UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc. **Docket No. ER22-496-000**

MOTION TO INTERVENE AND PROTEST OF THE RETAIL ENERGY SUPPLY ASSOCIATION

Pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission's ("Commission's") Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214, the Retail Energy Supply Association ("RESA")[1] hereby files this Motion to Intervene and Protest in the above-referenced proceeding, in which Midcontinent Independent System Operator, Inc. ("MISO") proposes to revise Module E-1 of its Open Access Transmission Tariff ("Tariff") to include a Minimum Capacity Obligation ("MCO") on Market Participants participating in MISO's Planning Resource Auction ("PRA"). MISO's MCO proposal is unjust and unreasonable and would have adverse effects on the MISO market. It must be rejected. In support of this Motion to Intervene and Protest, RESA submits as follows:

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

I.
MOTION TO INTERVENE

A. Correspondence and Communications

Correspondence and communications regarding this matter should be addressed to the following person(s), and the same should also be designated for service on the Commission's official list for this proceeding:

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B. RESA

RESA is a non-profit trade association of independent corporations that are involved in the competitive supply of electricity. RESA and its members are actively involved in retail electricity markets throughout the United States, including retail markets in each of the Commission-approved RTO/ISOs. Many of RESA's members are active in MISO markets.

C. Motion to Intervene

On November 30, 2021, in Docket No. ER22-496, MISO proposed revisions to Module E-1 to impose a MCO on load serving entities ("LSEs") participating in the PRA in order to meet Resource Adequacy Requirements ("RAR"). MISO requests that the Commission issue an order in the proceeding by September 1, 2022 so that they can be in place for the 2023/2024 Planning Year.

II.
PROTEST

MISO's proposed changes to Module E-1 fail to address MISO's stated concern: that changes to the generation mix in MISO, which, as the result of certain fossil generation retirements and the development of renewable energy, may cause a shortage of resources participating in the PRA. According to MISO, procurement of capacity using the PRA with the shifting generation mix "introduces higher than acceptable risk that an LSE, and potentially all or a portion of the MISO Region, will have insufficient capacity if there is a sharp drop in capacity offered into the PRA."[2] Is MISO's solution one that would create a more robust and competitive capacity market? No. To the contrary, MISO seeks to implement capacity obligations outside the PRA, reducing transparency, undermining flexibility that is a cornerstone of MISO's resource adequacy construct, shifting risk to LSEs and permitting the exercise of market power in the capacity procurement process.

Specifically, MISO proposes that LSEs procure, either through ownership or bilateral contracts, sufficient Zonal Resource Credits ("ZRCs") to meet 50% of their total Planning Reserve Margin Requirement ("PRMR") prior to the Planning Resource Auction.[3] An LSE that fails to procure sufficient ZRCs via bi-lateral contracts or through generation ownership will pay a penalty (the "MCO Non-Compliance Charge") set at 1.5 times that daily Cost of New Entry ("CONE").

MISO proposes to implement these changes initially on a region-wide basis for the 2023/2024 Planning Year. For the 2025/2026 Planning Year, these changes will apply on a sub-regional level. While acknowledging that there are market power concerns when the program is

[2] MISO Docket No. ER22-426 Filing Letter at 4.

[3] MISO proposes to subject this requirement to a 50 MW *de minimis* exemption, allegedly to reduce the burdens on smaller LSEs.

applied on a sub-regional basis, MISO punts a solution to the future, including language in the Tariff that requires coordination and consultation with the Independent Market Monitor ("IMM") and a subsequent filing with the Commission.[4] In short, rather than even attempting to develop a workably competitive capacity construct, MISO has taken a short cut so drastic that the proposal will immediately harm competition and impair transparency and flexibility and, in the future will unlikely be able to overcome acknowledged market power issues in sub-regional areas. MISO's apparent hesitancy to propose market power mitigation measures may simply reflect the fact that MISO could not fashion any adequate measures, because the fundamental construct of the MCO is, at its core, anti-competitive, and no market power mitigation measures will change that.

MISO's supporting testimony is, at best, a tepid endorsement of the program. Scott Harvey, for example, focuses not on the robustness of the program, but on the "speed with which it can be implemented."[5] Mr. Harvey goes on to state, "[t]here may be other approaches that could encourage appropriate long-term capacity planning, but they would require a much larger commitment of MISO and stakeholder resources over a much longer timeframe than in implementing the MCO."[6] Mr. Harvey also points out deficiencies/risks with the pivotal supplier test supported by another witness.[7] MISO's filing is unjust and unreasonable and must be rejected.

