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**

ORGANIZATION OF MISO STATES REQUEST FOR CLARIFICATION AND REHEARING

I. Introduction

On June 21, 2005, the Federal Energy Regulatory Commission (FERC or Commission) issued an order on rehearing and offer of proof in the above captioned docket concerning access by state regulators to confidential Midwest ISO (MISO) data. After careful review, the Organization of MISO States (OMS) respectfully asks the Commission to review its June 21 Order and grant clarification and/or rehearing. As discussed in greater detail below, the OMS notes the following Commission errors:

1) The Commission erred by misidentifying and misunderstanding the OMS's "proposal" in this case. The OMS's "proposal" was provided in its March 11, 2005 Comments, not in the OMS's initial draft settlement discussion document that MISO filed as part of its February 17, 2005 informational filing;

2) The Commission erred in stating MISO's proposed provisions would be unjust and unreasonable only on the basis that those provisions are different from corresponding provisions approved by the Commission in the PJM case;

3) The Commission erred in its decision to permit unlimited challenges of Authorized Agency information requests, failing to strike the proper balance between the needs of State Commissions and the concerns of some market participants;

4) The Commission erred in prohibiting limited discussion of confidential information among Authorized Requestors sponsored by different Authorized Agencies; and

5) The Commission erred in reversing its decision in PJM that the PJM tariff process would be one voluntary means for states to access confidential data and would not prohibit other means of states accessing confidential data. By contrast, the Commission in this case limited the states to

merely one "sole" process by which state regulators may access confidential MISO and IMM data. The Commission should not prohibit alternative voluntary or legal processes.

6) The Commission erred in prohibiting state agencies such as Departments of Commerce that perform PUC-type functions from receiving Confidential Information.

7) The Commission erred in failing to recognize that State Commissions also have a regulatory role affecting wholesale markets.

8) The Commission erred in improperly suggesting that OMS bears a burden of proof to cite specific instances in which it has actually used confidential information to which it does not yet have access, and the Commission erred by improperly reasoning that State Commissions seek "unlimited" access to confidential wholesale market data.

9) The Commission erred in concluding that State Commissions can "damage" utilities or "harm" markets merely by possessing Confidential Information.

10) The Commission erred in imposing an additional Offer of Proof requirement beyond the requirements in the Non-Disclosure Agreement.

11) The Commission erred in its: (1) misstatements that OMS wishes the Commission to "cede" jurisdiction to the State Commissions; (2) flawed reasoning that the justness and reasonableness of MISO's proposal for state regulator access to Confidential Information depends on whether the access fundamentally changes the way State Commissions do business; and (3) misunderstanding that State Commissions can access under state law much or even all of the Confidential Information they seek through the MISO tariff.

II. Discussion

A. The OMS's "Proposal" for the Record in this Docket is Captured in the OMS's March 11, 2005 Comments, not in the October 28, 2004 Draft Settlement Discussion Document that the MISO Attached to its February 17 2005 Informational Filing

The Commission erred in misidentifying and misunderstanding the OMS's "proposal" in this case. The OMS's "proposal" was provided in its March 11, 2005 Comments, not in the draft settlement discussion document that MISO filed as part of its February 17, 2005 informational filing, without prior OMS consent.

At Paragraphs 69 and 70 of the Commission's June 21 Order, the Commission described the process that led up to MISO's February 17, 2005 informational filing. The Commission correctly observed in footnote #25 that the OMS had developed a draft version of tariff and non-disclosure agreement language dated October 28, 2004. The OMS developed that October 28 discussion draft to facilitate the Commission's wishes expressed in Paragraph 57 of its August 6, 2004 Order that the Midwest ISO "work with stakeholders and state commissions to develop a consensus proposal governing disclosure of data to state regulatory agencies." Paragraph 70 accurately notes that the Midwest ISO circulated the OMS's October 28 discussion draft (as well

as several revisions) among the participating stakeholders in October and November, 2004. The OMS authorized MISO to make that limited distribution because the Commission had directed MISO to "work with stakeholders and state commissions" and the OMS believed (correctly) that circulation of a draft document would facilitate discussions.

However, the OMS was not asked, and did not give, prior authorization to the Midwest ISO to attach the OMS's October 28, 2004 settlement discussion draft to the Midwest ISO's February 17 informational filing. Indeed, until the Midwest ISO made the document public on February 17, 2005, the OMS had always considered the October 28, 2004 draft to be a confidential settlement discussion document. Since MISO made the OMS's October 28, 2004 draft settlement discussion document public on February 17, 2005, the OMS clarified in its initial comments on March 11, 2005 that the initial draft discussion document was provided to MISO and the stakeholders only as "a means of facilitating progress in the discussions."[1] The draft settlement document was intended for discussion purposes only and was never formally presented to the OMS Board of Directors for formal approval.

