



the interests of such entities.<sup>1</sup> The Data Collection NOPR proposes to implement new regulations that would require MBR Sellers and entities trading virtual products or holding financial transmission rights (together with MBR Sellers, Reporting Entities) to report certain legal and financial connections to other entities (Connected Entities) to assist the Commission in its analytics and surveillance efforts. The Data Collection NOPR also proposes to adopt new requirements regarding the substance and format of information reported by MBR Sellers in order to obtain and maintain market-based rate authority. Therefore, the Independent Generation Owners & Representatives have a vested interest in the outcome of this proceeding.

At the outset, the Independent Generation Owners & Representatives commend the Commission for substantially reworking its original Connected Entities proposal set forth in the notice of proposed rulemaking addressing Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators issued in Docket No. RM15-23-000 (Connected Entity NOPR). The Independent Generation Owners & Representatives appreciate the Commission's efforts to appropriately narrow the focus of its data collection efforts and substantially reduce the reporting burden on Reporting Entities. The Data Collection NOPR is a significant step towards addressing industry concerns regarding compliance burdens and unnecessary reporting requirements.

While the Independent Generation Owners & Representatives generally support the overall direction of the Data Collection NOPR, the Independent Generation Owners

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<sup>1</sup> The Independent Generation Owners & Representatives are private equity firms that manage and control investment funds that invest in a wide array of businesses, including the independent power sector.

& Representatives submit that certain aspects of the proposal should be eliminated or modified, as discussed below, to achieve the least burdensome reporting regime and capture useful information. The Independent Generation Owners & Representatives also seek clarification on several aspects of the Data Collection NOPR.

### **III. COMMENTS REGARDING THE CONNECTED ENTITY PROPOSAL**

#### **A. Reporting of Ownership and Control Relationships**

Under the Commission's new proposal, Connected Entity ownership and control reporting would extend to affiliates, as defined under the MBR program,<sup>2</sup> that are: (1) ultimate affiliate owners of the Reporting Entity – i.e., the furthest upstream affiliates in the ownership chain, (2) participants in FERC-jurisdictional organized wholesale electric markets; or (3) purchasers or sellers of financial natural gas or electric energy derivative products that settle off the price of physical electric or natural gas energy products.

The Independent Generation Owners & Representatives generally support the proposal to limit ownership reporting to ultimate affiliate owners. With correct interpretation, the proposal would significantly reduce the burden on Reporting Entities to collect, monitor, and report extensive information concerning their ownership structures and corporate relationships that is wholly irrelevant to the Reporting Entities' jurisdictional activities. It is essential that the rule be narrowly tailored to capture entities

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<sup>2</sup> FERC's regulations define an "affiliate" as: "(i) [a]ny 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) [a]ny 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) [a]ny 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) [a]ny person that is under common control with the specified company." 18 C.F.R. § 35.36(a)(9).

with ultimate decision-making authority over FERC-jurisdictional activities without sweeping in countless intermediate, passive, or non-controlling entities that have no influence over such activities. Further, aligning the Connected Entity ownership reporting requirement with the MBR program ownership reporting requirement (also focused on ultimate affiliate owners) will reduce reporting errors and omissions and increase the usefulness of the information collected.

The Independent Generation Owners & Representatives seek clarification with respect to application of the “ultimate affiliate owner” concept to Reporting Entities owned or controlled by investment funds managed by private equity firms (Fund Managers). In such cases, the Fund Manager typically has a 10% or less ownership interest (if any) in the Reporting Entity but is an affiliate of the Reporting Entity under FERC’s rules by virtue of its authority to exercise control over the management of the Reporting Entity. The Independent Generation Owners & Representatives request confirmation that where a Fund Manager directs the jurisdictional activities of a Reporting Entity, the Fund Manager is the relevant ultimate affiliate owner for reporting purposes.

