

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

**COMMENTS OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL (“ELCON”) AND THE
AMERICAN FOREST AND PAPER ASSOCIATION (“AF&PA”)**

ELCON and AF&PA appreciate the opportunity to comment on the Commission’s July 21, 2016 *Notice of Proposed Rulemaking* (the “NOPR”) on data collection for analytics and surveillance and market-based rate purposes.

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and are consumers of electricity in the footprints of all organized markets and other regions throughout the United States. Many of ELCON’s members have market-based rate authority that would be affected by the proposed changes.

AF&PA is the trade association of the forest, pulp, paper, paperboard, and wood products industry in the United States. AF&PA’s members are among the nation’s largest consumers of electric power, purchasing over 82 billion kilowatt-hours of electricity annually nationwide. AF&PA’s members include electricity consumers and producers.

The NOPR replaces FERC’s earlier proposals on “Connected Entity” data (issued September 17, 2015 in Docket No. RM15-23-000) and on ownership information in market based rate (“MBR”) filings (issued December 17, 2015 in Docket No. RM16-3-

000), which FERC has now withdrawn. As noted by FERC, the NOPR “reflects departures” from its earlier Connected Entity proposal and proposes changes similar to those in the earlier MBR Notice of Proposed Rulemaking.

ELCON and AF&PA are very appreciative of FERC’s responsiveness to the issues raised by ELCON and AF&PA and others concerning the earlier proposals. As the Commission correctly notes, the prior proposals risked unnecessarily burdening the regulatory community by requiring submission of potentially duplicative information. NOPR at P 9. In many respects, the NOPR is a considerable improvement. For instance, the NOPR reworks the definition of the “Connected Entities” that need to be reported. It also proposes to adopt certain changes to reduce and clarify the scope of ownership information that MBR sellers must provide, revises the information required in asset appendices, and eliminates the requirement from Order No. 816 that MBR sellers submit corporate organizational charts.

In addition, ELCON and AF&PA wish to stress that it vigorously supports the Commission’s exercise of its anti-manipulation authority and recognizes the value to the Commission in collecting some of the information contemplated by the NOPR in the course of an enforcement investigation. However, ELCON and AF&PA also stress that the costs and burdens associated with collecting the proposed information will be significant. Market information, in particular, is expensive and burdensome to collect, produce, organize and protect, and its submission and dissemination involves risk of inadvertent disclosure or malicious discovery and misuse. Thus, it is imperative for the Commission to carefully consider the anticipated benefits of imposing these information-collection requirements against a realistic assessment of whether, in light of the Commission’s existing broad authority to compel discovery of relevant information and the information already available under current rules, the substantial costs and burdens that would be imposed by the NOPR’s requirements are justified.¹ As the

¹ ELCON and AF&PA fully incorporate by reference herein their earlier comments filed jointly in Docket No. RM15-23-000.

NOPR recognizes, “compliance burdens should be minimized where possible,” NOPR at P 10.

To that end, the NOPR , contains a number of new proposals reflecting a radical departure from the earlier proposals that must be carefully scrutinized. The proposals that entities submit the Connected Entity information and most of the MBR information electronically into a relational database using an as-of-yet undefined XML schema raise a host of new issues the Commission should address before adopting any final rule. ELCON and AF&PA believe that many of the proposed requirements require further definition and refinement and therefore urges the Commission to closely examine the issues ELCON and AF&PA and other commenters raise before imposing any new reporting obligations. In these comments, ELCON and AF&PA focus on issues of particular concern to ELCON and AF&PA members: (1) the terms in the NOPR that established the scope of the reporting requirements related to Connected Entities; (2) particular aspects of the proposed changes to the MBR reporting requirements; and (3) confidentiality issues.

