

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

Voltus, Inc.)	
Complainant,)	
)	
v.)	Docket No. EL21-12-000
)	
Midcontinent Independent System)	
Operator, Inc.)	
Respondent.)	
)	

**MOTION TO DISMISS AND
ANSWER OF THE
MIDCONTINENT INDEPENDENT SYSTEM OPERATOR, INC.**

The Midcontinent Independent System Operator, Inc. (“MISO” or “Respondent”) submits¹ this Motion to Dismiss and Answer to the Complaint of Voltus, Inc. (“Voltus” or “Complainants”). As discussed herein, the Complaint should be dismissed as an impermissible collateral attack on Order Nos. 719² and 719-A³ of the Federal Energy Regulatory Commission (“FERC” or “Commission”), for its failure to meet the requirements of Section 206 of the Federal Power Act⁴ (“FPA”) and as a result of the procedural flaws discussed below.

¹ This submission is made pursuant to Rules 206, 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. §§ 385.206, 385.212 and 385.213 (2020).

² Wholesale Competition in Regions with Organized Electric Markets, 125 FERC ¶ 61,071 (Oct. 17, 2008) (“Order No. 719”).

³ Wholesale Competition in Regions with Organized Electric Markets, 128 FERC ¶ 61,059 at P 44 (July 16, 2009) (“Order No. 719-A”).

⁴ 18 C.F.R. § 385.206 (2020).

I. EXECUTIVE SUMMARY

On October 17, 2008 the Commission issued Order No. 719 in an effort to improve the operation of organized wholesale electric markets in the areas of demand response, long-term power contracting, market monitoring policies and RTO and ISO responsiveness.⁵ In the area of demand response, Order No. 719 required RTO/ISOs in certain circumstances to permit an aggregator of retail customers (“ARC”) to bid demand response on behalf of retail customers directly into the RTO/ISO wholesale energy markets, unless the laws or regulations of the relevant retail regulatory authority (“RERRA”) do not permit a retail customer to participate.⁶ A RERRA’s prohibition of a retail customer’s participation in RTO/ISO wholesale markets through an ARC has commonly become referred to as the “Opt-Out.” In support of its position the Commission explained that the Opt-Out “properly balances the Commission’s goal of removing barriers to development of demand response resources in the organized market that we regulate with the interests and concerns of state and local regulatory authorities.”⁷

The Commission affirmed the Opt-Out in Order No. 719-A, making it clear that Order No. 719 did not challenge the role of states and others to decide the eligibility of retail customers to provide demand response.⁸ Subsequent legal challenges to the Opt-Out’s preservation in FERC Order No. 745⁹ were rebuffed by the Supreme Court, finding that the Commission’s implementation of the Opt-Out is a “program of cooperative federalism, in which States retain the

⁵ Order No. 719 at P 2.

⁶ *Id.* at PP 3 and 154.

⁷ *Id.* at P 156.

⁸ Order No. 719-A at P 43.

⁹ Demand Response Compensation in Organized Wholesale Energy Markets, 134 FERC ¶ 61,187 (2011) (“Order No. 745”).

last word.”¹⁰ The Opt-Out was most recently preserved in FERC Order No. 2222, which distinguished ARCs from distributed energy resource aggregators stating, “... unlike aggregators of demand response, distributed energy resource aggregators are capable of engaging in sales for resale of electricity and those distributed energy resource aggregators making such sales in the RTO/ISO markets are public utilities subject to the Commission’s jurisdiction.”¹¹

Voltus’ Complaint alleges MISO’s Open Access Transmission, Energy and Operating Reserve Markets Tariff (“Tariff”) is unduly discriminatory, preferential and produces unjust and unreasonable rates because it implements the Opt-Out as established and consistently preserved by the Commission. Voltus fails to plead with specificity the actions or inactions MISO has taken that are either inconsistent with the Tariff or in any way produce an outcome contrary to the FERC accepted Tariff language. Instead, Voltus uses the Complaint as a vehicle to challenge the Opt-Out, arguing that the continuation of the Opt-Out results in rates that are unjust and unreasonable given the evolution of demand response and subsequent Commission and Court opinions involving other resource types. In support of its allegations Voltus provides a significant amount of information espousing the benefits of demand response, the need for demand response in MISO, and Voltus’ own value proposition with respect to the aggregation of demand resources in organized wholesale markets. Despite Voltus’ expansive discussion of demand response and its own value proposition, the Complaint fails to carry the burden established in Section 206 of the Federal Power Act.

¹⁰ *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016) at 780.

¹¹ Order No. 2222 at P 60 (*Nat’l Ass’n of Regulatory Util. Comm’rs*, 964 F.3d at 1190 (citing Order No. 841-A, 167 FERC ¶ 61,154 at PP 51-52 (distinguishing [electric storage resource] participation in wholesale sales from demand response resources participating in wholesale bids)).

The Complaint notes MISO's many and ongoing stakeholder discussions to address the emerging role of demand response in MISO's markets. In recent years, a key focus of MISO's Resource Availability and Need ("RAN") initiative has been to align the availability and performance of certain demand resources, specifically Load Modifying Resources ("LMR"), with the corresponding accreditation received in MISO's annual Planning Resource Auction ("PRA"). The solutions developed through MISO's stakeholder process involving LMR accreditation are the result of extensive stakeholder discussion and the compromise of market participants, RERRAs and MISO with respect to the implementation timeline for changes to accommodate changes to retail tariffs and contract provisions. MISO is currently in the process of developing the next phase of its RAN initiative through its stakeholder process where the role of demand response will continue to be a key topic of discussion.

The ultimate question raised by the Complaint is one of federal versus state jurisdiction over the manner in which demand resources may participate in wholesale electricity markets. Demand resources can and do participate in the MISO markets even when states have chosen to preclude third-party aggregation of retail load. This is generally done through the traditional relationship between the retail electricity customer and its load serving entity overseen by the applicable RERRA. This policy question cannot be resolved through a complaint proceeding in a single RTO/ISO region, as recognized by the Complaint's request for the establishment of a rule making proceeding to address the Opt-Out. An immediate repeal of the Opt-Out in MISO would effectively allow an end-run around the Commission's established rulemaking process, the MISO stakeholder process and state regulatory commission processes where more robust and wholistic market rules are being considered.

Voltus' request for an expedited Commission order with the singular focus of removing the Opt-Out from MISO's markets would effectively place MISO's Tariff in opposition to the Commission's regulations in 18 C.F.R § 35.28(g)(iii). In addition, a one-off departure from the Opt-Out in MISO could have significant impacts on MISO's members, RERRAs and markets, placing MISO in the untenable position of effectively implementing wholesale market demand response measures that are either inconsistent with or not supported by the laws, regulations, orders, and/or policies established by its RERRAs. Not only would this type of one-off resolution significantly impact MISO and its RERRAs with respect to other RTO/ISOs where the Opt-Out would remain in effect, it would also create yet another point of jurisdictional distinction between retail regulators in non-RTO/ISO regions and those that regulate utilities in RTO/ISO regions. Distinctions such as these create negative consequences to the value that RTO/ISOs provide to their respective footprints.

As discussed below, MISO requests that the Commission dismiss the Complaint as it is an impermissible collateral attack on Order Nos. 719 and 719-A and fails to meet the requirements of Section 206 of the Federal Power Act. Should the Commission find that the Complaint passes these procedural and precedential hurdles, MISO requests that the Commission find that the Complaint fails to identify any actions or inactions of MISO that are inconsistent with its FERC accepted Tariff and therefore dismiss the Complaint.

II. BACKGROUND

On April 29, 2009, MISO filed with the Commission revisions to its Tariff in compliance with Order No. 719 ("April 2009 Compliance Filing").¹² Among other revisions, the April 2009

¹² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

Compliance Filing submitted, for informational purposes, revisions to allow an ARC to bid demand response directly into MISO's markets, unless the laws, regulations or orders of the relevant electric retail regulatory authority do not permit a retail customer to participate.

On October 2, 2009, MISO submitted an additional filing ("October 2009 Compliance Filing") in compliance with Order No. 719 and 719-A providing proposed Tariff revisions to allow the participation of ARCs¹³ in MISO's markets. The October 2009 Compliance filing explained that MISO would accept offers from an ARC unless and until it receives a notification from the relevant electric retail regulatory authority either: (1) contesting the certification of the ARC's retail load; or (2) claiming that the customer is no longer eligible to participate.¹⁴ In addition, the October 2009 Compliance Filing set forth the process for contesting a certification in section 38.6 of the Tariff.¹⁵ MISO also stated that in cases where a certification has been contested, it will inform the ARC and the ARC will be required to limit its offers to only those retail demand resources that are uncontested and that, in cases where a resource has been disqualified, MISO proposes to allow the ARC to make an offer only if the RERRA notifies MISO that the ARC and relevant retail customers are again eligible to participate.¹⁶

¹³ See Module A of the MISO Tariff, which defines an ARC as follows:

A Market Participant that represents demand response on behalf of one or more eligible retail customers, for which the participant is not such customers' L[oad] S[erving] E[ntity], and intends to offer demand response directly into the Transmission Provider's Energy and Operating Reserve Markets, as a Module E Planning Resource or as an E[mergency] D[emand] R[esponse] resource.

¹⁴ See *Midwest Independent Transmission System Operator, Inc. Filing re Aggregators of Retail Customers*, October 2, 2009, Transmittal Letter at p. 10 ("October 2009 Compliance").

¹⁵ *Id.* at FERC Electric Tariff, Fourth Revised Volume No. 1, Original Sheet No. 655G.

¹⁶ *Id.*

In an order issued December 15, 2011 (“December 2011 Compliance Order”), the Commission accepted MISO’s proposed ARC Tariff revisions including the current Tariff’s language in Section 38.6 A. iii. 1. (a) a and b, which specifically includes references to the laws, regulations, *or orders* of a RERRA in its incorporation of the requirements of 18 C.F.R § 35.28(g)(iii).¹⁷ The Commission also required MISO to submit several modifications to the ARC registration requirements in proposed Tariff section 38.6. Among other things, the Commission stated that the Tariff does not establish a timeline for MISO to provide notification of an ARC’s registration request to the RERRA and/or relevant load-serving entity or to complete the registration. The Commission stated that MISO did not address what will happen should a RERRA and/or load-serving entity challenge a registration request and required MISO to address these issues with additional Tariff language on compliance.¹⁸ The Commission required MISO to revise section 38.6(3) to read, in part, “unless and until the Transmission Provider receives a notification from the [relevant electric retail regulatory authority] that either (a) contests the certification provided by the ARC under sub-paragraph (1) of this section or (b) claims loss of eligibility of resources registered with the ARC.”¹⁹

MISO’s compliance filing addressing the requirements of the December 2011 Compliance Order was conditionally accepted in July of 2012, subject to a further compliance filing.²⁰ Ultimately, the Tariff language in Section 38.6 of the Tariff was accepted by the Commission on September 22, 2016.²¹

¹⁷ *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,214 (2011).

¹⁸ Order No. 719 Compliance Order, 137 FERC ¶ 61,214 at P 153.

¹⁹ *Id.* P 154.

²⁰ *Midwest Indep. Trans. Sys. Operator, Inc.*, 140 FERC ¶ 61,060 (2012).

²¹ *Midwest Indep. Trans. Sys. Operator, Inc.*, 156 FERC ¶ 61,194 (2016). In addition, MISO notes that on July 31, 2020, in Docket No. ER20-2591, MISO submitted revisions to the

III. ANSWER

A. The Complaint is barred by law and precedent and must be dismissed on its face.

The Complaint ignores law and the established precedent of the Commission and courts and should be dismissed on its face. Specifically, Voltus inappropriately seeks revision of the Commission's regulations through a Section 206 complaint proceeding. In addition, the Complaint constitutes an impermissible collateral attack on FERC Order Nos. 719 and 719-A and represents an inappropriate and untimely rehearing request of Order No. 2222.

1. Voltus inappropriately seeks revision of the Commission's regulations through a Section 206 complaint proceeding.

As a public utility, MISO is charged with carrying out the Commission's directives and regulations as promulgated in the Commission's orders and codified in the Code of Federal Regulations. Voltus relies on Section 206 of the Commission's Rules of Practice and Procedure²² to attack MISO for carrying out its obligations as a public utility by including the Opt-Out in the Tariff as required by 18 C.F.R. § 35.28(g)(iii). Voltus' assertions waffle between allegations that, on one hand claim MISO's Tariff is unjust and unreasonable because it implements the Opt-Out; and, on the other hand, claim that the majority of RERRAs in MISO are invalidly enforcing the Opt-Out through reliance on RERRA orders rather than specific laws and regulations enacted by

MISO Tariff, including Section 38.6, to clarify registration and other processes related to ARC participation in MISO markets. As discussed in the Transmittal Letter, MISO's ultimate goals in submitting this filing are to enhance the registration process and to alleviate any potential artificial impediments to registration and participation by ARCs in MISO's markets. MISO also explained that the proposed improvements, if accepted by the Commission, will provide an appropriate platform for additional, more substantive ARC Tariff revisions in the future. The revisions submitted in this docket were developed through the MISO stakeholder process and are currently pending Commission acceptance.

²² 18 C.F.R. §385.206 (2020).

state legislature.²³ These assertions, however, are only pretext to Voltus' collateral attack on the Opt-Out established in Order Nos. 719 and 719-A.

Ultimately, Voltus inappropriately uses the Section 206 Complaint proceeding to forward a petition for declaratory order interpreting the Commission's regulations in 18 C.F.R. § 35.28(g)(iii) and to initiate a rulemaking proceeding. Voltus specifically requests:

2) that the Commission issue an order interpreting its own regulation, 18 C.F.R. § 35.28(g)(iii), and find that certain relevant electric retail regulatory authorities ("RERRAs") in MISO issued prohibitions against third party demand response providers in a manner inconsistent with the terms of that regulation and that such prohibitions are therefore void; and

3) that the Commission issue a notice of proposed rulemaking to repeal the provisions set forth in 18 C.F.R. § 35.28(g)(iii) permitting RERRAs to bar third party demand response aggregators from participating in wholesale markets, on the grounds that these provisions are: (i) inconsistent with the jurisdictional provisions of the Federal Power Act and (ii) result in rates that not just and reasonable and are unduly discriminatory and preferential.²⁴

Section 207 of the Commission's Rules of Practice and Procedure states, in relevant part, that a person must file a petition when seeking:

- (1) Relief under subpart I, J, or K of this part;
- (2) A declaratory order or rule to terminate a controversy or remove uncertainty;
- (3) Action on appeal from staff action, other than a decision or ruling of a presiding officer under Rule 1902;
- (4) A rule of general applicability; or

²³ See Complaint at 1 - 2 requesting: (1) that the Commission find that MISO Tariff provisions authorizing states to bar third party demand response providers from participating in MISO's wholesale market are: (i) inconsistent with the jurisdictional provisions of the Federal Power Act, and (ii) not just and reasonable, and are unduly discriminatory and preferential, and, (2) that the Commission issue an order interpreting its own regulation, 18 C.F.R. 35.28(g)(iii), and find that certain relevant retail electric retail regulatory authorities ("REERAs") in MISO issued prohibitions against third party demand response providers in a manner inconsistent with the terms of that regulation and that such prohibitions are therefore void.

²⁴ Complaint at 1 - 2.

