

150 FERC ¶ 61,068
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Maxim Power Corporation, Maxim Power (USA), Inc., Docket No. IN15-4-000
Maxim Power (USA) Holding Company Inc., Pawtucket
Power Holding Co., LLC, Pittsfield Generating Company,
LP, and Kyle Mitton

ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED PENALTY

(Issued February 2, 2015)

1. Pursuant to Rule 209(a)(2) of the Commission's Rules of Practice and Procedure,¹ the Commission's Revised Policy Statement on Enforcement,² and the Commission's Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties,³ the Commission directs the above-captioned respondents, Maxim Power Corporation, Maxim Power (USA), Inc., Maxim Power (USA) Holding Company Inc., Pawtucket Power Holding Co., LLC, Pittsfield Generating Company, LP (collectively "Maxim") and Kyle Mitton (together "Respondents") to show cause why they should not be found to have violated section 1c.2 of the Commission's regulations and section 222 of the Federal Power Act (FPA),⁴ through a scheme to obtain payments for reliability dispatches based on the price of expensive fuel oil when Maxim in fact burned much less costly natural gas. The Commission further directs Maxim to show cause why it should not be found to have violated 18 C.F.R. § 35.41(b) of the Commission's rules through the same

¹ 18 C.F.R. § 385.209(a)(2).

² *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 35-36 (2008).

³ *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, at P 5 (2006).

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

conduct. The Commission further directs Respondents to show cause why they should not be assessed civil penalties in the following amounts:⁵

- *Maxim and its Named Subsidiaries (jointly and severally):* \$5,000,000
- *Kyle Mitton:* \$50,000

Respondents may also seek a modification of those amounts consistent with section 31(d)(4) of the FPA.⁶ Pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure,⁷ the Commission directs Respondents to file an answer with the Commission within 30 days of the date of this order. Office of Enforcement Staff (OE staff) may reply to Respondents' answer within 30 days of the filing of the answer. The Commission will consider these pleadings as part of its review of this proceeding.

2. This case presents allegations by OE staff of Respondents' violation of the Commission's Prohibition of Energy Market Manipulation, and of Maxim's alleged violation of Section 35.41(b) of the Commission's rules. These allegations arose out of an investigation conducted by OE staff and are described in the Enforcement Staff Report and Recommendation submitted to the Commission on January 16, 2015 (OE Staff Report).⁸ Issuance of this order does not indicate Commission adoption or endorsement of the OE Staff Report.

3. The OE Staff Report alleges that, principally through its employee Kyle Mitton, Maxim engaged in a series of transactions with ISO-New England (ISO-NE) and misleading communications with the ISO-NE Internal Market Monitor (IMM) for the purpose of obtaining inflated make-whole payments at high fuel oil prices when a Maxim plant was dispatched for reliability, even though the plant was actually burning much less expensive natural gas. During July and August 2010, Maxim regularly submitted Day Ahead offers to ISO-NE at high oil prices, but on 22 days when it got reliability commitments, burned much less expensive gas to produce all or almost all of the plant's energy.

⁵ Because the ISO-NE IMM later applied mitigation to recoup what it viewed as excessive payments to Maxim, the Staff Report does not seek additional disgorgement.

⁶ We note that under section 31(d)(4) of the FPA, 16 U.S.C. § 823b(d)(4), the Commission may "compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed . . . at any time prior to a final decision by the court of appeals . . . or by the district court."

⁷ 18 C.F.R. § 385.213(a).

⁸ The OE Staff Report is attached to this order as Appendix A. The OE Staff Report describes the background of OE staff's investigation, findings and analysis, and proposed sanctions.

4. Because Maxim's plant was being called on to ensure the reliable operation of the grid, rather than because of economics, the ISO's rules provided that Maxim could be paid make-whole payments (called Net Period Commitment Payments) based on its fuel price. The OE Staff Report alleges that when the IMM asked Maxim about its offers, Maxim (through Mitton) responded with communications giving the impression that Maxim was unable to obtain gas and was therefore burning more expensive oil. Maxim gave those responses to the IMM even though, on many days, Mitton had bought large quantities of gas before submitting a Day Ahead offer based on oil prices.

5. In light of the allegations contained in the OE Staff Report, the Commission directs Respondents to respond to this order as set forth above.⁹ This order also is the notice of proposed penalty required pursuant to section 31 of the FPA.¹⁰ In the answer to this order, Respondents have the option to choose between either: (a) an administrative hearing before an ALJ at the Commission prior to the assessment of a penalty under section 31(d)(2); or (b) an immediate penalty assessment by the Commission under section 31(d)(3)(A). If Respondents elect an administrative hearing before an ALJ, the Commission will issue a hearing order unless it is determined that the matter can be resolved in a summary disposition; if Respondents elect an immediate penalty assessment, and if, after a review of the full record to be developed in this proceeding, the Commission finds a violation, the Commission will issue an order assessing a penalty. If such penalty is not paid within 60 days of assessment, the Commission will commence an action in a United States district court for an order affirming the penalty.¹¹

6. The Commission authorizes OE staff to disclose information obtained during the course of the investigation as necessary to advance this matter.

The Commission orders:

(A) Within 30 days of the date of this order, Respondents must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why they should not be found to have violated

⁹ Under 18 C.F.R. § 385.213(c), Respondents must file an answer that provides a clear and concise statement regarding any disputed factual issues and any law upon which he relies. Respondents must also, to the extent practicable, admit or deny, specifically and in detail, each material allegation contained in the OE Staff Report and set forth every defense relied upon. Failure to answer an order to show cause will be treated as a general denial and may be a basis for summary disposition under Rule 217. 18 C.F.R. § 385.213(e)(2).

¹⁰ 16 U.S.C. § 823b(d).

¹¹ FPA Section 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B). *See also Process for Assessing Civil Penalties, supra* note 3.

18 C.F.R. § 1c.2 and 16 U.S.C. § 824v(a) with respect to the conduct described in the Staff Report.

(B) Within 30 days of the date of this order, Maxim must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why they should not be found to have violated 18 C.F.R. § 35.41(b) through the conduct described in the Staff Report.

(C) Within 30 days of the date of this order, Respondents must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why their alleged violation should not warrant the assessment of civil penalties in the amounts described in Paragraph 1 of this order, or a modification of that amount consistent with section 31(d)(4) of the FPA.

(D) In any answer, Respondents should address any matter, legal, factual or procedural, that they would urge in the Commission's consideration of this matter. To the extent that Respondents cite any material not cited in the OE Staff Report, Respondents are directed to file non-publicly one (1) copy of such material on CD-ROM or DVD in the captioned dockets and to serve a copy of same on OE staff.

(E) Pursuant to section 31(d)(1) of the FPA, within 30 days of the date of this order, Respondents may also make an election to have the procedures set forth in section 31(d)(3) of the FPA apply to this proceeding. Under that provision, if the Commission finds a violation, the Commission will issue a penalty assessment and, if not paid within 60 days of the order assessing penalties, the Commission will institute an action in the appropriate United States district court. Should Respondents fail to make a timely election under section 31(d)(1), the procedures of section 31(d)(2) will apply.

(F) Within 30 days of the filing of the answer by Respondents, Enforcement staff may file a reply with the Commission.

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

Commissioner Bay is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

APPENDIX A:

**OFFICE OF ENFORCEMENT
STAFF REPORT**



FEDERAL ENERGY REGULATORY COMMISSION

**Maxim Power Corporation, Maxim Power (USA), Inc.,
Maxim Power (USA) Holding Company Inc., Pawtucket Power
Holding Co., LLC, Pittsfield Generating Company LP, and Kyle Mitton**

Docket No. IN15-4-000

Enforcement Staff Report and Recommendation

Office of Enforcement

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I. Executive Summary

In this report, Enforcement staff recommends that the Commission issue to Maxim Power Corporation (Maxim Power), Maxim Power (USA), Inc., Maxim Power (USA) Holding Company Inc., Pawtucket Power Holding Co., LLC, and Pittsfield Generating Company LP (collectively “Maxim” or “Maxim Power”), along with Kyle Mitton, a Maxim Power executive (together, “Respondents”), an order to show cause (a) why Maxim and Mitton should not be required to pay civil penalties for violating section 222 of the Federal Power Act and the Commission’s Anti-Manipulation Rule, 18 C.F.R. § 1c, and (b) why Maxim should not be required to pay civil penalties for violating 18 C.F.R. § 35.41(b).¹

Maxim owns three electric power generators that participate in markets administered by ISO-New England, Inc. (ISO-NE or “the ISO”). The focus of this Report is Maxim’s plant in Pittsfield, Massachusetts (“the Pittsfield plant” or “Pittsfield”), which Maxim acquired in 2008.² Pittsfield can burn either fuel oil or natural gas to generate electricity, although it typically burns gas, which is almost always much cheaper on a per-MWh basis. This report is about a strategy employed by Maxim and Mitton in the summer of 2010 to collect payments from ISO-NE for reliability dispatches at high oil prices when the plant actually burned much cheaper gas.³ Maxim executive Kyle Mitton developed and implemented this strategy.

Although the Pittsfield plant is relatively inefficient (and its energy offers are usually above market rates), the ISO often needs to dispatch Pittsfield for reliability when loads are high. When ISO-NE does so, it ordinarily provides “make-whole” payments to Maxim for the difference between the plant’s offer price and lower market rates.

¹ The strategy described in this Report is one of three identified in a November 3, 2014 Notice of Alleged Violations by Maxim and its personnel. Enforcement’s investigation of the other two strategies continues.

² News Release, *Maxim Power Corp. Acquires 170 MW Pittsfield, Mass. Power Plant* (Aug. 6, 2008) available at <http://maximpowercorp.mwnewsroom.com/press-release/Maxim-Power-Corp-Acquires-170-MW-Pittsfield-Mass-Power-Plant-886821>.

³ Maxim has made four major submissions relevant to the 2010 oil-gas strategy, on November 4, 2013, January 9, 2014, April 28, 2014, and December 5, 2014. Mitton has made one submission, on December 5, 2014. We refer to those submissions as the November 2013 Maxim Submission, the January 2014 Maxim Submission, the April 2014 Maxim Submission, the December 2014 Maxim Submission, and the December 2014 Mitton Submission.

On many days in July and August 2010, Maxim offered Pittsfield to ISO-NE based on high oil prices. Even though Pittsfield's offer prices were usually far above market rates and thus did not clear the Day Ahead market based on price, ISO-NE regularly needed Pittsfield for reliability reasons during those hot summer months, and committed the plant many times on that basis.

Because it was being committed for reliability, Maxim expected to be, and initially was, paid an out-of-market payment based on its offer price – that is, at high oil prices – even though it was actually burning much less expensive gas. As a result, Maxim collected extra payments averaging more than \$135,000 per day on the days it received Day Ahead commitments after offering based on oil prices, and then burned gas.

When the IMM asked Maxim in mid-July 2010 why it was offering Pittsfield at such high prices, Maxim gave answers that created the false impression that Maxim had to use high-priced oil because the Pittsfield plant itself was having problems obtaining gas. In fact, Maxim was not only able to procure gas to satisfy nearly 100% of its commitments, but in many cases had already purchased large quantities of gas for next day delivery when it submitted offers based on oil prices. As discussed below, these purchases show that Maxim was expecting reliability commitments for the next day, and planned, after offering Pittsfield based on oil prices, to burn gas for much if not all of any commitment period.

All told, Maxim received \$2.99 million in excessive payments from this strategy. The ISO later recouped these payments after the IMM discovered (with no help from Maxim) what Maxim had done.

II. Background

A. The ISO-NE Marketplace

In several regions of the United States, entities regulated by the Commission, called Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs), operate wholesale markets for electricity. One of these entities is ISO-NE, an RTO that operates wholesale electricity markets serving most or all of Connecticut, Maine, Massachusetts, Rhode Island, New Hampshire, and Vermont.

In regional markets such as those operated by ISO-NE, sellers (including generation owners such as Maxim) and buyers (including “load-serving entities,” i.e., utilities that provide electricity to retail customers) submit prices at which they are willing to transact. To send appropriate price signals, the prices at which electricity is bought and sold in ISOs and RTOs vary to some extent from one location to another within the same region. For that reason, market prices for energy are called “Locational Marginal Prices,” or “LMPs.”

ISO-NE operates both “Day Ahead” and “Real Time” markets for energy. As its name suggests, the Day Ahead market operates one day ahead of the date on which the energy is actually delivered (the “operating date”). The Real Time market operates on

the day the energy is transmitted, and prices and dispatch levels are resolved on a five-minute basis.

ISO-NE schedules Day Ahead awards (or “unit commitments”) to power plants in two ways:

(i) **Marketplace awards**: generally, ISO-NE commits units based on a plant’s economics (or “merit”), that is, because the plant’s offer price is competitive (or “economic”).

(ii) **Resources committed for reliability purposes**: in some cases, a plant is needed to ensure that the ISO-NE grid can run reliably. A plant may clear the Day Ahead market, even if it is very expensive, because of a reliability need. A plant committed because of a reliability need may qualify for Net Commitment Period Compensation (NCPC), commonly known as make-whole payments, depending on the circumstances.⁴

ISO-NE passes through the costs of NCPC payments to load-serving entities, which in turn pass those costs along to households, businesses, nonprofits, and government entities as part of retail electricity bills. Excessive make-whole payments therefore translate into higher electricity bills for consumers.⁵

Because resources that are needed for local reliability needs have little (or in Maxim’s case no) competition, ISO-NE screens these resources’ offers for market power. If a resource has the ability to exercise market power, the resource’s offer is limited through a mechanism called Local Reliability Commitment mitigation. This type of mitigation applies if the plant’s offer exceeds 110% of its “reference levels.”⁶ Reference

⁴ November 2013 Maxim Submission at 12-13 (“When out-of-merit dispatches occur, the dispatched supplier receives a Net Commitment Period Credit (‘NCPC’ or ‘uplift’) payment that reflects the difference between the amount in that seller’s Supply Offer and the LMP amount it will receive for being dispatched”). Again, when units clear the Day Ahead market for reliability, they do not affect LMPs.

⁵ See, e.g., Testimony of Kyle Mitton Vol. I (Aug. 28, 2013) (Mitton Test. Vol. I) Tr. 128 (“And the money that is paid by generators to New England ISO is ultimately paid by load; correct? A Correct. Q So the households and businesses and nonprofits and government agencies that use electricity, they’re the ones who ultimately bear NCPC payments; right? A Okay. I would assume that’s correct. Q Do you have any reason to think it’s not? A Nope.”).

⁶ ISO-NE Tariff, Section III.A.5.5.6.2; see Declaration of David W. DeRamus, Ph.D. (Nov. 4, 2013) (DeRamus Decl.) at 6 ¶ 11, attached to November 2013 Maxim Submission (“if the total Supply Offer is more than 110 percent of its total Reference Level costs, the NCPC payments to the seller are automatically mitigated down to the seller’s Reference Level costs.”).

levels are estimates, negotiated with the IMM, of a plant's actual costs based on a given fuel cost.⁷

B. The Maxim Corporate Family and its New England Plants

Maxim Power Corporation is a Canadian firm based in Calgary, traded on the Toronto Stock Exchange. Through wholly-owned subsidiaries, it owns power plants in Canada, France, and the United States. The Canadian parent's wholly-owned U.S. subsidiary, Maxim Power (USA), Inc. (Maxim USA) itself has several layers of wholly-owned subsidiaries, including Respondents Maxim Power (USA) Holding Company Inc., Pawtucket Power Holding Co., LLC, and Pittsfield Generating Company. Through these subsidiaries, Maxim USA (and its Canadian parent) own and control three power plants in New England that sell into ISO-NE.⁸ (In corporate documents, Maxim refers to all of these entities as part of the "Maxim Group.")⁹

Maxim Power Corporation personnel (such as Kyle Mitton) control and act for each of the entities named as Respondents. (Of those entities, only Maxim Power Corporation has employees.) For example, Maxim Power Corporation employees in Calgary decide what offers to submit each day to ISO-NE for Maxim's Pittsfield (181 MW), Pawtucket (64 MW), and CDECCA (62 MW) plants.¹⁰ Similarly, all relevant communications with ISO-NE and the IMM about Maxim's Pittsfield plant are made by Maxim Power Corporation employees in Calgary. Similarly, all revenues and costs for

⁷ November 2013 Maxim Submission at 14 ("Reference Levels are developed by the IMM in consultation with the seller. When offers are to be mitigated, they are intended to reflect estimates of the actual costs incurred to respond to a dispatch instruction.").

⁸ Maxim Power Corporation, *Project Stateside Management Presentation* at 8-9 (April 2013) (*Project Stateside Presentation*). Maxim's operating entities in New England with market-based rate authority are Pittsfield Generating Company LP ("Pittsfield Generating Co."), Pawtucket Power Associates Limited Partnership ("Pawtucket"), and Capitol District Energy Center Cogeneration Associates ("CDECCA"). November 2013 Maxim Submission at 7. A subsidiary of Maxim USA, Maxim Power (USA) Holding Company Inc., in turn owns Pittsfield Generating Co. *Project Stateside Presentation* at 9.

⁹ The facts discussed here about the Maxim corporate family are documented in detail in Section IV(H)(3) below.

¹⁰ Mitton Test. Vol. I Tr.16-17 (Mitton confirms that Maxim Power's Calgary-based Energy Marketing Group is responsible for submission of prices to the New England ISO).

the other entities are ultimately accounted for on the books of the Canadian parent, Maxim Power Corporation.

All three of Maxim's New England plants can burn either gas or oil, and are therefore called "dual-fuel" units.¹¹ Because it is relatively inefficient, Pittsfield's operating costs are usually above ISO-NE market prices (*i.e.*, LMPs).¹² When demand in New England is high, however, the Pittsfield plant is uniquely situated to provide a specific reliability function, called Volt Ampere Reactive ("VAR" or simply voltage) support, to ensure the reliability of the New England grid. As a result, for some time periods, no matter what price Maxim submits to ISO-NE for the Pittsfield plant, the Pittsfield will clear the Day Ahead market to ensure grid reliability for the next day.¹³

Before ISO-NE had a capacity market, the Pittsfield plant was subject to a "Reliability Must Run" (RMR) agreement with the ISO from December 1, 2005 to May 31, 2010. The RMR agreement was premised on an ISO-NE study concluding that Pittsfield (also called Altresco) was uniquely positioned to provide voltage support at high load levels:

Altresco is located in an extremely weak part of the system. There are limited transmission and generation resources that make up the primary supply for the Pittsfield area. Without these facilities, the area relies on a 115 kV transmission system that cannot adequately provide voltage support in the area under certain contingency conditions. At New England load levels beyond 17,500 MW, and with the most critical unit in the area offline and Altresco unavailable, the loss of the Berkshire 345/115 kV autotransformer results in low voltages in the area that violate [reliability requirements for voltage].¹⁴

¹¹ Project Stateside Presentation at 8.

¹² DeRamus Decl. at 5 ¶ 7 ("The Pittsfield plant . . . is a relatively inefficient generation resource that operates as a peaking facility, meaning that it is costly to operate compared to other generation resources and operates economically only during peak periods.").

