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FERC Proposes to Revamp its Market-Based Rate Policies and Procedures

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On June 19, 2014, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a Notice of Proposed Rulemaking ("NOPR") proposing to revise its standards for evaluating applications to sell energy, capacity, and ancillary services at market-based rates, as set forth in Order No. 697 and subsequent orders. FERC's revisions have two primary goals: (1) to streamline the horizontal and vertical market power analyses that public utilities are required to submit when filing an application for market-based rate authority or a triennial market power update; and (2) increase the transparency of information that sellers report to FERC as part of the market-based rate process, including the seller's affiliates and corporate structure and its interest in generation and transmission assets. **Horizontal and Vertical Market Power Analyses** FERC proposes significant changes to the horizontal market power analysis that sellers must include in their market-based rate filings. Currently, when applying for market-based rate authority or filing a triennial market power update, a seller is required to submit two indicative screens, a wholesale market share screen and a pivotal supplier screen. The screens focus on the amount of uncommitted capacity owned or controlled by a seller and its affiliates in a relevant market, and sellers are permitted to deduct any capacity committed under a long-term contract of one year or more when preparing the screens. Failing the screens creates a rebuttable presumption that the seller and its affiliates have horizontal market power in the relevant geographic market. However, for sellers that fail the screens, but are located in an ISO or RTO ("RTO"), the Commission's prior practice has been to allow the sellers to obtain or retain market-based rate authority by relying on the RTO's Commission-approved monitoring and mitigation measures. In order to allow sellers to address horizontal market power issues in a streamlined manner, FERC proposes to eliminate the requirement to submit the indicative screens in two circumstances:

- First, sellers located in an RTO market may rely on the Commission-approved monitoring and mitigation to prevent the exercise of market power in lieu of submitting the indicative screens; and

- Second, if all the generation capacity owned or controlled by a seller and its affiliates in the relevant markets is fully committed, the seller may explain that its capacity is fully committed instead of submitting the indicative screens.

If adopted, FERC's proposal would significantly reduce the filing burden for market-based rate sellers. By allowing sellers to forego the indicative screens in favor of relying upon RTO monitoring and mitigation, FERC's proposal would essentially eliminate the indicative screen requirement for all sellers located within such markets. Similarly, FERC's proposal to eliminate the screen requirement for sellers that do not have any uncommitted generation capacity promises to elevate substance over form by recognizing that such sellers cannot exercise horizontal market power, thus eliminating the "purely mathematical task" of preparing the screens in those circumstances. FERC also proposes to eliminate the requirement that a seller provide information on sites for generation capacity development as part of its vertical market power analysis when submitting an application for market-based rate authority or a triennial market power update. Additionally, FERC proposes to eliminate the requirement that sellers file quarterly land acquisition reports. FERC noted that since adopting this requirement, it has not received a single complaint or allegation that a seller's control of such sites created a barrier to entry. **Reforms to Increase Transparency** In addition to streamlining the horizontal market power analysis, FERC also proposes several changes that appear to enhance FERC Staff's ability to assess corporate affiliation, the jurisdictional assets held by a public utility and its affiliates, and the total capacity located in a particular market. Among other things, FERC proposes to:

- Require sellers to report all long-term firm purchases of capacity and/or energy when preparing the indicative screens and asset appendices, regardless of whether the purchase gives the seller or its affiliates control of the capacity, in order to assist FERC Staff in "siz[ing] the market correctly" and "ensur[ing] consistent treatment of long-term firm sales and long-term firm purchases."

- Require sellers to provide an organizational chart, similar to that required of FPA Section 203 applicants, depicting their affiliates and upstream owners when filing applications, updated market power analyses, and notices of change in status.

- Require sellers to submit the indicative screens and asset appendices in an electronic spreadsheet format that can be searched, sorted, and accessed using electronic tools.

- Establish a comprehensive searchable public database of information submitted by sellers in their asset appendices.

Other Changes and Clarifications The NOPR also includes several other significant proposed changes and clarifications, including to:

- Clarify that a seller must file a change in status whenever the seller or its affiliates acquire generation that would result in a cumulative net increase of 100 MW or more in any relevant market since their last market-based rate filing, even if the seller has not previously studied the market where the generation is located.
- Propose that long-term purchases of energy or capacity be included when assessing whether a seller has met the 100 MW threshold triggering a change in status.
- Clarify that while sellers may employ the conservative assumption that there are no competing imports when preparing the horizontal market power analysis, sellers must include any uncommitted capacity that they and their affiliates can import into the relevant market.
- Revise the regulations to codify a distinction in determining category seller status for power marketers versus power producers.
- Clarify that the accounting and reporting waivers typically granted to market-based rate sellers do not extend to certain requirements applicable to licensed hydropower facilities.
- Redefine the default geographic market for independent power producers with generation capacity in a generation-only balancing authority area ("BAA") so that the default geographic market will be the BAA of each directly interconnected transmission provider.
- Provide additional guidance on FERC's website as to how a corporate family may submit a single, joint master corporate tariff.
- Clarify how to study Simultaneous Transmission Import Limit and submit such information to the Commission.

Comments on the NOPR are due within 60 days after publication in the Federal Register. A copy of the NOPR is available ***here***.