- (5) Any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.²⁵

Voltus' request number 2 above amounts to a petition for declaratory order, while request number 3 above requests a rulemaking proceeding that would result in a rule of general applicability. Both are inappropriately presented to the Commission as part of this Section 206 complaint proceeding and must be dismissed.

Assuming, arguendo, that Voltus' failure to petition the Commission for a declaratory order or rulemaking under Rule 207 is not dispositive for the dismissal of the Complaint, Commission precedent dictates that requests to implement a rulemaking must be rejected when the requesting party fails to show that circumstances have significantly changed as to warrant re-examining issues.²⁶ Here, Voltus fails to identify any circumstances that have significantly changed since the Commission's preservation of the Opt-Out in Order No. 2222, which was issued less than two months prior the filing of the Complaint.

²⁵ 18 C.F.R. §385.207 (2) & (4) (2020) ("Rule 207").

²⁶ See *Eric S. Morris v. NERC and SERC*, 153 FERC ¶ 61,266 at P 12 (2015) (The Commission has rejected petitions and requests that it implement a rulemaking when the requesting party fails to show a sufficient change in circumstances or that there is a sufficient problem to merit a generic solution.). See also, *Tenaska Power Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,308, at P 33 (2004) (rejecting request to implement a rulemaking, stating that the requesting party had not shown that circumstances had sufficiently changed as to warrant re-examining issues); *Midwest Indep. Transmission Sys. Operator, Inc.*, 104 FERC ¶ 61,060, at P 21 (2003) (rejecting petition for rulemaking when there had not been a substantial change in circumstances), aff'd, 388 F.3d 903 (D.C. Cir. 2004); *Natural Gas Supply Ass'n*, 115 FERC ¶ 61,327, at PP 10-11 (2006) (rejecting request for rulemaking to establish natural gas quality and interchangeability standards, stating that gas quality and interchangeability issues arise under discrete circumstances, and as there was no evidence of an industry wide problem, petitioner had not justified its specific nationwide standards); *Amoco Prod. Co.*, 26 FERC ¶ 61,271, at 61,624 (1984) (rejecting request to implement a rulemaking to amend the definition of minimum rate gas, stating there was insufficient evidence to support generic relief).

In addition, the Complaint should be dismissed in the interest of administrative efficiency. Voltus' inappropriate use of this Section 206 complaint proceeding to attack MISO's Tariff in an effort to forward its principal argument against the Opt-Out puts MISO in the untenable position of defending broad Commission policy applicable to all RTO/ISOs and RERRA policy regarding the participation of retail customers in wholesale markets – both of which MISO has no authority over. To the extent that Voltus seeks to forward its arguments against the Opt-Out or RERRA actions implementing the Opt-Out it should be required to do so through appropriate procedural vehicles at both the Commission and local level and not through this Section 206 complaint proceeding.

2. The Complaint is an impermissible collateral attack on Order Nos. 719 and 719-A.

The issues raised in the Complaint have been adjudicated and, as such, Voltus' Complaint is an impermissible collateral attack on Order Nos. 719 and 719-A. The Commission has a long-standing policy discouraging collateral attacks on its findings and precedent involving previously resolved issues. Under that policy, collateral attacks on final orders and re-litigation of applicable precedent impede the finality and repose in agency decisions that are essential to administrative efficiency, and are therefore strongly discouraged.²⁷ The Commission's policy is broad and is not constrained by the limits of the doctrine of collateral estoppel.²⁸ To this end, the Commission has explained that, "in the absence of new or changed circumstances requiring a different result, it is

²⁷ *Southern Co. Servs., Inc.*, 129 FERC ¶ 61,153 at P 37 (2009).

²⁸ *Pac. Gas & Elec. Co.*, 121 FERC 61,065 at P 40 (2007).

contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined.”²⁹

The Complaint fails to identify new or changed circumstances requiring a different result. Instead, Voltus ignores the Commission’s justification for the continued and consistent preservation of the Opt-Out in Order No. 2222 issued less than two months prior to Voltus Complaint. In that Order the Commission relies on the FPA, relevant FERC precedent, a United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) Opinion, and the Supreme Court’s statement that the Commission has jurisdiction to decide which entities may participate in wholesale markets.³⁰ In *EPSA*, the Supreme Court commented that the Opt-Out is a “program of cooperative federalism, in which States retain the last word.”³¹

In Order No. 2222 the Commission explains that the Opt-Out was provided through an exercise of the Commission’s discretion in recognition of the linkage between wholesale and retail markets and the States’ role in overseeing their load serving entities’ rates and retail sales.³² Despite Voltus’ arguments that the MISO Tariff discriminates against aggregators of demand response, the Commission distinguishes distributed energy resource aggregators from aggregators of demand response stating that, “... unlike aggregators of demand response, distributed energy resource aggregators are capable of engaging in sales for resale of electricity and those distributed

²⁹ *Id.*, quoting *Alimito Co.*, 41 FERC ¶ 61,312, at 61,829 (1987), *order on reh’g*, 43 FERC ¶61,274 (1988).

³⁰ Order No. 2222 at P 58.

³¹ *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016) at 780 (“*EPSA*”).

³² Order No. 2222 at P 59 (citing *EPSA*, 136 S. Ct. at 779 (describing the opt-out as a “notable solicitude toward the States,” in recognition of “the linkage between wholesale and retail markets and the States’ role in overseeing retail sales”); *Nat’l Ass’n of Regulatory Util. Comm’rs*, 964 F.3d at 1190 (“Local Utility Petitioners correctly acknowledge that *EPSA* did not condition its holdings on the existence of an opt-out.”)).

energy resource aggregators making such sales in the RTO/ISO markets are public utilities subject to the Commission’s jurisdiction.”³³

Ultimately, the Complaint fails to carry its burden to prove MISO’s Tariff results in unduly discriminatory and preferential treatment and results in unjust and unreasonable rates. Moreover, it does not take issue with the Commission’s order accepting Tariff Section 38.6, which details the Opt-Out and related RERRA challenge provisions as applied in the MISO markets.³⁴ Instead, the gravamen of Voltus’ Complaint is an attack on the Opt-Out as established in Order No. 719 and 719-A. As such, Voltus’ challenge of the MISO Tariff should be dismissed.

3. The Complaint should be dismissed as an impermissible and untimely Request for Rehearing of Order No. 2222.

Voltus, through its requested relief in the complaint, employs a legally impermissible scatter-shot approach to challenge the Opt-Out established in Order Nos. 719 and 719-A and modify the requirements of Order No. 2222. Specifically, Voltus’ second remedy requested states that, “[T]he Commission should order MISO at a minimum, and potentially all other RTO/ISOs, to incorporate consideration of demand response aggregators in the ongoing stakeholder work to implement Order 2222 coordination mechanisms.”³⁵

The Commission’s precedent is clear that a Section 206 complaint is not a vehicle to challenge matters already pending before Commission in another proceeding.³⁶ Voltus did not

³³ Order No. 2222 at P 60 (*Nat’l Ass’n of Regulatory Util. Comm’rs*, 964 F.3d at 1190 (citing Order No. 841-A, 167 FERC ¶ 61,154 at PP 51-52 (distinguishing [electric storage resource] participation in wholesale sales from demand response resources participating in wholesale bids)).

³⁴ See Order on Compliance, *Midwest Independent Transmission System Operator, Inc.*, 137 FERC ¶ 61,214 (2011) (“December 2011 Compliance Order”).

³⁵ Complaint at p. 85.

³⁶ See, e.g., *Champion Energy Marketing LLC v. PJM Interconnection, L.L.C.* [“PJM”], 153 FERC ¶ 61,059 at P 31 (2015) (dismissing a complaint against certain cost allocation

seek rehearing of Order No. 2222 and cannot now be permitted to request Commission action directing additional compliance requirements associated with Order No. 2222. Allowing Voltus' requested relief with respect to matters addressed in Order No. 2222 would permit an end-run around the Commission's established proceeding,

B. Voltus' allegations that MISO's Tariff provisions result in unjust and unreasonable rates and discriminatory treatment of demand response fail to meet the burden of FPA Section 206.

The Complaint fails to identify and explain how MISO's actions or inactions violate applicable statutory standards or regulatory requirements as required by FPA Section 206.³⁷ Instead, the Complaint simply alleges that MISO's implementation of Tariff language accepted by the Commission in a manner consistent with the Commission's orders results in unjust and unreasonable rates and discriminatory treatment. As such, the Commission should deny Voltus' request that the Commission find that MISO's Tariff provisions authorizing states to bar third party demand resource providers from participating in MISO's wholesale market are: (i) inconsistent with the jurisdictional provisions of the Federal Power Act, and (ii) not just and reasonable, and are unduly discriminatory and preferential.³⁸

1. MISO's FERC accepted Tariff recognizes Opt-Outs pursuant to laws, regulations, or orders of the RERRA.

Voltus' argument that MISO's acceptance of an Opt-Out from any RERRA other than Arkansas is without merit. The Commission's regulations at 18 C.F.R § 35.28(g)(iii) do not limit the Opt-Out to only laws and regulations:

provisions of PJM's tariff, ruling that the complainant "should first raise its concerns and potential resolution through the PJM stakeholder process or in the Commission's ongoing price formation proceeding."

³⁷ 18 C.F.R. § 385.206 (b)(1) and (2) (2020).

³⁸ Complaint at p. 1.

Aggregation of retail customers. Each Commission-approved independent system operator and regional transmission organization must accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, and the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers. *An independent system operator or regional transmission organization must not accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets by an aggregator of retail customers, or the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers.*³⁹ (emphasis added)

Voltus employs a narrow reading of Order Nos. 719 and 719-A Opt-Out pursuant to state law or regulation, arguing that only Arkansas has passed a “law” establishing an Opt-Out and that all other RERRA Opt-Outs pursuant to state agency orders are invalid and should not be recognized by MISO.⁴⁰ While this narrow reading is beneficial for Voltus’ argument, it ignores the Commission’s regulations and accepted Tariff language of Section 38.6 A. iii. 1. (a) a and b, which specifically includes laws, regulations, *or orders* of a RERRA as provided below:

- a. Where the relevant utility distributed more than four million MWh in the prior fiscal year, an ARC must certify that the laws, regulations, *or order(s)* of the RERRA do not preclude the end use customer from participating directly in the Transmission Provider’s Energy and Operating Reserve Markets, providing Capacity under RAR of the Tariff, or being used as an EDR resource. The ARC may also state whether the RERRA specifically permits such participation by the end use customer; or
- b. Where the relevant utility distributed four million MWh or less in the prior fiscal year, an ARC must certify that the laws, regulations, *or order(s)* of the RERRA specifically permit the end use customer to participate directly in the Transmission Provider’s Energy and Operating Reserve Markets, to

³⁹ 18 C.F.R § 35.28(g)(iii) (2020).

⁴⁰ Complaint at p. 83 and Exhibit C – State Opt-out Chart.

provide Capacity under RAR of the Tariff, or to be used as an EDR resource.⁴¹

The Commission accepted the above language by order dated December 15, 2011.⁴² Contrary to Voltus' argument that would ultimately require MISO to interpret state law, regulations or orders, Section 38.6 of the Tariff and MISO's related implementation of the ARC certification provisions are consistent with the Commission's regulations established in the Code of Federal Regulations and Order Nos. 719 and 719-A. The Commission was clear in Order No. 719-A in its attempt to shield RTO/ISO's from such an obligation, stating:

The RTO or ISO should not be in the position of having to interpret when the laws or regulations of a relevant electric retail regulatory authority are unclear. While we leave it up to the relevant retail authority to decide the eligibility of retail customers, their decision on policy should be clear and explicit to that the RTO or ISO is not tasked with interpreting ambiguities.⁴³

The Tariff's ARC certification provisions require an ARC to either: inform MISO that a demand resource is not eligible to participate through the ARC in the case of demand resources in large utilities, or, explicitly inform MISO of a demand resource's eligibility to participate in MISO's markets through an ARC in small utilities. Thus, MISO's process elicits a clear and explicit statement of a resource's eligibility from a RERRA consistent with the intent of the Commission in Order No. 719-A.

2. MISO's recognition of the Opt-Out does not discriminate against demand resources.

MISO does not discriminate among demand resources that participate in MISO's markets. Voltus confuses the *eligibility* of a demand resource to participate in MISO's markets with the

⁴¹ MISO Tariff, Section 38.6 A. iii. 1. (a) a. (*emphasis added*).

⁴² See Order on Compliance, *Midwest Independent Transmission System Operator, Inc.*, 137 FERC ¶ 61,214 (2011) ("December 2011 Compliance Order").

⁴³ Order No. 719-A at P 50.

treatment of the demand resource in the markets. Voltus does not allege that MISO treats a demand resource represented by an ARC differently from a demand resource that is not represented by an ARC, save its eligibility to participate in MISO's markets when an Opt-Out exists. The Commission's authority to determine which resources are eligible to participate in the RTO/ISO markets is a fundamental component of the regulation of the RTO/ISO markets.⁴⁴ Section 38.6 of MISO's Tariff simply reflects the eligibility criteria established for demand resources in Order Nos. 719 and 719-A.⁴⁵

This eligibility threshold is not unique to demand resources. All resources in MISO's markets must meet certain eligibility thresholds. Specific resource types face different eligibility criteria, some of which are administratively established while others are derived from reliability requirements or other industry standards. For example, Attachment HHH to the Tariff requires that a distribution connected Electric Storage Resource ("ESR") represent that it will meet all the requirements set forth by the Electric Distribution Company for participation in MISO's markets. In addition, ESRs must meet all requirements established by all applicable regulatory bodies having jurisdiction over the ESR, the company representing the ESR, the Electric Distribution Company and MISO.⁴⁶

⁴⁴ *Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 841-A, 167 FERC ¶ 61,154 at P. 38 (2019) ("Order No. 841-A").

⁴⁵ MISO notes that on July 31, 2020, in Docket No. ER20-2591, MISO submitted revisions to the MISO Tariff, including Section 38.6, to clarify registration and other processes related to ARC participation in MISO markets. As discussed in the Transmittal Letter, MISO's ultimate goals in submitting this filing are to enhance non-discriminatory treatment of, and to alleviate any potential artificial impediments to registration and participation by, ARCs in MISO's markets. MISO also explained that the proposed revisions, if accepted by the Commission, will provide an appropriate platform for additional, more substantive ARC Tariff revisions in the future. The revisions submitted in this docket were developed through the MISO stakeholder process and are currently pending Commission acceptance.

⁴⁶ MISO Tariff, Attachment HHH, Recitals.

All resources are required to satisfy applicable eligibility criteria before participating in MISO's markets. In this instance, the Commission directed RTO/ISOs to include in their respective tariffs specific eligibility criteria (*i.e.*, the Opt-Out) for demand resources participating in organized wholesale markets through ARCs. The Commission in the December 2011 Compliance Order again relies on the language of Order No. 719-A when dismissing protests related to the Opt-Out, providing:

The Commission stated clearly, and we will not revisit this policy here, that: The Final Rule also does not make findings about retail customers' eligibility, under state or local laws, to bid demand response into the organized markets, either independently or through an ARC. The Commission also does not intend to make findings as to whether ARCs may do business under state or local laws, or whether ARCs' contracts with their retail customers are subject to state and local law. Nothing in the Final Rule authorizes a retail customer to violate existing state laws or regulations or contract rights. In that regard, we leave it to the appropriate state or local authorities to set and enforce their own requirements.⁴⁷

Once the eligibility criteria are met, demand resources may participate in MISO's markets subject to the same rules applicable to all similar resource types. Nothing in the MISO Tariff precludes a demand resource that is eligible to participate in MISO's markets from providing the services it is capable of providing regardless of who bids the resource into the market. In fact, MISO's implementation of the requirements of 18 C.F.R. § 35.28(g)(1)(iii) includes a default to accept bids from ARCs representing customers of large utilities and requires a RERRA to provide MISO with an explicit statement prohibiting ARC participation in instances where state laws, regulations or orders limit a resource's eligibility to participate in MISO's markets. As such, Voltus' claims of undue discrimination and preferential treatment under the Tariff should be dismissed as the Commission has clearly left to the RERRA the decision of the eligibility of a demand resource to participate in MISO's markets through an ARC.

