

#### IV. Effective Date

21. This order on rehearing and clarification is effective May 5, 2020.

By the Commission.

Issued: February 20, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

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#### DEPARTMENT OF ENERGY

#### Federal Energy Regulatory Commission

#### 18 CFR Part 35

[Docket No. RM16-17-001; Order No. 860-A]

#### Data Collection for Analytics and Surveillance and Market-Based Rate Purposes

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Order on rehearing and clarification.

**SUMMARY:** The Federal Energy Regulatory Commission addresses requests for rehearing and clarification and affirms its determinations in Order No. 860, which amends its regulations governing market-based rates for public utilities.

**DATES:** The order on rehearing and clarification is effective October 1, 2020.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

#### I. Introduction

1. On July 18, 2019, the Commission issued Order No. 860,<sup>1</sup> which revised certain aspects of the substance and format of information submitted for market-based rate purposes by Sellers.<sup>2</sup> Specifically, the Commission adopted

the approach to data collection proposed in the notice of proposed rulemaking issued in July 2016, *i.e.*, to collect market-based rate information in a relational database.<sup>3</sup> However, the Commission declined to adopt the proposal to require Sellers and entities, other than those described in FPA section 201(f),<sup>4</sup> that trade virtual products<sup>5</sup> or that hold financial transmission rights (FTR)<sup>6</sup> (Virtual/FTR Participants) to report certain information about their legal and financial connections to other entities (Connected Entity Information). In this order, we address requests for rehearing and clarification of Order No. 860.<sup>7</sup>

2. Six requests for rehearing and/or clarification were filed.<sup>8</sup> The requests for rehearing and clarification concern

<sup>3</sup> *Data Collection for Analytics & Surveillance and Market-Based Rate Purposes*, Notice of Proposed Rulemaking, 81 FR 51726 (Aug. 4, 2016), 156 FERC ¶ 61,045 (2016) (NOPR).

<sup>4</sup> 16 U.S.C. 824(f).

<sup>5</sup> Virtual trading involves sales or purchases in the day-ahead market of a Regional Transmission Organization (RTO) or Independent System Operator (ISO) that do not go to physical delivery. By making virtual energy sales or purchases in the day-ahead market and settling these positions in the real-time market, any market participant can arbitrage price differences between the two markets. See *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, at P 921 n.1047, clarified, 121 FERC ¶ 61,260 (2007), order on reh'g, Order No. 697-A, 123 FERC ¶ 61,055, clarified, 124 FERC ¶ 61,055, order on reh'g, Order No. 697-B, 125 FERC ¶ 61,326 (2008), order on reh'g, Order No. 697-C, 127 FERC ¶ 61,284 (2009), order on reh'g, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

<sup>6</sup> The term "FTR," as used in the NOPR and Order No. 860, was intended to cover not only Financial Transmission Rights, a term used by PJM Interconnection, L.L.C. (PJM), ISO New England Inc., and Midcontinent Independent System Operator, Inc., but also Transmission Congestion Contracts in New York Independent System Operator, Inc., Transmission Congestion Rights in Southwest Power Pool, Inc., and Congestion Revenue Rights in California Independent System Operator Corp. Order No. 860, 168 FERC ¶ 61,039 at P 2 n.6.

<sup>7</sup> Order No. 860 will become effective October 1, 2020.

<sup>8</sup> The requests for rehearing and/or clarification were filed by the following entities: (1) Edison Electric Institute (EEI); (2) Fund Management Parties (FMP), which includes Ares EIF Management, LLC, for itself and its public utility affiliates, Monolith Energy Trading LLC, as the sole owner of Solios Power LLC, for itself and its public utility affiliates and affiliates the engage in trading of virtual and/or financial transmission products, Southwest Generation Operating Company, for itself and its public utility affiliates, and Star West Generation LLC, for itself and its public utility affiliates; (3) Office of the People's Counsel for the District of Columbia, Delaware Division of the Public Advocate, Citizens Utility Board of Illinois, and West Virginia Consumer Advocate Division (collectively, Joint Advocates); (4) NRG Energy, Inc. and Vistra Energy Corp. (together, NRG/Vistra); (5) Starwood Energy Group Global, L.L.C. (Starwood); and (6) Transmission Access Policy Study Group (TAPS).

the following subjects: (1) Ownership information, including ultimate upstream affiliates;<sup>9</sup> (2) passive owners; (3) Connected Entity proposal; (4) implementation and components of the Data Dictionary; (5) public access; and (6) due diligence requirements.

3. We deny the requests for rehearing, and grant in part and deny in part the requests for clarification, as discussed below.

#### II. Discussion

##### A. Substantive Changes to Market-Based Rate Requirements

##### 1. Ownership Information

##### a. Final Rule

4. In Order No. 860, the Commission adopted the proposal to require that, as part of their market-based rate applications or baselines submissions, Sellers must identify through the relational database their ultimate upstream affiliate(s). The Commission explained that, because this is a characteristic the Commission will rely upon in granting market-based rate authority, Sellers must also inform the Commission when they have a new ultimate upstream affiliate as part of their change in status reporting obligations. In addition, the Commission required that any new ultimate upstream affiliate information must also be submitted into the relational database on a monthly basis.<sup>10</sup>

##### b. Request for Clarification

5. NRG/Vistra seeks clarification solely with respect to implementation issues relating to identifying and reporting a Seller's ultimate upstream affiliate(s) where holdings of publicly traded voting securities are involved.<sup>11</sup> NRG/Vistra first argues that an investor should not be considered a Seller's ultimate upstream affiliate based solely on holdings of publicly traded securities. According to NRG/Vistra, where publicly traded securities are involved, applying the ultimate upstream affiliate definition will yield false positives and fail to recognize the control exercised by the publicly traded entity. In this regard, NRG/Vistra asserts that the Commission has granted financial institutions blanket

<sup>9</sup> "Ultimate upstream affiliate" is defined in the final rule as "the furthest upstream affiliate(s) in the ownership chain—*i.e.*, each of the upstream affiliate(s) of a Seller, who itself does not have 10 percent or more of its outstanding voting securities owned, held or controlled, with power to vote, by any person (including an individual or company)." Order No. 860, 168 FERC ¶ 61,039 at P 5 n.10.

<sup>10</sup> Order No. 860, 168 FERC ¶ 61,039 at P 121.

<sup>11</sup> NRG/Vistra Request at 4.

<sup>1</sup> *Data Collection for Analytics & Surveillance and Market-Based Rate Purposes*, Order No. 860, 84 FR 36390 (July 26, 2019), 168 FERC ¶ 61,039 (2019).

<sup>2</sup> A Seller is defined as any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act (FPA). 18 CFR 35.36(a)(1); 16 U.S.C. 824d.

authorizations under FPA section 203(a)(2) to acquire 10 percent or more of the voting securities of public utilities based on its understanding that these institutions are acquiring such interests “in the ordinary course of business and as a passive investor (*i.e.*, not to gain control of the [public utilities]),” and that their holdings of such securities will “not convey control of day-to-day operations of jurisdictional facilities.”<sup>12</sup>

6. As an example, NRG/Vistra states that the Vanguard Group, Inc.

(Vanguard) has reported that it, together with certain related entities, owns more than 10 percent of the shares of NRG’s common stock. NRG/Vistra maintains that, although these shares are voting securities, there is no reason to regard Vanguard as “controlling” NRG or its Seller subsidiaries in any respect relevant to the Commission’s analysis and monitoring of Sellers as Vanguard has reported its holdings of NRG’s common stock to the Securities and Exchange Commission (SEC) through Schedule 13G filings. NRG/Vistra explains that the Commission has recognized that, in order to file a Schedule 13G, an investor must certify that the securities were not acquired for the purpose, or with the effect, of changing or influencing control over the issuer. NRG/Vistra also states that Vanguard has obtained a blanket section 203(a)(2) authorization similar to the other section 203(a)(2) blanket authorizations in recognition that it is acquiring the shares of entities like NRG on behalf of investors in its managed funds exclusively for investment purposes, not for the purpose of managing, controlling, or entering into business transactions with portfolio companies. NRG/Vistra argues that, if NRG’s Seller subsidiaries were to identify Vanguard as their ultimate upstream affiliate, it would inaccurately suggest that they are under common control with other Sellers in which Vanguard and its affiliates might also own 10 percent voting interests. NRG/Vistra adds that NRG itself would not appear in the relational database in this case.<sup>13</sup>

7. Accordingly, NRG/Vistra requests that the Commission clarify that an investor (or investor group) will not be considered a Seller’s ultimate upstream affiliate based solely on holdings of publicly traded securities. NRG/Vistra explains, in other words, where the voting securities of a Seller’s upstream owner are publicly traded, the exercise

of tracing upstream ownership will stop at the publicly traded entity unless the facts and circumstances suggest that a holder of 10 percent or more of the publicly traded voting securities has an intent and ability to exercise control over the publicly traded entity and its subsidiaries. NRG/Vistra posits that the Commission could find that, unless the publicly traded entity states otherwise, the Commission will presume that any holder of 10 percent or more of the entity’s securities does not have an intent and ability to exercise control over the publicly traded entity and its subsidiaries. NRG/Vistra adds that, if such facts and circumstances change, the publicly traded company could commit to notify the Commission within 30 days upon notice of that change. NRG/Vistra contends that, at minimum, investors that have made Schedule 13G filings with the SEC or that have obtained blanket FPA section 203 authorizations should not be considered ultimate upstream affiliates because such investors have affirmatively represented that they do not hold the securities for control purposes.<sup>14</sup>

