

hypothetical or theoretical existence, as our recent experience relating to collusion in the Western markets aptly demonstrates.<sup>52</sup>

G. Market Behavior Rule 2(e) (Prohibition Against Certain Bidding Behavior).

### 1. Commission Proposal

93. In addition to the prohibition against market manipulation, as set forth in proposed Market Behavior Rule 2, we also proposed, as a specific action or transaction that would be prohibited, "bidding the output of or misrepresenting the operational capabilities of generation facilities in a manner which raises market prices by withholding available supply from the market."

### 2. Comments

94. Commenters challenge Market Behavior Rule 2(e) on a number of grounds. As a legal matter, EEI and others assert that the proposed rule is vague and overbroad, thus failing to provide market participants with sufficient notice of the conduct it would require or prohibit.<sup>53</sup> The New York ISO adds that the proposed rule fails to make any distinction between competitive and anti-competitive behavior or set a threshold that would permit market participants to have reasonable flexibility to adjust their bidding behavior in conformance with legitimate market forces. AES asserts that the proposed rule is vulnerable to misinterpretation and would require substantial oversight on the part of regulators.

95. Commenters also argue that the rule, if implemented, should adopt an intent standard, among other revisions. Reliant argues that inadvertent misrepresentations should not be considered violations of the rule and should not subject a seller to the same penalties that would attach to intentional violations. FirstEnergy adds that a seller should not be penalized for the types of action prohibited by the rule absent a showing that the actions at issue were intended to raise market prices above competitive levels.

96. Commenters also address whether and to what extent the proposed rule should define and more squarely address the concepts of physical withholding and economic withholding on an industry-wide basis.<sup>54</sup> Reliant

asserts that its proposed definition of physical withholding would include an intent requirement and, with respect to subsection (b), would note that there may be legitimate reasons for not complying with a must-offer requirement.<sup>55</sup> EPSA, *et al.* add that the Commission's rule against physical withholding should include safe harbor language that would not require sellers to run their units in certain specified circumstances (*e.g.*, when doing so would risk jeopardizing public health and safety or damaging the seller's facilities, in order to comply with facility licensing, environmental or other legal requirements; or when doing so would be uneconomic under the given circumstances).

97. Commenters also raise a number of concerns regarding the definition and scope of the term economic withholding, as it might be applied by the Commission under its proposed Market Behavior Rule 2(e) standard. The New York ISO asserts that any prohibition on withholding supply from the market should not be triggered by the inclusion of legitimate opportunity costs in a unit's bid. Reliant, on the other hand, asserts that defining what would and what would not constitute withholding under the proposed rule is virtually undoable.

98. Finally, EEI asserts that because Market Behavior Rule 1 and Market Behavior Rule 2(b) require sellers to operate their generation units consistent with RTO and ISO rules and prohibit the submission of false information, Market Behavior Rule 2(e) is redundant and unnecessary. The New York ISO claims that the prohibitions contemplated by the rule could be implemented by existing market mitigation measures approved by the Commission.

### 3. Commission Ruling

99. We agree with commenters that Market Behavior Rule 2(e) is redundant and unnecessary and therefore will not adopt it. For the reasons discussed below, we find that Market Behavior Rule 1 sufficiently addresses the concerns we intended to address in proposing the express prohibition embodied in Market Behavior Rule 2(e).

withholding: Entities may not physically withhold the output of an Electric Facility (Generating unit or Transmission Facility) by (a) intentionally falsely declaring that an Electric Facility has been forced out of service or otherwise become unavailable, or (b) intentionally failing to comply with any applicable must-offer conditions of a participating generator agreement.

<sup>55</sup> See also Comments of EEI at 16–17 (noting that generating capacity may be withheld from the market for reasons not associated with anti-competitive activity).

100. Several commenters appear to have misread the intent of our proposed rule. They suggest that, if implemented, the proposed rule would have imposed a must-offer condition in markets in which such a requirement is not currently in effect. However, we did not intend to create this or any other new substantive obligation applicable to sellers, *i.e.*, obligations other than those which already apply to sellers in the markets in which they operate. Our intent, rather, was simply to provide clarity regarding a specific form of market manipulation that would, as proposed, be expressly prohibited under Market Behavior Rule 2.

101. Because our proposed rule related to "bidding" into organized markets and to misrepresentations concerning the "operational capabilities of generation facilities," commenters are correct that the requirements addressed by our proposed rule were necessarily tied to the existing requirements of the applicable power markets in which sellers operate and thus were already addressed by the unit operation requirements addressed in Market Behavior Rule 1. Given this overlap, *i.e.*, this redundancy in our proposed rules, we agree with those commenters who assert that Market Behavior Rule 2(e), as proposed, is unnecessary and should be rejected.

102. In reaching this conclusion, however, we are not finding that physical withholding,<sup>56</sup> or economic withholding,<sup>57</sup> cannot be a component of an activity that constitutes market manipulation, as prescribed by Market Behavior Rule 2.<sup>58</sup> Nonetheless, we clarify here that seller's compliance with Market Behavior Rule 1, *i.e.*, with the Commission-approved bidding and outage reporting rules in organized markets, should be sufficient to meet a sellers' obligations concerning bidding and reporting requirements with respect to a generating facility, absent seller's participation in manipulative conduct.

<sup>56</sup> The term "physical withholding" means not offering available supply in order to raise the market clearing price. Such a strategy is only profitable for a firm that benefits from the higher price in the market.

<sup>57</sup> The term "economic withholding" means bidding available supply at a sufficiently high price in excess of the supplier's marginal costs and opportunity costs so that it is not called on to run and where, as a result, the market clearing price is raised. Such a strategy is only profitable for a firm that benefits from the higher price in the market.

<sup>58</sup> To the extent this behavior violated any Commission-approved bidding rules in the applicable power market, moreover, it could also be found to be a violation of Market Behavior Rule 1.

<sup>52</sup> See *Enron Partnerships Order*, 103 FERC at P46.

<sup>53</sup> See Comments of EEI at 17; Comments of Southern at 14; Comments of InterGen at 15; Comments of Reliant at 11.

<sup>54</sup> Reliant proposes that the rule be revised to adopt the following standard relating to physical