

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Refinements to Policies and )  
Procedures for Market-Based )  
Rates for Wholesale Sales of )  
Electric Energy, Capacity and )  
Ancillary Services by Public )  
Utilities )**

**Docket No. RM14-14-\_\_\_\_\_**

**REQUEST FOR REHEARING OR, IN THE ALTERNATIVE,  
CLARIFICATION AND MOTION FOR STAY OF  
THE ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Section 313(a) of the Federal Power Act (the “FPA”)<sup>1</sup> and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),<sup>2</sup> the Electric Power Supply Association (“EPSA”)<sup>3</sup> respectfully requests rehearing or, in the alternative, clarification of the Commission’s October 16, 2015 order in the above-captioned proceeding,<sup>4</sup> with respect to the requirement that market-based rate sellers submit corporate organizational charts showing all of their “affiliates,” as defined

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<sup>1</sup> 16 U.S.C. § 8251(a) (2012).

<sup>2</sup> 18 C.F.R. § 385.713 (2015).

<sup>3</sup> EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. This filing represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

<sup>4</sup> *Refinements to Policies & Procedures For Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 816, 153 FERC ¶ 61,065 (2015) (“Order No. 816”).

in Section 35.36(a)(9) of the Commission's regulations,<sup>5</sup> in their applications for market-based rate authority, updated market power analyses and notices of change in status.<sup>6</sup> This requirement will impose an enormous burden on market-based rate sellers without any corresponding public interest benefit relative to existing requirements to identify affiliates relevant to the factors that the Commission considers in granting and renewing market-based rate authorization. On rehearing, the Commission should reverse its decision to require the submission of such organizational charts. At a minimum and in the alternative, the Commission should clarify that consistent with its practice with respect to applications under Section 203 of the FPA,<sup>7</sup> it will grant partial waivers of this requirement in order to allow market-based rate sellers to include in their organizational charts only those affiliates that are relevant to the Commission's market-based rate analysis.

Pursuant to Rule 212 of the Commission's Rules of Practice,<sup>8</sup> EPSA also respectfully moves for a stay of the effectiveness of this aspect of Order No. 816 pending action on the merits of this request for rehearing and clarification. Allowing the organizational chart requirement to take effect will create confusion and cause irreparable harm to EPSA's members and other market-based rate sellers that will be forced to prepare and submit organizational charts for little or

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<sup>5</sup> 18 C.F.R. § 35.36(a)(9) (2015).

<sup>6</sup> See Order No. 816, 153 FERC ¶ 61,065 at PP 332-35.

<sup>7</sup> 16 U.S.C. § 824b (2012).

<sup>8</sup> 18 C.F.R. § 385.212 (2015).

no corresponding public interest benefit. On the other side of the coin, delaying the effectiveness of this requirement will not harm any third party.

## I. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,<sup>9</sup> EPSA hereby identifies each issue on which it seeks rehearing and clarification of the October 9 Order, and provides representative precedent in support of its position on each of those issues:

1. The Commission's decision to require the submission of organizational charts showing all of a market-based rate seller's affiliates was arbitrary and capricious, did not reflect reasoned decision-making, and was not supported by substantial evidence, because there is no support for the Commission's conclusion that this requirement will not be unduly burdensome. See, e.g., *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) ("ICC"); *Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) ("PG&E").
2. The Commission failed to engage in reasoned decision-making, because it failed to provide a meaningful response to arguments by EPSA and others regarding the heavy burden that the requirement to submit organizational charts showing all affiliates would impose on market-based rate sellers. See, e.g., *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216, 224 (D.C. Cir. 2014) ("EPSA"), cert granted, 135 S. Ct. 2049 (2015); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("PPL Wallingford").
3. The Commission's decision to require the submission of organizational charts showing all of a market-based rate seller's affiliates was arbitrary and capricious, did not reflect reasoned decision-making and was not supported by substantial evidence, because the Commission failed to provide any rationale for requiring information regarding **all** affiliates of a specific entity, including affiliates that are not relevant to the Commission's analysis of whether an entity satisfies the Commission's standards for market-based rate authorization and because the organizational chart requirement adopted in Order No. 816 does not reflect the stated intent of this rulemaking. See, e.g., *Allentown Mack Sales &*

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<sup>9</sup> 18 C.F.R. § 385.713(c)(2) (2015).

*Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (“*Allentown*”); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) (“*Baltimore Gas*”); *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 841 (D.C. Cir. 2006) (“*National Fuel*”).

4. To the extent that rehearing is denied, the Commission should, at a minimum, clarify that, consistent with its treatment of applications under Section 203 of the FPA, it will grant requests for partial waiver of the requirement to provide corporate organizational charts and permit market-based rate sellers and applicants to provide charts showing only those affiliates that are relevant to the Commission’s analysis. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (“*Fox*”).

## II. BACKGROUND

### A. The Notice Of Proposed Rulemaking

On June 19, 2014, the Commission issued a notice of proposed rulemaking<sup>10</sup> proposing, among other things, that a seller would be required to provide, in any application for market-based rate authority, updated market power analysis, or notice of change in status, an organizational chart depicting the seller’s “current corporate structure indicating all upstream owners, energy subsidiaries and energy affiliates.”<sup>11</sup> The Commission stated that the organizational charts proposed to be required would be “similar to that which the Commission requires from section 203 applicants.”<sup>12</sup> The NOPR explained that, pursuant to Section 33.2(c)(3) of the Commission’s regulations, an application under FPA Section 203 must include a “description of the applicant,

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<sup>10</sup> See *Refinements to Policies & Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, & Ancillary Services by Pub. Utils.*, FERC Stats. & Regs. ¶ 32,702 (2014) (the “NOPR”).

<sup>11</sup> *Id.* at P 138.

<sup>12</sup> Order No. 816, 153 FERC ¶ 61,065 at P 324.

including . . . [o]rganizational charts depicting the applicant's current and proposed post-transaction . . . indicating all parent companies, energy subsidiaries and energy affiliates unless the applicant represents that the proposed transaction does not affect the corporate structure of any party to the transaction."<sup>13</sup> The Commission "believe[d] that the increased burden on market-based rate sellers would be minimal as most sellers have this organizational chart available."<sup>14</sup>

EPSA and other commenters objected to the proposed requirement.<sup>15</sup> EPSA and others explained that, contrary to the Commission's assumptions, many market-based rate sellers do not have the organizational charts readily available, particularly in the form sought by the Commission, and that burden of providing such charts would not "minimal" but actually quite substantial.<sup>16</sup> For example, NRG Energy, Inc. ("NRG") noted that it "has over 800 direct and indirect subsidiaries," and that

[e]ven if the NRG Companies could obtain the information about the corporate structure of these affiliates, the practical implications of attempting to generate an organizational chart that would capture all such information . . . would be anything but 'minimal,' and it is hard to imagine the NRG-themed

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<sup>13</sup> NOPR, FERC Stats. & Regs. ¶ 32,702 at P 137 (quoting 18 C.F.R. § 33.2(c)(3) (2015)).

<sup>14</sup> *Id.*

<sup>15</sup> See Order No. 816, 153 FERC ¶ 61,065 at PP 326-31 (describing protests).

<sup>16</sup> See, e.g., Comments of the Electric Power Supply Association at 15-17, Docket No. RM14-14-000 (filed Sept. 23, 2014) (the "EPSA Comments"); Comments of the NRG Companies at 3-5, Docket No. RM14-14-000 (filed Sept. 23, 2014) (the "NRG Comments"); Comments of NextEra Energy, Inc. at 15-17, Docket No. RM14-14-000 (filed Sept. 23, 2014); Comments of E.ON Climate & Renewables North America LLC at 14-15, Docket No. RM14-14-000 (filed Sept. 23, 2014).

mural that would result would yield any regulatory benefit commensurate with the massive burden.<sup>17</sup>

Accordingly, EPSA and other commenters urged the Commission not to adopt the organizational chart requirement or to “limit the requirement to include only public utilities subject to FERC jurisdiction rather than all affiliates within a seller’s corporate structure.”<sup>18</sup>

