

To: MISO Market Subcommittee
From: OMS Board of Directors
Subject: OMS comments and motions regarding Order 719 market monitoring issues
Date: 2/24/09

The OMS has reviewed the Midwest ISO's draft tariff language that it provided on 1/21 to discuss during 2/3 and 3/3 MSC meetings.¹ The OMS provides these comments to clarify and improve the tariff language in Module D, as well as raise some overall concerns on the role and responsibilities of the market monitor. At the end of this document are six motions that the OMS will present to the MSC on 3/3 in support of these comments.

1. Core Functions and Responsibilities of the IMM

The draft tariff changes the IMM's core functions in Module D of its market tariff to six specific functions. They are: i. Evaluate existing and proposed market rules, tariff provisions and market design elements and recommend proposed rule and tariff changes, ii. Review and report on the performance of the Markets, iii. Notify certain entities of significant market problems or potential tariff violations, iv. Assist in the development of the market monitoring Plan, v. Recommend modifications to market rules or tariffs to improve trading between, MISO and adjacent RTOs or BAs, and vi. Have such other duties and responsibilities as specified in this Plan, as amended from time to time.

A. Report on Prospective Mitigation

As background, FERC found "In order to strengthen MMU independence, the Commission proposed in the NOPR that MMUs be removed from tariff administration, including mitigation. This proposal was designed to free MMUs from a role that might make them subordinate to the RTO or ISO. The Commission regulates public utilities, and it is the public utilities that we hold accountable for tariff implementation. To the extent this function is performed by MMUs, the MMUs are assisting the RTOs and ISOs in the administration of their tariff, which places the MMUs in a subordinate position to the RTOs and ISOs. The proposal was also designed to remove the bias that might arise from the MMUs' analyzing the health of the markets they themselves had affected."²

As the OMS is aware, Ohio and Wisconsin have asked the FERC for reconsideration on this matter, namely that the tariff administration function, including mitigation, remain with the IMM. Acknowledging that the Midwest ISO must comply with the FERC's Order 719, the OMS recommends, as a way to accommodate these concerns, that the Midwest ISO add a seventh core function for the IMM in Module D. Specifically, that the IMM be required to report on a quarterly basis whether the RTO management now in charge of prospective mitigation has

¹ The draft changes to Module D are part of the 2/4 MSC meeting materials. See http://www.midwestmarket.org/publish/Folder/1d44c3_11e1d03fcc5_-7f200a48324a

² Order 719, at P 361

appropriately identified and mitigated improper market behavior using the IMM's developed software. The OMS Markets WG suggests the following specific wording for this seventh core function:

Section 52.3(a)(vii) On a quarterly basis, the IMM will provide to the Board, the Commission and the State Commissions a thorough review of the Transmission Provider's use of developed and installed mitigation software that is used prospectively as the Commission defines the term. The IMM's review should identify any instances where the Transmission Provider may have misapplied mitigation methods or where RTO management may have overrode procedures embedded in the mitigation software used in real time market operation and recommend improvements in software mitigation and practice. In order for the IMM to make such a report, the RTO must maintain and provide sufficient detailed records and logs and make them available to the IMM.

The OMS believes that this seventh function would provide the appropriate check on the Midwest ISO's newly sanctioned exclusive right to prospective market power mitigation. While the findings of the quarterly report would not be binding on market operations, they would highlight where the actions of RTO management may be impeding the public interest that markets be workably competitive and absent of market power abuse. Such a report need not be long if the MMU believes that the RTO management has properly proceeded in its new prospective mitigation function.³ In fact, favorable short reports would strengthen the credibility of the RTO management's use of its prospective market power mitigation authority.

It is the OMS's understanding that to comply with FERC Order 719, the Midwest ISO will have to purchase a license agreement from the market monitor to use the mitigation software. As long as the mitigation software is automated, the Midwest ISO's use of the software should not be different than the IMM's. As such, the burden of this additional core function should be minimal.

B. Proposed Market Rules and Tariff Provisions

Section 52.3(a)(i)(ii) effectively allows the IMM to keep proposed market rules, tariff provisions, etc from affected state commissions if the IMM believes that such knowledge may be "exploited". While market participants may be able to gain an unfair advantage from foreknowledge of rule or tariff changes, it is unclear why or how state commissions could "exploit" this type of information. Indeed, the OMS believes that this is the type of issue that the state commissions could provide valuable service to the IMM and the Midwest ISO. As such,

³ The Commission appears to find objectionable MMU actions that are applied prospectively to participant offers because such actions affect market outcomes, such as altering the prices of offers or altering the physical parameters of offers such as ramp rates and start-up time. Such MMU actions affect the market clearing price, and the Commission believes only an entity under its jurisdiction such as a public utility like the MISO should have that responsibility.

