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November 19, 2012

By Electronic Filing

Hon. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Subject: **Midwest Independent Transmission System Operator, Inc. and International Transmission Company d/b/a ITC*Transmission*, Docket No. ER11-1844-002; Answer of the New York Independent System Operator, Inc. in Opposition to Motion of the Midwest Independent Transmission System Operator, Inc. to Supplement the Record**

Dear Ms. Bose:

Attached please find the Answer of the New York Independent System Operator, Inc. in Opposition to the Motion of the Midwest Independent Transmission System Operator, Inc. to Supplement the Record.

Very truly yours,

/s/ Howard H. Shafferman

Howard H. Shafferman
Counsel for New York Independent System Operator, Inc.

cc: Parties of Record
Gretchen Kershaw, Esq. (Law Clerk to Judge Sterner)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc. and International Transmission Company d/b/a ITC*Transmission*

Docket No. ER11-1844-002

ANSWER OF NEW YORK INDEPENDENT SYSTEM OPERATOR, INC. IN OPPOSITION TO MOTION OF MIDWEST INDEPENDENT TRANSMISSION SYSTEM OPERATOR, INC. TO SUPPLEMENT THE RECORD

To: The Honorable Steven L. Sterner
Presiding Administrative Law Judge

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2012), the New York Independent System Operator, Inc. ("NYISO") hereby submits this answer in opposition to the motion filed by the Midwest Independent Transmission System Operator, Inc. ("MISO") on November 14, 2012 to supplement the record in the referenced proceeding (the "MISO Motion").

The New York Transmission Owners have authorized the NYISO to state that they support the NYISO's answer to the MISO Motion. The NYISO and the New York Transmission Owners are referred to collectively in this answer as the "New York Parties."

The Presiding Judge should deny the MISO Motion because:

- Precedent demonstrates that denial is appropriate; and
- Granting the motion would be highly prejudicial to the New York Parties and would violate due process.

If, despite the many factors requiring denial of the MISO Motion, the Presiding Judge decides to grant the MISO Motion, due process dictates that the Presiding Judge

establish procedures to permit a fair opportunity for the New York Parties to obtain and analyze the data that underlies the MISO's proposed new exhibits, and be granted an opportunity to respond to the contentions in the MISO Motion, and to MISO's proposed exhibits.

I. APPLICABLE PRECEDENT DICTATES THE DENIAL OF THE MISO MOTION

A review of Rule 716 of the Commission's Rules of Practice and Procedure,[1] the orders cited in the MISO Motion, and of other applicable Commission precedent demonstrates that the MISO Motion should be denied. The *SFPP* example cited by MISO provides no support for the MISO Motion.

A. *SFPP, L.P.*

The Administrative Law Judge's decision in *SFPP, L.P.* ("*SFPP*") that MISO discusses on page 5 of its Motion involved a significantly different set of circumstances from those presented in instant proceeding. *SFPP* does not support the MISO Motion.

As a preliminary matter, the Presiding Judge in *SFPP* did not include in his order a justification for granting the SFPP motion,[2] so there are no decisional principles that can be applied to the MISO Motion. In fact, the Presiding Judge in *SFPP* reached his decision based on the understanding that he would *not* be creating a precedent to be followed in other cases.[3] Furthermore, none of the parties appealed the procedural decision in *SFPP* to the

[1] MISO failed to cite the governing rule, Rule 716, 18 C.F.R. § 385.716 (2012), in its Motion

[2] SFPP, L.P., Docket No. IS09-390-002, Order Granting Motion to Re-Open and Supplement Record (Nov. 30, 2009) (Cianci, Jr., ALJ).

[3] SFPP, L.P., Docket No. IS09-390-002, Transcript for November 12, 2009, at 2689:16-17 ("Well, you know, what I do here, is really not going to be a precedent for anything else."); *id.* at 2689:23-25 ("I don't think anybody will be asserting my opinions, but I guess we can wait and see.").

Commission,[4] so there is no Commission ruling addressing the Presiding Judge's decision to re-open the record in Docket No. IS09-390-002.

SFPP filed its motion to re-open the record 14 days before the due date for post-hearing reply briefs.[5] SFPP submitted the additional evidence at that time "to provide all participants an opportunity, if they desire, to comment on the volume data in their reply briefs."[6] In contrast, MISO filed its motion 14 days *after* the due date for post-hearing reply briefs.

Further, SFPP offered into the record the actual data in question (oil pipeline volume throughput data) through an affidavit.[7] In contrast, MISO does not offer data. Rather, MISO's exhibits contain only a self-serving summary assessment of a set of data that MISO has not made available to the New York Parties. In addition, MISO has not identified a sponsoring witness to present a proper foundation for the proposed new exhibits, or to attest to their accuracy.

None of the evidence SFPP proffered was available until after the record had closed in that proceeding. By contrast, more than half of the evidence MISO seeks to introduce (the August data and some of the September data) was available to MISO before the hearing ended and the record had closed. All of the exhibits MISO proposes to introduce were available prior to the October 31 due date for reply briefs.

