

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Investigation of Terms and Conditions of  
Public Utility Market-Based Rate  
Authorizations

Docket No. EL06-16-000

**COMMENTS OF  
THE AMERICAN PUBLIC POWER ASSOCIATION AND  
THE TRANSMISSION ACCESS POLICY STUDY GROUP**

On November 21, 2005,<sup>1</sup> the Commission proposed repealing or incorporating elsewhere Market Behavior Rules that it ordered added to all market-based rate (“MBR”) tariffs in 2003,<sup>2</sup> and requested comments. The American Public Power Association (“APPA”) and the Transmission Access Policy Study Group (“TAPS”) agree with the Commission’s desire to provide clarity to market participants regarding the statutes, orders, rules and regulations it administers, and the standards to which they must hew to avoid controversies regarding possible market manipulation. However, clarity should not come at the cost of leaving gaps in the Commission’s array of tools to ensure that market-based rates are just and reasonable.

When it first proposed the Market Behavior Rules, the Commission stated that its “reliance upon competitive markets to establish just and reasonable rates requires that [it] have the tools necessary to ensure that prices created in these markets continue to fall

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<sup>1</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 113 F.E.R.C. ¶ 61,190 (2005) (hereafter “Repeal Proposal”).

<sup>2</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, “Order Amending Market-Based Rate Tariffs and Authorizations,” 105 F.E.R.C. ¶ 61,218 (2003) (hereafter “Order Amending Tariffs”), *reh’g denied*, 107 F.E.R.C. ¶ 61,175 (2004) (hereafter “Rehearing Order”), *appeal pending*, *Cinergy Mktg. & Trading, L.P. v. FERC*, Nos. 04-1168, *et al.* (D.C. Cir., appeal filed May 28, 2004).

within a just and reasonable zone.”<sup>3</sup> While the Energy Policy Act of 2005’s (“EPAct 2005”) anti-manipulation provisions have added new statutory authorities to the Commission’s toolbox, APPA and TAPS are concerned that outright repeal of the Market Behavior Rules would in the end leave the Commission with fewer tools, despite Congress’ intent to give the Commission more. As a result, the Commission would be less able to ensure that rates are just and reasonable and to fulfill its FPA obligation “to guard the consumer from exploitation by non-competitive electric power companies.”<sup>4</sup> APPA and TAPS thus oppose outright repeal of the Market Behavior Rules. Rather, the Commission should refine the Market Behavior Rules as necessary to make them work in tandem with FPA Section 222’s new, additional prohibition of market manipulation.

## **I. EXECUTIVE SUMMARY AND STATEMENT OF ISSUES<sup>5</sup>**

As developed fully in Part III below, APPA and TAPS provide the following responses to several of the questions posed by the Commission.

*Issue/Question 1:*<sup>6</sup> 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?

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<sup>3</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, “Order Seeking Comments on Proposed Revisions to Market-Based Rate Tariffs and Authorizations,” 103 F.E.R.C. ¶ 61,349, P 20 (hereafter “Order Seeking Comments”); *see also Order Amending Tariffs*, 105 F.E.R.C. ¶ 61,218, P 24.

<sup>4</sup> *NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *quoted in* Joseph T. Kelliher, *Market Manipulation, Market Power and the Authority of the Federal Energy Regulatory Commission*, 26 Energy L. J. 1, at 1 (2005).

<sup>5</sup> APPA/TAPS designate this Executive Summary as a Statement of Issues out of an abundance of caution. While “comments” on rulemakings are not deemed “pleadings” under Commission Rules, 18 C.F.R. § 385.202; *cf. San Diego Gas & Elec. Co.*, 113 F.E.R.C. ¶ 61,244, P 1 (2005) (comments on a settlement need not include statement of issues), APPA/TAPS are concerned that the pendency of the proposed repeal of the Market Behavior Rules in an EL docket, rather than an RM docket, could cause these comments to be deemed a pleading under Rule 203, 18 C.F.R. § 385.203, and hence trigger the requirement for a Statement of Issues.

<sup>6</sup> The “Question” designations correspond to those found at P 25 of the Repeal Proposal.

