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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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Maxim Power Corporation, Maxim Power (USA), Inc., Maxim Power (USA) Holding Company Inc., Pawtucket Power Holding Co., LLC, Pittsfield Generating Company, LP, and Kyle Mitton	)))))	Docket No. IN15-4-000

RESPONSE OF MAXIM POWER CORP. TO ORDER TO SHOW CAUSE

March 4, 2015

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I. EXECUTIVE SUMMARY

A market manipulation case should not be based on impressions but on hard unambiguous facts and literal, unforced applications of the law to conduct with no legitimate business purpose; and such cases only should be brought where the party charged with manipulation was on fair notice that the challenged conduct was unlawful. Anything less would be not only fundamentally unfair, but demonstrably vulnerable in court, as is the case with respect to OE Staff's claims here.

An objective evaluation of Maxim's offering strategy should begin where Maxim[1] began – with the undisputed premise that as a dual fuel unit, Maxim's Pittsfield plant could be committed by ISO-NE in the day ahead market on a gas-based offer and had Maxim not been able to procure sufficient gas to satisfy the dispatch for its entire term, Pittsfield would have been obligated to burn oil.[2] For just one day, that could mean losing over $300,000.[3] Many such instances then would result in very serious financial losses.[4] This very real risk – of having to burn oil when committed on gas and the necessity to minimize it – was what led Maxim to

[1] While OE Staff proposes to name certain subsidiaries of Maxim Power Corp. as respondents in this matter, we note that only Maxim Power Corp. ("Maxim"), and in some instances Maxim Power (USA), Inc. were given appropriate notice of OE Staff's alleged violation. The other entities were not.

[2] A generator's failure to satisfy its obligations due to a lack of fuel is excused only in the narrow circumstances where a resource has satisfied its burden to prove that it is not physically available to run due to an inability to procure fuel or transportation. *New England Power Generators Assoc., Inc. v. ISO New England Inc.*, 144 FERC ¶ 61,157 at PP 56, 58 (2013) (explaining that "a resource with a Capacity Supply Obligation must offer a MW amount equal to or greater than its Capacity Supply Obligation into the day-ahead and real-time energy markets when that resource is physically available," and while inability to procure fuel or transportation may excuse a resource for non-performance, "economic considerations are irrelevant to determining whether a unit is 'physically available.'").

[3] Bates Nos. MPCPROD00074438 to MPCPROD00074440 (Email from E. Kwok to R. Dominguez, et al. (Aug. 23, 2010, 14:10) (stating that "[o]ver a 24-hour period, the financial risks of burning fuel oil and being compensated on natural gas pricing on electricity can be in excess of $335,000")) (attached as Exhibit 1).

[4] Handwritten notes of Eagle Kwok with respect to July 22, 2010 call with the IMM ("July 22 Kwok Notes") (attached as Exhibit 2).

pursue the risk minimization strategy that OE Staff now contends was manipulative.[5] In regards to this strategy, there was no intent to deceive, no intent to defraud, and no intent to withhold or omit information. And, although OE Staff's 65-page Report to the Commission ("Report") is chock-full of exaggeration and hyperbole, it includes no reliable, much less unambiguous, evidence to the contrary.

Nevertheless, although legally unprecedented and predicated only on alleged after-the-fact impressions, OE Staff urges the Commission to bring this case against Maxim, even though OE Staff could not reasonably dispute that, if Maxim offered gas and had to burn oil, its conduct would not have amounted to market manipulation; nor would Maxim have been wrong had it offered on oil and burned gas after receiving an economic dispatch. But when Maxim offered on oil and then burned gas after receiving an out-of-merit dispatch – the receipt of which was wholly beyond Maxim's control – OE Staff cries manipulation.[6]

OE Staff theorizes that on such occasions Maxim knew that the IMM: (1) likely would never learn that Maxim had burned gas; and (2) likely would never review Maxim's fuel burns for purposes of determining whether mitigation was appropriate even through the IMM, in fact

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[5] This risk was not hypothetical. Indeed, after this exact scenario occurred on March 2, 2009, Mr. Dominguez informed Mr. Mitton that "There is no mechanism to accomplish this change" when Mr. Mitton inquired whether Maxim could change its offer from gas to oil after being forced to burn oil. *See* Email from K. Mitton to R. Dominguez (Mar. 2, 2009, 15:14) (attached as Exhibit 3).

[6] As discussed more fully *infra*, in 2014, ISO-NE subsequently modified its tariff to address the very risk that Maxim faced in the summer of 2010. *See ISO New England Inc*., 145 FERC ¶ 61,014 (2013), *compliance*, 147 FERC ¶ 61,073 (2014) (accepting proposal to permit market participants to update offers in real time to reflect real-time fuel or other costs). Thus, dual fuel generators are no longer required to submit uniform offers for the entire potential dispatch period and can instead submit gas-based offers for some number of hours, and submit oil-based offers for others. Market Rule 1 § III.1.10.9 ("a Market Participant may modify certain Supply Offer … parameters for a Generator Asset … on an hour-to-hour basis"). Moreover, the ISO-NE tariff now also allows generators that offer on oil and burn gas, to be paid on the oil price without even being mitigated provided the oil price is not more than 1.75 times the price of gas (after which point the generator would be mitigated but not prosecuted).

did learn, and reasonably could have been expected to learn of both of these things as part of its normal settlement review process.[7] Not surprisingly, OE Staff's Report lacks support for either assertion.[8]

What is also absent from OE Staff's Report is: (i) any evidence suggesting that Maxim did not act pursuant to a legitimate business purpose; (ii) any citation to any tariff provision that required either expressly or even in spirit that Maxim burn whatever type of fuel it specified in its day-ahead supply offers, or to notify the IMM if it did not;[9] (iii) any reference to any *contemporaneous* evidence that the IMM indeed was under any allegedly false "impression" that Maxim burned oil on the days in 2010 when, according to OE Staff, Maxim's alleged manipulative behavior occurred; (iv) any identification of any actual harm allegedly suffered by ratepayers as a result of Maxim's conduct given that Maxim was fully mitigated in the ordinary course; and (v) any persuasive, much less sustainable legal argument as to why, although Maxim was fully mitigated, and although the IMM had expressly decided not to refer this matter to FERC, the Commission now should invest even more of its resources in pursuing this obviously weak manipulation case – almost 5 years later.

Specifically, on August 16, 2010, the IMM requested, and shortly thereafter Maxim supplied, fuel burn data pursuant to the IMM's normal review process whereby, on an *ex post*

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[7] OE Staff alleges that Maxim's conduct was intentional, deliberate, and calculated conduct; OE Staff does not allege Maxim acted recklessly. Staff Report at 54.

[8] *Maxim Power Corporation*, 150 FERC ¶ 61,068 (2015), Appendix A (hereinafter, "Staff Report").

[9] OE Staff quotes IMM testimony, Staff Report n.79, stating that the "the market monitor must assume that a dual-fuel resource will run on the least cost fuel unless notified in writing that the resource will be burning the more expensive fuel." However, this testimony is describing market rules that did not become effective until 2012. *See n.*136 *infra.* Thus, the quoted testimony is irrelevant to Maxim's 2010 conduct.

basis, the IMM required sellers to "confirm and document" what fuels they had burned.[10] The IMM ultimately determined that certain of Maxim's supply offers violated a "conduct threshold screen for NCPC" and subsequently mitigated Maxim to the reference levels of the fuel Pittsfield actually burned. The IMM collected $2.99 million.

Several months later the IMM considered its own staff's recommendation that the matter be referred to FERC for potential violations of the tariff and Commission rules including the anti-manipulation rule. Ultimately, though, the IMM, with the agreement of ISO-NE's External Market Monitor, although certainly cognizant of its tariff obligation to refer manipulative conduct to OE Staff,[11] chose not to do so – almost four and a half years ago.[12]

After Maxim supplied the information about its fuel burns – "confirming" that on a number of days in July and August, 2010 it had burned gas after having submitted day ahead supply offers on oil – the IMM never suggested it had been misled by anyone at Maxim. Nor was this suggested in the unsent draft referral to FERC which OE Staff did not provide to Maxim until after it issued its preliminary findings and 1b.19 letter – fully 8 months after Maxim's initial

[10] Bates No. MPCPROD00082838 (Email from R. Dominguez to E. Kwok, et al. (Aug. 16, 2010, 15:42) (Mr. Dominguez stated that [i]n our standard review process, Altresco (Asset #326) has violated our conduct threshold screen for NCPC. As part of our process with dual fuel capable units, we are requesting you to confirm and document the fuel burn ...")) (attached as Exhibit 4); Bates Nos. MPCPROD00074438 to MPCPROD00074440 (Email from E. Kwok to R. Dominguez, et al. (Aug. 23, 2010, 14:10) (providing requested Pittsfield fuel burn information) (attached as Exhibit 1).

[11] Market Rule 1 § III.A.14 ("The Internal Market Monitor or External Market Monitor is to make a non-public referral to the Commission in all instances where the Internal Market Monitor or External Market Monitor has reason to believe that a Market Violation has occurred."). A "Market Violation" under Section III.A.14, includes "a tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies." Tariff § I.2.2

[12] Email from D. LaPlante to A. Fate, et al. (Sept. 6, 2013, 09:45), attaching draft memorandum dated December XX, 2010 re Altresco Bidding Behavior ("Draft Referral") (attached as Exhibit 5).

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Brady request.[13] Neither document mentioned the draft referral or the fact that the IMM decided not to make the referral. Nor did the IMM ever claim in 2010 that it had been under the "impression" that Maxim was burning oil on the days at issue, or that Maxim at any time inappropriately withheld or omitted any information from the IMM. It is true that there are no *written* communications prior to Mr. Dominquez's August request in which Maxim mentioned, or in which it was asked to describe, what fuel it had burned. Nevertheless the evidence is compelling that the IMM knew of the gas burns or at the very least reasonably could have been expected to know of them and, indeed, reasonably should have known pursuant to its own routine procedures.[14] In any event, Maxim was mitigated, and that ended the story. Or so it appeared.

In 2013, OE Staff began an investigation of Maxim that is wholly unrelated to the 2010 fuel burn activities at issue here. In what certainly looks like an effort to gain leverage in that investigation, OE Staff decided to resurrect the 2010 fuel burn issue. Then, in late 2014, when Maxim declined to enter into a tolling agreement, OE Staff decided to pursue the 2010 issue separately and on a fast track. It convinced a retired IMM employee, Mr. John Angeli, to sign a declaration on December 22, 2014 stating that he "understood" Maxim was burning oil on

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[13] *See Enforcement of Statute, Regulations, and Orders*, 129 FERC ¶ 61,248 (2009) (adopting disclosure policies consistent with *Brady v. Maryland*, 373 U.S. 83, 88 (1963), and its progeny).

[14] On August 16, 2010, when the IMM asked Maxim to "confirm and document the fuel burn," it sent Maxim a chart with various dates and two additional columns – one for "Natural Gas" and one for "No 2" (*i.e.*, fuel oil). Of course, the information sought in each column would have been superfluous had the IMM been under the "impression" that Maxim was burning oil. Staff Report at 33. Indeed, if that was their impression they would have simply asked Maxim to confirm that it was burning oil. Maxim accurately responded to this request and, a few months later, the IMM simply determined that, having violated certain conduct thresholds for NCPC, Maxim should be and was mitigated to the reference levels of the fuel actually burned, which Maxim had disclosed was primarily gas. As noted *infra*, this was the normal routine procedure.

certain days because it had offered on oil the prior day.[15] OE Staff offers no contemporaneous or other evidence (just unsupported argument) of one former IMM staffer's supposed understanding from five years ago (*i.e.*, there is no other evidence of what OE Staff refers to on at least 19 occasions in its 65-page report as to the IMM's "impression").

Mr. Angeli is silent as to whether Maxim's risk minimization strategy served a legitimate business purpose. Nor does Staff seriously contest Maxim's business purpose. Nor, for that matter, did the IMM staff in its draft referral which, as noted above, the IMM and External Market Monitor decided not to pursue. What led Maxim to adopt its risk management strategy was the fact that, for those days when gas might be restricted at the time it had to submit its offers, Maxim would not know with a high level of assurance what fuel actually would be available in a sufficient quantity so as to meet an unknowable dispatch period that could be as long as 24 hours. However, if a Market Participant decides that it would be better not to offer on a lower cost fuel, it could offer on a higher cost fuel and not be mitigated if <u>during the three plus month settlement period</u>, it was able to show the IMM that its decision to offer on the higher priced fuel was justified – whether on the basis of gas pipeline public postings or other documentation.

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[15] Maxim has not yet deposed Mr. Angeli. But it already is clear that the veracity of this declaration is highly questionable, not because we believe that the former IMM employee intentionally misspoke, but because, among other things when he asked OE Staff for additional materials to refresh his recollection, he was only provided with a selective portion of the relevant materials which, as described in Section II.G, are clearly incomplete; and because OE Staff, who drafted his declaration, didn't even solicit his testimony until well after issuance of OE Staff's preliminary findings; and because of Mr. Angeli's presumed failure to recollect (since he failed to address) any of the issues in this case beyond whether he had a phone call with Mr. Mitton in July 2010. We also note that no current IMM employee has proffered any evidence about her/his "impressions" or "understandings" in 2010; nor did any provide any contemporaneous records about such views. These points are further developed at Section II.J *infra.*

OE Staff tries to undermine the legitimate purpose of Maxim's risk mitigation strategy in part by not crediting Maxim's claim of surprise at being dispatched in the day ahead market. But the contemporaneous written evidence proves that Maxim indeed was surprised since it was not anticipating, much less predicting, any day ahead awards when it offered on oil.[16] And the evidence further shows that, even if Maxim could have predicted with a high degree of certainty when it would be dispatched for reliability, its risk minimization strategy decision to bid on oil on the days under examination still made sense here.