⁴⁷ December 2011 Compliance Order at P 157 (citing Order No. 719-A at P 54).

C. The Complaint should be dismissed as an end-run around matters currently being discussed in the MISO stakeholder process.

Voltus' request for fast track processing of the Complaint and an immediate, one-off repeal of the Opt-Out in MISO is inconsistent with Commission precedent dismissing complaints involving matters that are part of ongoing discussions in RTO/ISO stakeholder processes. The Commission has consistently held that an RTO/ISO stakeholder process is the preferred forum to develop Tariff revisions and policy that impact all market participants.⁴⁸

Voltus recognizes MISO's ongoing stakeholder initiatives and the coordination among MISO, stakeholders and state regulators to arrive at a solution to LMR accreditation reforms that required additional implementation time to garner stakeholder support given the potential need for retail tariff changes and modifications to contract arrangements.⁴⁹ Like the LMR accreditation reform referenced in the Complaint and accepted by the Commission earlier this year, the remedy sought by Voltus in the Complaint would certainly impact MISO's markets and has the potential to require changes to RERRA laws, regulations or orders, as well as demand resource contractual arrangements. These impacts are the exact types of impacts that Commission precedent seeks to address through RTO/ISO stakeholder processes rather than a complaint proceeding. To the extent that the Commission finds Voltus' Complaint persuasive, any resulting Tariff revisions and implementation details should be developed through the MISO stakeholder process rather than a Commission complaint proceeding.

⁴⁸ *Consolidated Edison Company of New York, Inc.*, 95 FERC ¶ 61,216, at 61,719 (2001) (“We strongly encourage market participants to use the stakeholder process, especially in this type of situation, i.e., where a market participant seeks to modify market measures that impact all market participants.”).

⁴⁹ Complaint at p. 69.

D. The Complaint is procedurally flawed and should be dismissed.

Regardless of the substantive rebuttals provided above, the Commission should dismiss the Complaint as procedurally flawed. Voltus has not sought resolution of the issues raised in the Complaint through the Commission's dispute resolution processes or adequately explain why they did not do so as required in 18 C.F.R. §385.206 (b)(9). Voltus only states that it did not seek dispute resolution from the Commission because it does not believe at this time that alternative dispute resolution would resolve the issues underlying this Complaint.⁵⁰ In addition, Voltus states that it has no reason to expect that alternative dispute resolution would result in the relief requested herein.⁵¹

IV. ADMISSIONS AND DENIALS; AFFIRMATIVE DEFENSES

Attachment A to this Answer includes MISO's specific admissions and denials, where possible. MISO's affirmative defenses are as set forth elsewhere in this Answer and include the following, subject to amendment and supplementation:

- (1) The Complaint fails to state a claim against MISO upon which relief can be granted.
- (2) The relief sought in the Complaint violates the Tariff and is contrary to the Federal Power Act.
- (3) The Complainant has failed to carry its burden under Section 206 of the FPA.
- (4) The Complainant has failed to comply with the Commission's Rules of Practice and Procedure applicable to complaints and requirement to petition the Commission for declaratory orders and rulemaking proceedings.

⁵⁰ Complaint at p. 88.

⁵¹ *Id.*

V. COMMUNICATIONS

MISO requests waiver of Rule 203(b)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.203(b)(3), to the extent necessary to permit the designation of more than two persons for service on behalf of MISO in this proceeding and requests all communications related to this filing be directed to:

Michael L. Kessler*
Managing Assistant General Counsel
Midcontinent Independent
System Operator, Inc.
720 City Center Drive
Carmel, IN 46032
Telephone: 317.249.5400
mkessler@misoenergy.org

James C. Holsclaw*
The Holsclaw Group, LLC
303 E. Main St.
Plainfield, IN 46168
Telephone: 317.839.1140
jim@thglaw.com

* Persons designated to receive official service.

MISO has served a copy of this filing electronically, including attachments, upon all parties listed on the Commission's eService list, as well as Tariff Customers, MISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, as well as all state commissions within the region. The filing has been posted electronically on MISO's website currently located at <https://www.misoenergy.org/legal/ferc-filings/> for other parties interested in this matter.

VI. CONCLUSION

WHEREFORE, MISO requests the Commission dismiss the Complaint for the reasons discussed herein.

Respectfully submitted,

/s/ Michael L. Kessler

Michael L. Kessler
Managing Assistant General Counsel
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Operator, Inc.
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Telephone (317) 249-5400
Facsimile (317) 249-5912

James C. Holsclaw
The Holsclaw Group, LLC

Counsel for the
Midcontinent Independent System Operator, Inc.

DATED: November 19, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day e-served a copy of this document upon all parties listed on the official service list compiled by the Secretary in the above-captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated this 19th day of November 2020, in Carmel, Indiana.

/s/ Julie Bunn _____

Julie Bunn

Midcontinent Independent System Operator, Inc.

Attachment A

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

Voltus, Inc.)	
Complainant,)	
)	
v.)	Docket No. EL21-12-000
)	
Midcontinent Independent System)	
Operator, Inc.)	
Respondent.)	
)	

RESPONDENT’S ADMISSIONS AND DENIALS IN RESPONSE TO COMPLAINT

In accordance with Rule 213(c)(2)(i) of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. § 385.213(c)(2)(i) (2020), to the extent practicable and to the best of Midcontinent Independent System Operator, Inc.’s (“MISO”) knowledge and belief at this time, MISO admits or denies below the factual allegations in the Voltus, Inc. (“Voltus” or “Complainant”) Complaint. To the extent that any fact or allegation in the Complaint is not specifically admitted below, it is denied. Except as stated below, MISO does not admit any facts in the form or manner stated in the Complaint. MISO retains the right to supplement its admissions and denials herein.

For purposes of MISO’s specific responses below, references to: “Commission Orders” shall include statements made by the Commission and studies or assessments conducted by the Commission; “Regulations” shall refer to the federal or state regulation referenced by Voltus in the corresponding paragraph; “Stakeholder Materials” shall include presentations, studies, whitepapers, position statements and written materials published or presented by MISO in one of its various stakeholder forums; “State Laws, Regulations or Orders” shall refer to the relevant

state law, regulation or order referenced by Voltus in the corresponding paragraph.

The Complaint does not contain allegations in numbered paragraphs. Therefore, to facilitate Commission review, MISO restates each paragraph of the Complaint in italics and omitting footnotes above each of MISO's paragraph specific admissions and denial.

I. THE PARTIES

1. Voltus

1. Voltus is a provider of demand response services to commercial and industrial customers across the United States and Canada. As an Aggregator of Retail Customers ("ARC") Voltus enables profitable participation in demand response programs across the MISO footprint. Voltus enables its commercial and industrial customers to deliver to wholesale and retail markets the benefits that their behind-the-meter assets (*i.e.*, load curtailment, energy storage, distributed generation, and energy efficiency) provide in delivering energy, capacity, and ancillary services that these markets need to operate. In return, Voltus secures market revenues for these assets as a form of payment to incentivize their participation in markets.

MISO RESPONSE: MISO admits that Voltus is a provider of demand response services in MISO. MISO is without sufficient information to form an opinion regarding Voltus' activities as described and therefore denies such statements.

2. Respondent

2. MISO is a Commission-approved RTO responsible for reliability coordination of the wholesale bulk power and electric transmission system in fifteen U.S. states and one Canadian province. Currently, MISO directs the operation of over 65,000 miles of high-voltage transmission, approximately 185,000 megawatts of power- generating resources

across its footprint, and manages one of the world's largest energy markets. MISO is a North American Electric Reliability Corporation certified balancing authority responsible for maintaining load-interchange- generation balance within its balancing authority area and for supporting the Eastern Interconnection frequency in real time. MISO has its principle operations in Carmel, Indiana. MISO also maintains backup control centers and data rooms in Indianapolis, Indiana; Eagan, Minnesota; and Little Rock, Arkansas.

MISO RESPONSE: MISO admits the allegations in this paragraph with the clarification that it does not maintain a backup and control center and data rooms in Indianapolis, Indiana.

II. INTRODUCTION AND EXECUTIVE SUMMARY

3. Long-standing federal policy aims to foster demand competition in wholesale energy markets because such competitive pressure has the effect of reducing wholesale power prices, increasing awareness of energy usage, providing more efficient operation of wholesale markets, mitigating market power, enhancing reliability, and supporting the integration of renewable energy resources. The inability of third-party aggregators of demand response to freely participate in MISO's wholesale market unnecessarily restricts and stifles such competition. The ability for states to target ARCs and specifically carve them out of MISO's wholesale market as codified in the "opt-out" provisions of Order 719, contravenes FERC's responsibilities pursuant to the Federal Power Act, results in rates that are unjust and unreasonable, and also unduly discriminates against demand response resources generally and demand response aggregators specifically. In MISO in particular, the pervasive extent of state opt-outs has resulted in an anemic market for wholesale demand response, which, in light of ongoing changes to the resource mix, now

poses an imminent threat to efficient and reliable grid operation. This Complaint focuses on the harm imposed by the state opt-outs in MISO, which are authorized under Order 719 and implemented through MISO's tariff. However, because the Complaint raises flaws that strike to the heart of the legality of the opt-out adopted in Order 719, the Complaint seeks reversal of the opt-out through rulemaking in addition to immediate redress of the unjust, unreasonable, and unduly discriminatory rates in MISO that adversely impact Voltus.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

4. The Commission has previously recognized the key role demand response plays in supporting a healthy and well-functioning grid, which also has the benefit of supporting just and reasonable rates. Demand response has proven to, among other things, flatten load profiles, reduce overall costs, increase reliability, and help properly balance supply and demand. Furthermore, the Commission and other regulatory entities have recognized that aggregators of demand response, such as Voltus, provide numerous enhanced benefits to the grid by expanding the amount of demand response in the market, lowering prices, enhancing the reliability of the system, encouraging implementation of innovative

technology, and simplifying delivery of grid services.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

5. Most recently, the Commission has again recognized the distinct value of distribution-connected resources, and of aggregators capable of ensuring their effective participation in wholesale markets, in the historic Order 2222. Indeed, the Commission found that “[a]ggregations of new and existing distributed energy resources [of which demand response is one] can provide new cost-effective sources of energy and grid services and enhance competition in wholesale markets as new market participants.” The Commission concluded that existing RTO/ISO rules “present barriers to the participation of distributed energy resource aggregations in the RTO/ISO markets, and such barriers reduce competition and fail to ensure just and reasonable rates.” The Commission then directed RTOs to adopt reforms to remove barriers to participation of distributed energy resource aggregations into its wholesale markets.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no

response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

6. In spite of its uncontroverted benefits, the full capabilities of demand response technology remain largely untapped. An assessment conducted at the Commission's direction found that the potential market for demand response in the United States would be close to 200,000 MW by 2019. Yet in 2018 electric utilities have delivered a mere fraction of that latent potential of demand response.⁸ In MISO, where the flexibility, availability, and other operational features of the fleet of predominantly utility-run demand response lags substantially behind that of other regions, the gap between the potential of the technology and reality is particularly wide.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

7. The failure to unleash demand competition poses an acute threat in MISO, where a combination of factors including reduced reserve margins, increased forced outages, and

the integration of variable renewable resources has led to increased Maximum Generation Emergency events, signaling increasing operational risk to the grid. MISO has stated that current reliance on demand response to meet load- serving entities (“LSE”) planning reserve margin requirements “has never been greater” and that these resources “are one of MISO’s ‘last lines of defense’ before having to engage in firm load shedding.” However, MISO’s demand response to date has largely underperformed or possessed inadequate operational characteristics to meet these increasing challenges.

MISO RESPONSE: To the extent that this paragraph references MISO’s Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies these allegations.

8. The opt-out directly contributes to MISO’s market inefficiencies and operational risk. At a moment when MISO’s evolving grid conditions most acutely require the enhanced capabilities of flexible demand response, the near ubiquity of state opt-outs within MISO has eviscerated demand competition, and thereby significantly impeded demand response development in the grid operator’s footprint.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

9. The opt-out is unlawful for numerous reasons. First, jurisprudence since the adoption of Order 719 now dictates that the opt-out approach taken in Order 719 is inconsistent with

the Federal Power Act's basic jurisdictional divide, as states simply do not possess the authority to directly determine whether resources are permitted to participate in RTO/ISO markets. The Commission's recent landmark orders on storage and distributed energy resources recognize this shift and have abandoned Order 719's blanket opt-out in favor of a considered framework for coordination between wholesale and distributional system operators with respect to participation of these resources. The Commission's conclusion that its exclusive jurisdiction over wholesale market rates precludes states from barring participation of storage or distributed energy resources applies with equal force to demand response. Order 719's anomalous treatment of demand response can no longer stand.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

10. Second, the opt-outs adopted under Order 719 have become a significant barrier to competition in the market, which act to insulate utility demand response programs from competitive pressures and result in rates that are not just and reasonable. Absent this competitive pressure, the market cannot unlock latent demand response resources or spur the innovation and technological development of demand response capability that would

otherwise ensure just and reasonable rates. There is no question that removing the primary barrier to aggregators of demand response participating in the market would increase the net amount of demand response and generate competitive pressure to produce operationally superior technology, such that power demand could more effectively respond to the wholesale price of electricity. The Commission broadly recognizes this principle in its Order 2222, where it states that “removing the barriers to participation by distributed energy resource aggregations will enhance the competitiveness” which “encourages entry and exit and promotes innovation, incents the efficient operation of resources, and allocates risk appropriately between consumers and producers.” Moreover, substantial evidence demonstrates the opt-out has stymied the development of demand response in MISO specifically, impacting both the quantity and quality of demand response participation, harming market efficiency and failing to ensure just and reasonable rates.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

11. Lastly, the opt-out is unduly discriminatory. First, there is no basis for demand response resources to face limitations on participation that energy efficiency, other forms of energy

storage, and other distributed energy resources do not. Such an approach defies the Commission's longstanding commitment to technology-neutral market rules. As the Commission recently recognized,

[L]imiting the types of technologies that are allowed to participate in RTO/ISO markets through a distributed energy resource aggregator would create a barrier to entry for emerging or future technologies, potentially precluding them from being eligible to provide all of the capacity, energy, and ancillary services that they are technically capable of providing.