### **B. Order No. 816**

In Order No. 816, the Commission adopted the proposal to require corporate organizational charts, finding that this requirement “should not be unduly burdensome.”<sup>19</sup> Stating that “the terms ‘energy subsidiaries’ and ‘energy affiliates,’ as used in the FPA section 203 context . . . are not meaningful in the market-based rate context,”<sup>20</sup> the Commission modified the NOPR proposal to require that the organizational charts show “all affiliates, as defined under section 35.36(a)(9) of the Commission’s market-based rate regulations.”<sup>21</sup> The Commission cautioned that sellers should “examine all upstream ownership information to ensure that all affiliates are captured in the chart” and stated that sellers would not be “permitted to use a derivative share method to calculate ownership interests in downstream partially-owned entities for purposes of identifying affiliates.”<sup>22</sup>

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<sup>17</sup> NRG Comments at 4-5 (citation omitted).

<sup>18</sup> EPSA Comments at 15-16.

<sup>19</sup> Order No. 816, 153 FERC ¶ 61,065 at P 332.

<sup>20</sup> *Id.* at P 333.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at P 334 (citation omitted).

### III. REQUEST FOR REHEARING OR, IN THE ALTERNATIVE, CLARIFICATION

#### A. The Commission Should Grant Rehearing Of Order No. 816 With Respect To The Organizational Chart Requirement

In Order No. 816, the Commission adopted the organizational chart requirement, summarily finding that it “should not be unduly burdensome” for sellers to provide the charts.<sup>23</sup> The Commission provided no evidence to support this assertion. Indeed, notwithstanding its obligation to “respond meaningfully” to concerns raised by interested parties,<sup>24</sup> the Commission did not even attempt to demonstrate that the concerns of EPSA and others regarding the burden of this requirement were unfounded. To make matters worse, the Commission then increased the burden by substituting “affiliates” for the “parent companies, energy subsidiaries and energy affiliates” language that was originally proposed in the NOPR.<sup>25</sup>

Ignoring the concerns raised by EPSA, the Commission simply assumed that the organizational chart requirement would not be unduly burdensome because (1) “[t]he Commission already requires sellers to file organizational charts for filings under FPA section 203”; (2) “as EPSA notes, some companies

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<sup>23</sup> *Id.* at P 332.

<sup>24</sup> *PPL Wallingford*, 419 F.3d at 1198 (citations omitted). See also *EPSA*, 753 F.3d at 224 (Commission is required to “engage the arguments raised before it” (citation omitted)); *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (agency required to “answer[] objections that on their face seem legitimate”); *Moraine Pipeline Co. v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990) (Commission failed to engage in reasoned decision-making where it “fail[ed] to respond to [petitioner’s] arguments”); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (agency ruling “arbitrary and capricious” if the agency “ignores important arguments or evidence”).

<sup>25</sup> See NOPR, FERC Stats. & Regs. ¶ 32,702 at P 137.

already have organizational charts for other purposes”; and (3) “the information that the Commission would require in organizational charts does not materially differ from what is currently provided in narrative form in market-based rate filings.”<sup>26</sup> This finding was not “based upon substantial evidence in the record,”<sup>27</sup> as none of these three suppositions is valid.

First, as indicated in comments to the NOPR, Section 203 applicants routinely request and receive partial waiver of Section 33.2(c)(3) of the Commission’s regulations in order to allow applicants to provide organizational charts depicting only those entities that are relevant to the transaction for which Section 203 approval is being sought.<sup>28</sup> In point of fact, it is rarely, if ever, the case that “**all** affiliates are captured in the [organizational] chart[s]”<sup>29</sup> provided in a Section 203 application. To the contrary, the pre- and post-transaction

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<sup>26</sup> Order No. 816, 153 FERC ¶ 61,065 at P 332.

<sup>27</sup> *PG&E*, 373 F.3d at 1319 (citation and internal quotation marks omitted). See also, e.g., *ICC*, 576 F.3d at 477 (explaining that a reviewing court cannot “uphold a regulatory decision that is not supported by substantial evidence on the record as a whole”); *Missouri Pub. Serv. Comm’n v. FERC*, 337 F.3d 1066, 1072-75 (D.C. Cir. 2003) (vacating and remanding Commission orders because it found, among other things, that the Commission had failed to articulate the actual reasons for its decision, and the reasons it did cite were “speculative,” unsupported by record evidence, and did not support its decision).

