



WSPP

Corporate Structure and Governance of Western Energy Imbalance Market

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I. Introduction

A. Introduction To The EIM And WSPP

Many market participants and commissioners from thirteen public utility commissions in the Western Interconnection are exploring the formation of a centrally administered, dynamically dispatched Energy Imbalance Market (EIM). The EIM would dispatch energy in five minute increments based upon a security constrained economic dispatch calculation (SCED). The EIM would account for transmission availability and establish the Locational Imbalance Price (LIP) for each node (location) based on offered resources. The EIM would dispatch only intra-hour market energy and no other product. In particular, the EIM would not be a market for next hour or next day energy or a full range of ancillary services as is found in PJM Interconnection, the Midwest Independent Transmission System Operator, and certain other regional transmission organizations or independent system operators (for convenience, both types of organizations are referred to as RTO).² Bilateral energy transactions and traditional transmission tagging would remain the core means of purchasing, selling, and delivering energy. The EIM would optimize these bilateral transactions by most economically resolving differences between energy schedules and load, including imbalance arising from variable energy resources and through use of least-cost economic dispatch.

¹ This paper was prepared by Wright & Talisman, PC for WSPP, with comments on earlier drafts provided by several interested parties. Wright & Talisman is an energy law firm. The firm's electric industry clients include WSPP Inc., Southwest Power Pool, Inc., PJM Interconnection, LLC, the transmission owners of the Midwest Independent Transmission System Operator, Inc., the Entergy Independent Transmission Coordinator, electric utilities (both jurisdictional and non-jurisdictional), and power and transmission project developers. Contact Arnold Podgorsky, General Counsel of WSPP Inc. and a Managing Shareholder. Email podgorsky@wrightlaw.com; telephone 202.393.1200.

² In its orders the FERC established different criteria for qualifying as an "independent system operator" and a "regional transmission organization." For purposes of this paper these distinctions are not material and both types of organizations are referred to as RTOs. Thus, in its initial order directing open transmission access, Order No. 888, FERC encouraged transmission owners to turn functional control of their transmission facilities to independent transmission system operators. The resulting system operators called themselves ISOs and some still use this term today. In subsequent orders, particularly Order No. 2000, FERC described regional transmission organizations as ISOs that incorporated certain additional functions such as centralized markets and enhanced long-term planning. For purposes of discussing EIM governance, there is no material difference between ISOs and RTOs and the term "RTO" encompasses both.

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WSPP is member driven, pro-competition and pro-markets. It is neutral, favoring no particular market sectors or participants. WSPP's principal functions today are administration of the WSPP Agreement, developing energy products and associated service schedules to serve evolving market needs, and training. WSPP's support for the potential development of the EIM includes analysis and presentations regarding governance, transmission structures, financial structures, and potentially other matters. WSPP facilitation of the EIM may include education, identification of solutions options, and, with market participants' involvement, participation in finding workable compromises. A listing of potential EIM issues not within the scope of this paper appears at the back.

An EIM market will require a Market Administrator, which could be WSPP. The Market Administrator would contractually engage a market operator. The Market Administrator also would house the: Members Agreement to establish and specify the EIM governance; Board of Directors; tariffs and agreements that comprise the market rules and transmission arrangements; contracts pertinent to market operation, seams and other inter-regional agreements; the market monitor as required, and administrative staff. These matters are described further below.

Market participants will determine which entity will act as Market Administrator. Appropriate entities include WSPP, through a sister corporate entity. This paper is not intended to identify the entity to serve as Market Administrator or to make a case in favor of WSPP's service in that capacity.

B. Addressing Governance

This paper describes potential governance approaches to facilitate discussion and eventual adoption of a governance structure. Governance includes at least the following:

- A corporate entity to house the governance structure, operational contracts and other agreements, and staff
- Corporate documents that would include agreed restrictions on the mission, subject to revision only upon an agreed substantial level of support
- Cost effective market management and operation, and contract administration
- Reasonable neutrality, in form and practice, such that market participants are induced to participate without concern that practices or execution could be unfairly biased against their economic position.
- A statement of agreed operational and economic goals and fiduciary duties to guide the Board of Directors if stakeholder processes produce an impasse.
- Facilitated stakeholder process for both development and operation, such that issues are resolved collaboratively and with minimal disagreement at the governmental level

Some may feel that it is premature to address corporate structure and governance until the PUC EIM Group has presented a comprehensive economic analysis of the potential market.³

³ Utility commissioners from across the Western Interconnection states established the PUC EIM Group to foster a collaborative multi-state effort to evaluate the costs and benefits of an EIM. The State-

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Others have indicated that governance (particularly limits upon the mission and potential evolution toward or imposition of an RTO) is critical to their interest and participation. The disparate views indicate that describing governance options at this time may bring additional participants into EIM discussions and potentially expand support for the market.

