

**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

**ISO New England Inc.**

**Docket No. ER20-668-000**

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**MOTION TO INTERVENE, COMMENTS, AND LIMITED PROTEST OF  
THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.**

Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),<sup>1</sup> the New England Power Generators Association, Inc. (“NEPGA”)<sup>2</sup> and National Hydropower Association (“NHA”) jointly file this Motion to Intervene, Comments, and Limited Protest of the Midcontinent Independent System Operator, Inc.’s (“MISO”) proposal to remove the exemption from Physical Withholding penalty charges for Resources that are not Planning Resources under MISO’s Tariff.<sup>3</sup> MISO cites to the Commission’s Order No. 861, and the regulations promulgated in the associated rulemaking proceeding, as supporting the removal of the Physical Withholding exemption. Order No. 861, however, addressed a matter distinct from the applicability of Physical Withholding penalties and should not be read to dictate the Tariff changes MISO asks the Commission to accept. The Commission should not adopt MISO’s reading of Order No. 816 in that it may be considered a change in

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<sup>1</sup> 18 C.F.R. §§ 385.211, 385.214 (2019). This Motion to Intervene, Comments and Limited Protest is timely filed. *See Errata Notice Extending Comment Period*, Docket No. ER20-668-000 (Dec. 23, 2019).

<sup>2</sup> The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular member.

<sup>3</sup> *Midcontinent Independent System Operators, Inc.’s Proposed Revisions to MISO’s Tariff Remove Physical Withholding Exemption under Module D of the Tariff*, Docket No. ER20-668-000 (filed Dec. 20, 2019) (“MISO Filing”).

Commission policy giving rise to challenges to market power mitigation rules in other RTOs/ISOs not in need of change according to MISO's request herein. NEPGA and NHA thus respectfully request that if the Commission accepts MISO's filing in part or in whole, or otherwise directs changes to MISO's Tariff, that it do so without adopting MISO's reading of Order No. 861 and without declaring a Commission policy according to MISO's reading.

## **I. Motions to Intervene and Communications**

### **A. New England Power Generators Association, Inc.**

NEPGA is the trade association representing competitive power generators in New England. NEPGA's member companies represent approximately 26,000 megawatts, or nearly 90% of the installed capacity in New England. NEPGA's Member companies also own or operate over 4,500 megawatts of installed capacity in MISO. NEPGA's mission is to support competitive wholesale electricity markets in New England. NEPGA believes that open markets guided by stable public policies are the best means to provide reliable and competitively-priced electricity for consumers. A sensible, market-based approach furthers economic development, jobs and balanced environmental policy for the region. NEPGA's member companies are responsible for generating and supplying electric power for sale within the New England bulk power system. As active participants in the ISO-NE and MISO wholesale electricity markets, NEPGA's member companies have substantial and direct interests in the outcome of these proceedings, and those interests cannot be adequately represented by any other party in the proceeding.

### **B. National Hydropower Association**

As the national trade association for the hydropower industry, we monitor public policy proposals that impact hydropower resources. NHA represents more than 240 companies, from Fortune 500 corporations to family-owned small businesses. Our diverse membership includes

public and investor- owned utilities, independent power producers, developers, equipment manufacturers, and other service providers. As a national association, NHA has members across the country in nearly every RTO/ISO market. Because the determination in this proceeding will affect our members, NHA has a direct and substantial interest in this proceeding which cannot adequately be represented by any other party. Given its direct interest, NHA’s motion to intervene is in the public interest, and should be granted.

All correspondence and communications related to this proceeding should be addressed to the following individuals:

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**I. THE COMMISSION SHOULD NOT READ ORDER NO. 861 TO DECLARE A GENERAL POLICY OR EVOLUTION OF POLICY THAT ALL ENERGY-ONLY RESOURCES MUST BE SUBJECT TO PHYSICAL WITHHOLDING PENALTIES AS PROPOSED BY MISO**

