151 FERC ¶ 61,094
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

ORDER ASSESSING CIVIL PENALTIES

(Issued May 1, 2015)

1. In this order, we find that Maxim Power Corporation, Maxim Power (USA), Inc., Maxim Power (USA) Holding Company Inc., Pawtucket Power Holding Co., LLC, Pittsfield Generating Company, LP (collectively Maxim or the Maxim companies) and Kyle Mitton (Mitton), an Energy Marketing Analyst at Maxim (together, Maxim and Mitton or Respondents) violated section 1c.2 of the Commission's regulations and section 222 of the Federal Power Act (FPA), which prohibit energy market manipulation,[1] 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. We additionally find that Maxim violated 18 C.F.R. § 35.41(b) (2014) of the Commission's rules, which, in relevant part, prohibits a Seller, like Maxim, from submitting false or misleading information or omitting information to Commission-approved independent system operators or market monitors unless due diligence is exercised to prevent such an occurrence, through the same conduct.[2] In light of the seriousness of these violations, we find that it is appropriate to assess civil penalties

[1] 18 C.F.R. § 1c.2 (2014); 16 U.S.C. § 824v(a) (2012).

[2] *Maxim Power Corporation, et al.*, 150 FERC ¶ 61,068 at P 5 (2015) (Order to Show Cause).

pursuant to section 316A of the FPA,[3] in the following amounts: $5,000,000 against Maxim and $50,000 against Mitton.

2. Respondents' scheme involved Maxim's Pittsfield generating plant (Pittsfield), which is a dual-fuel plant, meaning it can generate electricity using either natural gas or fuel oil. Pittsfield is in a strategic location where, even if the electricity from Pittsfield is not offered at a competitive price, the grid operator may request that Pittsfield generate electricity to keep the electric grid operating (i.e., to ensure system reliability). The market rules in effect in the New England electricity market at the time provided that generators required to run to meet New England's reliability needs were paid a price that was capped based on the fuel source used to generate power. In the summer of 2010, fuel oil was more expensive than natural gas. Thus, a dual-fuel generator would receive a higher payment for electricity produced when burning fuel oil than natural gas.

3. During some of the hottest days in 2010, Respondents made offers to sell energy from the dual-fuel Pittsfield generator to the grid operator based on high-priced oil. As a result of Pittsfield's high offer price, the grid operator often chose less expensive options and did not select Pittsfield to generate. Nevertheless, Pittsfield was often needed to ensure system reliability and so was requested to run despite its higher price.

4. While Maxim made offers based on high-priced fuel oil, in fact, Pittsfield burned cheaper natural gas to generate the power it sold to the grid operator, ISO New England Inc. (ISO-NE). According to the market rules in effect at the time, Pittsfield would receive more money if the grid operator believed that Maxim was burning fuel oil rather than natural gas. When questioned by the market monitor, Respondents repeatedly referred to natural gas pipeline restrictions, suggesting that they were unable to obtain natural gas and were thus burning oil. Instead, Respondents were able to obtain natural gas, sometimes in advance of their oil-based offers. These misrepresentations were made in an attempt to ensure that Maxim continued to receive the higher payments that were premised on Pittsfield's running on fuel oil instead of natural gas.

5. We find that Respondents intentionally engaged in a fraudulent scheme, through misrepresentations and material omissions, to obtain and protect payments established by offers based on the price of oil, even though they ran the Pittsfield unit on lower-priced natural gas, which should have set their compensation.

[3] 16 U.S.C. § 825o-1 (2012).

I. Executive Summary

6. Maxim's Pittsfield generator often must run to provide reliability to the New England electricity grid even if the generator is uneconomic to operate. Recognizing that generators needed to ensure system reliability have enhanced market power, the grid operator, ISO-NE, proposed, and the Commission approved, market power mitigation rules limiting the revenues that plants like Pittsfield can receive when committed for system reliability.[4]

7. As relevant here, generators committed for reliability, such as Pittsfield, indicate in their offers into ISO-NE's Day-Ahead markets whether their offers to sell energy are based on using oil or natural gas as fuel. ISO-NE's internal market monitor (IMM) then caps payment to the generator based on the cost of the fuel used plus an additional amount. As discussed below, we find that during some of the hottest days in 2010, Maxim and Mitton repeatedly submitted Day-Ahead offers to sell energy from the Pittsfield generator under the pretense that it would be using high-priced oil as fuel. Instead, Maxim and Mitton expected the generator to burn, and in fact it did burn, much cheaper natural gas. In some cases, Maxim had already procured natural gas for the following day before submitting Day-Ahead offers based on oil prices. When questioned by the IMM, Maxim and Mitton responded with intentional evasion, misleading questioners by implying that Pittsfield was physically unable to obtain natural gas and therefore had to run on oil. The IMM eventually identified this scheme before Maxim received the inflated payments. Had the IMM not identified the behavior, consumers in New England would have suffered almost $3 million in harm.[5] We find that Maxim's

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[4] *ISO New England Inc.*, 129 FERC ¶ 61,008 at P 12 (2009) (accepting revisions to ISO-NE market power mitigation rules at issue here and describing them as applying to "resources [that] have market power and must be dispatched for reliability"); ISO New England Inc., FERC Electric Tariff No. 3, Section III – Market Rule 1, Appendix A-Market Monitoring, Reporting and Market Power Mitigation, Sheet Nos. 7433, *et seq.*, § III.A.5.8. (The Reliability Commitment Mitigation section is captured in § III.A.5.5.6 of the current ISO-NE Tariff). All references to ISO-NE's tariff are to the version in effect at the time of the violations, unless otherwise noted.

[5] The IMM identified Maxim's behavior and payments stopped. Thus, Maxim never profited from its scheme. However, manipulation, fraud, and misrepresentations to market monitors are unacceptable in Commission-regulated markets even where such behavior is caught before it causes harm to consumers. Courts have long recognized that attempted manipulation and fraud are worthy of punishment in the same manner as successful schemes. *See*, *e.g.*, *Kuehnert v. Texstar Corp.*, 412 F.2d 700, 704 (5th Cir.

(continued…)

and Mitton's conduct constituted a scheme to defraud ISO-NE and was intentional, manipulative, and deceptive in violation of the FPA and the Commission's regulations. We further find that it is appropriate to assess civil penalties against Maxim and Mitton.

II. <u>Background</u>

A. <u>Relevant Entities</u>

8. Maxim Power Corporation is a Canadian firm based in Calgary, Alberta. Through wholly-owned subsidiaries, Maxim Power Corporation owns power plants in a number of countries, including the United States. Among the Respondent companies, only Maxim Power Corporation has employees and its employees in Calgary direct the actions of all of the Maxim companies.[6] Revenues and costs for all of the Maxim companies are recorded on Maxim Power Corporation's books.

9. Pittsfield (also called "Altresco") is a power plant owned by Maxim Power Corporation in Pittsfield, Massachusetts, which is directly owned by Pittsfield Generating Company, LP. Maxim's Pittsfield facility is a 181 megawatt (MW), dual-fuel unit that can burn either oil or natural gas to generate electricity. Pittsfield obtains natural gas through a connection with Tennessee Gas Pipeline Company, L.L.C.

10. Maxim's Pittsfield generator often must run to ensure reliable operation of the electric grid. The Commission has previously noted the critical nature of the reliability support provided by Pittsfield.[7]

11. Mitton has worked for Maxim since 2005 and, during the summer of 2010, he was a senior analyst in the company's Energy Marketing Group. Among other duties, the Energy Marketing Group decided what prices to submit each day in ISO-NE's Day-Ahead markets for Maxim's New England plants, including Pittsfield. Mitton's supervisor was Eagle Kwok (Kwok), Maxim Power Corporation's head of Energy

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1969) ("we are not convinced of any difference in substance between a successful fraud and an attempt").

[6] For example, Maxim Power Corporation employees in Calgary decide what offers to submit each day for Pittsfield. Testimony of Kyle Mitton Vol. I, Tr. 16-17 (Nov. 13, 2013).

[7] *Pittsfield Generating Co., L.P.*, 115 FERC ¶ 61,059, PP 29-31 (2006) ("The ISO-NE Report indicates that ISO-NE designates the Facility as needed for voltage support in an extremely weak part of the system.").

Marketing. Mitton and Kwok communicated with ISO-NE personnel regarding Pittsfield's activities.

B. ISO-NE Market Rules

12. ISO-NE is one of several Commission-regulated regional transmission organizations, which operates the wholesale electricity markets in New England. ISO-NE's footprint includes Connecticut, Maine, Massachusetts, Rhode Island, New Hampshire, and Vermont. ISO-NE schedules the majority of electricity needed for the region using principles of supply and demand, dispatching needed generation resources based upon supply offers submitted by the generators. Normally, generators that make supply offers at or below the market price (*i.e.*, the Locational Marginal Price) are dispatched and paid the Locational Marginal Price.[8] However, in some cases, as is relevant here, a generator is needed to operate regardless of whether it is economic to do so at the time. A generator may be dispatched, even if it is very expensive, because of a reliability need. A generator dispatched because of a reliability need may obtain payments above the market price (*i.e.*, above the Locational Marginal Price), called Net Commitment Period Compensation (NCPC).

13. Under the ISO-NE tariff, generators such as Pittsfield indicate in their Day-Ahead offers whether their offers to sell energy are based on using oil or natural gas as fuel. If the generator is committed for reliability, the generator receives out-of-market compensation above the market clearing price because the costs of providing energy or reserves from the generator would otherwise exceed the revenue paid to the resource owner. This additional compensation, NCPC, is designed to compensate generators that are needed for reliability reasons but that would be too expensive for their owners to operate at a profit if paid only the Locational Marginal Price.[9] This NCPC payment

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[8] ISO-NE operates both "Day-Ahead" and "Real-Time" markets for energy. As its name suggests, the Day-Ahead market operates one day ahead of the date on which the energy is delivered.

[9] The Commission has approved ISO-NE's tariff provisions regarding NCPC payments to ensure that the rates are just and reasonable when generators are needed for reliability. *See*, *e.g.*, *ISO New England Inc.*, 129 FERC ¶ 61,008 (2009). The NCPC rules in July and August 2010 were adopted following a 2009 filing by ISO-NE at the Commission. 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).

reflects the difference between the amount of that generator's supply offer and the Locational Marginal Price amount it will receive for being dispatched.[10] Because generators needed for reliability purposes (like Pittsfield) may be able to exercise market power, ISO-NE's market rules cap NCPC payments at each facility's approximate actual costs, plus 10 percent.[11] As the Commission explained in 2009, "[t]he purpose of NCPC mitigation is to prevent the exercise of market power by resources that face no competition" while ensuring that the generator receives a fair return.[12] To determine the cap on NCPC payments for each generator, the IMM estimates a resource's fuel and variable operation and maintenance costs to determine its "reference level."[13] The IMM relies upon information provided by each generator regarding the fuel it is burning to derive the reference level and implement mitigation. For facilities that can burn different fuels to produce electricity, different reference levels apply depending upon the fuel used. In the summer of 2010, fuel oil was generally much more expensive than natural gas and, thus, a generator's reference level was much higher when it was burning oil rather than natural gas.

14. Under ISO-NE's tariff in July and August 2010, generators were eligible to receive NCPC payments when they were "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 [generator] in the energy markets."[14] Because resources that are needed for reliability may have market power, ISO-NE limits these resources' offers. If a resource has the ability to exercise market power, the resource's compensation is capped at 110 percent of its estimated actual costs.[15] In the summer of 2010, a generator needed to

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[10] *ISO New England Inc.*, 129 FERC ¶ 61,008 at P 2 (2009).

[11] *Id*. P 12. ISO New England Inc., FERC Electric Tariff No. 3, Section III – Market Rule 1, Appendix A-Marketing Monitoring, Reporting and Market Power Mitigation, Sheet Nos. 7433, et seq., § III.A.5.8. The process for capping revenues is called "mitigation" and is implemented by ISO-NE's IMM.

[12] *ISO New England Inc.*, 129 FERC ¶ 61,008 at P 12 (2009).

[13] A resource's reference level is comprised of the "IMM's estimate of that resource's fuel and variable operation and maintenance costs." *Id.* P 2.

[14] *See*, *id.*

[15] ISO New England Inc., FERC Electric Tariff No. 3, Section III – Market Rule 1, Appendix A-Marketing Monitoring, Reporting and Market Power Mitigation, Sheet Nos. 7433, et seq., § III.A.5.8.

ensure the reliability of the electric grid, such as Pittsfield, would be eligible for substantially higher NCPC payments if it provided a reference level based on burning oil as a fuel rather than natural gas.

15. In 2012, after the conduct at issue, ISO-NE adopted new processes, including new procedures for dual-fuel generators, which are set forth in Appendix A, section III.A.3 of the Commission-approved tariff. These new procedures require dual-fuel generators to affirmatively demonstrate to the IMM that they need to burn a more expensive fuel if they wish to collect NCPC payments related to the more expensive fuel. To satisfy this requirement, dual-fuel generators like Pittsfield must automatically include documentation within five days that they actually burned the more expensive fuel.[16]

C. Office of Enforcement Investigation and Order to Show Cause

16. After an investigation of Respondents' conduct related to Pittsfield, the Commission's Office of Enforcement staff (OE Staff) submitted an Enforcement Staff Report and Recommendation (OE Staff Report) to the Commission alleging that Maxim and Mitton violated the Commission's Prohibition on Market Manipulation, 18 C.F.R. § 1c.2 (2014) and section 222 of the FPA, 16 U.S.C. § 824v(a) (2012), by attempting to collect NCPC payments based on oil-fired generation at Pittsfield when, in fact, the generator was using lower cost natural gas as fuel and by intentionally deceiving the IMM. The OE Staff Report also alleged that Maxim violated 18 C.F.R. § 35.41(b) (2014) by providing misleading information to the IMM when the IMM initially questioned Maxim about Pittsfield's NCPC payments. The OE Staff Report recommended that Maxim and Mitton be assessed civil penalties of $5,000,000 and $50,000 respectively.

17. In the Order to Show Cause, the Commission ordered Respondents to file answers within 30 days showing cause why Maxim and Mitton should not be found to have violated 18 C.F.R. § 1c.2 (2014) and 16 U.S.C. § 824v(a) (2012) and why Maxim should not be found to have violated 18 C.F.R. § 35.41(b) (2014). In addition, the Commission directed Maxim and Mitton to show cause why these alleged violations should not warrant the assessment of civil penalties in the amount of $5,000,000 and $50,000 respectively, or a modification of those amounts consistent with section 31(d)(4) of the FPA.[17] The Commission also notified Respondents that they may elect, within 30 days of the Order to Show Cause, to have the procedures set forth in section 31(d)(3) of the

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[16] ISO New England Inc., ISO New England Inc. Transmission, Markets and Services, Section III – Market Rule 1 – Standard Market Design, app. A (41.0.0), § III.A.3.2 (Dual Fuel Resources).

[17] 16 U.S.C. § 823b(d)(4) (2012).

FPA apply to this proceeding. Under that provision, if the Commission finds a violation, the Commission may assess a civil penalty and, if not paid within 60 days of the order assessing a civil penalty, the Commission may institute an action in the appropriate district court. As further stated in the Order to Show Cause, if Respondents failed to make that timely decision, then the procedures of section 31(d)(2) will apply and the Commission shall assess the penalty after an administrative hearing before an Administrative Law Judge at the Commission.[18] The Order to Show Cause further allowed OE Staff to file a reply within 30 days of the filing of Respondents' answers.[19]

18. On March 4, 2015, Respondents gave joint notice electing the procedures set forth in section 31(d)(3)(A) of the FPA and the Order to Show Cause,[20] thereby electing a penalty assessment if the Commission found a violation. Maxim Power Corporation and Mitton filed separate answers to the Order to Show Cause on March 4, 2015 (Maxim Answer and Mitton Answer, respectively).[21]

19. Although Maxim and Mitton filed a joint election under FPA § 31(d)(3) on behalf of all of Respondents, the Maxim Answer to the Order to Show Cause appears to have been filed on behalf of only Maxim Power Corporation. The Maxim Answer summarily asserts that "only Maxim Power Corp., and in some instances Maxim Power (USA), Inc. were given appropriate notice of OE Staff's alleged violation."[22] However, OE Staff's investigation involved multiple Maxim entities.[23] Maxim Power Corporation employees act on behalf of the subsidiary Maxim respondents,[24] and, in fact, Maxim Power (USA), Inc. has no separate employees.[25] Maxim Power Corporation controls its subsidiaries,

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[18] *See* 16 U.S.C. §§ 823b(d)(2) and 823b(d)(3)(A) (2012).

