

144 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Richard Silkman

Docket No. IN12-13-000

ORDER ASSESSING CIVIL PENALTY

(Issued August 29, 2013)

1. In this order, the Commission finds that Dr. Richard Silkman has violated section 1c.2 of the Commission's regulations and section 222 of the Federal Power Act (FPA), which prohibit energy market manipulation.¹ In light of the seriousness of these violations and the lack of any effort by Dr. Silkman to remedy his violations, we find that a civil penalty, pursuant to section 316A of the FPA,² is appropriate.

I. Background

2. Dr. Silkman is the managing member of Competitive Energy Services, LLC (CES), which is an independent energy services company based in Portland, Maine.³ In 2003, Dr. Silkman and CES began providing energy consulting services to Rumford Paper Company (Rumford), which owns and operates a large paper mill in Rumford, Maine. As relevant here, Dr. Silkman assisted Rumford with its participation in

¹ 18 C.F.R. § 1c.2 (2013); 16 U.S.C. § 824v(a) (2006).

² 16 U.S.C. § 825o-1 (2006).

³ Dr. Silkman's answer to the Show Cause Order was filed jointly with CES, which is the subject of a parallel enforcement proceeding. *See Competitive Energy Services, LLC*, 144 FERC 61,163 (2013). Because Dr. Silkman and CES are each separately liable for violating section 1c.2 of the Commission's regulations and section 222 of the FPA, we here issue separate orders with respect to each.

ISO New England, Inc.'s (ISO-NE) Day-Ahead Load Response Program (DALRP).⁴ Through DALRP, ISO-NE compensated customers for certain load reductions, also called demand response, as measured against a baseline load (customer baseline)⁵ established for each facility providing the demand reduction.

3. On April 17, 2012, the Commission's Office of Enforcement Staff (OE Staff) submitted to the Commission an Enforcement Staff Report and Recommendations (OE Staff Report) alleging that Dr. Silkman had violated the Commission's Prohibition on Market Manipulation, 18 C.F.R. § 1c.2 (2013), by conceiving of a fraudulent scheme in connection with the DALRP, so that CES and Rumford would artificially inflate Rumford's customer baseline to enable Rumford and Dr. Silkman to receive compensation for demand response without Rumford intending to provide the service or actually having to reduce load. The OE Staff Report described the fraudulent scheme as follows: Dr. Silkman devised and, along with Rumford, implemented, a plan to inflate Rumford's customer baseline by curtailing Rumford's normal use of on-site generation during Rumford's initial DALRP customer baseline period, and instead replacing that on-site energy with energy taken from the grid. This curtailment created an inflated customer baseline that did not reflect Rumford's routine electricity consumption from the grid. After establishing Rumford's initial inflated customer baseline, Rumford, under the advice of Dr. Silkman and CES, resumed its routine practice of operating its on-site generation to lower electric consumption from the grid. Rumford then offered its demand response into the DALRP on a daily basis, at a minimum offer price which would almost always be accepted by ISO-NE, thereby, under the terms of the DALRP, leaving in place that inflated customer baseline. Both Rumford and, through Rumford, CES and Dr. Silkman, received compensation for Rumford providing demand response because, when measured against its inflated customer baseline, Rumford's routine use of its on-site generation appeared to have reduced its load. The OE Staff Report

⁴ An independent system operator (ISO) "is an independent company that assume[s] operational control—but not ownership—of the transmission facilities owned by its member utilities [and] provide[s] open access to the regional transmission system to all electricity generators at rates established in a single, unbundled, grid-wide tariff that applies to all eligible users in a non-discriminatory manner." *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 367 n.1 (D.C. Cir. 2013) (quoting *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004)) (internal quotation marks omitted).

⁵ Per the ISO-NE DALRP manual in effect at the time, a customer baseline is calculated using "the average hourly load, rounded to the nearest kWh, for each of the 24 hours in a day." ISO New England Load Response Program Manual, Rev. 9 § 4.2.1 (effective Apr. 7, 2006) (Load Response Program Manual).

recommended that Dr. Silkman be assessed a civil penalty of \$1,250,000 for his role in the fraudulent scheme.

4. On July 17, 2012, the Commission issued an Order to Show Cause and Notice of Proposed Penalty.⁶ The Commission directed Dr. Silkman to file an answer within 30 days showing cause why he should not be found to have violated 18 C.F.R. § 1c.2 and 16 U.S.C. § 824v(a) in connection with CES's participation in ISO-NE's DALRP. In addition, the Commission directed Dr. Silkman to show cause why his alleged violation should not warrant the assessment of a civil penalty in the amount of \$1,250,000, or a modification of that amount consistent with section 31(d)(4) of the FPA. The Commission also stated that Dr. Silkman must, within 30 days, elect either an administrative hearing before an Administrative Law Judge at the Commission prior to the assessment of a penalty pursuant to section 31(d)(2) of the FPA or, if the Commission finds a violation, an immediate penalty assessment by the Commission under section 31(d)(3)(A) of the FPA.⁷ The Show Cause Order further allowed OE Staff to file a reply within 30 days of the filing of Dr. Silkman's answer.⁸

5. On July 27, 2012, Dr. Silkman gave notice electing the procedures set forth in section 31(d)(3)(A) of the FPA and the Show Cause Order,⁹ thereby electing an immediate penalty assessment if the Commission finds a violation. Dr. Silkman filed his answer to the Show Cause Order on September 14, 2012 (Show Cause Answer). OE Staff filed a reply to Dr. Silkman's answer on November 14, 2012 (OE Staff Reply).

II. Discussion

6. 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.¹⁰ Order No. 670 implemented this prohibition, adopting the Anti-Manipulation Rule. That rule, among other things, prohibits any entity from: (1) using a fraudulent device, scheme or artifice,

⁶ *Richard Silkman*, 140 FERC ¶ 61,033, at P 3 (2012) (Show Cause Order).

⁷ *See* 16 U.S.C. § 823b(d) (2006).

⁸ On August 13, 2012, the Commission extended Dr. Silkman's deadline to respond to the Show Cause Order to September 14, 2012. On September 26, 2012, the Commission extended OE Staff's deadline to reply to Dr. Silkman's show cause response to November 13, 2012.

⁹ *See* Ordering Paragraph D to Show Cause Order.

¹⁰ 16 U.S.C. § 824v(a) (2006).

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, sale or transmission of electric energy subject to the jurisdiction of the Commission.¹¹

7. Pursuant to section 316A(b) of the FPA, the Commission may assess a civil penalty of up to \$1 million per day, per violation against any person who violates Part II of the FPA (including section 222 of the FPA) or any rule or order thereunder.¹² In determining the amount of a proposed penalty, section 316A(b) requires the Commission to consider “the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.”¹³ For natural persons, who are not subject to the Commission’s Penalty Guidelines,¹⁴ the Commission has considered five factors in determining the amount of any civil penalty assessed pursuant to section 316A of the FPA: (1) seriousness of the offense; (2) commitment to compliance; (3) self-reporting, (4) cooperation; and (5) reliance on OE Staff guidance.¹⁵

8. As discussed below, we find that Dr. Silkman violated section 1c.2 of the Commission’s regulations and section 222(a) of the FPA through the scheme he conceived with Rumford regarding Rumford’s participation in the DALRP. Further, we find that a civil penalty of \$1,250,000 is appropriate given the seriousness of

¹¹ 18 C.F.R. § 1c.2(a) (2013); *see Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 49, *reh’g denied*, 114 FERC ¶ 61,300 (2006).

¹² 16 U.S.C. § 825o-1(b) (2006). Under section 3 of the FPA, “‘person’ means an individual or a corporation.” *Id.* § 796(4).

¹³ *Id.*

¹⁴ The Commission’s Penalty Guidelines are appended to *Enforcement of Statutes, Orders, Rules, & Regulations*, 132 FERC ¶ 61,216 (2010) (Penalty Guidelines). The Penalty Guidelines do not apply to a natural person such as Dr. Silkman. The Commission “determine[s] the appropriate penalty for natural persons based on the facts and circumstances of the violation but . . . look[s] to [the Penalty] Guidelines for guidance in setting those penalties.” Application Note 1 to Penalty Guidelines § 1A1.1.

¹⁵ *See Enforcement of Statutes, Regulations & Orders*, 123 FERC ¶ 61,156, at PP 54-71 (2008) (Revised Policy Statement on Enforcement); *see also Moussa I. Kourouma d/b/a Quntum Energy LLC*, 135 FERC ¶ 61,245, at P 42 (2011).

Dr. Silkman's violation and the harm caused by his conduct. As discussed below, in order to alleviate any concern about Dr. Silkman's ability to pay the penalty, we will permit Dr. Silkman, if he desires, to pay the penalty pursuant to an agreed upon payment plan with OE Staff, subject to Commission approval.

A. Findings of Fact

1. ISO-NE's DALRP Framework

9. The Commission's regulations define demand response as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy."¹⁶ A demand response resource is a resource capable of providing demand response.¹⁷

10. From June 1, 2005¹⁸ through the relevant period of OE Staff's investigation, the DALRP allowed compensation for demand response resources that "provide a reduction in their electricity consumption in the New England Control Area during peak demand periods."¹⁹ ISO-NE calculated that reduction in electricity consumption taken from the grid by first establishing a customer baseline for each demand response resource, and then subtracting the demand response resource's actual metered load during the hours in which ISO-NE accepted the demand response resource's price-based bid.²⁰ DALRP market participants could offer their demand response resources at a minimum price of \$50/MWh and a maximum price of \$1,000/MWh. Each offer had to be at least 100 kW.

¹⁶ 18 C.F.R. § 35.28(b)(4) (2013).

¹⁷ *Id.* § 35.28(b)(5).

¹⁸ See *ISO New England, Inc.*, 123 FERC ¶ 61,021, at P 4 (April 4, 2008 Order), *order on reh'g*, 124 FERC ¶ 61,235 (2008) (September 11, 2008 Order).

¹⁹ ISO New England, Inc., FERC Electric Tariff No. 3, Section III – Market Rule 1 – Standard Market Design, Appendix E-Load Response Program, 2nd Rev Sheet No. 7902, § III.E.1.1. This order refers to ISO-NE's tariff in operation during the time period covered by OE Staff's investigation.

²⁰ April 4, 2008 Order, 123 FERC ¶ 61,021 at PP 4-5; see also Load Response Program Manual § 4.3.1.3.

Each accepted offer then would be paid the applicable day-ahead zonal price multiplied by the cleared day-ahead offer.²¹

11. ISO-NE's Load Response Program Manual required each DALRP participant to "be willing and capable of interrupting load within the parameters of the offer" and to "be able to interrupt Monday-Friday, on non-Demand Response Holidays between 7:00 AM - 6:00 PM."²² Per the Load Response Program Manual, each resource had its own customer baseline, which was determined as "the average hourly load, rounded to the nearest kWh, for each of the 24 hours in a day."²³ For a new demand response resource, the Load Response Program Manual specified that its customer baseline was "calculated for each hour in [a] day based on meter data from the initial [five] business days after the asset [wa]s approved and hourly meter data beg[an] to be recorded."²⁴ Once an initial customer baseline was established, the customer baseline would be recalculated each day based on a weighted average of the previous day's customer baseline and the meter data for the present program day. However, for any day that a demand response offer was accepted, that day's customer baseline would be excluded from the rolling weighted average calculation of a demand response resource's customer baseline. Thus, a DALRP participant indefinitely could maintain its initial customer baseline by making daily offers that were accepted.²⁵

12. Any ISO-NE market participant or demand response provider could enroll itself or an end-user in the DALRP.²⁶ ISO-NE would then pay or collect fees from the enrolling participant (the entity responsible for enrolling the demand asset) but was not responsible for disbursing any revenues to, or collecting fees from, a demand response provider. The enrolling participant would then be responsible for distributing or collecting such funds to the demand response provider.²⁷

²¹ ISO New England, Inc., FERC Electric Tariff No. 3, Section III – Market Rule 1 – Standard Market Design, Appendix E-Load Response Program, 1st Rev Sheet No. 7906-7907, §§ III.E.2.2-III.E.2.3; Load Response Program Manual § 4.5.1.1.

