

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

Midwest Independent Transmission)	Docket Nos.	ER07-529-000
System Operator, Inc.)		

**MOTION FOR INTERVENTION AND COMMENTS OF THE ORGANIZATION
OF MISO STATES, INC.**

Pursuant to Rule 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or Commission), 18 CFR 385.214 and the Commission's Notice of Filing issued on February 20, 2007, in the above-captioned docket, the Organization of MISO States (OMS) hereby respectfully moves to intervene in this docket and submits the following comments for the Commission's consideration.

I. Background

On May 27, 2005, the Commission issued its *Policy Statement on Market Monitoring* (Policy Statement).¹ The Commission stated that the intent of the Commission's Policy Statement is to provide guidance on the coordinated roles and responsibilities of the Commission and the market monitors associated with ISOs and RTOs.² In particular, the Policy Statement detailed the respective roles of the market monitors and the Commission's enforcement staff in any investigation and/or enforcement of any potential violations of the RTO's market rules by market participants.

¹ *Market Monitoring in Regional Transmission Organizations and Independent System Operators, Policy Statement on Market Monitoring Units*, 111 FERC ¶ 61, 267 (2005).

² Policy Statement, at P. 1

On February 9, 2007, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted for filing to the Commission, revisions to Module D of the Midwest ISO FERC Electric Tariff, Third Revised Volume No. 1 (EMT). The Midwest ISO's transmittal letter states that the Midwest ISO filing is the result of the Midwest ISO Independent Market Monitor's (IMM) review and analysis of Module D to the EMT that has determined that Module D requires changes in order to provide clarification in conformity with the Commission's Policy Statement.³

On February 20, 2007, the Commission issued a Notice of Filing and established March 2, 2007 as the deadline for comments and protests regarding the Midwest ISO's February 9, 2007 filing.

II. Motion for Intervention out of Time

Pursuant to Rule 214(a) of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(a), the Organization of MISO States (OMS) files its Motion for Intervention in the above-captioned proceeding. Service of all pleadings, documents, and communications in this matter should be made on the following:

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Executive Director
Organization of MISO States
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Des Moines, Iowa 50309
(515) 243-0742

In support of its intervention, the OMS states that it serves as the regional state committee, with representatives from each state commission with regulatory jurisdiction

³ Transmittal Letter, at 2

over entities participating in the Midwest ISO. Based on the foregoing, the OMS respectfully submits that OMS and its members have a direct and substantial interest in these proceedings, that no other party can adequately represent the interests of the OMS or its member states in this proceeding, and that its intervention is appropriate at this stage of the proceeding. Because of the schedule of OMS Board meetings, board approval of this intervention request at an earlier date was not possible.

III. Summary of the OMS' Position

For all of the reasons explained in the following Sections of these Comments, the OMS recommends that the Midwest ISO's Module D be modified to: (1) clearly state that the IMM will monitor market participant compliance with the Commission's Market Behavior Rules and report potential violations to the Commission; (2) identify the sections in the Midwest ISO's EMT that provide the Midwest ISO with specific market power mitigation authority and thereby make the referral provisions of Module D inapplicable in those instances; and (3) state that the IMM shall be kept informed about the status of referrals made by the IMM to the Commission.

IV. Discussion

A. Module D Should Be Modified to Clearly State that the IMM Will Monitor Market Participant Compliance with the Commission's Market Behavior Rules and Report Potential Violations to the Commission.

The Commission's Policy Statement clearly states that "it is the obligation of the MMU [Market Monitoring Unit] to inform the Commission of potential Market Behavior Rule violations and any violations of the ISO/RTO tariff that the Commission has not

allowed the ISO/RTO to resolve in the first instance”⁴ FERC’s Market Behavior Rules are codified in its Rules and Regulations at 18 CFR Sections 1c.2 and 35.37 and deal with market participant behavior in wholesale transactions and potential energy market manipulation.

Section 53.3a of Module D states:

In cases requiring IMM referral to FERC as otherwise called for in this Section, or in any other case in which the IMM has reason to believe, based upon sufficient credible information, that a Market Participant, the Transmission Provider, or Control Area Operator have (1) violated the Transmission Provider’s Market Rules, or (2) violated FERC Market Monitoring Policy Statement Rules, the IMM will refer the matter to the Commission, addressed to the Commission’s Office of Enforcement (or any successor organization) in a manner described in Section 53.3.b. (underlining added)

Section 1.188a of Module A in the Midwest ISO Tariff defines “Market Rules” as:

The rules and procedures for operation of the Energy Markets, including but not limited to calculation of LMPs, in accordance with the Transmission Provider’s Open Access Transmission and Energy Markets Tariff.

Further, Section 1.98c of Module D defines “FERC Market Monitoring Policy Statement Rules” as:

The market rules as set forth in the *Market Monitoring in Regional Transmission Organizations and Independent System Operators, Policy Statement on Market Monitoring Units*, 111 FERC ¶ 61, 267 (2005).

