ORAL ARGUMENT IS NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1168
(Consolidated with Nos. 04-1170, 04-1188, 04-1235, 04-1237, 04-1238)

CINERGY MARKETING & TRADING, LP, *et al.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

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GLOSSARY

CA Petitioners	Petitioners California State Parties and Consumer Advocates
Electric Rehearing Order	*Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization*, 107 FERC ¶ 61,178 (2004)
Electric Rules Order	*Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization*, 105 FERC ¶ 61,218 (2003)
FPA	Federal Power Act, 16 U.S.C. § 824 *et seq.*
Gas Rehearing Order	*In the Matter of Amendments to Sales Certificates*, 107 FERC ¶ 61,174 (2004)
MBR regime	Market-based rate regime
MP Parties	Market Participant Petitioners
NGA	Natural Gas Act, 15 U.S.C. § 717, *et seq.*
NGPA	Natural Gas Policy Act, Pub. L. 95-621 (Nov. 8, 1978), 92 Stat. 3350, *codified at* 15 U.S.C.§ 3301 *et seq.*
Order No. 644	*Amendments to Blanket Sales Certificates*, FERC Stats. * Regs. ¶ 31,153 (2003)
Proposed Rules Order	*Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization*, 103 FERC ¶ 61,349 (2003)
Western	Petitioner Western Resources, Inc.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1168
(Consolidated with Nos. 04-1170, 04-1188, 04-1235, 04-1237, 04-1238)

CINERGY MARKETING & TRADING, LP, *et al.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") properly found that, to be just and reasonable, market-based rate tariffs of public utilities and natural gas companies subject to FERC jurisdiction under the Federal Power Act ("FPA"), 16 U.S.C. § 824 *et seq.*, and the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.*, respectively, must include, among other things, a provision that prohibits any type of market manipulation.

2. Whether the Commission properly determined that certain natural gas sales do not meet the definition of "first sales" within the meaning of the Natural Gas Policy Act of 1978 ("NGPA"), Pub. L. 95-621 (Nov. 8, 1978), 92 Stat. 3350, *codified at* 15 U.S.C. § 3301 *et seq.*, and thus fall within the scope of FERC's NGA jurisdiction.

3. Whether the Commission adopted appropriate remedies and procedures to resolve alleged violations of the market behavior rules.

4. Whether FERC's market-based rate regime satisfies the Commission's statutory consumer protection responsibilities.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Pertinent sections of the NGA, the NGPA, and the FPA, and the regulations thereunder, are set out in an addendum to this Brief. In addition, Appendix A includes the Market Behavior Rules and the Remedy and Complaint Procedures at issue.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

This case resulted from Commission concern that existing tariffs and blanket certificates allowing for market-based rates did not sufficiently assure the consumer protection that is at the heart of FERC's responsibilities under the FPA and the NGA. In response to that concern, the Commission in late 2001 "proposed to condition all new and existing market-based rate tariffs and authorizations to include a provision

prohibiting the seller from engaging in anticompetitive behavior or the exercise of market power." *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 103 FERC ¶ 61,349 at P 1 (2003)("Proposed Rules Order").

The instant proceeding, commenced under FPA § 206, *id.* at P 10, JA , proposed tariff provisions designed to protect against problems encountered as part of the implementation of organized energy markets around the country, particularly those encountered in the California energy markets during 2000-01. *Id.* at P 4, JA . Paper hearing procedures were established with comments and reply comments; in addition, FERC Staff held a technical conference in March 2001 to address the proposed tariff provisions that was followed by more comments. *Id.* at P 12, JA .

The Proposed Rules Order put forward a set of market behavior rules for inclusion with all market-based rate tariffs and authorizations, *see generally id.* at pp. 62,375-78 and 62,380-81, JA and , and invited comments and reply comments. *Id.* p. 62,380 at P (D). On November 17, 2003, the Commission established market behavior rules: on the electric side, the rules were set out in *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003)("Electric Rules Order"), JA ; and, on the natural gas side, comparable regulations were set in *Amendments to Blanket Sales Certificates*, FERC Stats.& Regs. ¶ 31,153 (2003)("Order No. 644"), JA . Both orders set out, *inter alia*, a general

prohibition against market manipulation. *See* Order No. 644 at P 27, JA (setting out proposed 18 C.F.R. §284.288(a)) *and* Electric Rules Order at P 35, JA (setting out Rule 2).