[19] On February 18, 2015, Respondents filed a joint motion seeking an extension of time to answer the Order to Show Cause. OE Staff filed a reply on February 20, 2015. The Commission denied the motion on February 24, 2015.

[20] *See* Order to Show Cause at ordering paragraph E.

[21] Mitton, in addition to his separate answer, adopted Maxim's Answer in its entirety. Mitton Answer at n.1.

[22] Maxim Answer at n.1.

[23] OE Staff Report at 58-61.

[24] *See*, *e.g.*, Data Response 5 (stating that Maxim Power Corporation "provides services related to operations" to the affiliates); OE Staff Report at 59.

operating them as a single unified business enterprise. Maxim had actual notice of the alleged violations and the Order to Show Cause properly identified all of the Maxim entities as respondents.

20. The Commission's regulations and the Order to Show Cause required each of the Respondents to answer the Order to Show Cause.[26] Under the Commission's regulations, failure to answer is treated as a general denial that can result in summary disposition.[27] Although we find that all of the named Maxim entities (not only Maxim Power Corporation) are in violation of both our regulations and the Order to Show Cause, we will waive the regulations to allow the Maxim Answer to suffice as an answer for all of the respondent Maxim companies.

21. OE Staff filed a single reply to the answers on March 23, 2015 (OE Staff Reply). On April 6, 2015, Maxim Power Corporation and Mitton filed a joint response to the OE Staff Reply (Respondents' Reply). On April 14, 2015, Maxim Power Corporation and Mitton filed a joint supplement to Respondents' Reply (Respondents' Supplemental Reply).[28]

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[25] *See* CSSU_MAXIM_0000001 (Confidential Information Memorandum) at 22-23 (cited in OE Staff Report at 61-62).

[26] *See* 18 C.F.R. § 385.213(a) (2014) ("Any respondent to a complaint or order to show cause must make an answer, unless the Commission orders otherwise"); Order to Show Cause at ordering para. (A), (B), and (C).

[27] *See* 18 C.F.R. §§ 385.213(a), (c)(3), and (e)(2) (2014).

[28] We note that the Order to Show Cause directed Respondents to submit answers in response to the Order and allowed OE Staff to submit a reply within 30 days of the Respondents' answer. The Order to Show Cause did not authorize a second answer in response to OE Staff's reply. Additionally, Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2014), prohibits an answer to a protest or an answer, unless otherwise permitted by the decisional authority. Respondents' Reply and Respondents' Supplemental Reply are inconsistent with the Commission's rules and the briefing process adopted in the Order to Show Cause. Further, much of Respondents' Reply and Respondents' Supplemental Reply is duplicative of arguments made in the Maxim Answer and Mitton Answer. Although the Commission disfavors such unauthorized submissions, we have considered Respondents' arguments in our deliberations. Further, we have treated the arguments made in Respondents' Reply and Respondents' Supplemental Reply as if they were made by all of Respondents rather than just Maxim Power Corporation and Mitton.

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

III. Discussion

23. Section 222(a) of the FPA makes it unlawful for any entity to use a deceptive or manipulative device in connection with the purchase or sale of electric energy or the transmission of electric energy subject to the Commission's jurisdiction.[29] Order No. 670 implemented this prohibition, adopting the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2 (2014). That rule, among other matters, prohibits any entity from: (1) using a fraudulent device, scheme or artifice, or making a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase, sale or transmission of electric energy subject to the jurisdiction of the Commission.[30]

24. Section 35.41(b) of the Commission's regulations requires that a Seller "provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors . . . [or] Commission-approved independent system operators . . . unless Seller exercises due diligence to prevent such occurrences."[31] Pittsfield Generating Company, L.P., a subsidiary of Maxim, is a Seller as that term is defined in 18 C.F.R. § 35.36(a)(1) (2014) because it has authorization to make market-based sales for resale of electric energy.[32]

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[29] 16 U.S.C. § 824v(a) (2012).

[30] 18 C.F.R. § 1c.2(a) (2014); *see Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 49, *reh'g denied*, 114 FERC ¶ 61,300 (2006).

[31] 18 C.F.R. § 35.41(b) (2014).

[32] *See Pittsfield Generating Co., L.P.*, 85 FERC ¶ 61,147 (1998); 18 C.F.R. § 35.36(a)(1) (2014).

A. Findings of Fact

1. Respondents' Behavior and Communications

25. From December 2005 through May 31, 2010, the Pittsfield generator was subject to a Reliability Must Run agreement with ISO-NE.[33] The Reliability Must Run agreement was premised on ISO-NE's conclusion that the generator was "located in an extremely weak part of the system."[34] Under the Reliability Must Run agreement, the generator received special compensation on an annual basis.[35] The agreement was terminated at the end of May 2010. Beginning in June 2010, Maxim had to operate Pittsfield consistent with the ISO-NE market rules, including possible mitigation of Pittsfield's offers down to oil or natural gas reference levels.

26. July and August 2010 were particularly hot months in New England and ISO-NE published forecasts that predicted substantial increases in the electrical load it would need to serve.[36] For 38 of the 45 days between July 5, 2010 and August 18, 2010, Maxim offered to generate electricity at Pittsfield based on high oil prices, but was able to procure natural gas and transport it to Pittsfield. On 22 of those 38 days, Maxim was committed for reliability and collected NCPC payments based on the oil prices submitted, but burned all or nearly all natural gas at a much lower cost. On 11 of these 38 days,

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[33] A Reliability Must Run agreement allows generator units needed to ensure system reliability to recover their costs plus a reasonable return on investment from ISO-NE. *See*, *e.g.*, *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1196 (D.C. Cir. 2005); *New England Power Pool and ISO New England Inc.*, 100 FERC ¶ 61287, at P 50 (2002) ("ISO-NE has the authority to negotiate individual [Reliability Must Run] agreements as are required to maintain and/or improve system reliability"), *order on reh'g*, 103 FERC ¶ 61,304 (2003).

[34] ISO New England Inc., Application, Docket No. ER06-262-000 at Attachment D (filed Nov. 30, 2005) (ISO New England – System Planning Department Evaluation of Need for Pittsfield Generating Facility (Altresco) (Aug. 22, 2005)).

[35] *See* Maxim investigative submission at 20 (November 4, 2013) ("Pittsfield's average annual revenues were approximately $445/MWh" during the last 14 months of the [Reliability Must Run] agreement).

[36] *See* Energy Tariff Experts, LLC, *July 2013 ISO-NE Heat Wave and Historical Peak Days*, *available at* http://energytariffexperts.com/blog/2013/7/17/iso-ne-heat-waves-and-capacity-tags.

Maxim had already contracted for the natural gas it needed to generate power before it submitted to ISO-NE its Day-Ahead offer based on the cost of oil.

27. Mitton made the offers on behalf of Pittsfield into the ISO-NE market based on oil pricing, and he was responsible for the purchases of natural gas that Pittsfield burned.[37] Based on oil and natural gas prices during this period, Maxim would have been paid around $175/MWh, while actually burning natural gas that would produce electricity at a cost of about $75/MWh. Maxim, thus, would have profited about $100/MWh, even when its costs were higher than the market clearing price.[38]

28. The IMM first inquired about Maxim's oil offers on July 15, 2010. In response to a voice message from IMM employee John Angeli about Pittsfield's fuel prices, Mitton replied in a July 16, 2010 email that, "[w]e 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 . . .."[39] Angeli requested the notices and, on July 19, 2010, Mitton provided copies of pipeline restriction notices along with statements that "there have been restrictions [on Tennessee Gas Pipeline] every day of the month so far in July."[40] Mitton further stated that the pipeline was facing "'bottlenecks' and reducing the amount of gas that can flow."[41] He continued, "[d]uring normal heat this wouldn't be an issue however with the prolonged heat wave in the Northeast restrictions have been a serious issue."[42]

29. The next day, July 20, 2010, the IMM responded: "When you have a fuel issue please let us know so we can model the unit on the correct fuel."[43] Mitton promised to do

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[37] *E.g.*, Data Response 47c (identifying 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 natural gas, and Pittsfield's operating on natural gas during July 2010).

[38] OE Staff Report at 14.

[39] MPCPROD00074407 (Email from Mitton to Angeli (July 16, 2010)).

[40] MPCPROD00074409 (Email from Mitton to Angeli (July 19, 2010)).

[41] *Id.*

[42] *Id.*

[43] *Id.*

so.[44] He also stated, "As a heads up we are in on fuel oil again for tomorrow [i.e., July 21, 2010]."[45]

30. Also on July 20, 2010, another Maxim employee sent a message to Mitton and Mitton's supervisor, Eagle Kwok, stating that he had "read through the Market Rules and talked with Kyle [Mitton]."[46] The message provides the employee's understanding of the market rules, explaining that the IMM has to go through three stages of investigation when implementing mitigation: (1) "Before imposing any mitigation, the [IMM] has to investigate reasons for the offer. If they are not convinced . . ."; (2) "They conduct a test to see if there is a material impact on NCPC"; and (3) "If the test fails, they find the participant guilty and mitigate offers." The message concluded: "[i]f we can provide the [IMM] with the rationalization behind our pricing, it won't get to the 2nd or 3rd stages [sic]." On July 21, 2010, Mitton sent a message to Angeli: "Altresco [i.e. Pittsfield] is on fuel oil pricing again for 7/22 due to gas restrictions again"[47] along with a copy of a Tennessee Gas Pipeline gas flow restriction posting for the day. Although on July 20, 2010 Mitton committed to inform the IMM whenever there was a "fuel issue," neither he, nor anyone at Maxim, did so from July 22, 2010 on. However, from July 22, 2010 through August 18, 2010, Maxim submitted offers using an oil-based price on 22 of the 25 days during this time period.

31. On August 16, 2010, the IMM sent an email to Mitton and Mitton's supervisor, Eagle Kwok, asking the generator to "confirm and document" the fuel burned in July when the unit was ordered to run for reliability reasons.[48] On August 18, Mitton called the IMM. According to the IMM's call notes:

> [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 [the] IMM. I corrected his understanding

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[44] *Id.*

[45] *Id.*

[46] MPCPROD00091433 (Email from Devasahayam to Kwok and Mitton (July 20, 2010)).

[47] MPCPROD00074418 (Email from Mitton to Angeli (July 21, 2010)).

[48] OE Staff Report at 33.

> and informed him that the IMM never indicated that the offer of oil and burning of gas was an acceptable behavior.[[49]]

32. Kwok provided the requested fuel burn information to the IMM in an August 23, 2010 email, showing that the generator had burned natural gas on most days when it was dispatched for reliability reasons. Among other statements in the email, Kwok: (1) asserts that "we have been forthwith with IMMU [sic] under the circumstances by which we have made our decision to offer Pittsfield's energy either using natural gas or fuel oil pricing," and (2) "we would like the IMMU to clarify and reaffirm that Pittsfield has acted reasonable [sic] 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."[50]

33. The IMM questioned Maxim's behavior and conducted an investigation in August 2010. 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 submitted offers based on oil prices but burned gas or almost all gas. In November 2010, 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. In total, Maxim's NCPC payments were reduced by $2.99 million through this mitigation process.

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[49] *Id.* at 34.

[50] *Id.* at 35.

B. Determination of Violations

1. Maxim's and Mitton's Violations of 18 C.F.R. § 1c and FPA Section 222[51]

a. Fraudulent Scheme, Device or Artifice; Materially Misleading Statement or Material Omission

i. Maxim and Mitton Answers[52]

34. Maxim asserts that:

> The record simply does not support the conclusion that Maxim or any of its employees used or employed any device, scheme, or artifice to defraud, or that Maxim or any of its employees made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.[[53]]

35. Maxim claims that its offers for Pittsfield were based on a "risk minimization strategy."[54] According to Maxim, under that strategy, they submitted offers into the Day-Ahead market based on fuel oil because of the "uncertainty of obtaining enough gas due to [pipeline] restrictions, and the risk of huge financial losses if Pittsfield had to burn fuel oil after offering on gas . . .."[55] Maxim further explains that its "primary motivation in the summer of 2010, when faced with [Tennessee Gas Pipeline] pipeline restrictions and a massive heat wave expected to drive up energy use, was to assure that Pittsfield...would be available to support reliability while at the same time avoid having to bid and being dispatched on gas but having to burn oil."[56] To address this risk, according to Maxim,

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[51] The Commission addresses Respondents' separate violation of 18 C.F.R. § 35.41(b) (2014) below at PP 99-103.

[52] Mitton, in addition to his separate answer, adopted Maxim's Answer in its entirety. Specifically, Mitton relies upon Maxim's arguments to demonstrate that "there was no violation of the anti-manipulation rule." Mitton Answer at n.1.

[53] Maxim Answer at 46.

[54] *Id.* at 13.

[55] *Id.*

they "made supply offers based on oil."[57] Respondents claim that internal company emails in June and July 2010 discuss this risk minimization strategy.[58]

36. Maxim argues that "OE Staff has presented no evidence of so much as a single misrepresentation or instance of deceit here…. Certainly, there is no evidence suggesting that Maxim misrepresented its gas purchase or intentionally withheld from the IMM the fact that such purchases were made."[59] Maxim disagrees that its communications "gave the IMM the 'false impression' that the plant had actually burned oil."[60] Maxim claims that "[n]one of the cited communications incorrectly state what fuel was burned at Pittsfield, or state anything that reasonably should have led to any such 'false impression.'"[61] Maxim claims that "no contemporaneous records even remotely suggest that the IMM ever had such an impression."[62] Maxim states that when the IMM requested information regarding fuel burn at the Pittsfield plant, "Maxim did not hesitate whatsoever in providing this information."[63] Further, Maxim states that it is "fatuous" for OE Staff to claim that "Maxim's conduct was manipulative because it allegedly failed to provide sufficient predictive information…as to what fuel Maxim might end up burning."[64]

37. As to the fact that Maxim did not inform ISO-NE that Pittsfield was often burning natural gas, not oil, Maxim states that there was no rule that "required Maxim, prior to submitting supply offers, to anticipate and answer questions that the IMM had not asked

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[56] *Id.* at 14.

[57] *Id.* at 15.

[58] Respondents' Reply at 15-16.

[59] Maxim Answer at 47-48.

[60] *Id.* at 48 (citing OE Staff Report at 53).

[61] *Id.* (footnotes omitted).

[62] *Id.*

[63] *Id.*; *see also* Respondents' Reply at 10 ("[OE Staff] points to no evidence . . . of any situation where the IMM made an inquiry to Maxim about any fuel burn where Maxim did not reply forthrightly, completely, and directly.")

[64] Maxim Answer at 9-10.

but might later pose, as part of its routine settlement process."[65] Maxim notes that in 2012, the tariff "was changed to specifically require dual-fuel units to confirm fuel actually burned…."[66] Respondents argue that ISO-NE's tariff revisions made in December 2014 regarding the mitigation of dual-fuel generators is evidence that the behavior was not previously prohibited.[67] Maxim adds that "neither Maxim nor Mr. Mitton engaged in anything approaching what any court ever has found to constitute market manipulation."[68]

38. Based on Mitton's emails to the IMM, Maxim argues that they "informed the IMM that Maxim was offering on oil because it thought it prudent to control risk due to the uncertainty of procuring enough gas to satisfy an unknown and unquantifiable dispatch."[69] Maxim contends that they "never addressed or in any way affirmatively, negatively, elliptically, or otherwise in the least bit knowingly misled the IMM about the fuel that it actually would or did burn."[70] The Respondents' Supplemental Reply argues that emails from the IMM to Maxim "did in fact routinely confirm fuel burns" and that Maxim's alleged manipulation would have been ineffectual because the IMM would have "mitigated Maxim wholly aside from whatever statements Maxim or Mitton made or allegedly failed to make to the IMM as to what fuel actually was burned."[71] Mitton argues that he should not be liable because he did not submit each of the Day-Ahead offers at issue[72] and that he acted consistent with company policy.[73]

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[65] *Id.* at 49.