It is unclear whether the Midwest ISO has chosen to reference the Commission’s Policy Statement in this way in Module D as a circuitous method of indicating an intent for the IMM to monitor and report potential violations of the Commission’s Market Behavior and Market Manipulation Rules, specifically the provisions at 18 CFR Sections 1c.2 and 35.37, or whether failure to directly reference the Commission’s Market Behavior and Market Manipulation Rules in Section 53.3a of Module D represents an

⁴ Policy Statement Appendix A, at P. 1 (emphasis added).

intent not to monitor and report potential violations of the Commission's Market Behavior and Market Manipulation Rules to the Commission.⁵

As written, Section 53.3a could be interpreted to leave a large hole in the monitoring responsibilities of the Midwest ISO's IMM. Unless the issue is clarified, the IMM's monitoring responsibilities could be interpreted to be limited only to the Midwest ISO's Market Rules and general Commission policy, thus leaving critical monitoring responsibilities, such as monitoring for those matters described in the Commission's Rules and Regulations at 18 CFR Sections 1c.2 and 35.37 outside the IMM's responsibilities. To remove this ambiguity, Module D should be revised to directly reference the Commission's Market Behavior and Market Manipulation Rules as the subject of IMM monitoring and reporting as well as the Midwest ISO's Market Rules.

B. Module D Should Be Modified to Identify the Sections in the Midwest ISO's EMT that Provide the Midwest ISO with Specific Market Power Mitigation Authority and Thereby Make the Referral Provisions of Module D Inapplicable in Those Instances.

In its Policy Statement, the Commission stated,

. . . it is appropriate for ISOs/RTOs to administer certain matters that concern market behavior (with appeal rights to the Commission) if the behavior is objectively identifiable and set forth in the ISO/RTO tariff and for which the violations have clear Commission-approved sanctions that are set forth in the tariff.⁶

Section 53.3a of Module D reflects this provision of the Commission's Policy Statement. Specifically, Section 53.3a states,

The foregoing notwithstanding, a clear, objectively identifiable violation of the Transmission Provider's Market Rules, where such rules provide for an explicit remedy that has been accepted by the Commission and can be administered by the

⁵ See, *Prohibition of Energy Market Manipulation*, 114 FERC ¶61,047, (2006) *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶61,218 (2003), reh'g denied, 107 FERC ¶61,175 (2004) at Appendix A

⁶ Policy Statement, at P. 5

Transmission Provider, shall not be subject to the provisions for referral under this Section 53.3.

When there is a Midwest ISO Market Rule that provides for an explicit remedy that has been accepted by the Commission and can be administered by the Midwest ISO, then the provisions of Section 53.3a that would require the IMM to refer a violation of Midwest ISO Market Rules to the Commission will *not* apply. Rather, in such circumstances, the Midwest ISO would simply implement the remedy that is specified in that particular Midwest ISO Market Rule.

The proposed process is not at issue. However, the language of Module D requires some fine-tuning and bolstering. Specifically, the proposed Module D revisions do not provide cross-reference to the specific Midwest ISO Market Rules and the specific sections of the EMT that would provide the Midwest ISO with the clear Commission-approved market power mitigation authority that would lead to the inapplicability of the normal referral process in 53.3a of Module D.

As the Commission noted in its Policy Statement, “Organized markets work best to benefit customers when the market rules and tariff provisions governing ISO/RTO-administered markets and contained in the ISO/RTO tariff are clearly understood by and followed by market participants.”⁷ Module D, as proposed, does not allow for that level of discernment. Accordingly, Module D should be modified to list the specific sections of the Midwest ISO’s EMT that provide an explicit market power mitigation remedy so that users of the tariff will be able to clearly discern the circumstances in which the referral procedures of 53.3a will apply and the specific circumstances in which those circumstances will not apply.

⁷ Policy Statement, at P. 5

C. Section 53.3b of Module D Should Be Modified to State that the IMM Shall Be Kept Informed About the Status of Referrals Made by the IMM to the Commission.

Section 53.3b of Module D states that an IMM referral to the Commission shall be in writing and non-public.

The Commission's Policy Statement states,

Following a referral to the Commission, the MMU should continue to notify and inform the Commission of any information that the MMU learns of that may be related to the referral, but the MMU should not undertake any investigative steps regarding the referral except at the express direction of the Commission Staff.⁸

The Commission also addressed the issue of the post-referral process in its Order on Rehearing in *PJM Interconnection*. Specifically, the Commission stated:

Under Commission regulations, investigations are non-public except to the extent that the Commission directs or authorizes public disclosure. 18 C.F.R. § 1b.9 (2006). The Commission is specifically authorized to keep all referrals non-public and to protect confidential information and sources. Confidentiality is central to the success of all Commission investigations. It provides reasonable protection to persons who become involved in these investigations and fosters cooperation with the Commission. Preserving confidentiality also protects innocent persons who might be erroneously alleged to have committed wrongdoing or otherwise be adversely affected by simply being associated with an investigation. For similar reasons, all aspects of an MMU referral, from its initiation to its conclusion, are deemed confidential unless the Commission authorizes disclosure.⁹