A. **The MCO Proposal Will Reduce, Not Enhance Competition**

Under the current resource adequacy construct, LSEs may procure their capacity obligation through a number of mechanisms, including in the PRA. LSEs have the flexibility to procure capacity through contract (or ownership), by paying a deficiency charge, or through some

[4] *See*, proposed Tariff section 69A7.1A(e)(i).

[5] Harvey Testimony at 2, l.15.

[6] *Id.* at ll.16-18, *see also*, at 28, ll 16-22 to 29 l.4.

[7] *Id*. at 15, l. 22 to 16, l. 7.

combination of the PRA and these other mechanisms. The choice lies with the LSE to make a business decision in how best to meet its capacity obligation, based on its own assessment of the costs and risks of each option. Generators participating in the PRA compete to supply LSEs' capacity obligation, with transparent, market-based prices, and with MISO serving as the clearinghouse and the enforcer to ensure that generators and LSEs meet their respective obligations. MISO now proposes to remove an LSE's choice, requiring LSEs to procure 50% of their capacity obligations from bilateral contracts (or from generation owned by the LSE). The purported reason for this proposal is to encourage LSEs to procure capacity in advance of the PRA, in case there is insufficient capacity bidding into to the relevant auction.[8] The solution is simply anti-competitive and unjust and unreasonable.

First, by requiring LSEs to enter into bilateral contracts (or the use of owned generation) to meet 50% of the MCO, MISO is eliminating a considerable portion of the LSE's flexibility in determining how to satisfy their capacity obligations. That flexibility has been a core tenant of the MISO resource adequacy construct, and MISO has not explained why it is just, reasonable and not unduly discriminatory to eviscerate that flexibility.

Second, requiring LSEs to enter into bilateral contracts (or the use of owned generation) to meet 50% of the MCO also eliminates capacity from the transparent, competitive market. Generators may not bid that capacity into the PRA; LSEs will have to negotiate capacity purchases with generators (or counterparties representing generators) at prices that will be unknown to the market.

Third, what sort of bilateral contract or similar arrangement will satisfy the obligation? Is MISO going to become a reviewer of LSE contracts and make determinations as to whether a

[8] MISO Filing Letter at 4.

contract is sufficient to meet its LSE MCO? Mr. Harvey aptly notes in his affidavit that, "…[e]ven if bilateral capacity transaction prices were reported or disclosed, the effective cost of capacity procured in bilateral transactions would be difficult to assess. Bilateral contracts can have variable terms relating to credit requirements, multi-year contract duration, future year options, associated energy market hedges and potentially other contract terms."[9] Mr. Harvey notes that requiring specific terms in a bilateral contract, "…would be undesirable and could inhibit low cost forward hedging in both energy and capacity."[10] While Mr. Harvey inappropriately relies on past PRA market performance (that MISO asserts needs to change) to justify this significant reduction in market flexibility and transparency, that past reliance bears no resemblance to a market that results from what MISO proposes. The plain effects of MISO's proposal cannot be ignored.

Fourth, how will MISO ensure that generators do not game the system? MISO's MCO proposal may create an incentive and ability (i.e., given that LSEs are forced to enter into contracts negotiated on a non-transparent basis) for generators to negotiate higher prices bilaterally with LSEs rather than participate in the PRA. Alternatively, a generator with multiple affiliates will be able to optimize their generation value based not on competitive prices, but on what the generator can receive outside of the market. Not only does the MISO capacity market lose transparency, the MCO could exacerbate market power concerns by permitting generators to withhold capacity to raise prices. MISO's capacity prices are just and reasonable only "where neither buyer nor seller has significant market power."[11] As noted by the U.S. Supreme Court, ". . . the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."[12]

[9] Harvey Affidavit at 10, ll. 16-21.

[10] *Id*. at fn 9.

[11] *Tejas Power Corp. v FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

[12] *FPC v. Hope Natural Gas*, 320 U.S. 591, 603 (1944).

Mr. Harvey, in his Affidavit highlights the limitations to the pivotal supplier test performed by the Brattle Group on these very topics. Mr. Harvey states,

> **Q. Are there potential limitations of these pivotal supplier calculations?**
> **A.** Yes. It is possible that some supply counted as available for sale in the pivotal supplier test calculations might not actually be available for sale if it has been sold to MISO LSEs under bilateral contracts not visible to MISO such as capacity sales structured as contracts for differences. Conversely, it is also possible that some of the LSEs identified as being required to purchase capacity under the MCO already purchase capacity to cover part or all of their planning reserve margin requirement under capacity contracts that are structured so they are not visible to MISO, such as a contract for differences that settled against the PRA price. Any such LSEs would only need to make these contracts visible to the MISO like other ZRC transactions to comply with the MCO.[13]

In fact, Mr. Harvey's testimony explains away each of the identified flaws that he identifies, by making counter assumptions. On this basis alone, the proposal is unjust and unreasonable and must be rejected.

