

137 FERC ¶ 61,046
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Southwest Power Pool, Inc.

Docket Nos. ER09-1050-006
ER09-1192-005
ER11-121-000
(not consolidated)

ORDER ON CLARIFICATION, REHEARING, AND COMPLIANCE

(Issued October 20, 2011)

1. On October 15, 2010, in Docket Nos. ER09-1050-006 and ER09-1192-005, ISO New England Inc. (ISO-NE) submitted a request for clarification or, in the alternative, rehearing of the September 16, 2010 order issued by the Commission on Southwest Power Pool, Inc.'s (SPP) compliance with Order No. 719¹ market monitoring requirements.² Also on October 15, 2010, in Docket No. ER11-121-000, SPP submitted a filing proposing revisions to Attachment AG³ in its Open Access Transmission Tariff (Tariff), in compliance with the Commission's directive in the September 2010 Order.

2. In this order, we grant ISO-NE's request for clarification. We also accept SPP's revisions to Attachment AG in its Tariff, effective February 18, 2010, as requested.

¹ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009), *order denying reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

² *Southwest Power Pool, Inc.*, 132 FERC ¶ 61,240 (2010) (September 2010 Order).

³ Attachment AG in the SPP Tariff contains SPP's market monitoring plan.

I. Background

A. Order No. 719

3. In Order No. 719, the Commission established reforms to improve the operation of organized wholesale electric power markets and amended its regulations in the areas of: (1) demand response, including pricing during periods of operating reserve shortage; (2) long-term power contracting; (3) market monitoring policies; and (4) the responsiveness of Regional Transmission Organizations (RTO) and Independent System Operators (ISO) to their customers and other stakeholders.⁴

4. With regard to market monitoring policies, Order No. 719 required the Market Monitoring Unit of each RTO or ISO to engage in three core market monitoring functions: (1) identifying ineffective market rules and recommending proposed rule and tariff changes; (2) reviewing and reporting on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities; and (3) notifying the Commission's Office of Enforcement of instances of real or suspected violations that may require investigation.⁵

B. November 2009 Order

5. On April 28, 2009, in Docket No. ER09-1050-000, SPP submitted its initial Order No. 719 compliance filing. In an order issued on November 20, 2009, the Commission found, among other things, that Attachment AG in SPP's Tariff was noncompliant with the three core market monitoring functions articulated in Order No. 719. For example, in regard to the third core market monitoring function (notification of suspected violations), the Commission found that SPP did not specifically state that its Market Monitoring Unit would notify the Commission's Office of Enforcement of certain events. The Commission also found that Attachment AG did not contain the broader requirement that the Market Monitoring Unit report suspected violations of any Commission rule and regulation, nor did Attachment AG state that the Market Monitoring Unit would identify and notify the Commission's Office of Enforcement of instances where inappropriate dispatch may require investigation.⁶ To rectify these and other shortcomings, the Commission required SPP to submit an additional compliance filing 90 days after the issuance of the November 2009 Order.

⁴ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 1.

⁵ *Id.* P 354.

⁶ *Southwest Power Pool, Inc.*, 129 FERC ¶ 61,163, at P 122 (2009) (November 2009 Order).

C. September 2010 Order

6. On February 18, 2010, in Docket Nos. ER09-1050-003 and ER09-1192-003, SPP submitted its compliance filing in response to the market monitoring directives in the November 2009 Order. In its order on this compliance filing (the September 2010 Order), the Commission found SPP compliant with all requirements except those relating to the third core market monitoring function. Specifically, the Commission found that section 3.2 of Attachment AG, in its proposed form, did not limit the Market Monitoring Unit's referral of real or suspected market violations solely to the Commission's Office of Enforcement, as required by Order No. 719.⁷

7. The Commission also emphasized that Order No. 719 stressed the importance of the non-public nature of Office of Enforcement investigations,⁸ and the Commission promulgated a rule providing that referrals of market violations to the Office of Enforcement be non-public in nature.⁹ The Commission required SPP to revise section 3.2 of Attachment AG to limit its Market Monitoring Unit's referral of suspected market violations, and any information pertaining to such referral, to the Commission's Office of Enforcement.¹⁰ The Commission required SPP to submit an additional compliance filing 30 days after the issuance of the September 2010 Order.¹¹

II. Notice of Filings and Responsive Pleadings

8. Notice of SPP's October 15, 2010 compliance filing in Docket No. ER11-121-000 was published in the *Federal Register*, 75 Fed. Reg. 65,313 (2010), with interventions, comments, and protests due on or before November 5, 2010. No parties submitted interventions, comments, or protests in this proceeding.

