

144 FERC ¶ 61,163  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Competitive Energy Services, LLC

Docket No. IN12-12-000

ORDER ASSESSING CIVIL PENALTY

(Issued August 29, 2013)

1. In this order, the Commission finds that Competitive Energy Services, LLC (CES) has violated section 1c.2 of the Commission's regulations and section 222 of the Federal Power Act (FPA), which prohibit energy market manipulation.<sup>1</sup> In light of the seriousness of these violations and the lack of any effort by CES to remedy its violations, we find that a civil penalty and disgorgement, plus interest, pursuant to section 316A of the FPA,<sup>2</sup> is appropriate.

**I. Background**

2. CES is an independent energy services company based in Portland, Maine. CES's managing member is Dr. Richard Silkman (Dr. Silkman).<sup>3</sup> In 2003, CES began providing energy consulting services to Rumford Paper Company (Rumford), which

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<sup>1</sup> 18 C.F.R. § 1c.2 (2013); 16 U.S.C. § 824v(a) (2006).

<sup>2</sup> 16 U.S.C. § 825o-1 (2006).

<sup>3</sup> CES's answer to the Show Cause Order was filed jointly with Dr. Silkman, who is the subject of a parallel enforcement proceeding. *See Richard Silkman*, 144 FERC ¶ 61,164 (2013). Because Dr. Silkman and CES are each separately liable for violating section 1c.2 of the Commission's regulations and section 222 of the FPA, we here issue separate orders with respect to each.

owns and operates a large paper mill in Rumford, Maine. As relevant here, CES assisted Rumford with its participation in ISO New England, Inc.'s (ISO-NE) Day-Ahead Load Response Program (DALRP).<sup>4</sup> Through the DALRP, ISO-NE compensated customers for certain load reductions, also called demand response, as measured against a baseline load (customer baseline)<sup>5</sup> established for each facility providing the demand reduction.

3. On April 17, 2012, the Commission's Office of Enforcement Staff (OE Staff) submitted to the Commission an Enforcement Staff Report and Recommendations (OE Staff Report) alleging that CES had violated the Commission's Prohibition on Market Manipulation, 18 C.F.R. § 1c.2 (2013), by conceiving of a fraudulent scheme in connection with the DALRP, so that CES and Rumford would artificially inflate Rumford's customer baseline to enable Rumford and CES to receive compensation for demand response without Rumford intending to provide the service or actually having to reduce load. The OE Staff Report described the fraudulent scheme as follows: CES devised and, along with Rumford, implemented, a plan to inflate Rumford's customer baseline by curtailing Rumford's use of on-site generation during Rumford's initial DALRP customer baseline period, and instead replacing that on-site energy with energy taken from the grid. This curtailment created an inflated customer baseline that did not reflect Rumford's routine electricity consumption from the grid. After establishing Rumford's initial inflated customer baseline, Rumford, under the direction of CES, resumed its routine practice of operating its on-site generation to lower electric consumption from the grid. It then offered Rumford's demand response into the DALRP on a daily basis, at a minimum offer price which would almost always be accepted by ISO-NE, thereby, under the terms of the DALRP, leaving in place that inflated customer baseline. Both Rumford and, through Rumford, CES, received compensation for Rumford providing demand response because, when measured against its inflated

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<sup>4</sup> An independent system operator (ISO) "is an independent company that assume[s] operational control—but not ownership—of the transmission facilities owned by its member utilities . . . . [and] provide[s] open access to the regional transmission system to all electricity generators at rates established in a single, unbundled, grid-wide tariff that applies to all eligible users in a non-discriminatory manner." *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 367 n.1 (D.C. Cir. 2013) (quoting *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004)) (internal quotation marks omitted).

<sup>5</sup> Per the ISO-NE DALRP manual in effect at the time, a customer baseline is calculated using "the average hourly load, rounded to the nearest kWh, for each of the 24 hours in a day." ISO New England Load Response Program Manual, Rev. 9 § 4.2.1 (effective Apr. 7, 2006) (Load Response Program Manual).

baseline, Rumford's routine use of its on-site generation appeared to have reduced its load. The OE Staff Report recommended that CES be assessed a civil penalty of \$7,500,000 and ordered to disgorge \$166,841.13 in unlawful payments for its role in the fraudulent scheme.

4. On July 17, 2012, the Commission issued an Order to Show Cause and Notice of Proposed Penalty.<sup>6</sup> The Commission directed CES to file an answer within 30 days showing cause why it should not be found to have violated 18 C.F.R. § 1c.2 and 16 U.S.C. § 824v(a) in connection with CES's participation in ISO-NE's DALRP. In addition, the Commission directed CES to show cause why its alleged violation should not warrant the assessment of a civil penalty in the amount of \$7,500,000, or a modification of that amount consistent with section 31(d)(4) of the FPA, and disgorgement of \$166,841.13 in payments received as a result of CES's conduct with respect to ISO-NE's DALRP. The Commission also stated that CES must, within 30 days, elect either an administrative hearing before an Administrative Law Judge at the Commission prior to the assessment of a penalty pursuant to section 31(d)(2) of the FPA or, if the Commission finds a violation, an immediate penalty assessment by the Commission under section 31(d)(3)(A) of the FPA.<sup>7</sup> The Show Cause Order further allowed OE Staff to file a reply within 30 days of the filing of CES's answer.<sup>8</sup>

5. On July 27, 2012, CES gave notice electing the procedures set forth in section 31(d)(3)(A) of the FPA and the Show Cause Order,<sup>9</sup> thereby electing an immediate penalty assessment if the Commission finds a violation. CES filed its answer to the Show Cause Order on September 14, 2012 (Show Cause Answer). OE Staff filed a reply to CES's answer on November 14, 2012 (OE Staff Reply).

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<sup>6</sup> *Competitive Energy Servs., LLC*, 140 FERC ¶ 61,032, at P 3 (2012) (Show Cause Order).

<sup>7</sup> See 16 U.S.C. § 823b(d) (2006).

<sup>8</sup> On August 13, 2012, the Commission extended CES's deadline to respond to the Show Cause Order to September 14, 2012. On September 26, 2012, the Commission extended OE Staff's deadline to reply to CES's show cause response to November 13, 2012.

<sup>9</sup> See Ordering Paragraph D to Show Cause Order.

## II. Discussion

6. 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.<sup>10</sup> Order No. 670 implemented this prohibition, adopting the Anti-Manipulation Rule. That rule, among other things, 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.<sup>11</sup>

7. Pursuant to section 316A(b) of the FPA, the Commission may assess a civil penalty of up to \$1 million per day, per violation against any person who violates Part II of the FPA (including section 222 of the FPA) or any rule or order thereunder.<sup>12</sup> In determining the amount of a proposed penalty, section 316A(b) requires the Commission to consider "the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner."<sup>13</sup> Although the Penalty Guidelines are not mandatory, the Commission uses them and its policy statements on enforcement to guide its penalty analysis.<sup>14</sup>

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<sup>10</sup> 16 U.S.C. § 824v(a) (2006).

<sup>11</sup> 18 C.F.R. § 1c.2(a) (2013); *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).

<sup>12</sup> 16 U.S.C. § 825o-1(b) (2006).

<sup>13</sup> *Id.*

<sup>14</sup> *See Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 (2010) (Penalty Guidelines Order); *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220, at PP 6, 26 (2010) (Initial Penalty Guidelines Order) (seriousness of violation and timely efforts to remedy a violation will continue to be significant factors under the Penalty Guidelines). The Commission also noted when issuing its Initial Penalty Guidelines Order that it will continue to rely on issues identified in its policy statements on enforcement, *Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156, at PP 50-71 (2008), and *Enforcement of Statutes, Orders*,

(continued...)

8. As discussed below, we find that CES violated section 1c.2 of the Commission's regulations and section 222(a) of the FPA through the scheme it conceived with Rumford regarding Rumford's participation in the DALRP. Further, we find that a civil penalty of \$7,500,000 and disgorgement of \$166,841.13, plus interest, is appropriate given the seriousness of CES's violation and the harm caused by its conduct. As discussed below, in order to alleviate any concern about CES's ability to pay the penalty, we will permit CES, if it desires, to pay the penalty pursuant to an agreed upon payment plan with OE Staff, subject to Commission approval.

**A. Findings of Fact**

**1. ISO-NE's DALRP Framework**

9. The Commission's regulations define demand response as "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."<sup>15</sup> A demand response resource is a resource capable of providing demand response.<sup>16</sup>

10. From June 1, 2005<sup>17</sup> through the relevant period of OE Staff's investigation, the DALRP allowed compensation for demand response resources that "provide a reduction in their electricity consumption in the New England Control Area during peak demand periods."<sup>18</sup> ISO-NE calculated that reduction in electricity consumption taken from the

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*Rules, and Regulations*, 113 FERC ¶ 61,068, at PP 17-27 (2005), as well as its policy statement on compliance, *Compliance with Statutes, Regulations, and Orders*, 125 FERC ¶ 61,058 (2008), to measure the seriousness of violations and timely efforts to remedy violations. The Commission stressed that any conflict will be resolved in favor of the Penalty Guidelines. Initial Penalty Guidelines Order, 130 FERC ¶ 61,220 at P 63. The Penalty Guidelines are appended to the Penalty Guidelines Order.

<sup>15</sup> 18 C.F.R. § 35.28(b)(4) (2013).

<sup>16</sup> *Id.* § 35.28(b)(5).

<sup>17</sup> See *ISO New England, Inc.*, 123 FERC ¶ 61,021, at P 4 (April 4, 2008 Order), *order on reh'g*, 124 FERC ¶ 61,235 (2008) (September 11, 2008 Order).

<sup>18</sup> *ISO New England, Inc.*, FERC Electric Tariff No. 3, Section III – Market Rule 1 – Standard Market Design, Appendix E-Load Response Program, 2nd Rev Sheet No. 7902, § III.E.1.1. This order refers to ISO-NE's tariff in operation during the time period covered by OE Staff's investigation.

grid by first establishing a customer baseline for each demand response resource, and then subtracting the demand response resource's actual metered load during the hours in which ISO-NE accepted the demand response resource's price-based bid.<sup>19</sup> DALRP market participants could offer their demand response resources at a minimum price of \$50/MWh and a maximum price of \$1,000/MWh. Each offer had to be at least 100 kW. Each accepted offer then would be paid the applicable day-ahead zonal price multiplied by the cleared day-ahead offer.<sup>20</sup>

11. ISO-NE's Load Response Program Manual required each DALRP participant to "be willing and capable of interrupting load within the parameters of the offer" and to "be able to interrupt Monday-Friday, on non-Demand Response Holidays between 7:00 AM - 6:00 PM."<sup>21</sup> Per the Load Response Program Manual, each resource had its own customer baseline, which was determined as "the average hourly load, rounded to the nearest kWh, for each of the 24 hours in a day."<sup>22</sup> For a new demand response resource, the Load Response Program Manual specified that its customer baseline was "calculated for each hour in [a] day based on meter data from the initial [five] business days after the asset [wa]s approved and hourly meter data beg[an] to be recorded."<sup>23</sup> Once an initial customer baseline was established, the customer baseline would be recalculated each day based on a weighted average of the previous day's customer baseline and the meter data for the present program day. However, for any day that a demand response offer was accepted, that day's customer baseline would be excluded from the rolling weighted average calculation of a demand response resource's customer baseline. Thus, a DALRP participant indefinitely could maintain its initial customer baseline by making daily offers that were accepted.<sup>24</sup>

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<sup>19</sup> April 4, 2008 Order, 123 FERC ¶ 61,021 at PP 4-5; *see also* Load Response Program Manual § 4.3.1.3.

<sup>20</sup> ISO New England, Inc., FERC Electric Tariff No. 3, Section III – Market Rule 1 – Standard Market Design, Appendix E-Load Response Program, 1st Rev Sheet No. 7906-7907, §§ III.E.2.2-III.E.2.3; Load Response Program Manual § 4.5.1.1.

<sup>21</sup> Load Response Program Manual § 2.2.1.

