

requirement. We believe that doing so would eliminate the need to retain Market Behavior Rule 5.

23. Finally, Market Behavior Rule 6 requires adherence to codes of conducts and the Standards of Conduct, and prohibits collusion to violate the codes of conduct or the Standards of Conduct. The codes of conduct are issued specifically to each market-based rate seller as part of their authorization, and the Standards of Conduct are applicable by rule to all market-based rate sellers engaged in or having affiliates engaged in transmission services. Our view is that Market Behavior Rule 6 restates requirements independently applicable to market-based rate sellers, except for the prohibition on colluding to violate the codes of conduct or Standards of Conduct. But collusion is a type of fraud,¹⁸ and thus collusion to violate codes of conduct or Standards of Conduct would be subject to the proposed part 47 regulations.

24. In addition to simplifying our behavior rules, avoiding confusion, and providing more regulatory certainty, it is also our view that a smooth transition from the existing Market Behavior Rules to the proposed part 47 regulations and other rules and regulations achieves our original goal in adopting the Market Behavior Rules, that is, to assure that wholesale market rates for electric energy are just, reasonable, and not unduly discriminatory or preferential. In EPAct 2005, Congress has provided broad and strong prohibitions of market manipulation, and reliance on rules implementing these statutory prohibitions will likewise assure that wholesale markets reflect competitive forces and produce just and reasonable rates.

25. We seek comment on whether the Market Behavior Rules should be repealed prospectively, including responses to the following questions:

1. Are there any aspects of the Market Behavior Rules that should be retained in market-based rate sellers' tariffs and authorizations, or can all substantive provisions of the Market Behavior Rules be reflected in the proposed part 47 regulations and other Commission rules and regulations?

2. Is there a need or basis for retaining existing Market Behavior Rule 2 in light

of the anti-manipulation provisions set forth in the proposed part 47 regulations?

3. Should the Commission incorporate the qualification that no action or transaction explicitly contemplated by Commission rules, or undertaken at the direction of an ISO or RTO, is a violation of Market Behavior Rule 2 into the proposed part 47 regulations?

4. Should the affirmative defense of "legitimate business purpose" in existing Market Behavior Rule 2 be retained in any form?

5. Is there any aspect of behavior forbidden by Market Behavior Rule 3 that would not act as a fraud or deceit in connection with the purchase or sale of electric energy or transmission services subject to the Commission's jurisdiction?

6. Is the requirement of Market Behavior Rule 4 to report transaction information accurately, to the extent a seller reports such information to price index publishers, necessary in light of the proposed part 47 regulations?

7. Is there any aspect of Market Behavior Rule 6 that is not covered directly and explicitly by each seller's code of conduct as contained in tariff authorizations, or by the Standards of Conduct in part 358 of our regulations, or by the proposed part 47 regulations?

26. We encourage responses to the specific questions above as well as additional relevant comments regarding whether the Market Behavior Rules should be repealed.

27. The Commission invites interested persons to submit comments on the matters, issues, and specific questions identified in this order. Comments are due thirty (30) days from the date of publication of this order in the **Federal Register**, and reply comments are due fifteen (15) days from the date that initial comments are due. To facilitate the Commission's review of the comments, the Commission requests that commentors provide an executive summary of their position. In addition, the Commission requests that commentors identify each specific question addressed by their comments and use appropriate headings.

The Commission Orders

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 CFR Chapter I), the

Commission proposes to revise all public utility sellers' market-based rate tariffs and authorizations as discussed in the body of this order.

(B) Interested entities may file comments and reply comments regarding the proposed prospective repeal of the Market Behavior Rules set forth herein. Initial comments will be due 30 days from the date this order is published in the **Federal Register**, and reply comments will be due 15 days from the date that initial comments are due to be filed.

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

By the Commission.

Magalie R. Salas,
Secretary.

[FR Doc. 05-23467 Filed 11-28-05; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL06-4-000]

Informal Staff Advice on Regulatory Requirements; Interpretive Order Regarding No-Action Letter Process

Issued November 18, 2005.

