

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

Wholesale Competition in Regions with Organized Electric Markets))	Docket Nos. RM07-19-000 AD07-7-000
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**COMMENTS OF THE ORGANIZATION OF MISO STATES
ON ADVANCE NOTICE OF PROPOSED RULEMAKING**

The Commission’s Advance Notice of Proposed Rulemaking (ANOPR) in this docket invites discussion on four areas of organized market structure:

- The role of demand response in organized markets;
- Increasing opportunities for long-term power contracts;
- Strengthening market monitoring; and
- The responsiveness of Regional Transmission Organizations (RTO) and Independent System Operators (ISO) to customers and other stakeholders.

The Organization of MISO States (OMS) provides the following comments on each area.

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I. DEMAND RESPONSE AND PRICING DURING POWER SHORTAGES IN ORGANIZED MARKETS

In this portion of the ANOPR, the Commission’s focus is on exploring market rules that allow both wholesale and qualifying retail customers to offer demand response into the day-ahead energy, real-time energy and ancillary services markets. Market design and market rules are the linchpins enabling demand resources to compete on equal footing with generation resources.

The OMS supports a well-functioning competitive wholesale power market in the Midwest ISO region, and agrees that engagement by customers, on the demand side of the market, is vital to this objective. Without an active and dynamic demand side it will be difficult, if not impossible, to attain that objective. The OMS’s working group, the Midwest Demand Resources Initiative, is tasked to promote progress toward an active demand side throughout the MISO footprint.

The aim of demand response programs is to lower costs to all customers. An active demand side can work in real time to signal that curtailment of some electric use is more valuable than dispatching more expensive supplies. The OMS agrees with the Commission that other values flow from an active demand side as well, including:

- customers who are more aware of the cost of electricity and what they can do about it, especially at times of peak and low reserves;
- efficient signals to long term investors in generation and transmission capacity¹;
- efficient maintenance of resource adequacy and system reliability;
- reduced volatility in power prices; and
- generator market power mitigation.

The OMS recognizes that the *system* value of demand response is enhanced for all participants if demand resources are developed and offered in all States. Fortunately, demand resources are everywhere. Demand resources represent a broad category of options potentially available to customers, including demand response, energy efficiency, distributed generation, storage, and efficient rate design options². Unfortunately, many of these demand resources are currently only prospective resources because of barriers to their active participation in the market.

The OMS also agrees with the Commission that:

“Effective demand response can be achieved by linking wholesale and retail markets. While the Commission can remove some obstacles to demand participation in organized markets, more effective demand response also requires the action of state commissions.”³

However, the OMS points out that the Commission has been sensitive to state jurisdictional authority in matters related to electric service to retail customers.⁴ Some states within MISO have made demand resources available for the benefit of reducing demand for load serving entities (LSE) for a number of years. These demand resources were created at the state level

¹ The efficient signals demand response provides is one of many factors that investors in new generation consider, but it is not the most significant factor. Typically, such investors place greater weight on the ability to obtain higher payments to cover their relatively high fuel costs or a longer term guaranteed revenue stream, e.g. longer-term contracts or guarantees from a state regulator for building.

² Efficient rate design options could include two-part real-time (or day-ahead) pricing or critical peak rebate programs that allow consumers to hedge the bill impacts of variable pricing while benefiting from being able to control marginal energy usage in response to changes in wholesale prices.

³ ANOPR, at P 48.

through direct load control mechanisms, interruptible tariffs or by special contracts. These demand resources are often referred to as “legacy” demand response.

In responding to the Commission’s questions, the OMS must consider these issues in the context of the recent (August 2006) FERC staff report “Assessment of Advanced Metering and Demand Response” that found very high levels of demand resources (at least by comparison) available in the region. The OMS acknowledges, as does the FERC report, that the bulk of those resources are “legacy” utility programs, largely designed, implemented, triggered and compensated in a pre-organized market framework, for a set of purposes defined by individual state policy makers and significantly distinct from those addressed in this ANOPR. Some states in the Midwest ISO with legacy demand response programs are concerned about the problems that may result for such programs if they are **required** to participate in wholesale markets in ways that are contrary to state rules and regulatory orders creating the original design of these retail programs. . Until new demand response resources are developed in the Midwest ISO footprint, the existence and availability of those “legacy” demand response programs is critical to the reliability of the system. Aligning these legacy demand response programs with the current market framework is difficult and the OMS’s responses to this ANOPR need to be considered in light of that fact.

1. Demand Response Participation

The ANOPR proposes to obligate each RTO/ISO to purchase demand resources in its markets for energy imbalance, spinning reserves and supplemental reserves, as long as the demand resources, like all other generation resources, meet the necessary technical requirements and the resources submit an offer under the generally-applicable bidding rules at or below the

⁴ ANOPR, at P 35.

market-clearing price.⁵ Provided that it is consistent with state laws and rules, the OMS supports the concept of demand resources if they are offered, at least as an equal with generation resources, for the provision of energy and ancillary services

2. Removing Demand Response Disincentives

The ANOPR seeks comment on whether to eliminate, during a system emergency, charges to buyers in the energy market for taking less electric energy in the real-time market than purchased in the day-ahead market.⁶ The Commission describes these charges as “deviation charges” and includes uplift costs in that category.⁷

Clearly, it does not make sense to charge market participants for not taking delivery of energy during periods of system emergency shortages. Indeed, it would be problematic for an RTO/ISO to call for demand reductions during a system emergency and then assess penalties for schedule deviations or general uplift charges to parties that comply with the call for reduction. As such, the Commission should eliminate such charges and even consider developing programs that compensate parties that actually reduce their demand during such emergencies.⁸

Furthermore, the Commission requests comment as to whether the “deviation charge” should be eliminated for a day-ahead to a real-time load reduction when there is no system emergency. The OMS agrees with the Commission that eliminating the deviation charge beyond system emergencies would serve to develop greater levels of customer demand response. The OMS is mindful, however, of the Commission’s legitimate concerns that making such market changes could result in unintended results, such as new gaming strategies and less accurate market scheduling practices. Customer-sided demand response is critical to ensuring a

⁵ ANOPR, at P 59.

⁶ ANOPR, at P 62.

⁷ *Id.*

⁸ See, *Midwest Independent Transmission System Operator*, 120 FERC ¶ 61,029 (2007).

competitive energy market, however, and we believe that greater consideration of this issue is warranted, beyond initial comments. OMS suggests that the Commission direct the RTOs and ISOs to explore this issue further and to recommend whether such deviation charges could be reduced or eliminated for demand reduction from the day-ahead to the real-time markets, and to identify under what conditions and circumstances such changes might be appropriate, based on their experience with market operations.

3. Co-Optimizing Energy and Operating Reserves

The ANOPR proposes to modify RTO/ISO tariffs so that DR resources must be allowed to provide spinning and supplemental reserves without also being required to sell into the energy market.⁹ This change to market rules is intended to address the disincentive for DR to be an operating reserve. The Commission states that without this modification, customers may hesitate to offer demand reductions as operating reserves due to concerns about disruptions to their businesses. The OMS urges the Commission to reconsider its proposal to prohibit RTO/ISO programs that co-optimize the offering of energy and ancillary services.¹⁰ Such co-optimization programs can produce large efficiency improvements.¹¹

To ameliorate the Commission's concern about the effect of co-optimization on DR providers, the better solution would be to allow DR providers to submit offers with features such as duration and frequency of permitted interruption. Such offer elements would be analogous to such features as ramp rates, run times, and start/stops that are allowed in generator offers

4. Demand Response Aggregators

The ANOPR proposes that each RTO/ISO include provisions in its tariff that allows DR

⁹ ANOPR, at P 60.

¹⁰ The Midwest ISO has submitted such a co-optimization proposal in Docket No. ER07-550.

¹¹ See, for example, Midwest Independent Transmission System Operator, Inc revisions and amendments to its Open Access Transmission & Energy Markets Tariff etc under ER07-550 (February, 2007).

offers from third-parties who would aggregate the demand response of a number of retail customers that are not LSEs, “unless state retail electric laws or regulations do not permit this.”¹² The OMS supports this proposal. Third-party aggregators can provide a convenient option to direct end-user participation. Furthermore, third-party aggregators could also be a significant source of innovation in the market – and under the right market rules – could assist in getting participation from all sectors. The OMS, however, recommends that the Commission be mindful of the potential impact third-party aggregators have on reliability, by carefully considering the relationship between the aggregator that participates in the market and the load serving entity that sheds load under maximum generation emergency operating procedures. If there are two different entities responsible for load shedding, this could have the unintended effect of both entities depending or relying on the same load reduction during an emergency event where load exceeds generation capacity. This dual responsibility would lead to a loss of reliability.

