

increased to a six-year or even seven-year requirement,<sup>73</sup> and others recommend that it be approved, as proposed.<sup>74</sup>

122. Commenters also raise concerns regarding the scope and specificity of the proposed requirement. EEI, Dynegy and MidAmerican, for example, argue that the language in the rule is too vague, while Exelon submits that the proposed rule would arguably require a seller to retain virtually every piece of paper it generates. These and other commenters conclude that without a more narrow, clearly articulated requirement, the proposed rule could be burdensome and costly.<sup>75</sup> Reliant requests clarification that the data retention requirement not extend to economic analyses associated with the development of prices and bids that underlie the prices charged by a seller (e.g., fuel cost, variable operation and maintenance expenses, or opportunity costs). In addition, Reliant argues that the products specified in Market Behavior Rule 5 be limited to jurisdictional products for which sellers have express authority to sell at market-based rates.

### 3. Commission Ruling

123. We will adopt Market Behavior Rule 5, as revised. As revised, Market Behavior Rule 5 will require a market-based rate seller to:

Retain for a period of three years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products it sold pursuant to this tariff or the prices it reported for use in price indices.

124. In revising this rule, we clarify that we are not seeking retention of "cost-of service" or analytical data related to all sales, as some commenters perceived from our use of the word "reconstruction" in our original proposal. Rather, we are requiring that sellers retain the complete set of contractual and related documentation upon which they billed their customers for their sales. The sales contemplated are sales made pursuant to the seller's market-based rate tariff. The Commission is indifferent as to whether this material is retained in paper form or in an electronic medium as long as the data can be made accessible in a reasonable fashion if its review is required by the Commission or its Staff.

125. In addition, commenters suggest that the length of the retention period

may be burdensome. On balance, however, requiring sellers to retain records for the period proposed, *i.e.*, for three years, will not constitute an undue burden on sellers, particularly given the fact that sellers can satisfy this requirement either by retaining their records in a hard copy form or electronically. To permit a shorter retention period may not allow sufficient time for the investigations into possible violations.

### K. Market Behavior Rule 6 (Related Tariff Matters)

#### 1. Commission Proposal

126. In the June 26 Order, we noted that in the Western Markets Report, Staff had found that sellers had failed to abide by their market-based rate codes of conduct<sup>76</sup> and their Order No. 889 standards of conduct.<sup>77</sup> We noted that these tariff provisions, among other things, required the functional separation of transmission and wholesale merchant personnel. We sought comment on whether Market Behavior Rule 6, as proposed, was sufficient in its scope and breadth to cover any and all matters relating to violations of the market-based rate codes of conduct and the Order No. 889 standards of conduct.

#### 2. Comments

127. Notwithstanding the discussion which accompanied our proposed rule, commenters suggest that the language set forth in Market Behavior Rule 6, as proposed, could be construed to apply to codes of conduct other than sellers' market-based rate codes of conduct. Accordingly, commenters seek clarification that the codes of conduct to which Market Behavior Rule 6 refers are the codes of conduct contained in sellers' market-based rate schedules. EEI also challenges the proposed rule as being too heavy-handed, permitting the Commission, in theory, to revoke a seller's market-based rate authority for any code of conduct or standards of conduct violation, no matter how small or insignificant the infraction (e.g., failing to correctly post a job description).<sup>78</sup>

<sup>76</sup> The Commission requires a market-based rate code of conduct when a power marketer is affiliated with a public utility with a franchised service area and captive customers. See *Carolina Power & Light Company*, 97 FERC ¶ 61,063 (2001).

<sup>77</sup> See *Open Access Same-time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,135 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

<sup>78</sup> See also Comments of EME at 11 (asserting that the proposed rule is vague and ill-defined).

### 3. Commission Ruling

128. We will adopt Market Behavior Rule 6, as revised. As revised, Market Behavior Rule 6 will require that a market-based rate seller:

Not violate or collude with another party in actions that violate Seller's market-based rate code of conduct or Order No. 889 standards of conduct, as they may be revised from time to time.

129. Market Behavior Rule 6 is designed to emphasize our commitment to make certain that entities adhere to our electric power sales code of conduct and Order No. 889 standards of conduct. In response to commenter concerns, we have revised this rule to add clarity. In revising this rule, we clarify that this rule applies to a seller's electric power sales code of conduct contained in a Seller's market-based rate tariff or rate schedule as well as seller's Order No. 889 standards of conduct. We intend that any violation of this provision will subject the seller and its affiliates to disgorgement of unjust profits, as applicable, or other remedies as the Commission may find appropriate.

130. We further clarify that, in adopting this rule, it is not the Commission's intention to order disgorgement of unjust profits or other remedies for inadvertent errors (such as incorrectly posting a job description). However, the Commission is concerned with all violations and, in particular, those violations which involve affiliate sales and preferential treatment, including access to transmission information or service.

### L. Additional Rules and Alternative Options

#### 1. Commission Proposal

131. In the June 26 Order, we noted that the prohibitions set forth in our proposed Market Behavior Rules represented only one of the tools available to the Commission to ensure just and reasonable rates and that in undertaking our enforcement decisions, we would focus on the best outcome for assuring just and reasonable rates in our jurisdictional markets. We stated that in some instances, significant remedial action may be warranted, while in other instances, we may use a specific set of facts and circumstances to clarify our requirements for acceptable public utility activities. We noted that in formulating our proposed rules, we were required to balance a number of competing interests. We sought comments from interested entities on whether our proposed rules struck the appropriate balance.

<sup>73</sup> See Comments of NASUCA at 23 (six years); Comments of East Texas Cooperatives at 10 (seven years).

<sup>74</sup> See Comments of Reliant at 21.

<sup>75</sup> See e.g., Comments of Duke Energy at 39-40.