

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

Midwest Independent Transmission)	Docket Nos. ER04-691-060
System Operator, Inc.,)	EL04-104-057
)	ER04-106-015

COMMENTS OF THE ORGANIZATION OF MISO STATES

I. Introduction

On August 19, 2005, the Midwest Independent Transmission System Operator (MISO or Midwest ISO) submitted to the Federal Energy Regulatory Commission (FERC or Commission) proposed revisions to the Midwest ISO's Open Access Transmission and Energy Markets Tariffs (EMT) in compliance with the Commission's June 21, 2005 and August 6, 2004 Orders in *Midwest Independent Transmission System Operator*.¹

In general, the Commission's August 6 Order accepted portions of the Midwest ISO's confidentiality proposal as an interim measure, subject to modification.² Paragraph 557 of the August 6 Order also directed the Midwest ISO to work with its stakeholders to develop a different consensus proposal regarding state access based on the approach approved by the Commission in *PJM Interconnection LLC*.³ Finally, the August 6 Order included some specific compliance directives for the Midwest ISO regarding other confidentiality-related issues.

The June 21 Order considered the Organization of MISO States' (OMS's) Offer of Proof regarding the Midwest ISO's proposal to share information with State Commissions, and the outstanding requests for rehearing of the Commission's August 6 Order.⁴ In the June 21 Order, the Commission directed the Midwest ISO to confer with the OMS prior to Midwest ISO submitting its August 19 compliance filing.⁵ Because of those discussions, the OMS, with a few minor concerns for clarification, endorses the EMT and Non-disclosure Agreement (NDA) provisions in Midwest ISO's August 19 filing regarding State Commission access to confidential information.

¹ *Midwest Independent Transmission System Operator, Inc., et al.*, 108 FERC ¶ 61,163 (2004) ("August 6 Order"), order on reh'g, 109 FERC ¶ 61,157 (2004), order on reh'g, 111 FERC ¶ 61,043 (2005).

² August 6 Order at P 557-65.

³ *PJM Interconnection, L.L.C.*, 107 FERC ¶61,322 (2004)

⁴ *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,448 (2005) ("June 21 Order").

⁵ June 21 Order, at P. 72

On July 21, 2005, the OMS filed a limited request for rehearing regarding a limited number of issues raised by the Commission's June 21 Order. That limited request for rehearing is still pending before the Commission. Consequently, the OMS will specifically limit these comments to a few new issues raised by the Midwest ISO's August 19 compliance filing.

The Midwest ISO's August 19 filing consists of the following four parts: (1) a transmittal letter; (2) Tab A, a redlined version of the Midwest ISO tariff sheets on which Midwest ISO proposes modifications; (3) Tab B, a clean version of the Midwest ISO tariff sheets on which Midwest ISO proposes modifications; and (4) Tab C, a draft procedure for requests for information and challenges of confidentiality designations by parties other than FERC and State Commissions. In general, Midwest ISO's August 19 filing proposes to modify the following parts of the EMT: (1) Section 38.9.1; (2) Section 38.9.4; (3) Section 54.4; (4) Attachment Z; and (5) Attachment EE.

On August, 31, 2005, the Commission noticed the Midwest ISO's August 19 compliance filing and set September, 9, 2005 as the deadline for comments and protests. Accordingly, the OMS herein submits these limited Comments.

II. Comment Summary

A. The OMS understands that the Midwest ISO's intent in its August 19 filing is to provide a single process for state commissions and other parties to challenge the designation of certain information as confidential⁶ and to clarify the type of information that is likely to be accorded confidential status.⁷

B. Because of circuitous definitions inherent in such a complex and comprehensive tariff, some points in the tariff do not appear to achieve the intent stated in the transmittal letter. Section III.A of these comments explains the chain of logic that shows the ambiguous application of the Tab C procedures either to State Commissions that are Authorized Requestors or State Commissions that are not Authorized Requestors. Changes are suggested to align the intent with the tariff language.

