

141 FERC ¶ 61,131  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

J.P. Morgan Ventures Energy Corporation

Docket No. EL12-103-000

ORDER SUSPENDING MARKET-BASED RATE AUTHORITY

(Issued November 14, 2012)

1. On September 20, 2012, the Commission issued an order directing J.P. Morgan Ventures Energy Corporation (JP Morgan) to show cause why its authorization to sell electric energy, capacity, and ancillary services at market-based rates should not be suspended.<sup>1</sup> As discussed below, we find that the statements identified in the Show Cause Order constitute violations of section 35.41(b) of the Commission's regulations.<sup>2</sup> Consequently, pursuant to section 206 of the Federal Power Act (FPA), we will suspend JP Morgan's market-based rate authority for a period of six months, to become effective on April 1, 2013.<sup>3</sup>

**I. Background**

2. In 2005, the Commission authorized JP Morgan to sell electric energy, capacity, and ancillary services at market-based rates in several regions, including the market administered by the California Independent System Operator Corporation (CAISO).<sup>4</sup>

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<sup>1</sup> *J.P. Morgan Ventures Energy Corp.*, 140 FERC ¶ 61,227 (2012) (Show Cause Order).

<sup>2</sup> 18 C.F.R. § 35.41(b) (2012) "*Communications*. A Seller 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."

<sup>3</sup> 16 U.S.C. § 824e (2006).

<sup>4</sup> *J.P. Morgan Ventures Energy Corp.*, 112 FERC ¶ 61,322 (2005).

JP Morgan continues to be an active participant in the CAISO market, and is therefore subject to the terms and conditions of CAISO's Open Access Transmission Tariff (Tariff or OATT).

3. Section 11.1 of Appendix P of CAISO's Tariff requires CAISO's Department of Market Monitoring (DMM) to refer to the Commission all instances in which the DMM has reason to believe that a Market Violation<sup>5</sup> has occurred and to immediately terminate all independent actions related to the alleged violation following a referral.<sup>6</sup> Section 11.5 of Appendix P of the Tariff similarly prohibits the DMM from undertaking "any investigative steps regarding the referral except at the express direction of FERC or FERC Staff."<sup>7</sup>

4. On March 25, 2011, CAISO sent a data request to JP Morgan regarding its bidding activities in the CAISO market.<sup>8</sup> In March of 2011, CAISO also orally informed JP Morgan that CAISO intended to refer the matter to the Commission's Office of Enforcement.<sup>9</sup> JP Morgan submitted responses to CAISO's March 25 request on April 11, 19, and 27, 2011.<sup>10</sup> In light of those responses, CAISO sent an amended data

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<sup>5</sup> The Tariff defines a "Market Violation" as "A CAISO Tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies." CAISO, eTariff, FERC Electric Tariff, App. A (0.0.0).

<sup>6</sup> CAISO, eTariff, FERC Electric Tariff, App. P, § 11.1 (3.0.0) (section 11.1) ("... Once DMM has obtained sufficient credible information to warrant referral to FERC, DMM shall immediately refer the matter to FERC and desist from independent action related to the alleged Market Violation. DMM may, however, continue to monitor for any repeated instances of the activity by the same or other entities, which would constitute new Market Violations. DMM shall respond to requests from FERC for any additional information in connection with the alleged Market Violation it has referred.").

<sup>7</sup> CAISO, eTariff, FERC Electric Tariff, App. P, § 11.5 (section 11.5) ("Following a referral to FERC, DMM is committed to notify and inform FERC of any information that DMM learns of that may be related to the referral but DMM shall not undertake any investigative steps regarding the referral except at the express direction of FERC or FERC Staff.").

<sup>8</sup> See JP Morgan Response to Show Cause Order at Att. 2 (letter from the DMM to JP Morgan's outside counsel).

<sup>9</sup> See JP Morgan Complaint, Docket No. EL12-70-000, at 5 (filed May 21, 2012) (May 21, 2012 Complaint).

<sup>10</sup> See JP Morgan Response to Show Cause Order at Att. 2 (letter from the DMM to JP Morgan's outside counsel).

request on May 4, 2011 that requested information responsive to five different areas of inquiry.<sup>11</sup> CAISO identified these separate requests for information as Request No. 1, Request No. 2, Request No. 3, Request No. 4, and Request No. 5. The May 4 data request required JP Morgan to respond by May 18, 2011.<sup>12</sup>

5. In a May 18, 2011 letter to the DMM, JP Morgan's outside counsel cited the "post-referral bar" in section 11.1 of Appendix P of CAISO's Tariff and argued that "the DMM should refer the matter to FERC and stop its independent action."<sup>13</sup>

6. On May 20, 2011, CAISO officially referred JP Morgan's bidding activities to the Office of Enforcement for further investigation.<sup>14</sup>

7. In a June 13, 2011 letter to the DMM, JP Morgan's outside counsel provided certain spreadsheets and stated JP Morgan's belief that "the DMM does not have the authority to seek the [spreadsheets] and should refer the matter to FERC and stop its independent action."<sup>15</sup>

8. In a June 21, 2011 email, the DMM forwarded to JP Morgan's outside counsel the official referral of JP Morgan's bidding activities sent to the Director of the Office of Enforcement on May 20, 2011.<sup>16</sup>

9. In a June 24, 2011, 9:45 AM email to JP Morgan's outside counsel, with the Subject line: "Data requests to JP Morgan from California MMU," staff from the Office of Enforcement wrote:

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *See* JP Morgan Response to Show Cause Order at Att. 3 (letter from JP Morgan's outside counsel to the DMM).

<sup>14</sup> *See* JP Morgan Response to Show Cause Order at Att. 7. CAISO also referred more of JP Morgan's bidding activities in 2010 to the Office of Enforcement in June 2011.

<sup>15</sup> JP Morgan Response to Show Cause Order at Att. 5 (letter from JP Morgan's outside counsel to the DMM).

<sup>16</sup> JP Morgan Response to Show Cause Order at Att. 7 (letter from the DMM to JP Morgan's outside counsel).

This will confirm that Commission staff has expressly directed the California ISO Market Monitor to continue to seek full and complete responses from JP Morgan to the data requests or other inquiries that the Market Monitor directed to JP Morgan through June 20, 2011.<sup>17</sup>

JP Morgan's outside counsel responded to this email at 11:25 AM: "Thank you."<sup>18</sup>

10. In a July 28, 2011, 12:31 PM email to JP Morgan's outside counsel, with the Subject line: "FW: Data requests to JP Morgan from California MMU," staff from the Office of Enforcement wrote, "I hereby confirm that FERC OE has expressly directed the CAISO MMU to analyze those materials to assist us in our work."<sup>19</sup> JP Morgan's outside counsel responded to this email at 12:49 PM: "Thank you."<sup>20</sup>

11. In a September 27, 2011 letter to JP Morgan, CAISO informed JP Morgan of the results of the CAISO's review of potential violations of the Investigation Information requirements as described in CAISO Tariff Section 37.6.2.<sup>21</sup> CAISO's review determined that JP Morgan had failed to timely provide full responses to Request No. 4 and Request No. 5 of the May 4, 2011 data requests.<sup>22</sup> CAISO's notice indicated that JP Morgan had 30 days to respond to the letter before CAISO determined whether sanctions were required by the CAISO Tariff.<sup>23</sup>

12. Meanwhile, on October 15, 2011, staff from the Office of Enforcement sent an email to JP Morgan's deputy general counsel (and copying JP Morgan's outside counsel) asking if the deputy general counsel could provide the DMM with certain materials that outside counsel still had not provided in response to the DMM's May 4 data request and

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<sup>17</sup> JP Morgan Response to Show Cause Order at Att. 9 (letter from Office of Enforcement staff to JP Morgan's outside counsel).

<sup>18</sup> See *Submission By Office of Enforcement Concerning JP Morgan Complaint Against CAISO*, at 5, Docket No. EL12-70-000 (filed June 19, 2012) (hereinafter referred to as "Enforcement's June 2012 Submission").

