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March 11, 2005

Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20246

Re: Informational Filing of Midwest Independent Transmission System Operator, Inc., FERC Docket Nos. ER04-691-024 and EL04-104-023

The attached comments by the Organization of MISO States (“OMS”) are, with a few minor exceptions, in support of the “Informational” filing made by the Midwest ISO (“MISO”) in the above-captioned dockets on February 17, 2005. Because the MISO’s proposals incorporate appropriate elements of the PJM filing as FERC requested and because it provides the requisite access to confidential information while striking a balance with the legitimate due process and confidentiality protections for market participants, the OMS urges the Federal Energy Regulatory Commission (“FERC” or “Commission”) to accept the vast majority of the proposal and language revisions to the MISO’s Tariff. The balance point will best assure the reliable and efficient functioning of the wholesale and retail markets.

The OMS wishes to express its gratitude to the management of the Midwest ISO for its leadership in trying to resolve the few remaining differences between the OMS and the stakeholders that participated in the negotiations. While not all of the distance was bridged, the OMS believes that the negotiations were fruitful and provided all parties with understandings of the other perspectives. The OMS also wishes to thank Mr. Richard Miles and Mr. Wilbur Earley of the FERC Staff for their efforts to reach accommodation on the few issues.

As the OMS stated in the “offer of proof” filed on February 11, 2005, the OMS has a keen interest in this matter due to state statutory obligations and the desire to advance critical public policy issues in a manner that protects consumers as well as market participants. The OMS believes that all interests –short and longer run - are best served by greater transparency in both the retail and wholesale power markets that the Midwest ISO’s proposed changes would engender.

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There are, however, a few important concerns and some relatively minor clarifications that the OMS would propose to be resolved with guidance from the FERC for inclusion in the Midwest ISO's Tariff. Accordingly, the OMS offers these comments to assist the Commission in its deliberations.

Respectfully Submitted,

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Executive Director

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

Midwest Independent Transmission System Operator Inc.)	Docket No. ER04-691-024
Public Utilities with Grandfathered Agreements in the Midwest ISO Region)	Docket No. EL04-104-023

**COMMENTS OF THE ORGANIZATION OF MISO STATES
ON THE MIDWEST ISO’S FEBRUARY 17 INFORMATIONAL FILING**

Pursuant to Rule 211 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. §385.211, and Notice issued by the Commission on March 1, 2005, the Organization of MISO States (“OMS”) hereby submits its comments on the informational filing submitted by the Midwest ISO in the above-captioned proceeding on February 17, 2005 (“February 17 Filing”).

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I. Background

On March 31, 2004, MISO submitted its revised Open Access Transmission and Energy Markets Tariff (“TEMT”). As part of its TEMT proposal, MISO and its independent market monitor (“IMM”) would have provided confidential information to state regulators pursuant to the terms of proposed TEMT Sections 38.9.4 and 54.3 respectively.

On August 6, 2004, the Commission issued an order conditionally accepting most of the MISO’s March 31 filing.¹ However, the Commission’s August 6 Order, among other

¹ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (2004), hereafter (“August 6 Order”)

things, rejected the MISO's proposed TEMT Sections 38.9.4 and 54.3 concerning sharing confidential information with state regulators.

The Commission directed MISO to work with the state commissions and interested MISO stakeholders to develop a new proposal governing state commission access to confidential data and to file the new proposal as part of a compliance filing.²

On September 3, 2004, the OMS filed a request for rehearing of the Commission's August 6 decision concerning state regulator access to confidential MISO and IMM data. The OMS accepted the Commission's invitation to participate in a MISO-led stakeholder process to develop a new data access proposal.

On September 30, 2004, the Commission issued an order granting rehearing for further consideration and holding in abeyance the compliance filing requirement of the August 6 Order.³ In the Order, the Commission accepted the OMS' proposal to provide an Offer of Proof showing that, (1) state commissions have statutory authority to safeguard confidential data; and (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.⁴

On February 11, 2005, the OMS provided its Offer of Proof as requested by the Commission in its September 30 Order.

On February 17, 2005, MISO made an informational filing containing both a description of the current status of the issues concerning state regulator access to confidential MISO and IMM data and an alternative proposal.

MISO's February 17 filing contains a cover letter and several appendices. MISO described the purpose of its February 17 filing as follows:

The Midwest ISO is submitting the present informational filing to provide the Commission with a further description of the stakeholder discussions, and the Midwest ISO's alternative proposal to resolve the parties' differences on state access to confidential information.⁵

Appendix C is the heart of MISO's February 17 filing and contains MISO's alternative proposal. Appendix C contains three documents: (1) a new TEMT Section 38.9.4; (2) a Non-Disclosure Agreement ("NDA") that outlines the terms and conditions under which MISO and the IMM will provide confidential information to state commissions; and (3) a list of definitions for new terms in Section 38.9.4. The underline and strikeout in Appendix C of MISO's February 17 filing illustrates changes that were made to the documents in the course of the stakeholder

² August Order, at 571

³ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,321 (2004)

⁴ *Ibid.*, at P11-12

⁵ MISO February 17 filing at 3.

discussions as compared to the October 28, 2004 version of the documents that the OMS initially provided to MISO and the stakeholders as a means of facilitating progress in the discussions.⁶

II. OMS Position and Recommendation

The Commission's August 6 Order directed MISO to work with the state commissions and interested MISO stakeholders to develop a consensus proposal governing state commission access to confidential data in the possession of the MISO and the IMM. The OMS is deeply appreciative of MISO's efforts to address the concerns of state commissions and MISO's various stakeholders in the development of the February 17 proposal. The OMS recognizes the significant commitment of time and effort by the top management of the MISO, the active market participants, and FERC staff in this process. The OMS generally agrees with the description of the chronology of events, meetings, and conference calls set forth by MISO in its February 17 filing cover letter.

Although a few differences are currently still un-bridged, much progress was made in the stakeholder process to draft a new data access proposal acceptable to all participating parties. The alternative proposal in Appendix C of MISO's February 17 filing is the result of significant compromise by all participants. Even a cursory comparison of MISO's alternative proposal in Appendix C with the OMS's initial October 28, 2004 proposal (which MISO helpfully attached as Appendix A to the February 17 filing) will show the extent of the compromises agreed to by the OMS participants. The OMS understands and shares the appropriate sensitivities of market participants that the confidentiality of sensitive information not be compromised. The state commissions have a keen interest in these matters due to statutory obligations and the desire to advance critical public policy issues in a manner that protects energy consumers as well as market participants. In these comments, the OMS outlines additional paths to bridge the few remaining differences.

The alternative proposal in MISO's Appendix C is also responsive to the Commission's concerns expressed in the August 6 Order. The proposal is consistent with the approach the Commission approved for PJM and incorporates a non-disclosure agreement ("NDA") similar to that used by PJM, as the Commission recommended in its August 6 Order.⁷

While the OMS is very supportive of the vast majority of the provisions in MISO's alternative proposal, the OMS, nevertheless, believes that there are several provisions that would create concerns and, in some cases, administrative difficulties for state commissions. In addition, there are several minor modifications that can easily be made to improve clarity or consistency throughout the proposal. In addition to identifying and describing these exceptions to our general position of support for MISO's alternative proposal, the OMS has provided suggested alternative language in Appendix A that would resolve the OMS's concerns without adversely affecting stakeholders' due process or jeopardize the protection of confidential information.

⁶ MISO generously included the OMS's initial October 28 proposal as Appendix A to its February 17 filing.

⁷ August 6 Order at P561.

The OMS urges the Commission to direct MISO to make modifications to the proposal contained in Appendix C of MISO's February 17 filing that are consistent with the modifications recommended by the OMS in Appendix A to this pleading. The OMS is ready and willing to work with MISO in a continued effort to address any lingering concerns of market participants in a manner that is acceptable to both the market participants and the state commissions. To the extent that the Commission determines that further stakeholder discussion would be fruitful on particular issues, the OMS recommends that the Commission: (1) remand those issues back to MISO for resolution in accordance with the compromise options described by the OMS in various sections of this pleading; (2) establish a firm date for MISO's compliance filing; and 3) allow the Commission's Alternative Dispute Resolution facilitators to assist the parties if requested.

III. Discussion

A. Major Issues

1. The Provision in Subsection 38.9.4.5(e) That Would Provide Any Party an Opportunity to Challenge a State Commission's Information Request Should Be Narrowed.

State commissions within the OMS as a matter of course and statute address matters of equity. The OMS therefore shares market participant concerns for due process and the need to maintain confidential information for the sake of the market. The OMS notes that MISO included tariff subsection 38.9.4.5(e) in the February 17 filing for discussion purposes only and that its inclusion is based only on a letter received by MISO from a few members of one sector of market participants.⁸ The OMS' concern with Subsection 38.9.4.5(e) is that it would permit any party to challenge any and all information request from an Authorized Requestor.⁹

The OMS is sensitive to the concerns of these market participants and is confident that as they gain experience in dealing with the OMS member state commissions in this regard, this apprehension will be eliminated. As such, the OMS does not believe that it is necessary to include language in the MISO tariff that would grant parties an unlimited opportunity to challenge any and all information requests submitted by an authorized requestor to MISO or its IMM. The state commissions demonstrated in their Offer of Proof that they have the statutory ability to protect confidential information and have an unblemished record of protecting such information. Furthermore, state commissions require RTO data to conduct their statutory functions and the Commission needs cooperation and assistance from the state commissions in order for the Commission to better satisfy its obligations. Challenges to a state commission's information request to MISO or the IMM would frustrate these efforts and run counter to the cooperative relationship that the Commission has been attempting to cultivate with the OMS and the Midwest state commissions.