*APPA/TAPS Answer:* Yes, Market Behavior Rules should continue to be included in MBR tariffs. The Commission conditioned MBR tariffs with the Market Behavior Rules pursuant to its authority and obligation under FPA Sections 205 and 206 to ensure that market-based rates fall within a zone of reasonable and to provide remedies when they do not. *Rehearing Order*, 107 F.E.R.C. ¶ 61,175, PP 158-60; 16 U.S.C. §§ 824d, 824e. Market manipulation must continue to be an MBR tariff violation. Section 222/Part 47 enhance the Commission's authority to deal with market manipulation, but do not eliminate the underlying justifications for the Market Behavior Rules, which should largely be maintained.

*Issue/Question 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?

*APPA/TAPS Answer:* Yes. Rule 2, which should be interpreted to include a "scienter" requirement, should be retained because it prohibits intentional market power exercise, which renders a market-based rate unjust and unreasonable. *Order Amending Tariffs*, 105 F.E.R.C. ¶ 61,218, P 38. Some will likely argue that Section 222/Part 47 do not reach intentional market power exercise absent fraud, deceit or other dishonesty, which creates uncertainty that further necessitates retention of Rule 2.

*Issue 3/Question 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?

*APPA/TAPS Answer:* Yes. MBR sellers' codes and standards of conduct do not contain the Market Behavior Rules' identification of remedies for violations. *See, e.g.*, 18 C.F.R. Part 358. The Commission has not proposed that Part 47 replace the Market Behavior Rules as the enforcement backstop for violations of codes or standards of conduct. Similarly, Market Behavior Rule 1, requiring compliance with organized market rules, should be retained because these organized market rules do not prescribe the remedies, such as loss of MBR authority, set forth in the Market Behavior Rules.

*Issue 4:* Are there any other measures the Commission should take to ensure that there are no gaps in its regulations protecting against market manipulation?

*APPA/TAPS Answer:* In addition to the foregoing, and in any event, APPA/TAPS urge that (a) neither elimination of the Market Behavior Rules specific complaint process nor Section 222(b) of the FPA be construed to limit market participants' long-standing complaint rights under Sections 206/306, 16 U.S.C. §§ 824e, 825e, and (2) no aspect of the Market Behavior Rules be repealed until replacement rules are in effect.

## II. MOTION TO INTERVENE

### A. *Interests of APPA and TAPS*

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power systems provide over 16 percent of all kilowatt-hour (“kWh”) sales to ultimate customers, and do business in every state except Hawaii. Approximately 1,840 of these systems are cities and municipal governments that currently own and control the day-to-day operation of their electric utility systems. Public power systems own about 10 percent of the nation’s electric generating capacity, but purchase nearly 70 percent of the power used to serve their ultimate consumers. APPA and its members thus have a strong interest in well-functioning, transparent wholesale power supply markets that are not adversely affected by market manipulation. APPA participated in the Commission proceedings that led to the adoption of the Market Behavior Rules.

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.<sup>7</sup> As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members have long been concerned about structural changes in the electricity and natural gas industries that could adversely affect competition, rates or regulation, or could expose consumers to harms from cross-subsidization. TAPS has

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<sup>7</sup> TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power Inc. Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; ElectriCities of North Carolina, Inc.; Florida Municipal Power Agency; Geneva, Illinois; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric Co.; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; Oklahoma Municipal Power Authority; Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

commented on nearly all of the Commission's major rulemakings and policy inquiries involving the electricity industry over the past decade, including those that led to the adoption of the Market Behavior Rules in Docket Nos. EL01-118-000.

Given the perspectives that APPA and TAPS bring to these proceedings, their participation is in the public interest. Further, no other party can adequately represent the interests of their members. APPA and TAPS therefore respectfully request intervention.

