

139 FERC ¶ 61,154
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

In re Vista Energy Marketing, L.P.

Docket No. IN12-9-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued May 24, 2012)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement), Vista Energy Marketing, L.P. (Vista) and Michael P. Whalen, Jr. (Whalen). This Order is in the public interest because it resolves Enforcement's investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2011), into whether Vista accurately described Whalen's role in Vista in connection with Vista's application for market-based rate authority under section 205 of the Federal Power Act (FPA section 205), 16 U.S.C. § 824d (2006), and whether Vista and Whalen violated the terms of the Commission's August 2009 order granting that application. *Vista Energy Marketing, L.P.*, 128 FERC ¶ 61,188 (2009) (MBR Order). The investigation examined possible violations of the terms of Vista's MBR Order and of the Commission's regulation prohibiting the submission of inaccurate information, 18 C.F.R. § 35.41(b). Vista agreed to pay a civil penalty of \$350,000 and both Vista and Whalen agreed to certain restrictions on their participation in Commission-jurisdictional activities for a period of two years.

I. Background

2. As described in the Agreement, Whalen was one of three investor/owners of Vista, an entity seeking market-based rate authority. Whalen previously pled guilty to charges involving the delivery of false, misleading or inaccurate reports of market information to natural gas price indices in 2000-2001. In its application for MBR authority in Docket No. ER09-553-000, Vista made multiple representations and commitments to the Commission that Whalen would play a limited role in Vista's operations and management. The Commission in its MBR Order relied upon and accepted Vista's representations and commitments regarding Whalen, including commitments that he would play no role in Vista other than that of an investor and that he would not exert influence or control over Vista. However, Whalen was involved in multiple aspects of Vista's operations. Among other activities described in the Agreement, Whalen personally conducted Vista business development and marketing activities, directed Vista

employees in specific business development tasks, organized and participated in regular status update meetings, offered advice and direction to Vista employees, and participated in Vista hiring and personnel management issues.

3. The Commission's MBR Order also directed Vista to report to the Commission within 30 days if the terms of any of its representations and commitments accepted in the order changed. Vista did not report any changes.

II. Investigation

4. Enforcement opened a non-public, preliminary investigation of Vista in 2010 following an Enforcement audit that indicated Whalen's activities may have been inconsistent with Vista's representations and commitments to the Commission.

5. Enforcement determined that Whalen's role in Vista's operations and day-to-day management was inconsistent with Vista's representations and commitments accepted by the Commission. Vista and Whalen violated the conditions of the MBR Order by failing to adhere to those conditions and by failing to inform the Commission of changes to those representations and commitments. Enforcement also determined that Vista's representations and commitments regarding Whalen constituted misleading information and that Vista failed to exercise due diligence to correct this misleading information, thereby violating 18 C.F.R. § 35.41(b). Enforcement determined that Vista's conduct constituted a reckless violation of a Commission order given Vista's awareness of the Commission's concerns and subsequent directives regarding Whalen's role in Vista.

III. Stipulation and Consent Agreement

6. Enforcement staff, Vista and Whalen resolved Enforcement's investigation by means of the attached Agreement.

7. Vista and Whalen stipulate to the facts. Vista and Whalen admit that despite Vista's representations and commitments, Vista failed adequately to limit Whalen's involvement in Vista's operations, his ability to interact with Vista employees and his ability to speak to third-parties on behalf of Vista. Vista further admits that its compliance training of Whalen on the Commission's directives regarding his limited role in Vista was insufficient to ensure his compliance with those directives. Vista and Whalen admit to Whalen's involvement in multiple aspects of Vista's operations.

8. Vista and Whalen neither admit nor deny violations of the terms of the Commission order and of 18 C.F.R. § 35.41(b), but Vista agrees to pay a civil penalty of \$350,000 and Vista and Whalen each agree to certain future limitations on their involvement with Commission-jurisdictional electric sales. Specifically, Vista agrees for a period of two years to refrain from filing an application under FPA section 205 seeking Commission authorization to sell electric energy at wholesale in interstate commerce.

Whalen agrees for a period of two years not to have a role other than as a passive investor in any entity that sells electric energy at wholesale in interstate commerce, not to make new investments in entities that seek or have authority to sell electric energy at wholesale in interstate commerce, and to restrictions on certain business contacts with individuals at entities in which he is already invested. Whalen further agrees to submit periodic affidavits during the two-year period attesting to his compliance with these restrictions.

