

155 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Indianapolis Power & Light Company v.
Midcontinent Independent System
Operator, Inc.

Docket No. EL14-70-001

ORDER DENYING REHEARING

(Issued April 15, 2016)

1. On October 15, 2014, the Commission issued an order granting Indianapolis Power & Light Company's (Indianapolis Power) 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 Indianapolis Power's retirement of Eagle Valley coal units 3-6 (Eagle Valley) to comply with environmental requirements.¹
2. On November 14, 2014, the Dynegy Companies,² the NRG Companies,³ and Exelon Corporation (together, Suppliers), and MISO filed requests for rehearing of the October 15 Order. In this order, the Commission denies requests for rehearing of the October 15 Order, as discussed below.

¹ *Indianapolis Power & Light Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,047 (2014) (October 15 Order).

² For purposes of this filing, the Dynegy Companies are Dynegy Marketing and Trade, LLC and Illinois Power Marketing Company.

³ For purposes of this filing, the NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC.

I. Background

3. On February 16, 2012, the United States Environmental Protection Agency (EPA) issued a final rule, referred to as Mercury and Air Toxics Standards (MATS), establishing national emission standards for hazardous air pollutants from coal- and oil-fired generators and requiring compliance with MATS by April 16, 2015.⁴ An existing source may, if necessary, request an extension of one year to comply with MATS.⁵ If an existing source is deemed critical for reliability purposes, it may qualify for an administrative order from the EPA at the end of its extension, allowing it to operate in noncompliance with MATS for up to one additional year. An existing source may also choose to cease operations rather than comply with MATS.⁶

4. In its filing made on June 20, 2014, Indianapolis Power represented that Eagle Valley was required to comply with MATS requirements by April 16, 2016,⁷ after which Indianapolis Power stated that it will retire Eagle Valley because it will not meet those emission standards. Indianapolis Power represented that, because MISO determined that Eagle Valley was not needed for reliability purposes beyond April 16, 2016,⁸

⁴ *National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9304 (Feb. 16, 2012).

⁵ 40 C.F.R. § 63.6(i)(4)(i)(A) (2015) (“The owner or operator of an existing source who is unable to comply with a relevant standard established under this part . . . may request that the Administrator (or a State . . . when the State has been delegated the authority to implement and enforce the emission standard for that source) grant an extension allowing the source up to 1 additional year to comply with the standard, if such additional period is necessary for the installation of controls.”).

⁶ EPA, *The Environmental Protection Agency’s Enforcement Response Policy for Use of Clean Air Act Section 113(a) Administrative Orders in Relation to Electric Reliability and the Mercury and Air Toxics Standard*, at 1 (Dec. 16, 2011) (EPA Policy Statement), <http://www.epa.gov/mats/pdfs/EnforcementResponsePolicyforCAA113.pdf>.

⁷ Indianapolis Power Request for Waiver and Complaint at 13 & n.32. Indianapolis Power stated that it sought and received from the Indiana Department of Environmental Management a one-year extension to permit Indianapolis Power to continue operating Eagle Valley until April 16, 2016. *Id.* at 13 & n.34 (citing Attachment A (Testimony of L. Franks) at 4 (Franks Test.)).

⁸ *Id.* at 13 (citing Franks Test. at 7).

Indianapolis Power could not obtain an administrative order from the EPA, which would allow Eagle Valley to continue to operate for up to one year past April 16, 2016 without risk that EPA will seek civil penalties for noncompliance.⁹

5. The MISO 2015-2016 Planning Year runs from June 1, 2015 to May 31, 2016,¹⁰ which leaves approximately 6.5 weeks between the EPA MATS compliance deadline and the end of the MISO Planning Year. Indianapolis Power asserted that the Tariff requires Capacity Resources to be available for service during the entire 2015-2016 Planning Year and to meet this requirement Eagle Valley must be available for service from April 16, 2016 through May 31, 2016, over which 6.5 week period it would not meet the MATS requirements. Indianapolis Power asserted that it was neither permitted to withhold Eagle Valley from offering into the MISO Planning Reserve Auction for the 2015-2016 Planning Year nor permitted to declare a forced or scheduled outage for the 6.5 week period. According to Indianapolis Power, the Tariff did not provide a clear mechanism that would permit Indianapolis Power to purchase replacement capacity through the auction to cover the 6.5 week period.¹¹

