170 FERC ¶ 61,215
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Midcontinent Independent System Operator, Inc. Docket No. ER18-462-001

ORDER DENYING REHEARING

(Issued March 20, 2020)

1. On February 28, 2018, the Commission issued an order accepting Midcontinent Independent System Operator, Inc.'s (MISO) filing of provisions of its Open Access Transmission, Energy and Operating Reserve Markets Tariff (MISO Tariff) governing resource adequacy in the MISO region.[1] On March 30, 2018, Main Line Generation, LLC (Main Line), Midwest TDUs,[2] Suppliers,[3] and Potomac Economics, Ltd., MISO's Independent Market Monitor (Market Monitor), each filed a timely request for rehearing of the Commission's February 2018 Order. In this order, we deny rehearing.

I. Background

A. MISO's Filing and February 2018 Order

2. In its December 15, 2017 filing in the present docket, MISO refiled, in its entirety, its then-effective resource adequacy Tariff provisions, and requested that the Commission reaffirm that they were just and reasonable. MISO's refiled resource adequacy construct was based on resource adequacy provisions that it had filed on July 20, 2011 in Docket No. ER11-4081-000 (2011 Filing). In an order issued in June 2012, the Commission

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[1] *Midcontinent Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,176 (2018) (February 2018 Order).

[2] Midwest TDUs are Conway Corporation, Great Lakes Utilities, Madison Gas and Electric Company, Midwest Municipal Transmission Group, Missouri Joint Municipal Electric Utilities Commission, Missouri River Energy Services, Municipal Energy Agency of Nebraska, City of North Little Rock, Southern Minnesota Municipal Power Agency, and WPPI Energy.

[3] Suppliers are NRG Power Marketing LLC and GenOn Energy Management, LLC (the NRG Companies); Dynegy Marketing and Trade, LLC and Illinois Power Marketing Company (the Dynegy Companies); and Electric Power Supply Association.

conditionally accepted MISO's 2011 Filing in part, rejecting some aspects of the proposal and requiring MISO to make modifications.[4] Certain parties to that docket filed petitions for review of the 2012 Order and the 2015 Rehearing Order with the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). While those petitions for review were pending, on October 30, 2017, the D.C. Circuit granted the Commission's motion for remand of the record in Docket No. ER11-4081 to permit the Commission to take into account the D.C. Circuit's recent opinion in *NRG Power Marketing, LLC. v. FERC*,[5] which addressed limitations on the Commission's legal authority to impose conditions on the acceptance of filings made pursuant to section 205 of the Federal Power Act (FPA).[6]

3. MISO submitted its filing in the present docket while the Commission was considering what further action to take in the remanded Docket No. ER11-4081.[7] In the February 2018 Order, the Commission accepted MISO's resource adequacy Tariff provisions. In an order issued on remand in Docket No. ER11-4081-005 concurrently with the February 2018 Order, the Commission rejected MISO's 2011 Filing, given the Commission's finding that it could not be accepted as filed and the statutory limitations on the Commission's authority to conditionally accept filings as discussed in *NRG*.[8]

B. MISO's Subsequent Tariff Revisions Affecting Certain Resource Adequacy Provisions

4. While the requests for rehearing of the February 2018 Order were pending, MISO filed, and the Commission accepted on October 31, 2018, revisions to certain aspects of MISO's resource adequacy construct to enhance locational considerations.[9] These revisions added a new feature called Historic Unit Considerations (HUC), which affect

[4] *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,199 (2012) (2012 Order), *order on reh'g*, 153 FERC ¶ 61,229 (2015) (2015 Rehearing Order).

[5] 862 F.3d 108 (D.C. Cir. 2017) (*NRG*).

[6] 16 U.S.C. § 824d (2018).

[7] MISO stated that its filing did not change any of the then-current Tariff provisions, but rather was requesting that the Commission reaffirm that the provisions were just and reasonable. MISO Filing at 1.

[8] *Midwest Indep. Transmission Sys. Operator, Inc.*, 162 FERC ¶ 61,173 (2018) (Order on Remand).

[9] *Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,067 (2018) (October 2018 Order).

some of the aspects of MISO's resource adequacy construct that are subject to the requests for rehearing.

5. HUCs reflect a new methodology to allocate excess revenue from the Planning Resource Auction (Auction).[10] Under this new methodology, if capacity prices in the Auction separate, MISO will allocate the resulting excess Auction revenue to load-serving entities (LSE) with historic arrangements that could not have foreseen MISO's zonal construct or changes, such as Grandfathered Agreements, pre-zonal capacity contracts (i.e., arrangements that predate July 20, 2011), or contracts with External Resources that predate March 26, 2018 (i.e., the date of MISO's original proposal to enhance the locational aspects of its resource adequacy construct).[11] Each HUC is defined with a source Local Resource Zone (Local Zone) or External Resource Zone (External Zone), a sink Local Zone, as well as a MW quantity of capacity.[12] The value of each MW of HUC is calculated to be the Auction Clearing Price of the sink Local Zones less the Auction Clearing Price of the source Local Zone or External Zone.[13]

6. Midwest TDUs supported MISO's HUC provisions.[14] As relevant here, Midwest TDUs asserted that HUCs were necessary to protect LSEs' investments in existing capacity resources from price separation risk that was unforeseeable at the time the commitments were made.[15] Midwest TDUs further argued that accepting MISO's HUC provisions would be consistent with FPA section 217.[16] Midwest TDUs stated that

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[10] *Id.* P 92.

[11] *Id.* (citations omitted). On August 2, 2018, the Commission rejected MISO's original proposal, without prejudice. *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,081 (2018) (August 2018 Order). The Commission accepted MISO's revised proposal in the October 2018 Order.

[12] October 2018 Order, 165 FERC ¶ 61,067 at P 92 (citations omitted).

[13] *Id.* P 93 (citation omitted).

[14] *Id.* PP 96-98 (citations omitted).

[15] *Id.* P 96 (citation omitted).

[16] *Id.* P 97 (citations omitted) (referencing 16 U.S.C. § 824q (2018)).

"accepting MISO's HUCs proposal would go a long way toward mitigating these concerns with regard to pre-July 2011 resources and existing External Resources."[17]

7. The Commission found MISO's HUC provisions, which it noted were intended to help LSEs transition to MISO's new locational market design for resource adequacy, to be just and reasonable.[18] The Commission noted that there is no certainty that HUCs will be fully funded and thus there is a chance that LSEs will not be made whole.[19] The Commission concluded that, because HUCs are funded by excess Auction revenue caused by the very same Auction price separation, such scenario was unlikely.[20] Therefore, the Commission concluded that MISO's HUC provisions provided a substantial, albeit imperfect, hedge to Auction price separation without compromising reliability by waiving transmission constraints or requiring other LSEs to provide additional funding for supplemental make-whole payments.[21] Accordingly, the Commission found MISO's HUC provisions to be a just and reasonable approach to providing affected LSEs a hedge against Auction price separation directly caused by changes to MISO's resource adequacy construct.[22]

8. The Commission noted that the amount of existing arrangements that are eligible for HUCs will decrease over time and eventually no HUCs will remain.[23] The Commission explained that, due to the transitional nature of MISO's HUC provisions, LSEs will not be able to permanently avoid the locational price signal that MISO's resource adequacy construct was designed to provide.[24] In addition, the Commission explained that, because HUCs would apply only to existing arrangements and would not affect the market parameters used in clearing the Auction, MISO's HUC provisions would not affect Auction Clearing Prices and therefore will not impugn locational price

[17] Midwest TDUs, Motion to Intervene and Comments, Docket No. ER18-2363-000, at 9 (filed Sept. 21, 2018).

[18] October 2018 Order, 165 FERC ¶ 61,067 at PP 115-121.

[19] *Id.* P 120.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* P 115.

[24] *Id.*

signals that will continue to inform future resource adequacy decisions.[25] Accordingly, the Commission found that MISO's HUC provisions are a just and reasonable solution that would not embed inefficiencies in MISO's resource adequacy construct.[26]

II. Procedural Matters

9. On April 16, 2018, the Louisiana Public Service Commission (Louisiana Commission) filed a motion to intervene out-of-time. Also on that date, the Mississippi Public Service Commission (Mississippi Commission) and the Louisiana Commission filed a motion for leave to answer and answer to the requests of rehearing of Main Line, Suppliers, and the Market Monitor.

10. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission associated with the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. We find that the Louisiana Commission has not met this higher burden of justifying its late intervention and therefore deny its motion to intervene.[27]

11. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2019), prohibits answers to requests for rehearing. We therefore reject the answer filed by the Mississippi Commission and the Louisiana Commission.

III. Substantive Matters

12. The requests for rehearing challenge the Commission's acceptance in the February 2018 Order of certain of MISO's resource adequacy provisions. We deny rehearing, as discussed below.

13. As an initial matter, we note that many of the arguments raised on rehearing seek to impose on MISO the rules and requirements used in the centralized capacity markets in the Eastern Regional Transmission Organizations (RTO)/Independent System Operators (ISO). As discussed below, we reject those arguments, recognizing the regional differences between MISO and those RTOs/ISOs. Notably, approximately 90% of the load in MISO is served by vertically integrated LSEs, the vast majority of which are

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[25] *Id.*

[26] *Id.*

[27] *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

subject to state integrated resource planning processes. To accommodate the make-up of the MISO's footprint, MISO's proposed Tariff provisions accepted in the February 2018 Order provide that its resource adequacy requirements "are complementary to the reliability mechanisms of the states and the Regional Entities . . . within the [MISO] region."[28] Moreover, MISO's proposed Tariff language explains that the resource adequacy requirements "are not intended to and shall not in any way affect state actions over entities under the states' jurisdiction."[29] In other words, unlike the centralized capacity constructs used in the Eastern RTOs/ISOs, MISO's Auction is not—*and has never been*—the primary mechanism for its LSEs to procure capacity.

A. <u>Zonal Auction Price Separation and the Zonal Deliverability Charge</u>

1. <u>February 2018 Order</u>

14. Under MISO's proposed resource adequacy construct accepted in the February 2018 Order, LSEs in each Local Zone are required to procure sufficient capacity to meet their respective annual Planning Reserve Margin Requirements (Reserve Requirements).[30] An LSE can satisfy its Reserve Requirement in any of the following four ways: (1) purchase capacity through the Auction; (2) submit a Fixed Resource Adequacy Plan to demonstrate that it has designated capacity to meet all or a portion of its Reserve Requirement; (3) self-schedule capacity and offer it into the Auction at a price of zero; and/or (4) pay the Capacity Deficiency Charge.[31]

15. MISO's Auction selects the least-cost set of capacity resources needed to meet each Local Zone's Reserve Requirement, while respecting local and sub-regional constraints, and establishes the Auction Clearing Price for each Local Zone for the

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[28] MISO, FERC Electric Tariff, Module E-1, § 68A (33.0.0).

[29] *Id.*

[30] February 2018 Order, 162 FERC ¶ 61,176 at P 2 (citing MISO, FERC Electric Tariff, Module E-1, § 68A.7 (31.0.0)).

[31] MISO, FERC Electric Tariff, Module E-1, § 69A.1(d) (33.0.0). The Capacity Deficiency Charge is a charge that is assessed to an LSE that has not demonstrated to MISO that it has sufficient Planning Resources to meet its Reserve Requirement. The current Capacity Deficiency Charge equals 2.748 times Cost of New Entry for each MW that the LSE is deficient. MISO, FERC Electric Tariff, Module E-1, § 69A.10 (31.0.0).

upcoming Planning Year.[32] An LSE that elects to submit a Fixed Resource Adequacy Plan, rather than participate in the Auction, may be subject to a Zonal Deliverability Charge that applies when an LSE designates resources located in a Local Zone that has a lower Auction Clearing Price to serve demand in a Local Zone with a higher Auction Clearing Price.[33] MISO stated that the charge effectively represents the "congestion" caused by the Fixed Resource Adequacy Plan using what would have been lower-priced resources to serve higher-priced demand.[34] An LSE could avoid payment of a Zonal Deliverability Charge if the LSE qualified for a Grandmother Agreement or a Zonal Deliverability Charge Hedge if it funds certain Transmission System upgrades that result in an increase in the Capacity Import Limit of the Local Zone in which its load is located.[35]

16. In the February 2018 Order, the Commission disagreed with arguments made by Midwest TDUs that MISO's proposed imposition of the Zonal Deliverability Charge on an LSE's capacity designations is inconsistent with an LSE's firm transmission rights under section 217.[36] The Commission found that, by the express language of section 217(b)(2),[37] LSEs are entitled to use their firm transmission rights, or equivalent,

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[32] February 2018 Order, 162 FERC ¶ 61,176 at P 3 (citing MISO, FERC Electric Tariff, Module E-1, § 69A.7.1 (38.0.0)).

[33] *Id.* P 4 (citing MISO, FERC Electric Tariff, Module E-1, § 69A.7.6 (31.0.0)).

[34] MISO Filing at 13-14.

[35] February 2018 Order, 162 FERC ¶ 61,176 at P 4 & n.9 (citing MISO, FERC Electric Tariff, Module E-2, § 69A.11.12 (30.0.0) and Module E-1, § 69A.7.7(b) (30.0.0)). HUCs have since replaced Grandmother Agreements in MISO's resource adequacy construct. October 2018 Order, 165 FERC ¶ 61,067 at P 92.

[36] February 2018 Order, 162 FERC ¶ 61,176 at PP 83-91.

[37] Section 217(b)(2) provides:

> Any [LSE] described in [section 217(b)(1)] is entitled to use the firm transmission rights, or, equivalent tradable or financial transmission rights, in order to deliver the output or purchased energy, or the output of other generating facilities or purchased energy to the extent deliverable using the rights, to the extent required to meet the service obligation of the [LSE].

16 U.S.C. § 824q(b)(2).

"to deliver *energy* to meet their service obligations, to the extent deliverable."[38] The Commission observed that nothing in section 217 purports to shield LSEs from capacity charges that are necessary to correctly value the locational aspects of capacity so that the system operator can ensure resource adequacy. The Commission noted that it has repeatedly held that the requirements of section 217 do not apply to capacity markets.[39]

17. The Commission found that the Zonal Deliverability Charge does not hinder the ability of LSEs to use firm transmission rights to serve energy to their load.[40] Further, the Commission found that the Zonal Deliverability Charge also does not affect the price of transmission service to deliver energy from a point of receipt to load or the quantity of capacity that LSEs have relied on and can rely on from their resource. Finally, the Commission noted that, although not required under section 217, limited opportunities do exist under MISO's resource adequacy construct for LSEs to hedge against capacity market (i.e., Auction) price separation—specifically, via the Zonal Deliverability Charge Hedge.[41] Accordingly, the Commission rejected Midwest TDUs' contention that section 217 bars the implementation of the Zonal Deliverability Charge.

2. Request for Rehearing

a. FPA Section 217 Implications with Respect to Imposition of the Zonal Deliverability Charge

i. Midwest TDUs' Arguments

18. Midwest TDUs argue that the February 2018 Order erred in finding that section 217 does not apply to capacity markets and is irrelevant to capacity delivery.[42] Midwest TDUs argue that, contrary to the Commission's reading of section 217 in the February 2018 Order, section 217 directs the Commission to support firm delivery of LSEs' self-supply capacity resources to meet their service obligations. They assert that the Commission did not offer a legally satisfactory explanation for its holding that

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[38] February 2018 Order, 162 FERC ¶ 61,176 at P 86 (emphasis in February 2018 Order).

[39] *Id.* P 89 (citing *PJM Interconnection, L.L.C.*, 150 FERC ¶ 61,041, at P 19 (2015) (PJM CIL Rehearing Order); *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,197, at P 178 (2017) (PJM Pseudo-Tie Enhancements Order)).

[40] *Id.* PP 88, 91.

[41] *Id.* P 90.

[42] Midwest TDUs Request for Rehearing at 4, 8.

section 217 excludes capacity resources needed to meet service obligations,[43] and that the Commission failed to explain how the protection of firm transmission rights under section 217 excludes LSEs' rights to firmly receive at their native load the capacity they obligatorily hold, supported by firm transmission rights, to serve that load.[44] Midwest TDUs also argue that the Commission did not parse the various subsections of section 217.

