

150 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark, and
Norman C. Bay.

Consumers Energy Company

Docket No. ER15-435-000

ORDER GRANTING REQUEST FOR WAIVER

(Issued February 20, 2015)

1. On November 18, 2014, Consumers Energy Company (Consumers Energy) filed a request for limited waiver of certain provisions of Midcontinent Independent System Operator, Inc.'s (MISO) Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) in connection with Consumers Energy's suspension of seven coal-fired power plants (collectively, Classic Seven) totaling 940.7 megawatts (MW) to comply with environmental requirements.¹ As discussed below, the Commission finds good cause to grant the requested waiver.

I. Background

2. Consumers Energy states that it is a public utility that owns and operates generating facilities with a capacity of approximately 6,500 MW and serves over 1.8 million residential, commercial, and industrial customers in the Lower Peninsula of the State of Michigan. Consumers Energy plans to suspend the operations of the Classic Seven on April 15, 2016. Consumers Energy states that it has taken and will continue to take additional steps to replace the generation lost through the suspension of the Classic Seven. Consumers Energy explains that it has committed to purchase a 542 MW gas-

¹ The Classic Seven consist of: J.C. Weadock Unit 7 – Nameplate Capacity 151 MW; J.C. Weadock Unit 8 – Nameplate capacity 151 MW; B.C. Cobb Unit 4 – Nameplate Capacity 156 MW; B.C. Cobb Unit 5 – Nameplate Capacity 156 MW; J.R. Whiting Unit 1 – Nameplate Capacity 101.2 MW; J.R. Whiting Unit 2 – Nameplate Capacity 101.5 MW; and J.R. Whiting Unit 3 – Nameplate Capacity 124 MW. Consumers Energy Request for Waiver at 4.

fueled generation plant in Jackson, Michigan (Jackson Plant)² and intends to fully bridge the capacity gap by taking additional steps, which may include the expanded use of demand response and/or the rescheduling of currently planned generation outages.³

3. Consumers Energy represents that the United States Environmental Protection Agency (EPA) released the Mercury and Air Toxics Standards (MATS) final rule on December 21, 2011 and that affected sources were required to comply within three years of the MATS effective date of April 16, 2012.⁴ Consumers Energy states that it sought and received a one-year extension and thus, Consumers Energy may continue to operate the Classic Seven as coal-fueled facilities until April 16, 2016.⁵

4. Consumers Energy acknowledges that it could seek an administrative order from the EPA to operate in noncompliance of the MATS requirements for up to an additional year pursuant to section 113(a) of the Clean Air Act, but states that the EPA's policy memorandum limited the administrative order option to only those generators whose shutdown will present a "reliability risk" such that "operation of the unit after the MATS Compliance Date is critical to maintaining electric reliability, and that failure to operate the unit would result in the violation of at least one of the reliability criteria required to be filed with the Commission."⁶ Consumers Energy adds that the applicable Planning Authority, in this case MISO, must provide its concurrence.⁷ Consumers states that, in its May 17, 2012 Policy Statement on the Commission's role regarding the EPA MATS, the Commission (1) required any utility seeking an Administrative Order to make an informational filing with the Commission including the same information that the owner/operator submitted to the EPA; (2) clarified that it would review the Planning

² Consumers Energy clarifies that it is likely that the current owner of the Jackson Plant will offer the Jackson Plant's capacity into the 2015-2016 Planning Resource Auction and that the Jackson Plant's capacity will likely clear in that auction. *Id.* at 4.

³ *Id.* at 4-5.

⁴ *Id.* at 5 & n.12.

⁵ *Id.* at 5, Attachment A (Testimony of David F. Ronk at 8 (Ronk Test.)).

⁶ *Id.* at 6 (citing EPA, *Enforcement Response Policy for Use of Clean Air Act Section 113(a) Administrative Orders in Relation to Electric Reliability and the Mercury Air Toxics Standard*, at 6-7 (Dec. 16, 2011), available at <http://www.epa.gov/mats/pdfs/EnforcementResponsePolicyforCAA113.pdf>).

⁷ *Id.*

Authority's analysis included in each informational filing, recognizing the Planning Authority's knowledge of, and expertise in, local and regional conditions; and (3) stated that it would advise the EPA whether, based on the Commission's review of the informational filing, there might be a violation of the Commission-approved Reliability Standard, or the Commission's comments may also identify other issues within its jurisdiction.⁸

5. Consumers Energy states that it submitted its revised Attachment Y Notification of Potential Generation Resource Change of Status (Attachment Y Notification) for the Classic Seven to MISO on March 14, 2013.⁹ Consumers Energy states that MISO notified Consumers Energy in June 2013 that the Classic Seven were not needed for reliability purposes beyond April 15, 2016. Consumers Energy represents that MISO's Attachment Y determination effectively precluded Consumers Energy from seeking an Administrative Order from the EPA to extend operation of the facility past April 16, 2016.¹⁰

6. Consumers Energy argues that the Tariff's Resource Adequacy Requirements are unjust and unreasonable in relation to the 6.5 week period after the MATS compliance deadline and before the end of the 2015-2016 Planning Year.¹¹ Consumers Energy states that the Tariff has requirements that run over a Planning Year and that if the Classic Seven are to be considered Capacity Resources by MISO during the 2015-2016 Planning Year, the current MISO rules would require the Classic Seven to be available for service for the entire Planning Year through May 31, 2016.¹² Consumers Energy represents that

⁸ *Id.* at 6-7 (citing *Policy Statement on the Commission's Role Regarding the Environmental Protection Agency's Mercury and Air Toxics Standards*, 139 FERC ¶ 61,131 (2012)).

⁹ *Id.* at 7. Section 38.2.7 of the MISO Tariff requires that any Market Participant planning to retire or suspend a Generation Resource must notify MISO by submitting an Attachment Y Notification at least 26 weeks prior to retirement/suspension. MISO then completes an Attachment Y Reliability Study to determine whether the Generation Resource is necessary for the reliability of the Transmission System. MISO, FERC Electric Tariff, Module C, § 38.2.7 (31.0.0).

¹⁰ Consumers Energy Request for Waiver at 7-8.

¹¹ *Id.* at 8.