Given all of the other protective features of Section 38.9.4 and the proposed Non-Disclosure Agreement, granting market participants unlimited challenge any and all requests for

⁸ MISO February 17 Filing, at 5

⁹ "Authorized Requestor" is a defined term in MISO's proposal.

information seems excessive. Both the tariff and the NDA contain detailed specifications for keeping the data confidential; they require a detailed specification of the form and content of the information request; they limit the types of information that can be sought; they limit the use of the information received; they provide any affected market participant with the opportunity to discuss the information request with the authorized requestor to resolve differences; and they include specifications for the return of confidential information. These are useful due process protections that do not unduly interfere with states' ability to do their jobs. In contrast, the unfettered ability of market participants to challenge any and all information requests would interfere.

Experience has shown that not all market participants have genuine interests in seeing that competitive markets operate efficiently and fairly. To the contrary, some market participants may have an interest in unfair or inefficient markets. When left unchecked, gaming and market manipulation can seep into the markets. Some market participants may have incentives to try to prevent state commissions from identifying circumstances in which MISO markets are not operating efficiently and fairly. Approving tariff language granting any party the right to challenge any and all qualified state commission information requests would provide market participants with a mechanism to thwart useful state commission examination of issues.

The OMS has also identified several practical reasons why the Commission should reject such unlimited challenges. These practical reasons are ones of timeliness of decisions and the imposition of excessive costs on state commissions.

Under Subsection 38.9.4.5(e), if a market participant were to challenge a state commission's information request, MISO would be obligated to withhold the data or information requested by the state commission until the market participant's challenge is resolved. While the language in Subsection 38.9.4.5(e) does provide that the market participant shall request the Commission to treat its challenge as a "fast-track complaint," there is no specified timeframe for resolution of the challenge or a requirement that the challenge be resolved at all. This potential situation gives the OMS concern, given the time-sensitive circumstances in which electricity markets operate and the possible negative impact that it may ultimately have on ratepayers or other market participants.

Subsection 38.9.4.5(e) also requires each party to "bear its own costs" in the context where a market participant exercises the option to challenge. The state commission would have to be willing to incur significant costs to counter challenges (perhaps frivolous ones) from market participants. These costs would most likely include the time and expense for a state commission to prepare testimony and send attorneys and technical witnesses to Washington, D.C. for hearings and other proceedings initiated by the Commission to resolve challenges. For the most part, state commissions simply do not have sufficient resources to spend on such proceedings.

Accordingly, the OMS recommends that the opportunity to challenge should not be unlimited. The state commissions, MISO, and the market participants may be able to reach agreement on language for a limited opportunity to challenge that does not apply to all parties, does not apply to all types of requested information, does not impose burdensome costs on state commissions, and does not unduly extend the normal five-day time frame between a state commission's information request and MISO's delivery of the information requested.

For example, one option for compromise on this opportunity to challenge issue might specify the types of state commission information requests that could be subject to challenge. Such a compromise would build on the explicit provision in Section 38.9.4.1(b)(i) that permits state commissions to seek information “including, but not limited to, that enumerated and described as available to the IMM in Module D” of MISO’s TEMT. Our proposed compromise would be modeled on a procedure that has already been accepted by the Commission in another challenge context and is currently in MISO’s TEMT. That procedure is as follows. Section 54.1 of Module D of MISO’s TEMT describes the kinds of data and information that MISO will have in its possession “in the course of its operations.”¹⁰ Section 54.1 specifies that MISO’s IMM shall have access to that MISO data and information (all data and information generated by MISO in the course of its operations and described in Section 54.1) as a matter of course without challenge. Section 54.2 of Module D of MISO’s TEMT permits the IMM to request additional information from any person. Section 61 of Module D of MISO’s TEMT is a list of information types that must be provided by a market participant to the IMM upon the IMM’s request as provided by Section 54.2 and without challenge. However, Section 54.2.2(c) of Module D of MISO’s TEMT states that a market participant may challenge the IMM’s request for data or information “to the extent that the party has a good faith basis to assert that the data or information is not included in any of the categories on the list [in Section 61].”¹¹

Similarly, to the extent that a state commission’s information request to MISO or MISO’s IMM falls within the bounds of the information types listed in Sections 54.1 and 61 of Module D of MISO’s TEMT, the OMS believes it would be unreasonable to permit an affected market participant an opportunity to challenge such an information request. To the extent that a state commission’s information request to MISO or the IMM is for information that they have obtained that falls outside the bounds of the information types listed in Sections 54.1 and 61 of Module D of MISO’s TEMT, the OMS believes it would be reasonable to permit an affected market participant an opportunity to challenge such an information request. The procedure set out in Subsection 38.9.4.5(e) of MISO’s February 17 alternative proposal should be a workable procedure for implementing this kind of limited challenge.

The OMS is open to entertaining other language that would provide affected market participants an opportunity to challenge a reasonable range of state commission’s information requests. For example, the “opportunity to challenge” provision of Subsection 38.9.4.5(e) could be linked to the “limitation on disclosure obligation” provision of Section 38.9.4.5(g) that proposes to limit the way in which a state commission may receive requested information.

In addition to the above-described approach for reaching compromise on the challenge issue, there may be ways of expanding the range of issues subject to the conference provisions of Section 38.9.4(d) to address market participant concerns. As written in MISO’s alternative proposal, the conference provision of Section 38.9.4(d) is limited only to “differences concerning the scope or time period” covered by the state commission’s information request. If the conference opportunity is expanded to cover other matters, a market participant’s concern with a state commission’s information request might be resolved in the conference such that no official challenge process would be necessary. The OMS would be willing to support an expansive opportunity for an affected market participant to have discussions in conferences with a state

¹⁰ Section 54.1 of Module D of MISO’s TEMT.

¹¹ Section 54.2.2(c) of Module D of MISO’s TEMT.

commission that submitted an information request to MISO or the IMM. The only qualification to this offer would be in the very limited circumstances where *ex parte* requirements would prevent such discussion.

In any event, should the commission determine that a limited opportunity for an affected market participant to challenge a state commission's information request should be included in the package, there are numerous possibilities for fruitful compromise on workable language. If the Commission determines that a limited challenge opportunity is appropriate, then the OMS recommends that this issue be remanded back to MISO with instructions for further stakeholder discussion on the matter along the lines of the compromise concepts described by the OMS above. However, the OMS's primary recommendation is to delete subsection 38.9.4.5(e).

2. The Provisions of Section 39.9.4.1(d) and NDA Section 2.4.6 That Impose an Obligation on State Commissions to Defend Against Disclosure of Market Participants' Confidential Information in Judicial Proceedings Involving a State Commission's Denial of a Third Party Request for Information Obtained by the State Commission Through the Section 38.9.4 Process Should Be Clarified To Better Account For Individual State Statutes And Administrative Processes.

The term "Third Party Request" is defined in the NDA and includes a request or demand by "any entity" on an authorized requestor or authorized agency for confidential information obtained from the MISO or the IMM through the Section 38.9.4 process. Section 2.4.6.1 of the NDA requires a state commission to deny all Third Party Requests for information received by the state commission through the Section 38.9.4 process.

If the state commission's denial of a Third Party's request for information that the state commission obtained through the Section 38.9.4 process is challenged by the Third Party in a court proceeding, Section 38.9.4.1(c) and Section 2.4.6.1 of the NDA require an authorized agency to "defend against any disclosure of Confidential Information pursuant to any Third Party Request through all available legal process." The only exception to this sweeping obligation on the state commission is the provision in Section 38.9.4.1(d) and Section 2.4.6.2 that waives the state commission's obligation if the state commission is subject to a state law that would "prohibit or prevent" the state commission from defending against Third Party Requests.

The market participants' concerns about Third Party Requests appear to arise primarily in the context of state Freedom of Information Act ("FOIA") provisions and the impact of those statutes on state commissions. In the previously submitted OMS Offer of Proof, state commissions addressed the relationship between state FOIA provisions and information received through the Section 38.9.4 process. States explained that the state FOIA provisions contain numerous exemptions, such as those pertaining to trade secret and commercially sensitive information and would likely cover the type of information expected to be obtained through the Section 38.9.4 process.

Consequently, the provision of NDA Section 2.4.6.1 that requires state commissions to deny Third Party Requests is generally workable. States do not expect to request or receive

information from MISO and the IMM under the provisions of Section 38.9.4 that would not be exempt from state FOIA disclosure requirements.

However, the OMS is concerned that the provision of NDA Section 2.4.6.1 requiring state commissions to defend market participants' interests in legal proceedings is untenable. While a state commission will generally protect and defend its own practices and procedures, the OMS cannot support a provision that would put a state commission in the position of representing the interests of market participants in forums that may address the underlying nature of data they have designated as confidential. There are also ethical considerations involved. State commission counsel generally have only one client, the state commission. Requiring state commission counsel to represent a market participant may, under certain circumstances, raise issues under the states' ethical canons and disciplinary rules for lawyers. To ask state commissions to defend the legal interests of market participants in judicial forums concerning the underlying nature of specific data (e.g., its commercial sensitivity or trade secret nature), is unfair both to state commissions and the market participants themselves. Further, the realities of limited state commission legal budgets may have an impact on how vigorous a state commission could be in protecting the market participant's commercial interest in a judicial proceeding.

