170 FERC ¶ 61,170
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. ER20-668-000

ORDER REJECTING FILING

(Issued February 28, 2020)

1. On December 20, 2019, pursuant to section 205 of the Federal Power Act (FPA),[1] Midcontinent Independent System Operator, Inc. (MISO) filed proposed changes to Module D of MISO's Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff). In its December 20 Filing, MISO proposes to remove Tariff provisions that exempt all Generation Resources that are not Planning Resources under Module E-1 of the Tariff from physical withholding penalty charges in the day-ahead market, and to add Tariff provisions stating that it would not be deemed physical withholding if a Market Participant reasonably expected the costs of making its Resource available to be higher than the Resource's expected net revenues from being available. In this order, we reject the December 20 Filing, as discussed below.

# I. Background

## A. December 20 Filing

2. MISO proposes to modify section 65.3.1 of its Tariff to delete the exemption from physical withholding penalty charges for Generation Resources that are not designated as capacity resources in MISO.[2] Specifically, MISO proposes to delete the following language from section 65.3.1.b of the Tariff:

> Generation Resources that are not designated to satisfy [Resource Adequacy Requirements] shall not be subject to penalty charges for

[1] 16 U.S.C. § 824d (2018).

[2] Transmittal at 1.

> physical withholding from the [d]ay-[a]head Energy and Operating Reserve Market or Reliability Assessment Commitment process during the Real-Time Energy and Operating Reserve Market.

MISO also proposes to add new language in section 64.1.1 of the Tariff stating that a market participant shall not be deemed to have physically withheld a Resource "if the Market Participant reasonably expected the costs of making the Resource available to be higher than the Resource's net revenues from being available."[3]

3. MISO contends that its proposed revisions are not intended to create a must-offer requirement but rather are meant to enable effective mitigation of market power where it exists. In an affidavit attached to the December 20 Filing, MISO's Market Monitor submits that the proposed change removes a flaw in the Tariff to bring it into alignment with the Commission's market-based rate policies. The Market Monitor states that, under the Commission's market-based rate policies, a market participant seeking to sell into MISO markets must either: (1) not have any market power; or (2) be subject to effective market power mitigation measures that limit the ability of the participant to exercise its market power.[4] The Market Monitor argues that if neither of these two conditions is satisfied, the Tariff would allow suppliers to freely exercise market power, which would lead to uncompetitive prices. The Market Monitor contends that this is in conflict with the Commission's market-based rate policy which relies on competition to ensure that rates are just and reasonable under the FPA.[5]

4. The Market Monitor states that in Order No. 861,[6] the Commission exempted sellers seeking market-based rates in Regional Transmission Organization (RTO) and Independent System Operator (ISO) markets from having to submit indicative market power screens expressly because the sellers are subject to the RTOs/ISOs' market power mitigation measures. The Market Monitor argues that the policy of relying on RTO/ISO mitigation measures when granting market-based rate authority is reasonable but is

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[3] *Id*. at 4-5.

[4] Affidavit of Dr. David B. Patton, Attachment C, ¶ 12 (Patton Aff.).

[5] *Id*. ¶ 13.

[6] *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets*, Order No. 861, 168 FERC ¶ 61,040 (2019).

undermined by MISO granting a market power mitigation exemption to a supplier on the basis that it did not sell capacity to the RTO/ISO, when it may have market power.[7]

5. The Market Monitor suggests that the current exemption from physical withholding penalties for non-capacity resources may have been rationalized by one of two flawed premises: (1) when an RTO/ISO procures capacity to meet its resource adequacy requirements, it will have sufficient capacity subject to mitigation that the market outcomes will be competitive; and/or (2) physical withholding mitigation measures effectively create a must-offer obligation. The Market Monitor argues neither premise is true.[8]

