150 FERC ¶ 61,176
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Colette D. Honorable.

City Power Marketing, LLC and K. Stephen Tsingas — Docket No. IN15-5-000

ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED PENALTY

(Issued March 6, 2015)

1. Pursuant to Rule 209(a)(2) of the Commission's Rules of Practice and Procedure,[1] the Commission's Revised Policy Statement on Enforcement,[2] and the Commission's Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties,[3] the Commission directs the above-captioned respondents, City Power Marketing, LLC (City Power) and K. Stephen Tsingas (together, Respondents), to show cause why they should not be found to have violated section 1c.2 of the Commission's regulations and section 222 of the Federal Power Act (FPA) by engaging in fraudulent Up To Congestion (UTC) transactions in PJM Interconnection L.L.C.'s energy markets.[4] The Commission further directs City Power to show cause why it should not be found to have violated 18 C.F.R. § 35.41(b) of the Commission's rules through false and misleading statements and material omissions relating to the existence of instant messages discussing the trading conduct at issue here. Finally, the Commission directs Respondents to show cause why they should not be jointly and severally required to disgorge unjust profits of $1,278,358 and to be jointly and severally assessed civil penalties in the following amounts:

- *City Power:* $14,000,000
- *K. Stephen Tsingas:* $1,000,000

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[1] 18 C.F.R. § 385.209(a)(2).

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

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

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

Respondents may also seek a modification of those amounts consistent with section 31(d)(4) of the FPA.[5] Pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure,[6] the Commission directs Respondents to file an answer with the Commission within 30 days of the date of this order. Office of Enforcement Staff (OE staff) may reply to Respondent's answer within 30 days of the filing of the answer. The Commission will consider these pleadings as part of its review of this proceeding.

2. This case presents allegations by OE staff of Respondents' violation of the Commission's Prohibition of Energy Market Manipulation and City Power's violation of 18 C.F.R. § 35.41(b). These allegations arose out of an investigation conducted by OE staff and are described in the Enforcement Staff Report and Recommendation submitted to the Commission on February 23, 2015 (OE Staff Report).[7] Issuance of this order does not indicate Commission adoption or endorsement of the OE Staff Report.

3. The OE Staff Report alleges that Tsingas, trading on behalf of City Power, conceived of and implemented a fraudulent scheme in connection with the UTC markets operated by PJM. Specifically, OE staff alleges that Tsingas devised and implemented a manipulative scheme to inflate trade volumes of UTCs through transactions designed to wrongfully collect large amounts of market credits known as Marginal Loss Surplus Allocations (MLSA) based simply on trading volume. For example, the OE Staff Report alleges that Tsingas (for City Power) placed UTC trades in opposite directions on the same paths, in the same volumes, during the same hours for the purpose of creating the illusion of bona fide UTC trading and thereby to capture large amounts of MLSA that PJM distributed at that time to UTC transactions with paid transmission. The Report also alleges that Tsingas (through City Power) engaged in two other types of volume UTC trades to wrongfully collect MLSA.

4. The Staff Report also alleges that Tsingas made numerous false statements to Commission staff under oath to try to prevent staff from learning about (and obtaining) important documents, namely instant messages that Tsingas exchanged with his partner during the time they were doing the trades at issue here. According to staff, these

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

[6] 18 C.F.R. § 385.213(a).

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

messages contain important evidence about how and why City Power and Tsingas did the trades under investigation.

5. In light of the allegations contained in the OE Staff Report, the Commission directs Respondents to respond to this order as set forth above.[8] This order also is the notice of proposed penalty required pursuant to section 31 of the FPA.[9] In the answer to this order, Respondents have the option to choose between either (a) an administrative hearing before an ALJ at the Commission prior to the assessment of a penalty under section 31(d)(2), or (b) an immediate penalty assessment by the Commission under section 31(d)(3)(A). If Respondents elect an administrative hearing before an ALJ, the Commission will issue a hearing order unless it is determined that the matter can be resolved in a summary disposition; if Respondents elect an immediate penalty assessment, and if, after a review of the full record to be developed in this proceeding, the Commission finds a violation, the Commission will issue an order assessing a penalty. If such penalty is not paid within 60 days of assessment, the Commission will commence an action in a United States district court for an order affirming the penalty.[10]

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

<u>The Commission orders:</u>

(A) Within 30 days of the date of this order, Respondents must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why they should not be found to have violated 18 C.F.R. § 1c.2 and 16 U.S.C. § 824v(a) with respect to their UTC trading in PJM.

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

[9] 16 U.S.C. § 823b(d).

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

(B) Within 30 days of the date of this order, City Power must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why it should not be found to have violated 18 C.F.R. § 35.41(b) through the conduct described in the Staff Report.

(C) Within 30 days of the date of this order, Respondents must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why their alleged violation should not warrant an order requiring Respondents jointly and severally to disgorge unjust profits and to be jointly and severally assessed civil penalties in the amounts described in Paragraph 1 of this order, or a modification of that amount consistent with section 31(d)(4) of the FPA.

(D) In any answer, Respondents should address any matter, legal, factual or procedural, that they would urge in the Commission's consideration of this matter. To the extent that Respondents cite any material not cited in the OE Staff Report, Respondents are directed to file non-publicly one (1) copy of such material on CD-ROM or DVD in the captioned dockets and to serve a copy of same on OE staff.

(E) Pursuant to section 31(d)(1) of the FPA, within 30 days of the date of this order, Respondents may also make an election to have the procedures set forth in section 31(d)(3) of the FPA apply to this proceeding. Under that provision, if the Commission finds a violation, the Commission will issue a penalty assessment and, if not paid within 60 days of the order assessing penalties, the Commission will institute an action in the appropriate United States district court. Should Respondents fail to make a timely election under section 31(d)(1), the procedures of section 31(d)(2) will apply.

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

By the Commission. Commissioner Bay is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX A

FEDERAL ENERGY REGULATORY COMMISSION

City Power Marketing, LLC and K. Stephen Tsingas

Docket No. IN15-5-000

Enforcement Staff Report and Recommendation

Office of Enforcement

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Executive Summary

This is a matter involving two separate violations: market manipulation and a series of false statements intended to conceal crucial evidence from FERC investigators.

Steven Tsingas is the founder and owner of a financial firm (City Power) specializing in energy trading. For years, Tsingas made a successful specialty in energy arbitrage trades: trying to profit by predicting changes in price spreads between two locations. He used a financial product called Up-To Congestion to make these spread trades. As Tsingas knew from years of personal experience, this type of arbitrage is difficult work, requiring skill, expertise, specialized software tools, analysis of historic data, and constantly-updated information about weather forecasts, generator outages, and transmission outages.

In the summer of 2010, Tsingas realized he could make a different type of Up-To Congestion trades: trades aimed at zero or minimal spread changes, but that would enable him, through sheer trading volume, to collect payments that would otherwise go to other market participants. Specifically, Tsingas learned that the wholesale energy market made payments for all trades that reserved paid transmission, and that at certain times the payments were predictably larger than the transaction costs of Up-To Congestion trades. Tsingas then realized that by entering into sham trades – which appeared to be spread trades but were not – he could profit not through arbitrage but through sheer trading volume. For most of July 2010, Tsingas implemented this plan, with wash-like "round trips" whose spread changes netted to zero, along with similar trades with zero or (to make his intent slightly less obvious) near-zero spread changes.

Once he discovered that the scheme worked, Tsingas ramped up his trading volume far above the levels at which he had done spread trading for years. By the time the market monitor discovered the scheme at the end of July 2010, Tsingas and his firm had collected more than $2 million in market payments, which reduced, dollar for dollar, payments to other market participants, including utilities that deliver electricity to consumers. Net of transaction costs, Tsingas' firm had a profit of nearly $1.3 million from his volume trades.

When Enforcement staff began investigating this matter at the Commission's direction, Tsingas tried to cover up crucial evidence to prevent this agency from learning what he had done. Although he knew his partner had saved months' worth of their instant messages, in which they talked about the scheme as they were implementing it, Tsingas repeatedly denied under oath that any such documents existed. As a result, Enforcement Staff did not discover the documents for more than 18 months, when they came to light when his former partner produced them.

As the IMs demonstrate, Tsingas knew his volume trading was a sham: he and his partner describe these trades as "a scam," as "sleazy," as "free money," as "great ammo" for the Market Monitor, as a "sin," as a "game," as "not trading, [but] playing the rules,"

and as "high volume churn." And a month after the making the trades, Tsingas joined a filing that condemned trades like those he had done as "unpermitted trading patterns."

Enforcement concludes that Tsingas and his company violated the Federal Power Act and the Commission's Anti-Manipulation Rule, and the company violated the Commission's regulation, 35 C.F.R. § 35.41(b), requiring firms like City Power to be candid in their communications with the Commission and its staff. Because of the seriousness of their wrongdoing, staff recommends that the Commission order City Power and Tsingas to show cause why they should not be held jointly and severally liable to disgorge their unjust profits ($1,278,358) and to pay civil penalties of $14 million (City Power) and $1 million (Tsingas).

I. **BACKGROUND**

A. **The PJM Market**

In several regions of the United States, entities regulated by the Commission, called Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs), operate wholesale markets for electricity. One of these RTOs is PJM, which operates an 11-state wholesale electricity market stretching from Illinois to North Carolina.

In these regional markets, sellers (such as owners of power plants) and buyers (such as "load-serving entities," i.e., utilities that provide electricity to retail customers) submit prices at which they are willing to transact. To send appropriate price signals, the prices at which electricity is bought and sold in ISOs and RTOs vary to some extent from one location to another (called "nodes") within the same region. For that reason, market prices for energy are called "Locational Marginal Prices," or "LMPs." There are three components to Locational Marginal Prices: an energy price (which is uniform throughout the RTO or ISO), congestion charges (which may vary from one node to another), and line loss charges (discussed below).[1]

PJM operates both "Day Ahead" and "Real Time" markets for energy. As the name indicates, the Day-Ahead market operates one day ahead of the date on which the energy actually flows through power lines. (We refer to the day on which the energy flows as the "trade date.") The Real Time market operates on the day the energy is transmitted. The "vast bulk of transactions occur" in the Day-Ahead market.[2]

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[1] *See generally* Energy Primer: A Handbook of Energy Market Basics at 65 (describing LMPs and their components), available at http://www.ferc.gov/market-oversight/guide/energy-primer.pdf (last visited Jul. 21, 2014).

[2] *Black Oak Energy, LLC et al. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042, at P 41 (2008).

B. City Power, Tsingas, and Jurco

Respondent Tsingas lives in Fort Lauderdale, Florida. He is the founder and now the sole owner of Respondent City Power Marketing, LLC ("City Power").

Tsingas first did virtual energy trading while working at Conectiv Energy from around 2000 to 2001.[3] In 2005, Tsingas founded his own energy trading company, City Power, which was granted Market-Based Rate Authority by the Commission that same year and has had it ever since.[4] According to Tsingas, the firm has made more than $40 million through its energy trading.[5]

Between 2005 and early 2010, the company was based in New Jersey. In or about April 2010, City Power and Tsingas relocated to Fort Lauderdale, Florida. Tsingas has always been the majority owner of City Power, and is now the sole owner.[6]

Tsingas met and worked with Tim Jurco on energy trading at Conectiv Energy, and the two became friends. Jurco joined City Power in 2006 and was a partner and employee of City Power until August 11, 2011, when he submitted a letter of resignation.[7]

In the summer of 2010, when City Power did the trades at issue here, Tsingas lived in Fort Lauderdale and Jurco lived in Kansas. As a convenient way of communicating with each other in real time, Tsingas and Jurco used instant messaging, and they often discussed their trades (including the trades at issue here) in their IMs. During this investigation, even though he knew that his City Power partner (Jurco) had

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[3] Testimony of K. Stephen Tsingas (Oct. 8, 2010) (Tsingas Test.) Tr. 24-26. Conectiv Energy was later acquired by Pepco. *Id.* at 28.

[4] Letter Order Accepting City Power Marketing, LLC's Filing of Original Sheet 1 et al to FERC Electric Tariff 1, Original Volume 1, effective December 15, 2004, Docket No. ER05-330-000, *et al.* (issued Mar. 15, 2005); *see* Letter Order Accepting Order No. 714 Compliance Filings, Docket No. ER10-2411-001, *et al.* (Dec. 10, 2010) (approving amended City Power MBR application, which included minor changes to previously-approved MBR application).

[5] Tsingas personal web site, http://www.stephentsingas.com ("Steve ensured that the company was prosperous from day one, ultimately making more than 40 million dollars almost single handedly.") (last visited Feb. 2, 2015).

[6] City Power no longer files its own tax returns, but instead its financial results are included in Tsingas' personal tax return. Email from Christopher McEachran to Thomas Olson (Oct. 28, 2013) ("As to the City Power 2012 tax return, since Mr. Tsingas is the only remaining partner, it is no longer a partnership and Mr. Tsingas is now the sole owner. Therefore, the City Power 2012 tax return is attached to Mr. Tsingas' individual tax return as Schedule C.").

[7] Tsingas Test. Tr. 747.

kept the IMs and had sent them to City Power's counsel, Tsingas repeatedly made false statements during 2010 and 2011 designed to prevent staff from learning about the IMs. In 2012, Enforcement learned that Jurco, who was a City Power partner in July 2010, had in fact kept copies of the traders' summer 2010 IMs. As shown below, the IMs provide a detailed contemporaneous record of why City Power and Tsingas did the trades at issue here.

C. Physical and Virtual Up-To Congestion Transactions

In PJM, both companies that actually flow electricity as well as purely financial (or "virtual") traders can trade in a product called Up-To Congestion, or "UTC." UTC transactions were initially created as a tool for physical market participants (such as utilities) to hedge congestion price risks by "stipulat[ing] a maximum congestion charge they were willing to pay." [8] By 2008, however, after getting Commission approval, PJM permitted virtual traders to "utilize[] up-to congestion transactions as purely financial trades to arbitrage price differences between points."[9] As the Commission described it:

> Under an Up-To congestion price arrangement, arbitrageurs may sell power at point A and buy power at point B in the Day-Ahead market as long as the price differential between these points is no greater than the specified amount. If during the Real-Time market, the spread between these points increases, the arbitrageur makes money; if the spread decreases, it loses money.[10]

Although they are purely financial, virtual (including UTC) transactions can affect prices in the Day-Ahead market as well as what units are dispatched by the ISO to provide energy to the wholesale grid.[11] In addition, during the time period relevant here (July 2010), virtual UTC traders, like physical market participants, needed to reserve transmission via the Open Access Same-Time Information System (OASIS).

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[8] PJM Mot. for Leave to Answer, *Black Oak, LLC, et al. v. PJM Interconnection, LLC*, Docket No. EL08-14-000, at 5 (filed March 4, 2008).

[9] *Id*.

[10] *Black Oak Energy, LLC, et al. v. PJM Interconnection, LLC*, 122 FERC ¶ 61,208, at n.85 (2008) (Order Denying Complaint).

[11] *Id.* P 38 (noting that there is a "price impact of the virtual transaction on the physical transmission system that forms the basis for both the Day-Ahead and Real-Time Energy Markets."); *see also* Financial Marketers Mot. for Leave to Answer, *Black Oak Energy LLC, et al. v. PJM Interconnection LLC*, Docket No. EL08-14-000, at 19 (filed Jan. 10, 2008) ("it is undoubtedly true that virtual transactions can alter dispatch patterns").

The reason the Commission allows virtual traders (including those who trade UTCs) to participate in ISOs and RTOs is that "market participants benefit from the trading activities engaged in by arbitrageurs through price convergence between the Day-Ahead and Real-Time market, a more stable market, [and] increased price discovery and market liquidity."[12] The self-interested motivation for arbitrageurs, of course, is to make money by "tak[ing] advantage of profitable price differences between the Day-Ahead and Real-Time markets."[13]

As they have repeatedly acknowledged, City Power and Tsingas understood that the purpose of allowing virtual traders to participate in ISOs was to encourage beneficial arbitrage. In September 2010, for example, City Power joined with other virtual traders in a filing that discussed the purposes of financial UTC trading in PJM. In that filing, City Power told the Commission that virtual trading serves an "extremely valuable purpose" by "alleviat[ing] price uncertainty," "reduc[ing] congestion," and "lower[ing] prices."[14] In particular, City Power said, "[v]irtual transactions, including Up-To Congestion trading, help[] reduce price differences between the Day-Ahead and Real-Time markets, thus reducing the incentive for buyers and sellers to forego bidding physical schedules in the Day-Ahead Market in expectation of better prices in the Real-Time Market."[15]

A month later, Tsingas made the same points when he came to the Commission to testify in this investigation in October 2010. Tsingas explained that in his virtual trading, he used his expertise (from prior jobs) about "the physical system" to engage in "weather arbitrage between two points . . . looking at generation outages and then looking at transmission outages."[16] And in November 2013 City Power and Tsingas said in their response to staff's Preliminary Findings that "the virtual PJM market is a derivatives

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[12] *See, e.g.*, *ISO New England*, 113 FERC ¶ 61,055, at P 46 (2005); *Calif. Ind. Sys. Operator Corp*., 112 FERC ¶ 61,013, at P 175 (2005) (benefits of convergence (virtual) trading include price convergence).

[13] *See, e.g.*, Order Denying Complaint at P 44.

[14] Motion for Leave to Intervene and Comments of Financial Marketers, *PJM Interconnection, LLC*, Docket No. ER10-2280-000, at 10-11 (Sept. 2, 2010) ("Sept. 2, 2010 Financial Marketers Filing") (emphasis added)

[15] *Id.* at 11.

[16] Tsingas Test. Tr. 41. Tsingas also testified that "[his] understanding is that the reason why the PJM market exists, you know, is to send out pricing signals. Basically, people bid up the area that's short on generation, and therefore, generators come on line and relieve the congestion." *Id.* at 55-56.

market designed to exploit inefficiencies in the physical market in order to root out its inefficiencies."[17]

City Power and Tsingas for years used UTCs to try to profit through arbitrage between the Day Ahead and Real Time markets in PJM. In July 2010, however, they engaged in a new and completely different form of transactions, which bore no relationship to what they themselves considered to be genuine UTC trading.

This new trading strategy – which we call "volume trading" in this Report – was not aimed at profiting by arbitraging price spreads but at the opposite: ensuring that spread changes were zero (or close to zero). By providing City Power with a pretext to reserve large volumes of paid transmission, however, this new strategy enabled Respondents to divert to themselves more than $2 million in payments from PJM intended for legitimate transactions. Tsingas' partner Jurco captured the essence of this new trading strategy in an IM during July 2010: "it isn't trading – it's playing the rules."

D. <u>Marginal Loss Surplus Allocation (MLSA)</u>

When electricity is transmitted through the wholesale electric power grid, a certain amount of energy is lost to heating of high-voltage transmission lines. This is called "line loss." The farther energy travels on power lines, the greater the line loss.[18] To ensure that the market price at each pricing node reflects the actual costs of providing energy to that particular location, charges for line losses are one of the three components of LMPs in PJM and other RTOs and ISOs.

To promote market efficiency, the Commission has directed PJM to set the price for line losses at marginal, rather than average, cost.[19] Because marginal costs of line losses are higher than average costs, PJM collects more in line loss payments than the

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[17] Response of City Power Marketing LLC and Mr. K. Stephen Tsingas to Staff's Preliminary Findings Letter in *In Re PJM Up-to-Congestion Transactions*, IN10-05-000, at 21 (Nov. 4, 2013) (hereinafter "November 2013 Response").

[18] *Atlantic City Elec. Co., et al. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 3 (2006) (2006 MLSA Order) ("As in the case of all electric transmission, there is some loss of the scheduled megawatts as the power is transmitted from the point of generation to the point of delivery. That is, the total megawatt-hours of energy received by customers is less than the total megawatt-hours of energy produced by generators. Such loss results in a cost PJM incurs to maintain the level of the scheduled power and to deliver it under conditions of system reliability.").

[19] *Id.* P 4 ("the actual cost of meeting load would be reduced by using the marginal loss method."); *id.* P 22 ("Billing on the basis of marginal costs ensures that each customer pays the proper marginal cost price for the power it is purchasing").

total amount of actual line losses. This results in a "marginal loss surplus."[20] Marginal loss surpluses increase with increased volumes of power placed on the grid.[21]

When the Commission directed PJM to set prices for line losses at marginal cost in 2006, it recognized that "a method needs to be determined for disbursing the over collected amounts."[22] The procedure for distributing the extra line loss payments is called "Marginal Loss Surplus Allocation," or MLSA.

The particulars of PJM's MLSA distribution method were litigated in what came to be known as the "*Black Oak*" proceeding.[23] The distribution method in effect during the summer of 2010 was established in a September 2009 Order.[24] Under the distribution method approved by that Order, during the summer of 2010, PJM paid MLSA based on the MWh volume of a market participant's successfully scheduled transactions (including UTC trades) associated with paid transmission reservations.[25] In the July 2010 strategy discussed here, City Power and Tsingas devised a pretext – sham UTC trades – to reserve large volumes of paid transmission and thereby qualify for millions of dollars of MLSA payments.

E. <u>Spread Gains and Losses in UTC Trades</u>

As discussed in the next section, in his UTC spread trades, Tsingas looked for pairs of nodes where he expected (based on detailed daily research and years of experience) that price spreads would widen between the Day Ahead and Real Time markets.[26] (In a UTC trade, the first node is called the "source" and the second node is called the "sink.")

From City Power's perspective, UTC spread trades were effectively a way of trying to make money by buying low and selling high. For example, suppose a trader

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[20] 2006 MLSA Order at P 5 ("Use of the marginal loss method will result in PJM over recovering its expenditures… .").

[21] *See id.* ("It is a characteristic of the electric grid that marginal losses increase as the number of megawatts of power moved on the grid increases.").

[22] 2006 MLSA Order at P 24.

[23] The first-named petitioner was Black Oak Energy, LLC.

[24] *Black Oak Energy, LLC et al. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at P 29 (2009).

[25] *Black Oak Energy, LLC et al. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at P 25 (2009). This litigation is discussed in detail at Section IV below.

[26] Tsingas Test. Tr. 85 ("Q And I believe you testified that the spread -- the up-tos are profitable when the spread widens; correct? A Yes. ").

submits a UTC bid to PJM (before the noon Eastern Time deadline) between point A and point B. In the Day Ahead market, the LMPs at these two points (announced that afternoon) turn out to be $15 and $20, so the Day Ahead spread between them is $5. Assuming the trader's bid has cleared (a process discussed below), the trader will pay the Day Ahead spread of $5 to PJM, plus transaction costs.[27] The trader, that is, has "bought" the Day Ahead spread.

In the Real Time market the next day, the LMPs at points A and B turn out to be $15 and $25. The spread between A and B has thus widened from $5 in the Day Ahead market to $10 in the Real Time market.

With a UTC trade, PJM pays the trader the Real Time spread (here, $10). Because the trader paid only $5 to PJM in the Day Ahead market, the trader has made (before considering transaction costs) a $5 spread gain on the trade: buying low (at $5) and selling high (at $10).

The market can also go the other way: if the spread narrows from $5 in the Day Ahead market to (say) $1 in the Real Time market, the trader will lose $4 on spread changes, plus transaction costs. That is, the trader will pay $5 into the Day Ahead market and get back only $1 in the Real Time market: losing money by buying high and selling low.

Even if spreads between two points widen between the Day Ahead and Real Time markets, there are also transaction costs to consider. For example, even if a UTC trade resulted in 15 cents in spread gains, the trader might have to pay much more than that in transaction costs. (Tsingas estimated transaction costs for cleared trades with paid transmission at 88 cents/MWh.) In the next section, we discuss the hard work that City Power and Tsingas did when they engaged in genuine UTC spread trading to predict which pairs of points would be profitable to them despite having to pay substantial transaction costs.

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[27] Transaction costs are discussed further below, but in a March 2012 response to Data Requests (CITY_DR31.xls), City Power calculated them as 67 cents per bid MWh for trades associated with paid transmission and an additional 21 cents per cleared MWh. Staff's more precise analysis of transaction costs is in Section I(J) below. As discussed there, the 67 cent/MWh "sticker price" for transmission is sometimes reduced by certain credits, which can lower a market participant's effective transaction costs. In discussing "transaction costs" in this Report, we mean a market participant's effective transaction costs after adjustments like these.

