

markets.⁸⁷ As always, we will consider the full range of options available to the Commission to promote competition and to ensure that rates remain just and reasonable.

150. We also reject commenters' assertions that a disgorgement remedy may be difficult to calculate in a particular case, or may operate as a chill on the market in other circumstances. The concerns raised by commenters, in this regard, are speculative at best. Moreover, any such concerns can be fairly evaluated by the Commission on a case-by-case basis, with a full opportunity for input from all interested parties. Thus, we need not reject a disgorgement remedy in all cases simply because it may be inappropriate to apply (and need not be imposed) in a specific case. For the reasons discussed below (see Section H, "Legal Authority") we will also reject the assertion that the Commission is precluded from applying a disgorgement remedy under section 206 of the FPA or on due process grounds.

151. We also reject commenters' assertions that, in enforcing our Market Behavior Rules, the Commission should consider a make-the-market-whole remedy. In fact, the remedies outlined by the Commission in the June 26 Order, including the possible revocation of Sellers' market-based rate authority, will provide a sufficient inducement for sellers to comply with our rules. Our primary focus, in this regard, is on encouraging appropriate market behavior and deterring inappropriate market behavior.

152. Finally, we will reject the proposal made by Mirant and TransAlta that the triggering event applicable to market participant complaints be the date on which the transaction was entered into, absent fraud or willful withholding of material information on the part of the seller. We will not limit market participant complaints in this way. First, the Commission's Market Behavior Rules address both actions and transactions and thus cannot be limited to dates applicable to transactions alone. For example, the declaration of an outage, as addressed by Market Behavior Rule 1, could be an action that does not necessarily involve a transaction.⁸⁸

⁸⁷ Moreover, if Congress grants the Commission additional remedial power, including the authority to levy civil penalties, the Commission will, in addition to the remedies set forth herein, implement such authority and utilize it when appropriate for violations of these Market Behavior Rules.

⁸⁸ In this regard, while we held in the June 26 Order that our disgorgement remedy, in the context of a market-participant complaint, could only be sought on "transaction-specific basis," we clarify

Second, the June 26 Order was clear that the 60-day requirement would be triggered by the occurrence of the violation, which (in the case of a transaction) could come well after the transaction date. Finally, the extension of this 60-day period, we said, would be based on whether the complainant knew or should have known of the behavior which forms the basis for its complaint, not fraud or any other conduct that the complainant would be required to attribute to the seller as a pre-condition to its right to seek relief.

N. Legal Authority

1. Commission's Findings in the June 26 Order

153. In the June 26 Order, we concluded that section 206 of the FPA would not bar the Commission from either approving or enforcing our proposed Market Behavior Rules.⁸⁹ We noted that we had initiated this proceeding under section 206, for the purpose of examining whether sellers' market-based rate tariffs are just and reasonable, or whether, conversely, they should be revised as proposed herein. We stated that should we determine that sellers' currently effective tariffs are unjust and unreasonable or may lead to unjust and unreasonable rates without the inclusion of the market behavior rules we proposed herein, we would require that these tariffs be revised to include the rules prospectively, as section 206 requires.

154. We also found that the refund limitations of section 206(b) would not bar the Commission from enforcing our proposed Market Behavior Rules. We found that any remedies stemming from a violation of our proposed tariff provisions would be based on the tariff conditions themselves, as approved herein, and that we were fully authorized to take actions and impose remedies when tariffs are violated.

2. Comments

155. A number of commenters continue to challenge the Commission's authority to promulgate and/or enforce its proposed Market Behavior Rules, given the asserted limitations of Section 206 of the FPA.⁹⁰

here that this requirement, as it relates to actions, need only refer to specific actions.

⁸⁹ See June 26 Order, 103 FERC ¶ 61,349 at P46. Our discussion of this issue, we noted, was prompted by the comments we received in response to the more broadly-stated tariff condition proposed in our Initial Order issued in this proceeding. See Initial Order, 97 FERC at 61,976 and note 4, *supra*.

⁹⁰ See e.g., Comments of EEI at 27; Comments of ANP, Inc., *et al.* at 6–10; Comments of Central Vermont, *et al.* at 3; Comments of Cinergy at 21; Comments of Duke Energy at 14; Comments of FPL

156. In addition, commenters also challenge one or more of the Commission's proposed Market Behavior Rules on due process grounds.⁹¹ Southern, for example, argues that fundamental concepts of due process require that standards of conduct be sufficiently clear and unambiguous so as to provide a reasonable guide by which to identify prohibited conduct.⁹² Southern further asserts that basic principles of administrative law require agencies to provide regulated entities with adequate notice of the conduct expected of them.⁹³ Southern adds that an agency fails to provide fair notice if the regulations and other policy statements issued by the agency are so unclear that regulated entities are unable to identify with ascertainable certainty the standards with which the agency expects parties to conform.⁹⁴

157. AE Supply points to two Commission cases in which the Commission required the proposed tariff provisions at issue to impose a more clear and specific obligation and suggests that applying this same degree of specificity here, the Commission's proposed rules do not pass muster. AE Supply states that in *California Power Exchange*,⁹⁵ the Commission held that a tariff provision addressing the improper use of market power could only prohibit specific actions or specific outcomes and required the utility to provide actual examples of the specific actions that would be prohibited. AE Supply further notes that in *New York Independent System Operator, Inc.*,⁹⁶ the Commission rejected a proposed market power mitigation remedy, in part, because the New York ISO had not described with enough specificity the types of conduct that would trigger the imposition of the proposed measures and because the New York ISO had not established specific thresholds or bright line tests that would trigger the

Energy, LLC at 9; Comments of Mirant and TransAlta at 6; Comments of TransCanada at 6.

⁹¹ See Comments of EEI at 23; Comments of Southern at 13; Comments of ANP Inc., *et al.* at 1012; Comments of BPA at 5; Comments of BP Energy Company at 4–5; Comments of Cinergy at 23; Comments of Duke Energy at 8; Comments of InterGen at 9; Comments of Mirant and TransAlta at 18; Comments of TransCanada at 5.

⁹² See Comments of Southern at 13, citing *Gates & Fox, Co. v. OSHRC*, 790 F.2d 154, 155 (DC Cir. 1986).

⁹³ *Id.*, citing *Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1, 3 (DC Cir. 1987); *McElroy Electronics Corporation v. FCC*, 990 F.2d 1351, 1358 (DC Cir. 1993).

⁹⁴ *Id.*, citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (DC Cir. 2000).

⁹⁵ 88 FERC ¶61,112 at 61,265 (1999).

⁹⁶ 89 FERC ¶61,196 at 61,605 (1999).