

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
FEDERAL ENERGY)		
REGULATORY COMMISSION,)		
)	Case No.	
Petitioner,)		
)		
v.)		
)		
MAXIM POWER CORPORATION,)		
MAXIM POWER (USA), INC.,)		
MAXIM POWER (USA) HOLDING)		
COMPANY INC., PAWTUCKET)		
POWER HOLDING CO., LLC,)	JURY TRIAL REQUESTED	
PITTSFIELD GENERATING)		
COMPANY, LP, and KYLE MITTON,)		
)		
Respondents.)		
_____)	

PETITION FOR AN ORDER AFFIRMING THE FEDERAL ENERGY REGULATORY COMMISSION’S MAY 1, 2015 ORDER ASSESSING CIVIL PENALTIES AGAINST MAXIM POWER CORPORATION, MAXIM POWER (USA), INC., MAXIM POWER (USA) HOLDING COMPANY INC., PAWTUCKET POWER HOLDING CO., LLC, PITTSFIELD GENERATING COMPANY, LP, AND KYLE MITTON

Petitioner Federal Energy Regulatory Commission (“FERC” or “Commission”), pursuant to section 31(d)(3) of the Federal Power Act (“FPA”), 16 U.S.C. § 823b(d)(3) (2012), petitions this Court for an order affirming the Commission’s May 1, 2015 Order Assessing Civil Penalties (“Order Assessing Civil Penalties”) against Maxim Power Corporation, Maxim Power (USA), Inc., Maxim Power (USA) Holding Company Inc., Pawtucket Power Holding Co., LLC, and Pittsfield Generating Company, LP (collectively “the Maxim Entities” or “Maxim”) and against Maxim employee Kyle Mitton.

SUMMARY OF THE ACTION

1. This is an action seeking enforcement of civil penalties assessed by the Commission (a) against Maxim and Mitton for violating section 222 of the FPA and the Commission's rule prohibiting manipulation, 18 C.F.R. § 1c.2 (2014), through a scheme to defraud the New England wholesale electricity market (operated by ISO New England, Inc. ("ISO-NE" or "the ISO")) of nearly \$3 million by charging for an expensive fuel that Maxim did not actually burn, and (b) against Maxim for violating the Commission's rule concerning truthfulness in communications, 18 C.F.R. § 35.41(b) (2014), by making false and misleading statements and omitting material information in communications with the ISO's Internal Market Monitor.

2. ISO-NE is an independent, nonprofit, Regional Transmission Organization (RTO) serving Massachusetts, Connecticut, Maine, New Hampshire, Rhode Island, and Vermont. Among other things, the ISO conducts daily auctions in which wholesale suppliers of electricity (generators such as power plants, wind turbines, or hydroelectric dams) offer to provide electricity, and wholesale purchasers (*e.g.*, utilities like National Grid that sell electricity to retail customers) offer to purchase electricity. Through the operation of supply and demand, these auctions set market prices for electricity each day. The Commission regulates these markets as part of its obligation under the Federal Power Act to ensure that wholesale electricity rates are just and reasonable. At the Commission's direction, the ISO has a watchdog unit, called an Internal Market Monitor ("IMM"), that, among other responsibilities, seeks to detect improper conduct by market participants.

3. In addition to managing daily auctions and performing other marketplace functions, ISO-NE seeks to ensure that the New England grid operates reliably and to avoid

blackouts or other service interruptions. In some cases, for engineering reasons, the ISO must dispatch a generator (that is, direct the generator to operate) to ensure reliability, even though the price the generator has offered is above the market clearing price. For example, the ISO may determine that a particular generator is needed to ensure grid reliability on a particular day even though that day's market price is \$50/MWh and the generator's offer price for that day is \$70/MWh. (In retail electricity markets, the relevant unit of measurement is the kilowatt-hour (KWh). In wholesale markets, the relevant unit is 1,000 KWh's, which is called a megawatt-hour (MWh).)

4. When the ISO makes this type of out-of-market dispatch, it ordinarily pays the generator the difference between the plant's higher offer price and the market price (in this example, $\$70/\text{MWh} - \$50/\text{MWh} = \$20/\text{MWh}$). These types of out-of-market payments for reliability dispatches are known as Net Commitment Period Compensation ("NCPC") payments.

5. A power plant that is needed to ensure that the grid operates reliably may have market power, that is, the ability to charge high, uncompetitive prices. To protect wholesale purchasers (and ultimately retail customers), ISO-NE has, with Commission approval, adopted rules that limit (or "mitigate") the prices that power plants can charge when they are needed for reliability. In the summer of 2010, when the ISO dispatched a power plant for reliability, these rules limited payments to the plant to 110% of the estimated cost (or "reference level") of the fuel the plant burned.

6. Some power plants can burn either natural gas or fuel oil. This type of generator is called a "dual-fuel" unit. The cost of producing a unit of electricity is almost always much higher from burning fuel oil than from burning natural gas. Under the ISO's mitigation rules in effect in the summer of 2010, which limited NCPC payments to 110% of a unit's reference

levels, a generator could usually charge much more for burning fuel oil than for burning natural gas. During the period relevant here, a dual-fuel unit dispatched for reliability could collect about \$175/MWh based on fuel oil prices as opposed to about \$75/MWh based on natural gas prices.