²² Load Response Program Manual § 2.2.1.

²³ *Id.* § 4.2.1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* § 2.2.

²⁷ *Id.* § 4.5.4.

2. Dr. Silkman's Participation in the DALRP

13. CES had, on occasion, served as Constellation NewEnergy, Inc.'s (Constellation's) broker for soliciting demand response customers in New England.²⁸ In exchange for CES referring customers to Constellation, Constellation would act as the customer's enrolling participant in the DALRP and would pay CES a percentage of the referred customer's DALRP revenues. In the spring of 2007, on behalf of CES, Dr. Silkman approached Rumford's parent company, NewPage Corporation, to suggest Rumford participate in ISO-NE's DALRP.²⁹ Constellation served as Rumford's enrolling participant and kept 10 percent of Rumford's DALRP revenues received from ISO-NE. Constellation then distributed 85 percent of the total DALRP revenues to Rumford and provided the remaining five percent to CES as Constellation's broker to Rumford.³⁰

14. In 2007-2008, Rumford's paper mill had an electricity consumption ranging between 85 MW and 105 MW. When the mill was fully operational, Rumford's electricity consumption was approximately 95 MW.³¹ To meet its mill's energy requirements, Rumford used a combination of grid electricity purchases and its on-site generator, G4, with a nameplate capacity of 110 MW. Rumford relied primarily on G4 to serve its load given the prevailing 2007 fuel prices.³² Due to the difficulties in starting up and shutting down, G4 ran continuously at least at a "level necessary to maintain essential mill operations."³³ Rumford sold excess electricity generated by G4 to the grid.

²⁸ See Master Broker Agreement between Constellation NewEnergy, Inc. and Competitive Energy Services, LLC (signed by Richard Silkman Aug. 28, 2006). Citations herein are to documents obtained and sworn testimony taken during OE Staff's nonpublic investigation. Citations to most documents refer to the entity supplying each document and the electronic or physical Bates stamp (*e.g.*, RUMF000001-3) and transcript references refer to the last name of the deponent, page, and line of the relevant transcript (*e.g.*, Silkman Dep. 150:1-10).

²⁹ See Silkman Dep. 150-52.

³⁰ See Response of Competitive Energy Services, LLC to Certain Questions in the April 7, 2008 Data Request to Rumford Paper Company for which CES Has Relevant Information at 8 (Apr. 25, 2008) (CES Data Response); RUMF000001-3 at 3.

³¹ Show Cause Answer, Dr. Silkman Rule 1b.19 Response at 11-12 (Dr. Silkman 1b.19 Response).

³² *Id.* at 12-13.

³³ *Id.* at 13.

Additional operation of the G4 generator depended on market prices and Rumford's cost to generate additional electricity from G4.³⁴

15. In mid-2007, when Dr. Silkman on behalf of CES approached Rumford about participating in the DALRP, Dr. Silkman and Rumford agreed that Rumford would claim 20-30 MW of demand response in the DALRP.³⁵ Dr. Silkman proposed that Rumford participate in the DALRP by lowering its G4 generation output during the initial five-day customer baseline establishment period, thereby increasing its grid electricity purchases.³⁶ Because Rumford's customer baseline would be established based on its metered consumption of grid electricity, purchasing additional grid electricity would increase its customer baseline even if its total mill load otherwise remained the same.³⁷ Dr. Silkman and Rumford expected that Rumford's increased purchases of electricity from the grid during the initial customer baseline period would cost Rumford approximately \$120,000, but Dr. Silkman informed Rumford that the higher grid energy purchase expenses could be earned back within one week of DALRP participation.³⁸ Once Rumford's customer baseline was established based on the increased grid electricity purchases, Rumford would participate in the DALRP by making load reduction bids at the minimum offer price at the time of \$50/MWh.³⁹

16. Dr. Silkman further told Rumford personnel that, if Rumford's load reduction bids cleared each day Rumford participated in the DALRP, Rumford's customer baseline would not be adjusted from its customer baseline set during the initial customer baseline period. Therefore, once the initial customer baseline period ended, Rumford's initial customer baseline was established, and Rumford began submitting daily load reduction

³⁴ *Id.*

³⁵ Silkman Dep. 171-72.

³⁶ *Id.* 203:11-14; Alley Dep. 107-09, 126:2-6.

³⁷ *See* Alley Dep. 90-91, 107-08, 122-24.

³⁸ E-mail from Dr. Richard Silkman, Managing Member, Competitive Energy Services, LLC, to John Fuller, Production Manager, Rumford Paper Company, cc to Scott Alley, Utilities Superintendent, Rumford Paper Company, and Rick Abradi, Energy Manager, Rumford Paper Company (July 19, 2007 5:39 PM EDT) (July 19, 2007 E-mail).

³⁹ *See* Alley Dep. 143:13-16; Silkman Dep. 318:19-22 (conceding that it would have been a mistake if Rumford bid under the \$50/MWh minimum bid offer).

bids, Rumford would be able to receive payment for load reductions by simply resuming routine operation of the G4 generator without otherwise reducing its load.⁴⁰

17. On behalf of Rumford, CES contacted Constellation to enroll Rumford in the DALRP. CES proposed using Constellation as its enrolling participant due to Constellation's size and good reputation in the New England Power Pool.⁴¹ In July 2007, Rumford executed an agreement with Constellation to enroll Rumford in the DALRP.⁴² During the enrollment process neither Dr. Silkman nor Rumford sought advice from Constellation or ISO-NE about their planned actions during the initial five-day customer baseline period for Rumford.⁴³ As part of enrollment, CES, with Rumford's consent, communicated to ISO-NE a demand response capability for Rumford of 20 MW.⁴⁴

18. Rumford's initial five-day customer baseline ran on July 24, 25, 26, 27, and 30, 2007. Per the Load Response Program Manual, Rumford did not include July 28 and 29, 2007 in this initial customer baseline because these two days were non-business days.⁴⁵ Shortly before 7:00 AM each day of the initial customer baseline period, Rumford's metered consumption of grid energy increased to 30-45 MW, where it would stay until 6:00 PM, when it returned to approximately 5-10 MW.⁴⁶ The increase in Rumford's purchases of grid energy during these hours was attributable to Rumford instructing its personnel to curtail the G4 generator, increasing grid energy purchases from ISO-NE.⁴⁷

⁴⁰ See Alley Dep. 90-91, 119-20, 136, 139, 140-41, 145-46.

⁴¹ See RUMF000001-3 at 2. The New England Power Pool is a voluntary association of market participants from the six New England States.

⁴² Responses of Constellation NewEnergy, Inc. to [OE] Staff's April 7, 2008 Data Request at 10 (May 9, 2008).

⁴³ See Silkman Dep. 190:10-16.

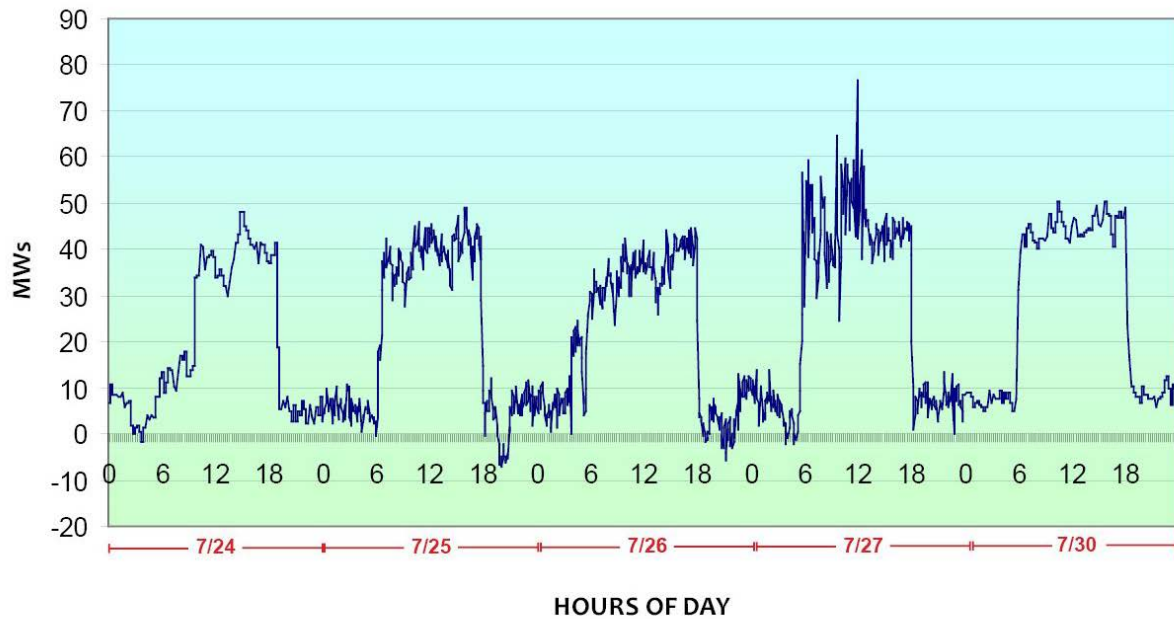
⁴⁴ CES Data Response at 3.

⁴⁵ See ISO-NE generated load profiles for Rumford Paper Company in July, August, and November 2007 and 5-minute interval energy data, ISO-NE April 22, 2008 Data Response.

⁴⁶ See *id.*

⁴⁷ Response of Rumford Paper Company to the August 15, 2008 Second Data Requests to Rumford Paper Company at 25.

19. ISO-NE used the metered load data reflected on the following chart to establish Rumford's initial customer baseline:



20. On almost every non-holiday weekday between July 31, 2007, and early February 2008, Rumford or CES on its behalf submitted DALRP load reduction offers for each DALRP program hour.⁴⁸ These offers were almost always submitted at the minimum DALRP offer price of \$50/MWh.⁴⁹ Rumford's offers of \$50/MWh almost always cleared during this period because they were lower than locational marginal prices during DALRP hours in this period.⁵⁰ Rumford earned DALRP revenues for each day it participated in the DALRP during this period. Because Rumford offered into the DALRP almost every weekday during this period and those offers almost always cleared, its customer baseline did not adjust significantly over time. The only situations where Rumford's bids did not clear were when CES inadvertently submitted an invalid offer, when Rumford expected to repair on-site equipment over the subsequent day, and when

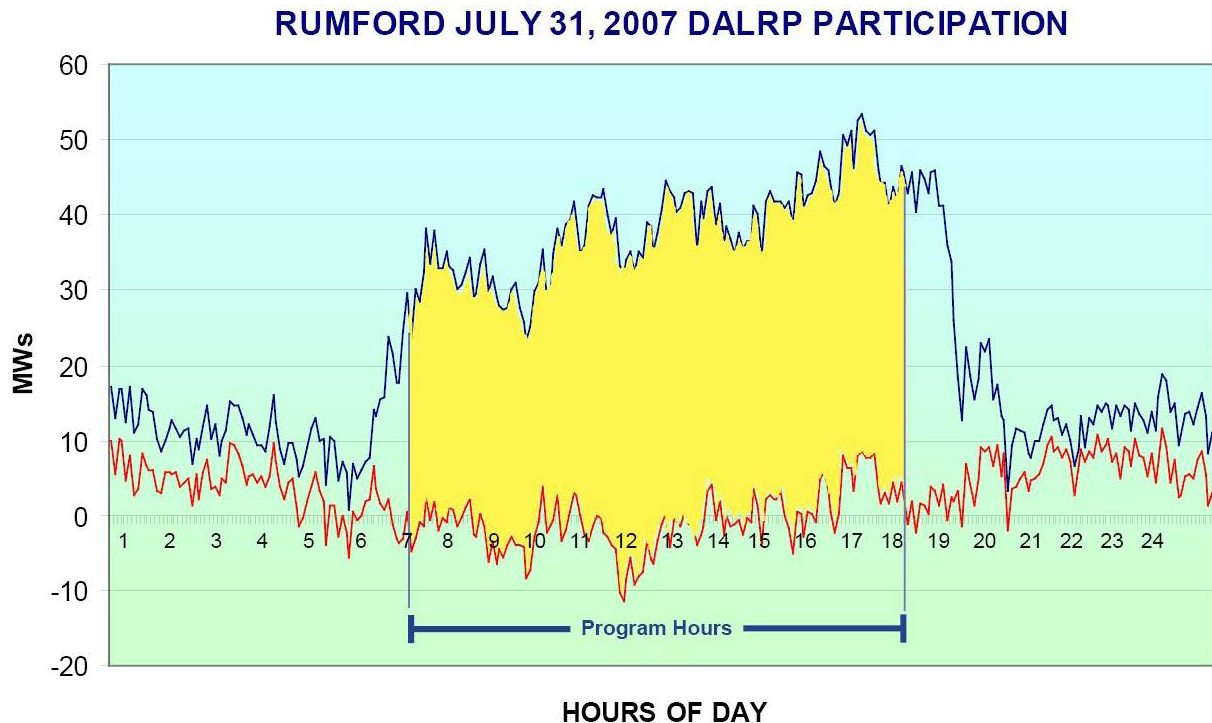
⁴⁸ See RUMF0000926-0000946 (spreadsheet providing Rumford's DALRP offer data).

