

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER04-691-057 ER04-691-060
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Public Utilities With Grandfathered Agreements In the Midwest ISO Region	Docket Nos. EL04-104-054 EL04-104-057
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ORDER ON REHEARING AND COMPLIANCE FILING

(Issued October 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

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). The draft TEMT contemplates that all services provided pursuant to its terms and conditions will be provided by a Transmission Provider. In turn, the TEMT defines "Transmission Provider" as the Midwest ISO or any successor organization. See TEMT, Module A, section 1.320, Second Revised Sheet No. 133. For clarity, we will refer to the Midwest ISO wherever the TEMT refers to the Transmission Provider.

regulators. Subsequently, the Organization of MISO States (OMS) filed an Offer of Proof relating to the Midwest ISO's proposal to share confidential wholesale market information with the states in its region. The Commission analyzed the OMS's filing and the public comments thereupon – which included a Midwest ISO filing that contained a proposal for addressing the areas of disagreement between utilities and states with regard to data sharing – in an order dated June 21, 2005.²

3. In this order, we deny in part and grant in part the OMS's request for rehearing of the Offer of Proof Order, but provide further detail and explanation that will supplement the language of that order. We will also accept, as modified, the Midwest ISO's filing to comply with the confidentiality sections of the TEMT II Order and with the Offer of Proof Order.

I. Background

4. The Midwest ISO's March 31, 2004 TEMT filing (March 31 Filing) proposed provisions to govern the Midwest ISO's handling of confidential data.³ 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,"⁴ and to request that the Commission keep this information confidential under 18 C.F.R. § 388.112.

5. 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.*, the

² *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,448 (2005) (Offer of Proof Order).

³ *See* Module C, section 39.9, Original Sheet Nos. 455-69.

⁴ *See id.* at section 38.9.3, Original Sheet No. 463.

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.

6. 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 the OMS and the states seek access to data that is comparable to the Commission's access, how they will keep that data confidential, or for what purpose they will use the data."⁵ 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 independent system operators (ISOs) should have comparable confidentiality rules as they move toward a joint and common market.

7. At the OMS's request, the Commission granted rehearing of the TEMT II Order for the limited purpose of permitting the OMS 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.⁶ The OMS submitted such a filing on February 11, 2005, and indicated therein that, in light of productive discussions about data access that had taken place since the issuance of the TEMT II Order, it expected the Midwest ISO to file a revised data confidentiality proposal. The Midwest ISO, in a comment on that filing, submitted two draft proposals: (1) an OMS proposal,⁷ which had been circulated among stakeholders in October and November 2004; and (2) alternative tariff provisions that the Midwest ISO had circulated in late November 2004. The Commission required the Midwest ISO to file the tariff provisions contained in the latter proposal, with a number of amendments described in the Offer of Proof Order.

⁵ TEMT II Order at P 561.

⁶ See *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,321 (2004) (Confidentiality Order).

⁷ The OMS seeks rehearing of the Commission's characterization of its document as a "proposal." We will discuss its argument in detail below.

II. Request for Rehearing, Notice of Filing and Responsive Pleadings

8. As further detailed below, the OMS requested clarification and rehearing of the Offer of Proof Order. The Midwest ISO submitted a filing to comply with the Offer of Proof Order and to address the TEMT II Order's compliance requirements relating to data confidentiality.⁸

9. Notice of the Midwest ISO's compliance filing was published in the *Federal Register*, 70 Fed. Reg. 52,373 (2005), with interventions and protests due no later than August 26, 2005. In a subsequent notice, the Commission corrected the deadline for interventions and protests to September 9, 2005.⁹ WPS Resources Corporation (WPS Resources) filed a motion to intervene and protest, and later filed a supplemental protest. The OMS filed comments. The Midwest ISO filed an answer on September 26, 2005, and WPS Resources filed a response thereto on October 5, 2005.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), WPS Resources' motion to intervene serves to make it a party to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the Midwest ISO's answer because it has provided information that assisted us in our decision-making process. We are not persuaded to accept WPS Resources' answer, and will, therefore, reject it.

B. The OMS's Request for Rehearing

12. The OMS's request for rehearing contains 11 specifications of error in the Offer of Proof Order, and seeks varying forms of relief with each argument. We will discuss the OMS's arguments below.

⁸ Those requirements had been held in abeyance pending the OMS's submission of the Offer of Proof and a further Commission order. *See Confidentiality Order* at P 12.

⁹ *Errata Notice*, Docket No. ER04-691-060, *et al.* (Aug. 30, 2005).

1. Identification of the OMS's Confidentiality Proposal

a. Request for Rehearing

13. The OMS alleges that the Commission erred in misidentifying and misunderstanding the OMS's confidentiality "proposal." As identified in the Offer of Proof Order, the OMS states that it developed a draft version of tariff and non-disclosure agreement language dated October 28, 2004. However, it indicates that until the Midwest ISO made that document public in its February 17, 2005 filing, the OMS considered it to be a confidential settlement discussion document.¹⁰ It had been intended for discussion purposes only, and was never formally presented to the OMS Board of Directors for approval.

14. The OMS indicates that, at the time the Midwest ISO filed the OMS's discussion draft, the OMS was no longer advancing that draft as its proposal, but was in substantial agreement with the Midwest ISO on the language that the Midwest ISO included in its own February 17 proposal. The OMS avers that it did not object to the Midwest ISO's decision to attach the OMS's discussion draft to the Midwest ISO's comments, because a comparison of the October 28, 2004 document with the one that the OMS advanced as Appendix A to its March 11, 2005 comments would illustrate the degree to which the OMS's representatives had compromised its earlier October 28, 2004 position in order to respect the Commission's wishes that the parties develop a consensus proposal.

15. The OMS argues that the Commission does not seem to have recognized the preliminary form of the settlement discussion document or the Midwest ISO's recognition that subsequent changes to the OMS "proposal" should be expected. It is concerned that that the Commission's apparent misunderstanding of the nature of the October 28, 2004 document has led the Commission to errors of reasoning and conclusions throughout the Offer of Proof Order. The OMS seeks clarification or rehearing of the Commission's misunderstanding of the OMS's position, and revision of 18 individual paragraphs of the Offer of Proof Order "to remove inaccurate descriptions of the OMS's proposal in the record of this case."¹¹

¹⁰ The Commission treated that filing as a comment on the Offer of Proof. *See Notice of Extension of Time*, Docket Nos. ER04-691-024 and EL04-104-023 (Mar. 1, 2005).

¹¹ OMS Request for Rehearing at 4.

b. Discussion

16. We understand the OMS's concern that the nature of the October 28, 2004 document may not have been apparent in light of the fact that the Midwest ISO, not the OMS itself, filed the document. Indeed, there was nothing in the record to indicate whether the OMS Board of Directors had read and approved the document, or whether the OMS considered the document confidential. However, we also find, as we explain further below, that the Offer of Proof Order indicated: (1) the Commission's understanding that the document was used in settlement discussions; (2) that the document was, by then, several months old; and (3) that the document did not reflect the OMS's then-current position at the time the Offer of Proof was submitted.

17. The Offer of Proof Order indicates that parties sought, but did not reach, consensus on several important issues regarding the data confidentiality proposal. It also recounts the Midwest ISO's assertions that during the months of October and November, 2004 – well before the Offer of Proof or the Midwest ISO's counter-proposal was filed – the Midwest ISO circulated “original and revised TEMT provisions that OMS proposed to govern the access of state commissions to confidential data,” and states that the OMS document was attached to the Midwest ISO's comments in the Offer of Proof proceeding.¹² The Commission therefore made clear its understanding that the document had been used in the settlement discussions. So, while it did not constitute a formal “proposal” to the Commission, it was part of the ongoing settlement discussions and intended to prompt further discussions – which is the spirit in which the Commission used the word “proposal.”

18. As the OMS itself points out, the Offer of Proof Order noted the date of the OMS document.¹³ The order further noted that the Midwest ISO's revisions thereto were circulated in late November 2004, and then revised at least four times to reflect stakeholder and OMS comments.¹⁴ The language of the Offer of Proof Order makes clear that the October 28, 2004 document was no longer current at the time the Midwest ISO filed it.

19. The OMS also had, and availed itself of, further opportunities to comment on the various data confidentiality proposals and to articulate its position at the time the

¹² Offer of Proof Order at P 69-70.

¹³ *Id.* at P 69 n.25.

¹⁴ *Id.* at P 70.

Commission considered the Offer of Proof and the Midwest ISO's alternative proposal.¹⁵ The Commission acknowledged the substance of the OMS's comments in the Offer of Proof Order.¹⁶ Those comments, which included proposed changes to the Midwest ISO's alternative proposal, made clear that the OMS's position had changed since October 28, 2004.¹⁷

20. We agree with the OMS that "a comparison of [the October 28, 2004] initial draft discussion document with the one that OMS advanced as Appendix A to its March 11, 2005 Comments would starkly illustrate the degree that the OMS's representatives had compromised the initial October 28, 2004 position in an effort to respect the Commission's expressed wishes that a consensus proposal be developed."¹⁸ Although the Offer of Proof Order did not make a side-by-side comparison of the two documents, the Commission's comparison of the OMS's October 28, 2004 settlement document with the Midwest ISO's alternative proposal was intended to show the similarities between the parties' positions and to illustrate the progress toward consensus that the parties were making in their settlement discussions.

21. We find that the Commission's use of the word "proposal" to describe the October 28, 2004 document was not inaccurate; in any event, even if it were, it constitutes harmless error. In subsequent sections of this order, we will address the OMS's argument that the Commission's decisions rested on an incorrect premise.

¹⁵ See Comments of the Organization of MISO States on the Midwest ISO's February 17 Informational Filing, Docket Nos. ER04-691-024 and EL04-104-023 (Mar. 11, 2005); Reply Comments of the Organization of MISO States to Parties' Filings of March 10, 2005, Docket Nos. ER04-691-024 and EL04-104-023 (Mar. 25, 2005) (responding to parties' comments on the Offer of Proof and the Midwest ISO's February 17 filing).

¹⁶ See Offer of Proof Order at P 84-92, for an example.

¹⁷ See *id.* at P 77-78, 84. These paragraphs summarize, respectively: (1) the provisions contained in the OMS's October 28, 2004 settlement document that address conditions under which the Midwest ISO and/or the IMM shall disclose confidential information to an Authorized Requestor; (2) the Midwest ISO's modifications thereto, as they appear in its February 17 alternative proposal; and (3) the OMS's statement in its comments that it supported some of the Midwest ISO's revisions.

¹⁸ OMS Request for Rehearing at 3.

2. **Policy Differences Between Regional Transmission Organizations**

a. **Request for Rehearing**

22. The OMS argues that the Commission makes contradictory statements when it: (1) disagrees with the OMS that inter-Regional Transmission Organization (RTO) tariff differences cannot, alone, make a tariff proposal unjust and unreasonable;¹⁹ and simultaneously (2) finds that where inter-RTO tariff differences will hinder coordinated RTO operations, the Commission may find that an otherwise reasonable proposal is unjust and unreasonable.²⁰

23. The OMS agrees with the Commission that inter-RTO differences that hinder coordinated RTO operations should be found to be unjust and unreasonable, but it argues that not all inter-RTO differences hinder coordinated RTO operations. This is why it urged the Commission to use “compatibility” as the proper standard in its March 11 comments. It believes that paragraph 65 of the Offer of Proof Order essentially agrees that inter-RTO differences cannot by themselves make a tariff proposal unjust and unreasonable, and that, in order to be found unjust and unreasonable, the tariff provisions must be found to hinder coordinated RTO operations.

