

FORMATION AND NURTURE OF A REGIONAL STATE COMMITTEE

*William H. Smith, Jr.**

I. Introduction	185
II. Need for Increased Cooperation on Electric Transmission	186
A. New Entities and New Workload	186
B. Policy Calls for Multi-State Cooperation.....	188
1. National Governors Association	188
2. FERC.....	189
C. Functions of State Regulators with Respect to Wholesale Markets	190
III. Formation of a Regional State Committee.....	191
A. Assessment of Legal Tools Available for Multi-State Cooperation.....	191
B. Key Formation Issues	193
C. The Midwest Goal of Multi-state Cooperation	195
D. Timeline for the Formation of the Organization of MISO States	196
E. Specifics of the Organization.....	197
IV. Experience Using the OMS Structure.....	198
A. Internal Process.....	198
B. OMS Board Process.....	198
C. Issues Addressed.....	199
D. Resolution of Disputes and the Format of Filings	200
E. Approaches in Other Regions	202
V. Conclusion	203

I. INTRODUCTION

Recognizing the increasingly regional nature of the transmission grid, fifteen state regulatory commissions in the Midwest began planning a regional state committee in 2002. The Organization of MISO States, Inc. (OMS) began operation in June 2003. The formation of OMS and its subsequent operation offers many lessons for regulatory cooperation in other regions.

The changes in the wholesale electric markets, particularly within regional transmission operator (RTO) areas, have increased the volume and the complexity of the workload of state commissions. They can meet their responsibilities more efficiently through a coordinated multi-state organization.

The formation of a multi-jurisdictional body involves careful design of the organization's structure, finances, and staffing to ensure that it can serve its intended purposes in a manner politically acceptable to its members and its audiences. The leadership and the membership of a multi-jurisdictional

* William H. Smith, Jr. is Executive Director for the Organization of MISO States. Prior to January 2004, Mr. Smith was a member of the staff of the Iowa Utilities Board. He was responsible for the Board's federal agency representation and assisted in the formation of the Organization of MISO States. He is a member of the Energy Bar Association and the District of Columbia Bar. He holds a B.A. degree in Economics from Yale University and a J.D. degree from Cornell University.

organization needs to collaborate in the context of potentially divisive issues and circumstances. The OMS has found successful ways to give policy guidance to the RTO and to the Federal Energy Regulatory Commission (FERC) on behalf of a membership with varying interests. The coordination of state participation in RTO activities and in FERC policy provides value to the states, the RTO and its stakeholders, and the FERC.

II. NEED FOR INCREASED COOPERATION ON ELECTRIC TRANSMISSION

A. *New Entities and New Workload*

During the period leading up to the decision to form a regional state committee, Midwestern state regulatory commissions were aware of the growing importance of the wholesale power markets and, in particular, the increased reliance on the transmission system. This awareness came from their observation of industry trends, reports, and decisions of the FERC¹ and the Department of Energy, and from the attention of other organizations such as the National Governors Association (NGA).²

As states debated the adoption of retail competition during the second half of the 1990s, they gained more appreciation for the role played by wholesale markets in the success of competitive or monopoly retail regimes. As many states adopted retail choice programs, states consciously accepted greater reliance on the wholesale market and the transmission system.³

The FERC's requirements for independent management of the transmission grid⁴ led utilities to different responses in different regions. New transmission organizations were formed in some regions, such as the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and the California ISO. In other regions, existing regional entities such as New York Power Pool, PJM Interconnection, NE Pool, Southwest Power Pool, and the Electric Reliability

1. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, [Regs. Preambles 1991-1996], F.E.R.C. STATS. & REGS. ¶ 31,036 (1996), 61 Fed. Reg. 21,540 (1996), *order on reh'g*, Order No. 888-A, F.E.R.C. STATS. & REGS. ¶ 31,048 (1997), 62 Fed. Reg. 12,274 (1997), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in relevant part sub nom.*, Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom.*, New York v. FERC, 535 U.S. 1 (2002); Order No. 2000, *Regional Transmission Organizations*, F.E.R.C. STATS. & REGS. ¶ 31,089 (1999), 65 Fed. Reg. 809 (2000); *order on reh'g*, Order No. 2000-A, F.E.R.C. STATS. & REGS. ¶ 31,092 (2000), 65 Fed. Reg. 12,088 (2000), *aff'd sub nom.*, Public Utility District No. 1 of Snohomish County, Wash. v. FERC., 272 F.3d 607 (D.C. Cir. 2001); *see also State-Federal Regional RTO Panels*, 97 F.E.R.C. ¶ 61,182 (2001), *reh'g denied*, 98 F.E.R.C. ¶ 61,309 (2002); F.E.R.C., WHITE PAPER ON WHOLESALE POWER MARKET PLATFORM (2003), http://www.ny.mex.com/media/ferc_paper.pdf.

2. NATIONAL GOVERNORS ASSOCIATION, INTERSTATE STRATEGIES FOR TRANSMISSION PLANNING AND EXPANSION (2002), <http://www.nga.org/Files/pdf/INTERSTATESTRATEGIESPLANNING.pdf> [hereinafter NGA REPORT].

3. *See, e.g.*, The Illinois Electric Service Customer Choice and Rate Relief Law, 35 ILL. COMP. STAT. 200/10-230 (1997).

4. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,036 (1996), 61 Fed. Reg. 21,540 (1996).

Council of Texas (ERCOT) were transformed into independent transmission system operators. With the exception of ERCOT, the transmission management activities of these entities were subject to regulation by the FERC under the Power Act.⁵ For the most part, the existing entities were already regulated by the FERC.

The shape of these transmission organizations was fluid during their formative years. Some proposed organizations never achieved participant support (RTO West and GridFlorida, for example) and one, the Alliance RTO, did not achieve FERC's regulatory approval.⁶ With the disapproval of the Alliance RTO, the FERC placed additional requirements on the Midwest ISO and the PJM Interconnection.

Running parallel to ISO development was the concept of the independent transmission company. This strategy was pursued successfully by American Transmission Company in Wisconsin and unsuccessfully by the sponsors of Translink Transmission Company. Similar concepts were explored and some were partially implemented by National Grid, International Transmission Company, and Michigan Electric Transmission Company.

All these activities were proposed and considered in FERC dockets. These dockets could carry the name of the transmission organization or they could be captioned by a lead sponsor.⁷ Other dockets were filed by traditional utilities as they joined or withdrew from transmission entities. Notices of these filings were difficult for state commission staffs to identify and monitor because of the volume and the multiple captioning possibilities.