19. Midwest TDUs assert that delivery of capacity required to satisfy resource adequacy—and not only delivery of energy—is included in "firm transmission rights" referenced in section 217(b), and has long been recognized as such.[45] Midwest TDUs note that Order No. 888-A defined the firm "network" transmission service on which LSEs typically rely as "firm transmission service . . . for the delivery of *capacity and energy* from its designated Network Resources to service its Network Loads."[46] Midwest TDUs also note that section 28.3 of the MISO Tariff states that "[t]he Transmission Provider . . . will provide Firm Transmission Service over the Transmission System to the Network Customer for the delivery of *Capacity and Energy* from its Network Resources."[47] Midwest TDUs note that section 28.3 of the *pro forma* open access transmission tariff (*pro forma* OATT) similarly provides for the delivery of "capacity and energy." In addition, Midwest TDUs note that the Introduction to Module B of the MISO Tariff states that, "Point-To-Point Transmission Service is for the receipt of *Capacity and*

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[43] *Id.* at 12.

[44] *Id.* at 13.

[45] *Id.* at 9.

[46] *Id.* at 9-10 (quoting *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at app. B & 30,530 (*Pro Forma* Open Access Transmission Tariff, § 28.3) (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)) (emphasis added by Midwest TDUs).

[47] *Id.* at 10 (quoting MISO, FERC Electric Tariff, Module B, § 28.3 (30.0.0)) (emphasis added by Midwest TDUs).

Energy at designated Point(s) of Receipt and the transmission of such *Capacity and Energy* to designated Point(s) of Delivery."[48]

20. Further, Midwest TDUs argue that capacity is a key element of the long-term power supply arrangements "required to meet" LSEs' service obligations within section 217(b)(2), and constitutes a "reasonable need[] of [LSEs] to satisfy the[ir] service obligations" within the meaning of section 217(b)(4).[49] Midwest TDUs argue that LSEs must hold capacity in order to satisfy their "service obligations," defined by section 217(a)(3) to encompass legal "requirement[s] applicable to . . . an electric utility . . . to provide electric service to end-users or to a distribution utility."[50] Midwest TDUs state that MISO LSEs, including Midwest TDUs, have long been subject to reliability obligations to hold capacity resources in order to meet reserve margin obligations under state and local law and to fulfill their service obligations to their distribution-system members or retail customers. Midwest TDUs state that both state and federal law codify these requirements through resource adequacy obligations. Midwest TDUs state that, in particular, the MISO Tariff subjects every MISO LSE to resource adequacy requirements. Midwest TDUs assert that MISO LSEs have longstanding commitments to capacity resources that were secured to fulfill these obligations. Midwest TDUs assert that the section 217 statutory protection of service obligation deliveries thus extends to capacity from the self-supply resources that MISO LSEs arrange to deliver to their load via firm network transmission service in order to meet their resource adequacy obligations.[51]

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[48] *Id.* (quoting MISO, FERC Electric Tariff, Module B, Introduction (30.0.0)) (emphasis added by Midwest TDUs).

[49] *Id.* at 9. Section 217(b)(4) provides:

> The Commission shall exercise the authority of the Commission under this Act in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of [LSEs] to satisfy the service obligations of the LSEs, and enables [LSEs] to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

16 U.S.C. § 824q(b)(4).

[50] Midwest TDUs Request for Rehearing at 9 (quoting 16 U.S.C. § 824q(a)(3)).

[51] *Id.* at 8-9 (citation omitted).

21. Midwest TDUs argue that a foundational principle of open access requires that MISO and Transmission Owners plan and build the MISO Transmission System so as to maintain the long-term deliverability of designated network resources to load.[52] Midwest TDUs assert that section 217 honors that principle by directing the Commission to protect and support LSEs' rights to firm delivery of their capacity resources (either physically firm delivery or its financial equivalent). Midwest TDUs note that section 217(b)(4) directs the Commission to enable LSEs to secure such delivery rights, by mandating that the Commission "enable[] [LSEs] to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet" their "service obligations."[53]

22. Midwest TDUs argue that Order No. 681,[54] which implemented section 217, recognized that section 217(b)(4) expressly calls for hedging of planned resources. Midwest TDUs note that in Order No. 681, the Commission determined that long-term transmission rights should be fully funded, such that congestion does not prevent the economic value of long-term firm resources from being delivered.[55] Midwest TDUs argue that, although Order No. 681 focused on energy delivery rights, the statutory requirement is broader and encompasses delivery of the capacity aspect of LSEs' service obligation power supply.[56] Midwest TDUs assert that Congress called on the Commission to effectively preserve and enable LSEs to secure physically or financially firm transmission rights for delivery to load of the capacity associated with existing resources and planned future resources. Midwest TDUs contend that transmission rights used to satisfy native load service obligations by enabling receipt of adequate capacity resources fall within this protected scope.

23. Midwest TDUs argue that section 217(c) instructs the Commission to take into account section 217(b)(1)-(3)'s policies of ensuring that LSEs that held pre-existing firm transmission rights for the delivery of their service-obligation resources will be able to

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[52] *Id.* at 11.

[53] *Id.* (quoting 16 U.S.C. § 824q(b)(4)).

[54] *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, 116 FERC ¶ 61,077, *reh'g denied*, Order No. 681-A, 117 FERC ¶ 61,201 (2006), *reh'g denied*, Order No. 681-B, 126 FERC ¶ 61,254 (2009).

[55] Midwest TDUs Request for Rehearing at 12 (citing Order No. 681, 116 FERC ¶ 61,077 at P 18).

[56] *Id.*

continue using those rights, or will enjoy equivalent financial rights.[57] Midwest TDUs argue that consequently, section 217(c) obligated the Commission, in addressing the present MISO proposal as it applied to transmission rights held by LSEs as of January 1, 2005, to "take[] into account" the policies of sections 217(b)(1)-(3).[58]

24. Midwest TDUs assert that the Commission's reliance on the word "energy" in the statutory text is overly simplistic.[59] Midwest TDUs assert that, as used in the FPA,

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[57] *Id.* at 11. Section 217(c) provides:

> Allocation of Transmission Rights- Nothing in subsections (b)(1), (b)(2), and (b)(3) of [section 217] shall affect any existing or future methodology employed by a Transmission Organization for allocating or auctioning transmission rights if such Transmission Organization was authorized by the Commission to allocate or auction financial transmission rights on its system as of January 1, 2005, and the Commission determines that any future allocation or auction is just, reasonable and not unduly discriminatory or preferential, provided, however, that if such a Transmission Organization never allocated financial transmission rights on its system that pertained to a period before January 1, 2005, with respect to any application by such Transmission Organization that would change its methodology the Commission shall exercise its authority in a manner consistent with the Act and that takes into account the policies expressed in subsections (b)(1), (b)(2), and (b)(3) as applied to firm transmission rights held by [an LSE] as of January 1, 2005, to the extent the associated generation ownership or power purchase arrangements remain in effect.

16 U.S.C. § 824q(c). Midwest TDUs assert that MISO falls within the "provided, however, that" clause (i.e., the savings clause) of section 217(c), because MISO "never allocated financial transmission rights on its system that pertained to a period before January 1, 2005." Midwest TDUs Request for Rehearing at 11-12 n.36 (quoting 16 U.S.C. § 824q(c)). Midwest TDUs note that "MISO's new market began operating on April 1, 2005." *Id.* (quoting *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 246 (D.C. Cir. 2007)).

[58] Midwest TDUs Request for Rehearing at 11-12 & n 36 (quoting 16 U.S.C. § 824q(c)).

[59] *Id.* at 13 (citing February 2018 Order, 162 FERC ¶ 61,176 at PP 86, 88-89, 91).

"energy" encompasses capacity.[60] Midwest TDUs contend that the Commission has made this holding in establishing jurisdiction over resource adequacy. Midwest TDUs note that the Commission held that the New England counterpart to MISO's Reserve Requirement—i.e., ISO New England Inc.'s (ISO-NE) Installed Capacity Requirement—is within federal jurisdiction because it is a practice affecting a jurisdictional rate—namely, "the price of capacity"—as the sale of capacity is a "sale[] subject to Commission jurisdiction."[61] Midwest TDUs assert that FPA section 201 is the statutory provision that conferred the Commission's underlying jurisdiction over sales of capacity.[62] Midwest TDUs observe that, just like section 217, section 201 does not include the word "capacity" and that section 201 instead refers to the "sale of electric *energy*."[63] Midwest TDUs state that the D.C. Circuit affirmed this reasoning.[64]

25. Midwest TDUs argue that similarly, the Commission established its jurisdiction over ISO-NE's Installed Capacity Requirement by citing the Commission's prior judicially affirmed holding that capacity deficiency charges are federally jurisdictional fees "for power and reserve service," and as such fall within the Commission's section 201 jurisdiction over the interstate wholesale "sale of electric energy."[65] Midwest TDUs note that in *Municipalities of Groton v. FERC*,[66] the D.C. Circuit affirmed the Commission's decision in *New England Power Pool Agreement*,[67] in which the Commission found that a capacity deficiency charge is a charge for "sale of electric energy subject to the jurisdiction of the Commission" within the meaning of FPA section 205.[68] Accordingly, Midwest TDUs argue that "energy" is synonymous with electrical power for purposes of section 201, section 205, and section 217, and thus encompasses both MWh and MW. Midwest TDUs assert that MW constitute "not

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[60] *Id.*

[61] *Id.* (quoting *ISO New England Inc.*, 119 FERC ¶ 61,161, at P 23 (2008)).

[62] *Id.* (referencing 16 U.S.C. § 824 (2018)).

[63] *Id.* (quoting 16 U.S.C. § 824) (emphasis added by Midwest TDUs).

[64] *Id.* (citing *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (2009) (*CT DPUC*)).

[65] *Id.* at 13-14 (citing *N.Y. State Reliability Council*, 122 FERC ¶ 61,153 (2008)).

[66] 587 F.2d 1296 (D.C. Cir. 1978) (*Groton*).

[67] Opinion No. 775, 56 F.P.C. 1562 (1976).

[68] Midwest TDUs Request for Rehearing at 14 (citation omitted).

electricity itself but the ability to produce it when necessary" thereby enabling "LSEs to . . . meet expected peaks in electricity demand."[69]

26. Midwest TDUs also note that section 210 of the Public Utility Regulatory Policies Act (PURPA) requires electric utilities to purchase "electric energy" from qualifying facilities.[70] Midwest TDUs observe that Commission regulations promulgated under this provision implement an obligation to purchase "energy *and capacity*" from qualifying facilities.[71]

27. Further, Midwest TDUs note that section 217 also refers to native load "service obligations" and "long term power supply arrangements" without distinguishing between the capacity and energy aspects of those obligations and arrangements.[72] Midwest TDUs assert that the statutory reference to "power supply arrangements" is telling because "power" has long been used as industry nomenclature for either capacity alone or capacity and energy together.[73] Midwest TDUs assert that, relatedly, the statutory reference to "long term power supply arrangements" reinforces this denotation of capacity arrangements, as capacity goes to long-term reliability.[74]

28. In addition, Midwest TDUs argue that section 217 also provides that LSEs may use their firm transmission rights to deliver the "output" of their owned generation, not just "energy."[75] Midwest TDUs assert that "output" in this context has been defined as "[t]he amount of *power or* energy produced by a generating unit, station, or

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[69] *Id.* (quoting *CT DPUC*, 569 F.3d at 479).

[70] *Id.*

[71] *Id.* (quoting 18 C.F.R. § 292.303(a) (2019)) (emphasis added by Midwest TDUs).

[72] *Id.* (quoting 16 U.S.C. § 824q(b)(4)).

[73] *Id.* at 14-15 (citing, *inter alia*, U.S. Energy Info. Admin., Glossary, https://www.eia.gov/tools/glossary/?id=electricity (EIA Glossary) (defining "Power" as "[t]he rate of producing, transferring, or using energy, most commonly associated with electricity. Power is measured in watts and often expressed in [KW] or [MW].")).

[74] *Id.* at 15; *see also id.* at 9.

[75] *Id.* at 15 (quoting 16 U.S.C. § 824q(b)(2)).

system."[76] Midwest TDUs contend that, similarly, the legislative history of the Energy Policy Act of 2005[77] states that section 217 "requires [the Commission] to ensure that [LSEs] serving electricity consumers are entitled to use their transmission facilities or equivalent transmission rights to serve 'native load,' i.e., to meet certain service obligations and certain contractual obligations," without distinguishing between the capacity and energy aspects of service to native load.[78] Midwest TDUs argue that Congress intended that the Commission protect both the capacity and energy aspects of LSEs' service obligations.

29. Midwest TDUs assert that firm deliverability of capacity means the ability to receive firm delivery of electric energy at the times when it is most needed.[79] Midwest TDUs asserts that the February 2018 Order provides no explanation of why Congress would have protected LSEs' receipt of energy under long-term power supply arrangements, except at the times when they most need it.

30. In addition, Midwest TDUs note that the Commission cites to two orders concerning the PJM Interconnection, L.L.C. (PJM) capacity market (i.e., the PJM CIL Rehearing Order and the PJM Pseudo-Tie Enhancements Order) for its interpretation that section 217 does not apply to capacity markets.[80] Midwest TDUs contend that the PJM capacity market is statutorily distinct from the MISO market, asserting that, pursuant to section 217(c), unlike MISO, PJM is not subject to section 217(b)(1)-(3).

31. Midwest TDUs argue that in the February 2018 Order, the Commission prevented LSEs from being able to secure a meaningful hedge against unpredictable charges for use of their longstanding capacity resources.[81] Midwest TDUs argue that, consequently, LSEs can no longer rely on their firm transmission rights (or obtain a financial equivalent) for delivery of their capacity resources to their load to meet their resource

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[76] *Id.* (quoting EIA Glossary (definition of "Output")) (emphasis added by Midwest TDUs).

[77] Pub. L. No. 109-58, § 1233, 119 Stat. 594, 957 (2005) (EPAct 2005).

[78] Midwest TDUs Request for Rehearing at 15 (quoting H.R. Rep. 109-215, at 263 (2005)).

[79] *Id.* at 16.

[80] *Id.*

[81] *Id.* at 18.

adequacy obligations as they are exposed to additional charges in the event of inter-zonal transmission constraints.[82]

32. Midwest TDUs argue that such charges are not subject to the limited hedging for new resources that trigger incrementally priced transmission upgrades (i.e., a Zonal Deliverability Charge Hedge), because the time when existing resources might have triggered such upgrades is past. Midwest TDUs explain that because existing resources have already cleared all applicable MISO tests for designation as a network resource, they have no way to receive Zonal Deliverability Charge Hedges. Midwest TDUs argue that because LSEs do not make new firm transmission service requests for their longstanding resources, the opportunity for hedging is never triggered.[83]

33. Midwest TDUs note that the Commission held in Order No. 681 in interpreting section 217(b)(4) that "for a transmission right to be 'firm,' it must be firm as to both quantity and price," meaning that "'firm transmission rights' must be firm as to both the 'physical' component of the right and the 'financial' component of the right."[84] Midwest TDUs assert that, while that interpretation was expressed in the context of energy delivery firmness, it is equally applicable to capacity. Midwest TDUs contend that by imposing a zonal deliverability charge on existing resources,[85] the February 2018 Order, via the MISO Tariff, charges an additional, unavoidable price for delivering capacity across zonal borders. Midwest TDUs assert that the zonal deliverability charge makes the transmission right to delivery of those resources non-firm. Midwest TDUs argue that, by placing unavoidable zonal deliverability charges on existing resources that became inter-zonal under MISO's proposed resource adequacy construct, the February 2018 Order is contrary to the definition of firmness in Order No. 681.[86]

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[82] *Id.* at 18-19.

[83] *Id*. at 23.

[84] *Id.* at 19 (quoting Order No. 681, 116 FERC ¶ 61,077 at P 82).

[85] Midwest TDUs assert that MISO's proposal applies "explicit and implicit zonal deliverability charges" and they use both capitalized and non-capitalized versions of the term, stating that "[i]n the Tariff Module E-1 nomenclature . . . the zonal deliverability charge takes the form of an explicit 'Zonal Deliverability Charge' (thus capitalized) when applied to an LSE utilizing the Fixed Resource Adequacy Plan option, and an implicit (but functionally identical) difference between market-clearing prices paid and received when applied to an LSE that self-schedules its capacity resources within the [Auction]." *Id.* at 17-18.

[86] *Id.* at 20.

