

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

Midwest Independent Transmission System Operator, Inc.))))	Docket No. EL11-34-000
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**MOTION FOR LEAVE TO INTERVENE AND COMMENT
OF THE ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Rules 211, 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. §§385.211, 385.212 & 385.214 (2010), the Electric Power Supply Association (“EPSA”) respectfully files for leave to intervene and comment in support of the complaint in the above-captioned proceeding. On April 8, 2011, the Midwest Independent Transmission System Operator (“MISO”) filed a petition for declaratory order concerning its Joint Operating Agreement (“JOA”) with the Southwest Power Pool (“SPP”).¹

Specifically, MISO sought Commission guidance on the interpretation of JOA Section 5.2, which describes how MISO and SPP should share capacity on a common transmission path. According to MISO’s petition, SPP has publicly stated that Section 5.2 is not applicable if or when Entergy Arkansas joins an RTO.² However, MISO’s interpretation is that Section 5.2 is not contingent on the membership of either ISO/RTO. EPSA agrees with MISO’s interpretation and urges the Commission to do so as well. Expeditious Commission guidance in interpreting JOA Section 5.2 has become even more important since MISO filed

¹ *Petition for Declaratory Order, Request for Shortened Comment Period and Request for Expedited Treatment*, Docket No. EL11-34-000 (April 8, 2011). (“MISO Petition”)

² MISO Petition, p. 5.

its petition, as Entergy announced its intention to join MISO in a press release issued April 25, 2011.³

I. MOTION TO INTERVENE & COMMUNICATIONS

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving power markets. EPSA seeks to bring the benefits of competition to all power customers.⁴

EPSA members are interconnected with and/or are pursuing interconnection to the grid in MISO and SPP, and as such represent a significant portion of the supply capacity in those regions. Further, EPSA members also own assets in the Entergy footprint. Finally, EPSA has always been an advocate of reducing seams and, in fact, advocated for the technical conference that led to the establishment of JOAs between MISO, PJM and SPP.⁵ As a result, EPSA has a direct and substantial interest in the instant proceeding that cannot be adequately represented by any other party, and allowing EPSA to actively participate in this proceeding would be in the public interest. Accordingly, EPSA respectfully requests that the Commission grant this timely motion to intervene.

³ *Entergy Corporation Proposes Joining a Regional Transmission Organization* (April 25, 2011), available here: http://www.entergy.com/news_room/newsrelease.aspx?NR_ID=2114. (“Entergy April 25 Press Release”)

⁴ The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

⁵ See: *Joint Motion of ELCON, EPSA, et al. to Convene a Technical Conference on Interregional Coordination*, Docket No. RM99-2-000 (December 15, 2000).

All pleadings, correspondence and other communications concerning this proceeding should be directed to:

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II. COMMENTS IN SUPPORT OF MISO'S PETITION

EPSA would support Entergy's decision to join any ISO or RTO, as EPSA advocates the development and expansion of organized wholesale electricity markets. Indeed, Entergy's announced intentions to join MISO enumerated vast benefits that were specific to the decision to join MISO.⁶ MISO's petition correctly noted that many benefits are contingent upon the outcome of the instant proceeding. However, regardless of the benefits that the specific MISO/Entergy pairing may bring, MISO's legal interpretation of JOA Section 5.2 is still the correct one. In contrast, SPP's interpretation is not apparent in the plain language of Section 5.2, lacks Commission precedent and is contrary to the Commission's landmark Order No. 2000. FERC should clarify that MISO's interpretation of JOA Section 5.2 because is the correct legal interpretation of that language; the expeditious realization of the benefits Entergy consumers will derive from its decision to join MISO are simply an additional benefit.

⁶ *Summary of the Evaluation of Possible Regional Transmission Organization Membership by the Entergy Operating Companies*, Released as an Attachment to the Entergy April 25 Press Release (see fn. 3). Available at: http://entergy.com/global/rto/rto_summary.pdf.

A. DIFFERING INTERPRETATIONS OF JOA SECTION 5.2

The plain text of JOA Section 5.2 makes no mention of the membership makeup either MISO or SPP. Further it does not specify a difference between contracted paths to parties within either RTO and third party entities. Instead, it simply describes contract path capacity sharing “[i]f parties have contract paths to the same entity.”⁷ According to the MISO petition, MISO and SPP have different interpretations of the word “entity” as it relates to Section 5.2. In considering those differing interpretations, the Commission should keep in mind the intent of JOAs throughout the Eastern Interconnection and how best to design those JOAs so as to avoid unintended consequences.

