ORGANIZATION OF MISO STATES, INC.
Special Board of Directors Meeting
Conference Call Notes
June 30, 2005

Kevin Wright, President of the Organization of MISO States, Inc. (OMS), called the June 30, 2005 Meeting of the OMS Board of Directors to order via conference call at approximately 2:00 p.m. (CST). The following board members or their proxies participated in the meeting:

Kevin Wright, Illinois
David Hadley, Indiana
John Norris, proxy for Diane Munns, Iowa
AW Turner, proxy for Mark David Goss, Kentucky
Burl Haar, proxy for Ken Nickolai, Minnesota
Steve Gaw, Missouri
Greg Jergeson, Montana
Tim Texel, proxy for Eugene Bade, Nebraska
Susan Wefald, North Dakota
Judy Jones, Ohio
Andrew Tubbs, proxy for Glen Thomas, Pennsylvania
Rolayne Wiest, proxy for Gary Hanson, South Dakota
David Sapper, proxy for Bert Garvin, Wisconsin

Absent
Manitoba, Michigan

Others present on conference call:
Nancy Campbell, Minnesota
Jack Dwyer, Iowa OCA

OMS Staff participating - Bill Smith, Julie Mitchell

The directors and proxies listed above established the necessary quorum for the meeting of at least eight directors being present.

Business Items

1. Consideration of OMS Draft Comments to FERC on Long-Term Transmission Rights on Markets with Locational Pricing, Docket #AD05-7.

- Susan Wefald moved to accept the comments and file them with FERC. Judy Jones seconded.

- The was limited discussion about making sure everyone had the same version of the document and then the motion was put to a roll call vote.

- The motion passed 10-0 with 3 abstentions and 2 states absent. States voting aye were: Illinois, Indiana, Iowa, Minnesota, Missouri, Montana, North Dakota, Ohio, Pennsylvania, Wisconsin. States abstaining were: Kentucky, Nebraska, South Dakota. States absent were: Manitoba, Michigan.

2. FERC Order on Access to Confidential Data.

- Dave Hadley gave an overview of the FERC order and what was discussed in the work group meeting.

- The work group recommends that Scott Hempling be asked for his legal opinion about the appropriateness of a court appeal, that a rehearing be requested for those issues in the FERC order that are not ripe for an appeal and that the OMS work with MISO on its compliance filing and then file comments on that. The work group vote was 8-1.

- Dave Hadley then took questions on the work group's recommendations and those recommendations were discussed in depth along with what the timeframe for action needed to be.

- Greg Jergeson moved to retain Scott Hempling for the indicated analysis and delegate to the Executive Committee the terms and conditions of the contract including a cost cap of $10,000-12,000. Susan Wefald seconded the motion. The motion passed by unanimous voice vote.

Additional conversation was had about changes in FERC leadership and OMS outreach to the new FERC commissioners.

The meeting adjourned at 3:30pm CST.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Long Term Transmission Rights in Markets Operated by Regional Transmission Organizations and Independent System Operators	))))	Docket No. AD05-7-000

COMMENTS OF THE ORGANIZATION OF MISO STATES ON ESTABLISHING LONG TERM TRANSMISSION RIGHTS IN MARKETS WITH LOCATIONAL PRICING

I. Background

On May 11, 2005, the Federal Energy Regulatory Commission (FERC) issued a Notice Inviting Comments on Long-Term Transmission Rights. In its notice, the FERC characterized the concern as one that has been raised by some market participants regarding their inability to fully hedge market prices from resources that they may own or have under contract. In this context, a hedge is the ability for the load-serving entity to keep the price for serving load at the cost of operating resources owned or under long-term contracts (i.e., Designated Network Resources (DNRs)) and short-term contracts for economy transactions.

In regions of the United States where Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs) either do not exist or do not use Financial Transmission Rights (FTRs),[1] the issue of hedging is dealt with via the deliverability of power from generation sources to native load using "physical" transmission rights – the right to inject power from a generation source to serve native load. In particular, Network Service is defined as transmission service from a load-serving entity's DNRs to its native load.[2] Specifically, once the Transmission Provider approves a load-serving entity's DNRs, it is the obligation of the Transmission Provider to make the upgrades necessary for the load-serving entity to continue to be able to deliver the power from those DNRs. - It is important to recognize that physical transmission rights never constituted an absolute ability to flow a particular transaction all hours

[1] For example, the Southwest Power Pool (SPP) is a FERC-approved RTO that does not plan to use FTRs to manage congestion in its proposed real-time energy imbalance market.

[2] For hedging the price of short-term bilateral contracts, the load-serving entities can also arrange delivery via requests for short-term, point-to-point service.

of the year. Specifically, there are times when deliverability from the most economic resources may be restricted because of transmission constraints and more expensive generation must be dispatched to meet those constraints; i.e., redispatch is required to maintain power system reliability. In addition, all physical transactions are subject to curtailment using Transmission Line Loading Relief (TLR) in the event that allowing schedule transmission flows would otherwise violate the security constraints and threaten the reliability of the power system. A TLR event can curtail firm service from DNRs when the curtailment of non-firm service does not alleviate the threat to the grid.

What is described above as a hedge through physical deliverability is not the case for RTOs and ISOs that have adopted the use of FTRs. While holding an FTR from a DNR will assure the load-serving entity that it can hedge its cost from that generation source, a load-serving entity is not assured that it will be allocated FTRs from its DNRs for its entire load. For example, in the FTR allocation process at the Midwest ISO, load-serving entities are assigned Candidate FTRs (CFTRs) from each of their DNRs and the Midwest ISO performs an annual allocation by which the load-serving entities are allowed to nominate FTRs from their CFTRs in a series of four tiers that add up to their forecasted summer peak demand. Not all CFTRs nominated will necessarily be allocated to the load-serving entities because of a requirement that all allocated FTRs be simultaneously feasible.[3] In the Staff Discussion Paper on Long-Term Transmission Rights Assessment (May 11, 2005), the issue is described as follows:

> "Some market participants have concerns that sufficient transmission rights may not be available each year to adequately cover their congestion cost exposure. They argue that the combination of potentially volatile congestion costs, variability in the annual allocation, and the inability to secure a known quantity of transmission rights for multiple years introduces an unacceptable degree of uncertainty into resource planning and investment. As a result, some participants want the ability to obtain long-term transmission rights or service at a price certain."[4]

As a general matter, the OMS supports the desire by all market participants to develop approaches that will reduce market risks from congestion costs. However, this issue is somewhat

[3] This requirement is necessary in order to maintain expected revenue adequacy for the RTO/ISO; i.e., to ensure that the RTO/ISO expects to collect sufficient revenues in congestion cost payments to pay out to the FTR holders.

[4] Long-Term Transmission Right Assessment, FERC Staff Discussion Paper, p.1.

more complex than it might first appear. Specifically, the more traditional view of resource planning involving building generation plants that will serve a specified load or service territory for the life of the plant is different from the perspective where multiple load-serving entities use shorter-term contracts to serve retail load on a competitive basis. In competitive markets, market participants may determine that the risks associated with longer-term commitments are unacceptable because of the lack of certainty regarding the load that they will be serving. These two perspectives imply that purveyors of each of these different perspectives will have a desire to hedge power supplies for significantly different forward time periods. The Midwest ISO provides a footprint that encompasses the traditional perspective of state-regulated, vertical utilities, the restructured paradigm in which generation supply is a competitive resource and systems that have divested transmission assets. These comments of the Organization of MISO States (OMS) have attempted to address the issue of long-term financial transmission rights from all of these diverse perspectives.

II. Summary of Comments

The need to decrease the risk associated with congestion costs appears to be a general concern that is cognizant of credit ratings, and the costs to market participants and ultimate consumers. With the needs for more capital intensive investments by utilities to perform environmental upgrades to existing facilities, the demands for replacing older capacity, the demands for additional base-load capacity, and the need for transmission system enhancements, initiating a discussion at the federal level addressing these needs and concerns through long-term transmission rights or other means is timely and welcomed.

In response to the notice inviting comments regarding long-term transmission rights, the OMS is submitting detailed comments. The following highlights the primary points of the more detailed discussion.

- To guarantee long-term transmission rights absent grid expansion is likely to mean shifting the congestion costs among market participants without lowering the overall level, and therefore risks, of these congestion costs. This does not mean that the FERC or RTOs should abandon consideration, further discussion, and potential implementation of long-term transmission rights.
- Longer-term transmission rights that are not subject to prorating require a higher risk premium (potentially much higher) than shorter-term transmission rights that are subject to prorating. This is because the longer the term for which risks are to be

mitigated, the greater the amount of uncertainty and the higher the cost of mitigating that risk. Given that the OMS is not aware of any proposals or practical ways to set a higher risk premium on long-term transmission rights or exemption from pro-ration, further stakeholder input and discussion of this issue is needed at the RTO level.

- If some form of reverting to physical rights is used to address the establishment of long-term transmission rights, it should not occur at the expense of reduced efficiency to the RTO day-ahead and real-time energy markets
- A properly executed regional transmission planning process, including siting with appropriate cost allocation for reliability and regionally beneficial upgrades to the transmission system, is likely the most important factor in reducing congestion costs in the long term.

III. Detailed Comments on Long-Term Transmission Rights Assessment

A. The Interest in Long-Term Transmission Rights

The FERC Staff's well-written Discussion Paper refers to some market participants' perception of greater price risk because of volatility of the congestion cost component of locational marginal pricing (LMP) or "congestion cost risk" as well as the desire to diminish this risk when financing new generation and transmission investment.[5] FERC Staff notes that, while not all market participants agree with the need, it would like comments on several questions:

- **What are the needs of market participants for long-term transmission rights in RTO markets?**
- **What has been the experience with congestion pricing and transmission rights of market participants in RTO markets?**
- **Have financial right allocations been sufficient to meet participants' needs for congestion hedging and long-term resource planning and acquisition?**

Because the Midwest ISO has operated for such a short period of time, it is impossible for the OMS to answer any of the above questions with hard factual data. However, the OMS points out that the FERC Staff has made an assumption at the outset that, at first added some confusion regarding answering its third question related to long-term resource planning and acquisition:

> "Most RTOs do provide long-term transmission rights (i.e., rights with terms greater than one year) for transmission upgrades or expansion that increase transmission capability. These long-term transmission expansion rights merit extensive discussion in

[5] FERC Staff Report at 4.

> themselves, but the paper will focus on long-term rights to existing transmission capacity."[6]

With respect to long-term financial rights associated with new infrastructure, the concern of some market participants is that, without such rights, it is difficult to finance new generation projects that are located remote from the load. Later in its discussion paper, the FERC Staff notes that the real issue may be not on a specific project, but rather on the "overall risk profile of the utility," and this may impair the utility's "overall financial flexibility and ability to make the strategic decision to invest in new generation (instead of, for example, to purchase power through a contract)."[7] The point here is that just having long-term financial rights for new generation options may not be sufficient to mitigate the perceived poor risk profile that a utility may have because of its congestion cost risk on existing generation resources. In part, this explains the emphasis that the FERC Staff has placed on long-term financial rights for existing transmission capacity as opposed to similar rights for transmission upgrades.

1. To guarantee long-term transmission rights absent grid expansion means shifting the congestion costs among market participants without lowering that overall risk.

Functional energy markets can encourage market participants to develop many risk management instruments, such as demand resource options. While there may be other methods for reducing the risk of congestion costs in the long-term, expanding transmission capacity appears to be the most direct means of decreasing that risk. Without increasing the capacity of the electrical system, moving to long-term transmission rights cannot in and of itself decrease the overall risk of congestion cost, and may only prove to move that risk from one set of market participants to another.

For new generation resources, implications for the ability to hedge congestion cost risk are directly related to the deliverability standards for DNRs that must be met in order for the RTO to grant a long-term FTR. Assuming a greater amount of transmission capacity is built to meet deliverability standards, the greater will be the assurance for market participants that they will be able to hedge their overall congestion costs over a longer period of time. Any realistic consideration of long-term transmission rights must take into consideration the relationship

[6] Ibid, p.4.