The Independent Generation Owners & Representatives also request clarification with respect to the scope of the requirement to report affiliates that engage in financial derivative transactions. Specifically, the Independent Generation Owners & Representatives seek confirmation that the reporting requirement is limited to transactions that require participation in Commission-regulated organized markets – i.e., transactions that may affect jurisdictional rates – and does not extend to transactions in which settlement is based purely on a price index and not conditioned on market

participation. In addition, the Independent Generation Owners & Representatives seek confirmation that the Commission does not intend to require entities to report the details of these affiliate financial transactions. To the extent that the Commission has authority to request this information, any such requests should be limited to the context of an investigation proceeding.

## **B. Reporting of Traders**

The proposed rule would require reporting of traders employed or engaged by a Reporting Entity. A “trader” is broadly defined as any employee or contractor “who makes, or participates in, decisions and/or devises strategies for buying or selling physical or financial Commission-jurisdictional electric products or physical natural gas.”<sup>3</sup> The Commission asserts that this proposal is narrower than the Connected Entity NOPR proposal; however, the proposed definition of trader will sweep in a wide array of individuals that are not substantially and routinely engaged in trading activities. If implemented as proposed, the reporting requirement would be unduly burdensome for a majority of Reporting Entities and would result in the collection of a significant amount of irrelevant information.

In many cases, the Commission’s proposed definition of a trader would encompass all of the same officers that would have been reportable under the Connected Entity NOPR because of their general participation in company operations. It also would extend to the entire management team of a Reporting Entity, and include attorneys, accountants, or others, who may, as some small part of their duties, participate in certain decisions, as well as individuals that serve in advisory roles on boards or otherwise. In

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<sup>3</sup> Data Collection NOPR at P 52.

addition to being unclear as to the level of decision-making involvement required to trigger “trader” status, it is likely that individuals would change status frequently, depending on their day-to-day involvement (or lack of involvement) in business decisions. As a result, Reporting Entities would be required to continuously update their trader information on a decision-by-decision and report personnel changes at all levels of their organizations. The benefit, if any, of collecting the names of all the various individuals who may technically fall under the proposed definition of a trader is substantially outweighed by the compliance burden. Moreover, the ownership and control information reported through the Connected Entity and MBR regimes should be sufficient to allow the Commission to identify relationships among Reporting Entities and their trading activities. If there is a need to further investigate such trading activities and identify key individuals, the Commission should do so in the context of a specific investigation rather than impose an onerous reporting requirement on the industry. Accordingly, the Commission should eliminate the trader reporting requirement as unmanageable and unnecessary.

In the alternative, the Commission should clarify and modify the trader definition to narrow the scope and target only those individuals with primary authority to direct and oversee trading activities. Mere participation in the organizational decision-making process should not confer trader status. Such status should be limited to individuals with primary authority to make, implement, and oversee purchase and sale decisions as a routine part of their job. Accordingly, the Commission should revise the definition of trader to focus on those individuals in an organization that have primary responsibility for trading activities and to exclude employees and contractors that have no independent

authority to act.<sup>4</sup> These individuals are not only responsible for the trading functions of their companies, but they also are most likely to possess relevant information. While other individuals may contribute to the decision-making process by offering information and advice, reporting of these individuals would serve no useful purpose and would undermine the Commission's efforts to identify meaningful relationships. In addition, consistent with the Commission's stated intent to narrow the scope of the employee reporting requirement from that proposed in the Connected Entity NOPR, the Commission should clarify that a Reporting Entity is not required to report its chief executive officer, chief financial officer, or chief compliance officer unless such individual possesses primary authority to direct trading activities.

Further, the Commission should refine the definition of trader to expressly exclude individuals appointed to boards or other positions that serve an advisory function. For example, private equity firms often designate individuals to take an active role in the high level governance of their portfolio companies, but these individuals generally serve in an advisory capacity and are not involved in the day-to-day market activities and operations of the portfolio companies. In this structure, trading decisions are made and implemented at the portfolio company level by senior individuals with decision-making authority. Therefore, there is no reason to collect additional information regarding individuals in advisory and other roles.

The Independent Generation Owners & Representatives also seek clarification that the requirement to report traders would apply only to individuals engaged in trading

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<sup>4</sup> To the extent possible, the Commission should provide guidance regarding functions that do not fall within the definition of a trader – e.g., general advisory or consulting work, back office functions, and legal services. Such guidance would significantly facilitate compliance and minimize the burden of data collection efforts.

activities on behalf of the Reporting Entity and would not extend to traders employed or engaged by affiliates of the Reporting Entity.