C. Provisions in the Attachment EE NDA and the EMT regarding breach are inconsistent. As discussed in Section III.C of these comments, Section 3.2 of the Attachment EE NDA should be modified to delete language permitting Midwest ISO to determine a breach on its own without consultation or receipt of notice. Such a revision would make Section 3.2 of the NDA consistent with language that already exists in Section 38.9.4.7(b) of the EMT.

D. The August 19 filing contains a proposed definition of Confidential Information that is overly broad. Accordingly, the OMS recommends minor modifications to the definition as shown in Section III.D of these comments to better align the scope of the definition with its purpose.

⁶ See paragraph A.16 at page 10 of the transmittal letter and paragraph B.3 at page 12.

⁷ These clarifications are contained in the attachments to Tab C.

E. The OMS has referred minor clerical inconsistencies in the August 19 filing to counsel for the Midwest ISO to be considered for correction in a future filing.

III. Discussion

After careful review of the Midwest ISO's August 19th filing, the OMS makes the following comments and recommendations.

A. The Proposed Tariff Language Is Inconsistent with the Intent Stated in the Transmittal Letter

At page 12 of the Transmittal Letter of the August 19 filing, the Midwest ISO states that, as required by the August 6 Order (at P 565), and reiterated by the June 21 Order (at P 127 and 13), and after stakeholder consultations, the Midwest ISO has revised Section 38.9.1 and Section 54.4 of the EMT to provide third parties an opportunity to challenge a market participant's designation of information as confidential. Midwest ISO's proposed Section 38.9.1 and Section 54.4 tariff language states that the procedures for such challenges will be "specified in the Business Practice Manuals (BPMs)." Midwest ISO submitted for informational purposes in Tab C a document titled "Draft Procedure for Requests for Information and Challenges to Confidentiality Designations," but the language does not make it as clear as it could be that Tab C is intended to be the vehicle that state commissions that are authorized requestors, state commissions that have – for whatever reason – not signed a Non-Disclosure Agreement, market participants and all other third parties to contest a designation of confidentiality to become part of the referenced Business Practices Manual.

Midwest ISO states on page 13 of its Transmittal Letter that the material in Tab C is associated with the challenge language that Midwest ISO proposes to add to Sections 38.9.1 and 54.4 of the tariff. However, footnote 1 of Tab C states that the procedure therein is reserved for parties other than FERC or the Authorized Requestors. Midwest ISO attempts to clarify in footnote 21 on page 13 of the Transmittal Letter that the term "Third Parties" (capitalized) excludes Authorized Requestors/Authorized Agencies and the term "third parties" (lower case) includes them; but this attempt falls short because sections 38.9.1 and 54.4 of the tariff use the lower case term "third parties."

With this lack of clarity about the relationship between the language it proposes to add to Sections 38.9.1 and 54.4, and 38.9.4.5(f) of the tariff and the "informational" provisions in Tab C of the filing, the OMS has not developed substantive comment on those provisions. If, as suggested below, the Commission directs the Midwest ISO to resolve this ambiguity by making the Tab C provisions applicable to challenges by state commissions, the OMS suggests that additional stakeholder consideration of the procedures would be appropriate. A 30- or 45-day period is suggested to resolve these ambiguities. Such consideration would be consistent with Paragraph 565 of the August 6 order, which directed MISO "to work with its stakeholders to develop a process under which third parties may challenge disclosing parties' designation of information as Competitively Sensitive."