8. However, if the Commission does not grant this clarification, NRG/Vistra requests that, where there is a change resulting from trading publicly traded securities, the change be deemed to occur when the Seller had actual or constructive notice of the change. NRG/Vistra argues that the Commission has acknowledged the difficulty of tracking secondary market transactions and that, as a general matter, publicly traded companies rely on after-the-fact investor filings with the SEC, including (but not limited to) Schedule 13D and 13G filings, for information about when a given investor or investor group has acquired significant holdings of their shares.<sup>15</sup> NRG/Vistra maintains that, where Schedule 13D and 13G filings are made, the Seller will receive actual or constructive notice that an investor has acquired 10 percent or more of its publicly traded parent company’s shares within 10 days after the end of the month of the underlying trades. NRG/Vistra posits that, by granting its request, Sellers will have a more reasonable amount of time to make its submission to update the database, which would lessen the burden on Sellers and reduce the chance of

inaccurate submissions that would later have to be corrected.<sup>16</sup>

#### c. Commission Determination

9. We deny NRG/Vistra’s request that the Commission clarify that an investor will not be considered a Seller’s ultimate upstream affiliate based solely on holdings of publicly traded securities. This determination is consistent with current Commission requirements, *i.e.*, that Sellers must identify all upstream owners.<sup>17</sup> When the final rule takes effect, this determination will also be consistent with the requirement to report all ultimate upstream affiliates.<sup>18</sup>

10. More importantly, however, this determination is consistent with the affiliate definition in § 35.36(a)(9).<sup>19</sup> Among other things, the affiliate definition provides that an affiliate of a specified company means “any person that directly or indirectly owns, controls, or holds with power to vote, ten percent or more of the outstanding voting securities of the specified company.”<sup>20</sup> The Commission established in the final rule that the definition of ultimate upstream affiliate “means the furthest upstream affiliate(s) in the ownership chain” including “any entity described in § 35.36(a)(9)(i).”<sup>21</sup> There is no exemption under either of these definitions for entities that hold publicly traded securities. Rather, to exempt these entities from this definition would require a change to the affiliate definition in § 35.36(a)(9)(i) because the determining criterion is voting securities. Neither the NOPR nor the final rule proposed or considered any change to the substance of the affiliate definition. For this reason, we also find NRG/Vistra’s request to be outside of the scope of this rulemaking as it is not a logical outgrowth of the NOPR or final rule.<sup>22</sup>

11. In addition, once the relational database is implemented, consistent and complete information on ultimate upstream affiliates will be crucial for database integrity and accuracy, given

<sup>16</sup> *Id.* at 8–9.

<sup>17</sup> Order No. 697–A, 123 FERC ¶ 61,055 at P 181 n.258.

<sup>18</sup> When Order No. 860 becomes effective, Sellers generally will only need to identify a subset of their upstream affiliates, the ultimate upstream affiliate(s). Order No. 860, 168 FERC ¶ 61,039 at P 5 n.10.

<sup>19</sup> 18 CFR 35.36(a)(9).

<sup>20</sup> 18 CFR 35.36(a)(9)(i).

<sup>21</sup> 18 CFR 35.36(a)(10).

<sup>22</sup> In determining whether a proposal is a logical outgrowth of a NOPR, the issue is whether interested parties “*ex ante*, should have anticipated that such a requirement might be imposed.” *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

<sup>12</sup> *Id.* at 4–5 (quoting *Morgan Stanley*, 121 FERC ¶ 61,060, at P 9 (2007), *order on clarification*, 122 FERC ¶ 61,094 (2008)).

<sup>13</sup> *Id.* at 5–6.

<sup>14</sup> *Id.* at 6–7.

<sup>15</sup> *Id.* at 7–8 (quoting *FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060, at P 36 (2007), *on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008)).

that the information in the database may affect a multitude of filers. Therefore, to ensure the relational database functions as intended, it would not be appropriate for the Commission to sever the chain of affiliation with respect to holders of publicly traded securities and preemptively find that they are not ultimate upstream affiliates. NRG/Vistra alternatively requests that the Commission stop tracing upstream ownership at publicly traded entities unless the facts and circumstances indicate that a holder of 10 percent or more of the securities has an intent and ability to exercise control over the publicly traded entity. We decline to adopt this subjective approach, given that it is critical that ultimate upstream affiliates be consistently reported to the database.

12. We also deny NRG/Vistra's alternative request to allow publicly traded Sellers or the Seller subsidiaries of publicly traded companies extra time to file updates to the relational database. Although we appreciate that tracking trading in a publicly traded ultimate upstream affiliate may be difficult, the requirement to identify upstream affiliates is not a new requirement. Currently, a Seller owned by a publicly traded company, like a Seller with any other type of owner, must timely report to the Commission any changes in the conditions the Commission relied upon when granting it market-based rate authority, which typically include any changes in ownership such as new affiliations. These reports must be made within 30 days of the date of that change.<sup>23</sup> When Order No. 860 takes effect, Sellers will continue to have at least 15 days to incorporate, in their monthly database submissions, any relevant changes to their ultimate upstream affiliate(s).<sup>24</sup> Given that Sellers will still have at least 30 days to submit their notice of change in status filings, we do not believe that Sellers potentially having as few as 15 days to make their database submissions is a significant change from current practice such that Sellers with publicly traded ultimate upstream affiliates will necessarily require additional time to report changes regarding their ultimate upstream affiliates.

13. In addition, granting this alternative request would affect the timing of quarterly notice of change in

status filings, as certain ownership changes could be reported approximately 75 days after the relevant transaction occurs.<sup>25</sup> This could result in Sellers not having the most up-to-date information in their notice of change in status filings and triennial filings. Consequently, we deny NRG/Vistra's alternative request.

## 2. Passive Owners

### a. Final Rule

14. In Order No. 860, the Commission adopted the proposal to require Sellers to make an affirmation, in lieu of a demonstration, in their market-based rate narratives concerning their passive owners. The Commission explained that such a demonstration is unnecessary, given that the Commission does not make a finding of passivity in its orders granting market-based rate authority and that removing this demonstration will ease the burden on filers.<sup>26</sup>

15. The Commission also clarified the nature of the proposed affirmation regarding passive owners. Specifically, "[w]ith respect to any owners that a Seller represents to be passive, the Seller must identify such owner(s), and affirm in its narrative that the ownership interests consist solely of passive rights that are necessary to protect the passive investors' or owners' investments and do not confer control."<sup>27</sup> The Commission also clarified that it will continue to require change in status filings when passive interests arise in a Seller that has received market-based rate authority, so that the Seller can make the necessary affirmations. However, the Commission provided that, in this context, a Seller only needs to make a change in status filing to report and affirm the status of new passive owners as passive and need not submit any additional information into the relational database.<sup>28</sup>

16. In addition, the Commission clarified that it is not changing existing policy regarding the definition of a passive investor and that specific clarifications on that policy are beyond the scope of this proceeding. The

Commission explained that, in most circumstances, a determination as to passivity is fact-specific and that, if a Seller is uncertain whether an investment is passive, it may file a petition for declaratory order.<sup>29</sup> Indeed, the Commission emphasized that nothing in Order No. 860 is intended to overturn the Commission's case-specific determinations as to passivity and an entity's reporting obligations under previously issued declaratory orders.<sup>30</sup>

17. As to obligations regarding the relational database, the Commission concluded that passive owners need not be reported in the database as ultimate upstream affiliates. The Commission also did not require that a Seller report the identity of its passive owners in the database. Further, the Commission clarified that, if a Seller can make the requisite affirmation regarding passive ownership, it would not need to list the assets associated with any such passive owner in its asset appendix.<sup>31</sup> The Commission stated, however, in footnote 209 of the final rule that "Sellers should provide the identity of new passive owner(s) in their narratives when making their passive affirmation."<sup>32</sup>

### b. Requests for Clarification and/or Rehearing

18. FMP requests clarification or, in the alternative, rehearing with respect to footnote 209 of the final rule. As background, FMP explains that many entities subject to the final rule are owned by or associated with one or more passive, non-managing owners. FMP states that the Commission has recognized the widespread nature of the passive ownership of public utilities and notes that the final rule referred to several instances where the Commission treatment of non-voting ownership interests indicated that they are outside the scope of the jurisdiction of the FPA.<sup>33</sup>

19. FMP asserts that footnote 209 is inconsistent with paragraphs 140 and 141 of the final rule, which state that Commission treatment of passive ownership is not being changed and that a passive owner need not be identified in the filing materials that are established and described in the final rule. FMP contends, however, that

<sup>25</sup> That is, if the reportable transaction occurs on March 1, the relevant SEC filings that serve as notice to a Seller are made by April 10, according to NRG/Vistra, and the monthly database updates would be due on May 15.

<sup>26</sup> Order No. 860, 168 FERC ¶ 61,039 at P 137.

<sup>27</sup> *Id.* P 138 (citing *AES Creative Res., L.P.*, 129 FERC ¶ 61,239 (2009) (*AES Creative*)). The Commission added that it expects that this affirmation will be included in the narrative of initial market-based rate applications and in any other market-based rate filing (e.g., triennial update or change in status notification) in which the Seller is making a passive ownership representation. *Id.* n.206.

<sup>28</sup> *Id.* P 139.

<sup>29</sup> *Id.* P 140. The Commission also declined to extend any safe harbor to affirmations made in good faith. *Id.* n.207.

<sup>30</sup> *Id.* P 140.

<sup>31</sup> *Id.* P 141.

<sup>32</sup> *Id.* n.209 (emphasis added).

<sup>33</sup> FMP Request at 1–2 (citing *Starwood Energy Grp. Global, L.L.C.*, 153 FERC ¶ 61,332, at P 21 (2015) (*Starwood*); *AES Creative*, 129 FERC ¶ 61,239).

<sup>23</sup> 18 CFR 35.42.