OE Staff also is wrong in claiming that because Maxim purchased some level of gas in advance of its bids, the conclusion that Maxim used load forecast data to predict reliability dispatches must be correct. But this ignores the very important fact that Maxim was unable to predict when it would be dispatched for reliability, and certainly not able to predict the potential dispatch run hours. Hence, Maxim's risk of significant losses from having to operate on oil after offering on gas did not turn on its ability to predict to any degree that it might be called to run for reliability. As shown herein, even when Maxim was awarded a day ahead dispatch after purchasing some amount of gas before submitting its day ahead offer, it very often had to secure more gas to meet the full day ahead dispatch, and always had to secure additional gas to meet the additional hours run in real time beyond the day ahead dispatch. Accordingly, the fact that Maxim purchased some amount of gas in advance of submitting the day ahead offers does not serve in any way to corroborate OE Staff's view that Maxim had the ability to predict either a reliability dispatch or its length.

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[16] *See* Email from K Mitton to E. Kwok, et al. (June 23, 2010, 12:06) (attached as Exhibit 9); Email from K. Mitton to R. Taikowski (June 23, 2010, 18:13) (attached as Exhibit 10); Email from K. Mitton to E. Kwok, et al. (June 24, 2010, 11:33) (attached as Exhibit 11); Email from E. Kwok to K. Mitton and C. Devasahayam (June 24, 2010, 12:09) (attached as Exhibit 12); Email from C. Devasahayam to E. Kwok, et al. (July 1, 2010, 20:24) (attached as Exhibit 13).

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In any event, here, if the IMM required more information from Maxim than what it initially was provided *before* allowing Maxim to offer on oil, it either could have asked for more information or rejected Maxim's request. Ultimately, it did neither, but it did eventually decide that mitigation was appropriate.[17]

It is black letter law that intent to defraud is an element of manipulation.[18] As the Commission has noted, when the evidence of intent to defraud is not based on misstatement or other affirmatively deceptive conduct, but rather an omission, there must be some duty to speak.[19] That duty can be based either on a statute or rule or on "omit[ting] 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."[20] As Judge Woodlock stated in *FERC v. Lincoln Paper* and *Silkman*:

> "Fraud has to be a material misrepresentation on the basis of deceit in this context, in which they either made a material misstatement of fact or omitted to state [a] material statement of fact . . . I'm not getting at scienter. I'm simply getting at deceit in its core form, the actions that are necessary or inaction that is necessary to constitute that. The question of scienter is did they know that

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[17] Mr. Angeli does not address any of these issues either.

[18] Prohibition of Energy Mkt. Manipulation, Order No. 670, FERC Stats. & Regs. ¶ 31,202 at PP48-49 ("Order No. 670"), reh'g denied, Order No. 670-A, 114 FERC ¶ 61,300 (2006) (codified at 18 C.F.R. pt. 1c). *See also* Testimony of Anna Cochrane (then Deputy Director of FERC's Office of Enforcement) before the U.S. Senate Committee on Energy & Natural Resource, Energy Subcommittee Hearing (Mar. 25, 2009, 01:04:05), available at: http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=1b61e0fd-a5b9-a137-625a-cbfaf9facb9a ("the legal definition of speculation, I mean of market manipulation, is its really a fraud statute so what we have to show is that the trader had an intent to manipulate the market. <u>If a trader is taking advantage of a market rule or a market loophole then we don't have authority to go after them.</u> But if they were intentionally trying to manipulate the market, that's where we can go after them.")

[19] Order No. 670 at P 35 ("we clarify that the Final Rule creates no new affirmative duty of disclosure.").

[20] 18 C.F.R. § 1c.2(a)(2).

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> that's what they were doing. What did they omit to state that they should have stated?"[21]

OE Staff's case hinges on Maxim's allegedly having omitted to tell the IMM – when it notified the IMM it would be offering on oil due to the posted Tennessee Gas Pipeline ("TGP") restrictions – what fuel it actually *would be burning* in the future, and Maxim's having continued not to disclose this information until specifically asked to do so in writing.[22] But OE Staff never references any statement by Maxim that allegedly was rendered misleading by this allegedly omitted material fact. For this reason alone, then, its case is legally infirm.[23]

Furthermore, OE Staff provides no evidence even remotely showing that by virtue of Maxim's actions or inactions, the IMM was led to misperceive or incorrectly assume anything. In fact, though, the evidence suggests the IMM did know, reasonably should have known or been expected to learn during the settlement process that Maxim burned gas on certain days when offered on oil in the day ahead market.

Certainly Maxim had a duty to respond to such questions as actually were posed by the IMM. But it was not obligated to divine (and then answer) all such questions as the IMM eventually might actually ask, or might reasonably have asked Maxim once it notified the IMM of its intent to offer in on oil – *e.g.*, such questions as could have clarified whatever impressions the IMM might have had in light of the information that Maxim did provide. To now claim that

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[21] Hearing Transcript Excerpts at 37-38, *FERC v. Silkman, et al. and FERC v. Lincoln Paper, et al.*, Nos. 13-CV-13054, 13-CV-13056 (D. Mass. Jul. 18, 2014) (attached as Exhibit 6).

[22] Staff Report at 52-53.

[23] As discussed more fully in Section J below, the Commission's regulations require OE Staff to show that Maxim failed to say something necessary "in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 18 C.F.R. § 1c.2(a)(2). OE Staff comes nowhere close to showing this, and for the same reasons, Maxim did not submit false or misleading information to ISO-NE or to the IMM and, thus, did not violate Section 35.41.

Maxim's conduct was manipulative because it allegedly failed to provide sufficiently predictive information so as not possibly to leave the IMM with the wrong impression as to what fuel Maxim might end up burning is fatuous.

If Maxim's notice about the uncertainty of obtaining gas due to TGP pipeline restrictions was insufficient, it should never have been given permission to offer on oil. If the IMM assumed this notice necessarily meant Maxim would end up actually burning oil, it need only have asked Maxim to confirm its thinking, just as the IMM eventually did. More importantly, though, OE Staff has not adduced any evidence to the effect that it ever occurred to Maxim that the IMM likely did not know, or likely would not ever come to learn what fuel Maxim ended up burning or, that anyone at the IMM, including Mr. Angeli, ever suggested that the IMM would not have learned this in the ordinary course. Nor does the draft referral, which was not submitted, suggest otherwise.

On the other hand, there is considerable contemporaneous evidence that (a) certainly by July 20, 2010, Maxim was aware it could be mitigated, but was willing to accept this possibility in order not to incur the even larger losses that would result were Maxim to have bid on gas, and then be forced to burn oil;[24] and (b) Maxim candidly discussed the mitigation risk with the IMM well before Staff alleges the IMM found out about Maxim's having burned gas.

Just two days ago, OE Staff emphasized in *Powhatan*, where the Commission also has issued an order to show cause, that contemporaneous evidence must be given greater weight than

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[24] Bates No. MPCPROD00091433 (Email from C. Devasahayam to E. Kwok, *et al.*, (July 20, 2010, 19:07) describing market rules regarding mitigation)) (attached as Exhibit 28).

post hoc rationalizations.[25] Indeed, OE Staff contended in *Powhatan* that the positions of the persons and entities subject to the show cause order should be rejected in large part precisely because they did not provide a single piece of contemporaneous evidence in support of the *post hoc* rationalizations they offered to justify their conduct.[26] It follows – and we should think OE Staff would be obliged to agree – that its contemporaneity standard should be no less applicable here. Here, though, Maxim has provided considerable contemporaneous evidence demonstrating that OE Staff's "impression" and "common sense" based theories are wrong. And, OE Staff has not provided a single piece of contemporaneous evidence (or any other evidence for that matter) in support of the post hoc rationalizations it tries to marshal against Maxim.

Finally, as discussed herein, and in our prior submissions,[27] not every action that results in market power mitigation also supports a market manipulation claim.[28] Moreover, even if there were a concern about deficiencies in Maxim's communications with the IMM, the Commission should decline to assess penalties as it did in *Dartmouth*.[29] Dartmouth failed to declare an outage, and ISO-NE withheld its capacity payment. The Commission initiated an investigation and found that Dartmouth violated the ISO-NE tariff and 18 C.F.R. § 35.41(a). Although it viewed Dartmouth's violations as "serious" the Commission also cited Dartmouth's cooperation

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[25] Reply of Enforcement Staff to Answers of Houlian Chen, HEEP Fund, Inc., CU Fund, Inc. and Powhatan Energy Fund, LLC, FERC Docket No. IN15-3-000 at 9 (filed Mar. 2, 2015).

[26] *Id* at 10, 15.

[27] Maxim's prior submissions were provided to OE on November 4, 2013 ("November 4 Submission"), January 9, 2014 ("January 9 Submission"), April 28, 2014 (Response to Preliminary Findings"), and December 4, 2014 ("Response to OE Staff's 1b.19 Letter"). In addition, Maxim submitted letters to Chairman LaFleur on March 20, 2014 and April 30, 2014). Each of these documents is included in the materials OE Staff has produced to the Commission, located in the folder names "Maxim Submissions") and are incorporated herein by reference.

[28] *See, e.g., New York Independent System Operator, Inc.*, 131 FERC ¶ 61,169 (2010) ("*NYISO 2010 Order*"), *order on reh'g*, 139 FERC ¶ 61,001 (2012) *("NYISO 2012 Order*") (together, "*NYISO Orders*").

[29] *Dartmouth Power Assoc.*, 134 FERC ¶ 61,085, at PP 5-9 (2011) ("*Dartmouth*").

and determined that, while it could impose a civil penalty of as much as $1 million per day for as long as the violations continued, it would not impose any civil penalty because Dartmouth's capacity payment had already been withheld by ISO-NE.[30] In other words, although Dartmouth had violated the Tariff, and while Dartmouth's violations were serious, FERC determined that it would not impose any additional monetary penalty in light of the forfeiture of monies imposed by ISO-NE. The same conclusion should hold here because Maxim has already been mitigated; there was no Tariff violation; objective evidence demonstrates clearly that TGP was reporting constraints throughout July 2010 and, thus, Maxim had legitimate concerns about securing sufficient gas to meet a yet-to-be-determined ISO-NE dispatch requirement; and as in *Dartmouth*, "no actual harm occurred to the market or the reliability of the ISO-NE system."[31]

Accordingly, for the reasons set forth herein, Maxim respectfully contends that it did not violate 18 C.F.R. § 1c.2, 18 C.F.R. § 35.41(b) or 16 U.S.C. § 824v and no penalty should be assessed against it.[32]

II. RESPONSE

A. The Pittsfield Plant and the RMR Agreement

To completely understand the 2010 fuel burn issue, one should understand the Pittsfield plant and the reliability must run agreement (the "RMR Agreement"), which expired just one month before the events in question here. Pittsfield operates a 181 MW (nameplate) combined cycle electric generation facility that consists of three gas turbines and one steam turbine. Pittsfield has dual fuel capability; it can burn natural gas or oil. Maxim has on-site oil storage

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[30] *Id.* at PP 19-21.

[31] *Id.* at P 19.

[32] Maxim's election pursuant to Show Cause Order, ordering paragraph (E) is being filed separately.

but acquires gas from the market each day, if available. Until it expired on May 31, 2010, Pittsfield provided reliability services to ISO-NE under the RMR Agreement, pursuant to which Maxim was paid cost-based rates and required to make offers (or "stipulated bids") in accordance with formulas in the RMR Agreement.[33] Because Pittsfield's offers were dictated by contract, Maxim did not need to create offers each day based on its assessment of market conditions or the potential results of prices in the day ahead or real time energy markets. It simply needed to determine whether to submit gas-based stipulated bids or oil-based stipulated bids.

B. Maxim's 2010 Risk Minimization Strategy

On May 31, 2010, the RMR Agreement expired and was not renewed – presumably because ISO-NE thought Pittsfield was no longer needed for reliability. Soon thereafter, TGP began issuing curtailment notices on account of system constraints caused by compressor operation issues.[34] Obviously, this further complicated Maxim's assessment of supply offer risks, much of which was relatively new to Maxim personnel since at the time Maxim had purchased the Pittsfield plant, it already was operating under the RMR Agreement. Because of the uncertainty of obtaining enough gas due to the TGP restrictions, and the risk of huge financial losses if Pittsfield had to burn fuel oil after offering on gas, Maxim began submitting offers into the day ahead market (sometimes referred to as the "DAM") based on fuel oil. If Pittsfield was not dispatched in the day ahead market, ISO-NE could still dispatch Pittsfield later that same day *or at any time during the real time market operating day* based on the supply

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[33] *Pittsfield Generating Company, L.P.*, 119 FERC ¶ 61,001 (2007).

[34] Bates Nos. MPCPROD00074409 to MPCPROD00074411 (Email from K. Mitton to J. Angeli (July 19, 2010, 16:48), attaching July 2010 TGP restriction notices) (attached as Exhibit 7).

offers submitted during the day ahead market (or, if supply offers were changed during the re-offer period, such re-offers). Thus, Maxim had the same fuel risk after the day ahead market closed – and all the way through the following real time market operating day – as it had before offering in the day ahead market. And, for additional dispatches directed after the close of the day ahead market, Maxim would need to secure gas outside the normal gas day procurement period. Accordingly, because Maxim had exposure for the entirety of the operating day, Maxim maintained its oil-based supply offers throughout the re-offer period when TGP posted restrictions even if, by that time, Maxim had procured sufficient gas to meet a day ahead award. OE Staff does not mention any of these facts.