7. Maxim owns three power plants that participate in ISO-NE markets, including a dual-fuel generator in Pittsfield, Massachusetts. Maxim and its employee in charge of making bids for the Pittsfield plant, Kyle Mitton, knew that the Pittsfield plant would make large amounts of money if Maxim could burn inexpensive natural gas at the Pittsfield plant but nevertheless be paid by the ISO based on the much higher price of fuel oil. This scheme could succeed, however, only so long as the IMM did not realize that Maxim had actually burned natural gas at Pittsfield.

8. During hot days in July and August 2010, Maxim and Mitton repeatedly submitted offers to ISO-NE for Pittsfield at high oil prices when they expected and planned to burn much cheaper natural gas. On many days, Maxim procured natural gas before it learned whether it had been dispatched by the ISO, and on at least 11 days it did so before submitting offers priced on oil.

9. Starting in mid-July 2010, the IMM asked Maxim questions about its high-priced offers for Pittsfield. Maxim and Mitton responded with a series of evasive and misleading responses implying that pipeline restrictions on interstate natural gas pipelines transporting natural gas to the Pittsfield plant were preventing Pittsfield from obtaining natural gas and that the plant therefore had to burn fuel oil. Maxim and Mitton gave these responses to try to prevent the IMM from discovering that the plant had burned natural gas when Maxim had submitted

offers at fuel oil prices, and thereby to prevent the IMM from mitigating Pittsfield to lower natural gas prices.

10. The IMM eventually discovered that Maxim had actually burned natural gas on many days when it offered on fuel oil prices and was able to recover the \$2.99 million in inflated payments to Maxim. Had Maxim's and Mitton's scheme not been uncovered, electricity ratepayers in New England would have suffered nearly \$3 million in harm.

11. The Commission's Office of Enforcement ("Enforcement") conducted an investigation of Maxim's and Mitton's actions concerning Maxim's offering Pittsfield at fuel oil prices and later burning of natural gas in July and August 2010 and its communications with the ISO-NE IMM on those topics. On February 2, 2015, the Commission ordered Maxim and Mitton to show cause why they should not be found to have violated the FPA's prohibition against fraud and market manipulation and section 1c of the Commission's rules, and ordered Maxim to show cause why it should not be found to have violated the Commission's candor rule, 18 C.F.R. § 35.41(b). In responding to the Commission's order, Maxim and Mitton each chose (pursuant to section 31(d)(3) of the FPA) to forego an administrative proceeding and instead to have the Commission assess a civil penalty if it found a violation. Based on the briefing in response to a February 2, 2015 show cause order and its review of the voluminous evidence presented by Enforcement and Respondents, on May 1, 2015 the Commission issued an Order finding that Maxim and Mitton devised and implemented a fraudulent scheme to collect nearly \$3 million in inflated reliability payments at fuel oil prices when the Pittsfield plant actually burned natural gas, in violation of 18 C.F.R. § 1c.2. The Order also found that Maxim violated 18 C.F.R. § 35.41(b) through a series of misleading communications with the ISO-NE IMM.

The Order Assessing Civil Penalties, *Maxim Power Corp. et al.*, 151 FERC ¶ 61,094 (2015), is attached as Exhibit 1 and incorporated by reference in this petition.

12. The Order Assessing Civil Penalties directs Maxim to pay a civil penalty of \$5,000,000 and directs Mitton to pay a civil penalty of \$50,000. As neither Maxim nor Mitton has made these payments, the Commission seeks, pursuant to FPA section 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B) (2012), an order from this Court (1) affirming the Order Assessing Civil Penalties with a corresponding judgment, (2) requiring Maxim to pay the \$5,000,000 civil penalty, and (3) requiring Mitton to pay the \$50,000 civil penalty.

PARTIES

A. Petitioner

13. FERC is an administrative agency of the United States, organized and existing pursuant to the FPA, 16 U.S.C. § 791a *et seq.*

B. Respondents

14. Maxim Power Corporation is incorporated under the laws of the province of Alberta, Canada, with its principal place of business in Calgary, Alberta. Through subsidiaries, Maxim Power Corporation owns and controls a power plant in Pittsfield, Massachusetts.

15. Maxim Power (USA), Inc. and Maxim Power (USA) Holding Company Inc. are incorporated under Nevada law with their principal place of business in Calgary, Alberta. Through subsidiaries, these entities own and control the Pittsfield power plant.

16. Pittsfield Generating Co., LP is a limited partnership organized under Delaware law with its principal place of business in Pittsfield, Massachusetts. Pittsfield Generating Co. owns the Pittsfield power plant.

17. Pawtucket Power Holding Co., LLC is a limited liability company organized under Delaware law and is the lead participant with ISO-NE for both Pittsfield and two other Maxim plants in New England.

18. Kyle Mitton is a Canadian citizen residing in Calgary, Alberta. In 2010, Mitton was a Senior Energy Analyst with Maxim. On behalf of Maxim, Mitton regularly interacted in summer 2010 with ISO-NE and the IMM, both based in Holyoke, Massachusetts.

JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction over this action pursuant to FPA section 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B).

