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

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

Duke Energy Indiana, Inc. Docket No. ER15-592-000

ORDER GRANTING REQUEST FOR WAIVER

(Issued February 20, 2015)

1. On December 5, 2014, as supplemented on February 3, 2015, Duke Energy Indiana, Inc. (Duke Indiana) 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 Duke Indiana's retirement of Wabash River Units 2-5 and suspension of Wabash River Unit 6 (collectively, Wabash River Units) totaling 668 megawatts (MW) to comply with environmental requirements.[1] As discussed below, and based on the facts of this case, the Commission finds that Duke Indiana need not offer the Wabash River Units into the 2015-2016 Planning Resource Auction.

I. **Background**

2. Duke Indiana states that it owns and operates generation, transmission, and distribution facilities to serve customers in Indiana. Duke Indiana states that its retail electric service is regulated by the Indiana Utility Regulatory Commission (Indiana Commission). Duke Indiana explains that it is a participant and load serving entity in the MISO markets and states that it purchases and sells capacity, energy, and ancillary services subject to the terms and conditions of the Tariff.[2]

[1] The Wabash River Units have a combined nameplate capacity of 668 MW and a combined unforced capacity rating of 588.6 MW. Wabash River Units 2-5 have a combined nameplate capacity of 350 MW and a combined unforced capacity rating of 299.6 MW. Wabash River Unit 6 has a nameplate capacity of 318 MW and an unforced capacity rating of 289 MW. Duke Indiana Request for Waiver at 5, 24.

[2] *Id.* at 4.

3. Duke Indiana explains that the United States Environmental Protection Agency (EPA) Mercury and Air Toxics Standards (MATS) rule establishes limits for hazardous air pollutants emitted from, among other sources, existing and planned coal-fired generators. Duke Indiana represents that the deadline for compliance is April 16, 2015; however, Duke Indiana explains that it obtained a one-year extension from the Indiana Department of Environmental Management to permit Duke Indiana to continue operating the Wabash River Units until April 16, 2016. Duke Indiana believes there is a minimal chance that it could obtain an EPA administrative order that would allow the Wabash River units to operate past April 16, 2016.[3]

4. Duke Indiana states that it could comply with the MATS requirements by retiring/suspending the Wabash River Units or by switching to low-sulfur/low-chlorine coal and installing baghouses along with activated carbon injection and dry sorbent injection. However, according to Duke Indiana, due to the age of the Wabash River Units and the estimated $100 million cost of installing compliance equipment, the most cost-effective way for Duke Indiana to comply with the MATS requirement is to retire Wabash River Units 2-5 and suspend Wabash River Unit 6 by April 16, 2016.[4]

5. Duke Indiana states that it submitted its Attachment Y Notification of Potential Generation Resource Change of Status (Attachment Y Notification) for Wabash River Units 2-5 to MISO on May 31, 2013.[5] Duke Indiana represents that MISO presented Duke Indiana with its Attachment Y Reliability Study results on November 18, 2013, indicating that Wabash River Units 2-5 would not be needed for reliability purposes beyond April 16, 2016.[6] Duke Indiana explains that in May of 2014, after receiving the one-year extension from the Indiana Department of Environmental Management, Duke Indiana submitted a modified Attachment Y Notification to postpone the retirement date

---

[3] *Id.* at 2, 5.

[4] *Id.* at 5-6, 12.

[5] *Id.* at 6. 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).

[6] Duke Indiana Request for Waiver at 2-3, 6-7.

of Wabash River Units 2-5. Duke Indiana states that, on October 4, 2014, it received approval from MISO to retire Wabash River Units 2-5 on April 16, 2016.[7]

6. Duke Indiana represents that Wabash River Unit 6 was not included in the original Attachment Y Notification because Duke Indiana had not yet completed its analysis of the economics of converting that unit to a natural gas-fired unit. Duke Indiana states that it has since decided to suspend Wabash River Unit 6, and that it submitted its Attachment Y Notification for Wabash River Unit 6 on September 30, 2014 and MISO has up to 180 days to complete its study. Duke Indiana explains that, because MISO might not complete its study in time for Duke Indiana to file a separate waiver request for Wabash River Unit 6, Duke Indiana determined that the prudent course was to seek, in this request for waiver, Commission approval of a waiver that would apply to Wabash River Unit 6 prior to the 2015-2016 Planning Resource Auction, subject to the outcome of MISO's Attachment Y study.[8] On February 3, 2015, Duke Indiana supplemented its request for waiver by submitting a letter stating that MISO has determined that Wabash River Unit 6 may be suspended without being designated a System Support Resource (SSR).[9]

7. Duke Indiana explains that MISO has interpreted its Tariff to require that Capacity Resources be available for service during the entire 2015-2016 Planning Year[10] and to meet this requirement, the Wabash River Units must be available for service through May 31, 2016, 6.5 weeks after the April 16, 2016 MATS compliance deadline. Duke Indiana represents that MISO has taken the position that Duke Indiana is not permitted to

---

[7] Duke Indiana Request for Waiver at 8. According to Duke Indiana, MISO stated that the only way to postpone the retirement date of Wabash River Units 2-5 was to submit a new Attachment Y Notification, re-enter the Generator Interconnection Queue, and sign a Generator Interconnection Agreement (GIA) to have interconnection rights during the one-year extension period. Duke Indiana represents that the GIA was executed on November 20, 2014 and that MISO filed the GIA with the Commission on December 4, 2014 in Docket No. ER15-580-000. *Id.* at 7-8.

[8] Duke Indiana Request for Waiver at 6-7.

[9] Duke Indiana Supplement at 1.

