

on whether our rule, as proposed, would remedy the abuses outlined by Staff in the Western Markets Report by ensuring that published price indices represent a fair and accurate measure of actual prices and trading volumes. Finally, we noted that in Docket No. AD03-7-000, we were considering certain price formation issues, including a requirement covering the reporting of price data by jurisdictional entities.⁶⁶ Accordingly, we proposed to condition our rule by stating that “seller shall adhere to such other standards and requirements for price reporting as the Commission may order.”

2. Comments

113. Issues raised by commenters with respect to the proposed rule generally mirror the concerns discussed above relating to Market Behavior Rule 3. These concerns include, principally, (i) the absence of an intent standard;⁶⁷ (ii) the need for confidentiality when reporting transactions to publishers;⁶⁸ and (iii) the importance of clarifying the scope of the information to be reported.⁶⁹

114. With respect to scope, Platts submits that if the Commission does require sellers to state whether they report “all sales” to publishers, the Commission should further specify the information it expects to be provided. Platts argues that sellers should be required in their notification to state whether they are reporting their prices for electricity transactions, gas transactions or both, and to state to which publications they are reporting prices. Platts adds that sellers should be required to state that the information they provide to publishers includes all of the company’s trading at all North American trading points, not merely a complete set of data for those points at which a seller chooses to report data.

115. The Intercontinental Exchange, Inc. (Intercontinental) argues that since there are only a small number of index publishers relative to the hundreds of sellers, the Commission should compel index publishers to reveal the number of sellers reporting transaction-level data and the number of transactions reported for each index at each hub on a daily (for day-ahead indices) and monthly (for

month-ahead indices) basis. Finally, NASUCA and TDU Systems argue that Market Behavior Rule 4 should require mandatory reporting in order to restore liquidity and confidence to electricity and natural gas markets. NASUCA submits that this requirement should apply to all purchases as well as sales.

3. Commission Ruling

116. We will adopt Market Behavior Rule 4, as revised. As revised, Market Behavior Rule 4 will require that a market-based rate seller comply with the following:

To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller shall provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement issued by the Commission in Docket No. PL03-3 and any clarifications thereto. Seller shall notify the Commission within 15 days of the effective date of this tariff provision of whether it engages in such reporting of its transactions and update the Commission within 15 days of any subsequent change to its transaction reporting status. In addition, Seller shall adhere to such other standards and requirements for price reporting as the Commission may order.

117. In the June 26 Order, we referred to our on-going proceeding investigating price index formation in Docket No. AD03-7-000. As commenters note, since our proposal regarding these rules was issued, we have issued a Policy Statement addressing standards we believe appropriate for the formation of price indices that will be robust and accurate in the context of a voluntary reporting regime.⁷⁰ Included in the Policy Statement is an allowance for a “safe harbor,” pursuant to which reporting errors would not be subject to Commission sanction (e.g., as seller’s conduct may relate to Market Behavior Rule 4).

118. In our rule, as revised herein, we explicitly adopt the standards set forth in the Policy Statement for transaction reporting. Further, we also adopt the “safe harbor” set forth therein as a component of our enforcement policy with respect to this rule. In addition, we make clear that all sellers will be required to inform the Commission of their “reporting status” within 15 days of the effective date of this revision to their tariff and within 15 days of any subsequent change in reporting status.

119. Finally, several commenters suggest that we require mandatory

reporting, while other commenters contend that we have created requirements that will have a chilling effect on reporting. We believe that we have struck an appropriate balance in our rule. For the moment, we are attempting to work within the framework of voluntary reporting. We are awaiting Staff’s review of the comprehensiveness of reporting in the wake of our Policy Statement. At this time, we are not mandating reporting. We have engaged in a comprehensive investigation of transaction reporting and related issues and believe the practices set forth in our Policy Statement represent the necessary minimum for those entities that choose to report. Accordingly, we will not require reporting, here, but will set forth practical standards for entities that do report.

J. Market Behavior Rule 5 (Record Retention)

1. Commission Proposal

120. In the June 26 Order, we noted that in the Western Markets Report, Staff recommended that all electric market-based rate tariffs and authorizations be expressly conditioned to require sellers to retain data and information needed to reconstruct a published price index for a period of three years.⁷¹ Based on Staff’s recommendation, we proposed and sought comment on the record retention guidelines set forth in Market Behavior Rule 5. Specifically, we sought comment on whether this Market Behavior Rule, as proposed, would ensure that companies adopt suitable retention policies permitting the Commission and interested entities to better monitor these transactions and practices.

2. Comments

121. Commenters generally agree that a data retention requirement of some kind should be imposed on market-based rate sellers, but disagree over the number of years over which this requirement should apply. Some argue that the data retention period should be reduced from the proposed three-year period to a two-year or even one-year requirement,⁷² others request that it be

surveys and price indices, is accurate and consistent.”

⁶⁶ *Id.* at P31.

⁶⁷ See Comments of EPSA, *et al.* at Attachment B, pp. 6-7; Comments of EEI at 20; Comments of MidAmerican Energy at 5; Reliant at 20; Comments of National Energy Marketers Association at 13; Comment of PG&E at 11; Comments of EME at 10.

⁶⁸ See e.g., Comments of EME at 10.

⁶⁹ See Comments of Central Vermont, *et al.* at 18; Comments of the FTC at 17-18; Comments of OPG at 5.

⁷⁰ See Price Discovery in Natural Gas and Electric Markets, 104 FERC ¶ 61,121 (2003).

⁷¹ See Western Markets Report at ES-14 and III-52. EPSA, in its code of ethics and sound trading practices, requires its members to “maintain documentation on all transactions for an appropriate period of time as required under applicable laws and regulations.”

⁷² See Comments of Central Vermont, *et al.* at 18-19 (two years); Comments of Merrill Lynch, *et al.* at 9 (two years); Comments of FirstEnergy at 21 (two years) Comments of EPSA, *et al.* at Attachment B, p. 7 (one year).