

Client Alert

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FERC Substantially Modifies Filing Requirements for Market-Based Rate Sellers and Clarifies Rules on Priority Rights Granted to Owners of Certain Interconnection Facilities

By Robert Fleishman, Zori Ferkin, and Paul Varnado

On October 16, 2015, the Federal Energy Regulatory Commission (FERC or “Commission”) issued Order No. 816 that revises filing requirements for market-based rate (MBR) sellers of electric energy, capacity, and ancillary services.¹ The Final Rule will reduce the administrative burden on current and prospective participants in wholesale power markets in certain respects and create certain new regulatory obligations. Order No. 816 amends Part 35 of the Commission’s regulations.² The effective date of the Final Rule is 90 days after Order No. 816 is published in the Federal Register. A copy of Order No. 816 can be found [here](#).

FERC also issued an order offering specific guidance to MBR sellers preparing to conduct market power screens,³ a copy of which can be found [here](#), and Order No. 807-A clarifying its regulations and policies regarding open access to and priority rights on Interconnection Customer’s Interconnection Facilities (ICIF), a copy of which can be found [here](#).⁴

REQUIREMENTS FOR MARKET-BASED RATE APPROVAL – QUICK BACKGROUND

The Commission uses a four-prong analysis to assess whether a seller should be granted market-based rate authority: (1) whether the seller and its affiliates lack, or have adequately mitigated, market power in generation; (2) whether the seller and its affiliates lack, or have adequately mitigated, market power in transmission; (3) whether the seller or its affiliates can erect other barriers to entry; and (4) whether there is evidence involving the seller or its affiliates that relates to affiliate abuse or reciprocal dealing. In Order No. 697, the Commission implemented regulations to uniformly review market-based rate applications, implementing market power screens and tests and requiring an MBR filer to make certain representations and provide certain descriptions of its ownership, control, and affiliations.⁵

¹ *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, 153 FERC ¶ 61,065 (2015) (“Final Rule”).

² 18 C.F.R. §§ 35.36, 35.37, 35.42, and Appendices to Part 35.

³ *Public Service Company of New Mexico*, 153 FERC ¶ 61,060 (2015) (“PNM Order”).

⁴ *Order Denying Rehearing and Granting Clarification*, Order 807-A, 153 FERC ¶ 61,047 (2015).

⁵ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 (2007). Order No. 697 was clarified by several subsequent orders.

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FERC REVISES THE SCOPE OF HORIZONTAL MARKET POWER ANALYSIS FOR GENERATION

The Commission's MBR regulations specify two "indicative screens" for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen. Passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.

The Final Rule eliminates the indicative screen requirement for sellers whose generation capacity in the relevant geographic market is fully committed under firm sales arrangements with a non-affiliated buyer for terms of at least one year.⁶ The NOPR proposed eliminating the default requirement for indicative screens for sellers in RTO/ISO markets, reasoning that the monitoring and mitigation functions built into organized markets were an adequate check on horizontal market power. In response to comments questioning the effectiveness of those functions, the Commission in Order No. 816 reversed course and decided to shelve this proposal for now, moving it to a new Docket (AD16-8-000) for future consideration.⁷

Order No. 816 expands the scope of the indicative screens by now requiring a seller to include its long-term firm capacity and/or energy purchases, regardless of whether the seller has operational control of the generation capacity supplying the purchased power.⁸ The Commission also broadens the scope of horizontal market-power analysis for an Independent Power Producer (IPP) located in a generation-only balancing authority by expanding the default relevant geographic market to be the balancing authority area of each transmission provider to which the IPP's generation-only balancing authority area is directly interconnected.⁹

Order No. 816 clarified the "simplifying assumptions" in its indicative screens including assuming no competing import capacity.¹⁰ For the capacity rating used in indicative screens, a seller may now de-rate facilities with energy-limited generation (other than solar photovoltaic generation) below their nameplate ratings, if the seller uses objectively supportable and consistent five-year average capacity factors.¹¹

MBR sellers perform Simultaneous Transmission Import Limit (SIL) studies in horizontal market power analysis as a basis for calculating import capability to serve balancing authority area load. Order No. 816 clarifies several technical aspects of the SIL study methodology in order to improve consistency between the methodology a transmission provider uses to calculate SIL values, the methodology it uses for calculating and posting available transmission capacity or for evaluating transmission service requests, and the transmission provider's tariff.¹²

⁶ Order No. 816 at P 39.

