

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

(Docket No. RM06-13-000; Order No. 674 )

Conditions for Public Utility Market-Based Rate Authorization Holders

(Issued February 16, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations to include certain rules governing the conduct of entities authorized to make sales of electricity and related products under market-based rate authorizations. This amendment is a codification of certain rules that were formerly incorporated in market-based rate sellers' tariffs.

EFFECTIVE DATE: The rule will become effective [insert date of publication in the **FEDERAL REGISTER**].

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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Conditions for Public Utility Market-Based Rate  
Authorization Holders

Docket No. RM06-13-000

ORDER NO. 674

FINAL RULE

(Issued February 16, 2006)

**I. Introduction**

1. The Federal Energy Regulatory Commission (Commission) is amending 18 CFR part 35 to codify Market Behavior Rules 1, 3, 4, and 5, rules that previously have been incorporated in market-based rate sellers' tariffs. By this order, the Commission is not substantively changing Market Behavior Rules 1, 3, 4, and 5, but merely relocating them to the Code of Federal Regulations.

2. The Commission is issuing this order as a Final Rule without a period for further public comment or a delay in the effective date. Under 5 U.S.C. 553(b), notice and comment procedures are unnecessary when the agency for good cause finds that notice and public procedure thereon is unnecessary.

3. This Final Rule makes no substantive changes in existing regulatory requirements, and, as such, it will not change the effect these regulatory provisions have on regulated entities or the general public. Moreover, the Market Behavior Rules were subject to notice and comment in June 2003<sup>1</sup> and again in November 2005.<sup>2</sup> Additional notice and comment is unnecessary because this Final Rule is procedural, that is, it merely transplants Market Behavior Rules 1, 3, 4, and 5 from sellers' market-based rate tariffs to the Commission's regulations. This Final Rule does not make any substantive change in scope or application of the Market Behavior Rules 1, 3, 4 or 5, and it does not impose any new burden or regulatory requirement on market-based rate sellers. Based on the foregoing, the Commission has good cause to find that notice and comment procedures are unnecessary in this rulemaking.

## **II. Background**

4. On November 17, 2003, acting pursuant to section 206 of the FPA, the Commission amended all market-based rate tariffs and authorizations to include the

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<sup>1</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 FERC ¶ 61,349 (2003).

<sup>2</sup> Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, "Order Proposing Revisions to Market-Based Rate Tariffs and Authorizations," 113 FERC ¶ 61,190 (2005).

Market Behavior Rules.<sup>3</sup> The Commission determined that sellers' market-based rate tariffs and authorizations to make sales at market rates would be unjust and unreasonable unless they included clearly-delineated rules governing market participant conduct, and that the Market Behavior Rules fairly apprised market participants of their obligations in competitive power markets and were just and reasonable.<sup>4</sup>

5. Market Behavior Rule 1 requires sellers to follow Commission-approved rules and regulations in organized power markets. These rules and regulations are part of the ISO or RTO tariffs, and sellers' agreements to operate within ISOs and RTOs bind them to follow the applicable rules and regulations of the organized market.

6. Market Behavior Rule 2 prohibits "actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products." Actions or transactions explicitly contemplated in Commission-approved rules and regulations of an organized market, or undertaken by a market-based rate seller at the direction of an ISO or RTO, however, are not violations of Market Behavior Rule

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<sup>3</sup> 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) (Market Behavior Rules Order). The Market Behavior Rules are currently on appeal. See Cinergy Marketing & Trading, L.P. v. FERC, Nos. 04-1168 et al. (D.C. Cir., filed April 28, 2004).

<sup>4</sup> Market Behavior Rules Order, 105 FERC ¶ 61,218 at P 3 and 158-74.

2. In addition, Market Behavior Rule 2 prohibits certain specific behavior: Rule 2(a) prohibits wash trades; Rule 2(b) prohibits transactions predicated on submitting false information; Rule 2(c) prohibits the creation and relief of artificial congestion; and Rule 2(d) prohibits collusion for the purpose of market manipulation.

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

8. Market Behavior Rule 4 deals with reporting of transaction information to price index publishers. It requires that if a seller reports transaction data, the data be accurate and factual, and not knowingly false or misleading, and be reported in accordance with the Commission's Price Index Policy Statement.<sup>5</sup> Rule 4 also requires that sellers notify the Commission of whether they report transaction data to price index publishers in accordance with the Price Index Policy Statement, and to update any changes in their reporting status.

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

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<sup>5</sup> Price Index Policy Statement, 104 FERC ¶ 61,121 (2003).

