

8. Duke Power Company LLC, Duke Power Company, Duke Energy Trading and Marketing, L.L.C., Duke Energy Marketing America, LLC, Duke Energy Fayette, LLC, Duke Energy Hanging Rock, LLC, Duke Energy Lee, LLC, Duke Energy Vermillion, LLC, Duke Energy Washington, LLC, Cincinnati Gas & Electric Co., PSI Energy, Inc., Union Light Heat & Power Company, Cinergy Marketing & Trading, LP, Brownsville Power I, L.L.C., Caledonia Power I, L.L.C., CinCap IV, LLC, CinCap V, LLC, Cinergy Capital & Trading, Inc., Cinergy Power Investments, Inc., St. Paul Cogeneration, LLC

[Docket Nos. ER06-619-000, ER96-110-019, ER99-2774-011, ER03-956-008, ER03-185-006, ER03-17-006, ER01-545-008, ER00-1783-008, ER02-795-006, ER96-2504-013, ER05-1367-002, ER05-1368-002, ER05-1369-003, ER00-826-005, ER00-828-005, ER98-421-016, ER98-4055-013, ER01-1337-008, ER02-177-009, ER03-1212-007]

Take notice that on February 7, 2006, the above-referenced proceedings, tendered for filing under section 205 of the Federal Power Act: (1) Amended market based rate tariffs for each of the MBR Companies and (ii) a notice of succession for the name change of Duke Power, currently a division of Duke Energy to Duke Power Company LLC.

Comment Date: 5 p.m. Eastern Time on February 28, 2006.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public

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Magalie R. Salas,
Secretary.

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL06-16-000]

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suede G. Kelly; Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations; Order Revising Market-Based Rate Tariffs and Authorizations

Issued February 16, 2006.

1. The Commission has decided to rescind Market Behavior Rules 2 and 6 and to codify the substance of Market Behavior Rules 1, 3, 4, and 5 in the Commission's regulations under the Federal Power Act (FPA).¹ The central purpose of the Market Behavior Rules² was to prohibit market manipulation by public utility sellers acting under market-based rate authority. This prohibition is set out in Market Behavior Rule 2. Subsequent to the issuance of the Market Behavior Rules, Congress provided the Commission with specific anti-manipulation authority in the Energy Policy Act of 2005 (EPAct 2005).³ To implement this new authority, the Commission recently issued Order No. 670, adopting a final rule making it unlawful for any entity,

including public utility market-based rate sellers, to engage in fraudulent or deceptive conduct in connection with the purchase or sale of electric energy, natural gas, or transmission or transportation services subject to the jurisdiction of the Commission.⁴ In order to avoid regulatory uncertainty and confusion, to assure that all market participants are held to the same standard, and to provide clarity to entities subject to our rules and regulations, we rescind Market Behavior Rule 2 effective upon publication of this order in the **Federal Register**.

2. In addition, we will remove Market Behavior Rules 1, 3, 4, and 5 from public utility market-based rate tariffs and instead codify them in our regulations, rescind Market Behavior Rule 6 as no longer necessary, and rescind Appendix B of the Market Behavior Rules Order as no longer applicable. Contemporaneously herewith, the Commission is issuing a Final Rule in Docket No. RM06-13-000⁵ which is being made effective immediately upon publication in the **Federal Register**. The Market Behavior Rules Codification Order incorporates Rules 1, 3, 4, and 5 into our FPA regulations with no substantive change. In light of this action, Market Behavior Rules 1, 3, 4, and 5 will no longer be of any force or effect in market-based rate tariffs as of the date the Market Behavior Rules Codification Order is effective.⁶

I. Background

3. On November 17, 2003, acting pursuant to section 206 of the FPA, the

⁴ *Prohibition of Energy Market Manipulation*, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, 114 FERC ¶ 61,047 (Jan. 19, 2006) (Order No. 670).

⁵ *Compliance for Public Utility Market-Based Rate Authorization Holders*, Docket No. RM06-13-000, issued February 16, 2006 (Market Behavior Rules Codification Order).

⁶ As provided for in the Market Behavior Rules Order, the Market Behavior Rules have been included in tariff filings by a number of market-based rate sellers. As a result of the changes being made in this order and the contemporaneous Market Behavior Rules Codification Order, the Market Behavior Rules no longer will be part of seller's market-based rate tariffs. It would be burdensome, however, to require sellers to make new tariff filings for the sole purpose of removing the Market Behavior Rules from their tariffs. Sellers need not do so, unless we direct otherwise in the future. In the absence of any such direction, at such time as sellers make any amendments to their market-based rate tariffs or seek continued authorization to sell at market-based rates (e.g., in their three-year update filings), sellers shall at that time remove the Market Behavior Rules from their tariffs. Nonetheless, Market Behavior Rules 2 and 6 will be of no force or effect in sellers' tariffs as of the date this order is published in the **Federal Register**, and Market Behavior Rules 1, 3, 4, and 5 will be of no force and effect as of the effective date of the Market Behavior Rules Codification Order.

¹ 16 U.S.C. 791a *et seq.* (2000).

² *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, "Order Amending Market-Based Rate Tariffs and Authorizations," 105 FERC ¶ 61,218 (2003), *reh'g denied*, 107 FERC ¶ 61,175 (2004) at Appendix A (Market Behavior Rules Order). The Market Behavior Rules are currently on appeal. *Cinergy Marketing & Trading, L.P. v. FERC*, Nos. 04-1168 *et al.* (DC Cir. Filed April 28, 2004).

³ Energy Policy Act of 2005, Public Law No. 109-58, 119 Stat. 594 (2005). Congress prohibited the use or employment of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of electric energy or transmission services subject to the jurisdiction of the Commission. Congress directed the Commission to give these terms the same meaning as under the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2000).

Commission amended all market-based rate tariffs and authorizations to include the Market Behavior Rules. We determined that sellers' market-based tariffs and authorizations to make sales at market rates would be unjust and unreasonable unless they included clearly-delineated rules governing market participant conduct, and that the Market Behavior Rules fairly appraised market participants of their obligations in competitive power markets and were just and reasonable.⁷

4. Market Behavior Rule 1 requires sellers to follow Commission-approved rules and regulations in organized power markets. These rules and regulations are part of the Commission-approved tariffs of Independent System Operators (ISO) or Regional Transmission Organizations (RTO), and, where applicable, market-based rate sellers' agreements to operate within ISOs and RTOs bind them to follow the applicable rules and regulations of the organized market.

5. Market Behavior Rule 2 prohibits "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." Actions or transactions explicitly contemplated in Commission-approved rules and regulations of an organized market, or undertaken by a market-based rate seller at the direction of an ISO or RTO, however, are not violations of Market Behavior Rule 2. In addition, Market Behavior Rule 2 prohibits certain specific behavior: Rule 2(a) prohibits wash trades, Rule 2(b) prohibits transactions predicated on submitting false information, Rule 2(c) prohibits the creation and relief of artificial congestion, and Rule 2(d) prohibits collusion for the purpose of market manipulation.

6. Market Behavior Rule 3 requires sellers to provide accurate and factual information, and not to submit false or misleading information or to omit material information, in any communication with the Commission, market monitors, ISOs, RTOs, or jurisdictional transmission providers.

7. Market Behavior Rule 4 deals with reporting of transaction information to price index publishers. It requires that if a seller reports transaction data, the data be accurate and factual, and not knowingly false or misleading, and be reported in accordance with the Commission's Policy Statement on price

indices.⁸ Rule 4 also requires that sellers notify the Commission of whether they report transaction data to price index publishers in accordance with the Price Index Policy Statement, and to update any changes in their reporting status.

