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1. In this order, we find that Vitol Inc. (Vitol) and Federico Corteggiano (Corteggiano) (collectively, Respondents) violated section 222(a) of the Federal Power Act (FPA)¹ and section 1c.2(a) of the Commission's regulations,² which prohibit energy market manipulation, through a scheme to sell physical power at a loss in the California Independent System Operator Corporation's (CAISO) wholesale electric market in order to eliminate congestion that they expected to cause losses on Vitol's congestion revenue rights (CRRs). In light of the seriousness of these violations and the lack of effort by Respondents to remedy their violations, we find that it is appropriate to assess civil penalties pursuant to section 316A of the FPA³ in the following amounts: \$1,515,738 against Vitol and \$1,000,000 against Corteggiano. The Commission further directs Vitol to disgorge unjust profits, plus applicable interest, pursuant to section 309 of the FPA,⁴ in the following amount: \$1,227,143.

I. Background

A. Relevant Entities

2. Vitol, a Delaware corporation with its principal place of business in Houston, Texas, is a direct, wholly-owned subsidiary of Vitol Holding SARL.⁵ Vitol Holding SARL is a direct, wholly-owned subsidiary of Vitol Holding BV, a privately held Dutch company engaged in the physical distribution and trading of crude oil and petroleum products, and other energy and non-energy commodities.⁶ Vitol Holding BV has over 40 offices worldwide and in 2018 had over \$231 billion in revenues.⁷ Vitol trades and

¹ 16 U.S.C. § 824v(a) (2018).

² 18 C.F.R. § 1c.2(a) (2019) (Anti-Manipulation Rule).

³ 16 U.S.C. § 825o-1 (2018).

⁴ *Id.* § 825h.

⁵ Vitol Inc., Application for Order Accepting Initial Rate Schedule, Waiving Regulations, and Granting Blanket Approvals, Docket No. ER10-1452-000, at 2 (filed June 15, 2010).

⁶ *Id.*

⁷ Vitol, *Who We Are*, <https://www.vitol.com/who-we-are/> (last visited Oct. 17, 2019).

markets oil, power, and other energy-related products throughout the United States.⁸ Vitol received market-based rate authority from the Commission in July 2010.⁹ During the time period relevant to this proceeding, Vitol had approximately 230 employees, including 12 traders on its power trading desk.¹⁰ Vitol referred to its power trading desk as the “Power Matrix.”¹¹ Vitol’s Power Matrix had two traders focused on trading Financial Transmission Rights (FTRs)¹²—Corteggiano and Sergio Brignone (Brignone).¹³

3. Corteggiano primarily traded FTRs/CRRs.¹⁴ Corteggiano had primary responsibility for trading CRRs in the CAISO region.¹⁵ In 2013, Corteggiano generated at least \$13 million in profits for Vitol trading FTRs/CRRs. Corteggiano, who holds a

⁸ Vitol, Application for Order Accepting Initial Rate Schedule, Waiving Regulations, and Granting Blanket Approvals, Docket No. ER10-1452-000, at 3 (filed June 15, 2010); *see also* Vitol, *Who We Are*, <https://www.vitol.com/who-we-are/> (last visited Oct. 17, 2019).

⁹ *Vitol Inc.*, Docket No. ER10-1452-000 (July 23, 2010) (delegated order).

¹⁰ Vitol, June 13, 2014, Response to Data Request No. 3-4; OE Staff Submission of Non-Public Investigative Materials, July 12, 2019, at Other Cited Materials—Power Matrix VITOL_FERC_0000113_image; Testimony of Sergio Brignone at 26:14-27:8 (Mar. 5, 2014) (Brignone Test.). Hereinafter, for ease of reference, we will cite documents in the OE Staff Submission of Non-Public Investigative Materials filed July 12, 2019 directly by the Bates Number or description of the document.

¹¹ VITOL_FERC_0000113_image; Brignone Test. at 26:20-27:4.

¹² Different energy markets have different names for this financial product. Many use “FTR,” but CAISO, for example, uses “CRR.” “FTRs” and “CRRs” are synonymous.

¹³ Testimony of Federico Corteggiano, Vol. 1, at 15:13-19 (Mar. 6, 2014) (Corteggiano Test. Vol. 1). Corteggiano was responsible for the following regions: CAISO, PJM Interconnection, L.L.C., ISO New England Inc., and New York Independent System Operator, Inc. *Id.* at 12:20-23. Brignone was responsible for the following regions: Midcontinent Independent System Operator, Inc., Electric Reliability Council of Texas, and Southwest Power Pool, Inc. Brignone Test. at 12:4-7.

¹⁴ Corteggiano Test. Vol. 1 at 12:14-16.

¹⁵ *Id.* at 12:14-23.

Ph.D. in power system engineering, joined Vitol in May 2012, bringing years of experience related to electric power markets, and, in particular, experience regarding the CAISO market and trading CRRs.¹⁶ He joined Vitol from Deutsche Bank, where he worked from January 2009 to April 2012 as an FTR/CRR trader.¹⁷ At Deutsche Bank, Corteggiano traded CRRs in CAISO. Prior to Deutsche Bank, he worked as an electric market analyst on the FTR/CRR trading desk at Citadel Investment Group, where he did quantitative research and built trading software for FTRs/CRRs.¹⁸ Before that, Corteggiano worked as a senior software engineer at Nexant, Inc., where he helped create the CRR operations software for CAISO.¹⁹

B. The CAISO Market

4. CAISO operates a competitive wholesale electricity market that uses locational marginal prices (LMPs) for settlements of purchases and sales at specific locations.²⁰ Locations inside the CAISO market are called “nodes” and locations at the borders are called “interties.” Interties are transmission interconnections between CAISO and other Balancing Authority Areas (BAAs).²¹ The LMP at each location consists of three components: (i) system marginal energy cost (SMEC), which is the energy price, and which is the same at all locations in the CAISO market at any particular time; (ii) the marginal cost of congestion (MCC), which reflects the added cost of meeting demand at a location that, due to constraints in the transmission system, cannot be met by dispatching power from lower-cost generators located outside the constrained area; and (iii) the marginal loss cost (MLC), which is the cost of physical transmission line losses.²²

¹⁶ Order to Show Cause, app. A, at 5-6 (hereinafter, Appendix A to the Order to Show Cause will be cited directly as the Staff Report); Corteggiano Test. Vol. 1 at 10:2-3, 24:23-24.

¹⁷ Corteggiano Test. Vol. 1 at 11:7-24.

¹⁸ *Id.* at 10:22-11:6; Testimony of Federico Corteggiano at 17:8-19:22 (Nov. 16, 2010) (Corteggiano 2010 Test.).

¹⁹ Corteggiano Test. Vol. 1 at 10:12-18; Corteggiano 2010 Test. at 20:16-21:20.

²⁰ *See* CAISO, Electronic Tariff, app. C, Fifth Replacement (CAISO Tariff).

²¹ At an intertie, power leaving CAISO is considered an export, and power entering CAISO is considered an import.

²² *See* CAISO Tariff at app. C; CAISO, Oct. 24, 2018, Response to Data Request No. OE-CAISO-1-4 (CAISO Response to OE-CAISO-1-4).

CAISO determines the MCC by multiplying the “shadow price” (i.e., the marginal value of relieving the particular transmission constraint) at each binding transmission constraint in the CAISO network by the “shift factor” (essentially a measurement of the relative contribution of flow from supply or demand on a given transmission system element).²³

5. During the period relevant to this matter, CAISO operated a day-ahead market, which produced power schedules and LMPs for each hour of the following day.²⁴ Bids for supply or purchase of energy in the day-ahead market had to be submitted by 10:00 a.m. Pacific time on the day before the trade day. Three hours later, at approximately 1:00 p.m. Pacific time, CAISO informed bidders whether it had accepted (or “cleared”) their bids for the day-ahead market. At the same time, CAISO also published on its Open Access Same-Time Information System (OASIS) site the hourly LMP for each node, as well as the value (in \$/MWh) of each of the three components making up the LMP (i.e., SMEC, MCC, and MLC).²⁵

6. The pricing node (Pnode) denoted as Pnode CRAGVIEW_1_GN001 in CAISO’s electric network model (Cragview), is associated with the Cragview electrical bus, which is a physical location on the transmission system within the PacifiCorp-West BAA.²⁶ The Cragview electrical bus is connected to CAISO through a single, 115 kV transmission line, which is commonly referred to as the “Cascade intertie.”²⁷ The Cascade intertie is relatively small and isolated, with only approximately 80 megawatts (MW) of import capacity and approximately 45 MW of export capacity.²⁸ Cragview serves as the scheduling and pricing point for transfers of power between the CAISO BAA and the PacifiCorp-West BAA over the Cascade

²³ CAISO, Oct. 24, 2018, Response to Data Request No. OE-CAISO-1-5 (CAISO Response to OE-CAISO-1-5).

²⁴ *Cal. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,087, at PP 3-4 (2013).

²⁵ CAISO Response to OE-CAISO-1-4.

²⁶ CAISO, Oct. 24, 2018, Response to Data Request No. OE-CAISO-1-3 (CAISO Response to OE-CAISO-1-3).

²⁷ *Id.*

²⁸ *Id.*

intertie.²⁹ LMP at Cragview reflects 100 percent of the congestion on the Cascade intertie.³⁰

C. Products: CRRs

7. CRRs are financial instruments issued by CAISO that allow CAISO market participants to manage their exposure to transmission congestion costs in the day-ahead market.³¹ CRRs are allocated to load-serving entities and also offered for purchase in competitive monthly and annual auctions.³² CRRs have a designated quantity, stated in MWs, and term.³³ CRRs are differentiated by time of use periods (on-peak and off-peak) for each day covered by the CRR.³⁴ Each CRR consists of a source node and sink node, which designate the direction of the CRR (CRRs run from source to sink).³⁵

8. CRRs settle on an hourly basis in the day-ahead market based on the difference in the day-ahead marginal congestion cost between two locations (the source and sink).³⁶ The holder of a CRR receives a payment if the congestion in a given hour is in the same direction as the CRR and the holder incurs a charge if congestion occurs in the opposite

²⁹ *Id.*

³⁰ The shift factor between the Cascade intertie and Cragview is 100 percent, meaning that 100 percent of the shadow price for the Cascade intertie appears in the MCC component of the LMP for Cragview. CAISO Response to OE-CAISO-1-5; *see also* Testimony of Federico Corteggiano, Vol. 2, at 148:24-149:5 (July 24, 2014) (Corteggiano Test. Vol. 2). When there is a “binding constraint,” i.e., when the capacity of a transmission element has been fully utilized, on the Cascade intertie, a shadow price is calculated for the intertie. CAISO Response to OE-CAISO-1-5.

³¹ CAISO Business Practice Manual for Congestion Revenue Rights, § 1.3 (Version 15, Oct. 10, 2013) (CRR BPM).

³² CAISO Tariff §§ 36.1, 36.2.5, 36.2.6, 36.2.7.

³³ CRRs are available for four terms: one-month (“Monthly”), three-month (“Seasonal”), ten-year (“Long-Term”), and thirty-year (“Merchant Transmission”). CRR BPM § 1.3.

³⁴ *See* CAISO Tariff § 36.3.3.

³⁵ *Id.* § 36.2.

³⁶ *Id.* § 36; CRR BPM § 1.3.

direction.³⁷ The per-MW payment or charge is equal to the marginal cost of congestion at the sink minus the marginal cost of congestion at the source for each hour in the day-ahead market.³⁸

9. CRR settlements are paid through CAISO's CRR Balancing Account, which is funded by a combination of day-ahead market congestion revenues and proceeds from the CRR auctions.³⁹ Any revenue shortfall in this account, which may occur if the payments owed to CRR holders based on their entitlements exceed the market revenue generated by congestion costs, is funded through an allocation of the shortfall to load-serving entities.⁴⁰

II. Procedural History

10. On February 5, 2014, staff in the Commission's Office of Enforcement (OE Staff) opened a preliminary investigation of Vitol's physical and CRR transactions at the Cragview Pnode within the CAISO market.⁴¹ On June 3, 2014, the Commission ordered a non-public, formal investigation of Respondents' trading.⁴² On December 12, 2016, OE Staff issued a Preliminary Findings Letter to Vitol and Corteggiano, stating that it had preliminarily concluded that they had engaged in manipulative activity in violation of the Anti-Manipulation Rule⁴³ and FPA section 222.⁴⁴ On March 8, 2017, Vitol and Corteggiano submitted a joint response to the Preliminary Findings Letter, and Corteggiano additionally submitted a separate individual response.⁴⁵ On June 20, 2017,

³⁷ CAISO Tariff § 36.2.1; CRR BPM § 1.3.

³⁸ CRR BPM § 1.3.

³⁹ *Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,120, at P 4 (2011).

⁴⁰ *Id.*

⁴¹ Staff Report at 10-11. OE Staff's investigation began after a market participant in the CAISO market met with OE Staff on a confidential basis on December 16, 2013, to report its concern that Vitol had engaged in cross-product market manipulation at Cragview. *Id.* at 10.

⁴² *Id.* at 11.

⁴³ 18 C.F.R. § 1c.2(a) (2019).

⁴⁴ 16 U.S.C. § 824v(a) (2018); Staff Report at 11.

⁴⁵ Staff Report at 11.

Respondents entered into tolling agreements with OE Staff that extend the running of the statute of limitations for 365 days beyond the otherwise applicable limitations period.⁴⁶

11. On June 22, 2018, OE Staff provided Respondents notice, pursuant to section 1b.19 of the Commission's regulations,⁴⁷ of its intent to recommend the initiation of a public proceeding against Respondents.⁴⁸ On August 10, 2018, Respondents submitted a joint response to OE Staff's section 1b.19 notice letter.⁴⁹ Respondents submitted an updated response to OE Staff's section 1b.19 notice letter on December 18, 2018.⁵⁰

12. On July 10, 2019, the Commission initiated the instant proceeding by issuing an order directing Respondents to show cause why they should not be found to have violated the Commission's Anti-Manipulation Rule⁵¹ and FPA section 222⁵² by selling physical power at a loss in the CAISO wholesale electric market in order to eliminate congestion that they expected to cause losses on Vitol's CRRs.⁵³ The Commission additionally directed Vitol to show cause why it should not be required to disgorge unjust profits in the amount of \$1,227,143, plus interest, and further directed Vitol and Corteggiano to show cause why they should not be assessed civil penalties of \$6,000,000 and \$800,000, respectively.⁵⁴ The alleged violations described in the Order to Show Cause arose out of an investigation conducted by OE Staff, which culminated in the Enforcement Staff Report and Recommendation (Staff Report) attached to the Order to Show Cause as Appendix A.⁵⁵

⁴⁶ *Id.* at 11.

⁴⁷ 18 C.F.R. § 1b.19 (2019).

⁴⁸ Staff Report at 11.

⁴⁹ *Id.* at 11-12.

⁵⁰ *Id.* at 12.

⁵¹ 18 C.F.R. § 1c.2 (2019).

⁵² 16 U.S.C. § 824v(a) (2018).

⁵³ *Vitol Inc.*, 168 FERC ¶ 61,013, at P 1 (2019) (Order to Show Cause).

⁵⁴ *Id.* P 1.

⁵⁵ *Id.* P 2.

13. On July 11, 2019, the Commission filed a notice designating certain Commission staff as non-decisional in deliberations by the Commission in this docket.⁵⁶ On July 17, 2019, the Commission filed an update to the July 11, 2019 notice of the designation of non-decisional staff.

14. On July 12, 2019, OE Staff filed non-public investigative materials, including the investigative documents relied on in the Staff Report.

15. On July 18, 2019, Respondents filed a joint motion to designate all OE Staff and all other Commission staff involved in the decision to issue the Order to Show Cause as non-decisional staff in this proceeding (Motion to Designate as Non-Decisional). On July 31, 2019, OE Staff filed a reply opposing the Motion to Designate as Non-Decisional.

16. On July 24, 2019, Respondents filed a joint motion for extension of time to respond to the Order to Show Cause (Motion for Extension of Time). Specifically, Respondents requested an extension until September 9, 2019, to file their answer, and an equal extension for OE Staff to submit its reply. On July 25, 2019, OE Staff filed a reply to the Motion for Extension of Time, opposing the requested extension. Upon consideration of the motion, the Commission gave notice on August 5, 2019, that Respondents' due date for filing a response to the Order to Show Cause would be extended to and including August 23, 2019.

17. On August 9, 2019, Respondents submitted a joint notice of their election under FPA section 31(d)(3) and the Order to Show Cause,⁵⁷ thereby electing an immediate penalty assessment if the Commission finds a violation.⁵⁸

18. On August 23, 2019, Respondents filed a joint answer to the Order to Show Cause (Respondents Answer). Also on August 23, 2019, Corteggiano filed a separate, individual answer to the Order to Show Cause (Corteggiano Answer).⁵⁹

⁵⁶ 18 C.F.R §§ 385.2201-385.2202 (2019).

⁵⁷ 16 U.S.C. § 823b(d)(3) (2018); Order to Show Cause at Ordering Paragraph (E).

⁵⁸ Vitol Inc. and Federico Corteggiano August 9, 2019 Notice of Election of *De Novo* Review.

⁵⁹ The Corteggiano Answer incorporates by reference all the defenses and positions raised in the joint Respondents Answer. *See* Corteggiano Answer at 1.

19. On September 17, 2019, Respondents filed a notice that their Motion to Designate as Non-Decisional is moot and need not be addressed by the Commission.⁶⁰

20. On September 20, 2019, OE Staff filed its reply to the Respondents Answer and the Corteggiano Answer. On September 25, 2019, OE Staff filed a revised reply correcting two errors in the original filing (OE Staff Reply).

III. Discussion

A. Preliminary Matters

1. Motion to Designate All OE Staff and All Commission Staff Involved in the Decision to Issue the Order to Show Cause as Non-Decisional Staff

21. On July 18, 2019, Respondents filed a motion to designate all OE Staff and “all staff who participated in the decision to issue the Order to Show Cause as non-decisional staff” in this matter.⁶¹ On September 17, 2019, however, Respondents filed a notice, claiming that this motion is moot because, they claim, “any adjudication in this matter will occur in federal court rather than in an administrative proceeding.”⁶²

22. The Commission will treat Respondents’ notice as a withdrawal of their request to designate all OE Staff and certain other Commission staff as non-decisional and, therefore, need not rule on the motion.⁶³ However, the Commission disagrees with Respondents’ characterization of the nature of this proceeding. Contrary to their claim, this Order to Show Cause proceeding *is* an adjudication. FPA section 31(d)(3)(A)

⁶⁰ See Vitol Inc. and Federico Corteggiano September 17, 2019 Notice that Respondents’ July 18, 2019 Designation Motion is Moot (arguing that the election of the *de novo* district court review procedures set forth in FPA section 31(d)(3) rendered the designation motion moot).

⁶¹ Vitol Inc. and Federico Corteggiano July 18, 2019 Motion to Designate All Staff of the Office of Enforcement and All Staff Involved in the Decision to Issue the Order to Show Cause As Non-Decisional Staff.

⁶² Vitol Inc. and Federico Corteggiano September 17, 2019 Notice that Respondents’ July 18, 2019 Designation Motion is Moot.

⁶³ See *id.* (“Accordingly, Respondents’ Designation Motion need not be addressed by the Commission.”).

requires the Commission to “promptly assess such penalty, *by order . . .*”⁶⁴ Significantly, under the Administrative Procedure Act, an agency order is formulated following an adjudication.⁶⁵ And, consistent with these statutory provisions, the Commission has always understood these types of proceedings to constitute adjudications.⁶⁶ Therefore, while we need not rule on their motion, we correct Respondents’ mischaracterization of this proceeding, which, consistent with the relevant statutes and Commission practice, is an adjudication.

2. Request for Oral Argument

23. Corteggiano requests oral argument to address the allegedly “new and unprecedented legal theories and issues” raised by this proceeding.⁶⁷ We do not agree with Corteggiano’s assessment that the legal theories and issues raised in this proceeding require oral argument, or that oral argument in this matter would be helpful to the Commission.⁶⁸ The record in this proceeding provides us with sufficient bases to make

⁶⁴ 16 U.S.C. § 823b(d)(3)(A) (emphasis added).

⁶⁵ See 5 U.S.C. § 551(7) (defining “adjudication” as an “agency process for the formulation of an order”).

⁶⁶ See, e.g., *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, at P 5 (2006) (explaining that, under FPA section 31(d)(3), the Commission will issue “an order setting forth the material facts that constitute the violations and assess any appropriate penalty”); *ETRACOM LLC*, 155 FERC ¶ 61,284, at P 29 (2016) (*ETRACOM*) (describing order to show cause proceeding as an “adjudication”). At least one district court has also recognized that the Commission’s decisions in order to show cause proceedings stem from a full adjudication of facts and law. See *FERC v. Silkman*, 177 F. Supp. 3d 683, 700 (D. Mass. 2016) (“That the statutory scheme makes the Commission’s determinations only the first step in a legal process does not strip those determinations of their content and shrink them into the equivalent of a ‘charging letter’ . . . FERC did more than decide to bring suit. It conducted an adjudication.”) (citation omitted).

⁶⁷ Corteggiano Answer at 14.

⁶⁸ The Commission has not in the past held oral argument on Orders to Show Cause that have originated from OE Staff Reports. Thus, in denying Corteggiano’s request, he is being treated consistently with respondents in other similar proceedings. See, e.g., *Houlian Chen*, 151 FERC ¶ 61,179, at P 192 n.417 (2015) (*Chen*) (citing *Barclays Bank PLC*, 144 FERC ¶ 61,041 (2013) (*Barclays*)); *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163 (2013) (*Competitive Energy*); *Richard Silkman*,

our findings, and there is no need for oral argument. We therefore decline Corteggiano's request to allow oral argument in this matter.⁶⁹

3. Duty to Respond to Staff Report

24. Respondents assert that the Order to Show Cause "misstates the answer requirement" by asserting that "'Respondents must also, to the extent practicable, admit or deny, specifically and in detail, each material allegation contained in the [Staff Report] and set forth every defense relied upon.'" ⁷⁰ Respondents state that the Commission's rule governing answers, Rule 213 of the Commission's Rules of Practice and Procedure,⁷¹ "refers only to 'pleadings.'" ⁷² Respondents argue that the Staff Report is not a pleading, and was not adopted or endorsed by the Commission in the Order to Show Cause, and therefore Respondents are not required to respond to each and every allegation in the Staff Report.⁷³ Nonetheless, Respondents state that in their Answer, and in the separate Corteggiano Answer, they "rebut the material factual assertions in the Enforcement Staff Report."⁷⁴

25. Rule 213 provides that an answer to an order to show cause "must contain a clear and concise statement of: (i) Any disputed factual allegations; and (ii) Any law upon which the answer relies."⁷⁵ Further, when an answer is made to an order to show cause, the answer must "to the extent practicable: (i) [a]dmit or deny, specifically and in detail, each material allegation of the pleading answered; and (ii) [s]et forth every defense relied

144 FERC ¶ 61,164 (2013) (*Silkman*); *Lincoln Paper and Tissue, LLC*, 144 FERC ¶ 61,162 (2013) (*Lincoln Paper*)).

⁶⁹ See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) ("the very basic tenet of administrative law [is] that agencies should be free to fashion their own rules of procedure," quoting *Vermont Yankee*, 435 U.S., 519, 544 (1978)).

⁷⁰ Respondents Answer at 91 (quoting Order to Show Cause at P 5 n.9).

⁷¹ 18 C.F.R. § 385.213(c) (2019).

⁷² Respondents Answer at 91.

⁷³ *Id.* at 91-92 (citing Order to Show Cause at P 2).

⁷⁴ *Id.* at 92 n.316.

⁷⁵ 18 C.F.R. § 385.213(c)(1) (2019).

on.”⁷⁶ While the Order to Show Cause issued in this proceeding does not adopt or endorse the Staff Report, it does explain that this case presents allegations presented by OE Staff in the Staff Report, which was attached to the Order to Show Cause, and which summarized those allegations.⁷⁷ Given that the Order to Show Cause is based on OE Staff’s allegations in the Staff Report, it is reasonable to expect, pursuant to 18 C.F.R. § 385.213(c), that Respondents will respond to the allegations in the Staff Report in their answers. Regardless, we find this issue moot, given that Respondents assert that they have in fact provided rebuttal to all “material factual assertions in the [Staff Report].”⁷⁸

4. Investigatory Process

26. Corteggiano argues that the Staff Report should be rejected, because it “does not reliably develop the facts or analyze the law,” is based on “selective third-party statements,” and “omit[s] material information and suggest[s] the existence of relevant and potentially exculpatory information that [OE Staff] apparently did not seek and which Mr. Corteggiano and [Vitol] could not scrutinize.”⁷⁹ Corteggiano alleges that OE Staff “sheltered” relevant witnesses (including CAISO personnel) from examination by Respondents’ counsel. Corteggiano asserts that the “inadequate, incomplete and unfair investigatory process is not a just basis for exercising the Commission’s prosecutorial powers.”⁸⁰

27. We do not agree with Corteggiano’s argument that the Staff Report should be rejected outright for not reliably developing the facts or analyzing the law. The very purpose of this Order to Show Cause proceeding is to determine whether, taking into consideration Respondents’ arguments in response to the Staff Report and any defenses

⁷⁶ *Id.* § 385.213(c)(2).

⁷⁷ See generally Order to Show Cause at PP 2-4; *Enforcement of Statutes, Orders, Rules, and Regulations*, 123 FERC ¶ 61,156, at P 36 (2008) (Revised Policy Statement on Enforcement) (“After considering [OE Staff]’s recommendations and the subject’s submission, the Commission determines whether an Order to Show Cause is appropriate. If so, we issue the Order to Show Cause with [OE Staff]’s report attached. We will not issue any findings regarding the matter until we have received the subject’s response to the Order to Show Cause.”).

⁷⁸ Respondents Answer at 92 n.316.

⁷⁹ Corteggiano Answer at 4.

⁸⁰ *Id.*

raised, the facts and the law support a finding that Respondents violated FPA section 222 and the Commission's Anti-Manipulation Rule.⁸¹ Under the procedures of section 31(d)(3) of the FPA, which Respondents have invoked here, Respondents have had the opportunity to respond to the allegations included in the Staff Report in their answers to the Order to Show Cause and those arguments have been considered in this proceeding and are addressed below.

28. Further, Corteggiano's bare assertions that the Staff Report omits certain material, exculpatory evidence, and that OE Staff sheltered certain witnesses from examination, are unpersuasive. Corteggiano has failed to describe with any specificity the exculpatory evidence OE Staff failed to seek, the materials allegedly omitted from the Staff Report, the witnesses that were not available for examination, or any other actions taken by OE Staff that led to an inadequate investigatory process. As discussed in more detail below in Section III.A.5, the Commission has consistently observed that bare assertions are insufficient to warrant a response from the Commission.⁸² Therefore, we are not persuaded by Corteggiano's arguments challenging the sufficiency and fairness of the investigatory process.

5. Other Affirmative Defenses Raised by Respondents

29. In addition to raising fact-specific defenses regarding the necessary elements of a manipulation claim and the appropriateness of the civil penalty and disgorgement recommendations, which are addressed below in Sections III.D-E, Respondents raise certain other, threshold affirmative defenses. Specifically, Respondents argue that the Commission's Anti-Manipulation Rule, and its application of that rule, is unconstitutionally vague, and that the claims raised in the Order to Show Cause are barred, in whole or in part, by the doctrine of estoppel.⁸³

30. Respondents' unconstitutional vagueness and estoppel arguments are perfunctorily asserted, without elaboration or development, and thus are insufficient to warrant a response from the Commission.⁸⁴ It is well established that:

It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work,

⁸¹ See Order to Show Cause at PP 1, 5.

⁸² *Barclays*, 144 FERC ¶ 61,041 at P 20 (citations omitted).

⁸³ Respondents Answer at 95.

⁸⁴ See *Barclays*, 144 FERC ¶ 61,041 at P 20 (citations omitted).

create the ossature for the argument, and put flesh on its bones. As we recently said in a closely analogous context: “Judges are not expected to be mind readers. Consequently, a litigant has an obligation to ‘spell out its arguments squarely and distinctly’ or else forever hold its peace.”⁸⁵

Moreover, courts have similarly found that it is not their obligation “to research and construct the legal arguments open to parties, especially when they are represented by counsel.”⁸⁶ Other courts have noted that “perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived,”⁸⁷ and that “issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.”⁸⁸

31. In *Barclays*, we thus rejected perfunctorily asserted, undeveloped statute of limitations and estoppel defenses, noting that such defenses were “conclusory at best” and “often lack[ed] substance, facts, or legal argument.”⁸⁹ We find the same is true here. Respondents’ recitation of unconstitutional vagueness and estoppel defenses, as well as any other defenses similarly raised, are conclusory, and made without any analysis or

⁸⁵ *United States v. Zannino*, 895 F.2d 1, 18 (1st Cir. 1990) (citations omitted).

⁸⁶ *David v. Dist. of Columbia*, 503 F. Supp. 2d 104, 126-27 (D.D.C. 2007) (quoting *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003)).