¹² MISO's Planning Year begins June 1 and extends until May 31 of the following Year. *Id.* at 2; see MISO, FERC Electric Tariff, Module A, § 1.P (34.0.0).

it may not withhold¹³ the Classic Seven from offering in MISO's 2015-2016 Planning Resource Auction and states that, according to MISO's interpretation of the Tariff, Consumers Energy is not permitted to declare a forced or scheduled outage for the 6.5 week period.¹⁴ Consumers Energy states that the Tariff requires that a market participant must offer its resources, even if it knows those resources will not be available throughout the upcoming Planning Year.¹⁵ Further, Consumers Energy states that there is no mechanism within the Tariff that ensures that it will be able to buy replacement capacity through the auction to cover the 6.5 week period and, instead, Consumers Energy could have to purchase replacement capacity for the entire Planning Year at a cost ranging from \$5.8 million to \$84.8 million.¹⁶ Consumers Energy represents that this would result in it having far more capacity than it needs for the first 45.5 weeks of the Planning Year just so it can cover the fixed capacity obligation during the 6.5 weeks of spring when the need for capacity is far lower.¹⁷

7. Consumers Energy represents that even without the Classic Seven, it still anticipates maintaining Planning Reserve Margins between 28 and 47 percent during the 6.5 week period. Further, Consumers Energy notes that, following completion of its Attachment Y study to determine whether the Classic Seven were necessary for the reliability of the system, MISO determined that, due to planned transmission upgrades, the Classic Seven are not necessary for reliability beyond April 15, 2016.¹⁸ Consumers Energy also states that MISO's Zone 7 Maintenance Margin Charts indicate an available

¹³ The Tariff provides that the following category of conduct may warrant mitigation: "*Physical withholding of an Electric Facility including a Planning Resource . . . [that] may include . . . declaring that an Electric Facility has been derated, forced out of service or otherwise become unavailable for technical reasons that are not true or cannot be verified[.]*" Consumers Energy Request for Waiver at 9-10; *see* MISO, FERC Electric Tariff, Module D, § 63.3.a.i (30.0.0).

¹⁴ Consumers Energy Request for Waiver at 2, 11.

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 2, 12. Consumers Energy developed this range by using the 2014-2015 Auction Clearing Price for Zone 7 (\$16.75 per MW-day) to calculate the low end and the 2014-2015 Cost of New Entry for Zone 7 (\$246.85 per MW-day) to calculate the high end. *Id.*; Ronk Test. at 14.

¹⁷ Consumers Energy Request for Waiver at 2.

¹⁸ *Id.* at 15; Ronk Test. at 8-9 (citing Ex. E).

margin of 5,929 MW to 10,030 MW and 621 MW to 8,520 MW in April 2016 and May 2016, respectively.¹⁹ Consumers Energy explains that the MISO Maintenance Margins are developed using a very conservative approach and changes to scheduled maintenance are possible.²⁰

8. Consumers Energy states that the Commission has recently addressed an essentially identical situation involving Indianapolis Power and Light Company (Indianapolis Power).²¹ Consumers Energy explains that it filed a similar request for waiver in Docket No. ER14-2622-000 and that the Commission denied that request for waiver, without prejudice to Consumers Energy filing a new waiver request providing additional support.²² Consumers Energy states that, in this request for waiver, Consumers Energy addresses the deficiencies identified by the Commission and seeks the same waiver granted by the Commission in the Indianapolis Power Order.²³

9. Consumers Energy points out that, like Indianapolis Power, Consumers Energy faces the following regulatory and Tariff requirements: (1) MATS compliance forced retirement of resources by April 16, 2016; (2) Resource Adequacy Requirements are based on the 2015-2016 Planning Year, which extends through May 31, 2016; (3) the MISO Tariff does not permit retired units to be withheld from the MISO 2015-2016 Planning Resource Auction; (4) MISO Tariff does not permit retired units to be on a forced or scheduled outage during the 6.5 week period; (5) no clear mechanism exists for replacing capacity for the 6.5 week period; and (6) absent a waiver or modification of

¹⁹ Consumers Energy Request for Waiver at 15-16 (citing MISO's Maintenance Margin Charts, *available at* https://www.oasis.oati.com/woa/docs/MISO/MISOdocs/MM_Oct2014_update.zip).

²⁰ *Id.* at 16 (citing Ronk Test. at 21; MISO's Maintenance Margin whitepaper reviewed by the Supply Adequacy Working Group in December 2013, *available at* http://www.oatioasis.com/woa/docs/MISO/MISOdocs/MM_Whitepaper.pdf). Consumers Energy clarifies that it has multiple outages scheduled during the 6.5 week period from April 16, 2016 through May 31, 2016 and that Consumers Energy could move some of the outages if necessary. *Id.* (citing Ronk Test. at 21).

²¹ *Id.* at 3, 16 (citing *Indianapolis Power & Light Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,047 (2014) (*Indianapolis Power Order*)).

²² *Id.* at 3 (citing *Consumers Energy Co.*, 149 FERC ¶ 61,110 (2014)).

²³ *Id.* (citing *Indianapolis Power Order*, 149 FERC ¶ 61,047 at PP 63, 71).

certain Resource Adequacy Requirements, no economically reasonable alternatives have been identified.²⁴

10. Consumers Energy states that the Commission granted Indianapolis Power's request for limited waiver of the must-offer requirement and requirement to purchase replacement capacity for the 6.5 week period. Consumers Energy represents that the Commission held that Indianapolis Power's request for waiver was consistent with Commission precedent for granting one-time waivers that are of limited scope, remedy a concrete problem, and have no undesirable consequences. Consumers Energy notes that the Commission dismissed as moot Indianapolis Power's complaint.²⁵

Consumers Energy Request for Waiver

11. Consumers Energy requests limited waiver of the must-offer requirement²⁶ and the requirement to purchase replacement capacity²⁷ for the period from April 16, 2016 to May 31, 2016. Consumers Energy argues that the request for waiver: (1) is in good faith; (2) is of limited scope; (3) will address a concrete problem; and (4) will not have undesirable consequences.²⁸

12. Consumers Energy argues that it has acted in good faith because it (1) acted in a timely manner to submit its Attachment Y Notification to MISO; (2) is purchasing the Jackson Plant and is taking various other steps which may include the expanded use of Demand Response to fully bridge any capacity gap; (3) will be resource sufficient; and (4) has worked cooperatively with MISO to address the 6.5 week issue. In sum,

²⁴ *Id.* at 17 (citing Indianapolis Power, Complaint, Docket No. EL14-70-000, at 2-3 (filed June 20, 2014)).

²⁵ *Id.* at 18-19 (citing *Indianapolis Power* Order, 149 FERC ¶ 61,047 at PP 63-69).

²⁶ Under section 69A.5 of the MISO Tariff, capacity used to meet a Planning Resource Margin Requirement (unless replaced pursuant to section 69A.3.1.h) must offer into the energy and ancillary services markets for each hour of each day for the entire Planning Year. MISO, FERC Electric Tariff, Module E-1, § 69A.5 (31.0.0).

²⁷ Section 69A.3.1.h of the MISO Tariff provides that if a Planning Resource is retired or suspended prior to the end of the Planning Year, the Market Participant must procure replacement capacity. MISO, FERC Electric Tariff, Module E-1, § 69A.3.1.h (34.0.0).

