105 FERC ¶ 61,146

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER03-323-002 ER03-323-003

ORDER DISMISSING COMPLIANCE FILING AND PROVIDING GUIDANCE

(Issued October 29, 2003)

1. In this order, the Commission dismisses as moot, the joint compliance filing submitted by the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and Potomac Economics, Inc., the Midwest ISO's Independent Market Monitor (IMM),[1] to comply with the Commission's order issued in this proceeding on March 13, 2003 (March 13 Order),[2] regarding the Midwest ISO's Market Mitigation Measures (Mitigation Measures).

2. This order is being issued concurrently with companion orders in Docket No. ER03-1118-000, ¶ 61,145 (2003), which grants the Midwest ISO's motion to withdraw its Open Access Transmission and Energy Markets Tariff (TEMT), and, as requested by the Midwest ISO, guides the Midwest ISO in further developing an energy markets tariff for future resubmission (TEMT Order), and Docket Nos. ER03-323-001 and ER03-323-004, 105 FERC ¶ 61,147 (2003), which dismisses as moot requests for rehearing of the March 13 Order (Rehearing Order). As explained in the TEMT Order, the Commission believes that the many interrelated provisions of the TEMT, including the Mitigation Measures, cannot be fully evaluated until a complete version of the TEMT, or any similar proposal, including all provisions that are to take effect on the same date, has been filed

[1]The Midwest ISO and the IMM shall be collectively referred to as "Midwest ISO."

[2]Midwest Independent Transmission System Operator, Inc., 102 FERC ¶ 61,280 (2003).

pursuant to Section 205 of the Federal Power Act.[3] Given that the TEMT Order effects a withdrawal of the TEMT, of which we consider the Mitigation Measures to be an intricate part, in this order, we dismiss as moot the Compliance Filing regarding the Mitigation Measures, but with guidance for future filings. Similarly, the Rehearing Order dismisses as moot the compliance filing at issue in that proceeding, but with guidance for future filings.

3. While we are dismissing as moot the Compliance Filing, we use the arguments set forth regarding it, as well as comments regarding the technical conference held on June 26, 2003 pertaining to the Mitigation Measures, as a vehicle for providing guidance to the Midwest ISO in further developing its Mitigation Measures. However, parties may revisit the issues, de novo, after the Midwest ISO refiles an energy markets tariff.[4]

Background

4. On December 23, 2002, the Midwest ISO submitted the Mitigation Measures as Attachment S-2 (December 23 Filing) to its Open Access Transmission Tariff (OATT). The Mitigation Measures were developed by the IMM, Dr. David B. Patton, after consultation with the Midwest ISO's Market Monitoring Working Group. As detailed in the December 23 Filing and March 13 Order, the Mitigation Measures rely upon "conduct" and "impact" tests to identify situations where it may be appropriate to mitigate instances of market power abuse. Categories of conduct screened under these tests include: (1) physical withholding, (2) economic withholding, (3) uneconomic production, (4) uneconomic load bidding, and (5) virtual trading.[5]

[3] 16 U.S.C. § 824d (2000).

[4] As this order provides guidance only and the matters discussed are subject to further proceedings and orders, this order is advisory in nature and not subject to rehearing.

[5] In general, under the Mitigation Measures, if a bidding party engages in economic withholding that has a substantial effect on prices (as determined by the conduct and impact tests), that party will have its bid replaced by a default bid. The default bid would be calculated by the IMM at reference levels. For all other actions that fail the conduct-impact test, such as physical withholding or an action that deliberately causes congestion, the offending party would incur financial penalties if that party's conduct causes a substantial increase in prices or guarantees payments in any market administered by the Midwest ISO.

5. In the March 13 Order, the Commission conditionally accepted for filing the Mitigation Measures, to become effective on the later of December 1, 2003, or the first day of operation of the Midwest ISO's Day-2, Day-Ahead Energy Markets. In taking that action, we directed the Midwest ISO to make several modifications to the Mitigation Measures. In addition, we provided guidance on certain issues the Commission considered critical to the development of the wholesale power market in the Midwest and directed a technical conference to be held regarding the adequacy, interaction and timing of various market design elements.

