

**BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

**REPLY COMMENTS OF THE ORGANIZATION OF MISO STATES
TO PARTIES' FILINGS OF MARCH 10, 2005**

Pursuant to the Federal Energy Regulatory Commission's ("FERC" or "Commission") Notice issued on March 1, 2005, the Organization of MISO States ("OMS") hereby submits its comments in response to certain market participants regarding the informational filing submitted by the Midwest ISO (February 17, 2005) and regarding the OMS's "Offer of Proof" (February 11, 2005). **Part I** of these comments highlights the broad areas of agreement with most market participants. **Part II** addresses several general concerns raised by some wholesale generators and marketers.

I. The Parties Have Reached General Agreement on State Data Access

In its March 11, 2005, filing, the OMS stated its broad support (with clarifications) for the Midwest ISO's Informational filing. No party seemed to raise serious concerns about the Midwest ISO proposals. Any remaining differences between the OMS and all but a few other parties are small and capable of resolution.

Some stakeholders have interpreted the FERC's Order for a PJM-like approach to require "exact equivalency."¹ Rather, the FERC clearly said that a revised proposal ought to:

¹ See, e.g., the comment of Cinergy Services, Inc. The bulk of Cinergy's comments are mischaracterizations of the FERC Orders, the Midwest ISO's tariff proposal, or the OMS's positions and, as such, do not merit reply. For example, Cinergy seems to treat the PJM

be “more closely aligned with PJM’s” [paragraph 557], have “comparable rules” [paragraph 561], “include the type of non-disclosure agreement recently approved for PJM” [paragraph 561], and “harmonize Authorized Requestors’ individual obligations to protect data” [paragraph 561]. In short, the FERC Order did not require that the MISO and PJM Tariffs be identical. The OMS believes that the FERC measured its words carefully to give credence to its longstanding and oft cited commitment for respecting regional differences and not engage in a “cookie cutter” or “one size fits all” approach where possible.

The OMS has worked with the Midwest ISO and stakeholders to ensure that the Midwest ISO’s Tariff language is readily usable within the Midwest ISO’s footprint.

The OMS believes that the Midwest ISO’s proposal, by incorporating a PJM “type” Non-Disclosure Agreement and other safeguards has addressed the FERC’s concerns as well as the legitimate concerns of market participants. This compromise has also accommodated the state commissions’ concerns for usability. As such, the Midwest ISO’s proposals have achieved a workable compromise for both state commissions and stakeholders.

The current proposal by the Midwest ISO, qualified by the modifications proposed by the OMS in its March 11, 2005, Comments, represents a reasonable balancing of interests,

decision as a binding and inflexible policy in conflict with the direct statements in the FERC series of Orders in this Docket (e.g., August 6 Order, “...to more closely align [at ¶ 557], “the type” of non-disclosure agreement [at ¶ 561], and “harmonize” [at ¶ 561]). Taking Cinergy’s entire filing in sum would render futile the entire course of stakeholder discussions directed by the Commission. All stakeholders who participated in those extensive discussions worked to “harmonize and align” the MISO procedures with PJM’s procedures. Cinergy’s comments did not earn credibility through presentation during the stakeholder dialogue. Readily observable in these comments was a lack of Cinergy’s participation in the stakeholder process where the issues it raises at this late date were thoroughly debated. The OMS is certain that the FERC will note that other commenters did participate and offered differences with the OMS earlier filings. All other participants’ filings offered support for the Midwest ISO tariff proposals.

provided that the few remaining outstanding issues are satisfactorily resolved. From the states' perspective, it provides an adequate vehicle for accessing the requisite information timely. From the market participants' perspective, it provides procedures which protect confidential information. These features flowed from extensive dialogue. The OMS made numerous and significant concessions to stakeholders and to address FERC's concerns. Many stakeholders compromised as well. The OMS also appreciates the extensive efforts of the Midwest ISO for achieving a high degree of consensus.

