

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

Midcontinent Independent System Operator, Inc.))))	Docket No. ER18-462-000
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**MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE NRG
COMPANIES, DYNEGY COMPANIES AND THE ELECTRIC POWER SUPPLY
ASSOCIATION**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),¹ the NRG Companies (“NRG”),² Dynegy Companies (“Dynegy”),³ and Electric Power Supply Association⁴ (“EPSA” and collectively, the “Suppliers”) respectfully move for leave to answer⁵ and answer the *Motion for Leave to Answer and Answer of the Midcontinent Independent System Operator, Inc.* (“MISO”) and the *Motion for Leave to Answer and Answer of the Organization of MISO States* (“OMS”), both submitted in the above-captioned proceeding on January 29, 2018 (“Answers”). The Suppliers respond to MISO’s

¹ 18 C.F.R. §§ 385.212, 385.213.

² For purposes of this filing, the NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC.

³ For purposes of this filing, the Dynegy Companies are Dynegy Marketing and Trade, LLC and Illinois Power Marketing Company.

⁴ This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

⁵ Although the Commission’s procedural rules do not allow for answers to answers or protests as a matter of right, the Commission regularly accepts otherwise impermissible answers where, as here, such answers will assist the Commission’s understanding of the record and its decision-making. *See, e.g., California Indep. Sys. Operator Corp.*, 153 FERC ¶ 61,155 at P 9 (2015); *Entergy Gulf States Louisiana, L.L.C.*, 153 FERC ¶ 61,153 at P 26 (2015); *Arizona Pub. Serv. Co.*, 153 FERC ¶ 61,157 at P 26 (2015).

mischaracterization of the NRG and Dynege Protest and the EPSA Protest made in this docket and offer further information.

I. ANSWER

A. The NRG Decision Does not Dictate That the Commission Merely Rubberstamp MISO's Proposal.

OMS urges the Commission to, in accordance with *NRG Power Marketing, LLC v. FERC*,⁶ approve MISO's filing of its currently effective capacity construct without modification.⁷ Such action is not consistent with *NRG PML*. As noted in the NRG/Dynege Protest, MISO's capacity construct was pending appeal when the *NRG PML* decision caused the Commission to seek and receive a voluntary remand of the case. The current MISO capacity construct resulted from a Commission order that erroneously accepted some proposed capacity market features of MISO's 2012 filing and rejected others. Because the order in which the Commission made these findings has now been voluntarily remanded, it would be legal error to simply rely on its findings. Instead, the Commission must now render an independent finding as to whether MISO's instant proposal, taken in its entirety is just and reasonable. Since MISO has not even attempted to meet this burden, the Commission should reject the filing.

B. Contrary to the Assertions of MISO and OMS, "Regional Differences" do not Justify an Unjust and Unreasonable Capacity Construct.

Both the MISO and OMS Answers suggest that prior Commission orders recognizing "regional differences" in MISO are sufficient to support the existing capacity construct. MISO summarizes by suggesting that the "MISO footprint is distinct from other regions as it is predominately composed of traditional vertically integrated utilities

⁶ *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) ("*NRG PML*").

⁷ OMS Answer at 8.

and [] state regulators generally have authority over long-term planning and resource adequacy.”⁸ Throughout its Answer, OMS uses “Eastern-RTO style capacity market” like it is a dirty word. MISO and OMS suggest that the Suppliers argue that the MISO capacity construct is not just and reasonable merely because it is not the same as that of the Eastern ISOs, which is simply inaccurate.

First, the Suppliers are not arguing that all capacity markets must be identical, but the protests explained that four fundamental features necessary for a well-functioning capacity market are missing from MISO’s capacity construct. MISO did not even address these four fundamental elements in its initial filing, let alone prove the filed construct was just and reasonable. For all the reasons discussed in those protests, failure to include those four fundamental elements has resulted in a MISO capacity construct that has produced unjust and unreasonable rates for the last five years. As the Independent Market Monitor for MISO concluded in its Protest filed in this docket, “the MISO capacity market governed by Module E has failed, since its inception, to perform efficient and competitively because its design is fundamentally flawed. . . . No objective analysis of the MISO capacity market could demonstrate that the outcomes under the current Module E are just and reasonable by any appropriate standard.”⁹

Second, while MISO and OMS attempt to justify the lack of the four elements with assertions of “regional differences,” the “regional differences” argument fails now, just as it did at the time of the 2012 Order. While “regional differences” and the make-up of market participants in those regions may allow different areas of the country to adopt

⁸ MISO Answer at 4.