5. Pricing under Scarcity Conditions

The ANOPR seeks comment on ways to modify mitigation rules to allow the market price to better reflect the value of lost load in an emergency situation. The ANOPR describes four possible proposals: (1) allow RTO/ISOs to increase both the energy bid caps and market-wide price caps above the current levels; (2) allow RTO/ISOs to raise the bid caps only for demand bids; (3) require RTO/ISOs to implement an operating reserve demand curve; and (4) allow the market-clearing price to rise to the level of the payment made to participants in an emergency demand response program.¹³ In addition to the four options discussed above, there is an option that could be implemented in regions that continue to cap offers and bids in energy markets. That alternative would permit end users who are willing to interrupt load at some price

¹² ANOPR, at P 70.

to participate in a voluntary demand response market in which participants could trade their uncalled priorities for being interrupted.¹⁴

Substantial market changes would be needed to implement the ANOPR's first proposal. The demand side of the market would need to be much more fully developed and sufficiently active to serve as the primary restraint on sellers' market power opportunities.¹⁵ The OMS is concerned that the necessary precedents and market design prerequisites are not yet widely in place to support the generic approach of raising generator offer caps or modifying other market mitigation measures. Increasing offer caps would only serve to allow generators to exercise market power and under the current state of the markets could lead to higher, not lower, electric costs for consumers. The OMS agrees with Commissioner Kelly's statement that,

Before the Commission considers whether to pursue such market rule modifications, I think it is important to address other barriers that may significantly restrict demand response participation. For example, the *FERC Staff Demand Response Assessment* concluded that the technologies needed to support significant deployment of demand resources, such as advanced metering, have little market penetration. [footnote omitted] Without the necessary technology already in place that would allow demand resources to respond to price signals in wholesale or retail markets, it is unclear how quickly they could develop the ability to respond after energy bid caps or market-wide caps are raised or eliminated. In other words, the technology and associated demand response capability must be in place before we consider raising or eliminating these price caps. Otherwise these higher energy prices may not elicit any demand reduction in a fashion capable of disciplining those prices and keeping them just and reasonable.¹⁶

The OMS believes qualified DR offers ought to be allowed to set the market-clearing price.

Substantial market design changes may be needed to implement this provision.

Unlike caps on supply offers that can limit strategic behavior, capping demand bids by

¹³ ANOPR, at PP 76-80.

¹⁴ P. Centolella, *Pricing Demand Response: Crossing the Chasm to Efficient Energy Markets*, at 15, San Diego, (Oct. 26, 2006) <www.sandiego.edu/EPIC/news/documents/Centolella.pdf>.

¹⁵ This concern also applies to the need for improving technology on the demand side of the market, such as the use of advanced meters and improving communications.

consumers and independent aggregators restricts only genuine consumer responses to shortages and high prices. While parties may differ over policies for avoiding shortages and ensuring resource adequacy, in the event that shortages occur, raising caps on demand bids under emergency response procedures, without lifting caps on supply offers, deserves serious consideration. On the other hand, in markets where demand response capabilities are not in place, raising the cap on demand bids could increase prices without producing demand reductions.

While raising caps in an emergency could better allow each customer to act on its value of lost load, the Commission is correct that RTO/ISOs would have to establish procedures for vigorous oversight and monitoring for the exercise of market power during a system shortage. If the Commission is suggesting that market power mitigation that is needed to prevent market power abuse would be dispensed with to enable cap-raising, the OMS opposes the Commission's proposal. Allowing the exercise of market power can never be a correct solution to any identified market design problem. However, demand response can act as a significant restraint on generator market power by making it both more difficult for suppliers to benefit from exercising market power and providing a check on strategic behavior.¹⁷

Generally, lifting generator offer caps or modifying other market power mitigation rules, under current market conditions (wholesale as well as retail), would be bad public policy and result in negative outcomes for customers and for the system as a whole. The OMS is not, however, **absolutely** opposed to the relaxation of the price caps. Under certain future market conditions, the OMS can imagine that such an action would result in positive impacts on the

¹⁶ Kelly Dissent at 1-2.

¹⁷ See, S. Rassenti, V. Smith, and B. Wilson, *Controlling Market Power and Price Spikes in Electricity Networks: Demand Side Bidding*, Proceedings of the National Academy of Sciences 100(5) 2998-3003 (March 4, 2003); see

function of the markets and reduce costs to consumers. Those future market conditions, expressed in somewhat general language, include, but are not limited to, the following:

1. The existence across the region of a well-functioning distributed generation market;
2. Increased region-wide penetration and adoption of energy efficiency technologies, either directly through price or cost induced changes in customer investment behavior and/or indirectly through incentives and other efficiency incentive programs;
3. Adoption of dynamic retail pricing for some substantial portion of the region-wide load and/or the establishment of extensive linkage between new and existing demand side resources and the wholesale markets;
4. Retail demand response tariffs that are designed to benefit the regional wholesale markets.

Regarding the remaining market design options suggested in the ANOPR, the OMS urges the Commission to remain flexible and open to considering various possible ISO/RTO proposals. ISO/RTO markets are developing at different paces. Scarcity pricing is complex with lots of unforeseen consequences. So while a detailed program for scarcity pricing is important for bringing about efficient levels of DR, a deliberate and thoughtful pace of reform in this area is warranted.

II. LONG-TERM POWER CONTRACTING IN ORGANIZED MARKETS

The ANOPR seeks comments on any concrete steps the Commission can take to facilitate voluntary long-term power contracting in organized market regions. In particular, the ANOPR discusses ideas such as: (1) requiring RTO/ISOs to post information that could facilitate long-term contracts, such as by aggregating and posting information on long-term contract prices and quantities on a periodic basis; (2) requiring or encouraging efforts to develop new standardized forward products; and (3) having a dedicated portion of the RTO/ISO's website as a bulletin board for market participants to post offers to buy or sell power long-term.¹⁸

also, S. Borenstein & J. Bushnell. *An Empirical Analysis of Market Power in a Deregulated California Electricity Market*, 47 *Journal of Industrial Economics* (September 1999).

¹⁸ ANOPR, at P 93

While some of these suggestions may be useful, the OMS does not support imposing them on RTO/ISOs as requirements at this time. For example, the stakeholders of a particular RTO/ISO may want their RTO/ISO to provide a bulletin board service for bilateral contracts. The Midwest ISO, for instance, in response to participant interest, maintains two bulletin boards as a part of its market systems: one for secondary FTR market bids and offers, and one for bilateral capacity transactions. Both are accessible through the Midwest ISO market portal in the same way participants conduct business in other markets it administers. In such cases, it may be appropriate for the RTO/ISO to develop such service and for the Commission to facilitate it. On the other hand, stakeholders may wish to avoid incurring the cost for development of a new RTO/ISO service and may wish to look for third parties to provide such bulletin board service. Or, perhaps, market participants would find no value in such bulletin board services.

Similarly, the OMS does not believe that it is necessarily the RTO/ISOs' responsibility to develop new standardized pro forma contracts. However, if the stakeholders of an RTO/ISO desire their RTO/ISO to engage in such a project, the OMS would urge the Commission to facilitate the effort.

Finally, the OMS does not support the Commission's proposal to require RTO/ISOs to post information on long-term contract prices and quantities on a periodic basis. RTO/ISOs are not in the best position to provide such information because they may not collect it in the normal course of business. If it is determined that more data availability on existing long term contracts would be useful in promoting more new long term contracts, then the OMS encourages the Commission to revise its current Electric Quarterly Report ("EQR") posting requirements to provide such information.

Looking at the bigger picture, the OMS believes that there are more fundamental issues

that the Commission can address that would be more likely to increase the amount of long-term contracts actually executed by market participants in the RTO/ISO regions. In particular, the OMS would urge the Commission to focus on “getting the prices right” in the spot energy and ancillary services markets and reducing regulatory uncertainty. A reliable, competitive, well-functioning spot market that reflects actual system operating conditions and that is operated in a stable, predictable regulatory environment will serve as the best foundation for hedging through long term bilateral contracting. In addition, development of rules and market designs for least-cost, efficient achievement and maintenance of long-term resource adequacy will go far toward establishing the proper framework for reasonable levels of long-term contracting.

