

UNITED STATES DISTRICT COURT  
FOR THE  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

United States Courts  
Southern District of Texas  
FILED

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In the Matter of an Application to  
Enforce Administrative Subpoenas of the  
  
U.S. Commodity Futures Trading Commission,  
  
Applicant,  
  
v.  
  
The McGraw-Hill Companies, Inc.,  
  
Respondent.

**MC-03-187**

**APPLICANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF AN APPLICATION FOR AN ORDER TO SHOW  
CAUSE AND AN ORDER REQUIRING  
COMPLIANCE WITH ADMINISTRATIVE SUBPOENAS**

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Applicant U.S. Commodity Futures Trading Commission (the “Commission”) submits this Memorandum of Points and Authorities in support of its Application for an Order to Show Cause and an Order requiring compliance with two administrative subpoenas *duces tecum* issued by the Commission to Respondent The McGraw-Hill Companies, Inc. (“MGH”) on February 7, 2003 (“subpoenas”).

## I.

### **INTRODUCTION**

Applicant Commission is an independent federal regulatory agency created by Congress to administer and enforce the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.* (2000) (the “Act”). Pursuant to its regulatory powers, the Commission is conducting investigations into the activities of power marketing and energy trading firms concerning the delivery of false or misleading trade data to MGH and possible manipulative conduct in violation of the Act or Commission Regulations. A number of companies have publicly confirmed that they submitted inaccurate trade data to MGH, and the Commission has uncovered additional, non-public evidence that other companies have submitted false trade data to MGH.<sup>1</sup> Pursuant to its investigative authority, the Commission subpoenaed MGH seeking production of the trade data submitted to MGH by specified companies, as well as MGH’s documents concerning MGH’s use of that data in indices which it calculates. MGH has refused to fully comply with its production requirements, inappropriately claiming that its information is protected by a qualified reporter’s privilege and that the subpoenas are overbroad. The Commission respectfully seeks an order compelling production on the grounds set forth below.

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<sup>1</sup> The facts discussed here are based on the Declaration of Joseph Rosenberg filed under seal herewith and cited as “Rosenberg Decl.” Rosenberg Decl. ¶3, Exhibit A: Dynegy Marketing & Trade (“Dynegy”) press release dated September 25, 2002; Exhibit B: American Electric Power (“AEP”) press release dated October 9, 2002; Exhibit C: The Williams Companies (“Williams”) press release dated October 25, 2002; Exhibit D: CMS Energy Corporation’s (“CMS”) press release dated November 4, 2002; and Exhibit E: El Paso Merchant Energy L.P. (“El Paso”) press release dated November 8, 2002. The Commission also has already found that Dynegy, West Coast Power LLC, and El Paso reported false price and volume information concerning purported natural gas trades and nonexistent trades to reporting firms like MGH, and that such false reporting constituted attempted manipulation of the natural gas markets. Rosenberg Decl. ¶4, Exhibit F: Commission Order Instituting Proceedings against Dynegy; Exhibit G: Commission Order Instituting Proceedings against El Paso.

MGH surveys and receives trade data from energy companies which it uses to calculate a weighted average, known as an index, that it sells to its subscribers. That index is used by market participants, including energy companies, speculators, and others, for various purposes, including to set price benchmarks based on the indices for transactions valued in the billions of dollars.<sup>2</sup> Natural gas traders, including futures traders, refer to MGH's indices for price discovery and assessing price risks.

The Commission is investigating all of the facts and circumstances regarding MGH's price indices. Accordingly, the subpoenas sought to obtain, in part, trade data submitted by a specific number of energy companies, documents showing MGH's calculation of indices, documents showing trade data MGH excluded from its calculations, and documents relating to any complaints received by MGH or any conversations relating to false, inaccurate or incorrect reporting of price and volume information or manipulation.

These documents are relevant to the determination of the possible effects the energy companies' submissions had on the indices. The subpoenas were lawfully authorized and narrowly crafted for the purpose of obtaining relevant documents so that the Commission can enforce the Act, and protect the public from further abuse.