F. City Power's UTC Trading through June 2010

In PJM, City Power and Tsingas focused on UTCs. From 2006 until 2010, Tsingas and City Power did many UTC trades aimed at profiting from spread changes, and although not every trade was profitable, overall they made money through their UTC spread trades. Tsingas was the principal trader for City Power in PJM, with help from Jurco.

To make money through UTC spread trading (which they had done for years), City Power (and Tsingas in particular) sought to find pairs of points where the spread was likely to widen significantly between the Day Ahead and Real Time markets.[28] Finding such pairs of points, however, was no easy matter. Rather, as Tsingas repeatedly testified, UTC spread trading is a difficult process, requiring up-to-the-minute research (about weather, generator outages, and transmission outages), experience and judgment, analysis of data about similar past days, and specialized computer tools.[29]

In July 2010, however, while continuing to do UTC spread trading, as he had done for years, Tsingas discovered a way to use UTCs as a vehicle for a far different trading strategy, which did not require the knowledge, skill, experience, and up-to-date research needed to successfully predict profitably widening spreads. This new bidding strategy was the opposite of spread trading: the traders looked for trades with *minimal* spread changes – or, if possible, none – because the goal was not to do a spread trade but to collect MLSA based purely on the volume of City Power's cleared UTC trades associated with paid transmission.

This new volume trading strategy in July 2010 is the focus of this investigation. As Tsingas told Jurco in a July 20, 2010 IM, unlike the arduous task of doing UTC spread trading, this type of trading enabled City Power to make large amounts of money for "doing nothing."[30]

Tsingas has repeatedly and falsely denied that he (and City Power) did volume trading in July 2010. Instead, as documented below, Tsingas has, in both testimony and written submissions, falsely claimed that City Power's trades at all times were aimed at profiting from spread changes.

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[28] Tsingas Test. Tr. 56 ("Q So *you would want the spread to widen*; correct? A *Yes.* Q Okay. *And you would lose money on an up to congestion transaction if the spread tightened?* A *Yes*, versus the day ahead market. . . ." (emphasis added).

[29] Tsingas Test. Tr. 46-47, 53-54, 58-59, 61-62, 95, 148-49,268-69, 359, 361, 375-76.

[30] Tsingas and Jurco IM, Bates No. JUR01656.

G. Bid Prices and the Clearing Process for UTC Transactions

Up To Congestion trades are so called because they allow market participants to signify their willingness to pay "up to" a certain amount for the spread between two nodes that the market participant has selected. That is, a market participant submits a bid price associated with its proposed trade – a commitment to pay "up to" that amount for the spread between the two points.

With UTC trades, PJM allowed market participants to choose a bid price of up to $50. If the Day Ahead spread between the two nodes selected by the market participant proves (when the Day Ahead market closes in the afternoon) to be less than or equal to that bid price, the bid will clear and the transaction will go through. If the Day Ahead price spread exceeds the bid amount, the bid will be rejected. For example, if a trader submits a $5 UTC bid between points A and B and the Day Ahead spread proves to be $6 (or $10 or $100), the bid will not clear.

To maximize the chances that a UTC bid will clear, a trader can submit the highest bid price permissible under the PJM tariff, namely $50/MWh. A $50 bid will ordinarily clear provided that the Day Ahead spread between the two selected points is below $50.[31]

While bidding at the highest permissible price ($50) makes a bid more likely to clear, it also carries risks. As Tsingas testified, "[at] some points you may want to put a $50 bid and other points you do not. It is a matter of risk, how much risk you want to take. *If you want to take an inordinate risk then you put in $50*. If you want to reduce your risk then you put in somewhat lower."[32]

The "inordinate risk" that Tsingas refers to is simple: by being willing to "buy" a spread between two points at the highest allowable price ($50), the trader risks a large loss if, to the trader's disappointment, the spread shrinks in the Real Time market.[33] (That is, the trader risks buying very high and selling very low.) For example, if a $50 bid clears with a Day Ahead spread of $49, and the spread shrinks to $4 in the Real Time market, the trader will lose $45/MWh. If the trader had bid for 500 MWh's, the trade

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[31] During July 2010, City Power made many of what they themselves called "round trip" trades, for example, simultaneous trades (i) between OVEC as source and MISO as sink, and also (ii) between MISO as source and OVEC as sink. If the Day Ahead spread on the OVEC-MISO trade was (for example) positive $10, the Day Ahead spread on the opposite trade (MISO-OVEC) would be -$10. With a -$10 spread on the latter path, any positive bid (e.g., $1) on that path would ordinarily clear, because (in this example) $1 is greater than -$10.

[32] Tsingas Test. Tr. 291 (emphasis added).

[33] Tsingas Test. Tr. 293 (agreeing that "[b]y bidding as high as $50, you are risking a larger loss if the spread narrows").

would result in a $22,500 spread loss for a single hour, even before paying transaction costs (discussed below). Across several hours, the loss would be multiples of that amount.

Because of the risks of high-priced bids, City Power usually bid well below $50/MW in its UTC spread trades. During June 2010, for example, when City Power was making only spread trades (and not the volume trades it did in July of that year), the median bid price it submitted for UTC trades was $13.31/MW.[34] City Power bid only 6% of its UTC trades at $50/MW during June, while it bid more than 11% at prices below $6/MWh, 36% at prices below $10/MW, and 73% at prices below $25/MW.

In August 2010, City Power's median bid price was $10.58/MW, and the company bid fewer than 3% of its UTC trades at $50/MW. In that month, City Power bid more than 84% of its UTC trades at prices below $25/MW.

H. Transaction Costs for UTC Trades in the Summer of 2010

In the summer of 2010, UTC trades could incur three types of transaction costs.

First, UTC traders had to pay certain PJM market charges (such as charges for market support, for market monitoring and for the secondary control center) for each cleared MWh. These charges fluctuated little and were typically between 3 and 5 cents for each cleared MWh.

Second, until a tariff change in September 2010, PJM required UTC transactions to be associated with an OASIS transmission reservation, either paid or free. In addition to the transmission charge, if any (discussed below), UTC traders had to pay for ancillary services (reactive power and black start). The latter charges averaged 17 cents per MWh.

Third, financial traders sometimes paid – but sometimes did not pay – to reserve transmission. When financial traders paid for transmission, they typically used the cheapest option: non-firm point-to-point transmission, which in 2010 cost 67 cents per MWh (sometimes reduced by certain discounts).[35] OASIS reservations where MISO was the transmission "sink," however, were not charged for transmission.

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[34] In December 2010, City Power submitted a spreadsheet (CITY000635) with data for all of its UTC trades between March and September 2010. The calculations in this section are taken from that spreadsheet.

[35] The transmission cost for a trade may sometimes be reduced or eliminated by a congestion adjustment. As a result, City Power's average transmission cost, for trades with paid transmission, was approximately $0.31 per MWh.

In February 2011 and March 2011, PJM produced to staff the following data sources: OASIS reservations, market bids, market awards, and billing items ("PJM Data"). Staff

To make a transmission reservation, participants had to pick two points – a source and a sink – in OASIS. But the PJM system did not require participants to choose these same two points for pricing the UTC transaction. Rather, in a separate system called the Enhanced Energy Scheduler (EES), traders chose pricing points for the UTC transaction.[36]

A trader hoping to profit from spread changes – as City Power did in its UTC trading through the end of June 2010 – would ordinarily choose to minimize transaction costs by sinking transmission into MISO if possible to get free transmission.[37] In many if not all of the July 2010 volume trades at issue here, however, Tsingas intentionally increased City Power's costs by reserving paid transmission (*i.e.*, avoiding sinking transmission into MISO), because paid transmission was the key to collecting MLSA.[38]

The impact of City Power's voluntary decisions to pay for transmission for volume trades in July 2010 is reflected in the firm's monthly PJM bills. During May, June, and August 2010, when City Power was doing only UTC spread trades, the firm incurred charges averaging $211,869 per month for paid transmission.[39] For July 2010, by contrast, City Power paid nearly a million dollars – $996,542 – for paid transmission.[40] That is, in July 2010 City Power paid nearly five times as much for paid transmission as it did (on average) in these three surrounding months. Paying for transmission it could have reserved for free was a central part of City Power's volume trading strategy, discussed in the next section.

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provided the PJM Data to City Power in 2011 and again in 2014. Staff's calculations here and throughout this Report are based on the PJM Data.

[36] PJM web site, *Enhanced Energy Scheduler FAQs*, available at http://www.pjm.com/LearningCenter%20Content/Home/three-priorities/keeping-the-lights-on/enhanced-energy-scheduler-faqs.aspx (last visited Feb. 4, 2015).

[37] Tsingas Test. Tr. 383-84.

[38] Tsingas Test. Tr. 384. So long as their OASIS transmission reservation did not sink into MISO, a trader could choose MISO as a pricing point on the EES system and still be eligible to collect MLSA. *See* Section II(C) below (discussing MISO-OVEC/OVEC-MISO trades).

[39] May 2010 PJM bill, CTYPWR_050110_053110_BILLPDF_O.pdf ($126,988 for paid transmission); June 2010 PJM bill, CTYPWR_060110_063910_BILLPDF_O.pdf ($203,358 for paid transmission); August 2010 PJM bill, CTYPWR_080110_083110_BILLPDF_O[1] ($304,260 for paid transmission). For some paths, free transmission is not an option, so City Power paid for transmission for some of what Tsingas called their "regular" (*i.e.*, spread) trades during these months.

[40] July 2010 PJM bill, CTYPWR_070110_073110_BILLPDF_O[1].pdf.

II. City Power's Summer 2010 Trading Aimed at Minimizing Spreads and Collecting MLSA Based on Trading Volume

The following is a brief history – told principally through the traders' own IMs and City Power's own responses to Data Requests – of how Tsingas and Jurco concluded in early July 2010 that other traders were doing volume trades and how they developed and implemented their own volume trading strategy that month.

In the remainder of this document, we provide dollar figures (and MWh volumes) to show the impact of City Power's volume trading in July 2010. Except where noted, we provide the calculations done by staff, using PJM data, on these matters. On page 47 below, however, we show that City Power's own calculations, provided in response to Data Requests, are very close to those done by staff.

A. City Power Sees Another Firm Reserving Very Large Amounts of Transmission on OASIS

OASIS transmission reservations are visible to other market participants. As a result, although a traders' choice of pricing nodes in the EES system was not visible to others, the ability to see transmission reservations via OASIS gave financial traders like City Power some information about what kinds of trades their competitors were doing.

As their IMs reflect, in mid-June 2010, Tsingas (whose IM handle was "TraderYoda") and Jurco began seeing other market participants making unusually large transmission reservations on OASIS. On June 19, for example, the traders exchanged the following IMs about large trades by Company A, a financial trading firm whose principals had worked with Tsingas and Jurco at Conectiv Energy:[41]

> traderyoda (11:18:39 AM): [redacted] going nuts doing 500 and 1000 mw deals...
>
> jurco831 (11:18:44 AM): wow

A week later, on June 26, the traders commented on the increasing difficulty of reserving transmission on OASIS, in this case a shortage of hourly reservations:[42]

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41 Tsingas and Jurco IM Bates No. JUR01486.

42 Tsingas and Jurco IM Bates No. JUR01491.

jurco831 (10:52:56 AM): plenty of daily trans out there

jurco831 (10:52:59 AM): not a lot of hourly

That same morning, Tsingas and Jurco again discussed Company A's unusually large OASIS transmission reservations:[43]

traderyoda (10:53:36 AM): they usually do, [redacted] been doing 100,000 mw's interface to interface

jurco831 (10:54:45 AM): wow

Later that same morning, Tsingas and Jurco again discussed the difficulty of reserving transmission on OASIS:[44]

traderyoda (11:04:05 AM): let me know once oasis clears up coming into pjm

jurco831 (11:04:18 AM): y

jurco831 (11:12:37 AM): still nothing

On June 28, the traders once again commented on Company A's unusually high large transmission reservations, in this case during the peak hours of "10-22" (i.e., 9 a.m. to 10 p.m.):[45]

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[43] Tsingas and Jurco IM Bates No. JUR01492. As shown in this section, during the summer of 2010, Tsingas and Jurco frequently discussed in their IMs the difficulty of reserving transmission on OASIS. Other market participants also noticed that the high level of transmission reservations by virtual traders during the summer of 2010 were making it difficult for others to reserve transmission on OASIS. *See* 2-PJMDOCS-#606249-v1-REDACTED_Conference_Call_Redacted (Aug. 6, 2010) (market participant told PJM that virtual traders doing volume transactions "prevent other participants who would like to flow real-time by 'tying up' ATC [Available Transmission Capacity] with transactions of no real value"); Response of Black Oak Energy to Second Amended Data Request at 2 (Oct. 4, 2010) (discussing "extreme difficulty" in reserving transmission during summer of 2010).

[44] Tsingas and Jurco IM Bates No. JUR01492.

traderyoda (9:52:55 AM): [redacted] 9,000 inetrface to interface mw's

traderyoda (9:52:58 AM): 10-22

jurco831 (9:53:07 AM): wow

traderyoda (9:53:09 AM): wonder what interfaces

Later that morning, the traders for the first time speculated that Company A might be placing very large trades to collect MLSA (which they called "losses"):[46]

jurco831 (10:56:32 AM): [redacted] going for it

traderyoda (10:57:31 AM): wonder what those punks are up to

jurco831 (10:57:39 AM): hmm

traderyoda (10:58:08 AM): maybe doing cheap stuff in order to collect losses later if they win the case

B. <u>July 3, 2010: Tsingas and Jurco Conclude that Company A is Doing "Net Flat" Trades to Collect Losses, and Decide to Do the Same Thing</u>

By the morning of Saturday, July 3, Tsingas and Jurco were becoming more confident that Company A's large volume trades were designed "to collect losses." That conclusion was bolstered by the fact that Company A placed the trades during peak hours,[47] when high loads meant that MLSA would be at its peak:

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[45] Tsingas and Jurco IM Bates No. JUR01504-05. In energy trading, hours are typically specified by when they end, so the hour immediately after midnight is called HE1 (for "Hour Ending 1"), the hour between 1 a.m. and 2 a.m. is called HE2, and so on.

[46] Tsingas and Jurco IM, Bates No. JUR01507. The "case" to which Tsingas is referring is presumably the *Black Oak* proceeding before the Commission, which concerned, among other things, whether and when virtual traders should collect MLSA. *See* Section IV(E)(1) below.

[47] Tsingas and Jurco IM, Bates No. JUR01529.

traderyoda (10:52:03 AM): so, it looks like [redacted] is doing all those mw's to collect losses

jurco831 (10:52:19 AM): yeah

jurco831 (10:52:20 AM): ok

traderyoda (10:52:20 AM): since they are all during the peak (10-22) when losses are high

jurco831 (10:52:27 AM): makes sense

Tsingas told Jurco that losses "pa[id] off" if the trades were "non-MISO" (because transmission into MISO was free and therefore ineligible for MLSA payments) and if prices were "strong" (*i.e.*, high):[48]

jurco831 (10:52:35 AM): are losses paying off lately?

traderyoda (10:52:45 AM): if you ahve non-miso

traderyoda (10:52:54 AM): and there is strong prices

Tsingas continued to wonder what Company A might be doing:[49]

traderyoda (10:54:58 AM): those bastards

traderyoda (10:55:35 AM): wonder what points they're doing

traderyoda (10:55:44 AM): or is it the rope-a-dope

traderyoda (10:55:57 AM): that may be the trick

Tsingas then decided – with a "EUREKA" – that Company A must be placing opposite trades ("both sides") at the same time "to collect losses":[50]

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48 *Id.*

49 *Id.*

50 Tsingas and Jurco IM Bates No. JUR01530. Yellow highlighting is added in all IMs reprinted in this Report.

traderyoda (10:56:13 AM): do both sides to collect losses

traderyoda (10:56:19 AM): EUREKA

traderyoda (10:56:33 AM): those bastards

Jurco immediately understood that Tsingas was talking about high volume ("load up") trades that would neutralize each other ("net flat") but still qualify for MLSA ("collect"):[51]

jurco831 (10:57:55 AM): nice

jurco831 (10:58:05 AM): load up

jurco831 (10:58:11 AM): net flat

jurco831 (10:58:14 AM): collect

jurco831 (10:58:20 AM): that is dirty dirty

jurco831 (10:58:24 AM): but legal I guess

Jurco here commented that while this type of trading was "dirty dirty," it was "legal I guess." As Jurco's and Tsingas' later IMs that month show, however, both traders were soon describing volume trading as "a scam," as "sleazy," as "free money," as "great ammo" for the Market Monitor, as a "sin," as a "game," and as "high volume churn." *See* p. 35 below.

In any event, that day, July 3, 2010, Tsingas and Jurco agreed to start doing what they had called "net flat" trades, like those they believed Company A was doing, for a few days to "see the payout." As they had discussed before, they would make the trades during peak hours and avoid sinking into MISO:[52]

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51 *Id.*

52 *Id.*

traderyoda (10:59:39 AM): we'll try it for a few days and see the payout

jurco831 (10:59:46 AM): k

jurco831 (11:08:35 AM): want me to start on some of these?

traderyoda (11:08:36 AM): aight, you can start

jurco831 (11:08:42 AM): k

traderyoda (11:08:45 AM): don't submit yet

jurco831 (11:08:47 AM): no

traderyoda (11:08:58 AM): all 10-22 deals go to non-miso

jurco831 (11:09:08 AM): ny sink

traderyoda (11:09:09 AM): as in ovec, ny, southern sinks

jurco831 (11:09:10 AM): got it

jurco831 (11:09:12 AM): k

Later that same day (July 3), the traders began to place the same type of "net flat" (A-to-B, B-to-A) trades that they believed Company A was already doing. They started with UTC trades where A was the MISO interface and B was the NYIS node, i.e., simultaneous trades from MISO to NYIS and in the opposite direction (NYIS to MISO).[53] As the traders had agreed, they placed the trades during peak hours when loads, and therefore loss payments, would be high,[54] and paid for transmission to qualify for MLSA.

A spreadsheet produced by City Power (CITY_DR31.xls) in response to a Data Request shows what happened that day, and on all of the days in July 2010 on which City Power did the trades under investigation. As Tsingas and Jurco expected, their equal and offsetting trades for trade date July 4, 2010 (IMO-NYIS and NYIS-IMO) were "net flat."

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53 PJM Data; *see also* CITY_DR31.xls.

54 As the Commission has explained, transmission line losses increase as load increases. *See* Order on Complaint Requiring Compliance with Existing Tariff Provisions and Related Filings, *Atlantic City Electric Company, et al.*, 115 FERC ¶ 61,132, at P 5 (2006) ("It is a characteristic of the electric grid that marginal losses increase as the number of megawatts of power moved on the grid increases").

During the hour between 11 a.m. and noon (i.e., "Hour Ending 12"), for example, City Power "made" $3,055 on the spread change between MISO and NYIS and "lost" precisely the same amount (-$3,055) on the spread change in the opposite direction (between NYIS and MISO). As City Power's own data show, the same pattern held true for each of the 11 hours for which City Power submitted its offsetting bids. As expected, therefore, City Power had zero net spread gains or losses on these paths.

Illustrative Excerpt from Spreadsheet (CITY_DR31.xls) Showing City Power's Calculations of Results of A-to-B, B-to-A Trades for Trade Date July 4, 2010

LOCAL DAY	HOUR_ENDING	SOURCE_PNODE	SINK_PNODE	Effective Loss Credit Allocation Rate for Hour* ($/MWh)	LOSSES COLLECTED	P/L MP BASIS (No Fees, No Credits)
7/4/2010	12	MISO	NYIS	$1.04	207.006	-$3,055
7/4/2010	12	NYIS	MISO	$1.04	207.006	$3,055
7/4/2010	13	MISO	NYIS	$1.06	212.634	-$2,604
7/4/2010	13	NYIS	MISO	$1.06	212.634	$2,604
7/4/2010	14	MISO	NYIS	$1.21	242.76	-$2,307
7/4/2010	14	NYIS	MISO	$1.21	242.76	$2,307
7/4/2010	15	MISO	NYIS	$1.36	271.282	-$2,681
7/4/2010	15	NYIS	MISO	$1.36	271.282	$2,681
7/4/2010	16	MISO	NYIS	$1.58	315.422	-$2,921
7/4/2010	16	NYIS	MISO	$1.58	315.422	$2,921
7/4/2010	17	MISO	NYIS	$1.78	355.514	-$3,117
7/4/2010	17	NYIS	MISO	$1.78	355.514	$3,117
7/4/2010	18	MISO	NYIS	$1.76	352.562	-$2,825
7/4/2010	18	NYIS	MISO	$1.76	352.562	$2,825
7/4/2010	19	MISO	NYIS	$1.45	290.546	-$692
7/4/2010	19	NYIS	MISO	$1.45	290.546	$692
7/4/2010	20	MISO	NYIS	$1.22	244.838	-$1,776
7/4/2010	20	NYIS	MISO	$1.22	244.838	$1,776
7/4/2010	21	MISO	NYIS	$1.18	236.522	-$2,592
7/4/2010	21	NYIS	MISO	$1.18	236.522	$2,592
7/4/2010	22	MISO	NYIS	$1.09	218.542	-$2,458
7/4/2010	22	NYIS	MISO	$1.09	218.542	$2,458
					$5,895	**$0**

Although City Power's opposite-and-equal trades cancelled each other out every hour, they gave City Power a pretext to reserve paid transmission on OASIS and thereby to qualify to receive nearly $6,000 in MLSA from PJM for these round-trip trades. The MLSA paid each hour ("Effective Loss Credit Allocation Rate") was between $1.04 and $1.78/MWh, which was greater than transaction costs (which City Power has estimated at about 88 cents/MWh). City Power's first experiment with round trip trades was therefore a success.

That same day, July 3, Tsingas experimented with another type of volume trading, which became the staple of City Power's trading later that month: trades between NCMPAIMP and NCMPAEXP. City Power had done trades between those points in the

spring, but even with free transmission, they were unprofitable.[55] But now that his focus was on collecting MLSA ("losses"), Tsingas saw NCMPAIMP-NCMPAEXP trades in a different light:

> jurco831 (10:52:35 AM): are losses paying off lately?
>
> traderyoda (10:52:45 AM): if you ahve non-miso
>
> traderyoda (10:52:54 AM): and there is strong prices
>
> jurco831 (10:53:09 AM): there is plenty of PJM-NY trans
>
> traderyoda (10:54:02 AM): may have to get back to ncmpaimp-ncmpaexp
>
> jurco831 (10:54:15 AM): y

Tsingas did "get back to NCMPAIMP-NCMPAEXP" that day (July 3, for operating date July 4), placing 5,200 MWhs of trades on that path (400 MWh's each hour from HE10 through HE22).[56] This second experiment also worked: although spreads moved in the wrong direction (narrowing rather than widening), and although City Power had to pay for transmission and transaction costs, MLSA payments still made these trades profitable.

C. <u>City Power Does Large Volumes of Round Trip Trades From July 4 through July 24</u>

After successfully eliminating spread gains or losses by using A-to-B, B-to-A "round trip" trades to collect MLSA for trade date July 4, City Power continued to do round trip trades through trade date July 24. (Although his NCMPAIMP-NCMPAEXP experiment had worked, that path had non-zero spreads – indeed, had spread losses on July 4 – making the trade less attractive as a vehicle for collecting MLSA.)

On July 5, for example, City Power again placed round trip trades between the NYIS and MISO nodes, and again achieved "net flat" spread changes but profits because of MLSA.

During the three weeks across which City Power submitted round trip trades, Tsingas and Jurco experimented with a variety of paths, starting, as discussed above, with MISO-to-NYIS, NYIS-to-MISO.[57] For trade date July 7, for example, City Power tried

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55 PJM Data; Tsingas and Jurco IM Bates No. JUR01529.

56 CITY_DR31.xls.

57 One path (IMO-to-NYIS, NYIS-to-IMO) that City Power tried for one day (trade date July 6) proved to be so volatile that spread changes rose above $50 for three hours, which meant

the OVEC-to-MISO, MISO-to-OVEC round trip, with trades across all 24 hours at 900 MWs (450 each way) per hour, for a total of 21,600 MWhs for that single day. Because MLSA payments averaged nearly $2/MWh across those 24 hours, City Power later collected $42,462 in MLSA payments from PJM for that day. With no spread gains or losses and $18,883 in transaction costs City Power had a profit for the day of $23,579 on OVEC-MISO "spread" trades that, as City Power intended, had no actual spreads.

