Supporting Statement
FERC-916, Record Retention Requirements for Pipelines Providing Unbundled Sales Service, and Persons Holding Blanket Marketing Certificates
Request for a three-year extension of a currently approved collection

The Federal Energy Regulatory Commission (Commission or FERC) requests Office of Management and Budget (OMB) review and approve **FERC-916, "Record Retention Requirements for Pipelines Providing Unbundled Sales Service, and Persons Holding Blanket Marketing Certificates"** (OMB Control No. 1902-0224). Current OMB approval expires on July 31, 2009.

A. JUSTIFICATION

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

In accordance with the Natural Gas Act (NGA), the Department of Energy Organization Act (DOE Act), and the Energy Policy Act of 2005 (EPAct 2005) (Attachment A), the Commission regulates the transmission and wholesale sales of natural gas in interstate commerce, monitors and investigates energy markets, uses civil penalties and other means against energy organizations and individuals who violate Commission rules in the energy markets, and administers accounting and financial reporting regulations and oversees conduct of regulated companies.

In order to carry this out, the Commission, in Orders No. 677 and 644 (Attachments B and C) imposed record retention requirement on sellers to retain, for a period of five years, all information upon which they billed prices charged for natural gas sold pursuant to their market-based sales certificate and the prices reported for use in price indices. Regulations were promulgated in 18 CFR 284.288 and 284.403 (Attachment D).

The requirement is necessary to ensure consistency with the rule prohibiting market manipulation (regulations adopted in Commission Order No. 670, [Attachment E] implementing the EPAct 2005 anti-manipulation provisions[1]) and the generally applicable five-year statute of limitations where the Commission seeks civil penalties for violations of the anti-manipulation rules or other rules, regulations, or orders to which the price information may be relevant.

The record retention period of five years is necessary due to the importance of records related to any investigation of possible wrongdoing and related to assuring compliance with the codes of conduct and the integrity of the market.

[1] 18 CFR 1c.1 and 1c.2, 71 FR 4,244 (2006).

2. HOW, BY WHOM AND FOR WHAT PURPOSE IS THE INFORMATION TO BE USED AND THE CONSEQUENCES OF NOT COLLECTING THE INFORMATION

Information retained under FERC-916 is used to monitor and enforce civil penalties in wholesale jurisdictional markets, thus maintaining the integrity of the market.

3. DESCRIBE ANY CONSIDERATION OF THE USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN AND THE TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN

Entities are encouraged to retain records in an electronic format thereby reducing the burden of storage costs.

4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATION AND SHOW SPECIFICALLY WHY ANY SIMILAR INFORMATION ALREADY AVAILABLE CANNOT BE USED OR MODIFIED FOR USE FOR THE PURPOSE(S) DESCRIBED IN INSTRUCTION NO. 2

There is no requirement to prepare documents. The only requirement is of retention of documents generated by and through the sale of natural gas.

5. METHODS USED TO MINIMIZE BURDEN IN COLLECTION OF INFORMATION INVOLVING SMALL ENTITIES

In most cases, the burden is proportional to the size of the entity. The number of records requiring storage is small for smaller entities and large for larger ones. The Commission encourages entities to store records in electronic format thereby reducing physical space needed for storage.

6. CONSEQUENCE TO FEDERAL PROGRAM IF COLLECTION WERE CONDUCTED LESS FREQUENTLY

If entities did not retain these records, the Commission would not be able to fulfill its enforcement duties set out under EPAct 2005.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION

There is one special circumstance related to this information collection. OMB's guidelines at 5 CFR 1320.5(d)(2)(iv) direct that agencies should not require

respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years. The Commission is requiring that respondents retain records for a period of five years. This is necessary as noted above to ensure consistency with the Commission's rule prohibiting market manipulation that implements the EPAct 2005 anti-manipulation provisions and the generally applicable five-year statute of limitations where the Commission seeks civil penalties for violations of the anti-manipulation rules or other rules, regulations, or orders to which the price information may be relevant. (There is no explicit statute of limitations set forth in Natural Gas Act (NGA) section 4A or in Federal Power Act (FPA) section 222, and no statute of limitations of general applicability appears in the NGA or FPA. The Commission declined in Order No. 670 to designate a statute of limitations or otherwise adopt an arbitrary time limitation on complaints or enforcement actions that may arise under NGA section 4A and FPA section 222. The Commission noted, however, that when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations, the general statute of limitations for collection of civil penalties, 28 U.S.C. 2462, applies.[2] Section 2462 in 28 U.S.C. imposes a five-year limitations period on any "action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."[3])

8. DESCRIBE EFFORTS TO CONSULT OUTSIDE THE AGENCY: SUMMARIZE PUBLIC COMMENTS AND THE AGENCY'S RESPONSE TO THESE COMMENTS

In accordance with OMB requirements in 5 CFR 1320.8(d), a notice was published in the Federal Register on March 30, 2009[4] (Attachment F) for the renewal of FERC-916. No comments were received during the 60-day comment period.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

There are no payments or gifts to record holders.

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[2] See, e.g., United States v. Godbout-Bandal, 232 F.3d 637, 639 (8th Cir. 2000).

[3] 28 U.S.C. 2462 (2000). The five-year limitation runs "from the date the claim first accrued."

[4] The notice appeared in the *Federal Register* Vol. 74, No. 64 issued on Monday, April 6, 2009.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

Not applicable. There is no information filed at the Commission under the FERC-916.

11. PROVIDE ADDITIONAL JUSTIFICATION FOR ANY QUESTIONS OF A SENSITIVE NATURE

Not applicable. There are no questions in the FERC-916.

12. ESTIMATED BURDEN OF COLLECTION OF INFORMATION

Number of Respondents Annually		Average Burden Hours Per Response		Total Annual Burden Hours
222	x	1	=	222

13. ESTIMATE OF TOTAL ANNUAL COST OF BURDEN TO RESPONDENTS

Respondent Burden Hours		Cost per Staff Employee Hour		Labor Cost		Storage Cost[5]		Total Annualized Cost
222	x	$17	=	$3,774	+	$81,051	=	$84,825

The estimated cost burden to respondents is $84,825.00. The estimated cost per respondent is $382.09.

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT

The estimated burden on government for analysis is *de minimis*, as the information collection merely requires entities to retain documents for a longer period of time than they might otherwise. The record retention period may cause the Commission to expend a few more hours analyzing records, but this increase would likely be very small. In addition, auditing of these records may be performed on a case-by-case basis as a result of allegations of wrongdoing or possible problems.

The estimated annual federal cost for Forms Clearance review is $1,480.00.

15. REASONS FOR CHANGES IN BURDEN INCLUDING THE NEED FOR ANY INCREASE

There has been no increase in burden and no change to the record retention requirements. However, the estimates provided for industry burden and cost have been improved.

16. TIME SCHEDULE FOR PUBLICATION OF DATA

The FERC-916 concerns only the retention of information for applicable entities; no information is collected or published by the Commission.

17. DISPLAY OF EXPIRATION DATE

There is no information filed with the Commission under the FERC-916.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT

[5] Calculated using an estimated 12,548 ft^3 of storage space.

There is one exception to the Paperwork Reduction Act statement. The Commission will not use statistical survey methodology for FERC-916.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable. Statistical methods are not employed for this data collection.

ATTACHMENT A

Energy Policy Act of 2005

SEC. 315. MARKET MANIPULATION.
The Natural Gas Act is amended by inserting after section
4 (15 U.S.C. 717c) the following:
‘‘PROHIBITION ON MARKET MANIPULATION
‘‘SEC. 4A. It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.’’.

SEC. 1283. MARKET MANIPULATION.
Part II of the Federal Power Act (16 U.S.C. 824 et seq.) is amended by adding at the end the following:

‘‘SEC. 222. PROHIBITION OF ENERGY MARKET MANIPULATION.
‘‘(a) IN GENERAL.—It shall be unlawful for any entity (including an entity described in section 201(f)), directly or indirectly, to use or employ, 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, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))), in contravention of such rules and regulations as the Commission may prescribe
as necessary or appropriate in the public interest or for the protection of electric ratepayers.
‘‘(b) NO PRIVATE RIGHT OF ACTION.—Nothing in this section shall be construed to create a private right of action.’’.

ATTACHMENT B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Revisions to Record Retention Requirements for Unbundled Sales Service, Persons Holding Blanket Marketing Certificates, and Public Utility Market-Based Rate Authorization Holders	Docket No. RM06-14-000

ORDER NO. 677

FINAL RULE

(Issued May 19, 2006)

I. Introduction

1. On February 16, 2006, the Commission issued a Notice of Proposed Rulemaking (NOPR) in which we proposed to revise §§ 284.288(b) and 284.403(b) of our regulations,[6] as promulgated by Order No. 644.[7] Sections 284.288(b) and 284.403(b) of the regulations require sellers to retain for a period of three years all data and information upon which they billed the prices charged for natural gas sales or prices they reported for use in price indices. Similarly, the Commission proposed revising new § 35.37(d) of the Commission's regulations under the Federal Power Act. Section 35.37(d) is the codification of former Market Behavior Rule 5.[8]

[6] 18 CFR 284.288(b) and 284.403(b) (effective Mar. 29, 2006). Prior to March 29, 2006, the record retention rules were contained in 18 CFR 284.288(c) and 284.403(c), but were re-designated at paragraphs (b) of those sections in Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates, Order No. 673, 71 FR 9709 (Feb. 27, 2006), FERC Stats. & Regs. ¶ 31,207 (2006).

[7] Amendments to Blanket Sales Certificates, Order No. 644, 68 FR 66323 (Nov. 26, 2003), FERC Stats. & Regs. ¶ 61,153 (2003), reh'g denied 107 FERC ¶ 61,174 (2004) (Order No. 644).

[8] The Commission recently codified certain Market Behavior Rules, including Market Behavior Rule 5, which was formerly a tariff condition for market-based rate sellers of electricity and related products. Conditions for Public Utility Market-Based Rate Authorization Holders, 114 FERC ¶ 61,163 (2006). The Commission in that order also rescinded Market Behavior Rules 2 and 6. Id. The Commission had promulgated former Market Behavior Rule 5 along with the other Market Behavior Rules in Investigation of Terms and Conditions of Public Utility

Section 35.37(d) requires that sellers retain for a period of three years 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 prices they reported for use in price indices.[9]

II. Background

2. In the NOPR, the Commission stated that subsequent to the issuance of Order No. 644 and the Market Behavior Rules Order, Congress provided the Commission with specific anti-manipulation authority in sections 315 and 1283 of the Energy Policy Act of 2005 (EPAct 2005).[10] To implement this new authority, the Commission issued Order No. 670, where we said we would adhere to the generally applicable five-year statute of limitations where we seek civil penalties for violations of the new anti-manipulation rules.[11] In the NOPR we pointed out that it would be inconsistent to allow complaints or enforcement actions seeking civil penalties for alleged violations to our anti-manipulation authority to be commenced more than three years after the transactions giving rise to such actions were carried out, but not to require that the data and information related to such transactions be retained for at least that long. Accordingly, the NOPR proposed to extend the record retention requirements of §§ 284.288(b) and 284.403(b) regarding natural gas records, and § 35.37(d) regarding electric records, from three to five years, in order to be consistent with the recently issued Order No. 670.[12]

III. Discussion

3. Two parties, the Edison Electric Institute and its Alliance of Energy Suppliers (together, EEI) and the American Public Gas Association (APGA), filed comments.[13] EEI and

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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) (Market Behavior Rules Order).

[9] 18 CFR 35.37(d) (effective Feb. 27, 2006).

[10] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), sections 315 and 1283.

[11] Prohibition of Energy Market Manipulation, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, p. 30,069 at P 63 (2006) (Order No. 670). In Order No. 670, the Commission did not adopt a specific statute of limitations on complaints or enforcement actions that may be brought pursuant to the Commission's anti-manipulation authority, but we did note that, when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations (as is the case with respect to the Commission's anti-manipulation authority), a five-year limitation period applies. Id. citing 28 U.S.C. 2462 (2000).

[12] NOPR at P 7.

[13] Another party, Edison Mission Energy, Edison Mission Market and Trading, Inc., and Midwest Generation EME, LLC (Edison Mission), filed a motion to intervene pursuant to the

APGA seek clarification regarding certain implementation issues involving the Commission's proposal to extend the record retention requirement from three to five years, but do not object to the proposed five-year retention period.

A. Comments

4. EEI states that under the current rule, a party is no longer required to maintain records created on March 1, 2002 after March 1, 2005.[14] EEI points out that if the proposed rule were finalized on May 1, 2006, then parties who no longer have records from March 2002 would technically be out of compliance with the Commission's rules because the March 2002 records were not maintained for five years.[15] Therefore, EEI requests that the Commission specify in the Final Rule that all new records must be maintained for five years and any existing records must be maintained for five years, but

that removal of records three or more years old prior to issuance of the Final Rule will not be a rule violation.[16]

5. APGA supports the Commission's proposal to extend the record retention requirement provided in §§ 284.288 and 284.403 of the Commission's regulations from three to five years.[17] APGA, however, requests the Commission clarify that the five-year period is a minimum period, subject to extension if at the end of a five-year period private parties or the Commission have initiated an investigation or formal litigation (whether regulatory or judicial) against a jurisdictional entity.[18] Accordingly, APGA urges the Commission to make clear that destruction of records at the end of the five-year period (or thereafter) is not permitted so long as an investigation or formal litigation involving the affected entity is ongoing.[19]

B. Commission Determination

6. The Commission adopts the Final Rule as proposed in the NOPR and revises §§ 284.288(b) and 284.403(b) of our regulations to require applicable sellers to retain for a period of five years all data and information upon which they bill the prices charged for natural gas sales or prices they report for use in price indices. Similarly, we revise § 35.37(d) of the Commission's regulations to require applicable sellers to retain for a period of five years all data and information upon which they bill the prices charged for electricity and related products in sales made under their market-based rate tariffs and authorizations or prices they report for use in price indices. These revisions reflect a two-year increase in the record retention requirement applicable to transactions pursuant to blanket certificates for unbundled natural gas sales services held by interstate natural gas pipelines, blanket marketing certificates held by persons making sales for resale of natural gas at negotiated rates in interstate commerce, and market-based rate authorizations held by certain sellers of electricity and related products. The extension of the record retention requirement we adopt here is necessary to ensure consistency with the new rule

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Commission's Rules of Practice and Procedure, 18 CFR 385.212 and 385.214.

[14] EEI at 2.
[15] Id.
[16] Id.
[17] APGA at 2.
[18] Id.
[19] Id.

prohibiting market manipulation adopted in Order No. 670 and the generally applicable five-year statute of limitations where we seek civil penalties for violations of the new anti-manipulation rules or other rules, regulations, or orders as to which the price data may be relevant.

7. In response to EEI's comments, the Final Rule does not apply retroactively to records that were not retained because they were three or more years old. The Final Rule requires that all new records must be retained for five years and any existing records, including those more than three years old, must be retained for five years. However, the failure to retain records more than three years old, prior to the effective date of the Final Rule, will not be a violation of the Final Rule.

8. In response to APGA's comments, the Commission notes that upon the commencement of an investigation, whether formal or informal, the entity being investigated is routinely directed to preserve and retain all existing and future records relevant to the subject matter of the investigation. Moreover, we note that §§ 125.2(l) and 225.2(l) of our regulations require that entities involved in litigation are to retain all relevant records.[20]

IV. Information Collection Statement

9. As discussed herein, the Commission is extending the record retention period of §§ 284.288(b), 284.403(b) and 35.37(d) of the Commission's regulations from three years to five years consistent with the statute of limitations that applies to actions seeking civil penalties for violations of the Commission's new anti-manipulation rule or other rules, regulations, or orders as to which price data and information may be relevant. The increased duration of information retention contained in this Final Rule has been submitted to the Office of Management and Budget (OMB) for review under the section 3507(d) of the Paperwork Reduction Act of 1995.[21] OMB's regulations require OMB to approve certain information collection requirements imposed by agency rule.[22]

10. The Commission's regulations in §§ 284.288(b), 284.403(b) and 35.37(d) specify the mandatory record retention requirements applicable to certain sellers of natural gas and electricity. The information provided to the Commission under Part 284 for record retention purposes remains identified as FERC-549. The Commission identifies the information provided for under Part 35 as FERC-516. As discussed above, the Commission is extending the mandatory record retention requirements in Parts 35 and 284 of its regulations for an additional two years.

11. Comments were solicited in the NOPR on the need for the increased record retention period, whether it will have practical utility, the accuracy of burden estimates in the NOPR, and for suggested methods of minimizing respondents' burdens. No comments were received on the need for, or burden or costs, of the increased records retention period. The burden for complying with this Final Rule is estimated as follows:

Data Collection	No. of	No. of	Hours Per	Total Annual

[20] 18 CFR 125.2(l) and 225.2(l) (2005).

[21] 44 U.S.C. 3507(d) (2000).

[22] 5 CFR 1320.11 (2005).

FERC-516 & FERC-549 Records Retention	Respondents	Responses	Response	Hours
FERC-516	1,150	1	2	2,300
FERC-549	222	1	2	444
Totals	1,372	1	2	2,744

Total Annual hours for Record Retention: Recordkeeping, 2,744 hours.

Information Retention Costs: The Commission projects an annualized average cost of all respondents as 2,744 hours @ $17 an hour = $46,648 (staffing) + $2,538,200 (1,372 entities @ $925 per year x 2 (storage)). This cost is based on 120 cubic feet (20 four-drawer file cabinets transferred off site to a storage facility). The costs include cubic feet of storage plus the cost of floor space plus the costs for records storage cartons. The Commission is requiring that entities retain records for an additional two years. Total costs = $2,584,848. Greater savings can be accomplished if documents are stored electronically, i.e., one file cabinet (four-drawer) (10,000 pages on average) = 500 MegaBytes (MByte) = one CD ROM.

Title: FERC- 549, Gas Pipeline Rates: Natural Gas Policy Act, Section 311; FERC-516, Electric Rate Schedule Filings.

Action: Proposed Collection.

OMB Control No: 1902-0086 and 1902-0096.

Respondents: Businesses or other for profit.

Frequency of Responses: Records of market-based rate transactions shall be retained for five years instead of three.

Necessity of the Information: It would be very difficult (if possible at all) for the Commission to monitor and prosecute violations of pipeline and blanket certificate sales of natural gas and market-based rate sales of electricity unless the underlying data and information supporting the prices charged for sales were retained. This data retention requirement is consistent with the information and data retention requirements applicable to sellers having cost-based rates.[23] Requiring pipeline and blanket certificate sellers of natural gas, and market-based rate sellers of electricity, to retain records is also consistent with the Commission's past practices as set forth in §§ 284.288(b), 284.403(b) and 35.37(d) of the Commission's regulations and, although the Commission adopts a retention period of five years (as opposed to the previous three-year requirement), such longer period is now required to ensure the information and data will remain available to support complaints and enforcement actions involving civil penalties for violations that occurred more than three years earlier.

V. Environmental Analysis

12. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[24] The Commission has categorically excluded certain actions from this

[23] See 18 CFR parts 125 and 225 (2005).

[24] Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (1987), FERC Stats. & Regs. ¶30,783 (1987).

requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[25] This Final Rule does not substantially change the regulations being amended, but merely extends for an additional period of time the existing retention requirements of the regulations and,
therefore, falls under this exception; consequently, no environmental assessment is necessary.

VI. Regulatory Flexibility Act Certification

13. The Regulatory Flexibility Act of 1980[26] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.[27] The Commission is not required to make such analyses if a rule would not have such an effect. The Final Rule merely extends an already existing record retention requirement from three to five years. Therefore, the Commission certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

VII. Document Availability

14. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. E.S.T.) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

15. From the Commission's Home Page on the Internet, this information is available in the eLibrary. The full text of this document is available on eLibrary both in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

16. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@FERC.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

VIII. Effective Date and Congressional Notification

17. This Final Rule will be effective [insert date 30 days from publication in **FEDERAL**

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[25] 18 CFR 380.4(a)(2)(ii) (2005).

[26] 5 U.S.C. 601-612 (2000).

[27] The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. 632 (2000). The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.201 (Section 22, Utilities, North American Industry Classification System, NAICS) (2004).

REGISTER]. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory

Enforcement Fairness Act of 1996.[28] The Commission will submit the Final Rule to both houses of Congress and the Government Accountability Office.

List of subjects

18 CFR Part 35
Electric power rates, Electric utilities, Reporting and recordkeeping requirements
18 CFR Part 284
Continental shelf, Natural gas, Reporting and recordkeeping requirements
By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission amends parts 35 and 284 Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 35 - - FILING OF RATE SCHEDULES AND TARIFFS

1. The authority citation for part 35 continues to read as follows:
Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.
2. In § 35.37, paragraph (d), the word "three" is removed and the word "five" is inserted in its place.

PART 284 - - CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

1. The authority citation for part 284 continues to read as follows:
Authority: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7532; 43 U.S.C. 1331-1356.

2. In § 284.288, paragraph (b), the word "three" is removed and the word "five" is inserted in its place.
3. In § 284.403, paragraph (b), the word "three" is removed and the word "five" is inserted in its place.