<sup>24</sup> Because monthly database updates will be due on the 15th of the month following the change, updates will be due between 15 and 45 days after the relevant change occurs (e.g., in April, Sellers have 15 days to make the monthly database update if the change occurred on March 31, but 45 days if it occurred on March 1).

footnote 209 substantially changes the Commission's existing policy.<sup>34</sup>

20. FMP argues next that footnote 209 is inconsistent with Commission precedent. FMP contends that nowhere in *Starwood*, for example, does the Commission require the submission of the identities of passive owners; FMP asserts that *Starwood* instead states that public utilities submitting market-based rate materials to the Commission "do not need to identify the [passive investors] in any future section 205 market-based rate application, updated market power analysis, or notice of change in status."<sup>35</sup>

21. FMP contends that footnote 209 also substantively contradicts other recent, controlling precedent on this issue. FMP asserts that, "in *Ad Hoc Renewable Energy Financing Group*,<sup>[36]</sup> the Commission referenced and confirmed without deviation exactly the conclusions stated in *AES Creative* and *Starwood* with respect to passive ownership . . . ." <sup>37</sup> However, FMP argues that the final rule does not explain footnote 209's departure from this precedent.<sup>38</sup>

22. In addition, FMP argues that footnote 209's use of the word "new" in the context of "new passive owners" is unclear. FMP contends that *Starwood* expressly addresses the concept of new passive investors and applies to future passive investors, as long as the investment is actually passive.<sup>39</sup> Lastly, FMP asserts that the NOPR did not give notice that the Commission was considering a substantial change to *Starwood*, *AES Creative*, and *Ad Hoc* along the lines of footnote 209.<sup>40</sup>

23. If the Commission does not clarify that footnote 209 does not apply to a passive investment that is consistent with *Starwood*, *AES Creative*, or *Ad Hoc*, FMP requests that the Commission grant rehearing of footnote 209 on the grounds that: (1) The legal standard applied in footnote 209 is contrary to the facts present in the other provisions of the final rule and Commission precedent relied on in the final rule; (2) footnote 209 lacks adequate support and does not represent reasoned decision-making because it misrepresents the Commission's holdings in paragraphs 140 and 141 of the final rule; (3) footnote 209 lacks adequate support and does not represent reasoned decision-

making because the Commission failed to examine the specific Commission orders on which the Commission relied on in the final rule and to apply its own precedent in a consistent fashion; and (4) footnote 209 departed from the Commission's precedent without notice in the NOPR such that the departure was arbitrary, capricious, or otherwise unlawful and in violation of FMP's rights.<sup>41</sup>

24. *Starwood* also requests clarification with respect to footnote 209 of the final rule and incorporates the entirety of FMP's pleading as part of its own request. *Starwood* argues that footnote 209 is inconsistent with prior Commission precedent, including *Starwood*'s own 2015 declaratory order.<sup>42</sup> *Starwood* contends that one of the primary reasons it sought a declaratory order was to obtain a definitive ruling from the Commission that it did not need to disclose the identity of its passive owners. *Starwood* argues that other similarly situated private equity funds and fund managers have relied on *Starwood* since that time. *Starwood* requests that the Commission clarify that nothing in the final rule, specifically footnote 209, will change existing Commission precedent, which *Starwood* argues clearly provides that parties do not need to disclose the identity of their passive owners.<sup>43</sup>

25. TAPS requests clarification regarding the affirmation a Seller must make if it has passive owners. According to TAPS, the classification of owners as active or passive is critical to the Commission's analysis of whether to grant market-based rate authority to a Seller. TAPS explains that the classification determines affiliation, which triggers several market-based rate reporting requirements, and that the Commission required in Order No. 816 that Sellers need not include in their asset appendices entities or facilities if they have claimed and demonstrated that the relationship with those entities or facilities is passive.<sup>44</sup>

26. TAPS explains that, with respect to the relational database, distinguishing between passive owners and affiliates takes on greater importance. TAPS contends that failing to do so will substantially frustrate the Commission's

ability to regulate the exercise of market power and ensure just and reasonable rates.<sup>45</sup>

27. TAPS contends that the generalized affirmation requirement described in Order No. 860 is much less specific than what was proposed in the NOPR.<sup>46</sup> TAPS thus requests that the Commission clarify that, for each owner that a Seller identifies as passive, the Seller must specifically (1) affirm whether each passive owner owns a separate class of non-voting securities, has limited consent rights, does not exercise day-to-day control over the company, and cannot remove the manager without cause; and (2) provide information sufficient to show that the Seller performed the requisite investigation for these affirmations.<sup>47</sup> According to TAPS, this clarification will allow the Commission to ensure that Sellers are complying with the Commission's existing policy regarding the definition of a passive investor and impose little, if any, additional burden on Sellers as they must already identify and investigate each of these four attributes of the ownership interests to make the affirmation.<sup>48</sup>

28. TAPS adds that requiring Sellers to include this basic information in their market-based rate filings is consistent with existing Commission practice and does not require a determination as to passivity. TAPS references the *EquiPower Resources Management, LLC* proceeding, in which Commission staff issued a letter with several questions regarding the passive nature of the ownership interests involved in the application for market-based rate authorization.<sup>49</sup> TAPS states that the Commission then granted the application by letter order without making any determination as to the passive ownership interests. TAPS points out that these questions concern the same matters as the NOPR's proposed affirmation requirement. TAPS asks that the Commission make clear that a "narrative that the ownership interests consist solely of passive rights that are necessary to protect the passive investors' or owners'

<sup>45</sup> *Id.* at 7–8.

<sup>46</sup> *Id.* at 8 (quoting NOPR, 156 FERC ¶ 61,045 at P 26 ("[W]e also propose . . . that with respect to any owners than [a Seller] represents to be passive, the [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.")).

<sup>47</sup> *Id.* at 8–9.

<sup>48</sup> *Id.* at 10.

<sup>49</sup> *EquiPower Res. Mgmt., LLC*, Docket No. ER10–1089–000 (June 16, 2010) (deficiency letter).

<sup>34</sup> *Id.* at 2–3.

<sup>35</sup> *Id.* at 3 (quoting *Starwood*, 153 FERC ¶ 61,332 at P 21).

<sup>36</sup> 161 FERC ¶ 61,010 (2017) (*Ad Hoc*).

<sup>37</sup> FMP Request at 3.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (citing *Starwood*, 153 FERC ¶ 61,332 at PP 14, 16–19).

<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.* at 4–5.

<sup>42</sup> *Starwood* Request at 1–2 (citing *Starwood*, 153 FERC ¶ 61,332).

<sup>43</sup> *Id.* at 2.

<sup>44</sup> TAPS Request at 6–7 (citing *Refinements to Policies & Procedures for Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 816, 153 FERC ¶ 61,065, at P 284 (2015), *order on reh'g and clarification* Order No. 816–A, 155 FERC ¶ 61,188 (2016)).

investments and do not confer control” include responses to these questions.<sup>50</sup>

29. If the Commission does not grant this clarification, TAPS requests rehearing of the Commission’s decision to allow Sellers to make an affirmation instead of a demonstration regarding passive ownership interests.<sup>51</sup> TAPS asserts that this vague affirmation requirement is contrary to the Commission’s obligations under the FPA and represents an unexplained departure from the Commission’s prior requirement in Order No. 816<sup>52</sup> that Sellers demonstrate passivity. According to TAPS, although the Commission stated that a demonstration is unnecessary given that the Commission makes no findings as to passivity in its orders granting market-based rate authority, the Commission did not explain the departure from the requirement in Order No. 816 that Sellers demonstrate passivity before excluding certain information from asset appendix entries.<sup>53</sup> TAPS contends that the Commission’s statement that it is not changing the substantive standards governing a determination of passivity, or the timing of such a determination, does not justify a change in Sellers’ reporting obligations.<sup>54</sup>

#### c. Commission Determination

30. We deny clarification and rehearing with respect to the Commission’s directive in footnote 209 of the final rule that “Sellers should provide the identity of new passive owner(s) in their narratives when making their passive affirmation.”<sup>55</sup> FMP and Starwood argue that this directive is inconsistent with provisions in the final rule as well as Commission precedent. FMP and Starwood also contend that footnote 209 represents a departure from Commission precedent and the NOPR did not provide notice of this change. We disagree for the reasons discussed below.

31. FMP and Starwood misread the Commission’s discussion of passive ownership in the final rule, including the clarification regarding new passive owners in footnote 209. The only substantive change the Commission made regarding passive interests in the final rule was to require Sellers to make

an affirmation, in lieu of a demonstration, in their market-based rate narratives concerning their passive ownership interests.<sup>56</sup> The Commission concluded that such a demonstration was unnecessary because it makes no findings regarding passivity in its orders granting market-based rate authority and thus an affirmation would reduce the burden on filers.<sup>57</sup> In addressing a comment in the final rule, the Commission noted that “passive owners need not be reported in the database”<sup>58</sup> and, in footnote 209, it only clarified that Sellers should provide the identities of the owners they are claiming to be passive in their transmittal letters. It is not inconsistent to say that passive owners need to be identified in the narrative but do not need to be reported in the database. Moreover, providing the names of such owners is consistent with current practice.<sup>59</sup> The use of “new” in footnote 209 means Sellers will only need to make the affirmation for, and provide the identify of, passive owners whom they have not previously identified to the Commission in a market-based rate proceeding.<sup>60</sup>

32. In addition, we disagree with FMP and Starwood that footnote 209 is inconsistent with Commission precedent. In the final rule, the Commission expressly provided that nothing in the final rule would impact, let alone overturn, the Commission’s case-specific determinations as to passivity and an entity’s reporting obligations under previously issued declaratory orders.<sup>61</sup> Consistent with current Commission policy, Sellers must continue to disclose new passive owners should the Seller acquire them unless those Sellers received case-specific determinations as to passivity and reporting obligations under a declaratory order. Thus, the entities that are the subject of the *AES Creative*, *Starwood*, and *Ad Hoc* declaratory orders may continue to rely on the determinations as to passivity in those orders as well as the associated reporting obligations. However, to the extent that entities *not* subject to those orders have relied on those orders for

reporting obligations, we clarify that those entities must comply with the Commission’s current policy described above and, when the final rule takes effect, as articulated in the final rule.

33. For these reasons, we also disagree with FMP and Starwood that the NOPR provided insufficient notice of a change in filing requirements regarding passive ownership. The Commission changed no aspect of its policy on passive owners except for reducing a Seller’s burden from a demonstration to simple affirmation. What FMP and Starwood characterize as a change to Commission policy in footnote 209 is only an explanation regarding existing policy, which will remain unchanged when the final rule takes effect.

34. We also deny clarification with respect to TAPS’s request that the affirmation: (1) Affirm whether each passive owner owns a separate class of non-voting securities, has limited consent rights, does not exercise day-to-day control over the company, and cannot remove the manager without cause; and (2) provide sufficient information to show that a Seller performed an investigation for the affirmation. Likewise, we deny TAPS’s alternative request for rehearing on the Commission’s decision to allow Sellers to make an affirmation instead of a demonstration regarding passive ownership interests.

