

155 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Lincoln Paper and Tissue, LLC

Docket No. IN12-10-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued June 1, 2016)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Lincoln Paper and Tissue, LLC (Lincoln). This order is in the public interest because it resolves the investigation into whether Lincoln engaged in fraudulent conduct in its participation in ISO-New England, Inc.'s (ISO-NE) Day-Ahead Load Response Program (DALRP), thereby violating the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2 and section 222 of the Federal Power Act (FPA). Lincoln neither admits nor denies the allegations and has agreed to a civil penalty of \$5,000,000 and disgorgement of \$379,016.03.

I. Procedural Background

2. Following a referral from ISO-NE's market monitoring unit, in March 2008, Enforcement opened a preliminary, non-public investigation pursuant to Part 1b of the Commission's regulations to determine whether Lincoln and other market participants had engaged in fraudulent conduct in their participation in ISO-NE's DALRP in violation of the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2 and section 222 of the FPA, 16 U.S.C. § 824v(a) (2012).

3. ISO-NE's tariff governed DALRP, which was implemented in June 2005 as a supplemental program to ISO-NE's real-time load response programs.¹ The DALRP required that enrolled resources "provide a reduction in their electricity consumption in

¹ *New England Power Pool and ISO New England, Inc.*, 111 FERC ¶ 61,064 (2005). The Commission has since approved periodic changes to the demand response provisions in ISO-NE's tariff. During the time Lincoln participated in the DALRP, ISO-NE further detailed the program through its Load Response Program Manual.

the New England Control Area during peak demand periods.”² The cost of payments made to DALRP participants was socialized across network load.

4. ISO-NE’s tariff provision regarding a reduction in load is consistent with the Commission’s long-standing position regarding demand response. The Commission memorialized this in 18 C.F.R. § 35.28(b)(4) (2015): “Demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.”

5. Following an investigation, Enforcement concluded that Lincoln violated 18 C.F.R. § 1c.2 when the company adopted and implemented a scheme to defraud ISO-NE of demand response payments. Enforcement informed Lincoln of this conclusion.

6. Enforcement and Lincoln engaged in unsuccessful settlement negotiations. Therefore, based on its conclusion that Lincoln had violated 18 C.F.R. § 1c.2, Enforcement recommended that the Commission issue an order to show cause requiring Lincoln to establish why it should not be required to disgorge DALRP revenues and pay a civil penalty.

7. On July 17, 2012, the Commission issued an Order to Show Cause alleging that, in connection with its participation in the DALRP, “Lincoln curtailed generation during the baseline period, intentionally creating a misleading baseline” and then “offered load reductions at the minimum offer price in order to freeze the inflated baseline, maximizing payments for phantom load reductions.” 140 FERC ¶ 61,031 at P 2 (2012).

8. On August 14, 2012, Lincoln elected to proceed pursuant to section 31(d)(3) of the FPA, 16 U.S.C § 823b(d)(3) (2012). Pursuant to the Commission’s Rules of Practice and Procedure, on September 14, 2012, Lincoln filed an Answer in Opposition to the Order to Show Cause denying that it had intentionally created a misleading baseline. On January 10, 2013, Lincoln filed “Supplemental Information,” to which Enforcement responded on January 25, 2013.

9. On August 29, 2013, the Commission issued an Order Assessing Civil Penalty in which it concluded that Lincoln violated section 222 of the FPA and the Commission’s Anti-Manipulation Rule (18 C.F.R. § 1c.2). In that Order, the Commission assessed a civil penalty of \$5,000,000 against Lincoln and ordered it to disgorge \$379,016.03 that the Commission determined to be illegally obtained revenue.

² ISO-NE, Tariff, Appendix E to Market Rule 1, § III.E.1.1.

10. Pursuant to FPA section 31(d)(3)(B), Lincoln had sixty (60) days to comply with the Order Assessing Civil Penalty by paying the penalty and disgorgement. Lincoln chose not to do so. Section 31(d)(3)(B) states that in such a circumstance the Commission “shall” file an action in district court seeking to affirm its order.

11. On December 2, 2013, the Commission filed a Petition in the United States District Court for the District of Massachusetts to affirm and enforce its Order Assessing Civil Penalty (the Litigation). On February 2, 2014, Lincoln moved to dismiss the Litigation on a number of grounds. The Commission opposed Lincoln’s Motion to Dismiss on March 14, 2014, and Lincoln replied on March 28, 2014. On April 11, 2016, the United States District Court for the District of Massachusetts denied Lincoln’s Motion to Dismiss and transferred the Litigation to the United States District Court for the District of Maine.

12. On September 28, 2015, while Lincoln’s Motion to Dismiss was pending, Lincoln commenced a voluntary case under chapter 11 of title 11 of the United States Code (Chapter 11 Case) in the Bankruptcy Court. Lincoln’s Chapter 11 Case is a “liquidating 11,” which will result in liquidation of Lincoln’s assets. With approval of the Bankruptcy Court, Lincoln has already sold the majority of its assets in the Chapter 11 Case and is in the process of selling those that remain.

13. On behalf of the Commission, Enforcement filed a proof of claim in Lincoln’s chapter 11 bankruptcy proceeding asserting claims for civil penalty and disgorgement of revenues (Claims).

14. Thereafter, Lincoln and Enforcement resumed settlement discussions, resulting in the attached Settlement Agreement, which resolves the Order Assessing Civil Penalty, the underlying investigation, and the Claims. The Agreement is subject to the approval of the Commission and the Bankruptcy Court, as discussed below.

II. Facts and Violations

15. In the Order Assessing Civil Penalty, the Commission found that Lincoln curtailed its internal generation by approximately 3 MW during the five-day period when Lincoln’s initial baseline load was established for the DALRP. Instead of operating the generator to supply Lincoln with as much of its energy needs as possible (as was typical for the facility) during this time, Lincoln purchased replacement energy during the baseline period at a cost of \$10,000. The Commission concluded that by intentionally ramping down the generator and purchasing energy, instead of producing energy on site, Lincoln established a false and inflated baseline.

