

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket No. RM16-17-000

**COMMENTS OF THE TRANSMISSION ACCESS  
POLICY STUDY GROUP**

In its Notice of Proposed Rulemaking (“NOPR”),<sup>1</sup> the Commission proposes to revise its regulations to change certain aspects of the substance and format of information submitted for market-based rate (“MBR”) purposes and collect certain data for analytics and surveillance for anti-market manipulation purposes. The NOPR explains that it is useful to think of these reporting requirements in two parts: (i) one pertaining to the MBR program (“MBR Information”), and (ii) one pertaining to analytics and surveillance (“Connected Entity Information”). NOPR, P 19. The MBR Information requirements would apply only to MBR sellers, and the Connected Entity Information requirements would apply to MBR sellers and entities, other than Federal Power Act (“FPA”) section 201(f) entities,<sup>2</sup> that trade virtual products or hold financial transmission rights (“FTRs”). *Id.* PP 11, 49. Significantly, the Commission proposes to collect, maintain, manage, and utilize this information through a wholly new relational database.

The Transmission Access Policy Study Group (“TAPS”) appreciates the opportunity to comment on the NOPR. In particular, TAPS supports the Commission’s

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<sup>1</sup> Data Collection for Analytics and Surveillance and Market-Based Rate Purposes, 81 Fed. Reg. 51,726 (proposed Aug. 4, 2016), 156 FERC ¶ 61,045 (2016).

<sup>2</sup> 16 U.S.C. § 824(f).

exclusion of FPA section 201(f) entities from the proposed Connected Entity Information requirements. NOPR, P 49. TAPS otherwise focuses its comments on the proposed changes in MBR reporting and data management.

TAPS does not oppose the Commission's proposed implementation of a relational database or its desire to narrow the existing requirement that MBR sellers report *all* owners, no matter how small their ownership percentage. *Id.* PP 24-25.<sup>3</sup> TAPS also appreciates the Commission's efforts to synchronize the MBR Information and Connected Entity Information reporting requirements in a way that both reduces burdens and enhances the Commission's data analysis. If this new system works as intended, the new relational database may facilitate and improve MBR regulation and/or market surveillance and analysis. That said, it is a major and ambitious undertaking. TAPS is concerned that the design, implementation, and utilization of the relational database may not operate as intended. TAPS has identified one specific proposed change necessary to maintain proper information as to corporate relationships for MBR purposes as ultimate corporate ownership changes over time. The August 11, 2016 Technical Workshop revealed additional potential problems.<sup>4</sup> Other problems may only come to light over

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<sup>3</sup> See Order No. 697-A, 73 Fed. Reg. 25,832, 25,860 n.258 (May 7, 2008), FERC Stats & Regs. ¶ 31,268 at P 181 n.258 (2008) ("Order No 697-A"), *clarified*, 124 FERC ¶ 61,055 (2008), *on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *on reh'g and clarification*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009), *corrected*, 128 FERC ¶ 61,014 (2009), *clarified*, Order No. 697-D, 75 Fed. Reg. 14,342 (Mar. 25, 2010), FERC Stats. & Regs. ¶ 31,305, *clarified*, 131 FERC ¶ 61,021 (2010), *reh'g denied*, 134 FERC ¶ 61,046 (2011), *reh'g denied*, 143 FERC ¶ 61,126 (2013), *review denied sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub-nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

<sup>4</sup> Federal Energy Regulatory Commission, Staff Notes on: Technical Workshop on the Draft Data Dictionary Attached to the Data Collection For Analytics and Surveillance and Market-Based Rate Purposes Notice of Proposed Rulemaking (RM16-17) (Aug. 11, 2016), <http://www.ferc.gov/CalendarFiles/20160909154402-staff-notes.pdf> ("Staff Notes on Technical Workshop").

time. In light of these concerns, TAPS cautions against the Commission's putting all of its MBR reporting "eggs" in one electronic "basket." Additional MBR reporting requirements are necessary, especially during initial implementation of the new MBR reporting system, to monitor the relational database, ensure that it functions as intended, and enable the Commission to collect all the information necessary to ensure just and reasonable rates. Accordingly, TAPS respectfully requests that the final rule:

- Requires a narrative description and organizational chart of *all* upstream "affiliate owners"<sup>5</sup> and other affiliates required for MBR regulatory purposes,<sup>6</sup> consistent with existing Commission staff practice, for at least one or two cycles of triennial MBR filings under the new relational database reporting regime.
- Requires MBR sellers to report the same information required for baseline or triennial reporting purposes whenever there is a change in ultimate affiliate ownership in order to ensure that reliance solely on the relational database (i) will not result in a loss of essential MBR reporting information and (ii) will maintain proper corporate affiliate family relationships as ultimate ownership changes over time.
- Revises the proposed amendments to section 35.37(a)(2) to expressly require MBR sellers to report in their "relational database filing any assets that are owned or controlled by an affiliate that does not have MBR authority" as proposed in the NOPR, P 32.
- Revises the NOPR statement, P 26, that MBR sellers must "affirm" certain facts about its passive owner(s) to be consistent with Commission precedent, up to and including Order No. 816, P 284,<sup>7</sup> which requires a *demonstration* of passivity.

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<sup>5</sup> The Commission describes "affiliate owners" as "owners that meet the definition of 'affiliate' provided in 18 CFR 35.36(a)(9)." NOPR, P 25. Identifying all upstream affiliate owners is a manageable and reasonable reporting obligation as compared to the burdensome task of identifying all upstream owners.

<sup>6</sup> Affiliates that "have a franchised service area or MBR authority, or directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies." *Id.* P 25.

<sup>7</sup> 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, 80 Fed. Reg. 67,056 (Oct. 30, 2015), FERC Stats. & Regs. ¶ 31,374 (2015) ("Order No. 816"), *on reh'g and clarification*, Order No. 816-A, FERC Stats. & Regs. ¶ 31,382 (2016) ("Order No. 816-A").

