



Commission's view on the need for states to have access to such information will reflect its attitude toward the states' responsibility to monitor competitive energy markets.

Second, the OMS asks rehearing or clarification of certain aspects of the Commission's decision to give priority in the annual allocation of FTRs to annual designated resources over monthly or seasonal designated resources.

## **II. THE FILED PROCEDURE FOR STATE COMMISSION ACCESS TO CONFIDENTIAL DATA SHOULD BE ACCEPTED**

The OMS requests a rehearing for purposes of further consideration. To facilitate the process, the OMS requests that the Commission grant rehearing for purposes of further consideration of the issues and allow an additional 120 days for the OMS to make an offer of proof that will allay the Commission's concerns and any legitimate concerns of stakeholders. Specifically, the OMS intends to offer proof that the State Commissions have the statutory authority to safeguard confidential information, that State Commission access to confidential information will advance the common goals of the FERC and State Commissions to work cooperatively for the efficient, reliable, and expeditious reform of the wholesale markets while preserving the legitimate needs of State Commissions.

The Commission's August 6, 2004 order discussed the Commission's rejection of the Midwest ISO's tariff sections dealing with State Commission access to confidential data in the following three paragraphs:

557. We will accept portions of the Midwest ISO's confidentiality proposal as an interim measure, subject to the modifications discussed below. The Midwest ISO will be required to file the modifications within 60 days of the date of this order. The Midwest ISO is also directed to make corresponding changes to Attachment Z. We note that there are many distinctions between the Midwest ISO's proposal and PJM's recent revisions to its confidentiality rules, which the Commission accepted on June 28, 2004, and that the Midwest ISO's proposal may provide greater access to data

than PJM's does. As the Midwest ISO and PJM move toward a joint and common market, it will become increasingly important that they have a common means of sharing data with state commissions. We therefore direct the Midwest ISO to work with its stakeholders, and with PJM if it desires to more closely align its confidentiality proposal with PJM's and to refile a revised proposal. For reasons described below, we will reject the Midwest ISO's proposals to share information with state commissions. As part of the process of developing a revised confidentiality process that is more closely aligned with PJM's the Midwest ISO should work with stakeholders and state commissions to develop a consensus proposal governing disclosure of data to state regulatory agencies. [Footnotes omitted].

561. We will reject Sections 38.9.4 and 54.3, pertaining to the Midwest ISO's and the IMM's [Independent Market Monitor] authority to share information with state regulatory commissions and other Authorized Requestors. Neither the Midwest ISO's filing nor intervenors' comments make clear why OMS and the states seek access to data that is comparable to the Commission's access, how they will keep that data confidential, or for what purpose they will use the data. The Midwest ISO's proposal is broader than the recently accepted PJM confidentiality policy. And we believe that the two ISOs should have comparable rules as they move forward toward a joint and common market. We therefore instruct the Midwest ISO to work with its stakeholders, and with PJM if it desires, to develop a revised proposal. The revised proposal should include the type of non-disclosure agreement recently approved for PJM. Such an agreement will harmonize Authorized Requestors' individual obligations to protect data.

562. The revised proposal should delete the Midwest ISO's proposal to permit Authorized Requestor's to disclose Confidential Information to other Authorized Requestors. As Detroit Edison and EPSA point out, permitting Authorized Requestors to exchange confidential data severely limits the Midwest ISO's ability to assess whether a party that receives the data has a legitimate need for it, and whether the Authorized Requestor can keep the data confidential under their statutory and regulatory authority. The Midwest ISO and stakeholders also should consider Cinergy, Duke and Dynegey's argument that market participants should be notified before the Midwest ISO or the IMM divulges Confidential Information to state regulatory agencies.

The OMS wishes to express its deep disappointment with respect to the Commission's discussion and decisions in these three paragraphs. In forming an RSC and working cooperatively with the Commission on MISO issues to date, the OMS has relied on statements by the Commission that recognize our mutual interests in serving the broad public interest are better advanced by cooperative federalism. Order 2000 set up an environment of choice, where

utilities had the option of joining an RTO. Many states had additional jurisdiction in choosing whether to allow this choice to become effective. The OMS reminds the Commission that it was the first RSC and, since its inception, has been working cooperatively with the Commission regarding RTO formation issues. Indeed, the PJM states, whether in the PJM Classic or PJM West regions, have yet to establish an RSC and to the knowledge of the OMS, states in Southeastern Association of Regulatory Utility Commissioners or Western Conference of Public Service Commissioners have no plans to establish an RSC. Where other State Commissions have not moved forward with RSC formation, the OMS has blazed a trail of cooperation with the Commission. Yet, when given a chance to deal with the OMS in a cooperative manner on issues of access to confidential information, the Commission elected to reject the data access agreement cooperatively reached among OMS, MISO, and the IMM. The OMS points out that stakeholders participated in the open process. This Commission decision leaves the OMS puzzled.