C. The Unpredictability of Reliability Dispatches

OE Staff takes great pains in its Report to try convincing the Commission that Maxim was not "surprised" when it was committed for reliability in 2010 after having made supply offers based on oil. But again OE Staff omitted some very important information. First and foremost, as OE Staff knows, Maxim's primary motivation in the summer of 2010, when faced with TGP pipeline restrictions and a massive heat wave expected to drive up energy use, was to assure that Pittsfield indeed unit would be available to support reliability while at the same time avoid having to bid and being dispatched on gas but having to burn oil. As Eagle Kwok, Maxim's former Director of Corporate Development and former Director of Energy Markets, and Mr. Mitton's supervisor at the time, testified:

> "if we're ever faced with a situation where ISO New England has directed us to dispatch and to provide energy into the marketplace and we've priced in on natural gas, and there is an OFO [Operational Flow Order] in place, we are really compromising the financial health of the company because the risk exposure for us is that we'd have to burn fuel oil. And if we burn fuel oil and we're priced in at a natural gas level, you're talking, you know, burning something that is five to six times the cost of your cheaper alternative. You just … you know, as a small company like

> Maxim, you don't need too many of those hours to really financially impair the health of the company."[35]

It was, then, in order to address this risk during a time of continued pipeline restrictions and high anticipated demand due to a heat wave that Maxim made supply offers based on oil. But it did so expecting that it would be priced out of the day ahead market, not that it would be committed for reliability. Contemporaneous emails demonstrate this expectation beyond doubt. And as noted earlier, it is OE Staff's own view that the greater weight should be given to contemporaneous evidence.[36]

For example, before the events in question here, on June 23, 2010, Mr. Mitton, then an Energy Marketing Analyst, explained to his supervisor, Mr. Kwok, that "RT [real time] Prices have a high probability of blowing out" and "staying out of DAM [day ahead market] reduces exposure." In a separate email that day he explained to his supervisor, Mr. Kwok, "the purpose of this was to try and avoid a DAM Award and leave all our MWs [megawatts] for the RT [real time] Market."[37] Similarly, on June 24, 2010, Mr. Mitton wrote: "I'm going to offer on Oil again to take us out of the DAM . . . it's a good idea to control risk."[38] And on June 24, 2010, Mr. Kwok wrote: "Please make sure we are keeping the plants out of DAM and taking RT prices in these volatile periods."[39] Mr. Devasahayam, Maxim's Manager of Energy Marketing and Portfolio Management, echoed this approach on July 1, 2010, when he noted, "Since it's the weekend and hard to get gas, I'll put a higher profit margin for the Day Ahead and then look for

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[35] Deposition of Eagle Kwok ("Kwok Dep.") at 103:25-104:15 (attached as Exhibit 8).

[36] *See* n.25 & n.26, *supra.*

[37] Email from K Mitton to E. Kwok, *et al*. (June 23, 2010, 12:06) (attached as Exhibit 9); Email from K. Mitton to R. Taikowski (June 23, 2010, 18:13) (attached as Exhibit 10).

[38] Email from K. Mitton to E. Kwok, *et al*. (June 24, 2010, 11:33) (attached as Exhibit 11).

[39] Email from E. Kwok to K. Mitton and C. Devasahayam (June 24, 2010, 12:09) (attached as Exhibit 12).

Real Time Opportunities."[40] And, on July 5, 2010 – the day OE Staff claims Maxim began its scheme to obtain reliability commitments in the day ahead market, Mr. Mitton wrote, "we should offer oil to go RT and avoid the potential liability of having a DAM Award."[41] And this concern was well founded as the TGP pipeline notice he sent to the IMM contained a "critical notice" as follows:

Tennessee Gas Pipeline :: Informational Postings - Windows Internet Explorer

Tennessee Gas Pipeline
an El Paso company

INFORMATIONAL POSTINGS | CUSTOMER ACTIVITIES | EL PASO

Critical Notices

Details	Notice Type	Posted Date/Time	Notice Effective Date/Time	Notice End Date/Time	Notice Identifier	Subject	Required Response	Response Date/Time	Notice Status
Details	Curtailment	7/6/2010 4:35:00 PM	7/6/2010 9:00:00 PM	7/7/2010 9:00:00 AM	132373	NO INCREASES MLV 355 7/6/10 - ID2	5		Initiate
Details	Curtailment	7/5/2010 9:30:00 PM	7/6/2010 5:00:00 PM	7/7/2010 9:00:00 AM	132361	RESTRICTIONS LIFTED 7/06/10 ID1	5		Initiate
Details	Curtailment	7/5/2010 4:15:00 PM	7/6/2010 9:00:00 AM	7/7/2010 9:00:00 AM	132356	RESTRICTIONS FOR 07/06/2010	5		Initiate
Details	Curtailment	7/5/2010 1:45:00 PM	7/6/2010 9:00:00 AM	7/7/2010 9:00:00 AM	132354	ANTICIPATED RESTRICTIONS FOR 07/06/10	5		Initiate

4 row(s) retrieved

Second, during this period of very high load forecasts and temperatures, and when TGP pipeline restrictions were being posted almost every day, and when prices were spiking during the real time market, it made perfect sense to offer on oil based on the uncertainty of obtaining enough gas to meet an extended dispatch. These contemporaneous documents show very clearly, then, that on such occasions *Maxim expected that Pittsfield would not be dispatched in the day ahead market* but rather that Maxim intended and expected to be dispatched on

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[40] Email from C. Devasahayam to E. Kwok, *et al*. (July 1, 2010, 20:24) (attached as Exhibit 13).

[41] Email from K. Mitton to C. Devasahayam (July 5, 2010, 11:44) (attached as Exhibit 37).

economics in the real time market, when prices were spiking or to self-schedule the Pittsfield unit in the real time market. When Maxim was dispatched on economics, it did not matter whether it offered on gas or oil or burned gas or oil, since its offers were below the locational marginal prices ("LMPs") set by ISO-NE.

D. Maxim's Risk Minimization Strategy Was Well Known to the IMM

The basic standard for a prosecutable material omission cannot be met in this case.[42] All of the discussions cited by OE Staff prior to August 16, 2010 – save for the conversation between Mr. Mitton and Mr. Angeli that OE Staff contends never occurred – focused on what fuel Maxim would be offering a day ahead (*i.e.*, on a given day for the next day) and the TGP restrictions that allowed Maxim to offer on fuel oil, not on what fuel Maxim actually would be burning that next day. That issue simply never arose in the communications OE Staff cites. It was not asked in any of the exchanges relied upon by OE Staff; there was no tariff provision, rule, duty, or even reason that should have prompted Maxim to provide such information that never had been requested; and it was not incumbent on Maxim to provide that unrequested information when it was asked only what fuel it would be offering and why.

In any event, on July 22, 2010, Eagle Kwok had a conference call with the IMM as reflected in his handwritten notes.[43] Participants from the IMM included Mr. Dominguez, Mr. Angeli and Mr. Bagge. Among the topics discussed was Maxim's recent offerings of Pittsfield on oil. Mr. Kwok explained that it was offering Pittsfield on oil as a "risk management strategy

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[42] As discussed more fully in Section J below, the Commission's regulations require OE Staff to show that Maxim failed to say something necessary "in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 18 C.F.R. § 1c.2(a)(2). OE Staff comes nowhere close to showing this, and for the same reasons, Maxim did not submit false or misleading information to ISO-NE or to the IMM and, thus, did not violate Section 35.41.

[43] July 22 Kwok Notes (attached as Exhibit 2).

to ensure we recover our fuel costs." Mr. Kwok added, "There are restrictions until Aug. 8th at TGP's gas compressor station and security of gas supply is not certain."[44] He also informed the IMM that Maxim "cannot sustain 1 or more dispatches by ISO-NE on gas cost and we have to burn fuel oil" and "We don't want to be in bankruptcy protection like Boston Generating."[45] Although there are repeated references to Maxim being unable to endure the financial hit of burning fuel oil, there is nothing in the notes even hinting that Maxim led the IMM to believe it would end up burning oil, nor is there any suggestion that anyone at the IMM asked Maxim what fuel it would be burning (or had burned) or, conversely, that the IMM did not then know Maxim was burning gas. Moreover, while Mr. Kwok's notes make it clear that Maxim's risk management strategy was pursued because the "security of gas supply is not certain," he never suggested that Maxim definitively could not or had not purchased any amount of gas – merely that the security of the supply was uncertain.

Finally, while Mr. Angeli claims in his Declaration that he would have logged the contested phone call with Mr. Mitton had it occurred (because "it would have been an important development, given the larger price differential between oil and gas"),[46] he did not log this July 22nd call in which, according to Mr. Kwok's notes, both he and Mr. Dominguez participated, even though this call certainly was of no lesser importance than the disputed call with Mr. Mitton. Nor does Mr. Dominguez's log reflect any reference to the topic of Maxim's fuel

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[44] *Id.* (attached as Exhibit 2). IMM was well aware of the fuel procurement issues Maxim faced, because Mr. Mitton began sending IMM notifications of TGP restrictions at least as of July 7, 2010. Email from K. Mitton to J. Angeli (July 7, 2010, 15:26) (illustrating a series of TGP restriction notices for July 6th and noting that "[w]ith the hot temperatures out in the Northeast US, TGP is experiencing a lot of gas restrictions.") (attached as Exhibit 32).

[45] July 22 Kwok Notes (attached as Exhibit 2).

[46] Corrected Angeli Declaration ¶ 6 (attached as Exhibit 25).

offerings even though they were discussed. Hence, the fact that either gentleman's logs might omit a given call does not mean the call never occurred.[47]

Only OE Staff, with the benefit of 20/20 hindsight, believes it was incumbent on Maxim, when discussing why it was offering on oil, to volunteer that despite offering on oil the day before, it still was hoping to burn gas the next day if it could obtain enough to cover the unknown length of the dispatch it had not yet received and might not receive. And OE Staff omits the fact that nominated gas was not confirmed by TGP until much later than the close of the ISO-NE day ahead offer period. Nor does OE Staff explain why the IMM could not easily tell from gas nomination data that Maxim had procured some amounts of gas, or why Maxim would not reasonably have assumed that in fact the IMM was reviewing this data.

OE Staff cites no legal authority or tariff provision or other authority to support its contention that Maxim had a duty to make sure the IMM understood that Maxim always hoped to burn, and did burn gas. Dual fuel units were required to justify any request to offer in on a higher priced fuel, to be sure, and Maxim did just that, but the IMM never challenged whether the TGP restrictions were sufficient justifications for offering on oil. And, while the tariff was later amended to *require* units that receive NCPC to supply *proof* of the fuel *actually* burned *after the fact*, Maxim did that voluntarily when the IMM asked for this information on August 16, 2010.[48] But this by no means shows that before providing such confirmation, the IMM did not already know.

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[47] July 22 Kwok Notes (attached as Exhibit 2); Email from R. Dominguez to A. Fate (Dec. 4, 2013, 12:49), attaching "Altresco Share Point Call Log_6_2010 to 6_2011" ("Pittsfield communications log") (attached as Exhibit 14); Email from R. Dominguez to T. Olson (Dec. 17, 2013, 09:47), attaching "Participant Communication_Angeli_6_2010_62011" ("Angeli call log") (attached as Exhibit 15).

[48] As noted in prior testimony and our submissions, we are confident that Mr. Mitton also informed Mr. Angeli in July 2010 that Maxim was burning gas. While OE Staff attempts to discredit Mr. Mitton's

(continued…)

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E. Any "Common Sense" Arguments Here Cut in Maxim's Favor

OE Staff's speculations about "common sense" and Maxim's expectation of "very large profits" should the IMM somehow never discover that Pittsfield burned gas, are just that – unsupported speculations. There is no tangible evidence or grounds even to infer an argument that Maxim had reason to believe the IMM did not and likely never would learn that Maxim burned gas, or even a contention that Maxim was on anything close to reasonable notice that its conduct was prohibited as OE Staff now claims. In fact, "common sense" suggests that IMM's standard mitigation procedures would true-up actual fuel volumes after-the-fact.[49] Moreover, it is not simply a matter of "common sense" that "very large profits" were *per se* prohibited since Maxim's per MWh profits under the FERC-approved and recently expired RMR Agreement exceeded its profits on those days that led to its having been mitigated.[50]

(continued…)

recollection by citing to Maxim's response to DR 28; but OE Staff fails to mention that Mr. Mitton was not primarily involved in preparing this response, as he stated in his testimony KM Dep. at 269 ("Yes, I remember discussing it briefly.") and through the course of this investigation his recollection was further refreshed as to this prior communication with Angeli. In addition, DR 28 asked Maxim to identify incidences where the IMM was informed about using gas before it had asked, and as Mr. Mitton has consistently indicated, he was responding to Mr. Angeli's question about the fuel burned. Accordingly, Mr. Mitton's call with Mr. Angeli did not meet the criterion for DR 28. In any event, as discussed *infra*, the IMM's practice was to monitor gas nominations and fuel burns with respect to dual fuel units so that Maxim reasonably would have assumed that the IMM would undertake that review. "ISO New England Inc. and New England Power Pool, Market Rule 1 Revisions Relating to the Mitigation of supply offers for Resources Committed to Satisfy Reliability Needs," Docket No. ER09-1546-000 (Aug. 5, 2009), Attachment 3 25:3-4 ("Current mitigation of NCPC payments associated with local reliability needs is administered through an ex post settlement process"), 27:14-18 ("Under the current procedures for NCPC mitigation, the market monitor has the three month-pus settlement period to review potential mitigation and consult with the Market Participant on issues such as the type of fuel used on the day in question. <u>The market monitor uses gas pipeline public postings and other documentation to verify Market Participant statements.</u>") (emphasis added) (attached as Exhibit 16).

[49] *Id.*

[50] Staff Report at 7.