9. On October 12, 2010, ISO-NE submitted a motion to intervene out-of-time in the SPP Order No. 719 compliance proceeding in Docket Nos. ER09-1050-000 and ER09-1192-000. In support of its motion, ISO-NE challenges a statement made by the Commission in the September 2010 Order regarding Market Monitoring Unit referrals to the Commission of suspected market violations. ISO-NE asserts that it could not have foreseen, simply by reviewing SPP's Filings in the proceeding, that the Commission

⁷ September 2010 Order, 132 FERC ¶ 61,240 at P 26.

⁸ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 465-469.

⁹ 18 C.F.R. § 35.28(g)(3)(iv)(A).

¹⁰ September 2010 Order, 132 FERC ¶ 61,240 at P 26.

¹¹ We note that Docket No. ER09-1192-005 remains in the current proceeding, since it is part of SPP's overall Order No. 719 compliance proceeding.

might interpret Order No. 719's requirements regarding Commission referrals of real or suspected market violations as limiting the communication of referrals solely to the Commission's Office of Enforcement.¹²

III. Discussion

A. Procedural Matters

10. Pursuant to 18 C.F.R. § 385.214(d) (2011), we will accept ISO-NE's late-filed motion to intervene because we find (1) it has shown good cause for its late filing, (2) the intervention will not disrupt the proceeding, (3) no other party adequately represents ISO-NE's interest, and (4) the intervention will not burden or prejudice another party.

B. Substantive Matters

1. ISO-NE Request for Clarification or, in the Alternative, Rehearing of the September 2010 Order

a. Request for Clarification or, in the Alternative, Rehearing

11. ISO-NE seeks clarification or rehearing of two issues relating to statements made by the Commission in the September 2010 Order regarding SPP's compliance with the third core market monitoring function.¹³ First, ISO-NE requests confirmation that a Market Monitoring Unit may, at its discretion, communicate or collaborate with an RTO's or ISO's employees and board members—assuming that those persons are bound by Commission-accepted confidentiality requirements—in the investigation of a suspected market violation or the preparation of a Commission referral, as well as make RTO or ISO employees and board members aware that a referral has been made. Second, ISO-NE requests confirmation that the Commission, in its statements in the September 2010 Order, only meant to prohibit disclosure of a Commission referral of a market violation to state regulatory authorities or other parties outside of the RTO or ISO.¹⁴

12. ISO-NE asserts that, when it is necessary to refer a matter to the Commission, the Market Monitoring Unit benefits from having access to RTO or ISO staff. ISO-NE states that its employees, officers, and board of directors historically have worked with ISO-NE's Market Monitoring Unit to identify and review market operation issues as they arise. According to ISO-NE, its employees often are the first to identify potential issues. ISO-NE asserts that the collaborative process between the ISO and its Market Monitoring

¹² ISO-NE Motion to Intervene Out-of-Time at 3-4.

¹³ See September 2010 Order, 132 FERC ¶ 61,240 at P 26.

¹⁴ ISO-NE Request for Clarification or Rehearing at 3, 9.

Unit is often necessary to determine outcomes and corrective actions to address these issues. In instances where its Market Monitoring Unit begins preparing a Commission referral, ISO-NE states that the Market Monitoring Unit often collaborates with the ISO's legal department and relevant business units to draft a comprehensive referral letter.¹⁵

13. ISO-NE further emphasizes the collaborative process, stating that early stages of review and later stages of the referral process often involve conversations among the Market Monitoring Unit, ISO-NE's legal department, relevant ISO-NE business units, and representatives of the Commission's Office of Enforcement. ISO-NE also states that the participation of and input of ISO-NE's subject matter experts and legal counsel is of great benefit to its Market Monitoring Unit in providing well thought out answers to follow-up questions and data requests from the Commission's Office of Enforcement. ISO-NE asserts that a broad understanding of the underlying referral by ISO staff is helpful to ensure a full response to questions and data requests. Overall, ISO-NE contends that prohibiting this historic, collaborative process will degrade the Market Monitoring Unit's ability to learn of, investigate, and refer to the Commission potential market violations. ISO-NE further argues that prohibiting preliminary communications with ISO-NE staff of even suspected violations would have undesirable consequences. As an example, ISO-NE states absent input from the ISO's other staff, the Market Monitoring Unit might not be able to notify the RTO or ISO of market abuses that could be corrected by the RTO or ISO's exercise of its section 205 rights to make an expedited filing of rules to prevent further abuse.¹⁶

14. ISO-NE asserts that prohibiting a Market Monitoring Unit from informing the RTO or ISO board of directors of a suspected market violation and a possible referral to the Commission would restrict the board's ability to fulfill its duties, which includes oversight of the Market Monitoring Unit and RTO or ISO markets. ISO-NE contends that the board must have reasonable knowledge of the Market Monitoring Unit's activities and be able to inquire about those activities. ISO-NE notes that Order No. 719 explicitly called for board oversight of a Market Monitoring Unit's activities.¹⁷

15. ISO-NE also contends that, under its governing tariff provisions, collaborations and communications between the Market Monitoring Unit and ISO-NE's board and staff regarding potential market violations are conducted on a confidential, non-public basis.