¹³ Project Stateside Presentation at 16 ("[I]f a transmission element becomes unavailable (N-1, N-1-1) low voltages outside operational range can occur under certain load conditions. Pittsfield is dispatched to guard against these low voltages situations, and *is the only generating facility in Western Massachusetts that can be dispatched to address these voltage issues*") (emphasis added).

¹⁴ ISO New England – System Planning Department Evaluation of Need for Pittsfield Generating Facility ("Altresco") (Aug. 22, 2005), within Attachment D to

The Commission conditionally approved a settlement revising the RMR Agreement in 2007,¹⁵ after accepting ISO-NE's conclusion that Pittsfield provided a critical reliability service.¹⁶

The RMR Agreement provided a steady source of revenue to Maxim during the period it was in effect: "During the last fourteen months of the Pittsfield RMR Agreement's term, Pittsfield's average annual revenues were approximately \$445/MWh."¹⁷ But in a development that Mitton described as "unfortunate,"¹⁸ the Agreement came to an end on May 31, 2010 as ISO-NE adopted a capacity market.¹⁹ Starting June 1, 2010, Maxim was therefore faced with the likelihood of sharply reduced revenues from one of its most important assets. Maxim adopted the oil-gas strategy described here within a few weeks after the RMR Agreement terminated.

C. Kyle Mitton

Kyle Mitton has worked for Maxim in Calgary, Alberta since September 2005.²⁰ During the summer of 2010, he was a senior analyst in Maxim's Energy Marketing Group, which, among other things, decided what prices to submit each day to ISO-NE for Maxim's three New England plants.²¹ In September 2012, Mitton became Maxim's director of corporate development.

D. The NCPC Tariff Rules in Effect in 2010

Like other ISOs and RTOs, ISO-NE has tariff rules designed to prevent generators from unfairly exploiting their market power when they are needed for reliability. In particular, ISO-NE's rules seek to prevent generators from extracting excessive make-whole (in this case, NCPC) payments when they are dispatched to ensure that the New

Section 205 Filing, *Pittsfield Generating Co., LP Cost of Service RMR Agreement*, Docket No. ER06-262-000 (Nov. 30, 2005).

¹⁵ Order on Uncontested Settlement and Rehearing, *Pittsfield Generating Co., L.P.*, 119 FERC ¶ 61,001 (2007).

¹⁶ Order Conditionally Accepting and Suspending Reliability Must Run Agreement and Establishing Hearing and Settlement Judge Procedures, *Pittsfield Generating Co., L.P.*, 115 FERC ¶ 61,059, at PP 29-31 (2006).

¹⁷ November 2013 Maxim Submission at 20.

¹⁸ Mitton Test. Vol. I at 94.

¹⁹ December 2014 Maxim Submission at 9.

²⁰ Mitton Test. Vol. I at 14.

²¹ Mitton Test. Vol. I at 15, 18-19.

England grid continues to operate reliably.²² The NCPC rules in place during 2010 were the result of an August 5, 2009 tariff filing by ISO-NE, which was approved in relevant part by the Commission on October 2, 2009.²³

Under the rules applicable at the time, New England market participants were eligible to receive NCPC payments when a resource is dispatched out of economic merit for reliability purposes and the fuel and variable operating and maintenance (O&M) costs of operating the resource, as reflected in its time-based Supply Offer, exceeded the revenue paid to the market participant in the energy markets. Specifically, NCPC payments to generators needed for reliability were limited to 110% of the unit's reference levels. As Maxim knew, reference levels for oil were, during this period (and almost always) much higher than reference levels for gas. By misleading the IMM about what fuel it burned, Maxim collected millions of dollars in NCPC payments for reliability dispatches at prices based on oil that were far above its actual (gas) costs. Only a later intervention by the IMM protected New England ratepayers from being charged these additional millions of dollars.

III. The Strategy: In July and August 2010, Maxim Burns Inexpensive Gas But Collects NCPC Based on Much More Expensive Oil

One month after its RMR agreement expired, Maxim began a new strategy in which it offered Pittsfield on high oil prices but, when committed for reliability based on those offers, actually burned much less costly gas. This strategy resulted in millions of dollars of excess NCPC payments. Maxim implemented its 2010 oil-gas strategy through Day Ahead offers it submitted during the 45 days between July 5 and August 18, 2010 (for operating dates July 6 through August 19, 2010).²⁴

²² *ISO New England Inc.*, 129 FERC ¶ 61,008 (2009) (2009 Order).

²³ 2009 Order; *ISO New England Inc. and New England Power Pool, Market Rule 1 Revisions Relating to the Mitigation of Supply Offers for Resources Committed to Satisfy Reliability Needs* at 16, Docket No. ER09-1546-000 (filed Aug. 5, 2009) (2009 Tariff Filing).

²⁴ This Report relies on the following spreadsheets provided by Maxim, ISO-NE, or the IMM:

1. Maxim Response to DR 28, attached to email from Diana Jeschke on Nov. 6, 2013 (DR 28 Response);
2. Maxim Response to DR 47c, attached to email from Diana Jeschke on Feb. 4, 2014 (DR 47c Response) (along with a version of this spreadsheet to which staff has added a column with next-day ISO peak load forecasts);

Two aspects of Maxim’s oil-gas strategy during July and August 2010 are relevant to Maxim’s and Mitton’s potential liability. *First*, on 38 of these 45 days, Maxim offered on oil prices; on 22 of those 38 days, Maxim was committed for reliability in the Day Ahead market and collected NCPC payments based on the oil prices it submitted, but burned all or nearly all gas at a much lower cost.²⁵ When asked by the IMM in July 2010 why it was offering at such high prices, Maxim gave answers that conveyed the impression that the Pittsfield plant was burning oil because it was having problems obtaining gas. Maxim did not tell the IMM it had burned gas on these 22 days until

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3. Market data (including Maxim offers and commitments) from ISO-NE IMM, attached to email from Scott Hodgdon on Dec. 15, 2014 (ISO-NE Market Data);
 4. Data from IMM about VARS (reliability commitment) flags for Pittsfield, attached to email from Scott Hodgdon on Dec. 16, 2014 (ISO-NE VARS Data);
 5. Historic Seven Day Forecast data from ISO-NE, attached to email from Helene Whitely on Dec. 11, 2014 (Seven Day Forecast Data), along with an extract showing only next-day (“Day 2”) peak load forecasts (Day 2 Peak Load Forecasts); and
 6. Summary mitigation calculations by IMM for Pittsfield plant for July and August 2010, attached to email from Richard Dominguez on Dec. 12, 2014 (July IMM Mitigation Spreadsheet and August IMM Mitigation Spreadsheet). The spreadsheets with these calculations are entitled July10_totalNCPC_326_prelim final run_Summary12062010.xlsx and Aug_2010_total_NCPC_326_prelim final run_Summary_12132010.xlsx.

For simplicity, we have aggregated key data from spreadsheets 2-6 into a single spreadsheet, with data for each day (e.g., July 6) on a single row of the spreadsheet. We refer to this Excel file below as the “Master Spreadsheet.”

Also for the convenience of the Commission and Respondents, we have combined the relevant emails from July and August 2010 into a single document, entitled “Relevant Emails (July-August 2010).”

²⁵ During this period, Maxim also received Real Time reliability commitments after offering Pittsfield (in the Reoffer Period) on oil prices, even though it burned all or nearly all gas. *See* Master Spreadsheet. The IMM also mitigated these payments to gas prices for all energy produced with gas. *See* July IMM Mitigation Spreadsheet and August IMM Mitigation spreadsheet. The analysis in text of Maxim’s Day Ahead offers on oil during this period (while actually burning gas) is equally applicable to its Real Time offers on oil (while actually burning gas) during this period.

August 23, 2010, and then only after the IMM specifically asked Maxim what fuel it had burned.²⁶

Second, on at least 10 of the 22 days when it offered oil and burned gas (and according to Maxim records, potentially on more days as well), Maxim had already purchased large volumes of gas before it submitted Day Ahead offers based on oil prices. Maxim did not disclose the latter fact to the IMM at any time in 2010, and Enforcement first learned about Maxim's advance gas purchases (before submitting oil offers) in the course of this investigation in November 2013.

A. The Strategy: Overview

In July and August of 2010, Maxim submitted high-priced offers for Pittsfield based on oil prices, even though Maxim itself obtained and burned gas. Until the IMM questioned these actions in August 2010, Maxim stood to collect millions of dollars in NCPD make-whole payments based on high oil costs that Maxim did not incur. Kyle Mitton, then an Energy Marketing Analyst at Maxim, personally implemented this strategy.²⁷

1. What Mitton expected to happen if Pittsfield offered oil and burned gas.

Mitton explained his (and Maxim's) expectations to IMM supervisor Richard Dominguez by phone on August 18, 2010, after Dominguez sent Maxim a request for information about its July 2010 fuel burns. Dominguez wrote a contemporaneous summary of that conversation, in which he and Mitton discussed IMM mitigation procedures, in a call log.²⁸ Neither Maxim nor Mitton dispute the accuracy of Dominguez's contemporaneous record of the conversation.²⁹

In their August 18, 2010 call, Mitton told Dominguez that he believed that "the mere notification of *potential* gas procurement [problems] and the offer of oil was

²⁶ DR 28 Response.

²⁷ *E.g.*, DR 47c Response (identifying Kyle Mitton as responsible for purchasing gas on many days in the summer of 2010); July 16, 19, 20, and 21 Mitton emails to IMM, within Relevant Emails (July-August 2010); Testimony of Kyle Mitton Vol. II (Nov. 13, 2013) (Mitton Test. Vol. II) Tr. 266-67 (discussing submission of Pittsfield offers based on oil prices, purchases of gas, and Pittsfield's operating on gas during July 2010).

²⁸ IMM Call Log (entitled "Altresco Share Point Call Log_6_2010 to 6_2011") (attachment to Dec. 4, 2013 email from R. Dominguez to A. Fate) (hereafter "Dominguez Notes of August 18, 2010 Call with Mitton").

²⁹ Mitton's December 2014 Submission at 17 (quotes Dominguez's note).

sufficient and *that no further review would be done by IMM.*³⁰ That is, Mitton expected that Maxim would be able to collect NCPC based on high oil prices even if Maxim actually bought and burned gas.

In his 2013 testimony (discussed in detail below), Mitton claimed that, contrary to what the contemporaneous (2010) record shows, he did not expect in 2010 to be able to collect NCPC based on oil prices when it burned gas after offering oil. But even in his 2013 testimony, Mitton acknowledged that if the IMM failed to discover that Maxim was burning gas (after offering at oil prices), Maxim would still be able to collect NCPC payments based on oil prices:

Q But what if the Market Monitor were not aware that you had burned gas and therefore went ahead and mitigated you based on oil?

A Well, you wouldn't get mitigated.

Q Right. If you, if they didn't know that you had burned gas they wouldn't mitigate you down to gas?

A Okay, I see what you are saying.

Q Is that fair?

A That is correct, if they didn't know, yes.³¹

As discussed below, Mitton's communications with the IMM conveyed the message that Maxim was burning oil because it was having difficulty acquiring gas. Had the IMM not later learned what Maxim was doing, Maxim would have retained millions of dollars of extra payments based on oil prices.

2. Financial outcomes of oil vs. gas offers.

To understand Maxim's 2010 oil-gas strategy, it is important to understand Maxim's economic incentives during this period.

a. Offers priced on gas vs. offers priced on oil.

During the 45 days of this strategy (operating dates July 6 through August 19), Maxim offered Pittsfield based on oil prices on 38 days and on gas prices on seven days.³² Maxim's average offer price for oil across these days was \$176.13 and its average offer price for gas was \$75.85.³³

³⁰ Dominguez Notes of August 18, 2010 Call with Mitton (emphasis added).

³¹ Mitton Test. Vol. II Tr. 288-89 (emphasis added).

³² Master Spreadsheet.

³³ Master Spreadsheet.

b. Economic vs. reliability awards.

During this period, because the Pittsfield plant qualified for NCPC based on the unit's costs, Maxim could obtain higher payments for reliability commitments if it could collect NCPC based on the more expensive fuel (during this period, always oil).

Offering based on oil prices every day had a potential downside, however: if Pittsfield was not called on for reliability, it could price itself out of the market by offering based on costly oil.³⁴ The ideal strategy from a pure profit-seeking standpoint, therefore, would be a hybrid: (i) offer on oil prices (but burn gas) if a reliability dispatch was likely, but (ii) offer on gas prices if a reliability dispatch was unlikely.

As discussed below, during the period of its oil-gas strategy, Maxim came close to achieving an ideal hybrid strategy. Most important, on 22 of the 45 days Maxim implemented the strategy, ISO-NE committed Pittsfield for reliability purposes after Maxim offered on oil prices. By collecting NCPC at those prices while burning gas, Maxim initially received nearly \$3 million in extra NCPC payments.

c. Profitability to Maxim of oil vs. gas offers when Pittsfield was committed for reliability.

In its August-September 2010 defense of its July-August 2010 Pittsfield offers, and in its submissions in this investigation, Maxim has pointed to the risks it faced if it offered based on gas prices but was unable to obtain sufficient gas and had to burn more expensive oil.³⁵ That is, Maxim says that it feared being paid based on gas prices while burning oil that cost about twice that much.³⁶

To put this concern in context, the following chart shows the possible results that Maxim could achieve if ISO-NE committed Pittsfield for reliability purposes. The result that Maxim says it feared (offer gas, burn oil) is Outcome 3 in this chart:

³⁴ Dec. 2014 Mitton Submission at 7 (“Indeed, during these early days, when Pittsfield’s offers were structured to cover the potential for burning oil, Maxim believed that it likely would not clear the Day-Ahead Market because of higher oil prices. The Company found it necessary to forgo that opportunity to minimize the risk associated with not being able to obtain sufficient gas supplies to sustain an ISO-NE dispatch.”).

³⁵ *E.g.*, Email from Eagle Kwok to Richard Dominguez (Aug. 23, 2010) (“Kwok August 23, 2010 Email”), within Relevant Emails (July-August 2010).

³⁶ *E.g.*, December 2014 Mitton Submission at 2-3.

1	2	3	4	5
Offer gas, burn gas	Offer oil, burn oil	Offer gas, burn oil	Offer oil, burn gas <u>IMM knows this</u> and mitigates NCPC payments to gas prices	Offer oil, burn gas <u>IMM does not know</u> <u>this</u> and Maxim collects NCPC based on oil prices
Modest profits	Modest but slightly larger profits	Large loss	Minimal if any profits	Large profits

As of the summer of 2010, if Maxim chose to offer Pittsfield based on oil prices because it had serious concerns that it would not be able to obtain gas, but then actually burned gas when it received reliability commitments from the ISO, it could have been forthright in responding to inquiries from the IMM about the plant's offers.³⁷ While that approach would protect Maxim against the undesirable Outcome 3, it would foreclose the highly profitable Outcome 5: collecting NCPC based on high-priced oil while actually burning much lower-priced gas. To protect the lucrative Outcome 5, during the period of this strategy, Maxim (through Mitton) gave the IMM the impression it was having difficulty in obtaining gas and was therefore burning the fuel it offered, *i.e.*, oil.

Until the IMM took action after it discovered what Maxim was doing, Outcome 5 proved to be highly profitable for the 22 operating dates between July 6 and August 19,

³⁷ The relevant ISO-NE tariff provisions have since changed, making this issue no longer relevant today. Specifically, in 2012, ISO-NE adopted new "Automated Mitigation" procedures, including new procedures for dual fuel units, which are set forth in Appendix A, Section III.A.3 of the tariff. With the new procedures, dual-fuel units that wish to be mitigated based on the reference price for the more expensive fuel must demonstrate in advance to the IMM that they need to burn that fuel, and must provide documentation within five days afterwards that they actually did so. These new procedures for mitigation of dual-fuel units are described in detail in a January 2012 (updated in June 2012) Powerpoint presentation by the ISO-NE IMM, *Automated Mitigation*, which is available at http://www.iso-ne.com/support/training/courses/mrkt_mon/automated_mitigation_webex_01_17_2012.ppt.

2010 when ISO-NE committed Pittsfield in the Day Ahead market for reliability purposes after offering on oil. Based on typical oil and gas prices during this period, if Maxim could collect NCPC at oil prices while burning gas, it could be paid at around \$175/MWh, while burning gas that cost around \$75/MWh. Maxim could therefore enjoy profits of around \$100/MWh, even when (as was almost always the case) its costs were higher than LMPs. It is these profits (totaling \$3 million during July and August) that the IMM recouped through mitigation after discovering that Maxim had offered oil and burned gas on many days.

During this investigation, Maxim (after consulting with Mitton) initially admitted in sworn discovery responses that it did not disclose to the IMM until August 23, 2010 that Pittsfield was burning gas after offering based on oil prices.³⁸ Later, Maxim and Mitton reversed their position and, starting in mid-November 2013, advanced a new, exculpatory factual claim: that Mitton did in fact so inform the IMM in July 2010. As discussed below, the record evidence shows that this claim is not correct.

d. Daily ISO-NE peak load forecasts.

Before Maxim submitted its offers each day in July and August 2010, ISO-NE published on its website an up-to-date forecast, based on weather conditions and other factors, of the largest expected system-wide electricity demand (or “peak load”) for the next day. (Not surprisingly given the impact of air conditioning on electricity use, summertime load forecasts are heavily influenced by predicted high temperatures.) Here is an example of what an ISO-NE peak load forecast looks like, showing that on Saturday morning, December 13, 2014, the ISO projected that peak load the next day (“Day 2”) would be 17,520 MWh:³⁹

³⁸ DR 28 Response.

³⁹ ISO-NE web site, Seven-Day Capacity Forecast, <http://www.iso-ne.com/markets-operations/system-forecast-status/seven-day-capacity-forecast> (last visited Dec. 13, 2014).

Seven-Day Capacity Forecast

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Every day at 6:00 a.m. and 10:00 a.m. eastern prevailing time, ISO New England publishes this summary of factors affecting the power system for the next seven days, including weather, generating capacity, and peak demand. The forecast is used to identify capacity deficiencies several days in advance and triggers the commitment of generators with start times greater than 24 hours. For today's forecast, see the [Morning Report](#)

View the forecast below, or [download a CSV file](#). Hover over items for an explanation.

WEATHER	DAY 2	DAY 3	DAY 4	DAY 5	DAY 6	DAY 7
	SUN 12/14	MON 12/15	TUE 12/16	WED 12/17	THU 12/18	FRI 12/19
High Temperature - Boston	41	41	44	45	40	37
Dew Point - Boston	26	29	37	38	25	21
High Temperature - Hartford	43	41	42	45	37	36
Dew Point - Hartford	28	27	34	34	20	17

GENERATING CAPACITY POSITION						
Total Capacity Supply Obligation (CSO)	30,340	30,340	30,340	30,340	30,340	30,340
Anticipated Cold Weather Outages	0	0	0	0	0	0
Other Generation Outages	1,795	2,287	2,692	2,607	2,242	2,471
Anticipated De-List MW Offered	2,397	2,397	2,397	2,397	2,397	2,397
Total Generation Available	30,942	30,450	30,045	30,130	30,495	30,266
Import at Time of Peak	3,518	3,718	3,718	3,718	3,718	3,718
Total Available Generation and Imports	34,460	34,168	33,763	33,848	34,213	33,984
Projected Peak Load	17,520	18,480	18,450	18,220	18,620	18,490

Because the Pittsfield plant had, until a few weeks earlier, been subject to a long-term RMR Agreement with ISO-NE premised on the ISO's reliability need for Pittsfield on days with high loads, Maxim knew that reliability dispatches were more likely during high-load days. All told, during the period of this strategy – from operating dates July 6 through August 19, 2010 – Maxim offered based on oil prices on 37 of 39 days when peak load forecasts were above 19,000 MWs.⁴⁰

B. Overview of Maxim's Offers During the Oil-Gas Strategy

As Mitton told the IMM in a July 19, 2010 email, New England experienced a “prolonged heat wave” during the preceding weeks, which led to high peak load forecasts.⁴¹ Starting on the second day of the heat wave (operating date July 6, 2010),

⁴⁰ Master Spreadsheet.