State commissions attempted to track this flurry of FERC activity. Because of differences in levels of staff size and sophistication, their ability to participate effectively in the FERC proceedings was not uniform. But the sheer volume of FERC dockets involving transmission issues became such that even the best endowed states were hard pressed to keep up. This increased federal work was in addition to continuing retail regulatory work, and in some cases, workloads that were swelled by the transition to retail competition.

Particular problems emerged as membership in transmission organizations changed. For instance, during the formation of Translink, states in its proposed footprint directed more attention to that effort than to the formation of the Midwest ISO. The disapproval of the Alliance RTO resulted in some reshuffling of memberships between the Midwest ISO and PJM such that the Illinois, Michigan, Indiana, and Ohio Commissions found themselves concerned with two RTOs rather than a single one. In several cases, critical decisions had been made before states could prioritize the dockets they should intervene in.

5. 16 U.S.C. § 825 (2000).

6. *Alliance Companies*, 97 F.E.R.C. ¶ 61,327 (2001).

7. The Midwest ISO was formed through Docket No. ER98-1438. The members noticed on the original filing were Cinergy Corp. (on behalf of Cincinnati Gas & Electric Company, PSI Energy, Inc., and Union Light, Heat & Power), Commonwealth Edison Company, Wisconsin Electric Power Company, Hoosier Energy Rural Electric Cooperative, Inc., Illinois Power Company, Wabash Valley Power Association, Inc., Ameren (on behalf of Central Illinois Public Service Company and Union Electric Company), Kentucky Utilities Company, and Louisville Gas & Electric Company. See *Midwest Independent Transmission System Operator, Inc.*, 84 F.E.R.C. ¶ 61,231 (1998). These six states represent fewer than half the jurisdictions now interested in Midwest ISO matters.

Three other realizations developed from informal conversations among regulators in the Midwest. First, this increased workload showed no promise of diminishing. If the new level of work was to be permanent, it would become necessary to reprioritize or increase staffing in order to monitor the FERC dockets and participate as appropriate. Second, these new FERC dockets involved new issues that were outside the experience and knowledge of commission staffs. Thus, until staff expertise was improved, there was a risk of missing important issues, either through lack of awareness or unavailability of resources. Third, states became aware that other states were covering the same matters. Commissioners became concerned that they were duplicating each other's effort on some matters, while leaving others unattended.

B. Policy Calls for Multi-State Cooperation

As the debate over retail competition wound down in the post-California period, public policy attention was directed towards finding ways the existing mixed system could be made to work more effectively. Two significant recommendations urged states to take formal measures to improve interstate cooperation on electricity issues. As these recommendations were developed, there was active public discussion of the issues being considered, including multi-state cooperation. And of course, the recommendations led to additional debate.

1. National Governors Association

In the fall of 2001, the National Governors Association formed a Task Force on Electricity Infrastructure (Task Force) to develop recommendations for revitalizing the nation's electricity infrastructure.⁸ The Task Force looked into questions of generation capacity, transmission capacity, and the growth of regional electricity markets. Its final report, *Interstate Strategies for Transmission Planning and Expansion*, was issued on August 6, 2002.⁹

The NGA report identified several challenges requiring greater cooperation among states. To clarify the state role in transmission planning, the NGA report reasserted the role of states in determining the need for new infrastructure, allocating the cost of new facilities, and coordinating siting review of new lines. The report recommended the formation of multi-state entities (MSEs) through which states could coordinate these functions.¹⁰ Specific organizational forms were prescribed: the MSE should be formed by the Governors through a memorandum of understanding, and the Governor should appoint the state's contact to coordinate its participation. The MSE should provide coordinated review and permitting of interstate lines by all affected states, with the ultimate objective of providing "one-stop shopping," forming a Project Team of states involved in a particular project to provide all review needed to allow construction.¹¹ The MSE should work toward best practices for planning. The report outlined the governance of the MSE, listing points to be included in the

8. NGA REPORT, *supra* note 2.

9. *Id.*

10. NGA REPORT, *supra* note 2.

11. *Id.*

MSE's bylaws. The report noted, however, that its recommendations were proposed as "a general approach, not a 'one-size-fits-all' model."¹² States were advised to consider the questions treated in the report when establishing an MSE for their region.

While the 2002 report provided encouragement to state agencies to engage in multi-state activity, there was continued discussion of even more specific guidance. In the Midwest, that was provided by a Midwest Governors Transmission Siting Protocol (the Protocol) signed in July 2005.¹³ The Protocol supports regional, cooperative approaches to transmission issues. By that time, the OMS had been formed and the Protocol provided practical confirmation of the directions it had taken.

2. FERC

Federal policy makers also began seeing the usefulness of increased regional cooperation in order to gain support for their initiatives. They also hoped to create a focal point to which they could direct policy questions for state consideration and decisions. This thinking was crystallized in the FERC's July 2002 proposed rule on "Standard Market Design" (SMD).¹⁴ The SMD proposal referred to multi-state cooperation by suggesting two ways for states to participate in RTO activity and regional planning. One section recommended that states within the footprint of an RTO form "Regional State Advisory Committees" (RSAC).¹⁵ The rule itself was not adopted.¹⁶ The RSAC's role was seen as providing advice directly to the independent board of the RTO.

While offering the advisory role, the SMD Notice of Proposed Rulemaking (NOPR) also drew on the MSE concept proposed by the NGA report. The NOPR described a "complementary" relationship between the RSACs and MSEs, presuming that multiple entities might exist side-by-side. However, it suggested that a single entity might be preferable to separate committees.¹⁷ Subsequent discussion within the National Association of Regulatory Utilities Commissioners (NARUC) further blended the concepts by referring to "Regional State Entities." The FERC discussion implied the two different kinds of functions being proposed. The MSE discussion acknowledged that decision authority remained with the states rather than the MSE; in other words, the MSE would be tasked with performing state functions in a regional context: siting, planning generation and transmission capacity, promoting demand-side

12. NGA REPORT, *supra* note 2, at 11.

13. PROTOCOL AMONG THE MIDWESTERN GOVERNORS REGARDING THE PERMITTING AND SITING OF INTERSTATE ELECTRIC TRANSMISSION LINES IN THE MIDWESTERN UNITED STATES AND MANITOBA, CANADA (2005), <http://www.misostates.org/MGATransProtocolFinalDraft7-8.pdf>.

