144 FERC ¶ 61,041

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith — Docket No. IN08-8-000

ORDER ASSESSING CIVIL PENALTIES

(Issued July 16, 2013)

Paragraph Numbers

1. On October 31, 2012, the Commission issued an order directing Barclays Bank PLC (Barclays), Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith (Individual Traders) (Barclays and Individual Traders, collectively, Respondents) to show cause why they should not be found to have violated section 1c.2 of the Commission's regulations[1] by manipulating the electricity markets in and around California from November 2006 to December 2008.[2] The Commission additionally directed Respondents to show cause why they should not be assessed civil penalties as a result of their violations. Respondents timely elected the procedures of section 31(d)(3) of the Federal Power Act (FPA), pursuant to which the Commission first shall assess a penalty (without formal trial-type administrative adjudication), and then shall institute an action in federal district court to

[1] 18 C.F.R. § 1c.2 (2012) (Anti-Manipulation Rule).

[2] *Barclays Bank PLC*, 141 FERC ¶ 61,084 (2012) (Order to Show Cause); *id.*, app. A at 1 (Staff Report).

affirm the penalty assessment.[3] In this order, we find that Respondents violated section 222 of the FPA and the Anti-Manipulation Rule.[4] Given the seriousness of these violations and the lack of any effort by the Respondents to remedy their violations, the assessment of civil penalties pursuant to section 316A of the FPA, and disgorgement of unjust profits pursuant to section 309 of the FPA is warranted.[5]

I. Executive Summary

2. The Commission finds that Respondents violated the Commission's Anti-Manipulation Rule[6] from November 2006 to December 2008 by manipulating the energy markets in and around California through the use of a coordinated, fraudulent scheme. Respondents intentionally engaged in an unlawful scheme to manipulate prices on 655 product days over 35 product months in the period between November 2006 to December 2008 in the Commission-regulated physical markets at the four most liquid trading points in the western United States.[7] Respondents conducted the manipulation by building substantial monthly physical index positions in the opposite direction of the financial swap positions they assembled at the same points and then trading a next-day fixed price, or "cash," product at those points to "flatten" their physical index obligations in a manner intentionally designed to increase or lower the daily index (Index) (representing a daily volume-weighted average of prices paid for the fixed-price trades conducted each day) at that point. By intentionally increasing or decreasing the Index, Respondents benefited Barclays' financial swap positions whose value was ultimately determined by the same Index. Put simply, Respondents traded fixed price products not in an attempt to profit from the relationship between the market fundamentals of supply and demand, but instead for the fraudulent purpose of moving the Index price at a particular point so that Barclays' financial swap positions at that same trading point would benefit. The communications among the traders not only describe and substantiate the scheme, but also demonstrate the affirmative, coordinated, concerted, and intentional effort among the Respondents, as well as their individual actions, to effectuate the scheme.

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[3] 16 U.S.C. § 823b(d)(3) (2006).

[4] 16 U.S.C. § 824v(a) (2006); 18 C.F.R. § 1c.2.

[5] *See* 16 U.S.C. § 825o-1 (2006); 16 U.S.C. § 825h (2006).

[6] 18 C.F.R. § 1c.2.

[7] *E.g.*, Staff Report at 1, 8. The four points where the Commission's staff from the Office of Enforcement (OE Staff) identified that the conduct occurred are Mid-Columbia (MIDC), Palo Verde (PV), North Path 15 (NP), and South Path 15 (SP). *Id*. at 8.

3. As discussed below, Respondents established a significant volume of monthly index or term fixed-price physical products (collectively, Physical Positions) at one of four trading points in the western United States in a direction—long or short—opposite to fixed-for-floating financial swaps (Financial Swaps) held by Respondents at that point.[8] Although establishing the Physical Positions had the effect of creating physical delivery or receipt obligations which Barclays was unable to meet in actual practice,[9] it also made it possible for Respondents to trade an equally significant volume of other physical products in order to "flatten" (i.e. achieve zero net physical obligations at the end of every trading day) Barclays' Physical Positions.[10]

4. Respondents would flatten these Physical Positions through the use of next-day fixed-price (or "cash") physical products (Dailies), which were often traded on the Intercontinental Exchange (ICE) platform.[11] OE Staff has shown that the intended effect of trading Dailies to flatten the Physical Positions was to influence the daily ICE Index settlement price at that trading point. The daily Index settlement price was represented by the volume-weighted average price (Volume-Weighted Average Price, sometimes also referred to as VWAP) of all of the Dailies trading on the point, on that day. The frequency and timing of the Dailies trading was done pursuant to a manipulative scheme designed "to push daily [I]ndex settlements up if Barclays was buying Dailies and to push them down if it was selling."[12] This trading activity was "not intended to get the best price on those trades" and was "not responding to supply and demand fundamentals," but instead was intended to "benefit" Barclays' related Financial Swap positions.[13] We find that the trading at issue was intended to move the Index rather than respond to market fundamentals and was generally uneconomic.

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[8] With respect to both physical and financial transactions, for the purposes of this order and for the sake of convenience the buyer is "long" and the seller is "short." "A long position in the financial swap benefits from a higher daily index because the daily floating payment the buyer receives is higher relative to the fixed-price at which the buyer purchased the financial swap. Conversely, a short position in the financial swap benefits from a lower daily index because the floating price the seller must pay is lower relative to the fixed-price the seller receives." *Id.* at 9.

[9] *See Id.* at 62; Staff Reply at 91.

[10] Staff Report at 16.

[11] *E.g.*, *id.* at 7.

[12] *Id.* at 23.

[13] *Id.* at 23.

5. The Financial Swaps held at a particular trading point on a particular day ultimately settled off the Volume-Weighted Average Price of the Dailies' trading at that point on that day.[14] OE Staff similarly has shown that Respondents established "substantial" Financial Swaps in 35 product months (the Manipulation Months) at one or more of the four trading points.[15] In the Manipulation Months Respondents demonstrated a pattern by which the Physical Positions were flattened through the use of Dailies "consistently" in a direction to impact the resulting daily Index to the benefit of its Financial Swaps.[16]

6. By way of example, as described in the Staff Report, if Barclays held a long Financial Swap position for the peak period on a particular day at one of the four trading points, it would build a short Physical Position for the peak period at that trading point for that same day. Respondents would then flatten the short Physical Position by buying Dailies. Buying Dailies would tend to push Index prices up.[17] These higher prices, in turn, would be beneficial at the settlement of the long Financial Swap position because Barclays would be paid a higher price at the settlement of those swaps than it would have absent its manipulation of the Index price. Alternatively, if Barclays held a short Financial Swap position for the peak period on a particular day at one of the four locations, it would build a long Physical Position for the peak period for that same day.[18] Respondents would then flatten the long Physical Position by selling Dailies. Selling Dailies would tend to push Index prices down. These lower prices, in turn, would be beneficial at the settlement of the short Financial Swap positions because Barclays would need to pay less at the settlement of those Financial Swaps than it would have absent its manipulation of the Index price.

7. As discussed below, the Commission concludes that Respondents not only engaged in this manipulative scheme at four trading nodes in the western United States during the Manipulation Months, but that they did so with the intent to commit fraud. The Commission considered various evidence to reach its conclusion, as will be set forth in greater detail below,[19] including: (i) Respondents' consistent pattern across the

[14] Staff Reply at 3.

[15] *E.g.*, Staff Report at 11, 13-15.

[16] *E.g.*, *id.* at 12.

[17] *E.g.*, *id.*

[18] *See generally id.* at 8-10, 12.

[19] *See infra* sections III.B.2, III.B.3.

Manipulation Months of building substantial Physical Positions directionally opposite to large Financial Swap positions, and the subsequent flattening of those Physical Positions through the use of Dailies in a manner that was inconsistent with fundamental supply and demand concerns but instead was in a direction which would tend to move price to the benefit of Respondents' Financial Swaps;[20] (ii) the difference of Respondents' trading behavior in the Manipulation Months versus the Respondents' trading behavior in months where manipulation was not alleged to have occurred;[21] (iii) communications among the traders which describe and substantiate the scheme and demonstrate the affirmative, coordinated, concerted, and intentional effort, as well as the individual actions, among the Respondents to effectuate that scheme;[22] (iv) the Respondents' failure to respond at all in their answers to allegations made by OE Staff concerning the building of Physical Positions and Financial Swap positions as being part of the manipulative scheme—material allegations that, under the Commission's rules at the very least, should have been answered[23]—and Respondents' attempts to instead address only the Dailies trading;[24] (v) the uneconomic nature of the Dailies trading;[25] (vi) the inconsistency between the Individual Traders' testimony under oath concerning certain of their communications and behavior, and the explanation the traders present in their Submissions of those same communications and behavior;[26] and (vii) the failure of Respondents' economic, statistical and legal analyses to provide explanation of or defense for the Physical Positions, Financial Swaps and the Dailies trading. The Commission also considered various evidence to reach its conclusion concerning intent. For example, OE Staff presented compelling evidence to demonstrate that the Individual Traders understood the impact their Dailies trading would have on the Index and that they executed those trades for precisely that reason, communicating freely about "trying to

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[20] *See infra* section III.B.2.b. *E.g.*, Staff Report at 13-35; Staff Reply at 2-4, 8-28, 45-46, 80-82.

[21] *See infra* section III.B.2.b. *E.g.*, Staff Report at 28-35; Staff Reply at 11-17.

[22] *See infra* sections III.B.2.a, III.B.2.e, III.B.3.b; *e.g.*, Staff Report at 38-59; Staff Reply at 17-38. In addition, the Commission considered the fact that trading losses were often moved from books of other individual traders to Connelly's book. *See infra* P 99; *see also infra* note 196.

[23] 18 C.F.R. § 385.213(c) (2012).

[24] *See infra* section III.B.2.b. *E.g.*, Staff Reply at 8-12.

[25] *See infra* section III.B.2.c. *E.g.*, Staff Report at 28-35; Staff Reply at 12-16.

[26] *See infra* section III.B.3.b. *E.g.*, Staff Reply at 29-38.

drive price,"[27] "protect[ing]" their positions,[28] and "mov[ing]"[29] or "affect[ing]"[30] the Index. Speaking documents that provide direct evidence of a violation are rare in fraud and manipulation cases, which do not require direct evidence of intent and instead typically rely on more indirect inferences of intent from circumstantial evidence.[31] Here, OE Staff not only presented such "speaking" documents, but in some instances was actually able to tie the expressions of intent in such documents to contemporaneous (or near contemporaneous) trading in furtherance of the scheme.[32] Nothing in Respondents' answers rebuts this evidence.

8. After considering the evidence and legal arguments presented by OE Staff and Respondents, we find that the scheme as described by OE Staff violates section 222 of the FPA and the Commission's Anti-Manipulation Rule. Furthermore, we find that OE Staff established through credible evidence that Respondents concocted, and each individually and affirmatively participated in, an unlawful scheme to manipulate the Commission-jurisdictional price of wholesale electricity in the western United States as alleged, and that they did so with scienter. And, after reviewing the proposed remedies, with due consideration of the mitigating and aggravating factors set forth in section 316A of the FPA,[33] we find that penalties and disgorgement are warranted. Accordingly, we find that Barclays should be assessed $435 million in civil penalties; that Connelly should be assessed $15 million in civil penalties; and that Brin, Levine, and Smith should be assessed $1 million each in civil penalties. In addition, we find that Barclays should be required to disgorge $34.9 million in unjust profits, plus interest.

II. <u>Background</u>

9. On July 3, 2007, OE Staff notified Barclays that it had begun an investigation of allegations that Barclays and some of its traders manipulated the electricity markets in

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[27] Brin Answer att. B, BARC0634367; *see infra* section III.B.3.b.i.

[28] BARC03900265; *see infra* section III.B.3.b.iii(a).

[29] BARC0260014; *see infra* section III.B.3.b.ii.

[30] BARC0090353; *see infra* section III.B.3.b.iv(a).

[31] *See infra* section III.B.3.v; *see also U.S. v. Sullivan*, 406 F.2d 180, 186 (2d Cir. 1969); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authority*, 105 FERC ¶ 61,218, at P 43 (2006).

[32] *See infra* section III.B.3.

[33] 16 U.S.C § 825o-1(b).

and around California beginning in November 2006.[34] The Commission issued a non-public order of formal investigation on October 2, 2008.[35] On June 10, 2011, OE Staff issued Preliminary Findings Letters to Barclays and the Individual Traders stating that it had preliminarily concluded that they had engaged in manipulative activity in violation of the Anti-Manipulation Rule.[36] Barclays and the Individual Traders responded to the Preliminary Findings Letters on August 29 or 30, 2011.[37] The Commission issued a notice of alleged violations on April 5, 2012. On May 3, 2012, OE Staff provided notice under section 1b.19 of the Commission's regulations[38] of its intent to recommend the initiation of a public proceeding against Barclays and the Individual Traders.[39] On June 11, 2012, Respondents provided their responses to OE Staff's 1b.19 letter.[40] The Commission issued the Order to Show Cause to commence this public proceeding on October 31, 2012.

10. In the Staff Report attached to the Order to Show Cause, OE Staff alleged that the Respondents violated the Commission's Anti-Manipulation Rule[41] from November 2006

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[34] *See* Staff Report at 55 (citing Ltr. from M. Higgins to M. Ramirez, July 3, 2007; Ltr. from M. Ramirez to M. Higgins, July 6, 2007).

[35] *Investigation Into Allegations of Market Manipulation of the Electric Energy Markets in the West*, Docket No. IN08-8-000 (Oct. 2, 2008) (non-public order).

[36] *See* Staff Report at 3; Barclays Answer at 6 (citing Ltr. from W. Heath to P. Pantano (Jun. 10, 2011)).

[37] Barclays August 29, 2011 response to the Preliminary Findings Letter is attached to Barclays Answer. *See* Barclays Answer app. 1 (August 29, 2011 Submission). The Barclays August 29, 2011 Submission was submitted on behalf of Barclays and of Connelly.

[38] 18 C.F.R. § 1b.19 (2012).

[39] Staff Report at 3; Barclays Answer at 7.

[40] Staff Report at 3. Barclays attached its June 11, 2012 response to the OE Staff's 1b.19 letter (which it calls its "Wells Submission") to its Answer. *See* Barclays Answer app. 2 (Barclays 1b.19 Submission). Brin and Connelly likewise attached their July 11, 2012 responses to their Answers. *See* Brin Answer, Ex. 2; Connelly Answer, Ex. 2.

[41] 18 C.F.R. § 1c.2.

to December 2008 by manipulating the energy markets in and around California through the use of a coordinated, fraudulent scheme.[42]

11. OE Staff recommended that the Commission assess a civil penalty against Barclays of $435 million and require Barclays to disgorge $34.9 million, plus interest. In addition, OE Staff recommended that the Commission assess civil penalties of $15 million against Connelly, $1 million against Brin, $1 million against Levine, and $1 million against Smith.

12. In the Order to Show Cause, the Commission directed Respondents to file an answer within 30 days explaining why they should not be found to have violated section 222 of the FPA and the Commission's Anti-Manipulation Rule as a result of their trading of electricity in the western United States from November 2006 to December 2008 as described in the order.[43] In addition, the Commission directed Respondents to show cause why the proposed penalties should not be assessed.[44] The Commission also stated that Respondents must, within 30 days, elect either an administrative hearing before an Administrative Law Judge (ALJ) at the Commission prior to the assessment of a penalty pursuant to section 31(d)(2) of the FPA or, if the Commission finds a violation, an immediate penalty assessment by the Commission pursuant to section 31(d)(3)(A) of the FPA.[45]

13. On November 29, 2012, Respondents each gave notice of their election under section 31(d)(3)(A) of the FPA and the Order to Show Cause,[46] thereby electing an immediate penalty assessment if the Commission finds a violation. Respondents answered the Order to Show Cause on December 14, 2012.[47] OE Staff filed its reply to Respondents' answers on January 28, 2013.

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[42] Staff Report at 1.

[43] Order to Show Cause, 141 FERC ¶ 61,084 at PP 1-4.

[44] *Id*.

[45] On November 29, 2012, the deadline to file answers to the Order to Show Cause was extended to December 14, 2012, and the deadline for OE Staff to file a response was extended to January 28, 2013.

[46] Order to Show Cause, 141 FERC ¶ 61,084 at Ordering Paragraph (D).

[47] Each of the Individual Traders relies on and cites to or expressly joins in and incorporates by reference the Barclays Answer and all of the prior filings made by Barclays in this matter. *See* Levine Answer at 3 (citing Barclays Answer); Smith Answer at 3 (citing Barclays Answer); Brin Answer at 2 n.6 (incorporating the Barclays Answer

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14. Section 222 of the FPA makes it unlawful for any entity to use a deceptive or manipulative device in connection with the purchase or sale of electric energy or transmission service subject to the Commission's jurisdiction.[48] Order No. 670 implemented this prohibition, adopting the Anti-Manipulation Rule. That Rule, among other things, prohibits an entity from: (1) using a fraudulent device, scheme or artifice to defraud or to engage in a course of business that operates as a fraud or deceit; (2) with the requisite scienter; (3) in connection with the purchase, sale or transmission of electric energy subject to the jurisdiction of the Commission.[49]

15. Pursuant to section 316A(b) of the FPA, the Commission may assess a civil penalty of up to $1 million per day, per violation against any person who violates Part II of the FPA (including section 222 of the FPA) or any rule or order thereunder.[50] In determining the amount of a proposed penalty, section 316A(b) requires the Commission to consider "the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner."[51] Although they are not mandatory, the Commission uses its Penalty Guidelines, as informed by its policy statements on enforcement, to guide its analysis.[52]

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by reference); Connelly Answer at 2 n.6 (incorporating the Barclays Answer). Thus, the Commission treats Barclays' arguments as those of each of the Individual Traders as well.

[48] 16 U.S.C. § 824v(a).

[49] *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, *reh'g denied*, 114 FERC ¶ 61,300 (2006). As the Commission explained in Order No. 670, the Anti-Manipulation Rule is patterned after the Securities and Exchange Commission's (SEC) Rule 10b-5, but in adopting the rule, the Commission noted that it would not be rote in its application of securities law to the energy markets. *See* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at PP 2, 7 (citing 17 C.F.R. § 240.10b-5 (2005)). Rather, the Commission explained that it would apply such precedent on a case-by-case basis as "appropriate under the specific facts, circumstances and situations in the energy industry." Order No. 670, FERC Stats & Regs. ¶ 31,202 at P 42.

[50] 16 U.S.C. § 825o-1. Under section 3 of the FPA, "'person' means an individual or a corporation." 16 U.S.C. § 796(4) (2006).

[51] *Id.*

[52] *See Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 (2010) (Penalty Guidelines Order); *Enforcement of Statutes, Orders, Rules, and*

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16. As discussed below, we find that Respondents violated the Anti-Manipulation Rule and section 222(a) of the FPA by intentionally amassing Physical Positions and flattening them through cash trading to impact the Index and thereby benefit Barclays' Financial Swaps. And Respondents have failed to demonstrate otherwise. We further determine that Respondents' answers fail to rebut the case for the appropriateness of the civil penalties and disgorgement recommended in the Staff Report and therefore, we assess the remedies proposed in the Staff Report pursuant to section 31(d)(3)(a) of the FPA.

III. Discussion

A. Preliminary Matters

1. Burden of Proof

17. As the proponent of the Order to Show Cause, OE Staff bears the burden of proof, which is to say, the ultimate burden of persuasion.[53] We find that the Staff Report establishes a prima facie case that Respondents effectuated a manipulative scheme, with the requisite intent, in connection with jurisdictional transactions warranting the imposition of civil penalties and disgorgement. A burden, therefore, falls upon Respondents to rebut the prima facie case established in the Staff Report: "[W]hen the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true."[54]

Regulations, 130 FERC ¶ 61,220, at PP 6, 26 (2010) (Initial Penalty Guidelines Order) (seriousness of violation and timely efforts to remedy a violation will continue to be significant factors under the Penalty Guidelines). The Commission noted when issuing its Initial Penalty Guidelines Order that it will continue to rely on issues identified in its policy statements on enforcement, *Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156, at PP 50-71 (2008), and *Enforcement of Statutes, Orders, Rules, and Regulations,* 113 FERC ¶ 61,068, at PP 17-27 (2005), as well as its policy statement on compliance, *Compliance with Statutes, Regulations, and Orders*, 125 FERC ¶ 61,058 (2008), to measure the seriousness of violations and timely efforts to remedy violations. The Commission stressed that any conflict will be resolved in favor of the Penalty Guidelines. Initial Penalty Guidelines Order, 130 FERC ¶ 61,220 at P 63. The Penalty Guidelines themselves are appended to the Penalty Guidelines Order.

[53] *See Dir. Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 275-76 (1994) (*Greenwich Collieries*).

[54] *Id.* at 280.

2. **Fairness of Process**

18. Barclays argues that its ability to respond to the Order to Show Cause has been prejudiced by OE Staff's refusal to respond to certain arguments raised by Respondents in their prior submissions to OE Staff.[55] This reflects a misunderstanding of the purpose of the Commission's investigative procedures. The preliminary findings letter and Rule 1b.19 process are intended to provide the subject of an investigation with both general notice of the nature of the violations alleged by OE Staff, and the opportunity to adduce arguments and evidence that could change OE Staff's views on whether a violation occurred. The process is also intended to ensure that OE Staff's views are as informed as possible before an investigation matures to the point that OE Staff recommends that the Commission issue an order to show cause. In short, while OE Staff shall give consideration to the legal and factual arguments put forward by the subject of an investigation, it is under no obligation to provide any response. Thus, Barclays was not prejudiced merely because OE Staff declined to share in detail its views on each argument that Respondents raised in their prior submissions. Instead, under the procedures of section 31(d)(3) of the FPA, which have been invoked by Respondents here, in their answers to the Order to Show Cause Respondents have had the opportunity to respond to the allegations included in the Staff Report and those arguments have been considered in this proceeding. They are, in fact, addressed below.

3. **Threshold Issues**

19. Respondents raise two threshold issues which they claim preclude the Commission's consideration of the allegations in the Order to Show Cause. First, Respondents assert that the allegations raised by OE Staff are time-barred.[56] Second, Respondents assert that the Commission is estopped from enforcing the alleged manipulation on the grounds that OE Staff waived its claims.