IV. Determination of the Appropriate Sanctions and Remedies

9. In determining the appropriate remedy for Vista, Enforcement considered the factors described in the Revised Policy Statement on Enforcement.¹ Specifically, staff considered the seriousness of Vista's and Whalen's actions, which misrepresented Whalen's involvement in Vista in connection with Vista's MBR application. Staff determined that Vista's violations were committed with reckless disregard for compliance with the Commission's regulations and the terms of the Commission's MBR Order, and thus were made with scienter. Staff also considered the following factors: Vista never made jurisdictional sales under its MBR authority and withdrew its MBR tariff; Vista's violations did not generate profits for Vista or cause market harm; Vista's senior management, including its compliance officer, failed to implement sufficient procedures to limit Whalen's involvement in Vista or to ensure his compliance with the MBR Order; Vista did not obstruct or interfere with administration of justice; staff found no prior history of similar violations by Vista; Vista did not self-report this matter; and Vista fully cooperated with staff's investigation.

10. The Commission concludes that the Agreement is a fair and equitable resolution of the matters concerned and is in the public interest, as it reflects the nature and seriousness of Vista's and Whalen's conduct.

¹ 123 FERC ¶ 61,156 (2008). As an individual, Whalen is not subject to the Commission's Penalty Guidelines.

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The Commission orders:

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Vista Energy Marketing, L.P.

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Docket No. IN12-9-000

STIPULATION AND CONSENT AGREEMENT

I. Introduction

1. The staff of the Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission), Vista Energy Marketing, L.P. (Vista) and Michael P. Whalen, Jr. (Whalen) enter into this Stipulation and Consent Agreement (Agreement) to resolve a non-public preliminary investigation of Vista conducted under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2011). The investigation examined Vista's statements to the Commission in connection with its application for market-based rate authority (MBR) under section 205 of the Federal Power Act (FPA section 205), purporting to limit Whalen's involvement in Vista's operations and management due to Commission concern over Whalen's past involvement in false natural gas price reporting behavior. The investigation focused on potential violations of the Commission's regulation prohibiting the submission of inaccurate information, 18 C.F.R. § 35.41(b); and on Vista's potential violation of an August 2009 order authorizing Vista to transact using market-based rates under FPA section 205. *Vista Energy Marketing, L.P.*, 128 FERC ¶ 61,188 (2009) (MBR Order); 16 U.S.C. § 824d (2006).

II. Stipulations

Enforcement, Vista and Whalen hereby stipulate and agree to the following facts:

A. Background

2. Vista is a Texas Limited Partnership with its principal place of business in Houston, Texas. Vista is primarily engaged in the business of being a retail energy provider in deregulated natural gas markets. Vista does not own any generation or transmission capacity and is not affiliated with any franchised public utility. Vista currently is comprised of a General Partner and three Limited Partners. Vista's General Partner, Irish Marketing, LLC (Irish), a Texas corporation, is comprised of three members who each hold a one-third membership interest in Irish, and who have invested capital in Irish for the purpose of developing and structuring new entities, including Vista. Initially, each of the three members held the same interests in Irish and Vista. Currently, two of these individuals (David Ranslem and Scot J. Thompson) are Member/Managers of Irish, and one (Whalen) is a Member/Investor of Irish. All three

are also the Limited Partners of Vista.

3. With respect to Whalen, in June 2006, prior to his involvement in Irish and Vista, he pled guilty to charges brought by the United States Attorney's Office for the Northern District of California and the Fraud Section of the Criminal Division of the United States Department of Justice alleging violations of the Commodity Exchange Act by knowingly delivering false or misleading or inaccurate reports of market information to natural gas price indexes while employed as a financial trader at Cinergy Corporation in 2000 - 2001. Whalen completed his probation relating to this conduct on March 9, 2009.

4. On January 26, 2009, Vista filed its MBR application in Docket No. ER09-553-000, seeking authorization to engage in wholesale sales of electric energy, capacity and ancillary services under FPA section 205. Vista's application described Whalen as one of three Members in Irish, Vista's sole general partner.

5. On February 26, 2009, acting under delegated authority, the Commission's Office of Energy Market Regulation (OEMR) issued a deficiency letter order requesting that Vista submit additional information to supplement its MBR application. Among other things, the deficiency order requested confirmation that Whalen was the same individual involved in the prior false natural gas price reporting activity and required Vista: to identify the responsibilities of Whalen at both Irish and Vista; to describe the role of Irish in Vista; and to identify the employees responsible for the real-time supervision of Whalen.

