UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators	Docket No. RM15-23-000

COMMENTS OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

The Commission proposes to collect "Connected Entity" information from participants in markets operated by independent system operators and regional transmission organizations (collectively RTOs), so as to better detect and deter price manipulation in RTO markets.[1] The Transmission Access Policy Study Group (TAPS) supports the proposal's objective. As the Commission relies on RTO markets to establish just and reasonable wholesale rates, monitoring and remedying improper activities in those markets is essential to protecting wholesale customers.

At the same time, parts of the proposed rule appear to be unworkable for section 201(f) entities, and would create compliance burdens—or, worse, the risk of non-compliance despite good intentions—disproportionate to the value of the data sought from them.[2] TAPS suggests modifying the rule in ways that should allow the Commission to obtain salient and timely Connected Entity data while limiting the burden on entities

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1 *See* Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators, Notice of Proposed Rulemaking, 152 FERC ¶ 61,219 (2015) (NOPR).

2 Section 201(f) entities include: municipal utilities, joint action agencies that represent multiple municipal utilities, state and federal power marketing agencies, and certain cooperative utilities. Under the FPA, such entities are outside the Commission's section 205-206 rate jurisdiction but subject to the Commission's section 222 anti-market-manipulation jurisdiction. 16 U.S.C. §§ 824(b)(2), 824(f), 824v(a).

that have comparatively little incentive or ability to affect market outcomes improperly. Specifically:

- TAPS is concerned that its members will not be able to automate reporting of Connected Entity changes, which are likely to be sporadic and infrequent. Ensuring that updates of such changes are submitted within the fifteen day (or another fixed) period will pose a serious and unjustified challenge. To provide for more reliable and timely reporting in practice, TAPS suggests an alternative compliance mechanism for section 201(f) entities: filing data quarterly, whether or not a change has occurred.
- In parallel with the exemption Congress required and the Commission adopted for electronic quarterly reporting, section 201(f) entities that have only a *de minimis* wholesale market presence should be exempt from the new reporting requirements.
- TAPS requests clarification of certain "Connected Entity" definitions and reporting requirements.
- Because the proposed rule is grounded in the Commission's anti-manipulation authority, violations of which require scienter, proof of scienter should be required to prosecute violations of the new reporting requirements.

I. TAPS'S INTEREST IN THE NOPR

TAPS is an association of transmission-dependent utilities in more than thirty-five states.[3] Because TAPS members rely on transmission facilities owned and controlled by others, TAPS supports open and non-discriminatory transmission access, and has supported the Commission's initiative to form independent RTOs fostering efficient transmission and generation investment and robust wholesale competition. TAPS supports monitoring and mitigating improper activities in RTO markets, and thus supports the rule's overarching objective, but suggests tailoring it to avoid imposing

[3] Duncan Kincheloe (Missouri Public Utility Alliance) chairs the TAPS Board. Jane Cirrincione (Northern California Power Agency) is the TAPS Vice Chair. John Twitty is the TAPS Executive Director.

undue burdens or risks on entities with limited incentives or abilities to exercise market power or manipulate wholesale power markets.

II. COMMUNICATIONS

Communications regarding these proceedings should be directed to:

John Twitty Executive Director TRANSMISSION ACCESS POLICY STUDY GROUP 4203 E. Woodland Springfield, MO 65809 Tel: (417) 838-8576 Email: 835consulting@gmail.com	Cynthia S. Bogorad Jeffrey A. Schwarz SPIEGEL & MCDIARMID LLP 1875 Eye Street, NW Washington, DC 20006 Tel: (202) 879-4000 Email: cynthia.bogorad@spiegelmcd.com jeffrey.schwarz@spiegelmcd.com

III. COMMENTS

A. TAPS supports the proposed rule's objectives and overall thrust.

The Commission has promoted development of RTO markets to provide just and reasonable wholesale rates. For the markets to accomplish that purpose, the Commission must monitor market activities rigorously enough to deter, or detect and remedy, improper behavior. TAPS strongly supports those efforts.

Given the number of transactions occurring in RTO markets, the Commission relies heavily on computer algorithms to identify anomalous trading patterns that could violate the applicable anti-manipulation regulation (18 C.F.R. § 1c.2) and thus warrant scrutiny. *See* NOPR PP 9-10. As described in the 2015 Report on Enforcement:[4]

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[4] 2015 Report on Enforcement at 57, Docket No. AD07-13-009 (Nov. 19, 2015), http://www.ferc.gov/legal/staff-reports/2015/11-19-15-enforcement.pdf.

> During FY2015, staff ran monthly screens to identify patterns at the hourly level by monitoring the interactions between physical and virtual bidding strategies and potentially-benefiting payouts. In particular, these screens identify financial transmission rights and swap-futures that exist at nodes and constraints where market participants also trade virtuals, generate electricity, or move power between RTO/ISOs. Staff continued to refine its analytic tools and screens for: (1) determining uneconomic virtual transactions by node, zone, and constraint; (2) detecting day-ahead market congestion manipulation that would benefit financial transmission rights and swap-futures positions; (3) identifying anomalies in physical offer patterns; and (4) identifying abnormal out-of-market payments.

During FY2015, the Commission expanded these tools to screen patterns of behavior on a portfolio basis and across RTO borders. *Id.*

The algorithms run on electronic data accumulated from various sources, including: e-Tags[5]; RTO-provided electronic data;[6] and the Commodity Futures Trading Commission's "Large Trader Report."[7] The Commission also receives electronic quarterly reports (EQRs) filed by public utilities with market-based rate authority and by certain section 201(f) entities.[8]

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[5] Availability of E-Tag Information to Commission Staff, Order No. 771, 77 Fed. Reg. 76,367 (Dec. 28, 2012), FERC Stats. & Regs. ¶ 31,339 (2012), *on reh'g*, Order No. 771-A, 78 Fed. Reg. 16,133 (Mar. 14, 2013), 142 FERC ¶ 16,181 (2013), *on reh'g and clarification*, Order No. 771-B, 153 FERC ¶ 61,177 (2015).