⁴¹ Email from Kyle Mitton to John Angeli (July 19, 2010), MPCPROD00074407 (within Relevant Emails (July-August 2010)) (emphasis added).

and continuously through operating date July 30, Maxim each day submitted offers for Pittsfield based on oil prices. During those 25 days, Pittsfield was committed for reliability in the Day Ahead market 16 times while offering on oil prices. (The IMM later recouped \$2.1 million paid based on Pittsfield's burning gas rather than oil on these 16 days.)⁴²

At the end of July 2010, however, the heat wave broke: daily highs in Boston (the largest city in ISO-NE territory) dipped from 90 degrees Fahrenheit on July 29 to 77 degrees on July 30, 72 degrees on July 31, 77 degrees on August 1, and 80 degrees on August 2.⁴³ ISO-NE's next-day load forecasts for these cooler days declined from 24,000 MWs on July 29 to 19,010 MWs on July 30, 16,350 MWs on July 31, 16,680 MWs on August 1, and 19,350 MWs on August 2.

For the first day of cooler weather (and lower load forecasts), July 30, Maxim continued to do what it had done for weeks, namely, offer based on oil prices. For the second, third, and fourth days of lower load forecasts, however, Maxim switched to offering based on gas prices. With these lower gas-based offers, if LMPs came in higher, Pittsfield could be committed in merit order, which, while less profitable than being committed for reliability purposes based on oil prices, was better than not being committed at all.⁴⁴

Starting on August 3, however, the heat wave returned, with highs in Boston rising to 87, 92, 90, and 92 degrees between August 3 and August 6. ISO-NE's peak load forecasts likewise rose, reaching 22,700 MWs for August 3, 25,200 MWs for August 4, 25,600 MWs for August 5, and 21,900 MWs for August 6. Maxim returned to offering based on oil prices for each of these four days. For the remainder of the time it employed the oil-gas strategy (through operating date August 19), Maxim continued to alternate between oil and gas offers.

Through this strategy, between July 6, 2010 and August 19, 2010, Maxim was committed:

- 22 times in the Day Ahead market for reliability purposes for Pittsfield after submitting oil-based offers (at prices between \$167.50 and \$185.46);

⁴² July IMM Mitigation Spreadsheet.

⁴³ Weather Underground website, http://www.wunderground.com/history/airport/KBOS/2010/7/25/CustomHistory.html?dayend=7&monthend=8&yearend=2010&req_city=NA&req_state=NA&req_statename=NA&MR=1 (last visited Jan. 14, 2015).

⁴⁴ Master Spreadsheet. As it turned out, Day Ahead LMPs during these three days were below Maxim's offer prices and Pittsfield did not get economic commitments.

- only one time in the Day Ahead market for reliability purposes after submitting on gas prices (a much less profitable outcome when dispatched for reliability, because Pittsfield would be mitigated to gas rather than oil prices); and
- one time after clearing economically (*i.e.*, not for reliability purposes) after submitting gas-based offers (at prices between \$51.90 and \$59.79).

On the 22 days for which ISO-NE committed Pittsfield in the Day Ahead market for reliability purposes after Maxim submitted oil-based offers during the period of its oil-gas strategy, Pittsfield burned 100% gas on 17 days, and burned gas with a small amount of oil (usually less than 3% of the MWhs produced) on five days.⁴⁵

After discovering that Maxim was offering oil but burning gas on these 22 days ISO-NE committed Pittsfield for reliability purposes in July and August 2010, the IMM recalculated Maxim’s NCPC payments to pay Maxim based on gas prices for the energy it produced with gas. The IMM determined that Maxim had received \$2.99 million in overpayments during July and August 2010 by offering based on oil prices but burning gas.⁴⁶ In its submissions to staff and the Commission in this investigation, Maxim has not challenged the IMM’s calculations.⁴⁷

C. Although Maxim Now Claims to Have Been “Surprised” to be Committed for Reliability, the Record Shows that Maxim Expected Those Commitments and Took Action Based on That Expectation

In their Submissions in this investigation, Maxim and Mitton have repeatedly claimed they were surprised that the ISO committed Pittsfield for reliability purposes during the summer of 2010. In its December 2014 Submission (at 9), for example, Maxim claims (with no supporting declaration or other evidence) that it was “surprise[d]” that Pittsfield was dispatched for reliability in the Day Ahead market in the summer of

⁴⁵ Master Spreadsheet.

⁴⁶ The IMM determined that Maxim had received \$2,104,757 in overpayments for July 2010 and \$886,679 in overpayments for August 2010, for a total of \$2,991,436. That total includes \$113,579 for August 31, 2010, after Kwok had admitted on August 23, 2010 that Maxim was offering oil and burning gas. July IMM Mitigation Spreadsheet and August IMM Mitigation Spreadsheet.

⁴⁷ December 2014 Maxim Submission at 1 n.6 (“Maxim was mitigated in 2010 for all of the profits associated with this event”); *id.* at 9 (“Ultimately, there were occasions when Maxim was mitigated and in total repaid ISO-NE approximately \$2.9 million”); December 2014 Mitton Submission at 12 (“all revenues in excess of the mitigation rules were refunded in 2010”); January 2014 Maxim Submission at 27 (“civil penalties are unnecessary when the party has already been mitigated”).

2010, that it only “later learned” that these dispatches “were made to satisfy a local reliability need,” and that “it had no expectation of receiving any reliability dispatches in the day ahead market.” In its April 2014 Submission, Maxim similarly claimed (again without citation to evidence) that it was “surprised when it was dispatched on its oil-based supply offers” in the summer of 2010. And in its January 2014 Submission (at 28), Maxim said it “had little or no expectation of being dispatched in the DA Market when offering on oil.”

For three independent reasons, these contentions are not consistent with the factual record:

1. **Maxim had extensive experience under a “Reliability Must Run” Agreement with the ISO until a few weeks before it began this offer strategy.**

As discussed above, the entire premise of Maxim’s RMR Agreement with ISO-NE was that Pittsfield was needed to provide a unique reliability service on days with high loads. During the summer of 2010, Maxim had access to ISO-NE’s peak load forecasts each day, which on many days showed that the ISO was expecting very high loads the next day. In any event, Maxim obviously knew that loads are higher on hot summer days, of which New England had many during July and August 2010.

2. **Maxim could not have been surprised as it was committed for reliability purposes day after day.**

Whatever Maxim’s (and Mitton’s) reaction may have been when ISO-NE committed Pittsfield for the first time in the Day Ahead market on oil prices for operating date July 6, they could not have been surprised as the same thing happened 22 times in a span of a month and a half.

On the second day in July when Mitton submitted Day Ahead offers on oil prices, namely on July 6 for operating date July 7, Mitton was aware that the ISO had committed Pittsfield for reliability purposes for July 6, for which the ISO had forecast peak loads higher than any actual load the previous year.⁴⁸ And on the morning of July 6, as Mitton was deciding how to offer Pittsfield for operating date July 7, the ISO projected that peak loads for July 7 would be higher than any actual load *in the previous three years*.⁴⁹ Since the ISO had committed Pittsfield for reliability purposes in the Day Ahead market for the July 6 operating day, for which the ISO had forecast a peak load of 25,660 MWs, Mitton could not have been surprised that the ISO again committed Pittsfield for reliability

⁴⁸ Master Spreadsheet.

⁴⁹ Energy Tariff Experts website, <http://energytariffexperts.com/blog/2013/7/17/iso-ne-heat-waves-and-capacity-tags> (last visited Dec. 13, 2014).

purposes in the Day Ahead market for the July 7 operating day, for which the ISO expected even higher peak loads (26,720 MWs).⁵⁰

Maxim's and Mitton's claim of surprise likewise cannot be squared with the fact that, starting on July 5, 2010, ISO-NE committed Pittsfield in the Day Ahead market for reliability purposes on high oil offers on four straight days (for operating dates July 6, 7, 8, and 9, 2010) and soon after on five straight days (for operating dates July 12, 13, 14, 15, and 16, 2010).

3. Maxim's advance gas purchases show that it expected Pittsfield to be committed for reliability.

That Maxim was not surprised to get reliability awards is also shown by its own conduct in making advance purchases of gas during the period of this strategy. The details are as follows:

In its November 2013 Submission, Maxim emphasized that it normally does not buy gas before receiving dispatch instructions from the ISO – much less before submitting a Day Ahead offer – because of the risk it will have to sell unused gas at a loss:

Maxim is taking a risk by purchasing gas before Pittsfield is dispatched. In fact, it is more typical that Maxim secures no gas prior to receiving a dispatch award so it does not have to resell the gas if Pittsfield is not dispatched, and incur a potentially significant loss. . . . And, on those occasions when it does procure fuel in advance of learning Pittsfield's dispatch instructions, Maxim is exposed to the risk that Pittsfield will not be dispatched, or dispatched at the levels it estimated, in which case Pittsfield will need to find some counterparty to purchase its excess gas.⁵¹

Yet on 11 days during the period of this strategy, Maxim has confirmed, in its response to Data Request (DR) 47c, that it purchased gas not only before Day Ahead commitments were announced but before submitting a Day Ahead offer. (*See* spreadsheet excerpt on p. 46 below.) Given Maxim's reluctance to buy gas it might not need to use, Maxim's advance gas purchases can only mean that it expected a Day Ahead commitment.

In theory, Maxim might have expected LMPs to be so high on these days that it would be committed based on economics despite offering on oil prices. But during the 1,080 hours (45 days x 24 hours) between operating dates July 6 and August 19, 2010, Maxim's Day Ahead offers priced on oil (between \$167.50 and \$185.91) were lower than

⁵⁰ Master Spreadsheet.

⁵¹ November 2013 Maxim Submission at 17.

ISO-NE Day Ahead LMPs for only nine hours, or less than 1% of the time. Taking into account Pittsfield's high startup and no load costs and four-hour Minimum Run time, the chances of a Day Ahead commitment without being needed for reliability were even more minimal. Maxim therefore could not have bought gas in advance with a realistic expectation that its offers on oil prices would clear the market based on economics.

In their submissions, Respondents have conceded this point: in his December 2014 Submission (at 7), for example, Mitton says that when Maxim was offering Pittsfield on oil during this period, it "believed that it likely would not clear the Day-Ahead Market because of higher oil prices."

By buying gas in advance of submitting oil offers on these 11 days, Maxim's behavior demonstrates that it believed it was likely to receive Day Ahead reliability awards. And ISO-NE's peak load forecasts for those days, available to Maxim each morning on the ISO-NE web site, show why Maxim had that expectation. The following spreadsheet adds ISO-NE's peak load forecasts to Maxim's DR 28 Response about advance gas purchases:⁵²

⁵² This spreadsheet also shows that Mitton bought gas before offering on oil on two days in late June when the ISO predicted high load levels.

Date of Gas Purchase	Revised Time of Purchase from DR 47 Dates (Eastern Time)	PEAK LOAD FORECAST FOR OPERATING DATE COLUMN F (FROM ISO-NE)	Gas purchase made before or after submission of DA offer?	Volume of Gas Purchased (MMBtu)	Operating Date for which Gas Purchased	Maxim Employee Who Made Gas Purchase
6/23/2010	6/23/2010 9:18	23560	Before	5000	6/24/2010	Kyle Mitton
6/23/2010	6/23/2010 9:18		Before	5000	6/24/2010	Kyle Mitton
6/23/2010	6/23/2010 9:18		Before	4500	6/24/2010	Kyle Mitton
6/23/2010	6/23/2010 9:32		Before	4700	6/24/2010	Kyle Mitton
6/28/2010	6/28/2010 9:14	23600	Before	4000	6/29/2010	Kyle Mitton
6/28/2010	6/28/2010 9:14		Before	8800	6/29/2010	Kyle Mitton
7/6/2010	7/6/2010	26720	Before	2000	7/7/2010	Kyle Mitton
7/6/2010	7/6/2010		Before	1000	7/7/2010	Kyle Mitton
7/6/2010	7/6/2010		Before	7000	7/7/2010	Kyle Mitton
7/6/2010	7/6/2010		Before	5000	7/7/2010	Kyle Mitton
7/6/2010	7/6/2010		Before	5000	7/7/2010	Kyle Mitton
7/12/2010	7/12/2010 9:28	23770	Before	3597	7/13/2010	Kyle Mitton
7/12/2010	7/12/2010 9:28		Before	1403	7/13/2010	Kyle Mitton
7/12/2010	7/12/2010 10:25		Before	5433	7/13/2010	Kyle Mitton
7/12/2010	7/12/2010 10:25		Before	1000	7/13/2010	Kyle Mitton
7/13/2010	7/13/2010	23740	Before	982	7/14/2010	Kyle Mitton
7/13/2010	7/13/2010		Before	3018	7/14/2010	Kyle Mitton
7/13/2010	7/13/2010		Before	5000	7/14/2010	Kyle Mitton
7/13/2010	7/13/2010		Before	4000	7/14/2010	Kyle Mitton
7/14/2010	7/14/2010 9:44	23510	Before	4200	7/15/2010	Kyle Mitton
7/14/2010	7/14/2010 9:44		Before	800	7/15/2010	Kyle Mitton
7/14/2010	7/14/2010 9:37		Before	2500	7/15/2010	Kyle Mitton
7/15/2010	7/15/2010	24220	Before	3000	7/16/2010	Kyle Mitton
7/15/2010	7/15/2010		Before	3500	7/16/2010	Kyle Mitton
7/15/2010	7/15/2010		Before	6500	7/16/2010	Kyle Mitton
7/15/2010	7/15/2010		Before	500	7/16/2010	Kyle Mitton
7/15/2010	7/15/2010		Before	1500	7/16/2010	Kyle Mitton
7/19/2010	7/19/2010 9:26	24020	Before	2400	7/20/2010	Kyle Mitton
7/19/2010	7/19/2010 9:53		Before	500	7/20/2010	Kyle Mitton
7/19/2010	7/19/2010 10:07		Before	2000	7/20/2010	Kyle Mitton
7/19/2010	7/19/2010 10:07		Before	5000	7/20/2010	Kyle Mitton
7/19/2010	7/19/2010 10:11		Before	2700	7/20/2010	Kyle Mitton
7/19/2010	7/19/2010 10:17		Before	1900	7/20/2010	Kyle Mitton
7/20/2010	7/20/2010	23260	Before	5000	7/21/2010	Kyle Mitton
7/20/2010	7/20/2010		Before	4800	7/21/2010	Kyle Mitton
7/20/2010	7/20/2010		Before	200	7/21/2010	Kyle Mitton
7/20/2010	7/20/2010		Before	4000	7/21/2010	Kyle Mitton
7/20/2010	7/20/2010		Before	2000	7/21/2010	Kyle Mitton
7/21/2010	7/21/2010 9:37	22600	Before	3000	7/22/2010	Kyle Mitton
7/21/2010	7/21/2010 9:37		Before	7000	7/22/2010	Kyle Mitton
7/21/2010	7/21/2010 9:40		Before	1200	7/22/2010	Kyle Mitton
8/10/2010	8/10/2010	23480	Before	5000	8/11/2010	Kyle Mitton
8/10/2010	8/10/2010		Before	8000	8/11/2010	Kyle Mitton
8/16/2010	8/16/2010 10:54	22530	Before	5830	8/17/2010	Kyle Mitton
8/16/2010	8/16/2010 10:54		Before	170	8/17/2010	Kyle Mitton
8/18/2010	8/18/2010	21390	Before	8000	8/19/2010	Kyle Mitton
8/18/2010	8/18/2010		Before	1000	8/19/2010	Kyle Mitton

On these 11 days in July and August, as the third column shows, ISO-NE forecast that loads would peak at levels between 21,390 and 26,720 MWs, for an average across these days of 23,567 MWs. Because Pittsfield was often needed for reliability on days with high loads in ISO-NE, Maxim’s expectation that it would likely be committed for reliability in the Day Ahead market – as shown by its own behavior in buying gas in advance – was warranted.

In short, Maxim’s claims that it was “surprised” to receive Day Ahead reliability commitments during this period are not consistent with the record.

D. The Strategy: Day by Day

1. Late June-July 4, 2010: Mitton experiments with oil-based offers

When the RMR Agreement ended on June 1, 2010, Maxim offered the Pittsfield plant on gas prices (averaging \$59.64) for 31 of the 35 operating days between June 1 and July 5, 2010. On four days in late June with high load forecasts, however, Maxim offered Pittsfield on oil prices (averaging \$172.96).⁵³ On at least two of those days (operating dates June 24 and June 29), Mitton bought substantial quantities of gas before submitting a Day Ahead offer, reflecting his expectation that Pittsfield was likely to be committed for reliability.⁵⁴

2. July 5, 2010: Mitton offers oil and Pittsfield is committed for reliability

On the morning of July 5, 2010, ISO-NE posted a peak load forecast of 25,660 MWs for the next day (July 6, 2010).⁵⁵ This was an exceptionally high forecast, higher than the largest actual load (25,100 MWs) during the preceding year (2009).⁵⁶

For the Pittsfield plant that day, Mitton submitted Day Ahead offers (for operating date July 6, 2010) based on oil pricing, at \$167.50/MWh.⁵⁷ That afternoon (July 5), the ISO gave Pittsfield a Day Ahead commitment for 11 hours on July 6.⁵⁸ Although the ISO does not immediately notify generators whether they have been committed economically or for reliability, when Mitton saw that the ISO had committed Pittsfield in the Day

⁵³ Master Spreadsheet.

⁵⁴ See pp. 19-22 above. Maxim did not get Day Ahead awards on these four days.

⁵⁵ Day 2 Peak Load Forecasts.

⁵⁶ Energy Tariff Experts website, <http://energytariffexperts.com/blog/2013/7/17/iso-heat-waves-and-capacity-tags> (last visited Dec. 13, 2014).

⁵⁷ Master Spreadsheet.

⁵⁸ Master Spreadsheet.

