

114 FERC ¶ 61,166
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 284

(Docket No. RM06-5-000; Order No. 673)

Amendments to Codes of Conduct for Unbundled Sales Service
and for Persons Holding Blanket Marketing Certificates

(Issued February 16, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: In this Final Rule, the Federal Energy Regulatory Commission (Commission) is amending its regulations regarding the blanket certificates for unbundled natural gas sales services held by interstate natural gas pipelines and the blanket marketing certificates held by persons making sales for resale of natural gas at negotiated rates in interstate commerce. Specifically, the Commission is rescinding sections of its regulations pertaining to codes of conduct with respect to certain sales of natural gas.

DATES: This Final Rule will become effective **[insert date 30 days after publication in the FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Amendments to Codes of Conduct for Unbundled Sales Docket No. RM06-5-000
Service and for Persons Holding Blanket Marketing
Certificates

ORDER NO. 673

FINAL RULE

(Issued February 16, 2006)

1. The Commission has decided to rescind §§ 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of its codes of conduct regulations,¹ as promulgated pursuant to Order No. 644.² The central purpose of Order No. 644 was to prohibit market manipulation by pipelines that provide unbundled natural gas sales service and by sellers of natural gas for resale at negotiated rates. This prohibition is set out in §§ 284.288(a) and 284.403(a) of the Commission's regulations. Sections 284.288(d)-(e) and 284.403(d)-(e) of the Commission's regulations are largely procedural in nature, dealing with remedies for violations of the codes of conduct requirements and time limits on complaints and

¹ 18 CFR 284.288(a), (d) and (e) and 284.403(a), (d) and (e) (2005).

² Amendments to Blanket Sales Certificates, 105 FERC ¶ 61,217 (2003), reh'g denied 107 FERC ¶ 61,174; 68 FR 66323 (Nov. 26, 2003); 18 CFR 284.288 and 284.403 (2003) (Order No. 644). Order No. 644 is currently on appeal. See Cinergy Marketing & Trading, L.P. v. FERC, No. 04-1168 et al. (D.C. Cir. filed April 28, 2004).

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Commission enforcement of the codes of conduct requirements. Subsequent to the issuance of Order No. 644, Congress provided the Commission with specific anti-manipulation authority in the Energy Policy Act of 2005 (EPAcT 2005).³ To implement this new authority, the Commission recently issued Order No. 670, adopting a final rule making it unlawful for any entity, including pipelines that provide unbundled natural gas sales service and all sellers of natural gas for resale, to engage in fraudulent or deceptive conduct in connection with the purchase or sale of electric energy, natural gas, or transmission or transportation services subject to the jurisdiction of the Commission.⁴ In order to avoid regulatory uncertainty and confusion, to assure that all market participants are held to the same standard, and to provide clarity to entities subject to our rules and regulations, we rescind §§ 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's regulations effective 30 days after publication hereof in the Federal Register.⁵

³ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005). Congress prohibited the use or employment of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of natural gas or transportation services subject to the jurisdiction of the Commission. Congress directed the Commission to give these terms the same meaning as under the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2000).

⁴ Prohibition of Energy Market Manipulation, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, 114 FERC ¶ 61,047 (Jan. 19, 2006) (Order No. 670).

⁵ The Commission will redesignate existing sections 284.288(b)-(c) and 284.403(b)-(c) of the Commission's regulations as new sections 284.288(a)-(b) and
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2. Although Order No. 670 makes it unnecessary to retain §§ 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's regulations, there is benefit to retaining §§ 284.288(b)-(c) and 284.403(b)-(c) of the Commission's regulations. Sections 284.288(b) and 284.403(b) of the Commission's regulations deal with requirements for price index reporting that are not entirely provided for by the new anti-manipulation regulations under Order No. 670. Sections 284.288(c) and 284.403(c) of the codes of conduct regulations require sellers to maintain certain records for a period of three years to reconstruct prices charged for natural gas. This requirement is also not provided for by Order No. 670.⁶

I. Background

3. On November 17, 2003, acting pursuant to section 7 of the NGA, we issued a final rule, Order No. 644, amending blanket certificates for unbundled natural gas sales services held by interstate natural gas pipelines and blanket marketing certificates held by persons making sales for resale of natural gas at negotiated rates in interstate commerce. This rule requires that pipelines that provide unbundled natural gas sales service and all

284.403(a)-(b), respectively. Unless otherwise specified, this NOPR will refer to these sections under their existing designation before the effectiveness of this Final Rule.

⁶ In a notice of proposed rulemaking issued contemporaneously with this Final Rule, Docket No. RM06-14-000, the Commission is proposing to extend the record retention requirements from three to five years to be consistent with the statute of limitations that would apply to actions seeking civil penalties for alleged violations of the new anti-manipulation rule implemented in Order No. 670.

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sellers of natural gas for resale adhere to a code of conduct with respect to certain natural gas sales. The Commission 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 was necessary to place additional conditions on blanket certificates for unbundled pipeline sales and sales for resale at negotiated rates. In formulating such conditions, the Commission was fulfilling its obligation to appropriately monitor markets and to ensure that natural gas prices remain within the zone of reasonableness required by the NGA.⁷

4. Under §§ 284.288(a) and 284.403(a) of the Commission's regulations, a pipeline providing unbundled natural gas sales service under § 284.284, or 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 or transactions include wash trades and collusion for the purpose of market manipulation.⁸

5. Sections 284.288(b) and 284.403(b) deal with reporting of transaction information to price index publishers. They require that if a seller reports transaction data, the data be accurate and factual, and not knowingly false or misleading, and be reported in

⁷ Order No. 644, 105 FERC ¶ 61,217 at P 91 (2003).

⁸ 18 CFR 284.288(a)(1)-(2) and 284.403(a)(1)-(2) (2005).

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accordance with the Commission's Policy Statement on price indices.⁹ Sections 284.288(b) and 284.403(b) also require that sellers notify the Commission of whether they report transaction data to price index publishers in accordance with the Price Index Policy Statement, and to update any changes in their reporting status.

6. Sections 284.288(c) and 284.403(c) require that sellers retain for a minimum three-year period all data and information upon which they billed the prices charged for natural gas sales made under §§ 284.284 or 284.402, or in transactions the prices of which were reported to price index publishers.

7. Sections 284.288(d)-(e) and 284.403(d)-(e) of the Commission's regulations are largely procedural in nature. Specifically, §§ 284.288(d) and 284.403(d) deal with remedies for violations of the codes of conduct requirements set forth in preceding §§ (a) through (c) of §§ 284.288 and 284.403. Sections 284.288(e) and 284.403(e) deal with time limits on complaints and Commission enforcement of the codes of conduct requirements.

8. At the same time that Order No. 644 was adopted for pipelines that provide unbundled natural gas sales service and holders of blanket certificate authority that make sales for resale of natural gas, the Commission also issued an order to require wholesale

⁹ Price Discovery in Natural Gas and Electric Markets, "Policy Statement on Natural Gas and Electric Price Indices," 104 FERC ¶ 61,121 (2003) (Price Index Policy Statement).

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sellers of electricity at market-based rates to adhere to certain behavioral rules when making sales of electricity.¹⁰

9. Following enactment of EAct 2005, the Commission issued a Notice of Proposed Rulemaking on October 20, 2005, in which we proposed rules to implement the new statutory anti-manipulation provisions.¹¹ In the Anti-Manipulation NOPR, we noted the overlap between §§ 284.288(a) and 284.403(a) of the Commission's regulations and the proposed EAct 2005 regulations.¹² We said that we would retain §§ 284.288(a) and 284.403(a) of the Commission's regulations for the time being, but also indicated that we would seek comment on whether we should revise or rescind §§ 284.288(a) and 284.403(a) of the Commission's regulations. In the meantime, we assured market participants that we will not seek duplicative sanctions for the same conduct in the event that conduct violates both §§ 284.288(a) or 284.403(a) of the Commission's regulations and the proposed new anti-manipulation rule.¹³

¹⁰ Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, "Order Amending Market-Based Rate Tariffs and Authorizations," 105 FERC ¶ 61,218 (2003), reh'g denied, 107 FERC ¶ 61,175 (2004).

¹¹ Prohibition of Energy Market Manipulation, 113 FERC ¶ 61,067 (2005) (Anti-Manipulation NOPR).

¹² Id. at P 15 and n.23.

¹³ Id. See also Enforcement of Statutes, Orders, Rules, and Regulations, "Policy Statement on Enforcement," 113 FERC ¶ 61,068 at P 14 (2005).

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10. In a Notice of Proposed Rulemaking dated November 21, 2005,¹⁴ the Commission, acting pursuant to section 7 of the NGA, proposed to rescind §§ 284.288 or 284.403 of the Commission's regulations once we issued final regulations implementing the anti-manipulation provisions of EAct 2005 and have had the opportunity to incorporate certain aspects of §§ 284.288 or 284.403 of the Commission's regulations into other rules of general applicability. The Commission also requested comment on whether "any aspects" of §§ 284.288 and 284.403 of the Commission's regulations should be retained, or could "all substantive provisions" of §§ 284.288 and 284.403 of the Commission's regulations be reflected in the final regulations implementing the anti-manipulation provisions of EAct 2005.¹⁵ We noted that rescission of §§ 284.288 and 284.403 of the Commission's regulations will simplify the Commission's rules and regulations, avoid confusion, and provide greater clarity and regulatory certainty to the industry. We emphasized our belief that rescinding §§ 284.288 and 284.403 of the Commission's regulations is consistent with Congressional intent in EAct 2005, which provided the Commission with explicit anti-manipulation authority, and that rescission

¹⁴ See Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates, 113 FERC ¶ 61,189 (2005) (November 21 NOPR).

¹⁵ Id. at P 20.

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will simplify and streamline the rules and regulations sellers must follow, yet not eliminate beneficial rules governing market behavior.¹⁶

11. The Commission received 11 comments and one reply comment in response to the November 21 NOPR.¹⁷ Many of the comments support the Commission's overall objectives in this proceeding, that is, to simplify the Commission's rules and regulations, avoid confusion, and provide greater clarity and regulatory certainty to the industry, while not eliminating beneficial rules governing market behavior by addressing them in other rules and regulations.

12. On January 19, 2006, the Commission issued Order No. 670, adopting regulations implementing the EAct 2005 anti-manipulation provisions. In Order No. 670 the Commission adopted a new Part 1c of our regulations under which it is "unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, (1) to use or employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make

¹⁶ Id. at P 11. At the same time we issued an order in Docket No. EL06-16-000 proposing similar changes to the behavior rules applicable to wholesale sellers of electricity at market-based rates. See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, "Order Proposing Revisions to Market-Based Rate Tariffs and Authorizations," 113 FERC ¶ 61,190 (2005).

¹⁷ Entities filing comments and reply comments are listed in the Appendix to this order, along with the acronyms for such commenters. The Commission has accepted and considered all comments filed, including late-filed comments.

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the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.”¹⁸

II. Discussion

A. Sections 284.288(a) and 284.403(a) of the Commission’s Regulations

13. In the November 21 NOPR the Commission sought comment on whether there is a need or basis for retaining §§ 284.288(a) and 284.403(a) of the Commission’s regulations in light of the then-proposed anti-manipulation rule, and whether the Commission should retain in any form the affirmative defense of “legitimate business purpose” in existing §§ 284.288(a) and 284.403(a) of the Commission’s regulations.

