

152 FERC ¶ 61,012  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

City Power Marketing, LLC and  
K. Stephen Tsingas

Docket No. IN15-5-000

ORDER ASSESSING CIVIL PENALTIES

(Issued July 2, 2015)

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1. In this Order, we find that City Power Marketing, LLC (City Power) and K. Stephen Tsingas (Mr. Tsingas) (collectively, Respondents) violated section 222 of the Federal Power Act (FPA)<sup>1</sup> and section 1c.2 of the Commission’s regulations,<sup>2</sup> which prohibit energy market manipulation, through a scheme to engage in fraudulent Up-To Congestion (UTC) transactions in PJM Interconnection, L.L.C.’s (PJM) energy markets to garner excessive amounts of certain credit payments to transmission customers. We also find that in the course of responding to the Commission’s Office of Enforcement Staff’s (OE Staff) investigation into its UTC trading conduct, City Power violated section 35.41(b) of the Commission’s regulations,<sup>3</sup> which, in relevant part, prohibits a seller, such as City Power, from submitting false or misleading information or omitting material information to Commission staff, by making false and misleading statements and material omissions related to instant message (IM) communications discussing Respondents’ UTC trading scheme. In light of the seriousness of these violations, we find that it is appropriate to assess civil penalties pursuant to section 316A of the FPA<sup>4</sup> in the following amounts: \$14,000,000 against City Power and \$1,000,000 against Mr. Tsingas. The Commission further directs City Power and Mr. Tsingas to disgorge

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<sup>1</sup> 16 U.S.C. § 824v(a) (2012).

<sup>2</sup> 18 C.F.R. § 1c.2 (2014) (Anti-Manipulation Rule).

<sup>3</sup> *Id.* § 35.41(b).

<sup>4</sup> 16 U.S.C. § 825o-1 (2012).

unjust profits, plus applicable interest, pursuant to section 309 of the FPA,<sup>5</sup> in the following amount: \$1,278,358.

## **I. Executive Summary**

2. Respondents' scheme involved financial trading in the wholesale electricity market administered by PJM. As discussed in further detail below,<sup>6</sup> PJM operates both a day-ahead market, in which generation is scheduled one-day prior to the relevant operating day, and a real-time market, in which generation is scheduled and dispatched to correct for variations between the day-ahead schedule and actual demand for electricity. PJM's energy market offers products that involve the physical movement of electricity, as well as various financial or virtual products that do not involve the exchange of physical energy, including the UTC product. A UTC product is a type of spread trade that allows market participants to arbitrage the difference between day-ahead and real-time congestion prices at two different locations.<sup>7</sup> When the UTC transactions discussed in this proceeding were made, PJM's market rules required market participants to reserve transmission service in connection with their UTC trades.<sup>8</sup> As a result, UTC transactions became eligible to receive certain transmission credits, known as Marginal Loss Surplus Allocation (MLSA).<sup>9</sup> PJM distributed the MLSA payments on a *pro rata* basis to all customers who paid for transmission service.

3. From July 4 to July 30, 2010 (Manipulation Period), Respondents designed and implemented a fraudulent UTC trading scheme to receive excessive amounts of MLSA payments. To do this, Respondents intentionally placed high volumes of three categories

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<sup>5</sup> *Id.* § 825h.

<sup>6</sup> Details regarding the PJM Market, UTC product, and transmission credit payments at issue in this proceeding are discussed in the background section. *See* discussion *infra* PP 15-26.

<sup>7</sup> In particular, a UTC bid that clears PJM's market will pay the difference between the day-ahead prices at location A and location B, and receive the difference between the real-time prices at location A and location B.

<sup>8</sup> Confidential Referral of Potential Violations of FERC Market Rule, at 2, 4 (Aug. 16, 2010) (PJM Referral). A reservation for transmission service that is accepted by PJM provides the market participant with the right to flow electricity on a designated transmission path. Any given transmission path has a limited amount of capacity.

<sup>9</sup> *See* discussion *infra* PP 23-26.

of UTC trades: (1) “round-trip” trades that canceled each other out by placing the first leg of the trade from locations A to B, and simultaneously placing a second leg of equal volume from locations B to A; (2) trades between two PJM nodes (SOUTHIMP-SOUTHEXP) that are import and export pricing points of the same PJM interface designed to have equivalent prices;<sup>10</sup> and (3) trades between two PJM nodes (NCMPAIMP-NCMPAEXP) that historically had a very small price spread and in most hours failed to generate spreads greater than the transaction costs associated with the trades. We will refer to these three categories of trades (round-trip, SOUTHIMP-SOUTHEXP, and NCMPAIMP-NCMPAEXP trades) collectively as “Loss Trades,” which is how Respondents referred to them. The contemporaneous evidence shows that Respondents artificially created these Loss Trades solely to reserve transmission service to enable them to collect excessive MLSA payments during the Manipulation Period.

4. Respondents engaged in the three categories of trades during various portions of the Manipulation Period, switching between two of the three categories when Mr. Tsingas’ partner, Timothy Jurco (Mr. Jurco), became concerned about the potential scrutiny by the market monitor of such fraudulent UTC trading. The timing and implementation of these categories of trading illustrate the manipulative scheme engaged in by Respondents. Specifically, Respondents pursued the round-trip UTC trades for 18 days between July 4 and July 24, 2010<sup>11</sup> and began pursuing that strategy when Mr. Tsingas discovered that a competitor was trading “both sides” to collect MLSA payments.<sup>12</sup> Respondents continued to pursue the round-trip trading strategy throughout

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<sup>10</sup> As relevant here, SOUTHIMP and SOUTHEXP are external proxy prices “introduced in 2006 so that PJM’s southern interface would receive one import price and one export price. This pricing method is a consolidation of 12 pricing nodes stretching from the Great Lakes in the Midwest ISO, through Kentucky, Tennessee and the North Carolina coast.” *PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,101, at P 5 n.6 (2009). Respondents engaged in two types of trades involving SOUTHIMP and SOUTHEXP. One set represents “round trip” trades from SOUTHIMP-SOUTHEAST and SOUTHEAST-SOUTHEXP. *See infra* P 47. The other set involved one way trades at SOUTHIMP-SOUTHEXP, and are discussed separately *infra* PP 49-50.

<sup>11</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls; Staff Reply at 15. Respondents traded round-trips every day between July 4 and July 24, 2010, except July 10, 11, and 18.

<sup>12</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:55:35 AM – 10:59:39 AM) (JUR01529-30).

a vast majority of the Manipulation Period and added the SOUTHIMP-SOUTHEXP strategy for a period of 8 days between July 5 and July 14, 2010.<sup>13</sup> Respondents pursued the SOUTHIMP-SOUTHEXP strategy despite the fact that Mr. Jurco observed to Mr. Tsingas that it was “nuts” to be paid losses on these zero spread trades<sup>14</sup> and despite the fact that Mr. Tsingas admitted that while the trades paid well, that it felt “sleezy.”<sup>15</sup> The SOUTHIMP-SOUTHEXP strategy was abandoned after Mr. Jurco expressed his discomfort with continuing those trades, noting that he felt “really funny about them” and that they “sure could be great ammo for [the PJM IMM] –all these hobos fight for losses then they rope a dope and collect huge numbers.”<sup>16</sup> Respondents replaced the SOUTHIMP-SOUTHEXP trading strategy with the NCMPAIMP-NCMPAEXP strategy from July 16 through July 30, 2010, while still pursuing the round-trip strategy. Mr. Tsingas explained that there was “nothing fishy” about pursuing the NCMPAIMP-NCMPAEXP transactions by claiming they were “different prices...all one way...cheap to get in...no one can give us shit for that.”<sup>17</sup> We find that the three trading strategies are evidence of a scheme to manipulate and that contemporary communications, data, and other evidence demonstrate that the strategies were fraudulent and entered into solely to access MLSA payments.

5. Based on the totality of the record in this proceeding, we find that Respondents’ Loss Trades during the Manipulation Period violated section 222 of the FPA and the Anti-Manipulation Rule. When used appropriately, UTC trades in PJM permit financial traders to profit by arbitraging market prices between two locations in the day-ahead and real-time market; these transactions can benefit PJM’s market by encouraging

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<sup>13</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

<sup>14</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 5, 2010, 9:26:09 AM-9:27:16 AM) (JUR01538-1539).

<sup>15</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 13, 2010, 9:31:48 AM-9:32:08 AM) (JUR01588).

<sup>16</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 14, 2010, 9:56:31 AM –9:57:20 AM) (JUR01590). The IMs indicate that Mr. Jurco left the issue of continuing to trade the SOUTHIMP-SOUTHEXP as part of their Loss Trade strategy up to Mr. Tsingas, but continued to express his discomfort.

<sup>17</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 16, 2010, 10:11:19 AM –10:16:49 AM) (JUR01614- JUR01615).

convergence between day-ahead and real-time market prices.<sup>18</sup> Respondents' testimony and the contemporaneous evidence makes clear that Respondents understood this, yet intentionally placed fraudulent Loss Trades that did not provide any benefit to the PJM market. Respondents knew that most of their Loss Trades would net no or a very minimal profit based on price spreads alone and that all of their Loss Trades would result in a loss after considering transaction costs. By making these trades, Respondents collected MLSA payments exceeding the transaction costs they incurred for the trades, and yielded a significant profit, as they expected.

6. We disagree with Respondents' argument that their Loss Trades did not constitute fraud because, they allege, the trades did not inject false information or give a false impression to other market participants or the market in general. Respondents' Loss Trades were manipulative. With respect to Respondents' round-trip trades, Respondents placed separate bids for each leg of their transaction, just as other market participants would place routine arbitrage-based UTC trades. As a result, the two separate legs of Respondents' offsetting trades were not connected and falsely appeared to PJM as legitimate UTC trades, thus concealing their fraudulent nature and purpose. Similarly, with respect to the SOUTHIMP-SOUTHEXP trades, Respondents placed their trades as if they were routine arbitrage-based UTC trades on nodes that were mathematically equivalent—which resulted in a zero spread, as Respondents intended. And with respect to Respondents' NCMPAIMP-NCMPAEXP trades, Respondents placed their trades as if they were routine arbitrage-based UTC trades between nodes with small price spreads primarily, if not solely, with the intent to garner MLSA payments. For all three of these Loss Trade strategies, Respondents deceived PJM into disbursing MLSA payments by creating the false impression that City Power was trading to arbitrage price differentials when, in fact, it was engaging in trades solely to collect MLSA payments to the detriment of other market participants. Further indication of Respondents' deception is shown by their July 16, 2010 abandonment of their SOUTHIMP-SOUTHEXP trading strategy in favor of beginning to trade NCMPAIMP-NCMPAEXP. Respondents specifically became concerned that their SOUTHIMP-SOUTHEXP transactions would be discovered by PJM or the PJM Independent Market Monitor (IMM) and transitioned to NCMPAIMP-NCMPAEXP because its low price spreads would provide the appearance of legitimate trades, while still providing large quantities of MLSA payments.<sup>19</sup>

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<sup>18</sup> *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208, at P 50 n.85 (2008); *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042, at P 43 (2008) (noting that financial arbitrage transaction is of value in energy markets); *see also* discussion *infra* P 20.

<sup>19</sup> *See* discussion *infra* PP 50-51.

7. Moreover, we find that Respondents' round-trip UTC transactions constitute wash trades, and that all market participants had notice that wash trades violate section 222 of the FPA and the Commission's Anti-Manipulation Rule.<sup>20</sup> Respondents' round-trip UTC trades were designed to ensure that both legs of a transaction would cancel each other out, thereby eliminating any associated price spread risk. As we have noted, trades that are pre-arranged to cancel each other out and involve no economic risk are wash trades, which are inherently fraudulent.<sup>21</sup>

8. Further, we conclude that Respondents engaged in their Loss Trades knowingly and intentionally. Contemporaneous IM communications, testimony, trade data, and other evidence demonstrate that Respondents chose to engage in UTC trades solely to garner excessive MLSA payments in a manner inconsistent with the market function of UTC transactions. In fact, Respondents elected to purchase transmission for all three categories of their Loss Trades specifically to obtain their MLSA payments.<sup>22</sup> Had their purpose been to profit by arbitraging price spreads they would not have increased transaction costs by purchasing this transmission. Respondents also understood that, as a consequence of this trading scheme, other market participants would receive a proportionally smaller share of MLSA payments. As Respondents' UTC transactions increased, their transmission service reservations and proportionate share of MLSA payments increased, thus decreasing the available transmission and MLSA payments for other eligible market participants. Accordingly, by targeting MLSA payments through these artificial, high-volume UTC trades, Respondents fraudulently obtained MLSA payments that otherwise would have been distributed to other market participants.

9. Based on the totality of the record in this proceeding, we also find that City Power violated section 35.41(b) of the Commission's regulations. In the course of OE Staff's investigation, Mr. Tsingas, on behalf of City Power, denied the existence of relevant IMs in responding to written and oral questions by OE Staff. Specifically, Mr. Tsingas falsely testified under oath in October 2010 that he did not believe City Power kept records of IMs, did not know if City Power made attempts to locate responsive IMs, and did not believe his partner, Timothy Jurco (Mr. Jurco) archived his IMs.<sup>23</sup> Mr. Tsingas also

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<sup>20</sup> See *Houlian Chen et al.*, 151 FERC ¶ 61,179, at P 103 (2015) (*Chen*); discussion *infra* PP 117-126.

<sup>21</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rule Authorizations*, 105 FERC ¶ 61,218, at P 53 (2003).

<sup>22</sup> See *infra* PP 52, 99.

<sup>23</sup> See *infra* P 220.

affirmed on behalf of City Power, in December 2010 and again in November 2011, that there were no IMs responsive to OE Staff's written request for all communications relevant to the UTC trading.<sup>24</sup> Contemporaneous evidence shows that Mr. Tsingas had detailed knowledge of responsive IMs prior to each of these inaccurate statements and omissions, and with minimal diligence could have ensured both that his statements were accurate and that the IMs were produced to OE Staff.<sup>25</sup> Therefore, we find that City Power intentionally submitted false or misleading information in communications with the Commission, without exercising due diligence to prevent such misrepresentations.

10. We also find that the Commission has jurisdiction over Respondents' conduct.<sup>26</sup> The U.S. Court of Appeals for the District of Columbia Circuit has held that the Commission has authority under the FPA to regulate the activity of traders, like Respondents, who participate in energy markets.<sup>27</sup> Moreover, the Commission has jurisdiction over the transmission or sale of electric energy at wholesale in interstate commerce,<sup>28</sup> as well as a responsibility to ensure that the rates and charges for transmission and wholesale power sales are just and reasonable and not unduly discriminatory or preferential.<sup>29</sup> As applicable here, virtual transactions, including UTC trades, are integral to the operation and settlement of Commission-jurisdictional wholesale electric markets. Respondents engaged in UTC transactions, reserved transmission capacity, and received MLSA payments pursuant to PJM's Commission-approved tariff.

11. Finally, having found that Respondents knowingly and intentionally devised and participated in a fraudulent scheme to manipulate PJM's wholesale electricity market in violation of the FPA and the Commission's regulations, and that City Power violated section 35.41(b) of the Commission's regulations, we conclude that both civil penalties and disgorgement should be assessed against Respondents. This determination is consistent with the Commission's long-standing practice to require disgorgement of

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<sup>24</sup> See *infra* PP 221-222.

<sup>25</sup> See *infra* P 53.

<sup>26</sup> See *infra* PP 198-203.

<sup>27</sup> *Kourouma v. FERC*, 723 F.3d 274, 276 (D.C. Cir. 2012).

<sup>28</sup> 16 U.S.C. § 824(b)(1) (2012).

<sup>29</sup> *Id.* §§ 824d, 824e.

unjust profits,<sup>30</sup> as well as the Commission's discretion to assess civil penalties against any person who violates Part II of the FPA, or any rule or order thereunder.<sup>31</sup>

## II. Background

### A. Relevant Entities

12. City Power is a financial firm headquartered in Ft. Lauderdale, Florida. In 2005, Mr. Tsingas founded City Power and obtained Commission authorization to make market-based rate sales for resale of electric energy.<sup>32</sup> City Power has engaged in physical power sales pursuant to its market-based rate authority, but is primarily a financial trading firm, specializing in transacting financial products related to wholesale electric markets.

13. From 2006 through 2011, Mr. Jurco was a partner at City Power who participated in energy market trading on its behalf.<sup>33</sup> With approximately seven years of experience as an energy trader, Mr. Jurco joined City Power in 2006 and began trading UTCs in PJM.<sup>34</sup> Mr. Jurco traded on behalf of City Power during the Manipulation Period. Mr. Jurco later terminated his partnership interest with City Power in August 2011.<sup>35</sup>

14. Mr. Tsingas is a commodities trader with approximately 15 years of experience trading virtual energy and other products in wholesale electric markets. He started trading virtual energy products while working at Conectiv Energy (Conectiv) in 2000 and 2001.<sup>36</sup> Messrs. Tsingas and Jurco worked together at Conectiv. Mr. Tsingas always has been City Power's majority owner, and has been its sole owner since Mr. Jurco

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<sup>30</sup> *Enforcement of Statutes, Regulations, & Orders*, 123 FERC ¶ 61,156, at P 43 (2008) (Revised Policy Statement on Enforcement).

<sup>31</sup> 16 U.S.C. § 825o-1(b) (2012).

<sup>32</sup> *See City Power Marketing, LLC*, Docket No. ER05-330-000 (Mar. 15, 2005) (delegated letter order).

<sup>33</sup> Jurco Test. Tr. at 11; Tsingas Test. Tr. at 14-15.

<sup>34</sup> Jurco Test. Tr. at 186.

<sup>35</sup> Tsingas Test. Tr. at 747.

<sup>36</sup> *Id.* at 24-26.

terminated his partnership interest. During all of the trading at issue in this matter, Mr. Tsingas traded on behalf of City Power.

## **B. The PJM Market**

15. PJM, one of several Commission-regulated Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs), operates a wholesale electricity market, which balances the minute-by-minute supply and demand requirements for electric power in a 13-state region extending from Illinois to North Carolina.<sup>37</sup> PJM uses market-based systems to determine a least-cost solution by optimizing available assets within its territory to meet electricity demand and reliability requirements. Electricity prices in PJM vary based on the specific location, or node, within the market. For this reason, electricity prices at the various locations are called Locational Marginal Prices (LMP). Three components summed together form the LMP: (i) an energy price (which is the same at each node and represents the cost to serve the next increment of load (demand) at a pre-determined reference location); (ii) the cost of congestion (which varies at each node depending on the limitations of the transmission system to move power freely between constrained and non-constrained locations); and (iii) the cost of line losses (which are central to this proceeding and which we discuss in greater detail below).

16. PJM operates a dual settlement market, with both a day-ahead market and a real-time market. PJM determines LMPs through the least-cost solution on an hourly basis in the day-ahead and on a five-minute basis (which can be integrated into an hourly figure) in the real-time for all nodes.

17. In addition to physical transactions, which are premised on the actual delivery of electricity, PJM offers various virtual products, including UTCs,<sup>38</sup> for which no generation is dispatched and no load is served, and obligations are met through cash

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<sup>37</sup> PJM's footprint includes all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia.  
<http://www.pjm.com/aboutpjm/who-we-are/territory-served.aspx> (last visited May 8, 2015).

<sup>38</sup> A virtual transaction does not require generation to be dispatched or load to be served. Rather, it allows a market participant to arbitrage day-ahead versus real-time prices by either purchasing or selling a position in the day-ahead market, and then doing the opposite in an equal volume at the same location in the real-time market, thereby taking no physical position when the system is dispatched.

settlement. Virtual products are designed to increase market liquidity, drive convergence between the day-ahead and real-time market prices,<sup>39</sup> and provide vehicles for hedging. While virtual products carry no obligation to buy or sell physical power, they serve a direct role in day-ahead price formation as reflected in day-ahead LMPs. As such, virtual products can: (1) be the price setting marginal factor in determining day-ahead LMPs; (2) affect day-ahead dispatch; and (3) affect other market participant positions.<sup>40</sup>

### C. PJM's Up-To Congestion Product

18. UTCs were initially created as a tool to hedge congestion price risk associated with physical transactions,<sup>41</sup> and later became a way for market participants to profit by arbitraging the price differences between two nodes in the day-ahead and real-time markets.<sup>42</sup> A UTC bid that clears “will pay the difference between the [d]ay-ahead sink LMP and the source LMP and be paid the difference between the [r]eal-time sink LMP and source LMP.”<sup>43</sup> Thus, “cleared UTC transactions in the direction of congestion are profitable when real-time congestion is greater than day-ahead congestion. In the counter-flow direction, UTC transactions are profitable when real-time congestion

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<sup>39</sup> Convergence in the PJM market is the reduction in the spread between day-ahead and real-time LMPs at a specific node. As indicated by PJM's IMM, “price convergence does not necessarily mean a zero or even a very small difference in prices between [d]ay-[a]head and [r]eal-[t]ime [e]nergy [m]arkets. There may be factors, from operating reserve charges to risk that result in a competitive, market-based differential.” PJM's IMM, *2010 State of the Market for PJM*, vol. 2 (Mar. 10, 2011), available at [http://www.monitoringanalytics.com/reports/PJM\\_State\\_of\\_the\\_Market/2010/2010-som-pjm-volume2-sec2.pdf](http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2010/2010-som-pjm-volume2-sec2.pdf).

<sup>40</sup> Howard J. Haas, *Spread Bidding: MA Concerns and Mitigation Outline* (Sept. 10, 2009), available at [http://www.monitoringanalytics.com/reports/Presentations/2009/Spread\\_Bidding\\_MA\\_Concerns\\_and\\_Mitigation\\_Outline\\_20090910.pdf](http://www.monitoringanalytics.com/reports/Presentations/2009/Spread_Bidding_MA_Concerns_and_Mitigation_Outline_20090910.pdf).

<sup>41</sup> *PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,121, at P 3 (2013); see also *Calif. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,087, at P 6 (2013) (noting that market participants can use virtual transactions to “hedge financial expectations”).

<sup>42</sup> *PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,121 at P 19.

<sup>43</sup> *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,144, at n.8 (2014).

decreases or reverses from the counter-flow direction toward the direction of congestion.”<sup>44</sup>

19. UTC transactions in PJM are designed to serve two purposes. First, market participants use them as a congestion management tool to hedge exposure to real-time congestion charges between the source and sink (which can differ significantly from day-ahead congestion charges) of physical energy transactions in PJM.<sup>45</sup> Second, financial traders use them as a “purely virtual product.”<sup>46</sup> Specifically, arbitrageurs can use UTCs to take on directional price risk related to the differences between LMP in the day-ahead and real-time markets. As the Commission has explained:

Under an Up-To congestion price arrangement, arbitrageurs may sell power at point A and buy power at point B in the [d]ay-[a]head market as long as the price differential between these points is no greater than the specified amount. If during the [r]eal-[t]ime market, the spread between these points increases, the arbitrageur makes money; if the spread decreases, it loses money.<sup>47</sup>

20. UTCs, like other virtual products, can promote market efficiency because, as we have recognized, virtual products “increase[] market liquidity and [create] price convergence between the day-ahead and real-time markets.”<sup>48</sup> Although they are settled financially, virtual (including UTC) transactions can affect prices in the day-ahead

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<sup>44</sup> *Id.*

<sup>45</sup> *PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,121 at P 3.

<sup>46</sup> *Id.* P 19 (noting the “evolution of the UTC product from a day-ahead financial hedge of a real-time physical transaction to its present primary use as a purely virtual product”).

<sup>47</sup> *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208 at n.85.

<sup>48</sup> *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,309, at P 20 (2003); *see also ISO New England Inc.*, 110 FERC ¶ 61,250, at P 30 (2005) (“In fact, virtual trading activities provide important benefits to the market, including price convergence between the [d]ay-[a]head and [r]eal-[t]ime markets, price discovery, market liquidity, and increased competition.”).

market as well as what units are dispatched by PJM to provide energy to the wholesale grid.<sup>49</sup>

21. In 2010, PJM required that all UTC transactions either source, or sink, at an external interface, or “wheel through” between two external interfaces (a simultaneous sourcing and sinking of power that led to a net MW position of zero). These rules reflected the initial purpose of UTC transactions, which was to provide a congestion hedge for market participants moving power into, out of, or through PJM. All of Respondents’ UTC transactions at issue here were submitted as wheel UTCs during the Manipulation Period.

22. At the time Respondents traded the UTCs at issue in this proceeding, PJM required all UTC transactions scheduled into the day-ahead market to be associated with transmission service reservations, which, once obtained, provided the right to flow electricity across the PJM system. PJM assessed certain transmission charges for transmission service reservations.<sup>50</sup> However, the PJM tariff did not require that the transmission service reservation associated with a UTC be on the same path as the UTC.<sup>51</sup> Moreover, reserved transmission with a Midcontinent Independent System Operator, Inc. (MISO) point of delivery,<sup>52</sup> unlike other points of delivery, was not assessed any transmission fees,<sup>53</sup> but also was not eligible for MLSA. In 2010,

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<sup>49</sup> *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208 at P 38 (noting that there is a “price impact of the virtual transaction on the physical transmission system that forms the basis for both the [d]ay-[a]head and [r]eal-[t]ime [e]nergy [m]arkets”).

<sup>50</sup> PJM Referral at 2, 4.

<sup>51</sup> PJM Response to Data Request No. 13 (May 2, 2012) (“A trader wishing to schedule an Up-to Congestion transaction during the relevant period for purposes unrelated to hedging a real power flow did not need to reserve transmission on a path geographically proximate or substantially identical to the path between the Up-To Congestion transaction nodes because this is not required by the PJM tariff.”).

<sup>52</sup> MISO, like PJM, is a Commission-jurisdictional wholesale energy market balancing the minute-by-minute supply and demand requirements for electric power in a geographic area that is to the west of PJM’s footprint.

<sup>53</sup> Monitoring Analytics’ PJM Marginal Loss Surplus Allocation and Market Participant Transaction Activity: May 15, 2010 through September 17, 2010, at 7 (Jan. 6, 2011) (IMM Referral).

Respondents reserved non-firm point-to-point transmission for their UTC trades. While Respondents were permitted to reserve capacity with a MISO point of delivery for all of the round-trip, SOUTHIMP-SOUTHEXP, and NCMPAIMP-NCMPAEXP UTC trades they scheduled to avoid being assessed transmission fees, Respondents did not use a MISO point of delivery for any of the trades at issue here and, instead, incurred unnecessary transmission fees.<sup>54</sup>

**D. Marginal Loss Surplus Allocations**

23. At the time of Respondents' conduct, all UTC transactions associated with transmission service in PJM were eligible to receive a portion of MLSA payments. MLSA refers to the PJM-developed and Commission-accepted distribution to market participants of the surplus revenues that PJM collects for transmission line losses.

24. When electricity flows through a transmission line, a certain amount of energy is lost in the form of heat. The farther electricity travels on any given transmission line, the greater the loss.<sup>55</sup> In calculating the cost of line loss, as part of LMP, PJM sets the price at marginal cost, rather than average cost.<sup>56</sup> Because marginal costs of line losses are greater than average costs, PJM receives more payments than necessary to compensate for actual line losses, resulting in a surplus revenue.<sup>57</sup>

25. The Commission recognized that "a method needs to be determined for disbursing the over collected amounts" of line loss payments.<sup>58</sup> In September 2009, the

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<sup>54</sup> For example, for Respondents' NCMPAIMP-NCMPAEXP UTC trades during the Manipulation Period, Respondents used NYIS as the point of delivery and paid transmission service reservation fees when free reservations existed.

<sup>55</sup> See *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132, at P 3 (2006) ("As in the case of all electric transmission, there is some loss of the scheduled megawatts as the power is transmitted from the point of generation to the point of delivery. That is, the total megawatt-hours of energy received by customers is less than the total megawatt-hours of energy produced by generators. Such loss results in a cost PJM incurs to maintain the level of the scheduled power and to deliver it under conditions of system reliability.").

<sup>56</sup> *Id.* P 4.

<sup>57</sup> *Id.* P 5.

<sup>58</sup> *Id.* P 24.

Commission accepted PJM's proposed distribution method, which paid MLSA on a *pro rata* basis to network service users and transmission customers (including virtual traders) in proportion to their ratio shares of the total megawatts (MW) of energy: (i) delivered to load in PJM; (ii) exported from PJM; or (iii) cleared in a UTC transaction that paid for transmission services during such hour.<sup>59</sup>

26. Mathematically, MLSA was calculated hourly as a market participant's eligible MWs (i.e., in energy delivered to load or transmission reservations for exports and UTCs) divided by the total PJM eligible MWs (i.e., total energy delivered to load and transmission reservations). Under this distribution mechanism, as a market participant's cleared UTC transactions increased, its transmission reservations increased and, thus, its share of the available MLSA also increased (while inversely decreasing the available MLSA for other market participants).

**E. PJM and IMM Referrals, Office of Enforcement Investigation, and Order to Show Cause**

27. In August 2010, PJM sent the Commission's Office of Enforcement (OE) a referral related to Respondents' UTC trades. The PJM referral was prompted by a market participant who contacted PJM on July 23, 2010, complaining about unusually high volumes of transmission reservations on PJM's Open Access Same-Time Information System (OASIS) and wondering whether certain market participants "were 'trying to game the system in some way' by 'trying to lock people out of transmission purchases.'"<sup>60</sup> PJM confirmed that several market participants reserved large quantities of transmission and discovered that such reservations were associated with high volumes of UTC bids, beginning on June 1, 2010.<sup>61</sup>

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<sup>59</sup> *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at P 23 (2009). The Commission found that PJM's proposed method of distributing line loss surplus to those that pay to support the fixed costs of the transmission grid is reasonable. *Id.* ("The Commission finds that PJM's proposal is a just and reasonable method of allocating the surplus, subject to the condition that PJM clarify that its tariff complies with our finding that payments be made only to those who pay for the costs of the transmission grid.").

<sup>60</sup> PJM Referral at 1. Another market participant contacted PJM on July 28, 2010, with a similar complaint. *Id.*

<sup>61</sup> *Id.* at 1.

28. PJM identified City Power as a market participant submitting high volumes of round-trip UTC transactions “in opposite directions between the same two points.”<sup>62</sup> PJM also identified City Power as a market participant “submit[ing] large MW volumes that sourced and sank at the SOUTHIMP/SOUTHEXP interface [and at the] NCMPAIMP/NCMPAEXP interface.”<sup>63</sup>

29. PJM observed that City Power (and the other market participants listed in the PJM referral) “intentionally submitted large volumes of [UTC] transactions for no purpose other than to illegitimately collect larger allocations of the marginal loss surplus.”<sup>64</sup> Specifically, PJM explained that City Power’s round-trip transactions “result[ed] in no risk of any day-ahead or balancing market settlement (because the settlement of the transactions in the opposite directions would offset each other in both the day-ahead and balancing markets).”<sup>65</sup> PJM explained that these offsetting UTC transactions resulted in an “allocation of marginal loss surplus based on the cleared [megawatt-hours] MWh of transactions.”<sup>66</sup> With regard to City Power’s SOUTHIMP-SOUTHEXP and NCMPAIMP-NCMPAEXP trades, PJM explained that “[t]he result of . . . sourcing and sinking at the same interface was that the participant would clear MWh of Up-To Congestion transactions in the Day-ahead Energy Market between pricing points that had little or no price separation.”<sup>67</sup> Using the SOUTHIMP-SOUTHEXP trades as an example, PJM explained that these “pricing points . . . had the exact same definition during the time period when the behavior was observed, and therefore by definition the prices at those points were identical.”<sup>68</sup> Consequently, PJM explained, City Power “was able to clear large MWh volumes of [UTC] transactions with no risk of any settlement in either the Day-ahead or balancing markets, but the cleared MWh on the reserved

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<sup>62</sup> *Id.* at 2. PJM’s referral also named certain other market participants, which OE separately investigated and which were subjects of a Commission Order Assessing Civil Penalties in *Chen*, 151 FERC ¶ 61,179.

<sup>63</sup> *Id.* at 3.

<sup>64</sup> *Id.* at 2.

