UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Ownership Information in Market-Based Rate Filings	Docket No. RM16-3-000

COMMENTS OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

In its Notice of Proposed Rulemaking ("NOPR"),[1] the Commission proposes to amend its regulations to clarify—and limit—the scope of ownership information that sellers seeking to obtain or retain market-based rate ("MBR") authority must provide. In particular, the Commission proposes to no longer require sellers to report comprehensive ownership information; and, instead, to limit reporting to certain types of affiliate owners. The Commission also proposes to limit which changes in owners trigger notice-of-change-of-status reporting requirements.

The Transmission Access Policy Study Group ("TAPS") appreciates the opportunity to comment on the NOPR. TAPS does not oppose the Commission's proposal to narrow the existing requirement that sellers report *all* owners, no matter how small their ownership percentage. However, we are concerned that the NOPR goes farther than needed to address that problem and, in turn, that it will impair the Commission's ability to carry out its statutory duties, including its obligations to accurately assess relationships between sellers and their affiliates. Reducing the administrative burden on the Commission and public utilities that have or seek authorization to sell at market-based

[1] Ownership Information in Market-Based Rate Filings, 80 Fed. Reg. 80,302 (proposed Dec. 24, 2015), FERC Stats. & Regs. ¶ 62,713 (proposed 2015).

rates must be assessed against the countervailing consideration that in ensuring just and reasonable rates under the Federal Power Act and authorizing service under MBR tariffs, the Commission must continue to safeguard consumers from the exercise of market power and other anticompetitive harms by entities requesting or seeking to maintain MBR authority.[2] The NOPR's proposed limitation on affiliate reporting requirements, however, severely erodes the Commission's ability to fulfill its statutory obligations. Accordingly, TAPS respectfully requests the Commission to revise its NOPR to:

- Require reporting of all *affiliate* owners, which will significantly reduce the burden created by the existing requirements but provide the Commission and interested parties with information necessary and material to its market power analysis.
- For affiliate owners and other affiliates of the MBR seller required to be included in the market power analysis, require a description of their affiliation with the seller.
- Clarify or revise the NOPR statement, P 13, that sellers must "affirm" certain facts to make it consistent with Commission precedent, up to and including Order No. 816, P 284,[3] which requires a *demonstration* of passivity.

I. INTEREST OF TAPS

TAPS is an association of transmission-dependent utilities in more than thirty-five states. TAPS members have a vital interest in the proper competitive functioning of wholesale power markets including the prevention of the exercise of market power in wholesale capacity, energy and ancillary markets. TAPS members have long been concerned about structural changes in the electric industry that could adversely affect competition, rates or regulation, or could expose customers to harm from unmitigated

[2] The Commission "approves applications to sell electric energy at market-based rates only if the seller and its affiliates do not have, or adequately have mitigated, market power." *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998).

[3] Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 816, 80 Fed. Reg. 67,056 (Oct. 30, 2015), FERC Stats. & Regs. ¶ 31,374 (2015) ("Order No. 816").

market power. TAPS has commented on nearly all major Commission rulemakings, including those pertaining to market-based rates. For example, TAPS, together with the American Public Power Association, successfully advocated that the Commission continue to require sellers in areas with Commission approved market-monitoring and mitigation to provide generation market-power analyses in Docket No. RM04-7-000, the Order No. 697 proceedings.[4] TAPS provided comments in Docket No. RM14-14-000 concerning the provision of information bearing on MBR authorization and has sought rehearing from Order No. 816.

II. COMMUNICATIONS

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[4] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904, 39,938 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, PP 289-90 (2007), *clarified*, 72 Fed. Reg. 72,239 (Dec. 20, 2007), 121 FERC ¶ 61,260 (2007) ("Order No. 697"), *on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832, FERC Stats. & Regs. ¶ 31,268 ("Order No. 697-A"), *clarified*, 124 FERC ¶ 61,055 (2008), *on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *on reh'g and clarification*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009), *corrected*, 128 FERC ¶ 61,014 (2009), *clarified*, Order No. 697-D, 75 Fed. Reg. 14,342 (Mar. 25, 2010), FERC Stats. & Regs. ¶ 31,305, *clarified*, 131 FERC ¶ 61,021 (2010), *reh'g denied*, 134 FERC ¶ 61,046 (2011), *reh'g denied*, 143 FERC ¶ 61,126 (2013), *review denied sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub-nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

III. COMMENTS

A. The Commission should require identification and description of all upstream affiliate owners, as well as other affiliates of the MBR seller required to be included in the market power analysis.