6. In response to the first premise, the Market Monitor contends that, since capacity market zones are defined by state boundaries and/or utility territories rather than by electrical areas such as load pockets or transmission constraints, this capacity market approach helps ensure that supply is adequate in broad areas, but provides no assurance that the energy and ancillary services market will be competitive. The Market Monitor adds that, even after MISO has procured sufficient capacity, often a single market participant controls the resources needed to resolve a key constraint or serve the load in a load pocket. The Market Monitor states that these resources are considered "pivotal" suppliers and are effectively monopolists in their locations that can set prices at non-competitive levels. The Market Monitor explains that MISO's current Tariff would allow mitigation of those suppliers for economic withholding, but those suppliers will be immune from mitigation if they choose to derate their resource(s) or otherwise make their resources unavailable, which is equivalent to offering a resource at an infinite price. The Market Monitor argues that the fact that a resource will receive this exemption provides a strong incentive for a supplier to avoid clearing the capacity market, and because the MISO Planning Resource Auction (Auction) has historically cleared at prices close to zero, a supplier with market power can acquire the physical withholding exemption at very little cost (foregone capacity revenue).[9]

7. In response to the second premise, the Market Monitor argues that the proposal does not create a must-offer obligation. The Market Monitor states that MISO's intention in eliminating the exemption is simply to ensure effective mitigation, that there is no obligation to offer, and that the potential sanction only applies to economic resources, that, if withheld, would result in a market price increase. The Market Monitor explains that the proposed Tariff language clarifies that a supplier is not physically withholding a resource if the resource is not expected to be economic to operate. The Market Monitor

[7] Patton Aff. ¶ 15.

[8] *Id.* ¶ 16.

[9] *Id.* ¶¶ 18-20.

contends that in this case, the supplier can often achieve savings by avoiding the costs of making the resource available and offering it. The Market Monitor submits that this would be a rational economic decision by a competitive supplier that has no market power, and, therefore, cannot be considered physical withholding.[10]

8. Finally, the Market Monitor argues that the Commission did not consider that requiring the physical withholding exemption for non-capacity resources would create instances when a supplier with market power would be free to exercise it, nor did the Commission consider the inherent conflict between this provision and its market-based pricing policy and the FPA requirements more broadly. The Market Monitor contends that it has observed many instances of potential physical withholding in MISO from resources that did not have a capacity obligation, but it would have been a poor use of market monitoring resources to investigate conduct for which no remedy is available. For example, the Market Monitor submits that in June 2016, a market participant withheld its non-capacity resource and engaged in over-production from other units, which contributed to severe congestion, costing more than $28 million in congestion costs. In another instance, two non-capacity resources had been on long-term "economic" outages, but were physically capable of operating. The Market Monitor states that these resources contributed to more than $33 million in real-time congestion on a single constraint since December 2017.[11]

### B. <u>The Commission's 2003 Order Addressing Physical Withholding Penalties for Non-Capacity Resources</u>

9. MISO filed to establish its Tariff Market Mitigation Measures as a complement to its Independent Market Monitoring Plan in 2003.[12] In its order, the Commission accepted MISO's proposed conduct and impact thresholds for when it may be appropriate to mitigate instances of market power abuse for physical withholding of generation facilities in the real-time market. However, it rejected the application of penalties to non-capacity resources for physical withholding in the day-ahead market. The Commission agreed with protesters that the imposition of economic withholding mitigation and penalties for physical withholding constitutes a must-offer obligation without a corresponding payment for capacity resources.[13] The Commission stated that it was reasonable to

[10] *Id.* ¶¶ 24-25.

[11] *Id.* ¶¶ 29-35.

[12] *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,280 (2003 Order), *order on reh'g*, 105 FERC ¶ 61,147 (2003) (2003 Rehearing Order).

[13] 2003 Order, 102 FERC ¶ 61,280 at P 96.

require generators to bid available generation into the real-time market and mitigate generators' bids to a level near their marginal costs, including opportunity costs.[14]

## II. Notice and Responsive Pleadings

10. Notice of the December 20 Filing was published in the *Federal Register*, 84 Fed. Reg. 71,914 (2019), with interventions or comments due on or before January 10, 2020. In an errata notice issued on December 23, 2019, the Commission extended the due date for interventions or comments to January 21, 2020.

