

not intended to manipulate market prices.<sup>36</sup> To address this issue, EPSA, *et al.* recommend that Market Behavior Rule 2(b) be revised to prohibit actions or transactions predicated on “knowingly” submitting false information to transmission providers or other entities responsible for operation of the transmission grid “with intent to manipulate the market.”<sup>37</sup>

62. Related to this same concern, Dynegy notes that due to forecasting errors, load forecasts and generation data are rarely 100 percent accurate. Dynegy further notes that sellers often face unknowable circumstances relating to the timing and duration of derates or outages. Given these and related contingencies, Dynegy seeks clarification that Market Behavior Rule 2(b) is not intended to supersede or otherwise nullify existing practices and/or market rules which allow for variation between forecasted and actual outcomes. Similarly, AES seeks clarification that the proposed prohibition does not apply to situations where submitted load data or generation data was incorrect due to the occurrence of a legitimate and verifiable contingency, or situations that occur in the normal course of business and are separately governed by terms and conditions of tariffs already on file with the Commission.

63. EEI also raises concerns regarding the interplay between the proposed rule and the existing practice known as virtual trading.<sup>38</sup> EEI proposes that the following language be incorporated into the proposed rule: “This prohibition [*i.e.*, the prohibition set forth in Market Behavior Rule 2(b)] does not apply to transactions such as virtual trading that are an intentional part of an RTO or ISO market design.”<sup>39</sup> Finally, commenters

assert that the term “paper trade” be deleted from the rule. Duke Energy claims, in this regard, that there is no common meaning in the industry for this term and thus it could refer to any number of transactions, many of which may be legitimate.

### 3. Commission Ruling

64. As discussed below, we will adopt Market Behavior Rule 2(b), subject to two revisions. As requested, we will adopt an intent standard applicable to our prohibition against the submission of false information to transmission providers or to other entities responsible for operation of the transmission grid, *i.e.*, to be actionable under this rule, the seller’s submittal must be knowingly false. Second, we will strike the example of “paper trades” from our illustrative, non-exclusive list of submissions subject to our rule. As revised, Market Behavior Rule 2(b) will prohibit:

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; or scheduling non-firm service or products sold as firm), unless Seller exercised due diligence to prevent such occurrences.

65. Commenters generally agree, as do we, that a Market Behavior Rule addressing market manipulation appropriately includes within its prohibitions the submission of false information to transmission providers or other entities responsible for operation of the transmission grid. As requested, however, we are approving this rule subject to the clarification that inadvertent or honest errors will not constitute a prohibited act under Market Behavior Rule 2. Rather, to be actionable under this rule, it must be shown that a seller has knowingly submitted false information.

66. This due diligence standard, however, will not be measured by the Commission with respect to the individual who actually tenders the data or who may otherwise be responsible for its submission. Rather, it will apply to the seller alone.<sup>40</sup> In this regard, we expect the seller to have in place processes that will assure the sufficiency and accuracy of the submitted information, regardless of who is actually responsible for submitting the information. Where a seller does not have such processes in place, it can be no defense to this rule

commenters in connection with Market Behavior Rule 2(c), discussed below.

<sup>40</sup> We make the same clarification, below, as it relates to Market Behavior Rules 2(d) and 3.

that the submission of data was made by a particular individual who did not personally know it to be false or incomplete.

67. Dynegy requests clarification that Market Behavior Rule 2(b) is not intended to supersede existing market rules which allow for variation between forecasted and actual demand or generation availability. We will grant Dynegy’s request. We recognize that where required, both buyers and sellers submit information to transmission providers or other entities responsible for operation of the transmission grid based on forecasts. We understand that these forecasts are not and cannot be entirely accurate. Market Behavior Rule 2(b), as approved herein, fully accommodates this reality by addressing the knowing submission of false information. Submitting information based on good faith estimates that turn out to be incorrect, then, would not be a case of knowingly submitting false information.

68. Commenters also express concern that Market Behavior Rule 2(b) could be read to prohibit Commission-approved activities such as virtual bidding. While we do not believe that virtual bidding is premised on the knowing submission of false information, we explained in the June 26 Order,<sup>41</sup> and reiterate here, that virtual bidding and other Commission-approved activities will not be considered actions taken in violation of our Market Behavior Rules. To underscore this point expressly (and as discussed above), we have revised the prohibition set forth in Market Behavior Rule 2 to provide that “[a]ctions or transactions undertaken by Seller which are explicitly contemplated in Commission-approved rules and regulations of an applicable power market (such as virtual supply or load bidding) are not in violation of the Market Behavior Rule 2.”

69. Finally, based on commenters’ objections, we have omitted the example of “paper trade” from our non-exclusive, illustrative list of submittals subject to Market Behavior Rule 2(b). We agree with Duke that because the term “paper trade” has no common meaning in the industry, at this time, using such an example to clarify the scope and reach of Market Behavior Rule 2(b) would not be beneficial.

<sup>36</sup> See Comments of EPSA, *et al.* at Attachment B, p.3; Comments of EEI at 14; Comments of AES at 26–27; Comments of FirstEnergy at 9; Comments of Reliant at 10.

<sup>37</sup> EEI proposes a slight variation in this intent standard to prohibit actions or transactions “predicated on intentionally submitting false information to transmission providers including ISOs and RTOs (such as scheduling non-firm service or products sold as firm; or conducting ‘paper trades’ where an entity falsely designates resources and also fails to have those resources available and feasibly functioning).” See Comments of EEI at 14. See also Comments of Reliant at 10 (“transactions predicated on submitting information known to be false”).

<sup>38</sup> A virtual trade can be distinguished from a physical trade that is actually scheduled to the extent that it involves no actual purchase (physical acquisition) or sale (physical disposition) of electricity. It is a purely financial transaction designed to capture an arbitrage opportunity. See, e.g., PJM Interconnection, L.L.C., 104 FERC ¶ 61,339 (2003).

<sup>39</sup> The interplay between the Market Behavior Rules and virtual trading is also raised by

<sup>41</sup> June 26 Order, 103 FERC at n.18.