In the course of the discussions held between October, 2004 and February, 2005, and with the valuable assistance of the Commission's dispute resolution staff, the OMS's representatives made substantial compromises (as described in the OMS's March 11, 2005 Comments) and was no longer advancing the October 28, 2004 draft as the proposed OMS proposal when MISO made its February 17 filing. Rather, as explained in the OMS's March 11, 2005 Comments, the OMS was and is in substantial agreement with the MISO on the language that MISO included in the alternative proposal filed by MISO as part of its February 17 informational filing.

At that time, the OMS did not formally object to MISO's decision to attach the October 28, 2004 draft settlement document to MISO's February 17 informational filing because the OMS believed that a comparison of that initial draft discussion document with the one that the OMS advanced as Appendix A to its March 11, 2005 Comments would starkly illustrate the degree that the OMS's representatives had compromised the initial October 28, 2004 position in an effort to respect the Commission's expressed wishes that a consensus proposal be developed. In contrast with certain other MISO stakeholder segments, the OMS and its member commissions went to great lengths in an attempt to satisfy the Commission's desire that a consensus proposal be developed.

The OMS notes that the MISO, in its February 17 filing, characterizes the OMS's October 28 draft as OMS's "original proposal" or "initial proposal." The Midwest ISO also noted in footnote 10 of its February 17 filing that its description of the OMS's October 28 draft is "without prejudice to any changes that the OMS may subsequently make to its proposal in response to the comments and suggestions of interested parties." Regrettably, in its June 21 Order, the Commission seems not to have recognized either the preliminary draft form of the October 28 document, or the recognition by MISO itself that subsequent changes to the OMS's "proposal" should be expected.

For these reasons, it is unfortunate that the Commission's June 21 Order misunderstood the OMS's initial October 28 discussion draft as the "OMS's proposal" in this case. This

[1] OMS March 11, 2005 Comments at 3.

mischaracterization shows up repeatedly in Section III.C of the Commission's June 21 Order (Paragraphs 69-124). In reliance on the OMS's October 28 discussion draft document that was attached to MISO's February 17, 2005 filing, the Commission incorrectly attributes to the OMS, positions that the OMS discussed in settlement discussions, but never advanced in the public record of this case. To be clear, the OMS never offered the October 28, 2004 discussion draft document as an exhibit in this case.

To the extent that the October 28 discussion draft is considered to be part of the evidence in this case, its existence on the record should be attributed to MISO—not to the OMS. OMS's "proposal" for the record in this case is captured in Appendix A of the OMS's March 11, 2005 Comments. Accordingly, the OMS requests revision of paragraphs 69, 70, 73, 77, 78, 79, 80, 81, 82, 83, 100, 101, 102, 103, 104, 119, 120, and 121 of the Commission's June 21 Order to remove inaccurate descriptions of the OMS's proposal in the record of this case. Furthermore, the OMS believes that the Commission's apparent misunderstanding about the exact nature of OMS's "proposal" on the record of this case has led the Commission to an unfortunate number of errors of reasoning and conclusions throughout the June 21 Order. Many of these are described in detail in subsequent sections of this pleading. Accordingly, the OMS seeks clarification and/or rehearing of the underlying misunderstanding of the OMS's position in this case.

B. The Commission Erred in Stating that MISO's Proposed Provisions would be Unjust and Unreasonable Only on the Basis That Those Provisions Are Different from Corresponding Provisions Approved by the Commission in the PJM Case

Paragraphs 64 and 65 of the June 21 Order state:

> 64. We disagree with OMS that inter-RTO differences cannot by themselves make a tariff proposal unjust and unreasonable. Although RTOs and ISOs are developing individually, with significant regional variations, they also are interdependent. The Midwest ISO and PJM, which are developing a joint and common market, provide a particular example of the close relationships that can develop between RTOs.
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> 65. The more closely related RTOs are, the more important it is that they have in place effective means of working together, despite market design and operational differences that may exist between them. In cases where such differences will hinder coordinated RTO operations, the Commission may find that an otherwise reasonable tariff proposal is unjust and unreasonable, and require changes to improve RTO compatibility. This is such a case.