16. The Commission determined that, once in the DALRP, Lincoln's artificially inflated baseline allowed the company to claim load reductions (the difference between its baseline load and its normal operations) without actually reducing any load. Enforcement concluded that for over six months from 2007 to 2008, Lincoln engaged in a scheme that ensured the baseline changed as little as possible,³ causing electricity consumers in New England to pay \$445,901.21 for demand response that never occurred, of which Lincoln received \$379,016.03.

17. The Commission determined that Lincoln violated section 222 of the FPA and the Commission's Anti-Manipulation Rule (18 C.F.R. § 1c.2), which prohibits any entity from (a) using a fraudulent device, scheme or artifice, or engaging in any act, practice, or course of business, that operates or would operate as a fraud, (b) with the requisite *scienter*, (c) in connection with a transaction subject to the jurisdiction of the Commission.

18. The Commission determined that Lincoln's actions constituted a fraudulent scheme or artifice. The Commission found that Lincoln's scheme was based on misrepresentations to ISO-NE about Lincoln's typical load and its willingness and ability to reduce load, and that because of these misrepresentations Lincoln was compensated for load response that it knew would never occur and in fact never occurred.

19. The Commission determined that by ramping down on-site generation and buying more grid power, Lincoln knowingly established and communicated to ISO-NE an inflated baseline that did not reflect Lincoln's genuine load response capability. It thus concluded that Lincoln did not intend to reduce its consumption or increase its generation once the baseline was established.

20. The Commission determined that by submitting daily offers to reduce load, Lincoln communicated a willingness and ability to reduce load. The Commission found these communications to be false because, as Lincoln understood, Lincoln was not reducing load and did not intend to reduce load as a result of its DALRP participation. The Commission determined that Lincoln used the offers to perpetuate the inflated baseline, and that this conduct defrauded ISO-NE at the expense of all rate payers in New England, as the cost of demand response is socialized across all Network Load.

³ The Commission concluded that Lincoln's baseline changed because a small number of its offers were mistakenly submitted improperly and failed to clear. Had they cleared, as the Commission concluded Lincoln intended, they would have prevented the baseline from adjusting.

21. With respect to *scienter*, the Commission determined that Lincoln knowingly adopted and participated in a scheme that established an inflated DALRP baseline so that it would be compensated for neither increasing generation nor decreasing consumption.

22. The Commission concluded that offers of demand response for day-ahead energy reductions are in connection with transactions subject to the Commission's jurisdiction, because sections 201 and 205 of the FPA give the Commission jurisdiction over the sale of electric energy at wholesale in interstate commerce, and demand response has both a direct and indirect effect on wholesale rates.⁴

23. In sum, the Commission determined in the Order Assessing Civil Penalty that Lincoln violated the Commission's Anti-Manipulation Rule by knowingly providing misleading information to Constellation and ISO-NE regarding its participation in DALRP, thereby committing and profiting from fraud in connection with a jurisdictional transaction.

III. Stipulation and Consent Agreement

24. Enforcement and Lincoln have resolved Enforcement's investigation by means of the Agreement. Lincoln admits to the facts set forth in the Agreement, but neither admits nor denies that its DALRP conduct was a fraud that violated the Commission's rules, regulations, or policies.

25. Lincoln stipulated to the facts recited in the Agreement, including those set forth below in paragraphs 26-45 of this Order.

26. Lincoln is a privately held limited liability company that owned and operated a paper mill in Lincoln, Maine, and produced a variety of specialty tissues and paper products. During the Relevant Time Period, the mill consumed electricity at a rate of approximately 20 MW/hr when fully operational. The mill generally operated 24 hours a day in eight hour shifts. Before the Relevant Time Period, Lincoln purchased the bulk of its electricity from the grid and operated an on-site Westinghouse generator to produce electricity and steam for some plant operations.

⁴ See *FERC v. Electric Power Supply Ass'n*, 577 U.S. ____ (2016) ("EPISA") (affirming FERC's jurisdiction over demand response).

27. ISO-NE's DALRP was implemented in June 2005⁵ to supplement ISO-NE's real-time load⁶ response programs. The LRP Manual at 1-1 states that ISO-NE and its market participants decided to "continu[e] the Load Response Program (LRP) with the goal of reducing peak electricity demand by large power users."⁷ LRP Manual, Revision 9, Effective Date April 7, 2006.
28. During the Relevant Time Period, ISO-NE's tariff provided that "Load Response Program incentives are available to any Market Participant which, consistent with the requirements set forth [in the Tariff], enrolls itself . . . to provide a reduction in their electricity consumption in the New England Control Area during peak demand periods." See ISO-NE Tariff, Appendix E to Market Rule 1, § III.E.1.1 (2nd Rev Sheet No. 7902, Effective Dec. 1, 2006).
29. Section 2.6 of the LRP Manual specifically indicated that "[o]wners of on-site . . . generators," like Lincoln, were "eligible to participate in the LRP."
30. A DALRP participant needed a customer baseline for verification and billing purposes. Under section 4.2.1 of the LRP Manual, a participant initiated participation in the program through the establishment of an initial customer load baseline.

⁵ *New England Power Pool and ISO New England, Inc.*, 111 FERC ¶ 61,064 (2005). During and after Lincoln's participation in the DALRP ended, the Commission approved periodic changes to the demand response provisions in ISO-NE's tariff. The DALRP expired on May 31, 2012, and the Commission has since approved revised tariff provisions governing demand response participants.