The OMS believes that the market participant who originally provided the information is in the best position to explain the commercially sensitive or trade secret nature of the data. The MISO is in the second-best position to explain such data-specific matters. To facilitate the ability of a market participant and/or MISO to participate in any judicial proceeding involving a challenge by a Third Party to a state commission's denial of an FOIA request, NDA Section 2.4.6.1 reasonably requires the state commission to notify MISO and the market participant of the judicial proceeding and to cooperate with them in their efforts. Moreover, the OMS is amenable to ideas for operationally improving such notice provisions.

The OMS is supportive of the proposed provision in Section 38.9.4.1(d) and NDA Section 2.4.6.2 that waives the state commission's obligation to defend against Third Party Requests if the state commission is subject to a state law that would "prohibit or prevent" the state commission from defending. However, given the circumstances described above, the OMS recommends that Section 38.9.4.1(d) and NDA Section 2.4.6.2 be expanded to also exempt a state commission from defending against a Third Party Request if there is any "rule or good cause shown" that would prohibit or prevent the state commission from defending against a Third Party Request. For example, legitimate reasons to exempt a state commission from defending against a Third Party Request should include as "good cause shown" state commission budget/resource limitations and the ethical concerns of lawyers described above. This modification could include a provision for MISO assume the responsibilities described in NDA Section 2.4.6.2, in the same way as MISO has proposed to do in cases where there is a state law prohibiting the state commission from defending against Third Party challenges of the state commission's denial of the Third Party request. The OMS is open to discussing additional methods for assisting MISO in such efforts.

3. Section 38.9.4.5(g) of the Proposed Tariff or Section 2.5(f) of the Proposed NDA Address Issues that are not Ripe for Decision at this time.

Sections 38.9.4.5(g) and NDA Section 2.5(f) propose to limit the manner in which state commissions could request and receive information through the 38.9.4 process. The PJM tariff was silent on this issue, preserving it for another time. Further, given that data procedures will continue to improve, and that technology development and diffusion will likely outpace our ability to anticipate its uses or its costs, imposing limits regarding the use of such technology at this time, may ultimately prove to be inefficient.

The OMS believes the issue is not ripe for the Commission to make a decision regarding the appropriateness of imposing these kinds of limitations on MISO's obligations. The OMS therefore recommends that the Commission have MISO delete Section 38.9.4.5(g) of the proposed tariff and Section 2.5(f) of the proposed NDA at this time.

4. The words “only” and “solely” Should Be Deleted From Section 38.9.4.1 Because They Could Have the Undesirable Effect of Superceding and Eliminating the Otherwise Applicable Opportunity for a State Commission and a Market Participant to Voluntarily Agree to Permit MISO to Release the Market Participant’s Confidential Information to the State Commission Under Arrangements Other Than That Specified in Section 38.9.4.

Under MISO's current OATT or under the TEMT as currently proposed by MISO, there is nothing that would prohibit MISO from releasing a market participant's confidential data to a state commission if the market participant voluntarily agrees to the release. Such voluntary arrangements may have been used with respect to certain financial transmission right information. The inclusion of the words “solely” and “only” in Section 38.9.4.1 would—perhaps unintentionally—have the effect of eliminating such voluntary arrangements. Surely the Commission would want to preserve the option for state commissions and market participants to voluntarily use an alternative approach to that specified in Section 38.9.4 for accessing the market participant's confidential information. Accordingly, the words “solely” and “only” should be deleted from Section 38.9.4.1.

5. Section 38.9.4.5(d) Should Be Modified to: (1) Specify That the Conduct of a Conference Under That Subsection Shall Not Delay MISO’s Obligation to Provide the Requested Information to the Authorized Requestor Within the Specified Timeframe In Section 38.9.4.5(f); and (2) Replace the Words “object to” with the Words “have a concern with” to Avoid the Connotation That a Market Participant May “Object” to a State Commission’s Information Request.

Section 38.9.4.5(d) permits MISO or an affected participant to request a conference with a state commission provided that such a request for a conference is submitted within four days of MISO's receipt of an information request from the state commission. This is a positive feature of MISO's proposal and should go far to reduce or eliminate affected participant concerns.

Section 38.9.4.5(d) does not explicitly suspend the otherwise applicable schedule specified in Section 38.9.4.5(f) for MISO's response to a state commission's information request. However, some may interpret Section 38.9.4.5(d) to suspend that schedule. In order to improve clarity and prevent any potential future controversy concerning this matter, a sentence should be added to Section 38.9.4.5(d) specifying that the timeframe for the MISO's provision of requested information under Subsection 38.9.4.5(f) shall apply, regardless of whether or not a conference is held under Section 38.9.4.5(d).

Finally, Section 38.9.4.5(d) seems to imply that an affected participant may "object" to a state commission's information request. If the Commission adopts a provision permitting a market participant to object to and challenge a state commission's information request, that provision will be spelled out in Section 38.9.4.5(e). Accordingly, the OMS urges the Commission to direct MISO to replace the words "object to" with the words "have a concern with" in Section 38.9.4.5(d).

The OMS has proposed specific language concerning these two issues in Section 38.9.4.5(d) of our Appendix A to this pleading.

6. The Provisions of Section 38.9.4.6 Should Be Modified to Specify a Timeframe in Which MISO Must Respond to the Authorized Requestors' Notification of Intent to Discuss Confidential Information With Each Other and to Clarify that the Discussion Shall Not Be Delayed Solely by a Failure of MISO to Respond to the Authorized Requestors' Notification Within the Specified Timeframe.

Section 38.9.4.6 specifies procedures under which Authorized Requestors who are parties to Non-Disclosure Agreements but who are sponsored by different Authorized Agencies may discuss Confidential Information with each other. This provision is critical for the OMS and for most state commissions. The OMS is sensitive to the concerns of MISO, the Commission and Affected Participants regarding the need to be able to keep track of who has discussed confidential information. Accordingly, OMS is willing to consider accepting the proposed process outlined in Section 38.9.4.6 as a workable compromise. However, the OMS is concerned that as written, the section does not have a deadline for MISO to carry out its obligation to verify the status of Authorized Requestors in advance of the discussion. Failure to specify a time period in which MISO is required to respond to the notification could prove to be a major obstacle for state commissions and severely impede their ability to cooperatively examine issues. Accordingly, the OMS recommends that Section 38.9.4.6 be modified to specify that, after it receives notice of the proposed discussion, MISO be required to confirm the status of all Authorized Requestors that will be included in the discussion within two business days from receipt of notification. However, MISO's failure to provide a response to the notification of planned discussion within these specified time frames should not prevent the discussion from taking place. For the sake of consistency, the same language should be added to Section 2.3 of the NDA. The OMS' proposed modifications to these sections can be found in Appendix A attached to this pleading.

7. The Language in Section 38.9.4.1(c) Should Be Modified to Eliminate an Inconsistency Concerning “Sister” State Agencies.

Section 38.9.4.1(c)(i) would require a state commission to confirm that it has statutory authority “to protect the confidentiality of any confidential information received pursuant to the Non-Disclosure Agreement from public release or disclosure and from release or disclosure to any other entity, including other agencies of state government.” The inclusion of the words “including other agencies of state government” in 38.9.4.1(c)(i) would place many state commissions in an untenable position of having to promise that they would disregard state law. Furthermore, the language is inconsistent with other sections of MISO’s proposal. MISO’s proposed NDA Section 2.2(e)(b) requires a state commission to identify any “state law, executive order or other administrative requirement that would compel release of Confidential Information to any person or agency and any interagency agreement or other procedure by which such person or agency could execute the Non-Disclosure Agreement or an agreement containing the same substantive provisions as this Agreement.” Section 1.15B in the Definitions section provides that “Authorized Requestors may include persons employed by a state agency within the Transmission Provider Region that has both access to documents in the possession of its same state public utility commission pursuant to state statute and the ability to protect those documents in accordance with the Non-Disclosure Agreement.”

Proposed language to cure the inconsistency in Section 38.9.4.1(c) of MISO’s proposal can be found in Appendix A of this OMS pleading.

B. Suggestions to Improve the Clarity and Consistency of MISO’s February 17 Filing

The OMS has identified several parts of the MISO’s February 17 filing that are either unclear or inconsistent with other parts of the February 17 filing. The OMS believes that these sections, if left as proposed, could create unnecessary difficulty or confusion in the future. Accordingly, the OMS offers the following suggestions with the intent of improving both the clarity and consistency of MISO’s February 17 filing.

1. Several Modifications Should Be Made to the Definitions Section to Improve Clarity and Consistency.

The OMS believes that the definition of Authorized Agency found in Subsection 1.15A could be improved by referring to the OMS or any successor organization. Such a change would make this subsection consistent with the definition of the same term in Subsection 1.2 of the proposed NDA.