<sup>28</sup> See NRG Comments at 6. See also, e.g., *Grant Wind LLC*, 153 FERC ¶ 62,086 (2015) (approving transaction where partial waiver was requested in the Application for Authorization under Section 203 of the Federal Power Act and Request for Expedited Consideration, Confidential Treatment and Waivers at 25, Docket No. EC15-203-000 (filed Sept. 4, 2015)); *RPA Energy, Inc.*, 153 FERC ¶ 62,087 (2015) (approving transaction where partial waiver was requested in the Application for Authorization under Section 203 of the Federal Power Act and Request for Expedited Consideration and Shortened Comment Period at 13, Docket No. EC15-215-000 (filed Sept. 25, 2015)); *ITC Midwest LLC*, 153 FERC ¶ 62,084 (2015) (approving transaction where partial waiver was requested in the Application for Approval of Acquisition of Assets Pursuant to Section 203 of the Federal Power Act at 10, Docket No. EC15-200-000 (filed Sept. 2, 2015)).

<sup>29</sup> Order No. 816, 153 FERC ¶ 61,065 at P 334 (emphasis added).

organizational charts in such applications typically show only those small slivers of the respective corporate families of the combining entities as are necessary to depict the effect of the transaction on the affected public utilities.

Second, EPSA's comment that certain companies may have organizational charts "for other purposes"<sup>30</sup> was taken out of context and, when read in context, underscores why the organizational chart will impose a significant burden on market-based rate sellers. EPSA's point was that even when companies have prepared organizational charts for other purposes, it would take significant time and effort to repurpose those charts to provide the information required by Order No. 816.<sup>31</sup> In fact, as EPSA explained, many organizational charts are for internal use and are used to track financial flows,<sup>32</sup> which is of little, if any, use in tracking the voting interests used by the Commission to define affiliation<sup>33</sup> and of little use in compiling the new charts required under Order No. 816.

Finally, it is simply not accurate to claim that the information to be provided in the organizational charts "does not materially differ" from what market-based rate sellers are already required to provide.<sup>34</sup> Under the Commission's existing regulations, sellers are only required to provide a description of a limited subset of their affiliates in their market-based rate filings.

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<sup>30</sup> *Id.* at P 332.

<sup>31</sup> See EPSA Comments at 15-17.

<sup>32</sup> See *id.* at 16.

<sup>33</sup> See 18 C.F.R. § 35.36(a)(9) (2015).

<sup>34</sup> Order No. 816, 153 FERC ¶ 61,065 at P 332.

Specifically, pursuant to Order No. 697<sup>35</sup> and the Commission’s market-based rate regulations, applicants and market-based rate sellers must identify those affiliates that own or control generation, transmission, and “inputs to electric power generation” – *i.e.*, “intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; physical coal supply sources and ownership of or control over who may access transportation of coal supplies”<sup>36</sup> – and then only where those affiliates own or control such assets in the relevant markets.

By contrast, Order No. 816 would require organizational charts depicting “**all** affiliates.”<sup>37</sup> This requirement would sweep in a broad array of affiliates that do not own or control generation, transmission, or inputs to electric power production in any relevant market. Indeed, it would cover affiliates that do not even do business in the United States. Accordingly, there is no support for the suggestion that the requirement adopted in Order No. 816 does not differ materially from the existing requirement.

Not only did the Commission fail to provide a reasoned basis for its finding that it would not be unduly burdensome for market-based rate sellers to compile organizational charts depicting all their affiliates, but Order No. 816 is further

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<sup>35</sup> *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *on reh’g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *on reh’g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *on reh’g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *clarified*, 131 FERC ¶ 61,021 (2010), *aff’d sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

<sup>36</sup> 18 C.F.R. § 35.36(a)(4) (2015).