34. Midwest TDUs argue that in effect, where a zonal deliverability charge applies, it requires LSEs to sell their capacity into the market at the zonal market price for capacity located in the Local Zone where the underlying physical resource is installed, and purchase substitute capacity off the market at the zonal market price for capacity located in the Local Zone that hosts the load.[87] Thus, Midwest TDUs disagree with the Commission's statement in the February 2018 Order that "the Zonal Deliverability Charge does not affect the quantity of capacity that LSEs have relied on and can rely on from their resource."[88] Midwest TDUs argue that the Commission fails to recognize that, in economic effect, zonal deliverability charges mean that LSEs are not receiving capacity "from their resource" and that LSEs are instead forced to purchase alternate capacity at a higher price. Midwest TDUs argue that this outcome does not honor the Commission's section 217(b)(4) obligations to enable long-term firm transmission rights for delivery of long-term service obligation power supply (or their financial equivalent) and to facilitate transmission planning and expansion to meet those needs or the Commission's obligations under sections 217(b)(1)-(2) and (c).[89]

35. Midwest TDUs argue that under the prior regional resource adequacy construct, an LSE who brought a capacity resource to the transmission system and had firm transmission service rights from the resource to load had a Tariff entitlement to receive the capacity value of that resource at its load.[90] Midwest TDUs assert that, under the February 2018 Order, however, that is no longer the case as to inter-zonal resources. Midwest TDUs argue that after having already paid the "Zonal Rate" that Transmission Customers taking Network Integration Transmission Service pay pursuant to Schedule 9 of the MISO Tariff, LSEs should not have to pay another delivery charge in the form of an explicit or implicit zonal deliverability charge.

36. Midwest TDUs argue that, contrary to statements in the February 2018 Order, they are not insisting that they be entirely "exempt" from zonal deliverability charges, or seeking to "forbid[] the imposition of Zonal Deliverability Charges on LSEs with firm transmission rights," or asking that "their cost of capacity must forever remain unchanged."[91] Midwest TDUs argue that section 217 envisions a balancing of considerations, and thus "can be satisfied by imperfect but substantial hedging of capacity deliverability charges—just as it is satisfied, under Order [No.] 681 and its

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[87] *Id.* at 18; *see also id.* at 20-21.

[88] *Id.* at 20 (quoting February 2018 Order, 162 FERC ¶ 61,176 at P 88).

[89] *Id.* at 20-21.

[90] *Id.* at 21.

[91] *Id.* at 24 (quoting February 2018 Order, 162 FERC ¶ 61,176 at PP 84, 86, 88).

implementation within MISO, by imperfect but substantial hedging of energy congestion charges."[92] Midwest TDUs argue that the February 2018 Order erred by deeming section 217 irrelevant, and therefore failing to engage in the required balancing.

37. Further, Midwest TDUs state that it is not their position that "their cost of capacity must forever remain unchanged."[93] Midwest TDUs argue that LSEs' cost of capacity is determined by the cost or price of the resources they built or purchased and that the associated delivery cost changes over time to track the changing embedded cost of the transmission system that enables firm delivery of that capacity. Midwest TDUs argue that the cost of delivering capacity from long-term firm resources is a bundled-in component of network transmission service.[94]

38. In addition, Midwest TDUs argue that the February 2018 Order erred in failing to provide any meaningful opportunity to secure financially firm delivery of new capacity resources.[95] Midwest TDUs argue that the conclusion that section 217 includes rights to financially firm delivery of existing capacity resources also applies to transmission of new capacity resources. Midwest TDUs contend that, absent a meaningful opportunity for LSEs to secure long-term financial hedges against inter-zonal Auction price separation for new resources, MISO's resource adequacy construct filing violates section 217 and is not just and reasonable.

39. To support their argument that MISO LSEs procuring new capacity resources have no meaningful opportunity to secure an accompanying hedge, Midwest TDUs note that the Zonal Deliverability Hedge would arise only if associated transmission requests triggered transmission upgrades, funded directly by a utility, that increased deliverability into the utility's load Local Zone.[96] Midwest TDUs explain, however, that transmission service requests in MISO do not trigger studies of whether to add import capability, explaining that MISO now studies most new network resources only for "aggregate deliverability" upon interconnection, without studying their source-to-sink deliverability. Thus, MISO TDUs contend that the suggestion that the new designations of network resources will lead to identification of upgrades that LSEs could fund to increase import capability into their load Local Zone is illusory, and they argue that the hedging

[92] *Id.* at 25.

[93] *Id.* (quoting February 2018 Order, 162 FERC ¶ 61,176 at P 88).

[94] *Id.*

[95] *Id.* at 44.

[96] *Id.* at 45-46 (citation omitted).

opportunity is nonexistent. Midwest TDUs assert that this reality is confirmed by MISO's admission that it has never granted any Zonal Deliverability Charge Hedge.[97]

40. Midwest TDUs argue that under the zonal construct approved by the February 2018 Order, charges for delivering a long-term resource commitment can change unpredictably throughout that commitment's term.[98] Midwest TDUs contend that, thus, it would be impossible for an unhedged transmission customer to know at the time that it seeks designation of a new network resource whether the capacity value of that resource will actually be delivered to the customer. Midwest TDUs argue that in economic effect, MISO's filing fails to make the firm delivery of new network resource capacity. Midwest TDUs aver that this failure violates not only section 217(b)(4), but also longstanding Commission precedent establishing customer rights to firm transmission of capacity and energy.[99]

41. Midwest TDUs argue that the Commission's failure to provide for meaningful hedges as to new capacity resources is not consistent with its treatment of a parallel issue in Order No. 681.[100] Midwest TDUs note that in Order No. 681, the Commission determined that long-term financial rights for new resources must be made available from existing and expanded transmission capacity; according to Midwest TDUs, this determination was consistent with section 217's direction to support existing and planned long-term power supply arrangements.[101]

ii. Determination

42. We deny Midwest TDUs' request for rehearing, which reasserts the argument previously advanced in Midwest TDUs' protest that their transmission rights preserved in section 217 entitle them to hedges against Auction price separation that occurs under MISO's resource adequacy construct. We find nothing in the language of section 217, or Congressional intent in enacting it, that indicates that the transmission rights protected by section 217 includes the right to such hedges and thus affirm the February 2018 Order.

43. Many of Midwest TDUs' arguments attempt to demonstrate that LSEs' transmission rights preserved by section 217(b)(1)-(3) include the right to firm delivery

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[97] *Id.* at 46.

[98] *Id.* at 45.

[99] *Id.*

[100] *Id.* at 47.

[101] *Id.* (citing Order No. 681, 116 FERC ¶ 61,077 at PP 210-211, 256).

of capacity from resources they designate to serve their load. Midwest TDUs thus contend that MISO may not impose on LSEs, under its resource adequacy construct, an unhedgeable zonal deliverability charge that reflects inter-zonal Auction price separation.

44. Section 217(b)(2) entitles LSEs to use "the firm transmission rights" (or equivalent tradable or financial transmission rights) that they held as of August 8, 2005 (i.e., the date of enactment of EPAct 2005) "to deliver the output" of the generation facilities described in section 217(b)(1) "or purchased energy" described in section 217(b)(1), "or the output of other generating facilities or purchased energy to the extent deliverable using the rights."[102] The "generation facilities" described in section 217(b)(1) are those owned by the LSE or Federal generation facilities that the LSE marketed the "output" from, and the "purchased energy" refers to energy purchased by the LSEs under wholesale purchase contracts.[103]

45. As discussed further below, we disagree with Midwest TDUs' contention that the transmission rights protected by section 217 include the right to deliver capacity, and their extension of that argument to mean that their alleged transmission right to delivery of capacity from one MISO Local Zone to another should shield an LSE from the Zonal Deliverability Charge component of MISO's resource adequacy construct.

46. Midwest TDUs argue that the terms "output" and "energy" are used in section 217(b)(2) to indicate what is delivered under the transmission right and that those terms encompass or equate to "capacity." However, the term "capacity" is not used in section 217. The D.C. Circuit, in *CT DPUC*, described the distinction between capacity and the electricity that is produced from that capacity:

> Capacity is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties—generally, generators—who can either produce more or consume less when required. . . . The goal is for LSEs to purchase sufficient capacity to easily meet expected peaks in electricity demand on their transmission systems.[104]

47. Consistent with the D.C. Circuit's explanation, when an LSE purchases capacity, it is purchasing an option to call upon a resource to physically perform, i.e., to produce "output" or "energy" to meet expected peaks in electricity demand. Given that capacity

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[102] 16 U.S.C. § 824q(b)(2); *see also* 16 U.S.C. § 824q(b)(1).

[103] 16 U.S.C. § 824q(b)(1)(A).

[104] 569 F.3d 477 at 479.

represents "the ability to produce [electricity] when necessary," capacity is not the same as "output" which, as Midwest TDUs have recognized, has been defined as "[t]he amount of power or energy *produced* by a generating unit, station, or system."[105]

48. Midwest TDUs rely upon the Commission's assertion of jurisdiction to regulate practices affecting the price of capacity sales as part of its jurisdiction over sales and transmission of "electric energy" to support their position that the term "energy" encompasses capacity. However, Midwest TDUs fail to distinguish the use of the term "electric energy" under section 201 and section 205 from the use of the term "energy" in section 217(b)(2). For purposes of the Commission's jurisdiction under section 201 and section 205, regulation of "electric energy" encompasses factors relating to capacity to the extent necessary to ensure just and reasonable rates and practices.[106] But Congress did not use the term "electric energy" in specifying what LSEs' firm transmission rights encompass under section 217(b)(2). Instead, as noted above, Congress used the phrase "to deliver the output or purchased energy."[107] Given this context, particularly the use of the word "output," we do not construe the term "energy," as used in section 217(b)(2), as encompassing or equating to capacity.

49. Section 217(b)(1) further indicates that Congress made a distinction between the terms "electric energy" and "energy." In describing one of the resources that can be used to meet an LSE's service obligation, Congress in section 217(b)(1)(A) used the term "electric energy":

> (1) Paragraph (2) applies to any [LSE] that, as of the date of enactment of this section—
>
> (A) owns generation facilities, markets the output of Federal generation facilities, or holds rights under one or more

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[105] Midwest TDUs Request for Rehearing at 15 (quoting EIA Glossary (definition of "Output")) (emphasis added).

[106] *See, e.g.*, *Miss. Indus. v. FERC*, 808 F.2d 1525, 1543-44 (D.C. Cir. 1987) (internal citations omitted), *vacated and remanded in part on other grounds*, 822 F.2d 1103 (D.C. Cir. 1987); *Groton*, 587 F.2d at 1302 (citing *FPC v. Conway Corp.*, 426 U.S. 271 (1976)); *ISO New England Inc.*, 119 FERC ¶ 61,161 at PP 23-24 (citations omitted).

[107] 16 U.S.C. § 824q(b)(2).

> wholesale contracts to purchase *electric energy*, for the purpose of meeting a service obligation; . . .[108]

In the context of a wholesale purchase contract, the term "electric energy" indicates a sale subject to the Commission's jurisdiction under section 201. However, in section 217(b)(1)(B), when describing what is delivered under an LSE's firm transmission rights held as of the date of enactment to meet its service obligations, Congress referred to "delivery of the output of the generation facilities or *the purchased energy*" and not to delivery of "electric energy."[109] Likewise, in section 217(b)(2), in describing the LSEs' continuing transmission right, Congress did not use the term "electric energy" to describe what is delivered but instead used the phrase "output or purchased energy," which again signals that what is delivered under the transmission right does not encompass or equate to capacity.

50. We find similarly unavailing Midwest TDUs' observation that section 210 of PURPA requires electric utilities to purchase "electric energy" from qualifying facilities, while the Commission's regulations promulgated thereunder implement an obligation to purchase both "energy and capacity." Midwest TDUs again fail to distinguish the use of the term "electric energy," which for regulatory purposes under the FPA and PURPA may include considerations related to capacity costs and practices,[110] from the use of the term "energy" to describe what is delivered under the section 217(b)(2) transmission right.

51. Midwest TDUs further argue that, because the MISO Tariff and the *pro forma* OATT contemplate transmission service as including "the delivery of Capacity," delivery of capacity required to satisfy resource adequacy—and not only delivery of energy—is included in "firm transmission rights" referenced in section 217(b).[111] We disagree. When the phrase "delivery of capacity" is used in the context of section 28.3 of the *pro forma* OATT and Module B of the MISO Tariff (which includes section 28.3), it

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[108] 16 U.S.C. § 824q(b)(1)(A) (emphasis added).

[109] 16 U.S.C. § 824q(b)(1)(B) (emphasis added).

[110] *See, e.g.*, *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at PP 60-61 (cross-referenced 10 FERC ¶ 61,150), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980) (cross-referenced at 11 FERC ¶ 61,166), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

[111] Midwest TDUs Request for Rehearing at 9-10 (citations omitted).

refers to the ability of a transmission customer to place on the grid at one location the energy capable of being produced by a specified amount of capacity, and to withdraw that same amount of energy from a different point on the grid.[112] Moreover, we find that the language that the *pro forma* OATT and MISO Tariff use to describe transmission service does not govern the Commission's interpretation of section 217. Not only does section 217 not use the term "capacity" but, as further discussed below, the terms "firm transmission rights" and "financial transmission rights" as used in section 217 apply only in the context of energy markets and not capacity markets. In any event, Midwest TDUs do not demonstrate how the phrase "delivery of Capacity" under the MISO Tariff and *pro forma* OATT requires the conclusion that section 217 prohibits MISO from incorporating as a component of its resource adequacy construct the value of a capacity resource that an LSE designates to meet its load as determined by market mechanisms, such as locational pricing.

52. We also disagree with Midwest TDUs' contention that the use of the term "long term power supply arrangements" in section 217(b)(4) suggests that the delivery of capacity is part of the transmission right protected by section 217.[113] Although the term "power" can refer to capacity and energy together, the term can also refer to energy alone.[114] In addition, although, as Midwest TDUs note, capacity helps ensure long-term reliability, the term "reliability" is not referenced in section 217.

53. Similarly, contrary to Midwest TDUs' contentions, the reference to native load "service obligations" in section 217(b)(4)—and in other provisions of section 217—also does not indicate that section 217 refers to the delivery of capacity. As discussed above, the language of section 217(b)(2) and section 217(b)(1)(B) expressly provides that what is delivered under an LSE's firm transmission rights to meet the LSE's service

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[112] For example, when the *pro forma* OATT at section 1.42 defines Reserved Capacity for transmission, it requires it to be expressed in terms of "whole megawatts a 60-minute interval," i.e. MWh, which is a measure of energy. Similarly, under section 13.8 of the *pro forma* OATT, "scheduling of any capacity and energy that is to be delivered must be stated in terms of 1,000 kW per hour," which again is a measure of energy.

[113] *See* Midwest TDUs Request for Rehearing at 9, 14-15.

[114] *See, e.g.*, EIA Glossary (defining "Power" as "[t]he rate of producing, transferring, or using energy, most commonly associated with electricity. Power is measured in watts and often expressed in [KW] or [MW]."); *see also id.* (defining "Power loss" as "[t]he difference between electricity input and output as a result of an energy transfer between two points").

obligations is "output [of the generation facilities] or purchased energy"[115] and does not reference capacity. In light of this language, and in light of the use of the term "financial transmission rights" described below, we disagree with Midwest TDUs' assertion that Congress has not distinguished between the capacity and energy aspects of an LSE's service obligations and long-term power arrangements. Indeed, consistent with the D.C. Circuit's observation that "capacity is not electricity itself but the ability to produce it when necessary,"[116] we find that an LSE does not physically deliver capacity to end-users to meet its service obligations; rather, an LSE delivers energy produced from capacity resources to end-users—or to a distribution utility who in turn provides energy to end-users. In arguing that an LSE should have a hedge against Auction price separation, Midwest TDUs essentially seek that all the LSE's capacity resources be treated as if they were located in the same Local Zone as the LSE's load.

54. Section 217(b)(1)-(2) preserves to LSEs the transmission rights they held as of the date of enactment, August 8, 2005, to meet their service obligations. To the Commission's knowledge, no transmission rights existed in 2005 in MISO or elsewhere that included hedges for the locational value of a capacity resource. Accordingly, there is no basis for finding that the transmission rights preserved by section 217(b)(2) include the capacity hedging right Midwest TDUs are now seeking.