[10] 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). The MISO Planning Year begins June 1 and extends until May 31 of the following Year. MISO, FERC Electric Tariff, Module A, § 1.P (34.0.0).

withhold the Wabash River Units from offering into the 2015-2016 Planning Resource Auction.[11]

8. Duke Indiana states that the Tariff provides that Planning Resources that clear the auction and retire or are suspended during a Planning Year must be replaced with an equivalent amount of capacity.[12] Duke Indiana believes that the Tariff's requirement to procure replacement capacity does not apply to resources on forced or scheduled outage; however, MISO's interpretation of the Tariff does not permit Duke Indiana to use the MATS compliance-related retirements as a basis for declaring a forced or scheduled outage for the final 6.5 weeks of the 2015-2016 Planning Year. Moreover, Duke Indiana states that the Tariff does not provide a mechanism that would allow Duke Indiana to purchase replacement capacity through the auction to cover the 6.5 week period. Duke Indiana represents that there is no guarantee that bilateral replacement capacity would be available and, further, there are no safeguards on the price of bilateral capacity.[13] Duke Indiana estimates the cost of replacement capacity for the Wabash River Units could range from $3.6 million to $17.7 million.[14]

9. Duke Indiana explains that MISO, in Docket No. ER14-2113-000, stated that failure to comply with any of the requirements and/or provisions of the Tariff, including the failure to obtain replacement capacity "shall subject a Market Participant to such reasonable charges, penalties, or other remedies or sanctions for noncompliance as may be recommended by [MISO] and implemented through appropriate Commission pleadings."[15] Further, Duke Indiana notes that Potomac Economics, Ltd. (Potomac

[11] Duke Indiana Request for Waiver at 3, 12. Section 63.3.a.i of 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[.]" MISO, FERC Electric Tariff, Module D, § 63.3.a.i (30.0.0).

[12] Duke Indiana Request for Waiver at 9 (citing MISO, FERC Electric Tariff, Module E-1, § 69A.3.1.h (34.0.0)).

[13] *Id.* 3, 9, 12-13.

[14] *Id.* at 13. Duke Indiana calculated a range of costs using the 2014-2015 Auction Clearing Price for Zone 7 ($16.75 per MW-day) to calculate the low end and current market prices ($2.50 per MW-week) to calculate the high end. *See id.* (citing Attachment A (Testimony of Diane L. Jenner) at 12 (Jenner Test.)).

[15] *Id.* at 10 (citing MISO, Tariff Filing, Docket No. ER14-2113, at 8 (filed June 3, 2014)).

Economics), MISO's Independent Market Monitor (hereinafter, the IMM), has not established a position on whether retiring resources affected by MATS compliance during the 2015-2016 Planning Resource Auction would be subject to physical withholding mitigation.[16]

10. Duke Indiana insists that the requested waiver does not raise reliability concerns. Duke Indiana explains that MISO determined that, as long as Wabash River Unit 6 was generating, retirement of Wabash River Units 2-5 would not cause single contingency overloads. Duke Indiana states that the study determined that in order to relieve Wabash River Unit 6 of its essential status, a new transmission line must be constructed. According to Duke Indiana, it is moving forward with the construction of that line and currently estimates that it will be completed in 2016.[17]

11. Duke Indiana states that the Wabash River Units represent less than three percent (unforced capacity) of the overall generation in Zone 6, and even without the Wabash River Units in service, Duke Indiana is forecasted to have sufficient resources for the 2015-2016 Planning Year to meet the 7.1 percent (unforced capacity) requirement that MISO generally requires for summer peak conditions.[18] According to Duke Indiana, its projected reserve margins without the Wabash Units on an unforced capacity basis are 76.3 percent and 27.7 percent for April 2016 and May 2016, respectively.[19] Duke Indiana contends that, although it cannot state this definitely until MISO posts the unforced capacity values of Duke Indiana's generation resources, this information confirms that Duke Indiana will not require the capacity associated with the Wabash River Units to meet its Planning Reserve Margin Requirement.[20]

---

[16] *Id.* at 10-11 (citing Potomac Economics, *Participation of Units Planned for Retirement or Suspension in the Planning Resource Auctions*, at 2 (July 2014), *available at* https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/SAWG/2014/20140710/20140710%20SAWG%20Item%2014%20IMM%20PRA%20Att%20Y%20Units.pdf).

[17] Duke Indiana Request for Waiver at 14-15.

[18] *Id.* at 15 (citing Jenner Test. at 14).

[19] *Id.* at 15-16, 18 (citing Jenner Test. at 16-17).

[20] *Id.* at 16 & n.23. 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).

12. Duke Indiana claims that it has diligently planned its system over the past ten years in anticipation of the potential need to retire units due to stricter environmental requirements. According to Duke Indiana, including the Wabash River Units, it has retired 1,124 MW since 2011. Duke Indiana states, however, that during the same timeframe, it has added 1,140 MW through purchase, construction, and the increase of demand response. Duke Indiana states that if it is required to offer the Wabash River Units into the 2015-2016 Planning Resource Auction, it would be for the benefit of another Load Serving Entity because Duke Indiana does not require the capacity to meet its own load requirements. Further, Duke Indiana states that it would then be required to purchase replacement capacity for the 6.5 week period and argues that this would effectively force Duke Indiana to replace the capacity twice.[21]

13. Duke Indiana explains that MISO's Loss of Load Expectation Study Report for the 2015-2016 Planning Year states that generating units that have approved suspensions or retirements as of May 9, 2014 are accounted for in the Loss of Load Expectation analysis.[22] Duke Indiana states that Wabash River Units 2-5 had an approved Attachment Y study as of May 9, 2014 and thus Wabash River Units 2-5 were not modeled in the Loss of Load Expectation study. According to Duke Indiana, Indianapolis Power and Light Company's (Indianapolis Power's) Eagle Valley Units 3-6, which received waiver from the Commission,[23] were also not included for the same reason. Duke Indiana argues that it is therefore reasonable to conclude that the retirement of Wabash River Units 2-5 will not cause resource adequacy issues because these units did not contribute towards Resource Adequacy for the 2015-2016 Planning Year. Duke Indiana acknowledges that Wabash River Unit 6 was most likely modeled in the Loss of Load Expectation study; however, Duke Indiana represents that 8,532 MW of unforced capacity, compared to the 289 MW Wabash River Unit 6, would have to be removed from the study to meet the one day in ten years Loss of Load Expectation criteria.[24]

---

[21] Duke Indiana Request for Waiver at 16-17 (citing Jenner Test. at 14-15).

[22] Loss of Load Expectation is the sum of the loss of load probability for the integrated daily peak hour for each day of the year. The requirement is set such that the loss of load is no greater than 0.1 day in one year. MISO, FERC Electric Tariff, Module A, § 1.L (34.0.0).

[23] Duke Indiana Request for Waiver at 17 (citing *Indianapolis Power & Light Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,047 (2014) (*Indianapolis Power* Order)).

[24] *Id.* at 17-18 (citing Jenner Test. at 16).