The OMS acknowledges that in some cases, it may be reasonable to shield from general public availability referrals made by the IMM to the Commission. However, the OMS also believes that it would be wise policy for the Commission to keep the IMM informed about the status of any referral that the IMM makes to the Commission. In particular, keeping the IMM informed about any Commission action or inaction on a

⁸ Policy Statement, at P. 8

⁹ *PJM Interconnection, L.L.C.*, Order on Rehearing, 117 FERC ¶ 61,263 (2006), at P. 27

referral that it has made would be to the benefit of the Midwest ISO stakeholders and the market in general, as it would help the IMM in future monitoring efforts and inform the IMM in making future referrals. Commissioner Kelly's July 20, 2006 dissent in *PJM Interconnection L.L.C.* takes a similar position on this issue. Specifically, Commissioner Kelly stated:

Further, protesters raised the concern that the Commission should inform the MMU as to the outcome of cases referred by the MMU to the Commission, including when the Commission takes no formal action, in order to help the MMU adequately respond or evaluate similar circumstances in the future. I believe that the Commission should inform the MMU of the outcome of its referral, subject to appropriate confidentiality restrictions. This information would provide the MMU with invaluable feedback on cases it has referred to the Commission and the whole market would benefit as a result.¹⁰

As the Commission notes in *PJM Interconnection L.L.C.*, the Commission's rules and regulations grant the Commission authority to determine the level of confidentiality that it will afford an investigation and therefore, keep the IMM apprised of the status of any Commission investigation resulting from an IMM referral. The OMS recommends that the Commission choose to do that in this case and codify that choice in the Midwest ISO's Module D.

The OMS agrees with the Commission's desire to protect parties involved in an investigation from being "adversely affected by simply being associated with an investigation." Nevertheless, the Commission could certainly find ways to provide information to the IMM that would guide future IMM activity without mentioning individual parties. However, the OMS notes that it is the IMM that will be responsible for the original referral and accordingly, will most likely already be aware of the parties and their level of involvement in a Commission investigation. Indeed, it is the IMM that

¹⁰ Commissioner Kelley's statement dissenting in part to the order re *PJM Interconnection, L.L.C.*, 116 FERC ¶ 61,038 (2006)

will have likely gathered all the initial information and is required by the Commission to continue to provide information on market participants that are the focus of the Commission's investigation.¹¹ Finally, the Midwest ISO Market Monitoring Plan requires the IMM to maintain the confidentiality of any data or information that it collects through the course of executing its duties – information that is the basis of any IMM referral or Commission investigation.¹²

In sum, it is to the benefit of the Midwest ISO stakeholders for the IMM to be kept informed about the status of any Commission investigation resulting from an IMM referral. As shown above, the IMM will play a significant role in setting the stage for any Commission investigation and will most likely already possess much of the information that will be the subject of a Commission investigation. The Midwest ISO EMT also places a confidentiality obligation on any information that the IMM obtains in the course of its duties. Accordingly, the OMS recommends that the Commission direct that the Midwest ISO's Module D be modified to state that the Commission will keep the IMM informed about any Commission investigation resulting from an IMM referral.

V. Conclusion

Wherefore, for all of the reasons explained above, the OMS recommends that the Midwest ISO's Module D be modified to: (1) clearly state that the IMM will monitor market participant compliance with the Commission's Market Behavior Rules and report potential violations to the Commission; (2) identify the sections in the Midwest ISO's EMT that provide the Midwest ISO with specific market power mitigation authority and

¹¹ Policy Statement, at P. 8

¹² See Section 54.2.1 of Module D, Open Access Transmission and Energy Markets Tariff for the Midwest Independent Transmission System Operator, Inc.

thereby make the referral provisions of Module D inapplicable in those instances; and (3) state that the IMM shall be kept informed about the status of referrals made by the IMM to the Commission.

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

Indiana Utility Regulatory Commission
Iowa Utilities Board
Michigan Public Service Commission
Minnesota Public Utilities Commission
Missouri Public Service Commission
Montana Public Service Commission
Nebraska Power Review Board
North Dakota Public Service Commission
Public Utilities Commission of Ohio
Wisconsin Public Service Commission
Kentucky Public Service Commission
South Dakota Public Utilities Commission

The Manitoba Public Utilities Board did not participate in this pleading. The Illinois Commerce Commission and the Pennsylvania Public Utility Commission abstained from support of these comments.

The Illinois Citizens Utility Board, the Indiana Office of Utility Consumer Counselor, the Iowa Office of Consumer Advocate and the Minnesota Department of Commerce, as associate members of the OMS, participated in these comments and generally support these comments.

Respectfully Submitted,

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Dated: March 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Des Moines, Iowa, this 13th day of March, 2007.

William H. Smith, Jr.
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