

data associated with affiliate transactions.

83. Although the separate reporting of other non-price data associated with affiliate transactions may provide additional information regarding liquidity at certain points, the Commission finds that this information is not necessary for the purposes of these rules.

84. Although commenters generally agree with reporting restrictions on transactions between affiliates in the June 26 NOPR, new Sections 284.288(b) and 284.403(b) of the Final Rule provide that to the extent a Seller engages in the reporting of transactions to publishers of price indices, the Seller shall do so in a manner consistent with the procedures set forth in the *Policy Statement*. The *Policy Statement* states that "a data provider should report each bilateral, arm's length transaction between non-affiliated companies in the physical (cash) markets at all trading locations."⁵⁵ Therefore, an entity filing consistent with the *Policy Statement* will not include sales to affiliates in its report. Accordingly, the Commission believes the addition of these two regulations (Sections 284.288(d) and 284.403(d) of the June 26 NOPR) is redundant, and shall be deleted.

D. Remedies

1. General Issues

85. Several commenters responded to the Commission's proposal that the violations of its code of conduct may result in various remedial actions by the Commission including the disgorgement of unjust profits, suspension or revocation of the blanket sales certificates or other appropriate remedies.

86. In regard to the Commission's inclusion of disgorgement as a potential remedy various commenters argue that the Commission does not have authority to condition NGA Section 7 certificates with such a retroactive refund obligation.⁵⁶ Commenters argue that the courts have held that the Commission's power to condition certificates cannot be permitted to diminish an entity's rights under NGA Sections 4 and 5.⁵⁷ These commenters argue the proposed disgorgement remedy is a refund condition that is not permitted under Section 5 of the NGA and that such disgorgement of unjust profits from a

just and reasonable rate is tantamount to retroactive ratemaking because NGA Section 5 provides only for prospective relief.⁵⁸ The commentors argue the Commission is attempting to expand its authority to order retroactive refunds, or, change retroactively the filed rate. They argue that courts have been clear that the Commission cannot (i) use its conditioning authority to circumvent other provisions of the NGA and (ii) do indirectly what it may not do directly and therefore the Commission cannot condition rates as it proposes to do so here, and subject them to retroactive refunds because Congress did not include such authority in the NGA.

87. Several commenters express concern that the term "unjust profits" is vague and subjective, the calculation of which would necessitate a review of all market conditions.⁵⁹ AGA recommends that the Commission limit the disgorgement of unjust profits to all illegal activity and not impose penalties for violation of those regulatory provisions associated with reporting activities.⁶⁰ NJR Companies object to the disgorgement remedy when the violation is inadvertent.⁶¹

88. Several commenters argue that the Commission should consider additional remedies such as a remedy that would require the offending entity to make the market whole for losses incurred because of its actions.⁶² They argue that if an entity must simply disgorge unjust profits, even if is caught for every infraction of the code, it is no worse off than if it had followed the rules in the first place. Therefore, they argue that disgorgement of unjust profits does not serve as a penalty or deterrent to future, similar actions. In sum, they argue that the failure to comply with the filed rate by engaging in prohibited manipulative behavior should include a potential remedy that is greater than disgorgement, such as a make the market whole remedy.

⁵⁸ Several commenters such as EnCana, Hess and Mirant argue that the term "unjust profits" is vague and subjective and therefore difficult to calculate. Hess requests that the Commission either adopt a more workable formula for calculating monetary remedies or clarify how the unjust profits standard will be applied. Mirant and EnCana suggest that the Commission adopt a presumption that unjust profits will be defined as the difference between a reported transaction's fixed price and a then-existing published index price for the market and time period in question. Mirant asserts that it would oppose any Commission proposal to recreate or somehow adjust previously reported index prices based on an after-the-fact review of reported data.

⁵⁹ See e.g., Mirant, Cinergy, EnCana, Hess.

⁶⁰ See AGA at 10.

⁶¹ NJR Companies at 19.

⁶² See e.g., CPUC, NASUCA, EMIT, PG&E, PSCNY and the Oversight Board.

89. Regarding the issue of appropriate non-monetary penalties, PSCNY states that all violations of the regulations should be publicly disclosed in a public file that may be accessed by buyers and the public. A list of bad actors and dates could be maintained on the Commission's Web site. Such public disclosure, PSCNY argues, would provide an additional deterrent for companies to avoid the stigma associated with engaging in anticompetitive behavior. PSCNY states that in the event of a particularly blatant and serious violation, or multiple violations, the Commission should place parties on notice that appropriate remedies could include revocation of market-based rate authority. NASUCA recommends that the Commission clarify that revocation of market-based rate authority will be for a specified minimum period of time that depends on the severity of the violation.

90. In Order No. 636, the Commission determined that after gas services were unbundled, sellers of gas supplies would not have market power over the sale of natural gas. This determination was based in large part upon Congress' finding that a competitive market exists for gas at the wellhead and in the gas field. The Commission determined that it would institute light-handed regulation and would rely on market forces at the wellhead to constrain sales for resale of natural gas within the just and reasonable standard set forth by the NGA. In implementing its findings in Order No. 636 and Order No. 547, the Commission issued blanket certificates to all persons who are not interstate pipelines which authorized such persons to make jurisdictional gas sales for resale at negotiated rates with pre-granted abandonment.⁶³ In issuing these certificates the Commission determined that the competitive natural gas market would lead all gas suppliers to charge rates that are sensitive to the gas sales market.

91. The Commission has determined that in order to protect and maintain the competitive natural gas market and to continue its light-handed regulation of the gas sales within its jurisdiction, it is necessary to place additional conditions on its grant of market-based sales certificates. In formulating such conditions to the market based rate certificates the Commission is fulfilling its obligation to appropriately monitor markets and to ensure that market-based

⁵⁵ See *Policy Statement*, 104 FERC ¶ 61,121 at P 34 (2003).

⁵⁶ See e.g., Comments of AGA, the FPL Group, NGA, Duke, NGA and Cinergy.

⁵⁷ Citing *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120 (D.C. Cir. 1979); Cf. *Northern Natural Gas Co. v. FERC*, 827 F.2d 779 (D.C. Cir. 1987).

⁶³ See 18 CFR 284.401–402 (2003).