Duke Indiana argues that this Loss of Load Expectation study is the "one day in 10 years reliability analysis" that "MISO uses for making resource adequacy determinations."[25]

14. Duke Indiana explains that the most recent Zone 6 Maintenance Margin results indicate an available margin ranging from 738 MW to 8,842 MW for the 6.5 week period, even with the retirement of Wabash River Units 2-5, the suspension of Wabash River Unit 6, and the retirement of Indianapolis Power's Eagle Valley Units 3-6. According to Duke Indiana, the Maintenance Margin charts for Zone 6 show an average reserve margin of 4,264 MW and at least 1,697 MW available during all but one day. Further, Duke Indiana claims that it has been diligent in submitting its planned outages to MISO and it has coordinated its planned outages with other utilities.[26]

15. Duke Indiana contends that its waiver request is consistent with the Indianapolis Power Order. Duke Indiana notes that the Commission held in the Indianapolis Power Order that it "reviews each request for waiver on a case-by-case basis, and granting this waiver will not impact the Commission's decision-making process on other waiver requests."[27] Duke Indiana argues that it has presented a substantial and well-supported case that it too should be entitled to a waiver. Duke Indiana represents that the facts facing its Wabash River Units are nearly identical to the facts that formed the basis for the Indianapolis Power Order.[28]

16. Duke Indiana states that, like Indianapolis Power, it: (1) obtained a one-year extension from the Indiana Department of Environmental Management; (2) faces the same conflicting compliance requirements created by the 6.5 week period between the MATS deadline and the end of MISO's 2015-2016 Planning Year; (3) submitted Attachment Y Notifications to MISO and has been informed by MISO that Wabash River Units 2-5 are not needed for reliability purposes beyond April 16, 2016; and (4) coordinated its planned generation outages through 2017 to ensure resource sufficiency in Indiana.[29]

---

[25] *Id.* at 19 (citing MISO, Request for Rehearing, Docket No. EL14-70-001, at 6 (filed Nov. 14, 2014)).

[26] *Id.* at 19-22 (citing Jenner Test. at 17-20; MISO's Maintenance Margin Charts *available at*: https://www.oasis.oati.com/woa/docs/MISO/MISOdocs/MM_Oct2014_update.zip).

[27] *Id.* at 23 (citing *Indianapolis Power* Order, 149 FERC ¶ 61,047 at P 65).

[28] *Id.* at 23-24.

[29] *Id.* at 24-26.

17. However, Duke Indiana also acknowledges that: (1) its request involves 668 MW nameplate capacity whereas Indianapolis Power's request involved 302 MW nameplate capacity; (2) its Attachment Y Notification for Wabash River Unit 6 is currently being evaluated by MISO whereas Indianapolis Power submitted its request for waiver after it had been informed that Eagle Valley Units 3-6 were not needed for reliability purposes beyond April 16, 2016; (3) it anticipates reserve margins of 76.3 percent and 27.7 percent in April 2016 and May 2016, respectively, whereas Indianapolis Power demonstrated that it will have reserve margins of 45 percent and 20 percent in April 2016 and May 2016, respectively; (4) based on updated information, Duke Indiana represents that MISO's Zone 6 Maintenance Margins range from 738 MW to 8,842 MW whereas Indianapolis Power demonstrated Maintenance Margins in the range of 4,000 MW to 8,000 MW; and (5) it will not require the capacity associated with the Wabash River Units to meet its capacity needs.[30]

18. Duke Indiana 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 six-week period. Duke Indiana notes that the Commission did not address alternative options proposed by Indianapolis Power and dismissed as moot Indianapolis Power's complaint. Duke Indiana contends that it faces the same situation faced by Indianapolis Power and therefore requests the same waiver that the Commission granted to Indianapolis Power.[31]

19. Nonetheless, Duke Indiana proposes that, if the Commission is concerned that granting various waivers could dampen prices in the Planning Resource Auction, the Commission could instead grant Duke Indiana waiver from the requirement that Duke Indiana must offer the Wabash River Units into the 2015-2016 Planning Resource Auction. Duke Indiana represents that this type of waiver would only be available to entities, such as Duke Indiana, that could demonstrate that they will have sufficient resources to meet MISO's unforced capacity requirements for the 2015-2016 Planning Year.[32]

20. Duke Indiana also supports further review of the Tariff's requirements as to whether a generation resource must offer into the Planning Reserve Auction if it has obtained an approved Attachment Y Reliability Study.[33]

---

[30] *Id.*

[31] *Id.* at 24 (citing *Indianapolis Power* Order, 149 FERC ¶ 61,047).

[32] *Id.* at 26-27.

[33] *Id.* at 28.

Duke Indiana Request for Waiver

21. Duke Indiana requests that the Commission grant a limited waiver of the must-offer requirement and the requirement to purchase replacement capacity in Tariff Sections 69A.5 and 69A.3.1.h, respectively, for the 6.5 week period from April 16, 2016 to May 31, 2016.[34] Alternatively, Duke Indiana requests that the Commission grant waiver of the Section 69A.5 requirement to offer the Wabash River Units into the 2015-2016 Planning Resource Auction.[35] Duke Indiana argues that either of its waiver requests meets the Commission's standards that the waiver request: (1) be made in good faith; (2) be of limited scope; (3) address a concrete problem that will be remedied; and (4) not have undesirable consequences, such as harm to third parties.[36]

22. Duke Indiana claims that the waiver is requested in good faith. Duke Indiana states that, through this waiver, it is attempting to comply with the conflicting MATS compliance deadlines and MISO Resource Adequacy Requirements while continuing to provide reliable and economic service. Duke Indiana represents that it has requested and obtained a one-year extension of the MATS compliance deadline for the Wabash River Units, which has permitted these units to remain in service for the 2015 summer peak season and the 2015-2016 winter peak season. Duke Indiana states that it will have sufficient capacity, far in excess of its load and of the reserve margins required through these peak seasons. Finally, Duke Indiana represents that it is unaware of any other cost-effective means to address this issue in good faith.[37]

23. Duke Indiana states that its waiver request is limited in scope because (1) it affects only the Wabash River Units, which have a combined nameplate capacity of less than 700 MW (and less than 600 MW unforced capacity) in a market with over 177,000 MW of nameplate capacity; (2) it applies to a limited 6.5 week off-peak period; and (3) Duke Indiana will have substantial reserves throughout this period.[38]

24. Duke Indiana claims that the waiver will address a concrete problem. According to Duke Indiana, the waiver request is necessitated by the difference in timing between the MATS compliance deadline and the end of the 2015-2016 Planning Year. Duke

[34] *Id.* at 3-4, 31.

[35] *Id.* at 31-32.

[36] *Id.* at 28-29.

[37] *Id.* at 29.

