137 FERC ¶ 61,213
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER08-394-021 ER08-394-022

ORDER ON REHEARING AND COMPLIANCE

(Issued December 15, 2011)

1. This order denies requests for rehearing of the Commission's April 16, 2009 order (April 16 Order),[1] and conditionally accepts the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) June 17, 2009 compliance filing (June Compliance Filing) to become effective June 18, 2009. The Commission's acceptance of the June Compliance Filing is subject to an additional compliance filing, as set forth below.

I. <u>Background</u>

2. In October 2008, the Commission generally accepted, subject to a compliance filing, the Midwest ISO's plan to financially settle its voluntary capacity auction.[2] The Commission accepted, in relevant part, the Midwest ISO's proposal to allow load serving entities (LSE) to secure additional capacity through a voluntary capacity auction. The Commission also approved the Midwest ISO's plan to assess a financial settlement charge for any deficient LSEs (i.e., those lacking sufficient capacity to meet their resource adequacy obligations). That financial settlement charge would be calculated based on the annual cost of new entry (CONE) for resources. Finally, the Financial Settlements Order addressed the Midwest ISO's proposal to distribute revenues from the collection of any deficiency charges.

---

[1] *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,054 (2009).

[2] *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,060 (2008) (Financial Settlements Order).

3. As noted above, however, the Commission accepted the revisions subject to further compliance. In particular, the Financial Settlements Order required the Midwest ISO to provide additional justification for its CONE value of $80,000/MW and to propose a more granular monthly deficiency charge, which should be tailored to deter deficiencies without being excessive on a monthly or cumulative basis.[3] The Financial Settlements Order also required the Midwest ISO's independent market monitor, Potomac Economics, Ltd. (Market Monitor), to explain in further detail how it intended to monitor for market power in the voluntary capacity auction and to describe what mitigation measures it could use to prevent market power.[4]

4. On November 19, 2008, the Midwest ISO submitted the compliance filing (November 2008 Compliance Filing) in Docket No. ER08-394-007. On that same day, the Market Monitor filed its plan for monitoring the voluntary capacity auction and the types of market mitigation measures that could be used to prevent market power. We addressed both of these filings in the April 16 Order.

5. In the April 16 Order, we found that the Midwest ISO provided sufficient data on compliance to justify its annualized $80,000/MW initial CONE value for any deficiencies in capacity. We also accepted the Midwest ISO's plan to assess the total CONE value of $80,000/MW for the first month's deficiency, while charging a smaller, incremental amount for violations in subsequent months. This approach, we found, struck the appropriate "balance[] between deterring deficiencies and avoiding gross incentives to overbuild capacity."[5]

6. As for the Market Monitor's monitoring and mitigation plan, the April 16 Order found that while the filing satisfied the Financial Settlements Order, the Midwest ISO needed to file the plan as part of its Tariff. Accordingly, the April 16 Order required the Midwest ISO to submit a compliance filing that would: (1) set forth Tariff provisions outlining the Market Monitor's plan to monitor Midwest ISO's voluntary capacity auction and Midwest ISO's obligations for mitigating any potential exercise of market power; and (2) address various concerns by market participants regarding the Market Monitor's plan to monitor the voluntary capacity auction, including how the plan could result in volatile capacity prices.[6]

---

[3] *Id.* P 74, 99.

[4] *Id.* P 155.

[5] April 16 Order, 127 FERC ¶ 61,054 at P 143.

[6] *Id.* P 120-124. The April 16 Order also required a compliance filing regarding the Midwest ISO's plan for ensuring the deliverability of load modifying resources in the

(continued…)

7. The Midwest ISO submitted the June Compliance Filing in response to the April 16 Order.

II. Requests for Rehearing

8. The Midwest ISO and Market Monitor filed a joint request for rehearing of the April 16 Order. The Illinois Municipal Electric Agency (Illinois Municipal) also requested rehearing of that order.

III. Notice of the Compliance Filing and Responsive Pleadings

9. Notice of the June Compliance Filing was published in the *Federal Register*, 74 Fed. Reg. 31,022 (2009), with interventions and protests due on or before July 8, 2009.

10. The following parties filed comments and protests regarding the June Compliance Filing: American Municipal Power, Inc. (AMP); the Coalition of Midwest Transmission Customers (CMTC); Consumers Energy Company (Consumers Energy); The Detroit Edison Company (Detroit Edison); Duke Energy Corporation (Duke); the Electric Power Supply Association (EPSA); Exelon Corporation (Exelon); FirstEnergy Service Company (FirstEnergy); Integrys Energy Services, Inc. (Integrys); and RRI Energy, Inc. (RRI Energy) (formerly Reliant Energy, Inc.).

11. The Midwest ISO filed a motion to answer and answer to the comments and protests. The CMTC and the Midwest Transmission Dependent Utilities (Midwest TDUs) also filed a joint answer to the comments and protests.

IV. Substantive Matters

A. Procedural Matters

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[7] prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers of Midwest ISO, the CMTC and Midwest TDUs. These answers have provided information that assisted us in our decision-making process.

---

voluntary capacity auction. The Commission addressed this issue in a separate order. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,057 (2010).

[7] 18 C.F.R. § 385.213(a)(2) (2009).

B. Rehearing

13. As set forth below, the Commission denies the requests for rehearing and affirms the April 16 Order in all respects.

1. Requirement to File Market Monitoring and Mitigation Plan

a. Background

14. In the Financial Settlements Order, the Commission directed the Market Monitor to further explain how it intended to monitor the voluntary capacity auction and to determine whether additional mitigation measures were needed. We specifically found that the Midwest ISO proposal, as set forth in section 69.3.5.h of its proposed Tariff, did "not adequately define the scope of the Independent Market Monitor's role."[8] We directed the Market Monitor to "specify the methods it will use to determine whether market power is being exercised and whether additional mitigation measures are needed, and what additional mitigation measures might look like."[9]

15. The Market Monitor responded to this request on November 19, 2008, by submitting its plan for monitoring the voluntary capacity auction. The plan generally explained how the Market Monitor defined physical and economic withholding, how it would screen for such conduct, how it would determine the price impact on the voluntary capacity auction, and how the Midwest ISO could potentially mitigate market power abuses. The Market Monitor noted that "[t]he most effective mitigation for economic and physical withholding is a must-offer provision that requires that capacity be designated to satisfy an LSE's capacity requirement or offered in the voluntary market at a competitive offer price level."[10] It noted, however, the details of "such an approach would need to be reviewed and approved by the Commission prior to its implementation."[11]

16. In a subsequent answer filed by the Market Monitor, it provided additional justifications for its market monitoring plan. The Market Monitor also provided specific examples of when a market participant could rightfully withhold capacity from the voluntary capacity auction. It further explained how it would not only monitor the activities of Capacity Resources in the auction, it would monitor the conduct of LSEs to determine whether they are engaging in conduct that artificially depresses auction prices.

---

[8] Financial Settlements Order, 125 FERC ¶ 61,060 at P 155.

[9] *Id*.

[10] Market Monitor November 19, 2008 Filing at 4.

[11] *Id.* at 5.

17. The April 16 Order found that the Market Monitor's filing complied with the Financial Settlements Order. However, we also found that the plan had to be filed as part of a proposed revision to Module D of the Tariff, which sets forth the Midwest ISO's rules for monitoring and mitigating its markets. The Commission noted that the proposed Tariff revisions "must contain sufficient detail for market participants to understand how the Market Monitor will monitor for withholding, when a market participant will be subject to mitigation, and what mitigation will be applied."[12] We further emphasized that the Tariff provisions must include specific mitigation measures that would be applied by the Midwest ISO.[13] We noted that these mitigation measures may include automatic mitigation for economic withholding or sanctions for physical withholding.[14]

b. Requests for Rehearing

18. The Midwest ISO and the Market Monitor request rehearing of the Commission's decision requiring the Midwest ISO to develop a mitigation plan for the voluntary capacity auction and to propose Tariff revisions for its plan. The Midwest ISO and the Market Monitor argue that a mitigation plan is unnecessary and premature because market power abuses are unlikely in the voluntary capacity auction. They assert that the Commission has never imposed mitigation measures when market power is unlikely.[15] They further note that if mitigation was imposed, market participants may be less willing to invest in new resources and suppliers may be less willing to import resources into the Midwest ISO. The possible reduction in capacity in the voluntary capacity auction, according to the Midwest ISO and the Market Monitor, may increase market prices.

19. The Midwest ISO and the Market Monitor also challenge whether it was necessary to consider automatic mitigation measures. They argue that such measures are only necessary to address structural defects in a capacity market, which have not been shown to exist in the Midwest ISO's voluntary capacity auction.

---

[12] April 16 Order, 127 FERC ¶ 61,054 at P 119.

[13] *Id*. P 120.

[14] *Id*.