35. Although we agree with TAPS that, for the relational database to function correctly and as intended, owners must be properly classified as passive, we decline to grant rehearing to require, as TAPS requests, that the affirmation specifically affirm each of the four attributes of passivity identified in the NOPR and for each Seller to provide sufficient information to show that the Seller performed the requisite investigation for the affirmation. First, Order No. 860’s requirement that a Seller identify passive owners and affirm in its narrative that the ownership interests consist solely of passive rights that are necessary to protect the passive investors’ or owners’ investments and do not confer control is taken from *AES Creative*’s requirements for passive ownership interests.<sup>62</sup> As contemplated in *AES Creative*, passive owners cannot hold voting securities, have more than limited consent/veto rights, or allow day-to-day control over a company.<sup>63</sup> In addition, the Commission clarified in Order No. 860 that “absent a Commission order to the

<sup>50</sup> *Id.* P 137.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* P 141.

<sup>53</sup> Order No. 697–A, 123 FERC ¶61,055 at n.258.

<sup>54</sup> In other words, this requirement will not apply to those Sellers who have made a passive demonstration prior to the effective date of the final rule.

<sup>55</sup> Order No. 860, 168 FERC ¶61,039 at P 140 (“Nothing in this [F]inal [R]ule is intended to overturn the Commission’s case-specific determinations as to passivity and an entity’s reporting obligations under previously issued declaratory orders.”).

<sup>62</sup> Order No. 860, 168 FERC ¶61,039 at P 138 & n.206.

<sup>63</sup> See *AES Creative*, 129 FERC ¶61,239 at PP 25–26.

<sup>50</sup> TAPS Request at 10–12.

<sup>51</sup> *Id.* at 13 (quoting Order No. 860, 168 FERC ¶61,039 at P 137).

<sup>52</sup> See Order No. 816, 153 FERC ¶61,065 at P 284.

<sup>53</sup> TAPS Request at 13–14 (citing Order No. 860, 168 FERC ¶61,039 at P 284). TAPS also points out that the final rule did not cite to Order No. 816 at all in its discussion of passive ownership. *Id.* n.9.

<sup>54</sup> *Id.* at 13–14.

<sup>55</sup> Order No. 860, 168 FERC ¶61,039 at P 141 n.209.

contrary, an owner who can remove the manager without cause is not considered passive.”<sup>64</sup> Thus, we reiterate here that unless the Commission specifically finds otherwise in a particular case, a Seller will not be able to make the passive affirmation where the owner can remove the manager without cause. Given that Sellers cannot make the requisite affirmation unless they can affirm that the ownership interests meet the *AES Creative* requirements and do not allow an owner to remove the manager without cause, we decline to require the specificity that TAPS requests.

36. Similarly, we deny clarification with respect to the information to be provided in the affirmation. Prior to the final rule, Sellers were required to make a demonstration regarding passive ownership, even though the Commission made no findings with respect to whether these ownership interests were truly passive. Accordingly, in the final rule, the Commission chose to reduce the filing requirements associated with making passive ownership representations. To require Sellers to show that they have sufficient information to make the affirmation would be to effectively continue the demonstration requirement. As explained, Sellers cannot affirm that their ownership interests consist solely of passive rights that are necessary to protect the passive investors’ or owners’ investments and do not confer control unless they have verified that those ownership interests meet the requirements of *AES Creative*. These Sellers must also abide by a duty of candor when making any filings with the Commission.<sup>65</sup> For these reasons, we also deny TAPS’s alternative request for rehearing.

## B. Connected Entity Information

### 1. Final Rule

37. In Order No. 860, the Commission declined to adopt the proposal to require Sellers and Virtual/FTR Participants to submit Connected Entity Information. The Commission acknowledged commenters’ concerns about the difficulties and burdens associated with this aspect of the NOPR and, accordingly, transferred the record to Docket No. AD19–17–000 for possible consideration in the future as the Commission may deem appropriate. However, the Commission noted that the determination in the final rule to collect market-based rate information in a relational database will provide value

to both the Commission’s market-based rate and analytics and surveillance programs.<sup>66</sup>

### 2. Request for Clarification and/or Rehearing

38. Joint Advocates request limited rehearing of the final rule and argue that the Commission erred: (1) By not applying the requirement to collect Connected Entity Information from Sellers and Virtual/FTR Participants; and (2) in failing to require Virtual/FTR Participants to abide by a duty of candor.

39. Joint Advocates first contend that the finding in the final rule that the Connected Entity reporting requirements are unduly burdensome is unsupported by the evidence and conclusory in nature. Joint Advocates argue that, although the final rule acknowledges that the Connected Entity Information proposal was among the most commented on, it says nothing more than there were many concerns raised about the difficulties and burden associated with the proposal. Joint Advocates contend that this statement alone does not support why the Commission failed to act on the proposal or why the proposal’s benefits are outweighed by any burden. Joint Advocates assert that the final rule instead ignores the record except for a cursory statement about supporting comments.<sup>67</sup>

40. Joint Advocates argue that the final rule focuses solely on comments regarding the proposal’s alleged burdens but takes that evidence out of context. Joint Advocates contend, for example, that AVANGRID, Inc.’s (AVANGRID) and EEI’s comments were critical of the burden imposed by the whole NOPR and that it is not reasoned decision-making to refer to these criticisms as if they apply only to the collection of Connected Entity Information.<sup>68</sup> Joint Advocates explain that the final rule references only one other set of comments, *i.e.*, Berkshire Hathaway Energy Company’s (Berkshire) comments, and that these comments note concerns with the previous Connected Entity proposal;<sup>69</sup> however, Joint Advocates argue that Berkshire does not ask the Commission to wholly

set aside the Connected Entity proposal but rather raises issues specific to its own business model. Joint Advocates argue thus that Berkshire’s comments do not support the final rule’s decision to set aside the Connected Entity proposal.<sup>70</sup>

41. Joint Advocates next assert that the final rule’s preferential treatment for Virtual/FTR Participants is discriminatory in both intent and application. Joint Advocates assert that the Commission has long recognized that virtual products, transactions involving such products and that, accordingly, sellers of such products, *i.e.*, Virtual/FTR Participants, are subject to the Commission’s jurisdiction.<sup>71</sup> Joint Advocates also point out that Virtual/FTR Participants are similarly situated with other market Sellers in that they are capable of affecting Commission-jurisdictional market prices. Joint Advocates contend that, even if the Commission adopted the Connected Entity proposal, the overall reporting requirements would still be significantly less than those for Sellers and that, without the Connected Entity requirements, Virtual/FTR Participants, unlike Sellers, have no duty of candor under the Commission’s regulations. According to Joint Advocates, the failure to adopt the Connected Entity proposal maintains a two-tiered regulatory scheme that is both unjust and unduly preferential and violates section 206 of the FPA. Joint Advocates argue that the appropriate remedy is to adopt the Connected Entity proposal and subject Virtual/FTR Participants to similar oversight as Sellers.<sup>72</sup>

42. Lastly, Joint Advocates assert that the final rule deprives the Commission of important tools to address and combat market manipulation and fraud. Joint Advocates echo the concerns in the dissent, including with respect to the GreenHat Energy, LLC’s default on its FTRs in the PJM market, and note the harm that could result from recidivist persons that commit fraud is real.<sup>73</sup>

43. Joint Advocates request in the alternative that the Commission accept their comments in the record of Docket No. AD19–17–000. Joint Advocates also ask that the Commission expediently implement the Connected Entity proposal and any additional reforms offered in Docket No. AD19–17–000 given the clear potential for future

<sup>66</sup> Order No. 860, 168 FERC ¶ 61,039 at P 184.

<sup>67</sup> Joint Advocates Request at 8–9.

<sup>68</sup> *Id.* at 9–10.

<sup>69</sup> See *Collection of Connected Entity Data from Reg’l Transmission Orgs. and Indep. Sys. Operators*, Notice of Proposed Rulemaking, 80 FR 80302 (Dec. 24, 2015), 152 FERC ¶ 61,219 (2015) (Connected Entity NOPR); *Collection of Connected Entity Data from Reg’l Transmission Orgs. and Indep. Sys. Operators*, Withdrawal of Proposed Rulemaking and Termination of Rulemaking Proceeding, 81 FR 49590 (July 28, 2016), 156 FERC ¶ 61,046 (2016).

<sup>70</sup> Joint Advocates Request at 10–11.

<sup>71</sup> *Id.* at 11.

<sup>72</sup> *Id.* at 12.

<sup>73</sup> *Id.* at 13–14.

<sup>64</sup> Order No. 860, 168 FERC ¶ 61,039 at P 140.

<sup>65</sup> 18 CFR 35.41(b).

market manipulation, fraud, and default.<sup>74</sup>

### 3. Commission Determination

44. As discussed below, we deny Joint Advocates' request for rehearing. We disagree with Joint Advocates' characterization of the Commission's determination in the final rule. The Commission did not state that the Connected Entity reporting requirements are "unduly burdensome," rather the Commission stated that it "appreciate[s] the concerns raised about the difficulties of and burdens imposed by" <sup>75</sup> the Connected Entity proposal. Further, we disagree with Joint Advocates' assertion that the final rule takes evidence regarding the burden of the Connected Entity proposal out of context. We acknowledge that AVANGRID's and EEI's comments expressed concerns about the burdens associated with both the market-based rate and Connected Entity proposals. However, the final rule elsewhere addressed commenters' concerns with the market-based rate proposal and made adjustments, clarifications, and determinations as needed.<sup>76</sup>

45. Regarding the Connected Entity proposal, the final rule did not detail all of the commenters' concerns. For example, commenters expressed concerns with the proposal, specifically with the proposed definition of "trader," <sup>77</sup> the scope of the proposal,<sup>78</sup> and other aspects of the Connected Entity proposal.<sup>79</sup> Ultimately, in the final rule, the Commission noted AVANGRID's, EEI's, and Berkshire's concerns while also noting that some commenters supported the Connected Entity proposal. After consideration of all of the comments, the Commission transferred the record to Docket No. AD19-17-000 "for possible consideration in the future as the Commission may deem appropriate." <sup>80</sup>

In doing so, the Commission acknowledged that it could explore the Connected Entity proposal in the future. Accordingly, we accept Joint Advocates' alternative request and place their instant comments in the record of Docket No. AD19-17-000 for consideration in the future as the Commission may deem appropriate.