[6] Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations and Independent System Operators, Order No. 760, 77 Fed. Reg. 26,674 (May 7, 2012), FERC Stats. & Regs. ¶ 31,330 (2012).

[7] Memorandum of Understanding Between the Commodity Futures Trading Commission and the Federal Energy Regulatory Commission Regarding Information Sharing and Treatment of Proprietary Trading and Other Information (Jan. 2, 2014), http://www.ferc.gov/legal/mou/mou-ferc-cftc-info-sharing.pdf.

[8] Public utilities with market-based rate authority must file EQRs to fulfill their obligation to keep their rates on file with the Commission. 16 U.S.C. § 824d(c). As discussed below, in order to promote price transparency, the Energy Policy Act of 2005 also gave the Commission authority to obtain such data from section 201(f) entities—which are outside of the Commission's rate-regulation jurisdiction—but required

While the Commission receives and analyzes substantial amounts of data, the NOPR states that the Commission "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." NOPR P 6. Likewise, the NOPR says the Commission "lacks a clear window into the relationships between market participants and other entities," which impairs its ability to "ascertain which individuals or companies may benefit from a given transaction or … may be jointly participating in a common course of conduct." *Id.* The difficulty seems to stem from several related data problems: (1) market participants are not identified consistently in different markets and different data sets, (2) information about corporate affiliation may not be comprehensive or up-to-date, and (3) existing data sources do not capture information about relationships other than corporate affiliation that may affect market participants' incentives and abilities to engage in improper conduct. TAPS supports taking targeted, cost-effective steps to overcome these impediments.

TAPS recognizes that section 201(f) entities are subject to Commission jurisdiction for purposes of enforcing FPA section 222. At the same time, TAPS urges the Commission to recognize that market participants are not all alike—and that uniform rules applied to dissimilar entities can impose disproportionate costs on those with less incentive and less ability to manipulate the markets. Many of the fundamental characteristics of section 201(f) entities—that they are non-profit, governmental, or consumer-owned load-serving entities, i.e., with legal obligations to serve retail load (or

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the Commission to exempt such entities from reporting requirements if they have only a *de minimis* wholesale market presence. 16 U.S.C. § 824t(a), (d); 18 C.F.R. § 35.10(b).

to serve another such entity with that obligation), often under laws, bond covenants, or other restrictions that curtail their ability to engage in speculative market activity—diminish the likelihood that they will engage in such activity.[9]

TAPS also urges the Commission to recognize that the rule's costs will take two forms: (1) the costs of the steps market participants will take to attempt to comply with the rule, and (2) the costs associated with the risk of enforcement action for violations of the new reporting requirement that may occur *despite* good-faith compliance efforts. For section 201(f) entities, these costs are borne by consumers, not by shareholders. As discussed below, the Commission should modify the proposed rule to ensure that the costs and risks it imposes on different market participants are better calibrated to the level of their incentives and abilities to manipulate Commission-jurisdictional markets.

B. TAPS supports requiring RTO market participants to obtain and report LEIs but requests clarification.

TAPS supports the requirement that all RTO market participants obtain and maintain a "Legal Entity Identifier" (LEI) code and report their LEI to each relevant RTO. *See* NOPR PP 25-28. Given the expectation that "[o]btaining an LEI is relatively inexpensive (approximately $250, with annual upkeep fees of approximately $150),"

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[9] Of the 41 civil penalty actions since January 1, 2007 that involved alleged market manipulation or submission of false information in violation of Commission regulations, *see* All Civil Penalty Actions, http://www.ferc.gov/enforcement/civil-penalties/civil-penalty-action.asp (last visited Jan. 20, 2016), just *one* appears to involve alleged violations by a section 201(f) entity. Similarly, only one of the 28 Notices alleging market manipulation or submission of false information since January 1, 2011, *see* Notices, http://www.ferc.gov/enforcement/alleged-violation/notices.asp (last visited Jan. 20, 2016), appears to involve a section 201(f) entity. A LexisNexis search of the Commission's "IN0* and IN1*" dockets for orders involving alleged electric market manipulation produces sixty-seven hits, but include only a small handful apparently involving a section 201(f) entity.

NOPR P 27, requiring their use appears to be a reasonable approach to tracking the identities of participants in RTO markets.

The NOPR proposes not to require LEIs for (or impose reporting obligations on) entities that participate only in non-RTO markets.[10] *See* NOPR P 13. TAPS supports this limitation. According to the NOPR, approximately ninety percent of all reported wholesale energy sales are made by RTO market participants or their Connected Entities. *Id*. Thus, requiring RTO market participants to report Connected Entity information should provide most of the data needed for the Commission to perform its screening for electric market manipulation. *Id.*

The NOPR also states that LEIs will be required only for RTO market participants. If a Connected Entity is not itself an RTO market participant, it would not need to obtain an LEI. *See* NOPR P 28 & app. at 40. For TAPS, this situation often arises in the context of joint action agencies (JAAs) and their members. Municipal electric utilities sometimes form JAAs to achieve economies of scale in developing generation facilities or purchasing wholesale power to serve retail loads.[11] Often, the JAA is an RTO market participant, but its members are not.[12] In this situation, TAPS understands that the

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[10] *See* NOPR P 13 (only RTO market participants must report Connected Entity information); *id.* & app. at 40 (no LEI is required for a Connected Entity that does not participate in an RTO market).