The qualified reporter's privilege, which MGH has relied upon in refusing to comply with the subpoenas, does not apply to MGH for two reasons. First, the process by which MGH receives trade data and calculates its indices does not involve newsgathering or commentary and therefore does not invoke the privilege. Second, in many instances, since the trade data MGH received and used in its calculations is not confidential, the privilege does not apply. This is

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<sup>2</sup> Rosenberg Decl. ¶6, Exhibit I: *USA: FERC Considers New Natgas Price Reporting Rules*, Reuters English News Service, Wednesday, March 26, 2003; Exhibit J: *FERC Staff Recommends Ways to Improve Natural Gas Indexes*, Dow Jones Energy Service, Thursday, March 27, 2003.

supported by the fact that a number of energy companies disclosed to third parties that they provided false or inaccurate data to MGH, and they also expressed a willingness to cooperate with the Commission's investigations and agreed to waive any confidentiality claims they have regarding their submissions to MGH. Despite these waivers and disclosures to third parties, MGH steadfastly refused to release any trade data submissions it received.<sup>3</sup>

Even assuming, *arguendo*, that the qualified reporter's privilege applies, the Commission meets its burden in overcoming that privilege in that the documents sought by the Commission are directly relevant; there are no reasonable alternative means to obtain the subpoenaed documents other than from MGH; and MGH has waived the right to invoke this qualified privilege by publicly releasing information regarding the submissions it received.

MGH's refusal to produce all of the relevant documents demanded in the subpoenas is impeding the Commission's ability to investigate allegations of false reporting and manipulation by a large number of power marketing and energy trading firms. Accordingly, the Commission respectfully requests that the Court compel MGH's full and complete compliance with the subpoenas to protect the public, and to fulfill the Commission's mandate of enforcing the Act.

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<sup>3</sup> To date, MGH has produced or partially produced documents responsive to portions of the subpoenas. However, MGH has refused to produce responsive documents to the following paragraphs contained in one subpoena attached to the Rosenberg Declaration as Exhibit X: ¶¶ 8, 9, 10, 11 and 16. Further, MGH has refused to produce responsive documents to the following paragraphs contained in the second subpoena attached to the Rosenberg Declaration as Exhibit W: ¶¶ 1, 2, 4, 5, and 10. Rosenberg Decl. ¶¶16, 21; Exhibits: W, X, and AB.

## II.

### STATEMENT OF FACTS

#### **A. The Conduct Under Investigation**

MGH, which has offices in Houston, Texas,<sup>4</sup> claims its indices are the most reliable source of industry pricing information.<sup>5</sup> MGH calculates its indices using trade data that energy companies represent as their actual, completed natural gas transactions.<sup>6</sup> MGH then places the indices in its subscription periodicals, which are used by these energy companies and others to set price benchmarks for other natural gas transactions, as price discovery tools and price risk assessments.<sup>7</sup> Thus, MGH's claimed "reliable" indices have a financial impact upon billions of dollars worth of natural gas transactions.<sup>8</sup>

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<sup>4</sup> See Rosenberg Decl. ¶5, Exhibit H: Platts, a division of MGH, maintains the following website, [www.platts.com](http://www.platts.com) ("Platts's website"). Consequently, venue of this subpoena enforcement action is proper in the Southern District of Texas because: (1) this Court is authorized to assert jurisdiction over a subpoena enforcement action; see *CFTC v. Harker*, 615 F. Supp. 420, 424 (D.D.C. 1985); 7 U.S.C. §15; and (2) Commission Regulation 11.4(e) states that venue is proper in a "jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business...."), see 17 C.F.R. § 11.4(e). Since MGH has offices in Houston, Texas, and many energy firms that report natural gas transaction data to MGH, including Enron and Dynegy, did so from offices located in the Southern District of Texas, this Court has jurisdiction to hear this matter.

<sup>5</sup> Rosenberg Decl. ¶9, Exhibit N: "The McGraw-Hill Companies, Inc.'s Supplemental Submission Regarding Reporter's Privilege in Response to Subpoenas Duces Tecum," ("MGH Supplemental Submission"), dated November 12, 2002, p. 1.

<sup>6</sup> Rosenberg Decl. ¶¶9, 10, Exhibit O: energy company spreadsheet; Exhibit P: Platts website statement regarding its methodology.

<sup>7</sup> MGH's publications are not available to the general public as they are subscription services for which MGH charges a significant annual fee. Rosenberg Decl. ¶8, Exhibits L, p. 2: *Gas Daily*; and M, p. 24: *Inside FERC's Gas Market Report*.

<sup>8</sup> Rosenberg Decl. ¶6, Exhibits I and J.

