UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc.	))	Docket No. ER11-4081-001

INITIAL BRIEF OF THE ORGANIZATION OF MISO STATES

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Pursuant to the Commission's *Order Initiating Briefing Procedures* issued by the Federal Energy Regulatory Commission ("Commission" or "FERC") on August 12, 2013,[1] and the Notice issued by the Commission on August 30, 2013, establishing October 11, 2013, as the deadline for parties in this proceeding to file initial briefs, the Organization of MISO States ("OMS") respectfully submits the following Initial Brief in the above-captioned docket. In this Brief and attachments, the OMS provides additional support for the Commission's decision rejecting the use of a minimum offer price rule ("MOPR") for the capacity auction of the Midcontinent Independent System Operator, Inc. ("MISO").[2]

I. BACKGROUND

On July 20, 2011, MISO filed proposed modifications to its Open Access Transmission, Energy and Operating Reserve Markets Tariff ("Tariff") concerning resource adequacy requirements in compliance with prior Commission orders.[3] In particular, MISO's filing proposed a MOPR to address concerns that a market participant may attempt to artificially

[1] *Midwest Indep. Transmission Sys. Operator, Inc*., 144 FERC ¶ 61,125 (2013) ("August 12 Order").
[2] Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."
[3] *Midwest Indep. Transmission Sys. Operator, Inc*., 131 FERC ¶ 61,228 (2010) and *Midwest Indep. Transmission Sys. Operator, Inc*., 131 FERC ¶ 61,057 (2010).

depress the auction clearing price by constructing new capacity resources and then offering this same resource into the auction at an uneconomic level.[4]

On June 11, 2012, the Commission issued its *Order on Resource Adequacy Proposal* that conditionally accepted the resource adequacy construct proposed by MISO.[5] As one of its conditions, the Commission rejected MISO's proposed MOPR on the basis that: (1) the vast majority of capacity in the MISO region is owned by, or under long-term contracts with, utilities serving their own load, who would therefore not benefit from any lowering of prices that may occur in the voluntary capacity auction; and (2) because the capacity auction approved by the Commission is voluntary, with opt-out and self-schedule options, the proposed MOPR would not likely be effective in deterring suppression of prices through the exercise of buyer market power.[6]

On July 11, 2012, several parties, including MISO's Independent Market Monitor ("IMM") and an *ad hoc* coalition of independent power producers ("Capacity Suppliers"), filed requests for rehearing of the June 11 Order. In their requests for rehearing, these parties challenged the Commission's reasons for rejecting MISO's proposed MOPR. On August 12, 2013, the Commission initiated briefing procedures to address matters raised by the IMM and the Capacity Suppliers with respect to the Commission's rejection of MISO's proposed MOPR.[7]

II. SUMMARY OF THE ARGUMENT

The OMS supports the Commission's June 11 Order rejecting MISO's proposed MOPR provisions. In the June 11 Order, the Commission properly concluded that MISO had not carried its burden of demonstrating that its proposed MOPR was just and reasonable. By rejecting the

[4] Midwest Independent Transmission System Operator, Inc. RAR Compliance Filing, at 15, Docket No. ER11-4081-000 (July 20, 2011) ("MISO July 20 Filing").
[5] *Midwest Indep. Transmission Sys. Operator, Inc*., 139 FERC ¶ 61,199 (2012) ("June 11 Order").
[6] June 11 Order at PP 56-58.
[7] August 12 Order at P 4.

MOPR, FERC recognized the significant differences between the MISO region and other regions in which the Commission has approved MOPR provisions, including the regulatory structure of the states and the retail regulatory authorities in the MISO footprint. The Commission's decision also appropriately reflected the Federal Power Act's ("FPA's") distinction between federal and state jurisdictional authority, including the jurisdiction of states over generation facilities and resource decisions.

In response to FERC's ruling that MISO's proposed MOPR is ill-suited for MISO's voluntary capacity auction design, the Capacity Suppliers and the IMM have sought rehearing of the June 11 Order proposing that MISO change the design to make participation by all capacity, including self-build capacity and bilateral purchases, mandatory. The relief the Capacity Suppliers and the IMM seek would require a fundamental change in the role that MISO's wholesale capacity auction serves in its overall market design - a change that MISO stakeholders overwhelmingly rejected and that is inconsistent with the state regulatory structure for ensuring resource adequacy for their retail ratepayers. As demonstrated herein, the IMM and Capacity Suppliers arguments on rehearing are flawed and lack merit. Accordingly, the Commission should deny rehearing.

III. FERC CORRECTLY REJECTED MISO'S MOPR PROPOSAL

A. By Rejecting the MOPR, FERC Recognized the Critical Differences in the MISO Region.

In determining in the June 11 Order, that a MOPR as proposed by MISO was not just and reasonable, FERC reasoned that:

- "[U]tilities own the vast majority of capacity within MISO;"[8]

[8] June 11 Order at P 66.

- The Capacity Suppliers had failed to explain why "states" must be seen as "agents for loads" that would have an incentive to exercise buyer market power;[9] and

- Most Load Serving Entities ("LSEs") have "little need to purchase capacity from MISO's capacity market" and, therefore, have no "significant incentive to exercise buyer market power;"[10]

Neither the IMM nor the Capacity Suppliers offer any challenge to these fundamental findings. To the contrary, as discussed in detail below:

- Statistics on the MISO IMM website confirm the huge percentage of capacity in the MISO region that is owned by utilities;

- The implication that states are "agents for load" is thoroughly rebutted by the legal framework of the FPA, the public interest obligation imposed on the states and the multi-faceted capacity regulations employed by the states within the MISO region;[11] and

- That the preponderance of utilities in the region own their own capacity supports the finding that utilities in the MISO region have little need to participate in the capacity auction and lack the incentive to exercise market power.

As explained in FERC's June 11 Order, the Commission has a substantial history of finding that significant differences exist between the MISO region and the eastern Regional Transmission Organizations ("RTOs") and that these differences warrant a different approach to resource adequacy in the MISO region.[12] The Commission correctly determined that these differences were sufficient to justify rejecting MISO's proposal to mandate a capacity auction with an accompanying MOPR.[13] This determination was consistent with both Commission

[9] *See id.* at P 67.
[10] *Id.* at P 68.
[11] For convenience, "state" or "state commission" as used herein will be deemed to include the City of New Orleans.
[12] *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,060, P 39 (2008) ("Financial Settlement Order"), *order on reh'g, Midwest Indep. Transmission Sys. Operator, Inc.,* 127 FERC ¶ 61,054, P 30 (2009) ("Financial Settlement Rehearing Order").
[13] June 11 Order at PP 38, 40, 66.

precedent and its discretionary judgment.[14] Specifically, "[i]t is well established that an 'agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable.' [internal citations omitted]; 'it is within the scope of the agency's expertise to make ... a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view.'"[15]

FERC's determination that LSEs are generally unlikely to benefit from exercising buyer market power is based upon the substantial record evidence in the form of numerous protests in opposition to the proposed MOPR.[16] Of particular note are the observations of the OMS and many utilities in the region that the "lumpiness" of generation investment creates capacity in excess of current demands, resulting in a "singular industry structure" of regulated utilities in states in the MISO region.[17]

The IMM and, particularly the Capacity Suppliers, would have the FERC believe that 78 years of a coordinated federal-state scheme of electricity market regulation under the Federal Power Act has not produced any FERC agency expertise (or practical comity) with respect to administering the complementary regulatory spheres of FERC and the state commissions across the country. FERC's policy choice to remove MISO's proposed MOPR provision is well within its expertise and discretion, and logically relatable to the "singular industry structure of regulated utilities" in states in the MISO region. "An agency's discretion is at its zenith when it is

[14] *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 478 (2013), citing *Town of Norwood v. FERC*, 962 F.2d 20, 22 (D.C. Cir. 1992) ("[W]e require only that the agency have made a reasoned decision based upon substantial evidence in the record.").

[15] *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 260-61 (2007) (upholding a FERC determination that a fixed cost adder was necessary "to provide an efficient incentive to invest," and was a "judgment about the future behavior of entities FERC regulates.").

[16] *See generally*, June 11 Order at PP 49-66.

[17] *Id.* at PP 49, 63.

'*fashioning* [ ] *policies*, remedies and sanctions, [ ] in order to arrive at maximum effectuation of Congressional objectives.'"[18]

As discussed further below in detail, the arguments of the IMM and the Capacity Suppliers are flawed in a number of ways. Their arguments on rehearing fundamentally assume that a capacity market is the only option for ensuring just and reasonable rates, ignoring the fact that arms-length bilateral contracting is just as much a part of the overall "wholesale electric market." Bilateral contracts are beneficial to the wholesale market. First, bilateral contracts need no additional administrative intervention in the form of mitigation (*i.e.*, MOPR) oversight in their creation and thus are even more "efficient" in bringing buyer and seller together. Second, bilateral contracts are an essential part of supply for LSEs in that they enable the reallocation of surplus generating capacity to where it is needed or desired on a longer term basis than the one- to three-year "short term" capacity auction proposed by the Capacity Suppliers and the IMM. Finally, the bilateral markets are a distinguishing feature of the MISO electric wholesale market with over 98% of demand being served through LSE-owned generation or bilateral contracts. The IMM's own data indicate that for 2011-12 (24 months) "most LSE obligations were satisfied through owned capacity or bilateral purchases," and that "cleared capacity in the VCA [MISO voluntary capacity auction] averaged just 1.1 GW, or *1.3 percent of the total designated capacity.*"[19]

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[18] *Pub. Utils. Comm'n of State of Cal. v. FERC*, 462 F.3d 1027, 1053 (9th Cir. 2006) (citing *Niagara Mohawk Power Corp. v. Fed. Power Comm'n,* 379 F.2d 153, 159 (D.C. Cir.1967) (emphasis added)).