[11] Likewise, consumer-owned distribution cooperatives sometimes form generation-and-transmission (G&T) cooperatives to perform such functions. Certain G&T cooperatives also have been excluded from the Commission jurisdiction for most purposes by section 201(f). For brevity, TAPS discusses issues in this pleading in terms of JAAs and their members, but parallel considerations apply to the relationships between section 201(f) G&T cooperatives and their members.

[12] We request clarification below as to whether (and under what circumstances) there would be a Connected Entity relationship between the JAA and a member.

member would not need to obtain an LEI (*see* NOPR P 28 & app. at 40). TAPS supports limiting the LEI requirement in this way.

However, TAPS cautions against narrowing the definition of market participants to RTO "members," as indicated by Commission Staff at the December 8, 2015 Technical Conference.[13] Membership in an RTO is not a prerequisite for participation in all RTO markets, and is often a voluntary step taken to participate in RTO governance.[14] Limiting market participant reporting obligations to RTO "members" will likely exclude numerous entities that actively engage in RTO market transactions but have not elected to become RTO members, thereby impeding the ability of the final rule to achieve the Commission's objectives. Thus, market participants should include entities that transact in one or more RTO markets, and not be limited to RTO members.

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13 *See* Notice of Proposed Rulemaking for the Collection of Connected Entity Data from RTOs and ISOs, Technical Conference Staff Presentation at 8 ("**any entity that is a member of an RTO/ISO per the applicable RTO/ISO tariff** must submit Connected Entity information to each RTO/ISO to which it is member") (Dec. 8, 2015) ("Staff Presentation") (emphasis in original), http://www.ferc.gov/CalendarFiles/20151210082835-Staff%20Presentation_final.pdf.

14 For example, an entity may participate in SPP's markets by becoming an SPP Market Participant, *see* Become a Market Participant, http://www.spp.org/stakeholder-center/customer-relations/become-a-market-participant/ (last visited Jan. 20, 2016), without becoming an SPP Member, *see* Become a Member, http://www.spp.org/stakeholder-center/customer-relations/become-a-member/ (last visited Jan. 20, 2016). SPP Membership affords voting privileges and decisionmaking rights as a participant in select organizational groups, and entails an annual fee and other obligations. *Id.* Similarly, to participate in MISO's markets, an entity must become a market participant, *see* Market Participants, https://www.misoenergy.org/StakeholderCenter/MarketParticipants/Pages/MarketParticipants.aspx (last visited Jan. 20, 2016), but need not become a MISO member. Members, https://www.misoenergy.org/StakeholderCenter/Members/Pages/Members.aspx (last visited Jan. 20, 2016). Becoming a MISO member permits "Stakeholders a voice in the committee process allowing them to provide advice and input to MISO on strategic and operational business decisions. It also guarantees participation in the election of MISO's Board of Directors. Each member gets a single vote and can represent one company or several." *Id.*

C. The Commission should allow section 201(f) entities to comply by reporting quarterly, regardless of whether changes have occurred.

A key TAPS concern is the NOPR's proposal to require market participants to update Connected Entity data on file with an RTO within fifteen days of a change. Our core concern is with the requirement to update data within a period triggered by irregularly occurring events. For TAPS members at least, those events are likely to be sporadic and infrequent. JAAs and their members tend to be stable organizations. Many employees remain with the same organization, sometimes in the same position, for decades. Moreover, JAA members generally are load-serving entities with long-term obligations to provide electric service. Contracts between JAAs and their members are usually long-term arrangements designed to support financing of new generation facilities or commitments to long-term power purchases. Changes obviously occur from time to time, but not as frequently or regularly as they do for entities with business models focused on shorter time-frames.[15]

While it might seem that the infrequency of such changes would reduce TAPS members' compliance burden under the proposed rule, that is likely not to be the case. Unlike public utilities that already are required to track and report certain changes to the Commission, non-jurisdictional entities may not have systems in place to enable them to

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[15] As noted above, references to JAAs in these comments should be interpreted as applying to section 201(f) G&T cooperatives as well. TAPS further recognizes that some jurisdictional public utilities, like most section 201(f) entities, may be small vertically integrated utilities with long-term obligations to serve retail consumers. TAPS believes it would be reasonable for the Commission to entertain case-by-case requests by jurisdictional public utilities to elect the quarterly reporting approach described herein. Conversely, TAPS recognizes that the Commission could determine upon an appropriate record that a particular section 201(f) entity lacks the characteristics discussed in the text (e.g., infrequency of Connected Entity changes) and should not be eligible thereafter to use the alternative quarterly reporting approach.

do so. And it will be costly and difficult for them to develop systems that ensure that an occasional Connected Entity change triggers an information update within fifteen days or other fixed period. TAPS is concerned that even entities with the best intentions and a culture of compliance will miss the fifteen-day deadline to report intermittent changes and find themselves at risk of enforcement measures. Moreover, under the NOPR's reporting time-frames, if an entity did not update its Connected Entity data within fifteen days of a change, it probably would not uncover the error until its next annual certification. Assuming an even distribution of Connected Entity changes throughout the year, such inadvertent non-compliance would remain uncorrected, on average, for nearly six months.