In Order No. 861 the Commission addressed a set of facts and circumstances inapposite to those presented by MISO and immaterial to the Tariff changes MISO seeks. In Order No. 861, the Commission addressed whether Commission-approved wholesale market mitigation rules could be relied on to address any market power concerns in lieu of indicative market power screens submitted to the Commission. The Commission found that approved mitigation rules could in fact serve that purpose, and thus “relieve[d] Sellers” of the burden of submitting indicative market

power screens to the Commission when seeking to participate in wholesale markets governed by Commission-approved mitigation rules.<sup>4</sup> The Commission clarified that resources seeking to make capacity sales in RTOs/ISOs that lack a RTO/ISO-administered capacity market subject to Commission-approved market monitoring must continue to submit indicative screens to the Commission.<sup>5</sup> Only the California Independent System Operator Corporation (“CAISO”) and the Southwest Power Pool, Inc. (“SPP”) wholesale capacity markets lacked Commission-approved mitigation rules at that time.<sup>6</sup> As a corollary to that clarification, the Commission further proposed to eliminate the rebuttable presumption that Commission-approved RTO/ISO market monitoring and mitigation is sufficient to address any horizontal market power concerns regarding sales of capacity in RTOs/ISOs that do not have an RTO/ISO-administered capacity market.<sup>7</sup> In sum, the Commission announced a policy to ease the regulatory burden for suppliers to sell at market-based rates in wholesale markets with Commission-approved market power mitigation rules.<sup>8</sup>

Here, MISO seeks to broaden the meaning of Order No. 861 to support the imposition of energy offer obligations on resources that did not assume, nor receive compensation for the must-offer obligations assumed by capacity resources. Though MISO asserts that it does not intend to create a must offer requirement,<sup>9</sup> its proposal would compel resources to offer into the energy market in every interval for which it cannot convince the IMM that it is uneconomic for the resource to be available for dispatch. This would create a must-offer requirement by any other name in some, if not all hours, and impose a regulatory burden on market participants at odds with

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<sup>4</sup> *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets*, Order No. 861, at P 1, Docket No. RM19-2-000 (July 18, 2019) (“Order No. 861”).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*, note 4.

<sup>7</sup> Order No. 861 at P 2.

<sup>8</sup> *See. e.g.*, Federal Energy Regulatory Commission News Release, *FERC Proposes to Ease Regulatory Burden for Certain Market-Based Sellers*, Docket No. RM19-2-000 (Dec. 20, 2018).

<sup>9</sup> MISO Filing, Transmittal Letter at 2.

the relief from regulatory burden the Commission directed in Order No. 861. Further, it would effectively create a rebuttable presumption that a non-capacity resource's failure to offer into the energy markets is an act of physical withholding.

MISO presently operates its energy markets under Commission-approved mitigation rules. In accepting those rules, the Commission specifically rejected calls to subject non-capacity resources to penalties for physical withholding in the Day-Ahead Market.<sup>10</sup> The Commission further found that “the imposition of economic withholding mitigation and penalties for physical withholding constitutes a must offer obligation without a corresponding payment for capacity resources.”<sup>11</sup> Only when a non-capacity resource chooses to offer into the Day-Ahead Market does the Commission require MISO to impose mitigation measures, specifically economic withholding mitigation measures, on the resource.<sup>12</sup> Resources in MISO thus have and can continue to rely on a Commission-approved mitigation rules in MISO. Likewise, Commission-approved market power mitigation rules in other RTOs/ISOs can and should be relied on to ensure just and reasonable rates.

NEPGA does not question MISO's basic premise that Commission policy requires that market-based rate authority is subject to market power mitigation.<sup>13</sup> But that policy does not compel a reading of Order No. 861 that would establish a new Commission policy, namely a rebuttable presumption that a non-capacity resource is physically withholding if it does not offer its resource into the energy markets. MISO's proposed rule, if applied broadly to all RTOs/ISOs as a matter of Commission market-based rate policy, may cause resources to take on the obligations of a capacity resource (in some or all energy market offer intervals) without the compensation

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<sup>10</sup> *Midwest Indep. Transmission Sys. Operator, Inc.* 102 FERC ¶ 61,280, at P 96 (2003).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> MISO Filing, *Affidavit of David B. Patton*, at P 12 (“Patton Affidavit”).

granted to a resource willing to take on a must-offer obligation. Though MISO proposes to excuse a resource if “the resource is not expected to be economic to operate” it presents no evidence that this would not effectively create an energy must-offer obligation for resources the market did not purchase as capacity. A failure by, or on behalf of energy users to procure sufficient access to call options on energy (by purchasing capacity) should not give them the benefit of those call options by default. It may be that the “not economic to operate” exemption may not apply frequently enough, or the relevant IMM may not allow it to apply frequently enough, to avoid creating an all-hour, or nearly all-hour must-offer obligation.