There is compelling evidence demonstrating that certain companies submitted false or inaccurate price and volume information to MGH for inclusion in its indices. Moreover, the submissions of other energy companies, acting as counter-parties to energy companies submitting false or inaccurate data, may also be relevant to verify those inaccuracies. Indeed, a number of companies have publicly confirmed that they have inaccurately reported transactions, and at least one of these companies has publicly indicated that it is conducting an internal investigation into the “impact of the [false reporting] activity on the price index.”<sup>9</sup> Further, it has been well publicized that much of the trade data submitted by certain energy companies to MGH was false.<sup>10</sup> MGH itself has acknowledged that “some energy companies and individual traders have repeatedly attempted to manipulate the price indexes” produced by Platts.<sup>11</sup> Accordingly, MGH has evidence in its possession establishing false reporting, and potentially attempted manipulation or manipulation, of the natural gas markets by energy companies under investigation.

MGH also has publicly commented on the exclusion of specific data received from one source and in one instance has made generalized, public comments regarding its exclusion from its calculations of questionable data allegedly received from confidential sources.<sup>12</sup> Specifically, following the indictments of two former energy traders for falsely reporting to MGH, MGH

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<sup>9</sup> Rosenberg Decl. ¶3, Exhibit C: Williams press release dated October 25, 2002.

<sup>10</sup> Rosenberg Decl. ¶7, Exhibit K: *A Call to Action*.

<sup>11</sup> Rosenberg Decl. ¶7, Exhibit K: *A Call to Action*.

<sup>12</sup> Rosenberg Decl. ¶¶14 and 15, Exhibits T and R: news articles.

made certain public statements.<sup>13</sup> Regarding the first indictment unsealed on December 4, 2002, Jim Nicholson, Platts's editorial vice president, stated, "an initial review of our records indicates that the data was received, considered and rejected because it was outside of the market price and could not be verified." On January 27, 2002, the same day that the second indictment was unsealed, Platts spokesman James Keener stated, "[t]he fact that data is received doesn't mean the data is utilized in our publication of our electricity and natural gas indices . . . [b]ad data in isn't necessarily bad data out." As discussed infra, by making such comments, MGH has effectively waived any claim to the qualified reporter's privilege.

**B. The Subpoenas at Issue and MGH's Failure to Comply**

Pursuant to the Act and Section 11.2(a) of the Commission's Regulations,<sup>14</sup> the Commission issued a formal order of investigation entitled "In the Matter of Enron Corp." (the "Enron Order") on February 13, 2002, and another formal order of investigation entitled "In the Matter of Certain Trading by Energy and Power Marketing Firms" (the "Energy Firms Order") on May 29, 2002, as amended.<sup>15</sup> As MGH has information relevant to those investigations, the Commission, on February 7, 2003, issued two statutorily authorized subpoenas to MGH to

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<sup>13</sup> Todd Geiger, a former natural gas trader at El Paso, was indicted on December 4, 2002, for reporting 48 false trades to *Inside FERC's Gas Market Report*. Rosenberg Decl. ¶14, Exhibit S: indictment. Michelle Valencia, a former natural gas trader at Dynegy, was indicted on January 27, 2003, for reporting 43 false trades to *Inside FERC's Gas Market Report*. Rosenberg Decl. ¶15, Exhibit U: indictment.

<sup>14</sup> Section 11.2 states, in pertinent part, that the Commission's Division of Enforcement "may conduct such investigations...to determine whether any persons have violated, are violating, or are about to violate the provisions of the [Act] ... or the rules, regulations or orders adopted by the Commission pursuant to [the] Act ... [and] may obtain evidence ... when authorized by order of the Commission, through the issuance of subpoenas." 17 C.F.R. §11.2(a) (2001). See *Collins v. CFTC*, 737 F. Supp. 1467, 1485 (N.D. Ill. 1990).

<sup>15</sup> Rosenberg Decl. ¶4, Exhibits F and G: Formal Orders of Investigation.

obtain that information.<sup>16</sup> The subpoenas require production of, *inter alia*, (1) documents containing price and volume information, (2) documents submitted by certain named energy companies to MGH for inclusion in its indices, (3) documents that MGH excluded from its calculations, and (4) documents relating to any complaints received by MGH or any conversations relating to false, inaccurate or incorrect reporting of price and volume information or manipulation.

