

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

<b>Investigation Of Terms And Conditions Of Public Utility Market-Based Rate Authorizations</b>	)	<b>Docket No. EL01-118-000 EL01-118-001</b>
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**COMMENTS OF INDUSTRIAL CONSUMERS  
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON),  
THE AMERICAN IRON AND STEEL INSTITUTE (AISI),  
THE AMERICAN CHEMISTRY COUNCIL (ACC)  
AMERICAN FOREST & PAPER ASSOCIATION (AF&PA)  
ASSOCIATION OF BUSINESS ADVOCATING TARIFF EQUITY (ABATE)  
CALIFORNIA LARGE ENERGY CONSUMERS ASSOCIATION (CLECA)  
CONNECTICUT INDUSTRIAL ENERGY CONSUMERS (CIEC)  
INDUSTRIAL ENERGY CONSUMERS OF PENNSYLVANIA (IECPA)  
SOUTHEAST ELECTRICITY CONSUMERS ASSOCIATION (SeECA),  
PJM INDUSTRIAL CUSTOMER COALITION (PJMICC) AND  
MULTIPLE INTERVENORS (MI)**

The Electricity Consumers Resource Council (ELCON), the American Iron and Steel Institute (AISI), the American Chemistry Council (ACC), American Forest & Paper Association (AF&PA), California Large Energy Consumers Association (CLECA), Connecticut Industrial Energy Consumers (CIEC), Association Of Business Advocating Tariff Equity (ABATE), Industrial Energy Consumers Of Pennsylvania (IECPA), Southeast Electricity Consumers Association (SeECA), PJM Industrial Customer Coalition (PJMICC), and Multiple Intervenors (MI), (collectively, “Industrial Consumers”), commend FERC for proposing to revise market-based rate authorizations to identify illegal behavior and proscribe certain gaming strategies. Since most ISOs and RTOs lack effective anti-gaming and anti-manipulation provisions,

Industrial Consumers have urged that FERC define anti-gaming prohibitions throughout the United States in comments filed in prior dockets<sup>1</sup>.

## **I. INTRODUCTION AND SUMMARY**

FERC proposes to revise market-based rate (MBR) tariffs to include as a condition of all new and existing MBR tariffs a prohibition on engaging in manipulative practices. 103 FERC ¶ 61,349 (June 26, 2003). The proposal is a new and much improved version of FERC's initial proposal in Docket EL01-118-000 (November 20, 2001). FERC now proposes to adopt behavioral conditions to MBR tariffs throughout the country, even if there is an RTO or ISO. The proposal is consistent with Industrial Consumers' recommendations that FERC establish specific standards to define unacceptable market behavior. Industrial Consumers regard FERC's proposal as complementary to the mitigation measures now required of RTOs/ISOs -- together they are the training wheels for the new markets. Also it is essential that the risk of new California-like market failures be eliminated to restore faith in competitive markets. Gaming behavior not only directly injures consumers but has the adverse indirect effect of encouraging the growing opposition to restructuring in the South and West, and reconsideration of restructuring elsewhere.

Industrial Consumers in their comments will make three principal points:

- Adoption of the proposed behavioral conditions is urgently needed because the current mix of behavioral conditions in ISO and RTO tariffs around the country is a mish-mash of inadequate and inconsistent conditions.

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<sup>1</sup> See comments by ELCON filed in dockets EL01-118, RM01-1 and PA02-02.

- FERC has not only the legal authority but the legal duty to impose behavioral conditions. Market-based rates are only just and reasonable if the market is sufficiently competitive that market participants cannot exercise market power. “[W]hen there is a competitive market the FERC may rely upon market-based prices...to assure a ‘just and reasonable’ result.” Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 870-71 (D.C. Cir. 1993); Louisiana Energy and Power Authority v. FERC, 141 F.3d 364 (D.C. Cir. 1998). “In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment.” Tejas Power Corp. v. FERC, 908 F.2d 998, 1004 (D.C. Cir. 1990). When the Commission authorizes market-based rates, it is under a continuing duty to ensure that the relevant market remains sufficiently competitive to prevent unjust and unreasonable prices. Process Gas Consumers Group v. FERC, 177 F.3d 995, 1002 (D.C. Cir. 1999) (“FERC must remain attuned to the status of the affected market vis-à-vis monopoly and competition.”).
- Vague anti-gaming prohibitions invite litigation as to the sufficiency of the tariff to provide notice to sellers. Specific delineations of improper behavior provide fair notice to regulated sellers as to appropriate conduct, better protect consumers, and mitigate costly and protracted litigation over the meaning of tariff provisions.