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

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

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

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

transmission service resulted in an allocation of the marginal loss surplus based on the large MWh quantity of cleared transactions.”<sup>69</sup>

30. PJM believed that Respondents’ round-trip, “opposite-direction” UTC transactions “constituted a scheme of ‘wash’ or offsetting trades that created no economic value and little to no risk to the participant, solely to inflate transaction volumes in order to receive an improper allocation of marginal loss surplus allocation revenue.”<sup>70</sup> PJM believed “that these offsetting trades were undertaken with the intent of manipulating PJM market rules so as to gain an allocation of marginal loss surplus revenue without any corresponding usage of the transmission system.”<sup>71</sup> PJM asked OE to investigate the conduct and to require Respondents to disgorge any of the revenue they received since June 1, 2010, as a result of this scheme.<sup>72</sup>

31. On August 25, 2010, the Commission ordered a non-public, formal investigation of City Power’s UTC transactions.<sup>73</sup> In that order, the Commission noted PJM’s allegations that “trades were undertaken with the intent of manipulating PJM market rules so as to gain an allocation of marginal loss surplus revenue without any corresponding usage of the transmission system,” and authorized OE to conduct an investigation “regarding violations of the Commission’s . . . Prohibition of electric energy market manipulation, that may have occurred in connection with, or related to, certain [UTC] transactions in PJM.”<sup>74</sup> The Commission also directed OE Staff to report the results of that investigation.<sup>75</sup>

32. On January 6, 2011, Monitoring Analytics, the IMM for PJM, submitted a similar referral to OE (IMM Referral). The IMM identified transactions by City Power and others that “took several forms, including wheeling up-to congestion transactions at interfaces with equal LMPs;” (i.e., City Power’s SOUTHIMP-SOUTHEXP trades), “wheeling up-to congestion transactions at interfaces with LMPs that were close to

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 4.

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

<sup>72</sup> *Id.* at 6.

<sup>73</sup> *PJM Up-To Congestion Transactions*, 132 FERC ¶ 61,169 (2010).

<sup>74</sup> *Id.* PP 1-2 (citation and internal quotations omitted).

<sup>75</sup> *Id.* at Ordering Paragraph.

equal;” (i.e., City Power’s NCMPAIMP-NCMPAEXP trades), and “equal and opposite up-to congestion transactions to and from the same internal PJM buses with equal LMPs” (i.e., City Power’s round-trip trades).<sup>76</sup> The IMM noted that it “views the identified transactions as violating the Commission’s anti-manipulation rule.”<sup>77</sup> It explained that the “value of the underlying transactions completely, or nearly completely, cancel out, creating a net benefit only to the extent that the entitlement to an allocation of marginal losses exceeds the cost of transmission service and any applicable ancillary service charges.”<sup>78</sup> It added that “[t]hese transactions exploit the marginal loss allocation rules implemented by PJM to derive a benefit from transactions with no fundamental economic rationale or value.”<sup>79</sup>

33. The IMM stated that Respondents’ “offsetting” UTC transactions were “similar in fundamentals to wash trades, which have been expressly identified as prohibited activities by the Commission.”<sup>80</sup> The IMM further compared the trades to wash trades conducted by Enron that also “took the form of energy market transactions that canceled out but created the illusion of volume trading.”<sup>81</sup> Similar to PJM, the IMM asserted that the referred trading activities “exploit the marginal loss allocation rules implemented by PJM to derive a benefit from transactions with no fundamental economic rationale or value.”<sup>82</sup> The IMM emphasized that because “there is no rational basis for characterizing such transactions as economic without the marginal loss surplus allocation, a determination that such transactions were intended to operate as a fraud or deceit upon PJM and participants in the markets administered by PJM is warranted. Such behavior violates the Commission’s rule prohibiting energy market manipulation . . . .”<sup>83</sup>

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<sup>76</sup> IMM Referral at 3.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 4.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 3.

<sup>83</sup> *Id.* at 3-4 (noting that City Power and others “had no basis to believe that their behavior could be a useful response to any market signal”).

34. On September 19, 2013, OE Staff issued a Preliminary Findings Letter to Respondents explaining the factual and legal bases for its preliminary findings of violations.<sup>84</sup> Respondents replied to the Preliminary Findings Letter on November 4, 2013.<sup>85</sup> The Office of the Secretary issued a Notice of Alleged Violations on August 25, 2014. After settlement discussions proved unavailing, OE Staff provided notices under section 1b.19 of the Commission's regulations<sup>86</sup> of its intent to recommend the initiation of a public proceeding against Respondents. On October 27, 2014, Respondents provided a response to OE Staff's section 1b.19 letter.<sup>87</sup>

35. On March 6, 2015, the Commission issued an Order to Show Cause, which commenced this public proceeding.<sup>88</sup> In the Staff Report attached to the Order to Show Cause (Staff Report), OE Staff alleges that Respondents violated the Commission's Anti-Manipulation Rule from July 4, 2010 to July 30, 2010. OE Staff also alleges that City Power violated Section 35.41(b) of the Commission's regulations by misleading OE Staff regarding IMs related to the trading under investigation. OE Staff recommends that the Commission assess: (1) a civil penalty of \$14,000,000 against City Power; (2) a civil penalty of \$1,000,000 against Mr. Tsingas; and (3) disgorgement of \$1,278,358, plus interest, against City Power and Mr. Tsingas jointly and severally.

36. In the Order to Show Cause, the Commission directed Respondents to file an answer within 30 days showing why City Power and Mr. Tsingas should not be found to have violated section 222 of the FPA and section 1c.2 of the Commission's regulations by engaging in fraudulent UTC transactions in PJM's energy markets, and why City Power should not be found to have violated 18 C.F.R. § 35.41(b) (2014).<sup>89</sup> In addition, the Commission directed City Power and Mr. Tsingas to show cause why the

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<sup>84</sup> Letter from T. Olson, OE Staff, to Todd Mullins, counsel for Respondents (Sep. 19, 2013).

<sup>85</sup> Letter from Todd Mullins, counsel for Respondents, to T. Olson, OE Staff (Nov. 4, 2013).

<sup>86</sup> 18 C.F.R. § 1b.19 (2014).

<sup>87</sup> Letter from Todd Mullins, counsel for Respondents, to T. Olson, OE Staff (Oct. 27, 2014).

<sup>88</sup> *City Power Marketing, LLC*, 150 FERC ¶ 61,176, at P 1 (2015) (Order to Show Cause).

<sup>89</sup> *Id.* at Ordering Paragraphs (A) and (B).

proposed penalties should not be assessed and why they should not be required to disgorge unjust profits with interest.<sup>90</sup> The Order to Show Cause also stated that Respondents 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 pursuant to section 31(d)(3)(A) of the FPA.<sup>91</sup> The Order to Show Cause further allowed OE Staff to file a reply within 30 days of the filing of Respondents' answer.<sup>92</sup>

37. On March 4, 2015, Respondents submitted a joint notice of their election under section 31(d)(3)(A) of the FPA and the Order to Show Cause,<sup>93</sup> thereby electing an immediate penalty assessment if the Commission finds a violation. On April 7, 2015, City Power and Mr. Tsingas filed a joint answer to the Order to Show Cause (Respondents' Answer). On April 1, 2015, PJM submitted comments in this proceeding. On April 23, 2015, Respondents submitted a response to PJM's comments.<sup>94</sup> On April 24, 2015, Eric S. Morris submitted a non-party protest in this proceeding in support of Respondents.<sup>95</sup> On May 5, 2015, OE Staff filed a reply to the Respondents' Answer

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<sup>90</sup> *Id.* at Ordering Paragraph (C).

<sup>91</sup> 16 U.S.C. §§ 823b(d)(2) and (d)(3)(A) (2012); Order to Show Cause, 150 FERC ¶ 61,176 at Ordering Paragraph (E).

<sup>92</sup> On March 13, 2015, OE Staff submitted non-public investigative materials to the Commission and, pursuant to the cover letter accompanying those materials, the Commission understands Respondents received them as well.

<sup>93</sup> Order to Show Cause, 150 FERC ¶ 61,176 at Ordering Paragraph (E).

<sup>94</sup> Rule 214 of the Commission's Rules of Practice and Procedure provides that "[n]o person . . . may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter." 18 C.F.R. § 385.214(a)(4) (2014). Therefore, PJM is not a party to this proceeding and we will not accept PJM's comments or Respondents' response to those comments.

<sup>95</sup> Mr. Morris is not a party to this proceeding and we will not accept Mr. Morris' protest. We recognize that Rule 211 of the Commission's Rules of Practice and Procedure, adopted in 1982, *see* 18 C.F.R. § 385.211(a)(1) (1983), allows any person to file a protest to object to an order to show cause. 18 C.F.R. § 385.211(a)(1) (2014). As the Commission subsequently explained in Order No. 718 (issued in the wake of the Energy Policy Act of 2005), however, "because a proceeding arising from an investigation is focused on the alleged conduct of a specific entity, intervention ordinarily

(continued...)

(Staff Reply).<sup>96</sup> On June 1, 2015, Mr. Morris submitted a second protest in this proceeding. On June 3, 2015, Respondents submitted an answer to the Staff Reply.<sup>97</sup>

38. As part of our adjudication of this matter, we have considered all accepted pleadings and attachments, as well as the investigative materials submitted to the Commission.

### **III. Discussion**

39. Section 222 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.<sup>98</sup> Order No. 670 implemented this prohibition, adopting the Anti-Manipulation Rule. That rule, among other matters, prohibits any entity from: (1) using a fraudulent device, scheme, or artifice, or making a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule, or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase, sale or transmission of electric energy subject to the jurisdiction of the

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is inappropriate and may delay or sidetrack the proceeding.” *Ex Parte Contacts and Separation of Functions*, 125 FERC ¶ 61,063, at P 2 (2008). Consistent with this statement, we determine that there is good cause to waive Rule 211 for this matter. *See* 18 C.F.R. § 385.101(e) (2014) (“[T]he Commission may, for good cause, waive any provision of this part . . .”).

<sup>96</sup> On April 20, 2015, OE Staff filed a motion seeking to revise the briefing schedule by extending the time to reply to Respondents' Answer. The Commission denied the motion on April 21, 2015.

<sup>97</sup> We note that the Order to Show Cause directed Respondents to submit answers in response to the Order and allowed OE Staff to submit a reply within 30 days of the Respondents' Answer. The Order to Show Cause did not authorize a second answer in response to OE Staff's Reply. Additionally, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or an answer, unless otherwise permitted at the discretion of the decisional authority. We are not persuaded to exercise our discretion and, accordingly, we reject Respondents' Motion Seeking Leave to File an Answer.

<sup>98</sup> 16 U.S.C. § 824v(a) (2012).

Commission.<sup>99</sup> Under the Anti-Manipulation Rule, fraud includes, but is not limited to, “any action, transaction, or conspiracy for the purpose of impairing, obstructing, or defeating a well-functioning market.”<sup>100</sup>

40. Section 35.41(b) of the Commission’s regulations requires that a Seller “provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors . . . [or] Commission-approved independent system operators . . . unless Seller exercises due diligence to prevent such occurrences.”<sup>101</sup> City Power is a Seller as that term is defined in section 35.36(a)(1) of the Commission’s regulations<sup>102</sup> because it has authorization to engage in sales for resale of electric energy, and has in fact made such sales.<sup>103</sup>

41. 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.<sup>104</sup> 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.”<sup>105</sup>

42. As discussed below, we find that Respondents violated section 222(a) of the FPA and section 1c.2 of the Commission’s regulations by engaging in fraudulent UTC transactions in the PJM energy market to receive large shares of MLSA payments that

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<sup>99</sup> 18 C.F.R. § 1c.2 (2014); *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 38, *reh’g denied*, 114 FERC ¶ 61,300 (2006); *see also Barclays Bank PLC*, 144 FERC ¶ 61,041 (2013) (*Barclays*).

<sup>100</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

<sup>101</sup> 18 C.F.R. § 35.41(b) (2014).

<sup>102</sup> *Id.* § 35.36(a)(1).

<sup>103</sup> *See City Power Marketing, LLC*, Docket No. ER05-330-000 (Mar. 15, 2005) (delegated letter order) (“City Power’s submittal, as discussed below, satisfies the Commission’s requirements for market-based rates.”); Respondents’ Answer at 141.

<sup>104</sup> 16 U.S.C. § 825o-1(b) (2012). Under section 3 of the FPA, “‘person’ means an individual or a corporation.” *Id.* § 796(4).

<sup>105</sup> *Id.* § 825o-1(b).

otherwise would have been allocated to other market participants, and that City Power violated section 35.41(b) of the Commission's regulations by making false and misleading statements and material omissions related to IMs discussing their trading.

**A. Findings of Fact**

**1. Relevant UTC Trading Conduct**

43. Respondents' UTC trading in PJM can be broken into two periods. In the first period, Respondents entered into UTC trades attempting to profit from locational price spread changes. In the second period (the subject of OE Staff's investigation), Respondents engaged in three distinct strategies for trading the UTC product with the goal of eliminating or minimizing spread changes and profiting solely based on collection of MLSA payments.<sup>106</sup> During the first period, which lasted from 2006 through June 2010, Respondents primarily traded UTCs between points where they anticipated that the spread would widen substantially between the day-ahead and real-time markets.<sup>107</sup> As Mr. Tsingas testified, this type of UTC spread trading is difficult, requiring fundamentals-based, sophisticated analyses regarding weather, generator and transmission outages, and historical data.<sup>108</sup>

44. During the second period, which lasted for most of the month of July 2010, Respondents continued, as one part of their UTC trading, attempting to profit from spreads—which Messrs. Tsingas and Jurco called their “regular”<sup>109</sup> trading—but they also added the three new strategies, aimed solely at collecting MLSA. Messrs. Tsingas and Jurco themselves referred to these three types of trades as trading “the losses.”<sup>110</sup>

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<sup>106</sup> Although we do not break out the Manipulation Period into separate periods, Respondents did alter their strategies during the Manipulation Period, focusing initially on a combination of round-trip trades plus trades at SOUTHIMP-SOUTHEXP, before shifting to a combination of round-trip trades plus trades at NCMPAIMP-NCMPAEXP. As explained *infra* PP 50-51, Respondents made this shift after Mr. Jurco became concerned that their Loss Trades at SOUTHIMP-SOUTHEXP would be discovered by PJM and the PJM IMM.

<sup>107</sup> Tsingas Test. Tr. at 56.

<sup>108</sup> *Id.* at 46-47, 53-54, 58-59, 61-62, 95, 148-49, 268-69, 359, 361, 375-76.

<sup>109</sup> IM from Mr. Tsingas to Mr. Jurco (July 22, 2010, 9:21:38 AM) (JUR01666).

<sup>110</sup> *See, e.g.*, IM from Mr. Tsingas to Mr. Jurco (July 16, 2010, 10:11:19 AM) (JUR01614) (“I figure tomorrow is hot so we should do the losses”); IM from

(continued...)

These three strategies, described below and referred to collectively throughout this Order as Respondents' Loss Trades, were the focus of OE Staff's investigation and are the trades at issue here.

**a. Round-Trip Trades**

45. Respondents' first type of Loss Trades involved round-trip trades, which canceled each other out by placing the first leg of the trade from locations A to B, and simultaneously placing a second leg of equal volume from locations B to A. Round-trip trading would effectively eliminate any risk of losing (or earning) money based on price spreads because the matched trades' price spreads canceled each other out.<sup>111</sup>

Respondents' round-trip UTC strategy canceled price spread risk; profits instead came only from collection of MLSA payments. At the same time, they incurred transaction costs to reserve transmission service for the trades, which enabled them to collect MLSA payments.

46. The idea for Respondents' round-trip trades stemmed from their observations of other market participants engaging in the same strategy. For example, on July 3, 2010, Mr. Tsingas observed another market participant trading "both sides to collect losses."<sup>112</sup> Mr. Jurco understood the import of this strategy, observing that the trades were "net flat," and remarking that such trading "is dirty dirty."<sup>113</sup>

47. After realizing that other market participants were engaged in round-trip UTC transactions, on July 3, 2010, Mr. Tsingas told Mr. Jurco, "we'll try it for a few days and see the payout."<sup>114</sup> Respondents thereafter executed round-trip UTC trades during

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Mr. Tsingas to Mr. Jurco (July 19, 2010, 8:31:12 AM) (JUR01635) ("let's get the losses stuff right now, we're going to need it"); IM from Mr. Tsingas to Mr. Jurco (July 22, 2010, 9:21:38 AM) (JUR01666) ("same mode, you do the regular deals I'll do the losses?"); IM Conversation Between Mr. Tsingas and Mr. Jurco (July 26, 2010, 9:14:06 AM-9:14:19 AM) (JUR01687) (planning the next trading day for Mr. Tsingas to trade "losses," and for Mr. Jurco to trade the "rest").

<sup>111</sup> Staff Report at 66-70; *see also* *Chen*, 151 FERC ¶ 61,179 at PP 95-97.

<sup>112</sup> IM from Mr. Tsingas to Mr. Jurco (July 3, 2010, 10:56:13 AM-10:56:33 AM) (JUR01530).

<sup>113</sup> IM from Mr. Jurco to Mr. Tsingas (July 3, 2010, 10:58:11 AM-10:58:20 AM) (JUR01530).

<sup>114</sup> IM from Mr. Tsingas to Mr. Jurco (July 3, 2010, 10:59:39 AM) (JUR01530).

18 days between July 4 and July 24, 2010.<sup>115</sup> During this time, Respondents executed round-trip trades on multiple paths, with a majority of them occurring on the paths OVEC-to-MISO and MISO-to-OVEC.<sup>116</sup>

48. Nearly all of Respondents' round-trip UTC trades worked as designed—with the exception of four hours, they were “net flat,” such that their trading produced no revenue based on price spreads alone. As a result, Respondents profited almost entirely from MLSA on these round-trip trades, collecting \$734,212 in MLSA payments, which resulted in net profits of \$455,730, after accounting for \$278,482 in transaction costs.<sup>117</sup>

**b. SOUTHIMP-SOUTHEXP Trades**

49. Respondents' second type of Loss Trades involved trading a UTC between two nodes—SOUTHIMP and SOUTHEXP—which are import and export pricing points of the same PJM interface, and which have equivalent prices in both the day-ahead and real-time markets. Respondents placed SOUTHIMP-SOUTHEXP trades on eight days between July 5 and July 14, 2010,<sup>118</sup> despite their knowledge during this time that the spread between these points “sett[ed] at \$0 all the time.”<sup>119</sup> Moreover, City Power incrementally increased the volume of its SOUTHIMP-SOUTHEXP trades, to 1,000 MW per hour on trade dates July 8 through July 14, 2010. The SOUTHIMP-SOUTHEXP price spread remained zero during this period. City Power collected \$170,897 in MLSA

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<sup>115</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls; Staff Reply at 15. Respondents made round-trip trades every day between July 4 and July 24, 2010, except July 10, 11, and 18.

<sup>116</sup> In addition to the OVEC-MISO path, Respondents engaged in round-trip trades at the following other locations: (a) IMO and NYIS, (b) MICHFE and SW, (c) MISO and NIPSCO, (d) MISO and NYIS, and (e) OVEC and MICHFE. Also, Respondents placed round-trip trades on July 17, 19, and 20, 2010, between SOUTHIMP-SOUTHEAST/SOUTHEAST-SOUTHEXP, which are separate from the trades they placed between July 5 and July 14, 2010, between the SOUTHIMP-SOUTHEXP PJM nodes.

<sup>117</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

<sup>118</sup> *Id.*

<sup>119</sup> IM from Mr. Tsingas to Mr. Jurco (July 5, 2010, 9:25:16 AM) (JUR01538).

payments based on its SOUTHIMP-SOUTHEXP trades, while incurring \$64,496 in transaction costs, for a net profit of \$106,401.<sup>120</sup>

50. Although Respondents' SOUTHIMP-SOUTHEXP Loss Trades proved very profitable, they stopped engaging in the strategy in mid-July 2010 when Mr. Jurco raised concerns. Originally, Mr. Tsingas planned to trade SOUTHIMP-SOUTHEXP "until market monitoring yells at us."<sup>121</sup> But on July 14, 2010, Mr. Jurco told Mr. Tsingas that he felt "really funny about the southimp-southexp," and that "this sure could be great ammo for [the PJM IMM]."<sup>122</sup> These concerns prompted City Power to stop trading SOUTHIMP-SOUTHEXP, but Respondents did not stop their Loss Trades generally, as they continued placing round-trip trades and began a third type of trade at NCMPAIMP and NCMPAEXP.

**c. NCMPAIMP-NCMPAEXP Trades**

51. Respondents' third type of Loss Trade involved trading UTCs between two PJM external interface pricing nodes—NCMPAIMP and NCMPAEXP—which historically had experienced very small price spreads.<sup>123</sup> Respondents engaged in these NCMPAIMP-NCMPAEXP trades on 9 days during July 2010, first on July 4, 2010, and again on 8 days between July 16 and July 30, 2010. Their focus on this path during the latter half of July stemmed from Messrs. Tsingas and Jurco's concern that the SOUTHIMP-SOUTHEXP trades would trigger the PJM IMM's attention.<sup>124</sup> Indeed, Respondents resumed trading NCMPAIMP-NCMPAEXP on July 16, 2010, right after Mr. Jurco expressed his concerns about the SOUTHIMP-SOUTHEXP trades.<sup>125</sup> On July 16, 2010, Mr. Tsingas expressed preference for the NCMPAIMP-NCMPAEXP

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<sup>120</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

<sup>121</sup> IM from Mr. Tsingas to Mr. Jurco (July 6, 2010, 11:09:11 AM) (JUR01550).

<sup>122</sup> IM from Mr. Jurco to Mr. Tsingas (July 14, 2010, 9:57:20 AM) (JUR01590).

<sup>123</sup> Respondents initially identified the nodes using their computer program to identify pathways that had the smallest historical spreads and therefore relatively low risk. Tsingas Test. Tr. at 106-107; Respondents' Answer at 43-45.

<sup>124</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 14, 2010, 9:56:31 AM –9:57:20 AM) (JUR01590).

<sup>125</sup> IM from Mr. Jurco to Mr. Tsingas (July 14, 2010, 9:56:31AM) (JUR01590).

trades because they were less obvious, noting that there was “nothing fishy about it.”<sup>126</sup> And, Mr. Tsingas took affirmative steps to make the trades less obvious. For example, he planned to reserve transmission “in small blocks if possible,” and set a “max [of] 1000 [MW] for any deal” to “stay below the radar.”<sup>127</sup>

52. City Power’s trades between these nodes averaged approximately 2,700 MW/day during late July 2010, and were almost all placed during peak hours when MLSA payments were projected to exceed the sum of transaction costs plus transmission payments (which they voluntarily chose to pay in order to receive MLSA payments). NCMPAIMP-NCMPAEXP price spreads averaged approximately \$0.16 / MWh during this period, producing \$100,642 in spread gains for City Power. Importantly, zero-cost transmission between the nodes was available. With zero-cost transmission, these trades generate a profit based on the price spread. However, City Power paid for transmission in conjunction with these trades, spending approximately \$532,060 despite the availability of zero-cost transmission between the nodes. By paying for transmission, however, City Power was entitled to MLSA payments. Across the 9 days in July 2010 when City Power placed trades on that path, it collected \$1,147,645 in MLSA from PJM, which, after netting transaction costs, resulted in net profit to City Power of \$716,227.<sup>128</sup>

## 2. Relevant Conduct Related to IM Communications

53. Messrs. Tsingas and Jurco extensively used IMs during July 2010 to discuss their Loss Trades, to develop and experiment with the three Loss Trade strategies, and to coordinate implementation of those strategies.<sup>129</sup> Respondents first learned of OE Staff’s investigation into their UTC trading upon receiving a document retention directive on August 18, 2010. The next morning, Mr. Jurco told Mr. Tsingas that he had reviewed his

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<sup>126</sup> IM from Mr. Tsingas to Mr. Jurco (July 16, 2010, 10:12:08 AM) (JUR01614).

<sup>127</sup> IM from Mr. Tsingas to Mr. Jurco (July 14, 2010, 10:30:34 AM) (JUR01594).

<sup>128</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls. Collectively, Respondents’ net profits from their round-trip (\$455,730), SOUTHIMP-SOUTHEXP (\$106,401), and NCMPAIMP-NCMPAEXP (\$716,227) trades resulted in total net profit of \$1,278,358, which is the amount we require Respondents to disgorge in this Order.

<sup>129</sup> See, e.g., *infra* P 179 (citing archived IMs discussing “the losses”).

IM archives relevant to the trading under investigation.<sup>130</sup> The two partners then discussed in detail the content of their prior IMs, in the context of Mr. Tsingas asking Mr. Jurco whether the IMs made them seem “guilty or righteous.”<sup>131</sup> Mr. Jurco characterized most of their prior conversations as “benign” but noted that they had frequently referred to certain trades as “loss trades,” had questioned “how many [of those] trades had zero risk,” and reminded Mr. Tsingas that they had discussed being “not comfortable with” the SOUTHIMP-SOUTHEXP strategy.<sup>132</sup>

54. In October 2010, Mr. Tsingas provided testimony under oath to OE Staff. When asked generally about his knowledge of whether City Power kept records of IMs, he replied “I don’t think we do.”<sup>133</sup> When asked whether Mr. Jurco or other colleagues “have set up their accounts to where it retains instant messages,” Mr. Tsingas answered “I don’t believe they do, you know, but I don’t know 100 percent for a fact. [...] I don’t remember if I checked or not. My understanding is they don’t. . . .”<sup>134</sup> Mr. Tsingas also denied having made, after receiving the document preservation letter, “any attempt to see if they have instant messages on their system.”<sup>135</sup>

55. In December 2010, Mr. Tsingas certified, on behalf of City Power, that City Power’s responses to OE Staff’s November 2010 Data Requests—including requests for “all communications” relating to UTC trading—were true, accurate and complete, despite the absence from that production of relevant IMs that Mr. Jurco, who throughout the relevant period and also at the time of Mr. Tsingas’ certification was Mr. Tsingas’ partner at City Power, had archived.<sup>136</sup>

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<sup>130</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (August 19, 2010, 8:21:23 AM-9:00:42 AM) (JUR01925).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Tsingas Test. Tr. at 144.

<sup>134</sup> *Id.* at 170.

<sup>135</sup> *Id.*

<sup>136</sup> OE Staff’s Second Set of Data Requests to City Power Marketing, LLC (Nov. 8, 2010); City Power Response to Data Request No. 2-2 (Dec. 6, 2010).

56. In his November 2011 response to OE Staff's June 2011 Data Requests specifically asking about IMs,<sup>137</sup> Mr. Tsingas stated on behalf of City Power that City Power had "reviewed computer files to determine if instant messages had been saved or otherwise archived on company computers. They were not."<sup>138</sup> City Power also stated that by November 2011 Mr. Jurco was no longer with the company and that "prior requests to Mr. Jurco to produce any responsive instant messages did not reveal any such instant messages."<sup>139</sup> City Power's response did not mention that Mr. Jurco in fact had relevant IM archives, the facts and contents of which Mr. Jurco had discussed with Mr. Tsingas in August 2010. City Power further affirmed that "upon receipt of Staff's document preservation directive, it was determined that City Power Marketing was not in possession of any responsive instant messages, and therefore no steps were required to prevent destruction of any such messages."<sup>140</sup>

57. Respondents never produced any IMs, but OE Staff later obtained the IMs that Mr. Jurco had archived after he resigned from City Power in late 2011.<sup>141</sup> In its November 2013 written response to OE Staff's Preliminary Findings Letter, City Power stated, in explaining its earlier statements related to IMs, that during the fall of 2010 Mr. Jurco had "refused to return" his City Power computer and that Mr. Jurco did not respond to communications regarding production of responsive documents.<sup>142</sup>

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<sup>137</sup> OE Staff's Third Set of Data Requests to City Power Marketing, LLC (June 20, 2011).

<sup>138</sup> City Power Response to Data Request No. 16(b) (Nov. 21, 2011). This request specifically mentioned "efforts to locate such messages [...] by searching Mr. Jurco's computer(s)."

<sup>139</sup> City Power Response to Data Request No. 16(c) (Nov. 21, 2011).

<sup>140</sup> City Power Response to Data Request No. 16(d) (Nov. 21, 2011).

<sup>141</sup> Jurco Test. Tr. at 13-14, 17.

<sup>142</sup> City Power Response to Preliminary Findings at 40-41 (Nov. 4, 2013).

**B. Determination of Violations****1. Fraudulent Device, Scheme or Artifice or Course of Business that Operated as a Fraud**

58. Fraud is the first element necessary to establish a violation of the Commission's Anti-Manipulation Rule.<sup>143</sup> Fraud is a question of fact that must be determined based on the particular circumstances of each case.<sup>144</sup> The Commission has explained that, under the Anti-Manipulation Rule, fraud includes, but is not limited to, "any action, transaction, or conspiracy for the purpose of impairing, obstructing, or defeating a well-functioning market."<sup>145</sup> Section 222 of the FPA states that:

It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.<sup>146</sup>

59. In light of the broad language of section 222 of the FPA, our use of the term "well-functioning market" is not limited just to consideration of price or economically efficient outcomes in a market.<sup>147</sup> Instead, we view the term to also broadly include consideration of "such rules and regulations as the Commission may prescribe as necessary or appropriate,"<sup>148</sup> which necessarily includes the rates, terms, and conditions of service in a market. Here, we find that intentionally subverting the allocation of payments provided by a tariff approved by the Commission constitutes interference with a "well-functioning market."

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<sup>143</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

<sup>144</sup> *Id.* P 50.

<sup>145</sup> *Id.*

<sup>146</sup> 16 U.S.C. § 824v (2012); *see also id.* §§ 824d, 824e.

<sup>147</sup> *See Chen*, 151 FERC ¶ 61,179 at P 49.

<sup>148</sup> 16 U.S.C. § 824v(a) (2012).

60. OE Staff alleges that, from July 4, 2010, through July 30, 2010, Respondents engaged in a series of practices that operated as a fraud or deceit on PJM and PJM market participants and that Respondents' actions constituted a course of business that operated as a fraud, or a fraudulent device, scheme, or artifice, thereby violating FPA section 222 and the Anti-Manipulation Rule.<sup>149</sup>

61. As discussed below, based on the totality of evidence, we find that the Respondents' UTC trading during the Manipulation Period operated as a course of business to defraud and a device, scheme, or artifice to defraud the PJM market and market participants.<sup>150</sup> We find OE Staff's arguments are persuasive. The evidence demonstrates that Respondents placed high-volume round-trip UTC trades without regard to market fundamentals and with the intent to benefit not from the spread on UTC trades but solely from the MLSA payments, and we find those actions to constitute fraud. We also find that Respondents' round-trip trades were wash trades, which the Commission has long recognized as fraudulent conduct. In addition, we find that Respondents had notice that the type of trading at issue here is fraudulent and violates FPA section 222 and our Anti-Manipulation Rule.

a. **Course of Business to Defraud and Device, Scheme or Artifice to Defraud**

i. **Respondents' Answer**

62. Respondents claim that their Loss Trades were not fraudulent for many reasons. As an initial matter, they emphasize that "fraud is simply not present in the facts of this case," arguing that Respondents did not lie or inject falsity into the market.<sup>151</sup> Similarly, they argue that they did not make any misrepresentation in connection with their trades.<sup>152</sup> Respondents assert that OE Staff's fraud claim fails because their Loss Trades

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<sup>149</sup> See, e.g., Staff Report at 37-38; see generally Staff Reply *passim*.

<sup>150</sup> While OE Staff alleges that Respondents' actions constituted both a "course of business to defraud" and a scheme to defraud—each in violation of section 222 of the FPA and the Anti-Manipulation Rule—OE Staff's submissions frequently address the acts solely as a scheme. We find both occurred and rely on the same evidence to support each finding.

<sup>151</sup> Respondents' Answer at 63.

<sup>152</sup> *Id.*

did not inject false information or give a false impression to other market participants or the market in general, and that trading was in fact quite apparent to the market.<sup>153</sup>

63. Moreover, they assert that OE Staff's attempt to label their trades as "uneconomic," "sham," and "gaming," does not make the conduct fraudulent.<sup>154</sup> They argue that "gaming" does not have a workable definition because it "is too much in 'the eye of the beholder.'"<sup>155</sup>

64. Similarly, Respondents argue that OE Staff's reliance on Order No. 670's "interference with a well-functioning market" language is too broad of a standard and would not withstand judicial scrutiny.<sup>156</sup> Respondents also refute OE Staff's argument that their trades did not benefit the market, alleging that this theory is unsupported by precedent and common sense, and that it conflicts with the concept of free markets.<sup>157</sup>

65. Respondents also challenge OE Staff's assertion that "by engaging in a transaction, a trader is implicitly 'representing' . . . that the trade is being put on for the 'purpose' that PJM . . . or somebody thinks, after the fact, is the appropriate reason for the trade."<sup>158</sup> Respondents argue that this is an "unsupported and impossible-to-apply standard," and that the law does not prohibit having a "bad purpose."<sup>159</sup>

66. Regarding the specific categories of Loss Trades, Respondents argue that none was fraudulent because they had a legitimate trading purpose for each. Respondents aver that their round-trip trades were actually part of an "optionality" strategy, placed with the intent to profit based on the failure of one leg clearing and rarely using "price taker" bids.<sup>160</sup> Respondents argue that they executed the SOUTHIMP-SOUTHEXP trades expecting to profit from favorable spreads and that Mr. Tsingas had no reason to believe

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<sup>153</sup> *Id.* at 67.

<sup>154</sup> *Id.* at 63.

<sup>155</sup> *Id.* at 65.

<sup>156</sup> *Id.* at 64.

<sup>157</sup> *Id.* at 64-65.