6. After the February 26, 2009 deficiency order, the three Irish Members restructured Irish's partnership structure to remove Whalen from an official management position in Irish (and through Irish, Vista). The new partnership document (with an effective date of January 8, 2009), designated Ranslem and Thompson as the Member/Managers in Irish and designated Whalen as the Member/Investor in Irish. Irish's revised Limited Liability Company Agreement provided that Members other than the Member/Managers "shall not take part in the management of [Irish's] business nor transact any business for [Irish] in their capacity as Members, nor shall they have the power to sign for or to bind [Irish]." Vista's revised Limited Partnership Agreement also expressly prohibited Irish from appointing Whalen to serve as an officer of Vista in any capacity.

7. On April 10, 2009, Vista supplemented its MBR application and responded to the deficiency letter order. In this filing, Vista made representations and commitments to the Commission regarding Whalen's ongoing and prospective role in Vista's and Irish's management and operations. In its April 10 response, Vista acknowledged that "the Commission has expressed concerns about Whalen's ability to manage the day-to-day operations of [Vista] either by virtue of having a direct role in the company or by virtue of his role in the upstream General Partner . . ." In response to these Commission concerns, Vista provided copies of its new corporate documents, described the

partnership restructuring of Irish and the new limitations in Vista's Limited Partnership Agreement and explicitly stated that "Mr. Whalen has no day-to-day operational responsibilities and also has no managerial or operational responsibilities in [Vista]."

8. On June 9, 2009, OEMR issued a second deficiency order seeking additional information regarding Whalen's role in Irish and Vista and seeking confirmation that Whalen would not "exert control or influence" over Vista. Specifically, the June 9, 2009 deficiency order asked Vista to "confirm that Mr. Whalen will not exert control or influence, nor attempt to exert control or influence over Vista Marketing," to "explain, in detail, what Mr. Whalen's role is, if any, in both Irish Marketing, LLC and Vista Marketing," and specifically asked whether "Mr. Whalen ha[s] any role in either company or is he strictly an investor in these operations."

9. In response to the June 9, 2009 deficiency order, Vista, on July 9, 2009, represented that "Mr. Whalen will not exert control or influence or attempt to exert control or influence control over Vista Marketing." Vista reiterated its prior representations about Whalen's limited management and operational control as a Member/Investor, and stated that: "[o]ther than as an investor in Irish Marketing, which in turn has invested capital in Vista Marketing and as a limited partner in Vista Marketing, Mr. Whalen has no role in either company."

10. On August 26, 2009, the Commission issued the MBR Order granting Vista's request for authorization to transact using market-based rates under FPA section 205 effective as of June 9, 2009. The MBR Order accepted, relied upon, and listed thirteen of Vista's various representations and commitments regarding Whalen, Irish and Vista. Among the representations accepted and relied upon by the Commission was that "the Member/Investor in Irish Marketing has no role in either Irish Marketing or Vista Marketing other than his investment in Irish Marketing as a Member/Investor and his investment in Vista Marketing as Limited Partner." The Commission also accepted and relied upon Vista's representations that Whalen "has no operational responsibilities and also has no other managerial or operational responsibilities in Vista Marketing," that he "will not take part in the management of Irish Marketing's business" and that he "will not exert control or influence or attempt to exert control or influence over Vista Marketing." Likewise, the Commission relied upon Vista's representation that a chief compliance officer would be responsible for ensuring compliance with the Commission's rules and regulations.

11. The Commission's MBR Order directed Vista to report to the Commission if the terms of any of its representations and commitments accepted in the order changed, no later than 30 days of the date of such change.

12. Vista never transacted under its MBR tariff, and voluntarily withdrew its MBR tariff on July 2, 2010.

B. Whalen's Role in Vista

13. Enforcement opened the investigation of Vista following an audit which indicated that Whalen's activities may have been inconsistent with Vista's representations and commitments to the Commission.

14. Although Vista had a compliance program related to trading activities, Vista failed to adequately limit Whalen's involvement in Vista's operations, his ability to interact with Vista employees or his ability to speak to third parties on behalf of Vista. Nor did Vista establish any structure whereby the two Irish Member/Managers could meet to make managerial or development decisions without Whalen's involvement. Vista's compliance training of Whalen on the Commission's directives regarding his limited role in Vista was insufficient to ensure his compliance with those directives.