⁷ *Id.* at P 27. The Commission also rejected a proposal to eliminate change in status requirements for sellers located in RTOs/ISOs. *Id.* at P 234.

⁸ *Id.* at P 130. A seller must also now list all long-term purchase agreements in their Asset Appendix. *Id.* at P 270.

⁹ *Id.* at PP 61-71.

¹⁰ *Id.* at P 84.

¹¹ *Id.* at PP 100, 103.

¹² See *id.* at PP 154-162. Further clarifications address the proper inclusion and submittal of data from wheel-through transactions, controllable transmission lines, and load. *Id.* at PP 167-199.

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FERC REQUIRES MORE INFORMATION REGARDING CORPORATE AFFILIATIONS

Citing increasingly complex organizational structures in the ownership interests of generation and utilities, the Commission will require an MBR seller to provide an organizational chart indicating all affiliates, similar to that which it requires from FPA section 203 applicants.¹³ This requirement builds on FERC's recent NOPR seeking from the RTOs/ISOs lists and descriptions of market participants' "Connected Entities" – those with certain ownership, employment, debt, or contractual relationships to the market participant.¹⁴ For the MBR filing, rather than indicating all upstream owners, energy subsidiaries and energy affiliates, a seller should include all "affiliates" as defined under section 35.36(a)(9) of the Commission's MBR regulations.¹⁵ If an entity is owned by multiple individual investors, such investors may be grouped in the organizational chart as long as they are identified elsewhere in the MBR filing.¹⁶ The Commission also reiterates its existing policy that when a corporate family has more than one affiliated seller, it may jointly file a single master tariff.¹⁷

FERC ELIMINATES QUARTERLY LAND ACQUISITION REPORTS

In Order No. 697, FERC instituted a requirement that MBR sellers report quarterly their (and their affiliates') acquisitions of land which could be used as sites for generation development. The purpose of the reports was to elicit useful information regarding the seller's ability to erect barriers to entry in the relevant markets and thus exercise vertical market power. In Order No. 816, FERC eliminates the quarterly reporting of land acquisitions. The Commission acknowledges that this requirement was burdensome, with little to no benefit in terms of useful information regarding barriers to entry.¹⁸

FERC UPDATES DATA REQUIREMENTS FOR MARKET POWER ANALYSES

To streamline data processing, the Commission revises the standard spreadsheet form¹⁹ that entities use to submit indicative screens as part of a horizontal market power analysis:

- adding new rows to the spreadsheet for SIL Values, Long-Term Firm Purchases (from outside the study area), and Remote Capacity (from outside the study area);
- requiring MBR sellers to file the indicative screens and asset appendices in a workable electronic spreadsheet format (i.e., an Excel file);²⁰
- codifying in Appendix A of the MBR regulations the requirement that MBR sellers submitting SIL studies adhere to certain instructions, which have long been posted on the Commission's website;²¹ and

¹³ *Id.* at PP 324, 332-335.

¹⁴ See MoFo's Client Alert on the Connected Entity NOPR [here](#).

¹⁵ Order No. 816 at P 333.

¹⁶ *Id.*

¹⁷ Order No. 816 at P 338.

¹⁸ *Id.* at PP 207-09.

¹⁹ Appendix A of Subpart H of 18 C.F.R. Part 35.

²⁰ Order No. 816 at P 80.

²¹ *Id.* at P 305.