20. As an initial matter, Respondents' threshold arguments are perfunctorily asserted, without elaboration or development. The Commission has consistently observed that bare assertions are insufficient to warrant a response from the Commission.[57] It is well established that:

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[55] Barclays Answer at 8-9.

[56] *See* Barclays Answer at 33; Connelly Answer at 67; Brin Answer at 50-51; Levine Answer at 37; Smith Answer at 28-30.

[57] *See, e.g., Entergy Ark., Inc.* 141 FERC ¶ 61,269, at P 30 (2012) (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,173, at P 93 (2010); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,108, at P 14 (2006));

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> It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. Judges are not expected to be mind readers. Consequently, a litigant has an obligation to 'spell out its arguments squarely and distinctly' or else forever hold its peace.[58]

Moreover, courts have found that it is not their obligation "to research and construct the legal arguments open to parties, especially when they are represented by counsel."[59] Other courts have noted that "perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived,"[60] and that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."[61] That is the case here. Respondents' recitation of the statute of limitations and estoppel issues, as well as other defenses similarly raised,[62] are conclusory at best, and often lack substance, facts, or legal argument. Respondents thus have waived their arguments raised in this perfunctory manner.[63] However, even if the

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CAlifornians for Renewable Energy, Inc. v. National Grid, 137 FERC ¶ 61,113, at P 36 (2011); *UNITIL Power Corp. v. Pub. Serv. Co. of N.H.*, 62 FERC ¶ 61,055, at 61,287 (1993); *Houlton Water Co. v. Me. Pub. Serv. Co.*, 55 FERC ¶ 61,037, at 61,110 (1991).

[58] *United States v. Zannino*, 895 F.2d 1, 18 (1st Cir. 1990).

[59] *Davis v. Dist. of Columbia*, 503 F. Supp. 2d 104, 126-27 (D.D.C. 2007) (quoting *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003)).

[60] *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

[61] *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (quotation marks and citation omitted).

[62] *See* Barclays Answer at 33-34; Levine Answer at 37; Smith Answer at 33.

[63] These perfunctory arguments, like any arguments not explicitly set forth in Respondents' answers, are not salvaged by Respondents' asserted "incorporation by reference" of arguments and evidence from their prior submissions to OE Staff into their answers to the Order to Show Cause. *See* Barclays Answer at 6. The Commission typically declines to consider arguments generically "incorporated by reference" in this manner. *See San Diego Gas & Elec. Co. v. Sellers of Market Energy and Ancillary Services*, 127 FERC ¶ 61,269, at PP 295-296 (2009) (rejecting parties' attempt "to broadly incorporate by reference all its previous arguments"). Barclays' putative incorporation by reference of over 100 pages of text and over 30 appendices falls far short of clearly informing the Commission of which of those arguments and appendices Barclays deems to have continuing relevance or to what specific issues Barclays deems

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issues were not waived, they would not preclude the Commission's exercise of jurisdiction here, as discussed below.

a. Statute of Limitations

21. Respondents argue that OE Staff's allegations are barred by the applicable statute of limitations.[64] Only Smith elaborates on this bare assertion. According to Smith, the Commission cannot impose penalties more than five years after the conduct giving rise to those penalties occurred.[65] Smith explains that the allegations are that Respondents' violations began on November 1, 2006. Smith states that on June 21, 2011, he entered an agreement with OE Staff to toll the statute of limitations until OE Staff terminates its investigation. Smith now asserts that OE Staff terminated the investigation on April 5, 2012, when the Secretary issued a notice of alleged violations.[66] Thus, Smith concludes that the tolling agreement was terminated on April 5, 2012 and that the remaining time left under the statute of limitations has run.[67]

22. The five-year statute of limitations has not and will not lapse as a result of the issuance of a notice of alleged violations because, contrary to Smith's suggestion, a

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them to have such relevance. *Id.* Indeed, to consider them would require the Commission first to make Barclays' argument for it, and then rebut it. The Commission's regulations make clear, moreover, that "[w]hen an answer is made in response to . . . an order to show cause, or an amendment to such pleading, the answerer must, to the extent practicable, (i) Admit or deny, specifically and in detail, each material allegation of the pleading answered; and (ii) Set forth every defense relied on." 18 C.F.R. § 385.213(c) (2012). To the extent Barclays (or any other Respondent) intends to rely on a particular defense, under our regulations it must actually set that defense forth in its Answer, specifically and in detail. In sum, to the extent Barclays (or any other Respondent) simply claims to incorporate such defenses by general reference, we may properly exercise our discretion to decline to consider these additional arguments.

[64] *See* Barclays Answer at 33; Connelly Answer at 67; Brin Answer at 50-51; Levine Answer at 37; Smith Answer at 28-30.

[65] Smith Answer at 28 (citing 28 U.S.C. § 2462 (2006)).

[66] According to Smith, Commission precedent establishes that a notice of alleged violations may issue only after OE Staff's investigation has been completed. *Id.* at 29 (citing *Enforcement of Statutes, Regulations, and Orders*, 134 FERC ¶ 61,054, at P 17 (2011)).

[67] *Id.* at 30.

notice of alleged violations does not necessarily mark the end of OE Staff's investigation. In fact, the Commission recently rejected this very argument in this proceeding, clarifying that issuance of a notice of alleged violations does not entail the close of an investigation.[68] Although the Commission's ultimate determination in that prior order addressed a separate, but related issue—the scope of the Commission's authority to continue its investigation after the issuance of a notice of alleged violations—that order makes clear that, contrary to Smith's assertion, OE Staff's investigation in this matter had not yet concluded.[69] Moreover, OE Staff has continued its investigation pursuant to section 307 of the FPA.[70] Consequently, the tolling agreements executed by Respondents remain in effect and the five-year statute of limitations has not lapsed.

b. Estoppel

23. Barclays, Levine, and Smith assert as a defense that the "Commission is estopped from pursuing claims that post-date Barclays' request to [OE] Staff to advise them if they should discontinue any type of trading activity."[71] We find that neither OE Staff nor the Commission is estopped, and that neither OE Staff nor the Commission waived or forfeited authority to pursue the manipulation here, merely because OE Staff did not respond to Respondents' request for guidance during the investigation. Indeed, there is no evidence that at the time of these discussions OE Staff had a factual understanding of Barclays' trading sufficient to draw any conclusions about whether the conduct was or was not lawful. Moreover, OE Staff or the Commission cannot be estopped from pursuing enforcement matters within its jurisdiction for such reasons. First, the Commission did not waive or forfeit its obligation to pursue violations of law within its jurisdiction. As the D.C. Circuit has explained, "waiver is the intentional relinquishment or abandonment of a known right."[72] And as the Supreme Court held, "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms."[73] Here, the Commission and its agents are "expressly authorized to bring" manipulation suits pursuant to the FPA, and therefore, "any waiver must be made in

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[68] *See Barclays Bank PLC*, 143 FERC ¶ 61,024, at PP 22-29 (2013).

[69] *Id.* PP 2-4.

[70] 16 U.S.C. § 825f (2006).

[71] Barclays Answer at 33; *accord* Levine Answer at 37; Smith Answer at 33.

[72] *United States v. Weathers*, 186 F.3d 948, 955 (D.C. Cir. 1999) (citations and quotation omitted).

[73] *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987) (internal citation omitted).

unmistakable terms."[74] Respondents have presented no evidence that OE Staff or the Commission expressly waived authority under law, and none will be implied.

24. In addition, neither OE Staff nor the Commission may be estopped based on the quality of OE Staff's response in 2007. "[I]t is well settled that the Government may not be estopped on the same terms as any other litigant."[75] Even if estoppel applied to the government, the elements would be: "(1) false representation, (2) a purpose to invite action by the party to whom the representation was made, (3) ignorance of the true facts by that party and (4) reliance."[76] Critically, an "[a]ssertion of equitable estoppel requires a 'definite misrepresentation.'"[77] And, the D.C. Circuit rejected claims of estoppel against a government agency where "there appears to have been no actual misrepresentation or concealment" and "no definitive statement was made."[78] That is the case here. Respondents explicitly predicate their claim for estoppel on OE Staff's silence, and allege no affirmative misrepresentation. Accordingly, Respondents' skeletal estoppel defense is denied.

B. Determination of Violation

1. Applicable Legal Standard—18 C.F.R. § 1c.2

25. In relevant part, section 222 of the FPA makes it

> unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy . . . any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary

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[74] *United States v. Philip Morris Inc.*, 300 F. Supp. 2d 61, 68-70 (D.D.C. 2004) (*Philip Morris*).

[75] *Heckler v. Cmty. Health Servs*., 467 U.S. 51, 60 (1984) (*Heckler*); *see also Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419, 421-22 (1990).

[76] *Philip Morris*, 300 F. Supp. 2d at 71 (citing *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988)); *see also Graham v. SEC*, 222 F.3d 994, 1007 (D.C. Cir. 2000).

[77] *Philip Morris*, 300 F. Supp. 2d at 71 (quoting in part *Heckler*, 467 U.S. at 59).

[78] *Grumman Ohio Corp. v. Dole*, 776 F.2d 338, 347-48 (D.C. Cir. 1985).

> and appropriate in the public interest or for the protection of electric ratepayers.[79]

The Commission implemented this statute by promulgating the Anti-Manipulation Rule[80] which prohibits an entity 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 the purchase or sale of electricity subject to the jurisdiction of the Commission.[81] For purposes of this rule, "the Commission defines fraud generally, that is, to include any action, transaction, or conspiracy for the purpose of impairing, obstructing, or defeating a well-functioning market."[82] We will address each of the rule's three elements in turn.

2. <u>Fraudulent Device, Scheme or Artifice</u>

26. The first element we address in determining whether there was a violation of the Anti-Manipulation Rule is establishing whether there was a fraudulent device, scheme, or artifice, or whether there was a course of business that operated as a fraud. As discussed below, we conclude that there was.

27. As noted above, OE Staff alleges that between November 2006 and December 2008, Respondents participated in a fraudulent device, scheme or artifice, or that they engaged in a course of business that operated or would operate as a fraud, in violation of the Commission's Anti-Manipulation Rule.[83] More specifically, OE Staff alleges that Respondents participated in manipulative conduct in and around California over this timeframe on 655 product days over the Manipulation Months in the Commission-regulated physical markets at the then four most liquid trading points in the area.[84] The activity alleged by OE Staff to be manipulative involved the trading of

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[79] 16 U.S.C. § 824v(a).

[80] 18 C.F.R. § 1c.2.

[81] *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 38; 18 C.F.R. § 1c.2. The other two elements of the Anti-Manipulation Rule, scienter and jurisdictional nexus are addressed *infra*.

[82] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

[83] *E.g.*, Staff Report at 36.

[84] *E.g.*, *id.* at 1, 8. As noted above, the four points at which OE Staff alleges the conduct occurred are MIDC, PV, NP, and SP. *Id.* at 8; *see also supra* note 7.

physical electric energy products.[85] OE Staff charges that Respondents engaged in a coordinated scheme to establish Physical Positions and then to trade Dailies to move ICE daily Index settlements to benefit fixed-for-floating Financial Swap positions.[86]

28. Specifically, OE Staff avers that Respondents engaged in a coordinated scheme to assemble "substantial" Physical Positions[87] which were generally in the opposite direction of Respondents' fixed-for-floating Financial Swaps.[88] Respondents would then flatten these Physical Positions through the use of Dailies, which trading was often concentrated on the ICE platform.[89] OE Staff alleges that the intended effect of flattening the Physical Positions was to influence the daily Index settlement at the four trading points. And, the Financial Swaps held at a trading point on a particular day settled off the Volume-Weighted Average Price of the Dailies' trading at that point, on that day.[90] OE

[85] As OE Staff noted, "Index was a good instrument for the type of manipulation Barclays pursued because it was a liquid product that could be obtained in sizable quantities at a low cost and . . . trading it against Dailies carried limited risk. . . . Barclays used physical index positions to create the physical obligation that Barclays then flattened with its manipulative cash trading." Staff Report at 16.

[86] *E.g.*, *id.* at 1, 8, 11.

[87] OE Staff notes that, while these generally were comprised of monthly physical index positions, they also included some fixed-price term positions. *Id.* at 12. Connelly and other Barclays' traders viewed the monthly physical index positions and the fixed-price term positions similarly when those positions went to delivery each day. *Id.* at 12, 16. Moreover, as the physical index volumes were generally larger than the fixed-price term volumes, OE Staff generally refers to the flattening of these Physical Positions as trading cash or Dailies against Index. *Id.* at 16.

[88] *Id.* at 13-21. The buyer of a fixed-for-floating financial swap pays a fixed-price and receives a floating price which consists of the ICE Volume-Weighted Average Price for each day of the duration of the swap. The seller of a fixed-for-floating financial swap receives the fixed-price and pays the floating price. *Id.* at 8-9. OE Staff reflects the Financial Swap position as adjusted for any offsetting physical fixed-price position. The majority of Barclays' financial price exposure was composed of Financial Swaps. Connelly testified that he viewed the physical fixed-price term positions as having a financial swap and index component. The Staff Report refers to Barclays' financial price risk exposure as its "financial swap position." The Commission has adopted this nomenclature here. *Id.* at 12.

[89] *E.g.*, *id.* at 7.

[90] Staff Reply at 3.

Staff similarly alleges that Respondents established "substantial" Financial Swaps in the Manipulation Months at one or more of the four trading points.[91] OE Staff avers that in the Manipulation Months Respondents demonstrated a pattern by which the Physical Positions were flattened through the use of Dailies "consistently" in a direction to impact the resulting daily Index to the benefit of its Financial Swaps.[92]

29. OE Staff alleges that, as Respondents were motivated by the desire to benefit Financial Swaps, they did not trade Dailies to get the best price from those transactions nor did they trade Dailies in response to the interplay of the forces of supply and demand.[93] OE Staff avers that the execution of Dailies by Respondents generally produced trading losses which were avoidable.[94] OE Staff also maintains that numerous communications between and among the Individual Traders demonstrate that the Dailies were engaged in to manipulate the Index. In addition, OE Staff presents evidence that Barclays' own compliance materials recognized that uneconomic trading engaged in to benefit another transaction would be manipulative.[95]

30. Respondents counter that the conduct "cherry-picked"[96] by OE Staff does not equate to a fraudulent device, scheme or artifice in violation of the Anti-Manipulation Rule nor was it a course of business that operated or would operate as a fraud in violation of that Rule. Respondents, in defense, argue that there is a lack of evidence and of the

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[91] *E.g.*, Staff Report at 11, 13-15.

[92] *E.g.*, *id.* at 12, 23-28.

[93] *E.g.*, *id.* at 12, 23-28. OE Staff offers illustrative examples of instances where Barclays and the Individual Traders traded Dailies in support of the Financial Swaps and not to obtain the best price from trading. *Id.* at 23-27.

[94] *E.g.*, *id.* at 1, 28-35. OE Staff notes that in some instances the Dailies produced gains or less substantial losses. *Id.* at 28.

[95] *E.g.*, *id.* at 37 & n.139; Staff Reply at 1.

[96] Barclays Answer at 3, 19, 24. It is important to note that, as previously mentioned, each of the Individual Traders relies on and cites to (Levine Answer at 3; Smith Answer at 3) or expressly joins in and incorporates by reference (Brin Answer at 2 n.6; Connelly Answer at 2 n.6) the Barclays Answer and all of the prior filings made by Barclays in this matter. *See supra* note 47. Thus, the Commission treats Barclays' arguments as those of each of the Individual Traders as well. In the same vein, the Barclays August 29, 2011 Submission was submitted on behalf of Barclays and of Connelly. *See* Barclays August 29, 2011 Submission at 1.

legal support necessary to satisfy the first prong of the three-part Anti-Manipulation Rule, including: there is no evidence of a joint scheme and there can be no group vicarious liability;[97] there is no pattern of manipulative conduct;[98] there is no evidence of material trading losses or that the Dailies were traded against Barclays interests;[99] there is no legal or economic support for OE Staff's position;[100] there is no evidence that Barclays could have or did trade to influence price;[101] there can be no fraud in open market transactions;[102] there is neither evidence of market power nor artificial price;[103] and that Barclays was motivated by legitimate business purposes.[104]

31. As discussed in greater detail below, we find that these arguments are not persuasive and that they fail to rebut the *prima facie* case set forth in the Staff Report and Order to Show Cause. We find OE Staff's allegations are credible and Respondents' actions constitute a violation of the Anti-Manipulation Rule and section 222 of the FPA. In sum, we conclude that Respondents engaged in a fraudulent device, scheme, or artifice and engaged in a course of business that operated as a fraud or deceit upon next-day fixed-price electric market participants and on the ICE daily Index electric market participants in the Manipulation Months. Specifically, we find the allegations and evidence demonstrate that Respondents amassed Physical Positions generally directionally opposite to Financial Swaps, which were then flattened—often at a loss—intentionally to the benefit of the Financial Swaps, and we find those actions to constitute fraud.

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[97] Barclays Answer at 22-23; Connelly Answer at 55-59; Brin Answer at 40-45; *see also* Smith Answer at 14-15; Levine Answer at 20.

[98] Barclays Answer at 3, 11-13; Barclays August 29, 2011 Submission at 23-24.

[99] Barclays Answer at 3, 10, 13-15.

[100] *Id.* at 9-10.

[101] *Id.* at 15-19.

[102] *Id.* at 1-2; Barclays August 29, 2011 Submission at 55-68; Levine Answer at 3; Smith Answer at 15; Staff Reply at 47-50.

[103] Barclays Answer at 4, 19-21.

[104] *E.g.*, *id.* at 13; Barclays August 29, 2011 Submission at 26-28; Brin Answer at 8-11; Connelly Answer at 11-14; Smith Answer at 15-17.

32. Fraud is a question of fact to be determined by all the circumstances of a case[105] and the Commission has defined fraud "to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market."[106] Consistent with that precedent, we base our conclusion here on the totality of the evidence set forth in the Submissions. Among the evidence we have considered in reaching this conclusion, as will be set forth in greater detail below, is: (i) Respondents' consistent pattern across the alleged 35 product months of building substantial Physical Positions directionally opposite to large Financial Swap positions, and the subsequent flattening of the Physical Positions through the use of Dailies in a manner that was inconsistent with fundamental supply and demand concerns but instead was in a direction which would tend to move price to the benefit of Respondents' Financial Swaps;[107] (ii) the difference in Respondents' trading behavior in the Manipulation Months from those months where manipulation was not alleged;[108] (iii) the communications among the traders that not only describe and substantiate the scheme, but also demonstrate the affirmative, coordinated, concerted, and intentional effort among the Respondents, as well as their individual actions, to effectuate that scheme;[109] (iv) the Respondents' failure to respond at all in their answers to allegations made by OE Staff concerning the building of Physical Positions and Financial Swap positions as being part of the manipulative scheme—material allegations that, under the Commission's rules at the very least, should have been answered[110]—and Respondents' attempts to instead address only the Dailies trading;[111] (v) the uneconomic nature of the Dailies trading;[112] (vi) the inconsistency

[105] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50; *Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056 at P 20 (2013) (order approving stipulation and consent agreement) (quoting Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 39).

[106] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

[107] *See infra* section III.B.2.b. *E.g.*, Staff Report at 13-35; Staff Reply at 2-4, 8-28, 45-46, 80-82.

[108] *See infra* section III.B.2.b. *E.g.*, Staff Report at 28-35; Staff Reply at 11-17.

[109] *See infra* sections III.B.2.a, III.B.2.e, III.B.3.b; *e.g.*, Staff Report at 38-59; Staff Reply at 17-38. In addition, the Commission considered the fact that trading losses were often moved from books of other individual traders to Connelly's book. *See infra* P 99; *see also infra* note 196.

[110] 18 C.F.R. § 385.213(c).

[111] *See infra* section III.B.2.b. *E.g.*, Staff Reply at 8-12.

[112] *See infra* section III.B.2.c. *E.g.*, Staff Report at 28-35; Staff Reply at 12-16.

between the Individual Traders' testimony under oath concerning certain of their communications and behavior, and the explanation the traders present in their Submissions of those same communications and behavior;[113] and (vii) the failure of Respondents' economic, statistical and legal analyses to explain or provide defense for the physical and financial positions and the Dailies trading. While our conclusion that the Respondents' behavior was fraudulent and manipulative is informed by all of the evidence and arguments presented in the Submissions, we respond below to certain of the defenses raised by Barclays and/or the Individual Traders in order to highlight particular facts which inform our determination here.

a. Joint Scheme

33. The evidence presented by OE Staff demonstrates the existence of a joint, coordinated scheme to manipulate the physical power markets. OE Staff provided trade data analyses, communications among and between the Individual Traders, and evidence of daily meetings where the Individual Traders discussed Financial Swap positions and coordination of physical trading coordination. [114]

34. In fact, various communications among and between the traders, identified by OE Staff, support our conclusion that Respondents implemented and participated in a coordinated scheme to manipulate the electric energy markets in and around California. For example, in January 2007, Levine emailed the entire West Power Desk—including Brin, Smith and Connelly—to request assistance with trading while she was out of the office. In those communications, she outlined her financial positions and noted that "[i]f we can keep the PV index up [where Levine was long] and the SP daily index down [where Levine was short] somehow that would be good to keep the BOM in."[115] OE Staff presented evidence that shows Brin and Smith reversed Physical Positions to support Levine's request.[116] Communications between Smith and Brin in November 2006 related to moving physical price in PV further demonstrate the existence of and participation in a coordinated scheme among Respondents. Specifically, the communications between Smith and Brin demonstrate that they understood that Smith's

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[113] *See infra* section III.B.3.b. *E.g.*, Staff Reply at 29-38.

[114] *E.g.*, Staff Reply at 29-38, 57-66.

[115] Staff Report at 51. Balance of Month, often referred to as BOM, refers to the remaining days in the current month. *Id.* at 7. "A BOM financial swap is the exchange of a fixed-price for the daily index for each of the remaining days in a given month." *Id.* at 9.