<sup>158</sup> *Id.* at 65.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 81-84.

that the spread would continue to settle at zero.<sup>161</sup> They assert that they placed their NCMPAIMP-NCMPAEXP trades to profit and fully expected them to profit based on their historical insights and unique weather information.<sup>162</sup>

67. Respondents also argue that they lacked fair notice that their Loss Trades would be considered fraudulent.<sup>163</sup> In this regard, they compare their conduct to a multiple-affiliate bidding case before the Commission in which two Commissioners dissented because the Commission previously addressed the relevant conduct and failed to proscribe it.<sup>164</sup> Further to their fair notice argument, Respondents aver that the Commission, in the *Black Oak* matter, “expressly anticipated that [Respondents’] conduct might be the result of the proposed tariff and nevertheless approved the tariff without prohibiting traders from conducting themselves in this manner.”<sup>165</sup> Respondents allege that the IMM stated on telephone calls during July 2010 that he did not believe that the trades at issue here violated any rules, and that City Power was “not doing anything wrong.”<sup>166</sup>

68. Respondents also maintain that the Commission’s Anti-Manipulation Rule precedent does not support OE Staff’s case against them.<sup>167</sup> For example, Respondents compare this case to the *Lake Erie Loop Flow* case, in which the Commission found that “the existence of a pricing incentive is suggestive of the lack of a fraudulent device, scheme or artifice, and is indicative instead of market participants responding to existing prices, rather than artificially affecting them.”<sup>168</sup> They also compare their conduct to the

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<sup>161</sup> *Id.* at 78-79.

<sup>162</sup> *Id.* at 75.

<sup>163</sup> *Id.* at 107-109.

<sup>164</sup> *Id.* at 108 (citing *Tenaska Mktg. Ventures*, 126 FERC ¶ 61,040, at 61,248 (2009) (Moeller, Comm’r dissenting) (Spitzer, Comm’r dissenting)).

<sup>165</sup> *Id.* at 112 (“[T]he Commission explicitly contemplated that market participants would factor MLSA payments into their calculus in seeking out profitable trades.” (citing *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042)).

<sup>166</sup> *Id.* at 113-116.

<sup>167</sup> *Id.* at 116-121.

<sup>168</sup> *Id.* at 117-118 (quoting *New York Independent System Operator, Inc.*, 128 FERC ¶ 61,049, at P 61,256 (2009) (*Lake Erie Loop Flow*)).

Commission's order in *Blumenthal*, noting that the Commission held that the "alleged 'scheme, artifice, or device' was not a fraudulent scheme at all, but an intentional plan by the energy companies to satisfy their tariff requirements while earning capacity payments and minimizing economic risks – a 'pattern of rational economic behavior.'"<sup>169</sup> Finally, Respondents disagree with OE Staff's reliance on the Commission's *Barclays* order, arguing that factors we relied on in *Barclays* to find fraud are not present here.<sup>170</sup>

69. Respondents dispute OE Staff's contention that their trades were inconsistent with supply and demand fundamentals, arguing that UTC traders focused on supply and demand do not only try to arbitrage price spreads. Rather, Respondents assert, their purpose "is to make a profit on trades after taking into account not only price spreads but also anticipated credits and debits (including MLSA payments) that are related to the trade."<sup>171</sup>

## ii. OE Staff Report and Reply

70. OE Staff asserts that all three categories of Respondents' Loss Trades in July 2010 were fraudulent because they were aimed not at profiting from spreads, but rather at collecting MLSA payments, which Messrs. Tsingas and Jurco refer to as "losses."<sup>172</sup>

71. With regard to Respondents' round-trip UTC trades, OE Staff states that in mid-to-late June 2010, Messrs. Tsingas and Jurco noticed some unusually large transmission reservations on OASIS.<sup>173</sup> In particular, OE Staff notes that Messrs. Tsingas and Jurco discussed a particular company's large transmission reservations, and speculated that it may be placing large trades to collect "losses."<sup>174</sup> According to OE Staff, by July 3, 2010, Messrs. Tsingas and Jurco concluded that the company was placing trades that would neutralize each other while still collecting MLSA.<sup>175</sup> OE Staff notes that although

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<sup>169</sup> *Id.* at 120 (quoting *Blumenthal v. Indep. Sys. Operator of New England*, 132 FERC ¶ 63,017, at P 111 (2010)).

<sup>170</sup> *Id.* at 120-121 (citing *Barclays*, 144 FERC ¶ 61,041).

<sup>171</sup> *Id.* at 121 (emphasis omitted).

<sup>172</sup> Staff Reply at 3-7.

<sup>173</sup> Staff Report at 13-14.

<sup>174</sup> *Id.* at 14-15.

<sup>175</sup> *Id.* at 15-17.

Mr. Jurco wondered whether it was legal, he and Mr. Tsingas called such trading “dirty” and a “high volume churn.”<sup>176</sup>

72. According to OE Staff, after discovering this conduct, Messrs. Tsingas and Jurco started doing those types of trades themselves on July 4, 2010, to see what the payout would be.<sup>177</sup> Specifically, OE Staff states, Respondents began making A-to-B/B-to-A trades where A was the MISO interface and B was the NYIS node, and they did so during peak hours when the MLSA payments would be larger.<sup>178</sup> OE Staff asserts that trade data provided by City Power shows that its trades on this first day of round-trip trading—July 4, 2010—cancelled out, resulting in no spread gains or losses on the associated paths, but earned nearly \$6,000 in MLSA.<sup>179</sup> OE Staff asserts that Respondents continued to submit round-trip trades through July 24, 2010.<sup>180</sup> During that time, OE Staff states, Messrs. Tsingas and Jurco experimented with various paths, including OVEC and MISO, among others.<sup>181</sup> OE Staff avers that none of Respondents’ round-trip trades produced any spread gains, but Respondents’ scheme collected \$734,212 in MLSA payments, which produced a net profit (after transaction costs) of \$455,730.<sup>182</sup>

73. OE Staff argues that Messrs. Tsingas and Jurco recognized that their round-trip trades were improper, because Mr. Jurco concedes in his testimony that Respondents were trying to collect MLSA while “achieving zero spreads,”<sup>183</sup> and in certain IMs Mr. Tsingas remarks that the PJM IMM could have “ripped into me” and that the trading could be criticized for being risk free.<sup>184</sup> OE Staff maintains that Mr. Tsingas was

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<sup>176</sup> *Id.* at 17.

<sup>177</sup> *Id.* at 17; Staff Reply at 9.

<sup>178</sup> Staff Report at 18.

<sup>179</sup> *Id.* at 19.

<sup>180</sup> *Id.* at 20.

<sup>181</sup> *Id.* at 21.

<sup>182</sup> *Id.* at 21; Staff Reply at 10.

<sup>183</sup> Staff Reply at 21.

<sup>184</sup> *Id.* at 11.

not prepared to talk about his trading with the PJM IMM,<sup>185</sup> nor did he say anything about his trading reflecting an “‘optionality’ strategy,” in which a leg of the trade breaks and produces a profit.<sup>186</sup> OE Staff claims that if Mr. Tsingas had done a “backtest analysis” in July 2010, he would have learned that the round-trip trades placed that month were a “highly unattractive” way of profiting.<sup>187</sup> Specifically, OE Staff calculates that over the preceding four-plus year period, the trading would have yielded an average profit of fractions of a cent per MWh.<sup>188</sup> According to OE Staff, nothing in the record supports Respondents taking the risks associated with the strategy of a leg failing to clear for such small potential returns.<sup>189</sup> OE Staff avers that if the market “moved \$50 the wrong way,” Respondents could have lost more than \$1 million in a single day, but their bids always cleared on the path where they placed the majority of their round-trip trades.<sup>190</sup> Further, OE Staff states that when a leg on Respondents’ IMO-NYIS/NYIS-IMO trades failed to clear for three hours on July 6, 2010, resulting in a loss of \$47,000 on the spread, Respondents “dropped the path and never returned to it.”<sup>191</sup>

74. OE Staff states that under the Commission’s Anti-Manipulation Rule, Respondents’ trading was “‘gaming’” that amounted to “‘taking unfair advantage’” of market rules to the detriment of the market by taking away available transmission and effectively increasing the cost of participating in PJM.<sup>192</sup> And, OE Staff notes that the Anti-Manipulation Rule ensured that the prohibitions on gaming and anomalous market

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<sup>185</sup> After PJM’s IMM left a message for Mr. Tsingas on July 30, 2010, Mr. Tsingas did not immediately return his call, but instead took time to “prepare” for the call by coming up with stories for his Loss Trades, including that the trades resulted from a “new model,” and that they did not know they could not trade that way because they “haven’t done physical.” See IM Conversation Between Mr. Tsingas and Mr. Jurco (July 30, 2010, 9:36:10 AM-9:42:09 AM) (JUR01735-36).

<sup>186</sup> Staff Reply at 12.

<sup>187</sup> *Id.* at 14.

<sup>188</sup> *Id.* at 20.

<sup>189</sup> *Id.* at 20.

<sup>190</sup> *Id.* at 16-17.

<sup>191</sup> *Id.* at 18.

<sup>192</sup> *Id.* at 62-63.

behavior previously found in Market Behavior Rule 2 would continue to be prohibited.<sup>193</sup> The principles that Respondents espouse, OE Staff argues, would effectively repeal the Anti-Manipulation Rule in ISOs, and render the Commission powerless to prevent market manipulation by virtual traders.<sup>194</sup>

75. OE Staff argues that Respondents' SOUTHIMP-SOUTHEAST/SOUTHEAST-SOUTHEXP trades were also fraudulent under the Anti-Manipulation Rule. OE Staff asserts that these trades were self-cancelling round-trip trades, with the "twist" that SOUTHIMP was the "A" node for one leg, and SOUTHEXP was the "A" node for the other leg.<sup>195</sup> Given that the nodes were modeled to have the exact same price, OE Staff claims that Respondents' trading scheme was simply another form of A-to-B/B-to-A trading.<sup>196</sup>

76. OE Staff states that Respondents never traded this way until July 4, 2010, when Mr. Tsingas realized that he could collect MLSA payments while SOUTHIMP-SOUTHEXP was settling "at \$0 all the time"—i.e. with no spread at all.<sup>197</sup> OE Staff states that after discussing such trades with Mr. Jurco, Mr. Tsingas concluded that he would "ride" those trades for a few days and "once I see that southimp-southexp works, that's all I'll do . . . until market monitoring yells at us."<sup>198</sup> According to OE Staff, Respondents proceeded to increase the volumes on that path for the next several days, collecting about \$170,000 in MLSA payments, which produced a net profit after transaction costs of more than \$100,000.<sup>199</sup>

77. OE Staff posits that Messrs. Tsingas and Jurco knew that the SOUTHIMP-SOUTHEXP trades were improper, as reflected in IMs in which Mr. Jurco says it "feels

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<sup>193</sup> *Id.* at 59-60, 84.

<sup>194</sup> *Id.* at 84.

<sup>195</sup> Staff Report at 48-50.

<sup>196</sup> *Id.* at 26. In addition, OE Staff avers that City Power also tried to "stay below the radar" by limiting its volumes below the level of another company they suspected was trading the same way. *Id.* at 27.

<sup>197</sup> *Id.* at 21-22; Staff Reply at 22-23 (citing IM Conversation Between Mr. Tsingas and Mr. Jurco (July 5, 2010, 9:25:16 AM-9:26:55 AM) (JUR01538)).

<sup>198</sup> Staff Report at 23-24; Staff Reply at 23.

<sup>199</sup> Staff Report at 24; Staff Reply at 24.

sleezy” and Mr. Tsingas criticizes other market participants doing the same or similar trading with the comment: “why can’t you guys stay out of our scam.”<sup>200</sup> In addition, OE Staff points to IM exchanges between Messrs. Tsingas and Jurco in which they referred to their trades as “losses” trades, and that those IMs show they wanted to continue making those trades [solely] because they were making money from MLSA.<sup>201</sup>

78. OE Staff contests Respondents’ claim that it traded SOUTHIMP-SOUTHEXP with an expectation of “favorable spreads.”<sup>202</sup> OE Staff states that there is no evidence that Mr. Tsingas did any research on the path; had he done so he would have discovered the spreads overall would have lost money even before accounting for transaction costs, as Respondents’ expert’s report shows.<sup>203</sup>

79. OE Staff asserts further that Respondents’ NCMPAIMP-NCMPAEXP Loss Trades were also fraudulent. According to OE Staff, after Mr. Jurco expressed concern about the SOUTHIMP-SOUTHEXP trades, Mr. Tsingas abandoned them in favor of NCMPAIMP-NCMPAEXP trades, the “*second-least volatile path in PJM.*”<sup>204</sup> OE Staff asserts that Mr. Tsingas identified that path using a computer program (referred to as the “*low volatility tool*”) that searched for paths with the smallest spread changes in either direction, positive or negative.<sup>205</sup> Had Respondents been seeking to make money on spread trades, OE Staff argues, it would not have sought the smallest spreads.<sup>206</sup> OE Staff also notes that the NCMPAIMP-NCMPAEXP path had the benefit of providing cover for Respondents’ conduct because the trades were non-zero trades.<sup>207</sup> Ultimately, in July 2010, OE Staff states that Respondents spent \$532,060 on transaction costs when

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<sup>200</sup> Staff Report at 28-29; Staff Reply at 24-25 (citing IM from Mr. Tsingas to Mr. Jurco (August 5, 2010, 9:51:42 AM) (JUR01798)).

<sup>201</sup> Staff Reply at 29.

<sup>202</sup> *Id.* at 27.

<sup>203</sup> *Id.*

<sup>204</sup> Staff Report at 28 (emphasis in original); Staff Reply at 31, 34.

<sup>205</sup> Staff Report at 28-29; Staff Reply at 30.

<sup>206</sup> Staff Report at 30.

<sup>207</sup> *Id.* at 31.

zero-cost transmission was available, to earn only \$100,642 on the spreads, but collected \$1,147,645 in MLSA payments, thereby turning this loss into a profit.<sup>208</sup>

80. OE Staff contests Respondents' assertion that the NCMPAIMP-NCMPAEXP path was an area with historically high volatility, on which it hoped to profit from LMP changes.<sup>209</sup> In addition to identifying this path using the low volatility tool, OE Staff notes that in the contemporaneous IMs Respondents referred to such trades as losses trades.<sup>210</sup> OE Staff questions Mr. Tsingas' reliance on data from 2011—after the trading at issue occurred.<sup>211</sup>

81. OE Staff also argues that the characteristics of the Respondents' trades on the NCMPAIMP-NCMPAEXP path earlier in 2010 were fundamentally and distinctively different.<sup>212</sup> According to OE Staff, most of those trades were at volumes of 200 MW, whereas the average volume of Respondents' trading on that path during the second half of July 2010 had increased to 2,743 MW.<sup>213</sup> OE Staff also points out that earlier in 2010, Respondents sought to decrease the transactions costs, but in July 2010 Respondents increased their transaction costs by choosing to pay for transmission when they could have reserved free transmission.<sup>214</sup> In addition, OE Staff notes that Respondents almost always placed their NCMPAIMP-NCMPAEXP trades for all 24 hours on the days they traded that path earlier in 2010, whereas in the second half of July 2010, 95 percent of their trades on that path were placed during peak hours alone, when Respondents knew MLSA payments would be highest.<sup>215</sup>

82. OE Staff states that earlier in 2010, the trades placed on that path, after transaction costs, yielded a loss of more than \$68,000, and the spreads produced greater losses in

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 47; Staff Reply at 30.

<sup>210</sup> Staff Report at 47.

<sup>211</sup> *Id.* at 48.

<sup>212</sup> Staff Reply at 36.

<sup>213</sup> *Id.* at 36-37.

<sup>214</sup> *Id.* at 38.

<sup>215</sup> *Id.* at 38-39.

July 2010.<sup>216</sup> OE Staff contends that Respondents' expert provides evidence from 2011 and 2012 which cannot show that Respondents would have had a reason at the time to think that the spread on the NCMPAIMP-NCMPAEXP path would be profitable in July 2010.<sup>217</sup> In any event, OE Staff points out that the expert's analysis using data for July 2011 and July 2012 shows that the spreads on average during July 2010 would still have lost money even before paying transaction costs.<sup>218</sup>

83. With respect to the Anti-Manipulation Rule, OE Staff argues that conduct itself can be deceptive. OE Staff argues that Respondents' transactions were deceptive in that they appeared to be UTC spread trades when they were not.<sup>219</sup> Specifically, OE Staff avers that Respondents selected trades with LMP spreads that were predictably zero, or de minimis in the case of NCMPAIMP-NCMPAEXP, and then reserved an "enormous" amount of transmission, thereby reducing the available capacity for other market participants, and diverting MLSA payments away from other market participants that had engaged in bona fide transactions.<sup>220</sup> Further, OE Staff points to filings made by the "Financial Marketers," a group that included City Power, in Docket No. ER10-2280-000, supporting changes to PJM's tariff that would prevent market participants from trading for the purpose of procuring large volumes of MLSA, and criticizing such conduct as "unpermitted trading patterns."<sup>221</sup>

84. OE Staff also points to several IMs to support its assertion that Respondents knew their trading was not appropriate and that they tried to hide it. For example, OE Staff states that in July and August 2010, Messrs. Tsingas and Jurco exchanged IMs that show they were trying to manipulate the market to collect MLSA.<sup>222</sup> In these IMs:  
(1) Mr. Tsingas wrote that it is "hard to turn down 150k for doing nothing;"<sup>223</sup>  
(2) Messrs. Tsingas and Jurco decided that Mr. Tsingas would trade losses, while

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<sup>216</sup> *Id.* at 39-40.

<sup>217</sup> *Id.* at 40.

<sup>218</sup> *Id.* at 40-41.

<sup>219</sup> *Id.* at 58.

<sup>220</sup> *Id.* at 58-59, 63-64.

<sup>221</sup> Staff Report at 40.

<sup>222</sup> *Id.* at 32-39.

<sup>223</sup> *Id.* at 32.

Mr. Jurco did the “regular deals;”<sup>224</sup> (3) Mr. Tsingas stated that PJM’s IMM “could’ve ripped into me for the SIMP-SEXP and the round trip ovec stuff;”<sup>225</sup> (4) Mr. Tsingas wrote in reference to other market participants engaged in similar conduct: “why can’t you guys stay out of our scam;” and (5) Mr. Jurco wrote: “there are larger sinners in this.”<sup>226</sup>

85. In addition, OE Staff argues that an indicium of fraud is Respondents’ implausible explanations for their trading, which OE Staff characterizes as an “after-the-fact rationalization.”<sup>227</sup> OE Staff notes that Mr. Tsingas, after being contacted by PJM’s IMM, sought to come up with an explanation for his trading, from blaming his model<sup>228</sup> to claiming not to realize this type of trading was not permissible.<sup>229</sup> OE Staff maintains that in trying to explain the trading in question, Mr. Tsingas made several inaccurate or inconsistent claims about his SOUTHIMP-SOUTHEXP trading, including that: (1) he did not know the two points had “zero spreads” when his IMs show that he knew that the path ““settle[d] at \$0 all the time;”<sup>230</sup> (2) he stopped doing the trades because there was no volatility, when the IMs show that he stopped because Mr. Jurco felt uncomfortable about them;<sup>231</sup> (3) he traded during peak hours to capture volatility, but that is also when MLSA payments are usually largest;<sup>232</sup> (4) he thought MLSA payments would only offset transaction costs, but in fact he expected the MLSA payments to be much larger than the

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<sup>224</sup> *Id.* at 33, 35.

<sup>225</sup> *Id.* at 37.

<sup>226</sup> *Id.* at 39.

<sup>227</sup> *Id.* at 46, 72.

<sup>228</sup> *Id.* at 41.

<sup>229</sup> *Id.* at 42.

<sup>230</sup> *Id.* at 43-44.

<sup>231</sup> *Id.* at 44.

<sup>232</sup> *Id.* at 45.

transaction costs;<sup>233</sup> and (5) he did after-the-fact research which he claimed to have relied on at the time he traded, but evidence shows he traded because the spread settled at \$0.<sup>234</sup>

86. With respect to Respondents' claim that the round-trip trading was "optionality" trading, placed with the hope that one leg would not clear,<sup>235</sup> OE Staff contends that Respondents' own spreadsheet shows that both legs cleared 99 percent of the time, and in the four instances where a leg did break "City Power took immediate steps to ensure it would not happen again."<sup>236</sup> According to OE Staff, the IMs between Messrs. Tsingas and Jurco suggest that Mr. Tsingas began doing the round-trip trades only after he realized that he could "do both sides to collect losses."<sup>237</sup>

87. Finally, OE Staff argues that, as part of their deception, Respondents planned to reserve transmission "in small blocks if possible" to "stay below the radar."<sup>238</sup> OE Staff posits that this was to minimize the scrutiny of the PJM IMM.<sup>239</sup>

88. On the point of fair notice, OE Staff argues that this proceeding does not raise the concerns identified by the dissenting Commissioners in *Tenaska*.<sup>240</sup> According to OE Staff, the bidding technique at issue in *Tenaska* had been brought to the Commission's attention, and on two prior occasions the Commission had rejected requests to change its policy to prohibit such practices.<sup>241</sup> Here, however, OE Staff states that the Commission

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<sup>233</sup> *Id.* at 45.

<sup>234</sup> *Id.* at 46.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 47 (citing IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:56:13 AM) (JUR01530)).

<sup>238</sup> Staff Reply at 41 (citing IM from Mr. Tsingas to Mr. Jurco (July 14, 2010, 10:30:34 AM) (JUR01594)).

<sup>239</sup> *Id.* at 42.

<sup>240</sup> *Id.* at 71 (citing *Tenaska Marketing Ventures*, 126 FERC ¶ 61,040, at 61,249 (2009) (Spitzer, Comm'r, dissenting)).

<sup>241</sup> *Id.* at 72 (citing *Tenaska Marketing Ventures*, 126 FERC ¶ 61,040, at 61,249 (2009) (Moeller, Comm'r, Dissent at 6)).

was unaware that the bidding behavior at issue was actually occurring, and once it was identified, the tariff was quickly changed to prevent it.<sup>242</sup>

89. OE Staff also disagrees with Respondents that the Commission had “explicitly contemplated” Respondents’ type of trading.<sup>243</sup> According to OE Staff, in *Black Oak* the Commission did not say anything “about arbitrageurs taking *MLSA* in[to] account, much less placing volume trades to collect it.”<sup>244</sup>

90. OE Staff similarly disagrees with Respondents’ contention that PJM’s IMM thought their trading was lawful.<sup>245</sup> OE Staff avers that the IMM did not wait until the Commission started its investigation in late August 2010 before concluding that Respondents’ type of trading was manipulative. Earlier in August 2010, in two meetings and on a telephone call with PJM stakeholders, the PJM IMM characterized the trading as unfair and as market manipulation.<sup>246</sup>

91. OE Staff also disputes the applicability of the *Lake Erie Loop Flow* and *Blumenthal* cases that Respondents cite.<sup>247</sup> OE Staff states that in the *Lake Erie Loop Flow* case, the market participant was attempting to profit from the spread.<sup>248</sup> OE Staff states that in *Blumenthal*, the entities were willing to provide capacity if called upon, whereas here Respondents’ trades lacked economic substance.<sup>249</sup> OE Staff also takes issue with Respondents’ attempt to distinguish their conduct from the indicia identified in

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 73 (emphasis in original).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 74-75.

<sup>247</sup> *Id.* at 76-77 (citing *Lake Erie Loop Flow*, 128 FERC ¶ 61,049, at 61,266 and *Blumenthal*, 132 FERC ¶ 63,017 at P 43, 48).

<sup>248</sup> *Id.* at 76.

<sup>249</sup> *Id.* at 77.

*Barclays*.<sup>250</sup> In particular, OE Staff argues that Respondents' trades were not driven by supply and demand.<sup>251</sup>

### iii. Commission Determination

92. We find, based on the totality of evidence presented, that Respondents engaged in a course of business to defraud and a device, scheme, or artifice to defraud the PJM market. As discussed in greater detail below, we find that: (i) Respondents' arguments are not persuasive; and (ii) there is sufficient evidence that Respondents' actions violated section 222 of the FPA and the Anti-Manipulation Rule. The evidence demonstrates that Respondents engaged in their round-trip UTC transactions, as well as their one-way transactions from SOUTHIMP-SOUTHEXP and from NCMPAIMP-NCMPAEXP, not for hedging or arbitraging price spreads but instead to receive large shares of MLSA payments that otherwise would have been allocated to other market participants.

#### (a) Round-trip trades

##### (1) Communications, testimony, and other evidence demonstrate the existence of a scheme to defraud

93. We find that Respondents' communications, testimony, and other evidence demonstrate that Respondents did not engage in their round-trip UTC trading for arbitrage or convergence purposes, but instead to maximize MLSA payments that, but for their trades, would have gone to other market participants. For example, when Mr. Tsingas decided to engage in Loss Trades after discovering that a competitor was using round-trip trades to collect MLSA payments, he told Mr. Jurco that a competitor was "doing all those mw's [sic] to collect losses . . . since they are all during the peak . . . when losses are high . . ." <sup>252</sup> When Mr. Jurco asked whether "losses [were] paying off lately," Mr. Tsingas observed: "if you have [sic] non-miso . . . and there [are] strong prices. . . ." <sup>253</sup> Mr. Tsingas even noted that he might "have to get back to ncmpaimp-

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 78.

<sup>252</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:52:03 AM – 10:52:20 AM) (JUR01529).

<sup>253</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:52:35 AM – 10:52:54 AM) (JUR01529). The reference here to "non-MISO" is to the fact that transactions that did not have MISO as the point of delivery for their transmission

(continued...)

ncmpaexp . . . using non-miso sinkks [sic], peak only. . . .”<sup>254</sup> At this point in the IM communication, Mr. Tsingas realized that his competitor was using round-trip trades and he and Mr. Jurco then discussed those trades, including the “flat” and, thus, no-profit nature of round-trip trading that nevertheless permitted them to collect MLSA payments. In the message below, Mr. Tsingas’ IM account appears under the name “traderyoda” and Mr. Jurco’s IM account appears under the name “jurco831”:

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

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

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

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

traderyoda (10:56:19 AM): EUREKA

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

jurco831 (10:57:55 AM): nice

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

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

jurco831 (10:58:14 AM): collect

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

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

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reservation needed to pay for transmission, which transmission in turn enabled one to obtain MLSA payments. The reference here to “collecting losses” is receipt of MLSA payments.

<sup>254</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:54:02 AM – 10:54:24 AM) (JUR01529). Here, Mr. Tsingas’ reference to “non-MISO sinkks [sic]” is a reference to the need to purchase transmission for those sinks, which then allows receipt of MLSA payments. And the reference to “non-peak” is his recognition that on peak hours MLSA payments exceed the sum of transmission and other transaction costs such that an MLSA scheme is profitable.

traderyoda (10:59:39 AM): we'll try it for a few days and see the payout. . . .<sup>255</sup>

Here, Mr. Jurco recognized that the round-trip positions have no real arbitrage risk by stating that they are “net flat” and also posited that the round-trip trades should be done in large volumes (“load up”). Not only did Mr. Tsingas fail to disagree with this analysis, but after receiving it, he determined that City Power would try round-trip trades for a few days to determine “the pay out.”

94. These contemporaneous IM communications demonstrate that Respondents knew that their “flat” round-trip trades would not generate a profit, but if they were traded in large volumes, Respondents could profit by collecting MLSA payments. These IM communications demonstrate that Respondents entered into those trades solely to collect MLSA payments.<sup>256</sup>

95. We find Respondents also knew their trades were profitable only due to MLSA payments. For example, when Mr. Tsingas decided to engage in the same strategy as his competitors, his IM communications with Mr. Jurco discussed that the losses were paying off.<sup>257</sup> Importantly, Mr. Jurco’s discussion of the mechanics of the competitor’s round-trip trades highlighted that the round-trip trades were large volume (“load up”) and with no profitable spread (“net flat”), yet were paid MLSA (“collect”).<sup>258</sup> Mr. Jurco even expressed his view that this strategy was “dirty, dirty.”<sup>259</sup> These statements demonstrate that Respondents understood that their round-trip positions had no real arbitrage risk and

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<sup>255</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:55:35 AM – 10:59:39 AM) (JUR01529-30).

<sup>256</sup> *Id.*

<sup>257</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:52:03 – 10:52:54 AM) (JUR01528).

<sup>258</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:55:35 AM – 10:59:39 AM) (JUR01529-30).

<sup>259</sup> *Id.* Mr. Jurco’s description of this strategy as “dirty dirty” demonstrates that he understood that there was something inappropriate about a round-trip trading strategy to collect MLSA payments. Although Respondents suggest that his statement that the trades were “legal I guess” requires a finding of no intent here, we disagree. We reject this argument as contrary both to the facts in this matter and to legal precedent. *See infra* P 185.

we conclude that these communications demonstrate that Respondents knew that these “flat” round-trip trades would not profit but for the MLSA payments.

96. These communications also show that Respondents understood that their round-trip UTC trades had little price risk by design, were not undertaken to arbitrage price spreads, were certain themselves to lose money, and were placed only to obtain transmission and thereby earn MLSA payments that otherwise would have gone to other market participants. Both Messrs. Tsingas and Jurco referred to their round-trip UTC trades as trading “the losses,” even as they pursued a separate group of UTC trades based on their traditional price spread arbitrage strategy that they had pursued prior to the Manipulation Period before they had discovered their competitor’s loss trading strategy.<sup>260</sup> As we discuss below, we also find unavailing Respondents’ argument that they affirmatively sought risk on these Loss Trades and wanted to make money through an “optionality” strategy.<sup>261</sup> The contemporaneous communications, and the other evidence in this proceeding, do not bear this out. In fact, we conclude they sought the opposite result as we explain further below.

## (2) Pattern

97. Respondents’ UTC trading pattern before learning of their competitors’ round-trip strategy was decidedly different from their round-trip UTC trading pattern after they learned of such strategy. In short, City Power moved to a period where it traded solely to arbitrage price spreads to a period where it added a risk-free or low-risk UTC trading approach whose purpose was to maximize MLSA payments through Loss Trades using high-volume UTC trading.

98. Prior to July 2010, City Power sought to trade UTCs between points where it anticipated that the spread would widen substantially between the day-ahead and real-time markets.<sup>262</sup> Mr. Tsingas testified that for this type of arbitrage trading he considered market fundamentals, including weather, generator and transmission outages, and historical data.<sup>263</sup> Subsequently, City Power continued using this “regular” strategy of arbitraging price spreads for some of its UTC trades, but it also added a strategy focused on eliminating or minimizing such spreads in its high-volume Loss Trades to maximize

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<sup>260</sup> See *supra* P 44.

<sup>261</sup> See Respondents’ Answer at 81-84.

<sup>262</sup> Tsingas Test. Tr. at 56.

<sup>263</sup> *Id.* at 46-47, 53-54, 58-59, 61-62, 95, 148-49, 268-69, 359, 361, 375-76.

MLSA payments. Specifically, on July 3, 2010, Mr. Tsingas told Mr. Jurco, “we’ll try it for a few days and see the payout.”<sup>264</sup> Respondents then executed their round-trip UTC trades during 18 days between July 4 and July 24, 2010.<sup>265</sup>

99. Respondents also changed the pattern of their transmission reservations—their key to collecting MLSA—for their Loss Trades during the Manipulation Period. City Power voluntarily increased its transaction costs in many of its July 2010 Loss Trades by choosing to pay for transmission, despite knowing that it could have opted for free transmission by utilizing the MISO interface.

(3) **The round-trip trades were uneconomic and contrary to the PJM UTC market design purpose**

100. We also find that Respondents’ round-trip trades were routinely uneconomic and contrary to the market design purposes for which PJM offered the UTC product.<sup>266</sup> Specifically, we find that not only were Respondents’ round-trip UTC trades routinely unprofitable when measured from a price arbitrage perspective, but the evidence demonstrates that Respondents engaged in them on a round-trip basis in order to flatten their exposure to price spread economics and by that means obtain profits through MLSA receipts. This lack of profit from economic fundamentals was an anticipated by-product of Respondents’ risk-canceling, round-trip trading. Further, Respondents were required to purchase transmission service to effectuate their UTC trades and be eligible for MLSA. As a result, the profit and loss calculation associated with such round-trip UTC trades, absent MLSA payments, necessarily resulted in a net loss to Respondents. We agree with the underlying PJM and IMM’s referrals that these trades had “no fundamental economic rationale or value” and that they “result[ed] in no risk of any day-ahead or balancing market settlement (because the settlement of the transactions in the opposite directions would offset each other in both the day-ahead and balancing markets).”<sup>267</sup>

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<sup>264</sup> IM from Mr. Tsingas to Mr. Jurco (July 3, 2010, 10:59:39 AM) (JUR01530).

<sup>265</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls; Staff Reply at 15. Respondents traded round-trips every day between July 4 and July 24, 2010, except July 10, 11, and 18.