[19] Potomac Economics, *2012 State of the Market Report for the MISO Electricity Markets*, 18 (June 2013) (emphasis added), ("*2012 State of the Market Report*") https://www.misoenergy.org/Library/Repository/Report/IMM/2012%20State%20of%20the%20Market%20Report.pdf (last visited September 28, 2013). Relevant pages attached as Exhibit A hereto.

FERC's decision to remove the proposed MISO MOPR provisions is based upon substantial evidence in the record, and reflects a reasoned application of agency expertise within FERC's broad discretion under the FPA to determine "just and reasonable rates."[20]

B. By Rejecting the MOPR, FERC Properly Recognized the Jurisdictional Authority and Key Role of the States in the MISO Region.

The states and retail regulatory authorities within the MISO footprint actively regulate resource adequacy. While specific regulatory procedures vary from state to state, this active regulation includes integrated resource planning, approval of new generation facilities, oversight of utility buy-side and demand-side decisions, and other authority over utility resource portfolios.[21]

1. The FPA limits FERC jurisdiction where states actively regulate resource adequacy.

Under the FPA, the Commission has jurisdiction over the transmission and sale of electricity at wholesale in interstate commerce,[22] by entities not excluded from FERC's jurisdiction.[23] The FPA withholds jurisdiction, "except as specifically provided …, over facilities used for the generation of electric energy."[24] The FPA further clarifies that FERC's jurisdiction "extend[s] only to those matters which are not subject to regulation by the States."[25] The matters at issue here, including decisions about the "[n]eed for new power facilities … their economic feasibility," and how they should be procured, are among those "characteristically

[20] Federal Power Act § 205, 16 U.S.C. § 824d.
[21] *See* OMS Resource Planning Survey at https://www.misoenergy.org/Events/Pages/AC20130220.aspx.
[22] 16 U.S.C. § 824(b)(1).
[23] 16 U.S.C. § 824(f).
[24] 16 U.S.C. § 824(b)(1).
[25] 16 U.S.C. § 824(a). While the U.S. Supreme Court has indicated that this statement is "one of great generality" that "cannot nullify a clear and specific grant of jurisdiction," the Court has also stated that this statement "cannot be wholly ignored" and that it is "relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness." *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 527 (1945).

governed by the States."[26] Decisions whether to purchase electricity are similarly subject to state, not FERC, jurisdiction.[27]

In the underlying pleadings in this docket, the OMS recognized the Commission's authority to establish wholesale prices for capacity through capacity auctions but highlighted the fact that the MOPR provisions proposed by MISO, as well as those advanced by the IMM and the Capacity Suppliers, would impermissibly interfere with state authority over resource adequacy decisions, in view of the unique circumstances of the MISO region. In rejecting the MOPR, and the related arguments of the IMM and the Capacity Suppliers, FERC appropriately recognized the authority of state and retail regulators under the FPA.

In addition, FERC's rejection of the MOPR is consistent with its previous holdings that recognize that the states retain control over local matters, including siting and construction of

[26] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205, 212 (1983); *New York v. FERC*, 535 U.S. 1, 24 (2002) ("States retain significant control over local matters," including "reliability of local service; … integrated resource planning and utility buy-side … decisions … [and] utility generation and resource portfolios.").

[27] *See also Ameren Energy Mktg. Co.*, 96 FERC ¶ 61,306, 62,189 (2001) ("[W]holesale ratemaking does not, as a general matter, determine whether a purchaser has prudently chosen from among available supply options. That is generally a question that the state commissions address." (footnote omitted)).

generation facilities[28] and that the states "should play a central role in developing resource adequacy policies" for the MISO region.[29]

Absent rejection, the MOPR, in its original form or as proposed by the IMM and the Capacity Suppliers, would have inappropriately encroached on the states' active regulation over generation facilities and resource adequacy and would have likely inhibited the entry of state-selected resources. As the OMS explained in earlier pleadings in this proceeding,[30] to the extent that a LSE's self-build or bilateral purchase capacity fails to clear the MISO capacity auction, the proposed MOPR rules would effectively obligate LSEs to buy duplicative capacity from the capacity auction in order to satisfy the reserve margin planning requirement. This obligation to purchase capacity over and above what is actually needed and approved by the state commission would intrude on state jurisdiction over capacity purchases, and inappropriately "compel the enlargement of generating facilities" in an LSE's portfolio, contrary to 16 U.S.C. §§ 824a(b) and 824(f), and *e.g., Otter Tail Power Co. v. FPC*, 473 F.2d 1253, 1258 (8th Cir. 1973) (holding that FERC's decision approving the sale of a municipality's generation to a utility on such terms as to effectively compel the utility to own generation exceeded FERC's jurisdiction under the FPA).. .

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[28] *See, e.g.*, *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, FERC Stats. & Regs. ¶ 31,036, 31,782, n.543 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *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). Specifically, Order No. 888 at 31,782, n.543 ("Among other things, Congress left to the States authority to regulate generation and transmission siting"); *id*, at 31,782, n.544 ("This Final Rule will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility general and resource portfolios; and authority to impose non-bypassable distribution or retail stranded cost charges."); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, PP 107, 227 (2011) (to same effect as to state regulation of transmission), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *appeal pending, South Carolina Pub. Serv. Auth. v. FERC, et al*., No. 12-1232 (D.C. Cir. Filed 5/25/2012 and later).

[29] *Midwest Indep. Transmission Sys. Operator, Inc.,* 122 FERC ¶ 61,283, P 68 (2008) ("Order on Resource Adequacy Proposal").

[30] *See* Notice of Intervention and Protest of the Organization of MISO States, Inc., 11-16, Docket No. ER11-4081-000 (Sept. 15, 2011) ("OMS Protest").

FERC precedent provides that the Commission may choose when and in what manner to challenge the dividing line between state and federal jurisdictional authority.[31] In Order No. 888, the Commission determined that it had authority to regulate unbundled retail transmission, but refused to extend that authority to bundled retail transmission due in part to "numerous difficult jurisdictional issues" that did not need to be resolved at the time.[32] Upholding this authority, the U.S. Supreme Court concluded that FERC's decision to not assert jurisdiction represented "a statutorily permissible policy choice."[33] FERC's rejection of the MOPR in deference to the states' asserted jurisdiction is, therefore, "a statutorily permissible policy choice" regarding its jurisdictional authority.

2. State regulation over resource adequacy is premised on the public interest.

The IMM and the Capacity Suppliers contention that resource decisions by states and other retail regulators will be based on achieving lower wholesale capacity prices,[34] ignores the key difference between regulators and other RTO participants: the regulators are charged with acting in the public interest.

Acting in the public interest is not about getting the lowest capacity price; it is about ensuring safe and reliable service at just and reasonable rates. Acting in the public interest involves balancing the interests of both the consumers and the utilities. This is in stark contrast to the self-interest of the Capacity Suppliers. While there is nothing wrong with the Capacity Suppliers being interested in maximizing their revenues and profits, the difference between

[31] *New York*, 535 U.S. at 27-28 .
[32] Order No. 888 at 31,699; *see also* Order No. 888-A at 30,225-26.
[33] *New York*, 535 U.S. at 28.
[34] Request for Rehearing of the Midwest ISO Independent Market Monitor, 9-11, Docket No. ER11-4081-000 (July 11, 2012) ("IMM Rehearing") and Request for Rehearing of Capacity Suppliers, 14, Docket No. ER11-4081-000 (July 11, 2012) ("Capacity Suppliers Rehearing").

private self-interest versus the public interest provides a substantial basis for the Commission's different treatment of buyer and seller market power in the MISO region.

Moreover, state and retail regulators examine multiple factors in determining whether a utility's resource choice is in the public interest. Generation resources provide two "joint" products: day-to-day energy and capacity. For states and retail regulators, the determination of resource adequacy is a multi-faceted public interest judgment about *long-term* needs. Reliable resource adequacy is not a short-term assessment or procurement choice. Power plants last for decades and power purchase agreements often have terms of up to ten years. Because of economies of scale and construction lead time, prudent resource adequacy determinations necessarily entail future capacity considerations. Reliable, prudent resource adequacy requires long-term planning that must examine multiple "uncertainties" and levels of risk. First, there is uncertainty over the future of fuel prices, demand and supply conditions, the regulatory environment, and technological change, all of which must be carefully considered by the regulator. Second, generation investment involves consideration of a wide variety of complex factors including: overall supply adequacy relative to long term forecasted need, reliability concerns, fuel diversity, economies of scale, environmental considerations, siting issues, and other public policy considerations.

In addition, bilateral contracts, which are a substantial component of the overall wholesale capacity market in the MISO region, often provide energy as well as capacity over the long-term. For these reasons, states and LSEs do not, and should not, take a short run perspective on resource adequacy. To do so would be imprudent and could lead to unjust and unreasonable rates over the long run. Therefore, a price signal from a single year's capacity auction is relevant only to the extent utilities have short term capacity needs that have to be met.

This is a very small portion of the resource adequacy requirements of regulated utilities in the MISO region.

