

126 FERC ¶ 61,185
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER09-566-000

ORDER DENYING MOTION

(Issued February 27, 2009)

1. On January 21, 2009, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed a motion (Motion) requesting the Commission to recognize the eligibility of certain contracts for the purchase of power and capacity as Capacity Resources, pursuant to the Commission's Order of October 20, 2008.¹ In this order, we find that the Commission's ruling in its Order On Rehearing and Compliance² on alternative verification procedures for determining the eligibility of all power purchase agreements as Capacity Resources apply to these contracts. Since eligibility will be determined by these procedures, we deny Midwest ISO's request to recognize the eligibility of the listed contracts as Capacity Resources.

I. Background

A. History of this Proceeding

2. When the Commission conditionally approved Midwest ISO's energy markets, on August 6, 2004, it approved the proposed Module E of the Midwest ISO Open Access Transmission and Energy and Operating Reserves Markets Tariff (Tariff) as a "short-term transition mechanism" to help ensure reliability throughout the Midwest ISO

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,062 (2008) (Compliance Order).

² *Midwest Indep. Transmission Sys. Operator, Inc.*, 126 FERC ¶ 61,144 (2009) (February 19 Order).

footprint, but directed Midwest ISO to work toward a long-term resource adequacy plan through its stakeholder process.³

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

4. On June 6, 2006, Midwest ISO submitted a compliance filing to the Commission proposing a two-phased approach to implement a permanent resource adequacy plan. In Phase I, Midwest ISO proposed to integrate short-term contingency reserves and regulation reserves (together, operating reserves) into the energy markets. In Phase II, Midwest ISO proposed several initiatives including the coordination of resource adequacy requirements with national and regional resource adequacy standards. The Commission accepted Midwest ISO's two-phase approach, accepting Midwest ISO's commitment to file Phase I in the fall of 2006 and Phase II in 2007, but also required Midwest ISO to file a detailed timetable for implementation of its plan.⁶

5. On February 15, 2007, Midwest ISO filed Phase I, a proposal for an ancillary services market facilitating the sale and purchase of contingency reserves and regulation reserves. The Commission conditionally accepted the Midwest ISO Phase I ancillary services market proposal on June 23, 2008.⁷ The Commission accepted Midwest ISO's resource adequacy implementation plan and directed Midwest ISO to file Phase II, a

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

⁴ Midwest ISO October 5, 2004 Compliance Filing, Docket Nos. ER04-691-007 and EL04-104-006, at 31.

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

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

⁷ *Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,296 (2008). The Midwest ISO ancillary services market commenced operations on January 6, 2009.

permanent long-term resource adequacy proposal, by December 2007.⁸ On December 28, 2007, Midwest ISO filed proposed revisions to Module E of the Tariff to comprehensively address long-term resource adequacy requirements and a timetable for implementation of its resource adequacy plan.

6. On March 26, 2008, the Commission conditionally accepted Midwest ISO's proposed revision to its long-term resource adequacy requirements and ordered compliance filings.⁹ On May 27, 2008, Midwest ISO submitted a compliance filing in response to 60-day compliance directive in the March 26 Order (May 2008 Compliance Filing).

7. The Commission issued an order on October 20, 2008 (Compliance Order) conditionally accepting Midwest ISO's May 2008 Compliance Filing, subject to further compliance. The Compliance Order addressed the determination of whether a particular power purchase agreement (PPA) would qualify as a Capacity Resource for purposes of Midwest ISO's resource adequacy plan. The Commission found, in part, that it was the responsibility of Midwest ISO to "make findings on whether the terms of specific provisions in the power purchase agreements make the agreements in question eligible to be classified as Capacity Resources" to meet the Resource Adequacy Requirements (RAR) of a Load Service Entity.¹⁰

8. On February 19, 2009, the Commission issued an Order on Rehearing and Compliance that required, among other items, Midwest ISO to propose a tariff revision that specifies alternative verification procedures in the event the power purchase agreements do not expressly specify each and every requirement of section 69.2.1.2.e of the Tariff in the body of the contracts themselves, and thereby ensure that such power purchase agreements can qualify as Capacity Resources.