[15] Midwest ISO and Market Monitor May 19, 2009 Request for Rehearing at 5 & n.14 (citing *Maryland Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,340 (2008); *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,053, at P 53 (2005)).

c. Commission Determination

20. We deny the Midwest ISO and the Market Monitor's request for rehearing. As the Midwest ISO and the Market Monitor have long emphasized, the voluntary capacity auction represented "a reasonable compromise position between those stakeholders that opposed any type of capacity auctions and those that advocated mandatory capacity auctions."[16] An important part of the compromise was the Market Monitor's monitoring of the auction to prevent physical withholding from the market.[17] In simple terms, the Midwest ISO's compromise recognized that while a market participant could choose to participate in the capacity auction (i.e., what makes it voluntary), market participants were not permitted to withhold capacity from the auction to manipulate capacity prices.[18] Under the Tariff, once a market participant decides to register and participate in the auction, the Midwest ISO requires the participant offer its capacity into the auction unless it meets one of the limited exceptions under the Tariff.

21. The Market Monitor has continued to emphasize these latter points in numerous filings. As it stated in its answer on December 24, 2008, "[v]oluntary or not, the Commission's obligations under the Federal Power Act would not allow participants with market power to voluntarily withhold resources to raise prices."[19] The purpose of the monitoring approach, according to the Market Monitor, "is only designed to identify market power abuses (not simply any unoffered capacity)."[20]

22. Given these statements, the Midwest ISO and Market Monitor's argument on rehearing—that is, they should not be forced to develop or file mitigation measures as part of the monitoring plan—is perplexing. The Midwest ISO and the Market Monitor cannot justify, on one hand, the need to develop detailed withholding screens, but argue on the other hand that mitigation measures are unnecessary if the Market Monitor discovers market power abuses. As we emphasized in the April 16 Order, explicit mitigation measures in the Tariff will help to ensure competitive outcomes and are better suited for a monthly auction framework.[21] We also believe that clear mitigation

---

[16] Midwest ISO August 18, 2008 Answer at 15-16.

[17] *Id*.

[18] *Id*.

[19] Market Monitor December 24, 2008 Answer at 3.

[20] *Id*.

[21] April 16 Order, 127 FERC ¶ 61,054 at P 121.

measures allow the Midwest ISO to take timely corrective action to resolve market power abuses. Such timely relief, in turn, helps to provide certainty for market participants and minimizes the negative impact of market power abuses. For these reasons, we affirm the April 16 Order's requirement that the Midwest ISO and the Market Monitor's proposed thresholds and associated mitigation measures must be included in the Tariff.

23. Nor do we agree with the Midwest ISO and Market Monitor's claim that mitigation measures will harm the capacity market. Contrary to this claim, we find that transparency and clear market monitoring and mitigation guidelines provide certainty for market participants and, are likely to increase the availability of supply. The Commission has emphasized repeatedly the importance of having clear guidelines for monitoring markets and applying mitigation measures.[22] We continue to believe that such guidelines are necessary and reasonable. Moreover, as discussed more fully in the compliance discussion below, the Market Monitor screens are only triggered with significant price thresholds. This further reduces the likelihood that the mitigation measures will be applied to market participants acting competitively.

24. The cases cited by the Midwest ISO and the Market Monitor[23] do not require otherwise. Contrary to their claims, these cases do not stand for the proposition that a mitigation plan is unnecessary without evidence of market power abuses. Rather, the cases stand for the proposition that once a mitigation plan has been proposed and filed, the Commission reviews the measures to ensure that they balance the need for efficiency and competiveness in the market with the need to protect against the potential exercise of market power. We will undertake that review below in the compliance section of this order as we review the Midwest ISO's proposed mitigation measures.

25. Finally, we disagree with the claim that the Commission erred by asking the Midwest ISO to consider automatic mitigation measures. The April 16 Order did not mandate that the Midwest ISO implement automatic mitigation measures, but instead identified the automatic mitigation measures as one type of mitigation measure that could be adopted. We continue to believe that it was appropriate for the Midwest ISO to consider a variety of mitigation measures, including automatic mitigation measures, as it considered the appropriate mitigation measures for its voluntary capacity auction. The

[22] *See New York Indep. Sys. Operator, Inc.*, 89 FERC ¶ 61,196, at 61,605 (1999) (emphasizing need for bright line tests and clear thresholds for determining market power abuses).

[23] *See, e.g., Maryland Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,340 (2008); *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,053, at P 53 (2005).

Midwest ISO and Market Monitor have not demonstrated that such direction was arbitrary or capricious and, thus, we will deny their request for rehearing on this issue.

2. CONE Value

a. April 16 Order

26. In the April 16 Order, we found that the Midwest ISO satisfied the requirements of the Financial Settlements Order and justified the annual CONE value of $80,000/MW applicable to the initial year of the resource adequacy plan. We noted that the assumptions used by the Midwest ISO in calculating this value were consistent with industry practice and we found the value to be just and reasonable.[24]

27. The April 16 Order also accepted the Midwest ISO's revised proposal for assessing CONE to LSEs without sufficient capacity.[25] In the Financial Settlements Order, we rejected the Midwest ISO's initial proposal because it assessed an annual CONE for every month where a deficiency occurs. We noted that such a proposal may be excessive especially if a load serving entity was deficient in several months.

28. In the response, the Midwest ISO proposed and we accepted a plan that would charge the CONE value for the first month of deficiency, but would charge a lesser percentage of CONE in months where a subsequent violation occurs. The amount charged for a subsequent deficiency depended, in part, on whether the deficiency occurred in a peak or non-peak month. The Commission found that the Midwest ISO's proposal struck an appropriate balance "between deterring deficiencies and avoiding gross incentives to overbuild capacity."[26]

b. Request for Rehearing

29. Illinois Municipal challenges the decision in the April 16 Order to accept the annualized CONE value of $80,000/MW. Illinois Municipal asserts that the Commission erred in placing the burden on customers to demonstrate that the Midwest ISO's rate is not just and reasonable. Illinois Municipal contends that the burden is on the utility to demonstrate why the assumptions it makes are relevant to its claims that the rate is just and reasonable.[27] Without these demonstrations, the Commission cannot claim to have

---

[24] April 16 Order, 127 FERC ¶ 61,054 at P 140.

[25] *Id*. P 144.

[26] *Id*. P 145.

[27] Illinois Municipal argues that the Commission should explain why questions regarding the assumptions used to develop the CONE value are irrelevant or ignored.

substantial evidence that the resulting CONE value is just and reasonable. Illinois Municipal also faults the Midwest ISO for not explaining or providing evidence why these assumptions and values are relevant to determining CONE in the Midwest ISO region.

30. Illinois Municipal faults the Commission for basing its decision to accept the CONE on the fact that the $80,000/MW-year CONE value is consistent with CONE values in other regional transmission organizations. Illinois Municipal asserts that the Midwest ISO's task was to demonstrate that its CONE value was developed through a methodology that was comparable to the methodology used by other RTOs.

31. Illinois Municipal considers the Commission decision in the April 16 Order to be at odds with its precedent that rejected PJM's proposal to set a CONE value for unconstrained regions based on CONE values for the constrained regions.[28] Illinois Municipal asserts that the Commission must explain how it can allow the Midwest ISO to set a CONE value that is no more than generally in line with other RTOs' values after having rejected PJM's proposal to set a CONE value based on the same principle.

32. Illinois Municipal also faults the Commission for accepting a proposal that limits the grounds on which customers can object to future revisions. Illinois Municipal does not consider the Commission's acceptance of general assumptions and unsubstantiated figures to be a sufficient basis for finding a proposed Tariff change to be just and reasonable. Illinois Municipal asserts that customers are entitled to an explanation of the factors that were considered and their relative weight as well as the process that was used and the basis for testing that process and its assumptions.

c. <u>Commission Determination</u>

33. We deny the request for rehearing. We clarify at the outset that the purpose of the CONE estimate is to set a value for penalties in the event that an LSE is resource deficient and to determine the economic withholding threshold for auction bidding mitigation. The purpose of the deficiency charge is to provide an incentive for market participants to obtain sufficient resources and the purpose of the economic withholding threshold is to ensure that market participants are not exercising market power in the auction. The CONE value, therefore, is not part of a cost-based rate. Its purpose is not to recover the cost of service or the revenue requirement associated with certain services or facilities that provide wholesale electric service.

34. We consider the information provided by the Midwest ISO and the Market Monitor to be sufficient for determining that the CONE value serves its function of

[28] *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 52 (2009).

providing an incentive for market participants to be resource sufficient and to offer competitive bids into the voluntary capacity auction. The Midwest ISO and the Market Monitor have provided the assumptions and explained the methods for developing the estimate of CONE value, and we find this information to be sufficient for finding that the deficiency charge and economic withholding threshold were developed based on reasonable assumptions and methods.

35. Responding directly to Illinois Municipal, the Commission has found the information provided to be sufficient for a finding that the CONE value used in the Midwest ISO's deficiency charge and economic withholding threshold is just and reasonable. No further demonstration of each cost element is required. Such an examination, while appropriate for cost-based rates, is not required for evaluating the reasonableness of the Midwest ISO's deficiency charge and economic withholding threshold.

36. Regarding the assumptions and methods used by the Midwest ISO and the Market Monitor, we consider it to be clear that capital and operating cost estimates for generators in the Midwest ISO[29] are relevant to an estimate of CONE for the Midwest ISO. We also consider the financing and accounting assumptions used by the Midwest ISO and the Market Monitor[30]—to reflect all the costs associated with construction of new generation and the methods used to compute an annual cost estimate—to be clearly relevant to the CONE value. This information provides a reasonable approximation of the cost of new entry for the Midwest ISO.