Additionally, some non-jurisdictional entities have expressed concerns that participation in the EIM could cause them to lose their non-jurisdictional status. Although this concern does not directly flow from governance, it is addressed in the FERC jurisdiction section below to provide context.

This paper addresses the following governance matters. Some topics are premature for detailed discussion and are touched on only briefly to establish placeholders:

- II. FERC jurisdiction
 - A. A structure that need not be an RTO
 - B. Market monitoring
 - C. Addressing concerns that EIM participation would cause non-jurisdictional entities to become jurisdictional
- III. Governance
 - A. Corporate organization
 - B. Member rights and obligations, and a members agreement
 - 1.Membership criteria
 - 2.Membership rights
 - 3.Statement of corporate goals
 - 4.Voting procedures
 - 5.Corporate restrictions, such as provisions to restrict additions to the mission
 - 6.Exit provisions
 - 7.Other provisions
 - C. Board of Directors, including whether Board members would be independent (unaffiliated with market participants), selected by members without independence restrictions, selected based upon areas of expertise, or a combination of the foregoing
 - D. Officers, market operations, and staff (and how to minimize same), including determining where and how to house the following functions:
 - 1.Officers
 - 2.Administrative operations
 - 3.Market operations
 - E. Regulatory and reliability compliance

Provincial Steering Committee (SPSC), a group funded by an ARRA grant for transmission planning in the Western Interconnection, is supporting the PUC EIM Group. The SPSC has three areas of focus: (1) transmission planning; (2) efficient use of the existing grid; and (3) lowering the cost of integrating variable generation. See www.westgov.org/puceim/inc . The website includes a strawman market design, design assumptions, and training sessions. This paper is intended to complement and be generally consistent with the PUC EIM Group effort.

C. Caveats: No Official Positions

The WSPP Executive Committee (WSPP board of directors) authorized WSPP to facilitate EIM exploration. This paper is to inform and facilitate discussion, and thereby foster knowledgeable decisions by potential EIM participants, most of which are WSPP members. The WSPP Executive Committee has not reviewed or approved this paper and it sets forth no official WSPP positions or preferences.

Wright & Talisman has prepared this paper to assist WSPP and market participants to identify issues and potential solutions. This paper does not set out legal advice or legal opinions for the benefit of any entity, including WSPP. Each prospective participant should obtain independent legal advice before making decisions concerning the matters addressed in this paper. This paper sets forth no legal positions or preferences of Wright & Talisman.

II. FERC Jurisdiction

Many market participants have expressed opposition to an RTO or the breadth of markets found in RTOs. These participants may seek assurances that governance and other structures can guard against an unwanted RTO or imposition of RTO-like markets or characteristics. Certainty on this point will require conferring with the FERC as the details of an EIM develop. But, a reasonable working assumption is with certain transmission arrangements, Federal regulators would not require that the EIM operate through an RTO. Nor would the FERC likely have a legal basis to exercise control over EIM governance, though it would have jurisdiction over the rates, terms, and conditions of EIM purchases and sales.⁴ As further explained, a non-jurisdictional entity's participation in the EIM would not cause that entity to become jurisdictional, though the FERC may excise jurisdiction over non-jurisdictional rates to the extent, if any, that they affect EIM rates.⁵

A. If the EIM Does Not Control Transmission Facilities Within The Meaning Of FERC Orders, The FERC Is Unlikely To Require That The EIM Be An RTO Or Fulfill RTO Criteria

As discussed in this section, the FERC may be expected to exercise FPA jurisdiction over the following:

- Determinations that the rates, terms and conditions of the EIM (market rules and pricing) are just and reasonable, including market rules defining the product, and all aspects of soliciting offers, calculating the LIP, and dispatch⁶

⁴ See FPA § 205, 16 U.S.C. § 824d (requiring all rates and charges made for transmission or the sale of electric energy subject to the jurisdiction of the FERC to be just and reasonable).

⁵ See section III.C below.

⁶ With respect to FERC jurisdiction over EIM rates, terms, and conditions, the EIM is distinguished from trading platforms. Trading platforms afford buyers and sellers the ability to identify

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- Monitoring the market to assure that pricing and execution are not influenced by the exercise of undue market power
- The mechanism (an adder, fixed participation fee, or other approach) to recover the startup and operational costs of the EIM
- Transmission rates, if any, of the EIM; *however*, for reasons discussed below it may be advantageous to structure the EIM so that transmission rates are not established by the EIM but are, instead, under the respective open access transmission tariffs (OATT) of the owners of the transmission facilities
- Just as the FERC, Commodity Futures Trading Commission, and other Federal and State agencies have jurisdiction concerning market manipulation and antitrust violations in all interstate commerce transactions, they would have that jurisdiction over the EIM

FERC jurisdiction over EIM rates, terms and conditions does not equate to FERC imposition of an RTO. If the EIM is structured appropriately, in our view FERC precedent would not require that the Market Administrator be an RTO against the wishes of market participants.

