

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

Midcontinent Independent System)
Operator, Inc.) Docket No. ER20-1926-000

COMMENTS OF AMERICA’S POWER AND THE LIGNITE ENERGY COUNCIL

America’s Power and the Lignite Energy Council are two of the group of entities expected to join the new affiliate sector of the Midcontinent Independent System Operator, Inc. (“MISO”) Advisory Committee¹ that MISO proposes in the Federal Power Act (“FPA”) Section 205 filing that is pending in the above-captioned docket.² As MISO has made clear in the filing, its proposal as to the affiliate sector is intended to be in place only on a temporary basis and will be replaced when a permanent proposal can be developed and filed with the Federal Energy Regulatory Commission (the “Commission”) for approval.³ America’s Power and the Lignite Energy Council appreciate the efforts that have been made by MISO and its Board of Directors that led to this filing. They support what MISO is proposing as a temporary solution, because, after about two years of effort to

¹ The mission statement of the Advisory Committee is set forth in its charter, which indicates that “the Advisory Committee shall be a forum for its members to be apprised for the MISO’s activities and to provide information and advice to the management and Board of Directors of the MISO on policy matters of concern to the Advisory Committee, or its constituent stakeholder groups, but neither the Advisory Committee nor any of its constituent groups shall exercise control over the Board or the MISO. The charter is available here: <https://www.misoenergy.org/stakeholder-engagement/committees/advisory-committee/> (last visited June 10, 2020).

² Midcontinent Independent System Operator, Inc., Revisions to Rate Schedule 1 to Establish a New Affiliate Sector for the Advisory Committee (“MISO Filing”).

³ *Id.* at 2.

get to this point, it is critical that they and others like them have a seat at the Advisory Committee table promptly.

The MISO proposal is more just and reasonable than the *status quo*. *However, and importantly, more needs to be done quickly to ensure non-discriminatory treatment in the MISO Advisory Committee process of entities such as America's Power and the Lignite Energy Council consistent with the requirements of the FPA.* Accordingly, America's Power and the Lignite Energy Council ask that the Commission's order implement the temporary Tariff change MISO proposes, find that further changes are needed consistent with the FPA, and provide guidance relating to just, reasonable and non-discriminatory Tariff provisions⁴ that should be filed to effectuate the permanent solution to fair Advisory Committee representation by a date certain, all as explained further herein.

I. DESCRIPTION OF AMERICA'S POWER AND THE LIGNITE ENERGY COUNCIL

A. America's Power

America's Power⁵ is a national trade organization that advocates at the federal and state levels on behalf of coal-fueled electricity and the coal fleet. Its membership is comprised of major industries — electricity generators, coal producers, railroads, barge operators, and equipment manufacturers — involved

⁴ Rate Schedule 1 of MISO's Open Access Transmission, Energy and Operating Reserves Market Tariff, Article Two, Section VI, Advisory Committee & Bylaws.

⁵ Formerly known as American Coalition for Clean Coal Electricity or ACCCE.

in generating electricity from coal.⁶ The coal fleet is a critical part of the nation's electricity supply because it is a reliable, resilient and fuel secure source of 24/7 baseload power; contributes to fuel diversity; produces affordable electricity; and serves as an insurance policy when other fuels are too expensive or not available. The coal fleet was responsible for supplying roughly 20 percent of U.S. electricity needs last year.

America's Power has a policy interest in joining the MISO Advisory Committee because the coal fleet was responsible for 44 percent of MISO's electricity generation—more than any other source—last year, and the fleet represented approximately 31 percent of MISO's electricity generating capacity, second only to natural gas. Some 16,500 megawatts (MW) of MISO's coal-fired generating capacity retired during the past decade, and more than 19,000 MW is expected to retire in the future based on announcements by the owners. America's Power and others are concerned about the threat to grid reliability and resilience and the loss of fuel security caused by the avoidable retirement of coal-fueled generating capacity.

