

clearinghouse that set a market clearing price for all wholesale seller participants, including [governmental entities]" and thus that jurisdiction may properly be asserted over sales by governmental entities.<sup>26</sup> The Commission continued:

Here, the central transactions, wholesale sales of energy in interstate commerce, were governed by FERC-approved rules and a FERC-jurisdictional ISO and PX \* \* \* [and] thus fell within FERC's jurisdiction regardless of the jurisdictional nature of the sellers or buyers. Further, the centralized wholesale spot electricity markets operated by the California ISO and PX were established (and have been modified) subject to FERC review and approval. Because the market did not exist prior to FERC authorization, all those who participated in the market had to recognize the controlling weight of FERC authority. Moreover, it is fair that all those who benefitted from this market also bear responsibility for remedying any potential unlawful transactions that might have occurred in the market.

\* \* \* \* \*

Consequently, if the price for a specific sale is found to be unjust and unreasonable, then all sellers who obtained that price received an unjust and unreasonable rate. To the extent the Commission determines refunds are an appropriate remedy for that sale, consumers can only be made whole by refunds from all sellers who received the excessive price. As [governmental entity] sellers of energy and ancillary services accounted for up to 30 percent of all sales in the California centralized ISO and PX spot markets, excluding them from a potential refund remedy could have a serious detrimental effect on consumers.<sup>27</sup>

15. This rationale applies equally in the context of violations of MMIP provisions that prohibit gaming and/or anomalous market behavior, as such provisions apply to all transactions in the California market.

#### *B. The MMIP's Provisions Concerning Gaming and/or Anomalous Market Behavior*

##### **1. Provisions Cited in the Staff Final Report**

16. Concerning the Commission's remedial authority with respect to the Identified Entities' alleged practices, the

Staff Final Report notes that the MMIP is one of several protocols that the Commission required the ISO and PX to include as part of their filed rate schedules.<sup>28</sup> The Staff Final Report also cites the underlying purposes of the MMIP,<sup>29</sup> discussed in MMIP 1.1 (Objectives) which provides in pertinent part:

This Protocol sets forth the workplan and, where applicable, the rules under which the ISO will monitor the ISO Markets to identify abuses of market power, to ensure to the extent possible the efficient working of the ISO Markets immediately upon commencement of their operation, and to provide for their protection from abuses of market power in both the short term and the long term, and from other abuses that have the potential to undermine their effective functioning or overall efficiency in accordance with section 16.3 of the ISO Tariff.<sup>30</sup>

17. The Staff Final Report also cites part 2 of the MMIP which specifies what are termed "Practices Subject to Scrutiny." Among those practices are two that the Staff Final Report identifies as being of particular concern to the Commission; the first is "gaming," and the second is "anomalous market behavior."<sup>31</sup> Gaming is defined at section 2.1.3 of the ISO's MMIP as follows:

[T]aking unfair advantage of the rules and procedures set forth in the PX or ISO Tariffs, Protocols or Activity Rules, or of transmission constraints in periods in which exist substantial Congestion, to the detriment of the efficiency of, and of consumers in, the ISO Markets. "Gaming" may also include taking undue advantage of other conditions that may affect the availability of transmission and generation capacity, such as loop flow, facility outages, level of hydropower output or seasonal limits on energy imports from out-of-state, or actions or behaviors that may otherwise render the system and the ISO Markets vulnerable to price manipulation to the detriment of their efficiency.<sup>32</sup>

18. Anomalous market behavior is defined at Section 2.1.1 of the ISO's MMIP:

"Anomalous market behavior" \* \* \* is \* \* \* behavior that departs significantly from the normal behavior in competitive markets that do not require continuing regulation or as behavior leading to unusual or

unexplained market outcomes. Evidence of such behavior may be derived from a number of circumstances, including: withholding of Generation capacity under circumstances in which it would normally be offered in a competitive market; unexplained or unusual redeclarations of availability by Generators; unusual trades or transactions; pricing and bidding patterns that are inconsistent with prevailing supply and demand conditions, e.g., prices and bids that appear consistently excessive for or otherwise inconsistent with such conditions; and unusual activity or circumstances relating to imports from or exports to other markets or exchanges.<sup>33</sup>

##### **2. The Staff Final Report's Interpretation of the MMIP<sup>34</sup>**

19. In brief, the Staff Final Report interprets the MMIP as "rules of the road" which the Commission may enforce, and as barring the kinds of practices at issue here. The Staff Final Report explains that the MMIP enumerates objectionable practices, the MMIP authorizes the ISO to impose "sanctions and penalties" or to refer matters to the Commission for appropriate sanctions or penalties,<sup>35</sup> and the MMIP was part of the ISO and PX tariffs on file with the Commission during the relevant period.<sup>36</sup> Accordingly, entities that transact through the ISO or PX and engage in such enumerated practices are in violation of filed tariffs. Further, the Staff Final Report concludes that various practices were violations of the MMIP and thus violations of the ISO's and PX's filed tariffs.

##### **3. Comments Regarding the Staff Final Report's Interpretation of the MMIP**

###### **a. Supporting Comments**

20. Several commenters supported the Commission Staff's interpretation of the

<sup>33</sup> MMIP 2.1.1.5 further provides that: The Market Surveillance Unit shall evaluate, on an ongoing basis, whether the continued or persistent presence of such circumstances indicates the presence of behavior that is designed to or has the potential to distort the operation and efficient functioning of a competitive market, e.g., the strategic withholding and redeclaring of capacity, and whether it indicates the presence and exercise of market power or of other unacceptable practices.

<sup>34</sup> See Staff Final Report, ch. VI at 8–10.

<sup>35</sup> MMIP 7.3.

<sup>36</sup> As the Staff Final Report notes, and as discussed in more detail below, the MMIP has been part of the ISO and PX tariffs on file with the Commission since 1998, which encompasses the relevant period of January 1, 2000 through June 20, 2001.

<sup>26</sup> July 25, 2001 Order, 96 FERC at 61,512; *accord id.* at 61,511–13.

<sup>27</sup> *Id.* at 61,513 (footnote omitted); *accord id.* at 61,511–13. On rehearing, the Commission reaffirmed its jurisdiction over these transactions. December 19, 2001 Order, 97 FERC at 62,180–87.

<sup>28</sup> As further explained below, the MMIP has been part of the ISO's and PX filed tariffs since 1998.

<sup>29</sup> Staff Final Report, ch. VI at 6–7.

<sup>30</sup> MMIP 1.1.

<sup>31</sup> Staff Final Report, ch. VI at 7–10.

<sup>32</sup> MMIP 2.1.3.