8. Market Behavior Rule 5 requires that sellers retain for a minimum three-year period all data and information upon which they billed the prices charged for electricity and related products in sales made under their market-based rate tariffs and authorizations or in transactions the prices of which were reported to price index publishers.

9. Finally, Market Behavior Rule 6 directs sellers not to violate, or to collude with others in actions that violate, sellers' market-based rate codes of conduct or the Standards of Conduct under part 358 of our regulations.⁹

10. Following enactment of EPart 2005, the Commission issued a Notice of Proposed Rulemaking on October 20, 2005, in which we proposed rules to implement the new statutory anti-manipulation provisions.¹⁰ In the Anti-Manipulation NOPR, we noted the overlap between Market Behavior Rule 2 and the proposed EPart 2005 regulations. We said that we would retain Market Behavior Rule 2 for the time being, but also indicated that we would seek comment on whether we should revise or rescind Market Behavior Rule 2. In the meantime, we assured market participants that we will not seek duplicative sanctions for the same conduct in the event that conduct violates both Market Behavior Rule 2 and the proposed new anti-manipulation rule.¹¹

⁸ *Price Discovery in Natural Gas and Electric Markets*, "Policy Statement on Natural Gas and Electric Price Indices," 104 FERC ¶ 61,121 (2003) (Price Index Policy Statement).

⁹ 18 CFR part 358 (2005). At the same time that the Market Behavior Rules were adopted for jurisdictional wholesale electric transactions, the Commission issued Order No. 644, which introduced parallel provisions in part 284 of our regulations under the Natural Gas Act governing pipelines and holders of blanket certificate authority that sell natural gas at wholesale. 18 CFR 284.288 and 284.403 (2005). Not every aspect of the electric Market Behavior Rules was applicable in the natural gas sales context, however. The part 284 regulations encompass Market Behavior Rule 2, including wash sales and collusion to manipulate, and Market Behavior Rules 4 and 5. Contemporaneously herewith, we also are issuing a final rule in Docket No. RM06-5-000 making parallel changes in sections 284.288 and 284.403 of the Commission's regulations.

¹⁰ *Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 (2005) (Anti-Manipulation NOPR).

¹¹ Id. at P 15. See also *Enforcement of Statutes, Orders, Rules, and Regulations*, "Policy Statement on Enforcement," 113 FERC ¶ 61,068 at P 14 (2005).

11. In an order dated November 21, 2005,¹² the Commission, acting pursuant to section 206 of the FPA, proposed to rescind the Market Behavior Rules once we issued final regulations implementing the anti-manipulation provisions of EPart 2005 and have had the opportunity to incorporate certain other aspects of the Market Behavior Rules in appropriate Commission orders, rules, and regulations. The Commission also requested comment on whether the Market Behavior Rules should be revised or rescinded. We noted that rescission of the Market Behavior Rules will simplify the Commission's rules and regulations, avoid confusion, and provide greater clarity and regulatory certainty to the industry. We emphasized our belief that rescinding the Market Behavior Rules is consistent with Congressional intent in EPart 2005, which provided the Commission with explicit anti-manipulation authority, and that rescission will simplify and streamline the rules and regulations sellers must follow, yet not eliminate beneficial rules governing market behavior.¹³

12. The Commission received 21 comments and four reply comments in response to the November 21 Order.¹⁴ Many of the comments support the Commission's overall objectives in this proceeding, that is, to simplify the Commission's rules and regulations, avoid confusion, and provide greater clarity and regulatory certainty to the industry, while not eliminating beneficial rules governing market behavior by addressing them in other rules and regulations.

13. On January 19, 2006, the Commission issued Order No. 670, adopting regulations implementing the EPart 2005 anti-manipulation provisions. In Order No. 670 the Commission adopted a new part 1c of our regulations under which it is

¹² *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 113 FERC ¶ 61,190 (2005) (November 21 Order).

¹³ November 21 Order, 113 FERC ¶ 61,190 at P 13. At the same time we issued a Notice of Proposed Rulemaking in Docket No. RM06-5-000 proposing similar changes to sections 284.288 and 284.403 of the regulations under the Natural Gas Act, 18 CFR 284.288 and 284.403 (2005).

¹⁴ Entities filing comments and reply comments are listed in the Appendix to this order, along with the acronyms for such commenters. The Commission has accepted and considered all comments filed, including late-filed comments. With respect to commenters that also filed motions to intervene, we are treating this proceeding as a rulemaking seeking comments from all interested entities. See *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, "Order Addressing Application of Ex Parte Rule and Requests for Extension of Time," 104 FERC ¶ 61,132 at P 5 (2003).

⁷ Market Behavior Rules Order, 105 FERC ¶ 61,218 at P 3, 158-74.

“unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, (1) to use or employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.”¹⁵

II. Discussion

A. Market Behavior Rule 2

14. In the November 21 Order the Commission sought comment on whether there is a need or basis for retaining existing Market Behavior Rule 2 in light of the then-proposed anti-manipulation rule, and whether the Commission should retain any of the affirmative defenses against a claim of manipulation, that is, actions or transactions explicitly contemplated by Commission rules, or undertaken at the direction of an ISO or RTO, or actions taken for a “legitimate business purpose.”

1. Should the Commission Retain or Rescind Market Behavior Rule 2?

a. Comments

15. Commenters were divided on the issue of whether Rule 2 should be retained or rescinded in light of the anti-manipulation provisions. Those in favor of retaining Rule 2 argue two principal points: first, the foreseeability standard of Rule 2 reaches negligent conduct or other conduct that falls short of being “provably” intentional but nonetheless has a foreseeable impact on rates; and second, Rule 2 has lasting utility because it provides a remedy for activities that may not be fraudulent, but could nevertheless function to manipulate prices for wholesale electric power and transmission services.¹⁶

16. Several commenters argue that Rule 2 should be retained because it prohibits conduct that “foreseeably could manipulate market prices,” and does not require the showing of scienter (intentional or reckless conduct), which means that Rule 2 reaches a broader range of conduct that may adversely affect consumers and energy markets than would the proposed anti-

manipulation rule alone.¹⁷ CPUC and others argue that nothing in EAct 2005 dictates or justifies the repeal of Rule 2. They argue that, in determining whether rates are just and reasonable, the Commission should only focus on the effect of a seller’s action and not on the seller’s intent, and that relying solely on intent may result in rates becoming unjust and unreasonable because it would limit the Commission’s ability to remedy conduct falling short of being intentional but whose rate-altering effect is foreseeable.¹⁸ PG&E and others argue that there is no risk of confusion or double jeopardy created by having both the Market Behavior Rules and the anti-manipulation rule promulgated pursuant to EAct 2005, and TDUS argues that repeal of the Market Behavior Rules may well create confusion rather than promote clarity.¹⁹ More generally, TDUS argues that the need for vigilant consumer protection is just as strong today as it was in 2003 when the Market Behavior Rules were adopted.²⁰ NYISO comments that the scienter standard of the proposed anti-manipulation regulations will make extensive discovery a necessity and greatly increase the cost of enforcement for all parties involved.²¹

17. APPA/TAPS (which argue that Rule 2 should be interpreted to include a scienter requirement) and others comment that Rule 2 should be retained because it prohibits the exercise of market power.²² SMUD notes that a tariff condition that protects the rights of consumers to refunds of charges that are the product of the exercise of market power or collusion is critical to customers who may have no antitrust remedy for such conduct.²³ PJM supports repeal of the Market Behavior Rules (including Rule 2), but encourages the Commission to amplify its continuing authority to take action to curb the exercise of market power in particular transactions in contexts not necessarily including fraud.²⁴

