

**BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Collection of Connected Entity Data from
Regional Transmission Organizations and
Independent System Operators**

Docket No. RM15-23-000

**COMMENTS OF THE
NATIONAL ENERGY MARKETERS ASSOCIATION**

The National Energy Marketers Association (NEM)¹ hereby submits these comments on the Commission’s Notice of Proposed Rulemaking published in the September 29, 2015, Federal Register, and subsequent extension of the comment filing date in the November 13, 2015, Notice of Technical Conference. At the December 8, 2015, Technical Conference, Staff gave a presentation overview on the NOPR and provided its responses to certain stakeholder questions pertaining to the definition of “Connected Entities.” In the Commission’s January 13, 2016, Order in this matter, it indicated it would receive comments on the NOPR as well as the information provided by Staff at the Technical Conference.

NEM strongly supports the Commission’s continued efforts to increase transparency in the wholesale energy marketplace and to monitor and prevent the unlawful exercise of market power. However, we do not believe that the proposed rulemaking, as currently drafted, is appropriately tailored and constructed to achieve those goals. We recommend

¹ National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM’s membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies.

that the Commission withdraw the NOPR and, based on industry comments received, make a determination as to whether a supplemental or revised NOPR can be appropriately tailored to achieve Commission goals or whether it would be preferable to modify existing reporting mechanisms to capture the data, in order to minimize regulatory burdens and risks to the industry and realize efficiencies associated with leveraging existing reporting mechanisms. NEM is concerned that the new proposed reporting regime will impose a disproportionately negative burden and cost on smaller competitive entities, including retail energy marketers. We are also concerned that the proposed reporting is framed in an overly broad manner that will not lead to the collection of useful or meaningful data. The proposed reporting also poses a risk of disclosure of competitively sensitive and proprietary information about competitive entities, such as retail energy marketers.

We urge the Commission to consider whether current reporting mechanisms can be modified to achieve the desired objective of the Commission without imposing a new, costly reporting burden on the industry. Alternatively, we suggest that the Commission consider differentiating the entities that are subject to the reporting burden based on the entity's relative ability to engage in the subject conduct following the precedent in Order 697 with respect to entities relative ability to exercise market power and the differentiated application of the requirement to file market power analyses.

I. Background

The NOPR would establish a new reporting regime under which RTO/ISO market participants would file information about their Connected Entities with the RTOs/ISOs.

Under the provisions of the proposed rule, RTOs/ISOs would report to FERC data from market participants to:

- i) Identify the market participants by means of a common alpha-numeric identifier;
- ii) List their “Connected Entities,” which includes entities that have certain ownership, employment, debt, or contractual relationships to the market participants, as specified in this NOPR; and
- iii) Describe in brief the nature of the relationship of each Connected Entity.

Market participants would file, pursuant to a tariff of the RTO/ISO, their Connected Entity data, subject to the obligation to update the filing within 15 days of a change in status as well as a yearly certification that the data filed is comprehensive and accurate. RTOs/ISOs would require their market participants to obtain a Legal Entity Identifier (LEI) and file their own LEIs as well as the LEIs of Connected Entities.

“Connected Entities” is a new term that the Commission proposes to define as follows:

A Connected Entity, which includes natural persons, is one which stands in one or more of the following relationships to a market participant:

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

d. 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, an energy marketing agreement, or the like.

Staff addressed the four components of the Connected Entities definition in response to stakeholder questions at the Technical Conference.

At the Technical Conference, Staff discussed the rationale for the NOPR and the collection of the Connected Entity data. Staff said the NOPR was routed in the Commission's Strategic Plan goal of detecting and deterring market manipulation. Staff said the data will be used for FERC's market surveillance program for the electric markets. Staff said it would provide a more complete understanding of trading patterns and yield fewer false positives in the surveillance screens.