[116] *Id.* at 51-52.

strategy was to sell Dailies to "prop up" Index because he was long financially.[117] In yet another example of the coordination and participation in the scheme, Brin recognizes and acknowledges the scheme in a communication with another trader in November 2006—explaining that Connelly set up Physical Positions opposite to Connelly's Financial Swaps and that Brin was trading Dailies in the direction of Connelly's Financial Swaps.[118]

35. Another example of the Individual Traders' participation in the scheme is observed in Connelly's Dailies trading on February 28, 2007. On that day, in less than three minutes his reserve bid—which was $3.50 higher than the most recent prior bid—was picked up 42 times. In communications surrounding those bids he expressed his understanding of the manipulative scheme by recognizing that his Dailies trading did impact Index and "laughed"[119] at concerns that his trading would be reported to the Commission.[120] The record shows that Connelly not only participated in the scheme but was the scheme's leader.[121] Still additional evidence supporting the coordinated scheme to manipulate the electric power markets in and around California is found in the trade data demonstrating the size and direction of the physical and financial positions held, how and by whom those positions were built and flattened, and the manner in which the trades were accomplished.

36. Respondents erroneously argue that under "group vicarious liability" they cannot be held liable for the joint scheme.[122] As an initial matter, we note OE Staff has not set forth, nor do we adopt, a theory of group vicarious liability; rather, OE Staff has alleged, and we agree, that each Individual Trader directly participated in and knowingly performed acts in furtherance of a coordinated fraudulent scheme as a primary violator of the Anti-Manipulation Rule.[123] In any case, however, section 222 of the FPA provides

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[117] *Id.* at 40. The coordination and participation in the scheme by Smith and Brin is again demonstrated in their communications on December 7, 2006, where Smith informed Brin of his intention to drive the price of NP off-peak down. *Id.* at 41.

[118] *Id.* at 46-48.

[119] *See* BARC009035.

[120] Staff Report at 53-55.

[121] *E.g.*, *id.* at 53-59; Staff Reply at 62-66.

[122] Connelly Answer at 55-59; Brin Answer at 40-45*; see also* Smith Answer at 14-15; Levine Answer at 20.

[123] *E.g.*, Staff Reply at 52.

the Commission with broad authority to address all attempts to manipulate wholesale energy markets, making no distinction between individuals or groups that may undertake such efforts. Moreover, Order No. 670, which implements the requirements of section 222, contemplates group conduct in violation of the Anti-Manipulation Rule.[124] Fraudulent schemes can be engaged in by more than one person. Indeed, the primary case on which Respondents rely in support of their argument against liability explicitly recognizes this: "[i]n any complex securities fraud . . . there are likely to be multiple violators."[125]

37. The additional Supreme Court precedent on which Respondents rely is distinguishable and, in fact, support our conclusion. The decisions in *Central Bank*,[126] *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*,[127] and *Janus Capital Group, Inc. v. First Derivative Traders*[128] concern violations of Section 10(b) of the Securities and Exchange Act of 1934 (the 1934 Act).[129] Unlike OE Staff's allegations against the Respondents, each of the cited authorities instead considers, and dismisses, aiding and abetting claims in private rights of action for misrepresentations—not schemes—in violation of the 1934 Act.[130] That is not the circumstance, here, however. Further, these

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[124] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at PP 50, 59 (market participants who engage in "conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market" and "collusion for the purpose of market manipulation" violate the Anti-Manipulation Rule).

[125] *Central Bank of Denver, NA v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (*Central Bank*).

[126] *Id.*

[127] 552 U.S. 148 (2008) (*Stoneridge*).

[128] 131 S.Ct. 2296 (2011) (*Janus*).

[129] 15 U.S.C. § 78j (2006). The Commission noted in Order No. 670 that it would not broadly apply precedent in the securities area but rather would do so as appropriate on a case-by-case basis. Order No. 670, FERC Stats. & Regs. ¶ 31,202 at PP 31, 42. Nonetheless, as explained above, even if we choose to apply this precedent, these cases support the Commission's conclusion.

[130] In fact, as the *Stoneridge* Court makes clear, the distinction in misrepresentation claims, in contrast to other claims, lies in the need to demonstrate reliance, which the Court notes is tied to causation. 552 U.S. at 158-161. *Central*, *Stoneridge*, and *Janus* decided specific questions concerning misrepresentation claims under SEC Rule 10b-5(b). Such is not the case here, where the issue is not

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cases do not affect the ability to bring a private right of action against primary violators, let alone an action brought by an agency under its regulations against primary violators.[131] Thus, *Central Bank*, *Stoneridge* and *Janus* do not contradict the Commission's conclusion here.

b. **Pattern**

38. Respondents deny the existence of a pattern of building and flattening the Physical Positions to the benefit of the Financial Swaps. In doing so, Respondents consistently ignore evidence that the Physical Positions and Financial Swaps were amassed as part of the manipulative scheme and instead focus only on the subset of those allegations involving the Dailies. In fact, in hundreds of pages of Submissions, neither Barclays nor any of the Individual Traders attempt to counter OE Staff's allegations concerning the Physical Positions and Financial Swaps. Instead, as we discuss below, they attempt to obscure the evidence presented relating to the Dailies trading.

39. Respondents suggest that trading Dailies is a natural outgrowth of the fact that Barclays neither controlled generation nor serviced load.[132] Respondents explain that their Physical Positions therefore needed to be flattened with Dailies lest Barclays risk an obligation to deliver or receive electric energy, which it was unable to do because of this failure to control generation or service load. However, the consistent pattern of building

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misrepresentation. Moreover, in each of *Central*, *Stoneridge* and *Janus*, the court was concerned with expanding the private right of action beyond what Congress intended. Again, such is not the case here.

[131] In the wake of *Central Bank*, it is well-established that primary violators of section 10(b) are not "restrict[ed] to supervisors or directors of securities fraud schemes while excluding from liability subordinates who also violated the securities laws." *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 112-13 (2d Cir. 1998) (holding that a subordinate who was alleged to have committed a manipulative act was "a primary violator despite the fact that someone else directed the market manipulation scheme"). "Indeed," the Second Circuit explained, "if the trader who executes manipulative buy and sell orders is not a primary violator, it is difficult to imagine who would remain liable after *Central Bank*." *Id.* at 112. Similarly, a company's or person's "allegedly central role in [manipulative or fraudulent] schemes, as their chief architect and executor, leaves no doubt as to [] potential liability as a primary violator." *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 336 (S.D.N.Y. 2004) (holding that defendant Arthur Andersen was subject to section 10(b) because the plaintiffs alleged the company "masterminded" the fraudulent schemes at issue).

[132] *E.g.*, Barclays August 29, 2011 Submission at 8 n.15.

the Physical Positions and Financial Swap positions, coupled with the Dailies trading in the Manipulation Months, demonstrates that this argument is without merit.[133] Moreover, it is not possible to reconcile Respondents' argument with the fact that Respondents often actively sought to increase the size of their Physical Positions or to reverse the direction of their Physical Positions[134] in a manner that affirmatively supported the scheme to manipulate the Index to benefit their Financial Swaps. In addition, these changes in size or direction of the Physical Positions were often accomplished on the very day that they needed to be flattened. We perceive no reason why, if the use of the Dailies was innocuous, as Barclays suggests, the Physical Positions would be increased or reversed, thereby increasing the pressure on Respondents to flatten them with Dailies or risk the obligation to deliver or receive energy. Neither Barclays nor the Individual Traders have offered the Commission an explanation for this behavior. These facts lead us to conclude that the behavior was not innocuous and, instead, that these transactions were a necessary part of the scheme.

40. Respondents also argue that OE Staff "cherry-picked"[135] the Manipulation Months and trading points to derive a scheme and invite the Commission instead to consider all of their trading across all of the product months.[136] This argument is without merit and the Commission declines the invitation to view the trade data in this "aggregated" manner. OE Staff never maintained that Respondents perpetrated their fraud in all product months in the over two-year period. The allegation instead is that it was the physical markets at four nodes across 35 product months that were manipulated. Respondents' attempt to obfuscate their fraudulent behavior by combining it with

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[133] Indeed, OE Staff-presented evidence shows that the scale and consistency of the use of the Dailies by Barclays and the Individual Traders and the resulting losses were quite different in manipulation and non-manipulation months. *See* Staff Reply at 12-13.

[134] *E.g.*, Staff Report at 19-21; Staff Reply at 10, 23-24. OE Staff offers examples of such behavior that is observed in the data. For example, on February 1, 2007, Smith reversed the SP peak short 875 MW/h Physical Position for February 2, 2007 by purchasing daily Index for 1375 MW/h so that it was now a long position. The long physical position created by Smith was now supportive of the average short Financial Swap position at SP peak for February of 1043 MW/h. *See* Staff Reply at 24.

[135] Barclays Answer at 3.

[136] Specifically, Respondents claim that the Commission should look at all 208 product month combinations across the four trading points during the Manipulation Months, not the 35 product months OE Staff identifies.[136] Respondents suggest that any alleged pattern of a manipulative scheme disappears in this larger universe of trade data. Barclays Answer at 3, 11-13.

behavior that was not alleged to have been manipulative cannot exonerate them.[137] To the contrary, the record in this case reflects a sustained and deliberate effort by Respondents first to build Physical Positions in a direction opposite to their Financial Swaps and then to flatten those Physical Positions in order to benefit the Financial Swaps.[138]

41. Respondents also posit that their Dailies trading was inconsistent with a manipulative scheme because their trading was not "aggressive," was conducted in the most liquid market windows, frequently presented buying and selling behavior on the same day, and included bilateral transactions which would not affect the ICE Index and therefore would not benefit the Financial Swaps.[139] These arguments are flawed as they fail to take into consideration the pattern of related position trading that is at issue by focusing only on the Dailies.[140] But even if we consider these arguments, we find that they are irrelevant. As Respondents were willing to lose money in their trading, the price point at which they transacted matters little, so long as their Dailies trading would have the effect of moving the ICE Volume-Weighted Average Price in the direction that would

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[137] For similar reasons, we also reject Barclays' minute-by-minute trading analysis. *E.g.*, Barclays Answer at 16; Barclays August 29, 2011 Submission at 31-41; *see also* Connelly Answer at 31-32; Brin Answer at 27-28. Rather than an invitation to "aggregate" all trading, this analysis invites the Commission instead to "disaggregate" the Dailies trading. The Commission similarly declines this invitation. There is no requirement that OE Staff examine minute-by-minute each and every trade in a market setting to establish a scheme. This attempt at disaggregation, like Barclays' attempt at aggregation, is nothing more than an attempt to obfuscate the evidence of the scheme. Moreover, these arguments ignore the scheme alleged here to focus instead only on the Dailies. Completely ignored and unexplained is the place the Dailies hold in the pattern that is formed among the Physical Positions, the Dailies and the Financial Swaps.

[138] In each of the 35 Manipulation Months, Respondents developed Physical Positions that were directionally opposite to their Financial Swaps. *See* Staff Report at 18. Indeed, OE Staff presented evidence demonstrating that, in all but one product month of the Manipulation Months, Respondents changed their start of month Physical Positions. *Id*. And in 33 of these product months, Respondents participated in such changes on more than one day in that month. *Id*.

[139] *E.g.*, Barclays August 29, 2011 Submission at 16-18; Connelly Answer at 23, 27, 29-36; Brin Answer at 4, 16-18, 28, 30-31; Levine Answer at 4-7, 11, 14-15; Smith Answer at 3-5, 13, 17.

[140] The same holds true as to the argument by the Individual Traders that they did not trade Dailies on particular days in certain of the Manipulation Months.

benefit Barclays' Financial Swaps. Thus, whether or not Respondents were market-makers or price-takers—Barclays' proffered test for aggressive trading behavior—is not relevant to the manipulation of the physical markets here. As OE Staff points out, if a manipulator is set on manipulating the market and exhibits a willingness to lose money, as Barclays did, then it is not surprising that other market participants would be willing to secure the funds Barclays was willing to lose for their own gain.[141] We similarly find that Barclays' argument that it traded during liquid times in the market is irrelevant to the analysis of the manipulative scheme. Again, Barclays exhibited a willingness to lose money. And again, it is unsurprising that other market participants were willing to enter that market to secure those funds, thereby making the market more liquid. Finally, it is worth noting that OE Staff has not alleged, and we do not find, that each and every trade Barclays entered into was manipulative. So it is neither surprising nor of consequence that Respondents may have bought and sold Dailies at the same location and on the same day or that Respondents also engaged in trading through bilateral transactions which do not impact the ICE Index. We conclude that the manipulative pattern set forth by OE Staff exists.

c. <u>Profitability of the Dailies</u>

42. As noted above, OE Staff alleges that Respondents' trading of Dailies generally resulted in net physical trading losses during the Manipulation Months. Respondents challenge OE Staff's allegations concerning the lack of profitability, both as compared to various markers[142] and as to whether or not each day or each month of trading was unprofitable.[143] These arguments amount to an assertion that, as a matter of law, if the

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[141] Staff Reply at 76-77.

[142] For example, Barclays and the Individual Traders: count profitable trade sessions in comparison to overall monthly profit; argue that many losses were a statistically insignificant amount (which Barclays defines as $2000 or under); argue that Barclays' over-the-counter trades lost money on an equivalent basis as the ICE Dailies; claim that the losses of the top 20 ICE participants were similar to Barclays' losses; argue that the difference between Barclays' weighted average price and the ICE Index is insignificant; and claim that the mathematical impact of Barclays' trades on the ICE Index were less than one percent. *E.g.*, Barclays Answer at 11-19 (and cited attachments); Barclays August 29 Submission at 23-24 (and cited Appendices); (Barclays 1b.19 Submission at 8-9; *see* Connelly Answer at 26; Brin Answer at 4, 19-22; Levine Answer at 7-11; Smith Answer at 3, 7-12.

[143] *E.g.*, Barclays Answer at 3, 10, 13-15. For example, Barclays asserts that Dailies traded in four of the 35 product months alleged to have been manipulated by Barclays were profitable. *Id.* at 14. In making these arguments Barclays also suggests that losses between $0 and $2000 are so statistically insignificant as to permit the

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Dailies were profitable, there can be no finding of a fraudulent scheme or manipulation. Similarly, the Individual Traders dispute whether they can be accused of market manipulation on days when their Dailies trading was profitable.[144]

43. The Commission has addressed this subject: "[P]rofitability is not determinative on the question of manipulation and does not inoculate trading from any potential manipulation claim."[145] Rather, the determination of fraud is based on all of the circumstances in the particular case before the Commission.[146] Profitability is an indicium to be considered among the overall facts that the Commission examines when considering a potential violation of its Anti-Manipulation Rule, but standing alone it is neither necessary nor dispositive. Here, Respondents' trading was generally uneconomic and this factor is considered among all of the circumstances of the case in reaching the conclusion that a fraudulent scheme existed. The fact that Respondents' trading may have been profitable on a particular day, or in a particular month, however, does not overcome the weight of evidence suggesting that Respondents manipulated the western electricity markets to benefit the value of Barclays' Financial Swaps.

44. Citing *Energy Transfer Partners, L.P*.[147] and *DC Energy LLC v. H.Q. Energy Servs. (U.S.) Inc.*,[148] Barclays argues that "[u]nder Commission precedent, in order to prevail in a manipulation case, the Commission must find not only that the trades in physical markets in some way benefited a related financial position, but also that those trades were against the interest of the entity charged with manipulation."[149] Barclays misrepresents the Commission's holdings in those orders. Neither of these decisions held that trading must be unprofitable for it to be in violation of the Anti-Manipulation Rule. In each of these decisions, the Commission was careful to point out, as it has here, that its

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Commission to ignore them altogether. *Id.* at 15. Barclays provides no support for this statement and the Commission therefore will not entertain the argument.

[144] *E.g.*, Brin Answer at 19-22, 30; Connelly Answer at 24, 32-33; Levine Answer at 7-10, 19, 25, 29; Smith Answer at 7-11, 21-22.

[145] *Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056 at P 20.

[146] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

[147] *Energy Transfer Partners L.P.*, 120 FERC ¶ 61,086 at PP 41, 43-50 (2007) (*ETP*).

[148] *DC Energy LLC v. H.Q. Energy Servs. (U.S.) Inc.*, 124 FERC ¶ 61,295, at 62,660-61 (2008).

[149] Barclays Answer at 13.

conclusion was based on all of the facts and circumstances of the specific case before it. It is true that in order to determine whether an entity has employed a fraudulent device, scheme or artifice, the Commission may consider whether the entity manipulated one market in order to benefit a position in another.[150] Based upon a careful review of the Submissions here, we have concluded that Respondents did manipulate physical markets subject to the Commission's jurisdiction through the use of Physical Positions and Dailies in order to benefit their Financial Swaps. Moreover, the credible information presented in the Submissions indicates that Respondents engaged in the physical manipulation not only at a financial loss, but by accepting that such losses were a foreseeable outcome of the scheme.[151] Thus, in this matter, the Commission concludes that the net financial losses Respondents incurred as a result of the Dailies in the Manipulation Months[152] is one piece of evidence that leads to the conclusion of a fraudulent scheme and, as will be discussed below, that also supports the conclusion that the Respondents possessed scienter.[153]

d. Barclays Misstates the Law Under the Anti-Manipulation Rule

45. Barclays misstates OE Staff's allegations and Commission precedent when it claims that OE Staff alleges "if Barclays is long a financial swap . . . it is manipulation if Barclays then bought day-ahead power contracts at the same location because that buying behavior would create 'pressure' to raise the prices that settled the swap prices," and claims that OE Staff has neither legal nor economic support for this assertion.[154] This is

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[150] *Brian Hunter*, 135 FERC ¶ 61,054, at PP 47, 53, 62, *order denying reh'g*, 137 FERC ¶ 61,146 (2011), *rev'd sub nom. Hunter v. FERC*, 711 F.3d 155 (2013); *ETP*, 120 FERC ¶ 61,086 at P 41; *see also Markowski v. SEC*, 274 F.3d 525, 529 (D.C. Cir. 2001). The court in *Hunter* granted the petition for review on jurisdictional grounds, however, this case is factually distinguishable. *See infra* section III.B.4. Notably, the D.C. Circuit did not address the merits of the Commission's other determinations in *Brian Hunter* and, thus, we reaffirm those findings not addressed by the court, such as the Commission's rejection of "open market" defenses.

[151] Staff Reply at 13 & n.38.

[152] It is instructive to consider the pattern of trading and trading losses in the non-manipulation months to the pattern of trading and trading losses in the Manipulation Months. *See* Staff Reply at 11-16.

[153] *See infra* section III.B.3.

[154] Barclays Answer at 9-10.

not what OE Staff alleged. Instead, as explained elsewhere in this order, OE Staff alleged, and we find, behavior to satisfy the three elements of the Anti-Manipulation Rule. Simply buying jurisdictional day-ahead power at the same location where swap positions would be benefitted from higher prices will not in and of itself violate the Anti-Manipulation Rule. Indeed, as Respondents understand, the Anti-Manipulation Rule requires the existence of: (i) a fraudulent scheme, conduct, misrepresentation or omission; (ii) scienter or recklessness; and (iii) a jurisdictional transaction. Far from driving participants from the markets as Barclays suggests,[155] we believe that penalizing manipulative behavior such as that engaged in by Barclays serves to protect the markets' structural integrity and will provide market participants with greater confidence in those markets.

e. The *Ex Ante* Theory

46. Barclays suggests that the behavior at issue cannot have been manipulative because the benefit to the financial positions from manipulating the physical market could not have been anticipated by Respondents and thus the alleged behavior would be "irrational" and the traders would lack "incentive" to engage in those trades.[156] Barclays states that leverage only exists if the quantity of physical and financial positions that settle against the Index are large enough such that the financial positions gain more from the price change than the Dailies would lose.[157] Barclays posits that, without leverage, a trader would lose more money trading Dailies than he would gain on the Financial Swap. To that end, Barclays—and, by incorporation, the Individual Traders—sets up what it calls its *ex ante* analysis which it claims demonstrates that in only 133 of a total of 699 trade sessions (19 percent) during the Manipulation Months, could the traders "potentially guess (based, for example, on previous days' trading) at the possibility that their day-ahead volumes might be sufficient to have some price effect on the outstanding financial swaps."[158] And, Barclays states that in 566 trade sessions (81 percent), the

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[155] *Id.* at 10.

[156] *E.g.*, Barclays August 29, 2011 Submission at 12; Barclays 1b.19 Submission at 12.

[157] *E.g.*, Barclays August 29, 2011 Submission at 12.

[158] Barclays 1b.19 Submission at 12. Barclays further argues that, in 90 of these trade sessions, the traders did not maximize the volume of trading on ICE. *Id.* Barclays' answer presented this *ex ante* analysis with different statistical results than those presented in Barclays' August 29, 2011 Submission, despite the fact that Barclays' answer cited to the August 29, 2011 Submission (without highlighting any difference). The results used in Barclays' answer are those that Barclays presented in the Barclays 1b.19 Submission. There is no explanation for the disparity in the figures represented in

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traders could not "reasonably believe" that they would trade Dailies to enhance the Financial Swaps in such a manner as to result in an overall profit.[159]

47. This analysis is unsubstantiated and unsupportable. First, Barclays' argument is contrary to the contemporaneous evidence presented to us because the communications among the traders themselves demonstrate that the traders understood that they were moving the Index to benefit Barclays' financial position.[160] For example, when Levine sent her January 31, 2007 email to the West Power Desk, including Connelly, Smith and Brin, informing them of her positions, she neither expressed doubt that trading Dailies would benefit the financial swaps nor did she conduct any "three day look back"[161] to determine what percentage of overall volume Barclays' trading might represent. Instead, Levine simply told the traders what her financial and Physical Positions were and asked them to keep the Index prices up in PV and down in SP to protect her Balance of Month financial position: "If we can keep the PV index up and the SP daily index down somehow that will be good to keep the BOM in."[162] Nor did Brin conduct a "three-day look-back" or express doubt that he was moving the price of Index with Dailies to support the Financial Swaps when he explained to another trader: "im [*sic*] doing phys[ical] so i [*sic*] am trying to drive price in fin[ancial] direction."[163] By contrast,

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Barclays' answer, let alone an explanation for the revision of the figures between the Barclays August 29, 2011 Submission and the Barclays 1b.19 Submission.

[159] *Id.* Certain of the Individual Traders also suggest that their trading could not have been manipulative for reasons related to the *ex ante* theory, and the Commission similarly dismisses this argument by the Individual Traders. *E.g.*, Brin Answer at 15-17, 25, 28-30; Connelly Answer at 15, 29-33. Of course, as noted above, each of the Individual Traders incorporated or adopted Barclays' arguments as their own. *See supra* at notes 7, 47.

