UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission	**)**	
System Operator Inc.	**)**	**Docket No. ER04-691-004**
Public Utilities with Grandfathered	**)**	
Agreements in the Midwest ISO Region	**)**	**Docket No. ER04-104-003**

Offers of Proof and Response of the Organization of MISO States to the Federal Energy Regulatory Commission's Order of September 30, 2004

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Introduction

The Organization of MISO States ("OMS") respectfully presents its arguments in favor of the Midwest Independent System Operator ("MISO" or "Midwest ISO") and its Independent Market Monitor sharing certain confidential data with state commission members of the OMS. This filing responds to the Commission's Order of September 30, 2004.[1]

A. Procedural Background

In the September 30, 2004, Order, the Commission granted the Organization of MISO States's ("OMS") request to "make an offer of proof regarding the Midwest ISO's data confidentiality proposal." September 30 Order at para. 2. That offer, as described by FERC,

[1] "Order Granting Rehearing for Purpose of Further Consideration, Granting Opportunity to Make Offer of Proof and Holding Compliance Requirement in Abeyance," 108 FERC ¶ 61,321 (2004). The September 30, 2004, Order granted rehearing of its Order of August 6, 2004. "Order Conditionally Accepting Tariff Sheets to Start Energy Markets and Establishing Settlement Judge Procedures," 108 FERC 61,163 (Aug. 6, 2004). The August 6 Order required certain modifications to the data access provisions of MISO's March 31, 2004, filing. The August 6 Order (at para. 561) also rejected MISO's proposal to share data with state commissions.

would demonstrate that "(1) state commissions have the statutory authority to safeguard confidential data; (2) state commission access to confidential information will advance the Commission's and state commissions' common goals for wholesale market reform while preserving the state commissions' legitimate needs. *Id.* at para. 9. The Commission further noted that

> The Midwest ISO's March 31 proposal did not 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. We appreciate OMS's offer to provide such clarification.

Id. at para. 11.

The primary purpose of this pleading is to provide the "offer of proof" and "clarification" requested by the Commission. But in light of certain changes in the facts since September 30, 2004, this pleading has additional purposes. The remainder of this Introduction explains these facts and purposes.

The most significant new fact is that OMS expects the MISO's March 31, 2004, filing to be replaced by a new filing. The Commission's August 6, 2004, Order directed MISO and stakeholders to try to reach a different solution on data access. Since that time, productive discussions have occurred concerning data access. As a result of those discussions, OMS no longer expects to argue for the specific provisions in MISO's March 31 2004 proposal. Rather, if MISO makes a new filing consistent with OMS's hoped-for outcome of the present negotiations, OMS expects to support that filing; or if there are differences, to support in part and seek modification in part. Because the deadline for the instant pleading precedes the final outcome of the MISO negotiations, OMS will not be able to address specific provisions. As explained further below the

principles and analysis we present here should apply equally well to the March 31, 2004, filing and the future MISO filing.

OMS therefore does not view a defense of the March 31, 2004, filing as necessary at this time. A procedural awkwardness arises, however. OMS's petition for rehearing, which was granted on September 30, 2004, for purposes of allowing the instant offer of proof, was a petition asking the Commission to reverse its rejection of the state data access provisions in MISO's filing March 31, 2004. As a technical matter, OMS's present pleading is responsive to a grant of rehearing relating to the March 31, 2004, MISO filing; but as a practical matter, OMS expects a new MISO filing to occur soon.

OMS still wishes to file this pleading, for three reasons. First, OMS wishes to respond directly to the Commission's interest in the questions set forth above, i.e., "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." September 30 Order at para. 11. The Commission's question, and OMS's answer, are applicable generically to any MISO filing on data access: not only the March 31, 2004, filing but the future filing. Second, since the issue of data access will remain unresolved between now and the time that MISO submits its next filing, OMS believes that the debate on this question will be served by a presentation that is more comprehensive than one responding solely to the Commission's questions. This more comprehensive presentation will, we hope, help the Commission to apply the correct legal standard to MISO's future filing while also understanding better how the future of wholesale competition is interrelated with the quality of state utility regulation, quality that depends on access to data.

Third, since OMS does not know for sure if and when MISO will submit a new filing, OMS finds it prudent to keep alive its legal right to judicial review with respect to the Commission's rejection of the data access provisions in MISO's March 31, 2004, filing. OMS therefore wishes to place before the Commission a full presentation on this subject.

B. Overview of this Pleading

Common to all three of these purposes is the need to respond to the Commission's concerns about state data access. In its August 6, 2004, Order, the Commission

1. "reject[ed] Sections 38.9.4 and 54.3, pertaining to the Midwest ISO's and the IMM's authority to share information with state regulatory commissions and other Authorized Requestors" (para. 561); and

2. directed Midwest ISO "to more closely align its confidentiality proposal with PJM's," (para. 557)

The Commission also stated:

> 561. ... Neither the Midwest ISO's filing nor the 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 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.
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> 562. The revised proposal should delete the Midwest ISO's proposal to permit Authorized Requestors to disclose Confidential Information to other Authorized Requestors....

Explaining his concurrence with the portion of the August 6 Order rejecting Midwest ISO's proposal to share data with state commissions, Commissioner Kelliher stated that

> [i]n my view, in order to justify approval of Midwest ISO's proposed procedures for distributing confidential information to these state entities, Midwest ISO would need to demonstrate that (1) providing the state entities with confidential information possessed by Midwest ISO and the IMM is necessary for the state entities to discharge their legal responsibilities, and (2) the state entities cannot obtain such information under state law.

This pleading seeks to respond to these concerns. Although we expect MISO's March 31, 2004, filing to be replaced by a new one, the new filing will raise similar issues of state data access. We hope the present pleading will assist the Commission in anticipating those issues and perhaps giving more guidance to those negotiating the final terms.

Part I of the pleading sets forth the legal framework. When a public utility, like MISO, submits a filing under Section 205 of the Federal Power Act, the utility is entitled to approval of that filing unless the Commission deems it to be unlawful. There are only two statutory bases for unlawfulness: the filing is unjust and unreasonable, or it is unduly discriminatory. Here, the Commission rejected MISO's data access provisions without making any finding of unlawfulness. The Commission then required, as a condition of reconsideration, that state commissions explain their need for the data. This treatment reversed the statutory burdens. Once MISO, a public utility, agrees to share data, absent unlawfulness it is not the states' burden to justify the provision. The only possible basis for a finding of unlawfulness would be Commission concern that generators would opt out of the MISO markets, thus diluting competitive forces and causing rates to rise above reasonable levels. We know of no legitimate basis for such a concern, and the Commission made no finding of one.

Part II responds directly to the Commission's questions. We explain how each element of data mentioned in the MISO March 31, 2004, filing at Module D (and likely to be made available in the new MISO filing) serves a state commission function, whether that state

commission presides over a retail competition market or a traditional regulated utility market. We also explain the interdependence between the state commission functions and the FERC's functions. The success of FERC-jurisdictional wholesale markets depends on state-jurisdictional retail decisions, such as whether, and to what extent, a state's retail customers should be dependent on utility wholesale power purchases. Part II explains that state commissions cannot make informed decisions about their dependence on wholesale markets without wholesale market data.

Part III addresses the Commission's concerns about protecting the data from disclosure. In addition to being bound by any MISO tariff provisions on data access, to the extent the state commission accesses the data pursuant to the MISO tariffs, each state commission is bound by the nondisclosure provisions of its state statutes. In this Part III, we also address Commissioner Kelliher's suggestion that state access to MISO data through a FERC requirement should be available only when the state commission lacks access under state law. We explain that this provision conflicts with the Federal Power Act's requirement that the FERC approve a MISO proposal if the proposal is lawful. The lawfulness of a MISO data-sharing provision under federal law does not depend on state commission powers under state law.

Part IV argues that the proposal in MISO's March 31, 2004, filing (and any similar proposal in any future filing) to allow state commissions to disclose data to other state commissions, subject to common restrictions, is not unlawful.

Part V responds to the Commission's statements that the MISO data access plan must track the PJM data access plan. We explain that statutory analysis does not support this position. There can be a number of lawful approaches to data access. As Part I explained, a utility applicant is entitled to FERC approval if its proposal is not unjust and unreasonable or unduly

discriminatory. A MISO proposal is not rendered unlawful because it does not track a PJM proposal.

I. Legal Framework: The Commission Must Approve a MISO Data Access Proposal Unless It Is Unjust and Unreasonable or Unduly Discriminatory or Preferential

A. The Commission Has Made No Finding That MISO's Sharing Data with States Is Unlawful

A public utility has a right to approval of its proposal if that proposal is just and reasonable and not unduly discriminatory. The Commission does not have authority to reject that proposal merely because the Commission, or some parties, prefer another proposal. In the instant case, the public utility is MISO. MISO proposed, in its March 31, 2004, filing, a method of data sharing with the states and with OMS; MISO will likely do so again in its new filing. The legal question is whether the MISO proposal is just and reasonable, and not unduly discriminatory or preferential.

In the series of Orders FERC has issued on data access, the legal standard has been absent. In its August 6, 2004, Order, for example, the Commission cited no legal basis for its rejection of Sections 38.9.4 and 54.3 of the proposed Open Access Transmission and Energy Markets Tariff ("TEMT") (regarding the authority of Midwest ISO and the Independent Market Monitor (IMM) to share information with state regulatory commissions and other Authorized Requestors). The Commission's explanation consists of two paragraphs, neither of which contains a legal standard:

> 561. We will reject Sections 38.9.4 and 54.3, pertaining to the Midwest ISOs and the IMM's authority to share information with state regulatory commissions and other Authorized Requestors. Neither the Midwest ISOs filing nor the intervenors comments make clear why OMS and the states seek access to data that is comparable to the Commissions access, how they will keep that data confidential,

> or for what purpose they will use the data. The Midwest ISOs proposal is broader than the recently accepted PJM confidentiality policy, and we believe that the two ISOs should have comparable rules as they move 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 nondisclosure agreement recently approved for PJM. Such an agreement will *harmonize* Authorized Requestors individual obligations to protect data.
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> 562. The revised proposal should delete the Midwest ISOs proposal to permit Authorized Requestors to disclose Confidential Information to other Authorized Requestors permitting Authorized Requestors to exchange confidential data severely limits the Midwest ISOs 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 individual statutory and regulatory authority. [footnote omitted] The Midwest ISO and stakeholders should also consider [the arguments of three intervenors] that market participants should be notified before the Midwest ISO or the IMM divulges Confidential Information to state regulatory commissions.

In footnote 328 to this passage, the Commission cited its rejection of a protester's similar proposal in conjunction with PJM's new information sharing policy. The Commission noted that allowing requestors to share data without PJM's knowledge would make it more difficult for PJM to keep track of who has data. See PJM Confidentiality Order, PJM Interconnection, L.L.C., 107 FERC ¶ 61,322 (2004) at Para. 35-37. The PJM Order as well did not contain any citation to the just and reasonable standard.

In reviewing a proposal of a public utility, the legal question is not whether the Commission, or opposing parties, would prefer a different outcome. The legal question is whether the proposal is just and reasonable and not unduly discriminatory or preferential. If so, the Commission must grant approval. This deference to lawful utility proposals is black letter Federal Power Act law. Where a regional transmission utility has made common cause with the 14 retail regulators, the deference required by law serves the policy goals of making regulation

more effective and more efficient. When MISO makes its new filing, we will ask the Commission to evaluate it with these principles and goals in mind.

B. Speculation About Harm To Wholesale Competition From State Data Access Is Not Substantial Evidence That the Midwest ISO Proposal Is Unjust and Unreasonable

We are aware of one possible argument for why a MISO proposal to share data access with state commissions could be unreasonable, in a statutory sense. The argument is as follows:

1. States' data access would discourage wholesale generators from serving the Midwest market.

2. With fewer wholesale generators in the market, market-based rates would be subject to less competitive discipline.

3. The absence of this competitive discipline would cause the market-based rates to exceed just and reasonable levels.

The argument does not provide a legal or factual basis for rejecting a MISO data-sharing proposal. Each of these three steps fails due to weaknesses of logic, facts or law.

First, there is no factual basis for finding that generators would remove themselves from a profitable wholesale market merely because the data would be available to state commissions who were legally obligated to keep the data confidential. Discomfort does not equal departure. Selling into the MISO market has many benefits for generators: an independent and predictable transmission access and generation dispatch regimes, access to ancillary services markets, resort to arbitration processes among them. Allowing data access is one part of that package of privileges. There is no factual basis for finding that any generators would leave the market, let alone that the number of departing generators would be so large as to diminish competition so significantly as to cause wholesale prices to rise to unreasonable levels.

Second, even if all generators with data discomfort withdrew from the market, rates would not necessarily become unjust and unreasonable. If there is insufficient competition to assure the reasonableness of market-based rates, the Commission still has the tool of cost-based rates. We are not suggesting a preference for cost-based rates; only that the implicit view that there is not a basis for FERC finding that generator withdrawal (assuming that any such withdrawal would occur due to a data access policy) necessarily would produce unreasonable rates.

Nor are we indifferent to whether wholesale markets develop or not. But unsupported assertions that harm might result from state commission data access to confidential data provide no legal support for rejecting a MISO data-sharing proposal as not just and reasonable.

II. State Regulators Will Use the Specific Data To Carry Out Specific State Responsibilities

A. In the Context of Data Access, the FERC-State Relationship Is Based On Vertical Inputs

In the electric industry, wholesale transactions are vertical inputs to retail transactions. Through wholesale purchases and sales of generation and transmission, retail sellers obtain the electricity resources needed for retail sales.

The FERC-state relationship mirrors the industry's vertical input relationship. FERC regulation and state regulation share the same statutory goal: protecting the consumer interest. But their place in the industry structure differs: FERC ratemaking regulates the wholesale inputs; state ratemaking regulates the retail outputs. Just as wholesale transactions are inputs to retail transactions, FERC's wholesale regulation is an input to the state's retail regulation. FERC-approved wholesale generation rates and transmission rates become costs incurred by

retail sellers. Those sellers' costs are subject to scrutiny by state regulators (in non-retail competition states) or by the retail market (in retail competition states).[2]

The vertical relationship between FERC and state commissions is often misunderstood as solely a hierarchical relationship. There are some elements of hierarchy, such as where special facts mandate that states allow recovery of wholesale costs.[3] But to view the federal-state relationship solely through a hierarchical lens distorts the legal picture. In this distorted picture, the state commission is a subordinate who assists FERC in carrying out FERC's goals, whose own policies give way to FERC's policies; a subordinate permitted access to FERC-jurisdictional data only when FERC deems that access necessary.

Refocusing, with an eye toward the vertical input relationship, corrects the vision. Retail costs reflect the costs of wholesale inputs. To control retail costs, the retail regulator must be informed about the wholesale inputs. Although wholesale inputs are regulated by FERC, the retail seller's choice among those inputs is regulated by the states.[4] That state regulation includes not only whether a retail utility chose prudently from the menu of wholesale options, but also whether the utility should have entered the wholesale market at all. The latter point warrants

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[2] Michigan is unique in that is has both bundled, traditionally regulated customers as well as those that have exercised retail choice.

[3] *See, e.g., Nantahala Power & Light v. Thornburg*, 476 U.S. 953 (1986)(state preempted from imputing to retail utility access to low cost power allocated elsewhere by FERC); *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (state preempted from disallowing from retail rates costs incurred in an interaffiliate transaction "order" by FERC); *but see Kentucky West Virginia Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir. 1988) (citing the "long standing notion that a State Commission may legitimately inquire into whether the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source"); *Pike County Light & Power Co. v. Pa. Pub. Util. Comm'n*, 77 Pa. Commw. 268, 273-74, 465 A.2d 735, 737-38 (1983) (similar holding).

[4] *Kentucky West Virginia Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir. 1988); *Pike County Light & Power Co. v. Pa. Pub. Util. Comm'n*, 77 Pa. Commw. 268, 273-74, 465

emphasis. FERC sets the wholesale table. The state decides whether its utility should eat at that table, or instead cook its own meal: whether it should buy from the wholesale market, or remain vertically integrated and generate its own power.

By focusing on the vertical input relationship, one can better understand the large difference in regulatory responsibilities between the two jurisdictions, and the states' need for data. The FERC's focus is just and reasonable rates in wholesale markets. The state commission's focus is broader: the rates and reliability of retail markets, short-term and long-term. In traditional regulation states, the boundaries of state concern encompass all inputs to the cost of retail electricity. Those inputs include not only wholesale prices, but also --

1. fuel supply: all influences on the price, quantity, quality, coal, oil, uranium, gas, renewable sources

2. technology: all influences on the technology used to convert fuel into electricity, and to transport electricity from generation to loads.

3. pollution regulation: all influences on the types of pollutants, the regulation of those pollutants and the cost of complying with that regulation.

Without data on these activities, as well as data on the operation of regional wholesale electricity markets, the states cannot assure that their retail utilities are operating efficiently in all these markets.

The universe of wholesale market data potentially available to the states from MISO is a direct substitute for data states would access if there were no wholesale market. A retail utility can own its own generation, or it can buy from the wholesale market. Either way, the state commission must protect retail consumers from excess costs. Common to both contexts is that the necessary data is input data. Under vertical integration, the input data is the cost of utility

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A.2d 735, 737-38 (1983).

construction and the cost of fueling, operating and maintaining the utility-owned generation. Under wholesale markets, the input data is wholesale market data. Data that would have been state-accessible prior to unbundling should not become state-inaccessible after unbundling -- even though the regulatory responsibilities of FERC and the state commissions have not changed.