## I. INTEREST OF TAPS

TAPS is an association of transmission-dependent utilities in more than thirty-five states.<sup>8</sup> Because TAPS members rely on transmission facilities owned and controlled by others, TAPS has a vital interest in the proper competitive functioning of wholesale power markets, including the prevention of the exercise of market power in wholesale capacity, energy, and ancillary markets. TAPS has commented on nearly all major Commission rulemakings, including those pertaining to market-based rates. TAPS also provided comments in Docket Nos. RM16-3-000 (“MBR Ownership NOPR”) and RM15-23-000 (“Connected Entity NOPR”), which addressed proposed and related MBR and Connected Entity Information reporting requirements but were withdrawn concurrently with the issuance of the instant NOPR.<sup>9</sup>

## II. COMMUNICATIONS

Communications regarding these proceedings should be directed to:

John Twitty  
Executive Director  
TRANSMISSION ACCESS POLICY STUDY  
GROUP  
P.O. Box 14364  
Springfield, MO 65814  
Tel: (417) 838-8576  
Email: 835consulting@gmail.com

Cynthia S. Bogorad  
Peter J. Hopkins  
Jeffrey M. Bayne  
SPIEGEL & MCDIARMID LLP  
1875 Eye Street, N.W.  
Suite 700  
Washington, D.C. 20006  
Tel: (202) 879-4000  
Email:  
cynthia.bogorad@spiegelmc.com  
peter.hopkins@spiegelmc.com  
jeffrey.bayne@spiegelmc.com

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<sup>8</sup> David Geschwind, Southern Minnesota Municipal Power Agency, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

<sup>9</sup> Transmission Access Policy Study Group, Comments (Feb. 22, 2016), eLibrary No. 20160222-5063 (“TAPS MBR Ownership NOPR Comments”); Transmission Access Policy Study Group, Comments (Jan. 21, 2016), eLibrary No. 20160122-5006.

### III. COMMENTS

#### A. **TAPS supports the transition of the MBR reporting regime to the proposed regional database, but this significant undertaking should include additional safeguards.**

TAPS supports the NOPR's objectives to render MBR reporting information more usable and accessible, better understand the financial and legal connections among market participants and other entities, and streamline information collection through a relational database. NOPR, P 2. In order to eliminate burdensome and unnecessary reporting, the NOPR proposes revisions to the information requirements for MBR sellers set forth in Order No. 697-A. Footnote 258 of Order No. 697-A provides that MBR sellers must provide information identifying "all upstream owners" and "all affiliates," and must "describe the business activities of its owners, stating whether they are in any way involved in the energy industry."<sup>10</sup>

The Commission believes that "information about owners that do not meet the definition of affiliates under section 35.36(a)(9) is not necessary to evaluate horizontal or vertical market power," and that "continuing to require information on unaffiliated owners may create a burden that is unrelated to the Commission's determination whether a MBR seller qualifies for MBR authority." NOPR, P 25.<sup>11</sup> As a result, the NOPR

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<sup>10</sup> Order No. 697-A, 73 Fed. Reg. 25,832, 25,860 n.258, FERC Stats. & Regs. ¶ 31,268, P 181 n.258.

<sup>11</sup> Affiliate is defined as:

(i) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;

(ii) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(iii) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such

proposes to require MBR sellers to provide information on only those affiliate owners that either:

(1) are an “ultimate affiliate owner,” defined as the furthest upstream affiliate owner(s) in the ownership chain; or (2) have a franchised service area or MBR authority, or directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies.

NOPR, P 25. This would exclude from the MBR reporting requirements information about most intermediate affiliate owners, so long as these intermediate affiliate owners do not fall within the second category of affiliate owners described in P 25 of the NOPR.<sup>12</sup>

The proposed revision of the ownership and affiliate information MBR sellers would be required to report is consistent with the Commission’s proposal in the withdrawn MBR Ownership NOPR. *Id.* P 25 (citing Ownership Information in Market-Based Rate Filings, 80 Fed. Reg. 80,302, 80,304-35 (proposed Dec. 24, 2015), FERC Stats. & Regs. ¶ 32,713, P 9 (2015)). In addition, the current NOPR proposes to require that MBR sellers provide this information in a specific format so that it can be included in

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relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and

(iv) Any person that is under common control with the specified company.

(v) For purposes of paragraph (a)(9), owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.

18 C.F.R. § 35.36(a)(9).

<sup>12</sup> See *supra* note 5 and item (2) in the block quote above. The NOPR proposes to require “the descriptive information and representations that MBR sellers are required to provide for purposes of the vertical market power analysis under 18 C.F.R. 35.37(d), (e).” NOPR, P 39 n.43.

a new relational database envisioned in the NOPR. *Id.* P 27. Because the relational database is intended to be able to generate a corporate organizational chart based on this information, the Commission proposes to eliminate the requirement, adopted in Order No. 816, that MBR sellers submit corporate organizational charts. NOPR, P 29.

As TAPS explained in its comments to the MBR Ownership NOPR,<sup>13</sup> TAPS does not object to the Commission's desire to streamline MBR sellers' reporting requirements, and it agrees that requiring the reporting of *all* owners, regardless of the extent of ownership or control over an MBR seller, is unduly burdensome and not calculated to lead to the production of information useful for assessing market power. TAPS also does not object to the creation of the proposed relational database. But the proposed streamlined reporting requirements and transition to a relational database represent significant changes to the MBR reporting regime, and prudence dictates that they be accompanied by additional backstops and safeguards so that the Commission can ensure just and reasonable wholesale power rates.

**1. The Commission should require identification and description of all upstream affiliate owners and other affiliates required to be included in market power analysis as a check on the proposed MBR reporting system.**

The new system proposed in this NOPR is a major undertaking that raises a host of design, implementation, and operational issues. It will only work if it is designed properly, has proper software, and reporting entities properly input data. As discussed below, TAPS has identified an apparent major flaw in the relational database and new reporting system, and stakeholders raised a number of additional concerns during the

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<sup>13</sup> TAPS MBR Ownership NOPR Comments at 5-12.

August 11, 2016 Technical Workshop.<sup>14</sup> While these discrete issues should be considered and addressed by the Commission, they also highlight the broader concern that such a significant undertaking will involve a range of both anticipatable and unforeseen challenges. Given the magnitude of the proposed changes, both in terms of the information required to be reported and the technical aspects of submissions and the relational database, the Commission should maintain certain existing reporting practices to act as a backstop for the new MBR reporting system, so that the Commission can ensure just and reasonable rates.

Problems with the rollout of the new reporting regime could undermine the accuracy of the Commission's analysis of MBR authority, as well as the legal basis for granting MBR authority. The courts have made clear that "the reporting requirements [are] an integral part of a market-based tariff [necessary to] pass legal muster." *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015 (9th Cir. 2004); *see also Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009) ("[B]oth we and the Ninth Circuit have held that FERC violates its oversight duty when it imposes no reporting requirements on generators and instead resorts to 'largely undocumented reliance on market forces as the principal means of rate regulation.'") (quoting *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1508 (D.C. Cir. 1984)). Maintaining a subset of existing reporting practices, without requiring the provision of all of the information specified in Order No. 697-A, for at least the first one or two cycles of triennial MBR filings, would ensure that the new MBR reporting system contains sufficient information to accurately reflect

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<sup>14</sup> See Staff Notes on Technical Workshop.



market realities and afford the Commission the ability to exercise the requisite oversight essential to the grant and exercise of MBR authority.

