

125 FERC ¶ 61,387  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Suedeem G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Energy Transfer Partners, L.P., *et al.*

Docket No. IN06-3-007

ORDER DENYING REQUEST FOR RECONSIDERATION

(Issued December 30, 2008)

1. This order addresses the McGraw-Hill Companies, Inc.'s (McGraw-Hill) request for rehearing or, in the alternative, reconsideration<sup>1</sup> of the Commission's September 4, 2008 order on rehearing,<sup>2</sup> which, among other things, required McGraw-Hill to produce information on eleven trading points throughout the country in response to a subpoena submitted by Energy Transfer Partners, L.P. (ETP). For the reasons discussed below, the Commission denies McGraw-Hill's request for reconsideration.

**Background**

2. The full procedural history of this proceeding can be found in the various Commission orders in the captioned docket. As relevant here, at the outset of this proceeding, ETP submitted a subpoena requesting that McGraw-Hill provide certain trade data and information concerning the compilation of *Inside FERC*<sup>3</sup> gas indices for

---

<sup>1</sup> Since McGraw-Hill is not a party to this proceeding, the Commission will treat its pleading as a request for reconsideration.

<sup>2</sup> *Energy Transfer Partners, L.P., et al.*, 124 FERC ¶ 61,224 (2008) (September 4 Order).

<sup>3</sup> *Inside FERC's Gas Market Report (Inside FERC)* is a monthly publication containing indices for the market price of natural gas at various trading locations that is published by Platts, a division of McGraw-Hill.

eleven trading points throughout the country that were unrelated to the Houston Ship Channel trading point, where ETP allegedly engaged in natural gas market manipulation. ETP sought this information to disprove Enforcement Litigation Staff's theory that fixed-price sales at the Houston Ship Channel should have remained aligned with the expected basis differential between NYMEX and the Houston Ship Channel. ETP argued that based on certain limited publicly available information, it determined that trading points throughout the country other than the Houston Ship Channel were impacted by Hurricanes Katrina and Rita and resulted in financial basis prices decoupling from fixed-price sales. Thus, ETP argued that changes in prices at the Houston Ship Channel were not the result of market manipulation but rather were due to weather and other market fundamentals that affected natural gas prices throughout the country.

3. In a May 8, 2008 order,<sup>4</sup> the Commission denied ETP's subpoena for information for the eleven trading points. Based on its analysis of ETP's subpoena request under the standards set forth by the courts in determining when a reporter or news gatherer, such as McGraw-Hill, is protected from a request to disclose information, the Commission determined that ETP had not shown that it had a need for the information and that it had exhausted all reasonably available alternatives sources. ETP sought rehearing of this determination.

4. On September 4, 2008, after ordering further briefing to supplement the record and several other pleadings filed by ETP and McGraw-Hill, the Commission granted rehearing and directed McGraw-Hill to provide ETP with the data and information on the eleven trading points sought by ETP in its subpoena.<sup>5</sup> The Commission found that ETP had shown that the requested data directly relate to its attempt to disprove Enforcement Litigation Staff's theory that fixed-price sales at the Houston Ship Channel should have remained aligned with the expected basis differential to NYMEX in the post-hurricane periods. The Commission found that ETP established that the publicly available data from Platts show only aggregate volumes, not individual trades transacted during bidweek, and that the day of bidweek may make a difference.<sup>6</sup> The Commission found that McGraw-Hill's suggestion that ETP obtain information from Intercontinental Exchange (ICE), voice brokers and individual trading companies through the subpoena process was unreasonable. The Commission determined that ETP had shown that data from public sources such as ICE represent only a small fraction of the sales reported by

---

<sup>4</sup> *Energy Transfer Partners, L.P., et al.*, 123 FERC ¶ 61,136 (2008).

<sup>5</sup> *Energy Transfer Partners, L.P., et al.*, 124 FERC ¶ 61,224 (2008).

<sup>6</sup> ETP has asserted that “[p]rices for monthly sales, and daily sales for that matter, change from one day to the next, and even within a day, and such changes can be substantial.” ETP's October 9, 2007 Answer at 75.

