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FERC Proposes To Expand Classes Of Information Collected From Participants In RTO And ISO Markets

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On September 17, 2015, the Federal Energy Regulatory Commission ("FERC") issued a ***notice of proposed rulemaking*** ("NOPR") proposing to significantly expand the information that entities would be required to disclose in order to participate in the wholesale markets administered by Regional Transmission Organizations ("RTO") and Independent System Operators ("ISO"). Notably, while market participants already are required to disclose certain affiliate relationships to the RTOs and ISOs in which they participate, FERC's proposal would require market participants to provide additional information regarding a broad array of contractual, employee, and other business relationships. In the NOPR, FERC proposes to require each RTO/ISO to amend its tariff to require market participants to identify and describe their relationships with "Connected Entities" and to require RTOs/ISOs to electronically transmit this information to FERC. A "Connected Entity" is defined broadly to include any entity, including a natural person, that falls within one of the following categories:

- An entity that directly or indirectly owns, controls, or holds with power to vote, 10% 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 from the market participant;

- The chief executive officer, chief financial officer, chief compliance offer, and the traders of a market participant (or employees who function in those roles, regardless of their titles);

- 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 an entity 10 percent of more of whose ownership instruments could, with the conversion of debt or structured products and in combination with other ownership interests, be owned or controlled, directly or

indirectly, by a market participant; or

- Entities that have entered into an agreement with the market participant that relates to the management of resources that participate in Commission-jurisdictional markets, or otherwise relates to 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, and energy marketing agreement, or the like.

In addition, each market participant would be required to: (1) update their Connected Entity data within 15 days of a change; and (2) certify on an annual basis that its reported Connected Entity data was comprehensive and accurate. Market participants also would be required to obtain a Legal Entity Identifier ("LEI"), a unique identifier that entities can obtain from the Global LEI Foundation, a non-profit organization established by the G20. Following passage of the Dodd-Frank Act, certain government agencies, including the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission, began requiring use of LEIs to identify parties to swaps transactions. FERC's proposal, if approved, would require each market participant to report in their Connected Entity data filing their own LEI and the LEI of each of their Connected Entities (if known). FERC states that requiring market participants to disclose Connected Entity and LEI data will assist FERC and each market in screening and detecting anti-competitive and manipulative conduct. While recognizing that both RTOs/ISOs and the CFTC provide FERC with a wealth of trading information, FERC states that it currently lacks a "clear window into the relationships between market participants and other entities, which can be complex." FERC adds that it also is unable to "fully utilize this information in order to detect and deter market manipulation because of uncertainty regarding the identify of a given market participant, which may trade under different identifiers in different markets and venues." While FERC's proposal is similar in certain respects to reporting requirements imposed by other regulatory bodies, FERC's proposal goes beyond forms with similar goals, such as the CFTC's ***Form 40***, and would require market participants to assess and monitor a wide array of business relationships to determine whether they constitute reportable Connected Entity relationships. As a practical matter, the breadth and ambiguity of the proposed definition of Connected Entity may make this analysis complex. Consider the following:

- While power sellers already are required to identify and report contractual arrangements that confer control over generation facilities in their market-based rate filings, FERC's proposed definition of Connected Entity appears to go one step further and would encompass parties to any agreement that "relates to the management of resources that participate in Commission-jurisdictional markets." The term "management of resources" is left undefined. However, FERC's discussion suggests that it could encompass a wide range of activities, including billing and bundling of services and products.

- For purposes of FERC's existing regulations, affiliate is typically defined as any person that owns, controls, or holds with power to vote, 10 percent or more of the outstanding "voting securities" of a specified company. Again, FERC's definition of Connected Entity appears to go beyond existing requirements by requiring market participants to identify entities holding non-voting or purely passive interests.

- FERC's NOPR also leaves open the question of what constitutes a "*de minimis*" interest in a market participant's profitability and requests comment on what an appropriate threshold may be.

Notwithstanding the potentially broad scope of FERC's proposed disclosure requirements, the NOPR suggests that FERC believes that the additional incremental cost to market participants of complying with these new requirements should be minimal. In particular, FERC states that it expects that it will take the average market participant approximately four hours to register for an LEI and to initially collect and report Connected Entity data, with an additional three hours per year to maintain and update this information. Nevertheless, the NOPR invites comments regarding the burden associated with complying with the new rule. Notably, Commissioner LaFleur issued a concurrence acknowledging that the NOPR "would create a significant new reporting regime for all market participants" and stating that she will consider market participants' comments on the benefits and burdens of the proposal when deciding whether to support the final rule. Comments on the NOPR are due 60 days after the date that the NOPR is published in the Federal Register.