[160] *E.g.*, Staff Report at 38-58; Staff Reply at 17-38; *see also supra* section III.B.2.a; *infra* III.B.3.b.

[161] Indeed, Levine affirmatively could not conduct a three day look-back as her email was intended to cover a twelve-day future absence.

[162] Staff Report at 51 (emphasis added).

[163] *Id.* at 47-48 (emphasis added). We understand the references to "phys" and "fin" throughout the Individual Traders' communications as abbreviations for "physical" and "financial," respectively. *See* Staff Report at 47 n.163 (citing Brin Test. at 333:2-6).

Respondents offered no trader communications or deposition testimony to support their *ex ante* theory.[164]

48. In addition, the assumptions made by Respondents in their *ex ante* theory are inherently flawed. For example, Respondents' theory wrongly assumes that each day's trading would unfold identically—with the same prices, volumes, and trade times—whether or not Barclays traded that day. In short, Barclays wrongly assumes that its trading Dailies had no impact on other market participants. But, if a trader were to add 30.7 percent to its historical market share on a day of trading, as Barclays suggests in its example,[165] it is unreasonable to assume that other market participants would fail to react to the increased trading by incorporating this information into their own trading decisions, resulting in different market outcomes.[166] Barclays' *ex ante* theory similarly fails to consider that the volume added by Barclays to the market would satisfy certain supply and demand that now would not need to be satisfied elsewhere. Moreover, Barclays ignores the difference between the low risk to profit and loss (sometimes referred to as, P&L) represented by the Dailies and the high risk to profit and loss represented by the Financial Swaps. Specifically, while the Financial Swaps benefit penny-for-penny from the Index settlement because their profitability is ultimately measured by the difference between the Volume-Weighted Average Price and the fixed price for which the swap was entered into, the profitability of the Dailies is measured by the difference between the Volume-Weighted Average Price of all the Dailies that Barclays transacted and the Volume-Weighted Average Price of all of the ICE Dailies. For example, whether the ICE Volume-Weighted Average Price is $30 per MW and the Volume-Weighted Average Price of all of Barclays' Dailies purchases was $31 per MW at a trading point, or whether the ICE Volume-Weighted Average Price is $40 per MW and Volume-Weighted Average Price of all of Barclays' Dailies purchases on that day was $41 per MW at that trading point, Barclays would experience the same net loss of $1 per MW on the Dailies at that point in both instances. However, any long Financial Swap

[164] We recognize that the traders now dispute the meaning of many of the communications. As we set forth below, however, at deposition, in many instances those traders either could not remember what those communications meant or professed not to know what they meant. We address this *infra* section III.B.3.b; *see also* Staff Reply at 29-38. The Commission notes below that, as a result, it accords little weight to Respondents' newly advanced explanations. This is especially true given what the Commission sees as the plain meaning of the language in those communications as compared to the unnatural interpretations which the traders now advance.

[165] August 29, 2011 Submission at 14.

[166] Indeed, this may be heightened in the time-sensitive and open-platform market in which these trades are undertaken.

that Barclays held at that trading point would benefit $10 per MW more on an ICE Volume-Weighted Average Price of $40 dollars than it would on the ICE Volume-Weighted Average Price of $30.

49. For the forgoing reasons, the Commission dismisses the *ex ante* theory and defense as inconsistent with the evidence, inconsistent with market theory, and based on faulty premises.

f. Open Market Trading

50. Respondents argue that the Dailies trading cannot have been manipulative absent a showing of something "more" because they were "open market" transactions.[167] Specifically, Barclays states that it is not possible to defraud market participants in an open market "based solely on transparent bids and offers"[168] and argues that section 10(b) of the 1934 Act and, thus SEC Rule 10b-5 "reaches only 'intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.'"[169] In lodging their "open market" defense, however, Respondents ignore the specific allegations in this matter and applicable Commission precedent and, again, they largely ignore the allegations made by OE Staff to focus only on the Dailies.

51. The Commission addressed and rejected similar "open market" defenses when it found that "section 4A of the Natural Gas Act proscribes otherwise legal conduct undertaken with manipulative intent, where a party intends to affect, or recklessly affects FERC-jurisdictional transactions."[170] Those same arguments hold true for open market defenses under the FPA because FPA section 222 is identical in relevant part to Natural Gas Act section 4A.

52. In that decision, the Commission also discussed the holding by the D.C. Circuit in *Markowski v. SEC*.[171] Like the trading here, the D.C. Circuit considered trading that was not in response to legitimate supply and demand indicators, but rather was made to control price for the "external purpose" of benefiting other positions.[172] The *Markowski*

[167] *E.g.*, Barclays Answer at 1-2; Barclays August 29, 2011 Submission at 55-68; Levine Answer at 3; Smith Answer at 15.

[168] Barclays August 29, 2011 Submission at 59.

[169] *Id.* (quoting *Hochfelder*, 425 U.S. 199) (emphasis removed).

[170] *Brian Hunter*, 135 FERC ¶ 61,054 at P 48; *see also* 15 U.S.C. § 717c-1 (2006).

[171] 274 F.3d 525 (D.C. Cir. 2001) (*Markowski*).

[172] *Id.* at 49.

court held that trading undertaken for the purpose of keeping prices at an artificial level serves to inject inaccurate information into the marketplace.[173] Likewise, in *Brian Hunter* the Commission held that "'open-market transactions send false information into the marketplace if such transactions are undertaken with the intention of creating a false price.' The difference between legitimate open-market transactions and illegal open-market transactions may be nothing more than a trader's manipulative purpose for executing such transactions."[174]

53. Despite this Commission precedent, Respondents argue that "open market" transactions require proof of some additional deceptive conduct, like misrepresentations, in order to be manipulative.[175] We note again that this is incorrect. As we said in *Brian Hunter*:

> A number of courts have recognized that transactions undertaken with manipulative intent, rather than a legitimate economic motive, send inaccurate price signals to the market: "Because every transaction signals that the buyer and seller have legitimate economic motives for the transactions, if either party lacks that motivation, the signal is inaccurate."[176]

54. Thus, the Commission made clear that otherwise legal conduct—or what Barclays refers to as "real" transactions—may be proscribed by our anti-manipulation provisions and that "transactions entered into with manipulative intent can serve as the basis for a manipulation claim, even in the absence of some other deceptive conduct."[177]

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[173] *Id.* at 48.

[174] *Brian Hunter*, 135 FERC ¶ 61,054 at P 49 (discussing *Markowski*, 274 F.3d 525).

[175] *E.g.*, Barclays August 29, 2011 Submission at 61-63.

[176] *Brian Hunter*, 135 FERC ¶ 61,054 at P 51 (quoting *In re Amaranth Natural Gas Commodities Litig*., 587 F. Supp. 2d at 534); *see also id.* P 51 n.78 (citing *SEC v. Masri*, 523 F. Supp. 2d at 372; *CFTC v. Amaranth Advisors*, *LLC*, 554 F. Supp. 2d at 534; *Initial Public Offering Sec. Litig*., 241 F. Supp. 2d at 391).

[177] *Id.* P 51 (citing *SEC v. Masri*, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007); *In re Amaranth*, 587 F. Supp. 2d at 534; *CFTC v. Amaranth Advisors*, *LLC*, 554 F. Supp. 2d 523, 534 (S.D.N.Y. 2008); *Initial Public Offering Sec. Litig*., 241 F. Supp. 2d 281, 391 (S.D.N.Y. 2003)).

55. Respondents also rely on *ATSI Communications, Inc. v. Shaar Fund, Ltd.*,[178] to support their proposition. *ATSI* does not, however, provide a safe harbor for Barclays. As the Commission has explained, the "*ATSI* court held that allegations of legal trading activities, standing alone, are insufficient to state a manipulation claim; such activities must be 'willfully combined with something more.' And it is often scienter—i.e., manipulative intent—that 'is the only factor that distinguishes legitimate trading from improper manipulation.'"[179] In this matter, as we discuss below, Respondents indeed acted with scienter.[180]

56. Moreover, the *ATSI* decision provides additional support for our conclusion in this matter. Specifically, the *ATSI* court stated that courts in the Second Circuit and elsewhere require that a manipulator engage in activity "aimed at deceiving investors" concerning how market participants valued a security. "The deception arises from the fact that investors are misled to believe 'that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators.'"[181] The *ATSI* court went on to explain that, in identifying activity which falls outside the natural interplay of supply and demand, courts have asked whether a false price signal is sent to the market. The court endorsed a focus on disruptions to . . . efficient pricing."[182] "In an efficient market, trading engineered to stimulate demand can mislead investors into believing that the market has discovered some positive news and seeks to exploit it . . . the duped investors then transact accordingly."[183] In a similar vein, in Order No. 670 the Commission made clear that the Anti-Manipulation Rule "prohibits the use or employment of any device, scheme, or artifice to defraud. The Commission defines fraud generally, that is, to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market."[184] Here too,

[178] 493 F.3d 87 (2d Cir. 2007) (*ATSI*).

[179] *Brian Hunter*, 135 FERC ¶ 61,054 at P 52 (footnotes omitted) (quoting *ATSI*, 493 F.3d at 101, and citing *ATSI*, 493 F.3d at 101-02, 104; *In re Amaranth*, 587 F. Supp. 2d at 534).

[180] Scienter is more fully discussed *infra* section III.B.3.

[181] *ATSI*, 493 F.3d at 100 (quoting *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999)) (citations omitted).

[182] *Id.*

[183] *Id.* at 100-01 (quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1466 (2d Cir. 1996)) (citations omitted).

[184] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

Respondents had improper intent, injected false information, and impaired, obstructed and defeated a well-functioning market.

57. Under the Commission's precedent, the activities identified here by OE Staff are manipulative behavior under FPA section 222 and the Anti-Manipulation Rule. The evidence set forth by OE Staff demonstrates that Respondents' scheme impaired Commission-jurisdictional physical markets, and that Barclays (and each of the Individual Traders) intended to effect that scheme. Such evidence includes, for example: (i) communications among the Individual Traders which acknowledge the scheme and demonstrate their active participation and trades to effect that scheme; (ii) information which demonstrates the pattern of Dailies trading consistent with the scheme; (iii) information which demonstrates the pattern of establishing the physical and financial positions and identifies those positions as being established by or held in the books of the various Individual Traders; (iv) information which demonstrates that Respondents' Dailies were generally traded at a loss; and (v) information proffered by OE Staff demonstrating that price was impacted by the trading of Dailies.[185] This evidence demonstrates that the intentional amassing of the positions and trading to influence price were not based on normal supply and demand fundamentals, but rather on the intent to effect a scheme to manipulate the physical markets in order to benefit the Financial Swaps. This trading injected inaccurate information into the market and impaired the functioning of the Commission-regulated physical markets. This behavior overcomes any "open market" defense.

58. Even without relying on the precedent set forth in *Brian Hunter*, we reach the same conclusion. In Order No. 670 we recognized that we would not be rote in our application of securities law to the energy markets and would apply such precedent on a case-by-case basis as "appropriate under the specific facts, circumstances, and situations in the energy industry."[186] The open markets cases cited by Respondents arise under securities laws and thus we need not automatically apply them, completely or in part, but rather must look to our industry to determine what is appropriate. The energy industry is not in all ways equivalent to the securities industry. Moreover, as we discuss below, our statutory mandate, unlike that of the SEC, is to ensure that rates for jurisdictional transactions are just and reasonable.[187] Therefore, in consideration of the nature and structure of our markets and of our statutory mandate, we hold that in matters which allege a violation of the FPA section 222 or the Anti-Manipulation Rule the defense that

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[185] *E.g.*, Staff Report at 13-35, 38-59, 62-63; Staff Reply at 8-38, 45-46, 62-67, 80-82; *see also supra* sections III.B.2.a, III.B.2.b, III.B.2.e; *infra* section III.B.3.b.

[186] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at PP 31, 42.

[187] *See infra* P 70.

trades were "real" trades is not dispositive of the question of manipulation. In this instance, Respondents intentionally manipulated Commission-jurisdictional physical markets to benefit Financial Swap positions thereby injecting false information into our markets and we disagree with Respondents that the Commission's market participants cannot be defrauded by this conduct.[188] Our ruling here is consistent with the Commission's obligation to ensure that rates for jurisdictional transactions are just and reasonable.

g. Artificial Price and Market Power

59. Barclays also argues that OE Staff has not produced evidence either that its trading had a material effect on prices[189] or that it had market power such that it could impact prices.[190] Neither artificial price nor market power, however, is a necessary element required to find a violation of the FPA or the Anti-Manipulation Rule.[191] Moreover, while Barclays presents numerous studies which it claims demonstrate that it could not have impacted price,[192] evidence of the communications between and among the

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[188] August 29, 2011 Submission at 59.

[189] This statement is incorrect because, as OE Staff pointed out, its preliminary econometric model estimates the difference in price which resulted from Barclays' trading on a particular day and estimates that in the Manipulation Months Barclays' cash-against-index trading "distorted market outcomes by $139.3 million." Staff Reply at 67; Staff Report at 62-63.

[190] Barclays Answer at 19-21; *see also* Barclays 1b.19 Submission at 11, 18-20 (and Appendices); Barclays Wells Submission at 16-18 (and Appendices).

[191] *Brian Hunter*, 135 FERC ¶ 61,054 at P 54 (citing Order No. 670, FERC Stats. & Regs. ¶ 31,202 at PP 48-54; *SEC v. Tambone*, 550 F.3d 106, 130 (1st Cir. 2008); *Berko v. SEC*, 316 F.2d 137, 143 (2d Cir. 1963)) (the "existence of an artificial price is not an element of a claim under § 4A of the Natural Gas Act or the Anti-Manipulation Rule (nor under § 10(b) of the [1934] Act, upon which § 4A was modeled).").

[192] We have examined Barclays' arguments concerning the various studies and are unpersuaded by them. *See* Barclays Answer at 19-21. For example, comparing the ICE Index, which took into consideration the trades manipulated by Barclays and the Individual Traders, to the Dow Jones index which did not take those trades into consideration is unreasonable for numerous reasons. For example, the comparison presumes that Dow Jones trading was not affected by ICE trading. Barclays offered no evidence to support this presumption. In addition, Barclays' analysis suggesting that the ICE Index would have been 18 percent lower without Barclays' trades in the Manipulation Months is flawed. ICE trading is done in a fast-paced environment where

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Individual Traders indicates that they affirmatively intended to affect price.[193] And, while Barclays also argues that it did not possess market power as it had no generation or load, it confuses market power with the ability to move average prices at a particular point through its speculative trading. Barclays has failed to substantiate the relevance of its lack of market power, especially in light of the distinction we have long drawn between the structural issue of market power and the behavioral issue of market manipulation.[194] The two are not identical and the absence of one does not entail the absence of the other.

h. <u>Legitimate Business Purpose</u>

60. Respondents further contend that they cannot be found to have manipulated the market because the trades were made for a legitimate business purpose.[195] We conclude, however, that there was no legitimate business purpose for this trading behavior. As noted above, Respondents established Physical Positions and traded Dailies to engage in a related-position manipulation. The evidence, including the pattern of trading, losses in the Dailies, information demonstrating the relationship between the positions and trading, and the communications between and among the Individual Traders, establishes this.[196] In short, manipulation is not a legitimate business purpose.

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market participants are influenced by the trading behavior of other market participants. *E.g.*, Staff Reply at 72-73. Barclays' analysis, as OE Staff recognized, does not take into consideration the influence Barclays' trades had over other market participants and thus cannot be sound. *Id.* For the same reason, the alleged lack of correlation between Barclays' trades on ICE and the changes to the ICE Index does not survive scrutiny.

[193] *E.g.*, *id.* at 67-68. And, as noted in this order, OE Staff's analysis indicates that price was indeed impacted by the trading. *See, e.g.*, *supra* note 190.

[194] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authority*, 114 FERC ¶ 61,165, at P 23 (2006).

[195] For example, Barclays and the Individual Traders point to such purported legitimate business purposes as the need to flatten the Physical Positions, the need to obtain market intelligence, the desire to establish themselves in the market, the desire to profit from trading, and even the desire to train young traders. *E.g.*, Barclays Answer at 13; August 29, 2011 Submission at 26-28; Brin Answer at 8-11; Connelly Answer at 11-14; Smith Answer at 15-17.

[196] *E.g.*, Staff Report at 13-35, 38-59; Staff Reply at 2-4, 8-38, 45-46, 80-82; *see also supra* sections III.B.2.a, III.B.2.b, III.B.2.c, III.B.2.e; *infra* section III.B.3.b.

61. However, even assuming, *arguendo*, that Respondents did have a legitimate business purpose for engaging in these transactions, that factor would just be one of many that the Commission would consider to determine whether each possessed scienter. The Commission addressed this issue directly when promulgating the Anti-Manipulation Rule, and rejected "calls for inclusion of a 'legitimate business purpose' affirmative defense."[197] The Anti-Manipulation Rule is modeled after SEC Rule 10b-5 which does not include provisions for "good faith" defenses[198] and the Commission explained that "the reasons given by an entity for its actions are part of the overall facts and circumstances that will be weighed in deciding whether a violation of the anti-manipulation regulation has occurred."[199] Consequently, an entity's business purposes will be relevant to an inquiry into manipulative intent, but a "legitimate business purpose" is not an affirmative defense to manipulation. And that is true here.

3. <u>Scienter</u>

62. Scienter is the second element of a violation of the Anti-Manipulation Rule.[200] For purposes of establishing a violation, scienter requires knowing, intentional, or reckless misconduct, as opposed to mere negligence.[201] OE Staff identifies evidence that, we find, demonstrates scienter, including direct evidence of manipulative intent, such as emails and instant messages (IMs), suspicious timing or repetition of transactions, execution of transactions benefiting derivative positions, and lack of legitimate economic motive or economically irrational conduct.[202]

63. The evidence establishes not only that the Individual Traders worked closely, collaborated, and communicated together, but that they worked, collaborated, and communicated with one another about the manipulative scheme.[203] As discussed above,

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[197] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations,* 114 FERC ¶ 61,165 at P 29.

[198] *Id.*

[199] *Id.*

[200] *See* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

[201] *Id.* PP 52-53 & n.107.

[202] *See, e.g.*, Staff Report at 23-35, 39-60; Staff Reply at 9-28, 46-50.

[203] *See, e.g.*, Staff Report at 58-59 (describing coordination among traders and noting that "[i]n the alleged manipulation months, the cash traders moved approximately $1.45 million of net cash trading losses from their trading books to Connelly's books"); *id.* at 22-23 (discussing coordination); Levine Test. at 121:22-122:4 (noting that the

(continued…)

the evidence shows that Levine, Smith, Brin, and Connelly built Physical Positions at four nodes in the opposite direction of Financial Swap positions held at those same nodes, and then subsequently flattened those positions by trading Dailies in a manner intended to push the Index price in a direction favorable to those Financial Swaps. The potential gains to Barclays' Financial Swap positions provided Respondents with ample incentive to engage in the scheme. The evidence shows that they understood how this scheme would work; that they expected it to work; that they intended it to work; that they built positions and executed trades for the purpose of making it work; and that they communicated with one another (and occasionally with outsiders), and sometimes with considerable candor, about various aspects of the workings of this scheme.

64. The evidence presented demonstrates that each of the Respondents individually, and all of them together, knowingly or recklessly undertook actions in furtherance of the manipulative scheme. We consider below the general and specific arguments advanced by Respondents to contest OE Staff's allegations that the scienter element of the Anti-Manipulation Rule is satisfied.

a. General Arguments

i. Burden

65. With respect to the burden of proof, Barclays states that "[i]t is not up to Barclays to refute OE [Staff's] strained interpretations of these emails and IMs. It is up to OE [Staff] to prove that its interpretations are true."[204] Barclays misstates the standard applicable in this proceeding. While it is true that, as the party alleging a violation, OE Staff bears the burden of proof, it is also true that Barclays bears the burden of rebutting OE Staff's allegations, including its interpretations of the emails and IMs after OE Staff establishes a prima facie case. As noted above, "when a party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true."[205] For reasons discussed below, Respondents have failed to rebut the interpretations set forth by OE Staff.

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traders sometimes traded in one another's books); Brin Test. at 62:3-4 ("Most people knew what everyone's position was. It was all talked about. It was all discussed."); BARC0634600-01 (IM exchange in which Smith advises Brin not to "buy any sp light index" because he is "gonna try to crap on the NP light and it should drive the SP light lower").

[204] Barclays Answer at 23 (citing no authority).

[205] *Greenwich Collieries*, 512 U.S. at 280.

ii. <u>Recklessness</u>

66. In its Report, OE Staff states that the scienter element can be satisfied with a showing of "recklessness,"[206] and OE Staff points out that: (1) the Individual Traders were aware that their cash trading could influence the indices; (2) they were regularly taking substantial losses on such trades; and (3) per the "Golden Rule,"[207] uneconomic trading to benefit a related position was known to be unlawful or at least prohibited by Barclays' company policy.[208] Respondents claim that "recklessness" cannot satisfy the scienter element of a violation of the Anti-Manipulation Rule in this case.[209] Respondents contend that, in trading cases such as this, only a demonstration of actual intent—or perhaps "extreme" recklessness—can suffice to establish a manipulation.[210] In effect, they ask us to create a special, elevated scienter requirement that would apply to Anti-Manipulation Rule violations involving trading.

67. We decline to do so because this issue was addressed in Order No. 670. When the proposed Anti-Manipulation Rule was offered for comment, some commenters urged the Commission to delete the language "or would operate as a fraud" from the rule.[211] The commenters reasoned that retention of this language without further qualification would sweep into the Anti-Manipulation Rule's ambit actions that were undertaken without

[206] Staff Report at 60-61 (citing Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 53). OE Staff argues that Connelly's conduct was, "at a minimum, reckless[]." *Id*. The Staff Report does not discuss recklessness in connection with the other Individual Traders, though, of course, the same standards apply to all. As discussed *infra*, we conclude that the conduct of each of the Individual Traders was intentional, rather than merely reckless.

[207] According to the testimony of a senior manager, training for Barclays' traders included the so-called "Golden Rule," which was not to lose money on a transaction with the intention of making money on another transaction. *Id.* at 2.

