

sloping demand curve (DSDC) in MISO.⁵ MISO stakeholders, state and local regulators, and MISO have repeatedly objected to and opposed such a change to MISO's Resource Adequacy construct.⁶ More importantly, the IMM's arguments have already been rejected in prior FERC orders.

The Organization of MISO States respectfully request that FERC reject the IMM's Protest and requested relief.

ANSWER

I. The Vast Majority of MISO is Comprised of Vertically Integrated Utilities; A DSDC is Unnecessary

FERC made it crystal clear that unlike NYISO, PJM and ISO-NE (Eastern RTOs), MISO does not require a DSDC to ensure just and reasonable capacity rates. MISO is comprised of utilities, the vast majority of which are vertically integrated. These utilities, unlike those in the Eastern RTOs, coordinate with their state and local regulators to ensure sufficient generation (e.g., through integrated resource planning) to serve their load and meet their reserve margin requirements. These utilities do not rely on the prices set in the Planning Resource Auction (PRA) to signal investments in capacity resources. The PRA operates around the fringes of state and local

⁵ Motion to Intervene Out of Time and Protest of the MISO Independent Market Monitor, Docket No. ER18-462-000 (Feb 7, 2018) (Protest). The IMM has been pushing the DSDC for many years - - *See, e.g.*, 2011 State of the Market Report for the MISO Electricity Markets, prepared by Potomac Economics, Independent Market Monitor for MISO (MISO IMM), June 2012, at vi, 17, available at <https://www.misoenergy.org/Library/Repository/Report/IMM/2011%20State%20of%20the%20Market%20Report.pdf>; 2012 State of the Market Report for the MISO Electricity Markets, prepared by the MISO IMM, June 2013, at vi, 19-20, available at <https://www.misoenergy.org/Library/Repository/Report/IMM/2012%20State%20of%20the%20Market%20Report.pdf>; 2013 State of the Market Report for the MISO Electricity Markets, prepared by the MISO IMM, June 2014, at vi, 18-20, available at <https://www.misoenergy.org/Library/Repository/Report/IMM/2013%20State%20of%20the%20Market%20Report.pdf>; 2014 State of the Market Report for the MISO Electricity Markets, prepared by the MISO IMM, June 2015, at v-vi, 3, 21-24, available at <https://www.misoenergy.org/Library/Repository/Report/IMM/2014%20State%20of%20the%20Market%20Report.pdf>.

⁶ According to the IMM, "Every other ISO/RTO capacity market in the Eastern Interconnection has ... implemented sloped demand curves in their capacity markets." Protest at 5.

resource planning to provide opportunities to purchase replacement capacity and to impose financial penalties when a Load Serving Entity (LSE) is capacity-short. Most state commissions in the east may have directed that utilities divest their generation or transmission systems to promote among other things retail access; the vast majority of state and local regulators in MISO have not.

The IMM argues incorrectly that MISO's current vertical demand curve "would provide suppliers with less than one percent of the revenues needed to break-even on an investment in a new peaking resource in MISO. These break-even revenues are known as the net cost of new entry or "net CONE".⁷ The IMM misses the point again. The majority of LSEs in MISO are regulated by state and local regulators that ensure that those LSEs acquire (by purchase or construction) sufficient capacity to serve their load and meet all resource needs, and 100% of those costs are recovered from retail customers. Even the IMM has admitted that "[i]n a regulated state ... [m]ost of the requirements are self-supplied so setting an efficient wholesale price really doesn't have a deleterious effect on consumers" The IMM's "break even" analysis is a red herring when applied to MISO, an RTO primarily comprised of vertically integrated utilities.

The IMM argues incorrectly that large price differences between PJM and MISO capacity prices "under identical supply conditions" proves that MISO's rates are unjust and unreasonable.⁸ But the supply conditions are not identical. Whereas generation in PJM is supplied primarily by resources NOT owned by LSEs, the generation in MISO is supplied primarily by incumbent utilities with costs recovered at the retail level.

⁷ Protest at 5.

⁸ Protest at 5.