As noted in ELCON's April 11, 2003 comments in Docket PA02-02, Industrial Consumers take no position on whether or not any seller involved in the specific California transactions challenged in FERC Staff's Final Report on Price Manipulation in Western Markets violated California ISO Tariff provisions.

## **II. DESCRIPTION OF FERC'S PROPOSAL**

As a result of the findings by FERC Staff in the March 26, 2003 Final Report on Price Manipulation in Western Markets (the "Gelinas Report"), FERC is now proposing specific standards for defining improper behavior. FERC specifically proposes the following behavioral rules for all sellers that elect to charge market-based rates as power marketers in lieu of cost of service rates:

- Rule #1: Unit Operation

Sellers will operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the rules and regulations of the applicable power market.

- Rule #2: Market Manipulation

Actions without a legitimate business purpose which manipulate or attempt to manipulate market prices, market conditions, or market rules for electricity, or which result in market prices that do not reflect legitimate forces of supply and demand are prohibited. FERC gives as examples (A) wash trades involving no change in beneficial ownership and no economic risk; (B) transactions predicated on submitting false information to transmission providers (such as inaccurate load or generation data); scheduling non-firm

service or products sold as firm, or conducting “paper trades”; (C) transactions creating and relieving artificial congestion; (D) collusion to create market prices at levels different from those set by market forces; and (E) bidding strategies that raise market prices by withholding available supply for the market.

- Rule #3: Communications

Sellers must provide complete and accurate information to FERC, RTOs, ISO, and market monitors.

- Rule #4: Reporting

Sellers must report complete and accurate information to publishers of electricity and gas price indices.

- Rule #5: Record Retention

Sellers must retain all data supporting prices charged or prices reported to publications for a period of 3 years.

- Rule #6: Related Tariffs

Sellers may not collude with another party in actions that violate the seller’s code of conduct or Order No. 889 standards of conduct.

Market participants must request remedies within 60 days after the end of the calendar quarter when the violation occurred or, if the violation was unknowable, 60 days after the market participant knew or should have learned of the behavior. Refunds would be calculated on the basis of disgorgement of profits earned on a transaction-specific basis.

### III. COMMENTS

#### A. **Due To Significant Variation Among RTO Tariffs, Anti-Manipulation Prohibitions Need To Be Strengthened And Standardized**

At present there is a crazy quilt of anti-gaming provisions which differ substantially from one region or market to another if they exist at all. Thus, FERC's proposal to standardized definitions of unacceptable behavior in MBR authorization is welcome by consumers and urgently needed. We review below the varying provisions in RTO tariffs prohibiting gaming.

**CAISO.** "Gaming" is defined at Section 2.1.3 of the CAISO's Market Monitoring Information Protocol (MMIP) as "taking unfair advantage of the rules" -- a rather vague definition:

[T]aking unfair advantage of the rules and procedures set forth in the [Cal] PX or [Cal] ISO Tariffs, Protocols or Activity Rules, or of transmission constraints in periods in which exist substantial Congestion, to the detriment of the efficiency of, and of consumers in, the [Cal] ISO Markets. "Gaming" may also include taking undue advantage of other conditions that may affect the availability of transmission and generation capacity, such as loop flow, facility outages, level of hydropower output or seasonal limits on energy imports from out-of-state, or actions or behaviors that may otherwise render the system and the ISO Markets vulnerable to price manipulation to the detriment of their efficiency.