Ahead market despite offer prices above LMPs, he could infer that the unit was not being committed on economics. And for July 6, even on a day with high LMPs because of exceptionally high temperatures, Pittsfield's offer price was above Day Ahead LMPs for eight of the 11 hours for which Pittsfield received a Day Ahead schedule.⁵⁹

Although it offered based on oil prices, Pittsfield burned only gas and no oil on July 6.⁶⁰ Had the IMM not later recouped the excess payments that Maxim received as a result, Maxim would have obtained \$99,163 in extra NCPC payments for this day alone (July 6).⁶¹

3. July 6: Maxim buys gas before submitting an oil-based Day Ahead offer, and burns only gas

Having received a Day Ahead schedule for Pittsfield after offering based on high oil prices on June 5 (for operating date July 6), Mitton repeated the strategy the next day (that is, in the offers he submitted on July 6 for operating date July 7). On the morning of July 6 when Mitton submitted his July 7 Day Ahead offer for Pittsfield, ISO-NE's peak load forecast of 26,720 MWs was even higher than it had been the day before,⁶² and higher than any actual load in the previous three years.⁶³

On July 6, before submitting his July 7 Day Ahead offer based on oil prices, Mitton had already procured 20,000 MMBtu of gas for Pittsfield for July 7 – enough to

⁵⁹ ISO-NE Market Data, Node LMPs tab; Mitton Test. Vol. I Tr. 154-55 (while Mitton did not “technically” know whether Pittsfield had gotten a commitment based on reliability, by “looking at LMPs and our offer price,” he could “determine if it looks like we were taken out of merit”); *id.* at 155 (Mitton could “infer” the type of commitment by looking at prices); *id.* (“Q So you receive the award, and you can add your own judgment based on your own understanding of what the day-ahead LMP is going to be and you offered in, you could determine effectively if this was an out-of-market payment, so any of the NCPC buckets, or a competitive offer that was picked up because it was at the marginal LMP or below that price? A Yeah, I would agree with that.”)

⁶⁰ DR 28 Response.

⁶¹ July IMM Mitigation Spreadsheet. Absent mitigation, Maxim would be paid NCPC based on its offer price. If Maxim's offer price proved to be more than 10% above the reference price for oil, it would be mitigated to the oil reference price.

⁶² Day 2 Peak Load Forecasts.

⁶³ Energy Tariff Experts website, <http://energytariffexperts.com/blog/2013/7/17/iso-ne-heat-waves-and-capacity-tags> <visited Dec. 13, 2014>.

run the plant for about 12 hours.⁶⁴ As discussed above, Mitton's decision to take the unusual step of buying gas before submitting a Day Ahead offer reflected his expectation that the ISO was likely to commit Pittsfield for reliability. Given the ISO's extraordinarily high load forecast for July 7, that expectation was logical.

Like the day before, that afternoon the ISO gave Pittsfield a Day Ahead commitment, this time for 13 hours.⁶⁵ Again, Mitton realized without being formally told that the award was not based on economics, because Pittsfield's offer price of \$171.69 was above ISO-NE Day Ahead LMPs for 10 of the 13 hours for which Pittsfield received a Day Ahead schedule, even on another day with high LMPs because of very hot weather.⁶⁶

As it had done the previous day, on July 7 Pittsfield burned only gas. For July 7, but for later IMM intervention, Maxim would have obtained \$90,041 in extra NCPC payments by being paid at oil prices.⁶⁷

4. July 7-16: with ISO-NE forecasting high peak loads, Maxim continues to offer based on oil prices, usually buying gas before submitting Day Ahead offers on oil

As the summer heat wave continued, between July 7 and July 15, ISO-NE forecast peak loads for the next operating date of between 21,410 MWs and 25,260 MWs.⁶⁸ Each day, Mitton offered Pittsfield based on oil prices (with offer of between \$171.73 and \$176.37/MWh). On seven of these nine days, ISO-NE gave Pittsfield Day Ahead commitments for reliability. On each of these seven days of reliability commitments, Pittsfield burned only gas.⁶⁹ At least for operating dates July 13, 14, 15, and 16 (and possibly for the other days as well), Mitton acquired substantial amounts of gas for the next day before submitting Day Ahead offers based on oil prices.⁷⁰

⁶⁴ DR 47c Response. With a heat rate of 8.4 (*Project Stateside Presentation* at 15), Maxim needed about 1,180 MMBtu of gas per hour to produce around 140 MWs.

⁶⁵ Master Spreadsheet. On July 7, temperatures in Boston hit 100° F. U.S. Climate Data web site, <http://www.usclimatedata.com/climate/boston/massachusetts/united-states/usma0046/2010/7> (last visited Dec. 9, 2014).

⁶⁶ ISO-NE Market Data, Node LMPs tab.

⁶⁷ July IMM Mitigation Spreadsheet.

⁶⁸ Day 2 Peak Load Forecasts.

⁶⁹ DR 28 Response.

⁷⁰ DR 47c Response.

For each of these seven operating dates, Maxim received Day Ahead schedules for reliability purposes. As with the earlier days when Pittsfield received Day Ahead schedules that month, the schedules could not have been based on economics: across the 73 hours for which Maxim received Day Ahead commitments during these days, its offers based on its oil costs (in the range of \$171 to \$176/MWh) were above Day Ahead LMPs in all but three hours.⁷¹

Again, after offering on oil prices, Maxim burned only gas on these seven days.⁷²

5. July 16-21: Mitton exchanges emails with the IMM about Pittsfield offers, continues to offer oil and burn nearly 100% gas

On or around July 15, 2010, IMM official John Angeli called Mitton and left a message about the “fuel price[s]” at which Maxim had been offering Pittsfield into ISO-NE.⁷³ Mitton responded by email the next day (July 16):⁷⁴

From: Kyle Mitton [kmitton@maximpowercorp.com]
Sent: Friday, July 16, 2010 12:03 PM
To: jangeli@iso-ne.com
Subject: Asset 326 - Altresco/Pittsfield

Hi John,

I was out of the office yesterday but got your message regarding the offer price for Asset 326. Similarly to our other units we have been offering the unit in conservatively on fuel oil due to the daily gas restrictions on Tennessee Gas Pipeline. I can provide you the restriction notices for your records if you like – please let me know.

Thanks,

Kyle Mitton
Energy Marketing Analyst
Maxim Power Corp.
p. 403.750.9310
c. 403.554.3060
f. 403.263.9125
e. kmitton@maximpowercorp.com
web www.maximpowercorp.com

When Mitton wrote this email to Angeli at mid-day on July 16, 2010:

⁷¹ Master Spreadsheet; ISO-NE Market Data, Node LMPs tab.

⁷² Master Spreadsheet.

⁷³ Email from Kyle Mitton to John Angeli (July 16, 2010), MPCPROD00074407 (“I was out of the office yesterday but got your message regarding the fuel price for Asset 326 [i.e., Pittsfield].”) (within Relevant Emails (July-August 2010)).

⁷⁴ MPCPROD00074407 (within Relevant Emails (July-August 2010)).

- Maxim had offered based on oil prices for the previous 11 days (including its Day Ahead offer for that day, July 16), and had received Day Ahead schedules for reliability purposes on all but two of those days;⁷⁵
- On at least five of those days (operating dates July 7, July 13, July 14, July 15, and July 16), Mitton had bought large volumes of gas before submitting a Day Ahead offer on oil prices;⁷⁶
- Mitton's advance gas purchases reflected his expectation that Pittsfield was likely to receive reliability schedules from ISO-NE;
- When buying gas in advance of submitting Day Ahead offers based on oil prices, Mitton planned to burn gas for much if not all of the reliability commitment he expected to receive based on oil pricing;
- Although Maxim offered based on oil prices on the nine days it received Day Ahead schedules for reliability purposes, Pittsfield burned 100% gas, and 0% oil, during those days;⁷⁷ and
- By collecting NCPC based on oil prices while actually burning gas, Maxim enjoyed very large profits. (The IMM later recouped an average of \$121,187 per day for the nine days between July 6 and July 16 when Pittsfield received a Day Ahead schedule for reliability purposes.)⁷⁸

In his July 16 email, Mitton did not mention that across the nine days for which it had received Day Ahead schedules based on oil prices, Maxim had burned no oil. (At the time Mitton wrote the email at mid-day on July 16, Pittsfield was burning 100% gas to satisfy its Day Ahead commitment after offering based on oil prices.) Instead, Mitton simply told Angeli that Maxim was offering based on oil because of pipeline restrictions. Because Mitton raised the spectre of pipeline restrictions, without mentioning that he had actually been able to procure gas every day, the natural reading of Mitton's email – and the one taken by IMM official Angeli – was that the Pittsfield plant itself was having problems acquiring gas and was therefore burning oil.⁷⁹

⁷⁵ Master Spreadsheet.

⁷⁶ DR 47c Response.

⁷⁷ DR 28 Response.

⁷⁸ July IMM Mitigation Spreadsheet (average daily recoupment for July 6, 7, 8, 9, 12, 13, 14, 15, and 16).

⁷⁹ Declaration of John Angeli ¶ 7 (Dec. 22, 2014) (Angeli Dec.). That this was the natural reading of Mitton's email is shown by testimony filed by ISO-NE in August 2009 in support of the tariff filing that led to the mitigation provisions at issue here. Joint

Angeli responded a few minutes later as follows:⁸⁰

From: Angeli, John [<mailto:jangeli@iso-ne.com>]
Sent: Friday, July 16, 2010 11:24 AM
To: Kyle Mitton
Subject: RE: Asset 326 - Altresco/Pittsfield

Kyle the backup would be helpful.

Mitton wrote back the following Monday, July 19, as follows:⁸¹

Testimony of David LaPlante and Mario S. DePillis, Jr., Attachment 3 to ISO New England Inc. and New England Power Pool, Revisions Relating to the Mitigation of Supply Offers for Resources Committed to Satisfy Reliability Needs,” Docket No. ER09-1546-000 (Aug. 5, 2009) (Joint Testimony). Mitton relies on this filing in his December 2014 Submission (at 8).

Relevant passages in the ISO-NE Testimony include the following:

- “The revised rules also prescribe that *the market monitor must assume that a dual-fuel resource will run on the least cost fuel unless notified in writing that the resource will be burning the more expensive fuel* and is unavailable on the least cost fuel.”⁷⁹ (Joint Testimony at 26) (emphasis added).
- “there are temporary changes to a unit’s operation due to unforeseen events outside the Market Participant’s control that might warrant not imposing mitigation for an Operating Day. An example of this second type would be the *lack of natural gas availability that requires a resource to burn oil instead.*” (Joint Testimony at 26) (emphasis added).

In other words, Mitton’s emails to Angeli appeared to be the type of notification described in ISO-NE’s Joint Testimony, namely that gas was unavailable and the unit was therefore burning oil. While the IMM might double-check later, it was Maxim’s hope, as the July 20 Devasahayam email discussed below explains, that this would not happen.

⁸⁰ MPCPROD00074409 (within Relevant Emails (July-August 2010)). The time stamps on the emails are sometimes in Eastern Time (Holyoke, Massachusetts, where ISO-NE is located) and sometimes in Mountain Time (Calgary, Alberta, where Maxim is located).

⁸¹ MPCPROD00074409 (within Relevant Emails (July-August 2010)).

From: Kyle Mitton [kmitton@maximpowercorp.com]
Sent: Monday, July 19, 2010 4:48 PM
To: Angeli, John
Cc: Eagle Kwok
Subject: RE: Asset 326 - Altresco/Pittsfield
Attachments: TGP Restriction Notice Summary (July 1-20, 2010).pdf

Hi John,

Here is a pdf with all the restrictions that TGP has posted on their Critical Notice Board month to date for July 2010. As you can see from this file there have been restrictions every day of the month so far in July. The main reason for this is that TGP is performing maintenance on some key compressor stations which are causing "bottlenecks" and reducing the amount of gas that can flow. During normal heat this wouldn't be an issue however with the prolonged heat wave in the Northeast restrictions have been a serious issue. Penalties issued by the Local Distribution Company for burning gas that is not ours are extremely severe, so to protect ourselves we have been offering in on fuel oil to control our risk exposure.

In the past Pittsfield/Altresco has sent a notice to let Market Monitoring know when the unit was offering on fuel oil due to gas pipeline restrictions. Is this a practice you wish us to continue on a go-forward basis?

Please don't hesitate to call me if you wish to discuss.

Regards,
Kyle

A few hours before writing this email, Mitton had offered Pittsfield on oil prices in the Day Ahead market for July 20, even though he had acquired 14,500 MMBtu of gas for delivery that operating day before offering on oil prices.⁸² Mitton did not mention that he had done so, or that (by then) Pittsfield had burned 100% gas on 11 of the 12 days when it had been committed for reliability that month (July 2010).⁸³ Mitton nevertheless told Angeli that he was offering Pittsfield on oil because of pipeline restrictions, emphasizing that the restrictions "*have been a serious issue.*"⁸⁴ Angeli understood from this email (and Mitton's other emails that month about pipeline restrictions) that Maxim was having problems acquiring gas and was therefore burning the fuel it offered, namely, oil.⁸⁵

The next day, Angeli wrote back to Mitton as follows:

⁸² DR 47c Response.

⁸³ Kwok August 23, 2010 Email (within Relevant Emails (July-August 2010)). On July 18, for the first time that month, Maxim burned oil to satisfy a small portion (in this case, 25%) of its Day Ahead commitment. Master Spreadsheet.

⁸⁴ July 19 Mitton Email (emphasis added) (within Relevant Emails (July-August 2010)).

⁸⁵ Angeli Decl. ¶ 7.

From: Angeli, John [mailto:jangeli@iso-ne.com]
Sent: Tuesday, July 20, 2010 11:47 AM
To: Kyle Mitton
Subject: RE: Asset 326 - Altresco/Pittsfield

Kyle, when you have a fuel issue please let us so we can model the unit on the correct fuel.

John Angeli

Mitton responded that afternoon as follows:

From: Kyle Mitton [kmitton@maximpowercorp.com]
Sent: Tuesday, July 20, 2010 1:22 PM
To: Angeli, John
Cc: Eagle Kwok
Subject: RE: Asset 326 - Altresco/Pittsfield

Thanks John – will do.

As a heads up we are in on fuel oil again for tomorrow.

Regards,

Kyle

Again, a few hours before writing this email, Mitton had offered Pittsfield on oil for operating day July 21, after securing 16,000 MMBtu of gas for that operating day. The previous day (operating day July 19), Pittsfield had burned only gas to satisfy its Day Ahead commitment, and as Mitton wrote his email, was doing the same on operating day July 20.

That day (July 20) Mitton spoke with a colleague, Chris Devasahayam, about how the IMM would handle Maxim's recent offers for Pittsfield. That evening, Devasahayam sent an email to his (and Mitton's) boss, Eagle Kwok, copying Mitton.⁸⁶ The email

⁸⁶ Email from Chris Devasahayam to Eagle Kwok (July 20, 2010), MPCPROD00091433 ("July 20 Devasahayam Email") (within Relevant Emails (July-August 2010)).

discussed how Maxim could avoid having the IMM mitigate Pittsfield's NCPC payments to gas prices on days when the plant burned gas.

Devasahayam began by telling Kwok and Mitton that the IMM "has the power to mitigate offers that have a material effect on NCPC."⁸⁷ (Because of the large price difference between oil and gas, Maxim's oil-based offers obviously had "a material impact on NCPC.") Before the IMM could mitigate a unit's offers, however, Devasahayam said that the IMM needed to go through "3 stages of investigation."⁸⁸ Crucially, Devasahayam said that "[b]efore imposing any mitigation, *the [IMM] has to investigate reasons for the offer.*"⁸⁹ Only if the IMM is "*not convinced*" about the reasons for the offer will it examine whether there is "a material impact on NCPC."⁹⁰ Devasahayam went on to discuss a variety of reasons a generator could give the IMM about why it was offering on oil.⁹¹

As Mitton knew, the IMM had begun the first stage – "investigating reasons for the offer" – with Angeli's inquiry the previous week about Maxim's high offer prices for Pittsfield. And the day before Devasahayam's email, on Monday, July 19, Mitton had sent Angeli an email about the "reasons for [Maxim's] offer[s]," which conveyed the impression that Maxim was having problems getting gas for Pittsfield and was therefore burning oil.

Mitton's next communication with Angeli (and his final communication with Angeli during July) was the next day, on the afternoon of Wednesday, July 21, 2010:

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (emphasis added).

⁹⁰ *Id.* (emphasis added).

⁹¹ *Id.*

From: Kyle Mitton [kmitton@maximpowercorp.com]
Sent: Wednesday, July 21, 2010 4:02 PM
To: Angeli, John
Cc: Eagle Kwok
Subject: Asset 326 on Oil Pricing for 7/22

Hi John,

Altresco is on fuel oil pricing again for 7/22 due to gas restrictions again.

Notice Type	Posted Date/Time	Notice Effective Date/Time	Notice End Date/Time	Notice Identifier	Subject	Required Response	Response Date/Time	Notice Status	Prior Notice Identifier	Critical Notice Indicator	TSP	Name
Curtailment	7/21/2010 1:50:00 PM	7/22/2010 9:00:00 AM	7/23/2010 9:00:00 AM	132631	ANTICIPATED RESTRICTIONS FOR 07/22/10	5		Initiate		Y	001939164	TGP

Regards,

Kyle Mitton
Energy Marketing Analyst
 Maxim Power Corp.
 p. 403.750.9310
 c. 403.554.3060
 f. 403.263.9125
 e. kmitton@maximpowercorp.com
 web www.maximpowercorp.com

Earlier that day (July 21), before offering Pittsfield for July 22 on oil prices, Mitton had already purchased 11,200 MMBtu of gas for July 22 delivery.⁹² The day before (July 20), Mitton had likewise purchased gas for July 21 delivery (totaling 16,000 MMBtu) before offering Pittsfield on oil prices for July 21. In his July 21 email about Maxim’s July 22 offer for Pittsfield, Mitton did not tell Angeli he had bought gas before offering on oil that day and the previous day. Instead, he again told Angeli that Maxim was offering Pittsfield on oil pricing “due to gas restrictions.” And again, in response to the IMM’s inquiry into the reasons for Maxim’s high-priced offers, Mitton’s email created the impression (and the IMM understood) that the Pittsfield plant was burning the fuel it offered: oil.⁹³

⁹² DR 47c Response.

⁹³ Angeli Decl. ¶ 7.

6. July 22-August 18: Maxim continues to offer oil and burn all or nearly all gas, with no further communication to the IMM about why it is doing so

From July 22 to August 18, Maxim continued to offer Pittsfield on oil pricing on 22 days,⁹⁴ and had been committed for reliability on 10 of those days.⁹⁵ Maxim burned 100% gas on five of those days, 98% gas on three days, 90% gas on one day, and 85% gas on one day.⁹⁶ On at least three of these days (operating dates August 11, 17, and 19), Mitton bought gas before submitting Day Ahead offers on oil.⁹⁷

Although Mitton had promised on July 20 to let the IMM know when Pittsfield had a “fuel issue,” Mitton sent no further emails to the IMM on that topic after July 21. Nor did Maxim do anything to correct the false impressions that Mitton had created through his earlier emails.

E. End of the Strategy and Aftermath

1. August 16, 2010: IMM asks Maxim to disclose what fuel it burned on the days in July when Pittsfield was committed for reliability

On the afternoon of August 16, 2010, ISO-NE’s IMM wrote to Mitton and his boss, Kwok, to ask what fuel Pittsfield had burned during the days in July on which the plant was committed for reliability:

⁹⁴ Master Spreadsheet.