6. Indianapolis Power proposed five alternatives in its waiver request: (1) waive that portion of the MISO Tariff that would bar Indianapolis Power from declaring Eagle Valley to be on an outage for the 6.5 week period at the end of the 2015-2016 Planning Year; (2) waive, for the 6.5 week period only, the must-offer requirement for Eagle Valley relative to the energy and ancillary services market under section 69A.5 and further waive for the same 6.5 week period the requirement to purchase replacement capacity under section 69A.3.1.h; (3) condition any replacement of Eagle Valley's capacity during the 6.5 week period on the availability of replacement capacity to be purchased bilaterally at a just and reasonable cost that recognizes the limited 6.5 week period, if the Commission were to waive the must-offer requirement for the requested 6.5 week period but find that Indianapolis Power must replace Eagle Valley's capacity during that period; (4) cap any fee or penalty associated with failing to have replacement capacity under contract during the 6.5 week period by limiting the fee to the 6.5 week period and not the full Planning Year and capping the fee at the annual auction clearing price; or (5) require a change in the MISO Tariff that would permit a Market Participant to retire or suspend a Capacity Resource if it is retired in order to comply with federal or

⁹ See *id.* at 13-16 (citing Franks Test. at 4).

¹⁰ The MISO Planning Year begins June 1 and extends until May 31 of the following Year. MISO, FERC Electric Tariff, Module A, § 1.P (39.0.0).

¹¹ Indianapolis Power Request for Waiver and Complaint at 2-3.

state environmental enforcement actions and if MISO is informed six months in advance of retirement.¹²

7. Indianapolis Power stated that, absent a waiver, it has a strong incentive to retire Eagle Valley prior to the 2015-2016 Planning Year to avoid potential compliance issues as well as to avoid the expenses of operating Eagle Valley for 45.5 weeks while effectively not receiving capacity credit for that time period.¹³ In the alternative, Indianapolis Power argued that, if the Commission did not grant its waiver request, the Commission should require MISO to modify its Tariff because it is unjust and unreasonable in how it addresses the disconnect between the EPA MATS deadline and the MISO Planning Year.¹⁴

8. Indianapolis Power stated that its request for waiver meets the Commission's standard for granting waiver: (1) Indianapolis Power has been unable to comply with the tariff provision at issue in good faith; (2) the waiver is of limited scope; (3) a concrete problem will be remedied; and (4) the waiver does not have undesirable consequences, such as harm to third parties.¹⁵

9. In the October 15 Order, the Commission, based on its review, found good cause for granting Indianapolis Power's second alternative 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, 2016.¹⁶ Specifically, the Commission found that the requested waiver was limited in scope in that it applies only to Eagle Valley for a limited period of time from April 16, 2016 to May 31, 2016 of the 2015-2016 Planning Year. Further, the

¹² *Id.* at 7-10.

¹³ *Id.* at 3.

¹⁴ *Id.* at 35-36.

¹⁵ *Id.* at 30 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,132, at P 8 (2014); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,069, at PP 8-9 (2011); *ISO New England Inc.*, 134 FERC ¶ 61,182, at P 8; *Cal. Indep. Sys. Operator, Corp.*, 132 FERC ¶ 61,004, at P 10 (2010); *Hudson Transmission Partners, LLC*, 131 FERC ¶ 61,157, at P 10; *Pittsfield Generating Co., L.P.*, 130 FERC ¶ 61,182, at PP 9-10; *ISO New England Inc.- EnerNOC, Inc., et al.*, 122 FERC ¶ 61,297 (2008); *Cent. Vt. Pub. Serv. Corp.*, 121 FERC ¶ 61,225 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007; *Acushnet Co.*, 122 FERC ¶ 61,045).

