

122 FERC ¶ 61,283
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Jon Wellinohoff.

Midwest Independent Transmission System Operator, Docket No. ER08-394-000
Inc.

ORDER ON RESOURCE ADEQUACY PROPOSAL

(Issued March 26, 2008)

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1. On December 28, 2007, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted proposed revisions to its Open Access Transmission and Energy Markets Tariff (TEMT)¹ to revise its interim Module E (Resource Adequacy)² to comprehensively address long-term resource adequacy requirements. As discussed below, the Commission will conditionally accept the proposed tariff revisions, to become effective March 27, 2008.

I. Background

2. When the Commission conditionally approved the TEMT, on August 6, 2004, it approved the proposed Module E of the TEMT as a “short-term transition mechanism” to help ensure reliability throughout the Midwest ISO footprint, but directed the Midwest ISO to work toward a long-term resource adequacy plan through its stakeholder process.³

3. On October 5, 2004, the Midwest ISO made a compliance filing proposing to develop a permanent resource adequacy plan by early June 2006.⁴ The Commission accepted the Midwest ISO’s proposal to file a long-term resource adequacy plan by June 6, 2006, and confirmed that the then-existing Module E was a reasonable and appropriate interim plan, while a long-term approach was still in development.⁵

4. On June 6, 2006, the Midwest ISO submitted a compliance filing to the Commission proposing a two-phased approach to implement a permanent resource adequacy plan. In Phase I, the Midwest ISO proposed to integrate short-term contingency reserves and regulation into the energy markets. In Phase II, the Midwest ISO proposed to undertake a long-term integration of shortage pricing with the energy market. The Commission accepted the Midwest ISO’s two-phase approach, accepting

¹ Midwest Independent Transmission System Operator, Inc., FERC Electric Tariff, Third Revised Vol. No. 1.

² Module E contains the resource adequacy provisions of the TEMT.

³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, at P 421, *order on reh’g*, 109 FERC ¶ 61,157 (2004), *order on reh’g*, 111 FERC ¶ 61,043, *order on reh’g*, 112 FERC ¶ 61,086 (2005), *aff’d sub nom. Wisc. Pub. Power Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007). The Midwest ISO’s energy markets commenced successfully on April 1, 2005.

⁴ Midwest Independent Transmission System Operator, Inc. Compliance Filing, Docket Nos. ER04-691-007 and EL04-104-006, at 31 (filed Oct. 5, 2004).

⁵ *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,043 at P 107.

the Midwest ISO's commitment to file Phase I in the fall of 2006 and Phase II in 2007, but also required the Midwest ISO to file a detailed timetable for implementation of its plan.⁶

5. On February 15, 2007, the Midwest ISO filed Phase I, a proposal for an ancillary services market facilitating the sale and purchase of contingency reserves and regulation. The Commission accepted the Midwest ISO's resource adequacy implementation plan and directed the Midwest ISO to file Phase II, a permanent long-term resource adequacy proposal, by December 2007.⁷

6. The Midwest ISO reports that, over the last two years, it has worked with stakeholders to develop the resource adequacy proposal. The Midwest ISO worked primarily with stakeholders through the Supply Adequacy Working Group and the Organization of MISO States (OMS)-established Resource Adequacy Working Group to identify key resource adequacy issues and develop solutions consistent with Commission guidance in prior orders. The Midwest ISO also received feedback from the Market Subcommittee and Advisory Committee prior to filing the proposal.

7. In this order, we conditionally accept Phase II of the Midwest ISO's permanent resource adequacy program. On February 25, 2008, the Commission conditionally accepted Phase I in its order on the Midwest ISO's ancillary services market proposal.⁸ The ancillary services market proposal includes scarcity pricing provisions that provide the market with price signals during shortages, and thereby provides incentives for market participants to contract for alternative resources, and the integration of demand resources into reserves markets.

8. Since the inception of the Midwest ISO energy markets, the Commission has required the Midwest ISO to develop a permanent resource adequacy program. While the Midwest ISO market will be resource adequate for the near future and the Midwest ISO is implementing a short-term reserves market,⁹ we consider the proposed long-term

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 61,292, at P 13 (2006).

⁷ *Midwest Indep. Transmission Sys. Operator, Inc.*, 119 FERC ¶ 61,311, at P 138, *order on reh'g*, 120 FERC ¶ 61,202 (2007) (Guidance Order).

⁸ *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172 (2008).

⁹ As Mr. Doying explains in his testimony, because of historical circumstances, such as the efforts of state commissions to ensure that LSEs within their jurisdiction have adequate resources to meet their loads, "the Midwest ISO currently has adequate Planning Resources and is expected to continue to have adequate Planning Resources for Planning Years 2008-2009, 2009-2010 and beyond." Midwest ISO Filing, Doying Aff. at

(continued)

resource adequacy provisions in this filing to be an important step in establishing the framework for efficient and reliable energy and reserves markets in the future.

9. We recognize that the OMS and stakeholders have been actively involved in developing this proposal over the past two years, and acknowledge the challenge of developing a resource adequacy plan that spans 15 states. It is our intent to build on the efforts of the states and stakeholders in the Midwest ISO region and thereby continue the momentum developed in this process. To facilitate these efforts and to move the proposal forward, we conditionally accept the Midwest ISO's filing, subject to completion of certain provisions that are still being considered by stakeholders.

10. Finally, we acknowledge the jurisdictional concerns of the OMS and the Midwest ISO. As discussed below, we believe that federal and state jurisdiction over various aspects of resource adequacy can be harmonized, and can result in an effective resource adequacy program that benefits all states and all stakeholders.

II. Summary of the Midwest ISO Proposal

11. On December 28, 2007, the Midwest ISO filed its long-term resource adequacy proposal. The proposal contains mandatory requirements for any market participant serving load in the Midwest ISO region to have and maintain access to sufficient planning resources. These planning resources include all resources used to meet a resource adequacy requirement, including generation capacity and demand response. Under the proposal, the Midwest ISO establishes a Planning Reserve Margin for each Load-Serving Entity (LSE) on an LSE-by-LSE basis. However, the Midwest ISO explains that its proposal "recognizes the right of states to establish Planning Reserve Margins . . . for LSEs in states that may either be higher or lower than the [Planning Reserve Margins] that the Midwest ISO would otherwise calculate for LSEs. . . ." ¹⁰ The Midwest ISO establishes a Planning Reserve Margin for each LSE based on a Loss of Load Expectation (LOLE) study, and each LSE must demonstrate that it has sufficient resources to meet those margin requirements. LSEs may contract with other parties to demonstrate compliance with the resource adequacy requirements. The Midwest ISO states that these requirements are meant to coincide and align with state and Regional

13. Mr. Doying states that "[t]his situation has provided the Midwest ISO with 'breathing space' in which it can prudently consider and develop an effective and equitable [resource adequacy plan]" *Id.* As such, under the Midwest ISO's proposal, LSEs have sufficient time to ensure that they have adequate resources and therefore the likelihood that they would face scarcity pricing in the Midwest ISO market is reduced.

¹⁰ Midwest ISO Filing, Transmittal Letter at 3.

Entities' reliability requirements, and in the event of a conflict, the relevant state's Planning Reserve Margin will apply.

12. The Midwest ISO proposes to manage resource adequacy through financial settlement/enforcement provisions. These provisions are still under development. The most recent drafts of these provisions would require LSEs to either obtain sufficient resources themselves or pay for resources. The Midwest ISO and its stakeholders are considering this approach because they believe it is best suited for the Midwest ISO market, in which load is predominantly managed by traditional vertically-integrated owners. The Midwest ISO states that it needs more stakeholder discussions with respect to competing financial settlement/enforcement plans, and seeks a 180-day extension of time to file those provisions.

13. The proposal anticipates a staged implementation of the resource adequacy requirements. The Midwest ISO requests that the proposed tariff sheets become effective on March 27, 2008. The Midwest ISO commits to filing financial settlement/enforcement language in advance of March 1, 2009, the date that LSEs are required to submit their specific resource plans. Also, the Midwest ISO states that the initial Planning Year will run from June 1, 2009 through May 31, 2010. The specific details of the proposal are discussed in further detail below.

III. Notice and Responsive Pleadings

14. Notice of the Midwest ISO's proposal was published in the *Federal Register*, 73 Fed. Reg. 2472 (2008), with protests and interventions due on or before January 28, 2008.

15. Timely motions to intervene were filed by: the Allegheny Energy Companies;¹¹ Alliant Energy Corporate Services, Inc.; BP Energy Company; Calpine Corporation; DC Energy Midwest, LLC; EnerNOC, Inc.; Exelon Corporation; FPL Energy, LLC; Great River Energy; International Transmission Company, Michigan Electric Transmission Company, LLC and ITC Midwest, LLC; New Covert Generating Company, LLC; the Office of the Ohio Consumers' Counsel; Otter Tail Power Company; PSEG Energy Resources & Trade LLC; Sempra Energy Solutions, LLC; and Tenaska Power Services Co. Timely notices of intervention were filed by the Illinois Commerce Commission (Illinois Commission) and the Michigan Public Service Commission.

¹¹ For purposes of their filing, the Allegheny Energy Companies include: Allegheny Power (the trade name for Monongahela Power Company, The Potomac Edison Company and West Penn Power Company) and Allegheny Energy Supply Company, LLC.

16. Timely motions to intervene and comments and/or protests were filed by: Ameren Services Company (Ameren); American Municipal Power – Ohio, Inc. (AMP-Ohio); American Transmission Company LLC, by its corporate manager, ATC Management Inc. (American Transmission); the Coalition of Midwest Transmission Customers (Midwest Coalition); Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (Constellation); Consumers Energy Company (Consumers); Dairyland Power Cooperative (Dairyland); The Detroit Edison Company (Detroit Edison); Dominion Retail, Inc., Dominion Energy Kewaunee, Inc., and Dominion Energy Marketing, Inc. (Dominion); Duke Energy Corporation and FirstEnergy Service Company (Duke/FirstEnergy); Dynegy Power Marketing, Inc. and LS Power Associates, L.P. (Dynegy/LS); the Electric Power Supply Association (EPSA); Hoosier Energy Rural Electric Cooperative, Inc. and Southern Illinois Power Cooperative (Hoosier/Southern Illinois); the Illinois Industrial Energy Consumers (Illinois Industrial); the Illinois Municipal Electric Agency (Illinois Municipal); Indianapolis Power & Light Company (IPL); Integrys Energy Services, Inc. (Integrys); Manitoba Hydro; the Michigan Public Power Agency (Michigan Public Power); Midwest Industrial Customers (Midwest Industrial); the Midwest Reliability Organization (Midwest Reliability); the Midwest TDUs;¹² Minnesota Power; Northern Indiana Public Service Company (Northern Indiana); ReliabilityFirst Corporation (ReliabilityFirst); Reliant Energy, Inc. (Reliant); Southwestern Electric Cooperative, Inc. (Southwestern); Strategic Energy, LLC (Strategic); Wabash Valley Power Association, Inc. (Wabash); Wisconsin Electric Power Company (Wisconsin Electric); Wisconsin Public Service Corporation and Upper Peninsula Power Company (WPSC/UPPCO); Wolverine Power Supply Cooperative, Inc. (Wolverine); and Xcel Energy Services Inc. (Xcel). The OMS filed timely comments.

17. Motions to intervene out-of-time were filed by: Coral Power, L.L.C. (Coral); the Dayton Power and Light Company (Dayton); and Duquesne Light Company (Duquesne). The Illinois Commission also filed comments out-of-time.

18. On February 12, 2008, Duke/FirstEnergy, Hoosier/Southern Illinois and the Midwest ISO filed answers to the comments and/or protests. On February 27, 2008, the Midwest Coalition, the Midwest TDUs, Reliant, and WPSC/UPPCO filed a response to the Midwest ISO's answer. On March 3, 2008, the Midwest TDUs filed a supplemental response.

¹² For purposes of their filing, the Midwest TDUs include: Great Lakes Utilities; Indiana Municipal Power Agency; Madison Gas & Electric Company; Midwest Municipal Transmission Group; Missouri Joint Municipal Electric Utility Commission; Missouri River Energy Services; Southern Minnesota Municipal Power Agency; and Wisconsin Public Power Inc.

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

20. Pursuant to Rules 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2007), the Commission will grant Coral, Dayton, and Duquesne's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers of Duke/FirstEnergy, Hoosier/Southern Illinois, the Midwest Coalition, the Midwest ISO, the Midwest TDUs, Reliant, and WPSC/UPPCO because they have provided information that assisted us in our decision-making process.

B. Sufficiency of the Midwest ISO Proposal

1. The Midwest ISO Proposal

22. While the Midwest ISO's proposal provides certain elements of the proposed long-term resource adequacy plan, several provisions are yet to be completed. The proposal does not include financial settlement/enforcement provisions.¹³ In addition, implementation details for several provisions are to be included in as-of-yet-undrafted Business Practices Manuals.¹⁴ The Midwest ISO asserts that Commission "review and approval of all the basic elements of [a resource adequacy proposal] for the Midwest ISO Region . . . will greatly assist the Midwest ISO's Market Participants because it will provide commercial certainty to these parties. . . . Moreover, [Commission] review and approval of the components of the [proposal] that stakeholders agree upon would greatly reduce uncertainty and promote completion of a long-term [resource adequacy proposal]."¹⁵

¹³ See *infra* section IV.I.

¹⁴ See *infra* section IV.R.

¹⁵ Midwest ISO Filing, Transmittal Letter at 7.

2. Comments and Protests

23. Several commenters, including the OMS, Ameren, Duke/First Energy, Dynegy/LS, IPL, Wisconsin Electric and Xcel, generally support the Midwest ISO's proposal as a step in the right direction toward implementing a long-term resource adequacy plan.¹⁶ These parties generally support the proposal as a means to encourage investment in generation resources and demand response, arguing that rejection of the filing as incomplete would further delay the establishment of a long-term resource adequacy program.

24. In contrast, other commenters, including AMP-Ohio, Dominion, Hoosier/Southern Illinois, the Illinois Commission, Illinois Municipal, the Midwest Coalition, Midwest Industrial, Southwestern, Strategic and WPSC/UPPCO, maintain that the Midwest ISO's proposal is deficient and therefore recommend that the Commission reject the filing without prejudice to the filing of a more complete Module E.¹⁷ These commenters also argue that piecemeal review of Module E would be inefficient.¹⁸ For example, WPSC/UPPCO state that three elements of a long-term regional resource adequacy program must be undertaken in coordination with the Electric Reliability Organization (ERO): "(i) a regional planning standard, (ii) a mandatory compliance monitoring program, and (iii) a mandatory enforcement process."¹⁹ WPSC/UPPCO maintains that the Midwest ISO's proposal fails to provide a coherent plan for achieving that coordination and those objectives.

3. Answers

25. In their answer, Duke/FirstEnergy continue to assert that the Midwest ISO's resource adequacy requirement proposal, although not complete, should not be delayed or rejected. Duke/FirstEnergy argue that the Midwest ISO's proposal should be accepted now, "so that [the Midwest ISO] can start gathering and evaluating the data it needs on a timely basis to meet the implementation schedule."²⁰ Duke/FirstEnergy acknowledge

¹⁶ As discussed below, even the entities supporting the proposal recommend certain revisions and/or clarifications to the proposal.

¹⁷ As discussed below, these entities offer specific revisions and/or clarifications to the proposal in the event the Commission does not reject the filing as deficient.

¹⁸ As discussed below, these entities express particular concern about the missing financial settlement/enforcement provisions as well as the provisions to be determined in the as-of-yet-undrafted Business Practices Manuals.

¹⁹ WPSC/UPPCO Comments at 5.

²⁰ Duke/FirstEnergy Answer at 3.

that certain issues have not yet been proposed, but they assert that the Commission has previously adopted “incomplete” rate design proposals subject to compliance filings to complete items left to Business Practices Manuals.²¹

26. Hoosier/Southern Illinois reiterate their argument that the Commission should not accept the Midwest ISO’s application. They state that, while they too are concerned about the adequacy of resources to serve load in the Midwest ISO footprint, “it is simply not true that the situation is sufficiently desperate that acceptance of an inadequate proposal now is better than requiring the Midwest ISO to return to the stakeholder process and develop a just and reasonable resource adequacy tariff.”²²

27. Similarly, WPSC/UPPCO argue that the Midwest ISO’s answer does not justify Commission acceptance of the proposal, and reasserts that the fundamental deficiencies of the filing require rejection. WPSC/UPPCO also assert that the Midwest ISO’s answer incorrectly represents that the proposal is a “compromise among stakeholders,” arguing that while many votes were cast on various proposals, the “Midwest ISO selected, as it has right to do, the provisions it wanted regardless of the resulting vote.”²³

4. Commission Determination

28. We will not reject the Midwest ISO’s proposal as incomplete. We do not consider the fact that the financial settlement/enforcement provisions are still under development to be a basis to reject the entire filing. As discussed more fully below, there are a number of important issues regarding the roles of states, the ERO, Regional Entities and the Commission that must be resolved in order to develop a resource adequacy program; this is the appropriate proceeding to make those determinations. The provisions we are evaluating in this order can be evaluated with the information available. We do not require completed financial settlement/enforcement provisions to make a determination as to the justness and reasonableness of the filed elements of the Midwest ISO’s resource adequacy proposal. Accordingly, we do not see the need to reject this filing and require a new filing when the financial settlement/enforcement provisions are completed. We expect the compliance process in this proceeding, as detailed in our compliance requirements throughout this order, will provide parties with sufficient

²¹ *Id.* at 6-7 (citing the California Independent System Operator Corporation’s (CAISO) Market Redesign and Technology Upgrade proposal).

²² Hoosier/Southern Illinois Answer at 6-7.

²³ WPSC/UPPCO Answer at 6.

opportunities to present their concerns and for Commission evaluation. For this reason, we will not require hearing procedures.²⁴

C. Jurisdictional Concerns and Coordination

1. The Midwest ISO Proposal

29. The Midwest ISO states that it interprets the “savings provisions” of Federal Power Act (FPA) section 215(i)²⁵ to allow broad authority to the states as to resource adequacy matters. It argues that section 215(i) establishes that states have the right to set their own Planning Reserve Margins,²⁶ and those margins may be higher or lower than the margins calculated by the Midwest ISO. The Midwest ISO states that if the Commission determines that its interpretation of section 215(i) is wrong, and as such the states would not have a right to set their own Planning Reserve Margins, it would still seek OMS endorsement before filing any amendments, including the missing financial settlement provisions.

30. Specifically, in proposed section 68.3, the Midwest ISO proposes tariff language intended to clarify the rights of state authorities:

Nothing in this Module E shall be interpreted as pre-emption of state authority to establish state reliability standards, safety standards, planning reserve margins, or the enforcement thereof. LSEs within the Transmission Provider Region must comply with all regulations and laws regarding reliability,

²⁴ Since we are not requiring a hearing, we will not suspend rates and establish a refund period.

²⁵ In relevant part, section 215(i)(2) provides that “[t]his section does not authorize the ERO or the Commission . . . to set and enforce compliance with standards for adequacy” In addition, section 215(i)(3) provides that “[n]othing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard. . . .” 16 U.S.C. § 824o(i)(2-3) (Supp. V 2005).

²⁶ A Planning Reserve Margin is the percentage of resources an LSE must maintain above the difference in the LSE’s forecast requirements and the capacity of its “Load Modifying Resources” to reliably serve load based on meeting the LOLE. As discussed in greater detail below, the Midwest ISO’s proposed LOLE is set at no greater than 0.1 day in one year, which equals the sum of the loss of load probability for the integrated daily peak hour for each day of the year.

including but not limited to any reserve margin requirements, of the states in which the Transmission Provider operates and where the LSE serves Load. To the extent that an LSE serves Load in two (2) or more states in the Transmission Provider Region, the LSE must comply with the state reliability or resource adequacy requirements of each state in which Load is served.^[27]

2. Comments and Protests

a. Jurisdictional Concerns and Coordination with State Regulatory Agencies

31. Commenters such as the OMS, IPL and Wisconsin Electric applaud the role that the Midwest ISO's proposal leaves states in establishing resource adequacy standards. These commenters maintain that the Midwest ISO's proposal recognizes the state's primary role for resource adequacy, but does not compromise the Midwest ISO's own independence. The OMS expands on the Midwest ISO's interpretation by stating its understanding that section 215(i)(2) gives states a unique role where resource adequacy and enforcement are concerned. Similarly, Wisconsin Electric states that it supports the Midwest ISO's objective not to infringe upon any of the jurisdictional state protections granted in section 215(i). IPL asserts that it will oppose any proposal that infringes on the traditional powers of the states or any interpretation of the Midwest ISO's filing that infringes on these powers. IPL states that the proposal, as it stands, does not upset state planning processes or requirements. IPL also states that this allocation of jurisdiction "properly takes into account the practical difference between Operating Reserves and Planning Reserves."²⁸

32. In addition, the OMS "seeks an accommodation as to procedure that is intended to better coordinate between the state and federal jurisdictions and ultimately expedite the FERC's administrative task." Specifically, the OMS "seeks an accommodation with the Midwest ISO to afford OMS the opportunity to endorse changes to Module E prior to any filing of future amendments, or to allow OMS to offer amendments of its own for separate filing to the Commission by the Midwest ISO."²⁹ While the OMS does not intend to preclude the Midwest ISO from making its own proposals under section 205, the OMS states that the ability of it to make its own separate filing "facilitates creation of

²⁷ Midwest ISO Filing at proposed Third Revised Sheet No. 811.

²⁸ IPL Comments at 9.

²⁹ OMS Comments at 2.

a more complete record before FERC in its initial consideration.”³⁰ The OMS seeks authority similar to that granted to the Regional State Committee for the Southwest Power Pool, Inc. (SPP).³¹

33. In contrast, several commenters express concern about the role that the proposal leaves states in establishing resource adequacy standards. Consumers, Detroit Edison, Duke/FirstEnergy, Hoosier/Southern Illinois, Michigan Public Power and WPSC/UPPCO assert that the Midwest ISO’s efforts to accommodate the interests of state regulatory agencies must be carefully tailored to not shift to the OMS decisional authority with respect to resource adequacy matters that do not affect state-jurisdictional powers and to protect the rights of LSEs that are not subject to state regulation. They argue that the proposed tariff provisions should be revised to make a distinction between LSEs that are subject to the jurisdiction of state regulatory authorities and those that are not. They also argue that much of the content of Module E has nothing to do with matters over which state commissions have jurisdiction. WPSC/UPPCO also state that section 68.3 is excessive, arguing that it delegates to the states authority which the Midwest ISO does not have. WPSC/UPPCO argue that the Midwest ISO does not have reliability authority under section 215 to delegate to the states and, since it has no such authority, it cannot characterize failure to comply with state regulations and law regarding reliability as a violation of the TEMT. In addition, Duke/FirstEnergy and Reliant argue that the broad language could introduce ambiguities and suggest broadly that state or Regional Reliability Organization requirements would become enforceable by the Commission through the TEMT.

34. Hoosier/Southern Illinois recommend several specific phrases to further clarify the distinction between LSEs subject to state authority and those that are not subject to state authority. Specifically, Hoosier/Southern Illinois recommend inserting the phrase “state jurisdictional” between “each” and “LSE” in proposed section 69.3.2 to clarify that the Midwest ISO will only report information about LSEs to the states that are subject to state jurisdiction. Hoosier/Southern Illinois also recommend adding to proposed section 69.3.4 language stating “in the case of any LSE subject to rate regulation by a state regulatory authority, informing that state regulatory authority.” In addition, in proposed section 69, Hoosier/Southern Illinois recommend adding “in the case of an LSE subject to rate regulation by a state regulatory authority.”³²

³⁰ *Id.*

³¹ *Id.* at 3 (citing *Southwest Power Pool, Inc.*, 108 FERC ¶ 61,003 (2004)).

³² Hoosier/Southern Illinois Comments at 17-18.

35. Consumers and Detroit Edison also express concern about the proposal for OMS endorsement of any amendments to Module E. Consumers asserts that the OMS and individual state commission are stakeholders just like other market participants, and there is no justification for favoring the OMS. Detroit Edison asks why the OMS should have “veto” power over all proposed amendments to Module E, particularly amendments that do not raise state-federal jurisdictional issues.

b. Jurisdictional Concerns and Coordination with the Electric Reliability Organization and the Regional Entities

36. Commenters also express concern about the way in which the deference to state authorities implicates the ERO³³ and Regional Entities.

37. WPSC/UPPCO raise several concerns about the way in which the Midwest ISO’s proposal would affect the ERO. WPSC/UPPCO argue that section 215 of the FPA vests the Commission with reliability authority which is to be exercised by the ERO and Regional Entities subject to two principal limitations – the ERO cannot require generation or transmission expansion and states have the right to adopt reliability standards that are not consistent with the ERO standards. Specifically, WPSC/UPPCO state that the Midwest ISO does not have the authority to establish a Planning Reserve Margin – that authority belongs to the ERO. WPSC/UPPCO also maintain that the proposal undermines ERO authority to establish a regional reserve margin. They assert that while section 215(i)(2) prevents the ERO (or this Commission) from ordering the construction of generation or transmission capacity or setting and enforcing compliance with standards for adequacy or safety, nothing in that savings provision prevents the ERO from establishing the reserve margin for a region which is “necessary to provide for the reliable operation of the bulk power system.”³⁴ WPSC/UPPCO also argue that the proposal diminishes the role of the ERO. WPSC/UPPCO state that section 215 only provides states the right to adopt reliability standards that are not inconsistent with ERO reliability standards and does not diminish reliability outside the state, and authorizes states to serve as an advisory body to the ERO and the Commission. WPSC/UPPCO note that, for purposes of section 215, the Midwest ISO is not a “regulating” entity, but rather a “regulated” entity. Accordingly, the Midwest ISO’s proposal “usurps the role of the

³³ The North American Electric Reliability Corporation (NERC) is the ERO. *North American Elec. Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh’g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on clarification and reh’g*, 119 FERC ¶ 61,046 (2007).

³⁴ WPSC/UPPCO Comments at 11 (citing FPA section 215(i)(a)(3)).

Planning Reserve Sharing Groups as defined by the Regional Entities.”³⁵ WPSC/UPPCO further maintain that reliability assessments should not be provided from the Midwest ISO, but from the Regional Entities – to ensure that reliability issues will be address with “one voice.”³⁶

38. American Transmission and Wisconsin Electric argue that the proposal is unclear as to how the Midwest ISO’s role will be shared with the Regional Entities. Wisconsin Electric notes that the Midwest Planning Reserve Sharing Group was formed to respond to the standards of the Regional Entities in the Midwest ISO region, including Midwest Reliability and ReliabilityFirst, and that it has recently developed its own LOLE process used to set the Planning Reserve Margins for participating members. Wisconsin Electric states that, to avoid the risk of multiple standards, the Midwest ISO should be directed to build on work already performed and to develop its methods to be consistent with those of the Regional Entities. American Transmission argues that the definition of Planning Reserve Margin does not match the text of the TEMT and does not reflect the roles of the Regional Entities or state regulatory authorities. While the definition specifically addresses other definitions proposed for Module E, including the LSE Forecast and LOLE calculation, the definition does not indicate that the Planning Reserve Margin set by Regional Entities or state authorities can or should be substituted.

39. Several commenters express concern about the way in which conflicting standards from the Regional Entities and the Midwest ISO/states would be resolved.

40. While Midwest Reliability and ReliabilityFirst do not oppose any terms of the Midwest ISO’s proposal, they express concern that the proposal could, in the future, conflict with the reliability standards developed by NERC, as ERO, or Midwest Reliability or may create an enforcement “double jeopardy.” ReliabilityFirst notes that it will closely monitor the implementation and further development of Module E to ensure that it does not conflict with Reliability Standards developed by NERC or the Regional Entities. Midwest Reliability asks that the Commission assure that nothing in the TEMT may conflict with reliability obligations of those entities subject to Reliability Standards and that, in the event of a conflict, deference is given to the Reliability Standards.

41. American Transmission, the Midwest TDUs and WPSC/UPPCO state that the Midwest ISO’s proposal is intended to complement and coincide with differing state and Regional Entities’ standards, but provides no specific details specifying how this coordination will be accomplished. The Midwest TDUs note that, while the proposal makes clear that state Planning Reserve Margins supersede that set by the Midwest ISO,

³⁵ *Id.* at 12.

³⁶ *Id.* at 15.

there is no specificity as to how the Midwest ISO will treat different standards from Regional Reliability Organizations. WPSC/UPPCO note that proposed section 69.1 fails to resolve potential conflicts between requirements for LSEs under Module E and as required by the Regional Entities. American Transmission asks that the Midwest ISO be directed to more specifically indicate how and in what manner, and when, state and Regional Entity reliability requirements are to be incorporated into the resource adequacy regime.

42. Dairyland argues that the Commission should ensure that the requirements imposed on LSEs do not conflict with those Reliability Standards set by the NERC or the Regional Entities. It also notes that ensuring that LSEs have adequate planning reserves to meet load within the Midwest ISO footprint is not sufficient to support reliability of the regional system, which includes load external to the Midwest ISO.

43. Ameren argues that the Midwest ISO be required to coordinate the development of resource adequacy requirements with NERC's resource planners. Ameren maintains that the Midwest ISO should establish an oversight group, "consisting of such NERC-registered companies that are Midwest ISO members and the Midwest ISO would review the input data, develop the assumptions underlying [LOLE] analyses, review the results of such technical analyses, determine the appropriate planning zones, review the resulting [Planning Reserve Margins], and recommend adjustments or revisions to the technical analyses where necessary."³⁷

44. In addition, AMP-Ohio, the Midwest TDUs and Wisconsin Electric note that the Midwest ISO refers to "Regional Reliability Organization," or RROs, rather than "Regional Entities," the current NERC terminology. The Midwest TDUs note that because of the ambiguity in the definitions used in the TEMT, and changes that have taken place in the industry, it is not clear that references to "RRO reliability requirements" in section 68 encompass resource adequacy requirements applied (and enforced through penalties) by Regional Reliability Organizations, such as MAPP. Wisconsin Electric supports the submission of a clean-up filing that would universally update the TEMT with current terminology and asks that the Commission give the Midwest ISO a deadline for submission of such a filing. AMP-Ohio also notes that the references to "NERC" should be replaced with "ERO."

3. Answers

45. In its answer, the Midwest ISO argues that Module E is consistent with state jurisdictional roles. The Midwest ISO notes that the Commission has previously recognized that resource adequacy raises "'complex jurisdictional concerns' which at

³⁷ Ameren Comments at 5.

times are at the ‘confluence of state-federal jurisdiction.’”³⁸ It argues that the proposal properly balances state and federal jurisdiction. The Midwest ISO also argues that its commitment to coordinate with the OMS is appropriate and is necessary “to preserve, to the greatest extent possible, the jurisdictional harmony that it believes is critical for successful implementation of long-term resource adequacy and which is represented in the Midwest ISO’s filing.”³⁹

46. The Midwest ISO argues that its proposal is not inconsistent with the role of the Regional Entities and asserts that it will continue to coordinate long-term resource adequacy provisions with all stakeholders, including the Regional Entities and Regional Reliability Organizations. The Midwest ISO states that “[t]o the extent that such organizations develop resource adequacy programs, the Midwest ISO will attempt to incorporate their standards while implementing the Module E provisions. The Midwest ISO notes, however, that Regional Entities obtain authority for all their actions from NERC [and] . . . NERC has limited authorities to set or enforce compliance with standards for resource adequacy.”⁴⁰

47. In their answer, Duke/FirstEnergy disagree with WPSC/UPPCO that the Midwest ISO’s proposal is duplicative of the role of Regional Reliability Organizations. They argue that “the [R]egional [E]ntities set the resource adequacy standard, and the [Regional Transmission Organization (RTO)] serves the complementary (and necessary) function of establishing enforceable requirements for meeting the standard. There is no overlap sufficient to warrant rejection of the [Midwest ISO] proposal.”⁴¹

48. In addition, Duke/FirstEnergy oppose the OMS’ suggestion that the OMS be given the ability to dictate the terms of the Midwest ISO’s section 205 filing as to Module E. Duke/FirstEnergy argue that this proposal is contrary to law, arguing that the courts have upheld the Commission’s decision to reject state-compelled section 205 filings and have found that the Commission cannot require a public utility to surrender its section 205 rights.⁴² Duke/FirstEnergy argue that the OMS’ reliance on SPP’s deference to its regional state committee is inapposite because the Commission subsequently disavowed

³⁸ Midwest ISO Answer at 23 (citing *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274, at P 1112 (2006)).

