitor that mitigation may be warranted.¹¹ Thus, a voluntary mechanism has become involuntary for suppliers, whereas this is not the case for load resources.

¹⁰ April 16 Order at P. 119.

¹¹ Section 64.1.1 of the proposed tariff indicates that withholding of a supplier of planning resources of more than the "Physical Withholding Threshold Quantity of resources under the supplier's ownership or control from the RAR voluntary capacity auction may warrant mitigation." (Compliance Filing Transmittal Letter, p. 7-8.)

EPSA does not oppose the tariff changes that place obligations on suppliers. However, those requirements should extend to both sides of auction participation – both the supply and load. When supply is obligated to participate based on specific thresholds, load should be under a similar obligation to participate. Otherwise, load may be able to game the VCA by walking away from VCA obligations without consequence when it is economically appealing to do so. If MISO’s tariff puts obligations on supply participation in the VCA, it must also put comparable obligations on load. The Commission’s April 16 Order directed MISO to include detail on mitigation for all market participants in the VCA, not just for supply. MISO has, therefore, only fulfilled half of the April 16 Order’s directive by omitting detail on load obligations in the VCA. The Commission should direct MISO to rectify the imbalance favoring load in its proposed VCA mitigation scheme.

MISO’s VCA proposals are further unduly discriminatory regarding MISO’s consideration of demand response resources. Though the Commission’s April 16 order directed MISO to propose a methodology to allow load modifying resources (LMRs)¹² to participate in the monthly auction,¹³ there are several reasons that the proposal to allow LMR participation in the VCA is unduly discriminatory, or at the very least, premature. First, LMRs are not universally deliverable resources. Only universally deliverable resources are currently allowed to participate in the VCA.¹⁴ Allowing LMRs to participate is unduly

¹² MISO has defined LMRs to include demand response resources and other behind-the-meter generation. Compliance Order Transmittal letter at p. 12.

¹³ April 16 Order at P. 153.

¹⁴ MISO Approved Tariff Section 69.3.5.c.

discriminatory to other non-universally deliverable resources. MISO has laid out a detailed timeline by which it will consider how to allow LMRs to fully participate in the VCA by 2010 and also proposes an interim mechanism to allow LMR participation immediately.¹⁵ MISO's timeline should instead consider how to include *all* non-universally deliverable generation in the VCA and not allow LMRs to participate through an interim mechanism until all comparable resources may participate on a comparable level.

Second, the sole reason MISO advances for allowing LMR participation in the VCA is that the market monitor has stated that no market power could result from LMR participation.¹⁶ However, MISO has not considered the discrimination created by the participation of these resources. The Commission should, at the very least, require MISO to address the discrimination question. It is Commission policy that demand response (which is defined here as an LMR) be treated comparably to other generation resources, not unduly preferentially. The Commission has advocated "comparable" treatment of demand response resources in Order No. 719, not preferential treatment.¹⁷ It continues to be important that the Commission not bias the market towards a particular outcome, but rather allow the market to determine the most cost-effective balance of both supply and demand, consistent with comparability and ensuring long-term

¹⁵ The interim mechanism includes deeming LMRs as universally deliverable if they meet certain criteria. Compliance Filing Transmittal Letter, p. 14.

¹⁶ Compliance Filing, Transmittal Letter, p. 3. Universally deliverable resources are defined as those resources that have interconnection service with MISO under Attachment X of the MISO tariff. External resources are also not universally deliverable and therefore cannot currently participate in the VCA.

¹⁷ Order No. 719, P 55 – The Commission demonstrates that it does not advocate preferential treatment for demand resources: "we do not find that this requirement will lead to any preferential treatment for demand response resources or supply-side resources. Both sets of resources would be treated and penalized comparably in instances of non-performance."

resource adequacy. Therefore, in this instance, the Commission should order MISO to not only consider how LMRs might participate in the VCA, but how all non-universally deliverable resources might participate.

D. THE REQUESTED EFFECTIVE DATE VIOLATES THE FILED RATE DOCTRINE AND COMMISSION POLICY AGAINST RETROACTIVE RATEMAKING

MISO has requested an effective date of May 1, 2009, for this compliance filing, explaining that “[t]he May 1 effective date is consistent with the commencement of the implementation of the Financial Settlement provisions in the Module E tariff.”¹⁸ This requested effective date is more than six weeks before the date of MISO’s compliance filing and will certainly affect capacity prices governed by MISO’s Module E. Any financial charges that accrued between May 1 and the time MISO’s new tariff language is approved should be governed by the tariff that was in effect at the time the charges were incurred.

The filed rate doctrine and the corollary prohibition against retroactive ratemaking likewise bar the effective date MISO seeks. While retroactive ratemaking is prohibited by the filed rate doctrine,¹⁹ MISO’s specific requested effective date would implement tariff changes retroactively and without prior notice, and therefore violates the prohibition on retroactive ratemaking under Section 205 of the FPA.²⁰ The Commission should reject MISO’s requested

¹⁸ Compliance Filing, Transmittal Letter, p. 15.

¹⁹ *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576 (1981) (The filed rate doctrine forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority).

²⁰ See, e.g., *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (“the filed rate doctrine is not limited to ‘rates’ per se”); *Northern Natural Gas Co. v. Kansas Corp. Comm’n*, 372 U.S. 84, 90-91 (1963) (noting that the doctrine applies to more than just “prices or volumes of purchases,” but also to the terms and conditions of tariffs). See also *Vermont Transco LLC*, 118 FERC 61,244 at P 50 (2007) (“The Commission views proposed changes to non-rate terms and

effective date and make the requested tariff changes effective when and if they are approved.

II. CONCLUSION

Wherefore, EPSA respectfully requests that the Commission order MISO to more fully vet and consider the relationship between mitigation and price formation in the VCA. Further, MISO should be directed to develop a plan by which all non-universally delivered resources can participate in the VCA, so as not to be unduly preferential toward LMRs. Finally, EPSA respectfully requests that the Commission deny MISO's requested effective date and make the requested tariff changes effective when and if they are approved.

Respectfully submitted,



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conditions of an existing contract as governed by the same rules applicable to proposed changes to rates in that contract.”).

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments by via email or postal mail upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., July 8, 2009.

A handwritten signature in black ink, appearing to read "Nancy Bagot", written over a horizontal line.

Nancy Bagot, VP Regulatory Affairs