

Federal Energy Regulatory Commission
Legal Authorities: ETP Show Cause
IN06-3-002

The Anti-Manipulation Rule: Prior to January 2006, the Commission's anti-manipulation rule that applied to sales of FERC-jurisdictional natural gas other than interstate pipelines was codified at 18 C.F.R. § 284.403(a) (known as Market Behavior Rule 2). That rule reads in pertinent part as follows:

Any person [who is not an interstate pipeline] making natural gas sales for resale in interstate commerce pursuant to [a blanket marketing certificate] . . . 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.

ETP has a blanket marketing certificate pursuant to 18 C.F.R. § 284.402(a) and thus is bound by Market Behavior Rule 2.

The Energy Policy Act of 2005 (EPAAct 2005): EPAAct 2005 provided the Commission with civil penalty authority for violations of the Natural Gas Act (NGA) and regulations issued under the NGA of \$1,000,000 per day per violation for violations occurring on or after August 8, 2005, the effective date of the Act. Accordingly, violations of Market Behavior Rule 2 that ETP is found to have committed after this date are subject to civil penalties.

Coordinate Jurisdiction with CFTC: The CFTC has jurisdiction with respect to trading on organized exchanges such as NYMEX. The Commission has jurisdiction with respect to the price of domestic natural gas sold for resale in interstate commerce by a pipeline or an affiliate of a pipeline. In the ETP matter, the CFTC has jurisdiction insofar as NYMEX prices were affected and the Commission has jurisdiction insofar as physical prices of domestic gas sold for resale in interstate commerce were affected.

Remedial Authority: The Commission has authority to order payment of civil penalties and disgorgement of unjust profits for violations of Market Behavior Rule 2.

- **Civil Penalties:** The Commission proposes to assess ETP civil penalties of \$79,000,000 for its 79 sales of natural gas that were manipulations and that were made after the effective date of EPAAct. These sales were for next-month gas and occurred in August, September and November 2005. The Commission proposes to assess ETP civil penalties of \$3,000,000 for its 58 sales of natural gas that were manipulations on December 23 and 28, 2005 of next day gas at Waha and Permian. The Commission proposes to assess Oasis Pipeline civil penalties of \$15,000,000 for its undue discrimination. Finally, the Commission proposes to assess Oasis Pipeline civil penalties of \$500,000 for its failure to file an amended operating statement pursuant to 18 C.F.R. § 284.123(e).

- **Penalty Factors:** In determining the appropriate size of a civil penalty for a given violation, the Commission was mandated by Congress to consider the seriousness of a violation and the remedial actions, if any, taken by a violator in response to a violation. EPAAct 2005 § 314(b) (2005) (codified at 15 U.S.C. § 717t-1). These factors were more specifically described in the Commission's *Enforcement Policy Statement. Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005). The Commission applies those factors to the factors of every case in order to arrive at an appropriate civil penalty amount.

The seriousness factors are: (1) what harm was caused by a violation? (2) Was a violation the result of manipulation, deceit or artifice? (3) Was the action willful, reckless, or deliberately indifferent to the results? (4) Was it part of a broader scheme? (5) Is it a repeat offense or does the company have a history of violations? (6) Was the wrongdoing related to actions by senior management? (7) How did the wrongdoing come to light? (8) What effect would potential penalties have on the financial viability of the company?

The remedial action factors are: (1) internal compliance; (2) self-reporting; and (3) cooperation.

- **Disgorgement:** Unlike civil penalties, the Commission does not approach the assessment and ordering of disgorgement of unjust profits as a discretionary matter. Except in rare circumstances not present here, any unjust profits received from violations of Commission requirements must be disgorged in their entirety.