Information, Please

by

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Information, Please

Both the U.S. Energy Information Administration (EIA) and the Federal Energy Regulatory Commission (FERC) collect data from electricity industry participants. The two agencies collect information for different purposes and have little incentive to plan or coordinate their activities with each other. EIA is the independent data collection arm of the Department of Energy (DOE) and is charged with gathering information needed to answer a broad range of energy policy questions. As a regulatory agency, FERC’s focus is the collection of data needed to monitor and regulate entities under its jurisdiction.

While both EIA and FERC have made changes to their collection processes to reflect transformations in the industry structure, a crucial question remains: as restructuring continues, will the public have access to the sum of information needed to assess and monitor the industry?

EIA’s Data Collection Programs

For decades both EIA and FERC have collected from electric utilities information aggregated on a monthly, quarterly or, most commonly, annual basis. Analysts use the resulting data series to assess the broad effects of policy decisions and to forecast where the industry is heading, in terms of energy supply, demand and prices, for example.

EIA began expanding its electricity data collection program in the early 1990s to reflect unregulated entities’ growing participation in electric markets. To the data already collected from electric utilities, EIA added capacity and generation information submitted by non-utility generators (NUGs), defined to include utility affiliates as well as true independents. To get the NUGs’ cooperation in filing, EIA
agreed to keep the information confidential, but as electric power industry restructuring moved forward throughout the 1990s, utilities also began requesting confidential treatment of data.

Of particular concern to the utilities was the difference in filing requirements between traditional utilities and NUGs. EIA considered this issue in a 1998 proceeding and, as a result, increased the similarity in type of generator information filed by each sector, eliminated the confidential treatment of NUG data, and established confidential treatment for a few, select data items, whether they were reported by utilities or NUGs.

In limiting the scope of items allowed to remain confidential, EIA relied on the requirements of the Freedom of Information Act (FOIA): ¹

Where information is required to be submitted, the test for FOIA disclosure is whether disclosure would cause substantial competitive harm. The question of whether substantial competitive harm will in fact occur (by release of data to the public) is a highly fact-specific one. The harm must be substantial, a mere negative effect alone does not meet the standard of substantial harm. Actual competition is a prerequisite if seeking exception from disclosure under FOIA. The entity must be operating in a competitive market, not a non-competitive market. Blanket allegations of harm will not suffice as proof of substantial harm.

Three years later, EIA reversed its stand on confidentiality and recommended that a broad array of annual data submitted be made confidential. By this time EIA was also collecting information from marketers selling power at wholesale and energy suppliers selling to end-use customers in retail choice states. Like NUGs, these entities

are for the most part unregulated and unaccustomed to reporting transaction data. Perhaps one reason EIA proposed to broaden its confidentiality policy was in hopes of increased cooperation from these unregulated sectors of the industry. Better cooperation would allow EIA to compile a more complete and relevant database.

As justification for the proposed change, EIA cited the increasingly competitive nature of the electric power industry, but did not attempt to provide substantive arguments that could meet the FOIA burden of proof in regard to competition or competitive harm. In fact, EIA’s assertion of increased competition was made at the same time as the widespread disruptions in California and western markets. The very nature of these problems, along with allegations of gaming the system, raised questions about both the extent of competition in electricity markets and the availability of information needed to monitor the market. In addition, a wide range of entities submitted comments against EIA’s proposal, offering strong arguments that the information should remain available to the public:

- The data are used for public policy goals, such as evaluating mergers, pricing and cost procedures, and assessing environmental impact;
- FOIA requires a balancing of interests between the public need for the information and the potential for competitive harm, and the balance favors non-confidentiality;
- The industry has not documented any specific harm that would occur from the release of the data; and
- The data, annualized and generally available six months or more after the end of the year, will have no competitive impact by the time of its release.
Ultimately EIA relented and approved confidential treatment for only a few items. However, subsequent to this 2001 proceeding, the situation changed in regard to EIA’s obligation to make data publicly available unless the agency can meet the burden of proof established by the FOIA and legal precedent. Congress passed the Confidential Information Protection and Statistical Efficiency Act, Title V of the E-Government Act of 2002 (Public Law 107-347). This new law provides that data collected under a pledge of confidentiality from a federal statistical agency such as EIA are exempt from the FOIA.

The intent of the law is to give federal agencies an easy method of providing confidential treatment of data collected only for statistical purposes, thus avoiding disputes over whether a data item meets the FOIA criteria for exemption from public disclosure. However, the effect of the law is to give EIA virtually unchecked authority to decide what information will remain in the public domain. FERC collects data for regulatory, rather than statistical purposes, and so the new law should not have the same effect on its data collection policies. In the past EIA has proposed confidential data treatment for certain data items, but ultimately revised its proposal to be in line with FERC’s more open treatment of data. However, the new law gives EIA a ready excuse to set its own course on confidentiality and not follow FERC’s lead.