1. Should the Commission Retain or Rescind Sections 284.288(a) and 284.403(a) of the Commission’s Regulations?

a. Comments

14. Commenters were divided on the issue of whether §§ 284.288(a) and 284.403(a) of the Commission’s regulations should be retained or rescinded in light of the anti-manipulation provisions. Those in favor of retaining §§ 284.288(a) and 284.403(a) of the Commission’s regulations argue two principal points: first, the foreseeability standard of §§ 284.288(a) and 284.403(a) of the Commission’s regulations reaches negligent conduct or other conduct that falls short of being “provably” intentional but nonetheless has a foreseeable impact on rates; and second, §§ 284.288(a) and 284.403(a) of the

¹⁸ 18 CFR 1c.1, 71 FR 4244 (2006).

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Commission's regulations have lasting utility because they provide a remedy for activities that may not be fraudulent, but could nevertheless function to manipulate prices for certain sales of natural gas.¹⁹

15. Several commenters argue that §§ 284.288(a) and 284.403(a) of the Commission's regulations should be retained because they prohibit conduct that "foreseeably could manipulate market prices," and do not require the showing of scienter (intentional or reckless conduct), which means that §§ 284.288(a) and 284.403(a) of the Commission's regulations reach a broader range of conduct that may adversely affect consumers and energy markets than would the proposed anti-manipulation rule alone.²⁰ CPUC and others argue that nothing in EAct 2005 dictates or justifies the repeal of §§ 284.288(a) and 284.403(a) of the Commission's regulations. They argue that, in determining whether rates are just and reasonable, the Commission should only focus on the effect of a seller's action and not on the seller's intent, and that relying solely on intent may result in rates becoming unjust and unreasonable because it would limit the Commission's ability to remedy conduct falling short of being intentional but whose rate-altering effect is foreseeable.²¹ CPUC argues that there is no risk of confusion created by having both

¹⁹ CPUC at 2-8; NASUCA at 5-10; NJBPU at 5-7.

²⁰ CPUC at 2-8; NASUCA at 5; NJBPU at 5-6.

²¹ CPUC at 5; NASUCA at 5, 8.

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§§ 284.288(a) and 284.403(a) of the Commission's regulations and the anti-manipulation rule promulgated pursuant to EAct 2005.²²

16. Commenters advocating rescission of §§ 284.288(a) and 284.403(a) of the Commission's regulations argue three main points. First, commenters argue that the Commission should not retain the foreseeability standard of proof of §§ 284.288(a) and 284.403(a) of the Commission's regulations because of the clear Congressional intent in section 315 of EAct 2005, which directs the Commission to adopt a standard of proof based upon scienter.²³ Second, commenters supporting rescission argue that there should be only one definition or standard to define what constitutes market manipulation. Retaining two sets of proscriptions, they argue, could lead to regulatory uncertainty and confusion,²⁴ and would be unduly discriminatory because of a dual standard applicable to jurisdictional sellers of natural gas while the remaining industry participants would be covered solely by the new standard of § 1c.1.²⁵ Third, the anti-manipulation regulations represent an improvement over §§ 284.288(a) and 284.403(a) of the Commission's

²² CPUC at 8.

²³ Cinergy at 6.

²⁴ INGAA at 6; NGSA at 3; AGA at 4 (arguing that this uncertainty that will deter otherwise proper market conduct, thereby promoting market inefficiency and causing a dampening effect on a competitive market).

²⁵ Cinergy at 6-7.

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regulations because, among other things, the language of new § 1c.1 provides stakeholders with clarity of language not present in §§ 284.288(a) and 284.403(a) of the Commission's regulations.²⁶

17. Indicated Market Participants argue that the anti-manipulation final rule should implement the scienter standard to conform to Congressional intent under the new NGA section 4A.²⁷ However, Indicated Market Participants and CPUC recommend that the other language in §§ 284.288(a)(1)-(2) and 284.403(a)(1)-(2), prohibiting wash trades and collusion, should be incorporated into the anti-manipulation final rule to provide clearer guidance to market participants.²⁸ APGA and NJBPU state that it would be satisfactory if the Commission clarified in the preamble to the anti-manipulation rule that wash trades and collusive sales remain prohibited.²⁹

b. Commission Determination

18. The Commission finds it unnecessary to retain §§ 284.288(a) and 284.403(a) of the Commission's regulations. Congress prohibited market manipulation by any entity

²⁶ Cinergy at 5 (arguing that the generic provision of sections 284.288(a) and 284.403(a) of the Commission's regulations is unlawful in its vagueness and, as a certificate condition, is contrary to the statutory scheme of the NGA).

²⁷ Indicated Market Participants at 10.

²⁸ Indicated Market Participants at 13; CPUC at 3, 8.

²⁹ APGA at 5; NJBPU at 7-8.

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and defined manipulation to include the requirement of scienter.³⁰ It would be inconsistent with Congress' direction if foreseeability were retained as a lesser standard of proof for market manipulation perpetrated by pipelines that provide unbundled natural gas sales service and holders of blanket certificate authority that make sales for resale of natural gas. To avoid the potential for uneven application of regulatory requirements based on whether a seller is a pipeline providing unbundled natural gas sales service or a holder of blanket certificate authority making sales for resale of natural gas, or any other entity purchasing or selling natural gas or transportation services subject to the jurisdiction of the Commission, the same standard of proof should apply to all entities for purposes of determining whether market manipulation occurred. It is not appropriate, as some commenters suggest, for the Commission to maintain a lesser standard of proof for only certain sellers of natural gas.

19. With respect to the suggestion that the specific proscribed behaviors in §§ 284.288(a)(1)-(2) and 284.403(a)(1)-(2) of the Commission's regulations be retained, the Commission finds this unnecessary. As we stated in issuing the new anti-manipulation rule, the specifically prohibited actions in §§ 284.288(a)(1)-(2) and

³⁰ In new 4A of the NGA, Congress used the terms "manipulative or deceptive device or contrivance" and directed that they be given the same meaning as used in section 10b of the Securities Exchange Act of 1934. It is well settled that those terms require a showing of scienter, that is, an intent to deceive, manipulate or defraud. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976). See Order No. 670, 114 FERC ¶ 61,047 at P 52-53.

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284.403(a)(1)-(2) (i.e., wash trades and collusion) are both prohibited activities under new § 1c.1 of our regulations and are subject to punitive and remedial action.³¹ Furthermore, we recognize that fraud is a very fact-specific violation, the permutations of which are limited only by the imagination of the perpetrator. Therefore, no list of prohibited activities could be all-inclusive. The absence of a list of specific prohibited activities does not lessen the reach of the new anti-manipulation rule, nor are we foreclosing the possibility that we may need to amplify § 1c.1 as we gain experience with the new rule, just as the SEC has done.³²

20. In short, rescission of §§ 284.288(a) and 284.403(a) of the Commission's regulations is consistent with Congressional direction and will not dilute customer protection. If conduct occurs that is not the result of fraud or deceit but nonetheless results in unjust and unreasonable rates, a person may file a complaint at the Commission under NGA section 5, or the Commission on its own motion may institute a proceeding under section 5, to modify the rates that have become unjust and unreasonable. In many

³¹ Order No. 670, 114 FERC ¶ 61,047 at P 59.

³² After considerable experience with Rule 10b-5, upon which our new anti-manipulation rule is modeled, the SEC has expanded the original Rule 10b-5 to add a number of specific provisions describing prohibited conduct. See 17 CFR 240.10b-5-1 through 240.10b5-14.

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respects customers are better protected by § 1c.1's breadth and purposeful design as a broad "catch all" anti-fraud provision.³³

2. Legitimate Business Purpose

a. Comments

21. Commenters are divided on whether the Commission should retain the "legitimate business purpose" provision of §§ 284.288(a) and 284.403(a) of the Commission's regulations. Indicated Market Participants argue that a legitimate business purpose should be a complete defense to an allegation of market manipulation, and that this provision should be incorporated into the anti-manipulation final rule.³⁴

22. AGA, on the other hand, argues that retention of the legitimate business purpose defense, as a matter of explicit language in the regulations, runs the risk of generating uncertainty.³⁵ AGA, NASUCA, and INGAA explain, however, that an action taken for a legitimate business purpose would be lacking in scienter or, alternatively, would provide an affirmative defense to allegations of market manipulation.³⁶ Nevertheless, AGA

³³ Aaron v. SEC, 446 U.S. 680, 690 (1980); see also Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 6-7 (1985) (describing section 10(b) as a "general prohibition of practices . . . artificially affecting market activity in order to mislead investors . . ."); Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151-53 (1972) (noting that the repeated use of the word "any" in section 10(b) and SEC Rule 10b-5 denotes a congressional intent to have the provisions apply to a wide range of practices).

³⁴ Indicated Market Participants at 10-11, 20.

³⁵ AGA at 6.

³⁶ AGA at 6; NASUCA at 20; INGAA at 6.

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requests that the Commission clarify that, although the legitimate business purpose language is to be removed from §§ 284.288 and 284.403, the concept continues to have an integral place within the scope of section 315 of EPAct 2005 and the new anti-manipulation regulations.³⁷

23. CPUC argues that that the legitimate business purpose should not be permitted as a defense to the proposed anti-manipulation regulations as it is analogous to a good faith defense, which is not allowed as a defense to intentional or reckless conduct in the context of SEC section 10(b).³⁸

b. Commission Determination

24. In promulgating § 1c.1, the Commission purposefully modeled its anti-manipulation rule after SEC Rule 10b-5 to provide stakeholders with as much regulatory certainty and clarity as possible, given the large body of precedent interpreting SEC Rule 10b-5.³⁹ SEC Rule 10b-5 does not include provisions for “good faith” defenses. However, in all cases, the intent behind and rationale for actions taken by an entity will be examined and taken into consideration as part of determining whether the actions were manipulative behavior. The reasons given by an entity for its actions are part of the

³⁷ AGA at 6. See also INGAA at 6 (urging the Commission not to disavow the legitimate business purpose defense, which is relevant to the question of scienter under the new anti-manipulation rule).

³⁸ CPUC at 8.

³⁹ Order No. 670, 114 FERC ¶ 61,047 at P 30-31.

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overall facts and circumstances that will be weighed in deciding whether a violation of the new anti-manipulation regulation has occurred. Therefore, the Commission rejects calls for inclusion of a “legitimate business purpose” affirmative defense.

B. Sections 284.288(b) and 284.403(b) of the Commission’s Regulations

25. The November 21 NOPR sought comment on whether it was necessary to retain §§ 284.288(b) and 284.403(b) of the Commission’s regulations.⁴⁰ The Commission stated its view that the first part of §§ 284.288(b) and 284.403(b), requiring sellers to provide accurate data to price index publishers if the seller is reporting transactions to such publishers, calls for accurate and truthful representations, and a failure to do so would be a violation of the proposed anti-manipulation regulations.⁴¹ The Commission stated that the second part of §§ 284.288(b) and 284.403(b) of the Commission’s regulations, requiring that sellers notify the Commission of their price reporting status and any changes in that status, does not appear elsewhere in our current or proposed regulations. The Commission noted, however, that price transparency is also addressed by EAct 2005, which adds new section 23 to the NGA, giving us authority to promulgate rules and regulations necessary to facilitate price transparency. Thus, the Commission stated that it intends to address market transparency issues in a separate proceeding, and anticipates that rules adopted in that proceeding will address the

⁴⁰ November 21 NOPR, 113 FERC ¶ 61,189 at 20.