⁴⁹ Dr. Silkman 1b.19 Response at 27.

⁵⁰ See OE Staff Report at 14; Dr. Silkman 1b.19 Response at 31-34.

ISO-NE instructed Rumford to restore its customer baseline after a generator outage in November 2007.⁵¹

21. During the months of Rumford's participation in the DALRP, Rumford did not veer from its routine in order to provide demand response; Rumford neither increased its on-site generation to reduce its demand from the grid nor reduced its electricity consumption. Dr. Silkman acknowledges that he did not expect Rumford would reduce energy consumption as part of participation in the DALRP.⁵² The following chart compares Rumford's actual grid consumption (the line on the bottom) to Rumford's established customer baseline (the line on the top) that was used by ISO-NE to calculate Rumford's load reduction for the purposes of DALRP compensation (shaded area between two lines during program hours) on July 31, 2007, Rumford's first day of DALRP participation:⁵³



⁵¹ Silkman Dep. 316; CES 1b.19 Response at 28-31.

⁵² Silkman Dep. 257:13-20.

⁵³ See December 7, 2011 ISO-NE Data Response.

22. ISO-NE paid Rumford \$36,193.37 for its demand response on July 31, 2007.⁵⁴ Rumford reflected comparable differences between its customer baseline and grid consumption on almost every other day of its DALRP participation. In total, ISO-NE paid \$3,336,964.63 for Rumford's participation in the DALRP between July 2007 and February 2008. Of that amount, Rumford received \$2,836,419.08, around 84.9 percent, and CES received \$166,841.13, around 4.9 percent.⁵⁵

23. On September 13, 2007, during an unexpected outage of Rumford's G4 generator, CES and Rumford submitted a 1 MW load reduction bid for each hour of possible DALRP participation. Even with G4's outage, Rumford was paid \$33,238.36 for DALRP participation that day.⁵⁶

24. In November 2007, Dr. Silkman sought advice from Constellation and ISO-NE on how to participate in the DALRP in light of another G4 outage. ISO-NE advised Dr. Silkman to reset Rumford's customer baseline to the levels established in July 2007.⁵⁷ Although neither ISO-NE nor Constellation criticized that customer baseline level, they also had no knowledge that Rumford, CES and Dr. Silkman established the customer baseline through lower on-site generation and increased grid energy purchases.⁵⁸

25. Except with regard to that November 2007 outage, Dr. Silkman and Rumford never asked ISO-NE or Constellation whether Rumford's actions during the initial customer baseline measurement period or throughout its participation in the DALRP were proper. Dr. Silkman and Rumford also did not tell Constellation or ISO-NE that Rumford had lowered its on-site generation and simultaneously purchased grid power during the customer baseline measurement period in late July 2007.⁵⁹ In January 2008, ISO-NE made a presentation notifying its stakeholders that it expected to make changes to the DALRP because several market participants had learned how to profit from intentionally establishing and then maintaining an inflated customer baseline. In this presentation, ISO-NE claimed that some market participants inflated their customer baselines by increasing consumption or lowering output of behind-the-meter generation when establishing their customer baselines and were paid for demand response without

⁵⁴ *Id.*

⁵⁵ *See* CNE0023813-18.

⁵⁶ December 7, 2011 ISO-NE Data Response.

⁵⁷ Silkman Dep. 99-101, 420-24.

⁵⁸ *See* Richard Dep. 49:2-8, 76-80.

⁵⁹ Silkman Dep. 260:7-15, 266:15-21, 366:12-17.

reducing load. In addition, ISO-NE indicated that ISO-NE intended to raise the minimum bid for DALRP participants, among other proposed actions.⁶⁰

26. Dr. Silkman forwarded ISO-NE's January 2008 presentation to Rumford managers that same month. In his e-mail to these Rumford managers, Dr. Silkman emphasized that, should ISO-NE change its DALRP rules, "many" days would occur in which the DALRP clearing price does not exceed the minimum bid, which would therefore cause the customer baseline of a DALRP participant whose bid does not clear to adjust.⁶¹

27. In January 2008, Dr. Silkman also received a phone call from Constellation's Senior Vice-President, Peter Kelly-Detwiler, followed by a letter from Constellation to all of Constellation's DALRP customers. In these communications, Constellation explained its concerns that certain DALRP customers had increased their usage during the customer baseline establishment periods. Constellation also warned that ISO-NE could sanction a customer or its enrolling participant if ISO-NE determined that the customer committed "fraud to extract Load Response Program payments."⁶²

28. On February 5, 2008 ISO-NE proposed tariff revisions changing the minimum price that demand response resources can offer into the market.⁶³ As a result, the minimum bid jumped from \$50/MWh on February 8, 2008, to \$121/MWh on February 11, 2008.⁶⁴ On April 4, 2008, the Commission accepted ISO-NE's DALRP changes, and announced that the Commission's Office of Enforcement had begun a non-public investigation in February 2008 into whether any participants in the DALRP had violated the Commission's rules.⁶⁵

⁶⁰ Henry Yoshimura, ISO New England, Day-Ahead Load Response Program (DALRP) Recommended Market Rule Changes PowerPoint Presentation at 3-4, 7-9, 15-17 (Jan. 23, 2008) (Yoshimura Presentation).

⁶¹ RUMF0001495-97.

⁶² RUMF0001701-02 at 1-2; *see also* Silkman Dep. 385-92.

⁶³ *See ISO New England Inc.*, Filing of Changes to Day-Ahead Load Response Program, Docket No. ER08-538-000 (Feb. 5, 2008).

⁶⁴ Dr. Silkman Answer at 13.

⁶⁵ April 4, 2008 Order, 123 FERC ¶ 61,021 at P 50 n.49; *see also* September 11, 2008 Order, 124 FERC ¶ 61,235 at P 9.

B. Determination of Violation**1. Fraudulent Device, Scheme or Artifice****a. Show Cause Answer**

29. Dr. Silkman claims OE Staff's entire support for his participation in an alleged market manipulation scheme consists of a single piece of advice to Rumford on its customer baseline establishment, i.e., Dr. Silkman's advice to Rumford described *supra* in PP 15-16, which Dr. Silkman asserts was neither fraudulent nor a scheme.⁶⁶ Dr. Silkman contends that while OE Staff's allegation of an "inflated" customer baseline hinges on Rumford's departure from a "normal" customer baseline, OE Staff fails to explain what a "normal" customer baseline would be for a facility such as Rumford, whose purchases from, and sales to, the grid fluctuate significantly from day-to-day and hour-to-hour.⁶⁷ Dr. Silkman maintains that, even if deemed erroneous after-the-fact, his advice to Rumford was not a fraudulent scheme.⁶⁸

30. Dr. Silkman points to a lack of guidance on how Rumford's customer baseline should have been established, and asserts his advice does not constitute fraud because it did not violate any ISO-NE or Commission rules, regulations, or DALRP program guidance.⁶⁹ Dr. Silkman claims no ISO-NE program documents "discuss, much less disallow, managing the level of behind-the-meter generation during the baseline period."⁷⁰ Dr. Silkman further claims that both ISO-NE and then-Commissioner Wellinghoff have recognized – in the context of correcting the flawed DALRP rules – that customer baseline methodologies are "complex" and "by no means intuitive."⁷¹

⁶⁶ Dr. Silkman Answer at 2, 12.

⁶⁷ *Id.* at 2-3, 6-7. In support, Dr. Silkman presents a graph displaying Rumford's purchases of electricity from, and sales to, the ISO-NE grid for 2007-2008, from which Dr. Silkman "def[ies] anyone to define Rumford's 'normal' baseline . . ." *Id.* at 3; *see also* Dr. Silkman 1b.19 Response at 11-13 (describing Rumford's operation of its G4 generator and its link to fuel prices and other operating conditions).

⁶⁸ Dr. Silkman Answer at 2.

⁶⁹ *Id.* at 2, 6.

⁷⁰ Dr. Silkman 1b.19 Response at 17.

⁷¹ *Id.* at 20-21 (citing April 4, 2008 Order, 123 FERC ¶ 61,021 at P 29; April 4, 2008 Order, 123 FERC ¶ 61,021 (Wellinghoff, Comm'r, concurring in part and dissenting in part)).

31. Dr. Silkman attributes any Rumford customer baseline errors to Constellation, Rumford's enrolling participant, who Dr. Silkman identifies as having settled other previous allegations of market manipulation.⁷² Dr. Silkman states that Constellation submitted Rumford's daily DALRP bids and was the sole entity with responsibility and the ability to speak with ISO-NE on Rumford's behalf.⁷³ Dr. Silkman argues that Constellation, not himself or CES, was in the best position to inform Rumford of the legitimacy of Rumford's customer baseline given Constellation's possession of both Rumford's prior metering data and – incident to Constellation's additional role as Rumford's power provider – Rumford's current power purchases.⁷⁴

32. Absent any contrary guidance from ISO-NE or Constellation, Dr. Silkman asserts it was not fraud for him to advise Rumford to set its customer baseline at a pre-determined level, considering one of Rumford's internal operating procedures. That procedure preceded Rumford's DALRP participation and called for different generating levels depending on the price of fuel and ISO-NE market prices, and in order to operate the mill safely. Dr. Silkman claims CES designed its customer baseline advice "to make available to the [DALRP] only the electricity in excess of what was necessary to operate [Rumford's] mill" if directed by ISO-NE to shed load to participate in the DALRP.⁷⁵

33. Dr. Silkman also disputes OE Staff's view that his advice resulted in Rumford being paid for "doing nothing."⁷⁶ Dr. Silkman claims Rumford was "paid for offering capacity and lower priced energy to the grid" and "for reducing the amount of electricity it purchased from the grid the day after its bids cleared."⁷⁷ Dr. Silkman asserts that Rumford met these requirements even if Rumford did not have to change the G4

⁷² Dr. Silkman Answer at 4, 12-14. We note the 2012 market manipulation settlement agreement referenced by CES involved Constellation Energy Commodities Group, Inc., an affiliate entity of Constellation NewEnergy, Inc., the entity which served as Rumford's enrolling participant. The Commission notes that the settlement in that proceeding did not involve any allegations involving Constellation NewEnergy, Inc. or of manipulation of the DALRP or any other demand response program. *See Constellation Energy Commodities Group, Inc.*, 138 FERC ¶ 61,168 (2012).

