

FERC Renews Focus on Order No. 860 Database Compliance

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Federal Energy Regulatory Commission's ("FERC's") Order No. 860 required all entities authorized by FERC to sell electric energy, capacity, and/or ancillary services at market-based rates ("MBR Sellers") to submit baseline filings to FERC's MBR Relational database by February 1, 2022. Recently, FERC began contacting certain MBR Sellers that may not have submitted the required baseline filing by email. FERC's notice recommends that the required baseline filing be submitted as soon as possible for the MBR Seller to come into compliance and avoid sanctions.

Below is Bracewell's blog post providing an overview of Order No. 860. Our attorneys also have practical experience with database submissions that have been made thus far. Please do not hesitate to contact us for assistance with Order No. 860 compliance.

On July 18, 2019, the Federal Energy Regulatory Commission ("FERC") issued two final rules—Order Nos. 860 and 861—adopting changes to the regulations and policies applicable to companies selling energy, capacity, or ancillary services at market-based rates ("MBR"). Collectively, the final rules make significant changes to the types of information that companies seeking to obtain or retain MBR authority will be required to provide to FERC as well as the manner in which this information is submitted to FERC.

In Order No. 860, FERC:

- Requires sellers to submit market, asset, and ownership information into a new "relational database" that will be established by FERC, and update this information on a monthly basis;
- Declined to move forward with FERC's controversial proposal to require entities participating in FERC-jurisdictional Regional Transmission Organization ("RTO") and Independent System Operator ("ISO") markets to

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begin identifying and reporting their “Connected Entities,” a term that was defined broadly to include individual traders as well as parties to certain contractual and business relationships; and

- Eliminate the requirement that MBR sellers submit a notice of change in status within 30 days of a material change in facts and instead require sellers to report these changes on a quarterly basis.

Separately, in Order 861, FERC:

- Eliminates the requirement that companies seeking to obtain or retain MBR authority in RTO/ISO markets with centralized capacity markets submit a market power analysis (ISO-NE, NYISO, PJM, and MISO); and
- Requires companies seeking to obtain or retain MBR authority to sell capacity in CAISO or SPP to submit an analysis demonstrating that they do not possess market power.

While certain aspects of these rules undoubtedly will reduce the burden on MBR sellers, they have the potential to create new challenges for MBR sellers as well. For instance, while FERC’s decision to implement a relational database may streamline the reporting of asset information in the long-term, MBR sellers will need to spend significant time becoming acquainted with FERC’s new reporting requirements and preparing their initial baseline submissions to FERC. Some of the new requirements also appear to overlap with existing requirements for Electric Quarterly Reports.

I. Overview of Final Rules

A. Order No. 860 (Data Collection for Analytics and Surveillance and Market-Based Rate Purposes)

In Order No. 860, FERC adopts changes to its regulations that will significantly revamp the way that ownership, asset, and market information is transmitted to FERC. Currently, companies seeking to obtain or retain MBR authority are required to submit excel files: (1) listing the generation assets, long-term firm purchase contracts, transmission assets, and natural gas intrastate pipeline and storage facilities owned or controlled by a filing company and its affiliates; and (2) containing a market share and pivotal supplier analysis in order to demonstrate that the filing company and its affiliates lack horizontal market power in a relevant geographic market.

In Order No. 860, FERC amends its regulations to move away from this structure and instead require companies to begin submitting ownership, asset, and market information in XML format to a new “relational database” that will be created by FERC. Pursuant to Order No. 860, companies seeking to obtain or retain MBR authority will be required to submit a filing to FERC’s relational database in accordance with a data dictionary maintained by FERC:

- Identifying any generation assets, long-term firm purchase contracts, transmission assets, and natural gas pipeline and storage facilities held by the company or its affiliates without market-based rate authority;
- Identifying its ultimate upstream owner(s); and
- Containing the indicative screens for any relevant geographic market.

Once this information is submitted to FERC, FERC's database will generate an asset appendix and market power screens reflecting the assets held by the company and its affiliates (*i.e.*, those under common control) that can be retrieved by the company, FERC staff, and the public. When submitting an MBR filing, a company will be required to incorporate these materials by reference by reporting a serial number associated with the asset appendix and screens that will be generated by FERC's database. In order to ensure that the information in FERC's database is up-to-date, FERC will require sellers to update the database by the 15th of each month to reflect any changes to the information that was previously submitted

Importantly, Order No. 860 will require the information set out above to be submitted on a seller-specific basis. Rather than submitting an asset appendix that identifies all of the relevant assets held by companies under common ownership, each MBR seller will now be required to submit a filing reflecting only those assets held by the seller and *its affiliates without MBR authority*. As a practical matter, this means that each MBR seller within a corporate family will be required to make an initial filing providing the information set out above as well as a monthly filing to report any changes to previously reported information. For instance, if a holding company system has 20 operating subsidiaries with MBR authority, each of these companies will be required to submit a filing providing the information set out above to FERC (*i.e.*, 20 filings). Similarly, if the upstream ownership of the holding company changes, each operating company will be required to submit a monthly update filing to reflect the change in ownership.