A. Broad Areas of Agreement

Most stakeholders view the Midwest ISO's current proposal as a reasoned compromise. The OMS is most appreciative of the support of most market participants in reaching an accord on this matter. For example, ATCLLC and METC state:

Taken together, the OMS Offer of Proof and the Midwest ISO's Informational filing are evidence of the substantial effort that has been made by all parties to negotiate a mutually agreeable data confidentiality policy...ATCLLC and METC believe that the OMS has set forth legitimate regulatory needs supporting state access to confidential data...[T]he OMS Offer of Proof provides a list of state regulatory functions and reasonable well supported explanations of how confidential data may be useful in the performance of these functions.

Conversely, ATCLLC and METC also recognize that sensitivities associated with providing access to data that has been deemed worthy of confidential treatment. The general experience of ATCLLC and METC has been that state regulators are cognizant of these needs and are willing and able to take the steps necessary to protect the inappropriate release of such information.²

Similar comments by Duke Energy are also appreciated:

The Commission has previously recognized that confidentiality provisions should balance the need for states to collect necessary market information with

² Joint Comments of American Transmission Company, LLC and Michigan Electric Transmission Company, LLC, at pages 1 and 2.

*the need to protect the rights of individual market participants with respect to this same information. The Informational Filing reflects this objective and is a fair and equitable resolution of all affected parties' interests. DENA (Duke Energy North America) supports the Midwest ISO's Informational Filing and urges the Commission to accept the proposed guidelines as submitted.*³

The threshold concern of many market participants was whether state commissions require access to confidential information to primarily fulfill their statutory duties. The OMS believes that there is general agreement that this concern has been satisfied. The OMS also believes that there is recognition by most market participants that state commissions have an important role in assisting in the development of a reliable and economically efficient wholesale market. For example:

*EPSA (Electric Power Supply Association) recognizes that the states play an important role in the development of regional transmission organizations (RTO) and have an essential interest in the universal goal of ensuring that wholesale markets remain competitive. In fact, EPSA appreciates the degree to which the OMS has committed itself to ensuring that the new bid-based markets in the Midwest ISO fully benefit regional wholesale and retail electricity customers.*⁴

Dynegy seems to agree with EPSA's comments provided that adequate safeguards are in place.

*In sum, DYPM fully supports access to relevant data by state commissions and others so long as that access is necessary to the situation for which it is sought and proper safeguards are in place to ensure its protection.*⁵

³ Comments of Duke Energy North America, at pages 1 and 2.

⁴ Protest of the Electric Power Supply Association on the Organization of MISO States Offer of Proof. at page 2.

⁵ Initial Comments of Dynegy Power Marketing Inc to the States Offer of Proof and Response of the Organization of MISO States, at page 6.

B. Policy Issues: Areas of Agreement

1. State Commission Responsibilities for Safeguarding Confidential Information

Because state commissions routinely deal with confidential information, the OMS is sensitive to the market participants' (as well as the Midwest ISO's, IMM's and FERC's) concerns about confidentiality. The Midwest ISO Tariff proposals have allayed most concerns. To be clear, state commissions, acting in good faith, will not request confidential information if they cannot protect confidential information and acknowledge that, under the provisions of the Tariff, the Midwest ISO will not provide confidential data to any state commission that is unable to protect confidential data.. In addition to state statutory authorities, states would be obliged to sign the Non-Disclosure Agreement before requesting information under this Tariff. Finally, the Midwest ISO will make the determination of whether a state can protect the data pursuant to its Tariff. Thus, the multiple layers of protections afforded by state statutes and a FERC-approved Midwest ISO tariff should satisfy the concerns of market participants. Therefore, we agree with FirstEnergy (at 9) that:

[t]he Midwest ISO's February 17 Informational Filing includes several improvements to the Midwest ISO's TEMT and the related Non-Disclosure Agreement that will help 'fill in the gaps' of state law to provide greater assurances that confidential data will be protected by state agencies. Specifically, the enhanced conditions precedent to the state agency's right to receive confidential information from the Midwest ISO is critical..."