[66] *Id.*

[67] *Id.* at 42-44.

[68] *Id.* at 47.

[69] *Id.* at 49-50. *See also* Maxim Answer at 27 ("Maxim has always maintained that procuring gas in advance of making its offers was part of a risk minimization strategy.").

[70] *Id.* at 50.

[71] Respondents' Supplemental Reply at 2.

[72] Mitton Answer at 4.

[73] *Id.* at 16.

39. Additionally, Mitton argues that the Commission does not have authority to apply section 222 of the FPA to individuals. Mitton argues that section 222 of the FPA "applies to entities not natural persons."[74] Mitton relies on a dictionary definition of the term "entity" as an "organization, not an individual" along with cases interpreting other statutes.[75] Mitton asserts that "Congress did not intend for FPA § 222 to apply to natural persons" because Congress did not use the term "person," as it did in section 10(b) of the Securities Exchange Act of 1934.[76] Mitton also argues that an interpretation of the term "entity" to include natural persons is not entitled to judicial deference because, according to Mitton, it is inconsistent with the express intent of Congress.[77]

ii. OE Staff Report and Reply

40. OE Staff contends that Respondents engaged in a strategy "to collect payments from ISO-NE for reliability dispatches at high oil prices when the plant actually burned much cheaper gas."[78] According to OE Staff, this "oil-gas scheme was a fraudulent device, scheme, or artifice, and was implemented through material misrepresentations."[79] OE Staff claims that Mitton's communications with the IMM intentionally "conveyed the false impression that Maxim itself was having difficulty obtaining gas and was therefore burning oil."[80] OE Staff states that Maxim intentionally made these misrepresentations "to protect [the] lucrative outcome" of "being paid for a costly fuel [i.e., fuel oil] when dispatched for reliability purposes while burning an inexpensive fuel [i.e., natural gas]."[81] OE Staff argues that "the incorrect impression that Maxim successfully communicated to the IMM is particularly egregious because not only did Maxim burn gas while offering

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[74] *Id.* at 25.

[75] *Id.* at 26 (citing *Black's Law Dictionary* (9th ed. 2009)).

[76] *Id.* (citing 15 U.S.C. 78j(b) (2012)).

[77] *Id.* at 27 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

[78] OE Staff Report at 2.

[79] *Id.* at 52.

[80] *Id.* at 49.

[81] *Id.*

(and expecting payment on) high oil prices, but it actually bought gas before submitting Day-Ahead offers based on oil prices….”[82]

41. According to OE Staff, Mitton “developed and implemented this strategy.”[83] OE Staff states that when the IMM asked why Maxim offered Pittsfield at such high prices, Mitton “gave answers that created the false impression that Maxim had to use high-price oil because the Pittsfield plant itself was having problems obtaining gas.”[84]

42. OE Staff contends that Respondents incorrectly characterize OE Staff’s allegations about Maxim’s communications to the IMM and Respondents’ manipulative scheme. OE Staff states that Respondents ignore the fact that many of Respondents’ statements to the IMM were not merely incorrect about future behavior (i.e., whether Pittsfield would burn gas) but were false about Maxim’s prior behavior (i.e., that Pittsfield had already burned gas or procured gas as its primary fuel). OE Staff asserts that “[t]his case is about Maxim’s communications to the IMM concerning what Maxim had actually done *in the past*.”[85] In support, OE Staff points to Mitton’s emails to the IMM, which focus on what had already happened, “not about how Maxim *would be offering* Pittsfield in the future.”[86] Because Maxim’s communications focused on Maxim’s past conduct, according to OE Staff, the misleading communications were about “conduct and events about which Mitton and Kwok had full knowledge.”[87]

43. Separate from the alleged fraudulent scheme and misleading statements by Maxim, OE Staff also alleges that Maxim violated 18 C.F.R. § 1c.2 (2014) “by deliberately *omitting* material information in communications with the IMM.”[88] To support this allegation, OE Staff points to emails from Maxim employees to the IMM that failed to state that the Pittsfield plant was burning natural gas.[89] These omissions

[82] *Id.* at 52.

[83] *Id.* at 2.

[84] *Id.* at 3.

[85] OE Staff Reply at 2 (emphasis in original).

[86] *Id.* at 3 (emphasis in original).

[87] *Id.* at 4.

[88] OE Staff Report at 52 (emphasis added).

[89] *Id.* at 53.

occurred despite the fact that Maxim had purchased natural gas prior to submitting offers based on oil prices.[90] OE Staff argues that Maxim had a legal duty to not omit this material information.[91]

44. OE Staff responds to Maxim's discussion of its alleged risk minimization strategy in two ways. First, OE Staff argues that, even if Maxim did pursue this policy, the manipulative scheme was not merely offering on oil and burning natural gas; rather it was offering on oil, burning natural gas, and then not communicating "*honestly with the IMM about what [Maxim] had done.*"[92] Instead of seeking advice from the IMM or being candid in its responses to the IMM, Maxim "wait[ed] for the market monitor to call, and then provid[ed] careful, narrow responses that implied false information and omitted material facts."[93] OE Staff asserts that "whatever Maxim's *ex ante* reasons for offering on oil, Maxim's efforts to mislead the [IMM] to *protect* its accumulating windfall gains violated the Anti-Manipulation Rule and section 35.41(b)."[94]

45. Second, OE Staff claims Maxim did not actually follow a risk minimization strategy. In support, OE Staff notes several facts uncovered in its investigation. First, OE Staff argues that there are no contemporary internal company documents about offering based on pipeline restrictions although such documents would be expected to exist.[95] Second, OE Staff asserts that Maxim in fact submitted Day-Ahead offers on natural gas when there were pipeline restrictions (an activity inconsistent with Maxim's "risk minimization" explanation).[96] Third, on one day (August 7, 2010), Maxim offered on oil when there were no pipeline restrictions, which was also inconsistent with Maxim's "risk minimization" explanation.[97] Fourth, internal Maxim emails demonstrate

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[90] *Id.*

[91] *Id.* This legal duty arose under 18 C.F.R. § 35.41(b) (2014), according to OE Staff. OE Staff separately addresses the omissions of material fact regarding Maxim's alleged violation of 18 C.F.R. § 35.41(b) (2014).

[92] OE Staff Reply at 5 (emphasis in original).

[93] *Id.* at 8.

[94] *Id.* at 13 (emphasis in original).

[95] *Id.* at 9.

[96] *Id.* at 9.

[97] *Id.* at 16.

that the purpose of Maxim's offers on oil was to avoid awards in the Day-Ahead market, not because of pipeline restrictions.[98] OE Staff argues that Maxim's repeated statements to the IMM about "pipeline restrictions" were misleading: "despite alleged difficulties from 'pipeline restrictions,' as of July 16, 2010 [the date when Mitton first communicated with ISO-NE regarding "daily gas restrictions" on the pipeline] Maxim was getting the gas it needed to fulfill reliability dispatches, always buying substantial quantities of gas before Day-Ahead awards were announced, and often buying gas before submitting Day-Ahead offers."[99] OE Staff also emphasizes that pipeline restrictions had had "zero impact on Maxim's ability to acquire gas."[100]

46. OE Staff recites Maxim's and Mitton's conduct to demonstrate that the conduct was "designed to protect the windfall gains that began to accumulate on operating date July 6, 2010, as Maxim received Day-Ahead reliability awards on oil offers but actually burned gas."[101] OE Staff notes that by the time of the July 16, 2010 email, Maxim would have collected nearly $1 million in profits from receiving NCPC payments based on oil when they burned gas.[102]

47. OE Staff argues that Maxim's communications with the IMM had several misleading features in common. According to OE Staff, Maxim's communications focused on "pipeline restrictions and theoretical losses" if Maxim were ever to offer on gas and, instead, have to burn oil.[103] Further, OE Staff contends that the communications were silent about the following circumstances: that Maxim was "offering oil, but burning gas…"; that Maxim was "often buying substantial quantities of gas before submitting Day Ahead offers on oil"; and that Maxim "stood to receive an ever-growing windfall by being paid for a costly fuel it did not burn."[104] OE Staff concludes that these communications "stuck to the same narrow statements . . . implicitly communicating that

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[98] *Id.* at 10.

[99] *Id.* at 17.

[100] *Id.*

[101] *Id.* at 13.

[102] *Id.* at 16.

[103] *Id.* at 19.

[104] *Id.*

Maxim was burning oil and omitting important information that could jeopardize Maxim's windfall."[105]

48. OE Staff responds to Mitton's argument that "entity" does not include natural persons by citing the Commission's position in Order No. 670 that "the term 'any entity' in the FPA and the Natural Gas Act is a 'deliberately inclusive term' that includes 'any person or form of organization….'"[106]

iii. Commission Determination

49. As discussed below, we find that Respondents' conduct constitutes a fraudulent scheme, device, or artifice in violation of 18 C.F.R. § 1c.2 (2014) and section 222 of the FPA. This conduct includes Respondents' offer strategy as well as the willful misrepresentations and omissions in communications with the IMM. We find that Maxim submitted offers for the Pittsfield plant based on oil prices, but instead burned natural gas. As a result of this strategy, Maxim attempted to obtain NCPC payments based on burning oil that were substantially higher than if its payments were based on using natural gas.[107] As part of the scheme, Respondents made misleading statements to the IMM, including suggestions that Pittsfield burned oil when, in fact, it burned natural gas and that pipeline flow restrictions led to Pittsfield's inability to obtain natural gas and, as a consequence, caused it to burn oil. Further, Respondents intentionally omitted material facts, i.e., that Pittsfield had been burning natural gas after it submitted offers based on oil prices and that Maxim had purchased and arranged for transportation of natural gas purchases prior to making its Day-Ahead offers based on oil prices. These statements and omissions were intended to impede the IMM's review of Maxim's behavior and hampered the IMM's ability to mitigate Maxim's offers.

50. A violation of section 1c.2 may occur not only through a manipulative scheme, but through false statements and deceit. Under 18 C.F.R. § 1c.2 (2014), the Commission has "defined fraud… as including fraud's definition under the common law, i.e., any false

[105] *Id.* at 20.

[106] OE Staff Report at 56 (citing Order No. 670, 114 FERC ¶ 61,047 at P 18).

[107] It is undisputed that by obtaining NCPC payments based on oil, Maxim obtained approximately $100 more per MWh than it would have if the payments were based on the fuel Maxim actually burned. Over the period at issue, Maxim would have gained $2.99 million of inflated NCPC payments, had the IMM not discovered the scheme and later applied the mitigation rules.

statement, misrepresentation, or deceit."[108] It is a violation for any entity "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading…." 18 C.F.R. § 1c.2(a)(2) (2014). In Order No. 670, the Commission explained this provision: "where an entity voluntarily provides information or where the entity is required by a tariff or a Commission statute, order, rule or regulation to provide information, and the entity then misrepresents or omits a material fact such that the information provided is materially misleading, there can be a violation of the Final Rule."[109]

51. To obtain higher payments, Respondents submitted Day-Ahead offers for the Pittsfield plant based on oil so that its offers were too high to clear the market economically. By avoiding clearing the Day-Ahead Market economically, Maxim could be committed in the Day-Ahead Market for reliability purposes. Respondents knew that if Pittsfield did not clear the Day-Ahead Market for economic reasons, ISO-NE would likely commit the Pittsfield plant for reliability reasons during the hot months of July and August 2010. In other words, by submitting offers high enough to avoid an economic award in the Day-Ahead market, Maxim expected to obtain reliability-based payments.[110] When committed and dispatched for reliability reasons, Maxim could obtain higher payments if it submitted a Day-Ahead offer based on oil than it could if it submitted a Day-Ahead offer based on natural gas, even if the Pittsfield plant ultimately burned natural gas.

52. As discussed herein, we find that, to retain these higher payments, Maxim and Mitton engaged in misleading communications with the IMM. The IMM had responsibility for mitigating resources dispatched for reliability purposes based on fuel. If the IMM had learned that the Pittsfield plant had obtained NCPC payments based on oil even though it had burned natural gas, it would have mitigated Pittsfield to the lower natural gas price. To avoid this result, Maxim and Mitton responded to the IMM's inquiries about Pittsfield so as to prevent the IMM from learning that Pittsfield had actually burned natural gas. In a series of emails in July 2010, Maxim and Mitton made misleading statements by falsely suggesting that Maxim was unable to obtain natural gas

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[108] *Lincoln Paper & Tissue, LLC*, 144 FERC ¶ 61,162, at P 30 (2013); *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163 at P 43 (2013); *Richard Silkman*, 144 FERC ¶ 61,164, at P 43 (2013).

[109] Order No. 670 at P 41 (footnote omitted).

[110] Maxim's intent is discussed below at PP 68-97.

because of pipeline flow restrictions. In these emails, they also omitted that Pittsfield had, in fact, burned natural gas and not oil. In addition, they also omitted the fact, in several instances, Maxim had made purchases of natural gas before submitting Day-Ahead offers based on oil prices.[111] Maxim's misleading statements and omissions became a necessary part of the manipulative scheme once the IMM began to inquire about Pittsfield's unusual energy offers (i.e., offers that were based on oil prices rather than natural gas prices).

53. A review of Maxim's communications reveals their misleading nature.[112] In the series of emails exchanged in July 2010, Mitton and IMM staff discussed Maxim's energy offers for Pittsfield.[113] The IMM initiated the exchange by calling Mitton about "the offer price for" the Pittsfield plant.[114] Throughout Maxim's subsequent responses, Mitton made statements suggesting that Pittsfield was burning fuel oil and that pipeline restrictions affected its ability to obtain natural gas, when, in fact, that was not the case.

54. For example, in the July 16, 2010 email Mitton states that "we have been offering the unit on fuel oil due to the daily gas restrictions on Tennessee Gas Pipeline."[115] In this

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[111] We agree with OE Staff that 18 C.F.R. § 1c.2 (2014) and FPA section 222 are violated both by the fraudulent scheme implemented by Maxim and Mitton and, separately, by Maxim's material omissions. *See* OE Staff Report at 52-53. By the same token, Respondents are incorrect that their violation of 18 C.F.R. § 1c.2 (2014) is predicated on a violation of 18 C.F.R. § 35.41(b). Respondents' Reply at 37. Respondents' manipulative scheme, including both their market behavior and their deceptions, is the basis of the violation of 18 C.F.R. § 1c.2.

[112] Respondents argue that, in order for their statements to have been misleading, the Commission must also determine that "the IMM did not know and would not have learned that Maxim burned gas." Respondents Reply at 9. This is incorrect. Statements may be misleading and manipulation may occur even if the entity harmed by the behavior ultimately uncovers it. In any event, it is clear that the IMM did not know that Pittsfield burned gas. The IMM continued to ask questions regarding Pittsfield's fuel use because it did not know what fuel was burned.

[113] Here, we examine Respondents' communications with the IMM for the purpose of evaluating a possible violation of 18 C.F.R. § 1c.2 (2014). The same communications serve as a basis to evaluate a violation of 18 C.F.R. § 35.41(b) (2014), which we discuss below in Section III.C.2.

[114] MPCPROD00074407 (Email from Mitton to Angeli (July 16, 2010)).

[115] MPCPROD00074407 (Email from Mitton to Angeli (July 16, 2010)).

email, Mitton suggested that the plant had been affected by the pipeline transportation restrictions, even though it had not, and, consequently, that the Pittsfield plant had been burning oil, even though it had burned gas. In fact, the Pittsfield plant was able to obtain natural gas for all of its dispatches in the month.[116]

55. We find that Mitton's subsequent July 19, 2010 email was similarly misleading. In that email, Mitton attached a document listing the restrictions on Tennessee Gas Pipeline, which according to Mitton had "restrictions every day of the month so far in July."[117] This statement again suggests that offers submitted for Pittsfield based on oil prices were due to pipeline restrictions when, in fact, the restrictions had no effect whatsoever on the fuel burned by Pittsfield. Likewise, pipeline restrictions had no substantial effect on Pittsfield's ability to obtain natural gas. In fact, for every operating day between July 7 and July 22, Maxim purchased natural gas before 12:30 p.m. (which is substantially before ISO-NE announced Day-Ahead generator selections).[118]

56. We also find that Mitton's July 20, 2010 email was misleading. On July 20, 2010, the IMM asked to be informed when Pittsfield "ha[s] a fuel issue . . . so we [the IMM] can model the unit on the correct fuel."[119] Mitton responded in a misleading fashion: "we are in on fuel oil again tomorrow [i.e., July 21, 2010]," indicating to the IMM that Pittsfield was unable to procure natural gas and would therefore be burning oil.[120] In fact, before making its Day-Ahead offer based on burning fuel oil, Maxim had already purchased natural gas for Pittsfield for the next day, July 21, 2010.[121]

57. We find that Mitton's July 21, 2010 email was also misleading. In that email, Mitton stated that "Altresco [i.e., Pittsfield] is on fuel oil pricing again for 7/22 due to gas restrictions again"[122] and attached a summary of the restrictions posted by Tennessee Gas

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[116] Master Spreadsheet, column AB.