**B. Communications**

Communications regarding these proceedings should be directed to:

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**III. COMMENTS**

**A. *To Ensure that the Commission Has All of the Tools It Needs to Ensure that Market-Based Rates are Just and Reasonable, It Must Retain Market Behavior Rules in Jurisdictional MBR Tariffs***

The Commission originally conditioned MBR tariffs with the Market Behavior Rules “[a]s part of [its] ongoing responsibility to provide regulatory safeguards to ensure that customers are protected from potential market abuses.” *Order Seeking Comments,*

103 F.E.R.C. ¶ 61,349, P 5. The FPA requires that jurisdictional rates be just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. § 824d. As the Commission has repeatedly observed, for market-based rates to satisfy the FPA's requirements, the seller must not have market power, or if it does, it must have mitigated that market power.<sup>8</sup> Accordingly, a rate that reflects market power exercise is unjust and unreasonable, and where a seller exercises market power it should be subject to remedial action, as the Commission noted when it first proposed the Market Behavior Rules:

In formulating the conditions to be added to public utility sellers' tariffs, the Commission is fulfilling its obligation to appropriately monitor markets and is thus taking steps to ensure that market-based rates remain within the zone of reasonableness required by the FPA. In a market-based rate regime, this means that public utility sellers will not be permitted to exercise market power or take anti-competitive actions that may increase market prices and that the Commission will take appropriate remedial steps.

*Order Seeking Comments*, 103 F.E.R.C. ¶ 61,349, P 21. The Market Behavior Rules make market manipulation an MBR tariff violation and thus prohibit "[m]arket conduct which is anticompetitive or which constitutes an abuse of market power." *Id.* at P 17.

EPA 2005 has now added new Section 222 to the FPA:

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.

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<sup>8</sup> See, e.g., *AEP Power Mktg, Inc.*, 108 F.E.R.C. ¶ 61,026, P 130 (2004).

This new prohibition of market manipulation does not supplant the underlying Sections 205/206-based, remedial justifications for the Market Behavior Rules or the Rules themselves. Rather, Section 222 provides the Commission with a new tool to protect consumers from market abuse. That new Section 222 should enhance, not replace, the Commission's existing mechanisms for addressing market abuse is evident from the Congressional record. For example, Senator Jeff Bingaman (D-NM), Ranking Member of the Senate Energy and Natural Resources Committee, noted:

We also direct FERC to use its *existing* authority to ensure Enron-style abuses do not happen again. The antimarket manipulation language *also works* toward this goal.

151 CONG. REC. S7053 (daily ed. June 22, 2005) (statement of Sen. Bingaman)

(emphasis added). In other words, Congress knew that the Commission already had authority to deal with market abuses and sought to enhance that authority. It did not modify the Commission's existing FPA authority or obligation to include Market Behavior Rules as conditions to MBR tariffs to ensure that the rates charged thereunder are just and reasonable.

Market manipulation must continue to be an MBR tariff violation. The Market Behavior Rules establish important Sections 205/206-based prohibitions and remedies, the need for which Section 222/Part 47 do not obviate. Consistent with Commission's expressed intent "not to eliminate beneficial rules governing market behavior," *Repeal Proposal* at P 13, and to ensure that the Commission's market-based rate program "afford[s] consumers a complete, permanent and effective bond of protection from

excessive rates and charges,”<sup>9</sup> the Commission must retain Market Behavior Rules as part of MBR tariffs.

***B. The Commission Must Retain Rule 2’s Prohibition on Intentional Market Power Exercise***

Rule 2 provides that: “Actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products are prohibited.” *Repeal Proposal*, Attachment A. In adopting the Rule, the Commission made clear that it sought to prohibit, among other actions, the intentional exercise of market power. For example, in its *Order Amending Tariffs*, the Commission stated:

If, for example, a seller is shown to have caused, or attempts to cause, an artificial shortage by physically withholding sufficient and otherwise available power from the market for the purpose of raising the sales price obtainable by other units participating in the market – the seller may be found to have engaged in market manipulation, as prescribed by Market Behavior Rule 2.

105 F.E.R.C. ¶ 61,218, P 38. Later in the same order, the Commission noted that such behavior could include economic as well as physical withholding. *Id.* at P 102; *see also id.* at PP 36, 37 and 40. In proposing the Rules, the Commission said that Rule 2 prohibits “activities that adversely affect competitive outcomes, that is, that result in rates that do not reflect legitimate market forces. Such rates would fall outside the zone of reasonableness.” *Order Seeking Comments*, 103 F.E.R.C. ¶ 61,349, P 22; *see also id.* at

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<sup>9</sup> *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 388 (1959).