24. The OMS states that the Commission did not explain how the different provisions in PJM’s and the Midwest ISO’s policies for allowing state regulators access to data would hinder coordinated RTO operations. It does not understand how allowing a state commission in the Midwest ISO footprint to have a different level of access to, or different procedures for, access to the Midwest ISO’s data than a state commission in the PJM footprint would have with respect to PJM could produce a result that would hinder coordinated RTO operations.

25. The OMS notes that the Offer of Proof Order stated 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,” and argues that the Offer of Proof explained at length that these issues are not relevant. The OMS argues, instead,

¹⁹ See Offer of Proof Order at P 64.

²⁰ See *id.* at P 65.

that the relevant issue is whether the Midwest ISO's proposed provisions are just and reasonable.

26. Next, the OMS asserts that the Commission found that many of the provisions in the Midwest ISO's approach that are different from PJM's are just and reasonable; the Commission rejected other proposed provisions on the ground that they were different from PJM's. The OMS argues that this is inconsistent with the Commission's statement that inter-RTO differences can be found unjust and unreasonable if they hinder coordinated RTO operations and the Commission's goal to improve RTO compatibility. The OMS requests that the Commission reconsider any decisions that it made based on the standard that the Midwest ISO proposal must be like PJM's, even if differences would not hinder coordinated RTO operations.

b. Discussion

27. The Offer of Proof Order found that inter-RTO differences could, by themselves, make a tariff proposal unjust and unreasonable.²¹ But we agree with the OMS that not *all* inter-RTO differences are unjust and unreasonable. It was for this reason that the Commission approved some of the Midwest ISO's data confidentiality provisions that are different from PJM's, and required the Midwest ISO to conform others to PJM's. We also agree that not *all* inter-RTO differences hinder coordinated RTO operations.

28. Some inter-RTO differences, however, are unjust, unreasonable, unduly discriminatory or preferential, and the Commission found that it is unreasonable for utilities in the same state to be subject to different rules governing that state commission's access to the utilities' data, based merely on the fact that the utilities are members of different RTOs.²² First, it was not and is not clear why two sets of confidentiality rules should apply to individual public utilities that may participate in both RTOs' energy markets.²³ Second, neither the Midwest ISO nor the OMS persuaded us that there are sufficient differences between PJM members and Midwest ISO members to warrant granting state commissions with jurisdiction over both RTOs' members different

²¹ *Id.* at P 64.

²² *Id.* at P 66.

²³ Offer of Proof Order at P 68. And, in this regard, the Commission has found that the rules applicable in PJM are just and reasonable. *See* PJM Confidentiality Order.

levels of access to the utilities' data.²⁴ As a consequence, it was not and is not necessary for the Commission to evaluate whether allowing a state commission in the Midwest ISO footprint a different level of access, or different procedures for access, to the Midwest ISO's data than a state commission in the PJM footprint would have with respect to PJM could produce a result that would hinder coordinated RTO operations. We therefore deny the OMS's request for rehearing on this point.

3. Challenges to Authorized Agency Information Requests

a. Request for Rehearing

29. The OMS argues, as it did in its March 11 comments, that the specifications in the tariff and non-disclosure agreement for keeping data confidential provide useful due process protections that do not unduly interfere with state commissions' ability to do their jobs. By contrast, the OMS believes that, if market participants had unfettered ability to challenge information requests, it would cause interference and unduly burden the states. It adds that if state commissions must bear all the costs of responding to a challenge, they will likely either concede or not submit information requests in the first place due to budget constraints. As a result, the OMS worries that the public interest, particularly retail customers' interests, would be damaged.

30. The OMS indicates that in its March 11 comments, it stated that state commissions, market participants and the Midwest ISO might be able to agree on language for a limited opportunity to challenge requests for confidential data. It notes that it suggested avenues for such agreement that were grounded in current provisions of the Midwest ISO tariff, and added that it was open to other language that would provide affected market participants an opportunity to challenge a reasonable range of state commission information requests. The OMS notes that the Commission seeks "a balanced weighing of the interests and needs of the parties" on this issue,²⁵ but argues that the Commission decided to ignore the compromise efforts and require the Midwest ISO to adopt a challenge provision like PJM's. It seeks rehearing of this decision, which it says does not strike a reasonable balance on this issue.

²⁴ *Cf. Alabama Elec. Coop. v. FERC*, 684 F.2d 20, 29 (D.C. Cir. 1982) (addressing different rates for different customer classes, and when such differences may be unduly discriminatory).

²⁵ OMS Request for Rehearing at 7 (quoting Offer of Proof Order at P 111).

b. Discussion

31. We note at the outset that the Midwest ISO and the OMS proposed nearly opposite options for challenging state commissions' access to confidential wholesale market data. The Midwest ISO would permit itself or an Affected Participant to challenge a state commission's data request,²⁶ while the OMS indicated that it would rather not allow any challenges.²⁷ The OMS argued in its March 11 comments, as it does here, that permitting unlimited challenges would be problematic for state commissions.²⁸ The arguments closely mirror those made with respect to PJM's challenge provision.²⁹

32. As we stated in the Offer of Proof Order, the Commission must consider the needs of both state commissions and market participants. The OMS's request for rehearing has raised no new, more persuasive arguments with regard to permitting challenges to requests for confidential information. Therefore, we again find that it is just and reasonable to require the Midwest ISO to propose a challenge provision that adheres to the precedent set in the PJM Confidentiality Order. The relevant PJM provision permits PJM or an Affected Member – in PJM parlance, a PJM member that provides confidential information to PJM and whose confidential information is requested by, or disclosed to, an authorized person under a non-disclosure agreement³⁰ – to object to a request for information, and provides for an opportunity for the parties to confer, and for proceedings before the Commission.³¹ We find that this appropriately balances the states' need for access to data with market participants' interest in protecting their confidential information.

²⁶ See Offer of Proof Order at P 102.

²⁷ See *id.* at P 106.

²⁸ Comments of the OMS at 4-7 (Mar. 11, 2005).

²⁹ See *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,322 at P 41-42 (2004) (PJM Confidentiality Order).

³⁰ PJM Interconnection, L.L.C. Third Revised Rate Schedule FERC No. 24, section 1.2A, Fourth Revised Sheet No. 18.

³¹ See *id.* at section 18.17.4.c.iii, Original Sheet No. 61D; PJM Confidentiality Order at P 41-43.

4. Discussion of Confidential Information Among Authorized Requestors Sponsored by Different Authorized Agencies

a. Request for Rehearing

33. The OMS challenges the Commission's rejection of a proposed tariff section, section 38.9.4.6, which would have allowed Authorized Requestors from different Authorized Agencies 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, provided they notified the Midwest ISO and the Midwest ISO confirmed the status of the Authorized Requestors that would be involved in the discussion.

34. The OMS agrees with the Commission that data confidentiality must be taken seriously, that it is important to maintain a chain of custody over the information, and that the Midwest ISO should always be able to ascertain the whereabouts of confidential information. The OMS argues that this is why, in its comments, it proposed that the provision be modified to require the Midwest ISO to notify any affected market participant of the Authorized Requestors' plans to discuss its confidential information. The OMS states that the context of discussion it envisioned is such that the essence of confidential information, or the implications of such information, does not require each participant to possess the information; rather, the discussions would divulge the meaning of the information without actually divulging the information itself. The OMS argues that requiring each Authorized Requestor to have confidential information in order for the meaning or essence of that information to be discussed will result in a proliferation of information requests that increases administrative burdens on state agencies, market participants and the Midwest ISO. It argues that if the Midwest ISO were to revise section 38.9.4.6 as the OMS proposed, then the Commission's concerns about maintaining a chain of custody and market participants' ability to track which Authorized Requestors have access to their information would be addressed, and there would be fewer administrative duties and risks associated with a proliferation of information requests.

35. The OMS believes that it is contradictory for the Commission to state that the Midwest ISO's proposal (which does not require Authorized Requestors from different agencies to have the same information) may have merit, yet require that Authorized Requestors from different Authorized Agencies discuss information only after they have both received it from the Midwest ISO. The OMS asks the Commission to clarify paragraph 99 of the Offer of Proof Order by deleting the fifth sentence of the paragraph and directing the Midwest ISO to adopt the OMS's proposed language to permit limited discussion among Authorized Requestors when the affected market participant has been provided with notice.

b. Discussion

36. We will not rehear the Commission's decision to reject proposed tariff section 38.9.4.6. But the OMS's arguments suggest that further explanation of the Commission's perspective on the proposal may be of use to the parties in the event that they would like to propose a revised provision in the future. To that end, we will provide a more detailed explanation of our views on the proposal.

37. The Commission indeed believes that the proposed section 38.9.4.6 may have merit; however, there is not enough information in the record for us to make an informed decision as to whether the proposal is just and reasonable. The OMS explained that state commissions will discuss confidential information with one another:

Often similar proceedings are occurring before adjoining state commissions involving the same or similar confidential information/data. In such instances, and, with the knowledge of those entities providing the confidential data, the state commission staffs may be in contact with each other regarding those proceedings and data, with no disclosure. We are talking about decades of practice, involving hundreds of proceedings and hundreds of individuals.³²

As the Commission noted in the Offer of Proof Order, it seemed likely that the public benefits of permitting Authorized Requestors sponsored by different Authorized Agencies to discuss confidential data may be substantial.³³ The OMS did not explain, however, what state regulators may discuss, and when, and why. This made it difficult for us to determine what practices are just and reasonable.

38. The OMS now explains that the context of discussion it envisions is such that the "discussions would divulge the meaning of the information without actually divulging the information itself."³⁴ As such, it would not be necessary for each participant in the discussions to have a copy of the confidential information at issue. If that is the case, the Commission understands that it would relieve the administrative burden on the state agencies in question if they were not required to present formal requests for data, but only to notify the Midwest ISO of a discussion that they planned. It would also ease the

³² Offer of Proof at 30.

³³ Offer of Proof Order at P 98.

³⁴ OMS Request for Rehearing at 8.

administrative burden on the Midwest ISO if the organization was required only to certify that the parties to the planned discussion are all Authorized Requestors and to notify the Affected Participants in question that the discussion is going to take place, without needing to produce multiple copies of the information in question.

39. The Commission is, nonetheless, left with questions as to how the procedure would be administered. It is not clear from the Midwest ISO's February 17 informational filing, or the OMS's comments thereupon: (1) how much notice state agencies would be required to give the Midwest ISO prior to discussing confidential information; (2) whether Affected Participants will be given an opportunity to object to the discussions, as they must be given an opportunity to object to written information requests; and (3) what procedure would be used to address an Affected Participant's objection. Furthermore, the language that the Midwest ISO proposed on February 17, 2005 for section 38.9.4.6 does not contemplate discussing only the essence of confidential information; it states that "Authorized Requestors who are parties to Non-Disclosure Agreements may discuss confidential information with each other"³⁵ This language is considerably broader than that of section 38.9.4.4, which permits the Midwest ISO and the IMM to make limited oral disclosures to Authorized Requestors for the purpose of enabling the Authorized Requestors to determine whether it is appropriate for them to make information requests of the Midwest ISO or the IMM.