²⁸ Consumers Energy Request for Waiver at 4, 22.

Consumers Energy states that it has worked diligently to comply with MATS and pursue options in cooperation with other stakeholders and MISO.²⁹

13. Consumers Energy states that its request for waiver is limited in scope in that it applies only to the Classic Seven for a limited 6.5 week period of time. Further, Consumers Energy claims that the requested waiver is limited in scope because the Classic Seven have a combined nameplate capacity of 940.7 MW in a market footprint with over 177,000 MW of nameplate capacity.³⁰

14. Consumers Energy argues that its request for waiver addresses a specific issue with respect to the relationship of the MATS compliance deadline and the MISO Planning Year that, absent waiver, would cause Consumers Energy's Classic Seven to be treated inequitably. According to Consumers Energy, absent a waiver, Consumers Energy could be subject to significant and unreasonable penalties or forced to pay for unneeded capacity. Consumers Energy alleges that these costs would not improve or supplement resource adequacy, but would however require its customers to pay for expenses not needed to ensure resource adequacy or reliability. Consumers Energy notes that there is no incremental auction under the Tariff and those with excess capacity may not be in a position to sell capacity bilaterally for a 6.5 week period at a just and reasonable price. Consumers Energy insists that its request for waiver addresses a concrete problem by allowing the Classic Seven to remain operational for the first 45.5 weeks of the 2015-2016 Planning Year, rather than subjecting Consumers Energy to either (1) retire the Classic Seven prematurely on May 31, 2015; (2) be in non-compliance with EPA regulations; or (3) violate the Tariff and be required to either pay an unknown cost for replacement capacity or be subject to civil penalties up to \$1 million per day under section 316A of the Federal Power Act (FPA).³¹

15. Consumers Energy contends that its request for waiver is solely intended to resolve the timing mismatch between the MATS compliance deadline and MISO's Planning Year. According to Consumers Energy, it will maintain reliable service to its customers. Consumers Energy states that the only issue here is whether unnecessary and unwarranted costs will be imposed on its customers as a result of this timing mismatch. Consumers Energy states that it will use the Classic Seven to meet its Resource Adequacy Requirements for the first 45.5 weeks of the 2015-2016 Planning Year and notes that the Classic Seven will therefore be available during the 2015 summer peak

²⁹ *Id.* at 22-23.

³⁰ *Id.* at 23-24.

³¹ *Id.* at 24-25.

period and the 2015-2016 winter peak period. Consumers Energy expresses its concern that it will be forced to purchase replacement capacity for the entire Planning Year and Consumers Energy should not be double charged for both the operation of the Classic Seven and the purchase of replacement capacity or other fees.³²

16. Consumers Energy asks the Commission to issue an order prior to February 1, 2015 so that Consumers Energy may finalize its resource plans in advance of the MISO 2015-2016 Planning Resource Auction.³³

II. Notice and Responsive Pleadings

17. Notice of Consumers Energy's request for waiver was published in the *Federal Register*, 79 Fed. Reg. 70,175 (2014), with interventions and protests due on or before December 9, 2014.

18. Alliant Energy Corporate Services, Inc. filed a timely motion to intervene. Organization of MISO States filed a notice of intervention. The following entities filed timely motions to intervene and comments or protests: Indianapolis Power; DTE Electric Company (DTE Electric); MISO; and Dynegy Companies,³⁴ NRG Companies,³⁵ and Exelon Corporation (together, Suppliers). The Michigan Public Service Commission (Michigan Commission) filed a notice of intervention and comments. Association of Businesses Advocating Tariff Equity (ABATE) filed a motion to intervene out-of-time and comments. On December 19, 2014, Consumers Energy filed an answer.

19. In its comments, Indianapolis Power submits that the Commission should carefully review Consumers Energy's request in the specific context of Consumers Energy's location within MISO Zone 7 and the specific generation units that are the subject of this waiver request. Indianapolis Power states that the Commission's decision here should be made independent of its decision in Indianapolis Power's proceeding.³⁶

³² *Id.* at 25-26.

³³ *Id.* at 26.

³⁴ For purposes of this filing, Dynegy Companies are Dynegy Marketing and Trade, LLC and Illinois Power Marketing Company.

³⁵ For purposes of this filing, NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC.

³⁶ Indianapolis Power Comments at 1.

20. In its comments, the Michigan Commission states that, in light of MISO's determination that suspension of the Classic Seven will not result in violations of any reliability criteria and Consumers Energy's representations that no additional resources are necessary to meet its demand for the 6.5 week period, the Michigan Commission believes that Consumers Energy's waiver request is reasonable and should be approved. The Michigan Commission notes that a significant amount of the coal-fired plant fleet will be shut down over the next decade which will possibly result in similar filings. The Michigan Commission expresses that it is important that the Commission act expeditiously to ensure that reasonable requests for accommodation, where reliability will not be impaired, are approved in order to avoid unnecessary and costly implications for ratepayers.³⁷

21. In its comments, DTE Electric supports the relief requested by Consumers Energy. DTE Electric reiterates Consumers Energy's position that the request for waiver (1) is limited in scope; (2) addresses a concrete problem; and (3) will not cause undesirable consequences.³⁸

22. In its protest, MISO explains that it is unable to support Consumers Energy's waiver request based on the same resource adequacy concerns MISO raised in its answer to the Indianapolis Power filing in Docket No. EL14-70-000.³⁹ MISO asserts that, by 2016, the MISO North and MISO Central regions may face a capacity deficit below the Planning Reserve Margin and that a shortfall would increase the risk of a loss of load event. MISO argues that a broader perspective is warranted to protect against the opportunity for a confluence of factors to undermine the region's expectations for resource adequacy. MISO notes that, to date, several companies have made waiver requests for the same 6.5 week period, implicating a total of 2,440 MW. Moreover, MISO suggests that a large number of pending requests creates additional regulatory uncertainty among buyers and sellers of capacity and hinders the efficiency of MISO's capacity construct.⁴⁰

³⁷ Michigan Commission Comments at 3-4; *see also* ABATE Comments at 3-4 (asserting that Consumers Energy's retail rates are among the highest in the Midwest and that, absent waiver, Consumers Energy may have to acquire replacement capacity and incur unnecessary expense and hardship to Consumers Energy's customers) .

³⁸ DTE Electric Comments at 2-3.

³⁹ MISO Protest at 4-5 & n.11.

⁴⁰ *Id.* at 4-6.

