

Client Alert

July 27, 2016

FERC Seeks to Enhance Electricity Market Surveillance and Data Collection for Market-Based Rate Sellers and Other Market Participants, but Substantially Eases Recently Proposed Data Reporting

By Robert Fleishman, Zori Ferkin, and Paul Varnado

On July 21, 2016, the Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking (July NOPR) to require certain participants in wholesale electric markets to submit “relational databases” to report information about their financial and legal affiliations to other entities.¹ The proposed rule changes will apply to market-based rate (MBR) sellers as well as entities trading virtual products or holding financial transmission rights (FTR). This alert describes [the July NOPR](#) and identifies some important implications for electricity market participants.

The July NOPR rescinds and replaces a much more expansive FERC Connected Entity NOPR issued on September 17, 2015, which would have required each Regional Transmission Organization and Independent System Operator to electronically deliver to the Commission, on an ongoing basis, data required from its market participants that would: (i) identify the market participants by means of a common alphanumeric identifier; (ii) list their “Connected Entities,” as defined quite broadly; and (iii) describe the nature of the employment, debt, and contractual relationships to each Connected Entity. MoFo published [a Client Alert on the Connected Entity NOPR](#).

The current NOPR also rescinds and replaces a FERC NOPR issued on December 17, 2015, which sought to clarify the scope of ownership information that MBR sellers must provide, and eliminates the requirement in Order No. 816 that MBR sellers submit corporate organizational charts.²

The NOPR is a further attempt to build on [Order No. 760](#), FERC’s 2012 rule requiring RTOs and ISOs to deliver key data to the agency on an ongoing basis so that it can better police behavior in electricity markets for potential violations of its Anti-Manipulation Rule. The Division of Analytics and Surveillance (DAS) within the Office of Enforcement conducts active surveillance on electric and natural gas market data and a substantial portion of the agency’s investigations arise from DAS surveillance activities.

¹ Notice of Proposed Rulemaking, Data Collection for Analytics and Surveillance and Market-Based Rate Purposes, 156 FERC ¶ 61,045 (July 21, 2016).

² NOPR ¶ 3.

Client Alert

THE JULY NOPR

Market participants and industry trade associations strongly objected to the prior proposals on entity information as overly broad and unduly burdensome, particularly in comments on the Connected Entity NOPR. In the July NOPR, FERC acknowledged that its proposals were significantly streamlined compared to the earlier NOPRs and adopted the commenters' suggestion that reporting of MBR data be consolidated with reporting of Connected Entity data to avoid unnecessary duplication of efforts to comply with both reporting regimes.

The principal requirements of the July NOPR include amending Part 35 of the Commission's regulations³ to require each MBR seller, as part of an initial application or any update or change in status filing, to identify Connected Entities, now more narrowly defined as: (i) an "ultimate affiliate owner," which is the furthest upstream affiliate in its ownership chain; (ii) an entity that participates in Commission-jurisdictional organized wholesale electric markets; or (iii) an entity that purchases or sells financial natural gas or electric energy derivative products that settle off of the price of physical electric or natural gas energy products.⁴ The Commission proposes to adopt without modification the existing definition of "affiliate" in its MBR regulations.⁵ It proposes to require individual employee relationships be reported only for employees who are traders participating in buying or selling of physical or financial products, and contractual relationships need only be reported for agreements that confer control over a generation asset used in, or offered to, wholesale electric markets.⁶ The July NOPR eliminates a proposal from the Connected Entity NOPR that would have required reporting of entities connected by the holding of debt instruments.⁷

The July NOPR also will require each MBR seller – in showing that it does not have or has adequately mitigated horizontal or vertical market power – to identify only those affiliate owners that: (i) are an "ultimate affiliate owner;" (ii) have a franchised service area or MBR authority; and (iii) directly own or control generation, transmission, or certain inputs to generation.⁸ A seller obtaining new MBR authority must prepare and submit its relational database within 30 days of the issuance of the order granting it MBR authority.⁹ The July NOPR establishes a quarterly obligation to amend previously-submitted databases as corporate relationships change.¹⁰

Each participant in virtual power markets or a holder of financial transmission rights which is not an MBR seller must, within 30 days of commencing such trading activity, submit Connected Entity data including ownership,

³ Proposed 18 C.F.R. §§ 35.37, 35.42, and 35.48 – 35.51.

⁴ NOPR ¶ 17.

⁵ NOPR ¶ 25.

⁶ NOPR ¶ 52.

⁷ NOPR ¶ 52.

⁸ NOPR ¶ 25 and Proposed 18 C.F.R. § 35.37(a)(2).

⁹ NOPR ¶ 65.

¹⁰ NOPR ¶ 65.

Client Alert

trader and contract information, and Legal Entity Identifiers (LEI) analogous to the requirements for MBR sellers.¹¹ This is the first time FERC has required virtual traders or holders of financial transmission rights to provide the Commission with information on a regular basis.

Other aspects of the July NOPR include:

- An MBR seller must disclose ownership or control by a foreign government entity, including a corporation owned in whole or part by a foreign government entity.¹²
- Owners identified as “passive” owners must meet certain requirements, including owning a separate class of securities, having limited consent rights, not exercising day-to-day control over the company, and not having the ability to remove a manager without cause.¹³
- Expansion of the “candor requirement” (found at Section 35.41(b) of FERC’s regulations) to prohibit under new Section 35.50(d) the submission of false or misleading information by participants in virtual trading and FTR markets.
- Information on long-term firm electricity sales must be included in relational databases, and location information for generators and firm purchases must be unit-specific.¹⁴
- Data will be submitted directly to the Commission rather than through RTO/ISOs as previously proposed.
- Electricity market participants must obtain and report LEIs, which are unique alphanumeric codes. FERC will assign its own LEIs as each new relational database is filed.¹⁵
- Entities that only sell natural gas may be reported by an MBR seller or Virtual/FTR Participant if they qualify as Connected Entities under the proposed definition of Connected Entity.
- MBR sellers will be required to submit the new relational databases, as well as their indicative MBR screens, as XML schema databases – the file format already required for submissions to FERC’s eTariff system. Submissions must comply with a “data dictionary” defining the required fields and acceptable values for each field.

IMPLICATIONS

The July NOPR is a victory for many energy market participants because it significantly lessens the administrative burdens that would have been imposed had the Commission adopted the prior NOPRs.

¹¹ NOPR ¶ 59.

¹² NOPR ¶ 26.

¹³ NOPR ¶ 26.

¹⁴ NOPR ¶¶ 35-38.

¹⁵ NOPR ¶ 28.

Client Alert

FERC's proposal to expand the candor requirement beyond MBR sellers to entities that participate solely in virtual or FTR markets is particularly noteworthy, because the Office of Enforcement would have a regulatory hook to potentially investigate allegedly false statements by a larger group of entities. Further, the Commission warns entities to apply due diligence to the retrieval and submission of the required information to avoid liability for the intentional or reckless submittal of incorrect or misleading information. Indeed, the Office of Enforcement could pursue violations and assess civil penalties if it believes relational data has been submitted inaccurately.

FERC's proposals, if adopted, would change the current data collection and reporting regime that governs MBR sellers and other market participants. The July NOPR would add a new requirement to compile and deliver a complex dataset, which may require substantial resources for many market participants. It is important to note that each relational database submitted as part of an MBR application will be publicly available via FERC's eLibrary system unless confidential treatment is requested pursuant to existing regulations.¹⁶ Connected Entity information provided by virtual traders and FTR holders, however, would be kept non-public unless the Commission authorized its release under its Rules on Investigations.

If the July NOPR is adopted, MBR sellers will need to evaluate whether the mechanisms they developed to comply with the Commission's MBR reporting requirements will ensure they comply with the changed data requirements. For example, parties entering into asset management agreements should consider the extent to which they may be required to report such agreements as contractual relationships that "confer control" over generation in the wholesale markets. The July NOPR's requirements for what will be treated as a "passive" ownership interest will, if adopted, affect the structure and specific terms and conditions for tax equity and similar investment agreements so that the investor interest conforms to the criteria for "passive" ownership.

FERC invites public comment, including on numerous specific proposals and alternatives throughout the NOPR. Commission staff has scheduled a technical workshop for August 11, 2016, to discuss the specific proposals for the data dictionary accompanying the NOPR. Comments on the NOPR are due 45 days after the NOPR is published in the *Federal Register*.

Contact:

Robert Fleishman
(202) 887-8768
rfleishman@mofo.com

Zori Ferkin
(202) 887-1532
zferkin@mofo.com

Paul Varnado
(202) 887-1531
pvarnado@mofo.com

¹⁶ NOPR ¶ 57.

Client Alert

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 12 straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.