37. We dispute Illinois Municipal's contention that the Commission based its finding of reasonableness on the fact that the Midwest ISO CONE value is consistent with the CONE value in other RTOs. The basis for the Commission's finding of reasonableness was its review of the assumptions made by the Market Monitor in developing the Midwest ISO CONE estimate, as indicated in Commission statements that specific assumptions were reasonable and a general assessment that all the assumptions were reasonable.[31]

38. We consider the April 16 Order to be distinguishable from the PJM Interconnection precedent cited by Illinois Municipal. In this proceeding, the Midwest ISO and the Market Monitor have developed a CONE value estimate specific to the Midwest ISO based on their own analysis of relevant regional data and estimates. In

[29] *See* Illinois Municipal May 18, 2009 Request for Rehearing at 7.

[30] *Id.*

[31] April 16 Order, 127 FERC ¶ 61,054 at P 140.

contrast, in the PJM proceeding, PJM was proposing to substitute a CONE value for unconstrained areas and apply it to constrained areas, with no assessment of the costs specific to the constrained areas. Hence, the Commission's rejection of the attempt by PJM to substitute one CONE value for another CONE value applicable to a different region has no implication for the Commission's decision accepting the Midwest ISO methodology for its proposed CONE value.

C. Compliance Filing

1. Physical and Economic Withholding

a. April 16 Order

39. In the April 16 Order, the Commission directed the Midwest ISO to work with the Market Monitor to file proposed Tariff provisions in Module D addressing how the Market Monitor would monitor the voluntary capacity auction.[32] As we emphasized, the Tariff provisions must contain sufficient detail for market participants to understand how the Market Monitor would monitor, and propose to have the Midwest ISO mitigate, the auction.[33]

b. Midwest ISO Filing

40. In the June Compliance Filing, the Midwest ISO proposes a threshold screen for determining whether a market participant may have engaged in physical withholding. As an initial threshold, the Midwest ISO has set a physical withholding threshold of 500 MW—that is, the Market Monitor will only screen market participants that have more than 500 MW of Planning Resources[34] under the supplier's ownership or control that have not been offered into the voluntary auction and have not been designated to satisfy the capacity obligations of an LSE in the Midwest ISO or exported. The Midwest ISO also proposes that exports of Planning Resources to a capacity market with prevailing prices less than 50 percent of the Auction Clearing Price be included as a category of conduct that warrants mitigation for physical withholding. If the Market Monitor finds that either of these circumstances has occurred, it will conduct a further inquiry to determine whether the market participant engaged in physical withholding. The Market

---

[32] *Id.* P 119.

[33] *Id*.

[34] Planning Resources are defined as Capacity Resources or Load Modifying Resources used to satisfy a LSE's resource adequacy obligations. Midwest ISO, FERC Electric Tariff, Third Revised Volume No. 1, Sixth Revised Sheet No. 113.

Monitor will then refer the violation to the Commission to determine the appropriate penalty up to the maximum penalty specified in the Tariff.

41. In addition to the physical withholding threshold, the Midwest ISO proposes to revise Module D of the Tariff to create an economic withholding threshold. The Midwest ISO proposes that the Market Monitor will employ an economic threshold equal to ten percent times the CONE value for Planning Resources. As noted above, the current CONE value in the Midwest ISO is $80,000/MW month. In the event a market participant's Planning Resource offer results in an impact on the Auction Clearing Price that exceeds the threshold, the Market Monitor shall substitute a Default Offer equal to the Reference Level.

c. Comments and Protests

42. RRI Energy, Duke, FirstEnergy, and AMP object to the Midwest ISO's proposed modification to include a trigger threshold for exporting Planning Resources to a capacity market with prevailing prices less than fifty percent of the Midwest ISO's auction clearing price. RRI Energy, FirstEnergy, and AMP argue that this proposed Tariff provision is deficient, in part, because it relies on pricing comparisons with neighboring markets that use different market rules and mechanisms[35] and that have more stable price regimes.

43. AMP argues that the Midwest ISO must clarify how it will apply its proposed capacity price test. RRI Energy argues that the Midwest ISO does not explain how the "prevailing price" is measured. Duke contends that comparing a bilateral export contract with the Midwest ISO's auction clearing price is meaningless because the Midwest ISO's voluntary capacity auction is thinly traded and, as such, the prices are volatile and completely unpredictable. Duke argues that Midwest ISO should not use the auction clearing price as a basis for monitoring the voluntary capacity auction.

44. Duke also requests clarification regarding the Midwest ISO's proposal to set a 500 MW initial physical withholding threshold. In particular, Duke seeks clarification as to whether: (1) the 500 MW threshold is meant to apply on an aggregated basis among affiliates; and (2) such aggregation would apply only among affiliates on the same side of an information sharing wall. With regard to the latter issue, Duke questions how this can be accomplished without violating the Commission's affiliate restriction rules.[36]

---

[35] Capacity commitments may last up to one year and be made up to three years in the future.

[36] 18 C.F.R. § 35.39(d) (2009).

45. Duke likewise challenges the Midwest ISO's proposal to establish a market impact trigger threshold of ten percent times the CONE value for the auction clearing price of Planning Resources. Duke requests that the Midwest ISO: (a) either justify or revise upward this market impact threshold; and (b) add a process for threshold assessment of market power prior to triggering any mitigation measures.

46. FirstEnergy also argues that the Commission should direct the Midwest ISO and Market Monitor to clarify how this market impact threshold will be determined and used. FirstEnergy, Exelon, and Detroit Edison suggest that the threshold should not be a static value. FirstEnergy suggests using a sliding scale or multiplier depending on the season and/or month. Detroit Edison and Exelon point out the value of capacity in the Midwest ISO is very high in summer months and very low at all other times and thus it is unreasonable to apply the threshold value on a year-round basis.

47. Finally, Exelon contends that the Midwest ISO needs to amend its mitigation measures to shape the threshold bid triggers to recognize that a generator might need to recover all its going-forward costs in a single peak month and therefore the measure of economic withholding can be based on a generator's annual costs, but the Tariff must make clear that threshold bids should be higher during the peak months and lower during the remaining months to realistically allow recovery of annual costs in a monthly capacity market.

d. <u>Answers</u>

48. The Midwest ISO emphasizes that while there may be difficulties inherent in establishing specific thresholds for analyzing market power, such difficulties do not outweigh the need for reasonable triggers to conduct an investigation of potential market power. The Midwest ISO argues that its proposed threshold—that is, one that involves the export of resources to a capacity market with a prevailing price less than fifty percent of the auction clearing price—is a reasonable trigger. And, while the Midwest ISO acknowledges that there may be differences between other regional markets, such differences do not serve as a rational basis for rejecting the Midwest ISO and Market Monitor's proposal.

49. Nor does the Midwest ISO believe that its proposal should be rejected because of price volatility or unpredictability in the voluntary capacity auction. It states that it selected the figure of fifty percent to establish a reasonable safe harbor for market participants. According to the Midwest ISO, unpredictable prices can explain apparent uneconomic behavior and serve as a basis for not mitigating a market participant.

50. The Midwest ISO also emphasizes that even if a market participant fails the fifty percent export test, such a trigger does not automatically result in a finding of market power abuse. Rather, the trigger simply provides a basis for the Midwest ISO and Market Monitor to conduct a more thorough examination of the withholding.

51. As for the protestors' arguments regarding "prevailing price," the Midwest ISO explains that the Market Monitor selected the term to accommodate possible changes in adjacent market pricing and therefore to ensure that the mitigation is effective and does not inappropriately mitigate suppliers. The Midwest ISO explains that the Market Monitor needs the flexibility to use the best available data of relative capacity prices for neighboring areas that can change over time.

52. The Midwest ISO clarifies that the 500 MW threshold is meant to apply on an aggregated basis to all affiliates of an entity, regardless of whether an information sharing wall exists between such entities. The Midwest ISO, as well as the Market Monitor, explains that such a construction is appropriate because affiliates share common economic interests, even if they are prohibited from sharing information.

53. With regard to the CONE value, the Midwest ISO and Market Monitor state, based upon their understanding of the neighboring capacity markets, that it is neither prudent nor necessary to revise upward the proposed market impact threshold of ten percent times the CONE. They explain that the selection of the value ten percent times CONE is due, in part, because CONE is an annual value of the cost of new entry for a generation resource and the Market Monitor believed that it is reasonable to establish a threshold value of a market participant's increase in the price of capacity in one month at ten percent times the annual CONE to determine a material impact on auction prices. The Midwest ISO and Market Monitor state that if a market participant's economic impact on the auction for a single month exceeded ten percent of the annual entry costs for capacity, then it is likely that the participant has market power and has engaged in conduct that likely warrants mitigation.

e. Commission Determination

54. We accept Midwest ISO's proposal. We agree with the Midwest ISO that a market participant's decision to export Planning Resources at prices significantly below the auction clearing price is a reasonable threshold for the Market Monitor to commence a more thorough examination to determine whether a supplier is attempting to exercise market power. A difference of more than 50 percent between capacity export prices and the Auction Clearing Price is a large difference that is appropriate for investigation by the Market Monitor. We find that the fifty percent threshold standard reasonably balances the Market Monitor's need to identify when a market participant has possibly engaged in physical withholding, but at the same time recognizes that the voluntary capacity auction may experience significant price fluctuations. The safe harbor created by the fifty percent standard should give most market participants sufficient cushion even when the prices in the auction are unpredictable and should limit proposals for mitigation so that mitigation is not applied inappropriately when market participants are offering competitively.