3. The MISO region inherently lacks the incentives to engage in capacity price suppression.

The Commission's assessment regarding the lack of incentives by load serving entities in the MISO region to engage in price suppression strategies is correct. The degree of concern about capacity auction price suppression is directly dependent on the magnitude of the load serving entity's "net short" position in owned or contracted capacity at the time of the capacity auction and the relationship of that net short position to the total market. Utilities that are *not* net short capacity (owned or contracted) at the time of the auction or are in a small net short position relative to the market are *very* unlikely to engage in capacity price suppression strategies. This net short observation does not directly depend on the type of prevailing regulation or business structure of the load serving entity. However, certain types of regulatory methods and certain types of business structures result in load serving entities that are less likely to be net short at the time of the capacity auction. Those regulatory structures and business structures overwhelmingly predominate in the MISO region.

The more load serving entities (and more load) in a region that are *not* net short capacity at the time of the auction, the less likely that region is to face capacity market price suppression attempts and the less need there is for a MOPR. Traditional state regulation, particularly with integrated resource planning, leads regulated utilities to *not* be net short capacity. Municipally owned and cooperatively owned utilities are generally in a similar position. The MISO region has a majority of traditional state regulation (i.e., 15 of 16 OMS members in the U.S. have traditional regulation) and, therefore, a large amount of load is served by traditionally regulated utilities. So, a MOPR is not needed in the MISO region, in contrast to other regions (for

example, the region of PJM Interconnection, L.L.C. ("PJM")) where much less load is covered by capacity (owned or contracted) at the time of the capacity auction (*i.e.*, there are much more and bigger "net short" capacity positions).

While it is generally assumed that competitive retail suppliers in retail access states are more likely than traditionally regulated utilities to be in net short capacity positions at the time of the capacity auction, this assumption, even if true, does not rise to a level of concern for capacity price suppression strategies in the MISO region. Because retail load in these programs can easily switch suppliers, LSEs in retail competition states may not be likely to enter into forward bilateral capacity contracts for much of their load. But, these LSEs are unlikely to engage in capacity price suppression strategies for the same reason. It would be risky for such LSEs to commit to new capacity and use it in a capacity auction to suppress price if the load it serves could switch to other suppliers at any time, leaving the LSE with excess capacity (sold at low prices).

Another important element in the success of a price suppression strategy for a net short entity is how large that entity's net short position is in comparison to the total load in the relevant market. A net short entity must successfully suppress the capacity price enough to offset the losses that it makes on its capacity sales with the gains it makes in purchasing capacity that it may need at the lower price. There are a large number of load serving entities in the MISO region and any one LSE's share of the market is generally small. Furthermore, to the extent that there are no binding constraints between MISO's capacity zones, the MISO market is very large. Thus, the share of any load serving entity's net short position in relationship to the market is likely to be even smaller, and its likely success in any capacity price suppression attempt would also be small. At the time the Commission rejected MISO's proposed MOPR, zonal binding

(where smaller capacity sub-markets are more easily manipulated by a price suppression strategy) in MISO's capacity auction was not expected, and MISO's transmission expansion planning process makes it likely that, if zonal binding is experienced in the future, it will likely be short-lived.

In conclusion, the Commission correctly assessed the likelihood that load serving entities in the MISO region would attempt to exercise capacity price suppression strategies. That likelihood is very small for the reasons that the Commission identified and as further explained above.

C. By Rejecting the MOPR, FERC Eliminated the Adverse Rate Impact a MOPR Would Have in the MISO Region.

In determining just and reasonable rates and related rules, FERC must balance a number of competing interests. However, first and foremost the Commission's duty is to protect customers from unjust and unreasonable rates.[35] Given that protection of consumers is a primary goal of the FPA, FERC made the most reasonable choice in simply rejecting MISO's proposed MOPR. Mandating and/or "fixing" the MOPR were choices that would have only forced FERC into effectively reversing its repeated determinations that the MISO region is unique and regional differences are to be reasonably accommodated. Those alternative choices are vastly inferior and problematic because this record lacks (1) substantial evidence of pricing abuses, (2) evidence of fundamental state regulatory changes since 2006, or (3) anything approaching a stakeholder consensus in MISO in favor of major capacity market changes. FERC wisely chose the "do no harm" approach and simply rejected MISO's MOPR rule and the significant risk of unjust and

[35] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 72 Fed. Reg. 39904, 31,819-20 (July 20, 2007) ("Order No. 697"); *see also Pa. Water & Power Co. v. Fed. Power Comm'n,* 343 U.S. 414, 418 (1952) ("A major purpose of the whole [Federal Power] Act is to protect power consumers against excessive prices."); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1017 (9th Cir. 2004) (describing "protecting consumers" as the FPA's "primary purpose.").

unreasonable rates. The FERC's decision to reject the MOPR in the MISO region properly avoids the adverse impact the MOPR would have on rates in a region that consists of LSEs that predominantly use self-supply and bilateral contracts to meet their resource needs.

Ninety-eight percent of the load in the MISO region is served through self-supply and/or bilateral contracts.[36] Imposition of a mandatory capacity auction and a MOPR is incompatible with the continued regulation of resource adequacy by states in the MISO region. State regulators have traditionally worked with their regulated utilities to plan for future capacity needs and ensure a reasonable opportunity for utilities to earn returns sufficient to attract needed capital to construct new capacity resources through retail electric rates. Yet a capacity market subject to a MOPR will neither reflect such regulator interaction nor send the proper price signal for the long term. Rather, the mere existence of a MOPR implies that state commission decisions to approve previous and future assets cannot be relied on to ensure sufficient capacity at just and reasonable rates. To quote previous OMS comments:

> [U]tilization of a MOPR in the MISO footprint, which is predominantly vertically integrated and state-regulated, if permitted at all, must be done in a very measured fashion, otherwise it is likely to lead to capacity not clearing a capacity market or raising the overall clearing price, neither of which are good for ratepayers. Inclusion of a MOPR provision in the MISO tariff, if not subjected to very specific limitations, implies state commission prudency decisions regarding resource investments by their jurisdictional utilities cannot be relied on to be in the public interest. There is no basis for that premise.[37]

It should also be understood that capacity pricing subject to a MOPR is short run pricing only; whereas generation investment, as regulated by the states, involves a multi-faceted public welfare judgment about the long term needs of energy and capacity. State regulators generally have a statutorily mandated responsibility to ensure that their utilities diligently plan to meet their customers' needs both in the near term and in the long term. In the absence of a MOPR the

[36] *See* note 20.
[37] OMS Protest at 16.

state commissions will continue to effectively balance the long-term capacity needs, the capacity owner's profitability and the need to charge just and reasonable retail rates.

MOPRs that have been approved to date have been justified, at least in part, on the assumption that short term pricing of capacity is the sole valid signal as to the need (or not) for the associated long term generation investment which takes into account the revenue from "joint product" energy and capacity. The question that should be asked is this: is a short term price of capacity established by a MOPR-restricted capacity auction is necessary, or even useful, within the MISO region, given the involvement and jurisdiction of state commissions over the resource procurement process. The answer is "no."

Capacity, within the MISO Resource Adequacy Construct, is a residually derived product and is determined after most LSEs have acquired the amount of generation that is sufficient to cover the forecasted peak demand for electricity. To build large, base load generators requires significant capital investment and return over a very long period of time (*i.e.*, 40 or more years). The capacity auction as proposed by the IMM for the MISO region, with the MOPR, does not provide a sufficient basis for such a long-term investment; in fact, no capacity auction can. Consequently, the capacity market envisioned for the MISO region by the Capacity Suppliers and the IMM, with the inclusion of a MOPR, will incent the construction of smaller units that will earn a return quickly, but may not offer the type of scale that would be more economically efficient over longer periods of time. It follows that electric rates resulting from use of this MOPR incented capacity will have to be higher than might otherwise be the case in the MISO region using the current construct of state commission oversight and the absence of any MOPR. This is because state regulatory oversight allows resource planning over a longer time frame,

taking many more elements into account, versus a MOPR that only is concerned with short term pricing in the voluntary capacity auction.

In addition, the "administrative" character of a MOPR renders it unable to convey proper price signals for generation investment. The MOPR itself is administratively determined and is not necessarily reflective of what capacity resources are currently available or could be constructed. The MISO capacity auction is a residual auction. Most of the required capacity is provided via resources owned by the LSEs or purchased through long-term bilateral contracts. Any price signal from the voluntary capacity auction will not be a meaningful price signal for future capacity. In terms of ensuring just and reasonable rates, a MOPR in the MISO region has the potential to cause ratepayers to pay again for capacity already purchased and paid for by the ratepayers.

If a MOPR precludes the current allowable MISO choices of opting out, for self-built capacity or use of bi-lateral contracts, the consumers of an affected LSE could indeed find themselves "paying again" when offers of the LSE's generation units are mitigated up and do not clear in a capacity auction. A MOPR makes that outcome significantly more likely, which would lead to unjust and unreasonable rates in the MISO region. Additionally, a MOPR may unreasonably prevent LSEs from receiving additional revenues from surplus generation that could reduce the revenues needed from retail consumers for long-term generation investment.

IV. CAPACITY SUPPLIERS AND IMM ARGUMENTS ON REHEARING ARE FLAWED AND SHOULD BE REJECTED

A. The IMM and the Capacity Suppliers Rehearing Arguments Ignore the Fundamental Provisions of the FPA and FERC's Regulatory Policies.