18. Commenters advocating rescission of Rule 2 argue three main points. First, commenters argue that the Commission should not retain the foreseeability standard of proof of Rule 2 because of the clear Congressional intent in section

1283 of EAct 2005, which directs the Commission to adopt a standard of proof based upon scienter.²⁵ Second, commenters supporting rescission argue that there should be only one definition or standard to define what constitutes market manipulation. Retaining two sets of proscriptions, they argue, could lead to regulatory uncertainty and confusion, and would be unduly discriminatory because of the dual standard applicable to market-based rate sellers of electricity while the remaining industry participants would be covered solely by the new standard of section 1c.2.²⁶ Third, the anti-manipulation regulations represent an improvement over Rule 2 because, among other things, the language of new section 1c.2 provides stakeholders with clarity of language not present in Rule 2, and similarly, the broad language of section 1c.2 means that any behavior forbidden by Rule 2 would also act as a fraud within the meaning of the anti-manipulation regulations.²⁷

19. EEI disagrees with commenters who argue for retention of the Market Behavior Rules in market-based rate tariffs on the theory that they provide an additional check on unlawful exercise of market power.²⁸ To the contrary, EEI thinks the Commission has established an increasingly sophisticated screening process to identify and require mitigation of any potential market power a tariff applicant may possess, prior to granting or reauthorizing market-based rate authority, and has developed several other tools, including RTO market rules and tariffs, market monitor oversight, and OMOI enforcement capabilities, to prevent and remedy the exercise of market power.²⁹

20. Some commenters supporting rescission of Rule 2, however, do so with the qualification that the specifically prohibited activities in Rule 2(a) through 2(d) (*i.e.* wash trades, transactions predicated on submitting false information, transactions creating and relieving artificial congestion, and collusion for the purpose of market manipulation) be retained to provide clearer guidance to market participants.³⁰ SUEZ supports rescission, but thinks the Commission should take steps to explain that it intends to retain the precedent that has

¹⁷ CAISO at 1–2, 8; CPUC at 4, 6–9; NASUCA at 5; NECPUC at 2, 6; NJBPU at 5–6; PJM/CIC at 3, 7–8, 10–11; TDUS (Reply) at 11–12.

¹⁸ CPUC at 7–8; CEOB at 4; NASUCA at 5, 8; NECPUC at 6; PJM/CIC at 10.

¹⁹ PG&E at 12; NYISO at 14; TDUS at 14.

²⁰ TDUS at 5.

²¹ NYISO at 11.

²² APPA/TAPS at 3, 8–12; ISO–NE (Reply) at 11; PJM at 4–5; TDUS at 2, 7.

²³ SMUD at 2–3.

²⁴ PJM at 1, 4–5.

²⁵ Ameren at 7; Cinergy at 7–8; EEI at 4–5, 8–9; EPSA at 6–7; PNMR at 8.

²⁶ Cinergy at 6–7; EEI at 5; PJM at 1–2.

²⁷ Ameren at 6, 9; Cinergy at 7.

²⁸ EEI (Reply) at 7–8.

²⁹ EEI (Reply) at 8.

³⁰ EEI at 6; Indicated Market Participants at 12–13; PNMR at 6–7; SCE at 4.

¹⁵ 18 CFR 1c.2(a), 71 FR 4244, 4258 (2006).

¹⁶ CEOB at 4–7; CAISO at 3–7; CPUC at 5–9; NASUCA at 5–10; NECPUC at 5–6; NJBPU at 5–7; NYISO at 7–12; PG&E at 7–12; PJM/CIC at 7–11; TDUS at 17–20.

accumulated under the Market Behavior Rules.³¹

b. Commission Determination

21. The Commission finds it unnecessary to retain Rule 2. Congress prohibited market manipulation by any entity and defined manipulation to include the requirement of scienter.³² It would be inconsistent with Congress' direction if foreseeability were retained as a lesser standard of proof for market manipulation perpetrated by public utility market-based rate sellers. To avoid the potential for uneven application of regulatory requirements based on whether an entity is a public utility under the FPA and a "non-jurisdictional" entity, or whether an entity is a public utility selling under market-based rate authority or selling at cost-based rates, the same standard of proof should apply to all entities and all jurisdictional sales for purposes of determining whether market manipulation occurred. It is not appropriate, as some commenters suggest, for the Commission to maintain a lesser standard of proof for only certain market participants or certain types of sales.

22. The Commission rejects comments that suggest Rule 2 has a purpose other than to prevent market manipulation, that is, also to curb market power or anti-competitive conduct that does not meet the deceptive conduct criteria for manipulation. Rule 2 focused on actions or transactions intended to manipulate market prices, conditions, or rules, not the existence or use of market power absent some manipulation. Market power, of course, can be used by a seller to manipulate markets; in such cases it is the act of manipulation—perpetrating a fraud or deceit of some kind—that is the violation of Rule 2 or of the new anti-manipulation rule.

23. Generally speaking, however, market power is a structural issue to be remedied, not by behavioral prohibitions, but by processes to identify and, where necessary, mitigate market power that a tariff applicant may possess or acquire. This occurs in the

screening process before the Commission grants an application for market-based rate authority, on consideration of changes in the seller's status or operations, and in the triennial review of market-based rate authorization, all of which are designed to assure just and reasonable rates. In addition, the Commission requires RTOs and ISOs to have independent market monitors,³³ and the Office of Market Oversight and Investigations monitors market operations. When such monitoring detects market abuse or structural problems, they will be addressed under FPA sections 205 or 206 to assure that reliance on market mechanisms produces just and reasonable rates.

24. With respect to the suggestion that the specific proscribed behaviors in Market Behavior Rule 2(a)–(d) be retained, the Commission finds this unnecessary. As we stated in issuing the new anti-manipulation rule, the specifically prohibited actions in Rule 2 (*i.e.*, wash trades, transactions predicated on submitting false information, transactions creating and relieving artificial congestion, and collusion for the purpose of market manipulation) all are prohibited activities under new section 1c.2 of our regulations and are subject to sanctions and remedial action.³⁴ Furthermore, we recognize that fraud is a very fact-specific violation, the permutations of which are limited only by the imagination of the perpetrator. Therefore, no list of prohibited activities could be all-inclusive. The absence of a list of specific prohibited activities does not lessen the reach of the new anti-manipulation rule, nor are we foreclosing the possibility that we may need to amplify section 1c.2 as we gain experience with the new rule, just as the SEC has done.³⁵

³³ The Commission issued a policy statement on market monitors which discussed, among other things, referrals by market monitors to the Commission when a market monitor finds actions by a market participant that may be a violation of the Market Behavior Rules. *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, "Policy Statement on Market Monitoring Units," 111 FERC ¶ 61,267 at P 6 and Appendix A (Protocols on Referrals). We clarify that this Policy Statement applies to potential violations of the new Order No. 670 anti-manipulation rule in lieu of Market Behavior Rule 2, and will apply to the requirements of Market Behavior Rules 1, 3, 4, 5, and 6 to the extent they are incorporated into other parts of the Commission's regulations.

³⁴ Order No. 670, 114 FERC ¶ 61,047 at P 59.