Under FERC precedent RTO formation and participation is voluntary. Except for an early approach by which the FERC imposed RTO participation as a condition of certain merger approvals,⁷ the FERC has not required RTO formation. Even its informal efforts to persuade entities to form RTOs have diminished in recent years as Commissioners and Staff have observed material opposition to the RTO-model in some regions. Further, while the FERC acts only through binding orders, informal discussions with Commissioners and Staff indicate that the FERC strongly supports the EIM even if not housed in an RTO. Particularly as details of the EIM emerge, these kinds of discussions will be needed to assure the legal feasibility of the kinds of approaches discussed in this paper.

The FERC's flexibility about RTO formation is consistent with precedent. Principles of RTO formation are set forth in FERC Order No. 2000.⁸ There, the FERC explained that the

each other for specific requirements, match their needs, and negotiate bilateral transactions. If the platform does not take title to the energy and its rules do not have an impact on pricing and other terms, the platform and rules are unlikely to be jurisdictional.

⁷ See *N. States Power Co.*, 90 FERC ¶ 61,020, at 61,135 (2000) (FERC based its approval of the merger of Northern States Power Company (Minnesota) with New Century Energies, Inc. on the resulting entity's participation in the Midwest ISO); see also *Ohio Edison Co.*, 81 FERC ¶ 61,110, at 61,408 (1997), *reh'g denied*, 85 FERC ¶ 61,203 (1998) (FERC conditioned its approval of the merger of Ohio Edison Company, Pennsylvania Power Company, Cleveland Electric Illuminating Company, and Toledo Edison Company on, among other things, the merged entity's participation in the Midwest ISO or another appropriate ISO).

⁸ *Regional Transmission Organizations*, Order No. 2000, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999) (Order No. 2000), at 31033-34, *order on reh'g*, Order No. 2000-A, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000) (Order No. 2000-A), *petitions for review dismissed sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

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various regions would determine whether a power exchange (any wholesale market) is necessary and whether the power exchange needed to be operated by an RTO.⁹ Thus, even in 2000 – a time of peak RTO formation – the FERC stated that energy markets could develop outside of and without RTOs.¹⁰

Although the FERC makes clear that a market can exist outside of an RTO, the precise structure of such a market would need to be carefully considered. If market participants disfavor an RTO, the transmission arrangements for the EIM would need to be structured to avoid any basis to require that the EIM be or emulate an RTO. In our view, one approach is to assure that the Market Administrator is not a transmission provider—that it would not sell transmission for EIM energy through its own OATT and, consequently and materially, would not assume control of any entity’s transmission facilities.¹¹ Rather, the Market Administrator could enter into standardized transmission service agreements with all applicable transmission owners solely for EIM transmission service. EIM transmission service is a five-minute transmission product. This transmission product would be separate and distinct from, and priced differently from, standard non-firm hourly transmission. A standardized pricing format could apply, although the cost recovery component of each service agreement possibly (likely) would differ, reflecting the disparate cost recovery requirements of respective transmission owners.

Under this structure, because the EIM would not be a transmission provider or control transmission facilities of others, it would not be subject to “open access” requirements and regulatory requirement of independence (generally applicable to RTOs) would be diminished or eliminated. While market participants may desire independence regardless of regulatory requirements, the intent of this paper is simply to point out a potential option.

If the EIM is not required to be independent, it follows that the FERC would not be expected to regulate governance and stakeholder procedures.¹² Further, the RTO criteria set out in FERC Order Nos. 888 and 2000 would be inapplicable. Because the EIM would not perform the basic tasks that RTOs perform and that underlie the RTO independence requirement (such as granting open access to transmission facilities under its operational control, calculations of transfer capability, and OASIS administration), there would be no regulatory predicate for

⁹ Order No. 2000 at 31,207. *See Pub. Util. Dist. No.1 v. FERC*, 272 F.3d 607,616 (D.C. Cir. 2001) (“the language of Order 2000 is sufficient to establish that RTO participation is voluntary”).

¹⁰ RTO formation requires an agreement filed under FPA § 205 setting out the rules, practices and procedures under which the RTO will be governed and operated, and requests by the public utility members of the RTO under FPA § 203 to transfer control of their jurisdictional transmission facilities from individual public utilities to the RTO. Order No. 2000 at n.5.

¹¹ See n.2; *see also* Order No. 2000 at 31,106-08 (enumerating the minimum functions of an RTO, including administering an OATT).

¹² Even concerning an RTO, the FERC lacks authority to regulate the composition of the Board of Directors. *See Calif. Indep. Sys. Corp. Op. v. FERC*, 362 F.3d 395, 401 (D.C. Cir. 2004) (rejecting FERC attempt under FPA § 206 to regulate the board of directors composition for the California ISO).