[208] *Id.* at 61.

[209] Connelly Answer at 52; Brin Answer at 39. Barclays likewise raised this argument in its prior submission, *see* Barclays August 29, 2011 Submission at 72-75, but declined to present it in its answer.

[210] Connelly Answer at 52-53; Brin Answer at 39-40.

[211] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 43.

actual intent.[212] The Commission rejected these proposals, and explicitly found that "recklessness satisfies the scienter requirement" of the Anti-Manipulation Rule.[213]

68. The Commission acknowledged in Order No. 670 that there was a diversity of opinion among the various courts of appeal as to how exactly recklessness should be defined in the context of securities law.[214] At the time, the Commission declined to commit itself to one of these definitions and we do so again now, because it is unnecessary. We are satisfied that the scienter element is met here under even the most stringent definition of "recklessness" because, as discussed elsewhere in this order, the evidence presented demonstrates that the conduct was not merely reckless, but intentional.

iii. Sole Intent

69. Respondents contend that a violation of the Anti-Manipulation Rule cannot be established unless the "sole" intention or purpose behind the transaction in question was manipulative.[215] The argument is without merit. As OE Staff correctly states, "'sole intent' is not the applicable legal standard."[216] Rather, under the Commission's Anti-Manipulation Rule, the Commission will make a holistic determination based on "the

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[212] *Id.*

[213] *Id.* PP 45, 53.

[214] *Id.* P 53 & n.109.

[215] Levine Answer at 33; Brin Answer at 11. Barclays also raised this issue in its prior submission. *See* Barclays August 29, 2011 Submission at 71-72. Respondents do not develop this theory in their answers. Levine states it without offering an argument to support it and Brin merely alludes to it. *See* Levine Answer at 33 ("show[ing] that the DA FPP trades at issue were intended to affect the value of related positions" is not enough "to satisfy the scienter requirement."); Brin Answer at 11 (characterizing OE Staff as alleging that Brin, Levine, and Smith "traded in the cash market with the sole purpose of manipulating the ICE index to benefit swap positions in Mr. Connelly's books"). Barclays itself, which presented the most developed version of the argument in its August 29, 2011 Submission, seems to have abandoned this line of argument, failing even to allude to it in its response to the Order to Show Cause. Barclays presented this argument in its August 29, 2011 Submission, but nowhere in its answer asserts or even alludes to that argument or references the relevant page numbers. The argument also seems to be absent from the Barclays 1b.19 Submission.

[216] Staff Reply at 50.

overall facts and circumstances."[217] The Commission has held that "a wholesale overlay of the securities laws onto energy markets [would be] overly simplistic" and therefore it is necessary to make a case-by-case determination of "whether it is appropriate to adopt securities precedents to specific energy industry facts, circumstances, or situations."[218]

70. We reject the notion that, in addition to establishing a manipulative purpose, OE Staff must also disprove all possible non-manipulative purposes with which it may have been commingled. The Anti-Manipulation Rule requires manipulative intent; it does not require *exclusively* manipulative intent. And the evidence in this case more than amply establishes that Respondents indeed acted with manipulative intent.[219] A manipulative purpose, even if mixed with some non-manipulative purpose, satisfies the scienter requirement. As we have previously pointed out, "the SEC does not have a duty to assure that the price of a security is just and reasonable," whereas our explicit statutory mandate is to ensure that the rates for jurisdictional transactions are just and reasonable.[220] This mandate to ensure just and reasonable rates means, among other things, that where the rate for a jurisdictional transaction is set by market forces, those market forces must not have been distorted by manipulation.[221]

iv. <u>Motive</u>

71. Respondents claim that OE Staff cannot establish scienter because the traders lacked any motive to engage in manipulative trading.[222] Both Levine and Smith point to their failure to be awarded bonuses as evidence that they received no benefit from the alleged violation.[223] They claim that the only motive alleged by OE Staff is personal

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[217] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 at P 29.

[218] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 31; *see also id.* P 42.

[219] *See infra* section III.B.3.b; *see also* Staff Report at 39-60; Staff Reply at 28-38.

[220] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 32; *see, e.g.*, 16 U.S.C. §§ 824d, 824e (2006).

[221] *See generally Calif. Ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004) (noting that the Commission's regulatory program before the enactment of the Energy Policy Act of 2005 was predicated on both *ex ante* review to prevent or mitigate market power and *ex post* review to detect manipulation).

[222] Levine Answer at 32; Smith Answer at 26.

[223] Levine Answer at 32-33; Smith Answer at 26-27.

loyalty to Connelly, and that such loyalty is either fictive or inadequate to establish scienter.[224] Respondents conclude that the absence of any "reason" or "rational motivation" to engage in the alleged manipulation, undermines OE Staff's determination that the scienter requirement has been satisfied.[225]

72. This argument has no merit. Establishing scienter does not require tying specific manipulative acts to specific personal motivations. "[P]ersonal motivation for manipulating the market is irrelevant" to a determination of whether the violation was committed with the requisite scienter.[226] As discussed below, there is ample evidence establishing that the traders acted with the requisite scienter independently of any evidence of specific personal motive.

73. Moreover, it cannot be said that the traders lacked motive: they were highly-compensated individuals who had reason to believe that their compensation would be increased even further if they were able to produce sufficient profits through their trading.[227] In addition, their denial of the existence of any social relationships that might provide or enhance their motive to engage in the scheme cannot be squared with the facts. The record reveals that the traders had personal and professional relationships of long standing, which persisted over the course of several years and multiple employers.[228]

[224] Levine Answer at 32 (denying that Levine had reason to be loyal to Connelly and asserting that such supposed loyalty was never rewarded in any way); Smith Answer at 27 ("loyalty or other feelings of affection do not amount to scienter"); *see also* Brin Answer at 13 (denying that the traders had "long-standing relationships with each other").

[225] Smith Answer at 27; Levine Answer at 33.

[226] *Graham v. SEC*, 222 F.3d 994, 1005 (D.C. Cir. 2000) (noting that the absence of a direct pecuniary interest in a violation "does not necessarily negate either motive or scienter."); *SEC v. U.S. Envtl. Inc*., 155 F.3d 107, 112 (2d Cir. 1998).

[227] *See* Staff Reply at 38-39 & n.167 (noting that Brin, Smith, and Levine received signing bonuses ranging from $100,000 to $500,000).

[228] *See* Staff Reply at 40-41. Moreover, Brin, at least, appears to have quite admired Connelly. *See* Brin Answer at att. B, BARC0634368 ("[Connelly] has it all in [his] head, he tells me to value something, he already has idea [*sic*] in his head, is always close to value[.] amazing[.]").

v. Direct Proof

74. Respondents contend that evidence of intent is relevant to determining scienter only to the extent (1) that it relates directly to a specific transaction alleged to have been manipulative, (2) that it falls exactly within the alleged manipulation period, or (3) that it is a statement, admission, utterance, or other communication made by the specific trader against whom OE Staff seeks to use it. Brin, for example, contends that "[OE] Staff cannot rely on the statements of others in a case against Mr. Brin."[229] Barclays states that the "emails and IMs cited by [OE] Staff all occurred during a brief span from October 2006 through the early summer of 2007," and that the "interpretation of intent gleaned from those few documents" does not "constitute[] evidence of Barclays' intent as to the following 18 months of alleged conduct."[230] Barclays contends that "intent evidence from one period can [not] simply be transported or imputed to a second, later period without any actual intent evidence for the second period."[231] In contesting OE Staff's characterization of certain communications involving the traders, Barclays argues generally that OE Staff failed to "tak[e] the analytical step of showing any nexus between the IMs and actual inappropriate trading activity," so therefore "they do not constitute substantial evidence of inappropriate intent."[232]

75. This is not correct. To begin with, OE Staff has demonstrated "a nexus between the IMs and actual inappropriate trading activity" in multiple instances, sometimes directly connecting trader communications with trading during specific time periods.[233] Nonetheless, the fact that a particular email or IM may not coincide precisely in time with the commission of a manipulative act does not dilute that evidence. Second, Respondents cite to no legal authority establishing that the intent to implement a manipulative or

[229] Brin Answer at 33. Levine similarly suggests that any communications "not actually authored by Ms. Levine" are immaterial to determining whether her conduct was "knowing or intentional." Levine Answer at 21.

[230] Barclays Answer at 28; Levine Answer at 21 (noting repeatedly that the "October 11, 2006 IM" authored by Levine was "outside the time period of the alleged manipulation"); Brin Answer at 37 ("[OE] Staff does not allege that Barclays or any trader actually manipulated the MidC Off peak for December 2006 about which this IM was created.").

[231] Barclays Answer at 28 (emphasis omitted).

[232] *Id.* at 25.

[233] Staff Reply at 20-26 (connecting IMs and other communications with specific trading in November 2006, February 2007, and April 2007).

fraudulent scheme can only be proven with evidence authored or uttered by the individuals engaged in the alleged scheme at the exact time at which the act was alleged to have occurred. That is because there is no such requirement. Far from it: it is well-established that, "[t]he presence of a fraudulent intent is rarely susceptible of direct proof, and must instead be established by legitimate inferences from circumstantial evidence. These inferences are based on the common knowledge of the motives and intentions of men in like circumstances."[234] The Commission itself announced, as far back as 2003, that its approach to enforcement:

> will be based on a consideration of the facts and circumstances of the conduct at issue to determine its purpose and intended or foreseeable result. We recognize that manipulation of energy markets does not happen by accident. However, *we also recognize that intent must often be inferred from the facts and circumstances presented.*[235]

Here, not only do the facts and circumstances give rise to an inference of intent, but the record also furnishes speaking documents that vividly illustrate that intent.

b. <u>Specific Arguments & Findings</u>

i. <u>Brin</u>

76. Brin contends that OE Staff fails to establish scienter because Brin was too inexperienced and unsophisticated to understand how to implement a manipulative strategy of the sort alleged[236] and he did not and would not have been able to effectuate

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[234] *U.S. v. Sullivan*, 406 F.2d at 186 (citing *Connolly v. Geshwiller*, 162 F.2d 428, 433 (7th Cir.) (*Connolly*)); *accord Thomas v. Doyle*, 187 F.2d 207 (D.C. Cir. 1950). Moreover, although non-binding here, it is instructive to note in this regard that the Federal Rules of Evidence provide that statements by coconspirators in furtherance of the conspiracy are not hearsay. Fed. R. Evid. 801(d)(2)(E).

[235] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authority*, 105 FERC ¶ 61,218 at P 43 (emphasis added).

[236] *See* Brin Answer at 40 ("The evidence clearly demonstrates that Mr. Brin had limited experience as a trader, when he was trading for himself or Mr. Connelly, and he certainly did not have the sophisticated understanding of the positions, ratios, leverage, and shares that would be required to make him aware of any purported market manipulation.").

such a strategy in any case.[237] Brin also contends that such scienter evidence as there is relates to time periods that do not correspond to allegedly manipulative trades executed by him.[238]

77. With respect to Brin's state of mind, the Submissions focus largely on a November 30, 2006 IM exchange between Brin and a friend at another trading firm.[239] In this IM exchange, Brin describes some trading errors he made and his friend asks him, "[did] you get burned?" to which Brin replies, "no not too bad, its weird bc some hubs [Connelly] is opp fin/phys, im doing phys so i [*sic*] am trying to drive price in fin direction."[240] Brin's friend asserts that "we do that here," but then expresses skepticism about the wisdom of such a strategy and asks, "why be long fin, and short phys[?]"[241] Brin proposes two possible reasons—either mistake, or malice by Connelly.[242] Brin's friend then adds another possible reason for making such trades: if "your fin. is much bigger," to which Brin responds, "oh yeah it is much bigger on one side."[243]

78. Barclays and Brin contend that the only way this language could support a finding that Brin intended to engage in market manipulation is if it is "taken out of context" and the remainder of the exchange ignored.[244] But there is nothing ambiguous in the

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[237] *See id.* at 38 ("What Mr. Brin never said, and what [OE] Staff has tried to place on him, is that his cash trading actually moved the index.").

[238] *See id.* at 33 ("[OE] Staff has failed to explain how this message sent on November 30, 2006 at the beginning of Mr. Brin's tenure at Barclays related in any manner to Mr. Brin's actual trading in the daily physical markets. [OE] Staff does not even allege that Mr. Brin or anyone else manipulated the December MidC Off-peak index, which was the subject of the trading in the IM.").

[239] *See* Staff Report at 46-48; Barclays Answer at 23-24; Brin Answer at 33-39; Staff Reply at 18, 29, 32-33.

[240] *See* Brin Answer, att. B, BARC0634367. In this context, we understand Brin's reference to "opp" as an abbreviation for the word "opposite."

[241] *Id.*

[242] *Id.* ("i [sic] think it is a mistake, or [Connelly] does it when he hates guy [*sic*] on the other side and wants to just run it against him").

[243] *Id.*

[244] Barclays Answer at 23; Brin Answer at 33.

statement "im doing phys so i [*sic*] am trying to drive price in fin direction."[245] This statement describes both the nature of Brin's own activity ("doing phys," i.e., executing physical transactions) and the purpose of that activity ("trying to drive price in fin direction"). Brin was clearly explaining that he was executing physical transactions to "drive" the daily Index in the "direction" that would benefit Barclays' Financial Swap positions. Respondents tacitly acknowledge this by their silence on any possible alternative meaning for the statement.[246] In essence, Brin contends that, given the theoretical premises he offers for what would be required "for [OE] Staff's manipulation theories to work,"[247] he could not possibly have understood enough to effectively implement the manipulative strategy alleged. This is not persuasive.

79. Brin's contention that he did not know enough to implement the strategy with the requisite scienter fails on all counts. To begin with, it is plain that he had knowledge of Connelly's financial positions—both in magnitude and in location. Otherwise, he would not have had any idea that Connelly was "opp fin/phys" at "some hubs," nor that the financial position was "much bigger" than the physical. Brin's November 30, 2006 IM exchange and the additional evidence presented by OE Staff[248] establishes that Brin both understood the mechanics of the manipulative scheme alleged by OE Staff, and willingly participated in that scheme. For example, he understood that his physical trading could move the Index and that Connelly had leveraged financial positions, i.e., Financial Swaps, that were "much bigger" than the corresponding Physical Positions that could benefit from such physical trading. Moreover, Brin's own statements make it clear that he intended this result. Finally, as Brin understood the dynamics of this manipulative scheme in November 2006, he necessarily continued to understand it throughout the duration of the manipulation period.[249]

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[245] Brin Answer, att. B, BARC0634367.

[246] Barclays makes no attempt to explain it. Brin acknowledges that "the 'drive price' syntax" presents a problem for him, but rather than explain it, changes the subject to "the mechanics of ratio, leverage, and share that would make the strategy *not* work." Brin Answer at 36 (emphasis in original). In any event, Brin has already offered sworn testimony that he does not remember the exchange and cannot interpret it. *Id.* at 36 (citing Brin Test. at 330:19-21, 331:14-16).

[247] *Id.* at 15.

[248] *See, e.g.*, Staff Report at 48-49.

[249] Neither Barclays nor Brin have produced any evidence to persuade us that Brin failed to understand these dynamics prior to November 2006.

80. The Commission finds that Brin executed physical trades for the purpose of moving Index prices to benefit Financial Swaps and, thus, that he knowingly and intentionally participated in the manipulation of products in connection with the Commission's jurisdictional markets.

ii. Smith

81. Smith and Barclays contend that OE Staff cannot establish that Smith acted with the requisite scienter because OE Staff relies upon a series of IM exchanges involving Smith that, they contend, are misinterpreted, contain "loose, ambiguous, and boastful statements," and that "[g]iven the amount of banter and boasting that routinely goes on among traders, especially in instant messages, it is not possible to determine whether any wrongdoing has occurred simply by reading an IM."[250] According to both Barclays and Smith, this evidence fails to establish scienter because "Mr. Smith traded for legitimate reasons," and OE Staff "cannot show any nexus between the IMs and actual inappropriate trading activity."[251] Smith also contends, as a general matter, that OE Staff's focus on Smith's IMs "unreasonably amplifies the sense of wrongdoing involved" because, among other things, Smith was only employed by Barclays for 8 of the 35 Manipulation Months.[252]

82. Whether Smith sometimes engaged in "playful banter" or sometimes executed legitimate trades is not at issue. What is at issue is whether Smith participated in a manipulative scheme with the requisite scienter. Specifically, with respect to Smith's IMs, the question is whether those IMs evince either a knowing or a reckless execution of transactions as part of a fraudulent scheme. The answer to that question is yes.

83. On November 3, 2006, Smith stated in an IM exchange that he "totally fukked [*sic*] with the Palo mrkt today," in order to "keep the sp/palo spread tighter."[253] Smith had motive to keep that spread "tighter" because Barclays had a short position in the

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[250] Barclays Answer at 24-25; *see also* Smith Answer at 19-20 (characterizing Smith's IMs as "joking," "bragging," "sarcastic or facetious," "ironic," and "playful banter").

[251] Smith Answer at 16; Barclays Answer at 25.

[252] Smith's employment at Barclays was terminated in March 2007. Smith Answer at 4 & n.7. We address Smith's argument that his liability is limited by his termination, *infra* section III.C.1.b.iv.

[253] BARC0260014.

SP/PV spread.[254] Smith more than tripled the size of Barclays' built short position at PV that morning,[255] and then flattened that position by buying 250 MW/h on ICE in the space of 15 minutes.[256] The prices at which PV peak traded on ICE increased dramatically during that time span.[257] When the other trader asked, "how far did you move the index," Smith answered, "not too far. . . . shoulda [*sic*] started earlier."[258] To give an innocent gloss to Smith's November 3, 2006 IM exchange, especially in light of the other evidence, would require ignoring the only reasonable interpretation possible.[259] The IM clearly represents an acknowledgment by Smith that he had executed physical transactions at PV with the intent of affecting the Index to "keep the sp/palo spread tighter."

84. The events of November 3, 2006 present compelling evidence of scienter. Courts have commented that, because manipulators so seldom furnish direct evidence of their intent, it generally must be inferred from the circumstances surrounding their actions.[260] In this instance, because Smith was unguarded in his IM chatter, the evidence provides a direct window into his understanding of the manipulative scheme, even as he was in the process of implementing it. In fact, the events of November 3, 2006 do not represent the

[254] Staff Reply at 20. Barclays had a long 525 MW/h Financial Swap position at PV peak and a short 75 MW/h position at SP peak. *Id*.

[255] Coming into the day, Barclays had a short 125 MW/h built Physical Position at PV peak; Smith increased that short position to 400 MW/h. *Id.*

[256] *Id.* at 21. To dispel any confusion about what he might have meant, Smith invited the recipient of his IM to "look at my deals on ICE." BARC0260014.

[257] Staff Reply at 21, Chart 2.

[258] BARC0260014.

[259] Smith's explanations and interpretations of his other IMs similarly strain credibility. *See* Staff Reply at 31-32.

[260] *See Connolly*, 162 F.2d at 433 (fraud is "rarely susceptible of direct proof"); *accord In re Sholdan*, 217 F.3d 1006, 1009 (8th Cir. 2000) ("direct evidence of fraud is rare"); *United States v. Suba*, 132 F.3d 662, 673 (11th Cir. 1998) ("direct evidence" is rarely available to prove "fraud crimes which, by their very nature, often yield little in the way of direct proof").

only instance in which Smith explicitly describes the manipulative scheme, in whole or in part, and actions he has taken in furtherance of it.[261]

85. Overall, the evidence demonstrates that Smith understood the manipulative scheme and that he knowingly executed trades in furtherance of that scheme. The fact that Barclays persisted in the scheme after it had terminated Smith's employment in no way diminishes his knowing participation in the scheme during the time of his employment with Barclays.

iii. Levine

86. Barclays and Levine both contend that the evidence cited in the Staff Report falls short of establishing that Levine acted in furtherance of the scheme with scienter. Barclays' defense is that the communications cited by OE Staff contain "loose" or "ambiguous" language, but do not contain a straightforward admission of any of the elements of what OE Staff has called the "three-part scheme."[262] Levine herself contends that the only way the cited communications could be construed as evincing manipulative intent is if the existence of the manipulative scheme is already presupposed, and that, in any case, Levine's actual trading disproves the allegations that she acted with manipulative intent.[263]

87. Both Levine and OE Staff focus their arguments on the same five communications, but they interpret them in irreconcilable ways.[264] Three of these five communications were authored by Levine (including one outside the time period of the alleged manipulation); the other two communications were authored by others. Levine contends that the communications not authored by her cannot be used as evidence to establish her state of mind and that they are, in any case, exculpatory.[265]

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[261] *See, e.g.*, Staff Report at 40 (connecting Smith's communications with manipulative trading on November 9, 2006); Staff Reply at 21-22 (same); Staff Report at 44-46 (connecting Smith's communications with manipulative trades in March 2007); Staff Reply at 19 (same).

[262] Barclays Answer at 24-25.

[263] Levine Answer at 21-29.

[264] *Compare id.* at 21-27, *with* Staff Report at 49-52, *and* Staff Reply at 19-24, *and* 30-35.

[265] Levine Answer at 27-29.

(a) October 11, 2006 Instant Message

88. In an IM exchange between Levine and a broker dated October 11, 2006, the broker asked Levine, "why do you guys trade this stuff [i.e., Index]" and proposed two possible reasons to Levine.[266] In her response, Levine added a third reason, "and also to protect a position, either BOM or prompt."[267] OE Staff alleges that this refers to protecting a financial position, either Balance of Month or prompt.[268] Levine argues in her Answer that she "was not talking about Barclays" and that there is no evidence that she was talking about financial, as opposed to physical, positions.[269]

89. Levine's explanation is not credible. To begin with, there is no plausible explanation other than that Levine was indeed "talking about Barclays." She insisted throughout her deposition testimony that she could speak only for herself and that she did not "know what other people's strategies were in the market."[270] If that were so, then she could not have been talking about anyone but Barclays. Second, the explanation that she offered, namely, that she was actually talking about "flattening" a Physical Position rather than "protecting" a Financial Swap position lacks credibility, because the broker had already suggested flattening a Physical Position as one of his two possible explanations to which Levine added a third—protecting a position.[271] Finally, as OE Staff observes, Levine's proffered explanation that she was referring to "protecting" Balance of Month and prompt fixed price Physical Positions makes little sense given that she was not able to credibly explain "why a non-financial position that carries no price risk needs protection."[272] Thus, we view the October 11 IM exchange as an

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[266] BARC0390264; Levine Test. at 122:22-23.