### C. Implementation & Data Dictionary

#### 1. Final Rule

46. In the final rule, the Commission revised the previous implementation schedule in the NOPR based on concerns regarding feasibility. The Commission explained that initially, after the final rule's issuance, documentation for the relational database will be posted to the Commission's website, including the extensible markup language document (XML), XML Schema Definition document (XSD), the Data Dictionary, and a test environment user guide as well as a basic relational database test environment. Additionally, the Commission stated that it intends to add to the new test environment features on a prioritized, scheduled basis until complete. The Commission stated that it would inform the public when releases will be made publicly available.<sup>81</sup>

47. The Commission stated that, during the development and testing phase, it would encourage feedback from outside testers and that, to facilitate this feedback, Commission staff will conduct outreach with submitters and external software developers, making any necessary corrections to available requirements and/or documentation.<sup>82</sup> In addition, the Commission explained that, in spring 2020, a user guide and a list of frequently asked questions regarding the process for preparing and submitting information into the relational database will be available on its website.<sup>83</sup>

48. The Commission also explained that, in fall 2020, submitters will be required to obtain FERC generated IDs

(GID)<sup>84</sup> for any reportable entity<sup>85</sup> that does not have a CID or LEI,<sup>86</sup> as well as the Commission-issued "Asset Identification" (Asset ID) number<sup>87</sup> for any reportable generation asset without a Plant Code, Generator ID, and Unit Code information from the Energy Information Agency (EIA) Form EIA-860 database (collectively, EIA Code).<sup>88</sup> The Commission stated that more information on discovering or obtaining these IDs will be published on the Commission's website.<sup>89</sup>

49. The Commission explained that, after all necessary IDs are acquired, submitters must then submit their baseline submissions into the relational database by close of business on February 1, 2021.<sup>90</sup>

50. The Commission stated that, to the extent that the Commission finds that technical workshops would be helpful after publication of the final rule, it will provide for those workshops.<sup>91</sup> In addition, the Commission explained that, if necessary, requests for an extension to the initial submission deadlines may be submitted similar to the way in which a current request for extension of time would be submitted to the Commission for consideration.<sup>92</sup>

51. The Commission determined that it would post the Data Dictionary and supporting documentation to the Commission's website.<sup>93</sup> The Commission also concluded that there was no need for additional notice and opportunity for comment on the Data Dictionary, but the Commission noted

<sup>84</sup> The GID is a new form of identification that was created alongside the final rule to serve as an identifier for reportable entities that do not have a Company Identifier (CID) or Legal Entity Identifier (LEI). The Commission explained that the system will allow Sellers to obtain unique GIDs for their affiliates and that additional information on the mechanics of this process will be made available on the Commission's website prior to the final rule's October 1, 2020 effective date. The Commission required affiliates to be identified using their CID if they have one, but if they do not, the Seller must use the LEI for the affiliate if available. If the affiliate has neither, the Commission required that the GID must be provided. *Id.* P 24 n.42.

<sup>85</sup> Reportable entities are any companies or natural persons that a Seller needs to identify in its database submissions.

<sup>86</sup> LEI is a unique 20-digit alpha-numeric code assigned to a single entity. They are issued by the Local Operating Units of the Global LEI System. *Id.* P 18 n.30.

<sup>87</sup> *Id.* P 64. The Commission added that, when creating the Asset ID, Sellers will be required to provide basic information about the generator, such as its plant name, nameplate capacity, and month and year it began commercial operation (if known). *Id.* n.108.

<sup>88</sup> *Id.* PP 64, 313.

<sup>89</sup> *Id.* P 313.

<sup>90</sup> *Id.* P 312.

<sup>91</sup> *Id.* P 317.

<sup>92</sup> *Id.* P 318 & n.398 (citing 18 CFR 385.212).

<sup>93</sup> *Id.* P 209.

<sup>74</sup> *Id.* at 3.

<sup>75</sup> Order No. 860, 168 FERC ¶ 61,039 at P 184.

<sup>76</sup> For example, in response to commenters' concerns, the Commission decided to not adopt the requirement for Sellers to identify their relationships with foreign governments. *Id.* P 146.

<sup>77</sup> Berkshire at 13-17; EEI at 11-15; International Energy Credit Association at 5-12; AVANGRID at 11-12; NextEra Energy, Inc. at 4-6; Manitoba Hydro at 3; Power Trading Institute at 5-6; Financial Institutions Energy Group 10-11.

<sup>78</sup> AVANGRID at 14-17; International Energy Credit Association at 22-23; Financial Institutions Energy Group at 4-13; Commercial Energy Working Group at 20-22.

<sup>79</sup> See International Energy Credit Association at 17-19; Power Trading Institute at 5 (opposing the requirement for Sellers to obtain LEIs); Berkshire at 4-8; NextEra Energy, Inc. at 3-4 (opposing the requirements to disclose certain affiliates that would fall within the definition of "connected entities").

<sup>80</sup> Order No. 860, 168 FERC ¶ 61,039 at P 184.

<sup>81</sup> *Id.* PP 308-309.

<sup>82</sup> *Id.* P 310.

<sup>83</sup> *Id.* P 311.



that Sellers may reach out to Commission staff for further information.<sup>94</sup>

## 2. Request for Clarification and/or Rehearing

52. EEI requests clarification regarding several implementation issues.<sup>95</sup> First, EEI argues that the implementation timeline should be extended to reflect the scope of the data required to be submitted and implementation challenges. EEI suggests that the Commission has adopted an unreasonably short timeline for implementing the final rule, considering the numerous questions as to implementation.<sup>96</sup> EEI argues that unexpected delays could impact compliance with the final rule and that, while the Commission has posted information regarding the XML, XSD, and Data Dictionary, it should also provide clarity as to when the other tools mentioned in the final rule will be available to users if such information is known.<sup>97</sup>

53. According to EEI, the scope and breadth of the data gathering effort will be extensive in most cases because the data to be gathered is nuanced and requires judgment to determine whether the data falls within the final rule's scope. EEI notes that the Commission now requests data on: (1) The contents of market-based rate tariffs and certain power purchase agreements (PPAs); (2) IDs associated with counterparties to those PPAs; (3) dates related to the various elements of the market-based rate tariffs and PPAs; (4) certain generation; and (5) certain affiliates. EEI points out that the breadth of this data is greater than what is collected today for asset appendices and that it may be difficult to identify who may hold this information, given that ultimate upstream owners often restrict the flow of data among affiliates.<sup>98</sup>

54. In addition, EEI explains that one of the first tasks of each Seller will be to determine for which generating assets it lacks EIA Codes and for which affiliates and counterparties, if any, it lacks a CID or LEI. EEI points out that in both cases the Commission must first generate data. EEI explains that requests for GIDs and Asset IDs are to be submitted in Fall 2020 and that given the compliance deadline and the fact that the Commission must first compile requests, this date occurs too late in the

process to meet the Commission's current implementation date. EEI also submits that the Commission first must post a CID list that is kept up-to-date so Sellers can know whether to request an GID.<sup>99</sup> EEI posits, however, that the Commission must recognize that it will take time for Sellers to determine the set of PPAs that require GIDs because no list of PPAs under which the Seller is a long-term Seller likely exists and, if a Seller's Electric Quarterly Report (EQR) contains such a list, it must be sorted by long-term sales of energy or capacity. EEI provides that only then can the CID list be checked to determine the need for an GID.<sup>100</sup>

55. EEI maintains that another issue that will affect the implementation timeframe is the need for internal compliance personnel and compliance programs to determine ongoing compliance. EEI suggests that such personnel will be spread over many departments and training will be required to establish reporting obligations and on the use of data collection software if data entry is not centralized.<sup>101</sup>

56. EEI contends that the data entry task will be substantial for some reporting entities and should be considered in estimating compliance time.<sup>102</sup> EEI suggests that, because the data entry and data gathering tasks are potential sources of human error, some level of review may be necessary post-data collection to ensure that obvious errors or omissions have not occurred.

57. EEI next contends that technical conferences are needed to refine the Data Dictionary and clarify the data that must be collected. For example, EEI references the Commission's guidance in the final rule regarding reporting the number of megawatts associated with full and partial requirements sales agreements, *i.e.*, “[f]or a full requirements contract, the amount should equal the buyer's most recent historical annual peak load” and “for a partial requirements contract, the amount should equal the portion of the buyer's requirements served by the seller multiplied by the buyer's annual peak load.”<sup>103</sup> EEI argues that this guidance raises several questions, and entities will have difficulty knowing what data to gather and report. Each entity may interpret the data

requirements differently without Commission clarification.<sup>104</sup>

58. EEI also questions the need for many of the date fields in the Data Dictionary. For example, EEI argues that the need for a field on “relationship\_start\_date” in the “entities\_to\_entities” table is unclear. EEI contends that, unless the Commission explains the need for retroactive dates in this field, as well as in other fields such as the “cat\_status\_effective\_date” field in the category status table, it should allow the Sellers to use the date of the baseline filing and not seek historical dates. EEI asserts that if the Commission does not accept this alternative, it should allow discussion during the technical conference on how this burden can be reduced. In addition, EEI states that both outside vendors and in-house personnel will build data collection software for the final rule. EEI argues however that the Data Dictionary in and of itself does not allow software developers to understand what is needed in the software. EEI references several tables, including “mbr\_authorization,” “mbr\_category\_status,” and “entities\_to\_genassets,” which could each be populated in different ways. EEI thus maintains that, for the software to have the functionality needed to meet the Commission's needs, Commission staff and Sellers must explain to software developers how each table in the Data Dictionary will work.

