

necessary for the reconstruction of the prices they charge, and the prices they report for use in published price indices;

- *Related Tariffs:* Finally, we proposed to clarify that sellers would not be permitted to violate or collude with another party in actions that violate seller's code of conduct or Order No. 889 standards of conduct.

6. We also stated that any seller found to have engaged in the behavior prohibited by our rules would be subject to a disgorgement remedy and any other appropriate non-monetary remedies such as revocation of seller's market-based rate authority. We sought comments from interested entities concerning a number of issues, including the specific language embodied in the rules themselves, the overall balance of interests reflected in these rules, and the remedies and procedures that would be available to market participants with respect to their enforcement.<sup>7</sup>

#### Notice and Responsive Pleadings

7. The June 26 Order was published in the **Federal Register**.<sup>8</sup> Interested entities were invited to file comments within 30 days of this date, with reply comments permitted within 30 days of the comment submission date. In response, numerous comments and reply comments were received from entities representing Federal and State agencies, consumer advocates, trade organizations, and all segments of the industry. These entities are listed in Appendix C to this order.

8. Comments generally supportive of the Commission's proposed rules were submitted by a broad majority of the entities who filed comments. Specifically, commenters generally concurred that establishing a clear set of market behavior standards governing sellers' conduct in the wholesale markets is necessary. There were disagreements voiced over the means to meet these objectives. For example, some argued that our proposed rules were a necessary but not a sufficient step forward in addressing the concerns outlined in the June 26 Order. These commenters submitted that in addition to our proposed rules, we should also consider a number of market design

changes to bolster the overall competitiveness of the wholesale markets. Others (most notably sellers or entities representing their interests) asserted that our proposed rules would, if implemented, impose a heavy-handed, open-ended burden on sellers that would, without fine-tuning and clarification, chill investment in the industry. A number of revisions were proposed addressing these issues.

9. On July 28, 2003, Southern Company Services, Inc. (Southern) filed a request for rehearing of the June 26 Order concerning the Commission's asserted statutory authority to adopt its proposed rules.

#### Discussion

##### *Procedural Matters*

10. We will grant intervention status to each of the entities listed in Appendix C to this order. In addition, we will dismiss Southern's request for rehearing. As we held in the June 26 Order and reiterate here, rehearing may not be sought in this case until such time as the Commission issues a final order, *i.e.*, within 30 days of the issuance of this order.<sup>9</sup> However, we will treat Southern's rehearing request as a comment, the substance of which is addressed in section N, below.

##### *Analysis*

11. The task before us in this proceeding is to determine how and to what extent market-based rate seller conduct in the wholesale markets should be monitored by the Commission and, when necessary, how and to what extent this conduct should be remedied. To this end, we concur with the consensus view conveyed in the comments we have received in response to our proposed rules, namely, that sellers, while accountable for their actions, need and deserve clearly-delineated rules governing their conduct so that both sellers, buyers, and other interested entities will know what is and what is not acceptable market behavior. We find market-based rate tariffs and authorizations that do not include such standards are unjust and unreasonable.

12. Our behavioral rules are designed to provide market participants adequate opportunity to detect, and the Commission to remedy, market abuses. Our behavioral rules are also clearly defined so that they do not create uncertainty, disrupt competitive commodity markets or simply prove ineffective. However, since competitive markets are dynamic, it is important

that we periodically evaluate the impact these rules have on the energy markets. We direct our office of Market Oversight and Investigation to evaluate the effectiveness and consequences of these behavioral rules on an annual basis and include this analysis in the State of the Markets Report.

#### A. Market Behavior Rule 1 (Unit Operation)

##### 1. Commission Proposal

13. In the June 26 Order, we noted that the integrity of an organized market and other markets as well require sellers to comply with the rules and regulations of the applicable power market. In Market Behavior Rule 1, therefore, we proposed 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 these rules and regulations. We stated that while market participants may become subject to additional requirements through tariff service agreements or other market participation agreements, a specific requirement in each seller's market-based rate tariff addressing unit operation issues would be necessary in order to give the Commission and interested parties direct remedial authority for violations that may not exist without such a condition.

##### 2. Comments

14. Commenters argue that Market Behavior Rule 1, unless it is revised, could be relied upon by market operators to impose operating and maintenance standards that would require generators to violate permit restrictions or operate in an unsafe manner.<sup>10</sup> EPSA, *et al.* request that the rule be modified by adding that the unit operation requirement contemplated by the rule be "consistent with the operational, legal and economic constraints on such generating facilities."<sup>11</sup> The New York Independent System Operator, Inc. (New York ISO) characterizes this issue as a reliability concern, and proposes that the rule require sellers to inform the

<sup>7</sup> In a companion issuance, we also proposed to modify natural gas market blanket certificates under subpart G of part 284 of the Commission's regulations to contain many of the standards proposed herein, where applicable. See Notice of Proposed Rulemaking, Docket No. RM03-10-000, Amendments to Blanket Sales Certificates, 103 FERC ¶ 61,350 (2003). A Final Rule in that proceeding is being issued contemporaneously with this order.

<sup>8</sup> 68 FR 40924 (2003).

<sup>9</sup> See Rule 713 of the Commission's Rules of Practice and Procedure, 18 CFR 385.713 (2003).

<sup>10</sup> Comments of Electric Power Supply Association, Colorado Independent Energy Association, Independent Energy Producers of California, Independent Power Producers of New York, Inc. and the Western Power Trading Forum (EPSA, *et al.*) at 2. See also Comments of Exelon Corporation (Exelon) at 6; Comments of Reliant Energy Power Generation, Inc. and Reliant Energy Services, Inc. (Reliant) ("Generators should not be penalized for failure to operate a plant in a physically impossible manner or in a way that is inconsistent with economic and environmental restrictions").

<sup>11</sup> See also Comments of Reliant at 4; Comments of Edison Electric Institute (EEI) at 8.