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

11. On November 21, 2005, the Commission proposed to rescind the Market Behavior Rules in light of the proposed rule to implement the anti-manipulation provisions of the Energy Policy Act of 2005 (EPA Act 2005).<sup>7</sup> We noted that the central purpose of the Market Behavior Rules, as reflected in Market Behavior Rule 2, was to prohibit market manipulation and that, with the enactment of statutory authority to bar such manipulation, the Market Behavior Rules could be rescinded upon the effectiveness of the new anti-manipulation rules.<sup>8</sup> This would simplify the Commission's rules and provide greater clarity to the industry by avoiding duplicative or overlapping requirements, yet retain important rules governing market behavior. We noted, however, that certain provisions of the other Market Behavior Rules should be incorporated into rules of general applicability.<sup>9</sup> On January 19, 2006, we issued a Final Rule adopting, with minor

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<sup>6</sup> 18 CFR part 358 (2005).

<sup>7</sup> Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 113 FERC ¶61,190 (2005); EPA Act 2005 sections 261 et seq., Pub. L. No. 109-58, 199 Stat. 594 (2005).

<sup>8</sup> Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 113 FERC ¶61,190 at P 1 and 14.

<sup>9</sup> Id. at P 20-22.

revisions, the proposed anti-manipulation rule.<sup>10</sup> The new anti-manipulation rules became effective January 26, 2006.

### **III. Discussion**

12. Concurrently with the issuance of this Final Rule, the Commission is issuing an order in Docket No. EL06-16-000 which rescinds Market Behavior Rules 2 and 6 from sellers' market-based rate tariffs.<sup>11</sup> As explained in the Market Behavior Rules Rescission Order, the anti-manipulation rule adopted in Order No. 670 makes it unnecessary to retain Market Behavior Rules 2 or 6. Also, as noted in the Market Behavior Rules Rescission Order, there is benefit to incorporating the substance of the other Market Behavior Rules into the Commission's regulations, and that codification is made herein.

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

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<sup>10</sup> Prohibition of Energy Market Manipulation, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, 114 FERC ¶ 61,047 (Jan. 19, 2006) (Order No. 670).

<sup>11</sup> Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, "Order Revising Market-Based Rate Tariffs and Authorizations," Docket No. EL06-16-000, issued February 16, 2006 (Market Behavior Rules Rescission Order).



14. Market Behavior Rule 3 requires accurate and factual communications with the Commission, Commission-approved market monitors, Commission-approved RTOs and ISOs, or jurisdictional transmission providers. As commenters in Docket No. EL06-16-000 point out, this rule is somewhat different from the new anti-manipulation rule, as it applies to all communications, not just those that are material in furtherance of a fraudulent or deceptive scheme. Accordingly, the substance of Market Behavior Rule 3 can be incorporated into the Commission regulations without duplicating or causing undue confusion with respect to the new anti-manipulation rule.

15. Market Behavior Rule 4 requires sellers to provide accurate data to price index publishers, if the seller is reporting transactions to such publishers, and includes a requirement that sellers notify the Commission of their price reporting status and of any changes in that status. While a deliberate false report would be a violation of the new anti-manipulation rule, there is no confusion in stating this as part of the Commission's regulations and in reinforcing the importance of the Price Index Policy Statement. The second aspect of Market Behavior Rule 4, notification to the Commission of the market participant's price reporting status and of any changes in that status, is not otherwise provided for; thus, we incorporate it here in new Part 35 of our regulations. This is a simple and non-burdensome way for the Commission to be informed of the prevalence of price reporting to price index developers. Codification of Market Behavior Rule 4 does not increase the burden of, or requirements for, notification in any way, because any market-based rate seller that provided a notification upon promulgation of the Market

Behavior Rules in November 2003 (or thereafter) need not notify the Commission again upon the effective date of this Final Rule. Only sellers who have not previously provided a notification of their price reporting status, and sellers who have a change in their reporting status, are required to notify the Commission.

16. Market Behavior Rule 5 requires sellers to maintain certain records for a period of three years to reconstruct prices charged for electricity and related products. This is different from the record retention requirements in Part 125 of our regulations, which largely are related to cost-of-service rate requirements.<sup>12</sup> In order to avoid potential confusion over the extent of this retention requirement, we are incorporating the record retention requirement in Part 35 of our regulations. Market Behavior Rule 5's record retention requirement was adopted alongside Market Behavior Rule 2 to permit the Commission and interested entities to better monitor market-based rate sales and to allow the Commission sufficient time for the investigations into possible violations of the Market Behavior Rules. For the same reasons, we think the record retention requirement of Market Behavior Rule 5 is a necessary companion to the new anti-manipulation

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<sup>12</sup> 18 CFR part 125 (2005).

regulations, which supplanted Market Behavior Rule 2 as the Commission's prohibition of market manipulation.<sup>13</sup>

#### **IV. Regulatory Flexibility Act Certification**

17. The Regulatory Flexibility Act of 1980<sup>14</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.<sup>15</sup> The Commission is not required to make such analyses if a rule would not have such an effect. The Commission concludes that this Final Rule would not have such an impact on small entities because this Final Rule is merely a procedural codification of rules presently in market-rate based sellers' tariffs. The Final Rule continues to apply only to market-based rate sellers; the content and scope of application of the rules remains unchanged. Therefore, no regulatory flexibility analysis is required.

