

122 FERC ¶ 61,178  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator,      Docket No. ER07-1182-001  
Inc.

ORDER DENYING REHEARING AND CLARIFICATION REQUESTS

(Issued February 27, 2008)

1. In a September 18 Order,<sup>1</sup> the Commission accepted the proposal of Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to permanently extend its Broad Constrained Area (BCA) mitigation measures. In this order we deny the Electric Power Supply Association's (EPSA) request for rehearing of the decision in the September 18 Order. We also deny Reliant Energy Inc.'s (Reliant) request that we clarify the September 18 Order. Lastly, while we strike the affidavit attached to EPSA's rehearing request as being contrary to Commission policy, we deny as moot the Midwest Transmission Dependent Utilities' (Midwest TDUs)<sup>2</sup> motion to strike the affidavit.

**I. Background**

**A. History**

2. The Commission has issued orders that, among other things, accepted market monitoring and market power mitigation for Midwest ISO,<sup>3</sup> as set forth in Module D of

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<sup>1</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 120 FERC ¶ 61,250 (2007) (September 18 Order).

<sup>2</sup> For the purposes of this proceeding, Midwest TDUs include Great Lakes Utilities, Indiana Municipal Power Agency, Lincoln Electric System, Madison Gas and Electric Company, Midwest Municipal Transmission Group, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Southern Minnesota Municipal Power Agency, and Wisconsin Public Power Inc.

<sup>3</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, *order on reh'g*, 109 FERC ¶ 61,157 (2004) (TEMT II Rehearing Order), *order on reh'g*, 111 FERC ¶ 61,043; *reh'g denied*, 112 FERC ¶ 61,086 (2005), *aff'd sub nom. Wisconsin* (continued...)

Midwest ISO's Open Access Transmission and Energy Markets Tariff (TEMT or tariff). In Midwest ISO, market power mitigation measures are implemented by an Independent Market Monitor (IMM) and may be applied to energy, start-up, and no-load offers in two types of electrical areas: Narrow Constrained Areas (NCAs)<sup>4</sup> and BCAs.<sup>5</sup>

3. In the TEMT II Rehearing Order, as part of its evaluation of whether Midwest ISO's proposal for market monitoring and mitigation was just and reasonable, the Commission accepted for a one-year period Midwest ISO's proposed use of BCA mitigation.<sup>6</sup> During that one-year period, the IMM was required to submit quarterly reports to allow the Commission to assess the use of BCA mitigation.<sup>7</sup> The TEMT II Rehearing Order further stated that, if Midwest ISO determined that BCA mitigation is required beyond the one-year period, it could file to extend such measures.<sup>8</sup>

4. Midwest ISO later requested a one-year extension of the BCA mitigation provisions. The Commission initially rejected Midwest ISO's request and directed it to

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*Public Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007). Section 1.320 of the TEMT defines "Transmission Provider" as Midwest ISO or any successor organization. For clarity, we will refer to Midwest ISO wherever the TEMT refers to "Transmission Provider."

<sup>4</sup> "An NCA is identified in advance and defined by one or more transmission constraints that are expected to be binding for at least 500 hours during a given twelve-month period and within which one or more suppliers are pivotal. Mitigation may be applied when a supplier exceeds both the conduct and impact thresholds." September 18 Order, 120 FERC ¶ 61,250 at P 3, footnotes omitted.

<sup>5</sup> "A BCA is not identified in advance but is dynamically defined when one or more transmission constraints are binding and can result in substantial locational market power. When a transmission constraint becomes binding, the IMM determines whether a generation resource should be included in a BCA by comparing a resource's generation shift factor (GSF) for that flowgate to the Constraint GSF Cutoff. Mitigation measures may be applied to a generation resource within a BCA if the generator's offer exceeds both the conduct and impact thresholds." September 18 Order, 120 FERC ¶ 61,250 at P 4, footnotes omitted.

<sup>6</sup> TEMT II Rehearing Order, 109 FERC ¶ 61,157 at P 227.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* P 231.

remove the BCA mitigation provisions from its tariff.<sup>9</sup> However, the Commission later granted rehearing, finding that BCA mitigation addressed locational market power that affected energy prices or created the opportunity to collect excessive revenue sufficiency guarantee (RSG) revenues.<sup>10</sup> Thus, the Commission permitted Midwest ISO to use BCA mitigation for an additional year but kept the requirement that the IMM file quarterly reports.

5. Midwest ISO then filed a request for a permanent extension of its BCA mitigation authority. It argued that prospective, automated BCA mitigation ensures reasonable prices better than retroactive remedies and that the benefits of BCA mitigation substantially outweigh the potential costs. Midwest ISO included in its filing an affidavit from the IMM (Patton Affidavit) analyzing the costs and benefits of BCA mitigation and supporting the request for permanent extension of BCA mitigation authority.