P 23. In rejecting rehearing challenges to the Rules, the Commission again confirmed that intentional market power exercise distorted and manipulated prices.<sup>10</sup>

The Commission now seeks comment on possible repeal of “the Market Behavior Rules in light of the proposed Part 47 regulations to implement the new anti-manipulation provisions contained in section 222 of the FPA and of the Commission’s other rules and regulations.” *Repeal Proposal* at P 12. This new Part 47 states that:<sup>11</sup>

(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 person.

The Commission says that “[i]t is our view that the scope of the new statutory prohibition on manipulation and the reach of the proposed Part 47 regulation eliminate the need for Market Behavior Rule[] 2.” *Id.* at P 14. While recognizing “some differences” between the Rules and Part 47, it further observes that “the differences do not seem to require keeping the Market Behavior Rules once the new Part 47 regulations are final.” *Id.* at P 15. The Commission asks: “Is there a need or basis for retaining existing Market

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<sup>10</sup> The Commission observed that “if the behavior was undertaken to provide service to a buyer with rates, terms and conditions disciplined by the competitive forces of the market, we would find the transaction to have a legitimate business purpose,” while “actions without a legitimate business purpose which would foreseeably result in a distorted price not reflective of a competitive market are appropriately attributed to the seller as manipulative acts.” *Rehearing Order*, 107 F.E.R.C. ¶ 61,173, at PP 43, 44.

<sup>11</sup> *Prohibition of Energy Market Manipulation*, 113 F.E.R.C. ¶ 61,067 (2005).

Behavior Rule 2 in light of the anti-manipulation provisions set forth in the proposed Part 47 regulation?” *Id.* at P 25, Q.2.

The answer is clearly “yes.” The Commission has said that Rule 2, with its prohibition on intentional market power exercise, provides “fundamental guidance for the conduct of holders of market-based rate authority.”<sup>12</sup> Where an MBR seller intentionally and successfully exercises market power, it goes without saying that the seller has market power. Under the circumstances, the Commission has an obligation under FPA Sections 205/206 to provide a remedy, whether it be disgorgement, loss of MBR authority or penalties. Where the MBR seller in fact intentionally exercises market power, the Commission cannot fail to act. Because Section 222/Part 47 leave some doubt as to whether such intentional behavior would be covered, in the absence of fraud or deceit, Rule 2 must be preserved to ensure the integrity of the Commission's MBR regimen.

APPA and TAPS are concerned that Section 222/Part 47 may not be sufficient to address all instances of intentional market power exercise. For example, the Commission might declare that under proposed Part 47 such intentional market power exercise constitutes employment of a “device, scheme, or artifice to defraud” or represents an “act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.” Under this view, intentional market power exercise creates an artificial shortage and thus is a deceptive practice that renders wholesale rates unjust and unreasonable. However, some might argue that interpreting Section 222, as implemented by Part 47, to cover intentional market power exercise stretches the meaning of “deceit or

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<sup>12</sup> *Midwest Indep. Transmission Sys. Operator, Inc.* 109 F.E.R.C. ¶ 61,157, P 264 (2004).

fraud,” which are generally thought to involve some element of outright dishonesty that may not be present in the case of intentional market power exercise. While the Commission also observes that “collusion is a type of fraud,” *Repeal Proposal* at P 23, which suggests that Section 222/Part 47 should reach collusive market power exercise by a group of market participants, the Commission must also be able to reach unilateral market power exercise by just one market participant.

Sellers seeking to place intentional market power exercise outside the ambit of Section 222 might also note that prohibiting market power exercise is not the aim of SEC regulation. The Securities and Exchange Act of 1934 has no equivalent to the just and reasonable standard; rather, it focuses on the integrity of the securities market place, particularly to ensure that all relevant information is revealed to investors.<sup>13</sup> It also appears that case law under SEC Rule 10b-5, to which the Commission says it will look in applying Part 47,<sup>14</sup> does not treat intentional market power exercise as a violation. In fact, most of the companies whose securities are subject to SEC oversight are not also subject to FPA-type economic regulation, which means that market power in most industries is not addressed unless it rises to the level of an antitrust violation. While the Sherman Act prohibits the abuse of monopoly power, as well as agreements in restraint of trade, it generally does not reach the mere possession or non-abusive exercise of

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<sup>13</sup> See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977) (“[T]he Court repeatedly has described the ‘fundamental purpose’ of the Act as implementing a ‘philosophy of full disclosure’; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute.”).