The Capacity Suppliers and the IMM submitted arguments that MISO's proposed buyer mitigation rules were fundamentally flawed and unlikely to ever result in any mitigation.[38] In part implicitly agreeing with their reasoning, the Commission found that MISO had failed to demonstrate that its MOPR proposal was just and reasonable and rejected MISO's proposal. The Capacity Suppliers now contend that it was FERC's responsibility to "strengthen the buyer mitigation rules" and that "the correct thing [for the Commission] to do would have been to *fix* the flawed proposal, not delete it."[39] Similarly, the IMM asserts that the only basis for eliminating the MOPR provision would be that "the flaws cannot be remedied."[40] Both of these arguments should be rejected as they ignore fundamental provisions of the FPA and FERC's regulatory policies.

1. The initial burden of demonstrating that the MOPR is just and reasonable is on MISO.

Under §205 of the FPA, the burden to prove that a proposed tariff will result in just and reasonable rates lies with the applicant, not the Commission.[41] The Commission's obligation is to review the proposed tariff and to determine whether it is just and reasonable and not unduly discriminatory or preferential.[42] MISO alone had the duty of demonstrating that the MOPR proposal was just and reasonable. FERC concluded that MISO had not made such a

[38] Capacity Suppliers Rehearing at 7.
[39] *Id.*
[40] IMM Rehearing at 10.
[41] *Cal. Indep. Sys. Operator Corp.,* 119 FERC ¶ 61,076, P 14 (2007).
[42] *PacifiCorp.,* 134 FERC¶ 61,099, P 5 (2011); *Midwest Indep. Transmission Sys. Operator, Inc.,* 139 FERC ¶ 61,261, P 31 (2012).

demonstration.[43] The IMM and the Capacity Suppliers ignore the Commission's proper finding that MISO failed to carry its burden and instead improperly cast the error as being that of the Commission's failure to "fix" MISO deficiencies.

2. FERC has no duty to cure deficient filings.

Having correctly determined that MISO had not carried this burden, FERC was precluded from accepting the MISO filing in its current state. While the Commission has broad discretion to conditionally accept a tariff filing subject to the applicant submitting a revised filing in compliance with the Commission directive, neither the FPA nor any other statute or regulation imposes an obligation on FERC to "fix" the deficiencies in an applicant's filing or to determine if the flaws can be remedied.[44] In fact, as discussed in Section III, FERC properly exercised its discretion in conditioning the acceptance of MISO's filing on the removal of the MOPR provision from MISO's resource adequacy proposal.[45]

3. Requiring FERC to cure deficient RTO filings on substantive market design issues undermines the importance of the stakeholder process.

The Capacity Suppliers and the IMM argument that FERC was required to fix the perceived flaws in MISO's proposed MOPR ignores the Commission approved stakeholder procedures and diminishes significantly the important role that the stakeholder process plays in the MISO region. The primary purpose of the stakeholder process is to provide a forum for interested parties to participate in the development of proposed tariff changes to MISO's energy and capacity markets.[46] By vesting the stakeholder process with the authority to propose and

[43] June 11 Order at P 66.
[44] *City of Groton v. FERC*, 584 F.2d 1067, 1070 (D.C. Cir. 1978), and *Papago Tribal Util. Authority v. FERC*, 628 F.2d. 235, 247 (D.C. Cir. 1980).
[45] June 11 Order at P 70.
[46] *Midwest Indep. Transmission Sys. Operator, Inc.,* 136 FERC ¶ 61,188, P 21 (2011) (citing FERC requirement under Order No. 741 that directs each RTO/ISO to revise its tariff to establish minimum criteria for market participation through its stakeholder processes); Order 719 at PP 116, 159 (requiring each RTO and ISO to work with its stakeholders, including state and local regulatory entities to make tariff revisions, market design, and

recommend to MISO such tariff changes to be filed at the FERC, the Commission recognizes that the entities that are most knowledgeable of the regional needs and capabilities are in the best position to incorporate their practical experience into a collaborative process that produces well-informed decisions.[47] Even in circumstances, such as the instant one, in which MISO filed the MOPR provision without the support of its stakeholders, the stakeholder process is integral to the development of proposals in RTOs, especially those involving market design. As noted by the FERC, a robust stakeholder process, including the advice of the Advisory Committee, is important to the development of proposals that MISO submits to the Commission.[48]

The IMM and the Capacity Suppliers contention that FERC should have cured the deficiencies in MISO's MOPR filing implies that FERC should develop substantial market design solutions and unilaterally impose them on RTOs without the input of stakeholders. The OMS contends that, under §205 of the FPA, the Commission has no duty to opine on what might be an acceptable filing, not to mention "fix" any perceived deficiency in MISO's filing.[49] Rather, in circumstances where FERC rejects a filing, nothing precludes a party from relying on

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market rules); s*ee also* the Commission's Notice of Proposed Rulemaking on *Wholesale Competition in Organized Markets,* 122 FERC ¶ 61,167 at P 24 (2008) (market design changes should be vetted through the stakeholder process and ultimately considered by the board of the RTO and brought to the Commission after consideration by the region); *see also* the Commission's Advance Notice of Proposed Rulemaking, *Wholesale Competition in Regions with Organized Electric Markets*, 72 Fed. Reg. 36276, FERC Stats. and Regs. ¶ 32,617, P 160 (June 22, 2007).

[47] Order No. 1000-A at P 648 (stating in the context of cost allocation that,"[W]e note that the Commission has previously found, and the D.C. Circuit has affirmed, that a stakeholder process is appropriate when unresolved issues may be better addressed in a forum featuring broad stakeholder input, and where a transmission solution can be better tailored to meet regional transmission needs through broad input from interested participants that may not otherwise participate in a Commission proceeding. [footnote omitted] The public utility transmission providers and stakeholders that make up the region are intimately familiar with the transmission needs of their region. Therefore, they are in the best position to develop, and submit to the Commission for review, a cost allocation method or methods that complies with the six cost allocation principles and best meets the transmission planning region's needs."). *See also Midwest Indep. Transmission Sys. Operator, Inc.,* 144 FERC ¶ 61,151 (2013) (FERC required use of stakeholder process to develop a Support Resource Agreement); *Midwest Indep. Transmission Sys. Operator, Inc.,* 139 FERC ¶ 61,197, P 9 (2012) (FERC directed that tariff revisions should go through MISO's stakeholder process.); *Midwest Indep. Transmission Sys. Operator, Inc.,* 137 FERC ¶ 61,212, n.207 (2011) (FERC stated that it encouraged interested parties to participate in MISO's stakeholder process to develop cost allocation proposal).

[48] *Midwest Indep. Transmission Sys. Operator, Inc*., 118 FERC ¶ 61,209, P 231 (2007).

[49] *PJM Interconnection, LLC*, 132 FERC ¶ 61,180, P 23 (2010).

the FERC's policy guidance, curing any deficiencies and submitting a new proposal through the established stakeholder process. FERC's action in rejecting MISO's MOPR was, therefore, consistent with its statutory obligations and maintains FERC's oft-stated emphasis upon, and respect for, the role of the stakeholder process in the RTOs.[50]

B. The IMM and the Capacity Suppliers Rehearing Arguments Ignore the Existing Enforcement Tools to Prevent Market Manipulation.

The Capacity Suppliers and the IMM argue that, even if only a very small amount of capacity clears through the MISO capacity market, such an amount has a critical impact upon forward capacity prices.[51] They argue that net buyers have a strong incentive to game the market by suppressing capacity auction prices in order to reduce their subsequently negotiated bilateral capacity contract prices.[52]

According to the IMM's data, the MISO region is one in which utilities own the vast majority of the capacity which means that all but an exceptionally small amount of the capacity needs of LSEs are satisfied through self supply, bilateral contracts or through a fixed resource adequacy plan ("FRAP") in lieu of participating in the capacity auction.[53] This reliance on self-supply and bilateral contracts, as discussed above, narrows considerably the risk of price suppressing behavior in the MISO energy markets. While theoretically, it may be possible for this small amount of capacity at auction to influence the bilaterally-negotiated capacity prices, the OMS believes that FERC has at its disposal an arsenal of tools that discourage anti-competitive conduct and prohibit the type of fraudulent pricing practices and market

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[50] August 12 Order (Clark, T., dissenting) (Circumventing the stakeholder process by reopening the MOPR issue in this narrow context interjects unnecessary uncertainty into MISO's resource adequacy construct at a time when the region is still adapting to the major design changes just recently approved. If market participants believe a MOPR will further the ability for the region to meet its resource adequacy needs, then they should bring these issues to the MISO stakeholder process where interested parties can comprehensively consider MOPR related issues.).

[51] Capacity Suppliers Rehearing at 12-13.

[52] *Id.*

[53] *See* note 20.

manipulation that the Capacity Suppliers and the IMM are concerned about. The risks and penalties associated with engaging in behavior to artificially reduce the prices in the capacity markets are so substantial that they should acts as a sufficient deterrent to prevent LSEs from engaging in such conduct.

Specifically, § 222 of the FPA prohibits any entity from using any deceptive or manipulative scheme or device in contravention of the Commission's rules and regulations.[54] Under FERC's regulation an entity that engages in any act or practice that would operate as a fraud (*i.e.*, impair or obstruct the market) or deceit upon another entity in connection with the purchase or sale of electric energy or the transmission of electric energy is subject to FERC enforcement.[55] The Commission's Office of Enforcement actively gathers information about market behavior, monitors market participants and works to ensure that entities comply with the applicable statutes, rules, regulations, and tariff provisions. Included among the Commission's resources is the ability to conducts audits, respond to hotline tips, and institute investigations to evaluate compliance with Commission requirements. Where violations occur, FERC has the authority to impose civil penalties of up to $1 million per day in fines, to disgorge all unjust profits and to obtain other costly compliance commitments.