B. The Boundaries of State Commission Concern Encompass All Wholesale Inputs to Retail Electric Service

1. Overview

In a regulated monopoly state, the state commission is concerned with the retailer's skill in obtaining wholesale power supply. This concern takes the form of the state commission's prudence review of the traditional utility's purchase and sales practices. In the retail competition state, there usually is a "provider of last resort" role played by the utility, which role also is fashioned and reviewed by the state commission. Even where there is not a provider of last resort utility, retail competition states will either want to monitor, or will be statutorily required to monitor, how well the new retail competitors manage their power supply.

To assess whether their retail utilities are accessing wholesale markets economically, the states will need to have access to confidential wholesale market information. To assess their utilities' mix of short-term and long-term purchases and sales, they must understand short-term and long-term markets. Where a utility has acquired surplus to prepare for future demand increases, the state must assess whether the utility is properly marketing that surplus in short-term or interruptible sales. The state must determine if the utility is economically timing its plant utilization and maintenance schedule in light of the cost of wholesale market replacement power. The states then must look beyond wholesale market activity to wholesale

market infrastructure, including the adequacy of transmission and generation resources. That adequacy affects the extent to which it is prudent for the utility to rely on wholesale power rather than to generate its own power; and ultimately whether its utilities should remain in the Midwest ISO.

The need for wholesale market information is at least as important to states that are pursuing competitive retail access programs. Unlike Commissions in traditional states, who can command generation information from jurisdictional integrated utilities, at least some retail states lack the statutory authority to obtain generation data from deregulated generation affiliates of the distribution utilities; and because of corporate separation between the two types of entities, the information will not migrate from the generation affiliate into the state-jurisdictional entity. These states also usually lack authority to obtain data from unaffiliated generating companies.

Retail access states are dependent on wholesale markets to discipline prices charged in retail markets. Where the utilities have divested generation, they meet their last resort supply obligations entirely through wholesale market purchases. State prudence reviews depend on accurate information on wholesale prices. The need for such review is particularly critical during the transition period from traditional regulation to retail competition, when volatility and rate shock can shake the confidence of retail customers. Confidence in wholesale markets enables not only prudence review, but the state's ability to influence the makeup of a utility's portfolio. In each case, data on the quality of competition in the wholesale markets are essential to the state regulatory role.

Retail access states are limited by statute in their ability to perform mitigation activities. It is not the states' intention to attempt to use access to confidential information for wholesale market mitigation purposes, or to attempt to interfere with FERC regulation of the MISO or the

markets it will run. If states can bring to the FERC table, by participating in FERC proceedings, their independent and informed observations of market activities and market operations, the interests of FERC and the states in further developing workably competitive markets will be served. States that are trying to implement retail competition have had thus far to rely on publicly available data. While the quality of this data has improved considerably, only primary data can inform the states sufficiently to enable them to declare that standard service offer customers, whose suppliers depend on wholesale prices will be paying reasonable rates.

The discussion below addresses with more specificity the role of states in eight key areas: resource adequacy, distribution, demand response management, maintenance schedules and outages, financial transmission rights ("FTRs") and prudence review of retail utilities, seams, transmission pricing, and control areas and ancillary services. The specific responsibilities of states, whether traditionally regulated or retail access states, is largely the same and the ultimate goal – enhanced reliability and economic efficiency – is entirely the same.

2. Resource Adequacy

a. In General

At the FERC level, long-term generation planning obligations rest with the wholesale seller, not with the agency; and these obligations rest with the wholesale seller only when that seller has volunteered to accept them. There is no FPA obligation to conduct long-term planning. A wholesale seller having a 30-year requirements contract to a municipal or cooperative customer must plan for and procure resources sufficient to satisfy that contract.

In its SMD *White Paper*, the Commission recognized the need for, and benefits from, RTO development of resource adequacy plans. But the *White Paper* also recognized the traditional legal role of the states, by articulating a principle of deference to regional state

committee (RSC)-determined guidelines for defining and achieving resource adequacy for the region. There is not a clear statutory role for comprehensive regional planning by FERC. *See* Appendix B.

Those states with traditional regulation, in contrast, have the legal responsibility to address adequacy in all aspects of the electric sales process. In state regulatory practice, a utility's generation obligation is defined not by individual contracts but by the statutory obligation to serve, for the long term. The state commission must address all aspects of generation planning, including: (a) the mix of utility-owned versus utility-purchased resources, short-term and long-term purchases, baseload, intermediate and peaking plants, fuel sources and generation and demand side management; (b) reserve margins, (c) location of new plants, and the relationship of that location to transmission availability; (d) the timing of acquisitions, life extensions, environmental upgrades and plant retirements; (e) whether new generation resources should be utility-owned or purchased at wholesale; and (f) the concentration of ownership in, and consequent competitiveness of, generating plants in the wholesale market. While not all state commissions conduct all these activities at all times (with some variation being attributable in part to whether the state is a retail monopoly state or a retail competition state), their Legislatures have the authority to involve state regulators in the full set of activities.

A goal of OMS is to see better planning coordination among the states, and among the state regulators. If planning and the resource acquisition that emanates from the planning process are not "optimized" on a regional basis, one of the most compelling advantages of RTOs and, therefore, Regional State Committees, is diminished.

A similar difference between FERC and states applies to transmission. Much attention has focused on FERC's entrance into the transmission planning universe: including Order 888's

requirement that transmission owners plan for network load, the RTOs' planning for intra-RTO transactions, and the new efforts to achieve inter-RTO planning. But this effort does not diminish the states' continuing responsibility for long term reliability of service provided by their local utilities; and, at least in states where those utilities still own transmission, for long term transmission reliability. Under Order No. 888, the transmission owner does have a long term planning obligation to those transmission customers who have contracted for network service, but that obligation is for transmission only, not for generation. And under Order 2000, the RTO has a long-term planning obligation, but for transmission only, and only for the territories of transmission owners who have voluntarily joined. The state commission's concern with transmission planning applies to all utilities that are under the state's jurisdiction, and there are no time limits.

A state commission, particularly if it uses traditional regulation, also must identify, or have its retail utilities identify, locations where generation will be built most economically by the utility or by the wholesale market entrants. Then the state commission must ensure that sufficient transmission is built to those areas. Whether a state favors or disfavors its utility's reliance on wholesale markets, the state will want to see transmission built to exploit the low-cost generation opportunities. The state therefore will be concerned with siting and construction schedules for new transmission, upgrades of transmission facilities, maintenance outages, forced outages, deratings and retirements of transmission facilities.

b. The Special Role of Integrated Resource Planning

Many states require each retail load-responsible utility to present short-term and long-term projections on loads and resources. States test their utilities' reliability through sophisticated load forecasting, including detailed end-use load research on all customer classes,

analysis of customer demand response, demographics, and state-specific economic drivers. The data thus gathered allow the states to identify future deficits and order the utility to correct them. Although these activities are more likely to occur in retail monopoly states, the retail competition states also will want to identify, in some manner, the relationship between supply and demand.

Some of these states have integrated resource planning ("IRP") rules. Under IRP, regulators, utilities and intervenors create an explicit mix of generation resources, load reduction and load management activities to meet that state's preferred resolution of the multiple vectors of price level, price volatility, long-term and short-term cost (whether to ratepayers specifically or the state's residents generally), operational characteristics, fuel mix, and supply certainty.

Stimulated by the formation of the Midwest ISO, regulators in the Midwest ISO region formed the OMS to look at, among other things, resource planning on a regional basis. To perform this resource planning function on a regional basis, the states must add regional data to their historically gathered state-specific data. Denial of access to such data will make it harder for a state commission to broaden geographically its planning perspective, beyond projects that benefit its specific state. Narrow geographical perspectives can cause lost opportunities. An analysis of a specific project may, for instance, appear to only provide minimal benefits to an individual state. Broader access to data could more readily reveal much needed regional benefits. One of the most compelling reasons for forming the OMS was to provide a regional framework for the planning process. Data access, on a regional basis, will facilitate this process.

3. Distribution

States must assure the integration of distribution facilities with transmission facilities. Integration includes planning and operation. Planning requires sufficient distribution assets in

the right locations, so as to connect load with the transmission system. Some states, therefore, must predict not only where load will grow, but also where transmission and transmission substations will be built. Those locations depend, in turn, on where generation will be built and used. Even a distribution-only regulator would benefit from knowledge of wholesale generation markets.

4. Demand Response Management

Demand response management takes many forms. Time-differentiated pricing, interruptible tariffs, end-use load control and investment in conservation equipment are among them. Each is a retail customer option; each falls exclusively within state jurisdiction. Each comes with a cost -- a cost which the state commission must weigh against the benefits. The possible benefits include improving price signals to wholesale generation markets and shaving price spikes. But the state commission must put a dollar figure on these benefits in order to compare them to costs. Without data on the behavior of wholesale markets, the state commission cannot calculate the benefits; the state cannot know how much price signal improvement is necessary or the magnitude of exposure to price spikes if there is no investment.

5. Maintenance Schedules and Outages

Since the central purpose of retail regulation is assurance of reliable supply at reasonable prices, the frequency of maintenance outages and unplanned outages is a state concern. Whether these outages occur in the generation, transmission or distribution sectors, they are inputs to the retail experience and therefore of statutory concern to the state commission.

6. FTRs and Prudence Review of Retail Utilities

For states to assess the prudence of a load serving entity's management of its FTR portfolio, state commissions must have detailed information on the operations of the wholesale market. Each utility's ability to minimize its costs will depend in part on its skill and judgment in managing FTRs. Because the utility's revenue requirement will include FTR costs and revenues, the retail rate regulator will need data on the inputs and options relating to FTRs. Because the FTR market is regional, the prudence analysis must be regional. And the state role here is not confined to ratemaking. A state's review process will need to consider projections of FTR costs. To arrive at those projections, the state will need data on the behavior of all market participants.

7. Seams

RTO boundaries do not match economic trading areas. FERC and the states must contend with four distinct sets of boundaries: RTO boundaries, retail service territory boundaries, regional reliability council boundaries, and state political boundaries. At least the state political boundaries remain unchanged. But mergers, and utility departures from one RTO to another, create multiple moving targets. Notwithstanding these difficulties, it remains FERC's and the state's responsibility to act in concert to ensure a reliable and economic wholesale market, regardless of seams.

The consumer interest is ill-served when states find themselves in opposition over seams, forcing the FERC to declare winners and losers in a zero sum game. Nor are states helped by having to deal with each other in the dark. Data can soften the edges of disputes by identifying logrolling opportunities, across regions and across periods of time. Data allows negotiators to focus not only on immediate cost shifts but future benefits. Data can change the game from allocating costs to dividing up benefits. The more states know, the better they can deal with the

seams issues; and the better they can deal with seams issues, the sooner the seams will be resolved.

8. Transmission Pricing

States do not set prices for unbundled transmission service. But, in many cases they do determine whether retail utilities may transfer transmission assets to RTOs, for how long and under what conditions. And each state decides its retail utility's retail rate recovery of RTO transmission charges. Further, each state through its individual procedures (e.g., IRP, siting and certificating processes), determines whether, where and when transmission is built.

Thus there are three major state commission decisions: transmission transfer, retail rate recovery of transmission related charges, and construction of transmission related infrastructure. A state commission cannot satisfy its statutory public interest obligations without finding that benefits exceed costs or, for some states, that no detriment will occur. In each of these three areas, the costs will be known and tangible, at least in part. Without a finding of benefits or, at least no detriment to the public, an approval will prove elusive. And there cannot be findings for benefits without supporting data.

9. Control Areas and Ancillary Services

Efficient wholesale markets require efficient control area services – ancillary services. These services include scheduling, balancing and voltage support. These control area services did not originate with Midwest ISO or even with wholesale markets. Prior to wholesale competition, many of these services were provided by the generating units owned by the vertically integrated utilities. In traditional regulation states, those utilities still must provide or procure scheduling, balancing and voltage support.

A vertically-integrated retail utility joining MISO does not shed this state law obligation. Each state commission must continue to enforce those obligations, by assuring its utilities' preparedness, and by penalizing or rewarding shortfalls and successes. State commissions will continue to have an interest in the provision of ancillary services whether those services are provided by vertically-integrated utilities, affiliates, or independent power producers.

Where these costs end up in retail rates (either directly, when the cost is attributable to the utility's own assets, or indirectly, where the utility purchases the services from others), the state commissions must be alert to the costs, and to the possibility that these costs will be unreasonable relative to the benefits received. To assess the relationship between cost and benefit, the state commission will require data on market activities whose continuation depends on control area costs.

C. The Success of FERC-Jurisdictional Wholesale Markets Depends on State Decisions About the Level of Utility Participation in Those Markets

Not only do states need the data to carry out their legal obligations; state commissions need the data so that FERC can carry out its obligations.

FERC has decided that competitive wholesale markets are a path to just and reasonable rates. For wholesale markets to develop competitively, retail utilities must buy from those markets rather than build their own generation. Where the state commission is obligated by state law to ensure reasonable rates, the state commission will likely discourage utilities from participating in wholesale markets if the states lack data with which to assess the costs and benefits of that participation.

Utilities do not determine their power supplies unilaterally. It is state commissions and state legislatures who determine how dependent the state should be on wholesale markets. A

state can order generation divestiture, making its retail customers and their retail suppliers completely dependent on the wholesale markets. The state can require generation ownership only, thereby limiting its wholesale market dependence to coordination transactions. Or the state can pick any point between those two poles.

The same reasoning applies to RTOs. In most states, state commission approval is a necessary step for utilities seeking to join an RTO. The meaning of "RTO" has evolved, at least in PJM and Midwest ISO, to mean not only a regional transmission manager, but also a maker of regional markets. Given this evolution, a state commission will hesitate to declare the transfer consistent with the public interest if the state cannot assure itself that the wholesale markets are or will be competitive.

Between the two poles of participation and nonparticipation in wholesale markets is a range of possibilities, all within the discretion of the state commission. In exercising that discretion, the state commission will consider the extent to which it can reduce the risks and increase the benefits associated with its exposure to wholesale markets. Data access will play a role.

Absent that data, the state commission cannot satisfy its overseers -- the state courts and the state Legislature -- that participation in wholesale markets is consistent with the state's interest. State commissioners serve in a post-California environment in which there is skepticism about the likelihood that wholesale competition will protect retail customers. States who are unable to assess the quality of wholesale markets will discourage their utilities from participating – as purchasers of wholesale power and as transferors of transmission assets.

In *Electric Power Supply Association v. FERC*, No. 03-1182 (D.C. Cir., Dec. 10, 2004), the Court of Appeals held that discussions between FERC decisional employees and RTO

market monitors, while a contested case was pending, and where those discussions were "relevant to the merits" of the contested case, would be ex parte contacts prohibited by Section 557(d)(1)(A) of the Administrative Procedure Act.

This outcome raises the question of how the market monitor's data can get before the Commission in a case where that data is relevant. There are many possible contested cases in which the market monitor's data could be relevant. Examples include proceedings to determine

a) whether one or more generators are violating RTO rules, such as by withholding capacity, or are taking other actions which warrant loss of their market-based pricing authority;

b) whether transmission shortages, present or imminent, will cause a shrinkage in import capacity which necessitates pricing relief or closer monitoring of prices;

c) whether a transmission owner is complying with agreed-upon maintenance schedules

The market monitor may prefer not to become a party to the case. FERC may be hesitant to subpoena the market monitor. The RTO may wish not to require the market monitor to be its witness; and in fact the RTO may not want to be a party to the case. So how does market monitor information get before the FERC?

Under the approach in the MISO March 31 filing (and under any likely future filing), an RSC and its member state commissions would have ongoing data access. They also likely will be intervenors in FERC proceedings. This dual role enables them to gather and analyze data, and bring the analysis and the data (subject to proper confidentiality treatment) to the Commission's attention by presenting a witness. The Commission even can initiate such a result, but requesting that the RSC or its member commissions present testimony based on data it has gathered. In this way, the FERC and the state commissions are using the data and their individual roles to regulate cooperatively.

In summary, FERC's approval of the Midwest ISO's data access is not only about helping the states do their jobs; it is about states helping FERC do its job. By articulating this latter point explicitly the Commission will protect its own legal position, should someone challenge its approval of the Midwest ISO proposal. As we have explained, (a) FERC believes that wholesale competition is necessary for just and reasonable rates, (b) retail utilities are not likely to participate in wholesale markets unless their state regulators allow it, and (c) their state regulators may not allow it if the data access is insufficient to allow them to protect consumers. By articulating this reasoning in its approval order, the Commission will be protecting that order with a compelling explanation.

III. The States Can Assure Nondisclosure to the Extent Desired by FERC and Legitimately Desired by the Generators

The only possible damage arising from MISO's sharing data with states is if a state were to make an unauthorized disclosure. But two facts preclude state disclosure. First, states accessing data through MISO's FERC-jurisdictional tariff will need to satisfy the conditions imposed by that tariff. Second, state law procedures furnish additional protection against disclosure. See Attachment C. The state law protections would apply both to data obtained by the state commission through the MISO process, and to data obtained through state law procedures. No party has cited any evidence that a state commission has breached its statutory duty to protect confidential information.

Some market participants also express concern that state commission access to confidential information would expose them to state investigations. The more likely result is the opposite one. Absent access to data, state commission concerns about unusual market activities could trigger a state commission investigation that would be obviated by informed discussions

with other players, such as the MISO, the IMM and FERC's Office of Market Oversight and Investigations (OMOI). And if the information does support an investigation, informed coordination with the IMM, Midwest ISO and the OMOI will sharpen the focus and reduce the expense for all.

Finally, Commissioner Kelliher's August 6, 2004, concurrence stated that the commissions need to show that they cannot obtain the desired information under state law. We do not see a statutory basis for this position. A FPA-jurisdictional utility's proposal -- such as a MISO tariff provision sharing data with states -- is either lawful or it is not. Its lawfulness under the FPA does not depend on whether state commissions have a separate data access route under state law.