2. Notification, Ability to Challenge, the ability of the Midwest ISO to control dissemination, and other Due Process Considerations

State commissions agree with FirstEnergy (at 10) and others on the necessity for notification, the ability of marketers to communicate with the state commissions concerning specific data, and the right to challenge access to certain information. In fact, FERC has

already made the determination in Module D of the Midwest ISO Tariff. The OMS agrees with the FERC and market participants that the Midwest ISO needs to maintain a list of Authorized Requestors and a chain of custody over the confidential information. FirstEnergy (at 10) suggested that the Midwest ISO's Tariff filing addressed its concerns:

The Midwest ISO's February 17 Informational Filing includes several provisions that would give the state agencies more responsibility in protecting the confidentiality of disclosed data.

3. The Purposes for which Confidential Information will be used

Many of the comments filed by the market participants indicated concern over the purpose for which state commissions intend to use confidential information. The OMS notes that neither the OMS nor any of the commenters protested Section 38.9.4.3 of the proposed Midwest ISO tariff which requires that a state commission use 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." However, this issue appears to still be a matter of controversy for a limited few market participants. Accordingly, the OMS will attempt to address this issue more completely in Part II.

4. "Streaming" Data

The OMS, upon reflection and with a keen interest in resolving this matter expeditiously and amicably, is willing to accept the tariff language of Section 38.9.4.5 (g) as it was filed by Midwest ISO in its February 17, 2005, Informational filing. The OMS addressed the

“ripeness” of this issue in its March 11 filing. The OMS hopes this acceptance of the Midwest ISO’s proposed Tariff language will resolve this issue.⁶

II. Some Independent Generators and Marketers Continuing to Seek to Restrict the States’ Access Misunderstand the States’ Purpose

Overview

In its Offer of Proof filed February 11, 2005, the OMS detailed its reasons for seeking data held by the Midwest ISO and its Independent Market Monitor. The OMS explained how data on wholesale markets assist states in regulating retail service. PSEG in particular (and some others within the IPP and marketer segment) continues to oppose OMS’s access to confidential information on general grounds and attempts to introduce new legal standards in the process. This Part responds to PSEG et al, in seven subsections:⁷

- a. The parties disagree over the legal standard
- b. The purposes for the data are to assess the benefits as well as the costs and associated risks of retail utilities’ participation in wholesale markets
- c. State regulation is not limited to post-hoc prudence review

⁶ The Illinois Commerce Commission (ICC) does not support this section. Rather, the ICC retains the position set forth in the OMS’ March 11 comments that explained that the PJM tariff does not prohibit state regulators from accessing streaming data and that progress in technology development could ultimately render such a prohibition in the Midwest ISO context inefficient. The OMS further explained at that time that the issue of streaming data is “not ripe for the Commission to make a decision” and that, accordingly, the Midwest ISO’s tariff should not contain an explicit prohibition on state regulators’ ability to access data in this way. The ICC maintains that the issue is still not ripe and that accordingly, the Midwest ISO’s tariff should not contain an explicit prohibition on state regulators’ ability to access data in this way.

⁷ While Cinergy’s comment also addressed several of these points, it did so in the context of its argument that the FERC is bound by its PJM decision. See footnote 1 above. This reply gives greater weight to the comments of stakeholders who participated in the series of discussions held at the Commission’s request.

- d. Wholesale data is not beyond the states' jurisdiction
- e. The market monitor does not substitute for the states
- f. Requiring states to make a case-by-case showing for data is not required by the just and reasonable standard
- g. Limiting states to data not otherwise available under state law fails the cost-benefit test

Someone reading this back-and-forth might get the impression that the states and a few market participants in a couple of sectors are locked in permanent disagreement. The OMS thinks the reality is more optimistic. Much narrowing of differences has occurred. But the foundation for future agreement will be strongest if the mutual understanding is complete. That is the OMS's goal in filing this response.

A. The parties disagree over the legal standard

PSEG states (at 6):

"[T]he inquiry must begin with the notion that the confidential information sought is proprietary in nature and should be made available only upon a showing by the requesting state commission that such information is absolutely necessary to carry out its statutory obligations and only after a showing that appropriate safeguards have been put into place."

