GLICK, Commissioner, dissenting in part:

1. I support the aspects of today’s final rule that streamline collection of the data needed to regulate market-based rates by creating a relational database and revising certain information requirements. I dissent in part, however, because the Commission is declining to finalize a critical aspect of the underlying notice of proposed rulemaking\(^1\) (NOPR) that would have required Sellers\(^2\) 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). That information is critical to combatting market manipulation\(^4\) and the Commission’s retreat from the NOPR proposal will hinder our efforts to detect and deter such manipulation.

\(^1\) 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).

\(^4\) See, e.g., Cal. ex rel. Lockyer v. FERC, 383 F.3d 1006, 1013 (9th Cir. 2004) (recognizing the role that “strict reporting requirements” play in ensuring that rates are just and reasonable and that the markets are not subject to manipulation).
2. When it comes to policing 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.\(^5\) 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 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.\(^6\) The abandoned aspects of the NOPR would have addressed all three deficiencies, among others.

4. Those deficiencies have real-world consequences. Consider a recent example from a Commission order of how an individual involved in one manipulative scheme was able to move, rather seamlessly, to allegedly perpetuate a similar scheme at another entity. On July 10, 2019, the Commission issued an Order to Show Cause with an accompanying report and recommendation from the Office of Enforcement that detailed how Federico Corteggiano allegedly engaged in a cross-product market manipulation

\(^5\) See NOPR, 156 FERC ¶ 61,045 at P 43.

\(^6\) 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. Id. at P 20.
scheme in the California Independent System Operator’s (CAISO). As described in that order, this alleged scheme used techniques that were similar to another manipulative scheme involving Corteggiano while he was employed at Deutsche Bank. Without the Connected Entity reporting requirements contemplated in the NOPR, the Commission lacks any effective means of tracking individuals who perpetrate a manipulative scheme at one entity and then move locations and engage in similar conduct elsewhere, as Corteggiano is alleged to have done. That makes no sense. We should not be leaving the Office of Enforcement to play “whack-a-mole,” addressing recidivist fraudsters only when evidence of their latest fraud comes to light.

5. Alternatively, consider the recent example of GreenHat Energy, LLC’s (GreenHat) default on its FTRs in PJM Interconnection, L.L.C. (PJM), at least as it is described in an independent report prepared for PJM’s Board. That report alleges that GreenHat told PJM it had bilateral contracts that would provide a future revenue stream, alleviating the need for additional collateral. The report further contends that PJM mistakenly relied on GreenHat’s representations and the contracts in question did not provide the promised revenue stream, significantly exacerbating GreenHat’s collateral shortfall. Under the Commission’s current regulations, no duty of candor attached to

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8 Enforcement investigated Corteggiano’s conduct at Deutsche Bank, which resulted in the settlement of manipulation allegations with Deutsche Bank for a civil penalty of $1.5 million and disgorgement of $172,645, plus interest, in January 2013. See Deutsche Bank Energy Trading, LLC, 142 FERC ¶ 61,056 (2013) (approving a settlement agreement in which Deutsche Bank neither admitted nor denied alleged violations). Although Corteggiano was not identified by name in the Order to Show Cause in the Deutsche Bank enforcement matter, the public Enforcement Staff Report attached to the order explained his central role in the trading scheme and referred to him by name. Deutsche Bank Energy Trading, LLC, 140 FERC ¶ 61,178, at App. A (2012).

9 I take no position on the accuracy of the events as discussed in that report or whether, even if true, the actions described therein would be improper. I use this report only as an illustrative example of what could occur in the absence of a duty of candor.


11 Id. (the report refers to this as “a seductive but problematic pledge”).
GreenHat’s allegedly misleading statements. It is, of course, impossible to know how a duty of candor for Virtual/FTR Participants would affect potential misstatements. But, if there were a duty of candor for Virtual/FTR Participants, it would give the Commission a basis for investigating potentially misleading statements and, if appropriate, sanctioning that conduct.\footnote{There is an open Office of Enforcement investigation into GreenHat’s alleged misconduct. \textit{PJM Interconnection, L.L.C.}, 166 FERC ¶ 61,072, at P 36 (2019) (noting that “the Commission’s Office of Enforcement began a non-public investigation under Part 1b of the Commission’s regulations into whether Green Hat engaged in market manipulation or other potential violations of Commission orders, rules, and regulations”).}

6. Although the Commission does not dispute the benefits that the Connected Entities Information would provide, it “declines to adopt” this aspect of the NOPR without any real analysis or explanation and based only on its “appreciat[ion]” of the “difficulties of and burdens imposed by this aspect of the NOPR.”\footnote{Final Rule, 168 FERC ¶ 61,039 at P 184. The Commission also notes that the creation of the relational database for market-based rate purposes will provide value for the Commission’s analytics and surveillance program. While true, that will not provide the distinct and critical Connected Entity Information needed to aid the Commission in detecting and deterring market manipulation. Without this information, the Commission continues to have little visibility into Sellers’ and Virtual/FTR Participants’ affiliates with solely financial market participants.} Nothing in the record suggests that any burdens associated with this reporting obligation would outweigh its considerable benefits. As an initial matter, the NOPR already paired back the scope of Connected Entity Information compared to the previous NOPR addressing this issue.\footnote{For example, in the initial proposal, the Commission proposed to collect information concerning ownership, employee, debt, and contractual connections, while this proposal replaced “employee” with the much narrower “trader” definition and eliminated the reporting of debt instruments. \textit{Compare Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators, 152 FERC ¶ 61,219, at P 23 (2015) (defining “Connected Entity”) with NOPR, 156 FERC ¶ 61,045 at P 17 (explaining changes from the 2015 proposal to the 2016 proposal); see also Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators, 156 FERC ¶ 61,046 (2016) (withdrawing and terminating the proposed 2015 notice of proposed rulemaking).} The Commission could have further explored ways to limit the impact of this rule if it were truly concerned about that burden by, for example, eliminating the inclusion of contracts for defining connected entities, which received strong pushback
from industry. Alternatively, the Commission could have established a phased-in implementation schedule to provide industry time to adjust to the new reporting requirements.

7. Instead, the Commission makes only a conclusory statement based on an unspecified burden to industry. It makes no effort to explain why that burden outweighs the benefits that Connected Entities Information would provide to the Commission’s ability to carry out its enforcement responsibilities. Without such information, the predictable result of today’s order is 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.

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8. Identifying, eliminating, and punishing market manipulation must remain one of the Commission’s chief priorities, as it has been since Congress vested the Commission with that responsibility when it enacted the 2005 amendments to the FPA in the wake of the Western Energy Crisis. In addition to the financial losses directly attributable to a particular instance of fraud, market manipulation erodes participants’ confidence in wholesale electricity markets—a dynamic that has serious deleterious consequences for the long-term health and viability of those markets. Although I appreciate the importance of avoiding unnecessary regulatory burdens, the record in this proceeding indicates that the Connected Entity Information is necessary and would, in the long-term, benefit all market participants, including those subject to the regulations, by helping to ensure confidence in the integrity of wholesale electricity markets.

For these reasons, I respectfully dissent in part.

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Richard Glick
Commissioner