The OMS recognizes that the Commission has ordered the Midwest ISO and PJM to move toward a joint and common market. As the Commission will remember, the OMS made the following statement in Paragraph 28 of the comments it filed in this docket on May 7, 2004:

The Commission should, 1) direct both MISO and PJM to renew their efforts to implement a common market, as described above, over their combined footprints; 2) establish a new deadline for implementing the common market; 3) require MISO and PJM to file a concrete plan and a valid timeline with mileposts to establish a true common market over the combined footprint of both PJM and MISO; and 4) commit itself to scrutinizing any MISO or PJM market design modification or tariff proposal with an eye to how that market design modification or tariff proposal affects the path to development of the common market.

Those comments were OMS's way of saying that movement toward a joint and common market has been too slow. While the OMS has strongly supported a joint and common market, the OMS is having second thoughts that its vision of, and cooperation in movement toward, that

joint and common market or any MISO-administered market, is supportable without adequate State Regulator access to data.

The proposed MISO energy markets will provide a completely new environment for both federal and state regulators. In the old environment, state regulators had full access to data that directly impacted their jurisdictional rate levels. The new market environment, including its day-ahead and real-time markets, creates new classifications of data in markets administered by the Midwest ISO—as opposed to the purely bilateral markets of the past. In non-retail access states, state regulators continue to have full jurisdiction over rate levels of bundled retail sales, and they have a statutory responsibility to their states’ constituents to fulfill State Commission jurisdictional requirements. In retail access states, state regulators have similar statutory responsibilities for provider-of-last-resort sales. The ability of State Commissions to fully satisfy their statutory obligations regarding the monitoring of the competitiveness of wholesale electric markets and protecting retail customers from the exercise of market power hinges on access to confidential data and information in the regional energy markets administered by the MISO. Regardless of whether states allow for retail competition or not, all OMS states recognize the importance of reform of the wholesale markets as the linchpin for net benefits that we expect our citizens to realize.

The OMS, in its support for joint and common markets among RTOs, recognized that the operational protocols need to be common but we also recognize that on some matters, such as State Commission access to confidential information, the case has not been made that a cookie cutter approach is essential now or at some point in the future when operations are more fully harmonized among RTOs. This “one-size fits all” approach ignores the differences in the character of state regulation in the MISO region as discussed above. The OMS understands the

Commission's position that it will become increasingly important that PJM and MISO have complementary means of sharing data with State Commissions. However, the August 6 Order categorically rejects MISO's proposal and imposes elements of the PJM model as the only way to achieve this objective and the Commission's endorsement of the PJM approach precludes consideration of alternative models that may prove to be comparatively advantageous.

Regardless, the Commission took this action without identifying any aspects of the MISO proposal that will create conflicts with the PJM approach already adopted for that RTO. The OMS objects to the Commission's unexplained action in this regard as a violation of due process for the Midwest State Commissions and requests Commission rehearing.

In Paragraph 561, the Commission instructs MISO to work with its stakeholders, and with PJM if it desires, to develop a revised proposal and that "the revised proposal should include the type of non-disclosure agreement recently approved for PJM." The Commission also specifically states in Paragraph 562 that, "the revised proposal should delete the Midwest ISO's proposal to permit Authorized Requestors to disclose Confidential Information to other Authorized Requestors." The Commission's specific decisions in this regard are a violation of the reasonable due process expectations of the Midwest State Commissions and rights to hearing under Section 206 of the Federal Power Act. Accordingly, the OMS requests that FERC grant rehearing for purposes of further consideration of the issues and allow 120 days for the OMS to engage in dialogue with all parties and offer proof that the OMS can sufficiently address the concerns of the FERC and the legitimate concerns of stakeholders. During the 120 days that the OMS is requesting in this Petition, the OMS will willingly meet with stakeholders and with MISO to modify MISO's filed proposal to address the Commission's concerns. However, it is

not appropriate for the Commission to dictate to the OMS and MISO a specific outcome to those negotiations before the negotiations begin.

