

otherwise unnecessary. Reliant notes the proposed rule already prohibits manipulation of market prices and that this prohibition covers prices associated with any jurisdictional product, whether energy, ancillary services, transmission, or any other.

32. The New York State Public Service Commission (New York Commission) requests that the Commission clarify that sellers are bound by the actions or transactions of their affiliates, as they relate to this rule. The New York Commission states that absent this clarification, sellers would be permitted to sidestep this rule by way of affiliate gaming practices. The New York Commission concludes that if a seller's affiliate violates a Market Behavior Rule in a way that improperly raises market prices and the seller enters into long-term contracts that benefit from that price, the seller's contract should be governed by this rule just as if the contracts had been signed by the affiliate.

33. Commenters also express concerns regarding the general impact of the proposed rule on the marketplace as a whole. EPSA, *et al.* claim that without greater specificity and clarity, the proposed rule will lead to excessive litigation. EEI speculates that sellers engaging in proscribed transactions will rely on the ambiguity in the proposed rule to defend their bad conduct. East Texas Cooperatives and First Energy suggest that the over-breadth of the proposed rule will prohibit or at least chill legitimate business behavior. The New York ISO submits that with the uncertainty engendered by the proposed rule, higher market prices may be necessary to induce construction of new generation in New York and in other regions.

34. Finally, the Federal Trade Commission (FTC) argues that structurally competitive markets that foster ease of entry are critical to efficient pricing, output, and investment, and are more likely to protect consumers than would the proposed rule. The FTC also suggests that because there may be conflicts between antitrust law and the meaning of the terms used by the Commission in the proposed rule (*e.g.*, the term "without a legitimate business purpose"), the Commission should limit and better focus its rule such that it would only prohibit sellers from engaging in conduct that violates the antitrust laws.

3. Commission Ruling

35. We will adopt the prohibition against market manipulation, as set

forth in Market Behavior Rule 2, as revised. As revised, the rule provides:

Actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products are prohibited. Actions or transactions undertaken by Seller that are explicitly contemplated in Commission-approved rules and regulations of an applicable power market (such as virtual supply or load bidding) or taken at the direction of an ISO or RTO are not in violation of this Market Behavior Rule.

36. Our rule, as revised, balances the need to provide sellers clearly-defined rules of the road 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. This objective is satisfied, here, by our reliance on a prohibition that is broad enough in its reach and yet clear enough in its focus to capture manipulative conduct in all its forms. Our rule, in essence, is designed to prohibit market-based rate sellers from taking actions which interfere with the prices that would otherwise be set by competitive forces, or from manipulating market conditions or market rules.²³ This standard, which recognizes that manipulative actions engaged in by sellers are not undertaken for a legitimate business purpose, has been applied by the Commission in the past.²⁴ For the reasons discussed herein, we apply it now to all market-based rate sellers.

37. In doing so, we clarify that transactions with economic substance, in which a seller offers or provides service to a willing buyer and where value is exchanged for value, are not prohibited by our rule. While commenters question the usefulness of the term "legitimate business purpose," in this context, we note that our reliance on this measure will ensure that sellers acting in a pro-competitive manner will have the opportunity to show that their actions were not designed to distort prices or otherwise manipulate the market. Behaviors and transactions with economic substance will thus be recognized as reflecting a legitimate

²³ An example of sellers' ability to manipulate market conditions is discussed in Section C, below, relating to wash trades. An example of sellers' ability to manipulate market rules is discussed in Section D (submission of false information) and Section E (creation of artificial congestion). An example of seller's ability to manipulate market prices is discussed in Section F (collusive acts).

²⁴ See *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 (2003) (*Enron*) (revoking Enron's blanket marketing certificate authorization based on Enron's participation in wash trades having "no legitimate business purpose").

business purpose consistent with just and reasonable rates.

38. However, an action or transaction which is anticompetitive (even though it may be undertaken to maximize seller's profits), could not have a legitimate business purpose attributed to it under our rule. If, for example, a seller is shown to have caused, or attempts to cause, an artificial shortage by physically withholding sufficient and otherwise available power from the market for the purpose of raising the sales price obtainable by other units participating in the market—the seller may be found to have engaged in market manipulation, as prescribed by Market Behavior Rule 2, *i.e.*, under these circumstances, there can be no legitimate business purpose attributable to such behavior.²⁵

39. Our prohibition against market manipulation is not the only tool we intend to rely upon to ensure competitive markets.²⁶ It is, however, a necessary tool, because it reflects the reality that we oversee a dynamic and evolving market where addressing yesterday's concerns may not address tomorrow's. As we apply Market Behavior Rule 2, moreover, we will be mindful of the fact that we are not only taking steps to assure just and reasonable rates for a specific transaction but are also providing guidance to sellers in general. As such, in determining the appropriate remedy for violations of this rule, we will take into account factors such as how self evident the violation is and whether such violation is part of a pattern of manipulative behavior.

40. As recommended by commenters, we will strike from our prohibition the proposed term that would have characterized, as manipulative behavior, an act resulting in "market prices which do not reflect the legitimate forces of supply and demand." While we do not believe that our use of this term was inappropriate or unjustified (as we intended it), many commenters appear to have misunderstood its purpose, suggesting that other causes (*e.g.*, the

²⁵ The available supply, in this instance, would have been withheld from the market without a legitimate business purpose with the objective of distorting the price of the remaining supply. Conversely, if the power was withheld due to a forced or planned outage, environmental restrictions, labor disruption, or similar business purpose, the resulting transaction would be reflective of a competitively derived price and would not be found to be manipulative. In this regard, we reject NASUCA's concern, *i.e.*, that sellers can fabricate legitimate business purposes where there are none. In fact, the Commission is well equipped, on a case-by-case basis, to determine whether the motives ascribed to transactions by sellers are legitimate or not legitimate.

²⁶ See *infra* Section L.