

Formal Comments Submitted by the ISO/RTO's

FORMAL COMMENTS

Quadrant: Wholesale Electric Quadrant
Recommendation: WEQ 2009 AP Item 3.a.ii.1; R07013 – Develop Confidentiality Agreement
Submitted By: ERCOT ISO, IESO, ISO New England, Midwest ISO, New York ISO PJM, and SPP
Date: January 15, 2010

These comments are in response to the Recommended Non-Disclosure Agreement ("NDA") that has been drafted by Joint Electric Scheduling Subcommittee in response to the WEQ 2009 AP Item 3.a.ii.1; R07013 – Develop Confidentiality Agreement.

In summary, and upon review of the details of the Draft NDA, we believe a more effective approach to ensuring that companies in receipt of in data transferred through the Electronic Tagging System ("ETS") would be to include a new requirement in WEQ-004 Coordinate Interchange that simply captures the need for receiving parties to keep such information confidential. For example language could be added to WEQ-004 stating

Any party submitting a Request For Interchange must have confidentiality agreements with all parties directly included on the Request For Interchange prior to submittal to prevent the misuse of such data.

There are a number of benefits of such an approach.

First, by including the language (or similar language above) into WEQ-004, it will be submitted and presumably approved by FERC, thereby becoming mandatory and enforceable by FERC, as part of a Transmission Service Provider's Tariff.

Second, it leaves to the parties responsible for sharing/receiving the information the decision-making about the best form for the Agreement to take. This is particularly important, because some Transmission Service Providers, like ISOs/RTOs, for example, already have confidentiality agreements and information policies with the companies with which they do business. Some of these confidentiality agreements and information policies are already FERC-approved. Companies like ISOs/RTOs are routinely in possession of data/information as, if not more, commercially sensitive than the data that is provided through the ETS. If NAESB establishes a Business Practice requiring Transmission Service Providers to have such Agreements and Policies in place, then there is no potential for a Transmission Service Provider to have unique agreements that best meet their needs and tariffs. (see detailed comments below).

Third, NAESB is not the best party with which NAESB members should enter into an Agreement on this matter. Even though NAESB will be administering the Electric Industry Registry, NAESB neither owns the data transferred through the ETS, nor is the aggrieved party if there is an inadvertent release.

Additionally, NAESB is unlikely to seek to enforce any NDA that exists. NAESB is not an enforcement agency and does not control the subject market data. Moreover, because the aggrieved party will not be a signatory to this contract, there may be confusion about how they can enforce the Agreement. This issue does not arise if the provision to keep information confidential is part of a Transmission Service Provider's Tariff. Finally, what happens if a party chooses not to sign the NDA? Is there a separate agreement between the registry or NAESB and other institutions to enable enforcement of the consequences of a participant not signing this document?

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Fourth, the details of the Draft NDA highlight additional difficulties with adopting the approach of entering into an agreement with NAESB.

In Provision (2), it says that the Recipient must ensure that third parties in receipt of the data will not release the information. This raises the question of whether the Recipient of the data can ensure what a Third Party does or doesn't do with the data. A recipient can ensure that the Third Party is aware of the confidentiality of the information, the Recipient should not be held liable for actions taken by parties beyond the Recipients control.

The Draft NDA refers to provisions becoming invalid if found to be unenforceable? Under what jurisdiction is this agreement entered into; e.g., the law of which state?

The Draft NDA seems to contemplate - but is very vague - about whether it could be interpreted to cover data and information more than E-Tag data. Some parts of the Draft NDA refer to ETS Data, and other parts of the Draft NDA refer to "Confidential Information?"

For those Transmission Service Provider that have FERC-approved Information or Confidentiality Policies (due to their handling of commercial sensitive data), the policies establish rules over the timing by which the Transmission Service Provider must keep the information confidential. This NDA suggests that the E-TAG data (but perhaps other information) could be released simply after 8-days. Will the 8-day delay period replace the more extended delay period per FERC policy for certain market data?

The Draft NDA states that the document constitutes the "entire agreement" between the parties exchanging data? How is this possible? There are no provisions on jurisdiction, each parties responsibilities, and other typical boilerplate that exist in "Agreements".

In conclusion, we support the effort to keep E-Tag Data confidential. We believe this can be accomplished much more simply and effectively through new requirement in WEQ-004 Coordinate Interchange that becomes FERC approved and enforceable, and would be consistent with policies currently in place to keep companies' commercially sensitive information confidential.