³⁹ *Id.* at 28-29.

⁴⁰ *Id.* at 27.

⁴¹ Duke/FirstEnergy Answer at 9.

⁴² *Id.* at 13-14 (citing *Massachusetts v. FERC*, 729 F.2d 886 (1st Cir. 1984); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002)).

its role in compelling SPP to give the regional state committee section 205 filing rights and that decision was made during the process of SPP pursuing its RTO application.

49. Duke/FirstEnergy also argue that such a proposal would be contrary to the consensus-building stakeholder process. Duke/FirstEnergy note that the OMS is not always unified in its views, and thus the proposal would appear to allow a majority of the Midwest ISO states to dictate section 205 filings over the objections of other states and against the will of the Midwest ISO. They also argue that it would undermine the independent Midwest ISO governance structure and usurp the Midwest ISO section 205 rights granted, as per the Midwest ISO Transmission Owners Agreement,⁴³ by the transmission owners to the Midwest ISO, not to the OMS. Duke/FirstEnergy argue that the Commission is without authority to mandate that the Midwest ISO and transmission owners accept an arrangement for sharing section 205 rights with the OMS that is different than that set forth in the Transmission Owners Agreement.

50. In its answer, WPSC/UPPCO assert that the Midwest ISO's answer "fails to recognize [s]ection 215's allocation of responsibilities, fails to justify Module E's putative delegation to states of authority that is [not] Midwest ISO's to delegate, and presumes Midwest ISO has certain responsibilities, such as establishment of a 'planning reserve margin,' which belongs to the ERO. . . ."⁴⁴ They also argue that the answer "fails to explain why Midwest ISO fails to exercise authority, which it does have, to establish a long-term compensation mechanism to induce generation expansion."⁴⁵

51. WPSC/UPPCO also argue that the Midwest ISO is establishing reliability standards and, therefore, it should follow the American National Standards Institute (ANSI)-certified standards process to "give participants the proper due process and allow the reliability standards to be vetted properly."⁴⁶ They reassert that these standards should be part of the TEMT and not part of the Business Practices Manuals.

⁴³ *Id.* at 14-15 (citing Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., FERC Electric Tariff, First Rev. Rate Schedule No. 1, App. K).

⁴⁴ WPSC/UPPCO Answer at 3.

⁴⁵ *Id.*

⁴⁶ *Id.* at 9.

4. Commission Determination

a. Authority to Review

52. We generally accept the role for state regulatory authorities in resource adequacy requirements set forth in the Midwest ISO's proposal. However, the role for state authorities cannot undercut this Commission's authority to review resource adequacy and reserve margins that affect matters within our jurisdiction, i.e., provisions that affect our authority under sections 201, 205, and 206 of the FPA to ensure that the provisions of the tariff will result in just and reasonable and not unduly discriminatory or preferential rates.

53. Specifically, section 201(b)(1) of the FPA confers jurisdiction on the Commission over the transmission of electric energy in interstate commerce, and sales of electric energy at wholesale in interstate commerce.⁴⁷ In addition, section 205(a) of the FPA states that:

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.⁴⁸

54. Finally, FPA section 206 gives the Commission the ability to review "any rate, charges, or classification" charged by a public utility for any transmission or sale subject to the jurisdiction of the Commission, as well as "any rule, regulation, practice, or contract affecting such rate, charge, or classification . . ."⁴⁹ Thus, the FPA confers upon the Commission the responsibility for ensuring that transmission and wholesale power sales, rates and charges, including any rule, regulation, practice or contract affecting them, are just and reasonable and not unduly discriminatory.⁵⁰

⁴⁷ 16 U.S.C. § 824(b)(1) (2000 & Supp. V 2005).

⁴⁸ 16 U.S.C. § 824d(a) (2000 & Supp. V 2005).

⁴⁹ 16 U.S.C. § 824e(a) (2000 & Supp. V 2005).

⁵⁰ See, e.g., *New York State Reliability Council*, 118 FERC ¶ 61,179 (2007), *order on reh'g*, 122 FERC ¶ 61,153 (2008) (*NYSRC*); *ISO New England, Inc.*, 118 FERC ¶ 61,157, *order on reh'g*, 120 FERC ¶ 61,234 (2007) (*ISO-NE I*); *ISO New England, Inc.*, 119 FERC ¶ 61,161, *order on reh'g*, 121 FERC ¶ 61,125 (2007) (*ISO-NE II*); *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274 (2006), *order on reh'g*, 119 FERC ¶ 61,076,

(continued)

55. The Commission's findings on elements of the Midwest ISO's resource adequacy proposal that affect matters within our jurisdiction are consistent with our precedent in other regions.⁵¹ For example, the Commission stated in regards to the CAISO and resource adequacy:

We find that, in situations where one party's resource adequacy decisions can cause adverse reliability and costs impacts on other participants in a regionally operated system, it is appropriate for us to consider resource adequacy in determining whether rates remain just and reasonable and not unduly discriminatory.^[52]

56. Most recently, the Commission addressed its jurisdiction as it relates to reserve margins in a case involving the New York Independent System Operator, Inc. (NYISO) and the New York State Reliability Council (NYSRC) which sets the Installed Reserve Margin for the state. There the Commission stated:

Further, the Commission did not "usurp," "intrude on," or "preempt" any authority exclusively within the jurisdiction of the New York Commission. Section 215(i)(2) of the FPA does not reserve authority over all matters related to or that flow from "resource adequacy," as the New York Commission suggests. The reservations of authority found in section 215(i)(2) of the FPA apply to the exercise of Commission jurisdiction under that section, not under other provisions of the FPA. The Commission has an *independent obligation* under sections 201, 205, and 206 of the FPA to consider whether practices affecting jurisdictional transactions result in rates, terms, or conditions that are unjust, unreasonable, or unduly discriminatory. That is what the Commission has done in this proceeding. We have considered the proposed 16.5 percent [Installed Reserve Margin] and concluded that the proposed 16.5 percent

order on reh'g 120 FERC ¶ 61,271 (2007) (*CAISO*).

⁵¹ See *ISO-NE II*, 119 FERC ¶ 61,161 at P 27-29; *CAISO*, 119 FERC ¶ 61,076 at P 540-64; *CAISO*, 116 FERC ¶ 61,274 at P 1112-20.

⁵² *CAISO*, 116 FERC ¶ 61,274 at P 1113 (citing *Cal. Indep. Sys. Operator Corp.*, 115 FERC ¶ 61,172, at P 36 (2006); *Gainesville Utils. Dep't. v. Florida Power Corp.*, 402 U.S. 515, 529 (1971)).

[Installed Reserve Margin] does not appear to have an adverse effect on matters within our jurisdiction.^[53]

57. The “independent obligation” under the FPA applies to the Midwest ISO markets in the same way it applies to the CAISO and NYISO markets. However, we acknowledge there are notable differences between these other RTOs and ISOs and the Midwest ISO markets. For example, the NYISO market has the NYSRC set the Installed Reserve Margin which is adopted by the NYISO. In addition, the NYISO and the CAISO are single state markets. In contrast, the Midwest ISO does not have a history of operating as a power pool and its territory overlaps three Regional Entities (ReliabilityFirst, Midwest Reliability, and Southeast Reliability Council), 15 states, and one Canadian province. By design the Midwest ISO will have to consider multiple reserve margin methodologies, and coordinate among the pre-existing resource adequacy constructs in its region as it moves toward a regional approach to ensuring resource adequacy.

58. As noted above, the Midwest ISO states that it interprets the savings provisions of FPA section 215(i) as establishing that states have the right to set their own Planning Reserve Margins. In a similar vein, the OMS interprets section 215(i)(2) to give states a unique role where resource adequacy and enforcement are concerned. We clarify that the savings provisions in section 215(i) are not a grant of new authority to the states, but merely preserve any authority states may have under state law “to take action to ensure the safety, adequacy, and reliability of electric service within that State, so long as such action is not inconsistent with any reliability standard . . .”⁵⁴ Nothing in section 215(i) affects the Commission’s preexisting authority under sections 205 and 206 to ensure that jurisdictional rates and practices are just, reasonable and not unduly discriminatory. Despite our disagreement with the Midwest ISO’s and the OMS’ interpretations of the savings clause, however, we do not believe that anything in the Midwest ISO’s proposal is inconsistent with section 215. As noted by certain of the Regional Entities and commenters, section 215(i)(3) preempts any state action if it is inconsistent with a federal reliability standard. We do not find, and the relevant Regional Entities do not cite to, any reliability standards that conflict with the Midwest ISO’s proposed tariff provisions regarding reserve margins.

59. Therefore, we find that Midwest ISO’s proposal regarding long-term resource adequacy does not conflict with the provisions of section 215. Section 215(i) states that the ERO shall have authority to develop and enforce compliance with reliability standards for only the bulk-power system and provides that section 215 of the FPA shall

⁵³ NYSRC, 122 FERC ¶ 61,153 at P 33 (emphasis added, internal citation omitted).

⁵⁴ FPA section 215(i)(3).

not be construed to preempt any authority of any state to take action to ensure the safety, adequacy, and reliability of electric service within that state, as long as such action is not inconsistent with any reliability standard. The reservations of authority found in section 215(i)(2) of the FPA apply to the exercise of Commission authority under that section. Accordingly, we interpret section 215 as not preempting any authority of states to set their own Planning Reserve Margins as long as they are not inconsistent with any reliability standard approved by the Commission. In the event that any tariff provision is found to be in conflict with the approved reliability standards, section 39.6 of our regulations provides for timely resolution of such a conflict.⁵⁵ Moreover, as noted above, section 215 does not limit our obligation to address resource adequacy requirements under FPA sections 201, 205, and 206.

60. Finally, we direct the Midwest ISO to clarify its use of “Regional Reliability Organization” in section 68 when referring to applicable reliability requirements.⁵⁶ We agree with commenters that the use of the term Regional Reliability Organization is confusing and ambiguous because some Regional Reliability Organizations, such as MAPP, established resource adequacy guidelines. We note that the definition of Regional Reliability Organization in proposed section 1.261 is used throughout the TEMT and includes “any successor organizations” to the Regional Reliability Organizations. Therefore, the Midwest ISO is directed to explain its use of Regional Reliability Organization in relation to resource adequacy requirements and explain why Regional Entity is not the appropriate term to use when referencing applicable “reliability requirements.” However, with respect to commenters’ concerns about references to “NERC” and “ERO,” we find that the Midwest ISO has appropriately referenced those terms in Module E.⁵⁷

⁵⁵ 18 C.F.R. § 39.6 (2007).

⁵⁶ We note, for example, that the Midwest ISO uses the term “Regional Reliability Organizations” or “RROs” at proposed Original Sheet No. 810A and proposed Third Revised Sheet Nos. 811-12.

⁵⁷ For example, proposed section 69.2.1.2.c. references “NERC Generation Availability Data System,” which is a NERC availability system, but in contrast, proposed section 69 references the ERO for submission of resource adequacy requirement information. *Compare* Midwest ISO Filing at proposed Third Revised Sheet No. 818 to proposed Second Revised Sheet No. 818A *with id.* at proposed Third Revised Sheet No. 812.

b. Proposed Section 68.3

61. We find that section 68.3, as proposed, presents possible conflicts with the Commission's responsibilities and jurisdiction under FPA sections 201, 205, and 206. Therefore, we decline to accept it. In cases where unjust and unreasonable wholesale rates are determined to exist, regardless of whether or not those rates apply to resource adequacy, the Commission would have exclusive jurisdiction to ensure just and reasonable rates. Precedent regarding the terms and conditions of wholesale capacity charges in RTOs and ISOs supports this interpretation. For example, as noted in *NYSRC*, in *Mississippi Industries v. FERC*, the Court of Appeals for the D.C. Circuit stated, “[c]apacity costs are a large component of wholesale rates” and therefore the share of the capacity costs of the system carried by each affiliate will significantly affect the wholesale price it pays for energy.⁵⁸ While the allocation of capacity did not set sales prices, it directly affects costs and “consequently, wholesale rates”⁵⁹ and therefore “FERC’s jurisdiction under such circumstances is unquestionable.”⁶⁰ Similarly, in *Municipalities of Groton v. FERC*, the court upheld the Commission’s authority to review section 9.4(d) of the New England Power Pool Agreement which included a deficiency charge for each participant in the agreement whose prescribed level of generating capacity, known as “capability responsibility,” fell by more than one percent below the set level.⁶¹ The court found that these charges are within Commission jurisdiction because they are under “the Commission’s inclusive jurisdictional mandate – which reaches discriminatory practices ‘with respect to’ jurisdictional transmissions, or ‘affecting’ such transmissions or services. . . .”⁶² The court further stated:

[i]t is sufficient for jurisdictional purposes that the deficiency charge affects the fee that a participant pays for power and reserve service, irrespective of the objective underlying that charge. This is well within the Commission’s authority as delineated in other court opinions.^[63]

⁵⁸ *Mississippi Industries v. FERC*, 808 F.2d 1525, 1541 (D.C. Cir. 1987), *vacated in part on other grounds*, 822 F.2d 1104 (D.C. Cir. 1987).

⁵⁹ *Id.*

⁶⁰ *Id.* (citing *Nantahala Power & Light Co. v. Thornburg*, 426 U.S. 953 (1986)).

⁶¹ *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1300 (D.C. Cir. 1978) (*Groton*).

⁶² *Id.* at 1302.

⁶³ *Id.* (citing, e.g., *FPC v. Conway Corp.*, 426 U.S. 271 (1976)).

62. We further clarify that we do not find it appropriate for Module E to reference “state reliability standards” or “state reliability requirements.”⁶⁴ We consider the terms as referring to Commission-approved reliability standards pursuant to section 215 of the FPA. In that sense, the tariff reference to a state establishing or enforcing reliability standards is inappropriate and should be removed from the TEMT. We agree that, pursuant to section 215(i)(3), a state may take action to ensure the reliability of electric service within that state so long as action is not inconsistent with any reliability standard. Appropriate tariff language that recognizes that a state may take action to ensure reliability of electric service as set forth in section 215(i)(3), would be acceptable.

63. We emphasize, however, that although we are rejecting section 68.3, we are approving the overall construct proposed by the Midwest ISO under which states can set differing reserve margins within the Midwest ISO – i.e., we are not requiring there to be a single, region-wide reserve margin. Our finding is therefore a relatively narrow one and necessary only to preserve our jurisdiction “under sections 201, 205, and 206 of the FPA to consider whether practices affecting jurisdictional transactions result in rates, terms, or conditions that are unjust, unreasonable, or unduly discriminatory.”⁶⁵ As explained below, there may be circumstances in the future where conflicts arise between state requirements and the requirements of FPA sections 201, 205, and 206, but we expect such conflicts to be rare and believe they should be addressed on a case-by-case basis, rather than through blanket rules regarding state-federal jurisdiction.

c. The OMS Proposal to Direct the Midwest ISO to Make Section 205 Filings

64. We deny the OMS’ request for authorization to offer amendments of its own for filing under section 205 to the Commission by the Midwest ISO. Section 205 grants filing rights to jurisdictional public utilities, not state agencies or commissions. While the OMS does not appear to be asking for section 205 filing rights, it “seeks an accommodation with the Midwest ISO to afford OMS the opportunity to endorse changes to Module E prior to any filing of future amendments, or to allow OMS to offer

⁶⁴ See, e.g., Midwest ISO Filing at proposed Second Revised Sheet No. 816 (“Nothing herein shall infringe upon the requirement that LSEs comply with state reliability standards, safety standards, planning reserve margins, or be subject to the enforcement thereof.”); *Id.* at proposed Original Sheet No. 833 (“Must offer requirements . . . will reflect resource operational limitations, . . . including all state regulations and laws relating to reliability, including but not limited to state reliability standards, safety standards, planning reserve margins, or the enforcement thereof.”).

⁶⁵ *NYSRC*, 122 FERC ¶ 61,153 at P 33.

amendments of its own for separate filing to the Commission by the Midwest ISO.”⁶⁶ We recognize that we have, in at least one instance, permitted a state regulatory group to direct an RTO to make a section 205 filing on its behalf.⁶⁷

65. We note that the OMS has been a stakeholder since the Midwest ISO started its energy markets and an active participant in discussions developing the long-term resource adequacy proposal. The OMS has not explained why its active participation in the stakeholder process, in conjunction with its comments on any Midwest ISO-related filings before this Commission and its ongoing ability to file a complaint under FPA section 206, somehow limit its ability to raise jurisdictional issues. Accordingly, based on the facts presented, we do not find that the OMS’ request is warranted.

66. In addition, as Duke/FirstEnergy point out, the courts have held that states cannot compel public utilities to make section 205 filings. As the Court of Appeals for the First Circuit found, to accept the claim that “[section] 205 includes ‘regulator-compelled’ utility-proposed changes would prevent the utility from choosing among reasonable rate-practice alternatives.”⁶⁸ The court also noted that such an interpretation “threatens confusion, possibly chaos. What is to prevent each state in a multistate service area from requiring the utility to file a *different* set of ‘reasonable’ rate practices with FERC? Neither law nor economics can identify one unique set of rates or practices as ‘reasonable,’ . . . and each state would prefer a rate structure that benefitted [sic] its residents to the detriment of its neighbors.”⁶⁹ This is particularly true for a multi-state public utility such as the Midwest ISO.⁷⁰ The court also found that such a proposal could “allow a state to do what FERC itself cannot, namely, to change an *interstate* rate practice that FERC has not found unreasonable.”⁷¹ Accordingly, without consideration of these factors, we will not unilaterally grant section 205 filing rights to the OMS.

67. We also note that the OMS’ proposal is distinguishable from that in *SPP*. In that case, the provision to require *SPP* to make certain section 205 filings on behalf of its

⁶⁶ OMS Comments at 2.

⁶⁷ *Southwest Power Pool, Inc.*, 108 FERC ¶ 61,003, *order on reh’g*, 109 FERC ¶ 61,010 (2004), *pet. for review dismissed sub nom. N.M. Att’y General v. FERC*, 466 F.3d 120 (D.C. Cir. 2006) (*SPP*).

⁶⁸ *Massachusetts v. FERC*, 729 F.2d 886, 888 (1st Cir. 1984).

⁶⁹ *Id.* (internal citations omitted; emphasis in original).

⁷⁰ For purposes of the FPA, an RTO is a “public utility.”

⁷¹ *Massachusetts v. FERC*, 729 F.2d at 888 (emphasis in original).

Regional State Committee was a consensual agreement of SPP, its transmission owners and its state commissions.⁷² There is no evidence of such agreement here. Furthermore, neither the OMS nor the Midwest ISO has provided any discussion regarding the Transmission Owners Agreement, which, as Duke/FirstEnergy note, sets forth the Midwest ISO's governance structure and, *inter alia*, the Midwest ISO transmission owners' agreement for sharing section 205 rights with the Midwest ISO. In addition, without any concrete proposal before us, we are unsure whether the OMS' ability to compel Midwest ISO filings could conflict with the Midwest ISO's independent rights and responsibilities under section 205 of the FPA, by allowing the OMS (or individual states) to dictate what filings the Midwest ISO will make with the Commission.

68. This notwithstanding, we agree with the OMS and the Midwest ISO that the states should play a central role in developing resource adequacy policies for the region. As we

⁷² The Commission stated, in relevant part:

We further dismiss as moot arguments that the February 10 Order erroneously allows the [Regional State Committee (RSC)] to compel SPP to make a section 205 filing. We emphasize that SPP voluntarily filed the RTO application at issue in this proceeding. In acting on that application in the February 10 Order, we required SPP to allow the RSC to direct certain section 205 filings. By deciding to proceed with its RTO application, SPP has voluntarily agreed to file with the Commission, pursuant to section 205, certain regional proposals that may be developed by the RSC. Because SPP has so agreed, the February 10 Order language on this issue no longer governs. Accordingly, since the factual predicate upon which these rehearing arguments were based no longer exists, we dismiss these arguments as moot.

We reject arguments that the RSC is infringing on SPP's own section 205 filing rights. As noted above, SPP agreed to file with the Commission certain regional proposals that may be developed by the RSC. In addition to RSC proposals, SPP may file its own proposals. Moreover, in our order on SPP's compliance filing to the February 10 Order, we accepted proposed language in section 7.2 of SPP's Bylaws, which provides that no RSC proposal "shall prohibit SPP from filing its own related proposal(s) pursuant to section 205."

held in *CAISO*, the fact that we have jurisdiction in this area does not mean that resource adequacy proposals cannot be developed by the states “in the first instance.”⁷³ This proceeding is evidence of that approach. The Midwest ISO has worked very closely with the OMS and other stakeholders for many months to design a resource adequacy proposal that is supported by the states and respectful of their authority. We applaud this approach and fully expect it to continue as the region further refines its resource adequacy proposal.

D. Establishing Planning Reserve Margins

1. The Midwest ISO Proposal

69. The Midwest ISO has proposed to establish a Planning Reserve Margin⁷⁴ that recognizes and is complementary to the reliability mechanisms of the states and the Regional Entities in its region. As discussed above, the Midwest ISO interprets the “savings provisions” of FPA section 215(i) as establishing that states have the right to set their own Planning Reserve Margins, and those margins may be higher or lower than the margins calculated by the Midwest ISO. The OMS expands on the Midwest ISO’s interpretation by stating its understanding that section 215(2)(i)(2) gives states a unique role where resource adequacy and enforcement are concerned. The Midwest ISO recognizes the right of states in its region to establish and maintain Planning Reserve Margins that may differ with the Planning Reserve Margins it establishes under the methodology of Module E.⁷⁵ The reserve margins established by the states could be higher or lower than the reserve margins the Midwest ISO establishes based on its analytical study methods.

70. In conducting its Planning Reserve Margin analysis, the Midwest ISO considers factors such as: generator forced outage rates, generator planned outages, forecast

⁷³ *CAISO*, 116 FERC ¶ 61,274 at P 1117.

⁷⁴ The Midwest ISO’s proposed definition of Planning Reserve Margin is “[t]he percentage of Capacity Resources that an LSE must maintain for planning purposes above the difference in that LSE’s Forecast LSE Requirement and the Capacity of Load Modifying Resources, to reliably be able to serve Load based upon meeting the LOLE.” Midwest ISO Filing at proposed Fifth Revised Sheet No. 113.

⁷⁵ “If higher or lower [Planning Reserve Margins] are mandated by certain states, then the Transmission Provider shall recognize and incorporate such [Planning Reserve Margins] for any affected LSE(s).” Midwest ISO Filing at proposed Fourth Revised Sheet No. 810.

performance of Load Modifying Resources,⁷⁶ and transmission congestion, among other factors. The Midwest ISO then proposes that each LSE will demonstrate that it has sufficient resources to meet the forecast requirements plus the applicable Planning Reserve Margin.

71. Annually, the Midwest ISO proposes to analyze and establish the Planning Reserve Margin for each LSE in its region and will publish the results at least five months before the Planning Year. The initial Planning Year is proposed to run from June 1, 2009 through May 31, 2010. The Midwest ISO has also proposed a transition period for LSEs so that they are not required to submit specific resource plan information to the Midwest ISO until March 1, 2009.⁷⁷ The Midwest ISO states that it expects to complete its initial Planning Reserve Margin studies by January 1, 2009 and update the studies annually thereafter.⁷⁸

2. Comments and Protests

72. While the OMS and Wisconsin Electric argue that it is appropriate for states to set Planning Reserve Margins that are higher or lower than that set by the Midwest ISO, the majority of commenters argue that this broad deference to the states is not appropriate.

73. Certain commenters, such as Constellation, Duke/FirstEnergy and EPSA, advocate a uniform reserve margin. EPSA argues that a uniform Planning Reserve Margin “is the only way to fully reap the benefits of a Regional Transmission Organization in the context of accurately planning for long-term resource adequacy.”⁷⁹ EPSA argues that it is in the states’ best interest to coordinate to establish a uniform Planning Reserve Margin – “[a]dequate capacity requirements with standard reserve margins would alleviate the concern of states with larger reserve margins being forced to compensate for states with lower reserve margins.”⁸⁰ EPSA also maintains that “[w]hile capacity constructs may differ (widely) across regions of the United States, planning reserve margins for RTOs are usually set by a regional entity rather than allowing each

⁷⁶ As discussed in further detail below, Load Modifying Resources are defined as a Demand Resource or behind-the-meter generation resources. Midwest ISO Filing at proposed Third Revised Sheet No. 91.

⁷⁷ *Id.* Transmittal Letter at 7 and Doying Aff. at 13-14.

⁷⁸ *Id.* Robinson Aff. at 9.

⁷⁹ EPSA Comments at 9.

⁸⁰ *Id.*

state to set its own [Planning Reserve Margin].”⁸¹ Similarly, Constellation argues that “[l]eaving the decision of an appropriate [Planning Reserve Margin] up to individual states has lead to erratic reserves throughout the region. . . . For purposes of regional planning and stability, it is essential that there be a region-wide reserve requirement that is, at a minimum, consistent with the NERC ‘1 in 10 year’ standard.”⁸²

74. Several commenters, including Ameren, Constellation, Detroit Edison, Dominion, Duke/FirstEnergy, Minnesota Power, and Wisconsin Electric, argue that allowing states to set lower Planning Reserve Margins may compromise reliability. For example, Wisconsin Electric argues that a minimum Planning Reserve Margin “is critical to fostering the development of a secure market that equitably distributes the burden of meeting the region’s resource adequacy needs.”⁸³ Wisconsin Electric argues that such minimum Planning Reserve Margins are consistent with the Commission’s authority under section 201 of the FPA, as articulated by Commission and court precedent.⁸⁴

75. Several commenters, including Ameren, Detroit Edison, EPSA, Midwest Industrial, Southwestern, Wisconsin Electric and WPSC/UPPCO, argue that allowing states to set lower Planning Reserve Margins may result in “free rider” concerns, where states with Planning Reserve Margins the same or higher than that of the Midwest ISO will be “leaned on” by states with lower Planning Reserve Margins. These commenters argue that there could be discriminatory treatment if the Planning Reserve Margin that the Midwest ISO would prescribe for an LSE, in the absence of a state regulator, were set higher for the LSE than the state regulator would have set for the LSE had the LSE been subjected to state regulation.

76. For example, WPSC/UPPCO argue that a number of state commissions do not have state statutory authority to require LSEs to maintain a planning reserve and those states commissions that do, may have limited authority over independent power producers and/or marketers. WPSC/UPPCO further argue that it is not clear whether Module E applies to public utilities’ section 205-jurisdictional business, and to public utilities’ state-jurisdictional business. They assert that it is unclear whether the Midwest

⁸¹ *Id.* at 10 (citing *ISO-NE I*, 118 FERC ¶ 61,157 (2007); PJM’s Installed Reserve Margin, *available at* <http://www.pjm.com/planning/res-adequacy/downloads/20040621-white-paper-sections12.pdf>).

⁸² Constellation Comments at 8.

⁸³ Wisconsin Electric Comments at 7.

⁸⁴ *Id.* at 7-8 (citing, *inter alia*, *CAISO*, 119 FERC ¶ 61,076 at P 540; *ISO-NE I*, 118 FERC ¶ 61,157 at P 20).

ISO believes it can apply its resource adequacy program to non-jurisdictional entities, such as cooperatives and municipal entities.

77. IPL requests that the Commission clarify that in the event an LSE does not meet its specific state-mandated Planning Reserve Margin, the LSE's neighbors will not be forced to subsidize the LSE's shortfalls. It argues that this will protect LSEs in states with higher Planning Reserve Margins from subsidizing LSEs in states with lower Planning Reserve Margins.

78. Certain of these commenters, including the Midwest TDUs and Wisconsin Electric, ask that the Commission confirm that Planning Reserve Margins are a minimum standard that applies to all LSEs in the Midwest ISO region and that LSEs may carry *higher* Planning Reserve Margins either of their own volition or in response to state requirements.

79. In addition, Dynegy/LS argue that the proposal for a Planning Reserve Margin of only one planning year ahead is insufficient to ensure reliability because it will be difficult to address any deficiencies in one year. It also notes that PJM has a three-year planning requirement and that this difference could create seams issues.

80. Ameren argues that new section 68 of the TEMT provides that the Midwest ISO's Planning Reserve Margin analysis will consider, among other things "the Generator Forced Outage rates of Capacity Resources," but in designating Planning Resources, including Capacity Resources, proposed section 69.2.1.2.d provides that "Capacity Resources will be accredited at the Capacity Resource's Unforced Capacity Rating."⁸⁵ Ameren argues that this would effectively double count Capacity Resources' forced outage ratings. Ameren asks that the Commission require the Midwest ISO to eliminate this double counting.

81. Consumers supports the Midwest ISO's proposal to establish a set of Planning Reserve Margins for the footprint, but only if the Commission directs the Midwest ISO to establish a Business Practices Manual Working Group to provide a forum for state commission and market participants to work with the Midwest ISO's technical staff. Consumers maintains that, rather than having state commissions dictate the reserve margin to the Midwest ISO, state commissions and their jurisdictional market participants would be able to instruct the Midwest ISO to conduct the LOLE study based upon state-specific adjustments to the Load Forecast uncertainty factors and granularity required to comply with state requirements.

82. Several commenters are concerned about the reporting requirements and how information gets communicated between the LSEs, state commissions, regional entities

⁸⁵ Ameren Comments at 13.

and the Midwest ISO generally. Some commenters assert that many provisions of Module E are redundant and burdensome. WPSC/UPPCO note that LSEs already have on going reporting requirements based on the Regional Entity Annual Reliability Assessment Standard. IPL notes that the proposal does not change the state requirements for utilities to produce integrated resource plans. Consumers argues that state commissions and their jurisdictional market participants should be able to simply instruct the Midwest ISO to conduct the LOLE study based upon state-specific adjustments to the Load Forecast. Southwestern objects to the monthly reporting requirements under section 69.1 generally, and asserts that an LSE should only be required to update its list of designated resources when the LSE revises its Load Forecasts and an LSE should have to document that it has obtained firm transmission service only once, unless substantial changes warrant further updates. Finally, WPSC/UPPCO argue that the Midwest ISO “lacks the relevant skill sets to make reliability assessments, and lack the governance, and extensive Regional Entity process and procedures to provide appropriate due process on setting, monitoring and enforcing reliability assessment standards.”⁸⁶

83. Several commenters have concerns with the definition of Planning Reserve Margin in proposed section 1.242.b. For example, Illinois Industrial argues that the Midwest ISO’s definition of Planning Reserve Margin is unclear because the Midwest ISO does not define how it will calculate the Planning Reserve Margin percentage, and whether it will be applied to: “(a) the LSE’s Forecasted LSE requirement, or (b) the difference between the LSE’s Forecast LSE Requirement and the Capacity of Load Modifying Resources.”⁸⁷ Illinois Industrial asks the Commission to require that the Midwest ISO continue to apply the Planning Reserve Margin percentage to the difference between the LSE’s Forecast LSE requirement and the Capacity of Load Modifying Resources and clarify the tariff language to make this clear. Reliant argues that behind-the-meter generation should be available to credit against an LSE’s resource adequacy obligations (measured as the sum of the Forecast LSE plus Planning Reserve Margin). Finally, Integrys argues that the definition of Planning Reserve Margin should be revised to read as “[t]he percentage of Capacity Resources that an LSE must maintain for planning purposes above that LSE’s Forecast LSE Requirement net of that LSE’s Capacity of Load Modifying Resources, to meet the LOLE.”⁸⁸ Integrys maintains that because Planning Reserve Margin is defined as a percentage, it should be used syntactically as a percentage, rather than MW.

