UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Data Collection for Analytics and Surveillance and Market-Based Rate Purposes	Docket No. RM16-17-000

COMMENTS OF TRANSMISSION ACCESS POLICY STUDY GROUP IN RESPONSE TO NOTICE SEEKING COMMENTS

On March 18, 2021, the Commission issued a Notice Seeking Comments ("Notice")[1] in the above-captioned proceeding regarding revisions to the data dictionary and XML schema that accompany the relational database established in Order No. 860.[2] The proposed revisions would apply only to those market-based rate Sellers[3] whose ultimate upstream affiliates have been granted blanket authorization under Federal Power Act ("FPA") section 203(a)(2)[4] to acquire up to twenty percent of the voting securities of public utilities. Specifically, the Notice proposes to require such Sellers to submit the following information to the relational database: (1) the docket number of the proceeding in which the Commission granted section 203(a)(2) blanket authorization to their ultimate upstream affiliates, and (2) the utility ID types and utility IDs of the utilities whose securities were acquired pursuant to those section 203(a)(2) blanket authorization orders.[5]

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[1] *Data Collection for Analytics & Surveillance & Mkt.-Based Rate Purposes*, 174 FERC ¶ 61,214 (2021).

[2] *Data Collection for Analytics & Surveillance & Mkt.-Based Rate Purposes*, Order No. 860, 168 FERC ¶ 61,039 (2019), *order on reh'g & clarification*, Order No. 860-A, 170 FERC ¶ 61,129 (2020).

[3] These Comments use the term "Seller(s)" as defined in the Commission's market-based rate regulations, 18 C.F.R. § 35.36(a)(1).

[4] 16 U.S.C. § 824b(a)(2).

[5] Notice P 1.

The Transmission Access Policy Study Group ("TAPS"), which has previously commented in this proceeding,[6] supports the revisions proposed in the Notice. TAPS' members are transmission-dependent utilities that rely on the proper competitive functioning of wholesale power markets. Accordingly, TAPS has a vital interest in the Commission's monitoring and regulation of market-based rate authority and the exercise of market power through its newly established relational database.

The Notice's proposed revisions to the relational database should ensure that the Commission can fulfill its statutorily mandated role to ensure just and reasonable rates. As the Commission explained in its companion order in *NextEra Energy Inc.*, 174 FERC ¶ 61,213 (2021) ("*NextEra*"), these revisions are necessary for the relational database to properly identify the affiliates of Sellers with market-based rate authority, while also maintaining necessary transparency into Sellers' ultimate upstream ownership structures, including institutional investors with FPA section 203[7] blanket authorizations, in order to guard against competitive abuses. Thus, TAPS urges the Commission to adopt the proposed revisions.

COMMENTS

Once implemented, the relational database will be one of the Commission's most important tools in ensuring just and reasonable market-based rates and analyzing market

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[6] Request for Leave to Submit Limited Follow-Up Comments to the February 27, 2020 Technical Workshop and Comments of Transmission Access Policy Study Group Requesting an Additional Technical Workshop, *Data Collection for Analytics & Surveillance & Mkt.-Based Rate Purposes* (Apr. 3, 2020), eLibrary No. 20200403-5231 ("TAPS Technical Workshop Comments"); Request for Clarification or, in the Alternative, Rehearing and Request for Rehearing of the Transmission Access Policy Study Group, *Data Collection for Analytics & Surveillance & Mkt.-Based Rate Purposes* (Aug. 19, 2019), eLibrary No. 20190819-5133; Comments of the Transmission Access Policy Study Group, *Data Collection for Analytics & Surveillance & Mkt.-Based Rate Purposes* (Sept. 19, 2016), eLibrary No. 20160919-5115.