⁹⁵ Master Spreadsheet.

⁹⁶ Master Spreadsheet.

⁹⁷ DR 47c Response.

From: Dominguez, Richard [mailto:rdominguez@iso-ne.com]
Sent: Monday, August 16, 2010 2:42 PM
To: Eagle Kwok; Kyle Mitton
Cc: Angeli, John; Bagge, Robert
Subject: Altresco - July 2010 Fuel Burn
Importance: High

Eagle, Kyle:

In our standard review process, Altresco (Asset #326) has violated our conduct threshold screen for NCPC. As part of our process with dual fuel capable units, we are requesting you to confirm and document the fuel burn for each of the following days:

Date	Fuel Burn	
	Natural Gas	Oil
Tuesday, July 06, 2010		
Wednesday, July 07, 2010		
Thursday, July 08, 2010		
Friday, July 09, 2010		
Saturday, July 10, 2010		
Sunday, July 12, 2010		
Tuesday, July 13, 2010		
Wednesday, July 14, 2010		
Thursday, July 15, 2010		
Friday, July 16, 2010		
Saturday, July 17, 2010		
Sunday, July 18, 2010		
Monday, July 19, 2010		
Tuesday, July 20, 2010		
Wednesday, July 21, 2010		
Thursday, July 22, 2010		
Saturday, July 24, 2010		

Please provide within 5 business day (not later than August 23, 2010).

Regards: Rick

Richard J. Dominguez, CBM
 Supervisor, Market Compliance | Market Monitoring

ISO New England One Sullivan Road, Holyoke, MA 01040-2841
 T 413 540 4552 F 413 535 4084 C 413-218-6672
 E <mailto:rdominguez@iso-ne.com>

2. August 18, 2010: Mitton talks with IMM staffer Dominguez

As discussed above, the IMM call logs show the following notes written by IMM official Richard Dominguez about a phone call with Mitton on August 18, 2010. (Maxim does not dispute the accuracy of these notes.)

Discussed the IMM process for confirming fuel burns of dual fuel units. [Mitton] was under the impression (wrongly) that the mere notification of 'potent[i]al' gas procurement [problems] and the offer of oil was sufficient and that no further review would be done by IMM. I corrected his understanding and informed him that the IMM never indicated that the offer of oil and burning of gas was an acceptable behavior. We would evaluate based on the circumstance but was in no way a pass for mitigation.

This email shows what Mitton hoped would happen: that after he sent his emails to Angeli about offering on oil because of pipeline problems, the IMM would do no further inquiry and the ISO would pay Maxim based on oil prices even when Pittsfield burned gas.

3. August 23, 2010: Kwok sends email to Dominguez

As requested, Kwok wrote back on August 23 with data about fuel burns, showing that on the 17 days in July when Pittsfield was committed for reliability, the plant had burned 100% gas on 15 days and mostly gas on two days. Kwok's email began as follows (highlighting added):

From: Eagle Kwok [<mailto:ekwok@maximpowercorp.com>]

Sent: Monday, August 23, 2010 5:10 PM

To: Dominguez, Richard

Cc: Angeli, John; Bagge, Robert; Mitton, Kyle; Kyle Van Koughnett; Heather Wilton; Jamie Urquhart; John Hanlon; Don Scholl; Johnson, George

Subject: RE: Altresco - July 2010 Fuel Burn

Importance: High

Rick,

Attached below is Pittsfield's fuel burn profile for the days that you have requested. Despite the disparity in natural gas and fuel oil consumption, you must appreciate that we have been forthwith with IMMU under the circumstances by which we have made our decision to offer Pittsfield's energy either using natural gas or fuel oil pricing. You have informed us that you are likely to seek mitigation measures at Pittsfield. However, we would like IMMU to provide us with additional information so that we can understand better the criterion by which mitigation measures are potentially implemented. In addition, we would like IMMU to clarify and reaffirm that Pittsfield has acted reasonable in its desire to mitigate substantial fuel pricing disparities during times of natural gas pipeline restrictions that can directly impact Pittsfield's ability to procure natural gas.

* * * *

In his August 23 email, Kwok did not claim that Maxim had previously told the IMM that it had been burning gas while offering on oil prices. Instead, as the above excerpt shows, Kwok said only that Maxim had been "forthwith" (Kwok later clarified that he meant upfront) about why it had *offered* Pittsfield based on oil prices.⁹⁸

⁹⁸ Testimony of Eagle Kwok (Feb. 10, 2014) (Kwok Test.) Tr. 85 ("Q What did you mean by the word "forthwith"? A We've been up front about it.").

4. The IMM Mitigates Maxim to Gas Prices For the Days It Offered Oil and Burned Gas

In October 2010, the IMM notified Maxim that it would be mitigated to gas reference prices for its burning of gas on the 19 days in July 2010 on which it offered on oil but burned gas or almost all gas.⁹⁹ The next month, the IMM told Maxim it would similarly be mitigated to gas prices for its burning of gas on seven days in August when it did the same thing.¹⁰⁰ All told, the ISO reduced Maxim's NCPC payments by \$2.99 million through this mitigation process.¹⁰¹ Maxim has not challenged the amount of mitigation; it argues only that mitigation should be the sole remedy for its oil-gas strategy.¹⁰²

5. IMM Staff Propose to Refer the Matter to FERC in December 2010, But Enforcement Learns this Only in September 2013

In December 2010, two ISO-NE IMM staffers prepared a draft referral of Maxim's 2010 oil-gas strategy to the Commission for investigation of potential violations of Commission rules.¹⁰³ Although market manipulation can violate Rule 1c even if wrongfully obtained payments are later returned, and although false and misleading statements and material omissions can violate Section 35.41(b), after the IMM conferred with the External Market Monitor, the IMM did not make a referral, because ISO-NE had been able to recover the overpayments to Maxim. Enforcement did not learn about Maxim's July-August 2010 offer behavior until September 2013, when Enforcement was investigating different Maxim activities.

⁹⁹ Letter from Richard Dominguez to Kyle Mitton (Nov. 16, 2010), MPCPROD00082844 (Exhibit 145).

¹⁰⁰ Letter from Richard Dominguez to Kyle Mitton (Dec. 16, 2010), MPCPROD00074577.

¹⁰¹ April 2014 Maxim Submission at 70 ("Maxim has already been mitigated at a cost of \$2.99 million for the activity now being challenged here.").

¹⁰² December 2014 Maxim Submission at 10 ("In short, mitigation is the corrective measure, not a manipulation claim").

¹⁰³ Email from David LaPlante to Aaron Fate (Sept. 6, 2013) (attaching draft referral of oil-gas strategy).

6. Maxim Denies It Told the IMM It Was Burning Gas Before Late August 2010, But Mitton Then Claims the Opposite

As discussed below, in the fall of 2013, when Enforcement asked Maxim for information about its 2010 oil-gas strategy, Maxim stated, in a sworn response submitted on November 7, 2013, more than six weeks after receiving the original request, that it never told the IMM it burned gas (after offering oil) until August 23, 2010.¹⁰⁴ Mitton was consulted in preparing this response.¹⁰⁵ Nevertheless, a week later, Mitton claimed to recall that he told IMM official John Angeli in a July 2010 phone call that Maxim was offering oil and burning gas. The record evidence shows that this claim is not correct.

7. November 6, 2013: Maxim Says It Never Told the IMM Before August 23, 2010 That It Had Offered Oil But Burned Gas

On September 17, 2013 (as amended on October 24, 2013), Enforcement asked Maxim (in DR 28) to provide a spreadsheet showing what fuel it had offered – and what fuel it had burned, if any – for each day since January 1, 2010. For those days when Maxim offered oil but burned gas, Enforcement asked whether Maxim told the IMM it burned gas (Column I); if so, when it did so (Column J); and whether it told the IMM before or after the IMM asked about what fuel Pittsfield had burned (Column K). The request (Column L) asked Maxim not only to “identify any written communications” but also to “describe any oral communications” (emphasis added), such as phone calls, in which Maxim notified the IMM that Maxim had burned gas after offering oil:

A	B	C	D	E	F	G	H	I	J	K	L
Date	Fuel bid in Day Ahead market	Fuel bid in re-offer	Fuel burned	If B=oil and D = at least 75% gas, did Maxim purchase gas before end of reoffer period? (Yes/No)	Reference price for oil	Reference price for gas	Did plant receive VAR NCPD payments for this day? (Yes/No)	If B = oil, C = oil, D = gas, and H = Yes, did Maxim notify ISO-NE or the IMM that it burned gas? (Yes/No)	If I = Yes, please state the date when Maxim so notified ISO-NE or the IMM	If I = Yes, did Maxim notify ISO-NE or the IMM that it burned gas before the IMM asked Maxim which fuel it had burned? (Yes/No)	If I = Yes, please (a) identify any written communications by Bates number and (b) describe any oral communications

On November 6, 2013, more than six weeks after receiving the original request, Maxim provided the final version of its response to DR 28 in the form of a spreadsheet.¹⁰⁶ Maxim thus had ample time to research its responses. Kyle Mitton was consulted in the preparation of this spreadsheet.¹⁰⁷

¹⁰⁴ DR 28 Response.

¹⁰⁵ Mitton Test. Vol. II Tr. 269.

¹⁰⁶ DR 28 Response.

¹⁰⁷ Mitton Test. Vol. II Tr. 269.

In its response to DR 28, Maxim did not claim that it ever told the IMM before August 23, 2010 about *any* gas purchases before submitting Day Ahead offers. And for those dates as to which it supplied an answer, Maxim both denied disclosing its advance gas purchases before August 23, 2010, and admitted that it told the IMM about these purchases only after the IMM asked about what fuel Pittsfield had burned. For example:

	A	B	D	H	I	J	K
1	Date	Fuel bid in Day Ahead market	Fuel burned	Did plant receive VAR NCPC payments for this day? (Yes/No)	If B = oil, C= oil and D= gas, did Maxim notify ISO-NE or the IMM that it burned gas?	If I = Yes, please state the date when Maxim so notified ISO-NE or the IMM	If I = Yes, did Maxim notify ISO-NE or the IMM that it burned gas before the IMM asked Maxim which fuel it had burned? (Yes/No)
188	7/6/2010	OIL	Gas	No	Yes	8/23/2010	No
189	7/7/2010	OIL	Gas	Yes	Yes	8/23/2010	No
190	7/8/2010	OIL	Gas	Yes	Yes	8/23/2010	No
191	7/9/2010	OIL	Gas	Yes	Yes	8/23/2010	No
192	7/10/2010	OIL	Gas	Yes	Yes	8/23/2010	No
195	7/13/2010	OIL	Gas	Yes	Yes	8/23/2010	No
196	7/14/2010	OIL	Gas	Yes	Yes	8/23/2010	No
197	7/15/2010	OIL	Gas	Yes	Yes	8/23/2010	No
198	7/16/2010	OIL	Gas	Yes	Yes	8/23/2010	No
202	7/20/2010	OIL	Gas	Yes	Yes	8/23/2010	No
203	7/21/2010	OIL	Gas	Yes	Yes	8/23/2010	No
204	7/22/2010	OIL	Gas	Yes	Yes	8/23/2010	No
210	7/28/2010	OIL	Gas	Yes	Yes	10/25/2010	No
218	8/5/2010	OIL	Gas	Yes	Yes	11/12/2010	No
224	8/11/2010	OIL	Gas	No	Yes	11/12/2010	No

8. November 13, 2013: Mitton Now Claims He Told the IMM in July 2010 that Maxim Was Offering Oil and Burning Gas

Although Maxim (after consulting with Mitton) stated on November 6, 2013 that it did not tell the IMM it had burned gas after offering oil before August 23, 2010, one week later, on November 13, 2013, Mitton gave directly contrary testimony. Specifically, in his recorded testimony, Mitton now claimed to remember a July 2010 phone call with IMM employee John Angeli in which Mitton disclosed that Pittsfield was burning gas even though it had offered on oil.¹⁰⁸ Mitton also claimed that during this phone call, Angeli told him that “in this scenario we would be mitigated back to gas.”¹⁰⁹

¹⁰⁸ Mitton Test. Vol. II Tr. 267-70, 295-96.

¹⁰⁹ Mitton Test. Vol. II Tr. 270.

At first during his November 13, 2013 testimony, Mitton said he recalled “a phone conversation with John Angeli where I did tell him that we were burning gas,” but that he “[didn’t] know the date of that,” although it “could have been around” July 16, “I’m unsure.”¹¹⁰ Mitton also said “I feel like it may have been around this time period” (mid-July 2010).¹¹¹

Soon after, however, Mitton was no longer unsure about the timing of the call: he now testified that he “absolutely” had this phone call with Angeli during July 2010.¹¹²

9. Maxim Characterizes the Claimed Mitton-Angeli Phone Call as “Critical”

On January 9, 2014, Maxim provided an additional submission in defense of its conduct in ISO-NE. Quoting Mitton’s testimony – but not mentioning Maxim’s contrary statements in its response to DR 28 – Maxim told Enforcement that the claimed Mitton-Angeli phone call was “*critical* for two reasons: (i) it demonstrates that IMM knew Pittsfield was burning gas; and (ii) Mr. Angeli only responded that mitigation would likely result, he did not ask Maxim to cease and desist.”¹¹³

10. April and December 2014: The Alleged Mitton-Angeli Phone Call Remains Central to Maxim’s and Mitton’s Defense of the 2010 Oil-Gas Strategy

In April 2014, Maxim responded to staff’s Preliminary Findings about the 2010 oil/gas strategy (the April 2014 Maxim Submission). Again, Maxim relied heavily on the alleged Mitton-Angeli phone call in July 2010.¹¹⁴ And again, Maxim had no explanation for why Mitton contradicted Maxim’s sworn response to DR 28, prepared in consultation with him.

Mitton’s December 2014 Submission likewise relies on the alleged Mitton-Angeli phone call and likewise offers no explanation for the contradiction.¹¹⁵

¹¹⁰ Mitton Test. Vol. II Tr. 268.

¹¹¹ Mitton Test. Vol. II Tr. 269.

¹¹² Mitton Test. Vol. II Tr. 268.

¹¹³ January 2014 Submission at 26 (emphasis added).

¹¹⁴ April 2014 Maxim Submission at 82-83 (“As Mr. Mitton has consistently explained, he specifically recalls informing Mr. Angeli of the IMM in mid-July that the plant was burning gas and Mr. Angeli informing him that the offers would likely be mitigated.”).

¹¹⁵ December 2014 Mitton Submission at 9 (“Mr. Mitton did inform the IMM of gas usage. . . . [He] specifically recalls informing Mr. Angeli of the IMM in mid-July that the

11. The Record Shows That Mitton Did Not Tell Angeli in July 2010 that Maxim Was Offering Oil But Burning Gas

Kyle Mitton may have spoken by phone at some point with John Angeli about burning gas at Pittsfield after offering on oil prices.¹¹⁶ The record evidence shows, however, that Mitton did not do so before August 23, 2010, when his boss, Eagle Kwok, responded to the IMM's inquiry about what fuel Maxim burned on various days in July.

First, as discussed above, in its sworn responses to DR 28, Maxim stated that the first time it told the IMM it had burned gas (after offering oil) was in Kwok's August 23, 2010 email. Mitton, who was by far the most knowledgeable Maxim employee about the 2010 oil-gas strategy, was consulted in preparing these responses.

Second, Mitton testified that he assumed he told his boss, Kwok, about his July 2010 call with Angeli, because he considered it very important: "I see no reason why I wouldn't tell my boss about *something that significant*."¹¹⁷ But Kwok did not recall hearing about any such call (or any other disclosure to the IMM about offering oil and burning gas) before August 23, 2010.¹¹⁸

Third, Maxim's internal emails do not mention any call with Angeli in which Mitton disclosed that Maxim was burning gas at Pittsfield. To the contrary, the one relevant internal email (from Chris Devasahayam on July 20) shows that Maxim was

plant was burning gas and Mr. Angeli informing him that the NCPC payments likely would be mitigated.").

¹¹⁶ For example, phone records produced by Maxim show a five-minute phone call between Mitton and Angeli on September 3, 2010. January 2014 Maxim Submission, p. 54 of 74.

¹¹⁷ Mitton Test. Vol. II Tr. 280 (emphasis added).

¹¹⁸ Kwok Test. Tr. 90:

"Q Burning oil versus burning gas. And my question is, are you aware of anyone at Maxim before August 23rd, 2010, advising anyone in the ISO New England market monitor's office that on some days in July when Maxim had offered Pittsfield based on oil pricing, it had burned gas?

A I am not aware of anyone at Maxim or our O&M contract provider who would have been in communication with ISO New England or market monitoring in instances where we have offered in on fuel oil due to gas pipeline restrictions and we have burned gas.

Q So is it fair to say the answer to my question is no?

A I would say that is a fair assessment, then. My response would be no."

focused on *avoiding* any further inquiry by the IMM about what fuel Pittsfield was burning, so that Maxim would be able to collect NCPC at oil prices.¹¹⁹ That email would make no sense if the IMM already knew that Maxim was burning gas and Maxim knew it would be mitigated to gas prices.

Fourth, none of Mitton's emails with Angeli (or any other IMM staffer) during July 2010 mention that Pittsfield was burning gas, or refer to any phone call in which Mitton told Angeli that Pittsfield was doing so. Had Mitton told Angeli this important fact by phone, he would likely have mentioned it in at least one of his emails with Angeli that month.

Fifth, the IMM kept a log of calls with market participants during this period. The log reflects other calls between Angeli and Mitton (and calls with other market participants), but does not reflect any conversation in which Mitton told Angeli that Maxim was burning gas at Pittsfield.¹²⁰

Sixth, Angeli is confident that no such call occurred.¹²¹ Angeli does not remember any such call, and states that if such a call had occurred, it would have been important news that he would have communicated to other IMM employees immediately.¹²² (That is, Angeli, like Mitton, believed that a reliability unit offering on high oil prices while burning much less costly gas was a major issue.)

Seventh, in his August 23, 2010 email to the IMM defending the propriety of Maxim's conduct, Kwok did not say that Mitton had previously told the IMM that the unit had been offering based on oil but actually burned gas. (The claimed call with Angeli would have been a key point in Maxim's defense.) Rather, Kwok told the IMM that Maxim had "been forthwith [i.e., upfront] with the IMM under the circumstances by which we have made our decision to *offer Pittsfield's energy either using natural gas or fuel oil pricing.*"¹²³ While Kwok said Maxim had all along been candid about why it was *offering* based on oil prices, he did not say that Maxim had previously disclosed that it *actually burned gas*, which is what Mitton claimed (three years later, starting in mid-November 2013) he told Angeli in July 2010.

¹¹⁹ Devasahayam Email (within Relevant Emails (July-August 2010)).

¹²⁰ Angeli Phone Log, entitled "Participant Communication_Angeli_6_2010_62011 REDACTED.pdf."

¹²¹ Angeli Decl. ¶ 3.

¹²² *Id.* ¶ 6.

¹²³ Kwok August 23, 2010 Email (emphasis added) (within Relevant Emails (July-August 2010)).

