

rules of an applicable power market will not be considered actionable physical or economic withholding.

23. Finally, commenters raise concerns that Market Behavior Rule 1 could require unit operation in an unsafe manner or in a way that could violate environmental permit restrictions. However, we are not aware of any Commission-approved rule or regulation (and commenters cite to no rule or regulation) which would require sellers to operate their units in an unsafe manner or in violation of any environmental permit restrictions. Issues of this nature should be raised and addressed in the applicable power markets when and to the extent they may arise.

B. Market Behavior Rule 2 (Market Manipulation)

1. Commission Proposal

24. In the June 26 Order, we stated that our reliance on 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. We stated that 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. Accordingly, we proposed to prohibit activities that adversely affect competitive outcomes, by stating that “[a]ctions or transactions without a legitimate business purpose which manipulate or attempt to manipulate market prices for electric energy and/or electric energy products which do not reflect the legitimate forces of supply and demand, are prohibited.”¹⁸

2. Comments

25. The Electricity Consumers Resource Council¹⁹ (ELCON, *et al.*) support Market Behavior Rule 2, as proposed. ELCON, *et al.* assert that the Commission’s proposed anti-manipulation prohibition is necessary due to the absence of and/or weakness of such provisions in the markets operated by the Cal ISO, PJM, ISO New England, Inc., the New York ISO and the Midwest Independent System Operator, Inc. (Midwest ISO). ELCON, *et al.*

characterize the anti-gaming provisions currently in effect in these markets as vague and conflicting, while in other regions of the country there are no standards at all. ELCON, *et al.* conclude that the Commission’s proposal to apply a single anti-gaming prohibition applicable to all markets is appropriate and urgently needed.

26. Other commenters take issue with the market manipulation prohibition set forth in proposed Market Behavior Rule 2. First, commenters assert that a market manipulation prohibition should not be applied to bilateral markets. Mirant and TransAlta, for example, argue that there is no economic rationale for applying market manipulation rules outside the short-term spot markets for power, given the difficulty of exercising market power in forward markets directly or leveraging market power from short-term markets into the forward markets. APPA and TAPS take the opposite position, noting market power and manipulation risks arise not only in the spot markets, but in the bilateral markets as well.

27. Commenters also challenge the sufficiency of the term “legitimate business purpose” in distinguishing between prohibited and non-prohibited conduct and question whether and to what extent the Commission can fairly (and with adequate notice to sellers) identify such motives. InterGen North America, L.P. (InterGen) argues, therefore, that the term “legitimate business purpose” is fatally vague and that there are no recognized principles or accepted rules or standards in the industry that would assist market participants in understanding what is and what is not “legitimate.” InterGen notes, in this regard, that Webster’s Dictionary defines the word “legitimate” as conforming to recognized principles or accepted rules and standards.²⁰ Dynegy Power Marketing, Inc. (Dynegy) asserts that in the organized markets in the East, any bid with respect to the marginal unit could be accused of attempting to manipulate prices, even if the market is covered by mitigation procedures that limit the unit’s bidding parameters.

28. For others, the term “legitimate business purpose” is insufficient because it will allow sellers who should be sanctioned to justify their bad conduct. The National Association of State Utility Consumer Advocates (NASUCA) points out that this term, if approved, will invite market

participants to try to excuse actions that are manipulative but that were undertaken to promote some imaginable business purpose.

29. Other commenters focus their concerns on the term “legitimate forces of supply and demand.” EPSA, *et al.* suggest that there is little consensus as to what price might result from the unfettered interplay among these market forces because there is little consensus as to how to value scarcity, how supply and demand interact to set prices, when to allow reserves and/or demand response to set the market clearing prices, what the proper components of marginal cost are, and when mitigation is appropriate. EPSA, *et al.* assert that without a clearer consensus on the proper approach to price formation, the proposed term will result in a great deal of controversy and expensive litigation to address issues that would be better resolved in other forums. In addition, EPSA, *et al.* submit that any attempt to reconstruct the legitimate forces of supply and demand in a complex market in which the interaction of the parties affects the outcome is virtually impossible.

30. Numerous commenters also argue that as a means of limiting the proposed rule and better defining it, an intent standard must be adopted (a recommendation also made with respect to certain other Market Behavior Rules, as discussed below).²¹ EME argues that without intent to manipulate the proposed rule, it would be unfair to punish market participants for actions that are economically justifiable and within the bounds of these rules are properly undertaken to maximize returns in a competitive market. Southern adds that to address these concerns, Market Behavior Rule 2 should be modified to prohibit sellers from “knowingly” engaging in the conduct prohibited by the rule “with the intent” to manipulate market prices, with a “showing that the seller actually succeeded in its efforts to manipulate the market.”²²

31. Reliant also argues that the term “electric energy products,” as used in the proposed rule, is undefined and

²¹ See e.g., Comments of EEI at 10; Comments of EPSA, *et al.* at 8–12; Comments of Exelon at 6; Comments of Southern at 12; Comments of Edison Mission Energy (EME) at 6; Comments of Pinnacle West at 6; and Comments of Reliant at 6.

²² Other commenters propose similar language incorporating this element of intent. See e.g., Comments of EPSA, *et al.* (prohibiting actions or transactions without a legitimate purpose “and which are intended to” manipulate or attempt to manipulate market prices); Comments of Reliant at 6 (prohibiting actions or transactions “undertaken” without a legitimate business purpose “and intentionally to” manipulate market prices).

¹⁸ June 26 Order, 103 FERC ¶ 61,349 at P22.

¹⁹ Joined by the American Iron and Steel Institute, the American Chemistry Counsel, the American Forest & Paper Association, the Association of Business Advocating Tariff Equity, California Large Energy Consumers Association, Connecticut Industrial Energy Consumers, Industrial Energy Consumers of Pennsylvania, Southeast Electricity Consumers Association, and Multiple Intervenors.

²⁰ See also Comments of EEI at 10 (asserting that the term “legitimate business purpose” is vague and would, if adopted, create market uncertainty); Reply Comments of Mirant and TransAlta at 16.