11. On January 10, 2020, the Mississippi Public Service Commission and Mississippi Public Utilities Staff filed a notice of intervention. On January 21, 2020, the Public Utility Commission of Texas and the Council of the City of New Orleans, Louisiana filed notices of intervention. Timely motions to intervene were filed by: Cooperative Energy; NRG Power Marketing LLC; Coalition of MISO Transmission Customers; MidAmerican Energy Company; American Municipal Power, Inc.; Ameren Services Company; WPPI Energy; Xcel Energy Services Inc.; Vistra Energy Corp.; Otter Tail Power Company; ALLETE, Inc.; Michigan South Central Power Agency; Calpine Corporation (Calpine); Electric Power Supply Association (EPSA); Entergy Services, LLC, Entergy Arkansas, LLC, Entergy Louisiana, LLC, Entergy Mississippi, LLC, Entergy New Orleans, LLC and Entergy Texas, Inc. (collectively, Entergy); Duke Energy Corporation (Duke); the Coalition of Midwest Power Producers (Midwest Power Producers); and the New England Power Generators Association, Inc. (NEPGA) and National Hydropower Association (NHA) (collectively, NEPGA and NHA).

12. Comments and/or protests were filed by Entergy and Duke (collectively, MISO Generators), Calpine, EPSA, Midwest Power Producers, and NEPGA and NHA.

13. On February 25, 2020, MISO filed an answer.

## III. Comments and Protests

14. EPSA, Calpine, MISO Generators, Midwest Power Producers, and NEPGA and NHA protested the December 20 Filing. Midwest Power Producers argue that, despite the fact that MISO has had its residual capacity construct in place for several years, that does not mean that this construct is working properly. Midwest Power Producers believe that, in the instances where the Market Monitor observed physical withholding from

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[14] *Id*. On rehearing of the 2003 Order, the Commission clarified that applying physical withholding penalties to the Reliability Assessment Commitment (RAC) process, which occurs after day-ahead but prior to real-time markets, is also prohibited by the Commission's determination in the 2003 Order in the absence of capacity payments. 2003 Rehearing Order, 105 FERC ¶ 61,147 at P 26.

resources that did not have must-offer obligations, if the MISO capacity construct was functioning properly, then the aforementioned resources would have been afforded a capacity payment reflective of the marginal value of reliability, and as such, would have been subject to the ongoing day-ahead must-offer requirement.[15] Midwest Power Producers request that the Commission note that more resources would clear in the capacity market and be subject to the day-ahead must-offer requirement if MISO were to transition to a downward sloping demand curve in its capacity construct.[16]

15. EPSA argues that the December 20 Filing attempts to resolve concerns with congestion, which is a MISO dispatch issue, not a withholding or mitigation issue. EPSA contends that as long as the resource in question follows its dispatch signal, there is no withholding issue present. EPSA suggests that if MISO wishes to remedy these issues, it should examine its dispatch process.[17] EPSA argues that the instant filing seeks to triage MISO's "broken" capacity construct by requiring non-Planning Resources to be prepared to run whether or not it is economically reasonable for them to do so on a practical basis. EPSA contends that MISO proposes this change even when MISO's own preferred procurement process has deemed these resources non-essential as they did not clear and therefore do not have a capacity supply obligation.[18] Calpine similarly submits that a more efficient and effective way to address these potential concerns would be to revamp MISO's capacity market structure to better reflect actual system conditions.[19]

16. All of the protestors argue that the current physical withholding exemption was required by the Commission in the 2003 Order and that MISO's proposal attempts to circumvent that required exemption.[20] EPSA states that the 2003 Order found that the "imposition of economic withholding mitigation and penalties for physical withholding constitutes a must-offer obligation without a corresponding payment for capacity resources."[21] Calpine argues that the Commission has elsewhere recognized that the threat of "financial penalties for physical withholding" effectively "generat[es]

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[15] Midwest Power Producers Protest at 10.

[16] *Id.* at 9.

[17] EPSA Protest at 3.

[18] *Id.* at 2-3.