59. Similarly, EEI suggests that software developers will need time to understand how each table may be used by a variety of customers before they can begin coding. EEI maintains that, because Sellers will require new data collection software to convert the collected data into an XML format, technical conferences will be useful for providing feedback about how long this process will take. EEI suggests that developing new software can take between six months to more than a year and that the relational database is more complicated than past Commission endeavors because some entities will not have a vendor in place. EEI submits that most Sellers will need time to contract to develop software, the process of which will likely take several months.<sup>105</sup>

60. EEI further provides comments on specific fields, such as the “PPA Agreement ID” field in the PPA table. EEI requests that the Commission verify that the identifier for each PPA should be the one used in EQR Field 20 only if the Seller is making a sale and that,

<sup>94</sup> *Id.* P 212.

<sup>95</sup> EEI Request at 4.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 4–5 (quoting Order No. 860, 168 FERC ¶ 61,039 at PP 309–310).

<sup>98</sup> *Id.* at 10–11.

<sup>99</sup> *Id.* at 11.

<sup>100</sup> *Id.* at 11–12.

<sup>101</sup> *Id.* at 12.

<sup>102</sup> *Id.* at 13.

<sup>103</sup> *Id.* (quoting Order No. 860, 168 FERC ¶ 61,039 at P 94).

<sup>104</sup> *Id.* at 6–7.

<sup>105</sup> *Id.* at 12–13.



where the Seller is purchasing long-term, it does not need to check to see: (1) If the Seller files EQRs; and (2) review the EQR of that Seller and find its identifier in its Field 20.<sup>106</sup> In regards to operating reserves, EEI requests that the Commission clarify that it is only seeking information as to Sellers who receive a Seller-specific order as to permit sales of operating reserves in a non-ISO/RTO balancing authority area in which it would otherwise be prohibited from selling under the model tariff wording.<sup>107</sup>

61. Lastly, EEI seeks clarification that Commission staff can make changes to the Data Dictionary fields as appropriate to reflect the outcome of the technical conference.<sup>108</sup>

### 3. Commission Determination

62. We grant EEI's request for clarification in part and deny it in part. First, we deny EEI's request to extend the implementation timeline and disagree with EEI's assessment that the scope and breadth of the data gathering effort will be extensive. As noted in the final rule, Sellers already collect most of the information required to be submitted under the final rule, either as part of the narratives in their market-based rate filings, asset appendices, EQRs, or as part of their market-based rate tariffs.<sup>109</sup> For example, Sellers should already have available a list of long-term PPAs in which they are the seller because such sales are reported in EQRs. The final rule merely alters the manner in which Sellers will provide this data to the Commission. Additionally, the current implementation timeline provides Sellers with over 18 months to gather any new data that they may be required to submit into the database.<sup>110</sup> We find this to be enough time to gather any necessary information.

63. In response to EEI's concerns that Sellers and vendors will not have enough time to become familiar with the submission process, we note that on January 10, 2020, the Commission provided, on its website,<sup>111</sup> updated versions of the Data Dictionary, XML, XSD, and a frequently asked questions document, as well as provided access to a test environment for the relational

database.<sup>112</sup> We expect that these items should provide Sellers, vendors, and other interested parties with a reasonable level of clarity on what Sellers will be required to submit and aid in the creation of tools to make those submissions. In regard to EEI's concerns that Sellers may not have enough time to determine for which affiliates or counterparties it needs to obtain a GID and which generating assets need Asset IDs, we note that the test environment (and the future portal for the relational database) should address these concerns. Sellers will find within the test environment tools to search for existing CIDs, LEIs, and GIDs, as well as the mechanism to create GIDs and Asset IDs.<sup>113</sup> Further, because the EIA Codes will be pulled from EIA, Sellers may also review the most recent EIA-860 table to discover whether they need to create an Asset ID for any generation asset.<sup>114</sup> Sellers will also be able to make test submissions into the relational database, which will help them to become familiar with the submission requirements of the database and how to format the data required.<sup>115</sup>

64. We anticipate that these items, along with the technical workshop, will provide interested parties with sufficient information and tools to be able to make their submissions. While we appreciate EEI's argument that unexpected delays could impact compliance with the final rule, to date, no such delays have occurred. Nevertheless, if unexpected delays do occur, Sellers may seek an extension of time to make their baseline submissions. Further, to the extent that EEI remains concerned about human error, we reiterate that the Commission's usual practice is simply to require a corrected submittal be made without any sanctions.<sup>116</sup>

65. Next, we grant EEI's request that the Commission hold a technical workshop, and we note that Commission staff will be hosting a technical workshop on February 27, 2020.<sup>117</sup> We expect that many of EEI's concerns with the Data Dictionary and

the data that must be collected will be addressed at the technical workshop. Nevertheless, we take this opportunity to provide some clarifications.

66. We will allow the use of a January 1, 1960 default date for certain date fields, for dates that occur before the October 1, 2020 effective date of the final rule, when populating the database.<sup>118</sup> For example, Sellers may input January 1, 1960 for date fields such as "relationship\_start\_date" in the "entities\_to\_entities" table if the relationship between the entities began before October 1, 2020 and the seller does not know the actual start date.<sup>119</sup>

67. We also verify that the "ppa\_agreement\_id" field in the "entities\_to\_ppas" table will be nullable and Sellers should only populate this field with the ID number in EQR Field 20 when they are reporting their own long-term sales. Stated another way, we do not expect Sellers to review the EQRs of their counterparties when preparing their submissions into the relational database.

68. Regarding operating reserves, we clarify that we are not seeking information on operating reserve authority provided for in standard market-based rate tariff provisions. The Commission is only seeking information on Sellers who have received a seller-specific authority to make sales of operating reserves at market-based rates.<sup>120</sup> Further, for specific questions about the Data Dictionary or other implementation issues, Sellers and

<sup>118</sup> We will continue to require Sellers to populate the "authorization\_effective\_date" field in the "mbr\_authorizations" table with the actual date that their market-based rate tariffs first became effective. For most Sellers this date is easily discoverable as it is in their market-based rate tariff. Additionally, Commission staff currently maintains, and posts on the Commission's website, a document where Sellers can discover this date. See <https://www.ferc.gov/industries/electric/gen-info/mbr/mbr-contact.xlsx>.

<sup>119</sup> One field that EEI specifically inquired about is the "cat\_status\_effective\_date" field in the "mbr\_category\_status" table. We clarify that for category statuses granted prior to October 1, 2020, Sellers may use the default date. For any changes to category statuses that occur after that date, Sellers should populate the effective date of the tariff that first reflects the changed status.

<sup>120</sup> The market-based rate standard tariff includes provisions for sales of ancillary services, including sales of operating reserves, in designated organized markets as well as for third-party sales. The third-party sales of ancillary service tariff provision specifies that authority for sales of "Operating Reserve-Spinning and Operating Reserve-Supplemental do not include sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers, except where the Commission has granted authorization." See <http://www.ferc.gov/industries/electric/gen-info/mbr/filings/tariff-changes/provisions.asp> (emphasis added). The Commission will only require operating reserve information where such specific authorization was granted.

<sup>112</sup> This test environment, and eventually the relational database, can be found at <https://mbrweb.ferc.gov/>.

<sup>113</sup> The ability to search for EIA Codes or Asset IDs for generation assets will be introduced into the test environment a future update.

<sup>114</sup> See <https://www.eia.gov/electricity/data/eia860/>.

<sup>115</sup> As noted in the January 10, 2020 notice, this is a test environment and all submissions into the database, specifically, XMLs and all created GIDs and Asset IDs, will not be part of the official record and will be cleared from the database before it officially goes live.

<sup>116</sup> Order No. 860, 168 FERC ¶ 61,039 at P 293.

<sup>117</sup> See Notice of Technical Workshop, Docket No. RM16-17-000 (Jan. 22, 2020).

<sup>106</sup> *Id.* at 15.

<sup>107</sup> *Id.* at 17.

<sup>108</sup> *Id.*

<sup>109</sup> Order No. 860, 168 FERC ¶ 61,039 at PP 88, 90, 97, 105, 122, and 158.

<sup>110</sup> Submitters have until close of business February 1, 2021 to make their initial baseline submissions.

<sup>111</sup> This information can be found at <https://www.ferc.gov/industries/electric/gen-info/mbr/important-orders/OrderNo860.asp>.

other interested parties may contact Commission staff at [MBRdatabase@ferc.gov](mailto:MBRdatabase@ferc.gov).

#### D. Public Access

##### 1. Final Rule

69. In Order No. 860, the Commission clarified that certain aspects of a Seller's market-based rate filing can appear in eLibrary as either public or non-public. The Commission noted that a Seller, like anyone else submitting information to the Commission, may request privileged treatment of its filing if it contains information that is claimed to be exempt from the Freedom of Information Act's mandatory disclosure requirements.<sup>121</sup> The Commission stated that it did not expect that the information required to be submitted into the relational database will qualify for privileged treatment and consequently declined to incorporate confidentiality safeguards in the relational database.<sup>122</sup>

##### 2. Request for Clarification and/or Rehearing

70. TAPS requests that the Commission clarify that the public has a right to access the relational database.<sup>123</sup> According to TAPS, in the final rule, the Commission repeatedly explains that its expectation is that the public will have access to the relational database.<sup>124</sup> TAPS argues, however, that neither the final rule nor the amended regulatory text directly states that the public will have the right to access, search, and use information contained in the relational database. TAPS requests that the Commission expressly clarify that the public will have the right to do so.<sup>125</sup>

71. TAPS points out that full access to the relational database and its functions is critical because the relational database will be one of the only remaining sources of information about the potential for anticompetitive market power. TAPS explains that this is because the final rule eliminated the requirement to submit organizational charts and for each Seller to report the assets of its affiliates with market-based rate authority. TAPS adds that the Commission also eliminated, in a separate rulemaking, the requirement that Sellers in certain RTO/ISO markets submit indicative screens for assessing horizontal market power.<sup>126</sup>

72. TAPS explains that the final rule also implies that the public will have broad access rights through the relational database's services function. However, TAPS argues that the final rule does not define services function or specify that the public will have access to all of the relational database's functions. TAPS thus requests that the Commission clarify that the public's right to access the relational database includes the ability to use all the functions available to the Commission.<sup>127</sup>

73. In addition, TAPS requests that the Commission clarify that the public will have access to the following: (1) The relational database function that generates organizational charts; (2) the same historical data as filers (*i.e.*, Sellers); and (3) the full set of market-based rate information, either through eLibrary or otherwise, including information Sellers submit into the database. TAPS also asks that the Commission clarify that all of the historical data preserved will be publicly available.<sup>128</sup>

##### 3. Commission Determination

74. As TAPS requests, we clarify that the public will be able to access the relational database. In this regard, we clarify that we will make available services through which the public will be able to access organizational charts, asset appendices, and other reports, as well as have access to the same historical data as Sellers, including all market-based rate information submitted into the database. We also clarify that the database will retain information submitted by Sellers and that historical data can be accessed by the public.