III. MARKET MONITORING POLICIES

The OMS agrees with the Commission that “market monitors have played an integral role in the organized electric markets” and that they provide “valuable reporting and analysis services not only to the Commission, but also to the RTOs and ISOs, to market participants, and to state commissions.”¹⁹ While some reform to current market monitoring policies and practices is clearly warranted, the OMS urges the Commission to avoid solutions that damage currently successful practices. The OMS also urges the Commission to review the comments submitted by the OMS in the Commission’s technical conference regarding its Review of Market Monitoring Policies.²⁰

1. Market Monitoring Unit (“MMU”) Structure and Independence

Before addressing the specific structural issues identified in the ANOPR, the OMS offers an overall observation. The critical determinants of successful market monitoring are the

¹⁹ ANOPR, at P 95

²⁰ See, Comments following Technical Conference of Organization of MISO States, Inc. under AD07-8 (April 16, 2007)

MMU's access to RTO market information, its ability to observe and evaluate RTO operations, the adequacy of its personnel and computational resources, its ability to form and provide independent professional advice and the receptivity of RTO management to that advice. Some of the structural issues identified in the ANOPR are secondary to these factors. The OMS states hold somewhat differing views on these secondary factors that are explained below.

a. Internal vs. External MMU

Among OMS states, Illinois and Indiana²¹ agree with the Commission that there is “no appreciable difference among the performance of the market monitors that can be attributed to whether they are external or internal to their RTO or ISO.”²² These OMS states agree that “the particular structural relationship between the MMU and the RTO or ISO [is] of secondary importance, provided that the RTO/ISO tariff contain[s] provisions ensuring independence on the part of the MMU.”²³ Neither an external MMU, nor an internal MMU, will be effective if RTO/ISO management has the ability to control them or influence their actions. As shown by the recent events in PJM, a tariff that contains poor reporting arrangements and relationships that would allow management to influence the MMU's behavior and findings can lead to a disruption in the marketplace. In particular, Illinois believes that what happened in PJM had very little to do with the PJM MMU being an employee of PJM. The Organization of PJM States pointed out a long time ago that Attachment M left the door open for this type of behavior from PJM management. The success of other RTO/ISO MMUs with an external MMU is not so much the result of the MMU being an external consultant, but more a reflection of a properly structured tariff and the fact that management respects the MMU and allows the MMU to do its job.

²¹ The Indiana Office of Utility Consumer Counselor also concurs with this view.

²² ANOPR, at P 110

²³ ANOPR, at P 109

Accordingly, the above OMS states urge the Commission not to impose a “one size fits all” approach to the structure of MMUs and instead focus on getting the tariff of the RTO/ISO right.

On the other hand, certain OMS states such as Wisconsin, North Dakota, Iowa, Minnesota, Montana, South Dakota, and Nebraska believe that a completely internal MMU model is seriously flawed. To them, events in PJM bear this out: assuming the best of behavior by all PJM parties, noting the ongoing investigation and that PJM itself is now abandoning the internal model (leaving no RTO/ISO with an internal MMU), and with still sizeable negative trade press coverage, the internal market monitoring model lacks forthright credibility. Yet market monitoring remains a key function for an RTO/ISO and its companion markets to operate competitively. Assuming any behavior less than above-board, these states believe the internal model has failed to provide convincing and trustworthy market monitoring, a frightening prospect when energy markets are still maturing. By comparison, the MISO model of using an external consultant looks impressive. For these reasons, these states believe the Commission should favor an external MMU presence.

Irrespective of the individual state’s positions noted above, all OMS states believe that the Commission must endeavor to make sure that poor reporting arrangements and relationships that allow management to influence the MMU’s behavior never become part of any respective RTO/ISO’s market monitoring tariff.

b. MMU Reporting Structure

The ANOPR proposes that the MMU “report either directly to the RTO/ISO’s board of directors or directly to a committee of independent board directors.”²⁴ In the past, the OMS has recommended that the Commission explore a Market Monitoring Oversight Board made up of

²⁴ ANOPR, at P 113

either the state commissions in the RTO/ISO footprint or a combination of federal and state regulators.²⁵ The OMS believes that an appropriate Joint Board could ultimately supplant the role of the RTO/ISO Board regarding the accountability of the MMU.

As an alternative to the Joint Board approach, the MMU could be required to report directly to the RTO/ISO Board or to a subcommittee of the RTO/ISO Board that does not include any member of the RTO/ISO management. While to date, the Midwest ISO Management and Board of Directors have respected the independent role of its MMU, a structure that has the MMU reporting to the RTO/ISO Board calls into question the ability of the MMU to act independently over the long run. Accordingly, such an approach would require explicit recognition that the MMU should not be required to seek the RTO/ISO's approval for activities such as conducting inquiries/investigations, submitting referrals to the Commission, submitting reports to the Commission or the state commissions, gaining access to the data that the MMU believes is necessary to complete an inquiry or to investigate any matter that the MMU reasonably believes would impair the efficient conduct of the RTO/ISO's facilitated markets.

The OMS urges the Commission to explore the possibility of developing Joint Boards for purposes of MMU reporting. The Joint Board proposal more thoroughly addresses the Commission's expressed concerns both for MMU independence and MMU accountability. Implementing the Joint Board approach would also eliminate any conflicts of interest that the RTO/ISO Board may have between RTO/ISO administration and MMU oversight.²⁶ Adoption of the Joint Board approach to MMU accountability may also address concerns expressed by some that the Commission not delegate any of its market oversight responsibility to an

²⁵ See, Comments following Technical Conference of Organization of MISO States, Inc. under AD07-8, at P. 2

²⁶ While the OMS will comment elsewhere in this document on the Commission's proposal for stakeholder membership on RTO Boards, we will take the opportunity to point out here the inherent and obvious conflict of

unaccountable non-governmental MMU. If the Commission dismisses the Joint Board proposal and proceeds to implement its proposal for MMU reporting to an independent RTO/ISO Board, the Commission must also factor in provisions that require notice to the Commission and approval by the Commission with input from the states of such things as MMU budget allowances and MMU personnel evaluation.

c. Focus on MMU Independence

Regardless of any decisions the Commission makes on MMU structure, the OMS urges the Commission to focus primarily on MMU independence. The OMS notes the following provision in the Midwest ISO tariff that the Commission would do well to require in all RTO/ISO tariffs. Specifically,

The IMM [independent market monitor] shall be granted complete independence to perform those activities necessary to provide impartial and effective market monitoring within the scope of the Plan. No person, party or agent, including the Transmission Provider, State Regulatory Commissions, or any other administrative oversight group responsible for the administration of the IMM activities, shall be granted authority to screen, alter, delete, or delay IMM investigations or the preparation of findings, conclusions, and recommendations developed by the IMM that fall within the scope of market monitoring responsibilities contained in the Plan.²⁷

The OMS also recommends that the Commission require each RTO/ISO tariff to include a provision authorizing the MMU to hire legal counsel separate from the RTO/ISO.

Because of the importance of *independent* market monitoring, the OMS believes that it would be beneficial for the Commission and states to have regularly scheduled conversations about monitoring issues to provide greater assurance that the market monitoring and mitigation policies are appropriate. Such conversations should also include the RTO/ISOs, the MMUs and relevant experts.

interest that such an approach to RTO governance would have with regard to the RTO Board's MMU oversight.

2. MMU Tools

The OMS agrees with the Commission that MMUs must have “adequate tools with which to perform their job.”²⁸ The OMS strongly supports the Commission’s proposal to require “each RTO and ISO to include in its tariff a provision imposing upon itself the obligation to provide its MMU with access to market data, resources, and personnel sufficient to enable the MMU to carry out its functions.”²⁹ However, as footnote 94 of the ANOPR notes, PJM’s Attachment M contains Commission approved tariff language that details the provision of resources and access to market data for PJM’s MMU. Yet, substantial controversy still exists over these very issues.³⁰

The PJM example illustrates that having in place a tariff provision requiring an RTO/ISO to “provide its MMU with access to market data, resources, and personnel sufficient to enable the MMU to carry out its functions” will not, in and of itself, eliminate all RTO/ISO-MMU problems regarding these issues. Admittedly, the Commission’s proposal to require each RTO/ISO to adopt a tariff provision “directing the MMU to report to the Commission any concerns it has with inadequate access to market data, resources, or personnel” will help the situation.³¹ However, without sufficient independence of the MMU from the RTO/ISO, potential fears of retaliation and retribution could still constrain an MMU’s enthusiasm to go public with such concerns. The Commission must not shrink from addressing this bigger independence issue and a Joint Board reporting structure would go far to address it.

The OMS also recommends that the Commission require that each RTO/ISO’s MMU tariff contain a provision obligating market participants to respond to MMU data requests. “Access to market data” that the MMU deems necessary or important must be guaranteed and

²⁷ Section 50.2 of the Midwest ISO’s tariff.

²⁸ ANOPR, at P 111

²⁹ ANOPR, at P 111

³⁰ See, e.g., the pleadings of the Organization of PJM States, Inc. in Docket Nos. ER06-826 and EL07-58.

the provision of such data on the part of market participants cannot be voluntary. For example, Section 54.2.2a of Module D of the Midwest ISO tariff provides for the following in this regard:

A party receiving an information request from the IMM shall furnish all information, in the requested form or format, that is: (i) included in the categories of data or information that it may request from a Market Participant to support an active investigation, as specified in Section 61; or (ii) reasonably necessary to achieve the purposes or objectives of this Plan, not readily available from some other source that is more convenient, less burdensome and less expensive, and not subject to a legal privilege.

Section 61 of Module D details the specific types of data that the MMU can seek from market participants, transmission owners and the RTO/ISO. These types include production costs, opportunity costs, generation logs, transmission logs and bidding agreements. The OMS notes that this obligation falls on market participants *and* transmission owners and the RTO/ISO.

Adoption of an across-the-board standard requiring market participants to respond to MMU data requests would minimize the Commission's burden in processing piecemeal MMU concerns about inadequate access to market data.