[19] Calpine Protest at 5.

[20] EPSA Protest at 3; MISO Generators Protest at 3-4; Midwest Power Producers at 5; Calpine Protest at 3; and NEPGA and NHA Protest at 4.

[21] EPSA Protest at 3 (citing 2003 Order, 102 FERC ¶ 61,280 at P 96).

the equivalent of a must-offer condition without an associated capacity payment."[22] Calpine also notes that the 2003 Order involved proposed procedures to "identify situations where it may be appropriate to mitigate instances of market power abuse,"[23] but nevertheless "reject[ed] application of penalties for physical withholding in the [d]ay-[a]head Market."[24]

17. EPSA contends that, in order to circumvent this requirement, MISO claims that it is not attempting to create a must-offer obligation and that the information provided in the new section 64.1.1.h is intended to provide market participants with examples of the economic considerations that could excuse them from physical withholding mitigation in situations where their resources otherwise have market power for binding constraints. EPSA submits that operationally, however, these changes would create a proxy for just such a requirement as non-Planning Resources would have to be prepared to run at almost any time. EPSA states that it is neither reasonable nor feasible to assume that such a resource would undertake the "excused economic exemption" process with the Market Monitor each time necessary. EPSA argues that this subjective process to determine the sufficiency of excused economic considerations could result in uneconomic operations, unrecoverable costs incurred while preparing to run, and the payment of penalties, and may in fact impair the overall economic viability of these resources. EPSA explains that non-Planning Resources often run for only a select few weeks or even few days a year and accordingly, resource owners make decisions on staffing, operations and maintenance, and other costs and obligations based on that operational profile.[25]

18. MISO Generators state that, whether intended or not, the proposed revisions implement a requirement that all generation resources bid into the day-ahead market and participate in the RAC process that occurs after the day-ahead commitments are determined. MISO Generators contend that while the proposed Tariff provides some clarifications of what constitutes physical withholding, it does not provide for any waiver or exemption from the must-offer obligation based on a showing that the resource is not expected to be economic. MISO Generators aver, therefore, that non-capacity resources

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[22] Calpine Protest at 3 (citing *Midwest Indep. Transmission Sys. Operator, Inc.* 108 FERC ¶ 61,163, at P 329 (2004) (TEMT II Order)).

[23] *Id*. at 4 (citing 2003 Order, 102 FERC ¶ 61,280 at P 8).

[24] *Id*. (citing 2003 Order, 102 FERC ¶ 61,280 at P 96).

[25] EPSA Protest at 3-4.

are subject to the same physical withholding provisions as those resources that were compensated for their capacity.[26]

19. MISO Generators argue that this is the same requirement that the Commission expressly rejected in the 2003 Order, where the Commission determined that application of day-ahead physical withholding mitigation to non-capacity resources is a must-offer requirement, but allowed for mitigation to apply to these resources if they opted to bid into the day-ahead market or had generation that was online and not fully loaded in real-time.[27] MISO Generators state that a free call option is created when physical withholding mitigation is applied to resources that do not receive a capacity payment, and the Commission has held that this free option is unjust and unreasonable.[28] MISO Generators further state that the Commission has recognized that allowing load serving entities to have a free call on any capacity that does not clear the capacity auction could, over the long term, undermine capacity auctions.[29] MISO Generators similarly argue that the bilateral market for capacity in MISO may be undermined if load serving entities know that they will be able to rely on capacity without cost.

20. MISO Generators argue that if a supplier does not have an expectation of receiving more than its marginal costs through MISO's markets and MISO, through its Auction, is unwilling to pay for the resource's capacity, the resource should be allowed to pursue other options, including seasonal shut-down, as well as other compensation avenues.[30] MISO Generators contend that the proposed application of physical withholding monitoring and mitigation could force a non-capacity resource to make commitments prior to real-time, for which capital investments may be required, to avoid incurring substantial penalties without simultaneously providing a reasonable opportunity to earn a return of and on its investment.[31] MISO Generators argue that when a resource does not receive a capacity payment, asking it to absorb the costs of not meeting a commitment made prior to real time or forcing it to incur additional

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[26] MISO Generators Protest at 3-4.