The Capacity Suppliers and the IMM contention that net buyers in the MISO region will have a strong incentive to game the market, in order to be able to subsequently negotiate bilateral contract prices that are based on artificially low auction prices resulting from their own manipulative conduct, ignores the extreme consequences associated with being found to have violated §222 of the FPA. Clearly, FERC's successful record of conducting investigations and identifying instances of market manipulation has acted as a deterrent to such conduct. Moreover,

[54] 16 U.S.C. § 824w.
[55] 18 C.F.R. §§ 1c.1 and 1c.2 (2013).

FERC's enforcement policy has encouraged companies to develop rigorous compliance programs to minimize the potential for violations. The OMS believes that the combination of FERC's enforcement activities coupled with the compliance programs developed by companies constitute an effective tool to prohibit the theoretical concerns argued by the Capacity Suppliers and the IMM.

C. The Capacity Suppliers Proposed MOPR is Inconsistent with the Anti-trust Case Precedent, Would Cast Too Broad a Net for Buyer Market Power, and Would Chill Competition for New Investment.

The Capacity Suppliers argue that the exercise of market power can create unjust and unreasonable rates regardless of whether the market power belongs to buyers or sellers, and, thus, they contend that FERC must set a price floor for all new buyer-side capacity through the use of an expanded MOPR.[56] However, the fact that lower prices may result from new entry does not necessarily mean that buyer market power is being exercised or that a broad mitigation measure should be imposed. Contrary to the implications in the Capacity Suppliers' pleading, *Weyerhaeuser* does not stand for the proposition that all buyer-side activity should be mitigated all the time. Although the U.S. Supreme Court in *Weyerhaeuser* recognized that buyer market power is the mirror image of seller market power, it stated that both predatory pricing (seller market power) and predatory bidding (buyer market power) schemes "are rarely tried, and even more rarely successful."[57] The Supreme Court also found that "mistaken findings of liability would 'chill the very conduct the antitrust laws are designed to protect.'"[58]

The setting of a price floor for all new buyer capacity pricing advocated by the Capacity Suppliers and the IMM would apply to *all* buyers self-supplying their capacity obligations. This

[56] Intervention and Protest of Capacity Suppliers, 46, Docket No. ER11-4081-000 (Sept. 15, 2013); Capacity Suppliers Rehearing at 9 (citing *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 320 (2007)).
[57] *Weyerhaeuser,* 549 U.S. at 323-24.
[58] *Id.* at 320.

approach casts too broad a net and is inconsistent with the very case law cited by the Capacity Suppliers and the IMM.

Importantly, most buyers in the MISO market are load-serving utilities with owned generation and subject to state regulatory oversight. The U.S. Supreme Court has held that state regulation "may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details."[59] State regulation in lieu of competition is the predominant regulatory regime in the MISO region. The right of the states to regulate the utility's procurement of sufficient but not excessive electric generating capacity to ensure reliability and service adequacy for their residents is unquestioned. The FPA explicitly leaves that issue to the states.[60] Moreover, through active regulation, the states in the MISO region have adopted clear and comprehensive policies actively supervising the procurement efforts of their utilities through such techniques as resource planning reviews, state certification proceedings, and retail rate hearings on the recovery of these costs from ratepayers.

Additional support for deference to state regulation of utility capacity procurement decisions is found in anti-trust law involving buyer-side market power. The U.S. Supreme Court has recognized an exemption from anti-trust laws for buyer-side activity that is undertaken pursuant to explicit state policy and that is carefully regulated by the state.[61] The Court found in *Parker v. Brown* that such state regulation is "to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately

[59] *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 633 (1992).
[60] FPA §§ 201(a) and (b), 16 U.S.C. §§ 824(a) and (b).
[61] *Parker v. Brown*, 317 U.S. 341, 350 (1943).

dealt with by Congress."[62] Here, as recognized by Congress in the FPA itself, the capacity procurement decisions of the utilities in the MISO region are a matter "appropriately" regulated by the states in the interest of the safety, health and well-being of their local communities. FERC's rejection of the Capacity Suppliers' and the IMM's protests below properly comports with this long-recognized jurisdictional divide and should be upheld on rehearing.

D. The IMM and the Capacity Suppliers Rehearing Arguments Ignore the Need to Accommodate Regional Differences.

The Capacity Suppliers seek to override FERC's clear precedent holding that regional differences need to be accommodated with respect to MISO's energy markets.[63] Examples of FERC precedent include:

> We reject calls from commenters that we require the Midwest ISO to file a capacity market proposal in lieu of an [energy only market] EOM approach to resource adequacy. We have consistently allowed for regional differences in the RTO context and have never mandated a one-size-fits-all approach for dealing with resource adequacy.[64]
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> * * * *
>
> Finally, New England Generators contend that PJM, NYISO, California ISO, or Midwest ISO do not limit the ability for resources to engage in *bilateral transfers based* on a reliability review. The Commission has consistently recognized that regional differences may be recognized in its analysis of the just and reasonableness of transmission organization proposals, [footnote omitted] *and the fact that other RTOs have enacted (or failed to enact) a particular market rule is not dispositive of the justness and reasonableness* of ISO-NE's market rule.[65]

The IMM and the Capacity Suppliers have not provided any justification for a departure from FERC's characterization of the MISO region in 2006. Nor have they provided a basis for their

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[62] *Id.* at 362-63.

[63] Capacity Suppliers Rehearing at 12-15, 36-38.

[64] *Midwest Independent Transmission System Operator, Inc.*, 116 FERC ¶ 61,292, P 53 (2006) (citing *Long-Term Firm Transmission Rights in Organized Electricity Markets,* 116 FERC ¶ 61,077, P 100 (2006) (noting the appropriateness of recognizing regional differences in market design)); *Southwest Power Pool, Inc*., 110 FERC ¶ 61,031, PP 22-23 (2005) (finding that differences between RTO regions may be warranted given the different circumstances of the markets); *Midwest Independent Transmission System Operator, Inc*., 102 FERC ¶ 61,196, P 43 (2003) (same).

[65] *ISO New England, Inc. and New England Power Pool*, 125 FERC ¶ 61,102, P 97 (2008) (emphasis added).

contention that wholesale electric rates previously approved by the Commission are no longer just and reasonable. Accordingly, the Capacity Suppliers' and IMM's arguments on rehearing of the June 11 Order have no sound factual basis and should be rejected.

E. The IMM and the Capacity Suppliers Rehearing Argument is Wrong; Strong Buyer Mitigation Rules Will Harm the Market.

In the request for rehearing the IMM stated:

> The Commission also raised concerns regarding the interaction fixed resource adequacy plan ("FRAP") opt-out provisions with the MOPR provisions.[Footnote omitted] Again, these concerns can be easily addressed by not allowing LSEs to designate capacity from new resources to satisfy their Module E requirements if the new resource is subject to an offer floor (resources that are determined to be economic would not be subject to an offer floor under the proposed MOPR). Instead, such resources could be required to first clear through the VCA. This would address the Commission's concern that the FRAP opt-out provisions would render the MOPR provisions ineffective.[66]

The IMM is advocating that LSEs no longer be allowed to opt out of the Voluntary Capacity Auction (VCA) with new resources deemed uneconomic by the IMM. Instead these resources will be required to first clear through the VCA with an applicable MOPR. Under this proposed requirement, if these new resources do not clear the VCA, ratepayers could be required to pay again at the wholesale level for capacity already paid for through retail rates. In addition, a MOPR may unreasonably prevent LSEs from receiving additional revenue through the VCA for surplus capacity that could reduce the revenues needed from retail consumers for long-term generation investment.

Finally, the MOPR and the IMM's determination on what is economic could severely restrict LSE options on, and state approval of, appropriate resources to meet resource adequacy and therefore lead to unjust and imprudent rates over the long run for the reasons discussed in Section III. B.2 above.

[66] IMM Rehearing at 10.

F. The IMM and the Capacity Suppliers Rehearing Arguments Fail to Recognize the Value of Bilateral Contracts.

1. A properly functioning bilateral market needs no additional oversight.

The U.S. Supreme Court held that "only when the mutually agreed-upon contract rate seriously harms the consuming public may the [FERC] declare it not to be just and reasonable."[67] This conclusion proceeded from a fundamental view that buyers and sellers in wholesale markets are "often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them."[68]

The Commission's MOPR decision in this case properly respects the "presumption" that bilateral contracts are just and reasonable, thereby making them complementary to a voluntary capacity auction in the achievement of the same statutory objective of just and reasonable rates. The only constraint on resorting to the presumption of a just and reasonable contract rate is a showing that a party "engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations."[69] Thus, the U.S. Supreme Court set a high level of protection for contracts. In light of that understanding, bilateral contracts, as used extensively in the MISO region, should not be subjected to any additional constraint — whether by a MOPR or otherwise — in the absence of an "unequivocal public necessity" or "extraordinary circumstances."[70]

Capacity Supplier arguments contradict the above-cited holdings in *Morgan Stanley* when they seek to subject MISO-region LSE contract resources to a MOPR within a capacity market framework. Without critical findings of "public necessity," a MOPR imposed in this proceeding for the MISO region, would effectively negate the *Morgan Stanley* presumption that

[67] *Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 545-46 (2008).
[68] *Id.* at 545 (citation omitted).
[69] *Id.* at 554.
[70] *Id.* at 550 (citations omitted).

arms-length bilateral contracts are just and reasonable under the FPA, and substitute an unwanted and unneeded administrative price mitigation mechanism.

