

strict manner because, among other things, “the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.”¹¹¹

166. Applying these standards here, we find that our Market Behavior Rules satisfy the requirement of due process. Market Behavior Rule 1, for example, gives sellers “ascertainable certainty” that in operating and scheduling their generation facilities, undertaking maintenance, declaring outages, and committing or otherwise bidding supply, they must do so in a manner that “complies with the Commission-approved rules and regulations of the applicable power market.” There can be no reasonable uncertainty, in this regard, as to what these broadly-practiced, generally-understood activities encompass in the wholesale electric utility industry (*i.e.*, operating facilities, scheduling, undertaking maintenance, declaring outages, and bidding supplies). Nor can there be any reasonable doubt as to the “rules and regulations” to which the rule applies.¹¹²

167. Similarly, we cannot agree that the prohibitions against market manipulation, as set forth in Market Behavior Rule 2, are unclear in their requirement. It should be noted, in this regard, that our requirement that seller’s actions or transactions have a “legitimate business purpose” is intended to give sellers an opportunity to explain their actions, while still safeguarding market participants against market manipulation for which there can be no legitimate business purpose attached. Sellers will not be required to guess at the meaning of this term, as applied, then, because the term can only have meaning with specific reference to a seller’s own business practices and motives, *i.e.*, if the seller has a legitimate business purpose for its actions or transactions, it cannot be sanctioned under this rule.

168. Moreover, as fully discussed in the June 26 Order and reiterated above, there is an important justification underlying our prohibition against market manipulation. We must be able

to protect market participants against abuses whose precise form and nature cannot be envisioned today. As we have previously stated, in establishing these rules, we have worked to strike a necessary balance. We have attempted to set forth with sufficient specificity the class of behaviors we intend to prohibit and to do so in a manner that will inform market-based rate sellers of the type of activities that are consistent with just and reasonable rates. At the same time, we have also attempted to maintain our ability to address particular activities and situations that cannot be envisioned today. Our Market Behavior Rules, we have said, are designed to codify our requirements and provide a regulatory vehicle for their enforcement going forward.

169. The Commission would not be able to fulfill its statutory responsibilities, however, if it established rules addressing future activities based only on the specificity of the past. While we have provided clarity and specificity, where possible, with respect to our experience with past market conduct, we must also establish general rules to prohibit a class of behavior going forward if we are to adequately protect customers to ensure that rates are the product of competitive forces (and thus are just and reasonable). Thus, our Market Behavior Rules have been designed to meet these twin objectives—to be specific in order to inform sellers as to the type of behavior that is prohibited today, while containing enough breadth and flexibility to address new and unanticipated activities, as they may arise in the future.

170. In sum, we believe our Market Behavior Rules, as modified, explained and approved herein, put sellers and all market participants on fair notice regarding the conduct we seek to encourage and the conduct we seek to prohibit. Stripped to their essentials, these guidelines amount to the following: (i) Act consistently within the Commission’s established rules; (ii) do not manipulate or attempt to manipulate power markets; (iii) be honest and forthright with the Commission and the institutions it has established to implement open-access transmission and entities publishing indices for the purpose of price transparency; and (iv) retain associated records. Viewed in this context, there can be no reasonable uncertainty over the underlying objectives embodied in our rules or their requirements going forward.

171. Nonetheless, we are committed to making our Market Behavior Rules as specific as they possibly can be and

thus, as discussed above, we are adopting a number of the revisions proposed by commenters in order to better focus and fine-tune the scope and application of our rules.

172. With respect to Market Behavior Rule 2, we have clarified that the rule applies to actions without a legitimate business purpose which are undertaken for the purpose of manipulation of wholesale power markets or prices and that actions which are explicitly contemplated in Commission approved processes such as virtual load or supply bidding are not considered manipulation.¹¹³ We have further explained that implementing Market Behavior Rule 2, we will consider all of the relevant facts and circumstances surrounding the particular transaction in question to determine whether the market-based rates sellers actions were without a legitimate business purpose but rather taken to impact the competitive market in a manner inconsistent with just and reasonable rates. We recognize that our standard is necessarily non-specific with respect to the particular activities it prohibits but believe that our explanation of its meaning and associated enforcement philosophy accompanying the rule make clear that we are acting to prohibit actions which create or are designed to create artificial prices which would not have existed in a competitive market but for the manipulative acts. We have provided specific examples of such acts in Market Behavior Rule 2(a) through 2(d).¹¹⁴ As explained above, we expect our administration of this rule will provide a vehicle to highlight specific prohibited activities on a case-by-case basis.

173. We have also revised the language of Market Behavior Rules 3 and 4 to assure that inadvertent factual errors in communications will not be sanctionable under our rules and, with respect to Market Behavior Rule 3, that only the Commission and entities relied upon by the Commission to implement open access transmission are the entities triggering seller’s factual reporting obligations. We have also revised Market Behavior Rule 5 to make clear that we are not requiring “cost-based” or other data but rather the data upon which the seller based its market-based

¹¹¹ *Id.* See also *Texas Eastern Products Pipeline Co. v. OSHRC*, 827 F.2d 46, 50 (7th Cir. 1987) (“Texas Eastern, as a major pipeline company, in which trenching and excavation are a part of its routine, had ample opportunity to know of the earlier interpretation, should have been able to see the sense of the regulations on their face, and if still in doubt Texas Eastern should have taken the safer position both for its employees and for itself.”).

¹¹² In fact, as discussed above, we are adopting the clarification that the rules and regulations to which this rule refers are limited to “Commission-approved” rules and regulations.

¹¹³ Statutes such as section 10(b) of the Securities and Exchange Act of 1937, 15 U.S.C. 78j (2000), prohibit the usage of any “manipulative or deceptive device or contrivance” in connection with the sale of securities. Courts have recognized that specific examples of such prohibited activities would emerge over time while market participants understood that “market manipulation” related to certain types of practices.

¹¹⁴ As noted above, we have also deleted proposed Market Behavior Rule 2(e).