"Anomalous market behavior" is defined at Section 2.1.1 of the CAISO's MMIP to prohibit "unusual trades" and "excessive pricing and bidding patterns:"

"Anomalous market behavior" . . . is . . . behavior that departs significantly from the normal behavior in competitive markets that do not require continuing regulation or as behavior leading to unusual or unexplained market outcomes. Evidence of such behavior may be derived from a number of circumstances, including:

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unusual trades or transactions;

pricing and bidding patterns that are inconsistent with prevailing supply and demand conditions, e.g., prices and bids that appear consistently excessive for or otherwise inconsistent with such conditions; and

unusual activity or circumstances relating to imports from or exports to other markets or exchanges.

**PJM.** The PJM market monitoring plan provisions are vague and insufficient. The Market Monitoring Unit is responsible for monitoring the following:

- A. Compliance with the rules, standards, procedures, and practices of the PJM Market set forth in the PJM Tariff, the PJM Operating Agreement, the PJM Reliability Assurance Agreement, the PJM Manuals, and the PJM Regional Practices Document.
- B. Actual or potential design flaws in the PJM Market operating rules, standards, procedures, and practices set forth in the PJM Tariff, the PJM Operating Agreement, the PJM Reliability Assurance Agreement, the PJM Manuals, and the PJM Regional Practices Document and structural problems in the PJM Market that may inhibit a robust and competitive market.
- C. The potential of any Market Participant(s) to exercise undue market power.<sup>2</sup>

**ISO-NE.** Under ISO-NE Rules,<sup>3</sup> “sanctionable behavior” includes failure to provide energy; failure to provide services; failure to respond to dispatch instructions; understatement of high operating limits; misrepresentation regarding operating conditions; misrepresentation of resource availability; failure to follow ISO instructions; failure to provide information; and failure to comply with market mitigation rules.<sup>4</sup>

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<sup>2</sup> PJM Interconnection, LLC, FERC Electric Tariff, Attachment M, Substitute Original Sheet No. 272, Section IV, “Monitored Activities.”

<sup>3</sup> NEPOOL Market Rules & Procedures, § 13 – Imposition of Sanctions by the ISO.

<sup>4</sup> Id. at § 13.4, defining “sanctionable behavior” as a violation of §§ 13.4.1.1 – 13.4.1.3, 13.4.2.1 – 13.4.2.3, 13.4.3.1 – 13.4.4.5 and 13.4.5.

**MISO.** The Midwest ISO Tariff <sup>5</sup> identifies “Conduct that May Warrant Mitigation.”

While this definition specifically addresses economic and physical withholding and authorizes the expansion of the definition to include other forms of conduct identified by the Independent Market Monitor (IMM) in the future, the provision fails to address abusive trading strategies through an anti-gaming or anti-manipulation provision.<sup>6</sup> Under the § 2.4(b) of the MISO tariff, a Temporary Mitigation Measure may also be imposed to mitigate the market effects of a rule or design feature of a Midwest Electric Market that allows a Market Participant to manipulate market prices. Under § 2.4(d), the IMM is required to monitor Midwest Electric Markets for other categories of conduct that substantially distort competitive outcomes in a Midwest Electric Market. The IMM may seek to amend the list of prohibited conduct to include any conduct that

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<sup>5</sup> MISO FERC Electric Tariff, Original Sheet 619H – 619J (effective Dec. 1, 2003). FERC issued an order accepting MISO’s market mitigation measures on March 13, 2003, subject to modifications and a technical conference. Midwest Independent Transmission System Operator, Inc., 102 FERC ¶ 61,280 (2003).

<sup>6</sup> 2.4 Categories of Conduct that May Warrant Mitigation

a) The following categories of conduct, whether by a single firm or by multiple firms, may warrant mitigation:

- (1) *Physical withholding of an Electric Facility*, that is, not offering to sell or schedule the output of or services provided by an Electric Facility capable of serving a Midwest Electric Market. Such withholding may include, but not be limited to, (i) falsely declaring that an Electric Facility has been derated, forced out of service or otherwise become unavailable, (ii) refusing to offer bids or schedules for an Electric Facility, (iii) operating a generating unit in real time to produce an output level that is less than the MISO’s dispatch instruction, or (iv) operating a transmission facility in a manner that is not economic, is inconsistent with Good Utility Practice and causes a transmission constraint.
- (2) *Economic withholding of an Electric Facility*, that is submitting bids for an Electric Facility that are unjustifiably high so that (i) the Electric Facility is not or will not be dispatched or scheduled, or (ii) the bids will set an artificially high market clearing price.
- (3) *Uneconomic production from an Electric Facility*, that is, increasing the output of an Electric Facility to levels that would otherwise be uneconomic in order to cause or contribute to a binding transmission constraint.
- (4) *Uneconomic load bidding or virtual bidding*, that is, bidding in the day-ahead market that is not economically justified based on risk management or other economic considerations, and that causes or contributes to substantial divergence between day-ahead and real-time prices.

would substantially distort or impair the competitiveness of any of the Midwest Electric Markets administered by the MISO.

**NYISO.** The NYISO Tariff has provisions nearly identical to the provisions in the Midwest ISO Tariff,<sup>7</sup> and similarly lacks language that directly addresses abusive gaming trading strategies separate from physical or economic withholding. The NYISO Market Monitoring Plan, adopted in 1999, states that the Market Monitoring Unit will scrutinize “[a]ny evidence of or other information relating to collusive or other anticompetitive or inefficient behavior in or affecting any of the New York Electric Markets.”<sup>8</sup>

The above description of vague and conflicting RTO anti-gaming rules shows that even where MMIPs are in effect, there is no uniformity as to the prohibitions. In many regions of the country there are simply no behavioral rules in effect. Thus, FERC’s prospective revision to MBR tariffs to impose consistent standardized behavioral rules is urgently needed.

At the same time that FERC implements needed changes, FERC should clarify that its market manipulation rules are not meant to override ISO-specific market monitoring rules, such as the NYISO Automated Mitigation Procedure (AMP). FERC should clarify that baseline ISO market monitoring rules are not affected by the adoption of revised terms for market-based rate authorizations.

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<sup>7</sup> NYISO FERC Electric Tariff, Second Revised Sheet No. 467-68, §§ 2.3, 2.4 (effective June 15, 2001).

<sup>8</sup> NYISO Market Monitoring Plan, § 5.1.2(2) (July 26, 1999).

**B. FERC Has A Statutory Duty To Adopt And Enforce Tariff Conditions To Address Anticompetitive Practices And Exercise Of Market Power As A Condition To Market-Based Rate Authority**

Section 206 requires that the Commission take corrective action when it finds that “any rate...or practice” is unjust and unreasonable. FERC recognized in its November 20, 2001 Order in Docket No. EL01-118 that there is current evidence of physical and economic withholding and other evidence of exercise of market power and that it has a statutory obligation to ensure that rates are just and reasonable, thus necessitating the addition of a refund obligation to FERC market-based rate tariffs. The Gelinas Report further documents the findings of FERC Staff with respect to abuses by manipulation of the Western Markets in 2000-2001.

Section 205 of the FPA provides: “All rates and charges made, demanded, or received by any public utility for or in connection with the . . . sale of electric energy subject to the jurisdiction of the Commission and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.” 16 U.S.C. Section 824d(a). The overriding purpose of prohibiting unjust and unreasonable rates and charges is “to protect consumers from exorbitant prices and unfair business practices. This purpose can be seen in the statutory requirement that rates be just, reasonable and nondiscriminatory.” Public Systems v. FERC, 606 F.2d 973, 979, n.27 (D.C. Cir. 1979). “[T]he prevailing price in the marketplace cannot be the final measure of ‘just and reasonable’ rates mandated by the Act.” FPC v. Texaco, Inc., 417 U.S. 380, 397 (1974).

Courts have stated that to be “just and reasonable” rates must fall within a “zone of reasonableness” where they are neither “less than compensatory” to producers nor “excessive” to consumers. When the inquiry is on whether the rate is reasonable to a producer, the underlying

focus of concern is on the question of whether it is high enough to both maintain the producer's credit and attract capital. When the inquiry is whether a given rate is just and reasonable to the consumer, the underlying concern is whether it is low enough so that exploitation by the regulated business is prevented. Farmers Union Central Exchange v. FERC, 734 F.2d 1486, 1502 (D.C. Cir. 1984), citing City of Chicago v. FPC, 458 F.2d 731, 750-51 (D.C. Cir. 1971, cert. den. 405 U.S. 1074 (1974)).

