

providing clarity regarding sellers' potential liability.¹⁵

Market Behavior Rule # 1: Unit Operation

Seller will operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the rules and regulations of the applicable power market.

18. The integrity of an organized market operated by an RTO or ISO and the integrity of other markets as well, depends in part upon generators and other sellers fully and accurately providing all information to market operators and complying with market rules, particularly those relating to bidding. In Market Behavior Rule # 1, therefore, the Commission proposes to require that Sellers operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the rules and regulations of the applicable power market. This requirement contemplates that sellers will follow these rules and regulations by providing complete and honest information, as may be required.¹⁶ Market Behavior Rule # 1 is consistent with our view that *ex ante* rules are superior to *ex post* regulatory action.

19. While we understand that market participants may become subject to additional requirements through tariff service agreements and other market participation agreements, we believe that a specific requirement in each seller's market-based rate tariff addressing unit operation issues is necessary in order to give the Commission and interested parties direct remedial authority for violations that may not exist without such a condition. We request comment on the inclusion of this condition in market-based tariffs.

Market Behavior Rule # 2: Market Manipulation

Actions or transactions without a legitimate business purpose which manipulate or attempt to manipulate market prices, market conditions, or market rules for electric energy, or result in market prices for electric energy and/or electric energy products which do not reflect the legitimate forces of supply and demand, are prohibited. Prohibited

actions and transactions include, but are not limited to: (A) Pre-arranged offsetting trades of the same product among the same parties, which trades involve no economic risk, and no net change in beneficial ownership (sometimes called "wash trades"); (B) transactions predicated on submitting false information to transmission providers or other entities responsible for operation of the transmission grid (such as inaccurate load or generation data; scheduling non-firm service or products sold as firm; or conducting "paper trades" where an entity falsely designates resources and fails to have those resources available and feasibly functioning); (C) transactions in which an entity first creates artificial congestion and then "relieves" such artificial congestion; (D) collusion with another party for the purpose of creating market prices at levels differing from those set by market forces; and (E) bidding the output of or misrepresenting the operational capabilities of generation facilities in a manner which raises market prices by withholding available supply from the market.

20. Our reliance upon competitive markets to establish just and reasonable rates requires that we have the tools necessary to ensure that prices created in these markets continue to fall within a just and reasonable zone. The tools we have relied upon include non-discriminatory transmission access, an efficient and pro-competitive wholesale market platform, and effective market monitoring and enforcement.

21. In formulating the conditions to be added to public utility sellers' tariffs, the Commission is fulfilling its obligation to appropriately monitor markets and is thus taking steps to ensure that market-based rates remain within the zone of reasonableness required by the FPA. In a market-based rate regime, this means that public utility sellers will not be permitted to exercise market power or take anti-competitive actions that may increase market prices and that the Commission will take appropriate remedial steps. Such steps may include market rules designed to prevent exercises of market power as well as conditions placed on market-based rate authorizations to prohibit conduct that adversely affects competitive market outcomes.¹⁷

¹⁷ The Court of Appeals for the DC Circuit has held that, while the Commission "enjoys substantial discretion in ratemaking determinations * * * by the same token, this discretion must be bridled in accordance with the statutory mandate that the resulting rates be 'just and reasonable.'" *Farmers Union Cent. Exch. Inc. v. FERC*, 747 F.2d 1486 at 1501 (D.C. Cir. 1984). In addition, the regulatory regime itself must contain some form of

22. Accordingly, we propose in Market Behavior Rule # 2 to prohibit activities that adversely affect competitive outcomes, that is, that result in rates that do not reflect legitimate market forces. Such rates would fall outside the zone of reasonableness.¹⁸ In making this proposal, we note that just and reasonable rates created through competitive markets is our goal. We believe that by providing further clarity concerning prohibited actions and transactions, and by undertaking judicious enforcement of these standards, we will help to enhance confidence in, and the integrity of, our jurisdictional markets for both customers and market participants.

23. In crafting Market Behavior Rule # 2, we have also attempted to provide specificity by including a non-exclusive list of prohibited activities that illustrates the types of activities that adversely affect competitive market outcomes. However, we have also included a generic standard which will allow us to take remedial action if we discover additional activities of a seller taken in contravention of our market behavior rules affecting the justness and reasonableness of rates. In the event that Staff, or a third party in a timely complaint, demonstrates that a transaction or behavior not expressly prohibited in our market behavior rules appears to be in violation of this rule (*i.e.*, that a given transaction or behavior is causing prices to reflect outcomes not reflective of market forces), we will require the identified seller to show cause why it should not be required to disgorge unjust profits obtained through such transaction or behavior, or be subject to appropriate non-monetary remedies. In evaluating responses to such show cause orders, we will take into account such matters as whether the seller can establish a legitimate business purpose consistent with prices set by market forces relative to its conduct.¹⁹

monitoring to ensure that rates remain within a zone of reasonableness and to check rates that depart from this zone. *Id.* at 1509. See also *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993).

¹⁸ In prohibiting transactions such as those involving false congestion, the Commission does not intend to prohibit transactions taken consistent with market rules in ISO or RTO markets such as virtual bidding or day ahead markets where "simulated" congestion may be reflected in pricing as part of market design.

¹⁹ The Commission considers a legitimate business purpose to be an action consistent with behavior in a competitive market which is taken to further a firm's business objectives without engaging in manipulative, illegal, or otherwise

¹⁵ See *supra* PP. 37–42 (complaint procedures and scope of liability).

¹⁶ We note that EPSA, in its code of ethics and sound trading practices, has developed a standard which includes elements of Market Behavior Rule # 1.