The OMS finds the Commission's position, as represented by these two paragraphs contradictory. In particular, the Commission states in Paragraph 64 that it disagrees with the OMS's statement that "inter-RTO differences cannot by themselves make a tariff proposal unjust and unreasonable." Nevertheless, in Paragraph 65, the Commission states that it will find inter-RTO differences to be unjust and unreasonable "in cases where such differences will hinder coordinated RTO operations"—not in all cases. The OMS agrees with the Commission that inter-RTO differences that "hinder coordinated RTO operations" should be found to be unjust and unreasonable – whether it is PJM or MISO. However, not all inter-RTO differences hinder

coordinated RTO operations. Accordingly, in its March 11 Comments, the OMS urged the Commission to use "compatibility" as the proper standard.[2] Indeed, in Paragraph 65, the Commission has essentially agreed with the OMS's statement that "inter-RTO differences cannot by themselves make a tariff proposal unjust and unreasonable." According to the Commission's statement, in order to be found unjust and unreasonable, the tariff provisions must be found to "hinder coordinated RTO operations." The Commission also stated that its goal was to improve RTO "compatibility."[3]

The OMS believes that the conclusion drawn by the Commission in Paragraph 65 - that differences in regulators' data access procedures between the Midwest ISO and PJM is a case where those "differences will hinder coordinated RTO operations" - is in error. In short, the Commission did not direct the MISO to adopt PJM's provisions across the board, but instead stated that "we approve of many elements of the Midwest ISO alternative proposal."[4]

The OMS notes that the June 21 Order does not describe or explain how different provisions in the two RTO's state regulator data access policies would "hinder coordinated RTO operations." In particular, the OMS finds it difficult to understand how allowing a state commission in the Midwest ISO footprint to have a different level of access to, or different procedures for, access to MISO's confidential data than a State Commission in the PJM footprint would have with respect to PJM could produce a result that would "hinder coordinated RTO operations."

The Commission's Order also states that the OMS's Offer of Proof "has not made clear why, if PJM's confidentiality rules do not prevent State Commissions in the PJM region from carrying out their regulatory responsibilities, similar provisions would prevent state regulators in the Midwest ISO region from carrying out their regulatory responsibilities, similar provisions would prevent state regulators in the Midwest ISO region --some of whom are the same as those in the PJM region --from carrying out their duties."[5] The OMS's Offer of Proof explained, at length, that these issues are not relevant. Even if the issues were relevant, the OMS is not in a position to assess whether PJM's provisions "prevent state commissions in the PJM region from carrying out their regulatory responsibilities." The OMS does note, however, that most State Commissions in the PJM footprint have not employed the PJM option. This fact may reveal something about the workability of the PJM provisions. Even so, the relevant issue in this case is whether MISO's proposed provisions are just and reasonable.

The Commission found many of the provisions in MISO's approach that are different from provisions in PJM's approach to be just and reasonable and the Commission approved those differences. The Commission also found some of MISO's proposed provisions unjust and unreasonable on the basis that they are not the same as provisions in the PJM policy. This is inconsistent with the Commission's own stated standard that inter-RTO differences can be found to be unjust and unreasonable if they "hinder coordinated RTO operations" or the Commission's stated goal to improve RTO "compatibility." Accordingly, the OMS requests that the Commission review its June 21 order for the purpose of reconsidering any decisions that it made

[2] OMS March 11, 2005 Comments at 32.
[3] June 21 Order at P 65.
[4] June 21 Order at P 72.
[5] June 21 Order at P 68.

based on the standard that the MISO proposal must be like PJM's even if differences would not hinder coordinated RTO operations. For example, as explained in a subsequent section of this pleading, in the June 21 Order, the Commission rejected all of the compromise suggestions put forth by the OMS and simply directed the MISO to adopt a challenge provision that "adheres to Commission precedent" citing the Commission's *PJM Interconnection, LLC* Order.

C. The Commission Erred in Permitting Unlimited Challenges of Authorized Agency Information Requests and did not Strike the Proper Balance Between the Needs of State Commissions and the Concerns of Some Market Participants

In its Comments, the OMS explained that State Commissions are sensitive to the concerns of market participants.[6] OMS explained that 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.[7] OMS explained that these are useful due process protections that do not unduly interfere with states' ability to do their jobs.[8] In contrast, the unfettered ability of market participants to challenge any and all information requests would clearly interfere and unduly burden the States.