⁸⁶ WPSC/UPPCO Comments at 15-16.

⁸⁷ Illinois Industrial Comments at 6.

⁸⁸ Integrys Comments at 17.

3. Answers

84. In its answer, the Midwest ISO argues that there are many legitimate reasons for Planning Reserve Margins to vary even if the methodology for developing those Planning Reserve Margins is uniform. The Midwest ISO notes, as an example, that LSEs in a region or state with an effective demand response program would be expected to have a lower amount of Capacity Resources than regions or states without an effective demand response program. The Midwest ISO also notes that the majority of states have recognized that Planning Reserve Margins may vary to account for regional differences and unique jurisdictional roles within each of the states in the region. The Midwest ISO asserts that varying Planning Reserve Margins do not create “free-riders,” but instead offer alternative methods for states and the LSEs under their jurisdiction to meet the uniform LOLE.⁸⁹

85. The Midwest ISO also clarifies its interpretation of its obligation to coordinate its long-term resource adequacy provisions with those that may be developed by the Regional Entities. The Midwest ISO states that it will attempt to incorporate the Regional Entities’ standards while implementing the Module E provisions. However, the Midwest ISO notes that Regional Entities obtain authority for all of their actions from NERC and based on section 215(i)(1-2), NERC has limited authorities to set or enforce compliance with standards with resource adequacy.⁹⁰ Therefore, the Midwest ISO asserts that Regional Entities have a limited role in resource adequacy programs; one that compliments, and will be coordinated with, the roles of the Midwest ISO, the states, and the Commission.

86. In its answer, Duke/FirstEnergy continues to oppose the proposal of the OMS that states be permitted to set Planning Reserve Margins that are lower but “consistent” with the Midwest ISO’s calculated LOLE. Duke/FirstEnergy disagree with the OMS’ expansive interpretation of state jurisdiction over resource adequacy under FPA section 215, arguing that “to the extent that any resource adequacy requirement materially affects rates, terms and conditions of jurisdictional service. . . . [t]he Commission has exclusive jurisdiction *under FPA section 205 . . .*”⁹¹ Duke/FirstEnergy also argues that the OMS never challenged the Commission’s authority to order resource adequacy requirements

⁸⁹ Midwest ISO Answer at 24-26.

⁹⁰ *Id.* at 27 (citing section 215(i)(1-2) for the proposition that the ERO and Commission are not authorized “to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services.”).

⁹¹ Duke/FirstEnergy Answer at 10-11 (emphasis in original).

under section 205 in the prior orders involving Module E, and any effort to do so now is a collateral attack.

87. Duke/FirstEnergy further argue that allowing states to set a Planning Reserve Margin that materially deviates from that produced regionally would create inconsistencies. Duke/FirstEnergy notes that there non-jurisdictional entities that argue that the TEMT should not be used to impose state requirements on them.

88. The Midwest TDUs argue that the Midwest ISO's answer may emphasize that it will employ a uniform Planning Reserve Margin methodology, but it does not address concerns about the adverse impacts about its intention to apply different *actual* reserve margins. They reiterate their concern that "LSEs that must abide by the Midwest ISO's higher reserve margin standards will be 'propping up' those in areas with state-lowered reserve requirements."⁹²

89. WPSC/UPPCO also argue that the Midwest ISO's answer fails to explain how allowing differing Planning Reserve Margins will not cause free ridership. They argue that the Midwest ISO's proposal does not require a state to demonstrate any "legitimate" reasonable prior to establishing a lower Planning Reserve Margin.

4. Commission Determination

90. We generally accept the Midwest ISO's proposal regarding the establishment of Planning Reserve Margins for each LSE. We recognize that under the Planning Reserve Margin provisions, the states may set reserve margins that differ from the reserve margins set by the Midwest ISO. We also recognize that state reserve margins may end up being higher or lower than the margins set by the Midwest ISO. However, we believe the Midwest ISO's proposal is a reasonable first step to addressing regional resource adequacy for several reasons.

91. First, the Midwest ISO's proposal represents a significant improvement over the *status quo*. There is currently no process within the Midwest ISO for assessing or enforcing resource adequacy on a regional basis. Under the Midwest ISO's proposal, all LSEs within the Midwest ISO region will be subject to a binding resource adequacy requirement. Furthermore, the analyses performed by the Midwest ISO should increase the information available to states that set resource adequacy requirements for their jurisdictional LSEs.

92. Second, approving the Midwest ISO's proposal is consistent with the flexible approach to resource adequacy we articulated in *CAISO*. There, we emphasized the fact that our jurisdiction in this area "does not mean that we must determine all the elements

⁹² Midwest TDUs Answer at 7.

of such a [resource adequacy] program *in the first instance*. Rather, we can, in appropriate circumstances, defer to state and [l]ocal [r]egulatory [a]uthorities to set those requirements. Our primary responsibility is to ensure that a workable program exists and is adhered to by all LSEs.”⁹³ That is the result we seek to achieve here. As indicated, under the Midwest ISO’s proposal all areas and LSEs within the Midwest ISO will now be bound by resource adequacy requirements, whether adopted at the federal or state level. Moreover, as noted by the Midwest ISO, this flexible approach recognizes the fact that different areas within the Midwest have different resources and demand response programs, which can change the Planning Reserve Margin while meeting the uniform LOLE requirement.⁹⁴

93. Several commenters argue that, if we adopt this flexible approach, state requirements could be set so low as to raise “free rider” concerns. Although we recognize this possibility, we believe it is unlikely to occur for several reasons. The reliability of electric service is critical to citizens of every state and state commissions therefore have strong incentives not to undermine reliability through policies that favor short-term economic gains (such as through free riding). Moreover, this free-riding concern is less likely to materialize in the Midwest ISO region because of its ancillary services market. Under the Midwest ISO’s ancillary services market, recently accepted by the Commission, areas short of energy will face scarcity pricing, thereby further deterring the incentive of any one area to be short on capacity.

94. Nonetheless, we recognize the possibility that future conflicts could arise between state and regional policies in this area. We would expect, for the reasons stated above, such conflicts to be rare. We also believe that it is important to allow the Midwest ISO region to gain experience with the role of the Midwest ISO in the area of resource adequacy. For these reasons, we decline to adopt any blanket rules to resolve potential future conflicts. If such conflicts do arise, we can address them on a case-by-case basis.

95. We are not requiring the Midwest ISO to file the each applicable reserve margin as part of its tariff. Under the interim Module E, the Commission recognized the inherent complications that those filings could entail in the diverse Midwest ISO region.⁹⁵

⁹³ *CAISO*, 116 FERC ¶ 61,274 at P 1117 (emphasis added).

⁹⁴ Midwest ISO Answer at 25-26.

⁹⁵ “It is impractical for the Midwest ISO to state in its tariff what reserve numbers apply to each individual market participant.” *Midwest Indep. Transmission Sys. Opeator, Inc.*, 109 FERC ¶ 61,285, at P 316 (2004), *order on reh’g*, 111 FERC ¶ 61,053, *order on reh’g*, 112 FERC ¶ 61,086 (2005), *aff’d sub nom. Wisc. Pub. Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007).

Instead, we are directing the Midwest ISO to maintain in its tariff, with as much clarity as possible and practical, the methodology behind the Planning Reserve Margin. We are also directing the Midwest ISO to collate the respective Planning Reserve Margins of its LSEs in a manner similar to that which is used in the CAISO. There the CAISO, as the system operator, reviews different reserve margins provided by the LSEs' scheduling coordinators, in their annual and monthly resource adequacy plan subject to the requirements set by California Public Utilities Commission or applicable local regulatory authority.⁹⁶ In the Midwest ISO, a somewhat analogous system will be needed because the Midwest ISO will be coordinating the various reserve margins set at the sub-regional or state area.

96. We understand the Planning Reserve Margin definition to mean that the Midwest ISO will apply the Planning Reserve Margin to the load forecast as adjusted to reflect Load Modifying Resources, i.e., the load requirement is reduced for Load Modifying Resources that are providing emergency resources, as stated in the definition of the Planning Reserve Margin and section 69.2.2. We require the Midwest ISO to clarify the definition to be consistent with this understanding and clarify that it is not requiring market participants to obtain Capacity Resources to cover a Planning Reserve Margin percentage share of their Demand Resource and their load served by behind-the-meter generation in the compliance filing to be submitted within 60 days of the date of this order. We agree with Integrys that the Planning Reserve Margin is a percentage calculation and accordingly we require the Midwest ISO to revise the provision to reflect the percentage basis for calculations in the compliance filing.

97. In addition to the directives above, we find that the Midwest ISO has not included sufficient detail regarding the methodology by which it will establish a Planning Reserve Margin and what are the procedures that the Midwest ISO will undertake in the event an LSE does not inform it of its applicable reserve margin. Therefore, the Midwest ISO must explain in greater detail how it will establish Planning Reserve Margins with data gathered from its respective LSEs, and clearly articulate the interaction between its Planning Reserve Margins and those established by the states. In addition, the Midwest ISO must clarify what Planning Reserve Margin applies, to any LSE in its region, in the event that no reserve margin is in effect for an LSE. The Midwest ISO should also confirm whether LSEs may carry higher Planning Reserve Margins either of their own volition or in response to state requirements.

⁹⁶ See California Independent System Operator Corporation, FERC Electric Tariff, Third Replacement Vol. No. 1, "Annual Resource Adequacy Plan," section 40.2.1, Substitute Original Sheet No. 463B through "Planning Reserve Margin," section 40.4, Substitute Original Sheet No. 463F.

98. We direct the Midwest ISO to make revisions to its methodology for Planning Reserve Margins as discussed in this section and to submit a compliance filing to be submitted within 60 days of the date of this order.

E. Loss of Load Expectation

1. The Midwest ISO Proposal

99. Under the Midwest ISO's proposal, the Midwest ISO will coordinate with LSEs to determine the appropriate Planning Reserve Margins based upon the probabilistic analysis of being able to reliably serve each LSE's Forecast LSE Requirement for each month of the Planning Year. This probabilistic analysis shall utilize a LOLE study. The Midwest ISO calculates the LOLE as the loss of load no greater than 0.1 day in one year, which equals the sum of the loss of load probability for the integrated daily peak hour for each day.

2. Comments and Protests

100. Commenters such as Dynegy/LS support the Midwest ISO's proposal for LOLE studies. Dynegy/LS agree that the Midwest ISO should perform these LOLE calculations and that these calculations should play a role in determining the zones within the Midwest ISO and the Planning Reserve Margin for each zone.

101. However, other commenters, including the OMS, IPL, Southwestern, and Wisconsin Electric, challenge the Midwest ISO's approach. For example, the OMS argues that, "[w]hile resulting planning and reserve margin requirements may vary across individual states or zones, it is important that the assumptions and the methodology for calculating LOLE be consistent."⁹⁷ Accordingly, the majority of the OMS asks that Module E be revised to provide that if higher or lower Planning Reserve Margins "consistent with Module E section 68.1 LOLE requirements" are mandated by the states, then the Midwest ISO will recognize and incorporate such Planning Reserve Margins for any affected LSEs.⁹⁸

102. Southwestern expresses concern about the Midwest ISO's definition of LOLE as the loss of no greater than 0.1 day of load in one year. Southwestern argues that the Midwest ISO does not justify using LOLE of 0.1 day of load in one year. Southwestern also argues that the LOLE used by the Midwest ISO should be no more conservative than the LOLE used by the state regulators in setting Planning Reserve Margins for entities

⁹⁷ OMS Comments at 4.

⁹⁸ *Id.* at 5. The Ohio Commission disagrees with this addition because it is concerned that the language may potentially preempt state action.

subject to their jurisdiction. Southwestern further asserts that using LOLE to calculate Planning Reserve Margins ignores load diversity among LSEs.

103. IPL requests that the Commission make several clarifications to the Midwest ISO filing. IPL requests that the Commission clarify that the LOLE study can be outsourced to an outside consultant. IPL requests that the Commission clarify that if an LSE does not meet its state-mandated Planning Reserve Margin, then that LSE's neighbors within the region will not be forced to subsidize the LSE's shortfall.

104. Wisconsin Electric is concerned about the process for developing the LOLE procedures to calculate the Planning Reserve Margins and for developing the procedures for accreditation of Capacity Resources. Wisconsin Electric notes that the details behind the process are deferred to as-of-yet, undrafted Business Practices Manuals.

105. Consumers argues that because Midwest ISO staff is technically capable of modifying the Multi-Area Reliability Simulation to accommodate the needs of multiple stakeholders, the Commission should order that the Midwest ISO be required "1) [to] recognize[] the right of stakeholders to choose to be studied alone; and 2) to specify specific Load Forecast [u]ncertainty factors."⁹⁹

106. Consumers also notes that the former MAPP participants traditionally used a "copper sheet" approach to calculating their LOLE, where the inputs into the LOLE study ignore the actual transmission limits, while Consumers and other ReliabilityFirst members have traditionally done a bottom-up LOLE study so as to demonstrate prudence to its state commission. Consumers argues that a single Planning Reserve Margin value applied to all LSEs and market participants will not provide the necessary granularity for some market participants and their state commissions. Consumers maintains that market participants need to have the ability to be defined as a single zone in the LOLE study.

107. Xcel asks that the Midwest ISO clarify that forecast data is to be provided by the load zone.

3. Commission Determination

108. We generally accept the Midwest ISO's proposal to use a uniform and consistent standard of loss of load no greater than 0.1 day in one year. We find that this standard, which can also be stated as one day in 10 years, is reasonable and consistent with industry standards.¹⁰⁰ In response to commenters' concerns, we clarify that we expect

⁹⁹ Consumers Comments at 7-8.

¹⁰⁰ For a recent example where 0.1 day in one year is used, *see* North American Electric Reliability Corporation, *Regional Reliability Standards* at http://www.nerc.com/~filez/regional_standards/regional_reliability_standards_under_dev

that the Midwest ISO will use a consistent methodology, but that under that methodology, different Planning Reserve Margins may be established throughout the Midwest ISO on a zonal basis as is further discussed herein.

109. As to proposed section 68.1 of Module E, we direct the Midwest ISO to clarify the methodology by which it will “utilize a Loss of Load Expectation (LOLE) study.”¹⁰¹ We find that the combination of the definition of LOLE in proposed section 1.175b and the use of LOLE in Module E do not result in sufficient clarity for users of the tariff. In particular, proposed section 68.1 states, “[t]he Transmission Provider shall coordinate with LSEs to determine the appropriate [Planning Reserve Margins] for the Transmission Provider Region based upon the probabilistic analysis of being able to reliably serve each LSE’s Forecast LSE Requirement for each Month of the Planning Year.”¹⁰² The Midwest ISO is also directed to clarify if the forecast data is to be provided by the load zone so that the Midwest ISO may complete its LOLE study. The Midwest ISO is directed to clarify how it will coordinate with LSEs to determine appropriate Planning Reserve Margins in the compliance filing to be submitted within 60 days of the date of this order. Although we are not mandating that all the probabilistic analysis be put into the tariff in lieu of the Business Practices Manuals, more detail is needed to understand how Planning Reserve Margin determinations will be made using a LOLE study.

F. Load and Resource Forecasting and the Consequences of Under-forecasting

1. The Midwest ISO Proposal

110. Under the Midwest ISO’s proposal, each LSE is required to determine its forecast LSE requirement consistent with Good Utility Practice and coordinate its load forecasts with the Midwest ISO. The Midwest ISO will coordinate the results from all of the LSEs to determine monthly anticipated peak integrated hourly forecast LSE requirements.

111. In addition, the Midwest ISO will, on a monthly basis, evaluate the accuracy of the Forecast LSE requirements submitted by each LSE for that month. To the extent the Midwest ISO determines that the Forecast LSE Requirement under-forecasts the load, it will notify the LSE of the deficiency. If there is a reported deficiency for three consecutive months or for one month between June and September, the Midwest ISO will inform the relevant state authorities and post the LSE’s name and period of deficiency on

elopment.html. In particular, *see* Standard-RES-501-MRO-01 – Planned Resource Adequacy Assessment at 3.

¹⁰¹ Midwest ISO Filing at proposed Original Sheet No. 810A.

¹⁰² *Id.*

the Midwest ISO's website. The Midwest ISO will also, on a monthly basis, evaluate the availability of Planning Resources identified by LSEs and will alert state authorities and the public of the results, similar to the procedure for Forecast LSE Requirement results.¹⁰³

2. Comments and Protests

a. Load and Resource Forecasting

112. Hoosier/Southern Illinois argue the Commission should reject section 69.3.4 (Load and Planning Resource Assessment) because it was opposed by the Market Subcommittee of the Midwest ISO.

113. Duke/FirstEnergy argue that proposed section 69.3.4 may not be necessary once financial settlement provisions are proposed and urges the Commission to direct the Midwest ISO to reconsider this section at that time. Duke/FirstEnergy assert that the Commission, during the financial settlement phase, should not necessarily encourage the after-the-fact compliance evaluation that is described in section 69.3.4. Duke/FirstEnergy state that the Commission should clarify that all financial settlement procedures remain open to consideration pending the Midwest ISO's filing of proposed financial settlement provisions.

114. Duke/FirstEnergy assert that the proposed evaluation of the accuracy of the load forecast should only review whether appropriate planning criteria were used, and not compare load forecast with actual load. Duke/FirstEnergy further argue that the section is overly vague and does not tell LSEs what they will be held accountable for and how the Midwest ISO will determine if the LSE had sufficient planning resources for the month. Duke/FirstEnergy state that a "great deal more information would be required as to how [the Midwest ISO] would calculate deficiencies, including how weather normalization will be performed and what deficiencies will be deemed 'statistically significant.'"¹⁰⁴ Duke/FirstEnergy further argue that the definition of "Demand" is internally inconsistent because it is defined in terms of load, which is defined in MWh, but should be expressed in MWs.

115. The Illinois Commission argues that LSEs in retail access states, such as Illinois, cannot reasonably be expected to accurately forecast their load two years in to the future, as customers can easily switch between retail suppliers. It argues that, as an alternative,

¹⁰³ The Midwest ISO Market Subcommittee voted to delete this section by a vote of 18 in favor, and 15 opposed. Of the 15 votes opposing deletion, 13 were state members of the OMS. Midwest ISO Filing, Robinson Aff. at 11.

¹⁰⁴ Duke/FirstEnergy Comments at 25.

the Midwest ISO could obtain a more meaningful and reliable system load forecast by forecasting aggregate system load directly or by aggregating load forecasts from local balancing areas or from distribution companies, rather than at the LSE level. The Illinois Commission also argues that the Midwest ISO's forecasting requirement fails to account for the ability of load to respond to changes in the price of electricity.

116. Strategic also opposes proposed section 68.2's requirement that each LSE determine its preliminary forecast. Strategic argues that the Midwest ISO should instead allow retail LSEs to obtain and rely on the data maintained by the distribution company serving the load to determine the preliminary forecast. Because of the "nature of retail competitive markets and the constant flow of contracts beginning and ending on any given day," Strategic argues that some retail marketers cannot accurately predict the total load they will supply in the future.¹⁰⁵ Strategic notes that the distribution utility, because of the nature of its obligation to deliver power, must make these sorts of projections. Strategic also asserts that any information that a retail marketer would provide would likely duplicate what the distribution company has prepared, and in many instances retail marketers rely on the data provided by the distribution company. For these reasons, Strategic argues that the Midwest ISO should allow the LSE the option to obtain and rely on forecast information provided by the distribution utility.

117. Dominion argues that the Midwest ISO's proposal to require LSEs to submit load forecasts requires clarification. Dominion argues that because these reporting obligations apply to "LSEs," they would appear to apply equally to competitive suppliers in retail choice states."¹⁰⁶ Dominion argues that competitive suppliers are "ill-equipped to submit such forecasts, as retail customers often shift between competitive suppliers and incumbent utilities."¹⁰⁷ Dominion also argues that "customers in retail-choice states typically do not make long-term commitments upon which competitive suppliers can rely for resource planning and load forecasting, and in turn, competitive suppliers typically do not make annual resource plans. . . . The more appropriate course would be for the [Midwest ISO] to rely on the electric distribution companies for all resource planning forecasts."¹⁰⁸

118. Several commenters seek revisions to the Midwest ISO's proposed approach to load forecasting. Midwest Industrial and Minnesota Power argue that the proposal for assessment of Load Forecast accuracy is not detailed enough. Duke/First Energy argue

¹⁰⁵ Strategic Comments at 8.

¹⁰⁶ Dominion Comments at 10 (internal citation omitted).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

that the definition of “Forecast LSE Requirement” is overly vague and does not specify the relevant time period. They also argue that they do not know what the definition is intended to measure.

119. EPISA requests that the Commission require the Midwest ISO to establish a mechanism by which the Midwest ISO “performs and aggregates the load forecasts with each local balancing authority . . . or oversees, verifies and corrects the forecasts performed by [local balancing authorities], the details of which are left to the discretion of [the Midwest ISO] and its stakeholders.”¹⁰⁹

120. Southwestern notes that small LSEs do not have the resources to use sophisticated and complex load forecasting models, and the proper and efficient operation of their systems require use of such models. Southwestern argues that small LSEs, i.e., those with loads of less than 150 MW, should be exempt from this requirement, and they should be allowed to submit their load forecasts based on simple forecasting techniques.

121. Several commenters also express concern about the load forecast reporting obligations presented in the Midwest ISO’s proposal. The Midwest TDUs argue that the Midwest ISO does not explain how planned and forced outages will be counted in the resource assessment. Reliant argues that the Midwest ISO’s proposal for load forecasting is flawed. It asserts that the Midwest ISO’s plan for “[t]he short-term posting of names [of LSEs that under-forecast] after the fact provides far too little incentive for LSEs to ensure that their forecasts are consistently accurate.”¹¹⁰ Reliant argues that the Commission should “require the Midwest ISO, in coordination with the [l]ocal [b]alancing [a]uthorities . . . to establish a well-defined mechanism to forecast load for the entire RTO and to base each LSE’s [resource adequacy requirement] obligation on the Midwest ISO’s load forecasts.”¹¹¹

122. IPL requests clarification and redrafting of proposed section 69.3.4. IPL notes that sentence two of this section refers first to “Planning Year” and then to “such Month,” and it is unclear which is the relevant interval. IPL asserts that the section mixes and matches Operating Reserves and Planning Reserves and short-term and long-term reserve issues. IPL also requests that the Commission clarify that this section does not permit the Midwest ISO to second guess state commission Integrated Resource Plan decisions. IPL also expresses concern that this section is an inappropriate, after-the-fact assessment of whether an LSE has met its planning requirements.

¹⁰⁹ EPISA Comments at 11.

¹¹⁰ Reliant Comments at 12.

¹¹¹ *Id.* at 13.

123. Integrys avers that it is not unreasonable to have some type of impartial review process to assure an LSE's forecast is being done in good faith, but that review process needs to be "clear, appropriate to the technical circumstances, and allow for reasonable due process."¹¹² Noting that the Market Subcommittee voted to delete proposed section 69.3.4 from Module E, Integrys argues that the proposal is none of those things. Integrys recommends that proposed section 69.3.4 be revised to evaluate a peak load forecast and to evaluate accuracy over longer periods than one month. Integrys also argues that it would be reasonable for a deficiency to be calculated based on whether an LSE's load forecast, after weather adjustment, is lower than its actual monthly peak load for either of five consecutive months in a Planning year or for three consecutive months of the four months from June through September.

124. Strategic also argues that proposed section 69.3.4, which describes how deficiencies are determined, is overly vague and would be difficult to implement. Strategic also notes that the TEMT allows the LSE to submit a written statement to the Transmission Provider, but does not indicate what the Transmission Provider does with the explanation and whether the explanation can exonerate a falsely-accused LSE. Strategic urges the Commission to order the Midwest ISO to more clearly define the standards by which LSEs will be held and to remove references to "statistically significant" from the tariff.

b. Posting Names of LSEs that Under-forecast Load

125. Several commenters filed comments in response to the Midwest ISO's proposal to post names of LSEs that under-forecast load. For example, commenters such as AMP-Ohio, Constellation, Integrys and Strategic note that the provisions are not clear and fail to provide sufficient due process for LSEs accused of under-forecasting. They argue that a determination that an LSE has under-forecasted will only be made if the "deficiency" is "statistically significant" but neither of those terms is defined. Integrys also argues that an accused LSE should at least be given the evidence upon which the Midwest ISO bases its conclusion before posting names.

126. Commenters such as Constellation, Hoosier/Southern Illinois and the Illinois Commission argue that LSEs should not always hold full responsibility for any under-forecasting. Constellation argues that Midwest ISO's posting approach to compliance is incomplete. It notes that, in many cases, non-balancing authority LSEs within the Midwest ISO do not create their own load forecast and to punish an LSE based on a Load Forecast created by another entity has no practical effect. Constellation also argues that forecasts, by their nature, are not precise – "[u]sing a standard forecasting methodology, for every day (or month) there is an equal chance that the actual load will be lower than

¹¹² Integrys Comments at 12.

what is forecasted versus the chance that the actual load will be higher than what is forecasted.”¹¹³

127. Hoosier/Southern Illinois also note that in addition to the concerns raised by the Market Subcommittee,¹¹⁴ the Midwest ISO does not appear to consider the fact that there are negative consequences to over-procurement as well as under-procurement and fails to consider that the LSE forecast requirement is to be a collaboration between the Midwest ISO and LSE, so the Midwest ISO should work with the LSE in the course of performing the forecast rather than blame it.

128. The Illinois Commission expresses concern that there is enough imprecision in the Midwest ISO’s proposed forecasting process, and enough eventualities not under the control of the forecaster to question to effectiveness of posting the names of LSEs that under-forecast. The Illinois Commission also argues that the public posting of the name of an LSE has determined to be deficient could put an LSE “in the unenviable position of having to negotiate a contract for capacity from a seller that knows that the LSE must buy the capacity.”¹¹⁵

129. Commenters such as Ameren and Consumers do not object to the posting of the names of under-forecasters, but argue that the proposal should not be seen as a substitution for financial settlement/enforcement mechanisms.

130. Dynegy/LS and EPSA argue that the “public shaming” provision is not a penalty. They argue that such a proposal would not even be necessary if the Midwest ISO provided the proper incentives to comply before-the-fact. Dynegy/LS note that a majority of the Market Subcommittee voted to delete the proposal.

131. Duke/FirstEnergy recommend that the Midwest ISO be required to file a reassessment of section 69.3.4 when it submits its financial settlement phase filing.

¹¹³ Constellation Comments at 12.

¹¹⁴ According to the Midwest ISO, the Market Subcommittee believed: “(1) that Module E should be a ‘forward looking’ program and thus no after-the-fact analysis of Forecast LSE requirements accuracy or Planning Resources availability should be required; (2) that the provision was not clearly drafted and should have focused more on the accuracy of data from distribution companies, rather than from LSEs; and (3) that the the provision might unfairly ‘publicly shame’ an LSE that made forecast errors in good faith.” Hoosier/Southern Illinois Comments at 21 (citing Midwest ISO Filing, Robinson Aff. at 11).

¹¹⁵ Illinois Commission Comments at 18.

Duke/FirstEnergy argue that the Midwest ISO should justify on a *de novo* basis the retention of any measures in the section.

3. Answers

132. As to load forecasting, the Midwest ISO states that it recognizes that load forecasts by LSEs are just estimates and therefore, “intends to be flexible in its implementation of the Forecast LSE Requirements by allowing ‘reasonable’ load forecasts, including, for example, ‘accounting for any actual weather conditions during the month.’ The Midwest ISO will not, however, permit gaming or ‘intentional under forecasts’ by LSEs.”¹¹⁶ The Midwest ISO also clarifies that it intends “statistically significant” to mean “rejection of the null hypothesis that the ‘actual load falls within the expected load’ plus or minus 2 standard deviations,” and is willing to clarify that in a compliance filing.¹¹⁷

133. With respect to the concerns about rebutting the posting of a name for under-forecasting, the Midwest ISO argues that no harm results from the lack of appeal because the evaluation process would provide the LSEs and the Midwest ISO with ample time to discuss “statistical significance” prior to implementation. “Moreover, if an LSE disputes the Midwest ISO’s determination, the Midwest ISO is amendable to publishing a ‘rebuttal’ statement from the LSE on the Midwest ISO’s website, which will enable the LSE to address any alleged errors that the Midwest ISO may have made in determining that an LSE Forecast error was statistically significant.”¹¹⁸

134. Regarding who should be making the forecasts, the Midwest ISO continues to believe that, while it should be responsible for correlating and reviewing for consistency the load forecasts provided by LSEs, the LSEs themselves are in the best position to evaluate and determine such information.

135. The Midwest ISO also argues that the posting of the names of the LSEs that under-forecast is necessary. It confirms, however, that this provision is not intended to be a replacement for the financial settlement/enforcement mechanisms.

136. In its response to the Midwest ISO’s answer, Reliant disagrees that LSEs are in the best position to be making forecasts, and asserts that the Midwest ISO should be responsible for developing the load forecasts in coordination with the local balancing authorities. Reliant argues that under the Midwest ISO’s approach there is a risk of poor

¹¹⁶ Midwest ISO Answer at 18 (internal citations omitted).

¹¹⁷ *Id.* at 19.

¹¹⁸ *Id.*

forecasting and a significant danger that the resource adequacy requirements will fall short. Reliant argues that if the Midwest ISO works with the local balancing authorities, and with the input of the LSEs, it “could ensure that necessary information is developed with respect to the inputs into the forecasting models, while at the same time ensuring the model itself and its application is implemented consistently.”¹¹⁹

4. Commission Determination

137. We recognize that the load forecast is integral to the determination of peak load requirements and, ultimately, the setting of Planning Reserve Margins. Therefore, we find it reasonable for the Midwest ISO to analyze the accuracy of load forecasts and to determine the sources of the inaccuracies so that the Midwest ISO and market participants have the basis to develop better forecasts in the future. We also find it reasonable that the Midwest ISO evaluate the accuracy of the LSE resource plans. We agree with Hoosier/Southern Illinois that the ideal approach to addressing forecasting issues would be a collaborative process with market participants. At the same time, we recognize that the primary purpose of this provision is to improve estimation techniques and therefore it is not a substitute for financial settlement provisions or other resource management mechanisms that ensure resource adequacy (as the Midwest ISO acknowledges its answer). Accordingly, we do not consider forecast error to be a deficiency, contrary to the Midwest ISO characterization and therefore we require the Midwest ISO to replace the term “deficiency” with “under-forecast” in the compliance filing and to propose a definition for the term in the TEMT. We also require the Midwest ISO to revise its definition of Forecast LSE Requirement so that it defines the time period in the phrase, “[t]he expected Demand for an LSE for a *given time period*,” and to clarify the purpose of this time period. In addition, we find the Midwest ISO answer to define the term “statistically significant” to be responsive to commenters, and we direct the Midwest ISO to propose a definition in the compliance filing to be submitted within 60 days of the date of this order.

138. We do not find that the forecast evaluations implicate state jurisdiction. As a purely analytical exercise, we do not see any impact of a forecast assessment on state-integrated planning processes. As discussed above, states may set Planning Reserve Margins in the first instance and, in the event a state does not have a Planning Reserve Margin, the Midwest ISO will set a default Planning Reserve Margin. This provision does not change that process.

139. In consideration of the fact that LSEs are the predominant servers of load in the Midwest ISO, we find it reasonable that LSEs be responsible for the load forecasts in most instances. We are encouraged by the Midwest ISO’s commitment in its answer that

¹¹⁹ Reliant Answer at 5.

it intends to be flexible in its forecast requirements, and we find this approach to be particularly appropriate for LSEs in retail choice states.¹²⁰ We agree with the Illinois Commission that these entities will have difficulty making forecasts two years into the future, especially since customers in these states can switch suppliers. Accordingly, we encourage the Midwest ISO and stakeholders to review the load forecasting processes in other RTOs and Independent System Operators (ISOs) with retail choice states as well as the alternative proposals of commenters, and determine if alternative processes are appropriate. We require the Midwest ISO to provide the Commission with an assessment of these alternatives and to propose potential modifications to its tariff in the compliance filing to be submitted within 60 days of the date of this order.