⁶ "Load" as used in this Agreement refers to the amount of electricity an entity draws from the grid. "Load response" refers to an entity reducing the amount of load it draws from the grid, and is synonymous with "demand response." The Commission has defined "demand response" as when "customers reduce electricity consumption from normal usage levels in response to price signals . . ." *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322, at P 9, *order on reh'g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh'g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *affirmed*, *FERC v. Electric Power Supply Ass'n, et al*, 577 U.S. ___, 136 S.Ct. 760 (2016) ("EPISA").

⁷ All references to ISO-NE's tariff and manuals are to the versions of these documents in effect during the time covered by Enforcement's investigation, unless otherwise noted. All references to the ISO New England Load Response Program Manual ("LRP Manual") are to the LRP Manual, Revision 9, Effective Date April 7, 2006.

31. The initial customer baseline was calculated by an average of hourly meter data from 7:00 a.m. through 6:00 p.m. for energy taken from the grid by the participant for the initial five business days after the participant was approved for the DALRP and hourly meter data began to be recorded. Once an initial baseline was established, the baseline adjusted on a rolling basis using actual load data from the participant.

32. Under section 4.2.2 of the LRP Manual, not all days were included in the rolling baseline calculation. Certain days were excluded from the rolling customer baseline, including holidays specified by ISO-NE, weekends, and any days on which a customer's daily DALRP offer was accepted.

33. Whenever a DALRP participant wanted to participate, it would submit to ISO-NE an offer to reduce load for the next non-holiday weekday (i.e., day-ahead), during program hours (7:00 a.m. through 6:00 p.m.). If ISO-NE accepted the offer, the participant was obligated to reduce load the next non-holiday weekday.

34. DALRP participants were allowed to offer load reductions by specifying a minimum price (in \$/MWh) and a minimum reduction amount (in MW/h). Under section 4.5.1.1 of the LRP Manual, a DALRP participant was paid based on the difference between its customer baseline and its metered load. As an example, if a participant's baseline in a given hour was 19 MW, and actual electrical consumption from the grid was 16 MW, the load response for which it was paid was 3 MW.

35. During the Relevant Time Period, the minimum DALRP offer price was \$50.00 per MWh.⁸ Per section 4.5.1.1 of the LRP Manual, DALRP participants with offers that cleared the day-ahead market were paid the Locational Marginal Price ("LMP") in the Day-Ahead Energy Market for the amount of load reduction that cleared. If a participant reduced more load in real-time than the amount cleared in the Day-Ahead Energy Market, it was paid for its additional load reduction at the Real-Time LMP. If the participant did not reduce as much load in Real-Time as it had offered in the Day-Ahead Energy Market, it was required to buy back the difference at the Real-Time LMP.

36. Under Section 2.2 of the LRP Manual, certain participants like Lincoln enrolled in the DALRP through entities known as Enrolling Participants. Under Section 5, an Enrolling Participant registered the participant in the DALRP and arranged for ISO-NE to receive meter data from the participant's meter. Under Section 4.5.4, ISO-NE made

⁸ Effective February 7, 2008, the Commission approved modifications to ISO-NE's tariff to tie the DALRP minimum offer price to an indexed amount that reflects fuel prices. *See ISO New England, Inc.*, 123 FERC ¶ 61,021, *reh'g denied*, 124 FERC ¶ 61,235 (2008).

DALRP payments to the Enrolling Participant. The Enrolling Participant then distributed these payments to the participant.

37. In July 2007, Lincoln became a participant in the DALRP with Constellation NewEnergy, Inc. (“Constellation”) serving as its Enrolling Participant (meaning that Constellation served as an intermediary between Lincoln and ISO-NE). During the Relevant Time Period, Constellation retained 15 percent of all DALRP payments payable to Lincoln. Lincoln and Constellation did not discuss how Lincoln would set its baseline.

38. Lincoln’s initial five-day customer baseline was measured on July 25, 26, 27, 30, and 31, 2007 from 7:00 am to 6:00 pm each day (July 28 and 29, 2007 were excluded because they were weekend days). Shortly before measurement began at 7:00 a.m. each day of the initial customer baseline period, Lincoln curtailed the Westinghouse generator by 3 MW. And just after measurement ended each day at 6:00 p.m., Lincoln increased the Westinghouse generator’s output by 3 MW. During these hours, Lincoln replaced the mill load usually met with output from the Westinghouse generator with energy purchased from the grid. Lincoln’s purchases of replacement grid energy during its five-day initial customer baseline period cost Lincoln approximately \$10,000.

39. Lincoln submitted its first DALRP load response offer on July 31, 2007, offering to reduce its load on August 1, 2007. Lincoln’s offer was accepted. Accordingly, ISO-NE paid \$5,015.36.

40. On almost every non-holiday weekday during the Relevant Time Period, Lincoln submitted DALRP load reduction offers for each DALRP program hour. Lincoln’s offers were almost always submitted at the minimum DALRP offer price of \$50/MWh. Lincoln’s offers of \$50/MWh almost always cleared during this period because they were lower than LMPs during DALRP hours in this period. Lincoln received DALRP payments for virtually every day it participated in the DALRP during this period.

41. In July 2007 and August 2007, Lincoln verified with Constellation, among other things, that cleared daily offers into the DALRP would freeze its customer baseline. As Lincoln’s offers almost always cleared,⁹ its baseline changed only occasionally during the course of its participation in the DALRP.¹⁰

⁹ During the Relevant Time Period, Lincoln missed the offer deadline on five days. Lincoln’s offers were not accepted on seven days, including the five with missed deadlines.

¹⁰ During the Relevant Time Period, Lincoln’s customer baseline changed several times, moving up and down; ultimately, Lincoln’s baseline decreased from 19.39 MW on July 31, 2007 to 17.73 MW in February 2008.

42. On November 29, 2007, Constellation sent Lincoln an email that stated, among other things, that “[d]istributed [g]eneration assets are not eligible to participate in the [DALRP] per the rules of ISO New England.”