Mitton talked with Kwok before Kwok sent his August 23 email to the IMM.¹²⁴ Neither Kwok nor Mitton could think of any reason Maxim would omit from this email a crucial defense of Maxim's past conduct and candor.¹²⁵

Finally, Mitton claims that Angeli told him in July 2010 that the IMM would later determine what fuel the unit had burned and mitigate the unit if it burned gas. But the contemporaneous record shows that no such conversation occurred during July 2010, or at any time before August 23, 2010.

The IMM call logs show the following notes from a phone call between Mitton and IMM staffer Richard Dominguez on August 18, 2010:

Discussed the IMM process for confirming fuel burns of dual fuel units. [Mitton] was under the impression (wrongly) that the mere notification of 'potent[i]al' gas procurement [problems] and the offer of oil was sufficient **and that no further review would be done by IMM**. I corrected his understanding and informed him that the IMM never indicated that the offer of oil and burning of gas was an acceptable behavior. We would evaluate based on the circumstance but was in no way a pass for mitigation.¹²⁶

Maxim and Mitton have not disputed the accuracy of Dominguez' contemporary notes about the August 18 phone call with Mitton.¹²⁷ Although Mitton claimed in November 2013 that Angeli told him in July 2010 that Maxim would likely be mitigated to gas prices if it offered oil and burned gas, the IMM's contemporaneous notes show that Mitton had the opposite expectation: that "no further review would be done by [the]

¹²⁴ Mitton Test. Vol. II Tr. 291.

¹²⁵ Mitton Test. Vol. II Tr. 297 ("Is there any reason that Maxim would not have wanted to remind the Market Monitor's office that there had been a previous phone call in which the Market Monitor had already learned that the unit was bidding oil and burning gas and indicated that that was fine? A. I see no reason."); Kwok Test. 80 ("Q. Did you say, Well, let's leave some things out of here that would be helpful to us? A. Sorry, helpful to Maxim Power? Q. Helpful to Maxim, yeah. A. I don't see why we would do so.").

¹²⁶ Dominguez Notes of August 18, 2010 Call with Mitton (emphasis added).

¹²⁷ December 2014 Mitton Submission at 17 ("*As the IMM noted in the recently produced call logs* when Mr. Dominguez discussed how the mitigation rules would be applied with Mr. Mitton . . .") (emphasis added). Mitton's December 2014 Submission reprints Dominguez' log entry in its entirety.

IMM” and that Maxim would keep its oil-based NCPC payments.¹²⁸ The contemporaneous record from 2010 thus contradicts the new factual claim that Mitton (and Maxim) advanced starting on November 13, 2013.

For all of these reasons, the record shows that Mitton did not call Angeli in July 2010, or at any time before August 23, 2010, to tell him that Maxim was offering oil but burning gas. That is, the call that Maxim said in its January 2014 Submission was “critical” to its defense did not occur.

12. Maxim’s January 12, 2015 Letter provides no reason to alter the conclusion that the Mitton-Angeli call did not occur in July 2010.

In a January 12, 2015 letter to staff, counsel for Maxim and Mitton make a variety of arguments relating to the alleged Mitton-Angeli phone call. We respond here to the significant contentions in that letter.

First, Maxim and Mitton contend (at 3) that the July 20, 2010 Devasahayam email shows that Angeli must have “spoken to Mr. Mitton about the fuel burn and potential mitigation.” But as discussed above, the Devasahayam email would make no sense if Mitton had already told Angeli that Pittsfield was burning oil. That email discusses ways in which the IMM might never find out what fuel Pittsfield had burned because it would never get to the second stage that Devasahayam describes, namely determining “whether there is a material impact on NCPC.” If the IMM already knew that Pittsfield was burning gas while offering oil, it would be obvious, given the large price differences between gas and oil, that burning gas would have a “material impact on NCPC.”

Second, Maxim and Mitton argue (at 3) that Devasahayam would have no reason to write his July 20 email unless Mitton had previously talked with Angeli about fuel burns and mitigation. But Mitton had an obvious reason to be interested in that topic, independent of any call with Angeli: to know whether Maxim would be able to keep the large amounts of extra money that ISO-NE was paying Maxim in NCPC based on its offers at oil prices.

Third, Maxim and Mitton point to Kwok’s statement in his August 23, 2010 email that the IMM had “informed us that you are likely to seek mitigation measures at Pittsfield,” and argue this must be a reference to the alleged July 2010 Mitton-Angeli call. That inference is incorrect: five days earlier, on August 18, 2010, Mitton spoke with Richard Dominguez about the IMM review process, and learned that “the offer of oil and burning of gas was [not] an acceptable behavior” and was “*in no way a pass for*

¹²⁸ That is, Mitton evidently believed that his emails to Angeli, which conveyed the impression that Pittsfield was burning the fuel it offered (oil), had ended the IMM review process. See July 20 Devasahayam Email (within Relevant Emails (July-August 2010)).

mitigation.”¹²⁹ Since Kwok knew (and was telling the IMM) on August 23 that Pittsfield had burned gas after offering oil, he knew based on Mitton’s August 18 call with Dominguez that the IMM was likely to seek mitigation.

In addition, Kwok’s statement about mitigation could not have been a reference to any prior conversation with Angeli. As discussed above, the Dominguez notes show that Mitton “understood” as of August 18, 2010 that Maxim would *not* be mitigated. Kwok could therefore not be referring to a call before August 18 in which Mitton allegedly learned the opposite.

Finally, Maxim and Mitton contend (at 4) that Dominguez’ notes of his August 18, 2010 call are significant in that they show that Mitton “had formulated an understanding” about mitigation before the call, and that Mitton must have derived that understanding from the alleged July 2010 call with Angeli. But this reasoning is illogical: Mitton did have a way to “formulate an understanding” about mitigation that had nothing to do with Angeli, namely his July 20 conversations with, and July 20 email from, his colleague Chris Devasahayam. What Mitton told Dominguez on August 18 is consistent with the Devasahayam email: that Maxim could retain NCPC based on oil because the IMM would do no further review. By contrast, as just noted, what Mitton told Dominguez on August 18 is in direct contradiction to what he claims he was told by Angeli in July.¹³⁰

¹²⁹ Dominguez Notes of August 18, 2010 Call With Mitton (emphasis added).

¹³⁰ Maxim and Mitton also argue (January 12, 2015 Letter at 4) that Dominguez’ notes are important because they “omit . . . an unequivocal statement that offering on oil and burning gas was acceptable behavior.” Maxim and Mitton do not dispute that Dominguez said that “the IMM never indicated that the offer of oil and burning of gas was an acceptable behavior.” Whether or not that is an “unequivocal” condemnation or not has no significance here.

Maxim further contends (at 4) that it is significant that Maxim offered oil and burned gas later in August. But *once the IMM was alerted that Maxim was doing this*, the IMM was sure to do appropriate mitigation and to ensure that Maxim was paid NCPC based on the fuel it actually burned.

13. Maxim never disclosed to the IMM that it often bought gas before offering Pittsfield on oil

When asked in mid-August 2010 what fuel it had burned when it offered on oil during July, Maxim admitted it had almost always burned gas. But Maxim did not disclose that in many cases, it had already acquired gas when it submitted Day Ahead offers based on oil prices.¹³¹

Maxim provided a spreadsheet in response to Data Requests 47c, which shows that on at least 11 days during this period (for operating dates July 7, July 13, July 14, July 15, July 15, July 20, July 21, July 22, August 11, August 17, and August 19, 2010),¹³² Mitton had already made large purchases of gas before submitting Day Ahead offers based on oil prices:

¹³¹ See July 16, 19, and 21, 2010 Mitton Emails to Angeli; Kwok August 23, 2010 Email (within Relevant Emails (July-August 2010)).

¹³² DR 47c Response.

Date of Gas Purchase	Revised Time of Purchase from DR 47 Dates (Eastern Time)	Gas purchase made before or after submission of DA offer?	Volume of Gas Purchased (MMBtu)	Delivery Point	Operating Date for which Gas Purchased	Maxim Employee Who Made Gas Purchase
7/6/10	7/6/10 9:21	Before	2000	Pittsfield	7/7/10	Kyle Mitton
7/6/10	7/6/10 9:21	Before	1000	Pittsfield	7/7/10	Kyle Mitton
7/6/10	7/6/10 9:21	Before	7000	Pittsfield	7/7/10	Kyle Mitton
7/6/10	7/6/10 9:32	Before	5000	Pittsfield	7/7/10	Kyle Mitton
7/6/10	7/6/10 9:32	Before	5000	Pittsfield	7/7/10	Kyle Mitton
7/12/10	7/12/10 9:28	Before	3597	Pittsfield	7/13/10	Kyle Mitton
7/12/10	7/12/10 9:28	Before	1403	Pittsfield	7/13/10	Kyle Mitton
7/12/10	7/12/10 10:25	Before	5433	Pittsfield	7/13/10	Kyle Mitton
7/12/10	7/12/10 10:25	Before	1000	Pittsfield	7/13/10	Kyle Mitton
7/13/10	7/13/10 9:28	Before	982	Pittsfield	7/14/10	Kyle Mitton
7/13/10	7/13/10 9:28	Before	3018	Pittsfield	7/14/10	Kyle Mitton
7/13/10	7/13/10 9:34	Before	5000	Pittsfield	7/14/10	Kyle Mitton
7/13/10	7/13/10 9:45	Before	4000	Pittsfield	7/14/10	Kyle Mitton
7/14/10	7/14/10 9:44	Before	4200	Pittsfield	7/15/10	Kyle Mitton
7/14/10	7/14/10 9:44	Before	800	Pittsfield	7/15/10	Kyle Mitton
7/14/10	7/14/10 9:37	Before	2500	Pittsfield	7/15/10	Kyle Mitton
7/15/10	7/15/10 9:18	Before	3000	Pittsfield	7/16/10	Kyle Mitton
7/15/10	7/15/10 9:24	Before	3500	Pittsfield	7/16/10	Kyle Mitton
7/15/10	7/15/10 9:26	Before	6500	Pittsfield	7/16/10	Kyle Mitton
7/15/10	7/15/10 9:52	Before	500	Pittsfield	7/16/10	Kyle Mitton
7/15/10	7/15/10 9:52	Before	1500	Pittsfield	7/16/10	Kyle Mitton
7/19/10	7/19/10 9:26	Before	2400	Pittsfield	7/20/10	Kyle Mitton
7/19/10	7/19/10 9:53	Before	500	Pittsfield	7/20/10	Kyle Mitton
7/19/10	7/19/10 10:07	Before	2000	Pittsfield	7/20/10	Kyle Mitton
7/19/10	7/19/10 10:07	Before	5000	Pittsfield	7/20/10	Kyle Mitton
7/19/10	7/19/10 10:11	Before	2700	Pittsfield	7/20/10	Kyle Mitton
7/19/10	7/19/10 10:17	Before	1900	Pittsfield	7/20/10	Kyle Mitton
7/20/10	7/20/10 9:23	Before	5000	Pittsfield	7/21/10	Kyle Mitton
7/20/10	7/20/10 9:39	Before	4800	Pittsfield	7/21/10	Kyle Mitton
7/20/10	7/20/10 9:39	Before	200	Pittsfield	7/21/10	Kyle Mitton
7/20/10	7/20/10 9:39	Before	4000	Pittsfield	7/21/10	Kyle Mitton
7/20/10	7/20/10 9:39	Before	2000	Pittsfield	7/21/10	Kyle Mitton
7/21/10	7/21/10 9:37	Before	3000	Pittsfield	7/22/10	Kyle Mitton
7/21/10	7/21/10 9:37	Before	7000	Pittsfield	7/22/10	Kyle Mitton
7/21/10	7/21/10 9:40	Before	1200	Pittsfield	7/22/10	Kyle Mitton
8/10/10	8/10/10 9:24	Before	5000	Pittsfield	8/11/10	Kyle Mitton
8/10/10	8/10/10 9:53	Before	8000	Pittsfield	8/11/10	Kyle Mitton
8/16/10	8/16/10 10:54	Before	5830	Pittsfield	8/17/10	Kyle Mitton
8/16/10	8/16/10 10:54	Before	170	Pittsfield	8/17/10	Kyle Mitton
8/18/10	8/18/10 10:07	Before	8000	Pittsfield	8/19/10	Kyle Mitton
8/18/10	8/18/10 10:24	Before	1000	Pittsfield	8/19/10	Kyle Mitton

On ten of the 11 operating dates when Maxim has admitted to buying gas for next day delivery before offering on oil, ISO-NE committed Pittsfield in the Day Ahead market for reliability.¹³³

¹³³ DR 47c Response; Master Spreadsheet. The one exception is for operating date August 19, 2010.

In addition to the 11 days on which Maxim admits it bought gas for next day delivery before offering on oil, Maxim says it may have done the same on another 11 days during this period (for operating dates July 8, July 9, July 10, July 11, July 12, July 17, July 18, July 19, July 29, August 4, and August 5).¹³⁴ As to this second set of 11 days, Maxim says it “do[es] not know” whether the purchases were made before or after submitting Day Ahead offers, although Day Ahead offers were then due at noon and Maxim apparently made the gas purchases between 8:30 a.m. and 12:30 p.m.:¹³⁵

Date of Gas Purchase	Time of Gas Purchase	Revised Time of Purchase from DR 47 Dates (Eastern Time)	Gas purchase made before or after submission of DA offer?	Volume of Gas Purchased (MMBtu)	Delivery Point	Operating Date for which Gas Purchased	Maxim Employee Who Made Gas Purchase
7/7/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2500	Pittsfield	7/8/10	Kyle Mitton
7/7/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	5000	Pittsfield	7/8/10	Kyle Mitton
7/7/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	3400	Pittsfield	7/8/10	Kyle Mitton
7/7/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	3000	Pittsfield	7/8/10	Kyle Mitton
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2000	Pittsfield	7/9/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	3000	Pittsfield	7/9/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	1200	Pittsfield	7/9/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	3800	Pittsfield	7/9/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2416	Pittsfield	7/10/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2500	Pittsfield	7/10/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	5000	Pittsfield	7/12/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	1191	Pittsfield	7/12/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	809	Pittsfield	7/12/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2416	Pittsfield	7/11/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2500	Pittsfield	7/11/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2416	Pittsfield	7/12/10	Chris Devasahayam
7/8/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2500	Pittsfield	7/12/10	Chris Devasahayam
7/16/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2803	Pittsfield	7/17/10	Chris Devasahayam
7/16/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2197	Pittsfield	7/17/10	Chris Devasahayam
7/16/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2803	Pittsfield	7/18/10	Chris Devasahayam
7/16/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2197	Pittsfield	7/18/10	Chris Devasahayam
7/16/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2803	Pittsfield	7/19/10	Chris Devasahayam
7/16/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	2197	Pittsfield	7/19/10	Chris Devasahayam
7/28/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	10000	Pittsfield	7/29/10	Chris Devasahayam
8/3/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	9368	Pittsfield	8/4/10	Chris Devasahayam
8/3/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	632	Pittsfield	8/4/10	Chris Devasahayam
8/4/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	1400	Pittsfield	8/5/10	Chris Devasahayam
8/4/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	12500	Pittsfield	8/5/10	Chris Devasahayam
8/4/10	Between 8:30 AM and 12:30 PM	Could not find record.	Do not know	1100	Pittsfield	8/5/10	Chris Devasahayam

Although Maxim admitted in August 2010 that it had *burned* gas at Pittsfield while offering on oil, it did not disclose that, on at least 11 (and potentially on as many as 22) days, it had already acquired gas *before submitting Day Ahead offers* during this period. Nor did Maxim disclose before this investigation that, of the 11 days on which it concededly bought gas for next day delivery before submitting a Day Ahead offer, it received Day Ahead reliability commitments on all but one day.

Because Maxim did not disclose this important information at the time, the IMM and External Market Monitor did not have these facts available to them in deciding

¹³⁴ DR 47c Response.

¹³⁵ DR 47c Response.

whether to refer Maxim's oil-gas strategy to the Commission in 2010. Enforcement first learned these facts from Maxim's November 2013 Submission.¹³⁶

Maxim's own records thus show that Mitton purchased gas for next day delivery before submitting offers based on oil prices on at least 11 days in July and August 2010, and that the 2010 oil-gas strategy that included these advance purchases led to nearly \$3 million in mitigation and to extensive back-and-forth with the IMM. Nevertheless, Mitton claimed at his deposition not to remember whether he had *ever* purchased gas before submitting an oil offer:

Q. . . . Was there any instance where you might bid in oil having procured some gas?

A. I don't recall, to be honest, I don't recall.

Q. Okay. Can you mention a specific instance where this might have occurred?

A. I'm honestly uncertain.¹³⁷

This testimony is not credible.

IV. Legal Analysis & Conclusions

Enforcement staff finds that Respondents defrauded ISO-NE through a scheme designed to collect make-whole payments from the ISO based on high oil prices when its plant was actually burning much less expensive gas. On many days, Respondents anticipated that Pittsfield would be committed for reliability, bought gas in advance, and then offered the unit based on oil, while planning to burn gas for much if not all of the expected commitment. This scheme resulted in overpayments to Maxim averaging more than \$135,000 per day on the 22 days when ISO-NE committed the plant for reliability based on oil costs.

Maxim has claimed that its conduct in July and August 2010 was the result of a risk minimization strategy, i.e., avoiding the risk of offering (and being paid) based on inexpensive gas but actually having to burn expensive oil.¹³⁸ As noted earlier, if Maxim offered on oil because of genuine concerns that it would not be able to obtain gas, it could have been candid in responding to IMM inquiries about its conduct. But that would have

¹³⁶ November 2013 Maxim Submission at 16-17 ("There may be some occasions when Maxim has some level of confidence that Pittsfield may be called upon to operate for some period of time and it will place a purchase order for gas of some amount prior to submitting its Supply Offer").

¹³⁷ Mitton Test. Vol. II Tr. 321-22.

¹³⁸ *E.g.*, April 2014 Maxim Submission at 67-68.

foreclosed the extremely lucrative outcome that Maxim sought: being paid for a costly fuel when dispatched for reliability purposes while burning an inexpensive fuel. Maxim therefore devised and implemented a scheme that not only eliminated the risk of a large loss but that – *provided the Market Monitor did not realize what Maxim was doing* – generated windfall profits.

To protect this lucrative outcome, Mitton crafted Maxim’s communications with the IMM to convey the false impression that Maxim itself was having difficulty obtaining gas and was therefore burning oil. That is, Maxim sought to lull the IMM into ending its inquiry after Mitton gave the IMM the impression that the unit was burning the fuel on which it offered.

Although it had many opportunities to do so, until asked about fuel burns by the IMM in mid-August 2010, Maxim never corrected the false impression created by Mitton’s emails. Instead, Maxim allowed the false message Mitton had communicated to persist, hoping to collect NCPD based on high oil prices when the plant actually burned much cheaper gas.

In addition to violating the Commission’s Anti-Manipulation Rule, the scheme violated Section 35.41(b) of the Commission’s regulations: Maxim (through Mitton) made false and misleading statements and omitted material information in its communications with the IMM about its oil-based offers during the relevant period. Although false and misleading statements and material omissions violate Section 35.41(b) even if they are merely the product of lack of due diligence, the relevant statements and omissions here were deliberate and intentional.