23. MISO clarifies that its Attachment Y Reliability Study determines whether the requested change of operating status would result in transmission reliability issues and does not include a review of resource adequacy impacts related to a resource retirement or suspension. Further, MISO states that the EPA describes two different types of circumstances that could be used to support an administrative order: “failure to operate the unit would (a) result in a violation of at least one reliability criteria . . . or (b) cause reserves to fall below the required system reserve margin.”⁴¹ Thus, MISO clarifies that its Attachment Y Reliability Study determination has not foreclosed the opportunity for Consumers Energy to seek an administrative order from the EPA.⁴²

24. MISO states that the Maintenance Margin analysis included in Consumers Energy’s request for waiver is not the type of assessment MISO uses for making resource adequacy determinations and states that unit retirements are fundamentally different from scheduled maintenance or a planned outage since there is no opportunity to reschedule a retired unit. MISO contends that the Maintenance Margin process does not provide the type of analysis necessary to determine that generation retirements will not contribute to broader resource adequacy concerns. MISO notes that generators that are not Capacity Resources are reflected in the Maintenance Margin analysis because they are available to serve load; however, those generators have the ability to sell capacity and energy to other markets and do not have an obligation to serve load in MISO. MISO argues that relying on units that will not be available for the duration of the Planning Year to meet Planning Reserve Margin Requirements⁴³ contributes to erosion of the resource adequacy planning process.⁴⁴

25. MISO acknowledges its engagement in an extensive stakeholder process to explore options related to the timing difference between the MATS compliance deadline and the end of the Planning Year; however, MISO explains that it very carefully considered a variety of proffered options and ultimately decided to not propose Tariff

⁴¹ *Id.* at 7 (citing EPA’s Enforcement Response Policy for use of Clean Air Section 113(a) Administrative Orders in Relation to Electricity Reliability and the Mercury and Air Toxics Standard, at 7 (Dec. 16, 2011), *available at* <http://www2.epa.gov/sites/production/files/documents/mats-erp.pdf>).

⁴² *Id.* at 7-8.

⁴³ Planning Reserve Margin Requirement is the amount of capacity required of each Load Serving Entity to meet its Resource Adequacy Requirements. MISO, FERC Electric Tariff, Module A, § 1.P (34.0.0).

⁴⁴ MISO Protest at 8-9.

revisions. MISO represents that it expressed to stakeholders that “[t]oday there is an obligation to provide capacity, or buy it from other participants who have it. Removing that obligation does in fact provide preference for those customers to supply at the expense of other [market participants].”⁴⁵ MISO contends that waiver of its Tariff requirements related to resource adequacy should not be considered unless and until it can be demonstrated that no other Tariff-compliant route is available. MISO argues that it seems premature to conclude that Consumers Energy will have no other means to address the capacity deficit created by the retirement of the Classic Seven.⁴⁶

26. In their protest, Suppliers argue that, if granted, Consumers Energy’s request for waiver would create an uneven and unduly discriminatory playing field for Capacity Resources and threaten MISO’s capacity market and reliability in the region. Suppliers point out that Consumers Energy’s filing is only one of a series of filings requesting waiver of MISO’s resource adequacy rules for the same 6.5 week period and suggest that these requests, together, present a significant threat to MISO’s resource adequacy structure. Suppliers contend that Consumers Energy has not satisfied any of the Commission’s waiver requirements.⁴⁷

27. Suppliers contend that Consumers Energy has not shown that a concrete problem exists and argue that any problem that exists is solely the result of Consumers Energy’s own business decisions. Suppliers suggest that Consumers Energy could have used the Classic Seven for the first part of the 2015-2016 Planning Year and then entered into bilateral agreements to purchase replacement capacity for the final 6.5 weeks of that Planning Year. Further, Suppliers point out that Consumers Energy will have had more than four years since the promulgation of the MATS rule to plan for the suspension of the Classic Seven’s operations. Suppliers allege that Consumers Energy did not take any steps to procure replacement capacity and instead asks the Commission to relieve it of its responsibility to comply with its capacity obligations for a significant portion of the 2015-2016 Planning Year.⁴⁸

⁴⁵ *Id.* at 9 (citing minutes of the December 5, 2013 Supply Adequacy Working Group meeting, *available at* <https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/SAWG/2014/20140109/20140109%20SAWG%20Item%2001c%20Minutes%2020131205.pdf>).

⁴⁶ *Id.* at 9-10.

⁴⁷ Suppliers Protest at 6-7.

⁴⁸ *Id.* at 7-8.

28. Suppliers note that while Consumers Energy submitted its Attachment Y Notification in advance, arranged to purchase another generating facility, and supposedly will be resource sufficient, Consumers Energy still makes no showing that it attempted to comply in good faith with its requirement to procure replacement capacity under section 69A.3.1.h of the Tariff. According to Suppliers, Consumers Energy attempts to excuse its failure to purchase replacement capacity by arguing that replacement capacity is unnecessary and suggests that there is a risk that replacement capacity may not be available or only may be available at an unknown cost. Suppliers comment that Consumers Energy fails to explain why it would be unjust or unreasonable to pay for replacement capacity, even at potentially high or unknown prices. Suppliers state that Consumers Energy concedes that it has chosen to suspend the Classic Seven for economic reasons and it should therefore be required to bear the financial consequences of that business decision.⁴⁹

29. Suppliers argue that Consumers Energy does not provide any evidence to support its claims that replacement capacity may not be available on the bilateral market and that it could cost as much as \$84.7 million to purchase replacement capacity. Suppliers state that more than 12 gigawatts (GW) of capacity did not clear the 2014-2015 Planning Resource Auction and notes that Dynegy Companies recently entered into a bilateral agreement to sell nearly 800 MW of capacity for the final eight months of the 2014-2015 Planning Year at a price that is close to the 2014-2015 Auction Clearing Price.⁵⁰

30. Suppliers argue that Consumers Energy's request for waiver is not limited in scope because (1) a request to be relieved of resource obligations for 6.5 weeks or 12.5 percent of the 2015-2016 Planning Year can hardly be considered of limited scope;⁵¹ (2) the Classic Seven represents approximately 14.5 percent of Consumers Energy's total capacity; (3) all resources, not just the Classic Seven, are subject to the MATS rule; and (4) all resources in MISO are subject to the resource adequacy provisions in the MISO Tariff.⁵² Further, Suppliers insist that Consumers Energy's waiver request, combined with the other similar requests, presents a cumulative threat to reliability and to the viability of MISO's resource adequacy construct. Suppliers warn that granting Consumers Energy's requested relief would only send the message that waiver can and

⁴⁹ *Id.* at 8-10.

⁵⁰ *Id.* at 10-11.

⁵¹ *Id.* at 12 (citing *Indianapolis Power Order*, 149 FERC ¶ 61,047 (Bay, Comm'r, dissenting)).