Rather than fully comply with the subpoenas, MGH demanded that the Commission reveal to MGH, on a company-by-company basis, whether it was in possession of facts establishing false reporting prior to MGH's compliance with the subpoenas. The Commission declined to do so, citing its authority to maintain the confidentiality of its investigations.<sup>17</sup>

MGH indicated that it had its own confidentiality concerns, yet it might waive objections if the Commission obtained waivers from the energy companies. Although many of these companies have been publicly identified as having submitted trade data to MGH such that their identities and the fact that they submitted data are no longer confidential, the Commission sought such waivers on MGH's behalf, in an effort to ensure compliance with its subpoenas without the need for this litigation. A number of energy companies have submitted waivers of

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<sup>16</sup> Rosenberg Decl. ¶17, Exhibits X and Y: subpoenas. The Commission previously issued a subpoena to MGH on October 9, 2002. Rosenberg Decl. ¶18, Exhibit Z: subpoena. That subpoena is not at issue in the instant Application.

<sup>17</sup> Section 8 of the Act provides, in pertinent part, that the Commission may withhold from public disclosure any data or information concerning or obtained in connection with any pending investigation of any person. 7 U.S.C. § 12(a)(1). Further, Section 11.3 of the Regulations provides, in part, that all information and documents obtained during the course of an investigation, whether or not obtained pursuant to subpoena, and all investigative proceedings shall be treated as non-public by the Commission and its staff except to the extent that the Commission directs or authorizes the public disclosure of the investigation. 17 C.F.R. § 11.3.

confidentiality at the request of the Commission,<sup>18</sup> yet MGH still refuses to turn to the Commission relevant documents related to these energy companies.<sup>19</sup>

### III.

#### **LEGAL ANALYSIS**

The subpoenas should be enforced because they are within the scope of the Commission's authority, they are not indefinite or overbroad, and they seek information directly relevant to the Commission's investigations of false reporting and other potential violations of the Act. Moreover, MGH cannot avoid complying with the subpoenas based on the qualified reporter's privilege, because (1) the privilege does not apply, (2) if it did apply, the privilege is overcome, and (3) the privilege has been waived.

#### **A. The Subpoenas Are Within the Commission's Authority**

The Commission has broad powers to investigate potential violations of the Act, and has lawfully initiated investigations into allegations of false reporting, attempted manipulation and/or manipulation of the natural gas markets by various energy companies. An essential component of these investigations is the power of the Commission to issue subpoenas to determine whether certain energy companies have "complied with or run afoul of" the Act or Regulations.<sup>20</sup> In this regard, the Commission's investigations are "more analogous to the

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<sup>18</sup> Rosenberg Decl. ¶20, Exhibits Z and AA.

<sup>19</sup> Also, during this process, the Commission learned that in November 2002, one energy company requested that MGH provide it with copies of its own submissions of trade data from January 1998 forward and that, although MGH initially agreed to do so, now, more than six months later, MGH refuses to comply with the company's request. Rosenberg Decl. ¶19, Exhibit Z: energy company letter.

<sup>20</sup> See 7 U.S.C. §§ 12, 15 (1994); *F.T.C. v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) ("agencies should remain free to determine, in the first instance, the scope of their own jurisdiction when issuing investigative subpoenas"); *Collins v. CFTC*, *supra*, 737 F. Supp. at 1485.

Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”<sup>21</sup> An administrative subpoena, as is at issue here, must be enforced “if the information sought ‘is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.’ ”<sup>22</sup> The Commission’s subpoenas to MGH fully comply with these criteria.

First, based on the plain language of Section 8(a)(1) of the Act, 7 U.S.C. § 12(a)(1) and Section 6(c) of the Act, 7 U.S.C. § 15, the inquiry into, among other areas, false reporting by energy companies to MGH falls within the scope of the Commission’s authority.<sup>23</sup> The investigation is, therefore, for a “lawfully authorized purpose, within the power of Congress to command.”<sup>24</sup>

Second, the subpoenas served on MGH are definite, unambiguous and narrow in scope. A subpoena is definite and unambiguous when “the disclosure sought ... [is] not [] unreasonable.”<sup>25</sup> Further, “the subpoena must be sufficiently limited in scope, relevant in

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<sup>21</sup> *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

<sup>22</sup> *F.T.C. v. Turner*, 609 F.2d 743, 744 (5th Cir. 1980), *quoting Morton Salt*, 338 U.S. at 744; *see also U.S. v. Chevron USA, Inc.*, 186 F.3d 644, 647 (5th Cir. 1999) (includes a fourth requirement that the subpoena is not issued for an improper purpose, such as harassment); *Winters Ranch Partnership v. Viadero*, 123 F.3d 327, 329 (5th Cir. 1997).

<sup>23</sup> *See, e.g., CFTC v. Harker*, 615 F. Supp. 420, 424 (D.D.C. 1985) (“the [Commodity Exchange] Act grants the Commission the authority to subpoena witnesses and to seek judicial enforcement of such subpoenas”).