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- codifying in its MBR regulations the regional reporting schedule in Order No. 697 for Category 2 sellers to submit triennial market power analyses.²²

FERC CLARIFIES INFORMATION REQUIRED REGARDING CATEGORIZATION OF MBR SELLERS

Under the MBR regulations, “Category 1” MBR sellers are exempt from periodic updates of market power analyses that apply to “Category 2” sellers.²³ Order No. 816 requires a power marketer with no generation assets, for purposes of determining its seller category status for each region, to now include all affiliated generation capacity in that region.²⁴ Power producers need only include affiliated generation that is located in the same region as the power producer’s generation assets.²⁵ The Commission explains that a power marketer with no generation assets in the ground is assumed to have no home market and is therefore assumed to be equally likely to make sales in any region; in contrast, because a power producer has authorization to make sales in other regions, it is assumed that the majority of its sales will be in the region(s) in which it owns generation assets.²⁶

FERC REVISES REQUIREMENTS FOR NOTICES OF CHANGES IN STATUS

Under the current MBR rules, an MBR seller must report a change in status when it or its affiliates acquire 100 MW or more of generation since the seller’s most recent triennial updated market power analysis or change in status filing in the geographic market that was the subject of the horizontal market power analysis on which the Commission relied in granting MBR authority.²⁷

In the NOPR, FERC had proposed to require a MBR seller to file a change in status notice if it acquires generation that would cause a cumulative net increase of 100 MW or more in the relevant geographic market itself or any “first-tier” market – a directly interconnected market with import potential.²⁸ In Order No. 816, FERC rejects this proposal. FERC adds, however, an obligation to file a change in status report when new affiliate relationships with the MBR seller result in a cumulative net increase of at least 100 MW of generation in the relevant geographic market.²⁹

Order No. 816 clarifies that a seller need not report behind-the-meter generation in its indicative screens and asset appendices, reasoning that it should be reflected in load data separately reported in FERC Form No. 714.³⁰ However, a seller must now count long-term firm power purchases as equivalent to generation capacity for the purpose of calculating the reporting threshold of a 100 MW cumulative increase.³¹

²² *Id.* at P 353.

²³ Order No. 697 at PP 853-863.

²⁴ Order No. 816 at P 320.

²⁵ *Id.*

²⁶ *Id.* at P 315.

²⁷ Order No. 697-A at P 512.

²⁸ Order No. 816 at PP 213, 230. The Commission also rejected proposals to require the use of nameplate capacity to calculate the change in status threshold, rather than seasonal ratings or a five-year average capacity factor. *Id.* at P 232.

²⁹ *Id.* at P 251.

³⁰ *Id.* at PP 252-254.

³¹ *Id.* at P 239.

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FERC CLARIFIES WAIVERS OF CERTAIN ACCOUNTING REQUIREMENTS FOR HYDROPOWER LICENSEES

The Commission has granted certain MBR sellers, such as power marketers and IPPs, waiver of the requirements of much of the Commission's Uniform System of Accounts.³² In Order No. 816, the Commission clarifies that any waiver of Part 101 accounting requirements granted to an MBR seller is limited such that licensed hydropower projects must still comply with the provisions of Part 101 that apply to hydropower licensees.³³ The Commission also reiterates that hydropower licensees with a cost-based rate tariff on file with the Commission must still comply with the full requirements of the Federal Power Act regarding costs and amortization.³⁴

FERC ISSUES ORDER REJECTING MBR APPLICATION AND OFFERING INDUSTRY GUIDANCE

On October 15, 2015, the Commission issued a related order rejecting, without prejudice, the application of Public Service of New Mexico (PNM) to sell electric energy at market-based rates in PNM's balancing authority area and the simultaneous transmission import limit (SIL) values submitted by PNM for the PNM balancing authority area. The Order is significant because the Commission states that it is providing the industry "broadly" in the order guidance as to "the type of information and analysis that is useful and appropriate for our consideration of a Delivered Price Test (DPT) and what is not."

The Commission identifies issues in PNM's DPT analysis and SIL study that "are recurring across a myriad of applicants." Its goal in providing clarification in this order "is to promote compliance with the Commission's regulations and policies in an effort to more timely process requests for market-based rate authorization and reduce delay."³⁵ In evaluating PNM's indicative screens for horizontal market power analysis, the Commission was unable to validate the results of PNM's SIL model, its calculations of available economic capacity and economic capacity, and its Delivered Price Test analysis.³⁶ The deficiencies pertained to: (i) data integrity, (ii) inclusion of nonoperational generating units when calculating potential supply, (iii) calculation methodology of variable costs (fuel, and operations and maintenance), (iv) accounting for long-term power purchase contracts, (v) inclusion of all applicable transmission rates, (vi) calculation methodology of available economic capacity, (vii) use of historical transaction data to corroborate results, and (viii) preparation of the SIL study in accordance with Commission precedent.³⁷

MBR sellers preparing to conduct market power screens should review the PNM Order to ensure they follow the Commission's specific technical guidance.