55. Further, we find that Congress's use of the term "financial transmission rights" in 2005 when it enacted section 217 supports the interpretation that section 217 was not intended to apply to capacity markets and thus does not shield LSEs from capacity market price separation. The LSEs' transmission rights protected by section 217 are referred to in the statute as "firm transmission rights" or "equivalent tradeable or financial transmission rights."[117] Congress did not define the term "financial transmission rights" in section 217 or elsewhere in EPAct 2005, thereby leaving it to the Commission to interpret this term when implementing section 217. Financial transmission rights had been established in PJM, ISO-NE, and New York Independent System Operator, Inc. (NYISO) by January 1, 2005,[118] and were also established in

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[115] 16 U.S.C. § 824q(b)(2); *see also* 16 U.S.C. § 824q(b)(1)(B).

[116] *CT DPUC*, 569 F.3d at 479.

[117] *See* 16 U.S.C. § 824q(b)(2)-(4). Section 217(b)(4) refers to "financial rights" rather than "financial transmission rights," but given the similar language in this context between section 217(b)(2) and section 217(b)(3) compared with section 217(b)(4), we presume that these terms have the same meaning.

[118] As discussed *infra*, section 217(c) provides in part that subsections 217(b)(1), (b)(2), and (b)(3) would not affect any existing or future methodology employed by a

MISO by August 8, 2005, the date section 217 was enacted as part of EPAct 2005.[119] These RTOs/ISOs used financial transmission rights to allow market participants to hedge against energy market price separation in systems where Locational Marginal Prices (LMP) were used to establish pricing for energy transactions.[120] Because financial transmission rights, as they existed and were understood at the time Congress considered and enacted section 217, had no relationship to the pricing of capacity or the locational value of capacity, we conclude that Congress did not intend in section 217 that firm transmission rights or financial transmission rights would entitle LSEs to have a hedge against capacity market price separation.

56. Section 217(c) supports this interpretation of financial transmission rights. Section 217(c) provides that sections 217(b)(1) through 217(b)(3) do not affect any existing or future methodology employed by an RTO/ISO for allocating or auctioning transmission rights if the RTO/ISO allocated financial transmission rights prior to January 1, 2005. In other words, the requirements of sections 217(b)(1) through 217(b)(3) do not require alteration of any existing or future methodology for PJM,[121] ISO-NE, and NYISO for allocating or auctioning transmission rights. Thus, section 217(c) demonstrates that Congress did not intend, or deem it necessary for purposes of section 217, to expand or reconfigure financial transmission rights in those three RTOs/ISOs to provide a hedge to capacity market price separation.

57. To accept Midwest TDUs' argument that section 217 entitles LSEs to have a hedge against capacity market price separation, we would have to interpret section 217 in

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transmission organization for allocating or auctioning transmission rights if it was authorized to do so as of January 1, 2005.

[119] *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997); *Cent. Hudson Gas & Elec. Corp.*, 88 FERC ¶ 61,306 (1999); *New England Power Pool*, 102 FERC ¶ 61,112 (2002).

[120] *See* Order No. 681, 116 FERC ¶ 61,077 at P 5 ("Financially, in LMP markets the price of congestion is measured as the difference in the cost of energy in the spot market at two different locations in the network. When such price differences occur, a congestion charge is assessed to transmission users based on their nodal injections and withdrawals. These price differences can be variable and difficult to predict. In order to manage the risk associated with the variability in prices due to transmission congestion, these markets use various forms of financial transmission rights . . . to allow market participants who hold the rights to protect against such price risks.").

[121] As discussed above, Midwest TDUs assert that the PJM is statutorily distinct from MISO claiming that pursuant to Section 217(c), unlike MISO, PJM is not subject to Section 217(b)(1)-(3). *See supra* 30.

a way that suggests that Congress intended that the firm transmission rights protected by section 217 must include a hedge against capacity market price separation, but only in the three RTOs/ISOs that had not established financial transmission rights prior to January 1, 2005. Such an interpretation is not reasonable absent express language from Congress.

58. In addition, NYISO had in place a locational capacity market that did not provide a hedging mechanism before Congress enacted EPAct 2005. It is reasonable to presume that Congress was aware that this market existed, and yet it allowed the capacity market differentials to continue for LSEs in that market along with NYISO's existing transmission rights allocation methodology. It is difficult to reconcile Midwest TDUs' interpretation of section 217 that Congress intended for MISO to offer LSEs a hedge against Auction price separation but did not require NYISO to provide LSEs such a hedge, simply because NYISO had been allocating financial transmission rights for its energy market on January 1, 2005. We find such interpretation illogical and not consistent with the intent of Congress as evidenced by what Congress required in the context of the existing factual situation at the time of enactment.[122]

59. Moreover, even if section 217 were interpreted to require that LSEs be shielded from Auction price separation as Midwest TDUs argue, MISO's current resource adequacy construct provides LSEs with reasonable protections against such price separation and thus would not contravene this statutory provision. As an initial matter, section 217 does not entitle LSEs to have a complete hedge against congestion but rather discusses meeting "the reasonable needs" of LSEs.[123] Among other things, it requires the Commission to exercise its authority to "enable[] [LSEs] to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet [their reasonable] needs."[124] Further, the Commission explained in Order No. 681 that it did not envision financial transmission rights, which apply in energy markets, to offer LSEs a "perfect hedge."[125] Indeed, Midwest TDUs have conceded that section 217 "can be satisfied by imperfect but substantial hedging of capacity deliverability charges—just as it is satisfied, under Order

[122] *See supra* para. 55.

[123] 16 U.S.C. § 824q(b)(4).

[124] *Id.*

[125] *See* Order No. 681, 116 FERC ¶ 61,077 at P 174. As noted in the February 2018 Order, in Order No. 681, the Commission applied the requirements of FPA section 217 to energy and ancillary services markets, and did not address capacity markets. February 2018 Order, 162 FERC ¶ 61,176 at P 87.

[No.] 681 and its implementation within MISO, by imperfect but substantial hedging of energy congestion charges."[126]

60. MISO's resource adequacy construct provides an opportunity to hedge against Auction price separation. First, as the Commission stated in the February 2018 Order, an LSE can sponsor transmission upgrades to accommodate its capacity arrangements.[127] By doing so, the LSE would qualify for a Zonal Deliverability Charge Hedge, which would provide it a perfect hedge against Auction price separation. We do not agree with Midwest TDUs' claim that the Zonal Deliverability Charge Hedge does not provide capacity resources a meaningful opportunity to hedge. Per the MISO Tariff provision and processes in the MISO Business Practices Manual, market participants must identify the network upgrade they are funding and the associated transmission service request in their application for the Zonal Deliverability Charge Hedge.[128] While it is true that a new network resource will only be evaluated for aggregate deliverability, this does not make the Zonal Deliverability Charge Hedge illusory. Rather, in the process of applying for firm transmission service from the new resource, an LSE can identify any network upgrades and thereby obtain a Zonal Deliverability Charge Hedge. Second, even if an LSE elects to procure capacity from a different Local Zone without sponsoring transmission upgrades, that LSE is still provided a partial hedge against Auction price separation through MISO's *pro rata* allocation of the Zonal Deliverability Benefit, which is based on the difference between the resource costs paid by LSEs in a given Local Zone and the revenues paid to resources that cleared in the Auction for that Local Zone.[129]

61. Finally, as noted above and discussed below,[130] MISO's resource adequacy construct currently includes HUC provisions. HUCs shield LSEs with pre-July 20, 2011 capacity arrangements from inter-zonal Auction price separation. Thus, with respect to these existing arrangements, HUCs provide LSEs a meaningful opportunity to hedge Zonal Deliverability Charges, which Midwest TDUs allege is required under section 217.

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[126] Midwest TDUs Request for Rehearing at 25.

[127] February 2018 Order, 162 FERC ¶ 61,176 at P 90; *see also* MISO, FERC Electric Tariff, Module E-1, § 69A.7.7(b) (33.0.0).

[128] *See* MISO, FERC Electric Tariff, Module E-1, § 69A.7.7(b) (33.0.0); MISO Resource Adequacy Business Practices Manual, § 5.4.2.

[129] *See* MISO, FERC Electric Tariff, Module E-1, § 69A.7.7(c) (35.0.0).

[130] *See supra* section I.B.

b. Whether Imposing the Zonal Deliverability Charge for Capacity from Existing Resources is Just and Reasonable

i. Midwest TDUs' Arguments

62. In addition to their arguments based on section 217, Midwest TDUs assert that the Commission should find that, absent an effective opportunity for LSEs to secure a substantial financial hedge against zonal deliverability charges for their longstanding resources, MISO's filing is not just and reasonable. Midwest TDUs contend that firm service commitments sunk prior to MISO's zonal construct should be honored, and that such capacity remain deliverable based on a price for transmission that, unlike the zonal deliverability charge, is cost-based and non-discriminatory.[131]

63. Midwest TDUs disagree with the Commission's findings in the February 2018 Order that "[s]hielding LSEs from locational price differentials . . . [w]ould undermine the functionality of the MISO [resource adequacy] construct and potentially harm reliability," and that zonal deliverability charges are "necessary to correctly value the locational aspects of capacity so that the system operator can ensure resource adequacy."[132] Midwest TDUs argue that allowing for hedging of zonal deliverability charges imposed on existing resources would not harm reliability.[133]

64. Midwest TDUs argue that the assumption that LSE resource planning will respond to price signals related to the inter-zonal deliverability of a particular resource depends on that signal preceding the LSE's long-term economic commitment to that resource.[134] Midwest TDUs contend that accordingly, if the Commission wishes to signal the deliverability cost consequences of a proposed new long-term resource, the Commission should confine the unhedged exposure to that signal to future resources. In addition, Midwest TDUs assert that Network Integration Transmission Service did not allow LSEs to disregard location when selecting their existing long-term resource commitments.[135] Midwest TDUs argue that deliverability factored into the planning for the acquisition of new capacity resources because it affected the pricing of the transmission service used to deliver the capacity and/or energy output of those resources. Finally, Midwest TDUs

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[131] Midwest TDUs Request for Rehearing at 26.

[132] *Id.* (quoting February 2018 Order, 162 FERC ¶ 61,176 at PP 85-86).

[133] *Id.* at 26, 48 n.129.

[134] *Id.* at 28.

[135] *Id.* at 30.

assert that the region has more than ample capacity, suitably distributed geographically, to reliably meet load.

65. Midwest TDUs argue that the Commission's approval of MISO's method of allocating the consequences of zonal capacity import limitations in the February 2018 Order is unduly discriminatory.[136] Midwest TDUs argue that section 217 calls for MISO to plan and effect the development of a transmission system that enables the value of LSEs' long-term power supply arrangements to reach their load on a financially firm basis. Midwest TDUs assert that financial firmness means that, if such development is not timely achieved, the consequences are to be shared broadly. Midwest TDUs assert that under the February 2018 Order, those consequences will no longer be shared.

66. Midwest TDUs argue that the section 217 statutory protection of the deliverability of LSEs' capacity resources reflects the long-established principle that LSEs who pay their fair share of transmission system costs are entitled to long-term-firm delivery of their long-term-firm resources, through first-come, first-served access to existing facilities and reflects the planning obligation of Transmission Providers to develop the grid so as to maintain firm deliverability.[137] Midwest TDUs argue that MISO will make individual transmission customers bear the financial consequences if new constraints arise and affect previously accepted network resources that are now deemed inter-zonal.[138] Midwest TDUs argue that it is arbitrary to place the consequences of such MISO non-performance disproportionately on individual transmission customers rather than uplifting them broadly.[139]

67. Midwest TDUs argue that this arbitrariness is even worse for transmission-dependent utilities, for at least two reasons.[140] First, Midwest TDUs assert that Transmission Owners are inherently better positioned than are transmission-dependent utilities to ensure that transmission planning and construction maintains firm delivery of their network resources. Second, they maintain that transmission-dependent utilities are more likely than Transmission Owners to find that

[136] *Id.* at 31.

[137] *Id.* at 10-11 (citations omitted).

[138] *Id.* at 32.

[139] *Id.*

[140] *Id.*

zonal boundaries lie between their resources and their loads.[141] Midwest TDUs explain that MISO's zonal boundaries place each of MISO's large and longstanding vertically integrated transmission owners in one particular Local Zone, while implicitly leaving many TDUs to be partitioned among multiple Local Zones. Midwest TDUs note that the first criterion by which MISO defines Local Resource Zones is "the electrical boundaries of Local Balancing Authorities,"[142] and they observe that Local Balancing Authority boundaries are the primary basis for the zonal boundaries.[143]

68. Midwest TDUs also contend that the distribution of zonal deliverability charge revenues (i.e., the Zonal Deliverability Benefit) is unduly discriminatory.[144] Midwest TDUs note that the surplus that is created when LSEs pay for capacity at a heightened load Local Zone price instead of receiving the value of their own capacity resources is distributed to all entities serving load in the "Deliverability Benefit Zone," i.e., the Local Zone or Zones that clear at the same heightened price as was paid by the LSE paying the zonal deliverability charge. Midwest TDUs contends that the payment by LSEs of the zonal deliverability charge and the distribution of the Zonal Deliverability Benefits is socialized expropriation, arguing that it inequitably diverts to others the fruits of the TDUs' acquisition of less expensive neighboring Local Zone resources to build or purchase.[145]

69. Midwest TDUs assert that the Commission has recognized that transmission pricing designed to charge more for crossing legacy transmission ownership boundaries is unduly discriminatory, and that the market distortion introduced by this discrimination weakens regional markets.[146] Midwest TDUs contend that, by applying this charge, the February 2018 Order reinstitutes a modified form of pancaked ratemaking against TDUs. Midwest TDUs argue that the MISO proposal is contrary to open access and market-independent system operation and is not reasonable.

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[141] *Id.* at 34-36.

[142] *Id.* at 34 (quoting MISO, FERC Electric Tariff, Module E-1, § 68A.3 (34.0.0)).

[143] *Id.* at 35.

[144] *Id.* at 33.

[145] *Id.*

[146] *Id.* at 36 (citing *Alliance Cos.*, 89 FERC ¶ 61,298, at 61,929 (1999), *order on reh'g and compliance*, 91 FERC ¶ 61,152 (2000), *order on reh'g and compliance*, 94 FERC ¶ 61,070, *order on reh'g*, 95 FERC ¶ 61,182 (2001)).

70. Midwest TDUs contend that, in Order No. 890-A, the Commission found that a proposal to make a disfavored class of customers disproportionately responsible for system shortfalls would be inconsistent with section 217.[147] Midwest TDUs argue that the February 2018 Order leaves partially intact, within Local Zones, the firm deliverability of service obligation capacity, noting that no zonal deliverability charge applies where the capacity resource and its load are located within the same Local Zone, even if there were intra-zonal congestion. Midwest TDUs contend that, because sections 205 and 206 preclude undue discrimination and undue preferences on the basis of locality, the February 2018 Order should have likewise respected the firm deliverability of service obligation resources between Local Zones.[148]

71. In addition, Midwest TDUs argue that the February 2018 Order fails to honor investment-backed reliance on the first-come, first-served open access that had been fundamental Commission policy.[149] Midwest TDUs argue that, by subjecting pre-July 2011 resources to zonal deliverability charges, the February 2018 Order amounts to an inequitable regulatory bait-and-switch. Midwest TDUs argue that under MISO's prior regional construct, MISO and its Transmission Owners were required to plan and build the MISO Transmission System so as to maintain the long-term, region-wide deliverability of designated network resources to load.[150] Midwest TDUs assert that LSEs entered into long-term commitments to inter-zonal resources in reliance on the regional construct. Midwest TDUs contend that the February 2018 Order adopts a new legal construct in which transmission customers are asked to take existing and later-arising transmission constraints as unyielding parameters, and modify their resource selections to live within them.

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[147] *Id.* at 37 (referencing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890-A, 121 FERC ¶ 61,297, at PP 23-24 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)).