20. Following the Commission's February 2, 2015 issuance of the Order to Show Cause and Notice of Proposed Penalty ("Order to Show Cause") to Maxim and Mitton under FPA section 31(d)(1), 16 U.S.C. § 823b(d)(1), Maxim and Mitton each elected the procedures of FPA section 31(d)(3), 16 U.S.C. § 823b(d)(3), under which the Commission may assess a civil penalty that, if unpaid, can be enforced by a federal district court. The Order to Show Cause, including the accompanying Enforcement Staff Report and Recommendation, is attached as Exhibit 2 and incorporated by reference in this petition. *Maxim Power Corp., et al.*, 150 FERC ¶ 61,068 (2015).

21. Pursuant to Maxim's and Mitton's elections, and after considering the voluminous evidence and arguments submitted by Enforcement and Respondents, the Commission assessed the civil penalties set forth in the Order Assessing Civil Penalties. Because neither Maxim nor Mitton paid their respective penalties within 60 days, the statute directs the Commission to file an enforcement action to affirm the penalty. FPA section 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B) ("If the civil penalty has not been paid within 60 calendar days after the

assessment order has been made under subparagraph (A), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty.”). The Commission therefore now files this petition for an order from this Court affirming the assessments of civil penalties. Under FPA section 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B), this Court “shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in [p]art” the Commission’s assessment of the civil penalty.

22. Venue properly lies within the District of Massachusetts pursuant to FPA section 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B), and section 317, 16 U.S.C. § 825p, because portions of the acts or transactions constituting the violations occurred in Massachusetts. Specifically, (1) Maxim and Mitton engaged in an unlawful scheme to defraud ISO-NE, which is located in Holyoke, Massachusetts, (2) Maxim and Mitton made false and misleading statements and omitted material information in communications with the ISO-NE IMM, also based in Holyoke, Massachusetts, (3) Maxim’s Pittsfield plant is located in this District, and (4) Maxim’s and Mitton’s scheme sought to defraud ISO-NE to the detriment of electricity customers in New England, including those in Massachusetts.

THE COMMISSION’S ANTI-MANIPULATION AUTHORITY

23. In the wake of Enron Corporation’s manipulative schemes in the western U.S. electricity markets, Congress, through the Energy Policy Act of 2005, amended the FPA to give the Commission broad authority to prohibit energy market manipulation. In relevant part, FPA section 222, 16 U.S.C. § 824v(a), makes it “unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy . . . any manipulative or

deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.”

24. The Commission implemented this statute in 2006 by promulgating section 1c.2 of its regulations, 18 C.F.R. § 1c.2. As explained by the Commission in its Order promulgating the regulation, section 1c.2 prohibits an entity from (1) using a fraudulent device, scheme, or artifice, or making a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule, or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of electricity subject to the jurisdiction of the Commission. 18 C.F.R. § 1c.2. *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047, at P 49, *reh’g denied*, 114 FERC ¶ 61,300 (2006) (“Order No. 670”). For purposes of this rule, “the Commission defines fraud generally, that is, to include any action, transaction, or conspiracy for the purpose of impairing, obstructing, or defeating a well-functioning market. Fraud is a question of fact that is to be determined by all the circumstances of a case.” Order No. 670 at P 50.

25. The Energy Policy Act of 2005 also provided the Commission with increased civil penalty authority. FPA section 316A, 16 U.S.C. § 825o-1, authorizes the Commission to assess civil penalties against violators up to \$1,000,000 for each day that a violation occurs. The Commission has found that each separate transaction that constitutes a violation is subject to a \$1,000,000 per day penalty. In assessing penalties, the Commission must consider “the seriousness of the violation and the effort of such person to remedy the violation in a timely manner.” FPA section 316A, 16 U.S.C. § 825o-1(b).

26. In 2008, the Commission adopted a policy that it would consider five factors to determine the amount of the civil penalty for violations: (1) seriousness of the offense; (2) commitment to compliance; (3) self-reporting; (4) cooperation; and (5) reliance on prior Enforcement guidance. *Enforcement of Statutes, Regulations & Orders*, 123 FERC ¶ 61,156, at PP 54-71 (2008) (“Revised Policy Statement on Enforcement”). These factors continue to apply to individuals and the Commission relied on these factors in determining the appropriate civil penalty for Mitton.

27. In 2010, the Commission adopted a set of non-binding Penalty Guidelines, applicable to corporate entities, based on the corporate fine provisions of the U.S. Sentencing Guidelines, in an effort to provide greater fairness, transparency, and consistency in its civil penalty determinations. *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216, at PP 5-6 (2010) (“Revised Policy Statement on Penalty Guidelines”). The Commission relied on the Penalty Guidelines in determining the appropriate civil penalty to assess against Maxim.

BACKGROUND

28. The Commission set forth in its Order Assessing Civil Penalties a detailed description of the relevant facts, including Maxim’s and Mitton’s conduct in connection with Maxim’s July-August 2010 offers to ISO-NE for the Pittsfield plant. *See* Order Assessing Civil Penalties at PP 8-15, 25-37, 49-67, 83-98, 102-103. In the Order Assessing Civil Penalties, the Commission concluded that Maxim and Mitton each violated the Commission’s anti-manipulation rule (18 C.F.R. § 1c.2), determined that Maxim violated section 35.41(b) of the Commission’s Rules, and assessed civil penalties of \$5,000,000 against Maxim and \$50,000 against Mitton.

A. The Maxim Entities and Mitton

29. Maxim Power Corporation (“Maxim Power”) is a Canadian firm based in Calgary, Alberta. Through wholly-owned subsidiaries, Maxim Power owns power plants in a number of countries, including the United States. Maxim Power’s staff in Calgary (including Mitton) control all of the Maxim Entities. Order Assessing Civil Penalties at P 8.