6. In accordance with the March 13 Order, Staff convened a technical conference regarding the Mitigation Measures on June 26, 2003 (June 26 Technical Conference). The June 26 Technical Conference addressed application of the Mitigation Measures in broad constrained areas (BCAs) and narrow constrained areas (NCAs), as well as the interaction between the measures and other market mechanisms, including resource adequacy requirements, safety-net bid caps, scarcity pricing and demand response. Following the June 26 Technical Conference, the IMM filed initial comments on July 17, 2003 (IMM Comments), and series of reply comments followed.

7. In addition, requests for rehearing of the March 13 Order were filed by the Midwest ISO and IMM; Reliant Resources, Inc. (Reliant); Cinergy Services, Inc. (Cinergy); and the Midwest Transmission Dependent Utilities (Midwest TDUs).[6] As stated above, the Rehearing Order is being issued concurrently with this order.

The Compliance Filings

8. On April 14, 2003, in Docket No. ER03-323-002, as amended on April 28, 2003 in Docket No. ER03-323-003, the Midwest ISO submitted the Compliance Filings, with proposed tariff revisions, in response to the March 13 Order.

9. In the Compliance Filings, the Midwest ISO requests that the Commission not accept the proposed revisions before it considers its request for rehearing.

10. The Midwest ISO requests that the proposed revisions be made effective on the later of December 1, 2003, or the first day of operation of the Midwest ISO's Day-2, Day-Ahead Energy Markets.

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[6] The Midwest TDUs include Lincoln Electric System, Madison Gas and Electric Company, Missouri River Energy Services, and Wisconsin Public Power, Inc.

Notice, Interventions and Protests

11. Notice of the Midwest ISO's April 14, 2003 compliance filing was published in the Federal Register,[7] with interventions, comments and protests due on or before May 5, 2003. Timely comments or protests were filed by Edison Mission Energy, Edison Mission Marketing & Trading, Inc., and Midwest Generation EME, LLC (collectively, Edison Mission Energy); Midwest TDUs; and Manitoba Hydro. On May 8, 2003 Exelon Generation Corporation (Exelon) filed an untimely motion to intervene and protest. Notice of the Midwest ISO's April 28, 2003 amendment to its compliance filing was published in the Federal Register,[8] with interventions, comments and protests due on or before May 19, 2003. No additional motions for interventions, comments or protests were filed.

Discussion

12. As stated above, given the withdrawal of the Midwest ISO's TEMT, we will dismiss as moot the Midwest ISO and IMM's Compliance Filings. Nevertheless, we will address the arguments set forth regarding the Compliance Filings, in an effort to guide the Midwest ISO in further developing a set of mitigation measures for future submission as part of an energy markets tariff.

A. Definition of Economic Withholding

13. In the March 13 Order, the Commission found that a more precise definition of terms like "unjustifiably high bids" and "artificially high price," used in identifying economic withholding would be preferable. Accordingly, we directed the Midwest ISO to submit a revised definition of economic withholding. However, responding to protests, we declined to require the Midwest ISO to adopt the definition of economic withholding in the Notice of Proposed Rulemaking on Standard Market Design (SMD

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[7] 68 Fed. Reg. 19,803 (2003).

[8] 68 Fed. Reg. 24,452 (2003).

NOPR) (which compares bid levels to caps specified in the SMD tariff)[9], and we rejected arguments for participating generator agreements or a safety-net bid cap.[10]

Compliance Filings

14. The Midwest ISO proposes compliance revisions to Section 2.4(a)(2) of Attachment S-2 to satisfy the Commission's concerns that these revisions expressly link the definition of economic withholding to the economic withholding criteria set forth in Section 3 of Attachment S-2. The Midwest ISO maintains that this approach makes the structure of the Mitigation Measures' definition of economic withholding consistent with the definition in the SMD NOPR while providing additional specificity by incorporating the Mitigation Measures thresholds that were accepted by the March 13 Order.