The interpretation disagreement over JOA Section 5.2 comes down to whether the section will remain applicable after Entergy joins MISO. In the instant petition, MISO asserts that:

The transmission-sharing provisions of Section 5.2 would be applicable to the Entergy interconnection after Entergy becomes a Midwest ISO transmission owner and should be interpreted to allow the Midwest ISO to utilize the combined transmission capacity of the existing SPP interconnections with Entergy and the Midwest ISO.⁸

⁷ MISO/SPP JOA Section 5.2. The full text of the Section is as follows: **Section 5.2 Sharing Contract Path Capacity.** If Parties have contract paths to the same entity, the combined contract path capacity will be made available for use by both Parties. This will not create new contract paths for either Party that did not previously exist. SPP will not be able to deal directly with companies with which it does not physically or contractually interconnect and the Midwest ISO will not be able to deal directly with companies with which it does not physically or contractually interconnect. Full MISO/SPP JOA available here: http://www.spp.org/publications/2008-12-19_Midwest%20ISO_SPP%20JOA_2009-02-19.pdf . Section 5.2 found on p. 31.

⁸ See Exhibit E of MISO’s petition: *Memorandum from Stephen L. Teichler and Ilia Levintine to Wayne Schug and Gregory A Troxell regarding Sharing Contract Path Capacity under the MISO/SPP JOA* (October 13, 2010). Also reiterated in MISO Petition, p. 9.

SPP has disagreed with this interpretation, noting that it is “inconsistent with the plain meaning of the terms of the SPP JOA.”⁹ Instead, SPP argues that “the SPP JOA applies only to the current configuration of the Midwest ISO, not to the expanded system that would exist if Entergy were a part of either organization.”¹⁰ Thus, MISO argues that Section 5.2 should stand as it is regardless of its membership mix while SPP notes that Entergy is no longer its own “entity,” but instead as part of MISO, MISO cannot have “contract paths to itself.”¹¹

Several fundamental aspects should be considered in deciding which is the correct interpretation of Section 5.2. While Joint Operating Agreements certainly must respect financial contractual rights, they must also be designed in such a way that they acknowledge actual physical power flows. The design of such agreements needs to begin with the realization that the Eastern Interconnection is electrically one very large interconnected system, and power flows do not always follow contractual paths. RTOs/ISOs and Balancing Areas that border RTOs/ISOs need to share extensive information to ensure that transactions have the desired effect and that any unintended consequences are identified and resolved quickly. While EPSA supports MISO’s interpretation because it is legally valid based on the plain text of Section 5.2 and Commission precedent supports it, it simply makes sense to also interpret the JOA in the way that can most encourage efficient use of physical power flows throughout the Eastern Interconnection and encourage voluntary membership in ISOs/RTOs.

⁹ *Limitations on Midwest ISO use of the SPP Transmission Capacity to Integrate into the Midwest ISO System*, Memorandum from SPP to the ERSC (January 11, 2011), p. 1. Also attached to MISO Petition as “Exhibit F.”

¹⁰ *Ibid.*

¹¹ *Id.*, p. 3.

B. MISO'S INTERPRETATION IS CORRECT

MISO's interpretation of Section 5.2 of the JOA is correct, and reliance on the similar implementation of the MISO-PJM JOA is entirely appropriate here. As it should, MISO's interpretation complies with the Commission's RTO and open transmission access policy, including the obligation imposed on RTOs by Order No. 2000 to address parallel flows on an interregional basis. Thus, MISO's interpretation is not only rooted in precedent via the MISO-PJM JOA, but it is also consistent with landmark Commission policy created to govern ISOs/RTOs. On the contrary, SPP's interpretation creates artificial transactional barriers that would exacerbate seams issues, prevent greater pricing convergence, and potentially decrease reliability margins.