⁴¹ November 21 NOPR, 113 FERC ¶ 61,189 at 16.

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§§ 284.288(b) and 284.403(b) requirements for providing transaction information to price index publishers and informing the Commission of price reporting status.⁴²

1. Comments

26. Commenters agree that it is not necessary to retain the requirement of §§ 284.288(b) and 284.403(b) of the Commission's regulations to report transaction information accurately, if the obligation is incorporated elsewhere. APGA and NGSA state that it would be satisfactory if the Commission clarified in the preamble to the anti-manipulation rule that accurate and truthful representations of price data remain a requirement.⁴³ AGA asserts that it would be prudent for the Commission to explicitly reiterate its commitment to its Price Index Policy Statement.⁴⁴ Similarly, Indicated Market Participants argue that §§ 284.288(b) and 284.403(b) of the Commission's regulations need not be retained since these requirements will be adequately addressed by the new anti-manipulation regulations, to the extent market manipulation is involved, by the Commission's Price Index Policy Statement, and by any new proceeding initiated by the Commission to implement section 23 of the NGA.⁴⁵

⁴² November 21 NOPR, 113 FERC ¶ 61,189 at 16.

⁴³ APGA at 6; NGSA at 3-5.

⁴⁴ AGA at 5.

⁴⁵ Indicated Market Participants at 16-19 (noting the advantage of a new proceeding that will broaden the applicability of this policy beyond certain blanket certificate holders under the codes of conduct regulations).

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27. However, NJBPU strongly encourages the Commission to adopt new rules on pricing transparency (and the record retention requirement to reconstruct prices) before, or at a minimum, contemporaneous with the repeal of the existing marketing transparency rules.⁴⁶

28. CPUC argues that §§ 284.288(b) and 284.403(b) of the Commission's regulations should be retained, because they identify known manipulative conduct, such as false reports to publishers of natural gas indices, which are not subsumed within the Commission's proposed or other existing regulations.⁴⁷

2. Commission Determination

29. Sections 284.288(b) and 284.403(b) of the Commission's regulations require sellers to provide accurate data to price index publishers, if the seller is reporting transactions to such publishers, and includes a requirement that sellers notify the Commission of their price reporting status and of any changes in that status. Upon consideration of the comments, we have determined that there is benefit to retaining §§ 284.288(b) and 284.403(b) of the Commission's regulations. While a deliberate false report would be a violation of Order No. 670, there is no confusion in retaining this statement in our existing regulations and thereby reinforcing the importance of the Price Index Policy Statement. Moreover, the second aspect of §§ 284.288(b) and 284.403(b) of

⁴⁶ NJBPU at 7-8.

⁴⁷ CPUC at 3, 8.

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the Commission's regulations, notification to the Commission of the market participant's price reporting status and of any changes in that status, is not otherwise provided for. Thus, we will retain these regulatory requirements. This is a simple and non-burdensome way for the Commission to be informed of the prevalence of price reporting to price index developers.

C. Sections 284.288(c) and 284.403(c) of the Commission's Regulations

30. The November 21 NOPR also sought comment on the need to retain §§ 284.288(c) and 284.403(c) of the Commission's regulations, which requires sellers to maintain certain records for a period of three years. The Commission stated that while it is important that all pipelines providing unbundled natural gas sales service and all persons holding blanket certificates making natural gas sales for resale in interstate commerce retain the data and information described in §§ 284.288(c) and 284.403(c) of the Commission's regulations, we intend to address this retention requirement in the context of our rules under the NGA, such that there will be no gap in the retention requirement.

1. Comments

31. Commenters generally recommended that the record retention requirement be retained, although they suggested different ways in which this would be accomplished. CPUC states that §§ 284.288(c) and 284.403(c) of the Commission's regulations should be retained since these requirements are not subsumed within the Commission's proposed

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or other existing regulations.⁴⁸ APGA argues that it is premature to eliminate the existing procedural requirements, such as the record retention requirements under §§ 284.288(c) and 284.403(c) of the Commission's regulations (and the price reporting requirements), when it is unknown what requirements will be implemented under future regulations or when those requirements will be make effective.⁴⁹ Thus, APGA maintains that any proposed elimination of procedural requirements must be coordinated with and based on specific proposals for replacement procedural requirements.⁵⁰

32. The Indicated Market Participants, however, state that the record retention requirement more appropriately belongs in the Commission's general regulations so that it will be applicable to more than just certain blanket certificate holders.⁵¹

2. Commission Determination

33. Sections 284.288(c) and 284.403(c) of the Commission's regulations requires sellers to maintain certain records for a period of three years to reconstruct prices charged for natural gas. This is different from the record retention requirements in Part 225 of our

⁴⁸ CPUC at 3, 7.

⁴⁹ APGA at 6.

⁵⁰ Id. See also NJBPU at 7-8 (encouraging the Commission to adopt new rules on the three-year record retention requirement before, or at a minimum, contemporaneous with the repeal of the existing requirements).

⁵¹ Indicated Market Participants at 17-18.

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regulations, which largely are related to cost-of-service rate requirements.⁵² Upon consideration of the comments, we have determined that there is benefit to retaining §§ 284.288(c) and 284.403(c) of the Commission's regulations. Given the importance of records related to any investigation of possible wrongdoing, and in order to avoid confusion, we will retain §§ 284.288(c) and 284.403(c) of the Commission's regulations on the record retention requirements. We reject Indicated Market Participant's suggestion to expand the scope of the record retention requirement beyond pipeline unbundled sales and blanket certificate sales, as other jurisdictional sales are made under cost-based tariffs.⁵³

D. Sections 284.288(d) and 284.403(d) of the Commission's Regulations

34. The November 21 NOPR also sought comment on the need to retain §§ 284.288(d) and 284.403(d) of the Commission's regulations. The Commission stated its view that if it decides to repeal §§ 284.288(a)-(c) and 284.403(a)-(c) of its regulations, §§ 284.288(d) and 284.403(d) of the Commission's regulations, dealing with remedies, are largely procedural and would become superfluous without the underlying operative paragraphs and therefore should be deleted.

⁵² 18 CFR part 225 (2005).

⁵³ As noted above, in a notice of proposed rulemaking issued simultaneously with this Final Rule, Docket No. RM06-14-000, the Commission is proposing to extend the record retention requirements from three to five years to be consistent with the statute of limitations that would apply to actions seeking civil penalties for alleged violations of the new anti-manipulation rule implemented in Order No. 670.

1. Comments

35. As noted above, some commenters advocate rescission of the codes of conduct regulations in their entirety.⁵⁴ NASUCA, however, notes the pending judicial challenges to §§ 284.288 and 284.403 of the Commission's regulations, which claim that the disgorgement remedy is retroactive ratemaking in violation of section 7 of the NGA. NASUCA urges the Commission not to capitulate to these challenges by repealing these rules and the disgorgement remedy in §§ 284.288(d) and 284.403(d) of the Commission's regulations.⁵⁵ NASUCA argues that the Commission should not, in an effort to provide greater clarity and regulatory certainty to the industry, eliminate profit disgorgement as a deterrent to manipulation and a remedy for manipulation. If it is not the intent of the Commission to abandon the disgorgement remedy, then NASUCA argues that §§ 284.288(d) and 284.403(d) of the regulations authorizing disgorgement should be retained.⁵⁶

36. APGA argues that the Commission must add to the anti-manipulation final rule the condition that a violation of the rule may trigger a disgorgement of profits from the time the violation occurred as well as suspension or revocation of the blanket certificate, since this condition was justified for §§ 284.288 and 284.403 of the Commission's regulations

⁵⁴ AGA at 5; Cinergy at 4; NGSA at 3.

⁵⁵ NASUCA at 12.

⁵⁶ NASUCA at 13.

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as fulfilling the Commission's obligation to appropriately monitor markets and to ensure that market-based rates remain within the zone of reasonableness required by the NGA.⁵⁷

37. CPUC states that in the November 21 NOPR, the Commission does not address remedies for violation of the new anti-manipulation regulations, or whether the same remedies will apply as for §§ 284.288(d) and 284.403(d) of the Commission's regulations.⁵⁸

2. Commission Determination

38. Concerns over the extent of the Commission's remedial powers are misplaced. Order No. 644 addressed a concern, stemming from the abuses in Western markets in 2000-2001, that there were not clear rules to deal with abusive market conduct. By fashioning regulations prohibiting manipulation, we established a clear basis for ordering disgorgement of unjust profits, along with other remedial actions, in the event of violations of such rules.⁵⁹ With the issuance of Order No. 670 and the availability of

⁵⁷ APGA at 5-6 (citing Order No. 644, 105 FERC ¶ 61,217 at P 91 (2003), reh'g denied, 107 FERC ¶ 61,174).

⁵⁸ CPUC at 9.

⁵⁹ Order No. 644, 105 FERC ¶ 61,217 at P 95 (2003), reh'g denied 107 FERC ¶ 61,174 (stating "[i]n 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.").

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significant civil monetary penalties for violations, the Commission now has a more complete set of enforcement tools—both rules and remedies and/or sanctions—to deal with market manipulation. The Commission will use these authorities as the facts and circumstances of each case indicate, as our discretion is at its zenith in determining an appropriate remedy for violations.⁶⁰ Accordingly, if companies subject to our jurisdiction violate the statutes, orders, rules, or regulations administered by the Commission, the Commission can order, among other things, disgorgement of unjust profits.⁶¹ The Commission also has the option of conditioning, suspending, or revoking market-based rate authority, certificate authority, or blanket certificate authority.⁶² Moreover, while section 5 of the NGA does not permit the Commission to establish just and reasonable

⁶⁰ See Niagara Mohawk Power Corp. v. FERC, 379 F.2d 153, 159 (D.C. Cir. 1967); accord 16 U.S.C. 825h (2000); Mesa Petroleum Co. v. FERC, 441 F.2d 182, 187-88 (D.C. Cir. 1971); Gulf Oil Corporation v. FPC, 563 F.2d 588, 608 (3rd Cir. 1977), cert. denied 434 U.S. 1062, reh'g denied, 435 U.S. 981 (1978); Consolidated Gas Transmission Corp. v. FERC, 771 F.2d 1536, 1549 (D.C. Cir. 1985).

⁶¹ See, e.g., Transcontinental Gas Pipe Line Corp. v. FERC, 998 F.2d 1313, 1320 (5th Cir. 1993) (holding the remedy of disgorgement of ill-gotten profits for a violation of the Natural Gas Act “well within [the Commission’s] equitable powers”); Coastal Oil & Gas Corp. v. FERC, 782 F.2d 1249, 1253 (5th Cir. 1986) (profits from illegal intrastate sales of gas in excess of a just and reasonable rate may be subject to disgorgement).

⁶² See, e.g., Enron Power Marketing, Inc., 103 FERC ¶ 61,343 at P 52 (2003); Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 99 FERC ¶ 61,272 at 62,154 (2002); San Diego Gas & Electric Company, 95 FERC ¶ 61,418 at 62,548, 62,565, order on reh'g, 97 FERC ¶ 61,275 (2001), order on reh'g, 99 FERC ¶ 61,160 (2002); accord Enron Power Marketing, Inc., “Order Proposing Revocation of Market-Based Rate Authority and Termination of Blanket Marketing Certificates,” 102 FERC ¶ 61,316 at P 8 and n.10 (2003), and cases cited therein.