2. Bilateral contracts have a necessary and essential role.

The U.S. Supreme Court observed, "Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce."[71] Bilateral contracts may be used to hedge against ordinary volatility of prices, and, in the case of generating capacity, the "lumpiness" of generation investment for resource adequacy. A short-term capacity auction can only ensure adequacy for the period designed for the auction, such as the one-year period in the MISO voluntary capacity auction. The 20-, 30-, or 40-year life of a generation facility is not going to be designed for just one year's increased need; the regulator will take a much longer run view and likely take into account collateral matters that endure for the life of the facility, such as environmental impacts, reliability, fuel diversity, economies of scale, and a potential host of additional issues.

Bilateral contracts executed by LSEs, with other LSEs or independent suppliers, permit the efficient reallocation of generation capacity where it is needed, in effect, moving "excess" capacity arising from the lumpiness of the construction of a physical plant to where a capacity "shortage" does not yet warrant construction for foreseeable load demand. Bilateral contracts of the magnitude and number in the MISO market are generation investment "hedges" in their own right; they increase or enhance the "marketability" of residual physical capacity in generation that state commissions authorize to be built. In themselves, the private negotiations preceding such contracts send important economic signals about long-term supply and pricing of generation capacity to the overall market. The IMM and the Capacity Suppliers would suppose such nonpublic LSE activities simply do not occur and that the *only signal of consequence* regarding

[71] *Id.* at 547.

future capacity needs must come from the clearing price in a centralized market auction.[72] This view is without factual basis, and certainly contrary to the experience of state commissions – which experience the Capacity Suppliers and the IMM essentially ignore – that through the states' regulatory oversight, the commissions "see into" LSE nonpublic activities with respect to their rates and resource adequacy construction and power purchasing plans.

The Capacity Suppliers argue that regional differences do not justify an ineffective capacity market.[73] Their criticism, however, does not indicate how the overall regulatory characterization of the MISO region (cost-of-service regulation and use of bilateral contracts) has changed since adoption of the original voluntary capacity auction in 2008, such that FERC should now reverse its June 11decision in order to remedy alleged capacity market deficiencies.[74]

Furthermore, they ignore the key "generation component" of cost of service regulation: that states oversee their LSEs' resource adequacy plans through such mechanisms as prudence reviews, integrated resource planning, and the process for obtaining certificates of public need for new generation. Those functions create a robust state role in MISO as to long-term generation and resource adequacy decisions that effectively subsume the kind of "spot-in-time" capacity auctions that the Capacity Suppliers advocate. If just and reasonable rates – the goal of the entire regulatory scheme -- are being achieved in MISO via self-supply and bilateral contracts, along with other structural and regulatory factors, then FERC rightly elected to refrain from tampering with this successful formula. The performance of the MISO market is consistent with one important objective of the FPA, specifically the development of energy supplies.[75]

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[72] Capacity Suppliers Rehearing at 37; IMM Rehearing at 7.
[73] Capacity Suppliers Rehearing at 36-38.
[74] *See* June 11 Order at P 38.
[75] *See, e.g.*, *Consol. Edison Co. v. FERC*, 510 F.3d 333, 342 (D.C. Cir 2007) ("[T]he FPA has multiple purposes in addition to preventing 'excessive rates' including protecting against 'inadequate service' and promoting the 'orderly development of plentiful supplies of electricity'"(internal citations omitted)).

G. The Capacity Suppliers Rehearing Arguments Continue to Focus on Self-interest Instead of the Public Interest.

One of the important deficiencies in the arguments of the Capacity Suppliers and the IMM is the total lack of any statement regarding or recognizing the obligation of states and retail regulators to act in the public interest. Instead, the Capacity Suppliers and the IMM refer to the states as "agents of load" with a purported self-interest tied exclusively to lowering wholesale capacity prices. Such references are wholly untrue, lacking any evidentiary support, and indicate an unfortunate lack of understanding of the role of states and state commissions in the regulation of the utilities under their jurisdiction. State commissions have the obligation to protect and promote the public interest, not the interest of any particular party that may appear before them. State commissions balance the interests of the consumer and the interests of the utilities. This balance is succinctly expressed in the phrase "safe and reliable service at just and reasonable rates." The states' public interest obligation and the wide range of factors considered by state utility commissions are discussed in Section III.B.2. Rather than indicating an understanding of the role and obligations of states, the witness for the Capacity Suppliers, Dr. Roy Shanker, has a limited view from a merchant perspective over a 20-year period, ignoring the reality of decades and decades of public interest evaluations. Regardless of whether Dr. Shanker's analysis is applicable in the context of markets where most states have deregulated generation resources, it is inapposite in the MISO region where most states have elected to retain regulatory oversight of resource adequacy in their jurisdictions. The Affidavit of Dr. Bradley K. Borum, attached as Exhibit B, effectively outlines and provides additional substantive evidence of the true nature of the states' interests.

H. The IMM and the Capacity Suppliers Rehearing Arguments Ignore FERC's Experience and Expertise.

Another deficiency in the IMM and the Capacity Suppliers Arguments is the failure to recognize that the Commission has over 78 years of experience regarding federal and state authority under the Federal Power Act. This extensive experience with technical and jurisdictional electric and natural gas issues is part of the basis for the level of deference the courts grant the Commission. As a result, the Commission may appropriately rely on its own expertise in making policy decisions, such as recognizing the differences between MISO and other RTOs and rejecting provisions, such as a MOPR, based on those differences.

I. The Orders that the Capacity Suppliers Rely Upon Are Distinguishable.

The Capacity Suppliers cite to the Commission's orders regarding other RTOs and the capacity constructs in those RTOs, including MOPR provisions, and claim that these are precedential orders and that the Commission must explain its reasons for making a different decision regarding the MOPR proposed by MISO.[76] The Capacity Suppliers fail to recognize that the Commission did articulate its reasons, as discussed in Section III. A above, for making a different decision with regard to MISO's proposed MOPR. First, the Commission pointed out the differences in the underlying regulatory scheme.[77] Second, the Commission noted the difference in how capacity is owned and procured by the utilities within MISO.[78] Third, the Commission found that, based on these differences, the MISO capacity auction should be voluntary, not mandatory, and should include the FRAP and self-schedule options.[79] Then, based on all of these determinations and factual findings, the Commission found that the

[76] Capacity Suppliers Rehearing at 10-11.
[77] June 11 Order at P 38.
[78] *Id*.
[79] *Id*. at P 40.

proposed MOPR would not be relevant.[80] In addition, the Commission cited to precedential orders recognizing that there were regional differences between the RTOs that were significant enough to support the Commission making different decisions from one RTO to the next, based on those regional differences.[81] Specifically, the Commission had found previously that the significant differences between MISO and the eastern RTOs (i.e., PJM Interconnection, L.L.C., ISO New England, and the New York ISO) warranted allowing for a different capacity construct within MISO.[82]

J. The Rehearing Arguments Improperly Elevate Protection of Competitors over the Protection of Competition.

The Capacity Suppliers and IMM proposal harms customers by protecting competitors and not competition. It has long been settled that our nation's competition policies are designed for the "protection of competition, not competitors."[83] Use of a MOPR in the MISO region is contrary to this policy and to FERC's stated principles that "[i]mproving the competitiveness of organized wholesale markets is integral to the Commission fulfilling its statutory mandate to ensure supplies of electric energy at just, reasonable and not unduly discriminatory or preferential rates."[84] FERC has further explained that "[e]ffective wholesale competition protects consumers by providing *more* supply options…..exerting downward pressure on costs, and *shifting risks away from consumers*."[85] Contrary to promoting competition, the Capacity Suppliers' and the IMM's recommendations[86] to adopt a MOPR that would apply in the MISO region would shield existing merchant capacity suppliers from the competitive potential of competitors' entry into the market and thus narrow, rather than expand, capacity choices for

[80] *Id*. at PP 68-69.
[81] *Id*. at P 38, n.59.
[82] *Id*.
[83] *Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 338 (1990).
[84] Order No. 719 at P 1.
[85] *Id*. (emphasis supplied).
[86] Capacity Suppliers Rehearing at 16-20; IMM Rehearing at 9-11.

consumers. The result will be increased capacity prices – a result directly contrary to FERC's statement of its statutory mandate and its goal of promoting effective wholesale competition.

The LSEs in the MISO region, many of which are utilities subject to state regulatory jurisdiction, have self-supplied their capacity obligations for 100-plus years under the supervision of their state regulatory commissions. LSEs have done so to comply with their statutory duties to serve captive customers, and so for generations LSEs have planned to meet their generating capacity and supply obligations through self-build options or bilateral purchases. For the past 100 years, LSEs have invested in or contracted for long-term capacity to satisfy their customers' demand and, absent imprudence, regulators have not second guessed these decisions. If the generating capacity that an LSE builds or purchases through a bilateral transaction in order to satisfy its own service obligations is subject to a MOPR, the LSE is exposed to a real risk that its MOPR-mitigated offer may fail to clear the capacity auction. This risk exposure leaves the LSE with little incentive to invest in new infrastructure or make long range plans to meet its customers' needs.