I. THE SCOPE OF THE PROPOSED CONNECTED ENTITY REPORTING REQUIRES FURTHER REFINEMENT

Under the NOPR, the Connected Entity reporting requirements would apply not only to sellers with MBR authority (or those seeking MBR authority), but also to entities that trade virtual products (sales or purchases in an RTO/ISO day ahead market that do not go to physical delivery) or financial transmission rights (including congestion contracts or rights) in the organized markets (“Virtual/FTR Participants”). ELCON and AF&PA recognize that this represents an improvement over the prior undefined term “Market Participant.” Moreover, at a conceptual level, ELCON and AF&PA appreciate and support these changes, which were a primary focus of its earlier comments on the prior Connected Entity NOPR in Docket No. RM15-23-000. In particular, compared to the earlier Connected Entity Notice of Proposed Rulemaking, the connected entity information required to be reported would be limited as follows:

- Affiliate information would be required only for entities that are either: (i) an “ultimate affiliate owner” of the entity, as defined for purposes of MBR requirements in section 35.37(a)(2); (ii) an entity that participates in Commission-jurisdictional organized wholesale electric markets; or (iii) an entity that purchases or sells financial natural gas or electric energy derivative products that settle off of the price of physical electric or natural gas energy products.
- The definition of “Trader” required to be named in reports would now be limited to “a person who makes, or participates in, decisions and/or devises strategies for buying and selling physical or financial electric or natural gas energy products.”
- The proposed requirement for the reporting of debt instruments would be eliminated.
- The category of contractual entity reporting would be considerably narrowed to entities that have entered into an agreement with a submitting entity that “confers control over an electric generation asset that is used in, or offered into, wholesale electric markets.”

The Commission currently proposes that MBR sellers and Virtual/FTR Participants be required to make a baseline submission within 90 days of publication of a final rule. In addition, such filers would also be required to report a “change in connection,” such as an entity becoming or ceasing to become a connected entity or a contractual connection that exceeds a *de minimis* threshold of 100 MW, within 30 days of the change.

Though, as noted above, the NOPR is an improvement from the earlier proposal in some respects, ELCON and AF&PA continue to be concerned that, as drafted, the burdens and costs of the current NOPR’s proposed reporting obligations will vastly exceed the benefits depending on the scope of key terms and definitions and how they would be applied in practice. Further refinement is needed, particularly in the following respects.

A. *The Scope of “Participates” in Markets Remains Unclear.*

The second prong of the NOPR’s definition of “Connected Entities” is an affiliate (as defined by section 35.36(a)(9)² that merely “*participates* in [FERC]-jurisdictional organized wholesale electric markets.” NOPR at P17 (emphasis added). However, the NOPR still does not define the scope of what it means to “participate” in wholesale electric markets. Without meaningful limitations, that term sweeps rather broadly. For example, of particular concern to ELCON and AF&PA members, it could encompass partial ownership interests in Qualifying Facilities (“QF”), assuming the QF is located in a FERC-jurisdictional market. ELCON and AF&PA urge the Commission to clarify the term, including limiting it to only those affiliates that are MBR sellers or are required to register as market participants under the operating rules of one or more RTOs or ISOs, and that FERC explicitly state that an ownership interest in a QF alone does not trigger Connected Entity Status.

B. *Issues with the Purchase or Sale of Natural Gas Derivative Products.*

The third prong of the NOPR’s definition of “Connected Entities” is an entity that “purchases *or* sells financial natural gas *or* electric energy derivative products that settle off the price of physical electric *or* natural gas energy products.” NOPR at P17 (emphasis added). On its face, this definition includes natural gas derivative sales, which are not simply electric market derivatives or other trading activity related to a MBR Sellers’ or Virtual/FTR Traders electric generation business activities. The NOPR’s explanation for including natural gas derivative sales is unclear. For example, the NOPR states that it “does not impose any filing requirements on entities that only sell natural gas,” yet the NOPR then goes on to state that “[e]ntities that only sell natural gas may, however, be reported by an MBR seller or Virtual/FTR Participant if they qualify as Connected Entities under the proposed definition of Connected Entity.” NOPR at P13 and n.19. These statements appear to be at odds. The NOPR also explains

² 18 C.F.R. 35.36(a)(9) (2016).

that, for MBR sellers, “ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities” is relevant to the vertical market power analysis. Finally, the NOPR explains the role of “virtual trading,” but this explanation is relevant only to electricity sales and purchases that do not go to physical delivery, not to natural gas. NOPR at n.5 and PP45-46. Nowhere does the NOPR articulate reasoned justification or basis for including financial natural gas marketers in the definition of Connected Entities. In any final rule, FERC should either delete the requirement or provide a reasoned explanation that is sufficient to overcome the burden of including these participants in the Connected Entity reporting requirements.