### **C. Reporting of Contracts**

The Independent Generation Owners & Representatives appreciate the Commission's attempt to narrow and refine the requirement to report certain contracts for Connected Entity purposes. Nonetheless, the proposed requirement remains entirely duplicative of existing MBR program reporting requirements. Only MBR Sellers would be affected by the Connected Entity contracts reporting requirement, and MBR Sellers are already required to report the very same contract information in their Electric Quarterly Reports (EQRs) submitted to the Commission. Rather than requiring MBR Sellers to submit the same information twice in separate reports, the Commission should implement changes to the EQR filing system to accommodate its Connected Entity data collection efforts. The Independent Generation Owners & Representatives support the option of including a company-specific identifier in the EQRs to facilitate pairing of the EQR data with the Connected Entity database. This approach would significantly decrease the reporting burden on MBR Sellers and would relieve the Commission from reviewing duplicative reports, thus saving both the industry and the Commission time and money. This approach also is consistent with the Commission's stated goal of eliminating duplication and unifying submissions of both MBR and Connected Entity Information.

The Independent Generation Owners & Representatives also request clarification that reporting of contracts in the Connected Entity context would be limited to (i) long-term contracts (duration of one year or longer) consistent with MBR reporting

requirements, and (ii) contracts entered into by the Reporting Entity and would not include contracts entered into by affiliates of the Reporting Entity.

In addition, the Independent Generation Owners & Representatives do not believe it would be useful to include a Reporting Entity's Purchaser Seller Entity (PSE) NAESB/OATI webRegistry Entity Code (PSE ID) in its Connected Entity submission. As discussed in the Commission's proceeding in Docket No. RM10-12 to revise the EQR filing requirements to include, inter alia, e-Tag information in EQRs, there is not a one-to-one relationship between e-Tag information and the underlying transactions. Often, the PSE identified in an e-Tag may simply be a tagging agent for sales negotiated by unrelated entities. Therefore, any attempt to pair Connected Entity information with e-Tag data is likely to result in confusion and misinterpretation. The Commission should exercise caution in this regard and not require the submission of information that has the potential to increase unwarranted investigations.

**D. Requirement to Obtain a Legal Entity Identifier**

The Data Collection NOPR proposes to require each Reporting Entity to obtain a Legal Entity Identifier (LEI). While the Independent Generation Owners & Representatives agree that a unique company identifier is helpful to the success of a relational database, it remains unclear why the Commission believes that third-party issued LEIs are preferred over Commission-issued identifiers, particularly in the absence of uniform protocols for LEI vendors. Before implementing a program that mandates the use of outside vendors at the expense of Reporting Entities, the Commission can and should take steps to improve its existing MBR company identifier (CID) system and expand that system to non-MBR Reporting Entities. There is no need to establish a

whole new identification scheme based on LEIs. In fact, the Commission proposes to assign a unique identifier to each Reporting Entity's Connected Entities that do not possess a LEI. The Commission should likewise assign a unique identifier to all Reporting Entities (or adapt the CID program) rather than require LEIs for the sake of administrative convenience.

The burden of obtaining a LEI is simply not justified. In order to obtain a LEI, a Reporting Entity would be required, at its own expense, to: (i) apply to a third-party LEI vendor and undergo a due diligence verification process (in addition to the Commission-related processes imposed under the new rule); (ii) execute one or more contracts with the LEI vendor; (iii) maintain books, billing records, correspondence, invoices, and accounts with the LEI vendor; and (iv) keep the LEI vendor informed of any material changes (separate and apart from notifying the Commission). Additionally, it will likely be the case that LEI vendors would have access to confidential information, which creates a whole separate host of issues for Reporting Entities. In light of these concerns, the Independent Generation Owners & Representatives urge the Commission to eliminate the LEI requirement from the proposed rule and rely instead on Commission-issued identifiers.