In Paragraph 562, the Commission states that “the Midwest ISO and stakeholders also should consider Cinergy, Duke and Dynegy’s argument that market participants should be notified before the Midwest ISO or the IMM divulges Confidential Information to state regulatory commissions.” The OMS interprets this statement as a suggestion as to what should be “considered” in the stakeholder process and not a requirement as to what must be included in a modified proposal. However, if this is not the Commission’s intention, the OMS requests rehearing regarding this statement.

In past meetings with the OMS, the Commission has stated its appreciation for the OMS’ ability to collaboratively work within the OMS framework in a manner that presents a more consolidated work product for the Commission’s consideration. The Commission’s decision not to allow the OMS to discuss Confidential Information within the ranks of the OMS will frustrate this OMS capability. Further, the Commission surely must understand how the OMS member Commissions might find insulting the Commission’s questioning of State Commission ability to hold data confidential. The OMS member Commissions are quite competent at dealing with confidential information and are willing and able to protect the information, and to demonstrate such an ability (as was the stated intention of the Midwest ISO’s tariff filing). As part of the OMS’s offer of proof, we will provide the Commission with each state’s statutory authority to safeguard confidential information. The OMS understands the Commission’s concerns about “authorized requestors.” During the 120 days requested by the OMS, we intend to address this matter. If there is more appropriate terminology (i.e., Authorized Requestor) that can be utilized, OMS is willing to consider such language.

The OMS is particularly puzzled by Commissioner Kelliher's concurrence with the portion of the order rejecting the MISO's proposal to allow both MISO and the Independent Market Monitor ("IMM") to provide confidential information to State Commissions. With respect to Commissioner Kelliher's first point, access to confidential information is unequivocally necessary for state entities to discharge their legal responsibilities. Rejection of the filed language is inconsistent with the breadth of functions that the Commission and the OMS have contemplated for the OMS and for RSCs generally.

While the OMS admits that the specific legal responsibilities of its member Commissions will vary, it is safe to assume that all OMS members have an obligation to protect their ratepayers from abuse of market power and anticompetitive behavior of market participants. As Commissioner Kelliher is aware, the wholesale market has a direct causal link to the price of power in retail markets. If the price of power in the wholesale market is subject to manipulation, the potential for serious harm to ratepayers is all too real. Accordingly, it is critical that the State Commissions be able to act swiftly to prevent any serious harm from befalling ratepayers under their charge. Without access to confidential information, it is simply impossible for anyone – including the Commission and the IMM – to determine if aberrant prices in the wholesale market are the result of genuine transmission system issues or price manipulation on the part of market participants. Indeed, the California experience has shown the level of damage that can befall ratepayers when those charged with protecting ratepayers fail to act in a swift and decisive manner.

Commissioner Kelliher also states that he would be unable to support the disclosure of confidential information to state agencies unless adequate safeguards are established to maintain the confidentiality of this information. Unfortunately, in this regard, Commissioner Kelliher's

dissent provides no specificity regarding his reasoning as to why current safeguards are inadequate. Market participants have long argued that Federal and State regulators should not be allowed to collect confidential market data for fear that an unintentional release of competitive information will result in harm to the market participant. However, the reality is that State Commissions have been routinely handling confidential information for years without incident. Indeed, most protests filed against providing access to confidential information in this docket are full of general assertions as to the potential harm that may result from a leak of confidential information. Unfortunately, none of the protests cite specific examples where a State Commission's handling of confidential information resulted in a leak where irreparable harm to a market participant was the result. Accordingly, the OMS questions the basis of FERC's decision regarding the provision of confidential information to State Commissions, given that history has shown the states to be more than adequate stewards of confidential information.

The OMS finds the Commission query regarding the "purpose they will use the data" worrisome. (Paragraph 561) The formation of the OMS, by sovereign States, was not as supplicants but as agencies with specific and constitutionally recognized authorities that are essential to the efficient development of the wholesale market and the protection of the retail markets. The Commission must not assume that OMS member states are turning over responsibilities to the Commission, or any other federal entity, when the states cooperate and coordinate with federal authorities in instituting new markets for the benefit of customers. Individual State Commissions have unique statutory authorities over generating resources, demand-response, and transmission. Because of these state authorities to ensure the reliability of electric supply, State Commissions have authority to obtain confidential information from jurisdictional utilities. Cooperation of the OMS states, versus lack of cooperation in other

regions to date, should not be taken by the Commission as a lesser willingness than State Commissions in those other regions to perform statutory regulatory responsibilities.