<sup>22</sup> *Id.* § 4.2.1.

<sup>23</sup> *Id.*

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

12. Any ISO-NE market participant or demand response provider could enroll itself or an end-user in the DALRP.<sup>25</sup> ISO-NE would then pay or collect fees from the enrolling participant (the entity responsible for enrolling the demand asset) but was not responsible for disbursing any revenues to, or collecting fees from, a demand response provider. The enrolling participant would then be responsible for distributing or collecting such funds to the demand response provider.<sup>26</sup>

## 2. CES's Participation in the DALRP

13. CES had, on occasion, served as Constellation NewEnergy, Inc.'s (Constellation's) broker for soliciting demand response customers in New England.<sup>27</sup> In exchange for CES referring customers to Constellation, Constellation would act as the customer's enrolling participant in the DALRP and would pay CES a percentage of the referred customer's DALRP revenues. In the spring of 2007, on behalf of CES, Dr. Silkman approached Rumford's parent company, NewPage Corporation, to suggest Rumford participate in ISO-NE's DALRP.<sup>28</sup> Constellation served as Rumford's enrolling participant and kept 10 percent of Rumford's DALRP revenues received from ISO-NE. Constellation then distributed 85 percent of the total DALRP revenues to Rumford and provided the remaining five percent to CES as Constellation's broker to Rumford.<sup>29</sup>

14. In 2007-2008, Rumford's paper mill had an electricity consumption ranging between 85 MW and 105 MW. When the mill was fully operational, Rumford's

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<sup>25</sup> *Id.* § 2.2.

<sup>26</sup> *Id.* § 4.5.4.

<sup>27</sup> *See* Master Broker Agreement between Constellation NewEnergy, Inc. and Competitive Energy Services, LLC (signed by Richard Silkman Aug. 28, 2006). Citations herein are to documents obtained and sworn testimony taken during OE Staff's nonpublic investigation. Citations to most documents refer to the entity supplying each document and the electronic or physical Bates stamp (*e.g.*, RUMF000001-3) and transcript references refer to the last name of the deponent, page, and line of the relevant transcript (*e.g.*, Silkman Dep. 150:1-10).

<sup>28</sup> *See* Silkman Dep. 150-52.

<sup>29</sup> *See* Response of Competitive Energy Services, LLC to Certain Questions in the April 7, 2008 Data Request to Rumford Paper Company for which CES Has Relevant Information at 8 (Apr. 25, 2008) (CES Data Response); RUMF000001-3 at 3.

electricity consumption was approximately 95 MW.<sup>30</sup> To meet its mill's energy requirements, Rumford used a combination of grid electricity purchases and its on-site generator, G4, with a nameplate capacity of 110 MW. Rumford relied primarily on G4 to serve its load given the prevailing 2007 fuel prices.<sup>31</sup> Due to the difficulties in starting up and shutting down, G4 ran continuously at least at a "level necessary to maintain essential mill operations."<sup>32</sup> Rumford sold excess electricity generated by G4 to the grid. Additional operation of the G4 generator depended on market prices and Rumford's cost to generate additional electricity from G4.<sup>33</sup>

15. In mid-2007, when CES approached Rumford about participating in the DALRP, CES and Rumford agreed that Rumford would claim 20-30 MW of demand response in the DALRP.<sup>34</sup> CES proposed that Rumford participate in the DALRP by lowering its G4 generation output during the initial five-day customer baseline establishment period, thereby increasing its grid electricity purchases.<sup>35</sup> Because Rumford's customer baseline would be established based on its metered consumption of grid electricity, purchasing additional grid electricity would increase its customer baseline even if its total mill load otherwise remained the same.<sup>36</sup> Dr. Silkman and Rumford expected that Rumford's increased purchases of electricity from the grid during the initial customer baseline period would cost Rumford approximately \$120,000, but Dr. Silkman informed Rumford that the higher grid energy purchase expenses could be earned back within one week of DALRP participation.<sup>37</sup> Once Rumford's customer baseline was established based on the

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<sup>30</sup> Show Cause Answer, CES Rule 1b.19 Response at 11-12 (CES 1b.19 Response).

<sup>31</sup> *Id.* at 12-13.

<sup>32</sup> *Id.* at 13.

<sup>33</sup> *Id.*

<sup>34</sup> Silkman Dep. 171-72.

<sup>35</sup> *Id.* 203:11-14; Alley Dep. 107-09, 126:2-6.

<sup>36</sup> *See* Alley Dep. 90-91, 107-08, 122-24.

<sup>37</sup> E-mail from Dr. Richard Silkman, Managing Member, Competitive Energy Services, LLC, to John Fuller, Production Manager, Rumford Paper Company, cc to Scott Alley, Utilities Superintendent, Rumford Paper Company, and Rick Abradi, Energy Manager, Rumford Paper Company (July 19, 2007 5:39 PM EDT) (July 19, 2007 E-mail).

increased grid electricity purchases, Rumford would participate in the DALRP by making load reduction bids at the minimum offer price at the time of \$50/MWh.<sup>38</sup>

16. Dr. Silkman further told Rumford personnel that, if Rumford's load reduction bids cleared each day Rumford participated in the DALRP, Rumford's customer baseline would not be adjusted from its customer baseline set during the initial customer baseline period. Therefore, once the initial customer baseline period ended, Rumford's initial customer baseline was established, and Rumford began submitting daily load reduction bids, Rumford would be able to receive payment for load reductions by simply resuming routine operation of the G4 generator without otherwise reducing its load.<sup>39</sup>

17. On behalf of Rumford, CES contacted Constellation to enroll Rumford in the DALRP. CES proposed using Constellation as its enrolling participant due to Constellation's size and good reputation in the New England Power Pool.<sup>40</sup> In July 2007, Rumford executed an agreement with Constellation to enroll Rumford in the DALRP.<sup>41</sup> During the enrollment process neither CES nor Rumford sought advice from Constellation or ISO-NE about their planned actions during the initial five-day customer baseline period for Rumford.<sup>42</sup> As part of enrollment, CES, with Rumford's consent, communicated to ISO-NE a demand response capability for Rumford of 20 MW.<sup>43</sup>

18. Rumford's initial five-day customer baseline ran on July 24, 25, 26, 27, and 30, 2007. Per the Load Response Program Manual, Rumford did not include July 28 and 29, 2007 in this initial customer baseline because these two days were non-business days.<sup>44</sup>

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<sup>38</sup> See Alley Dep. 143:13-16; Silkman Dep. 318:19-22 (conceding that it would have been a mistake if Rumford bid under the \$50/MWh minimum bid offer).

<sup>39</sup> See Alley Dep. 90-91, 119-20, 136, 139, 140-41, 145-46.

<sup>40</sup> See RUMF000001-3 at 2. The New England Power Pool is a voluntary association of market participants from the six New England States.

<sup>41</sup> Responses of Constellation NewEnergy, Inc. to [OE] Staff's April 7, 2008 Data Request at 10 (May 9, 2008).

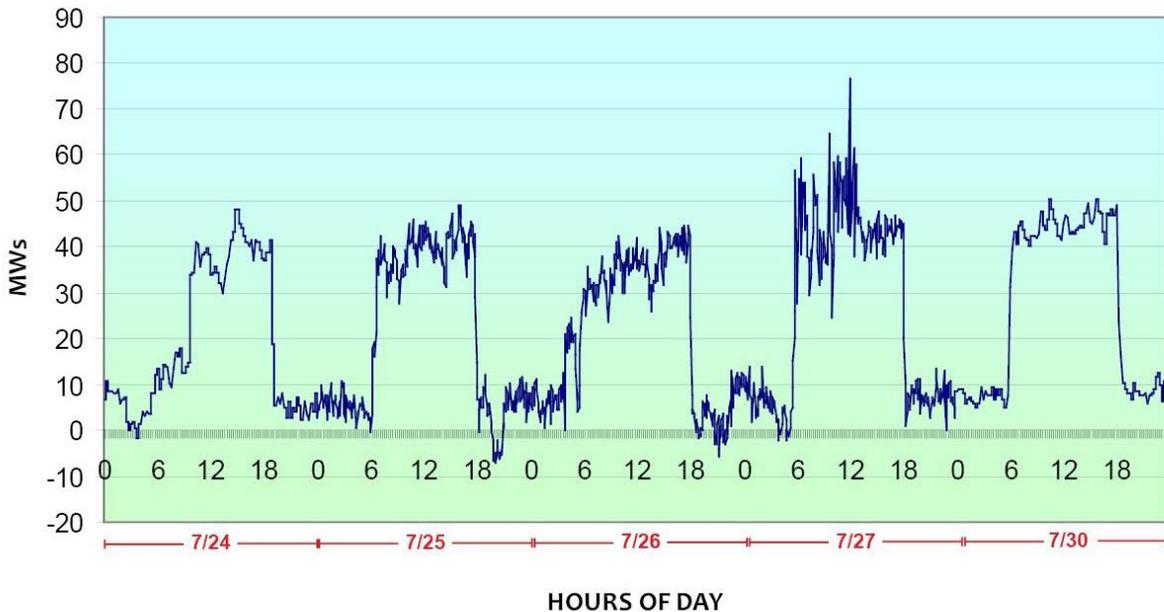
<sup>42</sup> See Silkman Dep. 190:10-16.

<sup>43</sup> CES Data Response at 3.

<sup>44</sup> See ISO-NE generated load profiles for Rumford Paper Company in July, August, and November 2007 and 5-minute interval energy data, ISO-NE April 22, 2008 Data Response.

Shortly before 7:00 AM each day of the initial customer baseline period, Rumford's metered consumption of grid energy increased to 30-45 MW, where it would stay until 6:00 PM, when it returned to approximately 5-10 MW.<sup>45</sup> The increase in Rumford's purchases of grid energy during these hours was attributable to Rumford instructing its personnel to curtail the G4 generator, increasing grid energy purchases from ISO-NE.<sup>46</sup>

19. ISO-NE used the metered load data reflected on the following chart to establish Rumford's initial customer baseline:



20. On almost every non-holiday weekday between July 31, 2007, and early February 2008, Rumford or CES on its behalf submitted DALRP load reduction offers for each DALRP program hour.<sup>47</sup> These offers were almost always submitted at the minimum DALRP offer price of \$50/MWh.<sup>48</sup> Rumford's offers of \$50/MWh almost

<sup>45</sup> *See id.*

<sup>46</sup> Response of Rumford Paper Company to the August 15, 2008 Second Data Requests to Rumford Paper Company at 25.

<sup>47</sup> *See* RUMF0000926-0000946 (spreadsheet providing Rumford's DALRP offer data).