⁷³ Dr. Silkman Answer at 12-14.

⁷⁴ *Id.* at 12-13.

⁷⁵ *Id.* at 7; *see also* Dr. Silkman 1b.19 Response at 21-23.

⁷⁶ Dr. Silkman Answer at 10.

⁷⁷ *Id.*

generator's operating level, and that other programs similarly provide legitimate payments to entities for doing what they already were doing.⁷⁸

34. Dr. Silkman further argues that any flaws in his advice regarding setting Rumford's customer baseline were attributable to fundamental flaws in ISO-NE's DALRP program, not fraud. In support, Dr. Silkman notes that OE Staff concedes that submitting unchanging minimum bids would not alone constitute market manipulation.⁷⁹ Dr. Silkman reasons that had the program "not been fatally flawed due to the static minimum bid price," Rumford's customer baseline would have adjusted.⁸⁰ Dr. Silkman further notes the Commission modified the DALRP in 2008 to eliminate the unchanging minimum bid price that produced static customer baselines.⁸¹

35. Dr. Silkman also asserts that CES's advice to Rumford is not fraud because that advice did not deceive Constellation or ISO-NE. Dr. Silkman claims that Constellation knew or should have known Rumford's generating capabilities and electricity purchases, and thus Constellation cannot claim it was unaware of Rumford's customer baseline period generator curtailments.⁸² Moreover, Dr. Silkman claims he explained to Constellation exactly how CES advised Rumford to set its customer baseline on at least three occasions before and after Rumford's enrollment in the DALRP.⁸³ Dr. Silkman also claims he did not deceive ISO-NE because ISO-NE, like Constellation, had the metering data regarding Rumford's energy usage.⁸⁴ Dr. Silkman further claims ISO-NE endorsed his customer baseline advice during a November 2007 outage by advising

⁷⁸ For example, Dr. Silkman notes that nuclear power plants will operate regardless of whether they receive capacity payments and that hydroelectric plants receive market clearing prices for electricity the plants would still generate if market prices were lower. *Id.*

⁷⁹ *Id.* at 10 (citing Enforcement Staff Report and Recommendations, *Competitive Energy Services, LLC*, Docket No. IN12-12-000 at 21 n.103 (Apr. 17, 2012)).

⁸⁰ *Id.* at 8, 11.

⁸¹ *Id.* at 2, 11 (citing September 11, 2008 Order, 124 FERC ¶ 61,235 at PP 5, 8; April 4, 2008 Order, 123 FERC ¶ 61,021 at P 25).

⁸² Dr. Silkman 1b.19 Response at 15; Dr. Silkman Answer at 17.

⁸³ Dr. Silkman 1b.19 Response at 24.

⁸⁴ Dr. Silkman Answer at 17.

Constellation that Rumford should reset its customer baseline to its initial customer baseline period level.⁸⁵

b. OE Staff Report and Reply

36. OE Staff argues that Dr. Silkman does not dispute the material facts of his conduct, only whether Dr. Silkman's conduct constitutes fraud.⁸⁶ OE Staff claims that Dr. Silkman, through CES, and Rumford engaged in a scheme that misrepresented to ISO-NE "Rumford's typical load and willingness and ability to reduce load" and resulted in compensation to Rumford, CES and Dr. Silkman, through his ownership interest in CES, for DALRP load reductions that Dr. Silkman and Rumford knew would never occur.⁸⁷ OE Staff claims that by curtailing generation and buying more grid electricity during the initial customer baseline period, "[Dr.] Silkman, CES and Rumford established and communicated to ISO-NE an inflated baseline that did not reflect Rumford's genuine load response capability."⁸⁸ OE Staff further claims that Dr. Silkman perpetuated that fraud by submitting daily DALRP offers to reduce load and falsely communicating a willingness and an ability to reduce load. According to OE Staff, this communication was false because Dr. Silkman, CES and Rumford understood Rumford, because of its customer baseline inflation, would not, and did not intend to, reduce load as a result of its DALRP participation.⁸⁹ OE Staff states that, as part of this scheme, CES submitted to ISO-NE a demand response registration that falsely claimed Rumford's capability to reduce its load by 20 MW.⁹⁰ OE Staff claims Dr. Silkman, CES and Rumford perpetuated their scheme to maintain an inflated customer baseline by submitting daily DALRP offers at the minimum price, knowing this likely would freeze the customer baseline.⁹¹ OE Staff asserts these actions defrauded ISO-NE and New England rate payers because the cost of demand response is socialized across all Network Load.⁹²

⁸⁵ *Id.*; see also Dr. Silkman 1b.19 Response at 29-30.

⁸⁶ OE Staff Reply at 1.

⁸⁷ OE Staff Report at 16.

⁸⁸ *Id.*

⁸⁹ *Id.* at 16-17.

⁹⁰ *Id.* at 16-17.

⁹¹ *Id.* at 17.

⁹² *Id.*

37. OE Staff rejects as meritless Dr. Silkman's claim that Rumford had to "set" its customer baseline at some level. OE Staff maintains that setting a customer baseline at an artificial quantity is inconsistent with the DALRP requirement that actual load be used for customer baseline calculations.⁹³ OE Staff claims that had Rumford "not participated in the DALRP using Dr. Silkman's scheme, it would have run the G4 generator during the baseline [period] rather than purchase large quantities of energy."⁹⁴ OE Staff states that Rumford's uneconomic energy purchases were abnormal and intended to increase later DALRP payments that Rumford, Dr. Silkman and CES would not have been able to obtain without Rumford's inflated customer baseline.⁹⁵ OE Staff argues that it is implausible that Dr. Silkman believed that legitimate participation by an industrial demand response participant required \$120,000 in uneconomic energy purchases by the customer during the initial customer baseline period.⁹⁶ OE Staff also notes there is no contemporary evidence that Dr. Silkman actually interpreted the DALRP rules to require the setting of an artificial customer baseline.⁹⁷

38. OE Staff rejects Dr. Silkman's argument that DALRP's complexity excuses his conduct. OE Staff claims Dr. Silkman misstates the complexity of the DALRP customer baseline-setting process, which initially calculates a customer baseline using a participant's actual load in each of the program hours for five days.⁹⁸ OE Staff claims there is no evidence that Dr. Silkman misunderstood the process and states that Dr. Silkman's conduct results not from confusion or mistake but rather represents deliberate, calculated fraud.⁹⁹

39. OE Staff further rejects Dr. Silkman's argument that the DALRP was a flawed program that routinely produced static customer baselines. OE Staff argues that Dr. Silkman engaged in fraud by inflating Rumford's customer baseline to allow

⁹³ *Id.* at 19.

⁹⁴ OE Staff Reply at 4.

⁹⁵ *Id.* at 4-5.

⁹⁶ OE Staff Report at 19.

⁹⁷ *Id.* at 20.

⁹⁸ *Id.* at 21.

⁹⁹ *Id.*

Dr. Silkman, CES and Rumford to receive demand response payments without providing any load reduction.¹⁰⁰

40. OE Staff rejects Dr. Silkman's argument that Rumford provided value for its DALRP payments by offering capacity and lower priced energy to the grid. OE Staff argues Rumford's DALRP participation provided no value because, as Rumford acknowledges, the only time it changed its operations to participate in the DALRP was when it curtailed on-site generation during the initial customer baseline measurement period.¹⁰¹ Moreover, OE Staff argues the DALRP was an energy program that compensated participants for *actual* reductions in grid energy used (as measured against a legitimately established customer baseline), and not, as Dr. Silkman suggests, a capacity program that compensated participants for agreeing to be prepared to provide energy or load reduction when called upon.¹⁰² OE Staff contends that Dr. Silkman, as an energy expert, understood this fundamental difference, and OE Staff characterizes Dr. Silkman's argument as an after-the-fact justification for his fraud.¹⁰³

41. OE Staff rejects Dr. Silkman's argument that Constellation had primary responsibility for DALRP customer baseline guidance and was in the best position to inform Rumford of the legitimacy of its customer baseline. OE Staff claims there is no credible written or oral evidence that Dr. Silkman (or anyone else) told Constellation about the scheme or, specifically, how Rumford curtailed generation during the customer baseline period.¹⁰⁴ OE Staff states that Constellation's actions are not at issue in this proceeding and such actions do "not exonerate Silkman for conceiving of and implementing his own fraudulent scheme."¹⁰⁵ OE Staff further claims that a settlement involving an affiliate of Constellation in an unrelated enforcement action is irrelevant to Dr. Silkman's fraud here.¹⁰⁶

¹⁰⁰ *Id.* at 21-22 & n.114.

¹⁰¹ OE Staff Reply at 7-8 & n.22 (citing Answer of Rumford Paper Company, Docket No. IN12-10-000, at 8 (Sept. 14, 2012) ("Rumford did not change its behavior when it began participating in the DALRP.")).

¹⁰² *Id.* at 8.

¹⁰³ *Id.*

¹⁰⁴ OE Staff Report at 23.

¹⁰⁵ OE Staff Reply at 12.

¹⁰⁶ *Id.*

42. OE Staff rejects Dr. Silkman's argument that he did not deceive ISO-NE because ISO-NE later endorsed Dr. Silkman's customer baseline advice in connection with an outage of Rumford's generation. OE Staff claims that ISO-NE's request that Rumford reinstate a customer baseline that ISO-NE believed was legitimate following an outage does not mean that ISO-NE knew about or condoned Dr. Silkman's fraudulent scheme to create an artificial customer baseline.¹⁰⁷

c. Commission Determination

43. We find that Dr. Silkman's conduct constitutes a fraudulent scheme or artifice, in violation of section 1c.2 of the Commission's regulations. The Commission has defined fraud in the context of section 1c.2 as including fraud's definition under the common law, i.e., any false statement, misrepresentation, or deceit. Fraud under section 1c.2 also includes "any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market."¹⁰⁸ Fraud is a question of fact to be determined by all the circumstances of a case.¹⁰⁹ Dr. Silkman, as a representative of CES, devised and implemented a scheme to inflate Rumford's customer baseline and thereby permit Dr. Silkman, CES and Rumford¹¹⁰ to be paid for demand response that Rumford never intended to provide or actually provided. CES, based on the scheme devised by Dr. Silkman, submitted to ISO-NE demand response registration information falsely claiming that Rumford had capability to reduce its load by up to 20 MW even though Dr. Silkman knew that under the scheme he designed Rumford would be paid only for demand reduction reflected in its artificially inflated customer baseline.¹¹¹ Before the initial customer baseline period, Rumford routinely used its G4 generator to meet at least

¹⁰⁷ OE Staff Report at 27; OE Staff Reply at 9.

¹⁰⁸ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50 & n.103 (referencing *Dennis v. U.S.*, 384 U.S. 855, 861 (1966)).

¹⁰⁹ *Id.* P 50.

¹¹⁰ The Commission notes that this order and all determinations contained herein should be read to address only the conduct of Dr. Silkman, and not Rumford. Although our discussion of Dr. Silkman's conduct with respect to the DALRP necessarily includes conduct by Rumford, we make no findings of fact or law in this order with respect to Rumford's conduct. Rumford's alleged violation of the Anti-Manipulation Rule was resolved in a Stipulation and Consent Agreement with OE Staff, which the Commission approved on March 22, 2013. *Rumford Paper Co.*, 142 FERC ¶ 61,218 (2013).