PSEG offers no support for this assertion. This statement raises several questions, discussed next.

1. What "need" should states show?

There is no debate over whether the states should protect confidential data received from the Midwest ISO. The debate is over when states should receive the data.

That debate has become clogged with adjectives. Some have argued that the states must show the data are "necessary." PSEG now offers "absolutely necessary." The proponents of this phrase did not connect it to the Federal Power Act.

A standard of "necessary" is illogical, because no protective action is literally necessary. Is it "necessary" for the market monitor to review hourly bids? "Necessary" is an absolute term. One cannot know if the action was "necessary" until after the fact; thus one cannot logically prove necessity before the fact. A standard of "necessary" means that the state commission must be certain, in advance, that absent the data some aspect of state regulation will fail and some consumer will be hurt. Regulation lacks such certainty. "Necessary" poses as a standard but functions like a rejection.

The proper standard is relevance. If the Midwest ISO, a public utility, proposes to share data with state commissions, the proposal is just and reasonable if the data are relevant to the state commission function of regulating retail utilities' involvement in wholesale markets. The connection to the Federal Power Act is direct:

1. FERC's jurisdictional concern is wholesale and transmission transactions.
2. The states' jurisdictional concern is retail service.
3. To the extent retail utilities participate in wholesale markets, the cost and quality of retail service is affected by conditions in wholesale markets.
4. Data from wholesale markets are part of the picture states use to assess the benefits, costs and risks of their utilities' participation in wholesale markets.
5. If states have only an incomplete picture of wholesale markets, they will tend to lack confidence in their utilities' participation in those markets and will tend to discourage that involvement or take actions (or inaction) to protect retail customers that may be viewed as having detrimental ramifications for the regional market (e.g., siting, approval of facilities, demand response).
6. The result of such state discouragement is a weaker wholesale market, which is a FERC jurisdictional concern.

For a regulator, there is no significant difference between "relevant" and "necessary." Effective regulation requires a complete picture. Regulators gather all kinds of information:

future loads and resources, financial condition, fuel costs, taxes. At any point in time, a regulator could not necessarily show that any data point is "necessary," in the sense that the regulatory function would fail without it. The regulator collects the information because it is relevant: because it is part of the complete picture of inputs and opportunities that affect the cost and quality of utility service.

2. What is the statutory significance of confidentiality?

The Federal Power Act speaks of just and reasonable rates, not of confidential data. Confidentiality has statutory significance to the extent it is necessary for just and reasonable rates. The Federal Power Act is not a data protection statute; it is a consumer protection statute.⁸

The OMS agrees that the Midwest ISO, as the public utility filing under Section 205, has the burden of proving that its proposal is just and reasonable. Once a public utility files a full tariff with supporting explanations, it enjoys a rebuttable presumption of reasonableness. A rebuttable presumption means that the burden of going forward moves to those who contest the filing. Here, PSEG and a few others contest the reasonableness of data access. But they offer no facts, no law, no arguments. They offer only possibilities: a state might disclose the data; the disclosure might "harm" wholesale markets; that "harm" might cause rates to become unjust and unreasonable. These easy-to-make, off-the-shelf statements do not support a burden of going forward. They are insufficient to lock out 14 states (and, by extension,

⁸ *Public Systems v. FERC*, 606 F.2d 973, 979, n.27 (D.C. Cir. 1979) ("Both the Natural Gas Act and the Federal Power Act aim to protect consumers from exorbitant prices and unfair business practices. This purpose can be seen in the statutory requirement that rates be just, reasonable, and nondiscriminatory. ... Of course, protection of the consumer includes maintaining the financial integrity of the regulated firm; but the focus of regulation remains control of the economic power of utilities that enjoy monopoly status.").

other states where RTOs and Regional State Committees are in various stages of development) from data relevant to the states' determination of whether their utilities should participate in wholesale markets, and to what extent. This disproportionality, between the PSEG's and a few others' evidentiary effort and the result they seek, has no home in the Federal Power Act.