It also appears that under the current language in the Midwest ISO's proposal, State Commissions that, for whatever reasons, do not execute the NDA in Attachment EE might not be permitted to make Information Requests and therefore, will not be eligible to initiate a challenge

regarding the designation of information as confidential. In particular, Section 38.9.4.5(f) of the EMT states,

If the Affected Participant, the Transmission Provider or the IMM considers the information sought by the Information Request as Confidential Information, the Authorized Requestor shall be provided an opportunity to challenge the designation or classification of the requested information as Confidential Information. (underlining added)

Section 1.15 defines an Authorized Requestor as “a person who has executed a Non-disclosure Agreement....” Accordingly, the wording in Section 38.9.4.5(f), in conjunction with the definitions of Authorized Requestor and Information Request in Attachment EE work together to cover only signatories to the NDA in Attachment EE and, therefore, extend the right to challenge a market participant’s confidentiality designation only to those State Commission persons that have signed the NDA found in Attachment EE.

At first blush, Midwest ISO’s proposal appears reasonable and well intentioned. However, it may be the case that some State Commissions will find themselves, for whatever reason, unable to sign the NDA in Attachment EE. Those State Commissions may be prevented from obtaining Confidential Information under Section 38.9.4 of the Midwest ISO tariff. That result, in and of itself, is not unreasonable. However, Midwest ISO’s proposal, as written, might be construed to forbid those same State Commissions from receiving information that is improperly designated as confidential – information that, if subjected to a reasonable challenge process, would be found to not warrant the confidential designation. Under the Midwest ISO’s proposal, those State Commissions will have no right to ask for information that may have been improperly designated as confidential and no right to challenge the improper designation. This result is unreasonable and inconsistent with the aspirations articulated by the Midwest ISO in the Transmittal Letter.

B. Suggested Language to Help Accomplish the Stated Intent of the Filing

The OMS suggests that these changes to the proposed tariff language would better achieve the intent expressed in the Transmittal Letter.

1. The caption of 38.9.1 of the tariff should be revised to read “Access by Market Participants and others ~~Acess~~.”

This proposed revision would alert users of the tariff that material under that heading may affect others than Market Participants. Specifically, section 38.9.1(b) provides for challenges by third parties. If state agencies are intended to use third party challenge procedures under some circumstances, this caption is more descriptive of that intent.

2. The OMS recommends that the Commission direct the Midwest ISO to revise Section 38.9.4.5(f) as follows:

If the Affected Participant, the Transmission Provider or the IMM considers the information sought ~~by the Information Request to be Confidential Information, State public utility commissioners, State commission staff and attorneys representing an Authorized Agency the Authorized Requestor~~ shall be provided an opportunity to challenge the designation or classification of the requested information as Confidential Information.

This proposed revision accomplishes two things. First it avoids the use in Section 38.9.4.5(f) of the defined term “Information Request” whose definition imposes unwanted implications in the challenge context. Second, it replaces the defined term “Authorized Requestor” (which requires a person to have signed the NDA in Attachment EE) with the list of the persons entitled to become an Authorized Requestor.

3. Because the actual tariff language in MISO’s August 19 filing does not appear to make State Commissions (whether or not they sign the Attachment EE NDA to become Authorized Agencies/Authorized Requestors) subject to the procedure in Tab C, the OMS is not substantively commenting on the Tab C procedures. The OMS understands that Tab C was provided to the Commission only for informational purposes. The OMS requests that the Commission not expressly endorse the procedure in Tab C because the OMS did not thoroughly evaluate that procedure, but the OMS’s cursory review of Attachment C has revealed several inconsistent and unclear language that the OMS would like to have a continued opportunity to discuss and resolve with the MISO.

For example, Tab C section (b)(vi) should be modified to make the challenge process available to a state that may not be able to execute a Non-Disclosure Agreement for a determination of whether confidential status has been appropriately applied to a particular set of information. Also, Tab C section (h) should be modified to refer to the informal challenge procedure.

C. Provisions in the Attachment EE NDA and the EMT Regarding Breach are Inconsistent

Section 38.9.4.7(b) of the EMT details the steps to be taken by the Midwest ISO or the IMM after receipt of a written notice from an Authorized Agency/Authorized Requestor or if the Commission has made a ruling that a breach has occurred. In particular, the Midwest ISO would verify the breach in consultation with the Authorized Agency prior to the termination of the NDA for an Authorized Requestor and the destruction or return of all confidential information in the possession of the Authorized Requestor. In contrast, the corresponding Section 3.2 of the NDA provides that the Midwest ISO or the IMM may determine on its own that a breach has occurred.