[7] Ibid, p. 16.

between resource deliverability standards and the ability to hedge congestion costs on a long-term basis.

2. Implications for revenue adequacy of long-term financial transmission rights

The FERC Staff discussion paper relates the uncertainty with respect to revenue adequacy to fund FTRs to changes in the topology of the network along with unexpected loop flow; i.e., "events that were not in the model used to identify the feasible set of rights" that "can reduce congestion revenues collected below the level needed to pay existing FTR holders."[8] In this regard, the FERC Staff believes that "the probability of revenue insufficiency is likely to be greater with long-term financial rights"[9] and raised the following questions.

- **Should long-term financial rights be fully funded or subject to revenue shortfalls due to transmission network changes?**
- **How should potential revenue shortfalls be allocated?**
- **If long-term financial rights are awarded based on forecast grid conditions, but maintenance of the grid declines, resulting in future infeasibility, which parties should be responsible for maintaining the revenue adequacy of the rights?**

The primary concern here is, if the hedging value of long-term FTRs is decreased because of revenue inadequacy, does the RTO need to protect these particular FTRs from having to pay for a share of the revenue inadequacy or should they be equally subject to prorated FTR payments like everyone else? In this regard, it is important to point out that if longer-term transmission rights are not subject to prorating, then these rights should require a higher risk premium than shorter-term transmission rights that are subject to prorating. This is because the longer the term for which risks are to be mitigated, the greater the amount of uncertainty and the higher the cost of mitigating that risk. Providing some market participants with long-term transmission rights that failed to incorporate a risk premium that accurately reflected the potential long-term congestion costs or subjected some customers to greater likelihood of pro-ration for otherwise equivalent service could be unduly preferential and discriminatory. The OMS is not aware of any proposals or practical ways to set a higher risk premium on long-term transmission rights or exemption from pro-ration. Therefore, the OMS recommends further stakeholder input and discussion of these issues at the RTO level.

[8] Ibid, p. 15.

[9] Ibid, p. 15.

As a practical matter, this is clearly a distributional question. When the RTO is short of revenues, someone must make up the shortfall (e.g., an uplift charge to all customers). If all load-serving entities are allowed the same opportunity to obtain long-term FTRs, then an expectation might be that each load-serving entity would have approximately the same pro rata share of long-term FTRs in their FTR portfolios. If RTO revenue shortfalls are allocated on the basis of a pro rata share of megawatts of FTRs held, then it should make no difference whether or not long-term FTRs were protected from an allocated share of a revenue shortfall because the amount of the shortfall taken from a load-serving entity would be approximately the same with or without long-term FTRs being protected. However, in practice the actual allocation of FTRs is likely to result in some load-serving entities having a higher mix of long-term FTRs than others.

B. Physical Rights as an Alternative for Providing Long-Term Transmission Rights

Reverting to OATT service is not equivalent to hedging congestion costs to a level equal to the cost of meeting load from owned generation. Specifically, in an OATT service context, load-serving entities will enter into short-term bilateral purchases and sales of power. This can occur on either a firm or non-firm basis. Short-term purchased power substitutes energy at a lower price than from owned generation, and short-term sales result in profits that are subtracted from the cost of meeting load from owned generation. These transactions require the load-serving entity to request physical transmission service, and, if available, the Transmission Provider grants such service, subject to possible curtailment through Transmission Line Loading Relief (TLR). The FERC Staff discussion paper correctly recognizes the fact that this first come - first served approach with possible TLRs is less efficient than having a bid system where the RTO uses security constrained economic dispatch to determine which generators will meet overall load at the least cost. If some form of reverting to physical rights is used, it should not be allowed to reduce the efficiency of the RTO centralized dispatch.

IV. Conclusion

The OMS is not unalterably opposed to longer-term transmission rights, if they can be designed in such a manner as to fairly apportion the risks so as to avoid undue discrimination and not disrupt the real-time market dispatch. However, the OMS is concerned that, if they are

pursued, long-term transmission rights be designed in a way that avoids providing some market participants with unduly preferential services. Without adequate expansion of grid capacity, long-term transmission rights are likely to only redistribute congestion costs among market participants.

The OMS recognizes that long-term financial transmission rights could provide added incentive to build infrastructure to expand the electrical system so as to reduce congestion costs in the long term. However, a properly executed regional transmission planning process, including siting with appropriate cost allocation for reliability and regionally beneficial upgrades to the transmission system, is likely to be a more important factor in reducing congestion costs in the long term.

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
Michigan Public Service Commission [pending concurrence by Friday]
Minnesota Public Utilities Commission
Missouri Public Service Commission
Montana Public Service Commission
North Dakota Public Service Commission
Public Utilities Commission of Ohio
Pennsylvania Public Utility Commission
Wisconsin Public Service Commission

The Kentucky Public Service Commission, the Nebraska Power Review Board, and the South Dakota Public Utilities Commission abstain from this comment for procedural reasons. 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.

Respectfully Submitted,
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Dated: June 30, 2005

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

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

ORDER ON REHEARING AND OFFER OF PROOF

(Issued June 21, 2005)

1. In an order dated August 6, 2004, the Commission approved the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) proposed Transmission and Energy Markets Tariff (TEMT), under which the Midwest ISO has initiated Day 2 operations in its 15-state region.[1] The Midwest ISO's Day 2 operations include, among other things, day-ahead and real-time energy markets and a financial transmission rights (FTR) market for transmission capacity.

2. The TEMT II Order accepted, subject to modification, portions of the Midwest ISO's proposed TEMT provisions governing data confidentiality, but it rejected the sections of the proposal that dealt with how confidential information should be shared between the Midwest ISO (or its Independent Market Monitor (IMM)) and state regulators. Today's order considers the Organization of MISO States' (OMS) Offer of Proof regarding the viability of the Midwest ISO's proposal to share information with states, and the outstanding requests for rehearing of the Commission's decisions

[1] *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 (TEMT II Order), *order on reh'g*, 109 FERC ¶ 61,157 (2004), *order on reh'g*, 111 FERC ¶ 61,043 (2005).

regarding the Midwest ISO's original confidentiality proposal. The order benefits customers because it strikes an appropriate balance between protecting market participants' confidential information and enabling state commissions with appropriate jurisdiction to exercise their investigatory authority.

I. Background

3. The Midwest ISO's March 31, 2004 TEMT filing (March 31 Filing) proposed provisions to govern the Midwest ISO's handling of confidential data.[2] The Midwest ISO will not disclose confidential information except in four circumstances. First, disclosure to the North American Electric Reliability Council (NERC) or Regional Reliability Councils is permissible if certain conditions are satisfied. Second, disclosure to a third party is permissible if the affected entity authorizes the release in writing, and disclosure is limited to the terms of the authorization. Third, the Midwest ISO may disclose confidential data if required by law or in the course of an administrative or judicial proceeding other than a Commission proceeding or investigation. Fourth, the Midwest ISO may use information that it already had, or that it was able to acquire, without being subject to confidentiality restrictions. The Midwest ISO also proposed to provide confidential information to the Commission and its staff upon request, "during the course of an investigation or otherwise,"[3] and to request that the Commission keep this information confidential under 18 C.F.R. § 388.112.

4. The Midwest ISO also proposed to provide confidential information to state commissions, state agencies that share regulatory responsibilities with the state commissions, or any organization formed by such state regulatory commissions (*e.g.*, OMS), if those entities request confidential information in the course of an investigation or are otherwise acting in fulfillment of a statutory duty. In disclosing confidential information, the Midwest ISO must ask the requesting entity to treat the information as confidential and non-public.

5. In the TEMT II Order, the Commission accepted portions of the Midwest ISO's confidentiality policy, subject to certain modifications, but rejected the Midwest ISO's proposal to share data with state entities. The Commission found that "[n]either the Midwest ISO's filing nor the intervenors' comments make clear why OMS and the states seek access to data that is comparable to the Commission's access, how they will keep

[2] *See* Module C, section 39.9, Original Sheet Nos. 455-69.

[3] *See id.* at section 38.9.3, Original Sheet No. 463.

that data confidential, or for what purpose they will use the data."[4] The Commission also noted that the Midwest ISO's confidentiality proposal was not in line with one recently approved for PJM Interconnection, L.L.C. (PJM), and opined that the two ISOs should have comparable confidentiality rules as they move toward a joint and common market.

6. OMS sought rehearing of the TEMT II Order for purposes of further consideration. It asked the Commission to grant it 120 days to make an offer of proof that: (1) state commissions have the statutory authority to safeguard confidential data; and (2) state commission access to confidential information will advance the Commission's and state commissions' common goals for wholesale market reform while preserving the state commissions' legitimate needs. On September 30, 2004, the Commission granted rehearing for this limited purpose, and allowed OMS 120 days in which to make its offer of proof.[5] At OMS's request, the Commission later extended the filing deadline to February 11, 2005.[6]

II. Offer of Proof, Notice of Filing and Responsive Pleadings

7. OMS filed its Offer of Proof on February 11, 2005. It states that in light of productive discussions about data access that have taken place since the issuance of the TEMT II Order, it expects the Midwest ISO to file a revised data confidentiality proposal. Accordingly, OMS does not think it is necessary to defend the March 31 Filing at this time. However, it recognizes that there is a "procedural awkwardness" to doing otherwise, because the Offer of Proof is responsive to a grant of rehearing that relates back to the March 31 Filing.[7]

8. OMS states that it has three reasons for filing the Offer of Proof. First, it wants to respond in a generic way to the Commission's questions regarding state commission data access: "why OMS and the state seek access to data that is comparable to the Commission's access, how they will keep that data confidential, or for what purpose they

[4] TEMT II Order at P 561.

[5] *See Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,321 (2004) (Confidentiality Order).

[6] *See Notice of Extension of Time*, Docket Nos. ER04-691-003 and EL04-104-003 (Jan. 25, 2005).

[7] Offer of Proof at 6.

will use the data."[8] Second, since the issue of data access will remain unresolved until the Midwest ISO makes its next data confidentiality proposal, OMS states that a more comprehensive presentation will help the Commission to apply the correct legal standard to the Midwest ISO's upcoming filing while also understanding how wholesale competition is related to the quality of state utility regulation. Third, OMS wishes to preserve its right to judicial review of the Commission's rejection of the data access provisions in the March 31 Filing.

9. The body of the Offer of Proof is in five major parts. First, OMS challenges the Commission's rejection of the data access provisions, noting that the Commission made no finding that the provisions were unlawful. It argues that it is not the states' burden to justify those provisions. Second, OMS explains how each element of data mentioned in Module D of the March 31 Filing serves a state commission function. Third, the Offer of Proof explains how the state commissions will protect data confidentiality. Fourth, OMS argues that the proposal in the March 31 Filing to permit state commissions to disclose confidential data to one another is not unlawful. Finally, the Offer of Proof responds to the Commission's statements that the Midwest ISO data access plan should track the PJM plan.

10. Notice of OMS's filing was published in the *Federal Register*, 70 Fed. Reg. 9,637 (2005), with interventions and protests due no later than March 3, 2005. The Commission later extended the comment deadline to March 10, 2005, and the reply comment deadline to March 25, 2005.[9] As discussed further below, the Midwest ISO made an informational filing on February 17, 2005, that included an alternative proposal for addressing the areas of disagreement in the parties' discussion of state agencies access to confidential information. The parties listed in Appendix A to this order filed comments, protests and reply comments. Cinergy later filed a motion to withdraw its comments and the outstanding portions of its request for rehearing of the TEMT II Order.

[8] Confidentiality Order at P 11; TEMT II Order at P 561.

[9] *See Notice of Extension of Time*, Docket Nos. ER04-691-024 and EL04-104-023 (Mar. 1, 2005).

III. Discussion

A. Procedural Matters

11. Midwest Independent Power Suppliers' filing includes a motion for leave to intervene. The group describes itself as "a group of leading independent power suppliers," but does not identify its members. It states that its members are involved in developing and owning electric generation in the Midwest. Some own and operate electric generation within the Midwest ISO footprint; others may particulate in the Midwest ISO energy markets in the future. Midwest Independent Power Suppliers states that it wants to protect its members' interests with respect to maintaining the confidentiality of competitively sensitive information.

12. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.[10] Midwest Independent Power Suppliers has not met this higher burden of justifying its late intervention.

B. OMS's Offer of Proof

1. Legal Framework

a. OMS's Offer of Proof

13. OMS argues that the Commission cited no legal basis for rejecting sections 38.9.4 or 54.3 of the proposed TEMT, and that the order to which it cited in doing so – *PJM Interconnection, L.L.C.*[11] – also did not discuss the "just and reasonable" standard of review. OMS states that the legal question is not whether the Commission, or opposing parties, would prefer a different outcome, but whether the proposal is just and reasonable and not unduly discriminatory. It adds that where a regional transmission utility "has made common cause with the 14 retail regulators, the deference required by law serves the policy goals of making regulation more effective and more efficient."[12] It further

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[10] *See Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

[11] 107 FERC ¶ 61,322 (2004) (PJM Confidentiality Order).

[12] Offer of Proof at 11-12.

states that there is no basis for a finding of unlawfulness because there is no evidence that state access will deter the entry of generation competition.

14. According to OMS, there is a three-part argument for why a Midwest ISO proposal to share data access with state commissions could be unreasonable: (1) state data access would discourage wholesale generators from serving the Midwest markets; (2) with fewer wholesale generators in the market, market-based rates would be subject to less competitive discipline; and (3) the absence of competitive discipline would cause market-based rates to exceed just and reasonable levels. OMS states that this argument fails because: (1) there is no factual basis for finding that generators would leave a profitable wholesale market on the basis that data would be available to state commissions; and (2) even if all generators who were uncomfortable with this data availability withdrew from the market, rates would not necessarily become unjust and unreasonable because the Commission has cost-based rates available as a tool.

15. OMS requests that the Commission accept the principles set forth in the Offer of Proof. It asks the Commission to apply those principles to its reconsideration of the TEMT II Order, and withdraw its rejection of the Midwest ISO's original confidentiality proposal, and also to the Midwest ISO's new filing. OMS argues that the Commission need not dispose of the Midwest ISO's March 31 Filing at this time, but can likely declare it moot when the new Midwest ISO proposal is filed.

b. Comments

16. PSEG contends that instead of answering the Commission's questions about OMS's need for confidential information, OMS has shifted the burden to the Commission to prove why OMS should not have unrestricted access to the information. PSEG submits that the burden should not be on the Commission to justify its rejection of the Midwest ISO proposal, but should be on OMS to show why the state commissions requesting confidential information must have it to carry out their statutory obligations and only after appropriate safeguards are in place. PSEG believes that OMS has failed to fulfill these responsibilities and suggests that the Commission should analyze the Midwest ISO's proposal with the same format used for PJM: namely, the Commission should analyze whether the proposal contains provisions that show: (1) the requesting commission has provided a rational explanation for why it needs particular data; (2) there is a process to afford the affected market participants an opportunity to challenge requests for information; (3) there is a demonstration that the released information will be safeguarded.

17. FirstEnergy urges the Commission to reject OMS's arguments that the Commission does not have the statutory authority to require the Midwest ISO and the OMS to justify the confidentiality provisions or that the Federal Power Act (FPA)

prohibits the Commission from requiring that state entities be provided access to confidential data only when the state commission lacks access under state law. FirstEnergy notes that the Commission possesses authority under section 205 of the FPA to ensure just and reasonable rates and charges and section 301 of the FPA also provides the Commission with specific authority over the dissemination of data and information obtained from public utilities. FirstEnergy argues that although FPA section 301 refers to information that comes into the Commission's possession, it would also logically extend to information that came into the possession of the Midwest ISO, as a Commission creation.

18. In its reply comments, LG&E argues that wholesale market activities fall within the Commission's jurisdiction, and that it does not serve anyone's interest to blur the FPA's bright line. It states that the existence of a federal regulator for market manipulation alleviates the possibility that one state will find market manipulation, while another state will not, and that the Commission can perform this task more efficiently than the states. LG&E avers that ignoring the explicit jurisdictional arrangement in the FPA results in regulatory uncertainty.

19. LG&E contends that the Offer of Proof erroneously states that the Commission lacks authority to reject the Midwest ISO's data confidentiality proposal. LG&E argues that the FPA grants the Commission the exclusive authority to regulate a public utility's rates and charges in connection with the transmission or wholesale sale of electric energy. According to LG&E, commenters have failed to explain why it is necessary or appropriate for states to assert jurisdiction over wholesale sales. LG&E argues that it provides data to the states in which it conducts retail operations, and that the Midwest ISO does not need to establish procedures to provide the information to those state commissions. To extend state commission jurisdiction to wholesale rates or transmission in other states, argues LG&E, encroaches on the Commission's jurisdiction and violates the Supremacy Clause of the Constitution. That the states intend to keep data confidential, LG&E concludes, does not overcome the threshold question of whether they have a legitimate need to access that data in the first place.

c. Discussion

20. We agree with commenters that the Midwest ISO bears the burden of proving that its proposed confidentiality provisions are just and reasonable. It is well settled that this burden falls upon a party proposing a rate change.[13] And when a new rate is proposed,

[13] *See, e.g.*, 5 U.S.C. § 556(d) (2000); 16 U.S.C. § 824d(e) (2000).

the Commission may review "a revised rate completely to assure that all its parts – old and new – operate in tandem to insure a 'just and reasonable' result . . . ."[14] This authority extends to non-rate terms that are a precondition to receiving service under the rate schedule in question; in such cases, the filing utility maintains the burden of proof to establish that such terms and conditions are just and reasonable.[15] We agree with FirstEnergy and LG&E that the Commission has authority to reject a proposal that has not been shown to be just and reasonable.[16]

21. The question here is whether the record demonstrates: (1) that OMS and the states need access to data that is comparable to the Commission's access; (2) that they will keep that data confidential; and (3) a legitimate purpose for the data. We will discuss these issues in detail below. LG&E's arguments with regard to whether granting states access to confidential market data alters jurisdictional lines between the Commission and the states is a corollary to these issues, and we will also discuss it in detail in the context of the proposals.

2. State Regulators' Need for Confidential Data

a. OMS's Offer of Proof

22. OMS states that it is incorrect to view the federal-state relationship solely through a hierarchical lens, in which the state commission is a subordinate that helps the Commission carry out its goals. In the electric industry, OMS explains, wholesale transactions are vertical inputs to retail transactions, and Commission regulation is an input to state retail regulation. It adds that retail regulators must be informed about wholesale inputs because the retail seller's choice among those inputs – including

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[14] *Cities of Batavia v. FERC*, 672 F.2d 64, 77 (D.C. Cir. 1982).

[15] *Southern California Edison Company*, 27 FERC ¶ 63,053 at 65,193-94 (1984) (Leventhal, J.) (finding that the filing utility bears the burden of proof as to the justness and reasonableness of the terms of an agreement that is a precondition to receiving service) , *aff'd*, Opinion No. 289, 41 FERC ¶ 61,188 at 61,490-91 (1987), *reh'g denied*, Opinion No. 289-A, 52 FERC ¶ 61,299 (1990).

[16] "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules . . . affecting or pertaining to such rates or charges shall be just and reasonable . . . ." 16 U.S.C. § 824d(a) (2000).

whether the utility should enter the wholesale market, or remain vertically integrated – is state-regulated. OMS notes that traditional regulation states are concerned with all inputs to the cost of retail electricity, including wholesale prices, fuel supply, technology and pollution regulation. It states that without data on the operation of regional wholesale electricity markets, states cannot assure that their retail utilities are operating efficiently in all these markets.

23. OMS indicates that the wholesale market data that the Midwest ISO could make available to it is a substitute for data that states would access if there were no wholesale market. It notes that under vertical integration, the input data is the cost of utility construction and the cost of fueling, operating and maintaining the utility-owned generation. Under wholesale markets, the input data is wholesale market data. OMS argues that data that is state-accessible prior to unbundling should not become inaccessible after unbundling.

24. Next, OMS argues that the boundaries of state commission concern encompass all wholesale inputs to retail electric service. It notes that state commissions make prudence reviews of traditional utilities' purchase and sales practices, and its "provider of last resort" role, if any. In order to assess whether retail utilities access wholesale markets economically, OMS argues that states need access to confidential wholesale market information. OMS adds that data access is at least as important for states with competitive retail access programs, because at least some retail states lack statutory authority to obtain generation data from deregulated generation affiliates of the distribution utilities or from unaffiliated generating companies. Confidence in wholesale markets, says OMS, enables both prudence review and the state commission's ability to influence the makeup of a utility's portfolio. It notes that in each case, data on the quality of competition in wholesale markets are essential to the state regulatory role.

25. OMS indicates that the states do not intend to use access to confidential information for wholesale market mitigation purposes, or to attempt to interfere with the Commission's regulation of the Midwest ISO or its energy markets. It states that if states can bring the Commission their independent, informed observations of market activities and operations, the interests of the Commission and the states in developing workably competitive markets will be served. States trying to implement retail competition have had to rely on publicly available data, and OMS believes that only primary data can inform the states sufficiently to enable them to declare that customers will be paying reasonable rates.

26. OMS notes that state regulation and Commission regulation are interdependent, explaining that 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 how their utilities should transfer transmission control

to an RTO. OMS explains that states' comfort in taking these actions depends in part on their ability to gather data to monitor the markets. In this way, OMS states, "state commissions and [the Commission] are truly co-regulators, each affecting wholesale markets from their separate industry roles. Having a common data base between the two sets of regulators is a natural and necessary consequence of this relationship."[17] OMS provides specific discussion of states' roles in eight regulatory areas, as follows:

- Resource Adequacy: OMS states that there is no clear statutory role for the Commission to engage in comprehensive regional planning, but that states with traditional regulation must address adequacy in all aspects of the electric sales process. It argues that if planning and resource acquisition are not optimized on a regional basis, one of the most compelling advantages of RTOs and regional state committees is diminished. Additionally, states remain responsible for long-term reliability of local utilities' service and, in states where utilities own transmission, for long-term transmission reliability.

- Integrated Resource Planning: Part of the reason Midwest regulators created OMS, the organization says, was to look at resource planning on a regional basis. OMS adds that to perform this resource planning function, states must add regional data to their historically-gathered, state-specific data. Denial of access to such data, OMS says, will make it harder for a state commission to expand its planning perspective beyond projects that benefit its specific state, while broader access to data could more readily reveal much-needed regional benefits.

- Distribution: OMS asserts that states must assure the integration of distribution facilities with transmission facilities. It notes that some states must predict where transmission and transmission substations will be built, which depends on where generation will be built and used. Even a distribution-only regulator would benefit from knowledge of wholesale generation markets, according to OMS.

- Demand Response Management: OMS argues that states must be able to put a dollar figure on the benefits of demand-response tools (such as time-differentiated pricing, interruptible tariffs, end-use load control and investment in conservation equipment) in order to compare them to costs.

[17] Offer of Proof at 33-34.

OMS states that without data on wholesale market behavior, the state commission cannot calculate the benefits.

- Maintenance Schedules and Outages: As the main purpose of retail regulation is to assure reliable supply at reasonable prices, OMS argues, the frequency of maintenance outages and unplanned outages is a state concern. OMS states that outages on the generation, transmission and distribution sectors are inputs to the retail experience and are of statutory concern to state commissions.

- FTRs and Prudence Review of Retail Utilities: OMS indicates that states need detailed information on wholesale market operations to assess the prudence of a load-serving entity's management of its FTR portfolio. The utility's revenue requirement will include FTR costs and revenues, so OMS argues that retail regulators need data on inputs and options relating to FTRs. OMS adds that the state's review process will need to consider projections of FTR costs; therefore, the state will need data on the behavior of all market participants.

- Seams: OMS notes that the Commission and state regulators must contend with RTO boundaries, retail service territory boundaries, regional reliability council boundaries and state political boundaries, yet they must act in concert to ensure a reliable and economic wholesale market, regardless of seams. It adds that data can soften the edges of disputes by identifying logrolling opportunities across regions and across periods of time. The more states know, OMS says, the better they can deal with seams issues.