C. The Requirement for Reporting of Trader Identity Is Insufficiently Supported, and the Definition of “Traders” is Overbroad.

ELCON and AF&PA appreciate that in the new NOPR there is now a defined term for “Traders” whose identities must be disclosed in required reports. However, under the NOPR, the definition of “Trader” required to be named in reports is “a person who makes, or participates in, decisions and/or devises strategies for buying and selling physical or financial electric or natural gas energy products.” NOPR at P 17. This definition fails to provide meaningful guidance as to the scope of decision-making authority encompassed in the definition of a “Trader.” Many personnel can be involved to varying degrees in “decisions” and “strategies” regarding gas and electric trading. Because the intended scope of the term “Trader” is unclear, it could be interpreted and applied in an overbroad fashion.

Who “participates” in decisions is not delineated. This important aspect of the scope of the requirements must be clarified. ELCON and AF&PA believe that “participates” should be read narrowly in connection with “devises” trading strategies, such that it encompasses only those individuals that have an active, day-to-day role or managerial responsibility determining what trading positions to take.

Further, the mere purchase of physical inputs to production is not relevant to detecting or deterring market manipulation.

Accordingly, as a threshold matter, ELCON and AF&PA question whether reporting of the identity of Traders is justifiable, particularly in the case of industrial organizations whose primary line of business is not participation in Commission jurisdictional markets. The issues described above are indicative of the potential breadth of such a reporting obligation and the challenges in crafting clear, narrowly focused language that would provide meaningful information to FERC while avoiding undue reporting burdens. Nowhere does the NOPR justify the burdens of reporting, and keeping updated, Trader identity information. The NOPR merely references a court decision described as upholding the Commission's authority to regulate virtual traders as market participants. NOPR at P47 and fn. 52.³

If FERC nonetheless proceeds with a reporting obligation respecting Traders, ELCON and AF&PA urge the Commission to revise the definition of "Trader" to focus on the information actually needed for FERC to detect or deter market manipulation while avoiding significant unintended and unwarranted burdens on entities subject to reporting. This is particularly important for industrial cogenerators and other industrial customers who only participate on a limited basis in the FERC jurisdictional markets to satisfy their industrial operational needs rather than, for instance, those that focus solely on obtaining financial profit from their trading activities. Therefore, ELCON and AF&PA suggest the definition of "Trader" be revised to read "a person who makes, or *is responsible for*, decisions and/or devises strategies for buying and selling physical or financial electric or natural gas energy products *with the objective of achieving profits through the successful anticipation of price movements.*"

³ Even the prior Connected Entity proposal in Docket No. RM15-23-000, at P9 of that NOPR, stated merely that the Commission reviews the legitimacy of market activity "by analyzing the circumstances surrounding the activity, including trader patterns and trader explanations." This statement offers no support for the concept of general, widely-applicable reporting and updating of individual Trader identity.

D. Passive Investments.

It is not clear whether FERC expects entities to report all “ultimate affiliate owners” whether their interests are passive or active, or just owners with active, voting interests. The NOPR does state “that with respect to any owners that an MBR seller represents to be passive, the MBR seller affirm in its ownership narrative that its passive owner(s) own a separate class of securities, have limited consent rights, do not exercise day-to-day control over the company, and cannot remove the manager without cause.” NOPR at P 26. This suggests that passive upstream owners could be subject to a requirement to be reported as Connected Entities, with representations regarding their passive status made on a case-by-case basis in relevant filings.