Yet that is precisely the limit imposed on current and future demand response technologies, which face barriers to entry throughout much of MISO.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

12. Second, the way in which the opt-outs are deployed in MISO is unduly discriminatory because it allows the states to treat demand response aggregators differently than utility-affiliated programs. The Commission has clearly recognized that key consideration in this context is whether the "operational characteristics" of differing distributed energy resources can be aggregated to meet "certain qualification and performance requirements." Therefore, the implementing entity or ownership of a particular demand response program is not a valid basis for discrimination, as it is immaterial to the

program's operational capabilities. The opt-out results in unequal treatment for resources capable of comparable performance - the hallmark of a discriminatory rule in wholesale electricity markets.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

13. To alleviate the ongoing and worsening harms posed by state opt-outs in MISO, Voltus requests the Commission find MISO's existing tariff provisions are not just and reasonable and are unduly discriminatory; direct MISO to disregard certain state actions that invalidly seek to block aggregators from participating in MISO through measures other than state law or regulation; and require MISO to initiate a process to incorporate mechanisms for coordination with distribution system operators, specific to demand response and parallel to those that apply to distributed energy resources under Order 2222. Voltus further requests that the Commission eliminate the unlawful opt-out adopted in Order 719 via rulemaking. Ultimately, Voltus seeks that the sea change in enhancing market competition, which began with storage resources in Order 841 and continued with distributed energy resources in Order 2222, extend now to demand response resources. The sensible approach to coordination with retail authorities and distribution system

operators adopted in those seminal Orders can and must be applied to demand response.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

III. REQUEST FOR FAST TRACK PROCESSING

1. Voltus is Materially Harmed by the Opt-Outs and Requests Fast Track Processing Pursuant to 18 CFR § 385.206(h) and 18 CFR § 385.206(b)(11)

14. At the time of filing, Voltus may only operate as an ARC in a small portion of MISO, which includes MISO Illinois, Michigan (serving the 10% of load that is allowed to buy competitive electricity supply), MISO Texas, and a limited set of municipal and cooperative utilities that have consented to allow Voltus to operate in their service territories (*e.g.*, the City of New Orleans). The state opt-outs, made available to states under Order 719 and the MISO tariff provisions implementing it, prevent Voltus from operating in the other states in MISO's footprint. Voltus estimates that but-for the opt-outs, Voltus could be delivering over 9,000 MWs of demand response in MISO states, and further estimates that if Voltus were delivering the same demand response that utilities currently provide, that Voltus would be saving ratepayers \$130 million per year, while delivering better quality service via its technology platforms.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

15. The state opt-outs represent nearly a half a billion dollars in potential lost revenue to Voltus. As a result of upcoming auction deadlines, standard processing of the Complaint

will not be adequate, and Voltus requests fast track processing pursuant to 18 CFR § 385.206(h) and 18 CFR § 385.206(b)(11). Each year in MISO a Planning Resource Auction (“PRA”) is held that allows demand response to bid into the market alongside any supply-side capacity resource. The PRA auction takes place in March of each year with results posted in April for delivery in the same year beginning in June. Resources that want to participate in the auction need to be approved for participation by MISO in February of each year. Voltus requests fast track processing such that Voltus would be able to bid demand response into the market from all MISO states by that timeframe. To generate such bids, Voltus would need to prepare their requests for approval to register in the PRA well in advance of when Voltus is required to have all information submitted to MISO for those resources to participate in the 2021/2022 PRA.

MISO RESPONSE: MISO admits that it holds the PRA in March of every year and posts the results in April of each year for the Planning Year beginning in June of the same year as the PRA. MISO also admits that eligible demand response may participate in the PRA. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

IV. BACKGROUND

1. Legal Background

a. Order 719 Aims to Remove Barriers to Demand Response to Improve Wholesale Market Competition.

16. In 2008, spurred by Congress’ urging in the Energy Policy Act of 2005 that it is the “policy of the United States” to encourage demand response, the Commission issued Order 719. Recognizing that “[i]mproving the competitiveness of organized wholesale

markets is integral to the Commission fulfilling its statutory mandate to ensure supplies of electric energy at just, reasonable and not unduly discriminatory or preferential rates,” Order 719 sought to eliminate barriers to demand response participation in RTO or ISO markets. Among other reforms, Order 719 required grid operators, except in certain circumstances, to permit an aggregator of retail customers to bid demand response on behalf of retail customers directly into its organized markets. The Commission found that permitting aggregators to participate reduces a barrier to demand response, and that “aggregating small retail customers into larger pools of resources expands the amount of resources available to the market, increases competition, helps reduce prices to consumers and enhances reliability.” The Commission further concluded that experiences with aggregation programs in PJM, New York Independent System Operator, Inc. (“NYISO”), and ISO New England show that such programs increase demand responsiveness in a region, and that permitting ARCs to participate in wholesale markets could encourage development of demand response programs.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

17. Certain parties to the proceeding opposed the requirement to permit direct participation of aggregators in the wholesale markets, arguing that the rule would violate the lines between federal and state jurisdiction and such aggregation of retail demand would require regulatory commission approval. To address the concerns of state and local retail regulatory entities and avoid new jurisdictional concerns, the Commission adopted its proposal to require participation of ARCs into regional markets “unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate in this activity.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

18. On rehearing, the Commission rejected arguments that its order to allow direct participation by aggregators into wholesale markets exceeds its authority under the Federal Power Act. The Commission reaffirmed that “well-functioning competitive wholesale electric markets should reflect current supply and demand conditions”; that “wholesale markets work best when demand can respond to the wholesale price”; and that the ARC requirement is one element of achieving the Commission’s statutory goals. The Commission again recognized the direct and indirect benefits of demand response on

wholesale market prices, including by enhancing reliability.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

19. The Commission further explained that its rule “did not challenge the role of states and others to decide the eligibility of retail customers to provide demand response.” The Commission adopted changes to Order 719 to address alleged burdens that the rule could place on smaller entities: for small utilities that distribute less than four million megawatt-hours, the grid operator cannot accept an ARC bid unless the relevant electric retail regulatory authority *permits* such a bid; whereas for utilities larger than that threshold, the grid operator must accept an ARC bid unless the relevant authority *prohibits* it. However, the Commission rejected claims that Order 719 imposes upon the relevant regulator a burden to clarify for an RTO/ISO whether an ARC may aggregate demand response within its jurisdiction. The Commission reiterated that Order 719 “indicated only that the RTO and ISO must accept bids from an ARC unless the laws or regulations of the relevant electric retail regulatory authority do not permit the ARC to bid.” Thus, “the Final Rule does not require retail regulators to take any action whatsoever.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

20. Several parties sought rehearing of the revised Order 719. Among other concerns, the rehearing requests sought clarity on the treatment of LSEs and third- party agents who may be designated by LSEs to provide demand response. The request argued LSEs should not inadvertently be included in the definition of an ARC and that third party agents for LSEs should not be treated as ARCs, because the automatic exclusion of such entities from providing demand response in small utility service territories would perversely create a barrier to demand response programs. The Commission rejected the request as contrary to the goal of the proceeding to “improve the operation of wholesale competitive markets in organized market regions.” The Commission explained that providing such “special treatment” to LSEs and their third-party agents would afford them a “competitive advantage” over ARCs that is contrary to the Commission goal of enhancing competitive markets. Further, the Commission was “not persuaded that such action is consistent with [its] obligation to prevent undue discrimination.” Ultimately, no party challenged Order 719 in court.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

b. The Supreme Court Upheld Commission Authority to Set Rules for Demand Response Participation in Wholesale Markets.

21. In 2011, the Commission issued Order 745 to address compensation for demand response in wholesale energy markets. The Commission reiterated that “a market functions effectively only when both supply and demand can meaningfully participate” and found that compensation levels inhibited meaningful demand side participation. On rehearing, parties again challenged the Commission’s authority to regulate demand response because “demand response is a retail non-purchase and retail rates have traditionally been subject to State or local regulation.” Parties also alleged that Order 745 interfered with existing retail demand response programs, and therefore intruded on state jurisdiction. Ultimately on appeal, the Supreme Court rejected these arguments. The Court concluded that market operators’ payment of demand response commitments directly affect wholesale rates; that in addressing those practices, the Commission does not regulate retail sales, and; finally, that finding the opposite would contradict the core purposes of the Federal Power Act. The Court recognized that the Federal Power Act bars the Commission from regulating retail rates, but concluded that FERC regulation does not constitute retail regulation merely because it affects “even substantially” the “quantity or

terms of retail sales.”⁴⁹ Because “every aspect of the regulatory plan happens exclusively on the wholesale market and governs exclusively that market’s rules,” Order 745 remains within the Commission’s jurisdictional bounds.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

22. No party challenged FERC’s provision for state opt-outs, first adopted in Order 719 and maintained in Order 745. As such, the Court did not address the lawfulness of this aspect of the Commission’s regulations. However, the Court noted that such solicitude toward the States was a “finishing blow” to opponents’ jurisdictional arguments.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

c. The Commission Declined to Afford State “opt-outs” for Energy Efficiency Resources and Electric Storage Resources.

23. In the years following the definitive ruling of the Supreme Court upholding the Commission’s authority to regulate wholesale participation of demand resources, the Commission has declined to extend state authority to ban other resources from participating in wholesale markets, notwithstanding that such participation may result in significant impacts to retail sales.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

24. In 2017, Advanced Energy Economy, a trade organization, sought a declaratory petition to establish, *inter alia*, the Commission’s exclusive jurisdiction to regulate the participation of certain energy efficiency resources (“EER”) in the wholesale electricity markets. A retail regulatory commission sought to restrict the ability of EERs to participate in wholesale markets. The grid operator, PJM, then launched a stakeholder process to consider a mechanism parallel to the demand response opt-out to enable RERRAs to limit EER participation within their retail service area. Advanced Energy Economy argued that because Order 719 did not provide for such an EER opt-out, only the Commission held the authority to adopt one. The Commission agreed, finding that:

“the Commission has exclusive jurisdiction over the participation of EERs in wholesale markets.” Further, the Commission concluded that “EERs’ connection to retail electric service does not dictate the jurisdictional authority of RERRAs regarding EERs’ wholesale market participation.” Instead, “[a] unilateral state action that directly prohibits or limits the participation of EERs in the wholesale markets directly impacts which EERs are eligible for participation and impermissibly intrudes upon the wholesale electricity market, a domain Congress reserved to the Commission alone.” The Commission did not grant a blanket power to states to ban EER participation in wholesale markets, stating that the Commission would consider any such requests “in a manner consistent with the Commission’s obligations to ensure that the rates, terms, and conditions of wholesale markets are just and reasonable and not unduly discriminatory or preferential.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

25. In the landmark Order 841, the Commission likewise declined to grant states the ability to block energy storage resources (“ESR”) participation in wholesale markets, even where ESRs are interconnected at the distribution-level. The Commission again

concluded that it “has exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets, including the wholesale market rules for participation of resources connected at distribution-level voltages or behind the meter.” The Commission considered the effects the wholesale sales from ESRs would have on the distribution system in deciding whether to exercise its discretion to grant an opt-out, but concluded that “the benefits of allowing electric storage resources broader access to the wholesale market outweigh any policy considerations in favor of an opt-out.” The Commission reasoned that the opt-out could limit participation, and impact the significant benefits of removing barriers to ESRs participation.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

26. The Commission acknowledged that nothing in Order 841, however, preempted the states’ right to regulate the safety and reliability of the distribution system. The Commission explained that the order does not modify states’ authority to provide terms of access, so long as the states “do not aim directly at the RTO/ISO markets.” Thus, states have the authority to include conditions in their own retail programs that prohibit participants from also selling into RTO/ISO markets. Market participants then possess a

choice between participating in retail or wholesale markets. States, however, “may not take away that choice by broadly prohibiting all retail customers from participating in RTO/ISO markets.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

d. The D.C. Circuit Upheld Order 841, Recognizing That the Commission Holds Exclusive Authority to Determine Who May Participate in the Wholesale Markets.

27. Parties challenged Order 841 and the Commission’s failure to incorporate a state opt-out in court as inconsistent with the jurisdictional limits of the Federal Power Act, but the D.C. Circuit fully rejected these arguments. The Court “swiftly” concluded that the Commission’s proscription against blanket bans on wholesale participation “directly affects wholesale rates.” Order 841 “hits the [jurisdictional] bullseye” because “keeping the gates open to all types of ESRs,” regardless of their interconnection points, ensures technological advances are fully realized in the markets, leads to greater competition, and thereby reduces wholesale rates. The Court further concluded that Order 841 did not regulate matters left to the states under the Federal Power Act. While “favorable participation models will lure local ESRs to the federal marketplace” and therefore impact the distribution system through which they connect, such effects are permissible.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

28. In response to the argument that Order 841 deprives states of the authority to block local ESRs from seeking access to wholesale markets through distributional facilities, the Court explained that it is not Order 841 that has the effect of depriving states of this authority, but rather the “well-established principles of federal preemption.” The Supremacy Clause dictates this result. The Court elaborated:

Any effort that aims directly at destroying FERC’s jurisdiction by necessarily dealing with matters which directly affect the ability of the Commission to regulate comprehensively or effectively over that which it has exclusive jurisdiction invalidly invades the federal agency’s exclusive domain.

Order 841, by taking off the table blanket state opt-outs but acknowledging that other forms of state regulation of local ESRs is permissible, merely repeats the ordinary principle that State’s regulations “aimed directly” at matters in FERC’s jurisdiction are preempted, “and those aimed at” fulfilling a State’s own jurisdictional obligations are not.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations

in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

e. The Commission Declined to Afford State “opt outs” for Distributed Energy Resources.

29. Most recently, the Commission again declined to extend state authority to ban resources from participating in wholesale markets in the context of distributed energy resources (“DER”). The final rule enables DERs to participate in the regional organized wholesale capacity, energy and ancillary services markets alongside traditional resources. Multiple DERs can aggregate to satisfy minimum size and performance requirements that they might not meet individually. The order is an outgrowth of FERC Order 841, which set similar rules for batteries and other energy storage systems to serve in wholesale markets. However, Order 2222 is much broader in scope, and provides guidance for how various types of aggregated resources can be integrated into wholesale markets. Order 2222 requires that:

For each RTO/ISO, the tariff provisions addressing distributed energy resource aggregations **must** (1) allow distributed energy resource aggregations to participate directly in RTO/ISO markets and establish distributed energy resource aggregators as a type of market participant. . .