<sup>24</sup> *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946).

<sup>25</sup> *U.S. v. Morton Salt*, *supra*, 338 U.S. at 652.

purpose, and specific in directive so that compliance will not be unreasonably burdensome.”<sup>26</sup> Here, the subpoenas call for the production of “all documents relating to submissions by [the specified energy companies] received by or used by McGraw-Hill to gather, calculate and publish price and volume information” and “all documents containing or describing any price and volume data that were rejected from, or otherwise not included in, a calculation of a price index.”<sup>27</sup> Accordingly, the subpoenas are narrowly drawn in that they require the production of documents over a defined period of time relevant to specific named entities under investigation by the Commission.<sup>28</sup> The subpoenas, therefore, are definite and unambiguous.<sup>29</sup>

Finally, the documents MGH has failed to produce in response to the subpoenas are directly relevant to the Commission’s investigation of false reporting and other possible violations committed by certain energy trading firms and their employees. Generally, in cases where a federal agency is seeking to enforce an administrative subpoena, relevancy is established if “the material sought is reasonably relevant to the purposes of the investigation.”<sup>30</sup> In these instances, the courts interpret relevancy broadly.<sup>31</sup> Notably, the Fifth Circuit has held that an administrative subpoena is enforceable “so long as the material requested ‘touches a

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<sup>26</sup> See *v. City of Seattle*, 387 U.S. 541, 544 (1967).

<sup>27</sup> Rosenberg Decl. ¶16, Exhibits W, ¶¶ 2, 4 and X, ¶¶ 9, 11: subpoenas.

<sup>28</sup> Rosenberg Decl. ¶16, Exhibits W and X: subpoenas.

<sup>29</sup> See, e.g., *F.T.C. v. Gibson*, 460 F.2d 605, 607-08 (5th Cir. 1972) (“[t]he language [of the subpoena] does not appear ambiguous or imprecise on its face nor does it leave any doubt about the identity of the documents whose disclosure is sought”).

<sup>30</sup> *U.S. v. Phoenix Petroleum Co.*, 571 F. Supp. 16, 21 (S.D. Tex. 1982), *aff’d*, 727 F.2d 1579 (5th Cir. 1984).

<sup>31</sup> *Sandsend Financial Consultants, Ltd. v. FHLBB*, 878 F.2d 875, 882 (5th Cir. 1989) (“the notion of relevancy is a broad one”), *citing E.E.O.C. v. Elrod*, 674 F.2d 601, 613 (7th Cir. 1982); *see also New Orleans Steamship Association v. EEOC*, 680 F.2d 23, 26 (5th Cir. 1982).

matter under investigation.”<sup>32</sup>

MGH’s claim that its indices are the most reliable source of industry pricing information<sup>33</sup> underscores the significant role MGH played in calculating price and volume indices based upon submissions from energy companies. Market participants rely upon these indices to set terms of billions of dollars worth of financial contracts. The information sought by the subpoenas consists of the submissions made by the energy companies to MGH regarding trade prices and volumes, and MGH’s use of these submissions. This specific information is directly relevant to “a matter under investigation” by the Commission<sup>34</sup> -- the false reporting and possible manipulation of the natural gas markets as well as quantification of the harm caused by those acts.<sup>35</sup> This essential information will enable the Commission to establish the effect that the false submissions had on the valuation of billions of dollars worth of transactions, and assist the Commission in fully enforcing the Act and assuring the future integrity of the market.

Nineteen of the twenty-three energy companies named in the subpoenas fall within at least one of the following categories: (1) the company has publicly disclosed that it submitted inaccurate trade data to MGH; (2) the Commission is in possession of evidence that tends to

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<sup>32</sup> *Sandsend, supra*, at 882, quoting *Motorola v. McLain*, 484 F.2d 1339, 1345 (7th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); see also *New Orleans Steamship Association v. EEOC, supra*, 680 F.2d at 26 (information sought was “within the broad spectrum of relevance” of the investigation).

<sup>33</sup> Rosenberg Decl. ¶9, Exhibit N: MGH Supplemental Submission.

<sup>34</sup> *Sandsend v. FHLBB, supra*, 878 F.2d at 882 (reversing denial of subpoena enforcement).