40. We also remain concerned that it is unreasonable to permit state commissions that have jurisdictional utilities in both PJM and the Midwest ISO to have access to different quantities of data from the different utilities in their (and also compared to other Midwest ISO) states.³⁶ As the Commission noted in the Offer of Proof Order, regulators in seven states³⁷ would be in this situation if there were significant differences between the RTOs' data confidentiality policies. We continue to find that is unduly discriminatory to subject public utilities to different levels of state commission access to confidential data based solely on the utilities' RTO membership. As such, before the Midwest ISO puts forward any revised proposal that would permit Authorized Requestors to discuss confidential information in the manner the OMS favors, it should work with PJM to ensure that the two RTOs' policies remain in harmony.

³⁵ Section 38.9.4.6.

³⁶ *See* Offer of Proof Order at P 66.

³⁷ The Commission named only six states in the Offer of Proof Order; it inadvertently omitted Virginia from the list of states that have both PJM members and Midwest ISO members within its borders.

5. Alternative Processes for Obtaining Information

a. Request for Rehearing

41. The OMS argues that the Offer of Proof Order creates the consequence that state commissions can access confidential Midwest ISO data only through the Midwest ISO tariff. It states that requiring the Midwest ISO to add the words “only” and “solely” to tariff section 38.9.4.1 would prohibit the Midwest ISO from releasing information to a state commission if the affected market participant had agreed to the release. As such, the OMS says, the integrity of the voluntary process, which market participants and state regulators now have available to them, would be lost. The OMS argues that this would go beyond what the Commission authorized in the PJM Confidentiality Order.

42. The OMS states that it does not object to alternative language that PSEG Energy Resources & Trade LLC (PSEG) proposed in its comments on the Offer of Proof. That language would provide that:

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

The OMS argues, however, that deleting the words “only” and “solely” from section 38.9.4.1 would be a much simpler way to achieve the same objective as PSEG’s language. It therefore urges the Commission to clarify the Offer of Proof Order and adopt either PSEG’s language or the OMS’s recommendation to delete the words “only” and “solely.”

b. Discussion

43. Upon further review, we agree with the OMS that it is acceptable for the Midwest ISO to release confidential wholesale market data to a state regulator on a voluntary basis, if the affected market participant voluntarily agrees to the release. The

Commission now better understands when the Midwest ISO might voluntarily release information. Accordingly, we will grant rehearing of our prior decision on this point.

44. We continue to agree with PSEG that deleting the words “only” and “solely” from section 38.9.4.1 could broaden the provision to the extent of vitiating its protection.³⁸ We will not require the Midwest ISO to delete the words, but we direct it to make a compliance filing, within 60 days of the date of this order, that adds PSEG’s proposed language at the beginning of section 38.9.4.1.

6. Receipt of Confidential Information by Employees of State Agencies Other Than Public Utilities Commissions

a. Request for Rehearing

45. The OMS expresses concern that paragraph 76 of the Offer of Proof Order will prevent employees of state agencies that are not public utilities commissions from receiving confidential wholesale market information. It takes issue with the Commission’s finding that it is illogical to permit employees of non-public utilities commission state agencies to receive confidential information if the employing agency itself cannot be an Authorized Agency.

46. The OMS notes that the definition of Authorized Agency that the Midwest ISO proposed in its February 17 filing eliminates public utilities commission-type agencies, leaving just the OMS and state commissions themselves in the definition of Authorized Agency. This provision, states the OMS, was the result of a compromise that removed non-public utilities commission state agencies as Authorized Agencies, with the understanding that an employee of such a state agency that performs public utilities commission-like functions still could become an Authorized Requestor through the same state’s public utilities commission. The order, however, leaves public utilities commission-type agencies in the OMS with no clear course of action to receive confidential information that they need to meet their statutory obligations. The OMS requests that the Commission restore the language of section 1.15B or direct the Midwest ISO to modify its definition of Authorized Agency to cover public utilities commission-type agencies that are OMS members.

³⁸ Offer of Proof Order at P 88.

b. Discussion

47. We appreciate the OMS's explanation that the apparent inconsistency between the definitions of "Authorized Agency" and "Authorized Requestor" was the result of a compromise. This was not clear to the Commission from the record prior to the Offer of Proof Order.

48. We do not object to the disclosure of confidential wholesale market information to employees of state agencies that are not public utilities commissions, if the employees' agencies "regulate[] the distribution or supply of electricity to retail customers or [are] legally charged with monitoring the operation of wholesale or retail markets serving retail supplies or customers within its State."³⁹ And we do not think it is critical that the definition of Authorized Agency precisely match that of PJM's, as state agency missions may vary. We have already recognized that state commissions may be legally required to share data with other state agencies,⁴⁰ and in that circumstance it is logical to permit agencies that are charged with regulatory responsibilities to have access to confidential information. It is not apparent from the tariff provisions that this was the parties' intent, however. We will grant rehearing and require changes to the definitions to make this clear.

49. We will require that an Authorized Requestor's own employer, rather than a state public utilities commission, sponsor an employee's application to become an Authorized Requestor. The employee's agency will be the most familiar with its own needs, and with the job descriptions of its staff members, and therefore is in the best position to select potential Authorized Requestors. We therefore grant rehearing and require the Midwest ISO to restore the last phrase of section 1.15A (which is section 1.14 A in the Midwest ISO's compliance filing) which was struck out of the draft provisions it filed on February 17: ". . . iii. a state agency that has both access to documents in the possession of a state public utility commission pursuant to state statute and the ability to protect those documents in accordance with the Non Disclosure Agreement."

³⁹ Section 1.15A.

⁴⁰ Offer of Proof Order at P 95.

7. **State Commissions' Regulatory Roles Affecting Wholesale Markets**

a. **Background**

50. The OMS states that the Commission misunderstood the OMS's statement in the Offer of Proof that, in light of their different roles, "state commissions and FERC are truly co-regulators; each affecting wholesale markets from their separate industry roles."⁴¹ The OMS indicates that its statement was not intended to imply that it sought a role in co-regulating wholesale sales, which are subject to the Commission's exclusive jurisdiction. Rather, the OMS says, state commissions are the exclusive regulators of "purchase for resale" transactions, when the wholesale purchaser is a retail utility. Therefore, the OMS says, with respect to wholesale markets, the Commission regulates the sellers, while state commissions regulate the buyers. According to the OMS, because each agency regulates one portion of the same wholesale transaction, both the Commission and the state commissions have a role with respect to wholesale markets and, that sense, act as co-regulators.

51. The OMS reiterates that it understands the different responsibilities of the Commission and the state commissions with respect to wholesale energy markets. It states that it has no desire to challenge those responsibilities, but that it wants to work with the Commission to ensure that those markets work as efficiently as possible. To that end, the OMS says, its use of the term "co-regulators" was meant to help illustrate the importance of granting state commissions access to confidential wholesale market information in order to help them carry out their legislative mandates and assist the Commission in competitive market goals.

52. Next, the OMS points out that no matter how the state-federal relationship is characterized, the non-disclosure agreement indicates that the Authorized Requestor "shall use the Confidential Information solely for the purpose of assisting an Authorized Agency in discharging its duty, responsibility or authority in fulfillment of which it authorized Authorized Requestors to make requests for Confidential Information pursuant to this Agreement, *and for no other purpose.*"⁴² It asks the Commission to: (1) clarify its statements in paragraph 41 of the Offer of Proof Order; and (2) revise any conclusions that the Commission may have reached based on a misperception of the

⁴¹ OMS Request for Rehearing at 11 (quoting Offer of Proof at 33).

⁴² *Id.* at 12 (quoting Confidentiality Agreement at § 2.4.4) (emphasis added).

OMS's intent in using the term "co-regulators" or the purpose to which state commissions intend to put the information received from the Midwest ISO.

b. Discussion

53. As the Commission stated in the Offer of Proof Order, it is evident that state commissions are concerned with the proper regulation of wholesale markets.⁴³ The Commission is charged with regulating public utility sales for resale in interstate commerce; state commissions regulate purchases for resale to retail customers, as the OMS notes. The Commission did not intend to change this relationship.

54. We decline to revisit the Offer of Proof Order's conclusions regarding the OMS's use of the term "co-regulators," however. Although the OMS has now explained what it meant by that term in greater detail in its rehearing request, the Commission continues to find that that term could be misconstrued in the future.

55. We also decline to grant rehearing of any other aspect of the Offer of Proof Order based on our now-better understanding of the OMS's use of the term "co-regulators" or the use to which state commissions plan to put confidential wholesale market data. Our improved understanding does not require or warrant any change in the analysis laid out in the Offer of Proof Order. What we stated before remains equally valid today. As previously stated, the OMS does not believe that state commissions share jurisdiction with the Commission, nor do we. As for how the state commissions may use confidential wholesale market data, the OMS provided an exhaustive description in the Offer of Proof of the state commissions' potential uses for the data, and the Commission summarized that description in the Offer of Proof Order.⁴⁴ The Commission further noted in the Offer of Proof Order that "[i]f the states have wholesale market data, they may have an array of uses for it that may have potential benefits for the public."⁴⁵ The Commission did not mean to expand upon, or otherwise interpret, the OMS's own statements as to how it would use the data.

⁴³ Offer of Proof Order at P 41.

⁴⁴ *Id.* at P 26 (citing Offer of Proof at 33-34).

⁴⁵ *Id.* at P 42.

8. The OMS's Burden of Proof

a. Background

56. The OMS challenges the Commission's statement in the Offer of Proof Order that:

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 those benefits.⁴⁶

The OMS states that the Offer of Proof Order does not explain why the Midwest ISO's wish to grant data access in the future depends on whether the states might have used similar data in the past. It also states that, no matter how the OMS might respond to the argument, it cannot cite how it has used confidential market data to which it has never had access.

57. Next, the OMS states that it does not seek "unlimited access" to confidential information; rather, it limits the types of data to those listed in the Offer of Proof and the potential recipients to those who committed to confidentiality. The OMS requests that the Commission revise the Offer of Proof Order to remove the implication that the OMS failed to meet its burden of proof because it did not cite specific instances in which it used data that it cannot access. It also asks the Commission to revise the Offer of Proof Order to remove inaccurate indications that the OMS or state commissions seek unlimited access to confidential wholesale market data. And finally, the OMS requests that the Commission revisit any conclusions that it drew based on inaccurate premises concerning either of these items.

b. Discussion

58. Although the OMS's Offer of Proof, and the state commissions' individual offers of proof, described how states could keep data confidential, they did not explain what data state commissions could obtain under state law. The OMS had said that state

⁴⁶ *Id.*

commissions could access *some* data under state law.⁴⁷ It had also alluded to voluntary disclosure procedures without describing how individual state agencies might access wholesale market data through the Midwest ISO or the IMM.⁴⁸ As such, it was not unreasonable for the Commission to have believed that states could have accessed wholesale market data in the past, or to express an interest in how the states had used that data in the past. The Commission did not require (and neither intended to require nor expect) the OMS to explain how state agencies had used data that had never previously been available to them.