[148] *Id.*

[149] *Id.*

[150] *Id.* at 38 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,062, at PP 46-49 (2007)).

ii. Determination

72. As discussed above,[151] after Midwest TDUs filed their request for rehearing, the Commission issued the October 2018 Order, which accepted MISO's enhancements to its resource adequacy construct, including MISO's HUC provisions. HUCs shield LSEs from inter-zonal Auction price separation with respect to pre-July 20, 2011 arrangements with internal resources. Further, as noted above, Midwest TDUs have stated that MISO's HUC provisions are consistent with section 217 and "go a long way toward mitigating [their section 217] concerns with regard to pre-July 2011 resources."[152] Accordingly, we find that with the Commission's acceptance of HUCs in the October 2018 Order, Midwest TDUs' arguments on rehearing with respect to MISO's imposition of the Zonal Deliverability Charge on LSEs that rely on existing resources (i.e., internal resources for which LSEs had rights predating July 20, 2011 and external resources for which LSEs had rights predating March 26, 2018) have effectively been addressed and therefore have become moot, and we need not further address these arguments.

c. Whether Imposing the Zonal Deliverability Charge for Capacity from New Resources is Just and Reasonable

i. Midwest TDUs' Arguments

73. Midwest TDUs argue that, absent a meaningful opportunity for LSEs to secure long-term financial hedges against inter-zonal Auction price separation for new resources, MISO's filing is not just and reasonable.[153] Midwest TDUs assert that the Commission should require MISO to correct that deficiency.

74. Midwest TDUs disagree with the Commission that "limit[ing]" hedges is necessary "to provide price signals to LSEs for where to locate resources" and "correctly value the locational aspects of capacity so that the system operator can ensure resource adequacy."[154] Midwest TDUs argue that hedging zonal deliverability charges would not harm reliability because LSEs already face Locational Clearing Requirements and other transmission charges (such as energy congestion and loss charges) that amply discourage

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[151] *See supra* section I.B.

[152] *See supra* P 6.

[153] Midwest TDUs Request for Rehearing at 44.

[154] *Id.* at 47 (quoting February 2018 Order, 162 FERC ¶ 61,176 at PP 85-86, 90).

them from making new commitments to inter-zonal resources that are already expected to face inter-zonal constraints.[155]

75. Midwest TDUs argue that a resource adequacy construct of an RTO or ISO should have a regional scope and a long-term orientation.[156] Midwest TDUs argue that, instead, by failing to provide a meaningful opportunity for LSEs to secure long-term financial hedges against inter-zonal Auction price separation, the Commission in the February 2018 Order wrongly balkanizes and truncates capacity markets.

76. Midwest TDUs assert that, if LSEs have no meaningful way to enjoy substantial assurance of receiving the capacity value of their power supply purchases, then they will be constrained to purchase locally. Midwest TDUs aver that a hurdle discouraging out-of-zone capacity resources will be erected, resulting in higher power supply costs for generation resource developers and LSEs alike. Midwest TDUs argue that this hurdle may result in a disconnect whereby resources are characterized as deliverable throughout MISO for purposes of determining market-based rate authority, "while constraints that effectively require local purchasing confer market power within more narrow markets."[157] Midwest TDUs assert that such a disconnect would be arbitrary and unreasonable and should not be permitted. Midwest TDUs contend that because establishing sub-MISO Local Zones balkanizes the market and the application of zonal deliverability charges re-introduces a form of delivery charge pancaking, they undermine the basis for treating the MISO Region as a single market for market-based rate purposes.[158] Midwest TDUs argue that zonal deliverability charges therefore should result in a narrower default relevant geographic market when sellers located within the submarket undergo market-based-rate analysis.

77. Further, Midwest TDUs argue that charges for crossing borders at which constraints arise after a purchase is committed will truncate capacity markets. Midwest TDUs argue that the February 2018 Order's refusal to assure the long-term-firm deliverability of long-term-firm resources works against the fundamental purpose of resource adequacy requirements by creating a perverse incentive for short-term, last-minute resources, which, according to Midwest TDUs, runs counter to Order No. 719.[159] Midwest TDUs contend that under the February 2018 Order, an LSE

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[155] *Id.*; *see also id.* at 26.

[156] *Id.* at 48.

[157] *Id.* at 48-49.

[158] *Id.* at 49 n.31.

[159] *Id.* at 49-50 (citing *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071, at PP 278-279 (2008), *order on reh'g*,

weighing a short-term versus a long-term commitment to a resource located in a neighboring Local Zone knows that a long-term commitment might leave it stuck paying zonal deliverability charges, i.e., stuck paying for the remote capacity at the higher price of local capacity. Midwest TDUs assert that the applicability of zonal deliverability charges may leave an LSE worse off if it is committed to a remote resource than if it is uncommitted. Midwest TDUs argue that the risk of zonal deliverability charges therefore will push the LSE to commit to the import for only so long as it can confidently predict zonal deliverability charges will not apply.

78. Midwest TDUs argue that the Commission should ensure that MISO sends price signals for the deliverability cost consequences of a proposed new long-term capacity resource when that new capacity resource is proposed for designation, not through after-the-fact annual zonal deliverability charges.[160] Midwest TDUs argue that, at the time an LSE proposes to designate a new network resource, an LSE cannot reasonably be expected to foresee zonal import constraints that arise after a purchase is committed.[161] Midwest TDUs assert that zonal deliverability charges imposed on deliveries will therefore constitute surprising and arbitrary penalties rather than incentives that would effectively steer LSEs away from those resources. Midwest TDUs contend that imposing an unfair distribution of the consequences of that surprise therefore will not solve the reliability concern. Instead, Midwest TDUs support the use of robust transmission and construction to address the reliability concern.[162]

79. Midwest TDUs argue that the February 2018 Order approves an elaborate set of rules that increases the likelihood of the transmission system becoming insufficiently robust by reversing incentives to plan and build transmission facilities needed to maintain ongoing deliverability.[163] Midwest TDUs argue that the reliability benefits of switching to this new construct, under which capacity may be priced higher when it crosses zonal borders, are not clear. Midwest TDUs argue that zonal deliverability charges fail to ensure planning and construction of transmission facilities and will discourage it. Specifically, Midwest TDUs assert that unhedgeable zonal deliverability charges will enable MISO's major vertically integrated transmission owners to profit from persistent transmission constraints that inhibit capacity deliverability, by raising Auction Clearing

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Order No. 719-A, 128 FERC ¶ 61,059, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009)).

[160] *Id.* at 30 n.92; *see also id.* at 49-50.

[161] *Id.* at 49-50.

[162] *Id.* at 50-51.

[163] *Id.* at 51.

Prices when transmission constraints are allowed to persist, and then distributing the extra revenue predominantly to the entities in that Local Zone (and similarly priced Local Zones) that have the most load. Accordingly, Midwest TDUs argue that unhedgeable zonal deliverability charges undermine the transmission predicate to any effective regional market for capacity.[164]

ii. <u>Determination</u>

80. We deny rehearing. Midwest TDUs' concerns regarding the competitive impacts of locational market mechanisms must be assessed in the context of the purpose of a resource adequacy construct, namely ensuring reliability. The relevant analysis for reliability in MISO's resource adequacy construct is the annual local reliability analysis of Local Clearing Requirements, Capacity Import Limits, and Capacity Export Limits. This analysis goes beyond simply providing firm transmission service and transmission planning, as discussed below. Midwest TDUs' preferred resource adequacy construct, which would shield new resources against inter-zonal Auction price separation, would not account for local resource availability or Local Zone capacity limits, thereby negating the purpose of a resource adequacy construct to ensure reliability on the peak day. The proposed MISO construct appropriately balances the competing goals of maximizing competition and ensuring reliability by allowing LSEs to serve their load with remote resources but having them bear the risk of Auction price separation if there are impediments to the deliverability of such resources. For this reason, we affirm the Commission's determination in the February 2018 Order that the Zonal Deliverability Charge is just and reasonable.

81. We disagree with Midwest TDUs' contention that Local Clearing Requirements and other transmission charges already amply discourage LSEs from making new commitments to inter-zonal resources that are expected to face inter-zonal constraints. Absent the Zonal Deliverability Charge, Local Clearing Requirements would have no impact on LSEs with resources in lower-priced Local Zones because those LSEs could avoid the high Auction Clearing Prices elicited by the Local Clearing Requirements by using a Fixed Resource Adequacy Plan. We also disagree with Midwest TDUs' argument that MISO should use robust transmission planning and construction rather than Zonal Deliverability Charges to address the reliability concerns, specifically limits in aggregate deliverability. Having found MISO's proposal just and reasonable under

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[164] *Id.* at 52.

section 205 of the FPA, the Commission is not required to consider whether the Zonal Deliverability Charge is more or less just and reasonable than other alternatives.[165]

82. Moreover, Midwest TDUs' arguments against the need for locational price signals contravene the Commission's prior directives for a locational mechanism in MISO's Resource Adequacy construct that recognizes the impact of transmission constraints in resource planning.[166] MISO's proposal in this proceeding complies with the Commission's prior directives to incorporate locational market mechanisms that address deliverability and thereby ensures that sufficient capacity is available in import-restricted Local Zones. For example, the Commission expressed its concern that transmission constraints would limit aggregate deliverability in the Locational Requirements Order addressing MISO's prior resource adequacy construct.[167] The Commission explained "that a more robust and permanent approach to addressing congestion that limits aggregate deliverability is ultimately required."[168] In order to resolve these deliverability concerns, the Commission directed MISO to evaluate locational capacity requirements in other regions to ensure sufficient capacity is available in import-restricted Local Zones to satisfy reliability requirements. Further, the Commission directed MISO to "inform the Commission . . . what steps are being taken to develop a more permanent approach."[169]

83. The Commission subsequently rejected MISO's filing submitted in compliance with the Locational Requirements Order because MISO had failed to address aggregate deliverability in the region.[170] Although MISO had argued that its transmission planning processes had been sufficient in addressing constraints that may limit deliverability and that its studies had revealed no local reliability problems for many years out,[171] the

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[165] *See Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984), *cert denied*, 469 U.S. 917 (1984); *OXY USA Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995); *Cal. Indep. Sys. Operator Corp*., 128 FERC ¶ 61,265, at P 21 (2009).

[166] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 126 FERC ¶ 61,144, at P 47 (2009) (Locational Requirements Order), *order rejecting compliance filing*, 131 FERC ¶ 61,228, at PP 23-24, 26-27 (2010) (Locational Requirements Compliance Order), *order on clarification*, 135 FERC ¶ 61,081 (2011).

[167] Locational Requirements Order, 126 FERC ¶ 61,144 at P 47.

[168] *Id.*

[169] *Id.*

[170] Locational Requirements Compliance Order, 131 FERC ¶ 61,228 at P 23.

[171] *See id.* PP 8-9.

Commission required MISO to implement a permanent approach to address congestion that limits aggregate deliverability.[172] The Commission further directed MISO to utilize market mechanisms such as locational pricing and locational market rules that provide incentives for market participants to obtain sufficient local resources to ensure reliability.[173] The Commission clarified that the Locational Requirements Order requires MISO to "develop a plan that details the steps that will be taken to incorporate [locational] market mechanisms into the Resource Adequacy Plan."[174] Consequently, contrary to assertions by Midwest TDUs, MISO's proposal is not a departure from the pre-existing construct. The Commission only conditionally approved the preexisting construct on the condition that MISO add a locational element, a requirement that the Zonal Deliverability Charge satisfies. Accordingly, MISO's proposal in this proceeding complies with the Commission's prior directives to incorporate locational market mechanisms that address deliverability and thereby ensures that sufficient capacity is available in import-restricted Local Zones. In contrast, Midwest TDUs' suggestion that MISO should rely exclusively on transmission planning and construction would not recognize the impact of transmission constraints in resource planning.

84. Nor are we persuaded by Midwest TDUs' assertion that the Zonal Deliverability Charge will discourage the planning and construction of transmission between Local Zones. Although Midwest TDUs argue that the Zonal Deliverability Charge could provide an incentive for vertically integrated transmission owners to profit from constraints, the Commission has established policies for open and transparent transmission planning in Order Nos. 890[175] and 1000,[176] which protect against, *inter alia*, the exercise of vertical market power.[177] Midwest TDUs provide no explanation of how

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[172] *Id.* P 23.

[173] *Id.* P 24.

[174] *Id.*

[175] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, at PP 418-425 (2007) (subsequent history omitted).

[176] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, at P 70 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41 (D.C. Cir. 2014).

[177] *See* Order No. 890, 118 FERC ¶ 61,119 at P 1747 ("[W]e have long held that the existence of an OATT is deemed to mitigate vertical market power and transmission market power held by a transmission provider and its affiliates in a particular market.").

these requirements would no longer be effective, and therefore we have no basis for concluding that the Zonal Deliverability Charge would negate the impact of these orders. For example, the revenues and profits of transmission owners in MISO are regulated under cost-of-service regulation. Generally, transmission owners in MISO cannot profit by selling their excess generation at higher prices in the long run from constraints created from failing to expand transmission capacity because such revenues are credited against retail rates. Moreover, Order No. 1000 provides a process to expand transmission capacity when and where additional transmission capacity is needed. Additionally, the MISO resource adequacy construct—which includes the Zonal Deliverability Charge—that Midwest TDUs decry has been in place since 2012. No party has presented evidence on the record that such balkanization, if it exists, has hindered transmission development during this time. Accordingly, we consider Midwest TDUs' concern to be speculative.

85. We also disagree with Midwest TDUs' claim that MISO's application of the Zonal Deliverability Charge reintroduces a form of delivery charge pancaking, as the Zonal Deliverability Charge is not a charge for transmission service. Rather, the Zonal Deliverability Charge represents Auction price separation between the location of the LSE's resource and its load. Locational Auction Clearing Prices ensure that LSEs pay for capacity based on the cost of capacity where that capacity is provided and relied upon, namely at the load location. As discussed in the February 2018 Order, the Zonal Deliverability Charge is necessary in order to send a price signal regarding the relative values of resources in different locations so that the system operator can ensure resource adequacy.[178] Binding transmission constraints exist when system demand exceeds available transmission capability, which can occur irrespective of the amount of firm transmission service rights issued by the transmission provider. Thus, having firm transmission service is not a guarantee against Auction price separation between Local Zones. As discussed above, the Commission recognized in the Locational Requirements Order that transmission constraints could limit aggregate deliverability.[179]

86. Accordingly, an LSE having firm transmission service is not relevant to what constitutes the cost of capacity to serve its load. As the resource location is not where the capacity is being provided and relied upon, the cost of a new capacity resource at the resource location under a long-term commitment does not necessarily constitute the cost of capacity to serve load in a different location. MISO's annual local reliability analysis for each Planning Year is not based on long-term firm transmission rights. Rather, MISO annually evaluates the Local Clearing Requirements in each Local Zone based on an

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[178] *See* February 2018 Order, 162 FERC ¶ 61,176 at PP 85-86.

[179] Locational Requirements Order, 126 FERC ¶ 61,144 at P 47.

assessment of the Local Reliability Requirement, the Zonal Import Ability, and controllable exports.[180]

87. Thus, when LSEs pay a locational market price, they are not paying for transmission service. Instead, they are paying a locational market price based on the market-clearing price for capacity in the Local Zone. Therefore, the locational market price is not another layer of costs or "pancaked costs" on top of the transmission service charge. Similarly, as noted above, the Zonal Deliverability Charge arising from the locational component of MISO's resource adequacy construct is not a transmission service charge. As such, contrary to Midwest TDUs' claim, the Zonal Deliverability Charges does not undermine the basis for treating the MISO region as a single market for market-based rate purposes.

88. Further, we disagree with Midwest TDUs' arguments that the Zonal Deliverability Charge that results from zonal Auction Clearing Prices represent "surprising and arbitrary penalties" on LSEs that build or acquire rights to resources from outside their Local Zone and that MISO should send price signals to LSEs when a new resource is proposed for designation and not through after-the-fact annual zonal deliverability charges.[181] Midwest TDUs essentially argue that, for the life of an LSE's new resource or agreement, the LSE should be insulated from yearly Auction price separation. However, as noted above, we consider it appropriate that the value of capacity reflect the locational cost of capacity. Therefore, it would be unreasonable to suspend zonal Auction Clearing Prices an LSE faces after designating the new resource for the entire life of a resource.

89. We agree with Midwest TDUs that an LSE cannot be reasonably expected to foresee, with perfect precision, zonal import constraints that arise after a purchase is committed. However, the lack of perfect precision does not mean that such decisions cannot be informed by current and potential constraints. Where there is already a constraint, or data is released by MISO indicating that the Local Clearing Requirement, Capacity Import Limit, or Capacity Export Limit are close to binding, such information should inform LSEs' resource decisions. LSEs may acquire resources located physically far from their load but it is appropriate that they—and not other market participants—bear the risk of constraints and resulting Auction price separation.

90. In sum, the Zonal Deliverability Charge ensures that an LSE that acquires a new resource outside a constrained Local Zone pays a price for capacity that reflects the locational cost of capacity. LSEs that designate a resource in their Fixed Resource Adequacy Plan in each Planning Year are designating resources that have been

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[180] MISO, FERC Electric Tariff, Module E-1, § 68A.6 (35.0.0); *see also* October 2018 Order, 165 FERC ¶ 61,067 at P 130 & n.219.