<sup>19</sup> See *id.* at 7. Hereinafter, the Office of Enforcement's June 24, 2011 email and its July 28, 2011 email will together be referred to as "the 2011 emails."

<sup>20</sup> See *id.*

<sup>21</sup> See JP Morgan Response to Show Cause Order at Att. 23 (letter from CAISO to JP Morgan).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

the 2011 emails from the Office of Enforcement.<sup>24</sup> Attached to the email was a letter in which the Office of Enforcement included copies of the 2011 emails to JP Morgan's outside counsel confirming the DMM's authorization to continue to seek information responsive to Request No. 4 and Request No. 5 of the CAISO DMM's May 4 data request.<sup>25</sup>

**A. October 18, 2011 Data Response to the CAISO DMM**

13. In an October 18, 2011 letter to the DMM, JP Morgan's outside counsel provided additional materials but continued to cite the CAISO Tariff section 11.1 and to characterize its submission of materials as voluntary.<sup>26</sup>

14. In an October 27, 2011 letter, JP Morgan's outside counsel responded to the CAISO's September 27, 2011 notice of penalty for failure to timely submit discovery responses as required under the CAISO Tariff.<sup>27</sup> JP Morgan counsel asserted that "J.P. Morgan had a good faith belief it was responding to the DMM on a voluntary, as opposed to a mandatory, basis" and again cited the CAISO Tariff section 11.1.<sup>28</sup>

15. In a December 5, 2011 letter to JP Morgan, CAISO stated that it had revised its earlier determination to find that JP Morgan's responses to Request No. 4 and Request No. 5 of the DMM's May 4 data request were 162 days late, rather than the 30 days indicated in the September 27, 2011 letter.<sup>29</sup> CAISO determined that information responsive to Request No. 4 and Request No. 5 was due by May 18, 2011 and JP Morgan failed to provide a full response until October 27, 2011. In this revised notice, CAISO stated its position on JP Morgan's repeated assertions of "voluntary" disclosures:

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<sup>24</sup> See *Submission by Office of Enforcement Concerning JP Morgan Motion to Withdraw Complaint Without Prejudice*, at 16-22 (filed July 3, 2012) (hereinafter referred to as "Enforcement's July 2012 Submission").

<sup>25</sup> *Id.*

<sup>26</sup> See JP Morgan Response to Show Cause Order at Att. 21 (letter from JP Morgan's outside counsel to the DMM) (October 18, 2011 Data Response to the CAISO DMM).

<sup>27</sup> See JP Morgan Response to Show Cause Order at Att. 24 (letter from JP Morgan's outside counsel to CAISO).

<sup>28</sup> *Id.*

<sup>29</sup> See JP Morgan Response to Show Cause Order at Att. 25 (letter from CAISO to JP Morgan).

In providing its response, the ISO reminds [JP Morgan] that, contrary to any suggestions made in the October 27 letter or elsewhere, the ISO has never viewed [JP Morgan]'s compliance with the May 4 data requests as voluntary and communicated that point to [JP Morgan] in advance of the initial May 18, 2011 due date.

16. In a February 13, 2012 letter, CAISO notified JP Morgan that it had decided to impose a financial penalty of \$486,000 against JP Morgan for failing to submit all responsive materials to CAISO by the deadline established in the May 4 data request.<sup>30</sup> The letter stated:

The ISO's determination is based, in part, on its view that the [DMM's] May 4, 2011 Information Request did not violate Appendix P, Section 11.1 of the ISO Tariff and, as such, was validly issued. Compliance with the Information request was thus mandatory, not voluntary, under the ISO Tariff.<sup>31</sup>

**B. March 21, 2012 Appeal**

17. On March 21, 2012, JP Morgan filed with the Commission a non-public appeal of CAISO's decision to impose the monetary penalty for violation of the CAISO Tariff.<sup>32</sup> Among other things, JP Morgan continued to argue that its responses to the May 4 data request were "completely voluntary" and that, pursuant to sections 11.1 and 11.5 of the Tariff, the DMM was divested of its authority to continue its investigation and impose a monetary penalty.<sup>33</sup> Further, JP Morgan stated that it "reasonably concluded as of March 9, 2011—and continues to conclude—that any responses to the DMM after that date were completely voluntary and that the assessed penalty has no basis under the CAISO Tariff."<sup>34</sup>

18. On April 20, 2012, in a non-public order, the Commission rejected JP Morgan's appeal as procedurally deficient.

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<sup>30</sup> See Enforcement's July 2012 Submission, at 27.

<sup>31</sup> *Id.*

<sup>32</sup> JP Morgan, Non-Public Appeal, Docket No. IN11-08-000 (filed Mar. 21, 2012) (March 21, 2012 Appeal).

<sup>33</sup> *Id.* at 8-10.

<sup>34</sup> *Id.* at 10.

### C. May 21, 2012 Complaint

19. On May 21, 2012, pursuant to section 206 of the FPA, JP Morgan filed a complaint alleging that the monetary penalty imposed by CAISO for JP Morgan's alleged failure to timely respond to the May 4 data request is unjust, unreasonable and unduly discriminatory.<sup>35</sup> Among other things, JP Morgan argued that CAISO's imposition of the monetary penalty and continued efforts to obtain information in response to the May 4 data request after CAISO had referred the matter to the Office of Enforcement violated sections 11.1 and 11.5 of the Tariff.<sup>36</sup> According to JP Morgan, once CAISO referred the matter to the Office of Enforcement, sections 11.1 and 11.5 of the Tariff prohibited CAISO from taking any further action against JP Morgan in the absence of an "express direction of FERC or FERC Staff."<sup>37</sup> Notably, JP Morgan also stated in the May 21, 2012 Complaint:

Neither the DMM nor [the Office of Enforcement] informed [JP Morgan] that the DMM had been authorized or instructed to continue to seek responses to the DMM's May 4 Requests—or any other request—either at the direction of [the Office of Enforcement] or the Commission under Section 11.5 or the monitoring clause of Section 11.1.

When [the Office of Enforcement] later requested that [JP Morgan] provide specific documents to the DMM, there was no suggestion that [the Office of Enforcement] was triggering the "express direction" exception in Section 11.5 or that [JP Morgan] had an on-going duty to respond to the May 4 Requests.

Therefore, it was entirely reasonable for [JP Morgan] to believe that the DMM had no legal basis for mandating information from the company relating to the relevant 2010 and 2011 bidding activity.<sup>38</sup>

20. In response to JP Morgan's May 21, 2012 Complaint, the Office of Enforcement submitted a response quoting the 2011 emails to show that the Office of Enforcement had informed JP Morgan and its counsel more than once that it had expressly directed the

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<sup>35</sup> May 21, 2012 Complaint at 2.

<sup>36</sup> *Id.* at 1-5.

<sup>37</sup> *Id.* at 12-13 (quoting section 11.5).

<sup>38</sup> *Id.* at 13 (Spaces have been inserted between sentences for clarity).

DMM to continue to seek data responses from JP Morgan because the DMM was authorized to continue analyzing materials to assist Commission staff.<sup>39</sup>

**D. June 22, 2012 Answer**

21. Following the Office of Enforcement's June 2012 Submission, JP Morgan filed a motion to withdraw its complaint,<sup>40</sup> and an answer to Enforcement's submission in which JP Morgan acknowledged that the March 21, 2012 Appeal and May 21, 2012 Complaint contained a "factual error."<sup>41</sup>

22. Specifically, in its June 22, 2012 Answer, JP Morgan acknowledged that in filing its March 21, 2012 Appeal and May 21, 2012 Complaint, it "failed to bring to the Commission's attention [the 2011] emails."<sup>42</sup> JP Morgan asserted that at the time it prepared and submitted these filings with the Commission, its outside counsel who had received and viewed the 2011 emails "did not recall" their existence "and did not otherwise connect them with the issues addressed in the Complaint, or in the previously filed Appeal."<sup>43</sup> JP Morgan stated that its omission of relevant communications with the Office of Enforcement in its filings with the Commission was in part due to outside counsel's receipt of these emails nearly a year earlier and the fact that the 2011 emails "did not expressly refer to section 11.5 of Appendix P to the CAISO Tariff."<sup>44</sup>

23. On July 3, 2012, the Office of Enforcement filed a submission to address the statements and assertions JP Morgan made to the Commission in its June 22, 2012 Answer.<sup>45</sup> The Office of Enforcement stated that despite the claim that JP Morgan's outside counsel (at Sutherland, Asbill and Brennan LLP) did not forward the 2011 emails to its co-counsel (at Skadden, Arps, Slate, Meagher & Flom, LLP), their client—JP Morgan—had itself received copies of those communications prior to its filing of the March 21, 2012 Appeal and May 21, 2012 Complaint.<sup>46</sup>

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<sup>39</sup> See Enforcement's June 2012 Submission.