The proposed MBR relational database reporting requirements aim to provide the Commission information on pieces of the corporate family tree: (i) the crown of the tree (ultimate affiliate owner(s)) and (ii) certain branches (certain affiliates the Commission requires to be reported for MBR purposes); it does not include the trunk of the tree (intermediate affiliate owners). If everything works as planned the requisite MBR corporate family organizational information will appear with a push of the button, though this information will not include intermediate affiliate owners.<sup>15</sup> If things breakdown, however, the Commission will be left with pieces of trees and no backup information as to whether and how they fit together.<sup>16</sup> What TAPS proposes is ongoing narrative reporting of sufficient information concerning the crown, the trunk, and the branches of the MBR corporate family to monitor and ensure that the database is working and that the Commission possesses the necessary information to perform its required MBR oversight.

TAPS proposes that the Commission maintain and formalize FERC Staff's existing informal practice of requiring MBR sellers to provide information identifying and describing all of their *affiliate* owners. Invenergy Thermal Development LLC's request for rehearing of Order No. 816 describes "Commission staff's past and current practice of requesting an MBR entity to provide in it[s] MBR Filings a narrative

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<sup>15</sup> Unless, e.g., they possess MBR authority or otherwise must be reported for MBR purposes.

<sup>16</sup> We recognize that the NOPR proposes to continue to require certain narrative ownership and affiliate information for purposes of assessing vertical market power. *See* NOPR, P 39 n.43. However, given the complexities of modern holding company structures, this measure is not likely to be a sufficient safeguard and backstop to enable the Commission (or others) to determine the proper corporate family affiliate relationships to rectify failures in the relational database due to breakdowns associated with change in status reporting of ultimate affiliate ownership. Thus, preservation of the Commission's ability to fulfill its MBR obligations is not assured.

describing the upstream owner affiliates of the MBR Entity along with an organizational chart depicting its upstream ownership structure.”<sup>17</sup> Invenenergy did not object to this practice; in fact, it suggested that the Commission clarify that the organizational chart requirement in Order No. 816 “be limited to depicting only the upstream affiliate owners of the MBR Entity submitting the MBR Filing.”<sup>18</sup> This information provides the crown and trunk of the MBR corporate family. In addition, TAPS proposes that the Commission also require identification of other affiliates required to be included in the market power analysis,<sup>19</sup> along with a description of their affiliation with the MBR seller. This information provides the relevant branches of the corporate family, and is basic to ensuring compliance with the Commission’s restrictions on affiliate sales and other affiliate requirements. While TAPS requests that MBR sellers be required to submit an organizational chart along with these narrative descriptions, this organizational chart would include only upstream affiliate owners and those affiliates required to be included in market power analysis<sup>20</sup>—not all of the entities required in the organizational chart the Commission adopted in Order No. 816.<sup>21</sup> Thus, TAPS seeks to preserve reporting of only a subset of previously required ownership information.

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<sup>17</sup> Invenenergy Thermal Development LLC & Invenenergy Wind Development LLC, Request for Clarification, or in the Alternative Request for Rehearing 7 (Nov. 13, 2015), eLibrary No. 20151113-5157.

<sup>18</sup> *Id.* TAPS does not seek here to address the merits of Invenenergy’s position on rehearing. Rather, we point to Invenenergy’s comments to show that the identification and description of all upstream affiliate owners is consistent with FERC practice and not unduly burdensome.

<sup>19</sup> Affiliates that “have a franchised service area or MBR authority, or directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies.” NOPR, P 25.

<sup>20</sup> *See supra* note 20.

<sup>21</sup> *See* Order No. 816, PP 332-34.

Preservation of reasonable and limited reporting requirements would still accomplish the Commission's objective of reducing unnecessary reporting burdens, since TAPS is not requesting that the Commission require MBR seller to identify *all* owners, regardless of the extent of their ownership or control, and *all* affiliates as strict adherence to footnote 258 of Order No. 697-A would require. Requiring a description of upstream affiliate owners and affiliates relevant to market power analysis, as a supplement to the information the NOPR proposes to require for input into the relational database, will guarantee that the Commission and the public have access to information necessary for MBR authorization purposes and for monitoring that the new database functions properly, particularly during the transition and first one to two cycles of triennial filings. It will ensure that in the event that there are problems with the relational database, the Commission will still be able to collect and continually review the "sufficient post-approval reporting requirements"<sup>22</sup> necessary for lawful reliance on MBR authority. *See Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 919 (9th Cir. 2011) ("By screening for market power before authorizing market-based rates, and by *continually monitoring sellers for evidence of market power*, FERC has adopted a permissible approach to fulfilling its statutory mandate to ensure that rates are just and reasonable.") (emphasis added). These requirements will also provide a check on the relational database, preserving a "paper trail" that will enable the Commission and stakeholders to monitor the efficacy of the new database and ensure MBR compliance.<sup>23</sup>

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<sup>22</sup> *California ex rel. Lockyer*, 383 F.3d at 1013.

<sup>23</sup> In particular, to have the ability to fully evaluate the database, stakeholders should be able to access the MBR organizational charts generated by the relational database, the same as Staff or the Commission. TAPS' understanding of the NOPR is that the Connected Entity Information will be for the Commission's own analytics and surveillance, and therefore requests that stakeholders have access only to the MBR

In addition, requiring the identification and description of upstream affiliate owners and certain other affiliates relevant to MBR regulatory purposes during the transition to the relational database should be feasible and not unduly burdensome. MBR sellers will have to trace through their organizational structures, including intermediate affiliate owners, in order to identify ultimate affiliate owners and the second category of affiliate owners that the NOPR proposes to include in the reporting requirements.<sup>24</sup> Thus, requiring MBR sellers to report their intermediate affiliate owners merely requires them to “show their work” and does not impose an undue burden. Furthermore, the Commission could revisit this requirement based on the performance of the relational database after three to six years, which would allow for at least one to two full cycles of triennial reports for all entities. If after this time the Commission and stakeholders are satisfied that the relational database and new reporting system accurately collects and maintains all of the information necessary for the Commission to evaluate MBR authority, the Commission could consider reducing the parallel reporting practices.

**2. The Commission should ensure that MBR ownership information is not lost over time as a result of sole reliance on the proposed relational database.**

While the significant and overriding general concerns described above warrant additional reporting safeguards and checks on the relational database, TAPS has identified an apparent flaw in the NOPR’s proposed MBR reporting scheme that could result in the loss of essential MBR reporting information over time. TAPS is concerned

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Information in the relational database.