### **B. September 18 Order**

6. The Commission accepted Midwest ISO's proposal to extend the BCA mitigation measures, without an annual sunset provision, effective July 21, 2007. We determined that the two years of data and experience regarding BCA mitigation measures indicated that BCA mitigation strikes the right balance for mitigation without over-mitigating or under-mitigating the market. We did not attach an annual sunset date or continue the requirement that the IMM submit additional quarterly reports. The Commission further stated that Midwest ISO's BCA mitigation plan addresses market power concerns without undermining current incentives for market entry and long-term resource adequacy. The Commission recognized that because Midwest ISO's market design is evolving, Midwest ISO may need to examine whether the BCA and NCA mitigation programs remain necessary or require adjustment in future proceedings.

### **C. Post-September 18 Order Filings**

7. Reliant requests clarification of the September 18 Order. It seeks clarification that: (1) Midwest ISO's proposed long-term resource adequacy plan must consider whether the BCA mitigation measures remain necessary or require modification; and (2) the annual State of the Market Report must include a rigorous cost-benefit analysis of the BCA mitigation program.

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<sup>9</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,158 (2006), *reh'g granted*, 116 FERC ¶ 61,068 (2006) (July 20 Order).

<sup>10</sup> July 20 Order, 116 FERC ¶ 61,068 at P 22.

8. EPSA filed a request for rehearing asserting that the cost-benefit analysis of BCA mitigation upon which the order was based was flawed. EPSA also argues that the Commission should not have granted a permanent extension of the BCA mitigation measures because the order recognized that the Commission may have to reexamine this mitigation as the Midwest ISO market evolves.

9. Midwest TDUs filed a motion to strike the Affidavit of Jonathan A. Lesser, PhD. (Lesser Affidavit) that was attached to EPSA's request for rehearing. The Coalition of Midwest Transmission Customers (Midwest Transmission Customers) filed an answer in support of the motion to strike the Lesser Affidavit.

## II. Discussion

### A. Lesser Affidavit

10. EPSA contends that the cost-benefit analysis in the Patton Affidavit is flawed. It points out that it argued in its initial protest that Dr. Patton's affidavit is fatally flawed. EPSA bases this argument on the evidence presented in the Lesser Affidavit, which it attaches to its rehearing request. It states that the Lesser Affidavit "presents a detailed critique of Dr. Patton's cost-benefit analysis, and specifies the necessary elements for a cost-based analysis of this mitigation, few of which actually appear in Dr. Patton's affidavit."<sup>11</sup>

11. We will strike the Lesser Affidavit. We generally require that issues be raised before the issuance of an order.<sup>12</sup> There is nothing in the Lesser Affidavit that could not have been filed as comments well before the September 18 Order was issued. Absent compelling circumstances, consideration of the Lesser Affidavit would undermine the administrative process.<sup>13</sup> Since EPSA did not even explain why it did not submit the Lesser Affidavit before the September 18 Order, we find that there are no compelling

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<sup>11</sup> EPSA Rehearing Request at 4.

<sup>12</sup> See *American Electric Power Service Corp. v. Aquila Merchant Services, Inc.*, 106 FERC ¶ 61,020, at P 91, n.74 (2004) and cases cited therein.

<sup>13</sup> See *Tenaska Power Services Co. v. Southwest Power Pool*, 102 FERC ¶ 61,140, at P 14, n.10-11 (2003) and cases cited therein.

circumstances that support deviation from our policy.<sup>14</sup> In light of our decision to strike the Lesser Affidavit, we find that the motion to strike is moot and so is the answer in support of the motion to strike.

**B. Whether the Commission Should Have Imposed a Sunset Provision**

12. While EPSA maintains that BCA mitigation should not be continued at all, if the Commission does allow it to continue, then EPSA requests that the Commission approve it for a one-year period or establish a reasonable time frame for a re-examination of BCA mitigation. It asserts that the Commission should not have permanently extended BCA mitigation because, as the order itself recognizes, the Commission may have to reexamine this mitigation as the Midwest ISO market evolves. EPSA argues that the September 18 Order fails to: (1) explain why interim filings for BCA mitigation approval would disrupt Midwest ISO's markets;<sup>15</sup> (2) ensure that Midwest ISO will reexamine its BCA mitigation; and (3) explain why a BCA mitigation measure filing timeframe of more than one year but less than permanence would be unduly burdensome. EPSA expresses concern that Midwest ISO may never reconsider the program, resulting in over-mitigation in a market without complementary resource adequacy and demand response initiatives.