[117] MPCPROD00074409 (Email from Mitton to Angeli (July 19, 2010)).

[118] *See* Data Response 47c; Master Spreadsheet. *See also* OE Staff Reply at 17-18.

[119] MPCPROD00074416 (Email from Angeli to Mitton (July 20, 2010)).

[120] *Id.*

[121] Mitton had submitted offers for Pittsfield based *on oil prices* for operating day July 21, after securing 16,000 MMBtu of natural gas for that operating day. Data Response 47c; Maxim Answer at 30.

[122] MPCPROD00074418 (Email from Mitton to Angeli (July 21, 2010)).

Pipeline, the pipeline supplying gas to Pittsfield. This statement suggests that Pittsfield was unable to obtain natural gas and was consequently burning oil. However, Maxim had already purchased gas for July 22 and, thus, when Mitton made the oil-based offer he already knew that Pittsfield would be running on natural gas for at least 7.0 hours.[123]

58. In addition to being misleading, Maxim's various communications omitted material facts in violation of 18 C.F.R. § 1c.2 (2014).[124] These omissions were material because the type of fuel that Maxim actually burned determined the amount that Maxim would have been paid.[125] As noted by OE Staff, the difference was approximately $100/MWh for a plant with a 176 MW nameplate capacity; for the period at issue, this difference amounts to almost $2.9 million over a 45-day period.[126]

59. As the Commission has explained: "[Market monitors] perform an important role in assisting the Commission in enhancing the competitiveness of ISO/RTO markets. Competitive markets benefit customers by assuring that prices properly reflect supply and demand conditions."[127] Respondents' scheme, including the misleading statements and omissions to the IMM, impaired and obstructed the functioning of the ISO-NE market in violation of 18 C.F.R. § 1c.2 (2014).[128] Maxim impaired and obstructed the application of ISO-NE's mitigation rules and impaired and obstructed the IMM's ability to detect Maxim's conduct and mitigate Maxim's exercise of market power through ISO-NE's mitigation rules.

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[123] Data Response 47c; Maxim Answer at 30.

[124] Omissions of material fact can form an independent basis for a violation of 18 C.F.R. § 1c.2 (2014).

[125] The Commission determines the materiality of a misleading statement or omission of fact on a case-by-case basis. Order No. 670 at P 51.

[126] OE Staff Report at 14, 17.

[127] *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267, at P 1 (2005).

[128] Section 1c.2 and FPA section 222 prohibit "any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market." Order No. 670 at P 50 and n.103 (citing *Dennis v. U.S.*, 384 U.S. 855, 861 (1966)).

60. Respondents offer multiple arguments to support their contention that their conduct was not manipulative or that they are not subject to the Commission's prohibition against manipulation and fraud. First, Respondents focus on the allegedly reasonable nature of Maxim's offer strategy. For example, Respondents argue that "there was no requirement under the tariff or under any theory of market manipulation that requires that the fuel basis for offers be the same as the fuel utilized."[129] However, whether manipulation exists is a question of fact to be determined based upon all of the circumstances of a case.[130] The Commission has made clear that "[a]n entity need not violate a tariff, rule, or regulation to commit fraud."[131]

61. Here, the fraudulent scheme consists not of the energy offers alone, but also the accompanying misleading statements and material omissions to the IMM – indicating an inability to rely on natural gas and a consequent need to rely on oil (with a resulting higher reference level), when, in fact, actually relying on natural gas and not oil. Those statements and omissions were an integral part of the scheme as they permitted Maxim to retain the higher oil-based payments while burning natural gas. Such misleading statements are not only strong indicia of intent, but also of the existence of a manipulative scheme. The question is not whether Maxim's energy offers alone would constitute manipulation, but rather whether Respondents' scheme, which included the multiple misleading communications, constitutes manipulation. We determine that this scheme indeed constitutes manipulation.

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[129] Maxim Answer at 42. Other examples include: "OE Staff claims that Maxim committed market manipulation because it acquired gas in advance of making day ahead offers on oil… all the while intending to burn gas in order to reap greater profits…." (*Id.* at 41); "There was nothing inappropriate about offering in one fuel and burning another…." (*Id.*); Maxim's scheme of offering on oil was part of a "risk minimization strategy" (*Id.* at 14-18, 27-32, 33-34, 51-52); "Pursuing a legitimate economic rationale is not a form of manipulation" (Mitton Answer at 25).

[130] Order No. 670 at P 50.

[131] *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163, at P 50 (2013) (citing Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 25); *Richard Silkman*, 144 FERC ¶ 61,164, at P 50 (2013); *Lincoln Paper and Tissue, LLC*, 144 FERC ¶ 61,162, at P 36 (2013). *See also In re Make-Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 83 (2013) (citations omitted).

62. Second, we disagree with Respondents' assertions that there is no evidence of misleading statements or omissions of material fact.[132] As detailed in our review above, we find that Respondents sent several emails to the IMM that contained misleading statements and that omitted material information in violation of 18 C.F.R. § 1c.2.[133] We thus disagree with Maxim's statement that "none of the cited communications incorrectly state what fuel was burned at Pittsfield, or state anything that reasonably should have led to [a] 'false impression.'"[134] These emails misleadingly indicate that pipeline restrictions affected Maxim's ability to procure natural gas such that Pittsfield burned oil. They also omit the material fact that the Pittsfield plant had actually burned natural gas and had purchased natural gas before Maxim submitted Day-Ahead offers based on fuel oil.[135]

63. Third, we reject Respondents' claims that they were not on notice that misleading statements or omissions of material fact to a market monitor could constitute manipulation.[136] The prohibition against such intentional statements or omissions is explicit in 18 C.F.R. § 1c.2 (2014), which makes it "unlawful" for any entity "to make

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[132] Maxim Answer at 48 ("there is no evidence suggesting that Maxim misrepresented its gas purchases or intentionally withheld from the IMM the fact that such purchases were made."); *Id.* at p. 50 ("OE Staff's Report is devoid of any substantial basis even for inferring much less finding that Maxim ever [omitted to state a material fact]…."); Mitton Answer at 1 ("OE Staff offers no evidence that Mr. Mitton intentionally misrepresented or omitted any material information…."); Maxim Answer at 50 ("it never addressed or in any way affirmatively, negatively, elliptically or otherwise in the least bit knowingly misled the [IMM] about the fuel that it actually would or did burn.").

[133] *See*, *e.g.*, MPCPROD00074407 (Email from Mitton to Angeli (July 16, 2010)); MPCPROD00074409 (Email from Mitton to Angeli (July 19, 2010)); MPCPROD00074418 (Email from Mitton to Angeli (July 21, 2010)).

[134] Maxim Answer at 48.

[135] We similarly reject Respondents' arguments that the IMM knew or should have known that Maxim burned gas when it offered oil. *Id.* at 9; Respondents' Supplemental Reply at 2. Maxim employees discussed the possibility that the IMM would not investigate actual fuel burns. *See* MPCPROD00091433 (Email from Devasahayam to Kwok and Mitton (July 20, 2010)). Further, the fact that the IMM continued to request information about fuel burns in its emails, including the August 16, 2010 email, demonstrates that the IMM did not, in fact, know of Respondents' use of natural gas.

[136] Maxim Answer at 20, 52; Mitton Answer at 22-23.

any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading…."[137] In the order promulgating this rule, the Commission also made explicit this prohibition on intentionally misleading statements and omissions of material fact.[138]

64. Fourth, Respondents incorrectly argue that ISO-NE's tariff revisions made in December 2014 regarding the mitigation of dual-fuel generators is evidence that their behavior was not previously prohibited.[139] These tariff changes are not relevant to our determination. Just as a finding of manipulation does not require a violation of a tariff,[140] a tariff change that prohibits future manipulative conduct does not excuse such conduct that occurred in the past.[141]

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[137] 18 CFR § 1c.2 (2014); *see also* Order No. 670 at P 51.

[138] Order No. 670 at P 41 ("where an entity voluntarily provides information or where the entity is required by a tariff or a Commission statute, order, rule or regulation to provide information, and the entity then misrepresents or omits a material fact such that the information provided is materially misleading, there can be a violation of the Final Rule . . . ").

[139] Maxim Answer at 42-44. *See ISO New England Inc.*, 148 FERC ¶ 61,179 (2014).

[140] *See*, *e.g.*, *Lincoln Paper & Tissue LLC*, 144 FERC ¶ 6,162 at P 36 (2013); *In re Make-Whole Payments & Related Bidding Strategies*, 144 FERC ¶ 61,068 at P 83 (2013).

[141] As the Commission has noted, "fraud is a very fact-specific violation, the permutations of which are limited only by the imagination of the perpetrator. Therefore, no list of prohibited activities could be all-inclusive." *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations,* 114 FERC ¶ 61,165, at P 24 (2006); *accord* Order No. 670 at P 25; *Lincoln Paper & Tissue LLC*, 144 FERC ¶ 6,162, at P 36 (2013) ("The Commission need not imagine and specifically proscribe in advance every example of fraudulent behavior."); *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163, at P 50 (2013); *Richard Silkman*, 144 FERC ¶ 61,164 at P 50 (2013); *In Re Make-Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 83 (2013) ("as Order No. 670 emphasizes, fraud is a question of fact to be determined by all of the circumstances of a case, not by a mechanical rule limiting manipulation to tariff violations.").

65. Fifth, we reject Mitton's defense that he did not implement all of the transactions at issue. Mitton participated in the scheme not only by making many of the energy offers and natural gas purchases at issue, but by making misrepresentations and omitting material facts in his statements to the IMM. Specifically, Mitton wrote the emails that contained the misleading statements and omissions of material fact. Mitton's arguments that "his actions implemented the company's risk minimization policy"[142] ignore the role he played in misleading the IMM. As discussed above, we find that Maxim engaged in manipulation, not merely a risk minimization policy. Further, we find that Mitton was complicit in the conception and execution of the manipulative scheme.

66. Sixth, regarding Mitton's argument that a natural person is not an "entity" under FPA section 222, the Commission has repeatedly held that section 222 of the FPA applies to natural persons.[143] We find that section 222 of the FPA reaches Mitton's conduct in this case and that the Commission has jurisdiction over Mitton for purposes of enforcing that provision. Section 222 of the FPA makes it unlawful for "any entity, directly or indirectly" to engage in fraudulent activities "in connection with" a transaction subject to the Commission's jurisdiction. The phrase "any entity" is broad, and applies to natural persons, such as Mitton, who have direct involvement in manipulative schemes.[144] In Mitton's case, such involvement extended to making misrepresentations to the IMM. Moreover, the Commission has jurisdiction over the ISO-NE market.

67. The Commission has an obligation under the FPA to ensure that rates are just and reasonable, which includes limiting the exercise of market power in organized markets.[145] ISO-NE's rules mitigate the exercise of market power while ensuring that a generator that is dispatched for reliability reasons receives fair compensation.[146] Under the ISO-NE

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[142] Mitton Answer at 6.

[143] *See*, *e.g.*, Order No. 670, at P 18; *Barclays Bank PLC*, 144 FERC ¶ 61,041, at P 113 (2013); *Richard Silkman*, 144 FERC ¶ 61,164, at P 73 (2013).

[144] *See* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 18. As we stated in Order No. 670, "Congress could have used the existing defined terms in the NGA and FPA of 'person,' 'natural-gas company,' or 'electric utility,' but instead chose to use a broader term without providing a specific definition."

[145] 16 U.S.C. § 824d(a) (2012).

[146] *ISO New England Inc.*, 129 FERC ¶ 61,008 at P 2 (2009) ("[t]he purpose of NCPC mitigation is to prevent the exercise of market power by resources that face no competition").

tariff, this compensation covers the fuel costs of generating electricity, plus a reasonable profit. Instead of accepting this compensation based on its true fuel costs, Respondents attempted to exercise Pittsfield's market power, adopting a scheme to obtain a greater payment as if the facility ran on fuel oil. In its communications with Maxim, the IMM here sought to determine the relevant facts and apply the mitigation rules, which are designed to address the consequences of market power. However, Respondents actively misled the IMM by making material misrepresentations and omitting material information from communications. Respondents' scheme was intended to defeat ISO-NE's mitigation rules and extract payments for costs that Maxim did not incur. Taken in its entirety, we find that this conduct is fraudulent and manipulative.

b. Scienter

i. Maxim and Mitton Answers

68. Respondents deny that they "engage[d] in knowing or intentional misconduct, or act[ed] recklessly."[147] Respondents claim that they were engaged in the "risk minimization strategy," for which "there was no intent to deceive, no intent to defraud, and no intent to withhold or omit information."[148] Respondents argue that "they legitimately intended to limit the risk of the day ahead market by offering on oil to avoid Pittsfield being dispatched on gas and forced to burn oil."[149] Further, Respondents claim that Maxim "sought to be available for what it perceived to be a less risky opportunity to operate in the real time market."[150]

69. First, Respondents argue that a showing of "extreme recklessness" is required to demonstrate scienter under 18 C.F.R. § 1c.2 (2014).[151] In support of their argument,

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[147] Maxim Answer at 47.

[148] *Id.* at 2.

[149] *Id.* at 47.

[150] *Id.*

[151] *Id.* at 45-46; Mitton Answer at 23.

Respondents rely on cases interpreting Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934.[152] Respondents assert that OE Staff has not met this burden.

70. Respondents state that their motivation in the summer of 2010 "was to assure that Pittsfield indeed unit [sic] would be available to support reliability while at the same time avoid having to bid and being dispatched on gas but having to burn oil."[153] Respondents also note that they "expected that Pittsfield would not be dispatched in the day ahead market but rather that Maxim intended and expected to be dispatched on economics in the real time market, when prices were spiking or to self-schedule the Pittsfield unit in the real time market."[154]

71. Respondents further deny that they attempted to conceal their conduct from the IMM. They argue that they "reasonably would have assumed that the IMM would" review the fuel burns because, they assert, "the IMM's practice was to monitor gas nominations and fuel burns with respect to dual-fuel units."[155] They also point to a phone call they allege occurred on or about July 20, 2010, between Mitton and Angeli (an IMM employee). According to Mitton, "I believe [Angeli] asked which fuel we had actually been burning and I said natural gas, or predominantly natural gas, I think there were a few times that we had to burn some oil, but fairly minimal."[156]

72. Respondents dispute Angeli's testimony[157] that such a conversation did not occur. First, Respondents argue that the call log that Angeli reviewed in preparing his declaration was incomplete and inaccurate because it did not include certain other communications between Mitton and Angeli during this period.[158] Second, Mitton argues

[152] Maxim Answer at 45-46 (*citing Dolphin & Bradbury v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008); *SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976)).

[153] *Id.* at 14.

[154] *Id.* at 16-17 (emphasis omitted).

[155] *Id.* at 19 n.48.

[156] *Id.* at 8 (citing Mitton Test. Vol. II Tr. 267-68).

[157] Angeli Declaration at 1 ("I am confident that I did not have any such phone call with Mr. Mitton (or anyone else at Maxim) during July 2010.").

