

INSIGHTS

FERC Alters Proposal to Enhance Reporting in Support of Enforcement

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At the Federal Energy Regulatory Commission's ("FERC" or "Commission") July 21, 2016 meeting, FERC issued a [Notice of Proposed Rulemaking](#) ("NOPR") proposing to establish a new reporting regime that would require market-based rate ("MBR") sellers and entities only trading virtual products and financial transmission rights in markets operated by Regional Transmission Organizations ("RTO") and Independent System Operators ("ISO") ("Virtual/FTR Participants") to submit detailed ownership, employee, and contractual information to a database maintained by FERC. FERC proposes that its staff would then rely on this information to administer the agency's MBR and enforcement programs, including detecting market manipulation and other anticompetitive activities. This information also would be shared with RTO and ISO market monitors as well as RTOs and ISOs to enhance their capability to identify manipulative conduct. Not only would FERC's proposal increase the amount of information collected from MBR sellers, it would represent the first time that FERC had required the submission of detailed ownership and affiliate information from Virtual/FTR Participants.

The proposals set out in the July 21 NOPR are modified versions of proposals contained in two NOPRs issued late last year, including a proposal that any entity participating in RTO/ISO markets identify and report any "Connected Entities"—a term that had been defined to include a range of affiliate, employee, and business relationships that previously had not been subject to FERC scrutiny. In related issuances, the Commission withdrew its two earlier NOPRs. While the July 21 NOPR attempts to respond to criticisms of its initial Connected Entity proposal by reworking the definition of Connected Entity, the July 21 NOPR would impose significant new reporting requirements on all MBR sellers (not just those in RTO/ISO markets) and Virtual/FTR Participants that will materially increase compliance risk.

An overview of the July 21 NOPR and FERC's next steps is provided below. As discussed further herein, FERC appears to recognize the need for dialogue with industry regarding its proposals and plans to hold a series of technical workshops to further explore its proposed rule. The first technical workshop is scheduled for August 11, 2016.

I. The July 21 NOPR

Pursuant to the framework proposed in the July 21 NOPR, MBR sellers and Virtual/FTR Participants would be required to submit detailed information regarding their ownership structures, certain employees and contracts, and assets to a FERC-maintained database. This information would be submitted in XML format, the same format used for FERC's eTariff

system. The set of information that an entity would be required to submit and associated reporting requirements depends upon whether it is a MBR seller or a Virtual/FTR Participant. As discussed below, MBR Sellers would be required to identify any Connected Entities as well as report detailed asset information. Virtual/FTR Participants that do not have MBR authority would be required to submit Connected Entity data only. In either case, all information would be required to be submitted in a manner consistent with a data dictionary posted on FERC's website, an initial draft of which is included as Attachment D to the NOPR.

A high level overview of the primary elements of FERC's proposal is set out below.

A. Connected Entity Information

All MBR sellers and Virtual/FTR Participants would be required to submit Connected Entity data to FERC. The July 21 NOPR departs from the earlier incarnation of FERC's Connected Entity proposal in two respects:

- o First, while FERC originally limited its Connected Entity proposal to entities participating in RTO/ISO markets, the proposal outlined in the July 21 NOPR would extend to any entity that has been granted authority to make sales of energy, capacity, and/or ancillary services at market-based rates. Thus, the July 21 NOPR includes MBR sellers that do not participate in RTO/ISO markets.

- o Second, FERC's original Connected Entity proposal had contemplated that this information would be reported to each RTO/ISO and then transmitted to FERC staff. The July 21 NOPR requires the filings to be made directly to FERC.

The definition of Connected Entity has been revised to exclude entities that hold non-voting passive interests in a seller/participant, debt relationships, certain employees, and certain contractual arrangements. As revised, the definition of "Connected Entity" includes a company's:

- o ultimate parent company, affiliates participating in Commission-jurisdictional wholesale electric markets, and affiliates that purchase or sell financial natural gas or electric energy derivative products that settle on the price of physical electric or natural gas energy products;
- o traders – defined as any person who makes, or participates in, decisions and/or devises strategies for buying and selling physical or financial electric or natural gas energy products; and
- o any entity that is party to an agreement with the company that confers control over an electric generation asset that is used in, or offered into, wholesale electric markets.

All MBR sellers and Virtual/FTR Participants would be required to obtain a Legal Entity Identifier ("LEI"), a unique identifier that entities can obtain from the Global LEI Foundation (a non-profit organization established by the G20), and report it to FERC. Many companies likely have an LEI used for other purposes.

In order to help ensure that Connected Entity data is accurate, FERC proposes to revise its regulations to impose a new requirement that Virtual/FTR Participants submit accurate, factual,

and complete information in any communication with FERC, FERC-approved market monitors, RTOs, and ISOs. FERC's proposal mirrors the existing prohibition on false and misleading statements contained in Section 35.41(b) of its regulations, which currently applies to MBR sellers. Violations of this section have been a material element to FERC enforcement.

B. MBR Information

In addition to reporting Connected Entity Information, an MBR seller would be required to separately identify and list any "affiliate owner(s)," which would include the: (1) furthest upstream affiliate in the ownership chain; and (2) all owners that have market-based rate authority, a franchised service area, generation, transmission, or inputs to electric power production. Each affiliate owner would be assigned a unique identifier by FERC's database, which, in turn, would be listed on FERC's website and be included in subsequent MBR filings. In addition, the affiliate owner information submitted to FERC's database would be used by FERC to generate a corporate organizational chart.

The July 21 NOPR would eliminate the current requirement that an MBR seller report assets owned by its affiliates in its asset appendix (although MBR sellers would still be required to consider such assets as part of their horizontal and vertical market power analyses). Instead, an MBR seller would be required to report its assets and any assets held by an affiliate that does not have MBR authority. The information reported in an MBR sellers' asset appendix would then be used by FERC's database to create a comprehensive asset appendix reflecting all of the assets that had been reported by MBR sellers with the same upstream owners. This asset appendix would then appear in FERC's eLibrary as part of the MBR seller's filing.

The July 21 NOPR proposes other significant changes to the information required to be reported in a MBR seller's asset appendix, including requiring each MBR seller to:

- o identify generating capacity on a unit-by-unit basis—as opposed to as a facility as a whole—and include the Plant Name, Plant Code, Generator ID, and Unit Code information from the Energy Information Agency's ("EIA") Form EIA-860 database;
- o identify and report any long-term firm sales (*i.e.*, those one year or longer);
- o eliminate the requirement that MBR sellers report the "size" of transmission and natural gas facilities; and
- o for unit-specific power purchase agreements, provide the associated Plant and Generator ID from the Form EIA-860 database.

C. Initial and Ongoing Reporting Requirements

The July 21 NOPR proposes to require Virtual/FTR participants to make an initial Connected Entity submission within 90 days of the publication of any final rule in this proceeding in the Federal Register. Any Virtual/FTR participants that commence trading products after this 90 day period would be required to make a Connected Entity submission within 30 days of commencing trading.

MBR sellers would be required to make a baseline submission of Connected Entity and MBR Information within 90 days of the publication of any Final Rule. New MBR Sellers would be required to make a Connected Entity submission within 30 days of the date of the issuance of an order granting MBR authority.

After the initial baseline filing, MBR Sellers and Virtual/FTR Participants would be required to update their Connected Entity data within 30 days of a change.

MBR sellers also would be required to update their Connected Entity and MBR Information on a quarterly basis to reflect any changes that had not already triggered a filing, including the retirement of generation assets, capacity rating changes, changes in affiliates, and change in the contact information of a seller.

II. Next Steps

Comments on FERC's proposals are due 45 days after publication of the July 21 NOPR in the Federal Register. The text of the July 21 NOPR, and the Commission's statements at the July 21 meetings, appear to recognize that substantial industry outreach will be required before FERC's reporting requirements could be implemented and suggest that FERC may be willing to further refine its proposal in response to industry comments as it has done here.

In order to facilitate dialogue about these requirements, the July 21 NOPR directs FERC staff to hold a series of technical workshops to discuss these proposals. Concurrently with the issuance of the July 21 NOPR, FERC issued a notice establishing a technical conference to discuss the proposed data dictionary. The technical conference will be held at FERC headquarters on August 11, 2016.