IV. The ability of state commissions to discuss confidential information with other state commissions, subject to common restrictions, is not unlawful; and it will allow states to fulfill their statutory duties

The Commission stated that "the revised proposal should delete the Midwest ISO's proposal to permit Authorized Requestors to disclose Confidential Information to other Authorized Requestors." August 6 Order at para. 562. The Commission there stated that permitting Authorized Requestors to exchange confidential data "severely limits 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 individual statutory and regulatory authority." *Id.* The Commission also stated that Midwest ISO and its stakeholders should consider whether market participants should be notified before MISO or the IMM "divulges" Confidential Information to state regulatory commissions. *Id.*

We see no legal or factual basis for the Commission's finding. The MISO, the public utility who proposed the data-sharing provision, has stated no worry about (a) its ability to assess whether a party that receives the data has a legitimate need for it, (b) whether the Authorized Requestor can keep the data confidential; or (c) whether the exchange of information among Authorized Requestors would deprive market participants of information about the status of requests for information. The Commission's August 6 Order imputed to MISO a concern which does not exist.

State commissioners and state commission staffs work regularly with confidential data, in state and FERC proceedings. In many of these instances, the confidential information/data involves multi-state jurisdictional utilities and multi-state intervenors. Often similar proceedings are occurring before adjoining state commissions involving the same or similar confidential information/data. In such instances, and, with the knowledge of those entities providing the confidential data, the state commission staffs may be in contact with each other regarding those proceedings and data, with no disclosure. We are talking about decades of practice, involving hundreds of proceedings and hundreds of individuals. Then add to the electricity proceedings the enormous number of telecommunication proceedings. No unauthorized disclosure, ever.

The Commission also omitted two major benefits of inter-state data sharing:

1. Obviating state investigations into events whose causes are explainable by the data: When adverse market events occur, data access, followed by internal state discussions, can resolve questions before investigations take on a life of their own. Allowing controlled and limited discussion of confidential data among state regulators would avoid forcing such concerns into a more formal template prematurely or unnecessarily.

2. Harmonizing state resource requirements: The MISO's TEMT, as amended per the Commission's November 8 rehearing Order at para. 326, notes at section 68.1.2.a that

> "Market Participants that serve load within the Transmission Provider Region must comply with all applicable regulations and laws regarding reliability, including any reserve margin requirements, of the states in which the Transmission Provider operates."

Similarly, the TEMT, as amended per the November 8 rehearing Order at para. 327, provides at section 68.1.2.b as follows:

> "To the extent that a Market Participant serves load in two (2) or more states in the Transmission Provider Region, the Market Participant must comply with the applicable reliability or resource adequacy requirements of each state in which it serves load."

Regional infrastructure planning is assisted by consistency across state plans. That consistency will emerge more reliably, and efficiently, if states can create working groups of Authorized Requestors to share and discuss information related to the various state reliability and resource adequacy requirements. *See also* November 8 rehearing Order at para. 337 (recognizing that the Midwest ISO's Module E "necessitates discretion in applying the Regional Reliability Organization and state reliability standards in effect -- including resolving differences between state and Regional Reliability Organization resource adequacy requirements, and determining standards that apply in the Midwest ISO region).

V. Differences between the Midwest ISO plan and the PJM plan will not necessarily render a MISO plan unlawful

The Commission rejected the MISO's March 31, 2004, proposal in part because it varied from the PJM approach. August 6 rehearing Order at 557, 561-562; November 8 rehearing Order at 482 (stating that it will become "increasingly important" for PJM and Midwest ISO to

have a common means of sharing data with state commissions). Inter-RTO differences, by themselves, do not make a proposal unjust and unreasonable.

If the Commission means that the data-sharing regimes in the two RTOs must be- "identical," it would be imposing on data sharing a standard that is not satisfied by any other aspect of the two RTOs. Little about the two RTOs is identical. "Compatible" would be a better standard: can generators readily comply with both standards?

When the MISO makes its new filing, the OMS will prepare an analysis of differences with the PJM approach to ascertain whether those differences create a condition that is inconsistent with the Federal Power Act.

Request for Waiver of Service

The OMS hereby respectfully requests waiver of the requirements set forth in 18 C.F.R. § 385.2010. The OMS has electronically served a copy of this filing upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, and the Midwest ISO Advisory Committee participants. In addition, the filing has been electronically posted on the OMS website at www.misostates.org under the heading “Filings to FERC” for other interested parties.

Good cause exists for granting this waiver due to the volume of interested parties in this matter, the limited resources available to make service, and the financial burden on the OMS in copying and mailing copies of this filing. Many parties, in fact, prefer receiving their copy in electronic format or from a website and are accustomed to electronic service on Midwest ISO dockets. Paper copies will be made available to any person upon request to the OMS office.

Conclusion

As a condition of reconsidering its rejection of MISO's data-sharing proposal, the Commission requested the state commissions to demonstrate their need for data and their authority to keep it confidential. This pleading has done so. We have explained the range of state retail regulation activities, from ratemaking to reliability. We have shown how the cost and quality of retail service depends on events within a service territory and across the OMS region. We have explained the importance to retail customers, in both traditional regulation states and retail competition states, of wholesale market activity. And we have shown how wholesale market data serves the state retail regulatory function.

We further explained that absent a finding of unlawfulness, a proposal by a public utility like MISO is entitled to acceptance. We see no basis for a finding of unlawfulness, because there is no evidence that state access will deter the entry of generation competitors.

We then turned to the interdependency between state regulation and FERC regulation. That interdependency works in both directions. FERC regulation of wholesale markets creates competitive pressures that make wholesale prices reasonable. FERC regulation of RTOs and their transmission-owning members can bring regional planning practices to a formerly atomized industry. Both the competitive pressures and the regional planning benefit states. In the other direction, states affect the development of wholesale competition when they make decisions increasing their utilities' wholesale purchase activity relative to utility-owned generation, and about whether and when their utilities should transfer transmission control to an RTO. States' comfort in taking these actions depends in part their ability to gather data to monitor the markets.

In these ways, state commissions and FERC are truly co-regulators, each affecting wholesale markets from their separate industry roles. Having a common data base between the

two sets of regulators is the natural and necessary consequence of this regulatory relationship.

OMS respectfully requests the Commission to accept the principles set forth in this document, and to apply them both to this reconsideration stage (by withdrawing its rejection of MISO's March 31, 2004, approach) and to MISO's new filing. We believe that the Commission need not finally dispose of the MISO March 31, 2004, filing at this time, but can likely declare it moot when the new filing arrives.

The Organization of MISO States submits these initial 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 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
Iowa Utilities Board
Indiana Utility Regulatory Commission
Minnesota Public Utilities Commission
South Dakota Public Utilities Commission
Montana Public Service Commission
Kentucky Public Service Commission
Illinois Commerce 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 preparing these comments and generally support them.

Respectfully Submitted,
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Appendix A - Explanation of Value to State Commissions of Specific Data Identified in MISO Module D

This Appendix A explains how the data sought by the state commissions will assist them in carrying out their state law obligations in the areas of retail ratemaking, planning for resource adequacy, and market monitoring. We will use the list of data types set forth in Module D of the MISO's March 31, 2004, filing, on the expectation that the similar data will be made available in the new MISO filing. The applicability of these types of data to the OMS states will vary depending on those states' characteristics, including whether the state is a traditional regulation state, a retail competition state, or a state that uses both market structures.

We address first the Midwest ISO data requirements, and then the market monitor data requirements.

Midwest ISO Data Requirements

1. Hourly Bids, Schedules, Offers, Actual Output Of Resources, Imports, And Exports From the Midwest ISO

Resource adequacy: As mentioned in the text, the success of the FERC-jurisdictional wholesale markets depends on state-jurisdictional retail decisions. The hourly bid and other information, including the operational characteristics of generating units and transmission capacity, is essential to the development of the requisite data bases to support a comprehensive state and regional planning process to evaluate the cost-effectiveness of new resources. Historically, the planning process has been the exclusive province of state commissions. The output and recommendations that emanate from the state and regional planning process, in turn, are a prerequisite for siting, construction, and cost recovery of transmission (new or upgraded transmission), power plants (new facilities, introduction of new technologies, environmental modifications, plant-life extensions, and retirements), and demand-response decisions of the state commissions within the OMS.

Retail rates: The state commission requires evidence of reasonable utility efforts to minimize fuel and purchased power cost. Utilities also will seek retail recovery for their legitimate expenditures associated with their participation in the Midwest ISO. And the states will want to compare the costs and benefits of their utilities' continued participation in Midwest ISO. The states therefore will need to:

1. Determine whether each utility's generation resources are being self-scheduled prudently. To do so, the states will need to evaluate the factors (e.g., real-time, day-ahead, bilateral contract and other information from the Midwest

ISO-operated markets) weighed by each utility company in making these decisions.

2. States must enforce their utilities' obligation to purchase power when purchase is more economical than internal production, and their obligation to sell any surplus into the markets. To do so, the state must evaluate the factors considered by companies in the preparation of their generator offer curves submitted to Midwest ISO.

3. Day 2 markets will enable load and resource diversity transactions savings, leading to the optimization of generation over a broad region. There also will be costs and revenues associated with FTRs, the LMP settlement process, redispatching costs to clear congestion, compensation for generating companies in the provision of ancillary services, transmission pricing revenues, and recovery of opportunity costs for sales foregone. State commissions must ensure that retail rates reflect the resulting changes in costs and revenues. They may need short-term and long-term information, not only to adjust rates timely but to determine if present ratemaking mechanisms, such as fuel pass-through clauses, remain appropriate with Day 2 markets

2. Reserved And Scheduled Transmission Service

Retail rates: State commissions need information on portfolios of scheduled and reserved transmission to assess whether their jurisdictional utilities are able to (a) purchase power when it is economical to do so and (b) sell any excess power after they have supplied the lowest cost power to their own native-load customers.

Each state commission also needs this information data to (a) evaluate factors to be considered regarding annual FTR nomination decisions that result in FTR allocations, and (b) evaluate the development of appropriate mechanisms for recovery of congestion costs, including FTR costs and netting of FTR revenues.

Planning: Limits on a utility's ability to reserve and schedule transmission services create parameters on the utility's planning options. State commissions need this information to make judgments about a utility's integrated resource plans.

Market monitoring: A state commission needs confidential data from its jurisdictional utilities to be able to ascertain if its utilities have an insufficient portfolio of transmission rights, because such insufficiency would make the service territory vulnerable to hoarding and discrimination. To ensure a proper analysis for individual states, transmission rights, FTRs, and other capabilities of the transmission system need to be examined on a regional and, even, an inter-RTO basis. As such, the data and attendant analysis must be regional.

3. Transmission Limits

Retail rates: Transmission limits affect a utility's costs of purchased power, and its generation operating costs. Also, utilities may seek retail rate recovery of investments relating to transmission constraints, including construction of transmission and generation, and demand-side measures.

Planning: Data on transmission limits is a necessary input to planning models used by states to assess whether the utility is meeting its statutory obligation to procure reliable and economic power supply. To the extent that transmission limits create bottlenecks – especially persistent load pockets that cause concern about price and quality of service, state commissions will have primary responsibility for reducing those constraints. Transmission limits will be an important driver in ascertaining whether a utility can purchase or sell firm power beyond its system as well as to determine if upgrades are required to serve their native load.

4. Hourly Flows Over Monitored Transmission Facilities

Retail rates: Hourly load flow is a necessary data input to allow state commission to assess the reasonableness of a utility's power procurement and sales decisions. For state commissions, the hourly flow data will also provide information that is important for assessing if there is a good match between the load-serving entities' FTRs and the expected transmission flows by using a datum based on the actual flow.

State Commissions recognize that the Midwest ISO region was oversubscribed and that the sum of all of the transactions entered into by their jurisdictional utilities prior to the Midwest ISO's establishment were not, in a regional context, simultaneously feasible. In large part, this situation was due to the failure to consider loop flow effects. This situation results in an insufficiency of FTRs and a resulting likelihood that some transmission congestion will be unhedged. As such, state commissions, their jurisdictional load-serving utilities, and consumers are certain to be concerned about the appropriate degree of "unhedged" congestion for individual jurisdictional entities and the attendant ramifications for the prices paid by consumers. The hourly flows will enable load-serving entities to plan, as accurately as possible, for the type and quantities of FTR. The information about actual power flows and the dynamic operational capabilities of the grid will be important to each state commission in assessing the prudence of their jurisdictional utilities' decisions regarding FTR nominations, as well as alternatives that utilities consider and implement to ameliorate problems resulting from insufficient allocations of FTRs.

Planning: State commissions within the OMS intend to participate fully in the Midwest ISO's planning processes. The state commissions intend to provide expertise, data bases (e.g., demographic, end-use and load research information, customer responsiveness to prices, empirical information concerning load shape implications of demand-response programs, state economic data) and familiarity with state-of-the-art planning tools as part of a comprehensive effort to assist in the construction and maintenance of the Midwest ISO's planning process. The information and expertise that the state commissions bring to the process will be augmented by the confidential information that the Midwest ISO will have

from its Market Participants as well as the ISO's own data on the operations of the Midwest ISO's markets (e.g., load flow data). The combination of state commission and Midwest ISO efforts should provide the foundation for comprehensive regional planning. This planning will be assisted by information that the Midwest ISO will routinely obtain from market participants, as well as empirical data from market operations such as, generation output - production costing, transmission capability information, data on hourly load flow over monitored facilities, generation / transmission maintenance scheduling, and data on transmission constraints (especially persistent binding constraints in load pockets). State Commission involvement in the Midwest ISO's comprehensive planning process is essential for the Midwest ISO's operational reliability, economic efficiency and for the long-term resource adequacy of the region. State commissions will also need to consider this information in reviewing market design as part of an assessment as to the reasonableness of their jurisdictional utilities' planning alternatives (e.g., generation, transmission, distribution enhancements, demand-response, procurement of FTRs) to secure reliable and economic power supply.

5. Dispatch of Generation For Energy, Regulation, Frequency, or Other Operational Orders

Rates: The costs associated with dispatching generation and "ancillary services" are largely embedded in existing retail rate base. To ensure that consumers are not "paying twice" for these services – once through retail rate base, and again through retail rate recovery of Midwest ISO costs, it will be necessary to obtain details on these costs.

Planning: To ensure reliable and economical service over the long term, state commissions need information regarding dispatch, regulation, and frequency. This information would assist in evaluating the need for new generation, transmission and, in limited cases, demand-response measures (e.g., curtailments consistent with applicable reliability council guidelines).

6. Redispatch of Generation

Retail rates: Cost recovery associated with companies' compliance with Midwest ISO directives on dispatch, redispatch and curtailment will be considered in state rate proceedings. The state commissions will need to evaluate:

a. how dispatch and redispatch costs are recovered today, including if recovery of such costs is through base rates or fuel cost proceedings today, and how these procedures might change.

b. the effects of redispatch on individual utilities in Midwest ISO Day 2 markets, including differences between Midwest ISO ordered redispatch today and in the future.

c. the appropriate capture and recovery of dispatch and redispatch costs in Midwest ISO Day 2 markets.

Planning: Where that redispatching produces a lost economy, the cause is often a transmission constraint. The solution to a transmission constraint may be transmission construction. A state commission will need redispatch information to determine, in its planning process, whether additional transmission is worth the cost.

7. Logs of Transmission Service Requests

Retail rates: State prudence reviews of utility procurement decisions will need evidence that the utility requested transmission service timely. The logs are part of that evidence. And if transmission logs demonstrate that a utility was denied access improperly (e.g., due to hoarding or improper market rules), state commissions will have basis for shielding a utility from prudence disallowance; and for taking action at FERC or in court to stop the improprieties.

8. Logs Of Generation Interconnection Requests

Market monitoring: Lack of transparency in the queuing process of individual utilities enable utilities to favor their own (and affiliated) projects, at the expense of Independent Power Producers. Moreover, the absence of logs of generation interconnection requests provides opportunities for traditional utilities to discriminate against alternative energy suppliers and customer-owned generation. By making the Midwest ISO responsible for generation interconnection and having access to logs of Generation Interconnection Requests, state commissions can better ensure that their jurisdictional utilities are not causing unnecessary power cost increases by creating undue obstacles that delay or have the effect of denying interconnection improperly to independent generators. State commissions can also use these logs to provide assurance that alternative energy and customer owned generation are being fairly considered in the planning process.

9. Generation and Transmission Outage Data

Retail rates: Generation and transmission maintenance and outage data is necessary for states to assess the prudence of retail utilities' operational decisions and their attendant costs. Particularly for longer-term purchases, state jurisdictional utilities will make decisions predicated in part on their expectations of their own generation and transmission outages as well as outages throughout the region. Even short-term transactions will entail decisions based on outage information. Ultimately, the decisions by jurisdictional utilities to buy and sell power in the markets operated or facilitated by the Midwest ISO will be reviewed by their respective state commissions for prudence and equitable flow-through of benefits and costs. Also, fuel and purchased power cost "trackers" are often tied to the operational performance of facilities; the outage data will be important evidence in those proceedings. And when state-jurisdictional utilities purchase replacement power, the state commission must assess whether the utility made the most feasible, economic deal. In the past, state

commissions undertaking this inquiry were limited to the representations made by their jurisdictional utilities about purchase and sales opportunities. In some instances, these representations could be cross-checked with other utilities in the state. Now the Midwest ISO's regional transparent real-time prices and information about longer-term bi-lateral contracts will allow state commissions to assess more accurately their jurisdictional utilities' performance in the regional markets during periods when their generating units are taken out of service.