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[4] Specifically, *SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121 (2011) does not indicate that any of the parties asked the Commission to overturn the presiding judge's order to re-open the record.

[5] SFPP, L.P., Docket No. IS09-390-002, Motion of SFPP, L.P. to Supplement the Record (Oct. 16, 2009).

[6] *Id.* at 1.

[7] *Id.*, Affidavit of James B. Kehlet at ¶ 4.

Finally, unlike the instant proceeding, the *SFPP* proceeding involved a broader range of parties agreeing that the supplemental evidence being offered was very significant and went to "the heart of the case," a key factor in identifying whether "extraordinary circumstances" justify reopening the record.[8] Before SFPP filed its motion to supplement the record, SFPP had stated in its initial post-hearing brief that volume throughput was "the central issue" in the case. Also, before SFPP filed its motion, one shipper opposing SFPP's position in the case identified volume throughput in its initial post-hearing brief as "the key issue," while another adverse shipper identified volume throughput as one of the four major issues in the case.[9]

MISO has not argued or otherwise demonstrated that the key to this proceeding is the MI/ON PAR operating data. To the contrary, Joint Applicants did not submit any PAR operating data in support of the Joint Application. The NYISO is the only party that has offered data on the actual operation of the MI/ON PARs into the record in this proceeding. The Joint Applicants have argued that the NYISO should be precluded from advancing any arguments regarding the efficacy of the MI/ON PARs based on "short term PAR operating data."[10] Nonetheless, MISO proposes the extraordinary procedural maneuver of re-opening the record to admit additional data addressing the operation of the MI/ON PARs and Lake Erie loop flow. MISO's request should be rejected.

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[8] *SDG&E* at P 26.

[9] *Id.* at 4 (quoting initial post-hearing briefs).

[10] MISO Motion at 2.

B. *Midwest Independent Transmission System Operator, Inc.*

MISO also relies on *Midwest Independent Transmission System Operator, Inc.*,[11] a case pertaining to the creation of a pricing zone within MISO. In that case the Michigan Public Service Commission ("MPSC") lodged its own administrative determination in the proceeding and the Commission adopted a seven factor test analysis performed by the MPSC in its determination to modify the parties' settlement and limit the assets reflected in the new zonal rates.[12] Subsequently, after extensive discussions between the parties, the MPSC revised its administrative determination to include additional facilities as transmission facilities eligible for the new pricing zone and the parties also revised their settlement agreement to incorporate the MPSC's revised findings.[13] Naturally, the Commission granted MPSC's unopposed motion to lodge its revised administrative determination because it was an essential document in the proceeding that was relied on by both the Commission and the parties.[14] Unquestionably, MPSC's revised administrative determination went to the heart of the matter in the settlement of that proceeding, whereas here, the MISO Motion only seeks to address one of the many arguments supporting dismissal of the Joint Application.

The MISO Motion is an unwarranted attempt to take advantage of an unusual and disfavored procedural measure meant only for extraordinary circumstances while failing to meet any of the elements or requirements of the standard for approving motions to re-open the record. MISO's arguments must be rejected and its motion denied.

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[11] 112 FERC ¶ 61,351 (2005).

[12] *Id*. at P 8.

[13] *Id*. at PP 13, 14, 20.

[14] *See id*. at PP 15, 19.

C. *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services*

MISO cites (at 5) to *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services*[15] ("*SDG&E*") in support of its motion to supplement the record. However, in *SDG&E*, the motion to supplement was denied by the Commission. Specifically, the Commission stated:

> Reopening a proceeding generally requires a change in fact, law or public interest [citing 18 C.F.R. § 385.716(c) (2008)]. To persuade the Commission to exercise its discretion to reopen the record, a party must demonstrate extraordinary circumstances that outweigh the need for finality in the administrative process [citing *U.S. Dept. of Energy – Western Area Power Administration*, 100 FERC ¶ 61,194, at P 17 (2002)]. The movant must show a change in circumstances that is more than just material; the change must go to the very heart of the case [citing *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,624 (1991)].[16]

As the movant failed to do in the *SDG&E* case, MISO has not alleged or demonstrated a change in fact, law or public interest, any extraordinary circumstances, or any change in circumstances that is (a) more than just material, and that (b) goes to the very heart of the case. MISO's Motion essentially admits that its evidence does not go to the heart of the case and merely represents an opportunity to respond to one of many arguments the NYISO made. MISO stated that it is submitting this evidence "since NYISO and its supporters have attached such significance to short term PARs operating data."[17] MISO's statement indicates that MISO does not view short term PARs operating data as going to the heart of the case.

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[15] 127 FERC ¶ 61,269 (2009).

[16] *SDG&E* at P 26.

[17] MISO Motion at 2.