Finally, although the Commission need not reach the issue in light of the false messages conveyed by Maxim’s affirmative statements in Mitton’s and Kwok’s emails, Maxim’s material omissions in those emails also violated the Anti-Manipulation Rule.

A. Elements of a Manipulation Claim

In 2005, Congress amended the Federal Power Act (FPA) in relevant part by adding section 222, which states:

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 . . . 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.¹³⁹

¹³⁹ 16 U.S.C. § 824v(a) (2012).

Pursuant to this statutory mandate, the Commission promulgated the Anti-Manipulation Rule. The portion of the Rule applicable to wholesale electricity provides as follows:

It shall be unlawful for any entity, directly or indirectly, 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 . . . to use or employ any device, scheme or artifice to defraud . . . or . . . to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.¹⁴⁰

It is unlawful to violate section 222(a) of the FPA or the Anti-Manipulation Rule, and under section 316A of the FPA violators “shall be subject to a civil penalty of not more than \$1,000,000 for each day that such violation continues.”¹⁴¹

As explained in Order No. 670, the Commission’s Anti-Manipulation Rule prohibits an entity from:

(1) us[ing] a fraudulent device, scheme or artifice, or mak[ing] 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 engag[ing] in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of . . . electric energy . . . subject to the jurisdiction of the Commission.¹⁴²

As discussed below, each of these elements is present here.

B. Market Manipulation is Not Limited to Tariff Violations

As the Commission has explained, its Anti-Manipulation Rule does not require proof of a tariff violation:

Market manipulation under the ’Commission’s Rule 1c is not limited to tariff violations. That Rule 1c is not so limited is by design. In the wake of Enron's schemes in the CAISO market, the Energy Policy Act of 2005 gave the Commission “broad authority to prohibit manipulation” and “an intentionally broad proscription against all kinds of deception, manipulation, deceit and fraud.” Both the breadth of Congress' authorization to the Commission and the breadth of

¹⁴⁰ 18 C.F.R. § 1c.2(a) (2014) (Anti-Manipulation Rule).

¹⁴¹ 16 U.S.C. § 825o-1 (FPA section 316A).

¹⁴² *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 49 (2006), *reh’g denied*, 114 FERC ¶ 61,300 (2006) (Order No. 670).

the Anti-Manipulation Rule itself are a response to what courts have long recognized: the impossibility of foreseeing the “myriad means” of misconduct in which market participants may engage. For that reason, as the Commission observed in 2006, “[N]o list of prohibited activities could be all-inclusive.” Instead, as Order No. 670 emphasizes, fraud is a question of fact to be determined by all the circumstances of a case, not by a mechanical rule limiting manipulation to tariff violations.

In Re Make-Whole Payments & Related Bidding Strategies, 144 FERC ¶ 61,068, at P 83 (2013) (footnotes omitted).

C. Market Manipulation Can Occur Through Conduct

In the same Order, the Commission explained that actions, and not just words, can be fraudulent or manipulative:

Conduct, as opposed to a specific false oral or written statement, is sufficient to establish a violation of Rule 1c, which is patterned on the SEC's Rule 10b-5. *See Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008) (“If [the Court of Appeals'] conclusion were read to suggest there must be a specific oral or written statement before there could be liability under § 10(b) or Rule 10b-5, it would be erroneous. Conduct itself can be deceptive, as respondents concede.”); *In re Amanat*, Exchange Act Release No. 54,708 (Nov. 3, 2006), *aff'd mem. sub nom. Amanat v. SEC*, 269 Fed. App'x 217 (3d Cir. 2008) (liability based on falsehoods communicated through conduct, namely submission of market data based on sham transactions).

Id. P 84.

D. Conduct Can Be Manipulative Even if Unlawful Gains Are Later Reversed

As precedent under Rule 10b-5 explains, the phrase “would operate as” in the Anti-Manipulation Rule means that schemes to defraud, such as Maxim’s 2010 offer-oil, burn-gas scheme, can be manipulative even if they are later unwound (e.g., through later mitigation here). *SEC v. Todt*, No. 98 Civ. 3980, 2000 WL 223836, at **9-10 (S.D.N.Y. Feb. 27, 2000), *aff'd mem.*, 7 Fed. App'x 98 (2d Cir. 2001); *Grumet v. Shearson/American Express, Inc.*, 564 F. Supp. 336, 340-41 (D.N.J. 1983); *see also Kuehnert v. Texstar Corp.*, 412 F.2d 700, 704 (5th Cir. 1969) (10b-5 covers attempts); *SEC v. Martino*, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003), *remanded on other grounds*, 94 F. App'x 871 (2d Cir. 2004) (same); *In re Tenaska Mktg. Ventures*, 126 FERC ¶ 61,040 (2009) (approving stipulation and consent agreements based on attempted manipulation). For the same reasons, attempts to defraud can be manipulative.

E. Application to Maxim's Oil-Gas Scheme

1. Fraudulent scheme, device, or artifice, or material misrepresentation

Maxim's July-August 2010 oil-gas scheme was a fraudulent device, scheme, or artifice, and was implemented through material misrepresentations. Maxim sought to mislead the ISO-NE IMM about what fuel it was burning, so that it could collect make-whole payments based on high oil prices even though it was actually burning much less expensive gas. Maxim (through Mitton) did so by repeatedly giving the IMM the false impression that Maxim itself was having difficulty in obtaining gas and was therefore burning the fuel it offered: oil. For example, Maxim told the IMM it was offering on oil prices because of pipeline restrictions that it told the IMM were "a serious issue," when Maxim itself was in fact, day after day, able to obtain all or virtually all of the gas it needed to satisfy its Day Ahead schedule.

Maxim elected to give the IMM the false impression it was burning oil because Mitton believed that, so long as the IMM did not know that the Pittsfield plant was burning gas, Maxim would be able to collect NCPD make-whole payments based on oil prices. Ensuring that the IMM did not realize that Maxim was burning gas at Pittsfield was therefore essential to Maxim's scheme.

The incorrect impression that Maxim successfully communicated to the IMM is particularly egregious because not only did Maxim burn gas while offering (and expecting payment on) high oil prices, but it actually bought gas before submitting Day Ahead offers based on oil prices on at least 11 (and likely more) days during the scheme.

Recognizing the impropriety of misleading the Market Monitor to obtain windfall payments for costly fuel it did not use, during this investigation (in mid-November 2013) Mitton claimed for the first time to have told IMM employee John Angeli by phone in July 2010 that Maxim was actually burning gas. Mitton made this new claim even though, a week earlier, Maxim (in consultation with Mitton) had said the opposite: that Maxim never gave the IMM that information until August 23, 2010. In any event, the record evidence overwhelmingly demonstrates that the July 2010 phone call described by Mitton did not occur, thus foreclosing what Maxim has correctly said is a "critical" element of its defense.

In its submissions in this investigation, Maxim also claims to have been "surprised" that the ISO needed Pittsfield for reliability on days with high loads. For the reasons discussed above, that claim is not credible.

2. Material omission

Although the Commission need not reach the issue – because Mitton's emails (on behalf of Maxim) affirmatively communicated a false impression – Maxim also violated the Anti-Manipulation Rule by deliberately omitting material information in communications with the IMM.

Maxim’s July and August 2010 emails to the IMM reflect the following material omissions:

- Mitton’s July 2010 emails to Angeli omitted the material fact that Maxim was in fact burning gas every day, even as it was being committed for reliability purposes priced on oil;
- Mitton’s emails omitted the material fact that on many (and possibly all) of these days, Maxim was purchasing gas before submitting its Day Ahead offers on oil; and
- Kwok’s August 23, 2010 email to Dominguez likewise omitted material facts about Maxim’s advance gas purchases before submitting offers based on oil prices.

In Order 670, the Commission explained that material omissions with *scienter* can violate the Anti-Manipulation Rule if there is “a duty to speak under a Commission-filed tariff, Commission order, rule or regulation”¹⁴³ Here, Maxim (through its wholly-owned subsidiary, Pittsfield Generating Co. LP) *did* have a duty to speak under a Commission rule, namely 18 C.F.R. § 35.41(b). Under that rule, firms with market-based rate authority, like Maxim’s Pittsfield Generating Co. LP (a respondent here), have the following duties:

Seller will 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, or Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercised due diligence to prevent such occurrences.

18 C.F.R. § 35.41(b) (emphasis added.)

Because Maxim subsidiary (and Respondent) Pittsfield Generating Co. had a “duty to speak,” and not to omit material information, under § 35.41(b), Maxim’s material omissions in Mitton’s and Kwok’s July and August 2010 emails to the IMM also violated the Anti-Manipulation Rule.

¹⁴³ Order No. 670 at P 49.

3. Scienter

The term *scienter*, for purposes of the Securities Exchange Act of 1934, refers to “a mental state embracing intent to deceive, manipulate, or defraud.”¹⁴⁴ The Commission applies that same standard to its Anti-Manipulation Rule. Under the Commission’s Order 670 at P 53, recklessness is sufficient to satisfy the requirement.

Staff concludes that Maxim and Mitton undertook the oil-gas scheme with the requisite *scienter*. For the reasons discussed in detail above, the scheme was intentional, deliberate, and calculated: Maxim and Mitton carefully sought to obtain Day Ahead commitments for reliability at high oil prices while actually burning gas, and to falsely convey the impression to the Market Monitor that the unit was actually burning oil. By doing so, Maxim and Mitton intended to deceive, manipulate, and defraud ISO-NE to obtain improper NCPC payments.

4. “In Connection With”

Maxim’s oil-gas scheme was in connection with jurisdictional transactions under 18 C.F.R. § 1c.2 (2014). The Commission has jurisdiction under the FPA over “the sale of electric energy at wholesale in interstate commerce.”¹⁴⁵ The FPA defines a “sale of electric energy at wholesale” as “a sale of electric energy to any person for resale.”¹⁴⁶ Maxim sells power and offers capacity into a Commission-authorized ISO. The oil-gas scheme therefore relates to the sale of energy at wholesale in interstate commerce.

F. False or Misleading Communications and Material Omissions

The Commission’s rule against false or misleading communications, 18 C.F.R. § 35.41(b) (2014), requires a seller to:

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 . . . unless Seller exercises due diligence to prevent such occurrences.

As discussed above, a Maxim subsidiary, Respondent Pittsfield Generating Co. LP, has market-based rate authority and is therefore required to comply with Section 35.41(b).

¹⁴⁴ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *see also Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011) (citations omitted).

¹⁴⁵ 16 U.S.C. § 824(b)(1) (2012).

¹⁴⁶ *Id.* § 824(d) (2012).

In its communications with the IMM in July and August 2010, Maxim intentionally conveyed false impressions and omitted material information. Section 35.41(b) does not require intent; that is, a market participant can violate the rule simply through lack of due diligence. Here, however, the violations were deliberate and intentional.

Maxim's false and misleading communications with the IMM, and the material omissions in those communications, are summarized in Section IV(E) above.

G. Individual Liability

Staff recommends that the Commission also hold Kyle Mitton individually liable under the Anti-Manipulation Rule.

As the lead Maxim employee then responsible for submitting offers for the Pittsfield plant to ISO-NE, Mitton implemented Respondents' offer-oil-burn-gas scheme in July and August 2010. In July 2010, Mitton repeatedly and falsely sent emails to the ISO's IMM that conveyed the impression that Maxim needed to offer the Pittsfield plant based on high oil prices because of supposed concerns about gas supply, even though Mitton was in fact virtually always able to procure much cheaper gas on those days, and even though Mitton himself had often purchased large amounts of gas before submitting Day Ahead offers for Pittsfield. Mitton sought to (and successfully did) convey these false impressions because he believed that, so long as the IMM did not realize that Pittsfield had burned gas, Maxim could be paid at high oil prices even though it did not burn oil. Through this scheme, which Mitton personally executed on behalf of Maxim, the company (initially) received far larger NCPC payments than it would have obtained based on the gas it actually burned.

Only when the IMM separately learned about this conduct did Maxim (and Mitton) admit on August 23, 2010 that Maxim had been offering oil while burning much cheaper gas. And even then, Maxim and Mitton failed to disclose the material fact that Maxim had bought gas in advance on many days during this scheme.

Mitton claimed at his deposition that he told IMM official John Angeli over the phone in July 2010 that Maxim was burning gas when offering oil. As discussed above, while this claim (first advanced in mid-November 2013) could be beneficial to Maxim's defense if true, the call did not in fact occur.

Mitton also claimed at his deposition not to remember whether he had ever purchased gas before submitting Day Ahead offers based on oil. Because Maxim's own records show that Mitton did this on at least 11 days in the summer of 2010, because doing so was part of a scheme that resulted (until stopped by the IMM) in more than \$100,000 per day in additional profits for Maxim, and because the 2010 oil-gas scheme led to a large (\$3 million) mitigation by the IMM, this testimony is not credible.

Mitton’s salary and bonuses are determined by senior management and are periodically adjusted.¹⁴⁷ It is a fair inference that Mitton believed he would personally benefit if he were able to obtain millions of dollars of additional revenue for Maxim by being paid as though Maxim had burned expensive oil when in fact it burned much cheaper gas.

Mitton argues that the Federal Power Act does not authorize the Commission to hold individuals liable under the Anti-Manipulation Rule. The Commission has long since resolved that issue, concluding in Order No. 670 that the term “[a]ny entity” in the FPA and the Natural Gas Act is a “deliberately inclusive term” that includes “any person or form of organization”¹⁴⁸

H. Additional Maxim Defenses

Staff has already addressed many of Maxim’s contentions above. Here, we respond to Maxim’s most significant contentions that have not been previously discussed.

1. Due process.

Maxim argues that it would violate due process to hold them liable for market manipulation when the tariff did not specifically forbid, for example, submitting offers designed to collect payments for costly fuel that a plant did not burn.¹⁴⁹ But this is simply another way of arguing that, contrary to long-standing Commission precedent (and long-standing authority under Rule 10b-5), there can be no manipulation without a violation of a specific, express rule (such as a tariff violation). In any event, due process requires only that “laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Valicenti Advisory Services, Inc. v. SEC*, 198 F.3d 62, 66 (2d Cir. 1999) (quoting *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996)).

Maxim and Mitton knew that the IMM performs mitigation of offers based on reference levels. They knew that reference levels for oil were much higher than reference levels for gas during this period. They knew that Maxim could make very large profits if it could burn inexpensive gas while being subject to mitigation only at much higher oil prices. And they knew that they could achieve this result if they responded to the IMM in a way that kept the IMM from realizing that Maxim was actually burning gas. It requires nothing more than common sense for the owners of a power plant to realize it is wrong to

¹⁴⁷ Mitton Test. Vol. I Tr. 193-95.

¹⁴⁸ Order No. 670 at P 18; *see* Order Assessing Civil Penalties, *Barclays Bank PLC*, 144 FERC ¶ 61,041 at P 113 (2013); Order Assessing Civil Penalties, *Richard Silkman*, 144 FERC ¶ 61,164, at P 73 (2013).

¹⁴⁹ E.g., April 2014 Maxim Submission at 32-33.

mislead a market monitor to be able to charge an ISO (and ultimately ratepayers) for high-priced fuel that the plant did not burn.¹⁵⁰

2. Only rogue traders should be charged as individuals.

Mitton argues that even if Rule 1c applies to individuals, it applies only to individuals who engage in conduct not authorized by the company. But the same policy reasons that support imposition of liability on rogue traders – to ensure that the individuals who devise and execute manipulative schemes have personal incentives not to do so – apply equally whether or not the behavior is done with company approval.

3. Maxim’s subsidiaries should not be held accountable.

On December 1, 2014, staff notified Maxim that it planned to name as respondents the following wholly-owned subsidiaries of Maxim Power: Maxim Power (USA), Inc., Maxim Power (USA) Holding Company Inc., Pawtucket Power Holding Company, LLC, and Pittsfield Generating Company LP (collectively the “Maxim Subsidiaries”). Staff offered Maxim an additional 30 days to provide an explanation of why the Commission should not name these wholly-owned entities, controlled by the same handful of individuals at Maxim’s headquarters in Calgary, as respondents.

In a January 5, 2015 letter, Maxim contended that naming these entities as respondents would be improper. Maxim’s contention is mistaken, and its claims about the record are incorrect.

¹⁵⁰ Although it bought several power plants that operate in wholesale energy markets regulated by the Commission, Maxim (a Canadian firm) did nothing to learn about the requirements of the Commission’s Anti-Manipulation Rule. Testimony of John Bobenic (Oct. 3, 2013) (Tr. 59-60 (hereinafter “Test.”) (Bobenic “did not provide [Maxim staff] any specific guidance with respect to that anti-manipulation rule”); Test. 63 (“Q. Without getting into what legal advice you got, have you ever before August 1st, 2013, sought legal advice about the Commission’s anti-manipulation rule? A. I don’t think we have.”); Test. 68 (“Q. So through August 1st, to your knowledge, you provided your staff with no summary of the principles about how the Commission applies its anti-manipulation rules, is that fair? A. I did not, no.”); Test. 69 (Bobenic “[not] aware of anyone else providing [Maxim] staff with any analysis of the Commission’s anti-manipulation decisions before August 1st, 2013”); Test. 73 (Bobenic “now understand[s] that a market manipulation rule can go beyond the violation of specific rules akin to speed limits,” but “did not understand that before August 1st, 2013”); Test. 232 (“And from 2005 when you acquired Pawtucket, which was in the New England ISO, and within FERC jurisdiction until early August of 2013, you never made any inquiry into what the anti-manipulation rule... how that would apply to your business, correct? A. No, I did not.”).

On the first page of its January 5, 2015 letter, Maxim states that “[t]hroughout this investigation, OE Staff has investigated the conduct of one corporate entity: Maxim Power Corp.” That statement is incorrect.

Most notably, the Preliminary Findings letter sent to Maxim in March 2014, to which Maxim responded in April 2014 (and again in December 2014, when the letter was attached to staff’s 1b.19 notice), specifically identified Maxim’s top-level U.S. subsidiary, Maxim Power (USA), Inc., as one of the entities under investigation:

This letter sets forth the preliminary findings of the staff of the Office of Enforcement (OE) of the Federal Energy Regulatory Commission (FERC or Commission) in OE’s investigation into certain activities of Maxim Power Corporation *and its subsidiary Maxim Power (USA), Inc. (Maxim USA) (together Maxim)* in markets administered by ISO New England (ISO-NE).¹⁵¹

On this basis alone, Maxim’s statement to its Commission that “[t]hroughout this investigation, OE Staff has investigated the conduct of one corporate entity: Maxim Power Corp.” is incorrect.

That this statement is not factual is confirmed by many other documents in the record. From the outset of this investigation, Enforcement has looked at the conduct of all relevant parts of the Maxim corporate family, not merely of the Canadian parent company (Maxim Power Corporation). Enforcement’s first Data Request, dated August 29, 2013, for example, stated that all references to Maxim Power Corporation “*include its directors, officers, employees, agents, contractors, consultants, attorneys, affiliates, subsidiaries, parents, holding companies, and any other person acting or purporting to act on behalf of Maxim, including Maxim Power (USA) Inc.(MUSA).*”¹⁵²

In the same August 29, 2013 Data Request, four of the first five requests asked for information about Maxim Power Corporation’s affiliates:

1. Please provide a current organization chart showing Maxim Power Corporation and *all affiliates, subsidiaries, parents, and holding companies* related directly or indirectly to it, including ownership shares and (if different) control.
2. Please identify all officers and directors of Maxim Power Corporation, *MUSA, and Maxim Power (US) Holding Company Inc.* If the answer has changed since January 1, 2012, please explain the changes.