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requiring independence and separation.¹³ EIM governance could be unregulated (though it would be subject to the Members Agreement discussed below), just as the governance of other non-RTO jurisdictional entities is not regulated (other than any applicable Code of Conduct and Standards of Conduct compliance).¹⁴

Absence of jurisdiction over governance would not diminish the importance of neutrality and fairness. If the Market Administrator is not established to be completely independent, other factors should tend to assure these characteristics. First, FERC jurisdiction under FPA § 205 requires review of all rates, terms and conditions, including an opportunity for all participants to protest and be heard.¹⁵ All concerned parties would have an opportunity to file protests concerning whether the proposed rates, terms, and conditions are just and reasonable. As a practical matter, the FPA § 205 procedure requires that there be significant consensus to avoid protests and obtain FERC approval. Second, provisions of the Members Agreement (discussed below), including potential voting procedures and exit rights, can be structured to help assure that decisions do not unfairly or unduly prejudice any market sector or participants.

WSPP is an example of a minimalist regulatory approach. The WSPP Agreement contains membership requirements, governance provisions, a voting structure, and voting thresholds to change the Agreement. Because WSPP is not an RTO and does not otherwise administer an OATT for any transmission owner, the FERC does not regulate its independence or operations other than the terms and conditions for energy transactions set out in its tariff (the WSPP Agreement).¹⁶

¹³ Compare the EIM to the Entergy Services, Inc. Independent Coordinator of Transmission (ICT), which oversees open access to the Entergy transmission system. The ICT was established to be an independent coordinator of Entergy's transmission system to resolve findings that Entergy had undue transmission market power. The FERC did not require that an RTO perform these functions but did require that the performing entity have certain independence characteristics of an RTO. See *Entergy Services, Inc.*, 115 FERC ¶ 61,095 (2006). Because the ICT was to grant or deny requests for transmission service, perform feasibility, system impact, and other studies related to transmission service, calculate available flowgate capability, and perform a transmission planning function, in addition to administering Entergy's OASIS, and the EIM would likely not perform these functions, the required independence of the ICT is not instructive with respect to the EIM. *Id.* at PP 2, 42-43, 61-62.

¹⁴ FERC's general authority to regulate the governance of jurisdictional utilities is limited to FPA § 305, which regulates interlocking directorships and other potential conflicts of interests between directors of such utilities and other market actors. See *Calif. Indep. Sys. Corp. Op. v. FERC*, 362 F.3d at 401 (rejecting FERC attempt under FPA § 206 to regulate the board of directors composition for the California ISO). The FERC has rejected a one-size-fits-all approach to RTO board structure and declined to order any specific board structure for RTOs. *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719 at P 534 (2008).

¹⁵ See FPA § 205, 16 U.S.C. § 824d.

¹⁶ WSPP maintains an OATT which WSPP members who do not have their own OATTs may be required to use, but WSPP does not exercise control over any member's transmission facilities. It is, therefore, not an ISO or RTO.

Some market participants may prefer a higher level of FERC regulation of governance, to help assure that the EIM does not unduly favor any market sector. Indeed, some may prefer an RTO. This paper is not intended to discourage such approaches, which would be for market participants to decide.

B. Market Monitoring

Whether the EIM energy dispatch is characterized as energy, ancillary services or both, the FERC is likely to require that the Market Administrator demonstrate that EIM transactions will not reflect the undue exercise of market power. This may require a demonstration with the initial filing of market rules. It also may require the ongoing retention of a market monitor to assure against such exercise. The FERC would contend that the FPA requirement that rates and terms be just and reasonable necessitates monitoring of EIM market based rates.¹⁷

C. Participation In The EIM Would Not Cause Non-Jurisdictional Entities To Become Jurisdictional Entities; But Would Result In Review Of Inputs Into EIM Rates

The rates, terms, and conditions of the EIM would be determined by the EIM market rules, which, as discussed above, would be subject to FERC jurisdiction. Some non-jurisdictional entities (“Exempts”) have expressed concern that participation in an EIM would cause them to lose their exempt status. This result would not occur, although as explained below the FERC would have jurisdiction to review an Exempt’s rates, terms and conditions that affect the EIM’s jurisdictional rates. Notably, with regard to energy transactions, even that jurisdiction should not create any burden for Exempts, to the extent their sales into the EIM would occur under their market based rate tariffs and not cost-based rates. Because several Exempts expressed concern about FERC jurisdiction in informal discussions, we set out an explanation of the regulatory concepts in some detail.