The Midwest ISO offered a proposal and explained its reasons. OMS's Offer of Proof largely supported Midwest ISO's data access plan, with detailed explanation of the data's relevance and of their commitment to confidentiality. This has also been largely supported by market participants. PSEG and a few others, however, attack with generalities about the possibility of disclosure and the possibility of harm. Then they argue that these generalities require the states to show that each data type is "absolutely necessary." This equation does not add up.

FirstEnergy (at 3-4) wants to weigh one interest against the other, permitting state access only when the risk of harm caused by the unauthorized release is clearly offset by the need for the information to the state entity in fulfilling its legal responsibilities under state law. There is an irony here. The OMS presents dozens of pages of explanation on the states regulatory purposes and how the data will assist the states in fulfilling their regulatory duties. PSEG and a few others provide no information to support their general concerns about "potential harm." Yet they argue that weighing of these two competing concerns favors them. "The risk of harm" is simply too unsubstantiated an allegation to support restricting states' data access.

3. Section 301 is not relevant to this debate

FirstEnergy (at p.3 n.12) argues that Section 301 authorizes FERC to restrict the states' access. Section 301 has no application here. By its terms, Section 301 applies only to Commission employees.⁹ FirstEnergy argues that FERC can rely on Section 301 to restrict data dissemination by the Midwest ISO, because "MISO is entirely a creature of FERC." This characterization is incorrect. The Midwest ISO is a public utility. The Midwest ISO was not created by FERC because the FERC has no authority to create a public utility. Rather the Midwest ISO is a nonprofit corporation, created by its incorporators. The Midwest ISO's activities are bounded by its agreements and tariffs, all as approved by FERC, but the Midwest ISO was not created by FERC. The Midwest ISO is not within FERC, any more than an Independent Market Monitor is within FERC.¹⁰ Because the Midwest ISO is not within FERC, Section 301 does not apply.

B. The purpose for the data is to assess the costs and risks of retail utilities' participation in wholesale markets

PSEG (at 11) states: "The OMS claims that they will use the data to carry out unidentified 'state responsibilities.'" On the contrary, the OMS's Offer of Proof detailed eight areas of state responsibility in which the state commissions may use the data. A few generators also argue that the OMS did not detail the type of data sought. *See, e.g.*, PSEG at 8 ("Conspicuously absent in this listing, however, is any detail as to exactly what kind of data actually is needed and required to aid the states in fulfilling their respective statutory roles.").

⁹ Section 301(b) provides, "No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge ... except insofar as he may be directed by the Commission or by a court."

¹⁰ *Cf. Electric Power Supply Association v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004) (holding that market monitors are not FERC employees for purposes of the Sunshine Act).

However, that data has been detailed extensively in OMS' Offer of Proof. Acceptance of Module D of the Midwest ISO's Tariff was a good faith effort by the OMS to accept such data parameters since it was already vetted by stakeholders and approved by the FERC as necessary for the IMM to satisfy their numerous responsibilities. Appendix A of the OMS Offer of Proof, prepared by technical staff of the state commissions, provides sufficient explanation.

PSEG (at 12) quotes the OMS accurately:

"FERC believes that wholesale competition is necessary for just and reasonable rates . . . [,] retail utilities are not likely to participate in wholesale markets unless their state regulators allow it . . . and their state regulators may not allow it if the data access is insufficient to allow them to protect consumers."

But PSEG interprets the OMS position inaccurately, saying (id.):

"Obviously, such a veiled threat of non-participation cannot advance the cause of setting up regional markets based on mutual cooperation."

Our statement is not veiled and it is not a threat. It is out in the open and it is a legal fact: States determine the extent of their utilities' dependence on wholesale markets. States also have authority over much of the cost recovery associated with state jurisdictional utilities participation in the Midwest ISO. State actions (as well as inactions) have ramifications for the wholesale market because of their intrinsic interrelationships. The states' decisions reflect their level of confidence as to whether wholesale markets will work. The state commissions cannot be passive in the wholesale market while telling their judicial and legislative overseers that they are protecting the public.