⁸⁷ *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

⁸⁸ *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (quotations and citation omitted).

⁸⁹ *Barclays*, 144 FERC ¶ 61,041 at P 20.

explanation.⁹⁰ We therefore find that Respondents have waived the arguments raised in this perfunctory manner and therefore dismiss them.⁹¹

B. Applicable Legal Standard

32. Section 222 of the FPA makes it “unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy . . . any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of electric ratepayers.”⁹² The Commission implemented this prohibition through Order No. 670, which promulgated the Anti-Manipulation Rule.⁹³ The Anti-Manipulation Rule, among other matters, prohibits any entity from: (1) using a fraudulent device, scheme, or artifice, or making a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule, or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon

⁹⁰ Moreover, at least three U.S. district courts have rejected unconstitutional vagueness arguments in the context of the Anti-Manipulation Rule. *See FERC v. Coaltrain Energy, L.P.*, No. 2:16-cv-732, 2018 WL 7892222, at *16-17 (S.D. Ohio Mar. 30, 2018) (*FERC v. Coaltrain*) (rejecting unconstitutional vagueness arguments, in part, because the defendants were sophisticated and the Anti-Manipulation Rule contains a scienter requirement); *FERC v. Silkman*, 177 F. Supp. 3d at 704-705 (rejecting void-for-vagueness argument); *FERC v. City Power Marketing LLC*, 199 F. Supp. 3d 218, 238 (D.D.C. 2016) (*FERC v. City Power*) (“The Anti-Manipulation Rule gave clear notice that fraudulent schemes of all sorts were prohibited.”).

⁹¹ Respondents also seek to inappropriately “reserve” additional defenses that may be available, but which are not raised in answer to the Order to Show Cause. Respondents Answer at 95; Corteggiano Answer at 1 (incorporating by reference all of the defenses contained in the joint Respondents Answer). Any reasonably available defenses that were not raised in response to the Order to Show Cause are waived. *See* 18 C.F.R. § 385.213(c)(2) (2019) (an answer to an order to show cause must “to the extent practicable . . . [s]et forth every defense relied on”); *FERC v. Silkman*, 177 F. Supp. 3d at 697 (“defenses to a civil penalty order may be waived if a party failed to raise them in response to an Order to Show Cause issued by FERC”).

⁹² 16 U.S.C. § 824v (2018).

⁹³ *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047, at P 49 (2006), *reh’g denied*, 114 FERC ¶ 61,300 (2006) (Order No. 670).

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.⁹⁴

33. Pursuant to FPA section 316A(b), the Commission may assess a civil penalty of up to \$1 million⁹⁵ per day, per violation against any person who violates Part II of the FPA (including FPA section 222) or any rule or order thereunder.⁹⁶ 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.”⁹⁷

34. As discussed below, we find that Respondents violated FPA section 222 and the Anti-Manipulation Rule by intentionally engaging in fraudulent physical energy imports, from October 28 through November 1, 2013, at the Cascade intertie (i.e., at the border of the CAISO wholesale electric market) to relieve congestion at Cragview, thereby reducing the Cragview LMP and economically benefitting Vitol’s CRRs sourced at that location. We further determine that Respondents’ answers fail to rebut the case for assessing civil penalties and disgorgement and therefore we assess civil penalties and require disgorgement pursuant to FPA sections 31(d)(3)(a) and 309, as discussed below in Section III.E.

C. Findings of Fact

1. CAISO’s Derate of the Cascade Intertie in Mid-October 2013 and Announcements of Subsequent Derates

35. In December 2012, during CAISO’s annual CRR auction, Corteggiano, on behalf of Vitol, acquired on- and off-peak CRR positions sourcing at Cragview for all quarters of 2013. The CRR positions included approximately 42.9 MW of on-peak and 31.2 MW of off-peak CRRs for the fourth quarter of 2013 (October through December) sourcing at

⁹⁴ 18 C.F.R. § 1c.2 (2019); Order No. 670, 114 FERC ¶ 61,047 at P 49; *see also City Power Marketing, LLC*, 152 FERC ¶ 61,012, at P 39 (2015) (*City Power*); *Chen*, 151 FERC ¶ 61,179 at P 35.

⁹⁵ As explained below, this amount is now annually adjusted for inflation, and currently is in excess of \$1.2 million.

⁹⁶ 16 U.S.C. § 825o-1(b) (2018). Under section 3 of the FPA, “‘person’ means an individual or a corporation.” *Id.* § 796(4).

⁹⁷ *Id.* § 825o-1(b).

Cragview.⁹⁸ Due to the relation between Cragview and the Cascade intertie,⁹⁹ Vitol's CRR position would earn money if the Cragview Pnode was priced lower than an internal CAISO node (i.e., when there was import congestion on the Cascade intertie) and lose money if the Cragview Pnode was priced higher than an internal CAISO node (i.e., when there was export congestion on the Cascade intertie). Vitol purchased these CRRs "to profit based upon Vitol's long-term view of market fundamentals and its expectation that the congestion component of the . . . [LMP] at the source location would be lower than the congestion component of the LMP at the sink locations."¹⁰⁰

36. On September 13, 2013, CAISO informed market participants that it planned to derate the export capacity on the Cascade intertie to 0 MW for the period of October 28-November 1 due to an outage on a connecting line, while maintaining the 80 MW import capacity on the intertie.¹⁰¹ In early October 2013, CAISO informed market participants that it would similarly derate the export capacity on the Cascade intertie to 0 MW for two hours on October 18 and 14 hours on October 19, again while maintaining the 80 MW import capacity.¹⁰² CAISO subsequently announced additional planned derates of the export capacity on the Cascade intertie for November and December 2013.¹⁰³ Because the import capacity on the Cascade intertie remained open during these partial derates,

⁹⁸ Staff Report Supporting Materials, "allVitolCRRsatCragview.xlsx."; Respondents Answer at 22 (citing Testimony of Anne Marie Hanley, Vol. 1, at 39:9-16, 40:4-7, 96:12-17 (July 24, 2014) (Hanley Test. Vol. 1); VITOL_FERC_0015484; VITOL_FERC_0015486; VITOL_FERC_0015488). The fourth quarter Cragview CRRs sank at either the COWCREEK_6_N001 (COWCREEK) node or SPIAND1_7_B1 (SPIAND) node. *See* Staff Report Supporting Materials, "allVitolCRRsatCragview.xlsx."

⁹⁹ *See supra* P 6.

¹⁰⁰ Vitol, May 15, 2014, Response to Data Request No. OE-VITOL-1-12 (Vitol Response to OE-VITOL-1-12).

¹⁰¹ *See* CAISO OASIS Transmission Outage Notices, <http://oasis.caiso.com/mrioasis/logon.do>; go to Transmission → Transmission Outages → Transmission Interface ID: CASCADE_BG; enter date of outage and press "apply."

¹⁰² *See id.*

¹⁰³ *See id.*

market participants could submit both import and export bids, which would be accepted if the aggregate flow on the intertie resulted in no net exports.¹⁰⁴

37. On October 18, the first day on which CAISO partially derated the export capacity of the Cascade intertie, Cragview experienced an unusually high LMP of \$388.11/MWh¹⁰⁵ resulting from the intertie binding with a shadow price of \$350/MWh.¹⁰⁶ The following day, October 19, LMPs at Cragview were again \$388.11/MWh for the 14 hours during which the Cascade intertie was partially derated.¹⁰⁷ Vitol's CRR position sourcing at Cragview lost approximately \$30,711 during the two-hour derate on October 18 and approximately \$210,503 during the fourteen-hour derate on October 19.¹⁰⁸

38. The \$388.11/MWh price that appeared at Cragview during the October 18-19 derate was not the result of a cleared bid; rather, it was a degenerate price that was set by an uncleared bid.¹⁰⁹ A degenerate price occurs when there are a range of economically optimal prices for the same optimal dispatch (i.e., there is no one market-clearing price, but rather many potential market-clearing prices). In such a supply and demand condition, any of the prices in the degenerate range are appropriate and support an economic dispatch solution. Any of the multiple optimal solutions will achieve the same least-cost dispatch, and the cleared awards will be the same regardless of which of the multiple prices the market clears. However, any shift in supply or demand can eliminate the degeneracy, and thus even a small change in quantity can produce a large change in the market-clearing price.¹¹⁰

¹⁰⁴ CAISO, October 24, 2018, Response to Data Request No. OE-CAISO-1-7 (CAISO Response to OE-CAISO-1-7).

¹⁰⁵ Staff Spreadsheet "Profit&Loss_of_Vitol_Imports&CRRs@Cragview.xlsx," (Tab "CAISO_OASISdataviaVelocitySuite").

¹⁰⁶ Affidavit of Mark Rothleder at 2-3 (June 21, 2017) (Rothleder Aff.).

¹⁰⁷ Staff Spreadsheet "Profit&Loss_of_Vitol_Imports&CRRs@Cragview.xlsx," (Tab "CAISO_OASISdataviaVelocitySuite").

¹⁰⁸ Vitol Response to Staff's Preliminary Findings (March 8, 2017) at 4-5 (Vitol PF Response).

¹⁰⁹ Rothleder Aff. at 2-3.

¹¹⁰ See generally William J. Hogan, *Multiple Market-Clearing Prices, Electricity Market Design and Manipulation* 5 (2012), https://sites.hks.harvard.edu/fs/whogan/Hogan_Degenrate_Price_033112r.pdf. CAISO

39. Corteggiano, who closely monitored market conditions within CAISO as part of his normal practice as a CRR trader, observed the \$388.11/MWh price at Cragview on October 18 and October 19 and believed the price was related to the derates.¹¹¹ Corteggiano also observed that Vitol's CRRs sourcing at Cragview had incurred losses totaling more than \$240,000 over those two days. Corteggiano was aware that CAISO had scheduled similar partial derates of the Cascade intertie from October 28-November 1, and again later in November and December 2013.¹¹²

2. **Actions Taken by Corteggiano and Vitol Following the Mid-October 2013 Derate**

40. On October 18, 2013, Corteggiano contacted several other Vitol employees regarding the possibility of importing power at Cragview during the period October 28-November 1, when the Cascade intertie would again be partially derated. Specifically, Corteggiano asked Kolby Kettler (Kettler), Vitol's Manager of Non-Oil Operations, and Mark Sickafoose (Sickafoose), a Vitol Power Matrix trader, to assist him in arranging to purchase power in Oregon and import it into CAISO at Cragview in the day-ahead market on October 28-November 1, 2013.¹¹³

41. Corteggiano needed assistance arranging the imports at Cragview because he lacked the internal authority to import physical power. Vitol only grants employees authority to trade in specific products. To trade outside those blanket authorizations, employees must seek "exceptions."¹¹⁴ In October 2013, Corteggiano only was authorized to trade FTRs/CRRs, and therefore he needed Dylan Seff (Seff), the head of Vitol's

has since removed the potential for degenerate market-clearing pricing from its markets. *Cal. Indep. Sys. Operator Corp.*, 156 FERC ¶ 61,152 (2016) (approving CAISO's tariff amendment eliminating degenerate pricing at interties).

¹¹¹ Respondents Answer at 13-15.

¹¹² *Id.* at 13 (citing Corteggiano Test. Vol. 1 at 52:21-53:1).

¹¹³ See Corteggiano Test. Vol. 1 at 78:13-79:13; Corteggiano Test. Vol. 2 at 189:25-190:13.

¹¹⁴ Testimony of Dylan Seff at 33:11-18 (Apr. 1, 2015) (Seff Test.).

Power Matrix, to authorize an exception to allow him to trade physical power.¹¹⁵ Seff authorized that exception.¹¹⁶

42. Corteggiano also needed assistance arranging the imports at Cragview because he lacked the expertise needed to arrange such trades, including the contact information of power sellers and the knowledge of how to schedule the physical movement of the purchased power.¹¹⁷ Prior to October 2013, Corteggiano had never traded physical power while at Vitol¹¹⁸ and had only ever traded physical power one time in his career, while he was at Deutsche Bank.¹¹⁹

43. The physical trades that Corteggiano made on behalf of Deutsche Bank at the Silver Peak intertie in the CAISO market were the subject of a separate, earlier Commission market manipulation investigation.¹²⁰ Specifically, at Deutsche Bank, Corteggiano had CRRs that would earn money on export congestion at the Silver Peak intertie and lose money on import congestion. In January 2010, CAISO partially derated the Silver Peak intertie to 0 MW in the import direction, causing “phantom” import congestion to appear, which caused Corteggiano’s CRRs to lose money. Corteggiano executed small physical trades in the opposite direction of the derate at Silver Peak, that

¹¹⁵ See Seff Test. at 33:11-18, 34:4-6 (Corteggiano needed Seff’s authorization to trade physical power, which was an “exception” to Corteggiano’s authorization to trade FTRs/CRRs); *Amended and Restated Declaration Under Penalty of Perjury of Ann Marie Hanley* at 3, ¶ 6(c) (Hanley Dec.) (Corteggiano not authorized to trade physical power).

¹¹⁶ Seff Test. at 34:11-18.

¹¹⁷ Corteggiano Test. Vol. 1 at 79:14-80:7.

¹¹⁸ *Id.* at 84:24-85:3 (Cragview imports were Corteggiano’s first time trying to take advantage of physical energy prices); Hanley Dec. at 3, ¶ 6(c) (Corteggiano had not traded physical power at Vitol before the Cragview transaction).

¹¹⁹ Corteggiano Test. Vol. 2 at 163:23-165:23. While at Deutsche Bank, Corteggiano briefly traded physical power to test liquidity at another intertie. Corteggiano 2010 Test. at 69:19-71:18, 109:14-22.

¹²⁰ See *Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056, at P 19 (2013) (Order Approving Stipulation and Consent Agreement between OE and Deutsche Bank related to allegations that Deutsche Bank violated the Anti-Manipulation Rule by trading physical exports at Silver Peak with the intent to benefit its CRR position at Silver Peak) (*Deutsche Bank*).

eliminated the “phantom congestion.”¹²¹ In testimony given in 2010, Corteggiano admitted his understanding of the concept of “phantom congestion” and that adding small amounts of export flow at the intertie could eliminate that phantom congestion.¹²²

44. In response to Corteggiano’s request for assistance, Sickafoose began looking for power to purchase and import at Cragview on Friday, October 18.¹²³ Sickafoose, in his capacity as a “west desk” trader in the Vitol Power Matrix, had traded physical power in CAISO on a limited basis,¹²⁴ but never for a colleague who was not authorized to trade physical power.¹²⁵ That same day, Kettler began gathering and circulating information about how Vitol could move power from the Pacific Northwest to Cragview, including information about transmission paths that could be used and also a “tagging template,” a form that would need to be filled out to effectuate the transmission of power over whatever path they chose.¹²⁶

45. The following Monday, October 21, Corteggiano asked to meet “ASAP” with Seff, Brignone, and Kettler to discuss the proposed import transaction.¹²⁷ That same day, Kapil Saxena (Saxena), another Vitol Power Matrix trader, began working on finding power to import at Cragview. Kettler and the two “west desk” traders in the Vitol Power Matrix, Sickafoose and Saxena, continued working throughout the week to find a

¹²¹ *Id.* Corteggiano understood “phantom congestion” to be congestion triggered by something other than actual physical flows on the system. Corteggiano 2010 Test. at 94:19-25.

¹²² *Id.* at 93:6-9.

¹²³ Respondents Answer at 14 (citing VITOL_FERC_0000044 (IM between Mark Sickafoose and bcpowerpge (Oct. 18, 2013))).

¹²⁴ Testimony of Mark Sickafoose, Vol. 1 at 9:1-5 (Mar. 5, 2014) (Sickafoose Test. Vol. 1).

¹²⁵ *Id.* at 22:12-23:4.

¹²⁶ VITOL_FERC_0000360 (Email from Kolby Kettler to Mark Sickafoose and Federico Corteggiano, “Import at CRAG for Cascade Price” (Oct. 18, 2013)).

¹²⁷ VITOL_FERC_0001269 (Email from Federico Corteggiano to Dylan Seff, Kolby Kettler, and Sergio Brignone, “Trading Opportunity” (Oct. 21, 2013)).

counterparty from which they could purchase power to import at Cragview.¹²⁸ Over the course of the week, Kettler and Power Matrix traders contacted several companies, including TransAlta,¹²⁹ EDF Trading North America,¹³⁰ Powerex,¹³¹ and Morgan Stanley,¹³² seeking to purchase power for import at Cragview. The Vitol team expended substantial time and effort on the transaction, and exhibited marked flexibility on key deal terms, including quantity, price, and the risk of transmission unavailability.

46. After the traders had already begun looking for power to import, on Monday, October 21, Corteggiano sought approval for the transaction from Vitol's General Counsel, Ronald Oppenheimer (Oppenheimer), and Ann Marie Hanley (Hanley), the compliance advisor for the Power Matrix, who reported to Oppenheimer. Seff told Corteggiano to do so:

I said it [the transaction] seems to make sense, but given the sensitivity of having transactions like that you already got an FTR position, let's make sure we run it through compliance, and have them authorize it as well.¹³³

¹²⁸ VITOL_FERC_0000049-50 (IM between Kapil Saxena and temutrevor (Oct. 21, 2013); VITOL_FERC_0000033-37 (IM between Kolby Kettler and jennier678 (Oct. 25, 2013); VITOL_FERC_0000051 (IM between Kapil Saxena and pwxtrader (Oct. 21, 2013); VITOL_FERC_0000023-24 (IM between Kapil Saxena and pwxtrader (Oct. 22, 2013); FERC_SUB_IN14-4_0000475.mp3 (Telephone Call between Kapil Saxena and Ryan Killam).

¹²⁹ VITOL_FERC_0000049-50 (IM between Kapil Saxena and temutrevor (Oct. 21, 2013)).

¹³⁰ VITOL_FERC_0000033-37 (IM between Kolby Kettler and jennier678 (Oct. 25, 2013)).

¹³¹ *See, e.g.*, VITOL_FERC_0000051 (IM between Kapil Saxena and pwxtrader (Oct 21, 2013)). "pwxtrader" is Phil Kern at Powerex. Testimony of Kapil Saxena Vol. 1 at 124:18-125-4 (July 22, 2014) (Saxena Test. Vol. 1). *See also* VITOL_FERC_0000023-24 (IM between Kapil Saxena and pwxmiles (Oct. 22, 2013)). "pwxmiles" is Miles Federspiel at Powerex. Saxena Test. Vol. 1 at 127:15-22.

¹³² FERC_SUB_IN14-4_00000475.mp3 (Telephone call between Kapil Saxena and Ryan Killam (Oct. 25, 2013)).

¹³³ Seff Test. at 65:13-19. Vitol's "ISO/RTO Products Trading Guidelines" required traders to "seek guidance" from senior management or Compliance "prior to

47. That same day, Corteggiano emailed Oppenheimer and Hanley about the potential “[t]rading opportunity” at Cragview.¹³⁴ In the email, Corteggiano requested that Oppenheimer and Hanley “analyze the regulatory risk” of the proposed import transaction.¹³⁵ Corteggiano explained in the email that during the mid-October derate of the Cascade intertie, the LMP at Cragview was \$388.11/MW. Corteggiano explained that the same derate was scheduled for the week of October 28-November 1 and that Vitol “could expect [the] same LMPs at the intertie.”¹³⁶ Corteggiano stated that Vitol could buy power from Oregon at around \$40/MWh and buy transmission to move it to Cragview at around \$10/MWh. Corteggiano stated that, if they moved 50 MW for the total 104 hours, they could expect a profit of \$1,757,600.¹³⁷ Corteggiano noted to Oppenheimer and Hanley that there was “market risk” given that “liquidity is uncertain at the intertie, and bid/offer information is not available from 10/28 to analyze it,” and that the CAISO price at the intertie “could drop as bid volume increases.”¹³⁸ Corteggiano explained that, if they were unable to sell the power, they would still have to pay transmission fees and sell the power back into the original market. Finally, Corteggiano stated that there was “regulatory risk,” because Vitol owned CRRs sourcing at Cragview “which were negatively impacted” by the earlier derate and that the “same liquidity uncertainty could affect this CRRs valuation,” and that Vitol could end up setting the

bidding or offering an ISO/RTO product that overlaps with another ISO/RTO product at an aggregate pricing point that is below 500 kV.” VITOL_FERC_0111124-31 (Vitol ISO/RTO Products Trading Guidelines (Jan. 2, 2013)).

¹³⁴ VITOL_FERC_0015481 (Email from Federico Corteggiano to Ann Marie Hanley and Ron Oppenheimer (Oct. 21, 2013)).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

price at the intertie.¹³⁹ Corteggiano stated that their “idea” was to “put price-sensitive bids, selling power only if it cover[ed] all transmission and scheduling fees.”¹⁴⁰

48. In response to Corteggiano’s email, Oppenheimer directed Hanley to take primary responsibility for reviewing the proposed transaction, giving her discretion to review whatever information she felt was important.¹⁴¹ Hanley first sought to validate the exceptionally high \$388.11/MWh price by viewing it on a “nodal tool” that Corteggiano used to track LMPs.¹⁴² The “nodal tool” showed the \$388.11/MWh price at Cragview on October 18, while simultaneously showing that LMPs at surrounding nodes were significantly lower.

49. Hanley next asked Kettler to contact CAISO to verify that the \$388.11/MWh price was “real” and not the result of “a technological glitch or error.”¹⁴³ However, Kettler did not ask CAISO that specific question. Rather, on October 23, Kettler and Corteggiano together drafted an email to Mark Rothleder (Rothleder), Vice President, Market Quality & Renewables Integration at CAISO, asking various questions about how the price was set at Cragview on October 18-19.¹⁴⁴ Specifically, the email asked whether “someone has the capability to submit export schedules in this case and potentially set the

¹³⁹ *Id.* Corteggiano’s email to Oppenheimer and Hanley did not disclose the exact amount Vitol’s CRRs lost during the October 18-19 derate (\$240,000) or the amount that would be lost if the \$388.11/MWh price reappeared during the next derate (approximately \$1,200,000). Staff Report at 19. Hanley testified that having knowledge of the CRR losses would not have changed her analysis in any event. Hanley Test. Vol. 1 at 71:11-15.

¹⁴⁰ VITOL_FERC_0015481 (Email from Federico Corteggiano to Ann Marie Hanley and Ron Oppenheimer (Oct. 21, 2013)).

¹⁴¹ Testimony of Ronald Oppenheimer at 44:2-6 (Apr. 18, 2017) (Oppenheimer Test.).

¹⁴² Hanley Dec. at 4, ¶ 7(b)(ii); Hanley Test. Vol. 2 at 76:4-7.

¹⁴³ Hanley Test. Vol. 2 at 139:16-21.

¹⁴⁴ VITOL_FERC_0016162. Kettler testified that he was just the “conduit” for Corteggiano’s questions. Testimony of Kolby Kettler, Vol. 2, at 304:15-306:24 (July 24, 2014) (Kettler Test. Vol. 2).

intertie price” and whether “someone [can] place an import offer and a simultaneous export for equal mws and set the price.”¹⁴⁵

50. Within the next 48 hours, Rothleder called Kettler and confirmed that the \$388.11/MWh price was “a valid solution for the hours in which the Cascade intertie was congested”¹⁴⁶ Rothleder explained that the “price was set based on the cost of serving the next megawatt of demand at the location” and that because the export limit was set at zero MW, “the price was set by an import bid during the intervals in question because the import bid . . . could allow a megawatt of demand to be served at that location.”¹⁴⁷ Rothleder thus confirmed that the high price was set by an import bid.

51. Rothleder’s response was similar to the response Corteggiano had received from CAISO in answer to a comparable inquiry in the *Deutsche Bank* matter, when he sought information about similarly anomalous pricing at the Silver Peak intertie. In both cases, CAISO said that the unusually high price was set by a “bid,” rather than an actual import or export.¹⁴⁸ In CAISO, “bid” means an “offer” for supply (import) or demand (export) of energy,¹⁴⁹ not a cleared offer. Congestion arising from an *uncleared* bid is “phantom congestion,” resulting from something other than actual, physical flows on the system.¹⁵⁰ “Phantom congestion” is what Corteggiano sought to – and did – eliminate with his

¹⁴⁵ VITOL_FERC_0015847 (Email from Kolby Kettler to Mark Rothleder, “FW: Cascade de-rate” (Oct. 23, 2013)). Hanley did not see a draft of the email, testifying that she was “unaware” of it. Hanley Test. Vol. 2 at 140:10-12, 144:6-9.

¹⁴⁶ Rothleder Aff. at 3.

¹⁴⁷ *Id.*

¹⁴⁸ A CAISO representative had emailed Corteggiano in January 2010 that the “results [at Silver Peak] are correct” and that the “price was set by the export bid. Note, you will see that nothing cleared.” Email from Siri Klovstad to Federico Corteggiano dated Jan. 25, 2010, cited in *Deutsche Bank Energy Trading Answer*, Ex. A., at 14 (publicly available on FERC E-Library). Although CAISO does not publish information on individual bids, it does publish net flow data for the interties each day.

¹⁴⁹ A bid is “[e]ither (1) an offer for the Supply or Demand of Energy or Ancillary Services, including Self-Schedules, submitted by Scheduling Coordinators for specific resources, conveyed through several components that apply differently to the different types of service offered to or demanded from any of the CAISO markets or (2) a Virtual Bid.” CAISO Tariff, app. A, Master Definition Supp. (effective Oct. 1, 2013).

¹⁵⁰ *See supra* n.121.

trading at the Silver Peak intertie when he worked at Deutsche Bank.¹⁵¹ Thus, in both this case and *Deutsche Bank*, CAISO indicated that it regarded prices set by an uncleared bid to be legitimate (describing them as “valid” in this case and “correct” in *Deutsche Bank*).

52. Kettler conveyed the information from the call with Rothleder to Corteggiano and Hanley. However, Hanley’s testimony confirmed that neither Kettler nor Corteggiano told her that the \$388 price was the product of an uncleared bid:

My interpretation of what [Kettler] conveyed to me was that he spoke to CAISO. They confirmed that the 388 was not an error or glitch. It was real to the extent that it was disseminated by CAISO but they didn’t provide any additional color related to bidding or offering or extent or anything of that nature, any other details related to it other than yes, that was a published LMP.¹⁵²

53. Hanley met with Oppenheimer on the same day she received Corteggiano’s email describing the proposed transaction, and shared her view that it was a profit-making opportunity independent of the CRRs and therefore lawful.¹⁵³ In a subsequent meeting, Hanley and Oppenheimer discussed how Commission precedents on market manipulation might apply, and then decided together to approve the transaction, despite the fact that Vitol’s CRRs could benefit.¹⁵⁴ Hanley concluded that Corteggiano had an “independent” trading strategy based principally on her “verification” of the \$388.11/MWh price signal¹⁵⁵ and her belief in Corteggiano’s claim that he did not propose the import

¹⁵¹ Corteggiano’s investigative testimony in *Deutsche Bank* demonstrates his knowledge of how to eliminate “phantom congestion” through a physical trade at an illiquid intertie, and thereby aids in establishing knowledge, intent, opportunity, and plan.

¹⁵² Hanley Test. Vol. 2 at 141:10-16.

¹⁵³ *Id.* at 117:19-119:12.

¹⁵⁴ *Id.* at 122:11-19; *Declaration Under Penalty of Perjury of Ronald S. Oppenheimer* at 2, ¶ 10 (Mar. 8, 2017) (Vitol PF Response, Ex. G) (Oppenheimer Dec.).

¹⁵⁵ Hanley Test. Vol. 1 at 41:8-13 (“the most important information to verify was whether the price signal showing \$388.11/MWh was valid or real or not, because the independence of the entire strategy weighed in largely on this price signal. So that was the most important thing for me to verify”).

transaction to benefit his CRR position.¹⁵⁶ However, neither Hanley nor Oppenheimer understood that the \$388.11/MWh price at Cragview could have been degenerate (set by an unaccepted bid) and therefore could have reflected “phantom congestion” that could be eliminated by importing power.¹⁵⁷

54. On October 25, in the monthly CAISO CRR auction, Corteggiano acquired CRRs running counter-flow to Vitol’s existing CRRs sourcing at Cragview, thereby “flattening” Vitol’s relevant CRR position and eliminating the risk of potential losses during the November and December derates of the Cascade intertie.¹⁵⁸ While Corteggiano had flattened Vitol’s relevant CRR position from November 1 onward, Vitol was still exposed to potential losses on its CRRs sourcing at Cragview for the remainder of October.¹⁵⁹ If the \$388.11/MWh price reappeared during that week, Vitol’s CRRs sourcing at Cragview would lose another \$1.2 million.¹⁶⁰

¹⁵⁶ Hanley Dec. at 5, ¶ 7(g)(ii)-(iii) (“I forcefully, directly and specifically explained to [Corteggiano] that he and the company are prohibited from entering into a physical transaction for the purpose of benefiting a related position. I made clear to him that he could not engage in the proposed transaction if it was his intent to benefit the CRR positions. Mr. Corteggiano told me that he understood my admonition, and that it was his intent to profit from a potentially high price at Cragview, not to benefit his CRR positions. I observed his demeanor and believed him.”) (Vitol PF Response, Ex. F).