[28] See 5 U.S.C. 804(2) (2000).

ATTACHMENT C

105 FERC ¶ 61, 217
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Amendments to Blanket Sales Certificate Docket No. RM03-10-000

ORDER NO. 644

FINAL RULE

(Issued November 17, 2003)

I. Introduction

1. The Federal Energy Regulatory Commission (Commission) is amending the blanket certificates for unbundled gas sales services held by interstate natural gas pipelines and the blanket marketing certificates held by persons making sales for resale of gas at negotiated rates in interstate commerce to require that pipelines and all sellers for resale adhere to a code of conduct with respect to gas sales. The purpose of the revisions is to ensure the integrity of the gas sales market that remains within the Commission's jurisdiction. This rule is another part of the Commission's continuing effort to restore confidence in the nation's energy markets. Contemporaneously with this rule, the Commission is also issuing a rule to require wholesale sellers of electricity at market-based rates to adhere to certain behavioral rules when making wholesale sales of electricity. In an order dated June 26, 2003,[29] the Commission, acting under the authority of Section 7 of the Natural Gas Act, proposed to revise Section 284.288 of its regulations, which is currently reserved, to require that pipelines providing unbundled sales service adhere to a code of conduct when making gas sales. The Commission also proposed to add a new Section 284.403 to Part 284, Subpart L to require persons holding blanket marketing certificates under Section 284.402 to adhere to a code of conduct when making gas sales.[30]

[29]103 FERC ¶ 61,350 (2003) (June 26 NOPR).

[30]Section 284.5 of the Commission's regulations also states that "[t]he Commission may prospectively, by rule or order, impose such further terms and conditions as it deems appropriate

2. The need for this code of conduct, we stated, was informed by the types of behavior that occurred in the Western markets during 2000 and 2001, by Commission Staff's Final Report concerning these markets,[31] and by our experience in other competitive markets. We stated that in formulating our proposed code of conduct rules, we were required to strike a careful balance among a number of competing interests. We noted, for example, that while customers must be given an effective remedy in the event anticompetitive behavior or other market abuses occur, sellers should be provided rules of the road that are clearly-delineated. We noted that while regulatory certainty was important for individual market participants and the marketplace in general, the Commission must not be impaired in its ability to provide remedies for market abuses whose precise form and nature cannot be envisioned today. We specifically sought comments on whether our proposed code of conduct rules had achieved the appropriate balance among these competing interests.

3. Here, based on the extensive comments received by the entities listed in the Appendix to this order and based on our further consideration of the issues presented, we will adopt the code of conduct rules proposed in the June 26 NOPR subject to certain modifications discussed below. These rules, as revised, are set forth below in, 18 CFR §§ 284.288 and 284.403.

4. Under Sections 284.288 and 284.403 of the new codes of conduct, a pipeline providing unbundled natural gas sales service under Section 284.284, or any person making natural gas sales for resale in interstate commerce pursuant to Section 284.402, is prohibited from engaging in actions without a legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion.

5. New Sections 284.288 and 284.403 also contain various reporting obligations. To the extent a pipeline providing service under Section 284.284, or any person making natural gas sales for resale in interstate commerce pursuant to Section 284.402, engages in reporting of transactions to publishers of gas price indices, the pipeline or blanket marketing certificate holder shall provide complete and accurate information to any such publisher. Further, such entities must retain all relevant data and information upon which they billed the prices they charged for natural gas they sold pursuant to their market based sales certificate or the prices they reported for use in price indices for three years. Moreover, such entities that engage in reporting must do so consistent with the Policy Statement on Natural Gas and Electric Price Indices, 104 FERC ¶ 61,121 (2003) (Policy Statement), which provides that a data provider should only report each bilateral, arm's-length transaction between non-affiliated companies. Violation of the preceding

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on transactions authorized by this part."

[31] Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000 (March 2003) (Final Report).

provisions may result in disgorgement of unjust profits, suspension or revocation of a pipeline's blanket certificate or other appropriate non-monetary remedies. Finally, any person filing a complaint for a violation of the preceding provisions must do so no later than 90 days after the end of the calendar quarter in which the alleged violation occurred unless that person could not have known of the alleged violation, in which case the 90-day time limit will run from the discovery of the alleged violation.

6. This code of conduct is designed to provide market participants adequate opportunities to detect, and the Commission to remedy, market abuses. This code is clearly defined so that its does not create uncertainty, disrupt competitive commodity markets or simply prove ineffective. However, since competitive markets are dynamic, it is important that we periodically evaluate the impact that these regulations have on the energy markets. We direct our office of Market Oversight and Investigation to evaluate the effectiveness and consequences of these regulations on an annual basis and to include this analysis in the State of the Markets Report.

II. Background

A. Changes in Natural Gas Industry

7. A decade ago, as a result of changes in the natural gas industry, Congressional legislation and various Commission rulemaking proceedings restructuring the gas industry, the Commission issued blanket certificates to allow pipelines and other persons selling natural gas to make sales for resale of natural gas at market-based or negotiated rates. These certificates were granted in two final rules issued by the Commission: Order No. 636[1] and Order No. 547.[2]

8. In Order No. 636, the Commission required all pipelines that provide open-access transportation to offer their sales services on an unbundled basis. To this end, the Commission issued to pipelines holding a blanket transportation certificate under subpart G of Part 284 of the Commission's regulations, or performing transportation under

[1] Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC. Stats. & Regs.¶ 30,939 (1992), order on reh'g, Order No. 636-A, FERC. Stats. & Regs. ¶ 30,950 (1992), order on reh'g, Order No. 636-B, 61 FERC. ¶ 61,272 (1992), aff'd in part, rev'd in part, United Distribution. Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), cert. denied, 137 L. Ed. 2d 845, 117 S. Ct. 1723, 117 S. Ct. 1724 (1997), on remand, Order No. 636-C, 78 FERC. ¶ 61,186 (1997), order on reh'g, Order No. 636-D, 83 FERC ¶ 61,210 (1998).

[2] Regulations Governing Blanket Marketer Sales Certificates, FERC Stats. & Regs. ¶ 30,957 (1992), order on reh'g and clarification, 62 FERC ¶ 61,239 (1993).

subpart B, a blanket certificate authorizing firm and interruptible sales for resale.[3] The Commission required that all firm and interruptible sales services be provided as unbundled services under the blanket sales certificate. The Commission found that this form of regulation would enable the pipelines to compete directly with other gas sellers on the same terms at prices determined in a competitive market. The unbundled sales services were also afforded pregranted abandonment authority.

9. In Order No. 636, the Commission authorized pipelines to make unbundled sales at market-based rates because it concluded that, after unbundling, sellers of short-term or long-term firm gas supplies (whether they be pipelines or other sellers) would not have market power over the sale of natural gas. The Commission's determination was also based on Congress' express finding that a competitive market exists for gas at the wellhead and in the field. The Commission indicated that it was instituting light-handed regulation, relying upon market forces at the wellhead or in the field to constrain unbundled pipeline sales for resale gas prices within the Natural Gas Act's "just and reasonable" standard. In addition, the requirement that pipelines provide open access transportation from the wellhead to the market also permitted the Commission to exercise light-handed regulation over jurisdictional gas sales. Finally, the Commission stated that it would be regulating the pipeline sales in the same manner as it had done for sales for resale by marketers.

10. The Commission also determined that a pipeline as a gas merchant would be the functional equivalent of a pipeline's marketing affiliate. The Commission concluded that standards of conduct set forth by Order No. 497 would apply to the relationship between the pipeline transportation function and its merchant function.[4] Accordingly, the regulations issuing pipelines blanket sales certificates included standards of conduct and reporting requirements. The purpose of imposing the requirements set forth in Order No.

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[3] 18 CFR § 284.281-287 (2003).

[4] Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497 , 53 FR 22139 (June 14, 1988), FERC Statutes and Regulations, Regulation Preambles 1986-1990 ¶ 30,820 (1988), order on rehearing, Order No. 497-A , 54 FR 52781 (Dec. 22, 1989), FERC Statutes and Regulations, Regulation Preambles 1986-1990 ¶ 30,868 (1989), order extending sunset date, Order No. 497-B , 55 FR 53291 (Dec. 28, 1990), FERC Statutes and Regulations, Regulation Preambles 1986-1990 ¶ 30,908 (1990), order extending sunset date and amending final rule, Order No. 497-C , 57 FR 9 (Jan.2, 1992), FERC Statutes and Regulations ¶ 30,934 (1991), reh'g denied, 57 FR 5815, 58 FERC ¶ 61,139 (1992), aff'd in part and remanded in part, Tenneco Gas v. Federal Energy Regulatory Commission, 969 F.2d 1187 (D.C. Cir. 1992), order on remand, Order No. 497-D , 57 FR 58978 (Dec. 14, 1992), FERC Statutes and Regulations ¶ 30,958 (1992), order on reh'g and extending sunset date, Order No. 497-E , 59 F.R. 243 (Jan.4, 1994), FERC Statutes and Regulations ¶ 30,987 (Dec. 23, 1994), order on reh'g, Order No. 497-F , 59 FR 15336 (Apr. 1, 1994), 66 FERC ¶ 61,347 (1994).

497 was to ensure that the pipeline did not favor itself as a merchant over other gas suppliers in performing its transportation function.

11. In Order No. 547, as part of the industry restructuring begun by Order No. 636, the Commission issued blanket certificates to all persons who are not interstate pipelines authorizing them to make jurisdictional gas sales for resale at negotiated rates with pregranted abandonment authority.[5] The blanket certificates were issued by operation of the rule itself and there was no requirement for persons to file applications seeking such authorization. The Commission determined that the competitive gas commodity market would lead all gas suppliers to charge rates that are sensitive to the gas sales market and cognizant of the variety of options available to gas purchasers. The Commission further stated that, in a competitive market, the basis for the rate to be negotiated between a willing buyer and seller is a commercial, not a regulatory, matter. The requirement that pipelines provide open access transportation from the wellhead to the market also permitted the Commission to exercise light-handed regulation over jurisdictional gas sales. The Commission also determined that marketing certificates issued by the final rule are of a limited jurisdiction. The Commission held that the holders of marketing certificates are not subject to any other regulation under the Natural Gas Act jurisdiction of the Commission by virtue of transactions under the certificates.

B. Events in Western Energy Markets

12. In March 2003, in Docket No. PA02-2-000, the Commission Staff concluded its Fact Finding Investigation of Potential Manipulation of Electric and Gas Prices and issued a Final Report on Price Manipulation in Western Markets (Final Report). A key conclusion of the Final Report is that markets for natural gas and electricity in California are inextricably linked, and that dysfunctions in each fed off one another during the California energy crisis. Staff found that spot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market. The Final Report found that dysfunctions in the natural gas market appear to stem, at least in part, from efforts to manipulate price indices compiled by trade publications. The Final Report stated that reporting of false data and wash trading are examples of efforts to manipulate published price indices.

13. While the Final Report contained numerous recommendations which will not be discussed here, the Staff did recommend that Sections 284.284 and 284.402 of the Commission's regulations be amended to provide explicit guidelines or prohibitions for trading natural gas under Commission blanket certificates. The specific recommendations include: (1) conditioning natural gas companies' blanket certificates on providing accurate and honest information to entities that publish price indices; (2) conditioning blanket certificates on retaining all relevant data for three years for reconstruction of price indices; (3) establishing rules banning any form of prearranged wash trading; and (4) prohibiting the reporting of trades between affiliates to industry

[5] 18 C.F.R. § 284.401-402 (2003).

indices.

III. Comment Analysis

A. Application of Code of Conduct to Jurisdictional Sellers

14. As an initial matter, the Commission will clarify the extent of its jurisdiction over resales of natural gas. As stated above, the Commission's NGA jurisdiction to regulate the prices charged by sellers of natural gas has been substantially narrowed by the Natural Gas Policy Act of 1978 (NGPA) and Congress' subsequent enactment of the Natural Gas Wellhead Decontrol Act of 1989. As a result of these statutory provisions first sales of natural gas were deregulated. Under the NGPA, first sales of natural gas are defined as any sale to an interstate or intrastate pipeline, LDC or retail customer, or any sale in the chain of transactions *prior* to a sale to an interstate or intrastate pipeline or LDC or retail customer. NGPA Section 2(21)(A) sets forth a general rule stating that all sales in the chain from the producer to the ultimate consumer are first sales until the gas is purchased by an interstate pipeline, intrastate pipeline, or LDC.[32] Once such a sale is executed and the gas is in the possession of a pipeline, LDC, or retail customer, the chain is broken, and no subsequent sale, whether the sale is by the pipeline, or LDC, or by a subsequent purchaser of gas that has passed through the hands of a pipeline or LDC, can qualify under the general rule as a first sale on natural gas. In addition to the general rule, NGPA Section 2(21)(B) expressly excludes from first sale status any sale of natural gas by a pipeline, LDC, or their affiliates, except when the pipeline, LDC, or affiliate is selling its own production.

15. Therefore, the Commission's jurisdiction under the NGA includes all sales for resale by interstate and intrastate pipelines and LDCs and their affiliates, other than their sales of their own production. The Commission's jurisdiction also includes a category of sales by entities that are not affiliated with any pipeline or LDC. Such entities are those making sales for resale of gas that was previously purchased and sold by an interstate or intrastate pipeline or LDC or retail customer.

16. Given that the Commission does not have jurisdiction over the entire natural gas market, several commenters raise concerns regarding the potential adverse effect of imposing the proposed code of conduct only on the portion of the natural gas market under the Commission's jurisdiction.[33] Commenters assert that the proposed rules could

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[32] NGPA Section 2(21)(A) states:

> General Rule.- The term "first sale" means any sale of any volume of natural gas- (i) to any interstate pipeline or intrastate pipeline; (ii) to any local distribution company; (iii) to any person for use by such person; (iv) which precedes any sale described in clauses (i),(ii), (iii); and (v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this Act.

[33] See, e.g., AGA, Peoples, NiSource, Nicor, Cinergy, Sempra, FPL Group, Reliant, Coral, NJR Companies, EPSA, ProLiance, Duke Energy, Questar, Western.

tilt capital markets against those subject to the code of conduct because they would be viewed as a riskier proposition than those entities selling gas that do not have the same regulatory risk. Commenters argue that to impose these regulations on a portion of the market causes an uneven playing field and amounts to undue discrimination because those under the rules would be: (1) subject to sanctions such as loss of certificate authority and disgorgement of profits; (2) hesitant to engage in legitimate transactions due to uncertainty imposed by vague and inconsistent standards developed in different proceedings; (3) subject to the increased risk of private enforcement actions by gas purchasers before the Commission; (4) subject to the shifting of investment to non-jurisdictional marketers, and; (5) subject to increased recordkeeping costs for jurisdictional entities.

17. Commenters argue that the proposed regulations are duplicative because other government agencies such as the Federal Trade Commission, the Department of Justice, and various state agencies already exercise jurisdiction over anticompetitive behavior.[34] Further, commenters argue that in addition to stifling innovation, the proposed regulations will erode regulated marketer participation, and thereby reduce the efficiency of the markets and deprive the customers of the benefits of deregulation. Furthermore, since this code regulates only a small portion of the market,[35] they argue that the rules will be ineffective in achieving uniform compliance.

18. Finally, commenters maintain that before imposing these potentially burdensome compliance conditions, the Commission should ascertain critical information on its effects, including the percentage of the natural gas sellers that would be required to comply with the proposed rule or the amount of the gas affected. Commenters argue that uncertainty caused by the proposed rules would be particularly damaging in light of the current need for additional supplies and the current need to regain investor confidence.

19. However, several commenters support the Commission's action in imposing a code of conduct.[36] These commenters state that if jurisdictional gas sellers seek to avoid a requirement that they do business honestly by restructuring their business to escape the Commission's jurisdiction, Congress might be interested in broadening the Commission's jurisdiction to prevent such outcomes. Moreover, they assert that the only way that jurisdictional certificate holders could be at a competitive disadvantage is if they are competing against companies that are engaging in the very illegal acts that the Commission's code of conduct is proscribing. Finally, commenters argue that the

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[34] Coral at 5.

[35] See NiSource at 9 (stating that the sales for resale by interstate pipelines and off-system sales by LDCs constitute a small portion of the gas sales transactions in the market, in contrast to producers and independent marketers that account for a very substantial portion of gas sold, which are not subject to the proposed regulations).

[36] See, e.g., BP, EMIT, CPUC, NASUCA.

proposed regulations should not harm any market participant and should not have a negative impact on natural gas prices, but will only require action consistent with a competitive market.

20. The Commission has reviewed the comments setting forth possible problems in placing a code of conduct regulations over the portion of the natural gas marketplace within its jurisdiction. In the Commission's view, implementing these regulations designed to prevent manipulation of market prices and prevent abusive behavior which distorts the competitive marketplace for natural gas will not present an undue burden for gas sellers under the Commission's jurisdiction or disrupt the competitive gas market.

21. As stated above, the Commission retains jurisdiction of sales of domestic gas for resale by pipelines, local distribution companies and affiliated entities, if the seller does not produce the gas it sells. The fact that the Commission does not regulate the entire natural gas market does not compel the Commission to refrain from exercising its authority over that portion of the gas market which is within its jurisdiction to prevent the manipulation of prices. By its action here, the Commission will maintain and protect the competitive marketplace within its jurisdiction. On balance, the Commission finds that its statutory responsibility to ensure just and reasonable rates for the sales over which it does have jurisdiction outweighs concerns that a portion of the market will not be subject to these regulations and the potential resulting market disruptions.[37]

22. This finding is based upon a balancing of factors raised by the commenters against the Commission's duty to maintain the competitive marketplace for natural gas within its jurisdiction. Although all sellers of natural gas will not be under the same set of regulations, this does not by itself place an undue burden, or for that matter, a competitive disadvantage of any consequence upon the sellers of natural gas within the Commission's jurisdiction. This is because the regulations to be placed upon jurisdictional natural gas sellers only prevent such market participants from distorting the competitiveness of the marketplace by engaging in abusive or manipulative acts in the marketplace. For instance, commenters argue that the increased regulatory risk could shift capital markets against those subject to the new regulations. This argument is speculative and it appears to the Commission that it is at least equally likely that investors and gas buyers would gain confidence in the knowledge that the jurisdictional seller of natural gas was required to engage in business practices that do not abuse or manipulate the marketplace.

B. Limited Jurisdiction of Blanket Certificates

23. In its June 26 NOPR, the Commission proposed to delete the last sentence of 18 CFR § 284.402(a) (2003) from its regulations. That sentence reads, "[a] blanket certificate issued under Subpart L is a certificate of limited jurisdiction which will not subject the certificate holder to any other regulation under the Natural Gas Act jurisdiction of the Commission by virtue of the transactions under the certificate."

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[37] We note that the Commission also does not have jurisdiction over all sales for resale in electric markets. The Commission nevertheless exercises its authority to prevent manipulation of the market by those sellers over whom it does have jurisdiction.

24. Several commenters raise concerns regarding this deletion.[38] Commenters argue that the statement of limited jurisdiction for the subject blanket certificates should remain in the regulations in order to relieve blanket holders of market sales certificates from any aspect of the Commission's jurisdiction which does not apply to market based rates such as the filing of tariff rates and various forms. Retaining this statement of limited jurisdiction is of particular concern to LDCs that are comprehensively regulated at the state level.[39] Commenters argue that the Commission should clarify that blanket certificate holders are not subject to any other regulations except as provided in Subpart L of Part 284. Finally, commenters argued that the new rules and burdens are inappropriate for affiliates of small pipelines, particularly where the pipeline is non-major and serves few customers and the affiliated seller is selling supplies for the primary purpose of balancing its purchases with its manufacturing needs.[40] These commenters argue that the Commission should establish a procedure to exempt such affiliates of small pipelines.

25. The Commission has reviewed the comments and has determined that it will not delete the affirmative statement of limited jurisdiction from its regulations; rather, in keeping with the points raised by the comments it will modify the sentence to read, "[a] blanket certificate issued under Subpart L is a certificate of limited jurisdiction which will not subject the certificate holder to any other regulation under the Natural Gas Act jurisdiction of the Commission, other than that set forth in this Subpart L, by virtue of the transactions under this certificate." Because the regulations adopted by the instant rulemaking will be placed in Subpart L, this action will maintain the original intent of the limited market based blanket certificate while allowing for the new conditions found necessary by the Commission.

26. Further, the Commission will not grant a generic exception to these regulations for small entities. In the Commission's view, entities with a small number of customers making few, or low volume, transactions should incur only minimal administrative or financial burden by virtue of these regulations.

C.Code of Conduct

1. General Language Prohibiting Manipulation

27. As revised Section 284.288(a) of the Commission's regulations provides that:

> A pipeline that provides unbundled natural gas service under § 284.284 is prohibited from engaging in 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 natural

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[38] See, e.g., Peoples, TXU, NiSource, USG, AGA, NGSA, NJR Companies, Shell Offshore, BP, Western.

[39] See NiSource.

[40] See USG.

gas.[41]

28. As discussed above, several commenters raise concerns regarding the general language prohibiting manipulation.[42] 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

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[41] 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.