<sup>24</sup> The second category is affiliate owners that “(2) have a franchised service area or MBR authority, or directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies.” NOPR, P 25.

that reports by an MBR seller of changes in its ultimate affiliate ownership could result in the database creating new family pairings that do not accurately link the MBR seller with its other non-MBR affiliates. In particular, the database could lose the links to those affiliates identified in P 25 of the NOPR that “have a franchised service area . . . , or directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies,” which the Commission intends to retain.<sup>25</sup>

Fundamental to the proposed relational database is the NOPR’s proposed requirement that MBR sellers identify their “ultimate affiliate owner.” NOPR, P 25. The NOPR defines this term as the MBR seller’s “furthest upstream affiliate owner(s).” *Id.* Proposed amended section 35.37 defines the term affiliate owner to mean “any owner of the Seller that is an affiliate of the Seller as defined in § 35.36(a)(9).”<sup>26</sup> Thus an affiliate owner appears to be “any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company.” 18 C.F.R. § 35.36(a)(9). The ultimate, i.e., furthest upstream, owner(s) would appear to be the entity(ies) that owns 10 percent or more of the corporate entity that controls directly or indirectly the MBR seller. The term ultimate affiliate owner appears to refer to an MBR seller’s immediate parent holding company<sup>27</sup> if that is the furthest

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<sup>25</sup> As discussed in Part B of these comments, the Commission must also maintain the link to the asset information of non-MBR affiliates.

<sup>26</sup> The proposed amended language is available in the NOPR at 81 Fed. Reg. at 51,740.

<sup>27</sup> For the purposes of these comments, TAPS uses the term “parent holding company” colloquially to mean an entity that directly or indirectly owns all or nearly all of the voting securities of one or more MBR sellers.

upstream owner; if not, the ultimate affiliate owner is the furthest upstream owner with at least the requisite 10 percent ownership interest in such a parent holding company. For example, if a hedge fund<sup>28</sup> or pension fund owns more than ten percent of a parent holding company that in turn owns an MBR seller, the hedge fund or pension fund would be the ultimate affiliate owner of that MBR seller. In this scenario, TAPS's understanding of the NOPR is that the MBR seller would not need to report the parent holding company, unless it falls within the second category of affiliate owners that must be reported under P 25 of the NOPR.<sup>29</sup> Even though the parent holding company wholly owns the MBR seller (and possibly other MBR sellers), it would not be the furthest upstream owner that falls within the definition of affiliate. This is not a merely a hypothetical scenario; for example, Calpine Corporation's most recent Securities and Exchange Commission Proxy Statement states that Hotchkis & Wiley Capital Management, LLC owns 11.1% of its common stock.<sup>30</sup> An MBR seller may have

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<sup>28</sup> For purposes of these comments, TAPS uses the term "hedge fund" to refer to an entity that "pool[s] investors' money and invest[s] the money in an effort to make a positive return." SEC Office of Investor Education and Advocacy, *Investor Bulletin: Hedge Funds* (Feb. 2013), [https://www.sec.gov/investor/alerts/ib\\_hedgefunds.pdf](https://www.sec.gov/investor/alerts/ib_hedgefunds.pdf).

TAPS supports and in no way takes issue with the Commission's determination that an entity that owns directly or indirectly 10 percent or more of the voting securities of an MBR seller enjoys presumptive control over the MBR seller. TAPS instead distinguishes here between hedge funds and parent holding companies in order to demonstrate the sensitivity and vulnerability of the proposed relational database's linking of MBR affiliates essential to MBR regulation solely by means of ultimate affiliate owners, which can change over time even when other corporate enterprise relationships do not.

<sup>29</sup> See *supra* note 23.

<sup>30</sup> Calpine Corporation, Proxy Statement Schedule 14A Information at 15 (Apr. 1, 2015), <http://d1lge852tjjqow.cloudfront.net/CIK-0000916457/efbec2ec-404c-4132-8be8-e5a5c0b7041f.pdf?noexit=true>. The Commission has granted MBR authority to several entities that are wholly owned by Calpine Corp. See *Calpine Energy Servs., L.P.*, 137 FERC ¶ 61,085 (2011), *clarified*, 145 FERC ¶ 61,191 (2013).

multiple ultimate owner affiliates<sup>31</sup> and the identity of its ultimate owner affiliate(s) may change over time.

The identification and reporting of an MBR seller's ultimate affiliate owner(s) appears to be key to operation of the relational database. Based on the NOPR and the Technical Workshop, it appears that the relational database will identify and track relationships among affiliates based on a "family relationship" of entities with a common ultimate affiliate owner. *See* NOPR, P 31 (describing operation of the relational database based upon common linkage through affiliation with a common ultimate affiliate owner). Under the NOPR's proposal, MBR sellers identify their ultimate affiliate owners in their baseline and triennial filings and otherwise report changes in ultimate affiliate ownership as necessary and appropriate. NOPR, PP 61, 65, 67. The baseline and triennial filings are comprehensive and require the reporting of the MBR seller's ultimate affiliate owner(s) as well as its affiliate owners that "have a franchised service area or MBR authority, or directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies." NOPR, P 25. But the proposed change in status filings do not require the same comprehensive reporting,<sup>32</sup> and that omission is problematic.

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<sup>31</sup> The NOPR discusses the hypothetical situation where "Company F's filing identifies two ultimate affiliate owners, Company A and Company B." NOPR, P 31.

<sup>32</sup> The proposed amendments to 18 C.F.R. § 35.42(c) do provide that "[c]hanges in status must be prepared in conformance with the instructions posted on the Commission's website." The proposed amended language is available in the NOPR at 81 Fed. Reg. at 51,740. While it is possible that these future instructions may address some of the concerns raised in these comments, the content of these instructions is currently unknown by stakeholders. Moreover, substantive requirements regarding the type of information required to be included in certain filings should be included in regulations that have gone through the rulemaking process, not left to instructions posted on the Commission's website, which are subject to

Based on the NOPR's description of the relational database, it appears that certain affiliate information essential to MBR oversight may be lost over time as entities file change in status reports to reflect changes in their ultimate ownership. Figure 1a illustrates a circumstance in which a hedge fund owns more than 10% of a utility parent holding company. The parent holding company owns two MBR sellers, each of which has a non-MBR affiliate. Here, the hedge fund is the ultimate affiliate owner of both of the MBR sellers. The relational database would create a "family A" that includes all MBR sellers who listed the hedge fund as their ultimate affiliate owner as well as all of the other entities (e.g., a non-MBR affiliated franchise utilities) listed in those MBR sellers' triennial filings (or the baseline filings contemplated by the NOPR, P 61).



