Incorporation by Reference

(g) Unless otherwise specified in this AD, the actions shall be done in accordance with CRJ 700/900 Series Regional Jet (Bombardier) Alert Service Bulletin A670BA–30–007, Revision A, dated April 15, 2003, including Appendices A and B, dated March 18, 2003. This incorporation by reference was approved previously by the Director of the Federal Register as of June 27, 2003 (68 FR 35152, June 12, 2003). Copies may be obtained from Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, 10 Fifth Street, Third Floor, Valley Stream, New York; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 2: The subject of this AD is addressed in Canadian airworthiness directive CF–2003–07, effective on March 25, 2003.

Effective Date

(h) This amendment becomes effective on December 31, 2003.

Issued in Renton, Washington, on November 20, 2003.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–29532 Filed 11–25–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM03–10–000; Order No. 644]

Amendments to Blanket Sales Certificates

November 17, 2003.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations regarding 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 to the current regulatory framework is to ensure the integrity of the gas sales market that remains within the Commission's jurisdiction. The rule is another part of the Commission's continuing effort to restore confidence in the nation's energy markets.

EFFECTIVE DATE: The rule will become effective December 26, 2003.

FOR FURTHER INFORMATION CONTACT: Robert D. McLean, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8156.

Frank Karabetsos, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8133.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Background
A. Changes in the Natural Gas Industry
B. Events in Western Energy Markets in 2000
III. Comment Analysis
A. Application of Code of Conduct to Jurisdictional Sellers
B. Limited Jurisdiction of Blanket Certificates
C. Code of Conduct
1. General Language Prohibiting Manipulation
2. Wash Trades
3. Collusion
4. Reporting to Gas Index Publishers
5. Three-Year Data and Information Retention Requirement
6. Prohibition on Reporting Transaction with Affiliates
D. Remedies
1. General Issues
2. 90-Day Time Limit on Complaints
IV. Administrative Finding and Notices
A. Information Collection Statement
B. Environmental Analysis
C. Regulatory Flexibility Act Certification
D. Document Availability
E. Effective Date and Congressional Review
Regulatory Text
Appendix—Entities Filing Intervening and Reply Comments

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

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,[1] 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.[2]

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,[3] 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.

[1] 1103 FERC ¶ 61,350 (2003) (June 26 NOPR).

[2] 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 on transactions authorized by this part.''

[3] 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).

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 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 it 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 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. 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

[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 (DC 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).

[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 (DC 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 FR 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).

[5] 18 CFR § 284.401–402 (2003).

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 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.[4] 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.[5] Commenters assert that the proposed rules could 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.[6] 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,[7] they argue that the rules will be ineffective in achieving uniform compliance.

18. Finally, commenters maintain that before imposing these potentially

[4] 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.

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

[6] Coral at 5.

[7] *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 ot the proposed regulations).

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.[8] 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 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.[9]

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.''

24. Several commenters raise concerns regarding this deletion.[10] 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.[11] 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.[12] 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,

[8] *See, e.g.,* BP, EMIT, CPUC, NASUCA.

[9] 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.

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

[11] *See* NiSource.

[12] *See* USG.

market conditions, or market rules for natural gas.[13]

28. As discussed above, several commenters raise concerns regarding the general language prohibiting manipulation.[14] 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 conduct they require or prohibit,[15] 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.'' [16] 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.'' [17]

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.[18] 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.'' [19]

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.[20] 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.'' [21]

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.

[13] 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.

[14] *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.

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

[16] *See General Electric Co.* v. *EPA*, 53 F.3d 1324, 1329–30 (DC 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.'').

[17] *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.'').

[18] *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.'').

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

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

[21] *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.'').

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 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.[22] 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.[23]

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 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.[24]

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.[25]

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

[22] 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.

[23] 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.

[24] *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'').

[25] 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.

within the Commission's 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'').[26]

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 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'').[27]

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

[26] 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 * * * .''

[27] 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 * * * .''

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 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.[28]

59. Several commenters argue that the Commission should better define the term collusion.[29] 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 pertaining to such rates and charges be just and reasonable.[30] 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.[31] These regulations are expressly tailored to our statutory duties and our competitive goals with respect to the natural gas market.[32]

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 from 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

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

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

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

[31] 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.