¹⁶ October 15 Order, 149 FERC ¶ 61,047 at P 65.

Commission found that Indianapolis Power's requested waiver addressed a concrete problem by allowing Eagle Valley to remain operational for 45.5 weeks of the 2015-2016 Planning Year, rather than subjecting Indianapolis Power to either prematurely retire Eagle Valley on May 31, 2015, be in non-compliance with the EPA regulations, or violate MISO's Tariff and potentially be required to pay an unknown cost for replacement capacity or subject to civil penalties. The Commission also found that the requested waiver would not cause undesirable consequences, based on Indianapolis Power's representation that it will meet all of its planning reserve requirements by Eagle Valley being on line during the peak periods of the summer 2015 and winter 2015/2016 seasons. Finally, given that the Commission granted Indianapolis Power's request for waiver, it did not address Indianapolis Power's request for clarification regarding a resource's must-offer obligation into the annual capacity auction for the planning year in which it retires and the Commission also dismissed as moot Indianapolis Power's complaint.¹⁷

II. Requests for Rehearing

10. In its request for rehearing, MISO notes that several companies have made waiver requests covering the same period from April 16, 2016 through May 31, 2016, and the Commission's granting of Indianapolis Power's request for waiver has made it possible that other companies will make requests for similar treatment. MISO states that it remains fundamentally concerned that the cumulative effect of granting these waiver requests would not be limited in scope and would have the potential to yield undesirable consequences. MISO further states that the large number of such requests creates additional regulatory uncertainty among buyers and sellers of capacity and hinders the efficiency of MISO's capacity construct.¹⁸

11. MISO contends that the October 15 Order should be reversed, or alternatively clarified, because it contains insufficient analysis or record evidence to support the Commission's determination that the requested waiver will not have undesirable consequences, including to third parties. MISO states that the Commission relied on the MISO Zone 6 Maintenance Margin Charts as a key basis for the Commission's determination that the requested waiver will not have undesirable consequences. However, MISO asserts that the Maintenance Margin analysis is not the type of assessment MISO uses for making resource adequacy determinations. Instead, MISO states that the Maintenance Margin analysis is a voluntary process related to coordination of Generation Planned Outages and was designed as a proactive measure to provide

¹⁷ *Id.* PP 65-71.

¹⁸ MISO Request for Rehearing at 4-5.

Market Participants some forward insight to forecasted available capacity during those time periods.¹⁹

12. Further, MISO contends that unit retirements are fundamentally different from scheduled maintenance or a planned outage because there is no opportunity to reschedule a unit once it is permanently retired. According to MISO, generators that are not Capacity Resources are reflected in the Maintenance Margin analysis because they are available to serve load, but they do not have an obligation to serve load in MISO. MISO states that those generators have the ability to sell capacity and energy to other markets, so it cannot be assumed that those generators will be available during a time of potential shortage.²⁰

13. MISO suggests that the Commission's decision to grant Indianapolis Power waiver may be based on only a small part of the information that is considered in establishing the Resource Adequacy Requirement and, therefore, the Commission should either alter its determination and deny the waiver, or clarify what other evidence in the record leads it to conclude that granting the waiver is appropriate.²¹

14. MISO also contends that the October 15 Order contains insufficient analysis or record evidence to ascertain the Commission's reasoning regarding the establishment of Planning Reserve Margins in the MISO region. Regarding the Commission's discussion of the process of setting the Planning Reserve Margins, MISO notes that "[i]f a state regulatory body establishes a [Planning Reserve Margin] for its regulated entities that is higher or lower than the MISO [Planning Reserve Margin], MISO will apply that state-established [Planning Reserve Margin] to those entities." MISO clarifies that the Indiana Utility Regulatory Commission (Indiana Commission) has not established a Planning Reserve Margin for the utilities under its jurisdiction, meaning that the MISO-established Planning Reserve Margin applies to Indianapolis Power. Further, MISO asserts that the Indiana Commission has not performed an assessment to determine that the Eagle Valley retirements will not present or contribute to supply adequacy concerns in the state or region, but instead relies on MISO analyses and processes. According to MISO, the Commission may have relied upon incorrect information in concluding that the Indiana Commission set Indianapolis Power's Planning Reserve Margin and, therefore, the

¹⁹ *Id.* at 5-6.