3. MMU Functions

a. MMU Advice on Rule and Tariff Changes

The OMS supports the Commission's proposal to require each MMU to continue to advise its RTO/ISO of "any recommendations for rule or tariff changes"³² The OMS also supports the Commission's proposal to require the MMUs to "advise the Commission and other interested entities" of any recommendations for rule or tariff changes.³³ The MMU has critical expertise in identifying market design elements that will facilitate competitive market participant behavior and competitive markets. However, the Commission's proposed requirements for the MMU to advise are too general to be meaningfully implemented. The details associated with

³¹ ANOPR, at P 111

³² ANOPR, at P 115

these requirements will need to be worked out - either by the Commission or by the state commissions and stakeholders of the individual RTO/ISOs and submitted to the Commission for review and approval.

b. MMU Referrals

The OMS supports the Commission’s proposal to retain the requirement from its *Policy Statement on Market Monitoring Units* that the MMU “make a referral to the Commission in all instances where the MMU has reason to believe that a market violation may have occurred.”³⁴

The OMS also supports the Commission’s proposal to specifically require MMUs to refer suspected violations of the Commission’s Anti-Manipulation Rules that were codified in the Commission’s *Prohibition of Energy Market Manipulation* Order.³⁵ The OMS notes that the Midwest ISO’s market monitoring plan already requires its MMU to monitor for violations of the Commission’s Anti-Manipulation Rules and refer suspected violations to the Commission.³⁶

The OMS notes the Commission’s new proposal to require each MMU to “refer any suspected violations of other Commission-approved rules and regulations, such as Codes of Conduct and Standards of Conduct.”³⁷ Section 53.3b of Module D in the Midwest ISO’s tariff currently does not require, but rather provides the MMU with the option of reporting a “significant market problem or a potential violation of the Transmission Provider’s Tariff, other FERC-approved Transmission Provider Market Rules, or the FERC Market Rules”. The OMS is not opposed to the Commission’s proposal to expand the MMU functions to require monitoring and reporting of suspected violations of any and all Commission-approved rules and regulations.

³³ ANOPR, at P 115

³⁴ *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267 Appendix A at P 4, underlining added.

³⁵ ANOPR, at P 116, citing *Prohibition of Energy Market Manipulation*, FERC Stats. & Regs. ¶ 31,202 (2006).

³⁶ See, Module D, Section 52.3b of the Midwest ISO’s tariff.

However, this new proposal could be a significant expansion of functions and duties for an MMU and, should the Commission implement such an expansion of MMU functions, the Commission must also ensure that the MMUs receive all needed increases in budgets and resources to perform such new functions.

c. MMU Analyses, Studies and Reports

As discussed elsewhere in this document regarding state commission needs for MMU information, MMU tariffs should be revised as needed to clarify that the MMU will conduct analyses and provide studies/reports when reasonably requested by a state commission or regional state committee. For example, the Midwest ISO tariff has a reasonable provision that could serve as a model in this regard. The Midwest ISO tariff states,

The IMM [independent market monitor] will also respond to requests from FERC or State Regulatory Commissions for additional analysis or data the IMM has in its possession, subject to its obligation to protect the confidentiality of the data.³⁸

The Midwest ISO's tariff also establishes an obligation on the MMU to provide reports of such analyses to the state commissions.³⁹

d. MMU Reports on RTO/ISO Performance

The OMS has argued that an MMU should be expected to provide critical evaluation of the RTO/ISO's management of energy markets and transmission operations.⁴⁰ In her separate statement concurring in part and dissenting in part, Commissioner Kelly states that she "would have proposed requiring the MMU to make recommendations related to its reports on RTO/ISO performance."⁴¹ The OMS supports Commissioner Kelly's proposal on this point.

³⁷ ANOPR, at P 116

³⁸ Midwest ISO tariff, Section 50.1

³⁹ See, e.g., Section 52.3.1 of the Midwest ISO tariff

⁴⁰ See, Comments following Technical Conference of Organization of MISO States, Inc. under AD07-8, at P. 1

⁴¹ Kelly Dissent at 1.

4. Market Power Mitigation by the MMU

a. MMU Authority to Administer Market Power Mitigation

The Commission's ANOPR includes a discussion of market power mitigation that is confusing, unclear and troubling.⁴² In particular, the ANOPR appears to make a proposal to prohibit MMUs from administering market power mitigation.⁴³ In the ANOPR, the Commission appears to believe that MMUs are improperly performing market power mitigation functions, conducting market power mitigation or administering the market power mitigation provisions of RTO/ISO tariffs. The ANOPR proposes to remove that function from the MMUs and transfer it to the RTO/ISOs. For example, the ANOPR states that "operational activities affecting the market, including mitigation, are more properly performed by the RTOs and ISOs themselves as part of their responsibility to administer their Commission-approved tariffs."⁴⁴

However, there is confusion as to what exactly the Commission's policy is regarding who is responsible for implementing market power mitigation. For example, consider the Commission's November 17, 2003, Order, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, where the Commission appears to have authorized MMUs to engage in market power mitigation. In particular, the Commission stated,

We believe it is appropriate to authorize MMUs to enforce certain ISO/RTO tariff matters if those matters are: (i) expressly set forth in the tariff; (ii) involve objectively-identifiable behavior; and (iii) do not subject the seller to sanctions or other consequences other than those expressly approved by the Commission and set forth in the tariff.⁴⁵

The Commission stated further that, to the degree its market behavior rules overlap with

⁴² ANOPR, at P 117-119

⁴³ ANOPR, at _ 119

⁴⁴ ANOPR, at P 119

⁴⁵ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at P 182, underlining added

“a clearly stated tariff provision for which the Commission has assigned the first-line enforcement authority with associated sanctions to a MMU subject to appeal to the Commission, we will defer in the first instance to the MMU, subject to possible review.”⁴⁶ These passages from the Commission’s 2003 Order appear to have given MMUs market power mitigation authority when such authority for the MMU is set forth in the RTO/ISO’s tariff and previously approved by the Commission.

However, the Commission’s subsequent 2005 Policy Statement on Market Monitoring Units appears to prohibit MMUs from engaging in market power mitigation, and instead assigns that function to the RTO/ISO. For example, the Commission’s MMU Policy Statement states that,

ISOs/RTOs may administer compliance with tariff provisions only if they are expressly set forth in the tariff; involve objectively identifiable behavior; and do not subject the seller to sanctions or consequences other than those expressly approved by the Commission and set forth in the tariff, with the right of appeal to the Commission.⁴⁷

Similarly, Paragraph 6 of the MMU Policy Statement refers to “Commission-approved tariff provisions that are administered by the ISO/RTO.”⁴⁸

In addition, Section 62 of the Midwest ISO’s Module D suggests that it is the Midwest ISO, and not the MMU, that is primarily responsible for administering market power mitigation.

Specifically, the Midwest ISO’s Module D states,

“These market power Mitigation Measures are intended to provide the means for the Transmission Provider to mitigate the market effects of any conduct that would substantially distort competitive outcomes in the Energy Markets or other markets

⁴⁶ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at P 185, underlining added.

⁴⁷ *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267 at P 5, underlining added.

⁴⁸ *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267 at P 6, underlining added

administered by the Transmission Provider, while avoiding unnecessary interference with competitive price signals”.⁴⁹

The OMS notes that the Midwest ISO’s tariff defines the term “Transmission Provider” as the Midwest ISO, not the MMU. With respect to MMUs administering market power mitigation, and to the Midwest ISO’s MMU in particular, it appears that the Commission is proposing a policy in the ANOPR that is exactly the same as the Commission’s current policy as expressed in the 2005 Policy Statement on Market Monitoring Units. To the extent that the Commission intends to be proposing a new or different policy from that adopted in the 2005 Policy Statement, the OMS requests that the Commission clarify its position.

If the Commission is proposing to remove the MMU from all supporting aspects of market power mitigation, such as development, refinement, and retention of the cost-based reference prices for each market seller, then the OMS opposes the Commission’s proposal. The OMS strongly believes that the current approach to mitigation taken by the Midwest ISO works for the Midwest region and should not be changed. Indeed, removing these types of market power mitigation support functions from the MMU and placing them in the RTO/ISO would create inherent conflicts of interest and duty that would threaten the integrity of market monitoring and market power mitigation. In particular, one can easily see a case in which management may be hesitant to perform a needed mitigation measure if it were to affect a market participant with a credible threat to leave the RTO/ISO. If the RTO/ISO were to cave to such a threat, the outcome in the wholesale marketplace would not be competitive. A hybrid board structure containing market participants would only compound these potential conflicts of interest and duty. Such an example shows that market power mitigation authority properly resides with the MMU and should not be left to the discretion of RTO/ISO management.