In *WestConnect*,¹⁸ the FERC explained that participation by Exempts in the WestConnect Regional Transmission Pricing Initiative did not by itself make their rates, revenue requirements, or costs subject to FERC review under FPA §§ 205 or 206.¹⁹ The FERC explained that it must “review the rates, revenue requirements, and costs of the non-jurisdictional Participants only if

¹⁷ While beyond the scope of this paper to describe in detail, to the extent if any that the sale of EIM energy is determined to be the sale of ancillary services, the FERC would likely contend that a market monitor is required to address special requirements concerning sale of these services. *See generally, Avista Corp.*, 87 FERC ¶ 61,223 (“*Avista I*”), order on reh’g, 89 FERC ¶ 61,136 (1999) (“*Avista II*”). *See also Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities*, Order No. 697, at P 1049, III FERC Stats. & Regs., Regs. Preambles ¶ 31,252, order on clarification, 121 FERC ¶ 61,260 (2007).

¹⁸ *WestConnect*, 124 FERC ¶ 61,240, at P 18-20 (2008) (“*WestConnect*”).

¹⁹ *Id.* at P 18.

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they affect the rates charged by jurisdictional Participants for jurisdictional service they provide.”²⁰

For example, in *Pacific Gas & Electric Co.*,²¹ the court found that “FERC never clarified and developed either the approach or the standard that it applied” to its review of the transmission revenue requirements (“TRR”) filed by the City of Vernon, a municipal Exempt, to participate in the California ISO (“CAISO”).²² The court explained that CAISO’s transmission access charge methodology “is a formula rate through which the TRR of each participating transmission owner is collected” and that “the TRR of each participating transmission owner can be conceptualized not as its own rate but rather as a cost of the CAISO.”²³ The court further explained that “Vernon’s TRR need not be independently subjected to the just and reasonable standard of § 205,” and that “[w]hile FERC does subject the TRRs of jurisdictional participating transmission owners to an independent § 205 just and reasonable review, FERC may take a different approach as to Vernon . . . so long as FERC can ensure by examining Vernon’s TRR that the CAISO’s rates will ultimately be just and reasonable.”²⁴

Similarly, in *Basin*,²⁵ the FERC found that the revenue requirement of Basin, an exempt electric cooperative, was a component of the rates charged jointly by Basin and two other utilities (one of which was a jurisdictional public utility while the other was Exempt) for service provided under their joint OATT and affected the justness and reasonableness of those rates.²⁶ The FERC therefore reviewed the justness and reasonableness of Basin’s proposal to increase its revenue requirement.²⁷

WestConnect demonstrates that Exempt rates into jurisdictional entities are not always subject to review. There, the rates of the Exempts did not affect WestConnect rates. The FERC explained that because the revenues for the jurisdictional participants for the service they provided were capped at the OASIS posted ceiling rate, “participation of a non-jurisdictional Participant . . . [would] never cause the rate charged by the jurisdictional Participants . . . to be

²⁰ *Id.*

²¹ *Pacific Gas & Electric Co. v. FERC*, 306 F.3d 1112 (D.C. Cir. 2002)

²² *Id.* at 1118. As a transmission owning member of the CAISO, the City of Vernon had the choice to either file directly with FERC its TRR, or submit it to the CAISO, whose review is subject to review and acceptance by FERC. *Id.* at 1115.

²³ *Id.* at 1116.

²⁴ *Id.*

²⁵ *Basin Electric Power Cooperative*, 113 FERC ¶ 61,079 (2005)

²⁶ *Id.* at P 16.

²⁷ *Id.*

higher than their OATT rates, already found by the Commission to be just and reasonable.”²⁸ The FERC concluded that “participation by the non-jurisdictional participants . . . would not by itself subject their rates, revenue requirements, or costs to review under FPA § 205 or 206.”²⁹

In the EIM, Exempt sellers generally would sell energy to the EIM under their own market based rate tariffs, not under cost-based rates. While the subject requires further exploration, sales under these tariffs would be considered inherently just and reasonable and no further inquiry should be required.³⁰ To the extent that the product is considered ancillary services and the Avista requirements apply, the expectation would be that a wide footprint and market monitoring would obviate the need for special market power studies to justified special ancillary services market based rate tariffs.³¹

III. Governance

A. Corporate Organization

Administration of the EIM could reside in either a not-for-profit corporation or a for-profit corporation. Our discussions with market participants indicate a preference for a not-for-profit corporation (here, EIM Corp), but some have interest in exploring a for-profit approach.³² Not-for-profit corporations have no shareholders and distribute no dividends. They are governed by a board of trustees (here, the Board) and can be governed by their members if the articles or

²⁸ *Id.* at P 19.

²⁹ *Id.* at P 20.