<sup>35</sup> Although not binding, the Commission has met the requirements in the Second Circuit’s decision in *In Re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir.) (*per curiam*), *cert. denied sub nom., Arizona v. McGraw-Hill*, 495 U.S. 909 (1982), that evidence be presented that the documents sought by subpoena did in fact involve MGH. Here, the evidence demonstrates that each of the enumerated companies has submitted price and volume information to MGH’s publications *Gas Daily* and *Inside FERC’s Gas Market Report*.

support an allegation that the company submitted false or inaccurate trade data to MGH; or (3) the Commission is in possession of evidence that the company submitted trade data to MGH.<sup>36</sup> Thus, the subpoenas seek information from MGH that is directly relevant to the issue of possible manipulation, attempted manipulation and false reporting by energy companies to MGH.

Accordingly, because the subpoenas are within the Commission's authority, are not overbroad, and because the information sought is directly relevant to the Commission's investigation of all of the facts and circumstances regarding the submission of false trade data to MGH, MGH's failure to comply with the subpoenas is without merit, and the subpoenas should be enforced by this Court in their entirety.

**B. MGH Fails to Satisfy the Burden of Establishing the Qualified Reporter's Privilege**

MGH's failure to comply with the subpoenas is not warranted under the qualified reporter's privilege because (1) the privilege is inapplicable as the information sought is not obtained by MGH as a result of investigative reporting or newsgathering and in many instances the information submitted to MGH is not confidential; (2) the privilege, even if applicable, is overcome because the information sought is relevant, there are no reasonable alternative means to obtain the information, and there is a compelling interest in the information; and (3) MGH waived the privilege by making statements to the press regarding its sources and the use of its information.

**1. The Reporter's Privilege Does Not Apply Here**

The qualified reporter's privilege does not apply to MGH for two reasons. First, the process by which MGH receives trade data and calculates its indices does not involve investigative reporting or newsgathering. Second, in many instances the trade data MGH

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<sup>36</sup> At present, the Commission is not seeking to enforce the subpoena as to documents regarding the four remaining energy companies. Rosenberg Decl. ¶20.

received and used in its calculations is not confidential.

The burden is on the party claiming the protection of the reporter's privilege to establish each of three essential elements: "that they: 1) are engaged in investigative reporting; 2) are gathering news; and 3) possess the intent at the inception of the newsgathering process to disseminate this news to the public."<sup>37</sup> The purpose of the journalist's privilege is to "protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources."<sup>38</sup> MGH cannot establish any of these elements, and therefore its compilation of price indices does not fall within that privilege.

The Fifth Circuit has recognized a qualified reporter's privilege in certain civil cases to refuse to disclose confidential sources based on the Supreme Court's plurality decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972).<sup>39</sup> MGH's role as statistician in calculating an index does not entitle it to assert such a privilege. In collecting numerical data that energy companies voluntarily submit and calculating a price index from that data, MGH neither performs investigative reporting nor is it gathering news. Rather, MGH functions as a compiler of statistics.

The present case is similar to the facts of *In Re Madden, supra*, in which a non-party subpoenaed witness' "reports" on a 900 telephone line consisting of commentaries about upcoming wrestling events, results of past wrestling matches and discussions of professional wrestlers' personal lives and careers. The Third Circuit held that this information was

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<sup>37</sup> *In Re Madden*, 151 F.3d 125, 130-131 (3d Cir. 1998).

<sup>38</sup> *In Re Petroleum Products Antitrust Litigation, supra*, 680 F.2d at 7.

<sup>39</sup> *Miller v. Transamerican Press, Inc.*, 628 F.2d 932 (5th Cir. 1980) (*modifying* 621 F.2d 721), *cert. denied*, 450 U.S. 1041 (1981); *see also In Re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983).

“disseminating hype” rather than “reporting” or even “investigative reporting.” Thus, the Court concluded that the qualified reporter’s privilege was not applicable. Since MGH’s intent is simply to disseminate statistics rather than “news,” the qualified reporter’s privilege is also not applicable here.

It is also significant in the analysis of whether MGH functions as a newsgatherer that MGH’s publications are not disseminated to the general public. Rather, they are subscription services marketed to natural gas industry participants for a significant fee. In *American Savings Bank v. UBS PaineWebber*,<sup>40</sup> the court held that a credit rating agency that did not operate publications with complete circulation to the general public, but performed its ratings pursuant to a private, contractual agreement, was not entitled to the protections afforded by the First Amendment. Here, MGH distributes its indices only to its limited base of industry subscribers.