<sup>40</sup> *Motion to Withdraw 206 Complaint*, Docket No. EL12-70-000 (filed June 20, 2012).

<sup>41</sup> *Answer to Enforcement Staff's Submission Concerning Complaint*, Docket No. EL12-70-000, at 1 (filed June 22, 2012) (June 22, 2012 Answer).

<sup>42</sup> *Id.*

<sup>43</sup> *Id. at 2.*

<sup>44</sup> *Id. at 1-2.*

<sup>45</sup> Enforcement's July 2012 Submission.

<sup>46</sup> *Id.* The October 15, 2011 email from the Office of Enforcement is discussed *supra* in P 12.

24. In the September 20, 2012 Show Cause Order, the Commission preliminarily found that the: (1) October 18, 2011 Data Response to the CAISO DMM; (2) the March 21, 2012 Appeal of the CAISO Penalty; (3) the May 21, 2012 Complaint; and (4) the June 22, 2012 Answer may constitute violations of section 35.41(b) of the Commission's regulations.<sup>47</sup> Consequently, the Commission directed JP Morgan to show cause why it should not be found to have violated section 35.41(b). In addition, the Commission directed JP Morgan to show cause why its authority to sell electric energy, capacity, and ancillary services at market-based rates should not be suspended.

## **II. Notice and Responsive Pleadings**

25. Notice of this proceeding was published in the *Federal Register*, 77 Fed. Reg. 59,184 (2012), with JP Morgan's answer, as well as interventions, comments and protests due on or before October 17, 2012. JP Morgan filed its show cause response on October 17, 2012. Timely motions to intervene were filed by Invenergy Thermal Development LLC; Duquesne Power, LLC; Trans Bay Cable LLC; Pacific Gas and Electric Company; and Southern California Edison Company. A motion to intervene and comment was filed by CAISO.

## **III. Discussion**

### **A. Procedural Matters**

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

### **B. Substantive Matters**

#### **1. Violation of Section 35.41(b)**

##### **a. Show Cause Response**

27. JP Morgan argues that the statements identified in the Show Cause Order do not constitute violations of section 35.41(b) for four reasons.<sup>48</sup> First, JP Morgan contends

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<sup>47</sup> Show Cause Order, 140 FERC ¶ 61,227 at P 14. In the Show Cause Order, these statements were referred to as, "the October 18 Statement," "the March 21 Statements," "the May 21, 2012 Statements," and "the June 22, 2012 Statements."

<sup>48</sup> JP Morgan Response to Show Cause Order at 22-31.

that no violation has occurred because it observed adequate due diligence procedures.<sup>49</sup> In support of this assertion, JP Morgan explains that it hired “experienced, well-respected lawyers who specialized in the specific tasks at hand: handling discovery issues involving CAISO and [the Office of Enforcement].”<sup>50</sup> In addition to its in-house counsel, JP Morgan explains that two experienced law firms reviewed the October 18, 2011 Data Response to the CAISO DMM<sup>51</sup> and three law firms reviewed the March 21, 2012 Appeal before it was filed with the Commission.<sup>52</sup>

28. Regarding both the March 21, 2012 Appeal and the May 21, 2012 Complaint, JP Morgan confirms that it “failed to mention or address contextually the June 24 and July 28 Emails, either on a stand-alone basis or as attachments to the October 15 letter.”<sup>53</sup> Despite these failures, JP Morgan states that it “took sufficient, if imperfect, due diligence steps to comply with section 35.41(b).”<sup>54</sup> Further, JP Morgan states that it repeatedly expressed its position that its production of information to CAISO was voluntary. JP Morgan suggests that the repeated “ventilating” of its position evidences its good-faith effort to prevent misstatements.<sup>55</sup>

29. Second, JP Morgan contends that no violation has occurred because the “communications and actions—or lack thereof—of the Commission and CAISO help explain how [JP Morgan’s] misunderstanding continued unabated for over a year.”<sup>56</sup> JP Morgan states that it was never provided with information “in which [the Office of Enforcement] expressly directed CAISO to continue its post-referral investigation.”<sup>57</sup> JP Morgan further asserts that CAISO never informed JP Morgan that the Office of Enforcement had expressly directed CAISO to take investigative measures following the

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<sup>49</sup> *Id.* at 22-24 JP Morgan also states that section 35.41(b) only prohibits knowing violations. *Id.* (citing *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at PP 96, 110 (2003), *reh’g denied*, 107 FERC ¶ 61,175 (2004)).

<sup>50</sup> *Id.* at 23.

<sup>51</sup> *Id.* at 28.

<sup>52</sup> *Id.* at 24.

<sup>53</sup> *Id.* at 29-30.

<sup>54</sup> *Id.* at 30.

<sup>55</sup> *Id.* at 24.

<sup>56</sup> *Id.* at 25.

<sup>57</sup> *Id.*

DMM's referral.<sup>58</sup> Moreover, JP Morgan claims that prior to filing Enforcement's June 2012 Submission in response to the May 21, 2012 Complaint, the Office of Enforcement never informed JP Morgan that CAISO had been expressly directed to continue its investigation pursuant to section 11.5.<sup>59</sup>

30. In addition, JP Morgan describes an email sent on May 17, 2012 from the Office of Enforcement to JP Morgan's outside counsel and asserts that the Office of Enforcement staff "refused to answer" JP Morgan's inquiry as to whether the Office of Enforcement's use of the phrase "expressly directed" was intended to invoke section 11.5.<sup>60</sup> JP Morgan contends that on May 17, 2012, the Office of Enforcement sent JP Morgan's representatives an email that "used similar 'expressly directed' language" as is contained in the 2011 emails.<sup>61</sup> JP Morgan states:

Having raised in the [March 21, 2012 Appeal], and planning to raise in the [May 21, 2012 Complaint], similar issues, and in order to understand clearly what the May 17, 2012 email meant, [JP Morgan] asked [the Office of Enforcement] directly whether the "expressly directed" language was meant to invoke [s]ection 11.5. [The Office of Enforcement] refused to answer this question, and merely responded that it was important that [JP Morgan] "cooperate." This was consistent with [the Office of Enforcement's] actions from June 2011 to June 2012.<sup>62</sup>

31. Third, JP Morgan argues that the October 18, 2011 Data Response to the CAISO DMM, the March 21, 2012 Appeal, the May 21, 2012 Complaint, and the June 22, 2012 Answer do not contain knowingly false or misleading information.<sup>63</sup> JP Morgan asserts that the October 18, 2011 Data Response to the CAISO DMM accurately reflects its view at the time that the Office of Enforcement's October 15, 2011 letter sought voluntary cooperation, rather than mandatory compliance.<sup>64</sup> JP Morgan further contends that the March 21, 2012 Appeal and the May 21, 2012 Complaint were the product of an

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 26.

<sup>60</sup> *Id.* at 27, n.83.

<sup>61</sup> *Id.* Hereinafter, this email will be referred to as "the May 17, 2012 email."

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 27-31.