MISO's interpretation follows precedent with the MISO-PJM JOA. EPSA will not reiterate all of the reasons enumerated in the MISO petition here, though EPSA does endorse MISO's argument that "PJM and MISO have not limited the scope of [Section 6.5 – the analogous to MISO-SPP JOA Section 5.2] provision to third-party entities, but applied it to their own transmission-owning members."¹² EPSA would, however, like to emphasize the fact that Section 6.5 of the MISO-PJM JOA has withstood several membership changes in both of the contracting RTOs, including the addition of members that were previously third parties to both organizations. MISO has seen some of its members in the past year elect to switch to PJM membership. Though MISO has publicly noted

¹² MISO Petition, p. 17.

disappointment with those choices,¹³ it did not seek to block the RTO membership choices of those companies by reinterpreting the JOA in a way that would make it exponentially more difficult for its former members to make the switch. Further, both MISO and PJM have gained third-party members, including very large utilities like MidAmerican and AEP. Thus, “entity” as it has been used in the analogous section of the MISO-PJM JOA has meant both “third-party entity” and “transmission owning member.” In all of these cases, the JOA was not changed. Any necessary transmission path sharing simply happened according to the previously existing JOA. The point here is that the JOA is a tool to facilitate agreement over existing and future seams; it certainly should not be used instead as a means to block voluntary membership of an RTO. The MISO-PJM JOA is an example of that type of collaboration. The MISO-SPP JOA was predicated on the MISO-PJM JOA.¹⁴ Thus, one should follow the other’s example and intent and simply be utilized to manage any existing or future seams issues that may arise between the two markets, including shared transmission paths.

As a broader matter, MISO’s interpretation is consistent with FERC Order No. 2000. Pursuant to Order No. 2000’s overall goal to “promote efficiency in wholesale electricity markets and to ensure that electricity consumers pay the lowest possible price for reliable service,” addressing parallel path flow or (loop

¹³ For example, see: *Midwest ISO Media Statement on Duke Energy Ohio Announcement* (May 20, 2010), available here: https://www.midwestiso.org/Library/Repository/Communication%20Material/Stakeholder/Midwest%20ISO_DukeStatement_052010.pdf.

¹⁴ MISO Petition, p. 18.

flow) issues and interregional coordination were listed as two of the eight minimum functions of an RTO.¹⁵ To wit, Order No. 2000 states:

[W]e clarify that this rule does not prevent addressing parallel path flow issues on a larger-than-single-RTO basis. In fact, we require RTOs to develop and implement procedures for addressing parallel flow issues with other regions.¹⁶

MISO's interpretation is consistent with Order No. 2000. It seeks to address physical power flows in the simplest way possible, through the plain text of an already existing agreement. Further, it does not condition that agreement on membership mix. As far as interregional coordination goes, MISO states that when it became aware of the dispute, it sought to initiate a dispute resolution process pursuant to the JOA and SPP "declined to proceed expeditiously."¹⁷ Thus, MISO has petitioned the Commission for guidance on the matter. MISO has not only interpreted the JOA provision in a way that is consistent with Order No. 2000, but has acted to resolve the dispute in the proper way as well.

Finally, SPP's interpretation is incorrect for a number of reasons that are independent of MISO's interpretation. SPP's interpretation, on its own, seeks to create transactional barriers to complicate Entergy's choice to join MISO. In not allowing for the contract path capacity sharing language to proceed as written after Entergy becomes a MISO member, the SPP interpretation will exacerbate seams issues, prevent greater pricing convergence, and potentially decrease reliability margins. The Commission has had a longstanding policy of minimizing seams wherever possible. In fact, while the elimination of seams has been a

¹⁵ *Order No. 2000: Regional Transmission Organizations*, 89 FERC ¶ 61,285, Docket No. RM99-2-000 (December 20, 1999), p. 1.

¹⁶ *Id.*, p. 391.

¹⁷ MISO Petition, p. 10.

major issue since the inception of RTOs, the Commission has recently issued an order denying a MISO proposal to institute rate pancaking on the MISO-PJM seam.¹⁸ Eliminating seams issues concerning rate pancaking and transmission path congestion, in fact, is one of the most high priority initiatives being undertaken throughout the rest of the Eastern Interconnection. For example, in a discussion of the 2010 ISO/RTO Metrics Report presented by the CEOs of each ISO/RTO to the Commission, it was noted that simply working to eliminate seams between two neighboring ISOs would save consumers almost \$800 million.¹⁹ SPP's interpretation of Section 5.2 creates seams rather than eliminating them by alleging that SPP never agreed to share certain paths, or that the agreement to share those paths is contingent upon the RTO membership of the two parties to the JOA. Regardless of MISO's interpretation, SPP's take on Section 5.2 is patently wrong as it is inconsistent with the principles in Order No. 2000 and Commission policy since the issuance of Order 2000 that states a desire to eliminate seams wherever possible. Further, as the MISO Petition explains more fully, SPP seeks to insert "third-party" where the plain language simply says "entity," and so seeks to change the stated intent of the Section's language.²⁰

C. BENEFITS TO ENTERGY CONSUMERS

Though there would certainly be benefits had Entergy chosen to join SPP or any other RTO, the significant and specific benefits enumerated in Entergy's choice to join MISO will only be realized should the Commission endorse MISO's

¹⁸ *Order Conditionally Accepting Tariff Revisions*, 133 FERC ¶ 61,221, Docket No. ER10-1791-000 (December 16, 2010), P 440.