Protest

15. Manitoba Hydro states that the Midwest ISO's proposal to revise the description of economic withholding is still too vague and gives the IMM unbridled discretion to evaluate market conduct. As a result, Manitoba Hydro states that market participants will be unable to predict whether they will be subject to mitigation. Manitoba Hydro requests that the Commission direct the Midwest ISO to further revise Section 2.4 to clarify that good faith operation of generation units subject to unique resource limitations does not constitute unjustified economic withholding.

Discussion

16. The Commission finds that the Midwest ISO's proposed revision of the definition of economic withholding comports with the Commission's direction in the March 13 Order. While Manitoba Hydro argues that the proposed definition is too vague, we disagree. The additional thresholds included in the proposed definition set an appropriate basis for determination of economic withholding.

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[9] Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,563 (2002), 67 Fed. Reg. 55,451 (Aug. 29, 2002).

[10] March 13 Order, 102 FERC ¶ 61,280 at P 46.

B. Mitigation in Broad Constrained Areas

17. In the March 13 Order, the Commission conditionally accepted the Midwest ISO's proposed mitigation for BCAs. We directed the Midwest ISO to revise Sections 3.1.1 and 3.1.2 to clarify that mitigation will only apply in BCAs where a transmission constraint causes a unit to be dispatched above the level it would have been dispatched absent the constraint.[11]

Compliance Filings

18. The Midwest ISO proposes to make the required revisions in new Sections 4.2.2(a) and 4.3.1(c) of the Mitigation Measures instead of revising Sections 3.1.1(a) and 3.1.2(c). The Midwest ISO contends that this approach is more consistent with the intent of the March 13 Order, which states that the mitigation measures should only apply during periods when constraints are binding. The Midwest ISO states that Sections 4.2.2(a) and 4.3.1(c) are the provisions that actually impose Mitigation Measures, while Sections 3.1.1 and 3.1.2 simply establish the conduct thresholds that are used to identify physical and economic withholding.[12]

Protest

19. Edison Mission Energy argues that the Midwest ISO has not complied with the Commission's directive in the March 13 Order to revise the definition of a BCA to apply only where a transmission constraint causes a unit to be dispatched above the level it would have been dispatched absent the constraint in Sections 3.1.1 and 3.1.2. Instead, Edison Mission Energy states that the Midwest ISO proposes two new Sections 4.2.2(a) and 4.3.1(c),[13] which the Midwest ISO claims are the provisions which actually impose

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[11] Id. at P 55.

[12] We note that, in its request for rehearing, the Midwest ISO argues that the Market Mitigation Measures should only be applied in BCAs during binding transmission constraints without the need for additional generator-specific analysis. The Midwest ISO states that implementing a mitigation system that determines whether each individual generator is impacted by the constraint prior to applying the conduct and impact tests, would require additional computer modeling of the system to establish dispatch levels for each generator with and without a given transmission constraint (Two-Step Analysis).

[13] April 14 Compliance Filing at 3.

mitigation measures. Edison Mission Energy requests that the Commission direct the Midwest ISO to revise the definition of a BCA to limit its application to situations where a transmission constraint causes a unit to be dispatched above the level it would have been dispatched absent the constraint.

Discussion

20. At the June 26 Technical Conference, the IMM proposed the use of a new concept, namely, specified generation shift factors (GSFs), to identify generators that could exercise market power when a constraint is active and the GSF threshold is exceeded, a situation that would trigger the conduct and impact tests for generators in BCAs. As we recognize in our companion Rehearing Order, the GSF analysis may provide an appropriate framework to detect market power and determine when conduct and impact tests should apply in implementing the Mitigation Measures. However, as explained in the Rehearing Order, if the Midwest ISO intends to utilize a GSF analysis as part of its mitigation measures, it should submit that analysis as part of a proposed energy markets tariff.