43. On January 23, 2008, Lincoln and other DALRP participants for whom Constellation served as Enrolling Participant received letters from Constellation providing notice of Constellation’s support for a new proposal by ISO-NE to modify the DALRP offer (bidding) rules, by “increas[ing] the minimum bid required under the Day-Ahead Program, which will result in customers’ bids clearing less frequently and their baselines being adjusted more regularly.” Constellation stated that it was “concerned that some of [its] Day-Ahead Program customers may have increased their usage while ISO-NE was determining their baselines” and that bids based on these “inflated” baselines “may reflect a customer’s normal usage rather than dispatchable load that the ISO-NE can depend upon for reliability purposes.”

44. On February 5, 2008, ISO-NE proposed tariff revisions changing the minimum price that demand response participants can offer into the market. As a result, the minimum offer jumped from \$50/MWh on February 8, 2008, to \$121/MWh on February 11, 2008. The last day that Lincoln’s offer was accepted was February 7, 2008.

45. In total, ISO-NE paid \$445,901.21 to Constellation for Lincoln’s participation in the DALRP between July 2007 and February 2008. Lincoln was paid approximately 85 percent of this amount, or \$379,016.03.

46. Lincoln consents in the Agreement to disgorgement of \$379,016.03, as well as a \$5,000,000 civil penalty. Because Lincoln is bankrupt, it is unlikely to be able to pay these full amounts and instead has agreed to allow the Commission’s Claims in two parts: (1) an allowed unsecured Claim of \$379,016.03 for the disgorgement; and (2) an allowed subordinated Claim of \$5,000,000 for the civil penalty (collectively Settled Claims). Given Lincoln’s bankruptcy, Enforcement agrees that Lincoln’s allowance of the Settled Claims reasonably satisfies Lincoln’s disgorgement and civil penalty obligations.

47. Lincoln agrees in the Agreement to take all steps necessary to obtain permission from the Bankruptcy Court to make the Settlement Payment, including filing a motion for approval of the Agreement.

48. The Commission recognizes that the amount Lincoln will pay for the Settled Claims, and when it make such payments, are unknown at this time and will be determined by the United States Bankruptcy Court with jurisdiction over the Chapter 11 Case. The Commission therefore directs the disposition of these payments by Lincoln as follows:

- a. If Lincoln pays \$379,016.03 or less, all payments shall be made to ISO-NE, which shall allocate the payment(s) *pro rata* to network load during the applicable period.
- b. If Lincoln pays more than \$379,016.03, Lincoln shall pay:
 - i. The first \$379,016.03 to ISO-NE, which shall allocate the payment(s) *pro rata* to network load during the applicable period; and,
 - ii. Any amounts exceeding \$379,016.03 to the United States Treasury.

49. Pursuant to section 316(A) of the FPA, the Commission may assess a civil penalty up to \$1,000,000 for each day that a given violation continues.¹¹ In ordering Lincoln to pay a \$5,000,000 civil penalty, Enforcement considered the factors in the Revised Policy Statement on Penalty Guidelines.¹²

50. The Penalty Guidelines take into account 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 Commission therefore based its assessment in part on the seriousness of the violation, with respect to which the Commission concluded that Lincoln's violation (a) resulted in a loss of \$445,901.21 to electricity customers in New England (i.e., the amount paid by Network Load for Lincoln's phantom load response) and (b) lasted for a period greater than 50 days, but less than 250 days.

51. The Commission also considered the variety of factors listed in the Penalty Guidelines in deriving a culpability score, concluding that (a) Lincoln's high-level personnel and substantial authority personnel participated in and condoned the violation, (b) Lincoln did not have a prior history of violations before the Commission or other enforcement agencies, (c) Lincoln did not engage in obstruction of justice and (d) at the time of its violation, Lincoln lacked an effective compliance program.

52. Having considered the factors set forth by the Penalty Guidelines, the Commission concluded that the \$5,000,000 penalty in this case falls within a range that is consistent with the Penalty Guidelines and is appropriate.

¹¹ 16 U.S.C. §825o-1(b) (2006).

¹² *Enforcement of Statutes, Orders, Rules and Regulations*, 132 FERC ¶ 61,216 (2010) (Revised Penalty Guidelines).

Conclusion

53. Legitimate demand response can be an important factor in efficient organized wholesale energy markets. When legitimate, demand response in organized wholesale energy markets helps to increase competition in those markets.¹³ Demand response participants provide these benefits to the market through reductions of the energy they consume from the wholesale electrical grid.

54. Demand response is a “reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.”¹⁴ Many demand response programs, like the DALRP, have utilized a baseline as a means of measuring demand response performance. As the Commission reiterated in Order No. 719, “[b]aselines are designed to depict, as accurately as possible, a customer’s normal load on a given day. Establishing this baseline helps system operators to measure and verify load reductions, thus giving RTOs and ISOs the ability to not only determine if demand response resources showed up, but also what the proper value of the demand reduction should be.”¹⁵

55. It has been the Commission’s policy to encourage legitimate demand response, requiring organized markets to adopt accurate baseline methodologies as part of overall measurement and verification programs.¹⁶ However, even rigorous measurement and verification programs may not stop deceptive conduct. If a baseline is fraudulently established, claimed demand response may not reflect an actual reduction in consumption. In such circumstances, consumers of electricity ultimately pay for demand

¹³ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 FR 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281, at P 48 (2008) (Order No. 719).

¹⁴ 18 C.F.R. § 35.28(b)(4) (2015).

¹⁵ Order No. 719 at P 57.

¹⁶ *See, e.g.*, Order No. 745 at P 94.

response that does not really occur. The Commission's Anti-Manipulation Rule and FPA section 222 prohibit such fraud.¹⁷

56. We conclude that the Agreement is a fair and equitable resolution of this matter and is in the public interest, as it reflects the nature and seriousness of Lincoln's conduct.

