

2. Comments

132. A number of commenters assert, in effect, that the Commission's proposed Market Behavior Rules fail to strike the necessary balance of interests, given the Commission's asserted failure to address various additional issues.

133. El Paso Electric Company (El Paso), for example, states that June 26 Order failed to examine or otherwise provide any understanding on a number of important threshold questions underlying the Commission's stated objectives in this proceeding. Specifically, El Paso asserts that the Commission is attempting to articulate Market Behavior Rules without a full understanding of what constitutes a market, what dynamics foster a competitive market, and what kinds of behavior are beneficial or harmful.

134. The FTC points out that structurally competitive markets are generally the best remedy against anticompetitive behavior and that, as such, the Commission should give high priority to achieving structurally competitive markets while it pursues interim measures, if any, to address Market Behavior Rule violations. Similarly, EPSA, *et al.* submits that the solution for most of the alleged and actual inappropriate market behavior is well-functioning markets with clear and efficient rules that foster efficient investment and competitive behavior.⁷⁹

135. In addition, commenters assert that the Market Behavior Rules should apply to all market participants, including transmission owners and load serving entities (LSEs). AE Supply argues that buyers who manipulate markets to depress prices should be subject to complaints by sellers to recover appropriate surcharges. EEI notes that this could be accomplished by including the Market Behavior Rules in the tariffs administered by all RTOs, ISOs, and the Western Systems Power Pool.

136. APPA, TAPS, and TDU Systems propose that the Commission broaden the scope of its undertaking in this proceeding by addressing structural market issues. APPA and TAPS propose as additional rules, a requirement imposing long-term sales obligations for the benefit of LSEs, a requirement for

capacity auctions to de-concentrate generation, and additional rules providing for greater access to transmission and the relief of existing transmission constraints. TDU Systems recommends that the Commission take action on its proposed supply reassessment screen to provide an up-front measure of a seller's potential market power.

3. Commission Ruling

137. We share the views of those commenters who assert that the Commission's proposed Market Behavior Rules, taken alone, will not be adequate to ensure that the rates, terms and conditions offered by market-based rate sellers will be just and reasonable.

We also agree with EPSA, *et al.* and others that a well functioning market may be the best single, long-term remedy against the abuse of market power. In fact, the Commission is pursuing these efforts in other concurrent proceedings.⁸⁰

138. As we have recognized in the past, however, even in a structurally competitive market, individual sellers may have the ability to exercise market power. Individual sellers may have the ability to engage in market manipulation or other deceptive practices. Thus, it is appropriate that the Commission delineate well-defined rules of the road applicable to market-based rate sellers. Where these rules are violated, it is appropriate that the Commission provide a remedy for such conduct. It is important that such conduct be deterred to the extent possible.

M. Available Remedies and Complaint Procedures

1. Commission Proposal

139. In the June 26 Order, we indicated that in complaint proceedings brought before the Commission to enforce our proposed Market Behavior Rules, the principal remedy available to complainants for any Market Behavior Rule violation shown to have occurred (in addition to the potential revocation of the seller's market-based rate authority) would be the disgorgement of the seller's unjust profits attributable to the specific violation at issue.⁸¹

140. In addition, we proposed to limit the applicability of potential disgorgement of unjust profits exposure by requiring that any violation alleged by a market participant be made on a transaction-specific basis and that any

market participant request for disgorgement relief be made no later than 60 days after the end of the calendar quarter in which the violation is alleged to have occurred. We proposed that if a market participant can show that it did not know and should not have known of the behavior which forms the basis for its complaint within the period prescribed in our proposal, then the 60-day period would be deemed to run from the time when the market participant knew or should have known of the behavior. Finally, we proposed that these time limitations not apply to enforcement actions undertaken by the Commission.

2. Comments

141. EEI rejects the remedial approach set forth by the Commission in the June 26 Order. EEI asserts that to avoid regulatory uncertainty, the Commission should only pursue remedies on a prospective basis after the Commission identifies new market problems and/or the need for new market rules.

142. Numerous comments (both pro and con) were received regarding the specific financial remedy proposed by the Commission, *i.e.*, a disgorgement remedy. On the one hand, commenters challenge the Commission's authority to impose any remedies at all in this context based on various legal challenges (discussed below), the impracticalities involved in attempting to calculate such a remedy, and/or the commercial undesirability of doing so.⁸² Other commenters stake out a position on the opposite end of the spectrum, suggesting that a financial remedy limited to the disgorgement of unjust profits is entirely inadequate, unfair, and will not provide a sufficient deterrent against sellers who violate the Commission's rules.⁸³ The middle ground position between these two polar views, *i.e.*, a disgorgement remedy that would not require the seller to make the market whole (as proposed by the Commission in the June 26 Order), is supported by EPSA, *et al.* and others.

⁸² See Comments of EEI at 22–26; Comments of TransCanada at 4; Comments of Southern at 18 (noting that it may prove difficult, if not impossible, to calculate unjust profits in the context of market-based rates); Reply Comments of Mirant and TransAlta at 11 (noting that disgorgement liability could completely chill bulk power markets and severely limit capital market access for bulk power market participants); Reply Comments of Cinergy Services, Inc. (Cinergy) at 1–4 (arguing that a make-whole remedy would be unreasonable, unnecessary, impractical, and unauthorized by the FPA).

⁸³ See Comments of TDU Systems at 10; Nucor Steel, *et al.* at 7; SMUD at 6–7; PG&E at 3; Comments of Cal ISO at 5; Comments of NASUCA at 31; Comments of Cal Oversight Board at 5–6; Reply Comments of Central Maine, *et al.* at 8–9.

⁷⁹ See also Comments of East Texas Cooperative at 4–6 (stating that the lack of competitive markets remains a fundamental concern); Comments of ANP, *et al.* at 14 (the Commission should continue to rely on preventive measures tailored to specific markets, rather than adopting blanket rules that, by their own design, cannot stop anticompetitive behavior); Reply Comments of TDU Systems at 3 (noting that the Commission must address not only the behavior of market participants but the structure of the markets themselves).

⁸⁰ See *e.g.*, Midwest Independent Transmission System Operator, Inc., 105 FERC ¶ 61,145 (2003); California Independent System Operator Corporation, 105 FERC ¶ 61,140 (2003).

⁸¹ June 26 Order, 103 FERC ¶ 61,349 at P38.