14. Notice of Proposed Rulemaking, *Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*, [Proposed Regs. Preambles 1999-2003] F.E.R.C. STATS. & REGS. 32,563 (2002), 67 Fed. Reg. 55,451 (2002) (codified at 18 C.F.R. pt. 35) [hereinafter *NOPR Remedying Undue Discrimination*].

15. *Id.* at P 552.

16. Order Terminating Proceeding, *Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*, F.E.R.C. STATS. & REGS. ¶ 31,192, 70 Fed. Reg. 43,140 (2005).

17. *NOPR Remedying Undue Discrimination*, *supra* note 14, at P 553.

programs, and perhaps other functions.¹⁸ The RSAC, on the other hand, would be advising the RTO on transmission access and pricing, wholesale markets, and operating costs of the RTO, subjects that are plainly within the FERC's jurisdiction.

The FERC specifically did not address whether a single entity would ultimately be more effective than separate organizations for MSE and RSAC functions. State regulators began discussing questions such as maintaining clarity of function in a combined entity, and the relative roles of states, the FERC, and the RTO in directing the agendas of separate or combined organizations, and even more practical ones such as who would convene such organizations and what funding and staffing would be needed. In addition, where states had already begun participating in RTO stakeholder processes, as they had in MISO, there was concern by states that new organizations might put that participation in doubt. Moreover, other stakeholders were concerned that the state regulatory sector would have too many bites at the apple.

C. Functions of State Regulators with Respect to Wholesale Markets

As regulators began practical consideration of an advisory role in regional wholesale markets, it is helpful to restate, in this context, how those markets fit with state regulation. These answers take slightly different shapes in states with retail competition regimes and those with traditional vertically integrated regulatory systems.

In both situations, state regulators need to understand the wholesale market in order to understand the decisions retail utilities must make in their wholesale market activities. Retail utilities can rely on wholesale markets for supply of purchased power and to make sales of power. Utilities follow individual strategies in terms of being net buyers or net sellers, and the degree of short-term and long-term reliance they place on purchased supplies. Regulators are also responsible for evaluating how effectively regulated utilities sell surplus power into the wholesale markets, as long as their plants are a part of a retail-regulated rate base.

State regulators also play an active role in advocating the shape of wholesale markets. Their advice, directed to the FERC, the Department of Energy, and the Congress, urges structures of the wholesale market that will benefit their states' residents and businesses. Their effectiveness in this role depends on their ability to observe wholesale markets and to gain solid information.

Retail regulation ultimately decides the value of reliability. Decisions to build new generation are among the most critical made by state commissions. The timing of generation approval and the amount of investment approved reflect the amount retail customers will pay, and thus set the demand curve for capacity. In traditionally regulated states, these decisions are legislatively charged to assure an adequate supply to meet future usage levels. Those decisions rest on informed knowledge of wholesale markets and their dependability. In some retail competition states, these decisions are transferred to load-serving entities and to consumers themselves. That legislative judgment,

18. NGA REPORT, *supra* note 2.

and continuing judgments whether to retain that structure, rest on exactly the same kind of knowledge.

State regulators also are charged with making the decisions that permit land use for new transmission and generating facilities. These decisions usually weigh public needs against private land rights. In some cases, they weigh differing public uses, such as siting transmission through parkland. As with the previous kinds of decisions, knowledge of wholesale markets improves the quality of the decisions.

III. FORMATION OF A REGIONAL STATE COMMITTEE

Searching to fulfill these regulatory responsibilities in the context of the growing and more complex workload, state regulators had a mixed reaction to the invitations of the NGA report and the SMD NOPR. Certainly, they welcomed such explicit recognition of the state role in these issues. However, the invitations led to more practical questions that were not resolved by discussions of the concepts of RSACs and MSEs in the NGA report and the FERC's NOPR. On a very informal basis, a group of Midwestern regulators submitted the practical questions to more detailed examination to see whether workable answers could be found.

A. *Assessment of Legal Tools Available for Multi-State Cooperation*

Among the first tasks for state regulators was to identify and explore the legal means available to them to form and operate multi-state organizations.

The most direct solution would be legislative authorization to form multi-state or regional organizations. Federal legislation could reassign jurisdiction held by the FERC to regional organizations and set the parameters for their authority. In 2002, this option was not seen as a solution that would be easily available for Midwestern states to address regional RTO issues. Limited forms of legislative authorization did, in fact, become available with the passage of the Energy Policy Act of 2005 (EPAct 2005). The EPAct 2005 authorizes multi-state entities specifically to address reliability issues¹⁹ and transmission siting issues, if broad membership is reached within an interconnection.²⁰

A more conventional method available to states is the formation of an interstate compact. An interstate compact can provide for joint decisions of state jurisdictional questions. A compact cannot be given federal decisional authority without separate congressional action, raising the same political difficulties posed by a direct legislative solution.²¹ A compact approach would present

19. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221, 119 Stat. 594 (amending Federal Power Act § 216(i)).

20. *Id.* This authority is most applicable to states in the Western Interconnection. The FERC has approved the Western Interstate Regional Advisory Board with this authority. *Governors of Arizona, California, Colorado, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming*, 116 F.E.R.C. ¶ 61,061 (2006).

21. The U.S. Constitution provides in part that “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .” U.S. CONST. art. I, § 10, cl. 3. Extensive information about interstate compacts is maintained by the Council of State Governments through the National Center for Interstate Compacts (NCIC) (the NCIC website is available at <http://www.csg.org/programs/ncic/default.aspx> (last visited February 9, 2007)).

other barriers, as well. A compact must be approved in parallel state legislation by each state member. States have used this technique for a number of issues as diverse as automobile registration, placement of dependent children, and river basin management. Nevertheless, Midwest regulators did not think this avenue would provide the appropriate speed or flexibility for addressing regional transmission issues. First, formation of an interstate compact typically requires a minimum of three years, even for problems with high priority and familiarity to state legislators. Second, regulators at that time thought the fluid nature of the RTO process did not lend itself to formal legislation that might be difficult to amend.

The EPAct 2005 anticipated that an interstate compact might be a useful way to address issues of transmission siting and provided advance congressional authorization.²² So far, no group of states has responded to this congressional invitation.