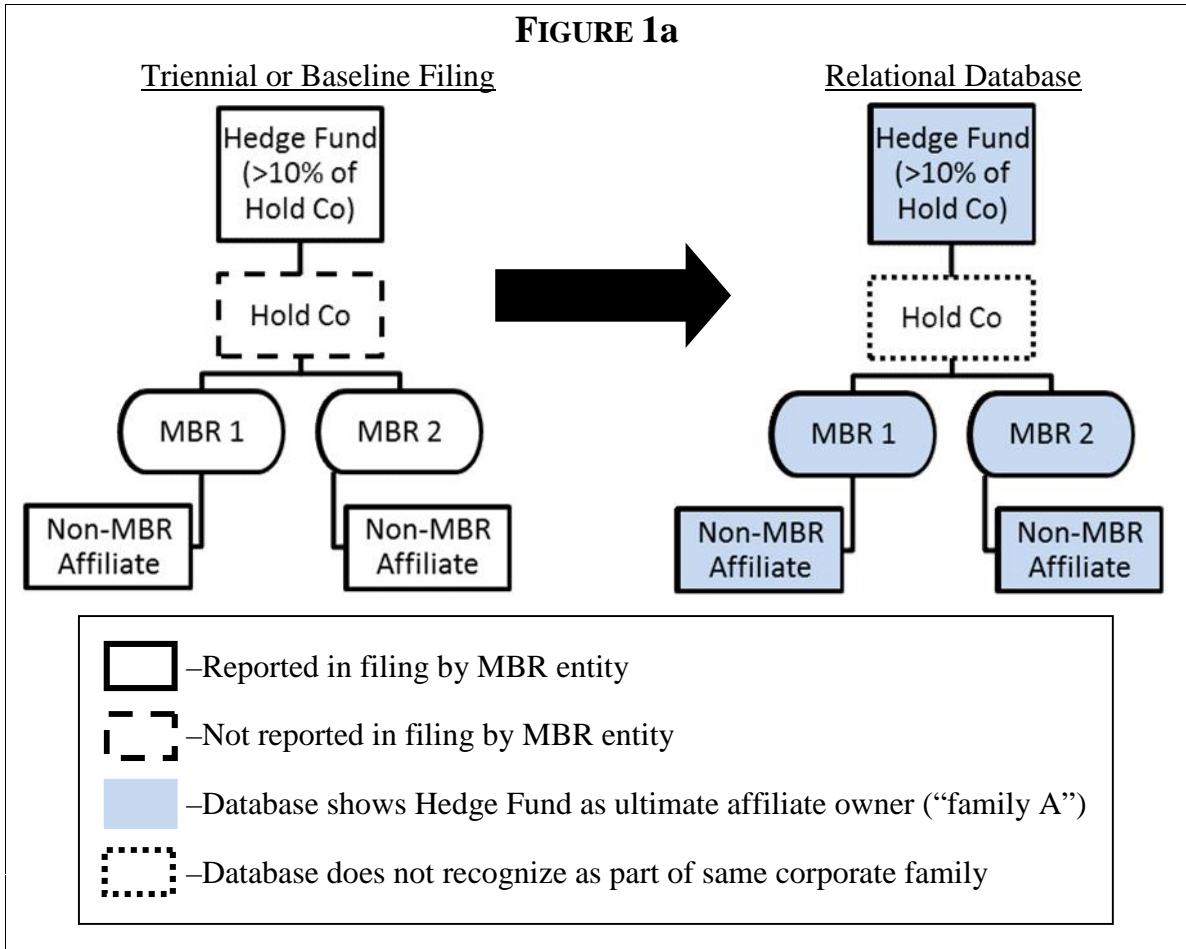
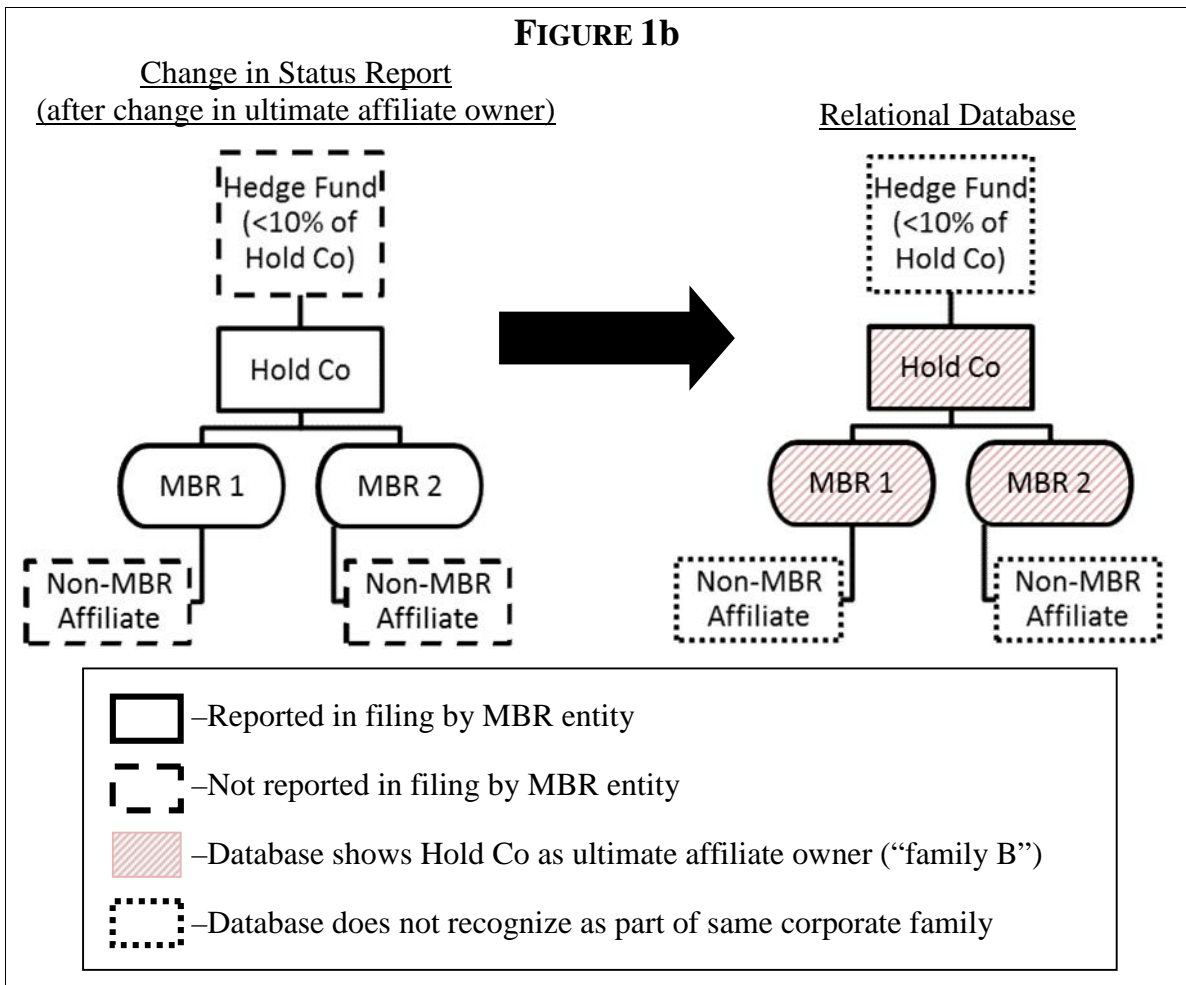