Other than MISO's offhand statement about what the NYISO and its supporters believe, MISO did not submit any other argument or evidence to show that short term PAR operating data goes to the heart of this proceeding. The NYISO is the only party that has offered data on the actual operation of the MI/ON PARs into the record in this proceeding. The Joint Applicants have argued that the NYISO should be precluded from advancing any arguments in this proceeding that attack the "efficacy of the PARs."[18] Nonetheless, MISO proposes the extraordinary procedural maneuver of re-opening the record to permit MISO to introduce unverified, self-serving, summary reports on the operation of the MI/ON PARs. MISO's request should be rejected.

D. *Interstate Power & Light Co. v. ITC Midwest, LLC*

The Commission's decision in *SDG&E* is consistent with other Commission precedent. For example, *Interstate Power & Light Co. v. ITC Midwest, LLC*, ("*Interstate Power*")[19] involved a complaint filed by Interstate Power and Light Company ("Interstate") against ITC Midwest, LLC ("ITC Midwest"), alleging ITC Midwest improperly implemented its formula rate for transmission service.[20] Interstate moved to reopen the record to admit testimony it filed in a retail rate case proceeding before the Iowa Utilities Board as well as its Form 8-K filing with the Securities and Exchange Commission.[21] Interstate argued that this evidence shows the effect on its customers of ITC Midwest's implementation of its transmission formula rate.[22] Interstate explained that the documents

[18] *See* Initial Post Hearing Brief of the Joint Applicants at 39-41.

[19] 135 FERC ¶ 61,162 (2011).

[20] *Id*. at P 1.

[21] *Id*. at P 12.

[22] *Id*.

were not duplicative of evidence already in the record and did not become available until after it submitted its complaint, but that the documents were publicly available records that were readily available to ITC Midwest.[23]

The main issue in the *Interstate Power* proceeding was whether ITC Midwest was improperly implementing its formula rate in a way that caused excessive cost increases and resulted in unjust and unreasonable charges.[24] Interstate's new evidence showed the effect of the proposed service charge increase on Interstate's customers. The Commission denied Interstate's motion, reiterating its policy against reopening the record except in extraordinary circumstances. The Commission held:

> the requesting party must demonstrate the existence of extraordinary circumstances, which are not merely material but rise to the level of a change in core circumstances that go to the very heart of the case [*Cal. Indep. Sys. Operator Corp*., 121 FERC ¶ 61,193, at P 14 (2007)]. The Commission's policy against reopening the record except in extraordinary circumstances is based on the need for finality in the administrative process [*id*. (citing *CSM Midland Inc*., 56 FERC P 61,177, at 61,624 (1991))]. We find that the new availability of Mr. Aller's testimony and Interstate's Form 8-K filing do not rise to the level of extraordinary circumstances, thus we deny Interstate's motion to reopen the record.[25]

Docket No. ER11-1844 turns on many issues, only one of which is the actual efficacy of the MI/ON PARs in conforming actual power flows to scheduled power flows at the MI/ON Interface. The Commission has repeatedly stated, "[t]o persuade the Commission to exercise its discretion to reopen the record, a party must demonstrate extraordinary circumstances that outweigh the need for finality in the administrative

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[23] *Id*.

[24] *Id*. at PP 1-3.

[25] *Id*. at P 23.

process."[26] The Commission has explained that requiring a showing of extraordinary circumstances is necessary to prevent "administrative chaos."[27] Therefore, any alleged benefit from re-opening the record in this case must be weighed against the potential harm.

Re-opening the record at this juncture would be fundamentally unfair to the New York Parties for three reasons. First, the New York Parties used the exhibits that were in the evidentiary record to formulate the arguments that they included in their initial and reply briefs. The New York Parties reasonably expected MISO and ITC to do the same. MISO did not submit its request to supplement the record with additional exhibits until after the initial briefs and reply briefs were filed. Had MISO informed the Presiding Judge and the other parties of its desire to update the record with additional PAR operating data before the evidentiary record was closed, and before the initial and reply briefs were filed, all parties would have possessed an equal opportunity to incorporate the supplemental data into their arguments. Due to MISO's failure to provide timely notice to all parties of its desire to supplement the record with additional Lake Erie loop flow and MI/ON PAR operating data, the significant tardiness of the MISO Motion is highly prejudicial to the New York Parties.

Second, had MISO made its request to admit supplemental MI/ON PAR operating data and Lake Erie loop flow data prior to the close of the hearing on the merits MISO would have been stuck with the additional data, regardless of whether MISO believed the additional data helped or hurt the Joint Applicants' cause. By delaying its request, MISO gained the opportunity to review and assess the data before it decided to tender the MISO

[26] *See, e.g., SDG&E* at P 26 citing *U.S. Dept. of Energy – Western Area Power Administration*, 100 FERC ¶ 61,194, at P 17 (2002).

[27] *See San Diego Gas and Elec. Co. v. Sellers of Market Energy and Ancillary Servs.*, 127 FERC ¶ 61,269 at P 35 (2009).