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

1. The Commission clarifies that section 388.104(a) of its regulations¹ may be used to obtain informal staff advice regarding certain matters. Specifically, this regulation may be used to request and obtain staff "no-action" letters, effective immediately, with respect to whether staff will recommend that the Commission take no enforcement action with respect to specific proposed transactions, practices or situations that may raise issues under the Commission's regulations relating to the Standards of Conduct for Transmission Providers,² Market Behavior Rules³ and, when a final rule is effective, the Commission's proposed Prohibition of Energy Market

¹⁸ Fraud and collusion are often used interchangeably. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 772 (1989). The Supreme Court long ago found fraud to be implicit in collusion. *Wheeler v. Denver*, 229 U.S. 342, 350 (1913) ("of course, the existence of collusion implies the existence of fraud"); *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 190 (1900) ("Collusion * * * implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose * * *").

¹ 18 CFR 388.104(a) (2005).

² 18 CFR part 358 (2005).

³ *Order Amending Market-Based Rate Tariffs and Authorizations*, 105 FERC ¶ 61,218 (2003) at Appendix A, *reh'g denied*, 107 FERC ¶ 61,175 (2004) (electric power); 18 CFR 284.288 and 284.403 (2005) (natural gas); appeal as to both electric power and natural gas Market Behavior Rules filed *sub nom. Cinergy Marketing & Trading, L.P. v. FERC*, Nos. 04-1168 *et al.* (DC Cir., appeal filed April 28, 2004).

Manipulation Rules.⁴ This “no-action letter” process will make available informal, advance advice by staff on transactions that otherwise could lead to enforcement action.⁵

Background

2. In recent months, a number of industry participants have expressed concerns about the perceived ambiguity and vagueness of the Standards of Conduct and Market Behavior Rules and uncertainty about how they apply to the varied corporate structures, business operations and trading strategies of companies subject to the Commission’s jurisdiction. There have been several suggestions that the Commission consider implementing a no-action letter process similar to those made available by the staffs of the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) to provide, in advance, increased certainty on whether particular transactions, practices or situations would be subject to agency enforcement action.

3. The potential risks of failure to comply with the Commission’s regulatory requirements increased significantly on August 8, 2005, with the enactment of the Energy Policy Act of 2005 (EPAc 2005).⁶ EPAc 2005 for the first time granted the Commission authority to assess civil penalties for violations of the Natural Gas Act (NGA) and rules, regulations, restrictions, conditions and orders thereunder, expanded the Commission’s Federal Power Act (FPA) civil penalty authority to encompass violations of all provisions of FPA Part II and rules and orders thereunder, and established the maximum civil penalty the Commission could assess under the NGA, FPA Part II and the Natural Gas Policy Act of 1978 as \$1 million per day per violation. EPAc 2005 also amended the NGA and FPA to make unlawful the use or

employment of manipulative or deceptive devices or contrivances in connection with the purchase or sale of natural gas, electric energy, gas transportation or electric transmission subject to the Commission’s jurisdiction in violation of regulations issued by the Commission. These statutory provisions grant the Commission new authority against manipulation in transactions in energy markets and enhance the Commission’s ability to impose sanctions for violations. On October 20, 2005, we proposed rules to implement the new EPAc 2005 anti-manipulation authority.⁷

4. While we intend to exercise our expanded enforcement authorities diligently in a firm but fair manner, we seek to temper the need to use those powers by increasing regulatory certainty and providing notice to the regulated community of the factors we will consider in responding to violations.⁸ More importantly, it is in the best interests of all segments of the energy industry that compliance with the statutes administered by the Commission and its orders and regulations should be emphasized. In announcing proposed rules to implement increased anti-manipulation authority under the FPA and NGA, we noted our intention to seek comments on whether to revise or repeal existing Market Behavior Rule 2⁹ because both it and the new anti-manipulation authority prohibit manipulative conduct.¹⁰ Concurrently with this order, we are instituting proceedings in Docket Nos. EL06–16–000 and RM06–5–000 on this topic. On October 20, 2005, we issued a Policy Statement on Enforcement that provides guidance on how we intend to implement our enhanced enforcement powers to provide “firm but fair enforcement of our rules and regulations.”¹¹ In particular, we encouraged entities subject to our jurisdiction to take proactive steps to emphasize compliance.¹² It is entirely consistent with this objective for us to permit entities to inquire of Commission staff in advance of transactions, practices or

situations that may raise compliance issues.