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission. Chairman Bay is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁷ *Id.* at P 95. See also *North America Power Partners*, 133 FERC ¶ 61,089 (2010) (approving settlement involving allegations of violations of the Anti-Manipulation Rule related to demand response program); *In re Joseph Polidoro*, 138 FERC ¶ 61,018 (2012) (approving settlement involving allegations of violations of the Anti-Manipulation Rule related to demand response program); *Enernoc, Inc.*, 141 FERC ¶ 61,211 (2012) (approving settlement involving allegations of tariff violations related to demand response program).

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:)	
)	Chapter 11
)	
LINCOLN PAPER AND)	
TISSUE, LLC,)	Case No. 15:10715
Debtor.)	
)	

STIPULATION AND CONSENT AGREEMENT

I. Introduction

1. The staff of the Office of Enforcement (“Enforcement”) of the Federal Energy Regulatory Commission (“Commission”) and Lincoln Paper and Tissue, LLC (“Lincoln”) enter into this Stipulation and Consent Agreement (“Agreement”).
2. The Litigation (defined in paragraph 3, below) involves the Commission’s December 2, 2013 Petition to affirm its Order Assessing Civil Penalty. In its Order Assessing Civil Penalty, the Commission concluded that Lincoln engaged in fraudulent conduct from July 2007 to February 2008 (the “Relevant Time Period”) in its participation in the Independent System Operator-New England’s (“ISO-NE”) Day-Ahead Load Response Program (“DALRP”), in violation of section 222 of the Federal Power Act (“FPA”) and the Commission’s Anti-Manipulation Rule, 18 C.F.R. § 1c.2 (2015). *See* 144 FERC ¶ 61,162 (2013).
3. This Agreement resolves, on the terms set forth herein, any and all matters or claims arising out of or relating to: (a) Enforcement’s investigation of Lincoln (the “Investigation”); (b) the Order Assessing Civil Penalty; (c) the litigation captioned “*Federal Energy Regulatory Commission v. Lincoln Paper and Tissue, LLC*,” initially filed in the United States District Court for the District of Massachusetts (Case No. 1:13-CCV-13056), now pending in the United States District Court for the District of Maine (Case No. 1:16-cv-206-JAW) (the “Litigation”); and (d) the Commission’s proof of claim (“Proof of Claim”) filed in Lincoln’s Chapter 11 bankruptcy case pending in the above-captioned matter.

II. Stipulations

Enforcement and Lincoln hereby stipulate and agree to the following facts as set forth in this section II:

A. Lincoln

4. Lincoln is a privately held limited liability company that owned and operated a paper mill in Lincoln, Maine, and produced a variety of specialty tissues and paper products. During the Relevant Time Period, the mill consumed electricity at a rate of approximately 20 MW/hr when fully operational. The mill generally operated 24 hours a day in eight hour shifts. Before the Relevant Time Period, Lincoln purchased the bulk of its electricity from the grid and operated an on-site Westinghouse generator to produce electricity and steam for some plant operations.

5. On September 28, 2015 (the “Petition Date”), Lincoln commenced a voluntary case under chapter 11 of title 11 of the United States Code (the “Chapter 11 Case”) in the Bankruptcy Court. Lincoln’s Chapter 11 Case is a “liquidating 11,” which will result in liquidation of Lincoln’s assets. With approval of the Bankruptcy Court, Lincoln has already sold the majority of its assets in the Chapter 11 Case and is in the process of selling those that remain.

B. ISO-NE’s Day-Ahead Load Response Program

6. ISO-NE’s DALRP was implemented in June 2005¹ to supplement ISO-NE’s real-time load² response programs. The LRP Manual at 1-1 states that ISO-NE and its market participants decided to “continu[e] the Load Response Program

¹ *New England Power Pool and ISO New England, Inc.*, 111 FERC ¶ 61,064 (2005). During and after Lincoln’s participation in the DALRP ended, the Commission approved periodic changes to the demand response provisions in ISO-NE’s tariff. The DALRP expired on May 31, 2012, and the Commission has since approved revised tariff provisions governing demand response participants.

² “Load” as used in this Agreement refers to the amount of electricity an entity draws from the grid. “Load response” refers to an entity reducing the amount of load it draws from the grid, and is synonymous with “demand response.” The Commission has defined “demand response” as when “customers reduce electricity consumption from normal usage levels in response to price signals” *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322, at P 9, *order on reh’g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *affirmed*, *FERC v. Electric Power Supply Ass’n, et al*, 577 U.S. ___, 136 S.Ct. 760 (2016) (“EPISA”).

(LRP) with the goal of reducing peak electricity demand by large power users.”³
LRP Manual, Revision 9, Effective Date April 7, 2006.

7. During the Relevant Time Period, ISO-NE’s tariff provided that “Load Response Program incentives are available to any Market Participant which, consistent with the requirements set forth [in the Tariff], enrolls itself . . . to provide a reduction in their electricity consumption in the New England Control Area during peak demand periods.” *See* ISO-NE Tariff, Appendix E to Market Rule 1, § III.E.1.1 (2nd Rev Sheet No. 7902, Effective Dec. 1, 2006).

8. Section 2.6 of the LRP Manual specifically indicated that “[o]wners of on-site . . . generators,” like Lincoln, were “eligible to participate in the LRP.”

9. A DALRP participant needed a customer baseline for verification and billing purposes. Under section 4.2.1 of the LRP Manual, a participant initiated participation in the program through the establishment of an initial customer load baseline.

10. The initial customer baseline was calculated by an average of hourly meter data from 7:00 a.m. through 6:00 p.m. for energy taken from the grid by the participant for the initial five business days after the participant was approved for the DALRP and hourly meter data began to be recorded. Once an initial baseline was established, the baseline adjusted on a rolling basis using actual load data from the participant.

