

definition of wash trades states the two key elements that the Commission sees as the fundamentally manipulative aspects of wash trading: (1) that the transaction or transactions are prearranged to cancel each other out; and (2) that they involve no economic risk. As such, the prohibition against wash trades is illustrative of the Commission's prohibition against the manipulation of market conditions.

55. Transactions such as "sleeving" or "bookouts" as described by the commenters do not fall with the key elements of the Commission's definition and therefore would not be prohibited by the regulation. Further, trades made to correct scheduling or nomination errors, or trades that do not result from an attempt to manipulate the market would not be prohibited by the Commission's regulation. Moreover, displacement or backhauls are not wash trades as they are transportation services obtained from a pipeline if operationally feasible and simply do not meet the definition of wash trades as set forth herein. A sleeve is not an off-setting trade but rather a mechanism to accomplish a gas sale among parties that have not established a credit relationship by including a third party seller that has acceptable credit in the transaction chain. The two resulting sales (which are only offsetting to the "sleeving" seller) are each with economic risk with a change in beneficial ownership and, usually at slightly different prices to reflect the use of the "sleeving" seller's credit. A "bookout" is not a pre-arranged trade but rather a subsequent arrangement to financially close out trades that were not prearranged and executed (and, in fact, closed out) with economic risk.

56. Commenters argue that the Commission should impose an "intent" standard relating to wash trading. The language, as proposed and finalized in this order, does include the element of intent. We recognize that buyers and sellers trade the same products with the same counterparties over the course of a trading day. Entering into a set of trades that happen to offset each other is not market manipulation. Wash trades are by their nature manipulative. By definition, parties must purposefully create prearranged off-setting trades with no economic risk to engage in a wash trade. We know of no legitimate business purpose to such behavior and no commenter has suggested one.

Accordingly, as opposed to many other behaviors which would not, standing alone, violate Sections 284.288(a) or 284.403(a), wash trades will constitute a *per se* violation.

57. The Commission finds that its definition of wash trading, as explained here, satisfies the requirements that parties will generally know what is expected of them and what actions are prohibited. Therefore, the Commission will not further define its regulations at this point.

### 3. Collusion

58. As revised Section 284.288(a)(2) of the Commission's regulations provides that prohibited actions and transactions include but are not limited to:

collusion with another party for the purpose of manipulating market prices, market conditions, or market rules for natural gas.<sup>28</sup>

59. Several commenters argue that the Commission should better define the term collusion.<sup>29</sup> For instance, TXU recommends that the Commission and market participants rely on federal and state antitrust laws specifically defining collusion in order to ensure certainty concerning the conduct that is prescribed. Sempra argues that the Commission's prohibition of collusion is unconstitutionally vague, as well as unnecessary since such conduct is already proscribed under other statutory and regulatory schemes administered by other federal agencies with specialized expertise in those areas of law.

60. NEMA argues that for conduct to constitute collusion, there must be an element of intent to manipulate prices in the marketplace as well as an actual impact on commodity prices. Shell asks what standard the Commission would rely upon to determine whether or not there was collusion to "create" prices at levels that differ from those set by market forces.

61. While commenters such as Sempra are correct in their observation that the prohibition set forth in Sections 284.288(a)(1) and 284.403(a)(1) may be similar, in certain respects, to the prohibitions set forth in federal antitrust laws, our authority, as it relates to Sections 284.288(a)(1) and 284.403(a)(1), is not derived from federal antitrust law. Rather, our authority comes from the NGA itself and its requirement that all rates and charges made, demanded, or received by any natural gas company selling natural gas subject to the jurisdiction of the Commission and all rules and regulations affecting or pertaining to such rates and charges be just and reasonable.<sup>30</sup> Although our regulatory

approach includes elements of anti-trust law, it is not limited to the structure of those laws. For example, our regulatory approach encompasses "partnerships" whose existence does not implicate anti-trust concerns that may, nonetheless, undertake manipulative behavior. Therefore, these regulations will be interpreted and enforced by the Commission consistent with our own policies and precedents. As such, we need not be concerned here whether, or to what extent, federal antitrust law may be broader in scope or more narrow in scope.<sup>31</sup> These regulations are expressly tailored to our statutory duties and our competitive goals with respect to the natural gas market.<sup>32</sup>

62. To avoid possible confusion regarding the interpretation and scope from our originally proposed language which prohibited collusion for the purpose of creating market prices differing from those set by market forces, we have replaced this term with language consistent with our prohibition against manipulation set forth above. Therefore, the instant regulation prohibits collusion with another party for the purpose of manipulating market prices, market conditions or market rules for natural gas. We find such collusive acts to be illustrative of our prohibition against the manipulation of market prices and clarify that Sections 284.288(a)(2) and 284.403(a)(2) merely expand our general manipulation standard set forth in subparagraphs (a) of these rules to include acts taken in concert with another party. In other words, these regulations prohibit market manipulation undertaken by one market participant acting alone and market manipulation undertaken collectively by more than one market participant.

### 4. Reporting to Gas Index Publishers

63. Proposed Regulation Section 284.288(b) states that:

To the extent a pipeline that provides unbundled natural gas sales service under § 284.284 engages in reporting of transactions to publishers of gas price indices, the pipeline shall provide complete, accurate and factual information to such publisher. The pipeline shall notify the Commission of whether it engages in such reporting for all sales. In addition, the pipeline shall adhere

<sup>31</sup> Similarly, we need not revise our rule so that violations of the antitrust laws are also prohibited by our rule. Federal antitrust law will continue to apply where it is found to apply, with or without our rule.

<sup>32</sup> See *Pennsylvania Water & Power Co. v. FPC*, 193 F.2d 230, 236 (D.C. Cir. 1951) ("A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the regulatory statute." [cit. omit.]).

<sup>28</sup> Section 284.403(a)(2) of the Commission's regulations contains an identical prohibition.

<sup>29</sup> See e.g., *Merrill Lynch and Morgan Stanley, Duke, TXU, Sempra, NGA, NEMA, Shell, EnCana, Hess, Mirant*.

<sup>30</sup> Section 4(a) of the NGA, 15 U.S.C. 717c.