<sup>14</sup> *Prohibition of Energy Market Manipulation*, 113 F.E.R.C. ¶ 61,067 at P 14.

market power,<sup>15</sup> unlike the FPA, which does not tolerate market-based pricing where the seller possesses or exercises unmitigated market power.<sup>16</sup>

APPA and TAPS thus urge retention of Rule 2's prohibition of intentional market power exercise in the charging of market-based rates. APPA and TAPS disagree that maintaining Rule 2 along side Section 222/Part 47 creates "confusion," *see Repeal Proposal* at P 24. Rule 2 covers certain conduct arguably not within Section 222/Part 47's scope and, in any event, the Commission has said that "conduct that violates both Market Behavior Rule 2 and the proposed Part 47 regulations will be treated as one violation of anti-manipulation rules." *Id.* at P 11. The Commission also cites Rule 2's "foreseeably" requirement and the "controversy and uncertainty" it has generated as another reason to repeal Rule 2 in favor of § 222/Part 47's "scienter" requirement. *Id.* at P 15. However, Rule 2, which already includes a requirement that conduct be "intentional," should be understood as encompassing the "scienter" standard. Indeed, the Commission's discussion of the scienter requirement states that "knowing, *intentional*, or reckless conduct is proscribed." *Id.* (emphasis added). Instead of throwing the baby out with the bathwater, the Commission should consider limiting Rule 2 to "intentional" acts.

In sum, the Commission adopted Rule 2's prohibition to help ensure that market-based rates are just and reasonable. It would be a cruel irony if the Commission's implementation of FPA Section 222, by which Congress sought to expand FERC's

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<sup>15</sup> *Verizon Commc 'ns Inc. v. Trinko*, 540 U.S. 398, 407 (2004).

<sup>16</sup> *AEP Power Mktg., Inc.*, 107 F.E.R.C. ¶ 61,018, P 40 (2004); *Order Seeking Comments*, 103 F.E.R.C. ¶ 61,349, at P 21.

authority to deal with market abuse, resulted in a diminution of FERC's enforcement tools to protect consumers. Rule 2 should thus be retained as described above.

***C. The Commission Should Retain Rules 1 and 6***

Rule 1 imposes on an MBR seller the obligation to comply with Commission-approved rules and regulations in a particular power market (*e.g.*, an RTO market). Rule 6 imposes obligations to adhere to an MBR seller's code or standard of conduct. In proposing Rule 1's repeal, the Commission said that "failure of a market participant to follow these rules and regulations is enforceable through the organized market's tariff and related agreements." *Repeal Proposal* at P 20. Regarding Rule 6, the Commission stated: "Our view is that Market Behavior Rule 6 restates requirements independently applicable to market-based rate sellers." *Id.* at P 23. In effect, the Commission is observing that Rules 1 and 6 impose no new substantive obligations on sellers. However, because the Market Behavior Rules also establish remedies for violations, outright repeal of Rules 1 and 6 could leave an enforcement void.

Neither Commission-approved market rules nor MBR sellers' codes/standards of conduct include remedies comparable to those announced for Market Behavior Rules violations, namely, disgorgement of unjust profits and possibly conditions on or suspension/revocation of MBR authority.<sup>17</sup> For example, MISO's Energy Markets Tariff remedies for violation of MISO's market mitigation measures do not specify revocation of MBR authority or the possibility of the Commission's penalty authority. *See* MISO

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<sup>17</sup> The Commission now also has enhanced penalty authority.

EMT §§ 65.3.1. and 65.3.2.<sup>18</sup> Similarly, the codes and standards of conduct required of MBR sellers and transmission providers do not contain any provisions regarding remedies for violations.