[158] Maxim Answer at 34-38; Mitton Answer at 10-13.

that Mitton's memory is more reliable because Angeli "dealt on a day-to-day basis with dozens of market participants on dozens of issues" whereas Mitton "dealt only with one market monitor."[159] Third, Respondents argue that Angeli did not review an internal Maxim email dated July 20, 2010, in which Maxim employee Chris Devasahayam analyzed the IMM's mitigation authority for burning gas. Devasahayam noted in the email that he had "talked with Kyle [Mitton]."[160] Mitton argues that "[t]he only plausible" explanation for Devasahayam's email is that Mitton told Devasahayam that Mitton talked to the IMM about the natural gas burns and that the IMM said that mitigation was likely.[161] Fourth, according to Respondents, IMM Supervisor Richard Dominguez's description of a call with Mitton on August 18 demonstrates that Mitton was under the impression that offering on oil and burning gas was "acceptable" and that this impression was consistent with Mitton and Angeli discussing the fuel burns on the disputed call.[162]

73. Respondents' claim that OE Staff bears the burden of demonstrating that they "had any reason to know whether, when, or for how long" conditions would exist leading to reliability dispatches for Pittsfield.[163] Respondents deny that they knew Pittsfield would be dispatched during the summer of 2010, "much less whether it would be dispatched on economics as opposed to for reliability."[164] Respondents also reject OE Staff's contention that Maxim's prior experience under the Reliability Must Run agreement helped Maxim to predict when it would be dispatched for reliability.[165]

74. Respondents also claim that OE Staff relies on a 2009 ISO-NE study to show that Respondents knew when Pittsfield would be dispatched for reliability purposes, but does not provide evidence that Maxim knew of the study or that Maxim's experience under the Reliability Must Run agreement in 2009 would lead Maxim to know that reliability

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[159] Mitton Answer at 8.

[160] *Id.* at 11 (citing MPCPROD00091433 (Email from Devasahayam to Kwok (July 20, 2010)).

[161] *Id.* at 10-11.

[162] Maxim Answer at 39; Mitton Answer at 14.

[163] Maxim Answer at 26.

[164] *Id.* at 21.

[165] *Id.* at 25.

dispatches were likely in 2010.[166] As for Pittsfield's advance natural gas purchases, Respondents argue that, although Maxim "did not expect to be dispatched in the day ahead market, it nonetheless procured gas to hedge the risk that it might be."[167] Maxim argues that it pre-purchased natural gas for Pittsfield only 26 percent of the time before they submitted an offer in the Day-Ahead Market between July 5 and August 18, 2010.[168] Respondents contend that on those days when Maxim purchased natural gas in advance, "Maxim in fact never knew for how long such a dispatch would last, and never purchased enough gas to satisfy a 24-hour dispatch, notwithstanding the prolonged heat wave and the very high relative load forecasts."[169] Even when Maxim "procured sufficient gas to meet a day ahead award," Maxim and Mitton claim that "because Maxim had exposure for the entirety of the operating day, Maxim maintained its oil-based supply offers throughout the re-offer period when TGP [Tennessee Gas Pipeline] posted restrictions."[170]

ii. OE Staff Report and Reply

75. OE Staff asserts that Maxim and Mitton engaged in an "intentional, deliberate, and calculated" scheme to deceive the IMM by utilizing misleading statements and material omissions.[171] According to OE Staff, 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 [IMM] that the unit was actually burning oil" to "protect a lucrative windfall."[172] In response to Respondents' argument that OE Staff must show "extreme recklessness" to demonstrate scienter pursuant to the market manipulation rules, OE Staff states that "recklessness is sufficient to prove scienter"

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[166] *Id.* at 24.

[167] *Id.* at 27.

[168] *Id.* at 26-27.

[169] *Id.* at 29.

[170] *Id.* at 14.

[171] OE Staff Report at 54; OE Staff Reply at 36.

[172] OE Staff Report at 54.

under 18 C.F.R. § 1c.2 (2014). However, OE staff argues that Maxim and Mitton acted with a higher level of scienter, namely, intent.[173]

76. OE Staff contends that Maxim and Mitton intended to obtain reliability commitments from ISO-NE and that the Pittsfield facility would burn cheaper gas to satisfy those commitments. OE Staff relies on three arguments to support its contention that Maxim and Mitton intended to obtain reliability commitments. First, "the entire premise of Maxim's [Reliability Must Run] Agreement with ISO-NE was that Pittsfield was needed to provide a unique reliability service on days with high loads."[174] Because Maxim "had access to ISO-NE's peak load forecasts each day" during the summer of 2010, and "Maxim obviously knew that loads are higher on hot summer days," OE Staff infers that Maxim and Mitton could generally predict when Pittsfield would be needed for reliability.[175] Second, OE Staff notes that Maxim and Mitton could not have been surprised when Pittsfield was committed for reliability under the same general conditions "22 times in a span of a month and a half."[176] Finally, OE Staff argues that Maxim's advance gas purchases demonstrate that Maxim and Mitton expected to be committed for reliability.[177]

77. OE Staff cites Maxim's November 2013 submission to Staff in which Maxim "emphasized that it normally does not buy gas before receiving dispatch instructions from

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[173] OE Staff Reply at 36.

[174] OE Staff Report at 18.

[175] *Id.* OE Staff cites Mitton's testimony to establish that Mitton and Maxim could infer whether their offers were accepted based on merit or reliability. *See* OE Staff Report at 23 n. 59 (citing Mitton Test. Vol. I Tr. 154-55) ("[W]hile Mitton did not 'technically' know whether Pittsfield had gotten a commitment based on reliability, by 'looking at [Locational Marginal Prices] 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 [Locational Marginal Price] 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 [Locational Marginal Price] or below that price? A Yeah, I would agree with that.'").

[176] OE Staff Report at 18.

[177] *Id.* at 18-19.

the ISO … because of the risk it will have to sell unused gas at a loss."[178] OE Staff argues that Maxim would have had no "realistic expectation that its offers on oil prices would clear the market based on economics" because they were higher than the ISO-NE Day-Ahead Locational Marginal Prices for all but nine hours during this period.[179] Therefore, OE Staff asserts that "[b]y buying gas in advance of submitting oil offers on … 11 days [during this period], it is reasonable to infer that Maxim and Mitton believed [Pittsfield] was likely to receive Day-Ahead reliability awards."[180]

78. Once Maxim and Mitton intentionally positioned themselves to obtain NCPC payments based on oil while burning cheaper gas, OE Staff asserts that Maxim and Mitton proceeded to intentionally mislead the IMM in an effort to "protect its accumulating windfall gains."[181] OE Staff focuses on the communications between Mitton, Kwok, and ISO-NE's IMM to establish that Maxim and Mitton intentionally misled the IMM through these communications.

79. According to OE Staff, Maxim and Mitton believed that Maxim would be able to collect, and retain, NCPC payments based on oil prices so long as the IMM did not discover that Pittsfield was burning gas.[182] OE Staff contends that Mitton intentionally failed to mention in his July 16, 19, 20, and 21 emails with Angeli, that on most of the

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[178] *Id.* at 19.

[179] *Id.* at 20. OE Staff also relies on Mitton's statements (Mitton investigative submission at 7 (December 5, 2014)) in which he stated that, when Maxim submitted offers based on oil prices during this period, "Maxim believed that it likely would not clear the Day-Ahead Market because of higher oil prices." *Id.*

[180] *Id.* at 19-20. OE Staff also notes that, in addition to the 11 days during this period when Maxim bought gas for next day delivery before offering on oil, Maxim may have done the same on another 11 days between July 8 and August 5. *Id.* at 47. In response to a data request, Maxim stated that it "[d]o[es] not know" whether it made gas purchases before submitting its Day-Ahead offer based on oil prices for these other 11 days. *Id.*

[181] OE Staff Reply at 13. As further evidence of Maxim's intent to obtain and retain NCPC payments based on oil prices, OE Staff points to Maxim's financial incentive, stating that "[t]he profits that Maxim stood to enjoy from two weeks of reliability dispatches for a single plant (Pittsfield) were greater than Maxim's average monthly net income from its entire worldwide operations." *Id.* at 16 (emphasis omitted).

[182] OE Staff Report at 11.

days in which Pittsfield received Day-Ahead dispatches based on oil prices, Pittsfield had not burned oil and that on several of those days, Maxim had bought large volumes of natural gas before submitting Day-Ahead offers based on oil.[183] OE Staff infers from these omissions, and from Mitton's emphasis on pipeline restrictions (i.e., "restrictions have been a serious issue"), that Maxim and Mitton were communicating they were having trouble acquiring natural gas, and thus, were burning oil.[184] By implying that they were burning oil, Maxim and Mitton sought to ensure that the IMM would not discover that Pittsfield was burning natural gas and would not mitigate the oil-based NCPC payments.[185]

80. OE Staff contends that Maxim and Mitton's intent to conceal the actual natural gas fuel burns is further evidenced by the fact that Maxim and Mitton failed to provide this information until the IMM unequivocally asked. OE Staff rejects Maxim and Mitton's claim that Mitton told IMM employee Angeli on or around July 20, 2010, that Pittsfield was burning gas.[186] According to OE Staff, "a conversation as important as the alleged Mitton-Angeli call would have been reflected in many if not all of [the recorded communications]" however none of the communications mention the call.[187] OE Staff states that Maxim's internal emails do not mention the Mitton-Angeli call and, although Mitton testified that he assumed he told Kwok about the "significant" call, Kwok did not recall hearing about the call.[188]

81. OE Staff also argues that "many of the statements in these documents would make no sense if the alleged July 2010 Mitton-Angeli phone call had actually happened."[189] For example, OE Staff cites Kwok's August 23 email to Angeli and Dominguez, in which Kwok assures the IMM that Maxim has "been forthwith with the IMMU under the circumstances by which we have made our decision to offer Pittsfield's energy either

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[183] *Id.* at 26-31.

[184] *Id.* at 26.

[185] *Id.* at 49.

[186] *Id.* at 37-43; OE Staff Reply at 29-32.

[187] OE Staff Reply at 31.

[188] OE Staff Report at 40.

[189] OE Staff Reply at 31-32.

using natural gas or fuel oil pricing."[190] If Mitton had previously mentioned the actual fuel burns to Angeli, OE Staff notes, it "would have been extremely important to Maxim's good faith [yet] Kwok did not claim Maxim had ever told the IMM … that Pittsfield had actually burned gas."[191] OE Staff also argues that Mitton's testimony about the Angeli call is contradicted by Mitton's August 18 call with Dominguez in which Mitton told Dominguez that he did not expect further review of Pittsfield's oil offers.[192] If Angeli had previously told Mitton that Pittsfield's offers would likely be mitigated then, according to OE Staff, Mitton's statement to Dominguez would make no sense.

82. As for Maxim and Mitton's argument that offers for Pittsfield based on oil prices were submitted for legitimate purposes – OE Staff responds that "the Commission need not resolve *why* Maxim had offered on oil … [b]ecause the basis of this case is Maxim's effort to mislead the IMM …."[193] However, OE Staff contends that Maxim's claim to have submitted offers based on oil prices to minimize risks associated with pipeline

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[190] OE Staff Report at 41 (citing MPCPROD00074438 (Email from Kwok to Dominguez) (Aug. 23, 2010)).

[191] OE Staff Reply at 26. OE Staff further challenges Respondents' contention that Mitton told the IMM on July 20, 2010 that Pittsfield was burning natural gas after submitting offers based on oil prices by pointing to inconsistent statements between Maxim and Mitton about communications with the IMM. Maxim stated that it notified the IMM on August 23, 2010 that Pittsfield burned natural gas after the IMM asked which fuel Pittsfield burned during July and August. However, Mitton testified that he told Angeli about the natural gas burns on or around July 20. OE Staff argues that Maxim consulted Mitton before preparing Maxim's statements to OE Staff and that Maxim's account contradicts Mitton's subsequent testimony. OE Staff Report at 37-38. Staff argues that the inconsistency between Maxim's response and Mitton's testimony indicates that Mitton's testimony is not credible. Mitton and Maxim respond by making the following points: (1) "Mitton was not primarily involved in preparing" Maxim's response to the data request; (2) Mitton's recollection of his call with Angeli was refreshed through the course of this investigation; and (3) Mitton was responding to Angeli's *question* about the fuel burn, so his statement was technically consistent with Maxim's response that Maxim did not mention the fuel burns until after it was first asked by the IMM. Maxim Answer at 19 n.48; Mitton Answer at 12.

[192] OE Staff Report at 42.

[193] OE Staff Reply at 8 (emphasis in original).

restrictions is nonetheless without relevant support in the record.[194] OE Staff notes that the only contemporaneous internal Maxim emails discussing the purpose of the oil offer omit mention of the purported "risk minimization strategy" but indicate that Maxim intended to price itself out of the Day-Ahead market and save its energy for the Real-Time market where they believed they could make more money.[195] OE Staff also cites several instances during the relevant period when Maxim submitted Day-Ahead offers based on natural gas prices despite the posting of relevant pipeline restrictions for those operating days. According to OE Staff, these offers undermine Maxim's claims that it would never submit offers based on natural gas prices in the face of pipeline restrictions because of the risk of "huge financial losses."[196]

iii. <u>Commission Determination</u>

83. We find that Respondents acted with the requisite scienter when they engaged in a fraudulent scheme, through misrepresentations and material omissions, to obtain and protect excessive NCPC payments. Scienter is the second element of 18 C.F.R. § 1c.2 (2014).[197] For purposes of establishing scienter, Order No. 670 requires reckless, knowing, or intentional actions taken in conjunction with a fraudulent scheme, material misrepresentation, or material omission.[198]

84. As discussed below, Respondents knew that, under the ISO-NE tariff, if ISO-NE committed Pittsfield for reliability, Maxim would be paid NCPC payments based on the fuel type reflected in its offers. Also, Respondents knew that the payments would be higher if the offers were based on the oil reference level and the IMM did not mitigate the offers to the natural gas reference level. The evidence shows that Maxim and Mitton submitted offers to ISO-NE based on the price of oil to avoid an economic dispatch and

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[194] *Id.*

[195] *Id.* at 9-10.

[196] *Id.* at 9.

[197] Order No. 670, 114 FERC ¶ 61,047 at P 49. Scienter is not an element of a violation of 18 C.F.R. § 35.41(b) (2014). *See Kourouma v. FERC*, 723 F.3d 274, 278-79 (D.C. Cir. 2013).

[198] Order No. 670, 114 FERC ¶ 61,047 at PP 52-53. Although we need not decide this matter because we find that Respondents indeed acted knowingly and intentionally to deceive the IMM, we note that Order No. 670 does not require a showing of "extreme recklessness." Order No. 670, 114 FERC ¶ 61,047 at P 53.

collect NCPC payments based on the oil reference level while burning less expensive natural gas. Moreover, the evidence shows that Maxim and Mitton intended to, and in fact did, burn natural gas, not oil. Further, Respondents intended to prevent the IMM from discovering this behavior.

85. Respondents claim that they could not have predicted with certainty whether they would receive a reliability commitment, or the duration of any commitment is misleading. Respondents do not, and cannot, argue that there is no correlation between reliability dispatches and high load. Indeed, they focus part of their "risk minimization" defense on the expectation that high temperatures would lead to higher load and increased volatility in real time energy prices.[199] That Respondents may not have been able to predict with absolute certainty whether they would be dispatched on days forecasted for high load or whether the commitment would last for one or twenty-four hours is not determinative. As Mitton concedes, he could infer from Pittsfield's offer and the day's Locational Marginal Prices whether Pittsfield's dispatch in the Day-Ahead Market was based on reliability or economic merit order.[200] Based on the load forecasts and their prior experiences being dispatched as a reliability resource under the Reliability Must Run agreement and their prior experiences as a reliability resource after the Reliability Must Run agreement expired, we conclude that Respondents understood when they were most likely to be dispatched for reliability. The evidence shows that Maxim was awarded reliability commitments 22 times over the course of a month and a half in July and August 2010.[201] As OE Staff notes, Respondents were well aware of the conditions likely to yield reliability dispatches after the first several days in this period.[202]

86. Respondents' purchases of natural gas prior to submitting their Day-Ahead offers also suggests that they expected to secure a commitment in the Day-Ahead Market. As Maxim stated in a submission in the investigation, it generally did not purchase gas prior to receiving a dispatch award because of the risk that it would not be dispatched and would incur a potentially significant loss.[203] Maxim responds that the statements in its submission refer to "current practice" and implies that it is currently easier to purchase

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[199] Maxim Answer at 16.

[200] Mitton Test. Vol. I Tr. 154-55.

[201] Master Spreadsheet (Column H).