[267] BARC03900265. The "prompt" month refers to the month following the current month. *Id*. at 5 n.17 (citing Levine Test. 144:23-25).

[268] Staff Report at 49.

[269] Levine Answer at 21-23.

[270] Levine Test. at 137:22-23; *id.* at 124:21 ("I can only speak for what I was doing"); *id.* at 132:17 ("I can only speak for what I did"); *id.* at 134:12 ("I can only speak for what I would do"); *id.* at 137:7-8 ("I can only speak for my own trading strategies"). We add that Levine did not provide at deposition, and thus under oath, the same account of the meaning of this exchange that she now advances in her answer.

[271] *See* Levine Answer at 22; Staff Reply at 34.

[272] *See* Staff Reply at 34; *see supra* section III.B.2.b. "Price risk" here simply refers to exposure to changing prices. As discussed above, the profitability of the Dailies

(continued…)

acknowledgement that the Respondents traded Index in order to protect the value of Barclays' Financial Swap positions.

(b) January 31, 2007 and April 2, 2007 Emails

90. In an email to her colleagues on January 31, 2007, Levine stated that she would be out of the office for a while and described her position—including her Balance of Month Financial Swap position in the SP to PV spread.[273] She then stated that, "[i]f we can keep the PV index up and the SP daily index down somehow that will be good to keep the BOM in."[274] OE Staff alleges that this statement "on its face is a request for her colleagues to trade Dailies to move the daily settlements for the PV index higher and the SP index lower to benefit her short position in the SP to PV spread, a BOM Financial Swap position which she had set forth in the same email."[275]

91. Levine denies any recollection of even writing the email, and offers no explanation or interpretation of this statement.[276] She also argues that this email cannot possibly evince manipulative intent on her part, because the recipients of the email did not trade in accordance with the wishes OE Staff alleges she expressed.[277] She further argues that, to the extent she herself executed any trades, "she, too, did not subsequently trade in a manner consistent with the [OE] Staff's theory of this case" and that "her trading was minimal" when she returned to the office.[278] Finally, she contends that the trades she executed on January 31, 2007 at PV and SP were spread trades and therefore

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is measured by the difference between the Volume-Weighted Average Price of all the Dailies Barclays' transacted and the Volume-Weighted Average Price of all of the ICE Dailies while the profitability of the Financial Swaps is ultimately measured by the difference between the Volume-Weighted Average Price and the fixed price for which the swap was entered into, and subject, in theory, to unlimited price movement in either direction. *See supra* P 48; Staff Report at 74 n.349.

[273] BARC04272014; Staff Report at 50-51.

[274] BARC04272014.

[275] Staff Report at 51.

[276] Levine Test. at 168:21-169:12.

[277] Levine Answer at 25.

[278] *Id.*

"Ms. Levine would have no idea when she posted these trades how they would be priced, or if the prices would be included in the ICE index."[279]

92. In a second email to her colleagues, on April 2, 2007, OE Staff alleges that Levine made a similar request to her colleague Monal Dhabliwala.[280] In that email, the stated purpose of the request was "to tell you what I would like you to do w[ith] my position," Levine evinces concern about her position on the SP/PV spread and states that "[i]f you can sell a bunch of index that would be good to keep the price up."[281] OE Staff concedes that there is no evidence that Dhabliwala acted on the request, but alleges that "other traders at Barclays, particularly Brin, traded the PV cash markets to move the daily index settlement higher during this month and hence appear to have acted on Levine's request."[282]

93. As with the January 31, 2007 email, Levine contends that neither she nor the recipient of the April 2, 2007 email traded consistent with the putative request contained therein.[283] She points out that the April 2, 2007 email "was not directed to Mr. Brin, and [OE] Staff presents no evidence that he received it."[284] Levine states, with respect to both emails, that she "was not instructing her colleagues to engage in any fraudulent conduct. She was asking them to legitimately and economically help manage her positions while she was out of the office."[285]

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[279] *Id.* at 26. Levine explains that, in spread trades, she "posted a bid or offer for the differential between the two locational prices (spread prices) that she wanted to trade," and then ICE matched her bids and offers with willing counterparties. *Id.* at 11-12. If the two "legs" of a spread trade are between the same counterparties, they would not be included in the Index. *See id.* at 12; Staff Reply at 81 n.371. OE Staff notes, however, that such a result was "infrequent," occurring in only approximately 15 percent of Levine's trades during the period between November 2006 and December 2008. Staff Reply at 81 n.371.

[280] Staff Report at 52.

[281] BARC0496996.

[282] Staff Report at 52.

[283] Levine Answer at 26-27.

[284] *Id.* at 26.

[285] *Id.* at 27.

94. Levine's arguments are not persuasive. In these communications, Levine was asking her colleagues to implement the manipulative scheme by trading Dailies to benefit her Financial Swap position. With respect to the January 31, 2007 email, because Levine does not explain the statement that "[i]f we can keep the PV index up and the SP daily index down somehow that will be good to keep the BOM in," there is no reason to suppose that it means anything other than what it says, or that she meant anything other than its apparent meaning.[286] Similarly, with respect to the April 2, 2007 email, Levine could not offer a credible alternative explanation to the one proffered by OE Staff, namely, that Levine was requesting her co-worker to enhance the value of her financial position by selling a large amount of Index. In fact, in both cases doing so would be instances of using Index "to protect a position, either BOM or prompt" consistent with the scheme.[287]

95. Levine's contention that there is no way of linking her April 2, 2007 email with the trades executed by Brin is meritless. At her deposition, Levine admitted that her email to Dhabliwala may have been "asking him to talk to somebody else who might be trading it on my behalf," and explained, "[i]t's an instruction on how I would like my position handled. I don't necessarily know who would be executing."[288]

96. The two emails and the October 11, 2006 IM demonstrate that Levine understood the elements of Barclays' manipulative scheme, and that she undertook actions in furtherance of that scheme. Indeed, we find these communications demonstrate that: (1) Levine understood that financial positions could be "protected" by Index trading; (2) Levine established positions that would have benefited from a change in the Index price; and (3) Levine requested her colleagues to execute cash trades for the explicit purpose of moving Index and thereby enhancing the value (or preventing the diminution) of those positions. To suppose that she intended or acted otherwise ignores the evidence. We thus conclude that Levine acted in furtherance of the scheme with the requisite scienter.

iv. <u>Connelly</u>

97. Barclays and Connelly argue that OE Staff has not established that Connelly acted with the requisite scienter in connection with the alleged manipulative scheme. In this,

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[286] Namely, she was requesting that her colleagues trade Dailies in a way that would "keep the PV index up and the SP daily index down" in order to enhance her Balance of Month Financial Swap position in the SP to PV spread. This is precisely the sort of trading that OE Staff alleges constitutes the manipulative scheme.

[287] BARC03900265.

[288] Levine Test. at 337:2-13.

Barclays focuses on the lack of explicitly inculpatory emails and IMs relative to those of other traders.[289] Connelly similarly points to OE Staff's emphasis on electronic communications by other traders, and contends that "this evidence cannot be imputed to Mr. Connelly to prove his intent to manipulate the market."[290]

98. Barclays and Connelly disagree that the three communications authored by Connelly that were cited in the Staff Report show evidence of his intention. These include two IM exchanges dated February 28, 2007, and an email sent by Connelly to the publisher of the Western Power Traders Forum newsletter on July 6, 2007. We address these communications below, but note that they do not constitute the sum total of evidence of Connelly's scienter. In fact, these communications, though probative, are neither the only nor even the most compelling evidence of Connelly's manipulative intent.

99. There are additional facts, communications, and trade data which demonstrate that Connelly understood the manipulative strategy that he both oversaw and personally implemented, and that directly contradict his current claims of ignorance of the scheme. For example, it is impossible to reconcile his role as the Managing Director of Barclays' North American power trading desk,[291] with the ignorance he has now professed regarding his subordinates' trading practices, strategies, and profitability.[292] In addition, it is also clear that Connelly allowed his traders to move their sometimes substantial losses incurred as a result of trading Dailies into his own book.[293] The Individual Traders—whom Connelly personally hired and had known for years[294]—testified that

[289] *See* Barclays Answer at 28 ("emphasiz[ing]" that there are "only [two] electronic communications by Mr. Connelly that OE [Staff] cited to show his intent") (emphasis omitted).

[290] Connelly Answer at 40.

[291] *See* Barclays August 29, 2011 Submission, app. AA, at ¶ 2.

[292] *See* Connelly Answer at 33 (denying Connelly "knew very many details about the younger traders' activities"); *id.* at 36-39 (explaining that Connelly would not have reviewed information or reports that would have alerted him to the losses his traders were incurring).

[293] *See* Staff Report at 58-59 ("[i]n the alleged [M]anipulation [M]onths, the cash traders moved approximately $1.45 million of net cash trading losses from their trading books to Connelly's books."). In this instance, a trader's "book" refers to the trades (positions) for which the trader has profit and loss and risk responsibility.

[294] *See* Staff Reply at 40-41.

they traded in Connelly's book and that they would not have done so without his knowledge and consent.[295] Brin, though the most junior trader on the desk, was aware of Connelly's financial positions and strategies and explained that he was executing them.[296]

100. Moreover, Levine's email of January 31, 2007, in which she described her Balance of Month Financial Swap position in the SP to PV spread and stated that, "[i]f we can keep the PV index up and the SP daily index down somehow that will be good to keep the [Balance of Month] in," was addressed to Connelly, among others. Respondents have not put forward any evidence that Connelly responded to the email, and they certainly do not suggest that he found anything untoward about the email. And, tellingly, none of the Respondents in this proceeding have offered an innocent interpretation of this document.[297]

(a) <u>February 28, 2007 Instant Messages</u>

101. On February 28, 2007, Connelly—unusually, in light of his senior status—traded Dailies for March 1, 2007 delivery.[298] Connelly placed a reserve bid for 1050 MW/h at $61.50, which was $2.50 MW/h more than the only other consummated transaction that day.[299] The Staff Report notes that the market accepted these offers to buy, and, when Connelly exited the market, "prices for Dailies dropped $1.50 almost immediately and continued to decline throughout the trading session."[300]

102. In an IM exchange between Connelly and one of his former colleagues, the former colleague describes that morning's trading as "a shitshow" to which Connelly responded, "crazy—I love it."[301] He then went on to say that "your boy started crying this morning[.] [H]e sent me an [ICE] message—said he was calling ferc," and then added, "lol."[302] In an email exchange later that day between Connelly and the same trader,

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[295] *See* Brin Test. at 374:12-375:17; Smith Test. at 389:20-22, 393:19-21.

[296] *See* Brin Answer, att. B, BARC0634367.

[297] For her part, Levine denies any recollection of writing the email and claims to be unable to decipher its meaning. Levine Test. at 168:2-169:12.

[298] Staff Report at 54.

[299] *Id.*

[300] *Id.*

[301] BARC0090305.

[302] *Id.*

Connelly's former colleague asks, "you going to have fun with the index all month?" to which Connelly responds, "no—it isn't going to affect much."[303]

103. Barclays and Connelly contend that these IM exchanges are innocuous. They argue that Connelly's "lol" comment proves nothing, and claim that his subsequent actions—assertedly reporting the matter to Barclays' compliance group—demonstrate that he took the threat appropriately seriously.[304] They further argue that Connelly's comment in the other IM exchange that his trading "isn't going to affect [Index] much" is actually exculpatory, because it demonstrates Connelly's belief that it is impossible to move the Index in the manner that is essential to the manipulative scheme alleged by OE Staff.[305]

104. Connelly's comment that his trading would not affect the Index "much" is not exculpatory. On the contrary, this statement on its face demonstrates that he understood that his trading could and would, in fact, affect the Index. It is also worth noting that the question from his former colleagues to which Connelly is responding was not explicitly about "affecting" the Index; rather, it was about "having fun with the Index." It was Connelly himself who introduced into the conversation the idea that his trading could "affect" the Index, and, as a result, this further demonstrates his belief that the Index was affected by his trading. Therefore, the suggestion that his comments prove that he believed that it was impossible to affect the Index—or to affect it enough to make the manipulative scheme work—contradicts both the plain language of the exchange and the circumstances surrounding it, and the Commission declines to adopt Connelly's newly proffered explanation.[306]

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[303] BARC0090353.

[304] Barclays Answer at 29; Connelly Answer at 43-45. Both Barclays and Connelly contend that the record confirms Connelly's account. Barclays Answer at 29; Connelly Answer at 43-45. OE Staff has challenged this assertion, however, asserting a lack of confirmatory evidence in the record. *See* Staff Reply at 36 n.152.

[305] Barclays Answer at 29; Connelly Answer at 41-42. Respondents' precise position on this issue is difficult to ascertain, as it seems to both acknowledge and deny that trading affects the Index. *Compare* Barclays Answer at 27 ("All qualifying trades affect the final index."), *with id.* at 29 ("it is not credible or logical that . . . Mr. Connelly 'was aware his trading this day could move the daily index settlement.'").

[306] Staff Reply at 37 (citing Connelly Test. at 731:6-9) (noting that at deposition Connelly claimed to be unable to understand what he meant or what he understood himself to be responding to).

105. In fact, considering all of this evidence—specifically, Connelly's trading that prompted both of these IM exchanges (and, presumably, the threat to report him to this Commission for executing those trades)—we find both IM exchanges are probative of his state of mind. In March 2007, Connelly was short the SP/MIDC spread, and stood to incur substantial losses on that position, due to his having misjudged the timing of the snow runoff that drives the prices at MIDC.[307] On February 28, 2007, Connelly came to the office unusually early, traded physicals, which he did not typically do, and traded them in volumes and in a direction that would have been expected to move the Index price in a direction favorable to his Financial Swaps for March.[308] Connelly's actions prompted chatter in the market—including questions about whether he would be behaving this way "all month" and a threat to report him to this Commission—and, by his own testimony, a meeting with Barclays' compliance department. These facts demonstrate to us that Connelly (and others) believed that his trading did affect the market.

(b) *The Friday Burrito* Incident

106. Three days after the Commission notified Barclays that it was under investigation for its Western U.S. power trading, a newsletter called *The Friday Burrito*, distributed by a staff member of the Western Power Trading Forum, included an article noting the unusual patterns of physical trading. The article asked, "[w]hat the hell is going on out there?" and noted that "the worst thing possible would be one party trying to move the financial markets with large physical positions."[309] Before the next business day, Connelly wrote an email to the publisher of *The Friday Burrito* offering an innocuous explanation for the physical trading volumes, and urging him to "embrace the change . . . as opposed to being afraid of it."[310] Connelly consented to allow *The Friday Burrito* to publish his email, but requested that his and Barclays' identities be kept anonymous.[311]

107. OE Staff, citing various evidence to support its theory of manipulation, contends that "[t]he explanations that Connelly provided for the trading . . . were false."[312] The

[307] Staff Report at 53-54.

[308] *Id.* Connelly lost $44,316 on his unusual cash trading of MIDC dailies on this day. *Id.*

[309] BARC0196571.

[310] BARC0196584.

[311] *Id.*

[312] Staff Report at 57.

Staff Report suggests what is more explicit in its Preliminary Findings Letter, namely, that Connelly sent the email to *The Friday Burrito* "to quash discussions regarding Barclays' manipulation of the Western United States power markets by providing alternative explanations for large volumes of cash trading."[313]

108. Connelly argues that, "rather than attempting to quash alleged discussions, which would have been ridiculously late given the start of the investigation, he was directly engaging on the issue."[314] Connelly also claims that knowledge of the allegedly manipulative activities and inculpatory comments of his traders cannot be imputed to him as of the date of his email to *The Friday Burrito*.[315] Finally, Connelly emphasizes that his reasons for requesting anonymity were legitimate: "any alleged nefarious characterization of such a request was completely outweighed by the basic reason that he was not authorized to make public statements or representations to the media on behalf of Barclays."[316]

109. While it is certainly true that the investigation was already underway, it does not follow that Connelly had no incentive to stifle speculation about "one party trying to move the financial markets with large physical positions."[317] Moreover, it is unclear either what Connelly could possibly have hoped to accomplish by "engaging the issue"[318] if, as he claims, he had no knowledge of the "statements and conduct of others,"[319] or why he would have chosen this issue to "engage" unless OE Staff had already explained its theory of manipulation to Barclays in fairly fine detail—which Barclays plainly contends it did not.[320] It is also difficult to reconcile Connelly's request for anonymity, ostensibly due to his desire "to keep a low profile," with his testimony that the "whole raison d'etre" for his job was to "*raise* Barclays' profile."[321] In addition, Connelly offers

[313] Connelly Answer at 46 (quoting Preliminary Findings Letter at 51).

[314] *Id.* at 47.

[315] *Id.* at 47-48.

[316] *Id.* at 48.

[317] BARC0196571.

[318] Connelly Answer at 47.

[319] *Id.*

[320] *See* Barclays Answer at 33 (contending that the Commission is estopped from pursuing this manipulation claim on the grounds that OE Staff declined to identify specific practices from which it should cease and desist).

a new explanation in his answer—specifically, that he was simply "not authorized" to speak to the media on behalf of Barclays—that he failed to provide to OE Staff at deposition and thus under oath.[322] We find that Connelly's new, and belated, explanation is not credible.

110. We find that Connelly acted with actual intent. We also find that the evidence supports a finding that his conduct satisfies the lesser "recklessness" standard, however stringently defined.[323] Connelly understood that Barclays' Dailies trading would impact the Index; he knew his own Financial Swap and built Physical Positions because he created them; he knew or reasonably should have known that his traders were accumulating significant losses in their Dailies trading—losses that, on some occasions, he moved into his own trading books; he knew other market participants viewed even his own Dailies trading to be unusual and potentially manipulative behavior worthy of reporting to this Commission and commenting on in a trade newsletter; he was charged with managing those traders and their positions; he knew or reasonably ought to have known that taking trading losses to benefit a related position violated the "Golden Rule;" and he had innumerable opportunities and occasions to ascertain that the traders he hand-picked and personally hired were taking losses by trading Dailies in a manner that benefited Financial Swap positions held by themselves or by other traders on the desk, or himself. This evidence is beyond reasonable dispute, and it would satisfy any of the various formulations of the "recklessness" standard that have been adopted by the courts of appeals.[324]

v. <u>Barclays</u>

111. As discussed above, the evidence supports the conclusion that the Individual Traders, including Connelly, the Managing Director of Barclays' North American power

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[321] BARC0196571; Staff Report at 58 n.208 (quoting Connelly Test. at 704:9-13 (emphasis supplied)).

[322] Connelly Answer at 48; Connelly Test. at 840:16-841:17 (testifying that the reason why he requested anonymity was simply that "I didn't want to see my name or Barclays' name in print" and stating four separate times that he did not recall why he wanted to keep those names out of print).

[323] This is likewise the case with the other traders, Brin, Levine, and Smith who manifest their recklessness not only through their outward actions, but also by their own statements.

[324] *See* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 53 n.109 (delineating various formulations of "recklessness" by the courts of appeal).

trading operation at the time of the violations, knowingly or recklessly executed a manipulative scheme involving the uneconomical trading of physical power for the purpose of enhancing its Financial Swap positions. Neither Barclays nor any of the other Respondents advance any argument that provides a legal basis for not imputing the Individual Traders' intent to Barclays itself. Consequently, we find that the knowing or reckless state of mind of the Individual Traders can and must be attributed to Barclays itself.

4. In Connection With a Transaction Subject to the Jurisdiction of the Commission

112. The third element of establishing a violation of the Anti-Manipulation Rule is determining whether the conduct in question was "in connection with" a transaction subject to the Commission's jurisdiction.[325] Barclays claims that the Commission has no jurisdiction over what it describes as the "financially-settled day-ahead transactions" at issue.[326] As discussed below, we find that the Commission has jurisdiction over the transactions at issue here.

113. In relevant part, section 201 of the FPA grants the Commission jurisdiction over "the sale of electric energy at wholesale in interstate commerce."[327] In 2005, Congress added section 222 of the FPA, at issue here, which encompasses "any entity" that "directly or indirectly . . . use[s] or employ[s], *in connection with the purchase or sale of electric energy . . . subject to the jurisdiction of the Commission*, any manipulative or deceptive device or contrivance."[328] Pursuant to section 222, the Commission promulgated the Anti-Manipulation Rule in 2006.[329] As interpreted and applied by the Commission, the anti-manipulation provisions of the FPA and related regulations reach "any entity," including "any person or form of organization, regardless of its legal status,

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[325] 16 U.S.C. § 824v(a); 18 C.F.R. § 1c.2.

[326] Barclays Answer at 33; *see also* Barclays 1b.19 Submission at 26 (citing *DC Energy, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165, at P 68 (2012); *Pacer Power LLC*, 104 FERC ¶ 61,131, at P 13 (2003); *Puget Sound Energy, Inc.*, 96 FERC ¶ 63,044, at 64,381 n.318 (2001)).

[327] 16 U.S.C. § 824(b) (2006).

[328] Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005) (codified at 16 U.S.C. § 824v(a)) (emphasis added).

[329] Order No. 670, FERC Stats. & Regs. ¶ 31,202 (codified at 18 C.F.R. § 1c.2).

function, or activities,"[330] and conduct that is "in connection with" a jurisdictional transaction, which is understood to mean that "the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction."[331] The D.C. Circuit recently held, however, that section 222 does not reach futures contracts that fall under the exclusive jurisdiction of the Commodity Futures Trading Commission (CFTC).[332] The manipulative transactions at issue here, though, are not under the CFTC's exclusive jurisdiction.

114. As established in the record before us, Respondents generally purchased and sold (either long or short) Physical Positions, which have physical delivery obligations.[333] As Barclays was unable to meet any physical delivery obligations,[334] Respondents then flattened Barclays' net Physical Position by trading Dailies (another physical product) pursuant to a manipulative scheme designed "to push daily index settlements up if Barclays was buying Dailies and to push them down if it was selling."[335] This physical trading activity was "not intended to get the best price on those trades" and was "not responding to supply and demand fundamentals," but instead was intended to profit from and "benefit" Barclays' related Financial Swap positions.[336]

115. The Commission has jurisdiction over the transactions, and thus authority over the conduct, at issue here. By engaging in these physical transactions, which were for the sale of electricity for resale in interstate commerce,[337] Respondents were engaging in the

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[330] *Id.* P 17.