Historically, states that regulate multi-state holding companies and administer performance-based adjustment clauses that are tied to generation outages recognized the potential for these utilities to purchase replacement power from affiliates, even if the replacement power was more expensive than power from unaffiliated suppliers. The absence of transparent markets, including transmission and generation outage information from regional suppliers that are not under the jurisdiction of that state commission, prevented the relevant state commission from conducting a comprehensive assessment of the reasonableness of decisions of the holding company and the regulated affiliate.

Planning: Production costing and resource expansion modeling, which state commissions use to review procurement prudence, require these data inputs.

Market monitoring: States have a statutory interest in making sure that there is optimal unit commitment and dispatching of power facilities. States, therefore, have obligations to address impediments to optimal commitment and dispatching, due to market rules or improper actions by owners or operators of generation and transmission.

10. Data on Complaints by Customers (i.e., Market Participants)

Market monitoring: The disposition of customer complaints can affect retail rates. Customer complaints could be triggered by allocation of FTRs, "grandfathered rights," the LMP settlement process, redispatching costs to clear congestion, the processing (e.g., time) of transmission requests, compensation for the provision of ancillary services, billing disputes, mitigation of market power, transmission pricing disputes, assurance of recovery of costs associated with the construction of new transmission, recovery of opportunity costs for sales foregone, and other issues. Since Midwest ISO is a nonprofit organization, the costs of its errors will end up charged to retail ratepayers. And, since many of the costs relating to these variables are already included in retail rates, state commissions will need to monitor for double-counting.

11. Other Information

The state commissions recognize that only the omniscient could enumerate all the information that state commissions need to discharge their statutory obligations to ensure proper treatment of benefits and costs associated with each utility's interaction with wholesale and retail markets. That is, as the Midwest ISO markets evolve, as seams agreements are reached with other RTOs and non-affiliated entities, it should be expected

that state commissions, the Midwest ISO, and the IMM will find it necessary to reassess the information that they receive in order to fulfill their statutory obligations for assuring reliable and reasonably low cost electricity.

Independent Market Monitor Data Requirements

1. *Production Costs*

Retail rates: Production costing information of a state's jurisdictional utilities will enable state commissions to determine how much production cost to allow in retail rates (including adjustment clauses). Comparisons of production costs with dispatch costs (including a retail utility's decisions to buy or sell power) in a transparent market will make it feasible for state commissions to establish benchmarks that will protect retail customers from excess costs.

Planning: Production cost information is essential for evaluating power supply options, ramifications of environmental upgrades, the price implications for decommissioning of power plants, the scheduling of generation and transmission outages, the effect of demand-response programs on the cost of providing service, the efficacy of alternative transmission enhancements, and comparative analysis of different fuel sources. Forecasts of future prices, under a variety of resource scenarios, is essential for state commissions' review and approval of resource planning, siting proposals, and cost recovery of resource enhancements.

Market monitoring: Comparing production and dispatch costs among states, especially for operating companies of multi-state holding companies, will enable states to have more effective regulation over utility affiliates of holding companies.

State commissions, by virtue of their jurisdiction over local natural gas distribution companies that are in many instances both gas and electric utilities, may also discover agency agreements, inventory practices or transportation arrangements (e.g., hoarding of pipeline capacity) that favor the utility and its affiliates to the detriment of other market participants such as utility generators, independent power producers, and distributed generation. Production cost information is necessary for this detailed analysis. This type of behavior might not be detected by the Market Monitor or the FERC because they lack jurisdiction over the local gas distribution practices.

The FERC's recent Notice of Inquiry in Docket RM12-04-000 entitled *Financial Reporting and Cost Accounting, Oversight and Recovery Practices for Regional Transmission Organizations and Independent Transmission Operators*, sought ideas on how to make accurate comparisons of RTOs. Important to any comparison of inter-RTO costs will be production cost data, in conjunction with other pricing information (e.g., real-time market clearing prices, day-ahead prices, and locational marginal cost price data). Persistent differences in locational marginal cost prices between RTOs, for example, would invite further scrutiny, including an examination of production costs of generators on both sides of the constraint, to determine of those differences are the result of flawed market rules or

abusive conduct.

Production costs are also critical in establishing payments for ancillary services, a basis for determining fair compensation in the event of market mitigation, and an element in the determination of opportunity costs.

2. *Opportunity Costs*

Retail rates: State commissions will need to know if their jurisdictional utilities are receiving fair compensation when they forego sales to comply with Midwest ISO operating instructions for redispatching their generating facilities or for providing ancillary services to the market. For all OMS states, reviewing this information on a regional basis will better ensure inter-regional equity. Because some state commissions are involved in two RTOs, state commissions will be uniquely qualified to assess the efficacy of the application of opportunity costs in a much larger region than individual RTOs would be able to do.

Some of these opportunity costs, redispatching, and ancillary services are already in the state-jurisdictional utilities' retail rates. These costs, to varying extents, are not new costs. Therefore, the state commissions will need to have the necessary information to ensure that, when their utilities do receive compensation from MISO, there is a mechanism for reflecting that compensation in retail rates.

Accurate opportunity costs also will facilitate the states' implementation of cost-effective demand-response programs.

Planning: Compensating generators based on opportunity cost will facilitate elimination of transmission congestion and the provision of ancillary services. The accuracy of opportunity cost therefore will affect the quality of regional and state planning processes. The payment of opportunity costs, if significant and persistent, may provide an important price signal for new (or upgraded) transmission, generation, and cost-effective demand response. These findings, then, would be used in state proceedings on integrated resource planning and cost recovery.

Market monitoring: In most of the Midwest ISO's footprint, the preponderance of power supply comes from vertically-integrated utilities that traditionally have been responsible for providing ancillary services (e.g., voltage support). The FERC has recognized that the provision of certain ancillary services could be a source of market power. Among other things, the exercise of market power may manifest itself in ways that would be unduly discriminatory to independent power producers and thus limit their market share. At the same time, small producers are capable of exercising market power also. State commissions' access to opportunity cost information will allow them to develop confidence in the various market players. That confidence means that the state commissions can be more flexible in the mix of vertically integrated and independent power that they allow to serve the market.

The inability of state commissions to have access to this critical information from IPPs could

cause state commissions to unduly favor traditional utilities in resource planning, siting, construction, and cost-recovery decisions.

3. *Generation Logs*

Retail rates: Generation logs detailing decisions to purchase or sell power, along with any notations regarding the operations, capabilities, and availabilities of the system, can be used by ***s***tate commissions determine the prudence of their utilities' purchased power and sales decision. Whether the recovery mechanism is cost-based ratemaking, performance-based ratemaking or adjustment clauses, this information will be essential. For those states, whether retail access or traditionally regulated, that regulate retail affiliates of multistate holding companies, operating agreements and interaffiliate cost-sharing arrangements complicate the picture. The information about dispatch of all of the holding company's generating fleet, in conjunction with other data about the operations of the holding company and its operating affiliates, is necessary for states to determine accurately the correct cost implications for the operating company located within their state. The decisions about allocating production and other operating costs are most commonly made at the holding company level. Given the complex interstate and intra-company arrangements, there is the potential for improper cost shifts among the operating companies within the various states.

Planning: Generation logs of individual companies, along with other operational data (such as MISO's day-ahead and real-time market information) are essential to establishing a datum for resource planning. That is, this information provides inputs and checks for inputs in production costing and optimization programs of planning models.

Market monitoring: Volatility is endemic to hourly markets such as Midwest ISO's "Day 2" mechanism. Volatility shakes the confidence of markets and policymakers, and causes risk to energy suppliers and consumers. State commissions will need to review generation logs to determine if volatility is resulting from withholding or other market power abuse.

4. *Bidding Arrangements*

Retail rates: Especially after the Midwest ISO's Day 2 Markets are operational, bidding information will be essential for state commissions to verify that their jurisdictional entities are prudently engaged in the markets. As the FERC recognizes from experiences in other markets, bidding arrangements could be a source of abuse that results in harm to retail consumers. During the price spikes of 1998 and 1999, for instance, there was insufficient transparency to investigate the causes. State commissions, by virtue of their statutory obligations will, from need assurances that the bidding strategies of their jurisdictional utilities are prudent and in the best interest of their consumers.

For states that have jurisdiction over an operating company of a multi-state holding company, knowledge about the bidding arrangements and their role in Midwest ISO markets will provide the requisite information to be able to determine if their operating company is

bearing a fair allocation of operating costs.

Planning: Having actual bidding information to verify the output of production cost analysis will serve as a critical check in the overall planning process. Ultimately, this planning information is essential to support siting, construction, and cost recovery of transmission (new or upgraded transmission), power plants (new facilities, introduction of new technologies, environmental modifications, plant-life extensions, and retirements), and demand-response decisions of the state commissions within the OMS

Market monitoring: State commissions have statutory responsibilities to address price volatility and reliability issues and to be responsive to state policymakers. The August 14, 2003 Blackout and the price-spikes in 1998 and 1999, provide compelling examples.

5. ***Other***

Retail rates: Since the Midwest ISO's markets are in the formative stages, it is impossible to say with certainty that the list of information is all inclusive. As such, the need for data (more, less, different) will evolve as the Midwest ISO's markets evolve. For example, **t**here are price interrelationships that will, over time, be reassessed to assure that the costs and benefits associated with jurisdictional entities participation in an RTO are properly assessed. Over time, as the Midwest ISO markets change, as seams agreements are reached with other RTOs and non-affiliated entities, state commissions will find it necessary to reassess the information that they receive in order to fulfill their statutory obligations for assuring reliable and reasonably low cost electricity.

Appendix B - Federal Energy Regulatory Commission Statements of the Value Articulated for the OMS and for Federal - State Coordination Identified in The FERC White Paper

FERC's "White Paper" Appendix A: Comparison of the Proposed Wholesale Market Platform with the RTO Requirements of Order 2000 (excerpts).

a) *We certify that Commission jurisdiction over non-price terms and conditions of transmission service used by wholesale transmission customers to serve bundled retail customers does not affect state authority over retail choice decisions, transmission siting, or local issues associated with transmission or distribution (e.g., maintenance, tree trimming, downed lines, and etc. page 5.*

b) The Final Rule would also clarify that the RTO or ISO may use license plate or postage stamp rates for designing the access charges for the region. Each regional state committee may determine which approach the RTO or ISO should file with the Commission under section 205 of the FPA. page 5.

c) *Order No. 2000. The RTO must provide for objective monitoring of the markets it operates to identify design flaws, market power abuses, and opportunities for efficiency improvements, and must propose appropriate actions. Reports of these actions must be filed with the Commission and affected regulatory authorities. The Commission believes that the information collected will be data that the RTO will collect or have access to in the normal course of business…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. The Final Rule would also specify the periodic reports that the market monitor must prepare. The market monitor will provide annual reports on the state of its markets to the Commission, the regional state committee, and other appropriate state regulatory authorities…" pages 11 and 12.*

d) *Order No. 2000. The RTO must be responsible for planning, and for director, or arranging, necessary transmission expansions, additions, and upgrades that will provide efficient, reliable, and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities…The RTO's planning and expansion process must accommodate efforts by state regulatory commissions to create multi-state agreements to review and approve new transmission facilities…In addition, the RTO or ISO may assess the need for transmission enhancements in view of the opportunities for energy efficiency, demand response, and new generation technologies consistent with the policy direction of the regional state committee on these issues. Pages 12 and 13.*

e) *The RTO or ISO would have a clear plan that states the non-discriminatory criteria that would be used for determining the reliability and economic enhancements that are needed for customers within the region. Each regional state committee may determine the criteria for these economic enhancements. If the regional state committee reaches a decision on the criteria that would be used, the RTO or ISO would file these criteria in a filing pursuant to section 205 of the FPA… page 16.*

f) *Order No. 2000 recognizes that states have an important role in RTO formation and governance, and regional interests forming an RTO are required to consult with the states about the appropriate role for states and about the organizational form of the RTO…[T]he Commission decided, given the diversity of regional state interests and state laws, as well as differences in the organizational forms that RTOs may adopt, to reach a generic conclusion about states' roles. The Commission has invited states to participate collaboratively with the FERC in fostering RTO formation. The Final Rule would retain the requirement for an important role for states in RTO or ISO formation. In addition, each RTO or ISO would be required to provide a forum for the participation of states representatives in its decision making process. The structure and functions of these groups will be determined by the states within the region…In the Midwest, state commissions have proposed the establishment of a flexible regional organization…that*

would provide coordinated action on matters that are subject to state jurisdiction as well as issues that relate to wholesale power markets and interstate transmission. Page 16 (emphasis added*)*

g) *Each regional state committee would determine the extent to which states within the region need to coordinate or have a consistent approach for certain planning issues that can affect cost responsibility among transmission owners and other load serving entities within the region. The RTO or ISO will provide the regional state committee with technical assistance. These include:*

- *Whether transmission upgrades for remote resources will be included in the regional planning process.*
- *The role of transmission owners in proposing transmission upgrades.*
- *The role of generation, transmission, energy efficiency, and demand response in resource adequacy.*

Each state Committee will also be responsible for determining the resource adequacy approach that will be used across the entire region. Page 17

Having sufficient available resources (generation, transmission, energy efficiency, demand response) is central to ensuring that wholesale prices are just and reasonable and that service is reliable. The Final Rule will not require a uniform approach to resource adequacy. Rather, each regional state committee will be asked to determine the approach for resource adequacy across the entire region. Page 17 (*emphasis added*)

Appendix C - Offers of Proof by the OMS State Commissions

The state commissions identified below provide detail on the state statutes which grant them access to, or prohibit disclosure of, confidential business data. These materials establish the general obligation to maintain confidentiality.

ILLINOIS COMMERCE COMMISSION

OFFER OF PROOF

Pursuant to the Commission's Order Granting Rehearing for Purpose of Further Consideration, Granting Opportunity to Make Offer of Proof, Midwest Independent Transmission System Operator, Inc.; Public Utilities with Grandfathered Agreements in the Midwest ISO Region, 108 FERC ¶ 61,321 (2004), and the Notice of Extension of Time issued January 25, 2005, the Illinois Commerce Commission ("ICC"), a member of the Organization of MISO States ("OMS"), hereby submits this offer of proof that the ICC has the statutory framework in place to protect confidential information received from a regional transmission organization, such as the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO" or "MISO"), in accordance with applicable laws and regulations.

The OMS Bylaws provide that individual member states may object to, support or comment on statements of the OMS.[5] The ICC intends for this filing to serve as a supplement to the separate OMS Offer of Proof document for the purpose of more fully elaborating on the issues specific to Illinois.[6]

The ICC welcomes and appreciates the Commission's efforts to assist the state commissions in obtaining access to certain market-sensitive confidential information necessary to carry out responsibilities at the state level. The Illinois Public Utilities Act charges the ICC with regulating public utilities in the State of Illinois.[7] As part of its regulatory duty, the ICC is required to ascertain that Illinois public utility rates, charges, and rules and regulations relating to rates and charges for retail service within Illinois are just, reasonable and non-discriminatory.[8] Furthermore, the Illinois General Assembly, through Section 220 ILCS §5/16-101A(d) has directed the ICC to "act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." In short, the Illinois General Assembly recognized the relationship between the retail and wholesale markets and required the ICC to advocate the development of competition in both the wholesale and retail markets.

By moving away from the traditional regulated public utility model and embracing competition as the principal mechanism to protect retail customer interests, the Illinois General Assembly has made Illinois fully subject to the regional nature of electricity markets and transmission operations. While the Midwest ISO and PJM Interconnection ("PJM") will provide regional transmission service and operate regional electricity markets, the Illinois legislature continues to look to the ICC to protect retail ratepayers in Illinois. Without access to system and market data from across the Midwest electric market region (of which Illinois will be a major part), the ICC's ability to monitor, mitigate and prevent the exercise of

[5] OMS Bylaws, adopted June 11, 2003, Article IV, paragraph 8, at 2.
[6] The ICC intends to attach this document to the OMS Offer of Proof, to serve as part of OMS Appendix C.
[7] 220 ILCS §5/1-101, *et seq*.
[8] 220 ILCS §§5/9-101 - 5/9-252.

market power imposed on Illinois electric consumers and ensure reliable system operations and efficient planning would be severely hindered. Indeed, without such information, the ICC would be effectively unable to carry out the directives of the Illinois General Assembly in the ways envisioned by that body. Accordingly, if the ICC is prevented from accessing necessary regional information (including Midwest ISO information), it may become necessary for the ICC to act under its own state statutory authority or to advise the Illinois General Assembly about any additional needed changes to the electricity regulation statutes in Illinois.

The ICC believes that this voluntary showing of these legislative obligations is adequate proof that state commission access to confidential information will advance the Commission's and state commission's common goals for wholesale market reform while preserving the state commission's legitimate needs.

With these obligations and concerns in mind, the ICC is pleased that it has in place practices and procedures to protect confidential information. We know of no instances in which these practices and procedures have been breached and appreciate the opportunity to report some of the details of these to the Commission as an offer of proof that the ICC will guard any confidential data received in accordance with applicable laws and regulations.

Under state law, the ICC may accord confidential treatment to information that companies are required to submit and that would otherwise be deemed public. Section 4-404 of the Act, concerning the ICC's protection of confidential and proprietary information, states as follows:

> The Commission [ICC] shall provide adequate protection for confidential and proprietary information furnished, delivered or filed by any person, corporation or other entity.[9]

Improper disclosure of facts or information by an ICC officer or employee may be prosecuted and punished as a criminal offense. Section 5-108 of the Act provides:

> Any officer or employee of the Commission [ICC] who divulges any fact or information coming to his knowledge during the course of an inspection, examination or investigation of any account, record, memorandum, book or paper of a public utility, except in so far as he may be authorized by the Commission or by a circuit court, shall be guilty of a Class A misdemeanor.[10]

In addition, the ICC's Rules of Practice, Section 200.430 on protective orders, allows the ICC, at any time during a proceeding on the motion of any person, to enter an order to protect the confidential, proprietary or trade secret nature of any data, information or studies. Although the normal time limit for confidential treatment is two years, and generally may not exceed five years, periods longer than five years may be allowed "upon a showing of good cause," as section 200.430(b) provides.