In addition to establishing a new relational database, Order No. 860 does make a number of substantive changes and clarifications to the information that MBR sellers will be required to provide:

- **Legal Entity Identifiers:** Initially, FERC proposed requiring all entities to obtain and report a Legal Entity Identifier ("LEI"), which is a unique 20-digit code assigned to an entity by the Global LEI System. In Order No. 860, however, FERC declined to adopt this requirement. Instead, FERC will require sellers to identify themselves and their affiliates/owners by providing an LEI, the Company Identifier ("CID") used for purposes of FERC's eTariff system, or, in the case of entities that do not have an LEI or CID, a new FERC-generated ID.
- **Generator Information:** FERC will now require that each generator be reported separately for purposes of the relational database and that MBR

sellers report the plant code, generator ID, and unit code from the Energy Information Administration's ("EIA") 860 database or to obtain a FERC-generated "asset ID" for generators that have not been reported in the 860 database.

- **Long-Term Firm Sales:** FERC will now require that MBR sellers report any long-term firm sales, which is defined to include any sales for one year or longer that is not interruptible for economic reasons. In addition to reporting the existence of the sale, sellers will be required to identify the counterparty (through a CID, LEI, or FERC-generated ID) and provide information regarding the type, duration, quantity, and location of the sale.
- **Long-Term Firm Purchases:** While MBR sellers already are required to report long-term firm purchases of energy and capacity meeting certain criteria, FERC will now require MBR sellers to provide the associated EIA or FERC Asset ID for the generation facility.
- **Transmission and Natural Gas Asset Information:** MBR sellers will no longer be required to provide specific details about their transmission and natural gas pipeline or storage facilities (e.g., size, length). Instead, MBR sellers' submissions into FERC's database only will be required to indicate whether they have transmission facilities covered by a tariff or natural gas assets in a particular balancing authority area.
- **Change in status reporting requirement:** In light of FERC's decision to require monthly updates to information submitted to its database, FERC will no longer require MBR sellers to file a notice of change in status within 30 days of a material change in facts following the effective date of the rule. Instead, MBR sellers will be required to submit notices of change in status on a quarterly basis.
- **Passive ownership:** Order No. 860 requires that sellers affirm in its filing that any entities with passive (*i.e.*, non-voting) ownership interests own a separate class of non-voting securities, have limited consent rights, do not exercise day-to-day control over the company, and cannot remove the manager without clause. FERC also clarified that sellers are required to submit a notice of change in status filing to report changes in passive (*i.e.*, non-voting) ownership interests so that they can make the necessary affirmations.

Notably, Order No. 860 declines to adopt FERC's initial proposal to require MBR sellers and entities that trade virtual products or sell financial transmission rights ("FTRs") within RTO/ISOs to begin identifying and reporting any "Connected Entities" in order to aid FERC's market surveillance and enforcement programs. As originally proposed, the term Connected Entity would have included owners, affiliates, individual traders, and parties to contracts that confer control over generation. Rather than moving forward with the proposal, Order No. 860 moves these proposals and the associated record to a new docket (AD19-17-000) to be taken up by FERC at a later date if it so

chooses. Based on comments made by the commissioners surrounding Order No. 860, it is clear that the decision to move the Connected Entity proposal to a new docket was the result of a lack of consensus among the Commissioners regarding whether to adopt or withdraw the proposals. For instance, Commissioner Glick expressed his disappointment in FERC's failure to implement this proposal in a dissent stating, "That information is critical to combatting market manipulation and the Commission's retreat from the NOPR proposal will hinder our efforts to detect and deter such manipulation."

B. Order No. 861 (Refinements to Horizontal Market Power Analysis for Sellers in Certain RTO/ISO Markets)

In Order No. 861, FERC revised its regulations such that MBR sellers will no longer be required to submit indicative screens in order to obtain or retain authority to sell energy, ancillary services, and capacity at market-based rates when studying RTO/ISO markets with energy, ancillary services, and capacity markets that are subject to FERC-approved RTO/ISO monitoring and mitigation. Thus, following the effective date of the rule, MBR sellers will no longer be required to submit indicative screens in order to demonstrate that they do not have market power in the markets operated by PJM, MISO, NYISO, and ISO-NE.

Notably, however, FERC rejected requests that it extend this proposal to companies selling at MBR in CAISO and SPP, each of which do not have centralized capacity markets with FERC-approved capacity monitoring and mitigation. In order to make sales of capacity within these markets, MBR sellers will still be required to submit indicative screens demonstrating that they do not have market power in order to sell capacity at MBR. Alternatively, if a seller in CAISO or SPP foregoes capacity sales, it need not submit indicative screens (*i.e.*, if it only sells energy and/or ancillary services at MBR).

In declining to extend these reforms to the CAISO and SPP markets, FERC concluded that the presence of FERC-approved monitoring and mitigation measures in these markets does not eliminate the potential for sellers to exercise market power in connection with their capacity sales. FERC's reasoning was that neither region administers a centralized capacity market and thus does not monitor and mitigate capacity sales. In practice, this means that a seller in CAISO and SPP that fails the screens will no longer be able to rely on the presence of FERC-approved market monitoring and mitigation measures to rebut the presumption that they have market power. Eliminating the ability of sellers in these markets to rely on the presence of market monitoring and mitigation measures has the potential to create challenges for sellers with substantial generation portfolios and/or long-term purchases within these markets.