Figure 1b illustrates what would happen in the event that the hedge fund divests itself of the parent holding company's stock such that it owns less than 10% of the parent holding company. Under the proposed change in status regulation, each MBR seller would have to report that the parent holding company is now its new ultimate affiliate owner. This would apparently generate a new "family B" with the parent holding company as the ultimate affiliate owner.<sup>33</sup> But "family B" will be incomplete and inaccurate because the database will not link the parent holding company to those entities

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<sup>33</sup> Relatedly, this may also create problems in the relational database's tracking of generation assets (discussed below in Part B of these comments), since the assets of MBR affiliates are linked through the identification of common ultimate owners.

that the Commission does not require to make MBR filings, but rightly considers central to MBR analysis.<sup>34</sup> This is because the only corporate affiliation that has changed for the reporting MBR seller is its ultimate owner, so it would not include these non-ultimate affiliate owner entities in its change in status report.



To avoid this loss and miscategorization of essential information, every change in status report that updates ultimate affiliate owner information needs to be as comprehensive as the baseline and triennial filings. This will allow the database to

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<sup>34</sup> These include affiliates with a franchised service area or that directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies. NOPR, P 25.

identify and categorize non-MBR affiliates under the new ultimate affiliate owner “family.” This is consistent with current regulations, as change in status reports are required to contain comprehensive information (as opposed to only information pertaining to the change).<sup>35</sup>

The Commission’s proposed new quarterly update reporting requirement does not appear to solve this problem. Proposed § 35.42(d) states that an MBR “Seller must report on a quarterly basis any changes to its previously submitted relational database information.”<sup>36</sup> But in the circumstance described above the MBR seller will have correctly reported the information that has changed. Thus, the proposed new quarterly updates requirement would not require disclosure of the continued connection to the relevant non-MBR affiliates previously identified by the MBR seller.

An additional concern with the relational database is that because it depends on the identification of common ultimate affiliate owners, it is vulnerable to the reporting errors of a few entities causing ripple effects that undermine its accuracy. As the Commission is aware, one hundred percent accuracy in reporting is not a valid assumption.<sup>37</sup> The hypothetical diagramed below in Figures 2a and 2b illustrates this concern. Here, the ultimate affiliate owner of several MBR sellers is a hedge fund that

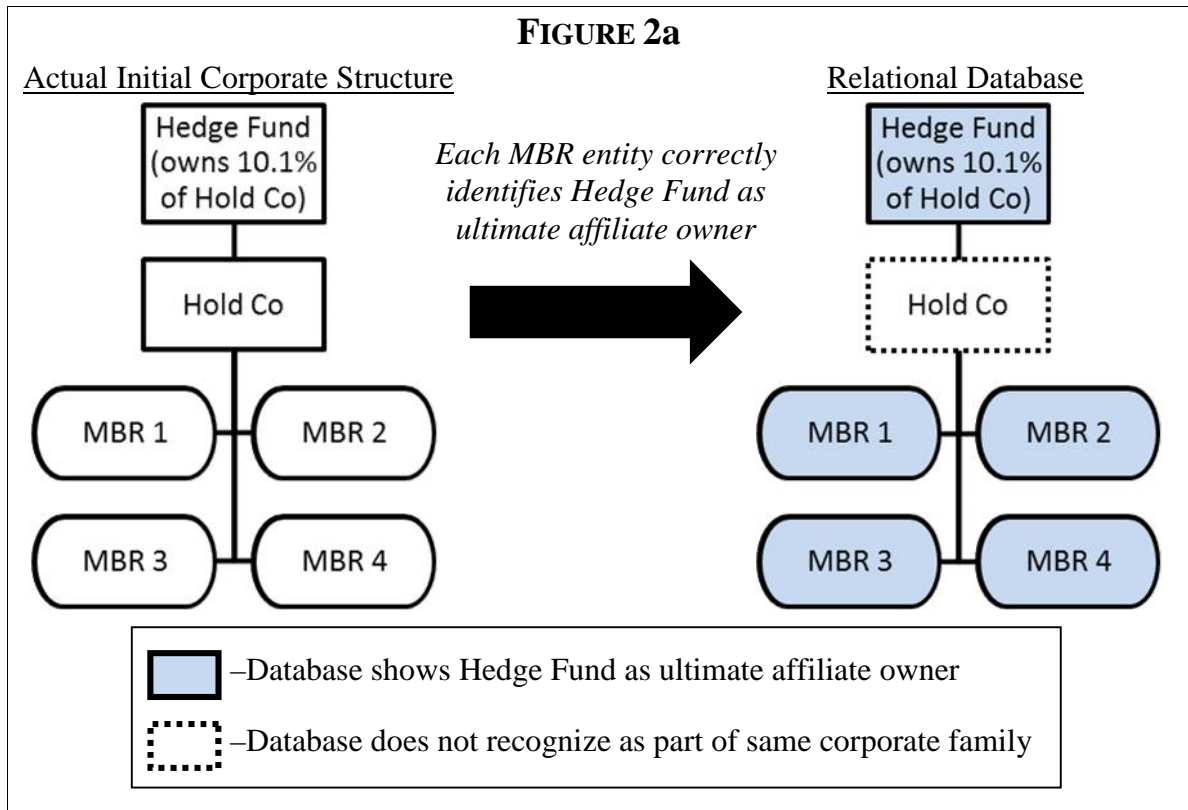
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<sup>35</sup> Currently, once an entity is obligated to file a change in status report, it must submit an Appendix B, which includes a list of all affiliates. 18 C.F.R. § 35.42(c); 18 C.F.R. Pt. 35, Subpart H, App. B.