11. Under section 4.2.2 of the LRP Manual, not all days were included in the rolling baseline calculation. Certain days were excluded from the rolling customer baseline, including holidays specified by ISO-NE, weekends, and any days on which a customer’s daily DALRP offer was accepted.

12. Whenever a DALRP participant wanted to participate, it would submit to ISO-NE an offer to reduce load for the next non-holiday weekday (*i.e.*, day-ahead), during program hours (7:00 a.m. through 6:00 p.m.). If ISO-NE accepted the offer, the participant was obligated to reduce load the next non-holiday weekday.

³ All references to ISO-NE’s tariff and manuals are to the versions of these documents in effect during the time covered by Enforcement’s investigation, unless otherwise noted. All references to the ISO New England Load Response Program Manual (“LRP Manual”) are to the LRP Manual, Revision 9, Effective Date April 7, 2006.

13. DALRP participants were allowed to offer load reductions by specifying a minimum price (in \$/MWh) and a minimum reduction amount (in MW/h). Under section 4.5.1.1 of the LRP Manual, a DALRP participant was paid based on the difference between its customer baseline and its metered load. As an example, if a participant's baseline in a given hour was 19 MW, and actual electrical consumption from the grid was 16 MW, the load response for which it was paid was 3 MW.

14. During the Relevant Time Period, the minimum DALRP offer price was \$50.00 per MWh.⁴ Per section 4.5.1.1 of the LRP Manual, DALRP participants with offers that cleared the day-ahead market were paid the Locational Marginal Price ("LMP") in the Day-Ahead Energy Market for the amount of load reduction that cleared. If a participant reduced more load in real-time than the amount cleared in the Day-Ahead Energy Market, it was paid for its additional load reduction at the Real-Time LMP. If the participant did not reduce as much load in Real-Time as it had offered in the Day-Ahead Energy Market, it was required to buy back the difference at the Real-Time LMP.

15. Under Section 2.2 of the LRP Manual, certain participants like Lincoln enrolled in the DALRP through entities known as Enrolling Participants. Under Section 5, an Enrolling Participant registered the participant in the DALRP and arranged for ISO-NE to receive meter data from the participant's meter. Under Section 4.5.4, ISO-NE made DALRP payments to the Enrolling Participant. The Enrolling Participant then distributed these payments to the participant.

C. Lincoln's Participation in DALRP

16. In July 2007, Lincoln became a participant in the DALRP with Constellation NewEnergy, Inc. ("Constellation") serving as its Enrolling Participant (meaning that Constellation served as an intermediary between Lincoln and ISO-NE). During the Relevant Time Period, Constellation retained 15 percent of all DALRP payments payable to Lincoln. Lincoln and Constellation did not discuss how Lincoln would set its baseline.

17. Lincoln's initial five-day customer baseline was measured on July 25, 26, 27, 30, and 31, 2007 from 7:00 am to 6:00 pm each day (July 28 and 29, 2007

⁴ Effective February 7, 2008, the Commission approved modifications to ISO-NE's tariff to tie the DALRP minimum offer price to an indexed amount that reflects fuel prices. *See ISO New England, Inc.*, 123 FERC ¶ 61,021, *reh'g denied*, 124 FERC ¶ 61,235 (2008).

were excluded because they were weekend days). Shortly before measurement began at 7:00 a.m. each day of the initial customer baseline period, Lincoln curtailed the Westinghouse generator by 3 MW. And just after measurement ended each day at 6:00 p.m., Lincoln increased the Westinghouse generator's output by 3 MW. During these hours, Lincoln replaced the mill load usually met with output from the Westinghouse generator with energy purchased from the grid. Lincoln's purchases of replacement grid energy during its five-day initial customer baseline period cost Lincoln approximately \$10,000.

18. Lincoln submitted its first DALRP load response offer on July 31, 2007, offering to reduce its load on August 1, 2007. Lincoln's offer was accepted. Accordingly, ISO-NE paid \$5,015.36.

19. On almost every non-holiday weekday during the Relevant Time Period, Lincoln submitted DALRP load reduction offers for each DALRP program hour. Lincoln's offers were almost always submitted at the minimum DALRP offer price of \$50/MWh. Lincoln's offers of \$50/MWh almost always cleared during this period because they were lower than LMPs during DALRP hours in this period. Lincoln received DALRP payments for virtually every day it participated in the DALRP during this period.

20. In July 2007 and August 2007, Lincoln verified with Constellation, among other things, that cleared daily offers into the DALRP would freeze its customer baseline. As Lincoln's offers almost always cleared,⁵ its baseline changed only occasionally during the course of its participation in the DALRP.⁶

21. On November 29, 2007, Constellation sent Lincoln an email that stated, among other things, that "[d]istributed [g]eneration assets are not eligible to participate in the [DALRP] per the rules of ISO New England."

22. On January 23, 2008, Lincoln and other DALRP participants for whom Constellation served as Enrolling Participant received letters from Constellation providing notice of Constellation's support for a new proposal by ISO-NE to modify the DALRP offer (bidding) rules, by "increas[ing] the minimum bid required under the Day-Ahead Program, which will result in customers' bids

⁵ During the Relevant Time Period, Lincoln missed the offer deadline on five days. Lincoln's offers were not accepted on seven days, including the five with missed deadlines.

⁶ During the Relevant Time Period, Lincoln's customer baseline changed several times, moving up and down; ultimately, Lincoln's baseline decreased from 19.39 MW on July 31, 2007 to 17.73 MW in February 2008.

clearing less frequently and their baselines being adjusted more regularly.” Constellation stated that it was “concerned that some of [its] Day-Ahead Program customers may have increased their usage while ISO-NE was determining their baselines” and that bids based on these “inflated” baselines “may reflect a customer’s normal usage rather than dispatchable load that the ISO-NE can depend upon for reliability purposes.”