[38] *Id.*

Indiana states that it cannot simultaneously comply with both the MATS requirements and MISO's Resource Adequacy Requirements. Duke Indiana represents that it can operate the Wabash River Units through the end of the 2015-2016 Planning Year and risk sanctions resulting from non-compliance with MATS requirements, or it can retire/suspend the Wabash River Units to comply with MATS requirements and risk sanctions from the IMM and under the Commission's civil penalty authority. Duke Indiana states that the Commission recognized in the Indianapolis Power Order that "[t]he requested waiver attempts to resolve the aforementioned problems created by the 6.5 week gap between EPA MATS deadlines and the MISO Planning Year that MISO and its stakeholders have recognized and spent over a year attempting, without success, to resolve through a tariff amendment."[39]

25. Duke Indiana claims that the waiver will not have undesirable consequences because it will synchronize the compliance deadline during a period of sufficient reserves without causing reliability and resource adequacy issues within MISO. According to Duke Indiana, it demonstrated that any reliability concerns are mitigated by the Loss of Load Expectation study, the MISO's Zone 6 Maintenance Margin charts that indicate a sufficient Planning Reserve Margin during the 6.5 week period at issue, and its representation that Indiana utilities have coordinated their planned outages through 2017 to ensure resource sufficiency in Indiana.[40]

26. Duke Indiana asks the Commission to issue an order prior to January 30, 2015 so that Duke Indiana may finalize its resource plans in advance of the 2015-2016 Planning Resource Auction.[41]

II. Notice and Responsive Pleadings

27. Notice of Duke Indiana's request for waiver was published in the *Federal Register*, 79 Fed. Reg. 74,079 (2014), with interventions and protests due on or before December 26, 2014.

28. Iowa Utilities Board filed a timely motion to intervene. Organization of MISO States filed a notice of intervention. The Indiana Commission filed a notice of intervention and comments. The following entities filed timely motions to intervene and comments or protests: MISO; the IMM; and Dynegy Companies,[42] NRG Companies,[43]

---

[39] *Id.* at 30 (citing Indianapolis Power Order, 149 FERC ¶ 61,047 at P 66).

[40] *Id.*

[41] *Id.* at 31.

[42] For purposes of this filing, Dynegy Companies are Dynegy Marketing and *(continued ...)*

and Exelon Corporation (together, Suppliers). Alliant Energy Corporate Services, Inc. (Alliant) filed an out-of-time motion to intervene. On January 13, 2015, Duke Indiana filed an answer. On February 3, 2015, Duke Indiana supplemented its request for waiver.

29. In its comments, the Indiana Commission explains that, under both the Federal Power Act (FPA) and Indiana state law, the Indiana Commission has jurisdictional authority regarding generation facilities, including the Wabash River Units. Moreover, the Indiana Commission explains that resource adequacy is a state jurisdictional issue. The Indiana Commission comments that granting Duke Indiana's waiver request will not cause undesirable consequences. Further, the Indiana Commission represents that Indiana utilities have submitted all necessary information to assure MISO that sufficient resources exist for the 6.5 week period and that Duke Indiana has represented to the Indiana Commission its reserve margins for the 6.5 week period ranging from 27 percent to 76 percent.[44]

30. The Indiana Commission states that, while it has approved Duke Indiana and other Indiana utilities to be members of MISO, the provisions of MISO's Tariff should not be construed to interfere with the reasonable, economic decisions of a state jurisdictional utility regarding compliance with EPA rules. The Indiana Commission contends that, due to the 6.5 week difference in timeframes for the MATS compliance deadline and MISO's Planning Year, MISO's Tariff provisions impose requirements that are unnecessary to assure resource adequacy during the 6.5 week period and/or impose additional unnecessary costs on Duke Indiana ratepayers. The Indiana Commission argues that, due to the needless nature of these requirements and/or costs, the Tariff provisions are unjust and unreasonable. The Indiana Commission states that Duke Indiana presents two reasonable solutions in its request and that granting either solution will allow for the proper use of the Wabash River Units and provide capacity to Duke Indiana's customers at just and reasonable rates.[45]

31. In its protest, MISO explains that it is unable to support Duke Indiana'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.[46] MISO states that, by 2016, the

---

Trade, LLC and Illinois Power Marketing Company.

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

[44] Indiana Commission Comments at 3-4.

[45] *Id.*

[46] MISO Protest at 5 & n.14.

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. MISO states that it finds it very difficult to understand how these accumulated waiver requests are limited in scope and will not have a great potential for undesirable consequences.[47]

32. MISO states that the Maintenance Margin analysis included in Duke Indiana'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 Requirements contributes to erosion of the resource adequacy planning process.[48]

33. MISO states that it is unable to support Duke Indiana's alternative waiver request for the same resource adequacy reasons. MISO represents that granting such a waiver would potentially remove qualified resources that would otherwise clear the Planning Resource Auction and provide reliability during summer and winter peaks. MISO argues that the capacity needs of an individual market participant are not relevant to a determination of physical withholding under the Tariff. Otherwise, according to MISO, market participants without capacity needs potentially could be permitted to withhold capacity to the detriment of the broader market. MISO states that Duke Indiana has made no representation that it has consulted with the IMM about its particular circumstances related to the Wabash River Units. According to MISO, market monitoring and mitigation is a case-specific endeavor in which each situation must be evaluated to determine the best application of measures.[49]

---

[47] *Id.* at 5-6.

[48] *Id.* at 7-8.

[49] *Id.* at 8-9.

34. MISO explains that market participants are not required to make offers at prices that would cause them financial sacrifice and, if this cannot be accomplished within the offer cap, then no offer is required. Furthermore, MISO states that market participants have options available concerning the determination of appropriate offer levels. MISO explains, for example, a market participant may request the IMM to establish a facility-specific reference level if the market participant provides documentation of going-forward costs of keeping a generation resource in operation.[50] MISO explains that, if Duke Indiana were to employ this process for the Wabash River Units, it would be able to account for full annual costs associated with the units, including the price to replace the capacity for the final 6.5 weeks of the Planning Year or the charge associated with failing to procure replacement capacity.[51] MISO encourages Duke Indiana and similarly situated market participants to request facility-specific reference levels and determine any other appropriate measures for the upcoming Planning Year.[52]

35. MISO notes that, in its filing, Duke Indiana points to the uncertain nature of the Tariff with regard to potential penalties associated with retiring Planning Resources during a Planning Year without replacing the capacity. MISO states that it intends to file a Tariff modification in January 2015 to impose a defined replacement charge based upon a daily Cost of New Entry value and request that the Tariff revisions become effective prior to the window for offers for the 2015-2016 Planning Year. MISO represents that this will provide certainty to market participants and allow the IMM to include the replacement charge as a component of establishing appropriate facility-specific reference levels.[53]

36. 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 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]."[54] MISO contends that waiver of its Tariff

---

[50] *Id.* at 9 (citing MISO, FERC Electric Tariff, Module D, § 64.1.4 (30.0.0)).