[27] *Id*. at 4.

[28] *Id*. at 6 (citing *New York Indep. Sys. Operator, Inc.*, 106 FERC ¶ 61,111, at PP 52-54 (2004); *California Indep. Sys. Operator Corp.*, 105 FERC ¶ 61,140, at PP 227, 229 (2003)).

[29] *Id*. (citing *ISO New England Inc.*, 138 FERC ¶ 61,027, at P 40 (2012)).

[30] *Id*. at 7.

[31] *Id*.

costs to be available, may be confiscatory, in violation of the Takings Clause of the U.S. Constitution.[32]

21. Midwest Power Producers contend that despite MISO's best intentions, the proposed Tariff provisions produce a compliance strategy for voluntary resources that requires day-ahead market participation. Midwest Power Producers remain concerned that the practical effect is the attachment of an ongoing must-offer obligation without a corresponding capacity payment and is a fundamental change to the Commission's approach to the obligations of resources that have no capacity award.[33]

22. NEPGA and NHA argue that although MISO asserts that it does not intend to create a must-offer requirement, the proposal would compel Market Participants to offer their resources into every market interval for which they cannot convince the Market Monitor that their resources are uneconomic.[34]

23. Midwest Power Producers contend that MISO supports the proposed removal of the physical withholding exemption for non-capacity resources by simply stating a disagreement with Commission precedent without citing a material change in factual circumstances that would warrant such modification.[35] Midwest Power Producers state that in the 2003 Order, the Commission declined to impose a day-ahead must-offer requirement on non-capacity resources, but also required voluntary, available generation to participate in real time. Midwest Power Producers submit that the Commission's determination struck a reasonable balance between mitigating market power and subjecting non-capacity resources to a set of obligations for which they would receive no compensation and that neither MISO nor the Market Monitor provide any evidence that it is just and reasonable to upend the reasonable balance struck by the Commission in the 2003 Order.[36]

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[32] *Id*. at 8 (U.S. Const. amend. V. ("[N]or shall private property be taken for public use, without just compensation."); *see also Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), *Duquesne Light Co v. Barasch*, 488 U.S. 299, 307 (1989); *Guaranty National Insurance Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990)).

[33] Midwest Power Producers Protest at 3.

[34] NEPGA and NHA Protest at 4-5.

[35] Midwest Power Producers Protest at 5.

[36] *Id*. at 6.

24. MISO Generators argue that the proposed provisions shift the burden to the non-capacity resource to constantly monitor current and expected future market conditions to determine whether it is economic and has market power, which may be fleeting instances during unforeseeable congestion. MISO Generators further explain that in the event that a non-capacity resource expects to be economic, it must take action to make itself available, and such action may include hiring and training new staff, or purchasing and repairing expensive equipment.[37]

25. MISO Generators submit that the Commission has continued to rely on the exemption from the must-offer requirement in recent orders. MISO Generators state that in the order on MISO's Order No. 841 compliance, the Commission relied on the existence of the must-offer exemption to cabin the exposure for Storage Energy Resources in the day-ahead market. MISO Generators state that in approving requirements that subject electric storage resources that receive capacity payments to must-offer obligations, the Commission implicitly recognized that those that opt to forego capacity payments will not be subject to the requirement to participate in the day-ahead market or RAC process.[38] MISO Generators argue that MISO's proposal would require all storage resources to bid into the day-ahead market and participate in the RAC process regardless of whether they are a capacity resource.[39]

26. Protestors also argue that, should the Commission reject arguments that MISO's proposal is tantamount to instituting a must-offer requirement for non-capacity resources in the day-ahead market, the Commission should require MISO and the Market Monitor to provide more clarity on how a resource will be certain that it will not be subject to physical withholding mitigation measures. EPSA requests that the Commission require the Market Monitor to implement a process in which a resource can get an *ex ante* determination from the Market Monitor that the resource will not be subject to physical withholding mitigation measures. EPSA contends that if a resource is subject to an after-the-fact debate between what costs are considered valid and what qualifies for an exemption to physical withholding mitigation measures, the resource will err on the side of offering rather than potentially facing the application of a penalty should the Market Monitor not agree with its cost classifications. EPSA argues that the Commission should require MISO and the Market Monitor to provide a written explanation of its determination to the market participant submitting a request for an exemption within a

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[37] MISO Generators Protest at 16.