To reduce unnecessary burdens of reporting, ELCON and AF&PA urge that in any final rule FERC clarify that passive upstream owners need not be reported as Connected Entities provided that the representations about passive status have been appropriately submitted.

II. MARKET-BASED RATE INFORMATION

The NOPR proposes revising the MBR reporting requirements in a fashion similar to what FERC proposed in the earlier ownership MBR Notice of Proposed Rulemaking. Under the NOPR, MBR sellers would need to provide ownership information on only those affiliates necessary for FERC’s assessment of horizontal or vertical market power, and removes the need to identify other owners. In particular:

- MBR sellers need to identify only those affiliate owners that either: (1) are an “ultimate affiliate owner,” defined as the furthest upstream affiliate owner(s) in the ownership chain; or (2) have a franchised service area or MBR authority, or directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies.
- Where an MBR seller is directly or indirectly owned or controlled by a foreign government or any political subdivision of a foreign government or any

corporation which is owned in whole or in part by such entity, the MBR seller would need to identify such foreign government, political subdivision, or corporation as part of its ownership narrative.

- With respect to any owners that an MBR seller represents to be passive, the MBR seller would need to affirm in its ownership narrative that its passive owner(s) own a separate class of securities, have limited consent rights, do not exercise day-to-day control over the company, and cannot remove the manager without cause.

In view of the new relational database capabilities, under the NOPR, an MBR seller would generally have to report its own assets, as well as those of any affiliate without MBR authority, yet, according to the NOPR, the net result would be an overall decrease in burden on MBR sellers. Various technical revisions to the information required to be reported regarding such assets are proposed at paragraphs 35-39 of the NOPR. MBR sellers would be required to update the relational database information quarterly with any changed information that did not invoke a change in status or 30-day change-in-connection filing.

At a conceptual level, ELCON and AF&PA agree with FERC that certain of the burdens of the current requirements of Order No. 697-A outweigh its benefits. Many of ELCON's and AF&PA's members have complex corporate structures with various layers and types of ownership interests. It is challenging to properly organize the required information as an initial matter, and then to keep it up to date on an ongoing basis. There is no realistic way to strictly implement Order No. 697-A, which on its face would require disclosure of individual shareholders. Moreover, such granular information is unnecessary to assess horizontal or vertical market power. As FERC has decided in other contexts, upstream owners that are not considered affiliates under FERC regulations do not raise market power concerns. To that end, ELCON and AF&PA appreciate FERC's efforts in the new NOPR to address these issues with the objective of reducing unnecessary reporting obligations.

However, the new NOPR as currently drafted still raises concerns that in certain respects the new MBR reporting requirements will inappropriately increase the current obligations. In any final rule, ELCON and AF&PA urge FERC to address the following issues.

A. The Commission Should Clarify Certain Important Issues Regarding the Treatment of Qualifying Facilities in any Final Rule.

The applicability of the new reporting requirements to QFs is of particular importance to ELCON's and AF&PA's members. Notably, to ensure information is not "lost," FERC proposes that an MBR Seller include information in its relational database submission about "any asset" that it or an affiliate "owns or controls" that does not have MBR authority, potentially creating a redundancy at odds with FERC's stated goal of minimizing the reporting burden over the long term. NOPR at P32. This filing would appear to require the MBR Seller to include in its relational database filing all generating units (potentially including QFs) selling at cost-based rates that the MBR Seller is affiliated with via common upstream ownership. This approach appears to add a layer of complexity on top of what FERC proposes to otherwise be a "streamlined" process.

This provision is one of several instances in which the NOPR may be inconsistent with the recent reforms adopted by FERC in Orders No. 816 and 816-A. ELCON and AF&PA are particularly concerned with the potential treatment under the NOPR of affiliations with generating units self-certified as QFs. In Orders No. 816 and 816-A, FERC determined that QFs are exempt from Section 205 of the Federal Power Act and thus do not need to be reported in the Asset Appendix or indicative screens.⁴ It is unclear how the NOPR's proposal to have MBR sellers include in their relational database submissions "any asset" "owned or controlled" by an affiliate lacking MBR authority, yet Orders No. 816 and 816-A now exempts QFs from MBR indicative screens and asset appendices. Moreover, when conducting the indicative screens, many MBR

⁴ Order No. 816 at P 255; Order No. 816-A at P 23.

sellers conservatively include output from QFs, consistent with FERC-approved simplifying assumptions for the market power and pivotal supplier analyses. To the extent an entity still wishes to rely on such simplifying assumptions, it is not clear how these QFs would then be treated in the relational database or the “populated” Asset Appendix.