C. Definition of Narrow Constrained Area (NCA)

21. In the March 13 Order, the Commission accepted the NCA Mitigation Measures, with modifications. We found that the proposed definition was overly broad and could inappropriately designate some areas as NCAs. We directed the Midwest ISO to adopt in its tariff a definition that includes a reasonable minimum number of congested hours that would define an NCA, or another less discretionary criteria paired with, or in addition to, the less than “three suppliers” rule.[14]

Compliance Filings

22. The Midwest ISO revised the definition of an NCA in Section 2.1 that proposes an additional "minimum" criterion in Section 2.5.1(b), which specifies that in order for an area to be designated as an NCA, it must have a binding transmission constraint expectation of at least five hundred hours during a given year. In addition, the Midwest ISO proposes to add a new definition of “Binding Transmission Constraint” to further minimize confusion.

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[14] March 13 Order, 102 FERC ¶ 61,280 at P 69.

23. The Midwest ISO notes that the minimum hours threshold will complement, not replace, the "three suppliers" rule. The Midwest ISO states that the same minimum threshold was approved for a comparable purpose in New England, and should be equally appropriate here.[15] The Midwest ISO also clarifies that the IMM will remove the area's NCA designation if it is determined that the transmission constraint that defines the NCA has been, or will be, binding for fewer than five hundred hours during a given year.

Protests

24. In its protest, the Midwest TDUs request that the Commission reject the proposed 500-hour minimum number of constrained hours used to define NCAs. The Midwest TDUs state that the 500-hour minimum is arbitrary, unsupported by any analysis of its impact and will lead to the perverse result of NCA thresholds above the BCA thresholds. In addition, the Midwest TDUs contend that the proposed language in Section 2.5.1(b) that requires the IMM to remove an area's NCA designation based on experienced congestion, without examining expected congestion, should be rejected.

Discussion

25. As explained in the Rehearing Order, the IMM has not yet proposed criteria to designate NCAs. The Midwest ISO should include such a designation as part of a proposed energy markets tariff, including proposed mitigation measures.

D. Removal of the "Lower of" Standard for Establishing Economic Withholding Thresholds in NCAs

26. In the March 13 Order, the Commission found that the proposed "lower of" impact threshold for NCAs was inappropriate. We concluded that using the lower of the BCA threshold or the NCA thresholds to determine whether units should be mitigated upsets the careful balance between the need to mitigate market power and the need to avoid unwarranted market intervention and undoing the effect of the price signals.

[15] See New England Power Pool, et al., 100 FERC ¶ 61,287 (2002), order on reh'g, New England Power Pool, et al., 101 FERC ¶ 61,344 (2002) (approving mitigation proposal for "Designated Congestion Areas" (DCAs), which are areas with "annual congestion hours" not less than 500 or greater than 2000 hours.) See also, ISO New England Inc., Compliance Filing on Scarcity Premium Proposal, Docket No. ER02-2330-011 at P 9-10 (emphasizing the fundamental similarity of the New England DCA and Midwest ISO NCA mitigation mechanisms).

Therefore, we directed the Midwest ISO to modify its tariff to remove the "lower of" thresholds as they apply to NCA mitigation.[16]

Compliance Filings

27. To comply with the March 13 Order, the Midwest ISO amended its compliance filing on April 28, 2003, to remove the "lower of" language from Section 3.2.1(c) of Attachment S-2.[17]|

Discussion

28. We find that the Midwest ISO removed the “lower of” language in Section 3.1.2(c), but failed to remove the language in Section 3.2.1(c).[18] We would expect the Midwest ISO would remove the "lower of" thresholds as they apply to NCA mitigation, in any future filing regarding mitigation.

E. Provide Cost Data for Generating Units Located within the NCAs

29. In the March 13 Order, the Commission noted that the proposed NCA mitigation would allow existing units to recover their marginal costs through their reference level, including opportunity costs, but that the Midwest ISO provided no information regarding whether that would provide existing units located within NCAs with the opportunity to recover fixed costs. We directed the Midwest ISO to provide fixed cost data for units located within the NCAs.[19]

Compliance Filings

30. The Midwest ISO states that, at this time, it is not able to provide cost data for generating units located within NCAs, because the IMM has not yet designated any NCAs. The Midwest ISO further states that even when NCAs are defined, the cost data requested by the Commission will not be accessible to the Midwest ISO or the IMM. However, the Midwest ISO commits to providing all relevant generation cost data in its

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[16] March 13 Order, 102 FERC ¶ 61,280 at P 71.