⁴⁹ Section 65.1 of Module D

b. Market Power Mitigation and MMU Independence

In the ANOPR, the Commission expresses a concern that “an MMU’s performance of [market power] mitigation functions can compromise its independence in evaluating and reporting on market performance.”⁵⁰ However, if the Commission is retaining the policy from its 2005 Policy Statement on Market Monitoring Units that places market power mitigation administration responsibilities primarily on RTO/ISOs, rather than MMUs, then the Commission’s expressed concern about the administration of market power mitigation affecting MMU independence is misplaced. The OMS requests that the Commission clarify its proposal concerning this aspect of MMU independence.

c. Allegations of MMU Over-Mitigation

The Commission noted the arguments of certain unnamed commenters regarding possible over-mitigation by MMUs. The Commission stated, “Certain commenters were concerned that such mitigation is being conducted without an adequate theoretical or empirical basis and is having a deleterious effect on the electric power market.”⁵¹ The criticisms of the MMUs by these commenters –whatever they are - are curious and seem to be misplaced.

While the issue was not described in the ANOPR, over-mitigation could take two possible forms: (1) a market participant is mitigated when it is not exercising market power; and (2) market power mitigation blocks energy prices from rising to appropriate levels during periods of scarcity. In a July 20, 2007 filing submitted by the Midwest ISO regarding broad constrained areas, Dr. David B. Patton, who is the MMU for the Midwest ISO market, submitted an affidavit that explains why the conduct and impact tests that are applied to the Midwest ISO market are highly unlikely to have either of these effects.

⁵⁰ ANOPR, at P 118

If the Commission is suggesting in its ANOPR that market power mitigation policies be relaxed so that generators are permitted to add to their revenue stream through the exercise of market power, the OMS strongly opposes the Commission's proposal. If the revenue streams available to generators and demand side response providers are not adequate to ensure reliability and long term resource adequacy in the market, the proper response is to examine the sufficiency of market design. The solution should never be to allow the exercise of market power. In any event, the OMS agrees with the Commission's position that this rulemaking is not "the appropriate forum to address issues of market power and mitigation."⁵²

d. The MMU and Tariff Administration

The Commission closes out its ANOPR discussion of market power mitigation with a sentence that goes far beyond market power mitigation and the MMU's role in that regard. In particular, the Commission states,

"Therefore, the Commission proposes requiring that MMUs refrain from assisting the RTO or ISO in tariff administration, from participating in ISO/RTO market operations, and from taking direct actions to influence the market, and instead concentrate on their role of providing market evaluation, reports, and advice."⁵³

This Commission statement is broad-sweeping and does not follow from the discussion that precedes it. The Commission's statement also raises several red flags for the OMS. Therefore, the OMS seeks clarification of the Commission's intent with this statement.

First, it is not clear how the Commission interprets the phrase "assisting in tariff administration." In the ANOPR, the Commission seems to equate tariff administration with market power mitigation. For example, the Commission states, "The function in question is that of providing support to the RTO or ISO in the administration of its tariff, which usually takes the

⁵¹ ANOPR, at P 117

⁵² ANOPR, at P 118

form of MMU-conducted market power mitigation.”⁵⁴ However, the 2005 Policy Statement already largely removed the MMU from administering market power mitigation. Furthermore, in the 2005 Policy Statement on Market Monitoring Units, the Commission specifically required MMUs to “provide support to the ISO/RTO in the administration of Commission-approved tariff provisions related to markets administered by the ISO/RTO”⁵⁵ Read literally, the Commission’s ANOPR is now proposing a one hundred and eighty degree change to prohibit the MMUs from providing tariff administration support. If the Commission intends to expand the range of “tariff administration” that it proposes to forbid the MMU to conduct, beyond administering market power mitigation and the other functions already largely forbidden to the MMU by the Commission’s 2005 Policy Statement on Market Monitoring Units, then the Commission must more clearly explain its proposed change in policy in this regard so that it can be evaluated. The ANOPR fails to provide this explanation.

Second, it is not clear what the Commission has in mind with respect to its proposal to prohibit MMUs from “participating in ISO/RTO market operations.” Moreover, the term “market operations” does not have a standard meaning. The OMS asks the Commission to clarify what it means by “market operations” in this regard and what it intends to prohibit MMUs from engaging in, with respect to “market operations”.

Third, the Commission proposes to prohibit MMUs from “taking direct actions to influence the market.” It is not clear what the Commission means by “direct actions to influence the market.” Similarly, with respect to the Midwest ISO, it is not clear what current actions of the Midwest ISO MMU would be prohibited by the Commission’s proposed prohibition on the

⁵³ ANOPR, at P 119

⁵⁴ ANOPR, at P 117, underlining added

⁵⁵ 111 FERC ¶61,267 at P 2

MMU regarding “direct actions to influence the market.”

Finally, as a general matter, the OMS is opposed to any Commission proposals that would have the effect of transferring key market monitoring functions out of the MMU or changes the mitigation approach presently practiced by the Midwest ISO management and the Midwest ISO’s MMU.

5. MMU Code of Ethics

The OMS supports the Commission’s proposal to develop a standardized MMU Code of Ethics that would impose certain minimum ethics standards on all MMUs. These minimum standards should, among other things, cover: (1) requiring the MMU to collectively have experience and expertise appropriate to perform the analysis of competitive conditions in RTO/ISO markets; (2) prohibiting all MMU personnel from having equity or other financial interests in any market participant or affiliate of any market participant affected by the market that is the responsibility of the particular MMU; (3) requiring the MMU to certify that it has no current engagements and will not undertake any new engagements during the period for which it is acting as MMU that present any conflict of interest with its MMU function; (4) prohibiting the MMU from using any non-public information that the MMU has access to in the course of its MMU function for any purposes other than performing the assigned responsibilities under its MMU function; and (5) prohibiting the MMU from undertaking any separate project or business that could benefit from the non-public information that the MMU has access to in the course of its MMU function.

The Midwest ISO’s Tariff has a useful provision that the Commission may wish to take note of and expand upon for application to the other MMUs. In particular, the Midwest ISO’s tariff states,

The Market Monitoring Liaison Officer shall adopt a policy on conflicts of

interest for the IMM [independent market monitor] establishing appropriate standards for the professional and financial independence of the IMM. In addition, the IMM shall adopt ethics policies and standards for its employees and subcontractors. The IMM, including each member, employee, or subcontractor of the IMM, shall comply at all times with the conflicts of interest and ethics policies, and shall certify such compliance to the Market Monitoring Liaison Officer upon request.⁵⁶

6. MMU Information

a. Information Needs of State Commissions

The OMS agrees with the Commission that there is a clear relationship between wholesale and retail markets.⁵⁷ The OMS appreciates the Commission’s recognition that, because of that relationship, state commissions have an “interest in the performance of wholesale power markets.”⁵⁸ The OMS agrees with the Commission that state commissions are not regular stakeholders, but are a separate class from market participants.⁵⁹ The OMS appreciates the Commission’s recognition that state commissions need information from the MMU “to assist them in performing their regulatory functions, given the integral relationship between wholesale and retail rates.”⁶⁰ However, as explained below, the Commission’s current policies to address these legitimate state commission information needs are woefully inadequate and the Commission’s ANOPR proposals are similarly insufficient and, in some cases, would reverse progress that has already been made.

The OMS is well aware of the argument that “Public disclosure of certain information, such as participant-specific offers or cost data, could harm market participants or could facilitate collusion under some circumstances.”⁶¹ However, the OMS strongly objects to the

⁵⁶ Section 52.2 of the Midwest ISO’s tariff.

⁵⁷ ANOPR, at P 122

⁵⁸ ANOPR, at P 122

⁵⁹ ANOPR, at P 123

⁶⁰ ANOPR, at P 123

⁶¹ ANOPR, at P 123

Commission’s suggestion that access by state regulators to such data would result in “jeopardizing the need for confidentiality on the part of market participants.”⁶² The Commission must distinguish between disclosure of information to the state commissions and disclosure of information to the public. State commissions have possessed and handled confidential data since the founding of state Commission regulation. The state commissions’ record in this regard is longstanding, speaks for itself and needs no further reiteration. Accordingly, the Commission’s insinuation in the ANOPR that state commissions cannot be trusted to maintain data confidentiality is off the mark and without merit. In spite of the Commission’s apparent belief, the reality is that state commissions are no less capable of protecting confidential data and information than is the Commission. Accordingly, the OMS recommends and requests that state commissions be granted access to MMU data and information on the same basis as such data and information access is made available to the Commission.

b. MMU Conference Calls

The OMS does not object to the Commission’s proposal to impose on each MMU a requirement to hold quarterly conference calls to report comprehensively on aggregate market and RTO/ISO performance.⁶³ In the past, the Midwest ISO’s MMU has provided the OMS with reports on market information and MMU market analysis. Accordingly, the Commission’s proposal in this regard would not appear to add much to what the OMS is already receiving from the Midwest ISO’s MMU.