<sup>266</sup> See *Chen*, 151 FERC ¶ 61,179 at PP 76-77.

<sup>267</sup> IMM Referral at p. 3; PJM Referral at p. 2.

101. The Commission has previously noted that while “‘profitability is not determinative on the question of manipulation and does not inoculate trading from any potential manipulation claim,’ it ‘is an indicium to be considered among the overall facts that the Commission examines when considering a potential violation of its Anti-Manipulation Rule, but standing alone it is neither necessary nor dispositive.’”<sup>268</sup> Here, we find Respondents’ underlying round-trip UTC trading (i.e., from the spread product, not the MLSA payment) was uneconomic, which supports the conclusion that a course of business and a scheme to defraud existed.<sup>269</sup>

102. Respondents’ round-trip trades only became profitable because of the MLSA payments. However, that the MLSA payments were not, and should not be considered, part of the underlying UTC trade is clear: UTCs were created as a tool for hedging congestion price risk associated with physical transactions, and later became a way for market participants to profit by arbitraging the price differences between two nodes in the day-ahead and real-time markets.<sup>270</sup>

103. Respondents’ round-trip trades were neither consistent with how the UTC product historically traded nor aligned with the arbitrage purpose of those trades. Respondents’ round-trip UTC trades did not “converge” the day-ahead and real-time spreads or in any way improve market efficiency. Moreover, we conclude that the UTC products’ history and purpose demonstrate that engaging in round-trip UTC trades with the MLSA payments as the sole or primary price signal is improper. Speculative UTC trades placed to arbitrage price spreads will have as their sole or primary price signal the price risk of the underlying UTC spread and will be placed with the purpose of profiting based on the direction of the spread. Yet, Respondents engaged in round-trip UTC trades that had no relationship to this purpose.<sup>271</sup>

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<sup>268</sup> *Chen*, 151 FERC ¶ 61,179 at P 77 (footnotes omitted; quoting, respectively, *Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056 at P 20 (2013); *Barclays*, 144 FERC ¶ 61,041 at P 43).

<sup>269</sup> We reject Respondents’ defense that these trades were placed with the hope that they would profit from a leg failing to clear. *See infra* PP 105-114.

<sup>270</sup> *Chen*, 151 FERC ¶ 61,179 at P 78 (citing *PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,121 at PP 3, 19); *see also Calif. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,087 at P 6 (noting that market participants can use virtual transactions to “hedge financial expectations”).

<sup>271</sup> *Chen*, 151 FERC ¶ 61,179 at P 80.

104. We reject Respondents' reliance on prior Commission orders to claim that any profit-driven actions in response to pricing incentives are not fraudulent. Those orders are distinguishable and involved trading behavior that differed significantly from Respondents' conduct. The *Lake Erie Loop Flow* matter involved responses to price signals created by market fundamentals that indicated that it was cheaper to schedule energy to flow clockwise around Lake Erie than to flow it in the more direct, counterclockwise path. Those transactions were executed to lower market participants' costs based on market fundamentals for transactions they already sought to engage in, and were not "created by any intentional actions of market participants to obstruct an otherwise well-functioning market."<sup>272</sup> That differs significantly from City Power's risk-free round-trip UTC trades, which were devoid of independent economic substance and designed solely to capture MLSA payments. Nor does the *Blumenthal* order's mention of "rational economic behavior" absolve Respondents' actions here.<sup>273</sup> That case dealt with capacity suppliers faced with inconsistent scheduling requirements between ISO-New England and the New York Independent System Operator that nevertheless attempted to provide capacity pursuant to their requirements. That differs significantly from Respondents' actions here in placing risk-free round-trip trades in order to obtain MLSA payments.

**(4) No credible evidence that Respondents engaged in optionality strategy**

105. Respondents argue that their round-trip trades were "optionality" trades placed with the intent to profit from one leg of the spread trade failing to clear (or one leg breaking).<sup>274</sup> In essence, Respondents' argument is that their round-trip UTC trades were exposed to substantial risk and potential profit because at any time one leg of the two-leg trade might not clear (i.e., leg A-B might clear where leg B-A did not). Not only do we find no contemporaneous evidence to support this defense, but we find instead that the evidence demonstrates that "optionality" was not Respondents' trading strategy.

106. First, we conclude that Respondents' suggestion that they sought to benefit from the optionality of a trade failing to clear is an after-the-fact rationale, inconsistent with contemporaneous communications. Specifically, Respondents' communications

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<sup>272</sup> *Lake Erie Loop Flow*, 128 FERC ¶ 61,049, App. A at 26; see also *Chen*, 151 FERC ¶ 61,179 at P 81.

<sup>273</sup> Respondents' Answer at 118-120 (citing *Blumenthal*, 132 FERC ¶ 63,017 at P 111).

<sup>274</sup> *Id.* at 81-85.

demonstrate that they wanted to schedule trades to collect MLSA payments. When Respondents first started round-trip trading, they did so because Mr. Tsingas had discovered a competitor's strategy to "do both sides to collect losses."<sup>275</sup> The IM communications between Messrs. Tsingas and Jurco at that time contain no discussion of picking paths likely to support an optionality strategy. Indeed, they had an hour-long IM discussion after Mr. Tsingas decided to place the round-trip trades with no mention of legs breaking or optionality and no discussion of bid prices to be used to pursue a leg-breaking, optionality strategy. Instead, their IM conversation concerned the mechanics for scheduling the trades and that "we'll try it for a few days and see the payout."<sup>276</sup> At one point, Mr. Tsingas noted, "I'm glad that I inspired the boys to collect losses."<sup>277</sup> Similarly, their IM communications in the days following the first round-trip trades are devoid of any discussion of an optionality strategy. Rather, the IMs show that Mr. Tsingas "want[s] to make sure we get paid for losses" and reflect concern for the lack of hourly interface trades in the peak trading hours when Mr. Tsingas believed higher MLSA payments could be collected.<sup>278</sup>

107. We are further persuaded that Respondents had no optionality strategy by their implementation of their round-trip trades. In the 347 hours in which Respondents engaged in round-trip trades, both legs of those trades cleared in 343—or 99 percent—of those hours.<sup>279</sup> Thus, Respondents experienced only four instances—or one percent of all of their round-trip trades—in which one direction of a round-trip trade failed to clear. We recognize that an optionality strategy is based on the potential for a rare occurrence, but if Respondents actually employed such a strategy, as they maintain, we would have expected them to alter their trading patterns to try to discover more effective ways to increase the potential for such occurrences, even if only slightly.

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<sup>275</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:56:13 AM) (JUR01530).

<sup>276</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:57:55AM – 11:58:29) (JUR01530-35).

<sup>277</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 11:14:05) (JUR01531).

<sup>278</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 6, 2010, 9:25:47 AM - 9:26:48 AM) (JUR01546).

<sup>279</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

108. Moreover, we conclude that City Power's reaction to the only instances of a profitable round-trip leg break is affirmative evidence that it sought to avoid an optionality strategy, not pursue one. The only profitable leg break that City Power experienced during its round-trip trading occurred on trade date July 19, 2010 in a single hour in which City Power placed a \$0 bid on the OVEC-MISO/MISO-OVEC path pair. This leg break resulted in a profitable trade even after transaction costs.<sup>280</sup> However, City Power never again bid \$0 on this path and never again experienced another leg break on this path pair.<sup>281</sup> Had City Power been pursuing an optionality strategy, we would expect it to have pursued more of this profitable trade.

109. We are not persuaded by Respondents' claim that their MISO-NYIS/NYIS-MISO round-trip trades indicate they pursued an optionality strategy. First, they only engaged in round-trip trading on this path for two of the 18 days they pursued the round-trip strategy: namely, July 4-5, 2010.<sup>282</sup> Second, Respondents claim that Messrs. Tsingas and Jurco bid \$33.55 on the MISO-NYIS leg for all eleven hours on July 4, 2010 for which they placed bids because it was the most likely leg to be rejected.<sup>283</sup> In support, they argue that July 2008 is the most comparable month to July 2010 for purposes of showing Respondents' historical views, and state that a bid of \$33.55 on that path would have resulted in that leg failing to clear in 188 hours in July 2008, approximately 55 percent of the hours analyzed.<sup>284</sup>

110. July 2008 is not an appropriate comparison month. We examined trade data from 2005 to 2009 for the summer month period (June-August) (i.e., the historical information that would have been available to inform Respondents' market view) and found that July 2008 was the most historically volatile of the months analyzed and thus is not a suitable comparison.<sup>285</sup> But for the five year period as a whole, we find Respondents'

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<sup>280</sup> *Id.* City Power made approximately \$1,147 on this trade after transaction costs.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> Respondents' Answer at 30. This leg cleared on July 4, 2010.

<sup>284</sup> *Id.* at 31. In making this calculation, Respondents do not analyze the bid hours for the entire month, but look only at hours ending (HE) 12-22 for each day of July 2008. Respondents placed the MISO-NYIS/NYIS-MISO round-trip trades during these 11 hours in July 2010.

<sup>285</sup> PJM LMP Data obtained from <https://dataminer.pjm.com/dataminerui/pages/public/lmp.jsf>.

\$33.55 bid would have cleared in 84 percent of hours ending 12-22 and in June-August 2009 that bid would have cleared 100 percent of the time in hours ending 12-22.<sup>286</sup>

111. Our examination of the trade data on that same path for July 5, 2010—the other day that month on which Respondents used that path, but omitted from their analysis—validates our conclusion that Respondents did not engage in an optionality strategy. They bid \$50 on MISO-NYIS that day, a bid that would have cleared in 83 percent of hours ending 12-22 in July 2008, 94 percent of the hours in June-August 2005-2009, and 100 percent of the hours in June-August 2009. Such a bid level is inconsistent with optionality because increasing the bid to \$50 made it even less likely that one leg would fail to clear.<sup>287</sup>

112. We find equally unpersuasive Respondents' argument that the "majority of the trades were not entered as 'price taker' bids" and were changed frequently as evidence of Respondents pursuing an optionality strategy.<sup>288</sup> We examined historical data (June-August 2005-2009 for hours ending 10-22 and all hours) for the paths on which Respondents bid their round-trip trades and found a low probability that Respondents' bids would not have cleared at their selected values.<sup>289</sup> The path with the highest likelihood of not clearing was MISO-OVEC/OVEC-MISO, where on July 19, 2010 Respondents placed a \$0 bid in both directions in a single hour and one leg broke.<sup>290</sup>

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> Respondents' Answer at 81-84.

<sup>289</sup> We looked at historical LMP data for the months of June-August in the years 2005-2009. We analyzed HE 10-22 because more than 90 percent of Respondents' round-trip trades occurred within these hours in July 2010. The difference is marginal if using all 24 hours. PJM LMP Data obtained from <https://dataminer.pjm.com/dataminerui/pages/public/lmp.jsf>; Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

<sup>290</sup> For the months of June-August of 2005-2009, a \$0 bid on OVEC-MISO had an 82 percent chance of failing to clear across HE 10-22. For the months of June-August of 2005-2009, a \$0 bid on MISO-OVEC had an 18 percent chance of failing to clear across HE 10-22. PJM LMP Data obtained from <https://dataminer.pjm.com/dataminerui/pages/public/lmp.jsf>; Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

Because Respondents never placed that bid again, it is not evidence of their pursuit of an optionality strategy.

113. The path with the next highest historical likelihood of not clearing was MISO-NYIS on July 4-5, 2010. The trading on these paths, however, took place on only 2 days and totaled 22 hours and 4,400 MWs.<sup>291</sup> By comparison, the round-trip strategy occurred across 18 days, 347 hours and involved 431,100 MWs.<sup>292</sup> Thus, we conclude these paths represent only a very small portion of Respondents' overall round-trip trading strategy, and we are not persuaded that the historical performance on this path can be imputed to the performance across the remaining paths.

114. Respondents claim that City Power and Mr. Tsingas represented to staff that these trades were optionality trades and that Mr. Tsingas has "consistently stated that these trades were made with the intention of one leg clearing."<sup>293</sup> In support, Respondents offer Respondents' November 4, 2013 Response to Staff.<sup>294</sup> We do not find this evidence credible because Respondents' contemporaneous communications fail to discuss the subject and their reactions to the four instances in which a leg failed to clear contradict any such strategy.<sup>295</sup>

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<sup>291</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

<sup>292</sup> *Id.*

<sup>293</sup> Respondents' Answer at 125.

<sup>294</sup> *Id.* (citing Respondents' November 4, 2013 Response Letter at 32; Tsingas Test. Tr. 817-820).

<sup>295</sup> For these reasons we find Dr. Bergin's characterization of Respondents' trades as a strategy with "embedded optionality characteristics" to be unpersuasive. Bergin Affidavit at 9. We also reject Dr. Bergin's reliance on data from 2011 and 2012 as part of his analysis because the traders could not have relied on future events to make their trading decisions. We also question the inclusion of winter and shoulder months in Dr. Bergin's analysis because it does not consider seasonality.

(5) **Respondents' deception arguments are unavailing**

115. Respondents argue that their round-trip trades were not deceptive and therefore not fraudulent.<sup>296</sup> We disagree. As we have said previously, “[f]raud is a question of fact that is to be determined by all the circumstances of a case.”<sup>297</sup> The market purpose behind speculative UTC trades in PJM was to permit traders to arbitrage the market to encourage convergence between the day-ahead and real-time markets.<sup>298</sup> Respondents’ fraudulent trades could not and did not provide that benefit to the market. Nonetheless, Respondents placed their trades as market participants would place an arbitrage-based spread trade, except Respondents’ round-trip UTC trades canceled each other out. The connected nature and purpose of the offsetting trades was concealed and created the illusion of arbitrage trading thereby subverting the PJM market. Specifically, as a result of Respondents’ deception, PJM distributed less in MLSA funds to those market participants who were engaged in behavior supportive of and beneficial to the PJM market and instead provided those MLSA funds to Respondents. In short, we find that Respondents defrauded PJM into allocating MLSA payments to Respondents by engaging in high volumes of fraudulent round-trip UTC trades solely to collect MLSA payments.<sup>299</sup>

116. Respondents claim that our decision in the *Lake Erie Loop Flow* case supports their view that they were responding to the pricing incentive created by the MLSA rather than engaged in fraud.<sup>300</sup> The *Lake Erie Loop Flow* matter involved transactions “scheduled on a single tag, and thus showed the source, sink and intervening transmission,” and scheduling requests between the ISOs were coordinated.<sup>301</sup> In contrast, Respondents’ trades were not scheduled via an electronic transmission tag so there was no mechanism by which PJM automatically could recognize their related

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<sup>296</sup> See Respondents’ Answer at 109.

<sup>297</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50; see also *Chen*, 151 FERC ¶ 61,179 at P 95.

<sup>298</sup> *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208 at n.85.

<sup>299</sup> See *Chen*, 151 FERC ¶ 61,179 at P 95.

<sup>300</sup> Respondents’ Answer at 117-118.

<sup>301</sup> *Lake Erie Loop Flow*, 128 FERC ¶ 61,049, App. A at 22.

nature, i.e., that the A-B transactions and the B-A transactions were linked and canceled each other out.<sup>302</sup> Moreover, unlike the *Lake Erie Loop Flow* case, here, Respondents did not simply follow pricing incentives for transactions they were already engaged in, but instead they created a high volume of new fraudulent transactions solely to receive MLSA payments.

(6) **Respondents' round-trip trades are wash trades**

117. Respondents argue that, contrary to OE Staff's assertion, their Loss Trades "were not wash trades, or anything like them."<sup>303</sup> Respondents aver that their trades were missing several key characteristics of wash trades, including that they did not: (1) impact prices; or (2) promulgate inaccurate information.<sup>304</sup> Likewise, Respondents refute OE Staff's attempt to compare their trading conduct to the "Death Star" trading practice used by Enron during the Western Energy Crisis.<sup>305</sup> Respondents note that the Commission found that Enron engaged in "gaming," which was prohibited by the California Independent System Operator (CAISO) tariff, but that PJM lacks an analogous "gaming" provision and that, unlike Enron, Respondents did not receive a benefit for nothing (because they paid for transmission).<sup>306</sup>

118. Lastly, Respondents dispute OE Staff's contention that their trading practices are analogous to the sham trades in *Amanat*.<sup>307</sup> Respondents distinguish their trading conduct with the behavior at issue in *Amanat*: the wash trades in *Amanat*, Respondents aver, were "manipulative because they create[d] the appearance of an ability to generate real profit without the attendant risk."<sup>308</sup> In contrast, Respondents assert, their trades

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<sup>302</sup> See *Chen*, 151 FERC ¶ 61,179 at P 97.

<sup>303</sup> Respondents' Answer at 127.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 132.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 128 (citing *Amanat*, SEC Docket 672, 2006 WL 3199181 (Nov. 3, 2006)).

<sup>308</sup> *Id.* at 130.

were not wash trades and “had the potential for profit and did not ‘create’ any false ‘appearance.’”<sup>309</sup>

119. OE Staff argues that Respondents’ trades under each of the three Loss Trade strategies were wash trades because they exhibit two key factors: (1) they are pre-arranged to cancel each other out; and (2) they involve no economic risk.<sup>310</sup> OE Staff avers that Respondents’ trades exhibited those two factors: they were pre-arranged to cancel each other out and they were structured to “eliminate all meaningful exposure to price changes.”<sup>311</sup> OE Staff also argues that Respondents’ trades were similar to the wash trades in *Amanat*, a case before the SEC in which a trader bought and sold securities to secure a volume-based credit.<sup>312</sup> OE Staff avers that Respondents did the same thing here, engaging in a “high volume churn to collect a benefit extrinsic to the merits of their trades.”<sup>313</sup>

120. OE Staff also argues that Respondents’ trading was like the circular scheduling strategy known as Death Star in that both resulted in no net position, and therefore no chance for material profits from the market prices; both were profitable as long as the associated credits exceeded the cost of scheduling the transactions.<sup>314</sup> Further, OE Staff notes that Respondents’ trades sent a false signal that they were legitimate arbitrage trades when they were effectively nullities.<sup>315</sup>

121. Respondents’ round-trip UTC trades are wash trades and, therefore, *per se* fraudulent and manipulative. The Commission’s original Market Behavior Rules identified wash trades as possessing two key elements—that the transactions: (1) are pre-arranged to cancel each other out; and (2) involve no economic risk.<sup>316</sup> Order No. 670

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<sup>309</sup> *Id.*

<sup>310</sup> Staff Reply at 78-79. Those factors, according to OE Staff, are consistent with the concept of wash trading as addressed by the SEC and CFTC. *Id.* at 79-80.

<sup>311</sup> *Id.* at 81.

<sup>312</sup> *Id.* at 81-82.

<sup>313</sup> *Id.* at 82.

<sup>314</sup> *Id.* at 83.

<sup>315</sup> *Id.*

<sup>316</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 53; *see also* Order No. 670, FERC Stats. &

later incorporated Market Behavior Rule 2 into the Commission’s Anti-Manipulation Rule.<sup>317</sup> Pursuant to Order No. 670, the Commission stated explicitly that the prohibitions included in that Market Behavior Rule—including prohibitions against wash trades—would continue to be prohibited activities under the Anti-Manipulation Rule.<sup>318</sup>

122. As discussed above, we find Respondents’ round-trip UTC trades satisfy both these elements and were, by design, wash trades. That is, Respondents’ trades were designed to cancel each other out and to eliminate price spread risk caused by differences in prices between the selected nodes. We find that “in Commission-regulated energy markets, the market risk associated with a wash trade need not be zero; it only need be small enough so that the risk has no practical or expected impact on the transaction, as was the case here.”<sup>319</sup> While Respondents note the theoretical potential for one leg of the transaction to break (the so-called “optionality” characteristic), the evidence shows that Respondents’ round-trip UTC trades cleared 99 percent of the time during the Manipulation Period (as Respondents expected) and that because both legs cleared together, Respondents’ round-trip UTC trades had no practical economic risk.

123. Additionally, we disagree with Respondents’ contention that their round-trip UTC trades were not wash trades because they were structured to produce a profit in their own right.<sup>320</sup> As discussed above, we are persuaded that the way in which Respondents’ profits were generated under the round-trip Loss Trade strategy reveals a scheme that is supportive of and consistent with our finding of manipulation. Respondents’ trades were intended to generate profits through the MLSA payments, which had no relationship to

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Regs. ¶ 31,202 at PP 58-59; *Chen*, 151 FERC ¶ 61,179 at P 103. We reject Respondents’ suggestion that wash trades necessarily exhibit other specific characteristics, such as an impact on prices. *See* Respondents’ Answer at 127.

<sup>317</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 58.

<sup>318</sup> *Id.* P 59.

<sup>319</sup> *Chen*, 151 FERC ¶ 61,179 at P 104; *see also Piasio v. CFTC*, 54 Fed. App’x 702, 705 (2nd Cir. 2002); *SEC v. Colonial Inv. Mgmt. LLC*, 659 F. Supp. 2d 467, 473 (S.D.N.Y. 2009); *Wilson v. CFTC*, 322 F.3d 555, 559 (8th Cir. 2003) (“Wash trading produces a virtual financial nullity because the resulting net financial position is near or equal to zero.”). *Cf.* 15 U.S.C. § 78i(a)(1) (2012) (Securities Exchange Act of 1934 defining wash trades, in pertinent part, as “an order or orders of substantially the same size . . .”).

<sup>320</sup> Respondents’ Answer at 130.

the underlying fundamentals of, or the purposes for, the UTC product. In that way, Respondents' scheme operated like other wash trades we have found to be unlawful.

124. Respondents' arguments that the trades in question were not manipulative or otherwise prohibited also ignores the Commission's long-standing policy that wash trades are inherently manipulative:

Wash trades, by their very nature, are manipulative and purposely so. By definition, parties to a wash trade intend to create prearranged off-setting trades with no economic risk. Thus, we know of no legitimate business purpose attributable to such behavior and no commenter has suggested one.<sup>321</sup>

125. Moreover, the very nature of a wash trade is to conceal the true purpose of the trade. In this case, Respondents' wash trades concealed that Respondents had used round-trip UTC trades to obtain transmission service reservations to collect MLSA payments.

126. We also reject Respondents' argument that their trades were nothing like Enron's Death Star trading. Like Death Star's circular strategy, Respondents engaged in round-trip UTC trading that resulted in no net position and, thus, no possibility for profit or loss from market prices. Moreover, Death Star's strategy was profitable so long as the credits received exceeded the cost of scheduling the transactions; similarly, Respondents' strategy was profitable so long as the MLSA payments exceeded their transaction costs. In addition, Respondents' round-trip UTC trades falsely appeared to PJM as legitimate, arbitrage-related trades when in fact they were nullities placed to garner MLSA payments. Thus, similar to Death Star, Respondents' UTC trades involved offsetting pairs to capture revenues without providing the corresponding benefit to the market.

(b) **Respondents' SOUTHIMP-SOUTHEXP trades**

127. Respondents' July 2010 SOUTHIMP-SOUTHEXP trades were placed on nodes that were defined by PJM as mathematically equivalent beginning on April 2, 2007 in the real-time market and April 3, 2007 in the day-ahead market.<sup>322</sup> While PJM explained that

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<sup>321</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 58; *see also Chen*, 151 FERC ¶ 61,179 at P 107.

<sup>322</sup> Record at Response\_to\_FERC\_4<sup>th</sup>\_Data\_REq\_to\_PJM\_CITY POWER.pdf. at Response to Request 3.

there were occasions of price divergence due to the impact of a de-energized bus,<sup>323</sup> an historical review of the data demonstrates that, after 2007, there was zero divergence in 2008 and an approximately \$0.01 divergence on average across the thirty days of June 2009 and the thirty days of June 2010.<sup>324</sup> An analysis of June to August 2008, June to August 2009, and June 2010 results in a zero spread on average between SOUTHIMP-SOUTHEXP.<sup>325</sup> Moreover, what is clear from the communications and data in this proceeding is that: (i) there was a zero spread on this path on the days during the Manipulation Period in which Respondents entered into these trades; (ii) Respondents knew that there was a zero spread; and (iii) Respondents continued to place these trades even with a zero spread.<sup>326</sup> Further, the communications and other evidence support our conclusion that Respondents engaged in this uneconomic behavior to further their scheme to collect MLSA payments and that they diverted those MLSA payments from other market participants.<sup>327</sup>

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<sup>323</sup> *Id.*

<sup>324</sup> The day-ahead and real-time LMPs were sourced from <https://dataminer.pjm.com/dataminerui/pages/public/lmp.jsf>. The spread is calculated as follows: (Sink Node RT LMP – Source Node RT LMP) – (Sink Node DA LMP – Source Node DA LMP). Even the small divergence seen in June 2009 and June 2010 produced an average negative actual spread and negative profits.

<sup>325</sup> *See* PJM LMP Data. The Commission looked at data for the months of June through August as these months represented a timeframe similar to the July trade dates at issue here.

<sup>326</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls; IM Conversation Between Mr. Tsingas and Mr. Jurco (July 5, 2010, 9:25:16 AM-9:26:55 AM) (JUR01538) (“so SOUTHIMP-SOUTHEXP settles at \$0 all the time, DA and RT. . .”).

<sup>327</sup> We dismiss as unpersuasive Dr. Bergin’s analysis of the SOUTHIMP-SOUTHEXP issue. We find Dr. Bergin improperly includes the 2007 data in his analysis and appears not to consider the mathematical equivalence of the nodes. Nor does Dr. Bergin appear to consider how removing the 2007 data would impact his conclusions. After 2007, we find that the average spread on this path was zero over the summer months of 2008 and 2009 and in June 2010. We further find that Dr. Bergin did not consider seasonality in performing his analysis.

128. Like round-trip trades that acted as an offset to each other, there was no substantive price risk and no arbitrage benefit to the market from these zero-spread SOUTHIMP-SOUTHEXP trades. The underlying SOUTHIMP-SOUTHEXP trades were by design unprofitable and this lack of profit was exacerbated by the transaction costs associated with the trades. Respondents made \$0 in spread revenue on the underlying SOUTHIMP-SOUTHEXP trades, and, when transaction costs were considered, they lost \$64,496.<sup>328</sup> It was only the MLSA payments that resulted in gain for these trades. Specifically, Respondents earned \$170,897 in MLSA, for a net profit of \$106,401.<sup>329</sup>

129. We find that the SOUTHIMP-SOUTHEXP trades were: (i) lacking arbitrage or convergence purposes; (ii) placed without regard to market fundamentals of supply and demand; (iii) uneconomic; (iv) placed solely with the intent to garner MLSA payments; (v) without substantive risk; and (vi) deceptive. Like Respondents' round-trip trades, the SOUTHIMP-SOUTHEXP trades were designed so that their price spread was zero, eliminating an economic risk. Also, Respondents traded large volumes of these risk free trades to target large payments of MLSA.<sup>330</sup> We conclude, therefore, that similar to the round-trip trades, the SOUTHIMP-SOUTHEXP trades are fraudulent and violate section 222 of the FPA and the Anti-Manipulation Rule.

(1) **Communications, testimony, and other evidence demonstrate the existence of a scheme to defraud**

130. Contemporary communications support our finding that Respondents used the SOUTHIMP-SOUTHEXP trades to further their scheme to defraud. For example, on July 5, 2010 Mr. Tsingas observed that "SOUTHIMP-SOUTHEXP settles at \$0 all the

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<sup>328</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

<sup>329</sup> *Id.*

<sup>330</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 13, 2010, 9:31:48 AM-9:32:01 AM) (JUR01588) ("these losses paid well the few days we had 2,000 mw's...as in 100k plus. . . .").

time, [day-ahead and real-time]. . . I did 500, no impact.”<sup>331</sup> A zero spread is consistent with the historical performance on this path.<sup>332</sup>

131. Respondents argue that Mr. Tsingas, on July 5, 2010, observes that “it used to be different” and claim that Mr. Tsingas was surprised that the spread was zero. Respondents note that Mr. Tsingas testified similarly on October 8, 2010 and August 21, 2014.<sup>333</sup> Respondents claim that this communication and testimony together demonstrate that Mr. Tsingas believed the SOUTHIMP-SOUTHEXP path had historical volatility, was surprised when the path settled at zero, watched the trade to assess its volatility, and stopped the trading “once they noticed it was in fact still settling at zero.”<sup>334</sup>

132. We find Respondents’ defense inconsistent with their contemporaneous communications and with the data related to trading on this path. While Mr. Tsingas may have expressed surprise that the spread was zero when he made the observation that “it used to be different,” the historical data for that path shows that after 2007 (when PJM began modeling SOUTHIMP and SOUTHEXP to be mathematically equivalent) the price spread was almost always zero.<sup>335</sup> Moreover, he learned the morning of July 5, 2010 that the spread on that day was zero, thereby undermining Respondents’ claim of surprise for the seven additional days that they continued to trade that path during the Manipulation Period. Thus, we conclude that Respondents had to have been aware of the \$0 spread on the path as of no later than July 5, 2010. Moreover, we find that contemporaneous communications show that Mr. Tsingas chose to continue trading the SOUTHIMP-SOUTHEXP path despite his knowledge that it had a \$0 spread: “we’ll ride

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<sup>331</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 5, 2010, 9:25:16 AM-9:25:35 AM) (JUR01538).

<sup>332</sup> *See supra* P 127.

<sup>333</sup> Respondents’ Answer at 79-80 and nn. 210-211; *see also* Tsingas Test. Tr. 410:20-24 (stating that he did not recall seeing that recent spreads between the SOUTHIMP-SOUTHEXP points were zero at the time he began placing those trades).

<sup>334</sup> Respondents’ Answer at 80.

<sup>335</sup> We note that there is no evidence that Mr. Tsingas acted on this surprise by reviewing historical data for that path or conducting other analyses to test its alleged volatility as we might reasonably expect from a trader confronted by market performance inconsistent with his expectations.

it out for a few days”<sup>336</sup> and “once I see that southimp-southexp works, that’s all I’ll do. . . until market monitoring yells at us.”<sup>337</sup>

133. We also do not find credible Mr. Tsingas’ October 8, 2010 testimony that Respondents rely upon as evidence of his lack of knowledge regarding the SOUTHIMP-SOUTHEXP \$0 price spread.<sup>338</sup> Mr. Tsingas here testified that he was the individual at City Power responsible for reviewing the performance of its trades and that there were instances he did so on a line-item basis and instances he did not.<sup>339</sup> He was then asked:

Q: So from July 4<sup>th</sup> to about July 14<sup>th</sup>, 2010, you didn’t ever look at the line item of this one trading strategy at south imp/ south exp to determine its success or lack of success?

A: I don’t recall that it was -- no. I did not. It wasn’t -- it was one of those stupid things where I really -- by the time I looked at it, I just assumed that it was just a low-volatility point, and I don’t recall seeing like a price difference. Sometimes you look at something, and you don’t -- sometimes when I look at something, I don’t really know what I’m looking at. In retrospect, I should have seen that it was zero, but I didn’t. When I noticed it, I took it out.<sup>340</sup>

134. We find informative the first two sentences of Mr. Tsingas’ testimony on which Respondents rely: Mr. Tsingas denied reviewing the daily performance of the SOUTHIMP-SOUTHEXP trades in this testimony, yet, the contemporaneous IM communication makes clear that Mr. Tsingas did, in fact, do so on the first day

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<sup>336</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 5, 2010, 9:26:55 AM) (JUR01538).

<sup>337</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 6, 2010, 11:08:53 AM - 11:09:11 AM) (JUR01550).

<sup>338</sup> Respondents’ Answer at 80 n. 210. The Commission also notes that while Respondents rely on this testimony, they fail to provide the context of the questioning that led to Mr. Tsingas’ testimony nor do they provide the first two sentences of the testimony, which, as set forth below, the Commission finds supportive of its conclusions here.

<sup>339</sup> Tsingas Test. Tr. 92-93.

<sup>340</sup> *Id.* at Tr. 93:7-20 (emphasis added).

Respondents held those positions.<sup>341</sup> Contrary to his testimony, he did not take the trades off “when [he] noticed it.” Instead, Respondents’ SOUTHIMP-SOUTHEXP trades continued for seven more trading days after Mr. Tsingas first discussed the zero spread in his IM. Consequently, contrary to his October 8, 2010 testimony, Mr. Tsingas entered into an IM discussion with Mr. Jurco about the zero spread that demonstrates they understood the situation—evidenced by the fact that they agreed to “ride it out for a few days.”<sup>342</sup>

135. Contemporary communications indicate that Respondents used the SOUTHIMP-SOUTHEXP trades to further their scheme. On July 5, 2010, almost immediately after noting the spread on the trades was zero, Mr. Tsingas informed Mr. Jurco by IM not only that he would “ride it out” but also instructed Mr. Jurco to place high volume trades “combo of [SOUTHIMP-SOUTHEXP] and some other crap. . . at least 1000 mw’s.”<sup>343</sup> Mr. Tsingas provided this instruction after Mr. Jurco had just observed the zero spread SOUTHIMP-SOUTHEXP trades: “do you still get losses? . . . cause that’s nuts.”<sup>344</sup> Several days later on July 13, 2010, Mr. Tsingas observed that “these losses paid well the few days we had 2,000 mw’s. . . as in 100k plus. . .” while acknowledging that it “feels sleezy.”<sup>345</sup> From July 8 through the date of this IM, July 13, Respondents had engaged in 1,000 MW per hour in SOUTHIMP-SOUTHEXP trades and 1,000 MW per hour in round-trip MISO/OVEC-OVEC/MISO trades.<sup>346</sup> Thus, Mr. Tsingas’ statement directly reflects his understanding that the high volume SOUTHIMP-SOUTHEXP trades led to the collection of large, “sleezy” losses. Taken together, these contemporaneous communications demonstrate that Respondents engaged in the SOUTHIMP-SOUTHEXP trades knowing they were low price risk and unprofitable from the perspective of the

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<sup>341</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 5, 2010, 9:25:16 AM-9:25:35 AM) (JUR01538).