[181] *See* Midwest TDUs Request for Rehearing at 50.

interconnected and have been determined to have deliverability to the MISO network. However, the cost of capacity is appropriately based on the locational cost of capacity in the load Local Zone—where the capacity is being provided and relied upon—as reflected in a market-based charge, the Zonal Deliverability Charge, that recognizes the impact of transmission constraints and Local Reliability Requirements.

B. Auction Participation

1. February 2018 Order

91. In the February 2018 Order, the Commission acknowledged that the Auction is voluntary for buyers (i.e., LSEs) and mandatory for sellers, but disagreed with protesters' assertions that this treatment is unduly discriminatory. The Commission explained that, although buyers do have the option to refrain from procuring sufficient capacity to meet their Reserve Requirements, doing so comes at a significant cost (i.e., the Capacity Deficiency Charge).[182] The Commission noted that no LSE has ever paid the Capacity Deficiency Charge, concluding that the charge has been effective in encouraging LSEs to satisfy their full Reserve Requirements. The Commission also explained that, although the MISO Tariff requires sellers to offer uncommitted resources into the Auction, sellers are not bound to this requirement if they sell their capacity bilaterally or to a neighboring region. The Commission found that there need not be perfect symmetry between the mitigation for buyers and sellers because of differences in how they might be able to exercise market power.[183]

92. The Commission disagreed with the notion that LSEs have the ability to exercise buyer-side market power by toggling between procuring capacity in the Auction and submitting Fixed Resource Adequacy Plans. The Commission asserted that capacity sellers have the same—if not greater—ability to similarly toggle between selling capacity in the Auction and bilaterally, and that capacity sellers have the option to sell capacity directly to LSEs in MISO through bilateral contracts, through the Auction, to buyers or RTOs/ISOs in neighboring regions, or through a combination of the three. The Commission explained that, through these options, capacity sellers can pursue whichever strategy they expect to maximize revenues so long as they do not violate the MISO Tariff or manipulate the market.[184]

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[182] February 2018 Order, 162 FERC ¶ 61,176 at PP 61-62.

[183] *Id.*

[184] *Id.* PP 63-65.

2. Request for Rehearing

93. Suppliers argue that the Commission failed to properly address their arguments that it is unduly discriminatory for the Auction to be voluntary for buyers and mandatory for sellers. Suppliers take issue with the Commission's explanations that "sellers are not bound to this requirement if they sell their capacity bilaterally or to a neighboring region" and that "capacity sellers have the same—if not greater—ability [as LSEs] to similarly toggle between selling capacity bilaterally and through the Auction."[185] Suppliers assert that the Commission failed to respond to their argument that "[t]here is no basis for the Commission's apparent assumption that bilateral contracts at compensatory prices are available for the taking whenever an independent generator is not recovering its costs in organized auction markets."[186]

3. Determination

94. We continue to find that it is not unduly discriminatory for the Auction to be voluntary for buyers and mandatory for sellers who have uncommitted capacity. As an initial matter, while the Commission has an obligation to ensure that similarly situated market participants are not unduly discriminated against in the provision of jurisdictional services, it does not follow that market participants who are *not* similarly situated are unduly discriminated against simply because they are subject to different sets of rules.[187] Suppliers do not argue that Auction buyers and sellers—who are situated on opposite ends of the MISO resource adequacy construct—are similarly situated, nor do Suppliers argue that the service sought is the "same service" (i.e., that sellers and buyers are seeking the same service).

95. Suppliers argue that the Commission erred in the February 2018 Order by failing to respond to their argument that "[t]here is no basis for the Commission's apparent assumption that bilateral contracts at compensatory prices are available for the taking whenever an independent generator is not recovering its costs in organized auction

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[185] Suppliers Request for Rehearing at 19 (quoting February 2018 Order, 162 FERC ¶ 61,176 at PP 61, 65).

[186] *Id.* (quoting NRG Companies and Dynegy Companies Protest at 18).

[187] *See, e.g., City of Vernon v. FERC*, 845 F.2d 1042, 1045-46 (D.C. Cir. 1988) (setting forth a two-part test for discriminatory treatment where different rates or services are offered, requiring a showing that the unequally treated customers are "similarly situated" and that the service sought is the "same service" actually offered elsewhere).

markets."[188] However, the Commission has never made this assumption. In the 2015 Rehearing Order, the Commission was clear that neither the Auction nor bilateral contracts must assure merchant generator viability in order to be just and reasonable, so long as the prices in the market reflect supply and demand conditions.[189] To the extent that Suppliers argue that MISO's Auction is unjust and unreasonable because, even with the option for a merchant generator to pursue a bilateral contract in lieu of participating in the Auction, a merchant generator may not guarantee full cost recovery, we address that, and similar arguments, below.[190] Regardless, Suppliers have not demonstrated that it is unduly discriminatory for the Auction to be mandatory for sellers on the sole basis that the Auction does not guarantee merchant generator viability.

C. <u>Just and Reasonable Rates</u>

1. <u>February 2018 Order</u>

96. The Commission found in the February 2018 Order that MISO's resource adequacy construct enables the MISO region to maintain sufficient capacity to maintain the one day in 10 year reliability standard and, therefore, results in just and reasonable rates.[191] The Commission explained that capacity prices (i.e., Auction Clearing Prices) may be below the net Cost of New Entry when the RTO/ISO region features surplus capacity.[192] The Commission disagreed with arguments that generators in MISO cannot recover their costs, and noted that the Market Monitor stated that most resources' energy and ancillary services revenues entirely cover their net going-forward costs.[193] The

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[188] Suppliers Request for Rehearing at 19 (quoting NRG Companies and Dynegy Companies Protest at 18).

[189] 2015 Rehearing Order, 153 FERC ¶ 61,229 at P 110 ("Such resources could sell capacity as part of long-term bilateral contracts, locking in a level of capacity revenues based on their expected value over the life of the agreements or could sell their capacity in the auction each year. In neither case must rates, in order to be just and reasonable, assure viability of such resources, so long as the prices in the market reflect supply and demand conditions.").

[190] *See infra* section III.C.

[191] February 2018 Order, 162 FERC ¶ 61,176 at P 58; *see also id.* P 69.

[192] *Id.* P 59 (citing *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 35 (2008)).

[193] *Id.* (citing Motion to Intervene Out of Time and Protest of the Market Monitor at 9 (Market Monitor Protest)).

Commission stated that the Auction Clearing Prices correlated with movements in supply and demand conditions, and found that the low capacity prices in MISO accurately reflect MISO's capacity surplus.[194]

2. Requests for Rehearing

97. The Market Monitor argues that the February 2018 Order is arbitrary and capricious because it departs from Commission precedent and policy without adequate explanation. According to the Market Monitor, the standard in assessing the justness and reasonableness of a capacity market design is whether it will produce price signals sufficient to attract and retain the necessary amount of capacity.[195] The Market Monitor states that the Commission cited the goal of providing appropriate price signals in its orders approving the use of a sloped demand curve in NYISO, PJM, and ISO-NE.[196] The Market Monitor asserts, however, that the MISO resource adequacy construct does not attract and retain needed capacity because it fails to accurately model the incremental value of demand and therefore misprices capacity.[197] The Market Monitor argues that the February 2018 Order failed to respond to the arguments related to the "attract and retain" standard.[198]

98. The Market Monitor argues that, although the Commission is "afforded wide latitude in rate-setting due to its expertise and broad statutory mandate,"[199] there is a zone of reasonableness bounded by investor interest against confiscation and consumer interest

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[194] *Id.* P 60.

[195] Market Monitor Request for Rehearing at 15-16 & n.34 (quoting *N. Y. Indep. Sys. Operator, Inc.*, 111 FERC ¶ 61,117, at P 25 (2005) ("The purpose of [a capacity] requirement is to ensure a minimum amount of capacity in the market to promote reliability, and thus, to elicit additional capacity that might not otherwise enter the market.")).

[196] *Id.* at 17-18 (citing *N. Y. Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,201, at PP 35-36, *reh'g denied*, 105 FERC ¶ 61,108 (2003); *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (2006); *ISO New England, Inc.*, 153 FERC ¶ 61,338, at P 12 (2015)).

[197] *Id.* at 18.

[198] *Id.* at 18-20.

[199] *Id.* at 20 (quoting *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 210 (D.C. Cir. 2018)).

against exorbitant rates.[200] According to the Market Monitor, a rate, term, or condition of jurisdictional service that falls outside of this zone of reasonableness is not just and reasonable.[201] Quoting the Supreme Court's decision in *FPC v. Hope Natural Gas Co.*, the Market Monitor argues that rates must be sufficiently high to "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed . . . ."[202]

99. The Market Monitor asserts that MISO's resource adequacy construct is unjust and unreasonable because it does not afford suppliers a reasonable opportunity to recover their costs.[203] According to the Market Monitor, "a market structure that consistently results in near-zero prices on the ground that the effects of such prices can be mitigated by state subsidies for a subset of participants, implies that prices are unreasonably low for others."[204] The Market Monitor contends that the Commission failed to explain how the impacts of near-zero capacity prices on competitive suppliers could be reasonable.[205]

100. The Market Monitor asserts that older, higher-cost existing resources, which are needed and economic for resource adequacy, and new resources being developed by competitive suppliers cannot cover their going-forward costs through energy and ancillary services revenues.[206] The Market Monitor argues that a competitive supplier will not enter the market and make necessary capacity investment without an expectation

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[200] *Id.* (citing *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 14 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951)).

[201] *Id.*

[202] *Id.* at 21 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 602 (1944) (*Hope*)).

[203] *Id.* at 21-22 (citing *Bridgeport Energy*, LLC, 113 FERC ¶ 61,311, at P 29 (2005) ("[T]he Commission has no obligation in a competitive marketplace to guarantee Bridgeport its full traditional cost-of-service. Rather, in a competitive market, the Commission is responsible only for assuring that Bridgeport is provided the opportunity to recover its costs.")).

[204] *Id*. at 12.

[205] *Id*. at 13.

[206] *Id.* at 22-23.

that it will be able to recover its costs.[207] According to the Market Monitor, because there is no such expectation of cost recovery under the existing resource adequacy construct, the amount of available capacity in MISO will continue to fall.[208]

101. The Market Monitor argues that the Commission erred by finding that MISO's "resource adequacy construct enables the MISO region to maintain sufficient resources to meet system-wide and locational Reserve Requirements and, thus, results in just and reasonable rates."[209] The Market Monitor asserts that: (1) this finding incorrectly assumes that MISO's capacity market prices played a meaningful role in producing the current capacity surplus; (2) the new resources built in MISO over the past decade have been built by vertically integrated utilities whose capacity costs are supported by retail rates; and (3) nearly ten percent of MISO's load is not served by vertically integrated utilities and a similar amount of MISO's generation is owned by competitive suppliers. According to the Market Monitor, there is no evidence that MISO's capacity surplus will continue into the future. The Market Monitor contends that the capacity surplus has been falling for two reasons: (1) vertically integrated utilities do not need to build new resources if they have sufficient resources to satisfy their capacity requirements; and (2) because the MISO markets do not provide sufficient revenue for existing resources with substantial going-forward costs, competitive suppliers have been exporting capacity or retiring their resources.[210]

102. The Market Monitor disagrees with the Commission's finding that "low capacity prices . . . accurately reflect MISO's capacity surplus."[211] The Market Monitor states that the Commission failed to demonstrate that the near-zero capacity prices accurately reflect the surplus level in MISO. The Market Monitor asserts that, by stating that capacity prices may be below the net Cost of New Entry in an RTO/ISO region that features surplus capacity, the Commission established an unreasonable standard. The Market Monitor claims that any capacity price between \$0/MW-day and \$250/MW-day would

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[207] *Id.* at 23. The Market Monitor states that the capital costs for such new resources are not yet sunk and thus there must be an expectation of cost recovery for investment to occur. *Id.*

[208] *Id.*

[209] *Id.* at 5 (quoting February 2018 Order, 162 FERC ¶ 61,176 at P 58).

[210] *Id.* at 5-7.

[211] *Id.* at 7 (quoting February 2018 Order, 162 FERC ¶ 61,176 at P 60).

satisfy that standard, and therefore the Commission's "seeming view" eliminates the possibility that it could find any capacity price to be unjust and unreasonable.[212]

103. The Market Monitor also disputes the Commission's observation that capacity prices over the last three years of data correlate to movements in supply and demand conditions.[213] The Market Monitor argues that this correlation disappears if: (1) the capacity price for the 2016/2017 Auction is adjusted to reflect greater sub-regional deliverability; and (2) the 2014/2015 Auction is also considered. The Market Monitor asserts that MISO's capacity surplus of 2,000 MW to 4,000 MW is only around one to three percent of the market, which the Market Monitor explains clears over 140,000 MW. The Market Monitor also argues that the Commission ignored the Market Monitor's demonstration that an efficiently designed market would clear at approximately $115/MW-day.[214]

104. The Market Monitor claims that the February 2018 Order mischaracterized the Market Monitor's following statement regarding why most suppliers offer capacity into the Auction at near-zero prices: "Because most existing resources earn enough energy and ancillary services revenues to entirely cover their going-forward costs[], the net [going-forward cost] is zero or very close to zero."[215] According to the Market Monitor, the February 2018 Order cited this statement as the sole basis for rejecting arguments that MISO's resource adequacy construct does not provide competitive suppliers with a reasonable opportunity to recover their costs. The Market Monitor argues that its statement was limited to most existing resources and thus does not encompass new resources or all existing resources.[216]

105. Main Line states that the Commission erred in accepting a resource adequacy construct that fails to produce just and reasonable rates in competitive retail areas and that unduly discriminates against merchant generators.[217] Main Line argues that the

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[212] *Id.* at 7-8.

[213] *Id.* at 9 (citing February 2018 Order, 162 FERC ¶ 61,176 at P 60). The Market Monitor also claims that the Commission introduced evidence not in the record by referencing the Auction Clearing Prices from the 2015/2016, 2016/2017, and 2017/2018 Auctions. *Id.*

[214] *Id.* at 9-10.

[215] *Id.* at 14 (quoting Market Monitor Protest at 9).

[216] *Id.*

[217] Main Line Request for Rehearing at 5.

Commission's finding contradicts section 205 because MISO's resource adequacy construct does not provide rational price signals for market participants and discriminates against merchant generators by not permitting them to recover their costs.[218] Main Line argues that the Commission ignored record evidence that the price signals for competitive retail states are neither meaningful for reliability nor rational for merchant generators.[219]

106. Suppliers argue that the Commission failed to consider the interests of independent power producers or ensure that they have a reasonable opportunity to recover their costs of invested capital.[220] Suppliers state that, while prices may be less than net Cost of New Entry in a given year, the combined flaws of MISO's resource adequacy construct produce a long string of zero or low Auction Clearing Prices that provide no meaningful signal to the market.[221] Suppliers argue that the Commission repeatedly ignored or glossed over serious concerns that flawed aspects of MISO's market design would consistently produce Auction Clearing Prices that are near zero.[222] Suppliers also argue that the Commission failed to acknowledge capacity prices are only a fraction of net Cost of New Entry and note that the highest clearing price to date, $72/MW-day in Local Zones 2-7 in the 2016/2017 Auction, represented approximately one quarter of net Cost of New Entry. Suppliers state that the Commission failed to explain how suppliers can expect to recoup their investments with these low capacity prices.[223]

107. Suppliers argue that the Commission's statement that prices will be low when there is excess capacity does not constitute a meaningful response to Suppliers' arguments that MISO's market rules are designed to consistently result in unjust and unreasonably low clearing prices.[224] Suppliers note MISO's past recognition that existing rules have proven inadequate in competitive retail choice areas and that they are

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[218] *Id.* at 5-6 (citing February 2018 Order, 162 FERC ¶ 61,176 at PP 67, 73, 76).

[219] *Id.* at 7.

[220] Suppliers Request for Rehearing at 7.

[221] *Id.* at 8.

[222] *Id.* at 16 (citing NRG Companies and Dynegy Companies Protest at 12).

[223] *Id.* at 9-10 (citing Market Monitor Protest at 5).