<sup>48</sup> CES 1b.19 Response at 27.

always cleared during this period because they were lower than locational marginal prices during DALRP hours in this period.<sup>49</sup> Rumford earned DALRP revenues for each day it participated in the DALRP during this period. Because Rumford offered into the DALRP almost every weekday during this period and those offers almost always cleared, its customer baseline did not adjust significantly over time. The only situations where Rumford's bids did not clear were when CES inadvertently submitted an invalid offer, when Rumford expected to repair on-site equipment over the subsequent day, and when ISO-NE instructed Rumford to restore its customer baseline after a generator outage in November 2007.<sup>50</sup>

21. During the months of Rumford's participation in the DALRP, Rumford did not veer from its routine in order to provide demand response; Rumford neither increased its on-site generation to reduce its demand from the grid nor reduced its electricity consumption. CES acknowledges that it did not expect Rumford would reduce energy consumption as part of participation in the DALRP.<sup>51</sup> The following chart compares Rumford's actual grid consumption (the line on the bottom) to Rumford's established customer baseline (the line on the top) that was used by ISO-NE to calculate Rumford's load reduction for the purposes of DALRP compensation (shaded area between two lines during program hours) on July 31, 2007, Rumford's first day of DALRP participation:<sup>52</sup>

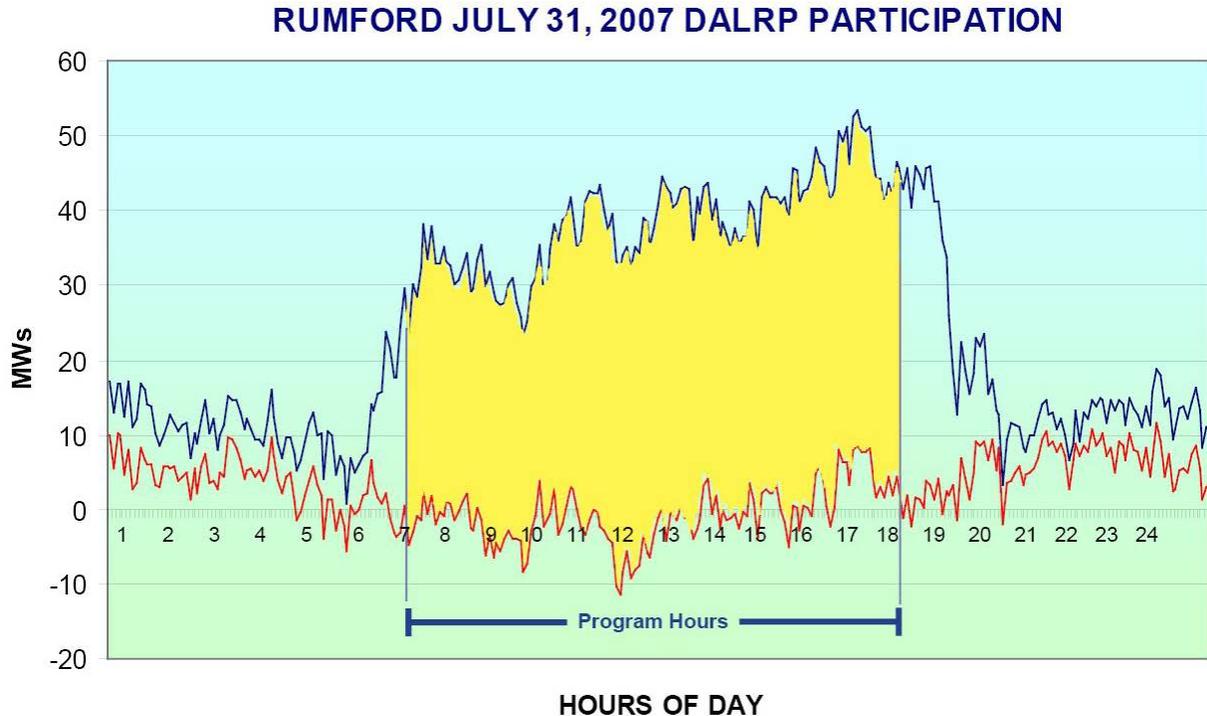
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<sup>49</sup> See OE Staff Report at 13; CES 1b.19 Response at 31-34.

<sup>50</sup> Silkman Dep. 316; CES 1b.19 Response at 28-31.

<sup>51</sup> Silkman Dep. 257:13-20.

<sup>52</sup> See December 7, 2011 ISO-NE Data Response.



22. ISO-NE paid Rumford \$36,193.37 for its demand response on July 31, 2007.<sup>53</sup> Rumford reflected comparable differences between its customer baseline and grid consumption on almost every other day of its DALRP participation. In total, ISO-NE paid \$3,336,964.63 for Rumford's participation in the DALRP between July 2007 and February 2008. Of that amount, Rumford received \$2,836,419.08, around 84.9 percent, and CES received \$166,841.13, around 4.9 percent.<sup>54</sup>

23. On September 13, 2007, during an unexpected outage of Rumford's G4 generator, CES and Rumford submitted a 1 MW load reduction bid for each hour of possible DALRP participation. Even with G4's outage, Rumford was paid \$33,238.36 for DALRP participation that day.<sup>55</sup>

24. In November 2007, CES sought advice from Constellation and ISO-NE on how to participate in the DALRP in light of another G4 outage. ISO-NE advised CES to reset

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<sup>53</sup> *Id.*

<sup>54</sup> *See* CNE0023813-18.

<sup>55</sup> December 7, 2011 ISO-NE Data Response.

Rumford's customer baseline to the levels established in July 2007.<sup>56</sup> Although neither ISO-NE nor Constellation criticized that customer baseline level, they also had no knowledge that Rumford and CES established the customer baseline through lower on-site generation and increased grid energy purchases.<sup>57</sup>

25. Except with regard to that November 2007 outage, Dr. Silkman, CES and Rumford never asked ISO-NE or Constellation whether Rumford's actions during the initial customer baseline measurement period or throughout its participation in the DALRP were proper. Dr. Silkman, CES and Rumford also did not tell Constellation or ISO-NE that Rumford had lowered its on-site generation and simultaneously purchased grid power during the customer baseline measurement period in late July 2007.<sup>58</sup> In January 2008, ISO-NE made a presentation notifying its stakeholders that it expected to make changes to the DALRP because several market participants had learned how to profit from intentionally establishing and then maintaining an inflated customer baseline. In this presentation, ISO-NE claimed that some market participants inflated their customer baselines by increasing consumption or lowering output of behind-the-meter generation when establishing their customer baselines and were paid for demand response without reducing load. In addition, ISO-NE indicated that ISO-NE intended to raise the minimum bid for DALRP participants, among other proposed actions.<sup>59</sup>

26. Dr. Silkman forwarded ISO-NE's January 2008 presentation to Rumford managers that same month. In his e-mail to these Rumford managers, Dr. Silkman emphasized that, should ISO-NE change its DALRP rules, "many" days would occur in which the DALRP clearing price does not exceed the minimum bid, which would therefore cause the customer baseline of a DALRP participant whose bid does not clear to adjust.<sup>60</sup>

27. In January 2008, CES also received a phone call from Constellation's Senior Vice-President, Peter Kelly-Detwiler, followed by a letter from Constellation to all of Constellation's DALRP customers. In these communications, Constellation explained its

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<sup>56</sup> Silkman Dep. 99-101, 420-24.

<sup>57</sup> See Richard Dep. 49:2-8, 76-80.

<sup>58</sup> Silkman Dep. 260:7-15, 266:15-21, 366:12-17.

<sup>59</sup> Henry Yoshimura, ISO New England, Day-Ahead Load Response Program (DALRP) Recommended Market Rule Changes PowerPoint Presentation at 3-4, 7-9, 15-17 (Jan. 23, 2008) (Yoshimura Presentation).

<sup>60</sup> RUMF0001495-97.

concerns that certain DALRP customers had increased their usage during the customer baseline establishment periods. Constellation also warned that ISO-NE could sanction a customer or its enrolling participant if ISO-NE determined that the customer committed “fraud to extract Load Response Program payments.”<sup>61</sup>

28. On February 5, 2008 ISO-NE proposed tariff revisions changing the minimum price that demand response resources can offer into the market.<sup>62</sup> As a result, the minimum bid jumped from \$50/MWh on February 8, 2008, to \$121/MWh on February 11, 2008.<sup>63</sup> On April 4, 2008, the Commission accepted ISO-NE’s DALRP changes, and announced that the Commission’s Office of Enforcement had begun a non-public investigation in February 2008 into whether any participants in the DALRP had violated the Commission’s rules.<sup>64</sup>

## **B. Determination of Violation**

### **1. Fraudulent Device, Scheme or Artifice**

#### **a. Show Cause Answer**

29. CES claims OE Staff’s entire support for CES’s participation in an alleged market manipulation scheme consists of a single piece of advice to Rumford on its customer baseline establishment, i.e., CES’s advice to Rumford described *supra* in PP 15-16, which CES asserts was neither fraudulent nor a scheme.<sup>65</sup> CES contends that while OE Staff’s allegation of an “inflated” customer baseline hinges on Rumford’s departure from a “normal” customer baseline, OE Staff fails to explain what a “normal” customer baseline would be for a facility such as Rumford, whose purchases from, and sales to, the

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<sup>61</sup> RUMF0001701-02 at 1-2; *see also* Silkman Dep. 385-92.

<sup>62</sup> *See ISO New England Inc.*, Filing of Changes to Day-Ahead Load Response Program, Docket No. ER08-538-000 (Feb. 5, 2008).

<sup>63</sup> CES Answer at 13.

<sup>64</sup> April 4, 2008 Order, 123 FERC ¶ 61,021 at P 50 n.49; *see also* September 11, 2008 Order, 124 FERC ¶ 61,235 at P 9.

<sup>65</sup> CES Answer at 2, 12.

grid fluctuate significantly from day-to-day and hour-to-hour.<sup>66</sup> CES maintains that, even if deemed erroneous after-the-fact, its advice to Rumford was not a fraudulent scheme.<sup>67</sup>

30. CES points to a lack of guidance on how Rumford's customer baseline should have been established and asserts its advice does not constitute fraud because it did not violate any ISO-NE or Commission rules, regulations, or DALRP program guidance.<sup>68</sup> CES claims no ISO-NE program documents "discuss, much less disallow, managing the level of behind-the-meter generation during the baseline period."<sup>69</sup> CES further claims that both ISO-NE and then-Commissioner Wellinghoff have recognized – in the context of correcting the flawed DALRP rules – that customer baseline methodologies are "complex" and "by no means intuitive."<sup>70</sup>

31. CES attributes any Rumford customer baseline errors to Constellation, Rumford's enrolling participant, who CES identifies as having settled other previous allegations of market manipulation.<sup>71</sup> CES states that Constellation submitted Rumford's daily DALRP bids and was the sole entity with responsibility and the ability to speak with ISO-NE on

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<sup>66</sup> *Id.* at 2-3, 6-7. In support, CES presents a graph displaying Rumford's purchases of electricity from, and sales to, the ISO-NE grid for 2007-2008, from which CES "def[ies] anyone to define Rumford's 'normal' baseline . . . ." *Id.* at 3; *see also* CES 1b.19 Response at 11-13 (describing Rumford's operation of its G4 generator and its link to fuel prices and other operating conditions).

<sup>67</sup> CES Answer at 2.

<sup>68</sup> *Id.* at 2, 6.

<sup>69</sup> CES 1b.19 Response at 17.

<sup>70</sup> *Id.* at 20-21 (citing April 4, 2008 Order, 123 FERC ¶ 61,021 at P 29; April 4, 2008 Order, 123 FERC ¶ 61,021 (Wellinghoff, Comm'r, concurring in part and dissenting in part)).

<sup>71</sup> CES Answer at 4, 12-14. We note the 2012 market manipulation settlement agreement referenced by CES involved Constellation Energy Commodities Group, Inc., an affiliate entity of Constellation NewEnergy, Inc., the entity which served as Rumford's enrolling participant. The Commission notes that the settlement in that proceeding did not involve any allegations involving Constellation NewEnergy, Inc. or of manipulation of the DALRP or any other demand response program. *See Constellation Energy Commodities Group, Inc.*, 138 FERC ¶ 61,168 (2012).

Rumford's behalf.<sup>72</sup> CES argues that Constellation, not CES, was in the best position to inform Rumford of the legitimacy of its customer baseline given Constellation's possession of both Rumford's prior metering data and – incident to its additional role as Rumford's power provider – Rumford's current power purchases.<sup>73</sup>

32. Absent any contrary guidance from ISO-NE or Constellation, CES asserts it was not fraud for CES to advise Rumford to set its customer baseline at a pre-determined level, considering one of Rumford's internal operating procedures. That procedure preceded Rumford's DALRP participation and called for different generating levels depending on the price of fuel and ISO-NE market prices, and in order to operate the mill safely. CES claims it designed its customer baseline advice "to make available to the [DALRP] only the electricity in excess of what was necessary to operate [Rumford's] mill" if directed by ISO-NE to shed load to participate in the DALRP.<sup>74</sup>

33. CES also disputes OE Staff's view that its advice resulted in Rumford being paid for "doing nothing."<sup>75</sup> CES claims Rumford was "paid for offering capacity and lower priced energy to the grid" and "for reducing the amount of electricity it purchased from the grid the day after its bids cleared."<sup>76</sup> CES asserts that Rumford met these requirements even if Rumford did not have to change the G4 generator's operating level, and that other programs similarly provide legitimate payments to entities for doing what they already were doing.<sup>77</sup>

34. CES further argues that any flaws in its advice regarding setting Rumford's customer baseline were attributable to fundamental flaws in ISO-NE's DALRP program, not fraud. In support, CES notes that OE Staff concedes that submitting unchanging

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<sup>72</sup> CES Answer at 12-14.

