

is unnecessary and has not been prepared in connection with this order.

3. Regulatory Flexibility Act Certification

194. The Regulatory Flexibility Act of 1980 (RFA)¹²⁹ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such analyses if a rule would not have such an effect.¹³⁰

195. The Commission does not believe that the Market Behavior Rules approved herein would have such an impact on small entities. Most of the sellers required to comply with the proposed regulations would be entities who do not meet the RFA's definition of a small entity whether or not they are under the Commission's jurisdiction. Therefore, the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

4. Document Availability

196. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington DC 20426.

197. From FERC's Home page on the Internet, this information is available in the eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

198. User assistance is available for eLibrary and the FERC's Web site during normal business hours by contacting FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at (866)292-3676 or for TTY, contact (202)502-8659.

5. Effective Date and Congressional Notification

199. The Commission has determined that the Market Behavior Rules approved in this order do not constitute a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996. The

provisions of 5 U.S.C. 801 regarding Congressional review of Final Rules, therefore, do not apply to this order.

Q. *Mirant Corp. v. FERC*

200. On September 12, 2003, the Bankruptcy Court for the Northern District of Texas issued a "Temporary Restraining Order Against the Federal Energy Regulatory Commission" (TRO) in *In re Mirant Corp. (Mirant v. FERC)*, Adversary Proceeding No. 03-4355, which enjoins the Commission "from taking any action, directly or indirectly, to require or coerce the [Mirant] Debtors to abide by the terms of any Wholesale Contract [to which a Mirant Debtor is a party] which Debtors are substantially performing or which Debtors are not performing pursuant to an order of the Court unless FERC shall have provided the Debtors with ten (10) days' written notice setting forth in detail the action which FERC seeks to take with respect to any Wholesale Contract which is the subject of this paragraph."

201. Should the TRO be converted into a preliminary injunction, an action that the Commission opposes, the Commission will appeal that order. Despite the Commission's disagreement with the validity of the TRO and its expectation that the TRO (or a preliminary injunction) will be vacated on appeal, the Commission must comply with it until vacated. The TRO requires ten days' written notice before the Commission takes a proscribed action with respect to a covered Mirant Wholesale Contract. Accordingly, to the extent that this order requires Mirant to act in a manner proscribed by the TRO, the order will provide written notice to Mirant of the action that the Commission will take with respect to a covered Mirant Wholesale Contract.

The Commission Orders

(A) The Market Behavior Rules set forth in Appendix A to this order are hereby adopted, as discussed in the body of this order, to become effective 30 days from the date of issuance of this order.

(B) In compliance with this order, market-based rate sellers are hereby directed to include the Market Behavior Rules, as approved herein, at such time as they file any amendment to their market-based rates tariff or (if earlier) at such time as they seek continued authorization to sell at market-based rates (e.g., in their three-year update filings). Notwithstanding this time allowance, as applicable to sellers' compliance filings, the effective date for the tariff revisions approved herein shall be the effective date, as specified in ordering paragraph A, above.

(C) The Secretary shall promptly publish this order in the **Federal Register**.

(D) Southern's request for rehearing of the June 26 Order is hereby dismissed, as discussed in the body of this order.

(E) The entities listed in Appendix C to this order shall be treated as parties to this proceeding.

By the Commission. Commissioners Massey and Brownell concurring with separate statements attached.

Linda Mitry,
Acting Secretary.

Appendix A—Market Behavior Rules

As a condition of market-based rate authority, [Company Name] (hereafter, Seller) will comply with the following Market Behavior Rules:

1. *Unit Operation:* Seller will operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable power market. Compliance with this Market Behavior Rule 1 does not require Seller to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or requirement applicable to Seller.

2. *Market Manipulation:* Actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products are prohibited. Actions or transactions undertaken by Seller that are explicitly contemplated in Commission-approved rules and regulations of an applicable power market (such as virtual supply or load bidding) or taken at the direction of an ISO or RTO are not in violation of this Market Behavior Rule. Prohibited actions and transactions include, but are not limited to:

a. Pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk and no net change in beneficial ownership (sometimes called "wash trades");

b. Transactions predicated on submitting false information to transmission providers or other entities responsible for operation of the transmission grid (such as inaccurate load or generation data; or scheduling non-firm service or products sold as firm), unless Seller exercised due diligence to prevent such occurrences;

c. Transactions in which an entity first creates artificial congestion and then purports to relieve such artificial congestion (unless Seller exercised due diligence to prevent such an occurrence; and

d. Collusion with another party for the purpose of manipulating market prices, market conditions, or market rules for electric energy or electricity products.

3. *Communications:* Seller will provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission,

¹²⁹ 5 U.S.C. 601–612 (2000).

¹³⁰ *Id.* at section 605(b).