Seeing that the OVEC-MISO round trip worked as planned – net flat on spreads but generating large MLSA payments – City Power executed A-to-B, B-to-A trades on that path nearly every day through trade date July 24. To maximize MLSA profits, City Power increased its volumes over time: for its OVEC-MISO round trip trades, City Power started at 900 MWs for trade date July 7, expanded to 1,000 MWs the next day, and then increased to 1,500 MWs starting on trade date July 15.[58] From these OVEC-MISO round trips alone, staff calculates that City Power collected $359,712 in MLSA from PJM during July 2010.

Between July 4 and July 24, City Power also did round trip trades between five other pairs of nodes: (a) IMO and NYIS, (b) MICHFE and SW, (c) MISO and NIPSCO, (d) MISO and NYIS, (e) OVEC and MICHFE, as well as (f) thinly-disguised round trip trades (SOUTHIMP-SOUTHEAST / SOUTHEAST-SOUTHEXP), which we discuss below. Across all of its July 2010 round trip trades, none of which had any spread gains, City Power collected $734,212 in MLSA from PJM, spent $278,482 on transaction costs, and enjoyed a net profit of $455,730.[59]

D. Tsingas Discovers that SOUTHIMP-SOUTHEXP Trades Are an Ideal Way to Minimize Spreads While Collecting MLSA

Soon afterwards, Tsingas realized he could collect MLSA via minimal-spread UTC trades in another way as well: by placing trades between two nodes that, at that time, had no spreads at all. City Power continued to place trades between these two nodes, SOUTHIMP and SOUTHEXP, until July 14, when Jurco told Tsingas he felt "really funny" about the trades.[60]

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that City Power's $50 bid on one of the round-trip paths did not clear during those hours. City Power's "net flat" plan having failed, City Power (according to its own calculations in CITY_DR31.xls) lost about $41,000 in one day on this round trip. City Power immediately abandoned that path. PJM Data; *see* CITY_DR31.xls.

[58] PJM Data.

[59] PJM Data; *see* Summary Spreadsheet Showing Staff and City Power Calculations ("Summary Spreadsheet").

[60] PJM Data.

Tsingas' discovery that SOUTHIMP-SOUTHEXP could be an ideal vehicle for collecting MLSA began with an experiment on July 4, 2010, when he submitted a UTC trade (for trade date July 5) for 500 MWs per hour between those nodes.[61] As had been true for previous days, the spreads between the two nodes proved to be zero in both the Day Ahead and Real Time markets, and the spread change was therefore, of course, also zero.

The next day (July 5), Tsingas discussed the trade with Jurco. The two realized that SOUTHIMP-SOUTHEXP trades could be an ideal way to minimize spreads while still collecting MLSA. That morning, Tsingas and Jurco exchanged the following IMs:[62]

> traderyoda (9:25:16 AM): so SOUTHIMP-SOUTHEXP settles at $0 all the time, DA and RT
>
> traderyoda (9:25:24 AM): wonder why that is
>
> jurco831 (9:25:33 AM): I see that
>
> traderyoda (9:25:35 AM): I did 500, no impact
>
> traderyoda (9:25:44 AM): it used to be different

The traders immediately realized that a path with no spreads at all could be another way to achieve the same results they were already getting with their A-to-B/B-to-A round trip trades, even though that would be "nuts":[63]

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61 PJM Data.

62 Tsingas and Jurco IM Bates No. JUR01538. Tsingas comment that his relatively large trade had "no impact" reflected his knowledge that virtual trades often affect market prices.

63 *Id.*

traderyoda (9:25:44 AM): it used to be different

jurco831 (9:25:57 AM): someone got to it before you

traderyoda (9:26:00 AM): wonder if the [redacted] are doing that

jurco831 (9:26:09 AM): do you still get losses?

jurco831 (9:26:13 AM): cause that's nuts

Tsingas said they would "ride it out for a few days," to see if SOUTHIMP-SOUTHEXP was a good vehicle to avoid spreads while still collecting MLSA: [64]

traderyoda (9:26:35 AM): also wonder if its tied into external gen and they do side adjustments (scary)

traderyoda (9:26:55 AM): so we'll ride it out for a few days

traderyoda (9:27:05 AM): combo of that and some other crap

jurco831 (9:27:10 AM): y

traderyoda (9:27:16 AM): at least 1000 mw's

Later that day, Tsingas said that if it worked, he would do only SOUTHIMP-SOUTHEXP trades until the Market Monitor stepped in:[65]

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[64] Tsingas and Jurco IM Bates Nos. JUR01539-40. That day, the traders again found it hard to reserve transmission on OASIS. Tsingas and Jurco IM Bates No. JUR01546 (Tsingas: "looking at OASIS as we speak . . . having a hard time finding the hourlies 10-22 interface stuff"); Tsingas and Jurco IM Bates No. JUR01549 (Jurco: "watching oasis – ready to pounce"); Tsingas and Jurco IM Bates No. JUR01550 (Jurco: "still nothing….it's there….k….done").

[65] Tsingas and Jurco IM Bates No. JUR01550.

> traderyoda (11:08:53 AM): once I see that southimp-southexp works, that's all I'll do
>
> jurco831 (11:09:00 AM): cool
>
> traderyoda (11:09:11 AM): until market monitoring yells at us

That day (July 6), City Power increased its SOUTHIMP-SOUTHEXP trades to 700 MWs for each of the 13 hours between 9 a.m. to 10 p.m. (i.e., HE10 through HE22). At that MW volume, these trades were 40% larger than the 500 MW trades that Tsingas had described as "[Company A] going nuts" only about two weeks earlier.

The SOUTHIMP-SOUTHEXP trades worked just as Tsingas hoped, with zero spreads in both the Day Ahead and Real Time markets. With MLSA as high as $3.86/MWh in the afternoon, City Power collected $23,879 in MLSA for the day, while incurring $6,216 in transaction costs for a net profit of $17,663 on "spread" trades that, again as intended, had no spreads.

With this successful experiment behind them, the traders exploited the zero-spread SOUTHIMP-SOUTHEXP strategy – increasing the volume of the trades to 1,000 MWs starting on trade date July 8 – on several days until trade date July 14.[66] All told, in its July trades between SOUTHIMP and SOUTHEXP, City Power collected $170,897 in MLSA from PJM, while incurring $64,496 in transaction costs, for a net profit of $106,401.[67]

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[66] As discussed below, City Power stopped placing SOUTHIMP-SOUTHEXP trades on July 14, after Jurco said he felt "really funny" about them.

[67] Summary Spreadsheet. Tsingas admitted in his August 2014 testimony that he had no reason to believe that his zero-spread SOUTHIMP-SOUTHEXP trades helped achieve what he knew to be the purpose of allowing virtual traders to do UTC trades:

> Q Do you have any reason to believe that the SOUTHIMP/SOUTHEXP transactions [led] to price convergence between the day-ahead and the real-time market?
>
> A No, in retrospect they were settling at zero.
>
> Q Do you have any reason to believe that the SOUTHIMP/SOUTHEXP transactions helped promote increased price discovery during July of 2010?
>
> A No.

Tsingas Test. Tr. 409-10.

On July 13, Tsingas told Jurco that MLSA "paid well" (more than $100,000) when City Power placed large trades aimed at losses, although it "feels sleazy":[68]

> traderyoda (9:31:48 AM): these losses paid well the few days we had 2,000 mw's
>
> jurco831 (9:31:55 AM): great
>
> traderyoda (9:32:01 AM): as in 100k plus
>
> traderyoda (9:32:08 AM): feels sleazy
>
> jurco831 (9:32:29 AM): wow

The next day (July 14), however, Jurco told Tsingas he was troubled about the SOUTHIMP-SOUTHEXP trades: [69]

> jurco831 (9:56:31 AM): back to the losses thing - I feel really funny about the southimp-southexp but I think you're right about the other deals

Jurco worried that the SOUTHIMP-SOUTHEXP trades "could be great ammo" for the PJM Market Monitor: [70]

> jurco831 (9:57:20 AM): this sure could be great ammo for Bowering - all these hobos fight for losses then they rope a dope and collect huge numbers

Tsingas disagreed, seeing the trades as a way to continue to make large profits:[71]

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68 Tsingas and Jurco IM Bates No. JUR01588.

69 Tsingas and Jurco IM Bates No. JUR01590.

70 *Id.*

71 *Id.*

traderyoda (9:57:51 AM): that's ok, as long as we get paid

jurco831 (9:57:52 AM): but who knows how he'll handle?

traderyoda (9:58:11 AM): question is would we rather have the money or not

A few minutes later, Tsingas asked Jurco whether he thought they should continue the SOUTHIMP-SOUTHEXP trades: [72]

traderyoda (9:59:01 AM): so, is it better wit or witout

jurco831 (9:59:04 AM): maybe by then we can collect 10 mil or so and you can really retire

traderyoda (9:59:10 AM): exactly

traderyoda (9:59:35 AM): so your vote is with but no simp-sexp?

Jurco responded that it was Tsingas' decision, but again signaled his discomfort:[73]

jurco831 (10:00:02 AM): I'd never do thousands and thousands, but that's me

jurco831 (10:00:12 AM): your call

Tsingas was persuaded to stop the trades, and City Power placed no SOUTHIMP-SOUTHEXP trades thereafter. Over the next few days, however, he devised a new type of volume trades, in which he used his knowledge that SOUTHIMP and SOUTHEXP then had the same prices to do round trip trades in a disguised way.[74]

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[72] Tsingas and Jurco IM Bates No. JUR01590.

[73] Tsingas and Jurco IM Bates No. JUR01591.

[74] Between July 17 and July 20, City Power did trades that combined the firm's round trip and SOUTHIMP-SOUTHEXP schemes: the firm did simultaneous trades between SOUTHIMP and SOUTHEAST and between SOUTHEAST and SOUTHEXP. Because (as Tsingas knew) SOUTHIMP and SOUTHEXP then had the same prices, this was a disguised form of round trip (A-to-B / B-to-A) trade. (In referring to round trip trades below, we include these matched trades as well.)

To minimize the visibility of City Power's remaining trades aimed at MLSA, Tsingas said he would stay well below the volumes of Company A to minimize City Power's visibility by keeping their trading volumes below their competitor's:[75]

traderyoda (10:00:24 AM): and stay in the 40-70% of [redacted]?

traderyoda (10:00:34 AM): I'm a follower

jurco831 (10:00:38 AM): yep

jurco831 (10:00:41 AM): I hear that

A few minutes later, Tsingas said he saw collecting losses as a way to fund his retirement:

traderyoda (10:05:01 AM): the way I look at losses is retirement

Later that day, the traders discussed setting a limit (of 750 or 1,000 MWs) on the size of their volume trades as a way to "stay below the radar":[76]

From a spreadsheet produced by City Power (CITY000635.xls), the table below shows the results of the first five hours of these trades. For each hour, any spreads from SOUTHIMP to SOUTHEAST are cancelled out, dollar for dollar, by spreads in the opposite direction from SOUTHEAST to SOUTHEXP, making the path "net flat":

1	EPT Hour Ending	Source Node Name in EES	Sink Node Name in EE	Amount Bid (MWh)	Amount Cleared (MWh)	Bid Price ($/MWI	DAM Energy Charges (-) (	RTM Energy Credits/Charges (+/-) ($)
35750	2010-07-17 10:00:00	SOUTHIMP	SOUTHEAST	750	750	41.33	($3,307.50)	$12,255.00
35751	2010-07-17 10:00:00	SOUTHEAST	SOUTHEXP	750	750	50	$3,307.50	($12,255.00)
35776	2010-07-17 11:00:00	SOUTHIMP	SOUTHEAST	750	750	41.33	($4,327.50)	$3,082.50
35777	2010-07-17 11:00:00	SOUTHEAST	SOUTHEXP	750	750	50	$4,327.50	($3,082.50)
35803	2010-07-17 12:00:00	SOUTHIMP	SOUTHEAST	750	750	41.33	($4,005.00)	$1,582.50
35804	2010-07-17 12:00:00	SOUTHEAST	SOUTHEXP	750	750	50	$4,005.00	($1,582.50)
35830	2010-07-17 13:00:00	SOUTHIMP	SOUTHEAST	750	750	41.33	($2,887.50)	$240.00
35831	2010-07-17 13:00:00	SOUTHEAST	SOUTHEXP	750	750	50	$2,887.50	($240.00)
35857	2010-07-17 14:00:00	SOUTHIMP	SOUTHEAST	750	750	41.33	($2,242.50)	($1,275.00)
35858	2010-07-17 14:00:00	SOUTHEAST	SOUTHEXP	750	750	50	$2,242.50	$1,275.00

75 Tsingas and Jurco IM Bates No. JUR01591.

76 Tsingas and Jurco IM Bates Nos. JUR01594.

traderyoda (10:29:39 AM): I would suggest doing it in small blocks if possible

traderyoda (10:29:45 AM): like 750 at a time

jurco831 (10:29:50 AM): ok

traderyoda (10:29:54 AM): it looks less honerous

traderyoda (10:30:08 AM): and the other hobos are doing it the same way

jurco831 (10:30:16 AM): ok

traderyoda (10:30:34 AM): maybe we set a max odf 1000 for any deal, what do you think?

jurco831 (10:30:39 AM): yes

traderyoda (10:30:39 AM): oasis wise

traderyoda (10:30:58 AM): this is the stay below the radar plan

E. City Power Switches to the Second-Least-Volatile Path in PJM to Achieve the Same Result But Less Visibly

In response to Jurco, who was troubled by the SOUTHIMP-SOUTHEXP trades and their zero spreads, Tsingas replaced that path – the least volatile in PJM – with what was then the *second*-least volatile path in PJM, namely NCMPAIMP-NCMPAEXP. That path, chosen to mimic the results of SOUTHIMP-SOUTHEXP but in a less obvious way, proved to be the most lucrative of City Power's volume trades during July 2010.

Tsingas testified that there are (at least) hundreds of paths on which one could place UTC trades during 2010.[77] In choosing NCMPAIMP-NCMPAEXP, however, instead of doing up-to-the-minute research about weather, generator outages, and transmission outages to choose which of those hundreds of paths were likely to have profitable spread changes, Tsingas used what he called a "low-volatility tool" to identify UTC paths with the *smallest* spread changes.[78]

City Power's tool did not look for paths with positive spread changes sufficient to cover the transaction costs of an UTC trade.[79] In fact, the tool did not look for paths with

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[77] Tsingas Test. Tr. 246 ("at least" hundreds of paths available for UTC trades).

[78] Tsingas Test. Tr. 106 ("We actually developed a low volatility tool…").

[79] This is what City Power did in its "normal" (*i.e.*, spread) trading. *E.g.*, Tsingas Test. Tr. 676 (in City Power's "normal transactions" they "were looking for a big blow out in price…").

small *positive* spread changes at all, as one would expect if the firm sought to profit from spread changes.

Instead, the tool looked for paths that had the smallest *absolute* spread changes (that is, the smallest swings up or down), and ranked paths on that basis, rather than on the basis of *positive* spread changes.[80]

In response to a data request, City Power reconstructed the output of the low-volatility tool for July 14, 2010, the day Jurco expressed his concerns about SOUTHIMP-SOUTHEXP to Tsingas. The results illustrate why Tsingas saw NCMPAIMP-NCMPAEXP as a promising replacement for SOUTHIMP-SOUTHEXP.

Here, for example, are the results of the low-volatility tool for HE 1400 and HE 1500 (*i.e.*, 1-2 p.m. and 2-3 pm.) on that trade date (July 14, 2014), showing that NCMPAIMP-NCMPAEXP was the second-least volatile path in PJM during those hours:[81]

HE 1400						HE 1500					
Src Pnode	Snk Pnode	Abs Spr	Cong Spr	Delta D	Delta F	Src Pnode	Snk Pnode	Abs Spr	Cong Spr	Delta D	Delta F
SOUTHIMP	SOUTHEXP	0	0	0	0	SOUTHIMP	SOUTHEXP	0	0	0	0
NCMPAIMP	NCMPAEXP	0	0	0.05	0.05	NCMPAIMP	NCMPAEXP	0.02	0.02	0.04	0.06
MISO	OVEC	0.05	0.05	-1.69	-1.64	DUKIMP	SOUTHEXP	0.21	0.21	-0.25	-0.04
OVEC	MISO	0.05	-0.05	1.69	1.64	CPLEIMP	NCMPAEXP	0.24	-0.24	0.16	-0.08
NCMPAIMP	SOUTHEAST	0.08	-0.08	0.54	0.46	MISO	NIPSCO	0.27	-0.27	0.88	0.61
SOUTHEAST	NCMPAEXP	0.08	0.08	-0.49	-0.41	NIPSCO	MISO	0.27	0.27	-0.88	-0.61
DUKIMP	NCMPAEXP	0.09	-0.09	0.24	0.15	MISO	OVEC	0.29	0.29	-1.69	-1.4
SOUTHEAST	OVEC	0.1	-0.1	-2.08	-2.18	OVEC	MISO	0.29	-0.29	1.69	1.4
OVEC	SOUTHEAST	0.1	0.1	2.08	2.18	SOUTHEAST	DUKEXP	0.38	0.38	-0.67	-0.29
MISO	DUKEXP	0.14	-0.14	0.44	0.3	CPLEIMP	SOUTHEXP	0.49	0.49	-0.78	-0.29
MISO	SOUTHEAST	0.15	0.15	0.39	0.54	DUKIMP	NCMPAEXP	0.52	-0.52	0.69	0.17
SOUTHEAST	MISO	0.15	-0.15	-0.39	-0.54	NIPSCO	OVEC	0.56	0.56	-2.57	-2.01
DUKIMP	SOUTHEAST	0.17	-0.17	0.73	0.56	OVEC	NIPSCO	0.56	-0.56	2.57	2.01
NCMPAIMP	OVEC	0.18	-0.18	-1.54	-1.72	LINDENVFT	NEPTUNE	0.57	-0.57	0.49	-0.08
OVEC	NCMPAEXP	0.18	0.18	1.59	1.77	NEPTUNE	LINDENVFT	0.57	0.57	-0.49	0.08
OVEC	DUKEXP	0.19	-0.19	2.13	1.94	SOUTHWEST	NIPSCO	0.62	0.62	0.46	1.08
NCMPAIMP	MISO	0.23	-0.23	0.15	-0.08	NIPSCO	SOUTHWEST	0.62	-0.62	-0.46	-1.08
MISO	NCMPAEXP	0.23	0.23	-0.1	0.13	NCMPAIMP	DUKEXP	0.69	-0.69	0.96	0.27
DUKIMP	OVEC	0.27	-0.27	-1.35	-1.62	SOUTHIMP	NCMPAEXP	0.73	-0.73	0.94	0.21
SOUTHEAST	DUKEXP	0.29	-0.29	0.05	-0.24	SOUTHIMP	SOUTHWEST	0.73	0.73	-1.62	-0.89
DUKIMP	MISO	0.32	-0.32	0.34	0.02	SOUTHWEST	SOUTHEXP	0.73	-0.73	1.62	0.89
NCMPAIMP	DUKEXP	0.37	-0.37	0.59	0.22	NCMPAIMP	SOUTHEXP	0.75	0.75	-0.9	-0.15
SOUTHIMP	SOUTHWEST	0.39	-0.39	-0.38	-0.77	MISO	SOUTHWEST	0.89	-0.89	0.42	-0.47
SOUTHWEST	SOUTHEXP	0.39	0.39	0.38	0.77	SOUTHWEST	MISO	0.89	0.89	-0.42	0.47
NIPSCO	CPLEEXP	0.42	-0.42	1.86	1.44	DUKIMP	SOUTHWEST	0.94	0.94	-1.87	-0.93

80 CITY_DR31.xls.

81 CITY_DR30.xls.

During these hours, the spread changes between the Day Ahead and Real Time markets (shown in the "Cong[estion] Spread") for NCMPAIMP-NCMPAEXP were zero and two cents, respectively.

In City Power's low-volatility spreadsheet, paths are ranked based on the absolute size of the spread, whether positive or negative.[82] For example, for HE1400 (on the left side above), the path MISO-SOUTHEAST, with a congestion spread of *positive* 15 cents, is shown as tied with the opposite path (SOUTHEAST-MISO), with a congestion spread of *negative* 15 cents.

Treating spread gains and losses identically would be puzzling if City Power's goal had been to make money from spread changes. But designing the tool that way made sense because City Power was trying to *eliminate* spreads, which could interfere with the goal of collecting MLSA through sheer transaction volume. (That is, volatility meant possible negative spreads, which could reduce or swamp MLSA profits.)

During peak hours (which were what City Power focused on for high MLSA payments), City Power's low-volatility tool showed that on July 14, NCMPAIMP-NCMPAEXP was the second-least volatile path for 10 out of 12 hours (in each case, behind only SOUTHIMP-SOUTHEXP).[83] For 9 of those 10 hours, the absolute spread change on NCMPAIMP-NCMPAEXP between the Day Ahead and Real Time markets was two cents or less per MWh. Some spread changes were positive, some were negative, and in no case was any spread change larger than 10 cents.[84] (City Power calculated that the transaction costs for UTC trades were 88 cents per MWh, so in every case any spread "gains" were dwarfed by transaction costs.)

As Jurco explained, because of its de minimis spread changes, NCMPAIMP-NCMPAEXP was of no interest to City Power as a spread trade at that point.[85] But these trades worked well as a pretext to schedule trades associated with large volumes of paid transmission and thereby collect large amounts of MLSA. Across the 16 days in July 2010 when City Power placed trades on that path, it collected $1,147,645 in MLSA from PJM.[86] To make the trades eligible to collect MLSA, City Power voluntarily increased

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82 Letter from City Power counsel to Thomas Olson (Sept. 9, 2011) (describing output of low-volatility tool, and explaining that first data column is "the absolute value of the spread").

83 CITY_DR30.xls.

84 *Id.*

85 Testimony of Timothy Jurco (Jurco Test.) Tr. 165 (spreads on NCMPAIMP-NCMPAEXP were "far lower than [City Power] would need to have an economic trade based on knowledge, skill and experience… .").

86 Summary Spreadsheet.

its transaction costs (by up to 67 cents per MWh) on these trades by choosing to pay for transmission, even though the traders knew they could use free transmission instead.[87] Between transmission fees and other charges, City Power's transaction costs across all of its NCMPAIMP-NCMPAEXP trades in July were $532,060.[88]

City Power and Tsingas chose the NCMPAIMP-NCMPAEXP path to minimize volatility – and thus to reliably collect MLSA – while also providing them with a fig leaf that was missing from the SOUTHIMP-SOUTHEXP trade, namely, non-zero spread changes. Because NCMPAIMP-NCMPAEXP showed such small spread changes, City Power's profits from MLSA on large trading volumes would be secure, whether spread changes were (slightly) positive or (slightly) negative.

Not surprisingly, since Respondents chose the path because they expected spreads to be close to zero, the NCMPAIMP-NCMPAEXP path in July 2010 continued to show little volatility, which happened to be slightly positive on average (about 16 cents/MWh). But City Power spent more than $5 in transaction costs for every $1 of spread "gains" ($532,060 in costs vs. $100,642 in spread "gains"). Consistent with Tsingas' real purpose in placing the trades, though, City Power collected MLSA payments of $1,147,645 on these trades during July. After paying transaction costs, City Power made a net profit of $716,227 on its NCMPAIMP-NCMPAEXP volume trades during July 2010.[89]

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[87] Tsingas Test. Tr. 383-84 ("Q You are aware are you not that for the same path it may be possible to either pay or not per transmission depending whether you sink into MISO? A I seem to recall something like that, yes. Q You can have the option of paying if you want to or of not paying if you want to, is that fair? A I think that is fair. Q In general, will you agree with me that as a business person other things being equal you are going to try to reduce your costs by avoiding charges if you can? A You will to reduce your overall costs, yes. . . . Q When you did NCMPAIMP and EXP in July you chose to use paid transmission, correct? A Yes. Q And that increased your costs for each megawatt hour, correct? A Yes. Q By perhaps 67 cents or so? A 67. Q You did that because by paying the 67 cents per transmission you had become eligible to collect loss credits, correct? A Yes."