Subsection 1.15B defines an Authorized Requestor as a person that has executed a NDA and is authorized by the Authorized Agency to receive and discuss confidential information. It is someone who has met all the requirements set forth by MISO regarding the receipt of confidential information. Section 1.15B should be modified to clarify that “attorneys representing an Authorized Agency” and “consultants and/or contractors directly employed by an Authorized Agency” do not constitute an exhaustive list of individuals that may qualify for Authorized Requestor status. For example, state commission staff and commissioners will also be eligible for Authorized Requestor status. Our specific language proposal on this point can be found in Appendix A to this pleading.

2. All References to State Commission Practices or Procedures Should be Made Consistent.

In several places throughout proposed Section 38.9.4 and the NDA (see, e.g., Section 38.9.4.1(a)(iv) and NDA Section 2.2(b)), the language refers to state commission “procedures” to protect against the unauthorized release of confidential information received pursuant to the Non-Disclosure Agreement. However, several other places throughout the documents refer to “practices or procedures” (see, e.g., NDA Section 2.1(iv)). For consistency, all such references should be changed to “practices or procedures.” State commissions can demonstrate that arrangements exist to protect confidential information regardless of whether those arrangements are formal state commission “procedures” or less formal state commission “practices”.

3. All References to Prohibiting the “Release” or “Disclosure” of Confidential Information and Similar Such Formulations Should Be Changed to Reference “Unauthorized Release.”

The NDA permits the “release” or “disclosure” of confidential information under certain specified and limited conditions. For example, Section 2.2(e)(b) of the NDA permits state commissions to identify any “state law, executive order or other administrative requirement that would compel release of Confidential Information to any person or agency and any interagency agreement or other procedure by which such person or agency could execute the Non-Disclosure Agreement or an agreement containing the same substantive provisions as this Agreement.” In addition, Section 38.9.4.6 permits limited discussion of confidential information among authorized requestors from different authorized agencies. Furthermore, Section 38.9.4.3 permits “any and all Authorized Requestors sponsored by the same Authorized Agency may have access to the Confidential Information that is provided to the sponsoring Authorized Agency pursuant to an Information Request.”

The documents sometimes use the correct terminology of “unauthorized release” (see, e.g., Section 3.1 of the NDA). However, numerous other places in the documents incorrectly refer only to “release.” For the sake of consistency, the OMS recommends that all such references be consistently changed to reference “unauthorized release.”

4. The Words “sponsored by” Need to Be Added to Several Places in the Documents.

The definition of “Authorized Requestor” in Section 1.15B permits an Authorized Agency to sponsor persons employed by a sister state agency as authorized requestors. Section 2.1(ii) of the NDA requires these persons to identify themselves as such when signing the NDA. However, numerous other places throughout the documents fail to reference this “sponsorship” provision when describing provisions applicable to authorized requestors. All such references should be consistently modified to recognize the sponsorship option.

5. Other Section 38.9.4 Tariff Language

a. Section 38.9.4.1

Subsection 38.9.4.1(c) (ii) should be modified to include the words, “except as provided in (d) below” and to eliminate the word “any.” If left as written, (c)(ii) is not only overly broad and presents a direct conflict with Subsection (d), but it also requires a state commission to disregard any statutory obligations that it may have regarding third party requests.

b. Section 38.9.4.2

The introductory paragraph of Section 38.9.4.2 should be modified so that the schedule of Authorized Requestors placed on the MISO’s web page would also include the email addresses and phone numbers of the Authorized Requestors. This additional information in the schedule of authorized requestors is in the best interest market participants and will assist them in initiating the conference provisions of Section 38.9.4.5(d).

c. Section 38.9.4.6

While the issue is likely of more interest to the market participants than to OMS, we, nevertheless, believe that MISO should include a provision in this section for notification of market participants. If multiple authorized requestors are planning to discuss confidential information among themselves, we believe it only fair that market participants have notice of that. MISO included a notice provision in the parallel section 2.3 of the NDA.

6. Other Non-Disclosure Agreement Language

a. Recitals

As written, the sixth paragraph of the Recitals section gives MISO and its IMM the option to abide by the requirements and conditions of the tariff regarding the provision of Confidential Information to an Authorized Requestor. To correct this oversight, the words “may provide Confidential Information” should be changed to “shall provide Confidential Information”.

IV. Conclusion

Wherefore, for all of the reasons explained above, the OMS urges the Commission to direct MISO to make modifications to the proposal contained in Appendix C of MISO's February 17 filing that are consistent with the modifications recommended by the OMS in Appendix A to this pleading. To the extent that the Commission determines that further stakeholder discussion would be fruitful on particular issues, the OMS recommends that the Commission: (1) remand those issues back to MISO for resolution in accordance with the compromise options described by the OMS in various sections of this pleading; (2) establish a firm date for MISO's compliance filing; and 3) allow the Commission's Alternative Dispute Resolution facilitators to assist the parties if requested.

The Organization of MISO States submits these comments because a majority of the members have agreed to generally support them. The following members generally support these comments, with the exceptions noted herein. Individual OMS members reserve the right to file separate comments regarding the issues discussed in these comments:

- Illinois Commerce Commission
- Indiana Utility Regulatory Commission
- Iowa Utilities Board
- Kentucky Public Service Commission
- Michigan Public Service Commission
- Minnesota Public Utilities Commission
- Missouri Public Service Commission
- Montana Public Service Commission
- Nebraska Power Review Board
- North Dakota Public Service Commission
- Public Utilities Commission of Ohio
- South Dakota Public Utilities Commission
- Wisconsin Public Service Commission

The Pennsylvania Public Utility Commission abstains from this comment. The Manitoba Public Utilities Board did not participate in this comment.

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

V. 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.

Respectfully Submitted,

William H. Smith, Jr.

William H. Smith, Jr.
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Organization of MISO States
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Dated: March 11, 2005

Appendix A

State Commission Data Access - Definitions of “Affected Participants,” “Authorized Agency,” “Authorized Requestor,” “Information Request” and “Non-Disclosure Agreement”

1.4A Affected Participant: A Market Participant, a person that engages in Market Activities or a person that takes any other service under the Tariff that has provided to the Transmission Provider Confidential Information that is requested by, or is disclosed to, an Authorized Requestor under a Non-Disclosure Agreement.

1.15A Authorized Agency: (i) a State public utility commission within the geographic limits of the Transmission Provider Region that regulates the distribution or supply of electricity to retail customers or is legally charged with monitoring the operation of wholesale or retail markets serving retail suppliers or customers within its State; or (ii) the Organization of MISO States or any successor organization., formed to act as a regional state committee as that concept is described in FERC’s Wholesale Market Platform White Paper¹² within the Transmission Provider Region; .

1.15B Authorized Requestor: A person who has executed a Non-Disclosure Agreement, and is authorized by an Authorized Agency to receive and discuss Confidential Information. Authorized Requestors may include, attorneys representing an Authorized Agency and consultants and/or contractors directly employed by an Authorized Agency, provided, however, that consultants or contractors may not initiate requests for Confidential Information from the Transmission Provider or the IMM. Authorized Requestors may include persons employed by a state agency within the Transmission Provider Region that has both access to documents in the possession of its same state public utility commission pursuant to state statute and the ability to protect those documents in accordance with the Non-Disclosure Agreement.

1.143 Information Request: A written request, in accordance with the terms of the Tariff for disclosure of Confidential Information pursuant to Section 38.9.4 of the Tariff.

1.222 Non-Disclosure Agreement: An agreement established between the Transmission Provider and affected parties governing the disclosure of Confidential Information. . Provided, however, that in the case of such an agreement between an Authorized Requestor and the Transmission Provider pursuant to Section 38.9.4 of the Tariff, the applicable form is appended to the Tariff as Attachment “__”, wherein the Authorized Requestor is given access to otherwise restricted Confidential Information.

¹² *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, Appendix A, at 16 (April, 2003).

Provisions On State Commissions' Information Access

38.9.4 Disclosure to Authorized Requestors

38.9.4.1 Basic Requirements for Disclosure

Notwithstanding anything in this section to the contrary, the Transmission Provider and/or the IMM shall ~~only~~ disclose Confidential Information, otherwise required to be maintained in confidence pursuant to this Tariff, to an Authorized Requestor ~~solely~~ under the following conditions:

- a) The Authorized Requestor has executed a Non-Disclosure Agreement with the Transmission Provider, stating:
 - i. that he or she is an Authorized Requestor;
 - ii. the position he or she holds within or the relationship he or she has with the Authorized Agency for which he or she will be an Authorized Requestor;
 - iii. that he or she is authorized to enter into and perform the obligations of the Non-Disclosure Agreement;
 - iv. that the relevant Authorized Agency, has practices or procedures adequate to protect against the unauthorized release of any confidential information received pursuant to the Non-Disclosure Agreement;
 - v. that he or she is familiar with, and will comply with, any applicable practices or procedures of the Authorized Agency which the Authorized Requestor represents; and that he or she is not in breach of any Non-Disclosure Agreement entered into with the Transmission Provider.