[42] 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.

conduct they require or prohibit,[43] 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."[44] 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."[45]

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.[46] 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."[47]

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.[48] 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."[49]

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[43] See Freeman United Coal Mining Company v. Federal Mine Safety and Health Review Commission, 108 F.3d 358, 362 (D.C. Cir. 1997) (Freeman).

[44] See General Electric Co. v. EPA, 53 F.3d 1324, 1329-30 (D.C. 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.").

[45] 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.").

[46] 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.").

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

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

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.

37. Nonetheless, we are committed to making our rules as specific as possible and thus, we are adopting a number of the revisions proposed by commenters in order to clarify the scope and application of our rules.

38. We clarify that we are focusing on behavior undertaken without an appropriate commercial underpinning for the purpose of distorting prices from those that would otherwise occur in the competitive market. However, the proposed term that would have characterized as manipulative behavior an act resulting in "market prices which do not reflect the legitimate forces of supply and demand" has resulted in confusion. While we do not believe that our use of this term was inappropriate or unjustified (as we intended it), many commenters appear to have misunderstood its purpose, suggesting that causes other than manipulation may explain a given dysfunction in the interplay between supply and demand. To avoid confusion on this point, then, and because our objectives with respect to this rule can be satisfied under the surviving clause, discussed above, we have eliminated this term from our rule. We clarify that this rule is not meant to say that we will identify prices that properly reflect supply and demand and then take action against

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[49] 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.").

sellers whose prices (however they may be established) differ. Rather, our rule is designed to prohibit market-based rate sellers from taking actions without a legitimate business purpose that are intended to or foreseeably could interfere with the prices that would be set by competitive forces.[50] One such action would be a wash trade. As discussed below, wash trades have no economic risk or substance, and create a false price for use in indices or in the market in general.

39. Commenters have also raised questions regarding how the Commission will determine whether this rule has been violated. In determining whether an activity is in violation of our rule, we will examine all relevant facts and circumstances surrounding the activity to evaluate whether there is a legitimate business purpose attributable to the behavior. We will evaluate whether the activity was designed to lead to (or could foreseeably lead to) a distorted price that is not reflective of a competitive market. Our approach will be to consider the facts and circumstances of the activity to determine its purpose and its intended or foreseeable result. However, the Commission recognizes that manipulation of energy markets does not happen by accident. We also recognize that intent often must be inferred from the facts and circumstances presented. Therefore, a violation of the instant rule must involve conduct which is intended to, or would foreseeably distort prices.[51]

40. Some ambiguity necessarily arises from the fact that we cannot expressly identify all behaviors that are precluded by the instant rule. However, in the Commission's view, the rule and its implementation provide sufficient clarity for market-based rates sellers to understand the scope of precluded behaviors. The rule clearly prohibits behaviors that are undertaken without a legitimate business purpose which are designed to, or foreseeably would, distort prices for jurisdictional natural gas sales.

41. Many commenters have raised concerns with the Commission's inclusion of the phrase "legitimate business purpose." The Commission's inclusion of the phrase is to assure sellers that transactions with economic substance in which a seller offers or provides service to a willing buyer where value is exchanged for value will not be considered prohibited by our rule. While several commenting sellers have raised concerns regarding the inclusion of the phrase "legitimate business purpose" in the rule, we believe that not only is the inclusion of the phrase necessary, it acts to ensure that such sellers acting in a pro-competitive manner will be able to show that their actions were not designed to distort prices or otherwise manipulate the market. Behaviors and transactions with economic substance in which a seller offers or provides service to a

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[50] Our rules are designed to cover actions that are intended to manipulate prices regardless of whether such actions actually resulted in distorted prices. We note, however, that in most such cases there will be no unjust profits to disgorge.

[51] When deciding how best to allocate our enforcement resources, we intend to focus our efforts primarily on those actions or transactions that have, in fact, caused distorted market prices.

willing buyer where value is exchanged for value will be recognized as reflecting a legitimate business purpose consistent with just and reasonable rates. However, an action or transaction which is anticompetitive (even though it may be undertaken to maximize seller's profits), could not have a legitimate business purpose attributed to it under our rule.[52]

42. Prices for transactions undertaken in the competitive marketplace where value is exchanged for value should be disciplined by market forces. On the other hand, all gas transactions may not be constrained by market forces. For example, if a gas merchant bought natural gas at a location typically used as an index reference point in a manner that drives prices higher (and promptly thereafter sold such gas at the market prevailing price at a loss) while also possessing a derivative position at a notional quantity significantly in excess of its physical gas position, that benefits from the increase in the market price of natural gas at this index reference point, these physical purchases may be interpreted as a component of a broader manipulative scheme and the cash market transactions may be found to be without a legitimate business purpose.[53]

43. We recognize that we are establishing a general rule that will become more clear and concrete after we have had the opportunity to consider actual cases. As with all new requirements of this nature, with caselaw comes further clarity. This reflects the fact that we oversee a dynamic and evolving market where addressing yesterday's concerns may not address tomorrow's. Nevertheless, experience in applying this rule should be instructive to both the Commission and market-based rates sellers. As we apply the rule, we will be mindful of the fact that we are not only taking steps to assure just and reasonable rates for a specific transaction but also providing guidance to sellers in general. As such, in determining the appropriate remedy for violations of this rule, we will take into account factors such as how self evident the violation is and whether such violation is part of a pattern of manipulative behavior.

44. The Commission rejects arguments that it should identify and prohibit only expressly-defined acts of manipulation. For all the reasons discussed above, it is essential and appropriate that we have a prohibition designed to prohibit all forms of manipulative conduct. In sum, we believe our rules, as modified, explained and adopted herein, put sellers and all market participants on fair notice regarding the conduct we seek to encourage and the conduct we seek to prohibit. Stripped to their essentials, these guidelines amount to the following: (i) act consistently within the Commission's

[52] See Enron Power Marketing, Inc., 103 FERC ¶ 61,343 (2003) (revoking Enron's blanket marketing certificate authorization based on Enron's participation in wash trades having "no legitimate business purpose").

[53] Although the instant example focused upon gas market prices manipulated upward in order to benefit the merchant derivative position, the transactions implementing any manipulation of the natural gas market will not be considered legitimate. For further discussion of several manipulative strategies see the Commission Staff's Final Report on Price Manipulation in Western Markets, Chapter IX, p. IX-9 through IX-24.

established rules; (ii) do not manipulate or attempt to manipulate natural gas markets; (iii) be honest and forthright with the Commission and the institutions it has established to implement open-access transportation and entities publishing indices for the purpose of price transparency; and (iv) retain associated records. Viewed in this context, there can be no reasonable uncertainty over the underlying objectives embodied in our rules or their requirements going forward.

45. Our code of conduct rules would not supercede or replace parties' rights under Section 5 of the NGA to file a complaint contending that a contract should be revised by the Commission (pursuant to either the "just and reasonable" or "public interest" test as required by the contract). Rather, any party seeking contract reformation or abrogation based on a violation of one or more of these regulations would be required to demonstrate that such a violation had a direct nexus to contract formation and tainted contract formation itself. If a jurisdictional seller enters into a contract without engaging in behavior that violates these regulations with respect to the formation of such contract, we do not intend to entertain contract abrogation complaints predicated on our instant code of conduct rules.

2. Wash Trades

46. Proposed Section 284.288(a)(1) provides that:

> Prohibited actions and transactions include but are not limited to pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk, and no net change in beneficial ownership (sometimes called "wash trades").[54]

47. TXU comments that wash trades should be more precisely defined, contending that the present definition does not explicitly limit the applicable transaction to one involving the same location, price, quantity, and term, and can be interpreted to prohibit legitimate exchange transactions that occur through displacement or backhauls.

48. Merrill Lynch and Morgan Stanley request that the Commission modify the definition of wash trades to clarify that it applies to parties who intended to enter into simultaneous offsetting trades to effectuate a wash trade. They request that the Commission further clarify its definition by specifying that wash trades must involve: (1) a deliberately pre-arranged pair of trades, (2) trades made at the same time, at the same price, and at the same delivery points, and (3) trades made between the same legal entities. NGSA submits that the proposed ban on wash trades should be narrowed to encompass only simultaneous offsetting trades that are intended to manipulate market prices or rules. It explains that parties may enter into legitimate business arrangements that may appear as wash trades, for example, trades made to correct a scheduling or nomination error, or to liquidate a position at a pricing point based on subsequent

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[54] Proposed Section 284.403(a)(1) applies these same prohibited actions and transactions to "[a]ny person making natural gas sales for resale in interstate commerce pursuant to § 284.402 . . . ."

changes in market conditions. NGSA suggests that the proposed regulation regarding wash trades be rewritten as: "knowingly pre-arranged simultaneous offsetting trades of the same product among the same parties, which involve no economic risk, and no net change in beneficial ownership (sometimes called 'wash trades')."

49. Reliant recommends the definition of wash trades be refined to eliminate the possibility that multiple traders within the same company who are trading with multiple traders in another company do not stand accused of engaging in wash trades by the mere coincidence that their trades offset one another. Reliant suggests that the regulation be re-written as: "trades of the same product among the same parties, which trades are pre-arranged to be offsetting and involve no economic risk, and no net change in beneficial ownership (sometimes called "wash trades").

50. The Oversight Board asserts that the definition of wash trade is unduly narrow, because it limits wash trades to transactions involving the same parties, the same quantity, and no economic risk whatsoever. The Oversight Board joins NASCUA in contending the proposed definition would permit a party to evade the wash trade prescription by engaging in transactions that result in the net financial position near to, but not equal to, zero. The Oversight Board contends that the Commission should qualify its wash trade definition to ensure that the codes of conduct can effectively react to unforeseen, novel attempts to circumvent the regulatory process. The Oversight Board requests that the Commission clarify that it will define wash trades as those necessarily affecting market prices or modify the definition to include pre-arranged multi-party transactions.

51. Commenters such as Select, Duke and NEMA suggest that the Commission's definition of a "wash trade" is too broad and may encompass transactions not intended to be wash trades such as "sleeving" and "bookout" transactions. Select explains that "sleeving" is a commonly performed trading practice in which a creditworthy party agrees to act as an intermediary in transactions between two parties who do not have a credit relationship. Duke recommends that legitimate trades may include the so-called "bookout" transactions, in which companies with offsetting delivery obligations resulting from heavy trading activity agree not to deliver to one another the offsetting amounts of energy. In the same vein, NEMA submits that there may be instances where legitimate business purposes appear to be wash trades (e.g., when traders "book out" or "test the waters"), and that the Commission should not deem such trade to be illegal. Sempra request that the wash trade prohibition to only apply to trades that affect the market and asks that the Commission clarify the definition accordingly.

52. Other commenters such as Shell Offshore, NEMA, and Coral question whether the Commission has provided adequate definitions for the terms used in its regulations. For example, Shell Offshore questions what the regulations mean by a "pre-arranged" trade, and how it differs from any other negotiation leading to a trade. It also questions how to define an "offsetting trade," and how the value is measured. It also asks what constitutes the "same product" (i.e., does an exchange of gas among the same parties constitute the

same product, and thus qualify as an illegal wash trade). It also notes that there are legitimate transactions that involve "no economic risk," such as a transaction providing a guaranteed supply at a guaranteed price. NEMA also requests additional clarification of the terms "wash trades" and "pre-arranged deals" and requests that the Commission investigate the meanings of the terms "intentional manipulation" and "wash trades" as they apply to securities and commodity futures trading.

53. The Commission will adopt Section 284.288(a)(1) as proposed. Thus, the regulation will state that:

> Prohibited actions and transactions include but are not limited to pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk and no net change in beneficial ownership (sometimes called "wash trades").[55]

54. The Commission disagrees with the comments that its definition of wash trades is ill conceived or vague. The 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

[55] The Commission also adopts Section 284.403(a)(1) as proposed, which will apply the same prohibited actions and transactions to "[a]ny person making natural gas sales for resale in interstate commerce pursuant to § 284.402 . . . ."

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.[56]

59. Several commenters argue that the Commission should better define the term collusion.[57] 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

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[56] Section 284.403(a)(2) of the Commission's regulations contains an identical prohibition.

[57] See, e.g., Merrill Lynch and Morgan Stanley, Duke, TXU, Sempra, NGSA, NEMA, Shell, EnCana, Hess, Mirant.

pertaining to such rates and charges be just and reasonable.[58] 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.[59] These regulations are expressly tailored to our statutory duties and our competitive goals with respect to the natural gas market.[60]

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 form 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 to such other standards and requirements for price reporting as the Commission may order.[61]

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[58] Section 4(a) of the NGA, 15 U.S.C. § 717c.

[59] 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.

[60] 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.]).

[61] Proposed regulation Section 284.403(b) provides a similar requirement stating:

64. Commenters argue that the Commission should not prescribe reporting requirements that might prevent innovation of better long-term solutions to the industry's evolving future needs for price information.[62] Others argue that the proposed penalties may discourage market participants from voluntarily reporting price data.

65. Commenters also argue that the confidential treatment of reported data, as required by the Policy Statement, is critical to the voluntary reporting process.[63] Moreover, several commenters recommend that the Commission articulate specific reporting requirements, consistent with the Policy Statement. Commenters submit that many aspects of the reporting process remain unclear. For instance, they argue that it is unclear what data must be reported, the format for the data, the policy for confirming the accuracy of the data, and to which entities the seller must report. BP seeks clarification of this rule, contending that it does not mandate reporting, but simply requires that any information reported be "complete." Specifically, BP asks the Commission to clarify that where an entity voluntarily reports, that entity should not be required to report all sales at all locations. Coral suggests that general reviews followed by spot checks should be all that is required to assure a reasonable level of accuracy in reported trade price information.[64] Other commenters argue that the Policy Statement obviates the need for a reporting rule.[65]

66. Several other commenters assert that the rule does not go far enough.[66] They recommend that the Commission require that all entities holding blanket certificates report all of their trades to the data collectors. They assert that only reporting occasional bits of information could lead to inaccuracies.

To the extent that blanket marketing certificate holder engages in reporting of transactions to publishers of gas price indices, the blanket certificate holder shall provide complete, accurate and factual information to any such publisher. The blanket marketing certificate holder shall notify the Commission of whether it engages in such reporting for all sales. In addition, the blanket marketing certificate holder shall adhere to such other standards and requirements for price reporting as the Commission may order.

[62] See, e.g., Western.

[63] See, e.g., PSCNY, NEMA, NGSA, Reliant, TXU.

[64] See Coral at 7.

[65] See, e.g., Mirant, Hess, Coral.

[66] See, e.g., EMIT, Platts, NASUCA.

67. Moreover, several commenters request clarification as to whether the Commission notification requirement is a one-time or ongoing obligation.[67] BP argues that the Commission should clarify that it is only necessary to indicate to the Commission that the entity engages in reporting. Merrill Lynch and Morgan Stanley requests that the Commission clarify that if new entrants or entities that currently do not report to indices subsequently initiate reporting, such entities must notify the Commission within 30 days from the first date they initiated reports.

68. As part of the reporting provisions, numerous parties recommend that the Commission incorporate a safe harbor provision into its proposal so that an industry participant who, in good faith, provides trade data to index developers, will not be subject to penalties for inadvertent mistakes in reporting the information. Several commenters ask that the safe harbor provisions mirror the one adopted in the Commission's Policy Statement.[68] Commenters submit that incorporation of a safe harbor provision will encourage the voluntary reporting of information. Commenters also request the Commission to clarify the proposed false reporting prohibition so that it only applies to information that is known to be false at the time it is reported, as opposed to false reports based on inadvertent mistakes or human error.[69] Nicor and NGSA add that the Commission should expressly state that the safe harbor protections in the Policy Statement are not eliminated or negated by the subject reporting requirements.

69. Calpine contends that any safe harbor provision must be adopted into the proposed code without the burden on industry participants to self-audit and self-correct errors not otherwise discovered in the ordinary course of business. Given the volumes of data to be reported, Calpine believes it a certainty that inadvertent errors that do no harm to the overall integrity of the indices will be made. NEMA urges that the safe harbor be extended to index prices published by parties that meet the Commission's protocols.

70. The Commission proposed this regulation to assure that to the degree that a market-based rates seller reports its transactions to publishers of natural gas price indices, such seller must do so honestly and accurately. The Commission also proposed to require sellers to inform it if they undertook such reporting. Based upon the comments received, we have modified Sections 284.288(b) and 284.403(b) to read as follows:

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[67] See, e.g., AGA, BP (recommending a one-time obligation), Peoples.

[68] See, e.g., Select; see also AGA (recommending that rather than incorporating a safe harbor provision into the subject proceeding, the Commission should clarify that the safe harbor announced in the Policy Statement applies specifically to a blanket marketing certificate holder's obligation, to the extent it engages in reporting of transactions to publishers of gas price indices, to provide complete, accurate, and factual information to any publisher).

[69] See, e.g., Merril Lynch and Morgan Stanley, Select, Mirant.

> To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller shall provide accurate and factual information and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement on Natural Gas and Electric Price Indices, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Seller shall notify the Commission within 15 days of the effective date of this tariff provision of whether it engages in such reporting of its transactions and update the Commission within 15 days of any subsequent change to its transaction reporting status. In addition, Seller shall adhere to such other standards and requirements for price reporting as the Commission may order.

71. In our June 26 NOPR, we referred to our on-going proceeding investigating price index formation. As many commenters have pointed out, since our proposal regarding these rules was issued we have also issued a Policy Statement addressing standards we believe appropriate for the formation of price indices that will be robust and accurate in the context of a voluntary reporting regime.[70] Included in the Policy Statement is a "Safe Harbor" under which reporting errors will not be subject to Commission sanction. Here, we explicitly adopt the standards set forth in the Policy Statement for transaction reporting. Further, we also adopt the "Safe Harbor" set forth therein as a component of our enforcement policy with respect to this rule.

72. The Commission clarifies that the requirement that entities notify the Commission of any change in status with regard to price reporting to indices is an ongoing obligation. As such, the entities must, upon the implementation of these regulations, inform the Commission of whether they report to the index publishers. As shown above, the Commission will modify the text of Sections 284.288(b) and 284.403(b) of its proposed regulations to provide that the blanket marketing certificate holder shall, after the initial notification to the Commission, inform the Commission of its reporting status within 15 days of the effective date of these regulations and within 15 days of any subsequent change in reporting status.

73. Finally, some commenters have asked that we require mandatory reporting while others contend that we have created requirements that will have a chilling effect on reporting. We believe that we have struck an appropriate balance in these rules. For the moment, we are attempting to work within the framework of voluntary reporting. We are awaiting our staff's review of the comprehensiveness of reporting in the wake of our Policy Statement. At this time, we are not mandating reporting. However, we have engaged in a comprehensive investigation of transaction reporting and related issues and believe that the practices set forth in our Policy Statement represent the necessary minimum for those entities that choose to report. Accordingly, we will not require

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[70] Policy Statement, 104 FERC ¶ 61,121 (2003).

reporting, but will seek to learn which sellers are reporting and set forth standards for those that do.

5. Three-Year Data and Information Retention Requirement

74. Proposed Section 284.288(c) of the Commission's regulations provides that:

> A pipeline that provides unbundled natural gas sales service under § 284.284 shall retain all relevant data and information necessary for the reconstruction of price indices for three years.[71]

75. Several entities comment on the Commission's proposed three-year data and information retention requirement.[72] Other commenters request clarification as to what constitutes "relevant data", and suggest that the Commission specify what types of data and information must be retained, and in what format (e.g., paper or electronic).[73] Commenters are concerned that the required documentation will prove too burdensome due to both the time and the money required to store and retrieve information. NJR Companies argues that the proposal may create a new set of business records that could lead to decreased market activity, and a slow-down or elimination of certain transactions.

76. BP asserts that relevant data should be limited to accounting data that records the details of each reported transaction, along with a record of the data transmitted to the index developer, if applicable. BP adds that requiring data maintained in the accounting records would be consistent with the Commission's proposed requirement for price reporting in its recent Policy Statement, which requires that price, volume, buy/sell indicator, delivery/receipt point, transaction date and time, term, and any counterparty name be maintained. It argues that negotiation materials and other ancillary data should not be required to be maintained.

77. Several commenters argue that the three-year retention period is too long, and that the burden may dissuade blanket marketing certificate holders from reporting data.[74] Other commenters argue that the three-year retention period is too short, and that with

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[71] Similarly, proposed Section 284.403(c) provides:

> A blanket marketing certificate holder shall retain all relevant data and information necessary for the reconstruction of price indices for three years.

[72] See, e.g., BP, NJR Companies, NEMA, NGSA, EMIT, Western, Sempra, Reliant, Coral, Hess, Peoples, Mirant, EnCana, NASUCA, ProLiance, Merrill Lynch and Morgan Stanley, PG&E, Duke.

[73] See, e.g., BP, NJR Companies, NEMA, Coral, Peoples, Mirant, EnCana, ProLiance, Merrill Lynch and Morgan Stanley, PG&E.