[224] *Id.* at 8-9 (citations omitted).

unlikely to attract enough merchant capacity to meet the one day in ten year reliability standard.[225]

3. Determination

108. We deny rehearing. We find that, consistent with the discussion on MISO's utilization of a vertical demand curve below,[226] MISO's high proportion of vertically integrated utilities differentiates MISO from NYISO, PJM, and ISO-NE. Therefore, contrary to the Market Monitor's assertion, MISO's resource adequacy does not depend entirely upon MISO Auction Clearing Prices. We reiterate that state and local authorities play an active role in ensuring resource adequacy, even those states with retail competition (i.e., Illinois and Michigan). We are not persuaded by the Market Monitor's arguments that MISO's resource adequacy construct does not attract and retain sufficient capacity, and we continue to find that MISO's resource adequacy construct enables the MISO region to maintain sufficient resources to meet system-wide and locational Reserve Requirements. If there are future needs for local or regional capacity within the MISO region, Auction Clearing Prices should increase to reflect such needs. We note that the Organization of MISO States (OMS)-MISO Survey indicates that the MISO region will continue to maintain sufficient resources through 2022.[227] Moreover, MISO's proposed Tariff provisions accepted in the February 2018 Order require MISO to post the Auction results on its public website.[228] Although neither the OMS-MISO Survey nor the Auction results provide forward price signals, they provide suppliers and LSEs substantial information on a zonal and region-wide basis to better understand supply and demand fundamentals and to make informed investment decisions.

109. We disagree with the Market Monitor's argument that Auction Clearing Prices for competitive suppliers are insufficiently high to protect investor interests in contravention of *Hope*, and we are similarly unpersuaded by Main Line's or Suppliers' assertions that the Auction is unduly discriminatory. We find that independent generators are afforded a reasonable opportunity to recover costs in MISO's capacity, energy, and ancillary services markets, even though revenues from the Auction are not insulated from the effects of surplus capacity, which may result in Auction Clearing Prices below the net

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[225] *Id.* at 13-14 (citing MISO, Filing, Docket No. ER17-284-000, at 2 (filed Nov. 1, 2016) (Competitive Retail Solution Filing)).

[226] *See infra* section III.D.

[227] *See* MISO Filing, Tab F, Prepared Direct Testimony of Laura Rauch at 15.

[228] MISO, FERC Electric Tariff, Module E-1, § 69A.7 (34.0.0).

Cost of New Entry.[229] As the Supreme Court noted in *Hope*, "regulation does not [e]nsure that the business shall produce net revenues.[230]

110. Contrary to arguments by the Market Monitor, Main Line, and Suppliers, the Auction Clearing Prices in MISO do not demonstrate that MISO's resource adequacy construct is unjust, unreasonable, unduly discriminatory or preferential. Rather, the Auction Clearing Prices in MISO reflect the surplus of capacity. The Market Monitor's assertion that such reasoning would validate any Auction Clearing Price between $0/MW-day and $250/MW-day ignores the fact that MISO's resource adequacy construct ensures just and reasonable rates through price signals that reflect available capacity rather than any particular price. Section 205 does not require that, for a resource adequacy construct to be just and reasonable, the construct must place a value on capacity above that which is needed to satisfy the resource adequacy requirement. Indeed, MISO's resource adequacy construct need not incentivize independent generators to build, retro-fit, or maintain existing resources when there is a capacity surplus.

111. Finally, we are not persuaded by the Market Monitor's assertion that including the 2014/2015 Auction Clearing Price along with the price changes over the last three years proves the lack of correlation between Auction Clearing Prices and movements in supply and demand. We reiterate the February 2018 Order's finding that the overall trend suggests that Auction Clearing Prices are accurately reflecting the corresponding demand for and supply of capacity.[231]

D. <u>Demand Curve</u>

1. <u>February 2018 Order</u>

112. In the February 2018 Order, the Commission found that, given the extremely high proportion of vertically integrated utilities and the active role that states have played in ensuring resource adequacy, the vertical demand curve is just and reasonable for use in MISO's resource adequacy construct.[232] The Commission stated that recognizing the diminishing marginal benefits of excess capacity was not essential to ensuring that LSEs in MISO acquired sufficient capacity to maintain the one day in 10 year reliability standard. The Commission explained that accepting both vertical and sloped demand

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[229] *See N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 35.

[230] *Hope*, 320 U.S. at 603 (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942)).

[231] February 2018 Order, 162 FERC ¶ 61,176 at P 60.

[232] *Id.* PP 67-69.

curves in different markets is consistent with precedent that filings made under section 205 "need not be the only reasonable methodology, or even the most accurate," so long as it is just and reasonable.[233]

2. **Requests for Rehearing**

113. The Market Monitor disagrees with the Commission's finding that the vertical demand curve is just and reasonable for use in MISO's resource adequacy construct.[234] The Market Monitor argues that the market design fails to accurately model the incremental value of demand and therefore fundamentally misprices the capacity procured in the Auction.[235] Further, the Market Monitor argues that the Commission has failed to establish a rational connection showing that, because the MISO region is characterized by relatively high participation by vertically integrated utilities subject to state regulation a vertical demand curve is just and reasonable.[236]

114. The Market Monitor and Suppliers argue that the February 2018 Order failed to address arguments regarding market volatility.[237] They argue that the price volatility caused by MISO's use of a vertical demand curve renders MISO's resource adequacy construct unjust and unreasonable because the construct cannot produce efficient long run economic price signals. The Market Monitor contends that, although an efficient market should produce volatile prices when there is volatility in supply or demand, market design elements (e.g., the vertical demand curve) should not cause the volatility.[238] The Market Monitor points out that the Commission previously found:

> When vertical demand curves are used, even small increases or decreases in supply can result in large changes in price, because a fixed amount of capacity must be procured. In addition, because a small decrease in supply can lead to a

[233] *Id.* P 68 (quoting *Oxy USA, Inc. v. FERC*, 64 F.3d at 692).

[234] Market Monitor Request for Rehearing at 11 (citing February 2018 Order, 162 FERC ¶ 61,176 at P 68).

[235] *Id*. at 18, 22.

[236] *Id.* at 11.

[237] *Id.* at 13; Suppliers Request for Rehearing at 11-12, 19-20.

[238] Market Monitor Request for Rehearing at 13.

> significantly higher price, sellers may have an incentive to withhold certain resources.[239]

Main Line and the Market Monitor observe that the Commission has approved the use of a sloped demand curve in NYISO, PJM, and ISO-NE.[240]

115. Suppliers similarly argue that the Commission failed to consider the fact that MISO had previously sought to implement a sloped demand curve when it made its Competitive Retail Solution Filing.[241] Suppliers cite the Brattle Group's testimony in that filing to explain how a vertical demand curve makes prices extremely volatile because even a small surplus drives prices close to zero while a minor shortage results in prices jumping very high or up to the price cap.[242] Suppliers then argue that MISO's use of a vertical demand curve in its Auction results in Auction Clearing Prices that are highly volatile and that such price volatility renders the MISO resource adequacy construct incapable of producing efficient long-term economic signals necessary to make investment and retirement decisions.[243] Suppliers conclude on this basis that there is no reason for the Commission to summarily claim that a vertical demand curve is just and reasonable for use in MISO's resource adequacy construct.[244]

3. Determination

116. We deny the requests for rehearing of the Market Monitor, Main Line, and Suppliers regarding the Commission's acceptance of MISO's use of a vertical demand curve.

117. We affirm that MISO's use of a vertical demand curve continues to be a reasonable method for LSEs to procure sufficient capacity to meet resource adequacy requirements. We reject Market Monitor's and Suppliers' arguments that price volatility stemming from MISO's use of a vertical demand curve renders MISO's resource

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[239] *Id.* (quoting *ISO New England, Inc.*, 153 FERC ¶ 61,338 at P 12).

[240] Main Line Request for Rehearing at 13-14 & n.46 (citations omitted); Market Monitor Request for Rehearing at 17-18 (citations omitted).

[241] Suppliers Request for Rehearing at 20.

[242] *Id.* (citing Competitive Retail Solution Filing, Tab C, Testimony of Dr. Samuel A. Newell, Dr. Kathleen Spees, and Dr. David Luke Oates on behalf of MISO regarding the Competitive Retail Solution at 10).

[243] *Id.* (citing Market Monitor Protest at 10).

[244] *Id.* (citations omitted).

adequacy construct unjust and unreasonable because it cannot produce efficient long run economic price signals. We find that a vertical demand curve, even with the potential for more Auction price volatility, establishes a fixed target for LSEs to meet their resource adequacy requirements. We find that the potential for higher Auction price volatility does not render a construct unreasonable so long as prices reflect supply and demand fundamentals and LSEs are able to meet MISO's resource adequacy requirements. Moreover, the need for new capacity in MISO is driven by a variety of considerations including, but not limited to, state resource planning and the opportunity to recover costs from the energy, ancillary services, and capacity markets.[245] Accordingly, ensuring resource adequacy in MISO is a product of a wide range of factors in addition to Auction Clearing Prices, such as market prices for other energy and reserve products, and state resource planning.[246] Although other resource adequacy constructs may value capacity beyond a fixed amount—as pointed out by the Market Monitor—this is not essential to MISO fulfilling its primary resource adequacy objectives.

118. MISO's resource adequacy construct is designed specifically to complement state mechanisms.[247] Accordingly, MISO supports the independent authority of state regulators for resource adequacy and facilitates resource adequacy goals with state regulators that have decision-making authority over the amount and types of resources that are necessary to meet shared objectives.[248] These objectives require that utilities meet forecast coincident peak load plus planning reserve obligations to satisfy a one day in 10 year loss of load expectation. It is consistent with these shared objectives for MISO to require LSEs in MISO procure a fixed amount of capacity to meet their Reserve Requirements. Moreover, given that the vast majority of MISO's LSEs are vertically integrated utilities that rely on their own resources to meet their resource adequacy needs, MISO's Auction is designed to allow LSEs to purchase—from merchant generators and/or other LSEs with excess capacity—residual capacity. This process helps ensure that all LSEs, collectively and individually, are able to meet their Reserve Requirements. To this end, the Commission has stated that "[MISO]'s voluntary [A]uction [affords] LSEs with an additional mechanism to procure needed capacity [to meet its Reserve Requirements] and increase transparency in the procurement of capacity."[249]

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[245] 2015 Rehearing Order, 153 FERC ¶ 61,229 at P 46.

[246] *Id.*

[247] MISO, FERC Electric Tariff, Module E-1, § 68A (33.0.0).

[248] MISO Filing, Tab E, Prepared Direct Testimony of Richard Doying at 5.

[249] *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,060, at P 36 (2008).

119. As OMS explains, less than five percent of the capacity in MISO in the 2017/2018 Planning Year was procured through the Auction.[250] The Auction thus enables a final opportunity for residual capacity purchases to meet Reserve Requirements, reflected by the vertical demand curve, and to fulfill coordinated resource adequacy goals of LSEs, MISO, and states. We find that the Auction Clearing Prices produced by MISO's vertical demand curve—along with the various sources of useful information on current and future supply and demand fundamentals such as market prices for other energy and reserve products, and state resource planning—provide meaningful signals to LSEs, states, and merchant generators when new resource investment is needed to meet local and regional resource adequacy requirements.

120. As noted in the February 2018 Order, the Commission's acceptance of a vertical demand curve in MISO and sloped demand curves in other RTOs/ISOs is consistent with precedent that a proposal "need not be the only reasonable methodology, or even the most accurate," so long as it is just and reasonable.[251] Further, as stated above, we affirm that a vertical demand curve continues to be a just and reasonable method for LSEs in MISO to procure sufficient capacity to meet resource adequacy requirements. We note that there are multiple just and reasonable market designs and find that the Market Monitor has not shown MISO's vertical demand curve to be unjust and unreasonable. While other RTOs/ISOs use demand curves that reflect the desire by those RTOs/ISOs and their stakeholders to place a value on capacity beyond that which is needed to satisfy resource adequacy requirements, sloped demand curves are not a prerequisite for a resource adequacy construct to be just and reasonable. The principal function of such constructs is to ensure reliability by assuring the availability of sufficient capacity, which MISO's construct accomplishes through a different market design intended to complement state mechanisms. While a sloped demand curve may be better suited to the market designs in ISO-NE, NYISO, and PJM, we continue to find that a vertical demand curve is just and reasonable in a region like MISO's with predominantly vertically integrated utilities over which state and local authorities play an active role in resource decisions and ensuring resource adequacy.

121. Further, we note that LSEs in other regions do not have the option that LSEs in MISO have to decide, on an annual basis, how much of their Reserve Requirements to satisfy through the Auction. In MISO, each LSE can elect to procure some or all of its capacity requirements through the Auction and/or by submitting a Fixed Resource Adequacy Plan. This approach, combined with the use of a vertical demand curve, provides LSEs substantial flexibility to effectuate state integrated resource plans while at

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[250] OMS Answer at 3 (citation omitted).

[251] February 2018 Order, 162 FERC ¶ 61,176 at P 68 (quoting *Oxy USA, Inc. v. FERC*, 64 F.3d at 692).

the same time ensuring that capacity requirements are met to maintain the one day in 10 year loss of load expectation. We acknowledge that MISO's resource adequacy construct provides more flexibility to LSEs than is provided in other regions with substantially different resource adequacy constructs.[252] However, we reiterate that we are not persuaded that the features of substantially different capacity constructs must be adopted for the MISO resource adequacy construct to be just and reasonable. Indeed, our finding in this order regarding MISO's use of a vertical demand curve takes into account the substantial differences between MISO's and other regions' resource adequacy constructs.

E. Auction Timing

1. February 2018 Order

122. The Commission found the prompt Auction design to be just and reasonable and disagreed with protestors that a multi-year forward auction construct is necessary for MISO's resource adequacy construct to be just and reasonable.[253] In response to arguments that the price signals are insufficient under MISO's prompt Auction, the Commission observed that—regardless of the time between the Auction and delivery period—a seller can obtain a capacity commitment and the resulting capacity revenues only for a single year. Thus, should a resource owner desire revenue certainty for multiple years, the only way to attain that certainty in the existing RTO/ISO capacity markets (including those with three-year forward periods) is through bilateral capacity contracts. The Commission further explained that MISO's resource adequacy construct is designed to accommodate bilateral contracting that could provide sellers such multi-year revenue certainty.[254] The Commission also stated that the OMS-MISO Survey provides some transparency through the provision of five-year estimates of the amount of capacity available in each Local Zone, including generation that may retire or complete construction, as well as projected load and Reserve Requirements.[255]

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[252] For example, PJM LSEs that opt out of the Base Residual Auction through the Fixed Resource Requirement option must commit all of their resource adequacy requirements to that option for multiple years. *E.g., Ohio Valley Elec. Corp.*, 164 FERC ¶ 61,181, at P 3 (2018).

[253] February 2018 Order, 162 FERC ¶ 61,176 at P 70.

[254] *Id.* P 71.

[255] *Id.* P 72. The Commission noted, however, that long-term state and local integrated resource planning processes diminish the need and thus the benefits of forward price signals. *Id.* P 73.

123. The Commission pointed out that there are benefits to a prompt auction design.[256] The Commission explained that load forecasting can occur within the year leading up to the Planning Year, and that MISO can accurately account for other considerations, such as transmission constraints, forced outage rates, and the expected performance of Load Modifying Resources. The Commission declined to address whether a prompt auction design or a forward auction design is preferable, but concluded that both can be just and reasonable.[257]

2. <u>Requests for Rehearing</u>

124. Suppliers argue that the Commission ignored the fact that a forward procurement process will help inform state planning processes and minimize ratepayer costs by indicating whether it is more economic to procure capacity bilaterally or construct new resources.[258] Suppliers contend that MISO's Competitive Retail Solution Filing acknowledged threatened shortages in competitive retail areas and therefore proposed a three-year forward procurement of capacity for competitive retail areas in order to "promote long-term resource adequacy and improve market transparency through forward price signals."[259] Suppliers contend that the Commission failed to respond to their concerns.[260]

3. <u>Determination</u>

125. We deny rehearing, and find that the record demonstrates that MISO's resource adequacy construct works cohesively with state mechanisms to ensure long-term resource adequacy. The mere reliance by Suppliers on MISO's comments in support of its Competitive Retail Solution Filing, which included, among other things, a three-year forward auction, is not adequate to support the implementation of a multi-year forward auction design.[261] Suppliers fail to acknowledge: (1) the results of a more recent OMS-MISO Survey, indicating that the MISO region is expected to maintain sufficient

[256] *Id.* P 74.