Platts.<sup>7</sup> Moreover, the Commission found that requiring ETP to determine all voice brokers and trading companies operating during the relevant period and then to subpoena such entities would require extensive and burdensome discovery. The Commission stated that while courts recognize that the reporter's privilege will not be abridged absent an attempt to obtain information from other reasonable sources,<sup>8</sup> "this does not mean, however, that a litigant must pursue an 'onerous, wide-ranging or ill-lighted' discovery path before seeking to obtain the information from a newsgatherer."<sup>9</sup>

5. On October 6, 2008, McGraw-Hill filed a request for rehearing, or, in the alternative, reconsideration of the September 4, 2008 Order.

### **McGraw-Hill's Request for Reconsideration**

6. McGraw-Hill asserts that the Commission erred in directing McGraw-Hill to produce documents concerning the eleven trading points in response to ETP's subpoena request because the information sought by these requests does not go to the heart of any claim or defense in this action.<sup>10</sup> McGraw-Hill asserts that before any court would enforce a subpoena seeking McGraw-Hill's privileged source material, the party seeking the information must be able to show that the information goes to the "heart of the matter," i.e., that the argument for which the information is sought is (1) crucial to the case of the requesting party and (2) cannot be made without the requested information. McGraw-Hill argues that ETP has made no showing that the argument for which the information is sought is crucial to its defense or that the argument cannot be made without the requested information. McGraw-Hill states that ETP is seeking the data from McGraw-Hill collected for the eleven trading points in order to compare whether the fixed price trades McGraw-Hill gathered for these eleven trading points varied from the expected basis differential to NYMEX. McGraw-Hill submits that since the need for the data is divorced from the McGraw-Hill indices, any compilation of trade data from any source for the eleven trading points will suffice. McGraw-Hill asserts that neither ETP or the Commission has explained why or how the argument ETP proposes to raise using the requested data goes to the heart of ETP's defense. McGraw-Hill argues that the eleven trading points are never mentioned in the charges against ETP and the defense is one of many that ETP is raising.

---

<sup>7</sup> ETP's July 25 Answer at 8-9.

<sup>8</sup> *CFTC v. McGraw-Hill*, 507 F. Supp. 2d 45, 55 (D.D.C. 2007), *citing*, *Zerilli v. Smith*, 656 F.2d 705, 717 (D.C. Cir. 1981).

<sup>9</sup> *Id.*, *citing*, *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974).

<sup>10</sup> *Citing*, *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981).

7. McGraw-Hill asserts that the Commission erred in directing McGraw-Hill to produce documents concerning the eleven trading points because ETP has not demonstrated that it has made any reasonable efforts to try to obtain the information sought from any non-journalistic sources.<sup>11</sup> McGraw-Hill states that ETP has apparently not attempted to obtain any trade data relating to the eleven trading points from any source other than McGraw-Hill. McGraw-Hill argues that before the reporter's privilege is overcome, the litigant must have made a least some effort to find the information from a non-journalistic source before turning to the journalist. McGraw-Hill contends that ETP has all but admitted that the reason for asking McGraw-Hill to produce this data is so that ETP can avoid the inconvenience of collecting data comparable to what McGraw-Hill may possess. McGraw-Hill argues that the reporter's privilege will not be set aside for reasons of mere convenience. McGraw-Hill contends that replicating a set of data comparable to McGraw-Hill's will not require issuing subpoenas to all voice brokers or trading companies. McGraw-Hill submits that all that is needed is a representative sample of data, collection of which is not nearly as difficult as ETP protests. McGraw-Hill maintains that ICE might be one source of such data. McGraw-Hill asserts that Amerex Energy, a voice broker that describes itself as one of the world's largest over-the-counter energy brokers might be another. McGraw-Hill concludes that ETP's untested and conclusory assertions of potential burden simply do not provide sufficient grounds to set aside McGraw-Hill's reporter's privilege. Accordingly, McGraw-Hill requests that the Commission grant reconsideration and reverse the September 4 Order to the extent that it required further document production from McGraw-Hill.