³⁵ After considerable experience with Rule 10b–5, upon which our new anti-manipulation rule is modeled, the SEC has expanded the original Rule 10b–5 to add a number of specific provisions describing prohibited conduct. See 17 CFR 240.10b–5–1 through 240.10b–5–14.

25. In short, rescission of Rule 2 is consistent with Congressional direction and will not dilute customer protection. If conduct occurs that is not the result of fraud or deceit but nonetheless results in unjust and unreasonable rates, a person may file a complaint at the Commission under FPA section 206, or the Commission on its own motion may institute a proceeding under section 206, to modify the rates that have become unjust and unreasonable. In many respects customers are better protected by section 1c.2's breadth and purposeful design as a broad "catch all" anti-fraud provision.³⁶

2. Affirmative Defenses

a. Actions or Transactions Undertaken at the Direction of a Commission-approved ISO or RTO

i. Comments

26. Several commenters argue that actions undertaken at the direction of a Commission-approved ISO or RTO should have explicit safe harbor status because market participants should be able to rely on the directives of an ISO or RTO without fear of prosecution for market manipulation for following such provisions.³⁷ CEOB and PJM, however, caution that such an affirmative defense should not be allowed in circumstances where: (1) The market participant does not have "clean hands" in creating the situation that necessitated the directions of the ISO/RTO; (2) the rule/direction is general or ambiguous; or (3) there is any associated fraudulent conduct because a market seller should not be able to use the RTO as a shield for those activities not explicitly permitted by market rules or where the RTO did not specifically prohibit the behavior.³⁸ Similarly, SCE, informed by its experience during the California energy crisis of 2001–2002, argues that actions which were individually contemplated by ISO/RTO rules should not categorically be exempt from punishment should the Commission find that, in combination, intentional, unlawful market manipulation has nevertheless occurred.³⁹

³⁶ *Aaron v. SEC*, 446 U.S. 680, 690 (1980); see also *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 6–7 (1985) (describing section 10(b) as a "general prohibition of practices * * * artificially affecting market activity in order to mislead investors * * *"); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151–53 (1972) (noting that the repeated use of the word "any" in section 10(b) and SEC Rule 10b–5 denotes a congressional intent to have the provisions apply to a wide range of practices).

³⁷ *Ameren* at 8; *CAISO* at 11; *EEI* at 6; *Indicated Market Participants* at 11–12; *NYISO* at 16–17; *PG&E* at 14; *SUEZ* at 1, 7.

³⁸ *COEB* at 7; *PJM* at 6.

³⁹ *SCE* at 4.

³¹ *SUEZ* at 6, 10, referring to *Intertie Bidding in the California Independent System Operator's Supplemental Energy Market*, "Order Authorizing Public Disclosure of Staff Report of Investigation," 112 FERC ¶ 61,333 (2005); see generally *EPSA* at 9–10, 13.

³² In new section 222 of the FPA, Congress used the terms "manipulative or deceptive device or contrivance" and directed that they be given the same meaning as used in section 10(b) of the Securities Exchange Act of 1934. It is well settled that those terms require a showing of scienter, that is, an intent to deceive, manipulate or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). See Order No. 670, 114 FERC ¶ 61,047 at P 52–53.

ii. Commission Determination

27. Comments that market participants should be able to rely on the directives of an ISO or RTO make a valid point. As the Commission stated in Order No. 670, if a market participant undertakes an action or transaction that is explicitly contemplated in Commission-approved rules and regulations, we will presume that the market participant is not in violation of section 1c.2. If a market participant undertakes an action or transaction at the direction of an ISO or RTO that is not approved by the Commission, the market participant can assert this as a defense for the action taken.⁴⁰ Of course, if a market participant acting with the requisite scienter has provided inaccurate or incomplete information to the ISO or RTO, and the ISO and RTO acts in reliance on the false or incomplete information, following such ISO or RTO directions is no defense to such manipulative conduct for that market participant. Just as we reject calls for inclusion of a list of prohibited conduct in section 1c.2, we similarly reject a list-type approach to defenses. Instead, we will evaluate all of the facts and circumstances of an allegation of market manipulation before deciding how to proceed.

b. Legitimate Business Purpose

i. Comments

28. Commenters are divided on whether the Commission should retain the “legitimate business purpose” provision of Rule 2. CBOB and CAISO oppose retention because in their view there is simply no manner in which activity taken with intent to defraud can constitute a legitimate business practice.⁴¹ CPUC argues that no such “good faith” defense exists in the context of SEC Rule 10b-5.⁴² NASUCA argues that the Commission should not keep only aspects of Rule 2 that are favorable to market-based rate sellers.⁴³ EEI, however, thinks the affirmative defense of legitimate business purpose was part of a generic definition of market manipulation that was vague and confusing to many in the industry, but it believes that the concept of legitimate business purpose should be maintained as an affirmative defense.⁴⁴ NYISO says it would be appropriate to continue the legitimate business purpose defense now specified in Rule 2 because this defense would ensure

proper consideration of the economic, commercial and physical complexities of competitive energy markets, including such practices as valid arbitrage between real-time and forward markets.⁴⁵ EPSA argues that the legitimate business purpose affirmative defense should also be preserved given the intent standard required by EPA Act 2005.⁴⁶ Similarly, Indicated Market Participants argue that a legitimate business purpose should be a complete defense to an allegation of market manipulation whether under Market Behavior Rule 2 or under the anti-manipulation rule.⁴⁷

ii. Commission Determination

29. In promulgating section 1c.2, the Commission purposefully modeled its anti-manipulation rule after SEC Rule 10b-5 to provide stakeholders with as much regulatory certainty and clarity as possible, given the large body of precedent interpreting SEC Rule 10b-5.⁴⁸ SEC Rule 10b-5 does not include provisions for “good faith” defenses. However, in all cases, the intent behind and rationale for actions taken by an entity will be examined and taken into consideration as part of determining whether the actions were manipulative behavior. The reasons given by an entity for its actions are part of the overall facts and circumstances that will be weighed in deciding whether a violation of the new anti-manipulation regulation has occurred. Therefore, the Commission rejects calls for inclusion of a “legitimate business purpose” affirmative defense.

B. Remedies and Sanctions

1. Comments

30. A number of commenters arguing for retention of the Market Behavior Rules express concern that the Market Behavior Rules provide the Commission with remedies, such as disgorgement of unjust profits for tariff violations, that may not be available under the anti-manipulation regulations.⁴⁹ These commenters also contend that civil penalties may not be a sufficient deterrent and, regardless, such sanctions are paid to the United States Treasury

and not to the damaged customers. NYISO seeks clarification on whether the Commission has discretion to use monies it receives in the form of civil penalties to compensate victims of market manipulation.⁵⁰

31. Arguing for repeal of the Market Behavior Rules, EEI submits that, under new FPA section 222, disgorgement of profits proximately linked to well-defined acts of market manipulation is a remedy available to the Commission and applicable to all, and not limited to market-based rate sellers.⁵¹

2. Commission Determination

32. Concerns over the extent of the Commission’s remedial powers are misplaced. The Market Behavior Rules Order addressed a concern, stemming from the abuses in Western markets in 2000–2001, that there were not clear rules to deal with abusive market conduct. By fashioning tariff rules prohibiting manipulation, we established a clear basis for ordering disgorgement of unjust profits, along with other remedial actions, in the event of violations of such rules.⁵² With the issuance of Order No. 670 and the availability of significant civil monetary penalties for violations, the Commission now has a more complete set of enforcement tools—both rules and remedies and/or sanctions—to deal with market manipulation. The Commission will use these authorities as the facts and circumstances of each case indicate, as our discretion is at its zenith in determining an appropriate remedy for violations.⁵³ Accordingly, if companies subject to our jurisdiction violate the statutes, orders, rules, or regulations administered by the Commission, the Commission can order, among other things, disgorgement of unjust profits.⁵⁴

⁴⁰ NYISO at 13.