[17] First Revised Sheet No. 619M.

[18] First Revised Sheet No. 619P.

[19] March 13 Order, 102 FERC ¶ 61,280 at P 73.

possession once the NCAs have been identified. The Midwest ISO asserts that the generating unit owners should voluntarily provide the Commission with any cost data it requires to determine whether the generators are able to recover their fixed costs.

Discussion

31. As discussed in the companion Rehearing Order and here, we expect the IMM to designate NCAs in any future, proposed energy markets tariff. Such a filing should also address all the components of the NCA definition, including the number of suppliers for individual or specific flowgates, number of constrained hours, cost data of generators, and any other market characteristics that are a process of designating an NCA. Accordingly, we will defer ruling on the cost data issue until our consideration of a future, proposed energy markets tariff.

F. Reference Levels

32. In the March 13 Order, the Commission accepted the methods proposed by the Midwest ISO for calculating reference levels,[20] since they are similar to those we approved in other markets that mitigate through conduct and impact thresholds. However, the Commission found that the Midwest ISO failed to explain the transition method that it will employ for calculating reference levels between the effective date of the Day-2 Markets and a date at least 90 days later when sufficient bidding histories are available. While stating our expectation that the method would involve a consultation between the IMM and the market participant to negotiate a reference level that at a minimum will apply for the first 90 days of the operation of Day-2 Markets, we directed the Midwest ISO to file tariff changes which incorporate details on the method it proposes to use during the transition period. Additionally, we required the Midwest ISO to provide reference levels to all market participants until the latter of 100 days after the

[20] Reference levels are calculated by the IMM using either: (1) the lower of the mean or median of the unit’s accepted bids for the last 90 days, adjusted for changes in fuel prices; (2) the mean of the LMP at the unit’s location during the lowest-priced 25 percent of the hours that the unit was dispatched in the last 90 days, adjusted for changes in fuel prices; or (3) a level determined in consultation with the supplier. The IMM will calculate reference levels over the unit's output range with a different reference level calculated for each 10 MWs of output using the method that the IMM deems the most accurate in reflecting a competitive bid level, provided that sufficient data are available. Reference levels will be calculated for all bid components, including start-up costs and minimum generation costs.

start of Day-2 Markets, or when the Midwest ISO deems the transition from a consultation-based method to a historical bid-based method is completed.[21]

Compliance Filings

33. The Midwest ISO states that during the transition period, it expects that the reference level determination would be governed by the hierarchy of methodologies specified in Section 3.1.4, as a result of the compliance filing. The revised section recognizes that during the first 90 days of the Midwest ISO's energy market operation, little or no reliable bidding histories may be available. Therefore, the Midwest ISO contends that, at this time, no further change to Section 3.1.4 should be necessary to accommodate the transition period. The Midwest ISO recognizes that it would be appropriate to discuss the criteria for determining when sufficient bidding data is available to apply Section 3.1.4(a), and related transition period issues at the technical conference that is to be convened. After the technical conference, the Midwest ISO states that an informational filing will be made which will provide additional detail on its proposed application of Section 3.1.4 during the transition period. The Midwest ISO requests that, if an informational filing is determined to be necessary, its proposal be treated as a motion to defer filing tariff revisions relating to the transition mechanism until 30 days after the planned technical conference (which occurred on June 26, 2003). To the extent necessary, the Midwest ISO also asks that the Commission grant a limited waiver of its filing rules in order to permit the inclusion of such a motion in a compliance filing.

Discussion

34. At the June 26 Technical Conference, the IMM outlined a process for obtaining data to derive a reference level for units for the first 90 days. After the first 60 days, the IMM proposes to base reference levels on bid and cost data, as specified in the proposed tariffs.[22] No comments were filed regarding this proposal. We anticipate that the Midwest ISO will incorporate this transition process in a future, proposed energy markets tariff.

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[21] March 13 Order, 102 FERC ¶ 61,280 at P 80.

[22] IMM Comments at 13.