B. MISO's MCO Proposal Inappropriately Shifts Performance Risks to LSEs and Raises Market Power Concerns

MISO's MCO proposal inappropriately shifts reliability obligations from MISO to LSEs. Requiring LSEs to enter into bilateral contracts to meet their PRMR removes MISO from its obligation to ensure that generation and load meet their obligations. For example, what happens if a generator does not perform its contractual obligation to an LSE and, as a result, does not meet a capacity obligation when called? MISO essentially cannot rely on contracted capacity to perform and would have no ability to penalize the generator for its failure to perform. It would be left to the LSE to enforce the terms and conditions of its contract – after the fact. There is no mechanism for MISO to ensure that there is no market power. The result of this flawed construct is that end use customers will bear the cost – through reduced reliability, flexibility and

[13] Harvey Affidavit at 15, l. 21 to 16, l.7.

transparency and increased capacity costs – when they are not the ones charged with administering a reliable wholesale market. MISO is simply abrogating its planning responsibilities for the sake of an alleged "quick fix" to a problem that requires MISO and Market Participants to thoughtfully and rationally address through comprehensive changes to the markets (that consider all issues including market power concerns, energy markets mechanisms, etc.) in response to a shifting generation mix.

The MCO proposal will create market power issues. Mr. Harvey's affidavit notes that "[t]here is a reasonable concern with the potential for the short-term exercise of market power in some Local Resource Zones."[14] Mr. Harvey's Affidavit provides that, "[a] concern might be expressed that there will be a greater potential for the exercise of market power at the Planning Area level at some point in the future if the MISO capacity margin tightens."[15] His response to his identified concern is that MISO members project a lot of additional capacity over the next decade so that LSEs have plenty of time to meet their future requirements.[16] This rationale flies in the face of MISO's articulated reasons for the entire proposal – that generation may not be available in the PRA in the future. These are just two examples of many in a strained and irrational support of the MCO changes.

C. MISO's MCO Obligation Harms Retail Suppliers and Wholesale Markets

MISO's MCO proposal would cause disruption in wholesale markets that would harm retail suppliers and their end use customers. Retail suppliers offer their customers competitive services in areas that permit competitive retail service. An end use customer may receive benefits not only during the term of the contract with its retail supplier, but receive benefits

[14] Harvey Affidavit at 18, ll. 12-1

[15] *Id.* at ll. 12-14.

[16] *Id*.

when, nearing the end of a term, it can evaluate other services and offerings from its existing supplier or a competitor. An obligation to obtain and maintain a long-term bilateral contract with a generator for capacity will cause two concrete problems for retail suppliers. For example, the retail supplier will have a MCO based on the load that it serves at a fixed moment in time and will have to have a bilateral contract for 50% of the MCO. Any increases or decreases in its load obligations during a Planning Year will not be reflected in its contractual obligation. There is no way for a bilateral contract to follow the load. LSEs would either have too much or too little under bilateral contracts, or, possibly be forced to hold duplicative capacity. In light of the multiple LSEs in the MISO market that are affected, a failure to address this issue makes the MCO unjust and unreasonable.

D. MISO's Proposal to Postpone Addressing the Transition to Sub-zonal Requirements is Unjust and Unreasonable

MISO proposes to initially apply the MCO on a region-wide basis for the 2023/2024 Planning Year. Then, MISO proposes to apply the MCO starting with the 2025/2026 Planning Year on a sub-regional basis. MISO, in its filing letter and the draft Tariff language, notes that, due to market power concerns MISO will work with the IMM to perform additional studies and make a subsequent filing that may contain market power mitigation measures.[17] As Mr. Harvey's Affidavit notes (as described above), there are already market power issues with the proposal as it is applied regionally. A two-year transition period is not going to solve market-power issues that have been pernicious in MISO for many years. *See, e.g., Public Citizen, Inc. v FERC*, 7 F.4th 1177 (D.C. Cir. 2021). MISO has sought to minimize market power issues to its detriment in the past, and it is time for MISO to work with its stakeholders to develop a program

[17] *See* MISO Filing Letter at 9.

that is workably competitive and ensures reliability, which must be part and parcel of the tariff at the outset. MISO's proposal will create needless market uncertainty.

In sum, MISO's filing must be rejected in its entirety. The Commission should direct MISO to work with its stakeholders to tackle capacity issues thoughtfully and comprehensively. This proposal does neither.

WHEREFORE, RESA respectfully requests that its Motion to Intervene be granted and its Protest considered by the Commission in rejecting MISO's filing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on each person listed on the Official Service list compiled by the Secretary in this proceeding.

Dated in Washington, DC this 14th day of January 2022.

Elizabeth W. Whittle
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