<sup>342</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 5, 2010, 9:25:16 AM-9:26:55 AM) (JUR01538).

<sup>343</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 5, 2010, 9:27:05 AM-9:27:16 AM) (JUR01539).

<sup>344</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 5, 2010, 9:26:09 AM-9:26:13 AM) (JUR01538).

<sup>345</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 13, 2010, 9:31:48 AM-9:32:08 AM) (JUR01588).

<sup>346</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

underlying trade, but they did so to further their scheme to trade large volumes of low-risk trades to garner MLSA payments.

(2) **Pattern**

136. Like the pattern and timing of Respondents' round-trip trades, the pattern and timing of the SOUTHIMP-SOUTHEXP trades reflect their fraudulent nature. Respondents placed SOUTHIMP-SOUTHEXP trades on 8 days between July 5 and July 14, 2010,<sup>347</sup> despite learning during this time—indeed, at the beginning of the 8-day period—that the spread between these points “settl[ed] at \$0 all the time.”<sup>348</sup> Moreover, City Power incrementally increased the volume of its SOUTHIMP-SOUTHEXP trades to 1,000 MW per hour on trade dates July 8 through July 14, 2010, while the SOUTHIMP-SOUTHEXP price spread remained zero during this period.

(3) **SOUTHIMP-SOUTHEXP trades were uneconomic and contrary to the PJM UTC market design purpose**

137. We find many similarities between Respondents' SOUTHIMP-SOUTHEXP trades and their round-trip trades. Specifically, not only were Respondents' SOUTHIMP-SOUTHEXP trades routinely unprofitable when measured from a price arbitrage perspective,<sup>349</sup> but zero spread trades were the expected result because, like their round-trip trades, these trades had no substantive economic risk.<sup>350</sup> This lack of profit from economic fundamentals was an anticipated by-product of Respondents' trading between two points with a zero spread. Moreover, even though they were not required to do so under the PJM tariff to effectuate these trades, Respondents purchased transmission service to effectuate their SOUTHIMP-SOUTHEXP trades to be eligible for MLSA payments. As a result of the charge for transmission service and other costs, the profit and loss calculation of the SOUTHIMP-SOUTHEXP trades, absent MLSA

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<sup>347</sup> *Id.*

<sup>348</sup> IM from Mr. Tsingas to Mr. Jurco (July 5, 2010, 9:25:16 AM) (JUR01538).

<sup>349</sup> Record at Staff Doc and Data Submission Mar 13, 2015\Summary spreadsheet\Summary Spreadsheet showing Staff and CPM calcs.xls.

<sup>350</sup> For these reasons and based on the evidence discussed and conclusions reached in this section, we dismiss as unpersuasive any suggestion that these trades were placed as optionality trades. *See* Respondents' Answer at 81-85; *cf.* discussion *supra* PP 105-114.

payments, necessarily resulted in a net loss to Respondents.<sup>351</sup> Respondents' own calculation reflects a loss of \$75,152 on the underlying SOUTHIMP-SOUTHEXP trades when transaction and other costs are taken into account.<sup>352</sup> However, with the MLSA payments, Respondents' SOUTHIMP-SOUTHEXP trades generated a profit of \$106,401.

138. Further, Respondents understood that the trades would operate in this manner. As we discuss above, Respondents contemporaneous IM communications demonstrate that, on July 5, 2010, Messrs. Tsingas and Jurco understood that there was a zero spread on the path, but that Mr. Tsingas nonetheless committed to continue trading the path.<sup>353</sup> Respondents also knew that these zero spread trades would not be profitable and, as such, would have no positive arbitrage effect on the market. Mr. Tsingas stated in his August 21, 2014 testimony that, in retrospect, since the SOUTHIMP-SOUTHEXP trades were settling at zero, they did not lead to price convergence in the PJM Market.<sup>354</sup> Accordingly, like Respondents' round-trip trading, we find Respondents' SOUTHIMP-SOUTHEXP trading was knowingly uneconomic, and only profitable insofar as they received MLSA payments for these trades, which supports the conclusion that a course of business and scheme to defraud existed.

139. As we noted above, MLSA payments are not part of the underlying UTC spread trade.<sup>355</sup> Instead, the Commission has found that "[s]peculative UTC trades placed to arbitrage price spreads will have as their sole or primary price signal the price risk of the underlying UTC spread and will be placed with the purpose of profiting based on the direction of the spread."<sup>356</sup> Given the design of the SOUTHIMP-SOUTHEXP points and the resulting \$0 spread, however, we find that the pursuit of a price risk on this path was not possible. In sum, like Respondents' round-trip trades, the SOUTHIMP-SOUTHEXP trades were inconsistent with how the UTC product historically traded and unaligned with the arbitrage purpose of those trades. Here, Respondents engaged in the SOUTHIMP-SOUTHEXP trades for the sole purpose of collecting MLSA payments and

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<sup>351</sup> See *Chen*, 151 FERC ¶ 61,179 at P 76.

<sup>352</sup> Record at Staff Doc and Data Submission Mar 13, 2015\Summary spreadsheet\Summary Spreadsheet showing Staff and CPM calcs.xls.

<sup>353</sup> See *supra* PP 130-135.

<sup>354</sup> Tsingas Test. Tr. 410:10-15.

<sup>355</sup> See *supra* P 102.

<sup>356</sup> *Chen*, 151 FERC ¶ 61,179 at P 80.

the underlying transactions had no price spread by design. Respondents' round-trip trades only became profitable because of the MLSA payments. However, the MLSA payments were not, and should not be considered, part of the underlying UTC trade. Engaging in UTC trades where the MLSA payments are the sole or primary price signal, as Respondents did here, is improper.<sup>357</sup> For each of these reasons, Respondents' SOUTHIMP-SOUTHEXP trades were fraudulent.

(4) **Respondents' SOUTHIMP-SOUTHEXP deception arguments are unavailing**

140. Respondents argue that their SOUTHIMP-SOUTHEXP trades were not deceptive and without deception there is no fraud.<sup>358</sup> We disagree for the same reasons we set forth above with respect to Respondents' round-trip trades.<sup>359</sup>

141. Similar to the round-trip trades, because of the zero price spread between the nodes, the SOUTHIMP-SOUTHEXP trades did not fulfil the purpose of allowing traders to arbitrage the market to encourage convergence between the day-ahead and real-time markets.<sup>360</sup> Nonetheless, Respondents placed their trades as market participants would place an arbitrage-based spread trade, except here they knew they would experience no price spread because the two points were consistently trading at the same price throughout the period the Respondents traded. The nature and purpose of the trades—obtaining MLSA payments—was concealed and created the illusion of arbitrage trading between these points thereby subverting the PJM market. Specifically, as a result of Respondents' deception, PJM distributed less in MLSA funds to those market participants who were engaged in behavior supportive of and beneficial to the PJM market and instead provided those MLSA funds to Respondents. In short, we find that the Respondents defrauded PJM into allocating MLSA payments to Respondents by engaging in high volumes of fraudulent zero spread UTC trades solely to collect MLSA payments.

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<sup>357</sup> *Id.*

<sup>358</sup> See Respondents' Answer at 109.

<sup>359</sup> See *supra* PP 115-116.

<sup>360</sup> *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208 at n.85.

(c) **Respondents' NCMPAIMP-NCMPAEXP trades**

142. As discussed below, we find that Respondents' NCMPAIMP-NCMPAEXP trades were fraudulent because the evidence demonstrates that Respondents placed them not for the purpose of hedging or arbitraging price spreads but instead to receive large shares of MLSA payments that otherwise would have been allocated to other market participants.<sup>361</sup>

143. Unlike Respondents' other two Loss Trade strategies, the NCMPAIMP-NCMPAEXP trades had shown small historical price spreads in the summer months (June to August) of 2009 and in June 2010. This behavior, however, is nevertheless consistent with Respondents' "losses" scheme reflected in the other two Loss Trade strategies: because Respondents' goal was to collect MLSA payments, they sought only to minimize their losses on the NCMPAIMP-NCMPAEXP trades so as not to interfere with their MLSA payment profits. Contemporaneous evidence indicates that Respondents shifted to trading the NCMPAIMP-NCMPAEXP path not due to expectations of profitable price spreads, but instead as a refinement and continuation of their underlying scheme to generate transaction volumes to obtain MLSA payments that exceeded their expected transaction costs. Respondents anticipated that the IMM would eventually stop their ability to make these profits and had become concerned that continuing their July 5 to July 14 trades at SOUTHIMP-SOUTHEXP raised the risk of the IMM discovering their trading at that point was being made solely to obtain MLSA payments. They then shifted on July 15 to trading NCMPAIMP-NCMPAEXP in multiple transactions at small volumes to continue receiving their MLSA payments. In fact, as shown below, contemporaneous evidence indicates that Mr. Tsingas and City Power chose these nodes because they reflected a one-way transaction with a low expected price spread.

144. During the 9 days Respondents traded the NCMPAIMP-NCMPAEXP path, price spreads averaged approximately \$0.16 per MWh, producing \$100,642 in spread gains for City Power. However, even though it did not have to pay for transmission to effectuate these trades, City Power nevertheless reserved and paid for transmission in conjunction with these trades, spending \$532,060, despite the availability of zero-cost transmission between the nodes. By paying for transmission, City Power was able to collect \$1,147,645 in MLSA from PJM, which, after netting transaction costs, resulted in net

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<sup>361</sup> See *Chen*, 151 FERC ¶ 61,179 at P 69.

profit to City Power of \$716,227.<sup>362</sup> The numerous contemporaneous communications, described below, demonstrate that Respondents engaged in these NCMPAIMP-NCMPAEXP Loss Trades solely for the purpose of earning MLSA payments.

(1) **Communications, testimony, and other evidence support the finding of fraud**

145. Contemporaneous IM communications and other evidence support our conclusion that Respondents placed the NCMPAIMP-NCMPAEXP trades in July 2010 for a fraudulent purpose. The NCMPAIMP-NCMPAEXP trades consisted of a one-day trade on flow date July 5, 2010 and then daily trading for flow dates between July 16 and July 30. First, with respect to the July 4, 2010 NCMPAIMP-NCMPAEXP trades, Respondents scheduled 400 MWs on this path in hours ending 10-22 (i.e., peak hours) for July 5, 2010 flow.<sup>363</sup> However, the trade data demonstrates that unlike Respondents' round-trip trades on that July 5, 2010 flow day—which had \$0 spreads because of their round-trip nature—Respondents' NCMPAIMP-NCMPAEXP trades had a negative spread in each hour in which Respondents traded (varying from -.10 to -.24).<sup>364</sup> Respondents' revenue on these NCMPAIMP-NCMPAEXP trades thus was negative even before considering transaction costs. In other words, once transaction costs were factored in, Respondents discovered they had made less money on these trades than they had on the round-trip trades that simply paid them the difference between the transactions costs and the MLSA without the negative price spread. From July 5, 2010 until July 15, 2010, Respondents stopped trading NCMPAIMP-NCMPAEXP in favor of trading SOUTHIMP-SOUTHEXP. It was not until Mr. Jurco expressed his misgivings about the SOUTHIMP-SOUTHEXP trades on July 14, 2010 that Respondents returned to trading NCMPAIMP-NCMPAEXP.

146. However, the July 3, 2010 IM communications and trade data demonstrate that Mr. Tsingas initially singled out NCMPAIMP-NCMPAEXP on July 4, 2010, to target MLSA. On July 3, 2010 Messrs. Tsingas and Jurco discussed using these trades as part of the Loss Trade strategy. Mr. Jurco questioned whether “losses [are] paying off lately,” and Mr. Tsingas responded that they were “if you [have] non-MISO . . . and there is

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<sup>362</sup> Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

strong prices. . . .”<sup>365</sup> Mr. Jurco then informed Mr. Tsingas that “there is plenty of PJM-NY trans[mission],” to which Mr. Tsingas replied “may have to get back to ncmpaimp-ncmpaexp. . . using non-miso sinkks [sic], peak only. . . .”<sup>366</sup> This communication, particularly Mr. Tsingas’ note to use “non-miso sinkks [sic], peak only,” reveals Respondents’ intent to engage in the July 4, 2010 NCMPAIMP-NCMPAEXP trades for the purpose of collecting MLSA. But after this strategy proved less profitable than the round-trip trades, Respondents put it aside for several weeks.

147. Respondents came back to this path on July 16, 2010 as a continuation of their scheme to defraud. On July 14, 2010, Mr. Jurco expressed his discomfort with continuing the \$0 spread SOUTHIMP-SOUTHEXP Loss Trades, noting that he felt “really funny about [them]” and that they “sure could be great ammo for [the PJM IMM] –all these hobos fight for losses then they rope a dope and collect huge numbers.”<sup>367</sup> Their IMs indicate that Mr. Jurco left the issue of continuing to trade the SOUTHIMP-SOUTHEXP as part of their Loss Trade strategy up to Mr. Tsingas, but continued to express his discomfort.<sup>368</sup>

148. As shown by his actions, Mr. Tsingas elected to stop the SOUTHIMP-SOUTHEXP trades as of July 15, 2010, and, beginning that day for the July 16, 2010 trade date, replaced them with NCMPAIMP-NCMPAEXP trades. On July 14, 2010, Respondents placed no trades on the SOUTHIMP-SOUTHEXP path for the first time after nine business days of trading, and thereafter they did not again trade SOUTHIMP-

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<sup>365</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:52:45 AM –10:52:54 AM) (JUR01529).

<sup>366</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:53:09 AM –10:54:24 AM) (JUR01529).

<sup>367</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 14, 2010, 9:56:31 AM –9:57:20 AM) (JUR01590).

<sup>368</sup> Mr. Tsingas asked Mr. Jurco whether City Power “would . . .rather have the money or not” from trading at SOUTHIMP-SOUTHEXP and whether “it [the loss strategy] is better wit[h] or wit[h]out. . . .” those trades. IM Conversation Between Mr. Tsingas and Mr. Jurco (July 14, 2010, 9:58:11 AM –9:59:01 AM) (JUR01590). Mr. Tsingas then point blank asked Mr. Jurco whether his “vote is with but no [SOUTHIMP-SOUTHEXP],” and Mr. Jurco responded “I’d never do thousands and thousands, but that’s me. . . your call.” IM Conversation Between Mr. Tsingas and Mr. Jurco (July 14, 2010, 9:59:35 AM –10:00:02 AM) (JUR01590-1591).

SOUTHEXP in the Manipulation Period.<sup>369</sup> We conclude, based on these contemporaneous IM communications and the subsequent trading behavior, that Respondents stopped trading the SOUTHIMP-SOUTHEXP path because of Mr. Jurco's misgivings about the trades and his concerns that the PJM IMM might pursue them. After stopping its trading of SOUTHIMP-SOUTHEXP, Respondents began scheduling large volumes of trades on the NCMPAIMP-NCMPAEXP path on July 15, 2010.

149. Additional IM communications on July 16, 2010 and trade data thereafter also support the Commission's finding of fraud related to the NCMPAIMP-NCMPAEXP trades placed between July 16 and July 30, 2010. On July 16, 2010 Messrs. Tsingas and Jurco engaged in a conversation in which Mr. Tsingas focused on Respondents' loss trading and set forth various benefits of the NCMPAIMP-NCMPAEXP trades:

traderyoda (10:11:19 AM): I figure tomorrow is hot so we should do the losses

traderyoda (10:11:29 AM): they're there if you want to get them

jurco831 (10:11:32 AM): ok

traderyoda (10:11:41 AM): ignore the other stuff for now

jurco831 (10:11:44 AM): k

traderyoda (10:12:01 AM): I love the NCMPAIMP-exp

traderyoda (10:12:08 AM): nothing fishy about it

traderyoda (10:12:12 AM): need more like that

jurco831 (10:13:04 AM): is that right. first three deals all the same?

jurco831 (10:13:17 AM): is that right? (wrong punctuation)

traderyoda (10:13:25 AM): yeah man

traderyoda (10:13:29 AM): different prices

traderyoda (10:13:31 AM): all one way

traderyoda (10:13:35 AM): cheap to get in

traderyoda (10:13:51 AM): no one can give us shit for that

jurco831 (10:16:14 AM): only one

jurco831 (10:16:23 AM): w/ ny sink

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<sup>369</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls.

jurco831 (10:16:36 AM): other than rtc available

traderyoda (10:16:38 AM): as in you couldn't get any but one

jurco831 (10:16:43 AM): right

jurco831 (10:16:49 AM): this is a crazy game. . . .<sup>370</sup>

150. This contemporaneous IM communication demonstrates that Respondents intended to focus their trading on advancing their loss collection scheme to the point of ignoring their other trades: “do the losses . . . they’re there if you want them . . . ignore the other stuff for now. . . .”<sup>371</sup> Moreover, we view Mr. Tsingas’ statement that there was “nothing fishy” about the NCMPAIMP-NCMPAEXP transactions by claiming they were “different prices . . . all one way . . . cheap to get in . . . no one can give us shit for that” as providing a roadmap to the mechanics of Respondents’ NCMPAIMP-NCMPAEXP fraudulent trading strategy and their intent in pursuing that strategy.

151. Mr. Tsingas’ recognition that NCMPAIMP-NCMPAEXP trades were “cheap to get in” further indicates that Respondents were pursuing minimal price spreads as the vehicle to obtain transmission and receive the MLSA payments they targeted. That Respondents understood as of July 16, 2010 that their scheme was to pursue both round-trip and NCMPAIMP-NCMPAEXP trades is evidenced in another IM communication the day before where Messrs. Jurco and Tsingas discussed trade scheduling issues and Mr. Tsingas asks: “you like the strategy? Some one way. Some two way.”<sup>372</sup>

152. We also find persuasive the fact that Respondents chose to pay for transmission reservations underlying their UTC trades, when Respondents were not required to do so. The PJM tariff did not require a market participant to reserve transmission on the same path as it scheduled the UTC for which it was reserving transmission. In addition, transmission reservations with a MISO point of delivery were not assessed transmission fees. But, to be eligible for MLSA payments, market participants were obligated to pay those transmission fees. Therefore, Respondents could have reserved transmission for their NCMPAIMP-NCMPAEXP trades with a MISO point of delivery to avoid having to pay for transmission and substantially decrease the transaction costs for those trades.

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<sup>370</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 16, 2010, 10:11:19 AM –10:16:49 AM) (JUR01614- JUR01615).

<sup>371</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 16, 2010, 10:11:29 AM –10:11:41 AM) (JUR01614).

<sup>372</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 15, 2010, 10:29:20 AM –10:29:29 AM) (JUR01606).

Nonetheless, Respondents paid for the transmission reservations to effectuate these UTC trades.<sup>373</sup> Indeed, Mr. Tsingas stated that he paid for transmission on NCMPAIMP-NCMPAEXP to be eligible for MLSA.<sup>374</sup> By choosing to unnecessarily pay those transmission fees Respondents, by their own calculation, incurred transaction costs of \$530,653. The transmission fees they chose to pay made the NCMPAIMP-NCMPAEXP trades unprofitable, but secured the MLSA payments.

153. Another communication on July 14, 2010 substantiates the fraudulent nature of the NCMPAIMP-NCMPAEXP trades. As set forth above, Messrs. Tsingas and Jurco began their IM conversation on that day by discussing Mr. Jurco's misgivings with the SOUTHIMP-SOUTHEXP trades and generally discussed losses.<sup>375</sup> Approximately one half hour after Mr. Jurco expresses his concerns about the SOUTHIMP-SOUTHEXP trades, Mr. Tsingas instructs Mr. Jurco regarding the volume of trading that day: "I would suggest doing it in small blocks if possible. Like 750 [MWs] at a time. . . ."<sup>376</sup>

154. With regard to this volume limiting strategy, Mr. Tsingas also stated that "it looks less honerous [sic] . . . and the other hobos are doing it the same way . . . this is the stay below the radar plan. . . ."<sup>377</sup> Mr. Tsingas then suggests that they "set a max [of] 1000 [MWs]. . . ."<sup>378</sup> Our review of the NCMPAIMP-NCMPAEXP trades placed the next day for trade date July 16, 2010 demonstrates that Respondents followed this plan that day, as they did for the majority of the trade dates on this path in the Manipulation Period.<sup>379</sup> After this July 14 discussion, none of Respondents' bids on the NCMPAIMP-

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<sup>373</sup> Of note, Respondents had chosen to utilize free transmission to effectuate UTC trades prior to their implementation of this trading strategy. Thus, Respondents were fully aware of this option. *See infra* P 156.

<sup>374</sup> Tsingas Test. Tr. 383-384.

<sup>375</sup> *See supra* PP 50, 147.

<sup>376</sup> IM from Mr. Tsingas to Mr. Jurco (July 14, 2010, 10:29:39 AM-10:29:45 AM) (JUR01594).

<sup>377</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 14, 2010, 10:29:54 AM –10:30:58 AM) (JUR01594).

<sup>378</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 14, 2010, 10:30:34 AM) (JUR01594).

<sup>379</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPW (January to July 2010).xls.

NCMPAEXP path exceeded 900 MWs.<sup>380</sup> We conclude that these contemporaneous IM communications and the trade data support our conclusion that Respondents' trades were part of a scheme to defraud and that Respondents: (i) knew that their trading was improper; (ii) hoped to hide their behavior from the market and PJM's IMM; and (iii) set and followed parameters in furtherance and support of their fraudulent scheme.

(2) **Pattern**

155. Like Respondents' round-trip and SOUTHIMP-SOUTHEXP trades, the timing and pattern of their NCMPAIMP-NCMPAEXP trades show their fraudulent nature. Respondents' focus on this path during the latter half of July stemmed from Messrs. Tsingas and Jurco's concern that the SOUTHIMP-SOUTHEXP trades would trigger the market monitor's attention. Indeed, Respondents began focusing on NCMPAIMP-NCMPAEXP trades on July 16, 2010, right after Mr. Jurco expressed feeling "really funny" about the SOUTHIMP-SOUTHEXP trades and that "this sure could be great ammo for [the IMM]."<sup>381</sup> On July 16, 2010, Mr. Tsingas expressed preference for the NCMPAIMP-NCMPAEXP trades because they were less obvious, noting that there was "nothing fishy about it."<sup>382</sup>

156. The volumes of Respondents' previous NCMPAIMP-NCMPAEXP trades also differed significantly from their July 2010 volumes. For example, Respondents placed NCMPAIMP-NCMPAEXP trades between February and April 2010, averaging an hourly volume of 211 MWs.<sup>383</sup> In contrast, their average hourly volume during the two-week period in July 2010 that they traded this same path was 2,743 MWs, 13 times larger than the volume in the earlier period.<sup>384</sup> This expanded volume allowed Respondents to collect a greater share of MLSA payments. In addition, during the February-April 2010 period, Respondents reserved free transmission for nearly all of their NCMPAIMP-NCMPAEXP trades by sinking the transmission into MISO.<sup>385</sup> In contrast, during

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<sup>380</sup> *Id.*

<sup>381</sup> IM from Mr. Jurco to Mr. Tsingas (July 14, 2010, 9:57:20 AM) (JUR01590).

<sup>382</sup> IM from Mr. Tsingas to Mr. Jurco (July 16, 2010, 10:12:08 AM) (JUR01614).

<sup>383</sup> *See* CITY POWER LOW VOLATILITY TRANSACTIONS JULY 2010.xls.

<sup>384</sup> *See id.*

<sup>385</sup> *See id.*

July 2010 Respondents voluntarily increased their transaction costs by choosing to pay for transmission so that they would collect MLSA.<sup>386</sup>

(3) **Respondents' NCMPAIMP-NCMPAEXP trades were uneconomic and contrary to the PJM UTC market design purpose**

157. We base our finding that the NCMPAIMP-NCMPAEXP trades were fraudulent on Respondents' purpose for placing such trades, but our decision is consistent with the uneconomic nature of the trades. Although Respondents' underlying NCMPAIMP-NCMPAEXP trades resulted in some spread revenue during the Manipulation Period, the transaction costs on the path were much greater than the revenue, and the underlying trades lost over \$460,000—apart from MLSA.<sup>387</sup> Moreover, Respondents' own experience from the end of January 2010 through early April 2010 demonstrated that this path was not routinely profitable, particularly when transaction costs such as transmission were considered. Specifically, while the underlying trades resulted in a small revenue of \$674, after transaction costs, these transactions resulted in a loss of \$68,000, by City Power's own calculation.<sup>388</sup> The vast majority of these trades were transacted using free transmission which did not qualify those trades for MLSA. Historical data shows that the spread was likely to produce returns close to \$0.<sup>389</sup> Respondents now dispute the accuracy of this historical data and claim they sought to profit based on price spreads. The evidence suggests that this is not the case. No contemporaneous trader communications address the selection of a path based on its likelihood to diverge. Moreover, based on the trade data, we find that Respondents anticipated that any possible spread revenue from their NCMPAIMP-NCMPAEXP trades would not be sufficient to cover their transaction costs.

158. As we explained in *Chen*, Respondents' strategy is improper and fraudulent. Given the communications, trade data, and other evidence presented, we find that Respondents' NCMPAIMP-NCMPAEXP trades did not have as "their sole or primary

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<sup>386</sup> Tsingas Test. Tr. at 383-384.

<sup>387</sup> Record at Staff Doc and Data Submission Mar 13, 2015\Summary spreadsheet\Summary Spreadsheet showing Staff and CPM calcs.xls.

<sup>388</sup> See CITY POWER LOW VOLATILITY TRANSACTIONS JULY 2010.xls.

<sup>389</sup> PJM LMP Data obtained from <https://dataminer.pjm.com/dataminerui/pages/public/lmp.jsf>.

price signal the price risk of the underlying UTC spread” and that they were not “placed with the purpose of profiting based on the direction of the spread.”<sup>390</sup>

159. Had Respondents wanted to benefit from the spread, they could have placed these trades using free transmission, foregoing the MLSA payments but greatly reducing the costs of their trading. Instead, they chose to pay for transmission reservations. Accordingly, we find Respondents followed a trading strategy to further a scheme to collect MLSA payments and that obtaining these MLSA payments was the motivating force behind their trades. For these reasons, we find Respondents’ NCMPAIMP-NCMPAEXP trades to be fraudulent.

**(4) Respondents’ NCMPAIMP-NCMPAEXP deception arguments are unavailing**

160. Respondents argue that their NCMPAIMP-NCMPAEXP trades were not deceptive and without deception there is no fraud.<sup>391</sup> We disagree. Respondents’ fraudulent trades could not and did not provide a benefit to the market. Nonetheless, Respondents placed their trades to conceal their nature and purpose and interfered with the functioning of the PJM market. Specifically, as a result of Respondents’ deception, PJM distributed less in MLSA funds to those market participants who were engaged in behavior supportive of and beneficial to the PJM market and instead provided those MLSA funds to Respondents. We find that the Respondents defrauded PJM into allocating MLSA payments to Respondents by engaging in high volumes of NCMPAIMP-NCMPAEXP trades solely to collect MLSA payments, despite a small price spread between the points.<sup>392</sup> Moreover, Respondents implemented their NCMPAIMP-NCMPAEXP trades in a deceptive manner in an effort to conceal their behavior. For example, referring to the limiting of the amount of traded volumes, Mr. Tsingas stated that “it looks less honerous

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<sup>390</sup> *Chen*, 151 FERC ¶ 61,179, at P 80.

<sup>391</sup> *See* Respondents’ Answer at 109.

<sup>392</sup> *See Chen*, 151 FERC ¶ 61,179 at P 95.

[sic] . . . and the other hobos are doing it the same way . . . this is the stay below the radar plan. . . .”<sup>393</sup> Mr. Tsingas then suggests that they “set a max [of] 1000 [MWs]. . . .”<sup>394</sup>

(d) **Respondents’ three Loss Trade strategies resulted in harm**

161. We reject Respondents’ argument that their actions caused no harm because other market participants were not entitled to MLSA payments. “While we have stated in the abstract that no market participant is entitled to a particular amount of MLSA payments and that PJM need not adopt a particular refund mechanism,”<sup>395</sup> PJM nevertheless filed a MLSA provision that later became effective as part of PJM’s Commission-approved tariff.<sup>396</sup> Under the PJM Tariff’s MLSA provision effective during the Manipulation Period, market participants who paid for transmission service for their transactions were entitled to receive the sum of MLSA payments established by the provision’s Commission-approved hourly calculation. Accordingly, we find that identifiable market participants were harmed by Respondents’ conduct because “they did not receive the MLSA payments they would have received absent Respondents’ unlawful . . . UTC trades, as provided for under the then-effective PJM Tariff’s MLSA provision.”<sup>397</sup> PJM provided calculations that indicated that Respondents collected MLSA payments of over \$2 million, depriving 2 market participants of more than \$200,000 each, 3 of between \$100,000 and \$200,000 each, and 3 of between \$50,000 and \$100,000 each.<sup>398</sup>

162. In addition, we find Respondents’ trades impacted transmission in PJM. Respondents loss trading impacted the availability of transmission from the time they

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<sup>393</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 14, 2010, 10:29:54 AM –10:30:58 AM) (JUR01594).

<sup>394</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 14, 2010, 10:30:34 AM) (JUR01594).

<sup>395</sup> *Chen*, 151 FERC ¶ 61,179 at P 98 (citing *Atlantic City Elec. Co. v. PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,132 at P 24).

<sup>396</sup> *Id.* (citing *Black Oak Energy, L.L.C. et al. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262 at PP 25-26).

<sup>397</sup> *Id.*

<sup>398</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM reallocation analysis (2015)/July2010 simulation of changed MLSA by CTYPWR removal.xlsx.

reserved this transmission service until the time it was released for other market participants' use in the real-time market.

(e) **Respondents had notice that their Loss Trades were fraudulent**

163. We reject Respondents' claim that the Commission failed to provide fair notice that Respondents' trading strategy would be impermissible—and a violation of section 222 of the FPA and the Commission's Anti-Manipulation Rule—because the Commission had not previously proscribed such conduct. Rather, we find that Respondents were on notice that placing uneconomic trades solely for the purpose of collecting MLSA payments violated the FPA and the Anti-Manipulation Rule.

164. Respondents improperly seek to use the fair notice doctrine as a shield to permit the very behavior that Congress sought to prohibit. Broadly written, FPA section 222 explicitly directed the Commission to adopt regulations in furtherance of the public interest and for the protection of electric ratepayers.<sup>399</sup> The Commission's implementing regulation, its Anti-Manipulation Rule, is written similarly broadly to encompass the full and wide variety of fraudulent activity that can occur.<sup>400</sup>

165. Although courts articulate fair notice in slightly different ways, they consistently consider whether a "reasonably prudent person, familiar with the conditions that the regulations are meant to address and the objectives the regulations are meant to achieve, [has] fair warning of what the regulations require."<sup>401</sup> For an agency to fail to provide sufficient notice, the regulation must be so ambiguous that it cannot be interpreted correctly and the agency must have failed to provide guidance before imposition of the penalty.<sup>402</sup>

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<sup>399</sup> 16 U.S.C. § 824v(a) (2012).

<sup>400</sup> See, e.g., *Chen*, 151 FERC ¶ 61,179 at P 116 n.283.

<sup>401</sup> *Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997) (*Freeman*); see also *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (citing *Freeman*); *Moussa I. Korouma, d/b/a Quntum Energy LLC*, 135 FERC ¶ 61,245, at P 34 (2011) (citing *Freeman*).

<sup>402</sup> *United States v. Lachman*, 387 F.3d 42, 57 (1st Cir. 2004); see also *PMD Produce Brokerage Corp. v. USDA*, 234 F.3d 48, 53 (D.C. Cir. 2000).

166. Commission precedent invalidates any claim of ambiguity concerning the scope of our Anti-Manipulation Rule. When the Commission adopted the Anti-Manipulation Rule, it defined fraud generally, that is, to include “any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.”<sup>403</sup> The Commission specifically addressed and rejected arguments that the regulation was vague or overbroad.<sup>404</sup> No entity appealed that decision. To raise the issue now is to collaterally, and thus, impermissibly attack Order No. 670, which the Commission will not entertain.

