

34. Based on Staff's recommendation, we propose and seek comment on Market Behavior Rule #5. In the Western Markets Report, Staff found that companies had little, if any, formal procedures in place to ensure the accuracy of the data reported to the trade press. Staff also found that companies had reported inaccurate information. Staff found that these inaccuracies were attributable to unstructured or nonexistent processes for reporting (e.g., taking the simple arithmetic average of the high and low trades), making up trades to come up with an average that was the midpoint of the traders' perceived range, and entering fictitious trades (both prices and volumes) to replicate prices reported to trading platforms. We seek comments on whether Market Behavior Rule #5, as proposed, would ensure that companies adopt suitable retention policies that would permit the Commission and interested entities to better monitor these transactions and practices, to the extent necessary and appropriate.

Market Behavior Rule #6: Related Tariffs

Seller shall not violate or collude with another party in actions that violate Seller's code of conduct or Order No. 889 standards of conduct.

35. In the Western Markets Report, Staff found that sellers had failed to abide by their market-based rate codes of conduct and their Order No. 889 standards of conduct. These tariff provisions, among other things, require the functional separation of transmission and wholesale merchant personnel. In one case, Staff found that a power marketer used a third party to circumvent the Commission's prohibition on affiliate sales.²⁴

36. To better monitor and deter these tariff violations, we propose and seek comment on Market Behavior Rule #6. Specifically, we seek comment on whether the standard as proposed is sufficient in its scope and breadth to cover any and all matters relating to violations of the market-based rate codes of conduct and the Order No. 889 standards of conduct. We seek comment on whether this compliance rule would be an effective way for the Commission to better ensure that the conduct of public utilities is consistent with the public interest.

Complaint Procedures and Limitations on Disgorgement Liability

37. As noted above, in crafting the market behavior rules proposed herein, we have attempted to balance our interest in providing adequate certainty for market participants to encourage fair, robust competition, with our equal commitment to protecting customers from the abuses of market power and other anticompetitive behavior. Looking ahead, we want to formalize both our market rules and their consequences for greater market certainty. Accordingly, we further seek comment on the procedural limitations proposed below.

38. First, we propose to limit the applicability of potential disgorgement of unjust profits exposure by requiring that any violation alleged by a market-participant be made on a transaction-specific basis and that any market participant request for such a remedy be made no later than 60 days after the end of the calendar quarter in which the violation is alleged to have occurred. If a market participant can show that it did not know and should not have known of the behavior which forms the basis for the complaint, within the period proscribed above, then the 60-day period will run from the time when the market participant knew or should have known of the behavior. In addition, we propose to restrict remedies sought in market participant complaints to the specific transactions which are the subject of these complaints.²⁵

39. For example, the backward-looking scope of remedial action due to an allegation made by a market participant concerning a violation of the behavioral rules contained in a market-based rates tariff would be limited to the period reaching to the beginning of the calendar quarter referenced above. Thus, an allegation could be made up to 60 days after March 31 of a calendar year seeking disgorgement of unjust profits for a transaction taking place in the quarter ending March 31. Any other action taken by the Commission on the basis of such allegation would be prospective only.

40. These time limits will apply to complaints initiated by market participants and not to those initiated by the Commission. The Commission has broad remedial authority to act in the event of violations of statutory or regulatory requirements or rules in

applicable tariffs.²⁶ Where there is a violation of the market behavior rules that are adopted for all new and existing market-based rate tariffs and authorizations, the Commission is proposing to retain the full scope of its authority to provide remedies upon its own motion. Thus, the Commission and its staff will not be subject to the time limitation on allegations of tariff violations. The Commission believes that this properly balances the interest of market participants in finality with the need to be able to take action against tariff violations.

41. Other limitations proposed by commenters in this proceeding have not been included in our proposal. For example, while several commenters have argued that sales into markets with Commission-approved market monitoring and mitigation should be exempt from any market behavior rules approved herein we are not including this limitation in our proposal. The findings made by Staff in the Western Markets Report illustrate that organized, bid-based markets, even those with approved market monitoring and mitigation procedures, remain vulnerable to anticompetitive behavior and the exercise of market power. Accordingly, Staff thus recommended that market behavior rules be adopted for all markets without exception.

42. Other commenters have suggested that entities such as power marketers and small generators should be exempted from our market behavior rules because entities such as these are unable to exercise market power in the markets in which they operate. We disagree. In the Western Markets Report, Staff found that power marketers and small generators can and have engaged in practices and transactions which our proposed market behavior rules are designed to prohibit. Accordingly, we propose to apply our market behavior rules to all sellers with market-based rate tariffs and authorizations.

Additional Tariff Revisions Proposed By Staff

43. In addition to the tariff revisions discussed above, Staff, in the Western Markets Report, also proposed tariff revisions relating to a seller's use of trading platforms, based on Staff's review of Enron's trading platform, Enron Online. Staff found that Enron Online lacked transparency and was subject to manipulation by Enron.²⁷ Accordingly, Staff recommended that

appropriate period of time as required under applicable laws and regulations."

²⁴ See also Idaho Power Company, et al. (Docket No. IN03-9-000).

²⁵ Such claims, moreover, would be required to comply with the Commission's revised complaint procedures in 18 CFR § 385.206 (2003). See Lester C. Reed v. Georgia Power Co., 94 FERC ¶ 61,100 (2001).

²⁶ San Diego Gas & Electric Co., 96 FERC ¶ 61,120 at 61,507-08 (2001), citing Washington Water Power Co., 83 FERC ¶ 61,282 (1998).

²⁷ See Western Markets Reports at ES-17.