³⁰ Thus, where the FERC has exercised its FPA § 205 review authority, it has done so with regard to cost-based rates. *See City of Vernon*, Opinion 479, 111 FERC ¶ 61,092, at P 44, *order on reh’g*, Opinion 479-A, 112 FERC ¶ 61,207 (2005), *reh’g denied*, Opinion 479-B, 115 FERC ¶ 61,297 (2006) (the City of Vernon’s transmission revenue requirement that was a component of CAISO’s jurisdictional rate was subject to a full FPA § 205 review as part of the FERC’s FPA § 205 review of CAISO’s jurisdictional rate); *City of Azusa*, 138 FERC ¶ 61,049, at P 19 (2012) (same); *Basin Electric Power Cooperative*, 113 FERC ¶ 61,079, at P 16 (2005) (Basin’s revenue requirement that was a component of a jurisdictional OATT rate was subject to a full FPA § 205 review); *Southwest Power Pool, Inc.*, 137 FERC ¶ 61,197, at P 15 (2011) (Kansas Power Pool’s transmission revenue requirement that was part of SPP’s OATT rate was subject to FPA § 205 review).

³¹ Exempts would not become subject to FERC’s suspension or refund authority as a result of transacting in the EIM. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,131 at PP 71-72 (2011); *Transmission Agency of N. Calif. v. FERC*, 495 F.3d 663, 667 (D.C. Cir. 2007).). *See also City of Azusa*, 138 FERC ¶ 61,049, at P 18 (2012) (citing *Pacific Gas & Electric Co. v. FERC*, 306 F.3d 1112 (D.C. Cir. 2002).

³² Regardless of whether the entity is for- or non-profit, it is likely to have financing requirements. Bearing in mind the cultural discomfort a for-profit approach might create, for-profit could be sensible if a third-party equity investment would be cost effective, for example, if lenders were to require equity or guaranties in lieu of equity. An equity investor would expect a reasonable rate of return on the investment, which return would be regulated and included in the rate.

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charter documents so provide. For-profit corporations have stockholders rather than members and are permitted to distribute dividends.³³

EIM Corp as Market Administrator would most likely be a new entity, standing alone or associated with another pre-existing entity. For example, it could exist under the umbrella of WSPP, SPP or another of the organizations that is exploring EIM development. WSPP has suggested that an organization with a West-wide footprint establish the Market Administrator, thereby avoiding the development of separate, smaller EIMs and resulting seams issues.

Assuming a not-for-profit approach, EIM Corp would include the following characteristics and components:

- An incorporated not-for-profit entity
- Members, who would all be party to a Members Agreement; the Members Agreement would contain governance requirements and restrictions on the activities of EIM Corp; the Members Agreement could, for example, restrict the corporation to administration of the EIM and restrict it from becoming an RTO except upon a super-majority vote.
- A Board, which, subject to the Members Agreement, would have plenary authority over the corporation and all of its actions
- Officers and staff, to administer the affairs of EIM Corp including
 - Stakeholder processes, including startup, any financing, market rules (including settlement and credit³⁴), and all related matters
 - Contract procurement and administration
 - Market operator, including billings and receipts
 - As required, a market monitor
 - As required, any WECC or NERC reliability standards waivers
 - Arrangements with WECC regarding state estimation data and Reliability Coordinator operating procedures
 - Arrangements with the California ISO and others regarding seams
 - Regulatory matters, including FERC, WECC, seams and, if applicable, State regulation

These elements are discussed more generally below.

³³ PJM is a limited liability company (LLC), the owners of which are its members. A LLC is a for-profit entity, but PJM is operated to generally match its revenues and costs.

³⁴ In today's RTO centralized markets, the RTO is not the buyer to the seller or the seller to the buyer, and does not take title to the energy. The RTO controls credit through a credit policy and short settlement periods. Defaults can result in socialized loss or uplift. While this structure is not ideal from certain legal perspectives (and may be under revision in accordance with FERC's Order No. 741) it may be the most cost effective for the EIM. This issue requires consideration, including any impact of Order No. 741.

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The laws of the various States for not-for-profit corporations are similar in most significant respects. EIM Corp could be incorporated in any of several States. Market participants might look to a State with a deep history of commercial case law, such as New York or Delaware, but this is not required.

Attention should be given to State gross revenue tax laws and similar taxation. As noted in n.34, in existing centralized markets the market administrator is neither the seller to the buyer nor the buyer to the seller, that is, it is not a transacting party and revenues are not booked as its own. For reasons including standing to seek collection (particularly in bankruptcy court) and the FERC proceedings to address this issue, the likely future model is that the market administrator will be the transacting party (buying from the seller, selling to the buyer). The particular structure adopted could be relevant to State taxation issues that are beyond the scope of this paper.

Incorporation of EIM Corp can be accomplished promptly, at minimal cost. The charter would contain certain public service language that would permit the corporation to obtain from the Internal Revenue Service recognition of exemption from federal income taxation (which is not automatic by virtue of not-for-profit status). Such an Internal Revenue Service ruling should be available given precedents that WSPP and RTOs have set.

