

charges to its buyer and upon which it reported its transactions to index publishers.

174. In sum, we have carefully considered our proposal and the comments we have received in light of our obligation to assure that wholesale power rates are just and reasonable and that sellers subject to our regulation are fairly apprised of their obligations as participants in a competitive power market subject to Commission oversight. We believe the rules we are establishing herein will allow us to assure just and reasonable rates and provide an adequate basis for sellers to understand our expectations of them.

#### O. RTO/ISO Coordination Issues

##### 1. Commission Proposal

175. In the June 26 Order, we noted that the Market Behavior Rules we were proposing would apply to any market-based rate sale, whether in the bilateral market or in an organized market, *i.e.*, in the bid-based markets administered by RTOs or by an ISO. We stated that these Market Behavior Rules were intended to complement any RTO or ISO tariff conditions and market rules that may apply to sellers in these markets.<sup>115</sup>

##### 2. Comments

176. Commenters disagree over whether and to what extent the Commission's Market Behavior Rules should be applied in organized markets. Some argue that in these markets, the Market Behavior Rules should not apply.<sup>116</sup> The New York ISO, the New York Commission, and ELCON seek clarification, in this regard, that when a generator unit operates and bids within the automated mitigation procedure (AMP) thresholds established by the New York ISO, such behavior will not be treated as a violation of any Market Behavior Rule.

177. Others assert that the Commission's Market Behavior Rules should play a vital role in the organized markets. Central Maine, *et al.*, for example, point out that market power problems have continued to plague the LMP markets, notwithstanding the oversight and intervention of market monitors.

178. EEI asserts that market participants should not be left with conflicting sets of rules and no guidance as to which applies or which takes precedence over the other. EEI recommends that where there is an inconsistency between the Market

Behavior Rules and an RTO or ISO tariff provision approved by the Commission, the Market Behavior Rule should be treated as subordinate. This is appropriate, EEI argues, because the RTO or ISO tariff provision, in this instance, will be the product of a regional stakeholder process specifically suited to meeting regional energy market needs.

179. EPSA, *et al.*, on the other hand, argue that while regional differences may be appropriate on various discrete matters, many of the Market Behavior Rules address generic issues and should be applied uniformly across all markets.

##### 3. Commission Finding

180. In our discussion of Market Behavior Rule 1, above, we clarified that absent inclusion in a broader manipulative scheme addressed in Market Behavior Rule 2, compliance with the Commission-approved rules and regulations of an applicable power market, such as an ISO/RTO market, will serve as compliance with our behavioral rules.<sup>117</sup> However, in order to provide as much clarity as possible to market participants and market monitoring units (MMUs), we will also provide guidance concerning how we expect both these Market Behavior Rules and ISO/RTO rules to be applied and enforced by the Commission and MMUs.

181. As stated in our order issued in Docket No. RT03-1-000 (Communications with Commission-Approved Market Monitors), MMUs may be viewed as the "functional equivalent" of the Commission's staff and, for example, are not typically subject to our *ex parte* rules in communicating with the Commission or Commission Staff.<sup>118</sup> In this regard, in ISO/RTO tariffs, we have approved certain limited authority to MMUs to enforce tariffs and implement sanctions for a market participant's failure to comply with tariff requirements.<sup>119</sup> In each case, the determination of a tariff violation and the sanctions imposed may be appealed to the Commission.

182. We believe it is appropriate to authorize MMUs to enforce certain ISO/RTO tariff matters if those matters are: (i) Expressly set forth in the tariff; (ii) involve objectively-identifiable behavior; and (iii) do not subject the seller to sanctions or other consequences other than those expressly

approved by the Commission and set forth in the tariff.<sup>120</sup> Beyond this defined MMU authority, sellers' behavior will be subject to direct Commission enforcement in the first instance, regardless of whether the behavior occurs in ISO/RTO administered markets or bilateral markets. Market-based rate authority has been granted to sellers not only based on a finding of lack, or mitigation, of market power, but also with the expectation that such seller will not act in an anti-competitive manner. Through our administration of these rules, the Commission can assure that anti-competitive behavior is not countenanced and that rates remain just and reasonable.

183. While MMUs may take actions as authorized by the ISO/RTO tariff, the Commission retains its responsibility to oversee tariff compliance on the part of any market-based rate seller. For example, a repeated pattern of tariff violations across several markets could lead the Commission to consider revoking a seller's market-based rate authorization. Further, except to the extent that enforcement authority has explicitly been authorized for an MMU in an ISO/RTO tariff, these behavioral rules will apply and be administered by the Commission.

184. The roles of the MMUs and the Commission will require the Commission staff and the MMUs to continue to forge a close working relationship. This process has been underway for some time. Commission Staff is coordinating data collection and reporting functions with MMUs, including developing appropriate triggers for referring compliance issues to the Commission. We expect an MMU to maintain an on-going dialogue with our staff so that we are apprised at all times of the status of the markets and activities of market participants. If an MMU becomes aware of activities of a market participant that appear to violate that market participant's market-based rate tariff condition or other requirement that has not been assigned to the MMU for enforcement in the first instance, the MMU is expected to bring the matter to the attention of the Commission staff.<sup>121</sup>

<sup>120</sup> With respect to such matters, we will rely on the MMUs to identify and take action with respect to a specific behavior covered in the tariff, subject to later appeal to the Commission. If the MMU does not take action in such a case, the seller, absent an appeal to the Commission, will not be exposed to subsequent Commission enforcement actions regarding behavior found acceptable by the MMU.

<sup>121</sup> We have stated that the MMUs "serve an important practical and unique function as the Commission's 'eyes and ears' in the marketplace,"

Continued

<sup>115</sup> See June 26 Order, 103 FERC ¶ 61,349 at P8.

<sup>116</sup> See Comments of AES at 5; Comments of Exelon at 5.

<sup>117</sup> See *supra*, Section A.

<sup>118</sup> See, Communications with Commission-Approved Market Monitors, 102 FERC ¶ 61,041 (MMU Communications Order), *order denying reh'g*, 103 FERC ¶ 61,151 (2003).

<sup>119</sup> See *e.g.*, New York Independent System Operator, Inc., 96 FERC ¶ 61,249 (2001).