
Orrick: FERC Proposes to Streamline Market-Based Rate Program.

On June 19, 2014, the Federal Energy Regulatory Commission ("FERC") issued a notice of proposed rulemaking ("NOPR") proposing to revise its policies for applications to sell energy, capacity, and ancillary services at market-based rates.

Generation owners and power marketers that sell wholesale energy, capacity, or ancillary services in the continental United States, outside of the area operated by the Electric Reliability Council of Texas, must obtain prior authorization from FERC to sell at market-based rates. FERC grants requests for market-based rate authority from sellers that can demonstrate that they and their affiliates lack or have adequately mitigated horizontal and vertical market power in the relevant geographic market. FERC uses a seller's balancing authority area or the relevant regional transmission organization ("RTO") or independent system operator market, as applicable, as the default geographic market. A seller that obtains market-based rate authority is subject to ongoing compliance obligations to demonstrate that it continues to lack or has adequately mitigated market power in its relevant market.

FERC's policy is to use two indicative screens for assessing an applicant's horizontal market power: the "pivotal supplier analysis" and the "wholesale market share analysis." Under each screen, FERC examines all of the generation owned or controlled by an applicant and its affiliates in the relevant market. Applicants that fail either indicative screen are rebuttably presumed to have market power and are given an opportunity to present other evidence to demonstrate that, despite the screen failure, they do not have market power. Once an applicant obtains market-based rate authority, it must comply with ongoing compliance obligations to demonstrate that it continues to lack or has adequately mitigated horizontal and vertical market power.

To streamline its horizontal market power analysis, FERC proposes to no longer require sellers in RTO markets to submit the indicative screens. Instead, wholesale power sellers in RTO markets would be permitted to rely on RTO market monitoring and mitigation measures to prevent the exercise of market power. FERC also clarifies that if all of the generation owned by a seller and its affiliates in the relevant and first-tier markets is fully committed, a seller does not need to submit the market screen analyses; instead, the seller can state that its capacity is fully-committed. FERC also proposes to clarify how sellers should prepare simultaneous transmission import limit studies, which measure the amount of power that can be imported into the relevant market.

FERC proposes to require sellers to provide an organization chart depicting their affiliates and upstream owners when filing initial market-based rate applications, updated market power analyses and notices of change in status. Under the proposed rule, sellers also would be required to submit the indicative screens and affiliated asset appendices in an electronic spreadsheet format that can be searched, sorted, and otherwise accessed using electronic tools. FERC seeks comment on whether it would be useful for FERC to develop a comprehensive searchable public database of the information contained in the asset appendices.

Under FERC's existing regulations, sellers with market-based rate authority must report to FERC any change in status that would reflect a departure from the characteristics FERC relied upon in granting market-based rate authority, including increases in affiliated generation of 100 MW or more. FERC proposes to clarify that the 100 MW reporting threshold is not limited to the geographic markets previously studied by a seller. That is, a seller must file a notice of change in status if it or its affiliates acquire generation that causes a cumulative net increase of 100 MW or more in any relevant geographic market. The revised regulations also would require sellers to include long-term firm purchases of capacity and/or energy in calculating the 100 MW change in status threshold.

FERC requires all market-based rate applicants, and sellers submitting a notice of change in status reporting new affiliates, to submit an asset appendix in the form prescribed in Order No. 697. In its NOPR, FERC states that the asset appendix should include all behind-the-meter generation and qualifying facilities owned or controlled by the applicant or its affiliates. FERC also proposes to allow sellers to aggregate their behind-the-meter generation by balancing authority area or market into one line on the asset appendix. Similarly, FERC proposes to allow sellers to aggregate their qualifying facilities under 20 MW by balancing authority area or market into one line. We note that while the proposed rule would alleviate some of the burdens associated with reporting numerous on-site generation, such as multiple rooftop residential or commercial solar facilities owned by a solar energy developer, the requirement to report all behind-the-meter generation will still be quite burdensome for sellers that own multiple small distributed generation facilities. We recommend that such sellers submit comments to FERC suggesting that the asset appendix should exclude all behind-the-meter generation that is 1 MW or smaller or that does not export power to the grid.

Finally, FERC provides guidance on the use of joint tariffs. FERC allows affiliated sellers within the same corporate family to choose whether to transact under a single market-based rate tariff for an entire corporate family or under separate tariffs. These "joint tariffs" allow sellers that are part of the same corporate family to designate a filing party to submit a single tariff on behalf of all affiliates within the corporate family. FERC notes that it is providing guidance on its website on how the corporate family should identify its designated filer and what each of the other filers should submit as a tariff record.

Comments on the NOPR are due by 5 PM Eastern on Tuesday, September 23, 2014.

Click here for a copy of the NOPR.

Last Updated: September 15 2014
Article by Adam Wenner and A. Cory Lankford
Orrick