Parties sought rehearing of both orders, which were generally denied, albeit with modifications to Rule 2's language. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 107 FERC ¶ 61,175 (2004) ("Electric Rehearing Order")JA , and *In the Matter of Amendment Sales Certificates*, 107 FERC ¶ 61,174 (2004)("Gas Rehearing Order"), JA .

The petitions for review followed.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

FERC has been delegated authority to set just and reasonable rates for the wholesale sale of: (1) electric energy by FPA §§ 205 and 206, 16 U.S.C. §§ 824d and 824e, and (2) natural gas by NGA §§ 4, 5, and 7, 15 U.S.C. §§ 717c, 717d, and 717f. The underlying proceeding arose from FERC's concern that the then-existing language of the tariffs and blanket certificates authorizing sellers to employ market-based rate pricing was inadequate to assure the level of customer protection required by the FPA and the NGA. Proposed Rules Order at P 1, JA . To remedy those concerns, the

Commission instituted proceedings under FPA § 206 and NGA § 5 to promulgate market behavior rules applicable to all sellers with market-based rate authority.

The primary goal of customer protection had to be balanced against the need for notice and a fact-specific resolution process in the promulgation of the rules:

> first, the need to provide for effective remedies on behalf of customers in the event anticompetitive behavior or other market abuses occur; second, the need to provide clearly-delineated 'rules of the road' to market-based rate sellers while, at the same time, not impairing the Commission's ability to provide remedies for market abuses whose precise form and nature cannot be envisioned today; and third, the need to provide reasonable bounds within which conditions on market conduct will be implemented so as not to create unlimited regulatory uncertainty for individual market participants or harm to the marketplace in general.

Electric Rules Order at P 4, JA .

B. Events Leading To And the Orders On Review

A paper hearing was conducted as part of the rules' promulgation, with parties having an opportunity to file comments, reply comments, and to participate in a technical conference that led to another round of comments. *See* Electric Rules Order, Appendix C, JA and Order No. 644, Appendix A, JA (both listing parties that filed comments). The comments "generally concurred that establishing a clear set of market behavior standards governing sellers' conduct in the wholesale markets is necessary." Electric Rules Order at P 8, JA . Nonetheless, parties took issue with different aspects of the proposed rules.

1. Market Behavior Rule 2

Rule 2 prohibits manipulative conduct, and was envisioned "to capture manipulative conduct in all its forms. . . [and] to prohibit market-based rate sellers from taking actions which interfere with the prices that would otherwise be set by competitive forces, or from manipulating market conditions or market rules." *Id.* at P 36, JA (footnote omitted). Comments questioned inclusion of "legitimate business purpose" as a part of Rule 2, but its inclusion would allow "sellers acting in a pro-competitive manner [to] have the opportunity to show that their actions were not designed to distort prices or otherwise manipulate the market." *Id.* at P 37, JA ; *see id.* at P 44, JA (same); *see also* Order No. 644 at P 35, JA (stating term is "intended to give sellers some latitude in determining their business actions, while safeguarding market participants against market manipulation for which there can be no legitimate business purpose").