G. Physical Withholding Penalties

1. Application of Physical Withholding Penalties to Generators

35. In the March 13 order, the Commission removed from the Mitigation Measures "the obligation for merchant generators with no state or Midwest ISO resource adequacy obligation and concomitant capacity payment to bid into the Day-Ahead Markets."[23] We further specified that generators should not be subject to the Mitigation Measure's penalties for physical withholding in the Day-Ahead Market, unless they are subject to a Midwest ISO or state Resource Adequacy obligation.[24]

Compliance Filings

36. The Midwest ISO concurs that physical withholding penalties should not be necessary in the Day-Ahead Market. It proposes to revise Section 4.3.1(b) to make clear that physical withholding penalties may be applied to the reliability assessment that the Midwest ISO will use to commit supplemental resources after the Day-Ahead Market closes. The Midwest ISO, under its “Day-2” energy market design, will use this assessment to ensure Real-Time reliability. The Midwest ISO states that, because the physical requirements and constraints that the Midwest ISO must satisfy through this process are very similar to the physical requirements that must be satisfied in the Real-Time market, the same locational market power concerns arise. The Midwest ISO contends that evading the commitment process is an effective means of ensuring that a unit is not available in the subsequent Real-Time markets. The Midwest ISO further states that sanctions against physical withholding, from the reliability assessment, are consistent with the March 13 Order’s holding that penalties may be imposed on generators that withhold in Real-Time, even if they do not receive capacity payments.

Protests

37. The Midwest TDUs state the Midwest ISO's proposed language in Section 4.3.1(b), which exempts certain generators from physical withholding penalties, fails to reflect Resource Adequacy requirements applicable to load serving entities within the Midwest ISO's footprint. The Midwest TDUs argue that Section 4.3.1(b) should be revised to implement the must-offer obligation in Day-Ahead Markets to recognize that

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[23] March 13 Order, 102 FERC ¶ 61,280 at P 47.

[24] Id. at P 96.

regional reliability councils impose Resource Adequacy requirements on the Midwest ISO.

Discussion

38. For the reasons discussed in the companion Rehearing Order, we recognize the need to ensure adequate capacity for reliability. As stated in the Rehearing Order, we would consider approving the application of physical withholding penalties in the Reliability Assessment Commitment (RAC) process, if there was a concomitant capacity payment.

39. With regard to the Midwest TDUs protest, we provide guidance on this issue in the companion TEMT Order and Rehearing Order.

2. Financial Penalties Not Applied to Economic Withholding

40. In the March 13 Order, the Commission conditionally accepted the Mitigation Measures' use of conduct-impact tests and default bids set at reference levels to mitigate economic withholding. However, we further found that the proposed definition of physical withholding could impose financial penalties, in addition to mitigation, for economic withholding, and that the Midwest ISO failed to demonstrate that the proposed conduct and impact thresholds are ineffective at preventing economic withholding. Accordingly, we rejected the Midwest ISO's proposal to further penalize generators, beyond authorized mitigation, for repeated economic withholding. We directed the Midwest ISO to modify its Mitigation Measures so that financial penalties would not be applied for economic withholding.[25]

Compliance Filings

41. The Midwest ISO proposes to revise the language in Section 4.3.1(b) to clarify that penalties are not intended to apply to economic withholding. In addition, the Midwest ISO proposes new language in Section 4.3.1(c), which provides that the sanctions shall apply to a generating unit only if it is located in a BCA or NCA and if one or more transmission constraints that give rise to locational market power in the area are binding.

[25] Id. at P 97.

Discussion

42. The IMM's response has not addressed our concern, as expressed in the March 13 Order. Section 3.1.1(b) still refers to economic withholding, as determined by the economic withholding thresholds in Section 3.1.2, to be physical withholding.[26] Economic withholding should not result in the application of additional physical withholding penalties, since we consider the mitigation of economic withholding to be sufficient. We expect that a proposed energy markets tariff, including mitigation measures, would be consistent with this principle.

H. Load Bidding Mitigation

43. In the March 13 Order, we accepted the Mitigation Measures upon the condition that they apply only to load whose persistent underscheduling creates operational problems (and that these problems will be identified on its web site).[27]

Compliance Filings

44. The Midwest ISO proposes revisions to Section 4.4.2(d), which state that underscheduling has created operational problems and a description of those problems will be posted on its website.