¹¹¹ See CES Data Response at 9; Alley Dep. 90-91 and 119-20.

a portion of its on-site electricity needs.¹¹² Under this scheme, for the DALRP program hours (7:00 AM to 6:00 PM) during the five-day initial customer baseline period (July 24, 25, 26, 27, and 30, 2007), Dr. Silkman instructed Rumford to intentionally reduce its G4 generator's operating level by 30-40 MW from the level at which it otherwise would have operated given the prevailing fuel and energy prices and mill energy requirements.¹¹³ That departure from Rumford's routine generating operating practices increased the amount of mill load served by energy from the grid and cost Rumford approximately \$120,000 over the five days in question.¹¹⁴ Curtailing the G4 generator in those hours – and only those hours – was uneconomic given Rumford's ability and established practice of generating electricity from its G4 generator at lower cost.¹¹⁵ Therefore, we find that it served no legitimate purpose, but rather ensured the customer baseline did not reflect Rumford's normal daily consumption pattern for energy taken from the grid.

44. This conduct created, and fraudulently communicated to ISO-NE, a higher, false customer baseline in those DALRP participation hours. After the initial five-day baseline period, Rumford resumed routine operation of its G4 generation during the hours of 7:00 AM to 6:00 PM.¹¹⁶ Because of its inflated customer baseline, Rumford portrayed a reduction from its inflated baseline simply by resuming routine use of its G4 generator (which displaces energy taken from the grid) and thus enabled Dr. Silkman, CES and Rumford to receive DALRP payments (calculated based on the difference between this elevated customer baseline and Rumford's metered energy taken from the grid) without Rumford having to alter its routine to provide any actual demand response.

45. We find that Dr. Silkman's advice to Rumford and his role in implementing that advice perpetuated Rumford's inflated customer baseline. Dr. Silkman knowingly and fraudulently exploited a DALRP provision that prevented a customer's baseline from adjusting on days when ISO-NE accepted its offer to provide demand response.

¹¹² See Dr. Silkman 1b.19 Response at 11-12.

¹¹³ See Silkman Dep. 203:11-14; Alley Dep. 109; ISO-NE generated load profiles for Rumford Paper Company in July, August, and November 2007 and 5-minute interval energy data, ISO-NE April 22, 2008 Data Response; Response of Rumford Paper Company to the August 15, 2008 Second Data Requests to Rumford Paper Company at 25.

¹¹⁴ See July 19, 2007 E-mail.

¹¹⁵ See Alley Dep. 124-25.

¹¹⁶ Silkman Dep. 257:13-20; Alley Dep. 140-41, 151.

Dr. Silkman, CES and Rumford made daily minimum DALRP offers knowing there was a high likelihood they would clear each day so that Rumford's customer baseline would not adjust, thereby continuing the fraudulent payments for demand response Rumford provided through its inflated customer baseline.¹¹⁷

46. We find that Dr. Silkman's actions with respect to the DALRP defrauded ISO-NE at the expense of all ratepayers in the ISO-NE footprint. Dr. Silkman's scheme caused electricity consumers in ISO-NE's footprint to pay \$3,336,964.63 for demand response that never occurred, of which Dr. Silkman received \$166,841.13.¹¹⁸

47. Dr. Silkman claims that complexities of the DALRP excuse his conduct; however, record evidence does not reflect that Dr. Silkman misunderstood or was confused about the baseline procedure. To that end, no express prohibition on curtailing on-site generation during the initial customer baseline period in order to create a higher baseline was necessary. The DALRP process for calculating a customer baseline was straightforward. That process required no customer action other than to operate the customer's facilities as it routinely would. Although Dr. Silkman claims ISO-NE and the Commission recognized the complexity of customer baseline methodologies in the 2008 DALRP modification orders, those references were to ISO-NE difficulties in designing accurate customer baseline methodologies ISO-wide, not to setting the baseline for particular customers.¹¹⁹

48. Furthermore, even assuming, *arguendo*, that certain features of the DALRP such as the minimum offer price, left the DALRP vulnerable to certain manipulation, that does not excuse the manipulation itself. Dr. Silkman would not have benefitted to the extent he did without instructing Rumford to establish and to maintain an artificially high customer baseline. His scheme was not an inevitable result of the DALRP's structure at the time.

¹¹⁷ See Alley Dep. 90-91 and 119-20.

¹¹⁸ See CNE0023813-18.

¹¹⁹ See April 4, 2008 Order, 123 FERC ¶ 61,266 at P 29 ("ISO-NE notes that Customer Baseline methodologies for demand response programs are complex, and that changes that could address the instant problem are by no means intuitive. Accordingly, ISO-NE maintains that changing the Customer Baseline methodology would not be a simple undertaking, and could consume from several months to more than a year to research, design, discuss, approve and implement such changes.").

49. While Dr. Silkman assails the OE Staff Report as faulting him for advising Rumford to deviate from “normal operations” during the initial customer baseline period without referencing how or where that term is defined, that argument is merely one of semantics and is unpersuasive. Dr. Silkman’s advice to Rumford, and his ultimate compensation for that advice, was premised on an acknowledged and unprecedented departure from Rumford’s routine practices. Rumford curtailed its G4 generator and increased purchases of grid electricity only during the hours of DALRP participation during the initial customer baseline period. This departure, as well as continuously submitting daily minimum bids for DALRP participation in order to freeze Rumford’s customer baseline when Dr. Silkman knew that Rumford did not intend to change its operations on days the bids cleared, demonstrates Dr. Silkman’s fraudulent actions.

50. We also reject Dr. Silkman’s arguments that a finding of fraud must be premised on the violation of a tariff, rule or regulation. An entity need not violate a tariff, rule or regulation to commit fraud.¹²⁰ Nor does a finding of fraud require advance notice specifically prohibiting the conduct concerned. Fraud is a matter of fact and requires evaluation of all the facts and circumstances of each case.¹²¹ The Commission need not imagine and specifically proscribe in advance every example of fraudulent behavior. We find Dr. Silkman’s fraudulent conduct violates section 1c.2 regardless of whether it violates a specific tariff provision.

51. We further find disingenuous Dr. Silkman’s claimed ignorance that legitimate DALRP participation entailed a reduction in load from a legitimately established customer baseline, given that he is a sophisticated energy consultant whose job entailed that exact task: advising clients on how to properly participate in energy-related programs such as the DALRP. While he cherry-picks various statements in prior Commission orders in an attempt to support his assertion that the DALRP was too complex to decipher, the Commission has clearly described the basic principle relevant here: In 2002, the Commission approved ISO-NE’s proposed program involving demand

¹²⁰ See Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 25 (noting that the Commission’s rules against market manipulation apply to “all forms of fraud and manipulation that affect . . . electric energy transactions and activities the Commission is charged with protecting”); see also *In Re Make-Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 83 (2013) (“as Order No. 670 emphasizes, fraud is a question of fact to be determined by all the circumstances of a case, not by a mechanical rule limiting manipulation to tariff violations” (footnote omitted)).

¹²¹ See Order No. 670, FERC Stats. & Regs. ¶ 31.202 at P 50.

response, describing it as a program that “would offer an additional financial benefit to customers for *reducing* their loads – a payment for the amount of the reduced load.”¹²²

52. As to Dr. Silkman’s view that Rumford provided value and appropriately received DALRP payments for offering capacity and lower priced energy to the grid and for reducing its electricity purchases, the DALRP was an energy market program, not a capacity program. Participants were compensated for their *actual* load reductions from their legitimately established customer baselines during the hours in which payment was provided. To be entitled to payment for participating in the DALRP, an entity needed to actually reduce its load from its legitimately established customer baseline during the hours for which DALRP bids were accepted, not increase its load taken from the grid during the customer baseline setting period and subsequently resume its routine course of operations. Rumford itself acknowledged, acting pursuant to the scheme designed by Dr. Silkman, it did not change its behavior or reduce its load taken from the grid when it began participating in the DALRP even though ISO-NE was accepting daily bids for Rumford to provide load reduction. Accordingly, Dr. Silkman, through CES, is not entitled to payment CES received for its role in Rumford’s fraudulent DALRP participation.¹²³

¹²² *New England Power Pool & ISO New England, Inc.*, 101 FERC ¶ 61,344, P 38 (2002) (emphasis added).

¹²³ Consistent with *Lincoln Paper & Tissue LLC*, 144 FERC ¶ 61,162 (2013) we also reject any argument that Dr. Silkman’s advice that Rumford turn off its on-site generator during the initial customer baseline period subsequently was validated by Order No. 745, Order No. 745-A, or orders addressing ISO and regional transmission organization compliance filings to Order No. 745. *See Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322 (2011), *order on reh’g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011). Those orders were issued subsequent to the relevant period here and apply prospectively, not retroactively. In any case, Order No. 745 and its progeny did not categorically characterize use of behind-the-meter generation as demand response for any purpose, be it compensation or establishing customer baselines. *See* Order No. 745-A, 137 FERC ¶ 61,215 at P 66; *ISO New England, Inc.*, 138 FERC ¶ 61,042, at P 76, *order on reh’g*, 139 FERC ¶ 61,116, at P 10 (2012). In fact, the Commission has rejected calls for standardized treatment of behind-the-meter generation for either purpose, while noting that “demand reductions that are not genuine may be violations of the Commission’s anti-manipulation rules.” Order No. 745, FERC Stats. & Regs. ¶ 31,322 at P 95; Order No. 745-A, 137 FERC ¶ 61,215 at P 66 & n.123; *ISO New England, Inc.*, 139 FERC ¶ 61,116 at P 20 n.26.

53. Dr. Silkman's allegations against Constellation are also irrelevant to this proceeding. As noted above, a prior enforcement proceeding involving a Constellation affiliate is irrelevant here. In any case, Dr. Silkman's attempt to blame Constellation for his own fraudulent conduct is also unpersuasive given Dr. Silkman's failure to instruct Rumford to change its conduct in the DALRP after Dr. Silkman in early 2008 received two communications from Constellation warning that such conduct was improper.

54. We further reject Dr. Silkman's argument that CES's conduct did not deceive ISO-NE or Constellation because both had access to Rumford's meter data. Having such access does not mean they were aware of Dr. Silkman's customer baseline advice or condoned it. There is no evidence ISO-NE was aware that Rumford's initial customer baseline was fraudulently set, and, given that lack of awareness, ISO-NE's instruction to reset that customer baseline cannot properly be viewed as an endorsement of Dr. Silkman's advice. Dr. Silkman did not seek advice or assistance from Constellation or ISO-NE relevant to setting its customer baseline, and, as stated above, an express warning against engaging in certain behavior (whether before or after the fact) is not a prerequisite to finding that the subject behavior constitutes fraud.

2. Scienter

a. Show Cause Answer

55. Dr. Silkman argues that he based his advice on a good faith interpretation of ISO-NE rules, as demonstrated by his advice to Rumford during outages in September 2007 and November 2007 to submit minimum bids to keep its customer baseline from adjusting, thereby reducing the amount of money Rumford received from the DALRP.¹²⁴ Dr. Silkman further claims Constellation and ISO-NE endorsed his advice. As discussed above, Dr. Silkman claims Constellation knew how he advised Rumford to set its customer baseline, and that ISO-NE also endorsed his approach during the November 2007 outage.¹²⁵

56. Dr. Silkman rejects OE Staff's conclusion that he had a "scheme" to inflate Rumford's customer baseline due to his alleged knowledge that Rumford's bids would clear every day and thereby maintain a static customer baseline.¹²⁶ Dr. Silkman asserts he was unable "to predict the future price of electricity" and that he "repeatedly told Rumford that Rumford would be expected to operate at its baseline level whenever its

¹²⁴ Dr. Silkman Answer at 15-16; Dr. Silkman 1b.19 Response at 58-63.

¹²⁵ Dr. Silkman Answer at 13, 17.