Responding to comments questioning the need for Rule 2 given other tools available to protect energy markets, the Commission found it "reflects the reality that [FERC] oversee[s:] a dynamic and evolving market where addressing yesterday's concerns may not address tomorrow's." *Id.* at P 39, JA . Rule 2 along with the other

Rules[1] serve a dual purpose: a step "to assure just and reasonable rates for a specific transaction" as well as a means of "providing guidance to sellers in general." *Id.* Reconciling those purposes for violations would occur during the remedy analysis where FERC "will take into account factors such as how self evident the violation is and whether such violation is part of a pattern of manipulative conduct." *Id.*

When a violation of Rule 2 is alleged, the threshold question would be whether "the facts presented appear to warrant further inquiry into whether the transaction appears to be of a questionable purpose," such as "whether the action was designed to lead to (or could foreseeably lead to) a distorted price not reflective of a competitive market." *Id.* at P 42, JA . Such "case-by-case" analysis would seek to determine "when, and if, a strategy employed by a seller lacks a legitimate business purpose." *Id.* at P 44, JA . When a Rules violation is alleged as grounds to abrogate a contract, another element of the required showing is "to demonstrate that such a violation had a direct nexus to contract formation and tainted contract formation itself." *Id.* at P 45.

Petitioners and others sought rehearing on grounds that Rule 2 was vague and overbroad, was too narrow, and should not require a direct nexus showing for contract

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1 Notwithstanding that as presented (*see* Appendix A hereto) Rule 2 encompasses several subsections, each subsection is treated as a separate Rule. *See, e.g.,* Electric Rules Order at PP 46-58, JA (discussing Market Rule 2(a) –wash trades).

abrogation. Electric Rehearing Order at P 30-36, JA . The Commission denied the rehearing requests.

Inclusion of "legitimate business purpose" answered criticism that Rule 2 was vague and overbroad by placing sellers on notice that their "actions and transactions" must have "intended or desired result that is consistent with the seller's authorized business activities." *Id.* at P 37, JA . Because in the "vast majority of cases," a seller's conduct "will track or be related to established industry practices, as previously authorized of permitted by the Commission," a seller will know, prior to taking action, whether the action or transaction will be for a legitimate business purpose. *Id.* at P 38, JA . The Rule is "further narrowed in its reach to exclude acts explicitly contemplated by Commission-approved rules and regulations in the applicable power market or acts taken at the direction of an ISO or RTO." *Id.* at P 39, JA . Finally, the provision offers sellers a mean "to defend its conduct" in any such hearing. *Id.* at P 38, JA ; *see id.* at P 43, JA (indicating "careful consideration of the facts and circumstances").

2. Remedy and Complaint Procedures

On the other side, the Commission declined to provide "greater specificity" to the meaning of legitimate business purpose because responding to "various hypothetical applications" of the standard could "invite the creation of loopholes which could be used by sellers for the purpose of avoiding [Rule 2]." *Id.* at P 40-41. The

Commission also declined to eliminate a showing that the "intended or foreseeable result is manipulation of market prices, market conditions or market rules" as a necessary element to prove a Rules violation. *Id.* at P 42, JA . "[R]ecognizing that intent must often be inferred," a seller's conduct would be closely examined in the specific circumstances. *Id.* at P 43.

Rehearing was also directed against the complaint procedures. *See* Electric Rehearing Order at PP 136-45, JA (summarizing rehearing requests). Questions were raised about the 90-day limitations period for filing a complaint, Electric Rules Order, Appendix B, JA , both as to its length and to its exceptions procedures. The Commission found that the limitations period balanced the "need for rate certainty" with "the fact that many market abuses are not immediately apparent." *Id.* at 147, JA . While, in general, a 90-day period applies, an action may be brought after the period expires upon "an adequate showing to convince the Commission that [the complainant] could not know of the alleged violation" during the limitations period. Electric Rehearing Order at P 148, JA . That allows a "reasonable person exercising due diligence . . . sufficient time to discover wrongful conduct and submit a claim." *Id.*

The limitations period for the Commission itself is "within 90 days from the date it knew of an alleged violation . . . or knew of the potentially manipulative character of an action or transaction." *Id.* at P 149. To make it easier to report violations, no

"specific procedural forum [was] established for enforcement of these rules." *Id.* at P 150. Complaints received via FERC's enforcement Hotline could initiate an investigation. *Id.* The complainant will bear the burden of "regarding the facts asserted," *id.*, but would not face any special summary judgment or burden of proof determinations when filing a complaint. *Id.* at P 152, JA . Rather, FERC's "existing rules of practice and procedure" will apply. *Id.*

