

**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
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**COMMENTS OF THE  
INDEPENDENT MARKET MONITOR FOR PJM**

Pursuant to a notice of proposed rulemaking issued in this docket on July 21, 2016 (“NOPR”), Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (“Market Monitor”), submits these comments on the Commission’s proposed new requirements for market-based rates (“MBR”) sellers (“MBR Sellers”) and entities trading virtual products or holding financial transmission rights (“Traders”) to report certain information about their legal and financial connections to other entities to assist the Commission in its analytics and surveillance efforts. The NOPR replaces the proposed rules on data collection for connected entities.

The NOPR would result in rules that require the regular provision of important data to the Commission in a common format. This is a significant step in developing systematic and comprehensive market monitoring across markets. However, the NOPR is less comprehensive than the prior proposed rule and, by design, does not provide for the collection of all data necessary to support all actual and potential analytics and surveillance efforts.<sup>1</sup> It is essential that any rule promulgated under this NOPR be limited to defining the

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<sup>1</sup> *Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators*, FERC Stats. & Regs. ¶ 32,711 (2015), *withdrawn*, 156 FERC ¶ 61,046 (2016).

parameters of routine data collection by the Commission and not undermine existing data collection efforts used to support analytics, market monitoring and/or market power mitigation under RTO/ISO rules. Any rule following the NOPR should explicitly provide that market monitors, Independent System Operators/Regional Transmission Organizations (“ISO/RTOS”) and the Commission may require additional information from market participants when needed. The rule should also make clear that the definitions of the data collected are not standards for the definition of related entities that apply in market power mitigation rules. The NOPR will increase the information regularly available to the Commission but should not result in a rule that serves as a bar to the collection and use of information needed to protect the markets from the exercise of market power and market manipulation.

## **I. COMMENTS**

The NOPR provides for the collection of defined information from MBR Sellers and Traders about their legal and financial connection to other entities. This is a step forward for the Commission in collecting information about the relationships among market participants that will enable monitoring across markets.

Any final rule in this proceeding should serve only as a threshold for standardized reporting to the Commission. Any final rule should explicitly state that the Commission’s Office of Enforcement, market monitoring units, and the rules of ISOs/RTOs may continue to require additional information, and may request new information, from MBR Sellers, Traders and other market participants and may continue to apply such information for market power monitoring and mitigation purposes.

Any final rule in this proceeding should not limit the ability of the Commission’s Office of Enforcement, market monitoring units and stakeholders to recommend, of the Commission to approve and of RTOs/ISOs to implement, rules for defining related entities that are more precise than the definitions in the rule, for the purpose of defining data

reporting obligations and for the purpose of defining thresholds for market power mitigation rules.

Specifically, the definitions of “Connected Entity” and “Ownership” (proposed 19 CFR § 35.49(d)) should not supplant existing or future standards that define the threshold for when a market power or manipulation test or rule applies.

The definition of “affiliate” incorporated by reference in the NOPR sets a threshold of ten percent or more of outstanding voting securities.<sup>2</sup> As the NOPR explains, the proposed definition excludes passive ownership and debt.<sup>3</sup> These thresholds could, if applied to purposes other than defining a reporting obligation to the Commission, create a safe harbor that would allow participants to design market power and manipulation strategies that would avoid disclosure and enforcement.

Defining hard thresholds for market power mitigation rules, such as ten percent ownership levels, and other aspects of the tests for ownership and control, invite strategies to circumvent the rule’s protection. As Commissioner Clark has observed:

[A] regulator like FERC cannot possibly create an all-inclusive list of prohibited activities.[footnote omitted] There simply is no exhaustive or comprehensive rulebook of all possible scenarios that would result in violations of our anti-manipulation rule—so market participants, shareholders, and regulators must rely on the

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<sup>2</sup> 18 CFR § 35.36(a)(9) provides: “Affiliate of a specified company means: (i) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company; (ii) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company; (iii) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and (iv) Any person that is under common control with the specified company. (v) For purposes of paragraph (a)(9), owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.”