⁶ America's Power's members include: Alliance Resource Partners L.P., Associated Electric Cooperative Inc., Berwind Natural Resource Corporation, Big Rivers Electric Corporation, BNSF Railway, Buckeye Power, Inc., Caterpillar Inc., CONSOL Energy, Crouse Corporation, CSX, Carbon Utilization Research Council, Drummond Company, Inc., GMS, Indiana Coal Council, Inc., JENNMAR, John T. Boyd Company, Kentucky Coal Association, Kentucky River Coal Corporation, Komatsu Mining, Murray Energy Corporation, Natural Resource Partners L.P., Norfolk Southern Corporation, Oglethorpe Power Corporation, Peabody Energy, PowerSouth Energy Cooperative, Prairie State Generating Company, , LLC, Rosebud Mining Company, Union Pacific Railroad, and Western Fuels Association.

B. The Lignite Energy Council

The Lignite Energy Council serves as a regional trade association representing lignite producers, major electric utilities and approximately 250 businesses providing goods and services to the mines and plants in the Upper Midwest. Its members work together to provide affordable and reliable electricity to consumers in the MISO energy market located in North Dakota, South Dakota and Minnesota. In addition, the Lignite Energy Council is working in a partnership with the Department of Energy, the State of North Dakota and the University of North Dakota on several technology projects to enhance efficiencies and reduce emissions from existing power plants.

The Lignite Energy Council has a policy interest in joining the MISO Advisory Committee because on any given day of the year, especially in the cold winter or the hot summer months, coal accounts for a substantial portion of the generation fuel mix on the MISO grid. Its members' generation fuel provides baseload power, grid stability, dispatchability and 24/7 reliability when consumers and industry need it the most. The lignite industry is unique because its power plants are sited next to the mines, giving it unequalled resilience during difficult weather events. The Lignite Energy Council has been instrumental in prompting MISO to form this new affiliate stakeholder group that would make the MISO sector process more inclusive to all points of view on electricity generation.

II. BACKGROUND

As MISO indicated in its filing, its Advisory Committee has evolved over time to its present structure comprised of ten sectors with a total of twenty-five representatives.⁷ The ten sectors are (1) transmission owners; (2) municipal utilities, electric cooperatives and transmission dependent utilities; (3) independent power producers and exempt wholesale generators; (4) power marketers and brokers; (5) end use customers; (6) state regulators; (7) public consumers; (8) environmental and other; (9) coordination member; and (10) competitive transmission developers. Of these, the first seven (transmission owners; municipal utilities, electric cooperatives and transmission dependent utilities; independent power producers and exempt wholesale generators; power marketers and brokers; end use customers; state regulators; and public consumers) are members of MISO. The last three (environmental and other, coordination member, and competitive transmission developers) are non-members of MISO. Notwithstanding their non-member status, these latter sectors were afforded voting rights on the Advisory Committee such that all of the current twenty-five representatives have voting rights. For example, as to the environmental and other sector, MISO explained:

The entities comprising the environmental and other stakeholder group on the Advisory Committee are not members of MISO; rather, they are representatives of stakeholder groups serving on the Advisory Committee, which have been chosen by recognized environmental and other stakeholder organizations having an interest in the activities of MISO. The entities comprising this special

⁷ MISO Filing at 3.

interest group have been granted voting rights in MISO’s stakeholder process.⁸

MISO provided a similar explanation as to non-members categorized as coordination members and competitive transmission developers.

The table below⁹ depicts the changes to the sectors and representatives afforded to each sector of the Advisory Committee over time:

Sector	1/15/1998 Original Filing	11/20/2000 MAPP COR Integration	9/16/2013 MISO South Integration	5/2/2014 Create CTD (and Current List)
Transmission Owners	2	3	3	3
Muni / Coop / TDU	2	3	3	3
IPP / EWG	2	3	3	3
Power Marketer / Broker	2	3	3	3
End Use Customers	2	3	3	3
State Regulators	2	3	4	4
Public Consumers	1	2	2	2
Environmental and Other	1	2	2	2
Coordination Member	Not Applicable	1	1	1
Competitive Tx Developers	Not Applicable	Not Applicable	Not Applicable	1
Total Representatives:	14	23	24	25

Beginning in 2018, the Lignite Energy Council approached MISO seeking to join an appropriate sector of the Advisory Committee.¹⁰ In light of the

⁸ <https://cdn.misoenergy.org/Current%20Members%20by%20Sector95902.pdf>. (last visited June 16, 2020).