The proposed disgorgement remedy, Electric Rules Order, Appendix B at P (4), JA , was also challenged on rehearing as exceeding FERC's statutory authority "by setting forth overly-broad and unduly vague tariff conditions that, when and if applied in a future case, against a particular seller, will impose on that seller the functional equivalent of a retroactive refund liability." Electric Rehearing Order at P 154, JA . The Commission disagreed, finding that the Rules "will operate as a set of conditions, on a going-forward basis, to sellers' grant of market-based rate authority." *Id.* aat P 158, JA . Inclusion of the Rules as part of market-based rate tariffs was justified by the FPA § 206 finding that "sellers' currently effective tariffs are unjust and unreasonable, or may lead to unjust and unreasonable rates without the inclusion of [the] proposed Market Behavior Rules." *Id.* at P 159, JA ; *see id.* at P 161, JA (when Rules violation alleged, "the issue would be whether the seller at issue has violated its tariff").

Other parties argued that the orders "failed to adequately explain the basis for [the] determination that a disgorgement remedy in lieu of any other monetary remedies should be regarded as appropriate," and that a disgorgement remedy "unlawfully conflicts with the FPA. . . [and] the Commission's general policy of providing refunds." *Id.* at P 126, JA . But disgorgement is not the sole remedy; its use does "not foreclose [FERC's] reliance on existing procedures or other remedial tools, as may be necessary, including generic rule changes or the approval of new market rules applicable to specific markets." *Id.* at P 129, JA ; *see id.* at P 131 (noting another remedy is "possible revocation of Sellers' market-based rate authority"); *see also* P 129 n. 46 (noting FERC's strong endorsement of legislation "that would provide the Commission with additional civil penalty authority").

Parties requested rehearing of the due diligence defense applied to Market Rule 2(b), *see* Electric Rules Order, Appendix A, JA (setting out rule), on grounds that it should not override a seller's liability for its employees' conduct. Electric Rehearing Order at P 57, JA . Due diligence evidence "may be directly relevant to the issue of intent," specifically, where procedures are in place to assure "the sufficiency and accuracy of the information submitted by the seller," as required by Rule 2(b), such evidence may show "in a given case that the false submission at issue was in the nature of an inadvertent or honest error." *Id.* at P 68, JA . Nonetheless, "the state of mind of

the seller's employees may be permitted to be considered in adjudicating the seller's liability." *Id.* at P 69, JA .

3. Market Behavior Rules 1 and 2(c)

Rehearing of Market Rule 1, related to generating unit operation, was sought on the basis that the absence of "an affirmative real-time must-offer obligation," Electric Rehearing Order at P 18, JA , could allow "physical withholding and other market power abuses [to] go unchecked." *Id.* at P 19. The Commission declined to use Market Rule 1 to "impose a new stand-alone requirement" in the form of "a substantive must-offer requirement," *id.* at P 27, JA , because that would "conflict with or defeat the objectives of existing Commission-approved rules or regulations in a specific market" where "standardized rules and procedures," have been adjusted to "recognize[] the validity of regional variations with respect to certain rules and procedures." *Id* at P 24, JA . Market Rule 1 was designed to enhance, not to replace, those rules. *Id.* Thus, while Market Rule 1 does not create a stand-alone must-offer obligation, a seller in a region with a must-offer obligation must satisfy that obligation. *Id.* at P 27, JA .

Rehearing requests regarding Market Rule 2(c), which prohibits the introduction of artificial congestion, Electric Rules Order, Appendix A, JA , sought to expand the Rule's scope to include any type of congestion. The Commission stated, however, that the rule "is designed to prohibit a specific form of market manipulation" based on

Enron trading strategies that had a "harmful and significant" adverse effect on the Western markets. Electric Rehearing Order at P 78, JA . The Rule's "relatively limited" scope adequately supplements in-place market structures designed to reduce congestion and its possible adverse effects by "serv[ing] as an important illustrative example of the type of market abuse" that is prohibited. *Id.* at P 79, JA .