An additional complication may arise in a situation that requires relying on the accuracy of relational database submission from other third-party “affiliates” being used to populate that MBR sellers’ specific asset appendix. This also implicates the QF issue noted above, where QFs are conservatively included in indicative screen analyses.

In view of the apparent incongruity between requiring “all assets” in the relational database with exempting QFs from the indicative screen and asset appendix as stated in Order No. 816 and Order No. 816-A, FERC should explicitly exclude QFs from the reporting obligations in any final rule. At a minimum, FERC should provide guidance and clarification regarding the issues for QF ownership discussed above that is consistent with the recent reforms of Order No. 816 and Order No. 816-A.

B. The Quarterly Reporting Requirement is Burdensome, Unnecessary and Should Not be Adopted

ELCON and AF&PA also are concerned about the need for and burden of the proposed quarterly reporting requirement. On top of a 30-day requirement for reporting a “change in connection,” FERC further proposes requiring MBR sellers submit a “quarterly update” to update the relational database intended to capture changes to prior information that did not trigger a change in status, a change in Connected Entity status, or other MBR-related submission such as notices of cancellation or revisions to category status. NOPR at P 66. As examples, the NOPR states the quarterly updates would note updates such as the retirement or acquisition of a generating asset, changes to capacity ratings for existing generating assets, loss of affiliation with another entity with MBR authorization, and changes to the “business card information” of the MBR seller.

This “quarterly update” proposal appears to be problematic in several respects. In addition to creating another reporting obligation layered on top of what FERC already is proposing elsewhere,⁵ the NOPR unnecessarily seeks to impose a reporting obligation to provide updates about changes that FERC has already determined do not require a Change in Status (*e.g.*, changes in capacity under 100 MW) and therefore do not implicate a MBR seller’s authorization to sell at market-based rates. Stated another way, the NOPR apparently reflects the view that a quarterly update filing is necessary to ensure the relational database contains up-to-date and fully accurate data in furtherance of ensuring just and reasonable rates, yet at the same time seeking information that FERC has already determined is not required under that same mandate to ensure just and reasonable rates. NOPR at P41. Thus, the justification for the quarterly reporting may be contradictory and inconsistent with the longstanding approach the Commission has taken in administering its MBR regime.

As detailed in the instances above, MBR sellers would likely see increased reporting obligations regardless of whether FERC adopts the quarterly update requirement of the proposal. Although this filing may be “routine,”⁶ in that it may be the case that minimal changes occur quarter-to-quarter, it still would require the incremental expense and time to prepare and submit the filing to FERC on a regular basis. Given the other requirements to update “Connected Entity” information, ELCON and AF&PA believe that the burdens of the proposed quarterly reporting requirement exceed its benefits and that it should be deleted from any final rule.

⁵ Several additional miscellaneous MBR-related proposed revisions include (a) eliminating the requirement to submit corporate organizational charts adopted in Order No. 816 but “suspended” prior to going into effect; (b) requiring indicative screen analyses be submitted in XML format; and (c) requiring various information included in the XML package about each MBR Seller such as (1) the category status for each region, (2) markets authorized to sell ancillary services, (3) requirements concerning any FERC-ordered seller-specific mitigation (if any), and (4) the effective date of initial grant of MBR authorization.

⁶ At the August 11, 2016 Technical Conference, FERC Staff indicated MBR Sellers would be expected to file the quarterly update even where no changes occur, similar to the requirement to submit an EQR even where no transactions occurred.