[74] See, e.g., ProLiance (requesting a 2-year retention period), NEMA (requesting a 1-year retention period), Coral.

current computer technology, a longer retention period should not result in additional costs to market participants.[75] Finally, some commenters argue that the three-year record retention period is consistent with the commercial practices of many natural gas sellers.[76]

78. Several commenters argue that the record retention requirement will only be meaningful if the Commission makes reporting of all trade data mandatory.[77] At the same time, other commenters argue that if an entity does not report, then documentation is not necessary to verify the accuracy of price indices.[78] Other commenters submit that only relevant data should be retained and not peripheral documents that may have been generated in association with a transaction, but which have no bearing on the data reported to index publishers.[79]

79. This proposed rule requires that sellers maintain relevant records regarding their sales for three years. After review of the comments received, we revise Section 284.288(c) to read:

> A pipeline that provides unbundled natural gas sales service under 284.284 must retain, for a period of three years, all data and information upon which it billed the prices it charged for the natural gas it sold pursuant to this certificate or the prices it reported for use in price indices for a period of three years.[80]

80. In revising the proposed rule, we clarify that we are not seeking retention "cost-of service" or analytical data related to sellers' sales as some commenters perceived from our suggestion that entities retain all relevant data "necessary for the reconstruction of price indices" in our original proposal. Rather, we are requiring that sellers retain the complete set of contractual and related documentation upon which such entities billed their customers for sales. The Commission is indifferent as to whether this material is retained in paper form or in an electronic medium as long as the data can be made accessible in a reasonable fashion if its review is required. In addition, commenters raise several issues in regard to the three-year retention period. On balance, the Commission does not believe that requiring sellers to retain records for a three-year period constitutes an undue burden given the fact that the Commission is prepared to allow the records to be

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[75] See, e.g., NASUCA (requesting a 6-year retention period).

[76] See, e.g., Western.

[77] See, e.g., EMIT.

[78] See, e.g., Sempra.

[79] See, e.g., BP, Hess, Mirant, Merrill Lynch and Morgan Stanley.

[80] The Commission will modify Section 284.403(c), applying to blanket marketing certificate holders, in a like manner.

kept in electronic or paper form. To permit a shorter retention period may not allow sufficient time for the investigations into possible violations.

6. Prohibition on Reporting Transactions with Affiliates

81. Proposed section 284.288(d) of the Commission's regulations provides that:

> A pipeline that provides unbundled natural gas sales transactions under § 284.284 is prohibited from reporting any natural gas sales transactions between the pipeline and its affiliates to industry indices.[81]

82. Commenters generally agree with this restriction.[82] NASUCA agrees to the prohibition of affiliate transactions from price indices calculations, but contends that other non-price information, such as the number of trades and the volumes associated with each trade, is important information that will help determine the liquidity at various hubs for which prices are calculated. It recommends that the regulation be modified to state that pipelines and certificate holders should separately report other non-price 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."[83] 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

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[81] Proposed Section 284.403(d) of the Commission's regulations provides that:

> A blanket marketing certificate holder is prohibited from reporting any natural gas sales transactions between the blanket market certificate holder and its affiliates to industry indices.

[82] See ProLiance, NASUCA, EnCana, Hess, NEMA.

[83] See Policy Statement, 104 FERC ¶ 61,121 at P 34 (2003).

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.[84] 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.[85] 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.[86] 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.[87] 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.[88] NJR Companies object to the disgorgement remedy when the violation is inadvertent.[89]

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[84] See, e.g., Comments of AGA, the FPL Group, NGSA, Duke, NGSA and Cinergy.

[85] 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).

[86] 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 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.

[87] See, e.g., Mirant, Cinergy, EnCana, Hess.

[88] See AGA at 10.

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.[90] 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.

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.[91] 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

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[89] NJR Companies at 19.

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

[91] See 18 CFR §§284.401-402 (2003).

certificates the Commission is fulfilling its obligation to appropriately monitor markets and to ensure that market-based rates remain within the zone of reasonableness required by the NGA. [92]

92. In order to find the market based sales service to be in the public convenience and necessity the Commission finds that the conditions herein must be met. Once the sales service is so conditioned, in the Commission's view adequate safeguards are in place so that the Commission may grant market based sales authority to jurisdictional sellers of natural gas. In so conditioning this service, the Commission is not prohibiting a jurisdictional seller of natural gas from requesting a certificate for a different form of service or filing pursuant to Section 4 of the NGA for a different rate or conditions of service. Neither does the Commission prohibit a customer of such a seller from raising objections under Section 5 of the NGA.

93. Moreover, if the conditions of service are not met, the Commission has the authority to impose the appropriate remedy for the violation.[93] In particular, the Commission does not agree with the comments that a violation of an existing condition of service may not be remedied by the Commission from the time the violation occurred. The Commission has the authority to remedy violations of certificate conditions.[94] Moreover, the courts have held that the Commission has a great deal of discretion when imposing remedies devised to arrive at maximum reinforcement of Congressional objectives in the NGA.[95] In devising its remedy the Commission is required to exercise

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[92] ? The Court of Appeals for the D.C. Circuit has held that, while the Commission "enjoys substantial discretion in ratemaking determinations . . . by the same token, this discretion must be bridled in accordance with the statutory mandate that the resulting rates be 'just and reasonable.'" Farmers Union Cent. Exch. Inc. v. FERC, 734 F.2d 1486 at 1501 (D.C. Cir. 1984). In addition, the regulatory regime itself must contain some form of monitoring to ensure that rates remain within a zone of reasonableness and to check rates that depart from this zone. Id. at 1509. See also Louisiana Energy and Power Authority v. FERC, 141 F.3d 364 (D.C. Cir. 1998); Elizabethtown Gas Co. v. FERC, 10 F.3d 866 (D.C. Cir. 1993).

[93] See e.g.,Coastal Oil & Gas Corp. v. FERC, 782 F.2d 1249 (1986).

[94] Consolidated Gas Transmission Corp., et al., 771 F.2d 1536 (D.C. Cir. 1985) (holding that the Commission has the authority under section 16 of the Natural Gas Act to order retroactive refunds to enforce conditions in certificates).

[95] The courts have held that "the breadth of agency discretion is, if anything, at its zenith when the action assailed relates . . . to the fashioning of policies, remedies and sanctions." Columbia Gas Transmission Corp., v. FERC, 750 F.2d 105, 109 (D. C. Cir. 1984), quoting, Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir.1967).

its discretion to arrive at an appropriate remedy,[96] and to explore all the equitable considerations, and practical consequences of its action and the purposes of the NGA.[97]

94. This action of remedying a violation of a certificate condition is not the same as the Commission's action in finding an existing rate unjust and unreasonable after hearing under Section 5 of the NGA. At the initiation of an NGA Section 5 proceeding the existing condition has not yet been found to be unjust and unreasonable. In contrast, in a remedial proceeding the issue is whether the entity has violated an existing condition of the tariff or the regulations. Therefore, in a remedial proceeding, unlike an NGA section 5 proceeding, the regulated entity has notice of the conditions required for service at the time of the implementation of the service condition and the Commission may, at its discretion, fashion an appropriate remedy.

95. In appropriate circumstances these remedies may include disgorgement of unjust profits, suspension or revocation of the blanket sales provision or other appropriate non-monetary remedies. Which of these remedies is appropriate will depend on the circumstances of the case before it and the Commission will not determine here which remedy or remedies it will utilize.[98]

2. 90-Day Time Limit on Complaints

96. Several commenters raise concerns about the 60-day time limit on complaints proposed in the June 26 NOPR.[99] Most of the commenters argue that the 60-day time period is unreasonably too short. Some commenters suggest a limit of six months.[100] Many commenters suggest modification of the provision's discovery exception, by adopting a "reasonableness" standard, i.e., a reasonable person exercising due diligence could not have known of the wrongful conduct.

97. Several commenters argue that the Commission errs in not applying the 60-day deadline to itself. They argue that if the Commission is allowed to initiate unlimited retroactive investigations, this vitiates any time constraints the rule otherwise places on

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[96] Gulf Oil Corp. v. FPC, 536 F.2d 588 (3rd. Cir. 1977), cert. denied, 4344 U.S. 1062 (1978), reh'g denied, 435 U.S. 981 (1978).

[97] See Continental Oil Co. v. FPC, 378 F.2d 510 (5th Cir. 1967) and FPC v. Tennessee Gas Transmission Co., 371 U. S. 145 (1962).

[98] Moreover, if Congress grants the Commission additional remedial power, including the authority to levy civil penalties, the Commission will, in addition to the remedies set forth herein, implement such authority and utilize it when appropriate for violations of these code of conduct regulations.

[99] The Oversight Board, Mirant, NiSource, Cinergy, Sempra, Reliant, EMIT, EnCana, Hess, Coral, NGSA, CPUC, NASUCA, PG&E, Merrill Lynch and Morgan Stanley, ProLiance.

[100] See the Oversight Board, EMIT, Coral, NASUCA (suggesting 6 months), and ProLiance (suggesting a two-year limit).

private complainants. Commenters recommend that the scope of any investigation that might stem from a complaint, or the Commission's own motion, be narrowly defined, and require the demonstration and quantification of the individual harm resulting from the prohibited conduct.[101] These commenters are concerned about the lack of finality for transactions under the proposed discovery exception to the 60-day requirement. Merrill Lynch and Morgan Stanley suggest either a hard and fast deadline of 60 days from the event with no exceptions or a rebuttable presumption the complainant knew about the alleged violation within the 60-day time period.

98. Upon consideration of the comments received concerning our 60-day proposal, in the Commission's view the 60-day time period may be insufficient time for parties to discover and act upon violations of these regulations. Accordingly, the Commission will modify its original proposal to allow 90 days from the end of the quarter from which a violation occurred for a party to bring a complaint based on these regulations. A 90-day time period provides a reasonable balance between encouraging due diligence in protecting one's rights, discouraging stale claims, and encouraging finality in transactions. Furthermore, the Commission clarifies that the language in Sections 284.288(e) and 284.403(e), "unless that person could not have known of the alleged violation", incorporates a reasonableness standard, i.e., the 90-day time period to file a complaint does not begin to run until a reasonable person exercising due diligence should have known of the alleged wrongful conduct. Rather than being impermissibly vague, this safeguard ensures a sufficient time-period for complainants to discover hidden wrongful conduct and submit a claim.

99. We will also place a time limitation on Commission enforcement action for potential violations of these regulations. The Commission, unlike the market participants who may be buyers or otherwise directly affected by a transaction, may not be aware of actions or transactions that potentially may violate our rules. Thus, the Commission will act within 90 days from the date it knew of an alleged violation of these code of conduct regulations or knew of the potentially manipulative character of an action or transaction. Commission action in this context means a Commission order or the initiation of a preliminary investigation by Commission Staff pursuant to 18 CFR section 1b. If the Commission does not act within this time period, the seller will not be exposed to potential liability regarding the subject action or transaction. Knowledge on the part of the Commission will take the form of a call to our Hotline alleging inappropriate behavior or communication with our enforcement Staff.

100. We also clarify that in this context the Commission's action will have reference to a Commission order or to the initiation to a preliminary investigation by Commission Staff. If the Commission does not act within this period, the Seller will not be exposed to potential liability regarding the subject transaction. In such a proceeding, knowledge on

[101] See also EPSA (arguing that the Commission should clarify that it will act quickly to review and discourage frivolous complaints).

the part of the Commission must take the form of a call to our Hotline alleging inappropriate behavior or communication with our enforcement staff.

VI. Administrative Finding and Notices

A.Information Collection Statement

101. The code of conduct rules adopted herein would require jurisdictional gas sellers to retain certain records for three years and also require them to notify the Commission whether or not they engage in the reporting of natural gas sales transactions to publishers of gas indices.[102]

102. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection requirements imposed by agency rule.[103] This final rule does not make any substantive or material changes to the information collection requirements specified in the NOPR, which was previously submitted to OMB for approval on July 14, 2003. OMB has elected to take no action on the NOPR. Thus, the information collection requirements in this rule are pending OMB approval. Comments were solicited and received on the need for this information, whether the information will have practical utility, the accuracy of the provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques. The Commission addressed these issues in sections III (C)(4)-(5) of this order. The burden estimates for complying with this proposed rule are as follows:

Data Collection	Number of Respondents	Number of Responses	Hours Per Response	Total Annual Hours
FERC-549				
(Reporting)	222	222	1	222
(Recordkeeping)	222	222	2	444
Totals			3	666

Total annual hours for Collection (reporting + recordkeeping) = 666.

Information Collection Costs: The Commission seeks comments on the cost to comply with these requirements. It has projected the average annualized cost of all respondents to be: Annualized Capital Startup Costs: 666 ÷ 2080 x $117,041 = $37,475. This is a one time cost for the implementation of the proposed requirements.

103. OMB's regulations require it to approve certain information collection requirements imposed by agency rule. The Commission is submitting a copy of this order to OMB.

104. Title: FERC-549, Gas Pipeline Rates: Natural Gas Policy Act, Section 311.

105. Action: Proposed Data Collection

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[102] See Sections 284.288(b)-(c), and 284.403(b)-(c).

[103] 5 C.F.R. § 1320 (2003).

106. OMB Control No. 1902-0086.

107. Respondents: Businesses or other for profit.

108. Frequency of Responses: On occasion.

109. Necessity of Information: The code of conduct rules approved herein would revise the Commission's regulations to require that pipelines that provide unbundled sales service or persons holding blanket marketing certificates adhere to a code of conduct when making gas sales. In addition, the Commission will require blanket sales certificate holders to maintain certain data for a period of three years. The addition of the codes of conduct, retention of data and standards for accuracy are efforts by the Commission to ensure the integrity of the natural gas market that remains within its jurisdiction.

110. Internal review: The Commission has reviewed the requirements pertaining to blanket sales certificates and has determined the proposed revisions are necessary to ensure the integrity of the gas sales market that remains within its jurisdiction. These requirements conform to the Commission's plan for efficient information collection, communication, and management within the natural gas industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

111. Interested persons may obtain information on the information requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426 [Attention: Michael Miller, Office of the Executive Director, Phone (202)502-8415, fax: (202)273-0873, e-mail: Michael.Miller@ferc.gov.]

112. For submitting comments concerning the collection of information(s) and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503, [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202)395-7856, fax: (202)395-7285].

B. Environmental Analysis

113. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[104] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[105] The actions proposed to be taken here fall within categorical exclusions in the Commission's regulations for rules that are clarifying, corrective, or procedural, for information gathering, analysis, and dissemination, and for sales, exchange, and transportation of natural gas that requires no construction of facilities.[106] Therefore, an

[104] Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

[105] 18 C.F.R. § 380.4 (2003).

environmental assessment is unnecessary and has not been prepared in this rulemaking.

C. Regulatory Flexibility Act Certification

114. The Regulatory Flexibility Act of 1980 (RFA)[107] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such analyses if a rule would not have such an effect.[108]

115. The Commission does not believe that this rule would have such an impact on small entities. Most of the entities required to comply with the proposed regulations would be pipelines, LDCs or their affiliates who do not meet the RFA's definition of a small entity whether or not they are under the Commission's jurisdiction. It is likely that any small entities selling natural gas would be making gas sales that are no longer subject to the Commission's jurisdiction. Therefore, the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

D. Document Availability

116. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (http://www.ferc.gov) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426

117. From FERC's Home Page on the Internet, this information is available using the eLibrary link. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

118. User assistance is available for eLibrary and the FERC's website during normal business hours at FERCOnLineSupport@ferc.gov or by calling (866)208-3676 or for TTY, contact (202)502-8659.

E. Effective Date and Congressional Review

119. These regulations are effective [insert date that is 30 days after publication in the FEDERAL REGISTER]. The Commission has determined, with the concurrence of the administrator of the Office of Information and Regulatory Affairs of OMB, that this Final Rule is not a “major rule” as defined in Section 351of the Small Business Regulatory Enforcement Fairness Act of 1996. The Commission will submit the Final Rule to both houses of Congress and the General Accounting Office.

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[106] See 18 C.F.R. § 380.4(a)(2)(ii), 380.4(a)(5), 380.4(a)(27) (2003).

[107] 5 U.S.C. 601-612.

[108] 5 U.S.C. 605(b).

List of Subjects in 18 CFR Part 284

Continental Shelf; Incorporation by reference; Natural gas; Reporting and recordkeeping requirements.

By the Commission. Commissioners Massey and Brownell concurring in part with separate statements attached.

(S E A L)

Linda Mitry,
Acting Secretary.

In consideration of the foregoing, the Commission proposes to amend Part 284, Chapter I, Title 18, Code of Federal Regulations, as follows.

PART 284 - - CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

The authority citation for Part 284 continues to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7532; 43 U.S.C.1331-1356.

Section 284.288 is added to read as follows:

§ 284.288 Code of conduct for unbundled sales service.

(a) A pipeline that provides unbundled natural gas sales service under § 284.284 is prohibited from engaging in 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 natural gas. Prohibited actions and transactions include but are not limited to:

(1) pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk and no net change in beneficial ownership (sometimes called "wash trades"); and

(2) collusion with another party for the purpose of manipulating market prices, market conditions, or market rules for natural gas.

(b) To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller shall provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement on Natural Gas and Electric Price Indices, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Seller shall notify the Commission within 15 days of the effective date of this regulation of whether it engages in such reporting of its transactions and update the Commission within 15 days of any subsequent change to its transaction reporting status. In addition, Seller shall adhere to such other standards and requirements for price

reporting as the Commission may order.

(c) A pipeline that provides unbundled natural gas sales service under § 284.284 shall retain, for a period of three years, all data and information upon which it billed the prices it charged for natural gas it sold pursuant to its market based sales certificate or the prices it reported for use in price indices.

(d) Any violation of the preceding paragraphs may subject Seller to disgorgement of unjust profits from the date when the violation occurred. Seller may also be subject to suspension or revocation of its blanket certificate under § 284.284 or other appropriate non-monetary remedies.

(e) Any person filing a complaint against a pipeline for violation of paragraphs (a) through (c) must do so no later than 90 days after the end of the calendar quarter in which the alleged violation occurred unless that person could not have known of the alleged violation, in which case the 90-day time limit will run from the discovery of the alleged violation. The Commission will act within 90 days from the date it knew of an alleged violation of these code of conduct regulations or knew of the potentially manipulative character of an action or transaction. Commission action in this context means a Commission order or the initiation of a preliminary investigation by Commission Staff pursuant to 18 CFR section 1b. If the Commission does not act within this time period, the seller will not be exposed to potential liability regarding the subject action or transaction. Knowledge on the part of the Commission will take the form of a call to our Hotline alleging inappropriate behavior or communication with our enforcement Staff.

In Section 284.402, the second sentence of paragraph (a) of § 284.402 is revised to read as follows:

§ 284.402 Blanket Marketing Certificates

A blanket certificate issued under Subpart L is a certificate of limited jurisdiction which will not subject the certificate holder to any other regulation under the Natural Gas Act jurisdiction of the Commission, other than that set forth in this Subpart L, by virtue of the transactions under this certificate.

Section 284.403 is added to read as follows:

§ 284.403 Code of conduct for persons holding blanket marketing certificates.

(a) 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 that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for natural gas. Prohibited actions and transactions include but are not limited to:

(1) pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk and no net change in beneficial ownership (sometimes called "wash trades"); and

(2) collusion with another party for the purpose of manipulating market prices, market conditions, or market rules for natural gas.

(b) To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller shall provide accurate and factual information, and not knowingly

submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement on Natural Gas and Electric Price Indices, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Seller shall notify the Commission within 15 days of the effective date of this regulation of whether it engages in such reporting of its transactions and update the Commission within 15 days of any subsequent change to its transaction reporting status. In addition, Seller shall adhere to such other standards and requirements for price reporting as the Commission may order.

(c) A blanket marketing certificate holder shall retain, for a period of three years, all data and information upon which it billed the prices it charged for the natural gas sold pursuant to its market based sales certificate or the prices it reported for use in price indices.

(d) Any violation of the preceding paragraphs may subject Seller to disgorgement of unjust profits from the date when the violation occurred. Seller may also be subject to suspension or revocation of its blanket certificate under § 284.284 or other appropriate non-monetary remedies.

(e) Any person filing a complaint against a blanket marketing certificate holder for violation of paragraphs (a) through (c) must do so no later than 90 days after the end of the calendar quarter in which the alleged violation occurred unless that person could not have known of the alleged violation, in which case the 90-day time limit will run from the discovery of the alleged violation. The Commission will act within 90 days from the date it knew of an alleged violation of these code of conduct regulations or knew of the potentially manipulative character of an action or transaction. Commission action in this context means a Commission order or the initiation of a preliminary investigation by Commission Staff pursuant to 18 CFR Section 1b. If the Commission does not act within this time period, the seller will not be exposed to potential liability regarding the subject action or transaction. Knowledge on the part of the Commission will take the form of a call to our Hotline alleging inappropriate behavior or communication with our enforcement Staff.

ATTACHMENT D

NGPA, Regulations 18 CFR Sec. 284.288 Code of conduct for unbundled sales service.

(a) To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy Statement on Natural Gas and Electric Price Indices*, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Seller must notify the Commission as part of its FERC Form No. 552 annual reporting requirement in §260.401 of this chapter whether it reports its transactions to publishers of electricity and natural gas indices. In addition, Seller must adhere to any other standards and requirements for price reporting as the Commission may order.