¹⁵⁷ Hanley Test. Vol. 2 at 196:2-21 (Hanley was not familiar with “degenerate pricing” at the time she evaluated the transaction and did not consider that the \$388.11/MWh could have been degenerate and based on artificial (phantom) congestion); Oppenheimer Test. at 26:21-24 (Oppenheimer did not understand how CAISO set LMP at a partially open intertie when no bids cleared), 73:2-16 (explaining that he distinguished the *Deutsche Bank* case from the facts on the basis that *Deutsche Bank* involved an attempt to alleviate phantom congestion, which he did not see as present in this case).

¹⁵⁸ Vitol Response to OE-VITOL-1-12 at 4-5.

¹⁵⁹ The last opportunity for Vitol to purchase counter-flow CRR positions for the month of October would have been in the monthly auction that occurred in September, prior to the October 18-19 derates.

¹⁶⁰ See Staff Spreadsheet “ProfitLoss_of_Vitol_ImportsCRRs@Cragview.xlsx.”

3. Vitol's Physical Imports at Cragview

55. Having received approval from Oppenheimer and Hanley, Vitol moved forward with securing physical power to import at Cragview. On Friday, October 25, Kettler executed a transaction with Morgan Stanley for 5 MW at \$46/MWh for Monday, October 28, exhibiting significant flexibility on price and terms.¹⁶¹

56. Vitol offered the 5 MW that it purchased from Morgan Stanley on October 25 into the CAISO day-ahead market for Monday, October 28 for \$1/MWh at Cragview.¹⁶² On October 27, CAISO published the hourly LMPs for October 28, which ranged from \$31.71/MWh to \$48.78/MWh – the \$388.11/MWh price did not reappear.¹⁶³ The CAISO published data also showed a net import at Cragview of 5 MW.¹⁶⁴ Ultimately, Vitol lost approximately \$1,000 on the October 28 import, but avoided approximately \$246,000 in losses on the CRR position that it would have otherwise incurred if the price had remained \$388.11/MWh.¹⁶⁵

57. Despite the fact that the \$388.11/MWh price did not reappear on October 28, as shown in the LMPs published October 27, on October 28 Vitol proceeded with purchasing 5 MW of power from Morgan Stanley for \$48/MWh for the remainder of the week (October 29-November 1).¹⁶⁶ At that point, Corteggiano could have decided to

¹⁶¹ FERC_SUB_IN14-4_00000480 (Telephone Call between Kolby Kettler and Ryan Killam (Oct. 25, 2013)). Vitol had wanted to purchase 5 MW for the entire week of October 28-November 1, but because they did not connect with Morgan Stanley until late on Friday, they were not able to complete a transaction for the entire week at that time. Respondents Answer at 27-28.

¹⁶² Testimony of Heather Noah at 48:15-20 (July 22, 2014) (Noah Test.). Noah worked for Kettler in the Power Operations group and managed all of Vitol's power scheduling. *Id.* at 12:12-23; 13:11-12.

¹⁶³ See Staff Spreadsheet "Aggregated_CAISO_OASIS_info.xlsx," (Tab CAISO_OASISdata via VelocitySuite, Column H).

¹⁶⁴ *Id.* at Column I.

¹⁶⁵ Staff Report at 31; Staff Spreadsheet "ProfitLoss_of_Vitol_ImportsCRRs@Cragview.xlsx," (Tab "Daily_clean", Columns B, C).

¹⁶⁶ VITOL_FERC_0000089-90 (IM between Kapil Saxena and Ryan Killam (Oct. 28, 2013)); Testimony of Kapil Saxena, Vol. 2, at 240:25-241:2 (July 23, 2014)

forgo further imports at Cragview, having seen the day before that (1) the \$388.11/MWh price had vanished, along with the congestion at Cragview, (2) his 5-MW import likely caused that result, and (3) Vitol lost money on the import deal. Instead, Vitol offered the 5 MW it purchased from Morgan Stanley on October 28 into the CAISO day-ahead market for October 29-November 1 for \$1/MWh at Cragview.¹⁶⁷ The hourly LMPs for October 29-November 1 averaged approximately \$40/MWh over the course of the week – again, the \$388.11/MWh price did not reappear.¹⁶⁸ Vitol ultimately lost approximately \$3,500 on the October 29-November 1 imports, but avoided approximately \$1,000,000 in losses on its CRRs.¹⁶⁹

D. Determination of Violations

1. Fraudulent Device, Scheme or Artifice

58. Fraud is the first element necessary to establish a violation of the Commission’s Anti-Manipulation Rule.¹⁷⁰ The Anti-Manipulation Rule states that:

It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy . . . (1) To use or employ any device, scheme, or artifice to defraud, (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act,

(Saxena Test. Vol. 2) (Corteggiano said on Monday morning that he wanted to continue the imports the rest of the week).

¹⁶⁷ Staff Spreadsheet “MarketHarm.xlsx,” (Tab “Bids,” Column F).

¹⁶⁸ Staff Spreadsheet “ProfitLoss_of_Vitol_ImportsCRRs@Cragview.xlsx,” (Tab “CAISO_OASISdataviaVelocity Suite,” Columns H, I).

¹⁶⁹ *Id.* at Tab “Daily_clean,” Columns B, C.

¹⁷⁰ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49; 16 U.S.C. § 824v (“It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.”).

practice, or course of business that operates or would operate as a fraud or deceit upon any entity.¹⁷¹

59. Fraud is a question of fact that must be determined based on the particular circumstances of each case.¹⁷² The Commission has explained that, under the Anti-Manipulation Rule, fraud includes, but is not limited to, “any action, transaction, or conspiracy for the purpose of impairing, obstructing, or defeating a well-functioning market.”¹⁷³ In light of the broad language of FPA section 222 and the Anti-Manipulation Rule, our use of the term “well-functioning market” is not limited just to consideration of price or economically efficient outcomes in a market.¹⁷⁴ Instead, we view the term to also broadly include consideration of “such rules and regulations as the Commission may prescribe as necessary or appropriate,”¹⁷⁵ which necessarily includes the rates, terms, and conditions of service in a Commission-jurisdictional market, such as the CAISO market at issue here.

60. An entity “need not violate a tariff, rule or regulation to commit fraud.”¹⁷⁶ The Commission has held that fraud under the Anti-Manipulation Rule can include open-market transactions, i.e., transactions occurring on public trading platforms or exchanges, executed with manipulative intent.¹⁷⁷ The Commission also has found fraud where entities engage in cross-market manipulation schemes, which involve trading in one

¹⁷¹ 18 C.F.R. § 1c.2 (2019).

¹⁷² Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

¹⁷³ *Id.*

¹⁷⁴ See *City Power*, 152 FERC ¶ 61,012 at P 59; *Chen*, 151 FERC ¶ 61,179 at P 49.

¹⁷⁵ 16 U.S.C. § 824v(a) (2018).

¹⁷⁶ *Lincoln Paper*, 144 FERC ¶ 61,162 at P 36 (“Nor does a finding of fraud require advance notice specifically prohibiting the conduct concerned.”); see also *In re Make-Whole Payments & Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 83 (2013) (fraud is determined by all the circumstances of a case, “not by a mechanical rule limiting manipulation to tariff violations”).

¹⁷⁷ See, e.g., *Chen*, 151 FERC ¶ 61,179 at P 136 (rejecting argument that transactions cannot be fraudulent if executed in “an open, transparent manner”).

market with the intent to move prices in a particular direction to benefit positions in a related market.¹⁷⁸

61. OE Staff alleges that, from October 28 through November 1, 2013, Respondents engaged in a fraudulent scheme, in violation of FPA section 222 and the Commission's Anti-Manipulation Rule, by undertaking import transactions in the CAISO day-ahead market that were designed to relieve congestion at the Cascade intertie and thereby reduce Cragview LMPs, which in turn allowed Respondents to avoid losses on their CRRs sourcing at Cragview.¹⁷⁹

62. As discussed below, based on the totality of the evidence in the record, we find that Respondents' imports in the CAISO day-ahead market from October 28 through November 1, 2013 at the Cascade intertie constituted a fraudulent device, scheme, or artifice to defraud the CAISO market and market participants. The preponderance of the evidence demonstrates that Respondents submitted physical import bids at the Cascade intertie with the intent to eliminate congestion, thereby lowering the Cragview LMP, to economically benefit Respondents' CRR position, and we find those actions constitute fraud. In addition, we have considered Respondents' arguments and defenses and find them unpersuasive.

a. Respondents Answer

63. Respondents argue that OE Staff has failed to state a claim for manipulation, because Vitol's imports at Cragview were consistent with supply and demand fundamentals and therefore there is no basis to allege that the physical sales were deceptive.¹⁸⁰ Respondents state that OE Staff does not claim that Respondents made material misrepresentations, material omissions, employed a deceptive trading practice (such as wash trades), or communicated inaccurate information to the market about the supply and demand for power at Cragview in an attempt to create an artificial price.¹⁸¹

¹⁷⁸ See, e.g., *ETRACOM*, 155 FERC ¶ 61,284 at P 96; *Barclays*, 144 FERC ¶ 61,041 at P 8.

¹⁷⁹ See, e.g., Staff Report at 34-35 (detailing OE Staff's findings regarding Respondents' manipulative scheme).

¹⁸⁰ Respondents Answer at 10, 32-36 ("The standard against which the truth or falsity of the information allegedly injected into the market is measured is supply and demand—in other words, information that could conceivably mislead other market participants or give rise to an artificial price.").

¹⁸¹ *Id.* at 10, 34; see also *id.* at 93-94 ("Affirmative Defenses . . . First Defense: Respondents did not use or employ any device, scheme, or artifice to defraud. Second

Respondents assert that, rather than being deceptive, their trades promoted the “ordinary interplay of supply and demand” and contributed to the formation of a market-based price, consistent with CAISO’s price signal.¹⁸² Respondents assert that OE Staff’s reliance on *ETRACOM* is misplaced, because in that case OE Staff’s allegations of fraud were tied to the impact of the alleged conduct on the interplay of supply and demand and the alleged attempts to create an artificial price.¹⁸³

64. Respondents assert that the “touchstone” of the fraud element in an open-market manipulation case is “whether a trader communicated to the market false or misleading information about supply and demand.”¹⁸⁴ Respondents argue that a sale of energy consistent with market fundamentals signaling demand contributes to the formation of a market-based price and conveys accurate information to the market. Respondents assert that neither the Commission nor any court has ever held that such a trade is deceptive or fraudulent.¹⁸⁵

65. Respondents argue that OE Staff contends the Cragview trades were deceptive solely on the basis that Corteggiano’s intent was to benefit his CRR position.¹⁸⁶ Respondents state that OE Staff supports its deception by intent theory by relying on generalized allegations that Respondents injected false information into the market that they were importing power at Cragview in order to profit; however, Respondents argue

Defense: Respondents made no untrue statement of material fact and did not omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. Third Defense: Respondents did not engage in any act, practice, or course of business that operated or would operate as a fraud or deceit upon any entity.”).

¹⁸² *Id.* at 34-36.

¹⁸³ *Id.* at 35 (citing *ETRACOM*, 155 FERC ¶ 61,284 at P 125). Respondents argue that, in *Barclays*, the Commission similarly explained that the manipulative scheme moved prices in a manner inconsistent with supply and demand. *Id.* (citing *Barclays*, 144 FERC ¶ 61,041 at P 56).

¹⁸⁴ *Id.* at 32-33 (citations omitted).

¹⁸⁵ *Id.* at 10-11, 33.

¹⁸⁶ *Id.* at 10, 33-34.

that submitting an offer to sell 5 MWs of power into CAISO does not transmit any information to anyone about the subjective intent behind the offer.¹⁸⁷

66. Respondents further argue that, even if OE Staff could prove Corteggiano's intent was to benefit his CRR position, Vitol's open market transactions at Cragview could not be found to violate the Anti-Manipulation Rule, given that they conveyed accurate information to the market, did not distort supply and demand, and deceived no one. Respondents argue that OE Staff's contention that intent alone can transform a legitimate open-market transaction into a fraudulent or deceptive act is legally incorrect.¹⁸⁸ Respondents state that a wrongful state of mind cannot inject false information into the market, and a manipulation claim "requires . . . something beyond otherwise legal trading, [that] specifically injects false information into the market and/or creates an *artificial* demand."¹⁸⁹ Respondents assert that CAISO's published and confirmed \$388.11/MWh price at Cragview provided Respondents with an incentive to sell power there, and that offering to sell power consistent with supply and demand and with the intent to perform if the offer is accepted conveys accurate, not false, information to the market.¹⁹⁰

67. Respondents argue that OE Staff's allegations in this case are similar to the U.S. Commodity Futures Trading Commission's (CFTC) in *CFTC v. Wilson*, where the CFTC alleged that defendants unlawfully placed orders for futures contracts with the intent to move the prices of the contracts in their favor, to increase the value of the futures contracts positions they held in their portfolio, which the CFTC alleged was inherently manipulative, regardless of whether they were reflective of fair market value.¹⁹¹ Respondents explain that the court in *CFTC v. Wilson* concluded that such a theory is

¹⁸⁷ *Id.* at 34.

¹⁸⁸ *Id.* at 11, 36 (citing *Blumenthal ex rel. Conn. v. ISO New Eng., Inc.*, 132 FERC ¶ 63,017, at P 111 (2010) ("[i]n the absence of misconduct, deceit, fraud or extreme recklessness, the market manipulation defined at 18 C.F.R. § 1c.2 cannot rightfully be inferred merely from knowing or intentional behavior or from a purposeful scheme or strategy evidencing otherwise legitimate objectives")).

¹⁸⁹ *Id.* at 36 (quoting *GFL*, 272 F.3d at 204 (emphasis added)). Respondents note that neither the Anti-Manipulation Rule nor any other law requires a trader to disclose to a counterparty the intent underlying a trade. *Id.* at 39 n.136.

¹⁹⁰ *Id.* at 37.

¹⁹¹ *Id.* at 37-38 (citing *CFTC v. Wilson*, 2018 WL 6322024, at *1, 14).

fundamentally unsound and “finds no basis in law,” and they argue that, for the same reason, the Commission should reject OE Staff’s liability theory in this case.¹⁹²

68. Further, Respondents argue that, even if intent alone could transform an open market transaction into a fraudulent one, such a claim would fail here because there is no proof that no other lawful purpose motivated Vitol’s Cragview imports. Rather, Respondents assert that the facts prove that Vitol and Corteggiano had an economic incentive to sell energy to CAISO at Cragview, and that OE Staff cannot establish a violation because it cannot prove that this objectively legitimate incentive was not at least one motivation for Respondents’ transaction.¹⁹³ Respondents argue that even under the *Masri* standard, which incorrectly accepted the notion that intent alone can transform an open-market transaction into a deceptive act, OE Staff still cannot prove intent, because they would have to “‘prove that *but for* the manipulative intent, the defendant would not have conducted the transaction.’”¹⁹⁴ Respondents assert that the facts show that Respondents pursued the physical trades at Cragview in response to an “objectively rational incentive,” and accordingly “[n]o reasonable trier of fact could conclude that a legitimate economic reason did not, at least in part, motivate Respondents’ transaction.”¹⁹⁵

¹⁹² *Id.* at 38 (citing *CFTC v. Wilson*, 2018 WL 6322024 at *15). Respondents explain that they do not cite *CFTC v. Wilson* for the proposition that the elements of manipulation under the Commodity Exchange Act and the Commission’s Anti-Manipulation Rule are identical, but rather for the court’s “declaration that no law precludes a trader with an open position from executing a trade at a market-based price even if the purpose of that trade is to benefit an open position” because “[s]uch a trade is not ‘inherently manipulative,’ as [OE Staff] contends.” *Id.* (citing *CFTC v. Wilson*, 2018 WL 6322024 at *1, 14).

¹⁹³ *Id.* at 11, 39-41.

¹⁹⁴ *Id.* at 39-40 (quoting *SEC v. Masri*, 523 F. Supp. 2d 361, 373 (S.D.N.Y. 2007) (*Masri*)). Respondents state that, in *Barclays*, the court applied the *Masri* standard and explained that market manipulation can occur “‘if an investor conducts an open-market transaction with the intent of *artificially* affecting the price of the security, and not for *any* legitimate economic reason.’” *Id.* (quoting *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1147 (E.D. Cal. 2015) (*FERC v. Barclays*) (emphasis added) (quoting *Masri*, 523 F. Supp. 2d at 372)).

¹⁹⁵ *Id.* at 41. Respondents argue that OE Staff’s theory turns the law on its head and requires the Commission to find that Respondents traded *for any illegitimate* reason, rather than *not for any legitimate* reason. *Id.* at 40.

69. Respondents argue that adopting OE Staff’s manipulation theory would harm the organized wholesale power markets by chilling legitimate market activity by creating regulatory risk for a market participant that sells energy in response to an ISO-published price simply because the sale might benefit another position, such as a CRR. Respondents assert that no law or market rule prohibits a market participant from trading energy at the same location where it holds an open CRR position, even if the trade might affect the value of the CRRs; rather, the markets are designed to incentivize such transactions.¹⁹⁶ Respondents state that, in *CFTC v. Wilson*, the court rejected very similar manipulation allegations, holding that when a trader makes a *bona fide* offer in the market that sets the market-based price, there is no manipulation, even if another position benefits.¹⁹⁷ Based on the same logic applied in *CFTC v. Wilson*, Respondents argue that the Commission should reject OE Staff’s liability theory here, where there is no evidence of fraudulent conduct.¹⁹⁸

70. Respondents also argue that the Commission should reject OE Staff’s reliance on undisclosed degenerate pricing to support its liability claim.¹⁹⁹ Respondents argue that CAISO’s degenerate pricing practices have caused inaccurate price signals and skewed market outcomes. Respondents state that LMPs are designed to send signals about the supply of, and demand for, power at specific points in the grid and to encourage market participants to respond. Respondents assert that Vitol’s physical trades were entirely consistent with the fundamental design of the CAISO market, which encourages responses to high prices; however, the complication is that Respondents learned later that the high price that prompted their trades was a degenerate price that disappeared when Vitol sold power.²⁰⁰ Respondents assert that at the time they made the Cragview trades, there was nothing in the CAISO Tariff or publicly available data that would have allowed Respondents to determine on their own that the \$388.11/MWh price was degenerate, and not a legitimate signal of supply and demand.²⁰¹ Respondents explain that CAISO has

¹⁹⁶ *Id.* at 11-12.

¹⁹⁷ *Id.* at 12 (citing *CFTC v. Wilson*, 2018 WL 6322024, at *20) (“[a contrary] theory, which taken to its logical conclusion would effectively bar market participants with open positions from ever making additional bids to pursue future transactions, finds no basis in law”).

¹⁹⁸ *Id.* at 38.

¹⁹⁹ *Id.* at 77-84.

²⁰⁰ *Id.* at 77-78.

²⁰¹ *Id.* at 79.

since acknowledged that degenerate pricing created pricing uncertainty in the market and problems with artificial congestion, which the Commission also acknowledged in its order approving revisions to the CAISO Tariff to eliminate degenerate pricing results.²⁰²

71. Respondents state that an undisclosed and unlawful pricing system, such as CAISO's degenerate pricing, should not form the predicate for a manipulation claim. Respondents argue that CAISO's degenerate pricing violated FPA section 205 and the Commission's "Rule of Reason," because it was not disclosed in or authorized by the CAISO Tariff, and was never approved by the Commission as just and reasonable, even though it was a methodology used to calculate a rate.²⁰³ Further, Respondents assert that CAISO's degenerate pricing methodology actually violated the least-cost dispatch principles embodied in CAISO's then-effective tariff.²⁰⁴ Respondents state that it is inappropriate to base a theory of market manipulation on the notion that the clearing price at Cragview should have been \$388.11/MWh, when this artificial price was actually the product of degenerate pricing practices not described in the CAISO Tariff, not approved by the Commission, not disclosed to the market, and which cannot be characterized as just and reasonable.²⁰⁵ Respondents state that the degenerate \$388.11/MWh price adversely affected them, by causing losses on their CRR position, by causing them to miss out on profits on their physical sales when the price unexpectedly failed to materialize,

²⁰² *Id.* at 78-79 (citing *Cal. Indep. Sys. Operator Corp.*, Docket No. ER16-1886-000, Tariff Amendment to Implement Pricing Enhancements at 6, 7, 16 (filed June 6, 2016) (CAISO Application); *Cal. Indep. Sys. Operator Corp.*, 156 FERC ¶ 61,152 at P 15).

²⁰³ *Id.* at 81 ("The Commission has held that provisions that 'significantly affect rates, terms, and conditions' of service must be included in an ISO's tariff.") (quoting *Energy Storage Ass'n v. PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,296, at P 103 (2018); *Cal. Indep. Sys. Operator Corp.*, 122 FERC ¶ 61,271, at P 16 (2008)); *see also* Respondents Answer at 94 ("Affirmative Defenses . . . Seventh Defense: CAISO's use of degenerate pricing was not authorized by its Commission-approved tariff. Moreover, CAISO failed to provide notice to market participants of its degenerate pricing practices. Eighth Defense: CAISO's use of degenerate pricing was unjust and unreasonable and never approved by the Commission. The concept of degenerate pricing did not exist in the CAISO tariff. To the extent that the Commission ever approved a CAISO tariff that is contended to permit degenerate pricing, the Commission's order failed to meet the requirements of reasoned decision-making.").

²⁰⁴ *Id.* at 82-83.

²⁰⁵ *Id.* at 83.

and that it would be unreasonable to further punish Respondents by finding market manipulation based on economically rational actions taken in response to that price.²⁰⁶

72. Respondents state that, while *ETRACOM* found that market design flaws do not excuse allegedly manipulative trading, this case is distinguishable, because here the “‘flawed [market] design was the cause of the . . . trading behavior in question.’”²⁰⁷ Also, Respondents state that OE Staff’s argument about “self-help” is without merit, because it assumes that Corteggiano knew the \$388.11/MWh price was degenerate, but, as explained in the Declaration of Kallie Wells (Wells), a former CAISO Senior Market Monitoring Analyst, Corteggiano did not know, and could not have known, that the \$388.11/MWh price was degenerate.²⁰⁸

b. Corteggiano Answer

73. Corteggiano argues that the Cragview trade was in accord with supply and demand and not deceptive in any respect.²⁰⁹ To find manipulation, Corteggiano argues that the Commission would have to disbelieve all the facts, which are supported by contemporaneous, direct evidence.²¹⁰

74. Corteggiano argues that the Cragview trade was made in response to a published \$388.11/MWh price that he believed would recur during the next scheduled derate, and which was confirmed by CAISO as being a “valid” price.²¹¹ Corteggiano explains that, in response to the price and intending to profit, Vitrol purchased 5 MW of physical power in an arms-length deal at fair market prices for the days of October 28 through November 1, 2013, offered the 5 MW for delivery at Cragview, sold the 5 MW at Cragview’s LMP, and delivered the 5 MW to Cragview, all in compliance with CAISO’s market rules and regulations. Corteggiano asserts that the Cragview trade was consistent

²⁰⁶ *Id.* at 83-84.

²⁰⁷ *Id.* at 84 (citing *ETRACOM*, 155 FERC ¶ 61,284 at P 118).

²⁰⁸ *Id.* at 2, 84 (citing Declaration Under Penalty of Perjury of Kallie Wells (Apr. 4, 2019) (Respondents Answer Ex. C) (Wells Dec.).

²⁰⁹ Corteggiano Answer at 2, 4 (noting that the Commission should question why it took so long to complete an investigation of a simple, small, and short trade).

²¹⁰ *Id.* at 2.

²¹¹ *Id.* at 2, 4-5.

with the forces of supply and demand, and contributed to the formation of a market price.²¹²

75. Corteggiano argues that the Commission's Anti-Manipulation Rule, by its terms, requires "proof of a deception with respect to a material fact that can corrupt the integrity of a market price."²¹³ Corteggiano argues that in this case there was no deception of any kind and no corruption of the integrity of the market price occurred. Further, Corteggiano states that "there is no allegation of a misrepresentation, a misleading statement, collusion, an artificial market device, abuse of market power, or trickery."²¹⁴ Corteggiano argues that there is therefore no basis on which to assert a violation of the Anti-Manipulation Rule, even if OE Staff is able to prove its allegation that the Cragview trade was intended to affect a related CRR position.²¹⁵

76. Corteggiano argues that the fact the Cragview trade lost approximately \$4,500 over the course of the week is not legally relevant, as the loss was minimal, within the normal range of unavoidable market risk, and not a marker of an uneconomic trade design. Corteggiano notes that other recent Commission cross-market manipulation cases all concerned trades that were supposedly designed or expected to lose money, or where supposedly fraudulent or deceptive devices were employed to carry out the strategy.²¹⁶ Corteggiano asserts that, without evidence of wrongful conduct, the Staff Report "grounds [its] theory of illegality on the supposition of an unexpressed intent that the 5 MW trade benefit a CRR position."²¹⁷ Corteggiano asserts that this evidence shows that Respondents' intent in executing the Cragview trades was to profit from expected future market prices, and that Respondents acted in good faith after receiving approval from legal and compliance counsel.²¹⁸

²¹² *Id.* at 2, 5 (arguing that the prices published at Cragview on October 28 through November 1, 2013 were in accord with supply and demand).

²¹³ *Id.* at 5 (citations and quotations omitted).

²¹⁴ *Id.* (citing Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50).

²¹⁵ *Id.* at 5-6 (citations and quotations omitted).

²¹⁶ *Id.* at 6 (citing *ETRACOM*, 155 FERC ¶ 61,284 at P 57; *Barclays*, 144 FERC ¶ 61,041 at P 31).

²¹⁷ *Id.* at 7.

²¹⁸ *Id.*

77. Corteggiano argues that the Commission should act as the courts have in securities and commodities law claims and reject OE Staff's reliance on "manipulation by hindsight."²¹⁹ Corteggiano argues that finding manipulation on these facts would chill markets, subvert the public interest, and be patently unjust.²²⁰

78. Further, Corteggiano asserts that finding a violation here would effectively create a new market rule that holders of CRRs may not enter into any (even non-deceptive) physical transaction at a location where they hold a CRR position.²²¹ Such a rule, Corteggiano argues, "would be contrary to the market design for CRRs," and would "unnecessarily retard liquidity for both physical and CRR markets, and be anticompetitive by arbitrarily restricting market access for CRR holders to their detriment."²²² Corteggiano argues that this new rule is problematic, because it was not informed by notice-and-comment rulemaking. Further, Corteggiano asserts that, because this is a new rule, the Commission cannot impose sanctions for conduct based on this new rule.²²³

c. OE Staff Report and Reply

79. OE Staff asserts that Respondents engaged in a fraudulent cross-market scheme in violation of FPA section 222 and the Commission's Anti-Manipulation Rule, similar to the conduct the Commission found to be fraudulent in *Barclays* and *ETRACOM*.²²⁴ OE Staff explains that, in *Barclays*, the Commission found a fraudulent scheme where the respondents traded physical energy products for the purpose of affecting a price index,

²¹⁹ *Id.* at 6 (citing *CFTC v. Wilson*, 2018 WL 6322024, *20 ("Since Defendants' trading pattern is supported by a legitimate economic rationale, it cannot be the basis for liability under the CEA. *Any other conclusion would be akin to finding manipulation by hindsight.*") (emphasis added) (citations omitted); *see, e.g., City of Pontiac Policeman's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 (2d Cir. 2014)).

²²⁰ *Id.* at 2-3.

²²¹ *Id.* at 3-4, 13.

²²² *Id.* at 4.

²²³ *Id.* at 4, 13 (explaining the fair notice doctrine) (citing *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987)).

²²⁴ Staff Report at 33-35; OE Staff Reply at 47-48.

which in turn benefitted their financial swap positions.²²⁵ OE Staff argues that *ETRACOM* is also instructive, where the Commission found respondents employed a fraudulent scheme in trading virtual supply for the purposes of lowering LMPs, which increased the profitability of respondents' CRR position sourcing at the same location as the virtual supply bids.²²⁶

80. Specifically, OE Staff alleges that the Respondents engaged in a fraudulent cross-market scheme when they imported physical power in the day-ahead market at Cragview during the business week of October 28 through November 1, 2013, not for a legitimate economic purpose, but to eliminate export congestion at Cragview during the partial derate in order to benefit their CRR position sourcing at the Cragview Pnode.²²⁷ As evidence of this scheme, OE Staff asserts that Respondents' CRR position sourcing at Cragview would lose money on any export congestion at the Cascade intertie.²²⁸ OE Staff alleges that, following CAISO's partial derate of the Cascade intertie on October 18-19, 2013, which negatively affected Respondents' CRR position sourcing at the Cragview Pnode,²²⁹ Respondents immediately took steps to eliminate their CRR exposure during the subsequent planned derates during the months of November and December.²³⁰ OE Staff alleges that Respondents were able to negate ("flatten") any risk to their CRR position during the November and December derates by purchasing counter-flow CRRs in CAISO's monthly CRR auction.²³¹ OE Staff asserts that, because the CAISO monthly CRR auction for October closed prior to the Cascade derates on October 18-19, Respondents knew that they would not be able to "flatten" their Cragview

²²⁵ OE Staff Reply at 48; Staff Report at 34 ("The Commission explained that the physical energy transactions in *Barclays* were fraudulent because they injected into the market the 'false information' that the transactions were undertaken for a legitimate economic purpose when they were actually undertaken for a manipulative purpose; the false information impaired the functioning of the market.") (citations omitted).