Second, in the several instances where MGH’s sources have waived confidentiality, or have publicly acknowledged that they have submitted false data to MGH, the qualified reporter’s privilege should not apply.<sup>41</sup> The instant facts are analogous to the Fifth Circuit’s decision in *U.S. v. Smith*, 135 F.3d 963 (5th Cir. 1998), which held that the qualified reporter’s privilege is inapplicable in criminal investigations involving non-confidential sources. This is so because the Commission’s authority to conduct investigations is a governmental “power of inquisition” analogous to that of a grand jury, and that authority may be exercised “merely on suspicion that the law is being violated, or even just because [the Commission] wants assurance that it is

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<sup>40</sup> Rosenberg Decl., Exhibit AC: 31 Media L. Rep. 1444, 2002 WL 31833223 (S.D.N.Y., Dec.16, 2002).

<sup>41</sup> A number of energy companies that reported trade data to MGH have waived confidentiality. Rosenberg Decl. ¶19, Exhibits Z and AA: waivers. Also, at least five of MGH’s sources – Williams, Dynegy, AEP, CMS, and El Paso – have publicly acknowledged submitting false or inaccurate data to MGH. Rosenberg Decl. ¶3, Exhibits A, B, C, D, and E.

not.”<sup>42</sup> In *Smith*, the Court ruled that a television station’s interview of the target of a criminal investigation, portions of which were aired and identified the source by name, was not protected by the qualified reporter’s privilege because the source had no expectation that the information he provided would be kept in confidence.<sup>43</sup> Similarly here, MGH cannot claim a privilege against disclosing sources of information when those very sources have publicly acknowledged or disclosed to third parties that they submitted false data to MGH. Clearly these sources no longer have any expectation that their identities are confidential. Accordingly, MGH should not be entitled to use the qualified reporter’s privilege to prevent scrutiny of admittedly bad acts.

## **2. The Reporter’s Privilege Is Overcome**

Even if this Court determines that MGH could assert a qualified reporter’s privilege, the present facts demonstrate that the privilege is easily overcome. In general, if the qualified reporter’s privilege is applicable, the party seeking to overcome the privilege in a civil case must show with substantial evidence the following: (1) the information sought is relevant; (2) reasonable alternative means to obtain the information have been exhausted; and (3) there is a compelling interest in the information.<sup>44</sup>

### **a. The Information Sought is Relevant**

In cases in which the qualified reporter’s privilege is invoked, relevancy is determined on

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<sup>42</sup> *United States v. Morton Salt Co.*, *supra*, 338 U.S. at 642-43; *Peavy v. WFAA-TV*, 221 F.3d, 158, 184 (5th Cir. 2000) quoting *Branzburg v. Hayes*, *supra*, at 682 (“[I]t is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability”).

<sup>43</sup> *U.S. v. Smith*, *supra*, 135 F.3d at 969.

<sup>44</sup> See *Miller v. Transamerican Press, Inc.*, *supra*, 628 F.2d at 932; *In Re Selcraig*, *supra*, 705 F.2d at 792.

a case-by-case basis.<sup>45</sup> As shown above, the information sought from MGH by the Commission's subpoenas is without question relevant to the Commission's investigations of false reporting to MGH and other potential violations of the Act because the documents responsive to the subpoenas consist of the submissions by the energy companies of potentially false trade data to MGH for inclusion in its indices. Further, the responsive documents will assist the Commission in determining the effect that the false submissions had on the index prices and their concomitant effect on the marketplace that relied on those indices to set the terms of billions of dollars worth of natural gas contracts.

**b. There Are No Reasonable Alternative Means To Obtain The Information**

The second component in cases where a party seeks to overcome a qualified reporter's privilege is that there are no reasonable alternative means to obtain the documents sought. In *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *op. supplemented by* 628 F.2d 932 (5<sup>th</sup> Cir. 1980), *cert. denied*, 450 US 1041 (1981), a libel case against a magazine and its publisher, the Fifth Circuit held that the plaintiff could obtain discovery of the identity of the defendant journalists' confidential source where there was substantial evidence that the published statement at issue was untrue and defamatory, no other source was available from which the information could reasonably be discovered, and knowing the identity of the informant was necessary to properly present the plaintiff's case.