(b) A pipeline that provides unbundled natural gas sales service under §284.284 shall retain, for a period of five years, all data and information upon which it billed the prices it charged for natural gas it sold pursuant to its market based sales certificate or the prices it reported for use in price indices.

NGPA, Regulations 18 CFR Sec. 284.403 Code of conduct for persons holding blanket marketing certificates.

(a) To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy Statement on Natural Gas and Electric Price Indices*, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Seller must notify the Commission as part of its FERC Form No. 552 annual reporting requirement in §260.401 of this chapter whether it reports its transactions to publishers of electricity and natural gas indices. In addition, Seller shall adhere to any other standards and requirements for price reporting as the Commission may order.

(b) A blanket marketing certificate holder shall retain, for a period of five years, all data and information upon which it billed the prices it charged for the natural gas sold pursuant to its market based sales certificate or the prices it reported for use in price indices.

ATTACHMENT E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Prohibition of Energy Market Manipulation Docket No. RM06-3-000

ORDER NO. 670

FINAL RULE

(Issued January 19, 2006)

IX. Introduction

18. On October 20, 2005, the Commission issued a Notice of Proposed Rulemaking (NOPR) to prohibit energy market manipulation.[109] Pursuant to section 4A of the Natural Gas Act (NGA)[110] and section 222 of the Federal Power Act (FPA),[111] as added to the statutes by the Energy Policy Act of 2005 (EPAct 2005),[112] the Commission proposed to add a Part 159 under Subchapter E and a Part 47 under Subchapter B to Title 18 of the Code of Federal Regulations. Under the proposed regulations, it would be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, or 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 person.

19. In the NOPR, the Commission stated that sections 315 and 1283 of EPAct 2005 "apply to the conduct of 'any entity,' not just jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority," and "includes not only regulated utilities but also governmental utilities

[109] Prohibition of Energy Market Manipulation, 113 FERC ¶ 61,067 (2005).

[110] 15 U.S.C. 717 et al. (2000).

[111] 16 U.S.C. 791a et al. (2000).

[112] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), 315 and 1283, respectively.

and other market participants."[113] Furthermore, we stated in the NOPR that sections 1c.1(a)(1)-(3) and 1c.2(a)(1)-(3) of the proposed regulations were patterned after the Securities and Exchange Commission's (SEC) Rule 10b-5,[114] and were "intended to be interpreted consistent with analogous SEC precedent that is appropriate under the circumstances."[115] Sections 1c.1(b) and 1c.2(b) of the proposed regulations stated that nothing in these provisions should be construed to create a private right of action. The Commission further noted, however, that sections 1c.1(b) and 1c.2(b) were not intended to take away any other right that may otherwise exist.

20. Thirty parties filed comments and nine parties filed reply comments.[116] In response to the comments, and as discussed more fully below, the Commission, among other things: clarifies the scope of application of the Final Rule; addresses comments pertaining to disclosure and sections 1c.1(a)(2)-(3) and 1c.2(a)(2)-(3) of the Final Rule; discusses the elements of a violation of the Final Rule; notes the relationship of the Final Rule to the Market Behavior Rules[117]; and deals with a number of implementation issues, such as the applicable statute of limitations, affirmative defenses and safe harbor provisions, and procedural matters.

21. For the most part, the Commission finds it unnecessary to change the wording of the proposed regulatory text, except in one respect: substituting "entity" for "person" in sections 1c.1(a)(3) and 1c.2(a)(3) of the Final Rule. However, we do provide certain clarifications requested by several commenters. In addition, we find that some of the recommendations made by commenters are more appropriately addressed in the proceeding initiated in Docket No. RM06-5-000, proposing to repeal the codes of conduct for unbundled sales service and for persons holding blanket marketing certificates, and in Docket No. EL06-16-000, proposing to repeal the Market Behavior Rules, which are currently included in all public utility sellers' market-based rate tariffs and authorizations.[118]

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[113] NOPR at P 9.

[114] 17 CFR 240.10b-5 (2005).

[115] NOPR at P 10. As explained in P 5, supra, the regulations proposed to be placed in new sections 159.1 and 47.1 will be new sections 1c.1 and 1c.2, respectively.

[116] Entities filing intervening and reply comments are listed in the Appendix to this Final Rule. The abbreviations for such commenters are noted in the Appendix. The Commission has accepted and considered all comments filed, including late-filed comments.

[117] Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003), reh'g denied, 107 FERC ¶ 61,175 (2004); Order No. 644, Amendment to Blanket Sales Certificates, 68 FR 66323 (2003), FERC Stats. & Regs. ¶ 31,153 (2003), reh'g denied, 107 FERC ¶ 61,174 (2004). The Market Behavior Rules are currently on appeal. Cinergy Marketing & Trading, L.P. v. FERC, Nos. 04-1168 et al. (D.C. Cir., appeal filed April 28, 2004).

22. Without a rule prohibiting manipulative or deceptive conduct, the language of EPAct 2005 sections 315 and 1283 does not, by itself, make any particular act unlawful. As a result, this Final Rule serves as the implementing provision designed to prohibit manipulation and fraud in the markets the Commission is charged with regulating. The Final Rule is not intended to regulate negligent practices or corporate mismanagement, but rather to deter or punish fraud in wholesale energy markets. In addition, to ease references to the Final Rule, we have determined to place the new regulations in a new Part 1c of the Commission's general regulations, rather than separately in new Parts 159 and 47 as proposed in the NOPR. The regulatory text of proposed sections 159.1 and 47.1 as identified herein will be new sections 1c.1 and 1c.2, respectively.

X. Background

23. On August 8, 2005, EPAct 2005 became law. Sections 315 and 1283 of EPAct 2005, amending the NGA and the FPA, respectively, are virtually identical, and prohibit the use or employment of manipulative or deceptive devices or contrivances in connection with the purchase or sale of natural gas, electric energy, or transportation or transmission services subject to the jurisdiction of the Commission. These anti-manipulation sections of EPAct 2005 closely track the prohibited conduct language in section 10(b) of the Securities Exchange Act of 1934,[119] and specifically dictate that the terms "manipulative or deceptive device or contrivance" are to be used "as those terms are used in section 10(b) of the Securities Exchange Act of 1934."

24. The SEC adopted Rule 10b-5,[120] which implemented section 10(b) of the Exchange Act. Since their promulgation, a significant body of legal precedent concerning section 10(b) of the Exchange Act and Rule 10b-5 has developed. Consistent with the mandate that certain aspects of the Commission's new authority be exercised in a manner consistent with section 10(b) of the Exchange Act, consistent with Congress' modeling sections 315 and 1283 of EPAct 2005 on section 10(b) of the Exchange Act, and as proposed in the NOPR, the Commission has modeled the Final Rule on Rule 10b-5. This approach will benefit entities subject to the new rule because there is a substantial body of precedent applying the comparable language of Rule 10b-5. In the course of responding to various comments, we will discuss the appropriate application of analogous securities law precedent that will inform the interpretation of the Final Rule in the context of the NGA and FPA.

XI. Discussion

25. The 30 initial comments and nine reply comments on the NOPR are from a diverse group of industry stakeholders. Overwhelmingly, commenters are supportive of our efforts to implement well-developed, clear and fair rules aimed at eliminating the potential for fraud in wholesale energy transactions. The comments identify a number of issues: (1) the scope of application of the Final Rule; (2) the usefulness of securities law precedents to the energy industry; (3) the disclosure implications of the Final Rule; (4) the elements that comprise a violation of the Final Rule; (5) how the Final Rule will interact with the Market Behavior Rules; and (6) a variety of procedural matters, including the appropriate statute of limitations to apply to the Final Rule. These issues and others that were raised in comments are addressed in the sections that follow.

[119] Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2000) (Exchange Act).

[120] 17 CFR 240.10b-5 (2005).

A. Scope of Application of Regulations

1. Comments

26. Several commenters express views on the appropriate scope of the proposed anti-manipulation regulations.[121] Commenters ask the Commission to clarify the meaning of "any entity" and "subject to the jurisdiction of the Commission" as these statutory terms apply to the proposed regulations. For example, the Midwest ISO supports broad application of the proposed regulations to any entity as opposed to "limiting the application of the regulations to FERC jurisdictional parties."[122] Likewise, NASUCA reads the proposed regulations as applying to all entities, "not just jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority."[123] AGA asks the Commission to clarify that "any entity" means that the proposed regulations extend beyond Order No. 644 regulation of jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority. This is necessary, AGA asserts, to ensure the rules will have the "intended effective impact on the market place for natural gas sales."[124]

27. Two commenters specifically address whether the proposed regulations apply to "first sales"[125] of natural gas. APGA, noting that first sales represent a substantial part of the wholesale natural gas market, argues that the phrase "subject to the jurisdiction of the Commission" in NGA section 4A must be read to apply only to "the purchase or sale of transportation services" and not to the preceding clause "purchase or sale of natural gas."[126] SUEZ, however, argues that "subject to the jurisdiction of the Commission" applies to purchases and sales as well as to transportation services. SUEZ maintains that "any entity" does not include entities engaged in non-jurisdictional transactions such as first sales, sales of LNG, or retail sales, but is intended only to bring certain governmental entities otherwise excluded

[121] See, e.g., AGA at 4-5; APGA at 10; APPA at 3-4; AOPL at 2; BP at 1-2; Cinergy at 8; EEI at 25-26; Indicated Market Participants at 8; Midwest ISO at 4; NARUC Reply at 3-5; SCANA at 3; SUEZ at 6-11.

[122] Midwest ISO at 4.

[123] NASUCA at 3.

[124] AGA at 4.

[125] "First sales" are certain wholesale sales of natural gas removed from the Commission's jurisdiction by the Natural Gas Policy Act of 1978 (NGPA) and the Wellhead Decontrol Act of 1989. Accordingly, the only sales of natural gas that the Commission currently has jurisdiction to regulate are sales for resale of domestic gas by pipelines, local distribution companies (LDCs), or their affiliates so long as they do not produce the gas that they sell, and sales for resale of natural gas previously purchased and sold by an interstate pipeline, LDC or retail customer. See San Diego Gas and Electric Company, 101 FERC ¶ 61,161 at P 10 (2002); Reporting of Natural Gas Sales to the California Market, 96 FERC 61,119 at 61,463, reh'g denied, 97 FERC ¶ 61,029 (2001).

[126] APGA at 3-10.

from FPA jurisdiction under the umbrella of the proposed regulations.[127]

28. APPA and NARUC also urge the Commission to construe the phrase "subject to the Commission's jurisdiction" to modify both the purchase or sale of electric energy and the purchase or sale of transmission services. By doing so, APPA and NARUC argue, the Commission will make clear the regulation does not apply to retail sales or purchases and thus will avoid overlap with state and local jurisdiction.[128] In reply comments, Cinergy argues that regardless of the parsing of the statutory language, the manipulation authority falls within the existing scope of the FPA and NGA, and that nothing in the scope of these statutes suggests that retail sales are in any way subject to the Commission's authority.[129] Likewise, EEI argues that the FPA is limited to wholesale markets, and that matters subject to state regulation are excluded from the reach of the Commission.[130]

29. NGSA asserts that EPAct 2005 does not open the door to regulation of non-jurisdictional sales even if they are subject to the anti-manipulation rules. NGSA acknowledges that the statutory provisions expand the Commission's authority to prevent market manipulation, but cautions that nothing in the statute grants the Commission any rate or certificate jurisdiction over deregulated first sales of natural gas.[131]

30. Other commenters address the meaning of "any entity" in the context of FPA sections 201(f) and 211A. PG&E argues that it is crucial that the Commission's authority to prohibit manipulation extend to all entities involved in the market. Noting the specific reference to entities described in FPA section 201(f), PG&E states that the proposed regulations should apply to all municipalities and other governmental agencies.[132] EEI also states that the proposed regulations must reach entities described in FPA section 201(f), including unregulated transmitting utilities under FPA section 211A. This is so, EEI argues, because the authority to require comparable open access transmission under FPA section 211A makes all transmission service provided by FPA section 201(f) entities subject to the jurisdiction of the Commission and thus subject to the proposed anti-manipulation rules.[133] APPA responds that under section 211A(c) certain entities are not subject to the transmission service requirements (those selling less than 4,000,000 MWhs per year, or that do not own facilities necessary to operate an interconnected transmission system, or that meet other criteria that the Commission may adopt in the future). These entities, APPA argues, are not subject to the jurisdiction of the Commission and thus not subject to the proposed regulations.[134] NRECA goes further, asserting that while FPA section 201(f) governmental entities are "potentially" subject to the proposed anti-manipulation regulations, the

[127] SUEZ at 10, referring to FPA section 201(f) entities.

[128] APPA at 4; NARUC Reply at 3-5.

[129] Cinergy Reply at 2-4.

[130] EEI Reply at 6.

[131] NGSA at 3.

[132] PG&E at 6.

[133] EEI at 25.

regulations can only apply to transactions that are otherwise subject to the Commission's jurisdiction. Thus, NRECA argues that neither party to a retail sale, to transmission service in intrastate commerce, or to a sale of electricity or

transmission service by a FPA section 201(f) entity are subject to the proposed regulations.[135]

31. AOPL seeks clarification that "subject to the jurisdiction of the Commission" does not mean the Commission would subject oil pipelines to claims of market manipulation in connection with transportation and transmission services subject to the Commission's jurisdiction under the Interstate Commerce Act (ICA).[136]

32. Finally, Cinergy asks that the text of the proposed regulations be modified to make explicit that the regulations pertain only to market manipulation, noting that SEC Rule 10b-5 applies to a wide range of activities beyond market manipulation.[137]

2. Commission Determination

33. As an initial matter, this Final Rule does not, and is not intended to, expand the types of transactions subject to the Commission's jurisdiction under the FPA, NGA, NGPA, or ICA. As now explained, however, the new regulations do apply to "any entity" as that is the scope of the Final Rule as directed by sections 315 and 1283 of EPAct 2005. If any entity engages in manipulation and the conduct is found to be "in connection with" a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority. Absent such nexus to a jurisdictional transaction, however, fraud and manipulation in a non-jurisdictional transaction (such as a first or retail sale) is not subject to the new regulations.

34. NGA section 4A and FPA section 222 make it unlawful for "any entity" to use a manipulative or deceptive device or contrivance "in connection with" the purchase or sale of natural gas or electric energy or the purchase or sale of transportation or transmission services "subject to the jurisdiction of the Commission."[138] The answer to the scope of

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[134] APPA Reply at 5-6.

[135] NRECA Reply at 2-5.

[136] AOPL at 1-3.

[137] Cinergy at 8.

[138] The text of EPAct 2005 section 315, adding section 4A to the NGA, is:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

application of the Final Rule lies in a reasonable reading of these terms in relation to each other.

35. "Any entity" is a deliberately inclusive term. Congress could have used the existing defined terms in the NGA and FPA of "person," "natural-gas company," or "electric utility," but instead chose to use a broader term without providing a specific definition. [139] Thus, the Commission interprets "any entity" to include any person or form of organization, regardless of its legal status, function or activities.[140]

36. The second aspect of the analysis focuses on the transaction involved. A transaction under NGA section 4A is "the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission." A transaction under FPA section 222 is "the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission." The critical issue is whether the limiting phrase of "subject to the jurisdiction of the Commission" applies to both preceding phrases, that is, (1) the purchase or sale of the energy commodity and (2) transportation services or transmission services, or just to the transportation or transmission services. APGA argues that the "rule of the last antecedent" means that it should only modify the last phrase, that is, transportation services or transmission services. But in the absence of definitive punctuation or other clearer expression of intent to limit the jurisdiction requirement only to transportation or transmission, the Commission must look for the meaning which is the most reasonable under the circumstances.[141]

The corresponding text of EPAct 2005 section 1283, adding section 222 to the FPA, is:

(a) IN GENERAL.—It shall be unlawful for any entity (including an entity described in section 201(f)), directly or indirectly, to use or employ, 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, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

(b) NO PRIVATE RIGHT OF ACTION.—Nothing in this section shall be construed to create a private right of action.

[139] See NGA sections 2(1) and 2(6); FPA sections 3(4) and 3(22). Congress did note that entities described in FPA section 201(f) are included in the meaning of entity. See FPA section 222(a).

[140] Because many entities that are engaged in wholesale natural gas or electricity transactions or in interstate transportation or transmission services, engage in both jurisdictional and non-jurisdictional transactions, it is not enough to say, as SUEZ suggests, that entities engaging in non-jurisdictional transactions are not covered.

[141] APGA at 4 (citing 2a N. Singer, Sutherland on Statutory Construction § 47:33 at 369 (6th rev. ed. 2000) and Barnhart v. Thomas, 540 U.S. 20, 26 (1993)). The general rule is that a qualifying phrase will normally apply to the provision or clause immediately preceding it. However, "where the sense of

37. The Commission concludes that the phrase "subject to the jurisdiction of the Commission" should be read as modifying both preceding phrases, that is, "the purchase or sale" as well as "transportation services" (NGA) and "transmission services" (FPA). Had Congress intended to expand the Commission's jurisdiction so significantly as to give it anti-manipulation authority over such transactions as first sales of imported natural gas, intrastate sales of electric energy, retail sales of electric energy or energy sales by governmental entities, we believe it would have done so explicitly. [142] Further, in light of the close link between transportation or transmission services and natural gas and electric commodity sales, we do not believe that Congress would have expanded the Commission's authority to cover all natural gas and electric commodity sales but not all gas transportation and electric transmission. Accordingly, we conclude that the most reasonable interpretation is that Congress did not expand the Commission's traditional NGA and FPA subject matter jurisdiction in sections 315 or 1283 of EPAct, but rather gave the Commission broad jurisdiction over the entities that engage in certain conduct affecting our subject matter jurisdiction.

38. Third, the phrase "in connection with" must be given meaning. APGA says that interpreting "subject to the jurisdiction of the Commission" as applying to sales effectively would exclude producers and marketers from the reach of the Final Rule as these are the dominant sellers of natural gas in wholesale markets. APGA argues this interpretation implies that enactment of NGA section 4A serves no purpose, as it does not increase the Commission's reach beyond the rules already promulgated by Order No. 644.[143] This is not the case, however. As discussed below, any entity may be subject to the Final Rule if its fraudulent or manipulative conduct is "in connection with" a purchase or sale of natural gas, electric energy, transportation service, or transmission service that is subject to the Commission's

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the entire act requires that a qualifying word or phrase apply to several preceding . . . sections, the word or phrase will not be restricted to its immediate antecedent." Sutherland § 47:33 at 372. The case referred to by APGA also notes that the rule is "not an absolute" and "can assuredly be overcome by other indicia of meaning." Barnhart v. Thomas, 540 U.S. at 26.

[142] Transactions not subject to the Commission's jurisdiction include first sales, sales of imported natural gas, sales of imported LNG, sales and transportation by NGA section 1(b)-(d) entities (i.e., activities including production and gathering, local distribution, "Hinshaw" pipelines, and vehicular natural gas), or by NGA section 7(f) companies, retail sales of electric energy, sales of electric energy in intrastate commerce, sales of electric energy by governmental entities and certain electric power cooperatives, and certain interstate transmission by governmental entities.

[143] APGA at 6-8. APGA also points to EPAct 2005 section 318, which adds a new section (d) to NGA section 20. Section 20(d) authorizes the Commission to seek a court order barring an individual found to have engaged in manipulation from future energy transactions; there is a similar new provision in FPA section 314(d). Here, APGA argues, Congress used subparts to separate sales from transportation service, and applied the "subject to the jurisdiction of the Commission" only to the latter. This is not dispositive. First, this is a separate section of the statute. Second, the use of subparts does not conclusively mean that "subject to the jurisdiction of the Commission" cannot also modify the first subpart. Third, the reading APGA urges still presents the troublesome prospect that parties could assert that the anti-manipulation authority now applies to retail sales or other transactions otherwise expressly excluded from the Commission's jurisdiction.

jurisdiction.[144] Thus, the third aspect of the analysis is to consider whether the fraud is "in connection with" a jurisdictional transaction.

39. Section 10(b)'s "in connection with" requirement has been construed broadly by the Supreme Court to encompass many circumstances where securities transactions "coincide" with the overall scheme to defraud.[145] However, the Supreme Court was careful to state that section 10(b) "must not be construed so broadly as to convert every common law fraud that happens to involve securities into a violation" of section 10(b) and Rule 10b-5.[146] Guided by this precedent, the Commission views the "in connection with" element in the energy context as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction. We note that, unlike the SEC, which has broad jurisdiction over securities transactions, our jurisdiction is limited to certain wholesale transactions that remain within the ambit of the NGA, NGPA, and FPA. At the same time, energy markets are made up of both jurisdictional and non-jurisdictional transactions. We do not intend to construe the Final Rule so broadly as to convert every common-law fraud that happens to touch a jurisdictional transaction into a violation of the Final Rule. Rather, in committing fraud, the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction.[147] For example, any entity engaging in a non-jurisdictional transaction through a Commission-regulated RTO/ISO market, that acts with intent or with recklessness to affect the single price auction clearing price (which sets the price of both non-jurisdictional and jurisdictional transactions), would be engaging in fraudulent conduct in connection with a jurisdictional transaction and, therefore, would be in violation of the Final Rule.