<sup>37</sup> Order No. 816, 153 FERC ¶ 61,065 at P 334 (emphasis added).

arbitrary and capricious because the Commission failed to provide a reasoned rationale for its decision to require such charts in the first instance. In particular, the Commission failed to articulate **any** basis for requiring information regarding affiliates that have little to do with the analysis of whether a seller satisfies or continues to satisfy the Commission's standards for market-based rate authority, much less did it explain how the purported benefits of such information outweigh the burden on sellers.<sup>38</sup> For example, nothing in Order No. 816 explains why the Commission requires information regarding affiliates that do not even do business in the United States or affiliates that do not own or control generation, transmission or inputs to electric power generation in the relevant markets, or how such information will assist the Commission's review of market-based rate filings. Of course, it is hard to imagine any scenario in which affiliation with a toymaker in Tokyo or a hotelier in Hungary could even potentially be relevant to such review. Nowhere in Order No. 816 has the Commission provided evidence of any issue, much less a "real problem,"<sup>39</sup> with respect to such affiliates.

The organizational chart requirement cannot be squared with the stated purpose of this proceeding, which was "to streamline certain aspects of [the market-based rate] filing requirements to **reduce** the administrative burden on applicants and the Commission."<sup>40</sup> This requirement dramatically increases the

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<sup>38</sup> See *State Farm*, 463 U.S. at 48 (the Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner" (citations omitted)); *Baltimore Gas*, 462 U.S. at 105 (agency must have "considered the relevant factors and articulated a rational connection between the facts found and the choice made" (citations omitted)).

<sup>39</sup> *National Fuel*, 468 F.3d at 841.

<sup>40</sup> NOPR, FERC Stats. & Regs. ¶ 32,702 at Summary (emphasis added).

administrative burden on market-based rate sellers, and organizational charts of the sort required by Order No. 816 seem unlikely to make the Commission's life any easier either. Similarly, while Order No. 816 stated that the Commission intended the organizational charts to mirror those provided in Section 203 applications and to reflect the narrative descriptions provided in market-based rate filings,<sup>41</sup> the Commission then turned around and adopted an organizational chart requirement that requires far more information than that provided in either Section 203 applications or market-based rate filings. The Commission's decision to require organizational charts showing all affiliates was thus far from "logical and rational."<sup>42</sup>

The Commission's failure to weigh the impact on sellers against the need for the required information is particularly troubling because market-based rate sellers have been subject to increasingly heavy compliance burdens in recent years. In particular, in addition to the organizational chart requirement, sellers are also subject to other requirements under Order No. 816, including but not limited to additional information required in the asset appendices that must be submitted with market-based rate filings. The Commission has also recently undertaken separate initiatives, such as the proposal to require participants in independent system operators and regional transmission organizations to identify their "connected entities,"<sup>43</sup> that would further increase burdens on sellers.

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<sup>41</sup> Order No. 816, 153 FERC ¶ 61,065 at P 332.

<sup>42</sup> *Allentown*, 522 U.S. at 374. See also *supra* note 38.

<sup>43</sup> See *Collection of Connected Entity Data from Reg'l Transmission Orgs. & Indep. Sys. Operators*, 152 FERC ¶ 61,219 (2015).

Moreover, these are not one-time efforts but will impose continuing burdens on sellers to ensure that the information they are providing is up to date. For example, in their comments on the NOPR filed in September 2014, the NRG Companies stated that there were over 800 direct and indirect subsidiaries of NRG. It is ESPSA's understanding that NRG now has over 1,000 direct and indirect subsidiaries, a significant increase, and that such subsidiaries change, in general, on a weekly basis. These numbers are certain to be even higher in the case of sellers affiliated with financial institutions, who are likely to hold ownership interests in a large number of entities and whose ownership interests are also likely to change rapidly. Sellers will thus have to spend a large amount of time tracking and updating their organizational charts. Sellers do not have unlimited resources, and EPSA is very concerned that the cumulative impact of these types of requirements will deter new entry and divert resources from other compliance efforts. The Commission should thus grant rehearing and eliminate the organizational chart requirement, or limit it to public utilities, as previously proposed by EPSA.