140. While we find the forecasting requirement in proposed section 69.3.4 to be reasonable, we do not find any purpose is served by posting the names of the LSEs that under-forecast or insufficiently plan resources. As discussed above, the load and planning resource assessment provisions are not financial settlement/enforcement provisions that ensure resource adequacy is achieved by LSEs. Also, state regulators are able to obtain the information they need on LSE forecasts for entities under their jurisdiction and, therefore, do not need a reporting requirement in the TEMT. For these reasons, we reject the website posting requirement. We direct the Midwest ISO to delete this provision in the compliance filing to be submitted within 60 days of the date of this order.

141. In response to concerns of commenters that the Midwest ISO's proposal lacks detail on several major features, we note that the proposal does not indicate how it will coordinate the results from all of the LSEs to determine monthly anticipated peak integrated hourly forecast LSE requirements. The Midwest ISO's proposal also does not indicate how planned and forced outages will be addressed in its evaluation of LSE resource plans. Accordingly, we direct the Midwest ISO to detail its forecast process in the Business Practices Manuals.¹²¹

142. Finally, we agree with IPL that the reference to "Planning Year" in this provision is confusing since the Midwest ISO is making monthly evaluations. We direct the Midwest ISO to delete this term from section 69.3.4 in the compliance filing to be submitted within 60 days of the date of this order.

¹²⁰ A flexible approach is also appropriate for small LSEs. An approach for these entities should be included in the compliance filing as well.

¹²¹ We also agree with Duke/FirstEnergy that the Midwest ISO needs to reconcile the definition of Demand, which is specified in MW, with the definition of load, which is specified in MWh. We direct this clarification in the compliance filing to be made within 60 days of the date of this order.

G. Submission of Resource Plans, Monitoring and Reports

1. The Midwest ISO Proposal

143. Under the Midwest ISO's proposal, LSEs are subject to both annual and monthly reporting requirements as to forecasts. LSEs are required to report, by March 1 of each Planning Year, their annual and monthly anticipated peak Forecast LSE requirements by the Commercial Pricing Nodes for the upcoming Planning Year. The proposal also requires LSEs to submit updates to such Forecast LSE Requirements no later than the first day of the calendar month preceding the calendar month for which requirements are being submitted. The Midwest ISO will coordinate with LSEs to determine the monthly anticipated peak integrated hourly Forecast LSE Requirement for a given period in time, expressed in MWs.

144. In addition, under proposed section 69.3, the Midwest ISO commits to provide states with relevant Resource Plan information to assist them in meeting their resource adequacy requirement standards. The Midwest ISO commits to maintain a database and report to states, when requested, the extent to which each LSE has met its forecasting responsibilities.

2. Comments and Protests

a. Demonstrating Capability and Submission of Resource Plan

145. Dairyland, Detroit Edison and Duke/FirstEnergy argue that the two-month period between the time when the LSEs learn of their obligations from the Midwest ISO and the time when they must submit their annual Resource Plans, demonstrate resource capability, and report annual and monthly forecasts (collectively, March 1 Reports), is inadequate. Detroit Edison states that "[t]here clearly is not enough time between January 1 – the first time LSEs learn the scope of their resource adequacy requirement – and March 1 of each year to enable LSEs to develop reliable resource plans."¹²² Detroit Edison argues that this is inconsistent with Midwest ISO's representation to stakeholders that Planning Reserve Margin results would be made public five months prior to the due date for generation resource plans. Detroit Edison asks that the Midwest ISO be required to make public the applicable Planning Reserve Margin information on or before October 1 prior to each Planning Year.

146. Dairyland argues that Module E should expressly provide that no LSE will face a shorter compliance window or otherwise be penalized by the failure of the Midwest ISO to timely fulfill its obligations under Module E.

¹²² Detroit Edison Comments at 11.

147. Southwestern notes that section 68.2 would require LSEs to submit load forecasts one year prior to each Planning Year. As proposed, the first Planning Year commences on June 1, 2009. Southwestern argues that this would require LSEs to submit their first-year annual forecasts by May 31, 2008. Southwestern states that this deadline does not provide LSEs sufficient time to complete the calculations and projections.

148. Duke/FirstEnergy assert that having to submit a binding annual data set would present problems for LSEs with significant load changes during the Planning Year and for LSEs whose contractual commitments terminate during the Planning Year. Duke/FirstEnergy request that the Midwest ISO clarify that the March 1 Reports are provisional and that if LSEs deviate from the information provided in the reports, they will not be subject to enforcement action and that resource adequacy requirement compliance will be assessed based on the monthly reports.

149. Detroit Edison argues that the Midwest ISO's proposal that resources designated as Planning Resources must demonstrate capability on an annual basis "commencing three months prior to the Planning Year" needs clarification. Detroit Edison also argues that the requirement that all testing for Generation Resources be done between March and June is impractical. It asks that the Midwest ISO revise the tariff to require resources to demonstrate capability on any annual basis "at any time during the year, such tests to apply to the next Planning Year."¹²³

150. AMP-Ohio argues that proposed section 69.2.1.2.d's requirements that Planning Resources demonstrate capability with regard to multiple, independent entities, could create confusion. It asserts that the Midwest ISO should coordinate with state authorities and the Regional Entities to place one set of consistent requirements for Planning Authorities in its Business Practices Manuals.

151. Midwest TDUs argue that the submission of load forecasts on a Commercial Node basis is not necessary and forecast requirements should instead be on an LSE basis. Midwest TDUs assert that their proposal reflects the fact that LSEs typically forecast on the basis of their entire load and meet resource adequacy requirements for their total load, not the load at a particular Commercial Node.

b. Reporting Requirements for Network Resources

152. Illinois Municipal questions whether LSEs should be required to meet certain reliability requirements (proposed section 69.2.1), demonstrate capability on an annual basis (proposed section 69.2.1.2.d), and use "generator or demand availability data information and methods" that are not yet specified (proposed section 69.2.1). Illinois Municipal argues that such information is already required in order to obtain Network

¹²³ *Id.* at 13.

Resource designations under the *pro forma* OATT. Illinois Industrial asks that the Commission not be able to require more than is required under section 29 of the *pro forma* OATT.

c. **Reporting Changes of Planning Resources or Forecast Load Requirements**

153. Illinois Municipal argues that proposed section 69.1.4.2, which requires LSEs to submit by the first of the month any change in their Planning Resources or Forecast LSE Requirements is followed by proposed section 69.1.4.3, which imposes on LSEs the requirement to “indicate the nature and current status of commitments with respect to each addition, retirement and sale or purchase of Planning Resources”¹²⁴ Illinois Municipal seeks clarification whether the more specific requirements of proposed section 69.1.4.3 are meant to provide guidance for proposed section 69.1.4.2, or whether they are a separate reporting requirement. Illinois Municipal also asks that the section be revised to require the reporting of “any significant change,” with examples to clarify what types of charges are significant.¹²⁵

3. **Answers**

154. In response, the Midwest ISO argues that it is disingenuous for parties to claim that they are unable to begin making plans to meet the resource plan obligations until January 2009, since all LSEs currently have regional planning reserve requirements under the existing TEMT, and have been obligated for several years to make long-term resource adequacy plans. According to the Midwest ISO, if an LSE promptly began planning for the first Planning Year using its current reserve requirement, it is unlikely that it would be required to make major adjustments in 2009. The Midwest ISO also agrees to provide earlier notice by promulgating Planning Reserve Margins as part of the Attachment FF transmission expansion planning process in the October prior to the Planning Year.

155. In response to the Midwest ISO, the Midwest TDUs state that the Midwest ISO’s answer “ignores the fundamental fact that its [resource adequacy requirement] regimen proposes to apply a new methodology for calculating [Planning Reserve Margins] that is different from the methodology historically used to assess resource adequacy”¹²⁶ Accordingly, the Midwest TDUs reiterate that two months is not enough time for an LSE to submit the required Resource Plans by March 1, 2009.

¹²⁴ Illinois Municipal Comments at 15.

¹²⁵ *Id.* at 16.

¹²⁶ Midwest TDUs Answer at 6.

4. Commission Determination

156. We agree with commenters that the Midwest ISO's proposed schedule for the development of resource plans leaves only two months for LSEs to develop their resource plans, and therefore may be unreasonable.¹²⁷ Such a tight schedule could be particularly unfair to market participants to the extent they will be penalized, in the yet-to-be-completed financial settlement/enforcement provisions, for resource inadequacy. Therefore, we direct the Midwest ISO to discuss its proposed schedule with stakeholders and revise the relevant provisions to provide for a longer time period for the development of resource plans, in the compliance filing to be made submitted 60 days of the date of this order. We also direct the Midwest ISO to specify in its revised provisions how it will address resource planning for market participants with significant load changes during the Planning Year.

157. With respect to testing procedures, we consider an annual test reasonable to ensure resources can perform in peak demand periods. We do not consider the three-month testing period to be unreasonable, as Detroit Edison claims. We recognize the Midwest ISO process is designed to obtain timely information without disrupting resources during peak demand periods.

158. We agree with AMP-Ohio that the verification procedures for planning resources are confusing and therefore we require the reference to Regional Reliability Organization and state verifications be deleted from section 69.2.1.2.d in the compliance filing to be submitted within 60 days of the date of this order. We further direct the Midwest ISO to fully explain its verification process in the Business Practices Manuals.

159. Responding to Illinois Municipal, we do not consider the Network Resource designations under the *pro forma* OATT to be relevant or appropriate for evaluating whether resources can qualify as Capacity Resources that are available during peak demand periods. The Network Resource designations do not address the resource capabilities that must be verified to determine if the resource can respond under peak operating conditions, and for this reason we consider the Midwest ISO proposed resource requirements to be appropriate.

160. We interpret the report required of LSEs regarding additions, retirements, sales or purchases of planning resources in proposed section 69.1.4.3 to be an annual requirement that is tied to the annual LSE Resource plan. To respond to Illinois Industrial, we direct

¹²⁷ We recognize, as Duke/First Energy notes, that the Midwest ISO may consider the LSE resource plan to be provisional and subject to monthly updates. However, the Midwest ISO filing gives no indication that the LSE resource plans are intended to be interim in nature.

the Midwest ISO to clarify the relationship of the requirements under proposed section 69.1.4.3 and the monthly reports required under proposed section 69.1.4.2 in the compliance filing to be submitted within 60 days of the date of this order.

H. Planning Zones

1. The Midwest ISO Proposal

161. In proposed section 68.1, the Midwest ISO states that, under its LOLE procedures, it intends to initially determine zones consistent with the planning areas listed in Attachment FF-3. In addition, the Midwest ISO states that it will determine additional zones, as needed, to address regional congestion issues consistent with its Business Practices Manuals.¹²⁸ The Midwest ISO also states that “[u]ntil the required technical studies have been completed, it is unclear how many different zones [it] will identify as having different [Planning Reserve Margins] to meet LOLE reliability criteria.”¹²⁹

2. Comments and Protests

162. The Midwest TDUs assert that the Midwest ISO does not provide sufficient detail about how it will determine zones. Specifically, the Midwest TDUs express concern about zone size: “Zones that are too small will lead to [Planning Reserve Margins] that are larger than needed to meet LOLE. . . . On the other hand, too large a zone can also drive up costs: the one-day-in-ten LOLE would become a more stringent standard when applied to overly large areas, because meeting the standard would require more reserves so as to allow only one shortage per decade in the larger area.”¹³⁰ The Midwest TDUs also express concern that LSEs that have load in more than one zone, and ask that the Midwest ISO clarify that “LSEs need only demonstrate Planning Resources equal to or greater than the LSE’s Forecast LSE Requirement plus its [Planning Reserve Margin] requirement for its total Load without having to separately forecast Loads in each zone and without having to separately provide defined Planning Resources for each Zone.”¹³¹ The Midwest TDUs ask that the Commission require the Midwest ISO to develop the zonal elements more completely, working with stakeholders.

163. The Midwest TDUs also argue that Planning Reserve Margins should feed into the transmission planning process. “[I]f transmission constraints result in Midwest ISO’s

¹²⁸ Midwest ISO Filing at proposed Original Sheet No. 810B.

¹²⁹ *Id.* Robinson Aff. at 9.

¹³⁰ Midwest TDUs Comments at 33-34.

¹³¹ *Id.* at 34.

establishing higher [Planning Reserve Margins] for certain zones, the planning process should consider solutions to such constraints so that LSEs in those zones do not bear an inequitable share of the responsibility for maintaining a uniform and consistent LOLE throughout the region.”¹³²

164. Constellation argues that it is necessary to set strict guidelines for the implementation of new zonal/sub-regional deliverability requirements. Specifically, Constellation argues that stakeholders enter into contracts based on the current market construct, so a significant lead time is necessary prior to the implementation of new sub-regions/zones.

165. AMP-Ohio argues that the criteria for establishing zones for determining the Planning Reserve Margin are ambiguous. It argues that the reasons underlying the creation of additional zones should be technical and objective in nature and laid out in the tariff.

166. Duke/FirstEnergy argue that the Midwest ISO should be required in a compliance filing to develop a process for identifying new zones. Duke/FirstEnergy also express concern with the Midwest ISO’s method for allocating Planning Reserve Margin *pro rata* among the zones for LSEs serving load in more than one zone. Duke/FirstEnergy state that the standard should account for the level of resources that are deliverable to each zone. Duke/FirstEnergy note that the language of proposed section 69 could be seen as calling for the averaging of an LSE’s Planning Reserve Margins and/or loads across zones. According to Duke/FirstEnergy, this could result in an LSE being able to meet Module E requirements for load in a zone using resources not deliverable to that zone. Duke/FirstEnergy therefore request that the Commission require the Midwest ISO to clarify that each LSE will be required to comply with Module E requirements for load inside each zone on a stand-alone basis.

3. Answers

167. In its answer, the Midwest ISO reiterates that it will develop zones based on well-accepted industry standards. The Midwest ISO states that similar to PJM, it will consider the strength of the transmission system when making its Planning Reserve Margin determination. For example, the Midwest ISO notes that a well-connected region might be able to achieve a LOLE standard at a lower Planning Reserve Margin than a region with weaker transmission interconnections. The Midwest ISO states that it will consider the size and the number of Generation Resources to establish equitable and reasonable Planning Reserve Margin zones. The Midwest ISO states that a region with a large

¹³² *Id.* at 35.

number of small resources could have a lower Planning Reserve Margin than a region with a fewer number of large resources.¹³³

168. In response, WPSC/UPPCO argue that the Midwest ISO's answer incorrectly states that development of Planning Reserve Margin zones will be based upon "well-accepted industry standards" because there are no such industry standards.¹³⁴ They argue that the establishment of zones will be purely subjective.

4. Commission Determination

169. We direct the Midwest ISO to clarify the method it may use to "establish additional zones within the Transmission Provider region to address regional issues, such as constrained areas. . . ."¹³⁵ While we understand and appreciate that the Midwest ISO commits to working with its stakeholders and that it will use "well-accepted industry standards" to determine the need for and the establishment of zones, we believe that further detail of the zonal methodology is appropriately placed in the tariff.¹³⁶ The establishment of new and additional zones impacts jurisdictional rates and, therefore, it is appropriate to include the zonal methodology in the tariff.

170. We accept the Midwest ISO's proposal to initially use the transmission planning zones listed in Attachment FF-3 and its assertion that it will not be able to determine any needed zonal reconfigurations until after the technical studies are completed. However, the methodology under which it will analyze those studies should be clear to stakeholders before any reconfigurations are effective. We suggest that one such reasonable template for the Midwest ISO to use to comply with this clarification directive is to review Attachment FF. We are also directing the Midwest ISO to clarify how it intends to allocate the Planning Reserve Margin to LSEs that operate in multiple zones and if it intends to implement a minimum zone size. In addition, we clarify that deliverability within zones is an important principle that the Midwest ISO should weigh when determining the zonal configurations. The Midwest ISO's answer provided many of the important details regarding the factors it will evaluate in the development of Planning Reserve Margin zones, but those details belong in the tariff. In any event, a user of the tariff should be able to reasonably determine how the Midwest ISO will establish zones and which criteria will be evaluated before changing zonal configurations.

¹³³ Midwest ISO Answer at 41.

¹³⁴ WPSC/UPPCO Answer at 8.

¹³⁵ Midwest ISO Filing at proposed Original Sheet No. 810B.

¹³⁶ Midwest ISO Answer at 41.

I. The Lack of Financial Settlement/Enforcement Provisions

1. The Midwest ISO Proposal

171. As previously noted, the Midwest ISO's proposal does not include financial settlement/enforcement provisions. The Midwest ISO states that stakeholders have developed multiple variations of potential tariff language, but have not reached a consensus.¹³⁷ The Midwest ISO seeks a 180-day extension of time to file with the Commission to financial settlement/enforcement provisions, in order to allow additional time for continuing discussions with the OMS and other interested stakeholders.

2. Comments and Protests

172. Commenters such as the OMS, Duke/FirstEnergy, IPL, the Michigan Commission, Michigan Public Power, and the Midwest TDUs support (or do not oppose) the Midwest ISO's proposal 180-day extension to develop tariff provisions regarding financial settlement/enforcement under section 69.3.5 of the revised Module E. The OMS states its commitment to "use this time and the stakeholder process to develop provisions that recognize state authority and apply any financial settlements fairly to all load-serving market participants who must meet planning reserve requirements."¹³⁸ Duke/FirstEnergy notes that, to the extent parties argue that it is unjust and unreasonable to evaluate the resource adequacy requirement in the absence of a proposed enforcement mechanism, the Commission did this four years ago when it accepted currently-effective Module E. IPL asserts that the proposals included in the Midwest ISO filing as part of the Mr. Doying Affidavit are flawed.

173. In contrast, several commenters, including AMP-Ohio, Dominion, Dynegy/LS, the Midwest Coalition, Midwest Industrial, Southwestern, Strategic, Wabash, Wisconsin Electric, and WPSC/UPPCO, argue that the absence of these provisions deprives the proposal of any value and that the financial settlement/enforcement mechanisms need to be considered as part of the other proposals. They seek rejection and note that the Commission similarly rejected the Midwest ISO's first ancillary services market filing as deficient.

174. Certain commenters, like Ameren, Dominion, Illinois Municipal, Michigan Public Power, Hoosier/Southern Illinois, and Midwest Industrial argue that, without understanding the financial settlement/enforcement mechanisms, it is unclear how the reasonableness of the resource adequacy plan can be assessed. They note that, once financial settlement/enforcement mechanisms are put in place, the certain provisions of

¹³⁷ Midwest ISO Filing, Transmittal Letter at 6-7; Doying Aff. at 9-11.

¹³⁸ OMS Comments at 3.

the filed proposal may need to be revised. They ask that the Commission affirm that market participants have an opportunity to comment on the entire comprehensive resource adequacy proposal after the Midwest ISO files its proposed financial settlement/enforcement terms.

175. Furthermore, commenters such as Ameren, Constellation, Consumers, Detroit Edison, Duke/First Energy, Dynegy/LS, EPSA, Reliant, Strategic and Wisconsin Electric, express concern about whether consensus may be reached in 180 days from the Commission's order. Certain commenters suggest that the Commission consider shortening the timeline for discussion on this issue. Commenters offer several alternatives, ranging from 0 additional days (immediate filing), to 90 days from the Commission's order on the proposal, to 180 days from the Midwest ISO's filing. Certain commenters suggest Commission-supervised settlement hearings. For example, Dynegy/LS argue that continued Commission oversight is necessary if any progress in developing financial settlement/enforcement provision is to be made. Dynegy/LS request that the Commission appoint a settlement judge to oversee the development of the provisions and ensure that this issue is resolved within the 180-day extension. Certain commenters suggest that, if the Midwest ISO and its stakeholders cannot reach a consensus, the Commission require the Midwest ISO adopt one of the two proposals discussed in the Doying Affidavit or some other "backstop" enforcement requirement that will be proposed at the conclusion of the additional stakeholder proceedings.

3. Answers

176. The Midwest ISO argues that the proposal can be approved without the financial settlement/enforcement provisions. It argues that these issues are "supplemental" to the "primary requirements of Module E," the development of Planning Reserve Margins and resource plans to achieve the LOLE.¹³⁹ The Midwest ISO states, however, that these provisions "should, and will, be added to Module E prior to implementation in 2009."¹⁴⁰ The Midwest ISO states its belief that it can reach stakeholder agreement within 180 days of its filing and therefore, does not object to certain commenters' request for a "drop dead" date of June 25, 2008. The Midwest ISO does not, however, agree with commenters' suggestions that the Midwest ISO be required to file any of the draft proposals now, arguing that the Commission should permit stakeholders 180 days to develop a consensus proposal.

177. In its response, Reliant argues that the Midwest ISO continues to be overly optimistic about reaching stakeholder consensus on this issue. Reliant argues that since

¹³⁹ Midwest ISO Answer at 7.

¹⁴⁰ *Id.* at 6.

December 28, 2007, the Midwest ISO has held two stakeholder meetings, neither of which made any substantive progress towards implementing a compliance proposal or included a discussion of the proposals included in the Midwest ISO's filing. Reliant reasserts that the Commission should deny the Midwest ISO's request for an extension for time.

178. WPSC/UPPCO argue that "enforcement goes to the heart of any reliability plan the success of which is predicated on the joint participation of a very large number of entities each one of which must bear its appropriate burden of contributing to the regional reliability."¹⁴¹ Accordingly, WPSC/UPPCO continue to assert that proposed Module E cannot be accepted until its financial settlement/enforcement provisions are complete and reviewed by the Commission.

4. Commission Determination

179. We appreciate the efforts of the Midwest ISO and its stakeholders to develop provisions that ensure LSEs have sufficient resources and we appreciate the time required to complete this important endeavor. At the same time we are cognizant of the need to have a complete resource adequacy program, and therefore we are sensitive to the concerns raised made by commenters that a partial resource adequacy program, without financial settlement/enforcement provisions, is insufficient. Consistent with Commission statements in previous orders, we are also concerned about the possibility of further delays.¹⁴² We do not consider the fact that certain indicators of resource adequacy show the Midwest ISO is generally resource adequate to be a credible basis for further delay. As difficult as these issues are, they need to be resolved so that the Midwest ISO can ensure the continued efficiency and reliability of its markets. For these reasons, we accept the Midwest ISO's commitment to make its filing no later than 180 days of the date of its filing, or June 25, 2008.¹⁴³ We clarify that in the event stakeholders can not agree on provisions, we direct the Midwest ISO to file financial settlement/enforcement provisions based on stakeholder feedback, whether or not full consensus was possible. While parties make numerous suggestions with respect to what features these provisions should include, we will wait until the Midwest ISO submits a proposal before making determinations on the features needed for just and reasonable financial settlement/enforcement provisions.

¹⁴¹ WPSC/UPPCO Answer at 4.

¹⁴² See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 61,292 at P 13.

¹⁴³ We note that the Midwest ISO in its answer does not object to a date certain for submittal of the financial settlement provision.

180. As discussed earlier, we are not rejecting the filing as deficient. We believe all the major features of the Midwest ISO resource adequacy program will be detailed with enough specificity for parties to make an informed evaluation of the proposed financial settlement provisions when they are submitted. As explained throughout this order, the Commission is requiring clarification and revision of a number of features and therefore we expect that, in the end, the Midwest ISO will have a complete and comprehensive resource adequacy program. Since the deficiency determinations will be made well after the financial settlement provisions are accepted by the Commission,¹⁴⁴ market participants will know the rate charged for transactions. We also find no basis to conclude that other provisions, such as the setting of Planning Reserve Margins, will require revision after completed financial settlement provisions are accepted, and therefore we do not see the need for additional review of the proposal after those provisions have been completed.

J. Qualification of Planning Resources

1. The Midwest ISO Proposal

181. Proposed section 69.2 describes the process and circumstances under which “Planning Resources” can be used to satisfy resource adequacy requirements. Planning Resources are sub-divided into two broad categories of resources: (1) Capacity Resources, and; (2) Load Modifying Resources.¹⁴⁵

182. Of those two types of resources, the Midwest ISO has proposed, in section 69.2.3, a must-offer requirement for Capacity Resources. Offers must be submitted in the pre-day-ahead, the day-ahead and the first post-day-ahead Reliability Assessment Commitment markets respectively unless the Capacity Resource is unavailable due to a full or partial, scheduled or forced, outage.¹⁴⁶ In addition, self-schedules may be used to satisfy the must-offer requirements. A Capacity Resource must submit either a self-

¹⁴⁴ As the Midwest ISO explains, the setting of Planning Reserve Margins and determination of the resource adequacy of LSEs will occur during 2009 – six months after the submittal of financial settlement provisions.

¹⁴⁵ Each of these is discussed in greater detail below, *see infra* sections IV.L and IV.M.

¹⁴⁶ The Midwest ISO defines Unforced Capacity as “[t]he amount of statistically dependable Capacity assigned to a Capacity Resource after accounting for that resource’s equivalent forced outage rate by applying the [Equivalent Forced Outage Rate (EFOR)] metric as defined in the NERC Generation Availability Data System.” Midwest ISO Filing at proposed Third Revised Sheet No. 138.

schedule or offer for each hour during the operating month. Any offer requirements reflect the resource's operational limitations, all state regulations and laws relating to reliability, including, but not limited to state reliability standards, safety standards, Planning Reserve Margins, or the enforcement thereof. Load Modifying Resources are only proposed to be subject to the must-offer during emergencies.

2. Comments and Protests

a. Definition of Planning Resources

183. Commenters such as Dynegy/LS support the Midwest ISO's adoption of the definition of Planning Resources to encompass Capacity Resources and Load Modifying Resources.

184. In contrast, commenters such as Minnesota Power argue that additional definition is necessary; they assert that the current definitions do not address how these new resources types will be integrated with other tariff modules.

b. Designation of Planning Resources and Demonstration of Availability of Planning Resources

185. Several commenters argue that the Midwest ISO's proposal does not fully explain the application of its requirements to demonstrate the availability of Planning Resources. The Midwest TDUs argue that "Module E's description of the monthly reporting process leaves it unclear as to whether Midwest ISO's enforcement of its [resource adequacy requirement] regimen will be consistent with the purpose of assessing whether LSEs [have] planned for adequate reserves."¹⁴⁷ Specifically, the Midwest TDUs ask that the Midwest ISO clarify how planned outages will affect the resources that may be included in monthly reports and audits. The Midwest TDUs also ask that the Midwest ISO clarify what it means for LSEs to "demonstrate" the capability of their Planning Resources on an annual basis.

186. Ameren argues that monthly demonstrations of availability under section 69.1 is appropriate for most of the year, but is insufficient for the peak summer period, during which reserve margins are critical and resources tend to be scarce. It argues that, for the peak summer period, LSEs should be required to demonstrate on May 1 of each year that they have designated planning resource sufficient to satisfy the resource adequacy requirements for the full four-month peak summer period.

187. Minnesota Power argues that the proposed evaluation of Planning Resources one month prior to the first day of each month is valuable. However, it argues that this

¹⁴⁷ Midwest TDUs Comments at 40.

before-the-fact review cannot be considered alone as part of enforcement, and that after-the-fact assessments are necessary to ensure compliance.

188. Manitoba Hydro argues that use of the term “designation” in section 69.2.1 is confusing because “designation” is most frequently used in relation to Network Resources. Manitoba Hydro argues that “[u]se of this term in both contexts may lead to the mistaken impression that all designated Network Resources must be Capacity Resources.”¹⁴⁸ It asserts that a different term should be used for specifying Planning Resources in order avoid confusion. Manitoba Hydro also notes that section 69.2.1.2.a provides that LSEs may satisfy their obligation with respect to Planning Resources by designating Capacity Resources or Load Modifying Resources “registered” with the Transmission Provider, but this type of “registration” is not clearly specified.

189. Similarly, Xcel argues that, as drafted, proposed section 69.2.1.2.a(ii) could be read to mean that a Capacity Resource must be designated for an entire year. It asks that the Midwest ISO be directed to clarify that the owner of the resource accepting designation as a Planning Resource only need do so for a “specified portion” of the Planning Year.

190. Hoosier/Southern Illinois argue that proposed section 69.1.2 is virtual identical to proposed section 69.1, and asks that the duplicative language be deleted.

c. Offer Requirements for Planning Resources

191. The Midwest TDUs agree with the Midwest ISO’s proposal to apply the must-offer requirement to Capacity Resources for the “Day-Ahead Energy Market and all pre-Day Ahead and the first post Day-Ahead Reliability Assessment Commitment, except to the extent that the Capacity Resource is unavailable due to a full or partial forced or scheduled outage consistent with this Tariff.”¹⁴⁹ The Midwest TDUs ask that the Midwest ISO continue to allow market participants to satisfy the must-offer obligation through sales into non-Midwest ISO markets (e.g., PJM) to avoid seams issues.

192. Manitoba Hydro argues that the must-offer obligation on power purchase agreements that otherwise qualify for status as a Capacity Resource should be clarified. Manitoba Hydro argues that it is not clear whether contractual restrictions on availability would qualify as “resource operational limitations,” therefore excusing the must-offer obligation. Manitoba Hydro notes that power purchase agreements may not obligate a seller to make capacity and/or energy associated with the capacity available during each hour of the month – “[c]apacity may be contracted on a seasonal basis or the energy

¹⁴⁸ Manitoba Hydro Comments at 13.

¹⁴⁹ Midwest TDUs Comments at 50.

delivery may be limited to certain days or hours, thus making the must offer obligation impossible to fulfill.”¹⁵⁰ Manitoba Hydro argues that it is unreasonable to disqualify power purchase agreements that otherwise qualify for status as a Capacity Resource simply due to their hours of availability.

193. Hoosier/Southern Illinois argue that it is unclear whether the must-offer requirement applies to the full capability of a Capacity Resource or only the Capacity Resources’ Unforced Capacity rating. They ask that the Commission require the Midwest ISO clarify that the must-offer requirement applies only up to a Capacity Resources’ Unforced Capacity rating.

194. Hoosier/Southern Illinois also argue that the Commission should direct the Midwest ISO to accredit each Capacity Resource at its Installed Capacity, rather than at its Unforced Capacity rating. They argue that the effect of using Unforced Capacity is to penalize LSEs that identify Capacity Resources that had outages during the prior year. They also argue that affected LSEs, particularly smaller LSEs (for whom a single generating unit may represent a relatively large share of total capacity) will have to pay more than necessary for Capacity Resources.

195. Dynegy/LS support the Unforced Capability construct, arguing that it will increase reliability by placing a greater value on generators that are able to perform when dispatched.

196. The Midwest TDUs state that the Midwest ISO’s proposal fails to provide detail as to how Unforced Capacity will be calculated for any Capacity Resource, and does not recognize that Unforced Capacity will not be suitable for every type of Capacity Resource. They argue that the Midwest ISO should be required to better explain how it will apply Unforced Capacity, especially with regard to purchased power resources, and to submit an informational filing.

197. Ameren argues that new section 68 provides that the Midwest ISO’s Planning Reserve Margin analysis will consider, among other things “the Generator Forced Outage rates of Capacity Resources,” but in designating Planning Resources, including Capacity Resources, proposed section 69.2.1.2.d provides that “Capacity Resources will be accredited at the Capacity Resource’s Unforced Capacity Rating.” Ameren argues that this would effectively double count Capacity Resources’ forced outage ratings. Ameren asks that the Commission require the Midwest ISO to eliminate this double counting.

