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FERC Proposes Revisions To Its Market-Based Rate Procedures

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The Federal Energy Regulatory Commission (“FERC”) is considering revising its market-based rate (“MBR”) regulations¹ to streamline filing requirements associated with FERC authorization for MBR sales of electric energy, capacity, and ancillary services (“MBR Authorization”) and to provide clarifications on MBR requirements. In addition to entities frequently seeking MBR Authorization for new projects, entities that already have MBR Authorizations should review the proposed changes as many of the proposals could help reduce the burdens associated with ongoing MBR compliance obligations. It is not too late to file to Comments on the Notice of Proposed Rulemaking (“NOPR”),² which are **due September 23, 2014**.

Introduction

FERC applies a four pronged approach when analyzing MBR applications, by examining and guarding against potential (i) market power in generation, (ii) market power in transmission, (iii) barriers to entry, and (iv) affiliate abuse. *See e.g.*, NOPR, at P 2. The horizontal market power screens were constructed through Order No. 697 (FERC’s last major MBR rulemaking) to facilitate this analysis.³ The relevant geographic markets for the horizontal market power screens depend on whether the MBR applicant or seller (for ease, both referred to herein as an “MBR Entity”) is located in a regional transmission organization (“RTO”) or independent system operator (“ISO”) market, whether there is any identified submarket, and should include any neighboring markets directly interconnected with the region where the MBR Entity is located (“First Tier Markets”). In a non-RTO/ISO market, the default market for purposes of calculating potential market power is the balancing authority area (“BAA”) where the MBR Entity is located. In an RTO/ISO region, the market should be the RTO/ISO (although, if a submarket exists, the submarket should be used). *See e.g., id.*, at PP 5-6. Once granted, MBR Authorization is conditioned on compliance with affiliate restrictions, electronic quarterly report (“EQR”) filings, notice requirements for changes in status, and triennial market power reports (“Triennials”) by larger “Category 2” sellers. *Id.*, at PP 7-8.

Frequently, MBR Entities with limited affiliated generation, fully committed capacity, or existence solely within market monitored RTO/ISO markets are required to complete full market power analyses despite their limited market presence. In the NOPR, FERC states through its Order No. 697 implementation, it has “found that the burdens associated with certain of [FERC] requirements may outweigh the benefits in certain circumstances.” *Id.*, at P 10. As a result, the NOPR proposes the modifications and clarifications discussed below, to streamline the MBR procedures while maintaining market integrity. Comments are **due September 23, 2014**.

Proposals to Revise MBR Procedures

FERC's proposals to streamline the MBR procedures were issued in two primary tranches. The first tranche includes FERC's proposals to ease or clarify the requirements associated with horizontal market screen analyses by MBR Entities. The second, and sometimes overlapping, tranche includes FERC's related proposals to ease or clarify MBR Entities' ongoing reporting obligations.

Revisions to Requirements Associated With Horizontal Market Power Analyses

FERC proposes to retain the existing horizontal market power screens established in Order No. 697. However, FERC would allow MBR Entities in RTO/ISO markets with approved market monitoring and mitigation measures to provide complete asset information and state that the MBR Entity is relying on such measures to address any potential market power, instead of completing full horizontal market power screens. Category 2 sellers would follow this same approach in Triennials. See NOPR, at PP 11 and 35-40.⁴

In addition, FERC proposes that where all generation owned or controlled by a seller and its affiliates is fully committed, this may be explained, rather than inclusion of full horizontal market power screens. Statements that capacity is fully committed would need to be supported by contract and counter-party information, and generation would not be considered "fully committed" if the seller has generation to serve native load, provider of last resort obligations, or an ability to reclaim generation. *Id.*, at PP 11 and 41-46.⁵ FERC also notes that full market power screens are not required for change in status filings. *Id.*, at P 38.

For purposes of horizontal market power screen calculation, FERC will also review, and include in its analysis, simultaneous import level ("SIL") data, long-term firm purchases from outside the study area, and remote capacity from outside the capacity area. *Id.*, at PP 13 and 58-67. Further, for purposes of calculating the screens when still necessary, FERC proposes revising the geographic market for independent power producers with generation located in a generation-only BAA to be the BAA of the transmission provider(s) to which the generation-only BAA is interconnected. Note that generation interconnected to a trading hub and could have more than one interconnected BAA, thereby necessitating MBR Entities that would still be required to complete horizontal market power screens to submit a set of market power screens for each of those BAAs interconnected to the trading hub. *Id.*, at PP 12 and 47-57.

The NOPR provides additional clarifications on simplifying assumptions, proposals for consistency in capacity calculations for all projects included in an MBR Entity's filing, and the inclusion of capacity for solar technologies as energy limited resources eligible to use a five year average capacity factor when calculating capacity. *Id.*, at PP 14-16 and 68-72. FERC also asks whether using capacity at peak would be a better measure for photovoltaic facilities. *Id.*, at P 70.

In addition, FERC proposes requiring that MBR Entities report all long-term firm purchases in their market power analysis, noting the confusion that can arise when such purchasers exclude that information in MBR filings. For example, on occasion a BAA that is also an MBR Entity has excluded capacity fully committed to it under a long-term power purchase agreement from its MBR market power analyses, which can affect the analyses submitted by other MBR Entities in that market. See *e.g., id.*, at PP 78 and 83.

When completing asset charts, FERC proposes that MBR Entities include full capacity (even if the MBR Entity only owns part of a generator) and that MBR Entities should not include passive investments. *Id.*, at PP 19, and 110-119.