59. As to whether the OMS seeks “unlimited” access to data, we find that the Offer of Proof was not specific about what types of data states might seek under new data disclosure provisions. The OMS noted that “the boundaries of state concern encompass all inputs to the cost of retail electricity,” including wholesale prices and:

1. Fuel supply: all influences on the price, quantity, quality, coal, oil, uranium, gas, renewable sources
2. Technology: all influences on the technology used to convert fuel into electricity, and to transport electricity from generation to loads.
3. Pollution regulation: all influences on the types of pollutants, the regulation of those pollutants and the cost of complying with that regulation.⁴⁹

The OMS further stated that without data on those activities, as well as data on the operation of regional wholesale electricity markets, states cannot assure that their retail utilities are operating efficiently in those markets.⁵⁰

⁴⁷ “The universe of wholesale market data potentially available to the states from [the Midwest ISO] is a direct substitute for data states would access if there were no wholesale market. . . . Data that would have been state-accessible prior to unbundling should not become state-inaccessible after unbundling. . . .” Offer of Proof at 15.

⁴⁸ *See* Comments of the OMS at 9 (Mar. 11, 2005) (stating that if the tariff provisions were worded a certain way, the Midwest ISO could release confidential data to a state commission if the market participant voluntarily agreed to the release).

⁴⁹ Offer of Proof at 15.

⁵⁰ *Id.*

60. While the OMS's description does not seek out (nor could the Midwest ISO provide) a literally unlimited scope of data, the Offer of Proof did not delve into what "all influences" might mean – and "all influences" could be read quite broadly. We therefore clarify that, as we understand the Offer of Proof, the OMS seeks access to a *broad*, but not literally unlimited, spectrum of wholesale market data.

61. We deny rehearing, however, with regard to the Commission's statement in the Offer of Proof Order that the OMS had not explained when it, or any of its member states, had actually used wholesale market data. Contrary to the OMS's arguments on rehearing, the Commission did not require the OMS to provide such examples, or state that the OMS had not met its burden of proof by failing to do so. Rather, the Commission acknowledged that, while the OMS had not described when it had used confidential wholesale market data to bring about public benefits, "[i]f the states have wholesale market data, they may have an array of uses for it that may have potential benefits for the public."⁵¹ If the Commission had required (or wanted) specific examples, it would not have found that there were potential benefits to providing state agencies with wholesale market data. It instead used the information it had from the OMS, and from the public utilities that filed comments, to help it "strike the appropriate balance between disclosing wholesale market data to states and protecting its confidential nature."⁵² This included requiring the Midwest ISO to file draft tariff provisions that will grant the OMS and its members states increased access to wholesale market data.

9. Potential Negative Effects of Disclosing Data to State Agencies

a. Background

62. The OMS argues that the Commission did not support its statements that unauthorized disclosure of confidential wholesale market information was perhaps not "the only source of potential damage to utilities if state commissions have access" to it, and that it was "appropriate to take precautions to minimize the risk of harm that could result from making disclosures of data to state commissions."⁵³ The OMS notes that state commissions have possessed and handled confidential information for as long as there have been state commissions, and that their record speaks for itself. Accordingly,

⁵¹ Offer of Proof Order at P 42.

⁵² *Id.* at P 43.

⁵³ OMS Request for Rehearing at 13-14 (quoting Offer of Proof Order at P 53).

the OMS asks the Commission to revisit its statements, arguing that the Commission, by suggesting that state commissions' mere possession of data can harm utilities, undermines the concept of state commission access to confidential information. The OMS also asks the Commission to revisit any conclusions it may have reached in the Offer of Proof Order based on these concepts.

b. Discussion

63. We clarify that state commissions' possession of confidential data should not harm utilities or energy markets. It is true that the Commission indicated that unauthorized disclosure of data may not be "the only source of potential damage to utilities" if state commissions have access to confidential wholesale market information.⁵⁴ But that statement was precautionary, and made in response to a scenario that the OMS offered – which is that there is some theoretical risk that granting states overbroad access to data may change merchant generators' economic incentives:

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.⁵⁵

As for the Commission's statement that it is appropriate to "minimize the risk of harm that could result from making disclosures of data to state commissions," that statement relates back to the Commission's discussion of unauthorized disclosure of wholesale market information, and the theoretical risk the OMS highlighted. It does not suggest – nor did the Commission intend to suggest – that state commissions' history with respect to confidential information causes us concern, or that state commissions' mere possession of confidential information may be harmful.

⁵⁴ Offer of Proof Order at P 53.

⁵⁵ *Id.* (emphasis added).

10. Offers of Proof from Individual States

a. Background

64. The OMS states that the Commission erred when it instructed the Midwest ISO to limit disclosure of confidential market data to states that filed an offer of proof. The OMS notes that its Offer of Proof contained offers of proof from 13 of the 14 OMS member states, and states that the Commission did not provide a justification or rationale for imposing this additional requirement on the states. The omission, says the OMS, undermines the OMS's voluntary offer to make an Offer of Proof on behalf of the states.

65. According to the OMS, the non-disclosure agreement and the tariff contain terms for state agency access to confidential data. If a state agency cannot commit to satisfying the terms of the non-disclosure agreement, the OMS says, it will not sign it or receive access to data under the Midwest ISO's tariff process. The OMS argues that for the Commission to impose an additional requirement for an offer of proof does not strike a proper balance between state commissions' needs and market participants' interests, and it exceeds the Commission's requirements for PJM. Accordingly, the OMS requests rehearing of this decision and asks the Commission to delete this requirement.

b. Discussion

66. The TEMT II Order noted that the March 31 Filing did not explain how the OMS and the states would keep wholesale market information confidential.⁵⁶ The OMS then volunteered "to make an offer of proof that (1) state commissions have the statutory authority to safeguard confidential data"⁵⁷ Its Offer of Proof included additional offers of proof from individual states that detailed state statutes that grant each state commission access to, or prohibit disclosure of, confidential business data.⁵⁸

67. The individual states' additional offers of proof responded to a concern that there was insufficient evidence in the record as to how confidential information would be protected. The Commission did not intend, in the Offer of Proof Order, to impose any

⁵⁶ See TEMT II Order at P 561.

⁵⁷ Confidentiality Order at P 9.

⁵⁸ Offer of Proof, Appendix C. The OMS provided information from regulators in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin.

further filing requirements. Rather, limiting data disclosure to states that filed an offer of proof was intended to confirm the OMS's voluntary effort to provide further information to assist the Commission in its decision-making process.

11. Statements in Paragraph 67 of the Offer of Proof Order

a. Background

68. The OMS raises three questions regarding the Commission's statement in the Offer of Proof order that:

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.⁵⁹

First, the OMS states that it does not understand the Commission's statement in the Offer of Proof Order that it "cannot cede jurisdiction to the state commissions." It states that this phrase has no antecedent, and that, in any event, the OMS never asked the Commission to cede jurisdiction to the state commissions.

69. Second, the OMS argues that whether or not having access to confidential data will change the way state commissions do business is not relevant to the legal question of whether the Midwest ISO's provision for state regulator access to wholesale market data is just and reasonable.

70. Third, the OMS is concerned that the Commission is under the impression that the state commissions are participating in this case in order to gain another avenue of access to confidential information that is already available to them. The OMS repeats its statement in the Offer of Proof that "at least some retail states lack the statutory authority to obtain generation data from deregulated generation affiliates of the distribution utilities . . . [and] also usually lack authority to obtain data from unaffiliated generating companies,"⁶⁰ and argues that it is inaccurate for the Commission to believe that state commissions can access this data under state law. The OMS requests that the Commission withdraw this statement from the paragraph 67 of the Offer of Proof Order

⁵⁹ Offer of Proof Order at P 67.

⁶⁰ OMS Request for Rehearing at 15 (quoting Offer of Proof at 17).

and revisit any conclusions that it may have reached based on misunderstanding the facts in that paragraph.

b. Discussion

71. The paragraph the OMS discusses arose in the context of differences between the Midwest ISO's data confidentiality policy and PJM's data confidentiality policy, and whether the policies to be adopted for the Midwest ISO were just and reasonable. The Commission approved state commission access to data, and did not intend to change the relationship between itself and the states' respective regulatory authorities.

72. As to expanded data access affecting the way state commissions do business, the Commission was merely making an observation; we did not intend to suggest that any such effects were relevant to the question of whether state commissions should have access to confidential information.

73. Finally, we grant rehearing with regard to the phrase "or even all," as it is apparent that all information at issue here is not currently available to all states.

C. The Midwest ISO's Compliance Filing

1. Background

74. The TEMT II Order accepted some tariff provisions on the treatment of confidential information, but rejected the proposed provisions governing the access of state regulatory commissions to confidential information. Instead, the TEMT II Order directed the Midwest ISO to file another proposal regarding state access to confidential information based on the PJM model. As described above, the OMS requested, and was granted, time to make an offer of proof that it said would allay the Commission's concerns regarding the Midwest ISO's original proposal for state access to confidential information.

75. On February 11, 2005, the OMS filed its Offer of Proof with the Commission, with several of the issues unresolved. Then, on February 17, 2005, the Midwest ISO filed an alternative proposal that sought to bridge the divergent positions of the parties on the unresolved issues. In the Offer of Proof Order, the Commission accepted substantial portions of the Midwest ISO's alternative proposal for state access, and required the Midwest ISO to file its provisions as tariff sheets, subject to modifications.

76. The Midwest ISO states that its August 19 compliance filing addresses the confidentiality-related compliance requirements of both the Offer of Proof Order and the

TEMT II Order. The present filing also makes several typographical or clarifying changes to relevant portions of the TEMT.

2. The Midwest ISO's Filing

77. The Midwest ISO states that it has deleted the original state access provisions that were filed on March 31, 2004. It adds that it has included provisions limiting disclosure of confidential data to states that have filed an offer of proof in these proceedings.

78. However, the Midwest ISO states that it “has left the door open for any other states to file an offer of proof.”⁶¹ Specifically, the Midwest ISO has revised section 38.9.4.1.b.i to provide that states that have filed offers of proof in these proceedings have made the necessary *prima facie* showing of the statutory authority, obligation, duty or responsibility required before a state agency can be eligible to become an Authorized Agency. Regarding the OMS, the Midwest ISO states that it has retained the requirement in section 38.9.4.1.b.i that there be a Commission order prohibiting the OMS from making any unauthorized disclosures. The Midwest ISO states that it has retained this requirement regarding the OMS because the Commission previously approved PJM's more general requirement. Moreover, according to the Midwest ISO, the Offer of Proof Order did not explicitly direct it to remove such a requirement with regard to the OMS. Instead, the Midwest ISO cites the Offer of Proof Order, which states “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 (NDA). Because we will require the Midwest ISO to formally file the tariff language, as revised, and a revised NDA, we decline to make the required statement in this order.”⁶²

79. The Midwest ISO states that it revised the definition of Authorized Requestors in section 1.15 to reflect the Commission's directive to clarify that Authorized Requestors do not include the employees of state agencies that have access to documents in the custody of the same state's public utility commission.

80. The Midwest ISO states that it incorporated several revisions to section 38.9.4 and added new proposed subsections to comply with directives from the Offer of Proof Order. First, the Midwest ISO submitted a modified section 38.9.4.1.c.i to clarify that the prohibition against Authorized Requestors' disclosure of confidential information would

⁶¹ Midwest ISO Transmittal Letter at 4 (Aug. 19, 2005).

⁶² Offer of Proof Order at P 93 n.32.

be subject to any applicable exceptions under state laws requiring or permitting such disclosure. Second, the Midwest ISO states that it revised section 38.9.4.1.c.vii to “fine-tune” the placement of language regarding the requirement of a written copy of an Authorized Requestor’s information. Third, the Midwest ISO states that it added the word “practices” to the proposed section 38.9.4.1.a.iv of the tariff and to section 2.2.b of the non-disclosure agreement, as well as to other solitary references to “procedures” in the proposed tariff and non-disclosure agreement provisions. In addition, the Midwest ISO states that it revised section 38.9.4.1.a.iv to add the word “adequate” to all references to practices and procedures in the proposed tariff and non-disclosure agreement provisions.

