

MMIP.³⁷ They argue that: (1) The MMIP is on file with the Commission as part of a filed tariff, and has been for some time, and thus can be enforced by the Commission; (2) the MMIP applies to all market participants, and is expressly intended to identify abuses and to provide for protection from such abuses; (3) the MMIP provides that the practices that are expressly subject to scrutiny are gaming and anomalous market behavior, and each is defined in some detail; (4) while the MMIP does not expressly prohibit such Gaming Practices as “ricochet” or “get shorty,” such a standard would require a level of detail that would be impossible to achieve, and it would require anticipating all of the myriad ways that could be dreamed up to “game” the markets, and to spell them all out in the MMIP; (5) it is hard to conceive that market participants as sophisticated as those here did not realize that the kind of trading practices at issue here were inappropriate; and (6) as part of a filed tariff, the MMIP ultimately is for the Commission to interpret and enforce, and the MMIP itself recognizes that the Commission is the ultimate enforcement authority.

b. Opposing Comments

21. Several parties filed comments opposing Commission Staff’s interpretation of the MMIP.³⁸ They argue that: (1) The MMIP was intended to provide direction to the ISO and not be a standard by which the Commission prosecuted market participants’ conduct; (2) the MMIP does not expressly bar any trading practices; and (3) the MMIP does not identify with precision the particular strategies that are subject to scrutiny, and thus, it is too vague to serve as a standard by which to judge market participants’ conduct. They argue that the Commission cannot hold market participants responsible in these circumstances, when they have not had fair notice that the trading practices at issue here are prohibited. Further, they contend that there is extrinsic evidence indicating that market participants, particularly including the ISO itself, did not view the MMIP as a bar to the kind of trading practices at issue here or as a basis for ordering disgorgement of unjust profits.

³⁷ E.g., the California Parties, which include the California Attorney General and the California Public Utilities Commission, among others.

³⁸ E.g., California Generators (Mirant, Dynegy, Williams), Competitive Supplier Group (Aquila, Aquila Merchant Services, Arizona Public Service Company, Avista Energy, Constellation Power Source, Coral Power, El Paso Merchant Energy, IDACORP Energy, Idaho Power Company, Pinnacle West Capital Corporation, Portland General Electric, Puget Sound Energy, and Sempra Energy Trading Corp.), Enron, and Reliant.

In this respect, the parties argue that the Commission to date has never indicated that it viewed the MMIP as a bar to such conduct; its orders, to the extent that they have touched on such matters at all, have, in fact, implied the contrary, according to the opposing commenters. They also suggest that if the Commission initiates an investigation, it would discourage new investment.

c. Other Comments

22. The California Parties also argue that other tariff provisions may have been violated, citing the following tariff provisions from the ISO Tariff: (1) Section 5.5.1 (Planned Maintenance); (2) Section 5.5.3 (Forced Outages); (3) Section 5.3 (Identification of Generating Units); (4) Section 5.4 (Western Systems Coordinating Council (WSCC) Requirements); (5) Section 2.2.7.2 (Submitting Balanced Schedules); (6) Section 2.5.22.11 (Failure to Conform to Dispatch Instructions); and (7) Section 20.3 (Confidential Information).

3. Commission Determination

23. The MMIP puts market participants on notice regarding their rights and obligations in the marketplace. It serves as the rules of the road for market participants. It also contemplates that these rules will be enforced by the Market Surveillance Unit, in the form of monitoring and reporting, or by the appropriate body or bodies (including this Commission), in the form of corrective actions.³⁹ While the Commission’s role in this regard may be triggered by the referral procedures outlined in the MMIP, the Commission also possesses the authority to enforce a filed tariff even in the absence of a referral.⁴⁰ We agree with the Staff Final Report that one key function of the MMIP is to put market participants on notice as to the rules of the road for market participants, so that the markets operated by the ISO are free from abusive conduct and may function as efficiently and competitively as possible. The Staff Final Report finds, and again we agree, that market participants cannot reasonably argue that they were *not* on notice that conduct such as the Gaming Practices discussed below would be a violation of the ISO and PX tariffs. In short, the key function of the MMIP is to put market participants on notice of what practices would be subject to monitoring and, potentially, corrective or enforcement

³⁹ Sections 2.3, 3.3.4 and 7.3 of the MMIP outline the procedures to be followed by the ISO and the PX when a market participant is found to have engaged in any of the suspect practices delineated in the MMIP.

⁴⁰ 16 U.S.C. §§ 824d, 824e, 825h (2000).

action, by either the ISO in the first instance or by the Commission, whose role includes enforcing the terms and conditions of filed rate schedules. Accordingly, it is appropriate for us to institute this proceeding.

24. MMIP 2.3 and its several subparts address how the ISO, including the Market Surveillance Unit, is to respond to market participants engaging in any of the suspect practices delineated in the MMIP. While the MMIP outlines intermediate steps (such as arranging for alternative dispute resolution or proposing language changes to the tariff), ultimately the MMIP directs the Market Surveillance Unit to refer matters to this Commission for enforcement.⁴¹ The MMIP contemplates that, while the ISO may try to correct misconduct on its own, the Commission is to be “the court of last resort” for misconduct committed by market participants, including the gaming and/or anomalous market behavior misconduct defined in the MMIP. While part 2 of the MMIP enumerates suspect practices, MMIP 7.3 authorizes the ISO to impose “sanctions and penalties” or, as particularly relevant here, to refer matters to the Commission for appropriate sanctions or penalties.

25. We agree with the Staff Final Report that if entities are found to have engaged in the identified misconduct, they will have violated the ISO’s and PX’s filed tariffs even if such formal procedures as referral outlined in the MMIP did not occur. The Commission can enforce a filed tariff even when there are processes in that tariff which, had they been used, would have assisted the Commission. Ultimately, the Commission can enforce a filed tariff with or without the assistance of a complaint or a referral.⁴²

26. In this regard, we note that the ISO and PX each initially submitted its MMIP (along with other protocols), for informational purposes only, on October 31, 1997. The Commission, however, found that the protocols, including the MMIP, “govern a wide range of matters which traditionally and typically appear in agreements that should be filed with and approved by the Commission.”⁴³ The Commission accepted the protocols, including the MMIP, for filing, and directed the ISO and PX each to post the protocols on its Internet site and to file its complete protocols pursuant to Section 205 of the FPA within 60 days of the ISO’s and PX’s Operations Date (that date ultimately was April 1,

⁴¹ MMIP 3.3.4.

⁴² 16 U.S.C. 824d, 824e (2000).

⁴³ Pacific Gas and Electric Co., *et al.*, 81 FERC ¶ 61,320 at 62,471 (1997).