- b) The Transmission Provider will verify that the Authorized Agency ~~employing~~ employing, retaining or sponsoring the Authorized Requestor has provided the Transmission Provider with the following information pursuant to Section 2.2 of Attachment “_” (NDA for Authorized Requestors):
 - i. a list of statutory authority, obligation or duty establishing or specifying the particular Authorized Agency’s duty, responsibility or authority in fulfillment of which it will make requests to the Transmission Provider or the IMM under this Section for information, including, but not limited to, that enumerated and described as available to the IMM in Module D of this Tariff; or, in the case of the Organization of Midwest ISO States (“OMS”), an order of the Commission prohibiting the release of confidential information by the Organization of Midwest ISO States, except in accordance with the terms of the Non-Disclosure Agreement;

- ii. a statement notifying and identifying to the Transmission Provider that the Authorized Agency has practices or procedures in place to protect against the unauthorized release of Confidential Information; and
 - iii. confirmation in writing that the Authorized Requestor is authorized by the Authorized Agency to enter into the Non-Disclosure Agreement and to receive Confidential Information under this Tariff
- c) In fulfilling the verification required by Subsection b) immediately above, the Transmission Provider shall be able to rely conclusively upon either an order of such Authorized Agency or a certification from counsel to such Authorized Agency, confirming that the Authorized Agency (i) has statutory authority, or in the case of the OMS is in receipt of and bound by the Commission Order referred to in subsection b) i above, to protect the confidentiality of any confidential information received pursuant to the Non-Disclosure Agreement from ~~public~~unauthorized release or disclosure ~~and from release or disclosure to any other entity, including~~(ii) will, except as provided in (d) other agencies of state government, (ii) will below, defend against ~~any~~ disclosure of Confidential Information pursuant to any Third Party Request through all available legal process, including, but not limited to, obtaining any necessary protective orders, (iii) will provide the Transmission Provider with prompt notice of any ~~such~~ Third Party Request or legal proceedings and will consult and cooperate with the Transmission Provider and/or any Affected Participant in its efforts to deny the Third Party Request or defend against such legal process, (iv) in the event a protective order or other remedy is denied, will direct Authorized Requestors authorized by it to furnish only that portion of the confidential information that their legal counsel advises the Midwest ISO in writing is legally required to be furnished, (v) will exercise its best efforts to obtain assurance that confidential treatment will be accorded to such confidential information, and (vi) has adequate practices or procedures in place to protect against the release of such ~~confidential information;~~Confidential Information; and (vii) confirmation in writing that the Authorized Requestor is authorized by the Agency to enter into the Non-Disclosure Agreement and to receive confidential information pursuant to the Tariff and under the Non-Disclosure Agreement.
- d) The certification from counsel for the Authorized Agency referred to in c)(ii) above must affirmatively disclose any state law, rule, or good cause shown that will prohibit or prevent the Authorized Agency from defending against ~~any~~ disclosure of Confidential Information pursuant to any Third Party Request as otherwise required by c)(ii). In an instance where there is such a state law, rule, or good cause shown disclosed, such certification shall confirm that the Transmission Provider would have notice of the Third Party Request and standing to pursue legal processes, including the obtaining of a protective order, before the forum or fora in which state law prohibits or prevents the Authorized Agency from taking such actions itself.

38.9.4.2 Schedule of Authorized Requestors

The Transmission Provider shall maintain a schedule of all Authorized Requestors and the Authorized Agency they represent, which shall be made available on ~~their~~its website or by written request. Such schedule shall include phone numbers and e-mail addresses. Such schedule shall be compiled by the Transmission Provider, based on information provided by any Authorized Requestor and/or Authorized Agency. The Transmission Provider shall update the schedule promptly upon receipt of information from an Authorized Requestor or Authorized Agency, but shall have no obligation to verify or corroborate any such information, and shall not be liable or otherwise responsible for any inaccuracies in the schedule due to incomplete or erroneous information conveyed to and relied upon by the Transmission Provider in the compilation and/or maintenance of the schedule.

38.9.4.3 Use of Confidential Information. The Authorized Requestor shall use the Confidential Information solely for the purpose of assisting an Authorized Agency in discharging its duty, responsibility or authority in fulfillment of which it authorizes Authorized Requestors to make requests for Confidential Information and for no other purpose. Any and all Authorized Requestors sponsored by the same Authorized Agency may have access to the Confidential Information that is provided to the sponsoring Authorized Agency pursuant to an Information Request.

38.9.4.4 Limited Oral Disclosures

a) The Transmission Provider or the IMM may, in the course of discussions with an Authorized Requestor or Authorized Requestors in meetings or teleconferences, orally disclose information otherwise required to be maintained in confidence, without the need for a prior Information Request. Such oral disclosures shall provide enough information to enable the Authorized Requestor or their Authorized Agency to determine whether additional Information Requests for information are appropriate. The Transmission Provider or the IMM will not make any written or electronic disclosures of confidential information to the Authorized ~~Person~~Requestor pursuant to this section. In any such discussions, The Transmission Provider or the IMM shall ensure that the individual or individuals receiving such Confidential Information are Authorized Requestors, orally designate Confidential Information that is disclosed, and refrain from identifying any specific Affected Participant whose information is disclosed. The Transmission Provider or IMM shall also be authorized to assist Authorized Requestors in interpreting confidential information that is disclosed. The Transmission Provider or the IMM shall provide any Affected Participant with oral notice of any oral disclosure promptly, but not later than one business day after the oral disclosure. Such oral notice to the Affected Participant shall include the substance of the oral disclosure, but shall not reveal any Confidential Information of any other entity and must be received by the Affected Participant before the name of the Affected Participant is released to the Authorized Requestor; provided, however, the identity of the Affected Participant must be made available to the Authorized Requestor within two (2) business days of the initial oral disclosure.

38.9.4.5 Information Requests

- a) **Form:** Information Requests to the Transmission Provider or the IMM shall be in writing, and shall include electronic communications addressed to the Transmission Provider or to the IMM as appropriate.
- b) **Content:** Each Information Request shall describe, in as much detail as possible, the particular information sought, including the time period for the requested information; provide a description of the purpose for which the information is being sought and state the time period for which it is expected that the information will need to be retained by the Authorized Requestor.
- c) **Notice:** The Transmission Provider or IMM shall provide an Affected Participant with notice of and a copy of an Information Request by an Authorized Requestor as soon as possible, but not later than two (2) business days after the receipt of the Information Request.
 - i. The Transmission Provider shall maintain all Information Requests of a general nature in an electronic form accessible by Market Participants and Authorized Requestors. Such list shall not include those Information Requests that sought information of or about a named Market Participant or that would, in the Transmission Provider's view, otherwise be readily ascertainable as being directed toward Confidential Information from or about an individual Market Participant. On at least an annual basis the Transmission Provider shall delete from the list all Information Requests for which the Confidential Information has been returned or destroyed by the Authorized Requestor.
- d) **Conference:** Should the Transmission Provider or an Affected Participant ~~object~~ have a concern with an Information Request or any portion thereof, either of them may, within four (4) business days following the Transmission Provider's receipt of the Information Request, request, in writing, a conference with the Authorized Agency, or the Authorized Agency's Authorized Requestor, to ~~resolve~~ discuss differences concerning the scope or time period covered by the Information Request; provided, however, nothing herein shall require the Authorized Agency or Authorized Requestor to participate in any conference. Regardless of whether a conference is held under this subsection, the timeframe for the Transmission Provider's provision of requested information under Subsection 38.9.4.5(f) shall apply.
- e) **Opportunity to Challenge.** *Any party to the conference may seek assistance from FERC staff in resolution of the dispute. Should such conference be refused by any participant, or not resolve the dispute, then the Transmission Provider, the Affected Participant or the Authorized Agency may initiate appropriate legal action at FERC within three (3) business days following receipt of written notice from any conference participant terminating such conference. Any complaints filed at FERC objecting to a particular Information Request shall be designated by the party as a "fast track" complaint and each party shall bear its own costs in connection with such FERC proceeding. If no FERC proceeding regarding the Information Request is*

*commenced within such three (3) day period, the Transmission Provider shall utilize its best efforts to respond to the Information Request promptly, consistent with section d below.]]**Materials in italics inserted for discussion. This material is based on item 1 from Richard Seide's December 13th letter to Steve Kozey and discussion at subsequent meetings]. [The OMS discusses this issue in Section III.A.1 of the comments]*

f) **Disclosure:** The Transmission Provider or IMM shall supply the information sought to the Authorized Requestor in response to any Information Request within the time period specified in the Information Request, but no later than five (5) business days after the receipt of the Information Request, unless the requested information can only reasonably be made available within an extended time period. To the extent that the Transmission Provider or IMM cannot reasonably prepare and deliver the requested information within the time frame specified in the Information Request or the five (5) business day period, it shall, within such period, hold discussions with the Authorized Requestor and provide the Authorized Requestor with a mutually agreed upon written schedule for the provision of such remaining information. Upon providing the requested information to the Authorized Requestor, the Transmission Provider or IMM shall provide a copy of the disclosed information to the Affected Participant.