²⁰ *Id.* at 7.

²¹ *Id.*

Commission should either alter its determination and deny the waiver or clarify what other evidence in the record leads it to conclude that granting the waiver is appropriate.²²

15. In Suppliers' request for rehearing of the October 15 Order, Suppliers state that granting Indianapolis Power's request for waiver will result in an unlawful preference for Indianapolis Power and unduly discriminatory treatment of other Capacity Resources.²³ Suppliers state that the October 15 Order would permit Indianapolis Power to satisfy its capacity obligations using a resource that will be non-functional for 6.5 weeks of the 2015-2016 Planning Year, without having to purchase any replacement capacity. Suppliers note, however, that other resources will be required to be available for the entire Planning Year and will be expected to purchase replacement capacity or be subject to penalties if they fail to satisfy their obligations for the entirety of the year.²⁴ Suppliers contend that MISO recognized this unduly discriminatory effect when it rejected the Supply Adequacy Working Group's proposed Tariff revisions that would have had the same effect as the waiver granted in the October 15 Order.²⁵

16. Further, Suppliers argue that the Commission failed to address their concerns regarding the discriminatory impact when it responded only with a statement that "[the Commission] do[es] not expect that the limited scope of the waiver will unduly influence a generator's decision to make investment to comply with MATS rules."²⁶ Suppliers point out 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"²⁷

²² *Id.* at 8-9.

²³ Suppliers Request for Rehearing at 6.

²⁴ *Id.* at 8-9.

²⁵ *Id.* at 9 (citing MISO, Supply Adequacy Working Group Meeting Minutes, at 4 (Dec. 5, 2013), <https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/SAWG/2014/20140109/20140109%20SAWG%20Item%2001c%20Minutes%2020131205.pdf>).

²⁶ *Id.* at 9-10 (citing 5 U.S.C. § 706(2)(A) (2012); October 15 Order, 149 FERC ¶ 61,047 at P 65).

²⁷ *Id.* at 10-11 (citing *Mass. Muni. Wholesale Elec. Co.*, 148 FERC ¶ 61,227, at P 14 (2014)).

17. Suppliers also argue that the October 15 Order harms MISO's capacity market and suppliers participating in that market. Suppliers contend that a market with a vertical demand curve is designed to return high prices during times of scarcity. Suppliers assert that the October 15 Order was arbitrary and capricious because the Commission failed to address serious concerns raised by Suppliers that granting the waiver request would result in undue discrimination and suppressed capacity prices to the detriment of other capacity suppliers.²⁸ Suppliers also assert that the Commission is obligated to engage the arguments of its dissenting commissioners.²⁹

18. Suppliers also contend that the October 15 Order failed to provide any rationale to explain why requiring Indianapolis Power to pay for replacement capacity, as required under the Tariff, would be unjust or unreasonable. According to Suppliers, the Tariff already accommodates the circumstances faced by Indianapolis Power in this case because Indianapolis Power could use Eagle Valley as a Capacity Resource until April 16, 2016 and then use purchased replacement capacity for the remainder of the Planning Year. Suppliers contend that the potential that Indianapolis Power could be required to pay an unknown cost for replacement capacity is a potential that any and all Market Participants face, and Suppliers argue that the Commission failed to explain why this potential would warrant relief. Further, Suppliers assert that Indianapolis Power's claim that it could be required to pay as much as \$22 million for replacement capacity was unsubstantiated. Suppliers also assert that the Commission failed to address Suppliers' statements that replacement capacity would likely be available and at substantially lower prices than those posited by Indianapolis Power.³⁰