In short, contrary to OE Staff's claim, during the summer of 2010, Maxim did not know in advance that Pittsfield would be dispatched at all, much less whether it would be dispatched on economics as opposed to for reliability.[51] Moreover, on days when Pittsfield was dispatched for reliability when offering on oil, and later burned gas, if Pittsfield had burned gas, it could be mitigated to levels reflecting its gas costs.[52] Only later did the IMM inform Maxim that the Tariff included no mechanism to change its offer to reflect gas pricing after-the-fact and that, in order to avoid mitigation, Maxim should burn oil if it offered on oil.[53]

F. Objective Data Does Not Support OE Staff's Theory That Reliability Commitments Were Known in Advance

OE Staff's case is premised on Maxim's purported ability to predict when reliability commitments would occur, and then to offer on oil to collect high NCPC, believing for some unstated reason that the IMM would never come to learn notwithstanding its routine review of gas nominations and its routine post-settlement review that Maxim had burned gas. OE Staff summarizes its case as follows:

> This report is about a strategy employed by Maxim and Mitton in the summer of 2010 to collect payments from ISO-NE for reliability dispatches at high oil prices when the plant actually burned much cheaper gas.[54]
>
> . . .

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[51] Deposition of Kyle Mitton ("Mitton Dep.") at 314:15-315:23 (attached as Exhibit 17).

[52] Bates Nos. MPCPROD00074443 to MPCPROD0007444 (Email from R. Dominguez to E. Kwok, et al. (Sept. 14, 2010, 10:25) (stating that "[t]he IMM will confirm actual fuel used for dual fuel units and as appropriate, mitigate to the cost of the fuel actually used.")) (attached as Exhibit 18).

[53] Mitton Dep. at 98:22 to 99:5 (Q: So can you describe to me what you recall about what -- let me back up for a second. We're talking about times in the summer of 2010 when you bid based on oil, but then decided to burn gas, correct, and apparently that did not work out and you decided to stop doing it; is that 2 fair? A. "Well, we had been informed by market monitoring that they – if we had offered on oil, they wanted us to run on oil, regardless of whether or not we could get gas.") (attached as Exhibit 33).

[54] Staff Report at 2.

> Because the Pittsfield plant had, until a few weeks earlier, been subject to a long-term RMR Agreement with ISO-NE premised on the ISO's reliability need for Pittsfield on days with high loads, Maxim *knew* that reliability dispatches were more likely during high-load days.[55]

We show immediately below that Maxim's experience under the RMR Agreement did not lead it to know when reliability dispatches would occur. However, even if it were true that Maxim knew or usually could predict when reliability dispatches would occur, which is not the case, we also show in Section II.F that its oil offers and overall conduct still were entirely legitimate. Moreover, it would at worst mean that Maxim had exercised market power. As noted in our numerous previous submissions:[56] (1) Commission precedent is unequivocal that the appropriate remedy for an abuse of market power is mitigation, not a manipulation claim, particularly when there is absolutely no evidence that Pittsfield failed to fulfill a reliability commitment; (2) Maxim already was mitigated by the IMM for precisely the conduct at issue here; and (3) as in *Dartmouth*, given that Pittsfield was mitigated "no actual harm occurred to the market or the reliability of the ISO-NE system," and therefore, as in *Dartmouth*, FERC should "not require payment of a civil penalty."[57]

Similarly, in the *NYISO Orders*, three generators structured their offers to receive higher uplift payments when they were needed for reliability. The offers were permitted and not subject to mitigation under the then-effective mitigation rules, but the NYISO observed a substantial increase in uplift payments and filed an application to change its mitigation measures to limit uplift payments in such situations. Notably, the Commission rejected requests to investigate or

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[55] *Id.* at 19 (emphasis added).

[56] *See* n.27, *supra.*

[57] *Dartmouth* at PP 5-9.

make a finding of market manipulation for conduct occurring before the rule change.[58] The Commission also noted that the generators complied with the tariff, followed NYISO instructions to support reliability, and were properly compensated in accordance with the tariff provisions in effect at the time.[59]

1. The Experience Gained From Operating Under the Pittsfield RMR Agreement Did Not Assure Maxim As To If and When the Pittsfield Plant Would Be Needed For Reliability

The objective data here further contradicts OE Staff's claim that Maxim could predict on the basis of its RMR experience and load forecasts when it would be dispatched for reliability.[60] According to OE Staff:

> "Before ISO-NE had a capacity market, the Pittsfield plant was subject to a "Reliability Must Run" (RMR) agreement with the ISO from December 1, 2005 to May 31, 2010. The RMR agreement was premised on an ISO-NE study concluding that Pittsfield (also called Altresco) was uniquely positioned to provide voltage support at high load levels:
>
>> Altresco is located in an extremely weak part of the system. There are limited transmission and generation resources that make up the primary supply for the Pittsfield area. Without these facilities, the area relies on a 115 kV transmission system that cannot adequately provide voltage support in the area under certain contingency conditions. At New England load levels beyond 17,500 MW, and with the most critical unit in the area offline and Altresco unavailable, the loss of the Berkshire 345/115 kV

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[58] *NYISO 2010 Order* at P 103; *NYISO 2012 Order* at P 76, 103 ("[T]he conduct described by NYISO in the September 4 filing did not indicate market manipulation, as defined by section 1c.2 of the Commission's regulations.").

[59] *Id.* at P 103.

[60] Contrary to OE Staff's contention, Maxim never claimed to be surprised at every single dispatch during summer 2010. Rather, as shown in the contemporaneous communications, and explained in this Section, Maxim could not predict, much less "know" in advance that a reliability commitment was forthcoming.

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> autotransformer results in low voltages in the area that violate [reliability requirements for voltage]."[61]

As a preliminary matter, OE Staff claims that on the basis of an ISO-NE study attached to the 2005 filing of the RMR Agreement (although not attached to the Agreement itself), Maxim should be imputed with having had knowledge of its contents.[62] That is silly. Maxim did not assist in the filing, did not negotiate or even sign the RMR Agreement, and became subject to the RMR Agreement only when it purchased Pittsfield about three years later in the latter part of 2008.[63] And before 2010 Maxim operated Pittsfield under the RMR Agreement only for a single summer period, the summer of 2009. More fundamentally, OE Staff has provided ***zero*** evidence of any correlation between high load days and reliability dispatches during the summer of 2009 to support its unsubstantiated claim that the RMR experience led Maxim to know in the summer of 2010 that reliability dispatches were "more likely" during high load days and notwithstanding whether the other contingencies in the RMR study did or did not occur at the same time.[64]

In fact, OE Staff's conclusion is not supported by the ISO-NE study or by Maxim's experience under the RMR Agreement, or by the actual events in July and August of 2010. As noted, the ISO-NE study contains three conditions precedent to Pittsfield (also known as Altresco) being needed for voltage support (*i.e.*, reliability). First, load levels must exceed

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[61] Staff Report at 6.

[62] *Id.*

[63] *See Pittsfield Generating Company, L.P.*, 124 FERC ¶ 62,009 (2008) (order authorizing disposition of jurisdictional facilities); Notice of Consummation, Docket No. EC08-93-000 (Aug. 14, 2008) (transaction consummated on August 6, 2008).

[64] OE Staff's claim that having previously operated under the RMR means Maxim somehow knew that Pittsfield was needed for reliability is undercut by the fact that ISO-NE elected not to renew the RMR Agreement, presumably because Pittsfield was no longer needed for reliability.

17,500 MW.[65] Second, "the most critical unit in the area" which is not defined in the study, must be "offline."[66] And third, there must be the "the loss of the Berkshire 345/115 kV autotransformer."[67]

With respect to the first criterion, of the 45 days between July 5 and August 18, 2010, during which OE Staff claims Maxim implemented its strategy,[68] 40 days had forecasted loads above 17,500 MW.[69] But, according to OE Staff, Maxim was committed for reliability in the day-ahead market on only 22 of those 40 days; only on 55% of the days when the forecasted load exceeded 17,500 MW. During these periods, on an *ex post* basis one could argue that the odds were slightly better than 50/50 that Pittsfield would be required for reliability. But this by no means shows that *ex ante* Maxim had to have known that the odds were enough in its favor that it could predict a reliability dispatch. 50/50 odds are a far cry from being able to predict, much less "know" in advance that a reliability commitment was forthcoming. Good business people don't base important commercial decisions on the toss of a coin.

The second contingency that needed to occur for Pittsfield to be committed for reliability[70] was that "the most critical unit in the area [be] offline."[71] However, there is no evidence in OE Staff's Report as to the identity of "the most critical unit in the area," nor

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[65] Staff Report at 6.

[66] *Id*.

[67] *Id.*

[68] *Id.* at 8.

[69] *See* Excerpts of OE Staff Master Spreadsheet, ISO-NE Next-Day Peak Load Projections (attached as Exhibit 19).

[70] Staff Report at 6.

[71] *Id.*

whether or when it was "offline" or functioning normally, or more importantly, whether Maxim had the slightest idea as to whether any of these possibilities would eventuate.

The third contingency was "the loss of the Berkshire 345/115 kV autotransformer."[72] Once again, there is nothing about the "Berkshire 345/115 kV autotransformer" in OE Staff's Report or why Maxim reasonably could be expected to have known the status of that transformer.

It is OE Staff's burden to make these showings – particularly since it, and not Maxim, has full access to ISO-NE records. In short, OE Staff provides no evidence that Maxim or Mr. Mitton had any reason to know whether, when, or for how long any of the three conditions leading to reliability dispatches would occur. OE Staff provides no evidence that Maxim undertook any studies or based any strategies on OE Staff's "forecasted load" hypothesis. Accordingly, it should be more than the Commission's impression that OE Staff oversimplified the importance of the forecasted load and overstated its case.

2. The Evidence Does Not Support OE Staff's Load Forecast Hypothesis

Even if the Commission were inclined to accept as true the theoretical plausibility of OE Staff's premise that reliability dispatches could be predicted on the basis of load forecasts, in fact, it is not borne out by the statistical analysis presented in OE Staff's Report. As noted above, according to OE Staff, Maxim implemented its offer on oil but burn gas strategy on 38 of the 45 days between July 5th and August 18th 2010;[73] Maxim "was committed for reliability in the Day Ahead market and collected NCPC payments" on 22 of those 38 days;[74] and Maxim

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[72] Staff Report at 6.

[73] *Id.* at 8.

[74] *Id.* at 9.

purchased gas before making day ahead offers on 10 of those 22 days.[75] Thus, OE Staff bases its case on the fact that Maxim might have known that it would be dispatched for reliability because it purchased gas 26% of the time (on 10 of 38 days) before it submitted an offer in the day ahead market. One in four odds does not equate to predictability, much less certainty.[76]

3. Gas Purchases Allowed Maxim to Minimize Dispatch Risks Including Those Associated with Its Not Being Able to Predict When Pittsfield Would be Dispatched for Reliability

Maxim has always maintained that procuring gas in advance of making its offers was part of a risk minimization strategy. It has always maintained that even though it did not expect to be dispatched in the day ahead market, it nonetheless procured gas to hedge the risk that it might be. In short, it would have some gas to burn if dispatched, but if not, it would still be available for the real time market or to self-schedule. OE Staff's Report does not mention, so presumably it did not analyze, Maxim's participation in the real time market or its consideration regarding self-scheduling. In any event, even the limited analysis it does provide undercuts OE Staff's theory, which as shown above, is no better than 26% reliable (*i.e.*, Maxim purchased gas prior to submitting day ahead offers only on 10 of the 38 days it submitted an oil-based offer in the day ahead market).

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[75] Staff Report at 9-10. OE Staff used the phrase "at least 10" to give the impression that the actual number is higher, but either it has evidence of more than 10 or it does not. None is cited despite OE Staff's obvious ability to subpoena third party gas suppliers.

[76] While OE Staff argues that Maxim's offers on gas for July 30 to August 2 are further evidence of the alleged "scheme," OE Staff fails to mention that there were no relevant pipeline restrictions for three of those days, and both load forecasts and temperatures were lower than they had been. Therefore Maxim's risk of not being able to acquire gas was reduced since demand presumably also would be lower.

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4. Maxim Never Knew In Advance How Long A Given Dispatch Would Last

Page 21 of OE Staff's Report contains a chart which indicates that on July 14, 2010 Maxim purchased 7500 MMBtu of gas before offering Pittsfield on oil into the day ahead market for July 15, 2010.[77] Maxim does not dispute this figure. What OE Staff's chart omits however, is that while 7500 MMBtu was enough gas to run for approximately 4 hours, Pittsfield actually was committed by ISO-NE for 8 hours for the July 15, 2010 day ahead market.[78] Thus, when Pittsfield was dispatched in the day ahead market on July 14, 2010 for July 15, 2010, Maxim still had to go into the market, with TGP restrictions posted in the midst of a heat wave, and purchase enough gas to run for an additional 4 hours to meet its day ahead commitment or it had to burn fuel oil. Equally important, Pittsfield actually ran for a total of 12 hours on that day.[79] Thus, after submitting its day ahead offer Maxim actually had to purchase enough *additional* gas to run Pittsfield for 8 more hours to complete its total dispatch obligation of 12 hours in order not to be forced to burn oil for those extra hours. But since there were TGP restrictions posted, and a prolonged heat wave,[80] Maxim had no assurance that it would later be able to procure enough gas after the day ahead market closed to run Pittsfield for 4, much less 8 additional hours. On the other hand, Pittsfield did have onsite oil storage, so Maxim offered Pittsfield on oil to ensure that it could meet such potential obligations without incurring significant financial losses.[81]

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[77] Staff Report at 21.

[78] Email from S. Hodgdon to T. Olson (Dec. 15, 2010, 15:24), attaching "Data_Request_Jun-Sep2010_Altresco_DATA," worksheet "DA_cleared" (attached as Exhibit 20).

[79] *Id.*, worksheet "RT_operations" (attached as Exhibit 20).

[80] Staff Report at 16.