167. Moreover, Respondents had notice that round-trip trading has long been deemed manipulative and inappropriate in Commission-jurisdictional markets. As noted above, even before the adoption of the Anti-Manipulation Rule, Market Behavior Rule 2(a) prohibited pre-arranged offsetting trades of the same product among the same parties, involving no economic risk and no net change in beneficial ownership—i.e., wash trades.<sup>405</sup> As we explained, that prohibition continues under the Anti-Manipulation Rule.<sup>406</sup> Thus, the market has had notice for more than a decade that wash trading is not permitted (and for at least five years before Respondents’ conduct here), and Respondents had notice that their specific conduct was manipulative and inappropriate.

168. We also reject Respondents’ view that our *Black Oak* orders can be read to authorize Respondents’ fraudulent Loss Trades and that their trades somehow fall within the safe harbor provisions provided by Order No. 670. For the “safe harbor” to be invoked, the action must have been “explicitly contemplated in Commission-approved rules or regulations...”<sup>407</sup> We find that Respondents’ actions were not explicitly contemplated by PJM’s rules and that the Commission did not approve placing

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<sup>403</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

<sup>404</sup> *Id.* PP 30-32; *see also* 17 C.F.R. § 240.10b-5 (2014). And City Power did not dispute those findings when it submitted comments (as part of the Financial Marketers) supporting PJM’s proposal to modify its tariff to prohibit the conduct now under scrutiny here. *See* Motion For Leave to Intervene and Comments of Financial Marketers, Docket No. ER10-2280-000 (filed Sept. 2, 2010).

<sup>405</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 52.

<sup>406</sup> *See* discussion *supra* P 121; Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 59.

<sup>407</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 67.

uneconomic UTC trades solely for the purpose of collecting MLSA payments in the *Black Oak* proceedings and therefore Respondents misinterpret and attempt to misapply the “safe harbor” provision. The *Black Oak* decisions’ holdings focused only on the merits of an MLSA distribution mechanism, and not on how market participants trade UTCs or the ways in which a market participant might manipulate that mechanism. The Commission’s passing mention of the issue in response to third-party comments was not an affirmation of the conduct.<sup>408</sup> Because the Commission’s *Black Oak* orders did not explicitly contemplate trading UTCs for the purpose of capturing MLSA revenues, Respondents cannot now claim to have reasonably concluded that their trades would not be subject to Commission scrutiny. When it is unclear whether conduct would be legal, the risk associated with pursuing that conduct falls on the market participant.<sup>409</sup> Moreover, Respondents’ arguments suggest that they relied on the *Black Oak* decisions as affirmation that their trades were allowed. No one has brought to our attention contemporaneous evidence that Respondents relied on the *Black Oak* decisions when they consummated their trades.

169. We also reject Respondents’ suggestion that they did not have fair notice because the PJM IMM stated that the Loss Trades “did not violate the market rules.” As Respondents properly acknowledge, “compliance with a tariff is not determinative as to whether fraud has occurred.”<sup>410</sup> Moreover, by the time Respondents spoke with the IMM, their Loss Trades had been executed, so there can be no claim of prior reliance.

170. Further, Respondents’ contemporaneous communications reveal that they knew they were engaged in unlawful conduct. For example, Mr. Jurco described the same type of trading conduct by competitors as “playing the rules,”<sup>411</sup> a “game,”<sup>412</sup> and a “high

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<sup>408</sup> See *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042 at PP 38, 43.

<sup>409</sup> See *Chen*, 151 FERC ¶ 61,179 at P 122 (citing *Precious Metals Associates, Inc. v. CFTC*, 620 F.2d 900, 909 (1st Cir. 1980)).

<sup>410</sup> Respondents’ Answer at 109. Respondents instead rely on a conversation to which they were not a party. *Id.* at 114-116.

<sup>411</sup> IM from Mr. Jurco to Employee A (July 23, 2010, 9:27:57 AM) (JUR02100).

<sup>412</sup> IM from Mr. Jurco to Mr. Tsingas (July 26, 2010, 10:17:33 AM) (JUR01691-92).

volume churn.”<sup>413</sup> Mr. Tsingas similarly showed that he understood that the SOUTHIMP-SOUTHEXP trading was unlawful when he complained about competitors, “why can’t you guys stay out of our scam.”<sup>414</sup>

**b. Scienter**

171. Scienter is the second element of the Commission’s Anti-Manipulation Rule.<sup>415</sup> For purposes of establishing scienter, Order No. 670 requires reckless, knowing, or intentional actions taken in conjunction with a fraudulent scheme, material misrepresentation, or material omission.<sup>416</sup>

**i. Respondents’ Answer**

172. Respondents claim that they did not act with the requisite scienter. They assert that the scienter element under federal securities case law requires “‘a mental state embracing intent to deceive, manipulate or defraud,’” and that Respondents did not enter into UTC transactions intending to send inaccurate signals into the market.<sup>417</sup>

173. Respondents also argue that the IM communications between Messrs. Tsingas and Jurco do not prove a fraudulent intent, noting that OE Staff distorts the meaning and context and omits material portions of such communications.<sup>418</sup> Respondents argue that these IM communications show that Respondents (1) believed the relevant UTC trades

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<sup>413</sup> IM from Mr. Jurco to Mr. Tsingas (July 26, 2010, 10:19:02 AM) (JUR01691-92).

<sup>414</sup> IM from Mr. Tsingas to Mr. Jurco (August 5, 2010, 9:51:42 AM) (JUR01798).

<sup>415</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49. Scienter is not an element of a violation of 18 C.F.R. § 35.41(b) (2014). See *Kourouma*, 723 F.3d at 278-79.

<sup>416</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at PP 52-53. Although we need not decide this matter because we find that Respondents indeed acted knowingly and intentionally to deceive the PJM market, we note that Order No. 670 does not require a showing of “extreme recklessness.” *Id.* P 53.

<sup>417</sup> Respondents’ Answer at 128 (quoting *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 104 (2d Cir. 2007)).

<sup>418</sup> *Id.* at 85.

were legal;<sup>419</sup> (2) distinguished their trading conduct with that of their competitors;<sup>420</sup> and (3) expected their SOUTHIMP-SOUTHEXP trades to result in favorable price spreads.<sup>421</sup>

174. Respondents argue further that the fact that a tariff exists that does not proscribe, but “effectively permits,” the relevant conduct is relevant to the issue of scienter.<sup>422</sup> In addition, referring to the *Black Oak* proceeding, Respondents argue that the Commission’s “various statements (or silence in some instances) along the way are highly relevant . . . to . . . whether traders could reasonably be said to have had the requisite subjective scienter for a fraud . . . .”<sup>423</sup>

175. Respondents also dispute OE Staff’s assertion that they have made “‘false denials’ that are evidence of false intent.”<sup>424</sup> Respondents distinguish the cases OE Staff relies on for this argument, stating that those cases involved “an objectively false statement [that] is not present in this case.”<sup>425</sup> Respondents also distinguish those cases by noting that they involved exculpatory statements that were “later proven to be false.”<sup>426</sup>

176. Finally, Respondents argue that, contrary to OE Staff’s assertion, City Power’s participation in the Financial Marketers’ September 2010 Commission filings is not evidence of scienter because these filings came after PJM and PJM’s IMM had already condemned the relevant UTC transactions as fraudulent.<sup>427</sup>

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<sup>419</sup> *Id.* at 86-91.

<sup>420</sup> *Id.* at 91-101.

<sup>421</sup> *Id.* at 101-107.

<sup>422</sup> *Id.* at 109.

<sup>423</sup> *Id.* at 110 (emphasis omitted).

<sup>424</sup> *Id.* at 123 (emphasis omitted).

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* at 124.

<sup>427</sup> *Id.* at 135-136.

**ii. OE Staff Report and Reply**

177. OE Staff argues that City Power and Mr. Tsingas acted with scienter by intentionally implementing a scheme to make unjust profits for themselves.<sup>428</sup> In support of this theory, OE Staff asserts that Respondents' knowledge that they were deceiving the PJM market to collect MLSA payments is reflected in IM communications, Respondents' condemnations of volume trading in Commission filings and testimony, and in Mr. Tsingas' false claim that he had never conducted volume trading.<sup>429</sup> On this last point, OE Staff argues that "it is a 'well-settled principle that false exculpatory statements are evidence—often strong evidence—of guilt.'"<sup>430</sup> Finally, OE Staff also argues that Mr. Tsingas' effort to conceal relevant and damaging IM communications is additional evidence of scienter.<sup>431</sup>

**iii. Commission Determination**

178. We agree with OE Staff that Respondents acted with the requisite scienter in connection with their scheme. We find sufficient evidence demonstrating Respondents' manipulative intent, including contemporaneous IM communications, testimony, trade data, and other evidence, the absence of market fundamentals underlying the UTC trades at issue, and Respondents' deliberate actions to modify the scheme to hide their trading behavior from the IMM. As discussed below, the evidence shows that Respondents, individually and together, knowingly and intentionally participated in a manipulative scheme to place uneconomic trades solely for the purpose of collecting MLSA payments and deceive PJM about the true nature of their transactions, thereby harming the market and other market participants. This evidence satisfies the scienter element by showing that Respondents: (1) clearly stated their purpose to engage in large volume UTC trading solely to collect "losses," or MLSA payments; (2) understood that their strategy was inconsistent with, and improperly obstructed the market design purpose of, UTC trading in PJM; (3) attempted to conceal the nature of their trading scheme to "stay below the radar;"<sup>432</sup> (4) traded UTCs in ways and volumes that differed from their previous trading;

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<sup>428</sup> Staff Report at 82.

<sup>429</sup> *Id.*; Staff Reply at 3.

<sup>430</sup> Staff Report at 69 (quoting *Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010)).

<sup>431</sup> Staff Report at 70.

<sup>432</sup> IM from Mr. Tsingas to Mr. Jurco (July 14, 2010, 10:30:58) (JUR01594).

(5) selected paths that consistently lost money based on price spreads; and (6) attempted to cover up the scheme by thwarting OE Staff's efforts to discover relevant IM communications.<sup>433</sup>

179. *Respondents stated their purpose to trade UTCs to collect losses.* On numerous occasions in contemporaneous IM communications, Messrs. Tsingas and Jurco referred to trading "the losses," and distinguished this trading strategy from the "regular deals," that they also placed.<sup>434</sup> These references to trading "the losses" began the first day they placed their fraudulent UTC trades and continued throughout the month of July. These statements clearly differentiated between what they considered to be their normal trading and trading solely to garner MLSA.<sup>435</sup>

180. *Respondents understood that trading "the losses" improperly conflicted with the market design purpose of UTC trading in PJM.* Respondents' testimony and contemporaneous IM communications reveal that they understood that the purpose in

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<sup>433</sup> We are also persuaded by OE Staff's argument that Respondents' scienter is further shown by their creation of false exculpatory statements—including their assertion that their round-trip trades were part of an optionality strategy—for which there is no evidentiary support contemporaneous with the relevant trading conduct and no credible evidentiary support.

<sup>434</sup> See, e.g., IM Conversation Between Mr. Tsingas and Mr. Jurco (July 3, 2010, 10:56:13 AM-10:59:39 AM) (JUR01530) (noting that competitors were doing "both sides to collect losses," and deciding that "we'll try it for a few days and see the payout"); IM from Mr. Tsingas to Mr. Jurco (July 13, 2010, 9:31:48 AM) (JUR01588) (after engaging in round-trip and SOUTHIMP-SOUTHEXP UTC trades for a combined hourly volume of 2,000 MWs, noting that "these losses paid well the few days we had 2,000 mw's"); IM from Mr. Tsingas to Mr. Jurco (July 16, 2010, 10:11:19 AM) (JUR01614) ("I figure tomorrow is hot so we should do the losses"); IM from Mr. Tsingas to Mr. Jurco (July 19, 2010, 8:31:12 AM) (JUR01635) ("lets get the losses stuff right now, we're going to need it"); IM from Mr. Tsingas to Mr. Jurco (July 22, 2010, 9:21:38 AM) (JUR01666) ("same mode, you do the regular deals I'll do the losses?"); IM Conversation Between Mr. Tsingas and Mr. Jurco (July 26, 2010, 9:14:06 AM-9:14:19 AM) (JUR01687) (planning the next trading day for Mr. Tsingas to trade "losses," referring to NCMPAIMP-NCMPAEXP, and for Mr. Jurco to trade the "rest").

<sup>435</sup> In addition to these contemporaneous statements, Mr. Jurco testified that he and Mr. Tsingas engaged in the round-trip, SOUTHIMP-SOUTHEXP, and NCMPAIMP-NCMPAEXP UTC trades for the purpose of collecting MLSA payments. Jurco Test. Tr. 52, 159, 169, 172-173.

placing UTC trades to collect MLSA ran contrary to, and obstructed, the market design purpose of UTC trading in PJM.

181. Respondents' testimony similarly shows that they understood the arbitrage-based purpose of UTC trading in PJM. Mr. Tsingas testified, for example, that before the Manipulation Period, he had traded UTCs for years to engage in "weather arbitrage between different points . . . looking at generation outages and then looking at transmission outages."<sup>436</sup> Mr. Tsingas testified further that he sought to trade UTCs between points where he anticipated that the spread would widen substantially between the day-ahead and real-time markets.<sup>437</sup> As Mr. Tsingas testified, this type of UTC spread trading is difficult, requiring fundamentals-based, sophisticated analyses regarding weather, generator and transmission outages, and historical data.<sup>438</sup>

182. Further, Respondents' contemporaneous IM communications confirm that they understood their Loss Trades were contrary to the purpose of UTC trading in PJM. On multiple occasions, Messrs. Tsingas and Jurco expressed concern that PJM's IMM would not approve of their Loss Trades. For example, on July 6, 2010, Mr. Tsingas told Mr. Jurco that he would do the SOUTHIMP-SOUTHEXP "until market monitoring yells at us."<sup>439</sup> Later, on July 14, 2010, Mr. Jurco told Mr. Tsingas that he felt "really funny about the southimp-southexp," and that "this sure could be great ammo for [the PJM IMM]."<sup>440</sup> On July 26, 2010, Mr. Jurco acknowledged the legal risk associated with conducting the round-trip trades, noting "you get rid of the round trips and we have no exposure at all in my opinion."<sup>441</sup> Similarly, on July 30, 2010, Mr. Tsingas stated that "[the PJM IMM] could've ripped into me for the SIMP-SEXP and the round trip ovec stuff."<sup>442</sup> Respondents would not have expressed these concerns about PJM's IMM—the

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<sup>436</sup> Tsingas Test. Tr. at 41.

<sup>437</sup> *Id.* at 56.

<sup>438</sup> *Id.* at 46-47, 53-54, 58-59, 61-62, 95, 148-49, 268-69, 359, 361, 375-76.

<sup>439</sup> IM from Mr. Tsingas to Mr. Jurco (July 6, 2010, 11:09:11 AM) (JUR01550).

<sup>440</sup> IM from Mr. Jurco to Mr. Tsingas (July 14, 2010, 9:56:31 AM-9:57:20 AM) (JUR01590).

<sup>441</sup> IM from Mr. Jurco to Mr. Tsingas (July 26, 2010, 10:18:35 AM) (JUR01692).

<sup>442</sup> IM from Mr. Tsingas to Mr. Jurco (July 30, 2010, 11:20:24 AM) (JUR01740).

individual responsible for detecting and reporting potentially unlawful conduct—if they thought their conduct was proper and consistent with the purpose of UTC trading in PJM.

183. Likewise, Respondents’ contemporaneous statements about the same trading conduct by competitors provides further evidence that they understood that their purpose in placing UTC trades ran contrary to, and obstructed, the market design purpose of UTC trading in PJM. When Mr. Jurco discovered, for example, that some of City Power’s competitors were making “net flat” round-trip UTC trades, he described them as “dirty dirty.”<sup>443</sup> Similarly, Mr. Jurco described this type of conduct by competitors as “playing the rules,”<sup>444</sup> a “game,”<sup>445</sup> and a “high volume churn.”<sup>446</sup> Mr. Tsingas similarly described SOUTHIMP-SOUTHEXP trading by competitors as a “scam.”<sup>447</sup>

184. The Commission finds unavailing Respondents’ argument that, in these IMs, City Power was distinguishing their trading conduct with that of their competitors.<sup>448</sup> These communications were discussing the same type of trading (and same purpose for such trading) as City Power’s trading; these communications referred directly to their competitors’ round-trip and SOUTHIMP-SOUTHEXP trades, and noted their competitors did these trades “to collect losses.”<sup>449</sup>

185. Respondents’ assertion that these IM communications showed they believed the relevant UTC trades were legal, even if dirty, also is without merit.<sup>450</sup> There would be no reason for Respondents to express concern that the PJM IMM would not approve of these trades if they believed their trades were completely legal. Moreover, we are not

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<sup>443</sup> IM from Mr. Jurco to Mr. Tsingas (July 3, 2010, 10:58:11 AM-10:58:20 AM) (JUR01530).

<sup>444</sup> IM from Mr. Jurco to Employee A (July 23, 2010, 9:27:57 AM) (JUR02100).

<sup>445</sup> IM from Mr. Jurco to Mr. Tsingas (July 26, 2010, 10:17:33 AM) (JUR01691).

<sup>446</sup> IM from Mr. Jurco to Mr. Tsingas (July 26, 2010, 10:19:02 AM) (JUR01692).

<sup>447</sup> IM from Mr. Tsingas to Mr. Jurco (August 5, 2010, 9:51:42 AM) (JUR01798).

<sup>448</sup> Respondents’ Answer at 91-101.

<sup>449</sup> See, e.g., IM from Mr. Tsingas to Mr. Jurco (July 3, 2010, 10:52:03 AM-10:56:13 AM) (JUR01529-1530) (referring to a competitor “doing all those mw’s to collect losses,” and noting that a competitor did “both sides to collect losses”).

<sup>450</sup> Respondents’ Answer at 86-91.

persuaded by the argument that Respondents did not intend to engage in unlawful trading behavior. Scienier does not require evidence that Respondents intended to break the law, but, rather, only that they intended to take certain actions and knew the consequences of such actions.<sup>451</sup> Respondents intended to trade UTCs in PJM in a way that eliminated or minimized risk from price spreads in order to obtain transmission and profit solely from MLSA payments, and they understood the consequences of trading on this basis—that they would be able to draw a greater share of MLSA payments at the expense of other market participants. It is this intent that matters for purposes of establishing scienter.

186. Finally, in September 2010, two months after the Manipulation Period and one month after learning of OE Staff's investigation, City Power joined other virtual traders in a Commission filing that advised the Commission that virtual trading serves an "extremely valuable purpose" by "alleviat[ing] price uncertainty," "reduc[ing] congestion," and "lower[ing] prices."<sup>452</sup> These virtual traders further advised that "[v]irtual transactions, including Up-To Congestion trading, help[] reduce price differences between the Day-Ahead and Real Time markets, thus reducing the incentive for buyers and sellers to forego bidding physical schedules in the Day-Ahead Market in expectation of better prices in the RealTime Market."<sup>453</sup> These purposes are achieved through fundamentals-based arbitrage trading, not trades aimed at eliminating any arbitrage opportunities to profit solely from a collateral (MLSA) benefit.

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<sup>451</sup> *Pittsburgh Terminal Corp. v. The Baltimore and Ohio Railroad Co.*, 680 F.2d 933, 942 (3d Cir. 1982) ("A violation of Section 10(b) does not require a specific intention to break the law. It requires only knowing or intentional actions which, objectively examined, amount to a violation."); *SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 77 (D.C. Cir. 1980) ("Knowledge means awareness of the underlying facts, not the labels that the law places on those facts. Except in very rare instances, no area of the law not even the criminal law demands that a defendant have thought his actions were illegal. A knowledge of what one is doing and the consequences of those actions suffices.").

<sup>452</sup> Motion for Leave to Intervene and Comments of Financial Marketers, Docket No. ER10-2280-000, at 10-11 (filed Sept. 2, 2010).

<sup>453</sup> *Id.* at 11. It makes no difference, as Respondents argue, that these statements came after PJM's IMM condemned Respondents' Loss Trades. These statements, combined with their prior actions and statements, show that Respondents understood the purpose of UTC trading, and it is not credible to believe that they did not know of and understand this purpose two months earlier while making the relevant trades.

187. *Respondents attempted to conceal their Loss Trades.* Respondents further demonstrated a manipulative intent through their attempt to conceal the nature of their trading to, as Mr. Tsingas put it, “stay below the radar.”<sup>454</sup> On July 14, 2010, Respondents decided to stop placing the SOUTHIMP-SOUTHEXP trades after Mr. Jurco expressed feeling “really funny” about them.<sup>455</sup> The next day, Respondents started replacing the SOUTHIMP-SOUTHEXP trades with their NCMPAIMP-NCMPAEXP trades. On July 16, 2010, Mr. Tsingas expressed preference for the NCMPAIMP-NCMPAEXP trades because they were less obvious, noting, “I love the NCMPAIMP-exp,” and that there was “nothing fishy about it.”<sup>456</sup> And, Mr. Tsingas took steps to make the trades less obvious, telling Mr. Jurco, for example, that they should reserve transmission “in small blocks if possible,” and set a “max [of] 1000 for any deal.”<sup>457</sup> This was part of his “stay below the radar plan.”<sup>458</sup> These attempts to conceal the nature of their trades are additional evidence of Respondents’ manipulative intent.<sup>459</sup>

188. *Respondents’ loss trading differed from their previous UTC trading.* Respondents’ scienter is also reflected in differences between their Loss Trades and their previous UTC trading. Under their prior UTC trading, which lasted from 2006 through June 2010, Respondents traded UTCs solely for the purpose of arbitraging price spreads.<sup>460</sup> In contrast, starting in July 2010, Respondents added the Loss Trades to its UTC trading and sought, with these Loss Trades, to eliminate or minimize price spreads and profit solely from MLSA. In addition, in order to become eligible to receive MLSA, City Power voluntarily increased the transaction costs for many of its Loss Trades by reserving paid transmission when it could have opted for free transmission without any

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<sup>454</sup> IM from Mr. Tsingas to Mr. Jurco (July 14, 2010, 10:30:58) (JUR01594).

<sup>455</sup> IM from Mr. Jurco to Mr. Tsingas (July 14, 2010, 9:56:31AM) (JUR01590).

<sup>456</sup> IM from Mr. Tsingas to Mr. Jurco (July 16, 2010, 10:12:01 AM-10:12:08 AM) (JUR01614).

<sup>457</sup> IM from Mr. Tsingas to Mr. Jurco (July 14, 2010, 10:29:39 AM-10:30:34 AM) (JUR01594).

<sup>458</sup> IM from Mr. Tsingas to Mr. Jurco (July 14, 2010, 10:30:58 AM) (JUR01594).

<sup>459</sup> See *SEC v. Svoboda*, 409 F. Supp. 2d 331, 341 (S.D.N.Y. 2006) (holding that defendants in securities fraud case “acted with a high degree of scienter,” based, in part, on its finding that they took “numerous steps . . . to conceal their illegal activity”).

<sup>460</sup> Tsingas Test. Tr. at 56.

MLSA disbursement. Indeed, City Power paid close to one million dollars (\$996,542) for paid transmission during July 2010.<sup>461</sup> In contrast, City Power paid an average of only \$211,869 per month for paid transmission during May, June, and August 2010.<sup>462</sup> Mr. Tsingas admitted that he understood that he could have used free transmission and opted to pay for it in July 2010 so he would become eligible for MLSA.<sup>463</sup>

189. The volumes of Respondents' previous UTC trading also differed significantly from their July 2010 volumes. For example, Respondents placed NCMPAIMP-NCMPAEXP trades between February and April 2010, averaging an hourly volume of 211 MWs.<sup>464</sup> In contrast, their average hourly volume during the two-week period in July 2010 that they traded this same path was 2,743 MWs, 13 times larger than the volume in the earlier period.<sup>465</sup> This large increase reveals Respondents' intent to engage in sheer volume trading for the purpose of garnering MLSA payments with little exposure from price spreads.

190. *Lack of market fundamentals underlying Respondents' Loss Trades.* Scierter is also shown in the absence of market fundamentals underlying each of the three categories of Loss Trades. The paths in these trades consistently failed to produce profits when evaluated based on their price spreads and transaction costs. With the exception of four hours, Respondents' round-trip trades were net flat, such that their trading produced no revenue based on price spreads alone. Similarly, Mr. Tsingas placed SOUTHIMP-SOUTHEXP trades on eight days between July 5 and July 14, 2010, even though he knew the spread between these points "settl[ed] at \$0 all the time."<sup>466</sup> In addition, City Power's previous trades on the NCMPAIMP-NCMPAEXP path (between February 3 and April 19, 2010) had experienced average spread changes of two-tenths of

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<sup>461</sup> See July 2010 PJM Bill, CTYPWR\_070110\_073110\_BILLPDF\_O[1].pdf.

<sup>462</sup> See May 2010 PJM Bill, CTYPWR\_050110\_053110\_BILLPDF\_O.pdf; June 2010 PJM Bill, CTYPWR\_060110\_063910\_BILLPDF\_O.pdf; August 2010 PJM Bill, CTYPWR\_080110\_083110\_BILLPDF\_O[1].pdf.

<sup>463</sup> Tsingas Test. Tr. at 383-384.

<sup>464</sup> See CITY POWER LOW VOLATILITY TRANSACTIONS JULY 2010.xls.

<sup>465</sup> See *id.*

<sup>466</sup> IM from Mr. Tsingas to Mr. Jurco (July 5, 2010, 9:25:16 AM) (JUR01538).

a penny, which, when combined with transaction costs, resulted in losses of more than \$68,000.<sup>467</sup>

191. *Respondents attempted to cover up relevant IMs about their Loss Trades.* Respondents' attempt to block OE's Staff's efforts to discover relevant IM communications, described in greater detail below, provides further evidence of their scienter. City Power, through Mr. Tsingas, engaged in a series of misrepresentations, false statements, and material omissions regarding IMs between September 2010 and November 2011, in an attempt to cover up its intent in placing the Loss Trades. This attempted cover-up is a strong indicator of Respondents' manipulative intent.<sup>468</sup>

192. *Conclusion.* Therefore, in light of the foregoing evidence, we find that City Power and Mr. Tsingas each acted with the requisite scienter to satisfy the requirements of section 222 of the FPA and the Anti-Manipulation Rule.

**c. In Connection with a Jurisdictional Transaction**

193. The third element of establishing a violation under FPA section 222 and the Commission's Anti-Manipulation Rule is determining whether the conduct in question was "in connection with" a transaction subject to the Commission's jurisdiction.<sup>469</sup> Section 201(b)(1) of the FPA confers jurisdiction on the Commission over "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce."<sup>470</sup>

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<sup>467</sup> See PJM Data; CITY\_DR31.xla; CITY POWER LOW VOLATILITY TRANSACTIONS JULY 2010.xls.

<sup>468</sup> *In re Nature's Sunshine Prods. Sec. Litig.*, 486 F. Supp. 2d 1301, 1310 (D. Utah 2007) ("Evidence that a defendant has taken steps to cover-up a misdeed is strong proof of scienter."); see also *Nathanson v. Polycom, Inc.*, 2015 WL 1517777, \*9 (N.D. Ca. 2015) (finding that defendant would not have made efforts to "hide . . . inappropriate expense claims without intent to defraud"); *Szulik v. Tagliaferri*, 966 F. Supp. 2d 339, 366 (S.D.N.Y. 2013) (finding that the complaint sufficiently alleged scienter in a securities fraud action, based, in part, on the allegation that defendants "prepar[ed] backdated invoices" in an effort to "cover[] their tracks").

<sup>469</sup> 16 U.S.C. § 824v(a) (2012); 18 C.F.R. § 1c.2 (2014).

<sup>470</sup> 16 U.S.C. § 824(b)(1) (2012).

**i. Respondents' Answer**

194. Respondents argue that the Commission lacks jurisdiction over their UTC trades at issue in this proceeding. In support of this argument, they claim that virtual transactions, including UTC trades, do not result in the transmission or delivery of electric energy.<sup>471</sup> They also assert that jurisdiction is not established by virtue of the relevant trades occurring in an ISO, arguing that “[j]urisdiction rests on the characteristics of the transaction, not on the platform where it was executed.”<sup>472</sup> Respondents further contend that the Commission lacks “in connection with” jurisdiction over Respondents’ Loss Trades because the trades did not result in any price convergence and, thus, there was no potential to affect physical electricity prices.<sup>473</sup> Similarly, Respondents argue that their UTC transactions did not negatively impact jurisdictional markets because their transmission reservations did not impact other market participants’ entitlement to MLSA or prevent others from obtaining transmission.<sup>474</sup>

**ii. OE Staff Report and Reply**

195. OE Staff asserts that Respondents’ conduct falls within the Commission’s jurisdiction for at least two reasons. First, the Commission has well-established authority to regulate virtual transactions, including UTC trades in PJM, because such transactions potentially affect the price and transmission of physical electricity.<sup>475</sup> In support, OE Staff argues that Respondents’ UTC transactions are an integral part of PJM’s day-ahead model and, therefore, play an important role in setting day-ahead prices.<sup>476</sup> Second, OE Staff argues that the Commission has jurisdiction over Respondents’ UTC transactions by virtue of Respondents’ reservation and purchase of jurisdictional transmission service in connection with those transactions.<sup>477</sup>

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<sup>471</sup> Respondents’ Answer at 69-70.

<sup>472</sup> *Id.* at 70-71.

<sup>473</sup> *Id.* at 71-72.

<sup>474</sup> *Id.* at 72-73.

<sup>475</sup> Staff Report at 82; Staff Reply at 64-66.

<sup>476</sup> Staff Report at 82-83 (quoting *Cal. Indep. Sys. Operator Corp.*, 110 FERC ¶ 61,041, at P 31 (2005)).

<sup>477</sup> *Id.* at 82; Staff Reply at 64.

196. Moreover, OE Staff avers that the Commission has authority to penalize Respondents for their UTC trades because they were “in connection with” jurisdictional transactions within the meaning of FPA section 222.<sup>478</sup> Specifically, OE Staff asserts that because UTCs were created by a Commission-approved tariff, are traded in a Commission-approved RTO market, and have the potential to affect physical electricity prices, the Commission has authority to penalize them under the Anti-Manipulation Rule.<sup>479</sup> Finally, OE Staff argues that Respondents’ reservations of huge volumes of transmission affected other market participants’ available capacity, even if temporarily.<sup>480</sup>

197. In response to Respondents’ argument that the Loss Trades did not affect prices because they did not result in price convergence, OE Staff points out that the Commission’s authority is not based on “specific outcomes of individual transactions,” but on “*categories* of transactions,” including virtual trades.<sup>481</sup> In response to Respondents’ argument that their trades had no impact because other market participants were not entitled to MLSA, OE Staff notes that the Commission stated, “*as an initial matter,*” that PJM had flexibility to determine how best to distribute MLSA, but that “*once a particular distribution method was approved,* market participants had a right to their share of that money under that method.”<sup>482</sup>

### iii. Commission Determination

198. We find that the Commission has jurisdiction over Respondents’ UTC trading during the Manipulation Period. Our jurisdiction extends to the transmission or sale of electric energy at wholesale in interstate commerce,<sup>483</sup> as well as the responsibility to ensure that rates and charges for transmission and wholesale power sales are just and reasonable and not unduly discriminatory or preferential.<sup>484</sup> Moreover, the Court of

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<sup>478</sup> Staff Report at 83.

<sup>479</sup> *Id.*

<sup>480</sup> *Id.* at 84.

<sup>481</sup> Staff Reply at 67 (emphasis in original).

<sup>482</sup> *Id.* at 70 (emphasis in original).

<sup>483</sup> 16 U.S.C. § 824(b) (2012).

<sup>484</sup> Section 205(a) of the FPA charges the Commission with ensuring that rates and charges for jurisdictional sales by public utilities and “all rules and regulations affecting or pertaining to such rates or charges” are just and reasonable. *Id.* § 824d(a).

Appeals for the District of Columbia Circuit has affirmed in recent years that the Commission has “authority [under the FPA] to regulate the activity of traders who participate in energy markets.”<sup>485</sup>

199. Respondents engaged in UTC trades within PJM’s energy market; their UTC transactions, associated transmission service reservations, and MLSA payments were implemented under PJM’s Commission-approved tariff.<sup>486</sup> Thus, by virtue of engaging in UTC transactions and benefiting from MLSA allocation, both of which operated under a Commission-approved tariff within PJM, a Commission-regulated RTO, we find the UTC trades at issue are under our jurisdictional purview.