⁹ This table can be found at page 4 of History of the transmission owners Agreement (TOA): *Sector creation, allocation of votes, definitions* available at [https://cdn.misoenergy.org/20200520%20AC%20Item%2003a%20History%20of%20the%20Transmission%20Owners%20Agreement%20\(TOA\)447231.pdf](https://cdn.misoenergy.org/20200520%20AC%20Item%2003a%20History%20of%20the%20Transmission%20Owners%20Agreement%20(TOA)447231.pdf) (last visited June 9, 2020).

¹⁰ See e.g., the June 9, 2019 comments of the Lignite Energy Council posted at <https://www.misoenergy.org/stakeholder-engagement/stakeholder-feedback/ac-sector->

constitution of each of the sectors depicted in the above table, the Lignite Energy Council appeared to fit best in the “other” category of the environmental and other sector.¹¹ However, despite that, in light of the remaining sectors’ descriptions, “other” best described the Lignite Energy Council, the members of the environmental sector were resistant to the addition of additional entities with which they perceived a non-alignment of interests.

As MISO explained in its filing, this led to the consideration of the issue of how to afford the Lignite Energy Council and other interested entities an opportunity to participate in the Advisory Committee taking place over an extended period of time at multiple MISO meetings.¹² As a result of these discussions, MISO has proposed revisions to its Bylaws and the transmission owners Agreement to create, with an effective date of July 29, 2020, what will be known as the affiliate sector to allow for “participation by entities that do not elect to participate in a

[name-change-20190619/](#) (last visited June 9, 2020). In these comments the Lignite Energy Council stated:

For the past year, we have been trying to find a sector to fit in, but so far, we have been unable to do so under the current stakeholder sector structure. We are hoping that organizational change can occur that would give us a seat at the MISO Advisory Committee table so that we can become valuable partners with other grid participants and contribute to the very important discussions occurring in MISO regarding reliability, cost allocation, resource availability and need (RAN), long term planning and more.

¹¹ As of May 20, 2020, MISO published a list indicating that there were 12 members of the environmental and other sector that include: 350 New Orleans, Clean Grid Alliance, Clean Wisconsin, Environmental Law & Policy Center, Energy Storage Association, Fresh Energy, Great Plains Institute, Natural Resources Defense Council, Sierra Club, Southern Wind Energy Association, Sustainable FERC Project and Union of Concerned Scientists. See <https://cdn.misoenergy.org/Current%20Members%20by%20Sector95902.pdf> (last visited June 9, 2020).

¹² MISO Filing at 4.

different sector or do not otherwise meet a different sector's respective sector guidelines" in the Advisory Committee.¹³ MISO expects these revisions to be in effect only for the short-term so as to allow immediate participation by entities like America's Power and the Lignite Energy Council¹⁴ that have been waiting for an extended period of time to join the Advisory Committee.

The temporary proposal would establish an affiliate sector on the following bases:

- The affiliate sector shall not be entitled to vote at the Advisory Committee or Planning Advisory Committee;
- Participants in this affiliate sector shall otherwise be afforded rights subject to and in accordance with MISO's Tariff and policies concerning MISO participation;
- The Affiliate sector shall accept all applying members or affiliated entities that do not elect to participate in a different sector or do not otherwise meet a different sector's respective sector guidelines; and
- The affiliate sector shall be allotted one (1) seat at the Advisory Committee and the right to submit one (1) majority and one (1) minority Hot Topic Paper, as applicable.¹⁵

MISO's Board has made clear its expectation that the Advisory Committee should develop a process that would allow for full participation in the committee by

¹³ *Id.* at 1.

¹⁴ Other entities that have participated in some way in the efforts that led to the MISO Filing and that may join the new affiliate sector include the North Dakota Chamber of Commerce, the Minnesota Chamber of Commerce, the Iron Mining Association of Minnesota, The North American Coal Corporation, The Coteau Properties Company, The Falkirk Mining Company and The Coyote Creek Mining Company.