Also at the Technical Conference, Staff clarified that the reporting requirements would only apply to market participants in RTO/ISO markets. For example, in PJM this is defined as an entity that has signed the PJM Operating Agreement. Connected Entities that are not RTO/ISO members as per the applicable tariff would not be required to file under the proposal. Market Participants would be required to update their filing when there is a change in status in their Connected Entities, i.e., when a new entity becomes a Connected Entity or ceases to be a Connected Entity.

II. The Need for the Extensive New Reporting Requirement Has Not Been Adequately Explained or Justified

The Commission stated that the proposed reporting requirement would enhance its efforts to “detect and deter market manipulation.” (NOPR at para. 1). Staff’s presentation at the Technical Conference maintained that the data was needed for the Commission’s electric market surveillance efforts as well as for RTOs/ISOs to monitor activities of market participants. Commissioner Clark noted at the Technical Conference that a threshold question in examining the proposed reporting requirement is whether the case has been made as to the need for the data. NEM submits that the need for the extensive and burdensome new proposed reporting requirement has not been adequately explained or justified. NEM strongly supports Commission efforts to detect and prevent market power abuses. However, the Commission has many tools, including existing reporting requirements and publicly available resources, which could be utilized for these purposes without imposing a new reporting regime on the industry. Moreover, if the data is predominantly intended for FERC surveillance purposes, it is unclear why the Commission would propose that market participants make the filings with RTOs/ISOs, thereby necessitating the burden and expense of multiple (likely non-standardized) filings, rather than filing directly with FERC itself.

The definition of “Connected Entity” in the NOPR has been constructed very broadly. Because of this broad brush approach, the data to be reported will cover an extensive number of entities, many of whom have not historically been the subject of FERC reporting. A nexus between all of the entities that would potentially be deemed “Connected” for purposes of the NOPR and the enhancement of market surveillance and

monitoring activities simply has not been established. Indeed, it will lead to the inefficient, over-collection of data that is not meaningfully related to, and will not support, the Commission's market surveillance efforts.

The disclosure of information regarding this extensive universe of entities, and under the frequent timeframe proposed, and potentially to multiple RTOs/ISOs, would pose a significant new cost and risk burden that will disproportionately impact small competitive entities. The industry participants in the Technical Conference noted the extensive planning processes and information technology changes that would be required to capture the data. It was also noted that it would require contractual renegotiations and modifications among entities. The NOPR will impose a similarly significant compliance burden and cost for smaller competitive entities that will fall within the wide net cast by the NOPR. Indeed, the NOPR represents a large burden for small competitive entities, that do not have and have not previously needed, a large FERC compliance staff but will now be forced to acquire and implement those resources. The NOPR significantly understated the compliance burden and associated costs to the industry.

III. The Commission Should Consider Modifications to Existing Reporting Requirements to Achieve its Objectives

Prior to imposing a new burdensome reporting regime on the industry, NEM recommends that the Commission consider whether its' goal of improving market surveillance efforts could be achieved through modifications to existing reporting requirements. NEM notes that the proposed reporting requirement is duplicative of other existing reporting requirements such as FERC Form 561 – Annual Report of Interlocking Positions and the Commission's affiliate disclosure requirements. It was also suggested

at the Technical Conference that existing Electric Quarterly Reports could be tailored to the Commission's objectives.

If the Commission perceives that existing reporting mechanisms have provided inadequate data, the first step should be to examine if the existing reporting could be improved to better serve the Commission's goals rather than imposing an entirely new reporting regime on the industry. Leveraging the use of existing reporting is efficient and cost-effective. Market participants already have a working knowledge of the terminology and filing requirements and have already implemented compliance mechanisms. The costs and burdens of complying with modifications to existing reporting requirements will likely be substantially less than an entirely new reporting requirement that entails development of company compliance processes and information technology.

