

143. Commenters also stake out a number of different positions regarding the Commission's proposed 60-day complaint limitation rule. EPSA, *et al.* and others submit that this complaint limitation proposal is both necessary and appropriate, as it relates to market participant complaints because, among other things, it will promote transactional certainty.⁸⁴ Others, including TDU Systems and East Texas Cooperatives, submit that this time limitation requirement will significantly undermine the Commission's overall objectives in this proceeding. Similarly, Central Maine, *et al.* argue for an extended period in which to file complaints, given (it contends) the complexity of an LMP-based market (and the time it requires to analyze market outcomes), the practicalities associated with billing cycles and correction periods, and the administrative burden associated with determinations of when a particular party knew or should have known of a rule violation. NECPUC submits that, at a minimum, the 60-day rule should be modified by providing all market participants 180 days to file a complaint from the date they know, or should know, of the violation at issue.⁸⁵

144. Commenters also address the Commission's statement in the June 26 Order that it would not be bound by the 60-day complaint limitation requirement applicable to market participant complaints. On the one hand, the Louisiana Commission asserts that this 60-day complaint exemption is appropriate and that it should also apply to state regulators. On the other hand, EPSA, *et al.* and EEI warn that such an allowance would constitute an open-ended risk that the Commission might question any seller's transaction at any time (even in response to a hotline complaint made by a market participant otherwise precluded from filing a complaint) and would have a chilling effect on the market.⁸⁶

145. Commenters seek a number of clarifications regarding the Commission's role in enforcing its Market Behavior Rules. EPSA, *et al.* seek clarification that while the Commission might reexamine transactions and provide guidance at

any time, it will nonetheless be bound by the time limitation imposed herein with respect to any remedies it might impose. Central Vermont, *et al.* also seek a limitation on the Commission's authority in this area, proposing that there be a time limit of six months following the date on which the violation is alleged to have occurred for the Commission to initiate an investigation and order disgorgement of unjust profits. The California Commission seeks clarification that a Commission Staff investigation initiated in response to an alleged tariff violation will be open to the public, noting that complaint proceedings initiated by other parties will necessarily be open to the public. Mirant and TransAlta also assert that the triggering event for bringing a complaint or initiating an investigation is unclear in the Commission's proposal. These entities propose that the triggering event be the time that the transaction at issue is entered into, absent fraud or the willful withholding of material information. Finally, Nucor Steel, *et al.* propose that revocation of a seller's market-based rate authority be made mandatory if it is determined that the seller is in violation of any Market Behavior Rule.

3. Commission Ruling

146. We will adopt the remedies and complaint procedures outlined in the June 26 Order, as revised (*see* Appendix B). Specifically, we will adopt the remedies and complaint procedures as they relate to market participant complaints, subject to the modification that the complaint limitation period will be 90-days, not 60-days, as proposed. Thus, a complaint must be brought within 90 days from the end of the calendar quarter in which the violation has been alleged to have occurred, unless a complainant can show that it did not know or should not have known of the behavior which forms the basis for its complaint within this time period.

147. Upon consideration of the comments received concerning our 60-day proposal, in the Commission's view the 60-day time period may be insufficient time for parties to discover and act upon violations of these rules. Accordingly, the Commission will modify its original proposal to allow 90 days from the end of the quarter from which a violation occurred for a party to bring a complaint based on these rules. A 90-day time period provides a reasonable balance between encouraging due diligence in protecting one's rights, discouraging stale claims, and encouraging finality in transactions. Furthermore, the Commission clarifies

that its exception regarding the time period applicable to the filing of a complaint, where the complainant could not have known of the alleged violation, incorporates a reasonableness standard, *i.e.*, the 90-day time period to file a complaint does not begin to run until a reasonable person exercising due diligence should have known of the alleged wrongful conduct. Rather than being impermissibly vague, this safeguard ensures a sufficient time-period for complainants to discover hidden wrongful conduct and submit a claim.

148. We will also place a time limitation on Commission enforcement action for potential violations of these Market Behavior Rules. The Commission, unlike the market participants who may be buyers or otherwise directly affected by a transaction, may not be aware of actions or transactions that potentially may violate our rules. Thus, the Commission will act within 90 days from the date it knew of an alleged violation of its Market Behavior Rules or knew of the potentially manipulative character of an action or transaction. Commission action in this context means a Commission order or the initiation of a preliminary investigation by Commission Staff pursuant to 18 CFR part 1b. If the Commission does not act within this time period, the seller will not be exposed to potential liability regarding the subject transaction. Knowledge on the part of the Commission will take the form of a call to our Hotline alleging inappropriate behavior or communication with our enforcement Staff.

149. We will not adopt commenters' additional proposed revisions and arguments. First, we reject EEI's argument that the disgorgement remedy proposed in the June 26 Order is inappropriate, because, EEI asserts, it will retroactively or retrospectively declare actions to be market abuses when such actions were not envisioned when the rules were promulgated. In fact, EEI's premise is mistaken. Our Market Behavior Rules establish clear advance guidelines to govern market participant conduct. Moreover, in approving these Market Behavior Rules and requiring sellers to be fully accountable for any unjust gains attributable to their violation, we do not foreclose our reliance on existing procedures or other remedial tools, as may be necessary, including generic rule changes or the approval of new market rules applicable to specific

⁸⁴ See also Reply Comments of EEI at 12–13; Reply Comments of Cinergy at 4–6.

⁸⁵ See also Comments of SMUD at 5–6 (pointing out that a market participant that uncovers a violation on the last day of the calendar quarter has only one third the amount of time to prepare a complaint as a market participant who happens to find evidence of a violation on the first day of the calendar quarter); Reply Comments of TDU Systems at 5.

⁸⁶ See also Reply Comments of Mirant and TransAlta at 8.