The IMM argues incorrectly that: “In wholesale electricity markets, the capacity market exists to facilitate long-term resource decisions to satisfy the system’s planning requirements.”⁹ Not in MISO. In MISO, the majority of state and local regulators rarely consider prices developed in the PRA when reviewing proposals to construct or acquire capacity and making decisions on long-term resource adequacy. As FERC concluded, a DSDC is not required in MISO for PRA prices to be just and reasonable.¹⁰

II. The IMM’s Very Late Protest Violates FERC’s Regulations and Precedent

The IMM is taking procedural short cuts that violate FERC precedent and rules. FERC has found Module E-1 of the MISO Tariff, including the vertical demand curve, to result in just and reasonable rates. MISO’s filing, which was intended to avoid any question as to the validity of the PRA following D.C. Circuit remand, simply refiled what is already on file and accepted by FERC. The IMM’s claim, that the MISO tariff is unjust and unreasonable, is (i) a collateral attack on FERC’s earlier finding, that is, an out-of-time request for rehearing; and (ii) a Section 206 complaint being filed as a protest. Finally, the IMM’s request for relief is outside FERC’s authority to grant.

IMM’s Protest is a collateral attack of the FERC’s Order accepting MISO’s Resource Adequacy Construct with the vertical demand curve: FERC’s June 11, 2012 order ¹¹ explicitly accepted MISO’s proposed vertical demand curve.¹² FERC denied the IMM’s rehearing request, concluding:

⁹ Protest at 5.

¹⁰ The next Section, including fn 13-15, cite FERC orders concluding a DSDC is not required in MISO.

¹¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,199 (2012) (June 11 Order); *reh’g denied*, 153 FERC P 61,229 (2015) (Nov. 25 Rehearing Order).

¹² See June 11 Order at PP 238, 245. On rehearing, FERC explained: “In the June 11 Order, the Commission accepted MISO’s proposal to establish a fixed reliability target expressed as a single MW value, otherwise known as a vertical demand curve.” Nov. 25 Rehearing Order, P 147. FERC specifically rejected the arguments raised by the IMM, the same arguments raised here, and denied rehearing. Nov. 25 Rehearing Order, at PP 154-61.

We disagree with the Market Monitor’s claim that the MISO resource adequacy plan is producing unreasonable market outcomes that can be attributed to the vertical demand curve. Based on the supply and demand conditions in the 2013/2014 Planning Resource Auction, whose results are part of the record in this proceeding, we do not consider the clearing prices in this auction to be unreasonable, nor do we consider the results of this auction to be an indication that the auction clearing prices are not providing accurate information on the value of reliability. The record in this proceeding provides no evidence of insufficient resource development where it is needed to ensure reliability. We do not dispute the Market Monitor’s position that a sloped demand curve can provide additional information on the value of capacity or NRG’s position that sloped demand curves can provide benefits. **However, we find that an administratively-determined sloped demand curve would inappropriately diminish the deference given to states in the MISO capacity construct, which the Commission has previously recognized.** Even if states in MISO have not yet exercised their right to do so, the MISO resource adequacy construct allows them to determine the demand curve based on their own reserve requirements. An administratively-determined demand curve would inhibit states from doing so. Additionally, we have found that **the vertical demand curve is a reasonable method for ensuring that LSEs procure sufficient capacity and our task here is not to choose among several reasonable alternatives.**¹³

* * * *

We disagree with the Market Monitor’s contention that the vertical demand curve is not reasonable in a locational capacity market. The vertical demand curves in each of the Local Resource Zones provide price signals that indicate the supply-demand balance in each zone, taking into account deliverability constraints. Accordingly, **the vertical demand curve does not hinder the efficient operation of locational price signals.**¹⁴

Despite FERC’s prior findings, the IMM continues to raise the same arguments to challenge MISO’s filing here. The IMM’s arguments constitute a collateral attack on a prior FERC order; they should be rejected.¹⁵

¹³ Nov. 15 Rehearing Order, at P 155 (emphasis added; footnote(s) omitted). *See also Devon Power, LLC*, 115 FERC 61,340 at P 151 (The Commission has repeatedly stated that "there is not a single just and reasonable method for satisfying capacity obligations."); *PJM Interconnection, LLC.*, 115 FERC 61,079 at P 103.

¹⁴ *Id.* at P 160 (emphasis added; footnote(s) omitted).

