

140 FERC ¶ 61,033
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Richard Silkman

Docket No. IN12-13-000

ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED PENALTY

(Issued July 17, 2012)

1. Pursuant to Rule 209(a)(2) of the Commission's Rules of Practice and Procedure,¹ the Commission's Revised Policy Statement on Enforcement,² and the Commission's Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties,³ the Commission directs the above-captioned individual to show cause why he should not be found to have violated section 1c.2 of the Commission's regulations and section 222 of the Federal Power Act (FPA).⁴ Dr. Richard Silkman (Silkman or Respondent), acting on behalf of his employer, Competitive Energy Services, LLC (CES), is alleged to have violated section 1c.2 by engaging in fraud in ISO New England, Inc.'s (ISO-NE) Day-Ahead Load Response Program (DALRP). The Commission further directs Respondent to show cause why he should not be assessed a civil penalty in the amount of \$1,250,000, or a modification of that amount consistent with section 31(d)(4) of the FPA.⁵ Pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure,⁶ the Commission directs Respondent to file an answer with the Commission within 30 days of the date of

¹ 18 C.F.R. § 385.209(a)(2) (2011).

² *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 35-36 (2008).

³ *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, at P 5 (2006).

⁴ 18 C.F.R. § 1c.2 (2011); 16 U.S.C. § 824v(a).

⁵ We note that under section 31(d)(4) of the FPA, 16 U.S.C. 823b(d)(4), the Commission may "compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed . . . at any time prior to a final decision by the court of appeals . . . or by the district court."

⁶ 18 C.F.R. § 385.213(a).

this order. Office of Enforcement Staff (OE staff) may reply to Respondent's answer within 30 days of the filing of the answer.

2. This case presents allegations by OE staff of violation of the Commission's Prohibition of Energy Market Manipulation. These allegations arose out of an investigation conducted by OE staff and are described in the Enforcement Staff Report and Recommendation submitted to the Commission on April 17, 2012 (OE Staff Report).⁷ The OE Staff Report alleges that Silkman, an employee of CES, conceived of a fraudulent scheme in connection with the DALRP participation of Rumford Paper Company (Rumford), a lumber mill in Rumford, Maine. Specifically, OE staff alleges that Silkman of CES advised Rumford to adopt, and, along with Rumford, implemented, a plan to inflate Rumford's load baseline and then repeatedly offer load reductions at the minimum offer price in order to freeze the inflated baseline, maximizing payments for phantom load reductions. The OE Staff Report alleges that, at Silkman's urging, Rumford curtailed generation during the baseline period, intentionally creating a misleading baseline. Further, OE staff alleges that Silkman of CES offered load response by Rumford on a daily basis, fraudulently communicating a willingness and ability to reduce load. The OE Staff Report alleges that Silkman understood that Rumford would not reduce load and, in fact, did not reduce load, contrary to its DALRP load reduction offers.

3. Based on the allegations contained in the OE Staff Report, the Commission orders Respondent to respond to this order as set forth above.⁸ This order also is the notice of proposed penalty required pursuant to section 31 of the FPA.⁹ In the answer to this order, Respondent has the option to choose between either (a) an administrative hearing before an ALJ at the Commission prior to the assessment of a penalty under section 31(d)(2), or (b) an immediate penalty assessment by the Commission under section 31(d)(3)(A). If Respondent elects an administrative hearing before an ALJ, the

⁷ The OE Staff Report is attached to this order as Appendix A. The OE Staff Report describes the background of OE staff's investigation, findings and analysis, and proposed sanctions.

⁸ Under 18 C.F.R. § 385.213(c), Respondent must file an answer that provides a clear and concise statement regarding any disputed factual issues and any law upon which he relies. Respondent must also, to the extent practicable, admit or deny, specifically and in detail, each material allegation contained in the OE Staff Report and set forth every defense relied upon. Failure to answer an order to show cause will be treated as a general denial and may be a basis for summary disposition under Rule 217. 18 C.F.R. § 385.213(e)(2).

⁹ 16 U.S.C. § 823b(d) (2006).

Commission will issue a hearing order; if Respondent elects an immediate penalty assessment, and if the Commission finds a violation, the Commission will issue an order assessing a penalty. If such penalty is not paid within 60 days of assessment, the Commission will commence an action in a United States district court for an order affirming the penalty, in which the district court may review the assessment of the civil penalty *de novo*.¹⁰

4. The Commission authorizes OE staff to disclose information obtained during the course of the investigation as necessary to advance this matter.

The Commission orders:

(A) Within 30 days of the date of this order, Respondent must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why he should not be found to have violated 18 C.F.R. § 1c.2 and 16 U.S.C. § 824v(a) with respect to CES's participation in ISO-NE's DALRP.

(B) Within 30 days of the date of this order, Respondent must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why his alleged violation should not warrant the assessment of civil penalties in the amount of \$1,250,000, or a modification of that amount consistent with section 31(d)(4) of the FPA.

(C) In any answer, Respondent should address any matter, legal, factual or procedural, that he would urge in the Commission's consideration of this matter.

(D) Within 30 days of the date of this order, Respondent may also elect (a) an administrative hearing before an ALJ at the Commission or (b) if the Commission finds a violation, an immediate penalty assessment by the Commission which a United States district court is authorized to review *de novo*.

¹⁰ FPA Section 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B)(2006). *See also Process for Assessing Civil Penalties, supra* note 3.

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(E) Within 30 days of the filing of the answer by Respondent, Enforcement staff may file a reply with the Commission.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

APPENDIX A

Enforcement Staff Report re: Richard Silkman



FEDERAL ENERGY REGULATORY COMMISSION

Richard Silkman

Enforcement Staff Report and Recommendation

Office of Enforcement
Division of Investigations

July 17, 2012

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The Office of Enforcement (Enforcement or staff) reports to the Federal Energy Regulatory Commission (Commission) its findings regarding the conduct of Richard Silkman (Silkman) in connection with his participation in ISO New England, Inc.'s (ISO-NE) Day-Ahead Load Response Program (DALRP).¹

I. EXECUTIVE SUMMARY

Enforcement recommends that the Commission issue an Order to Show Cause and Notice of Proposed Penalty to Silkman requiring him to show cause why he did not violate 18 C.F.R. § 1c.2 (2011) in connection with his participation in ISO-NE's DALRP and should not pay a civil penalty in the amount of \$1,250,000.

Silkman, representing Competitive Energy Services, LLC (CES), conceived a scheme to defraud ISO-NE of demand response payments, advised a DALRP participant, Rumford Paper Company (Rumford), to adopt the scheme, and helped implement the scheme. Specifically, Silkman, as the Managing Member of CES, advised Rumford to curtail internal generation by approximately 30-40 MW during the five-day period when Rumford's initial baseline load was established for the DALRP.² Instead of operating the generator to supply Rumford with virtually all of its energy needs (as was typical for the facility), Silkman and Rumford decided to curtail the generator and purchase replacement energy during the baseline period at a \$120,000 cost. By purchasing energy, instead of producing it on site, Silkman, CES, and Rumford reported larger energy consumption to ISO-NE than otherwise would have been the case, thereby establishing a false and inflated baseline.

Once in the DALRP, the artificially inflated baseline allowed Rumford to claim load reductions (the difference between the baseline and Rumford's typical operations) without actually reducing any load. CES and Silkman perpetuated and profited from this misrepresentation for over six months in 2007 to 2008, engaging in a scheme that ensured the baseline never appreciably changed. Because of Silkman's behavior, electricity consumers in New England paid \$3,336,964.63 for demand response that never occurred.

¹ Citations in this Report are to documents and sworn testimony in Enforcement's nonpublic investigation. Citations to most documents refer to the entity supplying each document and the electronic or physical bates stamp (*e.g.*, CES000029) and transcript references refer to the last name of the deponent, page, and line of the relevant transcript (*e.g.*, Silkman Dep. 30:5-10). All cited documents and transcripts are available for Commission review.

² Unless otherwise noted in this report, actions attributed to CES were undertaken by Silkman or at Silkman's direction.

Of this amount, CES obtained \$166,841.13 in revenue from July 2007 through January 2008.³ Silkman benefitted from the fraud as an owner and employee of CES.

Staff's investigation of Silkman and other ISO-NE demand response participants included nine depositions and multiple sets of data requests and responses. Silkman was informed both orally and in writing of staff's views, and was invited to apprise staff of any errors, any alternate views, or defenses. Staff fully considered Silkman's submissions.

Staff engaged Silkman in settlement negotiations, but was unable to reach an agreement. On May 13, 2011, staff provided Silkman written notice, pursuant to 18 C.F.R. § 1b.19 (2011), of staff's intent to recommend that the Commission issue an Order to Show Cause. Silkman responded on June 27, 2011; that response is being provided to the Commission with this Report. Silkman argues, among other things, that he did not violate § 1c.2 of the Commission's regulations, that he is not subject to the Commission's jurisdiction under § 1c.2, and that imposition of a civil penalty is unwarranted.⁴

II. BACKGROUND

A. Silkman, CES, and Rumford

Silkman has a doctorate in economics from Yale University.⁵ He is a self-identified expert in economic regulation⁶ and has been an expert energy industry witness approximately a dozen times before the Commission, state public utility commissions, and other venues,⁷ including regarding issues related to ISO-NE.⁸ He was the first

³ See Constellation0023813. CES received these revenues during Rumford's July 31, 2007 through February 6, 2008 DALRP participation.