23. On February 5, 2008, ISO-NE proposed tariff revisions changing the minimum price that demand response participants can offer into the market. As a result, the minimum offer jumped from \$50/MWh on February 8, 2008, to \$121/MWh on February 11, 2008. The last day that Lincoln’s offer was accepted was February 7, 2008.

24. In total, ISO-NE paid \$445,901.21 to Constellation for Lincoln’s participation in the DALRP between July 2007 and February 2008. Lincoln was paid approximately 85 percent of this amount, or \$379,016.03.

D. The Commission’s Investigation and Order to Show Cause Proceeding

25. On April 4, 2008, the Commission accepted ISO-NE’s DALRP changes, effective February 7, 2008, and announced that the Commission’s Office of Enforcement had begun a non-public investigation into whether any participants in the DALRP had violated the Commission’s rules.

26. On July 17, 2012, the Commission issued an Order to Show Cause alleging that, in connection with its participation in the DALRP, “Lincoln curtailed generation during the baseline period, intentionally creating a misleading baseline” and then “offered load reductions at the minimum offer price in order to freeze the inflated baseline, maximizing payments for phantom load reductions.” 140 FERC ¶ 61,031, P 2 (2012).

27. On August 14, 2012, Lincoln elected to proceed pursuant to section 31(d) of the Federal Power Act (“FPA”). 16 U.S.C § 823b(d)(3). Pursuant to the Commission’s Rules of Practice and Procedure, on September 14, 2012, Lincoln filed an Answer in Opposition to the Order to Show Cause denying that it had intentionally created a misleading baseline. On January 10, 2013, Lincoln filed “Supplemental Information,” to which Enforcement responded on January 25, 2013.

28. On August 29, 2013, the Commission issued an Order Assessing Civil Penalty in which it concluded that Lincoln violated section 222 of the FPA and the Commission’s Anti-Manipulation Rule (18 C.F.R. § 1c.2). In that Order, the

Commission assessed a civil penalty against Lincoln and ordered it to disgorge what the Commission determined to be illegally obtained revenue.

29. Pursuant to FPA section 31(d), Lincoln had sixty (60) days to comply with the Order Assessing Civil Penalty by paying the penalty and disgorgement. Lincoln chose not to do so. Section 31(d) states that in such a circumstance the Commission “shall” file an action in district court seeking to affirm its order.

30. On December 2, 2013 the Commission filed the Litigation to affirm and enforce its Order Assessing Civil Penalty. On February 2, 2014, Lincoln moved to dismiss the Litigation on a number of grounds. The Commission opposed Lincoln’s Motion to Dismiss on March 14, 2014, and Lincoln replied on March 28, 2014. On April 11, 2016, the United States District Court for the District of Massachusetts denied Lincoln’s motion to dismiss and transferred the Litigation to the United States District Court for the District of Maine.

III. Violations

31. As described below, the Commission reached several conclusions regarding Lincoln’s conduct in the Order Assessing Civil Penalty:

(a) The Commission determined that Lincoln violated section 222 of the FPA and the Commission’s Anti-Manipulation Rule (18 C.F.R. § 1c.2), which prohibits any entity from (a) using a fraudulent device, scheme or artifice, or engaging in any act, practice, or course of business, that operates or would operate as a fraud, (b) with the requisite *scienter*, (c) in connection with a transaction subject to the jurisdiction of the Commission.

(b) The Commission determined that Lincoln’s actions constituted a fraudulent scheme or artifice. The Commission found that Lincoln’s scheme was based on misrepresentations to ISO-NE about Lincoln’s typical load and its willingness and ability to reduce load, and that because of these misrepresentations Lincoln was compensated for load response that it knew would never occur and in fact never occurred.

(c) The Commission determined that by ramping down on-site generation and buying more grid power, Lincoln knowingly established and communicated to ISO-NE an inflated baseline that did not reflect Lincoln’s genuine load response capability. It thus concluded that Lincoln did not intend to reduce its consumption or increase its generation once the baseline was established.

(d) The Commission determined that by submitting daily offers to reduce load, Lincoln communicated a willingness and ability to reduce load. The Commission found these communications to be false because, as Lincoln understood, Lincoln was not reducing load and did not intend to reduce load as a result of its DALRP participation. The Commission determined that Lincoln used the offers to perpetuate the inflated baseline,⁷ and that this conduct defrauded ISO-NE at the expense of all rate payers in New England, as the cost of demand response is socialized across all Network Load.

(e) With respect to *scienter*, the Commission determined that Lincoln knowingly adopted and participated in a scheme that established an inflated DALRP baseline so that it would be compensated for neither increasing generation nor decreasing consumption.

(f) The Commission concluded that offers of demand response for day-ahead energy reductions are in connection with transactions subject to the Commission's jurisdiction, because sections 201 and 205 of the FPA give the Commission jurisdiction over the sale of electric energy at wholesale in interstate commerce, and demand response has both a direct and indirect effect on wholesale rates.⁸

32. In sum, the Commission determined in the Order Assessing Civil Penalty that Lincoln violated the Commission's Anti-Manipulation Rule by knowingly providing misleading information to Constellation and ISO-NE regarding its participation in DALRP, thereby committing and profiting from fraud in connection with a jurisdictional transaction.

IV. Settlement Terms Concerning Remedies and Sanctions

33. In conjunction with settling any and all civil and administrative disputes arising out of, related to, or connected with the Investigation, the Proof of Claim and/or the Litigation, Lincoln stipulates to the facts in Section II of this Agreement, but Lincoln neither admits nor denies the violations described in Section III of this Agreement. Lincoln and Enforcement agree to the following:

⁷ The Commission concluded that Lincoln's baseline changed because a small number of its offers were mistakenly submitted improperly and failed to clear. Had they cleared, as the Commission concluded Lincoln intended, they would have prevented the baseline from adjusting.

⁸ See *FERC v. Electric Power Supply Ass'n*, 577 U.S. ____ (2016) ("EP SA") (affirming FERC's jurisdiction over demand response).