- Transmission Pricing: According to OMS, the three major state commission decisions are: (1) transmission transfers (to and from RTOs); (2) recovery of transmission-related charges; and (3) construction of transmission-related infrastructure. OMS argues that a state commission cannot satisfy its statutory public interest obligations without finding that benefits exceed costs, or that no detriment will occur. OMS states that there cannot be findings for benefits without supporting data.

- Control Areas and Ancillary Services: OMS states that in traditional regulation states, vertically integrated utilities still provide or procure scheduling, balancing and voltage support services. It explains that vertically integrated retail utilities that join the Midwest ISO retain, and state commissions must continue to enforce, these obligations. State commissions, therefore, are interested in the provision of ancillary services and must be alert to their costs and to the possibility that the costs will be

unreasonable. To assess the cost/benefit relationship, OMS argues, state commissions require data on market activities whose continuation depends on control area costs.

27. OMS next argues that the success of Commission-jurisdictional wholesale markets depends on state decisions about the level of utility participation in those markets. For wholesale markets to develop competitively, it says, retail utilities must buy from those markets rather than build their own generation. OMS adds that state commissions that are required to ensure reasonable rates likely will discourage utilities from participating in wholesale markets if the states lack data with which to assess the costs and benefits of that participation. In addition, it notes that state commissions will hesitate to permit the transfer of transmission facilities to an RTO if the state cannot assure itself that the wholesale markets in that RTO are, or will be, competitive. It is within the state commission's jurisdiction to choose options between RTO participation and RTO non-participation. Absent wholesale market data, OMS says, the state commission cannot satisfy the state legislatures or state courts that participation in wholesale markets is consistent with the state's interest.

28. OMS asks how, under *Electric Power Supply Association v. FERC*,[18] a market monitor's data can get before the Commission in a contested case to which the data is relevant. It argues that the market monitor may prefer not to become a party to the case, or the Commission may hesitate to subpoena the market monitor. OMS states that in such an instance, the OMS and its member state commissions would have ongoing data access and likely will be an intervenor in the Commission proceedings. This would allow OMS to gather and analyze the data, then bring the analysis and the data to the Commission's attention. In this way, OMS states, the Commission and the state commissions may use data and their individual roles to regulate cooperatively.

b. Comments

29. The Illinois Commission states that it is required by state law to ascertain that Illinois public utility rates, charges and rules and regulations relating to rates and charges for retail service within Illinois are just, reasonable and non-discriminatory and that it must act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers. According to the Illinois Commission, without access to system and market data from across the Midwest electric market region, its ability to monitor, mitigate and prevent the exercise of market power

[18] No. 03-1182 (D.C. Cir. Dec. 10, 2004).

imposed on Illinois electric consumers and ensure reliable system operations and efficient planning would be severely hindered and it would be unable to carry out the directives of the Illinois General Assembly.

30. Dynegy notes that, according to the Offer of Proof, the state commission releasing data would have access to not just companies within its state, but also to companies who do business in that state from several states away, yet are still within the Midwest ISO. Dynegy argues that OMS has not sufficiently proven that state commissions need access to data beyond what the jurisdictional utility has access to or that OMS members do not have access to today. Therefore, Dynegy urges the Commission to continue with the approach it began with PJM.

31. EPSA protests the Offer of Proof because EPSA believes that it improperly relies on an expansive interpretation of the interdependence of state-federal regulatory functions, predicated on the need for vertical inputs. EPSA is concerned about potential damage to the competitive process that could be caused by such inputs, which EPSA finds present the possibility of public disclosure of confidential, commercially sensitive information possessed by wholesale buyers and sellers submitted in the Midwest ISO markets. As further described below, EPSA also argues that the Offer of Proof also does not properly align itself with the PJM confidentiality provisions, which EPSA notes are already approved and implemented.

32. EPSA argues that the Commission's jurisdiction is clearly defined as regulating all sales of electricity at wholesale, not just those sales that a state is constitutionally forbidden to regulate by the Commerce Clause. Thus, EPSA states, the Commission's exclusive jurisdiction over wholesale sales is clear and the states are not co-regulators. As such, EPSA argues that state commissions have no direct regulatory need or legal right to obtain broad access to wholesale generator data. According to EPSA, any need the states have relates to regulation of retail sales within their states. EPSA states that the data confidentiality policy should recognize this fundamental limitation on the states' jurisdiction and tailor any access to such data accordingly.

33. ATCLLC and METC comment that the Offer of Proof and the Midwest ISO's informational filing demonstrate that all parties have made a substantial effort to negotiate a mutually agreeable data confidentiality policy. ATCLLC and METC believe that OMS has set forth legitimate regulatory needs supporting state access to confidential data. Furthermore, ATCLLC and METC assert that the Offer of Proof provides a list of state regulatory functions and reasonable, well-supported explanations for how confidential data may be used to support these functions.

34. FirstEnergy asserts that to strike a proper balance between keeping commercially sensitive information confidential and disclosing sufficient information to state agencies

so that they may perform their statutory obligations, the Commission should: (1) limit the data available to state agencies only to necessary information to perform legal responsibilities and data that is not otherwise available through state law; (2) require the Midwest ISO to include strong confidentiality provisions in both the TEMT and the proposed non-disclosure agreement; (3) assign greater responsibility to state agencies for ensuring the confidentiality of information that is obtained from the Midwest ISO; and (4) require that each state agency satisfy the information request process before obtaining any access to confidential information.

35. In its reply comments,[19] OMS notes the general agreement of commenters that state commissions require access to confidential information and they have an important role in assisting in the development of a reliable and economically efficient wholesale market.

36. OMS also argues that parties offer no facts, legal basis or arguments in support of their claim that confidential information should only be made available upon a showing by the 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.[20] OMS believes the proper standard to evaluate confidential data requests is their relevance to the state commission function in regulating retail utilities' involvement in wholesale markets. OMS explains this data is relevant because lack of this data and an incomplete picture of wholesale markets will weaken state commissions' confidence in their utilities' participation in those markets and result in state commission discouragement of utility participation in wholesale markets, which is relevant to the Commission's jurisdictional concern under the FPA.

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[19] The OMS reply comments represent the support of the Illinois Commerce Commission, Indiana Utility Regulatory Commission, Iowa Utilities Board, Kentucky Public Service Commission, Michigan Public Service Commission, Minnesota Public Service 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, and Wisconsin Public Service Commission. The Pennsylvania Public Utility Commission abstained and the Manitoba Public Utilities Board did not participate. The Minnesota Department of Commerce and Iowa Consumer Advocate participated in these comments and generally support them.

[20] *See* PSEG at 6.

37. OMS also asserts that the parties that contest the reasonableness of data access based on a theoretical harm to wholesale markets do not provide a sufficient basis to rebut the Midwest ISO proposal, as required by section 205 of the FPA., and that the purported risk of harm[21] is unsubstantiated as an allegation to support restricting states' data access. Furthermore, OMS claims that section 301(b) of the FPA does not restrict states' access to information, contrary to FirstEnergy's assertion, since it only applies to Commission employees and Midwest ISO employees are not Commission employees.

38. OMS reviews the eight areas of state responsibility detailed in the Offer of Proof to rebut claims by parties that the proposal provides no detail on the kind of data needed and no explanation of the state responsibility that the requested information fulfills. OMS further explains that data is needed to support states' analysis of various market pricing proposals in the wholesale market.

39. OMS also explains that state commissions are concerned with pre-investment, planning and supply mix decisions of utilities, not just post-hoc prudence reviews as Dynegy alleges.[22] OMS argues that the more trust that states have in wholesale markets, the more likely they will allow their utilities to use them. Since part of retail regulation is determining the extent of dependence on wholesale markets and comparing the merits of self-build and wholesale purchases, this effort, according to OMS, does not duplicate Commission oversight of wholesale electric service as alleged by FirstEnergy. Also, since the wholesale market is both intra and multi-state and therefore retail utilities do not shop only from in-state sources, OMS considers these facts to be an appropriate basis for broad access to multi-state wholesale market data and generator data. OMS does not believe the IMM is an effective substitute for the state role since states must determine whether utilities can buy from wholesale sellers, the appropriate weight of wholesale purchases, the types of wholesale purchases and the reasonableness of purchases, all of which are beyond the determinations made by the IMM. According to OMS, without complete data, states cannot determine the extent to which its retail utilities should depend on wholesale markets.

40. Disputing positions of other parties, OMS argues that states need a general right of access to data, rather than a case-by-case justification for each data request, to determine retailers' participation in wholesale markets. OMS also disputes arguments that states should be limited to data they cannot access under state law, explaining that the data obtained in the Midwest ISO process will have additional benefits such as a common

[21] *See* FirstEnergy at 3-4.

[22] *See* Dynegy at 4-5.

format, timeliness, accuracy, lower costs to states, a central record and market participant protections in the non-disclosure agreement.

c. Discussion

41. 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 agency charged by statute with regulating public utility sales for resale in interstate commerce.

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.

43. Because the Commission is charged with regulating public utilities' wholesale power sales, and is not positioned to interpret every nuance of the fifteen Midwest ISO states' statutory duties with respect to the nature and scope of confidentiality, we rely on the Midwest ISO's tariff in the first instance in order to strike the appropriate balance between disclosing wholesale market data to states and protecting its confidential nature. We agree with FirstEnergy's suggestions for how this balance might be reached, and with ATCLLC and METC that the parties have made significant progress toward achieving these goals. As further described below, we will require the Midwest ISO to submit for filing a modified version of the revised tariff proposal it submitted in its February 17 filing.

3. State Protections for Confidential Data

a. OMS's Offer of Proof

44. OMS states that the only possible damage arising from sharing data with the state would be if a state made an unauthorized disclosure of the data. It argues, however, that states would have to access the data through the Midwest ISO's Commission-jurisdictional tariff, and state law furnishes additional protection against disclosure. OMS states that these state law protections would apply to data obtained through the Midwest ISO tariff process and to data obtained through state law procedures. OMS notes that no party has cited any evidence that a state commission has breached its statutory duty to protect confidential information.

45. OMS counters market participants' concern that state commission access to data would expose them to state investigations. It argues that state commission concern about unusual market activity could trigger a state commission investigation that would be obviated by informed discussions with organizations such as the Midwest ISO, the IMM, and the Commission's Office of Market Oversight and Investigations. OMS also states that the lawfulness of its access to market data under the FPA does not depend on whether state commissions have a separate access route under state law.

b. Comments

46. In addition to being a signatory to the Offer of Proof, the Ohio Commission submitted a supplemental filing to perfect Ohio's individual state offer of proof. The supplemental filing contains a March 9, 2005 Order by the Ohio Commission that addresses confidential information held by an RTO or available to its market monitor, which the Ohio Commission provided as further evidence that it can and will assure confidential information is maintained. The Ohio Commission asks that the Commission, the Midwest ISO and its stakeholders regard the supplemental filing as closure on the matter of whether or not the Ohio Commission can and will commit to protect confidential information.

47. The Illinois Commission, also a signatory to the Offer of Proof, in its supplemental filing cites to Illinois state laws that provide protections for confidential and proprietary information and that result in prosecution and punishment as a criminal offense for improper release of confidential information. The Illinois Commission states that it knows of no instances in which these practices and procedures have been breached. Also, the Illinois Commission cites to its rules of practice that protect confidential, proprietary and trade secrets, as well as Illinois Freedom of Information Act provisions that exempt trade secrets and commercial or financial information from the Act's disclosure requirements. The Illinois Commission also explains that a prior decision by the Illinois Commission granting information confidential status would not be binding on the judicial system, nor would the terms of a confidentiality agreement between the Illinois Commission and the party submitting the information be binding on a court. The Illinois Commission opines that where data is clearly sensitive to the market, as may be the case with respect to the information at issue here, it would take that into account and perhaps not require a lengthy hearing to determine the treatment of the information in question. The Illinois Commission asserts that information obtained from public utilities in the course of an investigation is treated as confidential unless the Illinois Commission or the courts order otherwise, and that information made confidential by the Illinois Commission may be subject to disclosure under the Illinois Freedom of Information Act. Finally, the Illinois Commission notes that the Illinois attorney general or a state's attorney can obtain data from the Illinois Commission pertaining to the enforcement of consumer protection laws. According to the Illinois Commission, state law mandates that

any materials or documents obtained in the course of an investigation by law enforcement authorities that are proprietary shall not be made public unless the designation as proprietary has been removed by a court or legal body of competent jurisdiction, or agreement of the parties.