40. Turning to the comments that address the applicability of the proposed regulations to FPA sections 201(f) and 211A,[148] here too the focus must be on the transaction and the entity's conduct to

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[144] AEP urges that the Final Rule identify the modalities through which an entity is prohibited from manipulating a market, noting that SEC Rule 10b-5 specifies that fraud or manipulation must involve the "use of any means or instrumentality of interstate commerce or of the mails, of any facility of any national securities exchange." AEP at 2. This is not necessary, as manipulation must be in connection with jurisdictional transactions which, by definitions in NGA section 1(b) and FPA section 201(b), are in interstate commerce.

[145] SEC v. Zandford, 535 U.S. 813, 825 (2002) ("[T]he SEC complaint describes a fraudulent scheme in which the securities transaction and breaches of fiduciary duty coincide. Those breaches were therefore 'in connection with' securities sales within the meaning of [section] 10(b)."). See also Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12-13 (1971) (previously the Supreme Court had stated that the requirement was met when there was an "injury as a result of deceptive practices touching [the] sale of securities"); Head v. Head, 759 F.2d 1172, 1175 (4th Cir. 1985) (the nexus must be more than a de minimis "touch," yet is applied flexibly where there is fraud affecting securities transactions).

[146] SEC v. Zandford, 535 U.S. at 820.

[147] See PP 52-53 infra for a discussion of the intent required for a violation of the Final Rule.

[148] See, e.g., APPA Reply at 5-6; EEI at 25; PG&E at 6; NRECA Reply at 2-5.

determine whether a violation of the Final Rule occurred. Again, the Commission emphasizes that if any entity engages in fraudulent conduct and that conduct is in connection with a jurisdictional transaction, then the Final Rule is applicable to that entity. It is, therefore, not necessary for the Commission to determine in this context how sections 201(f) and 211A are to be applied generally.[149]

41. With respect to the request by AOPL for clarification on whether "subject to the jurisdiction of the Commission" would cause oil pipelines to be subject to claims of market manipulation in connection with transportation services subject to the Commission's jurisdiction under the ICA, the Commission points out that EPAct 2005 did not amend the ICA to include anti-manipulation provisions, and therefore we do not

read the authority granted under the NGA and FPA to proscribe and penalize fraud or deceit as applying to oil pipeline transportation under the ICA.

42. As to Cinergy's request that the text of the Final Rule be modified to make explicit that the regulations apply only to market manipulation, we decline to do so. Cinergy's request would unduly narrow the broad authority Congress granted in EPAct 2005. The language of EPAct 2005 sections 315 and 1283 is modeled after section 10(b) of the Exchange Act, which has been interpreted as a broad anti-fraud "catch-all clause."[150] SEC Rule 10b-5, on which the Final Rule is patterned, does not expressly limit itself to manipulation, but uses terms such as "device, scheme, or artifice to defraud" and "fraud or deceit."[151] We will retain similar language in our Final Rule, which will permit the Commission to police all forms of fraud and manipulation that affect natural gas and electric energy transactions and activities the Commission is charged with protecting.

B. General Applicability of Securities Law Concepts

1. Comments

43. Commenters are divided as to whether we should model the proposed anti-manipulation regulations after SEC Rule 10b-5. Ameren, Cinergy, EPSA, Indicated Market Participants, EEI, LG&E,

[149] Section 211A permits the Commission to issue regulations to implement the provisions of FPA section 211A. At this time, the Commission has not proposed such regulations, but has included this issue in the Notice of Inquiry issued in Preventing Undue Discrimination and Preference in Transmission Service, 70 FR 55796 (2005), FERC Stats. & Regs. ¶ 35,553 (2005). Full delineation of the scope of FPA section 211A should be developed through that proceeding, not in the context of the anti-manipulation regulations.

[150] See 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).

[151] 17 CFR 240.10b-5 (2005). SEC Rule 10b-5 is titled "Employment of manipulative and deceptive devices."

NGSA, PNM and Xcel argue that adoption of a rule patterned on SEC Rule 10b-5 is problematic because the securities model is one of disclosure, designed in large part to protect novice investors by eliminating disparities in access to information, whereas the purpose of the FPA and NGA is to ensure "just and reasonable" rates in wholesale energy markets. Many of the commenters also argue that the participants in energy markets are largely sophisticated, and unlike less-sophisticated participants in the securities markets, do not need the protections of a disclosure regime.[152]

44. AGA comments that it is unclear how the SEC's model of disclosure will apply to natural gas market transactions, and ISDA and PNM argue that the Commission should refrain from a wholesale adoption of SEC case law as such an action would create uncertainty as to the duties, standards and obligations owed by market participants because of the different regulatory frameworks for energy and securities markets.[153] EPSA, PG&E and SUEZ call for further study and tailoring of Rule 10b-5 to the energy industry because of the differences between the operations of the securities markets and the energy markets.[154] FirstEnergy argues that the rules proposed in the NOPR are vague and overly broad.[155]

45. On the other hand, APGA, NARUC, NASCUA, NJBPU, and the States support the Commission's decision to model the proposed regulations on SEC Rule 10b-5.[156] APPA, NARUC and NJBPU argue that Rule 10b-5 case law will provide useful guidance as the Commission develops its own body of precedent to follow.[157] TDUS argues that the Commission's proposed rule prohibiting market manipulation plainly implements, in a straightforward manner, the express intent of EPAct 2005.[158] TDUS finds the arguments of Ameren and Xcel unpersuasive because parties as sophisticated as they purport to be ought to have no problem complying with a straightforward prohibition against making fraudulent representations in their transactions.[159] TDUS also argues that the level of sophistication of the parties to a bilateral negotiation is irrelevant because the

[152] Ameren at 3-4; Cinergy at 6-7; EPSA at 5-8; Indicated Market Participants at 10-13; EEI at 6-8; LG&E at 3-7; NGSA at 4-5; PNM Reply at 4-5; Xcel at 3-6.

[153] AGA at 4; ISDA at 3-5; PNM Reply at 4-6. But not everyone dismisses the importance of the regulations to sophisticated parties. APPA shares SCE's observation that the degree of "protection" implied by relative levels of counterparty sophistication must not be overstated, noting that even sophisticated market participants may need protection against market manipulations. APPA Reply at 3-4; SCE at 3-4.

[154] EPSA at 11; PG&E at 12; SUEZ at 14.

[155] FirstEnergy at 4-6.

[156] APGA at 4-5; NARUC at 4-5; NASCUA at 2-3; NJBPU at 2-3; States at 2. APGA, NARUC, and the States argue that modeling the Final Rule on SEC Rule 10b-5 is consistent with the express congressional dictates of EPAct 2005.

[157] APPA Reply at 1-2; NARUC at 5; NJPBU at 3.

[158] TDUS at 2-3.

Commission's anti-manipulation rules are not to protect the contracting parties from each other, but to protect the consumers who rely on the market for their energy supplies.[160]

46. APPA and INGAA support the Commission's reliance on section 10(b) of the Exchange Act and SEC Rule 10b-5, and the case law interpreting the statute and rule, as providing guidance to the Commission in administering its new EPAct 2005 anti-manipulation authority.[161] APPA and INGAA also recommend that the Commission take into account pertinent differences between the regulatory regimes of the Exchange Act and the NGA and NGPA, and depart from securities law precedent when industry structure and common sense so dictate.[162]

2. Commission Determination

47. As a general matter, the Commission does not believe that modeling the Final Rule on SEC Rule 10b-5 is problematic or will create uncertainty. This is not to say that commenters did not raise valid concerns about how securities precedent will be applied in the energy industry context. We intend to adapt analogous securities precedents as appropriate to specific facts, circumstances, and situations that arise in the energy industry. This is consistent with Congress' modeling of EPAct 2005 sections 315 and 1283 on section 10(b) of the Exchange Act and explicit references to section 10(b) in EPAct 2005 sections 315 and 1283, and will provide a level of substantial certainty with respect to how the regulations will operate that the Commission is not typically able to provide where a preexisting body of law and precedent is not readily available. The Commission likewise finds that modeling the Final Rule on SEC Rule 10b-5 provides clarity to affected parties similar to the clarity provided by Congress. Thus, the Commission rejects FirstEnergy's argument that the proposed regulations are vague and overly broad. As previously stated, the Final Rule is modeled on SEC Rule 10b-5, which is not vague or overly broad.[163]

48. The Commission rejects EPSA's, PG&E's and SUEZ's calls for further study and tailoring of Rule 10b-5 to the industry the Commission regulates. Further study and tailoring would not improve the Final Rule or industry understanding of its scope and applicability. While the Commission generally agrees with commenters that a wholesale overlay of the securities laws onto energy markets is overly simplistic, we also believe it would be illogical to simply ignore decades of useful guidance that securities law precedent can offer, especially considering that Congress deliberately modeled EPAct 2005 sections 315 and 1283 on section 10(b) of the Exchange Act. Therefore, the Commission intends to recognize, on a case-by-case basis, that the roles of the Commission and the SEC are not identical in determining whether it is appropriate to adopt securities precedents to specific energy industry facts,

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[159] Id. at 3.

[160] Id. at 3-4.

[161] APPA Reply at 1-3; INGAA at 7.

[162] APPA Reply at 1; INGAA at 5.

[163] See, e.g., United States v. Persky, 520 F.2d 283 (2d Cir. 1975); accord Todd & Co. v. SEC, 557 F.2d 1008, 1013 (3d Cir. 1977).

circumstances, or situations.[164]

49. The Commission recognizes that the SEC does not have a duty to assure that the price of a security is just and reasonable, and that our duty is not to protect purchasers through a regime of disclosure. Despite these differences in mission, however, wholesale natural gas and power markets, like securities markets, are susceptible to fraud and market manipulation, regardless of the level of sophistication of the market participants. Therefore, it is appropriate to model the Final Rule on SEC Rule 10b-5 in an effort to prevent (and where appropriate remedy) fraud and manipulation affecting the markets the Commission is entrusted to protect, while providing a level of certainty to market participants that is beyond that which the Commission would be otherwise required to provide. However, as discussed below, we provide several of the clarifications requested by the commenters to address the differences between the SEC's regulation of securities markets and our regulation of markets for natural gas and electricity.

C. Disclosure

50. Several commenters expressed concern over what they consider to be disclosure implications of the proposed regulations.[165] In particular, commenters focused on two disclosure-related areas: whether the proposed anti-manipulation regulations create a new duty of disclosure; and whether sections 1c.1(a)(2) and 1c.2(a)(2), and particularly the references to "omissions of material fact," impose an undue burden on bilateral, arm's-length negotiations.

1. Duty of Disclosure

a. Comments

51. Commenters' view is that the proposed regulations should not create an affirmative duty to disclose strategic or proprietary information not otherwise required under the FPA, NGA, or Commission orders, rules, or regulations.[166] Ameren argues that there is no evidence in EPAct 2005 that Congress intended to impose a general obligation of disclosure in the energy markets.[167] Ameren and LG&E provide examples of a company purchasing power as a result of a forced outage, and question whether, under the regulations, a party would have to disclose information detrimental to its bargaining position.[168] AEP expresses similar concern that the regulations should not require companies to disclose

[164] For example, as explained in paragraph 36 supra, the Commission is not adopting the disclosure regime of the SEC, and as explained in paragraphs 52-53 infra, the element of scienter will apply in the Final Rule just as it applies to SEC Rule 10b-5.

[165] See, e.g., Ameren at 4-6; AGA at 4; AEP at 2; Cinergy at 8-9; Indicated Market Participants at 10-13, 23-28; EEI at 14-16; EPSA at 5-11; FirstEnergy at 10-13; ISDA at 3-8; INGAA at 5-7, 10; LG&E at 9; NGSA at 2, 5-6; PG&E at 7; Progress at 2-4; SCE at 3-4; SUEZ at 12-14; Xcel at 2, 4-6.

[166] See, e.g., Ameren at 4; EEI at 16; Indicated Market Participants at 27.

[167] Ameren at 4.

[168] Id. at 5; LG&E at 8.

trade secrets, sensitive information, or forward looking information developed by the company.[169] AEP argues that the proposed rules be clarified to encompass only those instances where there is an affirmative duty to disclose, such as a Commission-imposed disclosure or reporting requirement.[170] EPSA and Progress argue that the regulations should be clarified so as not to result in broad disclosure obligations that would be incompatible with the arm's-length transactions that the Commission oversees.[171] Similarly, INGAA and EEI argue that the regulations should be revised to delete or limit any affirmative obligation to disclose information to a counterparty, or to educate another party in bilateral negotiations.[172] In support of its argument, INGAA cites SEC Regulation D, which exempts certain securities offerings from the registration and disclosure requirements of the securities laws because the investors in such offerings are sophisticated.[173] NGSA also states that the Commission should clarify that it does not intend to incorporate by reference the disclosure obligations applicable to issuers of securities.[174]

b. Commission Determination

52. The Commission declines to modify the proposed regulations in this Final Rule. To avoid uncertainty, however, we clarify that the Final Rule creates no new affirmative duty of disclosure. Commenters are mistaken to the extent they believe section 10(b) of the Exchange Act or SEC Rule 10b-5 imposes an independent affirmative obligation to disclose. Well-settled case law interpreting section 10(b) and Rule 10b-5 makes clear that section 10(b) and Rule 10b-5 do not, by themselves, create an affirmative duty to disclose absent a relationship of trust and confidence (i.e., a fiduciary relationship) or some other duty imposed elsewhere in the securities laws.[175] Therefore, in the arm's-length, bilateral negotiations that are typical in wholesale energy markets, absent some tariff

[169] AEP at 2.

[170] Id. at 3.

[171] EPSA at 1; Progress at 2-4.

[172] INGAA at 7; EEI at 16. See also ISDA Supplemental Reply at 2.

[173] INGAA at 5.

[174] NGSA at 2, 5-6.

[175] See Basic Inc. v. Levinson, 485 U.S. 224, 239, n.17 (1988) ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5.") citing Chiarella v. United States, 445 U.S. 222, 234 (1980) (". . . a duty to disclose under [section] 10 (b) does not arise from the mere possession of nonpublic market information. [T]he duty to disclose arises when [there exists] a relationship of trust and confidence. . . ."); see also Gross v. Summa Four, 93 F.3d 987, 992 (1st Cir. 1996) (citing Chiarella, the court holds that "[b]y itself. . . Rule 10b-5[] does not create an affirmative duty of disclosure. Indeed, a corporation does not commit securities fraud merely by failing to disclose all nonpublic material information in its possession."); accord Castellano v. Young & Rubicam, Inc., 257 F.3d 171, 179 (2d Cir. 2002); Ackerman v. Schwartz, 947 F.2d 841, 848 (7th Cir. 1991).

requirement or Commission directive mandating disclosure, the Final Rule imposes no new affirmative duty of disclosure.

53. As there is no new affirmative duty of disclosure under the Final Rule, commenters' concern over the disclosure implications of the proposed regulations is misplaced. The Final Rule operates within the regulatory framework of the FPA and NGA; the Commission is not adopting the disclosure provisions of the securities laws[176] or the purpose of the securities laws, which is "to protect investors by promoting full disclosure of information thought necessary to informed investment decisions."[177] Rather, the Final Rule, like section 10(b) of the Exchange Act and SEC Rule 10b-5, is an anti-fraud provision, not a disclosure provision.[178] Nothing in the Final Rule requires disclosure of sensitive information that would only function to weaken an entity's bargaining position in arm's-length, bilateral negotiations. Absent a tariff requirement or Commission directive mandating disclosure, there is no violation of the Final Rule simply because an entity chooses not to disclose all non-public information in its possession.[179]

54. Similarly, the Commission clarifies that nothing in the Final Rule changes the Commission's precedent on contract law. Private contracts are fundamental to the functioning of the energy industry, and the Commission expects parties to continue to rely on the contracts they enter into. The Commission expects parties to continue to resolve most contract disputes, including those based on claims of fraud in the inducement, without the involvement of the Commission, relying on state and federal courts to apply contract law as appropriate.

2. Sections 1c.1(a)(2) and 1c.2(a)(2) and Omissions of Material Fact

a. Comments

55. Commenters are divided as to whether the Commission should modify or delete sections 1c.1(a)(2) and 1c.2(a)(2) of the Final Rule, particularly with regard to sections 1c.1(a)(2) and 1c.2(a)(2)'s references to omissions.[180] Ameren, Cinergy, and Indicated Market Participants argue that sections 1c.1(a)(2) and 1c.2(a)(2) should not be adopted because the definition of market manipulation should

[176] See, e.g., 15 U.S.C. 78m (2000).

[177] SEC v. Ralston Purina Co., 346 U.S. 119, 123-5 (1953).

[178] See, e.g., International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 565 n.18 (1979) (distinguishing between the disclosure and antifraud provisions of the securities laws, the court states that a waiver from disclosure requirements because an investor is sophisticated does "not provide shelter from the criminal anti-fraud protection of Rule 10b-5 or other civil anti-fraud provisions); Sonnenfeld v. City of Denver, 100 F.3d 744, 746 n.1 (10th Cir. 1996) (noting that securities exempted from regulatory burdens are still subject to civil fraud causes of action).

[179] See supra note 67.

[180] Sections 1c.1(a)(2) and 1c.2(a)(2) read: "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 . . . ."

not include any general duty to disclose.[181] More specifically, EEI and EPSA argue that reference in sections 1c.1(a)(2) and 1c.2(a)(2) to "omissions of material fact" should be deleted as it would require market participants to disclose sensitive information that would not otherwise be exchanged among wholesale energy market participants engaged in bilateral negotiations, which could result in harm to the market participant's bargaining position.[182] EEI also argues that sections 1c.1(a)(2) and 1c.2(a)(2) should be modified to incorporate a knowledge and intent standard.[183]

56. FirstEnergy argues that sections 1c.1(a)(2) and 1c.2(a)(2) are overly broad, and unnecessary to protect electric ratepayers because participants in wholesale power sales transactions are sophisticated and have the ability to evaluate the veracity of any information that may be conveyed by other participants.[184] Indicated Market Participants argue that since the disclosure concepts of the securities laws are not generally applicable to electric and gas markets, sections 1c.1(a)(2) and 1c.2(a)(2) should be deleted.[185] Likewise, Xcel argues that there is no need to require SEC-like disclosure in wholesale energy markets, and it argues that the Commission should modify or delete sections 1c.1(a)(2) and 1c.2(a)(2).[186] While not asking for a change in the regulations, INGAA requests that we clarify that "mere puffery" is not actionable under the regulations.[187]

57. On the other hand, APGA, PNM and TDUS support the inclusion of sections 1c.1(a)(2) and 1c.2(a)(2) without modification.[188] APGA urges the Commission to reject calls for the deletion or modification of sections 1c.1(a)(2) and 1c.2(a)(2) because the vast bulk of natural gas sales are not negotiated by sophisticated market participants, but are determined by price indices that rely on full and accurate reporting.[189] PNM supports the inclusion of sections 1c.1(a)(2) and 1c.2(a)(2) noting that there may be rare instances where an omission of material fact amounts to market manipulation, but also notes

[181] Ameren at 6; Cinergy at 8; Indicated Market Participants at 28.

[182] EEI at 16; EPSA at 8.

[183] EEI at 16.

[184] FirstEnergy at 11.

[185] Indicated Market Participants at 27-28.

[186] Xcel at 2, 4-6.

[187] INGAA at 9.

[188] APGA at 5; PNM at 9; TDUS at 3-4.

[189] APGA at 5.

that the Commission should make clear that the sections create no new duty of disclosure.[190]

b. Commission Determination

58. The Commission rejects proposals to modify or delete sections 1c.1(a)(2) and 1c.2(a)(2) of the regulations. As just discussed, the Final Rule does not create an affirmative duty to disclose beyond any existing requirements. It is important to note, however, that where an entity voluntarily provides information or where the entity is required by a tariff or a Commission statute, order, rule or regulation to provide information, and the entity then misrepresents or omits a material fact such that the information provided is materially misleading, there can be a violation of the Final Rule if all of the other elements of a violation are present.[191] This does not mean, however, that a material misrepresentation or omission that affects only negotiations between two sophisticated parties will necessarily result in an enforcement action by the Commission. Instead, the Commission will decide whether to pursue enforcement action in such a situation on a case-by-case basis, with due consideration of whether such material misrepresentations or omissions occur in or have an effect on jurisdictional transactions. Absent such an effect, as we noted earlier, we generally will not apply the Final Rule to bilateral contract negotiations.

59. With respect to other comments related to the application of specific securities law precedent, as discussed earlier, the Commission intends, on a case-by-case basis, to be guided by analogous securities law precedent that is appropriate under the specific facts, circumstances, and situations in the energy industry. For example, even if some duty to provide information exists, the Commission agrees with INGAA that "mere puffery" is not violation of sections 1c.1(a)(2) and 1c.2(a)(2).[192]

D. Sections 1c.1(a)(3) and 1c.2(a)(3) and Intent

1. Comments

60. Some commenters suggested the Commission delete sections 1c.1(a)(3) and 1c.2(a)(3) of the

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[190] PNM at 9. As discussed above in paragraph 28, TDUS argues that no dilution or alteration of the proposed rules is warranted, regardless of the sophistication of the parties to a transaction. TDUS at 3-4.