[51] *Id.*

[52] *Id.* at 10.

[53] *Id.*

[54] *Id.* at 10-11 (citing minutes of the December 5, 2013 Supply Adequacy Working Group meeting, *available at* https://www.misoenergy.org/Library/Repository/
(continued ...)

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 Duke Indiana will have no other means to address the capacity deficit created by the retirement of the Wabash River Units.[55]

37. In its protest, the IMM argues that Duke Indiana has not established that replacement capacity is not available or cost effective to obtain. The IMM clarifies that, if Duke Indiana can obtain replacement capacity, even at a high cost, it can incorporate those expected costs in its capacity offer. The IMM argues that replacement capacity should be available bilaterally after the auction because it can likely be procured from any deliverable resource within or outside of Zone 6, which itself is not likely to be short on capacity or import constrained. The IMM explains that Duke Indiana can ensure that it will not be mitigated when it submits its expected replacement capacity costs by seeking a facility-specific reference level from the IMM that would be used in the market power mitigation process. The IMM notes that, to date, Duke Indiana has not sought such a reference level. According to the IMM, if replacement capacity would not be available, the replacement charge being proposed by MISO resolves this concern. The IMM explains that this charge would be applied to any supplier that has not procured replacement capacity and would establish the highest potential cost that such a supplier would incur by retiring prior to the end of the Planning Year without procuring replacement capacity. The IMM represents that, because the uncovered portion of the Planning Year is only 6.5 weeks, this charge would not be excessive and could be easily incorporated in the resources' facility-specific reference levels.[56]

38. The IMM opposes Duke Indiana's request for waiver of the day-ahead must-offer requirement because, according to the IMM, it could depress Planning Resource Auction prices by failing to recognize the cost of satisfying the full Planning Year obligations. The IMM also opposes Duke Indiana's alternative request for waiver of the physical withholding provisions applicable to the Planning Resource Auction because waiver could inflate Planning Resource Auction prices by failing to recognize operable resources that will be available to serve MISO's summer and winter peak needs. The IMM clarifies that, given the short duration of the period in which the units will be suspended or retired and the fact that this period occurs outside of MISO's expected peak demand conditions, it believes that waiver of the day-ahead must-offer requirement would be much less harmful to the market than waiver of the Planning Resource Auction physical

---

Meeting%20Material/Stakeholder/SAWG/2014/20140109/20140109%20SAWG%20Item%2001c%20Minutes%2020131205.pdf).

[55] *Id.* at 11.

[56] IMM Protest at 3.

withholding provisions. The IMM states that it believes rejecting all waiver requests and implementing the replacement charge proposed by MISO would be the best resolution of these issues because it would result in Planning Resource Auction prices that most accurately reflect the true market conditions.[57]

39. In their protest, Suppliers argue that, if granted, Duke Indiana'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 Duke Indiana's request for waiver is only the latest in a string of filings requesting waiver of the same requirements for the same 6.5 week period. Suppliers suggest that these requests, together, present a significant threat to MISO's resource adequacy structure. Suppliers contend that Duke Indiana has not satisfied any of the Commission's standards for waiver.[58]

40. Suppliers argue that Duke Indiana's reliance on the Indianapolis Power Order is misplaced because, according to Suppliers, the *Indianapolis Power* Order erred by (1) ignoring concerns raised by Commissioner Norman C. Bay, MISO, and the Suppliers; (2) deviating from Commission precedent; and (3) relying on evidence that was taken out of context. Suppliers argue that Duke Indiana's primary request for waiver does not satisfy the Commission's standards for waiver and further contend that, even assuming that the factors relied on by the Commission in the Indianapolis Power Order were valid, those factors do not support Duke Indiana's request for waiver.[59]

41. Suppliers contend that Duke Indiana has not identified a concrete problem. Suppliers state that there is no inherent conflict between EPA's implementation of MATS and the MISO Planning Year. Suppliers explain that nothing in the Tariff prevents market participants from retiring or suspending operations of their generating resources during a Planning Year and, instead, the Tariff simply requires such market participants to procure replacement capacity. Suppliers suggest that Duke Indiana could have used the Wabash River Units for the first part of the 2015-2016 Planning Year and then entered into bilateral agreements to purchase replacement capacity for the last 6.5 weeks of that Planning Year.[60]

---

[57] *Id.* at 3-4.

[58] Suppliers Protest at 6-7.

[59] *Id.* at 7.

[60] *Id.* at 8.

42. Suppliers argue that Duke Indiana's unwillingness to incur the cost of replacement capacity does not establish a concrete problem that can only be remedied by waiver. According to Suppliers, Duke Indiana concedes that replacement capacity could cost as low as $3.6 million for the Wabash River Units. Suppliers state that, even if the cost for replacement capacity could be as high as $17.7 million, Duke Indiana fails to establish that such a cost is unjust or unreasonable.[61]

43. Suppliers represent that the Tariff does not appear to require the Wabash River Units to be offered into the Planning Resource Auction and, accordingly, Duke Indiana could satisfy its Planning Reserve Margin Requirements by using resources other than the Wabash River Units, in which case Duke Indiana would not be subject to the obligation to procure replacement capacity. Suppliers argue, however, that in cases where a Load Serving Entity intentionally chooses to offer into the Planning Resource Auction resources that it knows will not be available for the entire Planning Year, as Duke Indiana seeks to do here, it should be required to bear the consequences of its decision and obtain replacement capacity as required under the Tariff.[62]

44. Suppliers point out that Duke Indiana will have had more than four years since the promulgation of the MATS rule to plan for the retirement and suspension of the Wabash River Units. According to Suppliers, Duke Indiana acknowledges that it has not taken 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.[63] Suppliers argue that Duke Indiana has not adequately supported its claims that replacement capacity would not be available or only available at excessive prices. Suppliers state that replacement capacity could be purchased bilaterally from resources that are available only for a portion of the Planning Year (i.e., new capacity may come online, existing contracts may terminate). Suppliers point out that more than 12 gigawatts (GW) of capacity did not clear the 2014-2015 Planning Resource Auction, which suggests that there is a substantial amount of capacity that will be made available bilaterally. Further, Suppliers represent 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.[64]

---

[61] *Id.* at 8-9, 11 (citing Jenner Test. at 12).