[331] *Id.* P 22.

[332] *Hunter v. FERC*, 711 F.3d 155, 160 (D.C. Cir. 2013) (holding that section 2(a)(1)(A) of the Commodity Exchange Act, 7 U.S.C. § 2(a)(1)(A) (2006), was not repealed by the Energy Policy Act of 2005, and therefore that the CFTC has exclusive jurisdiction over the manipulation of natural gas futures contracts traded on the New York Mercantile Exchange).

[333] Staff Report at 16.

[334] *See id.* at 62; Staff Reply at 91.

[335] Staff Report at 23.

[336] *Id.*

[337] *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 420-21 (1952) ("It is accordingly evident that the operations of the unified system enterprise are completely interstate in character,

(continued…)

"sale of electric energy to any person for resale" subject to section 201 of the FPA.[338] Moreover, Respondents' sales of Physical Positions and Dailies for resale are "in connection with" transactions subject to the Commission's authority under section 222 of the FPA. As the Commission has held, an entity "that acts with intent or with recklessness to affect the single price auction clearing price (which sets the price of both non-jurisdictional and jurisdictional transactions), would be engaging in fraudulent conduct in connection with a jurisdictional transaction."[339] That is the case here. Respondents traded "to affect" an index "which sets the price of both non-jurisdictional and jurisdictional transactions" and, therefore, they are subject to the Commission's authority under section 222 of the FPA and the Anti-Manipulation Rule.

116. The D.C. Circuit's holding in *Hunter* does not implicate the Commission's jurisdiction here because the manipulative scheme implemented by Respondents affected the price of physical electricity, and the manipulative trading occurred in the physical markets, which markets are not subject to the exclusive jurisdiction of the CFTC.[340] Moreover, the products that Barclays manipulated are physical products and not futures contracts, subject to this Commission's jurisdiction notwithstanding the fact that

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notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary.").

[338] 16 U.S.C. §§ 824(b), (d).

[339] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 22. The specific example provided in Order No. 670 addresses transactions in a "Commission-regulated RTO/ISO market," but conduct in the ICE market that intentionally or recklessly affects physical indexes (that, in turn, affect jurisdictional transactions) has essentially the same nexus to jurisdictional transactions, and therefore is subject to the Anti-Manipulation Rule and section 222(a) of the FPA.

[340] That the scheme was designed to ultimately garner profit by fraudulently increasing the value of Barclays' Financial Swap positions is immaterial for jurisdictional purposes because the manipulative conduct occurred in and adversely affected the physical electricity markets that are subject to the Commission's jurisdiction. The *Hunter* court did not defer to the Commission's construction of its jurisdiction because that case, unlike this case, involved "two competing governmental agencies assert[ing] conflicting jurisdictional claims." 711 F.3d at 157. *Hunter* does not apply to this case because the manipulative conduct here is not subject to the CFTC's exclusive jurisdiction, and is instead encompassed by the Commission's jurisdiction, as discussed above. *Cf. Arlington v. FCC*, 569 U.S. , 133 S. Ct. 1863 (2013) (*Chevron* deference applies to an agency's construction of its jurisdictional authority).

"Barclays almost always flattened its position on a day-ahead basis."[341] Here, Respondents engaged in a series of physical transactions "to affect" an index "which sets the price of both non-jurisdictional and jurisdictional transactions." These transactions and the scheme, therefore, are subject to section 222 of the FPA and the Anti-Manipulation Rule.

C. Liability

117. Having concluded that Respondents, in connection with the purchase or sale of electricity, knowingly or recklessly devised and participated in a scheme to manipulate the wholesale power markets in violation of section 222(a) of the FPA and the Anti-Manipulation Rule, we now must determine the appropriate remedies to assess. The Staff Report recommends that we assess civil penalties and disgorgement against Barclays, and civil penalties against the Individual Traders. After assessing the legal and factual issues, including those raised by the Respondents, and "tak[ing] into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner,"[342] we agree with OE Staff's recommendation and assess penalties and disgorgement.

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[341] Barclays 1b.19 Submission at 26. Barclays' reliance on *DC Energy, LLC et al. v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165 (2012), for the proposition that "none of the indicia of physicality . . . are present here," is inapposite for at least two fundamental reasons. *Id.* P 26. First, as addressed in this section, it is well established that the products that Barclays traded are, in fact, subject to the Commission's jurisdiction. Second, that decision is not analogous to the circumstances here because it involved a dispute over a specific term used in a particular tariff. In particular, that case addressed Internal Bilateral Transactions (IBTs), a product that enabled market participants to offset and avoid certain "deviation" charges, but under the tariff's language, the IBTs had to "contemplate the physical transfer of energy." *Id.* P 4. The complainants characterized the transactions as being "physical" under the tariff and reported them to the RTO as if they were tariff-compliant IBTs. *Id.* PP 1-7. The Commission, however, found that the complainants had not shown that their transactions, in fact, satisfied the tariff's physicality requirement. *Id.* P 66. The narrow tariff interpretation dispute in that case is, therefore, unrelated to the jurisdictional questions presented here.

[342] 16 U.S.C. § 825o-1(b).

1. Penalties

a. Barclays

118. In the Staff Report, OE Staff recommends that Barclays be assessed $435 million in civil penalties, an amount that it claims is in line with its calculation under the Penalty Guidelines.[343] Barclays counters that the recommended penalties "are wholly unsubstantiated, inconsistent with the Commission's Penalty Guidelines and will carry no weight in federal district court."[344] We disagree; under the Penalty Guidelines and our independent assessment pursuant to the statutory mandate of section 316A of the FPA, we find that OE Staff's recommendation is an appropriate and reasonable penalty for Barclays' substantial manipulation of the western power markets.

119. Assessing civil penalties under section 316A of the FPA requires determining the maximum penalty authorized by the statute and the appropriate penalty within that maximum after taking into consideration certain factors designated by the statute. Under the procedures the Commission has established, the Penalty Guidelines provide a method for considering the statutory factors with respect to a company. In addition, an individualized assessment may be necessary to determine what penalty is appropriate, and such an assessment may include a departure from the Penalty Guidelines. We will address each step in sequence.

120. First, we must determine what sanctions Congress has authorized for the conduct at issue. Under section 316A(b) of the FPA, any person who violates any statutory provision concerning the regulation of electric utility companies engaged in interstate commerce "or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues."[345] Thus, the maximum penalty authorized by law is determined by calculating how many violations occurred on how many days. The Staff Report indicates that, at a minimum, Barclays and the Individual Traders engaged in the unlawful manipulative conduct with respect to 35 monthly products for 655 product days.[346] Even at a rate of one violation per product day—a calculation that probably underestimates[347] the total number of

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[343] Staff Report at 65-66.

[344] Barclays Answer at 31.

[345] 16 U.S.C. § 825o-1.

[346] *See* Staff Report at 1.

[347] A one-violation-per-day calculation sets the lower end of the statutory maximum range, but the total number of violations (and thus the total maximum penalty)

(continued…)

violations that Respondents committed—that amounts to an authorized penalty of up to $655 million under the FPA, which is significantly more than the recommended penalties here. Therefore, the penalties below are well within our statutory authority.

121. Second, having determined the maximum penalty permitted by the statute, we must determine what sanction is most appropriate within that statutory cap. Our analysis is guided by section 316A(b) of the FPA, which states that, "[i]n determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner." To assist the consideration of these two statutory factors with respect to companies, the Commission promulgated the Penalty Guidelines to "play a significant role in our determinations of civil penalties" and noted that it "will continue to base penalties on the seriousness of the violation, measured in large part by the harm or risk of harm caused, an organization's efforts to remedy the violation, as well as other culpability factors, such as senior-level involvement, prior history, compliance, self-reporting, and cooperation."[348] In so doing, the Commission recognized that "no guidelines could include an exhaustive list of factors, and each decision will depend on the particular facts and circumstances,"[349] and emphasized that the Penalty Guidelines "do not restrict our discretion to make an individualized assessment based on the facts presented in a given case."[350] Accordingly, the "consideration [of] the seriousness of the violation" must begin with a consideration under the Penalty Guidelines, and conclude with an

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is far greater, because each manipulative trade made pursuant to the unlawful scheme constitutes a separate violation of section 222(a) of the FPA and the Anti-Manipulation Rule, and thus each manipulative trade is independently subject to the sanctions of section 316A. Here, the evidence indicates that Respondents' unlawful scheme required the traders to conduct multiple manipulative transactions on many of the 655 days at issue. For instance, OE Staff presented trade data demonstrating that, on November 3, 2006, Barclays, Smith and Levine alone engaged in over a dozen manipulative trades to effectuate their unlawful scheme. Staff Reply at 21. Even if Respondents engaged in only an average of two or three manipulative trades on each of the 655 product days at issue here, that would amount to a maximum penalty under the FPA of well over $1 billion, and perhaps more than $2 billion. In short, the penalties recommended in the Staff Report and ordered below are well short of the maximum amount supported by the statute.

[348] Penalty Guidelines Order, 132 FERC ¶ 61,216 at P 2.

[349] *Id.* P 32.

[350] *Id.* P 2.

independent assessment of the statutory factors "in order to make an individualized assessment based on the facts presented in a given case."[351]

122. Contrary to Respondents' assertions,[352] the Staff Report's discussion of the Penalty Guidelines reveals that the calculation was performed correctly. Per section 1C2.1 of the Penalty Guidelines, the first step in a calculation under the Penalty Guidelines is to determine the Violation Level. As stated in section 2B1.1(a) of the Penalty Guidelines, the Base Violation Level for a manipulation violation is 6. OE Staff calculates that Respondents caused $139.3 million in harm to the market through their manipulative trades.[353] Under section 2B1.1, if the loss exceeds $100 million, 26 points are added to the base. Furthermore, this violation continued for two years—i.e. more than 250 days—and therefore under section 2B1.1(b), another 6 points are added to the Violation Level, resulting in a total Violation Level of 38 points. Cross-referencing the Base Violation Level under section 1C2.2(b) derives a figure of $72.5 million. Under section 1C2.2(a), the Base Penalty is the greater of the amount from section 1C2.1(b) or the total losses. Therefore, because the total estimated harm here is greater than the base penalty in section 1C2.2(b), Barclays' Base Penalty is $139.3 million.

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[351] *Id.* P 32.

[352] Barclays Answer at 31 n.33 (stating that "the Staff Report does not adequately describe or support the culpability score it utilized in determining the range under the Commission's Penalty Guidelines" because it "does not indicate what weight it gave [culpability] factors.").

[353] OE Staff reached this estimate first by measuring "the total open interest of financial and physical instruments settling against the indices" and then multiplying that figure "by the price distortion resulting from Barclays' cash trading." Staff Report at 63. With respect to the first step—measuring the size of the total open interest of instruments settling against the indices during the months of manipulation—OE Staff found the sum of the total open interest of Financial Swaps that cleared on ICE with an estimate of the physical-market open interest bought and sold in the manipulation months by 25 entities believed to have been significant market participants. The Staff Report notes that ICE does not have open interest data before 2007, and so OE Staff's calculation of losses for the months of November 2006 PV peak and December 2006 NP off-peak reflect only "its estimate of the physical market's open interest." *Id.* at 63 n.233. The combined "open interest" figure for each day was then multiplied by the estimated price distortion caused by Barclays' manipulation. *Id.* at 63. OE Staff states that it derived this estimate from its "preliminary econometric model that allows [OE Staff] to estimate Barclays' change to the index settlement based on the net volume of Barclays' trading on a daily basis." *Id.* at 63.

123. The next step under the Penalty Guidelines is to determine the Culpability Score under section 1C2.3. Culpability begins with a score of 5, and that amount is then decreased or increased according to the presence of mitigating or aggravating factors. The Staff Report describes the culpability factors. First, the Staff Report concludes that high-level personnel at Barclays designed and supervised the manipulation.[354] In tandem with the fact that Barclays employs approximately 140,000 people, we agree that 5 points should be added per section 1C2.3(b)(1). Second, the Report notes that Barclays recently settled claims of manipulating the London Interbank Offer Rate at approximately the same time as its manipulation of the power markets, and argues that this prior history aggravates the seriousness of the offense per section 1C2.3(c).[355] We agree, and add another two points. Third, OE Staff asserts that Barclays' compliance program is inadequate per section 1C2.3(f) because the company did not have systems in place to detect uneconomic trading despite the company's recognition that such trading raised serious legal issues.[356] We agree, and do not accord any mitigating weight on account of Barclays' compliance program. Finally, OE Staff recommends that Barclays be accorded mitigating weight for cooperating with the investigation.[357] We concur, and subtract 1 point per section 1C2.3(g)(2). Therefore, we find that Barclays' Culpability Score is 11 (Base 5, + 5 for size and senior official involvement, + 2 for prior history, -1 for cooperation). Cross-referencing this figure with section 1C2.4, we determine that the minimum and maximum multipliers are 2.0 and 4.0, respectively.

124. The product of the minimum and maximum multipliers with the Base Penalty results in a penalty range of $278.6 million to $557.2 million. OE Staff recommended a civil penalty of $435 million, which is very nearly the midpoint of the penalty range.

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[354] *Id.* at 64.

[355] *Id.* According to public records, Barclays entered into a public settlement with the Criminal Division of the U.S. Department of Justice in June 2012 in which the company admitted and acknowledged responsibility for manipulating the London Interbank Offer Rate, agreed not to contradict the facts recited in the agreement, and further agreed to pay a $160 million monetary penalty. Department of Justice letter to Steven R. Peikin, et al., (June 26, 2012), *available at* http://www.justice.gov/iso/opa/resources/337201271017335469822.pdf. Barclays separately agreed to pay a $200 million penalty to the CFTC for the same manipulative conduct. *Barclays PLC*, No. 12-25, slip op. (C.F.T.C. June 27, 2012), http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder062712.pdf.

[356] *Id.* at 64-65.

[357] *Id.* at 65.

Aside from objecting to the imposition of penalties, Barclays presents no alternative penalty calculation. Taking into consideration the evidence presented to us and the statutory factors of FPA section 316A, we find that OE Staff properly applied the Penalty Guidelines to reach its recommendation that we impose $435 million in penalties, and that the statute authorizes penalties in that amount. Therefore, we find that the Penalty Guidelines support imposing a penalty of $435 million on Barclays.

125. Finally, we must undertake an independent assessment of the violation in order to determine whether the amount calculated under the Penalty Guidelines is reasonable and appropriate under the FPA. As the Commission has recognized, the Penalty Guidelines—like the United States Sentencing Guidelines—provide a "first step in determining an appropriate penalty."[358] But "the Commission cannot predict how it will measure loss in every case" because "[t]here may be circumstances when precise calculations cannot be made" and "the availability of evidence will likely vary from case to case."[359] For such reasons, "the Penalty Guidelines may not always account for the specific facts and circumstances of every case," and this "inevitable feature of a guidelines-based approach to determining penalties" was the reason that "we include[d] the flexibility to depart as necessary."[360] Accordingly, the Commission emphasized that the "decision to adopt a guidelines-based approach does not restrict the discretion that we have always exercised and will continue to exercise in order to make an individualized assessment based on the facts presented in a given case."[361] In short, while the Penalty Guidelines calculation provides an important starting point, in many cases we will undertake a separate, independent assessment of the facts and circumstances to determine what penalties are reasonable and appropriate under the FPA.

126. The circumstances warrant an independent assessment here. On *de novo* review, as Barclays notes, a federal district court may deviate from the Penalty Guidelines

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[358] Penalty Guidelines Order, 132 FERC ¶ 61,216 at P 19.

[359] *Id.* P 206.

[360] *Id.* P 32.

[361] *Id.* P 19; *accord id.* P 32; *see also, Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1271 (D.C. Cir. 1996) (noting, with respect to section 31(c) of the FPA which lists factors for consideration similar to those of section 316A, 16 U.S.C. § 823b(c), that "[b]y instructing the Commission to consider the nature and seriousness of an operator's violation and the operator's efforts to comply, Congress seems to have intended that the Commission tailor each penalty to the circumstances of a particular operator and its violation.").

calculation.[362] Moreover, Barclays has challenged OE Staff's calculation of market harm, and in particular has asserted that the "preliminary econometric model," which OE Staff did not divulge, is "crucial because it is how [OE Staff] determined the alleged price difference that it multiplied by the trading volume."[363]

127. Barclays states that it "would not be liable for any civil penalty . . . even assuming its conduct was unlawful" if OE Staff's model for measuring loss "is scientifically indefensible" or if OE Staff proved "no market harm." [364] That argument falls well short of the mark. The sanctions of section 316A of the FPA are penalties for unlawful conduct—not restitution, compensatory relief, disgorgement, or any other legal or equitable remedy.[365] And those punitive sanctions, as authorized by Congress, may be fairly characterized as severe: up to $1 million "for each day that such violation

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[362] Barclays Answer at 32. However, Barclays is incorrect that *Gall v. United States*, 522 U.S. 38 (2007), applies here. *Gall* addressed the federal Sentencing Guidelines, which purported to restrict the district court's discretion in sentencing beyond that established by Congress. That particular reasoning does not apply here because Congress expressly vested the Commission with discretion to determine an appropriate sanction, and the Penalty Guidelines were adopted to assist in that process. Nevertheless, courts reviewing a penalty assessment under the Penalty Guidelines "may accord less weight to such guidelines than to administrative regulations." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *see also United States v. Active Frontier Int'l, Inc.*, 867 F. Supp. 2d 1312, 1317 (Ct. Int'l Trade 2012) (according less deference to an agency's non-binding penalty guidelines).

[363] Barclays Answer at 31 & n.34.

[364] *Id.*

[365] 16 U.S.C. § 825o-1(b) ("Any person who violates any provision of part II of the FPA or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues"); *Tull v. United States*, 481 U.S. 412, 422 (1987) (in case involving analogous SEC enforcement provision, noting that "A civil penalty was a type of remedy . . . intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo" and that "An action for disgorgement of improper profits is, however, a poor analogy. Such an action is a remedy only for restitution—a more limited form of penalty than a civil fine."). Civil penalties are plainly distinct from other remedies. For instance, the Supreme Court recently held that the SEC's civil penalty provisions are subject to the general federal statute of limitations, leaving intact the lower court holding that disgorgement is not so limited. *Gabelli v. SEC*, 133 S. Ct. 1216, 1219-23 & n.1 (2013).

continues."[366] Those who violate any provision of Part II of the FPA (or any rules or orders thereunder) are subject to the imposition of these heavy penalties even if their unlawful conduct did not cause harm—or even if it is difficult to quantify the precise amount of harm. It is not necessary for the Commission to find proof of illicit profit or pecuniary harm in order to find a violator liable under section 316A. Therefore, the existence of a "statistically significant price difference" is not dispositive of the fundamental question concerning potential liability for civil penalties under the FPA.

128. To be sure, section 316A also requires us to take into consideration the seriousness of the violation "in determining the amount of a proposed penalty" within the statutory maximum.[367] With this in mind, at best Barclays' argument might stand for the proposition that the amount of pecuniary harm caused by unlawful conduct is one measure for assessing "the seriousness of the violation." We agree, which is why market harm was included in the Penalty Guidelines. But it is not the only method of assessing "seriousness"—or even a necessary one. The Penalty Guidelines recognize that it might be difficult to measure pecuniary loss in some instances, noting that the Commission "cannot predict how it will measure loss in every case."[368] For instance, the Commission recognized that it "may need to rely on a reasonable estimate of loss" when "precise calculations [of loss] cannot be made."[369]

129. That appears to be the case here. As discussed above, this matter involves a related-position manipulation, a complex scheme in the wholesale power markets in which a trader undertakes uneconomic or otherwise manipulative transactions in the physical market with intent to affect an index (or average price) in order to benefit related positions that settle on the index.[370] When the scheme is successful, the resulting index settles at a price different from the price that would have resulted from non-manipulative, bona fide trading. But quantifying the scheme's precise effect on the index is unnecessary under our penalty statute. Markets are dynamic, and traders' expectations about reasonable prices may be affected by the non-market or uneconomic prices offered

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[366] 16 U.S.C. § 825o-1.

[367] *Id.*

[368] Penalty Guidelines Order, 132 FERC ¶ 61,216 at P 206.

[369] *Id.*

[370] *See, e.g.*, *Constellation Energy Commodities Group, Inc.*, 138 FERC ¶ 61,168 at PP 11-17 (2012) (settlement order describing related-position scheme in power markets); *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 at PP 5-14 (order to show cause describing related-position scheme in natural gas markets).

by manipulators. Consummated transactions affect and influence other traders, and manipulative transactions convey false information to market participants and thus would improperly affect and influence market participants—and, as OE Staff argued, this effect may be particularly pronounced on platforms such as ICE where trading must occur on the prevailing bid-offer spread.[371] Moreover, requiring OE Staff to precisely quantify the difference between the fair market value and the manipulated value of the Index—and thus market harm—would require, in effect, OE Staff to prove that the manipulative scheme resulted in an "artificial price" even though it is not an element of manipulation under either the FPA or the Commission's regulations.[372]

130. Accordingly, we will independently assess the penalty in light of "the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner."[373] It is evident that Respondents' scheme was, in fact, serious. It was complex, requiring the Respondents to coordinate as they traded multiple products over long periods of time. It was also widespread, involving trading of more than 35 monthly products on more than 655 product days at the four most liquid electricity trading points in the western United States at the time. The scheme was also significant because Respondents manipulatively traded tens of thousands of MWh of electricity to affect monthly Index. Moreover, because large volumes of electricity are traded at the Index price, Respondents' manipulative trading affected the wholesale price of electricity in the western United States and, by affecting the cost of electricity eventually borne by load serving entities (including public utilities with load serving obligations), the scheme affected the ultimate retail price paid by tens of millions of consumers in California and elsewhere in the western United States. Finally, the evidence recounted above demonstrates that Respondents were aware of the seriousness of their conduct even as they manipulated prices.