Motion. MISO would not have submitted its Motion if MISO felt that the supplemental data was harmful to its case. This procedural advantage is entirely inappropriate.[28]

The third problem with the data MISO seeks to use to supplement the record is that MISO proposes to introduce a series of reports that it prepared that contain statistical data that addresses the operation of the MI/ON PARs and Lake Erie loop flow, but MISO has not provided to the New York Parties, and is not proposing to introduce, the data that underlies the reports MISO compiled and that the New York Parties would need to respond to MISO's proposed new exhibits. The New York Parties would require a complete set of Exhibit NYI-66 data covering the entire July 19, 2012 through November 13, 2012 period in order to respond to MISO's proposed new exhibits.

Weighing the benefits against the detriments, the benefit for MISO is an unwarranted "second bite at the apple" and an opportunity to re-respond to one of many arguments made by the New York Parties in this proceeding. The harms to the New York Parties are (a) the unexpected introduction of new/additional evidence after the New York Parties' initial and reply briefs have already been submitted, and (b) an inability to adequately respond to MISO's proposed new exhibits, because MISO, ITC and IESO are the custodians of the data that the New York Parties would require in order to be able to respond on an equal footing. The balance of equities weighs against re-opening the record in this case. MISO advances

[28] The NYISO's opposition to the MISO Motion on procedural grounds should not be interpreted as suggesting that the New York Parties agree with MISO's premise that the MI/ON PARs operated effectively over the July 18, 2012 to November 13, 2012 period. Presumably, the data that MISO submitted contains the arguments and statistics that are most favorable to the Joint Applicants' case. As explained in Sections III and IV of this answer, there are obvious gaps and errors in the data that MISO submitted, and in the claims that MISO made in its Motion. The evidentiary record in this proceeding is closed and it would be entirely inappropriate to require the New York Parties to perform additional analysis at this late juncture to defend their position. However, if the New York Parties are given all of the data they require to assess the MI/ON PARs operating effectiveness (the necessary data is identified in Section IV of this answer), and are granted a reasonable amount of time to respond by the Presiding Judge, the New York Parties will respond.

no reason why the normal course of this proceeding should be disturbed. The record should not be allowed to be muddied by a collection of new self-serving statements by MISO. The MISO Motion should be denied.[29]

II. GRANTING THE MISO MOTION WOULD BE HIGHLY PREJUDICIAL TO THE NEW YORK PARTIES AND WOULD VIOLATE DUE PROCESS

For numerous reasons, it would be extremely prejudicial and a violation of due process to grant the MISO Motion and admit MISO's attached documents, especially when the date of the Initial Decision is only five weeks away.

First, the data attached to the MISO Motion is summary data that appears to address the operation of the MI/ON PARs; however, MISO does not provide the underlying source data for the New York Parties to review and test MISO's claims. If the MISO had provided its proposed new exhibits with its testimony in this proceeding, the New York Parties would

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[29] *See also San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 133 FERC ¶ 61,014 at P 24 (2010):

> The Commission may reopen the record in its discretion where there is good cause [18 C.F.R. § 385.716 (2010)]. The Commission views good cause as consisting of extraordinary circumstances, that is, a change in circumstances that is more than just material, but goes to the very heart of the case [*CMS Midland, Inc*., 56 FERC ¶ 61,177, at 61,624, *reh'g denied*, 56 FERC P 61,361 (1991)]. In deciding whether to exercise its discretion, "the Commission looks to whether or not the movant has demonstrated the existence of extraordinary circumstances that outweigh the need for finality in the administrative process" [*East Texas Elec. Coop. Inc. v. Central & South West Serv., Inc*., 94 FERC ¶ 61,218, at 61,801 (2001)]. As the Commission has previously explained, "we recognize of course that changes have occurred since the close of the record. But such changes always occur. Yet litigation must come to an end at some point. Hence, the general rule is that the record once closed will not be reopened." [*Transwestern Pipeline Co*., Opinion No. 238, 32 FERC ¶ 61,009 (1985), *reh'g denied*, Opinion No. 238-A, 36 FERC ¶ 61,175, at 61,453 (1986)].

See also, e.g., In re Lichoulas, 125 FERC ¶ 61,195 at PP 10-11 (2008) ("Mr. Lichoulas' motion fails to meet the standard for reopening the record"); *Cal. Indep. Sys. Operator Corp. v. Cal. Indep. Sys. Operator Corp*., 121 FERC ¶ 61,193 at PP 14-15 (2007) ("[w]e find that Powerex has failed to demonstrate the existence of "extraordinary circumstances" that would warrant reopening the record"); *California Independent System Operator Corporation*, 120 FERC ¶ 61,271 at PP 54-55 (2007) ("[u]pon consideration of State Water Project's motion, we find that it has failed to demonstrate the existence of 'extraordinary circumstances' that would lead us to reopen the MRTU record"); *Weaver's Cove Energy, LLC, et al*., 115 FERC ¶ 61,058 at P 10 (2006) ("[w]e find that movants have not met that burden and will deny their requests to reopen"); *The Detroit Edison Company, et al*., 105 FERC ¶ 61,209 at P 29 (2003) ("[t]he movant must demonstrate a change in circumstances that goes to the very heart of the case. Detroit Edison has not done so.) (footnote omitted).

have been able to obtain the underlying source data as workpapers, or through discovery, and to question MISO's witnesses about the veracity of the claimed performance of the MI/ON PARs and the Replacement PARs.