C. Clarification Regarding Long-Term Purchase Agreements

MBR sellers with extensive portfolios of long-term purchase agreements may face additional complications under the NOPR. The NOPR states that if “an MBR seller believes there are any unique qualities of the contract that would not otherwise be captured by the relational database, the seller is free to explain this as part of its horizontal market power discussion.” NOPR at P37. This offers little guidance, and raises the issue of whether an affected MBR seller would have to submit such justifications for *every* “relational database” submission (which extends beyond simply MBR-related submissions), or only for MBR-related filings, as suggested by the reference to horizontal market power discussions. If required for every “relational database” submission, that requirement becomes even more onerous considering the expansive set of additional reporting requirements proposed by FERC related to whenever there is a “change in connection” or the quarterly MBR reports.

In any final rule, FERC should clarify that this obligation applies only to MBR-related filings and should identify the need for, and define, the sort of “unique qualities” in long-term purchase agreements to which the NOPR refers.

D. The Commission Should Decline to Adopt the Requirement Regarding Foreign Ownership Information

Under the NOPR, “where an MBR seller is directly or indirectly owned or controlled by a foreign government or any political subdivision of a foreign government or any corporation which is owned in whole or in part by such entity,” the MBR seller would have to identify such entity. NOPR at P26. The only explanation offered in the NOPR is that “[t]his information is useful in protecting public utility customers against inappropriate cross-subsidization and affiliate abuse concerns possible when controlling interests in a public utility are held by a foreign government, any political subdivision of a foreign government, or any corporation which is owned in whole or in part by such entity.” *Id.* This conclusory statement does not in any way support a requirement for identifying any ownership interest as “foreign,” nor does it explain

how doing so would be germane to FERC's Federal Power Act's authorities, such as how such status would implicate horizontal or vertical market power issues. ELCON and AF&PA strongly urge the Commission to reject this proposal.

III. ANY FINAL RULE SHOULD BE IMPLEMENTED IN A FASHION THAT FULLY PROTECTS CONFIDENTIAL INFORMATION

As with FERC's prior attempts to craft a Connected Entity rule, there are confidentiality concerns with FERC's proposed approach in the new NOPR. FERC states that information submitted for Connected Entity-purposes would be treated as non-public and confidential under FERC's regulations. Although FERC now propose to collect the information directly from market participants on a non-public basis – eliminating the need for the RTO/ISOs to act as “middlemen” – FERC, in the accompanying footnote, then goes on to state that it may share this information with “market monitors, RTOs and ISOs.” NOPR P57 and n.60. Any time confidential material is shared with additional parties, it increases the risk of inadvertent disclosure of sensitive commercial information, and any inadvertent disclosure increases the risk of a competitor being able to reverse engineer confidential trading strategies or business information. The NOPR, however, does not further address the confidentiality issues associated with such disclosure. In order to give information providers appropriate assurance that their confidential submissions will remain as such, ELCON and AF&PA urge FERC to delineate in any final rule a very narrow set of the circumstances in which it would be appropriate to share the information with market monitors, RTOs and ISOs.

CONCLUSION

ELCON and AF&PA support vigorous enforcement of the Commission's anti-manipulation rules and appreciate the considerable refinement to the earlier NOPRs. ELCON and AF&PA continue to be concerned, however, that the new NOPR as it currently stands is overly broad in many important respects and that its requirements, including key scoping terms, need further definition and refinement. The potential incremental benefits of the NOPR, taking into account the Commission's existing broad authority to compel discovery of relevant information and the information already available under current rules, need to be carefully balanced with the costs and burdens that the NOPR would impose, particularly with respect to electricity consumers. Should the Commission proceed to a final rule, it is critical that it better define and narrow the scope of the proposed requirements, as discussed in these comments, so that they operate in the most efficient manner without imposing undue burden, undesired consequences, and unnecessary costs on the market and – ultimately – consumers.

NOTICES AND COMMUNICATIONS

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Dated: September 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: September 19, 2016

/s/ W. RICHARD BIDSTRUP
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