In this NOPR, the Commission has proposed revisions to the language of 18 C.F.R. § 35.37(a)(2) to modify a requirement instituted on rehearing of Order No. 697-A. In footnote 258 of that Order, the Commission stated that sellers seeking MBR authority must: (1) trace upstream ownership until all upstream owners are identified; (2) state all affiliates; and (3) describe the business activities of its owners, stating whether they are involved in the energy industry.[5]

The Commission believes that "the associated burdens on the industry of providing this information may outweigh the benefits." NOPR, P 4. In particular, the NOPR notes that "[s]ellers have frequently alleged that it is very difficult to identify and describe individual shareholders, particularly those with less than ten percent voting interests," which, were the Commission to strictly adhere to footnote 258, "could require rejection of filings on procedural grounds irrespective of any market power concerns." *Id.* P 7.

In order to address the burdens flowing from footnote 258 and require the provision of information material to the Commission's assessment of whether the MBR seller and its affiliates do not have or have adequately mitigated market power, the NOPR proposes to amend section 35.37(a)(2) of the Commission's regulations to require sellers

[5] Order No. 697-A, 73 Fed. Reg. 25,832, 25,860 n.258, FERC Stats. & Regs. ¶ 31,268, P 181 n.258.

seeking to obtain or retain MBR authority to identify and describe two categories of upstream owners:

- The furthest upstream affiliate owners in its ownership chain—defined as the seller's "ultimate affiliate owner(s)."
- All affiliate owners with "a franchised service area or market-based rate authority, or that directly own or control: Generation, transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies."

NOPR, P 9. Affiliate owners that do not fall into those two categories are exempted from a seller's obligation to describe its ownership structure. *Id.*

TAPS does not object to the Commission's attempts to streamline seller reporting and agrees that requiring reporting of *all* owners, regardless of the extent of their ownership or control over the seller, may be both unduly burdensome and not calculated to lead to the production of information useful to assessing market power. Unfortunately, the NOPR's proposed solution—requiring that sellers report only on the above two categories of affiliate owners—would eliminate the reporting and identification of persons and entities presumptively deemed to control the entity seeking to obtain or maintain MBR authority. Specifically, the proposed revision of 35.37(a)(2) would not require an MBR applicant to: (i) provide a meaningful depiction of its corporate structure; (ii) identify all of the entities or persons deemed to control the applicant; or (iii) explain how the applicant is related to these affiliate owners and other affiliates that are required to be identified for MBR regulatory purposes. To minimize those deficiencies, and preserve the availability of information necessary for the Commission to be able to fulfill its statutory obligations to ensure just and reasonable rates, the final rule should require identification of all *affiliated* owners, along with descriptions of the

relationship of those affiliated owners, and of other affiliates required to be reported in the seller's market power analysis, to the MBR seller.

The NOPR (P 10) acknowledges the need "for the Commission to form a meaningful picture of a seller's ownership structure and to understand what affiliates ultimately have the power to influence a seller's operations." In order to meet this need, an entity seeking to obtain or maintain MBR authorization should be required to identify those entities deemed to have a controlling interest in the MBR-applicant (*i.e.,* those seeking to obtain or maintain MBR authority) and explain their relationship to the applicant's business. Under the Commission's regulations "[a]ny person that directly or indirectly owns, controls, or holds with power to vote, 10 percent of more of the outstanding voting securities of the specified company," is presumed to have a controlling interest in "the specified company" and is deemed an affiliate. 18 C.F.R. § 35.36(a)(9)(i).[6]

In its Notice of Proposed Rulemaking concerning Connected Entities the Commission made plain the importance of understanding intercorporate relationships for purposes of satisfying its statutory obligations to ensure just and reasonable rates in connection with MBR authorization.

> Understanding the relationship between connected entities can be an important aspect of the Commission's *ex post* analysis, which is a critical element of the market-based rate program. In *Lockyer*, the Ninth Circuit cited with approval the Commission's dual requirement of an *ex ante* finding of the absence of market power and sufficient post-approval reporting requirements, finding that the Commission does not rely on *ex ante* market forces alone in

[6] TAPS submitted comments in Docket No. RM09-16-000 opposing proposed changes in the affiliate definition and the existing affiliate restrictions. The Commission has not further acted on its proposal in that docket and TAPS' comments here are predicated on the Commission's existing affiliate regulations.

> approving market-based rate tariffs. In particular, the court found that the ongoing oversight and timely reconsideration of market-based rate authorization under section 205 of the FPA enables the Commission to meet its statutory duty to ensure that all rates are just and reasonable.

Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators, 80 Fed. Reg. 58,382, 58,385 (proposed Sept. 29, 2015), FERC Stats. & Regs. ¶ 32,711, P 19 (proposed 2015) (citing *Cal. ex rel. Lockyer v. FERC,* 383 F.3d 1006 (9th Cir. 2004), *comment date postponed*, 80 Fed. Reg. 71,755 (Nov. 17, 2015), 153 FERC ¶ 61,162 (2015) ("Connected Entity NOPR"). While the Connected Entity NOPR seeks data on a much broader array of connections, the first element of its proposed Connected Entity definition includes affiliate owners, as well as any other affiliates of the MBR seller required to be included in the market power analysis.[7] While the Connected Entity NOPR is focused on *ex post* analysis, the Commission's recognition of the key central role of understanding corporate relationships in fulfillment of the Commission's obligations to ensure the justness and reasonableness of market-based rates applies with equal force to the effectiveness of the *ex ante* evaluation as to whether a seller may obtain or maintain MBR authorization.

Footnote 258, the requirements of which the Commission now seeks to revise, arose out of the recognition that understanding corporate relationships plays a critical role

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[7] *See* Connected Entity NOPR, P 23 (proposed 18 C.F.R. § 35.28(g)(4)(i)):

> 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, including but not limited to voting and non-voting stock and general and limited partnership shares; 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.

in the Commission's ability to assess MBR sellers. In Order No. 697 (P 464), the Commission held that "a seller seeking to obtain or retain market-based rate authority will be obligated to provide a detailed description of its corporate structure so that the Commission can be assured that the Commission's [restrictions on affiliate sales and affiliate requirements] are being applied correctly." Following that, Footnote 258 appeared in a section of Order No. 697-A (P 181) titled "Affiliate Abuse" and appeared after the directive that "[t]he affiliate requirements and restrictions must be satisfied on an ongoing basis as a condition of obtaining and retaining market-based rate authority." Requiring MBR applicants to identify their affiliate owners and describe their affiliation with the seller and other affiliates required to be identified in the MBR analysis is essential for policing compliance with the Commission's affiliate restrictions in order to ensure just and reasonable, and not unduly discriminatory or preferential rates.

The identification of all affiliate owners serves other essential regulatory purposes. It is often, if not typically, the case that corporate strategy and policy governing the MBR applicant is set at the parent or intermediate holding company level.

In addition, the entity seeking MBR authority may be affiliated with other market sellers in a variety of ways, such as shared board of director membership or ownership interests at the intermediate or parent holding company level. These interconnected interests provide for the exchange of information, coordination of activities and shared profit interests that could result in exercises of market power or other anticompetitive conduct. *See, e.g.,* Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 13 (2010) (potential anticompetitive harms resulting from partial acquisitions).

Commission staff apparently believes that requiring the MBR applicant to provide information identifying and describing its affiliate owners is both necessary and reasonable. Invenergy Thermal Development LLC states in its rehearing request from Order No. 816[8] that it is "the Commission staff's past and current practice of requesting an MBR Entity to provide in its MBR Filings a narrative describing the upstream owner affiliates of the MBR Entity along with an organizational chart depicting its upstream ownership structure."

There is no evidence that requiring the identification and description of all upstream affiliate owners is unduly burdensome.[9] In addition, TAPS proposes that the Commission also require identification of other affiliates required to be included in the market power analysis, along with a description of their affiliation with the MBR seller. This information is basic to ensuring compliance with the Commission's restrictions on affiliate sales and other affiliate requirements. It also serves "to form a meaningful picture of a seller's ownership structure and to understand what affiliates ultimately have the power to influence a seller's operations." NOPR, P 10. For example, a description explaining the relationship of the MBR seller to an affiliate with MBR authority or a franchised service territory (and potentially affiliated generation) could bear materially on

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[8] Request for Clarification, or in the Alternative Request for Rehearing, of Invenergy Thermal Development LLC and Invenergy Wind Development LLC 7 (Nov. 13, 2015), eLibrary No. 20151113-5157 ("Invenergy Request for Rehearing").

[9] This, in fact, is precisely what Invenergy has proposed on rehearing in Docket No. RM14-14. Invenergy suggested the Commission "clarify that it intends the organizational charts included in MBR Filings should be limited to depicting only the upstream affiliate owners of the MBR Entity submitting the MBR Filing." Invenergy Request for Rehearing at 7. According to Invenergy, such a requirement would "be consistent with the Commission's intent in Order No. 816 to minimize the burden on MBR Entities." *Id.* TAPS does not seek here to address the merits of Invenergy's position on rehearing. Rather, we point to Invenergy's comments to show that the identification and description of all upstream affiliate owners is not unduly burdensome.

assessing an MBR applicant's market power and other relevant competitive considerations. And while a narrative description of the relationship of other market power affiliates to the MBR applicant entails further effort, the information is highly useful, if not essential to the Commission's ability to ensure just and reasonable rates, as discussed above. This is wholly unlike the wasted effort of identifying *all* minute fractional owners, or affiliated enterprises involved in non-germane, non-energy enterprises.