The Order further adopts a technology neutral definition of distributed energy resources that expressly includes, *inter alia*, “demand response.” The Commission further clarified “that, because demand response falls under the definition of distributed energy resource, an aggregator of demand response could participate as a distributed energy resource aggregator.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

30. In the final rule the Commission sought to “remove barriers to the participation of distributed energy resource[] aggregations in the Regional Transmission Organization (RTO) and Independent System Operator (ISO) markets (RTO/ISO markets).” The Commission found that “existing RTO/ISO market rules are unjust and unreasonable in light of barriers that they present to the participation of distributed energy resource aggregations.” The Commission concluded that “establishing the criteria for participation in RTO/ISO markets, including with respect to resources located on the distribution system or behind the meter, is essential to the Commission’s ability to fulfill its statutory responsibility to ensure that wholesale rates are just and reasonable.” In this context, the Commission specifically declined to grant states the ability to block DER participation in wholesale markets, finding that the “reliability, transparency, and market-related benefits” of participation by aggregators “outweigh the policy considerations in favor of an opt-out.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the

Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

31. However, the Commission inexplicably and contradictorily preserved the opt- out in Orders 719 and 719-A, thus allowing retail authorities to bar participation only one specific type of resource, aggregators of demand response resources. FERC’s Order 2222 nevertheless underscores the importance of DR benefits to competition, just and reasonable rates, and the value of using aggregators. Indeed, the Commission specifically recognized that an opt-out can “substantially limit [resource] participation” and thereby deprive RTO/ISO markets of “significant” benefits.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

2. Factual Background

- a. The Need for the Flexibility of Demand Response to Ensure Affordable, Reliable Service in MISO has Never Been Greater.**

32. The circumstances that have led to unprecedented reliance on demand response within MISO are “well documented” in a series of MISO-published whitepapers dating back to March 2019, as well as related MISO filings and corresponding Commission Orders. As MISO describes:

The MISO Region is transitioning from a generation portfolio dominated by coal and nuclear generation resources to a portfolio that relies on an increasing quantity of intermittent and emergency only resources – even to meet MISO’s planning reserve requirements. Base load generation retirements have increased the pace of this transition and have caused MISO to operate with actual capacity margins that have consistently been decreasing towards minimum resource requirements. As a result, MISO has experienced a decrease in operational flexibility as capacity margins continue to diminish.⁸⁹

MISO explains that operating at or near minimum reserve margin requirements results in greater exposure to correlated risks, such as extreme weather events. At the same time, MISO states that it faces increasing forced outage rates for generation and significant correlation in the timing of planned outages and derates. These circumstances result in resource risk outside of the traditional summer peak times. Further, MISO describes that increased reliance on intermittent and variable resources creates the need for intra-day flexibility. MISO has experienced a significant increase in the number of Maximum Generation Emergencies, including alerts, warning, events, and more of such emergencies outside of the traditional summer peak. MISO explains that this combination of factors increases the need for resources that can respond with short notification times, before emergency operations begin. Consequently, demand response resources now serve a particularly crucial role to ensuring reliability in MISO. Moreover, it is not merely the *quantity* of such resources, but the *quality* – i.e., their operational characteristics, including availability, notification time, and performance during

emergency conditions – that is critical to effective, efficient and reliable operations.

MISO explains that current reliance on demand response to meet LSE planning reserve margin requirements “has never been greater” and that these resources “are one of MISO’s ‘last lines of defense’ before having to engage in firm load shedding.” Nor is reliance on demand response a near-term phenomenon. MISO projects that its reforms to resource adequacy will continue to focus on enhancing resource availability, visibility, and flexibility, as the shift in the resource mix and other factors driving reliance on demand response will only intensify in the future.

MISO RESPONSE: To the extent that this paragraph references MISO’s Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies any allegations that are inconsistent with or expand upon MISO’s Tariff, filings or Stakeholder Materials.

b. Even as Reliance on Demand Response is at its Height, MISO Continues to Lack the Requisite Operational Quality of Demand Response.

33. At the same time that MISO recognizes that the additional operational flexibility offered by demand response is critical to the challenges it faces now and for the foreseeable future, it considers the suite of demand response resources currently available insufficient to meet operational needs. In particular, although a large quantity of capacity participates in MISO as “load modifying resources” (“LMR”), MISO has found the historical performance and operating characteristics of existing LMRs to be inadequate to meet MISO’s changing needs.

MISO RESPONSE: To the extent that this paragraph references MISO’s Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or

stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies any allegations that are inconsistent with or expand upon MISO's Tariff, filings or Stakeholder Materials.

34. MISO defines demand response as “actions taken to reduce consumption when the value of consumption is less than the marginal cost to supply the electricity,” and offers a number of different demand response market mechanisms allowing resources to participate in the wholesale market. Although MISO offers three different categories of demand products, including 1) LMRs; 2) Emergency Demand Response Resources (“EDR”), and 3) Demand Response Resources (“DRR”), the vast majority – roughly 90% – of demand response in MISO appear as LMR resources. LMRs include demand response resources and behind-the-meter generation that clear MISO's PRA and provide interruptible load services during capacity shortages to help meet the energy balance.

MISO RESPONSE: To the extent that this paragraph references MISO's Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies any allegations that are inconsistent with or expand upon MISO's Tariff, filings or Stakeholder Materials.

35. Although MISO procures a high proportion of demand response relative to its load, historically LMRs have been relied upon infrequently. Since MISO's market inception in 2005, there have only been ten instances where LMRs were called to address capacity shortages – seven of which occurred since 2017. In only one of those occasions did

MISO call upon all LMRs.¹⁰⁴ MISO explains that, in the past, capacity surpluses exceeded 40% of coincident peak, and LMR-type resources were used to meet infrequent “super-peaking” needs when demand was much higher than the expected forecast. Given the limited prior reliance on demand response, MISO explains that its LMR participation rules “focused on accommodating existing utility programs and capabilities.”

MISO RESPONSE: To the extent that this paragraph references MISO’s Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies any allegations that are inconsistent with or expand upon MISO’s Tariff, filings or Stakeholder Materials.

36. Now put to the test under recent conditions of tighter supply, MISO has repeatedly expressed concerns that it cannot rely on existing LMR to be available and perform during emergencies. The notification time for LMR is substantially longer than demand response capabilities in other RTO/ISOs. Prior to reforms adopted over the past year, nearly a third of LMRs required 12-hour notice and another 60 percent could be available within a four-hour window. Subsequent to its tariff reforms, MISO reports that notification requirements have declined significantly, yet some 20 percent of LMRs continue to require longer than 6-hour notification to be available. In contrast, emergency demand response products in PJM, CAISO, and NYISO allow for only 30-minute to at most 2-hour notice. Lack of LMR with short notification times has resulted in MISO being able to call only a small fraction of LMR during an emergency. In the lead up to emergency events where MISO was able to provide longer notification time,

existing LMR has underperformed.

MISO RESPONSE: To the extent that this paragraph references MISO's Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies any allegations that are inconsistent with or expand upon MISO's Tariff, filings or Stakeholder Materials.

37. Recent tariff reforms, including changes to allow MISO to schedule long-lead LMRs in advance of emergencies; a requirement on LMRs to offer based on actual availability in all seasons; LMR testing requirements; and limiting full accreditation to LMRs meeting certain shorter-notification requirements and availability requirements, are projected to continue to enhance LMR availability and transparency around LMR capabilities. Yet MISO has never contended that these "short term fixes intended to moderate current operational concerns" would alleviate the need for "a more holistic set of longer-term solutions." Indeed, even as MISO reported greater availability and flexibility in LMR at the time of registration, actual availability of LMR in operations decreased over the past year. Moreover, the recently-approved reforms are projected to result in declines in total LMR, potentially leading to the loss of as much as 2.6 GWs of capacity depending on how rapidly market participants respond to changing accreditation requirements. Such losses will occur even as MISO's reforms have not addressed larger structural concerns about LMR availability, including the discrepancy between where most LMRs are located (in North and Central MISO) and where most emergency events arise and LMRs or other flexible demand response are most needed (in MISO South). In sum, MISO

continues to need the capabilities of flexible, available demand response in order to ensure efficient, reliable and affordable operation both now and for the foreseeable future.

MISO RESPONSE: To the extent that this paragraph references MISO’s Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies any allegations that are inconsistent with or expand upon MISO’s Tariff, filings or Stakeholder Materials.

c. RERRAs have Blocked Aggregator Participation in MISO Across Nearly the Whole of the MISO Footprint.

38. MISO covers all or part of 15 states. In all but three states, aggregators of demand response that are not acting on behalf of an LSE are barred from directly participating in MISO. Most states adopted restrictions on ARC participation around 2009 or shortly thereafter, subsequent to the Commission’s decision on rehearing of Order 719. In several cases, the bans on ARC participation were adopted by orders that were styled as temporary to allow for further deliberation. Many of these early orders raised basic questions about matters such as the benefits of demand response to retail customers, or the mechanism by which non-utility participants could be credited for reductions in load. A decade later, these “temporary” orders largely stand unchanged. Other early orders provided little or no rationale at all, and also remain in force, unchanged.

MISO RESPONSE: MISO admits that it operates in all or part of 15 states. To the extent that this paragraph references the State Laws, Regulations or Orders, MISO states that as documents the State Law, Regulation or Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the

allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

39. The remaining states that have adopted orders banning ARCs did so recently, in response to efforts by aggregators to do business within the regulated utility service territory. In two instances, the mere notification of the registration of an ARC prompted, without deliberation, interim orders barring further activity by ARCs.

MISO RESPONSE: To the extent that this paragraph references the State Laws, Regulations or Orders, MISO states that as documents the State Law, Regulation or Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

40. Only one state in MISO has adopted a law restricting ARCs. In 2013, the Arkansas General Assembly passed legislation restricting ARC unless the Arkansas Public Service Commission (“Arkansas Commission”) determines such action to be in the public interest. After long dormancy, the Arkansas Commission opened an informational docket and then, on July 7, 2020, established a procedural schedule to consider the matter. On August 28, 2020, Arkansas Commission staff filed comments recommending that it is in the public interest to allow ARC participation. The proceeding is ongoing, with further opportunity for comment anticipated before the Arkansas Commission issues

a decision in the matter.

MISO RESPONSE: To the extent that this paragraph references the State Laws, Regulations or Orders, MISO states that as documents the State Law, Regulation or Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

41. At the same time that nearly all states in the MISO footprint have prohibited the participation of ARCs in the wholesale market, several states have encouraged generally or approved specific ARCs to serve as a third-party agents for an LSE. Such arrangements typically take two forms, one version in which certain ARCs are qualified by the utility to sign up retail customers, but the utility itself enrolls the customers in the wholesale demand response program. Alternatively, a utility may contract with a single demand response provider, setting explicit terms for enrollment, design, and implementation of the entire program. In each case, the LSE retains significant control over the design of the demand response program and terms of compensation. As discussed further herein, efforts to enable aggregator participation through such arrangements have largely been unsuccessful. Such arrangements have not supported significant opportunities for aggregators to participate in MISO markets, nor provided a substitute for robust competition of demand response in MISO markets.

MISO RESPONSE: To the extent that this paragraph references the State Laws, Regulations or Orders, MISO states that as documents the State Law, Regulation or

Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

V. DISCUSSION

1. States Lack Authority to Adopt a Blanket Ban on Wholesale Demand Response Participation.

a. Caselaw since the Adoption of Order 719 Now Shows that Blanket State Opt-Outs are Inconsistent with the Federal Power Act.

42. The Commission adopted provisions in Order 719 for states to categorically limit retail customer participation in wholesale markets at a time when its authority over demand response resources remained uncertain. Subsequent legal developments have clarified not only that the Commission has the authority to set the eligibility and other terms of participation of resources that are composed of retail customer actions or that connect at the distribution system in wholesale markets, but that this authority is exclusive. The D.C. Circuit's recent decision upholding Order 841 now leaves no doubt that the approach taken in Order 719 is inconsistent with the Federal Power Act's basic jurisdictional divide.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act,

Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is

required, MISO denies these allegations.

43. Order 841 omitted, over the objection of retail regulators, the opt-out afforded in Order 719. Yet in upholding the consistency of Order 841 with the Federal Power Act, the Court did not conclude that withholding such an opt-out was merely a reasonable choice within the Commission's discretion. Rather, the D.C. Circuit upheld Order 841 on grounds that have broader implications. The Court explained that Commission's denial of such an opt-out is not an usurpation of state authority, but "simply a restatement of the well-established principles of federal preemption." In other words, under the plain terms of the Federal Power Act, states *do not possess authority* to directly determine whether resources are permitted to participate in RTO/ISO markets. Such state actions directly "aim at" wholesale transactions and are therefore field preempted. As the Court described, a categorical ban on wholesale participation of certain resources "aims directly at destroying FERC's jurisdiction" – such state actions prohibit the very wholesale transactions that are the subject of FERC's authority, and necessarily impact the ability of the Commission to regulate comprehensively and effectively.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

44. The Commission acknowledges this clear shift in case law in Order 2222, where the Commission explains that it is the Commission that “has exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets,” and therefore that a RERRA “cannot broadly prohibit the participation” of a category of resources or resource aggregators “as doing so would interfere with the Commission’s statutory obligation to ensure that wholesale electricity markets produce just and reasonable rates.” The Commission simply failed to apply this legal framework to the opt-out in Order 719.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

45. While *EPSA*, *Hughes*, and *NARUC* did not directly address the legality of the state-opt out in Order 719, the Commission can no longer evade their implications. The legal landscape has shifted since 2009, and the opt-out originally afforded states in Order 719 is no longer legally viable.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no

response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

b. The Commission Lacks a Legally Relevant Basis to Distinguish Between Categorical Bans on the Participation of Demand Response and Those Prohibiting Other Resources.

46. Assuming *arguendo* that the Commission has some discretion in the matter, the Commission could not reasonably conclude that a state opt-out of demand response is consistent with the Federal Power Act, but that state opt-outs of storage and DERs are not. The Commission has already forcefully taken the position that a state ban on storage resources would be “preempted” because such a state action “aims directly at the wholesale markets.” The Commission cannot make a principled distinction between a state ban on wholesale participation of demand response resources and a ban on wholesale participation by storage resources or DERs. Each of these state actions categorically bar a type of *wholesale transaction* and therefore “aim at” or “target” the wholesale markets to exactly the same degree.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

47. The Commission itself has argued that “preemption turns on the subject or target of the state action, not its effects.” The Commission then made clear that a “state law—e.g., legislation, rule, or administrative order—categorically barring” a wholesale resource transaction would “aim[] *directly* at the [wholesale] markets subject to FERC’s exclusive jurisdiction and, accordingly, would intrude on that exclusive federal field.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

48. When a regulator exercises its authority in a manner that aims to regulate that which is reserved to the other sovereign’s exclusive authority, it oversteps its jurisdictional bounds just as if it had directly set a rate subject to the other regulator’s control. In the Order 841 litigation, FERC examined *Hughes*, citing it as “recent guidance on when a state program impermissibly aims at FERC’s regulatory turf.” FERC then argued that a hypothetical ban on storage facilities would be field preempted under *Hughes* because “[w]hile the [state] law regulated entities over which States exercise control—generation resources, 16 U.S.C. § 824(b)(1)—it did so in a way that targeted FERC’s statutory domain.” The Commission cited to a plethora of additional authorities in support for the proposition.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

49. FERC's argument in the Order 841 litigation is consistent with its position with regard to energy efficiency resources, where it found that state and local prohibitions on certain energy efficiency resources directly affect wholesale rates and therefore infringed upon the Commission's statutory mandate. Specifically, the Commission found that:

A unilateral state action that directly prohibits or limits the participation of EERs in the wholesale markets directly impacts which EERs are eligible for participation and impermissibly intrudes upon the wholesale electricity market, a domain Congress reserved to the Commission alone.

The logical consequence of the Commission's position, as articulated consistently in recent proceedings addressing storage, energy efficiency and distributed energy resources, is that the state actions that prohibit third party aggregators or individual retail customers from participating in MISO's wholesale markets are preempted.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which

no response is required. To the extent that a response is required, MISO denies these allegations.

50. Nor do the factual distinctions between the different technologies – their differing characteristics, ways of interacting with the distribution system, or spillover effects on retail rates – change that conclusion. No doubt wholesale participation by storage resources, energy efficiency resources, demand response resources, and other forms of distributed energy resources each impose differing types and degrees of impacts on the legitimate interests of retail authorities. Yet, the Commission has been clear that such impacts are “legally irrelevant.” As the Commission pointed out in the Order 841 litigation, *Hughes* found that States “may not seek to achieve ends, *however legitimate*, through regulatory means that intrude on FERC’s authority over interstate wholesale rates.” In each case, it is the direct aim of the state actions at wholesale transactions that matters, not the type of resource affected, or the potentially significant and legitimate state objectives.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

c. The Commission Cannot Lawfully Cede its Authority Over Just and Reasonable Wholesale Rates to Retail Authorities.