<sup>73</sup> *Id.* at 12-13.

<sup>74</sup> *Id.* at 7; *see also* CES 1b.19 Response at 21-23.

<sup>75</sup> CES Answer at 10.

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

<sup>77</sup> For example, CES notes that nuclear power plants will operate regardless of whether they receive capacity payments and that hydroelectric plants receive market clearing prices for electricity the plants would still generate if market prices were lower. *Id.*

minimum bids would not alone constitute market manipulation.<sup>78</sup> CES reasons that had the program “not been fatally flawed due to the static minimum bid price,” Rumford’s customer baseline would have adjusted.<sup>79</sup> CES further notes the Commission modified the DALRP in 2008 to eliminate the unchanging minimum bid price that produced static customer baselines.<sup>80</sup>

35. CES also asserts that its advice to Rumford is not fraud because that advice did not deceive Constellation or ISO-NE. CES claims that Constellation knew or should have known Rumford’s generating capabilities and electricity purchases, and thus Constellation cannot claim it was unaware of Rumford’s customer baseline period generator curtailments.<sup>81</sup> Moreover, CES claims Dr. Silkman explained to Constellation exactly how CES advised Rumford to set its customer baseline on at least three occasions before and after Rumford’s enrollment in the DALRP.<sup>82</sup> CES also claims it did not deceive ISO-NE because ISO-NE, like Constellation, had the metering data regarding Rumford’s energy usage.<sup>83</sup> CES further claims ISO-NE endorsed CES’s customer baseline advice during a November 2007 outage by advising Constellation that Rumford should reset its customer baseline to its initial customer baseline period level.<sup>84</sup>

**b. OE Staff Report and Reply**

36. OE Staff argues that CES does not dispute the material facts of its conduct, only whether CES’s conduct constitutes fraud.<sup>85</sup> OE Staff claims that CES and Rumford engaged in a scheme that misrepresented to ISO-NE “Rumford’s typical load and willingness and ability to reduce load” and resulted in compensation to CES and

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<sup>78</sup> *Id.* at 10 (citing OE Staff Report at 21 n.103).

<sup>79</sup> *Id.* at 8, 11.

<sup>80</sup> *Id.* at 2, 11 (citing September 11, 2008 Order, 124 FERC ¶ 61,235 at PP 5, 8; April 4, 2008 Order, 123 FERC ¶ 61,021 at P 25).

<sup>81</sup> CES 1b.19 Response at 15; CES Answer at 17.

<sup>82</sup> CES 1b.19 Response at 24.

<sup>83</sup> CES Answer at 17.

<sup>84</sup> *Id.*; *see also* CES 1b.19 Response at 29-30.

<sup>85</sup> OE Staff Reply at 1.

Rumford for DALRP load reductions that Rumford and CES knew would never occur.<sup>86</sup> OE Staff claims that by curtailing generation and buying more grid electricity during the initial customer baseline period, “CES and Rumford established and communicated to ISO-NE an inflated baseline that did not reflect Rumford’s genuine load response capability.”<sup>87</sup> OE Staff further claims that CES perpetuated that fraud by submitting daily DALRP offers to reduce load and falsely communicating a willingness and an ability to reduce load. According to OE Staff, this communication was false because both CES and Rumford understood Rumford, because of its customer baseline inflation, would not, and did not intend to, reduce load as a result of its DALRP participation.<sup>88</sup> OE Staff states that, as part of this scheme, CES submitted to ISO-NE a demand response registration that falsely claimed Rumford’s capability to reduce its load by 20 MW.<sup>89</sup> OE Staff claims CES and Rumford perpetuated their scheme to maintain an inflated customer baseline by submitting daily DALRP offers at the minimum price, knowing this likely would freeze the customer baseline.<sup>90</sup> OE Staff asserts these actions defrauded ISO-NE and New England rate payers because the cost of demand response is socialized across all Network Load.<sup>91</sup>

37. OE Staff rejects as meritless CES’s claim that Rumford had to “set” its customer baseline at some level. OE Staff maintains that setting a customer baseline at an artificial quantity is inconsistent with the DALRP requirement that actual load be used for customer baseline calculations.<sup>92</sup> OE Staff claims that had Rumford “not participated in the DALRP using CES’s scheme, it would have run the G4 generator during the baseline [period] rather than purchase large quantities of energy.”<sup>93</sup> OE Staff states that Rumford’s uneconomic energy purchases were abnormal and intended to increase later DALRP payments that Rumford and CES would not have been able to obtain without

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<sup>86</sup> OE Staff Report at 15.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 15-16.

<sup>89</sup> *Id.* at 15.

<sup>90</sup> *Id.* at 16.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 18.

<sup>93</sup> OE Staff Reply at 4.

Rumford's inflated customer baseline.<sup>94</sup> OE Staff argues that it is implausible that Dr. Silkman or CES believed that legitimate participation by an industrial demand response participant required \$120,000 in uneconomic energy purchases by the customer during the initial customer baseline period.<sup>95</sup> OE Staff also notes there is no contemporary evidence that CES actually interpreted the DALRP rules to require the setting of an artificial customer baseline.<sup>96</sup>

38. OE Staff rejects CES's argument that the DALRP's complexity excuses CES's conduct. OE Staff claims CES misstates the complexity of the DALRP customer baseline-setting process, which initially calculates a customer baseline using a participant's actual load in each of the program hours for five days.<sup>97</sup> OE Staff claims there is no evidence that CES misunderstood the process and states that CES's conduct results not from confusion or mistake but rather represents deliberate, calculated fraud.<sup>98</sup>

39. OE Staff further rejects CES's argument that the DALRP was a flawed program that routinely produced static customer baselines. OE Staff argues that CES engaged in fraud by inflating Rumford's customer baseline to allow CES and Rumford to receive demand response payments without providing any load reduction.<sup>99</sup>

40. OE Staff rejects CES's argument that Rumford provided value for its DALRP payments by offering capacity and lower priced energy to the grid. OE Staff argues Rumford's DALRP participation provided no value because, as Rumford acknowledges, the only time it changed its operations to participate in the DALRP was when it curtailed on-site generation during the initial customer baseline period.<sup>100</sup> Moreover, OE Staff argues the DALRP was an energy program that compensated participants for *actual*

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<sup>94</sup> *Id.* at 4-5.

<sup>95</sup> OE Staff Report at 18-19.

<sup>96</sup> *Id.* at 19.

<sup>97</sup> *Id.* at 20.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 20-21 & n.103.

<sup>100</sup> OE Staff Reply at 7 (citing Answer of Rumford Paper Company, Docket No. IN12-10-000, at 8 (Sept. 14, 2012) ("Rumford did not change its behavior when it began participating in the DALRP.")).

reductions in grid energy used (as measured against a legitimately established customer baseline), and not, as CES suggests, a capacity program that compensated participants for agreeing to be prepared to provide energy or load reduction when called upon.<sup>101</sup> OE Staff contends that CES, as an energy services company, understood this fundamental difference, and OE Staff characterizes CES's argument as an after-the-fact justification for its fraud.<sup>102</sup>

41. OE Staff rejects CES's argument that Constellation had primary responsibility for DALRP customer baseline guidance and was in the best position to inform Rumford of the legitimacy of its customer baseline. OE Staff claims there is no credible written or oral evidence that CES (or anyone else) told Constellation about the scheme or, specifically, how Rumford curtailed generation during the customer baseline period.<sup>103</sup> OE Staff states that Constellation's actions are not at issue in this proceeding and such actions do "not exonerate CES for conceiving of and implementing its own fraudulent scheme."<sup>104</sup> OE Staff further claims that a settlement involving an affiliate of Constellation in an unrelated enforcement action is irrelevant to CES's fraud here.<sup>105</sup>

42. OE Staff rejects CES's argument that CES did not deceive ISO-NE because ISO-NE later endorsed CES's customer baseline advice in connection with an outage of Rumford's generation. OE Staff claims that ISO-NE's request that Rumford reinstate a customer baseline -- that ISO-NE believed was legitimate -- following an outage does not mean that ISO-NE knew about or condoned CES's fraudulent scheme to create an artificial customer baseline.<sup>106</sup>

**c. Commission Determination**

43. We find that CES's conduct constitutes a fraudulent scheme or artifice, in violation of section 1c.2 of the Commission's regulations. The Commission has defined fraud in the context of section 1c.2 as including fraud's definition under the common law,

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<sup>101</sup> *Id.* at 7-8.

<sup>102</sup> *Id.* at 8.

<sup>103</sup> OE Staff Report at 21-22.

<sup>104</sup> OE Staff Reply at 11.

<sup>105</sup> *Id.*

<sup>106</sup> OE Staff Report at 26; OE Staff Reply at 8-9.

i.e., any false statement, misrepresentation, or deceit. Fraud under section 1c.2 also includes “any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.”<sup>107</sup> Fraud is a question of fact to be determined by all the circumstances of a case.<sup>108</sup> CES devised and implemented a scheme to inflate Rumford’s customer baseline and thereby permit Rumford<sup>109</sup> and CES to be paid for demand response that Rumford never intended to provide or actually provided. CES, based on the scheme devised by Dr. Silkman, submitted to ISO-NE demand response registration information falsely claiming that Rumford had capability to reduce its load by up to 20 MW even though CES knew that under the scheme it designed Rumford would be paid only for demand reduction reflected in its artificially inflated customer baseline.<sup>110</sup> Before the initial customer baseline period, Rumford routinely used its G4 generator to meet at least a portion of its on-site electricity needs.<sup>111</sup> Under this scheme, for the DALRP program hours (7:00 AM to 6:00 PM) during the five-day initial customer baseline period (July 24, 25, 26, 27, and 30, 2007), CES instructed Rumford to intentionally reduce its G4 generator’s operating level by 30-40 MW from the level at which it otherwise would have operated given the prevailing fuel and energy prices and mill energy requirements.<sup>112</sup> That departure from Rumford’s routine generating operating practices increased the amount of mill load served by energy from the grid and

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<sup>107</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50 & n.103 (referencing *Dennis v. U.S.*, 384 U.S. 855, 861 (1966)).

<sup>108</sup> *Id.* P 50.

<sup>109</sup> The Commission notes that this order and all determinations contained herein should be read to address only the conduct of CES, and not Rumford. Although our discussion of CES’s conduct with respect to the DALRP necessarily includes conduct by Rumford, we make no findings of fact or law in this order with respect to Rumford’s conduct. Rumford’s alleged violation of the Anti-Manipulation Rule was resolved in a Stipulation and Consent Agreement with OE Staff, which the Commission approved on March 22, 2013. *Rumford Paper Co.*, 142 FERC ¶ 61,218 (2013).

<sup>110</sup> See CES Data Response at 9; Alley Dep. 90-91 and 119-20.

<sup>111</sup> CES 1b.19 Response at 11-12.

<sup>112</sup> See Silkman Dep. 203:11-14; Alley Dep. 109; ISO-NE generated load profiles for Rumford Paper Company in July, August, and November 2007 and 5-minute interval energy data, ISO-NE April 22, 2008 Data Response; Response of Rumford Paper Company to the August 15, 2008 Second Data Requests to Rumford Paper Company at 25.

cost Rumford approximately \$120,000 over the five days in question.<sup>113</sup> Curtailing the G4 generator in those hours – and only those hours – was uneconomic given Rumford’s ability and established practice of generating electricity from its G4 generator at lower cost.<sup>114</sup> Therefore, we find that it served no legitimate purpose, but rather ensured the customer baseline did not reflect Rumford’s normal daily consumption pattern for energy taken from the grid.