B. Midwest ISO's Motion

9. In its motion, Midwest ISO requests that the Commission approve Midwest ISO's designation of certain contracts as Capacity Resources. Midwest ISO notes that Capacity Resources are defined in section 1.67 of the Tariff as "[t]he designated Generation

⁸ *Midwest Indep. Transmission Sys. Operator, Inc.*, 119 FERC ¶ 61,311, at P 138, *order on reh'g*, 120 FERC ¶ 61,202 (2007).

⁹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,283 (2008) (March 26 Order).

¹⁰ Compliance Order, 125 FERC ¶ 61,062 at P 59.

Resources, Demand Response Resource-Type I, Demand Response Resource Type II, External Resources and/or power purchase agreements that are available to meet Demand.” Pursuant to section 69.1 of the Tariff, a Load Serving Entity (LSE) is required to demonstrate that it has sufficient Capacity Resources and/or Load Modifying Resources in its Resource Plan to serve the entity’s Load in an amount equal to or greater than its Forecast LSE Requirement multiplied by one plus the applicable Planning Reserve Margin. Midwest ISO notes that a PPA must meet the requirements that are found in section 69.2.1.2.e of the Tariff to qualify as a capacity resource.

10. Midwest ISO lists in Appendix A to its motion specific contracts that Midwest ISO has determined should qualify as Capacity Resources even though some of the provisions in these agreements may not strictly conform to the requirements found in section 69.2.1.2.e of the Tariff.¹¹ Midwest ISO notes that the contracts, in some instances, were negotiated more than 20 years ago, before the formation of the Midwest ISO. Midwest ISO states that after a careful review of the terms and conditions of each of the contracts, it has determined that the contracts will provide reliable capacity for the region and thus will qualify as Capacity Resources.

11. Midwest ISO requests that the Commission acknowledge Midwest ISO’s determination of the eligibility of the contracts listed in Appendix A as Capacity Resources or, in the alternative, determine that the contracts are eligible to be treated as Capacity Resources based on the evidence presented by Midwest ISO.

12. Midwest ISO also requests expedited consideration and a shortened notice and comment period, due to the requirement that all LSEs submit their resource plans to Midwest ISO by March 1, 2009, for the 2009-2010 planning year. Accordingly, Midwest ISO requests that the Commission approve its determination no later than March 1, 2009. It also requests a shortened period for interventions and comment to seven days from the date of the notice of its request.

II. Notice and Responsive Pleadings

13. Notice of Midwest ISO’s filing was published in the *Federal Register*, 74 Fed. Reg. 6146 (2009), with comments due on or before February 5, 2009. Duke Energy filed a timely motion to intervene. Timely motions to intervene and comments were filed by Xcel Energy Services, Inc., Otter Tail Power Co., and Allete, Inc. (together, Joint

¹¹ Appendix A lists ten contracts that Midwest ISO indicates are eligible as Capacity Resources, that include the following parties: Manitoba Hydro, NSP (XCEL), Minnesota Power, Southern Minnesota, Great River Energy, Minnesota Municipal Power Agency, Otter Tail Power, Ontario Hydro, and ALLETE, Inc. d/b/a Minnesota Power.

Commenters); First Energy Service Co. (First Energy); Great River Energy (Great River); Southern Minnesota Municipal Power Agency (Southern Minnesota); Reliant Energy, Inc. (Reliant); and Manitoba Hydro. Timely motions to intervene and protest were filed by Consumers Energy (Consumers), and Integrys Energy Services, Inc. (Integrys). Midwest TDUs filed a timely motion to intervene, comments, and a motion to consolidate this docket with the docket in Docket No. ER08-394, the proceeding in which Midwest ISO's long-term resource adequacy proposal is being addressed. Dynegy Power Marketing (Dynegy) filed a motion to intervene one day out-of-time. Answers were filed by Midwest ISO, Midwest TDUs, Allete, Inc., and Dynegy and Reliant (Indicated Generators).

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹² the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2008), the Commission will grant Dynegy's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹³ prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Midwest ISO's answer because it provides information that assisted us in our decision-making process. We are not persuaded to accept the answers of Midwest TDUs, Allete, Inc., and Indicated Generators, and will therefore reject them.

B. Eligibility of Power Purchase Agreements To Be Capacity Resources

1. Background

16. Section 69.2.1.2.e in Module E of the Tariff states, in relevant part, that an LSE may designate a power purchase agreement as a Capacity Resource so long as the agreement meets the following requirements:

¹² 18 C.F.R. § 385.214 (2008).