PSEG implies that if it cannot limit state access to Midwest ISO data on terms satisfactory to itself, there will be "harm" (meaning that they will raise their prices or leave

the market). If that is PSEG's position, it should so state expressly, specifying the precise tipping point in state data access that will cause it to leave the market, what portion of the market it represents, and how its departure will actually affect market prices. For all we know, the departure of a generator will allow other generators that welcome transparency of markets, are less suspicious of state data management, and more understanding of the state role to take their place, in which case there will be no harm to the wholesale markets.

EPISA (at 3) refers to, and appears to assume the existence of, a "transition from cost-based to value-based markets." The implication is that the "transition" is inevitable and that, therefore, state data access is unnecessary. This reference to "transition," and the implication of inevitability, conflict with the facts. Some form of market pricing at wholesale has existed for over 25 years. Over that period, FERC has had at least 7 different methods for determining (or in some cases, failing to determine) the competitiveness of markets, and is considering new ones now in a rulemaking.¹¹ This past quarter century cannot be confused with a transition, at least not a smooth one. The statements of some states and utilities, moreover, about returning to their "roots" and building their own generation, suggest that the inevitability of this "transition" is not universally accepted. All states whose utilities depend on wholesale markets engage in ongoing comparisons between wholesale purchases and

¹¹ A short list would include:

- a. deviations from cost-based pricing to encourage more transmission construction
- b. deviations from cost-based pricing to encourage more economy transactions
- c. first-tier, second-tier test
- d. hub-and-spokes test
- e. delivered price test
- f. four-prong analysis
- g. supply margin assessment

Docket No. RM04-7-000, entitled *Market-Based Rates For Public Utilities*, was initiated April 14, 2004, 107 F.E.R.C. para. 61,019 to explore these issues for the 8th time.

self-build. No state within the Midwest ISO footprint has committed to abandon one approach for the other. Only with data access can this comparison continue.

Finally, Dynegy (at 5) states: "Far better that everyone work to find ways to create win-win scenarios than to seek access to confidential data merely to keep playing in a zero sum world." That is OMS's position precisely. Somehow Dynegy misunderstood the OMS to be seeking data access so its members could improve their standing in state vs. state allocation battles. The OMS argument is the opposite. The more states understand wholesale markets, the greater their ability to anticipate markets risks, and the greater their willingness to allow utilities to shop those markets. If the generators believe wholesale markets will bring benefits to consumers, we will reach this point sooner as more states trust those markets.

C. State regulation is not limited to post-hoc prudence review

Referring to state prudence reviews of utility wholesale purchases, Dynegy (at 4-5) states: "Such a review by a commission does not require access to anything more than what the utility itself had access to and nowhere in its Offer of Proof does the OMS allege that its members do not currently have adequate means to obtain that information from the most relevant party-the local utility."

Dynegy describes regulatory post-hoc review accurately, but omits half the regulatory equation. Post-hoc review is not the only regulatory tool. Pre-investment assessments, planning, and establishment of preferences about supply mix also occupy regulators. And these pre-investment assessments assist the wholesale markets. Retail utilities worried about post-hoc disallowance of wholesale purchases will avoid wholesale markets. The more trust states have in wholesale markets, the more likely they will allow, or encourage, their utilities

to shop them. The states gain this trust not from post-hoc prudence review, but pre-entry data review.

Dynegy thus argues against its self-interest. State data access serves the interest of Independent Power Producers and marketers. It comes down to goals: whether the goals of the states and the IPPs / marketers are consistent or inconsistent. If the goal of Dynegy, other IPPs and marketers is to increase state commission confidence in wholesale markets, with the result of increasing the quantity of utility purchases from those markets, our interests are consistent. But if the generators' goal is to limit scrutiny of wholesale markets, so that transgressions are easier to commit and harder to detect, our interests are adverse.

D. Wholesale data is not beyond the states' jurisdiction

The OMS argued that states carry out their retail utility regulation by evaluating the costs and risks of the vertical inputs, including inputs from wholesale power markets. PSEG objects (at 14):

"Such reasoning [about vertical inputs] continues to ignore the clear delineation between the Commission's exclusive authority over the regulation of the interstate wholesale electric markets as compared to the states' obligation to regulate their retail markets, and the pivotal role played by the independent market monitor, who is charged with identifying and deterring attempts at market manipulation. ... [T]he OMS mischaracterizes state commissions and FERC as "co-regulators" without any basis in law or fact, or recognition of jurisdictional purviews that are statutorily imposed."