[202] OE Staff Report at 18-20.

[203] *See* Maxim investigative submission at 17 (Nov. 4, 2013).

and sell gas than it was in 2010.[204] However, Maxim does not deny that in 2010 it also followed this practice of waiting to purchase gas until it had a dispatch award.

87. Regarding whether Respondents intentionally sought reliability commitments, Mitton states that "[W]hen 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."[205] Thus, Respondents knew that by submitting an offer in the Day-Ahead market based on the price of oil, it would likely not clear in economic merit order. Thus, any commitment it received would be for reliability. While Mitton argues that deciding "to forgo" Day-Ahead Market opportunities was to minimize the risk that Maxim would not obtain sufficient gas to meet a ISO-NE dispatch instruction,[206] the evidence does not support this theory. Rather, as discussed above, Respondents expected, based on their past experience, to be committed for reliability after submitting their offer based on oil prices. It is undisputed that Respondents knew they had to avoid an economic commitment in the Day-Ahead Market if they were going to be available for a reliability commitment, and thus be eligible to receive NCPC payments. Mitton concedes that Pittsfield could price itself out of the Day-Ahead Market by submitting offers based on oil prices because oil was priced much higher than natural gas.[207]

88. We find that Respondents submitted offers based on oil prices in order to be committed for reliability purposes. Their intent is demonstrated by their repeated market actions and their attempts to keep the IMM uninformed regarding the fuel burns. The Commission has previously stated that "[f]raud is a question of fact that is to be

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[204] Maxim Answer at 32-33.

[205] Mitton investigative submission at 7 (December 5, 2014).

[206] *Id.*

[207] *Id.* ("[W]hen 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"; Maxim decided "to forgo" Day-Ahead Market opportunities "by offering on oil" to minimize risk that it would not obtain sufficient gas to meet sustain an ISO-NE dispatch). *See also* Maxim Answer at 15 ("…Maxim made supply offers based on oil … expecting that it would be priced out of the day ahead market, not that it would be committed for reliability.").

determined by all the circumstances of a case."[208] The same is true for scienter, which is often proven through circumstantial evidence.[209]

89. Further, Respondents consistently provided misleading and incomplete information to the IMM about Pittsfield's offers based on oil prices and natural gas burns in an attempt to prevent the IMM from reducing Pittsfield's NCPC payments to reference levels based on natural gas. Mitton knew that the IMM would not mitigate Pittsfield's offers based on oil prices if the IMM believed that Pittsfield was burning oil instead of natural gas.[210] Further, Respondents appear to believe that if they provided a rationalization for submitting offers based on oil prices, the IMM would not further review the matter. An internal Maxim email on July 20, 2010 strategizes that Maxim could prevent the IMM from mitigating Pittsfield's offers "[i]f we can provide the [IMM] with the rationalization behind our pricing."[211] On August 18, following a phone call with Mitton, the IMM recorded that "[Mitton] was under the impression (wrongly) that the mere notification of 'potent[i]al' gas procurement [problems] and the offer of oil was

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[208] Order No. 670, 114 FERC ¶ 61,047 at P 50.

[209] Even if we agreed with Respondents' statement that "OE Staff has not provided the Commission with any direct evidence that Maxim or Mitton acted with scienter in the challenged communications with the IMM," the record is replete with circumstantial evidence of Respondents' intent. Respondents' Reply at 32. Circumstantial evidence of scienter is sufficient. *See*, *e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("Circumstantial evidence is not only sufficient, but may be more certain, satisfying and persuasive than direct evidence."); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1118 (D.C. Cir. 2009) ("A person's state of mind is rarely susceptible of proof by direct evidence, so specific intent to defraud may be, and most often is, inferred from the totality of the circumstances, including indirect and circumstantial evidence."); *United States v. Kim*, 267 F. App'x 712, 713 (9th Cir. 2008) (citation omitted) ("Fraudulent intent may be, and often must be, proven by circumstantial evidence."); *United States v. Salameh*, 152 F.3d 88, 143 (2d Cir. 1998) ("… as a general rule most evidence of intent is circumstantial…"); *United States v. O'Brien*, 14 F.3d 703, 706 (1st Cir. 1994) (citation omitted) ("Guilty knowledge, like specific intent, seldom can be established by direct evidence. This principle has particular pertinence in respect to fraud crimes which, by their very nature, often yield little in the way of direct proof.").

[210] Mitton Test. Vol. II Tr. 288-89.

[211] MPCPROD00091433 (Email from Devasahayam to Kwok and Mitton (July 20, 2010)).

sufficient and that no further review would be done by IMM."[212] In other words, Mitton believed that by focusing the IMM on Pittsfield's potential difficulties obtaining natural gas, the IMM would not conduct further review of Pittsfield's oil price-based offers.

90. As discussed above, we find that Respondents' attempts to mislead the IMM were part of an intentional plan to avoid further inquiry by the IMM about the fuel actually used at Pittsfield. Maxim stood to earn significant profits if the IMM did not mitigate the offers based on oil prices and permitted Maxim to collect higher NCPC payments when Pittsfield actually burned cheaper natural gas.[213]

91. When the IMM began to probe Respondents for information about the offers based on oil prices, Maxim and Mitton carefully and deliberately omitted information regarding the actual fuel burned from their responses until asked to provide the information point-blank and in detail. The emails Mitton sent to the IMM between July 16 and July 21 focused on gas pipeline restrictions, which Mitton described to Angeli as a "serious issue."[214] Nowhere did Mitton mention that, despite the "serious issue" posed by the natural gas pipeline restrictions, Pittsfield did not actually experience any issues in obtaining natural gas. Indeed, Mitton failed to mention in these communications that: on some of these days Pittsfield had already purchased natural gas for the following delivery day; Pittsfield was able to purchase natural gas on previous days when the pipeline restrictions were in effect; or that Pittsfield burned natural gas on all 11 days between July 6 and July 20 when it was dispatched for reliability after submitting offers based on

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[212] OE Staff Report at 34 (citing Altresco Share Point Call Log).

[213] Although Maxim had a financial incentive to protect its NCPC payments from mitigation, establishing motive or personal motivation is unnecessary for determining whether a violation of 18 C.F.R. § 1c.2 (2014) was committed with the requisite scienter. *See Barclays Bank PLC,* 144 FERC ¶ 61,041, at P 72 (2013).

[214] MPCPROD00074407 (Email from Mitton to Angeli (July 16, 2010) ("we have been offering the unit in conservatively on fuel oil due to the daily gas restrictions on [the pipeline]")); MPCPROD00074409 (Email from Mitton to Angeli (July 19, 2010) ("restrictions have been a serious issue… reducing the amount of gas that can flow")); MPCPROD00074416 (Email from Mitton to Angeli (July 20, 2010) ("we are in on fuel oil again for tomorrow")); MPCPROD00074418 (Email from Mitton to Angeli (July 21, 2010) ("Altresco is on fuel oil pricing again for 7/22 due to gas restrictions again.")).

oil prices. The careful omission of this information, which was essential to protecting Maxim's significant profits, was not accidental.[215]

92. We find that Respondents misrepresented their concern over natural gas supply "risks" to the IMM. The evidence demonstrates that Respondents occasionally submitted offers for Pittsfield based on natural gas prices in the Day-Ahead Market even when pipeline restrictions were posted.[216] Respondents' Reply contends that offers based on natural gas prices submitted for Pittsfield on six days in June do not undermine their explanation about how they addressed risk over the rest of July and August.[217] Respondents state that, "[m]uch time was spent in June coordinating with the IMM to develop the parameters which would govern how Pittsfield would operate in the competitive markets."[218] Respondents' argument that they lacked "sufficient data points" in June "to warrant an assessment of the risks of various offer options" is unpersuasive.[219] Not only was the risk, as described by Respondents in this proceeding, straightforward without an assessment of "data points," but, Respondents elsewhere state that Maxim's practice was to consistently submit offers for Pittsfield based on oil prices during pipeline restrictions, including during the Reliability Must Run agreement.[220] The risk that Pittsfield would not be able to obtain gas when dispatched due to pipeline restrictions, if real, should have concerned them on any day when pipeline restrictions were in effect – in June, July, or August. Regardless, the reality is that pipeline restrictions had no substantial effect on Pittsfield's ability to obtain and burn natural gas in July 2010 – something Respondents knew when they told the IMM that the pipeline restrictions were "a serious issue" during this time.

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[215] We reject Respondents' argument that "they legitimately intended to limit the risk of the day ahead market by offering on oil to avoid Pittsfield being dispatched on gas and forced to burn oil." Maxim Answer at 47. Respondents' argument ignores the misleading nature of the communications with the IMM.

[216] OE Staff Reply at 9-10 (citing OE Staff Reply Appendix E (Information about Tennessee Gas Pipeline Restrictions); Master Spreadsheet).

[217] Respondents' Reply at 20-21.

[218] *Id.*

[219] *Id.* at 21.

[220] *Id.* at 30.

93. Moreover, in at least one instance, where Respondents initially submitted offers based on oil prices in the Day-Ahead Market, they changed their offer to be based on natural gas prices in the Real-Time Market despite a pipeline restriction posted for that day.[221] These facts are inconsistent with Respondents' claims that "Maxim maintained its oil-based supply offers throughout the re-offer period when [Tennessee Gas Pipeline] posted restrictions even if, by that time, Maxim had procured sufficient gas to meet a day ahead award."[222]

94. Finally, for the reasons stated above, we do not find credible Respondents' claim that Mitton told the IMM that Pittsfield was operating on natural gas during a telephone call on or around July 20, 2010. Respondents' primary argument is that IMM employee Angeli's recollection is unreliable because it was based on an incomplete or inaccurate call log. As Angeli stated in his declaration, he was "confident that [he] did not have any such phone call with Mr. Mitton (or anyone else at Maxim) during July 2010." Angeli explained that his call log did not include a reference to the call, but then further noted that, if the call had occurred, he would have told his colleagues about the call because "it would have been an important development." Angeli also stated that none of his email correspondence with Mitton reflected the call.[223] Although Angeli's call log was incomplete as to every communication Angeli had with Mitton, we find that Angeli's statement that he would have included the call on the log and discussed it with his colleagues if it had occurred because he would have viewed it as "an important development," is credible and reliable.

95. Moreover, Mitton did not document the call and there is no direct evidence that he discussed the call with anyone. Further, when Mitton's supervisor, Kwok, revealed in response to the IMM's questioning that Pittsfield had burned natural gas after submitting offers based on oil prices and being committed for reliability, Kwok did not mention the alleged Mitton-Angeli call on July 20. Lastly, when Kwok told the IMM that Maxim "ha[d] been forthwith with the IMMU under the circumstances by which we have made our decision to offer Pittsfield's energy either using natural gas or fuel oil pricing,"[224] Kwok did not mention the alleged call to support his statement that Maxim had been "forthwith." Kwok's failure to mention this call supports our conclusion that the call did not occur.

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[221] OE Staff Reply at 11-12.

[222] Maxim Answer at 14.

[223] Angeli Declaration at 1-2.

[224] MPCPROD00074438 (Email from Kwok to Dominguez (Aug. 23, 2010)).

96. In sum, we do not find Mitton's claim, or an inexhaustive call log, sufficient to discredit the recollection of a retired IMM employee who has no interest in the outcome of this proceeding.[225]

97. We find that Maxim and Mitton each acted with the requisite scienter to satisfy the requirements of 18 C.F.R. § 1c.2 (2014) and section 222 of the FPA.

c. In Connection with a Jurisdictional Transaction

98. We find that Respondents' fraudulent scheme was in connection with a jurisdictional transaction. The third element of establishing a violation of 18 C.F.R. § 1c.2 (2014) and section 222 of the FPA is determining whether the conduct in question was "in connection with" a transaction subject to the Commission's jurisdiction.[226] Section 201(b)(1) of the FPA bestows jurisdiction to the Commission over "the sale of electric energy at wholesale in interstate commerce."[227] Section 205(a) of the FPA confers jurisdiction to the Commission over "[a]ll rates and charges made, demanded or received by any public utility for or in connection with the . . . sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges."[228] Neither Maxim nor Mitton dispute that their actions and related statements were in connection with jurisdictional transactions under 18 C.F.R. § 1c.2 (2014) and section 222 of the FPA. We conclude that Maxim's wholesale sales of energy to ISO-NE are within the Commission's jurisdiction and that Respondents' conduct was in connection with these jurisdictional transactions.

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[225] Mitton complains that he has not "examined Mr. Angeli to determine what OE Staff discussed with Mr. Angeli in persuading him to sign the declaration[,]" Mitton Answer at 13, and Maxim alleges that OE Staff "convinced" Angeli to sign the declaration. Maxim Answer at 5. Although a reasonable person might interpret these words to imply that Mitton believes that OE Staff acted improperly in its dealings with Angeli, Maxim and Mitton do not make explicit any such accusations. We further note that there is no evidence that OE Staff acted improperly. Moreover, there is no evidence to support Maxim's bald claim that the Commission's investigation in this matter "certainly looks like an effort to gain leverage" in another investigation. *Id.* In any event, our determinations in this proceeding are independent of any other investigations that may be ongoing, whether involving Maxim or any other entities.

[226] 16 U.S.C. § 824v(a) (2012); 18 C.F.R. § 1c.2(a) (2014).

[227] 16 U.S.C. § 824(b)(1) (2012).

[228] *Id.* § 824d(a) (2012).

2. Maxim's Violation of 18 C.F.R. § 35.41(b)

99. Section 35.41(b) of the Commission's regulations provides:

> A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.[229]

a. Maxim's Answer

100. Maxim asserts that "it did not submit false and misleading information to ISO-NE or to the market monitor."[230] In support of this assertion, Maxim relies extensively on the arguments set forth in its defense on the manipulation claim.

b. Staff Report and Reply

101. Staff asserts that the July and August 2010 communications conveyed false and misleading information and omitted material information.[231] To establish these assertions, OE Staff relies on Mitton's and Kwok's July and August 2010 communications with the IMM discussed in detail above.[232]

c. Commission Determination

102. Maxim's subsidiary, Pittsfield Generating Company, L.P., has market-based rate authority and, therefore, is a "Seller" under this rule.[233] As the Commission noted in initially adopting this regulation, "the integrity of the processes established by the Commission for open competitive markets rely on the openness and honesty of market

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[229] 18 C.F.R. § 35.41(b) (2014).

[230] Maxim Answer at 17 n.42.

[231] OE Staff Report at 55.

[232] *See*, *supra*, PP 49-67.

[233] *See Pittsfield Generating Co., L.P.*, 85 FERC ¶ 61,147 (1998).

participant communications."[234] As discussed above, we find that Maxim made misleading statements and omitted material information to the IMM.[235] In support of this determination, we rely on the same findings stated above in Section III.C.1.

103. We note that, unlike FPA section 222 and 18 C.F.R. § 1c.2 (2014), a violation of 18 C.F.R. § 35.41(b) (2014) need not be the result of an intentional act. Rather, it is sufficient if the false or misleading information was provided, or omission of material information was made, without due diligence exercised by the Seller. Although we find in this matter that the false communications were made intentionally, the Commission would be troubled by any market participant that made such consistently misleading representations without exercising due diligence.

C. Civil Penalty Determinations

104. Having concluded that Maxim intentionally engaged in a fraudulent scheme, through misrepresentations and material omissions, to obtain and protect NCPC payments for submitting offers based on oil prices when burning natural gas in violation of section 222(a) of the FPA and sections 1c.2 and 35.41(b) of the Commission's regulations, and that Mitton separately violated section 222(a) of the FPA and section 1c.2 through his knowing participation in this scheme, we now must determine whether penalties are appropriate and, if so, their amount. The OE Staff Report recommends that the Commission assess civil penalties against Maxim and Mitton. After assessing the legal and factual issues, including those raised by Respondents, and "tak[ing] into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner,"[236] we agree with OE Staff's recommendation and assess civil penalties.

105. Pursuant to section 316A(b) of the FPA, the Commission may assess a civil penalty of up to $1 million per day, per violation against any person who violates Part II

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[234] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at P 107 (2003).