[81] The facility has a 500,000 gallon on-site storage tank. Bates No. MPCPROD00007754 (Project Stateside Confidential Information Memorandum describing the Pittsfield facility) (attached as Exhibit 22).

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The following chart fills in the data OE Staff omitted from the chart on page 21 of its Report – including for those days when Maxim did procure enough gas to meet Pittsfield's day ahead commitment and those days when it did not. The point is not to suggest that Maxim never purchased enough gas to meet a day ahead commitment, but to demonstrate that on those 26% of the days when Maxim supposedly was so confident it would be dispatched day-ahead for reliability, that it purchased gas in advance – as OE Staff contends was the key predicate of Maxim's 2010 scheme – Maxim in fact never knew for how long such a dispatch would last, and never purchased enough gas to satisfy a 24 hour dispatch, notwithstanding the prolonged heat wave and the very high relative load forecasts:

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Gas Purchases Before Day Ahead Offer		Operating Date	Day Ahead Award Hours	Day Ahead Surplus (-Deficit) hours	Actual Run Hours	Actual Run Surplus (-Deficit) hours[82]
Offer Date	Amount (MMBtu/hours)					
23-Jun-10	19200/13.5 hrs	24-Jun-10	0	13.5	17	-3.5
28-Jun-10	12800/8.3 hrs	29-Jun-10	0	8.3	15	-6.7
6-Jul-10	20000/14.2 hrs	7-Jul-10	13	1.2	17	-2.8
12-Jul-10	11433/7.2 hrs	13-Jul-10	9	-1.8	13	-5.8
13-Jul-10	13000/8.5 hrs	14-Jul-10	10	-1.5	14	-5.5
14-Jul-10	7500/4.0 hrs	15-Jul-10	8	-4.0	12	-8.0
15-Jul-10	15000/10.1 hrs	16-Jul-10	9	1.1	14	-3.9
19-Jul-10	14500/9.7 hrs	20-Jul-10	9	0.7	13	-3.3
20-Jul-10	16000/10.9 hrs	21-Jul-10	8	2.9	12	-1.1
21-Jul-10	11200/7.0 hrs	22-Jul-10	6	1.0	8	-1.0
10-Aug-10	13000/8.5 hrs.	11-Aug-10	8	0.5	12	-3.5
16-Aug-10	6000/2.8 hrs	17-Aug-10	5	-2.2	9	-6.2
18-Aug-10	9000/5.2 hrs	19-Aug-10	0	5.2	8	-2.8

Indeed, the first two days OE Staff highlights are days when Maxim purchased some gas before making a supply offer in the day ahead market but did ***not*** receive a day ahead award. Moreover,

[82] These data differ somewhat from the data used by OE Staff, apparently because OE Staff's data does not account for the gas required to start up and shut down the facility for each run cycle (approximately 2600 MMBtu), and because OE Staff used a lower capacity value (140 MW) than that at which the plant actually was offered into the day ahead market (approximately 146 MW on average over the period).

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the difference in hours between the day ahead award and actual run times demonstrates the reality that Pittsfield had a number of real time dispatches and self-schedules during this time. Although Maxim purchased enough gas in advance of day ahead awards to satisfy 7 of 11 of those awards, it never purchased enough gas in advance of the day ahead awards listed to meet its obligations for the entire operating day because it could not predict the duration of any awards (and it never purchased enough gas in advance to run for 24 hours).

Indeed, OE Staff acknowledges the extent of the risks Maxim faced, noting that "Maxim burned … 98% gas on three days, 90% gas on one day, and 85% gas on one day. On at least three of these days (operating dates August 11, 17, and 19), Mitton bought gas before submitting Day Ahead offers on oil."[83] These dates, which are included in OE Staff's chart, demonstrate that Maxim had no way to know in advance *how much gas it would need* to operate on those days. For each of them, Maxim failed to obtain enough gas to run as dispatched and had to burn oil. OE Staff does not nor could it credibly contend that Maxim had any confidence that Pittsfield would receive a real-time dispatch, for reliability or otherwise, on days when it had ***not*** received a day ahead award. Nor can OE Staff credibly argue that because Maxim had purchased some amount of gas in advance of submitting day ahead offers it knew it would be committed for reliability. As demonstrated herein, Maxim clearly could not predict the dispatch run hours, and it risked significant losses if it had been unable to secure additional gas after the close of the day ahead market to meet the full day ahead dispatch plus the additional run hours beyond that during which it might be required to run.

What the objective data shows is the hard reality under which Maxim was required to operate at the time: Pittsfield had a capacity supply obligation after the RMR Agreement and

[83] Staff Report at 32.

Maxim intended to meet that obligation. In order to do so, in the face of uncertain gas supplies and volatile prices, Maxim chose to forego the day-ahead market by offering on oil while at the same time procuring gas in case it was dispatched because it could utilize that gas if it obtained a real-time dispatch or had to self-schedule. As a result, Maxim was quite surprised when it received day ahead awards after offering on oil. In the end, the IMM determined that burning gas after offering on oil violated a conduct threshold that was applicable only when Pittsfield was dispatched for reliability, and it mitigated Maxim to its *gas* reference levels since gas was the fuel actually burned. As noted, the IMM did not conclude that Maxim's conduct was manipulative and it did not refer the matter to FERC.

5. Even If Maxim Could Predict with a High Degree of Certainty When It Would Be Dispatched for Reliability, It Still Made Sense To Bid On Oil On Days In Question Here

OE Staff makes two arguments to support its assertion that Maxim could predict reliability dispatches, and as we show, both are incorrect. But even if Maxim could accurately predict those days when it would be needed for reliability, it could not predict the number of hours it would be called upon to run; therefore, it still made sense to offer on oil to cover the risk that it could not get sufficient gas to cover the full dispatch run, but nevertheless to purchase some gas in advance and actually burn gas when confidently able to do so.

First, OE Staff is incorrect that Maxim's statement in its November 2013 submission – that it rarely purchases gas before it gets a dispatch award – is evidence that the only occasions on which it departed from this practice in the summer of 2010 was when it expected to get a day ahead commitment.[84] Maxim's November 2013 submission was prepared before OE Staff raised any questions concerning the 2010 fuel burns. It described Maxim's current practice under

[84] Staff Report at 19-20.

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current ISO-NE rules, *e.g.*, where day ahead awards are provided much earlier in the day.[85] The current practices also reflect three plus years' experience operating in a post-RMR Agreement environment – experience it obviously did not have upon coming off the RMR Agreement, and an environment after the summer of 2010 unaffected by as many days of TGP curtailment notices. It also reflects an expansion of Maxim's portfolio of gas marketing counterparties. Moreover, current practices reflect the lessons learned from the summer of 2010 when Maxim was mitigated almost $3 million and was subsequently told by the IMM to burn what it offered.

In short, OE Staff's attempt to link the information provided about current practices in the November 2013 submission and the practices adopted in the summer of 2010 is mixing apples and oranges, and proves nothing about Maxim's expectations regarding day ahead commitments in 2010.

OE Staff also is wrong in asserting that purchasing some level of gas in advance of an award shows that Maxim was using load forecast data to predict reliability dispatches. OE Staff ignores the very important facts that Maxim not only was unable to predict when it would be dispatched for reliability, but also unable to predict the potential dispatch run hours. Put simply, Maxim's risk of significant losses from having to operate on oil when offering on gas did not turn on its ability to predict to any meaningful degree when it would be called to run for reliability. As shown herein, even when Maxim was awarded a day ahead dispatch after purchasing some amount of gas before it submitted its day ahead offers, it very often had to secure more gas to meet the day ahead dispatch, and always had to secure additional gas to meet the additional hours run in real time beyond the day ahead dispatch.

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[85] November 4, 2013 submission at 16-17 (attached as Exhibit 21).

Accordingly, the fact that some level of gas was purchased in advance of submitting the day ahead offers does not provide any support for OE Staff's claim that Maxim was able to predict when it would receive a reliability dispatch. And for this same reason, even if the forecasts provided some certainty as to the days Maxim would be called upon for reliability (which as shown in Section II.F.2, they did not), it still made sense for Maxim to offer on oil when there were TGP restrictions because Maxim had no way to predict or control the number of hours it would operate. Quite simply, the risk of significant financial losses remained even if Maxim had the ability to predict the days when it might be called upon for reliability.

G. The Evidence That Mitton and Angeli Spoke About the Fuel Burn Issue On or About July 20, 2010 Is Compelling

OE Staff goes to great pains to argue that the call between Mr. Mitton and Mr. Angeli never occurred and that Maxim raised this call only when it decided to change its story.[86] As OE Staff notes, Maxim characterized this call as

> critical for two reasons: (i) it demonstrates that the IMM knew Pittsfield was burning gas; and (ii) Mr. Angeli only responded that mitigation would likely result. He did not ask Maxim to cease and desist.[87]

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[86] Staff Report at 14. OE Staff notes that Mr. Mitton sent no emails on this topic after July 21, 2010. However, Mr. Mitton was on vacation for the next two weeks, from July 24, 2010 through August 7, 2010. *Id.* at 32. Nevertheless, the fact that Mr. Mitton was absent from the office does not give OE Staff any pause in casting blame on him even for offers made in his absence. *See id.* at 32.

[87] Staff Report at 39. Our January 30, 2015 submission, which we incorporate herein by reference, explains in detail why we are so confident that this call did occur. Among other things, we highlighted that Mr. Mitton spoke with Mr. Devasahayam after his call with Mr. Angeli and Mr. Devasahayam then researched mitigation. In response, OE Staff makes the unsupported claim that on that day, July 20, 2010, "Mitton spoke with a colleague, Chris Devasahayam, about how the IMM would handle Maxim's recent offers for Pittsfield." However, OE Staff cites no supporting document or testimony for their claim about the content of this conversation, which is unsurprising since it is a complete fabrication. OE Staff never asked Mr. Mitton about his discussion with Mr. Devasahayam, and OE Staff never even bothered to talk to Mr. Devasahayam or seek his testimony.

OE Staff acknowledges that such an exchange would fit squarely within the definition of what it terms "exculpatory" information,[88] but claims the call never occurred and that Maxim did not inform the IMM that Pittsfield was burning gas after offering on oil until August 23, 2010, after being asked.[89] OE Staff rests its contention on a recently procured declaration by Mr. Angeli that OE Staff itself drafted after submitting its 1b.19 letter.[90] However, the objective evidence, together with the reasonable inferences that may be drawn from the evidence, demonstrates that the call did occur and that the IMM did know that Maxim burned gas on most days.[91]

First, Mr. Mitton testified about the call and its occurrence. We respectfully urge the Commission to review both the transcript and the video of his deposition in order to assess his credibility, as well as the tone and demeanor of both Mr. Mitton and his examiners.[92]

Second, Mr. Angeli does not deny the call occurred. Rather, he declares on the basis of his obviously incomplete phone call log and his surmise that the events discussed were "important enough to have included them on his log"[93] that he "is confident" he "did not have any such phone call." However, the telephone records sent to Mr. Angeli by OE Staff and attached to his declaration show that he had at least one substantive four minute phone call with

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[88] Staff Report at 14.

[89] *Id.*

[90] *See* Email from T. Olson to J. Angeli (Dec. 22, 2014, 16:14), attaching draft Declaration of John A. Angeli (attached as Exhibit 23).

[91] Attached hereto as Exhibit 31. It must be noted and realized that if the Commission were to credit Mr. Mitton's recollection, OE Staff's case disappears. But, as discussed in Section II.H, even if Maxim cannot prove with 100% certainty that it did, it can still show there are more than sufficient additional reasons for the Commission to determine that OE Staff has failed to make a sustainable case.

[92] *See, e.g.,* Mitton Dep. at 321:25-322:19 (attached as Exhibit 17).

[93] Corrected Angeli Decl. ¶ 6 (attached as Exhibit 25).

Mr. Mitton on July 7, 2010 that is not reflected in his call log, and another one minute call with Mr. Mitton on July 16, 2010 that likewise was not included.[94]

Third, Mr. Angeli's declaration was based on a small selective, number of documents provided by OE Staff including a Pittsfield communications log, which purports to include all communications related to Pittsfield beginning with June 2010 including records of telephone and email communications by Mr. Angeli and other IMM personnel.[95] However, the first log entry was not made until July 22, 2010. And we know the log is incomplete because we have records of IMM communications with Maxim regarding Pittsfield on earlier dates in July 2010[96] – just the sort of "important" communications Mr. Angeli declared he would have logged,[97] and even though Mr. Angeli did log Pittsfield fuel burn-related emails on other days, such as October 21, 2010 and February 8, 2011.[98] Nor does Mr. Angeli's log reflect an entry for phone calls between Mr. Mitton and Mr. Dominguez on July 21, 2010 and July 22, 2010, even though both those calls are reflected in Mr. Mitton's phone records and Mr. Angeli himself participated in a July 22 call.[99]

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[94] *See* Telephone Records of Kyle Mitton ("K Mitton Phone Records") (attached as Exhibit 26); Angeli call log (attached as Exhibit 15). While it is possible the July 16, 2010 call may have been a voicemail, presumably a call log should include such communications.

[95] Pittsfield communications log (attached as Exhibit 14). This log refers to the "Altresco" unit, which is the same facility referred to as "Pittsfield" herein.

[96] For example, there was a call on July 7, 2010 (see discussed above) and a series of emails exchanged between Mr. Angeli and Mr. Mitton between July 16, 2010 and July 21, 2010 regarding fuel burns at the Pittsfield facility. K Mitton Phone Records (attached as Exhibit 26); Corrected Angeli Decl., Appendix B (attached as Exhibit 25).

[97] Corrected Angeli Decl. ¶ 6 (attached as Exhibit 25).

[98] Pittsfield communications log (attached as Exhibit 14).