³² Order No. 697 at P 985.

³³ Order No. 816 at P 345.

³⁴ *Id.* at P 347.

³⁵ *Public Service Company of New Mexico*, 153 FERC ¶ 61,060 at P 77 (2015) ("encourag[ing] other market-based rate applicants to make use of the guidance and clarification offered herein") ("PNM Order")

³⁶ *Id.*

³⁷ *Id.* at PP 10-76.

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FERC CLARIFIES RULES ON PRIORITY RIGHTS GRANTED TO OWNERS OF INTERCONNECTION FACILITIES

On October 15, 2015, FERC issued Order No. 807-A, granting requests for clarification, while denying requests for rehearing, of Order No. 807 in which FERC amended its previous regulations and policies regarding open access to and priority rights on Interconnection Customer's Interconnection Facilities (ICIF).

Order No. 807 amended section 35.28(d) of FERC's regulations to, among other things, grant a blanket waiver of the Open Access Transmission Tariff (OATT), Open Access Same-Time Information System (OASIS), and Standards of Conduct requirements for entities that are subject to such requirements solely because they own, control, or operate ICIF. In response to a request filed by the National Rural Electric Cooperative Association (NRECA), FERC clarified that if an ICIF owner no longer qualifies for the blanket waiver because it ceases to satisfy the qualifications stated in new section 35.28(d)(2) of the Commission's regulations, "the waiver would be automatically revoked with no Commission action being required."³⁸ Once the blanket waiver is no longer applicable, the entity would be required to file an OAT within 60 days and comply with the Commission's OASIS and Standards of Conduct requirements or file a request for waiver of these obligations.³⁹ As we reported in our Client Alert on Order No. 807, the blanket waiver granted in section 35.28(d)(2) is deemed revoked as of the date the public utility ceases to satisfy the qualifications for the waiver.⁴⁰

FERC also clarified that there are situations where FERC will determine that the blanket waiver will be revoked through Commission action. An example would be a situation where FERC determines that it is in the public interest to revoke the waiver in a proceeding under sections 210 and 211 of the FPA. In a situation where Commission action is necessary, FERC will provide the ICIF owner and stakeholders notice of the revocation and full due process rights to respond.⁴¹

We noted in our Client Alert on Order No. 807 that FERC made the blanket waiver available to non-public utilities with a reciprocity obligation.⁴² In requests for clarification, NRECA and the American Public Power Association and the Transmission Access Policy Study Group asked FERC to clarify that a non-public utility that owns ICIF may avail itself of not only the blanket waiver but also the five-year safe harbor period. FERC granted the request and in order 807-A "clarif[i]es that non-public utility ICIF owners may avail themselves of not only the blanket waiver, as the Final Rule stated, but also the safe harbor period." The intent in Order No. 807, FERC states, was to "make the package of reforms equally available to non-public utility ICIF owners."⁴³

³⁸ *Order Denying Rehearing and Granting Clarification*, Order 807-A, 153 FERC ¶ 61,047, at P 26 (2015).

³⁹ *Id.*

⁴⁰ MoFo Client Alert on Order No. 807 at 3.

⁴¹ Order No. 807-A at P 28.

⁴² MoFo Client Alert on Order No. 807 at 1.

⁴³ Order No. 807-A at P 31. Paragraph 31 of Order 807-A erroneously states that the Final Rule "does not explicitly state that non-public utility ICIF owners may take advantage of the blanket waiver..." Order 807, however, at paragraph 82 explicitly provides the blanket waiver to non-public utility ICIF owners with reciprocity obligations. The "omission" in Order 807 was of the safe harbor period.

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Contact:

Robert S. Fleishman
(202) 887-8768
rfleishman@mofo.com

Paul C. Varnado
(202) 887-1531
pvarnado@mofo.com

Zori G. Ferkin
(202) 887-1532
zferkin@mofo.com

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