In deciding whether information should receive confidential treatment on motions for protective orders, the ICC customarily turns to the criteria that guide courts in their application of the Illinois Freedom of Information Act (5 ILCS 140/1 through 11) ("FOIA") and, in particular, the statute's exemption for trade secrets. Section 7(1)(g) of the Illinois FOIA exempts trade secrets and commercial or financial information from the Act's disclosure requirements. In particular, it states the following:

> Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information may cause competitive harm,

[9] 220 ILCS §5/4-404.
[10] 220 ILCS §5/5-108.

> including all information determined to be confidential under Section 4002 of the Technology Advancement and Development Act. Nothing contained in this paragraph (g) shall be construed to prevent a person or business from consenting to disclosure.[11]

State law also exempts proposals and bids for contracts. Specifically, Section 7(1)(h) exempts:

> Proposals and bids for any contract, grant, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body, until an award or final selection is made. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made.[12]

In addition, state law exempts valuable formulae and research data obtained by the commission. Section 7(1)(i) exempts:

> Valuable formulae, designs, drawings and research data obtained or produced by any public body when disclosure could reasonably be expected to produce private gain or public loss.[13]

While a person seeking disclosure of confidential information could attempt to gain access to it through the Illinois FOIA, the exemptions would likely cover the confidential information at issue. Nevertheless, the courts would ultimately decide whether the ICC must disclose information sought under the FOIA should the matter rise to the judicial level. A prior decision by the ICC granting information confidential or privileged status under section 7(1)(g) would not be binding on the judicial system. The terms of a confidentiality agreement between the ICC and the party submitting the information would similarly not be binding on a court, however, the existence of such an agreement might be a relevant consideration in resolving the FOIA issue if it is taken through the judicial process.

Illinois courts have looked to federal law in assessing the FOIA exemptions. In National Parks and Conservation Ass'n v. Morton, 162 U.S. App. D.C. 223, 498 F.2d 765 (1974) ("National Parks"), the U.S. Court of Appeals interpreted the trade secrets exemption of the federal FOIA, which is worded similarly to the Illinois exemption, as requiring that commercial or financial information be deemed confidential "if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[14]

The ICC generally applies this test to determine whether to grant proprietary treatment of material under Section 7(1)(g) of the Illinois FOIA.[15] For example, in Cass Long Distance Services, Inc. and Cass Telephone Company, the ICC denied a petition for proprietary treatment where the documents in question were publicly available from another source.[16] However, in so doing, it addressed the two-prong National Parks test and provided guidance on its application. With respect the first prong, the ICC focused on its ability to collect the information in question as being adequately protected by the statutory

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[11] 5 ILCS §140/7(1)(g).
[12] 5 ILCS §140/7(1)(h).
[13] 5 ILCS §140/7(1)(i).
[14] *National Parks*, 498 F.2d at 770; *See also, Porter County Chapter of the Izaak Walton League of America, Inc. v. U.S. Atomic Energy Commission*, 380 F. Supp. 630 (1974) (court granted government's motion that documents requested were exempt from mandatory production under FOIA because, among other things, the documents were an integral part of the government's deliberative processes).
[15] *See Cass Long Distance Services, Inc. and Cass Telephone Company*, 1999 Ill. PUX LEXIS 206 (March 10, 1999).
[16] *Id*. at 42-43.

requirements of the Public Utility Act requiring that a local exchange carrier submit annual reports like the one at issue in that proceeding. Contrastingly, under the present application of Illinois law, not all of the market participants are required to submit the market data in question here, and it is certainly not submitted on a regular basis. As such, denying protection of sensitive data could impair the ICC's ability to obtain it. Further, with respect to the second prong, the ICC stated that "[i]f the competitive harm from the release . . . is readily apparent, it is not necessary to require . . . a demonstration [of the necessity for proprietary treatment]."[17] This suggests that where the data is clearly sensitive to the market, as may be the case with respect to the information at issue here, the ICC would take that into account and perhaps not require a lengthy hearing to determine the treatment of the information in question.

In summary, information that companies are required to file with the ICC under statute, order, or rule is generally a matter of public record unless the party moves to protect its confidential nature, and the ICC does so, or the ICC takes steps on its own to protect its confidential nature. Information obtained from public utilities or telecommunications carriers by Staff in the course of an investigation or inspection is treated as confidential unless the ICC or a court orders otherwise.[18] In either case, information made confidential by the ICC may be subject to disclosure under the Illinois FOIA. Whether disclosure is required under the FOIA will be resolved under the provisions of that statute, which contains a number of broad exemptions from its disclosure requirements.

As a general matter, the ICC will act consistent with the Public Utility Act and all consumer protection laws. On January 1, 2005, a new law became effective in Illinois that requires the ICC to provide any materials or documents already in its possession requested by the Attorney General or a State's Attorney pertaining to the enforcement of consumer protection laws.[19] However, even in the event of a request for materials in the course of investigation by law enforcement authorities, state law mandates that "any materials or documents that are proprietary shall not be made public unless the designation as proprietary has been removed by a court or legal body of competent jurisdiction, or the agreement of the parties[.]"[20]

Thus Illinois has many layers of protection in place to guard against public disclosure of confidential information. The ICC believes that this structure is sufficient proof and demonstration that the state commission has the statutory authority to safeguard confidential data.

WHEREFORE, for the reasons set forth above, the ICC hereby requests that the Commission accept this offer of proof that the ICC adequately and appropriately meets the criteria for a showing that: (1) the state commission has the statutory authority to safeguard confidential data; and (2) state commission access to confidential information will advance the Commission's and state commission's common goals for wholesale market reform while preserving the state commission's legitimate needs.[21]

INDIANA UTILITY REGULATORY COMMISSION

OFFER OF PROOF AND CERTIFICATION OF ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

[17] *Id*. at 45.
[18] 220 ILCS §5/5-108.
[19] 220 ILCS §5/4-601.
[20] 220 ILCS §5/4-601(2).
[21] In accordance with state statutory requirements, the ICC has filed a separate Offer of Proof on February 10, 2005, containing the information set forth here in Appendix C.

Indiana Code Section 5-14-3-4 identifies records that are exempt from public disclosure requirements. Records that are required to be kept confidential by federal law, records containing trade secrets, and confidential financial information obtained, upon request, from a person are exempt from public disclosure. However, financial information that is filed with or received by a public agency pursuant to state statute is not exempt. Under Indiana law, "trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Ind. Code § 24-2-3-2.

In addition, at the agency's discretion, additional types of records are exempt from public disclosure, including but not limited to:

- Administrative or technical information that would jeopardize a recordkeeping or security system;
- Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility;
- A record or a part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack.

An employee of a public agency who knowingly or intentionally discloses information classified as confidential by state law commits a Class A misdemeanor. Ind. Code § 5-14-3-10. Moreover, a public employee may be disciplined, up to and including termination, if the employee intentionally, knowingly, or recklessly discloses or fails to protect information classified as confidential by state law.

IOWA UTILITIES BOARD

OFFER OF PROOF AND CERTIFICATION OF ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

Iowa Code § 22.7 identifies records that shall be kept confidential unless otherwise ordered by a court or another person lawfully authorized to release the information. There are forty-six categories of such records. Some of the categories are: trade secrets, attorney work product, and reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose. Iowa has a broad definition of "trade secret." Pursuant to Iowa Code § 550/2(4), "trade secret" means information, including but not limited to a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, a person able to obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Other types of confidential information specifically identified in section 22.7 are:

- Records which if disclosed might jeopardize the security of an electronic transaction;
- Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside the government, to the extent that

the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making available to that government body if they were available for general public examination; and

- Records related to homeland security that are part of a critical asset protection plan.

Utilizing its statutes and rules, the Iowa Utilities Board (Board) routinely receives and holds confidential information that has been held confidential by a federal agency, such as the Federal Communications Commission and the Federal Energy Regulatory Commission (FERC).

Violations of chapter 22 are subject to criminal and civil enforcement proceedings. Iowa Code §§ 22.6 and 22.10. Also, a public employee may be subject to discipline, up to and including termination, if the employee discloses or fails to protect information classified as confidential by state law.

KENTUCKY PUBLIC SERVICE COMMISSION

OFFER OF PROOF AND CERTIFICATION OF ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

Under the Kentucky Open Records Act, KRS §§ 61.870 to 61.884 ("the Act"), and specifically under KRS § 61.878, certain public records are excluded from public disclosure requirements and subject to inspection only upon order of a court. Among others, these records include i) records required to be kept confidential by federal law or regulation; ii) records containing personal information; and iii) records confidentially disclosed to an agency or required to be disclosed to it and generally recognized as confidential or proprietary, which if subject to public disclosure would create an unfair commercial advantage to competitors.

The steps necessary to petition the Kentucky Public Service Commission ("Commission") for confidential treatment are contained in Administrative Regulation 807 KAR 5:001, Section 7. Any person requesting confidential treatment of a record must file a petition that sets forth the grounds under the Act upon which the Commission should classify the material as confidential. Additionally, the petition should attach one copy of the record that identifies only those portions that, unless redacted, would disclose confidential information and ten copies of the record with those portions obscured for which confidentiality is sought. Pending Commission action on the petition, the material identified within the record is temporarily accorded confidential treatment.

A complaining party who wishes to challenge the Commission's confidential determination may do so through the Attorney General. KRS §§ 61.880 and 61.882. If the Attorney General renders a decision in favor of the Commission, a complaining party may appeal by filing an action in Circuit Court. Id. Should the Attorney General find in favor of the complaining party, the Commission may seek review of that decision in Circuit Court. Id.

An employee of the Commission who in contemplation of official action by himself or by the Commission, or in reliance on confidential information to which he has access in his official capacity, uses or attempts to use that information to his pecuniary gain or aids another in doing so commits a Class D felony. KRS § 522.040. Moreover, a public employee is subject to discipline if the employee intentionally, knowingly, or recklessly discloses or fails to protect information classified as confidential.

MICHIGAN PUBLIC SERVICE COMMISSION

OFFER OF PROOF AND CERTIFICATION OF ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

(EXCERPT) Act 3 of 1939

460.6 Public service commission; power and jurisdiction.

Sec. 6. The public service commission is vested with complete power and jurisdiction to regulate all public
utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas, and pipeline companies; motor carriers; and all public transportation and communication agencies other than railroads and railroad companies.

TRANSMISSION OF ELECTRICITY (EXCERPT) Act 106 of 1909

460.551 Transmission of electricity in or between counties; control.

Sec. 1.

When electricity is generated or developed by steam, water or other power, within 1 county of this state, and transmitted and delivered to the consumer in the same or some other county, then the transmission and distribution of the same in or on the public highways, streets and places, the rate of charge to be made to the consumer for the electricity so transmitted and distributed and the rules and conditions of service under which said electricity shall be transmitted and distributed shall be subject to regulation as in this act provided.

460.552 Transmission of electricity; rate regulation by commission.

Sec. 2.

The Michigan public utilities commission, hereinafter referred to as “the commission” shall have control and supervision of the business of transmitting and supplying electricity as mentioned in the first section of this act and no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or charge.

460.6j Incorporation of power supply cost recovery clause in electric rates or rate schedule of utility; definitions; order and hearing; filing power supply cost recovery plan and 5-year forecast; power supply and cost review; final or temporary order; incorporating power supply cost recovery factors in rates; filing revised power supply cost recovery plan; reopening power supply and cost review; monthly statement of revenues; power supply cost reconciliation; commission order; refunds or credits or additional charges to customers; apportionment; interest; exemption; setting power supply cost recovery factors in general rate case order.

Sec. 6j.
(1) As used in this act:
(a) “Power supply cost recovery clause” means a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.
(b) “Power supply cost recovery factor” means that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost recovery clause incorporated in the rates or rate schedule of an electric utility.
(2) Pursuant to its authority under this act, the public service commission may incorporate a power supply cost recovery clause in the electric rates or rate schedule of a utility, but is not required to do so. Any order incorporating a power supply cost recovery clause shall be as a result of a hearing solely on the question of the inclusion of the clause in the rates or rate schedule, which hearing shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 of the Michigan Compiled Laws, or, pursuant to subsection (18), as a result of a general rate case. Any order incorporating a power supply cost recovery clause shall replace and rescind any previous fuel cost adjustment clause or purchased and net interchanged power adjustment clause incorporated in the electric rates of the utility upon the effective date of the first power supply cost recovery factor authorized for the utility under its power supply cost recovery clause.
(3) In order to implement the power supply cost recovery clause established pursuant to subsection (2), a utility annually shall file, pursuant to procedures established by the commission, if any, a complete power supply cost recovery plan describing the expected sources of electric power supply and changes in the cost of power supply anticipated over a future 12-month period specified by the commission and requesting for each of those 12 months a specific power supply cost recovery factor. The plan shall be filed not less than 3 months before the beginning of the 12-month period covered by the plan. The plan shall describe all major contracts and power supply arrangements entered into by the utility for providing power supply during the specified 12-month period. The description of the major contracts and arrangements shall include the price of fuel, the duration of the contract or arrangement, and an explanation or description of any other term or provision as required by the commission. The plan shall also include the utility's evaluation of the reasonableness and prudence of its decisions to provide power supply in the manner described in the plan, in light of its existing sources of electrical generation, and an explanation of the actions taken by the utility to minimize the cost of fuel to the utility.
(4) In order to implement the power supply cost recovery clause established pursuant to subsection (2), a utility shall file, contemporaneously with the power supply cost recovery plan required by subsection (3), a 5-year forecast of the power supply requirements of its customers, its anticipated sources of supply, and projections of power supply costs, in light of its existing sources of electrical generation and sources of electrical generation under construction. The forecast shall include a description of all relevant major contracts and power supply arrangements entered into or contemplated by the utility, and such other information as the commission may require.
(5) If a utility files a power supply cost recovery plan and a 5-year forecast as provided in subsections (3) and (4), the commission shall conduct a proceeding, to be known as a power supply and cost review, for the purpose of evaluating the reasonableness and prudence of the power supply cost recovery plan filed by a utility pursuant to subsection (3), and establishing the power supply cost recovery factors to implement a power supply cost recovery clause incorporated in the electric rates or rate schedule of the utility. The power supply and cost review shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969.
(6) In its final order in a power supply and cost review, the commission shall evaluate the reasonableness

and prudence of the decisions underlying the power supply cost recovery plan filed by the utility pursuant to subsection (3), and shall approve, disapprove, or amend the power supply cost recovery plan accordingly. In evaluating the decisions underlying the power supply cost recovery plan, the commission shall consider the cost and availability of the electrical generation available to the utility; the cost of short-term firm purchases available to the utility; the availability of interruptible service; the ability of the utility to reduce or to eliminate any firm sales to out-of-state customers if the utility is not a multi-state utility whose firm sales are subject to other regulatory authority; whether the utility has taken all appropriate actions to minimize the cost of fuel; and other relevant factors. The commission shall approve, reject, or amend the 12 monthly power supply cost recovery factors requested by the utility in its power supply cost recovery plan. The factors shall not reflect items the commission could reasonably anticipate would be disallowed under subsection (13). The factors ordered shall be described in fixed dollar amounts per unit of electricity, but may include specific amounts contingent on future events.

(7) In its final order in a power supply and cost review, the commission shall evaluate the decisions underlying the 5-year forecast filed by a utility pursuant to subsection (4). The commission may also indicate any cost items in the 5-year forecast that, on the basis of present evidence, the commission would be unlikely to permit the utility to recover from its customers in rates, rate schedules, or power supply cost recovery factors established in the future.

(12) Not less than once a year, and not later than 3 months after the end of the 12-month period covered by a utility's power supply cost recovery plan, the commission shall commence a proceeding, to be known as a power supply cost reconciliation, as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969. Reasonable discovery shall be permitted before and during the reconciliation proceeding in order to assist parties and interested persons in obtaining evidence concerning reconciliation issues including, but not limited to, the reasonableness and prudence of expenditures and the amounts collected pursuant to the clause. At the power supply cost reconciliation the commission shall reconcile the revenues recorded pursuant to the power supply cost recovery factors and the allowance for cost of power supply included in the base rates established in the latest commission order for the utility with the amounts actually expensed and included in the cost of power supply by the utility. The commission shall consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue was not considered adequately at a previously conducted power supply and cost review.

(c) Disallow net increased costs attributable to a generating plant outage of more than 90 days in duration unless the utility demonstrates by clear and satisfactory evidence that the outage, or any part of the outage, was not caused or prolonged by the utility's negligence or by unreasonable or imprudent management.

(e) Disallow the cost of fuel purchased from an affiliated company to the extent that such fuel is more costly than fuel of requisite quality available at or about the same time from other suppliers with whom it would be comparably cost beneficial to deal.

(14) In its order in a power supply cost reconciliation, the commission shall require a utility to refund to customers or credit to customers' bills any net amount determined to have been recovered over the period covered in excess of the amounts determined to have been actually expensed by the utility for power supply, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the power supply and cost review. Such refunds or credits shall be apportioned among the customers of the utility utilizing procedures that the commission determines to be reasonable. The commission may adopt different procedures with respect to customers served under the various rate schedules of the utility and may, in appropriate circumstances, order refunds or credits in proportion to the excess amounts actually collected from each such customer during the period covered.