⁴ June 27, 2011 Response of Silkman to § 1b.19 Notice, *passim* (Silkman's 1b.19 Response). While Silkman responded jointly with another subject of staff's investigation, CES, staff has evaluated violations by Silkman and CES separately. As an individual, Silkman is not subject to the Penalty Guidelines. See *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010) (Penalty Guidelines).

⁵ Silkman Dep. 33:8-10.

⁶ *Id.* at 15:3-11.

⁷ *Id.* 14-15.

⁸ *Id.* at 15-16.

natural person member of the New England Power Pool (NEPOOL).⁹ Silkman has been a principal owner of, and has been employed by, energy consulting firms since 1992 (including his founding and ownership of CES in 2000).¹⁰ Silkman is also a partner in two wind generation development companies in Maine (Beaver Ridge Wind, LLC and Mount Harris Wind, LLC) and a solar technology development company (GridSolar LLC).

CES is an independent energy services company based in Portland, Maine. Silkman describes himself as the “managing member” of the CES.¹¹ In addition to distributions of profits due to his ownership interest, Silkman is compensated for his employment as a managing member of CES depending upon the profitability of the partnership.¹²

CES occasionally solicited load response customers in New England for Constellation NewEnergy, Inc. (Constellation) under a Master Broker Agreement between CES and Constellation.¹³ Pursuant to this agreement, CES referred customers to Constellation and Constellation acted as the customer’s Enrolling participant in ISO-NE. Constellation compensated CES for referrals based upon a percentage the customer’s load response revenues. Through this arrangement, CES received 5% of the amount associated with Rumford’s DALRP participation.

While Silkman does not consider himself an expert on demand response, he testified that he is “generally speaking” comfortable giving advice regarding demand response participation to clients.¹⁴ CES advertises Silkman as “a nationally recognized expert in the regulation of public utilities, the development of competitive energy markets and the development, licensing and operation of power plants, including hydroelectric generating stations.”¹⁵ Silkman and CES regularly provide demand response consulting services. and, in spring 2007, Silkman approached Rumford to suggest that it participate

⁹ <http://www.competitive-energy.com> (visited on January 31, 2012).

¹⁰ Silkman Dep. 33:18-23; 39:7-20; 42-43.

¹¹ *Id.* at 34:4-12; 34:13-18.

¹² *Id.* at 64:11-24.

¹³ Master Broker Agreement between Constellation NewEnergy, Inc. and Competitive Energy Services, LLC (signed by Richard Silkman, August 28, 2006).

¹⁴ Silkman Dep. at 18:9-18; 19:6-9.

¹⁵ *See* <http://www.competitive-energy.com> (visited on January 31, 2012).

in ISO-NE's load response programs. Rumford agreed with the proposal, and, through its agreement with Constellation, CES referred Rumford to Constellation to participate in the DALRP.

CES and Silkman have provided consulting services to Rumford since 2003 regarding several energy-related initiatives.¹⁶ As a result of these contacts, Silkman agrees that he is "pretty familiar" with Rumford's physical plant.¹⁷

Rumford owns and operates a large lumber mill in Rumford, Maine and produces a wide variety of paper products.¹⁸ During the time frame covered by Enforcement's investigation, when the mill was fully operational its electricity consumption was generally in the 95 MW range. The mill operated 24 hours a day in equal work shifts and its load did not fluctuate appreciably between day and night hours. As CES understood, the Rumford facility generally operated its on-site 110 MW generator (referred to as "G4") to meet all of its electricity needs, purchasing additional or selling excess energy as necessary. G4's operation also produced steam which Rumford used as part of its manufacturing process.

B. The DALRP

Demand response is a "change[] in electric usage by end-use customers from their normal consumption patterns in response to changes in the price of electricity over time, or to incentive payments designed to induce lower electricity use at times of high wholesale market prices or when system reliability is jeopardized."¹⁹ Demand response

¹⁶ See Silkman Dep. 105:16-21.

¹⁷ *Id.* at 108-109.

¹⁸ Rumford is a subsidiary of NewPage Corporation (NewPage), an international paper manufacturer. On September 7, 2011, Rumford and NewPage filed for voluntary reorganization under Title 11 of the United States Code.

¹⁹ *U.S. Department of Energy, Benefits of Demand Response in Electricity Markets and Recommendations for Achieving Them: A Report to the United States Congress Pursuant to Section 1252 of the Energy Policy Act of 2005*, February 2006. This meaning of demand response was also adopted in the Commission staff's report, *Assessment of Demand Response and Advanced Metering*, Docket No. AD06-2-000, at 5 (available at <http://www.ferc.gov/legal/staff-reports/demand-response.pdf>) in August 2006. This definition is consistent with the definition recently incorporated in the Commission's regulations: "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric

requires, at the least, either reduced consumption or increased production of electricity by the responder.²⁰ Demand response programs in Commission-jurisdictional markets improve competition in those markets and help fulfill the Commission's mandate under the Federal Power Act (FPA) that rates for energy are just, reasonable, and not unduly discriminatory or preferential.²¹

ISO-NE's DALRP was implemented in June 2005 as a supplemental program to ISO-NE's real-time load response programs.²² The goal of all of ISO-NE's load response programs is to "reduc[e] peak electricity demand by large power users."²³ The DALRP reduces energy prices in ISO-NE by compensating resources that offer load reductions, and then actually reduce load, for hours in the next day when New England experiences

energy." 18 C.F.R. § 35.28(b)(4). Further, the Commission has stated that, in wholesale markets like ISO-NE, "demand response, whereby customers reduce consumption from normal usage levels in response to price signals, can generally occur [when] customers provide demand response that acts as a resource in organized wholesale energy markets to balance supply and demand." *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 FERC ¶ 61,187 at P 9 (2011) (Order No. 745).

²⁰ Silkman understood during the period covered by Enforcement's investigation that demand response requires a change in a participant's consumption pattern. For example, Silkman represented CES as a stakeholder participant of the New England Demand Response Initiative, which stated that "Demand Response Resources (DR resources) include all intentional modifications to the electric consumption patterns of end-use customers that are intended to modify the quantity of customer demand on the power system in total or at specific time periods." See *Dimensions of Demand Response: Capturing Customer Based Resources in New England's Power Markets, Report and Recommendations of the New England Demand Response Initiative*, at 6 (July 23, 2003) (available at <http://nedri.raabassociates.org/index.asp>).

²¹ Order No. 745 at P 8-9 (citing 16 U.S.C. § 824d (2006)).

²² *New England Power Pool and ISO New England, Inc.*, 111 FERC ¶ 61,064 (2005). The Commission has since approved periodic changes to the demand response provisions in ISO-NE's tariff.

²³ ISO New England Load Response Program Manual at 1-1 (LRP Manual). Note that all references to ISO-NE's tariff and manuals are to the versions of these documents in effect during the time covered by Enforcement's investigation, unless otherwise noted. Capitalized terms in this Report have the same meaning as provided in ISO-NE's FERC-approved tariff or relevant manuals as they existed during the time covered by Enforcement's investigation.

high energy prices. The DALRP requires that enrolled resources “provide a reduction in their electricity consumption in the New England Control Area during peak demand periods.”²⁴

During the period covered by Enforcement’s investigation, a load response resource began participation through the establishment of an initial customer load baseline, which was intended to reflect the quantity of energy the resource would have used absent participation in the DALRP. The initial load baseline was calculated by a simple average of hourly meter data from 7:00 AM through 6:00 PM for energy taken from the grid for the initial five business days after the asset was approved for the DALRP.²⁵ Once an initial baseline was established, the baseline adjusted on a rolling basis using actual load data from the resource.²⁶

However, not all days were included in the rolling baseline calculation. Most important, when a customer’s daily DALRP offer was accepted for a given day, that day would be excluded from the rolling customer baseline.²⁷ The reason for this exclusion is that the baseline was intended to represent an asset’s typical operating condition absent participation in the DALRP and loads during demand response days are not typical as demand response resources are reducing energy usage on these days.

Unlike some other demand response programs, the DALRP was not a program in which ISO-NE contacted participants to request load reductions. Instead, DALRP participants offered load reductions for the next day from the hours of 7:00 AM through 6:00 PM on non-holiday weekdays and, if the offer was accepted, the participant was obligated to reduce load the next day. Resources were allowed to offer load reductions by specifying a minimum price (in \$/MWh) and a fixed amount (in MW/h) of load reduction.²⁸ The participant’s real-time load was measured against its baseline to quantify the load reduction.²⁹ As an example, if in a given hour a resource’s baseline was 90 MW and actual electrical consumption from the grid was 87 MW, the calculated load reduction would be 3 MW.

²⁴ ISO-NE Tariff, Appendix E to Market Rule 1, § III.E.1.1.

²⁵ LRP Manual at § 4.2.1.

²⁶ *Id.*

²⁷ *Id.*, § 4.2.2.

²⁸ *Id.*, § 4.5.1.1.