131. Looking to the other statutory factor, Respondents did not attempt "to remedy the violation in a timely manner." Indeed, it appears that the scheme ended only after Respondents were aware that they were being investigated. And there is no evidence that Respondents made any attempt to remedy the harm they caused. We find that this statutory factor does not mitigate the seriousness of the violation.

132. After taking into consideration the two statutory factors of FPA section 316A in light of the evidence presented to us, we find that the penalties recommended by OE Staff

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[371] Staff Reply at 72-73.

[372] *Id.* at 70; *see also Brian Hunter*, 135 FERC ¶ 61,054 at P 54; Order No. 670, 132 FERC ¶ 61,216 at PP 48-54 (discussing elements of manipulation).

[373] 16 U.S.C. § 825o-1.

are authorized by statute, and appropriate to the conduct. The unlawful conduct here not only was widespread in scope, but it affected the integrity of the nation's wholesale energy markets. While we find the proposed penalties are considerably less than the maximum allowed, we will accept OE Staff's recommendation. We hereby assess penalties against Barclays in the amount of $435 million.

b. Individual Traders

133. OE Staff also recommends that the Individual Traders be assessed penalties for their role in conducting Barclays' manipulative scheme. In particular, OE Staff recommends that the cash traders—Smith, Brin and Levine—should be subject to civil penalties of $1 million each, and that Connelly be assessed a larger civil penalty—$15 million—because he was "the leader of the manipulative scheme . . . and [was] the highest paid member of the scheme."[374] In their respective answers to the Order to Show Cause, each of the Individual Traders responded to the Staff Report's penalty recommendations. We will address each in turn.

134. As an initial matter, though, the Penalty Guidelines do not apply to individuals,[375] and therefore this analysis is guided by the statutory considerations of section 316A of the FPA.[376] The Commission has previously considered five factors in determining the amount of penalty assessed pursuant to section 316A of the FPA: "(1) seriousness of the offense, (2) commitment to compliance, (3) self-reporting, (4) cooperation, and (5) reliance on OE Staff guidance."[377] According to the Staff Report, the recommended

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[374] Staff Report at 65.

[375] Penalty Guidelines at § 1.A1.1; *see also* Staff Report at 65 n.246.

[376] *Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156, at PP 54-71. Although the Penalty Guidelines apply only to companies, they also provide general guidance in determining the appropriate penalty for natural persons. *See* Penalty Guidelines at § 1.A1.1 & n.1; *see also In re Kourouma*, 135 FERC ¶ 61,245, at P 42 (2011) (highlighting some factors that the Commission will consider in assessing penalties).

[377] *See In re Kourouma*, 135 FERC ¶ 61,245 at P 42; *see also Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156 at P 54. Three of these five factors do not apply in this case. Notably, none of the Individual Traders self-reported their violations or claim to have relied on guidance from OE Staff. Furthermore, and as noted above, Barclays' compliance program did not include systems to detect uneconomic trading, and therefore, provides no basis for mitigating the proposed civil penalties.

penalties are based on an assessment that "the amounts appropriately reflect the severity of the violation and significant effect that Barclays' manipulation had on Western U.S. markets for more than two years."[378] Based on the evidence presented to us, we agree.

i. <u>Connelly</u>

135. In his Answer, Connelly urges the Commission to apply "the same discretionary considerations embodied in the [Penalty] Guidelines" and he focuses on six arguments for the proposition that he should not be subjected to any penalty: (1) that he did not "materially profit" from the conduct; (2) that he was "not a high-level employee;" (3) that he "cooperated with [OE Staff];" (4) that he "has no prior violations;" (5) that charging him would be bad policy because "front line supervisors are not their brothers' keepers under the law, and they should not be" on account of "some kind of conduct or some loose statement over which they had no control, no actual or constructive knowledge, and no assignment of responsibility;" and (6) that he cannot pay the proposed penalty.[379]

136. Despite his claims to the contrary, Connelly was a high-level employee. His job title—Managing Director of North American Power—and the fact that the company guaranteed him a multimillion dollar salary in 2006 and 2007 provide persuasive evidence of his high-level role within Barclays, not to mention his substantial role in hiring and firing his team of West power traders.[380] Moreover, his defense that "front line supervisors are not their brothers' keepers under the law, and they should not be" is particularly inapt. The evidence, described in greater detail above, demonstrates that he directed the scheme with manipulative intent, and that he was aware that such conduct was unlawful. First, Connelly personally participated in the manipulative trading. For instance, he traded Dailies on February 28, 2007 at a substantially inflated price relative to the prevailing market price, acknowledging in communications with a former colleague that his Dailies trading did affect Index, and he "laughed"[381] at concerns that his trading would be reported to the Commission.[382] More important, the scheme depended on his supervision and management. Not only was he aware of the scheme because he personally hired the other traders and supervised their trading, but they traded in Connelly's book and, as they testified, they would not have done so without his

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[378] Staff Report at 65.

[379] Connelly Answer at 61-67.

[380] Staff Reply at 100 & n.454

[381] *See* BARC009035; *see also supra* PP 35, 101-105.

[382] Staff Report at 53-55.

knowledge and consent.[383] Brin, though the most junior trader on the desk, was aware of Connelly's financial positions and strategies and explained that he was executing them.[384] Connelly's awareness of and support for the scheme is further demonstrated by the fact that he was copied on Levine's email of January 31, 2007, in which she stated that, "[i]f we can keep the PV index up and the SP daily index down somehow that will be good to keep the [Balance of Month] in." In short, the traders who worked for Connelly could not have effectuated the scheme without his awareness, supervision, and willingness to overlook their losses. We thus agree with OE Staff's observation that "any manager who devises a manipulative trading scheme . . . and instructs his subordinates to execute the scheme as Connelly has done should face enforcement action and a sizeable penalty."[385]

137. Therefore, Connelly personally directed and participated in a long-standing scheme to manipulate the wholesale price of electricity in the western United States. These manipulative trades are serious violations of the law. We recognize that Connelly contends that his personal financial circumstances may make payment of these penalties difficult, but Connelly's participation in a serious scheme to manipulate the nation's wholesale power markets warrants the imposition of significant penalties.[386] In addition, the recommended penalty, while severe, is well short of what the statute allows yet still provides appropriate deterrence to other managers who might otherwise seek to induce their subordinates to participate in a scheme to manipulate the nation's energy markets. For these reasons, and after taking into consideration the severity of his violations and his efforts, if any, to remedy the violations, we find that the $15 million penalty recommended for Connelly is appropriate and authorized under the FPA. We thus impose a penalty of $15 million.

ii. Brin

138. Brin objects that the Report "states no basis for arriving at [his] civil penalty amount," and argues that "the same discretionary considerations embodied in the Guidelines demonstrate that assessment of the proposed penalty would not further the Commission's enforcement objectives."[387] In so doing, he asserts that six factors—his

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[383] *See* Brin Test. at 374:12-375:17; Smith Test. at 389:20-22, 393:19-21.

[384] *See* Brin Answer, att. B, BARC0634367.

[385] Staff Reply at 101.

[386] And the other factors that Connelly cites, including his alleged cooperation, are already incorporated in the proposed penalty. *See* Staff Reply at 98-99.

[387] Brin Answer at 47-48.

alleged lack of personal profit from the manipulative scheme, his junior status, his cooperation with OE Staff, his lack of prior violations, his limited financial resources, and his potential entitlement to fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 (2006)—militate against imposing penalties directly on him.[388]

139. As previously discussed, Brin and the other traders undoubtedly had knowledge of both the scheme and that it was unlawful. Indeed, the evidence indicates that the traders undertook the scheme in spite of Barclays' compliance training, and, as described above, Brin in particular understood the concept of uneconomic trading.[389] Brin's comparison of his recommended penalty to the much-smaller penalties assessed against individual traders in other matters before the Commission misses the mark. The matters he refers to—*In re Kourouma* and *In re Polidoro*—involved schemes that were far less extensive in terms of duration and severity than Barclays' manipulation.[390] And, the other factors that Brin cites, including his alleged cooperation, are already incorporated in the proposed penalty.[391] Finally, Brin's role was substantial, for not only did he participate in the scheme as a cash trader, but he was responsible for informing the other traders of Connelly's positions to be traded each day, which was critical in ensuring the scheme's continuation and success.[392] His manipulative intent is clear from his communications, as indicated by statements such as: "im doing phys so i am trying to drive price in fin direction."[393] His conduct, in tandem with his manipulative intent, warrants an appropriate penalty.

140. We recognize that Brin argues his personal financial circumstances may make payment of penalties difficult, but, again, his willing participation in a serious scheme to manipulate the nation's wholesale power markets warrants the imposition of significant penalties. Brin committed numerous violations of law, each of which subjected him to a civil penalty of up to $1 million.[394] Therefore, the recommended penalty of $1 million is well short of what the statute allows. In addition, the recommended penalty, while

[388] *Id.* at 48-52.

[389] Staff Reply at 98-99.

[390] *In re Kourouma*, 134 FERC ¶ 61,105 (2011); *In re Joseph Polidoro*, 138 FERC ¶ 61,018 (2012); *see also* Staff Reply at 98-99.

[391] *See* Staff Reply at 98-99.

[392] Staff Report at 22; *see* Brin Test. at 34:12-21, 61:5-62:64.

[393] IM between D. Brin and C. Crowell, Nov. 30, 2006, BAR0634367-69.

[394] 16 U.S.C. § 825o-1.

severe, would provide appropriate deterrence to future traders who might otherwise be tempted to participate in a scheme to manipulate the nation's energy markets. In fact, given the facts and circumstances of Brin's role in this manipulative scheme, the $1 million penalty represents the minimum penalty that we would find acceptable in this matter. After considering the severity of his violations and his efforts, if any, to remedy the violations, we find that the $1 million penalty recommended for Mr. Brin is appropriate and authorized under the FPA. We thus impose a penalty of $1 million.

iii. <u>Levine</u>

141. Levine also objects to the recommendation that she should face a penalty of $1 million. Levine argues that the proposed penalty is "arbitrary, insupportable, and inconsistent with precedent."[395] In particular, she argues that the penalty "is out of proportion to recent assessments against individual power industry participants," that it "is not proportionate with her conduct under the [OE Staff's] theory," and then cites a number of factors that "favor further reductions" including that she was a low-level trader, was never cited for violating Barclays' or ICE's rules, that she "traded at all times for the benefit of her employer," was not paid a performance bonus in 2006-08, and that she fully cooperated with OE Staff's investigation.[396] Levine also argues that her trading conduct represented a small fraction of the total trading at issue, and that any penalty must be significantly reduced. Finally, she claims that "the Commission cannot reasonably calculate any alleged harm to market participants attributable to [her] conduct."[397]

142. The factors that Levine cites are not dispositive. Some of these factors, such as her cooperation and low-level status, have already been incorporated in the recommended penalty. Other factors, such as the penalties assessed against individuals in other investigations, are addressed above. And whatever the magnitude of her contribution to the overall scheme, nevertheless she violated the Anti-Manipulation Rule. The evidence, as described above, indicates that Levine participated in the scheme, and did so with manipulative intent. For instance, in an IM to another trader, Levine stated that a reason to trade Index was "to try to protect a position, either [Balance of Month] or prompt."[398] As noted above, her testimony that she was referring to cash traders generally in that

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[395] Levine Answer at 34.

[396] *Id.* at 35-36.

[397] *Id.* at 37.

[398] IM between K. Levine and J. Rainess, Oct. 11, 2006, BARC0390265-67; Staff Report at 49-50.

statement is not persuasive. Similarly, in an email to her colleagues, she stated that "[i]f we can keep the PV index up and the SP daily index down somehow that will be good to keep the [Balance of Month] in."[399] Finally, with respect to the calculation of market harm, we reiterate that section 316A of the FPA imposes penalties, not disgorgement or any other remedy, and thus it is not strictly necessary to precisely quantify market harm—particularly in instances where doing so is difficult—in order to warrant the imposition of such penalties for unlawful conduct, and this is particularly true in instances such as this in which the seriousness of the violation can be determined by means other than a precise calculation of market harm.

143. Levine violated the FPA on numerous occasions by participating in a deliberate scheme to manipulate power markets throughout the western United States. Her violations, therefore, were serious. Levine committed numerous violations of law, each of which subjected her to a civil penalty of up to $1 million.[400] Therefore, the recommended penalty of $1 million is well short of what the statute allows. We recognize that Levine argues her personal financial circumstances may make payment of penalties difficult, but again her participation in a scheme to manipulate the nation's wholesale power markets warrants the imposition of significant penalties. In addition, the recommended penalty, while severe, would provide appropriate deterrence to future traders who might otherwise be tempted to participate in a scheme to manipulate the nation's energy markets. In fact, given the facts and circumstances of Levine's role in this manipulative scheme, the $1 million penalty represents the minimum penalty that we would find acceptable in this matter. After considering the severity of her violations and her efforts, if any, to remedy the violations, we find that the $1 million penalty recommended for Ms. Levine is appropriate and authorized under the FPA. We thus impose a penalty of $1 million.

iv. Smith

144. Smith also objects to the recommended penalty. Smith asserts that "the proposed penalty is highly problematic because it is completely unsubstantiated and entirely arbitrary."[401] Smith further asserts that the proposed penalty "must be immediately decreased by four-fifths because he only traded, and was employed by Barclays, for one-

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[399] Email from K. Levine to M. Gerome, et al., Jan. 31, 2007, BARC0472014; *see* Staff Report at 51.

[400] 16 U.S.C. § 825o-1.

[401] Smith Answer at 31. Smith also argues that the "absence of any justification" for the proposed penalty "is startling" and "will be considered 'arbitrary' by a Federal District Court." Smith Answer at 31.

fifth of the time period covered by the Staff Report" and "must be further reduced because much of his trading . . . was inconsistent with the [OE Staff's] theory and was profitable."[402] Smith also claims that the recommended penalty should be decreased because he "was a low-level trader," that he violated no Barclays or ICE rules, that he traded for Barclays' benefit, that the penalty is "unprecedentedly large for a junior trader" who "had, at most, a minimal role in the alleged manipulation, has no prior violations and whom the [OE Staff] found to be cooperative."[403] Smith also objects that the penalty "is disproportionate to Smith's net wealth" and that the "penalties previously imposed on individual power traders . . . have been nearer to $50,000."[404] Finally, Smith argues that "[a]ny harm to market participants was the result of factors other than [Smith's] conduct."[405]

145. The evidence, as described above, indicates that Smith was a knowing participant in the manipulative scheme prior to his departure from Barclays. Smith's conduct and intent was particularly egregious and visible. For instance, during one of the manipulative months, Smith bragged that he "totally fukked [*sic*] with the Palo mrkt today" and "started lifting the piss out of the palo" with a "goal [] to keep the sp/palo tighter."[406] The next month, he proclaimed to Brin "don't buy any sp light index. I'm gonna try to crap on the NP light and it should drive the SP light lower."[407]

146. Smith directly participated in a scheme to manipulate the wholesale power markets in the western United States, which is a serious violation of law. In so doing, he committed numerous violations of law, each of which subjected him to a civil penalty of up to $1 million.[408] Therefore, the recommended penalty of $1 million is well short of what the statute allows. Furthermore, while his status as a low-level trader and his allegedly minimal wealth mitigates the recommended penalty, it does not eliminate his liability altogether. We recognize that his personal financial circumstances may make

[402] *Id.* at 31.

[403] *Id.* at 32.

[404] *Id.*

[405] *Id.* at 33.

[406] IM between R. Smith and M. Gerome, Nov. 3, 2006, BARC0260014-15; Staff Report at 39.

[407] IM between R. Smith and D. Brin, Dec. 7, 2006, BARC0634600-01; Staff Report at 41.

[408] 16 U.S.C. § 825o-1.

payment of penalties difficult, but his participation in a serious scheme to manipulate the nation's wholesale power markets warrants the imposition of significant penalties. In addition, the recommended penalty, while severe, would provide appropriate deterrence to future traders who might otherwise be tempted to participate in a scheme to manipulate the nation's energy markets. In fact, given the facts and circumstances of Smith's role in this manipulative scheme, the $1 million penalty represents the minimum penalty that we would find acceptable in this matter. After considering the severity of his violations and his efforts, if any, to remedy the violations, we find that the $1 million penalty recommended for Mr. Smith is appropriate and authorized under the FPA. We thus impose a penalty of $1 million.

2. **Disgorgement**

147. OE Staff also recommends that Barclays be assessed an estimated $34.9 million in disgorgement of unjust profits.[409] Barclays responds that the recommended disgorgement is "wholly inconsistent with the data available to Barclays" but does not propose a different sum.[410] We find that disgorgement of unjust profits stemming from Barclays' manipulative scheme is necessary and appropriate under section 309 of the FPA. Although different or more precise disgorgement amounts undoubtedly will be considered in the federal district court action to affirm the penalty assessment, based on the evidence available to us at this time we agree with OE Staff that Barclays should disgorge $34.9 million in unjust profits, plus interest.[411]

148. Violations of the securities laws present, for this purpose, a close analogy to the nature of the scheme and market harm evinced here, and so securities law decisions provide a good framework for assessing disgorgement in related-position frauds. It is widely recognized in the securities context that courts have "broad equitable power to fashion appropriate remedies, including ordering that culpable defendants disgorge their profits."[412] As the D.C. Circuit explained, an "order to disgorge is not a punitive

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[409] Staff Report at 65.

[410] Barclays Answer at 31.

[411] Respondents' unlawful scheme manipulated jurisdictional, physical markets, albeit they may have done so ultimately in order to benefit Respondents' related positions, most of which happened to be in the financial markets. And the Commission may seek disgorgement of unjust profits from any source in connection with the manipulation of its jurisdictional markets.

[412] *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996).

measure; it is intended primarily to prevent unjust enrichment."[413] "Disgorgement deprives wrongdoers of the profits obtained from their violations."[414] Moreover, "the district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged."[415] "Acknowledging that 'separating legal from illegal profits exactly may at times be a near impossible task,' [the D.C. Circuit has] held that 'disgorgement need only be a reasonable approximation of profits causally connected to the violation.'"[416]

149. Accordingly, the first question in the disgorgement analysis is to ascertain whether the unjust profits should be disgorged. As Barclays conducted a long-term scheme to manipulate the physical power markets in order to profit from its related positions, disgorgement is justified here. The second question is to calculate the amount to be disgorged. Does the amount recommended by OE Staff represent a "reasonable approximation of profits causally connected to the violation?" We find that it does.

150. OE Staff reached its current estimate of $34.9 million in disgorgement by multiplying the company's open interest in the Physical Positions and Financial Swaps for each day against its estimate of the difference in price that resulted from Barclays' trading on that day.[417] The estimate of price difference—that is, the amount by which Barclays' manipulative trading affected the Index—was derived from OE Staff's preliminary econometric modeling of Barclays' cash trading.[418] Barclays counters that the econometric model "is crucial" and that "if OE's purported method is scientifically indefensible and a better method demonstrates that there was no statistically significant price difference then there would be no market harm or benefit and Barclays would not

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[413] *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000).

[414] *Zacharias v. SEC*, 569 F.3d 458, 472 (D.C. Cir. 2009); *see also First Jersey Sec.*, 101 F.3d at 1475 (the "primary purpose of disgorgement as a remedy . . . is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws.").

[415] *First Jersey Sec.*, 101 F.3d at 1475.

[416] *SEC v. Whittemore*, 659 F.3d 1, 8 (D.C. Cir. 2011) (quoting in part *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C.Cir.1989)); *see also SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995) (the disgorgement amount "need only be a reasonable approximation of the profits causally connected to the violation.").

[417] Staff Report at 63.

[418] Staff Report at 63.

be liable for . . . disgorgement whatsoever even assuming its conduct was unlawful."[419] Despite its criticisms, Barclays did not suggest an alternative amount or approach, and it did not introduce an expert report or competing methodology to dispute OE Staff's calculation.

151. We find that OE Staff took the correct general approach in attempting to calculate "a reasonable approximation of the profits." This scheme in the power markets was intended to benefit a related position and profit by manipulating the settled Index. To the extent that the scheme succeeded, Barclays should disgorge those profits. And, in the absence of competing evidence presented to us concerning Barclays' profit from the scheme, we find that Barclays should disgorge $34.9 million in unjust profits, plus interest, from its manipulative scheme. In addition, we order that those unjust profits be distributed in a manner consistent with our order below.

152. Finally, this order will not be subject to rehearing.

The Commission orders:

(A) The Commission hereby directs Barclays to pay to the United States Treasury by a wire transfer a sum of $435 million in civil penalties within 30 days of the issuance of this order, as discussed in the body of this order. If Barclays does not make this civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a (2012) from the date that payment is due.

(B) The Commission hereby directs Connelly to pay to the United States Treasury by a wire transfer a sum of $15 million in civil penalties within 30 days of the issuance of this order, as discussed in the body of this order. If Connelly does not make this civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a from the date that payment is late.

(C) The Commission hereby directs Brin to pay to the United States Treasury by a wire transfer a sum of $1 million in civil penalties within 30 days of the issuance of this order, as discussed in the body of this order. If Brin does not make this civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a from the date that payment is due.

[419] Answer at 31 n.34. As addressed above, Barclays' argument with respect to civil penalties is inapposite.

(D) The Commission hereby directs Levine to pay to the United States Treasury by a wire transfer a sum of $1 million in civil penalties within 30 days of the issuance of this order, as discussed in the body of this order. If Levine does not make this civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a from the date that payment is due.

(E) The Commission hereby directs Smith to pay to the United States Treasury by a wire transfer a sum of $1 million in civil penalties within 30 days of the issuance of this order, as discussed in the body of this order. If Smith does not make this civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a from the date that payment is due.

(F) The Commission hereby directs Barclays, within 30 days of the issuance of this order, to distribute its unjust profits, plus interest, in the following manner to the Low Income Home Energy Assistance Program (LIHEAP) of the states of Arizona, California, Oregon and Washington for the benefit of their respective electric energy consumers:

(i) Arizona LIHEAP will receive 19 percent of the total of Barclays' unjust profits, plus interest.

(ii) California LIHEAP will receive 63 percent of the total of Barclays' unjust profits, plus interest.

(iii) Oregon LIHEAP will receive 9 percent of the total of Barclays' unjust profits, plus interest; and

(iv) Washington LIHEAP will receive 9 percent of the total of Barclays' unjust profits, plus interest.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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