In conclusion, the OMS requests rehearing for the purposes of further consideration of the issues and allow an additional 120 days for the OMS to offer proof to allay the concerns of the Commission with MISO's filed proposal for State Commission access to confidential data. The OMS will willingly meet with MISO and the MISO stakeholders to craft modifications to MISO's filed data access policy to address the Commission's stated concerns. However, it is not appropriate for the Commission to have prejudged the matter by making the sweeping assertions concerning Midwest State Regulators that it made in the August 6 Order and it is not appropriate for the Commission to have imposed on the Midwest a specific manner of addressing the Commission's general concerns. Cooperative federalism envisions shared responsibility. If the FERC expects the OMS to make recommendations on market readiness (Paragraph 55), the OMS state members have every right to expect information on the subsequent functioning of that market.

### **III. REHEARING OR CLARIFICATION IS NEEDED FOR CERTAIN SITUATIONS OF LONG-TERM SEASONAL TRANSMISSION SERVICE**

In its August 6 Order regarding the Midwest ISO Tariff for its Day 2 energy market, the Commission stated:

182. In *PJM Interconnection, L.L.C.*, we affirmed that long-term existing rights, of duration of one year or more, have priority over short-term monthly or seasonal rights in the annual allocation of FTRs (or ARR). This reflects the reasonable expectation of long-term customers that they will retain their transmission service. We will thus reject EPSA, Detroit Edison and Dominion's request for equal priority in the allocation to customers with less than annual existing service. The Midwest ISO FTR market offers opportunities for obtaining congestion hedges subsequent to the FTR allocation through the monthly and annual FTR auctions and for being granted ARRs for load in retail choice states.

The OMS does not address the specific circumstances faced by EPSA, Detroit Edison or Dominion; rather this pleading asks the Commission to clarify its order and consider broader policy considerations that may be of equal if not greater importance than a specific interpretation that could be applied to its policy of giving long-term existing rights with a duration of one year or more priority over short-term monthly or seasonal rights. While the OMS is in general agreement with the Commission policy on giving preference to long-term over short-term transmission rights in the allocation of FTRs, it is the specific application of that policy to contracts/arrangements that are seasonal in nature but still reflect “the reasonable expectation of long-term customers that they will retain their transmission service” that is of concern to the OMS. What follows are examples of contractual arrangements that meet the expectation of being long-term and for which the customer has arranged long-term transmission service, but on a seasonal rather than annual basis.

**A. EXAMPLES OF LONG-TERM SEASONAL TRANSMISSION SERVICE**

**1. SEASONAL CONTRACTS WITH INDEPENDENT POWER PRODUCERS**

In this example, a vertically integrated utility has entered into a purchased power contract with an Independent Power Producer (IPP). During the three-month summer period (June through August), the IPP will provide the utility with 1,000 MW of capacity and energy that is dispatchable from a combined cycle, gas-fired generation unit. During the remaining nine months of the year, the contract is reduced from 1,000 MW to 500 MW. The utility does not need the full capacity for purposes of reliability during those nine months, and the IPP is willing to take on the risk of selling its generation into the short-term energy market.

The utility is taking network service for the entire year, but the additional 500 MW from the IPP contract is only available as a designated resource for the utility during the three summer

months. A strict reading of paragraph 182 would be that at most, the utility is eligible for 500 MW of FTRs from the IPP contract because it only has 500 MW of service from that contract on an annual basis. This interpretation would have a detrimental impact on the utility's ability to hedge itself when it plans to dispatch the additional 500 megawatts at a relatively high capacity factor during these summer months. More importantly, this strict interpretation would have a significant detrimental impact on the development of Independent Power Production. In essence, it would pose a significant barrier to innovative forms of seasonal type contracts that IPPs can offer in order to attract long-term arrangements for power for their generation facilities.

## **2. SEASONAL DIVERSITY OF NEED FOR CAPACITY AND ENERGY**

Consider another contractual arrangement in which there is seasonal diversity between two utilities. The first utility owns capacity on an annual basis to meet its capacity reserve requirement for its summer peak load, but doesn't need 500 MW of that capacity to meet its reserve requirements during the winter period. The second utility peaks in the winter rather than the summer and in order to meet its winter capacity reserve requirement it enters into a contract with the first utility to purchase the 500 MW of capacity and energy for the winter.