200. Also, virtual transactions, including UTC transactions, are integral to the operation and settlement of Commission-jurisdictional wholesale markets.<sup>487</sup> In the context of the California Independent System Operator’s convergence bidding (virtual bidding), the Commission explained that:

[t]o participate in virtual bidding, a participant is required to submit virtual bids in the same way and at the same time as all other day-ahead bids. Virtual bids are cleared along with those other bids, and can affect the outcomes of the settlement of the day-ahead physical market. Therefore, virtual bids can be seen as a substitute for bids for physical power.<sup>488</sup>

201. The Commission has explained that it has jurisdiction over practices that affect rates and because “convergence bidding affects the market clearing price for wholesale power by determining, in conjunction with other bids, the unit that sets the market

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Section 206(a) gives the Commission authority over rates and charges by public utilities for jurisdictional sales as well as “any rule, regulation, practice or contract affecting such rates and charges” to make sure that they are just and reasonable and not unduly discriminatory or preferential. *Id.* § 824e(a).

<sup>485</sup> *Kourouma*, 723 F.3d at 276.

<sup>486</sup> *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262; *PJM Interconnection, L.L.C.*, 91 FERC ¶ 61,148 (2000); *Atlantic City Elec. Co.*, 86 FERC ¶ 61,147 (1999).

<sup>487</sup> *Cal. Indep. Sys. Operator Corp.*, 108 FERC ¶ 61,254, at P 74 (2004).

<sup>488</sup> *Id.*

clearing price, the Commission has statutory authority over this type of bidding to ensure that the rates it produces are just and reasonable.”<sup>489</sup> Therefore, we conclude that we have jurisdiction over Respondents’ virtual product trades conducted during the Manipulation Period.

202. Further, Respondents’ Loss Trades involved the reservation of jurisdictional transmission services within the PJM market. At the time of the transactions at issue in this proceeding, all UTC transactions were required to reserve transmission service and, as such, Respondents scheduled non-firm transmission service. As explained above, transmission of energy is within the Commission’s jurisdiction. Moreover, the Commission’s jurisdiction over transmission is extremely broad.<sup>490</sup> We reject the argument that this transmission service is not physical transmission and therefore not jurisdictional because it did not result in actual delivery of electric energy. Respondents’ UTC bids and associated transmission service reservations were integral to the settlement of PJM’s day-ahead market, regardless of whether the transmission reservation ultimately involved delivery of physical energy.

203. Apart from our direct jurisdiction, Respondents’ conduct also was “in connection with” other market participants’ jurisdictional transactions such that the necessary jurisdictional nexus under FPA section 222 is satisfied on this basis. We have noted that the “in connection with” element encompasses “situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction.”<sup>491</sup> Even where underlying fraudulent transactions do not involve the transmission or sale of electric energy in interstate commerce, they nonetheless can fall within the ambit of our jurisdiction if “the entity . . . intend[s] to affect, or . . . act[s] recklessly to affect, a jurisdictional transaction.”<sup>492</sup> We find that Respondents’ UTC transactions and associated transmission service reservations affected the amount of transmission service available to other market participants to use for their transactions, including physical

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<sup>489</sup> *Cal. Indep. Sys. Operator Corp.*, 110 FERC ¶ 61,041 at P 31.

<sup>490</sup> *New York v. FERC*, 535 U.S. 1, 16-17 (2002) (noting that the Commission has jurisdiction over the entire transmission grid).

<sup>491</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 22; *see also Barclays*, 144 FERC ¶ 61,041 at P 113; *BP America Inc.*, 147 FERC ¶ 61,130, at P 23 (2014); *Chen*, 151 FERC ¶ 61,179 at P 148.

<sup>492</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 22.

power sales.<sup>493</sup> We further find that their UTC transactions altered the amount of MLSA payments that otherwise would have been distributed to other market participants pursuant to the applicable PJM tariff provision. We find each of these contacts with transactions subject to the Commission's jurisdiction is a sufficient nexus to establish jurisdiction under FPA section 222.

**2. City Power's Violation of 18 C.F.R. § 35.41(b)**

204. Section 35.41(b) of the Commission's regulations provides:

A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.<sup>494</sup>

**a. Respondents' Answer**

205. Respondents characterize Mr. Tsingas' failure to mention the IMs in his October 2010 testimony as a deliberate choice to tell only the literal truth—"toe the narrowing line between completeness and accuracy of their answers while also avoiding the submission of any misleading information."<sup>495</sup> However, Respondents alternatively suggest that the same testimony was likely accidental, urging a "common sense conclusion that [any inaccuracy] was simply the result of [Mr. Tsingas'] lack of knowledge or (maybe) faulty recollection, and nothing more nefarious."<sup>496</sup> Respondents liken the failure to mention or produce any IMs to inadvertent "'data errors and omissions'" which the Commission has recognized sometimes occur in data-intensive

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<sup>493</sup> We reject Respondents' argument that their trades did not prevent others from obtaining transmission. As OE Staff correctly points out, a finite amount of transmission capacity exists on the PJM OASIS system, and market participants compete to reserve such capacity. Even though later released, Respondents' reservations prevented others from obtaining transmission for at least some period of time.

<sup>494</sup> 18 C.F.R. § 35.41(b) (2014).

<sup>495</sup> Respondents' Answer at 141-142; 152.

<sup>496</sup> *Id.* at 157-158.

investigations with large volumes of documents.<sup>497</sup> Respondents also suggest that Mr. Tsingas may not have even remembered that archived IMs existed, calling his August 19, 2010, conversation with Mr. Jurco “nothing more than a blip on Mr. Tsingas understandably congested radar.”<sup>498</sup>

206. Respondents argue that the IMs at issue were immaterial to OE Staff’s ability to understand and interpret Respondents’ trading strategy. Respondents contend that OE Staff otherwise engaged in voluminous discovery and “had everything it needed prior to Jurco’s production of his IM archives,” pointing out that OE Staff largely bases its manipulation allegations on facts discussed in Mr. Tsingas’ October 2010 testimony.<sup>499</sup> In support, Respondents cite the Commission’s order in *Cobb Customer Requesters v. Cobb Electric Membership Corp.* regarding the materiality of omissions.<sup>500</sup> Respondents also argue that Mr. Tsingas had no motive to conceal the IMs, because of his candor in other channels of investigative discovery regarding City Power’s trading.

207. In addition, Respondents argue that their statements to OE Staff were “literally true” in several respects: Respondents contend that Mr. Tsingas’ statements regarding IM retention were true in that “the Company itself did not keep such records” because City Power did not possess the IMs archived by Mr. Jurco on his company computer.<sup>501</sup> Respondents contend that Mr. Tsingas testified accurately by “speaking in the present tense” regarding City Power’s system settings for message retention as of the date of his

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<sup>497</sup> *Id.* at 141-142 (citing *Edison Mission*, 123 FERC ¶ 61,170, at P 9 (2008)). Respondents call their conduct “less than ideal processing of huge amounts of discovery . . . which resulted primarily from the messiness and complications of today’s digital age.” Respondents’ Answer at 10.

<sup>498</sup> City Power Response to Preliminary Findings, at 38 (Nov. 4, 2013).

<sup>499</sup> Respondents’ Answer at 137-140; *see also id.* at 156 (“Apparently, eventually, Staff got what they were looking for – which calls into question the materiality of this entire claim.”).

<sup>500</sup> 136 FERC ¶ 61,084, at P 51 (2011) (rejecting complaint regarding certain omissions from market based rate application as immaterial because none of the omissions were “germane to the factors the Commission considers when evaluating market-based rate applications.”).

<sup>501</sup> Respondents’ Answer at 156. Respondents assert that the “IM archives were Mr. Jurco’s personal property,” not in City Power’s possession. They further claim that Mr. Jurco’s transmission of his archives to City Power’s attorney did not confer possession on City Power. *Id.* at 147-151.

testimony.<sup>502</sup> Respondents contend that Mr. Tsingas did not lie to staff when he denied making any “attempt to see if they had instant messages on their system,” because the definition of “attempt” does not encompass Mr. Tsingas’ passively receiving the same information from Mr. Jurco, unsolicited, two months earlier.<sup>503</sup>

208. Respondents allege that Mr. Tsingas “reasonably believed that all responsive documents had been produced to staff” in response to the November 2010 Data Requests, and claim he was “quite surprised” when OE Staff inquired in 2011 about the lack of any IMs.<sup>504</sup>

209. Respondents blame Mr. Jurco for impairing their ability to respond to OE Staff’s June 2011 data requests, alleging that he was estranged from the company in the fall of 2011, refused to turn over his company computer, and that he urged Mr. Tsingas to lie to OE Staff about why City Power had not previously produced any IMs.<sup>505</sup> Respondents explain that Mr. Tsingas “narrowly tailored answers” during his testimony because he was “[a]fraid of what Mr. Jurco might say or do,” including lie to staff about why the messages were not previously produced.<sup>506</sup>

210. Respondents argue that their November 2011 narrative response to OE Staff’s Data Request “suggested that Mr. Jurco might have access to messages if they did exist and that Staff might need to reach out to Mr. Jurco directly for further investigation.”<sup>507</sup> Respondents also contend that although Mr. Jurco mentioned to Mr. Tsingas in August 2010 that Mr. Jurco had been ““looking through [his] IM archives,”” they “could only say

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<sup>502</sup> *Id.* at 152-154. (“Staff *did not ask* whether and of Mr. Tsingas’ colleagues had *previously archived* or whether they might *possess any archives.*”) (emphasis in original).

<sup>503</sup> *Id.* at 155-156.

<sup>504</sup> *Id.* at 161-162. However, as explained above, Respondents alternately suggest that Mr. Tsingas may not have ever known responsive IMs existed.

<sup>505</sup> *Id.* at 159-161, 164-165, and 168; City Power Response to Preliminary Findings, at 40-42 (Nov. 3, 2013).

<sup>506</sup> Respondents’ Answer at 161.

<sup>507</sup> *Id.* at 162.

with certainty what they themselves had done” and “had no reliable information regarding what efforts Mr. Jurco had made to locate his instant messages.”<sup>508</sup>

**b. Staff Report and Reply**

211. OE Staff argues that City Power (through Mr. Tsingas) made numerous false and misleading statements and material omissions regarding responsive IMs, which were “plainly an intentional coverup” to obstruct the investigation.<sup>509</sup> OE Staff argues that the IMs at issue were material, calling them “a centerpiece of the Staff Report, [providing] strong evidence of Tsingas’ and City Power’s scienter, and [contradicting] Tsingas’ post hoc accounts of the reasons for his trades.”<sup>510</sup>

212. OE Staff asserts that, as of August 19, 2010, Mr. Tsingas knew that Mr. Jurco had archived his IMs, and knew those archives included conversations relevant to the intent behind the UTC trading under investigation.<sup>511</sup> OE Staff therefore argues that Mr. Tsingas gave false testimony in October 2010 when, among other things, he answered “I don’t think we do” in response to being asked about his knowledge of whether City Power keeps records of IMs, and “I don’t believe they do” when being asked whether others (including Mr. Jurco) archived IMs locally.<sup>512</sup>

213. OE staff also claims that City Power made material false statements and omissions by certifying that its December 2010 data responses were complete, despite the lack of a single responsive IM.<sup>513</sup> To argue that the false statements were part of an intentional cover-up, OE Staff offers the corroborating testimony of Mr. Jurco and an anonymous former City Power partner that Mr. Tsingas and Mr. Jurco conspired to deliberately avoid producing IMs and to ensure that the company’s new counsel was not aware of saved

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<sup>508</sup> *Id.* at 163-164 (citation omitted).

<sup>509</sup> Staff Reply at 45.

<sup>510</sup> *Id.* at 3. OE Staff explains that the IMs at issue were material, in part because “speaking documents such as Tsingas’ IMs can (and here do) provide important insights into why a trader placed particular transactions.” *Id.* at 43 n. 93.

<sup>511</sup> Staff Report at 52-53; Staff Reply at 44.

<sup>512</sup> Staff Report at 55-57.

<sup>513</sup> *Id.* at 59.

IMs.<sup>514</sup> OE Staff dismisses the possibility that omitting the IMs was an inadvertent oversight, stating that Mr. Tsingas “could have discovered with minimal ‘diligence,’ (e.g. by asking Jurco, his IT colleague, or his counsel) that City Power was not producing the IMs.”<sup>515</sup>

214. OE Staff further argues that City Power made false and intentionally deceptive representations in November 2011 responses to data requests.<sup>516</sup> OE Staff notes that its November 2011 Data Request asked broadly for “all efforts” since 2009 to locate IMs, regardless of whether they were on company computers.<sup>517</sup> OE Staff suggests that City Power’s response regarding the IM retention settings used by Mr. Jurco was false and misleading because it “implies that, after due diligence, City Power’s search gave it no reason to believe there was responsive material to be produced.”<sup>518</sup> OE Staff criticizes City Power for silently excluding Mr. Jurco (a City Power partner) in its written response to OE Staff stating that “[n]o instant messages were in the possession of City Power Marketing that were responsive to any prior data request at any time since [August 2010].”<sup>519</sup>

215. OE Staff also alleges that in their November 2013 response to preliminary findings, City Power continued to make false and misleading statements regarding the IMs, in an attempt to blame Mr. Jurco for City Power’s failure to request his computer or IMs.<sup>520</sup> OE Staff infers that, in preparing their November 2013 data responses,

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<sup>514</sup> *Id.* at 57-59; Staff Reply at 51, 55-56. OE Staff suggests it is unlikely that Mr. Jurco unilaterally orchestrated a coverup, citing evidence that Mr. Tsingas and Mr. Jurco were cooperative partners and good friends, and spoke at length whenever there were significant developments in the investigation. Staff Reply at 51-54. OE Staff states that the “ultimate decision, of course, was with Tsingas, who controlled City Power and dealt with the firm’s attorneys in responding to the then-pending data requests.” Staff Reply 55.

<sup>515</sup> Staff Reply at 50.

<sup>516</sup> Staff Report at 59-65.

<sup>517</sup> Staff Reply at 45-47.

<sup>518</sup> *Id.* at 48-49.

<sup>519</sup> *Id.* at 49-50 (quoting Tsingas Test. Tr. at 884).

<sup>520</sup> *Id.* at 54.

Respondents did not in fact ask Mr. Jurco to return his computer, because OE Staff determined that Mr. Tsingas did not call Mr. Jurco at any point after late June 2011 and because Mr. Tsingas testified that company correspondence with Mr. Jurco during the relevant time period ““had absolutely nothing to do with computers or IMs.””<sup>521</sup>

**c. Commission Determination**

216. City Power has market-based rate authority and, therefore, is a “Seller” under this rule.<sup>522</sup> As the Commission noted when initially adopting market-based rates, “[t]he integrity of the processes established by the Commission for open competitive markets rely on the openness and honesty of market participant communications.”<sup>523</sup> As we discuss below, the duty of accuracy and candor imposed by section 35.41(b) on regulated Sellers is particularly important when it involves an investigation by Commission staff into potential violations. Here, we find that in responding to OE Staff’s investigation, City Power made misleading statements and omitted material information to OE Staff regarding the existence of certain material evidence, thereby violating both the letter and the spirit of the Commission’s accuracy requirement.<sup>524</sup>

217. We note that, unlike FPA section 222 and section 1c.2 of the Commission’s regulations, a violation of section 35.41(b) need not be the result of an intentional act. Rather, it is sufficient if the false or misleading information was provided, or omission of

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<sup>521</sup> Staff Report at 66 (citing Tsingas Test. Tr. at 856).

<sup>522</sup> *City Power Marketing, LLC*, Docket No. ER05-330-000 (March 15, 2005) (delegated letter order). Although not a requirement for enforcing the requirements of section 35.41(b) against a Seller, *see, e.g., Moussa I. Kourouma d/b/a Quntum Energy LLC*, 135 FERC ¶ 61,245, at P 20 n.37 (2011), City Power acknowledges that it has engaged in wholesale sales of power under this authority. Respondents’ Answer at 141.

<sup>523</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 107 (emphasizing the need for market-based rate sellers to act “in good faith when interacting with the Commission”).

<sup>524</sup> Because Respondents have not asserted a defense of due diligence, we need not analyze whether Respondents exercised due diligence to ensure the accuracy of their communications. *See Maxim Power Corp.*, 151 FERC ¶ 61,094, at P 102 n. 235 (2015) (citing *JP Morgan Energy Ventures Corp.*, 141 FERC ¶ 61,131, at P 45 (2012)). Nevertheless, as discussed above, we find that the misleading statements and omissions were made intentionally and, thus, we also find that Respondents did not act with due diligence to prevent the communications.

material information was made, without due diligence exercised by the Seller.<sup>525</sup> Nevertheless, we find here that Respondents' representations regarding IMs were intentionally misleading. Based on the totality of the circumstances here, we find it is not plausible that Mr. Tsingas' lack of candor on behalf of City Power regarding known IM archives, and City Power's repeated failure over several years to produce a single IM in response to OE Staff's unambiguous data requests were merely inadvertent oversights or data processing errors.<sup>526</sup>

218. The Commission has put market participants on notice of their obligation to be candid, and that it takes false or misleading statements seriously, particularly when they occur in the context of a staff investigation into potentially improper conduct.<sup>527</sup> As we stated in *Kourouma*, misrepresentations to Commission staff “hamper[] the Commission's ability to . . . discharge its statutory obligation to ensure that rates are just and reasonable [and] undermine[] the transparency of the market.”<sup>528</sup> We find that this “duty of candor”—as codified in section 35.41(b) and inherent in a Commission grant of market-based rate authority to a Seller—is a duty to be forthright and fully truthful. We

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<sup>525</sup> See, e.g., *Kourouma*, 135 FERC ¶ 61,245 at PP 21-22 (“[T]he history of section 35.41(b) indicates that intent is not a necessary element of a violation of this section.”); *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216, at P 176 (2010) (Revised Policy Statement on Penalty Guidelines) (“[S]ection 35.41(b) does not contain a scienter requirement.”).

<sup>526</sup> The Commission does not find credible Respondents' argument that Mr. Tsingas forgot discussing with his principal business partner, immediately upon learning of an Enforcement investigation into their trading, archived IMs containing detailed discussion of that trading, or that Mr. Tsingas assumed without verifying that any archived IMs were part of City Power's data production to OE Staff.

<sup>527</sup> See, e.g., *In Re Make-Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068 at P 89 (“[W]e remind all persons under investigation of the importance of candor and accuracy during all stages of Market Monitor inquiries and Commission investigations.”); *Maxim*, 151 FERC ¶ 61,094 (Order assessing civil penalty, including for making false and misleading statements regarding generator fuel, to ISO-NE and its market monitor); *Kourouma*, 135 FERC ¶ 61,245 (Order assessing civil penalty for omitting material information and submitting inaccurate information regarding corporate ownership and management, to the Commission in seeking Market-Based Rate authorization, rejecting respondent's characterization of his actions as “technical violations”).

<sup>528</sup> *Kourouma*, 135 FERC ¶ 61,245 at P 44.

reject City Power's suggestion that it can circumvent this duty by offering the "literal truth" defense, a doctrine from criminal perjury law,<sup>529</sup> and showing that Mr. Tsingas carefully tailored his responses during what they characterize as his "cross-examination."<sup>530</sup> This view is both inconsistent with the language and requirements of section 35.41(b) and would defeat the purpose of the duty of candor as a good faith standard beyond the bare minimum required to avoid criminal perjury liability. We find that Mr. Tsingas clearly knew that responsive IMs existed and that OE Staff was seeking them, and we reject Respondents' explanation their responses were carefully limited contemporaneously.

219. City Power correctly points out that "the materiality of a misrepresented or omitted fact will be determined on a case-by-case basis."<sup>531</sup> However, we find City Power's inaccurate statements and omissions were clearly material. The IM archives, known to Mr. Tsingas, related to the core subjects at issue in OE Staff's investigation: City Power's UTC trading activity and evidence of its partners' contemporaneous intent behind those trades. Here, as in *Edison Mission*, the "violations [...] were severe and not the type of data errors or omissions that sometimes occur in investigations involving large data production," and similarly the "acts that misled staff were protracted, related to core issues under investigation, and caused extensive misallocation of resources."<sup>532</sup> We emphasize that subjects of Commission investigations do not have the discretion to decide what evidence (or how much of it) is relevant. Instead they are obligated to fully comply with OE Staff's data requests or subpoenas regardless of whether they consider them duplicative or unnecessary.<sup>533</sup>

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<sup>529</sup> See, e.g., *Bronston v. United States*, 409 US 352, 360 (1973).

<sup>530</sup> Respondents' Answer at 152. Market participants are reminded that investigative testimony is not a "cross-examination," that investigations are not adjudications, and that they should fully and accurately respond to OE Staff's written and oral investigative questions.

<sup>531</sup> Respondents' Answer at 138 (citing Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 51 (2006)).

<sup>532</sup> *Edison Mission*, 123 FERC ¶ 61,170 at P 9.

<sup>533</sup> The Commission's regulations broadly authorize OE Staff in formal investigations to "administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements or other records relevant or material to the investigation." 18 C.F.R. § 1b.13 (2014).

220. We find that Mr. Tsingas' October 2010 testimony to staff was false, misleading, and omitted material information. Mr. Tsingas falsely testified that he did not believe City Power kept records of IMs and did not believe his colleagues set up their accounts to retain IMs. But since his August 2010 conversation with Mr. Jurco, soon after learning of the Commission investigation, Mr. Tsingas knew that Mr. Jurco had archived IMs relevant to the investigation, and he knew in October 2010 that OE Staff was probing the existence of responsive archived IMs involving City Power's trading.<sup>534</sup> For the reasons discussed above, we reject the argument that City Power, through Mr. Tsingas, can evade compliance with section 35.41(b) using post-hoc arguments regarding word choice and grammatical tense. We also reject the argument that Mr. Tsingas was truthful because City Power as a corporate entity did not have possession of the IMs at the time of Mr. Tsingas' October 2010 statements. The IMs were generated in the course of Mr. Jurco's trading on behalf of City Power, and they remained on Mr. Jurco's company computer in Kansas. City Power cannot hide behind corporate form where the IMs were stored on the company-owned computer of one of its principal partners.

221. We also find that City Power's December 2010 data responses were false and misleading because Mr. Tsingas, on behalf of City Power, swore that City Power had provided "all communications" regarding UTC trading, despite the absence of the IMs in that production. Because Mr. Tsingas knew from his conversations with Mr. Jurco that responsive IMs existed or had existed,<sup>535</sup> due diligence to ensure the accuracy of this statement on behalf of City Power required that Mr. Tsingas merely ask colleagues whether IMs were being included in the response. Had Mr. Tsingas and City Power truly been unable to obtain those IMs from Mr. Jurco upon request, they could have then so limited their response. That they chose to hide the existence of these IMs is indicative that their goal was to prevent OE Staff from obtaining these IMs.

222. We also find that City Power's November 2011 data responses were false and misleading, given the totality of their circumstances, because City Power repeatedly disclaimed its knowledge or possession of responsive IMs, and again produced none, despite Mr. Tsingas' awareness of their existence.<sup>536</sup> City Power also misled OE Staff when it represented that as part of "all efforts" to locate IMs, it had conducted a review to

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<sup>534</sup> See discussion *supra* PP 53-54.

<sup>535</sup> See discussion *supra* P 53.

<sup>536</sup> See discussion *supra* PP 56. Mr. Tsingas does not satisfy the duty of candor by claiming that, when he affirmed "[n]o instant messages were in possession of City Power," he was—silently—omitting Mr. Jurco despite Mr. Jurco being a principal partner of the company during the time at issue.

determine if it had responsive IMs and had determined that none were archived on company computers; Mr. Tsingas knew IMs had been archived on Mr. Jurco's computer<sup>537</sup> and chose to remain silent on this point to mislead OE Staff. We further reject the argument that City Power was truthful by carefully tailoring its answers given its limited knowledge of what was on Mr. Jurco's computer. City Power misled OE Staff by failing to clarify that Mr. Jurco possessed responsive IMs during the investigation, opting instead to imply that Mr. Jurco's company computer had been searched and contained no responsive documents.

223. The Commission has long encouraged entities subject to its jurisdiction to fully and meaningfully cooperate in staff investigations.<sup>538</sup> Based on the totality of the circumstances here, we find that Respondents understood that OE Staff sought—several times over the course of the investigation—to review IMs related to UTC trading; City Power should have meaningfully complied with these unambiguous requests. We find that City Power, intentionally impeded OE Staff's investigation, thereby unnecessarily wasting Commission resources in addition to violating its duty of candor and accuracy.

### **C. Remedies and Sanctions**

224. Having concluded that Respondents, in connection with jurisdictional UTC transactions and associated transmission services, intentionally or knowingly devised and participated in a fraudulent scheme to manipulate and a course of business to defraud PJM's wholesale power market in violation of FPA section 222 and section 1c.2 of the Commission's regulations, and that City Power violated section 35.41(b) of the Commission's regulations by making false and misleading statements and material omissions related to IMs discussing the fraudulent trading scheme, we now must determine the appropriate remedies to assess. OE Staff recommends both civil penalties and disgorgement against Respondents. After assessing the legal and factual issues, including those raised by Respondents, and "tak[ing] into consideration the seriousness of

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<sup>537</sup> See discussion *supra* P 53.

<sup>538</sup> See, e.g., *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068, at P 26 (2005) (2005 Policy Statement on Enforcement) ("We expect cooperation, as entities subject to our jurisdiction are required to provide us with information at our request. . . . Cooperation must come very early in the process, however, and must be in good faith, consistent, and continuing. No credit will be given if a company does no more than the minimum, or delays cooperation, or purports to cooperate but actually engages in conduct that impedes the Commission's activities or consumes Commission resources unnecessarily.").

the violation[s] and the efforts of such person[s] to remedy the violation[s] in a timely manner,”<sup>539</sup> we agree with OE Staff’s recommendation to assess penalties and disgorgement.

### 1. Penalties

225. Pursuant to FPA section 316A(b), 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.<sup>540</sup> Respondents executed the Loss Trades during much of July 2010. For example, they placed their fraudulent round-trip UTC trades during 18 days from July 4 through July 24, 2010.<sup>541</sup> Thus, even at a rate of one violation per day and considering only Respondents’ round-trip trades—an underestimation of the total amount and type of violations committed—we have the statutory authority to assess penalties of up to \$18 million each against City Power and Mr. Tsingas.

226. In determining an appropriate penalty amount within the statutory maximum, FPA 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.”<sup>542</sup> Although the Penalty Guidelines are not mandatory—and do not apply to individuals such as Mr. Tsingas—the Commission typically uses them and its Policy Statements on Enforcement,<sup>543</sup> to calculate penalties for organizations, such as City Power.<sup>544</sup>

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<sup>539</sup> 16 U.S.C. § 825o-1(b) (2012).

<sup>540</sup> *Id.*

<sup>541</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM Data given to City Power in 2011/Upto\_Trade\_Data\_CTYPWR (January to July 2010).xls; Staff Reply at 15.

<sup>542</sup> 16 U.S.C. § 825o-1(b) (2012).

<sup>543</sup> Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 (2008); *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005).

<sup>544</sup> See Revised Policy Statement on Penalty Guidelines, 132 FERC ¶ 61,216; *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220, at PP 6, 26 (2010) (Initial Policy Statement on Penalty Guidelines) (seriousness of violation and timely efforts to remedy a violation will continue to be significant factors under the Penalty Guidelines). The Commission also stated when issuing its Initial Policy

(continued...)

227. However, the Penalty Guidelines state that there are several exceptions when the Commission does not apply the various formulas in the Penalty Guidelines to calculate a penalty, and, instead, “determine[s] penalties based on the individual facts and circumstances.”<sup>545</sup> We created the exceptions to the Penalty Guidelines’ formulaic approach by design, recognizing that a “guidelines approach provides less flexibility and discretion than a more generalized approach [and] always creates the possibility of outcomes not adequately accounting for all of the specifics of a case.”<sup>546</sup> Two such exceptions apply to this matter. First, the Commission determines penalties on a case-by-case basis “[w]here there are multiple violations falling under different Chapter Two guidelines.”<sup>547</sup> Respondents’ violations fall under Penalty Guidelines section 2B1.1, which is the Chapter Two guideline that includes fraud, and, separately, under Penalty Guidelines section 2C1.1, which is the Chapter Two guideline covering intentional misrepresentations and false statements.<sup>548</sup> Thus, instead of calculating a penalty using the formulas in the Penalty Guidelines, we will determine an appropriate penalty on a case-by-case basis and will consider all the facts and circumstances, including the factors from our Revised Policy Statement on Enforcement, to guide this analysis. To be clear,

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Statement on Penalty Guidelines that it will continue to rely on factors identified in its previous policy statements on enforcement and policy statement on compliance to measure the seriousness of violations and timely efforts to remedy violations. The Commission noted that any conflict will be resolved in favor of the Penalty Guidelines. Initial Policy Statement on Penalty Guidelines, 130 FERC ¶ 61,220 at P 63. The Penalty Guidelines are appended to the Revised Policy Statement on Penalty Guidelines.

<sup>545</sup> Initial Policy Statement on Penalty Guidelines, 130 FERC ¶ 61,220 at P 32 (citing FERC Penalty Guidelines §§ 1A1.1, 1C2.1(b)).

<sup>546</sup> *Id.*

<sup>547</sup> FERC Penalty Guidelines § 1C2.1(b). The Penalty Guidelines contain three Chapter Two guidelines: Section 2A1.1 (Guideline for Violations of Commission-Approved Reliability Standards); Section 2B1.1 (Guideline for Fraud, Anti-Competitive Conduct and Other Rule, Tariff and Order Violations); and Section 2C1.1 (Guideline for Intentional or Reckless Misrepresentations and False Statements to the Commission or Commission Staff).

<sup>548</sup> We recognize that a “section 35.41(b) violation . . . is not limited to section 2C1.1 of the Penalty Guidelines [but] could also fall under section 2B1.1, covering fraud . . . .” *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 at P 176. Given the nature of Respondents’ misrepresentations and false statements, however, we believe they fit more squarely into section 2C1.1 than section 2B1.1.

this approach is not a departure from the Penalty Guidelines because the plain language of the guidelines provides for it.<sup>549</sup>

228. Second, the Commission determines penalties “for natural persons [such as Mr. Tsingas] based on the facts and circumstances of the violation but will look to [the Penalty Guidelines] for guidance in setting those penalties.”<sup>550</sup> Therefore, we also will determine Mr. Tsingas’ penalty on a case-by-case basis, guided by factors in the Revised Policy Statement on Enforcement. Similar to our handling of the multiple violations, this case-by-case approach for Mr. Tsingas is not a departure from the Penalty Guidelines because the guidelines dictate this result.

229. Thus, the Commission will not determine penalties in this matter through application of the formulas contained in the Penalty Guidelines. Instead, we will apply Penalty Guidelines section 1C2.1(b) and determine an appropriate penalty for City Power and Mr. Tsingas on a case-by-case basis and will consider the following five factors from our Revised Policy Statement on Enforcement to guide this analysis: (1) seriousness of the violation; (2) commitment to compliance; (3) self-reporting, (4) cooperation; and (5) reliance on OE Staff guidance.<sup>551</sup> OE Staff calculated City Power’s proposed penalty using the Penalty Guidelines. While the Penalty Guidelines provide that we should determine the appropriate penalty on a case-by-case basis, rather than applying the formulas set forth in the Penalty Guidelines, we are exercising our discretion to consider those formulas as part of our decision-making process. As explained below, we have considered this matter on a case-by-case basis, as directed by the Penalty Guidelines, and find that OE Staff’s proposed \$14 million penalty amount for City Power is fair and reasonable under the circumstances.

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<sup>549</sup> FERC Penalty Guidelines § 1C2.1(b).

<sup>550</sup> *Id.* § 1A1.1, Application Note 1.

<sup>551</sup> See Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at PP 54-71; *Kourouma*, 135 FERC ¶ 61,245 at P 42 (analyzing factors from *Revised Policy Statement on Enforcement* to determine appropriate penalty for individual).

a. **Assessment of Civil Penalty Against City Power**

i. **Respondents' Answer**

230. Respondents argue that OE Staff fails to explain its penalty calculation, which, it alleges, is required by the United States Sentencing Guidelines and related case law.<sup>552</sup> Respondents also argue that OE Staff's recommended penalty is flawed because OE Staff failed to "break out a penalty for the Section 35.41 claim."<sup>553</sup> Respondents allege numerous flaws in OE Staff's Penalty Guidelines application, including that OE Staff double counted by applying the volume enhancement in addition to loss, and that OE Staff declined to recommend a separate penalty for the section 35.41(b) claim only so that it could include an obstruction enhancement under the Penalty Guidelines.<sup>554</sup> Respondents aver that it should be given at least some credit for its compliance program.<sup>555</sup> Finally, Respondents argue that OE Staff's penalty recommendation should have considered City Power's diminishing financial condition and corresponding inability to pay.<sup>556</sup> Respondents claim that City Power is "not a going concern and has assets (as of late 2014) of less than \$850,000."<sup>557</sup>

231. In addition to their opposition to OE Staff's penalty analysis and calculation, Respondents contest OE Staff's assertion of joint and several liability, arguing that this common tort remedy is not supported by the facts of this case and distinguishing the case law upon which OE Staff relies.<sup>558</sup>

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<sup>552</sup> Respondents' Answer at 171-172 (citing *Rita v. United States*, 551 U.S. 338, 357-59 (2007)).