19. Moreover, Suppliers argue that if the Commission was concerned about Indianapolis Power paying excessively high prices for replacement capacity then it failed to explain why it did not accept Indianapolis Power's alternative offer to purchase replacement capacity for the 6.5 week period at just and reasonable rates. Suppliers agree with Commissioner Bay that the option to pay at just and reasonable rates would be "effective and pragmatic."³¹ Suppliers state that the Commission failed to address this

²⁸ *Id.* at 11 (citing October 15 Order, 149 FERC ¶ 61,047 (Bay, Comm'r, dissenting) ("Granting this waiver creates an unfortunate precedent that erodes MISO's capacity construct, undermines the bilateral market for capacity, and blurs, unnecessarily, a line that had once been bright.")).

²⁹ *Id.* at 11-12 (citing *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216, 224 (D.C. Cir 2014)).

³⁰ *Id.* at 12-14.

³¹ *Id.* at 14-15 (citing October 15 Order, 149 FERC ¶ 61,047 (Bay, Comm'r, dissenting)).

option and NRG Companies' suggestion that, at a minimum, the Commission reject Indianapolis Power's request without prejudice until Indianapolis Power conducts a "Request for Proposal-type process to procure the necessary bilateral capacity."³²

20. Suppliers argue that the Commission ignored statements by MISO regarding the harm to reliability and chose instead to rely on purported evidence that was taken out of context. Specifically, Suppliers argue that the Commission inappropriately relied on the Attachment Y analysis³³ and MISO's Zone 6 Maintenance Margin charts, which Suppliers assert are not germane in determining whether a resource may be relieved from its capacity obligations.³⁴

21. Suppliers state that the Commission found the Indiana Commission's support helpful given that the Indiana Commission "has the authority to establish a Planning Reserve Margin for Indianapolis Power"³⁵ However, Suppliers assert that the Planning Reserve Margin is only part of the annual Planning Reserve Margin Requirement established by MISO, and the fact that the Indiana Commission has authority to set a different Planning Reserve Margin for a specific year does not mean that it has authority to change Indianapolis Power's Planning Reserve Margin Requirement in the middle of a Planning Year, or to otherwise relieve Indianapolis Power of its resource adequacy obligations under the Tariff. Suppliers state that the Commission's reliance on the Indiana Commission's support rewrites the terms of the Tariff to suit Indiana's state-specific interests, even though the Indiana Commission did not provide any analysis with respect to the reliability issue related to the Eagle Valley retirements.³⁶

22. Suppliers also contend that the Commission ignored MISO's reliability concerns without explanation. According to Suppliers, it is not appropriate for the Commission to determine that reliability will not be harmed by looking at one utility or one state in

³² *Id.* at 15 (citing NRG Companies' Protest at 5).

³³ 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 (39.0.0).

³⁴ Suppliers Request for Rehearing at 7, 15-17.

³⁵ *Id.* at 17 (citing October 15 Order, 149 FERC ¶ 61,047 at P 68).

³⁶ *Id.* at 17-18.

isolation because MISO acts as a pool for resource adequacy purposes and the reliability of the pool is dependent on the regional availability of resources. Suppliers assert that the myopic approach of the October 15 Order fails to consider the cumulative impact of other requests for waiver and therefore contravenes Commission precedent.³⁷

23. Further, Suppliers contend that the Commission deviated from its precedent requiring a waiver applicant to demonstrate that it cannot comply with the relevant tariff provision in good faith. While Suppliers admit that there are circumstances where the good faith criterion is not applicable, they argue that Indianapolis Power could have complied with the Tariff by purchasing replacement capacity. Suppliers assert that the Commission failed to provide any rationale for not applying the good faith criterion in this case or to explain why the good faith criterion is not applicable in these circumstances, thereby rendering the October 15 Order arbitrary and capricious.³⁸

24. Lastly, Suppliers state that the Commission's claim that it reviews each request for waiver on a case-by-case basis and that granting waiver "will not impact the Commission's decision-making process on other waiver requests" ignores the fact that the Commission may not depart from precedent "*sub silentio*."³⁹ Suppliers contend that it is unclear how the Commission could deny requests by other load serving entities that are in similar situations.