Rule 2(c)'s limited scope was clarified to encompass "any form of congestion that may result from scheduling power flows in an uneconomic manner for the purpose of creating real or perceived congestion," as scheduling in an uneconomic manner could not have a legitimate business purpose *Id.* at P 81, JA . But the Commission declined to expand the rule to cover any and all congestion on the basis that other market rules were better situated to deal with congestion tactics that lack a legitimate business purpose. *Id.* at P 80, JA .

The petitions for review followed.

SUMMARY OF ARGUMENT

FERC orders are reviewed under the arbitrary and capricious standard that looks to whether the Commission's decision was based on the relevant facts and represents reasoned decisionmaking.

Here, FERC promulgated a series of market behavior rules for inclusion in market-based rate tariffs and authorizations to protect customers against behavior that

could or does prevent or impede markets from working in a competitive manner. MP Parties argue Rule 2, which generally proscribes manipulative conduct, is impermissibly vague because it does not identify specific prohibited conduct. A valid proscription is marked, however, by flexibility and reasonable scope, not by rigid specificity. Here, the definition given to "legitimate business purpose," as any intended result consistent with a seller's authorized business activities, meets that standard, particularly given that sellers' business activities are largely subject to FERC-approved tariffs. Sellers thus have sufficient notice of what activities are authorized. Legitimate business purpose may also serve as a potential defense based on the particular factual circumstances and the evidence proffered. Petitioners' assertion that Rule 2 does not fully account for regional tariff differences can be evaluated on a case-by-case basis.

MP Parties similarly challenge the inclusion of manipulation in Rule 2 as vague and uninformative absent current identification of specific prohibited conduct. But the Supreme Court has not found such specificity necessary to decide whether conduct is manipulative, relying, instead, on the dictionary definition of "manipulation" as a guide, which provides sufficient notice of proscribed conduct.

MP Parties' contention that Rule 2 circumvents the statutory structure by allowing remedies for acts not previously identified as proscribed assumes that until specifically identified, a manipulation or act lacking a legitimate business purpose is

legally authorized. That assumption is invalid. Market-based rate authority is founded on markets working competitively. As (1) manipulation is designed to control or artificially affect price and (2) acts without a legitimate business purpose unnecessarily restrict competition, they are impediments to markets working competitively that may be remedied by disgorgement, consistent with Congress' intent that FERC step in to protect customers where energy markets are operating in an anti-competitive manner.

Rule 2 does not violate the filed rate doctrine. By requiring sellers to act consistently with authorized business activities in a highly regulated industry, the Rule places sellers on notice that their rates might change if they are based on actions that circumvent, or are intended to circumvent, authorized activities.

MP Parties are wrong that the procedures for bringing a Rules violation complaint improperly shifts the statutory burden. A complainant has the burden of going forward to demonstrate that the facts alleged support all elements of a *prima facie* case. If a complainant meets that burden, then the burden properly shifts to the seller to demonstrate a legitimate business purpose for its action.

MP Parties' reliance on an FTC policy statement as support for limiting disgorgement to prospective application for clear violations based on existing precedent is overstated. The FTC policy statement uses a sliding scale approach to

judge whether disgorgement of past profits is appropriate. The factors cited by the FTC as favoring disgorgement of past profits supports FERC's proposed remedy.

FERC's interpretation of the "first sale" under NGPA § 2(21) was challenged as exceeding the Commission's statutory authority. This Court lacks jurisdiction to consider much of the argument under NGA § 19(b). In any event, Petitioners fail to show that FERC's interpretation is irrational.

Turning to the CA Petitioners' claims, the disgorgement remedy does not violate the statutory plan because it fully protects customers. Refunds under the FPA will not necessarily yield greater amounts to customers than would disgorgement. Refunds allow a seller to retain normal return on investment (profit), but disgorgement requires a seller to return all its profits. FPA § 206 offers only prospective relief from the refund effective date, but disgorgement allows recovery of past profits.