Second, the MISO Motion is not accompanied by sworn MISO testimony attesting to the veracity of the loop flow and PAR operating data referenced in the proposed exhibits. At the hearing, MISO disclaimed responsibility for a portion of the MI/ON PAR operating data it had provided to the NYISO in discovery, stating that the "source of the information originally is IESO."[30] In fact, MISO called into question the accuracy of a subset of the Exhibit NYI-66 PAR data that it provided to the NYISO, despite the fact that a MISO employee attested that its data responses were "true and correct, to the best of [his] knowledge, information and belief."[31] Given the spotty accuracy of the MI/ON PAR operating data MISO has previously submitted in this proceeding, it would be completely inappropriate to admit MISO's data without first carefully testing its accuracy.

Third, there has been no opportunity for the New York Parties to subject the documents or data in MISO's proposed new exhibits to the same scrutiny and cross-examination of sponsoring witnesses as documents or data produced by MISO (or NYISO) in discovery or offered as exhibits to MISO's (or NYISO's) sworn testimony. Nor is there any opportunity to respond through briefs to the new evidence MISO is asking the Presiding Judge to admit. Under these circumstances, granting the MISO Motion would be

[30] Tr. 923:16-17.

[31] *See* "Affidavit of Kevin Frankeny" accompanying MISO responses to 11th set of NYISO data requests. Several of these responses, including the large spreadsheet with 5-minute loop flow and PAR operating data, became Exhibit NYI-66.

prejudicial, and the lack of an adequate opportunity to respond would be a denial of due process.[32]

Fourth, the timing of the MISO Motion, when juxtaposed with the time periods to which MISO's proposed exhibits relate, provides more than sufficient reason to reject the MISO Motion as highly prejudicial to the New York Parties. The New York Parties are at a loss to understand how MISO can make the assertion (at 6) that "the supplemental material is being provided at a relatively early stage in the decisional process." A check of the calendar refutes the assertion that the MISO Motion is timely in any sense. The untested August and early September loop flow and operational data referred to in proposed Exhibits MSO-11 and part of proposed exhibit MSO-12 address a period of time when the record was still open. The hearing on the merits concluded on September 13, 2012. MISO did not seek admission of any supplemental MI/ON PAR operating data or Lake Erie loop flow data at the hearing. The data that MISO now seeks to admit is incomplete (it omits approximately two weeks of July data, and does not include data addressing the last week of October, or the month of November), was not sponsored by an attesting witness, and has not been subjected to cross-examination. MISO provides no explanation or valid excuse for its failure to offer its evidence, sponsored by an attesting witness, prior to the conclusion of the hearing on the merits in this proceeding.

Fifth, even if one disregards the formal procedural schedule in this proceeding (as MISO proposes to do), MISO's submission is extremely tardy. MISO gave the last of the

[32] As explained by the Commission, "In *Office of Consumers' Counsel, Ohio v. FERC*, the United States Court of Appeals for the District of Columbia Circuit has held that, in a case in which an ALJ has conducted a hearing, the Commission should not rely on new evidence presented in a post-hearing pleading, without giving other parties an opportunity to respond." *Northwest Pipeline Corp.*, 92 FERC ¶ 61,287 at pp. 62,014-15 (2000) (footnote omitted).

presentations it now proposes to include in the record as exhibits on October 23, 2012. MISO did not submit its Motion until November 14, 2012; twenty-two days after its **last** stakeholder presentation. Reply briefs were due in this proceeding on October 30, 2012. Since all of the data used to develop MISO's proposed evidentiary submission was complete by October 23, 2012, MISO could have made a motion prior to the due date for the reply briefs to extend the time to file the reply briefs to permit discovery on the new data so that it could properly be addressed in reply briefs. Rather than timely submitting the data it wanted to include in the record, MISO waited an additional 22 days, until well after reply briefs were filed, so that the New York Parties had no opportunity to consider or address MISO's proposed new evidence while preparing their reply briefs. The MISO Motion provides no explanation or excuse for its highly prejudicial 22-day delay.