²²⁶ OE Staff Reply at 49-50.

²²⁷ Staff Report at 34.

²²⁸ *Id.* at 12.

²²⁹ The LMP for Cragview during the partially derated hours on October 18-19, 2013 was \$388.11/MWh. *Id.* at 13.

²³⁰ *Id.* at 14.

²³¹ *Id.*

CRR position for the remaining October derates (October 28-31).²³² OE Staff further alleges that, due to the timing of the closure of the CAISO monthly CRR auction for November,²³³ Respondents needed to ensure that they could eliminate exposure for the Cascade derate on November 1.²³⁴

81. OE Staff alleges that, when Corteggiano saw the losses his portfolio suffered during the October 18 derate, he realized he could lose \$15,000 per hour from October 28 through November 1 if the \$388.11/MWh price recurred at Cragview.²³⁵ OE Staff alleges that Corteggiano immediately began enlisting assistance from his colleagues to trade physical power during the October 28 through November 1 derates in order to avoid further losses to his CRR portfolio.²³⁶ Staff asserts that Corteggiano had a spreadsheet showing the exact same \$388.11/MWh price in July 2013 during another Cascade derate, yet apparently took no action at that time to capture potential profits from the unusually high price.²³⁷

82. OE Staff argues that the physical trades were uneconomic, which is further evidence of Respondents' fraudulent scheme.²³⁸ OE Staff asserts that Respondents' negotiations with companies like Powerex and Morgan Stanley demonstrated their lack of concern over whether the power transactions would, in fact, be profitable.²³⁹ As one example, OE Staff points to Kettler informing Morgan Stanley that he would take just one megawatt for trading day October 28.²⁴⁰ OE Staff asserts that, had Respondents acquired just one megawatt of import power for October 28, and the \$388.11/MWh price

²³² *Id.* at 14, n.68.

²³³ *See* OE Staff Reply at 26, n.70 (the November 2013 monthly CRR auction results posted on the afternoon of October 29).

²³⁴ *Id.* at 26-27.

²³⁵ Staff Report at 38, n.183.

²³⁶ *Id.* at 15.

²³⁷ *Id.* at 30.

²³⁸ *Id.* at 43, 47.

²³⁹ *Id.* at 17-18.

²⁴⁰ OE Staff Reply at 45.

recurred, the maximum profit would be \$5,814,²⁴¹ compared to Corteggiano's average daily profit in 2013 of \$35,616 per day.²⁴² Further, OE Staff asserts that Respondents were indifferent to the profitability of the import transactions, because the maximum they could lose if they had to dispose of the purchased power for less than what they paid (or even \$0) was but a fraction of the \$15,000/hour they stood to lose on the exposed CRR position if the \$388.11/MWh reappeared.²⁴³ OE Staff asserts that, had the \$388.11/MWh price recurred at Cragview during the October 28-November 1 derates, Corteggiano may have lost as much as \$1.2 million on his CRRs, which represented roughly 10 percent of his overall profits for 2013.²⁴⁴

83. Further, OE Staff argues that, after CAISO announced the results for the October 28, 2013 Market Day in the day-ahead market, Respondents could see that the net flow on the Cascade intertie was 5 MW—the exact amount of megawatts as Respondents' imports.²⁴⁵ If Respondents' goal was to profit from the \$388.11/MWh price, OE Staff asserts, then Respondents would be expected to have adjusted their trading.²⁴⁶ OE Staff argues that, instead, Respondents “doubled down” by purchasing the same 5 MW of power for the rest of the business week despite losing money on the October 28 import, and continued submitting import bids for every Market Day that week, despite continuing to lose money each day.²⁴⁷

84. OE Staff argues that Corteggiano was not reacting to a price signal of \$388.11/MWh due to a “sudden trading frenzy,” but rather that he understood the pricing at the Cragview Pnode was based on supply and demand *bids* at Cragview.²⁴⁸ OE Staff further argues that there would be no economic incentive for a buyer to pay the \$388.11/MWh price for power at Cragview, because the prevailing prices at surrounding nodes were approximately

²⁴¹ *Id.*

²⁴² *Id.* at 46.

²⁴³ Staff Report at 38; OE Staff Reply at 24.

²⁴⁴ OE Staff Reply at 44-45.

²⁴⁵ *Id.* at 19.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 14-16.

\$39/MWh.²⁴⁹ OE Staff asserts that Corteggiano's own testimony and spreadsheets demonstrate his understanding of this.²⁵⁰

85. OE Staff asserts that Corteggiano had the necessary knowledge to understand that even a single megawatt of imported power could negate any recurring \$388.11/MWh price at Cragview, forming the basis of the urgent need to import *any* amount of power during the period of October 28 through November 1, demonstrating further evidence of his intent to fraudulently affect the congestion at the Cascade intertie for the benefit of his CRR position.²⁵¹

86. OE Staff responds to the Wells Declaration²⁵² by arguing that it is irrelevant, unreliable, and misleading.²⁵³ OE Staff argues that the Wells Declaration, which Respondents rely on to show that Corteggiano could not have known the \$388.11/MWh price was degenerate, is irrelevant, because OE Staff does not allege that Corteggiano knew the \$388.11/MWh price was degenerate.²⁵⁴ Rather, OE Staff posits, the relevant issue—which OE Staff states is not addressed by the Wells Declaration—is whether Corteggiano understood that he could eliminate congestion costs at Cragview by flowing power in the opposite direction of the derate, and thereby reduce the LMP at Cragview to the benefit of his CRRs.²⁵⁵ As discussed in P 85, OE Staff asserts that Corteggiano *did*

²⁴⁹ *Id.* at 14.

²⁵⁰ *Id.*

²⁵¹ Staff Report at 35.

²⁵² Respondents offered the declaration of Wells, a former member of the CAISO market monitoring team, who authored the CAISO's 2010 Market Surveillance Committee presentation on phantom congestion, to rebut OE Staff's allegations that Corteggiano knew the \$388.11/MWh at Cragview was degenerate. *See* OE Staff Reply at 34-35.

²⁵³ OE Staff Reply at 34. OE Staff notes that it did not address the Wells Declaration in the Staff Report, because Respondents did not provide the Wells Declaration until after the Staff Report had been submitted to the Commission. *Id.* at 35, n.107.

²⁵⁴ *Id.* at 34-35.

²⁵⁵ *Id.* at 35.

understand that.²⁵⁶ OE Staff further contends that the Wells Declaration is unreliable because it “ignores critical evidence” of Corteggiano’s intent, including Corteggiano’s knowledge that the net flow on the Cascade intertie on the first day of trading was Vitol’s exact bid.²⁵⁷ Lastly, OE Staff asserts that the Wells Declaration is misleading because its message that intertie LMPs are unable to be intentionally manipulated is contrary to previous statements by Wells in 2010—namely, her prior statements that intertie pricing needed to be monitored, particularly with regard to those entities holding related CRR positions as well.²⁵⁸

87. OE Staff alleges that Respondents’ import transactions at the Cascade intertie injected false information into CAISO’s day-ahead market.²⁵⁹ By sending this false information to the other market participants in the day-ahead market, OE Staff alleges that Respondents obstructed a well-functioning market.²⁶⁰

88. OE Staff argues that it does not need to prove adverse effects on “the natural interplay of supply and demand” or the existence of an “artificial price,” as Respondents assert.²⁶¹ OE Staff contends that, because Respondents made the physical trades to influence their CRR position and not for legitimate, market-based reasons, they have *per se* sent inaccurate signals to the market.²⁶² Indeed, OE Staff argues, “[b]ecause every transaction signals that the buyer and seller have legitimate motives for the transactions, if either party lacks that motivation, the signal is inaccurate.”²⁶³ To the extent that Respondents seek to hide behind alleged market flaws, OE Staff argues that to permit market participants to use those assertions as a safe harbor to excuse their conduct

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 35, n.108.

²⁵⁸ *Id.* at 35-36.

²⁵⁹ Staff Report at 34; OE Staff Reply at 51.

²⁶⁰ Staff Report at 34.

²⁶¹ OE Staff Reply at 47-48.

²⁶² *Id.* at 48.

²⁶³ *Id.* (quoting *Barclays*, 144 FERC ¶ 61,014 at P 53, n.176 (citations omitted)).

would result in chaos and market results “completely divorced” from supply and demand.²⁶⁴

89. OE Staff argues the *CFTC v. Wilson* case relied upon by Respondents is distinguishable and further states that the Commission has previously determined that an artificial price is not a necessary element for a finding of manipulation under the FPA or the Anti-Manipulation Rule.²⁶⁵

90. In response to Respondents’ assertions that there was no fraudulent device in the underlying conduct, OE Staff contends that intentionally deceptive conduct by itself constitutes market manipulation, and that there is no requirement that OE Staff prove any additional conduct by Respondents or use of a deceptive device in implementing their manipulative scheme.²⁶⁶

91. OE Staff asserts that Respondents have failed to demonstrate any reason why the Commission cannot “take enforcement action against a market participant that traded in response to a price set based upon an unlawful pricing methodology,” even assuming *arguendo* that Respondents did in fact trade at Cragview in order to profit off the \$388.11/MWh price and not to benefit their CRR position.²⁶⁷ OE Staff notes that there has been no showing that CAISO’s pricing methodology violates its tariff or the Commission’s Rule of Reason.²⁶⁸ OE Staff cites to the Commission’s Order in *ETRACOM*, noting that the “fact that a market may not be functioning optimally, or in the manner preferred by Respondents, does not negate the harm [Respondents] caused. Markets that are not functioning optimally may still be manipulated, and therefore harmed.”²⁶⁹

d. Commission Determination

92. We find, based on the totality of evidence presented, that Respondents engaged in a fraudulent device, scheme, or artifice to defraud the CAISO market and market

²⁶⁴ *Id.* at 51, n.176.

²⁶⁵ Staff Report at 48, n.226 (citing *Barclays*, 144 FERC ¶ 61,041 at P 59 (citations omitted)).

²⁶⁶ OE Staff Reply at 52-53.

²⁶⁷ *Id.* at 63.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 66, 71, n.255 (citing *ETRACOM*, 155 FERC ¶ 61,284 at P 176).

participants. As discussed in greater detail below, we find that: (1) Respondents' arguments are not persuasive; and (2) there is sufficient evidence that Respondents' actions violated FPA section 222 and the Anti-Manipulation Rule. The preponderance of the evidence demonstrates that Respondents engaged in physical import transactions at the Cragview Pnode for the purpose of eliminating congestion on the Cascade intertie, lowering the Cragview day-ahead LMP, and benefiting Respondents' CRR position.

93. The Commission has consistently found that "cross-market" schemes in which market participants trade in one market with the intent to move prices in a particular direction to benefit positions in a related market are manipulative.²⁷⁰ In so finding, the Commission has relied on a number of indicia of fraud, such as: a consistent pattern of trading in a direction that would tend to move the price to the benefit of a related financial position; changes in trading behavior during periods when manipulation is alleged as compared to trading during other time periods when manipulation is not alleged; trading that is uneconomic in nature; communications among traders substantiating the scheme; and the failure of a company to adequately explain the relevant positions and trading behavior.²⁷¹ We find that these indicia are present here and that they demonstrate that Respondents engaged in a fraudulent scheme.

94. During the period of October 28 through November 1, 2013, Respondents devised a scheme to submit physical import transactions at the Cragview Pnode to eliminate congestion on the Cascade intertie, thereby lowering the LMP at Cragview, to benefit their CRR position. As described in further detail below, among the evidence we have considered in reaching this conclusion is: (i) the timing and pattern of Respondents' physical import transactions at Cragview from October 28-November 1, 2013, which varied significantly from Respondents' normal trading strategy and which correlated with the exact dates Respondents' CRRs would be affected; (ii) the fact that Respondents were indifferent to the profitability of their physical imports at Cragview; (iii) Respondents' communications, testimony, and evidence substantiating the existence of a scheme to

²⁷⁰ See, e.g., *ETRACOM*, 155 FERC ¶ 61,284 at P 41; *MISO Cinergy Hub Transactions*, 149 FERC ¶ 61,278, at P 18 (2014); *Direct Energy Servs., LLC*, 148 FERC ¶ 61,114, at P 15 (2014); *MISO Virtual & FTR Trading*, 146 FERC ¶ 61,072, at P 13 (2014); *Deutsche Bank*, 142 FERC ¶ 61,056 at P 18; *Constellation Energy Commodities Group, Inc.*, 138 FERC ¶ 61,168 (2012); see also *Barclays*, 144 FERC ¶ 61,041 at P 16; *Brian Hunter*, 135 FERC ¶ 61,054, order denying reh'g, 137 FERC ¶ 61,146 (2011), rev'd sub nom. *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013); *Energy Transfer Partners L.P.*, 128 FERC ¶ 61,269 (2009).

²⁷¹ See *ETRACOM*, 155 FERC ¶ 61,284 at P 97; *Barclays*, 144 FERC ¶ 61,041 at PP 7, 32.

defraud; and (iv) Respondents' failure to offer credible and relevant explanations for their imports at Cragview from October 28-November 1, 2013.

95. Based on the totality of the evidence in the record, the Commission finds that Respondents acted with fraudulent intent by engaging in physical transactions to prevent losses on their CRR position, not to profit based on supply and demand fundamentals,²⁷² and that, by trading for this purpose, Respondents injected false and deceptive information into the marketplace.²⁷³ We do not agree with Respondents' arguments that OE Staff needed to present evidence of material misrepresentations, omissions, or the employment of a deceptive device, such as a wash trade. Respondents injected false information into the market that their transactions were undertaken for a legitimate economic purpose, when they were actually undertaken for a manipulative purpose, which operated as a fraud or deceit and impaired the functioning of the market.

i. Trading Pattern

96. We find that the timing and pattern of Respondents' physical trading at Cragview demonstrate the existence of a fraudulent and manipulative trading scheme. Respondents' trading at Cragview from October 28-November 1, 2013 was markedly different from their physical trading in CAISO before and during subsequent derates of the Cascade intertie.

97. When Vitol's CRR position sourcing at Cragview lost significant money during the October 18-19, 2013 partial derates at the Cascade intertie, Corteggiano noticed.²⁷⁴ Afraid that his CRR position would similarly lose money during future planned derates of the Cascade intertie, Corteggiano acquired counter-flow CRRs during the monthly CAISO CRR auction that flattened his CRR positions for November and December, thereby eliminating all downside risk on those CRR positions.²⁷⁵ However, Corteggiano could not purchase counter-flow CRRs at Cragview to avoid potential losses during the

²⁷² This finding is discussed in detail in Section III.D.2.

²⁷³ See, e.g., *ETRACOM*, 155 FERC ¶ 61,284; *Coaltrain Energy, L.P.*, 155 FERC ¶ 61,204 (2016) (*Coaltrain*); *City Power*, 152 FERC ¶ 61,012; *Chen*, 151 FERC ¶ 61,179.

²⁷⁴ Respondents Answer at 13.

²⁷⁵ Vitol Response to OE-VITOL-1-12 at 4-5.

derate planned for the last weekend of October (that monthly auction had closed in September).²⁷⁶ Rather, to prevent losses on the CRRs during that derate, Corteggiano and others at Vitol implemented a scheme that utilized physical power imports to eliminate congestion costs at Cragview, which prevented further losses on Vitol's CRR position during the late-October derate. Respondents had little experience ever engaging in such physical trades, had never engaged in physical transactions at the small, illiquid Cragview Pnode, and did so only during the week when their CRR position sourcing at Cragview were exposed to significant losses.²⁷⁷

98. The evidence shows that Respondents deviated from their normal trading patterns and practices with regard to the Cragview imports, which is an indicium of a fraudulent scheme. Indeed, prior to the import transactions at issue in this proceeding, Corteggiano had never before sought to trade physical power in response to an LMP price signal in the CAISO day-ahead market, even though he constantly monitored LMPs as part of his work managing his CRR portfolio.²⁷⁸ In fact, Corteggiano had never traded physical power at Vitol during his prior 18 months there.²⁷⁹ The only other time in his career that Corteggiano traded physical power was one occasion when he was at Deutsche Bank—trades that were also the subject of a Commission investigation. In addition, Vitol itself rarely traded physical power in CAISO (and then only at liquid hubs) and had never previously traded physical power specifically at the Cragview Pnode.²⁸⁰

²⁷⁶ See CAISO 2013 Monthly CRR Allocation and Auction Schedule at 3 (Apr. 15, 2012) (*available at* <http://www.caiso.com/Documents/2013MonthlyCRRAllocation-AuctionSchedule-Jul-Dec.pdf>) (auction for October closed on Sept. 24, 2013).

²⁷⁷ Vitol did not learn from CAISO that its counter-flow CRRs were granted (the “flattening” positions) until October 29, well after it had already begun pursuing a trade on November 1 (i.e., at the time a physical trade was pursued, the November 1 CRR position still was subject to risk of the derate causing losses). See OE Staff Reply 26, n.70; Attachments 3-4.

²⁷⁸ Corteggiano Test. Vol. 1 at 23:3-12, 33:16-34:5, 84:24-85:3.

²⁷⁹ Corteggiano Test. Vol. 2 at 163:23-165:14.

²⁸⁰ Sickafoose Vol. 1 at 9:1-9, 9:18-25; Kettler Vol. 1 at 140:12-15; Saxena Vol. 1 at 101:16-20, 120:25-122:4, 123:21-124:2; VITOL_FERC_0000027-28 (Oct. 24, 2013 IM conversation between Saxena and pwxmiles (remarking “[I] have no idea what [I]’m talking about when it comes to phys[ical]”).

99. Moreover, the timing of Respondents' physical trades is also an indicium of their fraudulent purpose. Corteggiano first contacted the other Vitol employees regarding a possible import of power at Cragview for the last week of October within 24 hours of learning of his CRR losses during the October 18 partial derate.²⁸¹ This timing indicates that Respondents decided to engage in these trades only after learning of the anticipated losses on their CRR position.

100. Respondents argue that the timing of their physical imports at Cragview was indicative of their desire to profit from the expected \$388.11/MWh price during the derate. However, Respondents' explanation is discredited by evidence that the \$388.11/MWh price had appeared at the Cragview Pnode in July 2013, but Vitol did not undertake physical sales to potentially profit from that price.²⁸² Neither Vitol nor Corteggiano undertook similar trades during later derates, when the \$388.11/MWh price reappeared,²⁸³ but when Vitol had no affected CRR position.²⁸⁴

ii. Unprofitability of Respondents' Physical Imports

101. We find that Respondents were indifferent to the profitability of their day-ahead offers at Cragview from October 28-November 1, 2013. Specifically, we find that this indifference to profitability, as evidenced by Respondents' day-after-day unprofitable price-taker offers, is evidence of their fraudulent scheme to eliminate congestion at the Cascade intertie, thereby lowering the Cragview LMPs during the Cascade intertie derate and benefitting their exposed CRR position.

102. It is an indicium of Respondents' fraudulent purpose that, while they assert that the purpose of the physical import transactions was to respond to and profit from the "high price signal" at Cragview,²⁸⁵ the reality is that Respondents on net lost money on

²⁸¹ See Vitol PF Response at 5; *see also* Corteggiano Test. Vol. 1 at 78:13-79:13; Corteggiano Test. Vol. 2 at 189:25-190:13.

²⁸² See CAISO Spreadsheet "cascade_bid_all_2013_Sent to Enforcement 812016.xlsx" (identifying other market participant as only bidder on July 31).

²⁸³ Staff Spreadsheet "Aggregated_CAISO_OASIS_info.xlsx," (Column H) (showing recurrence of \$388.11/MWh price during hours on Market Days November 4 and November 6).

²⁸⁴ CAISO Spreadsheet "cascade_bid_all_2013_Sent to Enforcement 812016.xlsx" (showing no Vitol bids at Cragview after November 1, 2013 for remainder of 2013).

²⁸⁵ See, e.g., Respondents Answer at 14, 34.

every day they transacted the physical imports.²⁸⁶ Still, despite the lack of financial return, Respondents continued to place the same money-losing trades. After the first day of trading, Vitol saw that its import of power at the Cascade intertie eliminated the \$388.11 price and that the net flow on the Cascade intertie for every hour was exactly the amount of Vitol's imports (5 MW), indicating that its import set the price. Yet, Vitol continued to bid for the rest of the week and take losses on the physical trades, even though it had the option to change its bids for later in the week. Further, Vitol submitted the bids as \$1 price-taker bids, which did not guarantee that Vitol would cover its transmission and scheduling fees, as Corteggiano originally proposed.²⁸⁷

103. The hourly LMPs for October 28 at Cragview (published by CAISO on October 27) ranged from \$31.71/MWh to \$48.78/MWh.²⁸⁸ The average LMP for October 29-November 1 was \$40/MWh.²⁸⁹ Vitol earned money in some hours, but ultimately lost approximately \$4,500 total on the physical transactions.²⁹⁰ However, the reduction in the Cragview LMP from \$388.11 to \$40, as a result of Vitol's trades, prevented roughly \$1,227,143 in losses on the Vitol CRRs for the period.²⁹¹ Thus, while the physical sales lost approximately \$4,500 over the course of five market days, the impact of eliminating the congestion costs at the Cascade intertie (effectuated by Respondents' physical trades) benefitted Vitol's CRR position by avoiding roughly \$1,227,143 in losses for the period, or approximately 10 percent of Corteggiano's portfolio for 2013.²⁹²

²⁸⁶ Staff Spreadsheet "ProfitLoss_of_Vitol_ImportsCRRs@Cragview.xlsx" (Tab "Daily_clean," Column B).

²⁸⁷ VITOL_FERC_0015481 (Oct. 21, 2013 Email from Federico Corteggiano to Ann Marie Hanley and Ron Oppenheimer) ("Our idea is to put price-sensitive bids, selling power *only if it covers all transmission and scheduling fees.*") (emphasis added).

²⁸⁸ Staff Spreadsheet "Aggregated_CAIISO_OASIS_info.xlsx" (Tab "CAISO_OASISdataviaVelocitySuite," Column H).

²⁸⁹ Staff Spreadsheet "ProfitLoss_of_Vitol_ImportsCRRs@Cragview.xlsx" (Tab "CAISO_OASISdataviaVelocitySuite," Columns H, I, M).

²⁹⁰ *Id.* at Tab "Daily_clean," Column B.

²⁹¹ *Id.* at Tab "Daily_clean," Column C.

²⁹² *See* Staff Report at 44-45.

104. Respondents' purchases of power from Morgan Stanley lacked any real negotiation on price or terms, indicating that Respondents were not attempting to maximize the potential profit on the physical transactions and is also an indicium of a fraudulent scheme. In their initial negotiations with Morgan Stanley, culminating in the purchase of 5 MW of power for Monday, October 28, Respondents were willing to take *any* amount of power, even just one MW,²⁹³ which also contradicts Respondents' assertions that their purpose in executing the transaction was purely to profit on that opportunity.

105. Subsequent negotiations with Morgan Stanley for the remainder of the week (October 29-November 1) also lacked any real bargaining that would indicate Respondents were seeking a profit opportunity from the physical transactions. Respondents purchased 5 MW from Morgan Stanley on October 28 for October 29-November 1 at a price of \$48/MWh.²⁹⁴ The \$48/MWh price is a mere \$0.78 lower than the highest LMP for Cragview for October 28 (published by CAISO on October 27).²⁹⁵ Having seen the results from their first day of trading physical power during the partial derate of the Cascade intertie, Respondents knew that they had failed to make a profit on that first day. Indeed, as discussed in more detail in Section III.D.2 below, they could see that, not only had the \$388.11/MWh price not reappeared, but that their own import transaction may have been the cause of it not reappearing. Regardless, Respondents did not revisit their offer price or the amount of megawatts to purchase, but rather moved forward with the same tactic and even paid *more* for the power from Morgan Stanley for the rest of the week.²⁹⁶

106. The totality of the evidence in the record demonstrates that Respondents were indifferent to whether the physical sales would be profitable. Their lack of concern, in turn, is further evidence that Respondents' primary purpose was *not* to generate a profit

²⁹³ OE Staff Reply at 23; FERC_SUB_IN14-4_00000477 ("hell, I'd even take one megawatt"). Acquiring just one MW of power would have led to a very small potential profit if the \$388.11/MWh price reoccurred (approximately \$5,814, compared to Corteggiano's average daily profit of \$35,616). *See* OE Staff Reply at 45-46.

²⁹⁴ VITOL_FERC_0000089-90 (Oct. 28, 2013 IM conversation between Kapil Saxena and Ryan Killam, purchasing power at \$48/MWh).

²⁹⁵ Staff Spreadsheet "Aggregated_CAISO_OASIS_info.xlsx," (Tab "CAISO_OASISdataviaVelocitySuite," Column H).

²⁹⁶ *See* FERC_SUB_IN14-4_00000480 (Oct. 25, 2013 telephone call between Kolby Kettler and Ryan Killam, purchasing power for \$46/MWh); VITOL_FERC_0000089-90 (Oct. 28, 2013 IM conversation between Kapil Saxena and Ryan Killam, purchasing power at \$48/MWh).

on the physical transaction. Rather, they executed the trades to avoid losses on their CRR positions. Accordingly, we find that Respondents' indifference to profit was indicative of their execution of a fraudulent scheme in violation of the Commission's regulations.

**iii. Communications, Testimony, and Other Evidence
Demonstrate the Existence of a Scheme to Defraud**

107. We find that Respondents' communications, testimony, and other evidence support our conclusion that Respondents engaged in a scheme to defraud the CAISO market and market participants. Respondents' communications, testimony, and other evidence support findings that: (1) Respondents engaged in physical import transactions at the Cragview Pnode for the purpose eliminating congestion on the Cascade intertie and lowering the Cragview day-ahead LMP to the benefit of Respondents' CRR position; (2) Respondents were aware of the losses to their CRR position that resulted and would continue to result from the derate; and (3) Respondents were aware that their physical trades impacted their CRR position.

108. We find that Corteggiano's testimony shows that Corteggiano understood that importing power over the Cragview intertie would eliminate costs at the Cragview LMP. Corteggiano testified he knew the shadow price on the Cascade intertie arose from the binding constraint imposed by the derate.²⁹⁷ Corteggiano also knew that 100 percent of the shadow price would appear as congestion costs in the Cragview LMP,²⁹⁸ and admitted knowing that the constraint would *not* bind if there was a net import flow on the Cascade intertie greater than 0 and less than 80 MW.²⁹⁹ Respondents do not attempt to refute this testimony; they simply state that Corteggiano's statements are true of any congestion, real or degenerate.³⁰⁰ Respondents also point to Corteggiano's answer, in the negative, when asked, under oath, whether he thought Vitol's physical energy sale would relieve the constraint.³⁰¹ However, considering Corteggiano's earlier testimony in this proceeding showing that he understood the mechanism for eliminating congestion, as well as his experience using the mechanism at the Silver Peak intertie while at Deutsche

²⁹⁷ See Corteggiano Test. Vol. 2 at 143:8-11 ("The binding constraint has an associated shadow price.").

²⁹⁸ *Id.* at 148:24-149:5.

²⁹⁹ See *id.* at 244:16-246:3.

³⁰⁰ Respondents Answer at 52.

³⁰¹ *Id.* at 53 (transcript citation omitted).

Bank, it is not credible that Corteggiano gave no thought to the possibility that his imports would relieve the constraint at the Cascade intertie.³⁰²

109. With respect to the Silver Peak intertie, we find that the knowledge Corteggiano gained at Deutsche Bank is highly relevant because it facilitated his manipulative trading at Cragview. As discussed above, Corteggiano admitted to OE Staff in 2010, during the investigation of Deutsche Bank's trading at Silver Peak, that he made unprofitable physical trades on behalf of Deutsche Bank to benefit CRR positions that otherwise would have been harmed by the congestion associated with partial derates at Silver Peak.³⁰³ This was the only time in his career that Corteggiano traded physical power, until he did so at Cragview in late October 2013. Respondents argue that neither the *Deutsche Bank* matter nor Corteggiano's testimony in that matter support OE Staff's allegations, on the grounds that there are key differences between the facts in this matter and the facts in the *Deutsche Bank* matter.³⁰⁴ We are not persuaded by this argument. The factual differences between the *Deutsche Bank* matter and this matter are outweighed by the relevant similarities. For example, both interties were partially derated during Corteggiano's trading and had relatively low capacity and low liquidity,³⁰⁵ and Respondents were given essentially the same information about how the intertie price was set in this case that CAISO gave Corteggiano in *Deutsche Bank*.³⁰⁶ These

³⁰² See also *infra* n.401 (discussing the fact that another market participant identified that the \$388.11/MWh price was likely degenerate and that trading would eliminate the price).

³⁰³ See Corteggiano 2010 Test. at 93:6-9.

³⁰⁴ Respondents Answer at 64-66.