51. Order 719 aimed to eliminate barriers to demand response, improve the competitiveness of wholesale markets, and thereby ensure just and reasonable rates. Yet by incorporating a blanket opt-out, the Commission placed retail authorities in the position of determining whether Order 719 will be fully implemented and its objectives achieved. In addition to the grounds described above, the opt-out adopted in Order 719 is *ultra vires* because it is an impermissible relinquishment of the Commission’s duty to ensure just and reasonable and not unduly discriminatory rates.

The terms of the Federal Power Act are clear:

Whenever the Commission . . . shall find that any rate . . . or that any rule . . . affecting such rate . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract *to be thereafter observed and in force*, and shall fix the same by order.¹⁵²

In each of Order 719 and 745, the Commission found that barriers to demand response impact the competitiveness of RTO/ISO markets, and reducing those barriers is necessary to ensuring rates that are just, reasonable and not unduly discriminatory or preferential.

The Commission concluded that reforms were needed to ensure demand response is “treated comparably to other resources.” Order 719 specifically found that permitting aggregators to participate would “expand[] the amount of resources available to the market, increase[] competition, help[] reduce prices to consumers and enhance[] reliability.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations

in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

52. Yet, even as the Commission identified the changes necessary to address the market flaws, the Commission failed to ensure that these reforms shall be “thereafter observed and in force.” States can block (and have done so to an extensive degree in the MISO footprint) the participation of aggregators and thereby obstruct the expansion of demand response resources and increased competition that the Commission found would contribute to reduced prices and enhanced reliability. The Commission cannot on one hand find that market rules fail to meet statutory muster and then, on the other, leave to chance the measures it has found necessary to remedy the inadequacy. The blanket opt-out afforded states in Order 719 represents precisely such an abdication of the Commission’s statutory mandate. The Commission cannot leave fulfillment of its duty to ensure just and reasonable rates to the unmediated discretion of state authorities.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

2. The Absence of Competition Among Demand Response Providers in MISO Due to Pervasive State Opt-outs Results in Rates That Are Not Just And Reasonable.

53. Fostering competitive bulk power markets is the bedrock of the Commission’s statutory task to ensure just and reasonable rates in RTO/ISOs. Yet the opt-out in Order 719 has

perversely become a significant barrier to competition. The near total adoption of bans on non-utility affiliated demand response within MISO insulates utility demand response programs from competitive pressures. The resulting harm is significant, ongoing, and will worsen absent action from the Commission to eliminate barriers to competition. MISO is deprived of robust competition from demand response aggregators, specialists who are capable of providing cutting edge technologies at lowest cost. Absent inducements of the retail regulator, traditionally regulated utilities face little to no incentive to adopt ambitious demand response programs. Unsurprisingly, the operational capabilities of existing demand response assets in MISO lag significantly behind that of other organized markets, even though many utility-run programs are supported by significant subsidies through retail rate charges. Lack of competition brings exactly the lackluster results one would expect: high cost and poor performance.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

54. Worse, the absence of competition is holding back the full capability of demand response within MISO at a time when it is needed more than ever to provide the grid flexibility in the face of shrinking reserve margins and a changing resource mix. During some recent events, a mere hundred megawatts or so of demand response, available in the right location and able to respond quickly, could have alleviated tight supply conditions. Yet, MISO lacked the flexible, responsive resources it needed. As MISO itself has documented, the strains on grid reliability are expected to worsen, and readily available,

fast-responding demand response will remain essential to the grid.

MISO RESPONSE: To the extent that this paragraph references MISO’s Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies these allegations.

55. Unlocking competition among demand response resources within MISO would both increase the amount of demand response in locations where it is currently lacking while creating the pressure for innovation and enhanced demand response capability. Enhanced competition is needed to drive the adoption of advanced demand response technologies that will be crucial to long-term affordability and reliability as conditions in MISO continue to evolve.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

a. The Commission Has Long Recognized That Robust Participation of Demand Response Increases Market Competitiveness and Ensures Just and Reasonable Rates.

56. FERC has “on numerous occasions . . . expressed the view that the wholesale electric power market works best when demand can respond to the wholesale price.” FERC is guided by the general principle that increased demand response in organized wholesale markets “improve[s] the functioning and competitiveness of those markets.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the

Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph.

57. FERC has identified numerous benefits of demand response that support a healthy and well-functioning grid, that in turn supports just and reasonable rates. For example, FERC has found that demand response can “provide competitive pressure to reduce wholesale power prices.” Demand response “balance[es] supply and demand, and thereby, helps produce just and reasonable energy prices . . . because customers who choose to respond will signal to the RTO or ISO and energy market their willingness to reduce demand on the grid which may result in reduced dispatch of higher-priced resources to satisfy load.” Furthermore, the Commission has identified that demand response also “tends to flatten an area’s load profile, which in turn may reduce the need to construct and use more costly resources during periods of high demand; the overall effect is to lower the average cost of producing energy.” A plethora of studies confirm the beneficial cost reductions due to demand response.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations. MISO is also without sufficient information and knowledge to form an

opinion as to Voltus' allegations regarding its application of demand response studies to this matter and therefore denies such statements at this time.

58. The Commission has also concluded that demand response can “mitigate generator market power,” because “the more demand response that sees and responds to higher market prices, the greater the competition, and the more downward pressure it places on generator bidding strategies by increasing the risk to a supplier that it will not be dispatched if it bids a price that is too high.” The Commission has also examined the impact of demand response on grid reliability, and found that it has the effect of “support[ing] system reliability,” as demand response “can provide quick balancing of the electricity grid.” In addition to these benefits, FERC has found that demand response can also “increase[] awareness of energy usage” and “encourag[es] development and implementation of new technologies, including renewable energy and energy efficiency resources, distributed generation and advanced metering.” Combined, these positive attributes of demand response have the effect of “improving the economic operation of electric power markets by aligning prices more closely with the value customers place on electric power.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these

allegations.

59. Finally, a recent study points to additional benefits of demand response on power systems with increasing penetration of variable renewable energy generation, as demand response resources can provide the flexibility and other essential grid services needed to maintain reliable operations.

MISO RESPONSE: MISO is without sufficient information and knowledge to form an opinion regarding Voltus' allegations in this paragraph and therefore denies such allegations at this time.

b. The Absence of Competition From Aggregators Deprives MISO of Their Unique Value and Stymies Robust Demand Response Participation.

60. The participation of unaffiliated DR aggregators contributes to just and reasonable rates in several ways. Such demand response providers afford unique value to the markets because their specialization can both increase the total quantity of demand response resources, and the operational capabilities of the resources participating in the market. Moreover, the competitive pressure that results from their participation will have the tendency to spur utility programs and affiliate demand response providers to innovate and provide services more efficiently.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

61. The lack of competition from non-utility affiliated demand response providers manifests in the failure of demand response to even remotely achieve its potential in the region.

MISO both lacks demand response resources in some regions, and particularly in MISO South, and too much of its existing demands response resources either underperform or possess inadequate operational characteristics.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

i. Aggregators offer specialized capabilities.

62. The Commission has specifically recognized the benefit of aggregators of demand response, explaining that “[a]ggregating small retail customers into larger pools of resources expands the amount of resources available to the market, increases competition, helps reduce prices to consumers and enhances reliability.” Furthermore, “existing aggregation programs in PJM, NYISO, and ISO New England have shown that these programs have increased demand responsiveness in these regions.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

63. Most recently, the Commission again acknowledged the particular value of aggregators in Order 2222. In declining to set restrictive limits on the scope of DER aggregations, which

may include demand response, the Commission found that “the benefits of allowing heterogeneous aggregations outweigh [a grid operator’s] preference to limit the types of resources that can participate in aggregations.” The Commission further explained that “[a]ggregations of new and existing distributed energy resources can provide new cost-effective sources of energy and grid services and enhance competition in wholesale markets as new market participants.” The Commission concludes that excluding such aggregators from wholesale markets “fail[s] to ensure just and reasonable rates.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

64. State regulators have also recognized the value of allowing demand response aggregators to participate in wholesale markets – even a number of those who have adopted prohibitions on the participation of such aggregators. For example, the Iowa Utility Board has noted that “ARCs could encourage implementation of innovative demand response programs and greater use of existing programs and allow large customers with more than one location to consolidate their demand response activities with a single ARC.” Likewise, the Wisconsin Public Service Commission noted the potential of aggregators to encourage the “implementation of innovative demand response technologies, while also

finding that “[f]or retail customers that take service at multiple locations from more than a single utility, ARCs may also provide them the opportunity to consolidate their demand response activities with a single vendor.” Most recently, the Arkansas Public Utility Commission staff assessed whether permitting ARC participation in wholesale markets is in the public interests, and concluded that such participation “provides a variety of public policy benefits.” Staff acknowledged that, “very few retail customers will be able to market and sell DR into wholesale electricity markets without the aid of an ARC” due to the many barriers retail customers face to access wholesale markets.

MISO RESPONSE: To the extent that this paragraph references the State Laws, Regulations or Orders, MISO states that as documents the State Law, Regulation or Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

65. As Gregg Dixon, the CEO of Voltus, describes in his attached declaration, there are several reasons that demand response providers are able to provide value that is different and better than utility-run demand response programs. First and foremost, demand response companies face the right incentives to deliver more robust demand response services. It is well understood that traditionally regulated utilities will fail to invest in reductions in energy demand, because under cost-of-service regulation a utility will earn more on the large capital expenditures necessary to increase supply, compared to the relatively small capital expenditures to develop a demand response product. Economist

and former Commissioner of the Public Utility Commission of Ohio (“PUCO”) Paul Centolella explains further:

A utility’s economic interests are not aligned with encouraging efficient demand participation in wholesale power markets. Most utility business models are based on earning a return on rate base, capital invested to meet consumer demand. Reducing customer demand often is in direct competition with opportunities for the utility to invest and increase future profitability. Moreover, demand reductions that reduce sales also may erode near term profits. In some jurisdictions, when sales to its own customers decline, the utility may not be able to retain any savings in fuel costs and / or profits from any off-system sales.¹⁷⁸

In contrast, demand response providers like Voltus only remain financially viable where they excel in producing high quality products that retail customers value and are willing to sign up for. Correspondingly, demand response providers develop a deep expertise in the core skills needed to produce innovative demand response: identifying demand response potential; excellent salesmanship; tailoring the product to the operational needs of the retail customer while meeting regulatory requirements; and development of the technology needed to support demand response performance.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus’ activities and allegations as described in this paragraph and therefore denies such statements at this time.

66. Because of their specialized expertise and different financial incentives, demand response providers eliminate barriers to participation in demand response products that utility-run (or even utility-affiliated) programs cannot. Demand response providers are able, unlike typical utility programs, to assume the burden of financial penalties by managing the risk of asset non-performance at a portfolio level. This eliminates the financial risk that is commonly the most significant barrier to customer participation in demand response

programs. Additionally, demand response providers can offer customers with multiple facilities located across jurisdictional lines a single, simple user experience; navigating the complexities of multiple regulatory requirements on the customer's behalf. The upshot of the advantages offered by demand response providers is that they can reach demand response potential that more regimented, less innovative utility- affiliated programs cannot. Voltus' experience in southern Illinois, in which the company was able to develop 800 MWs over a short two years of operation – representing close to 10% of regional load – demonstrates concretely the additional resources an aggregator can bring to MISO when allowed to compete for the opportunity.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus' activities and allegations as described in this paragraph and therefore denies such statements at this time.

67. Demand response providers not only unlock a greater quantity of untapped demand response, but also offer demand response of greater operational quality. Because unaffiliated demand response providers face fierce competition, there is strong pressure to continue to innovate and stay on top of technological advances. Voltus prides itself in being able to offer “instant communication of dispatches, real- time visibility and control of load curtailment, immediate settlement of dispatch performance, and automated financial transactions between markets and customers.” This presents a stark contrast with MISO's concerns about lack of visibility and uncertainty surrounding the availability and performance of a significant proportion of existing LMRs.

MISO RESPONSE: MISO is without sufficient information to form an opinion

regarding Voltus' activities and allegations as described in this paragraph and therefore denies such statements at this time.

68. Finally, because of the competitive forces they face, demand response providers provide these enhanced capabilities more cheaply than utility-run programs that are insulated from competition. In a Louisiana Public Service Commission proceeding, for example, Voltus compared the cost ratepayers are charged for load curtailment under existing utility-run demand response programs to its own cost to deliver the same service. Whereas industrial customers participating in the utility's interruptible load program receive a rate-payer subsidized premium above the wholesale market price, and thus charge ratepayers between \$30,960 to \$63,849 per Megawatt-Year of service, Voltus is willing and able to provide the same service at the wholesale market price – \$13,000 to \$32,000 per Megawatt-Year less than the cost of the utility-run program. Similarly, in Arkansas Voltus estimates that it can provide services at a cheaper rate *by a factor of three*, as compared to a utility-affiliated program. In MISO broadly, Voltus calculates that it could deliver the same amount of demand response currently delivered by utilities for approximately \$118 million, delivering a savings to ratepayers of \$130 million per year while elevating the quality of that demand response substantially. And consistent with study after study, demand response (even at the more costly utility-run rate) remains cheaper than the cost to construct a new generator to meet peak demand. In one of the few service territories in MISO that holds competitive solicitations, Voltus has repeatedly been a successful bidder, further demonstrating that demand response providers can provide the same services more cheaply where they are allowed to compete.

MISO RESPONSE: To the extent that this paragraph references the State Laws, Regulations or Orders, MISO states that as documents the State Law, Regulation or Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations. Finally, MISO is without sufficient information to form an opinion regarding Voltus' activities and allegations as described in this paragraph and therefore denies such statements at this time.

ii. Significant Latent Potential for Demand Response Remains Untapped in MISO.

69. The gap between the potential for flexible, responsive demand and the on- the-ground reality of LMR in MISO demonstrate the harm that is being caused by the lack of competition. The resources showing up in MISO today are nowhere near the latent potential of demand response. Significant advances have occurred that should enable much greater demand response capability, from a wider variety of sources. Yet, this fleet of flexible, more advanced demand response has not materialized in MISO.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus' activities and allegations as described in this paragraph and therefore denies such statements at this time.

70. The technological advances in demand response since 2009-10, when a majority of the state opt-outs were first put in place, have been considerable. Centolella explains that advanced metering infrastructure, only limitedly available at the time of Order 719's issuance, has now reached over half of electric customers in the United States. By the

end of 2020, the industry expects 60% of consumers in MISO will have such advanced meters in service. Further:

Today, inexpensive embedded processors and sensors, near ubiquitous connectivity, advances in data analytics and machine learning allow intelligent systems to control industrial processes, agricultural equipment, data center operations, building environments, distributed energy resources, electric vehicle charging, and multiple devices in our homes. Intelligent systems can learn preferences and optimize the timing of electricity use in response to multiple inputs. Such inputs can include the instructions of demand response aggregators, RTO control signals, energy prices, or local grid conditions. Intelligent systems can shape usage patterns based on forward prices, shift demand out of high price periods during the operating day, and flexibly modulate demand on a near real-time basis.

Such technological advances both expand the range of customers, end uses, and distributed resources that can participate in demand response, as well as enable demand response to become more flexible and dynamic. Some advanced forms of demand response should be able to respond rapidly to changes in markets or grid conditions, such as in the case of residential end uses that have been aggregated to provide ancillary services.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus' activities and allegations as described in this paragraph and therefore denies such statements at this time.