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rates prior to the refund effective date established under section 5, the Commission clearly has authority to order disgorgement of profits associated with an illegally charged rate, i.e., a rate other than the rate on file or in violation of a Commission rule, order, regulation, or tariff on file.⁶³ Therefore, the Commission may use disgorgement of unjust profits where appropriate, including to remedy a violation of the new anti-manipulation regulations.

39. EAct 2005 has enhanced the Commission's civil penalty authority.⁶⁴ Civil penalties, however, serve a different purpose from disgorgement or other equitable remedies. As we have said, the purpose of civil penalties is to "encourage compliance

⁶³ Transcontinental Gas Pipe Line Corp., 998 F.2d 1313 at 1320; see also Dominion Resources, Inc. et al., 108 FERC ¶ 61,110 (2004) (disgorgement for violations of the Commission's Standards of Conduct); El Paso Electric Company, 105 FERC ¶ 61,131 at P35 (2003) (finding disgorgement an "appropriate and proportionate remedy" for a violation of the Federal Power Act); Kinder Morgan Interstate Gas Transmission LLC, 90 FERC ¶ 61,310 (2000) (disgorgement ordered to remedy preferential discounts to affiliates); Stowers Oil & Gas Company, 44 FERC ¶ 61,128 (1988), reh. denied in part and granted in part, 48 FERC ¶ 61,230 at 61,817 (1989), appeal dismissed sub nom. Northern Natural Gas Co. v. FERC, Case Nos. 89-1512 et al., (D.C. Cir. 1992) (Commission "properly exercised its broad equitable power" in requiring disgorgement of unjust enrichment resulting from illegal sales of gas).

⁶⁴ EAct 2005 for the first time granted the Commission authority to assess civil penalties for violations of the NGA and rules, regulations, restrictions, conditions and orders thereunder (EAct 2005 section 314(b)(1), inserting new NGA section 22), and established the maximum civil penalty the Commission could assess under the NGA and the NGPA as \$1 million per day per violation. EAct 2005 section 314(b)(1), inserting new NGA section 22(a); EAct 2005 section 314(b)(2), amending NGPA section 504(b)(6)(A).

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with the law.”⁶⁵ The purpose of disgorgement, on the other hand, is to remedy unjust enrichment. The Commission will choose from the full range of available remedies and penalties—revocation, suspension, or conditioning of authority, disgorgement, and civil penalties—according to the nature of the violation and all of the facts presented. The imposition of both remedies and civil penalties in tandem may be necessary under certain circumstances to reach a fair result.⁶⁶ These are separate powers available to the Commission, as they arise under different provisions of the NGA.⁶⁷

40. We note that other agencies also impose civil penalties and equitable remedies in tandem. For example, the SEC can require an accounting and disgorgement to investors for losses and also impose penalties for the misconduct, and the CFTC can order restitution or obtain disgorgement and also impose fines for violations.⁶⁸ Similarly, in the

⁶⁵ Procedures for the Assessment of Civil Penalties under section 31 of the Federal Power Act, Order No. 502, 53 FR 32035 (Aug. 23, 1988), FERC Stats. & Regs. ¶ 30,828 (Aug. 17, 1988).

⁶⁶ Policy Statement on Enforcement, 113 FERC ¶ 61,068 at P 12 (2005) (stating, “[o]ur enhanced civil penalty authority will operate in tandem with our existing authority to require disgorgement of unjust profits obtained through misconduct and/or to condition, suspend, or revoke certificate authority or other authorizations, such as market-based rate authority for sellers of electric energy”).

⁶⁷ The authority to order disgorgement and other equitable remedies arises under the “necessary or appropriate” powers of section 16 of the NGA. 15 USC § 717o. The authority to impose civil penalties arises under section 22 of the NGA and section 504(b)(6)(A) of the NGPA, as amended by EPA 2005.

⁶⁸ See sections 21-21C of the Securities Exchange Act, 15 USC §§ 78u-78u-3 (2000); SEC v. Happ, 392 F.3d 12, 31-33 (1st Cir. 2004) (upholding SEC’s imposition of both disgorgement and a civil penalty equal to the amount of disgorgement; further, the

(continued)

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environmental context, the government is free to seek an equitable remedy in addition to, or independent of, civil penalties.⁶⁹ When we impose disgorgement as a remedy, we have broad discretion in allocating monies to those injured by the violations. As we noted in our Policy Statement on Enforcement, each case depends on the circumstances presented, and the Commission will not predetermine which remedy and/or sanction authorities it will use.⁷⁰

41. In light of the Commission's new monetary civil penalty authority set forth in EPCA 2005, and in light of our explanation above regarding the Commission's intent to choose from the full range of available remedies and penalties—revocation, suspension, or conditioning of authority, disgorgement, and civil penalties—according to the nature of the violation and all of the facts presented, the Commission does not see the need to retain §§ 284.288(d) and 284.403(d) of the Commission's regulations, which explains

court noted that the wrongdoer bears the risk of uncertainty in calculating the amount of disgorgement). The CFTC can revoke or suspend a registration, suspend or prohibit certain trading, issue cease and desist orders, order restitution, and seek equitable remedies (injunction, rescission, or disgorgement), all in addition to imposing a monetary fine. 7 U.S.C. 13a and 13b (2000); Comm. Fut. L. Rep. (CCH) ¶ 26,265 at 42,247 (1994).

⁶⁹ See, e.g., Tull v. United States, 481 U.S. 412, 425 (1987) (holding that the Clean Water Act does not intertwine equitable relief with the imposition of civil penalties; instead, each kind of relief is separately authorized in distinct statutory provisions).

⁷⁰ Policy Statement on Enforcement, 113 FERC ¶ 61,068 at P 13 (2005) (“[W]e will not prescribe specific penalties or develop formulas for different violations. It is important that we retain the discretion and flexibility to address each case on its merits, and to fashion remedies appropriate to the facts presented, including any mitigating factors”).

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that the Commission may subject violators of the codes of conduct regulations to disgorgement of unjust profits, suspension, revocation of its blanket certificate, or other appropriate non-monetary remedies. Having only one set of rules governing remedies will avoid confusion and provide greater clarity and regulatory certainty to the industry.

E. Sections 284.288(e) and 284.403(e) of the Commission's Regulations

42. In the November 21 NOPR, the Commission stated its view that if it decides to repeal §§ 284.288(a)-(c) and 284.403(a)-(c) of its regulations, §§ 284.288(e) and 284.404(e), dealing with time limits on complaints and Commission enforcement, are largely procedural and would become superfluous without the underlying operative paragraphs and therefore should be deleted.

1. Comments

43. Although some commenters advocated repeal of the codes of conduct regulations in their entirety, only two commenters address §§ 284.288(e) and 284.403(e) of the Commission's regulations dealing with time limits on complaints and Commission enforcement.

44. CPUC states that in the November 21 NOPR, the Commission does not address complaint procedures for violation of the new anti-manipulation regulations, or whether the same complaint procedures will apply as in §§ 284.288(e) and 284.403(e) of the Commission's regulations.⁷¹

⁷¹ CPUC at 9.

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45. INGAA argues that the Commission should preserve the time limits under §§ 284.288(e) and 284.403(e) of the Commission's regulations for filing a complaint under the new anti-manipulation regulations or for Commission action on a market manipulation allegation.⁷² INGAA maintains that §§ 284.288(e) and 284.403(e) of the Commission's regulations require that an action must be filed within 90 days after the end of the calendar quarter in which the alleged violation occurred or, if later, 90 days after the complainant knew or should have known that the alleged violation occurred. Further, §§ 284.288(e) and 284.403(e) of the Commission's regulations also require that the Commission take action within 90 days from learning of an alleged violation of the code of conduct regulations. According to INGAA, whether this is accomplished through the existing codes of conduct regulations or by amending the proposed anti-manipulation regulations, such a statute of limitations will preserve a needed degree of certainty and stability in the transition to new rules.⁷³

2. Commission Determination

46. In Order No. 670, we noted that when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations (as is the case with respect to the Commission's anti-manipulation authority), a five-year statute of limitations applicable to the imposition of civil penalties applies, and specifically rejected requests to

⁷² INGAA at 2, 5.

⁷³ Id.

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retain the 90-day period used for the Market Behavior Rules.⁷⁴ Consistent with the discussion of this issue in Order No. 670, we hereby reject requests to retain the 90-day requirement. Moreover, the Commission hereby rescinds §§ 284.288(e) and 284.404(e) of the Commission's regulations, dealing with time limits on complaints and Commission enforcement, as inconsistent with the more definitive statement on complaint procedures set forth in Order No. 670.

III. Regulatory Flexibility Act Certification

47. The Regulatory Flexibility Act of 1980⁷⁵ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.⁷⁶ The Commission is not required to make such analyses if a rule would not have such an effect.

48. The Commission concludes that this Final Rule would not have such an impact on small entities. This Final Rule rescinds §§ 284.288(a), (d) and (e) and 284.403(a), (d)

⁷⁴ Order No. 670, 114 FERC ¶ 61,047 at P 62-63.

⁷⁵ 5 U.S.C. 601-612 (2000).

⁷⁶ The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. 632 (2000). The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.201 (section 22, Utilities, North American Industry Classification System, NAICS) (2004).

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and (e) of the Commission's codes of conduct regulations, which have been supplanted by the recently issued Order No. 670, which implements EAct 2005. Therefore, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities. Therefore, no regulatory flexibility analysis is required.

IV. Information Collection Statement

49. This Final Rule merely rescinds §§ 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's regulations pertaining to codes of conduct with respect to certain sales of natural gas and does not include new information requirements under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

V. Environmental Statement

50. 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.⁷⁷ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.⁷⁸ Thus, we affirm

⁷⁷ Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (1987), FERC Stats. & Regs. ¶ 30,783 (1987).

⁷⁸ 18 CFR 380.4(a)(2)(ii) (2005).

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the finding we made in the NOPR that this Final Rule is procedural in nature and therefore falls under this exception; consequently, no environmental consideration would be necessary.

VI. Document Availability

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

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

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

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VII. Effective Date and Congressional Notification

54. This Final Rule will take effect on **[insert date 30 days after publication in the FEDERAL REGISTER]**. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this rule is not a major rule within the meaning of section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.⁷⁹ The Commission will submit the Final Rule to both houses of Congress and the Government Accountability Office.⁸⁰

List of subjects18 CFR Part 284

Natural Gas, Pipelines, Investigations, Penalties

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁷⁹ 5 U.S.C. 804(2) (2000).

⁸⁰ 5 U.S.C. 801(a)(1)(A) (2000).

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In consideration of the foregoing, the Commission amends 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. In § 284.288, paragraphs (a), (d), and (e) are removed, and paragraphs (b) and (c) are redesignated as paragraphs (a) and (b), respectively.

3. In § 284.403, paragraphs (a), (d), and (e) are removed, and paragraphs (b) and (c) are redesignated as paragraphs (a) and (b), respectively.