³⁰⁵ Corteggiano 2010 Test. at 109:14-22 (noting "lack of market participation" at Silver Peak), 96:3-4 (Corteggiano suspected only one transaction on intertie), 69:19 – 71:18) (testing more liquid locations for susceptibility to his trading, helping him confirm that the lower the liquidity, the more readily he could influence price); Hanley 2017 Test. at 64:5-7, 92:9-13 (Corteggiano was aware that liquidity at Cragview was low).

³⁰⁶ See Rothleder Aff. at 3 (stating that "[T]he market solution was a valid solution for the hours in which the Cascade intertie was congested. . . . [T]he price was set based on the cost for serving the next megawatt of demand at the location. . . . [S]ince the export limit was zero [MW], the price was set by an import bid during the intervals in question because the import bid . . . could allow a megawatt of demand to be served at that location."); E-mail from Siri Klovstad to Federico Corteggiano dated Jan. 25, 2010, cited in DBET Answer, Ex. A., at 14 (publicly available on FERC E-Library) (wherein a CAISO representative e-mailed Corteggiano in January 2010 that the "results [at Silver

similarities, coupled with the knowledge Corteggiano had from his experience at Deutsche Bank, provided Corteggiano with the necessary information to carry out the fraudulent scheme at Cragview.

110. The spreadsheet Corteggiano compiled, even before learning from CAISO that an import bid had set the \$388.11/MWh price at Cragview on October 18-19, shows relevant knowledge. Corteggiano's spreadsheet shows the Cascade line ratings, including a number of derates. For the one-year period beginning on October 23, 2012, LMPs at Cragview generally were well below \$50/MWh.³⁰⁷ For the hours in which net flow on the Cascade intertie was more than 0 MW, the highest price was \$119.75/MWh. The highest price on Corteggiano's spreadsheet was \$388.11/MWh, and it occurred for eight hours on July 31, two hours on October 18, and 14 hours on October 19. During every one of those hours, Cascade was derated to 0 MW in the export direction; the price was exactly \$388.11/MWh, and the net flow on Cascade was 0 MW.³⁰⁸ Respondents argue that Corteggiano's spreadsheet does not establish that Corteggiano knew that the \$388.11/MWh price was degenerate.³⁰⁹ While Respondents argue that the spreadsheet does not establish that Corteggiano *knew* the price at Cragview was degenerate, we find that the contents of Corteggiano's spreadsheet do show that he was aware of the unusually high nature of the \$388.11/MWh price and the 0 MW flow on the Cascade intertie – both factors that suggest the existence of “phantom congestion.”

111. Certain of Respondents' emails show that Respondents' real concern was avoiding losses on their CRRs, not making a profit on the physical power imports, and thus support a finding of intent, as discussed in greater detail below in Section III.D.2. For example, Corteggiano included Brignone on his October 21, 2013 email seeking to meet “ASAP” regarding the potential physical transaction. Brignone was Corteggiano's co-head of FTR trading and had no responsibility over or authority to trade physical power.³¹⁰ Respondents explain that Corteggiano would have included Brignone on any

Peak] are correct” and that the “price was set by the export bid. Note, you will see that nothing cleared.”).

³⁰⁷ See Staff Spreadsheet “Repeatingprices.xlsx.”

³⁰⁸ *Id.*

³⁰⁹ Respondents Answer at 53-54 (citing Wells Dec. ¶¶ 17-19).

³¹⁰ Corteggiano Test. Vol. 1 at 15:13-17; Brignone Test. at 12:4-7; Seff Test. at 33:11-18.

email that was relevant to their trading activities.³¹¹ But this does not explain why it would be important to discuss a physical power import with an FTR trader. Brignone would only be interested in the effect on Respondents' CRRs. In fact, Corteggiano conceded that Brignone, as an FTR trader, would have nothing to offer on the merits of Corteggiano's proposed import transactions.³¹²

112. The evidence also shows that Respondents' efforts to procure power were exceptional, which supports a finding of a fraudulent scheme. OE Staff describes a concerted effort on the part of Respondents to find, purchase, schedule, and import power at Cragview in the day-ahead market during the last week of October 2013.³¹³ Moreover, Respondents were willing to concede on key terms of the deal to facilitate the purchase.³¹⁴ As Corteggiano had neither the authority nor the expertise to import power himself, he enlisted Sickafoose and Kettler to assist him in arranging to import power at Cragview.³¹⁵

113. Respondents argue that Vitol's employees only spent a few hours over several days on the transaction.³¹⁶ Respondents' argument is not supported by the facts. For example, Respondents engaged numerous employees on the transaction. One employee spent hours searching for power to import, an endeavor which would usually take

³¹¹ Respondents Answer at 56.

³¹² Corteggiano Test. Vol. 2 at 187: 15-19.

³¹³ Staff Report at 15-18.

³¹⁴ FERC_SUB_IN14-4_00000480 (Telephone call between Kolby Kettler and Ryan Killam (Oct. 25, 2013)). Kettler told Powerex "we will take 100% of all the risks . . . trans, bookouts, you name it." VITOL_FERC_0000033-37 (IM between Kolby Kettler and jennier678 (Oct. 25, 2013)). Saxena testified that he has never "entered into a transaction where Vitol assumed all the risk of the loss." Saxena Test. Vol. 1 at 69:8-24.

³¹⁵ See Vitol PF Response at 5; *see also* Corteggiano Test. Vol. 1 at 78:13-79:13; Corteggiano Test. Vol. 2 at 189:25-190:13.

³¹⁶ Respondents Answer at 59.

seconds,³¹⁷ and over the course of the week Respondents contacted at least four different companies seeking to purchase power for import at Cragview.³¹⁸

iv. Respondents' Explanations of Their Trading Patterns Are Not Persuasive

114. Respondents' primary defense to OE Staff's allegations of fraud is that they executed the import transactions at issue based on their intention to profit from a CAISO-published price signal consistent with the interplay of supply and demand. We find that Respondents' explanations are not persuasive.

115. First, while Respondents assert that they saw the \$388.11/MWh price as a profiting-making opportunity, the evidence shows that the same price occurred in July 2013 and Respondents took no action.³¹⁹ Corteggiano's own spreadsheet references the \$388.11/MWh price at Cragview during a partial derate at the Cascade intertie,³²⁰ yet Respondents have not explained why they did not take action to respond to that high price signal as they did in October 2013, when they had a CRR position that stood to sustain significant losses. Furthermore, Respondents did not attempt to import power during the subsequent November and December 2013 scheduled Cascade intertie

³¹⁷ Saxena Test. Vol. 2 at 232:12-233:8, 234:2-5; *see also* VITOL_FERC_0000025-26 (IM between Kapil Saxena and Mark Sickafoose (Oct. 25, 2013)).

³¹⁸ VITOL_FERC_0000049-50 (Oct. 21, 2013 IM conversation between Kapil Saxena and temutrevor); VITOL_FERC_0000033-37 (Oct. 25, 2013 IM conversation between Kolby Kettler and jennier678); VITOL_FERC_0000051 (Oct. 21, 2013 IM conversation between Saxena and pwxtrader ("pwxtrader" is Phil Kern at Powerex, *see* Saxena Test. Vol. 1 at 124:18-125-4)); *see also* FERC_SUB_IN14-4_00000475.mp3 (Oct. 25, 2013 telephone call between Saxena and Ryan Killam); VITOL_FERC_0000023-24 (Oct. 22, 2013 IM conversation between Saxena and pwxmiles ("pwxmiles" is Miles Federspiel at Powerex, *see* Saxena Test. Vol. 1 at 127:15-22)).

³¹⁹ *See* Staff Spreadsheet "Repeatingprices.xlsx" (Cragview cleared at \$388.11/MWh on July 31); CAISO spreadsheet "cascade_bid_all_2013_Sent to Enforcement 812016.xlsx" (identifying other market participant as only bidder on July 31).

³²⁰ VITOL_FERC_0000437 (Corteggiano Spreadsheet).

derates,³²¹ despite the fact that those later dates were similarly positioned to the October 28-November 1, 2013 derate.

116. Second, Corteggiano had never reacted to any other high price signals with an attempt to effectuate a physical power transaction during his prior 18 months at Vitol, despite admitting that he monitored LMPs as part of his job managing the CRR portfolio.³²² Corteggiano did not attempt any similar physical trades after the late October 2013 transactions.³²³ Corteggiano therefore deviated from his normal trading behavior and expertise to execute the import transactions at issue, regardless of whether other high price signals occurred.

117. Third, while Respondents claim that they looked at the import transactions as a profit-making opportunity, the evidence shows that they were willing to purchase even *one* MW of power.³²⁴ That one MW of power would be sufficient to eliminate the congestion at the Cascade intertie causing the \$388.11/MWh. It would not, however, be a large enough quantity to generate a significant profit that would warrant the efforts Respondents took to acquire the power.

118. Finally, Vitol has provided evidence that it could not have “known” that the \$388.11/MWh price reflected degenerate pricing and/or phantom congestion, but manipulation does not depend on proof of actual knowledge. Rather, Corteggiano had more than enough information and experience to know that the aberrationally high \$388.11/MWh price was *likely* caused by phantom congestion. Corteggiano testified in *Deutsche Bank*, he was aware that CAISO had published material in 2010 on phantom congestion and resulting price impacts.³²⁵ Corteggiano also knew from his Deutsche Bank experience that even very small MW quantities moving one way or another could influence (protect) CRR positions in CAISO.³²⁶

³²¹ See CAISO spreadsheet “cascade_bid_all_2013_Sent to Enforcement 812016.xlsx” (showing that Vitol placed no bids at Cragview after November 1, 2013).

³²² Corteggiano Test. Vol. 2 at 163:23-165:14.

³²³ Corteggiano Test. Vol. 1 at 85:9-11.

³²⁴ OE Staff Reply at 23; FERC_SUB_IN14-4_00000477 (“hell, I’d even take one megawatt”).

³²⁵ Corteggiano 2010 Test. at 137:9-11.

³²⁶ See Corteggiano 2010 Test. at 69:19-71:18, 96:3-4, 109:14-110:8.

119. Given these facts, we find Respondents' explanations regarding their reasons for exploring physical trading at this intertie during the period of October 28 through November 1 unpersuasive.

v. Other Defenses

120. Respondents make numerous arguments about the CAISO market, including that it was not a well-functioning market, that its then-effective pricing mechanism, which allowed for degenerate prices, was an undisclosed market design flaw not authorized by the CAISO Tariff, and that CAISO's use of degenerate pricing was unjust and unreasonable.³²⁷

121. First, we do not agree with Respondents' argument that fraudulent conduct cannot be established by allegations that Respondents impaired, obstructed, or defeated a well-functioning market because the CAISO market was not well-functioning. As the Commission has previously explained, the "well-functioning market" language in Order No. 670 does not limit the reach of the Commission's Anti-Manipulation Rule to only those Commission jurisdictional markets without imperfections.³²⁸ As the Commission explained in *ETRACOM*, "[a]ll markets, even generally well-functioning markets, can have flaws and be susceptible to manipulation."³²⁹ In *ETRACOM*, the Commission was not persuaded by arguments that a software error and alleged CAISO market design flaws, similar to the ones alleged here, excused Respondents' market manipulation.³³⁰ Likewise, we find here that the presence of degenerate pricing does not obviate Respondents' market manipulation.

122. We also are not persuaded by Respondents' arguments that they should not be found liable for manipulation because CAISO's then-effective pricing mechanism led to degenerate pricing, which Respondents assert was a market design flaw not described in the CAISO Tariff. In *ETRACOM*, the Commission disagreed with arguments that supposed non-transparent market design flaws and errors render otherwise manipulative trading permissible.³³¹ In *ETRACOM*, the Commission also explained that "[m]arkets are

³²⁷ Respondents Answer at 94-95.

³²⁸ See *ETRACOM*, 155 FERC ¶ 61,284 at P 119; Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

³²⁹ *ETRACOM*, 155 FERC ¶ 61,284 at P 120.

³³⁰ *Id.* PP 118-25.

³³¹ *Id.*

rarely free of imperfections” and that Commission precedent does not “require[] that market participants have knowledge of any and all errors in the relevant markets as a prerequisite to a manipulation finding.”³³² We reinforce here that “[w]e expect market participants to abide by our Anti-Manipulation Rule at all times, notwithstanding any errors or flaws—actual or perceived, transparent or unknown—in the market.”³³³

123. Contrary to Respondents’ argument, the fact that CAISO later revised its pricing mechanism to eliminate the possibility of generating degenerate prices is not relevant here. Again, as the Commission explained in *ETRACOM*, an RTO/ISO’s decision to make changes to its market is not relevant to whether a market participant engaged in a manipulative scheme, as market design flaws do not excuse manipulative conduct and, in fact, they sometimes provide the context for such manipulative conduct.³³⁴

124. We also are not persuaded by Respondents’ argument that CAISO’s use of degenerate pricing was unjust and unreasonable and never approved by the Commission. This proceeding addresses whether Respondents violated the Commission’s Anti-Manipulation Rule, not the merits of CAISO’s then-effective pricing mechanism. Whether CAISO’s pricing mechanism (which is no longer effective) was unjust and unreasonable is irrelevant to the matters before us.

125. We also disagree with Respondents’ arguments that, because their transactions were “open market” transactions, they cannot be found to violate the Anti-Manipulation Rule, and that intent alone cannot transform an open-market transaction into a fraudulent or deceptive act. The Commission has recognized that “the difference between legitimate open-market transactions and illegal open market transactions may be nothing more than a trader’s manipulative purpose for executing such transactions.”³³⁵

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* P 126 (“Moreover, it would be contrary to our statutory obligations, and impractical as a matter of policy, to only enforce the Anti-Manipulation Rule on market designs and circumstances that continue to exist. This is especially true when the market change is intended at least in part to limit the potential for manipulation.”) (citations omitted).

³³⁵ *Barclays*, 144 FERC ¶ 61,041 at P 52 (citations omitted). This is consistent with manipulation precedent in securities and commodities law. *See Markowski v. SEC*, 274 F.3d 525, 529 (D.C. Cir. 2001) (holding that conduct can be manipulative “solely because of the actor’s purpose”); *In re Amaranth Natural Gas Commodities Litig.*, 587 F.

126. We are not persuaded by Respondents' two "policy" arguments for why the Commission should not find manipulation in this case. We disagree with the argument that finding manipulation on these facts creates a "new rule" that is "so vague that it makes it impossible to distinguish allegedly manipulative trades from non-manipulative trades in any objective way."³³⁶ Rather than finding manipulation based on some "new rule," this order merely applies the Commission's long-standing precedent regarding market manipulation.

127. The standard that we have applied in this case to determine whether there has been a violation of the Anti-Manipulation Rule and FPA section 222 is the same standard that the Commission has applied to similar cases, and is consistent with applicable statutes and regulations.³³⁷ We agree with OE Staff that Respondents' illegitimate trades, as evidenced by multiple indicators of fraudulent conduct, are readily distinguishable from legitimate trades.

128. Similarly, we do not agree with Respondents' argument that finding manipulation in this case would "chill legitimate market activity by creating regulatory risk for a market participant that sells energy in response to an ISO-published price simply because the sale might benefit another position, such as a CRR."³³⁸ Nothing in this order prohibits a market participant from engaging in *legitimate* transactions, in response to market fundamentals of supply and demand and an ISO-published price. Rather, this order reinforces that the Anti-Manipulation Rule prohibits *illegitimate* transactions entered into not based on market fundamentals, but rather, based on a fraudulent intent, and which inject false or fraudulent information into the market, such as trading in one market with the intent to benefit positions in a related market. This is not a case of "manipulation by

Supp. 2d 513, 534 (S.D.N.Y. 2008) (holding that "a legitimate transaction combined with an improper motive is commodities manipulation").

³³⁶ Respondents Answer at 80; Corteggiano Answer at 4.

³³⁷ We do not agree with Corteggiano's suggestion that OE Staff's action in pursuing this enforcement matter failed to meet the Constitutional requirements of fair notice. As OE Staff points out, the Commission has repeatedly rejected this argument in manipulation cases, and courts have agreed. OE Staff Reply at 79 (citing *Coaltrain*, 155 FERC ¶ 61,204 at PP 194-97; *Chen*, 151 FERC ¶ 61,179 at P 115; *City Power*, 152 FERC ¶ 61,012 at P 163; *FERC v. City Power*, 199 F. Sup. 3d at 237; *Silkman*, 177 F. Supp. 3d at 702-06)).

³³⁸ Respondents Answer at 11-12.

hindsight” as Respondents allege.³³⁹ Further, we note that Respondents’ reliance on *CFTC v. Wilson* is misplaced. In *CFTC v. Wilson*, the court’s finding that holding the defendants liable would effectively bar legitimate market activity was based on the fact that the defendants had an economically rational theory justifying their bids, while “the CFTC could offer no evidence to refute it.”³⁴⁰ Here, we find that OE Staff has presented sufficient evidence that shows Respondents’ actions were undertaken as part of a fraudulent scheme which injected false information into the market.

2. Scienter

129. Scienter is the second element necessary to establish a violation of FPA section 222 and the Commission’s Anti-Manipulation Rule.³⁴¹ For purposes of establishing scienter, Order No. 670 requires reckless, knowing, or intentional actions taken in conjunction with a fraudulent scheme, material misrepresentation, or material omission.³⁴² The Commission has explained that fraudulent intent need not (and often is not) established by direct proof, but rather can (and often must) be established by “legitimate inferences from circumstantial evidence” and that “[t]hese inferences are based on the common knowledge of the motives and intentions of men in like circumstances.”³⁴³

130. OE Staff alleges that the evidence shows that Respondents’ motive for the imports at Cragview was not to profit on them, but instead to benefit Vitol’s CRRs by preventing the congestion component of the \$388.11/MWh LMP from recurring, and therefore they acted with the requisite scienter in violation of FPA section 222 and the Commission’s Anti-Manipulation Rule.³⁴⁴

131. As discussed below, based on the totality of the evidence, we find that Respondents acted with the requisite manipulative intent. The evidence, which includes

³³⁹ Corteggiano Answer at 6 (quoting *CFTC v. Wilson*, 2018 WL 6322024 at *20).

³⁴⁰ *CFTC v. Wilson*, 2018 WL 6322024 at *20.

³⁴¹ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

³⁴² *Id.* PP 52-53.

³⁴³ *Barclays*, 144 FERC ¶ 61,041 at P 75 (quoting *U.S. v. Sullivan*, 406 F.2d 180, 186 (2d Cir. 1969) (*Sullivan*)).

³⁴⁴ See, e.g., Staff Report at 35-43 (detailing OE Staff’s findings regarding Respondents’ fraudulent intent).

contemporaneous communications, testimony, and trade data, shows that Respondents acted with the requisite scienter in connection with their scheme to defraud. In addition, we have considered Respondents' arguments and defenses and find them unpersuasive.

a. Respondents Answer

132. Respondents assert that OE Staff did not meet its burden to prove that they acted with the requisite scienter.³⁴⁵ Respondents argue that the facts support a finding that Vitol's energy sales to CAISO were motivated by a profit opportunity, not by a desire to benefit their CRR position. Specifically, Respondents assert that the contemporaneous written record, CAISO's confirmation of the validity of the \$388.11/MWh published price, the sworn testimony of Vitol employees, and the Wells Declaration, all show that Respondents acted in good faith in response to a legitimate economic incentive.³⁴⁶ Further, Respondents argue that Corteggiano's actions in consulting with Vitol's legal and compliance team before executing the proposed trades, including the disclosure of the CRR positions and the negative impact the initial derate had on those positions, "cannot be squared with the existence of manipulative intent."³⁴⁷

133. Respondents explain that, during the initial October derate, Corteggiano observed a \$388.11/MWh price at Cragview, which he thought signaled high demand and thus might reoccur during the later scheduled derates.³⁴⁸ Respondents explain that it is normal practice for Corteggiano, as a CRR trader, to closely monitor market conditions, including reviewing LMPs using Vitol's price visualization tool.³⁴⁹

134. In order to verify the price signal, Respondents assert that they prudently contacted CAISO, and a senior CAISO representative confirmed that the \$388.11/MWh

³⁴⁵ Respondents Answer at 94 ("Affirmative Defenses . . . Fourth Defense: Respondents did not act with the requisite *scienter*.").

³⁴⁶ *Id.* at 9.

³⁴⁷ *Id.* at 5.

³⁴⁸ *Id.* at 6, 12-14, 15 (noting that \$388.11/MWh price appeared on both October 18 and October 19).

³⁴⁹ *Id.* at 13.

price was “valid” and not the result of “any funny business,” which Corteggiano and Vitol understood to mean that the price was “real” and “legitimate.”³⁵⁰

135. Respondents point out that all of Vitol’s witnesses, including Corteggiano, testified under oath that they believed the \$388.11/MWh price signaled demand for energy at Cragview and that their goal in pursuing the proposed transaction was to profit on the energy sale, not to benefit the CRR position.³⁵¹ Respondents assert that a fundamental principle of LMPs is that price signals should incentivize market behavior (i.e., high prices should cause participants to import energy).³⁵² Respondents assert that OE Staff offers no testimony, written communications, or evidence of any type that contradicts the sworn testimony of more than a half dozen witnesses.³⁵³

136. Further, Respondents assert that the losses Vitol incurred on its CRR position during the initial October derate were “not substantial,” especially in the context of Corteggiano’s broadly diversified CRR portfolio, which as of October 2013 had

³⁵⁰ *Id.* at 6, 12-14 (citing Corteggiano Test. Vol. 1 at 72:7-15, 81:7-11, 89:7-8; Corteggiano Test. Vol. 2 at 227:6-9), 17 (noting that CAISO had a well-known habit of revising day-ahead prices, which Corteggiano was aware of, which caused Corteggiano and Kettle to contact CAISO to verify the price at Cragview), 18 (noting that CAISO did not tell Vitol that the \$388.11/MWh price was a degenerate price), 44-45 (noting that communications with CAISO, when taken at face value, do not support OE Staff’s speculation that Vitol was seeking to determine from CAISO that the price was degenerate).

³⁵¹ *Id.* at 6, 42, 45-46.

³⁵² *Id.* at 18.

³⁵³ *Id.* at 6; *see also id.* at 14-15 (noting that Vitol’s email correspondence about the Cragview transaction makes no reference to the CRRs, but rather focuses on responding to the price signal). Respondents reject OE Staff’s contention that two of Corteggiano’s emails indicate an intent to benefit the CRRs. *Id.* at 56 (explaining that including Brignone on an email about the Cragview transaction does not support an inference of manipulative intent, as it was reasonable to include the fellow FTR desk trader on such an email, and Brignone did not even attend the meeting Corteggiano set up to discuss the transaction), 57 (explaining that Corteggiano’s email to Kettler about congestion on the intertie does not support an inference of manipulative intent, because congestion is the relevant aspect of LMP that would lead to a meaningful price difference at a specific point and would determine the profitability of the import transaction).

substantial total gains for the year.³⁵⁴ Respondents point to the fact that Corteggiano originally proposed a 50 MW trade as evidence that the intent of the trades was to profit on the imports, not to benefit the CRRs.³⁵⁵

137. Respondents assert that their energy sales were open market transactions consistent with supply and demand fundamentals at Cragview.³⁵⁶ Respondents reject any assertion that intent alone can transform an open-market trade into a fraudulent one, as this would ignore the first element of a violation, unless there is proof that no other lawful purpose could have motivated the transaction.³⁵⁷ Respondents argue that OE Staff cannot prove that the \$388.11/MWh price incentive at Cragview was not at least one motivation for Respondents' transaction, and therefore OE Staff cannot establish a violation.³⁵⁸ Respondents assert that, under the *Masri* standard, which was applied by the court in *Barclays*, OE Staff must prove that "but for" the manipulative intent, the defendant would not have conducted the transactions at issue.³⁵⁹ Respondents argue that OE Staff's "like-men" standard based on "legitimate inferences from circumstantial evidence" turns the law on its head by allowing OE Staff to prove its allegations based on "any inference" that Respondents "may have traded, even in part, *for any illegitimate reason*," rather than requiring proof that Respondents traded "*not for any legitimate economic reason*."³⁶⁰

³⁵⁴ *Id.* at 14 (noting that Vitol had over 1,500 CRRs in CAISO at the time of the October trades at Cragview and that Corteggiano reasonably assumed that some CRRs would lose money, while others would profit).

³⁵⁵ Respondents Answer at 19, 42-43 (explaining that a 50 MW trade was consistent with the expectation of a profitable sale and inconsistent with OE Staff's contention that Corteggiano knew that importing as little as 1 MW of power would eliminate the congestion component of the LMP and lower the price).

³⁵⁶ *Id.* at 10-11.

³⁵⁷ *Id.* at 11, 36-39 (citing *Masri*, 523 F. Supp. 2d at 372).

³⁵⁸ *Id.* at 11.

³⁵⁹ *Id.* at 39-40 (citing *Masri*, 523 F. Supp. 2d at 373).

³⁶⁰ *Id.* at 40-41.

138. Respondents argue that no inference of an improper motive can be drawn from the facts presented by OE Staff. First, they argue that Vitol's (and Corteggiano's) efforts to procure physical power do not support an inference of improper motive.³⁶¹ They explain that it was logical and necessary for Corteggiano to enlist his colleagues' help in executing the trades, because Vitol's compliance program intentionally required prior review and approval of proposed trades involving related products.³⁶² Respondents also explain that it was not unusual for Kettler to be involved in seeking potential trades with counterparties.³⁶³

139. Second, Respondents also reject OE Staff's inference of improper intent from the fact that Vitol failed to forgo further imports at Cragview after seeing that the \$388.11/MWh did not return on the first day of the late October derate, explaining that Vitol always intended to implement the strategy for one week and that one day's pricing is not enough data to cause Respondents to abandon what appeared to be a significant profit opportunity.³⁶⁴

140. Third, Respondents assert that Powerex's data request responses are not probative of Respondents' intent and generally are not credible, as they are contradicted by Powerex's own contemporaneous behavior.³⁶⁵ Also, Respondents assert that the *Deutsche Bank* matter does not support OE Staff's allegations regarding intent, as the facts in that case are distinguishable from this proceeding.³⁶⁶ Respondents also reject OE

³⁶¹ *Id.* at 59 (explaining that Vitol's efforts involved only a few hours over several days, including limited phone calls and IMs, and that the difficulty in trying to find the power it needed indicated to Vitol that there was competition to supply power to Cragview and thus supported its belief in the economics of the trade).

³⁶² *Id.* at 60.

³⁶³ *Id.* at 60-61.

³⁶⁴ *Id.* at 61-62.

³⁶⁵ *Id.* at 63-64.

³⁶⁶ *Id.* at 65-67 (noting that Vitol's legal and compliance team reviewed and considered the facts of *Deutsche Bank* and distinguished it from the facts related to the Cragview trade).

Staff's inferences that Corteggiano's professional and financial incentives created an incentive to prevent losses on the CRRs.³⁶⁷

141. Respondents assert that OE Staff's argument that Respondents acted with scienter is based on the incorrect speculation that Corteggiano knew the \$388.11/MWh price was degenerate and that importing even 1 MW of power would eliminate the degeneracy and that Corteggiano traded with the purpose of eliminating the degenerate price—both speculations that Respondents argue that the evidence does not support.³⁶⁸ Respondents argue that they did not, and could not have known in October 2013 that the \$388.11/MWh price was a degenerate price, explaining that CAISO's price formation algorithm at the time was not described in the CAISO Tariff.³⁶⁹ Respondents dispute OE Staff's claim that Corteggiano learned about degenerate pricing from a March 2010 Department of Market Monitoring presentation made to the CAISO Market Surveillance Committee.³⁷⁰ Respondents explain that Wells, a former CAISO Senior Market Monitoring Analyst, who made the 2010 presentation on which OE Staff relies, testified that the presentation did not support OE Staff's inference about Corteggiano's knowledge of degenerate pricing and that Corteggiano could not have known that the \$388.11/MWh price signal was an artificial, degenerate price.³⁷¹ Respondents argue that Wells' Declaration "eviscerates the speculation" on which OE Staff's entire manipulation theory is based, and suggest that may be why OE Staff failed to even mention Wells' Declaration in its 64-page Staff Report.³⁷²

142. Respondents argue that the fact that they continued to sell energy to CAISO on November 1, 2013, a date on which their CRR position had no exposure to energy market

³⁶⁷ *Id.* at 67-68.

³⁶⁸ *Id.* at 41.

³⁶⁹ *Id.* at 6 (noting that CAISO has since eliminated its degenerate pricing practice through amendments to its tariff), 29-30 (explaining that Respondents first learned the price was degenerate in May 2017 from OE Staff), 46-54 (arguing that OE Staff's supposition that Corteggiano knew the price was degenerate is contradicted by the facts).

³⁷⁰ *Id.* at 6-7.

³⁷¹ *Id.* at 7 (citing Wells Dec. ¶¶ 8, 23-25), 47-49 (explaining that the Wells Declaration confirms that based on the publicly available information in October 2013, no market participant could have determined that the published \$388.11/MWh price was degenerate) (citing Wells Dec. ¶¶ 8-13).