²⁹ *Id.*, § 4.3.1.3.

During the period covered by Enforcement's investigation, the minimum DALRP offer price was \$50.00 per MWh.³⁰ Resources with offers that cleared the market were paid the Locational Marginal Price (LMP) in the Day-Ahead Energy Market for the amount of load reduction that cleared.³¹ If resources reduced more in Real-Time than the amount cleared in the DALRP as measured against their customer baseline, they were paid for the excess at the LMP in the Real-Time Energy Market. If they reduced less in Real-Time relative to a cleared offer, they were required to buy back the difference at the Real-Time LMP.³²

Demand response resources participated in the DALRP with assistance from third-parties known as Enrolling Participants.³³ The Enrolling Participant registered the resource in the DALRP program and arranged for ISO-NE to receive load response and meter data from the resource. ISO-NE made DALRP payments to the Enrolling Participant, and the Enrolling Participant then distributed these revenues to the load response resource and any other entities based upon agreements among those parties.³⁴ Regarding Rumford's participation, Constellation retained 10% of DALRP revenues as the Enrolling Participant and distributed 85% to Rumford and 5% to CES as Constellation's broker.³⁵

III. STAFF'S FINDINGS AND ANALYSIS

A. Findings

Silkman Devised a Scheme for Rumford's DALRP Participation

In mid-2007, Silkman, representing CES, approached Ronald Guay, Senior Counsel of NewPage Corporation (Rumford's parent company), regarding Rumford's

³⁰ Effective February 7, 2008, the Commission approved modifications to ISO-NE's tariff to tie the DALRP minimum offer price to an indexed amount that reflects fuel prices. *See ISO New England, Inc.*, 123 FERC ¶ 61,021, *reh'g denied*, 124 FERC ¶ 61,235 (2008). Rumford ceased offering load response into the DALRP after the rule change, though it remained enrolled in the DALRP program.

³¹ LRP Manual § 4.5.1.1.

³² *Id.*, § 4.5.1.1.

³³ *Id.*, § 2.2.1.

³⁴ *Id.*, § 4.5.4.

³⁵ CES Response to Data Request 7(b).

possible load response participation.³⁶ Silkman claimed that he believed that Rumford would be a good candidate for load response because the mill was a large industrial consumer of energy and had the ability to modify its on-site generation and electricity usage.³⁷

Silkman developed a scheme for Rumford's DALRP participation premised on Rumford's curtailment of generation from G4.³⁸ Silkman informed Rumford that it could curtail generation during the initial, five-day baseline creation period followed by daily load reduction offers at the minimum offer price.³⁹ Curtailing generation from G4 would require Rumford to temporarily increase its purchase of electricity. But, more important, curtailment would communicate to ISO-NE a higher demand for electricity which would result in an inflated initial baseline.

Silkman proposed that, once it began participating in the DALRP, Rumford would operate G4 as it typically had operated. In effect, this meant Rumford would *appear* to be reducing load relative to its inflated baseline without actually doing so. As Silkman explained to Rumford managers, if Rumford's DALRP offers cleared each day, the baseline would stay static and would not change to reflect actual generation or the mill's energy usage.⁴⁰ Since the baseline would stay static, Rumford could be regularly compensated for its claimed load reduction. In fact, Silkman told Rumford managers that Rumford's offers would clear every day.⁴¹ Once the baseline was set, Rumford needed only to comply with the ministerial and administrative aspects of the program while operating as usual,⁴² i.e., there would be no actual reduction of load.

³⁶ Guay Dep. 45-46.

³⁷ Silkman Dep. 106-108.

³⁸ *Id.* at 203:11-14.

³⁹ *See, e.g.*, Alley Dep. 143:13-16.

⁴⁰ *Id.* at 90-91 and 119-120.

⁴¹ *Id.* at 119:18-20.

⁴² Alley testified that Rumford expected "none, to very limited" changes in its operations due to DALRP participation under the scheme outlined by Silkman. *Id.* 139:7-9. Alley also stated that, to the best of his recollection, Rumford never had to reduce its electrical consumption in order to meet its DALRP load reduction commitments. *Id.* 140:19-24 and 141.

In June and July 2007, Silkman, other CES personnel, and groups of senior Rumford personnel met multiple times to discuss Rumford's participation in the DALRP based on CES's scheme.⁴³ Silkman proposed that CES would, at Rumford's direction, manage day-to-day activities associated with submitting DALRP offers with Constellation acting as the Enrolling Participant for Rumford.⁴⁴

At these meetings, Silkman explained to Rumford how the DALRP worked, how Rumford could participate, Rumford's obligations under the program, and money-making opportunities in the DALRP.⁴⁵ Rumford commissioned CES to prepare a "White Paper" describing potential load response participation.⁴⁶ In this paper, Silkman stated that CES had been tracking "zero baseline facilities," (i.e., facilities that were neither net importers nor exporters of energy, like Rumford) and concluded that such facilities could participate and receive full compensation.⁴⁷

While considering Silkman's proposal, Rumford evaluated the cost of purchasing replacement energy during the baseline period to make up for the planned curtailment of G4.⁴⁸ Rumford anticipated an increased out-of-pocket cost of \$120,000 to purchase additional energy from the grid.⁴⁹ Silkman advised that Rumford could expect to recoup this expense within a week of DALRP participation.⁵⁰ Silkman did not identify any cost or risk associated with Rumford's participation other than the initial cost of increased energy purchases.

⁴³ CES Response to Data Request 2 (describing meetings on June 12 and July 6).

⁴⁴ CES Response to Data Requests 7(a) and 7(d).

⁴⁵ Silkman Dep. 166:1-13.

⁴⁶ *Id.* at 179:4-13. Rumford produced this White Paper during Enforcement's investigation. *See* RUMF000001-000003.

⁴⁷ Rumf000001. In response to Enforcement data requests, CES produced no written materials demonstrating research it or Silkman conducted into "zero baseline facilities" to support this statement.

⁴⁸ Alley Dep. 126:2-6.

⁴⁹ E-mail from Richard Silkman, Managing Member, Competitive Energy Services LLC to John Fuller, production Manager, Rumford Paper Company, cc to Scott Alley, Utilities Superintendent, Rumford Paper Company and Rick Abradi, Energy Manager, Rumford Paper Company (July 19, 2007, 5:39 PM).

⁵⁰ *Id.*

After consulting with Rumford operators, Silkman suggested and Rumford agreed that it would claim 20-30 MW of load response in the DALRP.⁵¹ However, no contemporary written documents produced by Silkman, CES, or Rumford, including the White Paper, mention the proposal to curtail G4 during the baseline period,⁵² although this was a key aspect of Rumford's participation and Silkman does not dispute that he proposed that Rumford curtail generation during the baseline period. This lack of documentation is noteworthy given that the generation curtailment scheme and the projected revenues led Rumford personnel to question CES and Silkman "on numerous occasions about the legitimacy of the program" during meetings between the companies.⁵³ Regarding these concerns, Rumford's Utilities Superintendant, Scott Alley testified: "If someone comes and offers a program that supplies you with a financial benefit, and it does not look like there's a lot of downside, I think human nature is you automatically question, hey, what's up? And, you know, so we asked quite a bit about it."⁵⁴ Other senior managers at Rumford, Alley, Rick Abradi (Rumford's Energy Manager), and John Fuller (Rumford's Production Manager), expressed similar concerns to CES and Silkman regarding the legitimacy of Rumford's participation in the program.⁵⁵

Silkman admitted "there were some concerns [expressed by Rumford personnel] as to what the [LRP] manual means and how do you interpret the manual" regarding curtailing G4 and how Rumford should operate to establish its baseline.⁵⁶ Silkman also acknowledged that Rumford management stated to him that it appeared Rumford would be getting paid for doing nothing.⁵⁷ Explaining this reaction, Silkman testified: "I think it was just generally a lot of folks expressed a concern. It is important to remember the

⁵¹ Silkman at 171-72.

⁵² Silkman Dep. 239:18-24. However, in response to Enforcement data requests, Rumford produced a handwritten chart that appears to graphically demonstrate the curtailment scheme. Although Enforcement asked numerous deponents about the chart, none of whom was able to definitively identify the creator, Silkman said that the handwriting "could possibly be" his. *Id.* 245:9-11.

⁵³ Alley Dep. 116:9-15.

⁵⁴ *Id.* at 116:9-22.

⁵⁵ *Id.* at 116-117.

⁵⁶ Silkman Dep. 324:4-13.