198. Integrys argues that Planning Reserve Margins should be adjusted for forced outage rates in the same way as Capacity Resources. It suggests that the tariff be revised to provide that “[t]he Planning Reserve Margin for an LSE will be adjusted downward by

¹⁵⁰ Manitoba Hydro Comments at 7.

subtracting the weighted average Unforced Capacity rating for all the generators in the region for which the Planning Reserve Margin is determined.”¹⁵¹

199. Duke/FirstEnergy argues that section 69.2.3 suggests that must-offer requirements will vary from state to state, and this is unreasonable for the same reason that it is unreasonable for Planning Reserve Margins to vary from state to state. Moreover, Duke/FirstEnergy assert that this section would make state requirements enforceable by Commission in the must-offer context, which may again give rise to inconsistent outcomes in state and Commission proceedings. Duke/FirstEnergy propose that the final clause of proposed section 69.2.3, beginning with “all state regulations . . .,” be stricken. Duke/FirstEnergy also argue that the changes that need to be reported under section 69.2.2.2.a and the must-offer requirement in section 69.2.3 should be specified in the TEMT rather than the Business Practices Manuals.

3. Answer

200. In its answer, the Midwest ISO continues to argue that Capacity Resources must be evaluated on an Unforced Capacity basis. The Midwest ISO believes that “for reliability purposes, the ‘nameplate’ quantity of energy that can theoretically be produced from a facility is of little value in meeting actual peak load conditions. The Midwest ISO needs assurance that a particular facility will actually be able to meet peak energy conditions when it is called upon.”¹⁵² The Midwest ISO also argues that this approach is consistent with that of the other RTOs and ISOs in the Eastern Interconnection. The Midwest ISO states that it will continue to work with stakeholders to document how the standards will be applied through the Business Practices Manuals and is committed to evaluating EFOR demand and to periodically re-evaluating EFOR for all Capacity Resources, to ensure equitable treatment under Module E.

4. Commission Determination

201. We accept the Midwest ISO’s proposal to use a must-offer to compel Capacity Resources to offer in the pre-day-ahead, day-ahead and first Reliability Assessment Commitment. We also accept the proposal to impose a must-offer on Load Modifying Resources only during emergencies. The Midwest ISO maintained a must-offer requirement under the Module E interim resource adequacy plan,¹⁵³ and other RTOs and ISOs have similar must-offer requirements and stakeholders generally support a continuation of some form of must-offer requirement going forward. In addition, our

¹⁵¹ Integrys Comments at 18.

¹⁵² Midwest ISO Answer at 40.

¹⁵³ Midwest ISO Filing, Robinson Aff. at 19.

discussion of Planning Reserve Margins elsewhere herein responds to Duke/First Energy's concerns regarding varying reserve margins and state regulations.

202. We agree with Hoosier/Southern Illinois that it is appropriate for the Midwest ISO to specify the level of the offer required of Capacity Resources. As discussed, we believe that crediting the Capacity Resource at its Unforced Capacity basis is reasonable and, therefore, we find it reasonable that the Midwest ISO extrapolate this to the must-offer requirement. Therefore, we direct the Midwest ISO to clarify that the "offer" required of Capacity Resources applies to their Unforced Capacity and not their Installed Capacity. However, we disagree with Hoosier/Southern Illinois that resources should be credited at their installed capacity level. If a resource's must-offer requirement is set at its Unforced Capacity level, we believe it is reasonable that the resource also be credited at its Unforced Capacity level.

203. Furthermore, we consider the Unforced Capacity metric to be a better measure of the availability of capacity for peak demand periods than installed capacity or nameplate capacities. We agree with the Midwest ISO that the unforced capacity figures give a more realistic assessment of resource availability. We consider section 68 to be no more than a general introductory discussion, that includes a statement that generator forced outages will be considered in setting Planning Reserve Margins, and therefore we do not see that statement, in combination with the unforced capacity method in section 69.2.1.2, to result in double-counting. Nonetheless, to ensure our interpretation is correct, we require the Midwest ISO to clarify that it is not counting forced outages twice in the setting of Planning Reserve Margins in the compliance filing to be submitted within 60 days of the date of this order.

204. At this time, we do not believe that a demonstration of sufficient planning resources for the full four-month peak summer period by May 1 of each year is required. We note that, as discussed herein, we are requiring the Midwest ISO to clarify its process for establishing Planning Reserve Margins. We are also encouraging the Midwest ISO to review the load forecasting processes in other RTOs and ISOs with retail choice states as well as the alternative proposals of commenters, to determine whether alternative processes are appropriate.

205. With respect to Manitoba Hydro's argument that power purchase agreements should not qualify as Capacity Resources, we note that we are requiring the Midwest ISO to revise its proposal to address how the ability of power purchase agreements to meet the requirements of Capacity Resources can be verified.¹⁵⁴

¹⁵⁴ See section IV.L, *infra*.

206. With respect to section 69.2.1,¹⁵⁵ we consider the requirements for the designation of Planning Resources to be a term of service and therefore appropriate for the tariff. We require the Midwest ISO to file the requirements for designating Planning Resources as tariff revisions in the compliance filing due within 60 days of the date of this order.

207. We are unclear how section 69.1.2,¹⁵⁶ “Designating Planning Resources” substantially differs from section 69.1, “Load Serving Entity Responsibilities” and we direct the Midwest ISO to either clarify its purpose or delete it in a compliance filing to be submitted within 60 days of the date of this order.

208. We do not agree that the use of the term “designate” in proposed section 69.2.1.2 needs clarification. We clarify that we do not view the use of the term “designate” in section 69.2.1.2 as implying that all Network Resources must be Capacity Resources necessarily. In any event, under proposed section 69.2.1.2, no LSE is able to designate a Planning Resource generally unless it has ownership, contractual rights, or proof that the Planning Resource accepts its designation for the Planning Year. We also believe that the procedures by which a resource will be registered with the Midwest ISO are the type of details ideally suited to the Business Practices Manuals.

209. Similarly, we disagree that in proposed sections 69.2.2.2.a and 69.2.3, those changes should be specified in the tariff, instead of the Business Practices Manuals. Section 69.2.2.2.a is sufficiently clear that unit availability changes must be reported, except for *de minimis* changes. Notwithstanding our other clarifications directed herein, we believe that section 69.2.3 properly lists operational limitations as items better suited for the Business Practices Manuals.

K. Single-State or Regional Reliability Organization Planning Resources

1. The Midwest ISO Proposal

210. Under proposed section 69.2.1.1, if an LSE serves load both inside and outside the Midwest ISO within a single state or Regional Reliability Organization region, then the LSE must separately designate Planning Resources to cover the Forecast LSE Requirement and the appropriate Planning Reserve Margins for within and outside the Midwest ISO.

¹⁵⁵ See proposed Second Revised Sheet No. 816. We note that sections 69.2.1 and 69.1.2 have the same title, “Designating Planning Resources,” but that the former deals with requirements for designation and the latter deals with designation procedures.

¹⁵⁶ See proposed Third Revised Sheet No. 813.

2. Comments and Protests

211. AMP-Ohio, Dairyland, Illinois Municipal, and Xcel argue that proposed section 69.2.1.1 appears to obligate an LSE serving load both within and outside the Midwest ISO to designate Planning Resources to cover all load, including load outside the RTO. While AMP-Ohio and Xcel do not object to the Midwest ISO clarifying that an entity that serves load from both inside and outside the RTO cannot double count resources, they argue that there is no basis for the Midwest ISO to obligate these LSEs to comply with the Midwest ISO's resource adequacy requirements for the LSE's load outside the Midwest ISO. Xcel requests that the Commission explicitly acknowledge that, for loads outside the Midwest ISO, the appropriate Planning Reserve Margin should be established by an alternative mechanism, and there is no basis for extension of the Midwest ISO Planning Reserve Margin outside of the Midwest ISO region. Similarly, Illinois Municipal argues that the provision does not explain the purpose or mechanism for the requirement that any such LSE must separately designate Planning Resources to cover its PJM requirements. Dairyland argues that the obligations of an LSE to serve load external to the Midwest ISO footprint when the LSE also serves load within the Midwest ISO footprint needs to be clarified.

3. Commission Determination

212. Addressing the issues regarding load raised by AMP-Ohio and Xcel, we interpret proposed section 69.2.1.1 not to impose any reserve obligations on the portions of an LSE's load served outside the Midwest ISO region. Also, we interpret proposed section 69.2.1.1 as a way for the Midwest ISO to ensure that the resources LSEs are using to meet their resource adequacy requirements are not committed to other LSEs outside the Midwest ISO and that the capacity accepts the designation and the accompanying responsibilities. In other words, this section intends to avoid double-counting capacity when the same capacity can only be used to meet one standard at any one time. We find that a provision to avoid counting the same capacity twice is appropriate. The Midwest ISO is clear that it does not intend to assert jurisdiction over any resources outside its region, but that it needs certain data from resources to ensure fulfillment of their obligations.¹⁵⁷

¹⁵⁷ See Midwest ISO, Transmittal Letter at 10 and Robinson Aff. at 34; see also Midwest ISO Answer at 24 ("The Midwest ISO also believes that [resource adequacy requirements] should be implemented with respect to all Load within the Region, including FERC non-jurisdictional entities. Such a requirement is necessary because, in order for the Midwest ISO-controlled 'grid to function fairly and effectively, resource adequacy requirements must be borne by all LSEs, not just a few.'" (internal citations omitted)).

L. Capacity Resources

1. The Midwest ISO Proposal

213. Under the Midwest ISO's proposal, there are certain restrictions on the types of resources that can be designated Capacity Resources, "[t]he Resources and External Resources that are available to meet peak Load demand, including Generation Resources, liquidated damages contracts and Demand Response Resources,"¹⁵⁸ and are therefore eligible to satisfy resource adequacy requirements.

214. The Midwest ISO proposes to include purchase agreements with liquidated damages provisions as either on-system or off-system Capacity Resources, as long as the agreement provides for firm point-to-point transmission service and the liquidated damages are of the "make-whole" type. The Midwest ISO notes that Order No. 890 recognized that certain seller's choice contracts containing liquidated damage contract provisions for sources outside the Midwest ISO region could qualify as a Designated resource for procuring transmission service,¹⁵⁹ and that similar liquidated damages contracts could not qualify as designated Network Resources if the source of energy was within the RTO unless the liquidated damages contract specified a particular generation resource. The Midwest ISO also recognizes that the proposed provision was not included in the draft reviewed by the Market Subcommittee.

215. Under the Midwest ISO's proposal, power purchase agreements that identify specific generation resources within the Midwest ISO transmission system as a source of supply will be designated as on-system Capacity Resources. Power purchase agreements that do not specify a particular generation resource and instead have power supplied by a range of potential generation resources can be Capacity Resources only if the power supplied is external to the transmission system and will be designated off-system Capacity Resources.

216. Under the Midwest ISO's proposal, external resources may qualify as Capacity Resources provided they meet the following requirements: (1) they comply with the contractual obligations of Modules B and E of the TEMT; (2) they have firm transmission service to the Midwest ISO border and the service has been evaluated by the Midwest ISO for deliverability to the LSE's load inside the Midwest ISO region; (3) they

¹⁵⁸ Midwest ISO Filing at proposed Third Revised Sheet No. 54.

¹⁵⁹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 1474-83 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007).

have no negative impact on existing deliverable resources with the Midwest ISO region; (4) they have verification from the Regional Reliability Organization where their source is located that the capacity intended for deliverability to the Midwest ISO and the portion identified for delivery is not also assigned to a non-Midwest ISO load; and (5) they must establish capacity on an annual basis.

217. The Midwest ISO also proposes to determine the deliverability of Capacity Resources with system impact studies for analysis of aggregate deliverability for Capacity Resources requesting Network Resource Interconnection Service. The Midwest ISO's proposal includes procedures to qualify resources that require upgrades in order to meet the deliverability requirements. The Midwest ISO explains that absent deliverability, a resource will qualify as a Capacity Resource if the LSE has obtained firm transmission service from the resource to the LSE's load and is subject to all other Capacity Resource requirements, including the must offer requirements. The Midwest ISO's proposal will be accredited at the unforced capacity rating that accounts for the resource's EFOR according to the NERC Generation Availability Data System.¹⁶⁰

2. Comments and Protests

a. Designation of Power Purchase Agreements and Use of Liquidated Damage Contracts

218. Consumers notes that none of the drafts circulated the stakeholders included references to the use of financially firm liquidated damages contracts. Consumers states that the Midwest Planning Reserve Sharing Group spent over a year debating financially firm liquidated damages contracts, and eventually agreed to a three year phase-out. According to Consumers, the Midwest ISO was aware of the Planning Reserve Sharing Group agreement and yet it opted to include language that allows firm liquidated damages contracts to be regarded on an equal basis as designated physical generation capacity.¹⁶¹ Consumers considers financially firm liquidated damages contracts without designated physical resources providing the capacity, upon which the LOLE study relies, to introduce significant risk to the planning process and challenges the validity of the Planning Reserve Margin established by the LOLE study. Consumers asserts the Commission should order the Midwest ISO to recognize financially firm liquidated damages contracts only to the extent they are permissible under Order No. 890.

¹⁶⁰ The percent of scheduled operating time that a unit is out of service due to unexpected problems or failures and cannot reach full capability due to forced component or equipment failures.

¹⁶¹ Consumers Comments at 12.

219. EPSA states that the Midwest ISO's provision for counting power purchase agreements containing liquidated damage provisions was not reviewed by stakeholders prior to inclusion in the proposal. EPSA notes that "liquidated damages contracts" is not a stand alone defined term in the TEMT but the term is included in the definition of Capacity Resource. EPSA states that it is not clear that a liquidated damages contract can meet the Capacity Resource requirements outlined in Module E, and the Midwest ISO has not provided a demonstration that it could. EPSA notes that the Midwest ISO's reliance on Order No. 890 and the open access transmission tariff as support for its inclusion is not helpful because at issue here is a capacity tariff – "[t]here is a difference between firm energy purchases used to count for network resources and capacity."¹⁶²

220. Ameren argues that the Commission should reject the Midwest ISO's proposal to permit liquidated damages contracts with make-whole provisions to qualify as planning resources. However, if the Commission allows these to qualify as Capacity Resources, then the TEMT (not the Business Practices Manuals) needs to define such agreements, setting forth what provisions the agreements must contain to qualify.

221. Ameren also disagrees with the "make whole" requirement. Ameren argues that the Midwest ISO's reliance on Order No. 890 Network Designation conflates Network Resources and Planning Resources. It also argues that, in the resource adequacy requirement context, the LSE relying on a liquidated damages contract with make-whole provisions when there is not enough physical capacity to serve load may be kept whole financially, but will have to shed load.

222. Reliant argues that it is confusing and contradictory to single out only contracts with liquidated damages provisions for inclusion in the definition of Capacity Resources. Reliant proposes that the definition of Capacity Resource be revised to include the Resources and External Resources that are "owned or acquired through a purchase power agreement and available to meet peak Load demand and that meet the requirements set forth in Module E."¹⁶³

223. Reliant also notes that the term "liquidated damages" appears in section 69.2.1.2, which provides that no power purchase agreement may be designated as a Capacity Resource if it permits interruptions for reasons other than *force majeure* or "provides for liquidated damages other than a 'make whole' type, as further described in the Business Practices Manual for Resource Adequacy."¹⁶⁴ Reliant states that this language appears to be included because Order No. 890 clarified that a power purchase agreement that

¹⁶² EPSA Comments at 15.

¹⁶³ Reliant Comments at 21.

¹⁶⁴ *Id.* at 21-22.

obligates suppliers, in the case of interruption for reasons other than *force majeure*, must make the buyer financially whole by reimbursing them for the additional costs of replacement power will be considered a firm, rather than interruptible, transaction.¹⁶⁵

Reliant argues that these Order No. 890 requirements are not appropriate for designation of Capacity Resources for resource adequacy purposes. Reliant asks that section 69.2.1.2(e) be modified to add the clarification that “the inclusion of such make whole provisions does not eliminate the requirement that purchase power agreements designated as Capacity Resources meet all other requirements of Module E.”¹⁶⁶

224. Detroit Edison asks the Commission to reject the Midwest ISO’s provision that no power purchase agreement may be designated as a Capacity Resource if it permits interruptions for reasons other than *force majeure* or “provides for liquidated damages other than a ‘make whole’ type, as further described in the Business Practices Manuals for Resource Adequacy.” Detroit Edison argues that this provision was included in the proposal without any opportunity for input from stakeholders. Detroit Edison also argues that the provision is unclear, noting that “make whole type” liquidated damages is unclear.¹⁶⁷

225. Constellation asks that the Midwest ISO clarify its intentions as to liquidated damages contracts. It argues that it is unclear whether different standards apply for liquidated damages contracts for external sources as compared to those for internal resources. Constellation also argues that definition of “make whole payments” is undefined.

226. Ameren also argues that the liquidated damages contracts provision is confusing because while the transmittal letter provides that power purchase agreements containing liquidated damages provisions “may be designated as either on-system or off-system Capacity Resources,” the affidavit of Mr. Robinson states that liquidated damages contracts for sources of supply outside the Midwest ISO region can qualify, but those from within the Midwest ISO that do not specify a particular Generation Resource cannot qualify. Ameren believes that proposed TEMT provisions agree with Mr. Robinson’s Affidavit and ask that the Commission clarify that liquidated damages contracts for sources of supply within the Midwest ISO that do not specify a particular Generation Resource cannot qualify as Planning Resources.

227. Illinois Municipal argues that Order No. 890 explicitly provided for the “grandfathering” of contracts that contain unacceptable liquidated damages provisions

¹⁶⁵ *Id.* at 22 (citing Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 864).

¹⁶⁶ *Id.* at 23.

¹⁶⁷ Detroit Edison Comments at 10.

but that otherwise qualify for designation of Network Resources and the tariff should be revised to similarly grandfather contracts in this context.¹⁶⁸

228. AMP-Ohio argues that “make whole” should be defined in the tariff, rather than the Business Practices Manuals.

229. Southwestern also argues that the Midwest ISO should not require power purchase agreements with liquidated damages provisions to include firm point-to-point transmission service between the supply resources and LSEs’ load. It argues that power purchase agreements with liquidated damages provisions should be counted toward an LSE’s resource adequacy requirement on the same basis as agreements without liquidated damages provisions.

230. Southwestern does not oppose the Midwest ISO’s restrictions that prohibit an LSE from relying on power purchase agreements that allow suppliers to interrupt power supplies or do not have liquidated damages equal to “make whole” payments. However, Southwestern asks that the Commission not allow the Midwest ISO to restrict the designation of firm power purchase agreements that: (1) do not specify the generators from which the energy is being provided; (2) prohibit interruptions for economic reasons; and (3) provide for full liquidated damages. Southwestern argues that “[t]hese firm contracts with liquidated damages are common, have performed well over the years, and have satisfied LSEs’ required power supply resource adequacy requirements.”¹⁶⁹

231. Dynegy/LS supports the Midwest ISO’s proposal to require LSEs to identify the source of any designated capacity and to show that the owner of that resource is aware of and consents to the designation.

232. Xcel seeks clarification that Capacity Resource contracts can stipulate periods of time during which the Capacity Resource would only be available, such as an on-peak Capacity Resource.

233. Duke/FirstEnergy argue that the specific qualifications laid out in proposed section 69.2.1.2.e, including proof of deliverability and submission of generator availability data should be clarified to explain how these provisions will be applied to power purchase agreements.

234. Duke/First Energy argue that the Midwest ISO’s transmittal letter implies that a power purchase agreement containing liquidated damages provisions may be designated

¹⁶⁸ Illinois Municipal Comments at 11 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1455, 1460).

¹⁶⁹ Southwestern Comments at 18.

as a Capacity Resource so long as the agreement provides for firm point-to-point serve and the liquidated damages are of the “make whole” type. They note, however, that the proposed tariff language mandates that no power purchase agreement pay be designated a Capacity Resource if such agreement provides for liquidated damages other than a “make whole” type. Duke/FirstEnergy argue that any particular requirements pertaining to the qualification of liquidated damages contracts should be in addition to the other requirements for qualification of a power purchase agreement. Specifically, they argue that an external liquidated damages contract specify a particular resource or resources in order to be a Capacity Resource. Duke/FirstEnergy argue that Order No. 890 is not controlling, so there is no requirement for the Midwest ISO to accept liquidated damages contracts that are not tied to specific resources.

235. IPL notes that the current version of the TEMT does not define “power purchase agreement.” IPL requests that the Commission clarify that any future use of the term be defined to “take into account the current state of affairs with respect to bilateral contracting.”¹⁷⁰

b. Seller’s Choice Contracts

236. Wisconsin Electric argues that the Midwest ISO’s proposal is flawed because it does not permit entities to designate as a Capacity Resource a power purchase agreement that allows for power to be supplied from a range of potential Generation Resources if those resources are located within the Midwest ISO transmission system. Wisconsin Electric argues that this is inconsistent with the Commission’s decision in Order No. 890-A.¹⁷¹ Wisconsin Electric notes that the proposal does allow Capacity Resource designation for power purchase agreements as long as the range of potential Generation resources are outside the Midwest ISO. It asks that the Midwest ISO be directed to develop provisions to allow such agreements linked to internal Generation Resources, consistent with existing practice.

237. The Midwest TDUs argue that section 69.2.1.2.e, the sole provisions addressing purchased power agreements, “is so fundamentally flawed that it is not even a reasonable starting point for determining the treatment of the range of purchased power agreements

¹⁷⁰ IPL Comments at 18.

¹⁷¹ Wisconsin Electric states that Order No. 890-A allows resources from system purchases that are not linked to a specific generating unit to continue to be designated as Network Resources and that “the Commission’s existing policies regarding the eligibility of on-system sales for network resource status was not affected by the reforms adopted in Order No. 890.” Wisconsin Electric Comments at 16 (citing Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 885).

reasonably relied upon by LSEs in Midwest ISO.”¹⁷² The Midwest TDUs maintain that barring use of all on-system power purchase agreements that allow use of a range of resources inappropriately extends Order No. 890’s restrictions on Network Resource designation of on-system seller’s choice contracts to on-system system purchase agreements.¹⁷³ The Midwest TDUs state that Order No. 890-A “expressly provided for network resource designation of on-system purchase agreements without demanding unit-specific information as to the seller’s resources from which they are sourced (because that information is already available to the transmission provider through the seller’s network resource designations).”¹⁷⁴

238. The Midwest TDUs also state that this provision “improperly lumps together firm system purchase contracts (i.e., that are supported by the seller’s designated fleet of resources, and backed by the seller’s reserves) with seller’s choice contracts (i.e., that are not supported by a designated fleet of resources), and with on-system unit power purchases (that specify a specific a generation source on which it is typically contingent).”¹⁷⁵

239. The Midwest TDUs further argue that the terms of a qualifying off-system Seller’s choice contract would need to be examined to determine whether it is properly treated as a Capacity Resource, or is backed by reserves that should be considered. They argue that the “mechanistic importation of Order [No.] 890-A’s provisions for designating purchases as network resources (while an improvement on Midwest ISO’s wrongful disallowance of on-system purchases) into Section 69.2.1.2.e will not serve the resource adequacy purpose intended by Midwest ISO and produce just, reasonable and not unduly discriminatory rates.”¹⁷⁶

240. The Midwest TDUs ask that the Midwest ISO “be required to properly identify the types of purchases that appropriately count as a Capacity Resource (e.g., unit purchases, whether from a specific on- or off-system generation resource), provide guidelines for proper treatment of qualifying seller’s choice contracts in accordance with

¹⁷² Midwest TDUs Comments at 16.

¹⁷³ *Id.* (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 1483 (2007)).

¹⁷⁴ *Id.* at 16-17 (citing Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 889).

¹⁷⁵ *Id.* at 17.

¹⁷⁶ *Id.* at 18.

their terms, and . . . provide a clear mechanism to properly account and give full credit for reserves associated with on- and off-system firm purchase agreements.”¹⁷⁷

241. The Midwest TDUs argue that firm on-system system purchases from resources known to the Transmission Provider (because they are already designated as Network Resources by the seller) should be recognized as available to meet resource adequacy requirements. “But firm system purchases must be accounted for in a manner that recognizes that firm system purchases are already backed by the seller’s reserves, rather than treated as a generation resource that is subject to contingencies and thus requires reserves.”¹⁷⁸ They assert that the most appropriate way to treat firm system purchases for reserve adequacy purposes is to add the purchase to the seller’s load and deduct them from the buyer’s load in reserves calculations, consistent with industry practice and operating reality, but the Midwest ISO’s proposal provides no express provision for a shift from buyer to seller of reserve responsibility associated with firm system purchases. The Midwest TDUs argue that “[i]f the Commission does not require Midwest ISO to provide for on-system firm system purchases to be accounted for by shifting the load served by that purchase from the buyer to seller for purposes of Midwest ISO’s [resource adequacy requirement], the Commission should at least require Midwest ISO to account for the reserves included in such a purchase when counting the purchase as a Capacity Resource.”¹⁷⁹

242. The Midwest TDUs also argue that firm off-system purchases must be properly counted for resource adequacy purposes. They argue that “[b]y treating externally-sourced firm system purchases as merely a Capacity Resource, without distinguishing them from other externally sourced purchase power agreements that do not already include reserves, Midwest ISO inappropriately fails to take account of the reserves already included in the system purchase.”¹⁸⁰

243. Southwestern argues that while the Midwest ISO should not prohibit power purchase agreements that do not specify the generator from which the energy is being provided (but instead state that the energy will be supplied from a range of potential generators) from satisfying resource adequacy requirements. Southwestern argues that it is discriminatory that the Midwest ISO will allow such power purchase agreements to be deemed Capacity Resources if the range of generators is outside the Midwest ISO control area, but not if the range of generators is inside the Midwest ISO control area.

¹⁷⁷ *Id.* at 19.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 24.

¹⁸⁰ *Id.* at 25.

244. Southwestern asserts that the proposal needlessly limits an LSE's ability to use power purchase agreements that do not specify the exact generator from which the energy is being supplied. Southwestern states that the Midwest ISO does not provide any reason for such a restriction.

245. Southwestern also argues that the Midwest ISO allows LSEs to designate, as an "off-system Capacity Resource" a power purchase agreement that does not specify the particular generator that will provide the energy so long as the range of possible generators that will provide the energy is all outside the Midwest ISO footprint. Southwestern states that in order to so designate the power purchase agreement, the LSE must provide, among other things, specific information listed in section 29.2(v), but that information may not be available in the case the agreement does not specify the particular generator that will provide the energy. Southwestern also argues that it is not desirable for LSEs to provide that information.

246. Hoosier/Southern Illinois seek clarification that internal slice-of-system contracts are not precluded from being utilized as Capacity Resources. They argue that Order No. 890-A specifically found that the prohibition against the use of on-system seller's choice contracts as Network Resources was not meant to prohibit the use of slice-of-system contracts. They ask the tariff be revised, consistent with the draft Business Practices Manuals, to provide that "Slice-of-System contracts will qualify as firm Resources to meet Resource Adequacy requirements if the generating unit or fleet of generating units is identified upon designation."¹⁸¹

247. Illinois Municipal disagrees with the Midwest ISO's claim that its limitations on qualifying power purchase agreements are consistent with Order No. 890, arguing that the Midwest ISO's proposal require a greater showing than required by the Commission for having a resource designated as a Network Resource. Illinois Municipal also argues that Order No. 890-A makes clear that an LSE does not need to demonstrate that a power purchase contract represents a right to the output of any specific generating facilities, but that rather, the issues hinges upon the information that must be provided. Accordingly, Illinois Municipal asks that Module E be revised to make clear that on-system power purchase agreements that can or have been previously designated as Network Resources qualify as Planning Resources.

248. Duke/FirstEnergy argue that in section 69.2.1.2.e, "make whole" is not a defined term and such a key provision should not be left to the Business Practices Manuals.

¹⁸¹ Hoosier/Southern Illinois Comments at 15.

c. General Requirements For Capacity Resources

249. Xcel seeks clarification that Capacity Resource contracts can stipulate periods of time during which the Capacity Resource would only be available, such as an on-peak Capacity Resource.

d. Designation of External Resources

250. AMP-Ohio, Dairyland, Duke/FirstEnergy, Manitoba Hydro, and the Midwest TDUs express concern that the Midwest ISO not favor internal Capacity Resources over External Resources. The Midwest TDUs argue that the Midwest ISO should clarify that, “once an External Resource qualifies as a Capacity Resource (or Network Resource), it will not become disqualified because subsequent changes to system topology produce transmission model results suggesting that the External Resource causes other existing deliverable resources to become non-deliverable.”¹⁸²

251. Dairyland asserts that External Resources are not treated comparably, citing to the Midwest ISO’s proposal to exclude External Resources if they can be interrupted for reasons of *force majeure* and if they may be recalled by external entities, whereas purchase power agreements can be Capacity Resources if deliveries may be interrupted for reasons of *force majeure*. Dairyland also notes that there is a discrepancy as to whether the requirement to submit generator availability data applies to External Resources and seeks clarification from the Midwest ISO. Dairyland further argues that it is not clear whether LSEs using External Resources face a transmission capability requirement.

252. Manitoba Hydro claims that capacity purchased from External Resources should not be treated differently than internal resources. Manitoba Hydro notes that, unlike for internal resources, there is no exception allowing for External Resources to be interrupted or recalled in the event of *force majeure* and/or upon payment of liquidated damages of the make-whole type. Manitoba Hydro argues that there is no justification for the difference in treatment.¹⁸³

253. Manitoba Hydro argues that if the Commission does not direct the Midwest ISO to modify its treatment of External Resources, the Midwest ISO should be directed to

¹⁸² Midwest TDUs Comments at 36.

¹⁸³ Manitoba Hydro notes that, in November 2007, the Midwest ISO revised its form “Midwest ISO Request to Designate a Network Resource” to prohibit external resources from being designated as Network Resources if they can be recalled, whereas internal resources “may not be interruptible for economic reasons but may be curtailable for reliability reasons.” Manitoba Hydro Comments at 5.

grandfather contracts sourced from External Resources as Capacity Resources. It asserts that “[i]n order to preserve the economics of [existing] contracts which were negotiated in reliance upon the resource adequacy requirements in effect at the time, the Commission should direct the Midwest ISO to add grandfathering provisions to ensure that such power purchase agreements from External Resources qualify as Capacity Resources for the length of the contract term.”¹⁸⁴

254. AMP-Ohio argues that proposed section 69.2.1.3(d) provides that External Resources may qualify as Capacity Resources provided that the capacity portion identified for delivery has been verified as available capacity in the Regional Reliability Organizations. AMP-Ohio argues that Regional Reliability Organizations do not track and verify available capacity in this way. AMP-Ohio argues that, to the extent the Midwest ISO is trying to prevent double counting of resources, the language should require that “External Resources demonstrate firm transmission service to the Midwest ISO as well as a statement from the resource owner that the portion of the resource being committed to the Midwest ISO is not also serving load outside of the RTO.”¹⁸⁵

255. Duke/FirstEnergy argue that the Midwest ISO should clarify that proposed section 69.2.1.3.f does not impose new obligations for External Resources for purposes *other* than Module E. They are concerned that Module E not alter pre-existing obligations of External Resources for other purposes under the TEMT for which the External Resources already qualify. Duke/FirstEnergy also argue that the Midwest ISO has not sought to justify a new class of grandfathered agreements with privileged treatment in Module E, and thus Duke/FirstEnergy assume that the Midwest ISO did not intend to impart such privileged treatment upon External Resources. Duke/FirstEnergy that the Midwest ISO should clarify that External Resources must meet the requirements of Module E if the LSE wants to qualify the External Resource as a Capacity Resource.

256. Xcel faults the Midwest ISO for proposing that External Resources demonstrate capability annually. Xcel urges the Commission to direct the Midwest ISO to revise this provision so that designated External Resources are sufficient provided that they fully comply with their own state, Regional Reliability Organization or other applicable standards regarding the certification and designation of resources.

