

public input. The Commission, moreover, is not limited to notice and comment rulemaking in developing policy. Agencies generally are permitted considerable discretion to choose whether to proceed by rulemaking or by adjudication. Our decision to act in this proceeding pursuant to Section 206 is clearly within our authority.

Comment Procedures

52. We will provide interested entities an opportunity to file comments and reply comments regarding the proposed market behavior rules set forth in the Attachment to this order. Initial comments will be due 30 days from the date this order is published in the **Federal Register**, and reply comments will be due 30 days from the date that initial comments are filed.

The Commission Orders:

(A) The tariff provision proposed by the Commission in the November 20 Order is hereby modified and revised, as set forth in the Attachment to this order, and as discussed herein;

(B) Interested entities may file comments and reply comments regarding the market behavior rules set forth in the Attachment to this order. Initial comments will be due 30 days from the date this order is published in the **Federal Register**, and reply comments will be due 30 days from the date that initial comments are filed;

(C) Requests for rehearing of the November 20 Order are hereby dismissed, as discussed in the body of this order;

(D) The Secretary shall promptly publish this order in the **Federal Register**.

By the Commission.

Commissioner Massey concurring in part with a separate statement attached.

Commissioner Brownell concurring with a separate statement attached.

Magalie R. Salas,
Secretary.

Attachment—Market Behavior Rules

As a condition of market-based rate authority, [Company Name] (hereafter, Seller) will comply with the following Market Behavior Rules:

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.

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 and/or energy products, 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.

3. *Communications:* Seller will provide complete, accurate, and factual information, and not submit false or misleading information, or omit material information, in any communication with the Commission, market monitors, regional transmission organizations, independent system operators, or similar entities.

4. *Reporting:* To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas price indices, Seller shall provide complete, accurate and factual information to any such publisher. Seller shall notify the Commission of whether it engages in such reporting for all sales. In addition, the seller shall adhere to such other standards and requirements for price reporting as the Commission may order.

5. *Record Retention:* Seller will retain all data and information necessary for the reconstruction of the electric energy or electric energy products prices it charges or of the prices it reports for use in published price indices for a period of three years.

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.

Any violation of these Market Behavior Rules will constitute a tariff violation. Seller will be subject to disgorgement of unjust profits associated with the tariff violation, from the date on which the tariff violation occurred. Seller may also be subject to suspension or revocation of its authority to sell at market-based rates or other appropriate non-monetary remedies.

Massey, Commissioner, *concurring in part:*

I wholeheartedly support conditions to all market-based tariffs that declare manipulation off limits. Such outrageous behavior has cast a pall over the promise of energy markets and has brought some companies to dire financial straits. These tariff conditions should deter bad behavior in the future. If they fail to do so, then at least

the Commission will have industry wide legal tools to provide appropriate remedies. I commend Chairman Wood's strong leadership in developing this proposal.

I am writing separately to express my concern with one aspect of today's proposal. I would not limit the monetary penalty for tariff violations to disgorgement of unjust profits. Market manipulation can raise the market prices paid by all market participants and collected by all sellers. The Federal Power Act requires that all rates and charges be just and reasonable. Where the market has been manipulated so as to affect the market price, that price is not just and reasonable and is therefore unlawful. Simply requiring that bad actors disgorge their individual profits does not make the market whole because all sellers received the unlawful price caused by the manipulation. The narrow remedy of profit disgorgement is not an adequate remedy for the adverse effect of the bad behavior on the market price, and may not be an adequate deterrent to future behavior. The appropriate remedy may be that the manipulating seller makes the market whole.¹ Unfortunately, today's order appears to take this remedy off of the table. I would prefer to tailor the remedy to the circumstances of each case. I encourage comments on this issue.

For these reasons, I concur in part with today's order.

William L. Massey,
Commissioner.

Brownell, Commissioner, *concurring:*

1. Today we issue an order proposing to place conditions on sellers of power that have been granted market based rate authority. This proposal, coming 18 months after the Commission first launched the idea of conditioning sellers' market-based rate authorities, builds on industry events of the last few years. I have spoken about the need for the “10 commandments” and am encouraged that we are taking this step. Importantly, the proposal attempts to balance three goals:

- effective remedies on behalf of customers in the event anti-competitive behavior or other market abuses occur;
- clearly delineated “rules of the road” to market-based rate sellers while, at the same time, not impairing the Commission's ability to provide remedies for market abuses whose precise form and nature cannot be envisioned today; and,
- reasonable bounds within which conditions on market conduct will be implemented so as not to create unlimited regulatory uncertainty for individual market participants or harm to the marketplace in general.

2. I appreciate the need to balance these goals but have a fundamental concern that we've allowed markets to form without a full appreciation of what constitutes a market let alone the market dynamics that foster a truly competitive market. For example, what defines a competitive market and what constitutes scarcity pricing? These questions

¹ The Commission has accepted the make the market whole remedy as part of a settlement for withholding generation from the California PX market. See 102 FERC ¶ 61,108 (2003).