Discussion

45. The Commission finds that the proposed revisions to Section 4.4.2(d) do not fully comply with the March 13 Order. The first sentence in subsection (vi) states "that this practice has created operational problems, then the following mitigation measure may be imposed." To assure that this "practice" specifically addresses the underscheduling concern, we would expect that language similar to the following be added:

> "that this practice will apply only to load whose persistent underscheduling creates operational problems, then the following mitigation measure may be imposed."

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[26] We note that the proposed revisions to Section 4.3.1, the IMM's assertions notwithstanding, do not appear to address this issue.

[27] Id. at P 108.

46. We find that the Midwest ISO's posting the description of any such problems on its website would be appropriate.

I. Compensation for Improper Mitigation

47. The Commission noted in the March 13 Order that Section 4.2.2(b) of the proposed Mitigation Measures provides that a default bid shall not limit the price that a facility may receive unless the default bid determines the market clearing price.[28] We found it reasonable to permit the generator that was improperly mitigated (e.g., below that generator's marginal cost) to be compensated. We required the Midwest ISO to revise its tariff to provide for the generator to receive its full bid if the Midwest ISO subsequently determines that the bid was not an attempt to assert market power. This requirement is consistent with the provisions approved for the NYISO.[29]

Compliance Filings

48. The Midwest ISO proposes to add a new Section 6(d) to specify that, to the extent a generator has been improperly mitigated, the generator will recover "full bids," and to clarify that, except when authorized by the Commission, market-clearing prices will not be recalculated, if it is subsequently determined that an improperly mitigated bid would have set the market-clearing price.

Discussion

49. No party filed protests regarding this proposed revisions, and we would find the proposed Section 6(d) to be appropriate

J. IMM Compliance

1. Detecting Bids that Artificially Lowers Locational Prices

50. In the March 13 Order, the Commission expressed concern that sellers may attempt to lower prices at a particular location in order to increase prices for energy or

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[28] Id. at P 126.

[29] See New York Independent System Operator, Inc., 95 FERC ¶ 61,471 (2001) (NYISO).

transmission elsewhere, and that a net buyer may schedule or offer energy at below marginal costs in an attempt to lower energy prices associated with locations where it is a purchaser. Accordingly, we required the IMM to evaluate mechanisms for detecting bidding that lowers locational prices, where that bidding may be an exercise of market power in the energy and transmission markets.[30]

Compliance Filings

51. The Midwest ISO does not propose any revisions to address this issue at this time. The Midwest ISO states that the Mitigation Measures already provide the IMM with authority to monitor and respond in the event detection of abuse is found.[31] More specifically, the Midwest ISO cites Section 1(c), which requires the IMM to monitor the markets administered by the Midwest ISO for conduct that may distort competitive market outcomes but does not trigger the defined mitigation thresholds. The Midwest ISO states that this provision also empowers the IMM to propose new mitigation measures to deal with stratagems that artificially lower locational prices should they prove necessary.

Discussion

52. We consider the IMM's response to be appropriate to the concerns we have expressed. [32]

2. Rationale for Using Annual Constrained Hours in Calculating NCA Thresholds

53. In the March 13 Order, the Commission also directed the IMM to explain the rationale for using the constrained hours, rather than the number of hours a hypothetical peaking unit is needed, as a divisor for the hypothetical unit's fixed costs.[33] The Midwest ISO proposed to use the annual constrained hours, in the denominator, i.e., as a divisor of the hypothetical peaking unit's fixed costs, to determine the fixed cost adder. We

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[30] March 13 Order, 102 FERC ¶ 61,280 at P 39.

[31] Sections 2.4(a) (3), 4.4, and 4.5.

[32] We note the current definition of locational market power does not contemplate lower prices, below competitive levels, as an exercise of market power.

[33] March 13 Order, 102 FERC ¶ 61,280 at P 72.

expressed concern that, where a peaking unit may not be needed to meet load in an NCA with a binding constraint, there may not be an opportunity to adequately recover fixed costs and the price may not send the appropriate price signal.