[38] *Id*. at 14 (citing *Midcontinent Indep. System Operator, Inc.*, 169 FERC ¶ 61,137 (2019)).

[39] *Id*.

specified time period.[40] MISO Generators note that the proposed revisions do not indicate how far in advance calculations of net revenues should occur, nor do they provide guidance on what constitutes a "reasonable" estimate of expected net revenues and whether it includes a risk factor. MISO Generators further question whether MISO would second guess a resource's expected net revenues and expected costs when actual costs or revenues are significantly different.[41] Calpine submits that, under MISO's proposal, there is no way for suppliers to determine in advance what will be deemed "reasonable" by MISO and the Market Monitor, and thus the proposed provisions are likely to force suppliers to offer their resources, even if there is a risk that they incur a loss, rather than potentially be subject to penalties.[42]

27. MISO Generators contend that the proposal's definition of "economic" is inconsistent with regulatory concepts that allow the opportunity for return of and on investment. MISO Generators state that it appears that the Market Monitor defines "economic" in this context as costs not exceeding expected net revenues. MISO Generators contend that at a minimum, the test should be costs equal to expected net revenues, and, even then, they question why a rational market participant would operate a unit when it is only expected to break even.[43]

28. MISO Generators state that there is no provision in the Tariff that would allow an *ex ante* exemption from the mitigation or to consult with the Market Monitor on an *ex ante* basis. MISO Generators contend that, because there is no Tariff provision concerning such an exemption, there are no review or appeal rights if there is a disagreement over expected costs or expected net revenues.[44]

29. Midwest Power Producers state that depending on the resource, the cost-to-revenue comparison could change on a daily, monthly, or seasonal basis, and would be subject to *ex post* second guessing. Midwest Power Producers explain that there are plenty of MISO generators not operational for the winter period because the costs associated with winterization exceed the potential revenues. Midwest Power Producers suggest that under the proposed revisions, the Market Monitor could flag such a resource for physical withholding if the Market Monitor felt it would have been reasonable for such a facility to come on for a two-week period in the middle of the winter due to an

[40] EPSA Protest at 5-6.

[41] MISO Generators Protest at 15.

[42] Calpine Protest at 6.

[43] MISO Generators Protest at 15.

[44] *Id*. at 16-17.

anticipated electric supply shortage. Further, Midwest Power Producers contend that the revisions require non-capacity resources to be able to accurately forecast day-ahead and Real-Time prices for undefined periods of time to be able to determine whether committing a resource in either market would be reasonable. Thus, Midwest Power Producers argue that, in addition to creating a compliance risk, making an affirmative showing to the Market Monitor that a resource's expected costs exceed its expected revenues will require a non-Capacity resource to incur costs for which there is no corresponding compensation.[45]

30. Midwest Power Producers and EPSA request that in the event the Commission accepts MISO's proposal, the Commission direct MISO to include additional language, consistent with the Patton Affidavit, that clarifies that those discussions between the Market Monitor and market participants regarding the need to offer into the day-ahead market will happen on an *ex ante* basis. Midwest Power Producers contend that such discussions could be essential in determining the reasonableness of the decision from a resource to remain unavailable to MISO.[46] EPSA contends that the Commission should require MISO and the Market Monitor to provide a written explanation of the Market Monitor's determination to the market participant submitting a request for an exemption within a specified time period.[47]

31. Protestors also contend that MISO's reliance on Order No. 861 to support its proposal is unfounded. For example, protestors contend that, contrary to MISO's implication, Order No. 861 was not issued in order to require strengthening of RTO/ISO market monitoring and mitigation measures, noting that the Commission rejected calls in the Order No. 861 proceeding to initiate a formal review of RTO/ISO monitoring and mitigation practices.[48] They argue that MISO and the Market Monitor read Order No. 861 too broadly and that nothing in Order No. 861 suggested that current mitigation measures are inadequate and must be reformed.[49] If the Commission were to find MISO's proposal just and reasonable, parties request that the Commission do so without

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[45] Midwest Power Producers Protest at 8.