[191] These include the requisite scienter, discussed infra, and the conduct being in connection with a jurisdictional purchase or sale or jurisdictional transportation or transmission, discussed supra.

[192] See In re Advanta Corp. Sec. Litig., 180 F.3d 525, 538 (3rd Cir. 1999) (noting that general expressions of optimism for the future are immaterial and not actionable); Eisenstadt v. Centel Corp., 113 F.3d 738, 745 (7th Cir. 1997) ("Everybody knows that someone trying to sell something is going to look and talk on the bright side. You don't sell a product by bad-mouthing it. And everybody knows that auctions can be disappointing.") (emphasis in original); Raab v. General Physics Corp., 4 F.3d 286, 287 (4th Cir. 1996) (holding that predictions of future business prospects were not specific guarantees necessary to make them material within the meaning of section 10b); see also In re Northern Telecom Ltd. Securities Litig., 116 F. Supp. 2d 446, 466 (S.D.N.Y 2000) (stating that under section 10b and Rule 10b-5, actionable statements must be sufficiently "concrete" or "specific" to be material, as opposed to "single, vague statement[s] that are essentially mere puffery").

proposed regulations or revise them explicitly to include the element of intent. For example, Ameren argues that sections 1c.1(a)(3) and 1c.2(a)(3) are unnecessary in light of sections 1c.1(a)(1) and 1c.2(a)(1).[193] EEI argues that sections 1c.1(a)(3) and 1c.2(a)(3) should be deleted because the "operates as a fraud" language could prohibit any deceptive act regardless of whether scienter is present.[194] Alternatively, EEI and FirstEnergy suggest that sections 1c.1(a)(3) and 1c.2(a)(3) be revised. EEI urges that sections 1c.1(a)(3) and 1c.2(a)(3) include elements of knowledge and intent; FirstEnergy also asks that the phrase "or would operate" be removed so it would be clear that actions not intended to defraud from being subject to the regulations.[195]

61. In contrast, TDUS argues that the Commission should reject attempts to modify or delete sections 1c.1(a)(3) and 1c.2(a)(3) noting that SEC Rule 10b-5 has remained intact since 1951, and no court or SEC action has resulted in any change to Rule 10b-5.[196] APGA also opposes modification or deletion of sections 1c.1(a)(3) and 1c.2(a)(3), arguing that intent is already an element of a violation of the proposed regulations, and any elimination of sections 1c.1(a)(3) and 1c.2(a)(3) could create uncertainty by distinguishing the Final Rule from SEC Rule 10b-5 so as to render analogous securities law precedent inapplicable.[197]

2. Commission Determination

62. The Commission rejects proposals to modify or delete sections 1c.1(a)(3) and 1c.2(a)(3) beyond the substitution of "entity" in place of "person" as discussed below in paragraph 76. Sections 1c.1(a)(3) and 1c.2(a)(3) are necessary; and as discussed below, there can be no violation of the Final Rule, or any of its sections, absent a showing of the requisite scienter. SEC Rule 10b-5 has an analogous section that has remained unchanged since it was adopted in 1942, and there is abundant securities law precedent that highlights the ongoing relevance of that section.[198] Therefore, as the Final Rule is modeled on SEC Rule 10b-5 and the Commission intends to be guided, on a case-by-case basis, by analogous securities law precedent that is appropriate under the facts, circumstances, and situations presented in the energy industry, it is prudent to retain sections 1c.1(a)(3) and 1c.2(a)(3) without modification.

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[193] Ameren at 6-7.

[194] EEI at 13-14.

[195] Id. 14; FirstEnergy at 15.

[196] TDUS Reply at 8-9.

[197] APGA Reply at 5.

[198] One measure of the paragraph's importance is the frequency of use. There are numerous cases citing the "operate as a fraud" language of SEC Rule 10b-5, which suggest that it is not nugatory as EEI argues in its comments. See, e.g., SEC v. Zandford, 535 U.S. at 819; SEC v. George, 426 F.3d 786, 792 (2005).

E. Elements of a Manipulation Claim

1. Comments

63. Several commenters asked the Commission to clarify the elements of manipulation under the Final Rule.[199] INGAA recommends that the Commission explicitly reference the essential elements of the SEC's Rule 10b-5 cause of action that have been developed in the case law and provide greater guidance as to their application in the context of the natural gas markets.[200] Specifically, INGAA argues the Commission should clarify the definition of materiality, the requirement of scienter, the requirement of deception, the existence of a pre-existing duty to speak in a nondisclosure case, the absence of liability for mere puffery and other limitations.[201] Indicated Market Participants and NGSA state that the Commission should set forth the following as elements of a manipulation claim: misrepresentation or omission of a material fact; scienter, causation, reliance, and damages.[202]

64. EEI seeks clarification that fraud is a required element of the Final Rule and its sections.[203] AEP and EEI suggest that the Commission should explicitly identify the intent standard based on the scienter standard used in section 10(b), which is satisfied by a showing of recklessness.[204] EEI seeks clarification that liability under the market manipulation rule requires a showing of "extreme recklessness" or "egregious disregard."[205] Progress believes that the Final Rule should be revised to exclude "indirectly" from sections 1c.1(a) and 1c.2(a), and if the Commission is unwilling to do so, it should explicitly incorporate an intent standard.[206] In contrast, TDUS argues that the Commission should not modify the regulations to incorporate a specific standard of intent into the Final Rule.[207]

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[199] See, e.g., Ameren at 6-7; AEP at 3; Cinergy at 7-8; Indicated Market Participants at 9-10, 18; EEI at 12-14; FirstEnergy at 7-10; INGAA at 7-11; LG&E at 3; NGSA at 2, 5-8; NiSource at 3, 5-8; Progress at 2-3; SCE at 4.

[200] INGAA at 7-8.

[201] Id. at 11.

[202] Indicated Market Participants at 18; NGSA at 2, 5-7.

[203] EEI at 4.

[204] Id. at 12; AEP at 3.

[205] EEI at 12.

[206] Progress at 2-3.

[207] TDUS at 5.

2. Commission Determination

65. The Commission generally agrees that clarification of the elements of a violation under the Final Rule would reduce regulatory uncertainty and thereby assure greater compliance. It is unnecessary, however, to modify the text of the Final Rule. Rather, we will clarify the general requirements of a violation, guided by applicable securities law precedent, specifically the precedent setting out the elements the SEC must prove when it brings an enforcement action, as INGAA noted in its comments.[208] In enforcement actions under Rule 10b-5, the SEC must show that the defendant: (1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; and (3) in connection with the purchase or sale of securities.[209] The SEC does not need to show reliance, loss causation or damages because "the Commission's duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury."[210]

66. These elements offer useful guidance as to how the Commission will apply the Final Rule. The Commission will act in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission. In the paragraphs that follow, the Commission offers clarification on each element.

67. The Final Rule prohibits the use or employment of any device, scheme, or artifice to defraud. The Commission defines fraud generally, that is, to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-

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[208] INGAA at 10-11. See, e.g., SEC v. Monarch Funding Corp., 192 F.3d 295, 308 (2d Cir. 1999) (setting out the elements of an enforcement action under SEC Rule 10b-5). We reject the comments of Indicated Market Participants and NGSA, which set forth the elements of a private right of action under section 10(b) and Rule 10b-5. While cases arising in the context of private litigation may be instructive on certain points, the elements needed for a private right of action are not the same as those required for administrative enforcement applicable here.

[209] SEC v. Monarch Funding Corp., 192 F.3d at 308.

[210] See, e.g., SEC v. Credit Bancorp, Ltd., 195 F. Supp. 2d 475, 491 (S.D.N.Y. 2002) quoting Berko v. SEC, 316 F.2d 137, 143 (2d Cir. 1963) citing SEC v. North American Research & Dev. Corp., 424 F.2d 63, 84 (2d Cir. 1970) (reliance not an element of a Rule 10b-5 claim in the context of an SEC proceeding). Similarly, in a criminal prosecution for securities fraud, the government need not demonstrate specific reliance by the investor in a securities fraud prosecution. See United States v. Ashdown, 509 F.2d 793, 799 (5th Cir. 1975). However, the government must show "impact of the scheme on the investor." See United States v. Schaefer, 299 F.2d 625, 629 (7th Cir. 1962). While reliance, loss causation and damages are not necessary for a violation of the Final Rule, these elements will inform the Commission's assessment of any disgorgement or civil penalties that may be appropriate under the circumstances.

functioning market.[211] Fraud is a question of fact that is to be determined by all the circumstances of a case.

68. If there is a duty to disclose under a Commission-filed tariff or Commission directive, material misrepresentations and, under certain conditions, material omissions, may violate the Final Rule. Guided by securities law precedent, the Commission finds that a fact is material if there is a substantial likelihood that a reasonable market participant would consider it in making its decision to transact because the material fact significantly altered the total mix of information available.[212] Of course, not every fact about a transaction is material and, therefore, the materiality of a misrepresented or omitted fact will be determined on a case-by-case basis.[213]

69. The Commission rejects as unnecessary commenters' requests to incorporate a specific intent standard into the Final Rule. Congress directed that the terms "manipulative or deceptive device or contrivance" as they appear in sections 1283 and 315 of EPAct 2005 be interpreted in accordance with section 10(b) of the Exchange Act. According to the Supreme Court, "[t]he words 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that § 10 (b) was intended to proscribe knowing or intentional misconduct . . . conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."[214] Based on the foregoing, any violation of the Final Rule requires a showing of scienter.[215]

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[211] See e.g., Dennis v. United States, 384 U.S. 855, 861 (1966) (noting that fraud within the meaning of a statute need not be confined to the common law definition of fraud: any false statement, misrepresentation or deceit).

[212] TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976) sets forth the "total mix" or "substantial likelihood" test of materiality: a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available. Accord Basic, Inc. v. Levinson, 485 U.S. 224, 231-2 (1988).

[213] Based on securities law precedent, the relevant time period for determining materiality is at the time of the statement or omission, and not in hindsight. See Ganino v. Citizens Utils. Co., 228 F.3d 154, 165 (2d Cir. 2000).

[214] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976) (Hochfelder); accord Aaron v. SEC, 446 U.S. 680, 690 (1980) (Aaron).

[215] See Aaron, 446 U.S. at 690, 705 (stating that the words "manipulative," "device," and "contrivance" whether given "their commonly accepted meaning or read as terms of art" clearly refers to "knowing or intentional misconduct." In addition, the Court said that "Section 10(b) is described as a catchall provision, but what it catches must be fraud."); Hochfelder, 425 U.S. at 199 (noting that the words "manipulative," "device," and "contrivance" are "terms that make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence"). Despite section 10(b)'s use of the disjunctive "or" in "manipulative or deceptive device or contrivance," the Supreme Court has concluded that both require "misrepresentation."

70. Commenters sought clarification on whether recklessness satisfies the scienter element. The Supreme Court has not addressed whether recklessness satisfies the scienter requirement it read into section 10(b),[216] but the Courts of Appeals that have addressed the issue agree that recklessness satisfies the section 10(b) scienter requirement.[217] Similarly, the Commission concludes that recklessness satisfies the scienter element of the Final Rule.

71. For our discussion of the "in connection with" requirement, see paragraphs 21 and 22, supra.

F. Interplay with Market Behavior Rules

1. Comments

72. Several commenters raise concerns over the interplay between the proposed regulations and the Market Behavior Rules.[218] Some commenters advocate that the Commission retain Market Behavior Rules, either as they are currently written or with modification.[219] Several industry commenters request

[216] Hochfelder, 425 U.S. at 194 n.12 ("In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act. We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under [section] 10(b) and Rule 10b-5."). Although the scienter requirement was first read into section 10(b) in the context of a private right of action, in Aaron the Supreme Court decided that a showing of scienter is also required in SEC civil enforcement actions arising under section 10(b). Aaron, 446 U.S. at 695.

[217] Courts of appeal are in general agreement that that recklessness in some form satisfies the scienter requirement of SEC Rule 10b-5. For example, motive and opportunity to commit fraud or conscious behavior sufficient to raise a strong inference of recklessness is sufficient in the Second, Third, and Eighth Circuits. See, e.g., Florida State Board of Administration v. Green Tree Fin. Corp., 270 F.3d 645 (8th Cir. 2001); Novak v. Kasaks, 216 F.3d 300 (2d Cir. 2000); In re Advanta Corp. Securities Litig., 180 F.3d 525 (3d Cir. 1999). The First, Fifth, Sixth, Tenth and Eleventh Circuits apply a "severely reckless" or action with "conscious disregard" of the problem or risk standard. See, e.g., Nathenson v. Zonagen, Inc., 267 F.3d 400 (5th Cir. 2001); City of Philadelphia v. Fleming Companies, Inc., 264 F.3d 1245 (10th Cir. 2001); Grebel v. FTP Software, Inc., 194 F.3d 185 (1st Cir. 1999); In re Comshare, Inc. Securities Litig., 183 F.3d 543 (6th Cir. 1999); Bryant v. Avardo Brands, Inc., 187 F.3d 1271 (11th Cir. 1999). In the Ninth Circuit, a plaintiff must plead "in great detail facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct." See, e.g., In re Silicon Graphics Securities Litig., 183 F.3d 970 (9th Cir. 1999) (adopting the definition of recklessness as it appears in Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1977)).

[218] See, e.g., Ameren at 8-9; AGA at 5; Cinergy at 5, 9; EEI at 17-19; LG&E at 9; NARUC at 6; NASUCA at 4-5 (arguing for an expansion of the Market Behavior Rules to reach all market participants); PG&E at 4, 12-13; APPA Reply at 5; PNM Reply at 7-8; EEI Reply at 4-6.

[219] We note that, as a result of the timing of the comment due date in this proceeding, these comments were filed the same day as the Commission issued its orders proposing repeal of the Market Behavior Rules. See Amendments to Codes of Conduct for Unbundled Sales Service and for Persons

deletion of the foreseeability standard and "legitimate business purpose" criteria of Market Behavior Rule 2, and incorporation of the scienter standard of the proposed regulations. Certain commenters also find the specific prohibitions of Market Behavior Rules 2(a) (wash trades), 2(b) (false information), 2(c) (artificial congestion/relief), and 2(d) (collusion) useful because those rules offer guidance and specificity about the prohibition of certain defined transactions.

73. APPA argues that the Commission should deal with the future of the Market Behavior Rules in the Commission's separate FPA 206 proceeding and not as part of this proceeding.[220] PNM, in contrast, contends that adopting rules based on SEC Rule 10b-5 will be confusing, and instead urges the Commission to amend the existing Market

Behavior Rules to incorporate the terms of EPAct 2005 sections 315 and 1283, and not adopt the proposed regulations.[221]

74. EEI urges the Commission to retain the time limits and specific acts set forth in the Market Behavior Rules, and to state that compliance with the behavior rules guidelines constitutes compliance with the new rules.[222] Similarly, EEI argues that whatever the interaction between the Market Behavior Rules and the Final Rule, the Commission should clarify that there will be no "double jeopardy."[223]

2. Commission Determination

75. Both Market Behavior Rules 2 and 3[224] and this Final Rule prohibit fraud and manipulative conduct. The Market Behavior Rules are still in effect, although the Commission has indicated in the Market Behavior Rules proceeding (Docket Nos. EL06-16-000 and RM06-5-000) that the Market Behavior Rules may be revised or repealed after the anti-manipulation regulations are made effective.[225] If they are repealed, the Commission intends to have a smooth transition from the Market Behavior

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Holding Blanket Marketing Certificates, 113 FERC ¶ 61,189 (2005); Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 113 FERC ¶ 61,190 (2005).

[220] APPA Reply at 5.

[221] PNM Reply at 7-8.

[222] EEI Reply at 4-6.

[223] EEI at 21.

[224] The following analysis with regard to the Market Behavior Rules also applies to sections 284.288(a) and 284.403(a) of the Commission's codes of conduct with respect to certain sales of natural gas. 18 CFR 284.288(a) and 284.403(a) (2005).

[225] See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 70 FR 71484 (2005), 113 FERC ¶ 61,190 at P 13 (2005); Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates, 70 FR 72090 (2005), 113 FERC ¶ 61,189 at P 11 (2005).

Rules to the Final Rule on manipulation, and there will be no gap in our prohibition of manipulation as we complete the transition.

76. As stated in the NOPR, the Commission will not seek duplicative sanctions for the same conduct in the event that conduct violates both the Market Behavior Rules and this Final Rule.[226] With respect to the specific prohibitions of Market Behavior Rule 2 (wash trades, transactions predicated on submitting false information, transactions creating and relieving artificial congestion, and collusion for the purpose of market manipulation), these are examples of prohibited manipulation, all of which are manipulative or deceptive devices or contrivances, and are therefore prohibited activities under this Final Rule, subject to punitive and remedial action.[227] Further, as discussed further below, the specific provision set forth in the Market Behavior Rules for actions taken in conformity with the Commission-approved market rules adopted by an ISO or RTO identify behaviors that are presumptively not fraudulent and hence would not be violations of this Final Rule.

77. The issue of applying the time limits set forth in the Market Behavior Rules to this Final Rule will be dealt with below.

G. Statute of Limitations

1. Comments

78. Some commenters urged the Commission to adopt an explicit statute of limitations period for the proposed rules.[228] For example, NiSource cites the Sarbanes-Oxley Act in support of its argument that the Commission require actions under the Final Rule be commenced within two years of discovery of a violation, but in no event more than five years after occurrence of a violation.[229] AEP cites a private rights of action under SEC Rule 10b-5 in support of its argument for three year limitations period, and EEI argues the Commission should follow the five-year statute of limitations contained in 28 U.S.C. 2462 and adopt the 90-day provision of the Market Behavior Rules to require that an action must be filed within 90 days after the end of the calendar quarter in which the alleged violation of the Final Rule occurred or, if later, 90 days after the complainant knew or should have known that the alleged violation of the Final Rule occurred.[230]

2. Commission Determination

79. There is no explicit statute of limitations set forth in NGA section 4A or in FPA section 222, and no statute of limitations of general applicability appears in the NGA or FPA. The Commission declines to designate a statute of limitations or otherwise adopt an arbitrary time limitation on complaints or enforcement actions that may arise under NGA section 4A and FPA section 222. We note, however,

[226] See Prohibition of Energy Market Manipulation, 113 FERC ¶ 61,067 at P 15 (2005).

[227] See 113 FERC ¶ 61,190 at P 18 (2005); 113 FERC ¶ 61,189 at P 15 (2005).

[228] See, e.g., AEP at 3; EEI at 19-21; NGSA at 2, 5, 8; NiSource at 9.

[229] NiSource at 3.

[230] AEP at 3; EEI at 19-20.

that when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations, the general statute of limitations for collection of civil penalties, 28 U.S.C. 2462, applies.[231] Section 2462 in 28 U.S.C. imposes a five-year limitations period on any "action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."[232]

80. The Commission, therefore, rejects AEP's call for a three-year limitations period because that period applies only in the context of private rights of action under the securities laws, not to SEC enforcement actions. For the same reason, we reject NiSource's argument that a limitations period under the Sarbanes-Oxley Act should apply to actions we may bring under our enforcement authority, and EEI's request that the Commission apply to the Final Rule the 90-day action limitation of the existing Market Behavior Rules. We will exercise prosecutorial discretion in determining whether to pursue an alleged violation based on all the facts presented, including the time elapsed since the violation is alleged to have occurred, and will adhere to the five-year statute of limitations where we seek civil penalties.

H. Safe Harbors and Affirmative Defenses

1. Comments

81. Several commenters suggest that the Commission make explicit in the language of proposed regulations certain safe harbors. For example, they argue that the following should be deemed acceptable behavior: actions or transactions taken at the direction of an RTO or ISO (similar to the affirmative defense in Market Behavior Rule 2), compliance with Midwest ISO's market monitoring program, actions or transactions with a "legitimate business purpose," and legitimate hedging activity.[233]

82. Some commenters urge the Commission to provide specific examples of what would or would not constitute market manipulation.[234] NiSource argues that aiding and abetting, as opposed to primary violations, and actions taken pursuant to Commission-approved tariffs, state law, and Supreme Court precedent, as well as minor errors, would not violate the proposed rules.[235] Furthermore, some

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[231] See, e.g., United States v. Godbout-Bandal, 232 F.3d 637, 639 (8th Cir. 2000).

[232] 28 U.S.C. 2462 (2000). The five-year limitation runs "from the date the claim first accrued." Id. We intend that any administrative action for violation of the Final Rule be commenced within five years of the date of the fraudulent or deceptive conduct.

[233] See, e.g., AEP at 2; AGA at 5-6 (advocating a safe harbor for "inadvertent" errors); Ameren at 7; DTE at 2-4; INGAA at 11; LG&E at 3; NGSA at 2, 5, 8-9 (seeking clarification that the proposed regulations do not modify or supersede the Commission's policy statement on price reporting or the related safe harbor provisions of that policy); NiSource at 7; and SCANA at 3-4.