¹²⁶ *Id.* at 8.

bids were not accepted.”¹²⁷ Dr. Silkman argues OE Staff mischaracterizes the facts in claiming that Dr. Silkman informed Rumford its customer baseline would never change to reflect actual generation or the mill’s energy usage.¹²⁸ Instead, Dr. Silkman claims Rumford’s managers believed the customer baseline could change.¹²⁹ Dr. Silkman notes that at no point did Rumford, Constellation or ISO-NE question the legitimacy of Dr. Silkman’s customer baseline setting and bidding advice.¹³⁰

57. Dr. Silkman disputes OE Staff’s claim that his failure to act in response to an early 2008 letter from Constellation about customers increasing electricity usage during initial customer baseline periods shows that Dr. Silkman had “improper intentions.”¹³¹ Dr. Silkman states Constellation sent the letter to all of its customers and that Constellation told Dr. Silkman and Rumford that it was not specific to Rumford.¹³²

b. OE Staff Report and Reply

58. OE Staff reiterates the allegations set forth in its report that Dr. Silkman intentionally devised a scheme in connection with Rumford’s participation in the DALRP. OE Staff rejects Dr. Silkman’s argument that his advice to Rumford during two outages proves that Dr. Silkman acted in good faith. OE Staff notes that Rumford was actually paid more than average for its DALRP participation during the September 2007 outage.¹³³ OE Staff claims, as discussed above, that ISO-NE’s November 2007 advice to Constellation that Rumford should reset its customer baseline to its original stated level does not disprove Dr. Silkman’s fraud or justify his behavior, given that ISO-NE did not know that Rumford’s initial customer baseline was inflated.¹³⁴

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 8-9.

¹³⁰ *Id.* at 10.

¹³¹ *Id.* at 16.

¹³² *Id.*; Dr. Silkman 1b.19 Response at 43-45.

¹³³ OE Staff Report at 26-27.

¹³⁴ *Id.* at 27; OE Staff Reply at 9.

59. OE Staff claims that, in multiple instances, Rumford personnel questioned Dr. Silkman regarding the legitimacy of the DALRP.¹³⁵ OE Staff states that Dr. Silkman admitted in his deposition that Rumford expressed concerns about the meaning and interpretation of the Load Response Program Manual. OE Staff states that Dr. Silkman acknowledged hearing from Rumford management it appeared Rumford would be paid for doing nothing.¹³⁶ OE Staff posits that, while Dr. Silkman does not dispute that he proposed that Rumford curtail its G4 generator during the initial customer baseline period,¹³⁷ contemporary written documents produced by Dr. Silkman regarding Rumford's DALRP participation make no mention of that proposal, even though this was a key aspect of Rumford's participation.¹³⁸

60. OE Staff also argues that Dr. Silkman's inaction in response to warnings from Constellation is inconsistent with his claim that he acted in good faith.¹³⁹ OE Staff claims Dr. Silkman ignored two Constellation communications in January 2008 warning of the impropriety of CES's DALRP strategy. OE Staff also notes that Dr. Silkman received an ISO-NE PowerPoint which described Dr. Silkman's scheme precisely, noting that "several Market Participants appear to have figured out how to benefit from the creation and maintenance of a static [customer baseline]" by "intentionally inflating their [customer baseline]."¹⁴⁰ OE Staff argues this PowerPoint should have caused Dr. Silkman to advise Rumford to cease the scheme, and that Constellation's letter should have further troubled Dr. Silkman.¹⁴¹

¹³⁵ OE Staff Report at 10.

¹³⁶ *Id.*

¹³⁷ *Id.* at 10.

¹³⁸ The Commission assumes that the implication is that, if Dr. Silkman sincerely believed the DALRP actually allowed curtailment of Rumford's on-site generation during the baseline measurement period, then he might have included that advice among other contemporary written guidance to Rumford.

¹³⁹ OE Staff Reply at 9-10.

¹⁴⁰ OE Staff Reply at 9-10 (citing Yoshimura Presentation at 9).

¹⁴¹ *Id.* at 10.

c. **Commission Determination**

61. We find that Dr. Silkman had the requisite scienter when he engaged in a fraudulent scheme or artifice. Scienter is the second element of 18 C.F.R. § 1c.2.¹⁴² For purposes of establishing scienter, Order No. 670 requires reckless, knowing, or intentional actions taken in conjunction with a fraudulent scheme or artifice.¹⁴³ As we described above, Dr. Silkman, through CES, intentionally advised Rumford to curtail its generator during the initial customer baseline setting period and to submit demand response bids almost every hour of every day during Rumford's participation in the DALRP. Dr. Silkman intentionally assisted in submitting these bids to Constellation to enable Rumford to participate in the DALRP. This advice and these bids resulted in Rumford's purchasing approximately \$120,000 of grid electricity at ISO-NE market-prices rather than generating that energy using its G4 generator at a lower cost, per its routine practice. Dr. Silkman understood that Rumford would not change its operations to provide demand response for hours that its DALRP bids were accepted.¹⁴⁴ Dr. Silkman does not dispute that he and CES intentionally provided this advice and submitted these bids on behalf of Rumford. The record reflects no reason for this conduct other than to inflate Rumford's customer baseline so that Dr. Silkman, CES and Rumford could receive DALRP payments without having to reduce Rumford's load taken from the grid during hours the relevant bids were accepted. As stated, we find that Dr. Silkman understood the purpose of the customer baseline and how ISO-NE would calculate it for Rumford. Dr. Silkman thus recognized – and intended – that curtailing the G4 generator during the initial customer baseline period would artificially inflate its customer baseline and thereby allow Rumford to be paid for future DALRP participation without actually reducing load.

62. We reject Dr. Silkman's claim that his instructions to Rumford on establishing its customer baseline were founded on a pre-existing Rumford directive concerning how to operate its G4 generator at various fuel prices. Nor do we find convincing contemporaneous evidence that Dr. Silkman's instruction to Rumford regarding curtailment of the G4 generator during the initial five-day customer baseline period was based on Rumford's stated operational concerns. Instead, the record indicates that Rumford routinely operated its generator to meet its operational needs. During the initial customer baseline period, Rumford curtailed its G4 generator and purchased energy from the grid, even though it was uneconomic to do so. We find that Rumford would not have curtailed its G4 generator during the initial customer baseline period but for

¹⁴² Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

¹⁴³ *Id.* PP 52-53.

¹⁴⁴ Silkman Dep. 257:13-20; Alley Dep. 119-20.

Dr. Silkman's advice. This demonstrates that Dr. Silkman was motivated to increase CES's DALRP payments (and his own profits through CES's) received for Rumford's participation in the DALRP and not, as he claims, to ensure that Rumford's customer baseline was established at a level low enough to enable Rumford to shed load safely.

63. Dr. Silkman's requisite scienter is further supported by his understanding of the role that the DALRP customer baseline would play in compensating Rumford and CES for CES's scheme. He intentionally advised Rumford to take more grid energy during the initial customer baseline period, even though it was more costly than operating Rumford's G4 generator, because he knew that those one-time additional expenses would be recouped quickly through future demand response payments. Further, there is no record evidence demonstrating that Dr. Silkman's ongoing instruction to Rumford to submit uniform minimum \$50/MWh demand response offers is attributable to anything other than an attempt to freeze Rumford's customer baseline, thereby ensuring continued payments for non-existent demand response.

64. We reject Dr. Silkman's view that his actions during two Rumford outages in the fall of 2007 prove that he acted in good faith with respect to his DALRP conduct as a whole. As detailed above, Dr. Silkman's fraudulent conduct began when he devised and implemented a scheme. This scheme involved Dr. Silkman, CES and Rumford communicating to ISO-NE a capability of Rumford to reduce its load by 20 MW, setting an artificially high customer baseline, making uniform offers every day of Rumford's participation in the DALRP at the minimum price, and obtaining DALRP payments without providing any actual load reduction not attributable to the artificially inflated customer baseline. Dr. Silkman's actions during the two outages do not detract from or contradict the fraudulent scheme or show that Dr. Silkman acted in good faith. And even if Dr. Silkman were correct that he could have at times advised Rumford to act in ways to obtain even larger demand response payments without reducing its load, Dr. Silkman's failure to do so does not legitimize the scheme he chose to implement, both before and after those outages.¹⁴⁵ In any case, as OE Staff notes, Rumford received a larger DALRP payment than average during the September 2007 outage.

65. We agree with OE Staff that Dr. Silkman's inaction in response to Constellation's warnings regarding potential improper customer baseline inflation are inconsistent with

¹⁴⁵ As a general matter, we note that there are myriad reasons an entity engaging in fraud or market manipulation would not maximize its unjust profits at every opportunity. For example, an entity might seek to reduce the likelihood for discovery of its fraudulent or manipulative conduct. Thus, an entity's decision to forego possible additional unjust profits does not prove that the entity acted in good faith. Rather, as we stated in Order No. 670, "[f]raud is a question of fact that is to be determined by all the circumstances of a case." Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

Dr. Silkman's claim that he acted in good faith. Dr. Silkman received two communications from Constellation in January 2008 that reasonably should have alerted Dr. Silkman that Rumford's DALRP participation, and thus Dr. Silkman and CES's conduct, was potentially improper. One of these communications was a letter from Constellation to its DALRP customers, expressing concerns that some DALRP customers might have been inflating their customer baselines and submitting DALRP bids that reflected normal usage rather than load reduction. Constellation further stated that it was "concerned that some of [its] Day-Ahead Program customers may have increased their usage while ISO-NE was determining their baselines" and that bids based on these "inflated" baselines "may reflect a customer's normal usage rather than dispatchable load that the ISO-NE can depend upon for reliability purposes."¹⁴⁶ The other communication was an ISO-NE PowerPoint presentation relaying similar concerns and referencing the possibility that such behavior constituted fraud. These two communications should have at the very least given Dr. Silkman concern about the continued validity of his advice for setting Rumford's customer baseline. This is particularly true, given Dr. Silkman's current argument that Constellation and ISO-NE had each previously endorsed his customer baseline advice and our finding that these communications conflict with that purported belief. However, there is no record evidence that Dr. Silkman ever contacted anyone at ISO-NE or Constellation to discuss the validity of his advice to Rumford. Dr. Silkman and CES continued to submit bids and to accept payments resulting from Rumford's inflated customer baseline after Dr. Silkman received these communications. We thus agree with OE Staff that Dr. Silkman's actions are inconsistent with a finding that he acted in good faith.

66. Although Dr. Silkman takes issue with OE Staff's claim that he told Rumford managers that Rumford's offers would clear *every* day, thus ensuring the customer baseline would remain static, we do not find Dr. Silkman's degree of confidence as to whether Rumford's bids would clear every day to be relevant to our determination that Dr. Silkman engaged in fraudulent conduct. Whether or not he knew with absolute certainty that Rumford's daily bids at the minimum \$50/MWh offer price always would clear or advised Rumford that they always would clear, Dr. Silkman knew given market prices in ISO-NE that there was a high likelihood Rumford's bids would clear each day and thereby perpetuate Rumford's inflated customer baseline.¹⁴⁷

¹⁴⁶ RUMF0001701-02 at 1.

¹⁴⁷ See Alley Dep. 90-91 and 119-20.

3. In Connection with a Jurisdictional Transaction

a. Show Cause Answer

67. Dr. Silkman argues that the Commission does not have jurisdiction over *all* participants in the wholesale electric power industry and here has no jurisdiction over Dr. Silkman in his role as an “advisor.”¹⁴⁸ Dr. Silkman maintains that three U.S. Supreme Court cases exempt advisors from the securities fraud rule upon which the Commission’s Anti-Manipulation Rule is based and that such cases preclude the Commission from asserting jurisdiction over Dr. Silkman.¹⁴⁹

68. Comparing section 1c.2 of the Commission’s regulations to Rule 10b-5 of the Securities and Exchange Commission’s (SEC) regulations,¹⁵⁰ Dr. Silkman explains that in *Central Bank of Denver*, the Supreme Court held that under section 10(b) of the Securities Exchange Act, claims for aiding and abetting are not a primary violation of that Act.¹⁵¹ Dr. Silkman explains that in *Stoneridge Investment Partners*, “the Supreme Court expanded on *Central Bank [of Denver]* and held that a company which did not make any public misstatement or violate a duty to disclose, but did participate in a fraudulent scheme, could not be sued in a private lawsuit under Section 10(b).”¹⁵² Dr. Silkman explains that in *Janus Capital Group*, the Supreme Court held that an investment advisor could not be sued under section 10(b) for false statements made by the investment fund.¹⁵³

¹⁴⁸ Dr. Silkman Answer at 15; Dr. Silkman 1b.19 Response at 64 (citing *Automated Power Exch., Inc. v. FERC*, 204 F.3d 1144, 1153 (D.C. Cir. 2000)).