[46] *Id*. at 11.

[47] EPSA Protest at 5-6.

[48] *Id.* at 4-5; MISO Generators Protest at 11-14.

[49] *E.g.*, NEPGA and NHA Protest at 5-6; Calpine Protest at 4.

adopting MISO's reading of Order No. 861 and without declaring a broader Commission policy that could potentially affect non-capacity generators in other RTOs/ISOs.[50]

32. Finally, protestors argue that MISO's examples of potential physical withholding are lacking in adequate detail to support the Market Monitor's argument. For example, MISO Generators argue that MISO and the Market Monitor offer no evidence of physical withholding by non-Capacity resources. MISO Generators state that the evidence presented in the Patton Affidavit does not show that the must-offer exemption has exposed the MISO market to significant market power abuses, but, rather, the four examples provided in the Patton Affidavit merely show that some resources did not operate at certain times and that, if they had operated, market prices may have been lower.[51] MISO Generators contend that the Commission rejected the same arguments by MISO and the Market Monitor in the 2003 Order and that it should do so here.

33. NEPGA and NHA note that MISO asserts that a pivotal supplier chose not to make a resource available, but fails to provide any insight into why the resource was unavailable for dispatch. NEPGA and NHA aver that if this resource was unavailable because it would have been uneconomic to be available, it would have made the very decision MISO opines in this proceeding is a rational economic decision.[52]

34. Midwest Power Producers contend that the current mitigation provisions of MISO's Tariff allow the Market Monitor to report manipulative behavior to the Commission's Office of Enforcement.[53]

## IV. **Discussion**

### A. **Procedural Matters**

35. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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[50] *E.g.*, EPSA Protest at 5.

[51] MISO Generators Protest at 8 (citing Patton Aff. ¶¶ 32-34). *See also* Midwest Power Producers Protest at 9 (contending that the Market Monitor fails to cite a single instance where a resource failed to participate in the Auction and then continued to leverage the physical withholding exception to persistently manipulate the energy market throughout the relevant Planning Year).

[52] NEPGA and NHA Protest at 6.

[53] Midwest Power Producers Protest at 8.

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept MISO's answer and will, therefore, reject it.

### B. Substantive Matters

36. We find that MISO has not demonstrated that its proposal is just and reasonable; accordingly, we reject MISO's proposal, as described further below.

37. We find that MISO's proposed process lacks sufficient clarity to distinguish between non-capacity resources legitimately withheld from day-ahead markets due to economic reasons and those withheld in an attempt to exercise market power. This lack of clarity places non-capacity resources at risk of being penalized in circumstances that do not warrant it. For example, it is unclear whether a market participant would need to demonstrate that its unit is not economically viable prior to each day-ahead hour. The proposal also does not specify how a Market Participant would be treated if it chooses to shut down its resource seasonally or for some other time period, even though there may be individual days within that period when it might be economic for the unit to operate. In addition, we agree with protestors that requiring an affirmative showing by the Market Participant that it "reasonably expected the costs of making the Resource available to be higher than the Resource's expected net revenues from being available" is subject to sufficient uncertainty and possible burden that it, combined with the limited detail regarding those calculations and processes a Market Participant must follow, would have the effect of compelling non-capacity resources to offer into the day-ahead market rather than risk potential *ex post* sanctions. We therefore agree with protestors that MISO's proposal may effectively create a must-offer obligation on resources that do not receive a corresponding capacity payment. Further, although the Patton Affidavit indicates that the Market Monitor would be available to discuss whether a unit would be expected to offer into the day-ahead market on an *ex ante* basis, MISO does not include Tariff language to this effect in its proposal.