<sup>64</sup> *Id.* 27-28.

inadvertent oversight during a period in which the “frequency and intensity of communications and discovery in this investigation reached very high levels. . . .”<sup>65</sup>

32. JP Morgan rejects the Commission’s preliminary finding that the June 22, 2012 Answer may be false or misleading or contain material omissions.<sup>66</sup> According to JP Morgan, its filing “simply expresses [JP Morgan’s] regret for the errors that occurred and provides information explaining the reasons for that mistake.”<sup>67</sup> JP Morgan further asserts that statements in its June 22, 2012 Answer “confirmed that [JP Morgan] acted with good faith and with no intent to mislead anyone.”<sup>68</sup>

33. In support of its contention that the statements identified in the Show Cause Order did not knowingly contain false or misleading information, JP Morgan provides several affidavits by individuals closely involved in the preparation of the statements identified in the Show Cause Order. The affidavits generally state that each individual either did not recall the existence of the 2011 emails or believed that the 2011 emails set forth a request by the Office of Enforcement that JP Morgan voluntarily provide additional information to the CAISO DMM.<sup>69</sup>

34. Fourth, JP Morgan suggests that it could not have misled the Commission or CAISO by filing the March 21, 2012 Appeal and the May 21, 2012 Complaint, which “both omitted citation to the FERC Communications” because the information contained in the 2011 emails “was already in [the Commission’s] possession.”<sup>70</sup> JP Morgan

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<sup>65</sup> *Id.* at 29.

<sup>66</sup> *Id.* at 30.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *See e.g.*, Krupka Aff. ¶ 3 (“I read the June 24 Email as a request from the Federal Energy Regulatory Commission’s Office of Enforcement Staff asking, rather than compelling, JPMVEC to provide information to the DMM.”); Phillips Aff. ¶ 2 (“I did receive the October 15, 2011 sent by email from Enforcement staff to Diane Genova . . . However, I do not recall reviewing the attachments to that email at that time.”); Raisler Aff. ¶ 4 (“Although I appear to have seen in July 2011 one or both of the June 24, 2011 and July 28, 2011 emails from OE staff to Catherine Krupka . . . at the time of the filing of the [October 18, 2011 2011 Data Response to the CAISO DMM, the March 21, 2012 Appeal of the CAISO Penalty, the May 21, 2012 Complaint, and the June 22, 2012 Answer] I did not remember, or recall the existence of, the June 24 Email and the July 28 Email. . . .”); *see generally*, Genova Declaration ¶¶ 3-5; Konieczny Aff. ¶¶ 6-8; and Nakkab Aff. ¶¶ 3-4.

<sup>70</sup> JP Morgan Response to Show Cause Order at 31.

contends that had it “recalled the FERC Communications and realized their import, it would have referenced them.”<sup>71</sup>

**b. Commission Determination**

35. We find that the statements identified in the Show Cause Order each constitute individual violations of section 35.41(b). Section 35.41(b) of the Commission’s regulations requires sellers to provide accurate and factual information and prohibits sellers from submitting false or misleading information or omitting material information in any communication with the Commission, market monitors, independent system operators, regional transmission organizations, and jurisdictional transmission providers, unless the seller can demonstrate that it has exercised due diligence to prevent such occurrences.<sup>72</sup>

36. The record demonstrates that the Office of Enforcement informed JP Morgan and its outside counsel on at least three separate occasions through the 2011 emails and a letter that it had expressly directed the DMM to continue its investigation of JP Morgan’s bidding activities and to seek responses to CAISO’s May 4 data request.<sup>73</sup> JP Morgan both failed to disclose its receipt of these communications and submitted statements in filings with the Commission that falsely stated that it had no knowledge that the Office of Enforcement had expressly directed the DMM to continue seeking information from JP Morgan.<sup>74</sup>

37. The Commission has explained that section 35.41(b) only applies if a seller submits: (i) “false or misleading information”; or (ii) if the seller “omits material information” in “any communication” to the Commission or one of the entities specified in section 35.41(b). The statements contained in each of the communications identified in the Show Cause Order failed to satisfy the standard established in the Commission’s regulations. With respect to the October 18, 2011 Data Response to the CAISO DMM and the March 21, 2012 Appeal, JP Morgan falsely asserted to the DMM and the

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<sup>71</sup> *Id.*

<sup>72</sup> 18 C.F.R. § 35.41(b); *see also Cobb Customer Requesters v. Cobb Elec. Membership Corp.*, 136 FERC ¶ 61,084, at P 42 (2011). For the purpose of section 35.41(b), the Commission’s regulations define the term “seller” to mean “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 [FPA].” 18 C.F.R. § 35.36 (2012).

<sup>73</sup> *See* JP Morgan Response to Show Cause Order at Att. 9; Enforcement’s June 2012 Submission at 7; Enforcement’s July 2012 Submission at 16-22.

<sup>74</sup> *See* Enforcement’s July 2012 Submission at 9, 13, App. A.

Commission respectively, that JP Morgan's responses to the DMM were voluntary pursuant to section 11.1 of the Tariff. Regarding the May 21, 2012 Complaint, JP Morgan falsely stated that the Office of Enforcement had not informed JP Morgan that the DMM had been authorized to continue to seek responses to the May 4 data request. As the record illustrates, JP Morgan's statements in its communications with the CAISO DMM and filings with the Commission were not only inaccurate, but omitted material information.

38. In its June 22, 2012 Answer, JP Morgan acknowledges it "failed to bring to the Commission's attention [the 2011] emails," in its submission of the March 21, 2012 Appeal and May 21, 2012 Complaint. However, despite this admission, the June 22, 2012 Answer also fails to comport with the requirements of section 35.41(b). While the June 22, 2012 Answer attempts to draw support from several affidavits of individuals at JP Morgan and JP Morgan's counsel,<sup>75</sup> it is not credible that JP Morgan's representatives failed to recall or appreciate the significance of the 2011 emails and the Office of Enforcement's October 15, 2011 letter, especially in its preparation of the October 18 Data Response to the CAISO DMM.

39. JP Morgan's position also lacks credibility because of the May 17, 2012 email exchange with the Office of Enforcement.<sup>76</sup> In the May 17, 2012 email addressed to JP Morgan with the Subject line: "Confirming [the Office of Enforcement's] express directive to CAISO Market Monitor, and request to JP Morgan to cooperate with the MMU," the Office of Enforcement wrote, in part:

This is to advise you that the Office of Enforcement has expressly authorized and directed the CAISO Market Monitor to continue to seek from JP Morgan answers . . . to any other questions (or provision of any other relevant data) that the Market Monitor believes may be helpful in understanding the bidding behaviors mentioned. . . .

We have also advised the CAISO Market Monitor that, if they believe live interviews of the responsible traders would be more informative than getting written answers to written questions, they should seek to conduct the interviews. We hereby request that, if asked, JP Morgan promptly

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<sup>75</sup> See Krupka Aff. ¶¶ 3-9; Konieczny Aff. ¶¶ 6-8; Phillips Aff. ¶¶ 3-5; Raisler Aff. ¶¶ 4, 7; Genova Declaration at ¶ 4; Nakkab Aff. ¶ 3.

<sup>76</sup> See *supra* P 30.

(within three business days) make the traders available for any interviews requested by the Market Monitor relating to these topics.<sup>77</sup>

On May 18, 2012—only three days before filing the May 21, 2012 Complaint—JP Morgan’s outside counsel replied:

Thank you for your message. We assume you sent this pursuant to Section 11.5 of Appendix P of the CAISO tariff. However, we have not seen a notice of referral from the CAISO, as has been customary in the past (see attached example) and consistent with Article 37.8 and Appendix P Article 11 of the CAISO tariff. Can you let us know where things stand?<sup>78</sup>

On May 18, 2012, Office of Enforcement staff replied:

I understand that the MMU is getting in touch with you about this. Meanwhile, I want to reiterate how important it is for JP Morgan to provide full and timely cooperation to the MMU’s office, including making the responsible traders available for prompt interviews.<sup>79</sup>

Thus, only three days before filing the May 21, 2012 Complaint, JP Morgan and its outside counsel demonstrated that they understood that the Office of Enforcement’s use of phrases virtually identical to the language of section 11.5 of the CAISO Tariff confirmed that Commission staff had authorized the CAISO DMM to continue its investigation of JP Morgan’s bidding activities pursuant to that provision.<sup>80</sup> JP Morgan’s contention that the Office of Enforcement staff “refused” to clarify whether the “expressly directed” language was intended to invoke section 11.5 is meritless. JP Morgan’s response to the May 17, 2012 email confirms that in the days immediately

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<sup>77</sup> *Id.* May 17, 2012, 7:34pm email from Office of Enforcement Staff to JP Morgan and JP Morgan’s outside counsel.