5. The SEC and CFTC both provide no-action letter processes whereby they permit their staffs to review certain types of proposed matters and provide informal advice on whether the staff will recommend enforcement action if a matter under review is put into effect as proposed.¹³ Although this advice does not bind the agency, it is understood that agency staff who issue the no-action letters are themselves well-acquainted with the statutes, regulations, rules and orders the agency administers.¹⁴

Initial No-Action Letter Process and Procedures

6. After reviewing requests for a no-action letter process and studying efforts of other governmental agencies to maximize compliance with complicated statutory and regulatory schemes, we have concluded that we also can increase regulatory certainty and fairness by permitting entities to seek no-action letters similar to those issued by the SEC and CFTC staffs. We believe that a no-action letter process can yield significant benefits to the entities subject to the statutes, regulations, rules and orders administered by the Commission, particularly by reducing such entities’ risk of failing to comply with our rules and regulations.

7. Our regulations already recognize the ability of our staff to provide informal advice on matters pertaining to regulatory requirements.¹⁵ Staff spends a significant amount of time in these informal activities, such as conducting pre-filing meetings with persons who wish to submit an application to us. These activities are valuable, and we fully intend that staff continue its present efforts to render informal, non-binding advice. However, we also

⁴ *Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 (2005).

⁵ No public notice or comment on this order is necessary pursuant to section 4(b)(A) of the Administrative Procedure Act, 5 U.S.C. 553(b)(A) (2000), which exempts from such notice or comment “interpretative rules, general statements of policy or rules of agency organization, procedure or practice.” We herein establish procedures by which entities, if they choose to do so, may seek no-action letters as a form of staff informal advice that does not bind the Commission. See *James V. Hurson Associates, Inc. v. Glickman*, 229 F.3d 277, 280 (DC Cir. 2000) (The critical feature of agency actions that satisfy the section 553(b)(A) exception is that they do not themselves “alter the rights or interests of parties,” although they “may alter the manner in which the parties present themselves or their viewpoints to the agency,” quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (DC Cir. 1980)).

⁶ Energy Policy Act of 2005, Public Law No. 109–58, 119 Stat. 594 (2005).

⁷ *Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 (2005).

⁸ *Policy Statement on Enforcement*, 113 FERC ¶ 61,068 (2005).

⁹ *Order Amending Market-Based Rate Tariffs and Authorizations*, 105 FERC ¶ 61,218 at 62,170 (Appendix A) (electric power); 18 CFR 284.288(a) and 284.403(a) (natural gas).

¹⁰ *Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 at P 15.

¹¹ *Policy Statement on Enforcement*, 113 FERC ¶ 61,068 at P 1.

¹² *Id.* at PP 22–23.

¹³ See 17 CFR 202.1(d) (2005) (SEC) and 17 CFR 140.99 (2005) (CFTC).

¹⁴ For example, the SEC’s regulations state: “The informal procedures of the [SEC] are largely concerned with the rendering of advice and assistance by the [SEC’s] staff to members of the public dealing with the [SEC]. While opinions expressed by members of the staff do not constitute an official expression of the [SEC’s] views, they represent the views of persons who are continuously working with the provisions of the statute involved.” 17 CFR 201.1(d) (2005).

¹⁵ The first two sentences of section 388.104(a) of our regulations state, “The Commission staff provides informal advice and assistance to the general public and to prospective applicants for licenses, certificates and other Commission authorizations. Opinions expressed by the staff do not represent the official views of the Commission, but are designed to aid the public and facilitate the accomplishment of the Commission’s functions.” These statements are functionally equivalent to the parallel sentences of the SEC’s regulation recognizing its staff’s ability to issue no-action letters.

believe that it is appropriate to allow entities to use the existing regulation as a means to obtain advance notice on whether staff will recommend enforcement action against a particular transaction, practice or situation. Therefore, we are implementing a no-action letter process, initially on a limited basis, as set forth below.

8. We will initially limit no-action inquiries to questions relating to whether particular transactions, practices, situations or other matters would violate the Standards of Conduct, the Market Behavior Rules, or, when issued, the final Prohibition of Energy Market Manipulation Rules. Based on concerns raised by industry participants, we recognize that these rules may present interpretive challenges and substantial exposure to potential enforcement actions. As we gain experience with the no-action letter process concerning these rules, in the future we may change the matters that may be the subject of requests for no-action letters. At some future time, we may need to adopt formal regulations governing the no-action letter process and possibly establish a filing fee for no-action letters. Initially, however, no fee will be charged.

