

market conditions, or market rules for natural gas.¹³

28. As discussed above, several commenters raise concerns regarding the general language prohibiting manipulation.¹⁴ Commenters contend that the regulation contains too many ambiguous terms such as "legitimate business purpose," "manipulation," and "legitimate forces of supply and demand." NJR Companies assert that the proposal violates due process requirements, and that parties must receive fair notice before being deprived of their property. NJR Companies suggest that the Commission replace vague language with straightforward requirements.

29. Sempra recommends that the Commission take a cue from the jurisprudence of the CFTC and SEC by adopting a standard for manipulation that includes ability, intent, and effect as required elements of an offence. Reliant, Select, Merrill Lynch and Morgan Stanley assert that the Commission should establish four essential elements to prove manipulation: (1) The ability to move market prices, (2) the specific intent to create an artificial price, (3) the existence of an artificial price, and (4) causation of the artificial price by the accused.

30. Coral contends that adoption of the proposed regulation could have the effect of deterring blanket certificate holders from aggressively or creatively marketing their gas or developing new products that may benefit competitive gas markets. NASUCA argues that the Commission should clarify what types of manipulative behavior is prohibited. It adds that manipulation that results from inadequate planning, inept design, incompetent personnel, or poor supervision should not be exempted from enforceable action.

31. Hess believes that the Commission should not adopt this measure, asserting that, among other things, it has not sufficiently explained how it intends to enforce the standard. EnCana and Mirant question the necessity of the rule since the Commission and other agencies have already shown an ability

to police allegedly manipulative behavior.

32. We find that our rules, including specifically the prohibitions set forth relating to market manipulation, are not unduly vague as asserted by some commenters. 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,¹⁵ 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."¹⁶ The Commission's rules will be found to 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."¹⁷

33. 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.¹⁸ 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."¹⁹

34. 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.²⁰ 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 less 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."²¹

35. Applying these standards here, we find that our rules satisfy the requirement of due process. It cannot be said that the prohibitions against market manipulation, as set forth in the rules, are unclear in their intent. For example, our requirement that a seller's actions must have a "legitimate business purpose" is clearly intended to give sellers some latitude in determining their business actions, while safeguarding market participants against market manipulation for which there can be no legitimate business purpose. Sellers will not be required to guess at the meaning of the above-referenced term because it can only have meaning with specific reference to seller's own business practices and motives. In other words, if the seller has a legitimate business purpose for its actions, it cannot be sanctioned under this rule.

36. In establishing these rules, we have worked to strike a necessary balance. On the one hand, this prohibition allows the Commission to protect market participants from market abuses that cannot be precisely envisioned at the present time. At the same time, we have attempted to set forth with sufficient specificity the class of behaviors prohibited in a manner that will inform market-based rate sellers of the type of activities that are consistent with just and reasonable rates. This provides the Commission the ability to codify these requirements and provide a regulatory vehicle for their prospective enforcement. Thus, our 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 down the road.

¹³ Section 284.403(a) of the Commission's regulation provides that:

Any person making natural gas sales for resale in interstate commerce pursuant to § 284.402 is prohibited from engaging in actions or transactions that are without a legitimate business purpose and are intended to or foreseeably could manipulate market prices, market conditions, or market rules for natural gas.

¹⁴ See e.g., TXU, NGSA, Shell, NJR Companies, NEMA, EMIT, Cinergy, Sempra, Reliant, Select, Merrill Lynch and Morgan Stanley, Coral, Hess, Peoples, EnCana, Mirant, NASUCA.

¹⁵ See *Freeman United Coal Mining Company v. Federal Mine Safety and Health Review Commission*, 108 F.3d 358, 362 (DC Cir. 1997) (*Freeman*).

¹⁶ 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.").

¹⁷ 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.").

¹⁸ 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.").

¹⁹ See *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 730 (6th Cir. 1980).

²⁰ See *Village of Hoffman Estates, et al. v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1981) (*Hoffman*).

²¹ *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.").