48. Dynegy states that it fully supports access to relevant data by state commissions and others, where it is shown that such access is needed and as long as proper safeguards are in place to ensure that confidential data is protected. However, Dynegy does not find that the Offer of Proof has demonstrated that it has adequate safeguards, or that all states need the data and do not already have adequate means of getting it.

49. Dynegy notes that two OMS members did not provide offers of proof, which casts doubt as to whether all relevant regulatory bodies have protections in place currently. Dynegy is also concerned that although there may be adequate protections today, nothing prevents state legislatures, state commissions, or courts from passing legislation, promulgating rules or deciding cases that create a situation where the relevant state commission must disclose information to third parties without adequate protections.

50. ATCLLC and METC also recognize the need to protect proprietary information that has a commercial value, as well as critical infrastructure information, and ATCLLC and METC do not fault those entities seeking to ensure that adequate protections are developed and implemented in this proceeding. ATCLLC and METC state that their experience has been that state regulators are cognizant of these needs and are willing to take the steps necessary to guard against the inappropriate release of confidential information.

51. LG&E asserts in its reply comments that if the Commission allows states to access confidential data, sufficient protections are needed. LG&E notes OMS's allegation that some of the confidentiality provisions that the Midwest ISO suggests pose administrative difficulties, and argues that administrative inconvenience does not overcome the market participant's interest in the confidentiality of market data. It adds that disseminating market data beyond the Commission and appropriate state commissions creates unnecessary risks. LG&E argues that procedural safeguards must be addressed if the Commission wishes to encourage RTO participation, so that RTO membership will not expose utilities to liability related to the release of protected information.

c. Discussion

52. As an initial matter, we agree with OMS that the issue of state access to data under a Commission-approved tariff is distinct from the issue of state commissions' access to

data under their own state laws. We add, however, that OMS itself is not a state commission and apparently does not have statutory authority to obtain data.[23]

53. OMS, and its individual members such as the Ohio Commission, have given us every reason to believe that they take the confidentiality of wholesale market data seriously, and would make every effort to maintain this confidentiality. 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. As OMS itself points out elsewhere in its Offer of Proof, if states are given overbroad access to data, merchant generators may be discouraged from locating within the Midwest ISO region. OMS notes that there is no evidence of this to date, and we agree; however, we also note that there can be no evidence of this type of harm prior to the time that data confidentiality provisions of the TEMT are finalized and made effective. 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. We agree with LG&E that administrative difficulties associated with obtaining confidential data are less burdensome than the potential harm that could result from unauthorized disclosure, and that it 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.

4. Sharing Confidential Information Among States

a. OMS's Offer of Proof

54. OMS argues that there is no legal or factual basis for the Commission's finding in the TEMT II Order that a revised data confidentiality proposal should not include a provision that would allow Authorized Requestors to disclose confidential information to other Authorized Requestors. OMS states that the Midwest ISO, which proposed the provision, has not indicated that it is concerned about: (1) its ability to assess whether a party that receives the data has a legitimate need for it; (2) whether the Authorized Requestors can keep the data confidential; or (3) whether the exchange of information

[23] No party has cited state laws that would provide OMS itself with access to wholesale market data. Therefore, to the best of our knowledge, the issue of OMS's own access to data would be through tariff provisions filed with the Commission under the FPA.

among Authorized Requestors would deprive market participants of information about the status of requests for information. It argues that the TEMT II Order imputed such concerns to the Midwest ISO.

55. State commissioners and their staffs work regularly with confidential data in state and FERC proceedings, states OMS, and often, similar proceedings are pending before adjoining state commissions involving the same or similar confidential information. OMS states that in such instances, with the knowledge of the entities providing the confidential data, state commission staffs may be in contact with one another regarding these proceedings and data. OMS states that in decades of practice involving electricity and telecommunications, there has never been any unauthorized disclosure.

56. Further, OMS argues that the Commission did not discuss two major benefits of allowing state commissions to share data. It states that this practice may obviate state commission investigations into events whose causes may be explained by the data, and argues that allowing controlled, limited discussion of confidential data among state regulators would avoid forcing such concerns into a more formal setting prematurely or unnecessarily. Second, OMS argues that data sharing among state commissions would harmonize state resource requirements. It notes that the TEMT requires market participants to comply with state reliability and resource adequacy requirements, and argues that regional infrastructure planning is assisted by consistency across state plans. That consistency, OMS says, will emerge more reliably and efficiently if states can create working groups of Authorized Requestors to share and discuss information related to the various state reliability and resource adequacy requirements.

b. Discussion

57. OMS's statement that state commissions often discuss their similar cases does not surprise us. It is doubtless convenient for the states to do so. To that end, we appreciate OMS's suggestion that allowing data sharing may carry administrative benefits. Further, we take comfort from OMS's representation that there has never been unauthorized disclosure of confidential data in such circumstances.

58. We nevertheless continue to find that, in an interstate RTO context, it is appropriate to impose guidelines on the circumstances in which state commissions may share confidential wholesale market data initially obtained through a Commission-authorized requirement. Further, we find that the Midwest ISO should always be aware of what state commissions have access to this data. As described below, in our discussion of the specific confidentiality proposals, this can be accomplished without imposing undue burdens on state commissions or the Midwest ISO.

59. We disagree with OMS's arguments that the TEMT II Order incorrectly imputed to the Midwest ISO itself specific concerns about state access to confidential data. The TEMT II Order clearly attributed to two commenters concerns regarding *whether the Midwest ISO could assess* whether a party that receives data has a legitimate need for it, whether the Authorized Requestor can keep the data confidential, or whether the exchange of information among Authorized Requestors would be unfair to market participants.[24] The Midwest ISO had made no representations concerning its intent (or its ability) to assess these factors, and the Commission shared the market participants' concern that there should be some controls over the release of data to state commissions.

5. Relationship Between PJM and Midwest ISO Confidentiality Plans

a. OMS's Offer of Proof

60. OMS states that the Commission rejected the Midwest ISO's March 31, 2004 confidentiality proposal in part because it varied from the PJM approach. OMS argues that inter-RTO differences do not, by themselves, make a proposal unjust and unreasonable. It adds that if the Commission means that the data-sharing regimes in the two RTOs must be identical, it would be imposing on data sharing a standard that is not satisfied by any other aspect of the two RTOs. OMS argues that "compatible" would be a better standard.

b. Comments

61. EPSA states that it appreciates the effort that all parties put into the debate, and it commends the Midwest ISO for engaging in an effort to find common ground. However, EPSA finds that OMS has failed to respond to the questions that the Commission posed in prior orders. It asserts that OMS's Offer of Proof does not give the Commission any reason to diverge from its clearly-stated preference for PJM-type data confidentiality provisions in its review of the proposals set forth by the Midwest ISO. Furthermore, EPSA argues, OMS's arguments do not explain why two fundamentally different sets of confidentiality rules are needed for RTOs that will be operating joint and common markets. If PJM's procedures do not prevent state commissions from carrying out their regulatory responsibilities, EPSA wonders why similar procedures in the Midwest ISO

[24] TEMT II Order at P 562.

would. While EPSA acknowledges that an RTO may present unique circumstances justifying some customization of its confidentiality rules, certain features are essential to EPSA.

62. EPSA argues that the Commission was well within its authority to reject portions of the data access provisions originally proposed by the Midwest ISO based on their deviation from PJM confidentiality provisions that were accepted only two months prior.

63. PSEG finds that the Offer of Proof fails to provide adequate explanation and justification to the specific questions that the Commission raised in the TEMT II Order. They also assert that the OMS response lacks legal merit and fails to explain why the Midwest ISO confidentiality provisions do not need to provide protection to sensitive market data comparable to the recently-accepted confidentiality rules for PJM. PSEG also submitted an extensive matrix that compares the confidentiality provisions of the Midwest ISO proposal with the corresponding PJM provisions.

c. Discussion

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.

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.

66. There are portions of both the Midwest ISO and PJM in six states: Illinois, Indiana, Kentucky, Ohio, Michigan and Pennsylvania. In those states, the different confidentiality requirements that the two RTOs have proposed would provide state regulatory authorities with different amounts of access to wholesale market data for the utilities in their (and other) states, based merely on the fact that the utilities are members of different RTOs. For RTOs such as the Midwest ISO and PJM, which involve many of the same market participants, this is an unreasonable result.

67. 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. However, we do anticipate that the 15 state commissions could respond to the data access in 15 different ways.

68. We agree with EPSA that the Offer of Proof has not established why two sets of confidentiality provisions (PJM's and the Midwest ISO's) will be needed for public utilities that will eventually participate in the same joint and common market. We also agree with EPSA that the 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 – some of whom are the same as those in the PJM region – from carrying out their duties.

C. OMS's and the Midwest ISO's Tariff Proposals

1. Overview

a. OMS's Proposal and the Midwest ISO's Revisions

69. The Midwest ISO states that although the parties devoted considerable time and effort to discussing OMS's proposed approach to state agencies' access to confidential information, they did not reach consensus on several important issues. As a result, states the Midwest ISO, the Offer of Proof did not include a consensus proposal on state access to confidential information. It explains that the redlined version of the March 31 proposal in its February 17, 2005 filing (February 17 Filing) is virtually an alternative proposal for addressing the areas of disagreement that persisted in the parties' discussions of state agencies' access to confidential information.[25] This proposal was facilitated by the Commission's dispute resolution staff.

70. The Midwest ISO states that in the months of October and November, 2004, it circulated to stakeholders original and revised TEMT provisions that OMS proposed to govern the access of state commissions to confidential data. (The OMS proposal is attached to the Midwest ISO's comments.) The Midwest ISO also circulated alternative provisions in late November, 2004, when stakeholders had not reached substantial consensus on the OMS proposal, and it revised that proposal at least four times to reflect stakeholder and OMS comments. It states that the final version, which it appended to its comments, does not reflect consensus with OMS or stakeholders on several issues.

[25] The redline version revises a draft developed by OMS on October 28, 2004.

b. Comments

71. Dynegy's reply comments emphasize that the parties have made great efforts to narrow the areas of disagreement. Dynegy echoes OMS's request for time for further discussions to occur; however, if a final resolution evades the parties, Dynegy urges the Commission to adopt the equivalent rules in place for PJM. It states that OMS has not shown that the alternative default position it prefers is the proper course.

c. Discussion

72. The TEMT II Order required the Midwest ISO to work with stakeholders (and, if it wanted, with PJM) to develop a revised confidentiality proposal.[26] The Confidentiality Order held this requirement in abeyance pending the Commission's receipt of OMS's Offer of Proof.[27] We will require the Midwest ISO, which has not formally submitted a proposal in compliance with the requirements of the TEMT II Order, to file the redlined proposal that it submitted along with its comments, modified as described below. We will evaluate this filing as a compliance filing to the TEMT II Order. As discussed more fully below, we approve of many elements of the Midwest ISO alternative proposal, but we will require certain modifications that are consistent with PJM confidentiality provisions. Our ruling is intended to give states access to confidential information on terms they consider necessary to fulfill their obligations while protecting market participants from any harm that may result from the release of this sensitive, proprietary and confidential information. We note that OMS proposes minor tariff changes in its comments, and that it cites to its appendix for the proposed edits; however, a number of these proposed changes do not have corresponding edits in the appendix. As a result, we do not have sufficient information in the record to act on OMS's proposals. We encourage OMS to confer with the Midwest ISO, prior to the Midwest ISO submitting its compliance filing, to more clearly identify the suggestions.

2. Definitions

a. OMS's Proposal and the Midwest ISO's Revisions

73. OMS and the Midwest ISO each define five terms in their draft tariff provisions: (1) Affected Participant; (2) Authorized Agency; (3) Authorized Requestor;

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[26] TEMT II Order at P 561.