¹⁵ MISO Filing at 6.

March of 2021.¹⁶ MISO's Board indicated that principles of participation,¹⁷ alignment,¹⁸ and effectiveness¹⁹ should characterize this process.

III. COMMENT

A. FERC Should Accept the MISO Proposal on a Temporary Basis as an Improvement Over the *Status Quo*

America's Power and the Lignite Energy Council would have preferred that a durable, permanent proposal permitting their participation on the Advisory Committee be implemented from the outset, especially given that the participation issues that prompted this filing were first raised starting in 2018. However, the temporary proposal, which would allow them a seat at the table next month, is far preferable to the present state of affairs, in which they have no voice whatsoever on the Advisory Committee. Thus, despite their belief that this proposal would **not** be just and reasonable and would be unduly discriminatory were it being proposed

¹⁶ *Id.* at 7.

¹⁷ As to participation MISO's Board stated: "The stakeholder process should recognize the foundational role played by transmission owners and state regulators but also be fairly accessible through a sector for participation by existing and new organizations who have vested interests in the affairs of MISO. Further, the Board is not suggesting an expectation that every new participating organization should have a separate seat."

¹⁸ As to alignment MISO's Board stated: "Advisory Committee members seek to align individual and sector interests with our shared vision to provide the most reliable, value creating alliance to our end-use customers."

¹⁹ As to effectiveness MISO's Board stated: "Advisory Committee sectors participate effectively when (i) sectors are reasonably aligned with member organization views, using consolidation to achieve minimal overlap across sectors; and (ii) sector membership and representation structure facilitates constructive and efficient interaction with the MISO Board of Directors and MISO management."

on a permanent basis,²⁰ they are willing conditionally to support the proposal, despite their reservations, in light of its planned temporary nature.

As the Commission is aware, Section 205 of the FPA provides a utility, including MISO, “the right to file rates and terms for services rendered with its assets.”²¹ Pursuant to FPA Section 205, the Commission “plays ‘an essentially passive and reactive role’”²² whereby it “can reject [a filing] only if it finds that the changes proposed by the public utility are not ‘just and reasonable.’”²³ The Commission limits this inquiry “into whether the rates proposed by a utility are reasonable – and [this inquiry does not] extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs.”²⁴ The Commission has accepted proposals it has described as less than ideal when they have been proposed on a temporary basis and could be implemented earlier than the durable solution. The Commission has taken the opportunity to provide guidance with regard to its expectations as to the permanent solutions.²⁵

²⁰ As this is an FPA Section 205 filing, MISO must meet the just and reasonable standard. 16 U.S.C.A. § 824d(e). See e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,128 at P 25 (2006), *reh'g denied*, 119 FERC ¶ 61,097 at P 18 (2007) (holding that, in order to justify its proposed revisions, “the Midwest ISO must demonstrate that the revision meets the just and reasonable standard under section 205”).

²¹ *Atlantic City Elec. Co. v. FERC*, 295 F. 3d 1, 9 (D.C. Cir. 2002).

²² *Id.* at 10 (quoting *City of Winfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984)).

²³ *Id.* at 9.

²⁴ *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984).

²⁵ See, e.g., *ISO New England Inc.*, 144 FERC ¶ 61,204 at PP 21, 42, 50, 54 (2013). *Midwest Independent Transmission System Operator, Inc.*, 129 FERC ¶ 61,060 at PP 1-2, 48 (2009)(accepting interim proposal conditioned upon submission of superseding Tariff revisions and providing guidance “to help inform the ongoing discussions” on a long-term

Here MISO and the MISO Board explicitly have recognized concerns with the proposal but appear to realize that the temporary change is better than no change and are committed to developing a further change to replace this proposal.²⁶ In these limited circumstances, America's Power and the Lignite Energy Council, which would benefit from the near term ability to join a sector of the Advisory Committee, urge the Commission to permit the changes to go into effect. However, because the changes are not just and reasonable and are unduly discriminatory when viewed over an extended period of time, they ask that the Commission act to require the replacement of these provisions by a date certain, and provide necessary guidance as suggested *infra* to ensure that the replacement filing does not perpetuate the discriminatory treatment to which America's Power, the Lignite Energy Council and others similarly situated to them have been subjected.