While FERC has discretion in ratemaking methods, the burden is on the Commission to justify departures from cost-based rates. See City of Chicago, supra, 458 F.2d at 749 (a heavy burden is imposed on the Commission to justify departures from cost-based ratemaking). Rates must fall within a “zone of reasonableness” which is “bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates.”<sup>9</sup>

“[W]hen there is a competitive market the FERC may rely upon market-based prices . . . to assure a ‘just and reasonable’ result.” Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 870-71 (D.C. Cir. 1993). “In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment.” Tejas Power Corp. v. FERC, 908 F.2d 998, 1004 (D.C. Cir. 1990).

FERC has the flexibility to allow market-based rates if it is assured that the result is just and reasonable rates, e.g., because market power does not exist or had been mitigated. In Farmers Union, 734 F.2d 1502, the court rejected the Commission's reliance on a cost-based cap for oil transportation rates, because the cap was set at a level designed merely to prevent

“egregious exploitation and gross abuse” rather than to ensure a just and reasonable rate. Although premised on an assumption that competition would keep prices in the “zone of reasonableness,” the Commission made no findings that competition for oil transportation services was in fact sufficient to do so. The Commission did not look at market share or otherwise assess the number of competitors available to provide transportation service.

Similarly, in Tejas Power, the court rejected a gas inventory charge (“GIC”) that deviated from the cost-based model then in place for natural gas pipeline regulation. The court held that the Commission had erred in accepting the rate as part of a larger settlement package, having made no prior finding that the pipeline lacked significant market power vis-a-vis the customers.” 908 F.2d 1503.

FERC may implement a market-based rate regime only if it has made the appropriate analysis and findings. In Elizabethtown Gas Co. v. FERC, the D.C. Circuit upheld a market-based rate for the sale of natural gas because it found the market was competitive:

[W]e have indicated that when there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a “just and reasonable” result. *See Tejas Power*[], 908 F.2d [at] 1004 [] (“in a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment”). *See also Farmers Union* [], 734 F.2d [at] 1510 [].

Here the Commission specifically found that “Transco’s markets are sufficiently competitive to preclude it from exercising significant market power in its merchant function . . . .”

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<sup>9</sup> Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1177 (D.C. Cir. 1987).

In Louisiana Energy and Power Authority v. FERC, 141 F.3d 364 (D.C. Cir. 1998), the court rejected arguments by a municipal utility claiming that the grant of market-based rate authority to its competitor would allow the competitor to engage in predatory pricing. In so doing, the court relied on the Commission's prediction that its new open access transmission policies would prevent such an outcome and that competition and consumer welfare would be enhanced if the competitor were authorized to sell at market-based rates. 141 F.3d 370. "[S]hould the Commission's sanguine predictions about market conduct prove incorrect, LEPA can file a new complaint for any abuses of market power that do occur."

When the Commission authorizes market-based rates, it is under a continuing duty to ensure that the relevant market remains sufficiently competitive to prevent unjust and unreasonable prices. Process Gas Consumers v. FERC, 177 F.3d 995 (D.C. Cir. 1999) ("FERC must remain attuned to the status of the affected market vis-a-vis monopoly and competition.") Where markets are not sufficiently competitive to keep prices at reasonable levels, a court is likely to conclude that market-based rates are unlawful.

Industrial Consumers endorse the conclusions of FERC at ¶ 21 of the June 26, 2003 Order that, by adopting these conditions, FERC is fulfilling its statutory obligation to prohibit conduct that adversely effects competitive market outcomes. Thus the conditions proposed by FERC are necessary and appropriate to assure that pricing outcomes in a MBR regime are just and reasonable.

