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LEGAL ALERT

April 25, 2011

Electric Cooperatives Face Increased Reporting Requirements

Many non-jurisdictional electric cooperatives must begin filing Electric Quarterly Reports (EQRs) with the Federal Energy Regulatory Commission (FERC), according to an April 21, 2011 proposal by FERC. The new reporting requirement would apply to electric cooperatives with more than 4 million megawatt-hours (MWh) of annual wholesale power sales, as well as balancing authorities with more than 1 million MWh of sales. Municipal utilities and other governmental utilities also would be subject to the new requirement. The new requirement would not go into effect until after FERC issues a final rule on the proposal, and it is not known what kind of a transition period FERC will provide to new filers.

In addition to extending the EQR filing requirement to non-jurisdictional sellers, FERC also proposed to revise the current EQR filing requirements to require all EQR filers to submit: (1) transaction dates and times and types of rates; (2) information on whether a transaction was reported to an index publisher; (3) data identifying any broker or exchange platform used in arranging a transaction; and (4) electronic tag (e-Tag) identification data. In a separate proposal, FERC would require the North American Electric Reliability Corporation (NERC) to provide FERC with the complete e-Tag information currently reported to NERC by electric utilities and other market participants that schedule transmission. Together, these proposals are intended to increase transparency of market prices and enhance FERC's ability to police the markets for manipulation and other anti-competitive conduct.

Background

FERC's EQR filing requirement currently applies only to regulated public utilities such as traditional investor-owned utilities, merchant generators and power marketers. The EQR filings collect, and make publicly available, information on jurisdictional sellers' bulk power sales contracts and transactions, including counterparties, products, prices, quantities, and locations, all pursuant to a highly detailed, FERC-specified format. Last year, FERC initiated an inquiry into whether the EQR filing requirement should be extended to non-jurisdictional entities, such as electric cooperatives that are small or receive financing through the Rural Utilities Service (RUS), municipal utilities, and other governmental utilities such as the federal power marketing administrations (BPA, WAPA, etc.). Following comments on its inquiry, FERC issued the April 21, 2011 Notice of Proposed Rulemaking (NOPR) (Docket No. RM10-12-000).

FERC's proposal is based on its authority under Federal Power Act Section 220, adopted by the Energy Policy Act of 2005. Section 220 authorizes FERC to require all market participants to report information on transmission and power market transactions. Section 220 is intended to promote price transparency in the wholesale power markets. Because Section 220 applies to "market participants," FERC's authority is not limited to rate-regulated public utilities, and thus Section 220 authorizes FERC to impose reporting requirements on entities that are not otherwise subject to FERC's jurisdiction. Entities with only a "de minimis market presence" and transactions within the Electric Reliability Council of Texas (ERCOT) region are exempt from the Section 220 price transparency reporting requirements.

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FERC's Proposal

In the NOPR, FERC proposes to require non-jurisdictional entities that are otherwise exempt from FERC's "public utility" jurisdiction and have more than a *de minimis* market presence to submit EQRs. FERC finds that having such entities submit power sales data would promote price transparency in the wholesale markets. FERC determines that existing sources of information (such as Energy Information Administration (EIA) Form 861, RUS Form 12, and price index publications) do not provide sufficiently detailed information concerning non-jurisdictional entities' sales. In FERC's view, the proposed requirement would close a significant informational gap.

Non-jurisdictional entities would be required to use the same EQR that regulated public utilities currently file. The same information about wholesale power sales, transmission service, and transmission capacity reassignments would be reported. Certain adjustments to the EQR would be permitted to reflect the new EQR filers' non-jurisdictional status (such as not having to identify a FERC tariff reference).

Transactions in ERCOT and sellers in Hawaii and Alaska (that do not affect the interstate grid) would be exempt from the requirement.

De Minimis Exemption

FERC proposes to exempt, based on Section 220's mandated "de minimis market presence" exemption, non-jurisdictional utilities that sell 4 million MWh or less of wholesale power on average per year for each of the three prior years. The threshold for non-jurisdictional balancing authorities would be 1 million MWh of annual wholesale sales. Sellers would use data reported in the EIA Form 861 under "Sales for Resale" in determining whether this threshold is crossed. All wholesale sales, including cost-based and market-based sales, would be considered in calculating a non-jurisdictional utility's annual wholesale power sales.

FERC declined to exclude from the calculation sales by a generation and transmission cooperative (G&T) to its retail distribution cooperative members; in FERC's view, these are wholesale sales (sales for resale) for which EQR reporting would be appropriate. FERC distinguished the G&T's sales to its members from those of a vertically integrated utility that internally supplies its retail sales unit, which constitute retail sales and would not be reported. Subsequent sales by a G&T's member cooperative to its retail customers would not be included in the calculation because those are retail (as opposed to wholesale) sales.

Revisions to EQR Data Elements

FERC's NOPR also proposes new EQR data elements that would apply to all EQR filers. The EQR would be revised to include information on (1) transaction dates and times and types of rates (fixed, formula, index, or RTO/ISO price); (2) information on whether a transaction was reported to an index publisher; (3) data identifying any broker or exchange platform used in arranging a transaction; and (4) e-Tag identification data. FERC declines to include a new requirement to report resales of financial transmission rights (FTRs) in secondary markets, and proposes to delete the time zone and DUNS number fields from the EQR.

FERC also proposes to standardize the unit for reporting capacity ($/MW-mo.) and energy ($/MWh) transactions. EQR filers would be responsible for converting their sales data into these standardized units.

According to FERC, these EQR refinements "reflect the evolving nature of electricity markets, would increase market transparency . . ., and would allow market participants to file the information in the most efficient manner possible."

What This Means for You

Comments on FERC's proposed expansion of the EQR reporting requirements are due at FERC within 60 days after the NOPR is published in the Federal Register. Because FERC has already considered one round of industry comments in its initial inquiry last year, it seems unlikely that the FERC final rule will deviate significantly from the EQR filing requirements proposed in the NOPR. The expansion of the EQR filing requirement also is consistent with FERC's recent expansion of the reporting requirements for natural gas transactions, including extending them to non-jurisdictional natural gas companies.

It is not known at this time when FERC will issue a final rule, or what kind of an implementation period or transition process FERC ultimately will specify. FERC stated that it intends, prior to implementing the new requirement, to provide technical assistance and guidance, through workshops and training sessions, to cooperatives and municipal utilities facing EQR filing requirements for the first time. Non-jurisdictional entities subject to EQR reporting should plan on participating in these educational workshops and monitor the FERC website for training dates and locations.

Cooperatives and municipal utilities that have not previously filed EQRs also should prepare for the inevitable by familiarizing themselves with the current EQR filing process. Non-jurisdictional utilities should also ensure the requisite information is readily available for submitting EQRs in the near future, by reviewing internal accounting, data collection, and record-keeping processes. New EQR filers may save themselves significant filing anxiety if they get their data ducks in a row sooner rather than later.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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