⁵² *Id.* at 12-13.

should be sought in any situation where the timing of an environmental or other regulatory obligation does not perfectly coincide with the MISO Planning Year.⁵³

31. Suppliers argue that Consumers Energy has not satisfied its burden of demonstrating that harm will not result if its request for waiver is granted. Suppliers argue that the waiver, if granted, will permit Consumers Energy to use non-functional resources to satisfy its capacity obligations and, as a result, will result in undue preference for Consumers Energy and undue discrimination against other load serving entities and Capacity Resources that must comply with MISO's requirements for the entirety of the year. Suppliers represent that the Commission recently rejected a waiver request that would "result in unduly favorable treatment to [the applicant] while other market participants abided by the Tariff requirement," and recommends that the Commission do the same here.⁵⁴ Suppliers claim that Consumer Energy's request for waiver will harm MISO's capacity market by suppressing Planning Resource Auction prices and causing other resources, which may be called on to maintain reliability, to be deprived of capacity revenue.⁵⁵

32. Suppliers argue that Consumers Energy has not satisfied the burden to support its claim that reliability will not be adversely affected by its request.⁵⁶ Suppliers represent that MISO acts as a pool for resource adequacy purposes and that there is no basis for assessing reliability impacts by narrowly looking at one utility or one state in isolation and that such an approach conflicts with Commission precedent.⁵⁷ Suppliers point out that together, the requests to date cover over 2,300 MW of generation and present an ever increasing threat to the viability of MISO's capacity market and reliability in the interconnected region.⁵⁸ Next, Suppliers contend that MISO's Attachment Y analysis

⁵³ *Id.* at 13.

⁵⁴ *Id.* at 14 (citing *Massachusetts Muni. Wholesale Elec. Co.*, 148 FERC ¶ 61,227, at P 14 (2014)).

⁵⁵ *Id.*

⁵⁶ *Id.* at 15.

⁵⁷ *Id.* at 16 (citing *California Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274, at P 1113 (2006), *on clarification & reh'g*, 119 FERC ¶ 61,076 (2007) ("[O]ne participant's reliability decisions can impact the reliability of service available to other participants and the related costs the other participants must bear.")).

⁵⁸ *Id.*

only assesses transmission-related reliability issues and does not review resource adequacy impacts related to a resource retirement or suspension.⁵⁹ Further, Suppliers claim that the MISO Maintenance Margin Charts are only intended to provide an additional criterion to evaluate planned generator outage requests and does not demonstrate that a Capacity Resource may be removed without jeopardizing reliability.⁶⁰

33. While Suppliers maintain that the Commission should not have granted Indianapolis Power's request for waiver in Docket No. EL14-70-000, Suppliers note that Commissioners Clark and Moeller emphasized in a concurring statement that the *Indianapolis Power* Order "in no way ties our hands to granting waivers under a different set of circumstances."⁶¹ Suppliers argue that examination of specific circumstances requires the Commission to deny Consumers Energy's request for waiver. First, Suppliers note that Indianapolis Power represented a Maintenance Margin of over 3,000 MW in Zone 6, while Consumers Energy acknowledges that the Maintenance Margin for Zone 7 falls as low as 621 MW.⁶² Next, Suppliers note that the Classic Seven and DTE Electric's Trenton Channel Unit 7⁶³ have a combined capacity of approximately 1,060 MW, which constitutes over five percent of the 20,791 MW demand forecast for MISO Zone 7.⁶⁴ Suppliers state, by contrast, that Indianapolis Power's 216 MW Eagle

⁵⁹ *Id.* at 16-17 (citing MISO, Answer, Docket No. EL14-70-000, at 3 (filed July 25, 2014)).

⁶⁰ *Id.* at 17 (citing MISO's Maintenance Margin whitepaper reviewed by the Supply Adequacy Working Group in December 2013, *available at* http://www.oatioasis.com/woa/docs/MISO/MISOdocs/MM_Whitepaper.pdf).

⁶¹ *Id.* at 18-19 (citing *Indianapolis Power* Order, 149 FERC ¶ 61,047 (Clark and Moeller, Comm'rs, concurring)).

⁶² *Id.* at 19 (citing *Indianapolis Power*, Complaint, Docket No. EL14-70-000, Franks Test. at 15 (filed June 20, 2014)).

⁶³ *See* DTE Electric, Request for Waiver, Docket No. ER15-90-000, at 1 & n.3.

⁶⁴ Suppliers Protest at 19 (citing MISO, *2014/2015 MISO Planning Resource Auction (PRA)* (Apr. 2014), *available at* <https://www.misoenergy.org/Library/Repository/Report/Resource%20Adequacy/AuctionResults/2014-2015%20PRA%20Summary.pdf> (2014-2015 MISO Planning Resource Auction Summary)).

Valley facility represents approximately 1.2 percent of the 17,629 MW demand forecast for MISO Zone 6.⁶⁵

34. Suppliers suggest that, to the extent that the Commission is inclined to grant some form of relief, the Commission could clarify that Consumers Energy will not be found to have engaged in physical withholding if it does not offer the Classic Seven into the 2015-2016 Planning Resource Auction or, alternatively, the Commission could adopt Commissioner Bay's recommendation in the Indianapolis Power case and require Consumers Energy to "purchase replacement capacity for the 6.5 weeks on the condition that it be available at a just and reasonable rate."⁶⁶

35. In its answer, Consumers Energy states that the Michigan Commission's supporting comments underscore the fact that the problem Consumers Energy seeks to have the Commission address is not a reliability problem, but a timing problem. Consumers Energy contends that the Michigan Commission's support, as well its statements regarding the absence of reliability issues, should carry great weight.⁶⁷

36. Consumers Energy argues that the pleadings filed by MISO and Suppliers fail to rebut the fact that Consumers Energy will be operating with a reserve margin between 28 percent and 47 percent during the 6.5 week period. Consumers Energy states that, instead, MISO and Suppliers oppose the request for waiver almost exclusively on generalized assertions of adverse reliability impacts should a confluence of factors unrelated to Consumers Energy's request come to pass. Consumers Energy argues that, because the Commission reviews each request for waiver on a case-by-case basis,⁶⁸ Consumers Energy's request for waiver must be evaluated based on the unique facts and circumstances presented therein and generalized allegations of broad implications and potential consequences are unavailing.⁶⁹

⁶⁵ *Id.* at 19-20 (citing *Indianapolis Power Order*, 149 FERC ¶ 61,047 at P 15; 2014-2015 MISO Planning Resource Auction Summary).

⁶⁶ *Id.* at 22-23 (citing *Indianapolis Power Order*, 149 FERC ¶ 61,047 (Bay, Comm'r, dissenting)).