¹⁵ *See University of Tennessee v. Elliot*, 478 U.S. 788, 797-99 (1986) (U.S. Supreme Court rejected employment discrimination complaint filed in federal court as an impermissible collateral attack on final regulatory agency decision); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966) (a party cannot compel relitigation of final and conclusive administrative agency findings); *Pacific Gas & Elec. Co. v. FERC*, 533 F.3d 820

IMM’s Protest is a disguised Section 206 Complaint: FERC precedent specifically prohibits complaints included as protests. “The Commission has long held that a complaint should not be submitted as part of a motion to protest or intervene in an ongoing proceeding – such a filing does not allow interested parties sufficient notice of the complaint because it is not formally docketed and noticed.”¹⁶ The Protest should be rejected.

IMM’s Requested Relief is Outside FERC’s Authority: MISO’s Filing was straightforward: “This filing does not change any of the current Tariff provisions regarding MISO’s Resource Adequacy Requirements. Rather, MISO requests that the Commission reaffirm that its existing Resource Adequacy related Tariff provisions are just and reasonable. MISO requests an effective date for this filing of March 1, 2018.”¹⁷ In contrast, the IMM asks FERC to conditionally accept MISO’s Filing to allow for the upcoming PRA, but to initiate a section 206 complaint proceeding to direct MISO to essentially impose a DSDC for subsequent PRAs.¹⁸

(D.C. Cir. 2008) (the court does not have jurisdiction over collateral attacks on final FERC orders); *Sage Grouse Energy Project, LLC v. PacifiCorp*, 154 FERC ¶ 61,223, at P 29 (2016) (Sage Grouse’s complaint constituted an untimely request for rehearing and improper collateral attack on prior order); *Midwest Indep. Transmission Sys. Operator, Inc.*, 136 FERC ¶61,244 at P 175 (2011) (“[W]e will not entertain here what essentially constitutes an untimely request for rehearing and an improper collateral attack of those [prior] orders.”); *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 107 FERC ¶ 61,142, at 61,467 (2004) (“Collateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency; for these reasons, collateral attacks and relitigation are strongly discouraged.”).

¹⁶ *Entergy Servs., Inc.*, 104 FERC ¶61,084 at P 13 (2003) (“The Commission has long held that a complaint should not be submitted as part of a motion to protest or intervene in an ongoing proceeding – such a filing does not allow interested parties sufficient notice of the complaint because it is not formally docketed and noticed.”). See also *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,040, at P 18 (2016) (the Commission discourages the combination of complaints with other types of filings, including protests); *MidAmerican Energy Co. and Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,250, at P 71 (2011); *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,040, at P 18 (2016) (citing *Golden Spread Elec. Coop., Inc., et al. v. Southwestern Pub. Serv. Co.*, 115 FERC ¶ 61,136, at P 4 (2006); *Louisiana Power & Light Co.*, 50 FERC ¶61,040, at 61,062 - 63 (1990) (stating that complaints must be titled as such and cannot be included as part of a protest or motion to intervene)); *Yankee Atomic Elec. Co.*, 60 FERC ¶ 61,316, at 62,096 - 97 n.19 (1992) (explaining the importance of filing a complaint separately from a motion for clarification); *Entergy Servs., Inc.*, 52 FERC ¶ 61,317, at 62,270 (1990) (stating that complaints must be filed separately from motions to intervene and protests).

¹⁷ MISO Filing at 1.

¹⁸ Protest at 6.

According to the DC Circuit, “Section 205 does not allow FERC to make modifications to a proposal that transform the proposal into an entirely new rate of FERC’s own making.”¹⁹ Granting the IMM’s request would transform MISO’s Filing to an interim proposal and impose a condition to change existing, FERC-approved Tariff language not requested by MISO.

III. Conclusion

For the reasons stated above, the Organization of MISO States respectfully requests that the Commission reject the IMM’s Protest.

Respectfully submitted,

Tanya Paslawski

Tanya Paslawski
Executive Director
Organization of MISO States
tanya@misostates.org
(515) 207-3551

Dated: February 16, 2018

¹⁹ *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, at 110 (D.C. Cir. 2017).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the parties designated on the official service list for the above-captioned docket in accordance with the requirements of Rule 2010 of the FERC's Rules of Practice and Procedure.

Dated at on the 16th day of February, 2018.

Tanya Paslawski