<sup>78</sup> *Id.* May 18, 2012, 3:37pm email from JP Morgan’s outside counsel to Office of Enforcement staff.

<sup>79</sup> *Id.* May 18, 2012, 5:40pm email from Office of Enforcement Staff to JP Morgan and JP Morgan’s outside counsel.

<sup>80</sup> Section 11. *Protocol on Referrals of Investigations to the Office of Enforcement* provides in section 11.5 that the DMM may continue to “undertake any investigative steps regarding the referral” if expressly directed by Commission staff. Notably, section 11.1 provides that even after a referral has been made to the Commission, the “DMM may, however, continue to monitor for any repeated instances of the activity by the same or other entities, which would constitute new Market Violations. DMM shall respond to requests from FERC for any additional information in connection with the alleged Market Violation it has referred.”

preceding JP Morgan's submission of the May 21, 2012 Complaint, JP Morgan's representatives in fact fully understood and appreciated the significance of the "expressly directed" language included in the 2011 emails, even in the absence of a specific reference to section 11.5 or 11.1 of the CAISO Tariff. And yet, JP Morgan filed the May 21, 2012 Complaint without mentioning the existence or knowledge of these 2011 emails from the Office of Enforcement. Therefore JP Morgan lacks any good faith basis for interpreting its cooperation as voluntary.

40. We find that the various communications provided to JP Morgan by the Office of Enforcement staff, which contained the precise tariff language at issue, informed JP Morgan that the post-referral bar provided in section 11.1 of the Tariff was no longer in effect and adequately apprised JP Morgan of CAISO's authority to continue its investigation pursuant to section 11.5 of the CAISO Tariff. As discussed above, the Office of Enforcement repeatedly confirmed for JP Morgan that the Office of Enforcement had expressly directed the CAISO DMM to continue to seek responses to the May 4 data request. The fact that the 2011 emails did not specifically cite section 11.5 or 11.1 is inconsequential.<sup>81</sup>

41. JP Morgan's response to the Show Cause Order that it always believed that its production of information to the DMM was voluntary lacks credibility and cannot be reconciled with a rational reading of the emails from the Office of Enforcement. The 2011 (and 2012) email communications with the Office of Enforcement *directly* relate to the argument JP Morgan puts forth in its March 21, 2012 Appeal and May 21, 2012 Complaint. In sum, viewed in light of the entire record, the explanation provided in the June 22, 2012 Answer that JP Morgan "did not recall that the 2011 [e]mails existed and did not otherwise connect them with the issues addressed in the Complaint"<sup>82</sup> lacks credibility. Furthermore, section 35.41(b) requires the exercise of due diligence, which may extend beyond reliance on memory.

42. Contrary to JP Morgan's assertions, its retainer of qualified attorneys does not constitute sufficient due diligence to exonerate JP Morgan's violations. At the time the Commission implemented Market Behavior Rule 3, the predecessor of section 35.41(b), the Commission was well aware of the fact that the vast majority of entities that interact with the Commission do so through or with the assistance of competent counsel. Had the Commission intended the assistance of counsel to satisfy the due diligence exception, it need not have established the exception at all because sellers would be excused from virtually all misrepresentations or material omissions.

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<sup>81</sup> We note, moreover, that section 11.5 contemplates communication between the Commission and the DMM but does not require the Commission to give notice to the subject.

<sup>82</sup> June 22, 2012 Answer at 1.

43. Further, we fail to see how JP Morgan’s representatives exercised the “best-practice due diligence . . . that companies should take to address government investigations.”<sup>83</sup> Absent in JP Morgan’s response to the Show Cause Order is any explanation or description of how its counsel performed due diligence to ensure that all statements it made to the Commission in those filings were accurate. Instead, JP Morgan’s response suggests that reliance on counsels’ memories was “sufficient, if imperfect, due diligence.”<sup>84</sup> We disagree with this suggestion, particularly in light of the fact that one of the misrepresentations occurred a mere three days after JP Morgan received notice from the Office of Enforcement staff of its express direction to CAISO to continue to seek data, and demonstrated in a reply to Office of Enforcement staff that it understood the import of that notice. Moreover, as we explain elsewhere in this order, JP Morgan’s suggestion that it failed to recall its correspondence with the Office of Enforcement staff on this matter is not credible.

44. Further, JP Morgan’s repeated “ventilating” of its position that its production of information to CAISO was voluntary does not demonstrate the exercise of due diligence because it in no way suggests that JP Morgan took steps to avoid the misrepresentations at issue. Rather, such reiteration better demonstrates JP Morgan’s failure to exercise due diligence despite the various communications it received from the Office of Enforcement staff stating that staff had expressly directed CAISO to continue to seek responses to all data requests issued before June 20, 2011. Moreover, JP Morgan’s characterization of its discovery responses to the DMM does not change the obligation under the Tariff for it to timely and comprehensively respond to the DMM.

45. JP Morgan’s contention that none of the statements at issue contain knowingly false or misleading information, as explained by the various affidavits filed by JP Morgan in support of its position, offers no defense in this case. As discussed above, it is a violation of section 35.41(b) when a seller submits false or misleading information or omits material information in an applicable communication unless the seller demonstrates it has exercised due diligence to prevent such an occurrence. No showing of the respondent’s intent or mindset is necessary in order to demonstrate that a violation of section 35.41(b) has occurred.<sup>85</sup> The Commission has explained that the due diligence exception was added to the Commission’s rules for the purpose of ensuring that

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<sup>83</sup> See JP Morgan Response to Show Cause Order at 23-24.

<sup>84</sup> See *id.* at 30.

<sup>85</sup> See *Moussa I. Kourouma*, 135 FERC ¶ 61,245, at PP 20-22 (2011) (*Kourouma*).

inadvertent submissions are not sanctioned.<sup>86</sup> Thus, the Commission's task is first, to determine whether a qualifying misrepresentation or material omission has been made, and second, to the extent necessary, to evaluate whether the seller has exercised due diligence. JP Morgan's intent or state of mind is irrelevant to this inquiry because neither demonstrates the veracity or accuracy of JP Morgan's assertions or that JP Morgan exercised due diligence to ensure the accuracy of its communications with the CAISO and the Commission in this case.

46. Similarly, JP Morgan's suggestion that it could not mislead the Commission or CAISO about information that was already in the Commission's possession in no way demonstrates that the statements identified in the Show Cause Order do not violate section 35.41(b). The objective accuracy of a seller's statements is the regulation's central requirement. JP Morgan's purported inability to mislead CAISO, the DMM, or the Commission neither shows that the statements at issue were accurate nor that JP Morgan exercised due diligence. Further, a straightforward reading of the text of that provision dispels JP Morgan's interpretation that the Commission's rules would allow an entity to submit inaccurate information or omit material information, either intentionally or through its failure to exercise due diligence, so long as the entity ultimately failed to mislead the recipient. The regulation does not require that the recipient actually be misled or even be capable of being misled in order for communications containing misleading statements or material omissions to be deemed violations of section 35.41(b).

47. The failure of JP Morgan and its attorneys to acknowledge the existence of the 2011 emails from the Office of Enforcement staff in its March 21, 2012 Appeal and May 21, 2012 Complaint, together with the existence of the May 17-18, 2012 email exchange demonstrating counsel's awareness that Commission staff had authorized the ongoing DMM investigation, raises particular concerns under the circumstances. We remind counsel that as representatives of those sellers that have authorization to or seek authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the FPA, they are required under Commission regulations to ensure the veracity and accuracy of the pleadings they file with the Commission, and that Commission regulations provide various ways of addressing circumstances in which those requirements have not been met.<sup>87</sup>

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<sup>86</sup> *Kourouma*, 135 FERC ¶ 61,245 at P 21 (discussing *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 110); see also *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 110 (revising the initially proposed rule to include the due diligence exception to "assure that inadvertent submission of inaccurate or incomplete information will not be sanctioned.").