44. This conduct created, and fraudulently communicated to ISO-NE, a higher, false customer baseline in those DALRP participation hours. After the initial five-day baseline period, Rumford resumed routine operation of its G4 generation during the hours of 7:00 AM to 6:00 PM.<sup>115</sup> Because of its inflated customer baseline, Rumford portrayed a reduction from its inflated baseline simply by resuming routine use of its G4 generator (which displaces energy taken from the grid) and thus enabled Rumford and CES to receive DALRP payments (calculated based on the difference between this elevated customer baseline and Rumford’s metered energy taken from the grid) without Rumford having to alter its routine to provide any actual demand response.

45. We find that CES’s advice to Rumford and CES’s role in implementing that advice perpetuated Rumford’s inflated customer baseline. CES knowingly and fraudulently exploited a DALRP provision that prevented a customer’s baseline from adjusting on days when ISO-NE accepted its offer to provide demand response. CES and Rumford made daily minimum DALRP offers knowing there was a high likelihood they would clear each day so that Rumford’s customer baseline would not adjust, thereby continuing the fraudulent payments for demand response Rumford provided through its inflated customer baseline.<sup>116</sup>

46. We find that CES’s actions with respect to the DALRP defrauded ISO-NE at the expense of all ratepayers in the ISO-NE footprint. CES’s scheme caused electricity consumers in ISO-NE’s footprint to pay \$3,336,964.63 for demand response that never occurred, of which CES received \$166,841.13.<sup>117</sup>

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<sup>113</sup> See July 19, 2007 E-mail.

<sup>114</sup> See Alley Dep. 124-25.

<sup>115</sup> Silkman Dep. 257:13-20; Alley Dep. 140-41, 151.

<sup>116</sup> See Alley Dep. 90-91 and 119-20.

<sup>117</sup> See CNE0023813-18.

47. CES claims that complexities of the DALRP excuse its conduct; however, record evidence does not reflect that CES misunderstood or was confused about the baseline procedure. To that end, no express prohibition on curtailing on-site generation during the initial customer baseline period in order to create a higher baseline was necessary. The DALRP process for calculating a customer baseline was straightforward. That process required no customer action other than to operate the customer's facilities as it routinely would. Although CES claims ISO-NE and the Commission recognized the complexity of customer baseline methodologies in the 2008 DALRP modification orders, those references were to ISO-NE difficulties in designing accurate customer baseline methodologies ISO-wide, not to setting the baseline for particular customers.<sup>118</sup>

48. Furthermore, even assuming, *arguendo*, that certain features of the DALRP such as the minimum offer price left the DALRP vulnerable to certain manipulation, that does not excuse the manipulation itself. CES would not have benefitted to the extent it did without instructing Rumford to establish and to maintain an artificially high customer baseline. CES's scheme was not an inevitable result of the DALRP's structure at the time.

49. While CES assails the OE Staff Report as faulting CES for advising Rumford to deviate from "normal operations" during the initial customer baseline period without referencing how or where that term is defined, that argument is merely one of semantics and is unpersuasive. CES's advice to Rumford, and its ultimate compensation for that advice, was premised on an acknowledged and unprecedented departure from Rumford's routine practices. Rumford curtailed its G4 generator and increased purchases of grid electricity only during the hours of DALRP participation during the initial customer baseline period. This departure, as well as continuously submitting daily minimum bids for DALRP participation in order to freeze Rumford's customer baseline when CES knew that Rumford did not intend to change its operations on days the bids cleared, demonstrates CES's fraudulent actions.

50. We also reject CES's arguments that a finding of fraud must be premised on the violation of a tariff, rule or regulation. An entity need not violate a tariff, rule or

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<sup>118</sup> See April 4, 2008 Order, 123 FERC ¶ 61,266 at P 29 ("ISO-NE notes that Customer Baseline methodologies for demand response programs are complex, and that changes that could address the instant problem are by no means intuitive. Accordingly, ISO-NE maintains that changing the Customer Baseline methodology would not be a simple undertaking, and could consume from several months to more than a year to research, design, discuss, approve and implement such changes.").

regulation to commit fraud.<sup>119</sup> Nor does a finding of fraud require advance notice specifically prohibiting the conduct concerned. Fraud is a matter of fact and requires evaluation of all the facts and circumstances of each case.<sup>120</sup> The Commission need not imagine and specifically proscribe in advance every example of fraudulent behavior. We find CES's fraudulent conduct violates section 1c.2 regardless of whether it violates a specific tariff provision.

51. We further find disingenuous CES's claimed ignorance that legitimate DALRP participation entailed a reduction in load from a legitimately established customer baseline, given that it is an energy consulting company whose expertise entailed that exact task: advising clients on how to properly participate in energy-related programs such as the DALRP. While CES cherry-picks various statements in prior Commission orders in an attempt to support its assertion that the DALRP was too complex to decipher, the Commission has clearly described the basic principle relevant here: In 2002, the Commission approved ISO-NE's proposed program involving demand response, describing it as a program that "would offer an additional financial benefit to customers for *reducing* their loads – a payment for the amount of the reduced load."<sup>121</sup>

52. As to CES's view that Rumford provided value and appropriately received DALRP payments for offering capacity and lower priced energy to the grid and for reducing its electricity purchases, the DALRP was an energy market program, not a capacity program. Participants were compensated for their *actual* load reductions from their legitimately established customer baselines during the hours in which payment was provided. To be entitled to payment for participating in the DALRP, an entity needed to actually reduce its load from its legitimately established customer baseline during the hours for which DALRP bids were accepted, not increase its load taken from the grid during the customer baseline setting period and subsequently resume its routine course of

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<sup>119</sup> See Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 25 (noting that the Commission's rules against market manipulation apply to "all forms of fraud and manipulation that affect . . . electric energy transactions and activities the Commission is charged with protecting"); see also *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 the circumstances of a case, not by a mechanical rule limiting manipulation to tariff violations" (footnote omitted)).

<sup>120</sup> See Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

<sup>121</sup> *New England Power Pool & ISO New England, Inc.*, 101 FERC ¶ 61,344, P 38 (2002) (emphasis added).

operations. Rumford itself acknowledged, acting pursuant to the scheme designed by CES, it did not change its behavior or reduce its load taken from the grid when it began participating in the DALRP even though ISO-NE was accepting daily bids for Rumford to provide load reduction. Accordingly, CES is not entitled to payment it received for its role in Rumford's fraudulent DALRP participation.<sup>122</sup>

53. CES's allegations against Constellation are also irrelevant to this proceeding. As noted above, a prior enforcement proceeding involving a Constellation affiliate is irrelevant here. In any case, CES's attempt to blame Constellation for CES's own fraudulent conduct is also unpersuasive given CES's failure to instruct Rumford to change its conduct in the DALRP after CES in early 2008 received two communications from Constellation warning that such conduct was improper.

54. We further reject CES's argument that CES's conduct did not deceive ISO-NE or Constellation because both had access to Rumford's meter data. Having such access does not mean they were aware of CES's advice or condoned it. There is no evidence ISO-NE was aware that Rumford's initial customer baseline was fraudulently set, and, given that lack of awareness, ISO-NE's instruction to reset that customer baseline cannot properly be viewed as an endorsement of CES's advice. CES did not seek advice or assistance from Constellation or ISO-NE relevant to setting its customer baseline, and, as stated above, an express warning against engaging in certain behavior (whether before or after the fact) is not a prerequisite to finding that the subject behavior constitutes fraud.

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<sup>122</sup> Consistent with *Lincoln Paper & Tissue LLC*, 144 FERC ¶ 61,162 (2013) we also reject any argument that CES's advice that Rumford turn off its on-site generator during the initial customer baseline period subsequently was validated by Order No. 745, Order No. 745-A, or orders addressing ISO and regional transmission organization compliance filings to Order No. 745. See *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322 (2011), *order on reh'g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011). Those orders were issued subsequent to the relevant period here and apply prospectively, not retroactively. In any case, Order No. 745 and its progeny did not categorically characterize use of behind-the-meter generation as demand response for any purpose, be it compensation or establishing customer baselines. See Order No. 745-A, 137 FERC ¶ 61,215 at P 66; *ISO New England, Inc.*, 138 FERC ¶ 61,042, at P 76, *order on reh'g*, 139 FERC ¶ 61,116, at P 10 (2012). In fact, the Commission has rejected calls for standardized treatment of behind-the-meter generation for either purpose, while noting that "demand reductions that are not genuine may be violations of the Commission's anti-manipulation rules." Order No. 745, FERC Stats. & Regs. ¶ 31,322 at P 95; Order No. 745-A, 137 FERC ¶ 61,215 at P 66 & n.123; *ISO New England, Inc.*, 139 FERC ¶ 61,116 at P 20 n.26.

## 2. Scienter

### a. Show Cause Answer

55. CES argues that it based its advice on a good faith interpretation of ISO-NE rules, as demonstrated by its advice to Rumford during outages in September 2007 and November 2007 to submit minimum bids to keep its customer baseline from adjusting, thereby reducing the amount of money Rumford received from the DALRP.<sup>123</sup> CES further claims Constellation and ISO-NE endorsed its advice. As discussed above, CES claims Constellation knew how Dr. Silkman advised Rumford to set its customer baseline, and that ISO-NE also endorsed his approach during the November 2007 outage.<sup>124</sup>

56. CES rejects OE Staff's conclusion that CES had a "scheme" to inflate Rumford's customer baseline due to CES's and Dr. Silkman's alleged knowledge that Rumford's bids would clear every day and thereby maintain a static customer baseline.<sup>125</sup> CES asserts it was unable "to predict the future price of electricity" and that CES and Dr. Silkman "repeatedly told Rumford that Rumford would be expected to operate at its baseline level whenever its bids were not accepted."<sup>126</sup> CES argues OE Staff mischaracterizes the facts in claiming that CES and Dr. Silkman informed Rumford its customer baseline would never change to reflect actual generation or the mill's energy usage.<sup>127</sup> Instead, CES claims Rumford's managers believed the customer baseline could change.<sup>128</sup> CES notes that at no point did Rumford, Constellation or ISO-NE question the legitimacy of CES's customer baseline setting and bidding advice.<sup>129</sup>

57. CES disputes OE Staff's claim that CES's failure to act in response to an early 2008 letter from Constellation about customers increasing electricity usage during initial

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<sup>123</sup> CES Answer at 15-16; CES 1b.19 Response at 58-63.

<sup>124</sup> CES Answer at 13, 17.

<sup>125</sup> *Id.* at 8.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 8-9.

<sup>129</sup> *Id.* at 10.

customer baseline periods shows that CES had “improper intentions.”<sup>130</sup> CES states Constellation sent the letter to all of its customers and that Constellation told CES and Rumford that it was not specific to Rumford.<sup>131</sup>

**b. OE Staff Report and Reply**

58. OE Staff reiterates the allegations set forth in its report that CES intentionally devised a scheme in connection with Rumford’s participation in the DALRP. OE Staff rejects CES’s argument that its advice to Rumford during two outages proves that CES acted in good faith. OE Staff notes that Rumford was actually paid more than average for its DALRP participation during the September 2007 outage.<sup>132</sup> OE Staff claims, as discussed above, that ISO-NE’s November 2007 advice to Constellation that Rumford should reset its customer baseline to its original stated level does not disprove CES’s fraud or justify its behavior, given that ISO-NE did not know that Rumford’s initial customer baseline was inflated.<sup>133</sup>

59. OE Staff claims that, in multiple instances, Rumford personnel questioned CES regarding the legitimacy of the DALRP.<sup>134</sup> OE Staff states that Dr. Silkman admitted in his deposition that Rumford expressed concerns about the meaning and interpretation of the Load Response Program Manual. OE Staff states that Dr. Silkman acknowledged Rumford management told him it appeared Rumford would be paid for doing nothing.<sup>135</sup> OE Staff posits that, while CES does not dispute that it proposed that Rumford curtail its G4 generator during the initial customer baseline period,<sup>136</sup> contemporary written documents produced by CES regarding Rumford’s DALRP participation make no

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<sup>130</sup> *Id.* at 16.