As the OMS explained in its Comments, not all market participants have genuine interests in seeing that competitive markets operate efficiently and fairly and granting market participants an unlimited opportunity to challenge state commission information requests could tie the hands of the State Commissions while market problems fester.[9] The OMS explained that an unlimited challenge process would prevent the state commission from accessing data until after a challenge is resolved and the proposed process put no limit on the time that can be taken to resolve the challenge. The OMS Comments further explained that forcing a state commission to bear all of the costs of responding to a challenge will likely result in State Commissions being forced to either concede or not to submit information requests in the first instance, due to budget limitations - even when the State Commissions have a strong case. As a result, the OMS is concerned that the public interest, as represented by the interests of retail consumers, will be damaged significantly.[10]

The OMS explained in its Comments that 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.[11] The OMS suggested several open avenues for such agreement that are

[6] OMS March 11 Comments, at 4
[7] OMS March 11 Comments, at 5
[8] OMS March 11 Comments, at 5
[9] OMS March 11 Comments, at 5
[10] OMS March 11 Comments, at 5
[11] OMS March 11 Comments at 5

grounded in current provisions in MISO's tariff.[12] Beyond those avenues, the OMS stated that it 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" and suggested several possibilities in this regard.[13] Beyond the challenge language, the OMS explained that there may be ways of expanding the conference provisions of Section 38.9.4(d) to address the concerns of market participants.[14] The OMS stated that it "would be willing to support an expansive opportunity for an affected market participant to have discussions in conferences with a state commission that submitted an information request to MISO or the IMM."[15] In short, the OMS explained that there are "numerous possibilities for fruitful compromise on workable language" on the challenge issue and asked the Commission to remand the issue back to MISO with instructions for further stakeholder discussion on the matter along the lines of the compromise concepts described by the OMS.[16]

In the June 21 Order, the Commission states that it seeks "a balanced weighing of the interests and needs of the parties."[17] Yet the Commission rejected all of the compromise suggestions put forth by the OMS and simply directed the MISO to adopt a challenge provision that "adheres to Commission precedent" citing the Commission's *PJM Interconnection, LLC* Order.[18] The OMS respectfully states that the Commission did not strike a reasonable balance on this issue. Accordingly, the OMS requests rehearing of the Commission's decision with respect to challenge and requests that the Commission remand this issue back to the MISO with instructions to hold further stakeholder discussions on the matter and to find compromise as suggested in the OMS Comments.

D. The Commission Erred in Prohibiting Limited Discussion of Confidential Information Among Authorized Requestors Sponsored by Different Authorized Agencies

In Section 38.9.4.6, MISO proposed to permit Authorized Requestors from different Authorized Agencies to discuss confidential information with each other provided that the MISO is informed of the planned discussion and MISO confirms the status of the Authorized Requestors who would be involved in the discussion. The Commission addressed this provision in Paragraph 98 of its June 21 Order. Specifically, the Commission stated,

> Regarding section 38.9.4.6, we understand that state commissions often discuss with one another confidential information that is pending before them in similar cases, we remain uncomfortable with the prospect of permitting Authorized Requestors to freely share information with one another. We take the confidentiality of market participants' data very seriously, and we find that it is important to maintain a chain of custody over that data. We believe it is likely that the public benefits of permitting Authorized Requestors sponsored by

[12] OMS March 11 Comments at 6
[13] OMS March 11 Comments at 6
[14] OMS March 11 Comments at 6
[15] OMS March 11 Comments at 6-7
[16] OMS March 11 Comments at 7
[17] June 21 Order, at P111.
18 PJM Interconnection, L.L.C., 107 FERC ¶61,322 (June, 2004)

> different Authorized Agencies to discuss confidential data may be substantial; however, we also believe that the whereabouts of the data should be easily ascertainable in the event that it needs to be recalled or an unauthorized disclosure is made.

The OMS is in agreement with the Commission on taking the confidentiality of market participants' data very seriously. The OMS also agrees with the Commission on the importance of maintaining the chain of custody over that information and that the "whereabouts of the data should be easily ascertainable in the event that it needs to be recalled or an unauthorized disclosure is made." Lastly, the OMS agrees with the Commission's statement in Paragraph 58 of the Order that "the Midwest ISO should always be aware of what State Commissions have access to this data."

That is why the OMS proposed in Appendix A to its March 11 Comments that Section 38.9.4.6 be modified to require the MISO to notify any affected market participant of the Authorized Requestors' plans to discuss its confidential information. In particular, the OMS proposed that the following sentence be added to Section 38.9.4.6, "The Transmission Provider shall provide an Affected Participant with notice of the planned discussion within two (2) business days from receipt of notification of the planned discussion." Indeed, the Commission appears to be in agreement with the OMS's recommendation in this regard by stating,

> "We agree that section 38.9.4.6 should be revised to require Authorized Requestors to identify the other Authorized Requestors with whom the confidential information will be discussed, thereby providing information needed by market participants."[19]

The context of "discussion" envisioned by OMS is such that the essence of confidential information, or the implications of such information for purposes of decision making and policy formulation, does not require each participant in the discussion to actually possess the information. The discussions would divulge the meaning of the information without actually divulging the information itself.