**B. In The Alternative And At A Minimum, The Commission Should Clarify That It Will Grant Partial Waiver Of The Organizational Chart Requirement Consistent With Its Section 203 Practice**

As described above, the Commission should grant rehearing with respect to its decision to adopt the requirement to require market-based rate sellers to provide organizational charts depicting all of their affiliates. In the alternative, the Commission should, at a minimum, ease the burden on sellers by clarifying that it intends to liberally grant partial waiver of the organizational chart requirement to

permit sellers to depict only those affiliates that are relevant to the Commission's market-based rate analysis.

The requested clarification is consistent with Order No. 816 itself as well as the Commission's practice with respect to Section 203 applications.<sup>44</sup> In the NOPR and Order No. 816, the Commission indicated that the required organizational charts should be "similar to that which the Commission requires from section 203 applicants."<sup>45</sup> Accordingly, consistent with the Commission's regular practice of granting waiver in order to permit applicants under Section 203 to provide organizational charts that only relate to the transaction at issue,<sup>46</sup> the Commission should make clear that it will be receptive to requests for waivers to provide information relevant to the Commission's market-based rate analysis.

Similarly, in Order No. 816, the Commission stated that "the information that the Commission would require in organizational charts does not materially differ from what is currently provided in narrative form in market-based rate filings."<sup>47</sup> Given that sellers currently are not required to describe all of their affiliates and only provide narrative descriptions of their affiliates that are relevant to the Commission's market-based rate analysis, it would make sense for the organizational charts to be similarly limited. Indeed, targeted charts that depict only those affiliates relevant to the Commission's analysis will likely be more

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<sup>44</sup> See, e.g., *Fox*, 556 U.S. at 515 (the Commission may not "depart from a prior policy *sub silentio*").

<sup>45</sup> Order No. 816, 153 FERC ¶ 61,065 at P 324.

<sup>46</sup> See *supra* note 28.

<sup>47</sup> Order No. 816, 153 FERC ¶ 61,065 at P 332.

useful than a chart that swamps the Commission with unnecessary and irrelevant information, including information regarding foreign entities and entities that are in completely unrelated lines of business.

#### **IV. MOTION FOR STAY**

Under Section 705 of the Administrative Procedure Act, stay of an agency order is warranted where “justice so requires.”<sup>48</sup> In determining whether justice requires a stay, the Commission will consider whether (1) the party requesting the stay will suffer irreparable harm without a stay; (2) issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.<sup>49</sup> Each of these factors militates in favor of staying the effectiveness of Order No. 816’s organizational chart requirement pending action on the merits of EPSA’s request for rehearing or, in the alternative, clarification.

Absent a stay, EPSA’s members and other market-based rate sellers will suffer irreparable harm by being forced to prepare and submit organizational charts including all of their affiliates, including affiliates whose activities have absolutely no relevance to the factors considered by the Commission in authorizing wholesale sales at market-based rates. Obtaining this information and depicting it in graphic form will be a substantial burden given the size of many sellers’ corporate families and the further challenges of obtaining the necessary detail about investors’ corporate families. To be clear, the

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<sup>48</sup> 5 U.S.C. § 705 (2012).

<sup>49</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,100 at P 13 (2012); *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at pp. 61,630-31, *aff’d sub nom. Michigan Mun. Coop. Grp. v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993),

organizational chart requirement will remain extremely burdensome even after the initial organizational charts have been prepared, because of the challenges of updating and revising these charts over time. But the initial burden will be even more substantial and will be unavoidable absent a stay.

Granting a stay will do no harm to third parties and will affirmatively benefit the public interest. As discussed above, there is no evidence whatsoever that the incremental benefit of requiring sellers to submit organizational charts will outweigh the burden on sellers. Moreover, as discussed above and as Order No. 816 effectively concedes in asserting that this requirement “does not materially differ” current requirements,<sup>50</sup> sellers already provide detailed information about affiliates that own or control generation and transmission facilities and inputs to electric power production. It is hard to see how third parties or the public interest will be harmed by some modest delay in the effectiveness of a requirement to provide information on affiliates engaged in activities unrelated to the factors that the Commission considers in deciding whether to authorize market-based rate sales.

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<sup>50</sup> Order No. 816, 153 FERC ¶ 61,065 at P 332.