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APPENDIX

List of Parties Filing Comments and Reply Comments and Acronyms

American Gas Association (AGA)
American Public Gas Association (APGA)
California Public Utilities Commission (CPUC) **
Cinergy Services, Inc. and Cinergy Marketing & Trading, LP (Cinergy)
Constellation Energy Group Inc., et al. (Indicated Market Participants)
Interstate Natural Gas Association of America (INGAA)
Missouri Public Service Commission (MoPSC)*
National Association of State Utility Consumer Advocates (NASUCA)
Natural Gas Supply Association (NGSA)
New Jersey Board of Public Utilities (NJBPU)
New York State Public Service Commission (NYPSC)

* Entities filing late comments.

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

114 FERC * 61,166
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 284

(Docket No. RM06-5-000; Order No. 673)

Amendments to Codes of Conduct for Unbundled Sales Service
and for Persons Holding Blanket Marketing Certificates

(Issued February 16, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: In this Final Rule, the Federal Energy Regulatory Commission (Commission) is amending its regulations regarding the blanket certificates for unbundled natural gas sales services held by interstate natural gas pipelines and the blanket marketing certificates held by persons making sales for resale of natural gas at negotiated rates in interstate commerce. Specifically, the Commission is rescinding sections of its regulations pertaining to codes of conduct with respect to certain sales of natural gas.

DATES: This Final Rule will become effective [insert date 30 days after publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

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Docket No. RM06-5-000

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

G. Kelly.

Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates Docket No. RM06-5-000

ORDER NO. 673

FINAL RULE

(Issued February 16, 2006)

1. The Commission has decided to rescind ** 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of its codes of conduct regulations, [1] as promulgated pursuant to Order No. 644. [2] The central purpose of Order No. 644 was to prohibit market manipulation by pipelines that provide unbundled natural gas sales service and by sellers of natural gas for resale at negotiated rates. This prohibition is set out in ** 284.288(a) and 284.403(a) of the Commission's regulations. Sections 284.288(d)-(e) and 284.403(d)-(e) of the Commission's regulations are largely procedural in nature, dealing with remedies for violations of the codes of conduct requirements and time limits on complaints and Commission enforcement of the codes of conduct requirements. Subsequent to the issuance of Order No. 644, Congress provided the Commission with specific anti-manipulation authority in the Energy Policy Act of 2005 (EPAct 2005). [3] To implement this new authority, the Commission recently issued Order No. 670, adopting a final rule making it unlawful for any entity, including pipelines that provide unbundled natural gas sales service and all sellers of natural gas for resale, to engage in fraudulent or deceptive conduct in connection with the purchase or sale of electric energy, natural gas, or transmission or transportation services subject to the jurisdiction of the Commission. [4] In order to avoid regulatory uncertainty and confusion, to assure that all market participants are held to the same standard, and to provide clarity to entities subject to our rules and regulations, we rescind ** 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's regulations effective 30 days after publication hereof in the Federal Register. [5]

2. Although Order No. 670 makes it unnecessary to retain ** 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's regulations, there is benefit to retaining ** 284.288(b)-(c) and 284.403(b)-(c) of the Commission's regulations. Sections 284.288(b) and 284.403(b) of the Commission's regulations deal with requirements for price index

reporting that are not entirely provided for by the new anti-manipulation regulations under Order No. 670. Sections 284.288(c) and 284.403(c) of the codes of conduct regulations require sellers to maintain certain records for a period of three years to reconstruct prices charged for natural gas. This requirement is also not provided for by Order No. 670.[6]

I. Background

3. On November 17, 2003, acting pursuant to section 7 of the NGA, we issued a final rule, Order No. 644, amending blanket certificates for unbundled natural gas sales services held by interstate natural gas pipelines and blanket marketing certificates held by persons making sales for resale of natural gas at negotiated rates in interstate commerce. This rule requires that pipelines that provide unbundled natural gas sales service and all sellers of natural gas for resale adhere to a code of conduct with respect to certain natural gas sales. The Commission 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 was necessary to place additional conditions on blanket certificates for unbundled pipeline sales and sales for resale at negotiated rates. In formulating such conditions, the Commission was fulfilling its obligation to appropriately monitor markets and to ensure that natural gas prices remain within the zone of reasonableness required by the NGA.[7]

4. Under ** 284.288(a) and 284.403(a) of the Commission's regulations, a pipeline providing unbundled natural gas sales service under * 284.284, or 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 or transactions include wash trades and collusion for the purpose of market manipulation.[8]

5. Sections 284.288(b) and 284.403(b) deal with reporting of transaction information to price index publishers. They require that if a seller reports transaction data, the data be accurate and factual, and not knowingly false or misleading, and be reported in accordance with the Commission's Policy Statement on

price indices.[9] Sections 284.288(b) and 284.403(b) also require that sellers notify the Commission of whether they report transaction data to price index publishers in accordance with the Price Index Policy Statement, and to update any changes in their reporting status.

6. Sections 284.288(c) and 284.403(c) require that sellers retain for a minimum three-year period all data and information upon which they billed the prices charged for natural gas sales made under ** 284.284 or 284.402, or in transactions the prices of which were reported to price index publishers.

7. Sections 284.288(d)-(e) and 284.403(d)-(e) of the Commission's regulations are largely procedural in nature. Specifically, ** 284.288(d) and 284.403(d) deal with remedies for violations of the codes of conduct requirements set forth in preceding ** (a) through (c) of ** 284.288 and 284.403. Sections 284.288(e) and 284.403(e) deal with time limits on complaints and Commission enforcement of the codes of conduct requirements.

8. At the same time that Order No. 644 was adopted for pipelines that provide unbundled natural gas sales service and holders of blanket certificate authority that make sales for resale of natural gas, the Commission also issued an order to require wholesale

sellers of electricity at market-based rates to adhere to certain behavioral rules when making sales of electricity.[10]

9. Following enactment of EAct 2005, the Commission issued a Notice of Proposed Rulemaking on October 20, 2005, in which we proposed rules to implement the new statutory anti-manipulation provisions.[11] In the Anti-Manipulation NOPR, we noted the overlap between ** 284.288(a) and 284.403(a) of the Commission's regulations and the proposed EAct 2005 regulations.[12] We said that we would retain ** 284.288(a) and 284.403(a) of the Commission's regulations for the time being, but also indicated that we would seek comment on whether we should revise or rescind ** 284.288(a) and 284.403(a) of the Commission's regulations. In the meantime, we assured market participants that we will not seek duplicative sanctions for the same conduct in the event that conduct violates both ** 284.288(a) or 284.403(a) of the Commission's regulations and the proposed new anti-manipulation rule.[13]

10. In a Notice of Proposed Rulemaking dated November 21, 2005, [14] the Commission, acting pursuant to section 7 of the NGA, proposed to rescind ** 284.288 or 284.403 of the Commission's regulations once we issued final regulations implementing the anti-manipulation provisions of EAct 2005 and have had the opportunity to incorporate certain aspects of ** 284.288 or 284.403 of the Commission's regulations into other rules of general applicability. The Commission also requested comment on whether "any aspects" of ** 284.288 and 284.403 of the Commission's regulations should be retained, or could "all substantive provisions" of ** 284.288 and 284.403 of the Commission's regulations be reflected in the final regulations implementing the anti-manipulation provisions of EAct 2005. [15] We noted that rescission of ** 284.288 and 284.403 of the Commission's regulations will simplify the Commission's rules and regulations, avoid confusion, and provide greater clarity and regulatory certainty to the industry. We emphasized our belief that rescinding ** 284.288 and 284.403 of the Commission's regulations is consistent with Congressional intent in EAct 2005, which provided the Commission with explicit anti-manipulation authority, and that rescission

will simplify and streamline the rules and regulations sellers must follow, yet not eliminate beneficial rules governing market behavior. [16]

11. The Commission received 11 comments and one reply comment in response to the November 21 NOPR. [17] Many of the comments support the Commission's overall objectives in this proceeding, that is, to simplify the Commission's rules and regulations, avoid confusion, and provide greater clarity and regulatory certainty to the industry, while not eliminating beneficial rules governing market behavior by addressing them in other rules and regulations.

12. On January 19, 2006, the Commission issued Order No. 670, adopting regulations implementing the EAct 2005 anti-manipulation provisions. In Order No. 670 the Commission adopted a new Part 1c of our regulations under which it is "unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of

transportation services subject to the jurisdiction of the Commission, (1) to use or employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity." [18]

II. Discussion

A. Sections 284.288(a) and 284.403(a) of the Commission's Regulations

13. In the November 21 NOPR the Commission sought comment on whether there is a need or basis for retaining ** 284.288(a) and 284.403(a) of the Commission's regulations in light of the then-proposed anti-manipulation rule, and whether the Commission should retain in any form the affirmative defense of "legitimate business purpose" in existing ** 284.288(a) and 284.403(a) of the Commission's regulations.

1. Should the Commission Retain or Rescind Sections 284.288(a) and 284.403(a) of the Commission's Regulations?

a. Comments

14. Commenters were divided on the issue of whether ** 284.288(a) and 284.403(a) of the Commission's regulations should be retained or rescinded in light of the anti-manipulation provisions. Those in favor of retaining ** 284.288(a) and 284.403(a) of the Commission's regulations argue two principal points: first, the foreseeability standard of ** 284.288(a) and 284.403(a) of the Commission's regulations reaches negligent conduct or other conduct that falls short of being "provably" intentional but nonetheless has a foreseeable impact on rates; and second, ** 284.288(a) and 284.403(a) of the Commission's regulations have lasting utility because they provide a remedy for activities that may not be fraudulent, but could nevertheless function to manipulate prices for certain sales of natural gas. [19]

15. Several commenters argue that ** 284.288(a) and 284.403(a) of the Commission's regulations should be retained because they prohibit conduct that "foreseeably could manipulate market prices," and do not require the showing of scienter (intentional or reckless conduct), which means that ** 284.288(a) and 284.403(a) of the Commission's regulations reach a broader range

of conduct that may adversely affect consumers and energy markets than would the proposed anti-manipulation rule alone.[20] CPUC and others argue that nothing in EAct 2005 dictates or justifies the repeal of ** 284.288(a) and 284.403(a) of the Commission's regulations. They argue that, in determining whether rates are just and reasonable, the Commission should only focus on the effect of a seller's action and not on the seller's intent, and that relying solely on intent may result in rates becoming unjust and unreasonable because it would limit the Commission's ability to remedy conduct falling short of being intentional but whose rate-altering effect is foreseeable.[21] CPUC argues that there is no risk of confusion created by having both ** 284.288(a) and 284.403(a) of the Commission's regulations and the anti-manipulation rule promulgated pursuant to EAct 2005.[22]

16. Commenters advocating rescission of ** 284.288(a) and 284.403(a) of the Commission's regulations argue three main points. First, commenters argue that the Commission should not retain the foreseeability standard of proof of ** 284.288(a) and 284.403(a) of the Commission's regulations because of the clear Congressional intent in section 315 of EAct 2005, which directs the Commission to adopt a standard of proof based upon scienter.[23] Second, commenters supporting rescission argue that there should be only one definition or standard to define what constitutes market manipulation. Retaining two sets of proscriptions, they argue, could lead to regulatory uncertainty and confusion,[24] and would be unduly discriminatory because of a dual standard applicable to jurisdictional sellers of natural gas while the remaining industry participants would be covered solely by the new standard of * 1c.1.[25] Third, the anti-manipulation regulations represent an improvement over ** 284.288(a) and 284.403(a) of the Commission's regulations because, among other things, the language of new * 1c.1 provides stakeholders with clarity of language not present in ** 284.288(a) and 284.403(a) of the Commission's regulations.[26]