While Enforcement Staff has said that the Commission normally will not pursue inadvertent and timely corrected reporting errors, TAPS is concerned that the Commission might not consider error correction in the next annual certification to be timely. As a result, the NOPR's annual-certification-and-15-day-update reporting timeline may create substantial enforcement risk. At least for section 201(f) entities, who pose less market-manipulation risk than other market participants and who may have more difficulty than others in complying with the proposed rule, those risks and the costs incurred in efforts to lessen them would be disproportionate.

To reduce those risks and costs and to facilitate compliance, TAPS urges the Commission to allow section 201(f) entities to elect an alternative reporting schedule. Instead of certifying data accuracy annually and updating it within fifteen days of a change, entities electing the alternative would file regular quarterly reports, whether or not a change had occurred. The quarterly reports would provide any needed updates and certify the accuracy of the data as so modified. If no changes had occurred, the report would so state. Alternatively, the Commission might accomplish the same result by establishing an equivalent safe harbor: that section 201(f) entities will not be subject to enforcement action based on violations of the rule so long as they report Connected Entity changes by the end of the relevant quarter.

Either of these approaches would be superior to the NOPR's proposal in both reducing the risks and burdens on section 201(f) entities and facilitating compliance, thus enhancing the quality of collected data. It will be easier for section 201(f) entities to schedule regular quarterly reports than to ensure data are updated within fifteen days (or other fixed period) of infrequent, irregular changes. Under the quarterly approach, data would be updated to reflect a Connected Entity change by the end of the relevant quarter. Assuming that Connected Entity changes are distributed evenly throughout a quarter, updates would be filed within forty-five days, on average, of the date on which a change occurs. That is only thirty days more than the fifteen-day lag that would exist under the NOPR proposal, assuming perfect compliance. And it is much less than the six-month lag likely to occur, on average, under the NOPR proposal if entities do not update data within fifteen days and correct the omission in their next annual certification. Thus, TAPS's alternatives are tailored to achieving the Commission's objectives in a realistic and effective manner that appropriately takes into account the lesser risks that section 201(f) entities pose and the disproportionate burdens and challenges that they would face under the NOPR proposal.[16]

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[16] As noted above, non-profit governmental entities pose limited risk of market manipulation, and most section 201(f) entities experience Connected Entity changes less often than public utilities. Because of the

D. The Commission should exempt those section 201(f) entities that have only a *de minimis* wholesale market presence

Even if the Commission adopts the change requested above, it also should exempt from the new reporting requirements those section 201(f) entities that have only a *de minimis* wholesale market presence. Such an exemption would recognize appropriately the *de minimis* impact that such entities have on the wholesale markets, consistent with Congressional intent and other Commission regulations designed to protect the integrity of jurisdictional markets.

When Congress enacted the Energy Policy Act of 2005, it not only gave the Commission expanded enforcement authority that covered non-public utilities; it also authorized the Commission to impose certain price-transparency reporting requirements on such entities. *See* FPA section 220, 16 U.S.C. § 824t. At the same time, Congress explicitly directed the Commission to exempt from such new reporting requirements entities with a *de minimis* wholesale market presence. 16 U.S.C. § 824t(d). In Order No. 768, the Commission adopted specific criteria to implement the *de minimis* exemption.[17] It exempted non-public utilities that have sold fewer than four million MWh of energy at wholesale annually, on average over the preceding three years, as reported on EIA Form 761.[18]

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latter difference, section 201(f) entities' data on file with an RTO—even with quarterly reporting—could be correct more often than would be so for a public utility subject to the fifteen-day rule. If a public utility has five changes a year and updates data on the fifteenth day, the RTO's data for that public utility would be wrong seventy-five days each year. If a section 201(f) entity has one change a year and reports it in its next quarterly report, the RTO data for that entity would be wrong, on average, only forty-five days each year.

[17] Order 768, P 22.

[18] *Id.*

The Commission should adopt an equivalent exemption from the reporting requirements proposed in this NOPR. We explained above that section 201(f) entities, as governmental or consumer-owned utilities that operate on a non-profit basis, have limited incentives to engage in market manipulation. The subset of section 201(f) entities that sell fewer than four million MWh of energy at wholesale annually have *neither the incentive nor the ability* to affect jurisdictional markets significantly.[19]

Absent such an exemption, the rule would subject such entities to burdens that are disproportionate to the value gained by applying the rule to them. The NOPR is accompanied by a Regulatory Flexibility Act (RFA) analysis that assumes the rule's burdens will vary in proportion to a market participant's size. *See* NOPR P 57. However valid that assumption might be for typically sized investor-owned utilities and other public utilities, it is *not* true for non-public utilities with a *de minimis* wholesale market presence. Contrary to the NOPR's RFA analysis, which contends that many small utilities will have no Connected Entities, *all* market participants will have some Connected Entities virtually by definition, because they have CEOs, CFOs, compliance officers, and traders. So the correlation between market participant size and number of Connected Entities necessarily breaks down at the small end of the scale. Moreover, as shown above, some joint action agencies provide service to many members and operate with a complexity disproportionate to the JAA's size, in terms of employees or sales. For

[19] JAAs' sales to their members are counted when determining whether the JAA surpasses the four million MWh threshold. But a JAA that exceeds the threshold and must file EQRs may exclude from those reports data on its sales to its members. Order No. 768, P 22. This exclusion properly reflects that the JAA's member sales are not market sales and do not materially affect wholesale market price formation. *Id.* Moreover, an exempt JAA's sales to *non*-members—which Order No. 768 refers to as a JAA's "surplus market sales" (*id*. (internal quotation marks omitted))—will be substantially less than four million MWh

example, one JAA that serves more than sixty communities in four states and two RTO markets operates with fewer than fifty full-time-equivalent employees and disposes of less than four million MWh of energy annually. *See Mun. Energy Agency of Neb.*, 152 FERC ¶ 61,111, PP 6, 9 (2015) (granting waiver of standards of conduct and OASIS requirements). The costs of applying the rule to such entities far outweigh the potential benefits.