Given the absence of the Market Behavior Rules' remedies in the rules of organized markets and codes/standards of conduct, Rules 1 and 6 provide an important enforcement backstop in the case of MBR sellers, as well as greater clarity for MBR sellers regarding possible remedies that might be imposed in the event of violations.<sup>19</sup> Rules 1 and 6 should therefore be retained in MBR tariffs.

***D. The Commission Should Not Permit Any Gaps in its Regulations Protecting Against Market Manipulation***

The Commission states in the *Repeal Proposal* that: "The timing of proposed repeal is important. We do not intend to leave any gap in our regulations prohibiting manipulation of energy markets or other requirements of the Market Behavior Rules." 113 F.E.R.C. ¶ 61,190, n.12. While APPA and TAPS appreciate the Commission's expressed intent, it must ensure the absence of gaps in practice.

First, the enhancement of the Commission's tools for addressing market manipulation should not undermine market participants' long-standing rights to file complaints under Sections 206/306 of the FPA. APPA and TAPS anticipate that MBR sellers may argue that no adversely affected market participant can complain about

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<sup>18</sup> The MISO EMT is available at [http://www.midwestmarket.org/publish/Document/2b8a32\\_103ef711180\\_-75c60a48324a/Modules.pdf?action=download&\\_property=Attachment](http://www.midwestmarket.org/publish/Document/2b8a32_103ef711180_-75c60a48324a/Modules.pdf?action=download&_property=Attachment) (last viewed December 28, 2005).

<sup>19</sup> While on a case-by-case basis the Commission has imposed remedies for violations of codes of conduct, *see, e.g., Cleco Corp., et al.*, 104 F.E.R.C. ¶ 61,125 (2003); *Idaho Power Co., et al.*, 103 F.E.R.C. ¶ 61,182 (2003), Rules 1 and 6, in the context of the Market Behavior Rules, put violators on *advanced* notice of their potential liability.

possible market manipulation, citing repeal of the Market Behavior Rules' specific complaint procedures,<sup>20</sup> and language in Section 222(b) that "nothing in this section shall be construed to create a private right of action." Elimination of the Market Behavior Rules' complaint procedures, however, leaves in place the Commission's generic complaint rules (18 C.F.R. § 385.206), as well as the complaint provisions of the FPA (16 U.S.C. §§ 824e, 825e), as bolstered by EAct 2005's Section 1285 (eliminating the 60-day waiting period for refund effective date). Section 222(b) precludes only the kind of private right of action often pursued in the courts by private litigants under the Securities Exchange Act, not complaints filed with the Commission seeking relief under the FPA.

Second, where the Commission intends to translate existing requirements into new regulations, it should clarify when it will do so and not eliminate the existing requirements until the new regulations are in effect and no longer subject to judicial review or modification. For example, the Commission notes that Rule 4 "includes a requirement that sellers notify the Commission of their price reporting status and any changes in that status," and that such requirement appears nowhere else in Commission rules or regulations. *Repeal Proposal* at P 21. It further states that it intends to address these reporting requirements as part of a future rulemaking regarding EAct 2005's price transparency provisions, but announces no timeline or deadline for doing so. *Id.* Similarly, the Commission says that it intends to address Rule 5's record retention requirement "in the context of our rules under the FPA, such that there will be no gap in the retention requirement," *id.* at P 22, but does not say how and when it will do so. APPA and TAPS fear that leaving these commitments open-ended and undefined could

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<sup>20</sup> *Order Amending Tariffs*, 105 F.E.R.C. ¶ 61,218, Appendix B.

result in the very gaps the Commission says it wants to avoid. Therefore, if the Commission proceeds with repeal of the Market Behavior Rules, it should specify how and when it will translate existing requirements into new rules, and should not eliminate existing requirements until new ones are in effect.

### CONCLUSION

For the reasons set forth above, the Commission should not repeal the Market Behavior Rules.

Respectfully submitted,

*/s/ Mark S. Hegedus*

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December 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of December, 2005, caused the foregoing document to be sent by electronic mail to all parties on the list compiled by the Secretary of the Commission in this proceeding.

*/s/ Christa L. Wilkin*

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