[235] Because Maxim has not asserted a defense of due diligence, we need not proceed to analyzing whether Maxim exercised due diligence to ensure the accuracy of its communications. *See JP Morgan Energy Ventures Corp.*, 141 FERC ¶ 61,131, at P 45 (2012). Nevertheless, as discussed above, we find that the misleading statements and omissions were made intentionally and, thus, we also find that Maxim did not act with due diligence to prevent the communications.

[236] 16 U.S.C. § 825o-1(b) (2012).

of the FPA (including section 222 of the FPA) or any rule or order thereunder (including 18 C.F.R. § 1c2 or 35.41(b) (2014)).[237] In determining the amount of a proposed penalty, FPA section 316A(b) requires the Commission to consider "the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner."[238] In 2010, the Commission adopted Penalty Guidelines to guide its assessment of civil penalties for entities other than natural persons (like the Maxim entities).[239] In addition to the Penalty Guidelines, the Commission also relies on its enforcement policy statements.[240]

106. The Penalty Guidelines assess the seriousness of particular violations by determining a Base Violation Level depending on the type of violation involved. The Penalty Guidelines then adjust the Base Violation Level by considering the gain to the organization or the loss caused by the violation, and either the amount of energy involved in the violation or the duration of the violation, whichever is greater. The resulting violation level indicates a base penalty amount that is then adjusted using a culpability score multiplier to establish a penalty range. The Penalty Guidelines consider a variety of factors relating to a violator's culpability to determine the overall culpability score. The culpability score factors include evaluations of the efforts of the violator to remedy its violation. After establishing a penalty range, the Commission examines the specific facts of each case to determine whether the ultimate penalty should fall within, or, in appropriate circumstances, outside the indicated civil penalty range. Where facts warrant, the Commission retains discretion to deviate from the Penalty Guidelines range,

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[237] *Id.*

[238] *Id.*

[239] *See Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220, at P 59 (2010) (Initial Penalty Guidelines Order); Enforcement of Statutes, Orders, Rules, and Regulations, 132 FERC ¶ 61,216 (2010) (Penalty Guidelines Order); Application Note 1 to Penalty Guidelines § 1A1.1. The Penalty Guidelines are appended to the Penalty Guidelines Order.

[240] *See* Initial Penalty Guidelines Order,130 FERC ¶ 61,220, at P 63 (2010); Penalty Guidelines Order, 132 FERC ¶ 61,216, at P 2 (2010) (citing *Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156, at PP 50-71 (2008) (Revised Policy Statement on Enforcement) and *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068, at PP 17-27 (2005)). *See also Compliance with Statutes, Regulations, and Orders*, 125 FERC ¶ 61,058 (2008) (Policy Statement on Compliance).

but has cautioned that it "do[es] not intend to depart from the Penalty Guidelines regularly."[241]

107. For natural persons (like Mitton), who are not subject to the Commission's Penalty Guidelines,[242] the Commission considers five factors in determining the amount of a civil penalty assessed pursuant to section 316A of the FPA: (1) seriousness of the offense; (2) commitment to compliance; (3) self-reporting; (4) cooperation; and (5) reliance on OE Staff guidance.[243]

108. In determining the appropriate civil penalty for Maxim, we consulted the Penalty Guidelines. In determining the appropriate civil penalty for Mitton, we relied on the five factors articulated in the Revised Penalty Statement on Enforcement.[244]

1. Maxim's Civil Penalty

a. Maxim Answer

109. Maxim argues that OE Staff's recommended penalty is far in excess of what is permitted under the Commission's Penalty Guidelines because there was no financial harm, and the penalty exceeds any amount the Commission could justify in litigation.[245] Maxim further asserts that achieving compliance, not assessing penalties, is the Commission's stated goal in its enforcement efforts.[246]

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[241] Initial Penalty Guidelines Order, 130 FERC ¶ 61,220 at P 32.

[242] Application Note 1 to Penalty Guidelines § 1A1.1.

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

[244] *See* Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156, at PP 54-71 (2008).

[245] Maxim Answer at 52.

[246] *Id.* (citing FERC Penalty Guidelines § 1A1.1(2); Penalty Guidelines Order, 132 FERC ¶ 61,216 at P 110 (2010), quoting Policy Statement on Compliance, 125 FERC ¶ 61,058 at P 1 (2008)).

110. Maxim argues that OE Staff misapplied the Penalty Guidelines and relied on factually incorrect factors in conducting a Penalty Guidelines analysis.[247] Specifically, Maxim argues that there was no financial harm because Maxim eventually did inform the IMM as to the fuel actually burned, and Maxim was mitigated on the basis of the fuel that was burned.[248]

111. Maxim further argues that "even if the Commission based its penalty assessment on some measure of intended 'loss,' Maxim returned all of this money under ISO-NE's standard process and should receive commensurate credit against any 'intended loss' for '[t]he money returned … by the entity… to the victim before the violation was detected.'"[249] According to Maxim, even if the Commission were to find for any other reason that some measure of "financial harm" occurred, then the amounts returned through mitigation must be credited against whatever that alleged loss is.

112. Maxim quotes the Penalty Guidelines for the proposition that "[t]he Commission will use the gain that resulted from the violation as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."[250] Maxim then argues that in this case, the "measure of financial loss is easily ascertained – it was zero"[251] and that OE Staff's attempt to base a penalty on what it alleges was Maxim's "gain" is both factually inaccurate and legally flawed under the Commission's Penalty Guidelines.[252]

113. Maxim argues that there was no financial harm in this case – neither financial loss, nor financial gain – and any penalty imposed on either basis is therefore unjustified. Accordingly, Maxim contends that the Commission should revise the financial loss to zero, and maintain OE Staff's other penalty guideline applications. Maxim argues that the maximum penalty should be reduced to $20,000.[253]

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[247] *Id.* at 53.

[248] *Id.*

[249] *Id.* (citing FERC Penalty Guidelines § 2B.1.1, Application Note 2(E)).

[250] *Id.* at 54 (citing FERC Penalty Guidelines § 2B.1.1, Application Note 2(B)).

[251] *Id.*

[252] *Id.*

[253] *Id.*

114. Maxim also argues that, were the Commission to issue a separate penalty for Maxim's alleged violation of section 35.41, it should ignore OE Staff's recommendation to assess a penalty of $1.3 million because, without any financial harm, this proposed civil penalty is excessive.[254]

115. Finally, Maxim argues that the Commission should decline to assess penalties in this matter altogether because, it argues, this case is similar to *Dartmouth Power Associates*.[255] Maxim asserts that even though the Commission found that Dartmouth violated the ISO-NE Tariff and section 35.41(a) of the Commission's regulations, the Commission declined to assess a civil penalty in *Dartmouth* because Dartmouth's capacity payment had already been withheld by ISO-NE. Maxim argues that the Commission should apply the same reasoning here and find that, because Maxim was already mitigated by the IMM, "as in *Dartmouth*, 'no actual harm occurred to the market or the reliability of the ISO-NE system.'"[256]

b. <u>OE Staff Report and Reply</u>

116. OE Staff argues that Maxim's violation warrants assessment of the proposed $5,000,000 civil penalty. In calculating the proposed penalty under the Penalty Guidelines, OE Staff considered that Maxim's scheme lasted 45 days, was implemented by personnel with substantial authority in an organization with more than 10 employees, and was intended to achieve $2.99 million in unjust profits. OE Staff gave Maxim credit for cooperating with the investigation and determined that no additional disgorgement is needed because the IMM was able to recoup the $2.99 million in unjust profits.[257]

117. On the issue of harm, OE Staff rejects Maxim's claims that only actual loss may be considered under the Penalty Guidelines. OE Staff argues that the proposed penalty for Maxim is well within the penalty range indicated by the Commission's Penalty Guidelines, which treats "intended loss" the same as "actual loss."[258]

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[254] *Id.* at 55.

[255] *Id.* at 11 (citing *Dartmouth Power Assoc.*, 134 FERC ¶ 61,085, at PP 5-9 (2011) (*Dartmouth*)).

[256] *Id.* at 12 (citing *Dartmouth*, 134 FERC ¶ 61,085, at P 19 (2011)).

[257] OE Staff Report at 65.

[258] OE Staff Reply at 37 (citing Penalty Guidelines § 2B.1.1, Application Note 2(A)).

118. OE Staff also argues that Maxim should not receive any credit under the Penalty Guidelines against the $2.99 million intended loss because "Maxim did not 'return' its windfall; the IMM took it away from Maxim, over Maxim's protests."[259] OE Staff asserts that when the Penalty Guidelines propose that an entity receive credit for returning money before a violation is detected, such a credit is only appropriate when a market participant realizes that it has received funds improperly and returns them voluntarily.[260]

119. Finally, OE Staff distinguishes this matter from the Commission's decision in *Dartmouth.* OE Staff argues that, in *Dartmouth*, the Commission found that the generator's one time failure to report an outage was not intended to deceive ISO-NE and was not part of a larger pattern or practice of failure to declare outages to ISO-NE.[261] Moreover, the generator in *Dartmouth* had effectively already paid a penalty by foregoing its entire monthly capacity payment (nearly $232,000), an amount far beyond the small fraction of the monthly payment attributable to the brief outage.[262] OE Staff notes that the Commission stated that, but for this large administrative penalty, the Commission would likely have penalized the generator.[263]

c. <u>Commission Determination</u>

i. <u>Seriousness of the Violation</u>

120. We discuss the factors in the Penalty Guidelines and Policy Statements on Enforcement that are relevant to the seriousness of Maxim's violation below, to the extent applicable. These factors establish that Maxim's violations were serious and warrant a penalty.

121. *Manipulation, Deceit, Fraud, and Recklessness or Indifference to Results of Actions.* As noted above, the scheme Maxim developed and participated in violated sections 1c.2 and 35.41(b) of the Commission's regulations and falls under section 2B1.1

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[259] *Id.* at 25-26 (citing MPCPROD00074438 (Email from Kwok to Dominguez (Aug. 23, 2010))) and 38.

[260] *Id.* (citing Penalty Guidelines § 2B.1.1, Application Note 2(E)(i)).

[261] *Id.* at 39 (citing *Dartmouth* at P 14).

[262] *Id.* (citing *Dartmouth* at P 21).

[263] *Id.* (citing *Dartmouth* at P 21).

of the Penalty Guidelines (Fraud, Anti-Competitive Conduct and Other Rule, Tariff and Order Violations). Because much of the conduct violated both 18 C.F.R. § 1c.2 (2014) and 18 C.F.R. § 35.41(b) (2014), we are not assessing separate penalties. We note, however, that the Penalty Guidelines treat fraud and rule violations the same. Thus, we would assess the same penalty if we had found that Maxim's conduct had violated either 18 C.F.R. § 1c.2 (2014) or 18 C.F.R. § 35.41(b) (2014) individually. Both violations begin with a Base Violation Level of 6, as required by section 2B1.1(a) of the Penalty Guidelines.

122. *Harm Caused by the Violation*. The Penalty Guidelines measure a violation's seriousness in part by examining the gain or loss caused. Application Note 2A to Penalty Guidelines § 2B1.1 specifies that "loss" is the greater of "actual loss or intended loss." Application Note 2A (ii) then defines "intended loss" as "the pecuniary harm that was intended to result from the violation." As discussed above, we find that Maxim intentionally engaged in a fraudulent scheme, through misrepresentations and material omissions, to obtain and protect NCPC established by offers based on the price of oil, even though they ran Pittsfield on lower-priced natural gas, which should have set the NCPC price.[264] Had the IMM not eventually identified the scheme and avoided the excessive NCPC payments, ratepayers in New England would have suffered $2.99 million in actual loss. We disagree with Maxim that no harm calculation should apply to the Penalty Guidelines because Maxim's offers were reduced to reflect that the Pittsfield plant burned lower-priced gas. The fact that a violation is discovered by a market monitor does not excuse the violation. If the elimination of an unjust gain upon discovery of misconduct excused the misconduct, then a civil penalty would have no deterrent effect: if its manipulative conduct is undiscovered, a market participant keeps the unjust gains, but if its manipulative conduct is discovered, it only pays back the unjust gains. Under those circumstances, a manipulator that is caught is no worse off than the honest market participant. Use of "intended loss" is consistent with the Penalty Guidelines and we find that it is proper here.

123. We also disagree with Respondents that this matter is analogous to *Dartmouth*. As the Commission explained in *Dartmouth*, the Commission was presented with "unique circumstances."[265] In *Dartmouth*, ISO-NE, consistent with its tariff, withheld an entire month's capacity payment to Dartmouth Power even though the unit was only unavailable for less than 24 hours during an undeclared outage.[266] This forfeiture was

[264] *See*, *supra*, PP 83-97.

[265] *Dartmouth*, 134 FERC ¶ 61,085, at P 21 (2011).

[266] *Id.* at PP 5-9.

substantially greater than the unjust profit that Dartmouth could have derived from its violations. In addition, the Commission found in *Dartmouth* that the company's one-time failure to report a generator outage was "not part of a larger pattern or practice of failure to declare outages to ISO-NE."[267] Further, Dartmouth admitted to the violations and accepted compliance procedures needed to stop any recurrence. In contrast with *Dartmouth*, the IMM's actions in this matter merely stopped an unjust payment from being sent to Maxim. Maxim was not penalized for its violation. In addition, we have found that Respondents took many, repeated and intentional acts as part of the scheme to defraud ISO-NE.

124. Accordingly, $2.99 million is Maxim's appropriate market harm figure under section 2B1.1(b)(1) of the Penalty Guidelines, increasing Maxim's Base Violation Level by 18 points. We also agree with OE Staff that Maxim does not deserve credit for having its payments reduced by the IMM to the permissible level. Such credit against loss is only appropriate when money is returned "before the violation [i]s detected."[268]

125. *Isolated Instance or Recurring Problem, Systematic and Persistent Wrongdoing and Duration.* Maxim implemented its 2010 scheme 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).[269] Maxim submitted offers based on oil prices on 38 of the 45 days. On 22 of the 38 days on which Maxim submitted offers based on oil prices, Maxim was committed for reliability in the Day-Ahead Market and attempted to collect NCPC payments after submitting offers based on oil prices, even though it burned cheaper natural gas. Thus, Respondents' conduct lasted for 45 days. We agree with OE Staff that Maxim's conduct warrants enhancement of the violation level provided under section 2B1.2(D) of the Penalty Guidelines for a violation continuing for more than 10 days but less than 50 days. This increases the Base Violation Level by 2 points.

126. *Violation Level.* Based on the above, we find Maxim's final violation level is 26 points (calculated as the Base Violation Level of 6 points for fraud/regulatory violation plus the above-described increases of 18 points for harm and 2 points for

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[267] *Id.* at P 14.

[268] Penalty Guidelines § 2B1.1, Application Note 2(E)(i)).

[269] OE Staff Report at 8.

duration). A violation level of 26 indicates a base penalty of $3,700,000 under the Penalty Guidelines.[270]

ii. <u>Mitigating Factors Related to Culpability</u>

127. *Involvement in or Tolerance of Violations.* Section 1C2.3(a) of the Penalty Guidelines requires a base culpability score of 5, which is increased if high-level personnel or substantial authority personnel participated in or tolerated the violation under section 1C2.3(b) of the Penalty Guidelines. Here, Kyle Mitton, a senior analyst, directly participated in the scheme with the knowledge of his supervisors,[271] and this meets the Penalty Guidelines definition of tolerance by high-level personnel or substantial authority personnel. Section 1C2.3(b)(5) requires an additional 1 point if the organization had between 10 and 50 employees and an individual with substantial authority participated in the violation. We find that based on Maxim's size (between 10 and 50 employees) and the fact that at least two levels of management condoned Mitton's actions,[272] Maxim's culpability score should be increased by 1 point pursuant to section 1C2.3(b)(5) of the Penalty Guidelines.

128. *Prior History, Violation of Commission Order and Obstruction of Justice*. Under section 1C2.3(c)-(e) of the Penalty Guidelines, the Commission can increase the culpability score if the organization involved has a prior history of violations, violates a Commission order, or engages in obstruction of justice. Because none of these concerns arise here, no increase in the culpability score is required for any of these factors.

129. *Commitment to Compliance and Actions Taken to Correct Violation*. Under section 1C2.3(f) of the Penalty Guidelines, the Commission may reduce the base 5 point

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[270] Section 1C2.2(a) of the Penalty Guidelines provides that the base penalty shall be calculated as the greatest of: (1) the calculated violation level amount applied to the table contained at section 1C2.2(b); (2) the pecuniary gain to the organization from the violation; or (3) the pecuniary loss from the violation caused by the organization. The Penalty Guidelines thus contemplate that base penalty amounts can exceed an organization's pecuniary gain.

