

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket No. RM16-17-001

(Issued February 20, 2020)

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 rulemaking¹ (NOPR) that would have required Sellers² and entities that trade virtual products or that hold financial transmission rights (Virtual/FTR Participants)³ to report information regarding their legal and financial connections to various other entities (Connected Entity Information). Frankly, many aspects of this Connected Entity Information proposal should have been a no-brainer for this Commission. For example, the NOPR would have required Virtual/FTR Participants to be truthful in all communications with the Commission—not exactly a burdensome obligation. Nevertheless, the Commission has relegated even those common-sense reforms to a hollow administrative docket that has not seen any action and likely never will under the Commission’s current construct. As I explained in my earlier dissent, the Commission’s retreat from the NOPR proposal is part of a troubling pattern in which the majority seems indifferent to detecting and deterring market manipulation.

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

² “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 C.F.R. § 35.36(a)(1) (2018).

³ 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.⁴ 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 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.⁵ 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."⁶ That is hardly a reasoned explanation for why an

⁴ See NOPR, 156 FERC ¶ 61,045 at P 43.

⁵ 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.

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

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."⁷ 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

⁷ *Id.* P 45.