<sup>131</sup> *Id.*; CES 1b.19 Response at 43-45.

<sup>132</sup> OE Staff Report at 25-26.

<sup>133</sup> *Id.* at 26; OE Staff Reply at 8-9.

<sup>134</sup> OE Staff Report at 9.

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

<sup>136</sup> *Id.* at 8-9.

mention of that proposal, even though this was a key aspect of Rumford's participation.<sup>137</sup>

60. OE Staff also argues that CES's inaction in response to warnings from Constellation is inconsistent with its claim that it acted in good faith.<sup>138</sup> OE Staff claims CES ignored two Constellation communications in January 2008 warning of the impropriety of CES's DALRP strategy. OE Staff also notes that Dr. Silkman received an ISO-NE PowerPoint which described CES's scheme precisely, noting that "several Market Participants appear to have figured out how to benefit from the creation and maintenance of a static [customer baseline]" by "intentionally inflating their [customer baseline]."<sup>139</sup> OE Staff argues this PowerPoint should have caused CES to advise Rumford to cease the scheme, and that Constellation's letter should have further troubled CES.<sup>140</sup>

**c. Commission Determination**

61. We find that CES had the requisite scienter when it engaged in a fraudulent scheme or artifice. Scienter is the second element of 18 C.F.R. § 1c.2.<sup>141</sup> For purposes of establishing scienter, Order No. 670 requires reckless, knowing, or intentional actions taken in conjunction with a fraudulent scheme or artifice.<sup>142</sup> As we described above, CES intentionally advised Rumford to curtail its generator during the initial customer baseline setting period and to submit demand response bids almost every hour of every day during Rumford's participation in the DALRP. CES intentionally assisted in submitting these bids to Constellation to enable Rumford to participate in the DALRP. This advice and these bids resulted in Rumford's purchasing approximately \$120,000 of grid electricity at ISO-NE market-prices rather than generating that energy using its G4

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<sup>137</sup> The Commission assumes that the implication is that, if CES sincerely believed the DALRP actually allowed curtailment of Rumford's on-site generation during the baseline measurement period, then it might have included that advice among other contemporary written guidance to Rumford.

<sup>138</sup> OE Staff Reply at 9-10.

<sup>139</sup> OE Staff Reply at 9 (citing Yoshimura Presentation at 9).

<sup>140</sup> *Id.* at 9-10.

<sup>141</sup> Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

<sup>142</sup> *Id.* PP 52-53.

generator at a lower cost, per its routine practice. CES understood that Rumford would not change its operations to provide demand response for hours that its DALRP bids were accepted.<sup>143</sup> CES does not dispute that it intentionally provided this advice and submitted these bids on behalf of Rumford. The record reflects no reason for this conduct other than to inflate Rumford's customer baseline so that CES and Rumford could receive DALRP payments without having to reduce Rumford's load taken from the grid during hours the relevant bids were accepted. As stated, we find that CES understood the purpose of the customer baseline and how ISO-NE would calculate it for Rumford. CES thus recognized – and intended – that curtailing the G4 generator during the initial customer baseline period would artificially inflate its customer baseline and thereby allow Rumford to be paid for future DALRP participation without actually reducing load.

62. We reject CES's claim that its instructions to Rumford on establishing its customer baseline were founded on a pre-existing Rumford directive concerning how to operate its G4 generator at various fuel prices. Nor do we find convincing contemporaneous evidence that CES's instruction to Rumford regarding curtailment of the G4 generator during the initial five-day customer baseline period was based on Rumford's stated operational concerns. Instead, the record indicates that Rumford routinely operated its generator to meet its operational needs. During the initial customer baseline period, Rumford curtailed its G4 generator and purchased energy from the grid, even though it was uneconomic to do so. We find that Rumford would not have curtailed its G4 generator during the initial customer baseline period but for Dr. Silkman's advice. This demonstrates that CES was motivated to increase its own DALRP payments received for Rumford's participation in the DALRP and not, as it claims, to ensure that Rumford's customer baseline was established at a level low enough to enable Rumford to shed load safely.

63. CES's requisite scienter is further supported by its understanding of the role the DALRP customer baseline would play in compensating Rumford and CES for CES's scheme. CES intentionally advised Rumford to take more grid energy during the initial customer baseline period, even though it was more costly than operating Rumford's G4 generator, because CES knew that those one-time additional expenses would be recouped quickly through future demand response payments. Further, there is no record evidence demonstrating that CES's ongoing instruction to Rumford to submit uniform minimum \$50/MWh demand response offers is attributable to anything other than an attempt to freeze Rumford's customer baseline, thereby ensuring continued payments for non-existent demand response.

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<sup>143</sup> Silkman Dep. 257:13-20; Alley Dep. 119-20.

64. We reject CES's view that its actions during two Rumford outages in the fall of 2007 prove that it acted in good faith with respect to its DALRP conduct as a whole. As detailed above, CES's fraudulent conduct began when it devised and implemented a scheme. This scheme involved CES and Rumford communicating to ISO-NE a capability of Rumford to reduce its load by 20 MW, setting an artificially high customer baseline, making uniform offers every day of Rumford's participation in the DALRP at the minimum price, and obtaining DALRP payments without providing any actual load reduction not attributable to the artificially inflated customer baseline. CES's actions during the two outages do not detract from or contradict the fraudulent scheme or show that CES acted in good faith. And even if CES were correct that it could have at times advised Rumford to act in ways to obtain even larger demand response payments without reducing its load, CES's failure to do so does not legitimize the scheme it chose to implement, both before and after those outages.<sup>144</sup> In any case, as OE Staff notes, Rumford received a larger DALRP payment than average during the September 2007 outage.

65. We agree with OE Staff that CES's inaction in response to Constellation's warnings regarding potential improper customer baseline inflation are inconsistent with CES's claim that it acted in good faith. CES received two communications from Constellation in January 2008 that reasonably should have alerted CES that Rumford's DALRP participation, and thus CES's conduct, was potentially improper. One of these communications was a letter from Constellation to its DALRP customers, expressing concerns that some DALRP customers might have been inflating their customer baselines and submitting DALRP bids that reflected normal usage rather than load reduction. 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."<sup>145</sup> The other communication was an ISO-NE PowerPoint presentation relaying similar concerns and referencing the possibility that such behavior

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<sup>144</sup> As a general matter, we note that there are myriad reasons an entity engaging in fraud or market manipulation would not maximize its unjust profits at every opportunity. For example, an entity might seek to reduce the likelihood for discovery of its fraudulent or manipulative conduct. Thus, an entity's decision to forego possible additional unjust profits does not prove that the entity acted in good faith. Rather, as we stated in Order No. 670, "[f]raud is a question of fact that is to be determined by all the circumstances of a case." Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

<sup>145</sup> RUMF0001701-02 at 1.

constituted fraud. These two communications should have at the very least given CES concern about the continued validity of its advice for setting Rumford's customer baseline. This is particularly true, given CES's current argument that Constellation and ISO-NE had each previously endorsed CES's customer baseline advice and our finding that these communications conflict with that purported belief. However, there is no record evidence that CES ever contacted anyone at ISO-NE or Constellation to discuss the validity of its advice to Rumford. CES continued to submit bids and to accept payments resulting from Rumford's inflated customer baseline after CES received these communications. We thus agree with OE Staff that CES's actions are inconsistent with a finding that CES acted in good faith.

66. Although CES takes issue with OE Staff's claim that Dr. Silkman told Rumford managers that Rumford's offers would clear *every* day, thus ensuring the customer baseline would remain static, we do not find CES's degree of confidence as to whether Rumford's bids would clear every day to be relevant to our determination that CES engaged in fraudulent conduct. Whether or not CES knew with absolute certainty that Rumford's daily bids at the minimum \$50/MWh offer price always would clear or advised Rumford that they always would clear, CES knew given market prices in ISO-NE that there was a high likelihood Rumford's bids would clear each day and thereby perpetuate Rumford's inflated customer baseline.<sup>146</sup>

### 3. In Connection with a Jurisdictional Transaction

#### a. Show Cause Answer

67. CES argues that the Commission does not have jurisdiction over *all* participants in the wholesale electric power industry and here has no jurisdiction over CES in its role as an "advisor."<sup>147</sup> CES maintains that three U.S. Supreme Court cases exempt advisors from the securities fraud rule upon which the Commission's Anti-Manipulation Rule is based and that such cases preclude the Commission from asserting jurisdiction over CES.<sup>148</sup>

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<sup>146</sup> See Alley Dep. 90-91 and 119-20.

<sup>147</sup> CES Answer at 15; CES 1b.19 Response at 64 (citing *Automated Power Exch., Inc. v. FERC*, 204 F.3d 1144, 1153 (D.C. Cir. 2000)).

<sup>148</sup> CES Answer at 15; CES 1b.19 Response at 46-51 (citing *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)).

68. Comparing section 1c.2 of the Commission’s regulations to Rule 10b-5 of the Securities and Exchange Commission’s (SEC) regulations,<sup>149</sup> CES explains that in *Central Bank of Denver*, the Supreme Court held that under section 10(b) of the Securities Exchange Act, claims for aiding and abetting are not a primary violation of that Act.<sup>150</sup> CES explains that in *Stoneridge Investment Partners*, “the Supreme Court expanded on *Central Bank [of Denver]* and held that a company which did not make any public misstatement or violate a duty to disclose, but did participate in a fraudulent scheme, could not be sued in a private lawsuit under Section 10(b).”<sup>151</sup> CES explains that in *Janus Capital Group*, the Supreme Court held that an investment advisor could not be sued under section 10(b) for false statements made by the investment fund.<sup>152</sup>

**b. OE Staff Report and Reply**

69. OE Staff argues that CES was not merely an aider and abettor to Rumford’s fraud but, rather, itself committed fraud.<sup>153</sup> OE Staff states that CES, through Dr. Silkman, “conceived of the scheme, helped to implement it, repeatedly provided false information to ISO-NE . . . [, and] directly benefitted from the scheme.”<sup>154</sup> OE Staff argues that “Congress intended the Commission’s anti-manipulation authority to be broad and encompass ‘any entity,’ including CES, that engages in fraud in connection with a jurisdictional transaction,” and that even if one were to consider CES to be merely an advisor – which it is not – the Commission’s jurisdiction would still cover CES.<sup>155</sup>

70. OE Staff argues that CES largely disregards pertinent FPA and regulatory language. OE Staff states the operative question is not whether the Commission has jurisdiction over “advisors,” but whether CES is an “entity” that engaged in fraudulent activities “in connection with” a transaction subject to the Commission’s jurisdiction.<sup>156</sup>

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<sup>149</sup> CES 1b.19 Response at 47-48.

<sup>150</sup> *Id.* at 48 (citing 15 U.S.C. § 78j(b); *Cent. Bank of Denver*, 511 U.S. 164).

<sup>151</sup> *Id.*

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

<sup>153</sup> OE Staff Reply at 10-11.

<sup>154</sup> *Id.* at 11.

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

<sup>156</sup> OE Staff Report at 26-27.

OE Staff notes that the Commission in Order No. 670 stated that “if any entity engages in manipulation and the conduct is found to be in connection with a jurisdictional transaction, the entity is subject to the Commission’s anti-manipulation authority.”<sup>157</sup> OE Staff notes that the Commission defined the term “any entity” as “deliberately inclusive” and demonstrative of “Congressional intent to include any person or form of organization, regardless of its legal status, function, or activities.”<sup>158</sup>

**c. Commission Determination**

71. We find that CES’s fraudulent scheme was in connection with a jurisdictional transaction. The third element of establishing a violation of 18 C.F.R. § 1c.2 is determining whether the conduct in question was “in connection with” a transaction subject to the Commission’s jurisdiction.<sup>159</sup> Section 201(b)(1) of the FPA bestows jurisdiction to the Commission over “the sale of electric energy at wholesale in interstate commerce.”<sup>160</sup> 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.”<sup>161</sup> There is well-established court precedent with respect to Commission jurisdiction over practices that directly or significantly affect rates under the FPA.<sup>162</sup> A

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<sup>157</sup> *Id.* at 26-27 (quoting Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 16) (internal quotations removed).