15. Whalen's participation in Vista included the following activities: 1) he participated in identifying and interviewing potential candidates for the controller position in Vista; 2) he directed activities related to investigating TV advertising rates and related marketing opportunities for Vista; 3) he personally engaged in arranging and attended two business meetings to discuss potential business opportunities in California and then directed Vista employee responses to those meetings; 4) he directed and offered advice related to efforts to identify alternative names for the company; 5) he sought changes to a Vista-generated work product reporting on the company's recent financial performance and business activities; 6) he directed employees to create spreadsheets with trading results; 7) he attended regularly scheduled business status meetings with Vista employees and the Vista Member/Managers; and 8) on occasion, he individually met with and gave advice regarding Vista's operations to Vista employees.

16. Subsequent to the August 26, 2009 MBR Order, Vista did not at any time report to the Commission any changes in the representations and commitments it had made to the Commission concerning Whalen's level of involvement in Vista.

III. Violations

A. Violations of the MBR Order

17. Enforcement determined that Whalen's role in Vista's operations and day-to-day management was inconsistent with Vista's representations on which the Commission relied in authorizing Vista's MBR. Enforcement determined that Vista and Whalen violated the conditions of the MBR Order by failing to adhere to those conditions. Enforcement determined Vista also violated the MBR Order when it failed to inform the Commission of changes to those representations and commitments given Whalen's extensive involvement in Vista's operations and day-to-day management. Enforcement determined that Vista's conduct constituted a reckless violation of a Commission order,

given Vista's awareness of the Commission's concerns and subsequent directives regarding Whalen's role in Vista. Enforcement determined that by failing accurately to characterize Whalen's involvement, Vista's conduct misled the Commission that Whalen was limiting his role in Vista to that of an investor uninvolved with management or day-to-day operations.

B. Violations of Section 35.41 of the Commission's Regulations

18. Under section 35.41(b) of the Commission's regulations, a Seller is required to "provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission ..., unless Seller exercises due diligence to prevent such occurrences." 18 CFR § 35.41(b).

19. Enforcement determined that Vista's representations to the Commission, committing that Whalen would not be able to exert any control or influence over the management or operations of Vista and that Whalen's role would be limited to that of an investor, constituted "misleading information." Enforcement determined that Vista did not fulfill these commitments and failed to exercise due diligence to correct the misleading information. Enforcement concluded that Vista violated section 35.41(b) of the Commission's regulations.

C. Additional Factors

20. Enforcement determined that Vista's conduct misled the Commission and constituted serious violations. However, because Vista never made jurisdictional sales under its MBR authority and withdrew its MBR tariff, Vista's violations did not generate profits for Vista or cause market harm.

21. Enforcement determined that, although Vista had a compliance program in place at the time of the MBR Order, Vista's senior management, including its chief compliance officer, failed to implement sufficient procedures to limit Whalen's involvement with Vista and ensure compliance with the Commission's MBR Order. Enforcement determined that Vista's violations were committed with reckless disregard for compliance with the Commission's regulations.

22. Enforcement determined that Vista's violations did not obstruct or interfere with administration of justice, Vista did not commit a prior violation of a Commission requirement, and Vista fully cooperated with both the Audit and Enforcement's investigation.

IV. Remedies and Sanctions

23. For purposes of settling any and all civil and administrative disputes arising from

Enforcement's investigation, Vista and Whalen agree with the facts as stipulated in Section II of this Agreement but Vista and Whalen neither admit nor deny the violations described in Section III of this Agreement. Vista and Whalen further agree to undertake obligations set forth in the following paragraphs.

A. Civil Penalty

24. Vista shall pay a civil penalty of \$350,000 to the United States Treasury, by wire transfer, within ten days after the Effective Date of this Agreement, as defined below.

B. Restrictions on Certain Jurisdictional Activities

25. For a period of two years after the date of an order approving this Agreement, Vista shall not file an application under FPA section 205 seeking Commission authorization to sell electric energy at wholesale in interstate commerce.