The Power Act authorizes the FERC to establish Federal-state Joint Boards as another method to address mixed issues of state and federal interest.²³ Though the FERC has never invoked its Joint Board authority,²⁴ this mechanism was considered as a method of addressing RTO issues. It was not viewed as an appropriate means to address the state-jurisdictional issues, however, because the FERC would hold primary responsibility for setting the scope of the Joint Board. State regulators were reluctant to yield that much control over the agenda of a regional state committee to a federal agency with potentially different priorities.

A final direction also existed. State regulatory agencies could simply agree to coordinate certain portions of their work. To the extent the states could participate in FERC dockets, there was no objection to their participation through coordinated groups. Indeed Midwestern states had developed an extensive history of jointly addressing natural gas pipeline rate cases. At the critical time during 2002, several states were cooperating on the review of the proposed Translink Transmission Company.

There were other successful examples of structured multi-state cooperation without formal authority. The New England Conference of Public Utility Commissioners had a long history of successful cooperation with a professional staff employee on regional electricity issues.

Within the Midwest region, eight states between Missouri and Montana participate in the Missouri River Basin States Association (MRBA) to provide coordinated advice to the U.S. Corps of Engineers with respect to management of the dams and reservoirs on the river. The MRBA offers the states a forum where they can work through differences of interest with respect to water uses. It often led to a unanimous state position, which carried weight with the federal agency. Similarly, the fourteen-state region served by US West (more recently known as Qwest) formed a regional oversight committee that permitted region-wide discussion of issues among the states, between the states and the company, and between the state regulators and the Federal Communications Commission

22. Energy Policy Act of 2005 § 1221 (amending Federal Power Act § 216(i)).

23. 16 U.S.C. § 839f(g) (2000).

24. A Joint Board was instituted under the requirements of the Pacific Northwest Power Planning and Conservation Act in the early 1980s. *Id.*

(FCC). This example showed that a utility subject to multiple regulatory agencies could support region-wide discussions among its regulators.

The telecommunications world provided another cautionary note to state commissions that pointed towards coordination as opposed to a multi-state structure with more decisional authority. Though not resolved until early 2004 in *United States Telecom Ass'n v. FCC*²⁵ the FCC's implementation of the 1996 Telecommunications Act²⁶ was challenged with respect to sub-delegations to state commissions of questions within the FCC's statutory authority.²⁷ State regulators were aware of the challenges to the FCC's deference to state decision-makers, even as they were acting under those delegations. The lesson of these cases was that promises of deference by federal regulators had to be viewed skeptically by state regulators.

Consideration of these various forms of legal structure led Midwest regulators to a determination in late 2002 to proceed with the initial exploratory steps of forming an organization to coordinate their regional transmission activities with no formal decisional authority.²⁸

B. Key Formation Issues

With that preliminary decision made, attention turned to a list of practical details of an organizational structure. Planning began by studying a not-for-profit membership corporation. That model held up under examination.

25. *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004).

26. 47 U.S.C. § 160-614 (2000).

27. The Court declared that, "while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities--private or sovereign--absent affirmative evidence of authority to do so." *United States Telecom Ass'n*, 359 F.3d at 566. The order suggests that the finding was made in the context of a Court frustrated by an agency's repeated attempts to fulfill the requirements of a statute, though admittedly one in which Congress left the most sensitive decisions to the regulatory agency. *Id.* The Court summarized the statutory requirement: "[t]he Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 et seq. (the 'Act'), sought to foster a competitive market in telecommunications. To enable new firms to enter the field despite the advantages of the incumbent local exchange carriers ('ILECs'), the Act gave the Federal Communications Commission broad powers to require ILECs to make 'network elements' available to other telecommunications carriers, *id.* §§ 251(c)(3),(d), most importantly the competitive local exchange carriers ('CLECs'). . . . Congress left to the Commission the choice of elements to be 'unbundled,' . . ." *United States Telecom Ass'n*, 359 F.3d at 561. Two samples from the Court's analysis, which follow its recitation of two previous remands of the Commission's efforts to implement this section, indicate its frustration with the agency's claim of deference under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984): "[w]hile the FCC has sought to characterize the state commissions' role here as fact finding, . . . in fact the Order lets the states make crucial decisions regarding market definition and application of the FCC's general impairment standard to the specific circumstances of those markets, with FCC oversight neither timely nor assured. The Commission's attempted punt does not remotely resemble nondiscretionary information gathering. . . . Finally, the Commission's claim that *Diamond International Corp. v. FCC*, 627 F.2d 489, 492-93 (D.C. Cir. 1980), and *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1065 (2d Cir. 1980), uphold 'virtually indistinguishable' FCC subdelegations to state commissions, FCC Br. at 25, is (or should be) embarrassing." *United States Telecom Ass'n*, 359 F.3d at 567.

28. Reaching this conclusion also allowed state regulators to settle on the terminology of "regional state committee" instead of MSE or RSAC. The RSAC term originally led to objections that the FERC's proposal put states in the position of offering advice which the FERC could accept or reject. The preferred term explicitly recognizes that regional state committees can address FERC-jurisdictional matters in an advisory role and can coordinate state-jurisdictional activities over which the states retain decisional authority.

The first membership question was whether to designate regulators or governors—or governor appointees—as the primary members. Given that these discussions were primarily among regulators, it was concluded that regulatory agencies offered the best match of skills and interests. The major interactions were expected to be with the FERC and with the RTO dealing with market structures, rates, and assessing needs and benefits of planned transmission facilities. These were issues state regulatory agencies were already dealing with and involving governors' offices or state energy offices could lead to duplication of effort.

It is not a given that regulatory agencies are the most suitable members of a regional state committee. The NGA's recommendations understandably proposed a structure with significant gubernatorial involvement.²⁹ That option has been adopted by the New England states in the proposed New England States Committee on Electricity (NESCOE).³⁰

The membership structure chosen was to identify the individual regulatory agencies as the members of the corporation. Because of the relatively frequent change of regulatory personnel, it seemed less practical to identify individual members. Each agency designates one of its members as a director of the corporation. A related decision was made to designate a class of non-voting associate membership open to other state agencies interested in transmission issues. Some Midwestern states have planning and siting agencies, whose participation was desirable, and the associate status also facilitated the very useful participation of consumer advocate agencies.³¹

The decisional capability of the organization was aligned with the sense discussed above that the regional state committee's primary role would be coordination of state activity and development of common advice to the FERC and the RTO.³² A related question was whether the regional state committee would have particular filing rights with respect to the tariffs of the RTO. In the Midwest, no such filing rights were proposed. The Southwest Power Pool Regional State Committee, on the other hand, reached an agreement with the RTO under which the RTO agrees to file certain proposed tariff matter at the direction of the regional state committee.