¹³ 18 C.F.R. § 385.213(a)(2) (2008).

- (i) the power purchase agreement must identify one or more specific Generation Resource(s) or External Resource(s) that can be verified by the Transmission Provider as Capacity Resource(s);
- (ii) a power purchase agreement that does not identify the full Installed Capacity of Generation Resource(s) or External Resource(s) from which power will be supplied must specify the portions of each such Generation Resource and/or External Resource that are available under the power purchase agreement (i.e., slice-of-system resources) and that are verifiable by the Transmission Provider. Each Generation Resource and/or External Resource specified in such power purchase agreement must meet the criteria for a Capacity Resource for all of the portion of the contract amount assigned to the Generation Resource(s) and/or External Resource(s). The Capacity Resource amount will be reduced to remove amounts that fail to meet such criteria;
- (iii) a copy of every power purchase agreement must be provided to the Transmission Provider to enable it to verify the capacity backing the power purchase agreement and to confirm compliance with the RAR;
- (iv) a power purchase agreement may qualify as a Capacity Resource if it is only interruptible as a last resort under Requirement 6.3 of NERC Standard EOP-002;
- (v) an LSE seeking to designate a power purchase agreement as a Capacity Resource from internal Generation Resource(s) must demonstrate the internal Generation Resource is deliverable consistent with section 69.2.1.4 of the Tariff and demonstrate that the Generation Resources are not otherwise being designated as Capacity Resources by any other entity and satisfy all other requirements applicable to Capacity Resources including the must-offer requirement; and
- (vi) an LSE seeking to designate a power purchase agreement as a Capacity Resource from External Resource(s) must demonstrate that there is firm transmission service from the External Resource to the border of the Transmission Provider Region and that firm transmission service has been obtained to deliver capacity on the transmission system from the External Resource to the LSE and demonstrate that any External Resources being designated under the power purchase agreement as Capacity Resources are not otherwise being used as capacity resources in any other RTO/ISO or in another state resource adequacy program and satisfy all other requirements applicable to Capacity Resources including those relating to External Resources and the must-offer requirement.¹⁴

¹⁴ Midwest Independent Transmission System Operator, Inc., FERC Electric

2. Midwest ISO's Motion

17. Midwest ISO requests that the Commission acknowledge its determination of the eligibility of certain contracts listed in Appendix A of its January 21 Motion as Capacity Resources or, in the alternative, determine that the contracts are eligible to be treated as Capacity Resources based upon the evidence provided in the January 21 Motion.

18. Midwest ISO attaches an affidavit to its motion from Mr. Todd Hillman, Executive Director of Strategic Business Development. Mr. Hillman states that Midwest ISO has conducted an extensive analysis of certain power purchase agreements and determined they should qualify as Capacity Resources based on their historic reliability, the largely hydroelectric nature of the capacity for these contracts and the relatively minor differences between these contracts and the requirements of section 69.2.1.2.e of the Tariff. Mr. Hillman also explains that the Mid-Continent Area Power Pool has repeatedly accredited these contracts to satisfy resource adequacy requirement provisions and that its rules are consistent with the reliability procedures that the Commission has approved for Midwest ISO to utilize pursuant to Module E of the Tariff.

19. In the alternative, if the Commission determines that Midwest ISO lacks the authority to determine whether contracts qualify as Capacity Resources, then Midwest ISO requests that the Commission determine the contracts qualify as Capacity Resources.

20. Midwest ISO notes that some of the contracts are grandfathered agreements listed in Attachment P of the Midwest ISO Tariff.¹⁵ Midwest ISO believes that like these grandfathered agreements that were at issue in the GFA Procedural Order, the contracts at issue here are essential to the reliability of the transmission grid and should also be accommodated to preserve the commercial bargain between the parties.

21. Mr. Hillman notes that the power purchase agreements specified in Appendix A of the January 21 Motion do not meet several of the tariff requirements for the designation of power purchase agreements as Capacity Resources. Mr. Hillman states the contracts

Tariff, Third Revised Volume No. 1, First Revised Sheet Nos. 1461–1464.