[32] *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.]).

to such other standards and requirements for price reporting as the Commission may order.[33]

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.[34] 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.[35] 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.[36] Other commenters argue that the Policy Statement obviates the need for a reporting rule.[37]

66. Several other commenters assert that the rule does not go far enough.[38] 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.

67. Moreover, several commenters request clarification as to whether the Commission notification requirement is a one-time or ongoing obligation.[39] 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.*[40] 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.[41] 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:

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.[42] 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

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

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.

[34] *See e.g.,* Western.

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

[36] *See* Coral at 7.

[37] *See e.g.,* Mirant, Hess, Coral.

[38] *See e.g.,* EMIT, Platts, NASUCA.

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

[40] *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).

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

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

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 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.[43]

75. Several entities comment on the Commission's proposed three-year data and information retention requirement.[44] 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).[45] 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.[46] Other commenters argue that the three-year retention period is too short, and that with current computer technology, a longer retention period should not result in additional costs to market participants.[47] Finally, some commenters argue that the three-year record retention period is consistent with the commercial practices of many natural gas sellers.[48]

78. Several commenters argue that the record retention requirement will only be meaningful if the Commission makes reporting of all trade data mandatory.[49] 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.[50] 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.[51]

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.[52]

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 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.[53]

82. Commenters generally agree with this restriction.[54] 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

[43] 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.

[44] *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.

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

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

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

[48] *See e.g.*, Western.

[49] *See e.g.*, EMIT.

[50] *See e.g.*, Sempra.

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

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

[53] 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.

[54] *See* ProLiance, NASUCA, EnCana, Hess, NEMA.

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.'' [55] 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 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.[56] 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.[57] 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.[58] 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.[59] 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.[60] NJR Companies object to the disgorgement remedy when the violation is inadvertent.[61]

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.[62] 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.[63] 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 certificates the Commission is fulfilling its obligation to appropriately monitor markets and to ensure that market-based

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

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

[57] *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).

[58] 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.

[59] *See e.g.*, Mirant, Cinergy, EnCana, Hess.

[60] *See* AGA at 10.

[61] NJR Companies at 19.

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

[63] *See* 18 CFR 284.401–402 (2003).

rates remain within the zone of reasonableness required by the NGA.[64]

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.[65] 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.[66] 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.[67] In devising its remedy the Commission is required to exercise its discretion to arrive at an appropriate remedy,[68] and to explore all the equitable considerations, and practical consequences of its action and the purposes of the NGA.[69]

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.[70]

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.[71] Most of the commenters argue that the 60-day time period is unreasonably too short. Some commenters suggest a limit of six months.[72] 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 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.[73] 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

[64] 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).

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

[66] 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).

[67] 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).

[68] *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).

[69] *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).

[70] 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.

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

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

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

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 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.[74]

102. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection requirements imposed by agency rule.[75] 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 × $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.

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, DC 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, DC 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.[76] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human

[74] *See* Sections 284.288(b)–(c), and 284.403(b)–(c).

[75] 5 CFR 1320 (2003).

[76] 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).

environment.[77] 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.[78] Therefore, an 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)[79] 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.[80]

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 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington DC 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 Web site 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 December 26, 2003. 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.

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.

Linda Mitry,

Acting Secretary.

■ In consideration of the foregoing, the Commission is amending 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

■ 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. 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

[77] 18 CFR 380.4 (2003).

[78] *See* 18 CFR 380.4(a)(2)(ii), 380.4(a)(5), 380.4(a)(27) (2003).

[79] 5 U.S.C. 601–612.

[80] 5 U.S.C. 605(b).

the Commission will take the form of a call to our Hotline alleging inappropriate behavior or communication with our enforcement Staff.

■ 3. In § 284.402, the second sentence of paragraph (a) 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.

■ 4. 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.

Note: This appendix will not appear in the Code of Federal Regulations.