### C. Ambiguous Tariff Provisions Invite Litigation

Vague provisions that define the legality of manipulative trading practices are undesirable in any market. First, vague provisions are likely to create uncertainty among market

participants as to what behavior is proscribed and thus are less likely to prevent abuse before the fact. Second, ambiguity is likely to cause hesitation and delay prompt action by FERC-sanctioned Market Monitoring Units (MMUs) after the fact as they struggle to determine whether a violation has occurred. Third, vague provisions engender protracted legal proceedings and increase vulnerability on judicial review. Fourth, continued uncertainty at a time when the need for marketing reforms are under challenge in the political arena is counter productive.

The problems engendered by confusion over the parameters of acceptable trading behavior are illustrated by the still unfolding saga of application of CASO MMIP to the west coast markets. In the Gelinas Report issued on March 26, 2003, FERC Staff took the position that all of the so-called Enron trading strategies were proscribed by CAISO anti-gaming prohibitions. The Commission on April 2, 2003 invited comment as to whether these provisions gave the Commission adequate legal authority to proceed. Several California suppliers filed comments on April 11, 2003 disputing that the CAISO MMIP anti-gaming provisions were sufficiently specific to give notice to sellers that the so-called Enron trading strategies were prohibited. The sellers commented that a “market monitoring and information protocol” is designed to set a protocol for CAISO’s own administration of its monitoring function and do not necessarily establish standards for participants. These suppliers challenged FERC Staff’s reliance on the MMIP, citing case law that requiring that regulatory standards as a condition of enforceability should apprise regulated entities of the standards they are expected to follow with ascertainable certainty at least where there are penal sanctions. *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1987). Market participants are entitled to “fair warning” of the conduct that a regulation “prohibits or requires.” *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5<sup>th</sup> Cir. 1976).

FERC issued a show cause order on June 25, 2003 (Docket EL 03-137-000) finding that CAISO's MMIP provided a basis for FERC to initiate enforcement action with respect to certain types of "Enron trading" practices but that other types of trading practices did not warrant disgorgement of profits (e.g., underscheduling load, overscheduling load), or did not constitute gaming (e.g., export of power, arbitraging of ancillary services).<sup>10</sup> Industrial Consumers take no position with respect to the legality of retroactive application of CAISO MMIP to specific sellers or specific practices, but it is clear that the lack of clarity as to practices that are proscribed engenders uncertainty and imposes on the Commission and private parties potential for extensive costly litigation. Both customers and further development of market reforms suffer from this uncertainty.

By adopting the changes to tariff conditions on a prospective basis, FERC will avoid the plethora of litigation challenges that inevitably follow administrative attempts to close loopholes through retroactive enforcement proceedings. As FERC correctly notes, the proposed behavioral standards will become part of the "filed rates" of sellers seeking MBR based authorization -- thus enforceable consistent with the Filed Rate Doctrine.

**D. Prior Energy Price Control Regulations Have Included Anti-Gaming Provisions**

By analogy, petroleum price control regulations from the 1970s included "anti-sham" regulations to prohibit circumvention of price controls. These regulations were the basis on which federal energy authorities enforced "daisy chain" crude oil resale abuses.

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<sup>10</sup> Order To Show Cause Concerning Gaming And/Or Other Anomalous Behavior, 103 FERC ¶ 61,345.

Under the Department of Energy Oil Price Regulations, crude oil resellers were prohibited from engaging in any practice that circumvented or contravened or resulted in the circumvention of the agency's regulations. 10 C.F.R. § 205.202 provided that:

Any practice that circumvents or contravenes or results in a circumvention or contravention of the requirements of any provision of this chapter or any order issued pursuant thereto is a violation of the DOE regulations stated in this chapter.

A reseller was also prohibited from employing any practice that constituted a means to obtain a price higher than that permitted by the regulations. 10 C.F.R. § 210.62(c). United States v. Sutton, 795 F.2d 1040, 1052 (Temp. Emer. Ct. App. 1986).

### **CONCLUSION**

For the foregoing reasons, Industrial Consumers support FERC's proposed revision to market-based rate authorization. Such provisions are needed to avoid the potential for abuse. FERC has both the legal authority and the statutory duty to prospectively implement changes to tariff conditions.