[27] Confidentiality Order at P 12.

(4) Information Request; and (5) Non-Disclosure Agreement. Their definitions are generally similar, but two differences stand out:

- OMS proposes that an Authorized Agency – an agency that may receive confidential information – may include any regional state committee, such as itself; it also proposes that an Authorized Agency include a state agency that has access to documents in the possession of a state utility commission pursuant to state statute and the ability to protect those documents under a non-disclosure agreement. The Midwest ISO proposes limitations on OMS's definition that would make OMS, but not other regional state committees, Authorized Agencies; further, it proposes not to include any state agency that has access to documents in the possession of a state utility commission.

- OMS proposes than an Authorized Requestor – a person who may receive confidential data – include persons who have executed non-disclosure agreements and are authorized by an Authorized Agency to receive and discuss confidential information. This may include attorneys, consultants or contractors. The Midwest ISO would add to this definition persons employed by state agencies within the Midwest ISO region that have access to documents in the possession of its state's public utility commission and the ability to protect those documents under the non-disclosure agreement.

b. Comments

74. OMS also proposes modifications to the Definitions section to improve clarity, as specified in Appendix A to its comments.

75. EPSA asks the Commission to order the Midwest ISO include, in the final confidentiality rules, the requirement from the PJM tariff that an Authorized Agency must be one "that regulates the distribution or supply of electricity to retail customers and is legally charged with monitoring the operation of wholesale or retail markets serving retail suppliers or customers within its State."

c. Discussion

76. We will require the Midwest ISO to file the proposed definitions, as modified herein, as part of its revised tariff proposal. We note that in its revisions to OMS's proposal, the Midwest ISO deletes the third prong of the definition of Authorized Agency – that is, that an Authorized Agency can be a state agency that has access to documents in the possession of a state utility commission pursuant to state statute. This is consistent with PJM's provisions, which define "Authorized Commission" as a state public utility

commission within the PJM region that regulates the distribution or supply of electricity to retail customers and is legally charged with monitoring the operation of wholesale or retail markets serving retail customers or suppliers within its state, and we approve of this change.[28] We observe, however, that 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.

3. Disclosure to Authorized Requestors

a. OMS's Proposal and the Midwest ISO's Revisions

77. Under proposed section 38.9.4.1,[29] OMS proposes that the Midwest ISO and/or the IMM shall disclose confidential information to an Authorized Requestor under two conditions: (1) the Authorized Requestor has executed a non-disclosure agreement with the Midwest ISO, stating (among other things) that the relevant Authorized Agency can protect against the unauthorized release of any confidential information; and (2) the Midwest ISO has verified that the Authorized Agency employing or retaining the Authorized Requestor has provided the Midwest ISO with certain information under the non-disclosure agreement. The latter must include a list of statutory authority specifying what duty or authority is the basis for the Authorized Agency's request for information; a notification that the Authorized Agency has procedures to protect against the unauthorized release of confidential information, and written confirmation that the Authorized Requestor is authorized to enter into the non-disclosure agreement.

78. The Midwest ISO would modify OMS's draft by adding requirements for what the non-disclosure agreement must state. In addition to the items OMS proposes, the Midwest ISO would have the Authorized Requestor state in the non-disclosure agreement: (1) his or her position within, or relationship to, the Authorized Agency; (2) that the Authorized Agency has procedures adequate to protect against the release of

[28] PJM Confidentiality Order at P 19.

[29] All section designations are referenced from the February 17 Filing redline version.

information received under the non-disclosure agreement;[30] and (3) that he or she is not in breach of any non-disclosure agreement entered into with the Midwest ISO. The Midwest ISO also proposes amendments to the list of items that the Authorized Requestor must provide the Midwest ISO when requesting data. The Midwest ISO would require OMS (which does not have a governing statute) to provide a Commission order prohibiting OMS from releasing confidential information, except in accordance with the non-disclosure agreement. It also proposes that it must be able to rely on an order from the Authorized Agency, or a certification from counsel to that agency, confirming that the Authorized Agency: (1) has statutory authority (or, for OMS, a binding Commission order) to protect confidential information released pursuant to the non-disclosure agreement; (2) will defend against disclosure of confidential information pursuant to third-party requests;[31] (3) will provide the Midwest ISO with prompt notice of third-party requests or legal proceedings, and cooperate with the Midwest ISO's efforts to defend against them; (4) if a protective order or other remedy is denied, will direct Authorized Requestors to furnish only that portion of the confidential information that counsel advises the Midwest ISO must be furnished; (5) will use best efforts to obtain assurance that confidential treatment will be accorded to such confidential information; (6) has adequate procedures in place to protect against release of confidential information; and (7) will confirm in writing that the Authorized Requestor is authorized by the agency to enter into the non-disclosure agreement and receive confidential information.

79. OMS and the Midwest ISO essentially agree on section 38.9.4.2. That section provides that the Midwest ISO must maintain a schedule of all Authorized Persons (the Midwest ISO corrects this to "Authorized Requestors") and the Authorized Agencies they represent, and that the schedule shall be available on the Midwest ISO's Web site or by written request. The Midwest ISO must update the schedule upon receipt of

[30] The Midwest ISO proposes to delete the adjective "unauthorized" before "disclosure" in two places in this section. The Commission understands this to mean that under the Midwest ISO's proposal, the Authorized Requestor and the Authorized Agency are not entitled to disclose confidential information that they receive pursuant to the non-disclosure agreement under any circumstances.

[31] The Midwest ISO further proposes a provision that would require counsel's certification for the Authorized Agency to disclose any state law that will prohibit or prevent the Authorized Agency from defending against any disclosure of confidential information pursuant to any third party request.

information from an Authorized Agency or Authorized Requestor, but shall not be liable for inaccuracies in the schedule due to incomplete or erroneous information it receives.

80. The Midwest ISO proposes to insert a section, which it would number 38.9.4.3, that OMS's proposal does not contain. That section would require the Authorized Requestor to use confidential information solely for the purpose of helping an Authorized Agency to discharge its duty, responsibility or authority, in fulfillment of which it authorizes Authorized Requestors to seek confidential information. Any and all Authorized Requestors from the same Authorized Agency may have access to the confidential information that is provided to the Authorized Agency pursuant to an information request.

81. OMS's proposed section 38.9.4.4.a would permit the Midwest ISO or the IMM to orally disclose, during discussions with one or more Authorized Requestors, information otherwise required to be kept confidential. No prior information request would be required. In section 38.9.4.4.b, OMS also proposes to permit other persons employed or retained by Authorized Agencies to participate in the discussions, even if those persons are not Authorized Requestors, provided that they execute an agreement with the Midwest ISO that contains: (1) an agreement not to take notes that would contain confidential information; (2) an agreement not to retain documents or materials distributed in the meetings; and (3) terms sufficient to prevent the person from sharing or disclosing confidential information to a party that is not an Authorized Requestor.

82. The Midwest ISO's proposal deletes section 38.9.4.4.b, and conditions section 38.9.4.4.a. Its revised section 38.9.4.4.a would permit the Midwest ISO or the IMM to make oral – though not written or electronic – disclosures without the need for a prior information request, but only: (1) to Authorized Requestors; (2) without immediately identifying the Affected Participant(s) whose data is released; and (3) to provide enough information for the Authorized Requestor or the Authorized Agency to decide whether additional information requests would be appropriate. The Midwest ISO or the IMM must orally notify any Affected Participant of the fact and the substance of the oral disclosure within one business day after the disclosure takes place, without revealing the confidential information of any other entity. After the Affected Participant has received the notice, and within two business days of the disclosure, the Midwest ISO or the IMM will provide the identity of the Affected Participant to the Authorized Requestor.

83. Section 38.9.4.6 of OMS's proposal would allow Authorized Requestors who are parties to non-disclosure agreements with the Midwest ISO containing similar terms and conditions to the proposed non-disclosure agreement to discuss confidential information with one another. The Midwest ISO's draft provisions would modify this section by specifying that it applies to Authorized Requestors that are sponsored by different Authorized Agencies. It would also require the Authorized Requestor who made the

information request to notify the Midwest ISO in advance of the discussion so that the Midwest ISO can confirm the status of all Authorized Requestors from all Authorized Agencies that will be included in the discussion. Further, the Midwest ISO would specify that this type of discussion would not change the status of confidential information; that information would remain confidential.

b. Comments

84. While OMS supports section 38.9.4.1.d and section 2.4.6.2 of the non-disclosure agreement, which waive a state commission's obligation to defend against third-party requests if the state commission is subject to a state law that would prohibit or prevent the state commission from doing so, it recommends that these sections be expanded to also exempt a state commission from defending against a third-party request if there is any rule or good cause shown that would prevent a state commission from defending against a third party request. OMS states it cannot support a provision that would put a state commission in the position of representing the interests of market participants in forums that may address the underlying nature of data they have designated as confidential, and that such an outcome may raise issues under state ethical canons.

85. PSEG counters that the state commission should not be able to place the burden of defending against third-party requests for confidential information on the market participant, as OMS proposes. PSEG states that, because the proposed provisions give the state commissions greater access to data than would otherwise be available to them under their statutory authority, the Commission should require the state commissions to defend against third-party requests, when the information being sought is properly protected by the non-disclosure agreement.

86. PSEG requests that the Commission delete the portions of sections 38.9.4.1.d and section 2.4.6.2, which waive the state commission's obligations thereunder, if the state commission is subject to a state law that would prohibit or prevent it from defending against a third-party request. PSEG further proposes that the Commission find that a state commission cannot satisfy the conditions of an Authorized Agency because it cannot adequately protect the confidentiality of information received under the non-disclosure agreement if it is subject to a state law that would prohibit or prevent the state commission from defending against any third-party requests.

87. OMS also proposes eliminating the words "only" and "solely" from section 38.9.4.1 to ensure the provision does not eliminate the possibility of voluntary release of data under an alternative approach.

88. PSEG argues that, contrary to OMS's assertion, including the words "only" and "solely" in section 38.9.4.1 do not thwart the Midwest ISO's ability to release a market

participant's confidential data to a state commission, if the market participant agrees to the release. PSEG cautions that deleting the words could potentially broaden the universe of Authorized Agencies and Authorized Requestors to a degree where the protection of section 38.9.4.1 would be vitiated. PSEG proposes that the Midwest ISO adopt the following provision:

> 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 date 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.

According to PSEG, this provision would allow the Midwest ISO to release a participant's confidential data without making such consent limitless.

89. EPSA asserts that the final rule should delete phrases such as "except when inconsistent with state or federal law" from section 2.4.2 of the non-disclosure agreement since such phrases gut the protections provided under the non-disclosure agreement.

90. OMS argues for elimination of the phrase "including other agencies of state government" from section 38.9.4.1.c.i to ensure state commissions are not put in the untenable position of promising they would disregard state law and to ensure consistency with section 2.2.e.b of the non-disclosure agreement and section 1.15.b in the Definitions.

91. Finally, in its reply comments, OMS clarifies that state commissions, acting in good faith, will not request confidential information if they cannot protect confidential information and that the Midwest ISO will not provide confidential data to any state commission unable to protect it.

92. OMS advocates that section 38.9.4.6 should have the following language added to avoid delay:

> The Transmission Provider shall respond to such notification within two (2) business days from receipt of notification. The Transmission Provider shall provide an Affected Participant with notice of the planned discussion

> within (2) business days from the receipt of notification of the planned discussion. Failure of the Transmission Provider to provide the response to the notification of planned discussion or the notification of the Affected Participant within these specified time frames shall not prevent the discussion from taking place.

