

Chairman Kelliher on proposed changes to the Market Behavioral Rules (Docket Nos. RM06-5 and EL06-16)

“At our last meeting, the Commission issued proposed rules to prevent manipulation of wholesale power sales and jurisdictional gas sales. We plan to finalize those rules as soon as practicable. However, as we move to finalize the anti-manipulation rules, the electric and gas Market Behavioral Rules remain in place. At our last meeting, we discussed the need to consider changes in the Market Behavioral Rules, in light of the new anti-manipulation proposed rules. We also talked about the significant differences between the Market Behavioral Rules and the new anti-manipulation proposed rules.

“On the electric side, there are significant differences that are discussed in the orders. First of all, the universe of sellers that are covered by the rules vary between the Market Behavioral Rules and the new anti-manipulation rules. Under the Market Behavioral Rules, it is only public utilities. Under the new anti-manipulation rules, it is all entities, including otherwise non-jurisdictional wholesale power sellers.

“There is also a difference in the scope of transactions that are covered under the Market Behavioral Rules. Under the Market Behavioral Rules, only market based rate sales are covered. Under the new anti-manipulation rules, all wholesale power sales are covered, whether they are cost-based or market-based. Also, the intent standard is different.

“It is clear that the Energy Policy Act of 2005 did not reverse or repeal Market Behavioral Rules, but it is also clear it did not ratify them. Congress knows how to ratify a regulatory policy when it chooses to do so, and it did not choose to do so here. Instead, Congress specifically directed the Commission to use a different regulatory model than the Market Behavioral Rules. It is plain that we have discretion to reform or to repeal the Market Behavioral Rules. I think it will really end up being a merits call. I think the comments on the proposed rules will be very important.

“There are six Market Behavioral Rules. Market Behavioral Rule 2 is the heart of Market Behavioral Rules and it is clearly covered by the new anti-manipulation rules. Market Behavioral Rule 3 bars false statements and it is also covered by the new anti-manipulation proposed rules that we issued last month. Of the remaining four rules, most of the prohibited behavior is already barred by existing Commission rules, and the rest can be covered with changes in those rules.

“There is a value to regulatory certainty, and repealing Market Behavioral Rules when the anti-manipulation rules are finalized would offer greater regulatory

certainty. I think that repealing the Market Behavioral Rules would not come at a cost to customers. Having two sets of rules barring the same behavior does not offer more protection to customers. And, no regulatory gap would be created.

“I look forward to reviewing comments on proposed rule. I believe this order will give the regulatory community more certainty.”