

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Prohibition of Energy Market Manipulation : Docket No. RM06-3-000

---

COMMENTS OF THE NATIONAL ASSOCIATION OF  
STATE UTILITY CONSUMER ADVOCATES

---

**I. Introduction**

On October 20, 2005, pursuant to Sections 315 and 1283 of the Energy Policy Act of 2005 (“EPAAct 2005”),<sup>1</sup> the Commission issued a Notice of Proposed Rulemaking (“NOPR”) in the above-captioned docket. In the NOPR, the Commission proposes to add a Part 47 under Subchapter B (Regulations under the Federal Power Act) and a Part 159 under Subchapter E (Regulations under the Natural Gas Act) to Title 18 of the Code of Federal Regulations.

The proposed new regulations would implement Sections 315 and 1283 of EPAAct. Sections 315 and 1283 are virtually identical and prohibit the use or employment of manipulative or deceptive devices or contrivances in connection with the purchase or sale of natural gas, electric energy, or transportation or transmission services subject to the jurisdiction of the Commission. The anti-manipulation provisions of Sections 315 and 1283 closely track the prohibited conduct language in Section 10(b) of the Securities Exchange Act of 1934.<sup>2</sup> As a result, the Commission’s NOPR proposes to add regulations similar to the Securities Exchange

---

<sup>1</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

<sup>2</sup> Securities and Exchange Act of 1934, 15 U.S.C. §78j(b)(2005).

Commission's rule 10b-5<sup>3</sup> that was promulgated pursuant to Section 10(b) of the Securities Exchange Act of 1934.

Concurrently, the Commission issued a Policy Statement on Enforcement, outlining factors the Commission will consider when assessing civil penalties or developing remedies for violations of the statutes, orders, rules and regulations the Commission administers. The Policy Statement also identifies factors to be weighed in determining the seriousness of the violation, and indicates what consideration will be given for mitigating factors, such as adopting strong internal compliance programs, voluntarily reporting violations, and cooperating with staff investigations.<sup>4</sup>

The National Association of State Utility Consumer Advocates (“NASUCA”) submits these comments supporting the Commission efforts to ensure effective protections and remedies for consumers from energy market manipulation. These comments provide further recommendations for refinements or clarifications of the Commission's proposed rules.

NASUCA is an association representing 44 state utility consumer advocate offices in 41 states and the District of Columbia. NASUCA member offices are authorized by the laws of their respective jurisdictions to represent the interests of utility consumers in matters before state and/or federal regulators and courts. NASUCA offers the following comments on the NOPR.

## **II. Comments**

The Commission seeks in this proposed rulemaking to add to its regulations provisions prohibiting manipulation of energy markets that closely track the prohibited conduct language

---

<sup>3</sup> 17 CFR 240.10b-5 (2005).

<sup>4</sup> *Enforcement of Statutes, Orders, Rules and Regulations*, Docket No. PL06-1-000 (Issued October 20, 2005)(“*Policy Statement on Enforcement*”).

contained in Section 10(b) of the Securities Exchange Act of 1934 and Section 10b-5 of the Securities Exchange Commission regulations. Specifically, the proposed regulations make it unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, or 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 person.

The NOPR makes it clear that these proposed regulations apply to the conduct of “any entity,” not just jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority. The Commission’s new EAct authority under the anti-manipulation provisions coupled with expanded civil authority will provide it with more effective tools to assure workably competitive markets.

NASUCA supports the anti-manipulation provisions proposed by the Commission in its NOPR. Many states in which NASUCA members work have adopted retail choice programs in an effort to bring the benefits of competitive wholesale markets to retail consumers. These efforts cannot succeed unless consumers can have confidence in the wholesale markets that feed those retail transactions. Even in those states that have not opened up to retail choice, the utilities providing retail services buy and sell in the wholesale markets. The anti-manipulation provisions of EAct and the proposed regulations will provide the Commission with additional tools to pursue any entity that manipulates those markets.

The NOPR also explains the relationship between the proposed rules and the Commission's existing Market Behavior Rules<sup>5</sup> that emanated from the Commission's investigation of trading activity in Western markets during 2000-2001. The Market Behavior Rules were adopted to establish guidelines applicable to the conduct of jurisdictional market-based rate sellers in wholesale power markets and to jurisdictional companies engaged in wholesale sales of natural gas under blanket certificate authority. Therefore, both the Market Behavior Rules and the proposed regulations are designed to prohibit manipulative conduct. The Commission notes in its Policy Statement on Enforcement that its enhanced civil penalty authority will operate in tandem with its existing authority to require disgorgement of unjust profits and/or to condition, suspend or revoke certificate authority or other authorizations, such as market-based rate authority for sellers of electric energy.<sup>6</sup> Although the Commission's NOPR states that the Market Behavior Rules are to be retained, the NOPR also states that the Commission may seek to address the possibility of revising or repealing Market Behavior Rule 2 in the future.<sup>7</sup>

NASUCA does not support the repeal of Market Behavior Rule 2. Any revisions to the Market Behavior Rules should be to expand the scope of the Rules to incorporate the Commission's new authority over market manipulation by all market entities. At the time that the current Market Behavior Rules were implemented, the Commission's authority over sales of

---

<sup>5</sup> *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); *Order No. 644, Amendment to Blanket Sales Certificates*, FERC Stats. & Regs. ¶31,153 (2003), *reh'g denied*, 107 FERC ¶61,174 (2004).

<sup>6</sup> *Policy Statement on Enforcement* ¶12.

<sup>7</sup> Market Behavior Rule 2 states that "[a]ction or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products are prohibited." *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶61,218 at Appendix A (2003). In addition, Market Behavior Rule 2(a) expressly prohibits wash trades, Rule 2(b) prohibits transactions predicated on submitting false information, 2(c) prohibits creating and relieving artificial congestion, and Rule 2(d) prohibits collusion.

natural gas was limited to sales of domestic gas for resale by pipelines, local distribution companies and affiliated entities, if the seller does not produce the gas it sells. The Commission nonetheless determined that the adoption of the Market Behavior Rules was appropriate as a means of ensuring the integrity of the portion of the wholesale energy market subject to its jurisdiction.<sup>8</sup> As noted above, EAct grants the Commission authority to prevent market manipulation by any market participant. To the extent that the Commission determines that any of the existing Market Behavior Rules should be reconsidered, NASUCA would urge the Commission to consider an expansion of those rules even further, to make the Rules applicable to all market participants.

### **III. Conclusion**

For the reasons set forth above, NASUCA supports adoption of proposed Part 47 under Subchapter B (Regulations under the Federal Power Act) and proposed Part 159 under Subchapter E (Regulations under the Natural Gas Act) to Title 18 of the Code of Federal Regulations. These proposed anti-manipulation regulations provide the Commission with important tools to ensure effective protections and remedies for consumers from energy market manipulation. NASUCA also encourages the Commission to retain and expand its current Market Behavior Rules in addition to the new regulations promulgated pursuant to EAct.

---

<sup>8</sup> *Order 644*, p. 13