[99] *Compare* K Mitton Phone Records (attached as Exhibit 26) *with* Angeli call log (attached as Exhibit 15); July 22 Kwok Notes (attached as Exhibit 2). Nor is there any log entry for Mr. Dominguez' September 14, 2010 email regarding Pittsfield's fuel burn on that date. *Compare* Bates No.

(continued…)

Likewise, before signing his declaration, Mr. Angeli was not provided internal Maxim emails written just after Mr. Angeli told Mr. Mitton via an email on July 20, 2010 that Mr. Mitton should inform the IMM when there is a fuel issue so the IMM could "model the unit on the correct fuel."[100] That same day, Mr. Mitton informed Mr. Angeli that Pittsfield would be "in on fuel oil again for tomorrow."[101] And Chris Devasahayam sent an email to his boss, Eagle Kwok, and to Mr. Mitton in which he analyzed the IMM's authority to mitigate Maxim for burning gas after having "talked with Kyle."[102] It makes little sense that Mr. Devasahayam would suddenly have researched potential mitigation concerning the fuel burn – and gone on to explain the basis for his view after having "talked with Kyle" – if Mr. Angeli had not spoken to Mr. Mitton about the fuel burn, about the fact that Maxim had burned gas, and about the resulting potential for mitigation. Conversely, it is entirely likely that Mr. Mitton spoke with Mr. Devasahayam about mitigation and the fuel burn on the very same day he had discussed these topics with Mr. Angeli. Notably, mitigation is not even mentioned in the email correspondence between Messrs. Angeli and Mitton, which further supports the conclusion that a phone call discussing potential mitigation occurred.[103]

(continued…)

MPCPROD00074443 (Email from R. Dominguez to E. Kwok, et al. (Sept. 14, 2010, 10:25)) (attached as Exhibit 18) *with* Pittsfield communications log (attached as Exhibit 14).

[100] Bates No. MPCPROD00074416 (Email from K. Mitton to J. Angeli, et al. (July 20, 2010, 13:22)) (attached as Exhibit 27).

[101] *Id*. (attached as Exhibit 27).

[102] Bates No. MPCPROD00091433 (Email from C. Devasahayam to E. Kwok, et al., (July 20, 2010, 19:07) (describing market rules regarding mitigation)) (attached as Exhibit 28).

[103] To Maxim's knowledge, despite its several requests to OE Staff, OE Staff has not reviewed ISO-NE's telephone records or those possessed by its long-distance provider. Nor to our knowledge, although OE Staff obtained telephone records associated with Mr. Angeli's cellular phone, has OE Staff reviewed ISO-NE general landline records for outgoing calls (it is our understanding that ISO-NE does not have 2010 landline records for individual extension numbers) or obtained records from ISO-NE's long distance

(continued…)

Even though OE Staff relied on the Pittsfield communications log as the major premise for Mr. Angeli's declaration, OE Staff did not provide him with any of this other information – all of which was known to OE Staff – in order to refresh his recollection or to test his supposed confidence that he surely would have logged the call with Mr. Mitton given its importance. And the July 20 correspondence shows (or at a minimum, makes it much more likely than not) that Mr. Mitton and Mr. Angeli in fact did discuss on July 20, 2010 both the actual fuel burn, and the potential consequence of mitigation that same day.

H. Maxim's Case Would Remain Compelling Even If Mr. Mitton's Recollection Was Incorrect As To When the Mitton/Angeli Call Had Occurred

Had the July call between Messrs. Mitton and Angeli occurred, it would be fully exculpatory as to Maxim's conduct here. But even if Mr. Mitton's recollection was incorrect and the call did not occur, this means nothing as to the vitality of OE Staff's case. It is undisputed that on August 18, 2010, Mr. Mitton and Mr. Dominguez discussed the same information that Mr. Mitton claims he and Mr. Angeli discussed a month earlier. Mr. Dominguez' call log[104] reflects the following:

> [Mitton] was under the impression (wrongly) that the mere notification of 'potent[i]al' gas procurement [problems] and the offer of oil was sufficient and that no further review would be done by IMM. I corrected his understanding and informed him that the IMM never indicated that the offer of oil and burning of gas was

(continued…)

telephone provider. Given OE Staff's representation to Maxim that OE Staff has provided Maxim with records obtained from third parties, we assume it has no such telephone records.

[104] To be clear, OE Staff provided Maxim with this call log long after Maxim informed it about the conversation between Mr. Mitton and Mr. Angeli.

> an acceptable behavior. We would evaluate based on the circumstance but was in no way a pass for mitigation.[105]

For starters, then, the IMM's records undercut OE Staff's claim that Maxim did not tell the IMM that Pittsfield actually had burned gas until August 23rd. It also undercuts OE Staff's claim that Maxim did so only after having expressly been asked by Mr. Dominguez. At a minimum, it is obvious that Mr. Dominguez knew on August 18, 2010 that Maxim had offered on oil and burned gas since in his log he states "the IMM never indicated that the offer of oil and burning of gas was an acceptable behavior." Putting aside how it is that Mr. Mitton came to have any understanding as to what the IMM previously had indicated, this August 18 conversation with Mr. Dominguez itself contains the same exculpatory elements as the call between Messrs. Angeli and Mitton and provides a substantial basis for inferring that these elements had been addressed well before August 18.

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[105] Staff Report at 34. OE Staff spends seven pages of its Report taking pot shots at Mr. Mitton for not initially recalling his conversation with Mr. Angeli (which occurred around July 20, 2010), and for waiting until after Maxim completed its DR 28 Response, which indicated that Maxim first informed the IMM about the details of each gas purchase on August 23, 2010. See Staff Report at 37-38. Notably, however, the Dominguez call log shows that Mr. Mitton and Mr. Dominguez discussed "the offer of oil and burning of gas" and that Mr. Mitton's "impression" and "understanding" had to be corrected. Since it was reported by Mr. Dominguez, OE Staff knows better than to suggest that this call, too, is not credible given Maxim's response to DR 28, nor why Mr. Mitton would have had any "impression" or "understanding" of whether the IMM would or would not mitigate Pittsfield if he had not spoken with Mr. Angeli. OE Staff cites Mr. Mitton's recollection that Mr. Angeli said mitigation would be "likely." But it attempts to refute the importance of the August 18th call with Mr. Dominguez by asserting that Mr. Mitton would have no reason to be "corrected" by Mr. Dominguez if Maxim "knew it would be mitigated to gas prices." Staff Report at 40-41. However, Mr. Mitton's recollection is quite consistent. First, Mr. Angeli did not say Maxim would be mitigated, he said it was likely. Second, Mr. Devasahayam then researched mitigation and Mr. Mitton took comfort from that research that mitigation could be avoided if appropriate notices were sent to the IMM concerning the fuel offers. Third, OE Staff concedes that Mr. Angeli was investigating Maxim's offers in July 2010, which is when Maxim began researching mitigation at precisely the same time. And, finally, Mr. Kwok's July 22 call notes corroborate Mr. Mitton's recollection and, despite their obvious importance, Mr. Angeli likewise neglected to reflect that call in his call log of all "important" events.

First, the "offer of oil and burning of gas" was discussed prior to August 18. Why else would Mr. Dominguez say he "informed [Mitton] that the IMM never indicated that the offer of oil and burning of gas was an acceptable behavior?" (emphasis added). If the subject had not been previously discussed, the underscored phrase otherwise would be unnecessary. Second, the possibility of mitigation was discussed. Third, Mr. Dominguez did not tell Mr. Mitton that Maxim needed to cease-and-desist from offering oil and burning gas, or that Maxim had done anything inappropriate. Presumably, he would have included such an admonition in his call log. Rather, all Mr. Dominguez said was that the IMM would evaluate the circumstances under which Maxim could be mitigated. And, as noted above, the only reason to have a discussion as to whether Maxim would be mitigated is because the IMM already knew that Maxim was offering in on a higher priced fuel (oil) yet burning a lower priced fuel (gas), which is precisely what Mr. Dominguez meant by the "offer of oil and burning of gas."

Equally important is that after this conversation, Maxim continued to offer on oil and burn gas. In fact, it did so for the very next operating day, August 19, 2010. Indeed, Maxim burned gas on August 19, 2010, and again on August 30 and again on August 31, *i.e.*, after Maxim supplied the requested fuel burn data to the IMM on August 23, which OE Staff incorrectly claims to have been the first time when Maxim came clean as to what it was doing, and only then because it received a direct request from the IMM, which request ostensibly left Maxim no choice but to disclose.

In conclusion, the IMM knew full well what was happening no later than August 18, 2010 (and almost certainly a good deal earlier by any objective reading of Mr. Dominguez call log) and before August 23, 2010, the date on which OE Staff contends Maxim was backed into having to disclose that it burned gas. And whenever it came to learn of Maxim's allegedly

manipulative omission, it still did not order Maxim to stop its risk minimization strategy, and it did not suggest or leave Maxim with the impression, that what it was doing was prohibited (because it was not). Rather, at least in this regard, the IMM did what it should have done: it evaluated the situation based on the circumstances and ultimately concluded that mitigation was appropriate; but a referral to FERC was not. OE Staff has not offered any reason for the Commission to second guess the IMM's conclusions.

I. Offering On Oil and Burning Gas is not Market Manipulation

As noted above, OE Staff claims that Maxim committed market manipulation because it acquired gas in advance of making day ahead offers on oil (when it knew it would be committed for reliability in the day ahead market) all the while intending to burn gas in order to reap greater profits than it would have had it offered on gas and burned gas. OE Staff claims that "Maxim's advance gas purchases can only mean that it expected a Day Ahead commitment."[106] As to OE Staff's premise that Maxim expected to be committed in the day ahead market, we showed above that contemporaneous written communications are to the contrary.[107]

But more fundamentally, even if Maxim had offered in on one fuel expecting to burn another, this conduct is not market manipulation. There was nothing inappropriate about offering in on one fuel and burning another – certainly not in 2010. For example, during those hours where Maxim's oil based offer prices were below the LMP,[108] there was no issue that

[106] Staff Report at 19.

[107] Email from K Mitton to E. Kwok, et al. (June 23, 2010, 12:06) (attached as Exhibit 9); Email from K. Mitton to R. Taikowski (June 23, 2010, 18:13) (attached as Exhibit 10); Email from K. Mitton to E. Kwok, et al. (June 24, 2010, 11:33) (attached as Exhibit 11); Email from E. Kwok to K. Mitton and C. Devasahayam (June 24, 2010, 12:09) (attached as Exhibit 12); Email from C. Devasahayam to E. Kwok, et al. (July 1, 2010, 20:24) (attached as Exhibit 13).

[108] Staff Report at 19-20.

Maxim burned gas even though it offered on oil. And had Maxim offered on gas, but ended up having to burn oil, and possibly lose in excess of $300,000 per day, presumably, OE Staff would not have any issue with this either (even if OE Staff also believed the IMM might not have known that Maxim actually did burn oil).

The simple economic reality is that Maxim reasonably believed it was better off being mitigated to its gas reference levels than having to burn oil if committed day ahead after offering on gas and required to run for longer than it had gas to burn. As OE Staff knows, there was no mechanism available under the then-current tariff rules[109] for Pittsfield to change a gas-based offer to an oil-based offer if Pittsfield's gas supplies were insufficient to meet ISO-NE's dispatch instructions.[110] Thus, while mitigation was not the preferred outcome, it was a lot more attractive than the non-theoretical alternative of losing in excess of $300,000 a day.

Accordingly, there was no requirement under the tariff or under any theory of market manipulation that requires that the fuel basis for offers be the same as the fuel utilized. If the fuel basis for the offer is not he fuel burned, suppliers are either compensated for the less expensive fuel and lose a lot of money even if they burned the higher priced fuel, or <u>mitigated to the reference level of the less expensive fuel actually burned.</u>

Today, though, the IMM could not even have a false impression of the sort alleged here given two new rule change in December 2014 that allow generators to offer on one fuel and burn another if the price differential is not more than 1.75 times the price of the less expensive fuel, and subjects them to mitigation only when they exceed that multiple. Under Market Rule 1 §

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[109] This changed in 2014, *see* Exhibit 24.

[110] Kwok Dep. at 107:18-109:1 ("And we have no options or no alternatives to go back to the ISO and say … we're caught in this bind where we've priced in on natural gas but, look, best efforts, we tried to get natural gas, but we couldn't.").

III.A.3.2, attached hereto as Exhibit 24 and titled "Dual Fuel Resources," a dual fuel generator that offers its higher priced fuel now has to, under certain circumstances and within five business days, provide a written explanation of why that fuel was offered as well as evidence that it was actually burned. However, if the multiple is 1.75 or less, the generator is paid on the higher priced fuel, regardless of which fuel was actually burned. When greater than 1.75, the generator is paid the reference level of the lower priced fuel, which is what happens when a seller is mitigated. More importantly, as to the case here, ISO-NE's recognition of the reality that plants have legitimate economic reasons for offering one fuel and burning another; therefore, undercuts OE Staff's contention that the IMM was under the wrong "impression" about what fuel Pittsfield was burning on the days in question here. Moreover, ISO-NE's decision no longer even to mitigate plants that offer on a higher priced fuel and burn a lower priced fuel (unless the price difference is greater than a 1.75 multiple) demonstrates the legitimacy of Maxim's conduct in 2010 as well.

In addition, under Market Rule 1 § III.A.3.4 (Fuel Price Adjustments), dual fuel units today are able to offer on gas for certain hours and oil for others on a given day.[111] If that rule existed in 2010, Maxim would have been protected from a long reliability dispatch on gas had only oil to burn. In 2010, however, Maxim was required in the day ahead market to offer on one fuel for the entire day, so it took a conservative approach in light of consistent TGP pipeline notices, and offered on oil so that if it were dispatched, it would not suffer large losses. Not surprisingly, it also purchased gas when it could in order possibly to take advantage of the anticipated high real-time prices. In short, these rule changes demonstrate why Maxim's risk minimization strategy was entirely legitimate, if not prescient, and why Maxim's offering on one

[111] *See* Exhibit 24.

fuel and burning another plainly was not manipulative. The Commission should have been alerted to these highly relevant facts.