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<sup>14</sup> Even though we will strike the Lesser Affidavit and are not required to address its substance, we note that several of the arguments raised therein are faulty. For example, Dr. Lesser discusses the inherent uncertainty that the dynamic, real-time nature of BCA specification creates. He claims that it is unlikely that suppliers could exercise market power in the manner alleged by Dr. Patton and that the quarterly mitigation reports are notable not only for the infrequency of BCA mitigation, but also for the lack of any systemic pattern. Dr. Lesser also points to Dr. Patton's assumption that suppliers in BCAs would receive unjust and unreasonable RSG payments by manipulating their offers for start-up and no-load costs, constrained only by the limitations of Midwest ISO's software (and thus submitting offers at very high levels) and that such hypothetical offers have not been seen.

However, we believe the infrequency of BCA mitigation and lack of a systemic pattern reflects the ability of the BCA mitigation program to deter the exercise of market power. In addition, we understood that the offer behavior described by Dr. Patton represented a worst-case analysis, and that such behavior would have been subject to regulatory and/or legal challenge. We also note that the Lesser Affidavit does not address an underlying concern of the Commission: RSG payments could be unjust and unreasonable because of the exercise of market power without BCA mitigation.

<sup>15</sup> EPSA notes that no lapse in mitigation should occur if Midwest ISO files its requests for future mitigation in a timely manner.

13. EPSA contends that the cost-benefit analysis presented in the Patton Affidavit is fatally flawed. It argues that the analysis inadequately considers the costs of BCA mitigation, including its effect on price signals to reflect supply and demand conditions and to encourage market entry.

14. EPSA further argues that BCA mitigation is a structural barrier to the scarcity pricing needed to encourage new generation to enter the market. It asserts that the September 18 Order suggested that scarcity prices are the result of the exercise of market power and did not discuss the relationship between BCA mitigation and resource adequacy. EPSA contends that BCA mitigation hinders market signals and scarcity prices needed for regional demand response initiatives. It adds that the permanent extension of BCA mitigation is inappropriate without an adequate resource adequacy plan.

15. We will deny EPSA's request for rehearing. In the September 18 Order, we explained that we had originally imposed an annual sunset provision on the BCA mitigation program because we were "concerned that the IMM could exercise undue discretion over its application of BCA mitigation or that BCA mitigation would not appropriately mitigate market power."<sup>16</sup> However, the Commission said that experience had since shown that there was no need for a sunset provision because: (1) BCA mitigation appropriately addresses the exercise of market power and balances the risks of over-mitigation and under-mitigation;<sup>17</sup> (2) the IMM cannot apply BCA mitigation in excess of the objective tariff provisions and thresholds;<sup>18</sup> and (3) the IMM's discretion to approve reference level changes is rarely used and, even if used, would default to the objective measures provided in the tariff.<sup>19</sup> Thus, the Commission concluded that an annual sunset provision is no longer necessary, because its original concerns had been alleviated.

16. The Commission also stated in the September 18 Order that "eliminating BCA mitigation or granting only a one-year extension would be disruptive to Midwest ISO's energy markets."<sup>20</sup> It did not make sense to use Midwest ISO's resources, as well as market participants' resources, to address these issues before the Commission annually

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<sup>16</sup> September 18 Order, 120 FERC ¶ 61,250 at P 44, n.37.

<sup>17</sup> *Id.* P 25-27.

<sup>18</sup> *Id.* P 45, n.38.

<sup>19</sup> *Id.* P 45, n.39-40.

<sup>20</sup> *Id.* P 46.

even if the market circumstances are unchanged. The Commission stated that the concerns that BCA mitigation may need to be adjusted in the future should be considered, as appropriate, in future proceedings.<sup>21</sup> However, we will not pre-judge future proceedings or attempt to identify specific proceedings here.

17. We are concerned that allowing BCA mitigation only on an interim basis for another year would send a muddled signal to the market about the Commission's intent to ensure just and reasonable rates in these areas, regardless of any related proceedings. Providing for the re-examination of such mitigation in a year's time, without regard to other proceedings in the Midwest ISO market, would provide additional uncertainty to the market. Such uncertainty could make parties more reluctant to participate in the energy market. Further, providing for an annual re-examination of BCA mitigation, not linked to other events in the Midwest ISO market, would be costly for those participating in the debate.