(15) In its order in a power supply cost reconciliation, the commission shall authorize a utility to recover from customers any net amount by which the amount determined to have been recovered over the period covered was less than the amount determined to have been actually expensed by the utility for power

supply, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the power supply and cost review. For excess costs incurred through management actions contrary to the commission's power supply and cost review order, the commission shall authorize a utility to recover costs incurred for power supply in the reconciliation period in excess of the amount recovered over the period only if the utility demonstrates by clear and convincing evidence that the excess expenses were beyond the ability of the utility to control through reasonable and prudent actions. For excess costs incurred through management actions consistent with the commission's power supply and cost review order, the commission shall authorize a utility to recover costs incurred for power supply in the reconciliation period in excess of the amount recovered over the period only if the utility demonstrates that the level of such expenses resulted from reasonable and prudent management actions. Such amounts in excess of the amounts actually recovered by the utility for power supply shall be apportioned among and charged to the customers of the utility utilizing procedures that the commission determines to be reasonable. The commission may adopt different procedures with respect to customers served under the various rate schedules of the utility and may, in appropriate circumstances, order charges to be made in proportion to the amounts which would have been paid by such customers if the amounts in excess of the amounts actually recovered by the utility for cost of power supply had been included in the power supply cost recovery factors with respect to such customers during the period covered. Charges for such excess amounts shall be spread over a period that the commission determines to be appropriate.
(18) ….. If the commission sets power supply cost recovery factors in an order resulting from a general rate case:
(a) The power supply cost recovery factors shall cover a future period of 48 months or the number of months which elapse until the commission orders new power supply cost recovery factors in a general rate case, whichever is the shorter period.
(b) Annual reconciliation proceedings shall be conducted pursuant to subsection (12) and if an annual reconciliation proceeding shows a recoverable amount pursuant to subsection (15), the commission shall authorize the electric utility to defer the amount and to accumulate interest on the amount pursuant to subsection (16), and in the next order resulting from a general rate case authorize the utility to recover the amount and interest from its customers in the manner provided in subsection (15).

460.10 §§ 460.10 to 460.10bb; title of sections; purpose; applicability after January 1, 2002.
Sec. 10.
(1) Sections 10 through 10bb shall be known and may be cited as the “customer choice and electricity reliability act”.
(2) The purpose of sections 10a through 10bb is to do all of the following:
(a) To ensure that all retail customers in this state of electric power have a choice of electric suppliers.
(b) To allow and encourage the Michigan public service commission to foster competition in this state in the provision of electric supply and maintain regulation of electric supply for customers who continue to choose supply from incumbent electric utilities.
(c) To encourage the development and construction of merchant plants which will diversify the ownership of electric generation in this state.
(d) To ensure that all persons in this state are afforded safe, reliable electric power at a reasonable rate.
(e) To improve the opportunities for economic development in this state and to promote financially healthy and competitive utilities in this state.
(3) Subsection (2) does not apply after December 31, 2003.

460.10a Alternative electric suppliers; orders establishing rates, terms, and conditions of service; licensing procedure; switching or billing for services without consent; code of conduct; appliance service program; orders issued before June 5, 2000; self-service power; affiliate wheeling; rights of parties to existing contracts and agreements; true-up adjustment; determination of net stranded

costs; securitization charges; rates of returning customers.
Sec. 10a.
(2) The commission shall issue orders establishing a licensing procedure for all alternative electric suppliers. To ensure adequate service to customers in this state, the commission shall require that an alternative electric supplier maintain an office within this state, shall assure that an alternative electric supplier has the necessary financial, managerial, and technical capabilities, shall require that an alternative electric supplier maintain records which the commission considers necessary, and shall ensure an alternative electric supplier's accessibility to the commission, to consumers, and to electric utilities in this state. The commission also shall require alternative electric suppliers to agree that they will collect and remit to local units of government all applicable users, sales, and use taxes. An alternative electric supplier is not required to obtain any certificate, license, or authorization from the commission other than as required by this act.
(3) The commission shall issue orders to ensure that customers in this state are not switched to another supplier or billed for any services without the customer's consent.
(4) No later than December 2, 2000, the commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities. The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10cc.
(12) The orders issued by the commission before June 5, 2000 that allow customers of an electric utility to choose an alternative electric supplier, including orders that determine and authorize recovery of net stranded costs and implementation costs and that confirm any voluntary commitments of electric utilities, are in compliance with this act and enforceable by the commission. An electric utility that has not had voluntary commitments to provide customer choice previously approved by orders of the commission shall file a restructuring plan to allow customers to choose an alternative electric supplier no later than the date ordered by the commission. The plan shall propose a methodology to determine the electric utility's net stranded costs and implementation costs.
(19) After the time period described in section 10d(2), the rates for retail customers that remain with or leave and later return to the incumbent electric utility shall be determined in the same manner as the rates were determined before the effective date of this section.

460.10b Rates, terms, and conditions of new technologies; application to unbundle existing rate schedules; providing reliable and lower cost competitive rates; standby generation service; identification of retail market prices.

Sec. 10b.

(1) The commission shall establish rates, terms, and conditions of electric service that promote and enhance the development of new generation, transmission, and distribution technologies.

(2) No later than 1 year from the effective date of the amendatory act that added this section, each electric utility shall file an application with the commission to unbundle its existing commercial and industrial rate schedules and separately identify and charge for their discrete services. No earlier than 1 year from the effective date of the amendatory act that added this section, the commission may order the electric utility to file an application to unbundle existing residential rate schedules. The commission may allow the unbundled rates to be expressed on residential billings in terms of percentages in order to simplify residential billing. The commission shall allow recovery by electric utilities of all just and reasonable costs incurred by electric utilities to implement and administer the provisions of this subsection.

(3) The orders issued under this act shall include, but are not limited to, the providing of reliable and lower cost competitive rates for all customers in this state.

(4) An electric utility is obligated, with commission oversight, to provide standby generation service for open access load on a best efforts basis until December 31, 2001 or the date established under section 10d(2), whichever is later. The pricing for the electric generation standby service is equal to the retail market price of comparable standby service allowed under subsection (5). An electric utility is not required to interrupt firm off-system sales or firm service customers to provide standby generation service. Until the date established under section 10d(2), standby generation service shall continue to be provided to non open access customers under regulated tariffs.

(5) The methodology for identifying the retail market price for electric generation service to be applied under this section shall be determined by the commission based upon market indices commonly relied upon in the electric generation industry, adjusted as appropriate to reflect retail market prices in the relevant market.

MICHIGAN FREEDOM OF INFORMATION ACT (EXCERPT)
Act 442 of 1976

15.236 FOIA coordinator.

Sec. 6.

(1) A public body that is a city, village, township, county, or state department, or under the control of a city, village, township, county, or state department, shall designate an individual as the public body's FOIA coordinator. The FOIA coordinator shall be responsible for accepting and processing requests for the public body's public records under this act and shall be responsible for approving a denial under section 5(4) and (5). In a county not having an executive form of government, the chairperson of the county board of commissioners is designated the FOIA coordinator for that county.

(2) For all other public bodies, the chief administrative officer of the respective public body is designated the public body's FOIA coordinator.

(3) An FOIA coordinator may designate another individual to act on his or her behalf in accepting and processing requests for the public body's public records, and in approving a denial under section 5(4) and (5).

15.243 Exemptions from disclosure; public body as school district or public school academy; withholding of information required by law or in possession of executive office.

Sec. 13.

(1) A public body may exempt from disclosure as a public record under this act any of the following:

(d) Records or information specifically described and exempted from disclosure by statute.

(e) A public record or information described in this section that is furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.

(f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:

(i) The information is submitted upon a promise of confidentiality by the public body.

(ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.

(iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

(i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.

MINNESOTA PUBLIC UTILITIES COMMISSION AND THE MINNESOTA DEPARTMENT OF COMMERCE

OFFER OF PROOF AND CERTIFICATION OF ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

The Minnesota Public Utilities Commission (PUC) and the Minnesota Department of Commerce (Department), collectively the "Minnesota Agencies," offer the FERC the following information to establish that the Minnesota Agencies have the duty to regulate retail electric service in the State of Minnesota and, thus, gives them sufficient standing in this matter. Further, Minnesota Statutes contain safeguards for the treatment, i.e. unauthorized release, of information meeting the definition of trade secret information under Minn. Stat. § 13.37, subdivision 1. For the protection of data provided to the Minnesota Agencies, the MISO must clearly identify and mark as "Trade Secret" any data it determines to be confidential or trade secret for the purposes of ensuring that the data is not released to the public.

Regulatory Responsibility of the Minnesota Agencies

The duties of Minnesota Public Utilities Commission are established in Minnesota Statute 216A.05, subdivision 1:

> The functions of the commission shall be legislative and quasi-judicial in nature. It may make such investigations and determinations, hold such hearings, prescribe such rules and issue such orders with respect to the control and conduct of the businesses coming within its jurisdiction as the legislature itself might make but only as it shall from time to time authorize. It may adjudicate all proceedings brought before it in which the violation of any law or rule administered by the Department of Commerce is alleged.

The duties of the Department are established in Minnesota Statute 216A.07, subdivision 2 which designates the Department as the party "responsible for the enforcement of chapters 216A [Public Utilities Regulators], 216B [Public Utilities] and 237 [Telephone, Telegraph, Telecommunications] and the orders of the [Public Utilities] [C]ommission issued pursuant to those chapters." Furthermore, Minnesota Statute 216C.09 (a)(1) makes the Department the central repository within the state government for the collection of data on energy.

Minnesota Statutes and the Protection of Trade Secret Data

Chapter 13 of Minnesota Statutes regulates the Minnesota Agencies' collection, creation, storage, maintenance, dissemination, and access to government data in state agencies, statewide systems, and political subdivisions. Section 13.03, Access to Government Data, establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public. That section details the procedures by which access to data is governed.

Minnesota Statute 13.37, subdivision 1, identifies "trade secret information" as information, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. The Minnesota Agencies' joint policy for handling trade secret and privileged data requires that data considered "trade secret" must be clearly marked as such. Data that meet the definition of "trade secret" qualify as "nonpublic" data which are protected from disclosure. Minn. Stat. § 13D.05, subdivision 1, however, requires that a meeting of the Minnesota Public Utilities Commission at which trade secret data are discussed must be open to the public unless a protective order is in effect.

Under Minnesota Statute §13.06, a state agency may, if so needed, apply to the Commissioner of Administration for permission to classify data or types of data on individuals as private or confidential, or data not on individuals as nonpublic or protected nonpublic, for its own use and for the use of other similar agencies, political subdivisions, or statewide systems on a temporary basis until a proposed statute can be acted upon by the legislature.

Minnesota Statute §§ 13.08 and 13.09 contain the civil remedies and penalty provisions for a violation of Minn. Stat. ch. 13.

MISSOURI PUBLIC SERVICE COMMISSION

OFFER OF PROOF AND CERTIFICATION OF ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

The Missouri Public Service Commission (MoPSC) is a state agency, comprised of five individuals appointed as Commissioners by the Governor of the State of Missouri, who, among other things, are charged with setting just and reasonable rates of electrical corporations providing safe and adequate service and efficient facilities. Moreover, the Missouri Commissioners are charged, in general,

with being aware of the practices of these electrical corporations and addressing, as need be, those practices as they affect the operations of these entities and the provision of electrical service in the State of Missouri. Sections 393.130, 393.140 and 386.610 RSMo. The MoPSC has a staff of economists, engineers, accountants, financial analysts, attorneys and other professionally trained individuals who provide assistance to the Missouri Commissioners in these matters at both the state level and also at the federal level. The MoPSC utilizes legal counsel based in Washington, D.C. in addition to legal counsel in Jefferson City to provide assistance to the MoPSC in matters pending before federal agencies, in particular matters before the Federal Energy Regulatory Commission (FERC).

Indicative of the statutory purview and obligations of the MoPSC is that on February 26, 2004, in MoPSC Case No. EO-2003-0271, the MoPSC issued an Order Approving Stipulation And Agreement authorizing Union Electric Company, d/b/a Ameren UE to participate in the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) through a contractual agreement with GridAmerica, LLC. The MoPSC also would note that presently pending before it is the application of Aquila, Inc. in Case No. EO-2003-0566, seeking MoPSC authorization to join the Midwest ISO.

Treatment Of Information Provided To Missouri Public Service Commission (MoPSC)/Missouri Commission Staff (MoPSC Staff) Or Missouri Office Of Public Counsel (MoOPC) In Missouri Docketed Cases And Treatment Of Information Requested By MoPSC/MoPSC Staff Or MoOPC Outside Of Missouri Docketed Cases

Information provided to the Missouri Public Service Commission (MoPSC), including the Commissioners, the personal advisors of the Commissioners and the Missouri Public Service Commission Staff (MoPSC Staff), or the Missouri Office of the Public Counsel (MoOPC), including the Public Counsel and employees of the Public Counsel, is covered by various statutes, but there is a specific statute, Section 386.480 RSMo,[22] in the MoPSC Law, which takes precedence. All information provided to the MoPSC/MoPSC Staff and the MoOPC is public information/public records, but it may be treated as "closed public information," rather than "open public information," and access to closed public information may be limited. If the information is open public information, it is available for unrestricted public inspection. If the information is not open public information, i.e., if the information is closed public information, it is not available for unlimited public inspection. Missouri also has a Sunshine Law, Chapter 610 RSMo, which is similar in various respects to the Federal Freedom of Information Act, and as with the Federal Freedom of Information Act, not all public information/ public records are open to unlimited public inspection. Section 610.021 provides, in part, that a public governmental body is authorized to close records to the extent they relate to, among other things, records which (1) are protected from disclosure by law, (2) software codes for electronic data processing and documentation thereof and (3) relate to scientific and technological innovations in which the owner has a proprietary interest. Chapter 610 applies to the MoPSC, but Section 386.480 takes precedence and applies to all information provided to the MoPSC/MoPSC Staff or the MoOPC.

Under Section 386.480, an officer of the MoPSC (i.e., a Commissioner), an employee of the

[22] Section 386.480:

> No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provisions of this chapter, or chapter 610, RSMo, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. The public counsel shall have full and complete access to public service commission files and records. Any officer or employee of the commission or the public counsel or any employee of the public counsel who, in violation of the provisions of this section, divulges any such information shall be guilty of a misdemeanor.

MoPSC (i.e., a member of the MoPSC Staff), Public Counsel or an employee of MoOPC is guilty of a misdemeanor if they publicly divulge information provided to the MoPSC/MoPSC Staff or the MoOPC without an order of the MoPSC, unless the information is otherwise specifically required to be open to public inspection by the MoPSC Law, is open to public inspection by virtue of some other statutory provision or has been treated as open public information by anyone in possession of the information. Due to the existence of Section 386.480, the MoPSC Commissioners and their personal advisors, the MoPSC Staff and the MoOPC are not required to sign nondisclosure agreements under state law. The MoPSC has adopted a rule, 4 CSR 240-2.085[23], that provides for the issuance of a Protective Order by the MoPSC, in particular, in docketed cases in which a party desires to have information treated as not open to public inspection. The MoPSC is not limited to issuing a Protective Order only in docketed cases. The MoPSC rule addresses the specific treatment of information asserted to be either "Highly Confidential (HC),"[24] "Proprietary (P)"[25] or "Non-Proprietary (NP)"[26] in docketed cases. It is not required that there be a

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[23] In *obiter dicta* in *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n,* 562 S.W.2d 688, 694 n.13 (Mo.App. 1978), the Missouri Court of Appeals, St. Louis District, stated as follows: "We believe that the [MoPSC] should take steps to promulgate a similar rule [to that of the United States Nuclear Regulatory Commission] for the examination of proprietary information and for the presentation of evidence or cross-examination involving proprietary data by means of an *in camera* proceeding."

The MoPSC subsequently promulgated MoPSC Rule 4 CSR 240-2.085 Protective Orders, which states, in part, as follows:

> Any party seeking a protective order in any case, shall request such by separate pleading denominated "Motion for Protective Order." The pleading shall state with particularity why the moving party seeks protection, and what harm may occur if the information is made public. The pleading shall also include a statement that none of the information for which a claim of confidentiality is made can be found in any format in any other public document.

[24] The standard MoPSC Protective Order in docketed cases permits information to be designated as Highly Confidential (HC), Proprietary (P) or Nonproprietary (NP). The Highly Confidential designation is defined as follows:

> Highly Confidential (HC) – Information concerning (1) material or documents that contain information relating directly to specific customers; (2) employee-sensitive information; (3) marketing analyses or other market-specific information relating to services offered in competition with others; (4) reports, work papers or other documentation related to work produced by internal or external auditors or consultants; (5) strategies employed, to be employed, or under consideration in contract negotiations.
>
> Materials or information designated as Highly Confidential may, at the option of the furnishing party, be made available only on the furnishing party's premises and may be reviewed only by attorneys or outside experts who have been retained for the purpose of the case, unless good cause can be shown for disclosure of the information off-premises and the designated information is delivered to the custody of the requesting party's attorney. Outside expert witnesses shall not be employees, officers or directors of any of the parties in the proceeding. No copies of such material or information shall be made and only limited notes may be taken, and such notes shall be treated as the Highly Confidential information from which notes were taken.

[25] The Proprietary designation is defined as folllows:

> Proprietary (P) – Information concerning trade secrets,25 as well as confidential or private technical, financial and business information.
>
> Disclosure of Proprietary information shall be made only to attorneys, and to such employees who are working as consultants to such attorney or intend to file testimony in the proceedings, or to persons

docketed case for the MoPSC/MoPSC Staff and the MoOPC to perform their statutory responsibilities. In those situations where there is not a docketed case, there are no intervenors/parties. Since there are no intervenors/parties, the only entities that may access the purportedly confidential or proprietary information without a Commission Order are entities covered by Section 386.480, which is limited to the MoPSC/MoPSC Staff and MoOPC, and makes it a misdemeanor for the MoPSC/MoPSC Staff or the MoOPC to make open to the public, matters not specifically required to be open to public inspection by the MoPSC Law, the Missouri Sunshine Law (Chapter 610) or MoPSC Order.