34. Lincoln agrees that the Commission shall have an allowed unsecured claim against Lincoln in the amount of the disgorgement of \$379,016.03 received in connection with the DALRP program (the “Unsecured Claim”) and a claim subordinated (the “Penalty Claim”) to other general unsecured claims against Lincoln in the amount of the civil penalty of \$5,000,000⁹ (the “Settlement Amount”). The Settlement Amount will be satisfied in Lincoln’s Chapter 11 Case on the terms set forth below.

35. Lincoln and Enforcement (collectively the “Parties”) agree that: (a) the Unsecured Claim will be paid at the same percentage rate and at the same times as all other allowed general unsecured claims against Lincoln; and (b) the Penalty Claim will be treated as subordinated to all other non-subordinated claims or interests against Lincoln other than equity interests and will be paid on the same terms and at the same times as other similarly situated claims, if any, and will only be paid, if at all, after payment of all other claims and interests in or against Lincoln, other than interests arising out of equity interests in Lincoln (the payments if any on the Unsecured Claim and the Penalty Claim, collectively hereinafter the “Settlement Payments”).

36. Lincoln will make the Settlement Payments to the entity or entities specified in the Commission’s order approving this Agreement.

37. Lincoln shall make all filings reasonably necessary to secure approval of this Agreement by the Bankruptcy Court.

38. Lincoln and Enforcement shall provide all necessary cooperation to one another to ensure approval of this Agreement by the Bankruptcy Court and the Commission.

39. The effective date of this Agreement (“Effective Date”) shall be the earliest date on which both of the following have occurred: (a) the Commission has issued a final order approving this Agreement without material modification; and (b) the Bankruptcy Court has issued a final order approving this Agreement without material modification.

40. Upon the Effective Date, this Agreement shall resolve the matters specifically addressed herein as to Lincoln and any affiliated entity, and their agents, officers, directors, and employees, both past and present, and any

⁹ The Commission does not concede that its civil penalty claim would be subordinated in the ordinary course of Lincoln’s Chapter 11 Case, but agrees in settling this matter to allow its civil penalty claim to be treated as subordinated.

successor in interest to Lincoln, including any entity formed as a result of the confirmation of a plan of reorganization (the “Reorganized Lincoln”), whether such entity is named Lincoln Paper and Tissue, LLC or something else (collectively, the “Released Parties”).

41. Upon the Effective Date, the Commission shall release Lincoln and any successor or affiliate, including the Released Parties, and forever bar the Commission from holding or seeking to hold the Released Parties liable for any and all claims, known or unknown, arising out of, related to, or connected with the Investigation and/or the Litigation or the facts at issue therein. Moreover, no later than ten (10) business days after the Effective Date, the Commission shall file a motion to dismiss with prejudice the above-captioned Litigation or the Parties will file a stipulation dismissing with prejudice the Litigation, with each party to bear their own costs and expenses, including, but not limited to, attorneys’ fees.

42. The Commission shall have the right to void this Agreement should the Unsecured Claim be subordinated for any reason, including as result of a final ruling by any court. The Commission must exercise this right no later than fifteen (15) days after the date on which any court ruling subordinating the Unsecured Claim becomes final and unappealable.

43. Lincoln’s failure to (a) take all actions necessary to secure approval of this Agreement, or (b) comply with any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the Federal Power Act, 16 U.S.C. § 792, *et seq.*, and may subject Lincoln and any successor companies, including Reorganized Lincoln, but not including any liquidating trustee who may be appointed in the Chapter 11 Case, to additional action under the enforcement and penalty provisions of the FPA.

44. This Agreement binds the Released Parties. The Agreement does not create any additional or independent obligations on the Released Parties, other than the obligations identified in this Agreement. In the event the Chapter 11 Case is converted to chapter 7, this Agreement shall be binding on a chapter 7 trustee and this Agreement shall remain effective in the event the Chapter 11 Case is dismissed.

45. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer, or promise of any kind by any member, employee, officer, director, agent, or representative of Enforcement or Lincoln has been made to induce the signatories or any other party to enter into the Agreement.

46. In the event the conditions to the Effective Date are not satisfied, this Agreement (including, without limitation, the disgorgement, civil penalty, and any and all stipulations and representations) shall be null and void and of no effect whatsoever, and neither Enforcement nor Lincoln shall be bound by any provision or term of this Agreement, unless otherwise agreed to in writing by Enforcement and Lincoln.

47. In connection with the civil penalty provided for herein, Lincoln agrees that the Commission's order approving this Agreement without material modification shall be a final and unappealable order assessing a civil penalty under § 316(A)(b) of the Federal Power Act, 16 U.S.C. § 825o-1(b). Lincoln waives findings of fact and conclusions of law, rehearing of any Commission order approving this Agreement without material modification, and judicial review by any court of any Commission order approving this Agreement without material modification.

48. This Agreement may be modified only if in writing and signed by Enforcement and Lincoln. No modification will be effective unless any approval of the Commission and Bankruptcy Court that may be required with respect to such modification has been received.

49. Each of the undersigned warrants that he is an authorized representative of the entity designated, is authorized to bind such entity, and accepts this Agreement on the entity's behalf.

50. The undersigned representative of Lincoln affirms that (a) he has read this Agreement, (b) all of the matters set forth in this Agreement are true and correct to the best of his knowledge, information, and belief, and that he understands that this Agreement is entered into by Enforcement in express reliance on those representations, and (c) he has had the opportunity to consult with counsel.

51. This Agreement may be signed in counterparts.

Agreed to and Accepted:



Larry R. Parkinson
Director, Office of Enforcement
Federal Energy Regulatory Commission
Date: May 20, 2016



Lincoln Paper and Tissue, LLC
By: KEITH VAN SCOTTER
Its: PRESIDENT
Date: 17 MAY 2016