### **DESCRIPTION OF INDUSTRIAL CONSUMERS**

The Electricity Consumers Resource Council (ELCON) is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable and efficient electricity supply for all users at competitive rates. ELCON member companies produce a wide range of products, including: steel, aluminum, chemicals, petroleum, motor vehicles, industrial gases, machinery, glass, agricultural and food products, rubber, computer chips, paper and electronics. The

member companies of ELCON consume approximately five percent of all electricity in the United States.

The American Iron and Steel Institute (AISI) is the principal trade association of the North American steel industry. Its member companies account for about seventy percent of the raw steel production in the United States. The steel industry is one of the most energy-intensive sectors in the United States; the cost of electricity for AISI members may constitute as much as twenty percent of the manufacturing cost of a steel mill product.

The American Chemistry Council (ACC) is a nonprofit trade association whose member companies represent more than ninety percent of the productive capacity of basic industrial chemicals in the United States. The manufacturing processes of many ACC member companies are highly energy-intensive. In addition, the chemical industry used a substantial amount of self-generated electricity. Total electricity used by the industry, purchased plus self-generated, represented approximately eighteen percent of industrial electricity consumption in the U.S. and approximately six percent of national electricity consumption.

The American Forest and Paper Association (AF&PA) is the national trade association of the forest, paper and wood products industry. AF&PA, represents member companies engaged in growing, harvesting and processing wood and wood fiber, manufacturing pulp, paper and paperboard products from both virgin and recycled fiber, and producing engineered and traditional wood products. AF&PA members include manufacturers of over 80 percent of the paper, wood and forest products produced in the United States.

Association of Businesses Advocating Tariff Equity (ABATE), formed in 1981, represents the interests of large volume energy users in Michigan. ABATE intervenes in Michigan Public Service Commission proceedings to bring utility rates closer to the cost of

service, to permit customers to choose their energy suppliers, and to ensure a reliable, competitively priced energy supply for the state. Where appropriate, ABATE examines the overall revenue requirements as well as the tariffs and conditions of service of Michigan's utilities. ABATE also represents members before the Federal Energy Regulatory Commission.

The California Large Energy Consumers Association (CLECA) is a regular participant in electric rate proceedings before the California Public Utilities Commission.

The Connecticut Industrial Energy Consumers (CIEC) is an ad hoc coalition of energy-intensive industrial consumers of electricity, natural gas and water/wastewater that have facilities located in the State of Connecticut. CIEC is active before the Connecticut Department of Public Utility Control in most utility matters, including rate cases and electric restructuring proceedings. CIEC also actively participates in legislative development of energy and regulatory issues.

The Industrial Energy Consumers of Pennsylvania (IECPA) was formed to address generic energy issues before appropriate governmental bodies and other organizations in the Commonwealth of Pennsylvania.

The Southeast Electricity Consumers Association (SeECA) is a nonprofit trade association formed to facilitate the participation of large commercial and industrial users of electricity in proceedings of regional transmission organizations (RTOs), including, but not limited to, the SeTrans Regional Transmission Organizations (RTO) in the Southeastern United States.

The PJM Industrial Customers Coalition (PJMICC) is a group comprised of 37 of the largest commercial and industrial customers within PJM, including eight members who are PJM

members, to represent industrial users in the promotion of a fair, efficient and competitive marketplace with benefits accruing to all market participants.

Multiple Intervenors (MI) is an unincorporated association of 55 of New York State's largest energy users. Multiple Intervenors represents the interests of its members in proceedings at the New York State Public Service Commission, the Federal Energy Regulatory Commission and in court proceedings. Five members of Multiple Intervenors are members of the New York Independent System Operator and, through those members, Multiple Intervenors participate on the governing committees of the NYISO.

### **NOTICES AND COMMUNICATIONS**

Notices and communications should be addressed to:

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Respectfully submitted,

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Dated: August 7, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Comments of ELCON, AISI, ACC, AF&PA, ABATE, CLECA, CIEC, IECPA, SeECA, PJMICC and MI in Dockets EL01-118 et al., were today mailed to parties on the service list of this proceeding by U.S. mail, postage prepaid.

Dated at Washington, D.C., this 7<sup>th</sup> day of August 2003.

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