55. Nor do we consider a price comparison between the prices in the Midwest ISO's voluntary capacity auction and the prices of export capacity markets to be meaningless. Based on the Market Monitor's assessment that there are no market rules or mechanisms in neighboring capacity markets that would result in distortions or divergences of prices that could render such a comparison meaningless, we expect that the proposed threshold is likely to identify anomalous price behavior by market participants. We note that a market participant has the opportunity to justify its exports at low prices before any mitigation is applied. If a market participant is locked in for an extended period to supply exports to a neighboring capacity market at a single price while the Midwest ISO's auction price fluctuates, the market participant can discuss the circumstances of its export activity with the Market Monitor.

56. We find that the Market Monitor has reasonably explained how the prevailing prices for exports will be measured. We also agree with the Midwest ISO that the Market Monitor must have flexibility in determining prevailing prices, to accommodate changes in adjacent market pricing and thereby ensure that mitigation is not applied inappropriately. For this reason, we do not see that any purpose is served by putting a definition of prevailing prices into the Midwest ISO Tariff that risks being out of date and otherwise inaccurate. To provide market participants with as much certainty as possible, we require that the Market Monitor list in the Midwest ISO Business Practices Manuals the types of data and the data sources that will be evaluated in the export price analysis and provide updates in the event new data sources are added or revised.

57. We do not agree with Duke's concern regarding the application of the 500 MW physical withholding threshold to affiliates. While Duke correctly notes that affiliates may not share information about uncommitted generation, neither Duke nor its affiliates are subjected to mitigation unless they engage in physical withholding. The 500 MW threshold merely identifies an initial group of Planning Resources that the Market Monitor will review for possible physical withholding. We do not believe that Duke needs a waiver of the Commission's affiliate restriction rules so that Duke and its affiliates can discuss ways to avoid being reviewed for physical withholding. Accordingly, we accept the Midwest ISO's 500 MW threshold and its proposal to apply the threshold on an aggregated basis to all affiliates.

58. Finally, we find that the proposed market impact threshold of ten percent times the CONE value is reasonable. As indicated in the Midwest ISO's answer, an $80,000/MW offer in one month may not indicate the exercise of market power but if an offer could result in an increase in the auction price of over ten percent times the CONE in any month, we agree that this scale of increase could reasonably be considered a material impact on prices and an indication of the potential exercise of market power.

59. The Market Monitor states that ten percent times the CONE is a threshold value of a market participant's increase in the price of capacity in one month.[37] In other words, the threshold is not the auction price level as some comments imply. To ensure that market participants have a clear basis for understanding how the threshold operates, we direct the Midwest ISO to make a compliance filing thirty days after the date of this order to clarify in proposed Tariff language that the threshold is an impact threshold based on the increase in the auction price, and therefore is not based on the level of the auction price.

60. While some parties argue for a higher threshold in peak months, we consider the fact that a market participant's offer could increase the auction price by over $8,000/MW to be a significant and material impact on prices, even during these periods. While the Midwest ISO indicates in its answer it is willing to revise the description of the threshold further, we see no need for further revisions—beyond the clarification that the threshold is based on the increase in the auction price—to the economic withholding threshold proposal. As discussed, the Market Monitor is proposing an impact threshold that we find reasonable and therefore no further changes or clarifications are needed.

61. Finally, we will require the Midwest ISO to make a revision to the heading and first sentence of section 63.3.a.i of the Tariff. Although the Midwest ISO has proposed to include Planning Resources as a type of resource that may be subject to physical withholding screens, we are concerned that the heading and first sentence of section 63.3.a.i may cause confusion because the language indicates that the section only applies to Electric Facilities.[38] Not all Planning Resources, however, are Electric Facilities (for example, Load Modifying Resources are Planning Resources, but not Electrical Facilities). Accordingly, we will require the Midwest ISO to revised the header and first sentence in the compliance filing to clearly indicate that the section applies to all Planning Resources due thirty days after the date of this order.

---

[37] *See* Midwest ISO July 23, 2009 Answer at 10. A threshold of ten percent times the CONE value means there is a significant impact if an offer increases the auction price by more than $8,000/MW.

[38] Electric Facilities are defined in the Tariff as equipment used for generation, transmission, storage or control of the transmission of electricity and that is connected to or part of the transmission system operated by the transmission provider. Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, Second Revised Sheet No. 131.

2. Justifiable Exceptions to Offering Capacity

a. April 16 Order

62. As part of the Midwest ISO's monitoring proposal, the April 16 Order required the Midwest ISO to "provide clear guidance regarding when a decision not to offer capacity into the capacity auction will not be considered an exercise of market power."[39] These exceptions, as set forth in the April 16 Order, had to be set forth in the Tariff.

b. Midwest ISO Filing

63. In the transmittal letter of the June Compliance Filing, the Midwest ISO lists several circumstances in which a market participant with excess capacity can refuse to offer capacity into the voluntary capacity auction without being subject to referral to the Commission or other mitigation measures. The list includes: (1) suppliers that sell their capacity bilaterally before the auction; (2) suppliers that sell their capacity bilaterally after the auction; (3) suppliers that designate their capacity to satisfy their own capacity requirements; (4) suppliers that export their capacity to another area at a price that is comparable to or higher than the expected Midwest ISO capacity price; (5) suppliers whose capacity is not economic to sell in the Midwest ISO; (6) suppliers whose withholding would not raise prices; (7) suppliers that have a *de minimis* amount of unoffered capacity below a stated quantity threshold. The Midwest ISO did not include this list as part of its proposed Tariff revisions.

c. Comments and Protests

64. AMP argues that the proposed list, while specific, should not be viewed as an exclusive basis for determining whether a market participant has justifiably withheld capacity from the voluntary capacity auction. AMP asserts that there may be other bases on which a market participant may refuse to offer capacity into the auction and the list should be modified to incorporate such flexibility. AMP also argues that the list should be modified to include an exception for market participants serving their own capacity requirements in regions outside of the Midwest ISO region. Finally, AMP argues that the Midwest ISO failed to comply with the April 16 Order by not including the list as part of its proposed Tariff revisions.

65. Detroit Edison contends that the Midwest ISO proposed list of exceptions is unworkable. Detroit Edison argues that these exceptions will require the Market Monitor to examine bilateral contracts that may span multiple months or years and then compare those contracts to reference level capacity values to be determined by the Market Monitor

[39] April 16 Order, 127 FERC ¶ 61,054 at P 122.

on a month-by-month basis. Given these facts, Detroit Edison claims that neither the Midwest ISO nor the Market Monitor will be able to accurately determine whether a market participant's decision to withhold capacity from the auction satisfied any of the listed exceptions for bilateral contracts.

d. Answer

66. The Midwest ISO disagrees with AMP regarding an exception for market participants serving their own capacity requirements in regions outside the Midwest ISO. The Midwest ISO does not provide a basis for that disagreement. As for whether the list of exceptions should be included in the Tariff, the Midwest ISO defers to the Commission's direction on that issue.

e. Commission Determination

67. As set forth in the April 16 Order, the Midwest ISO had to "provide clear guidance regarding when a decision not to offer capacity into the capacity auction will not be considered an exercise of market power."[40] The April 16 Order also required "[t]hese exceptions to be clearly set forth in the Tariff filing." We agree with AMP that the Midwest ISO has failed to comply with this requirement of the April 16 Order and we order the Midwest ISO to submit a compliance filing thirty days after the date of this order to remedy this failure.

68. While we generally find the Midwest ISO's list of exceptions to be reasonable, we agree with AMP that the list should include market participants serving their own capacity requirements in regions outside of the Midwest ISO. Accordingly, we order the Midwest ISO to make this modification as part of its compliance filing due thirty days after the date of this order. We will not, however, require the Midwest ISO to create, as requested by AMP, a "catch-all" category of situations where physical withholding will not be mitigated. As the Commission has emphasized, organized markets work best when mitigation rules are "clearly understood by and followed by market participants."[41] The catch-all provision requested by AMP does not meet this clarity requirement and provides the Market Monitor with too much latitude in determining the types of behavior that may or may not be mitigated. Accordingly, we will deny AMP's request.

69. Finally, we do not agree with Detroit Edison's argument that the list is unworkable. We expect that the Market Monitor will be in contact with market

[40] *Id.* P 122.