PSEG and other commenters take the phrase "co-regulators" out of context, give it meaning the OMS specifically denied, and then attack the mischaracterization they created. The OMS thought its position was clear. We will reiterate.

Wholesale markets have wholesale sellers and wholesale buyers. Where the wholesale buyer is a utility selling at retail in the state, the state commission has jurisdiction

to review the utility's wholesale purchase activities. That jurisdiction ranges from post-hoc review of a utility's purchase activities to anticipatory actions, such as requirements for pre-approval of power plant or transmission line construction to wholesale purchases. To the extent that states pre-approve wholesale power purchases, states may elect for their jurisdictional utilities to avoid the wholesale market in favor of building their own generation.

Is this state commission activity the "regulation of interstate wholesale electric markets?" It is a question of semantics. When a state forbids its utility from buying at wholesale (in favor of self-build), the state is regulating the wholesale buyer. When FERC denies a wholesale seller the right to sell at wholesale, FERC is regulating the wholesale seller. Are the state and FERC regulating "the wholesale market?" Technically, each regulator is regulating only the entity over which it has jurisdiction. But both regulators are affecting the wholesale market; and both are acting within their jurisdiction. A state does not enter forbidden jurisdictional territory when it takes actions which affect the wholesale market; nor when it seeks data about that market.

FirstEnergy says (at 6) that the OMS approach would "provide for duplicative oversight of wholesale electric service." The imprecision in this statement masks the error. The states do not oversee wholesale service; they oversee retail service. Part of retail regulation is determining the extent of dependence on wholesale markets. A state comparing the merits of nuclear and coal for the next baseload plant would study the nuclear and coal markets before making a decision. A state comparing the merits of self-build and wholesale purchases would study wholesale markets. This effort does not "duplicate [FERC] oversight of wholesale electric service."

PSEG (at 11) states that Midwest ISO state commissions seek "confidential data outside of their jurisdictional boundaries." FirstEnergy (at 6) has "difficult[y] understanding why a state agency needs data relating to multistate wholesale markets as opposed to individual retail markets." EPSA (at 9) argues "state commissions have no direct regulatory need or legal right to obtain broad access to wholesale generator data." These commenters have missed the entire point. Retail utilities who buy in wholesale markets do not shop only from in-state sources. The evolution of the Midwest ISO and the wholesale market EPSA wishes to participate in are in fact both intra and multi-state. Surely, EPSA would not wish to restrict the market.

The PSEG and some generators have confused "jurisdictional boundaries" (retail service within the state) with transactional opportunities (wholesale purchases throughout a region). If a state commission's "jurisdictional boundaries" preclude it from looking at data on wholesale markets outside that state, then a retail utility's service boundaries must preclude it from buying power outside the state. Wholesale sellers then could sell only to buyers within their state -- the opposite result from that sought by these commentors. Of course this reasoning fails.

That is the real contradiction: the generators seek the right to sell at market prices, based on assertions that a competitive market exists throughout the region; but individual states should not have sufficient information to test the claims about that very same region.

E. The market monitor does not substitute for the states

PSEG (at 14) points to the "pivotal role of the independent market monitor." *See also* EPSA at 7 (the "IMM is sufficiently empowered and technically equipped to confirm the legitimacy of market outcomes"). The IMM does not substitute for the state role. The IMM

assists in making the wholesale markets work competitively. The state's role is different: the states have authorities that can, to varying extents, determine –

- a. whether to let its utilities buy from wholesale sellers at all
- b. the relative weight of wholesale purchases, as compared to self-owned generation, in the utility's power supply portfolio
- c. the types of wholesale purchases the utility should make (e.g., long-term, short-term, spot; baseload, intermediate, peaking)
- d. the reasonableness (both prudence and usefulness) of all utility wholesale purchases.