However, the OMS is intrigued by the Commission’s proposal that such informational conference calls be provided collectively to “the Commission staff, the staff of interested state

⁶² ANOPR, at P 124

⁶³ ANOPR, at P 125

commissions, and the management and board of directors of the RTOs and ISOs.”⁶⁴ The Commission envisions that such combined reporting and conference calls “would permit targeted requests for information and encourage a fuller exchange of relevant data.”⁶⁵ The OMS sees potential value in having such combined conference calls where the MMU can discuss issues jointly with Commission personnel, state commission personnel, and RTO/ISO personnel. Accordingly, the Commission should explore making this ANOPR proposal a reality. However, such an arrangement should not preclude also retaining the current arrangement where the MMU makes presentations directly to the OMS, to subgroups of the OMS, or to individual state commissions.

c. State Commission Requests for MMU Data

The Commission proposes that “state commissions may make requests for additional information from the MMUs.”⁶⁶ The Commission states that its proposal for allowing states to request such tailored information “should be for information regarding general market trends and performance, not information designed to aid state enforcement or related actions against individual companies.”⁶⁷ The OMS believes that it would be useful for state commissions to continue to receive general market performance information and market trends from the MMU and supports the Commission’s proposal to that extent.

The OMS also believes that state regulators and the Commission share responsibility for overall market oversight and regulation.⁶⁸ Specifically, state responsibilities for retail markets parallel the Commission’s responsibilities in wholesale markets. Accordingly, state

⁶⁴ ANOPR, at P 125

⁶⁵ ANOPR, at P 125

⁶⁶ ANOPR, at P 128

⁶⁷ ANOPR, at P 129

⁶⁸ See, Comments following Technical Conference of Organization of MISO States, Inc. under AD07-8, at 2-3

commissions should not be put into a position of merely having to trust the findings of the MMU, but rather, they should be provided with the information necessary to verify the MMU's findings. Many state commissions also need to be able to receive from the MMU specific data and information about the behavior and activities of particular individual market participants. In many cases, the MMU is the only source of this needed data and information. For example, many state commissions need timely access to unmasked market participant offer, bid, and unit cost data. Prior to restructuring and the attendant gravitation of authority from the States to the Commission, state commissions would have had ready access to data types analogous to these from their jurisdictional utilities. Development of workable procedures to enable state commissions to access this MMU data and information would not unduly burden the MMU and would not jeopardize the confidentiality of the data and information.

The OMS notes that the Midwest ISO's tariff already contains Section 54.3 which is ostensibly intended to enable state commissions to access confidential MMU data and information. However, many OMS states have found the procedures in Section 54.3 of the Midwest ISO's tariff to be unusable or unworkable because those provisions require state commissions to make declarations and demonstrations that are either not reasonable requirements, are unnecessary to protect data confidentiality or do not serve any reasonable purpose. Section 54.3 of the Midwest ISO's tariff is not just and reasonable. Therefore, the OMS recommends that the Commission open a docket to re-examine Section 54.3 of the Midwest ISO's tariff so that those provisions can be made just and reasonable, and workable for all of the OMS state commissions.

If the Commission truly wishes to develop an information access approach that will be "useful to the states, while at the same time respectful of the limited resources of the MMUs, and

how to ensure confidentiality with respect to certain market data”, the Commission should focus attention on fixing the existing Midwest ISO tariff provisions regarding state commission access to confidential Midwest ISO and MMU data and information.⁶⁹

d. Commission Pre-Screening of State Commission Information Requests

The OMS strenuously objects to the Commission’s ANOPR proposal which would have the Commission pre-screen data requests submitted to the MMU by state commissions. The Commission describes its proposal as follows:

...a state commission would remain free, on a case-by-case basis, to request that the Commission authorize the release of otherwise proscribed data. The Commission would evaluate any such request to determine if it demonstrates a compelling need for the requested information, and decide whether adequate protections can be fashioned for commercially sensitive material.⁷⁰

State Commissions cannot be dependent on the Commission’s processes for information they need to meet their own responsibilities. The Commission should decline to put itself in the position of evaluating the information needs of state commissions or the legitimacy of particular state commission requests for information from the MMU. State commissions have universally demonstrated their capability to maintain the integrity of commercially sensitive material and provisions should be established, as described above, for state commissions to access such material in the possession of the MMU. The Commission’s proposal to make state commission requests for, and access to, confidential MMU data and information subject to individual Commission pre-screening and approval is unworkable and the OMS urges the Commission to dismiss it .

⁶⁹ ANOPR, at P 128

⁷⁰ ANOPR, at P 129

e. State Commission Requests for the MMU to Conduct Inquiries and Analyses

Although it is not addressed in the ANOPR, the OMS recommends that each RTO/ISO tariff include appropriate provisions requiring the MMU to conduct specific inquiries and/or analyses at the request of a state commission or regional state committee. The OMS has argued in other forums that an MMU should be able to engage in activities such as providing information, recommendations, reports and market analyses to state commissions and the Commission and/or providing testimony as the MMU sees fit, in proceedings before the Commission and/or the States.⁷¹ The tariff provisions to implement this arrangement should ensure that the requested inquiries/analyses be properly bounded so as to not burden the MMU.

As discussed elsewhere in these comments concerning MMU functions, the Midwest ISO tariff has a useful provision that the Commission might use as a model. The Midwest ISO tariff states,

The IMM [independent market monitor] will also respond to requests from FERC or State Regulatory Commissions for additional analysis or data the IMM has in its possession, subject to its obligation to protect the confidentiality of the data.⁷²

The Midwest ISO's tariff also establishes an obligation on the MMU to provide reports of such analyses to the state commissions.⁷³

f. MMU Notifications of State Commissions

Although it is not addressed in the ANOPR, the OMS recommends that each ISO/RTO tariff include appropriate provisions requiring the MMU to notify affected state commissions when the MMU identifies a significant market problem that may require state commission action. State commissions cannot be expected to help solve a market problem if they are not

⁷¹ See, Comments following Technical Conference of Organization of MISO States, Inc. under AD07-8, at P 2

⁷² Midwest ISO tariff, Section 50.1

informed of the market problem by the very entity that has been specifically established to monitor and identify such problems.

The OMS notes that the policy it is proposing here seems to be consistent with Commission policy pronouncements of the recent past. For example, in a White Paper issued in 2003, the Commission stated,

The Final Rule would identify the reporting process that would be used if the market monitor thinks the markets are not resulting in just and reasonable prices or providing appropriate incentives for investment in needed infrastructure. This would include notification of the Commission, the regional state committee, and other appropriate state regulatory authorities of the nature of the problem and recommended solutions.⁷⁴

Also, the Midwest ISO tariff has language that could serve as a useful model for such a generic notification requirement. The Midwest ISO tariff requires its MMU to notify “the affected State Regulatory Commissions immediately in the event the IMM [independent market monitor] identifies a significant market problem” that may require action by “one or more State Regulatory Commissions.”⁷⁵ The OMS urges the Commission to generically require such a provision in the RTOs’ market monitoring tariffs.

7. Release of Bid and Offer Data

The Commission proposes to require, on a three month lagged basis, that “offer and bid data, without identification of the market participants, be posted on the RTO/ISO’s website, where it will be available to the Commission, to interested state commissions and to stakeholders.”⁷⁶

First, the OMS does not strenuously oppose the Commission’s proposal to require

⁷³ See, e.g., Section 52.3.1 of the Midwest ISO tariff

⁷⁴ Docket No. RM01-12-000 White Paper Wholesale Power Market Platform Appendix A (April 28, 2003) at 13, underlining added.

⁷⁵ Midwest ISO tariff Section 52.3.b

⁷⁶ ANOPR, at P 127

RTO/ISOs to make bid and offer data available to the public on a three month lag.⁷⁷ However, the OMS suggests that a four month lag, with some additional features described below, would strike a better balance. Currently, the Midwest ISO posts bid and offer data on a six month lag. Reducing the lag from six months to four months would seem to strike a reasonable balance between the interests of public information availability and maintaining competitive integrity by market participants. For example, some have argued the importance of keeping the bid and offer data confidential at least through the current market season and a four month lag accomplishes that goal as well as a six month lag. On the other hand, a three month lag would allow some intra-season overlap which might provide competitors with opportunities for market abuse.

Second, as to the Commission’s proposal to maintain the masking of market participant identities; the OMS recommends a more nuanced approach. The OMS urges the Commission to consider the detrimental effect of maintaining perpetual confidentiality of individual market participants’ identities such that particular bids/offers can never be matched up with particular market participants with reasonable assurance by outside analysts. For example, masking market participants’ identities obscures units’ geographic location, which may be a critical part of certain analyses. Perpetually masked data dramatically reduces the certainty about which independent analysts can draw market conclusions. Consequently, masking of market participant identities should be lifted at some point and the OMS suggests that the masking be lifted at the same time the bid/offer data is made public—i.e., on a four-month lag.