9. The experience of the SEC and CFTC shows that it is important that no-action letters be issued by staff who are familiar with the regulations on which the no-action letter process is focused. Requests for no-action letters should initially be submitted on a non-public basis to the General Counsel. The regulated community should understand that staff experts in a number of Commission offices will be consulted as appropriate in responding to no-action letter requests, and that responses to such requests should be treated as a consensus view of the Commission staff.

10. An entity that seeks a no-action letter must describe in writing the proposed transaction, practice, situation or other matter in complete detail, including identifying to the extent possible each of the corporate entities, counterparties or other persons that would be involved, the purpose of the matter, the requester's role in the proposed matter and the regulatory issues that the matter poses. Although requesters may seek guidance on both existing practices and anticipated future practices or transactions, the General Counsel or designee will not respond to no-action letter requests that raise purely hypothetical inquiries. Instead, our no-action letter process is intended to assist regulated entities in seeking guidance on the real world application of our regulations and orders. To

accomplish this objective, requesters must provide sufficient detail for staff adequately to address the factual and legal issues presented in the request. We also note that the General Counsel or designee will not respond to a request for a no-action letter that relates to the merits of an on-the-record proceeding currently before the Commission.

11. In addition, a no-action letter request must be accompanied by a statement that, to the best of the requester's personal information, knowledge and belief, the request is accurate and complete and does not contain any untrue statement of a material fact, that there is no omission of a material fact in the request, and that the request does not raise any issue that relates to the merits of an on-the-record proceeding currently before the Commission.

12. The issuance of a response to a no-action letter request is entirely within the discretion of the General Counsel or designee. If the information submitted with the no-action letter request is not sufficient, staff may request additional information or inform the requester that it will not respond to the request and give a reason. The timing of a response to a no-action letter request is also within the discretion of the General Counsel or designee.

13. In response to a request for a no-action letter, the General Counsel or designee may state that staff: (1) Will not recommend enforcement action if the matter is implemented as described in the request and in any additional information provided; (2) will not recommend enforcement action if the matter is implemented as so described only under conditions stated in the response, or as modified in the response; or (3) may recommend enforcement action if the matter is implemented as so described.

14. Until the date on which the General Counsel or designee issues a response to a request for a no-action letter, the Commission and its staff will treat the request and any other documents relating to it as non-public. However, the Commission believes that public disclosure of requests for no-action letters and responses is important to notify interested entities of staff's views with respect to regulatory matters at issue. Therefore, if the General Counsel or designee responds to a request for a no-action letter, we ordinarily intend to make public the request and the response at the time of the response. We note that this practice is consistent with that of the SEC and CFTC, both of which generally make public no-action letter requests and the

agency staff's response after the response is issued.

15. We understand that in some circumstances a proposed matter that is the subject of a request for a no-action letter may be confidential or proprietary, at least until the matter is implemented or until sufficient time has passed for the requester to determine, after receiving a response, whether to implement the matter. Thus, in unusual cases a requester may seek non-public treatment of its request for a no-action letter and a staff response, at least to the extent that the request and response describe the proposed matter or matters that are under review, for a specified period of time not in excess of 120 days from the date of any response.

16. If our staff agrees with the period of non-public treatment the requester seeks, the Commission will not make the request and the response public until the expiration of the time period sought by the requester. If staff disagrees with the non-public period sought by the requester, it will so notify the requester, who may then withdraw the request within 30 days of the date of the staff notice. In that case, the General Counsel or designee will not respond to the request, and the Commission and staff will treat the request and the staff notice as non-public. If the request is not withdrawn after the requester receives a staff notice, the Commission will make public on the date of issuance of the response the request, any additional information provided by the requester and the response.¹⁶

17. As with other informal advice provided by our staff, responses by the General Counsel or designee to requests for no-action letters will not bind the Commission and will not operate as agency action that would be subject to rehearing or judicial review. Any person who seeks a binding Commission determination concerning a proposed transaction, practice, situation or other matter may file a petition for a declaratory order pursuant to section 385.207 of our regulations.¹⁷

By the Commission.

Magalie R. Salas,
Secretary.

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¹⁶ These processes are consistent with procedures used by the SEC and the CFTC in their no-action letter programs to address concerns about the treatment of assertedly confidential or proprietary information in requests for no-action letters. See 17 CFR 144.98(b) (2005) (CFTC) and 17 CFR 200.81(b) (2005) (SEC).

¹⁷ 18 CFR 385.207 (2005).