257. Xcel argues that the disqualification of External Resources to serve as Capacity Resources if they can be recalled by external entities is inconsistent with past industry practice. Xcel asserts that past capacity sales and many bilateral arrangements allow a callback of energy from the Capacity Resource by the selling system to avoid the need to

¹⁸⁴ *Id.* at 7.

¹⁸⁵ AMP-Ohio Comments at 14.

shed firm system load in shortages. Xcel states that this issue is best resolved through the stakeholder process associated with the Business Practices Manuals.

258. In addition, Xcel proposes specific changes to the provisions regarding designation of External Resources as Capacity Resources. Xcel recommends clarifying proposed section 69.2.1.3.b to require External Resources “. . . have obtained *delivery* service from source to the ultimate sink for deliverability to the LSE’s Load.”¹⁸⁶ Xcel also recommends clarifying proposed section 69.2.1.3.d to require that an External Resource’s capacity portion identified for delivery to the Midwest ISO is shown to not be also assigned to “any third party” rather than “any a non-Transmission Provider load serving entity.”¹⁸⁷

e. Determination of Resource Deliverability

259. Illinois Municipal claims that the Midwest ISO’s provisions for meeting deliverability requirements should be clarified and simplified. It argues that proposed section 69.2.1.4.d is not clear as to when generation resources that have been accepted by the Transmission Provider and confirmed as Network Resources need to be “in place.” It argues that the grandfathering should at least extend to designated Network Resources irrespective of whether or not they are “on line,” as long as they have qualified before the LSEs are required to provide their Resource Plans.

260. Illinois Municipal also notes that the grandfathered resources must still be “evaluated for aggregate deliverability and be certified deliverable in order to qualify as a Capacity Resources for the Network Customer for periods beyond the confirmed designation or in order to qualify as a Capacity Resource for any other Network Customer.” Illinois Municipal argues that the Midwest ISO should clarify that whether the “aggregate availability” requirement is a present requirement or one imposed after “periods beyond the confirmed designation.” It also asserts that there is no reference to how a Network Customer’s rollover rights will be recognized and protected.

261. Illinois Municipal also states that the provisions that require “an analysis of aggregate deliverability,” and “validation” that the resource “can be dispatched along with all other Network Resources specified by Network Customers in the vicinity of the newly-designated candidate” needs to be clarified.

262. Reliant argues that the transmission requirements associated with designating a Capacity Resource are addressed in several provisions and confusing. In particular, Reliant notes that while the Midwest ISO requires each Capacity Resource to satisfy a

¹⁸⁶ Xcel Comments at 9 (emphasis in original).

¹⁸⁷ *Id.*

deliverability requirement, that requirement should be tied to qualification of Capacity Resource status, and would not be addressed by the customer also obtaining a separate transmission service for each Capacity Resource. Reliant also argues that it is unclear as to whether the deliverability analysis will consider deliverability to the Midwest ISO region as a whole or whether a new deliverability assessment would be required each time a different LSE is designated the resource. Reliant asks the Commission to direct the Midwest ISO to clarify the deliverability/transmission processes and eliminate these ambiguities.

263. AMP-Ohio argues that existing resources should not be excluded from requesting firm network service to serve a particular load as a Network Resource.

264. The Midwest TDUs argue that the proposal fails to establish coherent deliverability requirements. The Midwest TDUs argue that the proposal recognizes two categories of deliverability requirements: (1) “aggregate deliverability” meaning “the deliverability test that new resources must meet in order to obtain Network Resource Interconnection Service” under the TEMT; and (2) “resources ‘deliverable . . . to the LSE’s Load’ [or] ‘load-specific’ deliverability.” The Midwest TDUs explain that to qualify for a Capacity Resource, “some resources would be subject to the first, aggregate, deliverability test; other resources (or the same resources at different times) would be subject to the second, load-specific deliverability test; some resources would be subject to both tests; and some resources would qualify if they met either test. The classifications and practices determining which resources are subject to which test or tests, and when, are both unclear and unexplained, and to the extent they can be understood, appear to be arbitrary.”¹⁸⁸

265. The Midwest TDUs ask that, for the purposes of satisfying any deliverability-related test that must be met in order to qualify or receive full credit for a Capacity Resource, “Existing Network Resources meet that test (as to the network customer who designated them) for the remainder of their existing designations; and Resources will not fail that test if they are either located on the Midwest ISO transmission system or brought there through firm transmission, and have been successfully designated as Network Resources under Midwest ISO Network Transmission Service.”¹⁸⁹

266. IPL argues that the filing is unclear as to whether or not Designated Network Resources that are deliverable to the Midwest ISO footprint can be counted as fulfilling LSEs’ resource adequacy requirements. IPL requests that the Commission clarify that these requirements should be consistent with the Midwest ISO’s three planning regions.

¹⁸⁸ Midwest TDUs Comments at 7-8.

¹⁸⁹ *Id.* at 14.

3. Answers

267. The Midwest ISO responds that its proposal properly implements Order No. 890 to qualify power purchase agreements as Planning Resources. The Midwest ISO acknowledges that it only had limited discussions with stakeholders on this issue, but argues that it advised stakeholders that it would comply with Order No. 890. The Midwest ISO states that its proposal is consistent with the Commission's policies on the designation of Network Resources as expressed in Order Nos. 890 and 890-A. The Midwest ISO states that, in Order No. 890, the Commission found that "LD Contracts," the shorthand name given to power purchase agreements with liquidated damages provisions, can be designated as Network Resources so long as the contract is firm, and the liquidated damages provisions are of the "make whole" type. The Midwest ISO states that make whole provisions "obligates the supplier, in the case of interruption for reasons other than *force majeure*, to make the aggrieved buyer financially whole by reimbursing them for the additional costs, if any, of replacement power. Conversely, the 'make whole' provision would also require the buyer, in cases where receipt of power is declined for reasons other than *force majeure*, to make the aggrieved seller financially whole by reimbursing them for monetary loss, if any, in having to resell the power."¹⁹⁰ The Midwest ISO argues that, while it tried to balance the various views of stakeholders, it specifically drafted Module E in accordance with the liquidated damages contract guidance in Order No. 890 because the same reliability-based principles and requirements that apply to liquidated damages contracts as Network Resources should be applied here.

268. As to seller's choice contracts, the Midwest ISO argues that the Commission has found that seller's choice contracts, power purchase agreements that rely on a number of unidentified resources from which the seller may choose to fulfill supply obligations, can qualify for Network Resource treatment only if the sources from which it will supply power are all external to the Midwest ISO. The Midwest ISO argues Order No. 890 requires all internal generation resources to be specifically and individually identified. The Midwest ISO argues that the standards provided in Order No. 890 applicable to the designation of Network Resources for the purposes of granting Network Integration Transmission Service should apply equally to Planning Resources to comply with long-term resource adequacy requirements. The Midwest ISO also notes that it is not making any changes to previously-established deliverability requirements in the TEMT.

269. In their answer, Hoosier/Southern Illinois continue to argue that the Midwest ISO should permit "slice-of system" contracts to be eligible to be designated as Capacity Resources even where the resources in question are internal to the Midwest ISO footprint so long as other requirements of Module E are met. Hoosier/Southern Illinois state that they have learned, subsequent to the drafting of their protest, that the Midwest ISO will

¹⁹⁰ Midwest ISO Answer at 11-12.

not “recognize[] [liquidated damages] and seller’s choice type contracts as a Network Resource to count toward Module E requirements, unless it is completely sourced by generating units external to the Midwest ISO.”¹⁹¹

270. Hoosier/Southern Illinois disagree with commenters like EPSA and Ameren that argue that no liquidated damages contracts should be credited as Capacity Resources. They agree with Consumers that the three year phase-out of liquidated damages contracts was carefully negotiated by the Planning Reserve Sharing Group. They argue that it would be disruptive to not honor the negotiated phase-out. Hoosier/Southern Illinois also argue that “because new resources cannot possibly be constructed and placed in service in time for the upcoming planning year, the only consequence of not honoring the phase-out would be to require LSEs that were counting on those contracts to obtain duplicative resources, ultimately inflating the prices to be paid by their end users with no gain in reliability.”¹⁹² Hoosier/Southern Illinois also argue that the Midwest ISO’s rationale for excluding seller’s choice contracts other than those sourced externally is flawed. They argue that the provisions of Order No. 890 apply to Network Resources, not resource adequacy requirements.

271. In its response to the Midwest ISO’s answer, Reliant disagrees with the Midwest ISO’s intention to exclude seller’s choice contracts from meeting the requirement to identify specific generation units as Capacity Resources. Reliant states that the Midwest ISO should not excuse External Resources from the requirement to identify specific generation capacity as Capacity Resources. Reliant argues that the standards articulated in Order No. 890 are “at best a minimum requirement, as Order [No.] 890 did not intend to address long-term resource planning.”¹⁹³ Reliant also argues that the identification of specific resources for external seller’s choice contracts will prevent the risk of double counting Capacity Resources.

272. In its response to the Midwest ISO’s answer, the Midwest TDUs reassert that it is contrary to Order No. 890-A to prohibit on-system system purchases as Capacity Resources. The Midwest TDUs argue that the Midwest ISO’s answer fails to address the distinction between system sales and seller’s choice contracts presented in Order No. 890-A, and does not acknowledge the Midwest TDUs’ argument that firm system purchases (whether on- or off-system) are already backed by the seller’s reserves. The Midwest TDUs reassert that if the Commission does not require Midwest ISO to provide for on-system firm system purchases to be accounted for by shifting the load served by

¹⁹¹ Hoosier/Southern Illinois Answer at 3.

¹⁹² *Id.* at 5.

¹⁹³ Reliant Answer at 7.

that purchase from the buyer to seller for purposes of the resource adequacy requirement, the Commission should at least require the Midwest ISO to account for the reserves included in such a purchase when counting the purchase as a Capacity Resource.

273. The Midwest TDUs also disagree with the Midwest ISO's characterization of their comments on proposed changes to Module E's deliverability requirements as a collateral attack on the existing TEMT provisions. The Midwest TDUs argue that they do not object to the use of aggregate deliverability tests in the existing TEMT. They object to the Midwest ISO's "new and confusing employment of both aggregate *and* load-specific deliverability tests" for resource adequacy purposes.¹⁹⁴

4. Commission Determination

274. In Order Nos. 890 and 890-A, the purpose of designating purchase agreements as Network Resources was restricted to granting transmission service to ensure network customers had an appropriately firm contract term to reserve Available Transfer Capability. Those orders made clear that the Network Resource designation had no bearing on whether these resources would qualify as Capacity Resources.¹⁹⁵ Accordingly, we do not consider Order Nos. 890 and 890-A to be a basis for designating purchase agreements with liquidated damages provisions as Capacity Resources.

275. Nonetheless, we acknowledge these agreements are considered to be Capacity Resources in other RTOs and ISOs, such as the CAISO. However, in order to meet the definition of Capacity Resource, these agreements should be backed by resources that can be verified.¹⁹⁶ In consideration of the foregoing, we reject the Midwest ISO's proposal to include these agreements as Capacity Resources without prejudice to the filing of a revised proposal that includes a verification of resources in the compliance filing to be submitted within 60 days of the date of this order.

¹⁹⁴ Midwest TDUs Answer at 5 (emphasis in original).

¹⁹⁵ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 837 ("Whether or not such power purchase agreements may serve as a capacity resource under PJM's Reliability Pricing Model . . . is governed by the relevant [Reliability Pricing Model] rules adopted by PJM, which were not addressed in Order No. 890."); Order 890, FERC Stats. & Regs. ¶ 31,241 at P 1584 ("However, the purpose of the *pro forma* OATT is to provide nondiscriminatory transmission access, not to enforce generation adequacy requirements.").

¹⁹⁶ CAISO, 116 FERC ¶ 61,274 at P 1313, 1325.

276. With regard to seller's choice contracts, we also find that Order Nos. 890 and 890-A do not set the standards for Capacity Resources for the reasons discussed above.¹⁹⁷ Again, the Midwest ISO has not justified these agreements in terms of their ability to be the equivalent of Capacity Resources, and for this reason we reject the inclusion of these agreements without prejudice to the filing of a revised proposal. Since we are rejecting the Midwest ISO's proposal to designate power purchase agreements and seller's choice contracts as Capacity Resources, we need not address the modifications to power purchase agreements recommended by many of the commenters.

277. With respect to External Resources, commenters note that states and other entities certify and designate Capacity Resources and seek clarification as to whether the Midwest ISO will use those designations or will only designate Capacity Resources it has certified. We direct the Midwest ISO to clarify this issue for market participants and to submit proposed provisions detailing the process for certifying and designating of Capacity Resources in the compliance filing required within 60 days of the date of this order.

278. The annual capability demonstration has an important purpose: to show that the resource can meet the peak demand needs of the LSE. Part of that determination would include a system topology analysis to assess whether the resource is deliverable to the load. We consider such a requirement reasonable. To guarantee that a resource is always a resource would not be practical. While we agree with the Midwest TDUs that the Midwest ISO is required to facilitate the planning of expansions, we do not consider that requirement to mean that the Midwest ISO must guarantee the deliverability of External Resources to their loads for the life of these facilities.

279. We note that we are rejecting the provisions on power purchase agreements to which Dairyland and Manitoba Hydro refer and, for this reason, do not address their concerns with respect to comparability of External Resources with purchase agreements. We consider the provision that requires available capacity be verified in the Regional Reliability Organization in which the resource is located to be reasonable. We do not read this requirement to be that the Regional Reliability Organization must verify the available capacity, as AMP-Ohio concludes. However, we agree with commenters that the Midwest ISO must specify all requirements for External Resources in its tariff. Therefore, we require the Midwest ISO to explain its generator availability and transmission capability requirements for External Resources and to include those

¹⁹⁷ Order No. 890 cited to examples of purchase agreements that would qualify as Network Resources but would not qualify as Capacity Resources. Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 403 (citing *Ill. Power Co.*, 102 FERC ¶ 61,257, at P 14 (2003), *order on reh'g*, 108 FERC ¶ 61,175 (2004); *Wis. Pub. Power Inc. Sys. v. Wis. Pub. Serv. Corp.*, 84 FERC ¶ 61,120, at 61,650-51 (1998)).

requirements in proposed tariff provisions to be submitted in the compliance filing to be submitted within 60 days of the date of this order.¹⁹⁸

280. With respect to the deliverability analysis after a resource has been initially determined to be deliverable, we agree with the Midwest ISO that it must have an ongoing analysis of deliverability to reflect changes in system topology. Therefore, we do not consider it reasonable for the Midwest ISO to guarantee that resources determined to be deliverable to load in past analyses will always be deliverable to load in the future.

281. While we find that the overall Midwest ISO deliverability proposal to be reasonable, we require the Midwest ISO to clarify its procedures and thereby address the concerns of commenters in stakeholder discussions and to detail those clarifications in its Business Practices Manuals.

M. Load Modifying Resources

1. The Midwest ISO Proposal

282. In the Commission's guidance order on the Midwest ISO's ancillary services market proposal, the Commission encouraged the Midwest ISO to clarify its procedures "to identify, rank, deploy, and compensate . . . demand resources during emergency conditions."¹⁹⁹

283. Under the Midwest ISO's proposal, "Load Modifying Resources" can be used to satisfy resource adequacy requirements. Load Modifying Resources are Demand Resources²⁰⁰ and behind-the-meter generation²⁰¹ that may be used to satisfy resource adequacy requirements even if they do not qualify as Network Resources. These Load Modifying Resources must be registered with the Midwest ISO and be available for use

¹⁹⁸ We agree that the Midwest ISO should clarify proposed sections 69.2.1.3.b and 69.2.1.3.d consistent with Xcel's recommendations. We direct the Midwest ISO to include these revisions in the compliance filing to be submitted within 60 days of the date of this order.

¹⁹⁹ Guidance Order, 119 FERC ¶ 61,311, at P 70 (2007).

²⁰⁰ Demand Resources consist of interruptible load, direct control load management, and other resources that can reduce demand during emergencies.

²⁰¹ Behind-the-meter generation resources are generating resources located with load that do not participate directly in Transmission Provider energy markets. These generating resources have load located behind a retail customer meter and have an obligation to be available in emergencies.

in the event of an emergency. To receive capacity credit as a Load Modifying Resource, the Demand Resource must meet the following criteria: (1) be equal or greater than 100 kW; (2) be available for load reduction at the targeted level with no more than 12-hours notice; (3) be capable of ramping down to meet the targeted load reduction level by the hour designated in the Midwest ISO scheduling instruction; (4) maintain the target level of load reduction for at least four continuous hours; (5) be capable of being interrupted at least five times during any planning year for which it receives capacity credit; (6) any requested load reduction must be a reduction that would not have otherwise occurred within the next 24-hour period; and (7) have only one market participant claiming the Demand Resource capacity credit associated with the load reduction capability. Demand Resources are offered into day-ahead and real-time energy markets as price sensitive load bids and they are obligated to be interrupted during an emergency. Behind-the-meter generation interconnected under state regulatory procedures may not be dispatched by the Midwest ISO during an emergency where state law or regulations prohibit such dispatch.

284. In the event a Load Modifying Resource fails to respond when called upon or does not respond at the targeted level, for reasons other than *force majeure* or maintenance requirements, the market participant representing the LSE that received credit for use of a Load Modifying Resource will be subject to a penalty. The responsible market participant will be required to reimburse other market participants representing the LSEs in the local balancing area the costs that were otherwise incurred to replace the deficient resource at the time the Load Modifying Resource was called upon, on a load ratio share basis. The Midwest ISO may initiate an investigation into why the resource was unavailable and may disqualify the resource from being used to satisfy future resource adequacy requirements. If the Load Modifying Resource is unavailable for a second time, it will be required to make a penalty payment and will not be eligible for use in meeting resource adequacy requirements for the current planning year as well as the next planning year.

2. Comments and Protests

a. Load Modifying Resources, Generally

285. Detroit Edison asserts that the Midwest ISO's proposal fails to explain the relationship between Load Modifying Resources under Module E and Demand Resources under schedule 30, pending in Docket No. ER08-404.

286. Midwest Industrial agrees with the Midwest ISO's definition of Planning Reserve Margin in section 1.242b to extent it requires LSEs to maintain a percentage of Capacity Resources over the net LSE Load Forecast after subtracting Load Modifying Resources. Midwest Industrial disagrees with the Midwest ISO's adjustment of the Planning Reserve Margin for the expected performance of Load Modifying Resources. It argues that Planning Reserve Margins "based on netting out capacity after *adjusting first for*

*expected performance . . . will result in a higher than necessary [Planning Reserve Margins].*²⁰²

287. Midwest Industrial argues that it is not clear what is meant by “expected performance” of Load Modifying Resources. Midwest Industrial argues that “the language ‘expected performance’ suggests that the ‘freeing up’ of capacity associated with [Load Modifying Resources] will somehow be adjusted by Midwest ISO. Since Midwest ISO proposes to enforce compliance (through penalties), adjusting [Load Modifying Resources] in any fashion is unreasonable and unacceptable.”²⁰³

288. Dairyland argue that the Midwest ISO’s proposal to net behind-the-meter generation against Forecast LSE Requirement in the calculation of resource adequacy requirements is flawed. It argues that netting load and behind-the-meter generation implies that behind-the-meter generation has 100 percent availability.

289. Xcel proposes that section 69.2.2 be amended to state that “all [Load Modifying Resources] utilized to meet [resource adequacy requirements] must be *intended to be* available for use in the event of an Emergency as declared. . .”²⁰⁴ Xcel argues that this language is necessary because no resource can be realistically expected to be available every hour of the year and the imposition of such a harsh requirement on Load Modifying Resources will result in meager resource availability.

290. Detroit Edison argues that the Midwest ISO should clarify how Load Modifying Resources will be used in emergency circumstances. Detroit Edison argues that the requirement that Load Modifying Resources must be available in the event of an emergency “pursuant to the Emergency Operating Procedures of [the Midwest ISO] utilized during emergency steps to preserve Capacity Resources dedicated to firm Load and Operating Reserves” presumes a preference for Capacity Resources of Load Modifying Resources and should be rejected. Detroit Edison maintains that “an intent to rely on interruptible loads and behind-the-meter generation prior to available generation in addressing emergency conditions” should not be dictated in advance as part of the TEMT, but should be determined by the Midwest ISO’s operating personnel.²⁰⁵

²⁰² Midwest Industrial Comments at 7 (emphasis in original).

²⁰³ *Id.* at 6.

²⁰⁴ Xcel Comments at 9-10.

²⁰⁵ Detroit Edison Comments at 14.

291. Detroit Edison also asks that the Midwest ISO clarify exactly how Load Modifying Resources will be required to meet a “must-offer” requirement during emergency events.

292. AMP-Ohio argues that Load Modifying Resources should only be called upon during emergency situations.

b. Demand Resources

293. Several commenters argue that the Demand Resource provisions are incomplete until the procedures for accrediting, testing, validating, measuring and verifying them are vetted through the stakeholder process and accepted for filing by the Commission. For example, the Midwest TDUs oppose the Midwest ISO’s proposal to relegate Demand Resource accreditation to the Business Practices Manuals. The Midwest TDUs argue that the Demand Resource accreditation process is important because of the jurisdictional sensitivities associated with contracts between LSEs and their retail customers and state-authorized demand response programs.

294. Xcel argues that proposed section 69.2.2.1 needs to be clarified to require that such procedures are in fact established and documented within the Business Practices Manuals. It recommends that the Midwest ISO be required to develop procedures for evaluating Demand Resources “as established by,” rather than “consistent with” the Business Practices Manuals.

295. Illinois Industrial also notes that, in the discussion of requirement for Demand Resources, the Midwest ISO fails to define “peak load season.” Illinois Industrial states that “[i]t is important for end-use customers participating the Demand Resource program to understand the exact parameters of their obligation and adding this definition would help clarify the time period of their obligation.”²⁰⁶

c. Demand Resource Qualifications

i. Advisory Notice²⁰⁷

296. Several commenters, such as Consumers, Detroit Edison, and the Midwest Coalition protest the Midwest ISO’s proposal for a 12-hour advisory notice, and argue in

²⁰⁶ Illinois Industrial Comments at 10.

²⁰⁷ The Midwest ISO’s Demand Resource provisions, as proposed, require a Demand Resource to be available to be scheduled for a load reduction at the targeted load reduction level with no more than a 12-hour advisory notice. Midwest ISO Filing at proposed Fourth Revised Sheet No. 824.

favor of a 24-hour notice. For example, Consumers argues that the additional 12 hours is necessary to accommodate demand response programs that are designed to shift commercial and industrial load to non-peak hours on an economic basis. The Midwest Coalition also states that this is more comparable to how the Midwest ISO treats generation resources. At a minimum, Detroit Edison asks for an 18-hour advisory notice, “as this would comport with the timing of [the Midwest ISO’s] Day-Ahead market production runs under which most generation units are given their schedules for the following day.”²⁰⁸

297. A majority of the OMS states voted to support the 12-hour advisory notice.²⁰⁹ The Michigan Commission advocates a 24-hour notice. The Ohio Commission recommends a reasonable, but unspecified, notice period.

298. Duke/FirstEnergy also express concern that the 12-hour advisory notice period is inconsistent with the requirement that, unless the load associated with a Demand Resource that would normally be available for interruption is already off the transmission system, when a Demand Response load reduction is requested by the Midwest ISO, the resulting load reduction must be a reduction that would not have otherwise occurred within the next 24 hours. They argue that if LSEs are notified of a scheduled load reduction that is required in 12 hours, but would otherwise have occurred in 18 hours, there may be costs associated with accelerating the load reduction. Duke/FirstEnergy assert that the Midwest ISO will not give the LSE credit for the load reduction and thus effectively receive six “free” hours of load reduction, and that this is unjust and unreasonable. Duke/FirstEnergy urge that the Midwest ISO be required to use the same time period for these two sections and recommend that the advisory notice be set to 24 hours.

299. In addition, AMP-Ohio asserts that the advisory notice provisions should provide a minimum time period for the Midwest ISO to give an LSE to respond. “This would seem to create a situation where an entity could register a Demand Resource that could comply with Scheduling Instructions with a one hour notice, in other words within the 12 hour maximum notice provision. The Transmission Provider could then call on the resource to respond within 30 minutes and if the resource failed to respond it would be in noncompliance with the Scheduling Instructions.”²¹⁰ It argues that when entities register

²⁰⁸ Detroit Edison Comments at 16.

²⁰⁹ The OMS members voted unanimously for a 24-hour, rather than a 12-hour, advisory notice at a December 4, 2007 Market Subcommittee meeting. A majority of the OMS approved the 12-hour advisory notice at a January 24, 2008 OMS Board Meeting. OMS Comments at 5.

²¹⁰ AMP-Ohio Comments at 15.

Demand Resources, the entity may include a minimum response time of up to 12 hours and that the entity may not be penalized for not responding to Scheduling Instructions in less time than the entity listed as a minimum response time for the Demand Resource.

300. Detroit Edison states that Load Modifying Resources' designations as Planning Resources should not need to demonstrate capability through physical testing procedures.

ii. Curtailed

301. Midwest Industrial argues that the proposal needs to be revised to include interruptible demand that curtails down to a specified firm level. Similarly, Illinois Industrial argues that requiring Demand Resources to curtail by a pre-specified MW amount could make it impractical or uneconomic for existing end-use customers who presently participate in the Interruptible Demand program to continue to participate in the program. Illinois Industrial asks the Commission to require the Midwest ISO "to make clear in its tariff that Demand Resources are only required to curtail down to a firm demand level and not required to curtail demand by a pre-specified amount of MW."²¹¹

302. Midwest Industrial also argues that the Midwest ISO should provide separate designations for targeted load reductions on the one hand, and load curtailments to a specific firm service level on the other.

303. Xcel contends that the Midwest ISO's proposal to require Demand Resources to be capable of ramping down to meet the targeted load reduction level is not specific enough. It recommends that the Midwest ISO be directed to strike the detailed requirements of this sub-section and defer their development to the Business Practices Manuals. In the alternative, it recommends that the proposed language be revised to provide that "the required notice period has been met by the Transmission Provider and respecting other Demand Response attributes such as response sensitivity to Day of Week or similar limitations as may be characterized in the offer parameters of the Demand Response Resource."²¹²

304. Xcel further argues that it is too restrictive for the resultant load reduction to be a reduction that would not have otherwise occurred within the 24-hour period. It believes that the intent of this section should be clarified by stipulating that the demand reduction would not have otherwise occurred within in the same clock hours during the next 24-hour period. It recommends that this level of detail be further developed as part of the stakeholder process to establish the Business Practices Manuals.

²¹¹ Illinois Industrial Comments at 10.

²¹² Xcel Comments at 10.

305. Illinois Industrial asks that the Midwest ISO clarify that the testing of Demand Resources will not require the actual physical curtailment or interruption of load.

306. Duke/FirstEnergy note that the proposal requires a Demand Resource must be capable of being interrupt at least five times during “peak load season” and ask that the term “peak load season” be defined in order to avoid disputes regarding Demand Resource qualification. Duke/FirstEnergy request that the Midwest ISO also explain how and when the capability referenced in this section will be determined.

307. Midwest Industrial argues that the Midwest ISO has not provided any justification why Demand Resources must be capable of being interrupted at least five times during peak load season. It maintains that a more reasonable requirement for Demand Resources is to have the capability and frequency of interruptions to be no more than one occurrence per peak month in a planning year.

d. Behind-the-Meter Generation

308. Ameren and AMP-Ohio argue that behind-the-meter generation should not be dispatched during emergencies because certain behind-the-meter generation may never be available during emergencies because of state regulatory procedures and agreements. AMP-Ohio argues that in such cases, those resources provide no reliability benefit and should not qualify as Load Modifying Resources. AMP-Ohio states that it understands the Midwest ISO’s intention to include units that are energy limited due to state environmental regulations to particulate as capacity, but the proposed tariff language is too broad. Ameren argues that, at a minimum, such resources should be subject to dispatch when the zone in which they are located is capacity deficient.

309. Integrys argues that, based on stakeholder discussions, behind-the-meter generation should be able to be used either as a Load Modifier or as a Capacity Resource or local Capacity Resource.

310. Xcel argues that the proposed tariff revisions suggest that the Midwest ISO is obligated to activate behind-the-meter generation during declared emergencies prior to using Operating Reserves, but even during an emergency, the Midwest ISO may still make transitory use of Operating Reserves to respond to loss of a unit or to accommodate an interchange ramp period. Xcel argues that it believes the intention was to indicate that behind-the-meter generation resources would be deployed prior to the Midwest ISO’s operating decision to accept chronic depletion of operating reserves as the means to continue service to load.

311. Michigan Public Power argues that the definition of behind-the-meter generation is confusing, restrictive and not reflective of historical treatment of its member-owned generation. It notes that definition restricts behind-the-meter generation to resources located behind a retail customer, and therefore, would not recognize Michigan Public

Power's resources serving load located behind a Commercial Power Node. It also notes that the proposed definition was not discussed in the stakeholder process. Michigan Public Power argues that a clearer and more concise definition would be "a generating resource used to serve load located behind a CPNode."²¹³

312. Michigan Public Power also argues that the Midwest ISO's proposal inappropriately postpones the development of procedures for the treatment of behind-the-meter generation. Michigan Public Power argues that the proposal does not make clear whether these procedures will come in the form of additional tariff provisions or be incorporated into the Business Practices Manuals. It asserts that these undeveloped procedures could potentially restrict the flexibility that Michigan Public Power relies upon in accessing its behind-the-meter generation.

313. By contrast, Northern Indiana argues that the Midwest ISO's definition properly excludes the behind-the-meter generation installations of customers not contractually obligated to provide Northern Indiana with capacity and energy during system emergencies or otherwise. Northern Indiana also notes that, in some cases, it does not have the proprietary information regarding the capability and characteristics from these customers to provide to the Midwest ISO should Northern Indiana be required to submit information on behind-the-meter generation resources connected to its system.

314. Wolverine argues that the definition of behind-the-meter generation should not be limited to resources located behind a retail customer meter. Wolverine notes that certain of its own generating units that do not participate in the Midwest ISO's energy markets are currently treated as behind-the-meter under the TEMT and, although they are not located behind a retail customer meter, they are available for use in the event of an emergency, so should qualify in meeting Wolverine's resource adequacy requirement.

315. Illinois Industrial also notes that, in the discussion of requirement for Demand Resources, the Midwest ISO fails to define "peak load season." Illinois Industrial states that "[i]t is important for end-use customers participating the Demand Resource program to understand the exact parameters of their obligation and adding this definition would help clarify the time period of their obligation."²¹⁴

316. Integrys argues both retail and wholesale generation should qualify as behind-the-meter generation.

317. Duke/FirstEnergy request that the Midwest ISO revise the definition of behind-the-meter generation to clarify that it is the generation resource, not the load with which

²¹³ Michigan Public Power Comments at 6.

²¹⁴ Illinois Industrial Comments at 10.

the resource is located that does not participate directly in the market. Duke/FirstEnergy also request that the Midwest ISO either allow behind-the-meter generation to be located behind a wholesale customer meter or explain why it is appropriate to exclude wholesale customers.

318. The Midwest TDUs argue that although the Midwest ISO's proposal allows an LSE to use behind-the-meter generation as a "Load Modifying Resource" to satisfy resource adequacy requirements, the Midwest ISO's definition only includes behind-the-meter generation that is behind the retail meter, and excludes generation that is behind the wholesale meter, that is generation that is located on an LSE's distribution system and owned by the LSE. The Midwest TDUs state that this may have been inadvertent. However, if the exclusion was intentional, the Midwest TDUs ask that the Commission require the Midwest ISO to revise the definition to include generation behind the wholesale meter to appropriately recognize the value of all behind-the-meter generation on a non-discriminatory basis.

319. AMP-Ohio and Hoosier/Southern Illinois argue that there is no valid reason for excluding wholesale customer generation from the definition of behind-the-meter generation. They note that wholesale customer generation operating behind the meter can provide valuable reliability services. AMP-Ohio also notes that PJM's Reliability Pricing Model does not exclude wholesale customer generation from the definition of behind-the-meter generation.