¹⁴⁹ Dr. Silkman Answer at 15; Dr. Silkman 1b.19 Response at 46-51 (citing *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)).

¹⁵⁰ Dr. Silkman 1b.19 Response at 47-48.

¹⁵¹ *Id.* at 48 (citing 15 U.S.C. § 78j(b); *Cent. Bank of Denver*, 511 U.S. 164).

¹⁵² *Id.*

¹⁵³ *Id.*

b. OE Staff Report and Reply

69. OE Staff argues that Dr. Silkman was not merely an aider and abettor to Rumford's fraud but, rather, himself committed fraud.¹⁵⁴ OE Staff states that CES, through Dr. Silkman, "conceived of the scheme, helped to implement it, repeatedly provided false information to ISO-NE. . . . [, and] directly benefitted from the scheme."¹⁵⁵ OE Staff argues that "Congress intended the Commission's anti-manipulation authority to be broad and encompass 'any entity,' including an individual such as [Dr.] Silkman, that engages in fraud in connection with a jurisdictional transaction," and that even if one were to consider Dr. Silkman to be merely an advisor – which he is not – the Commission's jurisdiction would still cover him.¹⁵⁶

70. OE Staff argues that Dr. Silkman largely disregards pertinent FPA and regulatory language. OE Staff states the operative question is not whether the Commission has jurisdiction over "advisors," but whether Dr. Silkman is an "entity" that engaged in fraudulent activities "in connection with" a transaction subject to the Commission's jurisdiction.¹⁵⁷ OE Staff notes that the Commission in Order No. 670 stated that "if any entity engages in manipulation and the conduct is found to be in connection with a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority."¹⁵⁸ OE Staff notes that the Commission defined the term "any entity" as "deliberately inclusive" and demonstrative of "Congressional intent to include any person or form of organization, regardless of his or its legal status, function, or activities."¹⁵⁹

c. Commission Determination

71. We find that Dr. Silkman's fraudulent scheme was in connection with a jurisdictional transaction. The third element of establishing a violation of 18 C.F.R. § 1c.2 is determining whether the conduct in question was "in connection with" a transaction subject to the Commission's jurisdiction.¹⁶⁰ Section 201(b)(1) of the FPA

¹⁵⁴ OE Staff Reply at 11.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ OE Staff Report at 28.

¹⁵⁸ *Id.* (quoting Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 16) (internal quotations removed).

¹⁵⁹ *Id.* (citing Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 18).

¹⁶⁰ 16 U.S.C. § 824v(a) (2006); 18 C.F.R. § 1c.2(a) (2013).

bestows jurisdiction to the Commission over “the sale of electric energy at wholesale in interstate commerce.”¹⁶¹ Section 205(a) of the FPA confers jurisdiction to the Commission over “[a]ll rates and charges made, demanded or received by any public utility for or in connection with the . . . sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges.”¹⁶² There is well-established court precedent with respect to Commission jurisdiction over practices that directly or significantly affect rates under the FPA.¹⁶³ A demand response resource that may not be a public utility nonetheless may choose to participate in ISO-administered organized wholesale energy markets, therefore making it a market participant. The Commission has repeatedly found that market rules governing such participation by demand response resources in an organized wholesale energy market constitute practices that directly affect rates in those jurisdictional markets and therefore are subject to the Commission’s jurisdiction under section 205(a) and (c) of the FPA.¹⁶⁴ Here, ISO-NE’s markets are within the Commission’s jurisdiction, as is ISO-NE’s Commission-approved DALRP.¹⁶⁵

¹⁶¹ 16 U.S.C. § 824(b)(1) (2006).

¹⁶² *Id.* § 824d(a) (2006).

¹⁶³ *See Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009) (“[w]here capacity decisions about an interconnected bulk power system affect FERC-jurisdictional transmission rates for that system without directly implicating generation facilities, they come within the Commission’s authority” as a practice affecting rates under FPA); *Miss. Industries v. FERC*, 808 F.2d 1525, 1542 (D.C. Cir. 1987) (while capacity allocation costs “do not fix wholesale rates, their terms do directly and significantly affect the wholesale rates at which the operating companies exchange energy”); *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (“there is an infinitude of practices affecting rates and services”); *Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978) (capacity deficiency charge, just as the capacity adjustment charge “must be deemed to be within the Commission’s jurisdiction because it too represents a charge for the power and service the overloaded participant receives or it is at least a rule or practice affecting the charge for these services”).

¹⁶⁴ *See* Order No. 745-A, 137 FERC ¶ 61,215 at PP 20-35; *EnergyConnect, Inc.*, 130 FERC ¶ 61,031, at PP 27-32 (2010) (Commission has jurisdiction to regulate certain aspects of demand response and ISO market rules governing demand response as practices significantly affecting rates in organized wholesale electric markets).

¹⁶⁵ *See, e.g.*, September 11, 2008 Order, 124 FERC ¶ 61,235 at P 25 (approving revision to ISO-NE DALRP as just and reasonable); April 4, 2008 Order, 123 FERC ¶ 61,021 at PP 63-65 (approving revision to ISO-NE DALRP as just and reasonable);
(continued...)

72. We next find that Dr. Silkman's actions were "in connection with" a jurisdictional transaction, namely, Rumford's DALRP participation. Dr. Silkman devised the fraudulent scheme described above in which Rumford curtailed its generation and purchased electricity uneconomically during the initial customer baseline period to establish a false and inflated customer baseline. Dr. Silkman and CES also communicated with ISO-NE with respect to Rumford's DALRP participation, including communicating to ISO-NE that Rumford had a demand response capability of 20 MW. Dr. Silkman and CES further managed Rumford's day-to-day activities regarding its participation in the DALRP and, through Constellation, were responsible for submitting Rumford's DALRP offers. Thus, we find that Dr. Silkman's actions independent of Rumford were "in connection with" jurisdictional transactions.

73. We find that 18 C.F.R. § 1c.2 reaches Dr. Silkman's conduct in this case and that the Commission has jurisdiction over Dr. Silkman for purposes of enforcing section 1c.2. Section 1c.2 makes it unlawful for "any entity, directly or indirectly" to engage in fraudulent activities "in connection with" a transaction subject to the Commission's jurisdiction.¹⁶⁶ The phrase "any entity" is broad, and applies to any person such as Dr. Silkman who had both direct and indirect involvement in, and profited in connection with, Rumford's DALRP participation.¹⁶⁷ Moreover, as discussed above, the Commission has jurisdiction over the DALRP.

74. We find that the Supreme Court cases applying section 10(b) upon which Dr. Silkman relies are inapposite and do not insulate him from liability under section 1c.2. In *Central Bank of Denver*, the Supreme Court held that private liability under section 10(b) did not extend to those who aided and abetted a violation but did not themselves commit manipulative or deceptive acts.¹⁶⁸ *Central Bank*, however, does not bear on our determination that Dr. Silkman violated section 1c.2, based upon the finding that Dr. Silkman himself committed manipulative and deceptive acts in connection with jurisdictional transactions, as discussed above. In *Stoneridge Investment Partners*, the Court addressed the "reach of the private right of action the Court has found implied in

New England Power Pool & ISO New England, Inc., 111 FERC ¶ 61,064 (2005) (approving ISO-NE demand response programs and related tariff provisions).

¹⁶⁶ 18 C.F.R. § 1c.2 (2013); *see also* 16 U.S.C. § 824v(a) (2006) ("It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy . . . subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance.").

¹⁶⁷ *See* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 18.

¹⁶⁸ *Cent. Bank of Denver*, 511 U.S. at 177-78.

§ 10(b)” and determined plaintiffs had not relied on the respondents’ conduct and thus could not bring suit.¹⁶⁹ Unlike the implied private right of action under section 10(b), a private individual’s reliance on a manipulative or deceptive act is not an element in a government enforcement action under the FPA¹⁷⁰ and, thus, *Stoneridge Investment Partners* has no relevance to our decision here. Finally, in *Janus Capital Group*, the Court addressed the meaning of making a false statement under SEC Rule 10b-5(b), and held that only the person or entity that “ultimately has authority over a false statement” could be held liable for such violations.¹⁷¹ However, *Janus Capital Group* involved SEC Rule 10b-5(b), which establishes liability for false statements, whereas this case involves liability for schemes and fraud.¹⁷²

III. Civil Penalty Determination

75. Having concluded that Dr. Silkman, in connection with the purchase or sale of electricity intentionally or knowingly devised and participated in a fraudulent scheme in violation of section 222(a) of the FPA and section 1c.2 of the Commission’s regulations, we now must determine the appropriate penalties to assess. The OE Staff Report recommends that we assess civil penalties against Dr. Silkman. After assessing the legal and factual issues, including those raised by Dr. Silkman, and “tak[ing] into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner,”¹⁷³ we agree with OE Staff’s recommendation and assess penalties.

76. Pursuant to section 316A(b) of the FPA, the Commission may assess a civil penalty of up to \$1 million per day, per violation against any person who violates Part II of the FPA (including section 222 of the FPA) or any rule or order thereunder.¹⁷⁴ In determining the amount of a proposed penalty, section 316A(b) requires the Commission to consider “the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.”¹⁷⁵ For natural persons, who are not subject to the

¹⁶⁹ *Stoneridge Investment Partners*, 552 U.S. at 152, 158-59.

¹⁷⁰ See Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 48 & n.102.

¹⁷¹ *Janus Capital Group*, 131 S. Ct. at 2303.

¹⁷² SEC Rules 10b-5(a) and (c), which establish liability for schemes and fraud, mirror the parts of section 1c.2 herein at issue.

¹⁷³ 16 U.S.C. § 825o-1(b) (2006).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Commission's Penalty Guidelines,¹⁷⁶ the Commission has previously considered five factors in determining the amount of any civil penalty assessed pursuant to section 316A of the FPA: (1) seriousness of the offense; (2) commitment to compliance; (3) self-reporting; (4) cooperation; and (5) reliance on OE Staff guidance.¹⁷⁷

A. Show Cause Answer

77. Dr. Silkman argues OE Staff's proposed civil penalty of \$1,250,000 is "ruinous" and "ridiculous," emphasizing that Dr. Silkman received no direct compensation for CES's work on Rumford's behalf.¹⁷⁸ Although not further discussed in his Answer, Dr. Silkman incorporates his additional objections to OE Staff's proposed civil penalty from his earlier 18 C.F.R. § 1b.19 response. Those arguments are summarized below.

78. Dr. Silkman asserts that the Commission should proceed against only CES, not Dr. Silkman, because Dr. Silkman, in his role as a CES member, will indirectly pay for any CES disgorgement and civil penalty.¹⁷⁹ Based on his asserted entitlement to 21 percent of CES's profits and his claim that CES's profits from the \$166,000 it received from Rumford's DALRP participation amounted to only \$26,000, Dr. Silkman claims his indirect earnings from advising Rumford are only \$5,460.¹⁸⁰ Dr. Silkman claims OE Staff's \$1,250,000 penalty is disproportionate to this small payment. Dr. Silkman states that to pay OE Staff's proposed civil penalty would require close to his entire 2010 income (\$300,000) for several years.¹⁸¹ Dr. Silkman also contends the proposed civil penalty would force him into bankruptcy.¹⁸²

79. Dr. Silkman further claims that his advice to Rumford caused no loss, and that, in any case, Rumford's DALRP bids caused no losses to New England customers.¹⁸³

¹⁷⁶ See *supra* note 14.