71. Studies of the potential for growth of such flexible demand response show substantial opportunities. A Brattle study projects that more than 120 GWs of cost-effective flexible demand will be added to U.S. power systems by 2030, and analysts at Wood McKenzie assess that 60 GWs will be added to the grid by 2023 through technology such as smart thermostats and residential EV charging. Centolella opines that the order of magnitude of such estimates is reasonable, considering that end uses where the management of thermal

inertia could provide timing flexibility account for 37% of all U.S. electricity consumption.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus' activities and allegations as described in this paragraph and therefore denies such statements at this time.

72. Without the spur of competition, utilities are far less likely than demand response providers to make use of the significant new technical capabilities to deploy advanced forms of demand response. And the evidence is stark that the predominantly utility-run programs in MISO have failed to deliver on the potential of flexible demand response. Instead, MISO LMRs are largely relics of an earlier era when expectations for demand response technology were quite limited.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus' activities and allegations as described in this paragraph and therefore denies such statements at this time.

73. As former Commissioner Centolella describes based on his experience working in the industry during the relevant time period, through the 1980s and 90s large industrial and commercial customers sought special arrangements to reduce their costs and avoid increasing electric rates. Utilities offered discounted interruptible rates in response to such customer demands. These rates were often approved, not primarily to meet the operational needs of the power system, but to meet economic development goals. The expectations of these, often politically powerful, large customers was that service would

be curtailed only infrequently and under emergency conditions. “The successors of these interruptible rates make up the larger portion of MISO LMRs today.” Following advocacy efforts to promote energy efficiency and demand side management programs, utilities adopted additional air conditioner cycling and other direct load control programs, which can reduce peak demand while having a limited total impact on utility sales. Such programs allowed utilities to reduce demand by sending a signal to customers, but by their nature such programs cannot readily be adapted to following 5-minute dispatch instructions.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus’ activities and allegations as described in this paragraph and therefore denies such statements at this time.

74. The proof of the pudding is in the eating. As of this filing, 94% of demand response in MISO is only available in the lead up to an emergency. The vast majority of the remaining 6% can only be turned on or off by a utility calling an event in response to MISO dispatch instructions. Less than one percent of demand response in MISO can respond to continuous dispatch instructions. Moreover, as MISO itself describes in its recent LMR reform filings, even the demand response that is limitedly available to serve during an emergency event has at times underperformed, and almost all such resources require substantially longer notification times than other RTOs’ emergency-only resources.

MISO RESPONSE: To the extent that this paragraph references MISO’s Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or

stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies these allegations.

75. Likewise, data at the level of the large investor-owned MISO member utilities tell the same story. While the utility demand response programs vary significantly among states and in a few states utilities have or are being directed to develop significant demand response programs, in many states there is “little evidence of significant demand response activity.” States in the latter category comprise much of MISO South, and include: Louisiana, Kentucky, Missouri, Mississippi, North Dakota, South Dakota, and Texas. Further, interruptible and curtailable rates were by far the most common form of demand response, and were complemented in some states by direct load control programs. Yet, “interruptible and curtailable rates and direct load control programs often are available only in limited circumstances and typically do not support flexible continuously dispatchable responses.” Thus, both RTO-level and utility data tell the same story: demand response capability in MISO states is grossly lagging behind its potential.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus’ activities and allegations as described in this paragraph and therefore denies such statements at this time.

76. Independent analysis concludes that the economic value left on the table due to the lack of more robust demand response participation in MISO is substantial. Dahlke and Prorok modelled the annual consumer savings that would result from increasing dispatch of incentive-based demand response (the form of demand response that remains prevalent

throughout MISO today) assuming a competitive demand response market, and found average price reductions across simulations to range from three to nine percent.

Moreover, the authors found that the benefits under steep price spikes, which have been historically rare but are increasingly probable under current MISO conditions, can result in substantially higher estimates of consumer savings, particularly in MISO South where the market may be clearing in a steep portion of the supply curve. These findings are notable because they show significant benefits to market efficiency *without* factoring in the considerable additional benefits of more advanced forms of flexible demand response. Brattle, for example, estimates the national benefits of load flexibility could exceed \$15 billion/year by 2030. As described below, unleashing the forces of competition is necessary to unlock the tremendous benefits of advanced demand response in MISO.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus' activities and allegations as described in this paragraph and therefore denies such statements at this time.

iii. The Pervasive State-opt Outs are a Critical Contributing Factor to Anemic Demand Response Within MISO, and This Barrier to Competition Must be Eliminated to Ensure Just and Reasonable Rates.

77. The absence of more robust demand response participation in MISO is attributable in significant part to the lack of competition due to pervasive state opt- outs. Centolella identified four key ways in which these opt-outs negatively impact the wholesale power market:

1. Opt-outs put utilities in the role of gatekeeper over demand response participation in wholesale markets, while such utilities lack the correct incentives to maximize demand response contribution to market value.

2. Opt-outs perpetuate the disconnect between customers and market prices. The design limitations of typical utility-run programs – offering small reductions in rates in return for commitments to curtail demand on a limited number of occasions – fail to create the necessary relationship between the rate discount and the time and location-specific market value of demand reductions. Absent this fundamental connection between customer action and market prices, demand response cannot enhance market efficiency to the same degree.
3. State opt-outs block innovation. The regulatory process to adopt utility-run programs lags significantly behind the cycle of technological and market changes. A utility program will typically have to be proposed a year in advance, require analysis to warrant implementation, and may require piloting before widespread deployment. Non-utility providers are in a much better position to rapidly innovate, adjust plans, and use new tools.
4. State opt-outs result in a patchwork of program requirements and incentives that undercut the efficiency of scale. This patchwork is costly to navigate and creates a significant barrier to participation in the wholesale market.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations. In addition, MISO is without sufficient information to form an opinion regarding Voltus' activities and allegations as described in this paragraph and therefore

denies such statements at this time.

78. In Order 2222, the Commission expressly acknowledged that opt-outs can “substantially limit [] participation” of aggregators and threaten the benefits to reliability, transparency, and market efficiency that such participation brings to RTO/ISO markets. Nor does the so-called “participation model,” by which a utility offers demand response into the market on behalf of the aggregator, or other means by which aggregators deliver all are part of demand response service under a utility program, ameliorate these negative impacts. While nine states have permitted or suggested utilities might be allowed to form agreements with demand response aggregators to facilitate wholesale demand response participation, the approach has failed to support robust demand response participation. With a few limited exceptions, the utilities in these states have not made necessary agreements for aggregators. And, where a utility has had such an arrangement in place for a number years, limited potential demand reductions are purchased through a single aggregator. participate.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. In addition, MISO is without sufficient information to form an opinion regarding Voltus’ activities and allegations as described in this paragraph and therefore denies such statements at this time.

79. Former PUCO Commissioner Centolella opines that, if demand response opt-outs were eliminated in MISO, “demand response participation would increase significantly and include more flexible demand capable of continuously following dispatch instructions and providing real-time balancing and ancillary services.” In addition to the sound economic principles and reasoning set forth above, Centolella finds support for his conclusion from two independent studies assessing the potential of more flexible demand response technologies in MISO states, and a contrasting third study showing likely developments in the footprint under the status quo.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus’ activities and allegations as described in this paragraph and therefore denies such statements at this time.

80. The first two studies, one focused on Northern States Power (Minnesota distribution utility) and the second on Indiana investor-owned utilities (IOUs), are particularly informative of the likely benefits of eliminating the opt-outs because: 1) their estimates of cost-effective demand response potential are not limited to existing utility programs, and 2) they identify opportunities to expand demand response in states in which the existing programs already provide significant demand response. Both studies reveal significant further potential for development of flexible demand response participation in service territories that already show some of the highest penetrations of utility demand response in MISO. Although Northern States Power already has 850 MWs of load curtailment capability, equal to approximately 10% of its peak demand, the Brattle Group examined the potential of eight new programs in the footprint, and found between approximately

400-700 additional MWs of flexible demand response could be developed by 2030.

These resources would have the capability of “providing around-the-clock ‘load flexibility’ in which electricity consumption is managed in real-time to address economic and system reliability conditions.” In the same vein, the Indiana study found that, while some (but not all) of the Indiana IOUs had reached most of the commercial and industrial demand response potential under existing programs, there remained considerable potential to increase commercial and industrial demand response at utilities with less extensive programs and more broadly in a high avoided cost case. Additionally, the study analyzed the impact of increasing the market share of residential smart thermostats and found that smart thermostats could increase existing residential demand reductions by 83% to 460%.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus’ activities and allegations as described in this paragraph and therefore denies such statements at this time. In addition, the studies referenced by Voltus, as documents, speak for themselves and no response is necessary.

81. In contrast, a 2018 report developed by Applied Energy Group (AEG) to support MISO’s transmission planning estimated peak demand reductions using a base reference case. The reference case was intended to reflect continuation of the status quo, and was developed based upon existing demand response programs savings, costs, and program participation rates, as gathered through utility surveys and secondary research. AEG found that demand response, “is not expected to grow significantly – amounting to 4.8% of baseline peak demand by 2038.” In percentage terms, this represents a small decline

from 4.9% in 2019. MISO consultants do not expect significant new demand response capability to be developed under the status quo – even though significant untapped potential remains in the footprint. These studies provide additional backing to Centolella’s conclusion that elimination of the opt-out would result in participation of flexible demand response in the MISO wholesale market that would not otherwise be developed.

MISO RESPONSE: MISO is without sufficient information to form an opinion regarding Voltus’ activities and allegations as described in this paragraph and therefore denies such statements at this time. In addition, the study referenced by Voltus, as a document, speaks for itself and no response is necessary.

82. It is now clear that provision for a state opt-out in Order 719 opened the door to the near ubiquitous adoption of bans on non-utility demand response participation in MISO. The opt-out is, on its face, anti-competitive and harmful to the functioning of the wholesale market and therefore results in rates that are not just and reasonable. Moreover, substantial evidence, including the grid operator’s own testimony that the Commission has previously relied upon, shows that the lack of competition due to the opt-outs is currently harming MISO by failing to support sufficient levels of participation of flexible, responsive demand response. Finally, robust study of MISO market conditions supports the conclusion that unlocking competition by eliminating state opt-outs would increase supply of flexible, responsive demand response. Even before one considers the acute operational strains and threat to reliability looming in MISO, the evidence before the Commission compels the conclusion that the pervasive state opt-outs within MISO result

in rates that are not just and reasonable.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

c. The Absence of Demand Response Competition Contributes to Threats to Reliability in MISO.

83. The evolving market conditions and resource mix within MISO provide additional grounds to conclude that the state opt-out must be eliminated. While reducing barriers to robust demand response is critical to just and reasonable rates in any organized market, MISO's operational needs for flexible resources due to tightening reserve margins and increased penetration of renewables gives particular urgency here. The failure to eliminate a barrier to the participation of the responsive, flexible resources MISO needs today and for the foreseeable future exacerbates the threat to reliability in MISO.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

i. Greater Demand Response Capability in MISO Would Mitigate Ongoing Reliability Risks.

84. In recent years, MISO has experienced a significant increase in the frequency and severity of generation emergencies. Though it had previously not experienced a Maximum Generation (MaxGen) emergency since 2007, between 2016 and 2019 MISO experienced twenty-seven such emergencies. It additionally declared a MaxGen Alert requiring Conservative Operation on February 21st 2020, and again in July and August. In MISO's most recent Fall 2020 Seasonal Outlook, it again identified the likelihood that,

“[a] combination of both high load and high outage ‘worst case’ scenarios may require emergency procedures to access additional resources.”

MISO RESPONSE: To the extent that this paragraph references MISO’s Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies these allegations.

85. MISO’s investigations have led it to identify “Five key drivers” that contribute to the increasing MaxGen events, including (i) Aging and retirement of generating units; (ii) Correlated generation outages; (iii) growing reliance on emergency-only LMRs; (iv) Growing reliance on unscheduled resources; and (v) Growth in Variable Energy Resources. As Centolella explains, wind resource output in MISO is already experiencing large changes. On one specific day, for example, MISO wind output dropped first by nearly 4,000 MWh within two hours, and then again for a total drop of 8,600 MWh over a total of four hours – representing 13% of demand in all of MISO. Such rapid changes pose significant operational challenges to grid operators, challenges that can be more ably navigated through greater demand flexibility.

MISO RESPONSE: To the extent that this paragraph references MISO’s Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies these allegations.

86. MISO has recognized that, “[a]n increased reliance on intermittent and variable resources creates the need for intra-day flexibility, placing a premium on resources that can rapidly respond.” MISO’s renewable integration assessment further suggests that load shifting strategies such as demand control and energy storage could reduce the resource adequacy risks associated with greater reliance on renewable resources. Indeed, MISO has identified among its four “strategic imperatives” to “[e]nhance communication and coordination across the transmission and distribution interface – to address today’s challenges with Load Modifying Resources and with an eye toward emerging tech and active demand.” MISO could not be clearer that it needs operational capabilities beyond those available from existing LMR to navigate ongoing resource adequacy challenges. Centolella elaborates on the mechanisms by which demand response can mitigate ongoing risks to reliable operations:

Flexible demand response can mitigate and reduce the upward and downward slope in the ramping of other resources needed to offset changes in the output of renewable generation. Flexible demand response can reduce and shape peaks in net load – demand after accounting for variable renewable output – to match real-time resource availability, thereby lowering costs and avoiding emergencies. Finally, in response to dynamic pricing or innovative incentives, flexible demand could shift into periods when there is excess supply, avoiding the need to curtail low marginal cost renewable resources while maintaining minimum operating levels for generation that remains online to be able to respond to later reductions in renewable output.

The near-term reliability benefit of eliminating state opt-outs is perhaps most starkly demonstrated by examining recent MaxGen events, during which relatively modest changes in capacity availability can make all the difference in mitigating or avoiding an emergency event. For example, the Independent Market Monitor’s (IMM) analysis of the MaxGen event on September 15, 2018 highlights the challenges posed both by the limited LMR available in MISO South, and the severe operational limitations of the LMR that is available. The IMM noted that multiple factors led to tight conditions in the lead

up to the event, including a forced outage of the largest market resource and temperature forecast errors that, in turn, led to load forecast error. As tight conditions continued, the IMM observed that the operator's decision to call the event at 3:00pm, rather than at 11:30am when emergency conditions could first be projected, impacted LMR availability. By 3pm, almost no LMR could be called, whereas 90MW of LMR would have been available if the operator had acted sooner. After the event was called, emergency energy purchases of 600 MWs were implemented. Ultimately, the high prices triggered by the event prompted an additional 1GW of imports that resolved the shortage. Yet if, in place of the limited and outdated utility demand response programs, MISO South had available to it even modest quantities of flexible demand response, the unexpected outage and load forecast error would have posed less risk, and the event could have been more readily resolved.

MISO RESPONSE: To the extent that this paragraph references MISO's Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies these allegations.

87. Taking steps to eliminate barriers to demand response with the higher operational capability MISO needs – the increased availability, flexibility, and responsiveness – would help MISO manage ongoing threats to reliable operations.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

ii. Competition is Essential To Unlock the Next Generation of Demand Response Capabilities As MISO's Resource Mix Continues to Evolve.

