

H. Market Behavior Rule 3 (Communications)

1. Commission Proposal

103. In the June 26 Order, we proposed that sellers be required to “provide complete, accurate, and factual information, and not submit false or misleading information, or omit material information, in any communication with the Commission, market monitors, [RTOs, ISOs], or similar entities.” We sought comment on whether this proposed rule would be sufficient in its scope and breadth to cover any and all matters relevant to wholesale markets, including maintenance and outage data, bid data, price and transaction information, and load and resource data. In addition, we sought comment on whether this remedial authority would serve as a useful and appropriate tool in ensuring just and reasonable rates.

2. Comments

104. Commenters argue that the proposed rule should only prohibit violations knowingly committed.⁵⁹ Reliant points out that accidental violations, including mistakes made when responding to a request for data, or a reasonable but erroneous understanding of the type or scope of information requested, should not constitute a violation of the rule. EEI adds that unintentional errors and omissions occur in the ordinary course of business. Similarly, EPSA, *et al.* submit that market participants should retain the right to challenge requests for information and to exercise their judgment in determining the adequacy of a response, subject to subsequent direction from the Commission.

105. Commenters also favor limitation of the proposed rule to “Commission-approved entities” and thus the deletion of the proposed term “or similar entities.”⁶⁰ Commenters argue that the application of the rule to entities other than jurisdictional entities would create unnecessary confusion and uncertainty. Undue market uncertainty is also alleged with respect to the potential scope of the proposed rule. Dynegy, for example, argues that the term “material information” creates an overly high and

ambiguous standard that is not required to protect sophisticated commercial entities.⁶¹ Similarly, Reliant submits that the word “complete” effectively requires sellers to become mind-readers in order to avoid running afoul of the Commission’s rule.⁶² Amerada Hess asserts that it should be left to the RTOs, ISOs, and the market monitors to specify what does and what does not fall within the scope of the rule. Finally, commenters argue that the rule should be modified to require that any entity receiving data pursuant to the rule have appropriate data confidentiality protocols in place in order to ensure the confidentiality of the data it receives.⁶³

3. Commission Ruling

106. We will adopt Market Behavior Rule 3, as revised. As revised, Market Behavior Rule 3 will require a market-based rate seller to:

Provide accurate and factual information and not submit false or misleading information, or omit material information in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators or jurisdictional transmission providers, unless Seller exercised due diligence to prevent such occurrences.

107. In adopting this rule, we are emphasizing the need for market-based rate sellers to act honestly and in good faith when interacting with the Commission or organizations and entities tasked by the Commission with the responsibility of carrying out non-discriminatory transmission access and wholesale electric market administration. The integrity of the processes established by the Commission for open competitive markets rely on the openness and honesty of market participant communications.

108. We have modified the proposed rule, however, to make clear that it will only apply to communications with the Commission and entities subject to its jurisdiction. We believe that such clarification is appropriate to assure sellers that the information sought or provided hereunder will be directly related to the wholesale transactions for which they have received market-based rate authority.

109. In addition, we clarify that this rule will not be a basis for a

jurisdictional entity requesting or receiving information covered by this rule to compel the provision of such information or to fail to provide requested confidential treatment. The ability to compel the provision of information requested and determinations with respect to requests for confidential treatment will depend on the Commission-approved rules and regulations of the institution requesting or receiving the information.

110. We have also revised the rule to assure that inadvertent submission of inaccurate or incomplete information will not be sanctioned. As revised, the rule prohibits the knowing submission of false or misleading data.⁶⁴ In this regard, we intend the “due diligence” exception to apply to the entity, not the individual, submitting the data. As such, we expect the seller submitting the information to have in place processes that assure the accuracy of the submitted information. The submission of false or incomplete information on behalf of a seller by an individual that did not personally know it to be false or incomplete in the absence of a process to insure data accuracy and sufficiency will not excuse the seller’s conduct under this rule.

I. Market Behavior Rule 4 (Reporting)

1. Commission Proposal

111. In the June 26 Order, we applied the prohibition against false reporting, as set forth in proposed Market Behavior Rule 3, to the reporting of price data to publishers of electricity or natural gas price indices. We proposed that to the extent sellers engage in reporting of transactions to publishers of electricity or natural gas price indices, sellers will be required to provide complete, accurate and factual information to any such publisher. We further proposed that sellers would be required to notify the Commission of whether they engage in such reporting for all sales and that in addition, sellers would be required to adhere to such other standards and requirements for price reporting as the Commission may order.

112. We noted that Staff, in the Western Markets Report, supported the inclusion of such a requirement in sellers’ market-based rate tariffs and authorizations.⁶⁵ We sought comment

⁵⁹ See Comments of EPSA, *et al.* at Attachment B, p.6; Comments of EEI at 18–19; Comments of Duke Energy at 38; Comments of Exelon at 13; Comment of Reliant at 18; Comments of MidAmerican Energy at 5.

⁶⁰ See Comments of EPSA, *et al.* at Attachment B, p. 6; Comments of EEI at 18–19; Comments of Reliant at 18. *But see* Comments of the California Commission at 6 (proposing that the term “state regulatory authorities” be added to the list of entities to whom accurate information must be provided).

⁶¹ See also Comments of EPSA, *et al.* at Attachment B, p. 6 (noting that the word “material” is not currently defined).

⁶² See also Comments of Central Vermont, *et al.* at 17.

⁶³ See Comments of Reliant at 18; Comments of EME at 8; Comments of Pinnacle West at 9.

⁶⁴ As noted above, we make the same clarification as it relates to Market Behavior Rules 2(b) and 2(c).

⁶⁵ See June 26 Order, 103 FERC ¶ 61,349 at P28, citing Western Markets Report at ES–17. We also noted that EPSA, in its code of ethics and sound trading practices, requires its members to “ensure that any information disclosed to the media, including market publications and publishers of