In the alternative, if the Commission does adopt the LEI requirement, the Commission should make it clear that Reporting Entities are not limited to obtaining LEIs from a Commission-approved list of vendors. The Commission should adopt a framework that will promote competition among LEI vendors, thus allowing the market to control the price of LEIs rather than a small group of monopolistic vendors. This could be accomplished by the Commission issuing blocks of LEI numbers without charge

to all interested LEI vendors for re-issuance to Reporting Entities and by imposing minimal requirements on participation of vendors in the LEI market.

**E. Requirement to Update Connected Entity Information**

The Commission proposes to require reporting of changes to Connected Entity information within 30 days of the change. The Independent Generation Owners & Representatives request that the Commission ensure that information already provided via MBR-related filings is reported only once and according to the existing deadlines for those submissions. For example, changes in ultimate affiliate ownership information that are submitted under the MBR program within 30 days of such changes and contract information reported in EQRs should suffice for reporting purposes under the Connected Entity regime. This approach eliminates duplicative and unnecessary tracking and reporting requirements.

Changes to Connected Entity information that are not reported to the Commission through the MBR program or otherwise should be reported on an annual basis to significantly reduce the reporting burden while still providing the Commission with relevant information regarding such changes. Given the extent of overlap between the Connected Entity and MBR reporting regimes, there are relatively few pieces of information that will fall into this category. In the alternative, the Commission should adopt a quarterly reporting requirement for such changes. A quarterly EQR requirement is adequate for the purpose of monitoring wholesale power sales at market-based rates and thus should be adequate for the purpose of monitoring Connected Entity relationships.

## **F. Confidential Treatment of Connected Entity Information**

The Independent Generation Owners & Representatives strongly support the Commission's proposed treatment of Connected Entity data as non-public and confidential. However, there appears to be a tension between the Commission's proposal to publish a public list of affiliate owners and its commitment to protect the confidentiality of certain affiliate owner relationships. The Independent Generation Owners & Representatives request that the Commission provide a more detailed explanation of how it intends to protect confidential affiliate ownership information while still providing adequate public information to facilitate proper reporting by other entities that may share common relationships.

## **IV. COMMENTS REGARDING THE MBR REPORTING PROPOSAL**

### **A. Ownership Reporting**

The Commission proposes to revise the MBR program ownership disclosure requirements such that MBR Sellers would be required to disclose only affiliate owners that either (1) are an "ultimate affiliate owner", or (2) have a franchised service area or MBR authority, or directly own or control generation, transmission, or inputs to electric power production. The Independent Generation Owners & Representatives reiterate their support for eliminating unnecessary intermediate ownership disclosures and focusing on the furthest upstream affiliate owner(s) in the ownership chain. The Independent Generation Owners & Representatives agree with the Commission that requiring MBR Sellers to submit information on intermediate holding companies and unaffiliated owners creates a burden for the industry and does not provide the Commission with information useful to its determination of whether a MBR Seller qualifies for MBR authority. As

discussed above, the Commission should clarify that a Fund Manager with the ability to direct the jurisdictional activities of a Reporting Entity is the relevant ultimate affiliate owner for reporting purposes.

The Independent Generation Owners & Representatives also support the Commission's proposed streamlined approach to reporting passive investors through an affirmation in lieu of the current requirement to file extensive documentation of passive investors' limited voting rights. The Independent Generation Owners & Representatives seek confirmation that a MBR Seller may rely on an affirmation made in good faith after due inquiry for so long as the representations remain true to the best of its knowledge. In addition, the Independent Generation Owners & Representatives request clarification that passive investors that do not own a separate class of securities but meet all the other criteria (i.e., they have limited consent rights, do not exercise day-to-day control over the company, and cannot remove the manager without cause) qualify for the proposed streamlined reporting approach. In such cases, although the investors do not hold a separate class of securities, they lack the ability to direct the management or jurisdictional activities of a MBR Seller and therefore should be deemed to satisfy the Commission's criteria for passive investors.