17. Indicated Market Participants argue that the anti-manipulation final rule should implement the scienter standard to conform to Congressional intent under the new NGA section 4A.[27] However, Indicated Market Participants and CPUC recommend that the other language in ** 284.288(a)(1)-(2) and 284.403(a)(1)-(2), prohibiting wash trades and collusion, should be incorporated

into the anti-manipulation final rule to provide clearer guidance to market participants.[28] APGA and NJBPU state that it would be satisfactory if the Commission clarified in the preamble to the anti-manipulation rule that wash trades and collusive sales remain prohibited.[29]

b. Commission Determination

18. The Commission finds it unnecessary to retain ** 284.288(a) and 284.403(a) of the Commission's regulations. Congress prohibited market manipulation by any entity and defined manipulation to include the requirement of scienter.[30] It would be inconsistent with Congress' direction if foreseeability were retained as a lesser standard of proof for market manipulation perpetrated by pipelines that provide unbundled natural gas sales service and holders of blanket certificate authority that make sales for resale of natural gas. To avoid the potential for uneven application of regulatory requirements based on whether a seller is a pipeline providing unbundled natural gas sales service or a holder of blanket certificate authority making sales for resale of natural gas, or any other entity purchasing or selling natural gas or transportation services subject to the jurisdiction of the Commission, the same standard of proof should apply to all entities for purposes of determining whether market manipulation occurred. It is not appropriate, as some commenters suggest, for the Commission to maintain a lesser standard of proof for only certain sellers of natural gas.

19. With respect to the suggestion that the specific proscribed behaviors in ** 284.288(a)(1)-(2) and 284.403(a)(1)-(2) of the Commission's regulations be retained, the Commission finds this unnecessary. As we stated in issuing the new anti-manipulation rule, the specifically prohibited actions in ** 284.288(a)(1)-(2) and 284.403(a)(1)-(2) (i.e., wash trades and collusion) are both prohibited activities under new * 1c.1 of our regulations and are subject to punitive and remedial action.[31] Furthermore, we recognize that fraud is a very fact-specific violation, the permutations of which are limited only by the imagination of the perpetrator. Therefore, no list of prohibited activities could be all-inclusive. The absence of a list of specific prohibited activities does not lessen the reach of the new anti-manipulation rule, nor are we foreclosing the

possibility that we may need to amplify * 1c.1 as we gain experience with the new rule, just as the SEC has done.[32]

20. In short, rescission of ** 284.288(a) and 284.403(a) of the Commission's regulations is consistent with Congressional direction and will not dilute customer protection. If conduct occurs that is not the result of fraud or deceit but nonetheless results in unjust and unreasonable rates, a person may file a complaint at the Commission under NGA section 5, or the Commission on its own motion may institute a proceeding under section 5, to modify the rates that have become unjust and unreasonable. In many

respects customers are better protected by * 1c.1's breadth and purposeful design as a broad "catch all" anti-fraud provision.[33]

2. Legitimate Business Purpose

a. Comments

21. Commenters are divided on whether the Commission should retain the "legitimate business purpose" provision of ** 284.288(a) and 284.403(a) of the Commission's regulations. Indicated Market Participants argue that a legitimate business purpose should be a complete defense to an allegation of market manipulation, and that this provision should be incorporated into the anti-manipulation final rule.[34]

22. AGA, on the other hand, argues that retention of the legitimate business purpose defense, as a matter of explicit language in the regulations, runs the risk of generating uncertainty.[35] AGA, NASUCA, and INGAA explain, however, that an action taken for a legitimate business purpose would be lacking in scienter or, alternatively, would provide an affirmative defense to allegations of market manipulation.[36] Nevertheless, AGA requests that the Commission clarify that, although the legitimate business purpose language is to be removed from ** 284.288 and 284.403, the concept continues to have an integral place within the scope of section 315 of EAct 2005 and the new anti-manipulation regulations.[37]

23. CPUC argues that that the legitimate business purpose should not be permitted as a defense to the proposed anti-manipulation regulations as it is analogous to a good faith defense, which is not allowed as a defense to intentional or reckless conduct in

the context of SEC section 10(b).[38]

b. Commission Determination

24. In promulgating * 1c.1, the Commission purposefully modeled its anti-manipulation rule after SEC Rule 10b-5 to provide stakeholders with as much regulatory certainty and clarity as possible, given the large body of precedent interpreting SEC Rule 10b-5.[39] SEC Rule 10b-5 does not include provisions for "good faith" defenses. However, in all cases, the intent behind and rationale for actions taken by an entity will be examined and taken into consideration as part of determining whether the actions were manipulative behavior. The reasons given by an entity for its actions are part of the overall facts and circumstances that will be weighed in deciding whether a violation of the new anti-manipulation regulation has occurred. Therefore, the Commission rejects calls for inclusion of a "legitimate business purpose" affirmative defense.

B. Sections 284.288(b) and 284.403(b) of the Commission's Regulations

25. The November 21 NOPR sought comment on whether it was necessary to retain ** 284.288(b) and 284.403(b) of the Commission's regulations.[40] The Commission stated its view that the first part of ** 284.288(b) and 284.403(b), requiring sellers to provide accurate data to price index publishers if the seller is reporting transactions to such publishers, calls for accurate and truthful representations, and a failure to do so would be a violation of the proposed anti-manipulation regulations.[41] The Commission stated that the second part of ** 284.288(b) and 284.403(b) of the Commission's regulations, requiring that sellers notify the Commission of their price reporting status and any changes in that status, does not appear elsewhere in our current or proposed regulations. The Commission noted, however, that price transparency is also addressed by EAct 2005, which adds new section 23 to the NGA, giving us authority to promulgate rules and regulations necessary to facilitate price transparency. Thus, the Commission stated that it intends to address market transparency issues in a separate proceeding, and anticipates that rules adopted in that proceeding will address the ** 284.288(b) and 284.403(b) requirements for providing transaction information to price index publishers and informing the Commission of price reporting

status.[42]

1. Comments

26. Commenters agree that it is not necessary to retain the requirement of ** 284.288(b) and 284.403(b) of the Commission's regulations to report transaction information accurately, if the obligation is incorporated elsewhere. APGA and NGA state that it would be satisfactory if the Commission clarified in the preamble to the anti-manipulation rule that accurate and truthful representations of price data remain a requirement.[43] AGA asserts that it would be prudent for the Commission to explicitly reiterate its commitment to its Price Index Policy Statement.[44] Similarly, Indicated Market Participants argue that ** 284.288(b) and 284.403(b) of the Commission's regulations need not be retained since these requirements will be adequately addressed by the new anti-manipulation regulations, to the extent market manipulation is involved, by the Commission's Price Index Policy Statement, and by any new proceeding initiated by the Commission to implement section 23 of the NGA.[45]

27. However, NJBPU strongly encourages the Commission to adopt new rules on pricing transparency (and the record retention requirement to reconstruct prices) before, or at a minimum, contemporaneous with the repeal of the existing marketing transparency rules.[46]

28. CPUC argues that ** 284.288(b) and 284.403(b) of the Commission's regulations should be retained, because they identify known manipulative conduct, such as false reports to publishers of natural gas indices, which are not subsumed within the Commission's proposed or other existing regulations.[47]

2. Commission Determination

29. Sections 284.288(b) and 284.403(b) of the Commission's regulations require sellers to provide accurate data to price index publishers, if the seller is reporting transactions to such publishers, and includes a requirement that sellers notify the Commission of their price reporting status and of any changes in that status. Upon consideration of the comments, we have determined that there is benefit to retaining ** 284.288(b) and 284.403(b) of the Commission's regulations. While a deliberate false report would be a violation of Order No. 670, there is no confusion in retaining this statement in our existing

regulations and thereby reinforcing the importance of the Price Index Policy Statement. Moreover, the second aspect of ** 284.288(b) and 284.403(b) of the Commission's regulations, notification to the Commission of the market participant's price reporting status and of any changes in that status, is not otherwise provided for. Thus, we will retain these regulatory requirements. This is a simple and non-burdensome way for the Commission to be informed of the prevalence of price reporting to price index developers.

C. Sections 284.288(c) and 284.403(c) of the Commission's Regulations

30. The November 21 NOPR also sought comment on the need to retain ** 284.288(c) and 284.403(c) of the Commission's regulations, which requires sellers to maintain certain records for a period of three years. The Commission stated that while it is important that all pipelines providing unbundled natural gas sales service and all persons holding blanket certificates making natural gas sales for resale in interstate commerce retain the data and information described in ** 284.288(c) and 284.403(c) of the Commission's regulations, we intend to address this retention requirement in the context of our rules under the NGA, such that there will be no gap in the retention requirement.

1. Comments

31. Commenters generally recommended that the record retention requirement be retained, although they suggested different ways in which this would be accomplished. CPUC states that ** 284.288(c) and 284.403(c) of the Commission's regulations should be retained since these requirements are not subsumed within the Commission's proposed or other existing regulations.[48] APGA argues that it is premature to eliminate the existing procedural requirements, such as the record retention requirements under ** 284.288(c) and 284.403(c) of the Commission's regulations (and the price reporting requirements), when it is unknown what requirements will be implemented under future regulations or when those requirements will be make effective.[49] Thus, APGA maintains that any proposed elimination of procedural requirements must be coordinated with and based on specific proposals for replacement procedural requirements.[50]

32. The Indicated Market Participants, however, state that the record retention requirement more appropriately belongs in the

Commission's general regulations so that it will be applicable to more than just certain blanket certificate holders.[51]

2. Commission Determination

33. Sections 284.288(c) and 284.403(c) of the Commission's regulations requires sellers to maintain certain records for a period of three years to reconstruct prices charged for natural gas. This is different from the record retention requirements in Part 225 of our regulations, which largely are related to cost-of-service rate requirements.[52] Upon consideration of the comments, we have determined that there is benefit to retaining ** 284.288(c) and 284.403(c) of the Commission's regulations. Given the importance of records related to any investigation of possible wrongdoing, and in order to avoid confusion, we will retain ** 284.288(c) and 284.403(c) of the Commission's regulations on the record retention requirements. We reject Indicated Market Participant's suggestion to expand the scope of the record retention requirement beyond pipeline unbundled sales and blanket certificate sales, as other jurisdictional sales are made under cost-based tariffs.[53]

D. Sections 284.288(d) and 284.403(d) of the Commission's Regulations

34. The November 21 NOPR also sought comment on the need to retain ** 284.288(d) and 284.403(d) of the Commission's regulations. The Commission stated its view that if it decides to repeal ** 284.288(a)-(c) and 284.403(a)-(c) of its regulations, ** 284.288(d) and 284.403(d) of the Commissions' regulations, dealing with remedies, are largely procedural and would become superfluous without the underlying operative paragraphs and therefore should be deleted.