30. Through its wholly-owned subsidiary Pittsfield Generating Company, LP, Maxim Power Corporation owns and controls a power plant in Pittsfield, Massachusetts (the “Pittsfield plant” or “Pittsfield,” also called “Altresco”). Order Assessing Civil Penalties at P 9.

31. The Pittsfield plant can burn either oil or natural gas to generate electricity, although natural gas was almost always the cheaper fuel in the summer of 2010. *Id.* P 13. Pittsfield obtains natural gas through a connection with Tennessee Gas Pipeline Company, L.L.C. *Id.* P 9. Particularly on hot days, ISO-NE often needs the Pittsfield unit to run to ensure that the New England electric grid will operate reliably. *Id.* PP 10, 51.

32. Mitton has worked for Maxim since 2005. As a senior analyst in the company’s Energy Marketing Group in the summer of 2010, Mitton often decided what prices to submit to ISO-NE for Maxim’s New England plants, including Pittsfield, and often procured gas for use at the plant. Mitton’s supervisor was Eagle Kwok, then Maxim’s head of Energy Marketing. (Kwok no longer works at Maxim.) Mitton and Kwok regularly communicated with ISO-NE and the IMM about Pittsfield. Order Assessing Civil Penalties at P 11.

B. ISO-NE and its Market Rules

33. ISO-NE is a Commission-regulated Regional Transmission Organization that operates a wholesale electricity market in Connecticut, Maine, Massachusetts, Rhode Island, New Hampshire, and Vermont. Order Assessing Civil Penalties at P 12. As in other markets,

most of ISO-NE's dispatches of generation resources are based on price; that is, ISO-NE seeks to minimize the cost of generating energy by relying on generators with the lowest offer prices. In some cases, however, to ensure the reliability of the electric grid, ISO-NE may need a generator to operate even though its offer is above the market price (called "Locational Marginal Price" or "LMP") set by supply and demand. When that happens, ISO-NE provides the generator with Net Commitment Period Compensation payments to make up the difference between the generator's offer price and the market price. *Id.* This type of compensation is sometimes called a "make-whole" payment.

34. ISO-NE operates both "Day-Ahead" and "Real-Time" markets for energy. As its name suggests, the Day-Ahead market operates one day ahead of the date on which the energy is delivered. Order Assessing Civil Penalties at P 12 n.8. The deadline for submission of offers by generators in the Day Ahead market was noon Eastern Time in the summer of 2010.

35. To prevent generators needed for reliability from exploiting market power, ISO-NE's mitigation rules cap NCPC payments at each facility's reference levels (estimated actual costs) of the fuel the plant burned, plus 10 percent. Order Assessing Civil Penalties at PP 2, 13. For dual-fuel units like Pittsfield, different reference levels apply depending on the fuel used. In the summer of 2010, it was much more expensive to produce electricity with fuel oil than with natural gas, so reference levels for fuel oil were much higher than for natural gas. As a result, a dual-fuel plant such as Pittsfield could collect much higher NCPC payments if the IMM applied mitigation based on fuel oil rather than natural gas reference prices. *Id.* PP 13-14.

C. Respondents' Oil Offers, Gas Burns, and Communications with the IMM

36. From December 2005 through May 31, 2010, the Pittsfield plant operated under a Reliability Must Run ("RMR") agreement with ISO-NE. Order Assessing Civil Penalties at

P 25. The agreement was based on ISO-NE's determination (endorsed by the Commission) that the plant was needed to ensure grid reliability. *Id.* Under the RMR agreement, the ISO made annual payments to the owner of the Pittsfield plant for providing that reliability service. *Id.* The agreement terminated at the end of May 2010. *Id.* Starting on June 1, 2010, Pittsfield was subject to generally applicable ISO-NE market rules, including possible mitigation of Pittsfield's offers down to fuel oil or natural gas reference levels. *Id.*

37. The months of July and August 2010 were particularly hot in New England, and on many days ISO-NE needed to dispatch Pittsfield to ensure grid reliability. Order Assessing Civil Penalties at P 26. For 38 of the 45 days between July 5, 2010 and August 18, 2010, Maxim submitted offers for Pittsfield based on high fuel oil prices. *Id.* On 22 of those 38 days, the ISO committed Pittsfield for reliability and paid Maxim NCPC based on the fuel oil prices that Maxim submitted to the ISO, but in fact Maxim burned all or nearly all natural gas at a much lower cost on those days. *Id.* On many of these days, Maxim was so confident its plants would be needed for reliability that it bought natural gas hours before learning whether it had received a Day Ahead award, and on 11 of these days, Maxim had already contracted for natural gas before the noon deadline for submitting Day Ahead offers. *Id.* PP 26, 55.

38. On behalf of Maxim, Mitton submitted offers for Pittsfield to ISO-NE at oil prices during this period, often purchasing gas before submitting oil offers. Over these 38 days, Maxim's NCPC payments based on oil prices for Pittsfield were about \$100/MWh higher than NCPC payments based on gas prices (as noted above, \$175/MWh vs. \$75/MWh). Order Assessing Civil Penalties at PP 26-27. This translated into far greater profits.

39. Through this scheme, Maxim attempted to obtain NCPC payments for burning an expensive fuel (fuel oil) when it actually burned a much less expensive fuel (natural gas).