J. Staff's Legal Theory Is Unsustainable

1. Applicable Law

The Commission's anti-manipulation rule provides that a party may not:

> - use or employ any device, scheme, or artifice to defraud;
>
> - 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
>
> - engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.[112]

As the Commission has noted, the rule: (i) is modeled on Securities Exchange Act Section 10(b) and Rule 10b-5 thereunder; [113] (ii) can only be violated by persons acting with scienter; [114] (iii) does not impose any new affirmative duty of disclosure;[115] and (iv) requires a showing of fraud before a violation will be found. [116]

2. The Scienter Requirement and SEC Precedent[117]

Scienter is knowing or intentional misconduct.[118] Under securities law precedent, proving scienter requires proving that someone acted with "an intent to deceive, manipulate, or

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[112] 18 C.F.R. § 1c.2.

[113] Order No. 670 at PP 30-31.

[114] *Id.* at P 52.

[115] *Id.* at P 35.

[116] *Id.* at PP 49-50.

[117] The Commission has stated that its anti-manipulation rule should be interpreted under precedent applicable to Section 10(b) and Rule 10b-5 thereunder.

[118] *Id.* at P 53.

defraud."[119] While the Supreme Court has not addressed whether recklessness can satisfy the scienter requirement, FERC believes "recklessness in some form satisfies the scienter requirement of SEC Rule 10b-5."[120] Under Section 10(b) and Rule 10b-5 precedent, "extreme recklessness" must be proven to demonstrate scienter; mere recklessness is insufficient.[121] Extreme recklessness is "not merely a heightened form of ordinary negligence," and not determined on the basis of a "should have known" standard.[122] Rather, "it is an 'extreme departure from the standards of ordinary care ... that is either known to the defendant or is so obvious that the actor *must have been aware* of it.'"[123] Extreme recklessness is then "'a lesser

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[119] *Dolphin & Bradbury v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008) ("*Dolphin*"); *SEC v. Steadman,* 967 F.2d 636, 641 (D.C. Cir. 1992) ("*Steadman*"); *SEC v. First Jersey Securities, Inc.,* 101 F.3d 1450, 1467 (2d Cir. 1996) ("*First Jersey*"); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193, n.12 (1976) ("*Hochfelder*").

[120] Order No. 670 at P 53, n.109.

[121] *Dolphin,* 512 F.3d at 639; *Steadman*, 967 F.2d at 641-42.

[122] *Id.*

[123] *Id. See also City of Livonia Employees' Retirement Sys. v. Boeing Co.,* 711 F.3d 754, 756 (7th Cir. 2013) (adopting *Verifone* language); *In re Verifone Holdings, Inc. Securities Litigation*, 704 F.3d 694, 702 (9th Cir. 2012) ("reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it"); *In re Smith & Wesson Holding Corp. Sec. Litig*., 669 F.3d 68, 77 (1st Cir. 2012) (same); *Dronesjko v. Thornton*, 632 F.3d 658, 665 (10th Cir. 2011) (explaining that "[r]ecklessness is defined as 'conduct that is an extreme departure from the standards of ordinary care"); *Teachers' Ret. Sys. of L.A. v. Hunter*, 477 F.3d 162, 184 (4th Cir. 2007) (requiring recklessness to be "severe" and stating that "[a] showing of mere negligence will not suffice"); *Central Laborers' Pension Fund v. Integrated Elec. Servs. Inc.*, 497 F.3d 546, 551 (5th Cir. 2007) (requiring recklessness to be "severe" and "limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it"); *SEC v. Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003) ("[r]eckless conduct must be something more egregious than even 'white heart/empty head' good faith and represents an extreme departure from the standards of ordinary care such that the defendant must have been aware of it"); *Fla. State Bd. of Admin. v. Green Tree Financial Corp.*, 270 F.3d 645, 654 (8th Cir. 2001) (same); *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993) (severe recklessness "is 'limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of

(continued…)

form of intent,' implying the danger was so obvious that the actor was aware of it and consciously disregarded it."[124] Inexcusable neglect is not enough, as extreme recklessness is "neither ordinary negligence nor 'merely a heightened form of ordinary negligence.'"[125]

In market manipulation cases in particular, courts also have gone to great lengths to distinguish legitimate, profit-motivated strategies from those that cross the line in terms of prohibited conduct. Pursuing a legitimate economic rationale is not a form of manipulation:

> There must be 'something more,' some additional factor that causes the dissemination of false or misleading information . . . . Permitting intent to be the 'something more' causes difficulty in distinguishing between legitimate trading strategies and deliberate attempts at market manipulation. *In close cases, there should be no liability. The laws that forbid market manipulation should not encroach on legitimate economic decisions lest they discourage the very activity that underlies the integrity of the markets they seek to protect.*[126]

In the instant case, neither Maxim nor Mr. Mitton engaged in anything approaching what any court ever has found to constitute market manipulation.[127] The record simply does not support the conclusion that Maxim or any of its employees used or employed any device, scheme, or artifice to defraud, or that Maxim or any of its employees made any untrue statement

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ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it"); *Rolf v. Blyth, Eastman Dillion & Co.*, 570 F.2d 38, 47 (2d Cir. 1978) (same); *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (same).

[124] *Dolphin*, 512 F.3d at 639, *citing Sundstrand Corp.*, 553 F.2d at 1045.

[125] *Howard,* 376 F.3d at 1143-44; *Steadman*, 967 F.2d at 641. *See also Pegasus Fund, Inc. v. Laraneta*, 617 F.2d 1335, 1341 (9th Cir. 1980) (recklessness is sufficient to constitute the scienter required to maintain a Rule 10b-5 claim, but only when such recklessness comes closer to "being a lesser form of intent (to deceive) than merely a greater degree of ordinary negligence").

[126] *In re Amaranth Natural Gas Commodities Litigation*, 587 F. Supp. 2d 513, 534 - 35 (S.D.N.Y. 2008), *aff'd* 2013 WL 5302678 (2d. Cir. Sept. 23, 2013) (emphasis added).

[127] Although OE Staff does not appear to allege that Maxim's or Mr. Mitton's conduct was in any way reckless, for the reasons provided herein, it obviously was not.

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of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. They did not engage in knowing or intentional misconduct, or act recklessly. Rather, they legitimately intended to limit the risk of the day ahead market by offering on oil to avoid Pittsfield being dispatched on gas and forced to burn oil, and also sought to be available for what it perceived to be a less risky opportunity to operate in the real time market. This legitimate intent is clear from contemporaneous documents as well as credible consistent testimony.[128]

A violation of the anti-manipulation rule also requires a showing of fraud,[129] and "[f]raud has to be a material misrepresentation on the basis of deceit."[130] Yet OE Staff has presented no evidence of so much as a single misrepresentation or instance of deceit here. It is true that Maxim, on a number of occasions, procured a quantity of gas in advance of its pricing a supply offer based on oil. This was no fraud, but as shown above, a simple hedge against the possible financial exposure associated with a receipt of a day ahead award in circumstances where ISO-

[128] Email from K Mitton to E. Kwok, et al. (June 23, 2010, 12:06) ("If anything goes wrong, we have huge exposure to the potentially very high RT pricing – staying out of day-ahead market reduces exposure") (attached as Exhibit 9); Email from K. Mitton to R. Taikowski (June 23, 2010, 18:13) ("purpose of [offering on oil] was to try and avoid a day-ahead market Award and leave all our MW's for the RT Market") (attached as Exhibit 10); Email from K. Mitton to E. Kwok, et al. (June 24, 2010, 11:33) ("I'm going to offer on Oil again to take us out of the day-ahead market") (attached as Exhibit 11); Email from E. Kwok to K. Mitton and C. Devasahayam (June 24, 2010, 12:09) ("make sure we are keeping the plants out of day-ahead market and taking RT prices in these volatile periods") (attached as Exhibit 12); Email from C. Devasahayam to E. Kwok, et al. (July 1, 2010, 20:24) ("Since it's the weekend and harder to get gas, I'll put a higher profit margin for the Day Ahead, and then look for Real Time Opportunities") (attached as Exhibit 13); Kwok Dep. at 103:25-104:15 (attached as Exhibit 8).

[129] Order 670 at PP 49-50.

[130] Hearing Transcript Excerpts at 37, *FERC v. Silkman, et al. and FERC v. Lincoln Paper, et al.*, Nos. 13-CV-13054, 13-CV-13056 (D. Mass. Jul. 18, 2014) (attached as Exhibit 6).

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NE had the ability to require Pittsfield to run for up to 24 hours.[131] Certainly, there is no evidence suggesting that Maxim misrepresented its gas purchases or intentionally withheld from the IMM the fact that such purchases were made.

OE Staff alleges that by telling the IMM that it was offering on oil and allegedly omitting to say that it had purchased gas in advance of those offers, that Maxim gave the IMM the "false impression" that the plant had actually burned oil.[132] But none of the cited communications incorrectly state what fuel was burned at Pittsfield, or state anything that reasonably should have led to any such "false impression."[133] And no contemporaneous records even remotely suggest that the IMM ever had such an impression. Indeed, during the *ex post* settlement period when, pursuant to its standard process the IMM requested information regarding the Pittsfield fuel burn, Maxim did not hesitate whatsoever in providing this information. Thus, there was nothing deceitful or the least bit untoward about Maxim's risk management policy.

Nor has OE Staff even alleged recklessness, much less offered any evidence that any alleged omission was so "highly unreasonable" as to constitute "an extreme departure from the

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[131] As shown above, the point of the risk minimization policy was that Maxim did not know in advance whether Pittsfield would be dispatched at all, much less whether it would be dispatched on economics or for reliability.

[132] Staff Report at 53.

[133] Bates No. MPCPROD00074407 (Email from K. Mitton to J. Angeli (July 16, 2010, 12:03) ("we have been offering the unit in conservatively on fuel oil due to the daily gas restriction on Tennessee Gas Pipeline.")) (attached as Exhibit 29); Bates No. MPCPROD00074409 (Email from K. Mitton to J. Angeli (July 19, 2010, 16:48) ("The main reason for this is that TGP is performing maintenance on some key compressor stations which are causing "bottlenecks" and reducing the amount of gas that can flow. During normal heat this wouldn't be an issue however with the prolonged heat wave in the Northeast restrictions have been a serious issue.")) (attached as Exhibit 7); Bates No. MPCPROD00074416 (Email from K. Mitton to J. Angeli, et al. (July 20, 2010, 13:22) ("we are in on fuel oil again for tomorrow.")) (attached as Exhibit 27); Bates No. MPCPROD00074418 (Email from K. Mitton to J. Angeli, et al. (July 21, 2010, 16:02) ("Altresco is on fuel oil pricing again for 7/22 due to gas restrictions again.")) (attached as Exhibit 30); July 22 Kwok Notes ("Bid in oil as it is a risk management strategy to ensure we recover our fuel costs.") (attached as Exhibit 2).

standards of ordinary care" even beyond "inexcusable negligence" or so extreme as to have presented a danger of misleading the IMM, and where such omission either was known to Maxim or so obvious that Maxim "must have been aware of it."[134]

Moreover, to the extent OE Staff thinks there was some material omission it has to show that Maxim had some duty to speak.[135] Yet it points to no rule in 2010 that required Maxim, prior to submitting supply offers, to anticipate and answer questions that the IMM had not asked but might later pose, as part of its routine settlement process. Indeed, there was no such requirement in 2010. It was only in 2012 that the tariff was changed to specifically require dual fuel units to confirm the fuel actually burned; but even under the revised rule, this information was not required prior to submitting a supply offer, and while burning the lower-cost fuel might result in mitigation, it still was not prohibited.[136]

Multiple email communications with the IMM as well as Mr. Kwok's notes of a July 22, 2010 conference call with the IMM make it absolutely clear that, prior to submitting supply offers, Maxim informed the IMM that Maxim was offering on oil because it thought it prudent to control risk due to the uncertainty of procuring enough gas to satisfy an unknown and

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[134] *See* n.123, supra.

[135] Order No. 670 at PP 35-36. The anti-manipulation rule also does not impose any new affirmative duty of disclosure. *Id.* at P 35.

[136] "ISO New England Inc. and New England Power Pool, Notice of Effective Date of Automated Mitigation and Related Changes," Docket Nos. ER11-4540-000, ER12-1242-000, ER09-1546-000 (filed April 3, 2012) ("the substance of the [second phase of] Docket No. ER09-1546 changes, as reflected in the automated mitigation rules, will also become effective on April 17, 2012.") (implementing Market Rule 1 § III.A.3.2 ("If the Market Participant fails to provide supporting information demonstrating the use of the higher-cost fuel within five business days of the Operating Day, then the Reference Level based on the lower cost fuel will be used in place of the Supply Offer for settlement purposes.").

unquantifiable dispatch.[137] It is understandable, then, that OE Staff's Report is devoid of any substantial basis even for inferring much less for finding that Maxim ever "omit[ted] to state a material fact necessary in order to make the statements [it did make], in the light of the circumstances under which they were made, not misleading." Maxim never addressed or in any way affirmatively, negatively, elliptically, or otherwise in the least bit knowingly misled the IMM about the fuel that it actually would or did burn. Rather, the moment during the settlement period when the IMM requested information to "confirm and document" Pittsfield's fuel burns; it was quickly provided; and the IMM did not then challenge either its accuracy or its timing.