[41] *Mkt. Monitoring Units in Reg'l Transmission Orgs. & Indep. Sys. Operators*, 111 FERC ¶ 61,267, at P 5 (2005).

participants regarding their auction behavior and will verify the reasons that capacity is not being offered into the auction. We expect that these discussions will provide a sufficient basis for the Market Monitor to determine if referral is necessary. As discussed above, if a market participant is locked in for an extended period to supply exports to a neighboring capacity market at a single price while the Midwest ISO's auction price fluctuates, the market participant can discuss the circumstances of its export activity with the Market Monitor and the Midwest ISO can evaluate this information to determine if mitigation is appropriate.

3. Going-Forward and Opportunity Costs

a. April 16 Order

70. The April 16 Order directed the Midwest ISO, in consultation with the Market Monitor and market participants, to address two concerns raised by parties in their protests of the November 2008 Compliance Filing.[42] First, we directed the Midwest ISO to examine what the appropriate timeframe should be for measuring going-forward costs[43] and whether that timeframe should assume the permanent retirement of a resource. To the extent that the Midwest ISO disagreed with such an assumption, the April 16 Order directed the Midwest ISO to explain and support its choice of an alternative timeframe. Second, the April 16 Order directed the Midwest ISO to evaluate its policy on opportunity costs and whether such costs should account for the potential to export capacity to the PJM market.[44]

b. Midwest ISO Filing

71. The Midwest ISO proposes to revise several provisions in Module D of the Tariff to address the April 16 Order regarding opportunity costs and going forward costs. In particular, the Midwest ISO proposes to modify section 61.1 of the Tariff by allowing the Market Monitor to collect data regarding a resource's going-forward costs and

---

[42] *Id.* P 127.

[43] Going-forward costs are the costs of keeping a Generation Resource or Demand Response Resource in operation. Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, Proposed First Revised Sheet No. 1375A. Opportunity costs have been defined to include, among other things, data related to the opportunity to sell Capacity bilaterally or exporting Capacity to other markets. Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, Proposed Second Revised Sheet No. 1375.

[44] April 16 Order, 127 FERC ¶ 61,054 at P 127.

Opportunity Costs.[45] This data would include: "[d]ata or information related to the opportunity to sell Capacity bilaterally or exporting Capacity to other markets" and "[d]ata or information related to the costs of keeping a Generation Resource or Demand Response Resource in operation."[46]

72. The Market Monitor will use this data in setting reference levels[47] for Planning Resources. Accordingly, the Midwest ISO has revised section 64.1.4 to reflect that reference levels for planning reserve offers will be set based on a resource's opportunity costs to export capacity to a neighboring transmission region. In the event the market participant does not provide documentation of opportunity costs, the Market Monitor will develop reference levels based on the estimated opportunity cost of exporting capacity to a neighboring region. The Market Monitor will base the estimate on capacity pricing data from neighboring regions, available bilateral capacity contract information and the results of voluntary capacity auctions. The Market Monitor proposes to post reference levels at least five days prior to the deadline for submitting offers into the voluntary capacity auction. In the event a market participant's Planning Resource offer results in an impact on the Auction Clearing Price that exceeds the threshold, the Market Monitor shall substitute a Default Offer equal to the Reference Level.

73. With regard to going-forward costs, the Midwest ISO proposes that going-forward costs shall mean either: (1) the costs, including, but not limited to, mandatory capital expenditures necessary to comply with federal or state environmental, safety or reliability requirements that must be met to supply Planning Resources, for each of the following instances, as applicable, to supply Planning Resources that could be avoided if a supplier otherwise capable of supplying Planning Resources were either to cease supplying Planning Resources and energy while retaining the ability to re-enter such markets or to retire permanently from supplying Planning Resources and energy; or (2) the net

[45] Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, Proposed Original Sheet No. 1409.01, *et seq*.

[46] June 2009 Compliance Filing, Transmittal Letter at 9.

[47] Reference Levels, in the context of Module D of the Tariff, are the marginal costs for Resources including legitimate risk and opportunity costs. Midwest ISO, FERC Electric Tariff, Third Revised Volume No. 1, Fifth Revised Sheet No. 117. For Planning Resources, those risks and costs may include the opportunity costs of exports to neighboring capacity markets or the going-forward costs of keeping a Planning Resource in operation.

opportunity costs of foregone sales outside of the Midwest ISO, net of costs that would have been incurred as a result of the foregone sale if it had taken place.[48]

c. Comments and Protests

74. Exelon contends that the Midwest ISO needs to amend its monitoring and mitigation measures to recognize that a generator may need to recover all of its going-forward costs in a single peak month. Exelon asserts that the measure of economic withholding must be based on a generator's annual costs. Accordingly, it requests that the Tariff make clear that threshold bids should be higher during the peak months and lower during the remaining months to realistically allow recovery of annual costs in a monthly capacity market.

75. While RRI Energy generally appreciates the variety of alternative methods for determining reference levels, it opposes the Midwest ISO's revision to section 64.1.4.f.ii of the Tariff. That provision states that: "[t]he costs that a Capacity supplier would avoid as a result of retiring should only be included in its Going-Forward Costs if the owner or operator of that facility actually plans to mothball or retire it because the Capacity revenues it receives are not sufficient to cover those costs." RRI Energy recommends this provision be eliminated because it is inconsistent with other Tariff rules. In particular, RRI Energy argues that there is a mismatch between the voluntary capacity auction's month-to-month timing requirement and the 26-week lead-time required by Section 38.2.7 of the Tariff to submit a mothball/retirement notice. RRI Energy also believes that the proposed revision may inadvertently force a resource to exit the market. Finally, RRI Energy claims that the provision may result in inefficient bidding and suppress market prices.

76. Duke requests that the Midwest ISO clarify its definition of "Going-Forward Costs." It notes that the Midwest ISO has provided several means to measure going-forward costs, but it has provided no explanation of when to use which measurement. Duke argues that the proper measurement should be the one that results in the highest value for going-forward costs. In his testimony, Duke's witness, Mr. Stoddard, asserts that the Market Monitor should estimate proxy going-forward costs for different categories of resources. Duke contends that the Midwest ISO also should be required to clarify and explain how the Market Monitor will use the various sources of capacity data to develop reference prices.

77. In addition, Duke notes that while the Midwest ISO's proposed revisions indicate that the Market Monitor will "determine the level of the facility-specific [reference level]

[48] Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, Proposed Original Sheet No. 1409.02.

not later than 5 days prior to the deadline for submitting offers," this language does not require the Market Monitor to provide that information to the market participant. Accordingly, Duke recommends inserting the words "and provide it to the Market Participant" prior to "not later than five days prior…" in the Tariff at Section 64.1.2.f.iii, Original Sheet No. 1409.05.

78. FirstEnergy requests that the Midwest ISO clarify how reference levels will be determined with specific reference to the threshold based on the CONE value. FirstEnergy notes that reference levels could vary significantly depending on how and when they are determined. FirstEnergy asserts that market participants could be forced to offer at a loss if the Market Monitor does not take into account seasonal or monthly variations in value. FirstEnergy also requests that the Midwest ISO clarify the calculation of the facility-specific Planning Resource reference level, specifically with respect to capturing seasonal or monthly variations in the value of capacity.

d. Answers

79. The Midwest ISO and Market Monitor agree with Exelon regarding market participants that may seek to recover their entire annual going-forward costs in a single month. They assert that such conduct would not necessarily be an exercise of market power. The Midwest ISO submits that it will clarify in a compliance filing, if so directed, that the reference level for going-forward costs in a particular month will be based on the annual going-forward costs.

80. With regard to RRI Energy's arguments, the Midwest ISO asserts that the proposed language in section 64.1.4.f.ii was meant to "clarify that if a market participant attempts to justify a voluntary capacity auction offer based upon its assumption that if it did not receive a capacity payment it would economically be required to retire the generation resource, then it is rational to expect that if such an offer was not accepted that the market participant would submit notice of its intent to retire such resource."[49] The Midwest ISO and Market Monitor explain that it would be irrational to continue to own a resource if it failed to receive a capacity payment sufficient to enable it to operate profitably.

81. The Midwest ISO and Market Monitor further argue that if a market participant failed to seek to retire a Planning Resource, after not receiving the subject capacity payment that was predicated on maintaining the profitability of the resource, then it would be reasonable for the Market Monitor to assume that the market participant had actually not intended to retire the resource and that such market participant apparently was attempting to exercise market power by merely claiming that the capacity offer was

[49] Midwest ISO July 23, 2009 Answer at 12.

necessary to avoid the retirement of the resource. Therefore, the Midwest ISO and Market Monitor conclude that a resource's failure to provide notice based upon such auction bidding creates a presumption that the entity was not basing its auction offer on the revenue required to avoid retirement of the resource. The Midwest ISO and Market Monitor submit that they are not trying to force units to exit the market or suppress prices.

82. In response to Duke's arguments, the Midwest ISO attempts to clarify the going-forward cost issue by pointing to section 64.1.4.f.i of the Tariff. The Midwest ISO notes that this section contains two alternatives for the going-forward costs: (1) the documented costs that can be avoided by mothballing or retiring a generation resource; and (2) the opportunity costs that differ from the generic opportunity costs used to set the default reference.[50] The Midwest ISO claims that a market participant can request that the Market Monitor consider either approach for determining unit specific going-forward costs. However, the Market Monitor believes that it would be unusual for a market participant to select the approach that results in justification of a lower going-forward cost. The Midwest ISO also clarifies that the Market Monitor will use the various sources of capacity data to develop reference prices to establish a rebuttable presumption of the exercise of market power.