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<sup>13</sup> When the Commission seeks to impose civil penalties for a violation of the new anti-manipulation rule, a five-year statute of limitations applies. Order No. 670, 114 FERC ¶ 61,047 at P 62-3. This underscores the importance of the record retention requirement. Moreover, in the Market Behavior Rules Rescission Order issued contemporaneously herewith, we propose to extend the record retention period to five years to match this statute of limitations.

<sup>14</sup> 5 U.S.C. 601-612 (2000).

<sup>15</sup> 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).

As such, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities.

#### **V. Information Collection Statement**

18. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.<sup>16</sup> This Final Rule contains no new or modified information collections, and OMB reviewed the information collections when the Market Behavior Rules were promulgated in November 2003.<sup>17</sup> Therefore, OMB review of this Final Rule is not required.

#### **VI. Environmental Analysis**

19. 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.<sup>18</sup> 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

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<sup>16</sup> 5 CFR 1320.12.

<sup>17</sup> Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003) at P 187-92.

<sup>18</sup> Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (1987), FERC Stats. & Regs. ¶ 30,783 (1987).

amended.<sup>19</sup> This rule is procedural in nature and therefore falls under this exception; consequently, no environmental consideration is necessary.

## **VII. Document Availability**

20. 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.

21. 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.

22. 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](mailto:FERCOnlineSupport@FERC.gov)), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov)).

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<sup>19</sup> 18 CFR 380.4(a)(2)(ii) (2005).

### **VIII. Effective Date and Congressional Notification**

23. These regulations are effective [insert date of publication in the **FEDERAL REGISTER**]. The Commission has determined, pursuant to 5 U.S.C. 553(d), that a delayed effective date for this Final Rule is unnecessary. The Commission finds that notice and public procedure are unnecessary for the following three reasons. First, the regulations at issue have already been noticed and commented upon extensively. When the Market Behavior Rules were first proposed in June 2003, 69 parties filed comments, and when the Commission issued a Notice of Proposed Rulemaking in November 2005 seeking comment on whether the Market Behavior Rules should be rescinded, 21 comments and 4 reply comments were filed with the Commission.<sup>20</sup> Second, codification of Market Behavior Rules 1, 3, 4 and 5 presents no substantive change in regulation. The Market Behavior Rules are simply being moved from sellers' tariffs to Commission regulations. The scope and application of the rules, particularly the universe of entities to which the rules apply, remain unchanged rendering their transfer to the Commission's regulations merely procedural. Third, no new burden or regulatory requirement is imposed upon regulated entities or the general public by codification of Market Behavior Rules 1, 3, 4, and 5. For instance, entities that previously filed

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<sup>20</sup> See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 103 FERC ¶ 61,349 (2003); Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 113 FERC ¶ 61,190 (2005).

notifications with the Commission pursuant to Market Behavior Rule 4 (new section 35.37(c)) need not notify the Commission again under this Final Rule. Therefore, based on the foregoing reasons and because there is no change in the rights and obligations of the parties impacted, the Commission finds good cause for waiving the customary 30-day notice period before the effective date of this Final Rule.

List of Subjects in 18 CFR part 35

Electric power rates, Electric utilities, Reporting and record keeping requirements and Uniform System of Accounts.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

In consideration of the foregoing, the Commission amends part 35, 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. Subpart H is added to read as follows:

**Subpart H – Wholesale Sales of Electric Energy at Market-Based Rates**

**Sec.**

**35.36**            **Generally.**

**35.37**            **Market behavior rules.**

§ 35.36            **Generally.**

(a) For purposes of this subpart, seller means any person that has authorization to engage in sales for resale of electric energy at market-based rates under section 205 of the Federal Power Act.

(b) The provisions of this subpart apply to all sellers authorized to make sales for resale of electric energy at market-based rates, unless otherwise ordered by the Commission.

§ 35.37            **Market behavior rules.**

(a) Unit operation. Where a seller participates in a Commission-approved organized market, seller will operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that



complies with the Commission-approved rules and regulations of the applicable power market. Seller is not required to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or is a requirement applicable to seller through seller's participation in a Commission-approved organized market.

(b) Communications. Seller will provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless seller exercises due diligence to prevent such occurrences.

(c) Price reporting. To the extent seller engages in reporting of transactions to publishers of electricity or natural gas price 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 issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Unless seller has previously provided the Commission with a notification of its price reporting status, seller shall notify the Commission within 15 days of the effective date of this regulation whether it engages in such reporting of its transactions. Seller must update the notification within 15 days of any subsequent change in its transaction reporting status.

In addition, Seller must adhere to such other standards and requirements for price reporting as the Commission may order.

(d) Record retention. Seller must retain, for a period of three years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products it sold pursuant to seller's market-based rate tariff, and the prices it reported for use in price indices.