Maxim and Mitton knew that if the ISO dispatched Pittsfield for reliability, Maxim would obtain higher payments if it submitted offers based on fuel oil prices rather than natural gas prices, even if the plant actually burned natural gas, so long as the IMM did not realize that the plant had done so. Order Assessing Civil Penalties at PP 84, 89-90.

40. If the IMM learned that Pittsfield had received NCPC payments at fuel oil prices when it actually burned natural gas, however, it would mitigate Pittsfield to the lower natural gas price. Order Assessing Civil Penalties at P 52. To try to avoid this result, when the ISO inquired about Maxim's high offer prices, Maxim and Mitton crafted their responses to the IMM's inquiries about Pittsfield to try to prevent the IMM from learning that the plant had actually burned natural gas. In these communications, Maxim and Mitton falsely implied that Pittsfield was burning fuel oil because pipeline restrictions were limiting its ability to obtain natural gas. *Id.* PP 49, 52-57, 62. In addition, Mitton omitted material facts in each of his communications with the IMM on Maxim's behalf, including that during this period (a) Pittsfield had burned natural gas, not fuel oil, to meet virtually all of its reliability dispatches based on high-priced fuel oil offers and (b) Maxim often procured natural gas before submitting offers at high fuel oil prices. *Id.* PP 49, 52, 58, 62.

41. On July 15, 2010, the IMM left a voicemail for Mitton asking about "the offer price" for the Pittsfield plant. Order Assessing Civil Penalties at PP 28, 53. The next day, July 16, 2010, Mitton responded with an email saying: "We have been offering the unit in conservatively on fuel oil due to the daily gas restrictions on Tennessee Gas Pipeline. I can provide you the restriction notices for your records if you like" *Id.* P 28. By citing "daily gas restrictions" as the reason for Maxim's fuel oil offers, Mitton falsely implied that the restrictions had actually affected Pittsfield's ability to obtain natural gas, when in fact Pittsfield

had successfully acquired all of the natural gas it needed to meet the previous nine days of reliability dispatches. *Id.* P 54. In fact, for every operating day from July 7 to July 16, Maxim bought natural gas hours before it learned from ISO-NE whether it had received a Day Ahead award; on several of those days, Maxim did so before submitting offers at fuel oil prices. *Id.* P 55. Mitton's July 16 email on behalf of Maxim omitted any mention of these material facts. *Id.* PP 49, 52, 58, 62.

42. The IMM responded to Mitton's July 16 email that same day with a request for the backup support for Mitton's statements. On July 19, 2010, Mitton sent the IMM a document showing recent pipeline restriction notices, saying "there have been restrictions [on Tennessee Gas Pipeline] every day of the month so far in July." Mitton told the IMM official that the pipeline was facing "'bottlenecks' and reducing the amount of [natural] gas that can flow," and that "[d]uring normal heat this wouldn't be an issue however with the prolonged heat wave in the Northeast restrictions have been a serious issue." Order Assessing Civil Penalties at P 28.

43. Like his July 16 email, Mitton's July 19 email implied that Maxim's fuel oil offers for Pittsfield were due to pipeline restrictions when, in fact, the restrictions had not materially affected Maxim's ability to acquire natural gas for Pittsfield. Order Assessing Civil Penalties at P 55. In fact, for every operating day between July 7 and July 22, Maxim not only obtained natural gas to satisfy nearly all of Pittsfield's Day Ahead awards, but purchased natural gas hours before the ISO announced generator selections, and often before Maxim submitted Day Ahead offers at noon. *Id.* PP 55, 62. In his July 19 email, Mitton again did not disclose any of these material facts. *Id.* PP 49, 52, 58, 62. On July 20, 2010, the IMM sent an email to Mitton asking to be advised when Pittsfield "ha[s] a fuel issue . . . so we [the IMM] can model the unit on the correct fuel." Order Assessing Civil Penalties at P 29. Mitton responded, "we are in on

fuel oil again tomorrow [i.e., July 21, 2010],” *id.*, misleadingly implying that Maxim could not procure natural gas, would therefore be burning fuel oil, and should be modeled (and paid) at fuel oil prices. *Id.* P 56. In fact, before submitting its Day-Ahead offer based on burning fuel oil, Maxim had already purchased natural gas for Pittsfield for the next day, July 21, 2010. *Id.* Again, Maxim did not disclose either that it burned natural gas or that it bought natural gas in advance. *Id.* PP 49, 52, 58, 62.

44. Mitton sent another misleading email on July 21, 2010. In that email, Mitton stated that “Altresco [i.e., Pittsfield] is on fuel oil pricing again for 7/22 due to [natural] gas restrictions again.” Mitton attached a summary of restrictions posted by Tennessee Gas Pipeline, the pipeline supplying natural gas to Pittsfield. Order Assessing Civil Penalties at P 30. Mitton (for Maxim) again falsely suggested that Pittsfield was unable to obtain natural gas and was therefore burning fuel oil. *Id.* P 51. In fact, Maxim had already purchased a substantial amount of natural gas for operating date July 22 before submitting its Day Ahead offer. *Id.* P 57.

45. Although on July 20, 2010 Mitton told the IMM that Maxim would alert the IMM whenever there was a “fuel issue” (i.e., that Maxim was offering on oil prices because of issues about obtaining natural gas), neither he, nor anyone else at Maxim, sent any such notifications between July 22, 2010 and August 18, 2010, even though Maxim submitted offers on fuel oil prices on 22 of those 25 days. Order Assessing Civil Penalties at P 30.