[271] *See, e.g.*, Mitton Answer at 5-6 (explaining that Mitton's supervisor, Eagle Kwok (then Maxim's head of Energy Marketing), and Kwok's supervisor, Jamie Urquhart, supported submitting offers based on oil prices).

[272] *Id.* at 6 ("Mr. Uruquart [sic] – at least two levels over Mr. Mitton as Mr. Kwok's supervisor – expressed bidding instructions consistent with these concerns.").

culpability score by up to 3 points to take into account the nature and extent of an entity's internal compliance measures in existence at the time of the violation. OE Staff did not recommend compliance credit, and Respondents did not challenge this determination. Under these circumstances, we find that no compliance program credit is warranted.

130. *Cooperation.* Under section 1C2.3(g)(2) of the Penalty Guidelines, the Commission may reduce the base culpability score by 1 point if an organization cooperated in the investigation. Maxim's cooperation with OE Staff's investigation was sufficient to warrant credit and consideration. We therefore reduce Maxim's culpability score by 1 point.

131. *Self-Reporting*. Under section 1C2.3(g)(1) of the Penalty Guidelines, the Commission may reduce the base culpability score by 2 points if an organization self-reports a violation. Maxim made no report; ISO-NE instead discovered and informed staff of Maxim's conduct. Therefore we find that no reduction in the culpability score is warranted.

132. *Culpability Score.* We find that Maxim's final culpability score is 5 points (base score of 5 points increased by 1 point for senior management involvement in an organization with 10 to 50 employees and reduced by 1 point for cooperation). A culpability score of 5 indicates a multiplier of 1.0 to 2.0 which is then applied to the base penalty of $3,700,000 to produce a penalty range of from $3,700,000 to $7,400,000 under the Penalty Guidelines.

iii. <u>Appropriate Penalty</u>

133. Based on the foregoing factors, the pleadings in this case and the OE Staff Report, we find that a civil penalty of $5,000,000 is fair and reasonable under the circumstances. This civil penalty amount is within the Penalty Guidelines range resulting from the foregoing analysis ($3,700,000 to $7,400,000) from which we have made no deviations.[273]

134. No disgorgement is necessary because the IMM uncovered the manipulative scheme and stopped $2.99 million of excess NCPC payments to Maxim.

135. If Maxim does not pay the $5,000,000 civil penalty within 60 days of the date of this order, then the Commission will commence an action in a United States district court

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[273] Maxim as a corporate entity and Kyle Mitton as an individual are each separately liable for violating section 1c.2 of the Commission's regulations and we find that pursuing each is necessary here to appropriately deter their fraudulent conduct.

for an order affirming the penalty, in which the district court may review the assessment of the civil penalty de novo.[274]

136. We find that it is appropriate to hold all of Maxim jointly and severally liable for the civil penalty. Each of the corporate respondents is a wholly owned subsidiary of Maxim Power Corporation.[275] Documents produced in the investigation show that Maxim Power Corporation personnel in Calgary repeatedly acted on behalf of the subsidiary corporate respondents and that none of the subsidiaries have any employees.[276] Furthermore, publicly available documents identify Maxim Power Corporation personnel as official representatives of the subsidiaries.[277] Because Maxim Power Corporation treats the respondent subsidiaries as part of a single, unified business enterprise in which Maxim Power Corporation personnel in Calgary manage, control, and act on behalf of the firm's U.S. subsidiaries, joint and several liability is appropriate.[278]

2. Mitton's Civil Penalty

a. Mitton Answer

137. Mitton argues that, even if the Commission finds that he violated FPA section 222 and 18 C.F.R. § 1c.2 (2014), a civil penalty would be inappropriate.[279] Mitton also states that during the relevant period in 2010, he was merely an analyst tasked with submitting offers and procuring gas during certain portions of the 45-day period when he was in the office, and did not serve a different role from other employees who were also submitting offers and procuring gas during this period.[280]

138. Mitton argues that he had no pecuniary motive to design and implement a plan to enable Maxim to collect higher NCPC payments by submitting offers for Pittsfield based

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[274] 16 U.S.C. § 823b(d)(3)(B) (2012).

[275] OE Staff Report at 60-61.

[276] *Id.* at 61.

[277] *Id.* at 62.

[278] *See id.* at 57-65.

[279] Mitton Answer at 25-28.

[280] *Id.* at 28.

on oil prices while burning gas.[281] Mitton asserts that he pursued Maxim's risk minimization strategy in accordance with company policy and his supervisors' instructions, but he was never separately motivated to act inconsistently with company policy.[282] Mitton further argues that OE Staff fails to support its claim that his salary or bonus was based on specific transactions and that his desire to please his supervisors is no different than that of any other employee.[283]

b. OE Staff Report and Reply

139. OE Staff argues that Mitton was the lead Maxim employee responsible for submitting offers for the Pittsfield plant to ISO-NE and implemented Respondents' scheme to submit offers based on the price of oil and operate Pittsfield by burning natural gas in July and August 2010.[284] OE Staff asserts that Mitton repeatedly and falsely sent emails to the IMM that conveyed the impression that Maxim needed to submit offers for the Pittsfield plant based on high oil prices because of supposed concerns about natural 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 natural gas before submitting Day-Ahead offers for Pittsfield.[285] OE Staff further argues that Mitton personally executed this scheme on behalf of Maxim and that as a result of his efforts, Maxim attempted to receive far larger NCPC payments than they would have obtained based on the natural gas they actually burned.[286]

140. OE Staff argues that it is unreasonable for Mitton to claim that he would not have benefited had his scheme been successful. OE Staff asserts that Maxim pays bonuses in addition to salaries and Mitton's salary was periodically reset. OE Staff also argues that if Mitton earned the company $3 million in profit from one power plant over a period of a month and a half – more than the quarterly net income of Maxim's worldwide operations – he could reasonably expect to be compensated.[287] OE Staff asserts that given Mitton's

[281] *Id.* at 16.

[282] *Id.* at 16.

[283] *Id.* at 16-17.

[284] OE Staff Report at 55.

[285] *Id.*

[286] *Id.*

[287] OE Staff Reply at 38.

central role in the scheme, and considering his financial circumstances, a civil penalty of $50,000 is appropriate.[288]

141. Finally, OE Staff asserts that individual liability should not be limited to so-called "rogue traders" (i.e., traders acting without sanction by their employers) because it is important to ensure that individuals do not have an incentive to devise and execute manipulative schemes regardless of whether or not they have their company's approval to do so.[289]

c. Commission Determination

i. Seriousness of the Violation

142. As discussed earlier, Mitton's involvement was crucial to the fraudulent scheme. As described above, Mitton was the lead Maxim employee responsible for implementing Respondents' scheme in July and August 2010. We further found that Mitton personally sent emails to the IMM that conveyed the impression that Maxim needed to submit offers for the Pittsfield plant based on high oil prices because of supposed concerns about natural gas supply, even though Mitton was frequently able to procure much cheaper natural gas on those days, and even though Mitton himself had often purchased large amounts of natural gas before submitting Day-Ahead offers for Pittsfield. Mitton also knew about fuel burns from prior days when pipeline restrictions were in effect. Further, we have found that he engaged in this behavior intentionally. Under the circumstances, it is appropriate that we impose a civil penalty on Mitton.

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

144. *Harm Caused by the Violation.* Due to Mitton's efforts, ISO-NE would have paid Maxim $2.99 million in NCPC payments that it was not entitled to receive had the IMM not detected the manipulative conduct. We agree with OE Staff that $2.99 million is properly considered an "intended loss."[290]

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[288] OE Staff Report at 65.

[289] *Id.* at 57.

[290] *See*, *supra*, P 122. Although not binding on Mitton as a natural person, we note that our Penalty Guidelines measure a violation's harm in part by examining the greater

(continued…)

145. *Manipulation, Deceit, Fraud and Recklessness or Indifference to Results of Actions.* As noted above in Section II.C. above, the scheme Mitton participated in violated 18 C.F.R. § 1c.2 (2014) of the Commission's regulations and FPA § 222. Mitton's scheme was designed to deceive ISO-NE and to misrepresent the correct reference levels to be used to calculate Maxim's NCPC payments.

146. *Willful Action or in Concert with Others*. The scheme involved intentional misrepresentations and material omissions and was designed to deceive the IMM to enable Maxim (through Mitton) to receive excessive NCPC payments by submitting offers based on oil prices when Pittsfield actually burned less expensive natural gas. Mitton's actions were intentional.

147. *Isolated Instance or Recurring Problem Systematic and Persistent Wrongdoing, and Duration.* Under the scheme, Maxim (through Mitton) submitted offers for Pittsfield to ISO-NE and implemented Respondents' scheme over a 45-day period in July and August 2010.[291] We disagree with Mitton's contention that he was an unknowing employee, merely submitting offers and procuring natural gas during this period. We find that, throughout the 45-day period, Mitton repeatedly and falsely sent emails to the IMM implying that Pittsfield was running on more expensive fuel oil in order to capture and maintain illegitimate NCPC payments reflecting the higher priced fuel, not the less expensive natural gas the plant actually burned during most of this period.

148. *Self-Reporting.* Mitton's wrongdoing came to the Commission's attention after ISO-NE mitigated Maxim for the excess NCPC payments that Maxim obtained by submitting offers based on oil prices while actually burning natural gas. Mitton did not self-report his wrongdoing.

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of the gain or loss caused. Application Note 2(A) to Penalty Guidelines § 2B1.1 specifies that "loss" is the greater of "actual loss or intended loss." Application Note 2A (ii) then defines "intended loss" as "the pecuniary harm that was intended to result from the violation." As discussed above, we find that Mitton intentionally engaged in a fraudulent scheme, through misrepresentations and material omissions, to obtain and protect NCPC payments after submitting offers based on oil prices but burning natural gas. Had the IMM not eventually identified the scheme and stopped the excessive NCPC payments, ratepayers would have suffered $2.99 million in actual loss.

[291] OE Staff Report at 55.

ii. **Mitigating Factors Relating to Culpability**

149. *Commitment to Compliance and Actions Taken to Correct Violation*. The Commission has stated that it will take into account the nature and extent of an entity's internal compliance measures in existence at the time of the violation as well as the actions taken by an entity to correct the activity that produced the violation.[292] Here, neither Mitton nor his company, Maxim, had procedures in place to detect violations. Mitton and Maxim also provided no training of employees regarding the regulatory requirements governing energy markets and assigned no individual as ultimately responsible to ensure compliance. Moreover, as discussed above, Mitton received multiple communications indicating that his and Maxim's conduct was likely improper, but he did nothing to remedy such conduct.[293] Under these circumstances, we find that no compliance program credit is warranted.

150. *Cooperation.* Mitton's cooperation with OE Staff's investigation was sufficient to warrant credit and consideration.

151. *Self-Reporting*. Self-reporting of violations is an important consideration because entities are in the best position to detect and correct such violations. In the Revised Policy Statement on Enforcement, the Commission acknowledged that it would award penalty credit for parties that promptly self-report violations.[294] Mitton made no report; ISO-NE instead discovered his conduct and later informed OE that it had occurred. This factor, therefore, cannot serve to mitigate Mitton's violations.

152. *Reliance on Staff Guidance.* Mitton did not rely on Staff guidance and is not eligible for a credit for doing so.

iii. **Appropriate Penalty**

153. Based on the foregoing factors, the pleadings and other information provided in this case, and the OE Staff Report, we find that there is a need to deter the fraudulent conduct at issue and that a civil penalty of $50,000 is fair and reasonable under the circumstances. Maxim as a corporate entity and Mitton as an individual are each separately liable for violating section 1c.2 of the Commission's regulations and FPA

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[292] Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 57.

[293] *See*, *supra*, PP 49-67.

[294] Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 62.

section 222. We find that penalizing each is necessary here to appropriately deter both corporate and individual fraudulent conduct.

154. If Mitton does not pay the $50,000 civil penalty within 60 days of the date of this order, then the Commission will commence an action in a United States district court for an order affirming the penalty, in which the district court may review the assessment of the civil penalty de novo.[295]

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

The Commission orders:

(A) Maxim is hereby directed to pay to the United States Treasury by a wire transfer a civil penalty in the sum of $5,000,000 within 60 days, as discussed in the body of this order. Maxim Power Corporation, Maxim Power (USA), Inc., Maxim Power (USA) Holding Company Inc., Pawtucket Power Holding Co., LLC, Pittsfield Generating Company, LP are jointly and severally liable for this civil penalty.

(B) Mitton is hereby directed to pay to the United States Treasury by a wire transfer a civil penalty in the sum of $50,000 within 60 days, as discussed in the body of this order.

By the Commission. Chairman Bay is not participating.
Commissioner Clark is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

[295] 16 U.S.C. § 823b(d)(3)(B) (2012).

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

(Issued May 1, 2015)

CLARK, Commissioner, *dissenting*:

I dissent from today's order for two primary reasons. Most important, my decision is based on my belief that Enforcement Staff failed to meet its burden of proof. A second matter relates to the nature of the Commission's decision regarding individual culpability in this case.

While Enforcement Staff presents a plausible theory of its case, I am unable to support today's decision given the evidentiary record before us and the relatively high burden placed on staff to prove its case. In a market manipulation case such as the one before us, Enforcement Staff bears the burden of proving by a preponderance of the evidence that the respondent intended to engage in a deceptive course of business.

In past enforcement cases in which I have supported moving forward against a respondent, there has been little doubt in my mind that Enforcement Staff met its burden. In those cases, a record was developed that established clear intent and actions, and no plausible business explanation for the respondent's behavior. Often, contemporaneous electronic messages have further corroborated staff's theory of the case.

This case is materially different. While I do not discount the evidence that casts Maxim's behavior in a suspicious light, I cannot set aside the following undisputed facts in the record:

- Gas pipeline restrictions were in place during the time in question.

- When asked by the Independent Market Monitor about Maxim's supply offers, Mr. Mitton responded that Maxim was bidding "conservatively." This could have easily been interpreted by the Independent Market Monitor as a truthful response acknowledging that while the Pittsfield plant was typically burning gas, Maxim was offering in on oil as a way to play it safe given pipeline restrictions. This is not, on its face, an implausible business reason for structuring a supply offer in such a way. Yet, the Independent Market Monitor did not, at that time, follow-up

with the next logical question, "What fuel are you burning in real time?" Rather, the Independent Market Monitor seemed satisfied to simply have a copy of the posted pipeline restrictions.

- Approximately one month later, when the Independent Market Monitor did ask what fuel Pittsfield actually used, Maxim provided a truthful response.
- Upon receiving that information, the Independent Market Monitor was able to mitigate Maxim prior to settlement.

Staff's case linking Maxim's supply offers to a willful intent to deceive the Independent Market Monitor thus rests on the notion that while Mr. Mitton's responses may have been technically correct and ultimately truthful, Mr. Mitton did not anticipate what information the Independent Market Monitor was really seeking and therefore his responses were too narrow and not as forthcoming as they should have been.

To me, such a fact pattern does not a $5 million penalty make.

A second matter relates to the Commission's decision to penalize and hold accountable just one individual. The record clearly established that this bidding strategy was condoned and approved by management at Maxim.[1] Even in the event that I had found that Enforcement Staff had met its overall burden in the case, I could not support holding only the front-line employee culpable when management itself embraces and takes ownership of the actions. To be clear, I find that there are circumstances in which it can be appropriate to hold individuals accountable in these types of cases, and I have supported efforts to do so in the past. There may be cases where a rogue front-line employee concocts a manipulative scheme without management's active participation and blessing. However, this is not the case here. When we find individual liability appropriate, as a matter of fairness, we should strive to ensure that all those who carried out a scheme are held accountable, including superiors who knew of and authorized the actions.

For these reasons, I respectfully dissent.

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Tony Clark
Commissioner

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[1] *Maxim Power Corp.*, 151 FERC ¶ 61,094, at P 126 ("Kyle Mitton, a senior analyst, directly participated in the scheme with the knowledge of his supervisors" and "at least two levels of management condoned Mitton's actions").