III. Procedural Matters

25. On November 14, 2014, Indianapolis Power filed a motion for leave to answer and answer to the requests for rehearing filed by MISO and Suppliers. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2015) prohibits

³⁷ *Id.* at 19-20 (citing *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274, at P 1113 (2006), *order on clarification & reh'g*, 119 FERC ¶ 61,076 (2007) (“[W]here an interconnected transmission system is operated on a regional basis as part of an organized market for electricity . . . all users of the system are interdependent, particularly with respect to reliability, i.e., one participant's reliability decisions can impact the reliability of service available to other participants and the related costs the other participants must bear.”)).

³⁸ *Id.* at 20-22 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (stating that the Federal Communications Commission may not depart from a prior policy “sub silentio”); *Williams Gas Processing Gulf Coast Co. v. FERC*, 475 F.3d 319, 322 (D.C. Cir. 2006); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004)).

³⁹ *Id.* at 22-23 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515).

an answer to a request for rehearing. Accordingly, we reject Indianapolis Power's answer.

IV. Discussion

26. We deny the requests for rehearing.

27. First, as the Commission made clear in this proceeding and when addressing other similar requests for waiver, the Commission considered potential impacts on reliability in determining whether to grant relief sought by particular applicants. In each case, that record included the concerns raised by MISO and other parties, and now reiterated on rehearing, that the waivers were not limited in scope because they, as well as other potential waivers that might be sought, presented a cumulative threat with the potential to yield undesirable consequences and regulatory uncertainty. We continue to disagree with those assertions and affirm our decision to grant relief to Indianapolis Power. In particular, we note that the waiver granted to Indianapolis Power for a limited 6.5 week shoulder period is the only such waiver the Commission granted for MISO Zone 6, demonstrating that the Commission considered the specific facts of each case, as well as broader impacts on reliability, in determining whether relief was warranted based on the record.⁴⁰ Furthermore, the purported plethora of waiver requests similar to Indianapolis Power's never materialized. Therefore, we continue to disagree with MISO that granting individual waiver requests will contribute to a cumulative threat to reliability. The Commission's conclusion that granting relief to Indianapolis Power would not raise resource adequacy concerns is reinforced by the fact that, based on the results of the 2015-2016 Planning Resource Auction, we now know that Indianapolis Power's zone, Zone 6, cleared capacity well in excess of its Local Clearing Requirement. Zone 6 also imported far less capacity than its Capacity Import limit, presumably allowing sufficient capability to import energy during the 6.5 week period if necessary. In addition, all six exporting zones in MISO have capacity exports that fall short of their Capacity Export

⁴⁰ See *Duke Energy Indiana, Inc.*, 150 FERC ¶ 61,126, at PP 60-61 (2015) (*Duke Indiana*) (denying Duke Indiana's request for the same relief provided to Indianapolis Power and granting different relief instead, finding that Duke Indiana is in a fundamentally different position than Indianapolis Power); see also *MidAmerican Energy Co.*, 150 FERC ¶ 61,124 (2015); *Wisconsin Pwr. and Light Co.*, 150 FERC ¶ 61,221 (2015). We note that after the Commission granted Indianapolis Power's waiver, MISO proposed and the Commission approved tariff revisions that, under a defined set of circumstances, allow generators that retire or suspend on or after March 31, 2015 and by May 31, 2016 to be relieved of physical withholding mitigation provisions if they decide not to offer those resources into the 2015-2016 Planning Resource Auction. See *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,222 (2015).

