Client Alert

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FERC Seeks to Expand Electricity Market Surveillance with New Data Reporting Requirements

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On September 17, 2015, the Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking (NOPR) to expand the obligations of Regional Transmission Organizations and Independent System Operators (RTOs/ISOs) to report information to the Commission regarding the organized electric markets that RTO/ISOs administer.[1] The proposed changes will affect market participants who own or have a role in operating FERC-jurisdictional assets, financial market participants, individual employees of market participants, and investors and affiliates of market participants.

This alert describes the NOPR and identifies some important implications for electricity market participants.

EXISTING DATA COLLECTION BY FERC FOR ENERGY MARKET SURVEILLANCE AND ENFORCEMENT

In April 2012, FERC issued Order No. 760, a 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. The regional wholesale markets administered by RTOs and ISOs typically include day-ahead and hourly auction-based energy markets, annual capacity auctions to ensure generation resource adequacy, and other products derived from or ancillary to those markets. Order No. 760 requires RTOs/ISOs to provide various datasets including: participants' supply offers and demand bids; resulting awards, including quantity and price; resource output and dispatch instructions; marginal cost estimates; data related to transmission line constraints and power flows; financial transmission rights market information; settlement data for internal bilateral energy transactions and interchange transactions at the borders of the region; and data on uplift charges and credits.

Order No. 760 requires RTOs/ISOs to directly provide data to FERC staff relatively quickly—within seven days of market settlement. Previously, data collection by FERC was limited to quarterly publicly available reports of certain electric transactions and information obtained by FERC staff via ad hoc data requests to the RTOs or ISOs. FERC's Division of Analytics and Surveillance (DAS) was newly created within the Office of Enforcement when Order No. 760 was issued, and has taken primary responsibility for receipt and review of the submitted data.

The NOPR is FERC's first rulemaking proposal to substantively expand the scope of Order No. 760.

[1] Notice of Proposed Rulemaking, Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators, 152 FERC ¶ 61,219 (September 17, 2015).

FERC'S ENFORCEMENT PROGRAM IS ROBUST AND INCREASINGLY DATA-DRIVEN

In the three years since FERC issued Order No. 760, the Office of Enforcement has aggressively enforced energy market regulations, with a continued focus on allegedly fraudulent trading activity under its Anti-Manipulation Rule. FERC can now readily initiate non-public market manipulation investigations based on data collected directly by DAS, rather than depend on outside initiating sources such as market monitors or complaints to its Enforcement Hotline. With access to increased quantities and greater quality of market data, FERC may decide to pursue manipulation cases even in the absence of any "speaking documents" such as instant messages or voice recordings of trading activity, by inferring scienter solely from the pattern of trading activities.

THE NOPR

FERC made a preliminary finding that, despite its increased access to trading data since Order No. 760, it "cannot fully utilize this information in order to detect and deter market manipulation because of uncertainty regarding the identity of a given market participant, which may trade under different identifiers in different markets and venues" and may have complex relationships with other entities, such as shared ownership, debt, or contractual obligations.[2] FERC explains that "[u]nderstanding the ownership, employment, debt, and contractual relationships of market participants would provide context for [trading] data, and help determine whether there appears to be a legitimate business rationale for seemingly anomalous trading patterns, or whether there may be market manipulation, fraud, or abuse."[3]

FERC also determined that, although each RTO or ISO currently requires its participants to report and disclose affiliate relationships, those requirements are inconsistent and therefore inadequate to ensure FERC can sufficiently monitor increasingly complex business relationships that impact its jurisdictional markets. In creating uniformity across the organized electric markets, FERC expects to rescind "affiliate" reporting requirements of RTO/ISO tariffs in favor of the new term "Connected Entity."[4]

The NOPR proposes to require each RTO and ISO 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 newly defined; and (iii) describe in brief the nature of the relationship of each Connected Entity.

The proposed regulation would define Connected Entity in significant part as an entity with any of the following relationships to an electricity market participant:

- Holder of direct or indirect ownership, control, or voting interest in 10 percent or more of the market participant's ownership instruments;
- The chief executive officer, chief financial officer, chief compliance officer, and traders (or employee who function in those roles);

[2] NOPR ¶ 6.

[3] NOPR ¶ 2.

[4] NOPR ¶¶ 1, 7-8.

- Holder or issuer of a debt interest or structured transaction that gives the right to share in the market participant's profitability, above a *de minimis* amount or that is convertible to an ownership interest of 10 percent or more;
- Entity that could, with the conversion of debt or structured products, be 10 percent or more owned or controlled by a market participant; or
- Asset manager, energy marketer, or other similar entities with management, operational, or financial control over resources that participate in FERC-jurisdictional markets.[5]

To identify Connected Entities, the NOPR proposes to require electricity market participants to obtain and report Legal Entity Identifiers (LEIs), which are unique alphanumeric codes created pursuant to the Dodd-Frank Act to streamline reporting of financial data to regulators.[6]

FERC indicated that it would treat Connected Entity information as non-public, to the extent the information is not already public, and expects that FOIA exemption 4 (which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential") or FOIA exemption 7 (which protects "records and information compiled for law enforcement purposes") will apply to much of the data so collected.

IMPLICATIONS OF THE NOPR

FERC's proposed regulation significantly expands the scope of FERC's reporting requirements to include information about entities not typically subject to regulation by the Commission, including certain individual employees, investors, and creditors. Further, it is designed to assist market monitors in their investigations of potential market manipulation and will enhance FERC and market monitors' ability to police electricity markets.

In addition to requiring each RTO and ISO to collect and report the Connected Entity data, the NOPR also requires market participants to compile and deliver the data to each RTO or ISO, in a standardized form. FERC gives examples of the complex data table formats it expects to require of market participants, including tables that disclose each market participant's relationships with each of its Connected Entities.[7]

If adopted, the proposed regulation inevitably will create an administrative burden on all market participants in organized electricity markets. Some of the burden from the proposed rule change could be offset by its introduction of uniformity in reporting across the RTOs/ISOs, because entities that operate in multiple organized electric markets would face more consistent obligations and procedures across those regions. Commissioner Cheryl LaFleur issued a concurring opinion to express concern that the proposed rule would create "a significant new reporting regime," urging commenters to address its incremental costs.[8]

[5] NOPR ¶ 23.

[6] NOPR ¶¶ 24-28.

[7] NOPR ¶ 33.

[8] NOPR (LaFleur, Comm'r, concurring).

FERC invites comment, including on the feasibility of expanding the proposed rule to require submission of Connected Entity information from entities outside the RTO/ISO regions.[9] Comments on the NOPR are due 60 days after the NOPR is published in the *Federal Register*.

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[9] NOPR ¶ 13.