Appendix

List of Commenters

Amerada Hess Corporation (Hess)
American Gas Association (AGA) *
Atmos Energy Corp.
BP America Production Company and BP Energy Company (BP)
California Electricity Oversight Board (Oversight Board)
Calpine Corporation
Cinergy Marketing & Trading, LP (Cinergy) *
Coalition for Energy Market Integrity and Transparency (EMIT)
Coral Energy Resources, L.P. (Coral)
Duke Energy Corporation (Duke)
Electric Power Supply Association (EPSA)
EnCana Marketing (USA) Inc. (EnCana)
FPL Group, Inc. (FPL Group)
Intercontinental Exchange, Inc. (ICE)
Merrill Lynch Capital Services, Inc. and Morgan Stanley Capital Group, Inc. (Merill Lynch and Morgan Stanley) *
Mirant Americas Energy Marketing, LP (Mirant)
Missouri Public Service Commission (Missouri PSC)
National Association of State Utility Consumer Advocates (NASUCA)
National Energy Marketers Association (NEMA)
Natural Gas Supply Association (NGSA)
New Jersey Resources Corporation (NJR Companies)
Nicor Gas (Nicor)
NiSource, Inc. (NiSource)
Pacific Gas and Electric Company (PG&E)
Peoples Gas Light and Coke Company, North Shore Gas Company, and Peoples Energy Resources Corp. (Peoples)
Piedmont Natural Gas Co., Inc.
Platts
ProLiance Energy, LLC (ProLiance)
Public Service Electric and Gas Co., PSEG Power LLC and PSEG Energy Resources & Trade LLC (collectively, PSEG Companies)
Public Service Commission of the State of New York (PSCNY)
Public Utilities Commission of the State of California (CPUC)
Questar Energy Trading Company (Questar)
Reliant Energy Power Generation, Inc. and Reliant Energy Services, Inc. (Reliant)
Select Energy, Inc. (Select)
Sempra Energy (Sempra)
Shell Offshore Inc. (Shell Offshore)
TXU Portfolio Management Company LP (TXU)
USG Pipeline Company, B–R Pipeline Company, and United States Gypsum Company (USG)
Virginia Industrial Gas Users' Association (VIGUA)
Virginia Natural Gas, Inc.**
Western Gas Resources, Inc. (Western)

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

Massey, Commissioner, *concurring in part:*

The tariff conditions that the Commission approves today send a clear message to market-based rate sellers: Don't lie, don't manipulate market conditions, don't violate market rules and don't collude with others. For sellers who choose to behave otherwise, the Commission now has the tools to sanction such bad behavior and we give notice of what some of those sanctions could be. This action should help to restore the faith in energy markets that has been lost in the last few years.

There is one aspect of today's order, however, that I would have written differently. I would not limit the monetary penalty for tariff violations to disgorgement of unjust profits. Market manipulation can raise the market prices paid by all market participants and collected by all sellers. In such a case, the appropriate remedy may be that the manipulating seller makes the market whole. I would prefer to not take this or any monetary remedy off of the table, but instead to allow the Commission the flexibility to tailor the remedy to the circumstances of each case.

This one concern with today's order should not be interpreted, however, as diminishing in any way my enthusiastic support for this otherwise excellent order. I commend my colleagues for taking this important and much needed step.

For these reasons, I concur in part with today's order.

William L. Massey,
Commissioner.

Brownell, Commissioner, *concurring:*

1. We are adopting behavioral rules for market participants in the electric and natural gas markets. No one can question the good intention behind these behavioral rules. As I have stated before, if there are violations of our rules, regulations or policies, we must be willing to punish and correct. Concurrently, if there is misconduct by market participants that is intended to be anticompetitive, we must have the ability to remedy those market abuses.

2. Conversely, when we originally proposed behavioral rules, I had a number of concerns. I was concerned that the use of vague terms would create uncertainty and, thereby, undermine the good intentions of the rules. I feared that subsequent applications of the proposed behavior rules to real world actions could result in overly proscriptive ''rules of the road'' that will dampen business innovation and creative market strategies. The net effect would be less competition and the associated higher costs to consumers. I was concerned that we may be proposing a model that simply does not fit with the larger lessons we have learned in fostering competition over the past two decades, particularly in the gas market.

3. It is difficult to strike the right balance. I have carefully weighed the comments and believe the revisions and clarifications to the proposed behavioral rules achieve the appropriate balance. We clarify that these rules do not impose a ''must offer'' requirement. We revise the definition of manipulation to relate to actions that are ''intended to or foreseeably could'' manipulate markets. We add the exclusion that action taken at the direction of an RTO or ISO does not constitute manipulation.