<sup>87</sup> See, e.g., 18 C.F.R. § 385.2102(a) (2012).

## 2. Suspension of Market-Based Rate Authority

### a. Show Cause Response

48. Assuming for the sake of argument that any of the statements identified in the Show Cause Order constitute a violation of section 35.41(b), JP Morgan argues that such a violation does not warrant suspension of its market-based rate authority.<sup>88</sup> JP Morgan states that suspension of a seller's market-based rate authority is a severe penalty.<sup>89</sup> Further, JP Morgan explains that the Commission has committed to consider the circumstances surrounding a given violation in assessing non-monetary penalties to ensure that such penalties are appropriate and in proportion to the severity of the applicable violation.<sup>90</sup> Additionally, JP Morgan argues that the statements at issue caused no economic harm and were not made knowingly or with the intent to deceive the DMM or the Commission.

49. JP Morgan also argues that the Commission may only punish a seller's OATT violation where the Commission identifies a nexus between the violation and the entity's market-based rate authority.<sup>91</sup> In this case, JP Morgan contends that no such nexus exists. Specifically, JP Morgan states that the statements identified in the Show Cause Order pertain to a discovery-related directive, rather than JP Morgan's market-based rate authority or its selling or trading activities.<sup>92</sup> Moreover, JP Morgan argues that the

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<sup>88</sup> JP Morgan Response to Show Cause Order at 31 (citing *Investigations of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 110).

<sup>89</sup> *Id.* at 32.

<sup>90</sup> *Id.* at 32 (citing *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068, at P 1 (2005)).

<sup>91</sup> *Id.* (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 417, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 21012 U.S. LEXIS 4820 (U.S. June 25, 2012)).

<sup>92</sup> *Id.* at 33.

statements were not made in the course of a Commission proceeding addressing market-based rates.<sup>93</sup>

50. Finally, JP Morgan contends that its representatives argued based on a good-faith belief that section 11.1 applied because the exception provided in section 11.5 had not been triggered. According to JP Morgan, the Commission has previously “explained that ‘a subject’s good faith exercise of its rights under the relevant statutes and our regulations, including but not limited to good faith disputes regarding discovery or settlement issues, will not be considered in determining whether the subject of an investigation has cooperated with staff and will not cause the subject of an investigation to forego possible credit for exemplary cooperation.’”<sup>94</sup>

**b. Comment**

51. CAISO states that serious sanctions are appropriate if a seller submits material misrepresentations.<sup>95</sup> CAISO explains that it is essential that market participants act with candor and honesty in responding to requests for information in the course of an investigation. CAISO notes that such candor is especially significant in the course of a market monitor’s investigation of potential market misconduct. As a result, CAISO supports “decisive action” where a market participant has failed to comport to the Market Behavior Rules, and believes that suspension of market-based rate authority or some similar sanction could be appropriate for such a violation.<sup>96</sup>

52. CAISO also urges the Commission to consider operational factors that may affect the markets administered by CAISO in determining whether to suspend JP Morgan’s market-based rate authority.<sup>97</sup> CAISO explains that the generating units controlled by JP Morgan and its subsidiaries play a significant role in enabling CAISO to reliably meet demand. CAISO asserts that any remedy imposed should not result in CAISO losing access to the energy and capacity provided by those facilities. However, CAISO observes that the significance of those units offers no basis for reducing the severity of any sanction imposed by the Commission and that, in fact, the opposite may be true.

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<sup>93</sup> *Id.* JP Morgan encourages the Commission to refrain from “blurring the boundary between its ratemaking and enforcement authority.” *Id.* at 34.

<sup>94</sup> *Id.* at 31, n.95 (citing *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 22 (2008)).

<sup>95</sup> CAISO Comment at 4.

<sup>96</sup> *Id.* at 5.

<sup>97</sup> *Id.* at 7-8.

**c. Commission Determination**

53. As discussed above, we find that the statements identified in the Show Cause Order each represent violations of section 35.41(b). On numerous occasions, the Commission has explained that companies failing to adhere to the proper standards are subject to immediate revocation of their market-based rate authority.<sup>98</sup> Accordingly, we will suspend JP Morgan's authority to sell energy, capacity, and ancillary services at market-based rates for a period of six months, to become effective on April 1, 2013. JP Morgan will only be allowed to participate in wholesale electricity markets by either scheduling quantities of energy products without an associated price or by specifying a zero-price in their offer, as the relevant tariffs require. Furthermore, the rate received by JP Morgan will be capped at the higher of the applicable locational marginal price or its default energy bid. The Commission has previously accepted the default energy bid as a reasonable opportunity to recover costs.<sup>99</sup> Such a cap will also ensure that load-serving entities have access to adequate generating capacity to serve demand. However, given CAISO's stated concern that the generating units controlled by JP Morgan and its subsidiaries play a significant role in enabling CAISO to reliably meet system needs, we will delay the suspension until April 1, 2013. Such a delay will allow CAISO sufficient time to take steps necessary to maintain system reliability during the suspension period. Such a delay will also afford JP Morgan time to make alternative arrangements to fulfill any existing contractual obligations that may be affected. For instance, JP Morgan would have the option to file for cost-based rates pursuant to which it could be authorized to sell energy, capacity, and ancillary services during the suspension period.

54. JP Morgan's misrepresentations and the resulting penalty are most appropriately addressed at this time because the facts underlying the Office of Enforcement's ongoing investigation and the aforementioned violations are distinct. Consequently, we will not exercise the Commission's right to defer consideration of the matter until the Office of Enforcement has concluded its investigation.<sup>100</sup> The principal issue in the Office of

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<sup>98</sup> See, e.g., *Enforcement of Statutes and Regulations and Orders*, 123 FERC ¶ 61,156 at P 49; *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, at P 32 (2006); *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at P 6, 146, 151; *Enron Power Mktg., Inc.*, 102 FERC ¶ 61,316, at P 8 (2003) (citing *Fact Finding Investigation of Potential Manipulation of Elec. and Natural Gas Prices*, 99 FERC ¶ 61,272, at 62,153-54 (2002); *accord Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 97 FERC ¶ 61,220, at 61,975-77 (2001); *GWF Energy, LLC*, 98 FERC ¶ 61,330, at 62,390 (2002)).

<sup>99</sup> *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274, at P 1033-1057 (2006).

<sup>100</sup> See Show Cause Order, 140 FERC ¶ 61,227 at P 15.

Enforcement's investigation is whether JP Morgan's trading behavior constitutes market manipulation in violation of section 222 of the FPA<sup>101</sup> and Part 1c of the Commission's regulations.<sup>102</sup> The communications containing misrepresentations and material omissions that are at issue in this case, however, occurred several months after the trading behavior referred by the DMM took place. Additionally, while the October 18, 2011 Data Response to the CAISO DMM and the March 21, 2012 Appeal were made in the course of the Office of Enforcement's investigation, the May 21, 2012 Complaint and the June 22, 2012 Answer were made in a separate proceeding pursuant to section 206 of the FPA.

55. Separate consideration of JP Morgan's false statements is also appropriate because the principal causes of action in the respective proceedings are distinct. The Commission has previously explained that a violation of section 222 has occurred where an entity:

(1) uses a fraudulent device, scheme or artifice, or makes a material representation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit on any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.<sup>103</sup>

In comparison, a violation of section 35.41(b) requires neither a showing of a seller's intent nor a showing that the statements were made in connection with a jurisdictional transaction.<sup>104</sup> In addition, no party has alleged that the statements identified in the Show Cause Order constitute violations of Part 1c of the Commission's regulations.