¹⁷⁷ See *supra* note 15.

¹⁷⁸ Dr. Silkman Answer at 18.

¹⁷⁹ Dr. Silkman 1b.19 Response at 76.

¹⁸⁰ *Id.* at 77.

¹⁸¹ *Id.*

¹⁸² *Id.* at 68.

¹⁸³ *Id.* at 71.

B. OE Staff Report and Reply

80. OE Staff argues that Dr. Silkman's violation independently warrants assessment of the proposed \$1,250,000 civil penalty.¹⁸⁴ OE Staff notes that Dr. Silkman's behavior particularly warranted a civil penalty because Dr. Silkman and CES held themselves out as energy consulting experts in Commission-jurisdictional markets yet played a central role in the fraud.¹⁸⁵ OE Staff asserts that "proposed penalty is appropriate in light of the significant harm caused by [Dr.] Silkman's intentional behavior" and that the proposed penalty is consistent with the Commission's Revised Policy Statement on Enforcement.¹⁸⁶

81. OE Staff rejects Dr. Silkman's claim that his actions as an advisor caused no loss. OE Staff repeats its view that Dr. Silkman was not simply an advisor but instead an active participant in the fraudulent scheme, having conceived it, helped implement it, perpetuated it through false information provided to ISO-NE, and economically benefitted from it.¹⁸⁷ Similarly, OE Staff disputes Dr. Silkman's assertion that New England customers benefitted from Rumford's actions, arguing that Rumford provided no value to ISO-NE because it did not change its operations other than curtailing generation during the baseline period.¹⁸⁸

82. In the OE Staff Report, OE Staff argues that Dr. Silkman has the financial ability to pay OE Staff's recommended \$1,250,000 civil penalty. OE Staff notes that Dr. Silkman had substantial federal taxable income during the time of the violations in 2007 and 2008 and that Dr. Silkman owns assets of substantial value.¹⁸⁹ Accordingly, OE Staff argues that Dr. Silkman should be able to pay the recommended civil penalty and to avoid bankruptcy by contributing a portion of his annual income and liquidating some of his assets. OE Staff notes that it does not oppose permitting Dr. Silkman to pay his civil penalty over a multi-year period.¹⁹⁰

¹⁸⁴ OE Staff Report at 30.

¹⁸⁵ *Id.*

¹⁸⁶ OE Staff Reply at 13.

¹⁸⁷ *Id.* at 11.

¹⁸⁸ *Id.* at 7.

¹⁸⁹ OE Staff Report at 30.

¹⁹⁰ *Id.*

C. Commission Determination

1. Seriousness of the Violation

83. The Revised Policy Statement on Enforcement identifies a number of issues to be considered when analyzing the seriousness of violations of the FPA. We discuss these factors below to the extent that they are relevant here. Consideration of these factors establishes that Dr. Silkman's violations were serious and warrant a penalty.

84. *Harm Caused by the Violation.* As described above, we agree with OE Staff that Dr. Silkman conceived of and participated in a fraudulent scheme that resulted in ISO-NE (on behalf of its customers) paying Rumford, CES and Constellation \$3,336,964.63 across more than six months in 2007 and 2008 for non-existent demand response attributable to Rumford's artificially inflated baseline. We further agree with OE Staff that all of these DALRP payments resulting from Rumford's program participation were reasonably foreseeable and are properly an "actual loss" to ISO-NE, the harm from which should be attributed to Dr. Silkman and the other participants in his fraudulent scheme.¹⁹¹ We also reject Dr. Silkman's view that Rumford's actions caused no market harm. ISO-NE paid Rumford (and through Rumford, CES and Dr. Silkman) to provide demand response under the confines of a specific program, the requirements of which Dr. Silkman purposefully evaded through the establishment of a false Rumford customer baseline. Dr. Silkman harmed ISO-NE and its customers through the payments that ISO-NE made for the demand response that Dr. Silkman's client, Rumford, did not provide.

85. *Manipulation, Deceit, Fraud and Recklessness or Indifference to Results of Actions.* As noted above in Section II, the scheme Dr. Silkman developed and participated in violated section 1c.2 of the Commission's regulations. Dr. Silkman's scheme was designed to deceive ISO-NE and to misrepresent Rumford's intent and ability to reduce load while participating in the DALRP.

86. *Willful Action or in Concert with Others.* Dr. Silkman's scheme involved intentional manipulation of Rumford's customer baseline and was designed to deceive

¹⁹¹ Although not binding on Dr. Silkman as a natural person, we note that our Penalty Guidelines measure a violation's harm in part by examining the greater of the gain or loss caused. Application Note 2(A) to Penalty Guidelines § 2B1.1 specifies that "loss" is the greater of "actual loss or intended loss." Application Note 2(A)(i) defines "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the violation." These definitions inform our conclusion that the measure of the harm caused by Dr. Silkman should include all of ISO-NE's payments to Rumford during the period in which his fraudulent scheme was conducted.

ISO-NE to enable CES and Rumford (and through CES, Dr. Silkman) to receive DALRP payments while not altering Rumford's operations. As noted previously, we are not persuaded that Dr. Silkman acted inadvertently.

87. *Isolated Instance or Recurring Problem Systematic and Persistent Wrongdoing, and Duration.* Under Dr. Silkman's scheme, CES and Rumford (and through CES, Dr. Silkman) persistently and systematically coordinated fraudulent offers to ISO-NE each day of Rumford's DALRP participation to perpetuate Rumford's false customer baseline. CES's violation began during the five days in which it established Rumford's initial artificial customer baseline and extended for each day during the period Rumford made daily offers at a level designed to perpetuate its initial artificial customer baseline.

88. *Self-Reporting.* Dr. Silkman's wrongdoing came to the Commission's attention after ISO-NE discovered Rumford's false customer baseline and referred it to the Office of Enforcement. Dr. Silkman did not self-report his wrongdoing.

2. Mitigating Factors Relating to Culpability

89. *Commitment to Compliance and Actions Taken to Correct Violation.* The Commission has stated that it will take into account the nature and extent of an entity's internal compliance measures in existence at the time of the violation as well as the actions taken by an entity to correct the activity that produced the violation.¹⁹² Here, neither Dr. Silkman nor his company, CES, had procedures in place to detect violations. Dr. Silkman and CES also provided no training of employees regarding the regulatory requirements governing energy markets and assigned no individual as ultimately responsible to ensure compliance. Moreover, as discussed above, Dr. Silkman received multiple communications indicating his and Rumford's conduct in the DALRP was likely improper, but he did nothing to remedy such conduct.¹⁹³ Under these circumstances, we find that no compliance program credit is warranted.

90. *Cooperation.* Dr. Silkman's cooperation with OE Staff's investigation was sufficient to warrant credit and consideration.

91. *Self-Reporting.* Self-reporting of violations is an important consideration because entities are in the best position to detect and correct such violations. In the Revised Policy Statement on Enforcement, the Commission acknowledged that it would award penalty credit for parties that promptly self-report violations.¹⁹⁴ Dr. Silkman made no

¹⁹² Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 57.

¹⁹³ See *supra* P 65.

¹⁹⁴ Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 62.

report; ISO-NE instead discovered and referred his conduct. This factor, therefore, cannot serve to mitigate Dr. Silkman's violations.

92. *Reliance on Staff Guidance.* Dr. Silkman did not rely on Staff guidance and is not eligible for a credit for doing so.

3. Appropriate Penalty

93. Based on the foregoing factors, the pleadings in this case and the OE Staff Report, the Commission finds that there is a need to deter the fraudulent conduct at issue and that a civil penalty of \$1,250,000 is fair and reasonable under the circumstances. We find this civil penalty to be particularly appropriate given Dr. Silkman's use of his position as a provider of expert energy consulting services to develop and to solicit participation in a fraudulent scheme to undermine the ISO-NE DALRP. We reject Dr. Silkman's assertion that we should proceed only against CES for this conduct based on Dr. Silkman's potential indirect payment of a portion of any penalty we might assess against CES in the parallel CES proceeding. CES as a corporate entity and Dr. Silkman as an individual are each separately liable for violating section 1c.2 of the Commission's regulations and we find pursuing each is necessary here to appropriately deter corporate and individual fraudulent conduct.

94. We note that, in concluding that \$1,250,000 is a fair and reasonable civil penalty, we have taken into consideration Dr. Silkman's current financial condition. Although not binding on an individual like Dr. Silkman, our Penalty Guidelines establish that a reduction based on inability to pay is applicable only where the Commission finds that "the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay" a penalty.¹⁹⁵ Those standards also require that any reduction from the otherwise applicable penalty amount be "no more than necessary to avoid substantially jeopardizing the continued viability of the organization."¹⁹⁶ Measured by this standard, which we find equally relevant to an individual like Dr. Silkman, we agree with OE Staff that Dr. Silkman can pay a civil penalty without risk of bankruptcy. Dr. Silkman can contribute a portion of his annual salary and divest assets he owns to pay a penalty. Moreover, we agree with OE Staff that a payment plan can alleviate concerns about Dr. Silkman's inability to pay a penalty. Therefore, we direct Dr. Silkman to either: (a) pay the \$1,250,000 civil penalty within 60 days of the date of this order; or (b) within 30 days of this order, submit for Commission approval a payment plan agreed to by him and OE Staff.

¹⁹⁵ Penalty Guidelines § 1C3.2(b).

¹⁹⁶ See *id.* § 1C3.2; Application Note 1 to Penalty Guidelines § 1C3.2.

95. If Dr. Silkman does not agree to a payment plan with OE Staff within 30 days or does not pay the \$1,250,000 civil penalty within 60 days of the date of this order, then the Commission will commence an action in a United States district court for an order affirming the penalty, in which the district court may review the assessment of the civil penalty *de novo*.¹⁹⁷

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

The Commission orders:

(A) Dr. Richard Silkman is hereby directed to pay to the United States Treasury by a wire transfer a civil penalty in the sum of \$1,250,000, as discussed in the body of this order.

(B) Dr. Richard Silkman is hereby directed to either:

- (1) pay the \$1,250,000 civil penalty to the United States Treasury within 60 days of the date of this order; or
- (2) within 30 days of the date of this order, submit for Commission approval a payment plan agreed to by him and OE Staff, as discussed in the body of this order.

By the Commission. Commissioners Norris and LaFleur are dissenting in part with a joint separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁹⁷ 16 U.S.C. § 823b(d)(3)(B) (2006).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Richard Silkman

Docket No. IN12-13-000

(Issued August 29, 2013)

NORRIS and LaFLEUR Commissioners, *dissenting in part*:

We agree that Dr. Silkman's lead role in artificially inflating the baseline of a demand response provider to receive compensation for demand response services that were not provided warrants a significant penalty. We are particularly troubled by Dr. Silkman's misconduct because it potentially threatened the integrity of ISO-NE's demand response program. We also believe it is appropriate to find that Dr. Silkman, as an individual, and Competitive Energy Services, LLC, (CES), as the corporate entity, are separately liable for this violation of the Commission's regulations. But, we disagree with the penalty amount determination, and believe that the penalty should be reduced.

As managing member of CES, Dr. Silkman will likely also be required to pay some portion of the penalty imposed upon CES.¹ Indeed, *Competitive Energy Services, LLC* issued concurrently with this order dismisses CES's arguments that it will be unable to pay the penalty imposed by concluding, among other things, that CES could seek contributions from its members to pay the penalty amount.² Therefore, we believe that in this case the Commission should have considered the collective impacts of both the penalty against CES and the individual penalty against Dr. Silkman in determining the appropriate penalty amount imposed on Dr. Silkman.

For these reasons, we dissent in part.

John R. Norris
Commissioner

Cheryl LaFleur
Commissioner

¹ *Richard Silkman*, 144 FERC ¶ 61,164 at P 78 (2013).

² *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163 at P 102 (2013).