MISO's delay deprived the New York Parties of *any* opportunity (however unfairly short it would have been) to respond to the purported data in briefs without disrupting the Presiding Judge's decisional schedule. If MISO had filed its motion prior to the reply brief due date, the New York Parties could have been granted a reasonable period of time (which would have required an extension of the reply brief due date) to analyze the documents, issue and receive responses to discovery requests, reopen hearing procedures as necessary to allow cross-examination, and respond to MISO's proposed new exhibits in the reply briefs. MISO's failure to file a motion seeking permission to submit additional PAR operating and loop flow data before the record closed or, absent that, prior to the due date for the reply briefs, suggests that MISO seeks to gain a prejudicial advantage through surprise and gamesmanship. The Presiding Judge should not countenance such activities and should reject MISO's Motion.

III. THE DATA MISO SUBMITTED AND THE FACTUAL ASSERTIONS IN MISO'S MOTION CONTAIN READILY APPARENT INFIRMITIES

The unverified information in the proposed Exhibit MSO-11 through MSO-13 powerpoint presentations actually says very little about the ability of the MI/ON PARs to control Lake Erie loop flow. Instead, what the data appears to show is that average loop flow was relatively low during the time periods covered by the MISO stakeholder presentations.

MISO and IESO operate the MI/ON PARs to achieve a +/-200 MW Control Band. MISO's estimate of the average absolute value of Lake Erie loop flow *without* PAR control was approximately 207.3 MW in August[33] and 221.8 MW for the Sept. 22, 2012 to Oct. 23, 2012 period.[34] MISO's estimated average absolute value of Lake Erie loop flow *without* PAR control was approximately 199.7 MW (*i.e.*, within the +/-200 MW Control Band) for the month of September.[35] MISO's own estimates of what the average absolute value of Lake Erie loop flow would have been without the MI/ON PARs in service were very close to the +/-200 MW Control Band for the time periods addressed in proposed exhibits MSO-11 through MSO-13 without the need for MI/ON PAR control of Lake Erie loop flow.[36]

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[33] *See* proposed Ex. MSO-12 at 5 (based on the "Loop Flow without PARs" statistics in MISO's proposed exhibits, NYISO calculated the average absolute value of Lake Erie loop flow by multiplying the absolute value of the average clockwise loop flow by the time clockwise (%) and adding the absolute value of the average counterclockwise loop flow multiplied by the time counterclockwise (%) for each time period. For example, the calculation for August is the following; (220.4 * 0.494) + (194.5 * 0.506) = 207.3 MW.)

[34] *See* proposed Ex. MSO-11 at 3.

[35] *See* proposed Ex. MSO-12 at 5.

[36] While the term "without PARs" is not defined in the MISO submission, the NYISO understands the phrase refers to a MISO-calculated value of what Lake Erie loop flow would have been if none of the four circuits that comprise the MI/ON Interface were PAR controlled. *See* NYISO Initial Brief at 135-136 (discussing MISO's estimated loop flow values that were included in Column Five and Column Six of Exhibit NYI-66).

On page 5 of the MISO Motion, MISO makes five statements that do not make sense, and that are not supported by the new evidence that MISO is asking the Presiding Judge to admit into the evidentiary record. Specifically, MISO asserts that proposed exhibits MSO-11 through MSO-13 show that, following the initial shakedown period:

- all of the Michigan-Ontario PARs have consistently been in service,
- the Bunce Creek PARs have had the ability to control loop flow within the 200 MW deadband specified in the operating agreements nearly all of the time (indicated by the IDC status flag being set in the regulated mode 97-99% of the time),
- the Bunce Creek PARs have controlled loop flow within the 200 MW deadband 80-85% of the time, and
- the Bunce Creek PARs have actually demonstrated a maximum loop flow capability of up to 800 MW, all well in excess of original estimates.
- In addition, the exhibits confirm that MISO has now implemented the PARs-related pricing change to which NYISO has attached such significance.

Addressing each of the bulleted statements in turn, MISO's contention that all of the MI/ON PARs have been in service post July 18, 2012 does not appear to be consistent with a statement on slide 2 of proposed Exhibit MSO-13. The proposed exhibit states that there were "[a] couple of short single PAR outages (1 day)."

Following MISO's statement that "all of the Michigan-Ontario PARs have consistently been in service," MISO then makes several nonsensical statements about how the "Bunce Creek PARs" have controlled Lake Erie loop flow. ITC has admitted that the Bunce Creek PARs are not capable of controlling Lake Erie loop flow on their own.[37]

[37] *See* Ex. NYI-37 ("Some loop flow mitigation could occur by operating ITC's B3N PARs in isolation of the operation of the Ontario PARs on the interface, but the results would be sub-optimal, and be contrary to NERC compliance requirements.").

NYISO assumes that MISO's statements instead address the collective operation of all of the MI/ON PARs.

In the second bullet, MISO suggests that the MI/ON PARs have "had the ability" to control loop flow within the +/-200 MW MI/ON PAR operating Control Band nearly all of the time because the NERC IDC flag has been set to regulated mode 97-99% of the time. However, the third bullet states that actual power flows have only been in the Control Band 80-85% of the time.