¹⁵ Grandfathered Agreements (GFAs) are agreements concerning the delivery of energy and provision of transmission services held by Midwest ISO market participants that had been in place prior to the start of the Midwest ISO energy market. The Commission stated that its goal is to ensure the GFAs are accommodated in Midwest ISO's energy markets in a way that will not harm reliability or third parties, yet preserves the commercial bargain between the parties. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,191, at P 51 (2004).

do not comport with the following requirements of section 69.2.1.2.e of the Tariff: (1) they do not identify one or more specific resources that can be verified by Midwest ISO; (2) they do not specify either the full installed capacity of generation resources or external resources from which power will be supplied or specify the portions of each such generation resource and/or external resources that are available under the power purchase agreement; (3) they do not specify they are only interruptible as a last resort under Requirement 6.3 of NERC Standard EOP-002; and (4) they do not specify that the subject resources are not otherwise being designated as Capacity Resources by any other entity and are complying with the capacity resource requirements, including the must-offer requirement set forth in section 69.2.3. Despite the differences between the tariff requirements and the power purchase agreements, Midwest ISO has determined the contracts qualify as Capacity Resources.

22. Midwest ISO seeks a narrow exception for the contracts and does not intend to open the floodgates for all other power purchase agreements to be automatically exempt from the requirements of section 69.2.1.2.e. Midwest ISO explains these contracts deserve a narrow exception, in part, because of their being subject to Canadian jurisdiction, as well as their demonstrated reliable and long-term nature. Upon the expiration of the contracts, Midwest ISO anticipates that the subject entities will enter into contractual arrangements that will be consistent with all provisions of the Tariff.

3. Comments

23. Joint Commenters argue that the agreements they signed that were included in Midwest ISO's list would comply with the requirements embodied in section 69.2.1.2.3 of the Tariff but for a minor lack of specificity of the contractual language of the power purchase agreements due in part to the vintages of the contracts. Joint Commenters assert continued use of these contracts for the remainder of their contracts' terms is warranted.

24. Joint Commenters explain that their power purchase agreements were originally negotiated to satisfy Mid-Continent Area Power Pool capacity resource accreditation provisions at the time they were entered into. According to Joint Commenters, the rules that Mid-Continent Area Power Pool used to accredit these power purchase agreements to satisfy resource adequacy requirements are consistent with the procedures Midwest ISO uses pursuant to Module E of the Tariff. Failure to recognize these agreements as satisfying the now-applicable resource adequacy provisions would undo the commercial bargains struck in good faith between Manitoba Hydro or Ontario Power Generation and Joint Commenters, contend Joint Commenters, and therefore Joint Commenters would still have a contractual obligation to make capacity payments to Manitoba Hydro and Ontario Power Generation but would no longer receive the value for capacity that was the subject of negotiation when the power purchase agreements were entered into.

25. With regard to the Midwest ISO determination that two NSP Companies' power purchase agreements qualify as Capacity Resources, Joint Commenters assert the

Commission should uphold this determination given the critical importance of the power purchase agreements to serve native wholesale and retail customers. Joint Commenters consider continued treatment of these power purchase agreements as Capacity Resources to be consistent with the Commission's recent decision¹⁶ in that it enables the customer to retain the original benefits of its bargains entered into before Midwest ISO filed Module E of the Tariff.

26. Manitoba Hydro avers that disqualifying the contracts as Capacity Resources would discourage long-term contracting, contrary to the Commission's policies in Order No. 719.¹⁷ Manitoba Hydro contends that it is crucial to the preservation of long-term contracting that continually evolving market rules preserve the commercial value of these long-term contracts, as well as the negotiated terms and conditions. Manitoba Hydro clarifies that while the deficiencies in the contracts may be minor, negotiating amendments to cure such deficiencies would not be simple, requiring time-consuming re-negotiation and thus undoing the commercial bargain and requiring Canadian and/or state regulatory approval.

27. Great River Energy supports Midwest ISO's request for approval of its determination that all the referenced contracts qualify as Capacity Resources, including the Diversity Exchange Contract between Manitoba Hydro and Great River Energy. Great River notes this contract has been in effect since 1995 and has continuously qualified as accredited generation by Mid-Continent Area Power Pool. Confirming that all the contracts, including the Diversity Exchange contract, qualify as Capacity Resources is warranted due to the proven reliability of the contracts and the minor nature of the differences between the terms of the contract and the requirements of section 69.2.1.2.e of the Tariff.