⁴¹ EEI (Reply) at 4–5, 12–14.

⁴² *Market Behavior Rules Order*, 105 FERC ¶ 61,218 at P 149 (stating “in approving these Market Behavior Rules and requiring sellers to be fully accountable for any unjust gains attributable to their violation, we do not foreclose our reliance on existing procedures or other remedial tools, as may be necessary, including generic rule changes or the approval of new market rules applicable to specific markets”). See also *Market Behavior Rules Order*, order on reh’g, 107 FERC ¶ 61,175 at P 129.

⁴³ See *Niagara Mohawk Power Corp. v. FERC*, 379 F.2d 153, 159 (DC Cir. 1967); accord 16 U.S.C. 825h (2000); *Mesa Petroleum Co. v. FERC*, 441 F.2d 182, 187–88 (DC Cir. 1971); *Gulf Oil Corporation v. FPC*, 563 F.2d 588, 608 (3rd Cir. 1977), cert. denied 434 U.S. 1062, reh’g denied, 435 U.S. 981 (1978); *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1549 (DC Cir. 1985).

⁴⁴ See, e.g., *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1320 (5th Cir. 1993) (holding the remedy of disgorgement of ill-gotten profits for a violation of the Natural Gas Act “well within [the Commission’s] equitable powers”);

Continued

⁴⁰ Order No. 670 at P 67.

⁴¹ CBOB at 7; CAISO at 11–12.

⁴² CPUC at 11.

⁴³ NASUCA at 20.

⁴⁴ EEI at 11.

⁴⁵ NYISO at 16–17.

⁴⁶ EPSA at 10, 13–14.

⁴⁷ Indicated Market Participants at 10–11.

⁴⁸ Order No. 670, 114 FERC ¶ 61,047 at P 30–31.

⁴⁹ APPA/TAPS at 3, 13; CBOB at 3; NASUCA at 5, 7–8, 11–13; NECPUC at 1, 3; NYISO at 10–13; PJMICC at 8–9; SMUD at 3; TDUS at 24–27, TDUS (Reply) at 14. ISO-NE, for instance, urges the Commission to clarify that, under new FPA section 222, we are not limited to imposing civil penalties in the event of market manipulation, but may also order disgorgement of profits or other economic benefits to be returned to ratepayers. ISO-NE (Reply) at 14–17.

The Commission also has the option of conditioning, suspending, or revoking market-based rate authority, certificate authority, or blanket certificate authority.⁵⁵ Moreover, while section 206 of the FPA does not permit the Commission to establish just and reasonable rates prior to the refund effective date established under section 206, the Commission clearly has authority to order disgorgement of profits associated with an illegally charged rate, *i.e.*, a rate other than the rate on file or in violation of a Commission rule, order, regulation, or tariff on file.⁵⁶ Therefore, the Commission may use disgorgement of unjust profits where appropriate, including to remedy a violation of the new anti-manipulation regulations.

33. EPCa 2005 has enhanced the Commission's civil penalty authority.⁵⁷ Civil penalties, however, serve a different purpose from disgorgement or other equitable remedies. As we have said, the purpose of civil penalties is to "encourage compliance with the law."⁵⁸ The purpose of disgorgement, on the other hand, is to remedy unjust enrichment. The Commission will

choose from the full range of available remedies and penalties—revocation, suspension, or conditioning of authority, disgorgement, and civil penalties—according to the nature of the violation and all of the facts presented. The imposition of both remedies and civil penalties in tandem may be necessary under certain circumstances to reach a fair result.⁵⁹ These are separate powers available to the Commission, as they arise under different provisions of the FPA.⁶⁰

34. We note that other agencies also impose civil penalties and equitable remedies in tandem. For example, the SEC can require an accounting and disgorgement to investors for losses and also impose penalties for the misconduct, and the CFTC can order restitution or obtain disgorgement and also impose fines for violations.⁶¹ Similarly, in the environmental context, the government is free to seek an equitable remedy in addition to, or independent of, civil penalties.⁶² When we impose disgorgement as a remedy, we have broad discretion in allocating monies to those injured by the violations. As we noted in our *Policy Statement on Enforcement*, each case depends on the circumstances presented, and the Commission will not predetermine which remedy and/or sanction authorities it will use.⁶³

C. Market Behavior Rules 1, 3, 4, 5, and 6

35. In the November 21 Order, we indicated that some provisions of the Market Behavior Rules, such as Rules 1 and 6, restate existing obligations, and that other parts of the Market Behavior Rules, such as Rule 3 and the first part of Rule 4, would be covered by the new anti-manipulation rule. Other rules, we noted, should be incorporated into other regulatory requirements.⁶⁴ We indicated that action on the Market Behavior Rules would be taken in such a way as to assure there would be no gap in regulatory requirements.

1. Comments

36. Some commenters addressed Rule 1, arguing that a requirement to comply with organized market rules should be retained because these markets may not have adequate remedies for violations of their rules, or that such rules can be violated without fraudulent behavior.⁶⁵ NASUCA argues that Rule 1 provides a disgorgement remedy when a seller's conduct violates the tariff rules of another utility (the RTO).⁶⁶ On the other hand, Indicated Market Participants support elimination of Rule 1, but ask the Commission to make clear that compliance with the requirements of an organized market is an affirmative defense to a claim of manipulation.⁶⁷

37. Other commenters addressed Rule 3, suggesting that the requirement of providing accurate and factual information in communications is broader than prohibiting manipulation. NASUCA believes that Rule 3 covers misinformation that could be harmful but that does not amount to intentional misrepresentation, such as negligent transaction reporting that could manipulate index prices.⁶⁸ NYISO agrees and urges the Commission to retain a broad requirement for accurate and complete information provided to RTOs, ISOs, and the Commission.⁶⁹ PJM likewise says that Rule 3 is needed to impose an affirmative duty to provide accurate information even in circumstances involving no intent to

merits, and to fashion remedies appropriate to the facts presented, including any mitigating factors.").

⁶⁴ November 21 Order at P 19–23.

⁶⁵ APPA/TAPS at 3; CAISO at 10; CPUC at 3, 5–6; NYISO at 14–15.

⁶⁶ NASUCA at 6–7. NASUCA notes that disgorgement is available as a remedy when a seller violates its own tariff but, absent Rule 1, it is not clear that the disgorgement remedy (as opposed to penalties that may apply under the RTO tariff) would be available for a seller's violation of RTO tariff provisions or rules.

⁶⁷ Indicated Market Participants at 15–16.

⁶⁸ NASUCA at 21.

⁶⁹ NYISO at 19.

Coastal Oil & Gas Corp. v. FERC, 782 F.2d 1249, 1253 (5th Cir. 1986) (profits from illegal intrastate sales of gas in excess of a just and reasonable rate may be subject to disgorgement).

⁵⁵ See, e.g., *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 at P 52 (2003); *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 99 FERC ¶ 61,272 at 62,154 (2002); *San Diego Gas & Electric Company*, 95 FERC ¶ 61,418 at 62,548, 62,565, *order on reh'g*, 97 FERC ¶ 61,275 (2001), *order on reh'g*, 99 FERC ¶ 61,160 (2002); *accord Enron Power Marketing, Inc.*, "Order Proposing Revocation of Market-Based Rate Authority and Termination of Blanket Marketing Certificates," 102 FERC ¶ 61,316 at P 8 and n.10 (2003), and cases cited therein.