[234] See, e.g., SCANA at 3-5 (arguing for an explicit safe harbor for hedging transactions, and that any violation of the "shipper must have title" rule is a per se violation); NiSource at 7; and Indicated Market Participants at 20-22 (requesting specific guidance, including a non-exclusive list, of what would and would not be considered manipulative conduct, to aid in internal training and compliance programs).

[235] NiSource at 6-9.

commenters request a mechanism for obtaining guidance on whether proposed conduct violates the anti-manipulation rules through a procedure similar to the SEC's No-Action Letter process.[236]

2. Commission Determination

83. The Commission will address issues relating to the Market Behavior Rules, and the affirmative defenses or safe harbors therein, in the FPA section 206 proceeding and NGA NOPR related to the Market Behavior Rules in Docket Nos. EL06-16-000 and RM06-5-000. As noted in that proceeding, it is the Commission's intent to have a smooth transition to the new anti-manipulation regulations but not to leave gaps between the adoption of the Final Rule and any repeal or revision of the Market Behavior Rules.

84. In all events, however, it is not necessary to change the wording of the Final Rule. The availability of safe harbor presumptions of compliance and affirmative defenses will be the same as is currently the case under the Market Behavior Rules. Thus, 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 the Final Rule. 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.

I. Procedures for Handling Manipulation Claims

1. Comments

85. Some commenters seek clarification on how claims of market manipulation will be processed by the Commission. PG&E asks for procedures that will permit involvement of affected market participants in manipulation complaints, including intervention and full participation by affected parties, and availability of all remedies, including disgorgement or returning consumers to the condition they would have been in, absent manipulation. Doing so, PG&E asserts, would provide due process for those damaged by manipulation and would assure that the Commission considers all relevant factors in resolving the complaint.[237] Cinergy, on the other hand, states that it expects that complaints would be filed pursuant to NGA section 5 or FPA section 206, and that the Commission should incorporate in the Final Rule procedural requirements for filing complaints. Cinergy also seeks clarification on whether the Commission intends to apply the proposed regulations retroactively in any manner.[238] At the same time, however, Cinergy also argues that the Commission should explicitly urge parties first to take concerns and potential complaints to the Office of Market Oversight and Investigations Enforcement Hotline (Hotline). This, Cinergy explains, would permit entities accused of manipulation to present facts and evidence without suffering the potential harm within industry and the investment community that could result from an accusation of manipulation, and could lead to faster settlement resolutions of manipulation claims.[239]

86. EEI and INGAA also urge the Commission to address the formal process and procedures to be

[236] See, e.g., First Energy at 15-16; INGAA at 11.

[237] PG&E at 14-15.

[238] Cinergy at 10.

used in resolving manipulation complaints, including the burden of proof.[240] INGAA and ISDA suggest the Commission adopt a "Wells submission"[241] process like that of the SEC in which an entity is given, at the end of an investigation, notice of the proposed charges and enforcement action that staff intends to recommend to the SEC, and an opportunity to submit a written statement and materials to refute staff's recommendation.[242]

2. Commission Determination

87. Congress enacted the statutory prohibitions on market manipulation as separate sections of the NGA and FPA, giving the Commission anti-manipulation authority that is independent of other provisions of the NGA and FPA, including NGA section 5 and FPA section 206. Accordingly, the Commission rejects Cinergy's suggestion that complaints alleging manipulation necessarily would rely on NGA section 5 or FPA section 206.[243] As to the procedures to be followed when a complaint alleging manipulation is filed, the Commission will process the filing under the procedures currently set forth in Rule 206 of the Rules of Practice and Procedure.[244] The Commission rejects as unnecessary EEI's, INGAA's, and Cinergy's suggestions that we incorporate procedures into the Final Rule. The requirements for filing complaints are set out in Rule 206, and the process for handling complaints, including the allocation of the burden of proof, is well-defined through Commission case law. There is no need for a special or separate set of procedures for complaints arising from our new anti-manipulation authority.

88. Cinergy states that the industry needs to understand if there is to be any retroactive application of the Final Rule. The regulations adopted herein will become effective upon publication in the Federal Register. There can be no violation of the Final Rule until it is effective. The Market Behavior Rules, however, have been in effect since December 2003, and will remain in effect pending the outcome of the separate Docket Nos. EL06-16-000 and RM06-5-000 proceedings.

89. To the extent Cinergy suggests that no retroactive remedies should be used, the Commission reiterates that a complaint that alleges market manipulation will proceed under NGA section 4A or FPA section 222, utilizing the procedural rules and mechanisms generally applicable to NGA and FPA proceedings. We reject any suggestion that the Commission cannot remedy manipulative conduct after

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[239] Id. at 10-12.

[240] EEI at 19-21; INGAA at 13.

[241] The "Wells submission" process is set forth in SEC regulations, 17 CFR 202.5(c) (2005).

[242] INGAA at 12; ISDA Reply at 5.

[243] Even if a complaint were to involve NGA section 5 or FPA section 206 in some manner, that does not mean that the Commission would be limited only to prospective remedies, as Cinergy seems to suggest. Certain violations are susceptible of remedies from the time the violation occurred. See, e.g., Consolidated Gas Transmission Corp., 771 F.2d 1536 (D.C. Cir. 1985) (retroactive remedy available under NGA section 16).

[244] 18 CFR 385.206 (2005).

it has occurred, such as by ordering the disgorgement of profits and/or imposing a civil penalty. Congress did not limit the Commission's jurisdiction under NGA section 4A or FPA section 222 to prospective conduct and associated remedies only. How the Commission addresses market manipulation will depend on the facts presented, but we have significant discretion to shape equitable remedies that achieve the purpose of Congress' enactment of anti-manipulation provisions.[245] In devising a remedy, the Commission will exercise discretion to arrive at an appropriate remedy[246] and will explore all equitable considerations and practical consequences of our action pursuant to our statutory delegation.[247]

90. The Commission also declines to accept Cinergy's suggestion that we explicitly urge parties first to bring concerns and potential complaints to the Hotline.[248] Aggrieved entities should be free to choose the approach best suited to their circumstances, and if an entity so chooses, the Hotline (or other informal contact with the Commission's staff) is available for such matters.

91. Turning to INGAA's suggestion that the Commission adopt what is referred to as a "Wells submission" to permit entities under investigation to submit material to refute staff findings and recommendations prior to Commission action, we find that no new process need be adopted here. The Commission already has a regulation in place that provides a company under investigation with an opportunity to present its views,[249] and staff's existing practice is to present the company's views to the Commission as part of any report or recommendation made by staff following an investigation.

J. Miscellaneous Issues

1. Use of "Entity" in place of "Person" in sections 1c.1(a)(3) and 1c.2(a)(3)

a. Comments

92. Two commenters express concern with the use of "person" in proposed sections 47.1(a)(3) and

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[245] "[T]he Commission has broad authority to fashion equitable remedies in a variety of settings." Columbia Gas Transmission Corp. v. FERC, 750 F.2d 105, 109 (D.C. Cir. 1984) and cases cited therein. The courts have noted that "the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies, and sanctions . . . to arrive at maximum effectuation of Congressional objectives." Niagara Mohawk Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967).

[246] Gulf Oil Corp. v. FPC, 536 F.2d 588 (3rd Cir. 1977), cert. denied, 434 U.S. 1062 (1978), reh'g denied, 435 U.S. 981 (1978).

[247] FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962); Continental Oil Co. v. FPC, 378 F.2d 510 (5th Cir. 1967).

[248] See 18 CFR 1b.21 (2005)

[249] See 18 CFR 1b.18 (2005).

159.1(a)(3) and urge the Commission to substitute "entity" for "person."[250] Specifically, APPA points out that under proposed section 47.1(a)(3), it is unlawful "to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person" (emphasis added) and that the definition of "person" under the FPA excludes municipalities. Thus, according to APPA, an entity that practices a "fraud or deceit" on a municipality could argue that proposed section 47.1(a)(3) does not apply because the victim is not a "person" under the FPA.[251] APGA makes a similar argument with respect to proposed section 159.1(a)(3).[252]

b. Commission Determination

93. The Commission agrees with these commenters. It would be unfair and unintended to prohibit fraudulent or manipulative behavior by any entity, including municipalities, but then not cover fraud or deceit when it is perpetrated against a municipality. Accordingly, the Commission will substitute the word "entity" for "person" in sections 1c.1(a)(3) and 1c.2(a)(3) of the Final Rule.[253]

2. Impact of New Regulations on the Policy Statement on Natural Gas and Electric Price Indices

a. Comments

94. NGSA requests that the Commission clarify that the new regulations do not modify or supersede the Commission's Policy Statement on Natural Gas and Electric Price Indices.[254]

b. Commission Determination

95. The Commission clarifies that the new regulations are not intended to modify or supersede the Commission's Policy Statement on Natural Gas and Electric Price Indices. That Policy Statement provided guidance on how market participants should report price transaction information to price index developers, and stated that if the Policy Statement guidelines are followed, participants would not be penalized for inadvertent errors. We continue to encourage market participants to contribute to price formation and to utilize the guidelines of the Policy Statement when reporting pricing information. We also note that if an inadvertent error occurs, it would not involve the scienter needed for application of the Final Rule.

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[250] See APGA at 10-11; APPA at 2-4.

[251] APPA at 2-3.

[252] APGA at 10.

[253] As noted, the Final Rule will appear in 18 CFR 1c.1 and 1c.2 of the Commission's Rules of General Applicability, and the language change will be in 18 CFR 1c.1(a)(3) and 1c.2(a)(3).

[254] NGSA at 8-9. See Policy Statement on Natural Gas and Electric Price Indices, 104 FERC ¶ 61,121 (2003) (explaining the conditions under which the Commission will give industry participants safe harbor protection for good faith reporting of transactions data to entities that develop price indices).

3. Special Pleading

a. Comments

96. AEP argues that the Commission should discourage general allegations of fraud by requiring parties that bring an action under the proposed rule to plead with "sufficient particularity" by addressing eight items.[255] Other commenters, however, argue that the Commission should not adopt special pleading requirements beyond its notice provisions and existing complaint procedures.[256]

b. Commission Determination

97. Commenters' concerns regarding special pleading requirements are clearly covered by Rule 206 of the Commission's Rules of Practice and Procedure, which contains detailed requirements as to the specificity required by parties filing complaints with the Commission. For instance, under Rule 206(b)(1)-(2), a complaint must "clearly identify the action or inaction which is alleged to violate applicable statutory or regulatory requirements," and must "explain how the action violates statutory or regulatory requirements."[257] Similarly, in Order No. 663, the Commission sets forth the

requirement that issues must be listed with specificity in a separate section entitled "Statement of Issues."[258]

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[255] AEP at 3-4. The eight items are: (1) what identifiable acts or omissions occurred, what representations were made and why they were not accurate but constituted a scheme or device to defraud; (2) when and where each act occurred; (3) who participated, that is, how each entity is related to the case; (4) what specific documents contained what specific misrepresentations or material omissions; (5) how a party relied on the other party's actions; (6) whether the necessary element of scienter was present; (7) when the purchase, sale, or transmission of electric energy or natural gas occurred; and (8) what the offending party gained as a result of the fraud.

[256] See, e.g., TDUS Reply at 9.

[257] See Wisconsin Department of Natural Resources v. Wisconsin River Power Company, 101 FERC ¶ 61,108 at P 5 (2002) (rejecting complaint). See also Union Electric Company, d/b/a AmerenUE, 93 FERC ¶ 61,158 at 61,529 (2000) (denying a request for a hearing, citing Rule 206(b)(1), (2), and (8), and stating that "[t]he Commission's rules require a complaint not only to identify clearly the action that is alleged to violate applicable statutory standards or regulatory requirements, but to explain how the action violates those standards or requirements, and to include all documents in the complainant's possession that support the facts in the complaint").

[258] See Revision of Rules of Practice and Procedure Regarding Issue Identification, 70 FR 55723 (2005), FERC Stats. & Regs. ¶ 31,193 (2005).

XII. Regulatory Flexibility Act Certification

98. The Regulatory Flexibility Act of 1980[259] generally requires a description and analysis of Final Rule that will have significant economic impact on a substantial number of small entities.[260] The Commission is not required to make such analyses if a rule would not have such an effect.

99. The Commission concludes that this Final Rule would not have such an impact on small entities. This Final Rule prohibits all entities, including small entities, from employing manipulative or deceptive devices or contrivances in connection with energy markets subject to the Commission's jurisdiction, and therefore may cause entities, including potentially small entities, to increase costs in order to comply. This prohibition, however, will improve market transparency to the economic benefit of all entities, including small entities. Therefore, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities. Therefore, no regulatory flexibility analysis is required.

XIII. Information Collection Statement

100. This Final Rule implements the existing requirements as set forth in sections 315 and 1283 of EPAct 2005 and does not include new information requirements under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

XIV. Environmental Statement

101. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[261] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[262] Thus, we affirm the finding we made in the NOPR that this Final Rule is procedural in nature and therefore falls under this exception; consequently, no environmental consideration would be

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[259] 5 U.S.C. 601-612 (2000).

[260] The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. 632 (2000). The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.201 (Section 22, Utilities, North American Industry Classification System, NAICS) (2004).

[261] Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (1987), FERC Stats. & Regs. ¶ 30,783 (1987).

[262] 18 CFR 380.4(a)(2)(ii) (2005).

necessary.

XV. Document Availability

102. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

103. From the Commission's Home Page on the Internet, this information is available in the eLibrary. The full text of this document is available on eLibrary both in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

104. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@FERC.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

XVI. Effective Date and Congressional Notification

105. This Final Rule will take effect upon publication in the Federal Register. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this rule is not a major rule within the meaning of section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[263] The Commission will submit the Final Rule to both houses of Congress and the Government Accountability Office.[264]

106. A non-major rule goes into effect "as otherwise provided by law after submission to Congress."[265] The effective date may be sooner if the agency "for good cause" finds that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[266] The Administrative Procedure Act (APA)[267] requires rulemakings to be published in the Federal Register. The APA generally mandates that publication or service of a substantive rule not be made less than 30 days before its effective date. This waiting period is not required, however, if the agency finds "good cause" for waiving the 30 day waiting period.[268]

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[263] 5 U.S.C. 804(2) (2000).

[264] 5 U.S.C. 801(a)(1)(A) (2000).

[265] 5 U.S.C. 801(a)(4) (2000).

[266] 5 U.S.C. 808(2) (2000).

[267] 5 U.S.C. 551, et seq. (2000).

[268] 5 U.S.C. 553(d)(3) (2000).

107. The Commission finds that "good cause" exists that makes further notice and public procedure impracticable, unnecessary, or contrary to the public interest. The Commission has balanced the necessity for immediate implementation of this Final Rule against the principles of fundamental fairness which require that all affected persons be afforded reasonable time to prepare for the effective date of this ruling. The Commission is of the view that the persistent high energy prices in the wake of severe damage to the United States energy infrastructure from the hurricanes of 2005, together with the potential for severe price events in the event of cold winter weather during the winter months of 2006, may present opportunities for energy price manipulation. It would be contrary to the public interest to delay regulations that implement Congressional intent to prohibit manipulation in energy markets. Immediate adoption of the Final Rule will protect natural gas and electricity markets from manipulative conduct. Moreover, the public has had an opportunity to comment on the proposed rules, and the Final Rule being adopted is substantively the same as the rule that was proposed. Finally, the conduct proscribed by the Final Rule is similar to the conduct already proscribed by the Market Behavior Rules. Market participants should not have difficulty preparing to comply with a rule that bars manipulation in energy markets, particularly since many such participants are currently subject to the existing Market Behavior Rule provisions prohibiting manipulation. This Final Rule, therefore, will be made effective upon publication in the Federal Register.

List of subjects in 18 CFR Part 1c

Electric utilities
Natural gas
By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, under the authority of EPAct 2005, the Commission amends Chapter I, Title 18, Code of Federal Regulations, as follows:

1. Part 1c is added to read as follows:

PART 1c - - PROHIBITION OF ENERGY MARKET MANIPULATION

Sec.

1c.1 Prohibition of natural gas market manipulation.
1c.2 Prohibition of electric energy market manipulation.

Authority: 15 U.S.C. 717-717z; 16 U.S.C. 791-825r, 2601-2645; 42 U.S.C. 7101-7352; .

§ 1c.1 Prohibition of natural gas market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation 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.

(b) Nothing in this section shall be construed to create a private right of action.

§ 1c.2 Prohibition of electric energy market manipulation.

(a) It shall be 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.

(b) Nothing in this section shall be construed to create a private right of action.

ATTACHMENT F

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
[Docket No. IC09-916-000]

COMMISSION INFORMATION COLLECTION ACTIVITIES (FERC-916);
COMMENT REQUEST; EXTENSION

(March 29, 2009)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed information collection and request for comments.

SUMMARY: In compliance with the requirements of section 3506(c) (2) (a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104-13), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments in consideration of the collection of information are due May 29, 2009.

ADDRESSES: Comments may be filed either electronically or in paper format, and should refer to Docket No. IC09-916-000. Documents must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines at http://www.ferc.gov/help/submission-guide.asp.

Comments may be eFiled. The eFiling option under the Documents & Filings tab on the Commission's home web page: www.ferc.gov directs users to the eFiling web page. First-time users follow the eRegister instructions on the eFiling web page to establish a user name and password before eFiling. Filers will receive an emailed confirmation of their filed comments. Commenters filing electronically should not make a paper filing. If electronic filing is not possible, deliver original and 14

paper copies of the filing to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.

Parties interested in receiving automatic notification of activity in this docket may do so through eSubscription. The eSubscription option under the Documents & Filings tab on the Commission's home web page directs users to the eSubscription web page. Users submit the docket numbers of the filings they wish to track and will subsequently receive an email notification each time a filing is made under the submitted docket numbers. First-time users will need to establish a user name and password before eSubscribing.

Filed comments and FERC issuances may be viewed, printed and downloaded remotely from the Commission's website. The eLibrary link found at the top of most of the Commission's web pages directs users to FERC's eLibrary. From the eLibrary web page, choose General Search, and in the Docket Number space provided, enter IC09-916 then click the Submit button at the bottom of the page. For help with any of the Commission's electronic submission or retrieval systems, email FERC Online Support: ferconlinesupport@ferc.gov, or telephone toll-free: (866) 208-3676 (TTY (202) 502-8659).

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by telephone at (202)502-8663, by fax at (202)273-0873, and by e-mail at ellen.brown@ferc.gov .

SUPPLEMENTARY INFORMATION: The Commission is requesting comments on the record retention requirements of FERC-916[269], "Record Retention Requirements for Pipelines Providing Unbundled Sales Service, and Persons Holding Blanket Marketing Certificates," OMB Control No. 1902-0224. The FERC-916 record retention requirements are contained in 18 CFR 284.288(b) and

[269] FERC-916 was formerly called "FERC-916(549)," with the intent of consolidating the FERC-916 into the FERC-549 (OMB Control No. 1902-0086). FERC has decided not to consolidate the FERC-916 into the FERC-549, so this Notice deals only with the FERC-916 requirements.

284.403(b).

The Commission's regulations at 18 CFR 284.288 and 284.403 provide that applicable sellers of natural gas adhere to a code of conduct when making gas sales in order to protect the integrity of the market. The Commission imposes the FERC-916 record retention requirement on applicable sellers to "retain, for a period of five years, all data and information upon which it billed the prices it charged for natural gas it sold pursuant to its market based sales certificate or the prices it reported for use in price indices." FERC uses the FERC-916 records to monitor the jurisdictional transportation activities and unbundled sales activities of interstate natural gas pipelines and blanket marketing certificate holders.

The record retention period of five years is necessary due to the importance of records related to any investigation of possible wrongdoing and related to assuring compliance with the codes of conduct and the integrity of the market. The requirement is necessary to ensure consistency with the rule prohibiting market manipulation (regulations adopted in Order No. 670, implementing the EPAct 2005 anti-manipulation provisions[270]) and the generally applicable five-year statute of limitations where the Commission seeks civil penalties for violations of the anti-manipulation rules or other rules, regulations, or orders to which the price data may be relevant.

Failure to have this information available would mean the Commission is unable to perform its regulatory functions and to monitor and evaluate transactions and operations of interstate pipelines and blanket marketing certificate holders.

ACTION: The Commission is requesting a three-year extension of the current expiration date for the FERC-916, with no changes to the requirements.

BURDEN STATEMENT: Public reporting burden for this collection is estimated at:

[270] 18 CFR 1c.1 and 1c.2, 71 FR 4,244 (2006).

FERC Requirements	Number of Respondents Annually(1)	Number of Responses Per Respondent (2)	Average Burden Hours Per Response (3)	Total Annual Burden Hours (1)x(2)x(3)
FERC-916	222	1	1	222

The estimated total annual cost to respondents includes hours for labor (222 hrs. at $17 per hour, for a labor cost of $3,774) and record storage costs (using an estimated 12,548 cu. ft of records in off-site storage, for a total record storage cost of $81,051). The total annual cost (labor plus off-site record storage) is $84,825; the total annual cost per respondent is $382.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to retaining these records, such as administrative costs, off-site records storage, and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have

practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

Kimberly D. Bose,
Secretary.