¹⁵ *Id.* at 4-5.

¹⁶ *Id.* at 6-7.

¹⁷ *Id.* at 7-8 (*citing* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 339).

Thus, ISO-NE argues, this collaboration and communication should not violate Order No. 719's requirement for non-public referrals to the Commission.¹⁸

b. Commission Determination

16. As explained further below, the Commission grants ISO-NE's request for clarification. Consistent with 18 C.F.R. § 35.28(g)(3)(iv)(A), referrals by Market Monitoring Units must be "non-public." In Order No. 719 and orders on subsequent compliance filings by RTOs and ISOs, the Commission has emphasized that Market Monitoring Units must act with due regard for the need to maintain the confidentiality of referrals to the Commission's Office of Enforcement and the Commission's enforcement process.

17. The necessity of maintaining referral and investigative information as non-public in no way restricts Market Monitoring Units from collaborating with the RTOs or ISOs to determine whether market violations are occurring.¹⁹ Market Monitoring Units can, and must, work closely with their respective RTOs and ISOs to review market participant conduct and markets generally. This includes not only sharing factual information about specific market participants,²⁰ but also sharing information regarding issues such as tariff interpretation and market administration.²¹ Further, as ISO-NE notes, RTOs and ISOs and their Market Monitoring Units have worked together to identify and review market operations issues as they arise.²² Therefore, as ISO-NE requests, we clarify that the

¹⁸ *Id.* at 8.

¹⁹ ISO-NE does not seek to disclose referrals of suspected market violations to state commissions. The Commission addressed this issue in Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 465-469.

²⁰ For example, ISO-NE notes that its Market Monitoring Unit may seek to confirm settlement or market operations data with ISO employees as part of its investigations of suspected conduct. *See* ISO-NE Request for Clarification or Rehearing at 5.

²¹ ISO-NE notes that information gathering may include conferences involving the Commission's Office of Enforcement, the Market Monitoring Unit, and RTO or ISO staff. *See id.* at 6.

²² *Id.* at 4.

Commission's market monitoring requirements do not prohibit such collaborative efforts.²³

18. Regarding the disclosure of referrals to the RTO or ISO, we also grant ISO-NE's requested clarification. The fact that Market Monitoring Units must keep referral information "non-public" under 18 C.F.R. 35.28(g)(3)(iv)(A) does not prohibit disclosure of the referral to the Market Monitoring Unit's RTO or ISO so long as reasonable measures are taken to ensure that referral information remains confidential. We agree with ISO-NE that a Market Monitoring Unit's sharing of referral information with its RTO or ISO would enable a Market Monitoring Unit to more easily determine whether additional steps beyond a referral are needed to address market issues (e.g., whether tariff modifications are appropriate). Sharing referral information also enables a Market Monitoring Unit and its RTO or ISO to work collaboratively to evaluate suspect market behavior. Communication between a Market Monitoring Unit and its RTO or ISO is often also required to develop referrals.²⁴

19. Consistent with ISO-NE's requests, the Commission clarifies that Market Monitoring Units, RTOs, and ISOs may communicate referral information with each other across regions.²⁵ Collaboration between regional entities enhances overall market oversight by allowing those entities to focus attention on problematic interregional behavior and could lead to useful additional lines of inquiry by Market Monitoring Units. The Commission strongly encourages this type of communication, as long as reasonable precautions are taken to ensure that all referral information remains non-public.

20. We agree with ISO-NE that effective market monitoring requires close collaboration between the Market Monitoring Units, RTOs, ISOs, and the Commission's Office of Enforcement. This collaboration is important not only during the referral process but also during investigations initiated by the Office of Enforcement. We clarify

²³ Our clarification is consistent with section III.A.1.3 of the ISO-NE Tariff, as cited by ISO-NE. *See id.* at 9 (permitting the ISO-NE internal and external Market Monitoring Units to share data created by these units with the ISO).

²⁴ We note that the Office of Enforcement is also available to provide guidance to Market Monitoring Units regarding the content and appropriateness of referrals. A close working relationship between our enforcement staff and Market Monitoring Units is vital to the Commission's enforcement policies.

²⁵ *See New York Independent System Operator*, 136 FERC ¶ 61,116 (2011) (*NYISO*). In *NYISO*, the Commission accepted confidentiality provisions which allowed NYISO and its Market Monitoring Unit to share confidential information, including information concerning notifications and referrals to the Commission, with other RTOs, ISOs, and Market Monitoring Units under certain conditions.

that the Office of Enforcement may elect to share investigative information with Market Monitoring Units, RTOs, and ISOs, including referral information and information obtained from third parties, as long as appropriate measures are taken to ensure that such information is not disclosed and remains confidential.²⁶ Market Monitoring Units, RTOs, and ISOs may not share information provided by the Office of Enforcement with other Market Monitoring Units, RTOs, ISOs, or any other entity, without prior approval from the Office of Enforcement.