⁵⁶ *Transcontinental Gas Pipe Line Corp.*, 998 F.2d 1313 at 1320; see also *Dominion Resources, Inc. et al.*, 108 FERC ¶ 61,110 (2004) (disgorgement for violations of the Commission's Standards of Conduct); *El Paso Electric Company*, 105 FERC ¶ 61,131 at P35 (2003) (finding disgorgement an "appropriate and proportionate remedy" for a violation of the Federal Power Act); *Kinder Morgan Interstate Gas Transmission LLC*, 90 FERC ¶ 61,310 (2000) (disgorgement ordered to remedy preferential discounts to affiliates); *Stowers Oil & Gas Company*, 44 FERC ¶ 61,128 (1988), *reh. denied in part and granted in part*, 48 FERC ¶ 61,230 at 61,817 (1989), *appeal dismissed sub nom. Northern Natural Gas Co. v. FERC*, Case Nos. 89–1512 *et al.*, (DC Cir. 1992) (Commission "properly exercised its broad equitable power" in requiring disgorgement of unjust enrichment resulting from illegal sales of gas).

⁵⁷ EPCa 2005 expanded the Commission's FPA civil penalty authority to encompass violations of all provisions of FPA part II (EPCa 2005 section 1284(e)(1), amending FPA section 316A(a)), and established the maximum civil penalty the Commission can assess under FPA part II as \$1 million per day per violation. EPCa 2005 section 1284(e)(2), amending FPA section 316A(b).

⁵⁸ *Procedures for the Assessment of Civil Penalties under Section 31 of the Federal Power Act*, Order No. 502, 53 FR 32035 (Aug. 23, 1988), FERC Stats. & Regs. ¶ 30,828 (Aug. 17, 1988).

⁵⁹ *Policy Statement on Enforcement*, 113 FERC ¶ 61,068 at P 12 (2005) ("Our enhanced civil penalty authority will operate in tandem with our existing authority to require disgorgement of unjust profits obtained through misconduct and/or to condition, suspend, or revoke certificate authority or other authorizations, such as market-based rate authority for sellers of electric energy").

⁶⁰ The authority to order disgorgement and other equitable remedies arises under the "necessary or appropriate" powers of section 309 of the FPA. *Towns of Concord v. FERC*, 955 F.2d 67, 73 (DC Cir. 1992). The authority to impose civil penalties arises under section 316A of the FPA as amended by EPCa 2005.

⁶¹ See sections 21–21C of the Securities Exchange Act, 15 U.S.C. 78u–78u–3 (2000); *SEC v. Hupp*, 392 F.3d 12, 31–33 (1st Cir. 2004) (upholding SEC's imposition of both disgorgement and a civil penalty equal to the amount of disgorgement; further, the court noted that the wrongdoer bears the risk of uncertainty in calculating the amount of disgorgement). The CFTC can revoke or suspend a registration, suspend or prohibit certain trading, issue cease and desist orders, order restitution, and seek equitable remedies (injunction, rescission, or disgorgement), all in addition to imposing a monetary fine. 7 U.S.C. 13a and 13b (2000); Comm. Fut. L. Rep. (CCH) ¶ 26,265 at 42,247 (1994).

⁶² See, e.g., *Tull v. United States*, 481 U.S. 412, 425 (1987) (holding that the Clean Water Act does not intertwine equitable relief with the imposition of civil penalties; instead, each kind of relief is separately authorized in distinct statutory provisions).

⁶³ *Policy Statement on Enforcement*, 113 FERC ¶ 61,068 at P 13 (2005) ("We will not prescribe specific penalties or develop formulas for different violations. It is important that we retain the discretion and flexibility to address each case on its

deceive.⁷⁰ CAISO argues that Rule 3 prohibits submitting any false information, not just material information.⁷¹ SCE argues that Rule 3 is a superior formulation to the anti-manipulation rule and urges that it be used instead of the Rule 10b-5 language.⁷²

38. Some commenters believe Rule 4 is unnecessary, arguing that false reporting to an index publisher would be a violation of the new anti-manipulation rule. EPSA, for instance, urges the Commission to repeal Rule 4 but reaffirm the applicability of the Policy Statement on price indices.⁷³ Ameren, on the other hand, proposes that Rule 4 be added to the anti-manipulation regulations to explicitly require any entity to provide accurate and factual information to price index publishers.⁷⁴ CAISO believes that it is necessary to maintain a separate requirement in Rule 4 to report transaction information accurately to the extent a seller reports such information to price index publishers, because the accuracy of the information published should not depend upon whether the provider of the information had an intent to defraud.⁷⁵ EEI sees value in the guidance provided by Rule 4 and suggests that it be adopted as a Commission rule, thereby applying to all market participants.⁷⁶ TDUS calls for the retention of requirements to report changes in reporting status.⁷⁷

39. There was little controversy over Rule 5, as parties generally recommended that the record retention requirement be retained. CAISO says the data retention requirement is crucial to the Commission's enforcement powers.⁷⁸ The Indicated Market Participants say that the record retention requirement more appropriately belongs in the Commission's general regulations so that it will be applicable to more than just market-base rate sellers.⁷⁹ EEI supports keeping the three-year retention requirement, noting that otherwise the default ten-year period of part 125 of the Commission's regulations might be deemed to apply.⁸⁰ NASUCA, however, is concerned that moving the record retention

requirement to another rule might limit "remedies for the benefit of consumers when records are not kept."⁸¹

40. There also was general agreement that Rule 6, for the most part, restates requirements independently applicable to market-based rate sellers under each seller's code of conduct or by the Standards of Conduct in Part 358 of the Commission's regulations. PJM, EEI, and EPSA think Rule 6 may be rescinded as duplicative and unnecessary.⁸² APPA/TAPS, however, believes that Rule 6 should be retained because market-based rate sellers' codes of conduct and the Standards of Conduct do not identify remedies for violations, thus potentially leaving the Commission without an appropriate remedy.⁸³ SCE, on the other hand, expresses concern that aspects of Rule 6, particularly its prohibition of collusion, may not be captured by the proposed anti-manipulation regulations because there are collusive activities that do not amount to fraud.⁸⁴

2. Commission Determination

41. The Commission already indicated that certain requirements of the Market Behavior Rules would be recast in other Commission rules or regulations. Upon consideration of the comments, we have determined that there is benefit to incorporating most of the non-manipulation provisions of the Market Behavior Rules into the Commission's regulations, and we do so contemporaneously in the Market Behavior Rules Codification Order. While the basis for incorporating Rules 1, 3, 4, and 5 in our regulations is discussed there, we note the value provided by these rules briefly below. We also discuss the reason for rescinding Rule 6 as unnecessary.

42. Market Behavior Rule 1 is applicable in organized RTO or ISO markets. While it is essentially a restatement of existing obligations that are in the tariffs of the RTOs and ISOs, applicable to market participants through their participant agreements, there is value to customers in reinforcing the obligation to operate in accordance with Commission-approved rules and regulations by placing this expectation in the Commission's regulations. Accordingly, the Market

Behavior Rules Codification Order includes Market Behavior Rule 1 in the Commission's regulations.