⁵⁷ *Id.* at 324:14-17; 326-27.

context in which this occurs. There are lots of ISO programs where you get paid for doing nothing . . . The idea where somehow you get paid for something has become, and I don't want to be silly about this, but it has become sort of the commonplace understanding among customers and this is how the market works."⁵⁸

While Silkman understood that the scheme would result in payments to Rumford and CES essentially for doing nothing, he nevertheless persisted with this approach. Neither Silkman nor other CES employees contacted Constellation or ISO-NE to explore the appropriateness of the scheme in response to Rumford senior managers' initial reservations. Setting aside Rumford's initial reservations, Rumford and CES fully adopted the Silkman baseline inflation scheme.⁵⁹

Silkman, representing Rumford, contacted Constellation and initiated the load response enrollment process with Constellation as Rumford's Enrolling Participant. One of the reasons CES proposed to use Constellation was that Constellation was a "large and very respected" member of New England Power Pool (NEPOOL) and that "to the extent that issues arise about interpreting ISO New England rules or dealing with [] ISO New England, having them on our side will be very helpful."⁶⁰ However, before enrolling in ISO-NE's load response programs, neither Silkman, CES, nor Rumford sought advice from Constellation on ISO-NE rules with respect to the DALRP generally, how to operate during the baseline period, or whether the adopted scheme of getting paid for doing nothing was legitimate.⁶¹

Just before the baseline period, Silkman and Rumford personnel discussed the information that would be provided to ISO-NE to enroll Rumford.⁶² Although Rumford did not intend to change its operations to create a load reduction in the DALRP, Silkman and CES (with Rumford's approval) communicated a claimed load response capability for Rumford of 20 MW electronically to ISO-NE.⁶³

⁵⁸ *Id.* at 324-25.

⁵⁹ Guay Dep. 52:9-12.

⁶⁰ Rumf000001-000003. *See also* Silkman Dep. 189-90.

⁶¹ Silkman Dep. 190:10-16. Although Silkman spoke with Constellation a number of times before the baseline period, neither Silkman, CES, nor Rumford told Constellation that Rumford intended to curtail generation during the baseline period. *Id.* at 265-66.

⁶² *Id.* at 174:2-7.

⁶³ CES narrative Response to Data Requests at 3.

Consistent with Silkman's recommendation, Rumford executed an agreement with Constellation in July 2007, permitting Constellation to enroll Rumford in the DALRP. As compensation for CES's referral of Rumford to Constellation, CES received a monthly broker's fee of 5% of all revenues related to the customer's load response participation. Constellation retained 10% of all revenues and Rumford received the remaining 85%.⁶⁴ While not formalized in the broker agreement, CES and Constellation understood CES would act as the main point of contact for Constellation regarding Rumford's load response participation and that Constellation's direct contact with Rumford would be minimal.⁶⁵ The primary contact at CES regarding Rumford's DALRP participation was Silkman.⁶⁶

CES and Rumford Executed Silkman's Scheme

Rumford's initial five-day baseline period ran from July 24, 2007 through July 30, 2007 (excluding July 28 and 29, 2007, which were non-business days). Consistent with the agreed upon scheme,⁶⁷ Rumford curtailed generation from G4 during the baseline period.⁶⁸ Rumford managers instructed generation plant operators to reduce the generation output of G4 during the program hours of 7:00 AM through 6:00 PM.⁶⁹ Other than the generator's curtailment, Rumford operated as it otherwise would have absent DALRP participation.⁷⁰ Other than curtailing generation, Rumford did not increase its load.⁷¹ The curtailment resulted in an atypical load pattern for each of the baseline days, with Rumford's load spiking to 30-45 MW just prior to 7:00 AM, continuing at that level until 6:00 PM, and dropping precipitously to 5-10 MW just after 6:00 PM.⁷² Alley

⁶⁴ CES narrative Response to Data Requests; CES Response to Data Request 7(b).

⁶⁵ Silkman Dep. 129-30.

⁶⁶ *Id.*

⁶⁷ CES Response to Data Requests 9 and 20.

⁶⁸ Guay Dep. 71:3-22; Alley Dep. 110:4-7. Jerry LeClaire, Rumford's Mill Manager and the most senior Rumford official at the mill, was aware of this decision. *Id.* at 110:4-7.

⁶⁹ Rumford Data Responses 36d and e.

⁷⁰ Guay Dep. 67-68; Rumford Data Response 36b.

⁷¹ Rumford Data Response 35.

testified that curtailment of G4 during the initial baseline period was always between 25 and “40-ish” MWs and was roughly in the 30-40 MW range overall.⁷³ When questioned, Silkman admitted that Rumford “probably” would have generated more energy from G4 during the baseline period had it not participated in the DALRP.⁷⁴

Table 1⁷⁵ demonstrates the five-day load profile for Rumford using this scheme, including the marked increase in electricity consumption during the hours measured to calculate the baseline.

RUMFORD LOAD DURING BASELINE PERIOD

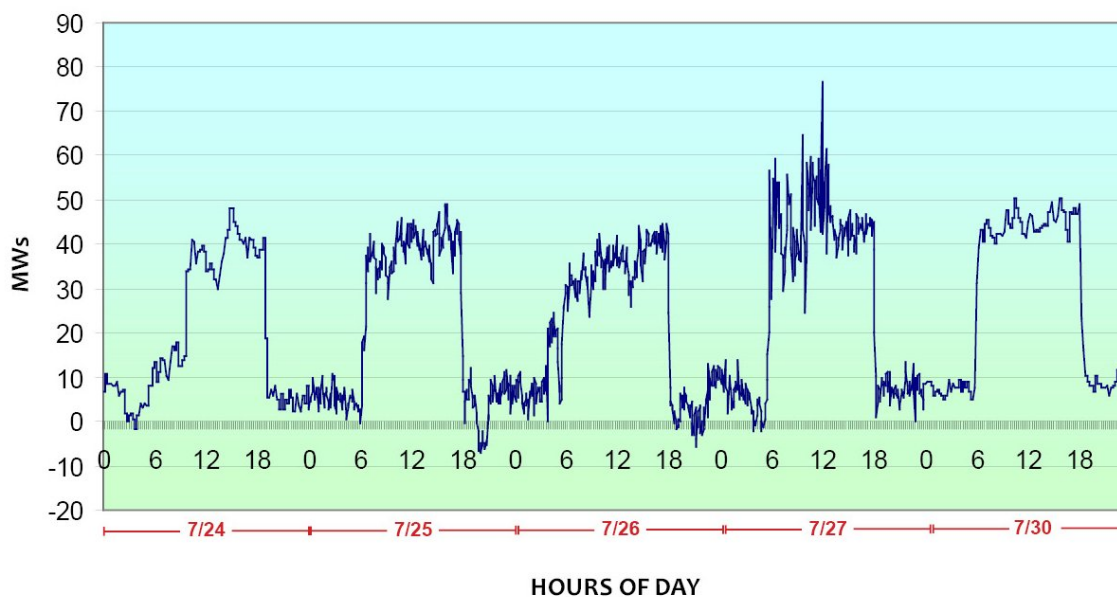


Table 1 demonstrates the increase in Rumford load during the five days relied upon by ISO-NE to establish Rumford’s baseline.⁷⁶ Just before 7:00 AM on each day,

⁷² See also ISO-NE generated load profiles for Rumford Paper Company in July, August, and November 2007 (provided as Attachment C to Enforcement’s first set of data requests to Rumford Paper Company dated April 7, 2008) and 5-minute interval energy data provided by ISO-NE. See April 22, 2008 ISO-NE Data Response.

⁷³ Alley Dep. 109:2-7. Alley could not recall a specific instance within the last few years (other than equipment outages) in which Rumford’s purchases of energy were greater than they were during the baseline period. *Id.* at 113-14.

⁷⁴ Silkman Dep. 295:11-19; 207:8-12.

⁷⁵ See December 7, 2011 ISO-NE Data Response.

Rumford curtailed generation from G4 and load dramatically spiked. The generation curtailment continued throughout the day until just after 6:00 PM, when ISO-NE stopped reviewing data to calculate the baseline.

Beginning on July 31, 2007, through early February 2008, Rumford and CES submitted daily, non-holiday weekday load reduction offers for each program hour in the DALRP.⁷⁷ Consistent with the agreed-upon scheme, the daily DALRP offers were virtually always submitted at the minimum offer values (\$50.00 per MW/h for a minimum of 1 hour each day).⁷⁸ As LMP prices in ISO-NE were virtually always above \$50.00 during program hours, Rumford's offers always cleared the market and the company received DALRP revenues for each day. Rumford's inflated baseline remained unchanged. As ISO-NE compared Rumford's actual load to its inflated baseline, it appeared that Rumford was reducing load and was compensated at the relevant LMP. The only circumstances in which Rumford's offers did not clear were when: (1) CES inadvertently submitted an invalid offer; (2) Rumford expected to repair on-site equipment during the next day; or (3) ISO-NE directed Rumford to restore the baseline following a November 2007 generator outage.⁷⁹

Once the inflated baseline had been established, Rumford operated its paper mill and generation facilities the same way it had operated them before the baseline period.⁸⁰ Rumford did not increase its generation to provide demand response. Likewise, Rumford never reduced its electrical consumption as a consequence of its DALRP participation.⁸¹ Silkman testified that typical, day-to-day fluctuations in Rumford's operations and energy usage did not require modifications to Rumford's DALRP offers.⁸² Silkman was aware that Rumford had no written procedures in place regarding reduction of energy

⁷⁶ Note that Saturday July 28 and Sunday July 29 are excluded from the chart as weekend days are not used to calculate the baseline.

⁷⁷ See RUMF0000926-0000946 (spreadsheet providing Rumford's DALRP offer data); Silkman Dep. 315-16; 320:1-5.

⁷⁸ Though DALRP participants may offer a minimum of 100 kW, as explained above, they are compensated for all load reductions below the baseline at prevailing real-time LMP prices.