⁶⁷ Consumers Energy Answer at 3.

⁶⁸ *Id.* at 4 (citing *Indianapolis Power Order*, 149 FERC ¶ 61,047 at P 65).

⁶⁹ *Id.* at 3-4.

37. Consumers Energy contends that Suppliers' only opposition to the request for waiver that relies on facts specific to this proceeding contrasts the MISO Zone 6 Maintenance Margin data with the MISO Zone 7 Maintenance Margin data in an attempt to suggest that the lower MISO Zone 7 Maintenance Margins are a basis on which the Commission could reject Consumers Energy's request for waiver. Consumers Energy provides four reasons why this argument is unavailing: (1) a lower Maintenance Margin merely indicates that fewer MWs of planned generator outages are currently available to be scheduled; (2) the fact that DTE Electric also has a waiver request during the same period is irrelevant because the MISO Zone 7 Maintenance Margin was calculated taking into account the suspension of operations of the Classic Seven and DTE Electric's Trenton Channel Unit 7; (3) the MISO Zone 7 Maintenance Margin is at or above 3,000 MW for most of the 6.5 week period and only falls below 1,000 MW on one day; and (4) if the Maintenance Margin falls below zero, MISO would attempt to reschedule planned maintenance.⁷⁰

38. Consumers Energy argues that the only relevant question here is whether its request for waiver meets the Commission's standards for waiver. Consumers Energy reiterates that (1) it is unable to comply with the Tariff provisions at issue in good faith; (2) the requested waiver is limited in scope; (3) the remedy proposed will address the concrete problem; and (4) no party has presented evidence that the requested waiver will adversely affect reliability.⁷¹

III. Discussion

A. Procedural Matters

39. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notices of intervention and 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) (2014), we will grant the late-filed motion to intervene of ABATE given its interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

40. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest unless otherwise

⁷⁰ *Id.* at 4-6.

⁷¹ *Id.* at 6-7.

ordered by the decisional authority. We will accept Consumers Energy's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

41. Based on our review of Consumers Energy's request for limited waiver of the must-offer requirement and requirement to purchase replacement capacity in MISO Tariff sections 69A.5 and 69A.3.1.h, respectively, for the period from April 16, 2016 to May 31, 2016, we find good cause to grant the requested waiver.

42. The Commission has previously granted one-time waivers of tariff provisions in situations where, as relevant here: (1) the waiver is of limited scope; (2) a concrete problem needed to be remedied; and (3) the waiver did not have undesirable consequences, such as harming third parties.⁷² Based on the record, we find that Consumers Energy's request for waiver satisfies the aforementioned conditions. We conclude that granting the requested waiver, and relieving Consumers Energy of the obligation to procure replacement capacity for the Classic Seven units for the limited period of time from April 16, 2016 to May 31, 2016, will benefit Consumers Energy's customers by reducing the financial impacts of the disconnect between the MISO 2015-2016 Planning Year and deadline for compliance with the EPA MATS requirements without materially impacting reliability or resource adequacy during the 6.5 week period in question.

43. First, we find that this waiver is of limited scope. The requested waiver is limited to the 940.7 MW Classic Seven for a limited period of time from April 16, 2016 to May 31, 2016 of the 2015-2016 Planning Year. It is uncontested that the EPA mandates begin on April 16, 2016, and that the MISO Planning Year ends on May 31, 2016. We are therefore faced with a clear timing mismatch limited to a 6.5 week period outside of the peak planning period. Suppliers argue that Consumers Energy's request is not limited in scope because it presents a cumulative threat to reliability if granted in conjunction with other similar waivers sought from the Commission.⁷³ We disagree and find the

⁷² See, e.g., *California Indep. Sys. Operator Corp.*, 146 FERC ¶ 61,184, at P 18 (2014); *Southwest Power Pool, Inc.*, 148 FERC ¶ 61,013, at P 13 (2014); *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,041, at P 5 (2014).

⁷³ See, e.g., *Indianapolis Power, Request for Waiver and Complaint*, Docket No. EL14-70-000 (filed June 20, 2014); *Duke Energy Indiana, Inc., Request for Waiver*, Docket No. ER15-592-000 (filed Dec. 5, 2014) (Duke Indiana); *MidAmerican Energy Company, Request for Waiver*, Docket No. ER15-199-000 (filed Oct. 27, 2014) (MidAmerican); *DTE Electric, Request for Waiver*, Docket No. ER15-90-000 (filed Oct. 14, 2014).

argument that granting this waiver will contribute to a cumulative threat to reliability to be speculative. MISO conducted an Attachment Y Reliability Study to determine whether the Classic Seven are necessary for reliability and found that the units are not necessary for reliability beyond April 15, 2016. While entities in the MISO footprint are working to install assets in order to meet environmental requirements in the long-term, no party to the proceeding has indicated that it intends to install, in the time remaining between now and April 2016, a temporary capacity resource for the 6.5 week period. Moreover, no party has presented a reliability issue for the 6.5 week period, or any evidence that an asset critical to reliability will be placed in service on a different schedule depending on how we act here. We therefore disagree that the waiver is not of limited scope because of its alleged potential impacts on reliability. We reiterate that the Commission does not take waiver requests lightly. The Commission reviews each request for waiver on a case-by-case basis and granting this waiver does not in any way dictate that the Commission will grant other waiver requests that seek the same relief.⁷⁴

44. We also find that Consumers Energy's request addresses a concrete problem. Consumers Energy's Classic Seven units must comply with EPA MATS requirements by April 16, 2016, and Consumers Energy, with the support of its state regulators, has made an economic decision to retire the Classic Seven units on that date. Consumers Energy therefore faces a discrete and concrete problem: how it should treat its Classic Seven units, which will remain operational for 45.5 weeks of the 2015-2016 Planning Year, including the peak periods in the summer of 2015 and winter of 2015-2016, for the purpose of meeting its resource adequacy requirements. The requested waiver resolves

⁷⁴ For example, in companion orders issued today, the Commission grants relief sought by MidAmerican and Duke Indiana to clarify that those entities need not offer the units at issue in those proceedings into MISO's 2015-2016 Planning Resource Auction. *See MidAmerican Energy Co.*, 150 FERC ¶ 61,124 (2015); *Duke Energy Indiana, Inc.*, 150 FERC ¶ 61,126 (2015). While both MidAmerican and Duke Indiana also sought waiver of sections 69A.5 and 69A.3.1 of the MISO Tariff (i.e., the same relief granted to Consumers Energy in this order, and previously granted to Indianapolis Power), the Commission concludes that alternative relief is appropriate under the facts of the cases. Specifically, the Commission finds that MidAmerican and Duke Indiana are in a fundamentally different position than Indianapolis Power, in that the MidAmerican and Duke Indiana units at issue in those proceedings are excess capacity that neither entity needs for its own customers, and therefore that it would be inappropriate to allow MidAmerican and Duke Indiana to sell that excess capacity to third parties through the 2015-2016 Planning Resource Auction and be compensated by third parties for a full year of capacity when neither MidAmerican nor Duke Indiana will be able to deliver that full commitment.

this problem created by the 6.5 week gap between EPA MATS deadlines and the MISO Planning Year that MISO and its stakeholders recognized and spent over a year attempting to resolve through a Tariff amendment.⁷⁵ We disagree with Suppliers' argument that Consumers Energy's request for waiver does not address a concrete problem because other supplies may be available for the 6.5 period, or because other load serving entities resolved this 6.5 week issue through other means.⁷⁶ The existence of other possible solutions, besides the requested waiver, does not eliminate Consumers Energy's problem.