The Midwestern states rather quickly decided that voting by state was adequate for a regional state committee, inasmuch as its actions would be advisory in nature, and because states were free to submit individual positions on any matter. New England's proposal, on the other hand, combines voting by state with voting weighted by electrical load.

With those initial hypotheses, regulatory staff could proceed to draft articles of incorporation as an Indiana non-profit corporation and corporate bylaws. A filing to the Internal Revenue Service for tax exempt status as a 501(c)(4) entity was also drafted, based on the civic welfare purposes of the corporation.

29. NGA REPORT, *supra* note 2.

30. The proposal is before the FERC in *The Governors of: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont*, 112 F.E.R.C. ¶ 61,049 (2005).

31. *Midwest Indep. Transmission Operator, Inc.*, 109 F.E.R.C. ¶ 61,168 (2004).

32. 112 F.E.R.C. ¶ 61,049 (2005).

A critical element for the success of the regional state committee is funding. The major costs of the regional state committee are staffing and meeting expenses, mostly travel costs. Coordination of meeting attendance allows more effective coverage, with less duplication, and including more states, especially those distant from the RTO's meetings locations.

When the Midwest organization was in formation, there were no models for RTO funding of a regional state committee. An agreement was reached with the RTO in which it agreed to provide funding to the regional state committee.³³ The agreement assures the decisional independence of the regional state committee and sets out a process for the committee to set its own budget level, with disputes to be referred to the FERC. The funding is treated as an administrative expense of the RTO in its cost recovery. Informal conversations with the FERC indicated no objection to this approach and did not indicate a need for the agreement to be filed. The agreement was not submitted to the FERC for approval, but the FERC has cited it favorably.³⁴

C. *The Midwest Goal of Multi-state Cooperation*

When this preliminary outline was done, the state commissioners concluded that the concept was sound, the proposal was workable, and the goal was achievable. Commissioners and staff went forward with fleshing out the remaining details of the organization.

The goals of the organization were spelled out to explain the concept to other RTO stakeholders and other observers. Commissioners also undertook to explain the proposal to governors and other political leaders who might have anticipated more participation in regional issues.

The most fundamental objective was coordination of the states' participation in the Midwest ISO stakeholder process. The Midwest ISO, because it was called into existence by its stakeholders beginning in 1996,³⁵ allows a high degree of stakeholder involvement in advising its Board and its management. This process is highly formalized, with membership in the Midwest ISO's Advisory Committee extended to nine separate sectors consisting of market participants and others interested in the industry. Specifically, the state regulatory sector holds three seats in the twenty-three member Advisory Committee. The seven states regulating the original Midwest ISO utilities agreed to a rotation of these seats among themselves. With subsequent growth of Midwest ISO membership, fourteen states and the province of Manitoba were involved in the formation of the regional state committee. While the newer states thought it important to honor the earlier commitments, they also saw the regional state committee as a way to coordinate state representation on the Advisory Committee.

Almost as important to the state regulators was a means to provide consolidated input to the FERC on matters of region-wide interest. The FERC

33. ORGANIZATION OF MISO STATES, INC. AND THE MIDWEST INDEPENDENT TRANSMISSION SYSTEM OPERATOR, INC. (2003), <http://www.misostates.org/OMSFundingAgreement.pdf>.

34. *PJM Interconnection, L.L.C.*, 113 F.E.R.C. ¶ 61,292 at P 36 (2005); 112 F.E.R.C. ¶ 61,049 at P 39 (2005).

35. NGA REPORT, *supra* note 2.

has usually given greater weight to submissions made on behalf of multiple states, giving states an incentive to collaborate whenever possible. From the states' point of view, a combined effort produces geometrically better pleadings, as each state's contribution tends to represent its strengths and interests. The arguments are tempered and honed by debate among the staff and commissioners. Thus multi-state documents tend to present more complete analysis, show more balance, and reflect a broader regional perspective. These documents generally deserve the greater attention they receive from the FERC. States occasionally call for deference and, in one instance, the EPAct 2005 allowed the FERC to extend deference to multi-state pleadings.³⁶ The goal of the Midwest regional state committee is to earn deference rather than claim it.

A third objective was to improve the expertise of staff and commissioners by more effectively sharing information and analysis. The OMS work groups provide regular conference calls for staff discussion. The OMS has also sponsored briefings and informational sessions for commissioners and staff.

The new organization was also expected to yield better coordination of participation in stakeholder activities by working through better reporting and internal discussion. As mentioned above, funding for travel to participate in Midwest ISO activities is especially important given the distances within the footprint. Without supplementary funding, states farther from Midwest ISO headquarters are at a significant disadvantage in participation compared to those within driving distance. In addition, some of the more distant states have smaller staffs and limited ability to cover the breadth of Midwest ISO activity.

It is worth noting two possible goals that were rejected in the formation of the regional state committee. First, in contrast to some of the hopes of the NGA report and the SMD NOPR, the regional state committee recognizes that it has no authority to make joint decisions. Authority that resided at the FERC or with individual states before the formation would continue there afterwards. Second, in response to concerns expressed by some stakeholders that a regional state committee could become another layer of regulation, Midwest commissioners expressly rejected any such possibility.

D. Timeline for the Formation of the Organization of MISO States

The tentative planning steps outlined above continued to lead Midwest regulators toward the formation of a regional state committee. These planning steps began seriously in November 2002. Fast progress was made during the spring of 2003. Concepts were committed to paper; drafts were finalized. In May 2003, articles of incorporation were filed creating the Organization of MISO States, Inc. as an Indiana, non-profit, domestic corporation.³⁷ In June 2003, the initial directors meeting was held, bylaws were adopted,³⁸ officers were elected, and the funding agreement was executed with the Midwest ISO. The organization operated without staff until January 2004. At that time, two

36. Energy Policy Act of 2005 § 1211 (amending Federal Power Act § 215(j)).

37. SECRETARY OF STATE, STATE OF INDIANA, CERTIFICATE OF INCORPORATION OF ORGANIZATION OF MISO STATES, INC. (2003), <http://www.misostates.org/Incorporation.pdf>.

38. ORGANIZATION OF MISO STATES, INC., BYLAWS (2003), http://www.misostates.org/OMS_bylaws.pdf.

full-time employees began work for the OMS and an office was established. Employment agreements were modeled on other non-profit policy agencies. Salary level, terms and conditions were set equivalent to senior staff levels at member commissions.