³⁷² *Id.*

prices, disproves OE Staff's claim that the purpose of the sales was to avoid losses on the CRR position.³⁷³ Also, they argue that Vitol's decision not to pursue the trading opportunity during later derates was reasonable, given that the \$388.11/MWh price had not reappeared during the October 28-November 1 derate.³⁷⁴

143. Further, Respondents argue that OE Staff improperly discredits Respondents' good faith conduct in following the Commission-recommended practice of seeking and obtaining advice from legal and compliance counsel before pursuing the proposed profit-seeking transaction.³⁷⁵ Respondents explain that their legal and compliance team conducted a thorough and careful analysis of the proposed transaction's compliance with applicable law (including meeting with the relevant Vitol staff, confirming the purpose of the transaction, considering relevant FERC guidance, and discussing the analysis with Vitol's general counsel), and ultimately approved the transaction as lawful.³⁷⁶ Respondents assert that Corteggiano made a complete disclosure of the intended transaction to the legal and compliance team.³⁷⁷ Respondents explain that the legal and compliance team was aware that Corteggiano's proposed physical trade could affect Vitol's CRR position, and that given the related positions, the proposed trade "warranted particular scrutiny."³⁷⁸ Respondents also note that the legal and compliance team was aware that Corteggiano was not pre-authorized to trade physical power, and that he was involved with the trades at issue in the *Deutsche Bank* investigation, which were the only physical trades Corteggiano made while at Deutsche Bank.³⁷⁹

144. Respondents explain that Vitol's legal and compliance team recommended changes to the proposed transaction size to reduce the operational risk of having to unwind the purchases if CAISO did not accept Vitol's bid to sell energy at Cragview, and

³⁷³ *Id.* at 7-8, 43 (asserting that they would have had no reason to trade on November 1 if the intent was to benefit their CRRs).

³⁷⁴ *Id.* at 29.

³⁷⁵ *Id.* at 8-9, 55, 68-77; *see also* Respondents Answer at 94 ("Affirmative Defenses . . . Ninth Defense: Respondents reasonably relied upon the advice of counsel and compliance personnel.").

³⁷⁶ *Id.* at 8, 15-16, 20-29.

³⁷⁷ *Id.* at 68-73.

³⁷⁸ *Id.* at 20 (citing Hanley Dec. ¶ 6(c); Oppenheimer Dec. ¶ 6), 69-73.

³⁷⁹ *Id.* (citing Hanley Dec. ¶ 6; Oppenheimer Dec. ¶ 6).

to price the bid in such a way as to minimize the risk of setting the market clearing price and being accepted at a negative price. Respondents assert that the transaction was executed in accordance with the legal and compliance team's guidance.³⁸⁰

145. Respondents disagree with OE Staff's characterization of the analysis conducted by its legal and compliance team, and assert that the analysis was in fact diligent, careful, and relied upon in good faith.³⁸¹ Respondents argue that Vitol's compliance advisor, Hanley, verified all the material facts related to the proposed transaction, including assessing the price signal and analyzing Corteggiano's cooperation and candor in describing the transaction, and evaluated the transaction in light of the Commission's prior guidance in the *Deutsche Bank*, *Barclays*, and other cases.³⁸² Respondents assert that good-faith reliance on the advice of legal and compliance counsel precludes a finding of scienter.³⁸³

146. Finally, Respondents argue that adopting OE Staff's manipulation theory would harm the organized wholesale power markets. Respondents assert that LMPs and CRRs are both fundamental components of the organized wholesale power markets, and that no law or rule prohibits a market participant from trading energy at the same location where it holds CRRs, even if the transaction might affect the value of the CRRs.³⁸⁴ Rather, Respondents assert that markets are designed to incentivize such transactions. Respondents argue that in *CFTC v. Wilson*, the court rejected manipulation claims similar to those made in this proceeding, holding that when a trader makes a *bona fide* bid or offer, there is no manipulation even if that price benefits another position held by the bidder/offeree.³⁸⁵ Respondents argue that the central reasoning in *CFTC v. Wilson* applies equally to this case,

³⁸⁰ *Id.* at 8, 27-29.

³⁸¹ *Id.* at 9-10, 68-75.

³⁸² *Id.* at 20-25, 26 (noting that Vitol's General Counsel, Mr. Oppenheimer, concurred with Ms. Hanley's conclusions regarding the lawfulness of the transaction) (citing Oppenheimer Dec. ¶ 10), 45 (explaining that Vitol's compliance advisor, Ms. Hanley, took reasonable steps to confirm the validity of the price signal).

³⁸³ *Id.* at 10, 76-77 (arguing that market participants need to be able to rely on legal and compliance professionals for advice on conducting their business activities and that courts generally find good faith on the part of entities that act in reliance on counsel, even if counsel's advice was incorrect).

³⁸⁴ *Id.* at 11-12.

³⁸⁵ *Id.* at 12 (citing *CFTC v. Wilson*, 2018 WL 6322024, at *20).

i.e. OE Staff's manipulation claim, if accepted, would chill legitimate market activity by creating regulatory risk for a market participant that sells energy in response to an ISO-published price simply because the sale might benefit another position, such as a CRR.³⁸⁶

b. Corteggiano Answer

147. Corteggiano asserts that he acted rationally, responsibly, and in good faith in response to what he understood to be a valid price reflecting high demand at Cragview during the scheduled derate, after receiving prior authorization for the trade from legal counsel and a compliance advisor.³⁸⁷ Corteggiano argues that OE Staff's recommendation requires disbelief of the facts of the case, including those supported by contemporaneous, direct evidence. Corteggiano asserts that CAISO never disclosed, and it could not have been known, that the \$388.11/MWh price at Cragview was a degenerate price.³⁸⁸

148. Corteggiano argues that there is no evidence of wrongful conduct or intent. Rather, Corteggiano asserts that the facts demonstrate that Vitol and Corteggiano's intent for the 5 MW trade was to profit from expected future market prices, not to cause false or artificial pricing or to affect the pricing of CRRs.³⁸⁹ Further, the duration of the Cragview trade was co-extensive with the time period of the next scheduled derate, not with the time period Vitol had CRR positions exposed to price risk.³⁹⁰

149. Corteggiano argues that his good faith intent is further established by the fact that Corteggiano sought the advice of legal and compliance counsel and conducted the trade as they approved.³⁹¹ Further, he asserts there is no evidence that legal and compliance

³⁸⁶ *Id.* (citing *CFTC v. Wilson*, 2018 WL 6322024, at *15 (“[a contrary] theory, which taken to its logical conclusion would effectively bar market participants with open positions from ever making additional bids to pursue future transactions, finds no basis in law”)).

³⁸⁷ Corteggiano Answer at 2.

³⁸⁸ *Id.* at 2-3.

³⁸⁹ *Id.* at 7.

³⁹⁰ *Id.* at 2.

³⁹¹ *Id.* at 7 (noting that the approved trade was ultimately 1/10 of the size he originally proposed), 10-11 (citing *SEC v. Ginder*, 752 F.3d 569, 576 (2d Cir. 2014) (relying on the fact that the trading practices at issue had been approved by not just the legal department, but also the compliance department and the defendant's supervisors, to

acted in bad faith. Corteggiano notes that OE Staff cites no instance where a person was charged with a violation where legal or compliance professionals approved the trade. Corteggiano rejects OE Staff's contention that the advice of counsel defense should not be accepted, because legal and compliance did not ask all the questions of Corteggiano that OE Staff would ask today; rather, Corteggiano argues that legal and compliance had sufficient information to give competent and correct advice.³⁹²

150. Corteggiano argues that the suppositions that he knew that the \$388.11/MWh price was degenerate and how to prevent it from occurring are based on erroneous hindsight bias and mischaracterizations of the facts.³⁹³ Corteggiano explains that he did not know all the information that Rothleder, CAISO's Vice President, knew at the time about the Cragview price; rather, he only knew that CAISO had said the price was "valid," which he understood to mean the product of competitive cleared trades.³⁹⁴ Corteggiano argues that CAISO's confirmation of the price as "valid" eliminates any suppositions that OE Staff draws from Corteggiano's prior work at Deutsche Bank, because the Deutsche Bank trades related to an earlier time, at a different location, and with different information communicated from CAISO about the pricing.³⁹⁵ Also, Corteggiano asserts that the fact that CAISO reported 5 MW of flow at Cragview during the week of the Vitol trade (when Corteggiano had submitted 5 MW offers) did not inform him that the price was degenerate, because CAISO reported only net flow and thus he could not have known the number and terms of the bids and offers that contributed to the formation of the market prices during the week of the trade.³⁹⁶ Corteggiano notes that CAISO's former Market Monitoring Analyst, Wells, confirmed that even CAISO personnel could not discern when a price was degenerate unless they researched information not available to the public.³⁹⁷

conclude that the defendant acted in good faith); *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004); *United States v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996)).

³⁹² *Id.* at 11-13.

³⁹³ *Id.* at 7-8.

³⁹⁴ *Id.* at 8.

³⁹⁵ *Id.* at 9.

³⁹⁶ *Id.* at 9-10.

³⁹⁷ *Id.* at 10 (citing Wells Dec.).

151. Corteggiano further asserts that the 50 MW trade he originally proposed was consistent with an intent to trade for profit, not to prevent price degeneracy.³⁹⁸

152. Corteggiano asserts that the judicial authorities have held that open market transactions, even if intended to affect market prices, are not chargeable as manipulation absent evidence that they injected into the market false information about the natural interplay of supply and demand.³⁹⁹

c. OE Staff Report and Reply

153. To meet its burden of establishing that Respondents acted with the requisite scienter, OE Staff notes as a threshold matter that Vitol faced over \$1.2 million in potential losses on its CRR position during the Cascade intertie derate for the week beginning on October 28. OE Staff contends that Corteggiano knew that he could likely eliminate the export congestion giving rise to this problem by importing physical power in the day-ahead market at Cragview. To do so, OE Staff alleges that he worked with other Vitol employees to arrange a purchase of physical power in the Pacific Northwest. OE Staff explains that these imports were Corteggiano's first transactions in physical products since joining Vitol.⁴⁰⁰

154. OE Staff points out that these purchases were made from Morgan Stanley after Powerex, a prospective seller, determined that Vitol's proposed purchase might benefit Vitol's CRR position and, citing a lack of credit arrangements, declined to sell. In OE Staff's view, this should have signaled to Corteggiano and Vitol that the transactions were at least potentially problematic.⁴⁰¹ OE Staff asserts that the subsequent negotiations with Morgan Stanley, though fruitful, lacked any real bargaining on terms, which OE

³⁹⁸ *Id.* (explaining that a 1 MW trade was all that was required to prevent a degenerate price, while a 50 MW trade carried far more risk of loss and reward and was consistent with the belief that the high price would recur).

³⁹⁹ *Id.* at 7.

⁴⁰⁰ Staff Report at 15.

⁴⁰¹ *Id.* at 42. In fact, OE Staff notes, Powerex was concerned by the fact that the price Vitol was willing to pay was above the prevailing market price, which suggested to Powerex that the transaction would be uneconomic on a stand-alone basis. Although that concern was not voiced by Powerex in communications with Vitol, OE Staff notes that it does serve as evidence of what a market participant reasonably should have recognized about the transaction. OE Staff Reply at 16.

Staff contends is further evidence of scienter in that it indicates a willingness to purchase for reasons other than an opportunity to profit on the subsequent sale.⁴⁰²

155. In fact, OE Staff notes, Vitol had not traded physical power at Cragview prior to learning of the initial losses on its CRR position. The \$388.11/MWh price had appeared earlier at Cragview, in July 2013, but this price passed without action by Vitol; OE Staff notes that Vitol's first physical trades at Cragview occurred in October 2013.⁴⁰³

156. OE Staff states that it was clear on Sunday, October 27, when the day-ahead market results for October 28 were published, that Vitol's first import transaction had eliminated the export congestion, although Vitol lost money on the imports. OE Staff points out, however, that Respondents nevertheless completed a second transaction to purchase power for import for the rest of the week.⁴⁰⁴ Once again, OE Staff explains, Respondents lost money, but by making these transactions, they were able to eliminate the export congestion and thereby avoid the far larger financial losses they otherwise would have incurred on the CRRs at Cragview, all of which, OE Staff notes, is evidence of their intent – not to profit from these transactions, but to manipulate the prevailing price of physical energy to protect themselves from significant losses on their CRRs.⁴⁰⁵

157. Noting Respondents' emphasis on Corteggiano's meetings and discussions with Vitol's legal and compliance personnel, OE Staff acknowledges that Corteggiano obtained approval from an attorney in Vitol's Office of the General Counsel and from a compliance advisor for his import transactions at Cragview.⁴⁰⁶ OE Staff contends, however, that in seeking their approval, Corteggiano provided inaccurate and incomplete information in certain material respects, and that the attorney and compliance officer failed to ask certain questions that would have brought to light the problematic nature of the trade. OE Staff notes, for example, that Corteggiano failed to disclose the fact that he knew that, as discussed below, importing as little as 1 MW of power likely would eliminate the congestion component of the LMP at Cragview, making his proposed imports unprofitable while benefiting his CRRs.⁴⁰⁷ Yet, OE Staff alleges that neither

⁴⁰² Staff Report at 40.

⁴⁰³ *Id.* at 39.

⁴⁰⁴ *Id.* at 31-32.

⁴⁰⁵ *Id.*

⁴⁰⁶ OE Staff Reply at 69.

⁴⁰⁷ *Id.* at 59-61.

legal counsel nor the compliance advisor understood or sought to understand this before approving Corteggiano's import transactions.⁴⁰⁸

158. In this regard, OE Staff argues that it does no good for Respondents to point to their willingness to buy more than a single MW of power. Respondents suggest that this indicates their genuine interest in making a profit on the physical trades, but OE Staff avers that Respondents in fact sought to buy power in *any* quantity up to 50 MW, and this indifference to quantity is actually evidence of their manipulative intent.⁴⁰⁹

159. OE Staff points out that despite the fact that Corteggiano, via Kettler, was directed by counsel to contact CAISO to confirm that the observed price of \$388.11/MWh was valid, he instead crafted and presented two questions that were designed to elicit information shedding light on whether the price was in reality a product of "phantom congestion," a conclusion that drew further support from the fact that the high price was not observed at other nearby nodes.⁴¹⁰ OE Staff asserts that Corteggiano shared neither his reformulated questions, nor the answers to those questions, nor the conclusions that he was able to draw from those answers, with counsel or the compliance advisor.⁴¹¹

160. OE Staff notes, as additional evidence of scienter, that Corteggiano had prior experience with the sources of congestion costs at partially derated CAISO interties in 2010, when he was working at Deutsche Bank.⁴¹² OE Staff explains that Corteggiano purchased CRRs for Deutsche Bank that earned money if export congestion occurred on the Silver Peak intertie and lost money if import congestion occurred. OE Staff states that, in January 2010, CAISO partially derated the Silver Peak intertie to 0 MW in the import direction and 13 MW in the export direction; import congestion appeared on the intertie, and Corteggiano's CRRs began to lose money.⁴¹³ OE Staff explains, as he

⁴⁰⁸ *Id.* at 60.

⁴⁰⁹ *Id.* at 22-25.

⁴¹⁰ Staff Report at 20-21.

⁴¹¹ OE Staff Reply at 59-61 (citing Staff Report at 52-53).

⁴¹² Staff Report at 35; *see* OE Staff Reply at 36-38.

⁴¹³ Staff Report at 3.

testified in the *Deutsche Bank* matter, Corteggiano was aware that CAISO had published material in 2010 on how phantom congestion could cause high prices.⁴¹⁴

161. OE Staff argues that Corteggiano thus knew that he could substantially alter or eliminate phantom congestion by trading even small quantities of physical power in the opposite direction of the derate.⁴¹⁵ OE Staff states that Corteggiano admitted to staff in 2010 that he made unprofitable physical trades on behalf of Deutsche Bank to benefit CRR positions that otherwise would have been harmed by the congestion associated with partial derates at Silver Peak.⁴¹⁶ OE Staff explains that this was the only time in his career that Corteggiano traded physical power, until he did so at Cragview in late October 2013.⁴¹⁷

162. For this reason, OE Staff contends that it is not necessary to prove that Corteggiano understood the concept of “degenerate pricing” in order to establish that Respondents acted with scienter. Rather, OE Staff argues that Corteggiano only needed to understand – and in OE Staff’s view the evidence shows that he did understand – that flowing power in the direction opposite to a derate could move the export limit away from 0, thereby eliminating approximately \$350 per MWh in congestion costs and the threat posed to Vitol’s CRR position.⁴¹⁸ The evidence offered by Respondents in support of their arguments regarding the complexity of degenerate pricing and Corteggiano’s inability to perceive it, given the limited information available to any market participant, are therefore beside the point in OE Staff’s view.⁴¹⁹

163. Respondents also gain nothing, in OE Staff’s view, from their argument that the trading in question somehow established a “market” price. OE Staff argues that Respondents’ trading was for the purpose of benefitting their CRR position, not to make money on the trades of physical power. Hence, according to OE Staff, Vitol’s purchases

⁴¹⁴ *Id.* at 8 (citing Corteggiano 2010 Test. at 137:9-11).

⁴¹⁵ Corteggiano testified that “phantom congestion” is “congestion that is not triggered by market behavior or by physical flows in the system.” Corteggiano 2010 Test. at 94:13-23.

⁴¹⁶ See Staff Report at 3-4 (citing Corteggiano 2010 Test. at 93:6-9).

⁴¹⁷ *Id.* at 4, 15.

⁴¹⁸ OE Staff Reply at 18.

⁴¹⁹ *Id.* at 35-36.

sent to the market a price signal motivated by manipulation, not by profit on the trades themselves. OE Staff asserts that there is nothing “market based” about such prices.⁴²⁰

164. OE Staff argues that more evidence of intent can be found by examining email communications during the relevant time period. OE Staff explains that Corteggiano chose to include Brignone on an October 21, 2013 message, despite the fact that Brignone did not trade physical power; Respondents’ claim that the fact that he would be included on emails relating to trading activity only confirms, in OE Staff’s view, the point that Corteggiano was keeping him informed because of the consequences on financial trades, i.e., the CRRs.⁴²¹ Similarly, OE Staff notes that an October 27, 2013 email message from Corteggiano to Kettler answering the latter’s question about prices at Cragview demonstrates intent, because in OE Staff’s view, the key point is that it shows an interest in the difference in prices between nodes – information relevant to CRR positions, but not to the profitability of a sale of physical energy at a specific node.⁴²²

d. Commission Determination

165. We find, based on the totality of the evidence presented, that Respondents acted with the requisite scienter in connection with their scheme to defraud. It is well-established that “[t]he presence of fraudulent intent is rarely susceptible of direct proof, and must instead be established by legitimate inferences from circumstantial evidence. These inferences are based on the common knowledge of the motives and intentions of men in like circumstances.”⁴²³ Indeed, the Commission has specifically recognized that “intent must often be inferred from the facts and circumstances presented.”⁴²⁴

166. As discussed below, we find the preponderance of the evidence shows that Respondents, individually and together, knowingly and intentionally participated in a manipulative scheme to place physical import bids at the Cascade intertie to eliminate

⁴²⁰ *Id.* at 21.

⁴²¹ *Id.* at 40-41.

⁴²² *Id.* at 41.

⁴²³ *Sullivan*, 406 F.2d at 186 (citing *Connolly v. Gishwiller*, 162 F.2d 428, 433 (7th Cir. 1947)); accord *Thomas v. Doyle*, 187 F.2d 207, 208 (D.C. Cir. 1950).

⁴²⁴ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 43.

congestion and economically benefit Respondents' CRR position, thereby harming the CAISO market and other market participants.

167. As discussed above in Section III.D.1, we are not persuaded by Respondents' argument that the trades at issue were motivated by a perceived profit opportunity from a high LMP, because the weight of the evidence cuts against this contention. First, the evidence shows that Respondents deviated from their normal trading behavior to execute these trades. As a threshold matter, we note that the trades at Cragview from October 28-November 1, 2013, represented the first time that Corteggiano engaged in physical trading in the course of his employment at Vitol. Corteggiano's principal duty was to manage Vitol's FTR and CRR portfolio—i.e., to trade financial products, not physical products. Corteggiano pursued the physical trades at Cragview only after learning of the losses sustained in Vitol's CRR position on October 18.⁴²⁵ These losses, coupled with his anticipation of further significant losses, created an economic motive to try to avoid more damage to Vitol's CRR profits, and this motive is relevant to the Commission's scienter finding.⁴²⁶ The evidence also shows that Vitol itself only infrequently purchased and sold physical power in the CAISO market, and had never previously done so at the illiquid Cragview Pnode.⁴²⁷ Corteggiano himself did not trade physical power again after the imports at Cragview.⁴²⁸

168. Further evidence that Vitol and Corteggiano's intent was not to profit from a physical sale, but rather to manipulate the price and protect Vitol's CRR position, is found in the period preceding the October trades at issue. The high price at Cragview had appeared in July 2013, but Vitol undertook no purchases or sales of physical energy at that time.⁴²⁹ Yet when faced with the prospect of substantial losses to the CRRs, Vitol

⁴²⁵ Corteggiano Test. Vol. 1 at 84:24-85:3.

⁴²⁶ See *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 795 (2d Cir. 1969) (manipulative purpose is prima facie established where a person who has a "substantial, direct pecuniary interest in the success of a proposed offering takes active steps to effect a rise in the market in the security" (citations and quotations omitted)).

⁴²⁷ VITOL_FERC_0000027-28 (IM Kapil Saxena and pwxmiles (Oct. 24, 2013)); Kettler Test. Vol. 1 at 131:10-15, 140:12-15.

⁴²⁸ Corteggiano Test. Vol. 1 at 85:9-11.

⁴²⁹ See "Repeatingprices.xlsx" (Cragview cleared at \$388.11/MWh on July 31); see also CAISO-generated spreadsheet entitled "cascade_bid_all_2013_Sent to OE Enforcement 812016.xlsx," sent by CAISO to OE Staff on August 1, 2016 (reflecting Morgan Stanley as sole bidder on July 31); VITOL_FERC_0000437 (Corteggiano

moved with alacrity – by flattening its positions post-November 1 and looking for power to buy for the days prior thereto on which it held CRR positions that were at risk by virtue of the derate.⁴³⁰ When the potential consequences of the Cascade derate emerged in October 2013, moreover, Corteggiano kept his fellow financial trader, Brignone, informed of the emerging plans for addressing potential losses.⁴³¹ But Brignone was not a trader in physical products; the most logical explanation for why Corteggiano kept him informed is the common interest the two shared in the company's positions in financial products, including their CRR positions, which stood to lose substantial sums as a result of the derate. As we explained in *ETRACOM* and reinforce here, significant deviations from typical trading behavior are relevant indicia of manipulative intent.⁴³²

169. Second, as explained in greater detail in Section III.D.1, the evidence generally shows that Respondents were indifferent to the profitability of the Cragview trades. We similarly find that Respondents' indifference to the profitability of the trades is also a relevant indicium of manipulative intent,⁴³³ and that, together with the deviation from normal trading behavior, supports a finding that Respondents' motive for the Cragview trades was to benefit Vitol's CRR position.

170. In addition to these indicia of manipulative intent, we also find that Corteggiano had the requisite knowledge to execute a scheme to benefit his CRR position. The evidence shows that Corteggiano knew that he could eliminate the congestion cost that constituted a large part of the \$388.11/MWh price LMP at Cragview by flowing even a small quantity of power in the opposite direction of the Cascade intertie derate. Corteggiano admittedly acquired this knowledge at Deutsche Bank where, through a series of trades, he learned that he could readily influence price at partially derated interties with low liquidity.⁴³⁴ Further, Corteggiano's own testimony demonstrates that he knew the shadow price on the Cascade intertie arose from the binding constraint

Spreadsheet); *see also* Corteggiano Test. Vol. 2 at 205:10-19 (expressing familiarity with price history at Cragview when he originally purchased the CRRs).

⁴³⁰ Vitol Response to OE-VITOL-1-12 at 4-5; Corteggiano Test. Vol. 1 at 78:13-79:13; Corteggiano Test. Vol. 2 at 189:25-190:13.

⁴³¹ VITOL_FERC_0001269 (Email from Corteggiano to Dylan Seff, et al., "Trading Opportunity" (Oct. 21, 2013)).

⁴³² *ETRACOM*, 155 FERC ¶ 61,284 at P 153.

⁴³³ *Id.* P 151.

⁴³⁴ Corteggiano 2010 Test. at 69:19-71:18; 96:4; 109:14-22.

imposed by the derate.⁴³⁵ He also knew that 100 percent of the shadow price would appear as congestion costs in the Cragview LMP, and that the constraint would not bind if there was a net import flow on the Cascade intertie greater than 0 and less than 80 MW.⁴³⁶ He therefore would have known, and expected, that importing 5 MW over that intertie would result in no shadow price on the intertie and no associated congestion cost in the Cragview LMP, which in fact is what occurred.

171. While the evidence indicates that it is likely that Corteggiano believed the \$388.11/MWh price at Cragview was degenerate, we agree with OE Staff that we need not find that Corteggiano *knew* the price was degenerate to support a finding that he acted with manipulative intent. Proof of scienter does not require a showing that Corteggiano understood the concept of degenerate pricing or its telltale indicia, either generally or in the specific context of the \$388.11/MWh price at Cragview. It is enough that OE Staff has proven that Corteggiano knew that congestion costs at partially derated interties could be eliminated by flowing power in the opposite direction of the derate. The Commission is persuaded that OE Staff has made this demonstration. Therefore, we find Respondents' evidence, including the Wells Declaration, purporting to explain the complexity of degenerate pricing and the impossibility of its discernment by an individual market participant, irrelevant to our finding that Respondents had the requisite manipulative intent.⁴³⁷

172. We note Respondents' emphasis on the role of their in-house counsel and compliance advisor, and their interaction with Corteggiano in assessing and approving the transactions at issue. The Commission recognizes that timely, accurate, and complete consultations with counsel and compliance personnel can make a valuable contribution to the proper functioning of the electricity markets. However, our view is informed by and consistent with the case law in other areas, which makes clear that a party seeking to rely on advice of counsel to defend its actions must show that (1) it made a complete disclosure to counsel of relevant facts, (2) sought advice on the legality of the proposed conduct, (3) received advice that the conduct would be legal, and (4) acted in good faith on that advice.⁴³⁸

⁴³⁵ Corteggiano Test. Vol. 2 at 143:8-11.

⁴³⁶ *Id.* at 148:24-149:5; 244:16-246:3.

⁴³⁷ *See generally* Wells Dec.; *see* Respondents Answer at 48-50.

⁴³⁸ *See, e.g., SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 467 (9th Cir. 1985), *citing SEC v. Savoy Industries, Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981).

173. In this case, we are unpersuaded that Corteggiano's consultations with legal counsel and Vitol's compliance advisor negate Respondents' intent to manipulate. We find that Corteggiano failed to make a complete disclosure of all material facts to counsel, which undermined legal and compliance counsel's review of the proposed transaction, which impacted the clarity and informed judgment of the guidance, and which negated Respondents' reliance on that advice. As an initial matter, Corteggiano's consultation with counsel was not sought independently, but rather was ordered by his supervisor, Dylan Seff.⁴³⁹ We also find that Corteggiano failed to disclose to counsel and the compliance advisor certain material facts, including his knowledge that importing even a small amount of power likely would eliminate the congestion component of the LMP at Cragview, making the proposed imports unprofitable while nevertheless benefiting Vitol's CRRs.⁴⁴⁰ Corteggiano knew this from his basic understanding of the CAISO market and from his prior experience summarized above, but, because Corteggiano failed to explain these key facts, neither legal counsel nor the compliance advisor understood the full implications of the proposed transactions before approving them.⁴⁴¹

174. In addition, we find that Corteggiano departed from the direction received from counsel and carefully managed the information he shared as the review process went forward. Although counsel directed that CAISO be queried as to whether the \$388 price was valid, Corteggiano instead crafted two other questions that Kettler posed to CAISO: whether "someone has the capability to submit export schedules in this case and potentially set the intertie price" and whether "someone [can] place an import offer and a simultaneous export for equal mws and set the price."⁴⁴² An answer to the first question could tell Corteggiano whether actions by a third party (placing exports over the Cascade

⁴³⁹ Seff Test. at 65:13-19.

⁴⁴⁰ VITOL_FERC_0015481 (Email from Federico Corteggiano to Ann Marie Handley, et al., "Trading Opportunity" (Oct. 21, 2013)).

⁴⁴¹ Neither Hanley nor Oppenheimer understood key elements of the mechanics of the transaction. *See* Hanley Test. Vol. 2 at 196:2-21 (Hanley did not consider possibility that price at Cragview reflected phantom congestion); Oppenheimer Test. at 79:7-16 (Oppenheimer was unaware of any connection between a derate and phantom congestion).

⁴⁴² VITOL_FERC_0015847 (Email from Kolby Kettler to Mark Rothleder, "FW: Cascade de-rate" (Oct. 23, 2013)). Hanley did not see a draft of the email, testifying that she was "unaware" of it. Hanley Test. Vol. 2 at 140:10-12, 144:6-9.

intertie) could defeat his strategy to eliminate congestion at Cragview.⁴⁴³ An answer to the second question could indicate whether the price was set by an uncleared “import offer” and therefore reflected “phantom congestion.”