⁷⁹ The latter two instances are discussed below.

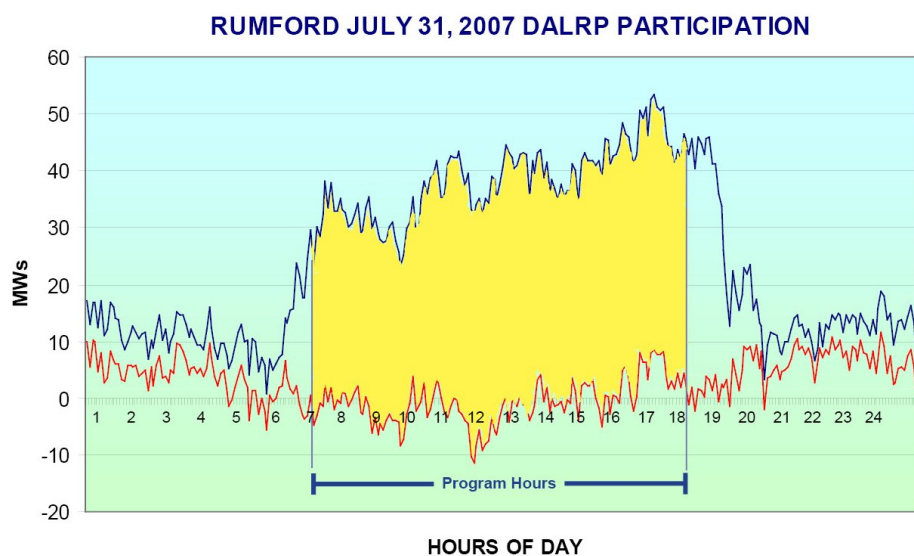
⁸⁰ Alley Dep. 140-41; 151:13-24.

⁸¹ Silkman Dep. 257:13-20; Alley Dep. 140:19-24.

⁸² Silkman Dep. 319:21-25.

consumption on days when DALRP offers were accepted⁸³ and Silkman admits that he did not anticipate Rumford would reduce energy consumption as part of its DALRP participation.⁸⁴ Rumford's offers were communications to ISO-NE of an availability and willingness to reduce load by a specified amount at a specified price, yet Rumford and Silkman never intended to and never actually did reduce load when its offers cleared.

Table 2⁸⁵ compares the baseline for Rumford (the blue line) with Rumford's actual load on July 31, 2007 (the red line), Rumford's first day offering into the DALRP. ISO-NE, unknowingly relying upon an inflated baseline, compared Rumford's actual load against the baseline to calculate the amount of load purportedly "reduced" by Rumford during the program hours (the shaded area). ISO-NE paid \$36,193.37 for Rumford's phantom load response on July 31, 2007.⁸⁶



A similar pattern is reflected for virtually every day of Rumford's DALRP participation. As a result of the scheme, ISO-NE paid \$3,336,964.63 for demand response that never occurred. Of this amount, Rumford received \$2,836,419.08 and CES received \$166,841.13.

⁸³ *Id.* at 257-58.

⁸⁴ *Id.* at 210-11.

⁸⁵ *See* December 7, 2011 ISO-NE Data Response.

⁸⁶ *Id.*

B. Analysis

Silkman violated § 1c.2 of the Commission's Regulations

Section 222 of the FPA prohibits the use of deceptive or manipulative devices in connection with the purchase or sale of electric energy or the transmission of electric energy subject to the Commission's jurisdiction.⁸⁷ Order No. 670 implemented this prohibition, adopting 18 C.F.R. § 1c.2 which prohibits an entity (including an individual) from: (1) using a fraudulent device, scheme or artifice, or making a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with a transaction subject to the jurisdiction of the Commission.⁸⁸ Fraud is a "question of fact that is to be determined by all the circumstances of a case."⁸⁹

- a) Fraudulent device, scheme or artifice; or engaged in any act, practice, or course of business that operates or would operate as a fraud

As to the first element under 18 C.F.R. § 1c.2, Silkman's actions constitute a fraudulent scheme or artifice. Silkman's scheme was based on misrepresentations to ISO-NE about Rumford's typical load and willingness and ability to reduce load. Because of these misrepresentations, Rumford and CES were compensated for load response that they knew would never occur and, in fact, never occurred. Silkman benefitted from this scheme through his ownership interest in CES.

By curtailing generation and buying more grid power, Silkman, CES, and Rumford established and communicated to ISO-NE an inflated baseline that did not reflect Rumford's genuine load response capability, as Rumford did not intend to reduce its consumption or increase its generation once the baseline was established. As Silkman knew, the baseline is a critical component to determining the load reduction of load response resources and calculating load response payments. Silkman's submission to ISO-NE of load response registration information was also false, claiming that the mill

⁸⁷ 16 U.S.C. § 791A (2006).

⁸⁸ *See Prohibition of Energy Market Manipulation*, Order No. 670, 71 Fed. Reg. 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, 114 FERC ¶ 61,047 (Jan. 19, 2006) (Order No. 670).

⁸⁹ *See id.* at P 50.

had a DALRP load response capability of 20 MW. Additionally, by submitting daily offers to reduce load, Silkman, CES, and Rumford communicated a willingness and ability to reduce load. These communications were false because, as Silkman understood, Rumford was not reducing load and did not intend to reduce load as a result of its DALRP participation. Instead, Silkman, CES, and Rumford used the offers to perpetuate the inflated baseline. These actions defrauded ISO-NE at the expense of all rate payers in New England as the cost of demand response is socialized across all Network Load.

b) Scierter

Silkman conceived of the scheme and persuaded Rumford to establish an inflated baseline to participate in the DALRP. Silkman knew Rumford would not reduce any load when it participated in the DALRP.⁹⁰ Instead, Rumford and CES would be paid for phantom load reductions without any appreciable change in the mill's operations. Silkman knew such a scheme would produce no discernable benefits to the electrical grid or reduce energy prices. Silkman also knew that CES and Rumford would be paid by ISO-NE for doing nothing. Silkman, CES, and Rumford understood that Rumford would neither increase generation nor decrease electricity consumption as part of Rumford's participation. Silkman, CES, and Rumford intended to defraud ISO-NE.

For these reasons, Enforcement concludes that scierter is present.

c) In connection with a transaction subject to the jurisdiction of the Commission

Offers of demand response for day-ahead energy reductions are in connection with transactions subject to the Commission's jurisdiction. Section 201(b)(1) of the FPA gives the Commission jurisdiction over the sale of electric energy at wholesale in interstate commerce. Section 205(a) of the FPA confers jurisdiction to the Commission over "[a]ll 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."⁹¹ Courts have held that where a provision or term of an agreement directly and

⁹⁰ See, e.g., Silkman Dep. 210-11; 257:13-20.

⁹¹ Section 205(c) of the FPA also contains similar language regarding the Commission's jurisdiction to require public utilities to file rates and charges for any sale subject to the Commission's jurisdictional rates, including all classifications, practices and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

significantly affects a wholesale rate, it is within the Commission's broad discretion to determine which practice that affect rates must be described in that rate schedule.⁹² Demand response has both a direct and indirect effect on wholesale rates and, indeed, the DALRP was designed precisely to affect (by lowering) wholesale prices for energy.⁹³ When demand response is offered into an organized market it directly affects the wholesale rates, and is therefore a practice affecting jurisdictional wholesale rates that is subject to the Commission's jurisdiction under §§ 205(a) and (c) of the FPA.

As an ISO's markets are within the Commission's jurisdiction, ISO-operated and Commission-approved load response programs are also within its jurisdiction.⁹⁴ Silkman conceived of a fraudulent scheme for Rumford's participation in this jurisdictional program, facilitated Rumford's participation, provided misleading information to Constellation and ISO-NE regarding Rumford's participation, and profited from the fraud through his ownership of CES. Accordingly, staff concludes that Silkman's fraudulent activity was in connection with a jurisdictional transaction and violated 18 C.F.R. § 1c.2.

C. Defenses Raised by Silkman

Silkman admits that he advised Rumford to curtail generation from G4 during the baseline period and purchase additional power from Constellation. Silkman also admits that, working with Rumford, he and CES submitted DALRP offers through Constellation for the minimum price of \$50/MWh between August 2007 and February 2008. However,

⁹² *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985). *See also Connecticut Dept. of Public Utility Control v. FERC*, D.C. Cir. 07-1375, slip op. at 14-15 (D.C. Cir. 2009) (holding that capacity decisions about an interconnected bulk power system affect Commission's jurisdictional transmission rates for that system and are within the Commission's jurisdictional authority).

⁹³ *See Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 at P 47 (2008) (Order No. 719), *order on reh'g*, 128 FERC ¶ 61,059 (July 16, 2009) (Order No. 719-A).

⁹⁴ *See* Order Nos. 719 and 719-A; *New England Power Pool and ISO New England, Inc.*, 111 FERC ¶ 61,064 (2005) (approving ISO-NE load response programs and related tariff provisions); *Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States*, 96 FERC ¶ 61,155 at 61,679, *order on clarification and reh'g*, 97 FERC ¶ 61,024 (2001). *See also Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) (upholding the Commission's authority to review the ISO-NE Installed Capacity Requirement under the Federal Power Act).