#### E. Due Diligence

##### 1. Final Rule

75. With respect to the due diligence standard in § 35.41(b), the Commission stated that it generally will not seek to impose sanctions for inadvertent errors, misstatements, or omissions in the data submission process. The Commission stated its expectation that Sellers will apply due diligence to the retrieval and reporting of the required information by establishing reasonable practices and procedures to help ensure the accuracy of their filings and submissions, which should minimize the occurrence of any such inadvertent errors, misstatements, or omissions. However, the Commission explained that the intentional or reckless submittal of incorrect or misleading information could result in

the Commission imposing sanctions, including civil penalties. The Commission explained that these circumstances might include, for example, systemic or repeated failures to provide accurate information and a consistent failure to exercise due diligence to ensure the accuracy of the information submitted.<sup>129</sup>

76. The Commission declined to adopt a "safe harbor" or a "presumption of good faith" or "good faith reliance on others defense," nor did the Commission decide to limit enforcement actions to only where there is evidence demonstrating that an entity intentionally submitted inaccurate or misleading information to the Commission.<sup>130</sup>

77. The Commission reiterated that a due diligence standard provides the Commission with sufficient latitude to consider all facts and circumstances related to the submission of inaccurate or misleading information (or omission of relevant information) in determining whether such submission is excusable and whether any additional remedy beyond correcting the submission is warranted.<sup>131</sup>

78. The Commission explained that establishing adequate due diligence practices and procedures ultimately depends on the totality of facts and circumstances and can vary case to case, depending upon evidence presented and whether, for example, reliance on third parties or affiliates is justified under the specific circumstances. The Commission added that most Sellers have knowledge of their affiliates' generation portfolios because Sellers must include this information in their indicative screens, so to the extent that the auto-generated asset appendix is clearly incongruous with the screens, the Commission expects that the Seller will make note of the perceived error in the transmittal letter.<sup>132</sup>

79. The Commission explained however that, if a Seller does not have accurate or complete knowledge of its affiliates' market-based rate information, in most cases it should be able to rely on the information provided by its affiliates unless there is some indication that the information the affiliate supplies is inaccurate or incomplete.<sup>133</sup> The Commission added that, although Sellers should not ignore obvious inaccuracies or omissions, relying on information from affiliates should be

<sup>121</sup> See 5 U.S.C. 552.

<sup>122</sup> Order No. 860, 168 FERC ¶ 61,039 at P 284.

<sup>123</sup> TAPS Request at 4.

<sup>124</sup> *Id.* (citing Order No. 860, 168 FERC ¶ 61,039 at PP 151, 152, 158, 234, 284).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 4–5.

<sup>128</sup> *Id.* at 5–6.

<sup>129</sup> Order No. 860, 168 FERC ¶ 61,039 at PP 291–293.

<sup>130</sup> *Id.* P 294.

<sup>131</sup> *Id.* P 295.

<sup>132</sup> *Id.* PP 295–296.

<sup>133</sup> *Id.* P 297.

sufficient to satisfy the due diligence standard provided there is a reasonable basis to believe that such information obtained from affiliates or third parties is reliable, accurate, and complete.<sup>134</sup>

## 2. Request for Rehearing

80. TAPS requests rehearing as to whether the Commission erred by (1) failing to include safeguards during the relational database's initial implementation to ensure that the newly adopted relational database functions as intended and at least as well as the pre-Order No. 860 data collection regime, and (2) failing to adequately specify the Commission's expectations for satisfying the Commission's<sup>135</sup> due diligence requirements under the new reporting regime.

81. According to TAPS, Order No. 860 conceded the risk of reporting errors and the Commission erred in declining to continue existing reporting requirements or other safeguards during the initial implementation of the relational database.<sup>136</sup> TAPS contends that the Commission also erred in failing to specify what ongoing practices and procedures the Commission expects Sellers to implement to satisfy their due diligence obligations.<sup>137</sup>

82. TAPS asserts that the essential component of the relational database is identifying common ultimate upstream affiliates among Sellers.<sup>138</sup> TAPS argues that the relational database will not work if Sellers fail to correctly identify their ultimate upstream affiliates and that, because of complex corporate organizational structures, the risk of such failures is significant, as the Commission acknowledged. TAPS maintains that the risk of error will increase over time as changes in ownership result in a new ultimate upstream affiliate. TAPS adds that other problems that could compromise the relational database are likely to emerge after the database is fully developed and implemented.<sup>139</sup>

83. TAPS contends that the final rule's response and solution to the problem of misreporting are inadequate. TAPS states that the final rule claims that the CID, LEI, and/or GID assigned by the relational database to each ultimate upstream affiliate will reduce the likelihood that Sellers attempting to

report the same ultimate upstream affiliate inadvertently report different entities.<sup>140</sup> TAPS argues however that the Commission conceded that this only remedies reporting errors where Sellers are attempting to report the same ultimate upstream affiliates, and that it does not address the concern that some Sellers will misidentify their ultimate upstream affiliates at the outset.<sup>141</sup> According to TAPS, the final rule claims that this error can be identified and addressed when a Seller views its auto-generated asset appendix.<sup>142</sup> However, TAPS argues that the auto-generated asset appendix may not help remedy this reporting error where there is no specific directive that Sellers perform an independent review of the asset appendix, retain the audit trail necessary to do so, or report errors for correction and/or correct such errors unless the errors are obvious. TAPS asserts that the final rule both fails to require such an audit trail and even allows Sellers to rely on other Sellers' information for accuracy.<sup>143</sup>

84. TAPS argues that the Commission should implement two safeguards to address these concerns. First, TAPS requests that, for purposes of accuracy, the Commission require that baseline database submissions, if not all submissions during the first three years of the relational database, include the asset appendix generated without using the database. TAPS contends that this will enable the Commission and others to check that the initial implementation of the relational database does not omit relevant information that would have been collected and made available under the previous market-based rate reporting regime.<sup>144</sup>

85. Second, TAPS requests that the Commission articulate its expectation for what practices Sellers should adopt after this initial three-year period to satisfy their due diligence obligations under § 35.41(b). Specifically, TAPS contends that the Commission specify that it expects Sellers' continued due diligence practices to include: (1) Creating appendices of affiliated generation assets developed without reliance on the relational database; (2) comparing the non-relational database asset appendices against the ones generated by the database; and (3) retention of those comparisons for a reasonable time (at least six years, or

two triennial market power updates). TAPS maintains that these requirements will ensure Sellers are able to identify reporting errors, the Commission can check the accuracy of the database-generated asset appendices, and the Commission can fulfill its statutory mandate to ensure just and reasonable rates during this transition.<sup>145</sup>

## 3. Commission Determination

86. We deny TAPS's request for rehearing requesting safeguards during the initial implementation of the relational database and requesting that there be specific expectations regarding due diligence obligations moving forward. We agree with TAPS that, for the relational database to work as intended, common ultimate upstream affiliates between Sellers must be correctly identified, and we expect Sellers to exercise due diligence as they make their initial submissions in the relational database. As stated in the final rule, the Commission acknowledged that there would be some risk of reporting errors where there are subtle changes in ownership percentages resulting in new ultimate upstream affiliates that may not be universally noticed and reported by all affiliated Sellers.<sup>146</sup> We also acknowledge that there will be reporting errors if, as TAPS suggests, Sellers misidentify their ultimate upstream affiliates at the outset. However, we believe these reporting errors will be minimal as the Commission's definition for ultimate upstream affiliate is clear.<sup>147</sup>

87. As such, we affirm the Commission's due diligence findings in the final rule, and decline to impose the additional requirements that TAPS requests. The Commission explained that a due diligence standard provides the Commission with sufficient latitude to make case-by-case considerations and that due diligence practices and procedures ultimately depend on the totality of the facts and circumstances, including whether reliance on third-parties or affiliates for information is justified.<sup>148</sup> We emphasize that the Commission's regulations impose a duty of candor on all Sellers to provide actual and factual information and to not submit false or misleading information in communications, or omit material information, in any communication with the Commission.<sup>149</sup> To the extent

<sup>134</sup> *Id.* P 298.

<sup>135</sup> 18 CFR 35.41(b).

<sup>136</sup> TAPS Request at 14–15 (citing Order No. 860, 168 FERC ¶ 61,039 at PP 123, 310).

<sup>137</sup> *Id.* at 15 (citing Order No. 860, 168 FERC ¶ 61,039 at P 291).

<sup>138</sup> *Id.* (quoting Order No. 860, 168 FERC ¶ 61,039 at P 5).

<sup>139</sup> *Id.* at 15–16.

<sup>140</sup> *Id.* at 16 (quoting Order No. 860, 168 FERC ¶ 61,039 at P 51).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (quoting Order No. 860, 168 FERC ¶ 61,039 at P 123).

<sup>143</sup> *Id.* at 16–17 (quoting *inter alia* Order No. 860, 168 FERC ¶ 61,039 at P 298).

<sup>144</sup> *Id.* at 17–18.

<sup>145</sup> *Id.* at 18–19 (citing Order No. 860, 168 FERC ¶ 61,039 at P 292).

<sup>146</sup> Order No. 860, 168 FERC ¶ 61,039 at P 123.

<sup>147</sup> See *supra* n.9.

<sup>148</sup> See Order No. 860, 168 FERC ¶ 61,039 at PP 295–296.