81. Fourth, the Midwest ISO submitted a revision suggested by the OMS to proposed section 38.9.4.1.c.ii, by including a cross-reference to section 38.9.4.1.d, regarding the terms under which Authorized Agencies and Authorized Requestors may be required or expected to defend against disclosure of confidential information to third parties seeking such disclosure. Fifth, the Midwest ISO states that it revised section 38.9.4.2 to add e-mail addresses and phone numbers of Authorized Requestors to the information to be included in the schedule of Authorized Requestors that will be posted on the Midwest ISO’s website. Sixth, the Midwest ISO states that it incorporated into the tariff a proposed section 38.9.4.5, with a provision designated as subsection (e), which incorporates fast-track processing regarding objections to information requests. It also indicates that, where there is an objection, the requested data shall not be provided within five business days, which would otherwise be required by section 38.9.4.5.f. Section 38.9.4.5.d also had new language added to clarify that the disclosure period will be five business days or any longer period stated in the information request.

82. Seventh, the Midwest ISO states that it revised section 38.9.4.6 to allow Authorized Requestors to discuss confidential information only after they have received such information from the Midwest ISO, and provided that they identify the other Authorized Requestors with whom the confidential information will be discussed. Eighth, the Midwest ISO states that it has clarified the procedures when there is a written notice of a breach of the non-disclosure agreement by submitting a proposed section 38.9.4.7.b. When a breach occurs, the Midwest ISO will terminate the non-disclosure agreement and require the Authorized Requestor to return the confidential information to the Midwest ISO. In addition, the Midwest ISO has clarified the corresponding section 38.9.4.7(a) of the tariff by adding conditions to justify an Authorized Requestor’s resumption of data access, to avoid the implication that any one of the factors listed is sufficient to warrant resumption of access.

83. The Midwest ISO states that “as required by the Offer of Proof Order” it has incorporated the non-disclosure agreement into the tariff as a new Attachment EE and revised the non-disclosure agreement’s sixth recital paragraph by replacing “may” with

“shall” in regard to the confidential information the Midwest ISO and IMM are required to provide whenever the terms of disclosure are met.

84. The Midwest ISO also submits that it has, in consultation with the OMS, made revisions to incorporate “minor tariff changes” that the OMS first proposed in its March 11, 2005 comments. Those changes include: (1) revising the definition of Authorized Agency in section 1.14A of the tariff to add the phrase “or any successor organization”; (2) revising the definition of Authorized Requestor in section 1.15 of the tariff to add references to state public utility commissioners and staff, as well as “regular employees,”⁶³ to the list of persons who may qualify for Authorized Requestor status; (3) revising section 38.9.4 and the non-disclosure agreement to uniformly use the adjective “unauthorized” to describe any release or disclosure of confidential information; (4) revising proposed section 38.9.4.6 to provide that the Midwest ISO will notify affected market participants regarding any planned discussion of confidential information between or among Authorized Requestors.

85. The Midwest ISO states that it has revised the tariff to comply with directives of both the Offer of Proof Order and the TEMT II Order regarding numerous directives about the process to designate information as “competitively sensitive.” These revisions include: (1) adopting a single definition of the term “confidential information”; (2) incorporating references to trade secrets and “competitively sensitive” information in the definition of confidential information; (3) providing a single definition of “competitively sensitive information”; (4) providing an opportunity for third parties to challenge the designation of information as “competitively sensitive” or otherwise confidential; (5) reflected such changes in the tariff’s form Non-Disclosure and Confidentiality Agreement (Attachment Z); and (6) developing appropriate procedures for the six-month delay in any release of “masked” bid and offer data.

86. The Midwest ISO requests an effective date of August 20, 2005, for the above-mentioned tariff revisions.

3. Comments

87. The OMS notes that the Offer of Proof Order directed the Midwest ISO to confer with it prior to the Midwest ISO submitting its August 19 compliance filing. The OMS states that, because of those discussions, it endorses the tariff and non-disclosure agreement revisions regarding state access to confidential information, with only a few minor concerns for clarification.

⁶³ Midwest ISO Transmittal Letter at 8 (Aug. 19, 2005).

88. The OMS states that it found inconsistencies in the Midwest ISO's revisions to the tariff in sections 38.9.1 and 54.4, and the information in "Draft Procedures for Requests for Information and Challenges," which the Midwest ISO submitted as Tab C to the August 19 compliance filing. The OMS is unclear if the language submitted as Tab C is intended to be the vehicle that state commissions that are Authorized Requestors, state commissions that have not signed a non-disclosure agreement, market participants and all other third parties use to contest a designation of confidentiality. The OMS is also unsure whether the Tab C language is intended to become part of the referenced business practices manual. The OMS notes that the Midwest ISO states in its transmittal letter that the material in Tab C is associated with the challenge language that it proposes to add to the tariff, but footnote 1 of Tab C states that the procedure therein is reserved for parties other than the Commission or Authorized Requestors. The OMS suggests that, if the Commission directs the Midwest ISO to resolve this ambiguity by making the Tab C provisions apply to challenges by state commissions, additional stakeholder consideration of these procedures for 30 or 45 days would be appropriate.

89. The OMS is also concerned that, under the current language, state commissions that do not execute the non-disclosure agreement in Attachment EE may not make information requests, and, therefore, are ineligible to challenge confidentiality designations. The OMS asserts that certain state commissions may not be able to sign the non-disclosure agreement in Attachment EE. The OMS also asserts that information may be improperly designated as confidential, and then state commissions that do not complete Attachment EE will have no right to ask for the information and no right to challenge the improper designation.

90. The OMS suggests revisions that it thinks will better achieve the intent expressed in the transmittal letter. The OMS suggests that the caption of section 38.9.1 should be revised to read "Access by Market Participants and Others," as opposed to the current title "Market Participant Access." The OMS also recommends that the Commission direct the Midwest ISO to revise section 38.9.4.5.f to state:

If the Affected Participant, the Transmission Provider or the IMM considers the information sought to be Confidential Information, State public utility commissioners, State commission staff and attorneys representing an Authorized Agency shall be provided an opportunity to challenge the designation or classification of the requested information as Confidential Information.

The OMS asserts that the suggested revision avoids the use of the term "Information Request" which has unwanted implications in a challenge context, and it replaces the term "Authorized Requestor" with the list of persons entitled to become an Authorized Requestor.

91. The OMS states that, because it does not view the tariff revisions as making state commissions subject to the procedures in Tab C, it does not have substantive comments on the Tab C procedures. However, the OMS requests the Commission to not endorse the procedures in Tab C because the OMS has not had time to thoroughly evaluate them, and the OMS would like to have a continued opportunity to discuss and resolve issues with the Midwest ISO.

92. The OMS states that, according to the Midwest ISO's February 17, 2005 informational filing, a breach of confidential information would be considered to have occurred when both the Midwest ISO and the Authorized Agency agreed or if the Commission ruled that a breach had occurred. However, the OMS notes that section 3.2 of the non-disclosure agreement (in the new Attachment EE) provides that the Midwest ISO or the IMM may determine on its own that a breach has occurred. The OMS states that the Offer of Proof Order did not direct the Midwest ISO to change the breach provision, and the OMS recommends that section 3.2 of the non-disclosure agreement in Attachment EE be modified to make it consistent with section 38.9.4.7.b of the tariff.

93. The OMS also states that the revised definition of "Confidential Information" in section 1.37 of Module A is overly broad. The OMS states that the inclusion of the words "or information" in the second line of the definition expands confidential information to include nearly anything. The OMS is also concerned about including the procedural protection of initial designation in the definition of confidential information without a process to reverse that initial treatment. The OMS asserts that an entity's designation of information as confidential should be subject to the challenge procedures of this tariff. Accordingly, the OMS proposes a clarifying phrase to refer to a determination following the challenge process and moving the word "or" in the definition of "Confidential Information."

94. WPS Resources generally found the Midwest ISO's request for information and confidential information challenge procedures to be confusing, lacking transparency, and providing the Midwest ISO and the IMM unlimited discretion without satisfying the requirements of 18 C.F.R. § 358.5 (Non-discrimination requirements for Transmission Providers).⁶⁴ Moreover, WPS Resources thinks the provisions in the Midwest ISO's filing will exclude market participants, whose information is not currently being requested or challenged, from participating in or even receiving notification of information requests or confidential status challenges, when those same market

⁶⁴ We note that WPS Resources filed a supplemental protest that recognizes that the standards of conduct requirements of 18 C.F.R. § 385.5 do not apply to RTOs, such as the Midwest ISO.

participants may be subject to the outcome of these non-public proceedings later when another party requests access to or challenges the confidentiality status of their information. Finally, WPS Resources protests the Midwest ISO's proposal to put the information request and challenge procedures in its business practices manuals, rather than in the tariff, which WPS Resources argues is a violation of Federal Power Act (FPA) section 205⁶⁵ and the Commission's "rule of reason."

95. WPS Resources found the provisions proposed by the Midwest ISO to be beyond the permissible scope of a compliance filing. For example, WPS Resources notes the compliance filing expanded the type of information that would be subject to a challenge beyond just competitively sensitive information. WPS Resources asserts that, to the extent the Midwest ISO would broaden the challenge procedures to apply to types of information other than competitively sensitive information, it must do it in a separate FPA section 205 filing with the appropriate just and reasonable review process.

96. WPS Resources also argues that the Midwest ISO's non-public information request and confidential challenge procedures explicitly exclude market participants who may be subject to the results of those procedures in the future. WPS Resources is concerned that the Midwest ISO's non-public process could result in inconsistent and unduly discriminatory decisions. WPS Resources argues that the Midwest ISO must have a public process with limited discretionary decision-making that provides an opportunity for all similarly situated market participants to participate in information requests and challenges to avoid discriminatory decisions. WPS Resources also disputes the Midwest ISO's stated need to avoid unwieldy notice procedures because it views confidential status of one market participant's information as affecting every other market participant.⁶⁶ WPS Resources also submits that, if the Midwest ISO's decisions on the status of information are going to set precedent, then every market participant that owns that type of information clearly has a legitimate interest in participating in the information request and challenge process. WPS Resources sums up this sentiment as similar types of information must be classified consistently regardless of the market participant's relation to the information.

⁶⁵ 16 U.S.C. § 824d (2000).

⁶⁶ Midwest ISO Transmittal Letter at 12 (Aug. 19, 2005). The Midwest ISO proposes to limit the challenge opportunity to situations where the person challenging the confidentiality designation is requesting the designated information.

97. WPS Resources asserts that the Midwest ISO's information request and challenge procedures belong in the tariff, not in the business practices manuals. WPS Resources takes issue with the Midwest ISO's statement that the information involves "procedural details that are still evolving and can be more readily refined in a [business practices manual]." ⁶⁷ WPS argues that the Commission's "rule of reason" should determine what belongs in the tariff, not the ease of revising evolving procedures. WPS Resources argues that procedures that dictate how, when and to whom information that may be confidential and/or competitively sensitive can be released significantly affects the jurisdictional service provided by the Midwest ISO, and, therefore, those procedures belong in the tariff. Moreover, WPS Resources notes the procedures invoke FPA section 206 ⁶⁸ as the process to resolve a market participant's dispute with the Midwest ISO's decisions to release or declassify information. Therefore, WPS Resources concludes that changes to these procedures should clearly be reviewed by the Commission. WPS Resources further asserts that if the information request and challenge provisions are incomplete, they should be completed, rather than put in the business practices manuals for future completion outside of Commission scrutiny.