In the spring of 2010, City Power had experimented with a small volume of NCMPAIMP-NCMPAEXP trades in the spring of 2010, but they were unprofitable even with free transmission and City Power abandoned them. PJM Data. City Power's July 2010 trades, with intentionally increased costs (by paying for transmission), were more than three times the volume of its spring trades on that path. *Id*.

[88] Summary Spreadsheet.

[89] PJM Data; Summary Spreadsheet.

F. The Traders Continue to Candidly Discuss Their Volume Trading Over the Rest of the Summer of 2010

In the second half of July, City Power continued to do round trip trades (through trade date July 24) and NCMPAIMP-NCMPAEXP trades (through trade date July 30). During that time, and into August, the traders exchanged many candid IMs about both these continuing "losses" trades and their SOUTHIMP-SOUTHEXP trades earlier that month.

On July 16, for example, Tsingas pointed out that because of expected high temperatures, the traders should focus on "the losses" while ignoring "the other stuff":[90]

> traderyoda (10:11:19 AM): I figure tomorrow is hot so we should do the losses
>
> traderyoda (10:11:29 AM): they're there if you want to get them
>
> jurco831 (10:11:32 AM): ok
>
> traderyoda (10:11:41 AM): ignore the other stuff for now

A day later, Tsingas pushed to do "losses" trades right away:[91]

> traderyoda (8:31:12 AM): lets get the losses stuff right now, we're going to need it

On July 20, Tsingas commented that it was difficult to give up the chance to make $150,000 "for doing nothing":[92]

> traderyoda (11:25:21 AM): the amount of trans sold has gone up over 2 fold over the last few weeks
>
> jurco831 (11:25:28 AM): totally
>
> traderyoda (11:25:30 AM): even 3-4 fold some days
>
> traderyoda (11:25:52 AM): hard to turn down 150k for doing nothing

On July 22, Tsingas told Jurco to do the firm's spread trades while Tsingas did the trades aimed at MLSA:[93]

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90 Tsingas and Jurco IM Bates No. JUR01614.

91 Tsingas and Jurco IM Bates No. JUR01635.

92 Tsingas and Jurco IM Bates No. JUR01656.

traderyoda (9:21:38 AM): same mode, you do the regular deals I'll do the losses?

Later that day, in reviewing the firm's billing statement from PJM and seeing how much money City Power was collecting in loss payments, Tsingas referred to volume trading as a "good scam" that he believed another firm (Company A) "was into," which was "obscene" and "disgusting":[94]

traderyoda (3:17:42 PM): that's a good scam [redacted] is into

traderyoda (3:17:54 PM): say 150k, have to pay the trans

traderyoda (3:18:02 PM): obscene

jurco831 (3:18:05 PM): it pays the bills that's for sure

traderyoda (3:18:18 PM): pigs

traderyoda (3:18:23 PM): disgusting

traderyoda (3:23:49 PM): but just like eating fatty deserts, it feels so good

On July 23, Tsingas discussed the enormous volumes of transmission being purchased by Company A and another firm, Company B, and said he wanted to minimize his visibility:[95]

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93 Tsingas and Jurco IM Bates No. JUR01666.

94 Tsingas and Jurco IM Bates No. JUR01673.

95 Tsingas and Jurco IM Bates No. JURO01678.

traderyoda (10:42:45 AM): [redacted] is buying more than us and [redacted]

traderyoda (10:42:53 AM): 203,000 for tomorrow

traderyoda (10:43:08 AM): 239,000 yesterday

traderyoda (10:43:26 AM): that's way more than all traders combined 6 months ago

jurco831 (10:43:29 AM): [redacted]

jurco831 (10:43:47 AM): they know a good hedge fund deal when they see one

jurco831 (10:43:50 AM): OPM

traderyoda (10:44:15 AM): I want to be the third guy in this race

That same day, in an IM discussion with another City Power partner, Jurco said that these transactions were not trading, but were simply "playing the rules":[96]

jurco831 (9:27:57 AM): I'm not a fan, really - it isn't trading, it's playing the rules - Steve and I talked long and hard about it

The next day, July 24, Tsingas used harsh words about what he saw as a third company's (Company C's) large volume of "round trip trades" – the same phrase Tsingas used to describe City Power's own A-to-B/B-to-A trades:[97]

traderyoda (10:54:25 AM): 280,000 mw's of round trip trades just for [redacted]

traderyoda (10:54:31 AM): for tomorrow

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96 Tsingas and Employee A IM Bates No. JUR02100.

97 Tsingas and Jurco IM Bates No. JUR01684-85.

jurco831 (10:54:33 AM): whoa

jurco831 (10:54:44 AM): no wonder [redacted] is pissed

jurco831 (10:54:58 AM): it's amazing how greedy everyone gets

jurco831 (10:55:05 AM): can't blame them I guess

traderyoda (10:55:12 AM): the new american way

jurco831 (10:55:21 AM): quick buck - not their company

jurco831 (10:55:25 AM): or their money

traderyoda (10:55:34 AM): "fuck everybody as long as I get paid" mentality

On July 26, Tsingas and Jurco agreed that, as on previous days, Jurco would do "losses" while Tsingas would submit the rest of City Power's trades. (City Power had stopped doing round trip trades by that day, so the traders were referring only to NCMPAIMP-NCMPAEXP.)[98]

jurco831 (9:14:06 AM): what's the plan for tomorrow - same?

jurco831 (9:14:09 AM): losses you

jurco831 (9:14:11 AM): rest me?

traderyoda (9:14:16 AM): yeah, let's do taht

jurco831 (9:14:17 AM): ok

Later that morning, the traders exchanged these IMs:[99]

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[98] Tsingas and Jurco IM Bates No. JUR01687. Other IMs likewise show that the NCMPAIMP-NCMPAEXP trades were aimed at losses: on July 21, in a discussion about trades aimed at MLSA, Tsingas said "at least most of our deals are one directional." JUR01656. By then, City Power was no longer doing round trip or SOUTHIMP-SOUTHEXP trades, so Tsingas can only be referring to City Power's NCMPAIMP-NCMPAEXP trades.

[99] Tsingas and Jurco IM Bates No. JUR01691.

traderyoda (10:01:57 AM): rules are rules

jurco831 (10:02:12 AM): spoken like a true loss collector

* * * * *

jurco831 (10:03:14 AM): free money

traderyoda (10:03:20 AM): some day the sh!t will hit the fan

traderyoda (10:03:59 AM): and then it will be: "boys you need to fix this", I'm retiring

Jurco went on to argue that bigger "sinners" like Company C were doing so much "high volume churn" that they were "bringing . . . to a close" what both traders understood was a "game":[100]

traderyoda (10:16:37 AM): [redacted] and [redacted] and [redacted] are the csame greedy [redacted] dude

traderyoda (10:16:51 AM): he's buying at least 600,000 mw's everyday

traderyoda (10:17:14 AM): as much as we do some months

jurco831 (10:17:33 AM): there are much bigger sinners than us in this game

* * * * *

traderyoda (10:18:50 AM): yeah, these pigs are making the game more difficult

traderyoda (10:19:00 AM): or should I say bringing it to a close

jurco831 (10:19:02 AM): just high volume churn

---

100 Tsingas and Jurco IM Bates No. JUR01691-92.

On July 30, after PJM Market Monitor Joe Bowring contacted him about City Power's trading, Tsingas admitted (and Jurco agreed) that Bowring could have chastised Tsingas for City Power's SOUTHIMP-SOUTHEXP and round trip trades:[101]

> traderyoda (11:20:24 AM): Joe could've ripped into me for the SIMP-SEXP and the round trip ovec stuff
>
> jurco831 (11:20:29 AM): yep
>
> jurco831 (11:20:33 AM): 100%

On August 1, 2010, in discussing a phone call that Tsingas suspected the Market Monitor had made to Company A, Tsingas criticized that company for doing trades at SOUTHIMP-SOUTHEXP (which he calls "SIMP-SEXP"), saying "that's how they play," even though City Power had done the same thing:[102]

> jurco831 (10:15:29 AM): I bet Joe did say they broke some rules
>
> traderyoda (10:16:37 AM): I bet they were doing simp-sexp or ny-ny
>
> traderyoda (10:16:42 AM): that's how they play
>
> jurco831 (10:16:42 AM): right
>
> jurco831 (10:16:45 AM): totally

That same day, the traders admired the "clever[ness]" of another trader, who they concluded was seeking to conceal his true intent (i.e., volume trading to collect MLSA) by collecting MLSA on only one side of a round trip trade:[103]

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101 Tsingas and Jurco IM Bates No. JUR01740.

102 Tsingas and Jurco IM Bates No. JUR01754.

103 Tsingas and Jurco IM Bates No. JUR01755.

traderyoda (10:22:45 AM): what [redacted] is doing is cool

traderyoda (10:22:51 AM): he only collects on one side

jurco831 (10:22:59 AM): on losses?

traderyoda (10:22:59 AM): does the other side to the MISO

jurco831 (10:23:02 AM): gotcha

jurco831 (10:23:06 AM): good on

jurco831 (10:23:07 AM): one

traderyoda (10:23:09 AM): that way he can say, what losses?

jurco831 (10:23:13 AM): right

jurco831 (10:23:15 AM): clever

The next day (August 2, 2010), Jurco admitted that the Market Monitor could describe City Power's transactions aimed at MLSA as "round trips" and "risk free":[104]

jurco831 (10:29:42 AM): he has plenty of buzz words he can use to describe this trading style

jurco831 (10:29:52 AM): round trip, risk free

Two days later, Tsingas again said that Company A (and one of its principals) had likely done SOUTHIMP-SOUTHEXP trades and that Company A probably wanted City Power to "stay out of our scam":[105]

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104 Tsingas and Jurco IM Bates No. JUR01762.

105 Tsingas and Jurco IM Bates No. JUR01798.

traderyoda (9:50:22 AM): [redacted] has not talked to me in weeks

jurco831 (9:50:31 AM): no?

jurco831 (9:50:32 AM): hmm

traderyoda (9:50:34 AM): nope

traderyoda (9:50:51 AM): I'm pretty sure they were doing ny-ny or simp-sexp

jurco831 (9:50:59 AM): may not be you - more likely the fact that he's got a lot on the line

jurco831 (9:51:00 AM): yep

traderyoda (9:51:24 AM): yeah, I just make it worse

traderyoda (9:51:28 AM): we

jurco831 (9:51:34 AM): y

traderyoda (9:51:42 AM): as in why can't you guys stay out of our scam

On August 19, the day after receiving a notice that Enforcement was investigating City Power's UTC trading, Jurco again said that other firms had done larger volumes of "sin[ful]" trades than City Power:[106]

jurco831 (10:28:50 AM): again, there are larger sinners in this - does that mean anything? maybe, maybe not

G. August-September 2010: Virtual Trader Coalition (Including City Power) Condemns Volume Trading in Commission Filings

In late July and early August 2010, the PJM Market Monitor realized that City Power and others were engaging in sham trades to collect MLSA. On August 18, 2010, PJM made a filing with the Commission seeking to amend its tariff to block further volume trading aimed at MLSA payments. In the filing, PJM explained that virtual traders had done both round trip trades ("equal offsetting trades . . . submitted in both directions between the same two points") and trades (such as SOUTHIMP-SOUTHEXP

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106 Tsingas and Jurco IM Bates No. JUR01928.

and NCMPAIMP-NCMPAEXP) "between pricing points that have little or no price separation."[107]

The PJM filing described these trades as "inappropriate" and as "intended to inflate the volume of Up-To Congestion transactions . . . and garner marginal loss revenue allocations."[108] In other words, the PJM filing called out the types of volume trades that City Power had done: round trips, SOUTHIMP-SOUTHEXP, and NCMPAIMP-NCMPAEXP.

In response, a coalition of City Power and eight other virtual traders, calling themselves the "Financial Marketers" made two filings agreeing with PJM's condemnation of the volume trading in which City Power itself had engaged. First, on September 2, 2010, the coalition made a filing in which they praised PJM's proposed tariff change as a way to "*protect[] the integrity of the markets* in PJM" from participants who sought "to *unduly profit* on the transmission component" of UTC transactions.[109] The coalition told the Commission that the "the transactions involved only a small number of Market Participants" and expressed hope that "these recent incidents will not serve to cloud the exemplary record of the Up-To Congestion Trading sector … ."[110]

Then, on September 14, 2010, the virtual trader coalition made another filing in the same proceeding. This filing is even more explicit in criticizing – as "unpermitted trading patterns" – the volume trades in which City Power engaged in July 2010:

> The Tariff Filing proposed by PJM, and supported by Financial Marketers and many others, is only intended to address and remedy certain *unpermitted trading patterns* associated with large volumes of Up-To Congestion transactions in order to eliminate any opportunity for market participants to improperly profit on the transmission reservation component of an Up-To Congestion transaction.[111]

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[107] Letter from Jacqulynn B. Hugee, Assistant General Counsel, PJM, to the Hon. Kimberly Bose, at 5, attached to *PJM Interconnection, LLC*, Proposed Schedule 1 of the Amended and Restated Operating Agreement, Docket No. ER10-2280-000 (filed Aug. 18, 2010).

[108] *Id.* at 5-6.

[109] Motion for Leave to Intervene and Comments of Financial Marketers, *PJM Interconnection, LLC*, Docket No. ER10-2280-000, at 2 (Sept. 2, 2010) (Sept. 2, 2010 Financial Marketers Filing) (emphasis added).

[110] Sept. 2, 2010 Financial Marketers Filing at 10.

[111] Motion for Leave to Answer and Answer of Financial Marketers, *PJM Interconnection, LLC*, Docket No. ER10-2280-000, at 3 (Sept. 14, 2010) (Sept. 14, 2010 Financial Marketers Filing) (emphasis added). In his 2014 testimony, Tsingas continued to condemn volume trading

H. Tsingas Begins Developing Cover Stories

After getting a voicemail from Bowring on July 30, Tsingas and Jurco discuss a variety of explanations they could give the Market Monitor about City Power's volume trades, such as that they were simply using a new computer model or that they had rejected trades they thought would work but be inappropriate:[112]

traderyoda (9:36:10 AM): got a call from the big dog while I was in the bathroom

traderyoda (9:36:16 AM): Bowring left a message

traderyoda (9:36:23 AM): kick it up a notch

traderyoda (9:36:25 AM): BAM

jurco831 (9:36:27 AM): wow

jurco831 (9:36:29 AM): there you go

jurco831 (9:36:37 AM): let me know it goes

traderyoda (9:36:43 AM): need to prepare for this one

jurco831 (9:38:44 AM): our model spit out some low volatility spreads

traderyoda (9:38:53 AM): new model

jurco831 (9:39:06 AM): we instantly saw se-sw would work, but would probably not make sense

* * * *

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when done by other firms. For example, he testified that he did not want to be represented by a lawyer who was also defending companies that traded "just to collect losses." Tsingas Test. Tr. 654-6.

112 Tsingas and Jurco IM Bates No. JUR01735-36.

jurco831 (9:39:30 AM): the issue with the imp-exp

jurco831 (9:39:47 AM): since we don't do physical, we have no idea that this cannot be done

jurco831 (9:39:53 AM): I think that's important

traderyoda (9:39:57 AM): haven't done physical

traderyoda (9:40:00 AM): yep

traderyoda (9:40:22 AM): also I didn't realize that a rule

traderyoda (9:40:24 AM): was

jurco831 (9:40:49 AM): we go by what the tool lets us do - we would assume that deals like that would be hard wired to fail if they were an issue

jurco831 (9:41:13 AM): like say, ny to ny...we assume that is a deal that can't be done...right, Joe?

jurco831 (9:41:20 AM): stuff like that

traderyoda (9:42:05 AM): need an hour to prepare

traderyoda (9:42:09 AM): all arguments

Half an hour later, Tsingas told Jurco he hadn't called yet because he needed to do "research."[113]

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[113] Tsingas and Jurco IM Bates No. JUR01736. In an IM exchange between Jurco and another City Power employee on August 25, 2010 (nearly a month after the relevant trades had stopped), they discuss Tsingas' request to have them "look at price history," even though Tsingas' IMs show that he did not rely on such research when he did the trades at issue here weeks before. JUR01213.

jurco831 (10:18:37 AM): did you call?

traderyoda (10:18:44 AM): nope

traderyoda (10:18:52 AM): doing research

I. Tsingas Gives Implausible Explanations for His Trading to Commission Staff

In his testimony, data responses, and submissions in response to staff's Preliminary Findings and 1b.19 letter, Tsingas has made many claims about his July 2010 trades that are contradicted by the factual record.[114]

1. SOUTHIMP-SOUTHEXP trades

City Power (through Tsingas) has made at least four inaccurate claims about the firm's SOUTHIMP-SOUTHEXP trades.

First, Tsingas has repeatedly claimed that he did not realize when he started doing those trades that the two points then had zero spreads. For example, Tsingas testified that his research tool "did not pick up" that SOUTHIMP-SOUTHEXP "settles with zero volatility," but instead (supposedly) "picked up that there was congestion there."[115] Tsingas said the same thing, in different words, five other times during his October 2010 testimony, claiming that only later did he realize that the path then had no spreads at

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[114] In his August 2014 testimony, Tsingas repeated and elaborated on the rationalizations discussed here about his July 2014 volume trades.

[115] Tsingas Test. Tr. 81.

all.[116] And he has repeated this untrue claim in data responses, testimony, and formal submissions ever since.[117]

In fact, as his IMs show, Tsingas was fully aware on July 5, 2010 – at the *outset* of his SOUTHIMP-SOUTHEXP trading – that the path then "settle[d] at $0 all the time," and that he would "ride it out for a few days."[118]

Second, Tsingas has made incorrect statements about why he *stopped* doing SOUTHIMP-SOUTHEXP trades. For example, in October 2010, he claimed that "[a]s soon as I saw" that the path had zero spreads, "I basically stopped doing the transaction,"[119] because "there was zero volatility, which basically just doesn't make sense. It's not what we do."[120] Again, Tsingas has made similar untrue claims throughout the investigation.

These claims are also knowingly inaccurate: as his July 15, 2010 IMs with Jurco show, Tsingas stopped trading at SOUTHIMP-SOUTHIMP not because he had just discovered it had zero spreads (which he had known for 10 days), but because Jurco felt "really funny" about the trades and urged Tsingas to stop doing them. Tsingas' responded that he was "OK" with "fight[ing] for losses" so long as City Power "[got] paid" by doing so. Only when Jurco continued to press the point did Tsingas agree to stop using SOUTHIMP-SOUTHEXP (and to keep the size of City Power's other volume trades below that of Company A).

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[116] Tsingas Test. Tr. 82-83 ("*It took a while for me to realize* that there was no differential between day-ahead and real-time markets… ."); *id*. at 90 (Tsingas "*did not expect* [any of his July 2010 trades] to be zero-volatility trades when [he] made those transactions"); *id*. at 93 ("In retrospect, I should have seen that it was zero, but I didn't."); *id.* at 94 ("So, yeah, I screwed up. I didn't, you know. Like I said, I distinctly remember that south imp/south export settled at different prices, and *it just didn't register*."); *id.* at 150 ("I remember I said *once I realized* [SOUTHIMP-SOUTHEXP] settled at zero, we stopped doing it.") (emphasis added); *see also id.* at 97 ("*It doesn't make sense to have a zero volatility*. I don't see what's there to be gained or lost to have something settling at zero…..[W]hy would you want to put on a zero-volatility transaction if you're trading? It doesn't make or lose money."); *id.* at 98 ("*In retrospect* . . . there are [times] where … you can actually make money off of [MLSA]") (emphasis added).

[117] *E.g.*, November 2013 Response at 28.

[118] In a moment of candor during his October 2010 testimony, Tsingas admitted that when he started the SOUTHIMP-SOUTHEXP trades, he did not "notice any volatility for the month prior." Tsingas Test. Tr. 94.

[119] Tsingas Test. Tr. 81.

[120] Tsingas Test. Tr. 81. Similarly, Tsingas testified: "When I noticed it [zero spreads], I took it out." *Id.* at 93.

Third, Tsingas has claimed that he did SOUTHIMP-SOUTHEXP (and other volume) trades during hours of peak demand "[b]ecause there's more volatility in on-peak."[121] In fact, Tsingas did not want "more volatility," but instead wanted zero or minimal volatility, so that spread changes would not interfere with profitably collecting MLSA. The reason Tsingas chose on-peak hours is that MLSA payments – which increase when load increases – are highest during times when loads are at their peak.[122]

Fourth, Tsingas has claimed that he believed that MLSA payments would merely "offset" or "cover" (i.e., be approximately equal to) the transaction costs of his volume trades.[123] That testimony was not correct: as his own IMs and other contemporaneous evidence show, Tsingas expected – correctly – that MLSA would be substantially larger than transaction costs, and would in fact be the only (or the only material) source of revenue from the trades.[124]

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[121] Tsingas Test. Tr. 153; *see id.* at 153-54 (because there is "no use" in doing zero-volatility trades, "you basically have to do it during the peak when the thing can spread apart a little bit."); *id*. at 161 (City Power did low-volatility trades "during on-peak hours in order to maximize the chances that there would be some volatility… .").

[122] Tsingas first realized the benefit of doing volume trades during peak hours (when MLSA payments are high) when he concluded on July 3, 2010 that Company A was trading in that way: "so, it looks like [Company A] is doing all those mw's to collect losses . . . since they are all during *the peak (10-22) when losses are high*." JUR01529 (emphasis added). Tsingas then said that City Power needed to "get back to" NCMPAIMP-NCMPAEXP "using non-miso [sinks], peak only." *Id.* City Power implemented that philosophy – non-MISO sinks to qualify for MLSA, peak hours when MLSA was high – in its volume trading during the remainder of July 2010.

[123] Tsingas Test. Tr. 99 ("I looked at it more that [MLSA] offsets your costs of putting on the transaction, and therefore, I was looking at it more from the point of view of what does it make without the costs associated with it."); *id.* at 112 ("the losses offset the cost of OASIS and some of the other ancillaries the up-to congestion transactions get charged."); *id.* at 116 ("I just assumed that [MLSA] covered the costs of OASIS and ancillaries, just roughly thinking in my mind."); *id.* at 152 ("I'm assuming that [MLSA] covered the cost. That was my whole thinking going into this, that it covered the cost of OASIS and ancillaries."); *id.* at 156 ("I was thinking that it kind of covered, you know, the OASIS costs … ."); *id.* at 157 ("keeping in mind that the cost of OASIS and ancillaries is a large source of expense. So you know, it's kind of put them together in my mind, that one offset the other."); *id.* at 159 ("Because my belief was that [MLSA] covered the costs of doing the transaction.").

[124] Tsingas Test. Tr. 159 . Tsingas also inaccurately denied that he had "ever engaged in up-to congestion transactions for the purpose of making a profit from the marginal loss surplus allocation." *Id.*

Fifth, City Power has done after-the-fact research and then claimed it relied on the research at the time. In City Power's November 2013 Response, for example, it cites statistics from earlier periods about occasional non-zero price spreads between SOUTHIMP and SOUTHEXP. In fact, Tsingas traded between those points in July 2010 because he saw that it then "settle[d] at $0 all the time, DA and RT."

2. Round trip trades

As discussed above, City Power placed round trip trades during July 2010 to achieve "net flat" spreads while still collecting MLSA. Placing trades in volumes that Tsingas had described as "nuts" only a few weeks before, City Power collected nearly $734,212 in MLSA from its July 2010 round trip trades.

In their November 2013 Response (at 32), City Power and Tsingas claim that their round trip trades were actually "optionality" trades, placed "with the intention of one leg not clearing." In support of this claim, they cite an instance in which one side of a round trip trade failed to clear: "on July 6, 2010 the two way trades acted as designed with only one leg clearing the market (IMO-NYIS, NYIS-IMO)."[125]

The record evidence shows that the "optionality" theory is an after-the-fact rationalization of City Power's round trip trades. As to the July 6, 2010 round trip trades IMO-NYIS/NYIS-IMO, for example, far from viewing "only one leg clearing" as a desirable result, City Power immediately stopped doing IMO-NYIS/NYIS-IMO trades after that day. (This decision is unsurprising, since City Power lost more than $40,000 as a result of "only one leg clearing" for a few hours.)[126]

City Power's own spreadsheet shows that, of the 347 hourly round-trip trades that it attempted to place during July, 343 (or 99%) cleared in both directions.[127] And as to the four hourly round trip trades that cleared on only one side (*i.e.*, where "a leg broke"), City Power took immediate steps to ensure it would not happen again: (i) as just

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[125] November 2013 Submission at 32.