E. The Commission should clarify the Connected Entity definitions and the contract information to be reported.

1. Ten-percent ownership

The NOPR defines the term "Connected Entity" to include, among other things:

> an entity that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the ownership instruments of the market participant … ; or an entity 10 percent or more of whose ownership instruments are owned, controlled, or held with power to vote, directly or indirectly, by a market participant; or an entity engaged in Commission-jurisdictional markets that is under common control with the market participant.

NOPR P 23(a). TAPS interprets this part of the Connected Entity definition as not encompassing the relationship between JAAs and their members, and requests that the Commission so clarify.

JAAs and their members are governmental entities (or instrumentalities thereof) that lack "ownership instruments." While members participate in the JAAs' governance, they do not own the JAA. For example, Missouri River Energy Services (MRES) is a non-profit JAA providing services to sixty member municipalities that own and operate

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per year.

their own electric distribution systems in Iowa, Minnesota, North Dakota, and South Dakota.[20] MRES is governed by a thirteen-member board of directors elected by and from the ranks of its members. But MRES is a governmental entity formed under Chapter 28E of the Iowa Code,[21] and operating under intergovernmental cooperation laws the four states listed above. While MRES's members elect its board of directors, none of the members has any ownership interest in MRES.

TAPS requests clarification that the ten-percent criterion applies only to *ownership* instruments, not to participation in the governance of a governmental entity without such instruments. Such a clarification would be consistent with the plain language of NOPR paragraph 23(a) and with the NOPR's focus on identifying relationships that provide financial motives to manipulate RTO markets. It also would be consistent with the exclusion of JAA–member relationships in other contexts where the Commission has addressed connections between entities participating in jurisdictional markets and their affiliates. *See* Standards of Conduct for Transmission Providers, Order No. 717-C, 75 Fed. Reg. 20,909 (Apr. 22, 2010), 131 FERC ¶ 61,045, P 21 (2010), *on reh'g and clarification*, Order No. 717-D, 76 Fed. Reg. 20,838 (Apr. 14, 2011), 135 FERC ¶ 61,017 (2011). As explained in Order No. 717-C, the Commission has held that JAAs and their members are not affiliates; are not bound by each other's obligations to provide reciprocal transmission service to public utilities from whom they take open-

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20 *See* Members, http://www.mrenergy.com/contents/resources-2 (last visited Jan. 20, 2016).

21 *See* Iowa Code § 28E.1 - .42, https://coolice.legis.iowa.gov/cool-ice/default.asp?category=billinfo&service=iowacode&ga=83&input=28E

access service; and JAA sales to their members are not marketing functions for standards of conduct purposes. *Id.* (citing Order No. 888-A and Order No. 2004-A).[22]

Clarifying that the ten-percent criterion applies to ownership, not governance, also avoids complicated questions about how it would apply in various situations. Ownership is unambiguous; governance can be much more complicated. Consider, for example, a hypothetical joint action agency RTO market participant with nine members, none of which is itself a market participant and each of which appoints one director to the JAA's board. In the simplest case, with per capita voting and simple-majority decisionmaking, each board member would wield one-ninth or eleven percent of the JAA board's decisionmaking power. But even that simple situation would raise a question, if the ten-percent criterion were to apply to governance: would the JAA's Connected Entities be the JAA's members or the directors they appoint to the JAA's board?[23]

The questions quickly become more complicated with slight fact variations. For example, the power of each director to affect a JAA's decision depends on how many members constitute a quorum, how many cast votes on particular initiatives, how votes

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[22] In response to a general question regarding an exemption for JAAs, Staff's document addressing questions on Connected Entity definitions responded that "[a]ll market participants are included." *See* Definition D at 6 ("Staff Responses"), http://www.ferc.gov/CalendarFiles/20151210082928-Staff_%20Responses%20to%20Connected%20Entity%20Definition%20Questions.pdf. TAPS does not view this generic response as prejudging the appropriateness of granting requests for changes in how the rule applies to JAAs, consistent with other Commission rules, as requested by TAPS here and elsewhere in these comments. As TAPS demonstrates in these comments, there is good reason to follow Commission precedent with regard to TAPS's specific proposals, and departure would require explanation.

[23] Assuming the ten-percent criterion applied to governance and a member-appointed director had more than a ten-percent vote, it might be more salient and informative to name the member as the Connected Entity, rather than the member-appointed director. But that would raise questions about how to treat directors that are *not* member-appointed. Some JAAs have boards of directors that include both member-appointed directors and at-large directors elected by the membership as a whole. Others have boards of directors that include directors appointed by the state governor. Assuming the ten-percent criterion applied and that such a director had more than a ten-percent vote, who would be the Connected Entity?

are tallied, and what threshold is required to pass or block action. If a supermajority is required, each director has relatively less power to approve an initiative and more power to block it. And different votes may be subject to different approval thresholds, making it hard to measure in the abstract what level of control any director has in the JAA's governance. Likewise, some matters may be subject to per capita voting, while in other instances votes may be weighted by a member's load-ratio share or some other variable. If a member (or director) had more than a ten-percent vote on some matters and less than ten-percent on others, would it be a Connected Entity?

Similarly, some JAAs establish different projects to perform different services, and members can choose the projects in which they wish to participate. Some projects involve planning to serve participating members' full power-supply requirements, while other projects support unit-specific generation developments or purchases, and others provide a different utility-related service. Membership rosters and voting percentages can vary by project. A member may have more than ten-percent governance control as to one project and less than ten-percent as to another.