### **Discussion**

8. McGraw-Hill argues that ETP's request for the Platts information on the eleven trading points is not crucial to ETP's case, i.e., does not go to the "heart of the matter" and ETP's case can be made without the Platts data, i.e., the information is reasonably available from alternative sources. We will address these two issues in turn.

9. McGraw-Hill argues that the information on the eleven trading points is not crucial to ETP's defense because the eleven trading points are not mentioned in the Show Cause Order and the defense to be raised based on this information is but one of many defenses ETP is raising. The Commission finds McGraw-Hill's argument unpersuasive. The fact that the eleven trading points were not mentioned in the Show Cause order or that it is one of many of ETP's defenses does not mean that information concerning the eleven trading points is not crucial to ETP's defense. ETP is seeking the Platts trade data in order to challenge the Enforcement Litigation Staff's use of an implied price theory to establish that ETP manipulated the natural gas market at the Houston Ship Channel.

---

<sup>11</sup>*Citing, Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981).

According to the Enforcement Litigation Staff's arguments, fixed-price sales at the Houston Ship Channel should have remained aligned with the expected basis differential to NYMEX in the periods after Hurricanes Katrina and Rita. ETP has indicated that it believes this theory is faulty based on its initial analysis and believes that a further analysis of information for trading points unrelated to the manipulation allegations at the Houston Ship Channel will show that other points were impacted by Hurricanes Katrina and Rita in terms of basis prices decoupling from fixed-price sales. The implied price theory is not only being used as a basis to establish liability but also as proof of the unjust profits that ETP allegedly reaped. The Commission finds that information that ETP can use to challenge both the basis for liability and potential damages is crucial to its defense. Just as Enforcement Litigation Staff has chosen its theories to establish its manipulation case, ETP should have the ability to establish its own defenses to the allegations. Neither the Commission nor any third party should be entitled to dictate the manner in which ETP defends itself.

10. McGraw-Hill argues that ETP can make its case without the Platts information on the eleven trading points because it asserts that similar information is available from ICE, Amerex and voice brokers. The Commission finds McGraw-Hill's arguments unpersuasive. ETP has explained in this proceeding that the type of data available from ICE and the other named alternate sources is not similar to the information that can be obtained from Platts for purposes of challenging the implied price theory. ETP has explained that data available from public sources such as ICE represent only a small fraction of the total deals reported to Platts.<sup>12</sup> For example, ETP states that at the Permian and San Juan basins during the requested months, the volume of trading activity reported to Platts was four to 26 times greater than the volumes sold on ICE.<sup>13</sup> ETP states that the discrepancy exists with respect to all of the other trading points as well.<sup>14</sup> In addition, as was stated in the September 4, 2008 order, ETP needs the information from Platts because the specific day on which a trade is made during bidweek is relevant to the case. ETP states that the publicly available data do not show the range of bidweek trading days compared to the days reflected in the trades reported to Platts. Thus, ETP has shown that there is a difference in both the quantity and quality of data available from Platts as compared to ICE and the other publicly available sources. In that respect information from ICE is not a true alternative source of information. Accordingly, for the reasons discussed above, McGraw-Hill's request for reconsideration is denied.

---

<sup>12</sup> ETP's July 25, 2008 Answer at 8 and Table 1 of the Appendix.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

11. Within 14 days of the date of this order, McGraw-Hill is directed to provide ETP with the information requested by Items 1.5, 1.6, 1.7 and 1.10 of its October 9, 2007 subpoena, and file a letter with the Commission in this docket specifying its compliance with this order and ETP's subpoena request.

The Commission orders:

(A) McGraw-Hill's request for reconsideration is denied.

(B) Within 14 days of the date of this order, McGraw-Hill is directed to provide ETP with the information requested by Items 1.5, 1.6, 1.7 and 1.10 of its October 9, 2007 subpoena, and file a letter with the Commission in this docket specifying its compliance with this order and ETP's subpoena request.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.