

F. Market Behavior Rule 2(d)
(Prohibition Against Certain Collusive Acts)

1. Commission Proposal

81. In addition to the prohibition against market manipulation set forth in proposed Market Behavior Rule 2, we proposed, as a specific action or transaction that would be prohibited, "collusion with another party for the purpose of creating market prices at levels differing from those set by market forces."

2. Comments

82. Commenters generally support a market behavior rule directed towards non-competitive collusive acts or transactions, but argue that Market Behavior Rule 2(d) should include language (and should be interpreted) consistent with federal antitrust laws and thus *not* read to create new or different norms of permissible behavior.⁴⁷ The New York ISO agrees, noting that the antitrust laws include a significant volume of precedents dealing with the appropriate meaning and scope of such terms as "collusion" and "unlawful constraints on competition."

83. The New York ISO also points out that Market Behavior Rule 2(d), in its proposed form, varies with federal antitrust laws in a way that it should not. Specifically, the New York ISO asserts that the term "for the purpose of creating market prices," as used in the proposed rule, suggests a reliance on an intent standard contrary to the accepted antitrust approach to collusion. In addition, the New York ISO argues that the proposed rule's focus on prices to the exclusion of non-price considerations is also inconsistent with federal antitrust law. Finally, the New York ISO suggests that the term "market forces," as used in the proposed rule, departs from the antitrust term "competition" and the focus of the antitrust laws on the "unreasonable restraint of competition."

84. The FTC also addresses these issues. The FTC points out that some seller conduct could violate both the antitrust laws and Market Behavior Rule 2, while other conduct could violate the Commission's rule (because it may be unjust and unreasonable) but not the antitrust laws. The FTC submits that to avoid potential conflicts in policing anti-competitive behavior, the Commission should reaffirm its general rule that sellers with market-based rate authority are prohibited from engaging

in conduct that would violate the antitrust laws.

3. Commission Ruling

85. We will adopt Market Behavior Rule 2(d), as revised, to prohibit Sellers from engaging in:

Collusion with another party for the purpose of manipulating market prices, market conditions, or market rules for electric energy or electricity products.

86. To avoid possible confusion regarding the interpretation and scope of the term proposed in the June 26 Order (concerning "market prices [set] at levels differing from those set by market forces), we are replacing this term with language consistent our prohibition ("manipulating market prices, market conditions, or market rules for electric energy or electricity products"). Thus, we are prohibiting market manipulation undertaken by one seller acting alone and we are prohibiting market manipulation undertaken collectively.

87. As noted above, commenters, while disagreeing over the scope of our rule, generally agree that a specific market manipulation prohibition addressing collusive acts is both appropriate and necessary. EEI, for example, states that it agrees with the underlying concept embodied in the rule, while Duke concludes that the Commission's rule legitimately targets collusive activity. EPSA, moreover, as part of its code of ethics and sound trading practices, has adopted a similar standard.⁴⁸

88. EEI, however, suggests that our prohibition should simply incorporate by reference existing federal antitrust law and its jurisprudence, while EPSA, *et al.* (reaching the same conclusion) points out that the Commission's proposed prohibition is too vague and overbroad because, among other things, there is no widespread consensus in the industry on the meaning of the term "creating market prices at levels differing from those set by market forces."

89. We disagree with these assertions. While commenters are correct in their observation that the prohibition set forth in Market Behavior Rule 2(d), as applied, may be similar in certain respects to the prohibitions set forth in federal antitrust law, specifically to the prohibitions against unreasonable restraints of trade as set forth in the Sherman Anti-Trust Act,⁴⁹ our authority

as it relates to Market Behavior Rule 2(d) derives not from federal antitrust law, but rather from the FPA itself and its requirement that all rates and charges made, demanded, or received by any public utility subject to our jurisdiction and all rules and regulations affecting or pertaining to such rates and charges be just and reasonable. Our approach includes elements of anti-trust law but is not limited to such. For example, it also encompasses "partnerships" whose existence do not implicate anti-trust concerns.⁵⁰

90. Thus, we need not address, here, whether or to what extent federal antitrust law may be broader in scope, in certain instances, or more narrow in scope, in other cases. Federal antitrust law, rather, will apply to sellers in the judicial proceedings or other authorized settings in which it is found to apply. Our rule, on the other hand, will be governed by the unique facts and circumstances at play in the wholesale electric industry and will be interpreted by the Commission consistent with our statutory duties relating to these issues.⁵¹

91. We also disagree that the Commission's standard is vague and overbroad and thus will not give sellers adequate notice of the conduct it requires or prohibits. While we address commenters' due process challenges in greater detail in Section N, below, we note here, with respect to Market Behavior Rule 2(d) in particular, that our rule merely expands upon the prohibition against market manipulation set forth in Market Behavior Rule 2. As discussed above, moreover, this prohibition is limited to actions or transactions that do not have a legitimate business purpose. As such, a seller cannot be found to have violated the prohibition set forth in Market Behavior Rule 2(d) where the conduct at issue (as known to the seller itself, in the first instance) has a legitimate business purpose. This limitation, we believe, puts sellers on adequate notice regarding the scope of our rule.

92. Finally, we do not agree that the industry lacks an understanding regarding the meaning of the terms referred to in our rule. These terms, rather, have more than a mere

⁵⁰ See *Enron Power Marketing, Inc., et al.*, 103 FERC ¶ 61,346 (2003) (*Enron Partnerships Order*) (requiring Enron and other entities with whom it had partnerships or other arrangements to show cause why they should not be found to have jointly engaged in manipulation schemes).

⁵¹ See *e.g., Pennsylvania Water & Power Co. v. FPC*, 193 F.2d 230, 236 (DC Cir. 1951) ("A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the regulatory statute." [cit. omit.]).

⁴⁷ See Comments of the FTC at 13; Comments of EPSA, *et al.* at Attachment B, p. 4; Comments of EMI at 7; Comments of EEI at 15; Comments of Duke Energy at 37.

⁴⁸ The EPSA standard prohibits parties from colluding with other market participants to affect the price or supply of power, allocate territories, customers or products, or otherwise unlawfully restrain competition.

⁴⁹ See 15 U.S.C. 1 (2000).