The IMM does not determine any of these things. Its activities cannot substitute for the state commission's responsibility. That responsibility is to determine whether its utilities' participation in wholesale markets will benefit consumers. That determination depends, in turn, on how the state commissions view the extent of competition in the wholesale markets.

The level of competitiveness in wholesale markets will be influenced by the Midwest ISO's tariffs and contracts, the generators' entry decisions and their selling behavior, FERC's regulatory decisions and the IMM's oversight, among other factors. While the activities of the Midwest ISO, FERC and the IMM influence the competitiveness of the wholesale markets, these activities do not substitute for the determination state commissions must make, independently, about the quality of those markets. The extent to which a state's customers are served by wholesale markets is a determination of the state exclusively. To make that determination, the states need data.

We readily acknowledge an overlap between the IMM and the state commissions. Both will make judgments about the competitiveness of wholesale markets. But the IMM's judgments do not preclude the state commissions from making different ones. State law

obligates the state commission to make its own judgment about the effectiveness of wholesale competition, including the effectiveness of the IMM, the Midwest ISO, and of FERC regulation. Without this judgment -- judgment informed by complete data -- the state cannot determine the extent to which its retail utilities should depend on wholesale markets.

F. Requiring states to make a case-by-case showing for data is not required by the just and reasonable standard

Dynegy (at 3) insists that states prove need on a case-by-case basis. Case-by-case proof would raise the cost of data access without commensurate benefit. The more efficient process is to establish now a general right of access to particular categories of data, based on (a) the relevance of the data to state commission activities, (b) each state's showing that it will keep the data confidential.

Dynegy (at 5) points to the OMS's statement "not all state commissions conduct all these activities at all times." From this statement, Dynegy extrapolates that "the access to broad information is not tailored to the specific needs of each state commission." Dynegy is missing a step in its reasoning. To block data access until a state determines its specific need puts the proverbial cart before the horse. A state does not determine its utilities' involvement in wholesale markets, and only then seek the data to monitor the results. Based on access to and analysis of the data, a state will determine the extent of its retailers' participation in wholesale markets. Data review must occur both before and during participation in wholesale markets.

G. Limiting states to data not otherwise available under state law fails the cost-benefit test

PSEG and FirstEnergy, for instance, argue that the states should be limited to data they cannot access under state law. *See, e.g.*, FirstEnergy at pp.5-6. This position lacks logic.

The Commission here should apply the generators' equation, weighing the states' need against the harm to wholesale markets.

If the state already has access under state law, then the incremental "harm" from states accessing the data from Midwest ISO is zero. If there is any benefit to the states, then the weighing favors the states. There is benefit to the states: accessing the data from Midwest ISO means the data will have the qualities associated with the Midwest ISO's data collection process. It will be presented in a common format, it will have the timeliness and accuracy required by the Midwest ISO's contractual relations with the data submitters, and it will already have been collected, thus saving the states time and money.

Market participants benefit also: if the state has accessed the data through the Midwest ISO process, there will be a single, central record of who has the data, what data and when they were accessed. The state, moreover, will be bound by the Midwest ISO's Non Disclosure Agreement -- a document which the generators have suggested is more trustworthy than state law (which, as one generator pointed out, could be amended at any time). These positive benefits, to the states and to the generators, outweigh the zero incremental harm.

In contrast, limiting states to Midwest ISO data they cannot obtain under state law has only negative effects: disparate data collection efforts, and no central list of data requestors and recipients.

III. Conclusion

A few generator interests have opposed state data access on grounds of need, extra jurisdictionality and duplication. The instant comments have sought to highlight the broad areas of agreement and explain not only that state access to data helps states, but it helps market participants as well. The states are committed to protecting against unauthorized

disclosure, consistent with the Midwest ISO tariff requirement and all other applicable laws and regulations. The IPPs and marketers should be committed to assisting the states in becoming comfortable with wholesale markets into which the IPPs and marketers wish to sell. With these two commitments in place, the foundation exists for agreement.

The OMS 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.

IV. 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,
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