Silkman disputes staff's conclusion that CES's actions were intentionally deceptive, fraudulent, and in connection with a transaction subject to the Commission's jurisdiction.

Enforcement has reviewed all of Silkman's arguments and believes them to be without merit. Silkman's arguments are not often explicitly linked to § 1c.2's criteria. However, virtually all of his defenses fall into the categories discussed below.

1. Silkman claims that his actions were based on a good faith review of ISO-NE rules

Silkman claims that ISO-NE's LRP Manual provided no guidance on how to operate during the baseline period and that, without any reliable guideposts, Silkman provided advice to Rumford on how to set the baseline in accordance with his best understanding of the DALRP rules.⁹⁵ Silkman further argues that he expected Rumford would "regularly [] curtail electricity load to satisfy its bid obligations under the DALRP"⁹⁶ and that under Silkman's understanding of the program, the essential question was determining the level of generation necessary to safely operate the paper mill, and to set the baseline so that only that excess generation was made available under the DALRP. Silkman argues that Rumford was effectively required to artificially set its baseline; that it "had to set its baseline *somewhere*."⁹⁷ This involved, according to Silkman, setting generation to "simulate" then non-existent market conditions: namely, "a situation where market prices were low."⁹⁸

These arguments are specious. There is no contemporary evidence that Rumford, Silkman, and CES believed actual load response would be required under the adopted scheme. As discussed above, the investigative record demonstrates the opposite: Rumford, Silkman, and CES knew that the scheme would allow Rumford and CES to be paid for doing nothing. Further, Silkman cannot explain why he needed to "set" a baseline that was designed to change to reflect actual variations in the mill's load.⁹⁹ Setting a baseline at an artificial quantity is inconsistent with the DALRP requirement that actual load be used for baseline calculations. Finally, it is implausible that Silkman believed that legitimate participation by an industrial demand response participant was conditioned upon \$120,000 in uneconomic energy purchases during the baseline period.

⁹⁵ See Silkman 1b.19 Response at 17 and 21.

⁹⁶ *Id.* at 21.

⁹⁷ *Id.* at 16 (emphasis original).

⁹⁸ Silkman Dep. 265-66.

⁹⁹ LRP Manual, § 4.2.1.

Silkman has not provided any contemporary evidence that he actually interpreted the DALRP so as to require the setting of an artificial baseline.¹⁰⁰

Silkman also claims that, while Rumford did not have to reduce load to be paid for DALRP load response, he initially believed that Rumford would need to “shed load in the program.”¹⁰¹ This assertion is inconsistent with statements made under oath by Rumford managers. When Silkman briefed Rumford on his proposal to create an artificial baseline, Rumford personnel understood there would be no genuine risk to participation,¹⁰² that there would be no benefit to the grid,¹⁰³ and, most tellingly, that the proposal sounded as if Rumford and CES would be getting paid for doing nothing.¹⁰⁴ Had Silkman truly thought that Rumford would have to regularly reduce load under his scheme (either by reducing consumption or increasing generation), the participants in these meetings would not have believed that the proposal sounded “too good to be true.”¹⁰⁵

2. Silkman claims that providing DALRP advice to Rumford was very complex

Silkman states that directing Rumford’s DALRP participation was “an enormously complex undertaking” because of the physical characteristics of the mill and the fact that the mill’s energy needs and fuel costs fluctuated hourly.¹⁰⁶ He cites a 2008 ISO-NE tariff

¹⁰⁰ In their submissions, Silkman and CES often misstate the function of the DALRP. For example, Silkman argues “[s]ince no one was ever asked to reduce load, the DALRP can be made to appear in retrospect as payment for ‘doing nothing,’ but the actual payment was for being available to interrupt load.” Silkman 1b.19 Response at 40. This statement is a straw man. The DALRP did not pay participants for their “availability to interrupt load.” The DALRP paid participants who *actually* reduced load. Participants were required to reduce load when they made offers to reduce load and those offers were accepted. Because Rumford offered to reduce load and those offers were accepted, Rumford was required to reduce load every day.

¹⁰¹ *Id.* at 23.

¹⁰² Silkman Dep. 258-59.

¹⁰³ Alley Dep. 68:14-24; 67:5-11.

¹⁰⁴ *See, e.g., id.* at 116:9-15.

¹⁰⁵ *Id.* at 117:3-7.

¹⁰⁶ Silkman 1b.19 Response at 2.

filing explaining that some baseline methodologies for demand response programs are complex.¹⁰⁷ Because of this alleged complexity, Silkman essentially claims that his actions cannot be deemed fraudulent.

Silkman misstates the complexity of the DALRP and the scheme he proposed. First, while some demand response baseline mechanisms are complex, the DALRP baseline process was not. The initial DALRP baseline was calculated using a participant's actual load in the program hours for five days. There is no evidence that Silkman, an energy industry expert, misunderstood the baseline calculation process.

Second, Silkman's scheme was easily understood: reduce generation when ISO-NE measures baseline load to establish an inflated baseline, return to typical operation after a baseline is established, submit uniform offers to reduce load each day, and receive payment for phantom load reductions. While Silkman now claims that Rumford's load profile required a complicated curtailment scheme and large uneconomic purchases of energy to set a baseline, there is no contemporary evidence backing up this assertion. Silkman did not engage in any complex analysis of Rumford's load or research how to set an artificial baseline based on a difficult "simulation" of hypothetical market conditions. Silkman's conduct was not the result of confusion or mistake; it was deliberate, calculated fraud.

3. Silkman claims that flaws in the DALRP caused the static baseline

Silkman argues that the perpetuation of Rumford's static baseline was the result of a flawed DALRP program rather than a scheme to defraud ISO-NE. Silkman asserts that once the baseline was originally established, he and CES submitted DALRP offers to Constellation in Rumford's name for the minimum price of \$50/MWh. Because ISO-NE did not change the minimum offer price, and because the market price generally did not fall below \$50/MWh, Rumford's offers were accepted each day.¹⁰⁸ Silkman claims that this conduct did not violate ISO-NE's tariff, and therefore he is insulated from any finding that he violated § 1c.2.¹⁰⁹

Silkman admitted he understood that energy prices in New England had increased and that there was the possibility DALRP customers could offer successfully into the DALRP every day, resulting in a static baseline.¹¹⁰ Silkman also acknowledged that "the

¹⁰⁷ *Id.* at 20-21 (quoting *ISO New England, Inc.*, 123 FERC ¶ 61,021 at P 29 (2008)).

¹⁰⁸ *Id.* at 31-34.

¹⁰⁹ *Id.* at 1.

¹¹⁰ Silkman Dep. 412:11-413:8.

inability to adjust [the] baseline on an ongoing basis creates some potentially perverse results”¹¹¹ including allowing ISO-NE to “pay for load that is not really interrupted.”¹¹² Although Silkman could not specifically recall telling Rumford that the baseline would not change if DALRP energy offers were accepted, he admitted it was likely that he had.¹¹³

Silkman cites the fact that ISO-NE later modified the DALRP to ensure that baselines were more likely to include updated load data, but this modification does not provide any defense to his conduct. The investigative record shows that during the period in question Silkman, CES, and Rumford chose to use high energy prices in New England as an opportunity to implement a scheme to receive demand response payments without providing any load reduction.

Enforcement also notes that, while ISO-NE’s tariff did not specifically prohibit Silkman’s scheme, § 1c.2 applies regardless of whether a tariff specifically prohibits a certain form of conduct.¹¹⁴ Conduct that may not conflict with a tariff may nonetheless be part of a fraudulent scheme.

4. Silkman claims that Constellation was fully aware of Rumford’s baseline activities and that fact exonerates him

Silkman claims that his actions in the DALRP were not fraudulent because Constellation was fully aware of Rumford’s actions. This argument is not correct.

As a threshold matter, whether Constellation employees could have deduced Silkman’s and CES’s behavior is not relevant to the question of whether Silkman engaged in fraud. Silkman deceived and defrauded ISO-NE. Constellation’s alleged knowledge of Silkman’s behavior, even if true, would not absolve Silkman, CES, or Rumford of their deception of ISO-NE and the harm caused to all New England rate payers.

¹¹¹ *Id.* at 92:17-19.

¹¹² *Id.* at 92-93.

¹¹³ *Id.* at 243:16-21.

¹¹⁴ For example, Silkman asserts that submitting DALRP offers at the minimum offer price of \$50.00 per MWh was permitted by the ISO-NE tariff. *See* Silkman 1b.19 Response at 32-33. Staff does not allege that the offers, in isolation, violate § 1c.2. Rather, the scheme was fraudulent because Silkman used these offers to perpetuate an inflated baseline, allowing it to repeatedly claim payment for load reductions that did not occur.