28. FirstEnergy does not object to a determination by the Commission that the power purchase agreements identified in Appendix A are eligible to be Capacity Resources, based on Midwest ISO's representation that the generation resources supporting these power purchase agreements have demonstrated reliability over many years and have been accredited by Mid-Continent Area Power Pool. FirstEnergy does not support a broader exception to the requirements of Module E for power purchase agreements generally.

29. Midwest TDUs agree that the Canadian contracts are eligible to be Capacity Resources in accordance with the Commission's October 20, 2008 Order and they

¹⁶ See *Xcel Energy Services, Inc.*, 126 FERC ¶ 61,001, at P 16 (2009).

¹⁷ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 61,400 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008).

support the result sought by Midwest ISO. Midwest TDUs recommend the Commission make clear that the basis for confirming the accreditation of the Canadian contracts should apply generally to all power purchase agreements, thereby obviating the need for broad waivers.

30. Midwest TDUs also raise a variety of concerns with the Midwest ISO's requirements for power purchase agreements to be considered Capacity Resources. They recommend that the requirements of section 69.2.1.2.e be revised and construed such that they protect the reasonable contract rights of the subject capacity contracts. Midwest TDUs argue these revisions are needed to ensure transparency, efficient resource planning, non-discrimination, and administrative efficiency. Specifically, Midwest TDUs recommend that the Commission make clear that the Tariff is to be revised and applied such that identification of the resources and resource quantities backing multiple-unit power purchase agreements – and demonstration that they meet the Tariff's firmness, single-count and NERC standard requirements – can occur within the Midwest ISO verification process to the extent those particulars do not expressly appear in the contract text.

31. Reliant argues the Commission should reject the January 21 Motion because the power purchase agreements do not meet the Tariff requirements and Midwest ISO lacks the authority to waive or grant exceptions to the Tariff. Reliant asserts the Commission only acknowledged Midwest ISO's authority to verify whether power purchase agreements meet the tariff requirements to make them an eligible capacity resource, and did not grant Midwest ISO the ability to dismiss or waive Tariff requirements. The fact that the power purchase agreements are long-term in nature or were executed prior to the implementation of Module E or previously qualified under other planning reserve rules should not result in automatic qualification of a power purchase agreements as a capacity resource, according to Reliant. Reliant also notes that the Commission rejected Manitoba Hydro's request for grandfathering of power purchase agreements.¹⁸

32. Reliant claims that if the power purchase agreements in question do not satisfy section 69.2.1.2.e.i, ii, iv and v, and Midwest ISO admits they do not, then the power purchase agreements should not be permitted to qualify as Capacity Resources under the Tariff. To the extent similar requests for exceptions are made, Reliant expresses the following concerns: (1) the result would be a weakening in Midwest ISO's ability to ensure system reliability; (2) the exceptions would swallow the rule; (3) the foundation upon which the tariff requirements were built would be undermined; and (4) establishment of a standardized product that buyers and sellers can transact with certainty to meet Midwest ISO's planning reserve requirements would be undermined.

¹⁸ See Compliance Order, 125 FERC ¶ 61,062 at P 59.

33. Integrys argues there is no question that the contracts identified do not meet the Tariff requirements as Capacity Resources since the Tariff requires that planning resources qualify pursuant to section 69.2. Integrys notes Midwest ISO gives no reason or basis for its determination that the four deficiencies, or differences, between the contract terms and the Tariff requirements in the contracts are acceptable. Integrys contends that since Midwest ISO's decision is unsupported by its witness, the January 21 Motion should be denied.

34. Consumers Energy notes that a contract in Appendix A between Ontario Hydro and Allele was executed over three months after the date section 69.2.1.2.e was filed in compliance with the Commission's March 26, 2008 Order in Docket No. ER08-394. Consumers Energy asserts this contract does not fit the narrow exception sought by Midwest ISO since it started only 21 days prior to the date Midwest ISO filed the motion and has not been proven to be reliable over time. Consumers Energy further argues that neither the January 21 Motion nor the Affidavit explain why this specific contract should be given preferential treatment or on what basis Midwest ISO will be using to grant an exception to the tariff for other contracts entered into after the effective date of section 69.2.1.2.e of the tariff. For these reasons, Consumers Energy recommends the Commission deny the January 21 Motion as it pertains to this contract.