45. We also find that the requested waiver will not cause undesirable consequences, based on Consumers Energy's representation that it will meet all of its planning reserve requirements during the peak periods of the summer 2015 and winter 2015-2016 seasons by having the Classic Seven on-line. We disagree with the contention that granting Consumers Energy's request for waiver would undermine system reliability. We again note that MISO found that the Classic Seven Units are not necessary for reliability beyond April 15, 2016.⁷⁷ Furthermore, we note that the Michigan Commission, which

⁷⁵ We acknowledge that, on January 28, 2015, MISO submitted proposed Tariff revisions in Docket No. ER15-918-000 that propose to revise its Tariff provisions regarding application of physical withholding mitigation to generation resources that are retiring or suspending operations during the period of time between the 2015-2016 Planning Resource Auction and the end of the 2015-2016 Planning Year. In granting the relief sought by Consumers Energy herein, we do not prejudge the merits of MISO's proposed Tariff revisions; we do note, however, that MISO's filing, if accepted, would go into effect on the next to last day of the offer period for the 2015-2016 Planning Resource Auction.

⁷⁶ Furthermore, while Suppliers point out that 12 GW of capacity did not clear the 2014-2015 Planning Resource Auction, we note that this fact does not necessarily mean that 12 GW of capacity will not clear the 2015-2016 Planning Resource Auction and therefore be available to bilaterally procure for the 6.5 week period at issue.

⁷⁷ Consumers Energy Request for Waiver at 15. MISO's Transmission Planning Business Practices Manual (Reliability Evaluation section 6.2.3) states:

System Intact (Category A) and single-element contingencies (Category B) will be considered in the evaluation, which are consistent with [North American Electric Reliability Corporation (NERC)] Planning Standards I.A. Category B includes any single transformer, generator, or transmission line outage. In addition, significant multiple-element contingencies consistent with NERC Category C will be reviewed.

(continued ...)

plays a critical role under MISO's resource adequacy construct in ensuring the adequacy and cost-effectiveness of electric service to Consumers Energy's customers, supports granting the waiver.⁷⁸ With regard to asserted concerns that granting the requested waiver could cause a deficit in resources needed to meet demand, we do not expect that granting the waiver will cause such a deficit, given that the waiver will cover only a limited period of time in the spring 2016 shoulder season. Furthermore, Consumers Energy represents that it is acting to bridge the capacity gap created by the retirement of the Classic Seven by taking steps such as acquiring new generation capacity⁷⁹ and possibly expanding the use of demand response, customer self-generation, and interruptible service.

46. Suppliers argue there is no basis for assessing reliability impacts by narrowly looking at one utility or one state in isolation. We agree and note that MISO's Attachment Y Reliability Study examines both local reliability and system reliability.⁸⁰

NERC Transmission Planning Standards TPL-001, TPL-002, and TPL-003 effective April 1, 2005 will be applied to test the system. In performing the [System Support Resource] study, Regional, State, and MISO Member (Local) planning criteria will be respected. In addition to NERC Standards, load deliverability will be tested in areas with potential load deliverable deficiency. A 1 day in 10 year [Loss of Load Event] criteria will be applied.

⁷⁸ For example, under MISO's resource adequacy Tariff provisions, if the Michigan Commission elects to establish a Planning Reserve Margin for Consumers Energy, MISO must use that Planning Reserve Margin in its calculation of Consumers Energy's Planning Reserve Margin Requirement.

⁷⁹ We note that the Commission approved Consumers Energy's acquisition of the 564 MW Jackson Plant, which will replace a substantial portion of the approximately 950 MW of generation that Consumers Energy plans to retire in 2016. *Consumers Energy Co.*, 148 FERC ¶ 61,251, at PP 16-17 (2014). Consumers Energy indicates that it intends to incorporate this facility into its generation fleet before mothballing the Classic Seven units, and if the Jackson Plant's capacity can be transferred to Consumers Energy, then its expected shortfall for the 6.5 week period may be as little as 400 MW. Consumers Energy Request for Waiver, Ronk Test. at 10. We encourage Consumers Energy to take all reasonable steps to procure any of the Jackson Plant's capacity, to the extent it is available for the 6.5 week period, to further mitigate the possibility of any impacts on system reliability.

⁸⁰ *See supra* note 77.

47. We also find that the Maintenance Margin Charts for MISO Zone 7, in which Consumers Energy is located, provide additional evidence in support of granting the waiver. Suppliers and MISO argue that reliance on Maintenance Margin Charts is not appropriate, but we disagree. We find MISO Zone 7 Maintenance Margin Charts to be of particular importance given the level of scheduled maintenance outages typically experienced during shoulder periods. This information provides us with a more granular understanding of the load forecast and scheduled outages in MISO Zone 7 on a daily basis for the 6.5 week period.

48. We are not persuaded by Suppliers' argument that granting the waiver request will harm Dynegy and other suppliers because they will be deprived of capacity revenues. A decrease in capacity revenues, were it to occur in the 2015-2016 Planning Year, could be a function of a number of market factors. These suppliers have other sources of potential revenues in the energy, reserves and capacity markets of MISO and adjoining Regional Transmission Organizations. In any case, Consumers Energy's waiver request presents the Commission with a discrete and concrete problem: whether Consumers Energy's customers should be required to replace the Classic Seven units' capacity during the 6.5 week period at an unknown and potentially significant cost, even though the capacity would be procured for a shoulder season. In addressing Consumer Energy's waiver request, we must weigh any revenue increases for suppliers against the potential increase in costs to Consumers Energy's customers. Under the facts of this case, we cannot justify assessing customers potentially significant costs to replace capacity during the 6.5 week period at issue when those costs are unlikely to have a meaningful impact on reliability or resource adequacy during the replacement period in question. We also disagree with assertions that granting this waiver will undermine MISO's resource adequacy construct; to the contrary, we conclude that granting the waiver under the limited circumstances here will help ensure that the timing disconnect between MISO's 2015-2016 Planning Year and the MATS compliance requirement does not unnecessarily increase costs for Consumers Energy's customers. As to Suppliers' concern that granting Consumers Energy's request for waiver results in undue preference, we find that Consumers Energy has adequately demonstrated that waiver is warranted under the facts presented, and our determination here is limited to the specific facts of this proceeding.