<sup>158</sup> *Id.* at 27 (citing Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 18).

<sup>159</sup> 16 U.S.C. § 824v(a) (2006); 18 C.F.R. § 1c.2(a) (2013).

<sup>160</sup> 16 U.S.C. § 824(b)(1) (2006).

<sup>161</sup> *Id.* § 824d(a) (2006).

<sup>162</sup> *See Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009) (“[w]here capacity decisions about an interconnected bulk power system affect FERC-jurisdictional transmission rates for that system without directly implicating generation facilities, they come within the Commission’s authority” as a practice affecting rates under FPA); *Miss. Industries v. FERC*, 808 F.2d 1525, 1542 (D.C. Cir. 1987) (while capacity allocation costs “do not fix wholesale rates, their terms do directly and significantly affect the wholesale rates at which the operating companies exchange energy”); *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (“there is an infinitude of practices affecting rates and services”); *Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978) (capacity deficiency charge, just as the capacity adjustment charge

(continued...)

demand response resource that may not be a public utility nonetheless may choose to participate in ISO-administered organized wholesale energy markets, therefore making it a market participant. The Commission has repeatedly found that market rules governing such participation by demand response resources in an organized wholesale energy market constitute practices that directly affect rates in those jurisdictional markets and therefore are subject to the Commission's jurisdiction under section 205(a) and (c) of the FPA.<sup>163</sup> Here, ISO-NE's markets are within the Commission's jurisdiction, as is ISO-NE's Commission-approved DALRP.<sup>164</sup>

72. We next find that CES's actions were "in connection with" a jurisdictional transaction, namely, Rumford's DALRP participation. CES devised the fraudulent scheme described above in which Rumford curtailed its generation and purchased electricity uneconomically during the initial customer baseline period to establish a false and inflated customer baseline. CES also communicated with ISO-NE with respect to Rumford's DALRP participation, including communicating to ISO-NE that Rumford had a demand response capability of 20 MW. CES further managed Rumford's day-to-day activities regarding its participation in the DALRP and, through Constellation, was responsible for submitting Rumford's DALRP offers. Thus, we find that CES's actions independent of Rumford were "in connection with" jurisdictional transactions.

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"must be deemed to be within the Commission's jurisdiction because it too represents a charge for the power and service the overloaded participant receives or it is at least a rule or practice affecting the charge for these services").

<sup>163</sup> See Order No. 745-A, 137 FERC ¶ 61,215 at PP 20-35; *EnergyConnect, Inc.*, 130 FERC ¶ 61,031, at PP 27-32 (2010) (Commission has jurisdiction to regulate certain aspects of demand response and ISO market rules governing demand response as practices significantly affecting rates in organized wholesale electric markets).

<sup>164</sup> See, e.g., September 11, 2008 Order, 124 FERC ¶ 61,235 at P 25 (approving revision to ISO-NE DALRP as just and reasonable); April 4, 2008 Order, 123 FERC ¶ 61,021 at PP 63-65 (approving revision to ISO-NE DALRP as just and reasonable); *New England Power Pool & ISO New England, Inc.*, 111 FERC ¶ 61,064 (2005) (approving ISO-NE demand response programs and related tariff provisions).

73. We find that 18 C.F.R. § 1c.2 reaches CES's conduct in this case and that the Commission has jurisdiction over CES for purposes of enforcing section 1c.2. Section 1c.2 makes it unlawful for "any entity, directly or indirectly" to engage in fraudulent activities "in connection with" a transaction subject to the Commission's jurisdiction.<sup>165</sup> The phrase "any entity" is broad, and applies to a company such as CES that had both direct and indirect involvement in, and received revenues in connection with, Rumford's DALRP participation.<sup>166</sup> Moreover, as discussed above, the Commission has jurisdiction over the DALRP.

74. We find that the Supreme Court cases applying section 10(b) upon which CES relies are inapposite and do not insulate CES from liability under section 1c.2. In *Central Bank of Denver*, the Supreme Court held that private liability under section 10(b) did not extend to those who aided and abetted a violation but did not themselves commit manipulative or deceptive acts.<sup>167</sup> *Central Bank*, however, does not bear on our determination that CES violated section 1c.2, based upon the finding that CES itself committed manipulative and deceptive acts in connection with jurisdictional transactions, as discussed above. In *Stoneridge Investment Partners*, the Court addressed the "reach of the private right of action the Court has found implied in § 10(b)" and determined plaintiffs had not relied on the respondents' conduct and thus could not bring suit.<sup>168</sup> Unlike the implied private right of action under section 10(b), a private individual's reliance on a manipulative or deceptive act is not an element in a government enforcement action under the FPA<sup>169</sup> and, thus, *Stoneridge Investment Partners* has no relevance to our decision here. Finally, in *Janus Capital Group*, the Court addressed the meaning of making a false statement under SEC Rule 10b-5(b), and held that only the person or entity that "ultimately has authority over a false statement" could be held liable for such violations.<sup>170</sup> However, *Janus Capital Group* involved SEC Rule 10b-5(b),

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<sup>165</sup> 18 C.F.R. § 1c.2 (2013); *see also* 16 U.S.C. § 824v(a) (2006) ("It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy . . . subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance.").

<sup>166</sup> *See* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 18.

<sup>167</sup> *Cent. Bank of Denver*, 511 U.S. at 177-78.

<sup>168</sup> *Stoneridge Investment Partners*, 552 U.S. at 152, 158-59.

<sup>169</sup> *See* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 48 & n.102.

<sup>170</sup> *Janus Capital Group*, 131 S. Ct. at 2303.

which establishes liability for false statements, whereas this case involves liability for schemes and fraud.<sup>171</sup>

### **III. Civil Penalty Determination**

75. Having concluded that CES, in connection with the purchase or sale of electricity, intentionally or knowingly devised and participated in a fraudulent scheme in violation of section 222(a) of the FPA and section 1c.2 of the Commission's regulations, we now must determine the appropriate penalties to assess. The OE Staff Report recommends that we assess civil penalties against CES. After assessing the legal and factual issues, including those raised by CES, and "tak[ing] into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner,"<sup>172</sup> we agree with OE Staff's recommendation and assess penalties and disgorgement.

76. Pursuant to section 316A(b) of the FPA, the Commission may assess a civil penalty of up to \$1 million per day, per violation against any person who violates Part II of the FPA (including section 222 of the FPA) or any rule or order thereunder.<sup>173</sup> In determining the amount of a proposed penalty, section 316A(b) requires the Commission to consider "the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner."<sup>174</sup> Although the Penalty Guidelines are not mandatory, the Commission uses them and its policy statements on enforcement, to guide its analysis.<sup>175</sup>

77. The Penalty Guidelines assess the seriousness of particular violations by determining a Base Violation Level 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.

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<sup>171</sup> SEC Rules 10b-5(a) and (c), which establish liability for schemes and fraud, mirror the parts of section 1c.2 herein at issue.

<sup>172</sup> 16 U.S.C. § 825o-1(b) (2006).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *See supra* note 14.

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 where the ultimate penalty should fall within outside or, in appropriate circumstances, outside the indicated civil penalty range. Where facts warrant, the Commission retains discretion to deviate from the Penalty Guidelines range, but has cautioned that it “do[es] not intend to depart from the Penalty Guidelines regularly.”<sup>176</sup>

**A. Show Cause Answer**

78. CES argues OE Staff’s proposed civil penalty of \$7,500,000 is “ruinous and ridiculous,” stressing that the proposed penalty is both 45 times the amount CES received for services rendered to Rumford (\$166,841.13) and significantly in excess of its annual revenue.<sup>177</sup> CES also claims the penalty is excessive as compared to the recent OE settlement with Constellation Energy Commodities Group.<sup>178</sup> CES also asserts additional objections to OE Staff’s civil penalty and disgorgement in its earlier 18 C.F.R. § 1b.19 response. Those arguments are summarized below.

79. CES argues OE Staff’s disgorgement figure of \$166,841.13 improperly treats CES’s revenues – rather than its profits on those revenues – as the “pecuniary gain” under the Penalty Guidelines.<sup>179</sup> CES asserts its submitted financial information indicates general profits of 15 percent after overhead and general expenses are removed, and that \$26,000 (approximately 15 percent of \$166,000.00) thus should be the disgorgement amount.<sup>180</sup> CES also rejects any interest calculation on this reduced amount during OE Staff’s CES investigative period, arguing OE Staff unduly delayed its prosecution.<sup>181</sup>

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<sup>176</sup> Initial Penalty Guidelines Order, 130 FERC ¶ 61,220 at P 32.

<sup>177</sup> CES Show Cause Answer at 18.

<sup>178</sup> *Id.* at 10.

<sup>179</sup> CES 1b.19 Response at 68-69.

<sup>180</sup> *Id.* at 69.

<sup>181</sup> *Id.* at 69 (citing *Milwaukee v. Cement Div., Nat’l Gypsum Co.*, 515 U.S. 189, 196 (1995)).

80. CES also asserts OE Staff misapplied section 2B1.1(b)(1) of the Penalty Guidelines in calculating its penalty level. CES claims its actions in advising Rumford caused no loss, and that, in any case, Rumford's DALRP bids caused no losses to New England customers.<sup>182</sup> Moreover, CES argues that its net gain of \$26,000 – its claimed profits on its share of the DALRP payments – should be used under section 2B1.1(b)(1) of the Penalty Guidelines to establish the loss instead of OE Staff's \$3,336,964.63 in combined DALRP payments to CES, Constellation and Rumford.<sup>183</sup>

81. CES further argues that no duration enhancement should apply under section 2B1.1(b) (2) of the Penalty Guidelines because its violation extended for less than 10 days. CES reasons its actions occurred only during the five-day initial customer baseline period, after which the customer baseline remained static, rather than extending for the entire period of Rumford's DALRP participation as OE Staff asserts.<sup>184</sup> Applying its reduced harm figure and its reduced duration enhancement CES argues its base penalty should be \$175,000.<sup>185</sup>

82. CES also claims it deserves a one point culpability score reduction for settlement as doing otherwise penalizes it for OE Staff's "hard-line" settlement negotiating position that prevented settlement.<sup>186</sup> With these reductions, CES claims its culpability score is 4 for a 0.8 to 1.6 multiplier. Applying this multiplier to its claimed \$175,000 base penalty, CES asserts the correct penalty range is \$140,000 to \$280,000.

83. Lastly, CES contends OE Staff's proposed penalty inadequately considers CES's inability to pay a penalty. In support, CES argues it had 2010 net income of \$300,000, a small fraction of OE Staff's proposed penalty. In 2010, CES states that it had revenues of approximately \$2,900,000 but net income of only approximately \$300,000. CES states that any penalty likely would reduce CES's future revenue streams due to the resulting reputational harm from a market manipulation finding. Accordingly, CES requests its

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<sup>182</sup> *Id.* at 71.

<sup>183</sup> *Id.* at 71-72.

<sup>184</sup> *Id.* at 72.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 74.

penalty be reduced to no more than the \$166,000 in revenues it received from Rumford's DALRP participation.<sup>187</sup>

**B. OE Staff Report and Reply**

84. OE Staff argues that CES's violation warrants assessment of the proposed \$7,500,000 civil penalty and the full, unadjusted \$166,841.13 of disgorgement and that the proposed CES penalty is consistent with the litigation range contained in the Commission's Penalty Guidelines.<sup>188</sup>

85. On disgorgement, OE Staff asserts that the entirety of the revenue fraudulently received by CES should be disgorged (as well as included in the harm to ISO-NE) and that CES should not be permitted a deduction for overhead and other expenses – none of which CES had proven.<sup>189</sup> OE Staff further stated that interest should accrue on the disgorged amount from the time of receipt of revenues consistent with the methodology set forth in 18 C.F.R. § 35.19(a).<sup>190</sup>

86. On the issue of harm, OE Staff rejects CES's claim that its actions as an advisor caused no loss. OE Staff repeats its view that CES and its employee, Dr. Silkman, were not advisors but instead active participants in the fraudulent scheme, having conceived it, helped implement it, perpetuated it through false information provided to ISO-NE, and directly economically benefitted from it.<sup>191</sup> Similarly, OE Staff disputes CES's assertion that New England customers benefitted from Rumford's actions, arguing that Rumford provided no value to ISO-NE because it did not change its operations other than curtailing generation during the customer baseline period.<sup>192</sup> Besides claiming it properly calculated CES's civil penalty under the Penalty Guidelines, OE Staff does not address CES's duration enhancement or settlement reduction arguments.