In short, the Commission's anti-manipulation rule can be violated only by persons acting with scienter,[138] and proving scienter requires proving that someone acted with "an intent to deceive, manipulate, or defraud."[139] But there is no evidence that Maxim had any such intent. OE Staff attempts to demonstrate Maxim acted with scienter by means of its unsupported theory that Maxim "carefully sought to obtain Day Ahead commitments for reliability at high oil prices while actually burning gas, and to falsely convey the impression to the Market Monitor that the

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[137] Bates No. MPCPROD00074407 (Email from K. Mitton to J. Angeli (July 16, 2010, 12:03) ("we have been offering the unit in conservatively on fuel oil due to the daily gas restriction on Tennessee Gas Pipeline.")) (attached as Exhibit 29); Bates No. MPCPROD00074409 (Email from K. Mitton to J. Angeli, et al. (July 19, 2010, 16:48) ("The main reason for this is that TGP is performing maintenance on some key compressor stations which are causing "bottlenecks" and reducing the amount of gas that can flow. During normal heat this wouldn't be an issue however with the prolonged heat wave in the Northeast restrictions have been a serious issue.")) (attached as Exhibit 7); Bates No. MPCPROD00074416 (Email from K. Mitton to J. Angeli, et al. (July 21, 2010, 16:02) ("we are in on fuel oil again for tomorrow.")) (attached as Exhibit 30); Bates No. MPCPROD00074418 (Email from K. Mitton to J. Angeli, et al. (July 21, 2010, 16:02) ("Altresco is on fuel oil pricing again for 7/22 due to gas restrictions again.")) (attached as Exhibit 30); July 22 Kwok Notes ("Bid in oil as it is a risk management strategy to ensure we recover our fuel costs.") (attached as Exhibit 2).

[138] Order No. 670 at PP 48-49, 52.

[139] *Dolphin & Bradbury v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008); *SEC v. Steadman,* 967 F.2d 636, 641 (D.C. Cir. 1992); *SEC v. First Jersey Securities, Inc.,* 101 F.3d 1450, 1467 (2d Cir. 1996); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193, n.12 (1976).

unit was actually burning oil."[140] But, as shown above, this claim is demonstrably refuted by the evidence. Maxim was not seeking day ahead commitments. Contemporaneous email communications demonstrate unequivocally that Maxim did not expect or even desire day ahead commitments,[141] which is why it could confidently testify that it was surprised upon receiving such commitments, as explained by Mr. Mitton in his November 2013 testimony.[142]

As shown in those emails, when Maxim made supply offers based on oil, "the purpose of this was to try and avoid a day-ahead market Award and leave all our MWs for the RT Market."[143] This was a risk management strategy used, as explained to IMM on July 22, 2010, because the security of gas supply was not certain.[144] Accordingly, far from showing any intent to manipulate, or even an extreme departure from the standards of ordinary care,[145] the evidence shows that Maxim's conduct was motivated by entirely legitimate efforts to manage the financial risk associated with obtaining gas in the summer of 2010.[146] Maxim's risk management policy is

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[140] Staff Report at 54.

[141] *See* Email from K Mitton to E. Kwok, et al. (June 23, 2010, 12:06) (attached as Exhibit 9); Email from K. Mitton to R. Taikowski (June 23, 2010, 18:13) (attached as Exhibit 10); Email from K. Mitton to E. Kwok, et al. (June 24, 2010, 11:33) (attached as Exhibit 11); Email from E. Kwok to K. Mitton and C. Devasahayam (June 24, 2010, 12:09) (attached as Exhibit 12); Email from C. Devasahayam to E. Kwok, et al. (July 1, 2010, 20:24) (attached as Exhibit 13).

[142] Mitton Dep. at 314:15-25 ("And you can look at our offers, beginning of June when we came off the RMR, they were bare bone, and they were – they were bare bone, and we were trying to get picked up, and subsequently we did get picked up a ton, and then it wasn't until July when we were conservatively offering in on oil to prevent the risk exposure on fuel procurement that all of a sudden we got picked up. We didn't think we would get picked up, and all of a sudden we got picked up, that's when we started to realize that they were getting reliability dispatches, we didn't even know.") (attached as Exhibit 17).

[143] Email from K. Mitton to R. Taikowski (June 23, 2010, 18:13) (attached as Exhibit 10).

[144] July 22 Kwok Notes (attached as Exhibit 2).

[145] OE Staff alleges that Maxim's conduct was intentional, deliberate, and calculated conduct; OE Staff does not allege Maxim acted recklessly. Staff Report at 54.

[146] Even the IMM acknowledged that "[a] legitimate strategy could be assumed for an oil offer in the DAM." Draft Referral (attached as Exhibit 5).

exactly the sort of "legitimate economic decision" that laws forbidding market manipulation should not encroach upon.[147]

K. OE Staff's Proposed Penalty Calculation is Excessive

No civil penalty is appropriate here given that Maxim did nothing wrong. But should the Commission think otherwise, it should not adopt OE Staff's recommended penalty. The amount proposed by OE Staff is far in excess of what is permitted under the Commission's penalty guidelines when, as shown below, there was no financial harm, and it is considerably in excess of any amount FERC might conceivably justify in litigation. Furthermore, achieving compliance, not assessing penalties, is the Commission's stated goal in its enforcement efforts.[148]

As discussed in Section II.B above, Maxim's 2010 bidding reflected an effort by the company to minimize its exposure to fuel prices and the mismatch between the electric and gas days, of which the Commission is clearly aware.[149] Maxim had no prior notice from the Commission, the ISO-NE tariff, from IMM staff or otherwise, that its risk mitigation strategy was somehow prohibited, and OE Staff's speculations about "common sense" and ISO-NE's alleged subjective impressions are irrelevant. Consequently, the Commission should reject OE Staff's proposal to impose any civil penalties whatsoever under the circumstances here. Maxim could not have known its conduct was prohibited; Maxim already was mitigated in due course under the then-existing tariff rules; and a penalty would serve no compliance purpose.

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[147] *In re Amaranth Natural Gas Commodities Litigation*, 587 F. Supp. 2d 513, 535 (S.D.N.Y. 2008), *aff'd*, 2013 WL 5302678 (2d Cir. Sept. 23, 2013).

[148] FERC Penalty Guidelines § 1A1.1(2); *Enforcement of Statutes, Orders, Rules, and Regulations,* 132 FERC ¶ 61,216 at P 110 (2010), *quoting Policy Statement on Compliance*, 125 FERC ¶ 61,058 at P 1 (2008).

[149] *See, e.g.*, Docket No. RM14-2-000 (proposed rulemaking to better coordinate the scheduling of natural gas and electricity markets).

In addition, the factors on which OE Staff appears to base its proposed penalty are factually incorrect. To the extent the Commission was to determine any civil penalty is appropriate – which it should not – it certainly should not accept OE Staff's flawed assumptions as the basis upon which such for penalty should be calculated.

1. Staff Misapplies the Commission's Penalty Guidelines – There Was No Financial Harm Associated With the Alleged Violations

There was no financial harm here. Neither ISO-NE nor any ratepayers experienced any financial loss because Maxim was fully mitigated under ISO-NE's standard process for such amounts as ISO-NE determined to result from Maxim's having violated the NCPC conduct threshold.[150] Whether or not Maxim acquired some quantity of gas in advance of its bids, any failure to disclose these purchases to ISO-NE or the IMM (or any other allegedly wrongful conduct here) did not result in any financial harm, because Maxim eventually did inform the IMM as to the fuel actually burned, and Maxim was mitigated on the basis of the fuel that was burned.

Furthermore, even if the Commission were based its penalty assessment on some measure of intended "loss," Maxim returned all of this money under ISO-NE's standard process and should receive commensurate credit against any "intended loss" for "[t]he money returned … by the entity … to the victim before the violation was detected."[151] And to be clear, the fact

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[150] Bates No. MPCPROD00082838 (Email from R. Dominguez to E. Kwok, et al. (Aug. 16, 2010, 15:42) ("In our standard review process, Altresco (Asset #326) has violated conduct threshold screen for NCPC.")) (attached as Exhibit 4).

[151] FERC Penalty Guidelines § 2B.1.1, Application Note 2(E). The Commission has also stated that it could "consider operational penalties that an organization had already paid under a utility's tariff for the same violation" in determining the appropriate penalty amount. *Enforcement of Statutes, Orders, Rules, and Regulations,* 132 FERC ¶ 61,216 at P 207 (2010). Thus, even if the summer 2010 bidding were a violation, ISO New England's mitigation mechanism should likewise be taken into consideration as eliminating any pecuniary loss associated with the alleged summer 2010 conduct.

that ISO-NE imposed mitigation does not suggest that ISO-NE detected a "violation" as that term is used here. What OE Staff alleges and seeks to penalize here are purported violations of the Commission's Rule 1c or Section 35.41. By contrast, Maxim was mitigated for having violated an NCPC threshold. But this distinction is not material to a penalty calculation. Even if the Commission were to find on the basis of this distinction or any other reason that some measure of "financial harm" occurred here, then the amounts returned through mitigation must be credited against whatever that alleged loss is.

For the same reasons, OE Staff's allegation that Maxim received $2.99 million in unjust profits is simply wrong. OE Staff knows there was no financial harm under the Commission's penalty guidelines no matter how such harm is defined.[152]

Moreover, the penalty guidelines state that "[t]he Commission will use the gain that resulted from the violation as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."[153] In this case, though, any measure of financial loss is easily ascertained – it was zero. In short, OE Staff's attempt to base a penalty on what it alleges was Maxim's "gain" is both factually inaccurate and legally flawed under the Commission's penalty guidelines.[154]

In short, there was no financial harm in this case – neither financial loss, nor financial gain – and any penalty imposed on either basis is therefore unjustified.[155] Accordingly, revising the financial loss to zero, and maintaining OE Staff's other penalty guideline applications, reduces the maximum penalty to $20,000.

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[152] Staff Report at 65.

[153] FERC Penalty Guidelines § 2B.1.1, Application Note 2(B).

[154] *Id.*

[155] FERC Penalty Guidelines § 2B.1.1(b)(1).

2. Staff's Proposed Penalties Are Otherwise Unjustified

OE Staff also recommends (also without support) that were the Commission to issue a separate penalty for Maxim's alleged violation of Section 35.41, (*i.e.*, just for Maxim's allegedly having made a false statement) the amount should be $1.3 million.[156] It is uncertain how OE Staff came up with this number. To the extent OE Staff relied to any extent on the Commission's penalty guidelines, for the reasons discussed above (*i.e.*, there still was no financial harm associated with the alleged "violation"). So this proposed penalty likewise would be excessive.

III. CONCLUSION

This is a case of first impression. To the best of our knowledge, this is the first time the Commission has issued an order to show cause based on conduct alleged to have constituted an abuse of market power and that already has been mitigated – in this case more than four years ago. It is a case where no rule prohibited the conduct or required the allegedly omitted disclosure – and no rule does so today.[157] It is a case involving legitimate business behavior – here, Maxim's risk minimization strategy – where the conduct is perfectly acceptable, and today expressly so. It is a case that hinges on the creation via an omission of an allegedly false "impression" by the IMM – which likewise has never formed the basis of a successful manipulation claim – that was never mentioned by the IMM, even after the IMM received the information that corrected its impression. Nor was the false impression even mentioned by the IMM's staff who considered whether there should be a referral to the Commission, albeit on the basis of an entirely different – though just as wrong and unsupportable – reason. Indeed, the

[156] Staff Report at 65.

[157] Indeed, as of December 3, 2014, dual fuel generators in ISO-NE can offer on one fuel and burn another. See Section II.I, *supra*; Exhibit 24.

IMM, together with ISO-NE's External Market Monitor rejected the proposed referral on the grounds that the conduct should be addressed through mitigation, and despite the IMM's obligation to make such referrals when there is evidence of manipulation. Nor does OE Staff even provide a reason why Maxim should reasonably have believed the IMM was not aware of Pittsfield's fuel burns, given that the IMM routinely confirmed and documented fuel burns and verified gas purchases by reviewing pipelines' public postings during the course of the IMM's *ex post* settlement process.

By all indications, this case arose out of OE Staff's desire to gain leverage in an ongoing investigation of Maxim in order to extract a settlement. It is flat out wrong to recommend the Commission move forward here, both as a matter of law and as an exercise of prosecutorial discretion. But, if this case is pursued, it will go to trial. Every issue raised here will be tried before a neutral arbiter. IMM personnel for the first time will be cross-examined as to their alleged impression; their failure to articulate the same to anyone at Maxim; their failure to tell Maxim to stop the conduct at issue; the recent rule changes that allow generators to offer on one fuel and burn another; the IMM's decision not to refer this matter to FERC; and as to how on earth, but for Mr. Dominguez having been inspired to ask, the IMM might never have known that Maxim had acquired significant quantities of gas even though the IMM monitors gas nominations for such information.

In short, unless the Commission decides not to proceed further here, OE Staff will have to present its case before a neutral federal district court judge based on a novel theory, old incomplete facts, and an alleged "omission" that allegedly left the wrong "impression" even though Maxim had no duty to disclose what was allegedly omitted and did not hesitate to provide such information when asked! And it will have to explain why the mitigation imposed over four

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years ago was insufficient. Consequently, should this case proceed further, it will simply waste yet more time and resources before Maxim and Mr. Mitton ultimately are vindicated; as they doubtless will be. Therefore, Maxim respectfully urges the Commission to terminate this investigation.[158]

Respectfully submitted,

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[158] All legal, factual and procedural matters not expressly admitted herein or in the accompanying materials or prior submissions or other materials submitted by or on behalf of Maxim are hereby denied.

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Consolidated Exhibit Volume for Response to Order to Show Cause and Notice of Proposed Penalty of Maxim Power Corp. and Kyle Mitton in Docket No. IN15-4-000

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