IV. Submission of the Connected Entity Data to RTOs/ISOs Implicates Concerns About the Protection of Confidential Data from Disclosure

The Commission stated in the NOPR that commercially sensitive information, such as contractual arrangements among entities, that is collected through the proposed reporting requirement may be entitled to FOIA protection. (NOPR at para. 21). At the Technical Conference, Staff said that all Connected Entity information that is not already public will be treated as non-public information for confidentiality purposes. This information could, however, be released if: FERC authorizes or directs its disclosure; the information is made public during an adjudicatory proceeding; or disclosure is required under FOIA. Notwithstanding the importance of the protections afforded to the information by FERC, NEM is concerned that market participants will be making their Connected Entities filing with RTOs/ISOs, not directly with FERC. As such, this raises the concern about

ensuring the protection of competitively sensitive and proprietary information filed by market participants with RTOs/ISOs. The Commission should consider how to ensure that the information is afforded the full protections it would receive if it had been filed by market participants at FERC, in the first instance.

V. If the New Reporting Regime is Adopted, the Commission Should Differentiate the Entities that are Subject to the Reporting Burden Based on the Entity's Relative Ability to Engage in the Subject Conduct

If, despite NEM's foregoing concerns and recommendations, the Commission decides to adopt the new reporting regime of the NOPR, NEM suggests that the final rules should differentiate the entities that are subject to reporting based on the entity's relative ability to engage in the subject conduct, in similar fashion to the exemption for filing regularly scheduled market power analyses for Category 1 sellers in Order 697.² The NOPR would require reporting from *all* RTO/ISO market participants, including small competitive retail entities that lack the capability (market power) to engage in the conduct the Commission is concerned about. Requiring these small competitive entities to develop costly compliance mechanisms to report Connected Entity data will not yield information in furtherance of Commission goals.

For example, NEM's membership is primarily comprised of competitive retail energy marketers that sell electricity and natural gas to consumers as a competitive alternative to the local utility. Retail energy marketers primarily buy physical energy and physical and

² In adopting the differentiated reporting requirements for Category 1 and Category 2 sellers in Order 697, the Commission reasoned, "it will streamline the administration of the market-based rate program by focusing the Commission's resources on sellers that have a significant presence in the market." By comparison, the Commission found that, "[t]he burden on Category 2 sellers is small compared to their market presence and activities, and is outweighed by the fact that submission of periodic updated market power analyses enhances Commission oversight and public confidence in the regulatory process." (Order 697 at paras. 848 and 852). This reasoning has equal application to the instant matter.

financial hedges necessary to provide consumers with the physical energy they want at a price (or price structure) they want. For example, retail energy marketers often purchase wholesale physical natural gas and electricity on a spot (delivery) month (day) basis and purchase financial hedges to lock in prices for any consumers who want a long-term fixed price contract. Retail energy marketers are buyers and price takers in the wholesale energy markets. These small competitive retail entities do not have the opportunity or ability, i.e., market power, to engage in the conduct the reporting is meant to detect.

Moreover, the increased cost of the reporting burden will need to be reflected in competitive retail marketer pricing as opposed to their regulated utility competitors that have cost recovery for regulatory compliance. This will unfairly and unnecessarily place competitive retail entities at a competitive disadvantage in making product offerings available to consumers. Accordingly, requiring reporting from these small competitive retail entities will impose a significant and disproportionate compliance burden and regulatory risk upon them, but it will not yield data targeted to the Commission's objective.

Differentiating the entities that are subject to the reporting burden would diminish the burden for smaller competitive entities and better ensure that the reporting collects targeted, meaningful industry data.

VI. Conclusion

NEM appreciates the opportunity to submit comments on the Connected Entity NOPR. For the reasons set forth herein, we recommend that the Commission withdraw the NOPR and make a determination as to whether a supplemental or revised NOPR can be appropriately tailored to achieve Commission goals or whether it would be preferable to

modify existing reporting mechanisms to capture the data, in order to minimize regulatory burdens and risks to the industry and realize efficiencies associated with leveraging existing reporting mechanisms.

Respectfully submitted,

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