Revisions to Reporting Requirements

FERC's proposals would reduce the reporting requirements for many MBR Entities (although more information may be required for certain larger MBR Entities and MBR Entities that are also transmission providers or BAAs). For example, FERC proposes to eliminate the requirement that MBR Entities file information on sites for generation capacity development in MBR applications or Triennials, and to cease the requirement to submit quarterly land acquisition reports. *Id.*, at PP 17 and 87-92.

Similarly, FERC proposes to revise the obligations for reporting increases in affiliated generation. First, FERC clarifies that there is an obligation to report 100 MW or more net increases in generation by existing affiliates in any relevant market. *Id.*, at PP 96-98. In addition, FERC proposes that rather than requiring a notice of change in status for any new affiliated generation, FERC would only require notices of change in status for new affiliated generation with 100 MW or more aggregate capacity, in any market. *See Id.*, at PP 102-109. FERC notes that its reference to all assets includes behind the meter generation and qualifying facility ("QF") generation. FERC issued that statement based on their "experience [] that some sellers are unsure if they should report new affiliates that own certain facilities such as qualifying facilities that are exempt from FPA section 205 and behind-the-meter facilities." NOPR at P 103. Parties may want to clarify that this means FERC is only requiring MBR Entities to report new affiliation with QFs that make MBR sales (even if those qualifying facilities are otherwise exempt from section 205 of the FPA), and that FERC would not require an MBR Entity to disclose acquisition of a QF making simply avoided cost sales under the Public Utility Regulatory Policies Act of 1978.

In connection with Category seller status (which in significant part depends on whether the MBR Entity owns, controls, or is affiliated with 500 MW or less of generation in a region), FERC proposes to refine the size criteria for Category 1 sellers. Category 1 sellers are not required to submit Triennials (unless otherwise requested by FERC). FERC clarifies that different standards as to calculation of the 500 MW limit will apply to different types of MBR entities. Specifically, FERC proposes that a *power marketer's* capacity calculation should include all affiliated generation in each region for purposes of the 500 MW Category 1 seller threshold, whereas, a *power producer* would only include affiliated generation in the region where it is located. In any region where a power marketer's affiliate has Category 2 seller status, it will be treated as a Category 2 seller. FERC states that its proposal assumes that power marketers have no home market. *Id.*, at PP 21 and 128-134.

Additional Clarifications

- **Organizational Charts:** In a step that might have been anticipated given the complex corporate structures often applicable to MBR sellers, FERC proposes that Sellers not only describe their affiliates and upstream owners in MBR filings, but also provide an organizational chart similar to those submitted in section 203 applications under the FPA. *See id.*, at P 22 and 136-139.
- **Joint Master Corporate MBR Tariff:** FERC recognizes that few affiliated sellers have taken advantage of the opportunity to designate one MBR seller for a single, joint master corporate MBR tariff. As a result, FERC proposes to clarify the process that a corporate family should use if it desires to use a single, joint master corporate MBR tariff through one designated

filer (and what the affiliated entities should submit in their e-Tariff databases). *See id.*, at PP 23 and 143.

- **Revisions to Waiver Language:** The NOPR proposes to preclude licensed hydropower projects from waiver of those Part 101 accounting obligations under the Uniform System of Accounts which are applicable to hydropower licenses. FERC would also require any hydropower projects with a Part 101 waiver in an MBR tariff to update the reference to the Part 101 waiver in the next MBR filing so that it excludes those requirements associated with hydropower licenses. Hydropower projects may still be eligible for waivers of Part 141, with the typical exception of §§ 141.14 and 141.15, relating to requirements for hydropower licenses. For clarity, FERC additionally proposes that all MBR sellers going forward include the language in their MBR tariffs (regardless of whether they have hydropower licenses). *See id.*, PP 29 and 176-178.
- **Clarification on Barriers to Entry Representation:** FERC states that the affirmative statement relevant to establishing lack of vertical market power, by providing that the applicant/MBR seller has not and would not erect barriers to entry into the relevant market, should include affiliates in the same geographic market where the applicant/MBR seller. FERC states that it intended the affirmative statement to include affiliates in the same geographic market in Order No. 697, and proposes to reflect the requirement in the regulations for clarity. *See id.*, at P 181.
- **Revision to Triennial Report Schedule:** Triennial reports for Category 2 sellers would still be due every three years; however, FERC proposes that the applicable regulation refer to the schedule for submission posted on FERC's website rather than the schedule in Order No. 697. Typical practice is to examine FERC's website for the filing deadlines applicable in each region. *See id.*, P 179-180. The website schedule is available at <https://www.ferc.gov/industries/electric/gen-info/mbr/triennial/when.asp>.
- **Clarifications on OASIS Practices, SIL Studies, and Simultaneous Total Transfer Capability Methods:** Clarifications were provided on these issues, which may be particularly significant for utilities which act as BAAs. *See id.*, PP 24-28 (summarizing these clarifications); *and id.*, at PP 157-174 (including additional detail).

As a result, the FERC proposed MBR revisions, streamline various filing requirements and provide clarifications on MBR procedures relevant to different types of MBR Entities. The revisions under consideration could materially reduce burdens and costs associated with ongoing MBR compliance activities. Entities both seeking and having MBR Authorization should review the proposed changes and consider comments. Comments on the NOPR are due September 23, 2014.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington D.C. attorneys:

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¹ 18 C.F.R. 35, Subpart H.

² *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 147 FERC ¶ 61,232 (2014) ("NOPR"). This overview discusses highlights from the NOPR. For full details, please review the NOPR.

³ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 848-50, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

⁴ FERC could, however, still direct an MBR Entity to complete horizontal market power analyses.

⁵ As with sellers in RTO/ISO regions, FERC could still require horizontal market power analyses upon request.

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