

Statement of Chairman Joseph T. Kelliher on Anti-Market Manipulation Final Rule

Today, the Commission issues final rules to prevent market manipulation in wholesale power and gas markets, and in transmission and transportation services.

In the Energy Policy Act of 2005, Congress established an express prohibition of manipulation in connection with the purchase or sale of wholesale power or natural gas, as well as transmission or transportation services. Congress also authorized the Commission to issue rules to prevent market manipulation. Today, we do just that.

In my view, this is one of the most important and challenging provisions of the Energy Policy Act. Congress gave us this authority out of recognition that wholesale power and gas markets had changed dramatically since the 1930s. While our legal duty remains the same – protecting the wholesale power and gas customer – we needed different regulatory tools to discharge this duty.

The Commission acted quickly to exercise this new authority in response to the high natural gas prices that ensued in the wake of Hurricanes Katrina and Rita. The significant loss of natural gas supply produced higher prices. The Commission acted to ensure that they did not go higher still because of market manipulation.

We have been careful in our approach in this exercise of this new authority. Congress told us to adopt the statutory model in section 10(b) of the Securities Exchange Act of 1934, and that is just what we did. We studied that model and how the SEC has implemented it over the years, and adapted it where necessary to our legal construct. We also studied the anti-manipulation provisions in commodities law, which are also modeled on the Securities Exchange Act of 1934. Our anti-manipulation final rule is modeled closely on SEC rules implementing section 10(b) of the Exchange Act. This approach should provide benefits to regulated entities, since there is a substantial body of precedent applying the comparable language in the 1934 Act.

Under the final rule, it shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or transmission services subject to the jurisdiction of the Commission, or the purchase or sale of natural gas or transportation service subject to the jurisdiction of the Commission, to (1) use or employ any device, scheme, or artifice to defraud, (2) make material false statements or omit material facts, or (3) engage in any act, practice, or course of business that operate or would operate as a fraud or deceit upon any person.

Consistent with the Energy Policy Act of 2005, these rules apply to “any entity”, not just public utilities and natural gas companies. The anti-manipulation rules will apply to entities that are not otherwise jurisdictional to the Commission, such as government utilities and other market participants. To be in violation of the new rules, however, such an entity must act with the requisite intent, and the fraud or deceit must be in connection with a transaction subject to the jurisdiction of the Commission, that is, the

entity must affect a jurisdictional transaction.

The anti-manipulation final rule is also consistent with SEC precedent with respect to the intent standard. We adopt the scienter requirement, which is an intent to deceive or manipulate or reckless action.

The Commission has another set of rules designed to prevent manipulation in wholesale power and gas markets, the Market Behavior Rules. In November, the Commission initiated a rulemaking to consider repealing these rules in favor of the new anti-manipulation final rule. This proceeding is ongoing, and we have received many comments reflecting a wide range of views. There is a new-found affection for the Market Behavior Rules in some quarters. Perhaps it is a question of preferring the devil you barely know.

It is my hope to take final action in the Market Behavior Rule proceeding very soon. In the meantime, the final rule we are issuing today makes plain that the Commission will not seek duplicative sanctions for the same conduct in the event that conduct violates both the anti-manipulation final rule and the Market Behavior Rules.

I recognize that the final rules we issue today do not provide an exhaustive laundry list of which specific transactions are consistent and inconsistent with the final rule. To some extent, that is unavoidable. Fraud is a very fact-intensive determination. Manipulation is a very fact-intensive determination.

The Energy Policy Act of 2005 granted the Commission significant civil penalty authority, comparable to that enjoyed by other federal economic regulatory bodies. Previously, the Commission had virtually no penalty authority.

We appreciate that we have to exercise our civil penalty authority carefully and accept the burden of greater efforts to assure that our rules are clear. That will make it easier for regulated entities to assure compliance, and make it easier for the Commission to identify violations.

The Commission is committed to providing a high degree of regulatory certainty in this area. We have initiated a "no action" letter process, where parties can request the views of Commission legal and enforcement staff on whether a proposed transaction or practice is consistent with the anti-manipulation final rule. This also will provide industry significantly greater regulatory certainty than exists today. We have issued an Enforcement Policy Statement, which uses our penalty authority in a manner designed to encourage compliance. We have also issued proposed rules to expand the procedural rights of companies subject to operational audits. Finally, to facilitate compliance we have made available through our website materials a package of information on the audit process and frequently asked questions about the Standards of Conduct. For those who seek to comply with our rules, we are trying to make it easier for you.

A final note. The anti-manipulation final rule will be effective upon publication in the *Federal Register*, which should occur next week. Just as we acted quickly in response to the hurricanes to ensure higher gas prices were not the result of market manipulation, we decided to put these new rules into effect as quickly as the law allows. These rules are backed by our enhanced enforcement and civil penalty authority.

I support the final rule.