state commissions should not be lumped together with the market participants, but instead be included with the Transmission Provider and the FERC staff in 52.3(a)(i)(ii) as shown below:

(ii) the IMM shall limit distribution of its identifications and recommendations to the Transmission Provider, FERC Staff and to affected State Commissions ~~FERC staff~~ in the event the IMM believes broader dissemination could lead to exploitation, with an explanation of why further dissemination should be avoided at that time;

2. IMM control of data

The last sentence in Section 54.1 of Module D states:

Any data created by the IMM, including, but not limited to, compilations or modifications of the Transmission Provider's data, will be kept within the exclusive control of the IMM.

The above language is likely an effort to comply with Order 719's direction for RTOs to "grant MMUs exclusive control over any MMU-created data".⁴ The OMS supports allowing the IMM to have primary control over its own data creations. However, the above language may be misinterpreted to suggest that the IMM is prevented from releasing this data or information, if the IMM were so inclined. Such an outcome would clearly represent a reduction in the independence of the IMM. As such, the OMS suggests the following edits to Section 54.1 to both capture the Commission's intent and resolve any potential ambiguity concerning the control of the IMM's data creations:

~~Any data created by t~~The IMM's control and dissemination of any data the IMM creates including, but not limited to, compilations or modifications of the Transmission Provider's data, shall not be dictated by the Transmission Provider.
~~will be kept within the exclusive control of the IMM.~~

3. Tailored requests for data from state commissions

The language in Section 54.3(b) of the proposed Module D concerns Tailored Requests for Information from Authorized Agencies. While the Commission's intent behind this provision is to expand the dissemination of information to the state commissions, the reality is that the proposed language is in direct conflict with the existing data access provisions found in Section 38.9.4 of the Midwest ISO tariff and represents a potential impediment to state commissions seeking confidential information that is in the possession of the IMM.⁵ Specifically, Section 54.3(b) would grant the IMM the authority to refuse requests for reports, analysis and raw data from authorized requestors (i.e. state commissions). If approved by the Commission, Section

⁴ Order 719, at P 328

⁵ Order 719, at P 449

54.3(b) would result in a drastic reduction in the amount of confidential information that could potentially be made available to the state commissions to fulfill their statutory obligations.

Paragraph 448 of Order 719 states that it will be up to each RTO or ISO, together with its stakeholders, to propose the confidentiality provisions they deem most appropriate, and to propose them to the Commission in a tariff filing. Further, in Paragraph 416, the Commission clarified that Order 719 is not intended to limit existing arrangements between MMUs and state commissions regarding the provision of information, subject to appropriate restrictions related to confidentiality concerns. Given that Commission-approved provisions concerning access to data in possession of the Midwest ISO/IMM already exist in Section 38.9.4 of the Midwest ISO's tariff, the OMS urges the Midwest ISO to adopt the following edit to the proposed Section 54.3(b).

54.3(b) Tailored Requests for Information from Authorized Agencies.

~~The IMM will entertain tailored requests for information from Authorized Agencies regarding general market trends and the performance of the Markets, excluding any information designed to aid state enforcement actions. Granting or refusing such requests shall be at the IMM's discretion based on time and resource availability.~~ The IMM shall fulfill ~~entertain~~ requests from Authorized Agencies for information in accordance with section 38.9.4 and Attachment EE of the Tariff.

The proposed edit would retain the data access provisions currently in the Midwest ISO tariff, while not placing any greater burden on the IMM to provide additional data, reports or analysis for the state commissions. The proposed edit also does not interfere with the IMM's ability to carry out its core functions. The edit also maintains the protection afforded to confidential information by the state commissions and the Midwest ISO/IMM.

4. IMM Information dissemination and quarterly reports

Order 719 requires the IMM to “Review and report on the performance of the wholesale markets to the Commission-approved independent system operator or regional transmission organization, the Commission, and other interested entities such as state commissions and market participants, on at least a quarterly basis and submit a more comprehensive annual state of the market report. The Market Monitoring Unit may issue additional reports as necessary.”⁶

Section 57.1 of the proposed Module D states that the IMM is required to provide a detailed state of the market report to FERC and the Midwest ISO Board, but only a “less extensive” report to the State Commissions. Given the nebulous nature of the term “less extensive”, the OMS would recommend that the Midwest ISO insert the exact Order 719 language directly into the tariff as follows:

⁶ Part 35.28 CFR

57.1 Annual and Quarterly Reports And Periodic Reports- Conference Calls

The IMM shall review and report on the performance of the wholesale markets to the Transmission Provider's Board of Directors, the Commission and other interested entities such as state commissions and market participants, on at least a quarterly basis. Copies of these reports shall be forwarded by the IMM to each of the Interested Government Agencies. Copies of the reports shall be made publicly available by the Transmission Provider by posting on its website, subject to redaction or other measures necessary for the protection of Protected Information. The IMM shall also prepare and submit to the Transmission Provider's Board of Directors a more detailed state of the market report on market trends and the competitive performance and efficiency of the Markets and Services. Such report shall be submitted at least annually and include any recommendations of the IMM for the improvement of the Markets and Services, or of the monitoring, reporting and other functions undertaken pursuant to this Plan.. The report shall also include a description of all requests for investigation/complaints and the resolution or disposition thereof. A copy of the report shall be forwarded by the IMM to each of the Interested Government Agencies. Copies of the report shall be made publicly available by the Transmission Provider by posting on its website, subject to redaction or other measures necessary for the protection of Protected Information. The IMM may issue additional reports to the Transmission Provider's Board of Directors, the Commission or other interested entities such as state commissions and market participants, as necessary. The IMM shall make one or more of its personnel available for regular conference calls, which may be attended, telephonically or in person, by the Commission and Authorized Agencies' staff, by representatives of the Transmission Provider, and by Market Participants, subject to appropriate measures for the protection of Protected Information.

5. Referrals to FERC regarding non public and confidential

Clarifying Confidential Non-Public Definition for Sanctions Imposition Purposes
the proposed Module D tariff wording to comply with FERC Order 719 is as follows:

65.3 Sanctions

65.3.1 Imposition

a. If the IMM identifies potential Tariff violations for which penalty charges are provided under this Tariff, the IMM must make a ~~confidential~~ non-public referral of such violations to the Commission so that the Commission can determine the appropriate penalty charges under this Section. If the IMM determines in accordance with the thresholds and other standards specified in this Module D, Part III that: (i) a Market Participant has engaged in physical withholding, or (ii) a Market Participant has engaged in uneconomic production; or (iii) a Load Serving

Entity is subject to a Penalty Level payment in accordance with Section 65.4 below; or (iv) a Transmission Owner has physically withheld transmission that causes transmission congestion, including the operation of network control devices in a manner that was not economic, the IMM must make a ~~confidential~~ non-public referral of such violations to the Commission.

The OMS acknowledges that the Midwest ISO is attempting to comply with Order 719. However, the OMS has long argued that the affected state commissions should also be notified of any referral of potential tariff violations to the FERC by the IMM.⁷ Accordingly, the OMS recommends that subsection (a) be modified to include language indicating that the IMM will also notify affected state commissions of any referral of potential tariff violations to the FERC by the IMM.

Additionally, the OMS recommends that the Midwest ISO eliminate the word confidential above as well. While this word has been in prior versions of the Module D tariff, its inclusion prevents outside scrutiny. Such scrutiny once again assists in assuring that the markets remain competitive. Non-confidential treatment acts as a deterrent to inappropriate competitive behavior. It is not the intent of the OMS to require the release of any information that may have criminal investigation implications.

⁷ See OMS' comments in Docket No. RM07-19-000 (2007), at 37-40 and (2008), at 10-11.

OMS proposed motions regarding Order 719 market monitoring issues

1. Core Functions and Responsibilities of the IMM

A. Report on Prospective Mitigation

“The Market Subcommittee supports the recommendation made by the Organization of MISO States of adding a seventh core function to Section 52.3(a) that the market monitor be required to report on whether the Transmission Provider has appropriately identified and mitigated improper market behavior using the market monitor’s developed software.”

B. Proposed Market Rules and Tariff Provisions

“The Market Subcommittee supports the recommendation made by the Organization of MISO States of excluding affected state commissions from the distribution limitation in Section 52.3(a)(i)(ii).”

2. IMM control of data

“The Market Subcommittee supports the recommendation made by the Organization of MISO States of clarifying Section 54.1 that the control and dissemination of data the market monitor creates is not subject to control of the Transmission Provider.”

3. Tailored requests for data from state commissions

“The Market Subcommittee supports the recommendation made by the Organization of MISO States of clarifying Section 54.3(b) that the market monitor shall fulfill requests for information from Authorized Agencies under Section 38.9.4 and Attachment EE.”

4. IMM Information dissemination and quarterly reports

“The Market Subcommittee supports the recommendation made by the Organization of MISO States of clarifying Section 57.1 by expanding the requirements of periodic reports to include Order 719 language.”

5. Referrals to FERC regarding non public and confidential

“The Market Subcommittee supports the recommendation made by the Organization of MISO States of revising Section 65.3.1 such that affected state commissions may also be notified.”