Here, there are potentially only two sources of the false trade data submitted by energy companies to MGH: MGH and the energy companies. However, several of the energy companies named in the subpoenas have informed the Commission that they do not have copies

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<sup>45</sup> *In Re Selcraig, supra*, 705 F.2d at 797 ("The method of establishing necessity for the confidential information depends on the circumstances of the case in which it is sought, including the issue to which the information is relevant").

of the data they submitted to MGH, or that they are uncertain whether the trade data they still possess was submitted to MGH in the form in which it has been retained. Thus, as to these companies, MGH is the sole source of the data the companies actually submitted. Further, MGH is the source of information concerning what data it actually used in calculating the indices, and it is the source of information by which the Commission can confirm that energy companies that have produced data to the Commission have complied with their production obligations. Inasmuch as several companies have publicly admitted to falsely reporting information it is proper for the Commission to verify that the documents that the energy companies were able to produce were, in fact, sent by the energy companies to MGH for inclusion in its calculations of the indices. Simply stated, MGH is the sole possessor of knowledge of what submissions it received and relied upon to calculate its indices and how it calculated the indices and possesses information that enables the Commission to quantify the harm done when the false data skewed the indices.

**c. There is a Compelling Interest in the Information**

The third component in cases where a party seeks to overcome a qualified reporter's privilege is that there be a compelling interest in the information sought.<sup>46</sup> Here, due to the "crisis of confidence" in the indices caused by "*repeated* attempt[s] to manipulate" them,<sup>47</sup> there is a compelling need for the Commission to obtain these documents, complete its investigation and return trust to the market.

There is substantial evidence that the subpoenaed information will aid the Commission in

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<sup>46</sup> *Miller v. Transamerican Press, Inc.*, *supra*, 621 F.2d at 726.

<sup>47</sup> Rosenberg Decl. ¶7, Exhibit K: *A Call to Action*, p. 1 (emphasis added) (thus, MGH has even acknowledged this crisis of confidence and the need to restore trust to the market).

determining what false data was submitted to MGH and if energy companies or others intended to manipulate the natural gas market in violation of Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2). Accordingly, these investigations will assist the Commission to maintain the integrity of the financial markets, ensure the reliability of information released to the public which is used to set the terms of financial interests, and provide for effective law enforcement where market integrity and reliability have been publicly questioned.

To maintain the integrity of the financial markets, it is critical that all available information released to the public is accurate and reliable. When a fraud on or manipulation of the market occurs, it is imperative that market integrity be restored by discovering and preventing a reoccurrence of that wrongful conduct. A competent investigation requires full access to all relevant documents in order to restore integrity to the market. In the instant case, these compelling interests far outweigh MGH's alleged claim to the qualified reporter's privilege.

### **3. MGH Has Waived the Qualified Reporter's Privilege**

In two instances, MGH has willingly conceded the identity of two energy companies by publicly commenting on pending criminal indictments. These disclosures constitute a waiver by MGH of any reporter's privilege that might otherwise apply.

In fact, the Fifth Circuit has expressly declined to embrace an extension of *Branzburg's* qualified privilege to a television news station that sought a "qualified privilege in their nonconfidential work product, so as to protect the media as an institution."<sup>48</sup> The Fifth Circuit reasoned:

We find little support in either the plurality or the concurring opinions of *Branzburg* the sort of privilege that WDSU-TV asks us to recognize. The newsreporters in *Branzburg* argued

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<sup>48</sup> *United States v. Smith, supra*, 188 F.3d at 969.

compellingly as to how forcing them to divulge confidential source information might ruin their ability to procure news in the future. . . . Despite the reporters' strong First Amendment arguments, however, the *Branzburg* Court rejected their call for a privilege. Here, on the other hand, the danger that sources will dry up is less substantial.<sup>49</sup>

As in *United States v. Smith*, this Court is not presented with the fact pattern of an investigative reporter with confidential sources that might “dry up.” In fact, this is an easier case than WDSU-TV’s example in *Smith*, given that MGH is not involved in front-line reporting but simply compiles and distributes data. The identity of the data suppliers is not privileged. As MGH has demonstrated by its public comments, it is willing to put aside any claims to confidentiality in response to public scrutiny. As such, MGH has willingly conceded the identity of its sources when it suits MGH’s purposes. Thus, this constitutes a waiver of any claims to confidentiality. Having waived the identity of its sources, MGH is not, merely by virtue of the issuance of data into the public realm, subject to the qualified reporter’s privilege.

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<sup>49</sup> *Id.* at 970 (footnote omitted).

IV.

CONCLUSION

For the foregoing reasons, this Court should issue an order to show cause requiring MGH to appear and demonstrate why an order should not be entered compelling it to fully comply with the subpoenas. As no good cause can be shown, this Court should order MGH to comply immediately in all respects with the Commission's subpoenas.

Dated: May 16, 2003  
New York, New York

Respectfully submitted,



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