#### **B. Asset Appendices and Indicative Market Power Screens**

The Commission proposes to replace seller-generated asset appendices and indicative market power screens with auto-generated information based on information submitted to FERC's relational database via an XML schema. The Commission's preferred proposal is to require each MBR Seller to submit information on its own assets and the assets of affiliates without MBR authority but not submit information regarding

affiliated MBR Sellers. In theory, the proposal would streamline the submission and processing of MBR filings. As a practical matter, however, taking control of the data out of the hands of MBR Sellers may lead to a significant number of incorrect or incomplete filings. This is most likely to occur with respect to jointly-owned MBR Sellers that must account for their affiliations through different owners but also is likely to affect any MBR Sellers that have more than a handful of affiliates.

For the preferred proposal to work, each affiliated MBR Seller must identify precisely the same ultimate affiliate owner(s), which is no simple task given the complicated organizational structures of private equity funds, institutional investors, and other industry participants. Each time a filing is submitted, the MBR Seller must confirm that the auto-generated information is accurate and re-file to correct any errors or omissions. Even after such corrections are filed, they may reappear in subsequent filings due to discrepancies in the way that affiliated MBR Sellers report their ultimate ownership. As a result, the Independent Generation Owners & Representatives are concerned that the Commission's preferred proposal would actually increase the ongoing compliance burden on MBR Sellers. For that reason, the Independent Generation Owners & Representatives favor the alternative proposal in which MBR Sellers would continue to provide information on all of their affiliates' assets, including affiliates with MBR authority, when submitting information for the relational database. While there is a risk that sellers may submit inconsistent information, the same risk exists with the preferred proposal. Between the two options, the alternative proposal is more likely to produce current and accurate information on a MBR Seller with considerably less burden.

### **C. Additional Comments on the MBR Reporting Proposal**

The Independent Generation Owners & Representatives provide the following additional comments regarding various aspects of the Commission's MBR proposal:

- The Independent Generation Owners & Representatives support the Commission's proposal to retract the requirement that MBR Sellers file comprehensive organizational charts. This proposal will eliminate a significant burden on MBR Sellers.
- The Independent Generation Owners & Representatives seek clarification regarding the relationship between the Commission's relational database and eTariff filing system. In particular, the Commission should clarify whether MBR filings with tariffs would be submitted through both systems using different software or if the systems will interact to reduce duplicate filings.
- The Independent Generation Owners & Representatives request clarification regarding the proposed reporting of generation on a unit-specific basis when there is shared ownership of a unit – e.g. if multiple MBR Sellers own interests in the same unit will the capacity be pro-rated among the owners on a proportional basis or will each seller be required to account for the full capacity of the unit in its market power analysis.
- The Independent Generation Owners & Representatives object to the proposal to include information on long-term firm sales in the relational database submissions of MBR Sellers. Such information is already reported through MBR Sellers' EQRs. As discussed above, the Commission should implement

changes to the EQR program that allow the Commission to use available data before resorting to duplicative reporting requirements.

## **V. COMMENTS REGARDING IMPLEMENTATION OF THE RULE**

The Independent Generation Owners & Representatives are concerned in general with the proposed time frames to implement the new reporting requirements. The Commission proposes to require that baseline reports be submitted to the Commission within 90 days from the publication of a final rule. This time frame is entirely too short. In order to comply with the XML filing format, new software to collect and submit the data must be created, tested, and rolled out. Reporting Entities must be trained to use the software or secure third-party vendor arrangements prior to the submission of any information. In addition, Reporting Entities must develop and implement new compliance plans in accordance with the final rule. Based on prior experiences related to the implementation of eTariff and the new EQR system, it could take up to a full year to implement the new rule. At a minimum, Reporting Entities should have 180 days to submit baseline reports and baseline submissions should be staggered to avoid the rollout issues that plagued the eTariff and new EQR software releases.

The Independent Generation Owners & Representatives fully support the Commission's commitment to hold outreach meetings with members of the industry to determine the most effective, expeditious, and cost-effective method of structuring data submissions. The Independent Generation Owners & Representatives urge the Commission not to rush implementation of the new rule and exacerbate the substantial implementation burden for Reporting Entities.

## VI. CONCLUSION

The Independent Generation Owners & Representatives appreciate the Commission's efforts to streamline its Connected Entity data collection proposal and improve its MBR program. The Independent Generation Owners & Representatives respectfully request that the Commission consider the comments and adopt the recommendations set forth above.

Respectfully submitted,

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