4. Answer

35. Midwest ISO recognizes the importance of applying the Tariff consistently and in a manner that does not unduly discriminate against any party. It also recognizes the need to maintain reliability by accrediting power purchase agreements only if there is sufficient evidence that the terms of the power purchase agreements are consistent with the underlying intent of the requirements in section 69.2.1.2.e and will reliably be able to deliver capacity to Midwest ISO. Accordingly, Midwest ISO states that it reviewed the contracts to ensure that the power purchase agreements operate in a manner that is consistent with the intent of the Tariff, including the requirement that the contracts be backed by verifiable resources.

36. Midwest ISO explains that the resources backing the power purchase agreements are expected to perform annual capability tests, submit generator availability data, cannot be committed to another resource adequacy program, and they must be available. Midwest ISO will evaluate power purchase agreements that request to serve as Capacity Resources on a case-by-case basis. Midwest ISO indicates it is premature to predict how many other power purchase agreements will qualify as Capacity Resources that do not have contractual terms or conditions with the specific language contained in section 69.2.1.2.e since LSEs are not required to provide their planning resources for the initial planning year until March 1, 2009.

37. In evaluating power purchase agreements that are submitted as Capacity Resources, Midwest ISO indicates it will examine: (1) the content of the power purchase

agreements; (2) the context in which the power purchase agreement was executed; (3) any available evidence of the historical reliability of the power purchase agreement; and (4) that the resources backing the power purchase agreement can be verified. Midwest ISO also states that it will not automatically reject a power purchase agreement that was executed before Module E as implemented simply because certain words are missing from the contract. Midwest ISO will also provide affected parties the opportunity to present additional support to demonstrate the power purchase agreement meets the intent of the Tariff.

38. Midwest ISO asserts that it will file at the Commission when it determines the power purchase agreement does not contain the specific language of the tariff but meets the intent of the requirements of section 69.2.1.2.e. As contracts executed prior to the implementation of Module E expire, Midwest ISO will require future power purchase agreements to strictly comply with section 69.2.1.2.e.

39. Midwest ISO notes the contract cited by Consumers Energy was originally executed in 2004, four years earlier than the requirements of section 69.2.1.2.e could have been anticipated. Midwest ISO continues to believe this contract is eligible to be a capacity resource.

5. Commission Determination

40. In the February 19 Order, the Commission required Midwest ISO to develop tariff provisions that set out alternative verification procedures in the event the purchase power agreement does not expressly specify every requirement in section 69.2.1.2.e. in the body of the agreement itself.¹⁹ Under the Commission's directive, the alternative verification procedures would apply to all power purchase agreements that do not expressly specify every requirement of section 69.2.1.2.e in the body of the agreement itself, including the power purchase agreements at issue in this proceeding. Therefore, we will not rule on the eligibility of these agreements in this proceeding, and, accordingly, we deny the motion.

41. We understand Midwest ISO's proposal to be that it intends to qualify purchase power agreements as Capacity Resources per the terms of the Tariff and to request waivers of section 69.2.1.2.e for certain agreements to the extent they do not meet the terms of the Tariff. We find Midwest ISO's proposed process to be inappropriate as it would potentially result in discriminatory treatment. The treatment of the contracts at issue in this proceeding will be addressed by Midwest ISO's compliance with the February 19 Order. Uniform application of verification procedures will provide LSEs

¹⁹ See February 19 Order, 126 FERC ¶ 61,144 at P 72.

with the certainty they need and it will help to ensure that there is no undue discrimination in the treatment of LSEs with similar power purchase agreements.

42. In terms of the verification process, we clarify that it is Midwest ISO's responsibility to determine whether the agreements satisfy its Tariff requirements in the context of the Tariff revisions.²⁰ We do not expect Midwest ISO to file its capacity resource determinations with the Commission.

43. With regard to Reliant's assertion that permitting power purchase agreements that do not satisfy section 69.2.1.2.e.i, ii, iv and v to qualify as Capacity Resources would harm Midwest ISO's ability to ensure system reliability and would undermine the Tariff requirements, we disagree. Under the directive in the February 19 Order, Midwest ISO will continue to ensure the power purchase agreements meet the requirements of section 69.2.1.2.e. The only change that results from alternative verification is that Midwest ISO can look outside the express terms of the power purchase agreements themselves to verify compliance. Therefore, Midwest ISO will continue to ensure the power purchase agreements can qualify to be Capacity Resources according to the same criteria the Commission has accepted as a reasonable basis for ensuring resource adequacy and long-term reliability.