[7] 16 U.S.C. § 824b.

power, consistent with its statutory obligations. Given the Commission's determination in *NextEra*, the proposed revisions are necessary to enable the relational database to serve that critical role.[8]

In *NextEra*, the Commission correctly held that "[u]nder 18 C.F.R. § 35.36(a)(9)(i), institutional investors that own 10% or more of the outstanding voting securities of the utility pursuant to a section 203(a)(2) blanket authorization order *are affiliates of those utilities through ownership of voting securities*."[9] As a result, and consistent with Order Nos. 860 and 860-A, the Commission confirmed that a Seller must identify such an institutional investor as its "ultimate upstream affiliate" in the relational database if that institutional investor is the furthest upstream affiliate in a Seller's ownership chain.[10]

NextEra also clarified that "the Commission's various affiliate restrictions would not apply between utilities, including market-based rate sellers, whose securities are owned by a common institutional investor pursuant to a section 203(a)(2) blanket authorization" solely based on that common ownership.[11] The Commission found that "the conditions in a section 203(a)(2) blanket authorization order . . . prevent institutional investors from exercising control over" the Sellers it acquires.[12] As a result, the

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[8] For the relational database to fulfill this critical role, any other known issues with its technical functioning must also be resolved before it goes into effect. *See* TAPS Technical Workshop Comments (discussing concerns that filers may create duplicative identification numbers for the same affiliated entity, which could impair the relational database's ability to properly connect affiliated entities). TAPS urges the Commission to continue its transparency in implementing this new market-based rate reporting regime and hold additional technical workshops as necessary to prevent these and other issues from interfering with the effectiveness of the relational database.

[9] *NextEra* P 42 (emphasis added).

[10] *Id.* P 53; *see also* 18 C.F.R. § 35.36(a)(10).

[11] *NextEra* P 52.

[12] *Id.*

Commission explained that it will not automatically treat Sellers as under "common control"—and thus affiliated under 18 C.F.R. § 35.36(a)(9)(iv)—because they share a common institutional investor that is subject to the conditions of a section 203(a)(2) blanket authorization order.[13] The Commission therefore clarified that "utilities with market-based rate authorization will not be required to link assets with other utilities with market-based rate authorization by virtue of the fact that they are both owned by an institutional investor pursuant to a section 203(a)(2) blanket authorization order."[14]

To implement this clarification in *NextEra*, the Notice proposes to distinguish the reporting and database treatment of (1) ultimate upstream affiliates that have been granted blanket authorizations under FPA section 203(a)(2); and (2) ultimate upstream affiliates without blanket authorizations.[15] As currently designed, the relational database links Sellers through their common ultimate upstream affiliates. To carry out the determination in *NextEra* that common ownership by ultimate upstream affiliate institutional investors that have been granted section 203 blanket authorizations does not give rise to affiliation between and among Sellers,[16] Sellers must report to the database whether their ultimate upstream affiliates have such blanket authorizations. Otherwise, the database cannot restrict affiliate linkages to those ultimate upstream affiliates that do not have blanket authorizations. This reporting and related database change should avoid the improper identification of market-based rate Seller affiliates that would otherwise arise by means of common ownership by ultimate upstream affiliate institutional

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[13] *Id.* (citing 18 C.F.R. § 35.36(a)(9)(iv)). The Commission explained that "this does not mean that such [Sellers] could never be considered affiliates based on other factors." *Id.* P 52 n.79.

[14] *Id.* P 52.

[15] Notice PP 7, 9.

[16] *NextEra* P 53.

investors that have been granted section 203 blanket authorizations, while allowing the database to link affiliates to ultimate upstream owners that lack such blanket authorizations.