To adopt as policy MISO’s reading of Order No. 861 would be improper as well due to MISO’s failure to provide sufficient evidence to demonstrate that a lack of must-offer requirement for non-capacity resources “has exposed the MISO market to significant potential market power abuses over the past two years.”<sup>14</sup> MISO provides a relatively meager measure of information for what it asserts are four examples of physical withholding causing cogestion costs. Even the information MISO provides sheds little light on whether undue market power has been exercised by energy-only resources in MISO. For example, MISO asserts that a pivotal supplier “chose not to make this resource available,” but fails to provide any insight into why the resource was unavailable for dispatch. Indeed, if this resource was unavailable because it would have been uneconomic to be available, it would have made the very decision MISO opines in this proceeding is a rational economic decision.<sup>15</sup> As to any further evidence of the undue exercise of market power, MISO only offers that its four examples are “just a sampling.”<sup>16</sup> It would be entirely unjust to base a Commission policy applicable to other RTO/ISO wholesale markets when MISO has

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<sup>14</sup> *Id.* at P 23.

<sup>15</sup> Patton Affidavit at P 25.

<sup>16</sup> *Id.* at P 32.

failed to provide any evidence of such market power in other markets, and a relatively small amount within MISO itself. Further, to the extent an internal market monitor suspects the exercise of undue market power it may avail itself of the enforcement referral process.

If the Commission were to adopt or agree with MISO's reading of Order No. 861, it may be considered to establish a Commission policy that all non-capacity resources must offer into the energy markets absent justifying to the IMM that it is uneconomic for the resource to be available to run. This would likewise undermine the most basic aspect of capacity market design which requires users of energy to procure adequate call options on energy to meet their energy needs. This is an unnecessary and, as explained above, improper reading of Order No. 861 and Commission policy. Should the Commission accept all or part of MISO's request herein, any Commission findings in this proceeding should be specific to MISO without adopting a broad application of MISO's reading of Order No. 861, in order to avoid the threat of upsetting market power mitigation and capacity market designs specific to each RTO/ISO. ISO-NE, for example, has Commission-approved mitigation rules governing physical withholding for both capacity and non-capacity resources, applied consistent with the ISO-NE capacity and energy markets designs.<sup>17</sup>

ISO-NE's capacity market differs from MISO's, in part in that it allows resources to de-list, or fail to take a Capacity Supply Obligation for a single annual Capacity Commitment Period. Thus, in ISO-NE, Market Participants are faced with the business decision of whether to assume a Capacity Supply Obligation, continue to operate as an energy-only resource, or to "mothball" the resource for a year. The imposition of a must-offer obligation on energy-only resources in all or some hours would have a material effect on that decision-making, which effect should be

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<sup>17</sup> See ISO New England Inc. Transmission, Markets and Services Tariff, Section III, Market Rule 1, Appendix A, *Market Monitoring, Reporting and Market Power Mitigation*, § III.A.4. Physical Withholding.

considered, if at all, through a purposeful deliberation of its impact on ISO-NE's Forward Capacity Market, its resource adequacy needs, and Market Participant incentives. ISO-NE need not and should not be subject to a challenge or change to its market power mitigation rules compelled by MISO's flawed reading of Order No. 861 and facts asserted by and specific to MISO. To the extent there is a need to re-examine the market power mitigation rules in ISO-NE, it should be subject to stakeholder and ISO-NE review through the New England Power Pool stakeholder process, not through MISO's reading of Order No. 861.

## II. CONCLUSION

For the reasons stated above, NEPGA and NHA respectfully request that the Commission grant these Motions to Intervene and, if it accepts MISO's proposal here in its entirety or in part, not declare its findings a matter of Commission policy under Order No. 861.

Respectfully Submitted,

/s/ Bruce Anderson

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding. Dated at Boston, Massachusetts, January 21, 2020.

*/s/ Bruce Anderson* \_\_\_\_\_

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