[62] *Id.* at 9.

[63] *Id.* at 9-10.

[64] *Id.* at 10-11.

45. Suppliers argue that Duke Indiana's waiver request 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;[65] (2) all resources, not just the Wabash River Units, are subject to the MATS rule; and (3) all resources in MISO are subject to the resource adequacy provisions in the MISO Tariff. Further, Suppliers state that there has been a proliferation of requests like Duke Indiana's and suggest that these requests present a cumulative threat to reliability and to the viability of MISO's resource adequacy structure. Suppliers warn that granting Duke Indiana's requested relief would only send the message that waiver can and 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.[66]

46. Suppliers argue that Duke Indiana 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 Duke Indiana to use non-functional resources to satisfy its capacity obligations and, as a result, will result in undue preference for Duke Indiana 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.[67] Suppliers claim that Duke Indiana's request for waiver will harm MISO's capacity market by suppressing Planning Resource Auction prices and causing other resources, which may otherwise be called on to maintain reliability, to be deprived of capacity revenue.[68]

47. Suppliers argue that Duke Indiana has not shown that reliability will not be harmed. According to Suppliers, Duke Indiana attempts to rely on MISO's Attachment Y study even though it also acknowledges that MISO has yet to complete its Attachment Y study of Wabash River Unit 6. Suppliers argue that, even if MISO's Attachment Y Reliability Studies find that all six of the Wabash River Units need not be designated as SSR units, MISO has explained that its Attachment Y analysis only assesses

---

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

[66] *Id.* at 12-14.

[67] *Id.* at 14-15 (citing *Massachusetts Muni. Wholesale Elec. Co.*, 148 FERC ¶ 61,227, at P 14 (2014)).

[68] *Id.* at 15.

transmission-related reliability issues and does not review resource adequacy impacts.[69] Next, 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.[70] Suppliers point out that together, the requests to date cover over 2,400 MW of generation and present an ever increasing threat to the viability of MISO's capacity market and reliability in the interconnected region.[71]

48. Next, Suppliers argue that a presentation given by the IMM before the MISO Supply Adequacy Working Group on July 10, 2014 makes Duke Indiana's reliance on the Loss of Load Expectation study to demonstrate resource adequacy misplaced. Specifically, the IMM presentation states that resources that are pending suspensions, already suspended, or pending retirement should be able and expected to participate in the Planning Resource Auction, supported by facility specific reference levels as needed.[72] Finally, Suppliers claim that the MISO Maintenance Margin Charts are only intended to provide "an additional criterion to evaluate planned generator outage requests" and do not demonstrate that a capacity resource may be removed without jeopardizing reliability.[73] Like MISO, Suppliers state 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

---

[69] *Id.* at 15-16 (citing MISO, Answer, Docket No. EL14-70-000, at 3 (filed July 25, 2014).

[70] *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.")).

[71] *Id.* at 17.

[72] *Id.* at 17-18 (citing Potomac Economics, *Participation of Units Planned for Retirement or Suspension in the Planning Resource Auctions* (July 2013), *available at* https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/SAWG/2014/20140710/20140710%20SAWG%20Item%2014%20IMM%20PRA%20Att%20Y%20Units.pdf).

[73] *Id.* at 18 (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).

process does not provide the type of analysis necessary to determine that generation retirements will not contribute to broader resource adequacy concerns.[74]

49. 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."[75] Suppliers argue that, even if the Maintenance Margins could or should be used to assess resource adequacy, the Maintenance Margins fail to support Duke Indiana's request for waiver. Suppliers note that Indianapolis Power represented a Maintenance Margin of over 3,000 MW in Zone 6; while by contrast, Duke Indiana acknowledges that the Maintenance Margin for Zone 6 is now 738 MW.[76] Next, Suppliers note that Duke Indiana's Wabash River Units are 668 MW and, when combined with Indianapolis Power's 216 MW Eagle Valley facility, would now represent five percent of the 17,629 MW demand forecast in Zone 6. Suppliers state, by contrast, that Indianapolis Power's Eagle Valley facilities only represent approximately 1.2 percent of the total demand forecast for MISO Zone 6.[77]

50. Suppliers recommend that the Commission deny Duke Indiana's primary waiver request and instead grant Duke Indiana's alternate waiver request and find that Duke Indiana is not obligated to offer the Wabash River Units into the 2015-2016 Planning Resource Auction. However, according to Suppliers, Duke Indiana's alternate request may not be necessary because the Tariff suggests that resources that are retiring or suspending operations during a Planning Year are not obligated to participate in the Planning Resource Auction.[78] Suppliers state that, nonetheless, the Commission should

[74] *Id.* at 19 (citing MISO, Answer, Docket No. EL14-70-000, at 5 (filed July 25, 2014); MISO, Request for Rehearing, Docket No. EL14-70-001, at 7 (filed Nov. 14, 2014)).

[75] *Id.* at 19-20 (citing *Indianapolis Power* Order, 149 FERC ¶ 61,047 (Clark and Moeller, Comm'rs, concurring)).

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

[77] *Id.* at 20 (citing *Indianapolis Power* Order, 149 FERC ¶ 61,047 at P 15; 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).

[78] *Id.* at 21-22 (citing MISO, FERC Electric Tariff, Module D, § 63.3.a.i (30.0.0); MISO, FERC Electric Tariff, Module E-1, § 69A.3.1.h (34.0.0)).

find that the Tariff does not obligate Duke Indiana (and others who are similarly situated) to offer into the Planning Resource Auction resources that will retire during the Planning Year, or grant Duke Indiana waiver of such obligation. According to Suppliers, this approach will safeguard reliability by ensuring Load Serving Entities do not rely on resources that will not be available to meet their Planning Reserve Margin Requirements and will instead permit other resources that are capable of meeting resource adequacy requirements under the Tariff for the entire Planning Year to be compensated for helping to maintain overall system reliability.[79]

51. In its answer, Duke Indiana reiterates that the retirement of the Wabash River Units will not result in reliability or resource adequacy issues. Duke Indiana maintains that it has diligently planned its system and has more than adequately prepared for the potential need to retire units due to evolving environmental standards.[80] Duke Indiana argues that MISO's Attachment Y Reliability Study results, Loss of Load Expectation study, and Maintenance Margins for Zone 6, as presented in Duke Indiana's request for waiver, have adequately addressed MISO's reliability concerns.[81]