Subjecting LSE self-build or bilateral contract capacity to a MOPR raises the risk that that capacity cannot be used to serve the LSE's own retail load, thus requiring the LSE to buy capacity it does not need for the sake of propping up prices for existing merchant generators. Applying a MOPR in the MISO region will also penalize traditional utility behavior and create barriers to new entry. This is obviously an untenable position for the regulated LSEs, the retail customers they serve and the states charged with authority to ensure safe and adequate retail service at just and reasonable rates.

If the Commission were to reverse its ruling as requested by the Capacity Suppliers and the IMM, long term investment by LSEs in the MISO region would be discouraged and may well

cease. This would force the MISO LSEs into the short term planning contemplated by the one year at-a-time procurement element inherent in the MISO auction design. In contrast, these LSEs need long-term reliability – a long-term hedge against both capacity and energy market price volatility and the flexibility to meet customers' needs.

FERC should reject the Capacity Suppliers attempt to narrow the choices of capacity supply and instead support competition principles by allowing LSEs the ability to continue to self-supply and bi-laterally contract as they have for many decades. Narrowing the choices in how LSEs satisfy their capacity obligations ensures only that the merchant suppliers will have limited competition in the auctions from potentially lower-cost new investment of regulated LSEs, and thus higher prices for incumbent generator capacity. The purpose of a capacity obligation is to ensure resource adequacy by encouraging *new* resources needed, not to protect incumbents through use of a competition stifling MOPR. The reduced reliability for electric consumers that is sure to follow if LSEs are discouraged from engaging in long term planning and capacity construction is not a viable option.

The desirability of competition rests on the premise that new entry will result in lower prices [which is] the "essence of competition."[87] FERC correctly rejected the MOPR in its initial ruling in this case, and should decline to take any action, including imposition of a MOPR or a mandatory capacity auction, that would only shield existing competitors from competition from new investment by LSEs seeking to meet their capacity obligations by self-build or bilateral purchase options. Treating the rational economic decisions of LSEs in their long-term planning and procurement efforts as inherently improper and as requiring MOPR mitigation could significantly inhibit the investment of hundreds of millions of dollars in the construction of new

[87] *Matsushita Electric Industrial Co., Ltd., et al. v. Zenith Radio Corp. et al*., 475 U.S. 574, 594 (1986).

generating capacity that may be needed to serve retail customers. This cannot be the result FERC seeks.

K. The IMM and Capacity Suppliers Wish List of MOPR Provisions Demonstrates the Inconsistent Nature of Their Argument.

The Capacity Suppliers seek to have the Commission include in any MOPR adopted for the MISO region a requirement that MISO screen for and mitigate buyer-side capacity offers for all new capacity, of all types, at 100% of net cost of new entry ("CONE").[88] However, they fail to note that the Commission has rejected both of these design elements in the PJM MOPR proceeding.[89] In PJM, FERC rejected the suppliers' request to set the screen and mitigation threshold for the MOPR floor at 100% of net CONE, recognizing that net CONE is only an estimate of the cost of hypothetical new merchant plant, and that actual costs for any individual resource may well vary from that estimate. The Commission also rejected supplier efforts in PJM to broaden the reach of the MOPR beyond gas-fired resources, properly reasoning that the most likely type of resource that could be subject to the potential exercise of buyer market power is a new gas-fired resource that could be developed in a relatively short time frame.[90]

The Capacity Suppliers seek to have it both ways - selectively relying on Commission precedent when it appears to support their position, and ignoring Commission precedent when it opposes their position. This inconsistent approach to Commission precedent on MOPR design is indicative of the unreasonableness of their arguments. The Commission properly rejected, outside the context of a settlement, setting the screen and mitigation threshold for a MOPR in

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[88] Capacity Suppliers Rehearing at 16.

[89] *PJM Interconnection, LLC, et al.*, 135 FERC ¶ 61,022, P 66, *order on reh'g*, 137 FERC ¶ 61,145, P 47 (2011). While FERC did eventually accept the 100% net CONE screen and threshold in PJM, it did so only as part of a settlement package that provides important and necessary exemptions that protect self-supply and vertically-integrated LSE supply from the MOPR. *PJM Interconnection, LLC*, 143 FERC ¶ 61,090, P 195 (2013). No such protections are advocated by the Capacity Suppliers here.

[90] *See PJM Interconnection, LLC*, *et al.*, 135 FERC ¶ 61,022 at P 153; *PJM Interconnection , LLC, et al.,* 137 FERC ¶ 61,145 at PP 109-112.

PJM at 100% of net CONE and properly rejected broadening the reach of the MOPR in PJM beyond gas-fired resources. The Capacity Suppliers have failed to identify any features of the MISO capacity auction that support resurrection of MISO's proposed MOPR for the MISO region.

V. CONCLUSION

The Commission should not be swayed by the flawed arguments of the IMM and the Capacity Suppliers. The Commission's decision to reject MISO's proposed MOPR provisions was based on substantive evidence, including the significant differences between the MISO region and the regions of other RTOs and the regulatory structure in the MISO region that already ensures resource adequacy.

Wherefore, for all of the reasons explained above, the OMS requests that the Commission deny the requests for rehearing by the IMM and the Capacity Suppliers.

The OMS submits this Brief because a majority of its members have agreed to generally support it. Individual OMS members reserve the right to file separate pleadings regarding the issues discussed herein. The following members generally support this Brief:

Arkansas Public Service Commission
Illinois Commerce Commission
Indiana Utility Regulatory Commission
Iowa Utilities Board [91]
Kentucky Public Service Commission
Louisiana Public Service Commission
Michigan Public Service Commission
Minnesota Public Utilities Commission
Mississippi Public Service Commission
Missouri Public Service Commission
Montana Public Service Commission

[91] On June 11, 2012, the Commission issued an order that conditionally accepted the resource adequacy construct proposed by MISO. In that order, the Commission rejected MISO's proposed MOPR; a decision consistent with the Iowa Utilities Board position in the OMS intervention and comments filed September 15, 2011. Based upon a review of the Commission's June 11, 2012, order, including the rejection of the MOPR, the Iowa Utilities Board supports the positions taken in this brief.

City of New Orleans
North Dakota Public Service Commission
South Dakota Public Utilities Commission
Public Utility Commission of Texas
Wisconsin Public Service Commission

The Manitoba Public Utilities Board did not participate in this pleading. The Indiana Office of Utility Consumer Counselor, the Iowa Office of Consumer Advocate, the Minnesota Department of Commerce, and the Missouri Office of the Public Counsel, as associate members of the OMS, participated in this Brief and generally support it.

Respectfully Submitted,
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EXHIBIT A

2012 STATE OF THE MARKET REPORT FOR THE MISO ELECTRICITY MARKETS

Prepared by:

INDEPENDENT MARKET MONITOR FOR MISO

JUNE 2013

Together with the increased penetration of wind resources, EPA regulations will put substantial economic pressure on existing coal resources to retire, which should reduce planning reserve margins in MISO. The MISO RAC will play a pivotal role in assuring that the market supports reliable planning reserve margins over the long term.

E. Attachment Y and SSR Status Designations

Attachment Y to the MISO Tariff requires suppliers seeking to retire or mothball a unit to notify MISO six months in advance of its desired retirement date. Based on a reliability study, MISO may then designate a resource as a System Support Resource (SSR), which it granted for the first time in 2012. As of March 26, 2013, there were an additional 15 SSR candidates being evaluated by MISO, with a further seven already determined to qualify as SSR.[10] An SSR cannot retire until a reliability solution, such as transmission upgrades, can be implemented or the reliability condition no longer exists. The SSR agreement provides for compensation to the Market Participant during this period of delayed retirement.

On July 25, 2012 MISO filed Tariff revisions that clarified both the designation and compensation provisions, which was urgently needed because of the large number of units that may retire due to the EPA regulations or unfavorable economic conditions (e.g., low gas prices, increased wind penetration). We will continue working with MISO on reviewing and, as needed, clarifying these procedures in order to ensure that SSR decisions result in efficient outcomes. As discussed further in the next section, it is also important that the capacity market sends appropriate signals to rationalize participants' decisions to retire or retrofit their resources.