¹⁵¹ Preliminary Findings Letter at 1 (Mar. 27, 2014) (emphasis added).

¹⁵² Data Request to Maxim Power Corporation, attached to letter from Thomas Olson to Larry Eisenstat (Aug. 29, 2013) (“August 2013 Data Request”) (emphasis added).

3. Please state all compensation provided by Maxim Power Corporation *or any affiliated entity* since January 1, 2011 to each officer and director identified in response to the preceding Data Request. Your response should include salaries, bonuses, stock or option grants, housing allowances, and any other form of compensation.

* * * * *

5. Please *provide any agreement between Maxim Power Corporation and MUSA* relating to the provision of services by the former to the latter.¹⁵³

As its responses to these Requests showed, Maxim understood that Enforcement sought information not only about the Canadian parent company but also about its U.S. subsidiaries, including the entities named as Respondents here. In its September 25, 2013 responses to the Data Requests served on August 29, 2013, for example, Maxim said the following:

Maxim Power Corp. (“MAXIM”) provides services related to operations, corporate development, corporate services, finance, accounting and the Office of the Chief Executive Officer to Maxim Power (USA), Inc. and its subsidiaries (“MUSA”). There is no written agreement between MAXIM and MUSA relative to the provision of these services.¹⁵⁴

In other words, Maxim told Enforcement at the outset of this investigation that Maxim Power Corporation employees act on behalf of Maxim’s top-level U.S. subsidiary (Maxim Power (USA), Inc.) *and on behalf of the subsidiaries of that entity*, including each of the Respondents here. This arrangement was so informal that “no written agreement” was needed to implement it.

¹⁵³ August 2013 Data Request at 3 (emphasis added).

¹⁵⁴ Response to Data Request 5, within Maxim Power Corp. September 25, 2013 Response to FERC Office of Enforcement’s August 29, 2013 Data Request (emphasis added).

Consistent with the statement in text, when Maxim responded to requests for the names of the individuals responsible for (a) submitting offers to ISO-NE and (b) complying with Commission regulations and the ISO-NE tariff, Maxim identified only Maxim Power Corporation employees. Response to Data Requests 6-7, within Maxim Power Corp. September 25, 2013 Response to FERC Office of Enforcement’s August 29, 2013 Data Request.

In its responses to these Requests, Maxim searched for, and provided, documents that were, as a technical matter, from its wholly-owned subsidiaries, including entities named as Respondents here:

When the settlement reports are provided from ISO-NE, they are provided to ***Pawtucket Power Holding Company***, the lead participant for all three MAXIM generating plants in the ISO-NE market (***Pittsfield Generating Company, L.P. (“Pittsfield[’])***), Capitol District Energy Center Cogeneration Associates (“CDECCA”) and Pawtucket Power Associates Limited Partnership (“Pawtucket”). Therefore, the settlement reports provided in response to this data request ***include data for Pittsfield, CDECCA and Pawtucket.***¹⁵⁵

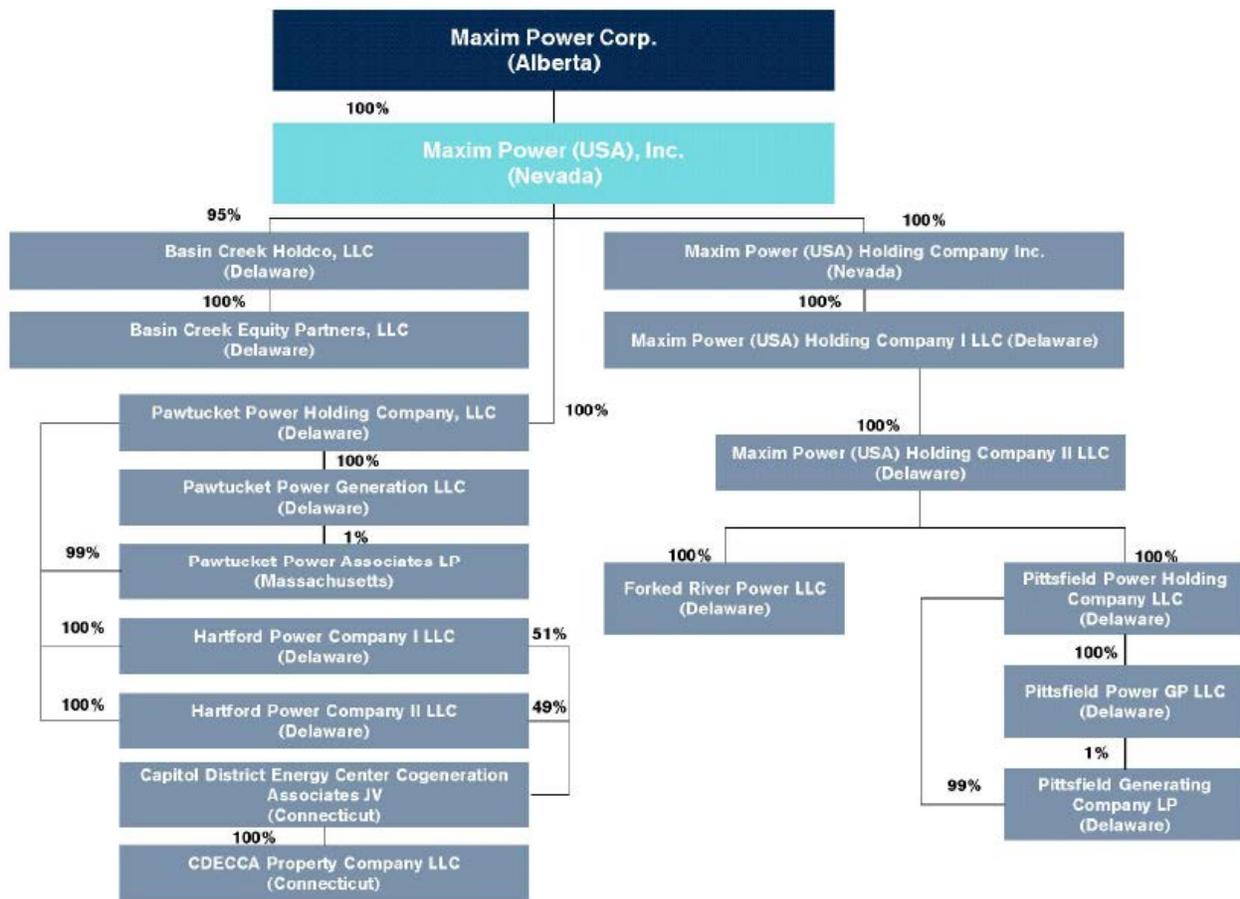
* * * * *

[A Maxim employee] ***obtained the information from the corporate data sheets for each company*** that were effective during the period January 1, 2012 to the present, as well as other information contained on MAXIM’s internal network “Corporate Services” directory.¹⁵⁶

When Maxim was responding to these requests in the fall of 2013, Maxim was seeking to sell its top-level U.S. subsidiary (Maxim Power (USA), Inc.) and all subsidiaries of that entity (including each of the Respondents other than Maxim Power Corporation). Maxim produced many documents relating to this potential transaction, including a January 2013 Confidential Information Memorandum for prospective buyers. The Memorandum included the following organization chart, showing that each of the corporate Respondents is wholly owned by Maxim Power Corporation:

¹⁵⁵ Response to Data Request 21, within Maxim Power Corp. September 25, 2013 Response to FERC Office of Enforcement’s August 29, 2013 Data Request (emphasis added).

¹⁵⁶ Response to Data Request 2, within Maxim Power Corp. September 25, 2013 Response to FERC Office of Enforcement’s August 29, 2013 Data Request (emphasis added).



The January 2013 Memorandum also confirmed that (a) in all respects relevant to this investigation, Maxim Power personnel in Calgary (in particular, the company’s Energy Marketing Group) manage and control the Maxim Subsidiaries and (b) none of the Maxim Subsidiaries has any employees:

C. Portfolio management

Maxim provides certain support services to [Maxim Power (USA), Inc. (“MUSA”)] and the Portfolio through corporate functions based in Calgary. MUSA currently has no employees and all Portfolio plant personnel are employees of each plant's respective O&M contractor. The support services provided by Maxim to MUSA are centralized in Maxim's Calgary headquarters and performed by Maxim employees. For US northeast plants, such services include energy-marketing, commercial/dispatch support operations, transfer pricing, and, with the exception of Pittsfield, day-to-day back office support, bookkeeping and accounting.

* * * *

Maxim's Energy Marketing Group has been working in the US Northeast markets since the acquisition of Pawtucket in November 2005. . . . CDECCA and Pittsfield, purchased in 2006 and 2008 respectively, were rolled into the Portfolio and are managed by the Energy Marketing Group as well.¹⁵⁷

That the Maxim Subsidiaries are controlled and operated by Maxim Power is confirmed by hundreds of documents that Maxim produced in response to Data Requests – including many cited by Maxim in its Submissions in this investigation – in which Maxim Power personnel such as John Bobenic, Kyle Mitton, Eagle Kwok, and Zane Westerbeek act on behalf of one or more of the Subsidiaries. The emails reproduced above from Mitton and Kwok to the ISO-NE IMM illustrate the point.

Other public documents confirm that Maxim Power Corporation employees in Calgary act for and control all of these entities. The President of Maxim Power Corporation, John Bobenic, for example, is also the President of Maxim Power (USA), Inc. and of Maxim Power (USA) Holding Company, Inc.¹⁵⁸ Bobenic has also acted as the representative of Pawtucket Power Holding Company, LLC in communications with ISO-NE.¹⁵⁹

The same points are clear in a variety of Commission filings by Respondent entities. In April 2013, for example, Maxim Power executive Kyle Mitton signed a filing on behalf of Pittsfield Generating Co., LP.¹⁶⁰ In November 2010, Maxim Power executive Eagle Kwok (then Maxim Power's head of Energy Marketing) was identified as the representative of the same subsidiary in another Commission filing.¹⁶¹ That filing discussed the relationship between two of the Maxim Subsidiaries: "Pittsfield

¹⁵⁷ Confidential Information Memorandum (Jan. 2013) at 22-23 (emphasis added).

¹⁵⁸ Nevada Secretary of State records, available at <https://www.nvsilverflume.gov/businessSearch> (last visited Jan. 15, 2015).

¹⁵⁹ Letter from ISO-NE addressed to "John Bobenic, Pawtucket Power Holding Company" (Feb. 3, 2012), available at http://www.iso-ne.com/trans/pp_tca/isonone_app_approvals/prop_plan/2012/jan/altresco_gen_sps_mod_i_3_9_approval.pdf

¹⁶⁰ Letter from Kyle Mitton to Kimberly Bose (April 7, 2013) (available on e-Library).

¹⁶¹ *ISO New England Inc. and New England Power Pool, Motion To Intervene And Protest Of Pittsfield Generating Company, L.P.*, Docket No. ER11-1829-000 (filed Nov. 9, 2010).

[Generating Co., LP] owns and operates Altresco, a three-unit, dual fuel (natural gas and fuel oil) combined cycle generating facility,” which “participates in the ISO-NE wholesale electric markets through its affiliate, Pawtucket Power Holding Company, LLC.” Similarly, in October 2008, Pittsfield Generating Co., LP made a Commission filing that identified Kwok as company representative for that firm and Kyle Mitton as contact person for Pawtucket Power Holding Company, LLC.¹⁶²

Entities that hold market-based rate (MBR) authority are subject to the requirements of 18 C.F.R. 35.41(b). For the Pittsfield plant, for example, the entity that has been formally granted MBR authority by the Commission is Pittsfield Generating Co., LP,¹⁶³ whose tariff specifically incorporates the Market Behavior Rules. In its Response to staff’s Preliminary Findings, Maxim Power Corporation did not object to the application of the Market Behavior Rules to it, although it argued that it had not violated those Rules. As a formal matter, however, as the entity with MBR authority, it is logical that Pittsfield Generating Co., LLP should be a Respondent as well with respect to claims under Section 35.41(b) about the Pittsfield plant, as well as claims under Rule 1c with respect to offers submitted (by Maxim Power employees) on its behalf. Similarly, since Pittsfield participates in the ISO-NE wholesale electric markets through its affiliate, Pawtucket Power Holding Company, LLC, it is logical to name the latter company as a respondent in connection with Pittsfield’s transactions in, and communications with, the ISO.

In short, Maxim Power Corporation treats the Respondent subsidiaries as part of a single, unified business enterprise in which Maxim Power personnel in Calgary manage, control, and act on behalf of the firm’s U.S. subsidiaries. Given these facts, it is fair and equitable for the Commission to do the same in its treatment of these entities in connection with this investigation.

This approach is consistent with settled law. *E.g., Capital Tel. Co., Inc. v. FCC*, 498 F.2d 734, 738 (D.C. Cir.1974) (“[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.”) (quoting *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905); *see also Town of Brookline v. Gorsuch*, 667 F.2d

¹⁶² Letter from Larry Eisenstat to Kimberly Bose, RE: Pittsfield Generating Company, L.P., Docket No. ER09-___-000; Filing of Revised FERC Electric Tariff Original Volume No. 1 to Reflect Change Of Agent, Docket No. ER09-215.000 (filed Oct. 31, 2008) (available on e-Library).

¹⁶³ November 2013 Maxim Submission at 7.

215, 221 (1st Cir. 1981) (following *Capital Tel. Co.*); *United States v. Emor*, 850 F. Supp. 2d 176, 204 (D.D.C. 2012) (same).

The Commission has regularly applied this same principle. *E.g.*, *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy & Ancillary Services*, 127 FERC ¶ 61,269, at P 221 (2009) (“The Commission’s policy for addressing affiliate transactions and the authority of the Commission to disregard corporate forms when necessary to fulfill its statutory obligations are well documented. . . . Accordingly, the Commission may regard two entities as one when necessary to meet a statutory goal.”); *Town of Highlands, N.C. v. Nantahala Power & Light Co.*, 37 FERC ¶ 61,149 (1986) (affirming ALJ decision to “pierc[e] the corporate veil” between firm and its upstream owner, and noting that “an agency may disregard the corporate form in the interest of public convenience, fairness, or equity.”).

The authority of the Commission – like other agencies – to do so has been upheld by the courts. In *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313 (5th Cir. 1993), for example, the Fifth Circuit upheld the Commission’s decision to treat three corporate affiliates as a single entity, finding that “the ALJ and the Commission correctly looked behind corporate forms and found that the three companies really were one.” 998 F.2d at 1321. Here, where the same handful of individuals in Calgary, employed by Maxim Power, control all of the subsidiaries (which have no employees of their own), that principle is clearly applicable.

The Maxim subsidiaries named as Respondents here have suffered no prejudice by the procedures followed in this investigation. The top-level Maxim U.S. subsidiary, Maxim Power (USA), Inc., was specifically called out in the Preliminary Findings letter, which staff sent to Maxim both in March 2014 and in November 2014 (as an attachment to a 1b.19 notice.) And as to all of the corporate Respondents, the substantive conduct at issue – such as offers submitted to ISO-NE and communications with the IMM by Mitton and Kwok – is *precisely the same*, and Maxim Power and Mitton have already addressed those issues at great length in their many Submissions since November 2013. To the extent the Maxim Subsidiaries wish to raise additional issues, they had 30 days in which to do so.

While the January 5, 2015 letter submitted by the Maxim subsidiaries does not claim they have any distinct defenses (or any different facts) as to the conduct at issue here, the Respondent subsidiaries have had a full opportunity to make any such arguments.¹⁶⁴ And if the Commission issues an Order to Show Cause, the Maxim

¹⁶⁴ The Maxim subsidiaries named as Respondents claim in their January 5, 2015 letter that they would be deprived of Due Process “considerations” if they were to be named as Respondents. These entities do not claim that they would be deprived of any rights under the Due Process clause, and the law is clear that they would not. *E.g.*, *SEC*

subsidiaries named as Respondents will have another full opportunity to present facts or make arguments before the Commission takes any action of legal consequence against them.

V. Remedies and Sanctions

The IMM recouped \$2.99 million from Maxim for the excess NCPC payments that Maxim obtained by offering on oil while actually burning gas. No additional disgorgement is therefore needed for this scheme.

The Commission's Penalty Guidelines apply to Maxim and its subsidiaries, but not to Mitton. The scheme achieved (until reversed by the IMM) \$2.99 million in unjust profits, lasted 45 days, and was implemented by personnel with substantial authority in an organization with more than 10 employees. Maxim cooperated with the investigation. Applying the Guidelines, therefore, staff requests a penalty of \$5,000,000 on Maxim. Because the same conduct violated both the Anti-Manipulation Rule and Section 35.41(b), staff does not recommend a separate penalty for the latter violation.¹⁶⁵

Given Mitton's central role in the scheme but taking his financial circumstances into account (Mitton's annual salary for 2013 was \$120,000 (in Canadian dollars) with a \$20,000 bonus), staff requests a penalty of \$50,000 for his violation of the Anti-Manipulation Rule.

VI. Conclusion

For the reasons discussed above, Enforcement staff recommends that the Commission (a) direct Respondents to show cause why they have not violated section 1c.2 of the Commission's regulations, and (b) direct Maxim to show cause why it has not violated section 222 of the Federal Power Act and 18 C.F.R. § 35.41(b). Enforcement staff further recommends the Commission direct Maxim and Mitton to show cause why they should not be assessed civil penalties for these violations of \$5,000,000 (for Maxim) and \$50,000 (for Mitton). For the reasons discussed above, staff recommends that the Commission hold Maxim and its subsidiaries named as Respondents jointly and severally liable for any penalty against Maxim.

v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984) ("The Due Process Clause is not implicated [by Respondent's claim] because an administrative investigation adjudicates no legal rights."); *Aponte v. Calderón*, 284 F.3d 184, 193 (1st Cir. 2002) ("[I]t is clear that investigations conducted by administrative agencies, even when they may lead to criminal prosecutions, do not trigger due process rights.").

¹⁶⁵ Were the Commission to issue a separate penalty for Maxim's violations of Section 35.41(b), staff would recommend a penalty of \$1.3 million.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Maxim Power Corporation, Maxim Power (USA), Inc.,
Maxim Power (USA) Holding Company Inc., Pawtucket
Power Holding Co., LLC, Pittsfield Generating Company,
LP, and Kyle Mitton

Docket No. IN15-4-000

(February 2, 2015)

CLARK, Commissioner, *dissenting*:

Having reviewed the OE Staff Report and Maxim's responses, I do not find that the record sufficiently supports the Commission moving forward with this Order to Show Cause. Nonetheless, in the next phase of the proceeding, both FERC Enforcement Staff and the Respondents will have an opportunity to more fully develop the record. As such, I make no prejudgment as to the final disposition of this case.

For these reasons, I respectfully dissent.

Tony Clark
Commissioner