[257] *Id.*

[258] Suppliers Request for Rehearing at 21.

[259] *Id.* (quoting Competitive Retail Solution Filing at 5 (footnote omitted)).

[260] *Id.*

[261] The Commission rejected MISO's Competitive Retail Solution Filing as unjust and unreasonable. *Midcontinent Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,128 (2017). No party requested rehearing of this order.

resources well into the next decade and can be used by state regulators to assist in resource planning in lieu of a forward capacity market;[262] (2) the impacts of state legislation on resource adequacy in those states;[263] and (3) the benefits of a prompt auction design, including those articulated in the February 2018 Order.[264]

126. In the February 2018 Order, the Commission weighed the benefits of a prompt auction design against the benefits of a multi-year forward auction design and determined that both can be just and reasonable.[265] We reiterate that determination here, and continue to find that MISO's prompt Auction design is just and reasonable. In light of this finding, the Commission is not obligated to consider whether MISO's proposal is more or less reasonable than other alternatives, including Suppliers' proposal for a three-year forward procurement of capacity for competitive retail areas.[266]

F. Market Power Mitigation

1. February 2018 Order

127. The Commission found that a Minimum Offer Price Rule (MOPR) is not needed for MISO's resource adequacy construct to be just and reasonable.[267] The Commission explained that the vast majority of capacity in MISO is owned by vertically integrated utilities and only a small portion of capacity is acquired by LSEs through the Auction. Accordingly, the Commission found unpersuasive arguments that it would be economic for LSEs to procure capacity in the bilateral market at above-market prices in order to suppress prices in the Auction.[268] The Commission similarly dismissed as unlikely arguments that an LSE would pursue such a strategy to suppress Auction Clearing Prices

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[262] *See* February 2018 Order, 162 FERC ¶ 61,176 at PP 58, 70.

[263] *See id.* P 49 & n.118 (citations omitted).

[264] *See id.* P 74 (explaining that a prompt auction design allows LSEs to forecast demand closer to the Planning Year and to consider changing conditions, such as transmission constraints, resource forced outage rates, and expected performance of Load Modifying Resources).

[265] *Id.*

[266] *See supra* note 165.

[267] February 2018 Order, 162 FERC ¶ 61,176 at P 75.

[268] *Id.* P 76.

in order to eventually suppress prices in the bilateral market.[269] The Commission acknowledged that it has accepted or required MOPRs in other RTOs/ISOs, but noted that it provides regions with substantial flexibility. The Commission explained that it considers the specific attributes of the regions and their members when evaluating whether their resource adequacy constructs are just and reasonable.[270]

2. Request for Rehearing

128. Suppliers state that the Commission found that a MOPR was not necessary because "the vast majority of capacity in MISO is owned by vertically integrated utilities and most of the capacity owned by independent generators is sold under long-term bilateral contracts."[271] Suppliers argue, however, that the Commission cannot use this reasoning to justify market rules that are applicable to the entire region, including areas with retail competition that no longer have any or have very few vertically owned utilities.[272] Suppliers further argue that the fact that more load is served by vertically integrated utilities in MISO than in other RTOs/ISOs does not adequately justify why the Commission required ISO-NE to incorporate a MOPR but found one unnecessary in MISO.[273]

129. Suppliers state there is no basis for the Commission's assumption that a MOPR is unnecessary because independent power producers can enter into bilateral contracts.[274] Suppliers contend that LSEs have little or no incentive to enter into bilateral contracts at just and reasonable rates when Auction Clearing Prices are expected to be low and

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[269] *Id.* P 77.

[270] *Id.* PP 79-80.

[271] Suppliers Request for Rehearing at 17 (quoting February 2018 Order, 162 FERC ¶ 61,176 at P 76).

[272] *Id.*

[273] *Id.* (citing, *inter alia*, *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (emphasizing that "[i]t is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently'" (citation omitted)); *Williams Gas Processing Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 322 (D.C. Cir. 2006) (vacating Commission orders because the Commission "neither explained its action as consistent with precedent nor justified it as a reasoned and permissible shift in policy"); *ISO New England, Inc.*, 135 FERC ¶ 61,029 (2011) (2011 ISO-NE Order)).

[274] *Id.*

generators are required to offer capacity into the Auction.[275] Suppliers note that the Commission acknowledges that Auction Clearing Prices may affect prices in the bilateral market, and they argue that the option to enter into bilateral contracts does not relieve the Commission of its statutory duty to ensure that the Auction produces just and reasonable prices.[276]

130. Suppliers argue that the Commission's belief that a MOPR is not necessary because LSEs lack incentive to suppress prices in the Auction makes no sense in light of the Commission's prior determination that "it is not reasonable for buyer-side mitigation to depend on the intent of the seller because an artificially low offer price can unreasonably suppress market prices regardless of the seller's intent."[277] Suppliers add that the Commission ignored their argument that "prophylactic measures are often put in place to deal with circumstances, like the exercise of buyer-side market power, that may be thought unlikely but that would have serious consequences if they came to pass."[278] Suppliers further argue that the recent zero-emission credit program in Illinois demonstrates the threat of artificial price suppression from out-of-market cost support. Suppliers also note the Commission's statements that ISO-NE's capacity market construct should include rules that appropriately manage the impact of out-of-market state support.[279]

3. <u>Determination</u>

131. We deny rehearing. Suppliers contend that, although vertically integrated utilities own approximately 90% of capacity in MISO, a MOPR remains necessary to protect against price suppression for the remaining 10 percent. We disagree. In the February 2018 Order, the Commission determined that MISO's proposed resource adequacy construct was just and reasonable by taking into consideration the entirety of the proposal and the effect of that proposal on the MISO footprint, as a whole. On rehearing, Suppliers fail to point to any evidence on the record demonstrating that the lack of a MOPR renders MISO's resource adequacy construct unjust and unreasonable, including in regions with retail competition.

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[275] *Id.* at 17-18

[276] *Id.* at 18 (citing February 2018 Order, 162 FERC ¶ 61,176 at P 77).

[277] *Id.* (quoting 2012 Order, 139 FERC ¶ 61,199 at P 69).

[278] *Id.* (quoting NRG Companies and Dynegy Companies Protest at 16-17).

[279] *Id.* at 18-19 & n.92 (citing *ISO New England Inc.*, 162 FERC ¶ 61,205, at PP 22, 24 (2018) (2018 ISO-NE Order)).

132. We also disagree with Suppliers' contention that the Commission has not adequately justified why it required a MOPR in ISO-NE but not in MISO. Contrary to Suppliers' assertions, the Commission considered more than the proportion of vertically integrated utilities in MISO to determine that a MOPR was not required. Rather, the Commission came to two different conclusions because the facts of the two proceedings were distinct. Suppliers have not demonstrated that the circumstances upon which the Commission based its determination to require ISO-NE to incorporate a MOPR, particularly with respect to out-of-market support, are present in MISO to compel the Commission to reach the same result in this proceeding.[280] Among other things, the Commission's determination in the ISO-NE proceeding cited by Suppliers focused on the actions of LSEs subsidizing new generation.[281]

133. Suppliers argue that there is no basis for the Commission's assumption that, because independent power producers can enter into bilateral contracts, a MOPR is not necessary. They repeat the assertion that expected low Auction Clearing Prices disincentivize LSEs from procuring capacity through bilateral contracts. Notably, Suppliers do not dispute the finding in the February 2018 Order that "[g]iven the long-term nature of bilateral contracts, an LSE would have to suppress prices in the Auction for multiple years to reduce the cost of capacity acquired through bilateral contracts and realize a reduction in its overall capacity costs."[282] As we discuss above,[283] low Auction Clearing Prices may reflect supply and demand fundamentals such as lower Reserve Requirements and more capacity supply being offered in that Auction, and do not necessarily mean that the Auction has produced unjust, unreasonable, and unduly discriminatory rates.[284]

134. In response to Suppliers' argument that the Commission's belief that a MOPR is not necessary because LSEs lack incentives to suppress prices in the Auction makes no sense because the Commission stated that an artificially low offer price can unreasonably suppress market prices regardless of the seller's intent,[285] we note that Suppliers have taken the Commission's argument out of context. In the 2012 Order, one of the reasons that the Commission rejected MISO's proposed MOPR was because the offer floor would

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[280] *See infra* P 136.

[281] 2011 ISO-NE Order, 135 FERC ¶ 61,029 at PP 158, 166.

[282] *See* February 2018 Order, 162 FERC ¶ 61,176 at P 77.

[283] *See supra* section III.C.

[284] *See* February 2018 Order, 162 FERC ¶ 61,176 at P 78.

[285] Suppliers Request for Rehearing at 18.

apply only if the Market Monitor determined that the seller intended for its offer to depress the Auction Clearing Price.[286] In other words, the Commission found specific aspects (i.e., the requirement that the Market Monitor must determine that a seller intended to depress Auction Clearing Prices) of MISO's proposed MOPR to be unjust and unreasonable. This is a separate and distinct argument from the Commission's determination in the February 2018 Order that a MOPR was unnecessary to render MISO's resource adequacy construct just and reasonable because, among other things, MISO's resource adequacy construct provided little incentive for LSEs to suppress Auction Clearing Prices.

135. Suppliers also contend that the Commission ignored their argument that "prophylactic measures are often put in place to deal with circumstances, like the exercise of buyer-side market power, that may be thought unlikely but that would have serious consequences if they came to pass."[287] We agree that such measures are sometimes appropriate; however, we also note that the Commission has repeatedly emphasized the importance of striking a balance in determining the appropriate amount of mitigation required for a particular market.[288] At its core, Suppliers' argument rests on the notion that, even though they were unable to demonstrate the need for a MOPR, a MOPR is nevertheless needed as a safety net to prevent future abuse. The only evidence Suppliers present in the record before us to support this argument is a reference to recent zero emissions credits legislation in Illinois. Given the lack of evidence in the record before us, we are not persuaded that the Auction requires a MOPR, at this time, to be just and reasonable. Further, we reiterate that the Commission can approve a proposal, finding that it "need not be the only reasonable methodology . . . so long as it is just and reasonable."[289]

136. Suppliers also argue that the February 2018 Order conflicts with the Commission's statement in the 2018 ISO-NE Order that it is "imperative that . . . a [capacity] market construct include rules that appropriately manage the impact of out-of-market state support, to ensure that the market's underlying principles are met and

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[286] 2012 Order, 139 FERC ¶ 61,199 at P 69.

[287] Suppliers Request for Rehearing at 18 (quoting NRG Companies and Dynegy Companies Protest at 16-17).

[288] *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,850, at P 58 (2003); *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 26 (2013); *New England Power Pool*, 101 FERC ¶ 61,344, at P 28 (2002); *Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169, at PP 40-41 (2008).

[289] February 2018 Order, 162 FERC ¶ 61,176 at P 80.

that the resulting rates are just and reasonable."[290] We disagree that the Commission's reasoning about maintaining investor confidence in ISO-NE's Forward Capacity Market given New England state actions at that time undercuts the Commission's rationale with respect to a MOPR in MISO. Suppliers' argument ignores the full context of the Commission's statement. In the 2018 ISO-NE Order, the Commission responded to an ISO-NE proposal that recognized and demonstrated that ISO-NE's then-current MOPR construct was no longer effective in managing the impact of out-of-market state support. The Commission explicitly noted that ISO-NE's proposal was tailored to respond to the emerging market trends of its region.[291] The Commission expressed concern in that proceeding that "out-of-market state support can result in the region building more capacity than it needs."[292] Those circumstances are not at play here, where Suppliers argue that Auction Clearing Prices are too low to attract the amount of capacity necessary to meet the one day in ten year reliability standard.[293] Accordingly, the evidence before us does not demonstrate that similar "emerging market trends" exist in MISO that would result in the region-overbuilding or even that MISO's proposal would be ineffective at managing such support.

G. <u>Commission's Authority Under FPA Section 205</u>

1. <u>February 2018 Order</u>

137. The Commission responded to Suppliers' assertion that the Commission should accept MISO's 2011 Filing without invalidating past Auctions by stating that this proceeding is limited to consideration of MISO's filing in this docket.[294] The Commission stated that issues related to the Commission's actions on voluntary remand in light of *NRG* were fully addressed in the concurrently issued Order on Remand.[295]

[290] Suppliers Request for Rehearing at 18-19 (quoting 2018 ISO-NE Order, 162 FERC ¶ 61,205 at P 24).

[291] 2018 ISO-NE Order, 162 FERC ¶ 61,205 at P 22.

[292] *Id.* P 24.

[293] *See* Suppliers Request for Rehearing at 13-14.

[294] February 2018 Order, 162 FERC ¶ 61,176 at P 92.

[295] *Id.* (citing Order on Remand, 162 FERC ¶ 61,173).

2. Requests for Rehearing

138. Main Line and Suppliers argue that the Commission in the February 2018 Order exceeded its authority under section 205 and "sidestepped" *NRG* limitations by accepting certain provisions of MISO's filing that were consistent with those revisions to MISO's resource adequacy construct filing that the Commission required in Docket No. ER11-4081.[296] Main Line and Suppliers note that in the Order on Remand, the Commission acknowledged that these Commission-directed revisions to MISO's Resource Adequacy construct exceeded the Commission's authority under section 205, pursuant to the D.C. Circuit's recent decision in *NRG*. Main Line and Suppliers observe that in MISO's instant filing, MISO included Tariff revisions that the Commission required in the 2012 Order and the 2015 Rehearing Order in Docket No. ER11-4081. They argue that the Commission erred by approving those revisions.[297]

139. In addition, Main Line and Suppliers argue that in the February 2018 Order, the Commission improperly relied on its prior findings in the 2012 Order and the 2015 Rehearing Order in Docket No. ER11-4081 as support for its decision, given the Commission's recognition in the Order on Remand that in those orders it had exceeded its authority under section 205 per *NRG*.[298] Main Line and Suppliers argue that MISO did not meet its burden to establish its filing was just and reasonable and assert the Commission approved the filing without a proper record of evidence. They argue that the Commission should have rejected the filing or, alternatively, should have developed further procedures to resolve the disputed issues of material fact.[299]

3. Determination

140. We deny rehearing, and find that the Commission did not exceed the scope of its authority under FPA section 205 in the February 2018 Order. As the Commission noted in the Order on Remand, the D.C. Circuit explained in *NRG* that "there are limits on the Commission's authority to propose modifications under [s]ection 205 even when the

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[296] Main Line Request for Rehearing at 3-5; Suppliers Request for Rehearing at 24-26.

[297] Main Line Request for Rehearing at 3-4; Suppliers Request for Rehearing at 24-25.

[298] Main Line Request for Rehearing at 3-4; Suppliers Request for Rehearing at 25.

[299] Main Line Request for Rehearing at 5; Suppliers Request for Rehearing at 25-26.

utility consents to those modifications."[300] As the Commission accepted MISO's instant section 205 filing without modification in the February 2018 Order, the *NRG* precedent is inapplicable. Further, as discussed in the February 2018 Order and this order, the record was sufficient in this proceeding to find that MISO's filing was just and reasonable.

141. We disagree with Main Line and Suppliers that it was improper for the Commission to note when making certain findings in February 2018 Order that such findings were consistent with the rationale and similar findings made in the 2012 Order and the 2015 Rehearing Order in Docket No. ER11-4081. In the Order on Remand, the Commission reversed the 2012 Order's conditional acceptance of MISO's 2011 Filing in Docket No. ER11-4081 and rejected MISO's 2011 Filing in its entirety, but this action was not because the determinations therein were erroneous or unsupported.[301] Rather, based on *NRG*, the Commission determined that conditioning acceptance of MISO's 2011 Filing on the revisions to that filing set out in the 2012 Order and the 2015 Rehearing Order would exceed the Commission's authority under section 205 notwithstanding that MISO consented to those revisions. The Order on Remand did not invalidate the findings in the 2012 Order and 2015 Rehearing Order. To the contrary, in the Order of Remand, the Commission's rejection of MISO's 2011 Filing was based on its prior finding in those orders that MISO's 2011 Filing had not been shown to be just and reasonable as filed.[302]

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[300] Order on Remand, 162 FERC ¶ 61,173 at P 11 (quoting *NRG*, 862 F.3d 108 at 115) (emphasis omitted)).

[301] *Id.* P 3.

[302] *Id.* P 15 (citing 2015 Rehearing Order, 153 FERC ¶ 61,229 at P 39).

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.