If at a hearing the HC or P information needs to be addressed, the proceedings are held *in camera*, i.e., all individuals who are not permitted by the Protective Order to see the particular information are cleared from the hearing room and the transcript of this portion of the proceedings is filed with the MoPSC under seal as either HC or P and is covered by the Protective Order.

In Missouri, in addition to a party seeking discovery by traditional forms of discovery (interrogatories, *subpoenas duces tecum*, depositions, requests for admissions, etc.) discovery by data request, which is akin to an interrogatory, is also recognized by MoPSC rule and case law. *State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 645 S.W.2d 44, 50-51 (Mo.App. 1983). Discovery through this method is governed by the same principles outlined above.[27]

A Missouri circuit court held in a 1993 decision in *Southwestern Bell Tel. Co. v. McClure*, Case No. CV193-502cc, pp. 8-9, Circuit Court of Cole County, in part, as follows:

> 1. The United States Constitution recognizes a property interest in maintaining the confidentiality of private business data. U. S. Const. Amend. XIV; *Ruckelshaus v. Monsanto*, 467 U.S. 986, 81 L. Ed.2d 815 at 831 (1989); *see also* Mo. Const. Art. 1 §10. Under Missouri law such a property interest is found by examining the following factors:
>
> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to secure the secrecy of the information; (4) the value of the

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designated by a party as outside experts. Employees to whom such disclosure is to be made must be identified to the other party by name, title and job classification prior to disclosure. Information designated as Proprietary shall be served on the attorney(s) for the requesting party. On-premises inspection shall not be required for Proprietary information, except in the case of voluminous documents. Any employees of the party who wish to review such Proprietary materials shall first read the Protective Order and certify in writing that (s)he has reviewed same and consented to its terms. The acknowledgment so executed shall contain the signatory's full name, permanent address, title or position, date signed, and an affirmation that the signer is acting on behalf of his/her employer. Such acknowledgment shall be delivered to counsel for the party furnishing the information or documents before disclosure is made.

[26] The Nonproprietary designation is defined as information that is neither Highly Confidential nor Proprietary.

[27] At the MoPSC, it is not automatic that all parties to a case receive copies of discovery of each other party and the responses to that discovery. Generally, Party A will first submit a data request to Party B requesting copies of all discovery requests that Party B has submitted or will submit to Party C or any other party. Next, Party A will review the discovery requests submitted by Party B to Party C. If Party A desires copies of specific discovery responses which Party C has provided to Party B, Party A will be asked to submit a request to Party C for copies of the discovery responses that Party C submitted to Party B in response to discovery from Party B. Generally, Party B does not want to be in the position of producing for Party A copies of information that Party C has asserted is HC or P. Also, if Party A must ask Party C for copies of information that Party C asserts to be HC or P, then Party C is aware that Party A is seeking access to this particular information and Party C may object to Party A's request for this information.

information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

See Ultra-Life Labs v. Eames, 221 S.W.2d 224, 233 (Mo.App. 1949) (quoting from the Restatement of the Law of Torts).

2. The property interest in such private business information may be protected by an injunction. *Ultra-Life Labs, Id*.

3. Missouri Rule of Civil Procedure 56.01(c)(7) also empowers a court to require that the confidential commercial information of parties before it not be disclosed or be disclosed only in a designated way. Rule 56.01 (c)(7).

4. The PSC has the right and obligation to honor the constitutionally protected property interest that persons coming before it have in their confidential business data. The "Sunshine Law" §610.000 RSMo (1986) *et seq*. does not allow nor require the PSC to abrogate such property interests. Instead, §610.021(14) RSMo Supp. (1992) specifically exempts information "otherwise protected by the law" from public disclosure.

In Missouri, decisions of circuit courts are not published and the case law states, regarding MoPSC orders on appeal from a Missouri circuit court to a Missouri court of appeals or the Missouri supreme court, that it is the decision of the MoPSC, not the decision of the circuit court, which is on review to the higher court. Thus, the June 21, 1993 decision of the Circuit Court of Cole County may be viewed as not constituting precedent or even being persuasive, except under the legal doctrines of law of the case, res judicata and collateral estoppel. Nonetheless, the decision is instructive as to how a Missouri court might rule.

Some state commissions have experience working together in multi-state audits. For example, in the 1980's and, in particular, in the 1990's, the MoPSC participated with other state commissions and the Federal Communications Commission (FCC) in separate joint audits of Bell Communications Research, Inc. (Bellcore),[28] GTE Telephone Operations basic property records[29] and Southwestern Bell Telephone Company affiliated transactions.[30] Each audit involved the review and the receipt of documents or copies of documents by the various state commission auditors containing or comprising data, information, studies and other materials that were deemed by Bellcore, GTE or SWBT as constituting trade secrets, valuable or sensitive commercial or financial information or information otherwise asserted by Bellcore, GTE or SWBT to be confidential or proprietary. For each of those audits, a common Protective Agreement was jointly negotiated covering the state commission staff members participating in each of those audits. Some states issued Orders, which served as addenda to the Protective Agreement. The last sentence of the MoPSC addendum Order to

[28] The Bellcore audit included the FCC and the California Public Utilities Commission, Florida Public Service Commission, Missouri Public Service Commission, Pennsylvania Public Utilities Commission, Tennessee Public Service Commission, West Virginia Public Service Commission and Wisconsin Public Service Commission.

[29] The GTE Telephone Operations basic property records audit included the FCC and the Alabama Public Service Commission, Arkansas Public Service Commission, Missouri Public Service Commission, Nebraska Public Service Commission, Ohio Public Utility Commission and Pennsylvania Public Utility Commission.

[30] The Southwestern Bell Telephone Company affiliated transactions audit included the FCC and the Arkansas Public Service Commission, Kansas Corporation Commission, Missouri Public Service Commission, Oklahoma Corporation Commission and the Texas Public Utility Commission.

the Protective Agreement between SWBT and the state commissions and the last sentence of the MoPSC addendum Order to the Protective Agreement between GTE and the state commissions both state that "[n]othing directed herein is intended to constitute a public release of information that is not already public information."

MONTANA PUBLIC SERVICE COMMISSION:

STATEMENT ON ABILITY TO PROTECT CONFIDENTIAL INFORMATION

The Montana Public Service Commission (MPSC) is authorized by law to protect certain information. Section 69-3-105(2), MCA, reads: "The Commission may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402, required to carry out its regulatory functions." The definition of trade secret at § 30-14-402(4) is as follows:

> "Trade secret" means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that:
> (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The MPSC may also protect other types of information if the provider/applicant can establish a lawful basis for protection. Requests to protect information are governed by MPSC administrative rules at ARM 38.2.5001-5030, which are available at the MPSC website, or on request. ARM 38.2.5007 contains pleading requirements for claiming trade secret protection, individual privacy protection, and other lawful claims.

MPSC Commissioners or MPSC staff who deliberately disclose protected information are subject to appropriate sanctions under Montana law. The MPSC takes seriously its responsibility to safeguard information covered by protective order, and has a reasonable process in place to safeguard such information. It is believed that the MPSC has never been the source of unlawful disclosure of protected information.

The MPSC, as the "authorized agency," can protect confidential information consistent with Montana law. Duly designated MPSC staff may sign a non-disclosure agreement and protect confidential information from other staff, MPSC Commissioners, and others who have not also signed a non-disclosure agreement.

NEBRASKA POWER REVIEW BOARD

OFFER OF PROOF AND CERTIFICATION REGARDING ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

Unlike most, and perhaps all, other state regulatory agencies exercising jurisdiction over electric utilities, the Nebraska Power Review Board ("NPRB") does not have any authority to approve rates that power suppliers charge consumers for electricity. Due to this, the NPRB does not normally receive or require disclosure of confidential information from the utilities over which it has jurisdiction. Nebraska is

unique in that there are no investor-owned electric utilities with retail operations in the state. Nebraska is served entirely by consumer-owned electric power suppliers, including public power districts, municipalities, and cooperatives. Nebraska's public power districts and municipalities are subject to the same disclosure requirements under public records laws as is the NPRB.

Nebraska law requires that all documents be considered public records unless there is a specific provision under which the document or record can be withheld. Neb. Rev. Stat. section 84-712.01 (1999). The general categories of documents that may be withheld from the public are enumerated in Neb. Rev. Stat. section 84-712.05 (1999). Subsection 3 of the statute states that trade secrets, scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no useful purpose, can be withheld. Subsection 5 states that records developed by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute part of the examination, investigation, citizen complaints or inquiries. Subsection 9 allows public utilities to withhold personally identified private citizen account payment information, credit information on others supplied in confidence, and customer lists. The NPRB does not have independent authority to issue orders finding that a record should be withheld from disclosure.

Due to the unique electric utility structure and regulatory scheme in the State of Nebraska, the NPRB does not have a need for the types of confidential information required by other state regulatory agencies. Should a situation arise under which the NPRB would need to acquire confidential information or documents, the NPRB would be willing to attest to the following prior to accepting such information or documents:

1) that Nebraska law allows or requires the information or document(s) to be withheld from public disclosure;
2) that the NPRB's executive director and general counsel or the NPRB Chairperson be required to sign a FERC and Midwest ISO approved "Non-Disclosure Agreement"; and
3) that the NPRB will make a written request, with adequate specificity, to the Midwest ISO or the Independent Market Monitor only for that information for which a determination has been made that Nebraska law allows or requires the confidential information to be withheld from public disclosure.

NORTH DAKOTA PUBLIC SERVICE COMMISSION:

OFFER OF PROOF AND CERTIFICATION OF ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

The statute is N.D.C.C. § 49-02-02(7) which provides that the commission shall have the power to:

> Cooperate with and receive technical and financial assistance from the United States, any state, or any department, agency, or officer thereof for any purposes relating to federal energy laws that deal with energy conservation, coal conversion, rate reform, and utilities subject to the jurisdiction of the commission. The commission shall also have the authority to file any reports, hold hearings, and promulgate regulations for any such purposes. Information received by the commission which was developed or obtained by the market monitor of the Midwest independent system operator, incorporated, or its successor, is exempt from section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.

PUBLIC UTILITIES COMMISSION OF OHIO

OFFER OF PROOF AND CERTIFICATION OF ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

This Offer of Proof and Certification responds to paragraphs 11 and 12 of the Order issued by the Federal Energy Regulatory Commission on September 30, 2004 in Docket No. ER-04-691-004. The Public Utilities Commission of Ohio (PUCO) hereby demonstrates its need for access to MISO Confidential Information, and presents its legal authority to protect this information.

The Ohio General Assembly has charged the PUCO with the duty to resolve abuses of market power in retail electric markets, to take measures to assure reasonable rates within a transmission constrained area, and to resolve abuses of market power that are not adequately mitigated by regional transmission organizations (RTOs).[31] Additionally, the PUCO is required to review long-term forecast reports by electric utilities[32] and to issue rules specifying measures to be taken during an energy emergency.[33] Finally, PUCO staff assists the Power Siting Board in reviewing applications to construct generation or transmission facilities.[34] In order to efficiently perform these statutory duties, the PUCO requires access to the Confidential Information held by the MISO.

Ohio Revised Code Section 149.43 (A)(1)(v) exempts records from public disclosure requirements,[35] which are required to be kept confidential by state or federal law One such state law protects trade secrets. A "trade secret" is defined as information that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[36] Additionally, the PUCO is required to take necessary measures to protect the confidentiality of information regarding a competitive retail electric service.[37]

The Public Utilities Commission of Ohio Makes The Following Attestations:

1. The PUCO may issue an order that is necessary to protect the confidentiality of information in a document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the Commission to be a trade secret.[38]
2. The Commission and its staff have a long history of operating under these procedures for confidential information, and, to the best of our knowledge and belief, have never violated a protective order.
3. The PUCO will issue a protective order determining how data provided by the MISO or the Independent Market Monitor to the Commission will be treated under the exceptions to the public records statutes described above. In addition, the PUCO attests that:
   a. as the "Authorized Agency" it can protect confidential information;
   b. an "Authorized Requestor," as a duly designated employee of the Public Utilities Commission of Ohio, can protect confidential information;
   c. an Authorized Requestor will be required to sign a FERC and MISO approved "Non-

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31 Ohio Rev. Code § 4928.06(E) (included in Attachment A).
32 Ohio Rev. Code § 4935.04 (included in Attachment A).
33 Ohio Rev. Code § 4935.03 (included in Attachment A).
34 Ohio Rev. Code § 4906.03 (included in Attachment A).
35 Ohio Rev. Code § 149.43 (A)(1)(v) (included in Attachment A).
36 Ohio Rev. Code § 1333.61 (D) (included in Attachment A).
37 Ohio Rev. Code § 4928.06 (F) (included in Attachment A).
38 Ohio Admin. Code § 4901-1-24 (D) (included in Attachment A).

Disclosure Agreement"; and

d. an Authorized Requestor will make a written request, with adequate specificity, to the Midwest ISO or the Independent Market Monitor only for that information which is covered by the PUCO's protective order.

Attached to this Offer of Proof are the Ohio statutes that demonstrate need for access to Confidential Information, and that enable the PUCO to protect such information. PUCO reserves the right to make supplemental filings that amplify and augment this Offer of Proof.

Public Utilities Commission of Ohio

Offer of Proof and Certification of Ability to Safeguard Confidential Information

Attachment A – Statutory Authorities and Responsibilities

§ 4928.02. State policy commencing with start of competitive retail electric service.

It is the policy of this state to do the following throughout this state beginning on the starting date of competitive retail electric service:

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service;

(H) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

§ 4928.06. Commission to ensure effectuation of state policy; rules; abuses of market power.

(E) (1) Beginning on the starting date of competitive retail electric service, the commission has authority under Chapters 4901. to 4909. of the Revised Code, and shall exercise that authority, to resolve abuses of market power by any electric utility that interfere with effective competition in the provision of retail electric service.

(2) In addition to the commission's authority under division (E)(1) of this section, the commission, beginning the first year after the market development period of a particular electric utility and after reasonable notice and opportunity for hearing, may take such measures within a transmission constrained area in the utility's certified territory as are necessary to ensure that retail electric generation service is provided at reasonable rates within that area. The commission may exercise this authority only upon findings that an electric utility is or has engaged in the abuse of market power and that that abuse is not adequately mitigated by rules and practices of any independent transmission entity controlling the transmission facilities. Any such measure shall be taken only to the extent necessary to protect customers in the area from the particular abuse of market power and to the extent the commission's authority is not preempted by federal law. The measure shall remain in effect until the commission, after reasonable notice and opportunity for hearing, determines that

the particular abuse of market power has been mitigated.

§ 4928.06. Commission to ensure effectuation of state policy; rules; abuses of market power.

(F) An electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code shall provide the commission with such information, regarding a competitive retail electric service for which it is subject to certification, as the commission considers necessary to carry out this chapter. An electric utility shall provide the commission with such information as the commission considers necessary to carry out divisions (B) to (E) of this section. The commission shall take such measures as it considers necessary to protect the confidentiality of any such information.

The commission shall require each electric utility to file with the commission on and after the starting date of competitive retail electric service an annual report of its intrastate gross receipts and sales of kilowatt hours of electricity, and shall require each electric services company, electric cooperative, and governmental aggregator subject to certification to file an annual report on and after that starting date of such receipts and sales from the provision of those retail electric services for which it is subject to certification. For the purpose of the reports, sales of kilowatt hours of electricity are deemed to occur at the meter of the retail customer.

§ 4935.03. Energy emergency rules; governor may declare emergency.

(A) The public utilities commission shall adopt, and may amend or rescind, rules in accordance with section 111.15 of the Revised Code, with the approval of the governor, defining various foreseen types and levels of energy emergency conditions for critical shortages or interruptions in the supply of electric power, natural gas, coal, or individual petroleum fuels and specifying appropriate measures to be taken at each level or for each type of energy emergency as necessary to protect the public health or safety or prevent unnecessary or avoidable damage to property. The rules may prescribe different measures for each different type or level of declared energy emergency, and for any type or level shall empower the governor to:

(1) Restrict the energy consumption of state and local government offices and industrial and commercial establishments;

(2) Restrict or curtail public or private transportation or require or encourage the use of car pools or mass transit systems;

(3) Order, during a declared energy emergency, any electric light, natural gas or gas, or pipeline company; any supplier subject to certification under section 4928.08 or 4929.20 of the Revised Code; electric power or gas utility that is owned by a municipal corporation or not for profit; coal producer or supplier; electric power producer or marketer; or petroleum fuel producer, refiner, wholesale distributor, or retail dealer to sell electricity, gas, coal, or petroleum fuel in order to alleviate hardship, or if possible to acquire or produce emergency supplies to meet emergency

needs;

(4) Order, during a declared energy emergency, other energy conservation or emergency energy production or distribution measures to be taken in order to alleviate hardship;

(5) Mobilize emergency management, national guard, law enforcement, or emergency medical services.

The rules shall be designed to protect the public health and safety and prevent unnecessary or avoidable damage to property. They shall encourage the equitable distribution of available electric power and fuel supplies among all geographic regions in the state.