E. Specifics of the Organization

The details of the OMS tracked the planning described above. Membership is open to state or provincial regulatory authorities that regulate the retail electricity or distribution rates of transmission-owning members or transmission-dependent utility members of the Midwest MISO, and agencies that have primary regulatory authority responsible for siting electric transmission facilities in those states or provinces. This membership definition creates the possibility of two member agencies from a single state, but that has not occurred. Agencies have preferred to have a single OMS member and coordinate as necessary within the state. Associate membership is open to other state or provincial agencies involved with energy planning, environmental issues, or advocacy issues relating to electric transmission. The OMS Board may approve other state agencies as associate members.

The OMS Organization matches the Midwest ISO footprint, including states only partially served by the Midwest ISO. Fourteen state regulatory agencies and the Manitoba Public Utilities Board have become OMS members. The OMS Board of Directors therefore has fifteen members, reflecting the one-vote-per-state voting protocol. Each member agency is free to designate a new OMS director at any time through any internal process it chooses. The OMS Executive Committee is composed of five members: the president, vice-president, secretary, treasurer, and an at-large member. The president and treasurer have several functions that demand their time: the president sets the agenda and conducts Board and Executive Committee meetings; the treasurer approves office expenditures and payroll and is responsible for bank and financial statements. The three other Executive Committee members also act as members of the MISO Advisory Committee representing the state regulatory sector. The identity between Advisory Committee participants and the Executive Committee brings a high level of familiarity with Midwest ISO issues to the OMS's discussions and vice-versa. The OMS directors are allowed to designate a proxy for any OMS meeting they are unable to attend personally. This provision has allowed the OMS to operate with a quorum at every scheduled meeting despite the busy schedules its commissioner-directors maintain.

The funding arrangement with the Midwest ISO has worked smoothly. The OMS began operations with a \$200,000 advance from the Midwest ISO. The OMS set an initial budget of around \$700,000, which provided for several contingencies that did not occur. For instance, the OMS budgets include expenses for an active program of FERC litigation that has not been pursued and for consulting assistance that was not used. The OMS budget for 2006 was set at \$511,000, again with some allowance for professional fees, but actual expenses were under \$390,000. Remittances are made electronically, currently at \$40,000 monthly. During one interval, remittances were suspended because the OMS revenues had overrun its expenses. The Internal Revenue Service approved the

501(c)(4) tax exempt status on July 13, 2004.³⁹ Budgets approved by the OMS Board have been accepted by the Midwest ISO Board without challenge. Thus in practice, the OMS's independence has been respected and there has been no occasion to seek dispute resolution from FERC as provided in the funding agreement.

IV. EXPERIENCE USING THE OMS STRUCTURE

The OMS has been in operation for over almost three and a half years. In many ways its experience has matched the expectations of its founders.

A. *Internal Process*

The Board chose an internal structure that was familiar to commissioners. It is modeled on the structure of the NARUC. The OMS conducts analysis of issues and develops positions and pleadings through internal work groups. Work group members are primarily staff of state commissions, but in several cases commissioners and staff from associate member agencies have participated and chaired Work Groups. The OMS Board and Executive Committee identify the issues of concern and assign them to work groups. The Board has added and eliminated work groups as issues have shifted. Work groups meet by conference call to draft a position paper which is distributed to Board members with as much lead time as possible before Board meetings, usually two or three business days. At a Board meeting, the work group recommendation is presented and discussed. It is subject to amendment by parliamentary process. The OMS bylaws require a majority of the full membership before a position is adopted. Since that majority is eight positive votes, as a practical matter, where one or two states are unable to participate in a Board meeting, a position receiving eight votes is actually receiving a supermajority.

The eight Working Groups currently in operation give a sense of the range of issues being addressed by the OMS. Work Groups often send representatives to stakeholder committees of the Midwest ISO. The Executive Director acts as a clearinghouse for these activities:

- Market
- Pricing
- Congestion Management and Financial Transmission Rights
- Market Monitoring and Mitigation
- Transmission Planning and Siting
- Demand Response
- Resource Adequacy
- Long-Term Development and RTO Governance

B. *OMS Board Process*

Board meetings and Executive Committee meetings are held monthly. Under the OMS bylaws, these meetings are open. Member states operate under open meetings laws, and the initial board believed it appropriate for the OMS to

39. Letter from Lois G. Lerner, Director, IRS Exempt Organizations, Rulings and Agreements, to Organization of MISO States, Inc. (July 13, 2004), <http://www.misostates.org/OMSTaxStatus.pdf>.

operate with similar transparency. Most meetings are held by teleconference calls. To date, the organization has held two face-to-face meetings per year: an annual meeting at Midwest ISO headquarters following the Midwest ISO annual meeting, and one following the NARUC regional meeting in the Midwest. The annual meeting provides an opportunity for personal interaction with Midwest ISO directors and management and other stakeholders, and to observe the stakeholder process and tour the Midwest ISO facilities. The other in-person meeting takes advantage of the presence of most commissioners to attend the NARUC regional meeting in June. Those meetings provide an opportunity to meet with the FERC commissioners, the independent market monitors, and other resources.

At each OMS monthly Board meeting, the Board reviews the agenda of the upcoming Midwest ISO Advisory Committee meeting. That review provides a way for the full membership to discuss the issues being addressed at the Midwest ISO. The three representatives are guided by the views they hear from the membership.

C. Issues Addressed

Using this system, the OMS has addressed issues in all the areas it was intended to be able to address. It has supported states' own work on new facilities, needs analysis, siting, and approval for transmission facilities. The most aggressive project in this area is called the Northwest Subgroup, a regional subset of the Transmission Planning and Siting Work Group's members from Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin. Its purposes are to mutually examine the five states' electric transmission permitting and siting processes and to explore ways to coordinate activities among the states when they receive electric transmission line permit applications that cross state boundaries.

Other work has addressed how states may choose to implement and assure resource adequacy. These issues remain the responsibility of most state commissions, but must be coordinated with RTOs and with regional reliability councils.

The OMS has also addressed FERC-jurisdictional issues. Some of these involve RTO issues, such as the structure of the Midwest ISO's energy market launched in early 2005 and the ancillary services market now under final development, and the pricing of transmission services. The OMS has also filed comments directly with the FERC and with the Department of Energy with respect to transmission issues.⁴⁰

The OMS has also considered issues for which they share responsibility with the FERC. These issues, such as reliability and investment, tend to underlie more specific issues and may be considered in the context of state-jurisdictional issues or FERC-jurisdictional issues.