The practical effect of requiring each Authorized Requestor to be in possession of confidential information in order for the meaning or essence of that information to be discussed will result in a proliferation of information requests and resulting in an increased administrative burden on everyone involved in the process, including state agencies, the MISO and market participants.

If MISO were to revise Section 38.9.4.6 as proposed by the OMS, the Commission's concerns about maintaining a chain of custody and the ability of market participants to keep track of which Authorized Requestors have access to their confidential information would be addressed and the administrative difficulties and risks associated with the proliferation of information requests would be avoided. Indeed, the Commission stated in Paragraph 99 of its June 21 Order that MISO's Section 38.9.4.6 proposal may have merit. With the additions proposed by the OMS, MISO's proposal would indeed have merit.

[19] June 21 Order at Paragraph 99.

Under these circumstances, it appears contradictory and not in accordance with the Commission's own findings that the Commission also stated,

> "We will therefore require the Midwest ISO to file a provision that would allow Authorized Requestors from different Authorized Agencies to discuss information only after they have each received it from the Midwest ISO."[20]

In that same paragraph, the Commission observed that MISO's proposal "may also have merit." The OMS notes that the MISO's proposal does not require Authorized Requestors from different Authorized Agencies to each have received the same confidential information from the MISO, but instead allows limited discussion as long as the Authorized Requestors status is confirmed. OMS recommends that MISO give notice to affected market participants. The Commission also observed that no party objected to MISO's proposal. The OMS proposed in its March 11 Comments, and reiterates above, language to address the Commission's stated concerns about chain of custody and market participant notification as described above. Accordingly, the OMS requests that the Commission clarify Paragraph 99 of its June 21 Order by deleting the contradictory sentence concerning Authorized Requestors having received the same information from MISO and directing MISO to adopt the OMS's proposed language to permit limited discussion among Authorized Requestors when notice has been provided to the affected market participant.

E. The Commission Erred in Going Beyond PJM Precedent of Emphasizing the Voluntary Nature of the Tariff Process By Which State Regulators May Access Confidential MISO and IMM Data, and Instead Found that this MISO Tariff Provision Would be the Sole Method of Obtaining the Information -- Prohibiting Other, Alternative Processes.

Paragraph 94 of the Commission's June 21 Order, creates the consequence that state Commissions can access confidential MISO data only through the mechanism in MISO tariff section 38.9.4, and not through any other mechanism. Specifically, Paragraph 94 states,

> "We agree with PSEG that it is appropriate to include the words "only" and "solely" in section 38.9.4.1. We are unsure under what circumstances the Midwest ISO might, as OMS suggests, voluntarily release information under an alternative approach, and thus cannot determine whether PSEG's proposed tariff provision is adequate to address those circumstances. To date, we are aware of no other avenues for disclosure of confidential data than those described in the tariff provisions at issue here, so the words do not threaten the integrity of any other process. If other avenues for disclosure of confidential data are needed – or added – in the future, PSEG and OMS may revive their arguments."

There is nothing in MISO's currently effective tariff that prohibits MISO from releasing confidential information to a requesting state commission if the market participant voluntarily agrees to the release.[21] Such a voluntary arrangement would be prohibited if the Commission permits the words "only" and "solely" to remain in MISO's proposed Section 38.9.4.1. Contrary

[20] Paragraph 99 of its June 21 Order.
[21] OMS March 11 Comments, at 9

to the Commission's statement, if the words "only" and "solely" remain in MISO's proposed Section 38.9.4.1, the integrity of this voluntary process, which market participants and State Commissions currently have available to them, would be lost. There is no logical reason why the Commission should mandate such a result. Doing so would be arbitrary and unreasonable, and would go beyond what the Commission itself authorized in the PJM proceeding in which it emphasized that the tariff provision was "voluntary."[22]

In its Comments in this case, PSEG recognized the importance of having this alternative voluntary option available. PSEG proposed a provision that the Commission quoted in paragraph 88 of its June 21 Order as follows,

> Nothing contained herein shall prevent the [Transmission Provider] from releasing a Market Participant's Confidential Information or information to a third party provided that the Market Participant has delivered to the [Transmission Provider] specific, written authorization for such release setting forth the data or information to be released, to whom such release is authorized, and the period of time for which such release shall be authorized. The [Transmission Provider] shall limit the release of a Market Participant's Confidential Information to that specific authorization provided from the Market Participant. Nothing herein shall prohibit a Market Participant from withdrawing such authorization upon written notice to the [Transmission Provider] who shall cease such release as soon as practicable upon receipt of the written notice.

