

This one concern with today's order should not be interpreted, however, as diminishing in any way my enthusiastic support for this otherwise excellent order. I commend my colleagues for taking this important and much needed step.

For these reasons, I concur in part with today's order.

William L. Massey,  
*Commissioner.*

Brownell, Commissioner, *concurring:*

1. We are adopting behavioral rules for market participants in the electric and natural gas markets. No one can question the good intention behind these behavioral rules. As I have stated before, if there are violations of our rules, regulations or policies, we must be willing to punish and correct. Concurrently, if there is misconduct by market participants that is intended to be anticompetitive, we must have the ability to remedy those market abuses.

2. Conversely, when we originally proposed behavioral rules, I had a number of concerns. I was concerned that the use of vague terms would create uncertainty and, thereby, undermine the good intentions of the rules. I feared that subsequent applications of the proposed behavior rules to real world actions could result in overly proscriptive "rules of the road" that will dampen business innovation and creative market strategies. The net effect would be less competition and the associated higher costs to consumers. I was concerned that we may be proposing a model that simply does not fit with the larger lessons we have learned in fostering competition over the past two decades, particularly in the gas market.

3. It is difficult to strike the right balance. I have carefully weighed the comments and believe the revisions and clarifications to the proposed behavioral rules achieve the appropriate balance. We clarify that these rules do not impose a "must offer" requirement. We revise the definition of manipulation to relate to actions that are "intended to or foreseeably could" manipulate markets. We add the exclusion that action taken at the direction of an RTO or ISO does not constitute manipulation.

4. Commenters also challenge the sufficiency of the term "legitimate business purpose" in distinguishing between prohibited and non-prohibited behavior. We clarify that transactions with economic substance, in which a seller offers or provides a service to a buyer where value is exchanged for value, are not prohibited behavior. Behavior driven by legitimate profit maximization or that serves important market functions is not manipulation. Moreover, I think it is important to recognize that scarcity pricing is the market response to a supply/demand imbalance that appropriately signals the need for infrastructure. For example, the high prices of 2000–2001 that reflected supply/demand fundamentals resulted in the first new power plants being constructed in California in ten years; price risk being hedged through the use of long-term contracting; and renewed efforts to correct a flawed market design.

5. We have also adopted measures that require accountability. A complaint must be brought to the Commission within 90 days

after the calendar quarter that the manipulative action was alleged to have occurred. The 90-day time limit strikes an appropriate balance between providing sufficient opportunity to detect violations and the market's need for finality. The Order also places a similar time limit on Commission action. As a matter of prosecutorial policy, the Commission will only initiate a proceeding or investigation within 90 days from when we obtained notice of a potential violation through either a hotline call or communications with our enforcement staff.

6. While these rules are designed to provide adequate opportunity to detect, and the Commission to remedy, market abuses and are clearly defined so that they do not create uncertainty, disrupt competitive commodity markets or prove simply ineffective, competitive markets are dynamic. We need to periodically evaluate the impact of these rules on the electric and gas markets. We have directed our Office of Market Oversight and Investigation to evaluate the effectiveness and consequences of these behavioral rules on an annual basis and include their analysis in the State of the Market Report.

Nora Mead Brownell.

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## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Federal Transit Administration

#### 23 CFR Part 476

RIN 2125–AF00

### Interstate Highway System

**AGENCIES:** Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This final rule removes regulations that prescribed policies and procedures for implementation of section 103(e)(4) of title 23, United States Code, which permitted the withdrawal of Interstate System segments and the substitution of public mass transit or highway projects or both. The Congress recognized the expiration of this program by eliminating the underlying statutory authority for this regulation. Therefore, the Federal Highway Administration and the Federal Transit Administration remove the regulations.

**EFFECTIVE DATE:** November 26, 2003.

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#### SUPPLEMENTARY INFORMATION:

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##### Background

In 1973, the Interstate System was about 83 percent complete; however, due to changed social, economic, and environmental conditions, many States realized it would be impracticable or unnecessary to construct some uncompleted segments of the Interstate, particularly in urbanized areas. But these States were reluctant to give up these segments for fear of losing substantial amounts of Federal-aid funds. Therefore, the Federal-Aid Highway Act of 1973 (Pub. L. 93–87, 87 Stat. 250, August 13, 1973), amended title 23, United States Code, by adding section 103(e)(4) to allow uncompleted or planned highways on the Interstate System in urbanized areas to be withdrawn and their funding entitlements be transferred to mass transit projects. This became known as the "Interstate withdrawal and substitution program" (also known as the "Interstate Transfer program") and it provided States with the opportunity to request withdrawal of a non-essential segment of the Interstate System, and the substitution of transit projects to serve the area that would have been served by the withdrawn segment. As a result of this Act, the Federal Highway Administration together with the Federal Transit Administration (known as the Urban Mass Transit Administration at that time) promulgated 23 CFR Part 476, Interstate Highway System.<sup>1</sup> Subpart D of this

<sup>1</sup> See final rule published on June 12, 1974, at 39 FR 20658.