26. For a period of two years after the date of an order approving this Agreement, neither Whalen nor any person or entity acting on his behalf: (a) shall be an officer, director, voting member, voting shareholder, manager or employee, or have any other role other than as a passive investor in any entity that sells electric energy at wholesale in interstate commerce; (b) shall have any contacts of a business or commercial nature with any officer, director, voting member, manager or employee of any entity selling electric energy at wholesale in interstate commerce pertaining to that entity's business, other than (i) receipt of financial and other investor information of the kind ordinarily provided to other investors or (ii) written communications that may occur, if necessary, no more than four times per year, pertaining strictly to the maintenance, increase, decrease in or transfer of any such financial investment, which written communications then must be provided to the Commission with the affidavit described in Paragraph 27; and (c) shall make any new investments in any entity in which he is not currently an investor that seeks or has authority to sell electric energy at wholesale in interstate commerce.

27. For a period of two years after the date of an order approving this Agreement, Whalen shall annually submit to the Director of the Office of Enforcement an affidavit attesting to his compliance with the conditions set forth in Paragraph 26. These submissions are due on the anniversary date of the order approving this Agreement. In addition, each time Whalen receives any written communications pursuant to Paragraph 26(b)(ii), Whalen shall submit an additional affidavit attesting to his compliance with the conditions set forth in Paragraph 26 and shall include the written communications regarding the maintenance, increase, decrease in or transfer of the applicable financial investment.

V. Terms

28. The Effective Date of this Agreement shall be the date on which the Commission issues an order approving this Agreement without material modification. When effective, this Agreement shall resolve the matters specifically addressed herein as to Whalen, Vista, and any affiliated entity, and their agents, officers, directors and employees, both past and present, and any successor in interest to Vista.

29. Commission approval of this Agreement in its entirety and without material modification shall release Whalen and Vista and forever bar the Commission from holding Whalen, Vista, its affiliates, agents, officers, directors and employees, both past and present, liable for any and all administrative or civil claims arising out of, related to, or connected with the investigation addressed in this Agreement.

30. Vista's failure to make a timely civil penalty payment 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 Vista to additional action under the enforcement and penalty provisions of the Federal Power Act.

31. If Vista fails to comply with the conditions set forth in paragraph 25 of this Agreement or Whalen fails to comply with the conditions set forth in paragraphs 26 and 27 of this Agreement, Vista's failure to comply with the conditions in paragraph 25 or Whalen's failure to comply with the conditions in paragraphs 26 and 27 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.*, by Vista or Whalen, respectively, and thus may subject Vista or Whalen, respectively, to additional action under the enforcement and penalty provisions of the Federal Power Act.

32. If Vista fails to make the civil penalty payment described above at the times agreed by the parties, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a(a)(2)(iii)(A) (2011) from the date the payments are due, in addition to any other enforcement action and penalty that the Commission may take or impose.

33. This Agreement binds Whalen, Vista and their agents, successors, and assigns. The Agreement does not create any additional or independent obligations on Whalen, Vista, or any affiliated entity, or their agents, officers, directors, or employees, other than the obligations identified in this Agreement.

34. 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 Vista has been made to induce the signatories or any other party to

enter into the Agreement.

35. Unless the Commission issues an order approving this Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement, Whalen nor Vista shall be bound by any provision or term of this Agreement, unless otherwise agreed to in writing by Enforcement and Vista and Whalen.

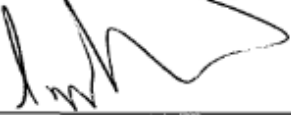
36. In connection with Vista's payment of the civil penalty provided for herein, Vista and Whalen agree that the Commission's order approving this Agreement without material modification shall be a final and unappealable order assessing a civil penalty under § 316(a) of the Federal Power Act, 16 U.S.C. § 825o(a). Whalen and Vista waive 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.

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

38. Whalen and the undersigned representative of Vista each affirm that he or she has read this Agreement, that all of the matters set forth in the Agreement are true and correct to the best of his knowledge, information and belief that he understands that this Agreement is entered into by Enforcement in express reliance on those representations, and that he or she has had the opportunity to consult with counsel.

39. This Agreement may be signed in counterparts.

Agreed to and Accepted:



For Vista Energy Marketing L.P.

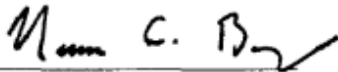
Scot J. Thompson

Date: 5/1/12



Michael P. Whalen Jr.

Date: 5/1/12



Norman Bay
Director, Office of Enforcement
Federal Energy Regulatory Commission

Date: 5.10.12

Document Content(s)

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