FERC’s Role in Data Collection

EIA and FERC’s traditional data collection programs—focused on historical, aggregated information—remain useful in assessing industry trends and addressing broad policy questions. However, they fail to provide the information needed for a second, crucial role: market monitoring. The burden in this regard falls on FERC, as it is the regulatory agency charged with assuring that markets are functioning properly.
Prior to the Energy Policy Act of 1992, utilities sold wholesale power at cost-based rates and FERC could use the company’s annual historical data to make a credible assessment of the reasonableness of the rates. However, once FERC began granting utilities and power marketers authority to make wholesale sales at market-based rates, the standards for rate reasonableness changed since any rate resulting from the workings of a competitive market was deemed reasonable. Rather than address the actual cost of providing power, FERC now would have to consider the degree of competition in the market and a company’s ability to exert market power. It seeks to do this primarily through regulating the independent system operators (ISOs), regional transmission organizations (RTOs) and other transmission providers, and imposing initial requirements for market-based rate approval.

FERC’s early conditions for authorization of market-based rates related to traditional market share indices—establishing generator market share of 20 percent or less as an indicator of lack of market power—and affiliate relationships—for example, requiring the adoption of a code of conduct addressing affiliate transactions and requiring the electric utility affiliate of a power marketer to have an open access transmission tariff on file with the commission.

FERC reconsidered market-based rate authority after the collapse of California and western power markets because its investigations revealed flaws in the market structure and rules governing wholesale power sales in California and identified a variety of market power problems. Thus, in November 2001, FERC proposed new conditions for market-based rates. After a political firestorm of protest from the regulated companies, it did not approve final rules until November 2003, two years later. The new rules
specifically forbid market manipulation and set forth examples of prohibited behavior, including:

- Engaging in wash trades (mirror-image trades with the same counter-party at the same time) that involve no economic risk and no net change in ownership;
- Submitting false information to grid operators;
- Creating artificial congestion and then purportedly relieving it; and
- Colluding with another party in order to influence market prices, market conditions or market rules.

Thus, FERC is maintaining its reliance on behavioral rules to prohibit the exercise of market power. In a second November 2001 order, FERC proposed a new market power test for market-based rate authority—Supply Margin Assessment (SMA). This proposal received significant opposition, and while FERC is using the SMA methodology on an interim basis, it has postponed the implementation of the SMA’s provisions designed to mitigate market power when an applicant does not pass the market power test. Under the SMA methodology, an entity has market power if its generating capacity is greater than the supply margin, defined as the difference between total capacity in the market and peak demand, taking transmission constraints into account.

In January 2004, more than two years after its initial proposal, FERC held a technical conference to consider modifications to the SMA test and what remedies should apply if a company has market power. According to FERC, 74 companies have failed the existing SMA test, but FERC has imposed no remedies and the companies continue to sell power at market-based rates.
The Role of Market Monitoring Units and ISO Data

FERC’s November 2003 approval of new conditions for market-based rates authorizes the Market Monitoring Units (MMUs) of ISOs or RTOs to enforce ISO/RTO tariff conditions, referring to the MMUs as practically an extension of FERC’s own monitoring and investigative staff. While it is necessary for FERC and the MMUs to have a good working relationship, too much reliance on the MMUs raises serious concerns. MMUs are employed by the ISOs, and so are not truly independent from the markets they monitor. In fact, since they are also responsible for developing market rules and procedures to correct perceived problems, they have a conflict of interest in assessing the effectiveness of their own rules.

FERC receives from the MMUs summary information in the form of annual reports and regular updates, and has access to all MMU data by request, for example, to investigate a specific situation or complaint. The MMUs, in turn, receive large amounts of real-time data from the ISOs, the ultimate data collectors. In effect, FERC has delegated its data authority to the ISOs.

While ISOs post a great deal of publicly available information on their Web sites, most is summary information and there is virtually nothing available by facility or company name. FERC requires all ISOs to release generator bid data after six months, but these reports do not identify generators and units. Prompt public access to ISO bid data, available in the Australian and British electricity markets, would help provide true market transparency and discipline markets. FERC, however, has allowed ISOs to keep this essential data confidential, thereby putting greater reliance on the MMUs’ oversight, with its intrinsic flaws.
In Order 2001, FERC improved its own collection of data by requiring traditional utilities selling at cost-based rates and all entities with market-based rate authority to file quarterly transaction information, including the quantity, price and counter-party. As justification for the new requirements, FERC asserted that the reports would better allow customers and the commission to identify situations indicating the possible exercise of market power. The quarterly reports are useful, but the information is filed on an aggregated basis one month after a quarter’s end. This does not allow for timely or detailed analysis and is not sufficient for effective market oversight.

**Conclusion**

Public access to information necessary for assessing and monitoring the electricity industry is threatened on two major fronts. Will historical, trend data continue to be available, or will EIA succumb to entreaties from the merchant sector and use its new authority to confer confidentiality status on a broad array of information? Will FERC require broader access to real-time data in order to improve market oversight, or will the commission continue to limit the availability of this critical information?