83. CMTC and the Midwest TDUs answer that the Commission should reject the Midwest ISO's offer to permit a generator to recover all of its going-forward costs in a one-month period. As justification for rejection, CMTC and the Midwest TDUs contend that offer caps are meant to prevent gaming opportunities and market manipulation and that permitting a generator to submit capped offers that reflect all going-forward costs for the year in a single month undercuts market power mitigation, which may lead to adverse consequences for customers such as gaming, market manipulation and increased auction clearing prices.[51] They further point out that neither Exelon nor the Midwest ISO limit a generator that includes all going-forward costs in a single month capped offer. Nor are the bids limited to the peak summer month auctions. CMTC and the Midwest TDUs claim that the Midwest ISO's proposal does not allow for the possibility that a peak month could occur in the winter months.

[50] This section also describes the process and details for calculating going-forward costs and providing the Market Monitor with such justification.

[51] These parties assert that gaming and market manipulation could result from owners of multiple units. For example, if a generator owns and bids several units into the auction, it could use a high capped offer in a particular month to set a high clearing price, either by setting the clearing price at its high capped offer if it clears, or by effectively withdrawing from the supply stack and allowing another high offer to clear.

84. As an alternative argument, CMTC and the Midwest TDUs claim that the Midwest ISO should file its proposal regarding going-forward costs in a separate section 205 filing. They argue that the Midwest ISO's offer proposes to make a significant change to the language in its Tariff, not pursuant to its own filing or in response to a Commission order, but rather in response to a party's comments. They also argue that customers should not be exposed to potential rate increases that arise from a proposal that is filed in a proceeding long after the original Tariff filing. They therefore contend that the Commission should reject the Midwest ISO's proposal without prejudice to a future filing under section 205.

e. Commission Determination

85. As required by the April 16 Order, the Midwest ISO has evaluated its policy on determining opportunity costs and going-forward costs and has proposed several revisions to its Tariff to address concerns raised by various parties. In particular, the Midwest ISO proposed revisions to section 61.1 of the Tariff, which allow it to collect data regarding opportunity and going-forward costs, and revised section 64.1.4 to detail how the Market Monitor will use this data to set reference levels for market participants. We find these provisions to be reasonable, subject to the modifications set forth below.

86. With regard to the issue of recovering all going-forward costs in one month, the proposed Tariff language states that the facility-specific reference level is equal to the annual going-forward costs per MW less the annual net revenues the generation resource would have received from a transmission provider's energy and ancillary services markets.[52] In other words, this language would allow a market participant to offer its annual costs, minus annual revenues, in its offer into the monthly auction without exceeding the reference level threshold. This should address Exelon's concerns without the need for further modification.

87. We do not agree with CMTC and Midwest TDUs that the Market Monitor's proposed reference levels will encourage gaming and market manipulation, and thereby increase auction clearing prices. Owners of multiple units will not be able to withhold capacity, as CMTC and the Midwest TDUs allege, because the Market Monitor has

[52] Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, Original Sheet No. 1409.05. The Midwest ISO clarified this interpretation in its answer by making clear that the going-forward cost-based reference level in the proposed Tariff language is based on the annual going-forward costs. For these reasons and because the proposed Tariff language explains the formulation of the reference level clearly, we see no reason to revise the Tariff further.

physical withholding screens to ensure this does not happen. Also, in the event the owner of multiple units is able to sell capacity in the auction at the maximum annual going-forward costs minus revenues for a particular unit, this level will typically represent the annual costs of standing-by for nearly all units offering into the auction—an amount that excludes most capital costs and is therefore a fraction of the CONE value. While it is possible, though unlikely, that an owner of multiple units could recover more than its stand-by costs in one year in the event there is a winter peak and a summer peak, we do not see such a low probability outcome for relatively minor costs to be a significant gaming incentive. Furthermore, the Market Monitor will be monitoring the behavior of resources of all affiliates offering into the auction and can refer such behavior to the Commission if it determines that the resource owner is acting in a non-competitive manner. Finally, such an offer price maximization strategy runs the risk of losing revenues for the owner because high offers may not be taken in the auction and therefore no auction revenues are obtained—a real possibility in the Midwest ISO capacity auction that has been clearing from less than $1/MW to $10/MW for most months and achieved a high cleared price of $10,015/MW—a fraction of the CONE value in the peak month of July.

88. In addition, we agree with Duke that the Market Monitor should provide the facility-specific Planning Resource reference level to the market participant when the Market Monitor makes this determination, which is no later than five days prior to the deadline for submitting Planning Resource offers. The Midwest ISO should make appropriate changes to reflect this fact in the compliance filing required above.

89. However, we do not agree with RRI Energy's claim that the Midwest ISO's proposal will suppress prices and force suppliers to retire their Planning Resources. If a market participant is not planning on retiring the facility, the true going-forward cost is the cost of moth-balling the facility or putting the facility on stand-by (and retaining the ability to re-enter the market) while ceasing to supply Planning Resources, and market participants are free to choose this option. If, on the other hand, a market participant chooses the option of basing its going-forward costs on the avoided costs of permanently retiring a facility, we consider it reasonable that the Midwest ISO require that the market participant actually be planning to retire the facility to use this option for determining an accurate going-forward cost. Inasmuch as market participants have a choice, we do not find a basis for the claim that market participants are forced to retire their facilities. And to the extent the choice picked reflects the true costs of that option, we find no basis for assuming that prices are suppressed.

90. We also do not agree with RRI Energy's claim that retirement notice provisions, as set forth in section 38.2.7 of the Tariff, will impact the Market Monitor's determination of a Planning Resource's going-forward costs and whether a market participant is planning to mothball or retire that resource. The language set forth in section 64.1.4.f.ii of the Tariff sets forth the Market Monitor's obligation to determine the

Planning Resource's going-forward costs and this section does not require the filing of a retirement notice. Thus, we do not find the retirement notice Tariff provisions to be a bar to the Market Monitor's determination as to whether a market participant is permanently retiring a Planning Resource. Nor do we consider the volatility in auction prices to be a barrier to retirement determinations. Over time, suppliers will have sufficient auction price and volume data upon which to make an informed judgment on whether the auction could reasonably be expected to recover the costs of the facility, and therefore suppliers would have sufficient information to determine if retirement is necessary.

91. Nor is it necessary, as Duke requests, to revise the proposed Tariff revisions to indicate that the going-forward cost is the higher of the two options. As the Midwest ISO stated in its answer, the going-forward cost is based on market participant notice of retirement and the market participant has the ability to choose between the two options. We find this approach to be reasonable and it should address Duke's concerns.

92. We consider the Midwest ISO proposal to base going-forward costs on the costs of each specific facility to be reasonable. We consider it premature at this point to require proxy unit costs because we have no basis to conclude that there is a lack of facilities data. The Midwest ISO and the Market Monitor can develop alternative methods if they find that data availability is a problem. We find the Market Monitor's clarification that market participants will pick the going-forward option to be responsive to Duke's concern as to which measurement method will be used to determine going-forward costs.

93. We agree with Duke that more specificity and transparency is needed with respect to how the capacity data will be used that the Market Monitor obtains to estimate the opportunity cost of exporting capacity to a neighboring region. Accordingly, we require that the Market Monitor specify the derivation of the opportunity cost including which prices (i.e., capacity pricing data from neighboring regions, available bilateral capacity contract information and/or auction results) were used in the opportunity cost estimation when the applicable reference level for Planning Resources are publicly posted thirty days prior to the deadline for submitting offers into each voluntary capacity auction. We require that the Midwest ISO revise its Tariff to reflect this information requirement in the compliance filing.

94. Responding to FirstEnergy, we consider the description of reference levels in the Tariff to be clear that the Market Monitor will base the reference level on available market price data or facility-specific information.[53] We expect that the Market Monitor's

[53] We clarify for FirstEnergy that, as specified in sections 64 and 65 of the Tariff, the economic withholding threshold based on the CONE value is the basis for determining if the market participant is engaging in economic withholding. If the Market Monitor determines that there is economic withholding per the requirements of the Tariff,

(continued…)

assessment of market prices and the opportunity costs of foregone sales will include gathering data on a variety of prices and therefore should reflect seasonal and monthly price trends.

95. Finally, we require the Midwest ISO to clarify the scope of section 61.1.c, "Going-Forward Costs."[54] While the Commission believes that the Midwest ISO intended to apply the section to all Planning Resources, including Load Modifying Resources, the section as drafted applies to only Generation Resources and Demand Response Resources, which may or may not include all Load Modifying Resources, such as behind-the-meter generation. Accordingly, we order the Midwest ISO to clarify this ambiguity as part of the compliance filing due thirty days after the date of this order. We also note that since the Going Forward value is based on Generation Resource costs and revenues, such a value is not relevant to LMRs or DRRs that are Planning Resources. We require that the Midwest ISO address this concern by either explaining the relevance of the Going Forward value to the reference level for LMRs and DRRs or propose appropriate alternative reference levels for LMRs and DRRs in the compliance filing.