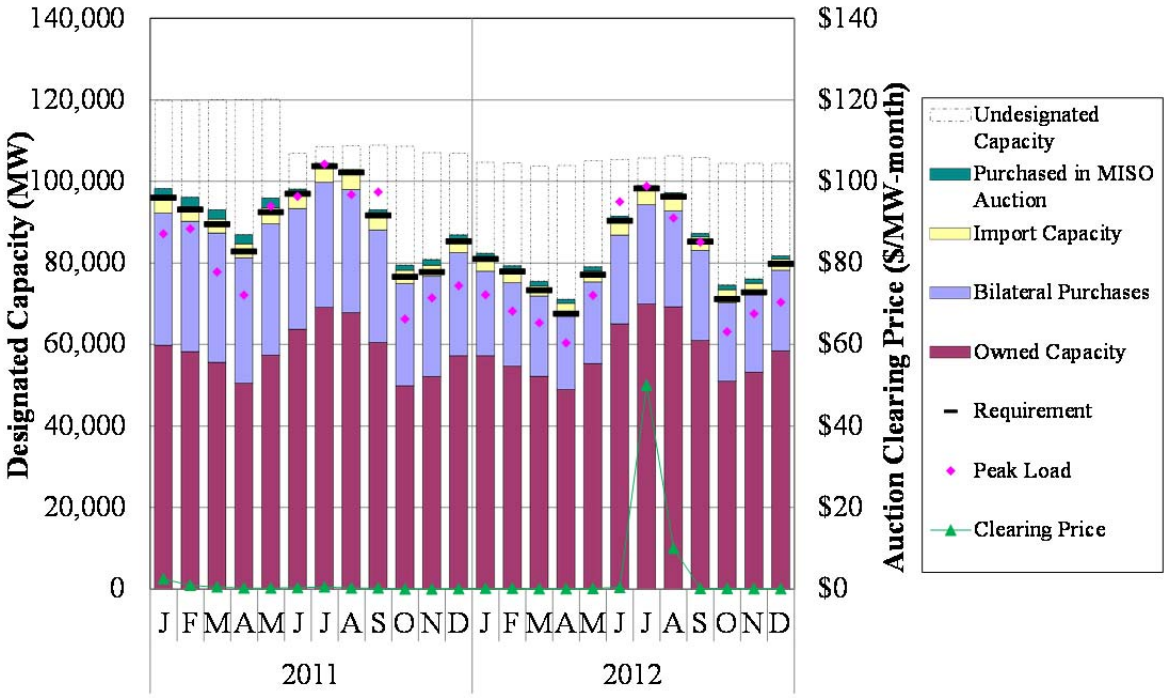
F. Capacity Market

Since June 2009, MISO has run a monthly VCA to allow LSEs to procure capacity to meet their Module E requirements. The VCA provides a revenue stream that, in addition to energy and ancillary service market revenues, should signal when new resources are needed. However, certain design flaws with MISO's RAC substantially undermined its performance in 2012. Figure 8 shows monthly capacity obligations for 2011 and 2012 and how they were satisfied.

10 Market participants for these seven resources still need to negotiate agreements with MISO and file them with FERC.

These obligations are based on a participant's forecasted load, so they vary monthly. To indicate the accuracy of these forecasts, the figure shows the requirement based on the actual monthly peak load.

Figure 8: Voluntary Capacity Auction
2011–2012



Since most LSE obligations were satisfied through owned capacity or bilateral purchases, cleared capacity in the VCA averaged just 1.1 GW, or 1.3 percent of total designated capacity. Low cleared quantities are consistent with the intention of the VCA as a balancing market. Nonetheless, it is a critical component of the economic signal for investment because it provides a transparent spot price for capacity that should be the primary driver of forward capacity prices (and, therefore, a primary driver of investment).

In 2013, MISO adopted a new RAC with a number of changes, the most significant of which is the introduction of zonal capacity requirements and clearing prices. This allows the market to more accurately signal the supply and demand conditions in different areas. In addition, MISO converted its requirements into an annual requirement and implemented an annual planning

resource auction ("PRA"). The PRA ran for the first time in April and produced a MISO-wide price of approximately $32 per MW-month, which is very low.

The very low price in the PRA indicates the performance of the capacity market continues to be undermined by two significant issues: 1) the current "vertical demand curve" and 2) barriers to capacity trading with PJM. The recently modified RAC effectively establishes a vertical demand curve because there is a single minimum capacity requirement for each LSE and a deficiency price for any LSE that is short. Because the marginal cost of selling capacity for most units is close to zero, a vertical demand curve will predictably establish clearing prices close to zero if supply is not withheld. In addition, the vertical demand curve is inconsistent with the underlying reliability value of excess capacity beyond the requirement. The implication of the vertical demand curve is that the last MW of capacity needed to satisfy the minimum requirement has a value equal to the deficiency price, while the first MW of surplus has no value. This is not true in reality—each unit of surplus capacity will improve reliability and lower energy and ancillary services costs for consumers (although these effects diminish as the surplus increases).

To address this flaw, we provided comments to FERC and recommended in prior *State of the Market Reports* that Module E of the Tariff be modified to implement a sloped demand curve.[11] A sloped demand curve would produce more stable and predictable pricing, which would increase the capacity market's effectiveness in providing incentives to govern investment and retirement decisions. A sloped demand curve also reduces the incentive to exercise market power—a market that is highly sensitive to withholding and can clear at the deficiency level creates a strong incentive for suppliers to withhold resources to raise prices. Withholding in such a market is nearly costless since the foregone capacity sales would otherwise be priced at close to zero. The need for a sloped demand curve may become particularly acute as planning reserve margins decline toward the minimum requirement level with the likely retirement of significant amounts of coal-fired capacity in MISO.

The second issue with MISO's current capacity market is the prevailing barriers to capacity trading between PJM and MISO. Capacity prices in both markets will only be efficient if

11 See "Motion to Intervene Out of Time and Comments of the Midwest ISO's Independent Market Monitor," filed September 16, 2011 in Docket No. ER11-4081.

participants can freely import and export capacity to arbitrage capacity price differences between markets to the extent that the physical transmission capability allows. Current barriers include a variety of PJM provisions that limit access to transmission, as well as the obligations imposed on external resources that sell capacity into PJM. We described these barriers in detail in a prior filing to FERC.[12] We continue to recommend that MISO work with PJM to address these barriers. FERC has scheduled for PJM, MISO, their respective market monitors, and the States in the two regions to give presentations at an upcoming FERC meeting on these issues.

12 Motion for Request For Leave To Answer and Answer of the MISO Independent Market Monitor, Docket No. ER11-4081-000.

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc.	))	ER11-4081-001

AFFIDAVIT OF DR. BRADLEY K. BORUM
DIRECTOR, ELECTRICITY DIVISION
INDIANA UTILITY REGULATORY COMMISSION

Dr. Bradley K. Borum, being first duly sworn, deposes and says:

1. I, Bradley K. Borum, am the Director of the Electricity Division of the Indiana Utility Regulatory Commission ("IURC" or "Indiana Commission"). In my twenty-seven (27) years of experience at the IURC, I have worked as a Senior Utility Analyst, Principal Utility Analyst, Econometrician, Assistant Director of Energy Policy, and my current position of Director of the Electricity Division. I serve primarily as an advisor to the Indiana Commission on technical and policy issues regarding the electric industry at both the state and federal level.

2. In 2008, the Indiana Commission formed an intra-agency RTO/FERC Team. Prior to that time, I was directly involved in the Organization of MISO States ("OMS") and its staff work groups, as well as with issues regarding the Midcontinent Independent System Operator, Inc. ("MISO", formerly known as the Midwest Independent Transmission System Operator, Inc.) and the Federal Energy Regulatory Commission ("Commission" or "FERC"). Since the formation of the IURC's RTO/FERC Team, I have had supervisory oversight of the team, receiving regular updates on the team's and OMS' activities, and have

continued to participate in my supervisory role on issues relating to the regional transmission organizations ("RTO") and FERC.

3. I received a B.A. degree from Coe College in Cedar Rapids, Iowa in 1981 with a double major in Business Administration and Economics. I received an M.A. and Ph.D. in Economics from Michigan State University in 1985 and 1989, respectively. Course work included microeconomics, statistics, econometrics, industrial organization and public utility economics. I was a teaching assistant at Michigan State University and taught courses in microeconomics and macroeconomics.

4. As a main part of my work at the Indiana Commission, I have reviewed, prepared and presented testimony and internal staff reports in numerous cases before the Indiana Commission concerning economic development rates, load forecasts, integrated resource planning, certificates of need to build power plants, environmental compliance plans, the cost equity capital, and incentive regulation.

5. My knowledge and understanding of public utility regulation, particularly as it has and continues to be done by states and state utility commissions, has been developed and is based on my education and my work at the Indiana Commission and through my interactions and participation with OMS and MISO.

6. The purpose of my affidavit is to describe State processes regarding assuring resource adequacy and the factors that state utility commissions consider in making determinations regarding the generation resources appropriate to meet the needs of the State, the utilities operating in the State, and the State's consumers.

7. States in general, and state utility commissions in particular, are charged with acting in the public interest. This involves examining and balancing the interests of many different entities, including both public utilities and consumers, as well as consideration of the public policies that have been set by both the legislative and executive branches of state government.

8. In making decisions regarding the appropriate generation resources for the States in the MISO region, many factors are taken into consideration. These factors include: the long-term forecasted demand for electricity; the amount and types of generation needed to safely and reliably provide electric service to meet that long-term demand forecast taking appropriate consideration of demand-side resources; the costs and performance characteristics of different generation technologies; the types of fuel available, projected prices, and the need for fuel diversity; renewable portfolio standards or goals; economies of scale in building larger generation facilities for the long term than what may be needed short term;; state and federal environmental regulations; siting issues; risks and uncertainties inherent in any long term planning process; and the financial, technical, and managerial expertise and capabilities of the company seeking to build new generation.

9. Wholesale capacity prices are but one factor among many in the decisions States in the MISO region make regarding the need for generation facilities. This is mainly due to the fact that wholesale capacity prices are at best short term indicators of capacity prices, while States are looking at the long term (frequently

20 – 30 years), considering a wide variety of factors, when making long term resource decisions.

NOTARIZATION

Bradley K. Borum, being duly sworn, deposes and states that the statements contained in this affidavit are true and correct to the best of his knowledge, information, and belief.

Bradley K. Borum

Bradley K. Borum

Sworn to and subscribed before me

this 3rd day of October, 2013.

Notary Public

My commission expires: 4-13-15

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.
Dated at Des Moines, Iowa, this 11th day of October, 2013.

William H. Smith, Jr.