[126] CITY_DR31.xls; NYIS-IMO Tab in City Power Spreadsheet Produced in Response to Data Request 31 (Tsingas Test. Exh. 323); Selected Columns in NYIS-IMO Tab in City Power Spreadsheet Produced in Response to Data Request 31 (Tsingas Test. Exh. 324).

Like any experienced trader, Tsingas and Jurco knew it would be possible to place round-trip trades in such a way to try to have one leg fail to clear, and that they might lose (or make) money if that happened. (For example, placing $0 on both legs, which they accidentally did in one hour, will usually achieve that result.) While Jurco thought that City Power might eventually try doing that, the factual record (described in text) shows that City Power did not in fact do so.

[127] PJM Data; CITY_DR31.xls.

discussed, City Power abandoned the IMO-NYIS / NYIS-IMO round trip and never returned to it when three hours of trades failed to clear on one side, and (ii) City Power immediately corrected the bidding error (bidding $0 for a single hour on the OVEC-MISO round trip) that led one of its round trip trades to clear on only one side.[128]

Tsingas' contemporaneous IMs with Jurco show that the real reason City Power did round trip trades was to neutralize spreads and instead collect MLSA based on trade volume. In particular, the IMs show that (a) City Power began the trades after Tsingas' July 4, 2010 "EUREKA" moment in which he realized that one could "do both sides to collect losses," and after Jurco responded "load up / net flat / collect, " and (b) Tsingas and Jurco consistently referred to the round trips as "losses" trades throughout July.

3. <u>NCMPAIMP-NCMPAEXP trades</u>

In their November 2013 Response (at 28), City Power and Tsingas claim they traded at NCMPAIMP-NCMPAEXP in July 2010 because "these nodes represent the southern part of PJM's territory which has been a high volatility area historically." That claim was untrue.

In fact, as City Power has elsewhere admitted, far from looking at NCMPAIMP-NCMPAEXP as a path with *high* volatility, City Power chose that path using a "*low*-volatility tool."[129] With that tool, City Power was not even looking for small *positive* spreads, but simply for the narrowest possible deviations from zero in either direction. That would make no sense if a trader were trying to profit from spread changes (especially with transaction costs much larger than these small spreads), but were a logical choice as a way to collect MLSA payments on large trading volumes while minimizing the risk that spread changes might cut into MLSA profits (or potentially result in large losses). That City Power saw NCMPAIMP-NCMPAEXP as a way to

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[128] On trade date July 19, 2010, for one hour (HE22), City Power bid $0 in both directions on OVEC and MISO. PJM Data; *see* CITY_DR31.xls. Not surprisingly, with a positive spread in the Day Ahead market in one direction, a $0 bid failed to clear in that direction but did clear in the other direction. City Power immediately corrected its mistake and made substantial positive bids for each of the 47 hourly round-trip OVEC/MISO trades it placed between July 20 and July 24, 2010. Showing that its goal was to achieve zero spreads, City Power did not repeat its $0 bids on any of its round trip trades, even though (by chance) the spread trade resulting from the failure of one side to clear on trade date July 19 was slightly profitable even after transaction costs. PJM Data; *see* CITY_DR31.xls.

[129] *See* Section II(C) above.

collect MLSA in July 2010 is further shown by the fact that the traders referred to those transactions as "losses" trades in their contemporaneous IMs.[130]

In his explanations of these trades, Tsingas has again used after-the-fact research to support untrue claims about why he made the trades. In his November 2013 Response, for example, Tsingas even cites data he could not possibly have seen in 2010 – that is, data from 2011 – to support his false claim that these trades were aimed at spread gains.[131]

J. Economics of City Power's July 2010 Volume Trades

As mentioned above, staff has used PJM data to calculate the MWh volume of City Power's volume trades, what City Power spent to perform the trades, and how much City Power received from PJM for each trade. The yellow columns in the table below show staff's determinations about these matters. For comparison purposes, as discussed in this section, the blue columns show City Power's calculations about these trades.

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130 *See* Section II(F) above. Tsingas testified in August 2014 that he chose to place trades at NCMPAIMP-NCMPAEXP in July 2010 because he was "hoping there were going to be spreads of at least a few dollars from time to time." Tsingas Test. Tr. 680. That claim is contradicted by the fact that he chose this path by using a low-volatility tool that looked for de minimis (or zero) spreads.

131 November 2013 Response at 29.

COMPARISON OF STAFF vs. CITY POWER CALCULATIONS OF ECONOMICS OF RELEVANT JULY 2010 UTC TRADES

UTC Path	UTC Revenues [Staff]	UTC Revenues [City Power]	OASIS & EES Charges [Staff]	OASIS & EES Charges [City Power]	PnL (w/o MLSA) Staff]	PnL (w/o MLSA) [City Power]	MLSA [Staff]	MLSA [City Power]	Total PnL [Staff]	Total PnL [City Power]
MISO_OVEC-OVEC_MISO	$0	$2,428	($133,481)	($176,221)	($133,481)	($173,793)	$359,712	$380,745	$226,231	$206,953
MISO_NYIS-NYIS_MISO	$0	$0	($6,998)	($7,744)	($6,998)	($7,744)	$13,550	$13,550	$6,552	$5,806
MISO_NIPSCO-NIPSCO_MISO	$0	$0	($7,106)	($13,728)	($7,106)	($13,728)	$34,491	$34,491	$27,386	$20,763
OVEC_MICHFE-MICHFE_OVEC	$0	$0	($67,578)	($68,024)	($67,578)	($68,024)	$153,931	$153,931	$86,353	$85,907
MICHFE_SW-SW_MICHFE	$0	$0	($21,236)	($31,680)	($21,236)	($31,680)	$55,108	$55,108	$33,872	$23,428
IMO_NYIS-NYIS_IMO	$0	($47,290)	($4,722)	($6,612)	($4,722)	($53,902)	$12,032	$12,032	$7,310	($41,870)
SOUTHIMP_SE-SE_SOUTHEXP	$0	$0	($37,362)	($50,160)	($37,362)	($50,160)	$105,387	$109,921	$68,025	$59,761
SOUTHIMP-SOUTHEXP	$0	$0	($64,496)	($75,152)	($64,496)	($75,152)	$170,897	$171,463	$106,401	$96,311
NCMPAIMP-NCMPAEXP	$100,642	$100,642	($532,060)	($560,653)	($431,418)	($460,011)	$1,147,645	$1,151,860	$716,227	$691,848
TOTALS	**$100,642**	**$55,780**	**($875,038)**	**($989,974)**	**($774,396)**	**($934,194)**	**$2,052,754**	**$2,083,102**	**$1,278,358**	$1,148,908

The "City Power" columns in the table are drawn from the firm's responses to Data Requests seeking its calculations about the economics of the firm's trades. The most important of these data responses is a spreadsheet produced by City Power on March 29, 2012, entitled "CITY_DR31.xls." This spreadsheet has separate tabs showing City Power's calculations about all but one of the types of trades discussed above.

The one exception is City Power's paired trades SOUTHIMP-SOUTHEAST / SOUTHEAST-SOUTHEXP between July 17 and July 20, 2010, as to which the CITY_DR31 spreadsheet is incomplete.[132] As discussed above, these trades were self-cancelling round trips, but with a twist: because Tsingas knew these two nodes then had the same prices, he used SOUTHIMP as the "A" node in his A-to-B trade and SOUTHEXP as the "A" note in the opposite trade (B-to-A).

To provide a fuller comparison of staff's calculations to City Power's, staff has used data from another City Power spreadsheet produced in discovery, CITY000635, to add the necessary data to evaluate (using City Power's own methodology) the economics of City Power's SOUTHIMP-SOUTHEAST / SOUTHEAST-SOUTHEXP round trips.

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[132] The CITY_DR31.xls spreadsheet has data for the SOUTHIMP-SOUTHEAST trades but not for the SOUTHEAST-SOUTHEXP trades.

For example, we have assumed, as City Power did, that it had transaction costs of 88 cents/MWh. (Its actual transaction costs were lower, as discussed below.)[133]

Staff's calculations using PJM data are more accurate than City Power's, for several reasons. But City Power's own calculations are close to those done by staff. As the table above shows, for example, staff calculates that City Power received $2,052,754 in MLSA from the trades at issue, while City Power's data responses show $2,083,102 in MLSA. As to net profits, staff has determined that City Power made a total of $1,278,358 from the trades, while City Power says the number is $1,148,908.[134]

There are two principal reasons for the difference. The first is that City Power has exaggerated its OASIS costs: as PJM's data (provided to City Power in 2011) show, because of certain billing adjustments, City Power's actual costs for paid transmission were often below the 67 cent sticker price that City Power uses in its calculations. The second is that City Power has included the costs (but not the intended gains) from trades that failed for technical reasons, even though City Power intended them to be volume trades to collect MLSA.

For example, on a few days some of City Power's UTC bids on the NCMPAIMP-NCMPAEXP trades were too low and failed to clear the market.[135] Similarly, with the traders in a rush to complete their work before the noon PJM trading deadline, they occasionally failed to reserve paid transmission, and their UTC trades during certain hours therefore did not qualify to collect MLSA. And as discussed above, with one of its round trip trades (IMO-NYIS / NYIS-IMO), one leg of the trade unexpectedly failed to clear for three hours, and the firm lost more than $40,000 as a result.

In its calculations, City Power includes the transaction costs of these uncleared trades, but does not include the profits it would have made if these volume trades had succeeded. Staff does not include these trades in its calculations.

Because it is not material to disgorgement or to the size of a civil penalty, there is no need to determine the precise amount of additional MLSA (and net profits) that City Power would have received if it had succeeded in the handful of intended volume trades

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133 Staff's calculations about the economics of the SOUTHIMP-SOUTHEAST / SOUTHEAST-SOUTHEXP round trips, using the City Power method, are in the second tab in the Summary Spreadsheet.

134 Summary Spreadsheet.

135 CITY_DR31.xls spreadsheet.

that failed for technical reasons.[136] In any event, City Power's figures are clearly too low, in that they include the costs of failed attempts without adding in the money City Power would have made if those attempts had succeeded.

K. Impact of City Power's Conduct on Other Market Participants

PJM has analyzed the impact on specific PJM market participants of City Power's unlawful volume trading.[137] In this analysis, PJM has recalculated how much additional MLSA other market participants would have received if City Power had not been paid MLSA for the volume trades at issue here.

PJM's analysis shows that City Power diverted money from hundreds of PJM market participants, and that the greatest impact of its manipulative trades was on load-serving entities. Four market participants lost more than $100,000 each, and one of them lost more than $200,000: PECO Energy Company ($105,472), serving southeastern Pennsylvania; Commonwealth Edison Company ($132,265), serving Chicago and northern Illinois; Dominion Virginia Power ($105,472), serving large parts of Virginia; and Appalachian Power Company (AEP Generation) ($265,773), which serves southern West Virginia.[138]

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[136] Penalty Guidelines, § 2B1.1 (Commentary), *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 at 111 (2010) (Revised Policy Statement on Penalty Guidelines) ("loss" includes "intended loss").

[137] PJM provided this analysis on January 28, 2015, in a spreadsheet entitled "July2010 simulation of changed MLSA allocations by CTYPWR removals.xlsx." Staff has provided this spreadsheet to City Power and will include it in the administrative record.

[138] The PJM spreadsheet shows a *net* reduction in City Power's MLSA payments of $2,031,372 by excluding the trades at issue here from receipt of MLSA. Staff calculates that City Power gained a total of $2,052,754 in MLSA from its manipulative trades. The small (1%) difference between these two figures is readily explained: in performing its analysis, PJM treated City Power as a single entity. Because City Power did both manipulative and non-manipulative UTC trades during July 2010, City Power is credited (for its non-manipulative trades) with a pro rata share of the MLSA reallocated from its manipulative trades.

III. CITY POWER'S AND TSINGAS' COVERUP OF IMs SHOWING THE INTENT BEHIND CITY POWER'S JULY 2010 VOLUME TRADES

A. Factual Background

From September 2010 through November 2011, City Power and Tsingas made a series of intentionally false statements under oath to try to keep staff from obtaining the instant messages that Tsingas and Jurco exchanged during the summer of 2010. Later, in 2013-14, City Power and Tsingas made a new round of false and misleading statements to try to explain away Tsingas' earlier obstruction. Only because Jurco kept the IMs, and produced them when asked, is staff able to present them to the Commission.

The relevant background is as follows: during the summer of 2010, Jurco had set his IM account to save his messages to his own computer hard drive, while Tsingas had set his account not to save IMs. On the afternoon of August 18, 2010, staff emailed Tsingas a letter directing him to preserve all City Power documents relating to UTC trading and to answer a few initial data requests. After Tsingas received the letter from staff, he and Jurco talked by phone for more than 50 minutes on the evening of August 18.[139]

The next morning, Tsingas learned both that Jurco had saved his IMs and (not surprisingly) that the archived IMs included discussions about their volume trading:

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[139] Calls Between Tsingas Cell and Jurco Cell on Aug. 18, 2010 (Exhibit 264) (Verizon Wireless call records).

jurco831 (8:21:23 AM): hey

jurco831 (8:21:39 AM): did a little homework last night

jurco831 (8:21:49 AM): looking through my IM archives

jurco831 (8:21:57 AM): do you archive yours?

traderyoda returned at 8:53:07 AM

traderyoda (8:53:42 AM): unfortunately not

traderyoda (8:55:30 AM): so, are we guilty or righteous?

jurco831 (8:55:46 AM): 6/28 - first IM discussion

jurco831 (8:55:58 AM): you literally wrote EUREKA!

jurco831 (8:56:42 AM): we mention losses a lot

jurco831 (8:57:17 AM): I don't know - most of the conversation is benign

jurco831 (8:57:34 AM): we do identify certain trades as "loss" trades

traderyoda (8:59:40 AM): the only question is how many trades had zero risk

jurco831 (9:00:34 AM): we talk about the SE trade

jurco831 (9:00:42 AM): saying that's one we're not comfortable with

From that moment, Tsingas knew that Jurco had archived his IMs with Tsingas from the preceding months. Nevertheless, Tsingas repeatedly and falsely denied under oath that Jurco had done so.

In mid-September 2010, Tsingas was planning to appear for testimony on Tuesday, September 21 at the Commission's offices in Washington, D.C. City Power was then represented by Attorney A.

Shortly before Tsingas planned preparation meeting with Attorney A, Jurco emailed Attorney A a copy of the archived IMs.[140] As the excerpts reprinted above show,

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[140] Jurco Test. 109-113 (Jurco had saved his IMs with Tsingas, knew they were relevant to this investigation, and sent email with attachments to Attorney A within the few days before September 17); Letter from Jurco Counsel) to AAA Arbitrator (June 26, 2014) ("In mid-

and as Tsingas knew from his August 19 IMs with Jurco, the IMs included many discussions of the UTC trades at issue.[141]

On the morning of Friday, September 17, 2010, Tsingas flew to Washington to meet with Attorney A to prepare for his scheduled testimony the next week.[142] When he met with Attorney A that morning, Attorney A discussed with Tsingas the IMs Attorney A had received from Jurco.[143] Either during or after the meeting, Tsingas called Jurco to reprimand him for having saved the IMs at all: "I think I remember calling him an idiot or something like that or even worse for saving his IMs. . . . I let him know my feelings of being an idiot to save [the IMs] in the first place … ."[144] Tsingas told Jurco to stop recording his IMs, and Jurco immediately complied: his recorded IMs with five different City Power employees stop that day.[145]

As of September 17, 2010, therefore, Tsingas (a) had known since August 19, 2010 that Jurco (a City Power partner) had saved his summer 2010 IMs with Tsingas, (b) knew that the IMs discussed the City Power UTC trades under investigation (as was obvious, and as Jurco told him on August 19, 2010), (c) knew that Jurco had provided the IMs to City Power's counsel, Attorney A, and (d) therefore knew that both a City Power partner (Jurco) and a City Power agent (Attorney A) had a copy of the IMs.

After Tsingas met with Attorney A on September 17 and discussed the IMs, Tsingas and Attorney A decided that Attorney A would no longer represent City Power in this investigation.[146] That afternoon, Attorney A sent Enforcement staff an email

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September, 2010, Jurco provided to counsel for City Power IMs potentially responsive to the Directive issued by FERC on or about August 18, 2010").

[141] Tsingas Test. Tr. 626 ("[d]uring the summer of 2010, [Tsingas] exchanged instant messages with Mr. Jurco about Up-To Congestion trading in PJM."); *id.* at 633 ("the instant messages that [he] exchanged with Mr. Jurco[,] many of them had to do with Up To Congestion trading in PJM… ."); Jurco Test. Tr. 103; *see id.* at 98 (IMs were responsive to Data Requests).

[142] City Power and Tsingas Response to Data Request 67 (Dec. 11, 2013); Tsingas Test. Tr. 423.

[143] Tsingas Test. Tr. 427, 429 (Tsingas and Attorney A discussed the traders' IMs). *See also* City Power and Tsingas Response to Data Request 59(b) and 59(c) (Dec. 11, 2013) (Jurco provided IMs to Attorney A before Attorney A resigned as counsel on September 17, 2010).

[144] Tsingas Test. Tr. 427, 429.

[145] Jurco IMs with City Power employees, Exhibits 136-140.

[146] *E.g.*, Tsingas Test. Tr. 572.

withdrawing from the case and asking to postpone the testimony, citing an unidentified "conflict."[147]

By that afternoon, City Power was no longer using Attorney A as its counsel in this investigation. Instead, City Power soon after hired another law firm, Law Firm Y, and did not tell that firm about the IMs when the firm was advising City Power and Tsingas about their responses to staff's questions.[148] On three different occasions (during his testimony in October 2010, in responses to Data Requests in December 2010, and in responses to Data Requests in November 2011), Tsingas made false statements about IMs designed to prevent staff from learning about them, even though he knew that City Power partner Jurco had saved his IMs and had given copies of them to City Power's original lawyer, Attorney A.

On November 22, 2011, one day after receiving City Power's November 21 responses to data requests, Enforcement sent Law Firm Y an email asking for contact information for Jurco.[149] Later that day (November 22), Tsingas and Law Firm Y exchanged a series of emails.[150] The next day, November 23, 2011, Law Firm Y sent an email to Enforcement withdrawing from representation of City Power. In December 2011, City Power retained new counsel, Law Firm Z, to represent it in this investigation, and relied on that firm until the spring of 2013.

B. Tsingas' False Testimony in October 2010

On October 8, 2010, Tsingas came to the Commission to give investigative testimony. Under oath that day, Tsingas falsely denied knowing whether anyone at City Power saved their instant messages. Early in the testimony, Tsingas was asked the following questions and gave the following answers:[151]

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147 Email from Attorney A to Enforcement Staff (Sept. 17, 2010).

148 Tsingas Test. Tr. 485 (between November 8 and December 6, 2010, Tsingas talked with Law Firm Y about other types of documents, but not about IMs).

149 Email from Thomas Olson to Law Firm Y, Nov. 22, 2011.

150 Privilege Log of Documents Withheld from Respondents' Production on August 14, 2014.

151 Tsingas Test. Tr. 144. Tsingas was then asked: "Is there someone we could ask to find out?" Instead of truthfully answering the question – by saying, "Yes, you could ask Tim Jurco" – Tsingas evaded it: "It would probably be on an individual basis. I know I don't. I think you have to go in there and physically set that up, if I recall correctly." Tsingas Test. Tr. 144.

Q Do you use instant messaging?

A Yeah, there may have been instant messaging.

Q What instant messaging programs do you use at work?

A Just IM, AIM, whatever that thing is.

Q Do you know if City Power keeps records of those IMs?

A I don't think we do.

Tsingas' statement "I don't think we do" was knowingly false and omitted material facts. As discussed above, Tsingas had learned on August 19, 2010 that City Power partner Jurco did keep records of his IMs. And Tsingas had learned, no later than September 17, 2010, that Jurco had sent copies of the IMs to City Power's original counsel, Attorney A.

Later in his testimony, Tsingas was asked the following questions about IMs and gave the following answers:

Q Do you know if Mr. Jurco or your other colleagues have set up their accounts to where it retains instant messages?

A I don't believe they do, you know, but I don't know 100 percent for a fact.

Q You haven't checked with them to find out?

A I don't remember if I checked or not. My understanding is they don't, but I can't remember how I remember that.

Q After receiving Staff's documentation preservation letter, did you make any attempt to see if they have instant messages on their system?

A No. But I did share that with the partners, at least, that this was out there.

This testimony was also knowingly false and misleading and omitted material information. In fact, Tsingas knew that Jurco had "set up his account" through at least August 19, 2010 to "retain instant messages," and had told Jurco he was "an idiot" for doing so. And Tsingas also knew that Jurco had stopped recording IMs on September 17, 2010, when Tsingas told him to do so.

Specifically:

- Tsingas' testimony that he "did not believe" Jurco had set up his account to retain IMs was at best highly misleading, since he knew that Jurco *had* set up his account to retain the IMs that are important to this investigation.
- Tsingas' testimony that he "did not remember if [he] checked or not" with Jurco to find out if he had retained IMs was knowingly false. In fact, Tsingas had learned on August 19, 2010 that Jurco did retain IMs, and knew no later than September 17, 2010 that Jurco had sent copies of the IMs to City Power's first lawyer, Attorney A.
- Tsingas' testimony that his "understanding" was that Jurco did not retain IMs, but that he "[couldn't] remember how I remember that" was knowingly false and misleading. If he meant that Jurco had *never* recorded IMs, his statement was false because he had known since August 19 that Jurco had done so. If he meant that Jurco was *not then* recording IMs, Tsingas did "remember how [he] remember[ed] that," because only three weeks earlier he had chastised Jurco (as "an idiot") for recording his IMs and told him to stop.
- Tsingas' testimony that he "did [not] make any attempt to see if they have instant messages on their system" after receiving staff's August 18 data retention letter was knowingly false and misleading. In fact, Tsingas learned the next morning (August 19) that Jurco had retained instant messages on his system.

C. <u>City Power's False Statements (Through Tsingas) in its December 2010 Responses to Data Requests</u>

On November 8, 2010, staff emailed City Power's new counsel, Law Firm Y, a Second Data Request seeking, among other things, "all communications and documents that relate to Up-To Congestion transactions."[152] This request prompted a flurry of phone

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[152] Second Data Request to City Power Marketing, LLC (Nov. 8, 2010) (Tsingas Test. Exh. 242).

calls, totaling about an hour, between Tsingas and Jurco that afternoon and the next morning.[153]

Although Jurco urged Tsingas to produce the IMs in 2011, Jurco admitted during his 2012 testimony that, in the fall of 2010, he agreed with Tsingas that City Power should not produce the IMs, even though they were responsive to the Data Requests:[154]

> Q. Without getting into attorney/client communications, do you recall becoming aware that there was a second data request?
>
> A. Yeah. Yes.
>
> Q. And do you recall having any communications, not including any attorney/client communications, with Mr. Tsingas about producing or not producing the instant messages in response to this second data request?
>
> A. Yes.
>
> Q. What communications with Mr. Tsingas do you recall?
>
> A. We had a discussion about whether we would put these IM archives in, in with the request.
>
> Q. And was this by telephone, by IM, or in person?
>
> A. Telephone.
>
> Q. And what was the substance of the communication?
>
> A. It was discussing how to handle the issue, whether whether or not we could keep them out for any reason and, I guess, still be compliant with the request.
>
> Q. And did the two of you reach any conclusion?
>
> A. We didn't -- we didn't -- we didn't include them.
>
> Q. Did you decide not to provide them to FERC?
>
> A. Correct.

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[153] Calls Between City Power Landline and Jurco Cell After City Power Receives Second Data Request on Nov. 8, 2010 (Tsingas Test. Exh. 276).

[154] Tsingas Test. Tr. 626 (agreeing that "[d]uring the summer of 2010, [he] exchanged instant messages with Mr. Jurco about Up-To Congestion trading in PJM… ."); *id.* at 634 (agreeing that "the instant messages that you exchanged with Mr. Jurco[,] many of them had to do with Up To Congestion trading in PJM… ."); Jurco Test. 103; *see id.* at 98 (IMs were responsive to Data Requests).