(B) The governor may, after consultation with the chairperson of the commission, declare an energy emergency by filing with the secretary of state a written declaration of an energy emergency at any time the governor finds that the health, safety, or welfare of the residents of this state or of one or more counties of this state is so imminently and substantially threatened by an energy shortage that immediate action of state government is necessary to prevent loss of life, protect the public health or safety, and prevent unnecessary or avoidable damage to property. The declaration shall state the counties, utility service areas, or fuel market areas affected, or its statewide effect, and what fuels or forms of energy are in critically short supply. An energy emergency goes into immediate effect upon filing and continues in effect for the period prescribed in the declaration, but not more than thirty days. At the end of any thirty-day or shorter energy emergency, the governor may issue another declaration extending the emergency. The general assembly may by concurrent resolution terminate any declaration of an energy emergency. The emergency is terminated at the time of filing of the concurrent resolution with the secretary of state. When an energy emergency is declared, the commission shall implement the measures which it determines are appropriate for the type and level of emergency in effect.

(C) Energy emergency orders issued by the governor pursuant to this section shall take effect immediately upon issuance, and the person to whom the order is directed shall initiate compliance measures immediately upon receiving the order. During an energy emergency the attorney general or the prosecuting attorney of the county where violation of a rule adopted or order issued under this section occurs may bring an action for immediate injunction or other appropriate relief to secure prompt compliance. The court may issue an ex parte temporary order without notice which shall enforce the prohibitions, restrictions, or actions that are necessary to secure compliance with the rule or order. Compliance with rules or orders issued under this section is a matter of statewide concern.

(D) During a declared energy emergency the governor may use the services, equipment, supplies, and facilities of existing departments, offices, and agencies of the state and of the political

subdivisions thereof to the maximum extent practicable and necessary to meet the energy emergency, and the officers and personnel of all such departments, offices, and agencies shall cooperate with and extend such services and facilities to the governor upon request.

(E) During an energy emergency declared under this section, no person shall violate any rule adopted or order issued under this section. Whoever violates this division is guilty of a minor misdemeanor on a first offense, and a misdemeanor of the first degree upon subsequent offenses or if the violation was purposely committed

§ 4935.04. Long-term forecast report by major utility facility owner or operator; review, comment, hearings.

(A) As used in this chapter:

(1) "Major utility facility" means:

(a) An electric transmission line and associated facilities of a design capacity of one hundred twenty-five kilovolts or more;

(b) A gas or natural gas transmission line and associated facilities designed for, or capable of, transporting gas or natural gas at pressures in excess of one hundred twenty-five pounds per square inch.

"Major utility facility" does not include electric, gas, or natural gas distributing lines and gas or natural gas gathering lines and associated facilities as defined by the public utilities commission; facilities owned or operated by industrial firms, persons, or institutions that produce or transmit gas or natural gas, or electricity primarily for their own use or as a byproduct of their operations; gas or natural gas transmission lines and associated facilities over which an agency of the United States has certificate jurisdiction; facilities owned or operated by a person furnishing gas or natural gas directly to fifteen thousand or fewer customers within this state.

(2) "Person" has the meaning set forth in section 4906.01 of the Revised Code.

(B) Each person owning or operating a gas or natural gas transmission line and associated facilities within this state over which an agency of the United States has certificate jurisdiction shall furnish to the commission a copy of the energy information filed by the person with that agency of the United States.

(C) Each person owning or operating a major utility facility within this state, or furnishing gas, natural gas, or electricity directly to more than fifteen thousand customers within this state annually shall furnish a report to the commission for its review. The report shall be termed the long-term forecast report and shall contain:

(1) A year-by-year, ten-year forecast of annual energy demand, peak load, reserves, and a general description of the resource plan to meet demand;

(2) A range of projected loads during the period;

(3) A description of major utility facilities planned to be added or taken out of service in the next ten years, including, to the extent the information is available, prospective sites for transmission line locations;

(4) For gas and natural gas, a projection of anticipated supply, supply prices, and sources of supply over the forecast period;

(5) A description of proposed changes in the transmission system planned for the next five years;

(6) A month-by-month forecast of both energy demand and peak load for electric utilities, and gas sendout for gas and natural gas utilities, for the next two years. The report shall describe the major utility facilities that, in the judgment of such person, will be required to supply system demands during the forecast period. The report from a gas or natural gas utility shall cover the ten- and five-year periods next succeeding the date of the report, and the report from an electric utility shall cover the twenty-, ten-, and five-year periods next succeeding the date of the report. Each report shall be made available to the public and furnished upon request to municipal corporations and governmental agencies charged with the duty of protecting the environment or of planning land use. The report shall be in such form and shall contain such information as may be prescribed by the commission.

Each person not owning or operating a major utility facility within this state and serving fifteen thousand or fewer gas or natural gas, or electric customers within this state shall furnish such information as the commission requires.

(D) The commission shall:

(1) Review and comment on the reports filed under division (C) of this section, and make the information contained in the reports readily available to the public and other interested

government agencies;

(2) Compile and publish each year the general locations of proposed and existing transmission line routes within its jurisdiction as identified in the reports filed under division (C) of this section, identifying the general location of such sites and routes and the approximate year when construction is expected to commence, and to make such information readily available to the public, to each newspaper of daily or weekly circulation within the area affected by the proposed site and route, and to interested federal, state, and local agencies;

(3) Hold a public hearing:

(a) On the first long-term forecast report filed after January 11, 1983;

(b) At least once in every five years, on the latest report furnished by any person subject to this section;

(c) On the latest report furnished by any person subject to this section if the report contains a substantial change from the preceding report furnished by that person. "Substantial change" includes, but is not limited to:

(i) A change in forecasted peak loads or energy consumption over the forecast period of greater than an average of one-half of one per cent per year;

(ii) Demonstration of good cause to the commission by an interested party.

The commission shall fix a time for the hearing, which shall be not later than ninety days after the report is filed, and publish notice of the date, time of day, and location of the hearing in a newspaper of general circulation in each county in which the person furnishing the report has or intends to locate a major utility facility and will provide service during the period covered by the report. The notice shall be published not less than fifteen nor more than thirty days before the hearing and shall state the matters to be considered.

Absent a showing of good cause, the commission shall not hold hearings under division (D)(3) of this section with respect to persons who, as the primary purpose of their business, furnish gas or natural gas, or electricity directly to fifteen thousand or fewer customers within this state solely for direct consumption by those customers.

(4) Require such information from persons subject to its jurisdiction as necessary to assist in the conduct of hearings and any investigation or studies it may undertake;

(5) Conduct any studies or investigations that are necessary or appropriate to carry out its responsibilities under this section.

(E) (1) The scope of the hearing held under division (D)(3) of this section shall be limited to issues relating to forecasting. The power siting board, the office of consumers' counsel, and all other persons having an interest in the proceedings shall be afforded the opportunity to be heard and to be represented by counsel. The commission may adjourn the hearing from time to time.

(2) The hearing shall include, but not be limited to, a review of:

(a) The projected loads and energy requirements for each year of the period;

(b) The estimated installed capacity and supplies to meet the projected load requirements.

(F) Based upon the report furnished pursuant to division (C) of this section and the hearing record, the commission, within ninety days from the close of the record in the hearing, shall determine if:

(1) All information relating to current activities, facilities agreements, and published energy policies of the state has been completely and accurately represented;

(2) The load requirements are based on substantially accurate historical information and adequate methodology;

(3) The forecasting methods consider the relationships between price and energy consumption;

(4) The report identifies and projects reductions in energy demands due to energy conservation measures in the industrial, commercial, residential, transportation, and energy production sectors in the service area;

(5) Utility company forecasts of loads and resources are reasonable in relation to population

growth estimates made by state and federal agencies, transportation, and economic development plans and forecasts, and make recommendations where possible for necessary and reasonable alternatives to meet forecasted electric power demand;

(6) The report considers plans for expansion of the regional power grid and the planned facilities of other utilities in the state;

(7) All assumptions made in the forecast are reasonable and adequately documented.

(G) The commission shall adopt rules under section 111.15 of the Revised Code to establish criteria for evaluating the long-term forecasts of needs for gas and electric transmission service, to conduct hearings held under this section, to establish reasonable fees to defray the direct cost of the hearings and the review process, and such other rules as are necessary and convenient to implement this section.

(H) The hearing record produced under this section and the determinations of the commission shall be introduced into evidence and shall be considered in determining the basis of need for power siting board deliberations under division (A)(1) of section 4906.10 of the Revised Code. The hearing record produced under this section shall be introduced into evidence and shall be considered by the public utilities commission in its initiation of programs, examinations, and findings under section 4905.70 of the Revised Code, and shall be considered in the commission's determinations with respect to the establishment of just and reasonable rates under section 4909.15 of the Revised Code and financing utility facilities and authorizing issuance of all securities under sections 4905.40, 4905.401 [4905.40.1], 4905.41, and 4905.42 of the Revised Code. The forecast findings also shall serve as the basis for all other energy planning and development activities of the state government where electric and gas data are required.

(I) (1) No court other than the supreme court shall have power to review, suspend, or delay any determination made by the commission under this section, or enjoin, restrain, or interfere with the commission in the performance of official duties. A writ of mandamus shall not be issued against the commission by any court other than the supreme court.

(2) A final determination made by the commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such determination was unreasonable or unlawful.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the commission by any party to the proceeding before it, against the commission, setting forth the determination appealed from and errors complained of. The notice of appeal shall be served, unless waived, upon the commission by leaving a copy at the office of the chairperson of the commission at Columbus. The court may permit an interested party to intervene by cross-

appeal.

(3) No proceeding to reverse, vacate, or modify a determination of the commission is commenced unless the notice of appeal is filed within sixty days after the date of the determination.

§ 4906.03. Powers and duties.

The power siting board shall:

(A) Require such information from persons subject to its jurisdiction as it considers necessary to assist in the conduct of hearings and any investigations or studies it may undertake;

(B) Conduct any studies or investigations that it considers necessary or appropriate to carry out its responsibilities under this chapter;

(C) Adopt rules establishing criteria for evaluating the effects on environmental values of proposed and alternative sites, and projected needs for electric power, and such other rules as are necessary and convenient to implement this chapter, including rules governing application fees, supplemental application fees, and other reasonable fees to be paid by persons subject to the board's jurisdiction. The board shall make an annual accounting of its collection and use of these fees and shall issue an annual report of its accounting, in the form and manner prescribed by its rules, not later than the last day of June of the year following the calendar year to which the report applies.

(D) Approve or disapprove applications for certificates;

(E) Notwithstanding sections 4906.06 to 4906.14 of the Revised Code, the board may adopt rules to provide for an abbreviated review of an application for a construction certificate for construction of a major utility facility related to a coal research and development project as defined in section 1555.01 of the Revised Code, or to a coal development project as defined in section 1551.30 of the Revised Code, submitted to the Ohio coal development office for review under division (B)(7) of section 1551.33 of the Revised Code. Applications for construction certificates for construction of major utility facilities for Ohio coal research and development shall be filed with the board on the same day as the proposed facility or project is submitted to the Ohio coal development office for review.

The board shall render a decision on an application for a construction certificate within ninety days after receipt of the application and all of the data and information it may require from the applicant. In rendering a decision on an application for a construction certificate, the board shall only consider the criteria and make the findings and determinations set forth in divisions (A)(2),

(3), (5), and (7) and division (B) of section 4906.10 of the Revised Code.

§ 149.43. Availability of public records.

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in Ohio kept by a nonprofit or for profit entity operating such alternative school pursuant to section 3313.533 [3313.53.3] of the Revised Code. "Public record" does not mean any of the following

(v) Records the release of which is prohibited by state or federal law;

§ 1333.61. Definitions.

As used in sections 1333.61 to 1333.69 of the Revised Code, unless the context requires otherwise:

(D) "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

OFFER OF PROOF AND CERTIFICATION OF ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

49-1-11. Rules of commission. The Public Utilities Commission may promulgate rules pursuant to chapter 1-26 concerning:
(1) Procedures for filing and cancelling tariffs, and information required to be included in tariffs;
(2) Procedures and requirements for filing and acting upon complaints;
(3) Procedures and requirements for filing applications for new or revised rates or tariff changes;
(4) Regulation of proceedings before the commission, including forms, notices, applications, pleadings, orders to show cause and the service thereof, all of which shall conform to those used in South Dakota courts;
(5) Procedures for obtaining a declaratory ruling and action on petitions for a declaratory ruling;
(**6) Procedures and requirements for handling confidential information and determining whether information should be protected as confidential;** and
(7) Procedures for communicating with the commissioners.

20:10:01:39. Confidential information defined. All facts, information, reports, orders, memoranda books, accounts, documents, and computer peripherals of any nature in the possession of the commission are available for examination by the public except the following:

(1) Personal information in confidential personnel records of the commission;
(2) Communications between counsel retained by the commission or staff and the commission and staff;
(3) Any information, records, or documents that constitute the work product of an attorney;
(4) Trade secrets recognized and protected by law;
(5) Information which is made confidential under any other provisions of state or federal law; and
(6) Information which is determined confidential by the commission.

20:10:01:40. Confidential treatment of information -- Posted notice. Information being afforded confidential treatment shall be kept in locked files. A notice in the following form shall be posted at the locked facilities in which confidential information is located:

NOTICE
The information in this file is designated confidential under chapter 20:10:01 of the rules of the South Dakota Public Utilities Commission. Disclosure of any such confidential information to a person other than commission members, employees, or agents is prohibited unless otherwise permitted by the commission.

20:10:01:41. Requests for confidential treatment of information. A request for confidential treatment of information shall be made by submitting the material to the commission along with the following information:
(1) An identification of the document and the general subject matter of the materials or the portions of the document for which confidentiality is being requested;
(2) The length of time for which confidentiality is being requested and a request for handling at the end of that time. This does not preclude a later request to extend the period of confidential treatment;
(3) The name, address, and phone number of a person to be contacted regarding the confidentiality request;
(4) The statutory or common law grounds and any administrative rules under which confidentiality is requested. Failure to include all possible grounds for confidential treatment does not preclude the party from raising additional grounds in the future; and
(5) The factual basis that qualifies the information for confidentiality under the authority cited.
Information shall be sent to the commission's executive director, unless another person is designated. Information submitted must clearly state in large letters on each page and on the envelope that confidential treatment is requested.

20:10:01:42. Requirements for proving confidentiality. A request for confidentiality generates confidential treatment of information pursuant to § 20:10:01:40, but it does not constitute a determination that the information is or is not confidential. The information will be treated as confidential and shall not be released until after a confidentiality determination has been made. The commission shall determine confidentiality after a request for access to the information is received. The party requesting confidentiality has the burden of proving by a preponderance of the evidence that the information qualifies as confidential information by showing that disclosure would result in material damage to its financial or competitive position, reveal a trade secret, or impair the public interest.

20:10:01:43. Requests for access to confidential information. Requests for access to confidential information shall be handled as follows:
(1) The request shall be filed with the commission's executive director;
(2) After a request for access to confidential information has been made, the commission may establish a procedural schedule for the purposes of determining confidentiality;
(3) The commission shall issue a protective order for information that it determines to be confidential. The protective order may contain procedures for handling the information and for controlling access to it for hearing purposes. Any information subject to a protective order is treated as confidential;
(4) Upon a determination that the information is not confidential, the information shall be afforded confidential treatment for an additional period of ten days or for a longer period as ordered by the commission to give the party asserting confidentiality an opportunity to seek review by the court; and
(5) If the commission has made a prior ruling that the information is confidential, the commission may take notice of the prior ruling. The commission shall consider whether or not the circumstances of the request are the same as in the prior ruling in determining what weight, if any, should be given to the prior ruling.

20:10:01:44. Use of confidential information in commission orders. Commission orders which rely on confidential information shall be drafted so as not to disclose the confidential information. Techniques which may be used to prevent the disclosure of information in commission orders include use of industry data which obscures the sources of specific data, use of range data which brackets specific values, and use of generalized descriptions which do not identify specific confidential information with its source.

If confidential information cannot be adequately protected by use of drafting techniques, the order shall include an appendix which sets forth the specific information on which the commission has relied. Such an appendix shall be treated as confidential.

PUBLIC SERVICE COMMISSION OF WISCONSIN

OFFER OF PROOF AND CERTIFICATION OF ABILITY TO SAFEGUARD CONFIDENTIAL INFORMATION

Any record which is specifically exempted from disclosure by state or federal law is exempt from disclosure under Wisconsin's Public Records Law, §§ 19.36 (1). The Wisconsin PSC ("PSCW") may withhold access to any record or portion of a record containing information qualifying as a trade secret. Wis. Stat 19.36(5). The term "trade secret" means:

> Information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:

1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or us.

2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

Wis. Stat. § 134.90 (1) (c). The PSCW may also withhold from public inspection "any information which would aid a competitor of a public utility in competition with the public utility." Wis. Stat. § 196.14.

Wis. Stat. § 196.795(9). The PSCW may withhold business information from a holding company system, which, if disclosed to the public, would competitively disadvantage any non utility affiliate; such information is not subject to the public records law, Wis. Stat. § 19.35; and the PSCW is obligated to protect such information from disclosure.

Any person who files a record may request the PSCW to handle the record confidentially on the ground that the record is exempt from disclosure under the Public Records Law (usually according to either the trade secrets or information aiding a competitor exemptions). Wis. Admin. Code § PSC 2.12 (3). The commission shall grant the request if there are reasonable grounds to believe the record is exempt from public disclosure. Wis. Admin. Code § PSC 2.12. (5) (b). If the commission grants a request for access to a record being confidentially handled, the filer of the record must be given has a right to contest disclosure in court. Wis. Stat. § 196.135 (4).

The Public Service Commission of Wisconsin makes the following attestations:

1. The PSCW may order that a record is exempt from public disclosure in whole or in part on a temporary or continuing basis. A commission hearing examiner presiding at a hearing may order such protective measures as are necessary to protect the trade secrets of parties to the hearing. Wis. Stat. § 227.46 (7).

2. The commission has a long history of operating under these procedures for confidential information, and, to the best of our knowledge and belief, has never had any violations of a protective order that resulted in public disclosure of confidential information.