4. <u>Mitigation Measures</u>

96. The April 16 Order directed the Midwest ISO, in consultation with the Market Monitor, to file proposed Tariff provisions that would address and mitigate potential exercises of market power.[55] We noted that these measures could include automatic mitigation for economic withholding and sanctions when necessary for physical withholding. The April 16 Order also emphasized that it was the Midwest ISO's obligation to conduct any mitigation in accordance with Order No. 719.[56] In the June Compliance Filing, the Midwest ISO proposes two revisions to the Mitigation Measures section. First, the Midwest ISO modified the section related to default offers, as set forth in section 65.2 of the Tariff, in the event of economic witholding.[57] Specifically, the Midwest ISO modified this section to include Planning Resources as one of the resources

---

the default offer will be based on the reference level of the Planning Resource.

[54] Midwest ISO, FERC Electric Tariff, First Revised Sheet No. 1375A.

[55] April 16 Order, 127 FERC ¶ 61,054 at P 120.

[56] *Id*.

[57] The Midwest ISO notes that default offers are a mitigation measure that requires a market participant "to Offer as if it faced workable competition during a period when" it failed to do so because it was engaged in physical or economic withholding. June 2009 Compliance Filing, Transmittal Letter at 10.

that is subject to default offers. And second, the Midwest ISO modified several provisions in section 65.3 to make clear that the sanction provisions apply to all Planning Resources regardless of location, in the event of physical witholding.

97. No party protested or commented on the proposed mitigation measures.

98. We find the proposed revisions to sections 65.2 and 65.3 to apply the Midwest ISO's mitigation measures to Planning Resources to be reasonable and in compliance with the April 16 Order.[58] While the April 16 Order asked the Midwest ISO and Market Monitor to consider whether automatic mitigation measures were necessary, the Midwest ISO and Market Monitor considered such measures and declined to implement those measures. Because automatic mitigation measures were not mandated by the April 16 Order, we will accept the Midwest ISO and Market Monitor's response.

5. Voluntary Nature of Auction and Stabilization Factors

a. April 16 Order

99. In the April 16 Order, the Commission directed the Midwest ISO to address Duke's concern regarding volatile prices for capacity and to address whether, in light of the monitoring and mitigation plan, it expects capacity prices will provide sufficient revenues for resources needed to maintain reliability to remain in the market or if "stabilization factors" would be necessary.[59]

b. Midwest ISO Filing

100. The Midwest ISO states in the June Compliance Filing that price stability is not a goal even in a market where the marginal cost of selling capacity is close to zero (with the exception of opportunity costs) and the market value of capacity during shortages is close to $80,000/MW-month and volatile prices are to be expected during the summer peak months, auction prices will vary substantially throughout the year and the inexperience of market participants using the auction may exacerbate price volatility in the short-run.

---

[58] While we are accepting the Midwest ISO's proposal to include language in sections 65.2 and 65.3 to make clear that such provisions apply to Planning Resources, the Commission found in another order issued concurrently with this order that section 65.3 must be modified to comply with Order No. 719. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,054.

[59] April 16 Order, 127 FERC ¶ 61,054 at P 124.

101. The Midwest ISO further states that the issue regarding the need for "stabilization factors" is premature at this point. The Midwest ISO contends that there can be no credible evidence that the voluntary capacity auction will not provide sufficient revenues for resources needed to maintain reliability because the revisions have only been in full effect for two months. The Midwest ISO contends that it is premature to predict what the long-term dynamics of the capacity market will be when the present capacity surplus is reduced and new investment is needed.

c. Comments and Protests

102. Duke, RRI Energy, and FirstEnergy argue that the Midwest ISO's proposal for market monitoring and mitigation of the auction transforms it into a mandatory, must-offer capacity auction. FirstEnergy requests that the Commission reject the proposal and either maintain the voluntary nature of the auction or propose an annual mandatory capacity auction. Duke recommends that at the least there is need for the introduction of a demand curve, which Stoddard's testimony claims can be accomplished prior to the June 1, 2010 commencement of the next planning year.

103. Duke argues that the market will fail unless stabilization factors are introduced and recommends that the Commission direct the Midwest ISO to adopt a demand curve. Similarly, RRI Energy contends that the Midwest ISO failed to address stabilization factors in its compliance filing and that in time the Midwest ISO's design will not provide sufficient revenues to existing resources, or appropriate incentives for the development of new infrastructure. RRI Energy also suggests that the Midwest ISO examine tools that address stabilization factors, including forward procurement. Integrys argues that a long-term capacity market is required to support resource adequacy in the Midwest ISO. EPSA suggests that the Commission direct the Midwest ISO to evaluate and address potential modifications to improve Module E's[60] ability to attract and retain investment and provide such evaluation to the Commission by November 30, 2009.

104. Detroit Edison requests that the Commission postpone implementation of the voluntary capacity auction because the market monitoring proposal of the Midwest ISO is unnecessary and unsubstantiated by objective evidence indicating that a market participant could exercise market power and/or engage in physical or economic withholding of capacity from the auction and the proposed market monitoring Tariff revisions impose undue administrative burdens[61] on market participants.

---

[60] Module E is the Resource Adequacy section of Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, Original Sheet No. 1441, *et seq*.

[61] Detroit Edison claims that estimating the opportunity cost of exporting capacity to a neighboring region and documenting going-forward costs that would justify the

(continued…)

d. Answer

105. The Midwest ISO responds that this proposal does not create a mandatory capacity auction. It states that parties raise improper collateral attacks on the Commission's prior orders. It claims that the Commission has addressed and has rejected arguments that the subject Tariff provisions create a mandatory market for the auction of capacity.[62] The Midwest ISO points to section 63.3 of the Tariff that provides the Market Monitor's mitigation authority will only apply to a market participant that has the ability to exercise market power with respect to capacity in the Midwest ISO region and that a market participant that cannot exercise market power has no obligation to participate in the voluntary capacity auction.

106. Nor does the Midwest ISO agree with the claim that the voluntary capacity auction is not voluntary. It notes that the issues raised by the parties do not involve market monitoring and mitigation, as addressed in the June Compliance Filing, but rather are issues regarding the fundamental design of the resource adequacy program. The Midwest ISO claims that the fundamental design issue has been addressed repeatedly by the Commission.[63] Accordingly, the Midwest ISO argues that the challenge is beyond the scope of the June Compliance Filing.

107. CMTC and the Midwest TDUs likewise argue that the challenge to the voluntary nature of the capacity auction is beyond the scope of this proceeding. They also contend even if Duke's proposal was not an impermissible attack on previous Commission orders, it should be dismissed because it is based on purely speculative concerns regarding the potential operation of the auction and advocates a solution that would impose a demand curve and forward procurement that has not achieved stellar results when instituted elsewhere, and is especially ill-suited to the actual composition of the Midwest ISO market.

108. The Midwest ISO further responds by reiterating that because the subject resource adequacy provisions have only been in effect since May of 2009 it would be premature, in the absence of any credible evidence, for the Midwest ISO to be required to evaluate

---

temporary mothballing or the permanent removal of a Planning Resource from the capacity markets will impose an undue administrative burden on market participants.

[62] *See* Financial Settlements Order, 125 FERC ¶ 61,060 at P 38.

[63] Midwest ISO July 23, 2009 Answer at 4 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,283, at P 376, *reh'g denied*, 125 FERC ¶ 61,061 (2008) (rejecting claims that the Midwest ISO must implement a centralized or a forward capacity market)).

and address potential modifications to improve Module E's ability to attract and retain investment and to provide such evaluation to the Commission by November 30, 2009. CMTC and the Midwest TDUs concur in their answer and state that the Midwest ISO's voluntary capacity auction should be allowed to continue as currently constituted so that the Midwest ISO and market participants can evaluate its actual strengths and weaknesses and, should modification prove necessary, propose workable solutions tailored to that real-world experience. They state that the Commission is wise to reject a "one-size-fits-all" approach and allow regions to determine their needs based on regional differences.

109. Finally, CMTC and the Midwest TDUs answer that the Midwest ISO's filing stops well short of making the auction involuntary. CMTC and the Midwest TDUs explain in defense that the scrutiny provided for in the Midwest ISO's filing is not onerous, that tests that the Midwest ISO has proposed for physical and economic withholding provide wide leeway and numerous safe harbors, such that generators can readily avoid having their capacity marketing questioned, such as the fail-safe opportunities to explain their actions, and that even if unable to present a legitimate business justification they will still receive the mitigated price for their capacity.

e. <u>Commission Determination</u>

110. We find that the Midwest ISO's explanations are responsive to the Commission's directive in the April 16 Order. The Commission's request was limited to obtaining an evaluation of the impact of the mitigation plan on prices and revenues, and the Midwest ISO has provided this evaluation. Accordingly, nothing further is required. Parties that urge a fundamental re-design of the Midwest ISO resource adequacy plan are requesting actions that are beyond the scope of the Commission's compliance requirement, and therefore we will not require further submittals.