This change in database reporting and operation necessitates one additional change. For Sellers with an ultimate upstream affiliate that has received blanket authorization, the Notice also proposes to require Sellers to identify the "utilities whose securities were purchased under the corresponding blanket authorization docket number."[17] Without this second component of the Notice's proposal, the relational database would cease to work for Sellers whose ultimate upstream affiliates have been granted section 203(a)(2) blanket authorizations. As the Notice explains, "[c]urrently, the ultimate upstream affiliate information is used to connect affiliates through this common affiliate in all instances."[18] When Sellers are not linked to other Sellers through their ultimate upstream affiliates—i.e., when the ultimate upstream affiliate has been granted blanket authorization under FPA section 203(a)(2)—an alternative mechanism for the database to link affiliated Sellers is needed. The Notice appropriately proposes to move one step down the ownership chain and have "the relational database instead link [market-based rate] affiliates through the upstream affiliate whose securities were acquired pursuant to the section 203(a)(2) blanket authorization."[19]

Finally, it is equally important that the Notice maintains the requirement established in Order Nos. 860 and 860-A, and confirmed in *NextEra*, that Sellers report

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[17] Notice P 9. Specifically, the Notice would require Sellers to report the utility ID types and the utility IDs of the utilities whose securities were purchased by the relevant ultimate upstream affiliate that had received blanket authorization under FPA section 203(a)(2). *Id.*

[18] *Id.* P 12.

[19] *Id.*

their ultimate upstream affiliates to the relational database even when the ultimate upstream affiliates are institutional investors with FPA section 203(a) blanket authorizations. Not only is this mandated by the Commission's affiliate definition under 18 C.F.R. § 35.36(a)(9)(i),[20] but it is also essential to the Commission's ability to monitor market power and fulfill its statutory obligation to ensure just and reasonable rates.

The Commission explained in *NextEra* that "institutional investors remain affiliates of public utilities whose securities are acquired pursuant to a section 203(a)(2) blanket authorization," and that "the Commission requires an ongoing disclosure of the sellers' affiliates" in order "[t]o effectively analyze whether sellers could exercise horizontal or vertical market power."[21] The Commission also agreed with the concerns of TAPS and others "that horizontal shareholding can: (1) blunt unilateral incentives to compete; (2) result in greater influence over decision-making to compete less aggressively or to coordinate conduct; (3) and facilitate the sharing of non-public, competitively sensitive information between rivals, leading to anticompetitive outcomes."[22] Information about horizontal shareholding must be transparent and accessible so that the Commission and public can monitor these concerns. As the electric industry and ownership structures change over time, the Commission must have sufficient information to evaluate the effectiveness of its current market-based regulations

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[20] "Under 18 C.F.R. § 35.36(a)(9)(i), institutional investors that own 10% or more of the outstanding voting securities of the utility pursuant to a section 203(a)(2) blanket authorization order are affiliates of those utilities through ownership of voting securities." *NextEra* P 42. "[I]nstitutional investors must be identified as ultimate upstream affiliates if they own 10% or more of the voting securities of a utility with market-based rate authorization." *Id.* P 53 (citing 18 C.F.R. § 35.36(a)(10)).

[21] *Id.* P 56.

[22] *Id. See also* Motion to Intervene and Protest of the Transmission Access Policy Study Group 12-16, *NextEra Energy Inc.*, Docket No. EL21-14-000 (Nov. 30, 2020), eLibrary No. 20201130-5151.

and evaluate whether changes are needed. It therefore is vital that institutional investors that have been granted blanket authorizations be reported by market-based rate Sellers to the relational database as their ultimate upstream affiliates, even if the relational database will not establish affiliation among Sellers based on common ownership by those institutional investors.

In sum, the revisions proposed in the Notice would allow the Commission to implement the clarifications made in *NextEra* while maintaining Order Nos. 860's and 860-A's "goal[] . . . to increase transparency into upstream affiliation and ownership information of market-based rate sellers."[23] As proposed, the relational database should be able to correctly link affiliated Sellers in order to generate complete asset appendices and implement other market-based rate regulatory consequences associated with affiliation. It will also provide important information about Sellers' ultimate upstream affiliates, including those that have received FPA section 203(a)(2) blanket authorization orders. Both of these elements of the relational database are essential to the Commission's ability to fulfill its statutory mandate to ensure just and reasonable rates.

[23] *NextEra* P 56.

CONCLUSION

The Commission should revise the relational database as proposed in the Notice.

Respectfully submitted,

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