

future trading platforms be designed to provide a sufficient level of transparency to enable users to understand the movements of the market. Staff also recommended that the Commission condition electric power market-based rate tariffs and authorizations to require that sellers who use trading platforms use only those trading platforms that employ a "credit change monitor," *i.e.*, a monitor that could be used to evaluate unusual patterns in credit changes in the platform. Staff found that without these safeguards, the credit structure could be used to manipulate access to other traders and the perceived market price.

44. Staff also recommended conditioning electric power market-based rate tariffs and authorizations to require that sellers who use trading platforms use only those trading platforms that agree to provide the Commission with full access to trade reporting and order book information for the trading systems and agree to adhere to appropriate monitoring requirements. To the extent the Commission promulgates standards for trading platforms, the Commission is considering conditioning electric power market-based rate sellers to use only those platforms that meet certain standards. The Commission seeks comment on this issue. We will not propose a market behavior rule relating to this recommendation at this time, however, pending our further review of this matter.

#### Legal Authority

45. A number of commenters in this proceeding have challenged the Commission's legal authority under the FPA to condition sellers' market based rate tariffs and authorizations, as proposed in the November 20 Order. These commenters have asserted, among other things, that the potential financial consequences for sellers found to be in violation of their market-based rate tariffs, as revised, would violate the filed rate doctrine and the refund limitations set forth in Section 206(b) of FPA.<sup>28</sup>

46. For the reasons discussed below, we reject these challenges to the Commission's authority. We have initiated this proceeding under Section 206, for the purpose of examining

whether sellers' market-based rate tariffs are just and reasonable, or whether, conversely, they should be revised as proposed herein. Should we determine that sellers' currently effective tariffs are unjust and unreasonable or may lead to unjust and unreasonable rates without the inclusion of the market behavior rules we propose, we will require that these tariffs be revised to include the rules prospectively, as Section 206 requires.<sup>29</sup> Thus, these tariff revisions, if approved, would not violate the filed rate doctrine.<sup>30</sup>

47. Nor would the refund limitations of Section 206(b) of the FPA bar the Commission from enforcing the tariff revisions proposed herein. Rather, any remedies stemming from a violation of our proposed tariff provisions would be based on the tariff conditions themselves, as approved herein. It is well settled that the Commission may take actions and impose remedies when tariffs are violated. These actions, moreover, would be fully consistent with the oversight responsibilities implicit in our market-based rates program.

48. Sellers' authorizations, in this regard, rely upon the existence of competitive markets. As illustrated by the Western Markets Report, it is possible for actions to be taken by sellers that can affect whether the prices charged in such markets are at competitive levels. Conditioning market-based rate authority to require sellers to comply with market behavior rules will help ensure that sellers do not engage in anti-competitive behavior and that just and reasonable rates will be achieved. By imposing actionable behavioral rules conditioned upon the risk of material remedial action, the Commission can further the goal of competition while protecting consumers and other market participants who do not engage in anti-competitive behavior.

<sup>28</sup> The Commission would intend to make the behavioral rules effective no earlier than the date of issuance of an order revising market-based rates tariffs to include new behavioral rules.

<sup>30</sup> Commenters also assert that the filed rate doctrine would be violated in this case because the behavioral standard, as proposed in the November 20 Order, failed to provide adequate notice regarding the conduct it would prohibit. However, we will not address these allegations here, given the significant revisions to the market behavior rules we propose to adopt here. In fact, the "filed rate," in this case, would include a set of specific behavioral standards voluntarily accepted by the seller, the meaning and intent of which will be fully aired in this proceeding. In addition, the filed rate would make explicit that any violation of our market behavior rules would potentially result in financial consequences, as discussed herein. Under these circumstances, our market behavior rules would provide the necessary predictability required by the filed rate doctrine.

49. Thus, while we are undertaking a Section 206 investigation to determine whether market-based rate tariffs must be revised to include the proposed market behavior rules to be just and reasonable, the potential remedies resulting from violations of such rules will flow from our conditioning such tariffs to provide, as a component of the tariff, a clear right for the Commission to enforce its standards and for affected parties to be compensated for violations.<sup>31</sup> Such actions would be in the nature of a proceeding to determine whether there has been a tariff violation, not a complaint that rates, terms or conditions were unjust and unreasonable under Section 206.

50. The Commission has ample authority to condition market-based rate tariffs in this fashion.<sup>32</sup> Here, these conditions are both necessary and appropriate to ensure that rates charged by sellers in the wholesale market will be based on, and influenced by, competitive factors. We do not intend for these tariff provisions to supersede or replace in any way any party or the Commission's rights under Section 206 to file a complaint asserting that any rates, term or condition or service are unjust and unreasonable and requires revision as we are proposing with market-based tariffs herein.

51. Finally, we reject commenters' assertion that the initiation of a rulemaking proceeding would be required to implement the tariff provisions proposed in this proceeding. As we noted above, the Commission is making its proposed revisions to sellers' market-based rate authorizations in this proceeding, because these proposals would embody tariff revisions applicable to individual sellers, not rule changes. As we also noted, however, we are taking this action in the context of an investigation with comment procedures designed to implement full

<sup>31</sup> We imposed a similar obligation, pursuant to our conditioning authority, in the California Refund Proceeding. See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, et al.*, 97 FERC ¶ 61,121, 61,370 (2000), order on reh'g, *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, et al.*, 97 FERC ¶ 61,275 (2001), appeal pending, *Public Utilities Commission of the State of California, et al. v. FERC*, Nos. 01-71051, *et al.* (9th Cir. June 29, 2001 and later).

<sup>32</sup> In fact, nothing in the Regulatory Fairness Act (RFA) (modifying FPA Section 206) or its legislative history suggests that Congress intended to address or limit the Commission's authority to condition market-based rate authorizations. Congress passed the RFA, which established the 15-month refund effective period, to give the Commission authority to order rate reductions for the period before the conclusion, but after the start, of Section 206 proceedings. See *San Diego Gas and Electric Co. v. Sellers of Ancillary Services, et al.*, 97 FERC at 62,220.

<sup>28</sup> Section 206(b) requires that any refunds made in a Section 206 proceeding initiated by the Commission on its own motion, be based on a refund effective date no earlier than 60 days after the publication by the Commission of notice of its intent to initiate such a proceeding, or, in the case of a complaint, no earlier than 60 days after the complaint was filed. Section 206(b) also limits the refund effective period to 5 months after the expiration of the such 60-day period.