Without access to the underlying data, NYISO cannot determine how often the MI/ON PARs actually achieved the +/-200 MW Control Band. Assuming *arguendo* that MISO's 80-85% claim is accurate, that shows that approximately 15% of the time, MISO and IESO are setting the NERC IDC flag for the MI/ON PARs to "Regulated Mode" at times when the MI/ON PARs should be in "Non-Regulated Mode."[38] The NYISO explained the reliability concerns presented by MISO's and IESO's inaccurate setting of the NERC IDC flag on pages 77 to 80 of its Reply Brief. MISO's additional data does nothing to dispel those concerns.

MISO's claim that the IDC flag is being set appropriately, despite the fact that MI/ON Interface flows were outside the +/-200 MW Control Band 15% of the time that the IDC flag was set to "Regulated," is inconsistent with statements that MISO made in pleadings that MISO filed with the United States Department of Energy ("DOE"):

> Taken together, the provisions of the CO2 [MI/ON PAR Operating Instruction] require that MISO and IESO take actions to regulate loop flow for as long as possible. When that ability is exhausted, and loop flow exceeds (or

[38] The IDC Flag is set to "regulated" 97-99% of the time but flows are within the +/-200MW control band only 80-85% of the time. The potential divergence ranges from 12% to 19%, so 15% is a reasonable average.

> is expected to exceed) +/-200MW, the IDC status flag will be set to "Non-Regulate."[39]

MISO's proposed new data shows that MISO is not living up to the commitments that it made to the DOE.

Exhibit NYT-35 is an e-mail discussion between MISO and ITC employees about the need to be able to escape the operating commitments that they undertook in the DOE Presidential Permit proceeding. In light of the statements in Exhibit NYT-35, it is not surprising to the New York Parties that MISO is now attempting to back out of its earlier commitment (in a pleading MISO filed with DOE) to set the NERC IDC flag in a timely and accurate manner.

Returning to the statements on page 5 of MISO's Motion, the final bullet states "the Bunce Creek PARs have actually demonstrated a maximum loop flow capability of up to 800 MW." However, none of the exhibits MISO submitted identify a period of time when the MI/ON PARs achieved 800 MW of control. The maximum claimed control the NYISO was able to locate in MISO's proposed exhibits was 710.3 MWs on page 5 of proposed Exhibit MSO-11. MISO's exhibits do not state how frequently, or for how long, this level of control was achieved. Evidence that *is* in the record in this proceeding shows the MI/ON PARs achieve 600 MW or more of loop flow control less than half of one percent of the time.[40]

On page five of its Motion, just below the five bullets, MISO states that it has implemented changes to the rules it uses to develop prices at the MI/ON Interface that

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[39] *See* Ex. NYI-10 at 7 of 14.

[40] *See* NYISO Initial Brief at 139-140 (using the data MISO provided in Exhibit NYI-66 to demonstrate that the MI/ON PARs achieved 600 MW or more of loop flow control in only 0.4% of intervals).

assume the MI/ON PARs will provide a greater degree of control over power flows that are scheduled at that interface.[41] However, MISO's new pricing rules only apply to schedules *at* the MI/ON Interface. MISO's pricing rules still assume that power scheduled (a) from MISO internal generators to MISO's internal loads, or (b) at *any* interface other than the MI/ON Interface, will continue to "loop" around Lake Erie and *will not be controlled by the MI/ON PARs*. The method that MISO now uses to develop Locational Marginal Prices in its markets *still* recognizes that the MI/ON PARs are not effective in controlling Lake Erie loop flow.

Finally, the incomplete data MISO submitted as proposed exhibits raises a host of questions that the Presiding Judge should consider carefully when assessing the merits of the MISO Motion. Questions related to gaps in the data that the MISO submitted include:

- Why didn't MISO include data covering July 19-31 in its submission?
- Why didn't MISO include data covering the period from October 23 through November 13 in its submission? In its stakeholder presentations MISO included data up to the day before the date of the presentation.
- Why didn't MISO provide the underlying data it relied on to create its summary statistics at the same level of detail and in the same format as the data MISO provided in discovery and the MISO used to create Exhibit NYI-66 to all parties at the same time it submitted proposed Exhibits MSO-11 through -13?
- Why did MISO use 15-minute average data instead of the 5-minute average data that was provided by MISO and entered in the record in Exhibit NYI-66?
- Why didn't MISO identify in Exhibits MSO-11 through -13 the percentage of the time when the MI/ON PARs were "fully mitigating" Lake Erie loop flow (that is, mitigating loop flow to near-zero[42]), the level of control that the Joint Application and accompanying testimony claimed the MI/ON PARs would achieve?

[41] *See* Ex. NYI-62 at 2 and Ex. NYI-70.

[42] *See* NYISO Initial Brief at 139 (loop flow is "fully mitigated" when it is "completely managed").