As a factual matter, Silkman never told Constellation of his scheme or even that Rumford curtailed generation during the baseline period. However, Silkman claims more generally that he and Constellation discussed Rumford's baseline "on at least three occasions."¹¹⁵ In a strict sense, this statement is true, as Silkman and Constellation personnel discussed the timing of the baseline and other procedural aspects of Rumford's initial DALRP participation. However, Silkman admits that neither he, nor anyone else at CES, disclosed to Constellation that Rumford curtailed generation during the baseline period or that Rumford had an inflated baseline.¹¹⁶ Internal, contemporaneous Constellation documents demonstrate that Constellation was unsure how Rumford was participating in the DALRP¹¹⁷ and the sworn testimony of Constellation employees is consistent on this point.¹¹⁸ Staff asked CES to produce all documents relevant to the contention that Silkman and CES discussed the baseline with Constellation. CES produced no responsive materials.¹¹⁹ Simply put, there is no credible written or oral evidence that Silkman clearly told Constellation how Rumford operated during the baseline period.¹²⁰ Silkman's focus on a Constellation data response on this point is misplaced.¹²¹

¹¹⁵ *Id.* at 8.

¹¹⁶ *See, e.g.*, Silkman Dep. 260:7-15 ("Q. On your application did you state or did Rumford state that it was curtailing generation during the baseline period? A. There was no reason to state that on the application."); *accord* Silkman Dep. 265:16-22 ("Q. Prior to the time in which the baseline was set, did you or anyone else at Rumford contact Constellation and explicitly tell them that Rumford intended to curtail generation during the baseline period? A. I'm not sure what you mean by explicitly . . ."); *accord* Silkman Dep. 266:15-21 (Q. . . . Looking at only the time period before the baseline was set, do you recall using the word curtailment in any conversations that you had with Constellation regarding participation in the load response programs? A. I don't recall that word, no."); *accord* Silkman Dep. 366:12-17 ("Q. Did Amy [Richard of Constellation] ever ask you specifically if you had recommended that Rumford turn off generation during the baseline period? A. I don't recall her asking. If she had I would have told her because that is how we did it, but I don't recall her asking that question specifically.").

¹¹⁷ *See, e.g.*, Constellation Data Response 18 (and revised response).

¹¹⁸ *See, e.g.*, Richard Dep. 85:21-24; 91:18-92:7.

¹¹⁹ *See* CES's February 16, 2010 Data Response 7.

¹²⁰ Silkman focuses on an August 2007 meeting with Constellation as support for his position that he told Constellation how Rumford's baseline was established. In fact, Constellation called the meeting because it had concerns about Rumford's

Further, Silkman's position is inconsistent with later events. In January 2008, Silkman received a phone call from Peter Kelly-Detwiler, a Senior Vice-President at Constellation.¹²² Silkman testified that Kelly-Detwiler informed Silkman that Constellation would soon be sending a letter to all of Constellation's DALRP customers, including Rumford, outlining concerns Constellation had developed regarding the program.¹²³ Silkman testified that Kelly-Detwiler indicated in this phone conversation that the letter was sent at the direction of Constellation's legal department, and that it was not specifically directed to CES's DALRP clients.¹²⁴ Within twenty-four hours of this conversation, Silkman contacted Rumford counsel Ron Guay and informed him that the letter sent by Constellation "was not directed to Rumford's participation."¹²⁵

Constellation provided Silkman of CES an advance copy of the letter which stated that Constellation was "concerned that some of our Day-Ahead Program customers may have increased their usage while ISO-NE was determining their baselines, possibly due to

participation and was uncertain how exactly Rumford had participated in the program including the establishment of Rumford's baseline. Richard Dep. 49:2-8. Constellation employees, including account manager Amy Richard, testified that while Constellation and Silkman discussed Rumford's DALRP participation during this meeting, Silkman never clearly explained that Rumford curtailed generation during the baseline or that the baseline had been inflated. *Id.* 79-80. In fact, Silkman's explanation regarding Rumford's participation was unclear, lacking any detail, and confusing, and Richard remained concerned about Rumford's participation following this meeting.

¹²¹ Silkman argues that the testimony of Constellation personnel is inconsistent with an initial Constellation data response where Constellation stated CES told it that "Rumford shut down its boiler and turbine in order to increase its baseline." *See* Constellation Data Response 18 (and revised response). *See also* Silkman 1b.19 Response at 3 (referencing Constellation Data Response 18). In response to further questioning by staff regarding this statement, Constellation corrected and clarified the response. All Constellation employees deposed by staff stated that Silkman never explicitly disclosed it had advised Rumford to create an artificial baseline by curtailing generation during the baseline period.

¹²² Silkman Dep. 385:5-18.

¹²³ *Id.* at 385:11-18.

¹²⁴ *Id.* at 385-86.

¹²⁵ *Id.* at 391:14-24; 392:11-15.

changed production schedules or on-site generation outages. If baseline usage is ‘inflated’ in this manner, bids into the Day-Ahead Program may reflect a customer’s normal usage rather than dispatchable load that ISO-NE can depend upon for reliability purposes.”¹²⁶ When pressed, Silkman testified that the language in the letter regarding customers’ inflated baselines did not cause him concern as Constellation had indicated that the letter was not directed specifically to Rumford or other CES clients.¹²⁷ Silkman did not contact anyone at ISO-NE or Constellation to discuss the content of the letter.¹²⁸

Silkman’s reaction to Constellation’s letter and call from a Constellation Vice-President is inconsistent with his claim that Constellation was aware of the baseline inflation scheme. The letter clearly indicated that inflated baselines were impermissible and that participants should not be paid for “normal usage.” Had Silkman previously told Constellation that generation was curtailed during the baseline period (creating an inflated baseline) or that Rumford was being compensated for “normal usage,” one would expect a much different reaction by Silkman. At the very least, one would expect Silkman to remind Constellation that it had allegedly permitted and approved the scheme and seek further discussions with Constellation.

In fact, Silkman, CES, and Rumford were aware that ISO-NE viewed the scheme as fraudulent *before* Constellation sent its letter. On January 21, 2008, Silkman forwarded to Rumford managers Abradi and Guay a January 16, 2008 presentation by ISO-NE on concerns that ISO-NE had developed regarding the DALRP.¹²⁹ In his cover e-mail, Silkman stated that ISO-NE was contemplating changes to the DALRP: “The problem with this is that there will be many days in which the clearing price does not get above the minimum bid, which will result in an adjustment to the Baseline.”¹³⁰ He also highlighted the fact that the attached presentation showed the “concern that ISO-NE has” about the DALRP.¹³¹ The ISO-NE PowerPoint presentation describes precisely the scheme adopted by Rumford and CES: “several Market Participants appear to have figured out how to benefit from the creation and maintenance of a static [baseline]” by “intentionally inflating their [baseline]. This is done by increasing consumption or by decreasing the output of behind-the-meter generation when building the CB [baseline],

¹²⁶ See Rumf0001701-02; Silkman Dep. 397:3-9.

¹²⁷ *Id.* at 398-99.

¹²⁸ *Id.* at 396:3-12; 399:4-14.

¹²⁹ Rumf0001495-0001497.

¹³⁰ Silkman Dep. 396:3-12; 399:4-14.

¹³¹ *Id.*

and by submitting a \$50.00/MWh offer (which would clear in today's market) and returning to normal operations for every day thereafter."¹³² Again, though alerted to the fact that the scheme was impermissible, Silkman, CES, and Rumford did nothing.

5. Silkman claims that G4 outages during DALRP participation demonstrate good faith

Silkman claims that during September and November 2007, Rumford and CES elected not to take advantage of outages of G4 to further increase the baseline, demonstrating that CES did not act in the DALRP with intent to defraud. Silkman argues that in September 2007, Rumford and CES submitted DALRP offers of 1 MW during a G4 outage, although, if they had instead chosen not to submit DALRP offers during the outage the baseline would have increased.¹³³ Further, he argues that in November 2007 during another G4 outage, he sought Constellation's advice on how to participate in the DALRP during this outage and Constellation spoke to ISO-NE staff who advised Constellation to reset Rumford's baseline in order to return the baseline to the level Rumford originally set when it joined the DALRP in July 2007.¹³⁴ Silkman claims that he felt "vindicated" when ISO-NE provided direction that reestablished the original baseline.¹³⁵ Silkman's arguments are misplaced.

Regarding the September 2007 event, data submitted by Rumford (and cited by Silkman) demonstrates that Silkman's description of the September event is faulty. It appears that Rumford and CES actually reaped substantial unjust profits for phantom load reductions during the September outage. By offering 1 MW for each program hour during the unexpected outage of G4, Rumford and CES received DALRP compensation for 1 MW of demand response at the relevant Day-Ahead price and additional DALRP deviation payments paid at the generally higher Real-Time price. According to the data provided, during this time Rumford was compensated in some hours for over 70 MW of demand response that did not occur.¹³⁶ Rumford's 1 MW hourly offers on September 13,

¹³² RUMF0002828; PowerPoint Presentation by Henry Yoshimura of ISO-NE regarding Day-Ahead Load Response Program (DALRP) Recommended Market Rule Changes at 9 (January 23, 2008).

¹³³ Silkman 1b.9 Response at 28.

¹³⁴ *Id.* at 29-30.

¹³⁵ *Id.*

¹³⁶ *See* LONDONECON060610-14. For example, on hour 18 on September 13, 2007, Rumford offered 1 MW of load response into the DALRP. Because of its inflated baseline (and, apparently, reduced mill operations during the G4 outage), Rumford showed a load response of 72.132 MW during this hour.