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<sup>187</sup> *Id.* at 75.

<sup>188</sup> OE Staff Reply at 12.

<sup>189</sup> OE Staff Report at 30.

<sup>190</sup> *Id.*

<sup>191</sup> OE Staff Reply at 11.

<sup>192</sup> *Id.* at 7.

87. In the OE Staff Report, OE Staff argues that CES fails to meet the Penalty Guidelines standards regarding a violator's inability to pay. OE Staff states that CES became the largest electricity aggregator in Maine by 2001 and expanded to serve Texas customers in 2002. OE Staff acknowledges that CES, like most limited liability companies, regularly distributes profits to members and did so routinely from 2006 to 2009.<sup>193</sup> OE Staff states it considered CES's continued financial viability and concluded that CES should be able to pay a \$7,500,000 civil penalty by foregoing future profits for a time and by requiring contributions from its members (who each received substantial profit distributions in the past, during the fraud, and while this matter was pending).<sup>194</sup> OE Staff further notes that it does not oppose permitting CES to pay a penalty over a multi-year period.

**C. Commission Determination**

**1. Seriousness of the Violation**

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

89. *Manipulation, Deceit, Fraud, and Recklessness or Indifference to Results of Actions.* As noted above in Section II, the scheme CES developed and participated in violated section 1c.2 of the Commission's regulations and falls under section 2B1.1 of the Penalty Guidelines (Fraud, Anti-Competitive Conduct and Other Rule, Tariff and Order Violations). CES's scheme was designed to deceive ISO-NE and to misrepresent Rumford's intent and ability to reduce load while participating in the DALRP. This violation begins with a Base Violation Level of 6, as required by section 2B1.1(a) of the Penalty Guidelines.

90. *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 (i) then defines "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the violation." Here, CES's violations resulted in ISO-NE (on behalf of its customers) paying Rumford, CES and Constellation \$3,336,964.63 over more than six months in 2007 and 2008 for non-existent demand response resulting

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<sup>193</sup> *Id.* at 30.

<sup>194</sup> *Id.* at 31.

from Rumford's artificially inflated baseline. We agree with OE Staff that all of these DALRP payments attributable to Rumford's program participation were reasonably foreseeable and are properly part of the "actual loss" to ISO-NE, the harm from which should be attributed to CES and the other participants in its fraudulent scheme. We also reject CES's view that Rumford's actions caused no market harm. ISO-NE paid Rumford (and through Rumford, CES) to provide demand response under the confines of a specific program, the requirements of which CES purposefully evaded through the establishment of a false Rumford customer baseline. CES harmed ISO-NE and its customers through the payments ISO-NE made for the demand response that CES's client, Rumford, did not provide. There is no basis to reduce this harm for purposes of CES's Penalty Guidelines calculation to some smaller subset of the amount CES received even where, as here, the resulting penalty turns out to be many multiples of that amount.<sup>195</sup> Accordingly, \$3,336,964.43 is CES's appropriate market harm figure under section 2B1.1(b)(1) of the Penalty Guidelines, increasing CES's Base Violation Level by 18 points.

91. *Isolated Instance or Recurring Problem, Systematic and Persistent Wrongdoing and Duration.* CES persistently and systematically coordinated fraudulent offers to ISO-NE each day of Rumford's DALRP participation to perpetuate Rumford's false customer baseline. CES's violation began during the five days in which it established Rumford's initial customer baseline and extended for each day during the period Rumford made daily offers at a level designed to perpetuate its initial artificial customer baseline. We agree with OE Staff that CES's conduct warrants enhancement of the violation level provided under section 2B1.2(E) of the Penalty Guidelines for a violation continuing for more than 50 days but less than 250 days. This increases the Base Violation Level by 4 points.

92. *Violation Level.* Based on the above, we find CES's final violation level is 28 points (calculated as the Base Violation Level of 6 points for fraud plus the above-described increases of 18 points for harm and 4 points for duration). A violation level of 28 indicates a base penalty of \$6,300,000 under the Penalty Guidelines.

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<sup>195</sup> 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.

## 2. Mitigating Factors Relating to Culpability

93. *Involvement in or Tolerance of Violations.* Section 1c2.3(a) 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). Here, Dr. Silkman, CES's managing member, directly participated in the scheme and meets the Penalty Guidelines definition of high-level personnel or substantial authority personnel. We find that based on CES's size (between 10 and 50 employees) and Dr. Silkman's substantial involvement that CES's culpability score should be increased by 1 point pursuant to section 1C2.3(b)(5) of the Penalty Guidelines.

94. *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.

95. *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 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. Here, we agree with OE Staff that CES lacked an effective compliance program at the time of its violation.<sup>196</sup> CES had no procedures in place to detect violations, no training of employees regarding the regulatory requirements governing energy markets, and assigned no individual as ultimately responsible to ensure compliance.<sup>197</sup> Moreover, as discussed above, CES received multiple communications indicating its and Rumford's conduct in the DALRP was likely improper, but CES did nothing to remedy such conduct.<sup>198</sup> Under these circumstances, we find that no compliance program credit is warranted.

96. *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. CES's cooperation with OE Staff's investigation was sufficient to warrant credit and consideration. We therefore reduce CES's culpability score by 1 point.

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<sup>196</sup> OE Staff Report at 28.

<sup>197</sup> *Id.*

<sup>198</sup> *See supra* P 65.

97. *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. CES made no report; ISO-NE instead discovered and referred CES's conduct. We find no reduction in the culpability score is warranted.

98. *Avoidance of Trial-Type Hearing.* Under section 1C2.3(g)(3) of the Penalty Guidelines, the Commission may reduce the base culpability score by 1 point if an organization resolved the matter without need for a trial-type hearing. CES did not avoid a trial-type hearing and we reject CES's request that it nevertheless receive this point because of OE Staff's so-called "hard-line" negotiating practices.

99. *Culpability Score.* We find CES's final culpability score is 5 points (base score of 5 points increased by 1 point for senior manager 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 \$6,300,000 to produce a penalty range of from \$6,300,000 to \$12,600,000 under the Penalty Guidelines.

### **3. Appropriate Penalty and Disgorgement**

100. Based on the foregoing factors, the pleadings in this case and the OE Staff Report, the Commission finds that a civil penalty of \$7,500,000 and disgorgement of \$166,841, plus interest, is fair and reasonable under the circumstances. This civil penalty amount is within the Penalty Guidelines range resulting from the foregoing analysis (\$6,300,000 to \$12,600,000) from which we have made no deviations. We find this civil penalty to be particularly appropriate given CES's use of its position as a provider of expert energy consulting services to develop and solicit participation in a fraudulent scheme to undermine the ISO-NE DALRP.<sup>199</sup>

101. With respect to the disgorgement amount, we reject CES's proposal to reduce this figure by 85 percent to account for its general and other expenses. Under section 1B1.1(a) of the Penalty Guidelines, the Commission enters a disgorgement order for the full amount of the pecuniary gain resulting from the violation, plus interest. The Commission defines pecuniary gain as including additional revenue from the relevant

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<sup>199</sup> CES as a corporate entity and Dr. Silkman as an individual are each separately liable for violating section 1c.2 of the Commission's regulations and we find pursuing each is necessary here to appropriately deter their fraudulent conduct. Although Dr. Silkman was the primary architect of the fraudulent scheme, CES's members economically benefitted and they are liable for the fraud committed under their corporate identity. See *Silkman*, 144 FERC ¶ 61,164 at P 93.

conduct of the violation.<sup>200</sup> There is no allowance for general and other expenses and we find no reason to subtract them in this case. Here, that revenue is the amount of CES's commission relating to Rumford's participation in the DALRP.<sup>201</sup> We will require the interest on this revenue to be calculated in accordance with 18 C.F.R. § 35.19(a) for the full period of time since CES received its portion of the Rumford DALRP proceeds.<sup>202</sup>

102. We note that, in concluding that \$7,500,000 is a fair and reasonable civil penalty, we have taken into consideration CES's current financial condition. Section 1C3.2(b) of our Penalty Guidelines establishes that a reduction based on inability to pay is applicable only where the Commission finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum payment required by the Penalty Guidelines. That standard also requires that any reduction from the otherwise applicable penalty amount be "no more than necessary to avoid substantially jeopardizing the continued viability of the organization."<sup>203</sup> Measured by this standard, we agree with OE Staff that CES can pay a civil penalty without substantially jeopardizing its continued operation. As OE Staff noted, CES can forgo future profits and seek a return of past distributions made to its members. Moreover, we agree with OE Staff that a payment plan can alleviate any concern about CES's inability to pay a penalty. Therefore, we direct CES to either (a) pay the \$7,500,000 civil penalty and disgorgement of \$166,841.13, plus interest, within 60 days of the date of this order, or (b) within 30 days of this order, submit for Commission approval a payment plan agreed to by CES and OE Staff.

103. If CES does not agree to a payment plan with OE Staff or does not pay the \$7,500,000 civil penalty and disgorgement of \$166,841.13, plus interest, within 60 days of the date of this order, then the Commission will commence an action in a United States district court for an order affirming the penalty, in which the district court may review the assessment of the civil penalty *de novo*.<sup>204</sup>

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<sup>200</sup> See Penalty Guidelines, Application Note 3(g) to § 1A1.

<sup>201</sup> See *id.*

<sup>202</sup> We note that, contrary to CES's allegation, we find no evidence of undue delay by OE Staff in prosecuting this matter.

<sup>203</sup> See Penalty Guidelines § 1C3.2(b) and Application Note 1 to Penalty Guidelines § 1C3.2.

<sup>204</sup> 16 U.S.C. § 823b(d)(3)(B) (2006).

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

The Commission orders:

(A) CES is hereby directed to pay to the United States Treasury by a wire transfer a civil penalty in the sum of \$7,500,000 and to pay disgorgement of \$166,841.13, plus interest, to ISO-NE, as discussed in the body of this order.

(B) CES is hereby directed to either:

(1) pay the \$7,500,000 civil penalty to the United States Treasury and pay disgorgement of \$166,841.13, plus interest, to ISO-NE, within 60 days of the date of this order; or

(2) within 30 days of the date of this order, submit for Commission approval a payment plan agreed to by CES and OE Staff, as discussed in the body of this order.

By the Commission. Commissioner LaFleur is dissenting in part with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Competitive Energy Services, LLC

Docket No. IN12-12-000

(Issued August 29, 2013)

LaFLEUR, Commissioner, *dissenting in part*:

I join the majority in finding that Competitive Energy Services, LLC (CES) has engaged in fraud. However, for the reasons discussed in my partial dissent in *Lincoln Paper and Tissue, LLC* (Lincoln),<sup>1</sup> issued concurrently with this order, I believe that the majority's application of the Penalty Guidelines<sup>2</sup> in this case double counts the duration of the fraud in setting a civil penalty. Therefore, I would have instead applied the Guidelines without double counting duration and assessed CES a civil penalty of \$4,200,000.<sup>3</sup>

Accordingly, I respectfully dissent from this aspect of today's order.

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Cheryl A. LaFleur  
Commissioner

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<sup>1</sup> 144 FERC ¶ 61,162 (2013) (LaFleur, Commissioner, dissenting).

<sup>2</sup> *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 (2010) (Penalty Guidelines).

<sup>3</sup> In this case, applying the Penalty Guidelines without double counting duration results in a penalty range of \$2,100,000-\$4,200,000.