52. Next, Duke Indiana argues that MISO's and the IMM's proposed alternatives to Duke Indiana's waiver requests are vague and create uncertainty for resource planning purposes. According to Duke Indiana, these proposals are inchoate and there is no information in the record that would enable Duke Indiana and the Commission to evaluate the Tariff proposal and assess the potential impact on Duke Indiana and its customers.[82]

53. Regarding the IMM's argument that Duke Indiana should be required to procure replacement capacity for the retiring facilities and seek a facility-specific reference level that would be used in the market power mitigation process, Duke Indiana points out that (1) the IMM does not address Duke Indiana's concerns that sellers would most likely require a significant premium for selling capacity for 6.5 weeks; (2) it does not seem reasonable to suggest that capacity owners in PJM Interconnection, L.L.C. (PJM) would violate the PJM tariff and accept a penalty in order to sell to utilities in MISO for a higher price; (3) the IMM offers no indication of what reference level it may be willing to accept; (4) the IMM does not indicate whether the level of charges that MISO suggests may be included in its upcoming filing could be automatically included in the reference

[79] *Id.* at 22.

[80] Duke Indiana Answer at 4.

[81] *Id.* at 5-6.

[82] *Id.* at 7-8.

level and approved by the IMM or whether the IMM would expect companies to bear the burden of demonstrating that MISO's proposed replacement charge is reasonable for purposes of inclusion in their capacity bids.[83]

54. Finally, Duke Indiana represents that time is of the essence in getting resolution to this situation and it therefore renews its request that the Commission grant its request for waiver by January 30, 2015.[84]

III. Discussion

A. Procedural Matters

55. 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 Alliant given its interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

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

B. Substantive Matters

57. Based on our review of Duke Indiana's request for limited waiver of the requirement that Duke Indiana offer the Wabash River Units into the 2015-2016 Planning Resource Auction, we find good cause to hold that Duke Indiana need not offer the Wabash River Units into the 2015-2016 Planning Resource Auction.

58. Duke Indiana seeks a Commission determination either that (1) it should be relieved of the must-offer obligation and obligation to procure replacement capacity under sections 69A.5 and 69A.3.1.h of the MISO Tariff for the Wabash River Units during the 6.5 week period from April 16, 2016 through May 31, 2016,[85] or (2) Duke

---

[83] *Id.* at 8.

[84] *Id.* at 9.

[85] This relief sought is the same relief granted to Indianapolis Power in the *Indianapolis Power* Order, 149 FERC ¶ 61,047.

Indiana need not offer the Wabash River Units into the 2015-2016 Planning Resource Auction. In support of its first request, Duke Indiana argues that the record demonstrates that it should receive the same relief that the Commission previously granted to Indianapolis Power. We disagree with Duke Indiana, and therefore decline to grant Duke Indiana a waiver of sections 69A.5 and 69A.3.1.h of the MISO Tariff.

59. Duke Indiana states that it can meet its Planning Reserve Margin Requirement without relying on the Wabash River Units' capacity as a self-supply resource. Instead, Duke Indiana indicates that it seeks to sell the Wabash River Units' capacity to third parties through the 2015-2016 Planning Resource Auction, despite the fact that Duke Indiana acknowledges that the Wabash River Units will be retired on April 15, 2016, before the end of the planning year. Duke Indiana's primary request for relief would therefore relieve Duke Indiana of its obligation to deliver a full year's worth of capacity to the purchaser(s) of that capacity while nonetheless being compensated for a full year's capacity through the Planning Resource Auction.

60. We find that Duke Indiana is in a fundamentally different position than Indianapolis Power, and therefore decline to grant to Duke Indiana the same relief previously granted to Indianapolis Power. In the *Indianapolis Power* Order, the Commission addressed a waiver request regarding the Eagle Valley Units, which Indianapolis Power sought to use *as a self-supply resource* in its capacity portfolio for the 2015-2016 Planning Year. The Commission granted Indianapolis Power a waiver of sections 69A.5 and 69A.3.1.h of the MISO Tariff to relieve Indianapolis Power of its must-offer obligation and obligation to procure replacement capacity for the Eagle Valley Units during the 6.5 week period from April 16, 2016 to May 31, 2016. In granting Indianapolis Power's request for waiver, a key consideration for the Commission was the unknown and potentially significant cost to Indianapolis Power's ratepayers of replacing the Eagle Valley Units' capacity during that off-peak shoulder season, where the cost of that replacement capacity likely would greatly outweigh any incremental reliability benefits.

61. Here, by comparison, Duke Indiana does not plan to use the Wabash River Units' capacity as a self-supply resource, where its ratepayers might be exposed to unknown and significant replacement capacity costs. Instead, Duke Indiana seeks to benefit from the sale of the Wabash River Units' capacity to third parties while being relieved of the obligation to deliver on its capacity commitment during the 6.5 weeks at issue. We find that the same concern regarding ratepayer impacts that underpinned the Commission's determination in the *Indianapolis Power* Order is not present here, and therefore decline to grant Duke Indiana waiver of sections 69A.5 and 69A.3.1.h of the MISO Tariff.

62. However, we nonetheless recognize that the disconnect between the MISO 2015-2016 Planning Year and the April 16, 2016 deadline for MATS compliance presents challenges for the Wabash River Units, which are scheduled to retire prior to the deadline for MATS compliance. In particular, Duke Indiana highlights the confusion regarding its

obligation to offer the Wabash River Units' capacity into the 2015-2016 Planning Resource Auction as an ongoing problem. Duke Indiana explains that, if it is required to offer the Wabash River Units' capacity even though the units will retire prior to the end of the planning year, Duke Indiana could be exposed to significant replacement capacity costs for the 6.5 week period if the Wabash River Units clear the auction and Duke Indiana incurs an obligation to provide capacity for the full year.

63. Under the facts presented here, we conclude that granting Duke Indiana relief – a determination that it need not offer the Wabash River Units into the 2015-2016 Planning Resource Auction – is appropriate. We acknowledge that there is disagreement regarding whether, under MISO's existing Tariff, the failure of a generating unit that is retiring during a MISO planning year to offer its capacity in that year's Planning Resource Auction would be deemed physical withholding. Certain parties, including Suppliers, argue that the MISO Tariff does not require retiring units to offer into the Planning Resource Auction, while others disagree with that reading of the Tariff.[86] Duke Indiana, in particular, requests an alternative form of relief that would find that Duke Indiana is not obligated to offer the Wabash River Units' capacity into the 2015-2016 Planning Resource Auction.[87] Given the targeted nature of Duke Indiana's request, we grant Duke Indiana's requested relief as to the Wabash River Units under the facts presented, and we grant waiver, to the extent necessary, of the provisions of the MISO Tariff that would require that Duke Indiana offer the Wabash River Units into the 2015-2016 Planning Resource Auction.[88]

---

[86] 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 Duke Indiana 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.