Q. The two of you were in agreement on that?

A. Correct.

On November 8, 2010, Enforcement sent City Power a Second Set of Data Requests, seeking (in Data Request DR 2-2) "all communications and documents that relate to Up-To Congestion transactions." The Data Request specifically mentioned "instant messaging" as one of the types of communications that should be produced.[155]

Tsingas knew that Jurco had responsive IMs and knew that Jurco had provided them to City Power's original counsel, Attorney A. But Tsingas made sure that City Power's new lawyers, at Law Firm Y, did not get a copy of – or learn about – the IMs.[156]

On December 6, 2010, City Power responded to the Second Data Request.[157] In response to the DR 2-2 request for all communications relating to UTC trading, City Power did not produce Tsingas' "EUREKA" IM about round trip trading, his IMs about SOUTHIMP-SOUTHEXP "settl[ing] at zero all the time," his IMs about "losses" trades, his IM about trading for "free money," or a single other instant message. Instead, Tsingas falsely certified under penalty of perjury that City Power's responses (including its response to DR 2-2) were true, complete, and accurate.

D. <u>City Power's False Statements (Through Tsingas) in November 2011 in Response to Staff's Third Data Request</u>

On June 20, 2011, OE served data requests on City Power specifically asking about IMs:

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[155] Second Data Request to City Power Marketing, LLC (Nov. 8, 2010), Definitions and Instructions at 5: "'Communication(s)' includes all verbal and written communications of every kind, including, but not limited to, telephone calls, conferences, electronic mail and correspondence, *instant messaging*, text messaging, and all documents and memoranda concerning the communication."(emphasis added).

[156] Although Tsingas falsely denied that he deliberately withheld the IMs from Law Firm Y, he admits that Law Firm Y never got them. Tsingas Test. Tr. 448 ("Q Do you know whether [Law Firm Y] got a copy of the instant messages from [Attorney A] before December 6, 2010? A Do I know that now or did I know that then? You need to tell me at what point in time. Q Do you know now? *A I do not believe they did*.") (emphasis added).

[157] Jurco Test. 132; City Power Oct. 11, 2013 Response to Office of Enforcement Sept. 20, 2013 Subpoena *Duces Tecum* Bates No. CPM000199 (Tsingas owned 85% of City Power under Operating Agreement in effect starting Oct. 1, 2009).

DR16. If Mr. Tsingas or Mr. Jurco sent or received any instant messages that you cannot now produce in response to Data Request No. 15, please:

a. state what instant message platform(s) (e.g., AIM, Gmail Chat, Google Talk, Yahoo) Mr. Tsingas and Mr. Jurco used during this time period, and what version of the platform(s) they used,

b. describe in detail all efforts to locate Mr. Tsingas' and Mr. Jurco's instant messages, including all efforts to locate such messages using Mr. Jurco's IM account(s) and by searching Mr. Jurco's computer(s);

c. for each relevant time period, describe the settings used by Mr. Tsingas and Mr. Jurco with regard to retention or non-retention of instant messages on each instant message platform either of them used, and produce screen shots showing (i) the current settings and (ii) the platform's instructions concerning retention settings;

d. describe in detail all efforts taken by City Power to prevent destruction of instant messages following receipt of the letter from W. Blair Hopkin dated August 18, 2010, including all efforts to prevent destruction of Mr. Jurco's instant messages; and

e. explain why City Power has not produced a single instant message in response to earlier Data Requests.

By coincidence, later that same day, Jurco arrived in Florida to see Tsingas and his other colleagues.[158] (Because he worked remotely, Jurco flew to Fort Lauderdale regularly to stay in touch with other City Power employees.)

After Jurco arrived in Fort Lauderdale, he and Tsingas went to a restaurant to discuss the data requests.[159] Their discussions about the requests – and about the IMs in particular – continued over the course of the next week. (Later that week, Tsingas took Jurco on a fishing trip to Bimini on Tsingas' yacht, during which they continued their discussion of what to do about the IMs.) Their discussions concluded with texts and a phone call on Monday, June 27, 2011, after Jurco had returned to Kansas City.[160]

Although Jurco had agreed with Tsingas in the fall of 2010 that they would not produce the IMs (even though the IMs were clearly responsive to staff's Data Requests), he now told Tsingas that he wanted to tell the truth and produce the IMs to staff. Tsingas rejected that advice and instead asked his lawyers to negotiate for a halt to discovery while City Power discussed a potential settlement. These facts are shown both by contemporaneous documents and by Tsingas' own testimony.

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158 Tsingas Test. Tr. 508-09.

159 *Id.* at 510.

160 Tsingas Test. Tr. 562-63.

Tsingas testified that his discussions with Jurco about the IMs came to a head on Monday, June 27, 2011, after Jurco had returned to Kansas.[161] Tsingas testified that when they spoke by phone that day, Jurco told Tsingas that he wanted City Power to "come clean."[162] Specifically, Jurco wanted City Power to (a) produce the IMs in response to the pending Data Requests and (b) truthfully admit that Tsingas and Jurco had jointly decided to withhold the IMs the previous fall.[163] As to mechanics, Tsingas testified that Jurco wanted to get the IMs from Attorney A (to whom Jurco had provided the IMs in September 2010) and then produce them to FERC.[164]

In other words, Jurco wanted City Power to respond honestly to the pending Data Requests. Tsingas testified that he was "in [a] state of shock" after Jurco made that request.[165]

In texts after their phone conversations on June 27, Jurco asked Tsingas if he had "made [his] position clear enough for you."[166] Tsingas understood that Jurco was referring to his position that City Power needed to come clean with FERC.[167]

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[161] Tsingas Test. Tr. 563-64.

[162] Tsingas Test. Tr. 560 ("[Jurco] called me up and said, 'No, we['ve] got to come clean.' 'No, we are both going to go to FERC and say that it was our joint ideas not to produce this...'"); *id.* at 565 ("It was his recommendation, not a recommendation, it was his demand that basically we come clean to FERC . . . ."). Tsingas said Jurco made these statements during their phone call(s) on June 27. Tsingas Test. Tr. 562-63.

[163] Tsingas Test. Tr. 568-70. As Tsingas explained, Jurco said that City Power "'need[s] to go to FERC and say that we were both in agreement, that we were going to withhold these IMs and then . . . produce them.'" (One of the Data Requests (DR16(e)) specifically asked City Power to explain why it had not previously produced the IMs.)

[164] In November 2013, Tsingas claimed that Jurco told him in June 2011 (specifically, on June 20, 2011) that Jurco had destroyed his own copy of the IMs. *E.g.*, Tsingas Test. Tr. 558. (Jurco did not destroy the IMs, since he was able to produce them in 2012.) There is no evidence to support this assertion but in any event, (a) Tsingas admits that Jurco saved the IMs and provided them to Attorney A in September 2010, (b) Tsingas admits he had known that since September 2010, and (c) Tsingas' sworn testimony and Data Request responses about what happened in 2010 would still be knowingly false even if Jurco had made the alleged statement to Tsingas in June 2011.

[165] Tsingas Test. Tr. 561.

[166] Texts Between Tsingas and Jurco, Bates No. CPM002385 (Tsingas Test. Exh. 308).

[167] Tsingas Test. Tr. 567.

A few hours later, Tsingas texted Jurco that City Power's lawyers were "negotiating a settlement . . . part of this settlement, if it happens, *will include not doing any more submittals including this last request*."[168] Tsingas also told Jurco that he (Tsingas) would decide these matters himself: "I do not want to discuss this as I am solely taking this on my shoulders."[169]

The strategy that Tsingas described to Jurco in his June 27 text worked, for a time: his lawyers "did arrange for a pause in discovery during settlement discussions."[170] But the discussions did not result in any agreement, and on October 28, 2011, staff asked City Power to respond to the pending requests, including the requests about IMs.[171]

Instead of telling the truth about what had happened with the IMs, Tsingas decided to give false answers to the pending Data Requests to try to prevent staff from learning about the messages. In City Power's November 21, 2011 response,[172] Tsingas repeatedly and falsely swore under oath that there were not then, and never were, any recorded IMs at City Power.

We discuss City Power's (i.e., Tsingas') responses one by one.

First, in response to Data Request 15, City Power said that it had "[n]o instant messages responsive to this request." In response to Data Request 16, asking why City Power was unable to produce IMs, City Power (through Tsingas) gave the following responses:

DR16. If Mr. Tsingas or Mr. Jurco sent or received any instant messages that you cannot now produce in response to Data Request No. 15, please:

a. state what instant message platform(s) (e.g., AIM, Gmail Chat, Google Talk, Yahoo) Mr. Tsingas and Mr. Jurco used during this time period, and what version of the platform(s) they used,

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168 Texts Between Tsingas and Jurco, CPM002385 (Tsingas Test. Exh. 308)(emphasis added).

169 Texts Between Tsingas and Jurco, CPM002385 (Tsingas Test. Exh. 308).

170 Tsingas Test. Tr. 579.

171 Email from Thomas Olson to Law Firm Y (Oct. 28, 2011) (Tsingas Test. Exh. 280).

172 Letter from Attorney B to Thomas Olson, Nov. 21, 2011 (Jurco Test. Exh.104).

RESPONSE:

a. Mr. Tsingas used AIM during that time period. Upon information and belief, Mr. Jurco also used AIM during that time period, but that information cannot be verified insofar as Mr. Jurco is no longer employed with City Power Marketing and the computer that he used during the time period referred to in DR15 is no longer in City Power Marketing's possession.

* * * * * * *

b. describe in detail all efforts to locate Mr. Tsingas' and Mr. Jurco's instant messages, including all efforts to locate such messages using Mr. Jurco's IM account(s) and by searching Mr. Jurco's computer(s);

RESPONSE:

b. City Power Marketing reviewed computer files to determine if instant messages had been saved or otherwise archived on company computers. They were not.

Giving a truthful answer to this question – about "all efforts to locate" the IMs, including on "Mr. Jurco's computers" – would have been simple: with no effort at all, *Jurco located the IMs immediately* on one of his computers after receiving staff's August 18, 2010 document retention letter, and told Tsingas about them roughly 12 hours later. Instead of admitting the truth, Tsingas falsely claimed that City Power had looked for instant messages "on company computers" and had not found any. Tsingas also omitted the material fact that City Power partner Jurco had not only saved his IMs, but had sent a copy of them to City Power's counsel, Attorney A, in September 2010.

c. for each relevant time period, describe the settings used by Mr. Tsingas and Mr. Jurco with regard to retention or non-retention of instant messages on each instant message platform either of them used, and produce screen shots showing (i) the current settings and (ii) the platform's instructions concerning retention settings;

Tsingas knew that Jurco had set his IM account to retain IMs during the relevant time period (the summer of 2010). But Tsingas omitted this material fact and instead described only his own settings (not to retain IMs).

RESPONSE:

c. During the time period referred to in DR15, Mr. Tsingas did not set AIM settings to save or archive instant messages saved or received. Mr. Jurco is no longer with City Power Marketing, but prior requests to Mr. Jurco to produce any responsive instant messages did not reveal any such instant messages. A screenshot of Mr. Tsingas's current AIM settings is attached hereto as CITY000919.

Tsingas then falsely said that "prior requests to Mr. Jurco to produce any responsive instant messages did not reveal any such instant messages." In fact, Jurco had told Tsingas about the IMs on August 19, 2010 and produced the IMs to City Power's counsel, Attorney A, in September 2010. Tsingas' statement to the contrary was intentionally false.

> **d. describe in detail all efforts taken by City Power to prevent destruction of instant messages following receipt of the letter from W. Blair Hopkin dated August 18, 2010, including all efforts to prevent destruction of Mr. Jurco's instant messages; and**

RESPONSE:

> **d. As noted above, upon receipt of Staff's document preservation directive, it was determined that City Power Marketing was not in possession of any responsive instant messages, and therefore no steps were required to prevent destruction of any such messages.**

Again, City Power (*i.e.*, Tsingas) deliberately gave a false answer to staff's request.

The true answer to DR 16(d) was simple: on August 18, 2010, City Power received a letter from staff; *that same evening* City Power partner Jurco found responsive instant messages on his computer; and *the next morning* Tsingas learned that Jurco had done so.

Tsingas assured staff that when City Power received staff's August 18 letter, City Power had "determined" that it "was not in possession of any responsive messages." The evidence shows that this statement was knowingly false, as was Tsingas' assurance that "no steps were required to prevent destruction of any such messages."[173]

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[173] Two years later Tsingas asserted, as a centerpiece of his defense, his supposed belief that Jurco *had* destroyed the IMs as of 2011. *See* note 164 above. That is, Tsingas contends that when he swore to the response to DR 16(d) in November 2011, he believed both (i) that "no steps were required to prevent destruction" of the IMs and that (ii) Jurco had destroyed the IMs.

In 2014, Tsingas testified that although Jurco was a partner in City Power in August 2010, Tsingas understood the term "City Power" in DR 16(e) not to include Jurco as of that time. Tsingas Test. Tr. 883. There is no possible good faith basis for this testimony.

e. explain why City Power has not produced a single instant message in response to earlier Data Requests.

RESPONSE:

e. No instant messages were in the possession of City Power Marketing that were responsive to any prior data request at any time since receipt of the letter from W. Blair Hopkin dated August 18, 2010.

In fact, Tsingas and Jurco had decided in the fall of 2010 not to produce them, even though they were responsive. But instead of explaining that, Tsingas falsely swore that City Power never had any instant messages at any time since August 18, 2010. That statement is false because, as Tsingas knew, City Power partner Jurco had saved his instant messages, confirmed on the evening of August 18 that he had done so, and told Tsingas all of that the next day. It is also false because, as Tsingas knew, Jurco had provided the IMs to City Power's original attorney in connection with the attorney's representation of City Power in this investigation. So the IMs were not only "in the possession of" City Power itself (through its partner Jurco) but had also been "in the possession of" City Power's agent, Attorney A.

In short, Tsingas intentionally gave false, misleading, and omission-filled answers to each subpart of Data Request 16 about instant messages. Tsingas then swore under penalty of perjury that each of his answers was "true, complete, and accurate."

E. City Power's and Tsingas' Effort in Their November 2013 Response to Preliminary Findings to Explain Away Their Earlier False Statements

On September 19, 2013, staff sent a Preliminary Findings letter to City Power and Tsingas. On November 4, 2013, City Power and Tsingas submitted a 45-page response.

Since staff (as Tsingas knew) had now obtained the IMs, Tsingas tried to explain away his earlier false statements with a new set of false statements. In short, Tsingas now claimed that any inaccuracies in his earlier sworn statements about IMs were Jurco's fault. In particular, City Power and Tsingas claimed they were unable to provide accurate information about the IMs in November 2011 because Jurco refused to return his computer, or to provide information about the IMs, between Jurco's resignation (on August 11, 2011) and City Power's response to the Data Requests about IMs on November 21, 2011. Those claims were knowingly false.

In their November 2013 response, for example, City Power and Tsingas claimed they were hamstrung because Jurco "refused to return" his City Power computer.[174] But City Power never asked him to do so.[175] Similarly, Tsingas claims that Jurco "declined to accept" Tsingas' phone calls, but phone records show that Tsingas never called Jurco during this period.[176] City Power and Tsingas also complain that Jurco "failed to reply to any letters or emails from [City Power's] IT personnel and accountants," and that they therefore "did not have any reliable information regarding what became of Mr. Jurco's IMs."[177] But the "letters [and] emails" are irrelevant: they had nothing to do with IMs or Jurco's computer.[178]

IV. **Legal Analysis and Conclusions**

As discussed below, Enforcement staff finds that Respondents manipulated PJM by entering into large volumes of transactions designed to do the opposite of what City Power and Tsingas understood to be the purpose of virtual UTC trading – to eliminate, not try to profit from, spreads – as a pretext to reserve paid transmission and collect MLSA based on trading volume alone. These deceptive and manipulative transactions resulted in City Power and Tsingas collecting millions of dollars that should have gone to other market participants.

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[174] November 2013 Response at 41 (discussing "Mr. Jurco's work computer (which he refused to return to CPM)… ."). The November 2013 Response also states that Jurco "violat[ed]… his partnership agreement" by "fail[ing] to return the computer" to City Power. *Id.* at 40.

[175] Responses to Open Subpoena Items From Administrative Subpoenas Issued by the Federal Energy Regulatory Commission on September 20, 2013, and November 15, 2013, at 4 (Aug. 13, 2014) (response to DR 53(a) (producing no documents in response to request for "[a]ll documents consisting or relating to communications with Mr. Jurco, after his resignation in "the summer of 2011" about "the computer that he had been working from in Kansas City… ."); *see also* Tsingas Test. Tr. 757, 857, 863, 864.

[176] Calls from City Power Landline to Jurco Cell or Landline (Tsingas Test. Exh. 270) at 6 (final call to Jurco from City Power landline was a 32-second call on July 27, 2011, before Jurco's resignation); Phone Calls Between Steve Tsingas' Cell Phone and Tim Jurco's Cell Or Landline Phone (Tsingas Test. Exh. 264) (final Tsingas cell phone call to Jurco was on June 27, 2011).

[177] November 2013 Response at 40.

[178] Tsingas Test. Tr. 856 (letters "had absolutely nothing to do with computers or IMs"); Tsingas Test. Tr. 758; *see id*. ("Q Did [IT head] reach out to Mr. Jurco in connection with instant messages or computers? A I do not believe that [they] reached out in connection to that.").

A. Elements of a Manipulation Claim

In 2005, Congress amended the Federal Power Act (FPA) in relevant part by adding section 222, which states:

> It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy . . . subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.[179]

Pursuant to this statutory mandate, the Commission promulgated the Anti-Manipulation Rule:

> It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission . . . to use or employ any device, scheme or artifice to defraud . . . or . . . to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.[180]

It is unlawful to violate section 222(a) of the FPA, or the Anti-Manipulation Rule, and under section 316A of the FPA, violators "shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues."[181]

The elements of market manipulation are (1) using a fraudulent device, scheme or artifice, or making a material misrepresentation, 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; and (3) in connection with the purchase or sale of electric energy or the transmission of electric energy subject to the jurisdiction of the Commission.[182]

Each of the elements of market manipulation is present here. Staff concludes that Respondents violated the Anti-Manipulation Rule by devising and executing the round trip, SOUTHIMP-SOUTHEXP, and NCMPAIMP-NCMPAEXP trading strategies described above. These UTC trades created the false appearance of arbitraging price

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179 16 U.S.C. § 824v(a) (2012).

180 18 C.F.R. § 1c.2 (2014) (Anti-Manipulation Rule).

181 FPA section 316A, 16 U.S.C. § 825*o*-1.

182 *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 49 (Order No. 670), *order denying reh'g*, 114 FERC ¶ 61,300 (2006).

differentials to deceptively collect MLSA. The evidence shows that City Power and Tsingas conducted these trades to minimize or eliminate the spread component of the UTC transaction and to profit instead on MLSA. (With the NCMPAIMP-NCMPAEXP trades, City Power and Tsingas sought to conceal their intent by doing trades with de minimis non-zero spreads.)

City Power and Tsingas knew from years of experience that UTC spread trading is difficult and requires extensive knowledge, skill, and research. By contrast, City Power's and Tsingas' volume trading was a simple way to make money "for doing nothing": Tsingas simply looked for trades with zero or de minimis spreads during hours when MLSA was likely to be high. And City Power's IMs are filled with acknowledgments that this type of trading, which he knew to be the opposite of spread trading, was a "scam" (or "high volume churn") (or "sleazy") and would be shut down by the Market Monitor once it realized what City Power and others were doing.[183]

1. Market Manipulation is Not Limited to Tariff Violations

As the Commission has explained, its Anti-Manipulation Rule does not require proof of a tariff violation:

> Market manipulation under the Commission's Rule 1c is not limited to tariff violations. That Rule 1c is not so limited is by design. In the wake of Enron's schemes in the CAISO market, the Energy Policy Act of 2005 gave the Commission "broad authority to prohibit manipulation" and "an intentionally broad proscription against all kinds of deception, manipulation, deceit and fraud." Both the breadth of Congress' authorization to the Commission and the breadth of the Anti-Manipulation Rule itself are a response to what courts have long recognized: the impossibility of foreseeing the "myriad means" of misconduct in which market participants may engage. For that reason, as the Commission observed in 2006, "[N]o list of prohibited activities could be all-inclusive." Instead, as Order No. 670 emphasizes, fraud is a question of fact to be determined by all the circumstances of a case, not by a mechanical rule limiting manipulation to tariff violations.

In Re Make-Whole Payments & Related Bidding Strategies, 144 FERC ¶ 61,068, at P 83 (2013) (footnotes omitted).

Similarly, in *Silkman*, the Commission explained that "[a]n entity need not violate a tariff, rule, or regulation to commit fraud. Nor does a finding of fraud require advance

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[183] *See generally* Section II above (quoting emails and testimony from Respondents).

notice specifically prohibiting the conduct concerned."[184] As the Commission explained in *Silkman* (at P 48): "even assuming, *arguendo*, that certain features of [the tariff] . . . left the [program] vulnerable to certain manipulation, that does not excuse the manipulation itself."

2. Market Manipulation Can Occur Through Conduct

In the *In Re Make-Whole Payments* Order, the Commission also explained that actions, and not just words, can be fraudulent or manipulative:

> Conduct, as opposed to a specific false oral or written statement, is sufficient to establish a violation of Rule 1c, which is patterned on the SEC's Rule 10b-5. *See Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc*., 552 U.S. 148, 158 (2008) ("If [the Court of Appeals'] conclusion were read to suggest there must be a specific oral or written statement before there could be liability under § 10(b) or Rule 10b-5, it would be erroneous. Conduct itself can be deceptive, as respondents concede."); *In re Amanat*, Exchange Act Release No. 54,708 (Nov. 3, 2006), *aff'd mem. sub nom. Amanat v. SEC*, 269 Fed. App'x 217 (3d Cir. 2008) (liability based on falsehoods communicated through conduct, namely submission of market data based on sham transactions).
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> *Id*. P 84.

3. False Denials Are Strong Evidence of Intent and Scienter

As the D.C. Circuit has explained, it is a "well-settled principle that false exculpatory statements are evidence—often strong evidence—of guilt." *Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010). Federal courts throughout the country are in agreement on this point.[185]

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[184] *Richard Silkman*, 144 FERC ¶ 61,164, at P 50 (2013) (citations omitted).

[185] *E.g.*, *United States v. Berrios*, 676 F.3d 118, 130 (3d Cir. 2012) ("[F]alse exculpatory statements may be introduced as evidence of the defendant's consciousness of guilt of the underlying charges . . . ."); *United States v. Vu*, 378 F. App'x 908, 909 (11th Cir. 2010) ("[I]t is reasonable for the jury to infer that a defendant's false statement to police demonstrates a consciousness of guilt."); *United States v. Elashyi*, 554 F.3d 480, 495 (5th Cir. 2008) ("[Defendant's] false statements 'provide[ ] persuasive circumstantial evidence of [his] consciousness of guilt.'") (citing *United States v. Diaz-Carreon*, 915 F.2d 951, 955 (5th Cir. 1990)); *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995) ("The false exculpatory statement instruction is aimed at pretrial fabrications, on the theory that the innocent do not fabricate to avoid being accused of crime.").

This point is important here because, as demonstrated in Section II above, Tsingas has made many false exculpatory statements about City Power's volume trading over the course of this case. For the same reasons, Tsingas' effort to conceal the IMs, which provide a minute-by-minute record of his thinking as he placed the trades at issue, is also powerful evidence of City Power's and Tsingas' scienter.

B. City Power's and Tsingas' Trades Were a Scheme, Device, or Artifice

The first element of an Anti-Manipulation offense is using a fraudulent device, scheme or artifice, or making a material misrepresentation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity. Fraud is a question of fact that must be determined based on the particular circumstances of each case.[186] 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."[187] City Power's and Tsingas' volume trades gave the false appearance that City Power was seeking to conduct trades aimed at profiting from spread changes, when in fact the trades were designed to minimize or eliminate spreads to provide a pretext to reserve paid transmission and collect MLSA.