111. We agree with the Midwest ISO that it is premature at this time to develop stabilization provisions or otherwise undertake a fundamental re-design of the Midwest ISO resource adequacy plan. Many aspects of the Midwest ISO permanent resource adequacy plan, including provisions accepted and revised in this order and other companion orders,[64] are still in the process of development. More time is needed for an assessment as to whether the market design is resulting in inadequate investment or hindering reliability.

---

[64] *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,057 (2010).

6. Eligibility of External Resources to Participate in Auction

a. April 16 Order

112. The Commission directed the Midwest ISO in the April 16 Order to address the effect of the eligibility rules specifically for Planning Resources that are not eligible to be offered into the monthly auction[65] and indicate the status of resources that could become eligible to participate in the monthly auction, but intentionally decide to remain ineligible and that have not contracted bilaterally for capacity.[66]

b. Midwest ISO Filing

113. The Midwest ISO in the June Compliance Filing states that only Planning Resources that are universally deliverable are qualified to participate in the voluntary capacity auction. It notes that there were three categories of Planning Resources that were not universally deliverable under the Tariff: (1) Load Modifying Resources; (2) Demand Response Resources; and (3) External Resources.[67] The Midwest ISO explains that these resources are not eligible for universal deliverability (and thus are not qualified to participate in the voluntary capacity auction) because these Planning Resources do not have Network Resource Interconnection Service with the Midwest ISO under Attachment X. In addition, the Midwest ISO notes that another Planning Resource category that is not universally deliverable consists of Generation Resources that take Energy Resource Interconnection Service under Attachment X.[68]

114. The Midwest ISO notes that it currently relies heavily on imports of energy, and therefore it may be inconsistent to restrict external resources from participating in the auction. The Midwest ISO also notes that the Market Monitor believes that the universal

[65] Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, section 69.3.5.c identifies the eligibility requirements for Planning Resource Offers in the monthly voluntary capacity auction.

[66] April 16 Order, 127 FERC ¶ 61,054 at P 123.

[67] *See* Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, Section 69.3.5.c.

[68] June 2009 Compliance Filing, Transmittal Letter at 3.

deliverability test may be unreasonable when applied to External Resources.[69] Currently, the Midwest ISO conducts deliverability tests on a facility specific basis. The Midwest ISO believes that it is appropriate to work with stakeholders to discuss this issue and any Tariff modifications.

c. Comment

115. Integrys argues that because only universally deliverable resources may participate in the voluntary capacity auction, external resources are improperly excluded from participation. This eliminates a significant source of generation and as a result the use of external resources as Planning Resources under Module E is impeded. Integrys recommends that the Commission direct the Midwest ISO to work with stakeholders to formulate and propose definitions and rules of deliverability for external resources.

d. Answer

116. The Midwest ISO explains that the Commission did not direct the Midwest ISO to propose provisions to allow for external resources to participate in the auction, but as stated in the June Compliance Filing,[70] the Midwest ISO will continue to work with stakeholders and that, at the direction of the Commission, the Midwest ISO is willing to modify the Tariff to allow for the participation of external resources in the voluntary capacity auction as it has discussed with stakeholders recently.

e. Commission Determination

117. As an initial matter, we note that the Commission accepted the Midwest ISO plan to allow Load Modifying Resources to participate in the auction in a separate order.[71] As for external resources, we agree with the Market Monitor that it is not reasonable to exclude external resources from eligibility in the voluntary capacity auction, particularly in light of the importance of these resources in ensuring long-term resource adequacy in the Midwest ISO. Accordingly, we require that the Midwest ISO submit, in a compliance

---

[69] The Market Monitor explains that the *2008 State of the Market Report* states that a facility-specific deliverability analysis may not be appropriate for imports that are centrally dispatched, and it proposes alternative approaches to evaluate deliverability. (http://www.potomaceconomics.com/uploads/midwest_documents/2008_State_of_the_Market_-_Final.pdf).

[70] June 2009 Compliance Filing at 4.

[71] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,057 (2010).

filing that is due thirty days after the date of this order, a proposal that makes external resources eligible to participate in the voluntary capacity auction.

7. Miscellaneous Issues

a. Mitigation Measures Applicable to LSEs

118. RRI Energy, EPSA, and Duke contend that the Market Monitor's mitigation proposal allows for the unduly discriminatory treatment of suppliers of capacity as compared to those entities that meet load requirements. RRI Energy contends that while the Midwest ISO's proposal "mitigates available capacity," there is no requirement for load to participate in the voluntary capacity auction.[72] RRI Energy claims that absent such a requirement for load, the Midwest ISO's proposal has the effect of allowing the resource adequacy price signals to be artificially suppressed by load. RRI Energy requests that the Midwest ISO adopt mechanisms that result in balanced participation by load and supply to ensure no one side is favored when it comes to price. Duke, FirstEnergy, and EPSA make similar arguments and contend that without comparable mitigation provisions for load, load participants will be able to game the system.

119. In response to these claims, the Midwest ISO and Market Monitor state that while they appreciate the parties' concerns regarding market abuse by LSEs, the April 16 Order did not require the Midwest ISO to address this issue as part of its compliance filing. Regardless, the Midwest ISO and Market Monitor argue that monopsony market power by LSEs is unlikely. If, however, the Commission directs the Midwest ISO to develop procedures to address the potential exercise of such market power by LSEs, it will do so.

120. We agree with the Midwest ISO and Market Monitor. The April 16 Order did not require the Midwest ISO to address or propose revisions related to monopsony market power by LSEs. In any event, we do not believe that such provisions are necessary. Unlike a market participant with excess capacity that fails to offer that capacity into the market, an LSE has an obligation to meet its resource adequacy requirements and will be penalized for its failure to do so. In other words, if an LSE does not bid for capacity in the auction that is needed to meet its resource adequacy requirement, it is penalized for the deficiency per the terms of Module E. We see no reason to require mitigation measures for load withholding because those provisions would be redundant to the penalties in Module E. We expect that the penalties will provide sufficient incentive to load to procure capacity by the means available, which includes participation in the voluntary capacity auction.

[72] RRI Energy July 8, 2009 Comments at 5.

b. Effective Date

121. EPSA contends that the May 1, 2009 effective date requested by the Midwest ISO for its proposal is problematic because it presents retroactive ratemaking concerns and therefore should be rejected. EPSA states that granting the requested effective date would implement Tariff changes retroactively and without prior notice, and therefore violates the prohibition on retroactive ratemaking under section 205 of the FPA. EPSA asserts that the proposed Tariff revisions should become effective if and when the Commission approves the revisions.

122. The Midwest ISO explains that it requested a May 1, 2009 effective date for the June Compliance Filing Tariff sheets because the May 1 date is consistent with the commencement of the implementation of the Financial Settlement provisions in Module E. The Midwest ISO explains that it requested waiver of any applicable provisions of the Commission's rules and regulations to allow for such an effective date and that market participants are familiar with the proposed Tariff changes because they were discussed with stakeholders on numerous occasions in various working group meetings before being filed with the Commission.

123. We agree with EPSA that the mitigation measures must be applied on a prospective basis. Thus, we cannot grant the Midwest ISO's request for a waiver to make the mitigation measure effective on May 1, 2009. We find, however, that there is good cause to make the provisions effective on the day after the Midwest ISO made the June Compliance Filing—that is, an effective date of June 18, 2009. We will not grant EPSA's request to make the revised Tariff sheets effective on the date of this order. We order the Midwest ISO to revise the Tariff sheets to reflect an effective date of June 18, 2009, as part of the compliance filing due thirty days after the date of this order.

c. Penalty Hours

124. Duke requests that the Midwest ISO clarify whether "Penalty Hours"[73] means all hours of the month, or only those hours of the month for which capacity is deemed to be withheld. Duke states that it prefers the latter interpretation. The Midwest ISO states in its answer that it would be willing to include as part of a compliance filing Tariff language that clarifies that "Penalty Hours" are defined as "all hours of a month for which Capacity is deemed to be withheld by a Market Participant."

---

[73] Section 65.3.2 of the Tariff provides a definition of the term "Penalty Hours" to be used to determine the "Base Penalty Charge." Midwest ISO, FERC Electric Tariff, Fourth Revised Volume No. 1, First Revised Sheet No. 1425.

125. We consider the Midwest ISO answer to be responsive to Duke's concern and we find that the proposed definition is reasonable. Therefore, we direct the Midwest ISO to include in a compliance filing thirty days after the date of this order Tariff language that clarifies that "Penalty Hours" are to be defined as "all hours of a month for which Capacity is deemed to be withheld by a Market Participant."

d. Other Revisions

126. We note that section 64.1.4.e references Planning "Reserve" Offers. There is no definition for this term in the Tariff, and therefore we assume this reference is meant to be Planning "Resource" Offers. We require that the Midwest ISO either revise this term to be Planning Resource Offers or propose a definition for Planning Reserve Offers in the compliance filing.

127. We require the Midwest ISO to revise the subsection headings in section 64.1.2 starting on Original Sheet No. 1409.05 by replacing subsection (e) with subsection (g) and the following subsections designated in order. We require this revision in the compliance filing to be submitted thirty days after the date of this order.

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) The Midwest ISO's June 17, 2009 compliance filing is hereby conditionally accepted, to become effective June 18, 2009, as discussed in the body of this order.

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.