98. WPS Resources argues that the Midwest ISO compliance filing is not the result of the negotiation process that the Commission directed in the Offer of Proof Order. ⁶⁹ WPS Resources asserts that stakeholders were given little time to prepare comments on the Midwest ISO's proposal, and that the majority of comments submitted were ignored. WPS Resources states that market participants received a draft proposal of the

⁶⁷ *Id.* at 13.

⁶⁸ 16 U.S.C. § 824e (2000).

⁶⁹ WPS Resources cites the Offer of Proof Order, which states:

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 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.

information request and confidential status challenge procedures on August 3, 2005, and were only given four business days (until August 9, 2005) to submit comments to the Midwest ISO. The Midwest ISO then held a conference call on August 11, 2005, and a day later, circulated the first full draft of its filing for comment. WPS Resources notes that no further drafts were circulated before the August 19 compliance filing. WPS Resources concludes that this process did not qualify as a true stakeholder negotiation process as the Commission required.

99. WPS Resources argues that certain definitions proposed by the Midwest ISO are confusing and contradictory. For example, WPS Resources notes the proposed revised definition in section 1.15 of Module A for Authorized Requestors includes consultants and contractors of an Authorized Agency (*i.e.*, state commissions in the Midwest ISO), but precludes them from actually requesting confidential information from either the Midwest ISO or the IMM. Because information requests go to either the Midwest ISO or the IMM, WPS Resources is unclear why a distinction is needed to define a consultant or contractor as an Authorized Requestor and then prohibit them from requesting information. Another example WPS Resources cites is the term Confidential Information in section 1.37, which was revised to include Competitively Sensitive Information, which is a new defined term in section 1.35a. However, both terms appear to describe the same type of information, without distinction. WPS Resources argues that if two terms are needed, a clear distinction should be made between them. WPS Resources is also confused by the need for two distinct terms: (1) Information Request, defined in section 1.142a, means a request for confidential information made by the Commission or an Authorized Requestor; (2) Request for Information, defined in the business practices manual, not in the tariff, applies to requests for information only by entities other than the Commission or Authorized Requestors, which may be confidential. WPS Resources argues the Midwest ISO is using two confusing terms that make it unclear if all requests for information must be submitted in writing in compliance with the Midwest ISO Draft Procedures. WPS Resources states that market participants routinely request non-confidential information from the Midwest ISO staff directly. WPS Resources asserts that if all those requests had to be submitted in writing, it will greatly increase the time required to distribute non-confidential information and the Midwest ISO's workload. Therefore, WPS Resources objects if the intent is to require all information requests in writing, and, if it is not, WPS Resources requests revision so that it is clear which information is subject to the written procedure. WPS Resources also argues that the requirement in section 38.9.4.1 that an Authorized Requestor complete a non-disclosure agreement is confusing, because it is not clear whether an individual is an Authorized Requestor before he or she completes the non-disclosure agreement, or after. WPS Resources also argues that the term Authorized Agency should be eliminated from Attachment Z, Article 4, subsection (c), because it will always be a person that is an Authorized Requestor who works for the agency.

100. WPS Resources argues the Midwest ISO's requirement in subsections (d)(iii) and (h) that FPA section 206 complaints be prepared and filed within three business days of the determination of information as confidential or non-confidential is unjust and unreasonable. WPS Resources asserts that a party would require at least two weeks to prepare a complaint.

4. The Midwest ISO's Answer

101. On September 26, 2005, the Midwest ISO filed an answer. The Midwest ISO's answer addresses issues raised by the OMS and WPS Resources, including each party's suggestions for revisions to the August 19 compliance filing.

102. As to the OMS's comment that it is unclear whether the procedures regarding requests for information and challenges to confidentiality designations (Tab C) apply to Authorized Requestors, the Midwest ISO states that it would be more efficient and less confusing if Information Requests made by Authorized Requestors are governed by a procedure separate from that applicable to Requests for Information made by parties other than the Commission and Authorized Requestors, as is currently stated. The Midwest ISO states that both Information Requests and Requests for Information,⁷⁰ include provisions to challenge confidentiality designations, so the opportunity to raise challenges is available to *both* Authorized Requestors (those that executed the non-disclosure agreement in Attachment EE) and those that have not executed the non-disclosure agreement. The Midwest ISO states that it is clear that the Draft Procedures specified under Tab C contain sections that apply to parties "other than" Authorized Requestors and the Commission, so those that cannot complete the non-disclosure agreement are covered. Nevertheless, to facilitate the greatest clarity, the Midwest ISO states that it is willing to further specify that the Draft Procedures also apply to state commissions that have not executed non-disclosure agreements for Authorized Requestors.

103. The Midwest ISO clarifies that the use of the term "third parties" in the tariff's challenge provisions applies to any parties other than the original provider and recipient

⁷⁰ According to the Midwest ISO's Draft Procedures in Tab C, footnote 1, a *Request for Information* is made by parties other than the Commission and Authorized Requestors, whereas an *Information Request* is made only by Authorized Requestors. This distinction is to aid the Midwest ISO's internal tracking, grouping, and handling of these requests.

of the confidential information (*i.e.*, the Affected Participant⁷¹ and the Midwest ISO/IMM). The Midwest ISO also notes the need to correct a misspelling of the word “parties” in section 38.9.1.b. The Midwest ISO states that the term “third parties” – and the opportunity to challenge confidentiality designations – applies to state commissions, whether or not they are Authorized Agencies. Attachment EE uses the term “Third Party,” but it has no bearing on the ability to challenge confidentiality designations. The Midwest ISO also states that it is willing to revise the caption of section 38.9.1 of the tariff to read: “Access by Market Participants and Others.”

104. In addition, the Midwest ISO pledges that it is willing to continue discussions with the OMS, as well as with stakeholders, regarding potential refinements to the Draft Procedures listed under Tab C. In particular, the Midwest ISO is willing to clarify that state commissions that are not Authorized Agencies may execute the form non-disclosure agreement under Attachment Z to the tariff.⁷² To help clarify the tariff, the Midwest ISO proposes to revise the second footnote of the Draft Procedures to specify that a requesting party includes state commissions (or their representatives) that have not executed non-disclosure agreements for Authorized Requestors. The Midwest ISO also states that it is willing to discuss the OMS’s suggestion that the Draft Procedures’ dispute provision refer to an informal challenge procedure.

105. The Midwest ISO disagrees that it has filed inconsistent provisions for determinations of a breach of confidential information. The Midwest ISO notes that PJM is not precluded from determining on its own that a breach has occurred just because the relevant state commission does not agree with that determination. The Midwest ISO notes that the TEMT II Order required it to primarily follow the PJM approach, and the Midwest ISO states that it followed it in regard to breaches. The Midwest ISO stresses that in its February 17 informational filing, it intended to acknowledge its obligation to act on a breach if the relevant Authorized Agency agrees that there was such a breach, but the Midwest ISO did not intend to concede that it could determine the existence of a breach only when the Authorized Agency agrees. The Midwest ISO also notes that, in

⁷¹ “Affected Participant: A Market Participant, a person that engages in Market Activities or a person that takes any other service under the Tariff that has provided to the Transmission Provider, Confidential Information that is requested by, or is disclosed to, an Authorized Requestor under a Non-Disclosure Agreement.” TEMT, Module A, section 1.4a.

⁷² We note that there are two non-disclosure agreements in the tariff: Attachment Z, which is the non-disclosure agreement for non-Authorized Requestors, and Attachment EE, which is the non-disclosure agreement for Authorized Requestors.

certain circumstances, the Authorized Agency could have a vested interest in the determination, and it would be improper to allow that entity to veto a breach determination.

106. The Midwest ISO disagrees with the OMS's criticism of the definition of Confidential Information. The Midwest ISO states that the definition it filed was present in the version of the TEMT filed on March 31, 2004, and no parties commented on it or asked for rehearing on it in that proceeding. More importantly, the Midwest ISO does not believe that the revision suggestions made by the OMS add to the definition's clarity or properly narrow its scope. The Midwest ISO asserts that the definition is clear and not unduly broad as filed. Moreover, the Midwest ISO notes that it has the authority to reject improper or inapplicable designations, regardless of a challenge by third parties so Confidential Information will not include every piece of data, as feared by the OMS.

107. The Midwest ISO also disputes several of the assertions made by WPS Resources in its comments on the August 19 compliance filing. Regarding the scope of the August 19 compliance filing, the Midwest ISO states that it is reasonably within the scope to apply the proposed challenge procedure to all confidentiality designations. The Midwest ISO notes that the TEMT II Order required it to make its filing at the request of two interveners (the OMS and the Illinois Commission), and those interveners requested a challenge process applicable to all confidentiality designations.⁷³ In addition, the Midwest ISO submits that its filing responds directly to a compliance requirement, and therefore, does not warrant a separate section 205 filing. However, even if it did need a separate section 205 filing, the Midwest ISO believes that it could combine such a filing with its August 19 compliance filing because of recent Commission precedent that allows compliance filings to be combined with section 205 tariff revisions that are "closely and plainly related" to the compliance requirements.⁷⁴

108. The Midwest ISO submits that it is reasonable to limit challenge opportunities to the parties that respectively own and request such information. The Midwest ISO notes that neither the TEMT II Order, nor the Offer of Proof Order, required it to publicly notify all market participants of each confidentiality designation and/or of each challenge. The Midwest ISO also submits that its proposed process comports with PJM's model, which was approved by the Commission.

⁷³ See TEMT II Order at P 565.

⁷⁴ Midwest ISO Answer at 14-15 (quoting *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,169 at P 15 (2005) (August 5 Order)).

109. The Midwest ISO also disputes WPS Resources' assertion that placing the procedures for requesting information and challenging confidentiality designations in the business practices manual contravenes FPA section 205 and the Commission's rule of reason. The Midwest ISO notes that WPS Resources has not cited any cases where confidentiality procedures were required to be placed into a tariff.

110. The Midwest ISO also disputes WPS Resources's arguments that the Midwest ISO did not use the proper stakeholder process or conduct appropriate negotiations prior to filing. The Midwest ISO notes that WPS Resources did not make any suggestion about the subject for almost a year after the TEMT II Order was issued, and the Midwest ISO brought up the subject of third party challenges on September 9, 2004. The Midwest ISO also notes that WPS Resources did not comment for over six months on the Midwest ISO's February 17, 2005 informational filing, which contained the same information now being protested. The Midwest ISO contends that the proper stakeholder consultations have been conducted. The Midwest ISO also states that it is committed to further discussions until the challenge procedure is refined and finalized.

111. The Midwest ISO disputes that its confidentiality procedures lack detail. The Midwest ISO asserts that its procedures contain more detail than any of the other RTOs' or ISOs'.

112. The Midwest ISO states, in response to WPS Resources' arguments that the Draft Procedures are confusing, that the definition of Authorized Requestor is patterned after PJM's definition of "Authorized Person."⁷⁵ The Midwest ISO believes that it is appropriate to retain a limit on consultants and contractors who act as Authorized Requestors. The Midwest ISO also notes that this aspect of the definition was present in the February 17, 2005 filing and was not commented on. The Midwest ISO also notes that Confidential Information is a broader term that incorporates Competitively Sensitive Information, and it submits that this definition adequately summarizes the usual legal understanding of the concept.