The City Power trades at issue here constituted a manipulative scheme, device, or artifice. *First*, they have all of the characteristics the Commission has identified as hallmarks or indicia of manipulative trading. *Second*, the trades are closely analogous to – indeed, are simply variations of – specific trading practices that the Commission has previously identified and proscribed as manipulation in the past, including schemes executed by Enron and others and wash trading. Finally, Respondents' explanations for, and defenses of, their conduct are unpersuasive.

1. Indicia of Manipulation Present in Respondents' Trading

City Power's volume transactions bear all the hallmarks of manipulation as clarified by recent Commission precedent. In the order assessing penalties against Barclays Bank PLC and certain of its traders for violating the Anti-Manipulation Rule, the Commission stated that certain facts could be indicative of a scheme to manipulate.[188] These indicia include, among others, (1) trading behavior inconsistent with supply and demand; (2) a marked difference in the trader's non-manipulative trading behavior versus the trading patterns of the manipulative scheme; (3) speaking documents that indicate the

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186 Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

187 Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

188 *See generally Barclays Bank PLC, et al.*, 144 FERC ¶ 61,041 (2013) (Barclays).

trader's intent; (4) whether the trades are uneconomic; and (5) failure to give plausible or credible explanations for the uneconomic nature of the trades.[189]

Although all of these indicia need not be present to find market manipulation, they are all present here.

a. Trading Inconsistent with Supply and Demand

First, City Power and Tsingas did not place their volume trades for what they understood to be the purpose of virtual UTC trades: to arbitrage changes in price differences between the Day-Ahead and Real-Time markets. Rather, the trades were designed to falsely appear to be spread trades as a pretext for collecting MLSA based on trading volume. City Power did the trades "not in an attempt to profit from the relationship between the market fundamentals of supply and demand"[190] – *i.e.*, from the anticipated change in prices between the Day-Ahead and Real-Time markets – but rather to collect MLSA and make a reliable profit by reducing spreads to zero (or as close to zero as possible). Indeed, as illustrated by City Power's use of a "low-volatility tool" to choose trading paths, the transactions were designed for the express purpose of eliminating City Power's exposure to price differentials. This type of trading would not occur in the absence of some ulterior purpose – here, diverting MLSA payments from other market participants engaging in legitimate transactions.

b. Marked Difference between Manipulative and Non-Manipulative Trades

Before they engaged in the manipulative trades here, City Power and Tsingas had many years of experience with spread trades using the PJM UTC product. As Tsingas explained many times, City Power's UTC spread trades required extensive (and constantly-updated) research into weather and outage data, comparison of those conditions to past trading days, and experienced judgment about what trades made sense to make. By contrast, City Power's volume trades required nothing of the kind: Tsingas simply needed to identify paths with little or no spreads (or zero *net* spreads, with the round trip trades), and make UTC trades with paid transmission during peak hours as a way to collect large MLSA payments.

Because its volume trades carried virtually zero risk, City Power and Tsingas did much larger volumes of trades on those paths than it did in their spread trades. As discussed above, for example, City Power did its manipulative trades in volumes greater

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189 *Barclays*, 144 FERC ¶ 61,041 at P 32.

190 *Barclays*, 144 FERC ¶ 61,041 at P 2.

than those that Tsingas saw only a few weeks earlier as "going nuts" when done by other traders.

c. Evidence of Intent

Tsingas' own IMs show that City Power's volume trades were aimed not at spreads but, in Tsingas' shorthand, at "the losses." That fact is confirmed by extensive other evidence discussed above, including Tsingas' own IMs, Jurco's candid testimony, and the fact that Tsingas used a "low-volatility tool" to find paths with zero or minimal spreads.

d. Uneconomic Trades

Other than as a vehicle for collecting MLSA, City Power's volume trades made no sense: they were designed *not* to have spread profits, even though the trades would still incur transaction costs (indeed, transaction costs that City Power voluntarily increased by choosing to pay for transmission). Because these were not spread trades at all, the only way they could make a profit was by capturing MLSA based on sheer trading volume.

e. Implausible Explanations

As discussed above, City Power and Tsingas offered a series of implausible (and false explanations for their volume trading. For example, although his own IMs show it is not true, Tsingas claimed in data responses and testimony that he did SOUTHIMP-SOUTHEXP trades because he expected to make money on spreads. Similarly, he claimed that his round trip trades were aimed not at MLSA but at profiting when one leg of the trade "broke," even though he immediately abandoned the NYIS-IMO path when a leg broke and City Power lost about $40,000. (Tsingas implausibly described this as the trade "act[ing] as designed.") In fact, his own IMs show that after his "EUREKA" moment when he realized that round trip trades were an ideal way to collect MLSA, he did those trades for precisely that purpose.

2. City Power's Volume Trading Strategies Were Similar to Enron's Manipulative Death Star Strategy

City Power's and Tsingas' conduct here is at the heartland of conduct that the Commission (and, by analogy, the securities laws) have long found unlawful. Although the use of UTCs in this particular scheme is unprecedented, schemes similar to Respondents' are not.

During (and to some extent precipitating) the Western Energy Crisis of 2000 – 2001, traders for Enron and other entities devised and engaged in an array of trading

schemes designed to game the markets.[191] Among these unlawful schemes were a number of "congestion-related practices," including "Circular Scheduling" (i.e., "Death Star").[192] The effect of these schemes was to deceive the California ISO into awarding the traders congestion relief payments for trades that did not relieve congestion.[193] The Commission condemned as unlawfully manipulative those "gaming practices" even though the trades were not explicitly proscribed by the terms of the applicable tariff, and were executed without affirmative concealment or overt false statements. In so doing, the Commission rejected claims that such practices were legal and that market participants were not adequately on notice that the Commission would deem them illegal. The Commission thus made clear – long before City Power and Tsingas did the trades at issue here – that analogous practices would be unlawful.

In the Circular Scheduling practice, better known as Death Star, traders scheduled a counterflow to receive a congestion relief payment, but also scheduled offsetting transactions. Death Star involved A-to-B and B-to-A schedule pairs, e.g., Lake Mead to California-Oregon Border (COB), paired with COB to Lake Mead.[194] Hence, "[w]ith the same amount of power scheduled back to the point of origin . . . power did not actually flow and congestion was not relieved. Circular Scheduling was profitable as long as the congestion relief payments were greater than the cost of scheduled transmission."[195] Other congestion-related practices similarly profited from deceiving the California ISO's congestion management software into awarding congestion-relief payments even though the net effect of such schedules was a nullity.[196]

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191 *See generally*, Memorandum from Christian Yoder and Stephen Hall to Richard Sanders Re: Traders' Strategies in the California Wholesale Power Markets'/ISO Sanctions (Dec. 6, 2000) (Enron Gaming Memo) available at http://www.ferc.gov/industries/electric/indus-act/wec/enron/12-06-00.pdf (last visited Feb. 20, 2015).

192 *See American Electric Power Service Corporation, et al.*, 103 FERC ¶ 61,345, at P 43 (2003).

193 "According to the [California] ISO rules, market participants received congestion relief payments for relieving flows in the direction of congestion or increasing counterflows in the opposite direction." *Id.* P 41; *see also*, Enron Gaming Memo at 3.

194 Enron Gaming Memo at 4.

195 *American Elect. Power Serv. Corp.*at P 43. Similarly, Respondents' volume UTC trades were profitable as long as the MLSA payments were greater than transactions costs.

196 *Id.* PP 42-44; Final Staff Report on Price Manipulation in Western Markets, *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, Docket No. PA02-2-000, at VI-27 (filed Mar. 26, 2003) (Final Staff Report).

These congestion-related practices were fraudulent and involved deception even though they did not violate any express terms of the then-existing tariff or include explicit false statements.[197] As the Final Staff Report on Price Manipulation in Western Markets noted, the congestion-related gaming practices were "designed to generate payments for relieving transmission congestion by 'fooling' the Cal ISO's computerized congestion management system."[198] For instance, the return leg of the Death Star transactions was scheduled on paths outside of the California ISO's control area, rendering them invisible to the ISO as a practical matter, even though the counterflow schedule involved in the Death Star transactions was "visible" to the ISO's computers and Enron made no explicit, affirmative misrepresentation or false statement in connection with the circular schedule.[199]

The only tariff provisions the congestion-related practices were found to violate were certain Market Monitoring and Information Protocols (MMIPs) prohibiting "gaming" and "anomalous market behavior." Each concept was very generally defined.[200] Nevertheless, the Commission found that the tariff incorporated those general provisions and that the provisions, in turn, proscribed Enron's schemes. The Commission also rejected challenges that the relevant tariff provisions were impermissibly vague with respect to what conduct was prohibited. In this vein, the Commission noted that

> The Enron memoranda [describing the congestion-related practices, among others] cited in the Staff Final Report illustrate the creativity of the various trading strategies it employed to the economic detriment of the market,

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197 The Commission's current Anti-Manipulation Rule bars conduct "that *operates* or *would operate* as a fraud or deceit upon any entity." 18 C.F.R. § 1c.2 (2014) (emphasis added).

198 Final Staff Report at VI-26.

199 *See* Enron Gaming Memo at 5 ("The ISO probably cannot readily detect this [Death Star] practice because the ISO only sees what is happening inside its control area, so it only sees half the picture"), available at http://www.ferc.gov/industries/electric/indus-act/wec/enron/12-06-00.pdf (visited Jul. 14, 2014).

200 "Gaming" was defined, in part, as "taking unfair advantage of the rules and procedures set forth in the . . . [t]ariffs . . . to the detriment of the efficiency of, and of consumers in, the ISO markets." *American Electric Power Service Corporation, et al*., 103 FERC ¶ 61,345, at P 17 (2003) (quoting California ISO MMIP Section 2.1.3). "Anomalous market behavior," in turn, was defined in part as "behavior that departs significantly from the normal behavior in competitive markets…" including, explicitly, "unusual trades or transactions" and "pricing and bidding patterns that are inconsistent with prevailing supply and demand conditions… ." *Id*. P 18 (quoting California ISO MMIP Section 2.1.1).

> other market participants and, ultimately, customers. *Enron (and others) would demand that a regulatory agency have the prescience to include in a rate schedule* **all** *specific misconduct in which a particular market participant could conceivably engage. That standard is unrealistic and would render regulatory agencies impotent to address newly conceived misconduct and allow them only to pursue, to phrase it simply, last year's misconduct – essentially, to continually fight the last war and deny the capability to fight the present or next one.*
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> . . .
>
> [T]he MMIP provided adequate notice to market participants of what conduct was prohibited. The mere fact that the MMIP does not expressly prohibit in so many words specific trading strategies . . . simply means that the Commission did not (as, indeed, it could not) foresee all the myriad means that certain market participants could employ to the detriment of competition; it does not mean that market participants determined to have engaged in Gaming Practices and Partnership Gaming may escape disgorgement of the unjust profits that they gained by their conduct. . . . . It is . . . clear that Enron, the author of these trading strategies, recognized that its trading strategies could have been prohibited by the MMIP and that Enron could be severely sanctioned for the trading strategies, if it were caught. Given this, Enron's (and others') current position that the language of the MMIP does not allow market participants to know what conduct is prohibited is not credible.[201]

Respondents' scheme is similarly proscribed by the Anti-Manipulation Rule. Like Death Star, Respondents' volume trades were designed to falsely appear to PJM to be bona fide spread transactions – and on that basis to make money – when in fact they were shams. Like Death Star, Respondents' volume trades were deceptive and manipulative even though they did not involve any explicit false statements or explicit tariff violations. And in light of the Commission's unambiguous condemnation of and enforcement action against Death Star and similar practices (even aside from the long-standing prohibition of wash trades and other sham transactions, discussed below), Respondents were on notice that like the Death Star trades, their volume trading scheme was improper.

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201 *American Electric Power Service Corporation, et al*., 106 FERC ¶ 61,020, at PP 45, 48 (2004) (bold in original, italics added, citations omitted).

3. City Power's Volume UTC Trades Are Functionally Equivalent to Wash Trades, Which Have Long Been Explicitly Prohibited

Respondents' volume trades were also manipulative because they were functionally equivalent to wash trades, which have long been condemned by the Commission, including when firms engaged in similar schemes during the Western Energy Crisis.

At the time of the Western Energy Crisis in 2000-2001, the Commission had not promulgated any regulations explicitly prohibiting market manipulation. Accordingly, as discussed above, the Commission was able to take action against such manipulative practices, by, among other things, enforcing the broad anti-manipulation provisions of the CAISO and Cal PX tariffs, which prohibited "gaming," and "anomalous market behavior." In the wake of the crisis, the Commission promulgated the Market Behavior Rules to more explicitly prohibit similar misconduct in other markets.[202]

Market Behavior Rule 2 prohibited "[a]ctions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products… ."[203] Among the schemes that the Commission explicitly proscribed was wash trading – a species of sham trading that the Commission described as "pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk and no net change in beneficial ownership."[204] But this description was not rigid or formalistic; the Commission established that this description of wash trading merely furnished an example of a prohibited practice, and it noted that the description was

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202 The Commission's first effort in this regard was its Order Establishing Refund Effective Date and Proposing to Revise Market-Based Rate Tariffs and Authorizations, issued on November 20, 2001 in the matter *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization*, 97 FERC ¶ 61,220 (2001),. The Commission subsequently modified those proposed revisions in view of information brought to light both by comments from industry and from its own investigation of the Western Energy Crisis. In June 2003, the Commission issued an order seeking comment on a new version of those proposed revisions. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization*, 103 FERC ¶ 61,349 (2003). The Market Behavior Rules were ultimately adopted in November 2003. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003) (Order Adopting Market Behavior Rules).

203 Order Adopting Market Behavior Rules at P 35 and Appendix A.

204 *Id.* PP 46, 52 and Appendix A.

intended to capture the "key elements" of a wash trade, rather than to define the practice narrowly.[205]

The Commission expressly rejected arguments that the rule should be construed narrowly to proscribe only specifically identified forms of conduct:

> We will reject commenters' argument that Market Behavior Rule 2 should identify and prohibit only expressly-defined acts of manipulation. For all the reasons discussed above, it is essential and appropriate that we have a prohibition designed to prohibit all forms of manipulative conduct.[206]

The Commission clarified that, with respect to "transactions with economic substance," where "value is exchanged for value," sellers would have the opportunity to demonstrate "that their actions were not designed to distort prices or otherwise manipulate the market."[207] In this context, it noted, however, that the "rates, terms and conditions" of such a transaction must be "disciplined by the competitive forces of the market… ."[208] Finally, although the rule was intentionally broad in scope, it was understood that market participants had been given sufficient and appropriate notice of the type of conduct that had been proscribed. As the Commission stated, "sellers can recognize the difference between actions and strategies that are in furtherance of legitimate profit opportunities… ," and those that are not.[209]

In direct response to the Western Energy Crisis and the "gaming practices" that came to light as a result, Congress passed the Energy Policy Act (EPAct 2005).[210] In relevant part, this statute included provisions that conferred on the Commission specific

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205 *See* Order Adopting Market Behavior Rules at Appendix A("Prohibited actions and transactions *include, but are not limited to* pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk and no net change in beneficial ownership (sometimes called 'wash trades').") (emphasis added); and *id*. at P 53 (identifying the two "key elements" of wash trading as being prearranged to cancel each other out and involving no economic risk). This approach is consistent with how the CFTC has viewed wash trades: "A wash sale is a transaction made without an intent to take a genuine, bona fide position in the market, such as a simultaneous purchase and sale designed to negate each other so that there is no change in financial position." *In re San Diego Gas & Elec. Co*., CFTC No. 10-08, 2010 WL 1638992 (CFTC Apr. 22, 2010) (citing *Reddy v. CFTC*, 191 F.3d 109, 115 (2d Cir. 1999)).

206 Order Adopting Market Behavior Rulesat P 41.

207 *Id.* P 37 and Brownell, Comm'r concurring.

208 *Id.* P 42.

209 *Id.* P 44.

210 Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005).

and broad anti-manipulation authority. In adopting the Anti-Manipulation Rule in Order No. 670, the Commission clarified that the conduct prohibited by Market Behavior Rule 2 would also be equally prohibited under the Anti-Manipulation Rule.[211] When the Commission rescinded Market Behavior Rule 2, it reiterated that the Anti-Manipulation Rule proscribed, among other things, all of the conduct prohibited under Market Behavior Rule 2.[212] In that same Order, it again emphasized that its anti-manipulation authority was broad in scope and could not be defined narrowly because doing so would only reward clever manipulators who invented novel and unforeseen schemes to defeat otherwise well-functioning markets: "fraud is a very fact-specific violation, the permutations of which are limited only by the imagination of the perpetrator. Therefore, no list of prohibited activities could be all-inclusive. The absence of a list of specific prohibited activities does not lessen the reach of the new anti-manipulation rule . . . ."[213]

In short, the Commission's current anti-manipulation authority stems from Congress' decision to arm it with tools adequate to combat the sort of manipulative gaming practices that came to light in the Western Energy Crisis. Those gaming practices, and schemes that are functionally equivalent to those practices, are prohibited under Part 1c.

The evidence shows that City Power's volume trades were functionally equivalent to expressly prohibited practices such as wash trades: City Power did the trades to create the false appearance of bona fide market activity without actually taking a bona fide position in the market. As courts have found, "[t]he essential and identifying characteristic of a 'wash sale' seems to be the intent not to make genuine, bona fide trading transactions."[214] This characterization squarely applies to all of Respondents' volume trades.

As to the minor spread gains that (by chance) City Power saw on the NCMPAIMP-NCMPAEXP trades (which were dwarfed by transaction costs), the

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211 *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 59 (2006).

212 *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, at P 24 (2006) (citing Order No. 670at P 59) (MBR Rescission Order).

213 MBR Rescission Order at P 24. Courts have similarly found that the 1934 Exchange Act's anti-manipulation provisions are intended to give effect "to the realization that an honest securities market depended on more than the exclusion of the cruder forms of lying, such as wash sales, matched orders, and the like." *Rosenberg v. Hano*, 121 F.2d 818, 820 (3d Cir. 1941).

214 *Sundheimer v. CFTC*, 688 F.2d 150, 151 (2d Cir. 1982) (citing *CFTC v. Savage*, 611 F.2d 270, 284 (9th Cir. 1979) (quoting *In re Jean Goldwurm*, 7 Agric. Dec. 265, 274 (1948)).

Commission has never indicated that it is essential to a wash trade that the transaction not be profitable, nor has the Commission ever insisted that wash trades be executed to move prices. Rather, the Commission has made clear that "profitability is not determinative on the question of manipulation and does not inoculate trading from any potential manipulation claim,"[215] and that trades need not have been executed for the purpose of moving market prices to constitute wash trades.[216] (Of course, here City Power and Tsingas chose NCMPAIMP-NCMPAEXP not to make money from widening spreads but because its de minimis spread changes made Respondents' goal – minimizing rather than profiting from spread changes – less visible.)

Nor is it relevant that City Power's volume trades entailed some non-zero risk. Respondents do not and could not contend that wash or wash-like trades must be absolutely free from all risk whatsoever.[217] Mere theoretical risk is not enough to evade the prohibition against "wash" trades.[218] Moreover, any risks that City Power incurred – such as the "risk" that MLSA payments would not exceed transaction costs on a sham

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215 *Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056, at P 20 (2013), quoted at *Barclays*, 144 FERC ¶ 61,041 at P 43; *see also Intertie Bidding in the California Independent System Operator's Supplemental Energy Market*, 112 FERC ¶ 61,333, at 62,481 (2005) ("profit maximization alone does not constitute a legitimate business purpose."); accord, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at PP 37-38 (2003).

216 *See* Order Adopting Market Behavior Rules, 105 FERC ¶ 61,218 at P 58 (declining to require that wash trades be executed for a specific purpose and declaring instead that, "we know of no legitimate business purpose attributable to such behavior."). The Commodity Futures Trading Commission has similarly recognized that impermissible wash trades may be executed for purposes other than moving market prices. *See Wilson v. CFTC*, 322 F.3d 555 (8th Cir. 2003) (wash trades executed to shift profits and losses for accounting purposes); *Sundheimer v. CFTC*, 688 F.2d 150 (2d Cir. 1982) (wash trades employed to obtain illegal tax benefits).

217 For example, matched stock trades intended to cancel one another out might not do so if prices changed between the time the first and the second order were executed.

218 Precedent from both CFTC and SEC supports this. *See, e.g.*, *Piasio v. CFTC*, 54 Fed. App'x 702, 705 (2d Cir. 2002) ("Under the CFTC's precedent, a wash sale is one in which market risk is reduced 'to a level that has no practical impact on the transaction at issue,' and in which the customer has 'the intent not to make a genuine, bona fide trading transaction.'"). The SEC has expressed similar views. *See* Short Sales, 69 Fed. Reg. 48008-01, at 48021 (Aug. 6, 2004) (characterizing a species of "sham transactions" as involving "no legitimate economic purpose or substance to the contemporaneous purchase and sale, no genuine change in beneficial ownership, *and/or little or no market risk*… .") (emphasis added) (internal citation omitted).

volume trade – are not the kind of risk (namely, failure to achieve favorable spread changes) that UTC trades are designed to incur.

In sum, City Power's volume trades were the functional equivalent of wash trades: while superficially appearing to be spread trades, they were designed to be the opposite – trades with spreads as small as possible – as a pretext to reserve large volumes of paid transmission and therefore collect MLSA that would otherwise go to market participants doing legitimate transactions.

To address novel schemes and novel variations of known schemes, the Commission gave itself flexibility in defining prohibited manipulative behavior under the Anti-Manipulation Rule. The Commission has long understood that it "oversee[s] a dynamic and evolving market where addressing yesterday's concerns may not address tomorrow's,"[219] so to effectively deter manipulative conduct, it must be able to "address newly conceived misconduct," or else it will be forced "to continually fight the *last* war . . . [without] the capability to fight the present or next one."[220]

In other words, there is no need to find that City Power's volume trades were technically "wash trades" to be unlawful: a scheme to capture MLSA by creating the false appearance of bona fide market activity is unlawful and is prohibited by the Commission's Anti-Manipulation Rule.

One analogous SEC precedent is *In re Amanat*,[221] which the Commission has cited in prior orders.[222] In *Amanat*, the SEC, affirmed by the Third Circuit, determined that it is manipulative under Rule 10b-5 to execute sham trades designed to avoid the effects of price changes due to market forces. *Amanat* involved a trader seeking to capitalize on a program in which a market data firm paid NASDAQ and its market participants who engaged in high-volume trading. In order to ensure he satisfied the minimum volume of trading required to be paid by the market data firm, Amanat conducted thousands of sham trades within a few days employing a computer program that automatically bought and sold the same securities within a very short time period. These trades netted to zero sales

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219 Order Adopting Market Behavior Rules, 105 FERC ¶ 61,218 (2003) at P 39.

220 *American Electric Power Service Corporation, et al*., 106 FERC ¶ 61,020, at P 45 (2004) (emphasis in original); *accord*, Order Adopting Market Behavior Rules, *supra*; Order No. 670.

221 *In re Amanat*, 89 SEC Docket 672, Admin. Proc. File No. 3-11813, 2006 WL 3199181, at **1-7 (SEC Nov. 3, 2006), *aff'd mem. sub nom. Amanat v. SEC*, 269 Fed. App'x 217 (3d Cir. 2008) (footnotes omitted).

222 *See In re PJM Up-To Congestion Transactions*, 142 FERC ¶ 61,088, at n.1 (2013); *see also In re Make Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 84 (2013).

and acquisitions, but NASDAQ paid Amanat based on the trade volume. The SEC held that Amanat had committed fraud within the meaning of Rule 10b-5 through this conduct.[223]

Similar in relevant ways to *Amanat*, City Power designed their sham UTC transactions to create the false appearance of bona fide trades, but in fact they were designed to neutralize (as much as possible) their exposure to market prices and profit simply from ramped-up trading volume. In *Amanat*, the trader received a monetary payment for his inauthentic trades that lacked independent value. The SEC found deceptive conduct based on an implicit representation that the transactions were bona fide.[224]

Like the trader in *Amanat*, City Power and Tsingas designed their volume trades to "wash" completely (or, to "fly under the radar," almost completely), returns or losses due to changes in the price spread of each UTC transaction in the pair. By making the trades, City Power and Tsingas implicitly signaled to the market that they did so for the sake of its potential profit from market price movements, but their real purpose was the opposite: to insulate his trades from the effects of price changes. And, as in *Amanat*, City Power and Tsingas had an ulterior purpose for their manipulative trades: just as the trader in *Amanat* increased his trade volume in order to reap payments from the exchange, City Power and Tsingas traded large volumes of deceptive UTC transactions to reap large MLSA payments.