49. Suppliers argue that the Commission should clarify that Consumers Energy will not be found to have engaged in physical withholding if it does not offer the Classic Seven into the 2015-2016 Planning Resource Auction. However, since this relief was not requested by Consumers Energy, we find the requested clarification to be outside the scope of this proceeding. We also decline Suppliers' alternative recommendation to require Consumers Energy to purchase replacement capacity to the extent that it is

available at just and reasonable rates.⁸¹ As discussed above, we find that Consumers Energy satisfies the Commission's waiver criteria.

50. In granting this waiver, we remain cognizant of the Commission's responsibilities under the FPA for the reliability of the bulk electric system and the oversight of regional electric markets to ensure that they sustain reliability at just and reasonable rates.⁸² Ultimately, we find that granting Consumers Energy's requested waiver is an appropriate remedy to address the inconsistency between the compliance date of the EPA's MATS requirements for the Classic Seven (i.e., April 16, 2016) and the end of MISO's 2015-2016 Planning Year (i.e., May 31, 2016). We note that the limited waiver granted herein does not implicate the resource adequacy requirements for the summer 2016 peak season, the 2016-2017 Planning Year, or any planning years thereafter. Furthermore, Consumers Energy remains obligated to maintain sufficient capacity for the remainder of the 2015-2016 Planning Year, including the peak seasons in summer 2015 and winter 2015-2016. We also note that the Commission continues to monitor resource adequacy in the MISO region, particularly in anticipation of the 2016-2017 Planning Year, and remains committed to working with the states, MISO, and stakeholders to ensure resource adequacy in the MISO region.

51. Under the circumstances presented, we grant Consumers Energy's request for waiver of the must-offer requirement and requirement to purchase replacement capacity under the MISO Tariff, as discussed above.

⁸¹ This proposal is derived from an alternative form of relief sought by Indianapolis Power in its waiver request granted by the Commission on October 16, 2014. *Indianapolis Power* Order, 149 FERC ¶ 61,047 (2014). However, we note that Indianapolis Power did not propose simply that it be required to purchase replacement capacity to the extent that it is available at just and reasonable rates; to the contrary, Indianapolis Power expressly requested that the Commission "place boundaries on the just and reasonable cost [at which] any replacement capacity could be offered." Indianapolis Power Waiver Request, Docket No. EL14-70-000, at 28 (filed June 20, 2014). Consumers Energy did not seek this alternative form of relief, and in any event, it is unclear what "boundaries" the Commission would impose if it granted this type of relief.

⁸² 16 U.S.C. §§ 824d, 824o (2012).

The Commission orders:

Consumers Energy's request for waiver is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Bay is dissenting with a separate statement attached.
Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Consumers Energy Company

Docket No. ER15-435-000

(Issued February 20, 2015)

BAY, Commissioner, *dissenting*:

The Commission today compounds the error it first committed in *Indianapolis Power & Light Co. v. Midcontinent Indep. Sys. Operator, Inc.*¹, when it granted Indianapolis Power's request for a waiver of the must-offer requirement and the requirement to purchase replacement capacity for a six-and-a-half week long period.² I noted in my dissent that the waiver was not of limited scope because other resources were presumably similarly situated and would file similar requests. Not surprisingly, this has come to pass. Other resources have seen the *Indianapolis Power* waiver and have decided to seek one for themselves. One can hardly blame them. At last count, six other entities with a nameplate capacity of almost 2,641 megawatts have filed for waivers. MISO has urged the Commission to adopt a broader perspective on reliability and warned that by 2016 the MISO North and MISO Central regions may face a capacity deficit below the Planning Reserve Margin and that a shortfall would increase the risk of a loss of load event.³ The IMM has also noted market-related concerns. Unlike the majority, I would heed those concerns and deny Consumers Energy's request for a waiver.

As a legal matter, Consumers Energy cannot carry its burden of justifying its waiver request. The Commission does not grant waivers lightly, for waivers, by their nature, tend to diminish regulatory certainty and may frustrate the settled expectations of market participants. I will not repeat the analysis from my dissent in *Indianapolis Power*, but note that it is equally applicable here. Consumers Energy cannot show that (1) it is unable to comply with the tariff provision in good faith, (2) the waiver is of limited scope, or (3) the waiver would not have undesirable consequences, such as harming third parties.

¹ 149 FERC ¶ 61,047 (2014).

² *Id.* at P 71.

³ *See* MISO Protest at 5.

Like Indianapolis Power, Consumers Energy relies on estimates for the cost of replacement capacity and has made no effort to procure capacity. It has not shown that capacity is unavailable or not cost effective to obtain. Beyond that, the case for denial is stronger here than in *Indianapolis Power* because we now know that other entities have filed requests for waiver, and it is possible that more are on the way. It is difficult to see how this waiver is of limited scope, as it involves 940.7 megawatts. It is equally difficult to establish that there would not be undesirable consequences resulting from the waiver.⁴

Although the legal analysis is dispositive, granting this waiver, along with the others, has the unfortunate consequence of creating unsound policy as well. It leads to regulatory uncertainty where once there was none, erodes MISO's capacity construct and reliability, undermines the bilateral capacity market, and, ironically, may even increase costs to consumers.

In practical terms, today's decision gives Consumers Energy the ability to participate in MISO's energy, capacity, and ancillary services markets for 45.5 weeks out of the 2015-16 planning year. This has the potential to provide significant financial benefit for Consumers Energy. But having gotten the benefit of access to the markets for most of the year, Consumers Energy will no longer have to cover its capacity obligation for Classic Seven for the remaining 6.5 weeks. For all those reasons, I would not grant Consumers Energy's waiver request.

Accordingly, I respectfully dissent.

Norman C. Bay
Commissioner

⁴ While the majority relies upon Attachment Y study, MISO has explained that Attachment Y only assesses transmission-related reliability issues and does not review resource adequacy impacts. *See* MISO Protest at 8. The majority's reliance on MISO's Maintenance Margin analysis is also unavailing, because that analysis is used for scheduled maintenance purposes, not to assess resource adequacy based on unit retirements. *See* MISO Answer at 9. Despite MISO's repeated attempts to explain what its own studies do, the majority characterizes them as establishing that the waivers pose no risk to local or system-wide reliability.