1. Comments

35. As noted above, some commenters advocate rescission of the codes of conduct regulations in their entirety.[54] NASUCA, however, notes the pending judicial challenges to ** 284.288 and 284.403 of the Commission's regulations, which claim that the disgorgement remedy is retroactive ratemaking in violation of section 7 of the NGA. NASUCA urges the Commission not to capitulate to these challenges by repealing these rules and the disgorgement remedy in ** 284.288(d) and 284.403(d) of the Commission's regulations.[55] NASUCA argues that the Commission should not, in an effort to provide greater clarity and regulatory certainty to the industry, eliminate profit

disgorgement as a deterrent to manipulation and a remedy for manipulation. If it is not the intent of the Commission to abandon the disgorgement remedy, then NASUCA argues that ** 284.288(d) and 284.403(d) of the regulations authorizing disgorgement should be retained.[56]

36. APGA argues that the Commission must add to the anti-manipulation final rule the condition that a violation of the rule may trigger a disgorgement of profits from the time the violation occurred as well as suspension or revocation of the blanket certificate, since this condition was justified for ** 284.288 and 284.403 of the Commission's regulations as fulfilling the Commission's obligation to appropriately monitor markets and to ensure that market-based rates remain within the zone of reasonableness required by the NGA.[57]

37. CPUC states that in the November 21 NOPR, the Commission does not address remedies for violation of the new anti-manipulation regulations, or whether the same remedies will apply as for ** 284.288(d) and 284.403(d) of the Commission's regulations.[58]

2. Commission Determination

38. Concerns over the extent of the Commission's remedial powers are misplaced. Order No. 644 addressed a concern, stemming from the abuses in Western markets in 2000-2001, that there were not clear rules to deal with abusive market conduct. By fashioning regulations prohibiting manipulation, we established a clear basis for ordering disgorgement of unjust profits, along with other remedial actions, in the event of violations of such rules.[59] With the issuance of Order No. 670 and the availability of significant civil monetary penalties for violations, the Commission now has a more complete set of enforcement tools-both rules and remedies and/or sanctions-to deal with market manipulation. The Commission will use these authorities as the facts and circumstances of each case indicate, as our discretion is at its zenith in determining an appropriate remedy for violations.[60] Accordingly, if companies subject to our jurisdiction violate the statutes, orders, rules, or regulations administered by the Commission, the Commission can order, among other things, disgorgement of unjust profits.[61] The Commission also has the option of conditioning, suspending, or revoking market-based rate authority, certificate authority,

or blanket certificate authority.[62] Moreover, while section 5 of the NGA does not permit the Commission to establish just and reasonable rates prior to the refund effective date established under section 5, the Commission clearly has authority to order disgorgement of profits associated with an illegally charged rate, i.e., a rate other than the rate on file or in violation of a Commission rule, order, regulation, or tariff on file.[63] Therefore, the Commission may use disgorgement of unjust profits where appropriate, including to remedy a violation of the new anti-manipulation regulations.

39. EAct 2005 has enhanced the Commission's civil penalty authority.[64] Civil penalties, however, serve a different purpose from disgorgement or other equitable remedies. As we have said, the purpose of civil penalties is to "encourage compliance with the law." [65] The purpose of disgorgement, on the other hand, is to remedy unjust enrichment. The Commission will choose from the full range of available remedies and penalties—revocation, suspension, or conditioning of authority, disgorgement, and civil penalties—according to the nature of the violation and all of the facts presented. The imposition of both remedies and civil penalties in tandem may be necessary under certain circumstances to reach a fair result.[66] These are separate powers available to the Commission, as they arise under different provisions of the NGA.[67]

40. We note that other agencies also impose civil penalties and equitable remedies in tandem. For example, the SEC can require an accounting and disgorgement to investors for losses and also impose penalties for the misconduct, and the CFTC can order restitution or obtain disgorgement and also impose fines for violations.[68] Similarly, in the environmental context, the government is free to seek an equitable remedy in addition to, or independent of, civil penalties.[69] When we impose disgorgement as a remedy, we have broad discretion in allocating monies to those injured by the violations. As we noted in our Policy Statement on Enforcement, each case depends on the circumstances presented, and the Commission will not predetermine which remedy and/or sanction authorities it will use.[70]

41. In light of the Commission's new monetary civil penalty authority set forth in EAct 2005, and in light of our explanation above regarding the Commission's intent to choose from the full range of available remedies and

penalties-revocation, suspension, or conditioning of authority, disgorgement, and civil penalties-according to the nature of the violation and all of the facts presented, the Commission does not see the need to retain ** 284.288(d) and 284.403(d) of the Commission's regulations, which explains that the Commission may subject violators of the codes of conduct regulations to disgorgement of unjust profits, suspension, revocation of its blanket certificate, or other appropriate non-monetary remedies. Having only one set of rules governing remedies will avoid confusion and provide greater clarity and regulatory certainty to the industry.

E. Sections 284.288(e) and 284.403(e) of the Commission's Regulations

42. In the November 21 NOPR, the Commission stated its view that if it decides to repeal ** 284.288(a)-(c) and 284.403(a)-(c) of its regulations, ** 284.288(e) and 284.404(e), dealing with time limits on complaints and Commission enforcement, are largely procedural and would become superfluous without the underlying operative paragraphs and therefore should be deleted.

1. Comments

43. Although some commenters advocated repeal of the codes of conduct regulations in their entirety, only two commenters address ** 284.288(e) and 284.403(e) of the Commission's regulations dealing with time limits on complaints and Commission enforcement.

44. CPUC states that in the November 21 NOPR, the Commission does not address complaint procedures for violation of the new anti-manipulation regulations, or whether the same complaint procedures will apply as in ** 284.288(e) and 284.403(e) of the Commission's regulations.[71]

45. INGAA argues that the Commission should preserve the time limits under ** 284.288(e) and 284.403(e) of the Commission's regulations for filing a complaint under the new anti-manipulation regulations or for Commission action on a market manipulation allegation.[72] INGAA maintains that ** 284.288(e) and 284.403(e) of the Commission's regulations require that an action must be filed within 90 days after the end of the calendar quarter in which the alleged violation occurred or, if later, 90 days after the complainant knew or should have known that the alleged violation occurred. Further, ** 284.288(e) and

284.403(e) of the Commission's regulations also require that the Commission take action within 90 days from learning of an alleged violation of the code of conduct regulations. According to INGAA, whether this is accomplished through the existing codes of conduct regulations or by amending the proposed anti-manipulation regulations, such a statute of limitations will preserve a needed degree of certainty and stability in the transition to new rules.[73]

2. Commission Determination

46. In Order No. 670, we noted that when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations (as is the case with respect to the Commission's anti-manipulation authority), a five-year statute of limitations applicable to the imposition of civil penalties applies, and specifically rejected requests to retain the 90-day period used for the Market Behavior Rules.[74] Consistent with the discussion of this issue in Order No. 670, we hereby reject requests to retain the 90-day requirement. Moreover, the Commission hereby rescinds ** 284.288(e) and 284.404(e) of the Commission's regulations, dealing with time limits on complaints and Commission enforcement, as inconsistent with the more definitive statement on complaint procedures set forth in Order No. 670.

III. Regulatory Flexibility Act Certification

47. The Regulatory Flexibility Act of 1980[75] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.[76] The Commission is not required to make such analyses if a rule would not have such an effect.

48. The Commission concludes that this Final Rule would not have such an impact on small entities. This Final Rule rescinds ** 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's codes of conduct regulations, which have been supplanted by the recently issued Order No. 670, which implements EPAct 2005. Therefore, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities. Therefore, no regulatory flexibility analysis is required.

IV. Information Collection Statement

49. This Final Rule merely rescinds ** 284.288(a), (d) and (e) and 284.403(a), (d) and (e) of the Commission's regulations

pertaining to codes of conduct with respect to certain sales of natural gas and does not include new information requirements under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

V. Environmental Statement

50. 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.[77] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[78] Thus, we affirm the finding we made in the NOPR that this Final Rule is procedural in nature and therefore falls under this exception; consequently, no environmental consideration would be necessary.

VI. Document Availability

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

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

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

VII. Effective Date and Congressional Notification

54. This Final Rule will take effect on [insert date 30 days after publication in the FEDERAL REGISTER]. The Commission has

determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this rule is not a major rule within the meaning of section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[79] The Commission will submit the Final Rule to both houses of Congress and the Government Accountability Office.[80]

List of subjects

18 CFR Part 284

Natural Gas, Pipelines, Investigations, Penalties

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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Docket No. RM06-5-000

In consideration of the foregoing, the Commission amends 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. In * 284.288, paragraphs (a), (d), and (e) are removed, and paragraphs (b) and (c) are redesignated as paragraphs (a) and (b), respectively.

3. In * 284.403, paragraphs (a), (d), and (e) are removed, and paragraphs (b) and (c) are redesignated as paragraphs (a) and (b), respectively.

#

Docket No. RM06-5-000

APPENDIX

List of Parties Filing Comments and Reply Comments and Acronyms

American Gas Association (AGA)
American Public Gas Association (APGA)
California Public Utilities Commission (CPUC) **

Cinergy Services, Inc. and Cinergy Marketing & Trading, LP
(Cinergy)
Constellation Energy Group Inc., et al. (Indicated Market
Participants)
Interstate Natural Gas Association of America (INGAA)
Missouri Public Service Commission (MoPSC)*
National Association of State Utility Consumer Advocates (NASUCA)
Natural Gas Supply Association (NGSA)
New Jersey Board of Public Utilities (NJBPU)
New York State Public Service Commission (NYPSC)

* Entities filing late comments.

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

Footnotes

[1] 18 CFR 284.288(a), (d) and (e) and 284.403(a), (d) and (e)
(2005).

[2] Amendments to Blanket Sales Certificates, 105 FERC * 61,217
(2003), reh'g denied 107 FERC * 61,174; 68 FR 66323 (Nov. 26,
2003); 18 CFR 284.288 and 284.403 (2003) (Order No. 644). Order
No. 644 is currently on appeal. See Cinergy Marketing & Trading,
L.P. v. FERC, No. 04-1168 et al. (D.C. Cir. filed April 28,
2004).

[3] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594
(2005). Congress prohibited the use or employment of "any
manipulative or deceptive device or contrivance" in connection
with the purchase or sale of natural gas or transportation
services subject to the jurisdiction of the Commission. Congress
directed the Commission to give these terms the same meaning as
under the Securities Exchange Act of 1934, 15 U.S.C. 78j(b)
(2000).

[4] Prohibition of Energy Market Manipulation, Order No. 670, 71
FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. * 31,202, 114 FERC *
61,047 (Jan. 19, 2006) (Order No. 670).

[5] The Commission will redesignate existing sections 284.288(b)-
(c) and 284.403(b)-(c) of the Commission's regulations as new
sections 284.288(a)-(b) and 284.403(a)-(b), respectively. Unless
otherwise specified, this NOPR will refer to these sections under
their existing designation before the effectiveness of this Final
Rule.

[6] In a notice of proposed rulemaking issued contemporaneously
with this Final Rule, Docket No. RM06-14-000, the Commission is
proposing to extend the record retention requirements from three
to five years to be consistent with the statute of limitations
that would apply to actions seeking civil penalties for alleged
violations of the new anti-manipulation rule implemented in Order
No. 670.

[7] Order No. 644, 105 FERC * 61,217 at P 91 (2003).