320. Illinois Municipal argues that the definition of behind-the-meter-generation needs to be better defined. For example, Illinois Municipal questions what "participate directly" in the market means in the context used by the Midwest ISO. Illinois Municipal argues that the definition should make it clear that municipally-owned generation qualifies as a Load Modifying Resource.

e. Penalties for Load Modifying Resources

321. Several commenters, including the OMS, the Illinois Commission, the Midwest Coalition, Midwest Industrial and Strategic, argue that the penalties for Load Modifying Resources should be removed from the tariff until all penalty provisions are filed with the Commission.

322. The OMS expresses concern that the Midwest ISO's proposal in this proceeding as well as the Midwest ISO's proposal in Docket No. ER08-404 (proposed Midwest ISO Schedule 30) assess penalties for failure to perform. The OMS notes that timing of the penalty provisions provided here cross the line between Midwest ISO Planning Year and Real Time operating activity. The OMS asks that the Commission defer the penalty provisions for Load Modifying Resources for consistency with the payment provisions of proposed Schedule 30. The OMS states that "[d]elaying this provision . . . would provide more time to determine whether penalties for nonperformance of demand response

resources in real time belong in Module C or Schedule 30 and to ensure consistency with the non-performance penalties of other resources.”²¹⁵

323. Midwest Industrial notes that until the base information regarding LSEs’ resource plans are provided (and they are not due until March 1, 2009), the penalty provisions should not apply. Midwest Industrial further argues that it is unclear how the financial penalty to replace the “deficient resource at the time that the [Load Modifying Resource] is called and does not respond” will be calculated. It argues that the Midwest ISO should have to submit a methodology to calculate the financial penalty before it can ascertain whether any of the penalty provisions are reasonable.

324. The Midwest Coalition states that the Midwest ISO has requested a transition period for resource adequacy requirements, such that LSEs are not required to submit specific resource plan information to the Midwest ISO until March 1, 2009, but the actual tariff language in section 69.2.2.3 does not reflect this intent. Third, the Midwest Coalition argues that the penalty provisions accepted by the Commission in other RTOs only apply where the Demand Resources receive corresponding capacity payments or capacity obligation offsets. “In the case of [the Midwest ISO], however, there is no centralized capacity market that provides capacity payments from a [Midwest ISO] market to demand response resources. In the absence of such capacity payments and in the absence of any evidence that penalties are necessary to induce performance in real-time, the penalty provisions in Section 69.2.2.3 should not be accepted.”²¹⁶ Finally, the Midwest Coalition states that the proposed tariff provision is too vague, noting that the tariff cites measurement and verification procedures, but none exist.

325. Southwestern states that it interprets the requirement for the responsible market participant “to reimburse the [market participants] representing the LSE in the [l]ocal [b]alancing [a]rea the costs that were otherwise incurred to replace the deficient resource at the time the [Load Modifying Resource] was called upon by the Midwest ISO, on a load ratio share basis” to mean that the Midwest ISO will allocate the costs of replacing the deficient resource only to non-complying market participants based on their load share and that no such costs will be allocated to other market participants. Southwestern maintains that any other allocation would be unjust and unreasonable.²¹⁷

326. Illinois Industrial argues that the proposed tariff revisions providing for penalties for Load Modifying Resources that fail to follow curtailment instructions make no allowance for exempting Load Modifying Resources from such penalties when the

²¹⁵ OMS Comments at 6.

²¹⁶ Midwest Coalition Comments at 9.

²¹⁷ Southwestern Comments at 13.

Midwest ISO fails to communicate instructions to Load Modifying Resources either due to a procedural failure by Midwest ISO or a failure of the Midwest ISO's communication system. Illinois Industrial asks that such an exemption be added to ensure there is not risk of penalty to customers under those circumstances.

327. Wolverine argues that behind-the-meter generation, as well as Demand Resources, should be excused from penalties if they are already being dispatched for either economic or reliability reasons at the time of a Midwest ISO emergency. Wolverine notes that a waiver of the penalty for a load reduction only applies to a request for interruption and does not specifically address a reduction in net load effected by an increase in dispatch.

328. Ameren argues that, under the Midwest ISO's proposal, in the event a Load Modifying Resource is called and does not respond, the market participant representing the LSE that has received a credit for the Load Modifying Resource would need to "replace the deficient resource." Ameren argues that this is more punitive than the penalties for Capacity Resources. Ameren also argues that the Commission should require the Midwest ISO to ensure comparable treatment of Load Modifying Resources and Capacity Resources when implementing the financial settlement/enforcement mechanisms in the future.

f. Disqualification of a Load Modifying Resource

329. AMP-Ohio objects to the Midwest ISO's proposal to subject a Load Modifying Resource to potential disqualification after its first instance of non-availability. AMP-Ohio asserts that the consequences of a Load Modifying Resource's first instance of non-availability are not always clear. It also argues that the proposal does not provide an LSE the opportunity to offer mitigation measures to ensure future compliance or for a Load Modifying Resource to return after disqualification. AMP-Ohio also argues that the Midwest ISO does not explain the process by which an LSE can challenge a determination that a resource was not subject to "maintenance requirements."

3. Answers

330. The Midwest ISO asserts that its treatment of Load Modifying Resources as Planning Resources is reasonable.

331. First, the Midwest ISO argues that the Demand Response used for Capacity Resources is fundamentally different than demand response that is proposed to be used as part of the Emergency Demand Response proceeding in Docket No. ER08-404. Therefore, the Midwest ISO argues that it would not be productive for the Commission to defer implementation of Module E Load Modifying Resources provisions and consolidate questions relating to non-performance as part of the Emergency Demand Response Proceeding. The Midwest ISO states that it will work with stakeholders to develop

testing procedures that ensure that Demand Resources are available during times of emergencies with minimum interruption by the Midwest ISO to encourage greater participation.

332. The Midwest ISO agrees with AMP-Ohio and Detroit Edison's request that behind-the-meter generation designated as a Load Modifying Resource are only required to be available during emergencies.

333. The Midwest ISO states that, based on the comments and protests, it believes it would be appropriate to modify the definition of behind-the-meter generation to remove the word "retail," and commits to doing so in a compliance filing if the Commission finds such modification to be appropriate. However, it does not agree with commenters that behind-the-meter generation should be otherwise expanded, arguing that "it cannot accredit [behind-the-meter generation] of which it has limited or no knowledge as Planning Resources. . . . With the exception of additional registration and information requirements required to properly assess resource adequacy, the proposed treatment of [behind-the-meter generation] . . . varies little from the current treatment under the existing Module E provisions."²¹⁸

334. The Midwest ISO asserts that the 12-hour advisory notice period is reasonable. It argues that this is necessary to avoid endangering reliability, because "resources that require more than 12 hours advance notice will likely not be available to provide load reduction (energy) during declared Emergencies."²¹⁹

335. Furthermore, the Midwest ISO argues that there should be no confusion regarding deliverability requirements, as the deliverability analysis is unchanged from the existing tariff.

336. In its response, the Midwest Coalition continues to disagree with the Midwest ISO's assertions that it is appropriate to limit resource adequacy eligibility to only those Demand Resources that can respond on 12-hours notice or less. The Midwest Coalition argues that this is inconsistent with the Midwest ISO's Emergency Demand Response initiative in Docket No. ER08-404, wherein the Midwest ISO did not propose any notice limitation. The Midwest Coalition also states that the Midwest ISO did not represent to stakeholders that any notice was necessary, and has, in fact, indicated that Emergency Demand Response participant notice requirement of as much as 24 hours, and perhaps more, would be respected. The Midwest Coalition also states that, contrary to the Midwest ISO's claims, capacity deficiencies are not completely unforeseeable and argues that the Midwest ISO will likely have advance knowledge of potential emergency

²¹⁸ Midwest ISO Answer at 17.

²¹⁹ *Id.* at 34.

conditions by 7:00 pm prior to the operating day, and perhaps sooner. The Midwest Coalition also expresses concern that a 12-hour notice limitation could undercut participation in the Demand Response program.

4. Commission Determination

337. The focus of the Midwest ISO's proposal is the inclusion of Demand Resources and behind-the-meter generation, i.e. Load Modifying Resources, in satisfying an LSE's resource adequacy requirements. To the extent the Midwest ISO has addressed emergency management provisions here, we believe it appropriate.²²⁰ These emergency management provisions are tied to the must-offer requirements for all resources, including Load Modifying Resources, that are also part of the resource adequacy proposal and therefore they should be evaluated in this proceeding. Accordingly, we will not delay consideration of these provisions until the Commission has made a determination on the Emergency Demand Response proposal in Docket No. ER08-404.²²¹ With respect to the processing issues raised by the OMS,²²² the ongoing compliance process in this proceeding and simultaneous consideration of the proposal in Docket No. ER08-404 will allow commenters and the Commission to address all aspects of both proceedings in a manner that ensures due process and full consideration of all issues.²²³

338. We find reasonable the Midwest ISO's proposal to consider the expected performance of Load Modifying Resources in the same way it evaluates outage rates for generation resources, in its evaluation of planning resources of LSEs.²²⁴ To ensure LSEs

²²⁰ As previously noted, the Commission requested that the Midwest ISO address treatment of Demand Response Resources during emergency conditions in its guidance order on the Midwest ISO's ancillary services market proposal. Guidance Order, 119 FERC ¶ 61,311 at P 70.

²²¹ We consider the Midwest ISO answer on the relationship between the provisions proposed in Docket No. ER08-404 and this proceeding to be responsive to Detroit Edison's concerns.

²²² OMS Comments at 6.

²²³ We will not require the Midwest ISO to insert "intends to" into the description of the availability of Load Modifying Resources. We consider it reasonable that Load Modifying Resources be available for use in the event of an emergency.

²²⁴ Since the Midwest ISO is evaluating expected performance, we do not believe the conclusion of Dairyland to be correct that the Planning Reserve Margin calculation assumes 100 percent availability of behind-the-meter generation.

understand the basis for the Midwest ISO's evaluations, we require the Midwest ISO to develop a process to explain its evaluations and provide opportunities for input on the appropriate performance parameters. We require the Midwest ISO to detail this process in the compliance filing to be submitted within 60 days of the date of this order.

339. We agree with Detroit Edison that Load Modifying Resources designated as Planning Resources should not need to demonstrate capability through physical testing procedures that interrupt their load. We direct the Midwest ISO to develop testing criteria for Load Modifying Resources that ensure these resources are capable of responding during emergencies and to ensure the testing of capabilities avoids interruptions. These revisions should be included in the compliance filing to be submitted within 60 days of the date of this order.

340. We agree with Detroit Edison that the phrase in the description of Load Modifying Resources in section 69.2.2, "pursuant to the Emergency Operating Procedures of the Transmission Provider utilized during emergency steps to preserve Capacity Resources dedicated to firm Load and Operating Reserves and in accordance with prohibitions and restrictions under state laws, rules, standards, and permits" is confusing, and accordingly we require the Midwest ISO to clarify the purpose of this phrase, and its impact on the use of the various resources during emergency conditions, in the compliance filing to be submitted within 60 days of the date of this order.²²⁵

341. We also agree with Detroit Edison that the Midwest ISO's proposal lacks specificity with respect to the offering procedures for Load Modifying Resources during emergencies, including the time frames under which offers must be made and other procedural requirements and the specific actions that will result in penalties. Accordingly, we require the Midwest ISO to clarify these procedures, and to provide revised tariff provisions within 60 days of the date of this order.

342. We agree with Ameren and other commenters that testing to ensure Demand Resources are available during emergencies is a key element in the development of a reliable emergency program. We find the Midwest ISO commitment to work with stakeholders on these issues to be responsive to their concerns. We find the Integrys recommendation that the testing procedures be established in the TEMT, rather than the Business Practices Manuals, to be appropriate for these important provisions and

²²⁵ We do not consider the phrase to confer a preference for other resources over Load Modifying Resources, as Detroit Edison contends, since the definition of Capacity Resources includes Demand Resources.

therefore require this revision be incorporated in the compliance filing to be submitted with 60 days of the date of this order.²²⁶

343. We find that the Midwest ISO's proposed 12-hour notification requirement could be reasonable for demand response resources providing emergency resources. Since it is the Reliability Coordinator for the Midwest ISO region, we place significant weight on the Midwest ISO's position that the 12-hour notice is required to avoid endangering reliability. However, in the absence of any evidence from the Midwest ISO to support the need for a 12-hour notice period, we direct the Midwest ISO to explain why the 12-hour advisory notice period is reasonable and provide support for its assertions that resources that require more than 12-hours advance notice will likely not be available to provide load reduction during emergencies and that the proposal is necessary to avoid endangering reliability.

344. We also agree with AMP-Ohio and Duke/FirstEnergy that the Midwest ISO needs to clarify the meaning of "advisory" notice, the apparent conflict of the 12-hour notice with the 24-hour reduction in proposed section 69.2.2.1.a.vi, and its requirements for response times of Load Modifying Resources. We direct the Midwest ISO to provide these clarifications in the compliance filing to be submitted within 60 days of the date of this order.

345. We agree with Illinois Industrial that it is not clear whether it is the Midwest ISO's intent to require Demand Resources to reduce load by a pre-specified amount equal to the targeted MW level at which the Demand Resource is qualified or if market participants can specify a targeted load reduction level, as the TEMT specifies in proposed section 69.2.2.1.a.ii, when they receive notice from the Midwest ISO to participate in an emergency. We expect that when the Midwest ISO provides notice to Load Modifying Resources that it needs their resources, the Midwest ISO is requesting these resources to specify a reduction down to a MW level for load, and that amount is specified at the time of the notice and prior to scheduling. We direct the Midwest ISO to clarify this interpretation in the compliance filing to be submitted within 60 days of the date of this order.

346. We agree with Xcel that the scheduling of Load Modifying Resources should be conditioned on the limitations of the offer parameters of the Demand Resource, including limitations based on the day and week of the emergency. Accordingly, we direct the Midwest ISO to discuss with stakeholders the details of the parameters and to provide

²²⁶ We also require the Midwest ISO to revise proposed section 69.2.2.1 so that it specifies the procedures for accrediting, testing, validating, measuring and verifying Load Modifying Resources are incorporated into the TEMT, and to delete references to the Business Practices Manuals.

revised tariff provisions in the compliance filing to be submitted within 60 days of the date of this order.²²⁷

347. We recognize that the setting of a minimum interruption requirement is needed to ensure that the Load Modifying Resources are available to make a meaningful contribution to emergencies throughout the year. However, we are concerned that the threshold not be set so high as to limit participation by Load Modifying Resources, and thereby reduce the benefits of these resources in lowering the amount of additional resources that must be built. Accordingly, we require the Midwest ISO to provide a summary of its stakeholder discussions on this issue as well as an explanation of the feasibility and impact of reducing the minimum requirement to the proposed less than five times a year in the 60-day compliance filing required by this order.

348. We agree with Michigan Public Power that the Midwest ISO must specify the procedures for committing and dispatching behind-the-meter generation, and those procedures should be specified in the tariff. Without such procedures, market participants will not be able to evaluate whether their Load Modifying Resources can participate in the resource adequacy program and under what circumstances participation is feasible. Accordingly, we require the Midwest ISO to specify these procedures in the 60-day compliance filing.

349. With regard to behind-the-meter generation, we find that the Midwest ISO's proposal to allow behind-the-meter generation subject to state restrictions to qualify as emergency resources to be problematic, and note the concern of commenters that these resources may not be available during emergencies. The purpose of Load Modifying Resources, which include behind-the-meter generation, is to provide emergency resources²²⁸ and to provide them in an effective manner during emergencies. While we accept this provision, we direct the Midwest ISO to address the concerns that this provision endangers reliability by creating a class of resources that are not available during emergencies, by providing an assessment of the reliability impact of these resources, and their potential for non-performance, to be submitted in the 60-day compliance filing.

350. We understand the concern of Integrys – that any generation, retail or wholesale, that does not participate in the energy market should be considered a Load Modifying Resource or Capacity Resource – to be primarily a concern that behind-the-meter

²²⁷ We also find the Midwest ISO response that it will limit the curtailments to the extent possible to be responsive to the concerns of the Illinois Industrials.

²²⁸ Under the Midwest ISO's proposal, Load Modifying Resources are obligated to be interrupted during an emergency. Midwest ISO Filing, Transmittal Letter at 11.

generation be considered a Capacity Resource since the Midwest ISO has specified procedures for the participation of all other generation resources in its proposal. We agree with Integrys that these resources may be able to make a contribution to resource adequacy and therefore we require the Midwest ISO to provide an explanation of the feasibility of these resources participating as Capacity Resources and make a proposal for their participation in the compliance filing to be submitted within 60 days of the date of this order.

351. We agree with Xcel that the Midwest ISO needs to clarify how it will deploy behind-the-meter generation in emergencies and to explain why behind-the-meter generation are deployed prior to Operating Reserves. We direct the Midwest ISO to make this clarification in the compliance filing to be submitted within 60 days of the date of this order.

352. We find the Midwest ISO answer that it will delete the term “retail” from its definition of eligible behind-the-meter generation, and replace it with terms that allow for behind-the-meter generation with wholesale service to participate to be responsive to commenters, and require this revision be included in the compliance filing.²²⁹ We agree with Illinois Industrial that “peak load season” needs to be defined so that market participants better understand their obligations. We also agree with Duke/FirstEnergy that the Midwest ISO should clarify that the definition of behind-the-meter generation is generation, not load, that does not participate directly in the market. We require the Midwest ISO to include this definition and clarification in the compliance filing to be submitted within 60 days of the date of this order.²³⁰

353. We understand the phrase “do not participate directly in the Transmission Provider Markets” to mean generators that do not offer into the Midwest ISO energy and reserves markets, and consider that phrase to be generally understood by market participants. We also expect that behind-the-meter generation of municipal entities would be generally considered as behind-the-meter generation, and therefore no additional revisions or explanations are needed in this regard.

354. Turning to the proposed penalty provisions, we do not consider these provisions to be inappropriate or inequitable. Stakeholders found these provisions to be necessary,

²²⁹ We also require the Midwest ISO to determine whether the behind-the-meter generation of Wolverine can qualify as Load Modifying Resources and to apprise the Commission of the status of those resources in the compliance filing.

²³⁰ We also require the Midwest ISO to revise these provisions to state that behind-the-meter generation will only be called upon during emergency circumstances, consistent with its answer to AMP-Ohio.

and the Commission found such measures to be useful to ensure reliability during shortages in its guidance order on the ancillary services market.²³¹ The decision to designate Load Modifying Resources by market participants is voluntary and therefore they make the decision to participate and abide by the terms of the penalties applicable to Load Modifying Resources knowing the terms of their participation. As the Midwest ISO notes, these resources are compensated through bilateral arrangements and therefore we do not consider the fact that the Midwest ISO does not have a capacity market to be a barrier to participation. The fact that the financial settlement provisions are still under development is irrelevant to these provisions. As discussed above, management of emergencies and the terms of participation for resources are primarily short-term reliability issues. These issues need to be resolved as soon as possible – and put into effect as soon as possible – to ensure the Midwest ISO has the resources and procedures to manage reliability. For this reason, we do not consider the fact that the financial settlement provisions will be evaluated several months later than these provisions to be inequitable.

355. We consider the payment of the cost to replace the deficient resource to be an appropriate penalty that reflects cost causation.²³² As discussed above, we do not consider Load Modifying Resources and Capacity Resources to be identical, contrary to Ameren's position. Load Modifying Resources must perform a critical function in emergencies and therefore the penalty for failure to perform at these times should be commensurate to the costs incurred. However, we agree with Ameren that the Midwest ISO needs to clarify how it will calculate the cost impact of the deficient resource, and we direct the Midwest ISO to provide its clarification in the compliance filing to be submitted within 60 days of the date of this order. Consistent with cost causation, we presume the costs incurred to replace a resource to be the incremental costs of replacing the demand resource with another resource.

356. We agree with commenters that market participants should not be assessed penalties in the event the Midwest ISO fails to communicate instructions or there is a failure in the Midwest ISO communication system. We require the Midwest ISO to revise its tariff accordingly in the compliance filing to be submitted within 60 days of the date of this order.

357. While we understand that the exceptions to the penalties do not specifically address a reduction in net load caused by an increase in dispatch from a behind-the-meter

²³¹ Guidance Order, 119 FERC ¶ 61,311 at P 70.

²³² We agree with Southwestern that the provision states that costs will be allocated only to the market participants not in compliance and therefore subject to the penalty, and that this cost allocation correctly reflects cost causation.

generator, we do not consider the phrase proposed by Wolverine – Load Modifying Resources are called upon – to clearly specify the circumstance. Accordingly, we require the Midwest ISO to revise this tariff provision to more specifically provide an exception for behind-the-meter generation that increase their dispatched quantities in the compliance filing to be submitted within 60 days of the date of this order.

358. We agree with commenters that the Midwest ISO needs to specify the measurement and verification procedures that apply to temperature sensitive Load Modifying Resources. Since those procedures are a factor in determining the penalty, we require these procedures in revised tariff provisions to be submitted in the compliance filing.²³³

359. As AMP-Ohio points out, the disqualification provision is unclear. As currently written, the provision may disqualify market participants with the first infraction in section 69.2.2.3.a. If the market participant is not disqualified for the first infraction and continues its participation, then an occurrence of a second infraction could make it liable for a one-year suspension as per section 69.2.2.3.b. In contrast, the testimony of the Midwest ISO only references the financial charge as the liability for the first infraction.²³⁴ In the event the Midwest ISO proposes to disqualify a market participant upon the first infraction, we presume the disqualification is not automatic and, to ensure clarity, we direct the Midwest ISO to revise its tariff to set forth a clear set of standards by which it would penalize a Load Modifying Resource for failure to respond. Market participants must know the basis for any penalty, especially one as severe as disqualification, and the basis for such a penalty must be specified in the TEMT. Also, the Commission needs to know the basis for penalizing market participants to ensure that the provision is not unduly discriminatory or preferential. We direct the Midwest ISO to submit tariff revisions consistent with this section in the compliance filing to be submitted within 60 days of the date of this order.

N. Electronic Bulletin Board

1. The Midwest ISO Proposal

360. Proposed section 69.3.3 provides for the Midwest ISO to facilitate a voluntary capacity exchange on an electronic bulletin board platform that allows market

²³³ While the Midwest ISO has provided the general formulation of the penalty in its tariff, we agree with commenters that the Midwest ISO should specify the calculation of the financial penalty to replace the deficient resource in its Business Practices Manual prior to the effective date of the provisions.

²³⁴ Midwest ISO Filing, Robinson Aff. at 16.

participants to enter into confidential transactions. The electronic bulletin board would facilitate transactions between market participants with excess planning resources and LSEs that have the need for those planning resources. The Midwest ISO Market Subcommittee voted to remove this provision from the proposal by a vote of 20 to 17, with 10 of the 17 opposed representing state members of the OMS. The Midwest ISO weighed the positions of stakeholders and chose to include the electronic bulletin board in the proposal because the Midwest ISO believes it is a valuable tool that provides an incentive to provide more accurate resource plans.

2. Comments and Protests

361. Southwestern supports the Midwest ISO's proposal to maintain an electronic bulletin board, noting that the posting of capacity prices of bilateral contracts will facilitate price transparency.

362. In contrast, commenters such as Consumers and Dynegy/LS argue that the electronic bulletin board is neither necessary nor likely to be used by market participants and should therefore be removed from the proposal. They note that the provision is not supported by stakeholders and a majority of the Market Subcommittee voted to remove the provisions. Dynegy/LS also argues that there are third-party vendors and exchanges (such as the IntercontinentalExchange, Inc., the New York Mercantile Exchange and the Chicago Board of Trade) that already have the capability and expertise necessary to perform this service for market participants. Dynegy/LS further state that many stakeholders expressed concerns about confidentiality.

363. IPL asserts that the electronic bulletin board is not necessary to the resource adequacy filing and may present jurisdictional problems. IPL is willing to work with the OMS and the Midwest ISO to develop a voluntary capacity exchange where no corresponding tariff provisions are required.

3. Commission Determination

364. We accept the Midwest ISO's proposal to maintain an electronic bulletin board for bilateral transactions. While we understand the concerns of market participants with regard to the posting of confidential information, we note that the proposed electronic bulletin board is voluntary and, therefore, does not require any market participant to divulge information it does not want to release. Furthermore, the Midwest ISO represents that the transactions will be kept confidential. Accordingly, we do not find this provision to be unreasonable, and to the extent it can facilitate capacity transactions, it should benefit the market. As to IPL's claim that the electronic bulletin board threatens the jurisdictional balance for resource adequacy, we note that IPL does not give any further explanation for its concerns, and we can find no jurisdictional implications of the proposal.

O. Capacity Markets

1. The Midwest ISO Proposal

365. The Midwest ISO does not propose to establish a centralized capacity market in this filing. As discussed above, the Midwest ISO instead proposes to require bilateral procurement of capacity by LSEs to meet the requirements determined by the Midwest ISO or states, as applicable. In his testimony, however, Mr. Doying explains that during Supply Adequacy Working Group meetings, some of the market participants' proposals for addressing capacity-deficient LSEs included conducting auctions to procure capacity for the deficient LSEs or establishing financial settlements based on the cost of new investment.

2. Comments and Protests

366. Several commenters contend that the Midwest ISO needs to adopt a centrally-run capacity market such as those used in PJM and ISO-NE. Constellation argues that the end result of this proceeding "should be the creation of a liquid, fungible formal capacity market which will resolve the potential reliability and planning problems of the Midwest ISO region."²³⁵ Integrys argues that Midwest ISO should implement a Forward Capacity Market to properly address long-term resource adequacy issues. Integrys argues that an energy market is not sufficient to recover the total cost of new generation and that the Midwest ISO should implement a formal, forward market for capacity, in which fungible capacity products can be traded over the long term. Integrys argues that the Midwest ISO should adopt a monthly capacity auction "to facilitate acquisition of capacity by LSEs before the date such capacity is due, to avoid gaming by both LSEs and capacity sellers and avoid withholding of capacity by sellers, and to financially settle charges to LSEs who have not provided sufficient capacity by the due date."²³⁶ Dynegy argues that the lack of financial settlement/enforcement mechanisms provides no incentive to comply with the resource adequacy requirements. Constellation asks that the Commission reject the Midwest ISO's proposal and direct the Midwest ISO to establish a resource adequacy plan that can operate as a formal capacity market. Dynegy argues that the Midwest ISO must create compliance incentives or create a market structure similar to PJM's Reliability Pricing Model.

367. Other market participants argue that the Midwest ISO needs to develop a centralized trading mechanism to help ensure resource adequacy and to facilitate the trading of capacity. Reliant argues that it would be more efficient for the Midwest ISO to

²³⁵ Constellation Comments at 5.

²³⁶ Integrys Comments at 8.

adopt a “single integrated system that would provide a platform for market participants and the Midwest ISO to perform the myriad of functions that will be involved in these procedures.”²³⁷ Reliant notes that other RTOs have adopted integrated systems that “efficiently account for capacity obligations and commitments, facilitate and track bilateral resource exchanges, monitor compliance, and assess penalties, and these model clearly provide ‘Best Practices’ that the Midwest ISO should adopt.”²³⁸ Reliant notes that PJM has developed its eCapacity system to administer its resource adequacy programs which until recently reflected a similar Unforced Capacity based approach as proposed by the Midwest ISO. Dominion argues that the Midwest ISO’s proposal “lacks a viable surrogate for the benefits and safeguards of forward-looking capacity markets that support a tradable capacity product through structured market mechanisms.”²³⁹

368. Taking the opposite position, IPL states that it will withdraw its support of the financial settlement filing to be submitted at the end of the 180-day period if the process “veers off course and develops into a flawed mandatory capacity market.”²⁴⁰ IPL reserves its right to comment on or protest the additional filings that emerge due to the extension of time. IPL generally supports the Midwest ISO’s filing and urges the Commission to approve the filing. IPL asserts that its support is conditioned on the understanding that the Midwest ISO’s proposal is not a springboard to move to a capacity market such as that of PJM. Southwestern states that the proposal is unnecessarily complicated and will impose unnecessarily high costs on market participants relative to the experience of market participants in the Midwest ISO. Southwestern states that “capacity costs, of even existing generators, will increase numerous times over without adding an iota of reliability. This assertion is confirmed by the implementation of new capacity markets in PJM, NYISO and [ISO-NE], where capacity prices are skyrocketing (in some cases increasing by more than 400 [percent]).”²⁴¹

369. WPSC/UPPCO state that the Midwest ISO’s failure to have a capacity market is problematic because an energy market is not adequacy to create long-term financial incentives for the construction of new generating capacity. WPSC/UPPCO assert that an energy market with a price cap will not lead to capacity expansion. WPSC/UPPCO further maintain that section 215 prohibits any requirement that a party be obligated to enlarge or construction additional generation, but it is “perfectly consistent with creation

²³⁷ Reliant Comments at 15.

²³⁸ *Id.* at 17.

²³⁹ Dominion Comments at 8.

²⁴⁰ IPL Comments at 5.

²⁴¹ Southwestern Comments at 9.

of a capacity market requiring an LSE to make payments in support of capacity owned and construction by others but used by the LSE to provide adequate service for its load.”²⁴²

370. WPSC/UPPCO further argue that there is no showing that the Midwest ISO’s proposal and PJM’s resource adequacy mechanism is compatible. They ask that Module E be modified to provide for “joint review by PJM and the Midwest ISO stakeholders of the approaches and options the two RTOs will follow in order to achieve system reliability and the benefits to be derived from ensuring that such approaches and options are either the same or are at least compatible with each other.”²⁴³

3. Answers

371. Duke/FirstEnergy disagree with the Illinois Commission that the Midwest ISO should not establish resource adequacy requirements, but rather should proceed with an energy only market augmented by an ancillary services market. Duke/FirstEnergy argue that the Midwest ISO’s energy market is not providing the scarcity signals needed to signal the need for new generation and refutes the notion that scarcity pricing alone is a sound means for achieving acceptable levels of reliability. Duke/FirstEnergy also argue that the Midwest ISO should not wait for a centralized capacity market, as some commenters request. Duke/FirstEnergy note that the Midwest ISO’s proposal, while not perfect, is a good proposal that falls within the “zone of reasonableness.”

372. The Midwest ISO asserts it is not creating a capacity market, but rather, simply establishing a capacity requirement. It notes that the stakeholders have not expressed a desire for a formal capacity requirement. It argues that the proposal provides a strong foundation for a successful long-term resource adequacy program.

373. The Midwest ISO further argues that the Mr. Doying’s affidavit adequately addresses the link between resource adequacy requirements, scarcity pricing and how the proposal is integrated with the ancillary services market. The Midwest ISO also states that its proposal is a replacement for existing Module E and that the specific items of concern raised by commenters (including infrastructure investment and Independent Market Monitor authority over market mitigation) are already dealt with in independent, albeit related, provisions of the TEMT.

374. The Midwest ISO further asserts that, contrary to commenters’ concerns, its proposal does take a long-term approach to resource adequacy. Specifically, it argues that the proposal provides for more than a one-year outlook, arguing that the proposal

²⁴² WPSC/UPPCO Comments at 20.

²⁴³ *Id.* at 22.

provides for a ten-year outlook and encourages entities to plan ten years out. “Although, the Planning Year is one year in terms of immediate obligations, the Midwest ISO provides for and encourages LSEs to conduct Resource planning on a monthly, yearly and ten-year forward-looking basis. The Midwest ISO also expects the states that have jurisdiction regarding resource adequacy for their LSEs to have a keen interest in long-term resource adequacy planning on a more than one-year basis.”²⁴⁴

375. In their response, WPSC/UPPCO continue to argue that scarcity pricing through the ancillary services market is inadequate and not designed to handle the entire energy market. They argue that there are no provisions in Module E to ensure any compensation.