IV. IF THE PRESIDING JUDGE IS NONETHELESS DISPOSED TO GRANT THE MISO MOTION, FURTHER PROCEDURES SHOULD BE ESTABLISHED TO PERMIT A FAIR OPPORTUNITY TO OBTAIN THE UNDERLYING DATA AND RESPOND TO THE MOTION AND EXHIBITS

If, despite the many factors requiring denial of the MISO Motion, the Presiding Judge is disposed to grant the MISO Motion, due process dictates that he establish procedures to permit a fair opportunity for the New York Parties to obtain and analyze the data that underlies the MISO's proposed exhibits and be granted an opportunity to respond to the contentions in the MISO Motion and in the MISO's proposed exhibits. Otherwise, as discussed above, the New York Parties will be effectively and unfairly precluded from responding to the claims made in the MISO Motion and the proposed exhibits, in violation of due process.[43]

Even if the proposed exhibits had been submitted with sworn testimony attesting to the veracity of the referenced data, and even if the motion had been made earlier, other factors underscore the prejudice that would result from acceptance of the documents into the record. For example, proposed Exhibits MSO-11 through MSO-13 contain conclusory powerpoints and largely indecipherable graphs. By contrast, in the discovery, testimony, hearing and briefing phases of this proceeding, the parties had the opportunity to obtain and rely on detailed factual data regarding actual loop flow and PAR operating measures. Proposed Exhibits MSO-11 through MSO-13 do not contain this detailed factual data, and thus deprive the non-MISO/ITC parties of the opportunity to test the conclusory statements, or to discover other pertinent facts, including whether the operation of the MI/ON PARs had adverse impacts on the New York Parties.

[43] *See Northwest Pipeline Corp.*, 92 FERC ¶ 61,287, at pp. 62,014-15 (2000) (footnote omitted).

MISO has failed to provide with the MISO Motion any support for the proposed exhibits' conclusory statements that is comparable to the level of factual detail set forth in Exhibit NYI-66. That Exhibit, which was admitted by joint stipulation of MISO and the other parties and the facts of which were addressed in NYISO's briefs, contains data – *for every five minute interval* – on:

- 5 minute IESO-ITC average flow;
- 5 minute IESO-ITC average schedule;
- 5 minute average adjusted loop flow;
- 5 minute average adjusted loop flow;
- total PAR offset;
- actual loop flow;
- tap move performed;
- IDC status;
- B3N actual tap;
- L4D actual tap;
- L51D actual tap; and
- J5D actual tap.

Without this data the New York Parties cannot adequately test MISO's unsupported claims regarding the operation of the MI/ON PARs.

Specifically, MISO should be required to provide to the New York Parties:

- 5-minute interval data of the same type and detail and using the same calculation method as was used by MISO to produce the data that became Exhibit NYI-66, for the period from July 18, 2012 through November 13, 2012;

- An explanation of how each number offered in the presentations in proposed Exhibits MSO-11 through MSO-13 was calculated, and the underlying data on which each calculation was premised;

- An explanation of how MISO calculated the average loop flow without PARs, and how MISO calculated the PAR correction (along with a complete sample calculation of an actual PAR correction for one interval including all data inputs into the calculation and how/why each input is necessary to the calculation);

- Information addressing MI/ON PAR outages (if any) that occurred after July 18, 2012. Slide 2 of proposed Exhibit MSO-13, MISO states that there were "[a] couple of short single PAR outages (1 day)." If there were additional MI/ON PAR outages that occurred after July 18, 2012, MISO, ITC and IESO should be required to (a) identify the MI/ON PAR that was affected in each case and provide (b) the dates of the outages, (c) the duration of the outages, and (d) a detailed explanation of the reason for each outage; and

- An affidavit attesting to the accuracy of all of the data that MISO provides.

Failure to require MISO to produce all of the requested data and to permit the New York Parties to use the detailed data to respond would prejudice the New York Parties' ability to participate in this proceeding and to effectively present their position.

Once in receipt of all of the requested information, the New York Parties should be provided a reasonable period of time to analyze this data and information, and to submit supplemental testimony and/or briefs to respond to MISO's new contentions. Once the New York Parties are in receipt of all of the data requested above, it would be reasonable to grant the New York Parties 22 days to respond. The proposed 22 days would be appropriate because (a) it is the same amount of time that MISO waited to submit its motion after it gave the last stakeholder presentation, and (b) the New York Parties estimate that three weeks is the amount of time they would reasonably require to review/analyze the data and prepare responsive pleadings.

V. CONCLUSION

Wherefore, for the reasons explained in Sections I through III of this answer, the Presiding Judge should reject the MISO Motion because granting it would be highly prejudicial and would deny the New York Parties due process of law. In the alternative, should the Presiding Judge choose to grant the MISO Motion, the Presiding Judge should require Joint Applicants to provide the data identified in, and establish the procedures specified in Section IV of this answer.

Respectfully submitted,

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November 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this 19th day of November, 2012.

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