<sup>149</sup> 18 CFR 35.41(b).

that there are inaccuracies in auto-generated asset appendices, we expect that Sellers will note those perceived errors in their transmittal letters. We reiterate that, while we expect that most inadvertently erroneous or incomplete submissions will be promptly corrected by reporting entities without the imposition of any penalty, the Commission will continue to exercise its discretion based on the circumstances to determine whether sanctions are appropriate.<sup>150</sup>

88. In addition, we find that TAPS's request for additional safeguards would both be burdensome and undermine the benefits of establishing the relational database. First, if the Commission required that all baseline database submissions and all submissions during the first three years of the relational database include asset appendices generated without the database, this would, in substance, continue the pre-final rule reporting regime except with additional filings.<sup>151</sup> Given that a purpose of the final rule is to reduce burden, this requirement would run counter to the one of the goals of the final rule and would result in a more burdensome system for Sellers; however, the Commission and the public would receive little, if any, added benefit.

89. Likewise, with respect to ongoing due diligence requirements, we decline to require that Sellers are expected to: (1) Create asset appendices without relying on the relational database; (2) compare those asset appendices to the ones generated by the database; and (3) retain those comparisons for at least six years. Although characterized as expectations, TAPS's request can be read as additional requirements that would be part of Sellers' responsibilities under § 35.41(b). As noted above, such requirements would run counter to the purpose of the final rule, specifically, the goal to reduce burden on Sellers. We reiterate, however, that Sellers have a duty to perform due diligence to ensure that the information that they provide to the Commission is accurate and complete, and we encourage Sellers to adopt due diligence practices, which could include those proposed by TAPS.

### III. Document Availability

90. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all

interested persons an opportunity to view and/or print the contents of this document via the internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE, Room 2A, Washington DC 20426.

91. From FERC's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

92. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

### IV. Effective Date

93. The order on rehearing and clarification is effective October 1, 2020.

By the Commission. Commissioner Glick is dissenting in part with a separate statement attached.

Issued: February 20, 2020.

**Nathaniel J. Davis, Sr.,**  
*Deputy Secretary.*

### UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION

Data Collection for Analytics and Surveillance and Market-Based Rate Purposes

Docket No. RM16-17-001

GLICK, Commissioner, *dissenting in part:*

1. I dissent in part from today's order, because I believe that the Commission should have finalized a critical aspect of the notice of proposed rulemaking<sup>1</sup> (NOPR) that would have required Sellers<sup>2</sup> and entities that trade virtual products or that hold financial transmission rights (Virtual/FTR Participants)<sup>3</sup> to report information

<sup>1</sup> *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045 (2016) (NOPR).

<sup>2</sup> "Seller means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act." 18 CFR 35.36(a)(1) (2018).

<sup>3</sup> As explained in the final rule, the Commission proposed to define the term "Virtual/FTR

Participants" as entities that buy, sell, or bid for virtual instruments or financial transmission or congestion rights or contracts, or hold such rights or contracts in organized wholesale electric markets, not including entities defined in section 201(f) of the FPA. *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 168 FERC ¶ 61,039, at P 182 (2019) (Final Rule).

2. When it comes to detecting market manipulation, context matters. A transaction that seems benign when viewed in isolation may raise serious concerns when viewed with an understanding of the relationships between the transacting parties and/or other market participants.<sup>4</sup> Unfortunately, information regarding the legal and contractual relationships between market participants is not widely available and may, in some cases, be impossible to ascertain without the cooperation of the participants themselves. That lack of information can leave the Commission in the dark and unable to fully monitor wholesale market trading activity for potentially manipulative acts.

3. That problem is particularly acute when it comes to market participants that transact only in virtual or FTR products. Virtual/FTR Participants are very active in RTO/ISO markets and surveilling their activity for potentially manipulative acts consumes a significant share of the Office of Enforcement's time and resources. It may, therefore, be surprising that the Commission collects only limited information about Virtual/FTR Participants and often cannot paint a complete picture of their relationships with other market participants. Similarly, the Commission has no mechanism for tracking recidivist fraudsters and manipulators who deal in

<sup>4</sup> See NOPR, 156 FERC ¶ 61,045 at P 43.

<sup>150</sup> Order No. 860, 168 FERC ¶ 61,039 at P 294.

<sup>151</sup> Further, we note that Sellers will not need to submit a transmittal letter with their baseline database submissions. Instead, the baseline submissions will consist solely of the submission of information into the database as required by the final rule.

these products and perpetuate their fraud by moving to different companies or participating in more than one RTO or ISO. And, perhaps most egregiously, the Commission's current regulations do not impose a duty of candor on Virtual/FTR Participants, meaning that bad actors can lie with impunity, at least insofar as the Commission is concerned.<sup>5</sup> The abandoned aspects of the NOPR would have addressed all three deficiencies, among others.

4. The Commission "declines to adopt" this Connected Entity Information aspect of the NOPR based only on its "appreciat[ion]" of the "difficulties of and burdens imposed by this aspect of the NOPR."<sup>6</sup> That is hardly a reasoned explanation for why an unspecified burden outweighs the boon that Connected Entities Information would provide to the Commission's ability to carry out its enforcement responsibilities. The Commission does note that it has transferred the record to a new docket for "possible consideration in the future as the Commission may deem appropriate."<sup>7</sup> Unfortunately, there is every indication that it will languish there for the foreseeable future.

5. That is a shame. Without the Connected Entity Information, we are forcing the Commission's Office of Enforcement to police the markets for manipulation with one arm tied behind its back. And despite the Office's valiant efforts, that means that market participants are more likely to find themselves subject to a manipulative scheme than if we had proceeded to a final rule on these aspects of the NOPR.

For these reasons, I respectfully dissent in part.

Richard Glick,  
*Commissioner.*

[FR Doc. 2020-03927 Filed 3-5-20; 8:45 am]

**BILLING CODE 6717-01-P**

<sup>5</sup> In contrast, section 35.41(b) of the Commission's regulations requires a Seller to "provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission," market monitors, RTOs/ISOs, or jurisdictional transmission providers, unless the "Seller exercises due diligence to prevent such occurrences. Virtual/FTR Participants are not subject to this duty of candor. The Connected Entity portion of the NOPR proposed to add a new section 35.50(d) to the Commission's regulations that would require the same candor from Virtual/FTR Participants in all of their communications with the Commission, Commission-approved market monitors, RTOs, ISOs, and jurisdictional transmission providers. NOPR, 156 FERC ¶ 61,045 at P 20.

<sup>6</sup> *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 170 FERC ¶ 61,129, at P 44 (2020).

<sup>7</sup> *Id.* P. 45.

## DEPARTMENT OF LABOR

### Employment and Training Administration

**20 CFR Parts 641, 655, 656, 658, 667, 683, and 702**

#### Office of the Secretary of Labor

**29 CFR Parts 2, 7, 8, 10, 13, 18, 24, 29, 38, and 96**

#### Office of Labor-Management Standards

**29 CFR Parts 417 and 471**

#### Wage and Hour Division

**29 CFR Parts 501 and 580**

#### Occupational Health and Safety Administration

**29 CFR Parts 1978 through 1988**

#### Office of Federal Contract Compliance Programs

**41 CFR Parts 50-203 and 60-30**

**RIN 1290-AA39**

#### Discretionary Review by the Secretary

**AGENCY:** Office of the Secretary

**ACTION:** Direct final rule.

**SUMMARY:** The Department of Labor is issuing this direct final rule (DFR) to establish a system of discretionary secretarial review over cases pending before or decided by the Board of Alien Labor Certification Appeals and to make technical changes to Departmental regulations governing the timing and finality of decisions of the Administrative Review Board and the Board of Alien Labor Certification Appeals to ensure consistency with the new discretionary review processes proposed in this rule and established in Secretary's Order 01-2020.

**DATES:** This direct final rule is effective April 20, 2020 unless significant adverse comment is submitted (transmitted, postmarked, or delivered) by April 6, 2020. If DOL receives significant adverse comment, the Agency will publish a timely withdrawal in the **Federal Register** informing the public that this DFR will not take effect (see Section III, direct final rulemaking, for more details on this process). Comments to this DFR and other information must be submitted (transmitted, postmarked, or delivered) by April 6, 2020. All submissions must

bear a postmark or provide other evidence of the submission date.

**ADDRESSES:** You may send comments, identified by Regulatory Identification Number (RIN) 1290-AA39, by either one of the following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the website instructions for submitting comments. To facilitate receipt and processing of comments, the Department encourages interested parties to submit their comments electronically.

- *Mail, hand delivery, express mail, courier service, or email.* You may submit your comments and attachments to Mr. Thomas Shepherd, Clerk of the Appellate Boards, Room S-5220, 200 Constitution Avenue NW, Washington, DC 20210, or you may submit them by email to [Shepherd.Thomas@dol.gov](mailto:Shepherd.Thomas@dol.gov). The Office of the Clerk is open during business hours on all days except Saturdays, Sundays, and federal holidays, from 8:30 a.m. to 5:00 p.m., Eastern Time.

*Instructions:* All submissions received must include the agency name and Regulatory Information Number (RIN) for this rulemaking. All comments received will generally be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas Shepherd, Clerk of the Appellate Boards, at 202-693-6319 or [Shepherd.Thomas@dol.gov](mailto:Shepherd.Thomas@dol.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Two of the four review boards within the Department of Labor were created by voluntary delegations of authority by previous Secretaries of Labor. Specifically, the Administrative Review Board (ARB)—which has authority to hear appeals from the decisions of the Department's Office of Administrative Law Judges (OALJ) about certain immigration, child labor, employment discrimination, federal construction/service contracts, and other issues—and the Board of Alien Labor Certification Appeals (BALCA)—which has authority over appeals from the decisions of the Employment and Training Administration's adjudication of foreign labor certification applications—were created, respectively, by a Secretary's Order and by regulation. Their existence is neither compelled nor governed by statute. Notably, before the ARB was created in 1996, many of the types of cases now subject to its jurisdiction were decided directly by the Secretary. Each board was also entrusted with the