Limits thereby providing flexibility for additional imports to Zone 6 if needed to cover any potential shortfall.

28. Suppliers and MISO also argue that reliance on Maintenance Margin Charts is misplaced, but we disagree. While the MISO Maintenance Margin Charts are not dispositive in and of themselves, as part of the record, we find them 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 zones on a daily basis for the 6.5 week period, which is relevant to the Commission's larger finding that the requested waiver would not materially impact reliability during the period in question.

29. MISO asserts that the Commission relied on incorrect information in concluding that the Indiana Commission set Indianapolis Power's Planning Reserve Margin. Moreover, Suppliers assert that while the Indiana Commission has authority to set a different Planning Reserve Margin for a specific year, the Indiana Commission does not have the authority to change Indianapolis Power's Planning Reserve Margin Requirement in the middle of a Planning Year, or to otherwise relieve Indianapolis Power of its resource adequacy obligations under the Tariff. However, the Commission in the October 15 Order merely acknowledged that the Indiana Commission has the authority to establish the Planning Reserve Margin,⁴¹ not that the Indiana Commission had established the Planning Reserve Margin in this case. Rather, the Commission's statements acknowledged as helpful the statements made by the Indiana Commission. In particular, the Indiana Commission's support for the requested relief bolstered the Commission's conclusion that resource adequacy will be maintained.

30. We also disagree with Suppliers' assertion that the Commission failed to address serious concerns raised by Suppliers that granting the waiver request would result in undue discrimination. The Commission addressed protestors' concerns regarding undue discrimination and found that it did not expect that the limited scope of the waiver will unduly influence a generator's decision to make investments to comply with MATS rules. In fact, Indianapolis Power stated that it had itself made significant investments and has already begun construction on a 650 MW gas-fired combined cycle facility, which is intended to replace Eagle Valley.⁴² After considering the issues before it and the limited nature of the waiver sought in this proceeding, the Commission determined that Indianapolis Power's request would not result in unfavorable treatment of similarly situated parties. We affirm that finding here.

⁴¹ MISO, FERC Electric Tariff, Module E-1, § 68A.1 (30.0.0).

⁴² Indianapolis Power Request for Waiver and Complaint at 12.

31. We also disagree with Suppliers' assertion that the Commission failed to address concerns that granting the waiver request would result in suppressed capacity prices to the detriment of other capacity suppliers. The Commission considered protestors' arguments and found that granting the requested waiver would not cause undesirable consequences. In any case, in weighing any revenue increases for suppliers against the potential increase in costs to Indianapolis Power's customers, we affirm that waiver was appropriate because the Commission 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.

32. We disagree with Suppliers that the Commission failed to provide a rationale to explain why requiring Indianapolis Power to pay for replacement capacity would be unjust or unreasonable. The Commission may grant a requested waiver where the applicant satisfies the Commission's waiver criteria. Upon finding that Indianapolis Power met its burden for a particular form of relief, the Commission was not required to address the alternative forms of relief proposed by Indianapolis Power.⁴³ Nonetheless, in subsequent orders granting similar requests for waiver, the Commission did address the particular form of relief referenced by Suppliers in their rehearing request.⁴⁴ Instead, as

⁴³ Cf. *Midcontinent Indep. Sys. Operator, Inc., Pub. Serv. Comm'n of Wis. v. Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071, at P 69 & n.146 (2014) (finding that because the Commission's determination extended the proposed System Support Resource cost allocation method beyond the proposed footprint, the Commission did not need to address alternative relief proposed by various commenters) (citing *e.g.*, *Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,271, at P 107 (2008) ("[W]e are not required here to consider alternative proposals. When the utility's proposed filing is determined to be just and reasonable, the Commission need not consider whether alternative proposals may also be just and reasonable."); *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,060, at P 129 (2012) ("Having found MISO's compensation proposal just and reasonable, we need not consider alternative compensation methodologies (e.g., not providing compensation)."); *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 691 (D.C. Cir. 1995) ("[T]he Commission may approve the methodology proposed in the settlement agreement if it is 'just and reasonable'; it need not be the only reasonable methodology, or even the most accurate."); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (finding that, under the FPA, as long as the Commission finds a methodology to be just and reasonable, that methodology "need not be the only reasonable methodology, or even the most accurate one"))).