[8] 18 CFR 284.288(a)(1)-(2) and 284.403(a)(1)-(2) (2005).

[9] Price Discovery in Natural Gas and Electric Markets, "Policy
Statement on Natural Gas and Electric Price Indices," 104 FERC *
61,121 (2003) (Price Index Policy Statement).

[10] Investigation of Terms and Conditions of Public Utility

Market-Based Rate Authorizations, "Order Amending Market-Based Rate Tariffs and Authorizations," 105 FERC * 61,218 (2003), reh'g denied, 107 FERC * 61,175 (2004).

[11] Prohibition of Energy Market Manipulation, 113 FERC * 61,067 (2005) (Anti-Manipulation NOPR).

[12] Id. at P 15 and n.23.

[13] Id. See also Enforcement of Statutes, Orders, Rules, and Regulations, "Policy Statement on Enforcement," 113 FERC * 61,068 at P 14 (2005).

[14] See Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates, 113 FERC * 61,189 (2005) (November 21 NOPR).

[15] Id. at P 20.

[16] Id. at P 11. At the same time we issued an order in Docket No. EL06-16-000 proposing similar changes to the behavior rules applicable to wholesale sellers of electricity at market-based rates. See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, "Order Proposing Revisions to Market-Based Rate Tariffs and Authorizations," 113 FERC * 61,190 (2005).

[17] Entities filing comments and reply comments are listed in the Appendix to this order, along with the acronyms for such commenters. The Commission has accepted and considered all comments filed, including late-filed comments.

[18] 18 CFR 1c.1, 71 FR 4244 (2006).

[19] CPUC at 2-8; NASUCA at 5-10; NJBPU at 5-7.

[20] CPUC at 2-8; NASUCA at 5; NJBPU at 5-6.

[21] CPUC at 5; NASUCA at 5, 8.

[22] CPUC at 8.

[23] Cinergy at 6.

[24] INGAA at 6; NGSAA at 3; AGA at 4 (arguing that this uncertainty that will deter otherwise proper market conduct, thereby promoting market inefficiency and causing a dampening effect on a competitive market).

[25] Cinergy at 6-7.

[26] Cinergy at 5 (arguing that the generic provision of sections 284.288(a) and 284.403(a) of the Commission's regulations is unlawful in its vagueness and, as a certificate condition, is contrary to the statutory scheme of the NGA).

[27] Indicated Market Participants at 10.

[28] Indicated Market Participants at 13; CPUC at 3, 8.

[29] APGA at 5; NJBPU at 7-8.

[30] In new 4A of the NGA, Congress used the terms "manipulative or deceptive device or contrivance" and directed that they be given the same meaning as used in section 10b of the Securities Exchange Act of 1934. It is well settled that those terms require a showing of scienter, that is, an intent to deceive, manipulate or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). See Order No. 670, 114 FERC * 61,047 at P 52-53.

[31] Order No. 670, 114 FERC * 61,047 at P 59.

[32] After considerable experience with Rule 10b-5, upon which our new anti-manipulation rule is modeled, the SEC has expanded the original Rule 10b-5 to add a number of specific provisions describing prohibited conduct. See 17 CFR 240.10b-5-1 through 240.10b5-14.

[33] *Aaron v. SEC*, 446 U.S. 680, 690 (1980); see also *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 6-7 (1985) (describing section 10(b) as a "general prohibition of practices . . . artificially affecting market activity in order to mislead investors . . ."); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151-53 (1972) (noting that the repeated use of the word "any" in section 10(b) and SEC Rule 10b-5 denotes a congressional intent to have the provisions apply to a wide range of practices).

[34] Indicated Market Participants at 10-11, 20.

[35] AGA at 6.

[36] AGA at 6; NASUCA at 20; INGAA at 6.

[37] AGA at 6. See also INGAA at 6 (urging the Commission not to disavow the legitimate business purpose defense, which is relevant to the question of scienter under the new anti-manipulation rule).

[38] CPUC at 8.

[39] Order No. 670, 114 FERC * 61,047 at P 30-31.

[40] November 21 NOPR, 113 FERC * 61,189 at 20.

[41] November 21 NOPR, 113 FERC * 61,189 at 16.

[42] November 21 NOPR, 113 FERC * 61,189 at 16.

[43] APGA at 6; NGSAA at 3-5.

[44] AGA at 5.

[45] Indicated Market Participants at 16-19 (noting the advantage of a new proceeding that will broaden the applicability of this policy beyond certain blanket certificate holders under the codes of conduct regulations).

[46] NJBPU at 7-8.

[47] CPUC at 3, 8.

[48] CPUC at 3, 7.

[49] APGA at 6.

[50] Id. See also NJBPU at 7-8 (encouraging the Commission to adopt new rules on the three-year record retention requirement before, or at a minimum, contemporaneous with the repeal of the existing requirements).

[51] Indicated Market Participants at 17-18.

[52] 18 CFR part 225 (2005).

[53] As noted above, in a notice of proposed rulemaking issued simultaneously with this Final Rule, Docket No. RM06-14-000, the Commission is proposing to extend the record retention requirements from three to five years to be consistent with the statute of limitations that would apply to actions seeking civil penalties for alleged violations of the new anti-manipulation rule implemented in Order No. 670.

[54] AGA at 5; Cinergy at 4; NGSa at 3.

[55] NASUCA at 12.

[56] NASUCA at 13.

[57] APGA at 5-6 (citing Order No. 644, 105 FERC * 61,217 at P 91 (2003), reh'g denied, 107 FERC * 61,174).

[58] CPUC at 9.

[59] Order No. 644, 105 FERC * 61,217 at P 95 (2003), reh'g denied 107 FERC * 61,174 (stating "[i]n 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.").

[60] See Niagara Mohawk Power Corp. v. FERC, 379 F.2d 153, 159 (D.C. Cir. 1967); accord 16 U.S.C. 825h (2000); Mesa Petroleum Co. v. FERC, 441 F.2d 182, 187-88 (D.C. Cir. 1971); Gulf Oil Corporation v. FPC, 563 F.2d 588, 608 (3rd Cir. 1977), cert. denied 434 U.S. 1062, reh'g denied, 435 U.S. 981 (1978); Consolidated Gas Transmission Corp. v. FERC, 771 F.2d 1536, 1549 (D.C. Cir. 1985).

[61] See, e.g., Transcontinental Gas Pipe Line Corp. v. FERC, 998 F.2d 1313, 1320 (5th Cir. 1993) (holding the remedy of disgorgement of ill-gotten profits for a violation of the Natural Gas Act "well within [the Commission's] equitable powers"); Coastal Oil & Gas Corp. v. FERC, 782 F.2d 1249, 1253 (5th Cir. 1986) (profits from illegal intrastate sales of gas in excess of a just and reasonable rate may be subject to disgorgement).

[62] See, e.g., Enron Power Marketing, Inc., 103 FERC * 61,343 at

P 52 (2003); Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 99 FERC * 61,272 at 62,154 (2002); San Diego Gas & Electric Company, 95 FERC * 61,418 at 62,548, 62,565, order on reh'g, 97 FERC * 61,275 (2001), order on reh'g, 99 FERC * 61,160 (2002); accord Enron Power Marketing, Inc., "Order Proposing Revocation of Market-Based Rate Authority and Termination of Blanket Marketing Certificates," 102 FERC * 61,316 at P 8 and n.10 (2003), and cases cited therein.

[63] Transcontinental Gas Pipe Line Corp., 998 F.2d 1313 at 1320; see also Dominion Resources, Inc. et al., 108 FERC * 61,110 (2004) (disgorgement for violations of the Commission's Standards of Conduct); El Paso Electric Company, 105 FERC * 61,131 at P35 (2003) (finding disgorgement an "appropriate and proportionate remedy" for a violation of the Federal Power Act); Kinder Morgan Interstate Gas Transmission LLC, 90 FERC * 61,310 (2000) (disgorgement ordered to remedy preferential discounts to affiliates); Stowers Oil & Gas Company, 44 FERC * 61,128 (1988), reh. denied in part and granted in part, 48 FERC * 61,230 at 61,817 (1989), appeal dismissed sub nom. Northern Natural Gas Co. v. FERC, Case Nos. 89-1512 et al., (D.C. Cir. 1992) (Commission "properly exercised its broad equitable power" in requiring disgorgement of unjust enrichment resulting from illegal sales of gas).

[64] EPAct 2005 for the first time granted the Commission authority to assess civil penalties for violations of the NGA and rules, regulations, restrictions, conditions and orders thereunder (EPAct 2005 section 314(b)(1), inserting new NGA section 22), and established the maximum civil penalty the Commission could assess under the NGA and the NGPA as \$1 million per day per violation. EPAct 2005 section 314(b)(1), inserting new NGA section 22(a); EPAct 2005 section 314(b)(2), amending NGPA section 504(b)(6)(A).

[65] Procedures for the Assessment of Civil Penalties under section 31 of the Federal Power Act, Order No. 502, 53 FR 32035 (Aug. 23, 1988), FERC Stats. & Regs. * 30,828 (Aug. 17, 1988).

[66] Policy Statement on Enforcement, 113 FERC * 61,068 at P 12 (2005) (stating, "[o]ur enhanced civil penalty authority will operate in tandem with our existing authority to require disgorgement of unjust profits obtained through misconduct and/or to condition, suspend, or revoke certificate authority or other authorizations, such as market-based rate authority for sellers of electric energy").

[67] The authority to order disgorgement and other equitable remedies arises under the "necessary or appropriate" powers of section 16 of the NGA. 15 USC * 717o. The authority to impose civil penalties arises under section 22 of the NGA and section 504(b)(6)(A) of the NGPA, as amended by EPAct 2005.

[68] See sections 21-21C of the Securities Exchange Act, 15 USC ** 78u-78u-3 (2000); SEC v. Happ, 392 F.3d 12, 31-33 (1st Cir. 2004) (upholding SEC's imposition of both disgorgement and a civil penalty equal to the amount of disgorgement; further, the court noted that the wrongdoer bears the risk of uncertainty in calculating the amount of disgorgement). The CFTC can revoke or suspend a registration, suspend or prohibit certain trading, issue cease and desist orders, order restitution, and seek equitable remedies (injunction, rescission, or disgorgement), all in addition to imposing a monetary fine. 7 U.S.C. 13a and 13b (2000); Comm. Fut. L. Rep. (CCH) * 26,265 at 42,247 (1994).

[69] See, e.g., Tull v. United States, 481 U.S. 412, 425 (1987) (holding that the Clean Water Act does not intertwine equitable relief with the imposition of civil penalties; instead, each kind of relief is separately authorized in distinct statutory provisions).

[70] Policy Statement on Enforcement, 113 FERC * 61,068 at P 13 (2005) ("[W]e will not prescribe specific penalties or develop

formulas for different violations. It is important that we retain the discretion and flexibility to address each case on its merits, and to fashion remedies appropriate to the facts presented, including any mitigating factors").

[71] CPUC at 9.

[72] INGAA at 2, 5.

[73] Id.

[74] Order No. 670, 114 FERC * 61,047 at P 62-63.

[75] 5 U.S.C. 601-612 (2000).

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

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

[78] 18 CFR 380.4(a)(2)(ii) (2005).

[79] 5 U.S.C. 804(2) (2000).

[80] 5 U.S.C. 801(a)(1)(A) (2000).

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