[87] *See* Duke Indiana Request for Waiver at 27-28.

[88] We limit our relief in this order to Duke Indiana's Wabash River Units and decline to determine, on a general basis, whether the existing MISO Tariff provides that *all* resources that retire during a given planning year may elect not to offer their capacity into that year's Planning Resource Auction without being deemed to have physically withheld that capacity.

64. 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.[89]

65. Based on the record, we find that Duke Indiana need not offer the Wabash River Units into the 2015-2016 Planning Resource Auction, and that this relief satisfies the aforementioned waiver conditions. First, we find that the requested relief is of limited scope, as it applies only to the 668 MW Wabash River Units and the 2015-2016 Planning Resource Auction.

66. Duke Indiana's request addresses a concrete problem by clarifying that Duke Indiana need not offer the Wabash River Units into the 2015-2016 Planning Resource Auction, and avoiding the undesirable options that Duke Indiana be in non-compliance with the EPA regulations by continuing to operate the Wabash River Units after April 15, 2016; possibly violate MISO's Tariff and/or be required to pay an unknown cost for replacement capacity; or be subject to civil penalties up to $1 million per day under section 316A of the FPA. The requested relief resolves the aforementioned problems created by the 6.5 week gap between EPA MATS deadlines and the MISO Planning Year while also allowing the Wabash River Units to remain in service and provide valuable energy and ancillary services during much of the 2015-2016 Planning Year, including during the summer 2015 and winter 2015-2016 peak periods.

67. We also find that the requested relief will not cause undesirable consequences. We disagree with MISO's concern that removing the requirement to offer the Wabash River Units into the 2015-2016 Planning Resource Auction would present resource adequacy and reliability concerns, based on Duke Indiana's representation that it is forecasted to have sufficient resources for the 2015-2016 Planning Year, even without the Wabash River Units. Furthermore, the capacity associated with the Wabash River Units will contribute to reliability by being available to be offered into the daily energy and ancillary services markets until April 16, 2016.

68. We disagree with the IMM that the alternative relief sought by Duke Indiana should be denied because it could increase prices in the Planning Resource Auction. While waiver of Duke Indiana's requirement to offer the Wabash River Units into the 2015-2016 Planning Resource Auction may reduce the supply of capacity for that auction, we are not persuaded that doing so will result in impermissible price inflation, especially if Duke Indiana would otherwise be required to purchase replacement capacity

---

[89] *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).

for the 6.5 week period at potentially high prices and factor those costs into its offers for capacity in the auction. Furthermore, to date MISO has not filed its proposal to establish a defined replacement charge based upon a daily Cost of New Entry value, which undercuts the potential viability of MISO and the IMM's recommendation that Duke Indiana simply incorporate the cost of replacement capacity into its offer for the Wabash River Units. Under the facts presented here, we find that Duke Indiana's alternative relief is appropriate.

69. In granting this relief, 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.[90] Ultimately, we find that granting Duke Indiana's requested relief is an appropriate remedy to address the inconsistency between the compliance date of the EPA's MATS requirements for the Wabash River Units (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 relief granted herein does not implicate resource adequacy requirements for the 2015-2016 Planning Year, the 2016-2017 Planning Year, or any planning years thereafter. Furthermore, the Wabash River Units remain available for Duke Indiana to offer into the daily energy and ancillary services markets for the first 45.5 weeks of the 2015-2016 Planning Year, including the peak seasons in summer 2015 and winter 2015-2016, and the capacity from the Wabash River Units could also be available in the bilateral market for resource adequacy during that time. 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.

70. Under the circumstances presented, we find that Duke Indiana need not offer the Wabash River Units into the 2015-2016 Planning Resource Auction and waive, to the extent necessary, provisions of the MISO Tariff that would require Duke Indiana to offer the Wabash River Units into the 2015-2016 Planning Resource Auction under the MISO Tariff, as discussed above.

The Commission orders:

Duke Indiana's requested relief 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.

[90] 16 U.S.C. §§ 824d, 824o (2012).

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Indiana, Inc. Docket No. ER15-592-000

(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.[3] 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.[4] The IMM has also noted market-related concerns. Unlike the majority, I would heed those concerns and deny Duke Indiana's request for a waiver.

As a legal matter, Duke Indiana 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. Duke Indiana cannot show that (1) it is unable to comply with the tariff provision in good faith,

---

[1] 149 FERC ¶ 61,047 (2014).

[2] *Id*. at P 71.

[3] MISO Protest at 5-6.

[4] *Id.* at 5.

(2) the waiver is of limited scope, or (3) the waiver would not have undesirable consequences, such as harming third parties.

Like Indianapolis Power, Duke Indiana 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 668 megawatts. It is equally difficult to establish that there would not be undesirable consequences resulting from the waiver.[5] Greater reliability risk is one; according to the IMM, higher capacity costs may be another if Duke Indiana is excused from offering the resources into the auction.

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. By allowing Duke Indiana to withhold the Wabash River Units from the auction, clearing prices for the auction may well be higher. A better, more market-oriented approach would be to deny the waiver and to implement the rather elegant proposal by the IMM to allow Duke Indiana to incorporate the costs of replacement capacity in its capacity offer, as well as in the resource's facility-specific reference levels.[6] If the offer clears, Duke Indiana is made whole for the replacement capacity's cost and the capacity offered into the auction has helped lower the clearing price to the benefit of consumers. If the offer does not clear, Duke Indiana has met its obligations under the tariff.

---

[5] 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 6. 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 Protest at 7. 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.

[6] IMM Protest at 3.

Under the majority's order today, Duke Indiana will still have the option of providing energy, ancillary services, and bilateral capacity from the Wabash River Units for 45.5 weeks out of the planning year. Nevertheless, having gotten the benefit of access to the markets for most of the year, Duke Indiana will be relieved of its capacity obligations for the Wabash River Units. For all those reasons, I would not grant Duke Indiana's waiver request.

Accordingly, I respectfully dissent.

____

Norman C. Bay
Commissioner