56. Contrary to JP Morgan's assertion, our decision to address the communications at issue in the current proceeding would not "blur the boundary between [the Commission's] ratemaking and enforcement authority."<sup>105</sup> JP Morgan's argument in favor of deferring our determination until after the Office of Enforcement has concluded its investigation is based on the faulty premise that "[t]he dispute here relates to discovery

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<sup>101</sup> 16 U.S.C. § 824w (2006).

<sup>102</sup> 18 C.F.R. Part 1c (2012) (Part 1c).

<sup>103</sup> *Prohibition of Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 (2006).

<sup>104</sup> Compare 18 C.F.R. § 35.41(b), with 18 C.F.R. § 1c.2 (2012), and Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

<sup>105</sup> JP Morgan Response to Show Cause Order at 34.

in an ongoing non-public investigation by [the Office of Enforcement].”<sup>106</sup> This premise ignores the legal authority pursuant to which JP Morgan filed communications with the Commission that contained significant misrepresentations and material omissions. The May 21, 2012 Complaint and the June 22, 2012 Answer were filed pursuant to section 206 of the FPA and relate to its allegation that the monetary penalty imposed by CAISO violated the Tariff and was unjust and unreasonable as a result.<sup>107</sup> Moreover, JP Morgan’s premise ignores the fundamental role of honesty and candor in the Commission’s market-based rate regime, as discussed further below. Thus, our suspension of JP Morgan’s market-based rate authority in the current proceeding, separate from the Office of Enforcement’s ongoing investigation, would adhere to the boundaries between the Commission’s ratemaking and enforcement authorities, rather than blur them.

57. The nature of JP Morgan’s violations is of critical importance in this case. The ability to charge market-based rates is a privilege, not a right, and in granting that privilege the Commission relies on the truth and veracity of the demonstrations made by companies when they apply for market-based rate authority. Furthermore, the Commission’s grant of market-based rate authority is founded upon the presumption that a company’s behavior will not involve fraud, deception or misrepresentation.<sup>108</sup> Consequently, the Commission relies on the submission of complete and accurate information from those that seek authorization to charge market-based rates. Indeed, the provision of false, misleading or inaccurate information undermines the very integrity of the Commission’s decision-making process, the Commission’s market-based rate regime, as well as the Commission’s ability to carry out its statutory obligation to ensure just and reasonable rates. For these reasons, the Commission has continuously warned market participants of the consequences associated with failing to abide by the Commission’s rules and regulations.<sup>109</sup>

58. In this light, the egregious nature of JP Morgan’s repeated submission of false and misleading statements to CAISO, the DMM, and the Commission requires the severe penalty of suspending JP Morgan’s market-based rate authority. Over a period of several months, JP Morgan continuously reasserted its fallacious position that section 11.1 barred the DMM’s investigative efforts because the DMM had not been expressly directed to continue its investigation pursuant to section 11.5. The record in this case demonstrates that JP Morgan and its representatives were notified and reminded time and again that this assertion was in fact incorrect. However, JP Morgan and its representatives either

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<sup>106</sup> *Id.*

<sup>107</sup> See May 21, 2012 Complaint at 10.

<sup>108</sup> *Enron Power Mktg., Inc.*, 102 FERC ¶ 61,316 at P 8.

<sup>109</sup> *Cf. supra* note 98.

intentionally, recklessly, or negligently ignored the Office of Enforcement's communications and continued to mislead those tasked with ensuring that the CAISO markets functioned properly and resulted in just and reasonable rates.

59. Again, we find JP Morgan's conduct before this Commission particularly troublesome under the circumstances. In the past several months, JP Morgan has submitted three separate filings containing statements that were premised on what are undeniably falsehoods. In the March 21, 2012 Appeal and the May 21, 2012 Complaint, JP Morgan implored the Commission to overturn CAISO's monetary penalty on the basis that the Office of Enforcement had never expressly directed the CAISO DMM to continue its investigation of JP Morgan's bidding activities. These misrepresentations served as the central argument advanced by JP Morgan as it persisted in referring to the post-referral bar of section 11.1. Notably, it was not until the Office of Enforcement called the Commission's attention to the inaccuracy of JP Morgan's assertions that JP Morgan acknowledged "mistakes in the Submissions."<sup>110</sup>

60. JP Morgan's argument that suspension of its market-based rate authority is unwarranted because its various misrepresentations caused no economic harm fails to fully take into account the seriousness of its violations. "The decision of whether to impose [non-monetary sanctions, such as suspending market-based rate authority] is based on an evaluation of the particular circumstances of the individual case, including the scope and seriousness of the violations."<sup>111</sup> The harm caused by a violation, whether it is economic or physical, is merely one factor in determining the appropriate penalty to be imposed. Moreover, as we note above, the Commission's market-based rate program relies on a presumption that those authorized to charge market-based rates will not engage in fraud, deception, or misrepresentation. Thus, misrepresentations by market-based rate sellers are serious violations causing harm to the integrity of the Commission's market-based rate authorizations.

61. Other factors similarly require a severe penalty in this case. For instance, JP Morgan's withdrawal of its complaint cannot be characterized as JP Morgan's having reported its own violation because the Office of Enforcement brought JP Morgan's misrepresentations to light. Only afterward did JP Morgan withdraw its complaint,

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<sup>110</sup> See JP Morgan Response to Show Cause Order at 25.

<sup>111</sup> *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 49 (2008); see also *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216, at P 97 (2010) ("We clarify that the Penalty Guidelines do allow for non-monetary sanctions. The Commission has always had the discretion to assess non-monetary sanctions, instead of or in addition to monetary penalties . . . . The Penalty Guidelines do not change this practice.").

while simultaneously filing the June 22, 2012 Answer, which contained more misrepresentations in violation of section 35.41(b).<sup>112</sup>

62. Similarly, JP Morgan offered no form of cooperation until after its misrepresentations had been exposed. Rather, JP Morgan repeatedly made deceptive and misleading statements to CAISO, the DMM, and the Commission over a period of several months.<sup>113</sup> Although a subject's good faith exercise of its rights is not to be considered as a failure to cooperate with the Commission, JP Morgan failed to act in good faith in this case.<sup>114</sup> At least as early as its receipt of the 2011 emails, JP Morgan could no longer in good faith argue that the DMM had not been expressly authorized by the Office of Enforcement to continue its investigation. Nevertheless, after being informed of the DMM's authority on three separate occasions, JP Morgan continually and disingenuously impeded the DMM's efforts.<sup>115</sup>

63. JP Morgan inappropriately relies on Order No. 697 in arguing that the Commission must establish a nexus between JP Morgan's inaccurate and incomplete statements and its market-based rate authority. In Order No. 697, the Commission stated:

We will adopt the NOPR proposal to revoke an entity's market-based rate authority *in response to an OATT violation* only upon a finding of a nexus between the specific facts relating to the OATT violation and the entity's market-based rate authority, and reiterate our statement in the NOPR that an OATT violation may subject the seller to other remedies the Commission may deem appropriate, such as disgorgement of profits or civil penalties. As stated in the NOPR, the finding that an OATT adequately mitigates transmission market power rests on the assumption that individual

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<sup>112</sup> See *supra* P 21-23, 38.

<sup>113</sup> As discussed above, JP Morgan's assertion that it and its representatives failed to recall the 2011 emails in preparation of the statements identified in Show Cause Order lacks credibility.

<sup>114</sup> *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 at P 22.