While the MISO Tariff has contained an "other" sector of the Advisory Committee, thus offering in words at least an opportunity for voices that do not fit into any other delineated sector, the existing members of the environmental and other sector have effectively blocked for far too long the ability of America's Power, the Lignite Energy Council and others similarly situated from having a voice on the

solution); *PJM Interconnection, L.L.C.*, 150 FERC ¶ 61,020 at P 33 (2015)(accepting proposal for temporary period until a more fulsome solution could be developed.

The Commission similarly has accepted a proposal because it was an acceptable interim solution until a more comprehensive evaluation could take place. *California Independent System Operator Corp.*, 131 FERC ¶ 61,148 at P 16 (2010).

²⁶ MISO Filing at 9.

Advisory Committee. Their actions have led to an implementation of the Tariff has been unjust, unreasonable and unduly discriminatory. The Commission should take action to end this unduly discriminatory state of affairs that is at odds with the strictures of the FPA at the earliest opportunity.

Notably, the only reasons the proposal in the MISO Filing is palatable and may be approved by the Commission are because of its planned short term duration, its improvement over the present situation, and in light of the consent of parties such as America's Power and the Lignite Energy Council, who are the parties in interest. The proposal is not just and reasonable and is unduly discriminatory for permanent implementation, as it continues to give greater rights, without justification, to other MISO non-member sectors that are similarly situated to the newly-proposed affiliate sector.

In particular, the twelve-member environmental and other sector would be afforded voting rights and two representatives (equivalent to two votes), while the affiliate sector would be denied voting rights completely and afforded only one sector representative, even though it may initially have nine or more members. This is not only discrimination but it is undue discrimination for FPA purposes. In addition, while the environmental and other sector presently is a catchall group, and has raised concerns about having members added that do not share its views, the MISO filing does not propose to solve the catchall problem but would foist it upon the new affiliate sector.

B. FERC Should Provide Guidance To Ensure a Non-Discriminatory Long-Term Solution is Filed by a Prompt Date Certain

The MISO stakeholder process has proven to be a slow means to address the problem of inclusiveness of interested voices on the Advisory Committee. The delay in addressing the exclusion of interested entities on the Advisory Committee has inured to the benefit of those seeking to mute voices with which they do not agree for far too long already. This has perpetuated discriminatory treatment antithetical to the FPA. Accordingly, it is appropriate and necessary for the Commission to intercede to require action to remedy the situation by a date certain and to provide guidance to ensure the substitute proposal is not unduly discriminatory. While the MISO Board has indicated its expectation that the replacement solution meet several criteria, anti-discrimination is not explicitly among them. This obligation imposed by the FPA falls squarely upon the Commission to ensure.

At least the following aspects of the MISO Filing are unduly discriminatory were the proposal to be in effect beyond the most limited time needed to implement a replacement:

- The affiliate sector shall not be entitled to vote at the Advisory Committee or Planning Advisory Committee;
- The affiliate sector shall accept all applying members or affiliated entities that do not elect to participate in a different sector or do not otherwise meet a different sector's respective sector guidelines; and
- The affiliate sector shall be allotted one (1) seat at the Advisory Committee and the right to submit one (1) majority and one (1) minority Hot Topic Paper, as applicable.

The Commission should opine in its order as to each.

1. The Commission Should Make Clear that Sector Voting Rights Must be Granted on a Fair and Non-Discriminatory Basis

As indicated in the Background section above, there are currently three sectors of the Advisory Committee that are non-members of MISO and each of those sectors either has one voting sector representative, or in the case of the environmental and other group, two voting sector representatives. All similarly situated sectors should be afforded similar treatment to avoid undue discrimination for purposes of the FPA. The environmental and other sector should not have two votes while the affiliate sector has none. The temporary proposal in the MISO Filing should have established an even playing field by allocating one of the two sector representative positions held by the present environmental and other sector to the affiliate sector. This was contemplated as an equitable solution during the process of devising a solution but ultimately not proposed in the MISO Filing. Yet the removal of one voting representative from the environmental and other group would have been reasonable in light of that sector's shedding of "other," and its refusal to accept America's Power and the Lignite Energy Council as others, as well as to provide equality among the non-member sectors.