44. The Commission's action in the February 19 Order requiring alternative verification procedures will make it more likely that power purchase agreements will qualify as Capacity Resources, and therefore makes it more likely that parties can preserve the commercial bargain in their agreements. However, we note that the fact that a contract has been a grandfathered agreement, or has been used as a capacity resource in the past, does not guarantee it will remain so in the future. Midwest ISO has a continuing responsibility to ensure that all agreements are verified to meet the requirements of Module E and its resource planning requirements.

C. Role of Midwest ISO In Designating Capacity Resources

1. Midwest ISO's Motion

45. Midwest ISO requests clarification regarding its role in determining whether certain power purchase agreements qualify as Capacity Resources. To that end, Midwest ISO states its belief that the Commission delegated the requisite authority to Midwest

²⁰ The Commission has found that the determination of whether the specific provisions in the power purchase agreements make them eligible to be classified as Capacity Resources is the responsibility of the Midwest ISO. *See* Compliance Order, 125 FERC ¶ 61,062 at P 59.

ISO to determine whether specific power purchase agreements should qualify as Capacity Resources. It further asserts such delegation of authority is consistent with the fact that Midwest ISO is the Reliability Authority in the Midwest ISO region and as such has a responsibility to ensure the reliability of the transmission system. To the extent such resources help ensure system-wide reliability, Midwest ISO believes that it has the authority to find that these power purchase agreements qualify as Capacity Resources.

2. Comments

46. Joint Commenters that Midwest ISO is responsible for determining whether a particular power purchase agreement can be designated as a capacity resource.

47. Integrys challenges Midwest ISO's assertion and claims that the Compliance Order does not authorize Midwest ISO to ignore the requirements of the Tariff or apply them differentially, but rather states the Commission is not stepping into the detail of whether specific power purchase provisions are eligible to be classified as Capacity Resources under the Tariff. According to Integrys, if Midwest ISO wants to allow power purchase agreements to qualify as Capacity Resources based on the extent such resources help ensure system-wide reliability, then Midwest ISO should include such language in the Tariff so that the standard could be applied fairly to all power purchase agreements without undue discrimination.

3. Answer

48. Midwest ISO cites to the Commission finding in the Compliance Order that Midwest ISO has responsibility for the contracts in question and can determine if their terms allow the resources to be eligible to be Capacity Resources.²¹ Midwest ISO considers this determination of responsibility to be consistent with the fact that Midwest ISO is the administrator of the Tariff and is the Reliability Authority in the Midwest ISO Region and as such has a responsibility to ensure the reliability of the transmission system and resource adequacy requirements. Midwest ISO asserts it has the requisite expertise to evaluate whether the terms of a specific power purchase agreement are consistent with the Tariff and thus qualifies as a Capacity Resource, even if the specific language in the power purchase agreement does not strictly include the requirements enumerated in section 69.2.1.2.e of the Tariff.

²¹ *Id.*

4. Commission Determination

49. As noted above, we confirm that Midwest ISO has the authority and the responsibility to verify whether power purchase agreements qualify as Capacity Resources consistent with its Tariff. This authority, of course, is restricted to implementing the Tariff as accepted by the Commission and the Commission's actions in this proceeding do not delegate or otherwise implicate functions undertaken by Midwest ISO pursuant to Order No. 2000,²² such as Reliability Coordinator functions.

50. Responding to Integrys' concern regarding discriminatory treatment, the February 19 Order requires that Midwest ISO file proposed tariff revisions concerning alternative verification procedures. The Commission will evaluate the proposed tariff revisions to ensure that the proposed procedures can be applied fairly to all power purchase agreements without undue discrimination.

D. Midwest ISO's Resource Adequacy Program Schedule

1. Comments

51. Joint Commenters contend that it is unlikely they could replace the power purchase agreements implicated in the January 21 Motion in time to meet the 2009 Resource Adequacy Plan, and therefore they would be subject to financial settlement charges.²³ Joint Commenters state the loss of these agreements would constitute a substantial financial burden in 2009 and in future planning years.

²² *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *Aff'd Sub Nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

²³ Financial settlement charges are payments by LSEs in the event their resources are determined to be deficient for meeting their resource adequacy requirements.