113. The Midwest ISO states that it is willing to limit the Draft Procedures to requests for confidential information by parties other than Authorized Requestors. To further clarify, the Midwest ISO proposes to use the term "Request for Confidential Information." Less formal procedures would then apply to requests for non-confidential information, provided that the more formal process is used for confidential information.

⁷⁵ Section 1.4B, PJM Operating Agreement.

114. The Midwest ISO also clarifies that it borrowed from the PJM model to construct the proposed requirement that an Authorized Requestor is defined as a person that has executed a non-disclosure agreement. This, in spite of the requirement that a potential signatory to the non-disclosure agreement must represent that they are already an Authorized Requestor, before signing. The Midwest ISO states that, if directed by the Commission, it is willing to revise section 38.9.4.1(a) of the tariff, by deleting subsection (i) to clarify the Authorized Requestor requirements.

115. The Midwest ISO submits that there is nothing confusing, contradictory or otherwise inappropriate in its statement that both a principal (such as an Authorized Agency) and its agent (such as an Authorized Requestor) can obtain certain kinds of information, despite the fact that such a requestor will always be a person and not an agency. On the contrary, since an agent's authority is derived from its principal, the Midwest ISO asserts that it is appropriate to state that any information received by the agent on behalf of the principal is ultimately obtained by the principal. The Midwest ISO views WPS Resource's point as semantic, but it is willing to revise Attachment Z so that it does not state that both Authorized Agencies and Authorized Requestors have the ability to obtain confidential information pursuant to section 38.9.4 of the tariff, if directed to do so by the Commission.

116. Finally, in response to WPS Resources' comments, the Midwest ISO states that the three-day period for initiating fast-track complaints was patterned after PJM's model. The short period accommodates a requesting party's potential need for expedited access to confidential information and/or blocking access to confidential information, according to the Midwest ISO.

5. Discussion

117. We find that the Midwest ISO has generally complied with its compliance obligations directed in the Offer of Proof Order. In particular, the Midwest ISO has filed a revised section 38.9.4 that complies with numerous Commission directives.⁷⁶

118. We find that it is appropriate for the Midwest ISO to maintain its "Draft Procedure for Requests for Information and Challenges to Confidentiality Designations," listed as Tab C to the filing, in its business practices manuals. The procedures listed in Tab C do not significantly relate to rates, terms, and conditions for service, and therefore do not

⁷⁶ See Offer of Proof Order at P 93-99.

need to be filed with the Commission for inclusion in the Midwest ISO tariff.⁷⁷ We note the Midwest ISO's willingness to continue to discuss, with the OMS and all other stakeholders, potential further refinements.⁷⁸ Therefore, although further stakeholder discussions of the material in Tab C is likely, we disagree that the Commission needs to order a specific 30- or 45-day discussion period, as suggested by the OMS; stakeholders may discuss such revisions for as long as necessary.

119. We note that the Midwest ISO further considered, and then agreed, that its Draft Procedure should be limited to requests for confidential information by parties other than Authorized Requestors.⁷⁹ The Midwest ISO found that although it still supports using two separate terms – Request for Information and Information Request – to describe whether or not the requestor is an “Authorized Requestor,” the Tab C Draft Procedures would be clarified by using the term “Request for Confidential Information.” We note that a “Request for Information” is only made by a non-Authorized Requestor, and hence, the only time it is relevant is when requesting “confidential” information. We also note that the Midwest ISO will further clarify that the Draft Procedures also apply to state commissions that have not executed non-disclosure agreements for Authorized Requestors.⁸⁰ We find the Midwest ISO's suggested changes will clarify its Draft Procedures, and direct it to use the term “Request for Confidential Information” and further specify the applicability of the Draft Procedures. As these revisions will be located in a business practices manual, which is not formally filed, there is no filing obligation related to this directive.

120. We note that the OMS had concerns with the use of the term “Third Parties” as it relates to language the Midwest ISO proposes to add to section 38.9.1, “Market Participant Access,” and section 54.4, “Confidentiality,” of the tariff. However, we find that the capitalized term “Third Party” is not defined in Module A of the tariff and only used in the cited tariff sections in the lowercase form “third party.” Therefore, we conclude that the meaning of the term “Third Party” or “third party” is defined by the status of the party making the information request. As noted in footnote 21 of the

⁷⁷ *See City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (finding that a tariff need include “only those practices that affect rates and services significantly”).

⁷⁸ Midwest ISO Answer at 9.

⁷⁹ *See id.* at 25.

⁸⁰ *Id.* at 6.

transmittal letter, “In the case of Information Requests by state agencies, the term “Third Party” refers to a party other than the Confidential Information’s original provider (*i.e.*, the Transmission Provider or the IMM), and the secondary recipient (*i.e.*, an Authorized Requestor or Authorized Agency) – which requests the Confidential Information from the secondary recipient rather than from the Transmission Provider or the IMM.” The Midwest ISO noted that the opportunity to challenge confidentiality designations applies to state commissions, irrespective of their status as Authorized Agencies.⁸¹ Therefore, we find that it is sufficiently clear that state commissions, regardless of their “third party” status, are able to challenge confidentiality designations. In addition, we agree that “parties” is spelled incorrectly in the revised language submitted in section 38.9.1.b, and we direct the Midwest ISO to correct the error as part of its subsequent compliance filing.⁸²

121. We understand the OMS’s concern that state commissions that do not execute the non-disclosure agreement in Attachment EE may not be permitted to make Information Requests and therefore will be unable to challenge a confidential information designation.⁸³ We interpret the non-disclosure agreement execution requirement – as it relates to the OMS – as: an Authorized Agency⁸⁴ includes all state public utility commissions in the Midwest ISO region and the OMS or any successor organization;

⁸¹ *Id.* at 6-7.

⁸² The Midwest ISO identified this typographical error in its answer.

⁸³ We note the OMS did not provide any specific reasons why state commissions or their employees could not execute the Attachment EE NDA. “However, it may be the case that some State Commissions will find themselves, for whatever reason, unable to sign the NDA in Attachment EE.” Comments of the Organization of MISO States at 4, Docket Nos. ER04-691-060 and EL04-104-057 (Sept. 9, 2005).

⁸⁴ “Authorized Agency: (i) a state public utility commission within the geographic limits of the Transmission Provider Region that regulates the distribution or supply of electricity to retail customers or is legally charged with monitoring the operation of wholesale or retail markets serving retail suppliers or customers within its State; or (ii) the Organization of MISO States or any successor organization formed to act as a regional state committee within the Transmission Provider Region.” TEMT, Module A, section 1.14a.

employees of the Authorized Agency may be Authorized Requestors,⁸⁵ but such persons must execute the non-disclosure agreement, specified in Attachment EE;⁸⁶ therefore, the agency itself does not need to execute a non-disclosure agreement, but the employees of the agency, who are to receive and discuss the confidential information, do. However, challenges to confidential information are permitted through other avenues in the tariff. As noted by the Midwest ISO, state commissions that are not Authorized Agencies may execute the form non-disclosure agreement under Attachment Z to the tariff.⁸⁷ We note that state commissions may voluntarily request confidential data under the terms of the Midwest ISO tariff, instead of their own state laws.⁸⁸ To clarify the procedure, we direct the Midwest ISO to revise the second footnote of the Draft Procedures to specify that a Requesting Party includes state commissions, as suggested in its answer.⁸⁹

122. Furthermore, we do not find the Attachment EE requirements an unreasonable burden to ensure that the people that represent Authorized Agencies will not disclose confidential information. In the Offer of Proof Order, the Commission found that any possible administrative difficulties in obtaining confidential data (*i.e.*, executing the non-disclosure agreement) were outweighed by the potential harm that would result from unauthorized disclosure.⁹⁰ In addition, in the Offer of Proof Order, the Commission agreed with FirstEnergy's suggestions about how a reasonable balance could be achieved

⁸⁵ “Authorized Requestor: A person who has executed a Non-Disclosure Agreement, and is authorized by an Authorized Agency to receive and discuss Confidential Information. Authorized Requestors may include State public utility commissioners, State commission staff, attorneys representing an Authorized Agency, and employees, consultants and/or contractors directly employed by an Authorized Agency, provided, however, that consultants or contractors may not initiate requests for Confidential Information from the Transmission Provider or the IMM.” TEMT, Module A, section 1.15.

⁸⁶ *See* Attachment EE, Original Sheet Nos. 1814-32.

⁸⁷ Midwest ISO Answer at 9.

⁸⁸ *See* Offer of Proof Order at P 93 (citing PJM Confidentiality Order at P 31).

⁸⁹ Midwest ISO Answer at 9.

⁹⁰ Offer of Proof Order at P 53 (“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. . . .”).

between keeping information confidential and disclosing sufficient information to state agencies so that they can perform their statutory obligations.⁹¹ FirstEnergy had four general suggestions: (1) limit the data available to state agencies only to information necessary 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.⁹² We find that the Midwest ISO has met these burdens through reasonable requirements enumerated in Attachment EE.

123. We agree with the OMS's suggested revision for section 38.9.1 of the tariff. The caption of section 38.9.1 currently reads, "Market Participant Access." The OMS suggests that the Commission direct it to read, "Access by Market Participants and Others." We note that the Midwest ISO is amenable to making this change,⁹³ and we direct it to do so in its compliance filing.

124. However, we disagree with the OMS's suggestion to revise section 38.9.4.5.f to avoid the use of the term "Information Request" and replace the term "Authorized Requestor," because of the corresponding responsibilities and challenge implications. For the reasons stated herein, we find that the tariff is clear that both Authorized Requestors and those state commissions that are not able to complete the non-disclosure agreement in Attachment EE, and attain Authorized Requestor status, have the ability to challenge confidential designations.

125. We likewise disagree with the OMS's revision suggestions for the definition of Confidential Information.⁹⁴ We do not find the definition of Confidential Information to be overly broad, and, therefore, we reject the suggestion to move the word "or" in the definition. We also note that the Midwest ISO has the discretionary authority to reject improper or inapplicable confidential designations, which serves as a backstop to ensure

⁹¹ *Id.* at P 43 ("We agree with FirstEnergy's suggestions for how this balance might be reached. . . .").

⁹² *Id.* at P 34.

⁹³ Midwest ISO Answer at 8.

⁹⁴ TEMT Module A, section 1.37.

that the confidential information classification is used appropriately. We also disagree that it is beneficial to define Confidential Information and then specify “unless determined not to be confidential. . . .”⁹⁵ Information not covered under the Confidential Information section, is, by definition, not Confidential Information and it is superfluous to state this fact.

126. We also disagree that the sections in the tariff and Attachment EE governing breaches are inconsistent and therefore need revision. We agree with the OMS that section 38.9.4.7.b of the Midwest ISO’s February 17, 2005 filing stated that a breach had occurred when both the Midwest ISO and the Authorized Agency agreed that it occurred.⁹⁶ However, that filing was meant to demonstrate that progress was being made on issues where the parties could not reach a resolution.⁹⁷ It was not intended to be a finished document, nor was it finished at the time of the Offer of Proof Order.⁹⁸ Moreover, the language in section 38.9.4.7.b only applies to a scenario where a written notice of a breach is received by the Midwest ISO or the IMM. In contrast, section 3.2 of Attachment EE constitutes a set of requirements that Authorized Requestors of Confidential Information agree to abide by.⁹⁹ We find nothing inherently discriminatory or inconsistent about the Midwest ISO or the IMM determining either independently or in conjunction with other parties that a breach has occurred. Moreover, the breach determination provisions are consistent with the relevant sections of the PJM Operating

⁹⁵ See Comments of the OMS at 6-7 (Sept. 9, 2005).