~~g) **Limitation On Disclosure Obligation:** The Transmission Provider or the IMM shall not be required to make disclosure in response to an Information Request in circumstances where an electronic data link, dedicated communication circuit or other hardware or third party services would be necessary to effectuate the disclosure. Nor shall the Transmission Provider or the IMM be required to make disclosure in response to an Information request that is of a scope or extent that it is materially similar to the flow of data from Market Participants to the Transmission Provider or from the Transmission Provider to the IMM.~~

38.9.4.6 Limited Discussion of Confidential Information Among Authorized Requestors Sponsored By Different Authorized Agencies

Authorized Requestors who are parties to Non-Disclosure Agreements but who are sponsored by different Authorized Agencies may discuss Confidential Information with each other; provided that the Authorized Requestor that made the Information Request pursuant to which the disclosure of Confidential Information was made by the Transmission Provider or the IMM notifies the Transmission Provider in advance of the discussion and the Transmission Provider confirms the status of all Authorized Requestors from additional Authorized Agencies that will be included in the discussion. The Transmission Provider shall respond to such notification within two (2) business days from receipt of notification. The Transmission Provider shall provide an Affected Participant with notice of the planned discussion within (2) business days from the receipt of notification of the planned discussion. Failure of the Transmission Provider to provide the response to the notification of planned discussion or the notification of the Affected Participant within these specified time frames shall not prevent the discussion

from taking place. Such discussion among Authorized requestors shall not change the status of the Confidential Information. It shall remain Confidential Information.

38.9.4.7 Breach of Non-Disclosure Obligations

In the event of any breach of a Non-Disclosure Agreement:

- a) The Authorized Requestors and/or their respective Authorized Agency shall promptly notify the Transmission Provider or the IMM, who shall, in turn, promptly notify any Affected Participant of any unauthorized release of Confidential Information provided pursuant to any Non-Disclosure Agreement. Upon notification, the Transmission Provider will cease disclosure to the Authorized Requestor pursuant to any Information Requests and will make no disclosure pursuant to any Information Request pending from the Authorized Requestor until it can be determined after consultation with the Authorized Requestor, his or her Authorized Agency and the Affected Participant that (i) the disclosure was not due to the intentional, reckless or negligent action or omission of the Authorized Requestor; (ii) there was no harm or economic damage suffered by the Affected Participant; (iii) there are now procedures in place to prevent a recurrence of the ~~disclosure~~ unauthorized release or (iv) similar good cause shown.
- b) To the extent that both the Transmission Provider and the Authorized Agency agree a breach has occurred, or FERC has made a ruling that a breach has occurred, the Transmission Provider and/or, the IMM may seek and obtain the immediate return of all Confidential Information obtained by the Authorized Requestor pursuant to the Non-Disclosure Agreement or certification of its destruction. Any other rights and remedies shall be pursuant to the terms of the Non-Disclosure Agreement.
- c) No Authorized Requestor, who is an employee of an Authorized Agency, shall have responsibility or liability whatsoever under the Non-Disclosure Agreement or this Tariff for any and all liabilities, losses, damages, demands, fines, monetary judgments, penalties, costs and expenses caused by, resulting from, or arising out of or in connection with the release of Confidential Information to persons not authorized to receive it; However, nothing in this Section 38.9.4.6.c is intended to limit the liability of any person who is not an employee of or a member of an Authorized Agency, to the degree not granted limitations as to liability under applicable state law of the Authorized Agency's state, when such a person is under contract to perform services for the Authorized State Agency, for any and all economic losses, damages, demands, fines, monetary judgments, penalties, costs and expenses caused by, resulting from, or arising out of or in connection with such unauthorized release.

Attachment___

Form of Non-Disclosure Agreement for Authorized Requestors

THIS NON-DISCLOSURE AGREEMENT (the “Agreement”) is made this ___ day of ___ by and between, _____, an Authorized Requestor, as defined below, ~~employed or retained~~ employed, retained, or sponsored by an Authorized Agency, as defined below, with offices at _____, and the Midwest Independent Transmission System Operator, Inc., a Delaware limited liability company, with offices at 701 City Center Drive, Carmel, Indiana, 46032 (“the Midwest ISO” or “Transmission Provider”). The Authorized Requestor and the Transmission Provider shall be referred to herein individually as a “Party,” or collectively as the “Parties.” Unless otherwise stated herein capitalized terms shall have the same meaning as set forth in the Transmission Provider’s Tariff on file with the Federal Energy Regulatory Commission.

RECITALS

Whereas, the Transmission Provider serves as the Regional Transmission Organization with reliability and/or functional control responsibilities over transmission facilities in the states of the Transmission Provider Region, and operates and oversees wholesale markets for electricity pursuant to the requirements of the Transmission Provider Tariff and the ISO Agreement; and

Whereas, the Transmission Provider’s Independent Market Monitor (“IMM”) serves as the monitor for the Transmission Provider’s wholesale markets for electricity in the Transmission Provider’s Region, and

Whereas, the Tariff requires that the Transmission Provider and the IMM maintain the confidentiality of Confidential Information; and

Whereas, Section 38.9.4 of the Tariff requires the Transmission Provider and the IMM to disclose Confidential Information to Authorized Requestors upon satisfaction of conditions stated in the Tariff, including, the execution of this Agreement by the Authorized Requestor; and

Whereas, the Transmission Provider desires to provide Authorized Requestors with the broadest possible access to Confidential Information, consistent with the Transmission Provider’s and the IMM’s obligations and duties under the Tariff, the ISO Agreement, and applicable FERC Orders; and

Whereas, this Agreement is a statement of the conditions and requirements, consistent with the requirements of the Tariff, whereby the Transmission Provider or the IMM ~~may~~shall provide Confidential Information to the Authorized Requestor.

NOW, THEREFORE, agreeing to be legally bound, the Parties hereby agree as follows:

1. DEFINITIONS.

1.1 Affected Participant. A Market Participant, a person that engages in Market Activities or a person that takes any other service under the Tariff that has provided to the Transmission Provider Confidential Information that is requested by, or is disclosed to, an Authorized Requestor under a Non-Disclosure Agreement.

1.2 Authorized Agency. (i) A State public utility commission within the geographic limits of the Transmission Provider Region that regulates the distribution or supply of electricity to retail customers or is legally charged with monitoring the operation of wholesale or retail markets serving retail suppliers or customers within its State; or (ii) the Organization of MISO States or any successor organization.

1.3 Authorized Requestor. A person, including the undersigned, which has executed this Agreement and is authorized by an Authorized Agency to receive and discuss Confidential Information. Authorized Requestors may include attorneys representing an Authorized Agency and consultants and/or contractors directly employed or retained by an Authorized Agency, provided, however, that consultants or contractors may not initiate requests for Confidential Information. Authorized Requestors may include persons employed by a state agency within the Transmission Provider Region that has both access to documents in the possession of its same state's public utility commission pursuant to state statute and the ability to protect those documents in accordance with the Non-Disclosure Agreement.

1.4 Confidential Information. Confidential Information is that information defined in Section 1.37 of the Tariff.

1.5 FERC or Commission. The Federal Energy Regulatory Commission.

1.6 Information Request. A written request in accordance with the terms of this Agreement for disclosure of Confidential Information pursuant to Section 38.9.4 of the Tariff.

1.7 ISO Agreement. The "Agreement Of Transmission Facilities Owners To Organize The Midwest Independent Transmission System Operator, Inc., A Delaware Non-Stock Corporation," as it may be further amended or restated from time to time.

1.8 IMM. The Independent Market Monitor established under Module D of the Tariff.

1.9 The Tariff. The Transmission Provider Open Access Transmission and Energy Markets Tariff, as it may be amended from time to time.

1.10 Third Party Request. Any request or demand by any entity upon an Authorized Requestor or an Authorized Agency for release or disclosure of Confidential Information. A Third Party Request shall include, but shall not be limited to, any subpoena, discovery request, request pursuant to state freedom of information or public records access statutes or regulations, or other request for Confidential Information made by any: (i) federal, state or local government subdivision, department, official, agency or court, or (ii) arbitration panel, business, company, entity or individual.

2. Protection of Confidentiality.

2.1 Representation as to Status and Acceptance of Duty to Not Disclose. The Authorized Requestor agrees that:

- (i) he or she is an Authorized Requestor as defined herein;
- (ii) he or she is employed by _____ [name of Authorized agency] as _____; _____, [OR IF NOT AN EMPLOYEE] is retained as _____ by the _____ [name of Authorized Agency], [OR IF AN EMPLOYEE OF A SISTER STATE AGENCY DESCRIBED IN SECTION 1.3 ABOVE] is sponsored by _____ [name of Authorized Agency];
- (iii) he or she is authorized by the _____ [name of Authorized Agency] to enter into and perform the obligations of this Non-Disclosure Agreement;
- (iv) the Authorized Agency identified in items (i) and (ii) above has procedures ~~and~~or practices to protect against the unauthorized release of Confidential Information received,
- (v) he or she is familiar with, and will comply with, all such applicable Authorized Agency procedures or practices;
- (vi) he or she is authorized to represent and warranty and does so represent and warranty that the Authorized Agency identified in (ii) above will, except as provided in Section 2.4.6.1, deny Third Party Requests and, except as provided in Section 2.4.6.3, defend, consistent with the terms of Section 2.4.6 below, against any legal process that seeks the Third Party release of any confidential information that would be released in contravention of the terms of the Non-Disclosure Agreement; ~~Confidential Information~~; and
- (vii) he or she is not in breach of any Non-Disclosure agreement entered into with the Transmission Provider.