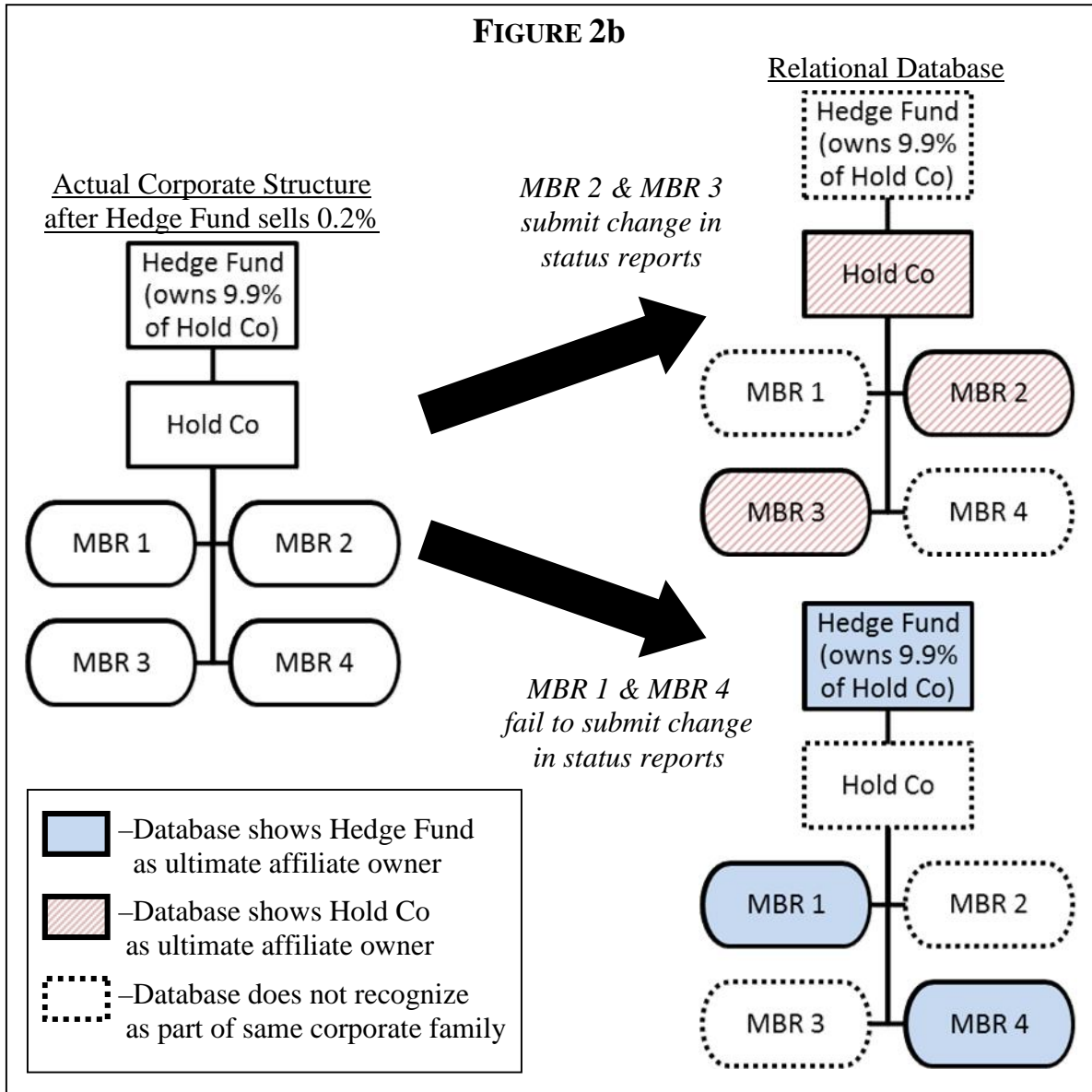
<sup>36</sup> The proposed amended language is available in the NOPR at 81, Fed. Reg. at 51,740.

<sup>37</sup> The Commission noted in Order No. 816 that, at the time, Staff “has found numerous submission errors from sellers.” Order No. 816, P 301. Similarly, the current NOPR explains that the Commission “appreciates that when extensive data must be submitted to a regulatory entity, occasionally some data may, despite an entity’s best efforts to achieve accuracy, turn out to be incomplete or inaccurate.” NOPR, P 58.

owns 10.1 % of their common parent holding company. Figure 2a illustrates what occurs when each MBR seller correctly identifies the hedge fund as its ultimate affiliate owner.



If the hedge fund sells off 0.2% of the parent holding company, bringing it below the 10% threshold in the definition of “affiliate,” it would no longer be the ultimate affiliate owner of the MBR sellers; the parent holding company would be the ultimate affiliate owner for the MBR sellers. However, as illustrated in Figure 2b, not all of the affiliated MBR sellers may notice and report this subtle change in ownership; as a result, the relational database would no longer recognize the relationship between the MBR sellers who properly updated their ultimate affiliate owner status and those who still list the hedge fund as the ultimate affiliate owner.



This potential problem could be mitigated if the Commission maintained the practice that MBR sellers provide a narrative description and chart of all upstream affiliate owners. With this safeguard in place, the Commission and, if afforded sufficient access to the database and backup data,<sup>38</sup> interested stakeholders would still be able to

<sup>38</sup> The Commission should provide the public rights to access the database “to generate a corporate organizational chart.” NOPR, P 29. See NOPR, P 67 (discussing organizational charts for use by the Commission).

recognize the connection between all the MBR sellers with a common holding company, even if some MBR sellers did not timely report the change in their *ultimate* affiliate ownership from the hedge fund to the holding company. Otherwise, these errors could go unaddressed until the next round of triennial filings, if they are noticed at all, leaving the database flawed for several years. Addressing this problem is especially important because the Commission wants to use the relational database for not only its evaluation of MBR compliance but also its ongoing analytics and surveillance of electric markets.

**B. The Commission should revise the proposed amendment to section 35.37(a)(2) to reflect the Commission’s position that MBR sellers must report information about the assets of their non-MBR affiliates.**

In P 32 of the NOPR, the Commission states that it “propose[s] to require that the MBR seller include in its relational database filing any assets that are owned or controlled by an affiliate that does not have MBR authority.” However, proposed amended section 35.37(a)(2) provides only that the “Seller must also provide *a list of assets*, certain specified information regarding affiliate owners, and other required market-based rate information in an XML schema for input into a relational database prepared in conformance with the instructions posted on the Commission’s website.”<sup>39</sup> While this obligation may fall within the requisite “list of assets,” or the instructions posted on the Commission’s website may address the issue of reporting assets owned or controlled by non-MBR affiliates, the regulations themselves should expressly and unambiguously require the reporting of non-MBR affiliates’ assets consistent with the text of the NOPR.

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<sup>39</sup> The proposed amended language is available in the NOPR at 81 Fed. Reg. at 51,740 (emphasis added).

This requirement is necessary because if an “MBR seller does not have a requirement to submit the information related to the [non-MBR] affiliated generating plant into the relational database, that information could be ‘lost.’” NOPR, P 32.<sup>40</sup> In contrast, the Commission explains in P 31 of the NOPR that the relational database will automatically recognize the assets of an MBR seller’s affiliates with MBR authority through their common ultimate affiliate owner(s)—although this information may also be lost due to the potential problems with the relational database’s reliance on common ultimate affiliates, discussed in the previous section of these comments. Information about the assets of non-MBR affiliates is necessary for “completeness,” NOPR, P 32, and without this information the Commission will be unable to accurately and fully understand the financial and legal connection among market participants and other entities for MBR purposes. The Commission should revise the text of the regulation to provide that an MBR seller is responsible for including in its relational database filing assets that it owns and assets owned by its non-MBR affiliates.