A strict reading of paragraph 182 would be that the 500 MW from this long-term contract are not eligible for FTR nomination by the winter peaking utility during its peak load season. This interpretation would have a detrimental impact on the utility's ability to hedge itself when it plans to dispatch the additional 500 megawatts during its peak seasons. In addition, this strict interpretation could have a significant detrimental impact on capacity arrangements that are mutually beneficial to both parties, and could result in higher costs for the customers of both utilities.

It should not be assumed that such arrangements are primarily between geographically dispersed utilities. Moreover, utilities that serve in rural areas of the Midwest ISO footprint (particularly, but not exclusively, Cooperatives) where natural gas is not available for end-use customer space heating tend to have winter peaking systems due to the heavy demand for electric space heating. In essence, if the winter peaking utility were to merge with the summer peaking utility, there would be no shortage of eligibility for FTRs to meet the winter peak load as the resources would count as a designated network resource for the merged utility on a year-round basis.

## **B. DISCUSSION**

The OMS requests that the Commission clarify its August 6 Order by separating the concept of long-term transmission service from the concept of annual designation of network resources, and recognize that seasonally designated network resources for network service can be contracted for a multi-year period. Moreover, the OMS suggests that the Commission continue to support the priority for long-term existing rights over short-term rights in the annual allocation of FTRs, but that its concept of long-term existing transmission rights be expanded to include monthly or seasonal designated resources for which the customer has obtained transmission rights for a multi-year period.<sup>1</sup>

In essence, the Commission should be considering the expected use of contracted generation services and if those services are scheduled to be utilized in a manner equivalent to a vertically integrated utility's use of an owned facility, equity suggests that load-serving entities with contracted generation services should receive equal protection from congestion costs. To do otherwise has the potential of penalizing smaller load-serving entities that depend on

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<sup>1</sup> The OMS understands that the Midwest ISO tariff does not currently allow for this distinction and that seasonal resources cannot be designated more than 12 months prior to the month in which a resource is to be scheduled as a

generation contracts to serve their loads. This concern extends to not only the small Transmission Dependent Utilities, but also to the smaller suppliers attempting to compete with the large utilities in states having retail choice.

Finally, while the OMS agrees that the Midwest ISO FTR market does offer opportunities for obtaining congestion hedges subsequent to the FTR allocation through the FTR auctions, facing the risks<sup>2</sup> of purchasing these hedges on a year-to-year or month-to-month basis will be a significant barrier to entering into long-term (multi-year) contracts for seasonal capacity and energy and will penalize smaller load-serving entities that are more dependent on generation contracts to serve their loads.

#### **IV. CONCLUSION**

The OMS requests that the Commission either accept the filed provisions with respect to access by State Commissions to confidential data or, alternatively, suspend them.

The OMS asks the Commission for clarification of its treatment of FTRs for seasonal service as discussed above.

The Organization of MISO States submits these comments because a majority of the members have agreed to support them. The following members support these comments. Individual OMS members reserve the right to file clarifying comments or minority reports on their own regarding the issues discussed in these comments.

North Dakota Public Service Commission  
Michigan Public Service Commission  
Missouri Public Service Commission  
Wisconsin Public Service Commission

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designated resource. Thus, the change that the OMS is requesting that the FERC consider would likely require a change in the currently approved Midwest ISO tariff.

<sup>2</sup> The risks include both availability of FTRs in the auction and the price at which available FTRs sell in the auction. These risks are of particular concern to the smaller Transmission Dependent Utilities.

Iowa Utilities Board  
Illinois Commerce Commission  
Indiana Utility Regulatory Commission  
Minnesota Public Utilities Commission  
South Dakota Public Utilities Commission  
Montana Public Service Commission

For procedural reasons, these members are not able to express a formal position at this time:

Kentucky Public Service Commission  
Public Utilities Commission of Ohio

Members not participating in these comments are:

Pennsylvania Public Utility Commission  
Nebraska Power Review Board  
Manitoba Public Utilities Board

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

Respectfully Submitted,

William H. Smith, Jr.  
William H. Smith, Jr.  
Executive Director  
Organization of MISO States  
100 Court Avenue, Suite 218  
Des Moines, Iowa 50309  
Tel: 515-243-0742

Dated: September 3, 2004

#### CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Notice of Intervention on all parties on the official service list compiled by the Secretary in this proceeding.

Dated at Des Moines, Iowa, this 3rd day of September, 2004.

William H. Smith, Jr.  
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