52. Noting their protest in Docket No. ER08-394,²⁴ Midwest TDUs express concern that Midwest ISO intends to approve only the contracts listed in Appendix A as Capacity Resources. If this is true, the likely consequence is that many other power purchase agreements would not receive validation in time for the March 1, 2009 resource plan submission deadline and the LSEs depending on those power purchase agreements would be subjected to deficiency payments, according to Midwest TDUs. They state the Commission must ensure the tariff language, and Midwest ISO's application thereof, will not produce such an unreasonable result.

53. Should the Commission consider a waiver necessary, Midwest TDUs assert the Commission should direct Midwest ISO to immediately institute a waiver process. Midwest TDUs contend the process should be designed such that power purchase agreements other than the Canadian contracts that predate the current Module E requirements and are shown to provide reliable capacity are accorded similar, and similarly timely, treatment as Capacity Resources.

54. Failure to renegotiate a new agreement prior to March 1, 2009 would place a purchaser in the untenable position of being unable to submit their resource plans as required under the Tariff, according to Manitoba Hydro.

55. Integrys recommends that the applicable contracts be revised to conform to the requirements of Module E. To the extent parties to a contract cannot agree on changes to make the contract qualify as a capacity resource, that circumstance is evidence that the contract cannot perform as a capacity resource and therefore should not be accepted as a capacity resource, states Integrys.

2. Commission Determination

56. As Midwest ISO indicates in its Motion²⁵ and Answer,²⁶ LSEs are not required to provide their planning resources for the initial planning year until March 1, 2009.

²⁴ In that docket, Midwest TDUs request that the Midwest ISO accept as a capacity resource a contract that identifies the fleet of resources standing behind it by means of a general description without naming any specific generating station within that fleet. Midwest TDUs note the Midwest ISO answered that in order for a power purchase agreement to qualify as Capacity Resources, the power purchase agreement must identify specific resources and not simply a system or fleet.

²⁵ See *supra* P 12.

²⁶ See *supra* P 35.

Accordingly, we expect the Midwest ISO's verification of planning resources will commence on March 1 and continue until the start of the planning year on June 1. We expect that the tariff revision and verification process can be accommodated in that time-frame. We encourage Midwest ISO to complete its compliance requirements and validation procedures in a timely manner so that market participants with qualifying resources are not subject to deficiency payments upon the start of the 2009-2010 planning year on June 1, 2009.

E. Motion to Consolidate

57. Midwest TDUs request that the instant proceeding be consolidated with Docket No. ER08-394 since the issues pending on compliance in that proceeding are intertwined with the issues raised in this Motion, and involve a common nucleus of operative fact. Midwest TDUs state the existence of the Motion and the arguments in its comments demonstrate the need for relief requested by Midwest TDUs in their December 10, 2008 protest and January 13, 2009 answer in Docket No. ER08-394.

58. We will not consolidate the instant proceeding with Docket No. ER08-394. Generally, the Commission consolidates cases where there are common issues of law and fact for purposes of settlement, hearing and decision.²⁷ However, here, as discussed above, we are denying Midwest ISO's motion without further proceedings. Consequently, there is no further proceeding to consolidate with Docket No. ER08-394, and therefore consolidation would serve no purpose.

F. Other Issues

59. Midwest TDUs assert that Midwest ISO should confirm that buyers need not qualify as Capacity Resources their full responsibility purchases. Since the reserve responsibility that must be satisfied by demonstrating sufficient capacity resources is shifted to the full responsibility seller, a full responsibility purchaser need not have its contract accredited as a capacity resource for the purchasing LSE, according to Midwest TDUs.

60. Midwest ISO confirms that an LSE with a Full Requirements Sales agreement is required to designate qualified Planning Resources to meet this additional obligation like it was its own load, per the tariff.²⁸ An entity assuming obligations under a Full

²⁷ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,142, at P 22 (2008).

²⁸ Midwest ISO, First Revised Sheet No. 1442.

Requirements Purchase is responsible for qualifying its Planning Resources to meet the reliability requirements of Module E, according to Midwest ISO.

61. This issue is beyond the scope of this proceeding. The Commission has addressed this issue in the February 19 Order.²⁹

The Commission orders:

Midwest ISO's motion is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Kelliher is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁹ See February 19 Order, 126 FERC ¶ 61,144 at P 60 – 61.