⁹⁶ See Informational Filing of the Midwest ISO at Tab C, page 6 (Feb. 17, 2005) (redline version of the OMS’s October 28, 2004 discussion document).

⁹⁷ *Id.* at 7.

⁹⁸ See Offer of Proof Order at P 69-72.

⁹⁹ “The Authorized Requestor agrees that its release of Confidential Information to persons not authorized under this Agreement to receive it constitutes a breach of this Agreement, unless the Authorized Requestor is required under state or federal law to release such information. If the Transmission Provider or the IMM determines on its own, or with an Authorized Agency, or receives from an Authorized Requestor or Authorized Agency a written notice, that a breach has occurred, or FERC has made a ruling that a breach has occurred, the Transmission Provider and/or the IMM shall terminate the Non-Disclosure Agreement and require either the immediate return of all Confidential Information obtained by the Authorized Requestor pursuant to the Non-Disclosure Agreement or a certificate of its destruction.” Attachment EE, section 3.2, Original Sheet No. 1828.

Agreement.¹⁰⁰ Section 38.9.4.7.b governs termination of the non-disclosure agreement upon written notice of a breach to the Midwest ISO or IMM, and section 3.2 of Attachment EE states the obligations of an Authorized Requestor (*i.e.*, not to release confidential information to unauthorized persons). In the Offer of Proof Order, the Commission addressed consulting with the Authorized Requestor's agency, when there was no breach of the non-disclosure agreement, but the Commission did not discuss the reverse situation.¹⁰¹ In contrast, the Commission never ruled whether the Midwest ISO could determine whether a breach had occurred without consulting the OMS. Finally, we agree with the Midwest ISO that it is not proper to allow a party that may have a vested interest in the outcome of a breach determination to have a "virtual veto power" over a breach declaration.¹⁰² For these reasons we decline to direct the Midwest ISO to revise the provisions related to whether a breach has occurred, and will allow without the concurrence of the OMS a determination of whether a breach has occurred.

127. We disagree with WPS Resources that the Midwest ISO went beyond the scope of a permissible compliance filing by not submitting a separate section 205 filing. We find that the Midwest ISO has appropriately included a challenge process applicable to all confidential designations, in compliance with both the TEMT II Order¹⁰³ and the Offer of Proof Order.¹⁰⁴ We also agree with the Midwest ISO that the provisions filed that are corollary to the compliance directives from the TEMT II Order and the Offer of Proof

¹⁰⁰ See PJM Operating Agreement at section 18.17.4(c)(iii), Original Sheet No. 61D, and section 4.1 Original Sheet No. 197G.

¹⁰¹ See Offer of Proof Order at P 123.

¹⁰² Midwest ISO Answer at 11.

¹⁰³ "Instead, as OMS and the Illinois Commission request, we will direct the Midwest ISO to work with its stakeholders to develop a process under which third parties may challenge disclosing parties' designation of information as Competitively Sensitive." TEMT II Order at P 565 (referring to the OMS's and the Illinois Commission's suggestion in P 555 that the Midwest ISO develop a process so that the designation of information as confidential may be challenged).

¹⁰⁴ "Accordingly, we will require the Midwest ISO to propose a challenge provision that adheres to Commission precedent and incorporates the appropriate fast-track review provisions to ensure timely resolution." Offer of Proof Order at P 111 (citing PJM Confidentiality Order at P 41-42).

Order are acceptable to include in the August 19 compliance filing, consistent with the Commission's language in the August 5 Order.¹⁰⁵ We also correct the Midwest ISO's statement that it incorporated the non-disclosure agreement into the tariff as a new Attachment EE, as required by the Offer of Proof Order at paragraph 124.¹⁰⁶ Paragraph 124 did not explicitly direct the Midwest ISO to file the non-disclosure agreement as a new attachment to the tariff. The Offer of Proof Order did direct the Midwest ISO to file the non-disclosure agreement, so the Midwest ISO has not exceeded the permissible scope with its compliance filing.¹⁰⁷

128. We disagree with WPS Resources that a public, noticed process is needed for confidentiality designations. The confidentiality requirements are first and foremost a means to ensure both that the confidential data of each market participant is protected and that the statutory obligations of each state are fulfilled. We do not find that a public process is needed to reasonably accomplish either of those objectives, and we do find that such a process would be an unreasonable burden. The Commission previously directed that the Midwest ISO propose a challenge process that balances the interests of market participants and state commissions as to the status of confidential information, consistent with Commission precedent.¹⁰⁸ We find that the Midwest ISO has complied with the Commission's directives in this regard. Also, we find that a public process would likely disrupt a timely resolution of designations.¹⁰⁹ In the Offer of Proof Order, the Commission cited the PJM Confidentiality Order as a basis for the Midwest ISO to propose a reasonable challenge procedure, and in PJM the focus is on parties more

¹⁰⁵ "The Commission has, however, accepted a section 205 filing in combination with a compliance filing when the compliance directives in question warranted changes to other, related tariff provisions." August 5 Order at P 5 (citing *New England Power Pool*, 85 FERC ¶ 61,141 at 61,550 (1998), *order on reh'g*, 87 FERC ¶ 61,043, *reh'g denied*, 88 FERC ¶ 61,276 (1999)).

¹⁰⁶ See Midwest ISO Transmittal Letter at 7 (Aug. 19, 2005).

¹⁰⁷ See Offer of Proof Order at P 93 n.32 ("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.").

¹⁰⁸ See *id.* at P 111 ("Accordingly, we will require the Midwest ISO to propose a challenge provision that adheres to Commission precedent and incorporates the appropriate fast-track review provisions to ensure timely resolution.").

¹⁰⁹ *Id.*

immediately involved.¹¹⁰ Therefore, we agree with the Midwest ISO that it is appropriate to limit the challenge process to situations where the person challenging the designation is requesting the designated information.¹¹¹ We agree that it would be inappropriate and unwieldy, and time-consuming, to require a general notice of, and opportunity to participate in, each individual confidentiality designation and challenge.¹¹² The tariff defines “confidential information” and “competitively sensitive,” and at this point we have no reason to believe, as WPS Resources alleges, that the Midwest ISO will irrationally apply the “confidential” designation to similar types of information.

129. We disagree with WPS Resources that the Midwest ISO did not follow the Commission’s directives to conduct negotiations with stakeholders prior to filing. Incidentally, we note that WPS Resources is alone in making such a claim, as no other comments were filed stating that the negotiation period was too short. Indeed, we note the Midwest ISO’s statement that WPS Resources did not comment or submit a counter-proposal for almost six months after the Midwest ISO’s February 17, 2005 filing.¹¹³ We also note that the OMS stated in its filing, “In the Offer of Proof Order, the Commission directed the Midwest ISO to confer with the OMS prior to Midwest ISO submitting its August 19 compliance filing. Because of those discussions, the OMS, with a few minor concerns for clarification, endorses the TEMT and Non-disclosure Agreement (NDA) provisions in Midwest ISO’s August 19 filing regarding State Commission access to confidential information.”¹¹⁴ We add that stakeholder discussions have been ongoing for the past year relating to confidentiality provisions. Finally, we accept the Midwest ISO’s statement that it will continue discussions with stakeholders concerning confidentiality provisions and the challenge procedure.¹¹⁵ Therefore, we find the Midwest ISO has

¹¹⁰ See PJM Confidentiality Order at P 41-42. We note that the relevant term in these paragraphs is “Affected Member,” *i.e.*, the party with a vested interest in the designation.

¹¹¹ See Midwest ISO Transmittal Letter at 12 (Aug. 19, 2005).

¹¹² *Id.*

¹¹³ See Midwest ISO Answer at 21.

¹¹⁴ Comments of the OMS at 1 (Sept. 9, 2005).

¹¹⁵ *Id.*

complied with the Commission's directives in the Offer of Proof Order¹¹⁶ and the TEMT II Order¹¹⁷ regarding stakeholder discussions.

130. We also disagree with WPS Resources that a three-business-day turnaround for complaints is too short. The Commission already has accepted the Midwest ISO's proposed tariff provisions regarding challenges to information requests.¹¹⁸ In addition, the Midwest ISO's provisions are almost identical to PJM's previously accepted tariff provisions in this regard.¹¹⁹

131. We find the Midwest ISO's proposed definition of Authorized Requestor¹²⁰ to be acceptably similar to PJM's Commission-approved definition of Authorized Person.¹²¹ Therefore, we do not agree that the definition is confusing or lacking in clarity. However, we do note that the Midwest ISO nevertheless is willing to make revisions to

¹¹⁶ Offer of Proof Order at P 72.

¹¹⁷ TEMT II Order at P 561.

¹¹⁸ See Offer of Proof Order at P 102, 111-13.

¹¹⁹ See PJM Operating Agreement, section 18.17.4.(c)(iii), Original Sheet No. 61D.

¹²⁰ The Midwest ISO proposes to define an Authorized Requestor as "A person who has executed a Non-Disclosure Agreement, and is authorized by an Authorized Agency to receive and discuss Confidential Information. Authorized Requestors may include State public utility commissioners, State commission staff, attorneys representing an Authorized Agency, and employees, consultants and/or contractors directly employed by an Authorized Agency, provided, however, that consultants or contractors may not initiate requests for Confidential Information from the Transmission Provider or the IMM." TEMT, Module A, section 1.15, Original Sheet No. 50A.

¹²¹ "Authorized Person shall mean a person who has executed a Non-Disclosure Agreement, and is authorized in writing by an Authorized Commission to receive and discuss confidential information. Authorized Persons may include attorneys representing an Authorized Commission, consultants and/or contractors directly employed by an Authorized Commission, provided however that consultants or contractors may not initiate requests for confidential information from the Office of the Interconnection or the PJM Market Monitor." PJM Operating Agreement, section 1.4B, Original Sheet No. 18A.

achieve greater clarity.¹²² The Midwest ISO can resolve the concerns about Authorized Requestors and the non-disclosure agreement completion requirements, most simply, by deleting section 38.9.4.1.a.i. Therefore, we direct the Midwest ISO to delete this subsection as part of its compliance filing. In addition, we direct the Midwest ISO to assist stakeholders that wish to be “Authorized Requestors” of confidential information to meet their responsibilities under Attachment EE so that none is impermissibly excluded.

132. We do not agree with WPS Resources that the tariff would be improved by revising Attachment Z to delete the reference to “Authorized Agencies,” because it is always a person that requests information. An Authorized Requestor is always related to an Authorized Agency, and there is nothing confusing or contradictory about referencing both in Attachment Z.

133. Finally, as we have granted rehearing with respect to the definition of “Authorized Agency” in section 1.14a, we will require the Midwest ISO to revise, and re-file, the definition.

The Commission orders:

(A) The OMS’s request for rehearing is hereby granted in part and denied in part, as described in the body of this order.

(B) The Midwest ISO’s compliance filing is hereby conditionally accepted in part and rejected in part, as described in the body of this order.

(C) The Midwest ISO is hereby required to make a compliance filing to reflect the determinations made in the body of this order, within 60 days of the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹²² Midwest ISO Answer at 26.