175. Realizing that an uncleared import bid set the \$388.11/MWh price at Cragview, Corteggiano understood that the “0 net flow” that CAISO reported for the Cascade intertie on October 18-19 meant there was no flow at all.⁴⁴⁴ He also knew that the fact the net flow was at the 0 MW limit established by the derate gave rise to the congestion costs in the \$388.11/MWh price.⁴⁴⁵ Congestion costs only arise when there is a “constraint”⁴⁴⁶ on transmission (such as that imposed by the derate on the Cascade intertie) and the constraint is “binding.”⁴⁴⁷ The constraints imposed by an intertie’s operating transfer capability limits become binding (i.e., prevent energy transfers) only

⁴⁴³ Kettler denied that he asked the question in order to confirm how exports at Cragview could upend Vitol’s strategy to eliminate congestion. *Declaration Under Penalty of Perjury of Kolby Kettler* at ¶ 6 (Mar. 8, 2017) (Kettler Dec.) (included in Vitol PF Response, Ex. E). However, Kettler testified that he was just a “conduit” for Corteggiano’s questions, so it is Corteggiano’s intent, not Kettler’s, that is relevant.

⁴⁴⁴ The net flow information was in a spreadsheet that Corteggiano had created using CAISO’s published data. *See* VITOL_FERC_0000437 (Corteggiano Spreadsheet). Corteggiano sent this spreadsheet to Kettler, highlighting the hours on October 18 and 19 with the \$388.11/MWh price. Email, Corteggiano to Kettler, “cascade.xls,” (Oct. 23, 2013).

⁴⁴⁵ Corteggiano Test. Vol. 2 at 143:8-11 (“The binding constraint has an associated shadow price”).

⁴⁴⁶ “Constraints” are limits on the flow of power through a power line or other transmission facility. A constraint can be a physical limitation (e.g., a transmission line is operating at its full capacity and is physically incapable of transmitting additional power or the line is shut down for maintenance). A constraint can also be operational (e.g., the imposition of power flow scheduling limits to prevent reliability problems). *See* CAISO Bus. Practice Manual for Definitions & Acronyms, Version 5 (Aug. 16, 2010) (defining “transmission constraints” as “physical and operational limitations on the transfer of electrical power through transmission facilities”). CAISO’s derate of the Cascade intertie to 0 MW in the export direction was a “constraint” because it limited power flow over the intertie.

⁴⁴⁷ A constraint is “binding” when the capacity of a transmission element has been fully utilized. CAISO Response to OE-CAISO-1-5.

when the *net* imports or *net* exports are at exactly the limits set for the intertie.⁴⁴⁸ If the net flow on Cascade were anything other than 0 MW, there would be no binding export constraint and there would be no export congestion costs relating to Cascade in the Cragview LMP.⁴⁴⁹ As Corteggiano understood from his trading at Silver Peak and from the Market Surveillance Committee's published materials, the constraint (and the associated congestion costs) could be removed simply by importing power – even just 1 MW – in the opposite direction of the derate. All Corteggiano needed to do was offer very low-priced power for import and CAISO likely would clear the bid, power would flow on the intertie in the import direction, and the export constraint would no longer bind. However, we find that Corteggiano failed to share these material facts with legal and compliance counsel when he sought their approval of the Cragview transactions.

176. Similarly, the evidence shows that Corteggiano did not inform legal or compliance counsel about the availability of transmission to Cragview, and therefore their approval of the Cragview import transaction was also based, at least in part, on a misunderstanding of the availability of transmission at Cragview. The evidence shows that Kettler checked transmission availability on October 21 and informed Corteggiano that 80 MW of non-firm transmission was available to Cragview (which was the full capacity of the transmission path to Cragview).⁴⁵⁰ Indeed, as Respondents could have seen on

⁴⁴⁸ Although CAISO does not accept bids when an intertie is derated to 0 MW in both directions, CAISO allows market participants to submit both import (supply) and export (demand) bids at a partially derated intertie because system operators can manage the intertie by netting import and export schedules to stay within the limits. *See* CAISO Response to OE-CAISO-1-7.

⁴⁴⁹ As noted above, CAISO determines the MCC by using the shadow price at each binding transmission constraint in the CAISO network. CAISO's tariff essentially defines shadow price as the value of relieving the particular transmission constraint. The shadow price is multiplied by a "shift factor" to calculate MCC. The shift factor measures the relative contribution of flow from supply or demand on a given transmission element. The shift factor between the Cascade intertie and Cragview is 100 percent, which means that 100 percent of the shadow price for the Cascade intertie appears in the MCC component of the LMP for Cragview. When there is a binding constraint on the Cascade intertie, a shadow price is calculated for the intertie. *See* CAISO Response to OE-CAISO-1-5. In the absence of a binding constraint, CAISO would not assign a shadow price for the Cascade intertie and there would be no export congestion costs relating to Cascade in the Cragview LMP.

⁴⁵⁰ Kettler reported to Corteggiano and others that there was 80 MW of non-firm transmission capacity available on the "Weed to Cragview" path, which Kettler advised was the "limiting factor" for power transmission to Cragview. VITOL_FERC_0001280

PacifiCorp-West's OASIS site, the *only* non-firm transmission reservations made on that path during the week of Vitol's trading were for Vitol's imports.⁴⁵¹ Kettler subsequently was informed by Morgan Stanley that non-firm transmission would be available because Powerex, which held the firm transmission rights for the path's full 80-MW capacity, would not be using the capacity.⁴⁵² Apparently unaware of the transmission information that Kettler and Corteggiano had obtained, Hanley erroneously believed that it was "difficult" for Vitol to procure transmission.⁴⁵³ This mistaken understanding gave her "more confidence" that there was competition to serve demand at Cragview and that Corteggiano's proposed import transaction therefore was an "independent trading strategy."⁴⁵⁴ This misunderstanding is just one example of Respondents' failure to fully inform legal and compliance counsel of all material facts regarding the Cragview transaction, and serves to undercut Respondents' attempt to rely on advice of counsel as a defense to a finding that they acted with manipulative intent.

(E-mail from Kolby Kettler to Federico Corteggiano, Mark Sickafoose, Kapil Saxena, and Dylan Seff (Oct. 21, 2013)).

⁴⁵¹ See PacifiCorp-West OASIS screenshot, "Reservation Summary for: PPW," <https://archive.oasis.oati.com/cgi-bin/webplus.dll?script=%2Fwoaarchive%2Fwoa-main.wml&ppr=BCTC>. As reflected in the screenshot, transmission reservations for the path that Kettler identified as "Weed to Crag" are made with a point of receipt of "BPAT.PACW" and point of delivery of "Crag."

⁴⁵² On October 25, Morgan Stanley's trader told Kettler that he had previously worked at Powerex and reassured him that transmission service for Vitol's transaction would be available because Powerex "won't be flowing." See FERC_SUB_IN4-4-00000477 (Telephone call between Ryan Killam and Kolby Kettler (Oct. 25, 2013)). PacifiCorp West's OASIS site showed that Powerex held the firm transmission rights for the full 80-MW capacity of the transmission path. See Transmission Reservation Detail 672283 CONFIRMED, <https://www.oasis.oati.com/cgi-in/webplus.exe?script=/woa/woa-ts-viewtsr-printview.wml&TSRID=8380313&FromHistory=0&IsFullPeriod=1&EditTSRList=> 127.

⁴⁵³ Hanley Test. Vol. 1 at 72:4-14. Hanley did not provide the specific source of her information on transmission availability, but testified that the only people with whom she had "lengthy conversations" about the proposed transaction were Corteggiano and Kettler. *Id.* at 73:9-14.

⁴⁵⁴ Hanley Test. Vol. 1 at 72:10-73:1.

177. Another example of Respondents' failure to fully inform legal and compliance counsel of all the material facts regarding the Cragview transactions is Corteggiano's failure to fully disclose and explain to Hanley the importance of his LMP pricing spreadsheet. Even before learning from CAISO that an import bid had set the \$388.11/MWh price at Cragview on October 18-19, Corteggiano had compiled a spreadsheet of data from CAISO from which he could ascertain that the price likely reflected "phantom congestion."⁴⁵⁵ Respondents claim that Hanley "had seen Mr. Corteggiano's spreadsheet,"⁴⁵⁶ but the evidence is not clear on this point.⁴⁵⁷

178. Corteggiano's spreadsheet shows the Cascade line ratings, including a number of derates. For the one-year period beginning on October 23, 2012, LMPs at Cragview generally were well below \$50/MWh.⁴⁵⁸ For the hours in which net flow on the Cascade intertie was more than 0 MW, the highest price was \$119.75/MWh. The highest price overall on Corteggiano's spreadsheet was \$388.11/MWh, and it occurred for eight hours on July 31, two hours on October 18, and 14 hours on October 19. During every one of those hours, Cascade was derated to 0 MW in the export direction, the price was exactly \$388.11/MWh, and the net flow on Cascade was 0 MW. Corteggiano observed that this

⁴⁵⁵ VITOL_FERC_0000437 (Corteggiano Spreadsheet). Corteggiano sent the spreadsheet to Kettler, highlighting hours on October 18 and 19 with the \$388.11/MWh price. *See* E-mail from Federico Corteggiano to Kolby Kettler, "cascade.xls" (Oct. 23, 2013) (attaching Corteggiano spreadsheet).

⁴⁵⁶ Vitol PF Response at 22-23; *see also* Hanley Dec. at 8, ¶ 10(a)(iii).

⁴⁵⁷ Hanley testified she had not seen the spreadsheet before. Hanley Test. Vol. 2 at 99:21-25. She gave this testimony on April 19, 2017, just one day after submitting an amended declaration stating she was aware Corteggiano had the spreadsheet when she approved the transaction. *See* Hanley Dec. at 8, ¶ 10(a)(iii). Hanley claimed that she "may have" seen some of the data on Corteggiano's computer screen. Hanley Test. Vol. 2 at 100:3. However, if she did, she appears not to have understood the data. For example, during her testimony, Hanley thought the column labeled "OTC" (Operating Transfer Capability), which showed the Cascade line ratings, referred to "over the counter." *Id.* at 100:25.

⁴⁵⁸ Corteggiano was familiar with the price history at Cragview at the time he originally purchased the Cragview CRRs. Corteggiano Test. Vol. 2 at 205:10-19.

“very unusually high price” was “exactly” the same for multiple hours on October 18-19.⁴⁵⁹

179. The combination of the derate, the exactly repeating prices, and the 0 MW net flow caught Corteggiano’s attention because it signaled “phantom congestion.” He knew the Cascade intertie from past experience, and he would have understood that the 0 MW net flow shown on his spreadsheet meant there was no flow at all over the Cascade intertie during the hours of the derate on October 18-19.⁴⁶⁰ This lack of flow indicated that an unaccepted bid must have set the unusually high price, an explanation that Corteggiano would recognize as consistent with the comments by CAISO representative Rothleder on the telephone call with Kettler. From his knowledge and prior experience, Corteggiano would have known that, if a market participant submitted the same unaccepted \$388.11/MWh bid for multiple hours, the price would exactly repeat for each hour. Had Corteggiano shared his spreadsheet with counsel and the compliance advisor and explained the significance of these very high, repeating prices in combination with the derate and 0 MW net flow, they would have seen that the \$388.11/MWh price reflected “phantom congestion,” and that the congestion would disappear if CAISO accepted Vitol’s import bid, directly affecting Corteggiano’s CRR position at Cragview.

180. We find that Corteggiano’s spreadsheet, his knowledge about the relevance of the prices indicated in that spreadsheet, and his understanding of phantom congestion to all be material facts relevant to any evaluation of the Cragview transactions from October 28-November 1, 2013. However, when seeking approval of the transactions, Corteggiano did not explain any of these facts to Vitol’s legal or compliance counsel.

181. Corteggiano not only withheld this relevant information, but also departed from counsel’s guidance in posing questions to CAISO, and failed to share the fruits of this inquiry with counsel or the company compliance advisor. For all of these reasons, we

⁴⁵⁹ Corteggiano Test. Vol. 1 at 55:18-22. OE Staff calculated that, of the 8,784 total hours reflected on Corteggiano’s spreadsheet, only 280, or 3.2 percent, repeated for more than one hour. *See* Staff Spreadsheet “Repeatingprice.xls.”

⁴⁶⁰ Corteggiano knew the topology of the CAISO network and therefore understood that the Cascade intertie, like the Silver Peak intertie, was a small capacity intertie. Corteggiano co-developed Vitol’s nodal tool, which is based on the topology of the CAISO network. Corteggiano Test. Vol. 1 at 19:8-20:16; *see also* Vitol’s PF Response, Ex. A (screen shot from nodal tool). He also helped develop CAISO’s CRR program software, which also reflects the network topology. *See* Corteggiano 2010 Test. at 20:16-21:20. Moreover, Corteggiano and his colleagues knew that liquidity at Cascade was low. Hanley Test. Vol. 2 at 64:5-7; 92:9-13 (Corteggiano and Hanley agreed liquidity low); Kettler Dec. at 4, ¶ 8.a. (“Cragview . . . not a liquid trading hub”).

find that the consultations by Corteggiano with the company's legal counsel and compliance advisor do not negate our finding that Respondents acted with the requisite scienter.

182. We also are not persuaded by Respondents' contention that their import on November 1 demonstrates an intent to capture the \$388.11/MWh price. Respondents claim that this is so because, by October 25, they "knew to a virtual certainty" that they had successfully hedged their November 1 CRR exposure.⁴⁶¹ In fact, however, Respondents could not have known until October 29, when CAISO posted the results of the monthly auction, whether CAISO had awarded the counter-flow positions.⁴⁶² Thus, even if Respondents' CRR positions were flattened as of November 1, Respondents still undertook the October 25 transaction with manipulative intent.

183. Finally, we disagree with Respondents' contention that a violation cannot be established unless OE Staff proves that no lawful purpose could have motivated the transaction.⁴⁶³ That assertion is inconsistent with our prior decisions. We have made it clear that "[t]he Anti-Manipulation Rule requires manipulative intent; it does not require *exclusively* manipulative intent."⁴⁶⁴ *Masri* does not control here.⁴⁶⁵ We have held that "a manipulative purpose, even if mixed with some non-manipulative purpose, satisfies the scienter requirement."⁴⁶⁶ That observation applies here with no less force than it did in *Barclays*.

⁴⁶¹ Respondents Answer at 43.

⁴⁶² See CAISO 2013 Monthly CRR Allocation and Auction Schedule at 3 (Apr. 15, 2012) (available at [http://www.caiso.com/Documents/2013MonthlyCRR Allocation-Auction Schedule-Jul-Dec.pdf](http://www.caiso.com/Documents/2013MonthlyCRR%20Allocation-Auction%20Schedule-Jul-Dec.pdf)) (indicating results of auction to be posted by 5:00 p.m. on Oct. 29, 2013). The results were actually posted at 1:12 p.m. on October 29, as reflected in data published on the CAISO OASIS website, copy attached as Attachment 4 to Staff Reply.

⁴⁶³ Respondents Answer at 11 (citing *SEC v. Masri*, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007)).

⁴⁶⁴ *Barclays*, 144 FERC ¶ 61,041 at P 70.

⁴⁶⁵ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 32.

⁴⁶⁶ *Barclays*, 144 FERC ¶ 61,041 at P 70.

184. For all of the foregoing reasons, we find that OE Staff has shown by a preponderance of the evidence that Respondents acted with the requisite scienter to establish a violation of the Anti-Manipulation Rule.

3. In Connection with a Jurisdictional Transaction

185. The third element necessary to establish a violation of FPA section 222 and the Commission's Anti-Manipulation Rule is determining whether the conduct in question was "in connection with" a transaction subject to the Commission's jurisdiction.⁴⁶⁷

186. The conduct in question is Respondents' physical offers in the CAISO day-ahead wholesale electric energy market, and the effect of those offers on Respondents' CRR position. Respondents do not contest that the conduct in question was "in connection with" transactions subject to the Commission's jurisdiction.⁴⁶⁸

187. We find that the Commission has jurisdiction over Respondents' conduct, and specifically their offers in the CAISO day-ahead wholesale electric energy market from October 28, 2013 through November 1, 2013 and their 2013 CRR position. Section 201(b)(1) of the FPA confers jurisdiction on the Commission over "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce"⁴⁶⁹ The Commission also has a responsibility to ensure that rates and charges for transmission and wholesale power sales are not unduly discriminatory or preferential.⁴⁷⁰ Moreover, the Court of Appeals for the District of Columbia Circuit has affirmed in recent years that the Commission has "authority [under

⁴⁶⁷ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49; 16 U.S.C. § 824v(a) (2018); 18 C.F.R. § 1c.2 (2019).

⁴⁶⁸ OE Staff Reply at 47 ("Respondents do not contest, and therefore concede (as they must), that staff has established the third element: conduct in connection with a jurisdictional transaction.") (citing Staff Report at 43 (Vitol's imports from October 28-November 1, 2013, were jurisdictional transactions under 18 C.F.R. § 1c.2 (2019))).

⁴⁶⁹ 16 U.S.C. § 824(b)(1) (2018).

⁴⁷⁰ FPA Section 205(a) charges the Commission with ensuring that rates and charges for jurisdictional sales by public utilities and "all rules and regulations affecting or pertaining to such rates or charges are just and reasonable." *Id.* § 824d(a). FPA section 206(a) gives the Commission authority over the rates and charges by public utilities for jurisdictional sales as well as "any rule, regulation, practice or contract affecting such rate[s] [or] charge[s]" to make sure they are just and reasonable and not unduly discriminatory or preferential. *Id.* § 824e(a).

the FPA] to regulate the activity of traders who participate in energy markets.”⁴⁷¹ Further, both the physical day-ahead offers and the CRR position at issue were implemented under CAISO’s Commission-approved tariff. By virtue of engaging in day-ahead physical offers and entering into CRR positions, both of which operated under a Commission-approved tariff within CAISO, a Commission-regulated independent system operator, we find the conduct at issue is under our jurisdictional purview.

E. Remedies and Sanctions

188. Having found that Respondents violated FPA section 222 and section 1c.2 of our regulations, we now must determine the appropriate remedies. OE Staff recommends that civil penalties be assessed against both Respondents and that Vitrol be required to disgorge its unjust profits. After assessing the legal and factual issues, including those raised by Respondents, and taking into consideration the seriousness of the violations and the efforts to remedy them in a timely manner, we agree with OE Staff’s recommendation to assess penalties and require disgorgement.⁴⁷²

189. Section 222 provides that “[i]t 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”⁴⁷³ Pursuant to FPA section 316A(b), 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) or any rule thereunder.⁴⁷⁴ In determining the appropriate penalty amount, FPA section 316A(b) requires the Commission to consider “the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.”⁴⁷⁵

⁴⁷¹ *Kourouma v. FERC*, 723 F.3d 274, 276 (D.C. Cir. 2013).

⁴⁷² 16 U.S.C § 825o-1(b) (2018).

⁴⁷³ *Id.* § 824v(a).

⁴⁷⁴ *Id.* § 825o1-(b). This penalty authority has since been adjusted to \$1,269,500 per violation, per day to reflect inflation. *See Civil Monetary Penalty Inflation Adjustments*, Order No. 853, 166 FERC ¶ 61,014, at P 8 (2019).

⁴⁷⁵ 16 U.S.C. § 825o1-(b) (2018).

190. The Commission has adopted Penalty Guidelines to perform this statutory penalty analysis and provide a civil penalty range for violations by companies, such as Vitol.⁴⁷⁶ The 2008 Revised Policy Statement on Enforcement and 2005 Policy Statement on Enforcement also inform the Commission's analysis.⁴⁷⁷ The Penalty Guidelines use two sets of factors to establish penalties. First, the Penalty Guidelines calculate a Base Penalty amount based on factors specifically tailored to the seriousness of the violation, including the harm caused by the violation. Second, the Penalty Guidelines consider several culpability factors, including efforts to remedy violations, which lead to minimum and maximum multipliers of the Base Penalty amount. The Penalty Guidelines then combine these sets of factors to arrive at the penalty range. After establishing a penalty range, the Commission examines the specific facts of each case to determine where the penalty should fall, and in appropriate cases, whether a penalty should be outside the range.⁴⁷⁸

191. The Penalty Guidelines do not apply to individuals such as Corteggiano. Instead, the Commission determines penalties for individuals based on the facts and circumstances as applied to five factors, pursuant to FPA section 316A: (1) seriousness of the violation; (2) commitment to compliance; (3) self-reporting; (4) cooperation; and (5) reliance on OE Staff guidance.⁴⁷⁹

⁴⁷⁶ See FERC Penalty Guidelines § 1C2.5. See generally *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 (2010) (Revised Policy Statement on Penalty Guidelines); *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220 (2010) (Initial Policy Statement on Penalty Guidelines). The FERC Penalty Guidelines are appended to the Revised Policy Statement on Penalty Guidelines.

⁴⁷⁷ Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156; *Enforcement of Statutes, Orders, Rules and Regulations*, 113 FERC ¶ 61,068 (2005) (Policy Statement on Enforcement).

⁴⁷⁸ Initial Policy Statement on Penalty Guidelines, 130 FERC ¶ 61,220 at P 32 (“We do not intend to depart from the Penalty Guidelines regularly, but neither will we always adhere to a rigid application of them.”).

⁴⁷⁹ See Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at PP 54-71; *City Power*, 152 FERC ¶ 61,012 at P 229; *Maxim Power Corp.*, 151 FERC ¶ 61,094, at P 107 (2015) (*Maxim Power*).

1. Assessment of Civil Penalty and Disgorgement Against Vitol

a. Respondents Answer

192. Respondents argue that OE Staff's calculation that Respondents' violation caused \$2,515,738 of harm to the market is flawed because it includes the underfunding of the amounts in the CAISO CRR Balancing Account. Respondents assert that this alleged underfunding is based on an artificial degenerate price. Respondents contend that it is more accurate to characterize the putative losses to the CRR Balancing Account as reducing an unfair windfall that would have been created by an artificial price.⁴⁸⁰ Respondents further contend that the CRRs are typically paid from the energy market and not the CRR Balancing Account, so the account is unrelated to any harm resulting from prices in the energy market.⁴⁸¹ Respondents also argue that OE Staff double-counted the underfunding amount by using it to calculate both the civil penalty and the disgorgement. Respondents contend that this is inconsistent with orders to show cause in other cross-market manipulation cases involving CRRs.⁴⁸²

193. Respondents assert that OE Staff unreasonably assumes that, but for Vitol's trade, the \$388.11/MWh price would have remained for the duration of the derate. Respondents contend that market conditions and bidding were unknowable *ex ante*, and that the \$388.11/MWh price did not appear in most hours during subsequent derates.⁴⁸³ Respondents state that a continuous price of \$388.11/MWh should have resulted in other market participants seeking to deliver power to Cragview and they note that is exactly what happened during the week of November 4, 2013.⁴⁸⁴

⁴⁸⁰ Respondents Answer at 87; *see also id.* at 94 ("Affirmative Defenses . . . Fifth Defense: Respondents did not cause the alleged harm, and no harm allegedly attributable to Respondents' conduct can reasonably be calculated. Sixth Defense: The law does not allow the calculation of market harm or disgorgement based upon an artificial, non-market-based price.").

⁴⁸¹ *Id.* at 87-88.

⁴⁸² *Id.* at 88 (citations omitted).

⁴⁸³ *Id.*

⁴⁸⁴ *Id.* at 88-89 (citing Unmasked Bid Data (attached to Email from Carol Clayton, FERC, to Paul J. Pantano, Jr. and Sohair Aguirre, Willkie Farr & Gallagher LLP; Charles Mills, Steptoe & Johnson LLP (Feb. 15, 2019, 5:17 PM)); Staff Report, Attach. 2, at 11).

194. Respondents also dispute OE Staff's calculation of the culpability score. Respondents argue that they should receive the full compliance credit for its compliance program because Vitol has an effective compliance program that is benchmarked against all of the guidance that the Commission has provided.⁴⁸⁵

195. Respondents contend that high-level Vitol personnel were not involved in, and did not condone or willfully ignore the alleged violation.⁴⁸⁶ Respondents dispute OE Staff's contention that Kettler had any knowledge of the alleged manipulation and maintain that the substantial authority personnel were aware of the trade and believed it to be lawful. Respondents further note that Kettler does not sit higher in the Vitol Organization than the General Counsel and that he had no authority to approve or disprove the transaction.⁴⁸⁷ Respondents also contend that Kettler, as Manager of Non-Oil Operations, is not high level personnel because his role is limited to operations and he does not have substantial control over Vitol or a substantial role in making policy.⁴⁸⁸

196. Respondents argue that OE Staff's recommended civil penalty of \$6,000,000 exceeds the Commission's authority under the FPA. According to Respondents, there was no possible intent to manipulate the price to benefit its CRR position on November 1, 2013, because its CRR position was not exposed to price risk on that date.⁴⁸⁹ Respondents state that the alleged "unlawful trading" occurred on only four days, which carries a statutory maximum penalty of \$5,078,000.⁴⁹⁰

b. OE Staff Report and Reply

197. OE Staff recommends that the Commission require Vitol to disgorge \$1,227,143, plus interest, in unjust profits.⁴⁹¹ OE Staff states that the Commission's Penalty Guidelines and precedent hold that a "reasonable estimate" of loss is sufficient for

⁴⁸⁵ *Id.* at 89.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at 89-90.

⁴⁸⁸ *Id.* at 90 n.308.

⁴⁸⁹ *Id.* at 90.

⁴⁹⁰ *Id.* (citing Staff Report at 57 n.262).

⁴⁹¹ Staff Report at 4.

assessing disgorgement.⁴⁹² OE Staff notes that, in *ETRACOM*, the Commission approved the same “but for” calculation of disgorgement that OE Staff used to calculate Vitol’s disgorgement.⁴⁹³

198. OE Staff states that the disgorgement calculation is based on a determination that, in the absence of Vitol’s manipulative trading, the LMP at Cragview would have been \$388.11/MWh for the 105 hours from October 28 through November 1, 2013.⁴⁹⁴ OE Staff explains that it then subtracted the actual posted LMP for each hour from the \$388.11/MWh to determine the price impact of Vitol’s trading, which was then multiplied by the amount of Vitol’s MWh of CRRs to determine the avoided losses (\$1,227,143).⁴⁹⁵

199. OE Staff recommends a civil penalty for Vitol of \$6,000,000. OE Staff states that, under the Penalty Guidelines, the base penalty in this case is the pecuniary loss from the violation.⁴⁹⁶ OE Staff calculates that the pecuniary losses total \$2,515,738, consisting of \$2,429,385 in reduced funding of CAISO’s CRR Balancing Account, and \$86,353 in losses suffered by the holders of CRR counter-flow positions at Cragview.⁴⁹⁷

200. OE Staff disputes Respondents’ contention that it should not have considered underfunding of the CRR Balancing Account in its harm calculation. OE Staff asserts that the \$388.11/MWh price is not “artificial,” but rather was established by the CAISO market software’s implementation of the pricing provisions in CAISO’s tariff. OE Staff asserts that it is therefore the price that would have appeared, absent Respondents’ unlawful conduct.⁴⁹⁸

⁴⁹² *Id.* at 56 (citations omitted).

⁴⁹³ *Id.* (noting that in *ETRACOM* the Commission “recognized the actual losses that cross-product manipulation involving CRRs inflicts on the holders of CRR counter-flow positions and the CRR balancing account”) (citing *ETRACOM*, 155 FERC ¶ 61,284 at PP 175, 177, 197).

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.* at 56-57.

⁴⁹⁶ *Id.* at 57 (citing FERC Penalty Guidelines § 1C2.2).

⁴⁹⁷ *Id.* at 57-58; *see also id.*, Attachment 3, Staff’s Market Harm Calculation.

⁴⁹⁸ OE Staff Reply at 70-71.

201. In response to Respondents' arguments that CRRs are typically paid from the energy market and not the CRR Balancing Account, OE Staff states that it views the Balancing Account as a proxy for market participants that have suffered losses that have not yet been traced to them. OE Staff asserts that any shortfall in the CRR Balancing Account is funded by load, and thus, any underpayment to that account is a loss to load-serving entities.⁴⁹⁹

202. OE Staff contends that there is no principle or logic supporting Respondents' "double-counting" argument. OE Staff asserts that the Commission's Penalty Guidelines treat disgorgement as separate from civil penalties, but use "losses" in the calculation of both.⁵⁰⁰

203. OE Staff also argues that its approach to disgorgement and losses is consistent with the methodology used in *ETRACOM*, where the Commission similarly considered the financial impact to all CRR holders at the relevant intertie caused by ETRACOM's conduct and considered losses paid by opposing CRR holders and "revenue inadequacy."⁵⁰¹

204. OE Staff argues that, despite Respondents' contentions to the contrary, the \$388.11/MWh price would have persisted absent manipulation. OE Staff claims it conducted careful analysis in establishing that the price at Cragview would have been \$388.11/MWh but for Respondents' unlawful trading.⁵⁰² OE Staff asserts that there was no real economic incentive to trade at Cragview. OE Staff states that, including Vitol, there were only six market participants that traded at Cragview in 2013 and, other than the market participant whose bid set the \$388.11/MWh price, Vitol was the only one who traded during the October 28 – November 1 derate.⁵⁰³

⁴⁹⁹ *Id.* at 71 (citing *Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,120, at P 4 (2011)).