Deleting the words "only" and "solely" from Section 38.9.4.1 would be a much simpler path to reaching the same objective. However, the OMS has no objection to PSEG's proposed language and urges the Commission to clarify its June 21 Order and adopt either PSEG's language or the OMS's initial recommendation to delete the words "only" and "solely" from Section 38.9.4.1.

F. The Commission Erred in Prohibiting Non-PUC State Agencies that Perform PUC-type Functions from Receiving Confidential Information.

Paragraph 76 of the June 21 order creates a situation where employees of non-PUC state agencies that perform PUC-type functions will be precluded from receiving any confidential information. Specifically, Paragraph 76 states,

> The Midwest ISO has inserted a parallel provision into the definition of Authorized Requestor to cover an employee of a state agency that has access to documents in the possession of the state utility commission. It does not make sense to provide that an Authorized Requestor may include an employee of a state agency that has access to documents in the custody of the same state's public utility commission, if the employee's agency cannot be an Authorized Agency. We will therefore require the Midwest ISO to delete the last sentence of section 1.15B when it makes its filing.

While the Commission's direction in Paragraph 76 makes the MISO definition of Authorized Requestor more like that found in PJM, it puts the PUC-type agencies and agencies that perform PUC-like functions (and that are associate members of the OMS) in a difficult position. The OMS notes that the Commission's direction in Paragraph 76 is based on the inability of the PUC-

[22] PJM Interconnection, L.L.C., 107 FERC ¶61,322 (June, 2004) at 3.

type agencies to become an Authorized Agency. However, the OMS notes that the definition of Authorized Agency proposed by MISO in its February 17 compliance filing eliminates PUC-type agencies capable of protecting the confidential information in their possession, leaving just the OMS and State Commissions in the definition of Authorized Agency.

The "parallel" provision was the result of a compromise which removed non-PUC state agencies as Authorized Agencies, with the understanding that an employee of a state agency that performs PUC-like functions could become an Authorized Requestor through the same state's public utility commission.

The June 21 order leaves the PUC-type agencies in the OMS with no clear course of action to receive confidential information. They need the confidential information to meet their statutory obligations and are able to protect the confidential information in their possession, yet they cannot become an Authorized Agency and their employees cannot become an Authorized Requestor. Such an outcome clearly fails to strike a proper balance between the needs of the State Agencies and the market participants. Accordingly, the OMS requests that the Commission either restore the language in Section 1.15B or direct MISO to modify its definition of Authorized Agency to cover the PUC-type agencies that are members of the OMS.

G. The Commission Erred in Failing to Recognize the State Commissions' Regulatory Role Affecting Wholesale Markets

In the conclusion to its Offer of Proof, the OMS explained that there is an interdependence between state regulation and FERC regulation and that the interdependency works in both directions. Specifically,

> FERC regulation of wholesale markets creates competitive pressures that make wholesale prices reasonable. FERC regulation of RTOs and their transmission-owning members can bring regional planning practices to a formerly atomized industry. Both the competitive pressures and the regional planning benefit states. In the other direction, states affect the development of wholesale competition when they make decisions increasing their utilities' wholesale purchase activity relative to utility-owned generation, and about whether and when their utilities should transfer transmission control to an RTO. States' comfort in taking these actions depends in part on their ability to gather data and monitor markets.[23]

The OMS concluded that, "in these ways, state commissions and FERC are truly co-regulators; each affecting wholesale markets from their separate industry roles."[24]

In response to this OMS discussion the Commission stated,

> We recognize that states are concerned regarding the proper regulation of wholesale markets. We disagree, however, that state commissions can serve as co-regulators with regard to wholesale energy markets. The Commission is the

[23] OMS February 11, 2005 Offer of Proof at 33.
[24] OMS February 11, 2005 Offer of Proof at 33.

> agency charged by statute with regulating public utility sales for resale in interstate commerce.[25]

The OMS believes that the June 21 Order misconstrues the intent of the OMS's use of the term "co-regulators". In particular, the OMS's use of that term was not intended to imply that the OMS is seeking a role in co-regulating wholesale sales – those are clearly the exclusive domain of FERC. However, the OMS notes that State Commissions are the exclusive regulators of "purchase for resale" transactions, when the wholesale purchaser is a retail utility. The OMS Offer of Proof explained that, with respect to wholesale markets, FERC regulates the sellers and the State Commissions regulate the buyers. Given that each agency regulates different ends of the same business transaction, both the FERC and the State Commissions have a role affecting wholesale markets and act as co-regulators.