One issue sparked extensive debate over the first two years of the OMS's work: state commission access to confidential data held by the RTO. While it is not the purpose of this article to analyze that issue, it provides a way to show

40. ORGANIZATION OF MISO STATES, FERC FILINGS, *available at* http://www.misostates.org/ferc_filings.htm (last visited Jan. 31, 2007).

how the OMS structure develops a position. The issue was assigned by the OMS Board to the Market Monitoring and Mitigation Work Group. That group met with Midwest ISO personnel and developed proposed language for submission to the FERC as part of the Midwest ISO's Transmission and Energy Markets Tariff (TEMT). After the filing of the TEMT in early 2004, the Work Group developed language supporting the filing. The Board approved a filing as recommended. When the FERC rejected the language,⁴¹ the Work Group recommended a rehearing filing to the OMS Board, and again the Board approved the work group's recommended filing suggesting an offer of proof process. The FERC's rehearing order accepted that proposal.⁴² The Work Group obtained an appropriate offer of proof from each state outlining its requirements for protecting sensitive data. The OMS Board approved a pleading forwarding the offers to the Midwest ISO on February 11, 2005. Further comments were submitted on compliance filings. The FERC, by order of June 21, 2005, required further discussions between the OMS and the Midwest ISO and other stakeholders. The Work Group conducted the required negotiations and again recommended comments on the compliance filing. The Work Group finally recommended that the OMS accept the outcomes of the FERC orders, and the Board agreed. The Work Group and the Midwest ISO legal staff cooperated to develop sample non-disclosure agreements, designations of authorized requesters, and sample data requests.⁴³ The OMS itself has not sought the necessary authority to obtain confidential market data in its own right. Because the OMS does not have a basis in state or federal statute with respect to its own handling of confidential material, a future FERC order would be required before the OMS could request or receive confidential data.⁴⁴ Coming out of this extended controversy, the OMS approach is to work with the resulting system and gauge its strengths and shortcomings through experience. That experience would guide any future filings to modify the current arrangements.

D. Resolution of Disputes and the Format of Filings

The OMS began with a mix of optimism that cooperation among states would prevail and skepticism that differences among states would be insurmountable. On balance, the optimists were right more often than they were wrong. Commissioners have shown impressive leadership in accepting conflicting viewpoints while assuring that the individual interests of their states are expressed.

It is not difficult to catalogue the differences within the Midwest ISO footprint. The "Midwest" is a very diverse region, stretching from the industrial areas of the Ohio Valley to the plains of Eastern Montana. Three states allow retail competition. Seven states use conventional rate-of-return regulation with vertically integrated utilities. One state separated transmission facilities from generation and distribution assets. Two states have a mix of retail competition

41. *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 F.E.R.C. ¶ 61,163 (2004).

42. *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 F.E.R.C. ¶ 61,321 (2004).

43. These Confidential Data Forms are available at <http://www.misostates.org/Forms-Confidential%20Data%20Forms%202006.htm> (last visited February 8, 2007).

44. *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 F.E.R.C. ¶ 61,157 (2004).

and conventional rate-of-return regulation. One state and one province are fully served by public power. The transmission facilities themselves, of course, have mixed uses, including reliability and economic considerations. The management pattern varies: the Midwest ISO manages the transmission facilities of member companies, but it must also coordinate service over transmission facilities of non-members that are connected to MISO. The region has had up to four different stand-alone transmission companies.

With that kind of diversity, it is not surprising that states would have different positions on issues. There are at least three ways the OMS has been able to coordinate those differences. First, some disagreements yield to sharing of information and analysis. When states can explain their thinking to each other, they often are able to bridge their positions under a principle of a higher magnitude. Occasionally, states moderate the strength of their position in recognition of the positions of other states and in the interests of being able to reach a consolidated position.

The most effective technique the OMS has developed is to include minority points of view in its documents. This approach is based on the judicial model of opinions, in which dissenting positions are identified and given full explanation. The judicial model contrasts with legislative models, where the language of a position is generalized until a majority can agree to it. The legislative model, while often useful, can lead to language so generalized that it becomes an abstraction that is not useful to the policy-maker reading it: "We often find it desirable when the sun is able to rise in the east." State regulators are familiar with the criticisms of such watered down language.

This question was presented to the FERC staff, which strongly preferred submissions using the judicial model. While they welcome being informed of real agreement among states on RTO issues, they recognize that in some situations the FERC will have to make a decision. In those cases, they prefer a full explanation of each possible answer. Based on that advice, OMS pleadings often include minority positions, usually set out in footnotes, and identifying the states that concur in that position.

An OMS pleading concludes with a listing of all states participating in the document as well as those not participating for various reasons. A state may prefer to submit its own comment and not join the regional comment. The OMS bylaws recognize each state's right to make separate filings, even if they subscribe to an OMS pleading. In other cases, a director may be temporarily unavailable, or may wish to consult with colleagues before committing to a position. Some states are obliged to consider a regional pleading in open session before endorsing it, and may lack sufficient time to notice the document for such consideration. These kinds of non-participation are summarized as "for procedural reasons."

The best test of the OMS's success in harmonizing positions is that the organization has reached a position with the support of at least eight states on every issue it has undertaken to address.⁴⁵ Its pleadings appear to have earned

45. The OMS has not participated in every case it might have. For example, in the early days of the OMS, its Board declined to participate in the FERC's docket on cross-border rates, Docket No. ER05-6, for transmission service between the Midwest ISO and the PJM Interconnection, thinking that the issues might

respect from the FERC.⁴⁶ A more subtle test is the speed with which the OMS Board is approving work group recommendations. This measure suggests that the process is hitting its stride—work groups can anticipate the kind of analysis the Board expects; they are sensitive to the concerns of individual states, and a level of trust has been established. A milestone was passed when one of the OMS representatives presented a position to the Advisory Committee, then added the statement that what he had just said represented the majority view of the OMS states, but was at odds with the position of his own state.

Compare this experience with recommendation #8 in the 2002 NGA report:

To promote voluntary cooperation and reduce the probability of impasse among states, the MSE should:

- facilitate regional negotiation and conflict resolution processes;
- actively encourage the use of new low-impact technologies and existing corridors to enhance or expand the grid in ways that minimize environmental and land-use burdens;
- explore tools that may be used to mitigate the inequitable distribution of costs that can accompany an interstate transmission line, including an impact fund that would be available to disproportionately impacted states for use toward energy related projects or the purchase of open space (to compensate for affected lands);
- evaluate ways to bar states that do not participate or that block important regional projects from obtaining benefits otherwise available through regional efforts; and
- promote the view of electricity (and electricity pricing and reliability) as a regional “common good” rather than a differentiating factor to be used in competition with neighboring states for economic development opportunities.