⁹ Motion to Intervene Out of Time and Protest of the MISO Independent Market Monitor, Docket No. ER18-462-000 (filed Feb. 7, 2018).

different mechanisms for achieving just and reasonable rates, the requirement to ensure just and reasonable rates applies in all FERC-jurisdictional markets. The Federal Power Act does not limit the requirement that rates be just and reasonable in any way that can be read to exclude independent power producers located in MISO. The fact that utilities own the vast majority of capacity within MISO does not justify unjust and unreasonable rates for the rest of MISO. Further, the Commission has adopted various core elements discussed in the Suppliers' protests while recognizing that the eastern markets include utility owned generation. For example, the Commission has approved buyer-side market power mitigation for the PJM Interconnection market, which includes a number of states that have not restructured their retail markets.¹⁰

Third, the MISO Answer misinterprets the arguments made by the Suppliers. Contrary to the MISO Answer's suggestions that the parties merely claimed there is a better solution to the MISO capacity structure, the parties illustrated that MISO's capacity construct as a whole is unjust and unreasonable. The Suppliers arguments are not that the MISO capacity construct is not just and reasonable because it is not the same as the capacity constructs in the eastern markets, but that the MISO capacity construct in its entirety is not just and reasonable. While the Suppliers pointed to elements of the MISO capacity construct to further demonstrate the unjust and unreasonableness of the construct, the protests also showed that history has illustrated the problems of the construct. The NRG/Dynegy Protest showed that over the past five years, MISO's capacity auctions have cleared at prices close to zero time and time again and in a few

¹⁰ See *NRG Energy, Inc.*, 141 FERC ¶ 61,207 at P 65 n.115 (2012) (“[W]hile some states within PJM have implemented retail choice, Indiana, Kentucky, North Carolina, Tennessee, Virginia, and West Virginia have not.”).

instances they have toggled from low to high, that MISO market participants are moving capacity to PJM, and that MISO itself has made public filings detailing the failures of MISO's capacity market.¹¹ The NRG/Dynegy Protest also pointed out MISO's own Forward Resource Auction ("FRA") filing as evidence that MISO itself has recognized the failures of its capacity construct.¹² MISO suggests that NRG/Dynegy's references to the FRA Filing are a collateral attack on the Commission's Order in that docket, however, the NRG/Dynegy Protest pointed to that filing to support the need for capacity reform.¹³

Fourth, OMS explicitly argues that the Suppliers "have been advocating, as they have in their comments and protests in this docket, that MISO adopt an Eastern-RTO style capacity market to provide higher capacity prices and therefore a greater opportunity for generators to obtain revenue."¹⁴ OMS ignores the detrimental consequences of MISO's lack of a real capacity market to consumers. While the current failed capacity market is devastating for independent generators—those that are not part of a vertically integrated public utility and therefore must sell their electric capacity on the open market—it will, over the long term, also harm consumers. While the lack of each of the four elements focused on in the Suppliers' protests are troubling on its own, together they all but guarantee that independent generators will not receive just and reasonable rates in the MISO-administered auctions. MISO's auction will clear at or near a price of \$0, meaning that independent generators will have little prospect of recovering

¹¹ NRG/Dynegy Protest at 8-13.

¹² *Id.*

¹³ MISO Answer at 5-6.

¹⁴ OMS Answer at 2.

even their fixed costs, let alone a reasonable return on their investments. That will ultimately hurt consumers, as the failure to compensate independent generators will discourage new investment and development.

C. Contrary to MISO's Suggestions, the Problems Recognized by MISO in the FRA Filing Have Not Yet Been Remedied.

MISO suggests that parties pointing to the FRA Filing and statements made therein to show that the MISO capacity construct is inadequate fail to account for the role states have taken in addressing resource adequacy needs in MISO and it highlights recent actions taken by Michigan and Illinois to address those needs.¹⁵ However, MISO does not recognize that Michigan's proposal, although now delayed, effectively forces all load-serving entities to procure capacity years into the future. With no price signal, all load-serving entities effectively have to buy from one of the two regulated utilities in Michigan. Further, in actuality Illinois has yet to officially consider any proposal. Although the Illinois General Assembly held one-subject matter hearing on the topics of Resource Adequacy in MISO Zone 4 and legislation developed by Dynegey that, if adopted, would provide for a state-managed competitive capacity procurement process; and the Illinois Commerce Commission staff held two Resource Adequacy workshops and invited stakeholder comments, it is unclear whether any further action will be taken by the Illinois General Assembly or Governor's Office to address what has been largely been viewed as MISO's responsibility. The only real solution is for MISO to adopt a capacity market as described in the protests in this docket.

¹⁵ MISO Answer at 6-7.

II. CONCLUSION

For the aforementioned reasons, the Suppliers respectfully request that the Commission reject the MISO filing for the reasons discussed herein and set forth in the protests in this docket.

February 13, 2018

Respectfully submitted,

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Certificate Of Service

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

Dated at Princeton, New Jersey this 13th day of February, 2018.

/s/ Maria DeLuca