

conclusion that market power had been exercised.

3. Commission Ruling

158. For the reasons discussed below, we find that: (i) the Commission is not barred by section 206 of the FPA from approving Market Behavior Rules applicable to market-based rate sellers, or allowing as a remedy the disgorgement of unjust profits and other remedies, as discussed herein; and (ii) these Market Behavior Rules are not unduly vague or overbroad.

159. First, we reject the suggestion that the potential financial consequences for sellers found to be in violation of the Commission's Market Behavior Rules would violate the refund limitations set forth in section 206(b) of the FPA.⁹⁷ As we noted in the June 26 Order, we 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 Market Behavior Rules, we would require that these tariffs be revised, but only on a prospective basis, as section 206 requires.

160. Our Market Behavior Rules will operate as conditions to the grant of market-based rate authority and the Commission, in such a case, has broad authority to impose conditions that will help ensure that rates are within a zone of reasonableness. We held in the June 26 Order and reiterate here that the approval of Market Behavior Rules, under these circumstances, and any future remedies imposed for their violation, would neither violate the filed rate doctrine nor the refund limitations of section 206(b).⁹⁸

161. Further, the Commission has the authority to impose the appropriate remedy where it finds that violations of its Market Behavior Rules have

occurred.⁹⁹ In particular, we reject the argument that a violation of an existing condition of service may not be remedied by the Commission from the time the violation occurred. In fact, the courts have held that the Commission has this authority in the fully analogous context presented by the Natural Gas Act (NGA).¹⁰⁰ The courts have also held that the Commission has a great deal of discretion when imposing remedies devised to arrive at maximum reinforcement of Congressional objectives.¹⁰¹ In devising its remedy, the Commission is required to exercise its discretion to arrive at an appropriate remedy,¹⁰² and to explore all equitable considerations and practical consequences of its action pursuant to its statutory delegation.¹⁰³

162. In addition, this order is based upon the Commission's finding after hearing that existing tariffs are unjust and unreasonable under section 206 of the FPA. In a proceeding brought pursuant to these rules, the issue would be whether the entity has violated its tariff. Therefore, in a remedial proceeding brought pursuant to these rules, unlike an FPA section 206 investigation initiated by the Commission, the regulated entity has notice of the conditions required for service at the time of the implementation of the service conditions and the Commission may, at its discretion, fashion an appropriate remedy.

163. In addition, we find that our Market Behavior Rules, including specifically the prohibitions set forth in Market Behavior Rule 2 (relating to market manipulation), are not unduly vague on their face.¹⁰⁴ While constitutional due process requirements

mandate that the Commission's rules and regulations be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit,¹⁰⁵ this standard is satisfied "[i]f, by reviewing [our rules] and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform."¹⁰⁶ Our Market Behavior Rules will satisfy this due process requirement "so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require."¹⁰⁷

164. As applied by the courts, this due process standard has been held to allow for flexibility in the wording of an agency's rules and for a reasonable breadth in their construction.¹⁰⁸ The courts have recognized, in this regard, that specific regulations cannot begin to cover all of the infinite variety of cases to which they may apply and that "[b]y requiring regulations to be too specific, [courts] would be opening up large loopholes allowing conduct which should be regulated to escape regulation."¹⁰⁹

165. The Supreme Court has further noted that the degree of vagueness tolerated by the Constitution, as well as the relative importance of fair notice and fair enforcement, depend in part on the nature of the rules at issue.¹¹⁰ In *Hoffman*, for example, the Court held that in the case of economic regulation (as opposed to criminal sanctions), the vagueness test must be applied in a less

⁹⁷ See e.g., *Coastal Oil Corp. v. FERC*, 782 F.2d 1249 (DC Cir. 1986).

¹⁰⁰ See Consolidated Gas Transmission Corp., et al., 771 F.2d 1536 (DC Cir. 1985) (holding that the Commission has the authority under section 16 of the NGA to order retroactive refunds to enforce conditions in certificates).

¹⁰¹ The courts have held that "the breadth of agency discretion is, if anything, at its zenith when the action assailed relates * * * to the fashioning of policies, remedies and sanctions." *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (DC Cir. 1984), quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (DC Cir. 1967).

¹⁰² *Gulf Oil Corp. v. FPC*, 536 F.2d 588 (3rd Cir. 1977), cert denied, 434 U.S. 1062 (1978), reh'g denied, 435 U.S. 981 (1978).

¹⁰³ *Continental Oil Co. v. FPC*, 378 F.2d 510 (5th Cir. 1967) and *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962).

¹⁰⁴ We note that due process challenges regarding the application of our rules to a particular case are not presented in this proceeding. Thus, commenters' arguments are limited to a facial challenge to our rules, i.e., an assertion that one or more of our rules is vague in all its possible applications.

¹⁰⁵ See *Freeman United Coal Mining Company v. Federal Mine Safety and Health Review Commission*, 108 F.3d 358, 362 (DC Cir. 1997) (*Freeman*).

¹⁰⁶ See *General Electric Co. v. EPA*, 53 F.3d 1324, 1329-30 (DC Cir. 1995) (holding that the agency's interpretation of its rules was "so far from a reasonable person's understanding of the regulations that [the regulations] could not have fairly informed GE of the agency's perspective.").

¹⁰⁷ See *Freeman*, 108 F.3d at 362. See also *Faultless Division, Bliss & Laughlin Industries, Inc. v. Secretary of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982) ("[T]he regulations will pass constitutional muster even though they are not drafted with the utmost precision; all that due process requires is a fair and reasonable warning.").

¹⁰⁸ See *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1971) (holding that an anti-noise ordinance was not vague where the words of the ordinance "are marked by flexibility and reasonable breadth, rather than meticulous specificity.").

¹⁰⁹ See *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 730 (6th Cir. 1980).

¹¹⁰ See *Village of Hoffman Estates, et al. v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1981) (*Hoffman*).

⁹⁷ Section 206(b) requires that any refunds made in a section 206 proceeding initiated by the Commission on its own motion be based on a refund effective date no earlier than 60 days after the publication by the Commission of notice of its intent to initiate such a proceeding, or, in the case of a complaint, no earlier than 60 days after the complaint was filed. Section 206(b) also limits the refund effective period to five months after the expiration of such 60-day period.

⁹⁸ See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, et al.*, 97 FERC ¶ 61,121, 61,370 (2000), order on reh'g, *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, et al.*, 97 FERC ¶ 61,275 (2001), appeal pending, *Public Utilities Commission of the State of California, et al. v. FERC*, Nos. 01-71051, et al. (9th Cir., June 29, 2001).