⁴⁴ *DTE Elec. Co.*, 150 FERC ¶ 61,127, at P 46 & n.85 (2015); *Consumers Energy Co.*, 150 FERC ¶ 61,125, at P 49 & n.81 (2015).

the Commission previously explained, “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.”⁴⁵

33. We disagree with Suppliers’ assertion that the Commission erred, in evaluating whether reliability will be harmed, by looking at one utility or one state in isolation because MISO acts as a pool for resource adequacy purposes and the reliability of the pool is dependent on the regional availability of resources. The Commission’s analysis was not limited to a particular utility or state. Rather, the Commission relied on MISO’s Attachment Y Reliability Study, which examines both local reliability and system reliability,⁴⁶ and the Maintenance Margin Charts for MISO Zone 6, which provide additional evidence in support of granting the requested waiver. Accordingly, we deny Suppliers’ request for rehearing on this issue.

34. Suppliers also contend that the Commission deviated from its precedent requiring a waiver applicant to demonstrate that it cannot comply with the relevant Tariff provision in good faith. However, as Suppliers themselves admit, there are circumstances where the good faith criterion is not applicable. Even if it were applicable, we find that Indianapolis Power acted in good faith in seeking waiver from the Commission. In particular, we note that parties, including Indianapolis Power, sought (unsuccessfully) to address the disconnect between the MISO Planning Year and the MATS effective date

⁴⁵ *Duke Indiana*, 150 FERC ¶ 61,126 at P 60.

⁴⁶ 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.

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.

through the MISO stakeholder process before seeking relief at the Commission.⁴⁷ Indianapolis Power also sought relief well in advance of the beginning of the MISO Planning Year, providing other parties and the Commission ample time to consider its requested relief. Indianapolis Power also complied with other pertinent Tariff provisions, including the requirement to timely submit an Attachment Y Notification.⁴⁸

35. Lastly, we disagree with Suppliers that the Commission's claim that it reviews each request for waiver on a case-by-case basis and that granting waiver "will not impact the Commission's decision-making process on other waiver requests" ignores the fact that the Commission may not depart from precedent "*sub silentio*."⁴⁹ Suppliers contend that it is unclear how the Commission could deny requests by other load serving entities that are in similar situations. However, we find that Suppliers' concern is misplaced. The Commission did not depart from precedent when it granted Indianapolis Power's waiver request, but rather based its decision on its review of the issues before it.⁵⁰ Furthermore, despite Suppliers' assertion that the Commission would be bound to grant the same relief to other waiver applicants, we note that the Commission in fact granted different forms of relief to individual waiver applicants based on the particular record presented in each proceeding.⁵¹ This reinforces the Commission's determination in this proceeding 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."⁵² Accordingly, we deny Suppliers' request for rehearing on this issue.

⁴⁷ Conflict with MISO Capacity Planning Year definition and EPA MATS Timeline at 4 (May 31, 2013), <https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/SAWG/2013/20130606/20130606%20SAWG%20Item%20004%20MATS%20Capacity%20Cr edit%20Concern.pdf>.

⁴⁸ *Supra* note 33.

⁴⁹ Suppliers Request for Rehearing at 22-23 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (stating that the Federal Communications Commission may not depart from a prior policy "sub silentio"))).

⁵⁰ *See supra* note 40 (denying a request for waiver from Duke Indiana).

⁵¹ *See Duke Energy Indiana, Inc.*, 150 FERC ¶ 61,126 (2015); *MidAmerican Energy Co.*, 150 FERC ¶ 61,124 (2015).

⁵² October 15 Order, 149 FERC ¶ 61,047 at P 65.

The Commission orders:

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.