2007 were particularly lucrative, with Rumford receiving \$33,238.36 for demand response that day.¹³⁷ This compares with Rumford's \$24,484.26 average daily payment for DALRP program days.¹³⁸

Regarding the November outage, ISO-NE's advice to reset the baseline to its preexisting level is not a defense.¹³⁹ Neither Silkman nor CES told ISO-NE that Rumford curtailed generation during the initial baseline period. Because ISO-NE did not know Rumford's initial DALRP baseline was inflated, it was understandable for ISO-NE to instruct Rumford to reset its baseline to the original level that ISO-NE presumed to be legitimate. ISO-NE's advice does not disprove Silkman's fraud, or justify his behavior.

6. Silkman argues that the Commission lacks enforcement jurisdiction

Silkman acknowledges the Commission has jurisdiction over the DALRP and load response participants.¹⁴⁰ However, Silkman attempts to argue his conduct here falls outside of the Commission's jurisdiction based on a pre-EPAAct 2005 case, *Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144, 1153 (D.C. Cir. 2000), holding that the Commission does not have general jurisdiction over all participants in the wholesale power industry.¹⁴¹ Further, Silkman argues that the FPA does not give authority to the Commission to pursue fraud allegations against entities that merely "aid and abet" others. Silkman cites precedent related to Securities and Exchange Commission enforcement under § 10(b) of the Securities and Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78j(b).¹⁴² In addition, Silkman argues that the Commission cannot engage in an enforcement action against Silkman because: (1) the Commission cannot "pierce the corporate veil" of CES to hold Silkman personally liable for fraud; and (2) Silkman did not receive a direct financial benefit from the alleged fraud.¹⁴³

¹³⁷ See Response of ISO-NE to Enforcement Request dated November 14, 2008.

¹³⁸ *Id.*

¹³⁹ The ISO-NE employee who spoke with Constellation and Silkman confirmed he was not told that the baseline was inflated or that Rumford experienced a similar outage in September 2007. See Robert Burke Aff., August 2008.

¹⁴⁰ Silkman 1b.19 Response at 64.

¹⁴¹ *Id.*

¹⁴² *Id.* at 47-51.

¹⁴³ *Id.* at 65.

Silkman largely ignores the relevant FPA and regulatory language. The operative question is not whether the Commission has jurisdiction over “advisors,” but whether Silkman is an “entity” that engaged in fraudulent activities “in connection with” a transaction subject to the Commission’s jurisdiction.¹⁴⁴ The Commission made clear in Order No. 670 that “if any entity engages in manipulation and the conduct is found to be ‘in connection with’ a jurisdictional transaction, the entity is subject to the Commission’s anti-manipulation authority.”¹⁴⁵ The Commission stated that the term “any entity” is “deliberately inclusive” and demonstrates Congressional intent to include any person or form of organization, regardless of his or its legal status, function, or activities.¹⁴⁶ The Commission’s enforcement jurisdiction over Silkman is not based upon a piercing of CES’s corporate veil.

Silkman did not merely aid and abet Rumford’s fraud, but rather actively developed, participated, and benefitted from the fraud in conjunction with Rumford. Silkman conceived of the scheme to defraud ISO-NE and New England rate payers. He recruited Rumford to join in this scheme. He helped to implement the scheme by communicating false and misleading information to ISO-NE. Further, CES’s percentage-based profit from the scheme was directly tied to the scheme’s success and Silkman benefitted from the scheme through his ownership of CES. Under these circumstances, Silkman and CES independently violated § 1c.2 of the Commission’s regulations.

IV. SANCTIONS

The Commission’s Penalty Guidelines apply to organizations, not natural persons.¹⁴⁷ However, the Commission has stated that it may look to the Penalty Guidelines for guidance when setting a civil penalty for individuals.¹⁴⁸ Enforcement relies upon the Commission’s Revised Policy Statement on Enforcement to determine the appropriate civil penalty for Silkman’s behavior.

The Revised Policy Statement on Enforcement sets forth a number of factors that the Commission considers in imposing a penalty, which relate to the seriousness of the

¹⁴⁴ 18 C.F.R. § 1c.2 (2011).

¹⁴⁵ Order No. 670 at P 16.

¹⁴⁶ *Id.* at P 18.

¹⁴⁷ Revised Penalty Guidelines, § 1A1.1., Application Note 1.

¹⁴⁸ *Id.*

offense, commitment to compliance, self-reporting, cooperating, and reliance on staff guidance.¹⁴⁹ Not all factors are applicable in every case. Staff notes below facts in this case relevant to these factors.

Seriousness of the Violations

Harm from Violations and Unjust Profits. As a result of Silkman's fraudulent scheme and implementation of that scheme, electricity customers in New England paid \$3,336,964.63 for demand response that never occurred. Further, the scheme harmed the transparency and integrity of the DALRP program. Silkman's scheme caused substantial harm to electricity consumers and to ISO-NE's DALRP. Silkman benefitted as a result of his ownership of and employment with CES.¹⁵⁰

Willfulness and Intent. Silkman's behavior was fraudulent, committed willfully and intentionally. Silkman clearly understood the DALRP prior to conceiving his scheme. He urged Rumford to adopt his scheme to deliberately curtail generation during the initial baseline creation period. He convinced Rumford management to participate in the DALRP despite the fact that all involved understood that Rumford would be paid for, in essence, doing nothing. Silkman knew that Rumford would incur \$120,000 in increased energy purchase costs to effectuate this scheme, but correctly predicted that Rumford would recoup these costs within a week.¹⁵¹ He deceived ISO-NE as to the legitimacy of Rumford's participation. Silkman's behavior is particularly egregious given his status as an energy consultant and his lengthy experience in the energy industry.

Scope and Duration. The scope of Silkman's misconduct was significant and its duration was prolonged. Silkman conceived of his scheme in July 2007, if not sooner, and persuaded Rumford to enroll in the DALRP under his proposal. Silkman helped to implement this scheme by supervising the submission of daily offers into the DALRP through early 2008. In addition, Silkman deflected concerns raised by others about Rumford's participation throughout this time.

Cooperation and Compliance

Silkman demonstrated satisfactory cooperation in the investigation, but did not provide "exemplary" cooperation.

¹⁴⁹ 123 FERC ¶ 61,156 at P 54-55.

¹⁵⁰ Silkman argues that his personal financial benefit from the fraud is a substantial mitigating factor. Silkman 1b.19 Response at 77.

¹⁵¹ Rumford earned over \$561,000 in the first full month of its DALRP participation (well over \$120,000 per week). See CNE0023813 (revised).

Financial Status

Based upon Enforcement's review of Silkman's financial status, Silkman has the ability to pay a civil penalty consistent with the recommendation herein. Silkman's federal taxable income was substantial in 2007 and 2008 (during the time of the violations)¹⁵² and he has assets with substantial value.¹⁵³

Silkman argues that a civil penalty of \$1 million or more would force him into personal bankruptcy.¹⁵⁴ Enforcement disagrees. Silkman should be able to pay the recommended civil penalty by contributing a portion of his annual income and liquidating some of his assets. Silkman has not made a credible argument to the contrary. However, Enforcement would not oppose permitting Silkman to pay the proposed penalty over a multi-year period.

Civil Penalty Conclusion

Staff recommends a civil penalty of \$1.25 million for Silkman. Silkman's behavior is particularly troublesome since Silkman and his company, CES, hold themselves out as providers of energy consulting services in Commission-jurisdictional markets. Silkman is a self-described energy industry expert and imposition of a substantial civil penalty is consistent with his central role in the fraud and would serve as a deterrent to other individuals considering fraudulent activity.

Further, the individuals and entities actually harmed by Silkman's behavior (i.e., electricity customers in New England, including individual retail rate payers) are unable to independently police and defend against this type of fraud. Under these circumstances, \$1.25 million is an appropriate civil penalty.

V. RECOMMENDED ACTION

Based on the above, Enforcement recommends the Commission issue Silkman an Order to Show Cause why he did not violate 18 C.F.R. § 1c.2 (2011) in connection with his fraudulent participation in the DALRP, and why the Commission should not require Silkman to pay a civil penalty of \$1,250,000. Enforcement also recommends the Commission make this Report public pursuant to 18 C.F.R. § 1b.20 and afford Silkman the opportunity to respond to staff's findings.

¹⁵² See Response to Silkman Data Request 4.

¹⁵³ Silkman Data Responses 5 and 6.

¹⁵⁴ Silkman 1b.19 Response at 68.

In accordance with 18 C.F.R. § 385.213 (2011), Enforcement recommends the Commission direct:

(a) Silkman, within 30 days of the date of an Order to Show Cause, be required to file an answer showing why he should not be found to have violated 18 C.F.R. § 1c.2 with respect to his participation in ISO-NE's DALRP.

(b) Silkman, within 30 days of the date of an Order to Show Cause, be required to file an answer showing why the Commission should not issue a notice of proposed penalty pursuant to the Commission's authority under § 316A of the Federal Power Act (16 U.S.C. 825o-1) in the amount of \$1,250,000.

(c) Enforcement, within 30 days of the date of Silkman's response, be required to file an answer to Silkman's answer.

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