The OMS understands the different responsibilities that the FERC and the State Commissions have with respect to wholesale energy markets and the roles that each play in the development of efficient energy markets. Indeed, the OMS has no desire to challenge those responsibilities. To the contrary, the OMS has a keen interest in working in concert with the Commission to ensure that those markets work as efficiently as possible. To that end, the OMS's use of the term "co-regulators" was intended to help illustrate the importance of granting the State Commissions access to confidential wholesale market information to allow them to carry out their legislative mandates and to assist the Commission in competitive market goals.

Regardless of the characterization of the state-federal relationship, the purpose for which State Commissions are seeking confidential information is carefully described in Section 2.4.4 of the non-disclosure agreement and the information received will be used for "no other purpose." In particular, Section 2.4.4 states,

> 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."

In summary, the State commissions are not seeking to challenge the Commission's authority regarding wholesale market transactions. Rather, the OMS used the term "co-regulators" in an attempt to illustrate the need for access to confidential information to carry out their state mandates. Accordingly, the OMS requests that the Commission clarify its statements in Paragraph 41 of the June 21 Order and revise any conclusions that the Commission may have reached based on a misperception of the OMS's intent in using the term "co-regulators" or based on the misunderstanding of the purpose to which State Commissions intend to put the information received form MISO under the Section 38.9.4 process.

H. The Commission erred in improperly suggesting that OMS bears a burden of proof to cite specific instances in which it has actually used confidential information to which it does not yet have access, and the Commission erred by improperly

[25] June 21 Order, at P 41.

reasoning that State Commissions seek "unlimited" access to confidential wholesale market data.

Paragraph 42 of the Commission's June 21 Order states:

> 42. OMS's arguments, and the commenters' responses, illustrate a fundamental dilemma regarding state commission access to RTO market data: If the states have wholesale market data, they may have an array of uses for it that may have potential benefits for the public. However, OMS cites no instances in which it (or any of its member states) has actually used wholesale market data in order to bring about the potential benefits that it identifies. And, as Dynegy and EPSA point out, it is not clear that state commissions need *unlimited* access to wholesale market data in order to bring about these benefits.

Taken either together or apart, the last two sentences of this quoted paragraph are inexplicable. The Commission's June 21 Order does not explain why MISO's reasonableness in wanting to grant data access in the future depends on whether the states have used similar data in the past. In any event, in spite of any argument that the OMS might make in response here, the OMS is caught in a catch 22. We would need to cite how we have actually used confidential market data, while at the same time having been precluded from access to it.

The OMS does not seek "unlimited access" to confidential information. The access that the OMS seeks is limited in numerous ways. Substantively, we limited types of data to those listed in our Offer of Proof. Procedurally, we limited the data to those who committed to confidentiality. While the phrase itself is undefined, the OMS is at a loss as to what the Commission considered to be "unlimited" in MISO's proposal.

Accordingly, the OMS requests that the Commission revise its June 21 Order to remove the implication that the OMS failed to meet its burden by not citing specific instances in which it has actually used confidential wholesale market data that it doesn't yet have access to. The OMS also requests that the Commission revise its June 21 Order to remove inaccurate statements or indications that OMS or State Commissions seek "unlimited" access to wholesale market data. Furthermore, the OMS requests that the Commission revisit any conclusions that it may have reached in the June 21 Order based on inaccurate premises concerning the OMS's burden of proof concerning how it has used confidential MISO information in the past or the Commission's inaccurate impression that State Commissions seek "unlimited" access to wholesale market data.

I. The Commission Erred in Concluding that State Commissions Can "Damage" Utilities or "Harm" Markets Merely By Possessing Confidential Information.

Paragraph 53 states,

> "We are not convinced, however, that the unauthorized disclosure of confidential data is the only source of potential damage to utilities if state commissions have access to wholesale market data. . . . . We thus find that it is appropriate to take precautions to minimize the risk of harm that could result from making disclosures of data to state commissions."

The Commission's unfounded assertions that mere possession of confidential market data by State Commissions could "damage" utilities or "harm" markets are unsupported. The OMS points to the fact that State commissions have possessed and handled confidential data since the founding of state commission regulation. The State Commissions' record in this regard is long-standing, speaks for itself and needs no further reiteration. Accordingly, the Commission's statements in Paragraph 53 of the June 21 Order are off the mark and merit revisiting.