CA Petitioners assert the 90-day limitations period for filing a complaint does not comply with the FPA. The cases on which they rely address, however, attempts to limit the extent of refunds. Policy considerations support the limitations period here. In addition, exceptions may be allowed where a complainant can show that it did not and reasonably could not know of the complaint within the limitations period. Such matters can and should be addressed in a specific factual context, not here.

CA Petitioners decry what they see as unnecessary roadblocks –seller intent, motive, due diligence, and direct nexus – to showing a Rules violation. They state those factors are not required to show rates are unjust and unreasonable under the FPA or NGA. Accepting that as true does not invalidate the use of those factors in evaluating whether a Rules violation occurred. The Commission did not limit what remedies could be employed to resolve a Rules violation; thus it may, in appropriate circumstances, require other remedies besides disgorgement. The direct nexus requirement applies only to FERC's threshold evaluation in contract abrogation, and does not preclude other avenues for seeking to abrogate a contract.

Rule 1 need not contain a universal must offer obligation to override RTO/ISO tariffs that do not include such an obligation. The Rule is intended to supplement, not to replace, the rules and regulations of the markets in which a seller does business. Rule 2(c) proscribes artificially-created congestion; it need not be expanded to prohibit the exercise of market power any time congestion occurs, as any exercise of market power is prohibited. Rule 2(c) is designed to go a step further by preventing sellers from seeking to create congestion artificially, as a means to exercise market power.

Some of the CA Petitioners challenge FERC's authority to adopt a market-based rate (MBR) regime. That issue has been addressed previously, and FERC's authority was upheld in *Lockyer*. Indeed, much of the argument seems to challenge the Ninth

Circuit's, not FERC's, reasoning. Here, the Commission was attempting to assure that all market-based rates remain just and reasonable by proscribing anticompetitive behavior. It was not reexamining its long-standing, court approved MBR regime.

Petitioners assert FERC cannot rely on indirect regulation for its MBR regime, but nothing in the NGA or FPA prevents reliance on indirect regulation to set just and reasonable rates. The instant orders are just one of many means implemented to assure that markets are competitive by proscribing conduct that could lead to anticompetitive conditions. Petitioners claim that the MBR regime has no theory by which FERC can prevent unduly discriminatory rates. The MBR regime protects against such discrimination in many ways, primarily through the use of industry-side, *pro forma* (open access) transmission tariffs, and FERC-established real-time energy markets operated by RTOs/ISOs.

The MBR regime is not the equivalent of the detariffing present in *Maislin* and *MCI*, both of which involved a complete lack of any filing requirement. FERC's MBR regime includes pre- and post-authorization filing requirements that help assure markets are competitive, and thus the resulting rates are just and reasonable.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the arbitrary and capricious standard set out in 5 U.S.C. § 706(2)(A). *Public Utils. Comm. v. FERC*, 254 F.3d 250, 253-54 (D.C.Cir. 2001). Under this standard, a "court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency." *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1083 (D.C.Cir. 2002), *cert. denied* 124 S.Ct. 48 (2003)(citations and internal quotation marks omitted). The Commission considered and reasonably responded to all concerns and objections raised by diverging parties in promulgating the Rules at issue.

RESPONSE TO MARKET PARTICIPANT PETITONERS' AND SUPPORTING INTERVENORS' BRIEFS

II. RULE 2 DOES NOT EXCEED FERC'S STATUTORY AUTHORITY

The Market Participant Petitioners and intervenors supporting Cinergy (jointly, "MP Parties") challenge Market Behavior Rule 2 ("Rule 2"), *see, e.g.,* Initial Order at P 35, JA (text of Rule), but do not seek review of any other Rule. *See* MPP Br. 15 and CI Br. at 1 (noting narrow issues raised for review). The MP Parties claim that Rule 2 is unlawfully vague, does not give adequate notice of what is proscribed, and cannot