Applying the ten-percent criterion to governance input, rather than ownership, ultimately would be unworkable and does not appear to be what the NOPR intended. TAPS requests that the Commission so clarify. Otherwise, the Commission should explain how the criterion ought to be applied in these different situations.

2. Chief executive officer, chief financial officer, and chief compliance officer, and traders

NOPR paragraph 23(b) proposes that RTO market participants identify as Connected Entities their chief executive officer, chief financial officer, chief compliance officer, traders, or employees who function in those roles regardless of their titles. TAPS requests clarification of which employees should be reported under these requirements. The role of chief executive officer seems self-evident. It normally will be clear which individual functions in that capacity even if that person has a different job title. But the roles of chief financial officer, chief compliance officer, and traders are less self-explanatory, and related functions may be spread among several individuals within an organization. Given the Commission's (appropriate) statement that job *titles* are not sufficient to determine whom to report, more clarity is needed as to the actual job functions that trigger reporting requirements.

For example, the role of chief financial officer can encompass many kinds of responsibilities, from ensuring the accuracy of an organization's accounting and financial records, to managing its capital structure and its debt or equity issuances (where relevant), to overseeing or participating in oversight of its risk-management policies, and participating in its strategic planning, among other tasks. At the same time, some organizations may distribute some or all of these functions among multiple individuals or groups. And some of these functions seem to bear little relationship to the kinds of market-manipulation issues that provide the NOPR's impetus. To facilitate compliance and avoid reporting of extraneous information, the Commission should clarify the job functions of the person(s) that it wants market participants to identify under the "chief financial officer" rubric.

Similarly, some organizations may have a single chief compliance officer, while others may have different employees in charge of different compliance requirements. For example, responsibility for NERC compliance, market/tariff compliance, environmental compliance, and other related functions, may be assigned to different people, each of whom reports to a different supervisor or directly to the CEO. The Commission should clarify the particular job functions of the person(s) it wants to market participants to identify under the "chief compliance officer" rubric.[24] Given the anti-manipulation impetus of the NOPR, TAPS suggests that the Commission limit this category to focus on identifying the employee(s) responsible for compliance with the Commission's anti-manipulation rules.

NOPR paragraph 23(b) also proposes to require RTO market participants to identify their "traders" as Connected Entities, but does not define the term. After the NOPR was issued, Commission Staff clarified that the term was intended to encompass employees who make financial or economic decisions about resources' participation and bidding strategies in RTO markets.[25] Staff further clarified that the term would *not* encompass employees who perform only ministerial functions associated with submitting offers to an RTO, so long as those employees do not have any input into or control over the decision whether to submit.[26] The Commission should clarify the term "trader" along the lines suggested by Staff, with one modification. Many employees—including load forecasters, analysts, risk management committees, and plant operators—may have some form of "input" into the decision whether and how to offer a resource in the market. The Commission should clarify that the term "trader" is intended to apply to employees *with*

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[24] The clarification provided in Staff Responses at 3 ("the person primarily responsible for overseeing and managing regulatory compliance") leaves questions as to the scope of regulatory activities covered, e.g., NERC compliance.

[25] *Id.*

[26] *See* Staff Responses at 3.

decisionmaking authority as to how and when to offer a resource into a market for economic gain.

3. Debt

NOPR paragraph 23(c) proposes to require RTO market participants to identify as a Connected Entity:

> An entity that is the holder or issuer of a debt interest or structured transaction that gives it the right to share in the market participant's profitability, above a *de minimis* amount, or that is convertible to an ownership interest that, in connection with other ownership interests, gives the entity, directly or indirectly, 10 percent or more of the ownership instruments of the market participant [or would satisfy the other elements of the ten-percent criterion in paragraph 23(a)].

The Commission should clarify that the holder of a debt instrument *not* convertible to an ownership interest (e.g., a revenue bond) would not qualify under this definition. TAPS requests clarification to eliminate any doubt that straightforward debt arrangements, which TAPS members often use to finance transmission and generation investments, are excluded. While full repayment of debt may depend on the issuer's solvency, the holder is entitled only to repayment of the bond plus interest; it is not entitled to "share in the market participant's profitability." NOPR P 23.

4. Contracts

NOPR paragraph 23(d) proposes to require RTO market participants to identify entities that enter into an agreement with a market participant that "relates to" the management of resources that participate in Commission-jurisdictional markets or to the operational or financial control of such resources, "such as a tolling agreement, an energy management agreement, an asset management agreement, a fuel management agreement, an operating management agreement, an energy marketing agreement, or the like" (internal citations omitted). The NOPR also proposes to require a detailed description of the relationships created by those contracts and the "major provisions of the contract … such as[:]"

> effective date, term, renewal provisions, and matters pertinent to the type of contract, such as heat rate curve for a tolling agreement, the MW or MWh curves for a power purchase agreement, together with identification of the generator or plant involved, the nature of any output sharing, and the like.

NOPR P 33. The Commission should narrow these overbroad requirements.

a) The Commission should clarify which contracts must be identified and summarized, and should exclude ordinary operating and maintenance agreements and power purchase agreements, at minimum.

Contracts are by definition flexible, and electric industry participants use them extensively for many purposes: to acquire power supplies, support development of new generation, hedge risk, and operate and maintain resources, among other things. Consequently, a very large number and wide variety of contracts "relate" in some way to the management or operational or financial control of resources that participate in RTO markets, most of which will be of little relevance to detecting possible market manipulation. Market participants should not be asked to comb through and report such a wide array of contracts—or, worse yet, to guess at their peril which contracts are reportable. Nor should they have to speculate about which contract terms the Commission will deem "major" provisions. Much more precision in needed to render these requirements reasonable.