18. We find that it is unnecessary to require Midwest ISO to re-examine its mitigation program at a specific time in the future. In the September 18 Order, the Commission said that the "IMM is required to report on the efficacy of the BCA mitigation program, including any recommended changes to its mitigation procedures, on an annual basis through the State of the Market Report."<sup>22</sup> In addition, we note that the IMM is obligated to monitor and report on the "adequacy and effectiveness of any proposed or actual Tariff provision, market rule, procedure, or action that affects the competitiveness or economic efficiency of the Markets and Services" and to recommend, as appropriate, modifications or other improvements.<sup>23</sup> Therefore, we find that the current tariff provisions are sufficient to ensure that the IMM monitors the efficacy of the BCA mitigation program, reports its findings, and recommends any needed adjustments to the program to prevent over-mitigation.

19. We disagree with EPSA's contention that the cost-benefit analysis presented in the Patton Affidavit is fatally flawed. As discussed earlier, we are striking the Lesser Affidavit on which this contention is based, and we also do not find the Lesser Affidavit convincing. Without the Lesser Affidavit, EPSA has raised no new arguments or issues concerning this matter that were not already considered and dismissed in the September 18 Order.

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<sup>21</sup> *Id.* P 46.

<sup>22</sup> *Id.* P 47, footnote omitted.

<sup>23</sup> Midwest ISO, FERC Electric Tariff, Third Revised Vol. No. 1, Third Revised Sheet No. 702 and Fourth Revised Sheet No. 711.

20. In addition, we will address EPSA's argument that BCA mitigation hinders demand response. We note that Midwest ISO has proposed mechanisms to promote market participation by demand response resources in its filings to implement its Ancillary Services Market, long-term Resource Adequacy Requirements, and compensation for emergency demand response resources.<sup>24</sup> We also reiterate our finding that BCA mitigation addresses market power concerns without undermining current incentives for market entry and long-term resource adequacy.<sup>25</sup> We note that the Commission has an obligation to mitigate market power to ensure just and reasonable market-based rates.

### C. Request for Clarifications

21. Reliant requests that the Commission clarify that each of the IMM's annual State of the Market Reports must include a rigorous cost-benefit assessment of BCA mitigation that is based on actual data and assessments. Reliant argues that the Patton Affidavit did not include the rigorous cost-benefit analysis previously required by the Commission<sup>26</sup> because it did not quantify the costs of over-mitigation, including adverse impacts on investment in capacity and demand response resources and on price signals to support new investment. It adds that the Commission should clarify that it intends to use cost-benefit analyses as its foundation for future mitigation decisions.

22. Reliant also requests that the Commission clarify that the September 18 Order imposes the obligation on Midwest ISO to demonstrate in its resource adequacy plan filing that the combination of that plan, existing or revised mitigation measures, and demand response resource programs will produce prices that are just and reasonable and allow for the recovery of, and incentives to invest in, needed generation and demand response resources.<sup>27</sup> Reliant argues that Commission precedent requires that these market elements be analyzed together.<sup>28</sup>

23. We will deny Reliant's clarification requests. First, in regard to the request that the IMM be required to perform formal cost-benefit analyses in future reports, we clarify

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<sup>24</sup> Those proposals were filed in Docket Nos. ER07-1372-000, -001; ER08-394-000; and ER08-404-000, respectively.

<sup>25</sup> September 18 Order, 120 FERC ¶ 61,250 at P 36.

<sup>26</sup> *Id.* P 24.

<sup>27</sup> Reliant Clarification Request at 4-5.

<sup>28</sup> *See id.* at 4-5, n.12-13 (citing *California Indep. Sys. Operator Corp.*, 105 FERC ¶ 61,140, at P 214, 274, *reh'g denied*, 105 FERC ¶ 61,278 (2003)).

that we do not believe that a formal cost-benefit analysis on this issue is needed in each of the IMM's State of the Market Reports. Instead, as explained in the September 18 Order, we find that Midwest ISO has demonstrated that the BCA mitigation program appropriately balances the risks of under-mitigation and over-mitigation. Given the requirements of the TEMT and annual State of the Market Report discussed herein and in the September 18 Order, it is unnecessary to specify the data that the IMM must consider in future reports.

24. We reiterate that Midwest ISO's mitigation program will be evaluated, as appropriate, in future proceedings. We reiterate our finding that "BCA mitigation addresses market power concerns without undermining current incentives for market entry and long-term resource adequacy."<sup>29</sup> In addition, we note that Reliant raises no new issues that were not addressed in the September 18 Order.

25. For the reasons discussed in this order, as well as the September 18 Order, we will deny the request for rehearing and the request for clarifications.

The Commission orders:

(A) The Lesser Affidavit is hereby struck for the reasons stated herein.

(B) Midwest TDUs' motion to strike the Lesser Affidavit is denied as moot for reasons stated herein.

(C) EPSA's request for rehearing is denied for the reasons stated herein.

(D) Reliant's request for clarifications is denied for the reasons stated herein.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>29</sup> September 18 Order, 120 FERC ¶ 61,250 at P 36.