Some may ask whether a corporate entity is required at all. A separate entity creates a wall between the obligations of the entity and the assets of its participants, including tax and liability risks), and fosters an enforceable internal governance structure. If the operation occurs without a separate, tax exempt entity, it could be a joint venture or association of its members. This structure could result in unanticipated and undesirable taxation and liability risks.

B. Member Rights And Obligations And Members Agreement

The Members Agreement would cover at least the following governance matters. These descriptions are intended to initiate thinking and discussing; they do not encompass all parties' positions.

1. Membership criteria

Members would likely include any electric utility, Federal power marketing agency, any entity in the business of producing, selling and/or purchasing electric energy for resale, and possibly other entities. As a practical matter this would include all market participants. Other interested entities such as transmission providers, reliability agencies, and interested governmental authorities could be permitted to be members as well, though possibly under different terms and conditions, including different fee and voting structures.

2. Membership rights

Matters requiring membership approval would be defined and percentages for approval specified (different matters could require different approval levels). Potential

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Member rights could include nomination and election of the Board, approval of significant contractual commitments such as the market operation contract, approval of startup arrangements such as any required financing, and approval of market and transmission rules and cost recovery mechanisms to be filed with the FERC for acceptance.

3. Statement of goals

A statement of goals or duties of the corporation, fiduciary or otherwise, would guide the Board of Directors, including determinations of actions to take when stakeholders are at an impasse. For example, the statement could bind the Board to achieve the highest economic efficiency or the most societal benefits.

4. Voting procedures

Voting may be by market sector (to help assure that no one sector dominates) or similar arrangement, and may include super majority requirements. The size of the footprint may have an impact on the need for sector voting.

5. Corporate restrictions

Market participants have not determined whether the EIM should be structured to guard against mission creep or whether the market should be permitted to evolve easily as participants may wish. It is feasible to address this matter in the Members Agreement, either by including restrictive provisions or by establishing voting levels to allow mission expansion. If participants favor restrictions, such restrictions could be at the heart of providing assurance that the EIM will be only an EIM, until and unless there is broad consensus for change. Until and unless such expansion of the organizational role is approved, the scope and services of the EIM in Western markets would remain unchanged.

6. Exit provisions

Exit provisions may be flexible, particularly to address unacceptable economic results, costs, or reliability. If the EIM requires financial commitments (loans or otherwise) for startup, these provisions may need to address stranded costs, potentially providing for an assessment or other protective mechanism upon exit.

7. Other provisions

Other provisions may incorporate matters addressed below such as size and composition of the Board. Note that the corporation would have bylaws, which would be consistent with the Members Agreement and also include routine corporate matters.

C. Board of Directors

A not-for-profit is required by law to have a board of directors (trustees). Subject to the Members Agreement and regulatory requirements, the Board would have ultimate authority and responsibility for the actions of EIM Corp.

The Board may be composed of subject matter experts independent of market participants, representatives of market participants, market sector representatives, or any combination of these or other variables. Subject matter expertise may include, only as examples, reliability, financial management, market operations, power flow or production cost modeling, and related market design or market efficiency skills. Other areas may also be pertinent. Not all pertinent areas require representation on the Board.

The Board may be of any size (at WSPP it is the entire Executive Committee). The size should be workable, to facilitate cost effective decision-making with additional participants providing input through stakeholder processes. A Board of five or seven would be workable and probably would suffice, though the size will need to be appropriate to capture the principal concerns of members.

The Board or Members would determine, in bylaws or the Members Agreement, the procedures for Board meetings, including whether meetings are open to the Members.

D. Officers, Market Operations, and Staff

1. Officers

By statute, EIM Corp will require a president, secretary, and treasurer. These appointments need not require significant financial commitments; the corporation would more productively focus on operational requirements. Operationally, the corporation will need a Chief Executive Officer and possibly one or two others.

A minimal staffing approach reflects that significant functions, including market operations and market monitoring, would be performed by contractors.

2. Administrative operations

As most aspects of market operations would be contracted out to the market operator, EIM Corp's functions would include the following, together with other functions identified in subsequent parts of this paper:

- Oversee stakeholder processes and facilitation, likely working with the market operator
- Procure and administer contracts with the market operator and software vendors as may be appropriate (licensing also could be held by the operator)

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- Procure and administer contract with the market monitor, as may be required
- Oversee a contractual relationship with WECC concerning use and confidentiality of state estimation data and other reliability interface
- Keep all books of account and financial records, handle all accounting and tax filings
- Financial audit function, including SAS 70

Determining necessary staff for EIM Corp can be achieved once more is agreed upon about the market. Facially, it appears that EIM Corp would require a chief executive officer, controller, and staff to handle stakeholder matters. Contracted regulatory compliance would be under the oversight of the CEO.