<sup>553</sup> *Id.* at 171.

<sup>554</sup> *Id.* at 172-175. City Power's objections to OE Staff's Penalty Guidelines application are moot, given our holding that the Commission determines a penalty on a case-by-case basis in this matter.

<sup>555</sup> *Id.* at 175.

<sup>556</sup> *Id.* at 175, 177.

<sup>557</sup> *Id.* at 177.

<sup>558</sup> *Id.* at 177-183.

ii. **OE Staff Report and Reply**

232. OE Staff recommends a civil penalty of \$14 million for City Power.<sup>559</sup> Applying section 2B1.1 of the Penalty Guidelines, OE Staff's recommendation accounts for the following factors: (1) City Power's fraudulent UTC trades yielded more than \$2 million in MLSA payments and nearly \$1.3 million in unjust profits (after transaction costs); (2) the manipulative trades involved more than 100,000 MWh of electricity; and (3) City Power obstructed the investigation by intentionally concealing documents and making false statements.<sup>560</sup>

233. In response to City Power's objections to OE Staff's penalty analysis, OE Staff asserts that it is not required under the FPA or Penalty Guidelines to provide a detailed explanation of its calculation and that it has correctly applied those guidelines, as they are written.<sup>561</sup> OE Staff also asserts that we should not consider City Power's financial condition on a standalone basis because its sole owner, Mr. Tsingas, has for years been able to move funds from the company to himself.<sup>562</sup> Moreover, OE Staff listed several of Mr. Tsingas' assets to show that his net worth is at least \$10 million.<sup>563</sup> Finally, OE Staff claims that the case for joint and several liability is compelling and appropriate in this case, given that Mr. Tsingas "has the power to remove every dollar from City Power [and thus] can make any penalty award against City Power . . . meaningless."<sup>564</sup>

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<sup>559</sup> Staff Report at 92.

<sup>560</sup> *Id.*; Staff Reply at 86.

<sup>561</sup> Staff Reply at 86.

<sup>562</sup> *Id.* at 87.

<sup>563</sup> *Id.* at 87-88.

<sup>564</sup> *Id.* at 89; *see also* Staff Report at 93 n. 252 (citing cases for proposition that "the Commission has the power under these circumstances to look past corporate form when doing so is in the public interest").

iii. **Commission Determination**

(a) **Seriousness of the Violation**

234. The Commission's Revised Policy Statement on Enforcement identifies several factors to consider in our analysis of the seriousness of the violations under the FPA.<sup>565</sup> We discuss these factors below to the extent that they are relevant to City Power's conduct. We first address the seriousness of City Power's Loss Trades, followed by a discussion of the seriousness of its intentional misrepresentations.

(1) **Seriousness of Loss Trade Violations**

235. *Harm Caused by the Violations.* As discussed above, identifiable market participants were harmed by Respondents' conduct because "they did not receive the MLSA payments they would have received absent Respondents' unlawful ... UTC trades, as provided for under the then-effective PJM Tariff's MLSA provision."<sup>566</sup> PJM provided calculations that indicated that Respondents' collected MLSA payments of over \$2 million and deprived 2 market participants of more than \$200,000 each, 3 of between \$100,000 and \$200,000 each, and three of between \$50,000 and \$100,000."<sup>567</sup> In addition, we find Respondents' trades impacted transmission in PJM. During the Manipulation Period, Respondents reserved more than 1.4 million MWh of transmission service in connection with their fraudulent loss trades.<sup>568</sup> Therefore, Respondents loss trading impacted the availability of transmission from the time they reserved this transmission service until the time it was released for other market participants' use in the real-time market.<sup>569</sup>

236. *Manipulation, Deceit, Fraud, and Recklessness or Indifference to Results of Actions.* City Power's Loss Trades operated as a fraud and deceit on PJM. Specifically,

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<sup>565</sup> See Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at PP 55-56.

<sup>566</sup> *Chen*, 151 FERC ¶ 61,179 at P 98. See also *supra* P 161.

<sup>567</sup> Record at Staff Doc and Data Submission Mar 13, 2015/PJM reallocation analysis (2015)/July2010 simulation of changed MLSA by CTYPWR removal.xlsx.

<sup>568</sup> PJM's Jan. 11, 2011 Response to Office of Enforcement's Second Data Request to PJM, Response No. 6.

<sup>569</sup> See *Chen*, 151 FERC ¶ 61,179 at P 99. See also *supra* P 162.

and as described above, City Power deceived PJM into disbursing MLSA payments by creating the false impression that it was trading to arbitrage price differentials when, in fact, it was engaging in trades solely to collect MLSA payments to the detriment of other market participants.<sup>570</sup>

237. *Willful Action or in Concert with Others.* City Power's Loss Trades scheme was willful. Despite its understanding of the purpose of UTC trading to try to arbitrage price differentials, City Power affirmatively designed and implemented a scheme to try to eliminate any price differentials.

238. *Isolated Instance or Recurring Problem; Systematic and Persistent Wrongdoing and Duration.* City Power executed the Loss Trades for most of the month of July 2010. It stopped only after being contacted by PJM's IMM.

239. *Was the Wrongdoing Related to Actions by Senior Management and Did Management Engage in a Cover-up.* Mr. Tsingas, who founded City Power and, during the relevant conduct, was a majority owner, designed and implemented the Loss Trades scheme on behalf of City Power. Indeed, on July 3, 2010, the day after realizing that other market participants were engaged in round-trip UTC transactions, Mr. Tsingas told Mr. Jurco, "we'll try it for a few days and see the payout."<sup>571</sup> From this day, and throughout most of July 2010, Mr. Tsingas was directly involved in City Power's three categories of Loss Trades at issue here, discussing the trades with Mr. Jurco and/or executing the trades himself.<sup>572</sup>

240. In sum, a review of each of the foregoing seriousness factors reveals that City Power's Loss Trade violations were very serious, warranting a significant penalty. The violations resulted in substantial financial harm, were fraudulent and willful, persisted for most of a month, and involved direct participation by senior management, which also attempted to cover up the conduct.

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<sup>570</sup> See *supra* PP 115, 140-141, 160.

<sup>571</sup> IM from Mr. Tsingas to Mr. Jurco (July 3, 2010, 10:59:39 AM) (JUR01530).

<sup>572</sup> See, e.g., IM from Mr. Tsingas to Mr. Jurco (July 13, 2010, 9:31:48 AM) (JUR01588); IM from Mr. Tsingas to Mr. Jurco (July 16, 2010, 10:11:19 AM) (JUR01614); IM from Mr. Tsingas to Mr. Jurco (July 19, 2010, 8:31:12 AM) (JUR01635); IM from Mr. Tsingas to Mr. Jurco (July 22, 2010, 9:21:38 AM) (JUR01666).

(2) **Seriousness of Intentional Misrepresentation Violations**

241. *Harm Caused by the Violations.* City Power caused harm by misleading and misdirecting OE Staff's efforts to investigate the relevant conduct. For more than a year, from September 2010 through November 2011, City Power made a series of misrepresentations, false statements, and material omissions about the existence of relevant IMs. These violations caused OE Staff to waste valuable time and resources during their investigative process. We consider this type of harm as an aggravating factor in our penalty determinations.<sup>573</sup>

242. *Manipulation, Deceit, Fraud, and Recklessness or Indifference to Results of Actions.* City Power misrepresented material facts about relevant IMs in an effort to hide them from OE Staff.<sup>574</sup> Such efforts were deceitful, reckless, and indifferent to the results of such actions.

243. *Willful Action or in Concert with Others.* City Power's efforts to conceal relevant IMs were willful. Despite understanding that OE Staff requested relevant IM communications, it made the affirmative decision to not be forthcoming and reveal to OE Staff the existence of relevant and damaging IMs.

244. *Isolated Instance or Recurring Problem; Systematic and Persistent Wrongdoing and Duration.* City Power's misrepresentations, false statements, and material omissions regarding the IMs lasted for more than a year; OE Staff finally obtained the relevant communications only as a result of Mr. Jurco's cooperation.

245. *Was the Wrongdoing Related to Actions by Senior Management and Did Management Engage in a Cover-up.* Mr. Tsingas attempted to cover up the company's Loss Trade conduct. This cover-up took two forms. First, PJM's IMM left a message for Mr. Tsingas on July 30, 2010, to discuss City Power's UTC trading. Instead of telling the

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<sup>573</sup> See Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 68 (“[E]ngaging in obstructionist conduct may be viewed as an aggravating factor in determining the amount of a civil penalty. Obstructionist conduct in an investigation can include, among other things: misrepresentation, persistent delays in responding to information requests, or frivolous objections to information requests.”); *Edison Mission*, 123 FERC ¶ 61,170 at P 9 (considering that Edison Mission's “acts that misled staff were protracted, related to core issues under investigation, and caused extensive misallocation of resources”).

<sup>574</sup> See *supra* PP 220-222.

IMM the plain truth—that City Power was designing trades to eliminate price spread risk and profit solely from collection of MLSA payments—Mr. Tsingas “prepare[d]” for the call by making up stories, including that the trades resulted from a “new model,” and that they did not know they could not trade that way because they “haven’t done physical.”<sup>575</sup> Mr. Tsingas told Mr. Jurco that he “need[ed] an hour to prepare . . . all arguments.”<sup>576</sup>

246. Second, Mr. Tsingas engaged in a cover-up to try to block OE Staff’s efforts to discover relevant IM communications between himself and Mr. Jurco. As discussed *supra*, Mr. Tsingas, on behalf of City Power, made a series of intentional misrepresentations, false statements, and material omissions between September 2010 and November 2011, and Mr. Tsingas failed to tell OE Staff that Mr. Jurco saved his IMs, despite having discovered this fact on August 19, 2010.<sup>577</sup> For example, on October 8, 2010, Mr. Tsingas falsely testified that he did not believe Mr. Jurco set up his IM account to retain his messages.<sup>578</sup>

247. Similar to the Loss Trade violations, City Power’s intentional misrepresentations were very serious, warranting a significant penalty.

**(b) Mitigating Factors Relating to Culpability**

248. *Commitment to Compliance and Actions Taken to Correct Violations.* 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.<sup>579</sup> We reject City Power’s argument that it is entitled to some compliance credit for having a compliance program in place at the time of the violations. Even assuming *arguendo* that City Power had a compliance program in place at the time of the violations, compliance

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<sup>575</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (July 30, 2010, 9:36:10 AM-9:42:09 AM) (JUR01735-36).

<sup>576</sup> *Id.*

<sup>577</sup> IM Conversation Between Mr. Tsingas and Mr. Jurco (August 19, 2010, 8:21:23 AM-9:00:42 AM) (JUR01925) (Mr. Jurco informing Mr. Tsingas that he was “looking through [his] IM archives,” and Mr. Tsingas then asking whether they are “guilty or righteous”).

<sup>578</sup> Tsingas Test. Tr. 170:10-14.

<sup>579</sup> Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 57.

credit is not warranted, given that City Power's founder and majority owner designed and directed the fraudulent trading conduct and then engaged in a cover-up to block OE Staff's efforts to discover IMs relevant to that conduct.<sup>580</sup>

249. We also find, as relevant to this factor, that City Power never made efforts to remedy or cease its fraudulent trading conduct and stopped the Loss Trades only after being contacted by PJM's IMM. Similarly, City Power had ample opportunity to remedy its section 35.41(b) violations by coming forward and disclosing the existence of relevant IMs, but it never did so. Thus, City Power's lack of efforts to remedy its violations, a factor we are required by statute to consider, weighs in favor of the assessment of a significant penalty.

250. *Self-Reporting, Cooperation, and Reliance on Staff Guidance.* None of the other mitigating factors serve to mitigate City Power's violations. Because it did not self-report the violations, cooperate with OE Staff's investigation, or seek guidance from staff, City Power is not eligible for a credit based on these factors.

**(c) Appropriate Penalty**

251. Based on the foregoing factors, the pleadings in this case, and the Staff Report, the Commission finds that there is a critical need to discourage and deter the fraudulent trading conduct and the intentional misrepresentations, false statements, and material omissions at issue and that OE Staff's recommended \$14 million civil penalty is fair and reasonable under the circumstances.

252. While we are not utilizing the formulas included in the Penalty Guidelines to specifically establish the penalty amount, as part of our decision-making process we have applied the formulas to the facts and circumstances of this case to consider the penalty levels that would result. City Power's Loss Trade violations would generate a penalty range of \$10,080,000 to \$20,160,000 under the Penalty Guidelines. Under section 2B1.1 of the Penalty Guidelines, this range accounts for the following factors: (1) City Power's Loss Trades resulted in more than \$2 million in loss, which is the amount City Power earned in MLSA that otherwise would have gone to other market participants; (2) City Power's Loss Trades involved more than 100,000 MWh of electricity; and (3) City Power willfully obstructed the investigation by concealing relevant IM communications.

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<sup>580</sup> While we are not applying the Penalty Guidelines to determine City Power's penalty, we nonetheless are persuaded by their guidance that an organization is not entitled to compliance credit where its governing authority directed or supervised the conduct. FERC Penalty Guidelines § 1C2.3, Application Note 10.

253. In addition, City Power's violations for intentional misrepresentations, false statements, and material omissions would generate a penalty range of \$2,560,000 to \$5,120,000 under the Penalty Guidelines. Under section 2C1.1 of the Penalty Guidelines, this range accounts for the following factors: (1) City Power's conduct resulted in substantial interference with the administration of justice; (2) City Power's conduct was extensive in scope, planning, and preparation; and (3) City Power willfully obstructed the investigation by concealing relevant IM communications.<sup>581</sup>

254. Thus, combining the two penalty ranges from each type of violations generates a penalty at the low end of the range of \$12,640,000 and a penalty at the high end of the range of \$25,280,000. OE Staff's \$14 million penalty is consistent with this range.

255. We find that the \$14 million civil penalty is particularly appropriate given City Power's multiple types of violations. It designed and implemented a fraudulent scheme and course of business to defraud other market participants and engaged in an intentional cover-up to thwart OE Staff's efforts to investigate the conduct. This civil penalty is also warranted given the widespread scope of and harm caused by the violations and given that City Power never made efforts to remedy or cease its violations and stopped trading only after being contacted by PJM's IMM.

256. None of City Power's arguments merits a different result. For example, OE Staff's recommended penalty is not flawed, as City Power contends, because OE Staff failed to detail its penalty calculation or break out a separate penalty for the section 35.41(b) violation. OE Staff's recommended penalty fulfilled the statutory requirements for determining an appropriate penalty: it considered the seriousness of the violations and City Power's efforts to remedy them, and its recommended penalty is within the statutory maximum. OE Staff explained the various factors it considered under this framework.<sup>582</sup> Nothing more is required.

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<sup>581</sup> This culpability factor for obstruction of justice applies despite the fact that obstruction of justice is inherent in the underlying violation. FERC Penalty Guidelines § 1C2.3, Application Note 8 ("Adjust the culpability score for the factors listed in subsection (e) [obstruction of justice culpability factor] whether or not the violation guidelines incorporates that factor, or that factor is inherent in the violation.").

<sup>582</sup> See Staff Report at 92; Staff Reply at 86.

257. We also agree with OE Staff that Mr. Tsingas should be held jointly and severally liable with City Power for the \$14 million civil penalty assessed against City Power.<sup>583</sup> City Power is wrong that this common tort remedy does not fit in a case like this. Joint and several liability has been applied to fraudulent trading cases where, as is the case here, there is no meaningful difference in multiple defendants' culpability.<sup>584</sup> Joint and several liability is particularly important here to prevent Mr. Tsingas, currently City Power's sole owner, from removing all funds from City Power and, thereby, avoid paying the full penalty amount.<sup>585</sup>

258. Finally, the Commission is not persuaded by City Power's argument that its financial condition and corresponding inability to pay "should reduce the penalty and disgorgement to well below \$1 Million."<sup>586</sup> We consider City Power's financial condition and ability to pay in connection with Mr. Tsingas' finances, given that Mr. Tsingas can move funds from City Power to himself and given that Mr. Tsingas is jointly and severally liable for the penalty against City Power. Thus, even assuming City Power's assets have dwindled to less than \$850,000, Mr. Tsingas has assets totaling

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<sup>583</sup> We recognize that Mr. Tsingas is not liable for City Power's section 35.41(b) violation. However, because he is liable for City Power's fraudulent trading conduct and our penalty assessment encompasses both violations, we find that it is appropriate to hold him jointly and severally liable for the penalty against City Power.

<sup>584</sup> See *SEC v. Haligiannis*, 470 F. Supp. 2d 373, at 386 n.13 (S.D.N.Y. 2007) (holding all four defendants in securities fraud case "to be joint and severally liable for civil penalties, as there is no meaningful difference in their culpability"); *SEC v. Levine*, 517 F. Supp. 2d 121, 147 (D.D.C. 2007) (finding multiple defendants jointly and severally liable for civil penalty where they worked together to fraudulently overstate assets and falsify records in violation of federal securities laws). See also *Chen*, 151 FERC ¶ 61,179 at P 165 n.379 (applying joint and several liability to civil penalty in similar matter).

<sup>585</sup> See *Capital Tel. Co., Inc. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) (holding that "[t]he courts have consistently recognized that a corporate entity may be disregarded in the interest of public convenience, fairness and equity . . . . [W]hen the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons") (internal citations and quotations omitted).

<sup>586</sup> Respondents' Answer at 177.

at least \$10 million, as described by OE Staff.<sup>587</sup> In any event, we question the candor of City Power's plea and claims of dwindling assets, given statements from Mr. Tsingas' website, which boasts that the company "continues to thrive and flourish everyday."<sup>588</sup> The website notes further that Mr. Tsingas has "ensured that the company was prosperous from day one, ultimately making more than 40 million dollars almost single handedly."<sup>589</sup> Thus, it appears from Mr. Tsingas' own representations that both City Power and Mr. Tsingas have ample ability to pay the \$14 million civil penalty.

259. Moreover, to alleviate any concerns about its ability to pay, we will allow City Power, if it desires, to pay the penalty pursuant to a payment plan negotiated with OE Staff, subject to Commission approval.

260. Therefore, we direct City Power to either (1) pay the \$14 million civil penalty 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 City Power and OE Staff. If City Power does not agree to a payment plan with OE Staff within 30 days or does not pay the \$14 million 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.<sup>590</sup>

**b. Assessment of Penalty Against Mr. Tsingas**

**i. Respondents' Answer**

261. Mr. Tsingas raises four arguments in opposition to OE Staff's \$1 million penalty recommendation. First, Mr. Tsingas argues that the Commission lacks statutory authority to penalize individuals because EPAAct 2005 addresses market manipulation by "any entity," without any reference to individuals or natural persons.<sup>591</sup> Second, Mr. Tsingas

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<sup>587</sup> See Staff Reply at 88 (citing Major City Power and Tsingas Financial Assets, 2014 08 20 Exh. 341 CORRECTED (on CD 1 of 3 contained in the investigative materials submitted on March 13, within "Tsingas Net Worth Docs" folder)).

<sup>588</sup> Steve Tsingas, <http://www.stephentsingas.com> (last visited June 22, 2015).

<sup>589</sup> *Id.*

<sup>590</sup> 16 U.S.C. § 823b(d)(3)(B) (2012).

<sup>591</sup> Respondents' Answer at 183-184 (citing 18 U.S.C. § 824v (2012)).

contends that OE Staff has failed to present any justification or analysis supporting its penalty recommendation.<sup>592</sup> Third, Mr. Tsingas avers that OE Staff's \$1 million penalty recommendation is not in line with prior Commission penalties assessed against individuals.<sup>593</sup> Finally, Mr. Tsingas argues that the Commission likely would never be able to collect a \$1 million penalty because his current net worth is approximately \$1 million and dwindling.<sup>594</sup>

**ii. OE Staff Report and Reply**

262. OE Staff recommends a civil penalty of \$1 million against Mr. Tsingas.<sup>595</sup> In recommending this penalty, OE Staff identifies the following factors, which go to the seriousness of the violations and Mr. Tsingas' efforts to remedy them: (1) Mr. Tsingas' conduct persisted until PJM's IMM asked him to stop; (2) Mr. Tsingas improperly collected millions of dollars from PJM that otherwise would have gone to other market participants; and (3) Mr. Tsingas' conduct "created risks to the integrity of the Day-Ahead market because the scheme had the potential both to affect Day-Ahead prices and to crowd out the efforts of other market participants to schedule transmission for their legitimate transactions."<sup>596</sup>

**iii. Commission Determination**

263. Given that City Power carried out its violations largely through the actions of Mr. Tsingas, our penalty analysis for Mr. Tsingas mirrors our analysis for City Power. Therefore, we will not separately address here each factor for Mr. Tsingas' penalty determination, as we did above with City Power's penalty analysis.

264. Based on our assessment of the various penalty factors, as described above in our penalty determination for City Power, the pleadings in this case, and the Staff Report, we find that there is a critical need to discourage and deter Mr. Tsingas' unlawful conduct and that OE Staff's recommended \$1 million civil penalty is fair and reasonable. Mr. Tsingas, in his individual capacity, conceived of, designed, and implemented the

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<sup>592</sup> *Id.* at 184.

<sup>593</sup> *Id.* at 184-185.

<sup>594</sup> *Id.* at 185-186.

<sup>595</sup> Staff Report at 92.

<sup>596</sup> *Id.* at 91.

three categories of fraudulent Loss Trades on behalf of City Power. As the founder and majority owner of the company, he personally profited from this conduct, which caused widespread financial harm to PJM and other market participants. Further, Mr. Tsingas never made efforts to remedy or cease his violations. These facts and circumstances warrant the \$1 million civil penalty OE Staff proposes.

265. Moreover, we are not persuaded by any of Mr. Tsingas' arguments in opposition to OE Staff's recommended penalty. First, we reject Mr. Tsingas' argument that the Commission lacks statutory authority to penalize individuals. Section 1c.2 of our regulations reaches Mr. Tsingas' conduct in this case, and we have jurisdiction over Mr. Tsingas for purposes of enforcing this law. The Anti-Manipulation Rule 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.<sup>597</sup> As we explained in Order No. 670, and have applied in multiple cases since, "[a]ny entity" is a deliberately inclusive term. . . . [that] include[s] any person or form of organization, regardless of its legal status, function or activities."<sup>598</sup> The phrase "any entity" is broad, and applies to natural persons, such as Mr. Tsingas, who have direct involvement in manipulative schemes.<sup>599</sup> The United States District Court for the Eastern District of California recently adopted this position in the *Barclays* matter, holding that "a meaning

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<sup>597</sup> 18 C.F.R. § 1c.2 (2014); *see also* 16 U.S.C. § 824v(a) (2012) ("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.").

<sup>598</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 18. The Commission previously has assessed civil penalties to individuals, for example, *see Maxim*, 151 FERC ¶ 61,094 at P 66; *Richard Silkman*, 144 FERC ¶ 61,164, at P 93 (2013); *Barclays*, 144 FERC ¶ 61,041 at PP 135-146; *Kourouma*, 135 FERC ¶ 61,245 at P 53; *Chen*, 151 FERC 61,179 at P 187. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's assessment of a civil penalty against Moussa I. Kourouma. *See Kourouma*, 723 F.3d 274.

<sup>599</sup> *See* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 18. As we stated in Order No. 670, "Congress could have used the existing defined terms in the NGA and FPA of 'person,' 'natural-gas company,' or 'electric utility,' but instead chose to use a broader term without providing a specific definition."

of ‘entity’ that includes natural persons appears more consistent with the goals of FPA § 222 and the surrounding statutory scheme.”<sup>600</sup>

266. Second, Mr. Tsingas is incorrect that OE Staff failed to present any justification or analysis supporting its penalty recommendation. It considered the statutorily-mandated factors—seriousness of the violations and efforts to remedy them—for both City Power and Mr. Tsingas in its Staff Report.<sup>601</sup> Third, given the seriousness of Mr. Tsingas’ violations, including the resulting financial harm to other market participants and his efforts to obstruct OE Staff’s investigation, we disagree that \$1 million is out of line with Commission precedent.

267. Finally, we question Mr. Tsingas’ claims regarding his ability to pay for the same reasons we questioned City Power’s assertions on this subject. However, to alleviate any concerns, similar to our holding with City Power, we will allow Mr. Tsingas, if he desires, to pay the penalty pursuant to a payment plan negotiated with OE Staff, subject to Commission approval.

268. Therefore, we direct Mr. Tsingas to either (1) pay the \$1 million civil penalty 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 Mr. Tsingas and OE Staff. If Mr. Tsingas does not agree to a payment plan with OE Staff within 30 days or does not pay the \$1 million 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.<sup>602</sup>

## 2. Disgorgement

### a. Respondents’ Answer

269. Respondents argue that disgorgement is not warranted because: (1) other market participants were not entitled to MLSA payments based on City Power’s transmission

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<sup>600</sup> *FERC v. Barclays Bank PLC*, No. 2:13-cv-2093, 2015 WL 2448686, at \*20-21 (E.D. Ca. May 20, 2015) (rejecting argument that claims against individual Barclays’ traders should be dismissed because “entity” under FPA section 222 does not include natural persons).

<sup>601</sup> See Staff Report at 91.

<sup>602</sup> 16 U.S.C. § 823b(d)(3)(B) (2012).

payments, and (2) City Power's transmission payments benefitted PJM and its transmission system.<sup>603</sup> In addition, Respondents disagree with OE Staff's disgorgement calculation, arguing that the three categories of trades at issue netted \$1,195,000, approximately \$83,000 less than OE Staff's disgorgement figure of \$1,278,358.<sup>604</sup> Regarding the appropriate disgorgement figure, Respondents also argue that, at most, they should be required to disgorge only the proceeds from its round-trip trades (approximately \$450,000) because they lacked notice that the other trades were illegal.<sup>605</sup> Finally, Respondents contend that OE Staff's disgorgement theory is flawed because it does not account for Mr. Jurco receiving a portion of the MLSA payments.<sup>606</sup>

**b. OE Staff Report and Reply**

270. OE Staff recommends holding City Power and Mr. Tsingas jointly and severally liable for the full amount of profits City Power received as a result of its manipulative trading scheme (\$1,278,358), plus interest.<sup>607</sup> OE Staff counters Respondents' disgorgement arguments by noting that disgorgement is a routine and appropriate remedy when entities engage in manipulation.<sup>608</sup> OE Staff further argues that Respondents' smaller disgorgement calculation results from City Power overstating its transmission costs for the relevant transactions.<sup>609</sup> Finally, OE Staff disagrees that Respondents' disgorgement should be limited to profits from the round-trip trades, arguing that all three types of trading conduct violated the Anti-Manipulation Rule.<sup>610</sup>

**c. Commission Determination**

271. We find that Respondents are required to disgorge all of its profits from all three categories of its Loss Trades. It is a long-standing Commission practice to require

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<sup>603</sup> Respondents' Answer at 169.

<sup>604</sup> *Id.* at 170.

<sup>605</sup> *Id.* at 170-171.

<sup>606</sup> *Id.* at 171.

<sup>607</sup> Staff Report at 92.

<sup>608</sup> Staff Reply at 85.

<sup>609</sup> *Id.*

<sup>610</sup> *Id.*

disgorgement of unjust profits.<sup>611</sup> In cases where pecuniary gain results from a violation, “the Commission enters a disgorgement order for the full amount of the gain plus interest.”<sup>612</sup> Pecuniary gain includes “the additional before tax profit to the entity resulting from the relevant conduct of the violation.”<sup>613</sup>

272. The disgorgement amount “need only be a reasonable approximation of profits causally connected to the violation”<sup>614</sup> and we find that OE Staff correctly calculated “a reasonable approximation of the profits” by taking the MLSA payments Respondents collected as a result of all three categories of trades and deducting the transaction costs of their trades. We find OE Staff’s estimation of profits more accurate than Respondents’ because OE Staff took into account actual transaction costs paid by City Power; excluded certain trades for which City Power was not eligible for MLSA, because one leg of the round-trip broke; and more precisely apportioned MLSA revenues to the fraudulent UTC trades at issue, based on their OASIS transmission reservations.<sup>615</sup>

273. Therefore, in addition to the civil penalties, we direct disgorgement payments, plus applicable interest, of \$1,278,358.<sup>616</sup> Such payments shall be made within 60 days of the date of this Order. We will require the interest on these sums to be calculated in accordance with 18 C.F.R. § 35.19(a) for the full period of time since Respondents received their MLSA payments from PJM.

274. Finally, we agree with OE Staff’s recommendation to hold City Power and Mr. Tsingas jointly and severally liable for the \$1,278,358 in unjust profits City Power received as a result of its fraudulent trading conduct. We find that applying joint and

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<sup>611</sup> Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 43.

<sup>612</sup> FERC Penalty Guidelines § 1B1.1(a).

<sup>613</sup> *Id.* § 1A1.1, Application Note 3(g).

<sup>614</sup> *SEC v. Whittemore*, 659 F.3d 1, 7 (D.C. Cir. 2011).

<sup>615</sup> *See* Staff Report at 49-50.

<sup>616</sup> As with the civil penalties, we will allow Respondents to pay the disgorgement payments pursuant to a payment plan negotiated with OE Staff, subject to Commission approval.

several liability is appropriate where, as occurred here, multiple respondents collaborate or have a close relationship in executing the fraud.<sup>617</sup>

#### **D. Rehearing**

275. Given Respondents' election under section 31(d)(3)(A) of the FPA, this Order will not be subject to rehearing.<sup>618</sup> If a person elects the procedure under section 31(d)(3) of the FPA, the statute provides for: (i) prompt assessment of a penalty by Commission order; (ii) if the penalty is unpaid within 60 days, the Commission shall institute a proceeding in the appropriate district court seeking an order affirming the assessment of a civil penalty and that court shall have the authority to review *de novo* the law and facts involved; and (iii) the district court shall have the jurisdiction to enforce, modify, or set aside, in whole or in part, such penalty assessment. Following this process, a person can appeal to a United States Court of Appeals within the appropriate time for review of the district court order.<sup>619</sup>

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<sup>617</sup> *Whittemore*, 659 F.3d at 10-11 (affirming finding that multiple defendants are jointly and severally liable for disgorgement of unjust profits because of their collaboration in a fraudulent securities scheme). As is the case with the civil penalty assessed against City Power, holding Mr. Tsingas jointly and severally liable for the disgorgement against City Power is appropriate because, as the sole owner and employee of City Power, he has the power to shut the company down. *See Capital Tel. Co., Inc. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) (holding that “[t]he courts have consistently recognized that a corporate entity may be disregarded in the interest of public convenience, fairness and equity . . . . [W]hen the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons”) (internal citations and quotations omitted). *See also Chen*, 151 FERC ¶ 61,179 at P 191 n.415 (applying joint and several liability to disgorgement payment in related matter).

<sup>618</sup> *See Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, at P 5 (2006); *see also Barclays*, 144 FERC ¶ 61,041 at P 152; *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163 at P 104; *Richard Silkman*, 144 FERC ¶ 61,164 at P 96; *Lincoln Paper and Tissue, LLC*, 144 FERC ¶ 61,162 at P 80.

<sup>619</sup> 16 U.S.C §823b(d)(3) (2012).

The Commission orders:

(A) City Power is hereby directed to pay to the United States Treasury by a wire transfer a civil penalty in the sum of \$14,000,000 and to distribute its unjust profits, plus interest, to PJM, as discussed in the body of this Order.

(B) City Power is hereby directed to either: (1) pay the \$14,000,000 civil penalty to the United States Treasury and disgorgement of unjust profits, plus interest, to PJM, 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 City Power and OE Staff, as discussed in the body of this Order. If City Power does not make the civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a from the date that payment is due.

(C) Mr. Tsingas is hereby directed to pay to the United States Treasury by a wire transfer a civil penalty in the sum of \$1,000,000 and to distribute his unjust profits, plus interest, to PJM, as discussed in the body of this Order.

(D) Mr. Tsingas is hereby directed to either: (1) pay the \$1,000,000 civil penalty to the United States Treasury and disgorgement of unjust profits, plus interest, to PJM, 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 Mr. Tsingas and OE Staff, as discussed in the body of this Order. If Mr. Tsingas does not make the civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a from the date that payment is due.

(E) The Commission directs PJM to establish a method to resettle and distribute the resettled MLSA payments in a manner which identifies: (i) the market participants that would have received higher MLSA payments in the absence of Respondents' activity during the Manipulation Period; and (ii) the amounts of those higher payments. The Commission directs PJM to use the disgorgement funds and interest it receives pursuant to this Order from City Power and Mr. Tsingas to provide reimbursement of MLSA payments, and any available interest, to those entities identified as a result of PJM's proposed methodology. PJM shall provide its proposed methodology to resettle and distribute the MLSA payments to the Director of OE within 45 days of receipt of all of the disgorgement and interest funds from City Power and Mr. Tsingas for the Director's approval. PJM shall distribute the funds to the entities it has identified

promptly after receiving the Director of OE's approval of the resettlement and distribution methodology.

By the Commission. Chairman Bay is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.