The OMS agrees with the Commission that “Public disclosure of certain information, such as participant-specific offers or cost data, could harm market participants or could facilitate

⁷⁷ Throughout this discussion, the OMS urges the Commission to keep in mind the distinction between proper policies and procedures applicable to public access to MMU data and information and proper policies and procedures applicable to state commission access to MMU data and information. As explained elsewhere in these

collusion under some circumstances.”⁷⁸ In particular, The OMS supports the current policy under which the generating unit specific cost data (i.e., reference price or unit estimated cost data) that is maintained by the MMU is never released in un-aggregated form to the general public.⁷⁹

The OMS urges the Commission to evaluate the arguments made by some that market players participating in repeated single clearing price auctions already have the ability to implicitly signal and thereby develop collective offer strategies that damage ultimate electricity consumers. If the inherent “repeated game” nature of ISO/RTO markets has already enabled the market participants to reasonably predict their competitors’ cost structure and bidding strategies, then retaining a lagged disclosure policy and continuing the masking of market participants’ identities would permit those market participants to continue implicit collusion practices. If these circumstances reasonably describe the existing state of the world with respect to RTO/ISO energy markets, then the better solution would be for the Commission to require RTO/ISOs to publicly disclose bid and offer information without any lag and without any identity masking. Such an approach would empower independent third party analysts and break the current monopoly on market analyses currently possessed by the MMUs within the six month lag period. In such circumstances, universal public access would lead to “bad actors” being immediately discovered and thus deterred from further bad actions.

The OMS urges the Commission to carefully assess market participants’ behavior in the current RTO/ISO markets before reaching final conclusions on the information lagging and market participant identity masking issues. If the RTO/ISO markets are working relatively well,

Comments, different policies and procedures are in order for these two distinct sets.

⁷⁸ ANOPR, at P 123, underlining added.

⁷⁹ As explained in this document, some state commissions need access to some market participants’ unit cost data

then requiring a four month lag in the public release of the unmasked bid and offer data would protect the competitive integrity of those markets while enabling timely public analyses of the data. However, if the RTO/ISO markets are not currently working well and are characterized by implicit collusion, then immediate release of unmasked bid and offer data would do no harm, and may do some good by immediately allowing third party analyses of the markets.

8. MMU Referrals to the Commission

a. Notifying State Commissions of MMU Referrals

The Commission proposes to maintain its current policy of not informing state commissions or any other entities when an MMU makes a referral to the Commission as provided in the Commission's Market Monitoring Policy Statement and Market Monitoring Protocols.⁸⁰ Similarly, the Commission proposes to retain its current policy of not providing information to any party about the actions or investigations that the Commission may or may not undertake pursuant to an MMU referral.⁸¹ The Commission states, however, that Commission staff "does give MMUs generic feedback regarding enforcement issues, and we intend to continue this practice in order to provide guidance in matters relating to their referral function."⁸²

The OMS urges the Commission to inform affected state commissions or to direct the MMU to inform affected state commissions whenever the MMU makes an official referral of market participant behavior to the Commission. Indeed, affected state commissions should be served with a copy of the MMU's referral under proper conditions of confidentiality. In this circumstance, as with many others covered by the Commission's ANOPR, state commissions could be effective allies with the Commission in considering the market participant behavior that

that is kept by the MMU and they should be permitted to access this data under appropriate confidentiality terms.

⁸⁰ ANOPR, at P 130

⁸¹ ANOPR, at P 130

led the MMU to make the referral.

The Commission's concern for the commercially sensitive nature of information involved with referrals is not relevant to providing state commissions with access to this information because state commissions have a demonstrated track record of protecting the confidentiality of commercially sensitive information. Similarly, the Commission's concern that informing state commissions of MMU referrals might somehow discourage market participants from self-reporting objectionable behavior is not applicable to MMU referrals which happen only because a market participant failed to self report. The Commission's concern for the reputations of potentially innocent parties that are the subject of an MMU referral is not applicable because state commissions have a demonstrated track record of protecting such confidential information. In sum, there are many good reasons for the Commission to inform affected state commissions of MMU referrals and no good reason not to.

The OMS also recommends that the Commission inform affected state commissions about the actions or investigations that the Commission may or may not undertake pursuant to an MMU referral. All of the above arguments with regard to initially informing affected state commissions of the MMU referral also apply to keeping the affected state commissions informed about the Commission's processing of the referral.

b. Informing the MMU of Post-Referral Activity by the Commission

The OMS has argued in the past that there should be more transparent reporting after an MMU referral to the Commission.⁸³ Similarly, FERC's response or non-response to an MMU referral should be communicated to the MMU, as the information would allow the MMU to do a better job of ongoing monitoring. The OMS also believes that informing the MMU and the state

⁸² ANOPR, at P 130

commissions regarding the Commission's investigations would be beneficial to the markets as a whole, as communicating the disposition or results of enforcement or investigative activities would provide a better way to communicate expectations to the MMU, market participants and stakeholders.

The OMS appreciates the Commission's current practice where Commission staff provides the MMU with generic feedback regarding enforcement issues. As the OMS has explained in other forums, the MMU needs feedback in order to improve market monitoring and make the referral process effective on a continuing basis. However, providing generic feedback regarding enforcement is not enough. The OMS urges the Commission to expand, standardize, and formalize the current limited and informal practice. The Commission should also impose a requirement on its staff to provide the MMU with specific, detailed post-referral information, rather than maintaining a voluntary policy of generic feedback.

The OMS notes that Commissioner Kelly and the GAO have supported the Commission's providing more timely information to the MMU, stakeholders and state commissions regarding the Commission's oversight efforts in both electric and natural gas markets. Further, Section 209(c) of the Federal Power Act (16 U.S.C. 824h(c)) supports the Commission's sharing of such information with state commissions. Specifically,

(c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

⁸³ See, Comments following Technical Conference of Organization of MISO States, Inc. under AD07-8, at 3

c. Policy on MMU Post-Referral Activity

The OMS urges the Commission to revisit the provisions of its 2005 Market Monitor Policy Statement that require the MMU, after it has made a referral to the Commission, to: (1) “desist from independent action related to the alleged Market Violation[s]”; and (2) “not undertake any investigative steps regarding the referral except at the express direction of the Commission Staff.”⁸⁴ These provisions are overly restrictive and prevent the MMU from engaging in proper monitoring of market participant conduct. The OMS urges the Commission to eliminate these restrictions on the MMU.

9. MMU Tariff Provisions

The OMS supports the Commission’s proposal to centralize all of the market monitoring provisions applicable to each particular MMU in that particular RTO/ISO’s tariff on file with FERC.⁸⁵ Placing all market monitoring provisions together into a single section of the RTO/ISO’s tariff will aid review of those provisions and facilitate comparisons of the MMU provisions across RTO/ISOs. Such centralization will also facilitate identification of instances of overlap and inconsistency of market monitoring provisions within an individual RTO/ISO. However, the OMS is more concerned that all of the proper MMU tariff provisions are in the tariff and less concerned that they are all located in a single tariff section.

10. Pro Forma MMU Tariff

The Commission states that it intends to include in its subsequent Notice of Proposed Rulemaking a proposed pro forma MMU section for the OATTs of the RTO/ISOs.⁸⁶ The Commission states its expectation that each RTO/ISO “may wish to modify certain provisions, or

⁸⁴ *Market Monitoring in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267, Appendix A, at P 4 and P 8

⁸⁵ ANOPR, at P 121

⁸⁶ ANOPR, at P 131

add others, to such pro forma tariff to suit its particular needs.”⁸⁷ The OMS supports this proposal. Establishment of some core market monitoring provisions that are standardized across the RTO/ISOs would be useful, provided that customization to suit particular needs is permitted.

IV. RESPONSIVENESS OF RTOs AND ISOs

The OMS supports proposals to increase the responsiveness of RTO/ISOs. However, responsiveness cannot only mean how promptly and thoroughly an RTO/ISO addresses expressed stakeholder desires. In addition, there is an expectation that RTO/ISOs must be able to act independently in carrying out their duties. *RTO responsiveness* and *RTO independence* must be pursued and maintained simultaneously.

1. RTO/ISO Board Responsiveness

The OMS agrees with the Commission that, “A well-functioning and responsible board of directors is necessary for establishing the strategic direction of the RTO/ISO, including customer orientation.”⁸⁸ The OMS also agrees that Board members must have “the expertise needed to set such direction and assess whether it is being followed successfully”⁸⁹ and that “representatives of customers and other stakeholders must have some form of effective direct access to the board of directors.”⁹⁰ The OMS supports the Commission’s proposal to require each RTO/ISO to develop and implement mechanisms for such direct access to the RTO/ISO board of directors, to allow flexibility and avoid being overly prescriptive in dictating the form that such mechanisms must take.⁹¹

⁸⁷ ANOPR, at P 131

⁸⁸ ANOPR, at P 147

⁸⁹ ANOPR, at P 147

⁹⁰ ANOPR, at P 148

⁹¹ ANOPR, at P 148

a. Hybrid Boards

The OMS urges the Commission to reconsider its proposal to allow hybrid RTO/ISO Boards. A hybrid RTO/ISO Board has all of the flaws described by Commissioner Kelly in her separate opinion in this proceeding concurring in part and dissenting in part. As Commissioner Kelly stated, “a hybrid board would jeopardize the fundamental principle of independence upon which ISOs and RTOs are based.”⁹² The OMS further agrees that simply requiring board members “not to serve their own interests inappropriately” is unworkable.⁹³ It is simply unrealistic to expect stakeholder board members to not attempt to act in their company’s best interests. Furthermore, it would be extremely difficult to detect conflicted conduct. These are fatal flaws in the stakeholder board member approach. The OMS urges the Commission to reject the hybrid board idea.

b. Board Advisory Committee

The better approach to improving RTO/ISO board responsiveness is to employ a refined board advisory committee approach. As the Commission describes, this advisory committee must have authority to “make recommendations directly to the board on matters before the board and on matters it believes the board should address.”⁹⁴ The board advisory committee must also be required to allow for minority views to be communicated to the board.⁹⁵ Membership on the board advisory committee must be limited to primary stakeholder groups. The OMS strongly recommends that state commissions and state consumer advocates be entitled to representation on any board advisory committee. The OMS also emphasizes the importance of a focused stakeholder process that enables and encourages the active involvement of stakeholders in

⁹² Kelly Dissent at 2.