88. MISO is clear-eyed that the factors leading to increasing resource adequacy risks and frequent emergency events are expected to persist or intensify over time, and that longer term structural reforms will be necessary to manage the resultant operational challenges. The shift of the resource mix toward deeper penetration of renewables is certain to continue. Centolella points out that wind and solar represent the substantial majority of new resources expected to come on line from 2020 to 2022. In September 2019, wind and solar comprised over 80% of new resources in the interconnection queue. This trend continued, with renewables again comprising the overwhelming majority of interconnection requests in the application period ending June 2020. Moreover, both states and utilities within the footprint have set ambitious decarbonization targets that will continue to drive the resource mix toward larger shares of renewables. As many as eleven of MISO's large utility members have set 80% or higher clean energy targets and five additional utilities have 50% clean energy goals. Based on utility announcements, wind and solar are expected to provide 30% of energy in MISO by 2030. Additional proposed state policy changes in Illinois, Minnesota, and Wisconsin could further accelerate renewable resource growth, leading to wind and solar providing 35% of the energy in MISO by 2030. As the resource mix continues to evolve, the need for operational flexibility, market valuation of a greater range of resource capabilities and services, enhanced communication and coordination, and other foundational market reforms grows.

MISO RESPONSE: To the extent that this paragraph references MISO’s Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies these allegations.

89. Achieving the deeper, more structural reforms MISO contemplates in order to meet future challenges will be facilitated by the elimination of barriers to demand competition. MISO’s experience working with stakeholders on its second round of LMR reforms, which aimed at changes to LMR accreditation, are illustrative. A significant set of stakeholders were strongly opposed to the reforms, until MISO agreed to delay implementation. These stakeholders voiced concerns about the “aggressive” timeline in light of the potentially lengthy regulatory tariff changes and modifications to contract arrangements. While all market participants depend to some extent on regulatory certainty and need time to adjust to market reforms, utility demand response programs are particularly dependent upon incentives or requirements adopted by retail regulators. As such, as discussed above, changes to such programs are particularly slow, and are reactive rather than proactive. Absent the pressure of competition, utility demand response programs simply will not exhibit the adaptability and innovation that unaffiliated demand response providers do. The predominance of utility demand response programs is a part of the institutional inertia that resists structural change, rather than, as the competitive business does, anticipate evolving market conditions and seek to gain competitive advantage because of them. Eliminating the demand response opt-out will not only address near-term threats to reliability, it will unleash the competitive forces that

are crucial to succeed in rapidly evolving and novel market conditions. Incremental, plodding change has worked well enough where the bulk power system saw little change for decades at a time. A more nimble response is called for in the face of the rapid pace of technological and economic changes that are shaping today's market.

MISO RESPONSE: To the extent that this paragraph references MISO's Tariff, filings or Stakeholder Materials, MISO states that as documents its Tariff, filing or stakeholder materials speaks for itself and no response is necessary. To the extent that a response is required, MISO denies these allegations. In addition, this paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

d. Eliminating the Opt-out Would Ensure Order 2222 Achieves Its Full Potential.

90. Order 2222 aims to eliminate barriers to distributed energy technologies and represents a crucial step to realizing the potential of such resources to serve as new cost-effective sources of energy and other grid services and enhance the market competition. Yet the tremendous potential of Order 2222 will remain unrealized while the demand response opt-out remains in place. Due to the opt-out, aggregators are barred from the full range of business models, emerging technologies, and the enhanced capabilities that result from combining different technologies. As the Commission explained cogently in Order 2222, a restrictive approach to the technologies that may be aggregated, or the business model under which an aggregator may operate, is a barrier to resource participation that undercuts the benefits of Order 2222:

We find that limiting the types of technologies that are allowed to participate in RTO/ISO markets through a distributed energy resource aggregator would create a barrier to entry for emerging or future

technologies, potentially precluding them from being eligible to provide all of the capacity, energy, and ancillary services that they are technically capable of providing.²⁵⁸

The Commission further explained that restricting RTO/ISOs from excluding any particular type of technology will “ensure that more resources are able to participate in such aggregations, thereby helping to enhance competition and ensure just and reasonable rates.” Indeed, one of the particular strengths of this approach is that, while individual resources or technologies may not meet qualification or performance requirements to provide certain services on their own, an aggregation may be able to do so where the individual resources provide complementary capabilities. Yet keeping the demand response opt-out in place takes off the table DER aggregations that incorporate the complementary capabilities of existing and enhanced demand response technologies – capabilities that are increasingly valuable to efficient and reliable operation of the grid as the resource mix continues to shift. The ability of demand response to shape customer load profiles, shift demand in response to price or other signals, and modulate demand to mitigate short-run ramps, grid disturbances, and contingencies on very short timescales supports integration of large shares of variable renewable resources, and creates significant economic and reliability benefits. These benefits are lost, and the great promise of Order 2222 truncated, while the opt-out remains in place.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which

no response is required. To the extent that a response is required, MISO denies these allegations.

91. For these reasons, Order 2222 is not enough to ensure just and reasonable rates in MISO. Moreover, the distributed energy technologies that Order 2222 may ultimately encourage will be years in coming before their services are available to grid operators and to the benefit of consumers. RTO/ISO compliance filings are due nine months from the Order, and full implementation is not expected until a year later. While such extended implementation schedules may be necessary to implement groundbreaking changes to RTO/ISO rules, this timeline nonetheless means that MISO will not see the benefits of greater DER participation affect market outcomes for years. In the meantime, demand response technology is already available and able to serve MISO's needs – if unleashed from the constraints on competition it faces under the opt-out.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

3. The Manner In Which Opt-outs Are Deployed In MISO Results In Undue Discrimination

92. The Federal Power Act requires that all rates, charges, and classifications of service must

be just and reasonable and cannot be unduly discriminatory or preferential. This standard prohibits one type of market participant from receiving preference over another type that can provide a similar service without an adequate justification. Here, particularly as currently applied within MISO, the opt- out provision of Order 719 clearly violates the principle of undue discrimination in at least two ways. First, the opt-out discriminates against direct retail customers and ARCs for demand response by allowing an entity that provides identical service but that is affiliated with a utility – or is the utility itself – to participate in Commission jurisdictional wholesale markets. Second, ARCs offering demand response can provide the same services to the grid as other technologies such as storage or behind the meter generation, yet are treated differently under the opt- out. Independently, either form of undue discrimination would be sufficient to find that the opt-out, as implemented within MISO, is unlawful.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

a. Undue Discrimination Under The Federal Power Act

93. As the Commission has observed, the Act “bristles with concern about undue discrimination.” Indeed, courts have long held that an “unjustifiable difference in rates for substantially similar service works an unlawful discrimination” that is prohibited

under the Federal Power Act. The Commission has explained that different treatment is unduly discriminatory “when there is a difference in rates or services among similarly situated entities.” Determining that entities are similarly situated “does not mean that there are no differences between them; rather, it means that there are no differences that are material to the inquiry at hand.” Entities are similarly situated “if they are in the same position with respect to the ends that the law seeks to promote or the abuses that it seeks to prevent, even if they are different in many other respects.” Irrelevant differences will not make parties dissimilarly situated.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

b. States Discriminate Against ARCs By Treating Them Differently Than Utility-Affiliated Programs

94. The vast majority of retail authorities within MISO bar aggregators representing retail customers in the wholesale market, and most also prohibit direct participation of large retail customers, yet many permit LSEs, or select aggregators working on behalf of LSEs, to participate in the wholesale market. There is no reasonable wholesale market basis for distinguishing between these entities, each which seeks to offer precisely the same wholesale market service.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

95. Utility-affiliated demand response providers, ARCs, and direct retail customer participants are similarly situated for purposes of Order 719 “with respect to the ends that the law seeks to promote or the abuses that it seeks to prevent,” as both can provide the same technological grid services. Indeed, the very goal of Order 719 is to eliminate barriers to demand response and ensure comparable treatment of demand response, in order to enhance market competition, maintain reliability, and allocate energy during a shortage to those who value it most. The Commission has expressly concluded that granting a preference to utility-affiliated demand response providers is “contrary to the goal of [the Order 719] proceeding.” In response to a request to exempt only LSE-affiliated demand response located in small systems from the requirement to make an affirmative showing before being permitted to participate in wholesale markets, the Commission explained that eliminating this barrier selectively “would effectively have the Commission provide load-serving entities and their designees with a competitive advantage over other ARCs.” The Commission concluded that it was “not persuaded that such action is consistent with our obligation to prevent undue discrimination.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations

in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

96. Yet, as it has been implemented throughout the MISO footprint, that is exactly how the opt-out functions today: as a means to provide utilities and their affiliates a “competitive advantage” over independent providers. Because of the opt-out, demand response providers lack leverage in negotiations with LSEs and must accept significant concessions in their terms of service in order to access the wholesale markets (where access is available at all). The disparate treatment of utilities and their affiliates within MISO achieves the opposite of the goals of Order 719; by “restricting demand participation, constraining the development of flexible demand response, and preventing third party providers with specialized expertise from offering innovative products and services” the existing tariff squelches competition rather than enhance it.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

97. The only relevant characteristic for the Commission to consider with regard to the eligibility of demand response to participate in wholesale markets is operational, specifically, the services demand response can provide. “From the perspective of the transmission grid, demand response produces a load reduction in the wholesale market from a validly established baseline,” regardless of the underlying business model of the owner/operator. Indeed, Order 2222 most recently reiterated this core principle that it is the service, not the form of the technology or the business model, that matters. Throughout the Order, the Commission rejected efforts to narrowly define the scope of technology or the business model that may comprise a DER. ISO New England, for example, argued that allowing heterogenous aggregations of demand response with other DERs would pose additional challenges. The Commission, however, was unconvinced, emphasizing that “the means by which an aggregation is able to provide wholesale services does not change the value of that service to the grid.”

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

98. Finally, the Commission’s recent decision in *New York Independent System Operator, Inc.*, reflect the Commission’s conclusion that state policy choices do not provide a valid

basis for less favorable treatment of some resources. There, the Commission rejected NYISO's proposed changes to the buyer-side market power mitigation rules based on state public policy choices.²⁸² Specifically, NYISO proposed to change the order in which projects are evaluated to allow Public Policy Resources to be reviewed before non-Public Policy Resources. Ultimately, the Commission found that NYISO's "proposal is unduly discriminatory because it does not provide sufficient justification for prioritizing the evaluation of Public Policy Resources before non-Public Policy Resources, independent of cost." The Commission found the two types of resources similarly situated, despite the fact that state law treats the two categories differently, because the two meet the same qualification and performance requirements. The Commission reasoned that, operationally, non-Public Policy Resources could adhere to the same requirements for interconnection and participation as Public Policy Resources, and non-Public Policy Resources could also meet the same identified capacity needs in the market, and thus treating them differently would constitute undue discrimination. The Commission's rationale applies equally to state law-based preferences for utility-administered demand response programs. Throughout MISO, utility programs are eligible to provide wholesale services, while ARCs are precluded from providing exactly the same service *based solely upon state policy choice*. Under the Commission's ruling, granting such preferences – regardless of the legitimacy of those state policy choices – is unlawful.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations

in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

99. In this context, where the services offered are technologically and operationally equivalent, the ownership of the resource provides no reasonable basis for discrimination. Here, there is no question that ARCs, or sophisticated large retail customers, are technically capable of providing the same demand response services as utilities. Indeed, years of experience now demonstrate that ARCs operate successfully in vertically integrated jurisdictions without impeding the traditional regulatory structure. Consistent with its longstanding precedent on undue discrimination, the Commission must find the opt-outs as applied within MISO unduly discriminatory and preferential.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

c. The MISO Tariff Discriminates Against Demand Response Resources By Treating Their Eligibility To Participate Differently Than Resources That Provide The Same Services

100. By the same core principles, where different technologies appear operationally equivalent to the grid, there is no basis for differentiating eligibility to participate in the market. The opt-out is also unduly discriminatory because it treats the eligibility of demand response programs within an aggregation differently from comparable resources, like storage or behind-the-meter generation. Order 2222, which, effectively singles out demand response technologies for less favorable treatment by leaving the opt-out in place, only amplifies the

irrationality, unworkability, and discriminatory nature of the current legal framework.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

101. Order 2222 recognized that other forms of distributed energy resources and demand response are often technically capable of providing the same service and indeed, are so operationally equivalent from the perspective of the grid operator that, lacking any other avenue to participate, other distributed energy technologies have actually participated in RTO/ISO markets as demand response. The Commission ultimately adopted an expansive definition of DERs to include, “any resource located on the distribution, any subsystem thereof or behind a customer meter,” so as to “encompass current and future technologies” and not to exclude some resources that could be aggregated to sell energy, capacity, or ancillary services. Moreover, the Commission directed RTO/ISOs not to prohibit heterogeneous aggregations of DER technologies, because such limits could become a barrier to emerging or future technologies and prevent them from being eligible to “provide all of the capacity, energy, and ancillary services that they are technically capable of providing.” Order 2222 goes to great lengths to recognize that it is not the nature of the technology that is central to its eligibility to participate in RTO/ISOs, but

rather the ability of a single resource or aggregation of resources to meet the qualification and performance requirements to provide the service they are offering to the market.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

102. Moreover, Order 2222 is consistent with a long line of precedent recognizing that it is the ability to provide the requisite service that counts, not the mechanism producing it. For example, the Commission concluded that the source of a load reduction, whether it came from behind-the-meter generation or operational shutdown, was irrelevant to a resource's eligibility to participate as demand response in NYISO markets.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

103. Yet under the opt-out, resources that have precisely the same ability to meet the qualification and performance requirements to participate in MISO are treated differently depending on the label by which they come to the market. Voltus has sought to register curtailable load as a resource in South Dakota, but was denied access because of the state opt-out in place. Yet where the same customer was able to produce the *same grid service* by placing some of its load on a lithium ion uninterruptible power supply, Voltus was permitted to register the resource as an electric storage resource and provide the service to MISO. This outcome, in which the ability to compete in the market turns not on the services provided or their cost, but instead on the equipment by which the service is produced, makes a mockery of the Commission's long commitment to technology-neutral markets. Yet this is precisely the unjust and irrational outcome that is perpetuated while the demand response opt-out remains in place.

MISO RESPONSE: This paragraph contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.

104. Because Order 841 and Order 2222 have rightly denied state opt-outs to technologies except for demand response, many other forms of technology are eligible to provide services that appear, from the grid operator's perspective, exactly the same as demand response, while demand response cannot. As Centolella explains, the only material difference between a battery and flexible demand is the medium used to store useful energy. With an intelligent control system, the thermal inertia of a building, water heater, or refrigerator unit can operate in a manner that is in direct competition with the services

provided by a lithium-ion. Energy storage resources can be deployed to shape load profiles, shift demand, or modulate demand in the same manner as many demand response technologies. And thus we have arbitrary rules that, for example, allows a battery or a flywheel storage resource to provide a service to the grid, but does not allow thermal storage to provide exactly the same service, although the value of those two services to the grid and to customers is equivalent. There is no justification for such discriminatory treatment based solely on the type of equipment by which the service is delivered.

MISO RESPONSE: To the extent that this paragraph references the Federal Power Act, Regulations or Commission Orders, MISO states that as documents the Federal Power Act, Regulation or Commission Order referenced speaks for itself and no response is required. To the extent a response is necessary, MISO denies the allegations in this paragraph. This paragraph also contains legal arguments and conclusions to which no response is required. To the extent that a response is required, MISO denies these allegations.