46. Other documents confirm that Maxim and Mitton intended their communications with the IMM about pipeline restrictions to deter the IMM from investigating what fuel Maxim had actually burned. An internal Maxim email from another Maxim employee to Mitton and Kwok on July 20, 2010, for example, said that Maxim could prevent the IMM from doing further inquiry into what fuel Maxim burned “[i]f we can provide the [IMM] with the rationalization

behind our pricing.” Order Assessing Civil Penalties at P 30. And Mitton told the IMM on August 18, 2010 (as reflected in the IMM’s call log) that during this period “[Mitton] was under the impression (wrongly) that the mere notification of ‘potent[i]al’ gas procurement [problems] and the offer of oil was sufficient and that no further review would be done by IMM.” *Id.* P 31.

47. On August 16, 2010, the IMM sent an email to Mitton and Mitton’s supervisor, Eagle Kwok, asking him to “confirm and document” the fuel burned in July when the unit was ordered to run for reliability reasons. *Id.* P 31. Kwok provided the requested fuel burn information to the IMM in an August 23, 2010 email. *Id.* P 32. In that email, Kwok did not claim that Maxim had ever previously disclosed that it burned natural gas after offering on fuel oil prices. *Id.* P 95. Instead, Kwok asserted only that Maxim had been forthcoming about “the circumstances by which we have made our decision to offer Pittsfield’s energy either using natural gas or fuel oil pricing.” *Id.* P 32.

48. In addition to being misleading, Maxim’s and Mitton’s communications to the IMM omitted material facts. Among other things, the communications omitted the material facts that (a) Maxim had actually burned natural gas, not fuel oil, on days when it offered on fuel oil prices; (b) Maxim was able to acquire virtually all of the natural gas needed to satisfy its Day Ahead awards; and (c) Maxim often bought natural gas before submitting Day Ahead offers at fuel oil prices. Order Assessing Civil Penalties at PP 49, 52, 58, 62. These omissions were material because the type of fuel that Maxim actually burned determined the amount that Maxim could collect in its NCPC make-whole payments (a difference averaging around \$100/MWh). Across the 45 days at issue, this difference cumulated to \$2.99 million. *Id.* P 58.

49. Market monitors play a critical role in helping the Commission to ensure the competitiveness of ISO/RTO markets. Respondents’ scheme, including their misleading

statements and material omissions to the IMM, impaired and obstructed the functioning of the ISO-NE market in violation of 18 C.F.R. § 1c.2 (2014). Order Assessing Civil Penalties at P 59.

50. Maxim's fraudulent scheme consisted of its entire pattern of conduct, including its energy offers on fuel oil prices (when in fact it expected to and did acquire virtually all of the natural gas it needed, often doing so hours before the ISO announced Day Ahead dispatches) and its misleading statements and material omissions to the IMM (designed to prevent the IMM from discovering that Maxim had burned natural gas). Order Assessing Civil Penalties at P 61.

Maxim impaired and obstructed the application of ISO-NE's mitigation rules and impaired and obstructed the IMM's ability to detect Maxim's conduct and mitigate Maxim's exercise of market power through ISO-NE's mitigation rules. *Id.* P 59.

51. In the course of this fraudulent scheme, Maxim and Mitton acted with scienter. Maxim and Mitton knew that the IMM would reduce Pittsfield's payments to natural gas prices if the IMM realized that the plant was burning natural gas after offering on oil prices, and knowingly and intentionally drafted their communications to try to prevent the IMM from learning the relevant facts. *Id.* PP 81-96.

52. The Commission has jurisdiction over Maxim's and Mitton's scheme under 16 U.S.C. § 824 (2012) because the scheme involved the sale at wholesale of electrical energy in interstate commerce. *Id.* P 98.

OFFICE OF ENFORCEMENT INVESTIGATION AND ORDER TO SHOW CAUSE

53. Enforcement opened an investigation of other conduct by Maxim in August 2013. In the course of that investigation, Enforcement learned about the July-August 2010 conduct at issue here and performed an investigation of that conduct. During the investigation, Maxim and Mitton made several lengthy submissions to Enforcement offering factual claims and

legal arguments in defense of their conduct, and provided copies of those submissions to the Commission.

54. After considering the factual record, including Maxim's and Mitton's submissions, Enforcement concluded from its investigation that Maxim and Mitton violated section 1c.2 of the Commission's rules when, as detailed above, they devised and implemented a scheme to collect inflated NCPC payments at high fuel oil prices for energy actually produced with much less expensive natural gas. Enforcement also concluded that Maxim had violated 18 C.F.R. § 35.41 of the Commission's rules through false and misleading statements and material omissions in communications with the ISO-NE IMM.

55. On November 3, 2014, the Commission publicly issued a Notice of Alleged Violations concerning three different types of conduct by Maxim and certain of its employees, including Mitton. The present case focuses exclusively on the second strategy discussed in the Notice of Alleged Violations, namely Maxim and Mitton's July-August 2010 oil-gas strategy. Enforcement's investigation of other conduct by Maxim described in the Notice of Alleged Violations is continuing, but that conduct is not related to the actions at issue here.