43. Market Behavior Rule 3 requires accurate and factual communications with the Commission, Commission-approved market monitors, Commission-approved RTOs and ISOs, or jurisdictional transmission providers. In the November 21 Order we commented that this requirement would be covered by the new anti-manipulation rule, and it could be confusing to have a duplicate rule regarding accurate and factual information.⁸⁵ As commenters point out, however, this rule is somewhat broader than the new anti-manipulation rule, as it applies to all communications, not just those that are material in furtherance of a fraudulent or deceptive scheme. Accordingly, we believe the substance of Rule 3 can be incorporated in our regulations without duplicating or causing undue confusion with respect to the new anti-manipulation rule.

44. Market Behavior Rule 4 requires sellers to provide accurate data to price index publishers, if the seller is reporting transactions to such publishers, and includes a requirement that sellers notify the Commission of their price reporting status and of any changes in that status. While a deliberate false report would be a violation of the new anti-manipulation rule, there is no confusion in stating this in our regulations and thereby reinforcing the importance of the Price Index Policy Statement. The second aspect of Market Behavior Rule 4, notification to the Commission of the market participant's price reporting status and of any changes in that status, is not otherwise provided for. This is a simple and non-burdensome way for the Commission to be informed of the prevalence of price reporting to price index developers, and is included in the Market Behavior Rules Codification Order.⁸⁶

45. Market Behavior Rule 5 requires sellers to maintain certain records for a period of three years to reconstruct prices charged for electricity and related products. This is different from the record retention requirements in part

⁷⁰ PJM at 7-8; TDUS at 21.

⁷¹ CAISO at 12.

⁷² SCE at 6; *see also* Ameren at 11; PG&E at 14.

⁷³ EPSA at 11-12, 15-16. *See also* SUEZ at 10-11; Indicated Market Participants at 16-19.

⁷⁴ Ameren at 11; SCE at 6.

⁷⁵ CAISO at 12.

⁷⁶ EEI at 12-13.

⁷⁷ TDUS at 27.

⁷⁸ CAISO at 10. *See also* CPUC at 9; TDUS at 27.

⁷⁹ Indicated Market Participants at 17-18.

⁸⁰ EEI at 13.

⁸¹ NASUCA at 7.

⁸² PJM at 8; EEI at 13; EPSA at 16.

⁸³ APPA/TAPS at 13. APPA/TAPS agrees that Rule 6 does not itself impose any new obligation, but notes that the Market Behavior Rules also provide for remedies for rule violations. *Id.*

⁸⁴ SCE at 7. SCE is concerned that market participants could collude, through a combination of lawful means, to accomplish an unlawful purpose. *Id.*

⁸⁵ November 21 Order at P 19.

⁸⁶ As is discussed in the Market Behavior Rules Codification Order, codification of the notification requirement does not mean that sellers who have previously provided notifications pursuant to Rule 4 now must repeat that notification. Only sellers who have not previously provided a notification of their price reporting status, and sellers who have a change in their reporting status, are required to notify the Commission. In other words, codification of Rule 4 does not increase the burden of, or requirements for, notification in any way.

125 of our regulations, which largely are related to cost-of-service rate requirements.⁸⁷ Given the importance of records related to charges under market-based rate authority to any investigation of possible wrongdoing, a separate record retention requirement specifically for market-based transactions is necessary. We include the Rule 5 record retention requirement in the Market Behavior Rules Codification Order.⁸⁸

46. Market Behavior Rule 6 requires adherence to a market-based rate seller's code of conduct and to the Order No. 2004 Standards of Conduct, and prohibits collusion to violate codes of conduct or the Standards of Conduct. The Standards of Conduct are already in our regulations. Many market-based rate sellers have a code of conduct in their tariff as a result of the authorization granted by the Commission to make market-based rate sales.⁸⁹ As for collusion, to the extent a seller colludes to violate either a code of conduct or the Standards of Conduct, the collusion would be a violation of the new anti-manipulation rule. In light of these facts, we find it unnecessary to codify Rule 6. Accordingly, we will rescind Market Behavior Rule 6 effective upon publication of this order in the **Federal Register**.

D. Miscellaneous Issues

1. The Commission Can Rescind the Market Behavior Rules in a Section 206 Order

a. Comments

47. A few commenters advocating retention of the Market Behavior Rules argue that the Commission has not found the Market Behavior Rules unjust and unreasonable. NASUCA, PG&E, and PJMCC contend that such a finding is a necessary prerequisite to acting under FPA section 206 to remove the Market Behavior Rules from market-based

tariffs and authorizations. These commenters contend that there have been no changed circumstances warranting rescission of the Market Behavior Rules.⁹⁰ Other commenters, however, argue that it is unduly discriminatory, confusing, and duplicative to retain the Market Behavior Rules given the implementation of the new anti-manipulation rule applicable to all entities, not just market-based rate sellers.⁹¹

b. Commission Determination

48. The Commission is acting within the scope of its authority under section 206 of the FPA in rescinding the Market Behavior Rules 2 and 6. Although the Commission in most circumstances would need to find that existing rates, terms or conditions are unjust, unreasonable, unduly discriminatory or preferential in order to modify them under section 206, here such a finding is not necessary because, as discussed in greater detail below, we are basing our changes to public utility tariffs on the change in law in EPAct 2005 and the incorporation of substitute anti-manipulation provisions in our regulations. Additionally, were we not to modify public utility tariffs to delete Market Behavior Rule 2, public utilities would be subject to two differing standards for manipulative practices while other market participants would be subject to one standard for manipulative practices. We do not believe this non-comparable treatment is justified.

49. The Market Behavior Rules were based upon the Commission's findings in 2003 that market-based rate sellers' existing tariffs were unjust and unreasonable without provisions to prohibit market manipulation.⁹² Since that time, circumstances have changed significantly with enactment of EPAct 2005. Congress has provided the Commission with an anti-manipulation statute and expressly required that manipulation include the requirement of scienter. Consistent with this Congressional mandate, the Commission has adopted a comprehensive new rule prohibiting energy market manipulation.

50. The central reason for adopting the Market Behavior Rules in 2003 was

the absence of any rules or regulations concerning market manipulation. That is no longer the case. Given the adoption of implementing regulations for the Commission's new statutory anti-manipulation authority, it would be inappropriate to maintain a differently worded tariff rule barring manipulation, that is, a rule that may not fully comport with Congressional intent. There should not be any inconsistency or conflict between two prohibitions governing the same conduct. The protection from manipulation of wholesale energy markets needed for tariffs to be just and reasonable is still in effect, but now through a rule of general applicability governing all entities, not just market-based rate sellers. Circumstances have changed. The protection needed to assure that market-based rate transactions are just and reasonable remains, but in a new regulation consistent with Congressional direction. The Commission thus has retained important protections for wholesale energy markets, but has done so in a way that reinforces regulatory certainty.

51. Likewise, there is no barrier to removal of Market Behavior Rules 1, 3, 4, 5, and 6. Rules 1, 3, 4, and 5 will remain in effect in another form, as we are adopting the substantive provisions of these rules in the Commission's regulations. To the extent these provisions are incorporated elsewhere, there is no substantive change and therefore no need to address whether these behavior rules are no longer just and reasonable. Finally, there is no barrier to rescinding Market Behavior Rule 6. As discussed, this rule repeats existing requirements to follow applicable codes of conduct and the Standards of Conduct in the Commission's regulations, and any collusion to violate these requirements would be in violation of the new anti-manipulation rule. There is no substantive change in regulatory requirements.

2. Time Limits on Complaints

52. A few commenters ask the Commission to retain the 90-day requirement of the Market Behavior Rules' remedies and complaint procedures.⁹³ EEI says these are important provisions that should be preserved in the new anti-manipulation rule.⁹⁴ Similarly, EPSA argues that

⁸⁷ 18 CFR Part 125 (2005).

