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Energy ADVISORY ■

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FERC Proposes to Reduce Information Required in Market-Based Rate Filings

The Federal Energy Regulatory Commission (FERC) last month issued a limited proposal to reduce the information required to be filed with some market-based rate filings. The proposal—a Notice of Proposed Rulemaking (NOPR) in Docket No. RM19-2-000—aims to relieve applicants of the need to submit information for FERC's horizontal market power screening tool when requesting to obtain, or retain, market-based rate authorization in certain electricity markets. These changes would be limited to applicants within the footprint of regional transmission organizations (RTO) and independent system operators (ISO) that run capacity markets.

Notice of Proposed Rulemaking

Since 2007, FERC has required applicants who seek to obtain or retain market-based rate authority for electricity sales to prove they lack horizontal market power based on two indicative screening methods: the pivotal supplier screen and the wholesale market screen. Passing both screens then establishes a rebuttable presumption that the applicant does not have horizontal market power.

FERC now proposes to permit market-based rate applicants to eliminate the horizontal market screens in their filings in two circumstances:

- Applicants in RTO and ISO markets with RTO/ISO-administered energy, ancillary services, *and capacity* markets that are subject to relevant monitoring and mitigation.
- Applicants located in RTOs and ISOs without a capacity market if their market-based rate authority will be, or is limited to, the sale of energy and/or ancillary services; that is, the authority would not extend to capacity sales.

No change is proposed for applicants making sales outside of an RTO or ISO market. FERC had advanced a similar proposal in the NOPR preceding its Order No. 816, in which it made a variety of changes to its market-based rate requirements. But it did not adopt the proposal at that time.

FERC's rationale for the proposal is that RTO and ISO market power mitigation methods are designed to prevent the exercise of market power. Because FERC has previously determined that RTO/ISO monitoring and mitigation adequately mitigate a seller's market power, any additional market power protections afforded by the horizontal market power screens are minimal. FERC reasons that the burden on sellers to include these screens in market-based rate filings may outweigh the benefits, given the presumption that RTO and ISO market monitoring and mitigation already address horizontal market power.

The proposal is effectively limited to the eastern and midcontinent organized electric markets with RTO/ISO run capacity markets. FERC would continue to require applicants in areas without an RTO/ISO capacity market to submit the horizontal market screens, essentially those in the southeast, northwest, and western U.S. In the West, the California Independent System Operator (CAISO) and Southwest Power Pool (SPP) run organized markets but do not have capacity markets (and therefore lack mitigation for capacity sales). So the proposal would not apply to applicants in these markets, unless the applicant commits only to sell energy or ancillary services in those markets. If an applicant commits to limit its sales to those products, then it would not need to file the horizontal market power screens. The NOPR is silent about whether there would be a change to the existing policy that the horizontal screens are not required for applicants making sales under long-term agreements, but no explicit change in this policy is proposed.

Finally, under existing policy, for applicants in RTO and ISO markets that fail the horizontal screens, FERC applies a presumption that the RTO/ISO market monitoring is adequate to address any market power issues. Under the proposal, applicants wanting to sell capacity in RTO and ISO markets that do not have capacity markets—again, the CAISO and SPP—who fail the screens would no longer be able to rely on that presumption. These applicants would need to submit evidence through a delivered-price test analysis or provide other evidence of a lack of horizontal market power, or propose mitigation for capacity sales in those markets.

Comments on the FERC proposal are due 45 days after publication in the *Federal Register*. The citation for the proposal is *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets*, Notice of Proposed Rulemaking, 165 FERC ¶ 61,268 (2018) (Docket No. RM19-2-000).

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any member of our Energy Group.

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