⁵⁰⁰ *Id.* at 72.

⁵⁰¹ *Id.* (citing *ETRACOM*, 155 FERC ¶ 61,284 at PP 175, 188).

⁵⁰² *Id.* at 73 (citing Staff Report at 32-33).

⁵⁰³ *Id.*

205. OE Staff contends that Respondents' reliance on prices at Cragview during the week of November 4, 2013 is misplaced. OE Staff states on November 4 and 6, the only bid was by the market participant that set the 388.11/MWh price.⁵⁰⁴ OE Staff notes that Powerex also placed a bid on November 5, but its bid did not clear and it was not motivated by the \$388.11/MWh price, which it recognized as degenerate.⁵⁰⁵ OE Staff notes that, on November 7 and 8, there was only one bidder and it had not bid earlier in the week, indicating that the \$388.11/MWh price was not the motivation for its bids.⁵⁰⁶

206. In assessing Vitol's culpability score, OE Staff added three points for the participation of "high-level personnel" based on Kettler's participation in the import transactions.⁵⁰⁷ OE Staff contends that Kettler played a substantial role, including negotiating the deal with Morgan Stanley for power to import at Cragview, and that he knew or should have known that the \$388.11/MWh price would disappear with Vitol's import transactions.⁵⁰⁸ OE Staff contends that, "[a]s the head of the Non-Oil Operations department reporting to the CEO, Kettler was 'an individual in charge of a major business or functional unit of the organization . . . ' and therefore 'high-level personnel' within the meaning of the Penalty Guidelines."⁵⁰⁹

207. While up to three points can be subtracted for an effective compliance program, OE Staff subtracted only one point from the culpability score for Vitol's compliance program.⁵¹⁰ OE Staff asserts that Vitol's compliance staff lacked sufficient training to evaluate complex transactions. OE Staff states that Hanley had too little knowledge or experience to evaluate Corteggiano's proposed transactions, had been in the compliance group for only four months, had not given regulatory advice relating to CAISO in her

⁵⁰⁴ *Id.* at 74-75.

⁵⁰⁵ *Id.* at 74 (citing Powerex, October 29, 2018, Response to Data Request OE-Powerex-1-4).

⁵⁰⁶ *Id.* at 75.

⁵⁰⁷ Staff Report at 59, n.268.

⁵⁰⁸ Staff Report at 59-60; OE Staff Reply at 76-77.

⁵⁰⁹ OE Staff Reply at 77 (quoting FERC Penalty Guidelines § 1A1.1, Commentary Application Note 3(a)); *see also* Staff Report at 59-60 (citing Kettler Test. Vol. 1 at 26:11-17).

⁵¹⁰ Staff Report at 60.

previous position, and had only limited training on CAISO market operations.⁵¹¹ OE Staff also states that Oppenheimer lacked the knowledge necessary to probe the underlying intent and likely effect of the imports on the Cragview LMP, never asked Corteggiano about the pricing methodology at the interties, and did not think the magnitude of Corteggiano's losses on his CRRs mattered in assessing his intent.⁵¹²

208. OE Staff disputes Respondents' contention that Vitol's compliance program deserves the full three points of compliance credit. OE Staff contends that Vitol's compliance program was not fully and adequately implemented. OE Staff asserts that Vitol's policy on overlapping transactions contained no procedural guidance or substantive standards.⁵¹³ OE Staff states that Vitol's deficient compliance program is best illustrated by its failure to stop the transaction at issue here despite having nearly a week to evaluate it, whereas Powerex was able to determine the transaction was problematic within three days.⁵¹⁴

209. OE Staff also subtracted one point from the culpability score to reflect Vitol's cooperation in the investigation.⁵¹⁵

210. OE Staff calculates a total culpability score of six points which produces a multiplier of 1.2 to 2.4 and a penalty range of \$3,018,885.60 to \$6,037,771.20. OE Staff argues that a penalty toward the top of the range is appropriate because of the seriousness of the violation and the lack of any effort to remedy it.⁵¹⁶

211. OE Staff asserts that its recommended penalty for Vitol of \$6,000,000 does not exceed the Commission's statutory authority. OE Staff contends that the maximum penalty per violation per day is \$1,269,500 and Respondents' unlawful trading continued for five days, which equals a statutory limit of \$6,347,500.⁵¹⁷ OE Staff argues that

⁵¹¹ *Id.* at 61 (citing Hanley Test. Vol. 2 at 19:12-16, 20:5-21:10, 23:13-25:3, 32:4-33:3).

⁵¹² *Id.* at 61-62 (citing Oppenheimer Test. at 40:25-41:4, 54:21-55:19).

⁵¹³ *Id.* at 60-61; OE Staff Reply at 75 (citing Staff Report at 60-62).

⁵¹⁴ OE Staff Reply at 75-76 (citing Staff Report at 41-42).

⁵¹⁵ Staff Report at 62.

⁵¹⁶ *Id.* at 63.

⁵¹⁷ OE Staff Reply at 77-78 (citing *Civil Monetary Penalty Inflation Adjustments*, Order No. 853, 84 Fed. Reg. 966, 967 (Feb. 1, 2019), 166 FERC ¶ 61,014 at P 8 (2019)).

Respondents could not be sure they hedged their CRR position for November 1 until the results of the CRR monthly auction were published on October 29. OE Staff states that, when Vitol completed its deal with Morgan Stanley on October 28, they purchased power to import on November 1 and submitted import bids for that day. OE Staff contends that Respondents intended to eliminate the \$388.11/MWh price at Cragview on November 1, and thus, the trading on November 1 constituted market manipulation.⁵¹⁸

c. Commission Determination

i. Seriousness of the Violation

212. The Commission's Revised Policy Statement on Enforcement identifies several factors to consider in our analysis of the seriousness of the violations under the FPA.⁵¹⁹ We discuss these factors below to the extent that they are relevant to Respondents' conduct.

213. *Harm Caused by the Violations.* The Penalty Guidelines measure a violation's seriousness by examining the loss caused.⁵²⁰ Commentary Application Note 2A to Penalty Guidelines § 2B1.1 specifies that "loss" is the greater of the "actual loss or intended loss." Commentary Application Note 2A then defines "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the violation." Here, Respondents caused \$2,515,738 in market harm in the form of (a) \$2,429,385 in reduced funding of CAISO's CRR Balancing Account, and (b) \$86,353 in losses suffered by the holders of CRR counter-flow positions at Cragview.

214. We are not persuaded by Respondents' arguments that OE Staff improperly included the underfunding of the CAISO CRR Balancing Account in its market harm calculation. Contrary to Respondents' contentions, OE Staff's calculations are not based on an "artificial price." The \$388.11/MWh price was established by the CAISO market software's implementation of the pricing provisions in CAISO's then-effective Commission-approved tariff, and would have appeared absent the manipulative conduct. It is therefore the correct price to use in the calculation of market harm.⁵²¹ We also do

⁵¹⁸ *Id.* at 78.

⁵¹⁹ See Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at PP 55-56.

⁵²⁰ FERC Penalty Guidelines § 2B1.1(b)(1).

⁵²¹ *ETRACOM*, 155 FERC ¶ 61,284 at P 176 ("The fact that a market may not be functioning optimally, or in the manner preferred by Respondents, does not negate the

not find persuasive Respondents' argument that the CRR Balancing Account is not related to any market harm because CRRs are typically paid from the energy market. Absent the unlawful trading, the losses on the Respondents' CRR position would have been paid into the CRR Balancing Account. Any shortfall in the CRR Balancing Account is funded by load, and thus, is a loss to load-serving entities. Finally, we disagree with Respondents' arguments that it is double-counting to use the underfunding of the CRR Balancing Account to calculate both the civil penalty and the disgorgement. As OE Staff notes, while the calculation of "losses" is used in both, the Commission's Penalty Guidelines treat disgorgement as separate from civil penalties.

215. We also disagree with Respondents' contention that OE Staff unreasonably assumed that the \$388.11/MWh price would have persisted absent its manipulation. OE Staff showed that no market participants, other than Vitol and the market participant who set the \$388.11/MWh price, placed day-ahead bids at Cragview from October 28 - November 1, 2013. Furthermore, contrary to Respondents' assertions, the trading that occurred during the derate the week of November 4, 2013 does not show that other market participants would have been interested in attempting to capture the \$388.11/MWh price. During the derate from November 4-8, 2013, only a limited number of bids were submitted. In addition to the market participant setting the \$388.11/MWh price, the only bids during that week were submitted by Powerex, who already identified the \$388.11/MWh price as degenerate, and one other participant who only traded late in the week. This suggests that the motivation for placing the bids during the week of November 4 was not to capture the \$388.11/MWh price. If market participants were not responding to the \$388.11/MWh price during the week of November 4, there is no reason to assume that they would have the week of October 28.

216. *Manipulation, Deceit, Fraud, and Recklessness or Indifference to Results of Actions.* As noted above, Respondents' manipulative trades operated as a fraud and deceit on the CAISO market and CAISO market participants. Specifically, Vitol engaged in a cross-product market manipulation scheme by selling electric power at a financial loss in CAISO's day-ahead market to benefit its CRR position.⁵²²

217. *Willful Action or in Concert with Others.* Respondents' conduct was willful. Respondents understood that the purpose of the trades was to benefit the CRR position, not to capture the \$388.11/MWh price.

harm ETRACOM caused. Markets that are not functioning optimally may still be manipulated, and therefore harmed.").

⁵²² See *ETRACOM*, 155 FERC ¶ 61,284; *Deutsche Bank*, 140 FERC ¶ 61,178.

ii. Aggravating and Mitigating Culpability Factors

218. The Penalty Guidelines rely on minimum and maximum multipliers of the Base Penalty to arrive at a penalty range.⁵²³ The multipliers are based on a culpability score, which starts with a base of 5 points.⁵²⁴ This base culpability score may be adjusted upwards or downwards based on several aggravating and mitigating culpability factors.

219. *Involvement in or Tolerance of Violations.* We agree with OE Staff's addition of three points to Vitol's culpability score for the involvement of high-level personnel in the manipulative transaction. Kettler, as head of the Non-Oil Operations department, is "an individual in charge of a major business or functional unit of the organization" and therefore "high-level personnel" under the Penalty Guidelines.⁵²⁵ Kettler participated in the violation by reaching out to a number of companies seeking to purchase power and ultimately negotiated and executed a transaction to buy power from Morgan Stanley. Kettler, as Vitol's liaison to CAISO, attended CAISO stakeholder meetings, had deep knowledge about CAISO's operations, and was responsible for communicating with Rothleder about the price formation at Cragview. Accordingly, we find that Kettler "participated in, condoned, or was willfully ignorant of the violation."⁵²⁶ Therefore, it is appropriate to add three points to Vitol's culpability score for the involvement of high-level personnel.

220. *Commitment to Compliance and Actions Taken to Correct Violation.* Under section 1C2.3(f) of the Penalty Guidelines, the Commission may reduce the 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. As OE Staff acknowledges, Vitol's compliance program "is documented and disseminated, includes an internal compliance hotline and is regularly reviewed and updated."⁵²⁷ Vitol's compliance program has guidelines that required traders to seek guidance from the "Operations Manager, VIC Head of US Power, or Compliance" prior to bidding an ISO

⁵²³ FERC Penalty Guidelines § 1C2.4.

⁵²⁴ *Id.* § 1C2.3(a).

⁵²⁵ Penalty Guideline § 1A1.1. Commentary 3(a).

⁵²⁶ FERC Penalty Guidelines § 1C2.3.

⁵²⁷ Staff Report at 60 (citing Letter from Vitol's Counsel to Enforcement, Ex. B (Nov. 13, 2015); *see also* Vitol Trading Compliance Manual for Vitol Group Employees Located in the United States, (Mar. 23, 2010)).

product that “overlaps” with another ISO product⁵²⁸ and provides for at least some procedures to proactively identify trading that might be manipulative.⁵²⁹ However, Vitol does not provide sufficient training for compliance officers so that they can recognize all the potential issues with complex transactions like the one at issue here and ask the probing questions necessary to effectively evaluate such transactions. Vitol’s compliance program also lacked any procedural or substantive guidelines to assist compliance officers in determining whether such cross-market trades should be allowed. While OE Staff recommends that we subtract only 1 point from Vitol’s culpability score for its compliance program, we find that, under the circumstances in this matter, it is appropriate to reduce the culpability score by 2 points for Vitol’s compliance program.

221. *Cooperation.* In recognition of Vitol’s cooperation with the investigation, we reduce the culpability score by 1 point.

222. We find that Vitol’s culpability score is 5 points. A culpability score of 5 indicates a multiplier of 1.0 to 2.0, which is then applied to the base penalty of \$2,515,738 to produce a penalty range of \$2,515,738 to \$5,031,476 under the Penalty Guidelines.

iii. Appropriate Penalty

223. Based on the foregoing factors, we find that there is a need to discourage and deter the fraudulent trading conduct at issue in this matter. We calculate a penalty range of \$2,515,738 to \$5,031,476 under the Penalty Guidelines. But, as explained below, we find that it is appropriate to depart from the Penalty Guidelines and we assess a civil penalty of \$1,515,738 against Vitol.

224. The Commission has explained that “[a]pplication of the Penalty Guidelines . . . is discretionary, not mandatory. As such deviations in penalties may be necessary to account for the specific facts and circumstances of a violation.”⁵³⁰ When departing, the Commission explained that it would “set out on the record the considerations that caused us to conclude a departure was appropriate.”⁵³¹

225. A strict application of the Penalty Guidelines to Vitol’s conduct would, considering all of the facts and circumstances in this matter, be unfair and unreasonable

⁵²⁸ Vitol ISO/RTO Products Trading Guidelines at 7 (Jan. 2, 2013).

⁵²⁹ Hanley Test. Vol. 1 at 29:24-30:12.

⁵³⁰ Initial Policy Statement on Penalty Guidelines, 130 FERC ¶ 61,220 at P 2.

⁵³¹ Revised Policy Statement on Penalty Guidelines, 132 FERC ¶ 61,216 at P 32.

and apportion too large a penalty to Vitol because it would not adequately account for conduct that was conceived of and primarily carried out by an individual trader. As discussed above, we find that Vitol bears substantial responsibility for the manipulative conduct addressed in this order and will assess a civil penalty against Vitol that appropriately accounts for this responsibility. The scheme was conceived of and executed by Vitol employees, using Vitol resources, to benefit Vitol's CRR position.

226. Nevertheless, we conclude that Corteggiano was the primary actor responsible for the market manipulation addressed in this order. He devised the scheme, proposed it to others, worked to facilitate its approval, and intended to, and did, benefit a CRR position that was booked to his account. Moreover, he had previously engaged in similar behavior that was investigated by OE Staff. In addition, the record in this proceeding suggests that Corteggiano deliberately withheld material information about the manipulative scheme from Vitol's compliance officers when discussing the relevant actions.⁵³² Under those circumstances, a strict application of the Penalty Guidelines to Vitol's conduct would not adequately account for Corteggiano's role in this matter, and thus we find that it is appropriate to depart from the Penalty Guidelines in this case.

227. We do find that it is appropriate to assess a total civil penalty of \$2,515,738—the bottom of the Penalty Guidelines range for Vitol—to penalize the manipulative trading and recognize the market harm that it caused. Because we have determined that ascribing this civil penalty amount to Vitol given the facts in this matter would be unfair and unreasonable, we find it appropriate to depart from the Penalty Guidelines. In recognition of Corteggiano's primary responsibility for the manipulative conduct, and, in particular, his efforts to withhold material information from Vitol's compliance officers, we will reduce the civil penalty assessed to Vitol by the size of the separately calculated civil penalty assessed against Corteggiano.⁵³³ As we set forth below, our separate civil penalty analysis for Corteggiano results in our assessment of a civil penalty of \$1,000,000 as to him. Accordingly, we will assess a civil penalty against Vitol of \$1,515,738. We find that this penalty is fair and reasonable and consistent with our obligations under FPA section 316A and the various factors raised for consideration by the Penalty Guidelines.

228. We also note that Respondents argue that OE Staff's recommended penalty exceeds the Commission's statutory authority because its CRR position was not exposed on November 1, 2013, and four days of fraudulent trading carries a maximum penalty of \$5,078,000. Because we assess a civil penalty less than \$5,078,000, this issue is moot.

⁵³² See, e.g., *supra* Section III.D.2.

⁵³³ See *infra* Section E.2.

229. We also find that Vitol is required to disgorge all of its profits from the manipulative scheme. It is a long-standing Commission practice to require disgorgement of unjust profits as an equitable remedy for manipulation.⁵³⁴ In cases where pecuniary gain results from a violation, “the Commission enters a disgorgement order for the full amount of the gain plus interest.”⁵³⁵

230. The disgorgement amount “need only be a reasonable approximation of profits causally connected to the violation”⁵³⁶ and we find that OE Staff’s recommended approach meets this standard. OE Staff calculates the amount of losses Vitol avoided by subtracting the actual posted LMP for each derate hour from \$388.11 to determine the price impact of Vitol’s trading. OE Staff then multiplies that amount by Vitol’s MWh of CRRs, which amounts to \$1,227,143 in avoided losses.

231. Therefore, in addition to the civil penalties, we direct a disgorgement payment, plus applicable interest, of \$1,227,143. Vitol shall make \$86,353 in disgorgement payments to the market participants who held CRRs that sunk at Cragview to reflect the value lost because the physical import decreased congestion at the Cascade Intertie and reduced the LMP at Cragview.⁵³⁷ Regarding the remaining \$1,140,790, we direct the CAISO to notify the Director of OE whether the CRR Balancing Account is in surplus and, if appropriate, to submit a proposal, to be negotiated with and approved by the Director of OE, for allocation of the remaining disgorgement funds via the CRR Balancing Account. If the CAISO and the Director of OE determine that it would be inappropriate to return the funds to the CRR Balancing Account, Vitol shall make the remaining disgorgement payment to California’s Low Income Home Energy Assistance Program (LIHEAP). Such payments shall be made within 60 days of the date of this Order. We require the interest to be calculated in accordance with 18 C.F.R. § 35.19a (2019) from the date Vitol received payment of the unjust profits.

2. Assessment of Civil Penalty Against Corteggiano

232. The Commission determines penalties “for natural persons based on the facts and circumstances of the violation but will look to [the Penalty Guidelines] for guidance in

⁵³⁴ Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 43.

⁵³⁵ FERC Penalty Guidelines § 1B1.1(a).

⁵³⁶ *SEC v. Whittemore*, 659 F.3d 1, 7 (D.C. Cir. 2011) (citation omitted).

⁵³⁷ See Staff Spreadsheet “MarketHarm.xlsx,” (Tab “Mapping Market Harm,” cells C4, K4, and M4). The three market participants should receive \$480, \$57,084, and \$28,789, respectively.

setting those penalties.”⁵³⁸ Consistent with the Revised Policy Statement on Enforcement, we determine civil penalties for individuals based on the facts and circumstances as applied to five factors: (1) seriousness of the violation; (2) commitment to compliance; (3) self-reporting; (4) cooperation; and (5) reliance on OE Staff guidance.⁵³⁹

a. Corteggiano Answer

233. Corteggiano argues that, as a natural person, he is not an “entity” within the meaning of FPA Section 222, and therefore the statute does not authorize a Commission action against him for violation of that provision or the Commission Anti-Manipulation Rule.⁵⁴⁰ Corteggiano states that the Enforcement Report recognizes that “[t]he Commission’s Penalty Guidelines do not apply to individuals.”⁵⁴¹

234. Corteggiano also argues that he cannot be a primary violator under scheme liability, because he did not propose or execute the 5 MW trade, and did not control the decision-making as to whether it was permissible.⁵⁴²

b. OE Staff Report and Reply

235. OE Staff recommends a civil penalty of \$800,000 against Corteggiano.⁵⁴³ OE Staff explains that its recommended penalty is based on the statutory factors discussed

⁵³⁸ FERC Penalty Guidelines § 1A1.1, Commentary Application Note 1.

⁵³⁹ See Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at PP 54-71; *City Power*, 152 FERC ¶ 61,012 at P 229; *Maxim Power*, 151 FERC ¶ 61,094 at P 107.

⁵⁴⁰ Corteggiano Answer at 14 (citing 16 U.S.C. § 824v; 18 C.F.R. § 1c.2); *see also* Respondents Answer at 95 (“Affirmative Defenses . . . Eleventh Defense: There is no statutory authority to hold Mr. Corteggiano liable for a violation of section 222 of the FPA because section 222 of the FPA is limited to an ‘entity’ and Mr. Corteggiano is not an ‘entity.’”).

⁵⁴¹ Corteggiano Answer at 14 (quoting Staff Report at 63).

⁵⁴² *Id*; *see also* Respondents Answer at 94 (“Affirmative Defenses . . . Tenth Defense: As a matter of law, Mr. Corteggiano cannot be a primary violator under scheme liability.”).

⁵⁴³ Staff Report at 63.

above and the factors set out in the Commission's Revised Policy Statement on Enforcement.⁵⁴⁴

236. OE Staff contends that, contrary to Corteggiano's arguments, both the Commission and the courts that have considered the issue have determined that individuals are "entities" within the meaning of FPA Section 222.⁵⁴⁵

237. OE Staff states that the court in *Coaltrain* recently made clear that an individual may be held liable as a primary violator under Section 222(a) if he partakes in the decision to execute the manipulative trade.⁵⁴⁶ OE Staff contends that the Staff Report sets forth ample evidence that Corteggiano more than merely "partook" in the decision to engage in the allegedly manipulative transactions.⁵⁴⁷

c. Commission Determination

238. As an initial matter, Corteggiano is incorrect that the Commission lacks statutory authority to penalize individuals for market manipulation. Section 222 of the FPA and section 1c.2 of the Commission's regulations make it unlawful for "any entity" to engage in manipulative conduct in connection with a jurisdictional transaction.⁵⁴⁸ The Commission has found, in Order No. 670 and in numerous subsequent cases interpreting the phrase, that the term "any entity" includes natural persons.⁵⁴⁹

⁵⁴⁴ *Id.* (citing FERC Penalty Guidelines § 1A1.1(1)).

⁵⁴⁵ OE Staff Reply at 67 (citing Order No. 670, FERC Stats. & Regs. ¶ 61,047 at P 18; *Coaltrain v. FERC*, 2018 WL 7892222, at *10; *FERC v. City Power*, 199 F. Supp. 3d at 239; *FERC v. Maxim Power Corp.*, 196 F. Supp. 3d 181, 201 (D. Mass. 2016) (*FERC v. Maxim Power*); *FERC v. Silkman*, 177 F. Supp. 3d 683 at 710; *FERC v. Barclays*, 105 F. Supp. 3d at 1146).

⁵⁴⁶ OE Staff Reply at 68 (citing *Coaltrain v. FERC*, 2018 WL 7892222, at *20).

⁵⁴⁷ *Id.*

⁵⁴⁸ 16 U.S.C. § 824v(a) (2018) ("It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy . . ."); 18 C.F.R. § 1c.2 (2019).

⁵⁴⁹ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 18; *see Coaltrain*, 155 FERC ¶ 61,204 at P 350; *City Power*, 152 FERC ¶ 61,012 at P 265; *Maxim Power*, 151 FERC ¶ 61,094 at P 66. Recent district court enforcement rulings have confirmed our position. *See FERC v. Coaltrain v. FERC*, 2018 WL 7892222, at *9-10; *FERC v.*

239. We also are not persuaded by Corteggiano's argument that he is not a primary violator under scheme liability. In *Coaltrain*, the court held that merely partaking in the decision to execute fraudulent trades was sufficient to state a claim for primary liability.⁵⁵⁰ Corteggiano, among other things, held the CRR position that the manipulative scheme intended to benefit, devised the scheme to import power at Cragview to benefit his CRR position, sent information to others to facilitate approval of the transaction, sought and obtained approval for the scheme, and had the transactions booked to his account.

240. Turning to the proper penalty amount, as mentioned above, the Revised Policy Statement on Enforcement identifies several factors to consider when making penalty determinations for individuals.⁵⁵¹ We discuss these factors below to the extent they are relevant to Corteggiano.

i. Seriousness of the Violation

241. *Harm Caused by the Violation.* Corteggiano's manipulative trades caused market harm by reducing the funding of CAISO's CRR Balancing Account, and causing losses to holders of CRR counter-flow positions at Cragview. As discussed above, the manipulative trades caused \$2,515,738 in market harm. Corteggiano persisted in his scheme as long as his CRR position was benefitting from the trades and stopped only when he was certain he had successfully avoided additional losses during future derates.

242. *Manipulation, Deceit, Fraud, and Recklessness or Indifference to Results of Actions.* As described above, Corteggiano's scheme operated as a fraud and deceit on the CAISO market and CAISO market participants.

243. *Willful Action or in Concert with Others.* Corteggiano conceived of the manipulative scheme and involved other Vitol employees as needed in order to carry it out.

ii. Mitigating Culpability Factors

244. *Commitment to Compliance, Self-Reporting, Cooperation, and Reliance on OE Staff Guidance.* Only one factor, cooperation, serves to mitigate Corteggiano's violations. Corteggiano did not self-report the violations and did not seek guidance from OE Staff.

Maxim Power, 196 F. Supp. 3d at 201; *FERC v. Silkman*, 177 F. Supp. 3d at 710; *FERC v. Barclays*, 105 F. Supp. 3d at 1145-46.

⁵⁵⁰ *Coaltrain v. FERC*, 2018 WL 7892222, at *20.

⁵⁵¹ *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 at PP 54-71.

iii. Appropriate Penalty

245. We find that Corteggiano's manipulative conduct was serious and intentional. Based on our assessment above, the pleadings in the case, and the Staff Report, we find that there is a critical need to discourage and deter unlawful conduct similar to Corteggiano's. Taking into consideration Corteggiano's cooperation with this investigation, as well as the other factors described above, we find it appropriate to assess a civil penalty of \$1,000,000 for Corteggiano's conduct and we find this sum to be fair and reasonable. Should Corteggiano's ability to pay the stated civil penalty be a concern, we will allow Corteggiano to pay the penalty pursuant to a payment plan negotiated with OE Staff, subject to Commission approval. Corteggiano and OE Staff should submit any such payment plan to the Commission for approval within 30 days of the date of this Order.

F. Rehearing

246. Given Respondents' election under section 31(d)(3)(A) of the FPA, this order will not be subject to rehearing.⁵⁵²

247. If a person elects the procedure under section 31(d)(3) of the FPA, the statute provides for (i) prompt assessment of a penalty by Commission order; (ii) if the penalty is unpaid within 60 days, the Commission shall institute a proceeding in the appropriate district court seeking an order affirming the assessment of a civil penalty and that court shall have the authority to review *de novo* the law and facts involved; and (iii) the district court shall have the jurisdiction to enforce, modify, or set aside, in whole or in part, such penalty assessment. Following this process, a person can appeal to a United States Court of Appeals within the appropriate time for review of the district court order.⁵⁵³

The Commission orders:

(A) Vitol is hereby directed to pay the United States Treasury by wire transfer a civil penalty in the sum of \$1,515,738 within 60 days of the issuance of this order, as discussed in the body of this order. If Vitol fails to make this civil penalty payment within the stated time period, interest payable to the United States will begin to accrue

⁵⁵² See *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, at P 5 (2006); see also *ETRACOM*, 155 FERC ¶ 61,284 at P 200; *Coaltrain Energy, L.P.*, 155 FERC ¶ 61,204 at P 365; *Barclays*, 144 FERC ¶ 61,041 at P 152; *Competitive Energy*, 144 FERC ¶ 61,163 at P 104; *Silkman*, 144 FERC ¶ 61,164 at P 96; *Lincoln Paper*, 144 FERC ¶ 61,162 at P 80.

⁵⁵³ 16 U.S.C. § 823b(d)(3) (2018).

pursuant to the Commission's regulations at 18 C.F.R. § 35.19a (2019) from the date that payment is due.

(B) Mr. Corteggiano is hereby directed to pay the United States Treasury by wire transfer a civil penalty in the sum of \$1,000,000 within 60 days of the issuance of this order, or to submit a proposed payment plan for approval within 30 days of the issuance of this order, as discussed in the body of this order. If Mr. Corteggiano fails to make this civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a (2019) from the date that payment is due.

(C) Vitol is hereby directed to disgorge \$480 to Strategic Energy Ltd., \$57,084 to Mercuria Energy America, Inc., and \$28,789 to Eagle Energy Partners I LP. Vitol will disgorge the remaining \$1,140,790 to either: (1) the CAISO CRR Balancing Account pursuant to a proposal negotiated between the CAISO and the Director of OE; or (2) should the CAISO determine it would be inappropriate to return the remaining \$1,140,790 to the CRR Balancing Account, Vitol shall disgorge the remainder to California's LIHEAP. Such payments shall be made within 60 days of the issuance of this order, and with applicable interest, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
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IN14-4-000.DOCX.....1-107