2.2 Conditions Precedent. The Authorized Requestor agrees that as a condition of the execution, delivery and effectiveness of this Agreement by the Transmission Provider and the continued provision of Confidential Information pursuant to the terms of this Agreement, the Authorized Agency shall, prior to the initial Information Request for Confidential Information by an Authorized Requestor on its behalf, provide the Transmission Provider with:

- (a) a list and copies of statutory authority, obligation or duty establishing or specifying the particular Authorized Agency's duty, responsibility or authority in fulfillment of which it will make requests to the Transmission Provider or the IMM under this Agreement for information, including, but not limited to, that enumerated and described as available to either the Transmission Provider or the IMM in Module D of the Tariff;

- (b) a statement notifying and identifying to the Transmission Provider that the Authorized Agency has practices or procedures in place to protect against the unauthorized release of Confidential Information; and
- (c) confirmation in writing that the Authorized Requestor is authorized by the Authorized Agency to enter into this Agreement and to receive Confidential Information under the Tariff;
- (d) in the case of the Organization of Midwest ISO States (“OMS”), an order of the Commission prohibiting the release of confidential information by the Organization of Midwest ISO States, except in accordance with the terms of the Non-Disclosure Agreement; and
- (e) A statement either
 - a. That there is no state law, executive order or other administrative requirement that would compel the mandatory release of Confidential Information held by the Authorized Agency to any person or agency that was not an Authorized Requestor; or
 - b. In the absence of the statement required by subsection a above, the identification of the state law, executive order or other administrative requirement that would compel release of Confidential Information to any person or agency and any interagency agreement or other procedure by which such person or agency could execute the Non-Disclosure Agreement or an agreement containing the same substantive provisions as this Agreement.

The Transmission Provider’s processing of such information to determine that the conditions precedent have been met shall be consistent with and governed by the terms of Section 38.9.4.1 of the Tariff. The Transmission provider and the IMM shall be expressly entitled to rely upon such Authorized Agency orders, and/or certifications of counsel as described in Section 38.9.4.1 in providing Confidential Information to the Authorized Requestor, and shall in no event be liable, or subject to damages or claims of any kind or nature hereunder or due to the ineffectiveness of Authorized Agency orders, or the inaccuracy of such certification of counsel.

2.3 Discussion of Confidential Information Among Authorized Requestors Sponsored By Different Authorizing Agencies. Authorized Requestors who are parties to Non-Disclosure Agreements containing the same substantive provisions as this Agreement but who are sponsored by different Authorized Agencies may discuss Confidential Information with each other; provided, (i) that the Authorized Requestor that made the Information Request pursuant to which the disclosure of Confidential Information was made by the Transmission Provider or the IMM notifies the Transmission Provider in advance of the discussion as to which Confidential Information will be discussed and (ii) identifies the other Authorized Requestors with whom the Confidential Information will be discussed and (iii) the Transmission Provider confirms the status of all Authorized Requestors from additional Authorized Agencies that will be included in

the discussion. The Transmission Provider shall respond to such notification within two (2) business days from receipt of notification. The Transmission Provider shall provide an Affected Participant with notice of the planned discussion within (2) business days from the receipt of notification of the planned discussion. Failure of the Transmission Provider to provide the response to the notification of planned discussion or the notification of the Affected Participant within these specified time frames shall not prevent the discussion from taking place. The discussion of Confidential Information among Authorized requestors pursuant to this section shall not change the status of the Confidential Information. Each Authorized Requestor who receives Confidential Information pursuant to the procedures covered by this section shall have all the obligations regarding ~~maintaining~~ such Confidential Information as he or she would have if the Confidential Information had been provided directly by the Transmission Provider to the Authorized Requestor. Disclosures authorized by this section shall be limited to discussion. Any request for documents containing Confidential Information originally provided to an Authorized Requestor shall only be made pursuant to an Information Request.

2.4 Care and Use of Confidential Information.

2.4.1 Control of Confidential Information. The Authorized Requestor shall be the custodian of any and all Confidential Information received pursuant to the terms of this Agreement from the Transmission Provider or the IMM or another Authorized Requestor.

2.4.2 Access to Confidential Information. Except when inconsistent with state or federal law, the Authorized Requestor shall ensure that Confidential Information received by that Authorized Requestor is disseminated only to those persons identified as Authorized Requestors by his or her Authorized Agency to the Transmission Provider pursuant to the requirements of Section 2.2(c) of this Agreement or, in the limited circumstances described by Section 2.3 of this Agreement, is discussed only with those persons properly identified as Authorized Requestors.

2.4.3 Notice of Change in Status. The Authorized Requestor or Authorized Agency shall promptly notify the Transmission Provider of any change that would affect the Authorized Requestor's status as an Authorized Requestor. The Transmission Provider shall maintain a schedule of all Authorized Requestors and the Authorized Agencies they represent, which shall be made publicly available on the Transmission Provider website and/or by written request. The Transmission Provider will compile the schedule, based on information provided by Authorized Requestors and/or Authorized Agencies. The Transmission Provider shall update the schedule promptly upon receipt of information from an Authorized Requestor or Authorized Agency, but shall have no obligation to verify or corroborate any such information, and shall not be liable or otherwise responsible for any inaccuracies in the schedule due to incomplete or erroneous information conveyed to and relied upon by the Transmission Provider in the compilation and/or maintenance of the schedule.

2.4.4 Use of Confidential Information. The Authorized Requestor shall use the Confidential Information solely for the purpose of assisting an Authorized Agency in discharging its duty, responsibility or authority in fulfillment of which it authorizes

Authorized Requestors to make requests for Confidential Information pursuant to this Agreement, and for no other purpose.

2.4.5 Return of Confidential Information. When the Authorized Agency determines that it no longer needs the Confidential Information that was disclosed to the Authorized Requestor, or for any reason the Authorized Requestor is not, or will no longer be an Authorized Requestor, the Authorized Agency or Authorized Requestor shall, (a) return the Confidential Information and all copies thereof to the Transmission Provider or the IMM, or (b) certify to the Transmission Provider or the IMM that all paper copies have been destroyed and all electronic copies of the Confidential Information have been deleted, *[or identify the time by which taking action consistent with state document retention laws it will comply with either (A) or (b) above]*. The Transmission Provider or the IMM shall waive this condition in writing if such Confidential Information has become publicly available or non-confidential in the course of business or pursuant to the Tariff, the ISO Agreement, or applicable rule or order of the FERC. Upon the request of the Affected Participant, but in any event no later than one year from the date of disclosure, the Transmission Provider shall inquire of the Authorized Requestor as to when the need for the information as originally specified in the Information Request will be concluded. The Authorized Requestor shall respond to the Transmission Provider within 30 days.

2.4.6 Defense Against Third Party Requests.

2.4.6.1 ~~The~~ Except where there is a state law, executive order or other administrative requirement as described in Section 2.2(e)(b) above, the Authorized Requestor's sponsoring Authorized Agency will deny any Third Party Requests and, except in the case where a certification by counsel of the Authorized Agency was made pursuant to section 38.9.4.1(d) of the Tariff, defend against any legal process that seeks the release of any ~~confidential information~~ Confidential Information that would be released in contravention of the terms of the Non-Disclosure Agreement. The Authorized Requestor's Authorized Agency shall defend against any disclosure of Confidential Information pursuant to any Third Party Request through all available legal process, including, but not limited to, obtaining any necessary protective orders. The Authorized Requestor, or upon written notification of assignment of this duty, the relevant Authorized Agency, shall provide The Transmission Provider and the Transmission Provider shall provide each Affected Participant, with prompt notice of any such Third Party Request or legal proceedings, and shall consult and, consistent with state statutes, cooperate with Transmission Provider and/or any Affected Participant in its efforts to deny the request or defend against such legal process. In the event a protective order or other remedy is denied, the Authorized Requestor agrees to furnish only that portion of the Confidential Information which their legal counsel advises the Transmission Provider (and of which the Transmission Provider shall, in turn, advise any Affected Participants) in writing is legally

required to be ~~furnished, and to exercise their best efforts to obtain assistance that~~ furnished.

~~2.4.6.2 confidential treatment will be accorded to such Confidential Information.~~

2.4.6.2 Where the certification from counsel for the Authorized Agency disclosed a state law, rule, or good cause shown that would prohibit or prevent the Authorized Agency from defending against any disclosure of Confidential Information, the Authorized Agency will be excused from the obligation to defend in 2.4.2.6.1, but shall have all other obligations in that section. In addition to those obligations, the Authorized Agency will have the obligation to consult with and cooperate with the Transmission Provider and the Affected Participant in their efforts to secure the right to participate in and defend against any disclosure of Confidential Information to the ~~third party~~ Third Party requestor. In the case where a previously disclosed state law, rule, or good cause shown prohibits or prevents the Authorized Agency from defending against any disclosure, the Transmission Provider, at the election of the Affected Party expressed through timely notice given consistent with Section 4 of this Agreement, will oppose any disclosure of Confidential Information pursuant to any Third Party Request through all available legal process, including, but not limited to, obtaining any necessary protective orders.