If over time, it becomes apparent that voluntary cooperation is not effective within a given region, the Task Force recommends that the MSE evaluate options for making decisions binding on member states.⁴⁷

The OMS experience gives reason to believe that the skeptical view of the last paragraph of the NGA recommendation may be unnecessary. To date, voluntary cooperation appears effective, at least within this region. Nothing in the OMS experience suggests the need to challenge the scope of the multi-state legal tool-kit by looking for ways to make decisions binding on member states.

E. Approaches in Other Regions

Another test of the success of the OMS model is degree of emulation it has received. To date, the regional committee concept has only gained interest in areas dealing with an RTO. Three RTOs (New York ISO, California ISO, and ERCOT) serve within a single state and the multi-state concept is inapplicable to them. The Committee on Regional Electric Power Cooperation (CREPC) developed outside an RTO framework in the Western states and serves many of the same purposes of regional coordination and communication.

The Southwest Power Pool (SPP) RSC was established in April 2004 by agencies in Arkansas, Kansas, Missouri, Oklahoma, New Mexico (non-voting

prove too confrontational for a fledgling regional state committee. That docket has indeed been riddled with controversy.

46. *E.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 F.E.R.C. ¶ 61,299 (2006).

47. NGA REPORT, *supra* note 2.

member), and Texas. It follows the OMS organizational model extensively. The most notable innovation in the SPP RSC charter is with respect to filing rights: the RTO agreed to file RSC language in some circumstances. The FERC on rehearing held that the SPP had voluntarily agreed to file with the FERC certain regional proposals that may be developed by the RSC, pursuant to section 205. It noted that the SPP may file its own proposals on the same subjects.⁴⁸ The OMS shares one overlapping member with the SPP RSC.

The New England States Council on Electricity proposal was first filed with the FERC on June 25, 2004. As noted above, this proposal varies from the OMS model in several respects. Most importantly, each state's membership is designated by its governor. A two-part voting method provides voting both by state and by load. Proposals must receive a majority by each method. The proposed budget is also significantly larger than the OMS budget level, anticipating the need for consulting assistance. The proposal has been remanded by the FERC for further refinement by the sponsors.⁴⁹

The Organization of PJM States (OPSI) was formed in April 2005, representing the states served by the PJM Interconnection. The OPSI followed the OMS model, in part because it shares six member states with the OMS. The overlapping footprints of the Midwest ISO and PJM cause their respective regional state committees to have overlapping membership. The only drawback dual membership presents is that those states are obliged to follow two sets of RTO activity. If they spread the workload among staff and commissioners, they need to create an internal coordination process. If they devote the same individuals to participate in both organizations, it is a significant commitment of their time, but they can transfer useful insights from one RTO's issues to the other.

While seams issues are a matter of obvious interest to all states, states served by multiple RTOs are keenly aware of the need to make markets compatible. In particular, the FERC's requirement that the PJM and Midwest ISO work towards a joint and common market is an area that invites future cooperation between the OMS and the OPSI.

V. CONCLUSION

The OMS experience thus far holds several lessons.

The OMS model builds the technical capacity of state commission staff through participation in work groups, mutual discussion, and participation in Midwest ISO technical committees. These activities also give commission staff members a broader perspective on regional issues and better knowledge of RTO operations and personnel. They gain the ability to network with appropriate experts in other states and throughout the stakeholder community. At the same time, staff members are allowed to gain deeper expertise by being able to concentrate on particular issues.

48. *Southwest Power Pool, Inc.*, 109 F.E.R.C. ¶ 61,010 at P 93 (2004).

49. NGA REPORT, *supra* note 2.

It has become clear that travel reimbursement is the key to state participation in activities of the RTO and the regional state committee. Increases in state budgets are always difficult to request and obtain, especially for travel and for activities outside the state that are difficult to explain to legislators and budget administrators. As mentioned above, in the Midwest ISO geography the states at the greatest distance from regional meeting locations also have the smallest staffs and the smallest travel budgets. Without an outside funding source, those states would be severely limited from participating in regional activities. States nearer to the meeting locations and those with larger staffs might be able to participate without outside funding, but would be hard pressed to carry responsibility for regional coordination with no reciprocal contribution.

The OMS experience has also shown the need for commissioners to be involved in policy decisions. Their authority is needed to balance local needs with regional needs. Without their direction, staff members do not feel empowered to broaden their focus sufficiently. In addition, commissioners have more opportunity to gain the political support within the state that supports their regional participation. The Midwest Governors Transmission Siting Protocol provides a basis for that participation, but it is not sufficiently detailed that staff members can act on it without direction from the commissioner level.

The commissioners participating in the OMS have shown exemplary leadership in showing respect for policy differences among states and among stakeholder interests. That leadership does empower staff members, but it must be refreshed frequently.

Overall, the OMS shows a high value return. All stakeholders, but especially the RTO and the FERC, gain the efficiency of dealing with the states collectively. The FERC has indicated informally that it appreciates the improved responsiveness of the states to its policy inquiries and the willingness of state regulators to take a more regional perspective. It has recognized the quality of the collaborative OMS statements by increased attention and by agreement on at least some occasions. The RTO directors and managers seem respectful of the need for state regulators to be generally satisfied with the services the RTO offers and the costs of those services. That satisfaction level is ultimately necessary for the continued success of the RTO.

Increased communication with RTO members has been especially productive. In the case of regulated entities, a sense of collegiality has developed, as regulators and other stakeholders share the task of making the RTO responsive and cost-effective. These entities generally understand the benefits of having better informed regulators. Regulated stakeholders value early indications of regulatory acceptance of certain RTO proposals before they make financial commitments. With unregulated entities such as power producers and marketers, the increased communication with regulators has had the useful effect of demystifying the other party, thereby building respect for their roles in the market. It has been especially helpful in persuading these groups that the regional state committee does not constitute another layer of regulation.

Last, state agencies believe that regional participation has improved their expertise on transmission and market issues. That knowledge is available to

their entire caseload, allowing improved analysis of issues. Regulators should be able to see the entire market affected by their decisions.