3. Market operations

Market operations would be contracted to an experienced market operator, for example Southwest Power Pool (SPP).³⁵ SPP is an RTO in the Southwest. It began as a loose power pool (no centralized dispatch), eventually took on functions of an independent transmission system operator with administration of its members' respective OATTs, and then established its own OATT for transmission on the facilities of its transmission owner members. SPP became an RTO, established a balancing market (called Energy Imbalance Service or EIS), and is establishing a centralized energy market with locational marginal pricing. Apart from cultural preferences (which may be important to the comfort level of EIM market participants), other operators with requisite skills may include any other RTO or other entity that operates centralized markets.

The market operator presumably would receive state estimation data from the WECC (under arrangements that have been discussed but not determined). On an ongoing basis the operator would determine imbalance requirements and resource and transmission availability, and then issue generator dispatch setpoints and balancing area scheduled interchange adjustments based on security-constrained economic dispatch (SCED), which establishes the LIP. Having been provided billing meter data to support EIM settlements, and calculated Energy Imbalance, and using a method to evaluate use of transmission resources, it would issue regular net invoices and require prompt payment. Regular, frequent invoicing manages credit risk, reducing the need for security and other credit protections, although these protections would still need to be addressed and a part of market rules.

Under the EIM transmission service agreement discussed above, the market operator also would take transmission service as required from the

³⁵ WSPP states no preference for any particular market operator. Several potential participants have expressed interest in SPP and SPP has expressed an interest in operating the EIM.

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respective transmission providers, and integrate resulting cost allocations and revenue distributions into the market settlements.

These market operations activities could occur at or adjacent to the operations of the WECC itself, potentially at SPP in Little Rock (or location of other market operator), or at a third location. The most cost efficient operations would likely make use of existing computer capability, staff, and office space, but there may be counter considerations, including the capacity of the operator's operational resources.

Intellectual property requirements to implement the EIM will need to be determined.

E. Regulatory and Reliability Compliance

Tariff documents would include the rules of the market and transmission arrangements. Rules of the market would include the specifications for execution of the market, settlement, billing and collection, and credit. Tariff arrangements would include the transmission service agreements (discussed above) and specifications for billing, collection, and revenue distribution. and any related provisions regarding transmission revenue collection and distribution.

EIM Corp would bear the primary responsibility, together with the market operator, for overseeing all regulatory filings and tariff administration, and assuring compliance with all filed rates and arrangements.

As noted above, EIM Corp would have general responsibility for complying with any requirements imposed by the FERC regarding assuring against the exercise of undue market power. Market monitoring, as the FERC may require, would be contracted to an appropriate economics firm that is experienced in the performance of monitoring functions.

With respect to reliability, EIM Corp would maintain any appropriate seams agreements with WECC, the California ISO and others, and any required balancing area agent or delegation agreements, registrations and reliability standards waivers with WECC and NERC.³⁶

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³⁶ All bulk power system owners, operators, and users are required to register with NERC as a NERC "Registered Entity."

Additional Issues

Separate from governance, EIM issues may include the items listed below. This paper is intended to augment the work of the PUC-EIM Group and in particular its strawman market design; references in this list to market issues are intended to stimulate thinking and not to suggest any separate or different process. This list is not exclusive.

- Working from the PUC-EUM strawman market design as a benchmark, market design, product definition, and pricing. Considerable attention has been given to market design, but there may not be wide agreement about product definition and its relationship to pricing elements, for example, whether pricing should include compensation for capacity.
 - Additionally, to the extent any market participant believes that its economic interests would be unduly prejudiced by an EIM, such assertions can be analyzed and efforts to made to negotiate just solutions.
- Availability of incentives, such as inclusion of development costs in transmission rates, even if the project is abandoned. There is precedent for these incentives and potential interest at the FERC in fostering their availability.
- Payment of pre-development costs as may be required, and development of any project agreement as may be needed, for the applicable footprint.
- Transmission structure. A mechanism under which transmission would be available to the EIM without the Market Administrator having an OATT or control of transmission facilities of other transmission providers.
- Transmission rates. Under the Federal Power Act virtually all transmission is priced to recover costs and, as applicable, a reasonable rate of return on investment. Transmission for balancing energy can be priced differently than customary non-firm transmission, and efforts are underway to develop a pricing mechanism. That mechanism would potentially support the rate under respective transmission service agreements and address how transmission revenue is to be distributed.
- Financial requirements for commencement of operations, which depend considerably upon whether up-front payment and, therefore, financing, is required to modify existing software and systems for the EIM, as well as the cost of other facilities, if any.
- Recovery of EIM operational costs, by an adder to EIM rates or another mechanism.
- Credit risk, including risk management and coverage of payment defaults.
- FERC requirements as to which it has jurisdiction under the Federal Power Act.
- Reliability interface with the WECC and NERC.
- Seams, internal to the EIM, and with the California ISO and any other non-participants.