2.5 Information Requests

- a) **Form:** Information Requests to the Transmission Provider or the IMM shall be in writing, and shall include electronic communications addressed to the Transmission Provider or to the IMM as appropriate.
- b) **Content:** Each Information Request shall describe, in as much detail as possible, the particular information sought; provide a description of the purpose for which the information is being sought and; state the time period for which it is expected that the information will need to be retained by the Authorized Requestor.
- c) **Notice:** The Transmission Provider or IMM shall provide an Affected Participant with notice and a copy of an Information Request by an Authorized Requestor as soon as possible, but not later than two (2) business days after the receipt of the Information Request.
- d) **Conference:** Should the Transmission Provider or an Affected Participant ~~object to~~ have a concern with an Information Request or any portion thereof, either of them may, within four (4) business days following the Transmission Provider's receipt of the Information Request, request, in writing, a conference with the Authorized Agency, or the Authorized Agency's Authorized Requestor, to ~~resolve~~ discuss differences concerning the scope or time period covered by the Information Request; provided, however, nothing herein shall require the Authorized Agency or Authorized Requestor to participate in any conference. Regardless of whether a conference is

held under this subsection, the timeframe for the Transmission Provider's provision of requested information under Subsection 2.5(j) shall apply.

e) **Disclosure:** The Transmission Provider or IMM shall supply the information sought to the Authorized Requestor in response to any Information Request within the time period specified in the Information Request, but no later than five (5) business days after the receipt of the Information Request, unless the requested information can only reasonably be made available within an extended time period. To the extent that the Transmission Provider or IMM cannot reasonably prepare and deliver the requested information within the time frame specified in the Information Request or the five (5) business day period, it shall, within such period, hold discussions with the Authorized Requestor and provide the Authorized Requestor with a mutually agreed upon written schedule for the provision of such remaining information. Upon providing the requested information to the Authorized Requestor, the Transmission Provider or IMM shall provide a copy of the disclosed information to the Affected Participant.

~~f) **Limitation On Disclosure Obligation:** The Transmission Provider or the IMM shall not be required to make disclosure in response to an Information Request in circumstances where an electronic data link, dedicated communication circuit or other hardware or third party services would be necessary to effectuate the disclosure. Nor shall the Transmission Provider or the IMM be required to make disclosure in response to an Information Request that is of a scope or extent materially similar to level of the flow of data from Market Participants to the Transmission Provider or from the Transmission Provider to the IMM.~~

g) **Necessary Oral Disclosures by the IMM.** The Transmission Provider or IMM may, in the course of discussions with an Authorized Requestor, orally disclose information otherwise required to be maintained in confidence, without the need for a prior Information Request. Such oral disclosures shall provide enough information to enable the Authorized Requestor or the Authorized Agency to determine whether additional Information Requests are appropriate. The IMM or Transmission Provider will not make any written or electronic disclosures of Confidential Information to the Authorized Requestor pursuant to this section. In any such discussions, the IMM or Transmission Provider shall ensure that the individual or individuals receiving such Confidential Information are Authorized Requestors under this Agreement, orally designate Confidential Information that is disclosed, and refrain from identifying any specific Affected Participant whose information is disclosed. The Transmission Provider or IMM shall also be authorized to assist Authorized Requestors in interpreting Confidential Information that is disclosed. The Transmission Provider or the IMM shall (i) maintain a written record of oral disclosures pursuant to this section, which shall include the date of each oral disclosure and the Confidential Information disclosed in each such oral disclosure, and (ii) provide any Affected Participant with oral notice of any oral disclosure immediately, but not later than one (1) business day after the oral disclosure. Such oral notice to the Affected Participant shall include the substance of the oral disclosure, but shall not reveal any Confidential Information of any other Participant and must be received by the Affected Participant

before the name of the Affected Participant is released to the Authorized Requestor; provided, however, the identity of the Affected Party must be made available to the Authorized Requestor within two (2) business days of the initial oral disclosure.

2.6 Notice of Disclosures. The Authorized Requestor, directly or through the Authorized Agency, shall promptly notify the Transmission Provider or the IMM, who shall, in turn, promptly notify any Affected Participant of any ~~inadvertent or intentional~~ unauthorized release of the Confidential Information provided pursuant to this Agreement. “Release” as used in this section does not include conduct authorized pursuant to Section 2.3. The Authorized Requestor shall take steps to minimize any further release of Confidential Information, and shall take reasonable steps to attempt to retrieve any Confidential Information that may have been released.

2.7 Ownership and Privilege. Nothing in this Agreement, or incident to the provision of Confidential Information to the Authorized Requestor pursuant to any Information Request, is intended, nor shall it be deemed, to be a waiver or abandonment of any legal privilege that may be asserted against subsequent disclosure or discovery in any formal proceeding or investigation. Moreover, no transfer or creation of ownership rights in any intellectual property comprising Confidential Information is intended or shall be inferred by the disclosure of Confidential Information by the Transmission Provider or by the IMM, and any and all intellectual property comprising Confidential Information disclosed and any derivations thereof shall continue to be the exclusive intellectual property of the Transmission Provider, IMM and/or the Affected Participant.

3. Non-Authorized Disclosure and Remedies.

3.1 Notification of Unauthorized Disclosure to Third Parties. The Authorized Requestors and/or their respective Authorized Agency shall promptly notify the Transmission Provider or the IMM, who shall, in turn, promptly notify any Affected Participant of any unauthorized release of Confidential Information provided pursuant to any Non-Disclosure Agreement. Upon notification, the Transmission Provider will cease disclosure to the Authorized Requestor pursuant to any still active Information Requests and will make no disclosure pursuant to any Information Request then pending from the Authorized Requestor, until it can be determined after consultation by the Transmission Provider with the Authorized Requestor, his or her Authorized Agency and the Affected Participant that (i) the disclosure was not due to the intentional, reckless or negligent action or omission of the Authorized Requestor; (ii) there was no harm or economic damage suffered by the Affected Participant from the disclosure or (iii) that similar good cause shown warrants resumption of the Transmission Provider’s disclosure obligations pursuant to this Agreement.

3.2 Material Breach. The Authorized Requestor agrees that release of Confidential Information to persons not authorized under this Agreement to receive it constitutes a breach of this Agreement, unless the Authorized Requestor is required under state or federal law to release such information. A breach shall be determined to have occurred if both the Transmission Provider and the Authorized Agency agree that a breach has occurred or FERC has determined that a breach has occurred. To the extent that both the Transmission Provider and

the Authorized Agency agree a breach has occurred, or FERC has made a ruling that a breach has occurred, the Transmission Provider and/or, the IMM may seek and obtain the immediate return of all Confidential Information obtained by the Authorized Requestor pursuant to the Non-Disclosure Agreement.

3.3 Waiver of Monetary Damages. If the Authorized Requestor is an employee of an Authorized Agency upon execution of the Non-Disclosure Agreement, he or she shall have no responsibility or liability whatsoever under this Agreement for any and all liabilities, losses, damages, demands, fines, monetary judgments, penalties, costs and expenses caused by, resulting from, or arising out of, or in connection with, the release of Confidential Information to persons not authorized to receive it. However; nothing in this ~~Section 3.2~~Section 3.3 is intended to limit the liability of any person who is not an employee of or a member of an Authorized Agency, or agent thereto, to the degree not granted limitations as to liability under applicable state law of the Authorized Agency's state, when such person is under contract to the Authorized Agency, for any and all direct economic losses, damages, demands, fines, monetary judgments, penalties, costs and expenses caused by, resulting from, or arising out of or in connection with such unauthorized release.

3.4 Post Employment Or Post Retention Duties

If an Authorized Requestor who has received Confidential Information pursuant to this Agreement terminates his or her employment with the sponsoring Authorized Agency, is no longer employed by the Authorized Agency he or she shall:

- Notify the Authorized Agency, the Transmission Provider and the IMM of the change in status;
- Certify to the Transmission Provider that he has transferred control of the Confidential Information to another Authorized Requestor at the same Agency, has retained no personal copies of the Confidential Information and that any Confidential Information not transferred has been destroyed.

If these steps have been taken, then the limitations as to liability in Section 3.3 shall apply to the former employee.

4. Notices. All notices required pursuant to the terms of this Agreement shall be in writing, and served upon the following individuals in person, or at the following addresses or email addresses:

If to the Authorized Requestor:

(email address)
with a copy to

(email address)

If to the Transmission Provider:

The Midwest Independent Transmission System Operator, Inc.
701 City Center Drive, Carmel, Indiana 46032
_____@midwest.iso.org

with a copy to
Stephen G. Kozey
General Counsel
skozey@midwestiso.org

5. Severability and Survival. In the event any provision of this Agreement is determined to be unenforceable as a matter of law (including state Freedom of Information Act statutes), the Parties intend that all other provisions of this Agreement remain in full force and effect in accordance with their terms. In the event of conflicts between the terms of this Agreement and the Tariff, the terms of the Tariff shall in all events be controlling. The Authorized Requestor acknowledges that any and all obligations of the Authorized Requestor hereunder shall survive the severance or termination of any employment or retention relationship between the Authorized Requestor and its respective Authorized Agency.

6. Representations. The undersigned is able to perform all of the obligations and duties contained herein.

7. Counterparts. This Agreement may be executed in counterparts and all such counterparts together shall be deemed to constitute a single executed original.

8. Amendment. This Agreement may not be amended except by written agreement executed by authorized representatives of the Parties.

9. Assignment. This Agreement is not assignable without the written agreement of both Parties.

10. Miscellaneous *[The Midwest ISO is open to consideration of inclusion of provisions for Judicial Recourse, dispute resolution and jurisdiction, but takes no position on these matters at this time].*

Midwest Independent
Transmission System Operator, Inc.
By:

AUTHORIZED REQUESTOR
By:

Name

Title:

Date:

Name

Title:

Date:
