
FERC Goes Back to the Drawing Board on Data Collection Rule

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On July 21, 2016, the Federal Energy Regulatory Commission (FERC) proposed a new data collection [rule](#) that would require market-based rate (MBR) sellers and entities trading virtual products or holding firm transmission rights (FTRs) in wholesale electric markets to report detailed information on their ownership structure, financial and legal connections with other entities (Connected Entities), and other related information. The proposed rule would also change the type and format of information that is required for MBR purposes. The new proposed rule replaces two earlier FERC rulemaking proposals on Connected Entities ([RM15-23-000](#)) (analyzed previously [here](#)) and ownership in MBR filings ([RM16-3-000](#)). Significant opposition to the earlier proposals sent FERC back to the drawing board, and FERC has now withdrawn both earlier proposals.

The new proposed rule would allow FERC to establish a relational database and enhance the Commission's ability to conduct analytics and surveillance activities on the nation's wholesale electric markets. Given the scope of the proposed rule and the complexity associated with establishing the relational database, FERC proposes to convene an all-day technical workshop on its proposal on August 11, 2016, in Washington DC.

While the new proposed rule would narrow the scope of entities and persons treated as a Connected Entity and clarify MBR ownership reporting requirements, it would still plow new ground for FERC to regulate non-market entities (beyond those directly or indirectly involved in jurisdictional energy markets).

Definition of Connected Entity

The proposed definition of Connected Entity would include:

- “affiliates,” based on the definition used for MBR purposes, in 18 CFR 35.36(a)(9);
- “traders,” defined as persons who “make[], or participate[] in, decisions and/or devise[]

strategies for buying and selling physical or financial electric or natural gas energy products”; and

- entities that enter into agreements that “confer[] control over an electric generation asset that is used in, or offered into, wholesale electric markets.”

Unlike the previous proposal, the new definition does not require reporting of passive owners, holders of non-voting stock or limited partners; chief executive officers, chief financial officers or chief compliance officers; or debt instruments or structured transactions.

MBR Seller Data Requirements

In contrast to the expansive scope of its earlier proposal for MBR filings, FERC's new proposed rule would revise the Commission's existing requirements to require MBR sellers to submit information identifying only their ultimate affiliate owners, defined as the furthest upstream affiliate(s) owners, as well as affiliate entities with either a franchise service area, or generation, transmission, or natural gas- or coal-related assets.

Under the new proposed rule, MBR sellers must still submit asset appendices that include assets owned by themselves and their affiliates without MBR authority. Unlike the earlier proposal, the new proposed rule would not require the asset appendices to list assets owned by affiliates with MBR authority.

In addition, MBR sellers would no longer need to submit corporate organization charts, which FERC has required since October 2015 (under [Order 816](#)). Instead, FERC proposes to use its proposed relational database to independently create an organizational relationship chart for all entities with MBR authority.

Virtual/FTR Trader Requirements

For the first time, entities that trade solely virtual instruments and/or FTRs would be required to submit Connected Entity information to the Commission. In the proposed rule, the Commission has stated that these types of trades “affect” markets and rates over which the Commission has jurisdiction, and that this information is needed for the Commission to conduct market surveillance activities and exercise its anti-manipulation authority.

Implications

- **Compliance Burden and Enforcement Risk.** While FERC has scaled back some reporting requirements in comparison to the previous proposed rules, the new proposed rule shows that FERC remains interested in expanding its investigative and market-manipulation enforcement capabilities. The new proposed rule will impose a significant compliance burden compared with the status quo, especially for entities that trade only virtual

instruments and/or FTRs, and create potential new avenues for FERC to pursue market manipulation claims.

- **Confidentiality Concerns.** The new proposed rule, like the earlier Connected Entity proposal, raises confidentiality concerns. For example, the new proposed rule would permit unified submittals of MBR and Connected Entity information, and notes that the former information will be made public via FERC's eLibrary. Therefore, compliance with the new proposed rule would create potential confusion as to what submittals are to be treated as non-public. In addition, by expanding the scope of submittal requirements, the new proposed rule (like the earlier proposals) continues to pose a risk that commercially sensitive information will be disclosed.
- **Rulemaking Process.** In light of the potential impacts of the new proposed rule, stakeholders should remain engaged in the rulemaking process and express concerns to FERC. FERC will hold workshops on various aspects of the new proposed rule, beginning with the technical workshop on the "relational" database on August 11, 2016.

WilmerHale's Energy Markets Regulation and Enforcement Group actively monitors developments at FERC, the CFTC and other agencies with jurisdiction over energy markets, advises regulated entities on the development and implementation of compliance programs, and represents entities in investigation and enforcement actions.

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