

market participants to maximize their profits.

b. Ancillary Services-Related Practices—Arbitrage.

64. As noted above, market participants engaged in several different practices involving ancillary services. Two of those we discussed above (Paper Trading and Double Selling) and we consider those practices to be Gaming Practices in violation of the MMIP. However, to the extent a market participant was merely taking advantage of systematic differences in the day-ahead and hour-ahead market prices for ancillary services by selling ancillary services in the day-ahead market and buying them back at a lower price in the hour-ahead market, we find this practice to be consistent with legitimate arbitrage.<sup>71</sup> Thus, as long as the market participant had the generation available to provide the ancillary services or appropriately contracted for it, selling the energy at one price and buying it back at a lower price did not violate the ISO rules or tariff and was nothing more than a method for the market participant to reap a valid profit from the price differential in the day-ahead and real-time markets.

c. Access to IIR Outage Data.

65. For an annual fee, market participants could subscribe to a generation outage notification service provided by Industrial Information Resources (IIR). IIR provided information to subscribers via daily e-mails and upon request regarding plant outages in the West. The information sometimes included the cause of outages, prospective as well as current plant outages, and expected start and end dates. IIR obtained information directly from the generating plants.

66. In the 100 Days Evidence, the California Parties alleged that market participants who utilized IIR violated the ISO tariff regarding confidentiality of outage data and that subscriptions to the IIR service raised issues under the antitrust laws. We disagree. The ISO tariff prohibits the ISO from revealing market participants' confidential outage data; the tariff does not prohibit the market participants providing the information to third parties and then subscribing to third-parties' services.<sup>72</sup> Further, subscribing to a service that provides outage information does not mean that the subscribers used that

information to manipulate the market. There has been no evidence to suggest that the sharing of outage information was used to manipulate the market. Subscribing to IIR's service did not involve any false representations, rule violations, or violations of MMIP. Furthermore, no evidence was offered to suggest that any outage data was used in a collusive manner to raise prices.

*E. Further Clarification as to What Constitutes Gaming Practices*

67. The screens used by the ISO and Dr. Fox-Penner are broadly inclusive and some of the characteristics that were used to identify potential Gaming Practices may also be present in transactions that were not actually Gaming Practices. In fact, the 100 Days Evidence indicates that there may be legitimate explanations for many of the transactions that may initially appear to be Gaming Practices. As a result, the Identified Entities will have an opportunity to submit evidence to the ALJ that may demonstrate that any or all of the transactions identified in the ISO Report or Dr. Fox-Penner's studies were not Gaming Practices. For example, with respect to transactions identified as False Imports, evidence that may demonstrate that the transactions were legitimate transactions and not part of a False Import practice might include establishing that: (a) The "imported" power was actually imported from outside the state of California and not a fictitious import, *i.e.*, not an export and import that constitutes a False Import, as described above; (b) the transaction was designed to work around a transmission constraint (such as on Path 15) which limited the movement of power between two points within the ISO control area by using an uncongested transmission path (such as the Pacific DC intertie) to move the power to a point outside the ISO control area and back to its intended destination; (c) the export and import were actually two independent and unrelated obligations such as a pre-existing long-term bilateral contractual export obligation followed by a real-time import from the same party in an unrelated transaction; or (d) the market participant was importing power on behalf of the ISO or California Department of Water Resources (California DWR), because suppliers were unwilling to assume the credit risk of dealing directly with the ISO or California DWR.

68. Similarly, evidence that may establish that transactions were not part of a Cutting Non-firm practice might be that, with respect to any energy that was scheduled, but did not flow, the energy

did not flow due to circumstances beyond the control of the market participant and without prior knowledge by the market participant that the energy would not flow. Regarding Paper Trading and Double Selling, evidence that may establish that the transactions, identified by the ISO and Dr. Fox-Penner, were not in fact Gaming Practices, but were instead legitimate transactions might include showing that: (a) The resources to provide the ancillary services sold in the day-ahead market were actually available to the bidder; (b) ancillary services payments were not received for capacity that was not available to provide ancillary services, or (c) the ISO requested that the market participant provide energy in the real-time market even though it knew that such energy was being held for ancillary services previously sold to the ISO.

*F. Identified Entities With Revenues of \$10,000 or Less*

69. We are exercising our prosecutorial discretion and not prosecuting certain of the Identified Entities which the ISO Report states have earned revenues of \$10,000 or less for a particular Gaming Practice and where we have no other basis to prosecute them for that particular Gaming Practice.<sup>73</sup> In the ISO's latest report analyzing various practices, the ISO states that its analysis includes market participants with a relatively small number of transactions and revenues from particular practices. The ISO explains that the smaller the volume of transactions and the revenues identified for individual market participants, the less the likelihood that the transactions represent prohibited Gaming Practices. The ISO, in fact, recommends applying a minimum threshold in any further investigations of these practices.<sup>74</sup> We agree that the burden and costs to both the parties and

<sup>73</sup> We, thus, are exercising our prosecutorial discretion and not prosecuting Constellation Power Source, Inc. for False Import practice.

Further, we are exercising our prosecutorial discretion and not prosecuting, Calpine Corp., Idaho Power Company, Modesto Irrigation District, TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc., and Williams Energy Services Corp. for Cutting Non-firm.

We, likewise, are not prosecuting Arizona Public Service Company, Calpine Corp., Hafslund Energy Trading, LLC, Portland General Electric Company, and Puget Sound Energy, Inc. for Circular Scheduling.

We, similarly, are not prosecuting Calpine Corp., City of Vernon, Constellation Power Source, Inc., Public Service Company of New Mexico and Portland General Electric Company for Paper Trading.

<sup>74</sup> ISO Report at 3-4 (June 2003).

<sup>71</sup> See California Independent System Operator Corporation, 82 FERC ¶ 61,327 (1998) (Commission accepted ISO Tariff Amendment No. 4, which allowed scheduling coordinators to buy back and sell ancillary services in the hour-ahead market).

<sup>72</sup> ISO Tariff 20.3.1-20.3.3.