Section 38.9.4.7 of the Midwest ISO’s February 17 informational filing defined a breach to have occurred if both Midwest ISO and the Authorized Agency agree that a breach has occurred or if the Commission ruled that a breach has occurred. Given that there was no language in the June 21 Order directing a change to that construction, the OMS recommends that

Section 3.2 of the NDA in Attachment EE be modified to make it consistent with Section 38.9.4.7(b) as follows:

If the Transmission Provider or the IMM ~~determines on its own, or~~ agrees with an Authorized Agency, or receives from an Authorized Requestor or Authorized Agency a written notice, that a breach has occurred, or FERC has made a ruling that a breach has occurred, the Transmission Provider and/or the IMM shall terminate the Non-Disclosure Agreement and require either the immediate return of all Confidential Information obtained by the Authorized Requestor pursuant to the Non-Disclosure Agreement or a certification of its destruction.

D. The Proposed Definition of Confidential Information is Overly-Broad

Section II.B.1 of the August 19 draft transmittal letter, proposes to define the term Confidential Information as:

Confidential Information: Any proprietary or commercially or competitively sensitive information, trade secret, or information regarding a plan, specification, pattern, procedure, design, device, list, concept, policy or compilation relating to the present or planned business of a Transmission Customer, Market Participant, or other user, which is designated as confidential by the entity supplying the information, whether conveyed orally, electronically, in writing, through inspection, or otherwise, that is received by the Transmission Provider or the IMM and is not disclosed except under the terms of a Confidential Information policy.

The OMS is concerned with the placement of the words "or information" in the second line of the definition. The placement of those two words separates and includes in the definition of what is confidential any information relating to "a plan, specification, etc." That separation and inclusion obviates any limitation or description in the first two lines of the definition prior to those words and is so expansive in scope as to include nearly anything.

The OMS is also concerned about including the procedural protection of initial designation in the definition of confidential information without an apparent means of reversing that initial treatment. An entity's designation of information as confidential should be subject to the challenge procedures of this tariff.

Accordingly, the OMS proposes a clarifying phrase to refer to a determination following the challenge process, and the very minor modification of moving the word "or" and striking a comma as follows:

Confidential Information: Any proprietary or commercially or competitively sensitive information, or trade secret, ~~or~~ information regarding a plan, specification, pattern, procedure, design, device, list, concept, policy or compilation relating to the present or planned business of a Transmission Customer, Market Participant, or other user, which is designated as confidential by the entity supplying the information, unless determined not to be confidential

pursuant to this tariff, whether conveyed orally, electronically, in writing, through inspection, or otherwise, that is received by the Transmission Provider or the IMM and is not disclosed except under the terms of a Confidential Information policy.

These small modifications to the definition will correct the large flaws described above.

IV. Conclusion

The OMS appreciates the opportunity to comment on the Midwest ISO's August 19 compliance filing. While the OMS endorses the aspirations for transparency contained in the Midwest ISO's Transmittal Letter and also supports the vast majority of the proposed provisions of the EMT and NDA regarding State Commission access to confidential information, for the reasons stated above, the OMS recommends that the Commission direct the Midwest ISO to make the modifications outlined above.

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

- Illinois Commerce Commission
- Indiana Utility Regulatory Commission
- Iowa Utilities Board
- 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

The following OMS members abstained from the vote for procedural reasons.
Public Utilities Commission of Ohio
Wisconsin Public Service Commission

The Pennsylvania Public Utility Commission abstained.

The following OMS members did not participate in this comment:
Kentucky Public Service Commission
The Manitoba Public Utilities Board
South Dakota Public Utilities Commission

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 notified all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, and Midwest ISO Advisory Committee participants of this filing. 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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Dated: September 9, 2005