4. Commenters also challenge the sufficiency of the term ''legitimate business purpose'' in distinguishing between prohibited and non-prohibited behavior. We clarify that transactions with economic substance, in which a seller offers or provides a service to a buyer where value is exchanged for value, are not prohibited behavior. Behavior driven by legitimate profit maximization or that serves important market functions is not manipulation. Moreover, I think it is important to recognize that scarcity pricing is the market response to a supply/demand imbalance that appropriately signals the need for infrastructure. For example, the high prices of 2000–2001 that reflected supply/demand fundamentals resulted in the first new power plants being constructed in California in ten years; price risk being hedged through the use of long-term contracting; and renewed efforts to correct a flawed market design.

5. We have also adopted measures that require accountability. A complaint must be brought to the Commission within 90 days after the calendar quarter that the manipulative action was alleged to have occurred. The 90-day time limit strikes an appropriate balance between providing sufficient opportunity to detect violations and the market's need for finality. The Order also places a similar time limit on Commission action. As a matter of prosecutorial policy, the Commission will only initiate a proceeding or investigation within 90 days from when we obtained notice of a potential violation through either a hotline call or communications with our enforcement staff.

6. While these rules are designed to provide adequate opportunity to detect, and the Commission to remedy, market abuses and are clearly defined so that they do not create uncertainty, disrupt competitive commodity markets or prove simply ineffective, competitive markets are dynamic. We need to periodically evaluate the impact of these rules on the electric and gas markets. We have directed our Office of Market Oversight and Investigation to evaluate the effectiveness and consequences of these behavioral rules on an annual basis and include their analysis in the State of the Market Report.

Nora Mead Brownell.

[FR Doc. 03–29300 Filed 11–25–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Federal Transit Administration

23 CFR Part 476

RIN 2125–AF00

Interstate Highway System

AGENCIES: Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), DOT.

ACTION: Final rule.

SUMMARY: This final rule removes regulations that prescribed policies and procedures for implementation of section 103(e)(4) of title 23, United States Code, which permitted the withdrawal of Interstate System segments and the substitution of public mass transit or highway projects or both. The Congress recognized the expiration of this program by eliminating the underlying statutory authority for this regulation. Therefore, the Federal Highway Administration and the Federal Transit Administration remove the regulations.

EFFECTIVE DATE: November 26, 2003.

FOR FURTHER INFORMATION CONTACT: For FHWA: Donald J. West, Office of Program Administration, HIPA–10, (202) 366–4652, or Steve Rochlis, Office of the Chief Counsel, (202) 366–1395, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays. For FTA: Rhoda Shorter, Office of Program Management, TPM–10, (202) 366–0206, and Scott Biehl, Office of the Chief Counsel, (202) 366–4063, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours for the FTA are 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may also reach the Office of the Federal Register's home page at: *http://www.archives.gov* and the Government Printing Office's Web page at: *http://www.access.gpo.gov/nara.*

Background

In 1973, the Interstate System was about 83 percent complete; however, due to changed social, economic, and environmental conditions, many States realized it would be impracticable or unnecessary to construct some uncompleted segments of the Interstate, particularly in urbanized areas. But these States were reluctant to give up these segments for fear of losing substantial amounts of Federal-aid funds. Therefore, the Federal-Aid Highway Act of 1973 (Pub. L. 93–87, 87 Stat. 250, August 13, 1973), amended title 23, United States Code, by adding section 103(e)(4) to allow uncompleted or planned highways on the Interstate System in urbanized areas to be withdrawn and their funding entitlements be transferred to mass transit projects. This became known as the ''Interstate withdrawal and substitution program'' (also known as the ''Interstate Transfer program'') and it provided States with the opportunity to request withdrawal of a non-essential segment of the Interstate System, and the substitution of transit projects to serve the area that would have been served by the withdrawn segment. As a result of this Act, the Federal Highway Administration together with the Federal Transit Administration (known as the Urban Mass Transit Administration at that time) promulgated 23 CFR Part 476, Interstate Highway System.[1] Subpart D of this

[1] *See* final rule published on June 12, 1974, at 39 FR 20658.