There is simply no defensible cause for one non-member group to be excluded from voting rights afforded to all the other groups. The importance of the voices of the affiliate sector group must not be marginalized. The environmentalists' point of view is no more pertinent or valid than the view of those in the coal sector, especially considering the importance of the coal fleet to MISO's

generation mix, and there is no call for the Environmental sector to have an outsized voice. The Commission should make the need for comity and non-discrimination relating to voting rights abundantly clear in its order on the MISO Filing.

2. The New Affiliate Sector Should not Have its Rights Diluted by Becoming a Catchall Group

While the members of a sector will of necessity have differing views on any specific issue that may be under consideration, MISO and the MISO Board have recognized that alignment of positions should be a guiding principle for the sector construct. Nonetheless, in the MISO Filing, MISO proposes that: “[t]he affiliate sector shall accept all applying members or affiliated entities that do not elect to participate in a different sector or do not otherwise meet a different sector’s respective sector guidelines.”²⁷ Thus, the MISO Filing relieves the Environmental sector of the burden of accepting others and explicitly imposes it upon the affiliate sector for the time being. Yet if it was unreasonable to require the Environmental sector to accept new entrants with non-aligned viewpoints, it is similarly unreasonable to require the affiliate sector to do so. The Commission should indicate that the affiliate sector should not be required to dilute the rights it acquires in the Advisory Committee process by being required to accept any and all, regardless of alignment, when other groups are not subject to any such obligation.

²⁷ MISO Filing at 6.

3. The Commission Should Require the Temporary Proposal to be Replaced as of a Prompt Date Certain

The MISO Board has indicated that the stakeholders should develop a process that would allow for full participation in the Advisory Committee by March of 2021 with no timeline for filing and effectuating such process. While America's Power and the Lignite Energy Council appreciate that the MISO Board has set a target for a durable solution to the Advisory Committee sector problem, the timeline is too attenuated. For approximately the last two years, the Lignite Energy Council has been seeking a voice on this important committee. While it and others like it may finally obtain a sector representative, the temporary solution is not separate but equal but is quite explicitly separate and unequal. That inequity - or undue discrimination in FPA parlance - should not be countenanced for another nine months to a year. The Commission should require that a durable solution be submitted for filing by December 1, 2020. Given the time that already has elapsed, an approximately five-month period to address the issue is more than ample.

IV. CONCLUSION

America's Power and the Lignite Energy Council respectfully request that the Commission: (1) accept the proposal to implement an affiliate sector with the temporary criteria set forth in the MISO Filing; (2) require that a permanent replacement be filed no later than December 1, 2020; and (3) provide guidance indicating that the permanent replacement must provide for voting rights to be granted and the addition of new members to be considered on an equitable basis.

Respectfully submitted,

/s/ Michelle Bloodworth

Michelle Bloodworth
America's Power
4601 N. Fairfax Drive, Suite 1050
Arlington, VA 22203
Tel.: 202.459.4803
Fax: 202.595.4663
Email:
mbloodworth@americaspower.org

/s/ Sandra E. Rizzo

Sandra E. Rizzo
Arnold & Porter
601 Massachusetts Avenue, NW
Washington, DC 20001
Tel. : 202.942.5826
Fax : 202.942.5999
Email :
Sandra.Rizzo@arnoldporter.com

On behalf of the America's Power

June 19, 2020

/s/ Jason Bohrer

Jason Bohrer
Lignite Energy Council
1016 E. Owens Ave.
PO Box 2277
Bismarck, ND 58502
Tel.: 701.355.2189
Fax: 701.258.2755
Email: jasonbohrer@lignite.com

On behalf of the Lignite Energy Council

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing comment this 19th day of June 2020, upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Jason Y Lee
Jason Y. Lee