Similarly, for section 2.3 of the non-disclosure agreement, OMS proposes the following addition:

> Failure of the Transmission Provider to provide the response to the notification of planned discussion or the notification of the Affected Participant within these specified time frames shall not prevent the discussion from taking place.

b. Discussion

93. We find that section 38.9.4.1, as modified by the Midwest ISO, provides acceptable provisions to include in the non-disclosure agreement.[32] OMS proposes to exempt state commissions from defending against third-party requests for information if there is any rule or good cause shown that would prevent the state commissions from doing so; PSEG opposes this modification. We understand that it may place state commissions in an awkward position to represent market participants' interests in proceedings that address the underlying nature of confidential information. However, as we found with respect to the PJM confidentiality proposal, it is voluntary for state commissions to request confidential wholesale market data under the terms of the Midwest ISO's tariff instead of their own state laws.[33] When they receive information in this manner, they should make every effort to protect it from third party requests, including engaging in legal processes if that becomes necessary.[34] We are confident that the state commissions will take seriously their obligation to disclose any conflicts of interest that would prevent them from defending against requests for confidential

[32] We take this opportunity to note that, under section 38.9.4.1.b.i, OMS is required to provide the Midwest ISO with a Commission order prohibiting OMS from releasing confidential data, except in accordance with the non-disclosure agreement. Because we will require the Midwest ISO to formally file the tariff language, as revised, and a revised non-disclosure agreement, we decline to make the required statement in this order.

[33] PJM Confidentiality Order at P 31.

[34] *Id.* at 33-34.

information. To this end, we note OMS's clarification that state commissions will not request confidential information that they cannot protect. In such circumstances, it is appropriate for the state commissions to use state law procedures to request confidential data.

94. 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.

95. OMS's request to delete the words "including other agencies of state government" from section 38.9.4.1.c.i is a double-edged sword. To some extent, state commissions may be legally required to share confidential data with other state agencies; however, we do not believe that state agencies should be permitted to do so without limitation. Therefore, the Midwest ISO should, when it files these tariff provisions, modify the language of section 38.9.4.1.c.i to read ". . . protect the confidentiality of any confidential information received pursuant to the Non-Disclosure Agreement from public release or disclosure and from release or disclosure to any other entity, including other agencies of state government, *except to the extent that such disclosure is required or permitted by state law*, (ii) . . . ."

96. Finally, we will require the Midwest ISO to revise section 38.9.4.1.c.vii to read "(vii) has authorized the Authorized Requestor to enter into the Non-Disclosure Agreement and to receive confidential information pursuant to the Tariff and under the Non-Disclosure Agreement, and can provide a written copy of such authorization." We find the OMS proposal to add "practices" to section 38.9.4.1.a and section 2.2.b of the non-disclosure agreement to be appropriate since it provides a more comprehensive description of the relevant standards for protecting confidential information. We also find the OMS-proposed changes in its appendix to section 38.9.4.1.c to be appropriate since they more accurately describe the terms of defending against disclosure of confidential information. Finally, we find the OMS proposal to add email addresses and phone numbers of authorized requestors to the Midwest ISO web page in section 38.9.4.2 to be appropriate.

97. We note that neither the OMS nor other parties provided substantive comments on the use of confidential information or limited oral disclosures in sections 38.9.4.3 and 38.9.4.4 respectively. We find that these provisions appropriately define how

confidential information will be used and the steps required for oral disclosures, and therefore we approve these provisions.

98. 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 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.

99. We find that the approach taken in PJM is entirely reasonable and that the benefits of tracking who has custody of confidential information far outweigh the administrative burdens of doing so. Therefore, as in PJM, we will permit Authorized Requestors to discuss confidential information only after they have each requested and received that information from the Midwest ISO.[35] We believe that the Midwest ISO's alternative proposal, which would allow Authorized Requestors to disclose information to one another only after notifying the Midwest ISO and receiving confirmation that the Authorized Requestor received the information, may also have merit. We are discouraged, however, that no party has commented upon it. 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. We direct the Midwest ISO to re-file this section, incorporating the modifications discussed above. 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.

4. Process for Making and Challenging Information Requests

a. OMS's Proposal and the Midwest ISO's Revisions

100. Section 38.9.4.5 of OMS's proposal outlines requirements for making information requests. Section 38.9.4.5.a provides that information requests shall be in writing, and include electronic communications as addressed to the Midwest ISO or the IMM as

[35] *See* PJM Confidentiality Order at P 35-37.

appropriate. Section 38.9.4.5.b requires that the information request describe the information sought in as much detail as possible. Under section 38.9.4.5.c, the Midwest ISO or the IMM must provide an Affected Participant with notice of an information request by an Authorized Requestor as soon as possible. Finally, under section 38.9.5.d, the Midwest ISO or the IMM must supply the information sought within the time period specified in the request, but no later than five business days after receipt of the request. If the Midwest ISO or the IMM cannot reasonably make the information available within that time, it shall provide the Authorized Requestor with a mutually agreed-upon schedule for providing the remaining information. After the Midwest ISO or the IMM discloses the information, it shall provide the Affected Participant with a copy of the disclosure.

101. The Midwest ISO proposes significant modifications to every subsection of OMS's version of section 38.9.4.5 except subsections -.a and -.d. In section 38.9.4.5.b, the Midwest ISO proposes to expand the requirement for a detailed information request by specifying that the request should also provide the time period for the requested information, a description of the purpose for which it is being sought, and a statement of the time period for which the Authorized Requestor expects to retain the information. The Midwest ISO would also insert a subsection (38.9.4.5.c) entitled "Notice," which would: (1) require the Midwest ISO or the IMM to provide an Affected Participant with notice and a copy of an information request within two business days of receiving the request; and (2) require the Midwest ISO to maintain all information requests of a general nature (that is, requests that do not seek information of or about a named market participant, or be readily ascertainable as directed toward a particular market participant's information) in electronic form accessible to market participants and Authorized Requestors.

102. Next, the Midwest ISO proposes to insert into section 38.9.4.5.d new subsection it calls "Conference," which would allow the Midwest ISO or an Affected Participant, if they object to all or a portion of an information request, to request a conference with the Authorized Agency or the Authorized Requestor. The Authorized Agency would not be required to participate in such a conference. Another new subsection, which is identified as being for discussion, would permit any party to the conference to seek assistance from commission staff in resolution of the dispute. If any participant refuses to participate in the conference, or the conference does not resolve the dispute, then the Midwest ISO proposes to allow itself, the Affected Participant or the Authorized Agency to initiate legal action before the Commission in the form of a fast-track complaint. In the absence of such action, then the Midwest ISO shall use its best efforts to respond to the information request.

103. The Midwest ISO has included a bracketed placeholder for section 38.9.4.5.e that would allow Affected Participants to raise an objection or challenge upon being notified

of an information request. The Midwest ISO explains that certain market participants advocate this section, but OMS opposes it, as discussed below.

104. Finally, subsection -.f, Disclosure, requires that answers to information requests be made no later than five business days after receipt of the request, or upon a mutually agreed upon written schedule, and that the authorized requestor, the Midwest ISO or the IMM will provide a copy of the disclosed information to the affected participant.

b. Comments

105. OMS advocates adding a sentence to section 38.9.4.5.d, specifying the timeframe for the Midwest ISO's provision of requested information under subsection f, regardless of whether a conference is held, and the words "object to" should be replaced by "have a concern with" to avoid duplication with subsection -.e.

106. OMS also recommends that the Commission delete section 38.9.4.5.e, which allows for challenges of state commission information requests. In light of the protective provisions and the proposed non-disclosure agreement, OMS considers unlimited challenges to be excessive and that such a provision could result in gaming and market manipulation. OMS also notes that such challenges would be problematic since there is no specified timeframe for resolution of a challenge or a requirement that the challenge be resolved at all and state commissions would have to bear their own costs. As an alternative, OMS proposes that the provision define which types of state commission information requests could be challenged and that states should have unchallenged access to data provided to the IMM under sections 54.1 and 61 of the TEMT. OMS also considers the conference provisions of section 38.9.4.d to be an opportunity for market participants to have discussions on information requests.

107. LG&E, in its reply comments, strongly supports the inclusion of proposed tariff section 38.9.4.5.e on the ground that the section establishes procedures for ensuring that requests for confidential market data will be thoughtful and necessary. LG&E also argues that allowing challenges to the data requests and making each party bear its own costs provides the market participant with a sense of control over the dissemination of the data, while ultimately allowing access by state commissions that have proved that they have legitimate need. LG&E states that weakening the provision, as OMS suggests in its comments, depletes the provision of its effectiveness.

108. In its reply comments, PSEG states that the Midwest ISO's confidentiality proposal is intended to establish a streamlined approach for the release of confidential information between the Midwest ISO and the state commissions in lieu of more time-consuming legal processes. Because the Midwest ISO's proposal is voluntary, PSEG points out that state commissions that do not participate will still have access to the

confidential information through the legal means already at their disposal. PSEG argues that the provisions must prescribe reasonable due process procedures to allow the Midwest ISO and the Affected Participant to challenge a state commission's request for information. PSEG therefore supports including section 38.9.4.5.e in the tariff. It challenges OMS's statements that this section would create a situation in which any party would have the right to challenge any and all information requests without sufficient justification. PSEG also states that without section 38.9.4.5.e, the Midwest ISO proposal lacks the traditional protections that Commission review of requests for confidential information affords.

109. PSEG argues that the premise for release of confidential information should be that confidential data is the market participant's property, and that it should be reasonably shared with state commissions only when needed, and when the state commission can justify its request. The Midwest ISO proposal, it says, seems to vest unfettered authority in the Authorized Agency. PSEG suggests that a reasonable solution would be to allow a market participant, Authorized Requestor or Authorized Agency to ultimately place the matter before the Commission via a fast-track complaint, and allow the Commission to serve as the neutral, final arbiter of any such dispute.

110. EPSA also supports inclusion of section 38.9.4.5.e in the final approved confidentiality rules.

c. Discussion

111. We note at the outset that under the just and reasonable standard of the FPA the Commission may consider both the needs of state commissions for wholesale market information and the needs of market participants to protect the confidentiality of the terms of their sales (and purchases) of energy. Unchallenged access to confidential and proprietary information, as proposed by OMS, would not represent a balanced approach. Similarly, we do not consider that the OMS alternative proposal for unchallenged access to IMM information or the use of the conference provision in lieu of challenge procedures represents a balanced weighing of the interests and needs of the parties. Accordingly, we will require the Midwest ISO to propose a challenge provision that adheres to Commission precedent[36] and incorporates the appropriate fast-track review provisions to ensure timely resolution.

112. With respect to OMS' proposed revisions to section 38.9.4.5.d, we will not require that confidential information be provided within five business days in the event of an

[36] *See* PJM Confidentiality Order at P 41-42.

objection and conference request. Inasmuch as parties have four business days to request a conference, a requirement that all information be provided within five days, i.e., the next day, makes the objection and conference provision in subsection -.d meaningless.

113. We will also not require that the phrase "object to" in section 38.4.5.d be replaced with "have a concern with," as proposed by OMS, since the phrases are interchangeable.

5. Disclosure Via Electronic Feeds

a. OMS's Proposal and the Midwest ISO's Revisions

114. The Midwest ISO proposes to add a subsection entitled "Limitation on Disclosure Obligation" to section 38.9.4.5.g. That subsection would provide that the Midwest ISO and the IMM shall not be required to make disclosure in response to an information request in circumstances where an electronic data link, dedicated communication circuit, other hardware or third-party services would be necessary to make the disclosure, or if the information request is of a scope and extent that it is similar to the flow of data from market participants to the Midwest ISO, or from the Midwest ISO to the IMM.

b. Comments

115. In its initial comments, OMS recommends deleting section 38.9.4.5.g and section 2.5.f of the non-disclosure agreement, which pertain to limiting state commission access to electronic data. According to OMS, improving technology will likely outpace the ability to anticipate its uses or costs, making a decision on the issue difficult at this time. Also, states OMS, the PJM preserved this issue for resolution at a future time.

116. PSEG is concerned that the Midwest ISO's proposal does not comply with the TEMT II Order's requirements that the Midwest ISO keep bid and offer data confidential for six months and mask the market participants' names upon any release of data. This, PSEG states, is the reason for the inclusion of section 38.9.4.5.g (which would exempt the Midwest ISO from making disclosures where an electronic link is required) in the Midwest ISO's tariff proposal. This provision would limit, but not foreclose, the state commission's ability to request and receive real-time bid and offer data, PSEG says. PSEG disagrees with OMS's argument that this proposal is not ripe for Commission decision, and supports including the provision in the tariff.