4. Conclusion: Respondents' Volume Trades Were a Manipulative Scheme

Respondents' volume trades bear all the indicia of a manipulative scheme: the transactions made no sense as spread trades; they were insulated from and undisciplined by market forces (which Tsingas understood were at the heart of real spread trading); and they differed sharply from City Power's non-manipulative trades. They were intended to – and did – deceive PJM. Like Enron's "Death Star" and other notorious trading strategies, the trades captured millions of dollars through that deception. Finally, City Power's volume trades were functionally equivalent to wash trades – they are simply a variation of that practice employing a novel product – and the Commission long ago identified wash trading as a prohibited manipulative strategy.

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223 *Amanat*, 2006 WL 3199181, at **7-10.

224 *Amanat*, 2006 WL 3199181, at *7. *See also Stoneridge Investment Partners v. Scientific-Atlanta, Inc*., 552 U.S. 148, 158 (2008) ("If [the appellate court's] conclusion were read to suggest there must be a specific oral or written statement before there could be liability under § 10(b) or Rule 10b-5, it would be erroneous. Conduct itself can be deceptive, as respondents concede.").

C. City Power and Tsingas Had Scienter

Scienter is an element of manipulation. The Commission recently explained that, "[f]or purposes of establishing a violation, scienter requires knowing, intentional, or reckless misconduct, as opposed to mere negligence."[225] The scienter element is satisfied here, because, as the evidence demonstrates, City Power and Tsingas intentionally implemented the scheme to make unjust profits for themselves. Their knowledge that they were deceiving the PJM market to obtain improper MLSA payments is reflected in dozens of IMs quoted above, in City Power's and Tsingas' condemnations of volume trading in Commission filings and testimony, and in Tsingas' (false) insistence that he never engaged in volume trading.

D. The Commission Has Jurisdiction Over Respondents' Volume Trades

City Power's and Tsingas' manipulative UTC transactions are within the Commission's FPA jurisdiction for at least two reasons. First, the Commission has well-established authority to regulate non-physical transactions, such as UTC trades in PJM, because virtual trades have the potential to affect the price (and transmission) of physical electricity.[226] Second, the Commission has jurisdiction over City Power's and Tsingas' UTC trades based on their reservation and purchase of transmission on the OASIS system.

As the Commission has explained, virtual bidding is "integral" to the sound operation of the wholesale markets of which they are a feature, and is a "substitute for bids for physical power."[227] In rejecting a direct challenge to the Commission's jurisdiction over convergence bidding (the California ISO's term for virtual trading), the Commission explained:

> Section 205 of the Federal Power Act gives the Commission the authority and responsibility to ensure that rates for jurisdictional power sales are just and reasonable. The Commission also has jurisdiction over practices that

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225 *Barclays*, 144 FERC ¶ 61,041 at P 62.

226 *E.g.*, *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 239 (D.C. Cir. 2013) ("[virtual trades] *contribute to the fluctuation of the market price*, which in turn influences whether load-serving entities (the technical name for market participants who actually traffic in electricity) will purchase electricity at a given time."); *California Independent System Operator Corp*., 110 FERC ¶ 61,041, at 61,135 (2005) ("since convergence [*i.e.*, virtual] bidding affects the market clearing price for wholesale power by determining, in conjunction with other bids, the unit that sets the market clearing price, the Commission has statutory authority over this type of bidding to ensure that the rates it produces are just and reasonable").

227 *California Independent System Operator Corp*., 108 FERC ¶ 61,254, at P 74 (2004).

> affect those rates. Since convergence bidding affects the market clearing price for wholesale power by determining, in conjunction with other bids, the unit that sets the market clearing price, the Commission has statutory authority over this type of bidding to ensure that the rates it produces are just and reasonable.[228]

Even if UTCs were not themselves jurisdictional (which they are, as discussed above), the Commission would have jurisdiction over them because they are "in connection with" jurisdictional transactions within the meaning of Section 222 of the FPA.[229] As the Commission has explained, its anti-manipulation authority reaches even non-jurisdictional transactions in circumstances like those present here:

> [A]ny entity engaging in a non-jurisdictional transaction through a Commission-regulated RTO/ISO market, 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 and, therefore, would be in violation of the Final Rule [adopting Part 1c].[230]

Since UTCs are created by a Commission-approved tariff and traded through a Commission-regulated RTO market, and since they have the potential to affect the price of jurisdictional transactions, the Commission has anti-manipulation authority with respect to the trading of UTCs.

In addition, the transmission reservation component of the City Power UTC transactions at issue here is by itself enough to bring them within Commission jurisdiction. The Commission's jurisdiction over transmission is extremely broad.[231] At the time of the transactions at issue in this proceeding, all UTCs were required by the

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228 *California Independent System Operator Corp*., 110 FERC ¶ 61,041, at 61,135 (2005) (footnote omitted).

229 *See* 16 U.S.C. § 824v(a) ("It shall be unlawful for any entity . . . directly or indirectly, to use or employ, *in connection with* the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . .") (emphasis added).

230 Order No. 670at P 22.

231 *See New York v. FERC*, 535 U.S. 1 (2002) (FERC has jurisdiction over the entire transmission grid, not merely transmissions at wholesale in interstate commerce).

PJM Operating Agreement to be associated with a reservation for transmission service.[232] PJM explained that "this transmission service requirement . . . served as the physical link between the Day-ahead Energy Market and the Real-time Energy Market transactions."[233] This physical link had potential consequences for physical transmission even if the market participant reserving it elected ultimately not to use that transmission reservation to flow electric energy, in that it reduced (even if temporarily) the amount of transmission capacity available for all transactions, including physical ones. In light of the Commission's expansive jurisdiction over transmission, the impact of City Power's and Tsingas' trading on transmission brings UTCs within that jurisdiction.

In sum, UTC trading is jurisdictional both because of its potential impact on physical transactions and (during the summer of 2010) because of its impact on jurisdictional transmission services.

E. Defenses

1. City Power's Claim that the Commission Endorsed Volume UTC Trading

City Power and Tsingas contend that in the *Black Oak* proceeding, the Commission approved the volume trading that Respondents did in July 2010. That contention is incorrect.

Respondents do not and cannot point to any statement by the Commission endorsing volume trading to collect MLSA. When the Commission discussed volume trading in 2008, in connection with a different proposal about how to allocate MLSA (namely, distribution to all virtual trades), it stated that it did not want PJM to pay virtual traders based on pure trading volume. Instead, the Commission stated in that Order that it sought "to create proper pricing signals so that arbitrage is profitable only when it reflects real price differentials between Day-Ahead and Real-Time markets."[234] When the Commission approved a very different distribution method (based on paid

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[232] PJM Operating Agreement Schedule 1, Section 1.10.1(b), Fourth Revised Sheet No. 355 (superseded, Sept. 17, 2010).

[233] Submission of Proposed Revisions to PJM Operating Agreement and Attachment K – Appendix to PJM OATT, *PJM Interconnection, L.L.C.*, Docket No. ER10-2280-000, at 8 (filed Aug. 18, 2010) (PJM Proposed Revisions).

[234] Order Denying Complaint, *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208, at P 44 (2008). As discussed above, the Commission allows virtual transactions in ISOs and RTOs because, if done legitimately, they may provide benefits such as price convergence. *ISO New England, Inc.*, 113 FERC ¶ 61,055, at P 30 (2005). Volume trading aimed not at arbitrage but at MLSA provides none of these benefits.

transmission MWhs) in September 2009, it did not have occasion to repeat that statement, because no party raised any issue about volume trading in connection with the new distribution method.[235] But nothing the Commission said or did suggests that it approved of volume trading as a way to collect MLSA with the new tariff rules that went into effect in September 2009.

The Commission need not find that the September 2009 Order specifically condemned volume trading to find that Respondents engaged in market manipulation. The unlawfulness of City Power's and Tsingas' volume trades is plain based on long-standing legal principles, including the Commission's prohibition of wash trading (incorporated by reference into the Anti-Manipulation Rule), the purposes of virtual trading (including UTCs) in ISOs, the Commission's determination that similarly abusive trading in CAISO was manipulative in its 2003 Gaming Order, and Order 670's recognition that the Commission must be flexible in applying its Anti-Manipulation Rule to new types of schemes.

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[235] In the *Black Oak* proceeding, the Commission made clear that its "determination here is based solely on the record in this case and the justification PJM has given for its allocation method." *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,024, at P 41 (2010) (emphasis added).

2. **Fair Notice**

The fair notice doctrine generally prohibits the government from imposing civil penalties or sanctions without first providing fair notice to the regulatory public of what conduct is proscribed.[236] The Commission has previously explained that, with respect to fair notice, "regulations will be found to satisfy due process as long as they are 'sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.'"[237]

As discussed in greater detail above, a reasonably prudent person, familiar with the conditions the Commission's Anti-Manipulation Rule was meant to address and the objectives it is meant to achieve, received "fair warning of what the regulations require" in light of the Commission's long history of viewing similar trading schemes and practices as manipulative.

That City Power and Tsingas had fair notice that their volume trading was deceptive and fraudulent is clear from the record. Among many examples:

- The IMs exchanged by Tsingas and Jurco during the period when they did the trades are filled with acknowledgments of the deceptive nature of volume trading: the traders described volume trades as a "scam," as "free money," as "nuts" if they still got MLSA, as "sleazy," as "great ammo for [the Market Monitor," as "disgusting," as demonstrating a "fuck everybody as long as I get paid" mentality, as a "sin," as "not trading" but "playing the rules," as "high volume churn," and as something the Market Monitor "could have ripped into" Tsingas for doing.
- In his testimony, Tsingas condemned volume trading, and (because he knows it is fraudulent) falsely denied that he had done it.

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236 *See generally* Albert C. Lin, *Refining Fair Notice Doctrine: What Notice Is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991 (2003). It is unclear whether the fair notice doctrine, in the regulatory context, derives from the Constitution or from the Administrative Procedures Act. *Id*. at 998-1001.

237 *Moussa I. Kourouma, d/b/a Quntum Energy LLC*, 135 FERC ¶ 61,245, at P 34 & n.66 (2011), quoting *Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Review* Comm'n, 108 F.3d 358, 362 (D.C. Cir. 1997); *see also Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999), citing *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1083-84 (10th Cir. 1998); *Stillwater Mining Co. v. Fed. Mine Safety & Health Review Comm'n*, 142 F.3d 1179, 1182 (9th Cir. 1998).

- In two filings in September 2010, City Power condemned volume trading, which it described in one of the filings as an "unpermitted trading pattern[]."
- Through his coverup of key documents showing his actual intent, Tsingas showed through his actions that he knew what he was doing was unlawful.

F. Individual Liability

In his October 27, 2014 Response to staff's 1b.19 letter ("October 2014 Response"), Tsingas contends that the Commission lacks statutory authority to penalize individuals like him. That contention is incorrect. The Commission has repeatedly concluded that its statutory anti-manipulation authority extends to individuals like Tsingas. In Order No. 670, the Commission explained:

> "Any entity" is a deliberately inclusive term. Congress could have used the existing defined terms in the NGA and FPA of "person," "natural-gas company," or "electric utility," but instead chose to use a broader term without providing a specific definition. Thus the Commission interprets "any entity" to include any person or form of organization, regardless of its legal status, function, or activities.[238]

The Commission has repeatedly applied this principle in enforcement proceedings against individuals. In 2013, for example, the Commission held:

> We find that 18 C.F.R. § 1c.2 reaches Dr. Silkman's conduct in this case and that the Commission has jurisdiction over Dr. Silkman [an individual] for purposes of enforcing 1c.2. Section 1c.2 makes it unlawful for "any entity, directly or indirectly" to engage in fraudulent activities "in connection with" a transaction subject to the Commission's jurisdiction. The phrase "any entity" is broad, and applies to any person such as Dr. Silkman who had both direct and indirect involvement in, and profited in connection with [manipulative jurisdictional transactions].[239]

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[238] Order No. 670at P 18 (citations omitted); *see also City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) ("any entity . . . may include a natural person").

[239] *Richard Silkman*, 144 FERC ¶ 61,164, at P 73 (2013) (internal citations omitted). Review of this Civil Penalty Assessment order is pending in federal district court for the District of Massachusetts in No. 13-CV-13054. *See also* Order Assessing Civil Penalties, *Barclays Bank PLC*, 144 FERC ¶ 61,041, at P 113 (2013).

G. City Power, Through Tsingas, Violated 18 C.F.R. § 35.41(d)

Section 35.41(b) of the Commission's regulations, 18 C.F.R. § 35.41(b) (2012), titled "Market Behavior Rules," states in relevant part:

> (b) Communications. A Seller[240] must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.

1. City Power is a "Seller"

City Power qualifies as a "Seller" under Section 35.41(b) because it has authorization to engage in sales for resale of electric energy, capacity and ancillary services at market-based rates ("MBR authority").

2. City Power and Tsingas Made False and Misleading Statements and Material Omissions in Communications with Commission Staff

City Power (through Tsingas) violated Section 35.41(b)'s requirement to "provide accurate and factual information and not submit false or misleading information, or omit material information" in communications with Commission staff. As discussed above, City Power (through Tsingas) made many false and misleading statements and material omissions to cover up the existence of hundreds of pages of responsive instant messages, and repeatedly and falsely denied, under oath, that any such IMs existed. City Power's and Tsingas' false and misleading statements and omissions were intended to prevent Enforcement staff from understanding City Power's bidding schemes and to obstruct this investigation.

Staff concludes that City Power did not exercise due diligence to prevent any of the false and misleading statements and material omissions described above. The only effort that would have been required to comply with Section 35.41(b) would have been for Tsingas to provide truthful information within his knowledge. Instead, Tsingas' false and misleading statements and material omissions on behalf of City Power were knowing, intentional, and deliberate, and occurred over a period of years.

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[240] The term "*Seller* means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act." 18 C.F.R. § 35.36(1).

3. Section 35.41(b) Applies to City Power

In their October 2014 Response, City Power and Tsingas argue that despite the clarity of its plain language, Section 35.41(b) "should not" apply to City Power here.[241] In particular, Respondents contend that Section 35.41(b) should apply to entities with MBR only if they have *actually used* that authority by doing physical transactions.[242] And they say that principle should exonerate City Power, which, they state, "*has never exercised its Market-Based Rate Authority* . . . on these *or any other* . . . transactions."[243] That is, Respondents tell staff (and the Commission) in their October 2014 Response that City Power has never done physical transactions.

That statement is not correct. In October 2010, Tsingas testified exactly to the contrary:

> Q Just can you give me a general broad picture of what City Power does?
>
> A We try to make money, but it doesn't always work. We actually – we do, I guess, virtual trades in New York ISO, MISO, and PJM. We do FTRs in MISO and PJM. We do, I guess, up-to congestion trades, even though it's really a part of virtual, in just PJM. I'm trying to think. *We also have done and are trying to do more of physical power trades between the ISOs.*[244]
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> * * * *
>
> Q Does City Power do FTRs, virtuals, and physical transactions as well?
>
> A *Yes*.[245]

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[241] October 2014 Response at 20-22. Respondents do not say that the Rule "does not" apply.

[242] October 2014 Response at 21 ("As it stands, *nothing* in the Commission's various orders constitutes a fair warning that a 'Seller' – **never having actually engaged in sales for resale of electric energy, capacity, or ancillary services at market-based rates –** will be penalized for inaccuracies made in response to Enforcement subpoenas and data requests . . . .") (italics in original; bold added).

[243] October 2014 Response at 20 (emphasis added).

[244] Tsingas Test. Tr. 36 (emphasis added).

[245] Tsingas Test. Tr. 45 (emphasis added); *see also id*. at 47 (City Power's physical trading is "more or less PJM to MISO or PJM to New York or something like that"); *id*. at 47 ("Q Is there a correlation in your trading between FTRs and virtuals or your physical trading? A Typically not. We try not to have a correlation.").

Since the factual premise (no physical trading) of City Power's argument is not correct, there is no need to address City Power's theory that entities with MBR authority that have not done physical trades can intentionally make false and misleading statements to the Commission, staff, ISOs, and Market Monitors without violating Section 35.41(b).

In any event, City Power's proposed narrowing of Section 35.41(b) cannot be squared with the plain language of the Commission's regulations. Section 35.36(a) of the Commission's rules defines the "Seller[s]" subject to Section 35.41(b) as "any person that *has authorization* to or *seeks authorization* to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act." 18 C.F.R. § 35.36(a)(1)(emphasis added). That is, the prohibition on false and misleading statements and material omissions in communications with the Commission and certain other audiences is triggered by application for (or receipt of) MBR authority, not by physical trading under that authority.[246]

In short, in this case, the Commission should, as it has consistently done in the past, enforce Section 35.41(b) as it was written, not as City Power would rewrite it to escape liability for its false and misleading statements and material omissions in communications with staff.

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[246] *Kourouma v. FERC*, 723 F.3d 274 (D.C. Cir. 2013). City Power also briefly suggests that Section 35.41(b) might apply only to communications *about* trades for which MBR authority is required." October 2014 Response at 20. That contention is incorrect. In *Kourouma*, for example, a would-be market participant who never received MBR authority – and obviously never conducted any physical transactions under MBR authority – was found to have violated Section 35.41(b).

H. Liability

The Commission has two means of imposing monetary remedies in response to a violation of the Anti-Manipulation Rule. The Commission can – and generally does – order disgorgement of unjust profits pursuant to its plenary authority in Section 309 of the FPA, and it can order the imposition of civil penalties pursuant to its civil penalty authority in Section 316A of the FPA. Both approaches are appropriate here, as Respondents were unjustly enriched by their scheme and because "civil penalties are an important tool to achieve compliance."[247]

The penalties recommended below are well within the Commission's statutory authority to impose penalties of up to $1 million per day per violation.[248] The Commission's longstanding practice in assessing penalties is to focus on the two statutorily-mandated factors: (1) seriousness of the violation and (2) efforts to remedy the violation.[249] Here, the violations were serious and, far from trying to remedy the violation, City Power and Tsingas persisted in their conduct until PJM's Market Monitor asked them to stop it.[250] Respondents not only improperly collected millions of dollars from PJM, where the money would have been allocated to bona fide transactions, but also created risks to the integrity of the Day-Ahead market because the scheme had the potential both to affect Day-Ahead prices and dispatch and to crowd out the efforts of other market participants to schedule transmission for their legitimate transactions.

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[247] *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 (2010) (Revised Policy Statement on Penalty Guidelines) at P 112 *and see id.* at P 216 ("The Commission has always required disgorgement in addition to the assessment of civil penalties.")

[248] FPA Section 316A, 16 U.S.C. § 825*o*-1(b). Courts will uphold even "severe" sanctions within statutory limits. *See Sundheimer v. CFTC*, 688 F.2d 150, 153 (2d Cir. 1982). Given that City Power and Tsingas executed manipulative round trip UTC trades for most of July 2010, at $1 million on per day of violations (to say nothing of the number of specific violations on those days), the statutory limits for civil penalties are well above those proposed here.

[249] Revised Policy Statement on Penalty Guidelines, 132 FERC ¶ 61,216, at P 16 (2010); *Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156, at P 51 (2008) (Revised Policy Statement on Enforcement) .

[250] *See* Section IV.B.2-3 (noting the role similar manipulative activities played in exacerbating the market dysfunctions precipitating the Western Energy Crisis); *see also In re San Diego Gas & Elec. Co.*, Comm. Fut. L. Rep. (CCH) ¶ 31,549, 2010 WL 1638992 (CFTC Apr. 22, 2010) ("[w]ash sales are 'grave' violations, even in the absence of customer harm or appreciable market effect") (*citing In re Piasio*, Comm. Fut. L. Rep. (CCH) ¶ 28,276, at 50,691 (CFTC Sep. 29, 2000), *aff'd sub nom. Wilson v. CFTC*, 322 F.3d 555, 559 (8th Cir. 2003).

Respondents' scheme to intentionally defraud the PJM market persisted for weeks, involved the reservation of more than a million MWh's of transmission during July 2010 alone, and resulted in the misallocation of over $2 million in MLSA payments. As detailed above, Respondents' scheme was manipulative and deceitful. They perpetrated a fraud on the nation's largest organized wholesale energy market in violation of section 1c.2 of the Commission's regulations. Tsingas intentionally designed the scheme to deceive PJM and then covered up the existence of documents showing the intent behind his trades.

In sum, Respondents' conduct warrants the imposition of a substantial financial penalty to create appropriate deterrence for other market participants who might otherwise consider engaging in similarly manipulative gaming of RTO markets or similar obstruction of Commission investigations.

I. Disgorgement

Where an entity has committed a violation resulting in pecuniary gain, the Commission directs disgorgement of the full amount of the gain plus interest.[251] Through its manipulative volume trading scheme, City Power received $1,278,358 in unjust profits after paying transaction costs. Staff recommends that the Commission order City Power to disgorge that amount, with interest, and hold City Power and Tsingas jointly and severally liable for doing so.

J. Civil Penalty

Section 2B1.1 of the Commission's Penalty Guidelines apply to City Power, a corporate entity. City Power's manipulative trades exceeded 100,000 MWh, yielded more than $2 million in improper MLSA payments and nearly $1.3 million in unjust profits after transaction costs. City Power (through Tsingas) obstructed the investigation by intentionally hiding damaging documents and deliberately making false statements over a period of years. Applying the Penalty Guidelines, therefore, if Tsingas were not the firm's sole owner, staff would recommend a penalty of $15 million against City Power.

The Penalty Guidelines do not apply to individuals such as Tsingas. In the particular circumstances of this case, and given Tsingas' sole ownership of City Power, we recommend that the Commission impose a penalty of $14 million on City Power and a penalty of $1 million on Tsingas.

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[251] *See* Revised Penalty Guidelines at §1B.1(a); Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 43 ("Requiring disgorgement is consistent with long-standing Commission practice . . . and the practice of other enforcement agencies . . .") (citations omitted).

Staff recommends that the Commission make City Power and Tsingas jointly and severally liable for any civil penalty against City Power. Tsingas personally conceived and executed the manipulative trades at issue here, personally profited (as 85% owner at the time) by nearly $1.1 million from the trades, and personally obstructed this investigation.[252]

V. Conclusion

For the reasons discussed above, Enforcement staff recommends that the Commission direct Respondents to show cause why they have not violated section 1c.2 of the Commission's regulations, which prohibits the manipulation of markets in wholesale electricity, and direct City Power to show cause why it has not violated 18 C.F.R. § 35.41(b). Enforcement staff further recommends the Commission direct City Power to show cause why it should not disgorge $1,278,358 in unjust profits, and direct City Power and Tsingas to show cause why they should not pay penalties of $14 million and $1 million, respectively. Finally, Enforcement staff recommends that the Commission hold City Power and Tsingas jointly and severally liable for both disgorgement and penalties.

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[252] Joint and several liability is crucial for practical reasons: absent that provision, Tsingas would have the ability to make a civil penalty against City Power a nullity, since he is the sole owner of City Power and can pull funds out of (or shut down) the company at will. Tsingas Test. Tr. 701-03. Under settled law, the Commission has the power under these circumstances to look past corporate form when doing so is in the public interest. *See Capital Tel. Co., Inc. v. FCC*, 498 F.2d 734, 738 (D.C. Cir.1974) ("'[t]he courts have consistently recognized that a corporate entity may be disregarded in the interest of public convenience, fairness and equity . . . . [W]hen the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.'") (quoting *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905)); *see also Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981) (following *Capital Tel. Co.*); *United States v. Emor*, 850 F. Supp. 2d 176, 204 (D.D.C. 2012) (same).

The Commission has applied this same principle. *E.g.*, *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy & Ancillary Services*, 127 FERC ¶ 61,269, at 62,309-10 (2009) ("The Commission's policy for addressing affiliate transactions and the authority of the Commission to disregard corporate forms when necessary to fulfill its statutory obligations are well documented. . . Accordingly, the Commission may regard two entities as one when necessary to meet a statutory goal."); *Town of Highlands, N.C. v. Nantahala Power & Light Co.*, 37 FERC ¶ 61,149 (1986) (affirming ALJ decision to disregard distinction between firm and its upstream owner, and noting that "an agency may disregard the corporate form in the interest of public convenience, fairness, or equity").