21. While Market Monitoring Units may share a variety of concerns with RTOs, ISOs, or other Market Monitoring Units, we remind Market Monitoring Units that Commission regulations require Market Monitoring Units to identify and notify the Office of Enforcement of all instances in which a market participant's behavior *may* require investigation, including, but not limited to, suspected market violations.²⁷

2. SPP Filing in Compliance with the September 2010 Order

a. Compliance Requirement

22. In the September 2010 Order, the Commission found that SPP was partially compliant with the third core market monitoring function articulated in Order No. 719 (the requirement to notify the Commission's Office of Enforcement of suspected violations). The Commission directed SPP to revise section 3.2 of Attachment AG to limit the Market Monitoring Unit's referral of real or suspected market violations, and any notifications pertaining to such referral, to Commission staff, as required by Order No. 719.²⁸

²⁶ 18 C.F.R. § 1b.9 (2011) requires that all documents and information obtained during the course of an investigation, and all investigative proceedings, shall be treated as nonpublic by the Commission and its staff, with certain enumerated exceptions including Commission authorization of public disclosure. This rule does not preclude the sharing of investigative information in a manner that is intended to preserve the confidentiality and non-public nature of such information. Therefore, sharing investigative information with Market Monitoring Units, RTOs, and ISOs is consistent with section 1b.9, as long as appropriate measures are taken to preserve confidentiality.

²⁷ 18 C.F.R. § 35.28(g)(3)(ii)(C). The Commission recently discussed this requirement in *NYISO* at P 22-24.

²⁸ September 2010 Order, 132 FERC ¶ 61,240 at P 26.

b. SPP's Filing

23. SPP proposes revisions to section 3.2 of Attachment AG that limit its Market Monitoring Unit's referrals of market violations to the Commission's Office of Enforcement. Specifically, proposed section 3.2 states that SPP's Market Monitoring Unit should "bring any instances of market behavior that may require investigation (including, but not limited to, suspected Tariff violations, suspected violations of Commission-approved rules and regulations, suspected market manipulation, and inappropriate dispatch) to the attention of FERC's Office of Enforcement (or its successor organization) staff."²⁹ SPP proposes to delete the SPP Board of Directors, the officers of SPP, or other affected state regulatory authorities (as the Market Monitoring Unit deems necessary or appropriate) from the list of persons or entities to which the Market Monitoring Unit may make referrals of suspected market violations.

24. In its filing, SPP requests an effective date of February 18, 2010 for its proposed changes to section 3.2 of Attachment AG, which coincides with the effective date requested, and granted, in the September 2010 Order proceeding. However, because this proposed effective date pre-dates SPP's submission of its electronic baseline Tariff,³⁰ SPP submits both an electronic Tariff version of its proposed changes to section 3.2 (effective July 26, 2010) and Tariff sheets formatted pursuant to Order No. 614 for historical purposes.³¹ As part of the historical record, SPP submits a Tariff sheet effective February 18, 2010 as well as a courtesy Tariff sheet effective March 31, 2010, to coincide with the effective date of a ministerial filing in Docket No. ER10-678-000 that the Commission previously accepted.³²

c. Commission Determination

25. We will accept SPP's changes to section 3.2 of Attachment AG in its Tariff because these changes meet the compliance requirement specified in the September 2010

²⁹ SPP Tariff, proposed Attachment AG § 3.2.

³⁰ SPP submitted its electronic baseline Tariff (SPP Tariff, Sixth Revised Volume No. 1) on July 26, 2010, which the Commission subsequently accepted. *See Southwest Power Pool, Inc.*, Docket No. ER10-1960-000 (October 28, 2010) (unpublished letter order).

³¹ The Tariff sheets formatted pursuant to Order No. 614 are part of SPP's previous Tariff (SPP Tariff, Fifth Revised Volume No. 1).

³² *See Southwest Power Pool, Inc.*, Docket No. ER10-678-000 (March 18, 2010) (unpublished letter order).

Order. We find that Attachment AG of the SPP Tariff is compliant with the third core market monitoring function articulated in Order No. 719.

26. We accept the changes to section 3.2 of Attachment AG effective February 18, 2010, as requested by SPP. We also accept SPP's electronic and Tariff sheet submissions to maintain the historical record.

The Commission orders:

(A) The Commission hereby grants ISO-NE's request for clarification filed in Docket Nos. ER09-1050-006 and ER09-1192-005 in response to the order issued on September 16, 2010, as discussed in the body of this order.

(B) The Commission hereby accepts for filing SPP's compliance filing in Docket No. ER11-121-000, effective February 18, 2010, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

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