The Commission should identify with specificity the key attributes of contracts likely to be relevant to its anti-manipulation mission. Paragraph 10 of the NOPR explains the need for understanding contract relationships of entities participating in RTO markets:

> Rather than performing a trade or other action that results in a direct benefit to itself, a market participant might instead take actions that benefit another entity that bears a financial or legal relationship to it. Entities under common control, whether by ownership, beneficial interest, or contractual relationships, might also collude to set prices by taking positions that together result in market manipulation.

This description suggests the core attributes of contracts that the Commission should know about to spot potentially manipulative market activity that otherwise could evade detection. The relevant contracts would be those that give an entity *other* than the RTO market participant the authority to control (for non-operational economic reasons) the availability or dispatch of, or the submission of offers for, a given resource. The Commission should clarify that only such contracts need to be reported and summarized.

At minimum, the Commission should make clear that ordinary operation-and-maintenance (O&M) agreements and power purchase agreements (PPAs) are excluded. Despite NOPR language that would seem to sweep in such agreements,[27] Commission Staff subsequently clarified that standard power purchase agreements and contracts for physical operation and maintenance services need not be reported.[28] That clarification brings the proposed requirements more in line with the NOPR's purposes, and the Commission should adopt it. Contracts that merely govern physical operation and

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27 *E.g.,* NOPR P 23(d) & n.29 (requiring reporting of "operating management agreement[s]" and other contracts that provide for "operating generation plants"); *id.* P 33 (suggesting the reporting of "MW or MWh curves for a power purchase agreement").

28 *See* Staff Responses at 4.

maintenance of a facility—or provide simply for the purchase and sale of capacity, energy, or ancillary services—should be excluded.[29]

b) The Commission should clarify that JAA–member contracts need not be identified and summarized.

The Commission also should clarify that contracts between JAAs and their members need not be identified and summarized. For the most part, the clarification in the preceding section (if granted) would exclude such contracts. Contracts between JAAs and their members are generally long-term arrangements under which the JAAs secure power supplies for the members and the members pay the cost of those supplies and the JAA's administrative and general expenses. The JAAs serve as the RTO market participants for purposes of purchasing power for resale to members.

The JAAs also serve as market participants for purposes of offering JAA–owned (and sometimes member-owned) resources for sale into RTO markets. JAA members frequently transfer economic control of their resources to the JAA, which acts as market participant and determines the products and prices the resources will offer into the RTO market as part of the JAA portfolio. (In such cases, the member often retains responsibility for physically operating and maintaining the resource.) In other instances, a member may choose to retain economic control of its resource, in which case the member acts as market participant with respect to that resource and it does not become part of the JAA's portfolio. In both cases, unit commitment and market-participation decisions are made by the RTO market participant, either the JAA or the member, for that resource.

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[29] Of course, contract substance, not an agreement's title, should be controlling. If an agreement is called an operation and maintenance agreement but actually transfers away from the RTO market participant the authority to decide how the resource participates in the RTO market, the contract should be reported.

If there are any JAA–member contracts under which the entity that serves as RTO market participant is *not* the entity with economic control of a resource, then TAPS agrees that those contracts should be reported. Otherwise, JAA–member contracts should be excluded, and TAPS asks the Commission to so clarify. Such an exclusion would be consistent not only with the NOPR's purposes (described above), but also with the treatment of JAA–member contracts in other rulemakings. As noted above, the Commission held in Orders 888-A, 2004-A, and 717-C that JAAs and their members are not affiliates for standards of conduct or reciprocal-open-access purposes. And when Order No. 768 extended EQR requirements to certain section 201(f) entities in order to promote wholesale market price transparency, the Commission declined to require reporting of sales by JAAs to their members,[30] holding:

> The Commission finds that information about a non-public utility's sales to its members, or by a non-public utility under a long-term, cost-based agreement required to be made to certain customers under statute, will not materially contribute to additional price transparency. These types of sales do not significantly impact wholesale price formation in electric markets because these sales generally take place between a non-public utility and a pre-determined customer without arm's-length negotiations. In addition, the benefit of obtaining information about such sales by non-public utilities may not outweigh the burden imposed on the non-public utilities that would need to report such sales in the EQR.

Order No. 768, P 22. The Commission should reach the same conclusion here.

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[30] Sales to JAA members are counted for purposes of determining whether the JAA has more than a *de minimis* wholesale market presence. But if a JAA exceeds that threshold and thus is required to file EQRs, it nonetheless may exclude from those reports its sales to its members. Order No. 768, P 22.

c) The Commission should clarify what resources are covered.

TAPS also seeks clarification as to what resources are included in the contract-based definition of Connected Entity. For example, would the NOPR require reporting of contracts for control of behind-the-meter generating resources? Would the answer depend on whether the behind-the-meter generating resources are (1) offered into an RTO market as supply, (2) used to support a demand-response resource that participates in an RTO market as supply, or (3) simply reduces load at one or more nodes in an RTO market? Similarly, would the NOPR require reporting of contracts for control of other load-reducing mechanisms (e.g., control of air conditioning or electric heating systems)? Would the answer depend on whether the mechanism was used to support a demand-response resource that participates in an RTO market as supply?

d) What contract information needs to be reported

As noted above, the NOPR proposes (P 33) that market participants be required to summarize reportable contracts' "major provisions." The NOPR offers examples, but they do not purport to be comprehensive or definitive. Consequently, market participants are left to guess what information they should include, at the risk of enforcement action if they omit information the Commission later decides they should have included. In response, honest and risk averse market participants will over-report—at considerable expense. The tasks of reviewing contracts to determine whether they are reportable, and then identifying and summarizing the "major" provisions of such contracts, is likely to be among the most burdensome measures required by the proposed rule. And the absence of clear guidance will make the task harder. Instead of searching for specific requested information, market participants will have to review contracts in their entirety and debate among themselves which provisions are "major" and how they should be described.