38. We find that the Market Monitor's reliance on Order No. 861 as justification for MISO's proposed revision is misplaced. In Order No. 861, the Commission relieved sellers located in certain RTO/ISO markets and submarkets subject to Commission-approved RTO/ISO monitoring and mitigation of the obligation to submit indicative screens[54] to the Commission in order to obtain or retain authority to sell energy, ancillary

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[54] In Order No. 697, the Commission adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen. The Commission has stated that passing both screens establishes a rebuttable presumption that the seller does not possess horizontal market power, while failing either screen creates a rebuttable presumption that the seller has horizontal market power. *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary*

services, and capacity at market-based rates. In Order No. 861, the Commission disagreed that it was necessary to initiate a formal review of the effectiveness of RTO/ISO monitoring and mitigation practices concurrent with the final rule, noting that the Commission has previously accepted each RTO's/ISO's market monitoring and mitigation provisions as just and reasonable. The Commission also stated that removing the indicative screens does not affect the RTOs/ISOs' application of the market power monitoring and mitigation provisions in their markets.[55] Thus, we agree with protestors[56] that Order No. 861 did not constitute a policy change that compels MISO's proposal in the present docket.

39. Because we find that MISO has not shown that its proposal is just and reasonable and not unduly discriminatory or preferential for the reasons addressed above, we need not address the remaining issues concerning other aspects of the proposal that were protested.

The Commission orders:

The December 20 Filing is hereby rejected, as discussed in the body of this order.

By the Commission. Commissioner Glick is concurring with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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*Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at PP 62-63, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

[55] Order No. 861, 168 FERC ¶ 61,040 at P 65.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc. Docket No. ER20-668-000

(Issued February 28, 2020)

GLICK, Commissioner, *concurring*:

1. I support rejecting Midcontinent Independent System Operator, Inc.'s (MISO) proposed revisions to Module D of its Open Access Transmission, Energy, and Operating Reserve Markets Tariff.[1] MISO's proposal would remove tariff provisions that exempt all Generation Resources that are not Planning Resources under Module E-1 of the Tariff (i.e., non-capacity resources) from physical withholding penalty charges in the day-ahead market. In their place, MISO would effectively make non-capacity resources subject to MISO's physical withholding rules. I agree with my colleagues that MISO's proposal casts too wide a net, putting certain non-capacity resources at risk of being penalized even when they lack market power and, therefore, have no incentive to withhold their capacity for the purpose of driving up prices.

2. Nonetheless, I share MISO's and the Market Monitor's concerns about the potential exercise of market power through physical withholding. The Market Monitor has observed what appear to be exercises of this type of market power by non-capacity resources in MISO over the past several years.[2] Addressing the potential for market participants to exercise market power is critical and would not, in and of itself, require the imposition of a must-offer obligation on non-capacity resources.[3] I write separately

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[1] *Midcontinent Independent System Operator, Inc.*, 170 FERC ¶ 61,170 (2020).

[2] MISO Filing, Dr. David B. Patton Aff. Attachment C ¶¶ 31-35; *id.* ¶ 35 ("These four examples are just a sampling of the types of conduct that likely would have been investigated for physical withholding and possibly have been mitigated absent the exemption."); *see also* MISO February 25 Answer at 8-9.

[3] *See Nevada Power Co.*, 153 FERC ¶ 61,206, at PP 47-48 (2015) (recognizing that physical withholding raises potential market power concerns that are, in effect, unique to market participants *not subject to* a must-offer requirement); *id.* (a market participant may be able to "strategically bid its resources such that the LMP does not reflect the economic unit, but rather reflects a unit the market participant selects to bid with potentially higher cost, to the benefit of its lower cost units. The same concern is not present for resources with must-offer requirements).

to encourage MISO, the Market Monitor, and stakeholders to continue to explore proposals to appropriately address and mitigate the potential for non-capacity resources to exercise market power through physical withholding.

For these reasons, I respectfully concur.

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Richard Glick
Commissioner