Compliance Filings

54. The IMM states that Section 3.1 .2(c)(1) of the Mitigation Measures contains a formula for calculating the economic withholding threshold for Energy and Minimum Generation Bids by generators located in NCAs. The formula states that the NCA threshold will equal the net annual fixed cost of a peaking generator divided by the total number of hours over the prior 12 months "in which the shadow price has been greater than zero on any interface into the [NCA] in which the generator is located, but not more than 2000 hours."

55. The IMM states its rationale in using constrained hours instead of a hypothetical peaking unit is that Locational Market Power (as that term is used in the Mitigation Measures) may be a substantial issue in many hours when the hypothetical peaking unit would not be dispatched. Additionally, the IMM believes that the intent of the Mitigation Measures is not to guarantee that revenues earned in the constrained hours will be sufficient but to ensure that a new peaking generator would be economic in each NCA. For example, in some of the NCAs, new investment in peaking generation may not be warranted. This could be the case, maintains the IMM, where there is not a lack of generation in the area, but its ownership is highly concentrated. The IMM asserts that allowing baseload or intermediate generating resources to raise prices to the marginal cost of a peaking generator in a large portion of the year would result in a substantial and unwarranted increase in the average annual prices in the NCA. The IMM further maintains that this is particularly important in the Midwest, because the vast majority of the generating units are baseload coal-fired, nuclear, hydroelectric, or intermediate natural gas resources, which are expected to set the market clearing price in most hours.

Protests

56. Edison Mission Energy asserts that the Midwest ISO has failed to properly explain, provide studies, or provide empirical evidence to justify its rationale for calculating the threshold for economic withholding in areas designated as NCAs. Edison Mission Energy also states that the Commission approval of a small number of hours for the Peaking Unit Safe Harbor energy bid mechanism in Devon Power[34] is applicable to the issue of the use of constrained hours for determining the NCA threshold.

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[34] See Devon Power, LLC, 103 FERC ¶ 61,082 at P 31 (2003) (Devon Power).

57. Exelon states the Commission should reject the IMM's explanation of the rationale for using annual constrained hours in calculating NCA thresholds, because, according to the Exelon, its mitigation plan is similar to that in New England, and the recent findings made by the Commission in Devon Power apply equally to the Midwest ISO. Exelon further states that the Commission should direct the Midwest ISO to reconsider application of the current formula and instead implement the Peaking Safe Harbor Bid proposal set out by the Commission in Devon Power.

Discussion

58. We defer addressing the specific proposal of the IMM and the concerns raised by Edison Mission Energy and Exelon, and instead will provide general guidance. As we state in the companion Rehearing Order, the Commission must ensure, in the context of a bid-based market design and taking account of all elements of market design, that there are both adequate incentives to attract and retain needed investment as well as rates that are not excessive.[35] Accordingly, we require in that order that the Midwest ISO and the IMM include such analysis in a comprehensive energy markets filing.

3. IMM Report Requirements

59. The March 13 Order directed the IMM to: (i) "monitor the effects of virtual bidding on the Midwest ISO's markets and provide quarterly reports of the findings during the first year of operations"; (ii) submit annual reports on the effects of virtual bidding in subsequent years; (iii) either combine its annual reports on the Midwest ISO market rules and congestion or issue them simultaneously; (iv) perform quarterly reviews of the Mitigation Measures to ensure that they are appropriate for the Midwest; and (v) include information on the frequency of mitigation, the number of generators mitigated, the number of megawatt hours mitigated, the results of mitigation by location and the level and frequency of transmission constraints in its quarterly reports.[36]

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[35] See Reliant Energy Mid-Atlantic Power Holdings L.L.C. v. PJM Interconnection L.L.C., 104 FERC ¶ 61,040 at P 38 (2003).

[36] March 13 Order, 102 FERC ¶ 61,280 at P 116.

Discussion

60. In the Compliance Filing, the IMM states it will comply with all of these reporting requirements, and we accept its representation at this point to be appropriate.

<u>The Commission orders</u>:

The Midwest ISO's Compliance Filings are hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.