¹⁹ *January 20, 2011 Open FERC Meeting Transcript*, citing Chairman Wellinghoff in a discussion on initiative to eliminate seams between New York and New England, p. 54, lines 2-13.

²⁰ MISO Petition, p. 13.

interpretation of Section 5.2. In addition to the facts that MISO's interpretation is the correct legal interpretation and has significant precedent behind it, MISO is correct in stating that the significant benefits of Entergy joining MISO can only be brought to fruition "in the event MISO's interpretation of Section 5.2 prevails."²¹

It is important in this proceeding to remember that transmission owners are encouraged to join RTOs, and such decisions are entirely voluntary. Accordingly, a transmission owner may well choose one RTO over another for the products and services that it offers, particularly when one RTO does not yet offer certain products and services. These decisions have fallen on several sides in recent cases. For example, in 2004 Commonwealth Edison's transmission system joined PJM instead of MISO.²² Even though there was only a limited contractual interconnection for several months until AEP also joined PJM, MISO and PJM were able to make the integration work by implementing a robust Joint Operating Agreement. Staff and stakeholders from both MISO and PJM have continued to implement enhancements and changes to that Agreement to decrease the effects of artificial financial seams and improve the viability of cross-border transactions, which should serve to bring better convergence between the two systems. Such efforts also inherently improve overall system reliability in the Eastern Interconnection. Again, JOAs should be used as tools to facilitate a voluntary transmission owner's choice to join an RTO, not as a method to block those choices.

²¹ MISO Petition, p. 5.

²²See: *Joint filing of New PJM Companies and PJM Interconnection LLC to expand PJM re Commonwealth Edison Co et. al.*, Docket No. ER03-262-000 (December 12, 2002).

Entergy has chosen MISO for many of the unique characteristics of that market. In particular, Entergy has noted in a press release that “[o]ne of the advantages of joining MISO is becoming a part of its already established “Day 2” market, or a centralized market-driven dispatch process.”²³ The Commission has always respected the voluntary nature of RTO membership and allowed each transmission owner to choose an RTO based on the potential products, services, and market structures that would most benefit that company.²⁴ Now, for the first time, an interpretation of JOA capacity path sharing language may stand in the way of a transmission owner’s voluntary RTO membership choice.

The Commission should agree with MISO’s interpretation of JOA Section 5.2. It follows the precedent derived from the MISO-PJM JOA. To agree with SPP’s interpretation would create a dangerous new precedent – it would allow ISOs/RTOs to modify JOAs any time a disagreement arises concerning the membership choice of a transmission owner. MISO has never invoked this tactic when transmission owners chose to join PJM instead of MISO. In this instance, the Commission should not assist SPP in blocking Entergy’s choice to join MISO.

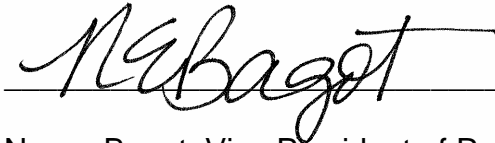
²³ Entergy April 25 Press Release, p. 1.

²⁴ See: *Order Addressing Duke Energy Realignment Request*, 133 FERC ¶ 61,058 (October 21, 2010); *Order Addressing FirstEnergy Realignment Request*, 129 FERC ¶ 61,249 (December 17, 2009); *Order Addressing conditional RTO Withdrawal Request of Duquesne Light Company*, 122 FERC ¶ 61,039 (January 17, 2008).

III. CONCLUSION

Wherefore, EPSA respectfully requests that the Commission grant its motion for leave to intervene in this proceeding and consider the comments herein. EPSA implores the Commission to agree with MISO's interpretation of JOA Section 5.2, as it follows prior JOA precedent, is consistent with Order No. 2000, is the simplest way to eliminate future seams between the two RTOs and is inherent in the plain language in the Section. As the legal basis for MISO's interpretation to prevail over SPP's is present, SPP should not be allowed to use the JOA as a means to block Entergy's voluntary membership in MISO.

Respectfully submitted,

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May 9, 2011

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., May 9, 2011.

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

Nancy Bagot, VP Regulatory Affairs