117. In its reply comments, OMS agrees to accept the draft Midwest ISO proposal to limit disclosure for information requests where an electronic data link, dedicated communication circuit or other hardware or third party services would be necessary to effectuate the disclosure.[37]

c. Discussion

118. We agree with PSEG that disclosure of data to state commissions via electronic data link, or in any other form that would simulate the flow of data from market participants to the Midwest ISO or from the Midwest ISO to the IMM, may not provide market participants with sufficient protection. Because OMS has acquiesced to this provision, we will require the Midwest ISO to file it as written.

6. Remedies for Breach of Non-Disclosure Agreement

a. OMS's Proposal and the Midwest ISO's Revisions

119. OMS proposes remedies for breach of the non-disclosure agreement in section 38.9.4.7. Its provision states that in the event of a breach: (1) the Authorized Requestor and/or their Authorized Agency shall promptly notify the Midwest ISO or the IMM, who will notify the Affected Participant; (2) the Midwest ISO or the IMM may seek and obtain the immediate return of all confidential information obtained pursuant to the non-disclosure agreement; and (3) no Authorized Requestor shall have responsibility or liability arising out of the disclosure, but there is no limitation on the liability of any person who is not an employee, member or agent of an Authorized Agency at the time of the release if that person engaged in intentional release of confidential information obtained during his or her duties as an Authorized Requestor.

120. The Midwest ISO would modify section 38.9.4.7 as follows. First, with respect to receiving notification of disclosure from an Authorized Requestor or Authorized Agency, the Midwest ISO proposes to cease disclosure to the Authorized Requestor until it can be determined that: (1) the disclosure was not due to the Authorized Requestor's intentional, reckless or negligent act or omission; (2) the Affected Participant suffered no harm or economic damage; (3) there are now procedures in place to prevent a recurrence

[37] ICC does not support this position. The ICC considers the issue to be not ripe and therefore the proposed tariff should not contain an explicit prohibition on access. Also, ICC supports the position that the PJM tariff does not prohibit state regulators from accessing streaming data and that progress in technology development could render such prohibition inefficient.

of the disclosure; or (4) good cause shown. With respect to the return of confidential information, the Midwest ISO proposes to also accept certification of the destruction of that information. Finally, the Midwest ISO would clarify the liability provision to specify that no Authorized Requestor *who is an employee of an Authorized Agency* shall be liable for disclosure, and that someone who is not an employee of an Authorized Agency shall be granted a limitation of liability if the laws of that state provide for one.

121. In addition, the Midwest ISO's filing includes OMS's draft non-disclosure agreement (to be made between the Authorized Requestor and the Midwest ISO) and the Midwest ISO's redlined discussion draft of the same.

b. Comments

122. In its reply comments, PSEG takes issue with the Midwest ISO's proposal for actions to be taken in cases where the non-disclosure agreement has been breached. PSEG argues that the proposed remedy would leave the confidential information in the Authorized Requestor's hands, pending consultations with the Authorized Agency. PSEG states that this contrasts with other remedy provisions previously approved in other RTOs and ISOs, such as PJM. In those provisions, upon written notice of a breach, the Transmission Provider terminates the non-disclosure agreement and the Authorized Requestor's rights to further information. This, PSEG states, would allow the Midwest ISO to secure the confidential information while these consultations were pending. PSEG also argues that the Midwest ISO proposal does not provide for any further remedy if the parties cannot resolve their differences after the consultation. This would not only leave them in administrative limbo, PSEG argues, but would allow previously disclosed confidential information to remain in the hands of an Authorized Requestor who may have breached the non-disclosure agreement. PSEG argues that in other RTOs and ISOs, the parties in that circumstance have recourse to the Commission for final disposition.

c. Discussion

123. We agree with PSEG that the Midwest ISO's proposal does not sufficiently protect market participants whose confidential data may have been disclosed in violation of the non-disclosure agreement. In the event of a written notice of a breach of the non-disclosure agreement, the Midwest ISO should terminate the agreement and the Authorized Requestor should be required to return the confidential information to the Midwest ISO.[38] If it is determined, following consultation with the Authorized

[38] *See* PJM tariff at § 18.17.4.d.

Requestor's agency, that there was no breach of the non-disclosure agreement, the Midwest ISO may restore the Authorized Requestor's status.

124. We find the OMS proposal to revise the sixth paragraph of the recitals in the non-disclosure agreement to indicate that the agreement states the terms under which the Midwest ISO and IMM *shall* provide confidential information, in place of "*may* provide" in the current draft, to be an accurate and therefore appropriate characterization of the agreement. Accordingly, we direct the Midwest ISO to make this revision in the compliance filing.

D. Requests for Rehearing of the TEMT II Order

125. In light of the pending Offer of Proof, the TEMT II Rehearing Order did not address three other requests for rehearing of the Commission's decisions in the TEMT II Order regarding the Midwest ISO's data confidentiality proposal.[39] We will address those requests for rehearing here.

1. Requests for Rehearing

126. In its request for rehearing, PSEG states that it agrees with the Commission's objective of harmonizing the Midwest ISO's and PJM's methods for addressing confidentiality issues and with the Commission's limitation of state commissions' and Authorized Requestors' access to confidential data.

127. PSEG states that the Commission erred in the TEMT II Order by failing to clarify, and failing to appropriately limit, third parties' ability to challenge designation of market information as "competitively sensitive." It requests that the Commission clarify its instruction that the Midwest ISO "'work with its stakeholders to develop a process under which third parties may challenge disclosing parties' designation of information as Competitively Sensitive.'"[40] First, PSEG states that the potential universe of third parties is boundless, and asks the Commission to define and narrow this term in an effort to avoid burdensome challenge requests. Second, PSEG argues that since the Commission envisions the use of a stakeholder process to develop the challenge process, the Commission must provide guidance to the Midwest ISO stakeholders so that there are

[39] *See* TEMT II Rehearing Order at P 2 & n.2 (deferring consideration of this issue). Cinergy has withdrawn the portions of its request for rehearing that remain outstanding; accordingly, we will not address its arguments in this discussion.

[40] PSEG Request for Rehearing at 12 (quoting TEMT II Order at P 565).

bounds upon the process that are consistent with other provisions of the TEMT that prohibit data disclosure. PSEG specifically proposes that: (1) the disclosing party receive notification of any challenge to its designations and be permitted to defend against any effort to remove such designations; and (2) any challenger be required to "meet a high threshold" in order to remove a "competitively sensitive" designation.[41]

128. Minnesota DOC indicates that it supports OMS's request for rehearing of the Commission's decisions regarding state access to confidential data. It explains that it is concerned about the data access issue if the final outcome parallels the holding of the PJM Confidentiality Order, because PJM's confidentiality provisions limit state access to public utility commissions. Minnesota DOC argues that the Commission wanted to guard against the possibility that many other state agencies would be able to receive confidential information, but that it did not give those other state agencies a way to obtain confidential information from an RTO.

129. Minnesota DOC states that it acts, in part, as the investigatory and enforcement arm of the Minnesota Public Utilities Commission (Minnesota Commission), and access to confidential data is essential for it to perform its statutory function. It indicates that it is the primary (and usually the only) party opposing utilities before the Minnesota Commission. Additionally, Minnesota DOC states that it is the agency that performs the financial and economic analysis of utility proposals that is otherwise performed by a separate division embedded within other state utility commissions. Minnesota DOC argues that the language included in the original Midwest ISO proposal would have allowed it the same data access as other state commissions with jurisdiction over Midwest ISO member utilities. It adds that if the Commission does not grant rehearing, the alternative is a process that will handcuff Minnesota DOC's ability to perform its statutory duties. As an example, Minnesota DOC states that it may need information from the Midwest ISO to gauge the effect of a market event on the prices or reliability of electricity served to a jurisdictional utility's customers.

2. Discussion

130. We deny PSEG's request for rehearing of the TEMT II Order. We do not see any reason why the Midwest ISO and the stakeholders cannot seek to resolve among themselves how to narrow the term "third parties," subject to review by the Commission. There is nothing in the record to aid us in making such a decision, and, as the Commission is not generally privy to requests for confidential data, negotiation seems

[41] *Id.* at 13.

likely to present the best resolution of this issue. For the same reasons, we also decline to prejudge the parameters under which parties may challenge the designation of information as competitively sensitive.

131. We find that Minnesota DOC's request for rehearing has been overtaken by subsequent events in this docket and is now moot. In light of the Offer of Proof and the Midwest ISO's alternative confidentiality proposal, no party now advocates resurrecting the portions of the Midwest ISO's initial proposal that the Commission rejected in the TEMT II Order. As the Minnesota DOC did not file comments in response to the Offer of Proof, and we cannot fairly evaluate whether and how its arguments on rehearing would apply to the Offer of Proof or the Midwest ISO's revised confidentiality proposal.

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) The Midwest ISO is hereby directed to file revised TEMT tariff sheets, as directed in the body of this order, within 30 days of the date of this order. The Midwest ISO is also required to revise the draft non-disclosure agreement so that it will conform to the revised tariff sheets.

By the Commission. Chairman Wood concurring in part with a separate statement attached.
(S E A L) Commission Kelliher dissenting in part with a separate statement attached.

Linda Mitry,
Deputy Secretary.

Appendix A

Parties Filing Comments and Protests Responsive to Offer of Proof

ATC and METC – American Transmission Company LLC and Michigan Electric Transmission Company LLC
Cinergy – Cinergy Services, Inc.
Duke – Duke Energy North America, LLC
Dynegy – Dynegy Power Marketing, Inc.
EPSA – Electric Power Supply Association
FirstEnergy – FirstEnergy Service Company
* **Midwest Independent Power Suppliers**
Midwest ISO – Midwest Independent Transmission System Operator, Inc.
Ohio Commission – Public Utilities Commission of Ohio
OMS – Organization of MISO States
PSEG – PSEG Energy Resources & Trade LLC

* Filing included a motion to intervene.

Parties Filing Reply Comments Responsive to Offer of Proof

Dynegy
Illinois Commission – Illinois Commerce Commission
LG&E – LG&E Energy LLC
OMS
PSEG

Parties With Outstanding Rehearing Requests

Ameren – Ameren Services Company
Cinergy
Detroit Edison – The Detroit Edison Company
Dynegy Companies – Dynegy Power Marketing, Inc. and Dynegy Midwest Generation, Inc.
Minnesota DOC – Minnesota Department of Commerce
PSEG

UNITED STATES OF AMERICA
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

(Issued June 21, 2005)

Wood, Chairman *concurring in part*:

While I am pleased that this order provides a needed mechanism to provide confidential information to state commissions or other state entities, I believe the standards that this order puts in place are more stringent and restrictive than necessary. The standards and procedures that now exist in PJM were approved by the Commission, in part, based on the input from a productive stakeholder process. However, I believe that those rules in PJM should not prevent us from adopting other proposals that would allow states better access to needed confidential information.

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Pat Wood, III
Chairman

UNITED STATES OF AMERICA
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

(Issued June 21, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

I dissent from the portion of this order that requires the Midwest ISO to revise its tariff to include procedures to provide confidential information to state commissions or other state entities. As I previously explained, in my view, in order to justify allowing Midwest ISO to include procedures in its tariff for distributing confidential information to state entities, Midwest ISO would need to demonstrate that (1) providing the state entities with confidential information possessed by Midwest ISO is necessary for the state entities to discharge their legal responsibilities, and (2) the state entities cannot obtain such information under state law.[1] There has been no demonstration made that access to confidential information held by Midwest ISO is necessary to enable the state entities to carry out their statutory responsibilities. There has also been no demonstration that state commissions are or will be unable to obtain access to confidential information from Midwest ISO under state law. In the absence of an adequate showing on either of these critical points, I cannot support the Commission's decision to require Midwest ISO to revise its tariff to provide state commissions or other state entities with confidential information.

_____
Joseph T. Kelliher

[1] *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 at 62,015 (2004) (Commissioner Kelliher, concurring and dissenting in part); *see also*, *PJM Interconnection, LLC*, 107 FERC ¶ 61,322 at 62,500 (2004) (Commissioner Kelliher, dissenting).