⁹³ Kelly Dissent at 2.

⁹⁴ ANOPR, at P 153

formulating policy advice to the Board

c. Open Board Meetings

The OMS strongly supports open RTO/ISO Board and Board committee meetings. When RTO/ISO Board meetings are routinely held in closed session for routine business, suspicions naturally arise about Board decisions. Open meetings provide a mechanism for stakeholders to assess whether the Board has understood the range of stakeholder positions and concerns on an issue and has made a fair and balanced decision. Open Board meetings will provide stakeholders with a useful opportunity to assess the nature and quality of the information being provided the Board and upon which they are asked to render decisions. The Midwest ISO largely follows an open Board meeting approach. The OMS recommends that if the Commission does not impose a general requirement for open Board meetings, that it at least express a preference that RTO/ISO Board meetings be held in public except for discussions of sensitive and confidential issues such as litigation and personnel.

d. Board/Stakeholder Communication and Interaction

It is essential that the Commission expect RTO/ISO Boards to establish procedures for Board members to gather information directly from stakeholders (i.e., unfiltered by RTO/ISO management) and to directly interact with stakeholders. Two-way communication is a key to responsiveness in both reality and perception. Such interaction can be accomplished, for example, by Board member participation in major stakeholder meetings and by regular Board solicitation of stakeholder input (e.g., position papers) on relevant issues.⁹⁶ RTO/ISO Boards should also establish procedures by which any stakeholder can submit written correspondence to

⁹⁵ ANOPR, at P 153

⁹⁶ All such stakeholder position papers should be publicly posted on the ISO/RTO web-site so that stakeholders with contrary views can respond.

the Board as well as directly address the Board as a whole. For example, providing an “open-mike” period at each open Board meeting and convening special stakeholder meetings periodically with the Board could serve this purpose. The Midwest ISO Board generally follows this approach. The OMS urges the Commission to formally express these kinds of expectations of RTO/ISO Boards.

2. RTO/ISO Executive Management Practices

The OMS agrees with the Commission that RTO/ISO managers “should be responsive to stakeholders but cannot be beholden to any particular stakeholder group.”⁹⁷ The Commission seeks comment on whether any reforms are necessary to increase management responsiveness to stakeholder concerns. In particular, the Commission asks whether it should encourage or require RTOs or ISOs to:

- Publish a strategic plan that includes plans for assuring responsiveness to customers and other stakeholders.
- Measure or otherwise assess customer satisfaction periodically, through a survey or other means.
- Have a formal process for gathering and evaluating recommendations for improving services to customers.
- Set performance criteria for executive managers based in part on responsiveness to stakeholders.
- Relate executive compensation to a measure of responsiveness to stakeholders.⁹⁸

The OMS believes the Commission should strongly encourage the use of such practices but not mandate them. Further, the Commission should express an intention to hold RTO/ISO Boards responsible for ensuring that management is properly responsive to stakeholder needs and concerns.

a. The Commission’s Role in Assessing RTO/ISO Responsiveness

The Commission will be able to measure and assess the degree to which RTO/ISO

Boards are succeeding in ensuring their RTO/ISO management's stakeholder responsiveness by the volume and range of negative comments and complaints submitted to the Commission by stakeholders. If the Commission finds itself routinely over-turning or rejecting proposals that are advocated by RTO/ISO management and approved by the RTO/ISO Board and filed with the Commission for approval, then there may be a problem with that RTO/ISO's stakeholder responsiveness. The Commission itself informally uses this type of measure when it assesses its own statutory compliance performance by considering the percentage of its decisions that are appealed to the Courts or the percentage of appealed decisions that are overturned or remanded by the Courts. The OMS proposes that the Commission use its own rulings on RTO filings as an RTO responsiveness measure.

The OMS also urges the Commission to establish an annual opportunity for interested stakeholders to submit to the Commission assessments of the RTO/ISO's performance in that year and to express any other opinions or concerns that stakeholders may have about their RTO/ISO. The Commission should coordinate its solicitation of stakeholder comments with an RTO/ISO annual stakeholder meeting.⁹⁹ The Commission should send a Commissioner or senior staff member to each RTO/ISO annual stakeholder meeting in order to summarize the comments submitted to the Commission by stakeholders of that RTO/ISO for that year.

b. Particular Attention Must Be Given to Load Interests

The OMS is concerned that certain stakeholders not be treated by either the RTO/ISO or the Commission as "more equal than others" in the stakeholder process. In particular, the RTO/ISO may have organizational or structural incentives to hear and act on the advocacy of

⁹⁷ ANOPR, at P 158

⁹⁸ ANOPR, at P 159

⁹⁹ The Commission should require each ISO/RTO to hold an annual stakeholder meeting.

some stakeholder groups and some members above others. For example, without transmission-owning members, the RTO/ISO would no longer exist. Also, generation-owning members of the RTO/ISO often have significant investments and sums of money affected by RTO/ISO decisions. These factors could drive RTO/ISO responsiveness to these sectors.

These transmission and generation owners are limited in numbers and have focused interests that are aggressively brought to the attention of the RTO. Load interests, by contrast, are diffuse and diluted. Although electricity customer numbers are very large, direct participation by individual electric customers in RTO/ISO stakeholder processes typically is limited, except for certain large electricity consumers. As a result, end-users must rely on surrogate representatives to protect their interests. Furthermore, some of those who presume to speak or act on behalf of load are really speaking or acting on behalf of other parts of their companies' business, perhaps generation, perhaps transmission, perhaps distribution, etc. As a consequence, the method of least resistance for an RTO/ISO is often to allocate costs and risks directly to load on a pro rata basis, rather than undertaking a more nuanced examination into cost causation or benefits distribution. Such a result runs counter to the purposes for which restructuring was undertaken in the first place, namely to lessen the risk and responsibility imposed on ratepayers (load) and redistribute it to those better situated to manage the risk.

The OMS urges the Commission to keep in mind that stakeholder participation in RTO/ISO processes is not uniform across sectors and that the RTO/ISO may have incentives to be more responsive to some sectors and some members above others. The interests of load can be easily overlooked in this environment. The process of Commission review of RTO/ISO proposals needs to take these factors into account.

3. RTO/ISO Budget Processes

The Commission discusses RTO/ISO budget processes and asks for feedback on how to

improve the transparency of the budget process.¹⁰⁰ The Commission, in particular, discusses budget issues for RTO/ISOs that have formula rates.¹⁰¹ The OMS urges the Commission to require regular budget forecast review. The OMS has found that a three year budget forecast has enhanced the transparency of the budgeting process for the Midwest ISO. Although these forecasts require regular updating, they give interested parties more incite into large capital projects on the horizon and foster a more thorough evaluation. Although budget information is often sensitive, warranting protective measures, it is also important to remember that RTOs are non-profit organizations and their budget review process should be open and timely.

V. CONCLUSION

The OMS supports the Commission's efforts to improve the operation of organized markets while not undoing or upsetting the significant efforts that have already been made in providing demonstrable benefits to electricity customers. To that end, the OMS respectfully requests that the Commission consider these comments as it develops its proposals and takes future steps in this rulemaking proceeding.

The OMS submits these comments because a majority of the members have agreed to generally support them. The following members generally support these comments. Individual OMS members reserve the right to file separate comments regarding the issues discussed in these comments:

Illinois Commerce Commission
Indiana Utility Regulatory Commission
Iowa Utilities Board
Kentucky Public Service Commission
Michigan Public Service Commission
Minnesota Public Utilities Commission

¹⁰⁰ ANOPR, at P 162-163

¹⁰¹ ANOPR, at P 162

Missouri Public Service Commission
Montana Public Service Commission
Nebraska Power Review Board
North Dakota Public Service Commission
South Dakota Public Utilities Commission
Wisconsin Public Service Commission

The Manitoba Public Utilities Board did not participate in this pleading. The Public Utilities Commission of Ohio and the Pennsylvania Public Utility Commission abstained from these comments.

The Indiana Office of Utility Consumer Counselor, the Iowa Office of Consumer Advocate, and the Minnesota Department of Commerce, as associate members of the OMS, participated in these comments and generally support these comments.

Respectfully Submitted,

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