⁸⁸ Order No. 670, 114 FERC ¶ 61,047 at P 62–63. In a Notice of Proposed Rulemaking in Docket No. RM06–14–000, issued contemporaneously herewith, we propose to extend the record retention period to five years. We encourage sellers to take the proposed change into account in their record retention policies.

⁸⁹ To safeguard against affiliate abuse, the Commission requires affiliates of public utilities, when they request market-based rate authority, to submit a code of conduct to govern their relationship with the affiliated utility. See, e.g., *Potomac Electric Power Company*, 93 FERC ¶ 61,240 at 61,782 (2000); *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062–63 (1994). Not all market-based rate sellers have codes of conduct. In addition, the Commission may waive the code of conduct requirement where there are no captive customers and, therefore, no potential for affiliate abuse. *Alcoa, Inc.* 88 FERC ¶ 61,045 at 61,119 (1999).

⁹⁰ NASUCA at 14; PG&E at 4, 7; PJMCC at 6–7.

⁹¹ EEI (reply) at 15; Cinergy at 4. EEI also argues that the Commission has ample evidence to find that retaining the Market Behavior Rules in market-based rate tariffs would be unduly discriminatory and, therefore, unjust and unreasonable. EEI (reply) at 15.

⁹² Market Behavior Rules Order, 107 FERC ¶ 61,175 at P 162; *order on reh'g*, 107 FERC ¶ 61,175 at P 161.

⁹³ In Appendix B to the Market Behavior Rules Order, the Commission required that complaints alleging a violation be filed within 90 days of the end of the calendar quarter in which a transaction occurred or, if the party could not then know of the alleged violation, 90 days from when the party should have known of the violation.

⁹⁴ EEI at 7.

absence of a 90-day limit on bringing complaints will cause regulatory uncertainty and present significant cost and risks to market participants.⁹⁵ Because the Market Behavior Rules are being rescinded, the 90-day time limit will no longer apply. In Order No. 670, we noted that a five-year statute of limitations is applicable to the imposition of civil penalties, and specifically rejected requests to retain the 90-day period used for the Market Behavior Rules.⁹⁶ Consistent with the discussion of this issue in Order No. 670, we reject requests to retain the 90-day requirement and rescind Appendix B of the Market Behavior Rules Order.

3. Additional Comments

53. A few parties requested an additional opportunity to comment once the Commission has finalized the proposed new anti-manipulation rule. The CEOB, for instance, asked that we provide the final language of the new anti-manipulation rule, then permit another round of comments in this proceeding on the appropriate scope and nature of changes to the Market Behavior Rules.⁹⁷ Similarly, SCE asks the Commission to institute a comprehensive, omnibus proceeding to adopt a new regulatory regime and, as appropriate, eliminate the current Market Behavior Rules.⁹⁸ This is not necessary. Order No. 670 adopted the proposed anti-manipulation rule with no substantive changes. As a result, comments predicated on the proposed anti-manipulation rule remain valid, and there is no need to have yet another round of comments on proposed changes to the Market Behavior Rules.

III. Conclusion

54. The Market Behavior Rules played a beneficial role as the Commission's oversight of wholesale energy markets continued to evolve. With the enactment of specific anti-manipulation authority in EPCA 2005, however, the time has come to shift our regulatory tools to focus on the anti-manipulation authority we now have under new FPA section 222 and the new rule in part 1c of our regulations. This will allow us to continue to protect customers with respect to manipulation by any entity, but in a manner consistent with Congressional guidance. The Commission will continue to monitor wholesale markets as they evolve and will consider changes in its regulations as may be necessary to assure that

wholesale markets are well-functioning and result in just and reasonable energy prices. With respect to the other provisions of the Market Behavior Rules, the substantive aspects of these Rules are being codified in our regulations and being made applicable to market-based rate sellers.

The Commission Orders

(A) Market Behavior Rules 2 and 6 and Appendix B of the Market Behavior Rules Order are hereby rescinded, effective upon publication of this order in the **Federal Register**. As discussed in the body of this order, Market Behavior Rules 1, 3, 4, and 5 are removed from sellers' market-based rate tariffs as of the date they are codified in the Commission's regulations under the Federal Power Act.

(B) Market-based rate sellers are hereby notified that they need not refile or amend their tariffs with respect to the rescission and removal of the Market Behavior Rules, unless we direct otherwise in the future. In the absence of any such direction, at such time as sellers make any amendments to their market-based rate tariffs or seek continued authorization to sell at market-based rates (e.g., in their three-year update filings), sellers shall at that time remove the Market Behavior Rules from their tariffs. Notwithstanding this, as of the date this order is published in the **Federal Register**, Market Behavior Rules 2 and 6 will be of no force or effect in sellers' tariffs, and Market Behavior Rules 1, 3, 4, and 5 will be of no force and effect in seller's tariffs as of the effective date of the Market Behavior Rules Codification Order.

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

By the Commission.

Magalie R. Salas,
Secretary.

Appendix—List of Parties Filing Comments and Reply Comments and Acronyms

Ameren Services Company (Ameren).
American Public Power Association and the Transmission Access Policy Study Group (APPA/TAPS).
California Electricity Oversight Board (CEOB).
California ISO (CAISO).
California Public Utilities Commission (CPUC).
Cinergy Services, Inc. and Cinergy Marketing & Trading, LP (Cinergy).
Constellation Energy Group Inc., *et al.* (Indicated Market Participants).
Edison Electric Institute (EEI).
Electric Power Supply Association (EPSA).
ISO New England (ISO-NE).*

National Association of State Utility Consumer Advocates (NASUCA).
New England Conf. of Public Utilities Commissioners and Vermont Department of Public Service (NECPUC).
New Jersey Board of Public Utilities (NJBPUC).
New York Independent System Operator, Inc. (NYISO).
Pacific Gas and Electric Company (PG&E).
PJM Industrial Customer Coalition (PJMICC).
PJM Interconnection, L.L.C. (PJM).
PNM Resources (PNMR).
Sacramento Municipal Utility District (SMUD).
Southern California Edison Company (SCE).
SUEZ Energy North America, Inc. (SUEZ).
Transmission Dependent Utility Systems (TDUS).*

* Entities filing reply comments only.

** Entities filing reply comments in addition to initial comments.

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 11858-002, California]

Elsinore Municipal Water District and the Nevada Hydro Company, Inc.; Notice of Availability of the Draft Environmental Impact Statement for the Proposed Lake Elsinore Advanced Pumped Storage Project

February 17, 2006.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for license for the proposed Lake Elsinore Advanced Pumped Storage Project (FERC No. 11858), located on Lake Elsinore and San Juan Creek, in the Town of Lake Elsinore, Riverside County, California, and has prepared a Draft Environmental Impact Statement (draft EIS) for the project.

In the draft EIS, Commission staff evaluate the co-applicant's proposal and the alternatives for licensing the proposed project. The draft EIS documents the views of governmental agencies, non-governmental organizations, affected Indian tribes, the public, the license applicants, and Commission staff.

Comments should be filed with Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All comments must be filed by April 25, 2006, and should reference Project No. 11858-002. Comments may be filed electronically via the Internet in lieu of

⁹⁵ ESPA at 8.

⁹⁶ Order No. 670, 114 FERC ¶ 61,047 at P 62-63.

⁹⁷ CEOB at 6.

⁹⁸ SCE at 3, 9.