4. Commission Determination

376. We deny commenters’ requests that the Commission reject the Midwest ISO’s proposal and direct the Midwest ISO to establish a centralized capacity market, such as those in PJM and ISO-NE. Commenters have not shown that the Midwest ISO’s proposal is unjust and unreasonable. Under its proposal of relying on bilateral procurement of capacity by LSEs, the Midwest ISO will have to perform functions similar to what we required in capacity markets including determining capacity obligations, monitoring compliance, and assessing penalties to deficient LSEs. Some of the options being discussed for the treatment of capacity deficient LSEs would involve functions similar to what other capacity markets perform, including procuring capacity on behalf of deficient LSEs or accessing penalties based on the cost of new investment. We will evaluate the financial settlement/enforcement provisions, when filed, to ensure that there are proper procedures and incentives in the Midwest ISO market to ensure resource adequacy comparable with those procedures used in other RTO capacity markets.

377. We disagree with Southwestern that the adoption of the Midwest ISO’s proposal will impose unnecessarily high costs on market participants. Market participants with ownership or bilateral contracts for capacity and energy will have a hedge against real-time prices, and all market participants in the Midwest ISO will benefit from the assurance of sufficient planning margins given the resource adequacy provisions.

378. In response to WPSC/UPPCO’s request that there should be a joint review by PJM and the Midwest ISO stakeholders of the approaches and options the two RTOs, we will decline to require such a process. We will, however, require the Midwest ISO to file as a part of the 180-day filing on financial settlement/enforcement provisions, a

²⁴⁴ Midwest ISO Answer at 39.

discussion on how it expects PJM's Reliability Pricing Model and the Midwest ISO's capacity procurement to function together to ensure resource adequacy.

P. Relationship Between the Midwest ISO Proposal and Other Proceedings

1. Background

379. On February 25, 2008, the Commission conditionally accepted the Midwest ISO's ancillary services market proposal. As a part of this ancillary services market filing, the Commission accepted the Midwest ISO's use of demand curves for operating curves and scarcity pricing, which would allow market prices to reflect the value associated with different shortages of operating reserves and the value of lost load. A number of commenters in that proceeding contended that scarcity pricing mechanisms should be considered along with the long-term resource adequacy proposal to determine whether the values used for scarcity pricing and the long-term capacity obligations together provide proper price signals to ensure both short-term reliability and long-term resource adequacy.

2. Comments and Protests

380. The OMS states that the proposal does not "on its face present any linkages to infrastructural investments, measures to allow for recovery of needed and prudent investment costs, scarcity pricing, or market monitoring and mitigation measures where long-term resource adequacy planning and development are concerned."²⁴⁵ The OMS asks that the Commission require the Midwest ISO to provide a compliance filing at the conclusion of the 180-day extension to examine financial settlement provisions, to provide "the required demonstration that all the Phase II elements, when taken together with the Phase I operating elements of the [a]ncillary [s]ervices market, result in a process that provides just and reasonable prices as well as the proper financial incentives for new resource entry into the market."²⁴⁶

381. Several other commenters agree with the OMS that the resource adequacy requirements should be evaluated in light of the scarcity pricing mechanisms accepted in the ancillary services market order. The Midwest Coalition and Midwest Industrial state that if the Midwest ISO intends to have a mandatory Planning Reserve Margin obligation, then the reasonableness of the \$3,500/MWh scarcity price associated with the Midwest ISO's ancillary services market should be reconsidered and ask that the Commission put all parties on notice that the Commission intends to revisit this issue when a

²⁴⁵ OMS Comments at 7.

²⁴⁶ *Id.*

comprehensive proposal is filed (presuming the 180-day extension is granted). The Illinois Commission argues that the Commission should direct the Midwest ISO to establish a comprehensive market design that would address “long-term integration of shortage pricing with the energy market to create proper incentives in a market context for long-term planning and investment in infrastructure.”²⁴⁷ It argues that the Midwest ISO’s proposal is too limited in scope, arguing that “[a]n effective and efficient resource adequacy approach for the Midwest ISO must build on the existing Commission approved ancillary services market design to provide the correct market-based financial incentives so that sufficient quantities of reserves of all types are available to the system operator at all times.”²⁴⁸

382. Other commenters argue that prices in the energy and ancillary services market might not be sufficient to encourage adequate investment with capacity requirements. Duke/FirstEnergy also note that the Midwest ISO energy markets do not provide the scarcity signals needed to encourage new investment in generation, and that a comprehensive resource adequacy requirement would also spur the development of new demand resources. WPSC/UPPCO also state that the Midwest ISO’s proposal fails to provide an economic incentive to stimulate voluntary construction of needed new generating capacity – what it deems to be the most important component of a viable resource adequacy program. WPSC/UPPCO maintain that the Midwest ISO’s proposal should be rejected for failure to incorporate a cost recovery mechanism for generators. WPSC/UPPCO assert that an energy market with a price cap will not lead to capacity expansion.

383. American Transmission expresses concern that the proposal does not provide an interrelationship between the Planning Reserve Margin, resource adequacy requirements and Planning Reserve Margins and the day-to-day operating reserve requirements. They argue that the fact that the Midwest ISO intends to include these items in the Business Practices Manuals is not adequate or appropriate.

384. Integrys argues that the proposal fails to reconcile resource adequacy with the Real-Time Sufficiency Tool, a process being developed by the Midwest ISO for interruption of individual LSEs at times when there is an insufficiency of generation Midwest ISO-wide. Integrys argues that the requirements, obligations, consequences and any penalties that are part of the Midwest ISO’s Real-Time Sufficiency Tool be included in the Module E tariff, so that the Commission and all market participants can receive a clear explanation and thorough review of matters affecting competition.

²⁴⁷ Illinois Commission Comments at 4.

²⁴⁸ *Id.*

3. Commission Determination

385. In the Midwest ISO's ancillary services market filing, the Midwest ISO proposed and the Commission subsequently accepted scarcity pricing provisions allowing market pricing to reflect the reliability value of reserves based on the value of the lost load (\$3500/MWh). With this scarcity pricing in place, the outstanding free-rider and investment incentive issues faced in other RTOs with tighter caps or lower scarcity pricing values, should be significantly reduced in the Midwest ISO. A state or LSE that fails to procure sufficient resources to meet its needs would face scarcity pricing in the spot market and ancillary services charges if not enough operating reserves were available.

386. We note, however, that there is a need for resource adequacy requirements in the Midwest ISO despite these price signals. While we agree with the Midwest ISO that the ancillary services market, scarcity pricing and a long-term resource adequacy plan all play a role in ensuring resource adequacy, we also agree with American Transmission that the inter-relationship between these market features and their interactions needs to be further evaluated, particularly in terms of their impact on market efficiency and reliability. For this reason, we require the Midwest ISO to explain these inter-relationships and their impact on market efficiency and reliability as part of the 180-day compliance filing.²⁴⁹

Q. Market Power

1. Comments and Protests

387. Dominion argues that the proposal lacks the necessary protections from the exercise of market power in the "bilateral" capacity market.

388. The Illinois Commission argues that the Midwest ISO's planning resources requirements will create a non-transparent bilateral market for capacity. The Illinois Commission asks that the Commission require the Midwest ISO to conduct a market power analysis on the Capacity Market in the Midwest ISO region and ensure that effective market monitoring and mitigations be in place. It argues that this is consistent with requirements approving PJM's Reliability Pricing Model and the Midwest ISO's ancillary services market.

²⁴⁹ We expect the Midwest ISO will also address the inter-relationship between its resource adequacy plan and other capacity management programs under development, such as the Real-Time Sufficiency Tool. Since the Midwest ISO has not submitted a proposal for a Real-Time Sufficiency Tool in this proceeding, we will not require its incorporation into the long-term resource adequacy plan in Module E.

2. Answer

389. The Midwest ISO argues that it is premature to require a market power analysis. The Midwest ISO states that it has broad existing authority under Module D to coordinate with the IMM to address all types of potential exercises of market power. Unlike the ancillary services market, this filing does not propose to begin administering any specific market under Module E. Therefore, according to the Midwest ISO, because no market is being created or implemented by the Midwest ISO, there is no need for a market power study.

3. Commission Determination

390. We agree with commenters that the issue of market power needs to be further evaluated. In particular, we note that we are requiring in this order that Capacity Resources be verified in power purchase agreements. Accordingly, we require the Midwest ISO and Independent Market Monitor to evaluate the potential for the exercise of market power in its long-term resource adequacy plan and to address to what extent, if any, the mitigation scheme should be revised as part of its 180-day submittal.

R. Matters Relegated to the Business Practices Manuals

1. The Midwest ISO Proposal

391. The Midwest ISO's proposal leaves several "implementation" issues to be detailed in the Business Practices Manuals. Among the issues relegated to the as-of-yet undrafted Business Practices Manuals are: the procedures and criteria for conducting LOLE studies, including the creation of planning zones;²⁵⁰ the details regarding qualifying contracts;²⁵¹ the procedures by which resources are designated as Planning Resources, including the requirement to demonstrate capability on an annual basis;²⁵² the conditions under which a power purchase agreement may be designated as a Capacity Resource;²⁵³ the accreditation of designated External Resources;²⁵⁴ determination of

²⁵⁰ Midwest ISO Filing at proposed Original Sheet No. 810B.

²⁵¹ *Id.* at proposed Third Revised Sheet No. 811.

²⁵² *Id.* at proposed Second Revised Sheet No. 816, proposed Second Revised Sheet No. 818A.

²⁵³ *Id.* at proposed Second Revised Sheet No. 818B, proposed Third Revised Sheet Nos. 819-20.

²⁵⁴ *Id.* at proposed Second Revised Sheet No. 822.

deliverability of Capacity Resources;²⁵⁵ procedures by which Load Modifying Resources are registered with the Midwest ISO;²⁵⁶ procedures by which Demand Resources will be accredited, tested, validated, measured, and verified;²⁵⁷ notification of any changes in status or availability of behind-the-meter generation;²⁵⁸ notification of status and availability of behind-the-meter generation;²⁵⁹ submission of self-schedules or offers for Capacity Resources and must-offer requirements for Planning Resources and curtailment during a declared emergency;²⁶⁰ characteristics of an electronic bulletin board platform;²⁶¹ and the test for determining statistical significance in the Midwest ISO's assessment of the appropriateness of the Forecast LSE Requirements and the Resource Plan.²⁶²

2. Comments and Protests

392. Several commenters, including Constellation, Dairyland, Dominion, Duke/FirstEnergy, EPSA, Hoosier/Southern Illinois, the Illinois Commission, Illinois Municipal, Integrys, IPL, Manitoba Hydro, Midwest Industrial, the Midwest TDUs, Minnesota Power, Northern Indiana, Southwestern, Strategic, Wabash Valley, Wisconsin Electric, and Xcel, express concern with the Midwest ISO's failure to include or adequately detail certain provisions in its filing, and to instead point to the as-of-yet undrafted Business Practices Manuals. Certain of these commenters argue that, without the necessary provisions, the Commission should reject the resource adequacy plan filing as incomplete. For example, Xcel argues that the Business Practices Manuals for resource adequacy must be completed (with sufficient advance time to allow commercial implementation) before the market design goes into effect. Xcel asserts that there should be a trial period of at least six months after the completion of the first draft of the Business Practices Manuals and before compliance with Module E is mandated by the Commission.

²⁵⁵ *Id.* at proposed Second Revised Sheet No. 823A.

²⁵⁶ *Id.* at proposed Second Revised Sheet No. 823B.01.

²⁵⁷ *Id.* at proposed Second Revised Sheet No. 823C.

²⁵⁸ *Id.* at proposed Second Revised Sheet Nos. 827-28.

²⁵⁹ *Id.* at proposed Original Sheet No. 830.

²⁶⁰ *Id.* at proposed Original Sheet Nos. 833-34.

²⁶¹ *Id.* at proposed Original Sheet No. 836.

²⁶² *Id.* at proposed Original Sheet No. 837.

393. Manitoba Hydro argues that the lack of detail and clarity in the market rules increases uncertainty, “which in turn discourages . . . investment in new assets, and also discourages forward capacity sales from existing uncommitted resources.”²⁶³

394. These commenters argue that several of the provisions being relegated to Business Practices Manuals will have a significant effect on rates and services and therefore, should be included in the TEMT and filed under section 205 in order to be better vetted. For example, Constellation argues that Business Practices Manuals are not required to be filed at the Commission, which precludes stakeholders from having any meaningful review and comment in its development or future revisions. Minnesota Power argues that the Midwest ISO should create a draft of the Business Practices Manuals for review with the tariff language on financial settlement/enforcement to ensure a reliable long-term resource planning process is being proposed. Constellation also expresses concern about the process by which the Business Practices Manuals are drafted – the drafting body, the Planning Reserve Sharing Group, is not open to all market participants. Consumers supports the Midwest ISO’s proposal to establish a set of Planning Reserve Margins for the footprint, but only if the Commission directs the Midwest ISO to establish a Business Practices Manual Working Group to provide a forum for state commission and market participants to work with the Midwest ISO’s technical staff.

3. Answers

395. In its answer, the Midwest ISO defends its decision to defer several issues to the Business Practices Manuals. The Midwest ISO argues that Commission precedent requires only provisions that “significantly affect the rates, term or conditions of service must be included in the [TEMT]; and that implementation provisions should be included in the [Business Practices Manuals].”²⁶⁴ The Midwest ISO asserts that the matters to be addressed in Business Practices Manuals are consistent with this distinction. The Midwest ISO also argues that it will continue to work with its stakeholders through the Supply Adequacy Working Group stakeholder process and the Tariff and Business Practices Subcommittee to develop the Business Practices Manuals in a timely manner and to allow for public availability no later than October 1, 2008.

396. In response, WPSC/UPPCO argue that the Midwest ISO’s answer fails to justify placement of key aspects of the proposal, notably the “reliability standards included in Module E,” to the Business Practices Manuals.²⁶⁵ They also argue that the Midwest

²⁶³ Manitoba Hydro Comments at 8.

²⁶⁴ Midwest ISO Answer at 5.

²⁶⁵ WPSC/UPPCO Answer at 7.

ISO's answer provides that the Business Practices Manuals will be developed by October 1, 2008, but it is not clear how and when stakeholders will have an opportunity to comment or protest them.

4. Commission Determination

397. As the Commission has previously stated, Business Practices Manuals

serve as guides for internal operations and inform market participants of the [RTO's and ISO's] practices. The information contained in the [Business Practices Manuals] is meant to provide further explanation of the [RTO's and ISO's] practices *but not significantly affect any rates, terms, or conditions, consistent with the Commission's "rule of reason."*²⁶⁶

398. Our policy is that only those practices that significantly affect rates, terms and conditions fall within the directive of section 205(c) of the FPA.²⁶⁷ Moreover, the Commission has recognized that

there is infinitude of practices affecting rates and service. The statutory directive [of section 205(c)] must reasonably be read to require the recitation of only those practices that affect rates and services significantly, that are *realistically* susceptible of speculation, and that are not so generally understood as to render recitation superfluous. . . .²⁶⁸

399. As stated above, there are several issues that the Midwest ISO proposes to relegate to treatment in the Business Practices Manuals. These provisions include: the procedures and criteria for conducting LOLE studies; Planning Zone criteria; the details regarding qualifying contracts; Planning Resources designation and registration procedures; Capacity Resource designation process; the accreditation of designated External Resources; Capacity Resources' deliverability; Load Modifying Resources

²⁶⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172 at P 489 (citing *CAISO*, 116 FERC ¶ 61,274 at P 1358 (emphasis added)).

²⁶⁷ *Id.* P 490 (citing *Prior Notice and Filing Requirements under Part II of the FPA*, 64 FERC ¶ 61,139 (1993) (discussing the Commission's jurisdiction over rates and charges that are "for or connected with" jurisdictional activities)).

²⁶⁸ *Id.* (citing *Prior Notice and Filing Requirements under Part II of the FPA*, 64 FERC ¶ 61,139 at 61,988 (internal citations omitted)).

registration; and testing, measurement, and verification procedures. We agree with the Midwest ISO that “implementation” details fall within the Commission’s rule of reason and are appropriately included in the Business Practice Manuals. However, as discussed in the body of this order, we find that some of what the Midwest ISO would relegate to the Business Practices Manuals, such as criteria or requirements, belongs in its tariff.

400. The Midwest ISO states that it will continue to work with stakeholders to develop the Business Practices Manuals, and we encourage the Midwest ISO to do so. However, we are sympathetic to commenters’ concerns that they need to be able to review the Business Practices Manuals to have a complete understanding of their responsibilities and obligations under the resource adequacy proposal. This is not only important as to the instant tariff filing and Business Practice Manuals but also with regard to the additional tariff provisions we direct the Midwest ISO to file, as directed in the body of this order. Accordingly, we direct the Midwest ISO to make its Business Practices Manuals publicly available as part of its 180-day compliance filing of financial settlement/enforcement provisions. This will allow stakeholders to anticipate their resource adequacy responsibilities in a more complete fashion. If there are matters that, as commenters suggest, may be more appropriately addressed in the TEMT because they significantly affect rates, terms and conditions, stakeholders will have the opportunity to voice those concerns as part of their comments to the Midwest ISO’s 180-day compliance filing. We reiterate that, following discussions with stakeholders regarding the Business Practices Manuals, the Midwest ISO must file any provisions that are determined to significantly affect any rates, terms or conditions of service in its tariff rather than in its Business Practices Manuals. We believe this will alleviate, in part, commenters’ concerns about the process by which the Business Practices Manuals are drafted. While we will not require the Midwest ISO to establish a new working group to draft the Business Practices Manuals, by allowing all stakeholders the opportunity to review and comment on the drafts, all market participants, including those not privy to the Planning Reserve Sharing Group, will be able to voice concerns about the implementation measures prior to their adoption.

S. Effective Date/Implementation Deadlines

1. The Midwest ISO Proposal

401. Midwest ISO requests that revised Module E become effective on March 27, 2008. It states, however, that some of the elements of the proposal are proposed to only become effective after a period of time. It notes, for example, that the definition of “Planning Year” specifies that the initial Planning Year will be between June 1, 2009 and May 31, 2010, so the requirement that LSEs annually submit Resource Plans would not become effective until March 1, 2009.

2. Comments and Protests

402. Several commenters express confusion regarding when certain elements of Module E become effective.

403. Reliant notes that many of the revisions to Module E do not appear to become effective until 2009. Reliant asks that the Midwest ISO clarify which elements of Module E, if any, become effective prior to the dates specified in the Module E revisions themselves.

404. Similarly, Constellation argues that it is unclear what rules will be in effect in operational year 2008-2009 versus 2009-2010. While it presumes, based on Midwest ISO representations at stakeholder meetings, the implementation date of March 27, 2008 is for planning purposes only and that the existing tariff will remain in effect, Constellation argues that the Midwest ISO needs to clarify this in writing.

405. The Illinois Commission argues that the March 27, 2008 effective date is inconsistent with the requested 180-day extension to develop financial settlement/enforcement provisions. The Illinois Commission argues that the Commission should set an effective date of some time after the 180-day discussion period concludes but, in no event, before implementation of the Midwest ISO's ancillary services market, currently scheduled for June 1, 2008.

406. Xcel asks that the Commission condition the effective date during the first year, Planning Year 2009-2010, as a non-binding "market trial" for the Midwest ISO and market participants to gain experience with the provisions. Xcel asks that the Midwest ISO be directed to convene a stakeholder after six months of that experience, and based on the feedback from that technical conference, then would the Midwest ISO finalize the Manual in the fall of 2009, in time for binding tariff implementation of Module E during the 2010-2011 Planning Year.

407. Duke/FirstEnergy assert that the first Planning Year must begin, as scheduled, on June 1, 2009 to ensure resource adequacy. Duke/FirstEnergy also argue that the Midwest ISO should be required to maintain the existing interim resource adequacy requirement in effect until the first day of the Planning Year under the proposed Module E. They assert that if the interim requirement is not maintained, then entities within the Midwest ISO that are not subject to a state or regional entity's resource adequacy requirement will have no resource adequacy requirement at all until the proposed Module E goes into effect.

408. While the Midwest TDUs do not oppose the Commission's consideration of the filed proposals while discussions of the financial settlement/enforcement mechanisms continue, the Midwest TDUs express concern about LSEs having time to comply with complete set of requirements, particularly at plan launch. The Midwest TDUs ask that the Commission extend the time for initial compliance with the resource adequacy plan.

“Further, at minimum and on an ongoing basis, Midwest ISO should be required to public [Planning Reserve Margins] by October 1 of the first year, and each year thereafter, In that way, LSEs will have an opportunity to secure at reasonable cost the resources required for their March 1 [resource adequacy requirement] submissions.”²⁶⁹

409. Southwestern asks that the Commission order a nominal suspension of the Midwest ISO filing to ensure the Commission retains the authority to order refunds at the conclusion of the proceeding. Furthermore, Southwestern requests that the Commission hold a hearing to resolve the disputed issues of material fact reflected in its comments and the proposal.

3. Answer

410. The Midwest ISO argues that the timing for the resource adequacy proposal is reasonable. It argues that it understands the need to provide adequate time for parties to comply and therefore, that is why the substantive provisions do not become effective until 2009. The Midwest ISO disagrees with commenters that argue that they are unable to precisely know how to comply with the Module E proposal absent the financial settlement/enforcement provisions. It further notes that this language will be filed with the Commission approximately one year before implementation.

4. Commission Determination

411. We interpret the Midwest ISO’s proposal to provide that the first Planning Year under revised Module E will begin in June 2009 and that a variety of activities must be completed before that date, such as the submittal of LSE load forecasts and resource plans and determinations by the Midwest ISO on the applicable Planning Reserve Margins for LSEs. Based on this understanding, we do not see a problem with setting a March 27, 2008 effective date for the proposed tariff sheets. We expect the forthcoming financial settlement/enforcement provisions will set an effective date based on their filing date in June 2008 and, therefore, these provisions will become effective after the commencement of the ancillary services market. We do not see any inconsistency with having one date for the financial settlement/enforcement provisions and another for the proposed tariff sheets presented in this filing, since the financial settlement/enforcement provisions will not be implemented until commencement of the 2009 Planning Year.

412. We find no reason for delaying the effective date for start of the resource adequacy plan. Based on our direction that the Business Practices Manuals be completed

²⁶⁹ Midwest TDUs Comments at 53.

and available to market participants by June 2008,²⁷⁰ market participants should have sufficient time to prepare for market start.

413. We direct the Midwest ISO to clarify that the reserve margin requirements in the interim resource adequacy plan remain in effect until the Midwest ISO sets new Planning Reserve Margins and revise the TEMT accordingly in the compliance filing to be submitted within 60 days of the date of this order.

414. We have addressed, earlier in this order, the concerns of the Midwest TDUs with respect to plan launch by directing the Midwest ISO to work with stakeholders to develop a process to notify market participants of their Planning Reserve Margin requirements at an earlier date to ensure that market participants have adequate opportunity to develop their resource plan.²⁷¹

415. Since the resource plan is forward looking, and does not have rate provisions, we do not see the need to suspend the effectiveness of the filing so that the Commission can order refunds. We consider the current compliance process to be sufficient to address issues in this proceeding and therefore we will not require additional hearing procedures.

T. Miscellaneous

1. Definitions of Load and LSE/Applicability of the Resource Adequacy Requirements

a. The Midwest ISO Proposal

416. The TEMT defines an LSE as any entity that has undertaken the obligation to provide electric energy for end-use customers by statute, franchise, regulatory requirements or contract for load located within or attached to the transmission system. Where a distribution cooperative or a municipal distribution system otherwise covered by the previous sentence is a wholesale customer of a generation and transmission cooperative or a municipal joint action agency, the generation and transmission cooperative, a state or federal agency or municipal joint action agency may act as an LSE for such distribution cooperative or municipal distribution system.

417. The introduction to proposed Module E states, in relevant part, that Module E provides mandatory requirements to be met by the “Transmission Provider, Market Participants serving Load in the Transmission Provider Region or serving Load on behalf

²⁷⁰ See *supra* section IV.R.

²⁷¹ See *supra* section IV.J.

of [an LSE] or other Market Participants to ensure access to deliverable, reliable and adequate Planning Resources to meet load requirements on the Transmission System.”²⁷²

b. Comments and Protests

418. The OMS supports the Midwest ISO’s definition of the term “LSE,” as it would apply to all market participants that serve load.

419. Duke/FirstEnergy argue that the resource adequacy requirement should only apply to LSEs. For this reason, they take issue with the language in the new “Introduction” to Module E stating that the Module provides mandatory requirements to be met by LSEs or market participants serving load on behalf of an LSE. Duke/FirstEnergy assert that this language is confusing and suggests that resource adequacy obligations can be met by someone other than the LSE. Duke/FirstEnergy note that the TEMT clearly defines “LSE” at section 1.171 as the entity with the *obligation* to serve an end-use customer. However, if the obligation is transferred to another entity that serves load on behalf of the LSE, then that other entity becomes the LSE, according to Duke/FirstEnergy. Thus the entity with the obligation to serve the load, the LSE, is the entity with the obligation to meet the resource adequacy requirement. Duke/FirstEnergy argue that any other language would be vague and confusing and that the Commission should therefore require the Midwest ISO to clarify that only the LSE, the entity with the obligation to serve the load, must meet the Module E requirements.

420. Duke/FirstEnergy also argue that Commission should require the Midwest ISO to clarify that a retail power marketer with an obligation to serve load is the LSE for that load. Duke/FirstEnergy distinguish the recent *Direct Energy Services, LLC* case by noting that it involved reliability standards that only applied to LSEs physically connected to the system, and retail marketers had not been shown to be physically connected in that case.²⁷³ Duke/FirstEnergy assert that *Direct Energy Services, LLC* thus did not make the finding that retail marketers *could not be* LSEs, only that that the reliability standards in that case did not apply to the retail marketers because they were not physically interconnected. In the instant filing, Duke/FirstEnergy argue that resource adequacy requirement applies to all LSEs, including retail marketers.

421. Duke/FirstEnergy express concern regarding language in section 69 that, in their view, implies Module E requirements follow the load when retail load switching occurs. They argue that the Commission should direct the Midwest ISO to clarify that when load

²⁷² Midwest ISO Filing at proposed Fourth Revised Sheet No. 810.

²⁷³ Duke/FirstEnergy Comments at 20 (citing *Direct Energy Servs. LLC*, 121 FERC ¶ 61,274 (2007)).

switching occurs, the entity that meets the definition of LSE, i.e., the entity with the obligation to serve the load, is the entity required to meet Module E requirements.

422. Ameren argues that in certain reliability proceedings, the Commission identified a potential reliability gap in differing treatment of Purchasing-Selling Entities and LSEs, and directed NERC to submit a plan to develop a consistent, uniform approach to ensure that appropriate reliability standards and requirements are applied to retail marketers in the same manners they are applied to LSEs. Ameren asks that the Commission require Midwest ISO to clarify that, for purposes of Module E, all market participants that serve load, whether are designated as Purchasing-Selling Entities or LSEs, are treated in a consistent manner.

c. Commission Determination

423. We agree with Duke/FirstEnergy that any entity that has the obligation to serve load should be defined as the LSE, and therefore retail power marketers with the obligation to serve load are LSEs. Also, when load switching occurs, the entity with the obligation to serve load is the LSE and that is the entity required to meet the Module E requirements. Responding to Ameren, we would expect that purchasing-selling entities, provided they have an obligation to serve load, must also meet the requirements of Module E. We direct the Midwest ISO to revise the definition of LSEs, for purposes of Module E, consistent with these findings in the compliance filing to be submitted within 60 days of the date of this order.

2. Title Tracking Tool

a. The Midwest ISO Proposal

424. The Midwest ISO proposes to administer a title tracking tool that shall permit market participants to confirm transfer of rights to Capacity Resources permitted to fulfill an LSE's resource adequacy requirement. The title tracking tool will provide a means to track the transfer of rights to Capacity Resources and Load Modifying Resources. The title tracking tool will also provide a means to electronically communicate data for reporting and monitoring functions under Module E.

b. Comments and Protests

425. Dynegy/LS support the Midwest ISO's proposal to implement a title tracking tool to confirm title transfers to Capacity Resources used to fulfill a LSE's resource adequacy requirement. It notes, however, that they support use of the tracking tool solely for tracking transactions entered pursuant to Module E.

c. Commission Determination

426. We find the title tracking tool to be a reasonable means to facilitate communication and monitoring of resources.

3. Price Taker

a. Comments and Protests

427. Southwestern argues that the Midwest ISO has deleted, without any justification, the provision that allows a Self Scheduled Resource to be a “price taker.” Southwestern argues that Self Scheduled Resources should have the option to be a price taker, and nothing in the Midwest ISO’s proposal alters this plan.

b. Commission Determination

428. The provision of concern to Southwestern has been moved to proposed section 1.282; the price-taker statement remains in that new section.

4. Contracts Supporting Reliability Obligations

a. Background

429. The Midwest ISO’s proposal states an LSE may contract with other entities to ensure conformity by the LSE with the resource adequacy requirements of Module E, a Regional Reliability Organization or a state, consistent with any Regional Reliability Organization or state requirements for, or limitations related to, such contracts. Details regarding qualifying contracts are to be set forth in the Business Practices Manuals.

b. Comments and Protests

430. Illinois Municipal asserts the provision should be clarified to allow an LSE to contract out its responsibilities in whole or in part, so that it is clear that a single entity, for example a generator operator, could be the “other entity” for purposes of generator availability reporting requirements and a seller making sales to the LSE should be permitted to supply the necessary information and registrations on behalf of the LSE.

c. Commission Determination

431. We note as, an initial matter, that the title of this provision, “contracts supporting reliability obligations,” is confusing. As discussed earlier in this order, we do not understand the Midwest ISO resource adequacy proposal to be a reliability plan that imposes reliability obligations. For this reason, we require the Midwest ISO to clarify, in the compliance filing to be submitted within 60 days of the date of this order, the purpose of this provision and to indicate what Regional Reliability Organization or state

requirements it is referencing. Since we are unsure of the purpose of this provision, we also require the Midwest ISO to provide the clarifications requested by Illinois Municipal.

5. External Resources Pseudo-Tied Out of the Midwest ISO Balancing Authority Area

a. Comments and Protests

432. The Midwest TDUs note that, in the ancillary services market proceeding in Docket No. ER07-1372, the Midwest ISO clarified that “if the [Missouri Public Energy Pool] is Pseudo-tied out of the Midwest ISO Balancing Authority Area, that Load has met its Operating Reserve obligation and will not be subject to any Operating Reserve cost allocation.”²⁷⁴ The Midwest TDUs argue that the same should be true of the installed and planning reserves at issue here to ensure that no obligation to carry double reserves is imposed. Specifically, the Midwest TDUs seek confirmation of the inapplicability of the resource adequacy requirements to Midwest TDU member Missouri Joint Municipal Electric Utility Commission load (included in the Missouri Public Energy Pool) that is pseudo-tied out of the Midwest ISO Balancing Authority Area and subject to SPP’s resource adequacy requirements.

b. Answer

433. In their supplemental answer, the Midwest TDUs report that the Midwest ISO has informed them that it agrees that load which is electrically removed from the Midwest ISO region to a control area in another region, such as SPP, is not subject to the resource adequacy requirements of Module E.

c. Commission Determination

434. We direct the Midwest ISO to clarify the criteria for designating pseudo-tied resources as Capacity Resources in the compliance filing to be submitted within 60 days of the date of this order.

The Commission orders:

(A) The Midwest ISO’s long-term resource adequacy proposal is hereby conditionally accepted for filing, to be effective March 27, 2008, as discussed in the body of this order.

²⁷⁴ Midwest TDUs Comments at 48.

(B) The Midwest ISO is hereby directed to submit a compliance filing, within 60 days of the date of this order, as discussed in the body of this order.

(C) The Midwest ISO is hereby directed to submit a compliance filing on or before June 25, 2008, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Kimberly D. Bose,
Secretary.