56. Pursuant to Commission practice, in March 2014, Enforcement sent Maxim a letter setting forth its preliminary findings about three Maxim strategies, including the 2010 oil-gas conduct at issue here. Maxim and Mitton were entitled to submit any factual materials or legal arguments they wished in response, and in April 2014, submitted an 88-page response (with 851 pages of exhibits), including factual materials and arguments relating to the 2010 oil-gas strategy.

57. In November 2014, after unsuccessful efforts to reach a settlement with Maxim and Mitton, and, consistent with Commission practice (18 C.F.R. § 1b.19), Enforcement sent

letters to Maxim and Mitton notifying them of Enforcement's intent to seek enforcement action by the Commission. In December 2014, Maxim and Mitton together submitted 36 additional pages of factual contentions and legal arguments, along with hundreds of pages of exhibits, and also incorporated by reference hundreds of pages of earlier submissions to Enforcement. Again, substantial portions of these materials addressed the 2010 oil-gas strategy. Maxim followed up with two additional submissions in January 2015.

58. After reviewing Maxim's and Mitton's submissions, Enforcement completed its investigation of Respondents' conduct related to Pittsfield's fuel oil offers and natural gas burns in July-August 2010. Enforcement then submitted a Staff Report and Recommendation ("Staff Report" or "Report") to the Commission alleging that Maxim and Mitton violated the Commission's Prohibition on Market Manipulation, 18 C.F.R. § 1c.2 and section 222 of the FPA, 16 U.S.C. § 824v, through a scheme (a) to collect NCPC payments based on fuel oil prices when in fact the plant burned lower-cost natural gas and (b) to deceive the IMM to achieve that result. The Report also alleged that Maxim violated 18 C.F.R. § 35.41(b) (2014) by providing misleading information to the IMM when the IMM asked Maxim about Pittsfield's oil offers. The Report detailed Enforcement's findings and recommended that the Commission issue an Order to Show Cause to Maxim and Mitton about the July-August 2010 oil-gas scheme. The Report recommended that the Commission assess civil penalties against Maxim and Mitton of \$5,000,000 and \$50,000, respectively. Enforcement also provided the Commission with Maxim's and Mitton's responses to Enforcement's letter under 18 C.F.R. § 1b.19, along with all of the exhibits and attachments submitted by Respondents.

59. On February 2, 2015, the Commission issued an Order to Show Cause and Notice of Proposed Penalty to Maxim and Mitton, along with the Staff Report. In the Order, the

Commission directed Respondents to file answers within 30 days showing cause why Maxim and Mitton should not be found to have violated 18 C.F.R. § 1c.2 and 16 U.S.C. § 824v(a) and why Maxim should not be found to have violated 18 C.F.R. § 35.41(b). The Commission also directed Maxim and Mitton to show cause why these alleged violations do not warrant the assessment of civil penalties in the amount of \$5,000,000 and \$50,000, respectively, or a modification of those amounts consistent with section 31(d)(4) of the FPA. The Commission notified Respondents that they could elect, within 30 days of the Order to Show Cause, 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 may assess a civil penalty and, if the penalty is not paid within 60 days of the order assessing the penalty, the Commission may institute an action in the appropriate district court. As further stated in the Order to Show Cause, if Respondents failed to make that timely decision, the procedures of section 31(d)(2) apply and the matter will be set for administrative adjudication at the Commission. The Order to Show Cause allowed Enforcement to file a reply within 30 days of the filing of Respondents' answers.

60. On March 4, 2015, Respondents jointly filed a notice electing the procedures set forth in section 31(d)(3)(A) of the FPA, thereby choosing a penalty assessment if the Commission found a violation. That same day, Maxim Power Corporation and Mitton filed answers to the Order to Show Cause. Enforcement filed a Reply on March 23, 2015. On April 6, 2015, Maxim and Mitton filed a joint response to the Enforcement Reply, and on April 14, 2015, a further response to the Enforcement Reply.

**AFTER REVIEW OF THE EVIDENCE, THE COMMISSION
FOUND THAT MAXIM AND MITTON VIOLATED
18 C.F.R. § 1c.2 AND THAT MAXIM VIOLATED 18 C.F.R. § 35.41(b)**

61. While Enforcement recommended the Commission issue an Order to Show Cause via the Staff Report, the Enforcement staff who investigated this case did not advise the Commission during its deliberations. The Commission's Separation of Functions regulation, Rule 2202, 18 C.F.R. § 385.2202 (2014), prohibits such investigative staff from participating in findings, conclusions, or decisions except as a witness or counsel in public proceedings.

62. The Commission reviewed the briefs and the extensive documentary and testimonial record and, on May 1, 2015, issued a 63-page Order Assessing Civil Penalties against Maxim and Mitton (Exhibit 1). In the Order, the Commission found that Maxim and Mitton violated FPA section 222 and 18 C.F.R. § 1c.2 in July and August 2010 by engaging in a scheme to inflate NCPC payments for its Pittsfield plant by being paid at high oil prices while actually burning much less expensive oil. Order Assessing Civil Penalties at PP 49-67. The Commission found that the Maxim/Mitton scheme constituted a fraudulent scheme or artifice, in violation of section 1c.2 of the Commission's regulations. The Commission also found that Maxim violated 18 C.F.R. § 35.41(b) by making false and misleading statements and omitting material information in its communications with the IMM. As to both violations, the Commission explained its reasoning in detail, including an evaluation of the legal and factual defenses raised by Maxim and Mitton.