However, the NOPR does not propose to require identification of all affiliate owners. Instead, it only proposes to require identification of "ultimate affiliate owner(s)" and affiliate owners that "have a franchised service area or market-based rate authority, or that directly own or control: Generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies." NOPR, P 9. These categories limit reporting to an insufficient subset of affiliates and will not provide the Commission with the understanding of an MBR seller's corporate relationships that is required for assessing a seller's market power.

For example, the furthest upstream affiliate owners may be hedge funds and pension funds rather than the parent holding company that controls the MBR applicant—and that parent holding company may not fall into a reportable category in its own right, even if many of its subsidiaries do. Assume for example that a pension fund, such as CalPERS, owned a 10% shareholder interest in a large utility holding company. Assume further that a subsidiary enterprise owned and operated the utility's merchant generation and was seeking to acquire or maintain MBR authorization. Under the NOPR's proposal,

the identity of the utility parent holding company, which is necessarily meaningful and material to assessing market power and competition considerations, would not be identified. And identification of the furthest upstream affiliate owner, *i.e.*, CalPERS, may not be particularly helpful "for the Commission to form a meaningful picture of a seller's ownership structure and to understand what affiliates ultimately have the power to influence a seller's operations." *Id.* P 10.[10] It certainly isn't sufficient to enable the Commission to perform its statutory obligations.

Indeed, in apparent recognition of the need to understand how the ultimate affiliate owners are related to the MBR applicant, the NOPR states (P 10) that "[t]he seller should also describe each ultimate affiliate owner's connection to the seller, and this description should be sufficient to allow the Commission to understand the relation between the seller and the ultimate affiliate owner(s), and could include references to the required corporate organizational chart." The final rule should expand this requirement to all affiliate owners and other affiliates required to be identified in the market power analysis, and codify this requirement together with the other changes suggested herein.

The NOPR (P 5) also states that its proposal is intended to "provide a new complementary framework" intended to work "[i]n conjunction with the new organizational chart requirement in Order No. 816." The status of Order No. 816's organizational chart requirement is uncertain. The Commission has stayed that requirement and "grant[ed] an extension of time such that market-based rate applicants

[10] To be clear, in some instances the identity of the ultimate affiliate owners could be material, as in the case of one utility holding company owning 10% or more of another utility holding company. What TAPS is proposing is the identification and description of all affiliate owners, along with a description of the other affiliates identified for the market power analysis.

and sellers will not be required to comply with the corporate organizational chart requirement prior to the issuance of an order on the merits of the requests for rehearing of the corporate organizational chart requirement." Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 153 FERC ¶ 61,337, P 3 (2015). In these circumstances, the Commission cannot properly rely upon the organizational chart requirement in Order No. 816 as a basis for its proposed revision to 18 C.F.R. § 35.37(a)(2).

B. The NOPR's statements about passive owners should be revised consistent with Order No. 816.

In P 13 of the NOPR, the Commission makes a proposal with respect to owners that a seller represents to be passive:

> [W]e propose to require that the seller affirm that its passive owners own a separate class of securities, have limited consent rights, do not exercise day-to-day control over the company, and cannot remove the manager without cause.

However, the Commission's policy—dating back to the 2009 case the Commission cites (P 13 n.21) but which it does not distinguish—requires a demonstration, not merely an affirmation, that a given set of investment interests are passive. *AES Creative Res., L.P.*, 129 FERC ¶ 61,239 (2009).

The Commission reaffirmed that requirement just recently in Order No. 816, writing that "sellers must demonstrate why such a relationship should be deemed passive." P 284. In fact, it rejected a proposal to do away with that requirement, finding that it "could encourage generation owners to acquire undisclosed passive interests." And it further reaffirmed that it would "continue to require that any seller that claims certain

interests are passive or non-controlling must meet the standards set out in *AES Creative*." *Id.*

The Commission fails to provide any reason in the NOPR for departing from its prior and recent precedent. TAPS sees no good reason for doing so. The Commission should not take claims of passive investment on faith, and instead reaffirm that the standards set forth in *AES Creative* and Order No. 816, still apply and sellers must show that a particular investment provides "only those limited rights necessary to protect the[] . . . investments." *AES Creative*, 129 FERC ¶ 61,239, P 25 (citing *Solios Power LLC*, 114 FERC ¶ 61,161, PP 9-10 (2006)).

CONCLUSION

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

Respectfully submitted,

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