**C. The NOPR’s statement about passive ownership should be revised consistent with Order No. 816 and Commission precedent.**

The NOPR addresses the reporting of passive ownership and:

propose[s], as the Commission did in the Ownership NOPR, that with respect to any owners that an MBR seller represents to be passive, the MBR seller *affirm* in its ownership narrative that its passive owner(s) own a separate class of securities, have limited consent rights, do

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<sup>40</sup> In contrast, the Commission explains in P 31 of the NOPR that the relational database will automatically recognize the assets of an MBR seller’s affiliates with MBR authority, through their common ultimate affiliate owner(s). However, this information may also be lost due to the potential problems with the relational database’s reliance on common ultimate affiliates, discussed in the previous section of these comments.

not exercise day-to-day control over the company, and cannot remove the manager without cause.

NOPR, P 26 (emphasis added) (footnote omitted).

As TAPS explained in its comments to the identical proposal in the now-withdrawn MBR Ownership NOPR, a requirement that sellers merely “affirm” passivity is inconsistent with Commission precedent, including Order No. 816, that requires a *demonstration* of passivity.<sup>41</sup> Order No. 816, issued less than one year ago, provided that “sellers must demonstrate why such a relationship should be deemed passive.” Order No. 816, P 284. The Commission also reaffirmed in Order No. 816 that it would “continue to require that any seller that claims certain interests are passive or non-controlling must meet the standards set out in *AES Creative*.” *Id.* (citing *AES Creative Res., L.P.*, 129 FERC ¶ 61,239 (2009)).<sup>42</sup>

While the Commission cites to *AES Creative* in the current NOPR, it fails to provide any reason for departing from its prior and recent precedent requiring a demonstration of passivity. TAPS sees no good reason for doing so. As explained in *AES Creative*, the difference between passive and active ownership is not a simple question of whether an owner possesses “rights [that can] affect the issuer’s conduct in some way,” but rather a functional distinction “between rights that give an investor the ‘authority to manage, direct, or control the activities’ of a company and rights that give investors ‘only those limited rights necessary to protect their . . . investments.’” *AES Creative*, 129 FERC

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<sup>41</sup> TAPS MBR Ownership NOPR Comments at 12-13. *See also* American Public Power Association & National Rural Electric Cooperative Association, Comments 11-12 (Feb. 22, 2016), eLibrary No. 20160222-5215.

<sup>42</sup> In *AES Creative*, the Commission held that “[a]ffiliation for these purposes is thus defined in terms of ownership of voting securities, except in circumstances where specific factors [set forth in 18 C.F.R. § 35.36(a)(9)(iii)] lead to a Commission finding of affiliation after notice and opportunity for hearing” and discussed the distinction between voting and non-voting securities. 129 FERC ¶ 61,239, PP 23, 25-26.



¶ 61,239, P 25 (citing *Solios Power LLC*, 114 FERC ¶ 61,161, PP 9-10 (2006)). Understanding this distinction is critical to the Commission's MBR analysis, and it should not take claims of passive investment on faith. Instead, the Commission should reaffirm that the standards set forth in *AES Creative* and Order No. 816 still apply and that sellers must demonstrate, not merely affirm, that a particular investment is passive.

**D. TAPS supports the exclusion of section 201(f) entities from the Connected Entity Information requirements.**

The Commission proposes not to include section 201(f) entities in the Connected Entity Information reporting requirements. NOPR, P 49. The Commission describes section 201(f) entities as “in the main consist[ing] of municipalities and certain cooperatives (as well as their associated joint action agencies),” and explains that “due to their financial structures, they have substantially reduced incentives to commit market manipulation.” *Id.*

The NOPR is correct to exclude section 201(f) entities from the Connected Entity Information requirements. The proposed Connected Entity Information requirements are designed to enable the Commission to understand the “legal or contractual relationships entities bear to one another” so that it can analyze “the circumstances surrounding a given pattern of trading, including the possible motivations for that behavior.” *Id.* P 43. It is neither useful nor necessary for the Commission's analytics and surveillance of market manipulation to impose uniform rules on dissimilar entities. Requiring Connected Entity Information from section 201(f) entities would inflict disproportionate costs without furthering the purpose of the proposed Connected Entity Information requirements.

Section 201(f) entities differ from MBR sellers, virtual traders, and FTR holders, and have less incentive and ability to engage in market manipulation. Section 201(f)

entities are non-profit, governmental, or consumer-owned load-service entities, i.e., with legal obligations to serve retail load (or to serve another such entity with that obligation), often under laws, bond covenants, or other restrictions that curtail their ability to engage in speculative market activity. These entities, unlike MBR sellers and entities that trade in solely virtual products and FTRs, are not motivated by profit, and as the Commission noted, “due to their financial structures, they have substantially reduced incentives to commit market manipulation.” NOPR, P 49. Nevertheless, the burden and cost of requiring Connected Entity Information from even small section 201(f) entities could be significant. Some joint action agencies provide service to many members and operate with a complexity disproportionate to the joint action agency’s size, in terms of employees or sales. For example, one joint action agency that serves more than sixty communities in four states and two RTO markets operates with fewer than fifty full-time-equivalent employees and disposes of less than four million MWh of energy annually. *See Mun. Energy Agency of Neb.*, 152 FERC ¶ 61,111, PP 6, 9 (2015) (granting waiver of standards of conduct and OASIS requirements). The costs of applying the Connected Entity Information reporting requirements to such entities far outweigh the potential benefits. Moreover, the costs of applying these proposed requirements on section 201(f) entities would be borne by consumers, not by shareholders. The NOPR properly recognizes these characteristics of section 201(f) entities and excludes these entities from the proposed Connected Entity Information requirements. Consistent with the NOPR the final rule should exclude section 201(f) entities from the Connected Entity Information reporting requirements.

## CONCLUSION

The Commission should adopt a final rule that retains its proposed exclusion of section 201(f) entities from the Connected Entity Information reporting requirements, but modifies the proposed rule regarding the MBR Information reporting requirements as set forth above.

Respectfully submitted,

*/s/ Cynthia S. Bogorad*

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Cynthia S. Bogorad

Peter J. Hopkins

Jeffrey M. Bayne

Attorney for Transmission Access

Policy Study Group

Law Offices of:

Spiegel & McDiarmid LLP

1875 Eye Street, NW

Suite 700

Washington, DC 20006

(202) 879-4000

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