<sup>115</sup> JP Morgan cites a September 30, 2012 article from the *L.A. Times* in support of its statement that the Commission must not act on its violations of 35.41(b) until an enforcement decision in the ongoing investigation is made to "avoid[] the possibility of prejudgment." See JP Morgan Response to Show Cause Order at 34, n.101. However, we note that the suggestion in the article that corporate law firms are there to represent their clients' interests by obfuscation, obstruction, delay or misdirecting the Commission from the truth in violation of Commission regulations renders our decision in this matter all the more relevant and important.

entities comply with the OATT and there may be OATT violations in circumstances that, after applying the factors in the Enforcement Policy Statement, merit revocation or limitation of market-based rate authority. We find, however, that it is inappropriate to revoke a seller's market-based rate authority *for an OATT violation* unless there is a nexus between the specific facts relating to the OATT violation and the seller's market-based rate authority.<sup>116</sup>

A straightforward reading of Order No. 697 makes clear that the nexus requirement set forth in that order for revocation of market-based rate authority is limited to cases involving OATT violations. In this case, JP Morgan has been found to have violated section 35.41(b) of the Commission's regulations—not any provision of the OATT. Thus, the passage of Order No. 697 cited by JP Morgan is inapplicable under the circumstances. Nevertheless, there is a nexus between JP Morgan's misleading statements and its market-based rate authority in that, as noted above, the Commission relies on accurate and complete information from those that it authorizes to charge market-based rates.

### 3. JP Morgan Subsidiaries

#### a. Comment

64. CAISO suggests that the Commission consider expanding the scope of this proceeding to include JP Morgan's subsidiary BE CA LLC (BE CA), which CAISO states may have been involved in the conduct at issue in the Show Cause Order.<sup>117</sup> According to CAISO, in a separate proceeding, JP Morgan has explained that it operates in the CAISO markets through tolling agreements held by JP Morgan and BE CA.<sup>118</sup> Further, CAISO states that BE CA has the right to dispatch the output of certain generating facilities in the CAISO region through tolling agreements. Thus, CAISO suggests that the Commission add BE CA as a respondent to the current proceeding, "if for no other reason than to avoid the risk of having an affiliate of [JP Morgan] circumvent and frustrate any remedy the Commission may determine is appropriate."<sup>119</sup>

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<sup>116</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 417 (footnotes omitted) (emphasis added).

<sup>117</sup> CAISO Comment at 5.

<sup>118</sup> *Id.* at 6 (citing J.P. Morgan Ventures Energy Corporation, Complaint, Docket No. EL12-105-000, at 1 (filed Sept. 14, 2012)).

<sup>119</sup> *Id.*

**b. Commission Determination**

65. In the Show Cause Order, the Commission directed JP Morgan to demonstrate why it should not be found to have violated section 35.41(b) of the Commission's regulations. The Show Cause Order addresses evidence suggesting that specific statements by JP Morgan may have been inaccurate. Consequently, CAISO's recommendation that the Commission add BE CA as a respondent to the Show Cause Order is beyond the scope of the current proceeding, which is confined to the October 18, 2011 Data Response to the CAISO DMM, the March 21, 2012 Appeal, the May 21, 2012 Complaint, and the June 22, 2012 Answer. Further, there is no evidence in the current record that BE CA has submitted misrepresentations that would violate section 35.41(b). Should evidence of a violation eventually come to light, the Commission will address the matter in a future proceeding.

The Commission orders:

JP Morgan's market-based rate authority is hereby suspended for a period of six months, effective as of April 1, 2013, as discussed in the body of this order.

By the Commission. Commissioner LaFleur is dissenting with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

J.P. Morgan Ventures Energy Cooperation

Docket No. EL12-103-000

(Issued November 14, 2012)

LaFLEUR, Commissioner, *dissenting*:

The record in this proceeding demonstrates that JP Morgan's alleged misrepresentations do not relate to its conduct in the market, but are instead litigation positions that pertain to whether it had the obligation to provide documents to CAISO after CAISO referred JP Morgan's bidding activities to the Commission.<sup>1</sup> Therefore, I believe the statements should be addressed as part of the ongoing investigation into JP Morgan's bidding activities, either as separate counts of obstruction, or as aggravating circumstances that factor into the determination of any civil penalty.<sup>2</sup>

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<sup>1</sup> Specifically, JP Morgan asserted that the Commission's Office of Enforcement did not expressly direct the Market Monitor to continue its investigation into JP Morgan's market activities, as required by the tariff, and that its production of documents to the Market Monitor was voluntary. *See* Order at PP 3-24.

<sup>2</sup> The Commission has available multiple alternatives for addressing JP Morgan's statements in the context of the ongoing investigation. For example, the Penalty Guidelines provide for adding points to JP Morgan's culpability score, and thus increasing its civil penalty, for obstruction of justice. *Penalty Guidelines* § 1C2.3(e) ("If the organization willfully obstructed or impeded . . . or encouraged obstruction of justice during the investigation or resolution of the instant violation, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance . . . add **3** points."). The Commission can also refuse to give JP Morgan any credit for cooperation, which would also result in a larger civil penalty. *Id.* § 1C2.3(g). If the Commission still feels that these adjustments do not fully address JP Morgan's statements, it may depart from the Penalty Guidelines and impose a higher penalty. *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216, at P 32 (2010). Finally, the Commission may bring a separate charge against JP Morgan for making intentional or reckless misrepresentations that result in "substantial interference with the administration of justice." *Penalty Guidelines* § 2C1.1 (defining "substantial interference" in part as causing "the unnecessary expenditure of substantial governmental or Commission resources.").

The Commission's decision to proceed with the suspension represents a novel use of its authority over market-based rates, and is unsupported by its own regulations.<sup>3</sup> In Order No. 697, the Commission recognized that it would be "inappropriate" to revoke an entity's market-based rate authority for a tariff violation unless there is a nexus between the specific facts of the violation and the entity's market-based rate authority.<sup>4</sup> By proceeding with today's order, the Commission departs from this sensible principle and establishes a new and potentially dangerous precedent: an entity can lose its market-based rate authority for litigation positions it takes before the Commission or Commission Staff, even if those positions do not relate to its activity or honesty in the market.

That this new precedent can yield arbitrary results is already clear from today's order. After today, the Commission's policy appears to be that there is a nexus requirement for revoking market-based rates in response to tariff violations, but not for misrepresentations or omissions.<sup>5</sup> The lack of such a requirement only underscores the absence of a clear and

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<sup>3</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 417, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 204, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 21012 U.S. LEXIS 4820 (U.S. June 25, 2012).

<sup>4</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 417.

<sup>5</sup> Order at P 63 ("A straightforward reading of Order No. 697 makes clear that the nexus requirement set forth in that order for revocation of market-based rate authority is limited to cases involving OATT violations.") In any event, the Commission goes on to claim that there is a nexus between JP Morgan's alleged misrepresentations and its market-based rate authority. Citing *Enron Power Mktg., Inc.*, 102 FERC ¶ 61,316, at P 8 (2003) (*Enron*), the Commission explains that its "grant of market-based rate authority is founded upon the presumption that a company's behavior will not involve fraud, deception or misrepresentation" and therefore the Commission relies on sellers with market-based rates to provide accurate and complete information to the Commission. Order at P 57, 63. This explanation, however, only further demonstrates the novelty of the Commission's position in this case. In *Enron*, the Commission revoked Enron's market-based rate authority after finding that Enron had engaged in gaming and misrepresentation related to the market. *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343, at P 53 (finding that Enron engaged in gaming in the form of inappropriate trading strategies), P 55 (finding that Enron failed to inform the Commission in a timely manner of changes in its market shares that resulted from its gaining influence/control over others' facilities), P 56 (concluding that Enron "engaged in behavior that undermines the functioning of the wholesale power market" and that "this same conduct violates the express requirements in [the Commission's] orders allowing the Enron Power Marketers to make sales at market-based

principled set of rules for when and how the Commission will exercise its authority to revoke market-based rates.

The principle that the punishment must bear at least some reasonable relationship to the behavior being punished is more important than the Commission's indignation in any particular case. JP Morgan may well face the loss of its market-based rate authority as a consequence of the pending investigation. But if so, it should be because of its conduct in the market, not because of a dispute over document production.

Accordingly, I would not reach in this proceeding the question of whether the statements violate section 35.41(b) of the Commission's regulations and would instead refer them to the ongoing investigation. Therefore, I respectfully dissent.

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Cheryl A. LaFleur  
Commissioner

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rates that they report changes in their status.”) (2003). Thus, in *Enron*, there was a clear nexus between Enron's conduct and its market-based rate authority, and the broad statements cited by the Commission today must be understood in that context.