<sup>3</sup> See NOPR at PP 17, 26 & Attachment B.

*use of judgment.* Industry may demand clear instructions via proscriptive rules, but industry still must make judgment calls.<sup>4</sup>

The Market Monitor, PJM and the Commission already have observed and addressed strategies that would have evaded the NOPR standards.

The ownership and control tests and rules applied to market participants under market power and manipulation rules, such as the three pivotal supplier test in PJM, may be more stringent than the NOPR proposed thresholds for data collection. Examples from current market participants show that some members have complex webs of interconnected entities that make it difficult to define the exact ownership shares held by connected entities. Ownership interests of less than ten percent, debt relationships and passive ownership interests can be material to creating incentives for the exercise of market power or manipulation.

The Market Monitor is concerned, for example, to ensure the continued functioning of the FTR forfeiture rule, which has prevented market participants from using virtual trades to manipulate the value of FTR positions.<sup>5</sup> The protection afforded by the FTR forfeiture rule is critical and should not be disturbed. Use of virtuals to manipulate FTR positions in unprotected markets has resulted in multimillion dollar fines.<sup>6</sup>

The FTR forfeiture rule uses the term “Effective FTR Holder” to define an entity or related entities that could benefit from the use of virtuals to manipulate the value of FTR positions. PJM and the Market Monitor have interpreted and applied the term Effective FTR Holder broadly to account for relationships material to the behavior that the rule is

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<sup>4</sup> Tony Clark and Robin Z. Meidhof, “Speeches: Ensuring Reliability and a Fair Energy Marketplace,” Colorado Nat. Res., Energy & Env. L. R. v. 25, Issue 2, which can be accessed at: <<http://www.colorado.edu/law/sites/default/files/Clark%20%26%20Meidhof%2025-2.pdf>>.

<sup>5</sup> See OA Schedule 1 § 5.2.1(b).

<sup>6</sup> See *MISO Virtual and FTR Trading*, 146 FERC ¶ 61,072 (2014); *Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056 (2013).

designed to detect and prevent. Based on its experience implementing the rule and observations of actual control relationships, the Market Monitor's position is that a ten percent threshold is too high to be a standalone enforcement threshold.<sup>7</sup>

The PJM tariff provides the following definition for a participant subject to the FTR forfeiture rule:

"Effective FTR Holder" shall mean:

(i) For an FTR Holder that is either a (a) privately held company, or (b) a municipality or electric cooperative, as defined in the Federal Power Act, such FTR Holder, together with any Affiliate, subsidiary or parent of the FTR Holder, any other entity that is under common ownership, wholly or partly, directly or indirectly, or has the ability to influence, directly or indirectly, the management or policies of the FTR Holder; or

(ii) For an FTR Holder that is a publicly traded company including a wholly owned subsidiary of a publicly traded company, such FTR Holder, together with any Affiliate, subsidiary or parent of the FTR Holder, any other PJM Member has over 10% common ownership with the FTR Holder, wholly or partly, directly or indirectly, or has the ability to influence, directly or indirectly, the management or policies of the FTR Holder; or

(iii) an FTR Holder together with any other PJM Member, including also any Affiliate, subsidiary or parent of such other PJM Member, with which it shares common ownership, wholly or partly, directly or indirectly, in any third entity which is a PJM Member (e.g., a joint venture).<sup>8</sup>

Market monitors, ISOs/RTOs and/or the Commission should not be prevented by this rule from developing more stringent thresholds for market power and manipulation screens or from requesting the information required by such thresholds. The NOPR should

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<sup>7</sup> See RTO Energy Trading, LLC, Petition for Declaratory Order of RTO Energy Trading, LLC and Request for Confidential Treatment, Docket No. EL15-38-000 (January 26, 2015).

<sup>8</sup> OA Schedule 1 Definitions E-F.

explicitly permit the Commission, market monitors and RTO/ISOs to preserve existing rules and to continue to develop effective new rules for defining and preventing the exercise of market power.

## II. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to these comments as the Commission resolves the issues raised in this proceeding.

Respectfully submitted,



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