63. The Commission found Maxim and Mitton acted with scienter in executing their wrongful conduct. Order Assessing Civil Penalties at PP 83-97. The Commission determined that Maxim and Mitton intentionally engaged in a scheme to offer on fuel oil prices while

actually burning natural gas and to mislead the IMM about what they had done. It also found that Maxim's wrongful conduct was in connection with a jurisdictional transaction.

64. The Federal Power Act confers jurisdiction on the Commission over wholesale electricity markets in interstate commerce. 16 U.S.C. § 824, 824d, 824v (2012). The Commission determined that it has jurisdiction over Maxim's wholesale sales of energy to ISO-NE and that Maxim and Mitton's conduct was in connection with these jurisdictional transactions. Order Assessing Civil Penalties at P 98. ISO-NE's markets are within the Commission's jurisdiction, as are ISO-NE's Commission-approved procedures for paying units needed for reliability.

65. The Commission found that it had enforcement jurisdiction over both Maxim and Mitton because section 222 of the FPA prohibits fraud by "any entity," which includes both corporations and individuals. Order Assessing Civil Penalties at P 66.

66. The Order Assessing Civil Penalties imposed a \$5,000,000 civil penalty against Maxim and a \$50,000 civil penalty against Mitton. Because the IMM had previously mitigated the excess payments to Maxim, the Commission did not order disgorgement.

67. The Commission found these civil penalties to be statutorily authorized under the FPA and appropriate in these cases. Order Assessing Civil Penalties at PP 104-153. The Commission further determined that the civil penalty assessments against Maxim and Mitton were consistent with the Commission's policy statements.

FIRST CLAIM FOR RELIEF

(Against Maxim and Mitton for Violating
FPA Section 222, 16 U.S.C. § 824v and 18 C.F.R. § 1c.2)

68. The Commission repeats each and every allegation set forth in Paragraphs 1 through 67, as if set forth fully herein.

69. Section 222(a) of the FPA makes it unlawful for any entity to use a deceptive or manipulative device in connection with the purchase or sale of electric energy or the transmission of electric energy subject to the Commission's jurisdiction.

70. The Commission's Order No. 670 implemented this prohibition, adopting the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2 (2014). That rule, among other matters, prohibits any entity from: (1) (a) using a fraudulent device, scheme or artifice, (b) making a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or (c) engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase, sale or transmission of electric energy subject to the jurisdiction of the Commission.

71. Maxim and Mitton used or employed a fraudulent device, scheme, or artifice, or engaged in an act, practice, or course of business that operates or would operate as a fraud or deceit, with scienter, in connection with electric energy subject to the jurisdiction of the Commission in contravention of FPA section 222, 16 U.S.C. § 824v, and 18 C.F.R. § 1c.2. Maxim and Mitton engaged in a fraudulent scheme, which relied on deception of the ISO-NE IMM, to obtain payments at high fuel oil prices for reliability dispatches when Maxim actually produced the energy using much less expensive natural gas. Accordingly, the Commission is entitled to an Order from this Court affirming its assessment of civil penalties against Maxim and Mitton under FPA section 31, 18 U.S.C. § 823b(d)(3)(B), and requiring Maxim and Mitton to pay those penalties.

SECOND CLAIM FOR RELIEF

(Against Maxim and Pittsfield Generating Co., LP for Violating 18 C.F.R. § 35.41(b))

72. The Commission repeats each and every allegation set forth in Paragraphs 1 through 69, and Paragraphs 69 through 71, as if set forth fully herein.

73. Section 35.41(b) of the Commission's regulations requires that a Seller "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 . . . [or] Commission-approved independent system operators . . . unless Seller exercises due diligence to prevent such occurrences." Pittsfield Generating Company, L.P., a subsidiary of Maxim, is a Seller as that term is defined in 18 C.F.R. § 35.36(a)(1) because it has authorization from the Commission to make market-based sales for resale of electric energy. Under Section 316A of the Federal Power Act, 16 U.S.C. § 825o-1 (2012), the Commission has jurisdiction to assess civil penalties for violations of agency rules, including section 35.41(b).

74. Maxim made false and misleading statements to the ISO-NE IMM, and omitted material information in communications with the IMM, concerning the operation of the Pittsfield plant in July and August 2010. Maxim did not exercise due diligence to prevent these misleading statements or to avoid these material omissions. Although not necessary to establish a violation of section 35.41(b), Maxim's violations were knowing and intentional.

JURY DEMAND

75. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, the Commission demands a trial by jury on all issues triable as such.

76. Although the Commission has included a demand for a jury trial, the Commission respectfully submits that, under the procedure specified in the Federal Power Act, a

trial is unnecessary, and that this Court can and should affirm the penalty assessments without modification following a review of the Commission's Order Assessing Civil Penalties and the materials presented to the Commission during the penalty assessment process.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court:

- (A) Enter an order and judgment affirming the Commission's assessment of a \$5,000,000 civil penalty against Maxim and ordering Maxim to pay that penalty.
- (B) Enter an order and judgment affirming the Commission's assessment of a \$50,000 civil penalty against Mitton and ordering Mitton to pay that penalty.
- (C) Order such other and further relief as may be necessary and appropriate.

Respectfully submitted,

FEDERAL ENERGY REGULATORY COMMISSION

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