Rather than giving illustrative examples, the Commission should specify the information it expects market participants to report and the level of detail with which it should be reported. Moreover, the Commission should focus its requirements to hone in on core contract terms (effective date, termination date, renewal provisions, contracting parties, and identity of the relevant market resources) and the factors that make the contract reportable (provisions that transfer control of the resource, or the direct financial benefit of its market participation, away from the market participant, as discussed above). The Commission should resist the urge to seek additional, extraneous data, such as heat rate curves (*see* NOPR P 33), or explain why such information is needed for the market-wide screening function.[31]

F. Participants in multiple RTO markets should submit data to each RTO, but only one should have audit authority.

The NOPR proposes to require RTOs to collect Connected Entity information from market participants. Some technical conference panelists suggested that, for the sake of efficiency and data consistency, it might make more sense for data to be submitted to and audited by the Commission instead. TAPS supports the NOPR's proposal to have data collected and potentially audited by RTOs, rather than the Commission.[32] At the same time, many TAPS members participate in more than one RTO

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[31] The NOPR's market-wide-reporting requirements neither substitute for nor constrain the Commission's investigative authority. If the Commission finds that it needs more information in a particular case, it can engage in a case-specific inquiry.

[32] TAPS understands that the Commission would retain authority to review the data and could investigate apparent inaccuracies pursuant to its anti-manipulation authority and, where applicable, under

market, and appreciate the potential downsides of submitting data to and being subject to audits by multiple RTOs.[33]

TAPS therefore suggests the following: Entities participating in the markets of more than one RTO submit the same form with identical Connected Entity data, simultaneously, to each such RTO. Each entity participating in the markets of more than one RTO should identify, as part of its submission, a "lead" RTO pursuant to criteria that the Commission should specify. The lead RTO so identified would be the only RTO with authority to audit the submission.[34] The criteria for identifying a lead RTO for each market participant should be objective, transparent, and easy to apply. And preferably, the criteria should produce relatively stable selections so that a market participant's lead RTO does not change frequently. For load-serving entities, the lead RTO should be the one in which the market participant has the greatest amount of load.[35] For generators, it should be the one in which the market participant has the greatest nameplate capacity of market-registered resources. For other entities, it could be the RTO in whose markets the entity has sold the most energy annually over the past three years.

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18 C.F.R. § 35.41.

[33] TAPS members' participation in multiple RTOs typically is not something over which they have full control. Transmission-dependent utilities must participate in the markets of the RTO that the relevant Transmission Owner (TO) chooses to join. If a JAA has members that depend on different TOs and those TOs choose to join different RTOs, the JAA effectively is required to participate in the market of each RTO.

[34] If a non-lead RTO suspects inaccuracies, nothing would prevent it from requesting that a lead RTO perform such an audit or, when appropriate, from referring matters to the Commission for possible investigation.

[35] TAPS suggests that vertically integrated utilities be treated as load-serving entities for this purpose, so their lead RTO would be the one in whose market the utility serves the greatest amount of load.

G. Scienter should be required for violation of the proposed rule.

The Commission asserts authority to require the collection of Connected Entity data from section 201(f) entities pursuant to the Commission's anti-manipulation authority under FPA section 222, together with its investigative authority under section 307(a) and its administrative powers under section 309.[36] The latter provisions allow the Commission to take the steps necessary to investigate potential violations of the FPA and Commission regulations and to carry out the FPA's provisions. Because the proposed rule is grounded (at least as to section 201(f) entities) in the Commission's authority under FPA section 222, alleged violations of the final reporting requirements should be subject to the same scienter requirements as violations of section 222 itself.[37] Thus, the Commission should clarify (at least as to section 201(f) entities) that alleged violations of the new reporting requirements will not be prosecuted absent a showing that the violation was intentional or reckless. *See* Prohibition of Energy Market Manipulation, Order No. 670, 70 Fed. Reg. 4,244 (Jan. 20, 2016), FERC Stats. & Regs. ¶ 31,202 (2006), *reh'g denied*, 114 FERC ¶ 61,300, P 45 (2006) ("[T]here can be no violation of the Final Rule, or any of its sections, absent a showing of the requisite scienter."); *id.* P 52 (deriving scienter requirement from the statutory language); *id.* P 78 ("inadvertent errors … would not involve the scienter needed for application of the Final Rule.").

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[36] The NOPR also invokes the Commission's inspection and examination authority under FPA section 301(b), 16 U.S.C. § 825(b), but that provision gives the Commission access to accounts and records of "licensees and public utilities," not section 201(f) entities.

[37] As discussed above, section 201(f) entities should be permitted to report quarterly or receive a safe harbor that enforcement action will not be taken for changes they fail to report in fifteen days but update by the end of the relevant quarter. The scienter requirement would apply to actions outside the safe harbor or quarterly reporting requirement.

CONCLUSION

The Commission should clarify and modify the proposed rule as set forth above.

Respectfully submitted,

/s/Cynthia S. Bogorad

Cynthia S. Bogorad
Jeffrey A. Schwarz

Attorneys for Transmission Access Policy Study Group

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW, Suite 700
Washington, DC 20006
(202) 879-4000

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