In the Offer of Proof and in the OMS Comments, the OMS expressed great concern about protecting against unauthorized disclosure of confidential information. Unauthorized disclosure does have the potential to damage utilities or harm markets. The tariff language and NDA language that the OMS supported in its March 11 Comments protect against unauthorized disclosure. However, by embracing ideas that mere possession of confidential information by State Commissions can "damage" utilities or "harm" markets, the Commission undermines the very concept of state Commission access to confidential RTO information.

Accordingly, the OMS requests that the Commission withdraw its statements implying that mere possession of confidential information by State Commissions can "damage" utilities or "harm" markets. Furthermore the OMS requests that the Commission revisit any conclusions it may have reached in the June 21 Order based on this faulty concept.

J. The Commission Erred in Imposing an Additional Offer of Proof Requirement Beyond the Requirements in the Non-Disclosure Agreement.

Paragraph 53 states,

> ". . . [I]t may be appropriate to limit the number of state commissions that may receive an individual utility's confidential information and we share Dynegy's concern that not all states have made an offer of proof that they will protect confidential data. Therefore, we will require, in the compliance filing ordered below, that the Midwest ISO include provisions limiting disclosure of data to states that filed an offer of proof."

The OMS notes that the OMS's February 11, 2005 filing contained Offers of Proof from thirteen out of the fourteen OMS member states. That fact aside, the OMS's voluntary offer to make an Offer of Proof on behalf of the states should not now be used by the Commission to impose a mandatory offer of proof requirement. The OMS also notes that the Commission offers no justification or rationale for imposing this additional requirement on the states and such an omission undermines the OMS' good faith offer.

The Non-Disclosure Agreement, along with the tariff, contains the terms for state agency access to confidential MISO data. If a state agency cannot commit to satisfying the conditions in the NDA, it will not sign the NDA and will not receive access under the MISO's tariff process. For the Commission to impose an additional requirement for an offer of proof does not strike the proper balance between state commission needs and market participant interests. Such a requirement also goes beyond the Commission's PJM requirements. For these reasons, the OMS requests that the Commission rehear its decision in Paragraph 53 to impose the additional offer of proof requirement and to delete that requirement.

K. The Commission Erred in its: (1) Statements that OMS Wishes the Commission to "Cede" Jurisdiction to the State Commissions; (2) Reasoning That the Justness and Reasonableness of MISO's Proposal for State Regulator Access to Confidential Information Depends on Whether the Access Fundamentally Changes the Way State Commissions Do Business; and (3) Misunderstanding that State Commissions Can Access Much Or Even All of the Confidential Information They Seek under State Law.

Paragraph 67 of the June 21 Order states,

> "The Commission cannot cede jurisdiction to the state commissions, and we do not see how our providing them with wholesale market information (at least some and perhaps much, or even all, of which they can, presumably, access under state law) could fundamentally change the way state commissions do business."

The OMS notes that it never asked FERC to "cede jurisdiction" nor did the OMS ask for any authority over wholesale sellers or their sales transactions. Accordingly, the OMS is puzzled by the phrase "The Commission cannot cede jurisdiction to the state commissions", as it has no antecedent.

The OMS finds the next phrase that appears in Paragraph 67 equally as enigmatic--

> "[W]e do not see how our providing them with wholesale market information . . . could fundamentally change the way state commissions do business"

The Commission's statements in Paragraph 67 are puzzling due to the fact that whether data access causes "fundamental change" or "no change" in "the way state commissions do business" is not relevant to the legal question of whether the MISO provisions for state regulator access to confidential information are just and reasonable.

Finally, the OMS believes that the Commission may have the mis-impression that the State Commissions are participating in this case merely to get another avenue of access to confidential information that they already have access to. That is not the case. In its Offer of Proof, the OMS explained that,

> …at least some retail states lack the statutory authority to obtain generation data from deregulated generation affiliates of the distribution utilities; and because of corporate separation between the two types of entities, the information will not migrate from the generation affiliate into the state-jurisdictional entity. These states also usually lack authority to obtain data from unaffiliated generating companies.

The Commission's belief that State Commissions can access under state law "at least some and perhaps much, or even all" of the types of confidential information being sought from MISO is not accurate. Accordingly, the OMS requests that the Commission withdraw its statement from

Paragraph 67 of the June 21 Order and revisit any conclusions that the Commission may have reached on the basis of the misunderstanding of the facts in that paragraph.

III. Conclusion

Wherefore, for each and all of the reasons explained above, the OMS respectfully requests that the Commission review its June 21 Order on Rehearing and Offer of Proof and grant rehearing and/or clarification in accordance with the recommendations submitted 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
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 request. The Manitoba Public Utilities Board did not participate in this request.

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 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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